**CAS 2006/A/1032 Sesil Karatancheva v/International Tennis Federation**

# ARBITRAL AWARD

delivered by the

## COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Quentin **Byrne-Sutton**, Attorney-at-law in **Geneva**, Switzerland

Arbitrators: Mr Beat **Hodler**, Attorney-at-law in **Bern**, Switzerland
His Honour Judge James Robert **Reid** QC, **London**, United Kingdom

between

Ms Sesil **Karatancheva**, Bulgaria

Represented by Prof. Darina **Zinovieva**, Attorney-at-law, and Ms Veselina Kanatova, legal researcher, Sofia, Bulgaria

As Appellant

and

**International Tennis Federation (ITF)**, London, United Kingdom
Represented by Messrs. Jonathan **Taylor** and Iain **Higgins**, Hammonds Solicitors, London, United Kingdom

As Respondent

# I. THE PARTIES AND THE ORIGIN OF THE DISPUTE

## A. The Parties

a) *The Appellant*

1. Ms Sesil Karatancheva is a Bulgarian professional tennis player who is highly ranked on the Association of Tennis Professionals' Tour ("ATP") (hereinafter referred to as the "player" or the "Appellant").

b) *The Respondent*

2. The ITF is the international governing body for the sport of tennis worldwide (hereinafter referred to as the "ITF" or the "Respondent").

## B. The Origin of the Dispute

3. The following summary of the facts is extracted in part from the decision of 11 January 2006 issued by the ITF "*Independent Anti-Doping Tribunal*", since, subject to the additional factual and expert evidence submitted by the parties at the hearing of 5 May 2006 in front of the Court of Arbitration for Sport ("CAS") in this proceeding, the parties agreed on the facts as established by the detailed procedure in the first instance.

4. The player was born on 8 August 1989.

5. Thus, in the spring and early summer of 2005, when the Paris and Tokyo doping-control tests referred to below took place, she was aged 15.

6. In November 2005 she was ranked 36th in the world.

7. She comes from a sporting family. Her father, Mr Radoslav Karatantchev, was a rowing champion and her mother, Ms Nelly Naydenova, a volleyball champion.

8. Mr Karatantchev's main occupation is managing and looking after his daughter's tennis career. He accompanies her to most of her tournaments. Unlike her father, the player speaks fluent English and can read English.

9. The player has played tennis since the age of five. As a child she suffered various ailments and injuries and was given medication for them. In 2004 she won the Roland-Garros juniors tournament. There she underwent a doping-control test on 6 June 2004, which was negative. She turned professional in 2004 and made her Grand Slam debut at the US Open in 2004. She was again tested, on 31 August 2004, with negative result. She understands about anti-doping rules in sport, and understood from at least 2004 onwards that players must submit to testing when required by the tennis authorities and are allowed to compete only on that basis.

10. On or about 12 November 2004 the player and her father (as parent and legal guardian) both signed a document headed "*2005 WTA Tour Mandatory Player Form*" which included the player's signature beneath a written "Anti-Doping Consent", agreeing to comply with the WTA's rules including its anti-doping rules. Mr Karatantchev's

signature also authorised relevant medical treatment and undertook to pay for it. The document stated above his signature that he had understood its contents and agreed to, *inter alia*, the Anti-Doping Consent.

11. At some point before 11 April 2005, the player signed the entry form for the 2005 Roland-Garros tournament. Her signature included confirmation that she had read and understood the agreement "*set out at the back of this entry form and accept its terms and conditions*". Those terms included the statement at paragraph 16 that French law governs the agreement. The terms also included the statement at paragraph 1 that the women's events at Roland-Garros are part of the WTA Tour and that the competition will be carried out in conformity with the Grand Slam Rules and Regulations 2005 and "*any rule or regulation as agreed by the French Tennis Federation*".

12. Paragraph 10 of the terms specifically dealt with anti-doping rules. It provided that the player "*must be prepared to undergo drug testing imposed upon the French Tennis Federation by authorities outside its control, or by the governing bodies of the game*". The relevant Gram Slam Rules provided at Article VI that player's must submit to drug testing "*imposed upon the event by authorities outside its* [the Grand Slam Committee's] *control or as a result of a drug-testing programme approved by the GSC.*"

13. In or about April 2005 the player became pregnant. She was due to compete at Roland-Garros. On 3 May 2005, her mother took her for an ultrasound scan and she was found to be in the early stages of pregnancy. According to the player, she thought the medical check up was linked to certain pains she complained about on a regular basis in relation to her periods, i.e. she did not suspect the ultrasound could be linked to verifying a possible pregnancy. According to the gynaecologist in Sofia who examined her on 3 May 2005, her last period started on 1 April 2005. Her parents directed she should not be told about the pregnancy until June 2005 and that it should be terminated.

14. The player took part in the Roland-Garros tournament in May 2005. There is an agreement between the ITF and the French Tennis Federation that drug testing will be carried out at Roland-Garros in a manner that satisfies the requirements of the French government and France's anti-doping agency.

15. The player lost in the quarterfinal on 31 May 2005. Her father was with her at the quarterfinal. She was then asked to undergo a doping test (the "Paris test"), which was performed on behalf of the ITF by *International Doping Tests and Management* ("IDTM"). The doping control officer was Ms Clabbers-Klein, from the Netherlands. The player signed the doping control form without incident. She also wrote "*No coments*" [sic] on it. The form included the words: "*I'm informed that I may be accompanied by one person of my choice during testing*". A blood test was also administered.

16. The escort was Ms Natacha Djordjevic, from Serbia. The player and Mr Karantchev say that she made a request to Ms Djordjevic that he should be allowed to accompany her, and that this was refused. Ms Clabbers-Klein says she does not recall this and that if such a request had been made, it would have been granted.

17. The player then returned to Bulgaria and subsequently competed at Wimbledon in June 2005, losing to Maria Sharapova. She did not have any medical treatment in respect of her pregnancy before leaving for Wimbledon.

18. On 16 June 2005, the player's A sample from the Paris test, having been analysed at the WADA accredited laboratory at Châtenay-Malabry, was certified as containing 12.6 ng/ml of 19-norandrosterone.

19. At some point before 25 June 2005 – it is not clear when – the player had a spontaneous incomplete abortion. She was admitted to hospital in Sofia on 25 June 2005 with vaginal bleeding and underwent a curettage ("*abrasio residuorum*"), under general anaesthetic.

20. At the beginning of July 2005, the player travelled to Tokyo as member of the Bulgarian national team, to compete in the Federation Cup.

21. On 5 July 2005, her father was with her at a practice session in Tokyo when she and her fellow team members were asked to undergo a doping test (the "Tokyo test").

22. The doping-control notification document included the statement that the player had the right to be accompanied. The player signed it. The player wrote "*No*" on the doping control form against the "Comment" box.

23. Again the player asserts that a request was made that her father should be allowed to accompany her into the doping-control station and that this was refused. The doping-control officer was Mr Shin Asakawa. The escort was Ms Setsuko Motonami.

24. On 19 July 2005, the A sample from the Tokyo test, having been analysed at the WADA accredited laboratory in Tokyo, was certified as containing 15.0 ng/ml of 19-norandrosterone.

25. On 28 July 2005, Mr Sahlström of IDTM wrote to the player informing her there was a case to answer in respect of the Paris A sample, and advising her that the B sample would be analysed.

26. On 7 September 2005, the Paris B sample was certified by the laboratory as containing 11.6 ng/ml of 19-norandrosterone.

27. On 16 September 2005, Mr Sahlström of IDTM wrote to the player informing her there was a case to answer in respect of the Tokyo A sample, and advising her that the B sample would be analysed.

28. On 27 September 2005, the ITF wrote to the player formally charging her with a doping offence in respect of the Paris sample.

29. On 4 October 2005, the player's parents replied, stating that the positive test result was due to the player's pregnancy.

30. The player has also indicated that she took dietary supplements from time to time, including during the period between Roland-Garros and her trip to Tokyo, which were

supplied to her by her father. The extent to which she took such supplements is unclear and there is no reliable evidence of what exactly was taken, when and in what doses.

31. On 12 October 2005, the Tokyo B sample was certified by the laboratory as containing 17.6 ng/ml.

32. On 25 October 2005, the ITF wrote to the player formally charging the player with a doping offence in respect of the Tokyo sample.

33. The ITF specified that, by operation of Article M.6.1 of the ITF's 2005 Tennis Anti-Doping Programme ("TADP"), the second offence would be discounted for sanctioning purposes, because it took place before the Player had received notice of her first positive test (the Paris test).

34. The player continued competing after being notified of the charges, while challenging them in front of the ITF "*Independent Anti-Doping Tribunal*".

35. In the autumn of 2005 a detailed procedure took place in front of the ITF "*Independent Anti-Doping Tribunal*", culminating in an evidentiary hearing on 14 and 15 December 2005, attended by the parties and a number of witnesses.

36. In its decision of 11 January 2006, the ITF "*Independent Anti-Doping Tribunal*" reasoned as follows:

"***The Tribunal's Conclusions, With Reasons***

*43. The player accepts that 19-norandrosterone is a prohibited substance and does not challenge the findings of the two laboratories that the substance was present in the player's body on both occasions. Nor is the chain of custody challenged.*

*44. The player makes a preliminary challenge to the jurisdiction of the Tribunal on four bases. The first is that the Programme did not apply to her because she did not either by signing the entry form for Roland-Garros or in any other way agree to be bound by it. The same submission is made also in relation to the Tokyo test.*

*45. The player submitted that the Programme was not "imposed" upon the French Tennis Federation by authorities outside its control or by the governing bodies of the game. She submitted that the French Tennis Federation had apparently agreed voluntarily to the applicability of the Programme, without any element of coercion or even pressure, as connoted by use of the verb "impose".*

*46. In the Tribunal's view, this point lacks any merit. The words "imposed upon" in paragraph 10 of the terms on the back of the entry form, in their context, plainly bear the meaning "binding upon". It would be extremely strange if they meant anything else. The terms of the Programme can only be "imposed" upon the French Tennis Federation if the latter agrees that they shall be. Even if that construction were wrong, the Programme is manifestly "a drug testing programme approved by the [Grand Slam Committee]" and thus falls within the concluding words of Article VI of the Grand Slam Rules and Regulations 2005.*

47. *In relation to both the Paris and Tokyo tests, the ITF submits further that players who take part in any events to which the Programme applies are bound by it under Article B.5 and (in respect of out of competition testing) Article G.2.5 until such time as they retire from the sport. Mr Taylor relied on the reasoning in cases such as Modahl v. British Athletic Federation Ltd. [2002] 1 WLR 1192, CA, in support of the proposition that a contractual obligation to abide by relevant anti-doping rules may be inferred from the player's conduct in taking part in competitions and submitting to out of competition testing.*

48. *The Tribunal has no difficulty in accepting the ITF's submissions on this aspect of the case. The player became bound by the Programme (subject to her other arguments dealt with below) by taking part in 2004 and 2005 in competitions to which it applies. It would be surprising if it were otherwise. Applying ordinary English law principles governing acceptance of contractual obligations (which the player did not submit were any different under French law which applies to the main contract to take part in Roland-Garros), the conclusion is inexorably reached that the player was and remains (subject to her other arguments) bound by the Programme.*

49. *Next, the player submits through Mr de Marco that any contract by which she would otherwise be bound, incorporating the Programme, is invalid because she is a minor and the contract is not in the class of contracts recognised in English law as being ones that can be enforceable against an infant if the contract is for the infant's benefit. In her written brief the player submitted that Bulgarian law applied to this issue, but at the oral hearing she conceded, rightly in our view, that English law applies to the issue, on the basis that English law is the law governing the Programme.*

50. *Both parties cited well known English case law in support of their submissions. Mr Taylor, for the ITF, relied on cases where a contract enabling a minor to practise the sport of boxing, and a contract enabling performance of musical entertainment by minors, had been upheld on the basis that they were of benefit to the infants who entered into them. Mr de Marco objected that in those cases the contracts at issue had only survived because they were analogous with contracts of employment or apprenticeship, a recognised form of contract capable of being upheld if of benefit to the infant concerned.*

51. *Mr de Marco therefore conceded that if the player had taken a job as a coach or engaged a manager she would be bound by the contract. In our view there is no material distinction between the player's contractual obligation to abide by the Programme to enable her to play tennis, and the contractual obligations of the young boxer in Doyle v. White City Stadium [1935] 1 KB 110, CA. The contract here is sufficiently similar to an employment contract in the sense that it enables the player to ply her trade. Consequently it is in principle capable of binding her if it benefits her. Manifestly, it does: she gains respect, fame and fortune from her mercurial talents on the tennis court. The contrary cannot seriously be suggested.*

52. *Thirdly, the player submits that the tests administered in Paris and Tokyo were unlawful because the player is a minor and the ITF therefore lacked power to*

*administer them without parental consent. In relation to the Paris test, the player contends that French law applies. In relation to the Tokyo test, the player's submission must presumably be that Japanese law applies.*

53. *The ITF does not accept that the applicable law is the law of the country where the test took place, but submits in any event that the player cannot show that the tests were unlawful by the law of respectively France and Japan in this case. In the case of the Paris test, the evidence of Mr Harris is that the French authorities require to satisfy themselves that the testing done at Roland-Garros is in accordance with French law. That evidence does not, of course, establish what French law actually is.*

54. *Mr de Marco relies on Article 6 of the 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine ("the 1997 Convention"). Subject to immaterial exceptions, that provides that "an intervention may only be carried out on a person who does not have the capacity to consent, for his or her direct benefit", and that in such cases parental consent must be obtained.*

55. *Mr Taylor does not accept that the 1997 Convention, an international treaty, is necessarily part of French law, nor that the urine test in Paris was an "intervention". He says it would be strange if the testing were contrary to French law in view of Mr Harris's evidence. He further points out that there is no evidence that the Tokyo test was unlawful according to the law of Japan. Moreover the player waived any objection in both cases by declining to note it on the doping control form.*

56. *We accept the ITF's submissions on this aspect. We see no evidence that the Tokyo test was unlawful. Nor do we accept that the urine test carried out at Roland-Garros was an "intervention" if, which is not clear, the 1997 Convention is part of French law. If parental consent is needed, it was bestowed by Mr Karatantchev first by signing the "Anti-Doping Consent" and the "Minor Medical Release" on the player's Mandatory Player Form, in November 2004, and subsequently by permitting his daughter to take part in the two tests; even if, which we have not accepted, he asked to attend and was refused. Moreover we accept that the player waived any objection she might have had, and we do not accept that she was incapable of doing so as a minor, as we do not accept that the presence of an adult was compulsory under the International Standard for Testing.*

57. *Next, the player submits that the Tribunal lacks jurisdiction to impose any sanction on the player because there was a departure from the International Standard for Testing in that in both Paris and Tokyo the player's father was refused admission to the testing station. We have already rejected the factual basis for this submission. We would add that it is in addition not a jurisdictional bar at all. The effect of a departure from the International Standard for Testing is to place an onus on the ITF under Article K.4.2 of the Programme to prove that "such departures did not cause the Adverse Analytical Finding or the factual basis for the Doping Offence".*

58. *Here, Dr Honour accepted under cross-examination from Mr Taylor (transcript page 54, second day) that if Mr Karatantchev was prevented against his will from attending the two tests, he could not see how that could affect the reliability of the laboratory results. Mr de Marco submitted that the pregnancy might have come to light if Mr Karatantchev had been admitted, and everything might thereafter have been different, but we would not have accepted that disclosure of the pregnancy would, if made, have changed anything materially, if we had found that he was prevented from attending.*

59. *That leaves the player's substantive defence to the charge: the contention that the positive test results were caused by nandrolone endogenously produced by the player as a result of her pregnancy. Appendix Two, paragraph S1.1.b to the Programme includes the following provision:*

   *"Where a Prohibited Substance ... is capable of being produced by the body naturally, a Sample will be deemed to contain such Prohibited Substance where the concentration of the Prohibited Substance or its metabolites or markers and/or any other relevant ratio(s) in the Athlete's Sample so deviates from the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production. A Sample shall not be deemed to contain a Prohibited Substance in any such case where the Athlete proves by evidence that the concentration of the Prohibited Substance or its metabolites or markers and/or the relevant ratio(s) in the Athlete's Sample is attributable to a physiological or pathological condition. ............"*

60. *The Tribunal has considered whether to approach this provision on the basis that pregnancy is a pathological or physiological condition. Plainly, in one sense it is a physiological condition. However, English and European Union sex discrimination law points against such an approach. The alternative approach which is preferable from the perspective of our anti-discrimination laws, is to treat the words "normally found in humans" as meaning, in a pregnancy case, "normally found in pregnant humans". We accept the invitation of Mr de Marco to adopt the latter approach though we emphasise that for reasons given below the result of the enquiry is the same on the facts of the present case whichever approach is adopted.*

61. *The player submitted, in reliance on Dr Honour's written and oral evidence, that the positive test results were more likely than not caused by the player's pregnancy and, in Tokyo, by the after-effects thereof. Dr Honour points to evidence that levels of 19-norandrosterone as high as (in the case of one urine sample) 16.5 ng/ml have been detected in women during the later stages of pregnancy. He accepts that in early pregnancy the excretion of 19-norandrosterone has not been documented. He considers that pregnancy cannot be ruled out as the cause of the positive test results, on the basis that the factual account provided by the player and her father is correct.*

62. *In the conclusion to his first report dated 18 November 2005, Dr Honour states that the 19-norandrosterone collected on 31 May 2005 in Paris "could reflect continued clearance from the body of steroids ... that had been produced up until*

*the time when the ovary ceased to be stimulated by placental hCG [human chorionic gondotropin] up until the spontaneous abortion". As to the Tokyo test, the result "has not been subjected to review". He drew attention to what he termed "the possibility of false negative hCG tests".*

63. *In an addendum to his report made on 18 November 2005, Dr Honour described a "hook effect" whereby when hCG concentrations are at their highest in early pregnancy, at around eight weeks, the high concentration of hCG invalidates the calibration curve, so that to get a true reading it is necessary to run the test with the sample diluted. In a subsequent report dated 7 December 2005 Dr Honour elaborated on this thesis and also questioned the appropriateness of the kit used by the Paris laboratory to run hCG tests. He could find no information about the kit used by the Japanese laboratory.*

64. *The ITF relied on some answers given by Dr Honour in cross-examination in which he appeared to accept that on the basis of the scientific literature available to him his explanation that pregnancy was the cause of the test results was merely possible rather than probable. The ITF also relied on the written and oral evidence of Professor Makin. He disputed the thesis that pregnancy was the cause of the positive test results and opined that on the balance of probabilities the cause was exogenous administration of a precursor of 19-norandrosterone, such as could be present in supplements taken by the player during the four to five weeks between the two tests.*

65. *Professor Makin considered that the levels of 19-norandrosterone found in the case of both tests were too high to be caused by pregnancy. His view was that the published data related to pregnancy beyond 14 weeks were not relevant to this case where the pregnancy never got that far. On the very limited data available he opined that the levels in the Paris and Tokyo samples would not, if caused by pregnancy alone, have exceeded 0.5 ng/ml. He rejected as statistically invalid the single example of a urine sample containing 16.5 ng/ml of 19-norandrosterone in later pregnancy.*

66. *He accepted after making enquiries that the Paris laboratory, though not the Tokyo laboratory, might not have fully complied with WADA standards, but was confident that any failures in that regard could not have produced the positive finding. He made enquiries about the hCG kits used by the two laboratories and satisfied himself that they were suitable for the purpose.*

67. *Professor Makin concluded, after studying data from the Paris and Tokyo laboratories, that the hCG assays from those laboratories do not suffer from the hook effect over the range of hCG concentrations expected in urine at 8-12 weeks gestation, and that their assay values were correct. He pointed to the relatively rapid rate of removal of hCG from the blood following a spontaneous abortion, which was such that he would expect hCG and 19-norandrosterone to be completely cleared within 10 days of a dilatation and curettage, such as that performed on the player on 25 June, i.e. by the time of the Tokyo test on 5 July.*

68. *We have considered carefully the evidence of both experts, written and oral. We have concluded that the player comes nowhere near satisfying us on the balance of probabilities that endogenous production of nandrolone resulting from pregnancy was the cause of the positive test results. We agree with Professor Makin that the data on which Dr Honour relies do not support that conclusion. We consider that Dr Honour's conclusion is too speculative to satisfy the onus on the player to prove on the balance of probabilities that his thesis is correct.*

69. *Dr Honour was instructed on the basis of the player's denial of having knowingly administered a prohibited substance exogenously. Whether or not that denial is true, the player took supplements regularly, including during the period between the two tests. The quantity and frequency and exact brand identities of those supplements are not known, but the evidence before us is that the player and her advisers did not check carefully the origin and ingredients of those supplements, still less have them tested to ensure that they were not contaminated with a precursor of 19-norandrosterone. We conclude that the supplements are more likely than the pregnancy to be the cause of the positive test results.*

70. *It follows that the ITF has established the commission of the two doping offences, which – it is common ground - must be treated as a single first offence for the purpose of imposing a period of ineligibility under Article M.2 of the Programme. The player sought to argue faintly at the oral hearing that she has a defence under Article M.5 of No Fault or Negligence, or No Significant Fault or Negligence. But that defence was not pleaded in the player's written brief and could not possibly succeed in the absence of proof of how the prohibited substance, if exogenously administered, entered the player's system.*

71. *The Tribunal is therefore obliged to deal with this case in accordance with the provisions of the Programme which apply to a first doping offence of this kind. First, we are obliged by Article L.1 of the Programme to disqualify the player's results obtained at the Roland-Garros tournament, including forfeiture of the 294 WTA computer ranking points and prize money of 110,370 euros (which we presume corresponds to the sum of US $ 126,744 set out in the schedule). Those points and that prize money must be forfeited.*

72. *Secondly, we are obliged by Article M.7, unless we consider that fairness requires otherwise, to disqualify the player's results, ranking points and prize money in respect of competitions in which the player competed subsequent to the French Open. Here, there were two doping offences and no unusual delays in notifying the player of the positive test results. She voluntarily continued competing after being so notified. She was entitled to do so, but had she abstained from competition the period of her abstention would have been credited against any period of ineligibility.*

73. *The player made no positive case that fairness required us to depart from the norm set out in Article M.7. We decline to do so. Accordingly the player's results must be disqualified, and her ranking points and prize money must be forfeited, in respect of all competitions subsequent to the French Open in which she took part.*

74. *Thirdly, we are required by Article M.2 of the Programme to impose a mandatory period of ineligibility of two years. We have a discretion under Article M.8.3(b) of the Programme - for example in cases of delay in the hearing process - to start the period of ineligibility on a date earlier than the date of this decision. In that regard, we bear in mind that the hearing took place just before the start of the Christmas and New Year holiday period, with the consequence that we were unable to issue our decision as early as we would have liked to have done, and were unable to do so within a period of two weeks after the end of the hearing, which would be reasonable outside the holiday period.*

75. *Accordingly we consider that the period of ineligibility should start as at the date when we would, but for the holiday period, have issued our decision. We decide pursuant to Article M.8.3(b) that the period of ineligibility shall start on 1 January 2006. The two year period is therefore the calendar years 2006 and 2007. The ban will expire at midnight on 31 December 2007.*

76. *We conclude by noting that the player is, fortunately for her, very young and talented. She is easily young enough and talented enough to recover from the blow to her career occasioned by this case. We would hope and expect that she will keep her skills honed during her period of ineligibility and will learn from this experience the lessons necessary to ensure that she does not in future fail to comply with the anti-doping rules applicable in her sport. In particular we hope that both she and her advisers will do their utmost to ensure that she takes every precaution to avoid ingesting, inadvertently or otherwise, not just prohibited substances as such, but also dietary supplements that could be contaminated with a prohibited substance.*

***<u>The Tribunal's Ruling</u>***

77. *Accordingly, for the reasons given above, the Tribunal:*

    (1) *finds that the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 27 September 2005 has been committed by the player: namely that a prohibited substance, 19-norandrosterone, in a concentration above the reporting threshold of 2 ng/ml, has been found to be present in the urine sample that the player provided at the French Open on 31 May 2005;*

    (2) *finds that the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 25 October 2005 has been committed by the player: namely that a prohibited substance, 19-norandrosterone, in a concentration above the reporting threshold of 2 ng/ml, has been found to be present in the urine sample that the player provided out of competition in Tokyo on 5 July 2005;*

    (3) *in the case of both doping offences, rejects the player's defences founded on alleged absence of a valid contract, alleged lack of jurisdiction and/or lack of consent, and rejects the defence that the positive test results are on the*

*balance of probabilities the result of endogenous production of nandrolone by the player consequent on her pregnancy;*

*(4) declares, however, that by reason of Article M.6.,1 of the Programme the two offences are to be treated as one single first offence for the purpose of the imposition of a period of ineligibility under Article M.2 of the Programme;*

*(5) orders that the player's individual result must be disqualified in respect of the French Open held at Roland-Garros, France, and in consequence rules that the ranking points and prize money obtained by the player through her participation in that event, must be forfeited;*

*(6) orders, further, that the player's individual results in all competitions subsequent to the French Open shall be disqualified and all prize money and ranking points in respect of those competitions forfeited;*

*(7) declares that the player shall be ineligible for a period of two years commencing on 1 January 2006 from participating in any capacity 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.*"

## II. SUMMARY OF THE ARBITRATION PROCEEDINGS

37. On 27 January 2006, Ms Karatancheva filed an appeal with the Court of Arbitration for Sport ("CAS") against the decision of 11 January 2006 of the ITF "*Independent Anti-Doping Tribunal*" (hereinafter the "appealed decision").

38. In her statement of appeal, Ms Karatancheva requested the following:

"7. *REQUESTED RELIEF:*

*7. 1. The challenge against the decision of the Anti-Doping Tribunal, pointed above, is because The Anti-Doping Tribunal, wrongly in our view, rules that a doping offence has been committed.*

*In the process before the CAS we would search to establish that no doping offence has been committed by the applicant, i.e. the two positive samples, according to the notes of Article S 1. 1 b of the TADP should have been considered as not containing a Prohibited Substance or its metabolites or markers because of the physiological condition of the applicant.*

*19 -NA is listed as a Prohibited Substance under Section Sl. 1 b of the TADP as being an Endogenous Anabolic Androcienic Steroid.*

*The notes to that part explain:*

> *"Where a Prohibited Substance ... is capable of being produced by the body naturally, a Sample will be deemed to contain such Prohibited Substance where the concentration of the Prohibited Substance or its metabolites or markers and/or any other relevant ratio(s) in the Athlete's Sample so deviates from the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production. ~~A Sample shall not be deemed to contain a Prohibited Substance in any such case where the Athlete proves by evidence that the concentration of the Prohibited Substance or its metabolites or markers and/or the relevant ratio(s) in the Athlete's Sample is attributable to a physiological or pathological condition...~~".*

*The above quoted note from Article S. 1. 1 B differentiates two hypothesis, namely - the first one when the ratio of the natural production from the body deviates from the range of values normally found in humans, and the second hypothesis - which we believe is the present case, when the endogenous production is a result of pathological or physiological condition of the athlete.*

*In that respect, the presence of the prohibited substance - 19 NA found in Sesil Karatancheva's probes is due mainly to her pregnancy condition (physiological criteria) on one hand, and biochemical influence of the regularly taken food supplements, on the other.*

*7. 2. Apart from the arguments stated briefly in 7. 1., the appeal against the decision of the Tennis Anti-Doping Tribunal is based on infringements of different procedural rules regulating the process of establishing the commission of a doping offence.*

*7. 3. With consideration to the above mentioned circumstances we request the Court for Arbitration for Sport to review the facts and the law and to issue a decision ordering that:*

*7. 3. 1. No doping offence has been committed under Article C. 1 of the Tennis Anti-Doping Programme 2005 in connection to the first and second positive findings and to rule out that Sesil Karatancheva should not bear the consequences set out for a doping offence, namely: disqualification of the player's individual results in respect of Roland Garros (the French Open), forfeiture of the ranking points and prize money obtained trough participation in that event (par. 77, 5 from the challenged decision), disqualification of the individual results in all competitions subsequent to the French open and forfeiture of all the prize money and ranking points in respect of those competitions ( par. 77, 6 from the challenged decision), and an Ineligibility period of two years (par. 77, 7 from the challenged decision).*

*7. 3. 2. Alternatively, if the CAS finds that a doping offence has been committed by the appellant, to eliminate the imposed two year period of Ineligibility because she had No Fault or Negligence for the offence (Article M. 5. 1 of the TADP) or reduce the two year period of Ineligibility according to Article M. 5. 2 of the TADP because of the appellant's No Significant Fault or Negligence for the offence.*

*7. 3. 3. If the CAS finds that a doping offence has been committed but the player had No Fault or Negligence or No Significant Fault or Negligence for the offence and it is admissible and fair to eliminate or reduce the amount of money forfeiture and disqualification points otherwise applicable.*

*7. 3. 4. If the CAS finds that a doping offence has been committed but the player bears No Fault or Negligence for the offence to reverse the penalty imposed under Article M.7 of the TADF 2005, namely disqualification of the results received in competitions subsequent to the French Open, i.e. to apply the regulation in Article M. 1. 2.*

*8. We appoint as arbitrator – Mr. Marc Hodler (Suisse)*

*9. SPECIAL REQUEST:*

*We ask the Court of Arbitration for Sports, in accordance with art. 65.3 from the Code of Sport - related arbitration, to adjudge the trial costs, taking into account the evidence for the financial state of the Appellant, applied with the Appeal Brief."*

39. On 7 February 2006, the Respondent acknowledged receipt of the statement of appeal and appointed Judge Reid as arbitrator.

40. On 9 February 2006, the Appellant filed her appeal brief detailing the reasons for her appeal and confirming the prayers for relief contained in her statement of appeal.

41. After a confusion of names between Marc and Beat Hodler, the Appellant confirmed that she appoints Beat Hodler for this case rather than Marc Hodler. Consequently, on 3 March 2006, the CAS confirmed the formation of the Panel comprised of Quentin Byrne-Sutton (President), Mr Beat Hodler and Mr. James Robert Reid.

42. On 13 March 2006, the ITF filed its answer, including the following prayers for relief:

"*7.1. For the reasons set out above, the ITF respectfully submits that no grounds for disturbing the Decision have been made out and therefore the appeal should be dismissed.*

*7.2. The ITF also asks the CAS to order the Player, pursuant to CAS Rule 65.3, to make a contribution towards the costs that it has been forced to incur in responding to this appeal.*"

43. On 24 March 2006, the CAS informed the parties that a hearing would take place on 5 May 2006.

44. During the month of April 2006, discussions took place between the parties regarding the organization of the hearing.

45. On 3 May 2006, the parties sent a jointly-signed letter dated 25 April 2006 to the CAS indicating their agreement on the witnesses that would be examined at the hearing and their proposal for the timetable.

46. On 27 April 2006, in keeping with the Panel's directions and the parties' joint letter of 25 April 2006, the Appellant filed a witness statement by Professor Plamen Kenarov.

47. The hearing took place in front of the Panel on 5 May 2006 in Lausanne, Switzerland, with the Counsel to the CAS (Ms. Andrea Zimmerman) and two interpreters in attendance. The following participants were present, except for those indicated as having been examined by telephone during the hearing:

a) *Appellant*

Ms Sesil Karatancheva, player

Mr. Radoslav Karatanchev, player's father

Ms Darina Zinovieva, Attorney-at-law

Ms Vaselina Kanatova, Legal Researcher

Mr. Roumen G. Dimitrov, expert witness

Mr. Plamen Kenarov, expert witness

b) *Respondent*

Mr. Jonathan Harris, ITF Anti-Doping Administrator

Mr. Jonathan Taylor, solicitor

Mr. Iain Higgins, solicitor

Mr. Hugh Makin, expert witness

Mr. Rasmus Damsgaard, expert witness (examined by telephone)

Mr. Staffan Sahlström, fact witness (examined by telephone)

48. During the course of the hearing, the parties' counsel made opening and closing statements, confirming in substance the content of the parties' written submissions, and the witnesses were examined.

49. After a discussion between the parties and the Panel, the Respondent accepted the Appellant's request to file a new document entitled "*Protocol N° 248*", dated 26 April 2006 and signed by Dr. Stefan Georgiev Benchev.

50. At the end of the hearing, the player expressed her position with respect to the circumstances surrounding the doping charges, and indicated what place tennis has occupied in her life thus far and what her personal goals are for the future.

# III. THE PARTIES' CONTENTIONS

## A. The Player

51. As her main argument, the player submits in substance that:

- "*No doping offence has been committed under Article C. 1 of the Tennis Anti-Doping Programme 2005 in connection to the first and second positive findings*". In both cases, the elevated levels of 19-norandrosterone ("19-NA") - a nandrolone metabolite - found in her two separate urine samples were *"due mainly to her pregnancy condition (physiological criteria) on one hand, and biochemical influence of the regularly taken food supplements, on the other"*.

- During and after the Paris and Tokyo tests, the ITF, directly and/or via the laboratories and the agency (IDTM) mandated by it, violated various procedural rules and due process, notably as follows:

  - In breach of article 5.4.3 of the *International Standard for Testing* ("IST"), the ITF has not produced any form evidencing the notification of the player that she was required to undergo the Paris test.

  - In breach of IST 5.4.1(d)(i), the player was not expressly notified of her right to have a representative (and, if required, an interpreter) present during the Paris test and, in breach of IST 5.3.9 and 5.3.10, her father was not notified that the testing was to take place. Such violations were exacerbated by the fact that the player also had a blood test carried out at that time without her father's notification.

  - There is no documentary evidence of any notification of the player that she was to have a blood test and the results of the Paris blood test do not mention whether the blood sample was "positive for steroids" or not.

  - At the time of the Paris and Tokyo tests, the player was a minor, i.e. under the age of 16, and yet her father was not allowed to attend the sample collection at either test despite her explicit will. This was in breach of IST 6.3.3. Furthermore, in breach of IST 7.4.6, her father was not asked to sign the relevant documentation.

  - Different conventions have been used for recording dates on the Paris laboratory documentation. Specifically, a computer generated document recorded the date as "06/02/2005", while a laboratory assistant manually recorded the date as "020605".

  - There is no "data and evidence with regard to the testing of the values of B-hCG and LH" and no data available on the kits used for the B-hCG testing.

  - The Paris laboratory applied the wrong correction formula to calculate the concentration of 19-NA in the urine sample of the Paris test.

- While the record reflects that the Review Board sought "additional information" from the Paris laboratory before it was prepared to conclude that there was a case to answer, the documents submitted by the ITF do not reveal what that information was. Nor do those documents indicate whether any recognition was given to the player's declaration that she had taken "medications for asthma".

- The Review Board should have suggested and/or the ITF should have carried out additional investigations into all of the substances declared by the Player on the Doping Control Forms (in Paris, "medications for asthma", and in Tokyo, "prednasolon").

- The Review Board failed to conduct itself properly in that the members did not attend a meeting to vote formally as to whether there was a case to answer or not. Furthermore, they have not provided any further information formally confirming that each individual member completed his review form independently, and the forms contain "*manually corrected words, cross-outs and amendments*" and "*fail to show in a formally clear and unambiguous way the person's declaration of will*."

- The player only received notice that the urine sample she had given on 31 May 2005 had tested positive for 19-NA by letter dated 28 July 2005, i.e. in an untimely fashion. This delay undermined the player's ability to defend herself against the doping charge, because it made it impossible for her to clarify the "*causes and circumstances*" behind the presence of the 19-NA in her Paris sample. In particular, had she known of the positive test earlier, she would have (i) "*undertaken the required medical examinations, tests and analyses to identify the cause for that result*", and (ii) "*suspended the taking of food supplements*" and organised a "*spectrometry of the food supplements taken as purchased from various traders and manufacturers*".

- The ITF failed to send copies of the two charge letters sent to the player to the National Anti-Doping Committee of Bulgaria ("NADCB"), as provided by article P.4 of the TADP. This deprived her of an opportunity to investigate and clarify the explanations for the increased level of 19-NA in her sample because the NADCB would have had greater financial capacity to assist in the organisation and management of an independent investigation into the case.

- In relation to the Tokyo test, the fact that the ITF asked for the names of the Bulgarian team before the Davis Cup tie shows some "intended actions" on the part of the ITF.

- During the Tokyo test there was the same failures as in Paris to notify the player of her right to have a representative.

- The analysis of the A and B samples of the Tokyo test was carried out by the same person, Mrs Ayako Ikekita.

- The handwriting on page 20 of the A-sample laboratory report might not belong to the same person as the handwriting on page 37 and the results in the table on page 20 of the A-sample laboratory report do not correspond with the hand-written figures in the table of page 37.

- At the opening and testing of the B sample, the name of the player was known.

- The appointed Review Board should have been told that the Tokyo positive test had been preceded by another positive test for the same player, i.e. the Paris test. If that had happened, the Review Board would have taken the view that there were "exceptional circumstances", so that there was no case to answer.

52. Alternatively, the player submits that if the panel considers a doping offence has been committed, then it should determine she is guilty of either: (i) No Fault or Negligence in relation to that offence (pursuant to article M.5.1 of the 2005 TADP); or (ii) No Significant Fault or Negligence (pursuant to article M.5.2 of the TADP).

**B. The ITF**

53. The ITF submits in substance that:

  ➢ "*Contrary to the "Pregnancy Defence", the 19-NA in the player's samples was not endogenously produced*", this being established by documentary and expert evidence.

  ➢ With regard to the alleged procedural discrepancies relating to the Paris and Tokyo tests, there was either no discrepancy (for the reasons explained by ITF with regard to each invoked discrepancy), and/or any alleged discrepancy was not the cause of the adverse analytical finding in this case and must therefore be discounted on the basis of article K.4.2 of the TADP, whereby: "*Departures from the International Standard for Testing that did not cause an Adverse Analytical Finding … shall not invalidate such evidence. If the Player establishes that departures from the International Standard occurred during Testing, then the ITF shall have the burden to establish that such departures did not cause the Adverse Analytical Finding …*".

  ➢ "*The player's two-year ban under article M.2 may not be eliminated or reduced under M.5, because the player cannot show that she bears no fault or negligence for her positive tests, or even that she bears no significant fault or negligence for her positive tests*", notably taking into account the following:

    - "*… in order to rely on either Article M.5.1 or M.5.2 the Player must first "establish", on the balance of probabilities, "how the Prohibited Substance entered his or her system." …. On that point, speculation is not enough; the evidence must be clear*". The player has not satisfied this threshold requirement because the evidence is unclear as to what type of supplements she ingested, when and in what amount.

- According to CAS jurisprudence and the commentary to article 10.5 of the WADC, the exception of "*No Fault or Negligence*" must be construed very strictly and in particular cannot apply in the case of a positive test resulting from a mislabelled or contaminated supplement.

- Similarly, the plea of "*No significant Fault or Negligence*" is an exception that is construed narrowly and which clearly does not apply where the athlete has taken no particular precaution to avoid contamination through supplements. In this case, whereas it is established that the ITF posts serious warnings about the risks involved in taking nutritional supplements (on its website since February 2004, in training/locker rooms of the WTA Tour events, in the form of a wallet card, etc.), the evidence indicates that the player and her father did not pay much attention to vetting the supplements used to ensure they were uncontaminated with prohibited substances.

- "*… the Player's father's actions are attributable to the Player for determining whether she can sustain a plea of No Significant Fault or Negligence. Given that it is undisputed that he supplied her with supplements having taken no precautions whatsoever to address the risk of ingestion of Prohibited Substances, it is beyond doubt that she cannot sustain a claim that her fault or negligence in relation to the 19-NA found in her two samples was "insignificant*", bearing in mind also article 10.3 of the WADC whereby athletes are responsible for the conduct of persons to whom they entrust access to their food and drink and CAS jurisprudence according to which the negligence of a member of the athlete's team must be attributed to the athlete.

# IV. DISCUSSION OF THE CLAIMS

## A. Jurisdiction

54. The jurisdiction of the CAS, which is not disputed, derives from article O.2 of the 2005 TADP and art. R47 of the Code of Sports-related Arbitration (the "Code").

55. Furthermore, it is not disputed that the appeal was timely.

56. The scope of the Panel's jurisdiction is defined in art. R57 of the Code, which provides that: "*The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*".

## B. Applicable Law

57. Art. R58 of the Code provides that:

> "*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of*

*law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*"

58. The Parties having both relied on the provisions of the IST and of the 2005 TADP, these are deemed applicable. Article S.1 of the TADP provides that the comments annotating various provisions of the World Anti-Doping Code ("WADC") may, where applicable, assist in the understanding and interpretation of the TADP. Consequently, the latter shall also serve to construe the provisions of the 2005 TADP if necessary. Any issues that need determining that are not regulated by the foregoing rules shall be decided on the basis of English law, since according to article S.3 of the TADP it is governed by English law.

59. The following provisions, among others, of the 2005 TADP and of the WADC are relevant in deciding the case:

a) *The 2005 TADP*

"*C. Doping Offences*

*Doping is defined as the occurrence of one or more of the following* […]:

*C.1 The presence of a Prohibited Substance or its Metabolites or Markers in a Player's Specimen, unless the Player establishes that the presence is pursuant to a therapeutic use exemption granted in accordance with Article E.*

*C.1.1 It is each Player's personal duty to ensure that no Prohibited Substance enters his or her body. A Player is responsible for any Prohibited Substance or its Metabolites or Markers found to be present in his or her Specimen. Accordingly, 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 or negligence or knowledge a defence to a charge that a Doping Offence has been committed under Article C.1.*

[…]

*M.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods.*

*Except where the substance at issue is one of the specified substances identified in Article M.3, the period of Ineligibility imposed for a violation of Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), Article C.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article C.6 (Possession of Prohibited Substances and/or Prohibited Methods) shall be:*

*First offence:* *Two (2) years' Ineligibility.*

*Second offence:* *Lifetime Ineligibility.*

*However, the Participant shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article M.5.*

[…]

*M.5.1 If the Player establishes in an individual case involving a Doping Offence under Article C.1 (presence of Prohibited Substance or its Metabolites or Markers) or Article C.2 (Use of Prohibited Substance or Prohibited Method) that he or she bears No Fault or Negligence for the offence, the otherwise applicable period of Ineligibility shall be eliminated. When the case involves a Doping Offence under Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event that this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the Doping Offence shall not be considered a Doping Offence for the limited purpose of determining the period of Ineligibility for multiple Doping Offences under Articles M.2, M.3 and M.6.*

*M.5.2 This Article M.5.2 applies only to Doping Offences involving Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), Article C.2 (Use of Prohibited Substance or Prohibited Method), Article C.3 (failing to submit to a Sample collection), Article C.8 (administration of a Prohibited Substance or Prohibited Method) or C.9 (refusing or failing to abide by any other provision of this Programme). If a Player establishes in an individual case involving such offenses that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than eight years. When the doping offense involves Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.*

[…]

*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 or Prohibited Method.*

*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 and Negligence, was not significant in relationship to the Doping Offence.*"

b) *The WADC*

"***Article 10.5.1*** *No Fault or Negligence*

*If the Athlete establishes in an individual case involving an anti-doping rule violation under Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under Article 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance of its Markers or Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Articles 10.2, 10.3 and 10.6.*

[…]

***Article 10.5.2*** *No Significant Fault or Negligence*

*This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Use of a Prohibited Substance or Prohibited Method under Article 2.2, failing to submit to a Sample collection under Article 2.3 or administration of a Prohibited Substance or Prohibited Method under Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Metabolites or Markers is detected in an Athlete's Specimen in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.*

***10.5.2 Comment:*** […] *Article 10.5 is meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.*

*To illustrate the operation of Article 10.5, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)*"

**C. Violation of Procedural Rules and Testing Procedures during the Doping-Control Tests**

60. The player is submitting in essence that due to a series of procedural deficiencies in the management of the tests by the ITF and its agents, and of failings in the laboratories' testing procedures which occurred during and between the Paris test and the Tokyo test, the positive findings must be deemed invalid for one or more of the following main reasons:

- The results of the tests relied on by the ITF are probably wrong, i.e. the analytical findings the laboratories' are most likely the result of their deficient testing methods and interpretation of results.
- The player's rights as a minor and as an athlete were not respected.
- The delays in notifying the positive findings and the failure to inform the NADCB prevented the player from verifying the reliability of the tests herself and of investigating in time the possibility that an unknown exogenous cause, such as the intake of nutritional supplements, enhanced the endogenous production of 19-NA resulting from pregnancy.

61. Given the applicable rules on multiple doping violations, the ITF "*Independent Anti-Doping Tribunal*" decided that despite it finding two separate doping offences relating to the Paris and Tokyo tests they must be treated as a single first offence for the purpose of imposing a period of ineligibility under article M.2 of the TADP.

62. This means that even if it were found that the procedural rules governing anti-doping tests were violated during the second doping-control test in Tokyo, such finding could have no bearing on any sanction imposed in connection with the Paris test if it is deemed to establish a first offence.

63. Thus and because for the reasons explained below the Panel considers a first offence in Paris to be established, the Panel will only make a determination on the procedural violations invoked by the player with regard to the Paris test.

64. Concerning the allegation that the results of the test were caused by failings in the testing procedures, it is necessary to account for article K.4.2 TADP, whereby "… *departures from the International Standard for Testing that did not cause an Adverse Analytical Finding … shall not invalidate such evidence…*" but "*… the ITF shall have the burden to establish that such departure did not cause the Adverse Analytical Finding …*".

65. Have considered the departures from the "*International Standard for Testing*" invoked by the player in relation to the Paris test in light of the evidence adduced by the ITF to establish that any such departures could not have caused the adverse analytical finding, the Panel is convinced by the testimony of the ITF's expert witness Professor Hugh L.J Makin (Emeritus Professor of Analytical Biochemistry with a specialization in the measurement of or biochemistry of steroids) that none of the alleged departures, even if they existed, could have given rise to the adverse analytical finding.

66. Professor Makin's opinion is summed up in his second written declaration, dated 12 March 2006, in which he concludes that "*However, I cannot see how, even if proven, these alleged breaches or "discrepancies" (either separately or together) could give rise to, or be a material factor in, positive findings of 19-NA at the concentration levels reported in urine samples collected from the player on two separate occasions and each analysed in two different WADA-approved laboratories*". Neither the cross examination of Professor Makin nor the examination of the player's expert witnesses at the hearing cast doubt on the reliability of his scientific assessment in that regard.

67. Accordingly and in application of article K.4.2 TADP, the finding of 19-NA at the concentration levels reported for the Paris test must be deemed correct and the factual reality of the invoked departures need not be assessed.

68. Concerning the player's rights as a minor and as an athlete, the Panel finds that no violations of such rights have been established. In that connection, the Panel considers that, at the very least, the player became bound by the TADP by participating in Roland Garros because by her doing so with her father's consent they both demonstrated their intention that she be subject to the rights and obligations stemming therefrom, bearing in mind that article B. 1 expressly stipulates that "*Any player who enters or participates in a Competition …sanctioned or recognized by the ITF or who has an ATP Tour or WTA Tour ranking … shall be bound and shall comply with all the provisions of this Programme*".

69. With regard to the allegation that the player suffered from delays in being notified of the results of the positive tests, the Panel considers that no breach of a deadline fixed

by the applicable rules is established and that in any event the player's duty to keep track of her use of medicine and any nutritional supplements exists independently from the notification of doping-control test results, in addition to the fact that the doping-control agents and officials must always seek a balance between speed of analysis/interpretation of results and the need to be diligent and cautious. Moreover, with respect to the testing of samples further to a doping-control test, the regulations do not envisage tests by athletes themselves but provide instead the testing of two samples (A and B) as a means to ensure fairness and reliability. Consequently, the Panel considers the player has not established that any omission by the ITF to notify the NADCB of the charge letters prejudiced her in any manner.

**D. The Doping Offences**

70. In relation to the existence of a doping offence the player is arguing that the positive tests may have been caused by the laboratories' deficient testing methods and interpretation of results and that, in any event, whatever concentration of 19-NA, if any, was truly present in the test samples "*the presence of the prohibited substance – 19NA found in Sesil Karatancheva's probes is mainly due to her pregnancy condition (physiological criteria) on the one hand, and biochemical influence of the regularly taken food supplements, on the other*".

71. In other words, in addition to questioning the validity of the testing, the player is contending that the positive tests are due to the endogenous production of 19-NA mainly caused by pregnancy with an enhancing influence of certain substances that can be found in nutritional supplements. The player also contends in parts of her submissions that stress and physical exertion are other possible causes of endogenous production of 19-NA, which in her case may have been additional factors that raised the level of 19-NA in her body.

72. For the reasons indicated above in § 64-67, the Panel has already determined that it does not find the analytical findings of the laboratory that undertook the Paris test to have been proven wrong.

73. Consequently, for the purposes of determining whether a doping offence occurred, the concentrations of 19-NA found in the Paris A and B samples are deemed correct.

74. According to the Paris laboratory-test reports dated 16 June 2005 (A sample) and 7 September 2005 (B sample), the levels of 19-NA detected were respectively 12.6 ng/ml and 11.6 ng/ml; with in each case a maximal admissible variation of 20%.

75. Professor Makin provided the opinion that the laboratory should have applied the WADA correction formula differently and this would have resulted in increasing the analytical result for the Paris A-sample from 12.6 ng/ml to 15.8 ng/ml. However for the purpose of its reasoning with regard to the doping offence, the Panel will rely on the concentrations as reported by the laboratory.

76. Furthermore, it is not contested that under the applicable rules the reporting level for positive testing of 19-NA is 2 ng/ml. For example, WADA Technical Document – TD2004NA (2004), entitled "Reporting Norandrosterone findings", stipulates that:

"*The Laboratory is to report as an Adverse Analytical Finding, any urine Sample from either a male or a female containing 19-norandrosterone (19-NA) at a concentration greater than 2ng/ml*".

77. It stems from the above that the concentration levels of 19-NA that the Panel deems to be established in relation to the Paris test (12.6 ng/ml and 11.6 ng/ml) are well in excess of the reporting level, i.e. approximately five times the reporting level (2 ng/ml), if one allows for the variations.

78. This implies that the analytical findings of the Paris test must be deemed constitutive of a doping offence under article C.1 of the TADP, unless the positive test can be considered the result of endogenous production of 19-NA under the criteria laid down at article 1.1.b of Appendix two of the TADP, according to which: "*Where a Prohibited Substance (as listed above) is capable of being produced by the body naturally, a Sample will be deemed to contain such Prohibited Substance where the concentration of the Prohibited Substance or its metabolites or markers and/or any other relevant ratio(s) in the Athlete's Sample so deviates from the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production…*" .

79. Given the content of the foregoing provision and the player's burden of proving the facts underlying her claim of endogenous production, she must establish that the concentration levels of 19-NA found in her Paris samples do not deviate from the values of 19-NA normally found in pregnant women in a range that makes it unlikely for the concentrations of 19-NA to be consistent with the normal endogenous production of 19-NA in pregnant women.

80. In that connection a preliminary question is whether she has established that other factors than the pregnancy itself can have participated in endogenously increasing the concentration of NA-19 in her body; the factors she is invoking being stress, physical exercise and the ingestion of nutritional supplements that contained substances that could enhance endogenous production of 19-NA caused by pregnancy.

81. The Panel shall examine in turn the different factors invoked by the player.

82. In assessing the different possible factors of endogenous production of 19-NA and in particular whether or not the concentration levels of 19-NA found in the player's Paris samples deviate from the values of 19-NA normally found in pregnant women in a range that makes it unlikely for the concentrations of 19-NA to be consistent with the normal endogenous production of 19-NA in pregnant women, the Panel does not have the scientific knowledge and training to make its own scientific assessment of the issues. It must therefore determine what it deems to be most likely, in light of the expert and factual evidence adduced on the scientific issues.

83. Regarding the factor of physical exercise, one of the expert witnesses called by the player, Dr J.W. Honour, a biochemist and specialist in the identification and measurement of steroids in biological samples of clinical nature (with a scientific career in steroid endocrinology), indicates that: "*The effects of exercise have been examined in a number of studies. Modest changes in concentrations of 19-NA in urine*

*have been recorded in males (Baume et al 2004). I have found no literature on such studies in females*".

84. Dr Honour's finding is confirmed in the WADA Technical Document – TD2004NA, according to which: "*It appears that exercise does not increase physiological levels of 19-norandrosterone significantly and certainly not sufficiently to approach the threshold*". This position set forth in the WADA Technical Document is supported by the opinion of Professor Makin, who, in his second written statement submitted by the ITF, declares: " *However, none of the studies provided data (nor am I aware of any other studies that produce data) to suggest that there might be an exercise-induced increase in the levels of 19-NA in excess of the WADA threshold concentration of 2ng/ml*". One of the player's other expert witness, Professor Roumen G. Dimitrov (Professor in Obstetrics and Gynaecology, Medical University of Sofia), referred to the possible effect of physical exercise, while conceding that: "*Although the values of 19-NA generally did not exceed the threshold levels there were cases when values just above 2ng/ml were measured*".

85. Since there is no reason to doubt the foregoing concurring opinions on the state of scientific knowledge relating to the relationship between physical exercise and the endogenous production of 19-NA - two such opinions being those of eminent specialists in the relevant field of study - the Panel finds that the factor of physical exercise in possible endogenous production of 19-NA in the player must be deemed negligible and very unlikely to have caused endogenous production of 19-NA in excess of 2ng/ml in the player.

86. Concerning the factor of stress, Dr Honour states that: "*Stress is not particularly know to influence 19 NT and indeed in a hypoglycaemia stress test conducted in evaluation of hCG stimulation (Reznik et al 2001) there were no demonstrable effects on 19NA excretion*". No evidence was adduced indicating the contrary. Consequently, the Panel considers that stress is not a factor to be accounted for in the computation of what portion of the concentrations of 19-NA found in the player's Paris sample could result from endogenous production.

87. Before turning to the pregnancy factor, it remains to be determined whether in this case the intake of nutritional supplements can be deemed one of the elements that could have affected the endogenous production of 19-NA and, if so, in what proportion and with what consequences.

88. In this connection the player submits that certain non-banned nutritional supplements she took, notably *Zimag* and *Tribestan* (*Sopharma*), contain substances that could enhance the endogenous production of 19-NA, the former due to containing a combination of zinc, magnesium and vitamin B6 and the latter due to being made from a dry extract of the herb *Tribulus terrestris*.

89. As an alternative argument, the player submits that certain nutritional supplements she ingested may have contained banned steroids, in particular 19-NA or its precursors, without her realizing. If the player succeeded in establishing the ingestion of nutritional supplements containing 19-NA or its precursors an exogenous cause of the concentration of 19-NA in excess of the reporting level, this would not prevent a

doping offence from being found under the applicable rules, but would open up the possibility of submitting that the penalty should be reduced under the rules on no fault or no significant fault. Consequently that possibility is discussed below in relation to the sanction.

90. If the player succeeded in establishing the endogenous production of 19-NA caused by the ingestion of nutritional substances, this could only prevent the finding of a doping offence if, combined with any other established causes of endogenous production, it was deemed to account for the entire concentrations of 19-NA found in excess of the reporting level.

91. That said, both of the player's foregoing arguments relating to the possible effects of nutritional supplements depend on her proving that she ingested nutritional supplements that contain either substances that cause endogenous production of 19-NA and/or 19-NA or its precursors.

92. In that relation, in the lower instance the ITF "*Independent Anti-Doping Tribunal*" found, among others, that: "*The extent to which she took such supplements was unclear* (quote para. 20). *We do no have any reliable evidence of what exactly was taken, when and in what doses. These supplements were not properly vetted to ensure that they were uncontaminated with any prohibited substances.* […] *She was unclear about what medication she had been taking and she did not always distinguish clearly in her evidence between medication and dietary supplements* (quote para. 24)".

93. A review of the evidence on record in the lower instance, including the transcript of the hearing it held on 14-15 December 2005, confirms that beyond general assertions by the player and her father that she took nutritional supplements - such assertions having simply been repeated as hearsay in the statements of the experts appointed by the player - there is no clear evidence (written proof or testimony) regarding what type of nutritional supplements were taken, during what periods and in what quantity.

94. In fact, the testimony of the player and her father are very worrisome to the extent they demonstrate that neither of them kept serious track of what medication and nutritional supplements were being taken and what they contained, whether it be before or during the period most relevant in this case.

95. In essence, the player indicated that she relied entirely on her father and two doctors, one being her uncle, who at irregular intervals gave her different types of nutritional supplements, vitamins and pills, which she ingested without asking questions or wondering what they might contain, except for believing that part of the medication was to treat Asthma and period-related pains. Upon being questioned at the hearing in front of this Panel, the player repeated that she had no specific recollection or understanding of what the nutritional supplements consisted of and confirmed that they were provided by her father.

96. No written record of any of the nutritional supplements allegedly ingested was adduced as evidence, or any testimony by either of the family doctors who supplied medicine and/or advice regarding nutritional supplements.

97. During his testimony in front of the first instance, the player's father underlined that his aim in providing nutritional supplements (as well as bananas and honey) was merely to help his daughter maintain sufficient energy and to recover during a physically-demanding programme of competitions. At the same time he admitted to having no specific knowledge of the content and effects of the nutritional supplements being provided - tending simply to believe, for example, that the most expensive must be the best – and to having relied entirely on indications gleaned here and there from coaches and doctors as well as from shops specialised in selling such products over the counter, among others pharmacies and authorized chemists.

98. For the above reasons – and since to prove that the concentrations of 19-NA found in her sample supplied during the Paris test were caused in part by the ingestion of nutritional supplements, and in what proportion, the player would need to adduce very specific evidence regarding what type of supplement was taken, in what doses and intervals and during what periods - the Panel considers the player has not established to what degree, if any, the ingestion of nutritional supplements influenced the concentrations of 19-NA found in her Paris sample.

99. In other words, the Panel finds that the player has not proven the ingestion of particular nutritional supplements containing specific substances that could enhance the endogenous production of NA-19 in pregnant women.

100. For the foregoing reasons, the only possible cause of endogenous production of NA-19 that can come into consideration in determining whether a doping offence has occurred, as defined by article C.1 of the TADP in connection with article 1.1.b of Appendix two of the TADP, is the player's pregnancy.

101. With regard to pregnancy as a possible cause of endogenous production of NA-19, the experts having provided opinions in this case all rely in part on the findings of a study by U. Mareck-Engelke/G. Schultze, H. Geyer/W.Schänzer (the "Mareck-Engelke study"), which gave rise to two reports on the subject, one in 2000, the other in 2002.

102. According to this study and the expert opinions submitted, one factor in determining the degree to which pregnancy may cause endogenous production of NA-19 is the stage of the pregnancy, given that the reasons for the endogenous production are different in early stages and later stages of pregnancy (as indicated by Dr Honour in his main statement) and because the reported figures indicate that detection in early pregnancy does not occur whereas the amount of NA-19 production tends to increase as the pregnancy develops.

103. It is therefore relevant to determine what stage of pregnancy the player had reached when the Paris test took place on 31 May 2005.

104. According to the medical certificates produced and the different expert opinions submitted, the player was between 5-6 weeks pregnant when her pregnancy was first detected during a gynaecological examination on 3 May 2005, which means she was at most 10 weeks pregnant at the time of the Paris test on 31 May 2005.

105. According to the Mareck-Engelke study (2000 report), "*In total 252 urine samples were investigated. In 154 urine samples 19-norandrosterone was detectable. The detection of 19-norandrosterone was possible from the 14th week of pregnancy (detection limit 0.2 ng/ml)*", i.e. detection did not begin until the 14th week (as is indicated by the graphs annexed to the report).

106. Moreover, in the same report in relation to the five volunteers out of which three had samples collected between the 5th and 10th week of pregnancy, the graphs and the report clearly indicate that 19-NA was only detected for the first time between the 14th and 16th week of pregnancy and "*In the first part of pregnancy* [i.e. soon after the 14th week] *the calculated concentration of 19-narandrosterone for all volunteers are situated between 1 and 2 ng/ml*". The report goes on to underline the increase of concentration of 19-norandrosterone during the course of pregnancy, i.e. as the pregnancy advances.

107. In terms of evidence, it is significant that the Mareck-Engelke study only reports the detection of 19-NA in pregnant women from the 14th week of pregnancy onwards, since in this case the player had only reached at most the 10th month of pregnancy when the Paris test took place. This point is acknowledged by the player's expert Dr Honour in his written statement when he underlines that, "*The excretion of 19-NA in early pregnancy (as far as I have been able to tell from an extensive literature search) has not been documented*" and confirmed by him during oral examination in the first instance when declaring, "*So I believe the data Mareck-Engelke, whilst being much the only data that we have to go on, does not reflect the physical situation with which we are concerned*".

108. Expressing his personal opinion on the issue in light of the Mareck-Engelke study, Professor Makin declared in his first statement that "*Even if the player was pregnant on 31st May with a viable foetus, this would NOT in my opinion be a reasonable explanation for the raised level of 19-NA found in this urine. At this stage, she would have been around 8 weeks pregnant and the only very limited data available suggest that levels of 19-NA at this stage would not have exceeded 0.5 ng/ml*", which leads him to the conclusions that "… *on the data we have, the chances of any pregnant women having an endogenous 19-NA concentration of 10 ng/ml is extremely remote*" and that "*On the balance of probabilities, interpreted in the scientific statistical sense, the probability, if SK was pregnant of 31st May, that she would excrete 19-NA at the concentrations found is very low*".

109. The expert opinions of Dr Honour and of Professor Dimitrov do not contradict the foregoing assessments by Professor Makin because their observations on the Mareck-Engelke study are more descriptive.

110. In the present case the player's Paris samples show concentrations of 19-NA which are at least 5 times the reporting value of 2ng/ml. Thus, even if one assumed an endogenous production of 19-NA of 2ng/ml caused by early pregnancy, i.e. 4 times the endogenous production envisaged by Professor Makin, the concentration of 19-NA unaccounted for by such endogenous increase would still represent several times the threshold value.

111. Thus, after weighing the scientific evidence in light of the facts of the case, the Panel considers that the concentrations of 19-NA found in the player's Paris sample deviate from the values of 19-NA which might be found in a pregnant women in her $10^{th}$ week of pregnancy, in a range that makes it very unlikely for the concentrations of 19-NA to be consistent with the normal endogenous production of 19-NA at that stage of pregnancy.

112. For such reason, the Panel finds that the Paris test must be deemed constitutive of a doping offence under article C.1 of the TADP and considers it need not pronounce itself on the subsequent Tokyo test, as in any event the Paris and Tokyo tests have been treated as a single first offence for the purpose of imposing sanctions.

## E. The Sanction

a) *Disciplinary Sanction (suspension)*

113. As an alternative submission, in the case she is found to have committed a doping offence, the player contends she is entitled to have the sanction eliminated or at least reduced on the basis respectively of a finding of "no fault or negligence" or of "no significant fault or negligence". The player submits that in considering her fault, the fact that she is a minor must be taken into account.

114. Accordingly, the Panel will now turn to the examination of the conditions applying to the elimination or reduction of a disciplinary sanction.

115. The TADP and the WADC provide that to benefit from a finding of no fault or no significant fault, the athlete must prove how the prohibited substance entered her/his system.

116. Under article M. 5.1 of the TADP (No Fault or Negligence) this condition is formulated as follows: "*When the case involves a Doping Offence under Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated*". Under article M. 5.2 of the TADP (No Significant Fault or Negligence), this same condition is formulated as follow: "*When the doping offence involves Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced*".

117. Obviously this precondition to establishing no fault or no significant fault must be applied quite strictly, since if the manner in which a substance entered an athlete's system is unknown or unclear it is logically difficult to determine whether the athlete has taken precautions in attempting to prevent any such occurrence.

118. In this case the player's argument for no fault or no significant fault is based on the allegation that if it was not endogenous production of 19-NA that caused the positive testing it must have been caused by the ingestion of nutritional supplements.

119. At the same time and as already indicated above, except for the general and relatively vague assertions of the player and her father that she took nutritional supplements, no direct evidence of any type (written evidence or testimony) was adduced in the first instance regarding the ingestion of any form of nutritional supplement, i.e. regarding what types of nutritional supplement were ingested in what quantities, at what intervals and at what dates. Furthermore, no detailed evidence on this issue was submitted on appeal in front of this Panel. Such evidence as was adduced was generalized and vague.

120. The player has contended that one of the reasons for the lack of evidence is that the slowness with which the results of the Paris test were notified to her prevented her from indulging in the verification of the content of the nutritional supplements she was taking.

121. The Panel has already found above that the ITF did not breach any procedural rules in the timing of the notifications.

122. However, more importantly, the Panel considers that an athlete's duty to keep track of and record her/his ingestion of nutritional supplements and other medication constitutes an ongoing duty under the applicable rules, which exists independently from the occurrence of any doping-control tests, and which forms part of a more general duty of care athletes have with regard to the respect of anti-doping requirements.

123. In the sport of tennis, the athletes' general duty of care is linked to the goal of the TADP announced under its article A.1, stating that: "*The purpose of this Tennis Anti-Doping Programme (the "Programme") is to maintain the integrity of tennis and to protect the health and rights of all tennis players*".

124. The duty of care of athletes is defined as follows under article 21 of the WADC:

*21.1 Roles and Responsibilities of Athletes*

*21.1.1 To be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant the Code.*

*21.1.2 To be available for Sample collection.*

*21.1.3 To take responsibility, in the context of anti-doping, for what they ingest and use.*

*21.1.4 To inform medical personnel of their obligation not to Use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the Code."*

125. In addition, the ITF takes the trouble to remind athletes, in special notices and reminders, of the risks of taking nutritional supplements and of their responsibility for the content of such supplements.

126. The ITF "Advisory Notice" includes a quote from the WADA position on the use of nutritional supplements stating, among others, that "*Doping control authorities cannot judge intent; they can only judge what is found in the body. Ultimately, athletes are responsible for what they ingest, so it is possible that the use of some nutritional supplements could lead to an athlete being found guilty of a doping offence … It is WADA's position that taking a poorly labelled nutritional supplement should not be regarded as an adequate defence in a doping hearing*".

127. An important goal and consequence of this regulatory framework is to make athletes responsible for their own actions. This includes the duty personally to manage their dietary and medical needs in a responsible manner in light of anti-doping rules.

128. The duty clearly covers the need to be mindful of keeping precise records and evidence of the ingestion of nutritional supplements, since, as indicated by article 21.1.1 of the WADC, athletes must be knowledgeable of the anti-doping rules and under such rules athletes must be in a position to prove what entered their systems, as provided for example by article 5.1 and 5.2 of the TADP.

129. For the above reasons, the Panel considers the player cannot use any alleged delay in notification of doping-control tests as an excuse for having no records or trace of what nutritional supplements she asserts to have taken over a relatively significant period of time, and she must meet the burden of proof stemming from articles 5.1 and 5.2 of the TADC.

130. Given the lack of any evidence regarding the content of the nutritional supplements the player and her father affirm she took, the only evidence that 19-NA entered her system via the ingestion of nutritional supplements is provided by circumstantial evidence in the form of the expert opinions of Dr. Honour, Professor Dimitrov and Professor Makin, who concur in stating that the levels of 19-NA found in player's samples are not typical of the concentrations which would be found in the case of ingestion of nandrolone for the purpose of performance enhancement through anabolic effects and that such levels of 19-NA could result from the ingestion of nutritional supplements.

131. Whether such circumstantial evidence is sufficient to constitute proof under articles 5.1 or 5.2 of the TADP of how the 19-NA entered the player's system becomes a moot question if, in any event, the player cannot satisfy the requirement of establishing no fault or no significant fault. Consequently, the Panel will first turn to the issue of fault.

132. Because the player is a minor and was only 15 years old at the time the Paris test took place, in determining whether the player can benefit from a finding of "no fault or negligence" or of "no significant fault", the Panel must first consider whether the player's behaviour and the diligence required of her with regard to anti-doping rules, must be assessed according to the same criteria as for an adult; or whether a lower degree of responsibility could come into consideration in view of her age.

133. In answering such question, the Panel considers it must interpret the applicable anti-doping rules in light of the current evolution of sports worldwide and the socially and legally recognized need to protect children and minors involved in sporting activities, notably with regard to their psychological, moral and physical well being (regarding

the multidisciplinary aspects of protection of minors in sport as a growing field of study, see e.g. Piermarco Zen-Ruffinen, Droit du Sport, 2002, pp. 220-232).

134. The TADP and WADC do not expressly refer to minors or any form of age limit when defining their scope of application and those part of the rules which define liability do not provide for a special regime for minors, except that under article M.4.1 of the TADP (relating to Trafficking, Administration of Prohibited Substance or Prohibited Method): "*A Doping Offence involving a Minor shall be considered a particularly serious offence*" (which can result in a lifetime ineligibility for a player support personnel having committed the offence), thereby underlining the particular attention which is paid to the need to protect minors (this corresponds to article 10.4.1 of the WADC).

135. On the contrary, both sets of anti-doping rules stipulate that they apply without distinction to any person who participates in a competition governed by the rules. This is provided under article B.1 of the TADP, whereby "*Any player who enters or participates in a Competition, Event or activity organised, sanctioned or recognized by the ITF or who has an ATP Tour or WTA ranking (a "Player") shall be bound by and shall comply with all of the provisions of the programme, including making himself or herself available for Testing both In-Competition and Out-of-Competition*".

136. Similarly, the introduction to the WADC indicates that: "*Anti-doping rules, like competition rules, are sport rules governing the conditions under which the sport is played. Athletes accept these rules as a condition of participation. Anti-doping rules are not intended to be subject to or limited by the requirements and legal standards applicable to criminal proceedings or employment matters*" and under "*Participants Comments"* adds that *"By their participation in sport Athletes are bound by the competition rules of their sport. In the same manner Athletes and Athlete Support Personnel should be bound by anti-doping rules based on Article 2 of the Code …*".

137. In other words, it is not the age, sex or any other personal characteristics of an individual that determines the application of the anti-doping rules but the participation of an athlete in events governed by the rules. This criteria of application of the rules is further emphasized the following definition of an "*Athlete*" in the WADC: "*For the purposes of Doping Control, any Person who participates in sport at the international level (as defined by each International Federation) or national level (as defined by each National Anti-Doping Organization) and any additional Person who participates in sport at a lower level if designated by the Person's National Anti-Doping Organization. For purposes of anti-doping information and education any Person who participates in sport under the authority of any Signatory, government, or other sports organization accepting the Code*".

138. In addition, the introduction to the WADC underlines that: "*The purposes of the World-Anti-Doping Program and the Code are: "To protect Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide …*".

139. The Panel considers that the foregoing provisions and definitions of the TADP and WADC clearly imply that, in order to achieve the goals of equality, fairness and

promotion of health the anti-doping rules are pursuing, the anti-doping rules must apply in equal fashion to all participants in competitions they govern, irrespective of the participant's age.

140. More specifically, with respect to athletes' duty of care in ensuring they do not ingest any prohibited substances, the regime of sanctions which applies if they do and the conditions under which they can establish "no fault or negligence" or "no significant fault or negligence", there is no wording in the provisions of the TADP or WADC, or in the official comments in the latter, indicating that the responsibility of younger athletes, notably minors, should be assessed by a different yardstick. The rules, therefore, do not anticipate a different regime for minors.

141. In these circumstances the panel considers that there is no automatic exception based on age. Such an exception is not spelled out in the rules and would not only potentially cause unequal treatment of athletes, but could also put in peril the whole framework and logic of anti-doping rules.

142. The reason for ignoring the age of the athlete is that either an athlete is capable of properly understanding and managing her/his anti-doping responsibilities, whatever her/his age, in which case she/he must be deemed fully responsible for her/his acts as a competitor, or the athlete is not mature enough and must either not participate in competitions or have her/his anti-doping responsibilities exercised by a person – coach, parent, guardian, etc. – who is capable of such understanding and management. In the latter case, the only way to ensure equality of treatment between participants and to protect the psychological, moral and physical health of younger athletes is to require that their representatives meet the same standards as any adult athlete. Otherwise, unscrupulous or negligent coaches, parents, guardians, etc. will be in a position to take the risk of blame while knowing that their protégés are safe from sanction. That would open the door to a possible system of doping abuse that would put the youngest athletes at the highest risk when in fact they need the most protection. In other words, any attempt to reduce the responsibility of younger athletes due to their age will in fact increase their vulnerability.

143. This is all the more true in today's world of amateur and professional sports, where there is a growing tendency in many if not all disciplines for athletes to begin their sporting activities at increasingly younger ages and to perform at extremely high levels and peak much earlier. As a result, there is a growing number of very young athletes competing seriously at national and international levels who are subject to extremely demanding training and competition regimes and who are managed by parents, guardians, coaches, etc. Furthermore, with larger sums of money being invested in most sports and increasingly younger athletes becoming professional and being sponsored, the pressure exercised on them by their environment is also increasing.

144. Accordingly, neither the TADP nor the WADC deem age to be a distinguishing factor in terms of anti-doping duties and responsibilities, and provide instead that all persons participating in competitions subject to the anti-doping rules are bound by them, whether they are adult or still a minor and whatever their age.

145. For the above reasons, the Panel finds that in this case the player's responsibility under articles 5.1 and 5.2 of the TADP must be assessed according to the same criteria as for an adult even if she was only 15-years old when the doping offences occurred, and that to the extend she was represented by her father in exercising her anti-doping duties his degree on diligence must count as hers in determining the degree of fault.

146. It is clear from the evidence, in particular the player's testimony at the hearing in the lower instance, that despite being relatively mature for her age and perfectly intelligent as well as multilingual - that is to say personally capable of understanding and complying with anti-doping requirements – she took little interest in any aspects of anti-doping and basically relied on her father, who was also in effect acting as her coach, in managing her nutritional supplements.

147. Her father's testimony at the hearing in lower instance indicates that he acted negligently and naively in handling what he perceived to be the dietary needs of his daughter and in managing the choice, purchase, verification and use of nutritional supplements. According to his own admission he had very little personal idea of what supplements to buy, even assuming that the most expensive would be the best, which led him to asking for advice here and there from different persons, and he never vetted the supplements in any manner to check for possibly prohibited substances. Furthermore, as previously mentioned, he did not keep any track of what he was buying and providing to his daughter. Thus, despite his apparently good intentions in trying to help his daughter, his behaviour was contrary to what a diligent approach should be to managing the use of nutritional supplements, bearing in mind all the specific warnings about such supplements that are issued by the ITF and WADC as well as public knowledge of the risks involved in using such supplements. That said, he is not necessarily to blame because, as indicated above, the Panel considers the player was capable of understanding anti-doping requirements and of discussing them with her father.

148. In addition, there remains a doubt regarding the exact nature of the exogenous source of 19-NA found in the player's system, since no evidence was adduced regarding the type, quantity and dates of use of nutritional supplements by the player and the only evidence that the 19-NA found in the player's samples did not come from a different exogenous source is circumstantial.

149. For the above reasons, the Panel finds there is no room for finding that the player was not negligent or not significantly negligent as defined respectively by article 5.1 and 5.2 of the TADP. Accordingly, it need not further examine whether the player met her burden of proving the exogenous source of 19-NG found in her system.

150. This confirmation of the ITC's decision is undoubtedly tough for a young player in full progression. However, if she is the determined and intelligent person she appeared to be at the hearing, she will no doubt find the resources to draw some lessons from this experience while, thanks to her young age, still having the opportunity to fight back to a high level in pursuit of a career that began early.

b) *Sporting Sanction (disqualification; forfeiture of ranking points and prize money)*

151. Given the above findings concerning the disciplinary sanction, the Panel considers there is no particular reason to treat the sporting sanction differently than was done by the lower instance in application of articles L.1 and M.7 of the TADP, and accordingly confirms the appealed decision in that respect.

(…)

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## ON THESE GROUNDS

The Court of Arbitration for Sport:

1. Dismisses the appeal filed by Sesil Karatancheva on 27 January 2006.

2. (…)

Lausanne, 3 July 2006

***THE COURT OF ARBITRATION FOR SPORT***

Quentin **Byrne-Sutton**

President of the Panel

Beat **Hodler**

Arbitrator

His Honour Judge James Robert **Reid** QC

Arbitrator