

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES
OF THE INTERNATIONAL TENNIS FEDERATION**

Before:

Susan Ahern (Chair)
Professor Peter Sever
Dr Jan Kleiner

BETWEEN:

INTERNATIONAL TENNIS FEDERATION

Applicant

and

DAYANA YASTREMSKA

Respondent

DECISION OF THE INDEPENDENT TRIBUNAL

I. Parties

1. The International Tennis Federation (“ITF”) is the international governing body for the sport of tennis. As a signatory to the World Anti-Doping Code (the “WADA Code”), it has issued the Tennis Anti-Doping Programme (“TADP”), which sets out WADA Code compliant anti-doping rules for professional tennis.
2. The Respondent, Ms Dayana Yastremska (the “Player” or “Respondent”) is a professional tennis player from Ukraine, who has career-high WTA rankings to date of 21 (singles) and 82 (doubles).
3. Together the ITF and the Player shall be known as the “Parties”.

II. Factual Background

4. Following a urine sample collection conducted on 24 November 2020, Sample No. A3157833 (the "Sample"), the Player tested positive for 1 α -methyl-5 α -androstane-3 α -ol-17-one, a metabolite of mesterolone ("Mesterolone") at a concentration of 0.7ng/mL (0.5ng/mL when corrected for the Sample specific gravity value of 1.028).
5. Mesterolone, a synthetic anabolic steroid derived from testosterone, is a Prohibited Substance listed in S1 of the WADA Prohibited List of Substances and Methods (the "Prohibited List", included as Appendix 3 to the TADP).
6. By a notice of charge dated 22 December 2020 (the "Notice of Charge"), the ITF informed the Athlete that an Adverse Analytical Finding (an "AAF") had been reported in relation to the Sample. The Athlete was charged with the commission of an Anti-Doping Rule Violation under Article 2.1 of the TADP (the "ADRV"), on the basis that Mesterolone, which is prohibited, was found to be present in her Sample.
7. Following the analysis of the B Sample, which confirmed the AAF, the Athlete was provisionally suspended by the ITF with effect from 7 January 2021 pursuant to Article 8.3.1 of the 2020 TADP. The Player was advised in the Notice of Charge that she had the right to apply at any time to the Chairman of the Independent Tribunal (the "Chair") convened to hear her case, for an order that the Provisional Suspension should be lifted by the means set out in TADP Article 8.3.3.
8. The ITF, pursuant to Article 8.1 of the TADP and Article 1.1. of the Procedural Rules Governing Proceedings before an Independent Tribunal Convened Under ITF Rules (the "Procedural Rules"), elected to refer the case to an Independent Tribunal for resolution.
9. The Player admitted the Article 2.1 ('presence') ADRV on 20 January 2021.

III. Proceedings before the Independent Tribunal

10. On 14 January 2021, the Chair was appointed by the Chairman of the Independent Panel to Chair the Independent Tribunal, with fellow Tribunal Members to be confirmed thereafter.
11. On 16 January 2021, an urgent application was made by the Respondent to vacate the Player's Provisional Suspension pending the final determination of the matter, in particular so that she could participate in the Australian Open. The application was made pursuant to Article 8.3.3 of the TADP, inter alia on the basis that the Player had a strong arguable case that she bore no fault or negligence for the Anti-Doping Rule Violation ("ADRV") charged, such that the provisional suspension should be lifted in accordance with Article 8.3.3(a)(vi)(B) of the TADP. A determination was sought by 22 January 2021.
12. On 17 January 2021, the Chair issued Directions inter alia inviting the ITF to respond. Between 20-22 January 2021, the ITF Response to the Player's Application to lift her Provisional Suspension and further submissions and evidence were received from both Parties.

13. On 22 January 2021, the Chair considered the application and issued the Operative Decision on the Provisional Suspension application, not granting the application. The Chair issued her reasoned decision on 24 January 2021 (the "Provisional Suspension Decision").
14. On 26 January 2021, the Player appealed the Provisional Suspension Decision to the Court of Arbitration for Sport ("CAS"). On 3 February 2021, the CAS Sole Arbitrator issued his Operative Award, denying the Respondent's appeal.
15. On 11 February 2021, a Directions Hearing on the substantive matter was held between the Chair and the Parties. The Parties confirmed their satisfaction with the composition of the appointed Independent Tribunal (the "Tribunal"). Directions on the delivery of written submissions and documentary evidence were issued by the Chair and a provisional hearing date set for 15 April 2021.
16. On the same date, the Respondent sought *inter alia* a clarification in relation to certain communications and made a disclosure request on the basis that the ITF had waived its legal privilege in respect of identified documents through collateral waiver.
17. On 5 March 2021, the Chair issued her reasoned Decision on Collateral Waiver.
18. By 19 March 2020, the parties had not agreed an alternative hearing date and were at an apparent impasse. The Chair intervened and on 31 March 2021, a further Direction was issued nominating either of 21 or 25 May 2021 as the Hearing date.
19. On 23 March 2021, the CAS Sole Arbitrator issued his Reasoned Award which found that the Player did not establish a strong arguable case that the source of the Mesterolone found in her system was more likely than not [REDACTED] her boyfriend [REDACTED] [REDACTED]. He also found that her other evidence was not sufficient to establish that she did not take the Mesterolone intentionally (the "CAS Decision").
20. On 24 March 2021, following a joint application from the Parties, Revised Directions were issued by the Chair and new dates for a hearing sought.
21. On 13 April 2021, the Chair issued a Procedural Order confirming 21 May 2021 as the Hearing date and issued Directions in relation to the conduct of the hearing, a draft hearing timetable and a cyber protocol for virtual hearings.
22. On 14 April 2021, the Respondent made a second application to lift her Provisional Suspension (the "Renewed Application") pursuant to either Article 8.3.3(a)(vi)(B) or Article 8.3.3(a)(vi)(D) of the TADP, requesting that same be determined by the Chair by 20 April 2021 to enable the Respondent to compete in the Madrid Open (scheduled to commence on 29 April 2021) or to exercise her right of appeal to CAS. The Renewed Application was made by the Respondent on the basis of new evidence, alleged previously misstated facts, and the passage of time. The ITF opposed the Renewed Application.

23. On 21 April 2021, the Chair issued her reasoned decision in respect of the Renewed Application to lift the Respondent's Provisional Suspension, declining to do so.
24. On 26 April 2021, the Respondent submitted her Defence with Exhibits and Authorities.
25. On 30 April 2021, the ITF submitted its Answer, Exhibits and Authorities including a copy of the CAS Decision.
26. On 10 May 2021, the Respondent submitted a witness list and made an application to submit further evidence (including a table listing exogenous substances that have been detected in [REDACTED] following ingestion) and to introduce Dr [REDACTED] a further expert witness. The application was permitted and a joint expert meeting between Dr [REDACTED] and Professor Handelsman (hot tub) was directed by the Chair together with the production of a joint expert report to the Tribunal which was provided dated 18 May 2021.
27. Also on 10 May 2021, a renewed application was made to the Chair for the production of documentation which had been the subject of the prior Decision on Collateral Waiver. On 12 May 2021, the Chair issued a Procedural Order confirming that she was not persuaded to revisit the Decision on Collateral Waiver on the basis of the Respondent's application.
28. On 19 May 2020: (i) the Respondent submitted a skeleton argument together with further evidence; (ii) the ITF did not submit a skeleton argument and sought instead to rely upon the CAS Decision and the legal analysis set out in its Answer. In its communication to the Tribunal, the ITF also submitted new evidence relating to the issues that the Tribunal had to determine in these proceedings – referred to hereinafter as the "New Evidence".
29. On 21 May 2021, a hearing was held by virtual means. The Tribunal was assisted by Ms Kylie Brackenridge, Secretariat to the Independent Tribunal, and joined by the following:
- | | |
|---------------------------|--|
| <u>For the ITF</u> | Mr Jonathan Taylor QC, Counsel, Bird & Bird
Mr Chris Lavey, Solicitor, Bird & Bird
Mr Charlie Bowkett, Bird & Bird
Mr Stuart Miller, ITF Anti-Doping Manager |
| <u>For the Respondent</u> | Mr Tom Seamer, Counsel, Morgan Sports Law
Mr Mike Morgan, Solicitor, Morgan Sports Law
Mr Richard Martin, Solicitor, Morgan Sports Law
Mr William Sternheimer, Solicitor, Morgan Sports Law
Ms Violetta Skrinnik - Independent Interpreter |
| <u>Observers</u> | Ms Emmanuelle Champagne – Sport Resolutions
Ms Courtney McBride – WTA Senior VP, Governance & Special Affairs Counsel |
30. The following witnesses gave evidence before the Tribunal:
- Ms Dayana Yastremska
 - Professor David Handelsman
 - Doctor Willem de Rondt and Doctor Diederik Smit (joint)

- Doctor Daren Austin
- Doctor [REDACTED]

31. As a preliminary matter at the opening of the Hearing, the Panel heard from the Parties with respect to the New Evidence submitted by the ITF. The Respondent's position was that the admissibility of the New Evidence was a question to be determined and that there were issues of confidentiality that arose from it. Having considered the written and oral submissions of the Parties the Tribunal decided to admit the New Evidence and accord it the weight the Panel considered appropriate.
32. The Respondent and all witnesses were informed by the Chair of the Tribunal of their duty to tell the truth and that the primary duty of the expert witnesses was to the Tribunal and not to any of the Parties. The Parties and the Tribunal had the opportunity to examine and cross-examine the Respondent and the witnesses. The Respondent also made an oral statement to the Tribunal at the conclusion of all the evidence and submissions which is summarised herein together with the other witness testimonies.
33. Certain matters arose during the Hearing which warranted further consideration post-Hearing by the Parties specifically in relation to a WhatsApp voice message between the Player and her father. In accordance with the directions of the Tribunal the ITF submitted its comments to the Secretariat on 27 May 2021. A number of extensions of time were sought by the Parties on consent and these were granted by the Tribunal.
34. On 7 June 2021, the Respondent sent to the Secretariat a letter which reflected the joint position of the Parties and essentially dealt with the resolution of what was termed "the voice message issue". In particular it stated that: *"Counsel for ITF confirmed that "on balance", having considered further material provided by Ms Yastremska, it "accepts the player's explanation for her comments at the hearing and will not ask the tribunal to infer an adverse inference from her failure to produce any WhatsApp voice message"*.

IV. Submissions of the Parties

35. The following outline of the Parties' positions and submissions is illustrative only and does not necessarily detail every submission and/or contention advanced by them. The Tribunal has nonetheless carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

A. The ITF's Submissions

36. This case does not have to be established as one which constitutes deliberate doping for the Player to be found guilty of the alleged ADRV. Rather, the TADP rules provide that intent is assumed once the Player returns a positive sample (Article 10.2.1).
37. Because Mesterolone is a Prohibited Substance a presumption arises that the Player ingested Mesterolone intentionally to enhance her performance. It is the Player's burden to rebut that presumption of intent by adducing evidence that satisfies the Tribunal that it is more likely than

not that her ingestion of Mesterolone was not intentional. It is not for the ITF to prove another more likely explanation and, if the Player cannot discharge that burden, a four-year ban must be imposed in accordance with TADP Article 10.2.1(a) as Mesterolone is a Prohibited Substance.

38. With regard to the presumption of intent, it is the position of the ITF that:
- (A) Should the Tribunal be persuaded that the [REDACTED] hypothesis of the Player as to the source of her Mesterolone positive Sample is more likely than not to be correct, *“the ITF accepts that that would be sufficient to discharge the presumption of intent, which would take her ban down from four years to two years, and it would also be sufficient to prove No Fault (because it cannot be said she should have known there was a risk of contamination in this manner), which would take her ban down from two years to zero (see TADP Article 10.4).”*
 - (B) But if the Tribunal is not persuaded that the [REDACTED] hypothesis is more likely than not to be correct, which is denied, then her only route to mitigation is to persuade the Tribunal that her other evidence (i.e., not as to source) establishes that it is more likely than not that she did not ingest the Mesterolone intentionally. If the Tribunal accepts that, then she will have rebutted the presumption of intentional use, and therefore her ban would be reduced from four years to two years.
39. The ITF disputes the contention of the Player that the ingestion of Mesterolone was unintentional and that her boyfriend, Mr [REDACTED] is the purported source of her Mesterolone contamination by means of kissing her boyfriend [REDACTED]. These reasons include:
- The Player has not fixed the fatal deficiencies in her evidence identified by the CAS Decision.
 - The Player has not proved on the balance of probabilities, how the Mesterolone entered her system, as she is required to do so under the TADP rules (No Fault or Negligence definition: *“...for any violation of Article 2.1 the Player must also establish how the Prohibited Substance entered his/her system”*).
 - The requirement for cogent proof of the route of ingestion of the Prohibited Substance is supported by the weight of CAS jurisprudence which repeatedly underscores the position that professions of innocence of themselves are insufficient as they can be made as easily by the guilty as by the innocent (*WADA v Daiders, Daiders & FIM, CAS 2014/A/3615, para 51.; Meca-Medina and Majcen v FINA, CAS 99/A/234 & 235*).
 - It is not enough for the Player to identify a possible explanation for the presence of the Mesterolone, she must provide specific, objective and persuasive evidence that the explanation is more likely than not to be correct or the stringent standard will not be met (*Taylor v World Rugby, CAS 2018/A/5583, para 83; WADA v IWF & Caicedo, CAS 2016/A/4377, para 52*).
 - The Player must also show that the ingestion of the alleged source product in the amount(s) and the time(s) specified would have produced the concentration of the substances that was subsequently found in her Sample. Otherwise only a coincidence arises (*WADA v Stanic & Swiss Olympic Association, CAS 2006/A/1130, para 52*).

- If there is a gap in the scientific knowledge, and therefore the hypothesis as to source remains unverified, the benefit of the doubt goes against the athlete, because it is the athlete that bears the burden of proof on the point (*Scott v ITF, CAS 2018/A/5768*).

40. In addition, the ITF submits that the Player's evidence does not meet the stringent requirements as to source. For that, the Tribunal would have to accept that [REDACTED]. In so considering the Tribunal would have to assess:

- (i) the risk of collusion;
- (ii) [REDACTED];
- (iii) [REDACTED];
- (iv) there is no proof that Mr [REDACTED] took [REDACTED] and his evidence is in the form of an unsworn statement and he was not available for cross-examination at the Hearing.
- (v) the New Evidence was a factor that the Tribunal needed to take into account when considering the admissibility and weight to be afforded to Mr [REDACTED] evidence.

41. The ITF further asserts that even if Mr [REDACTED] did take [REDACTED] on 23/24 November 2020, the Player still has to demonstrate by "concrete evidence" how the Mesterolone he ingested got into her system. The Player's assertion that it got there through [REDACTED], was rejected by the CAS Sole Arbitrator in the CAS Decision as insufficient to support such a finding and the Player has produced no further evidence to rectify that fatal deficiency.

42. The ITF addressed the scientific aspects of the case as to route of ingestion of Mesterolone via [REDACTED]. These are set out in detail in Section VI Merits under Issue (ii) from para. 124 – 139.

43. The ITF submitted that the Player's non-source evidence is insufficient to rebut the presumption of intentional use under TADP Article 10.2.1(a). CAS has made clear that it is only in the "rarest cases" that an athlete will be able to satisfy a hearing panel that their ingestion of a Prohibited Substance was not intentional. The ITF addressed the non-source aspects of the case raised by the Player in relation to (i) the polygraph results (ii) the hair sample test (iii) the fact that there was no Mesterolone found in the urine sample collected from the Player on 9 November 2020 and only 0.7 ng/mL of its metabolite found in her 24 November Sample does not rule out intentional doping (iv) female athletes not using Mesterolone to dope and (v) the fact the Player did not deliberately miss the 24 November 2020 anti-doping test.

44. The following are the reliefs sought by the ITF:

"8.1 Based on the foregoing, the ITF respectfully asks the Independent Tribunal:

8.1.1 to find that the Player has committed an anti-doping rule violation under 2020 TADP Article 2.1, in that a metabolite of mesterolone, an anabolic steroid prohibited at all times, was present in the urine sample collected from her on 24 November 2020;

8.1.2 to find that the Player has not met her burden to demonstrate that her violation was not intentional within the meaning of 2020 TADP Article 10.2.3, or that she

bears No Fault for that violation within the meaning of 2020 TADP Article 10.4, and therefore impose a period of Ineligibility of four years;

8.1.3 to fix the starting date of the period of Ineligibility at such date as the Independent Tribunal sees fit, whether that is the date of the Independent Tribunal's decision or (in accordance with TADP Article 10.10.3(b)) an earlier date that is no earlier than 24 November 2020; and

8.1.4 to make no order as to costs."

B. The Respondent's Submissions

49. The Respondent's submissions in essence, may be summarised as follows:

50. The Player admits the presence of Mesterolone in her Sample. Therefore, she asserts that this is a case that relates only to sanction and she will establish that she did not knowingly or deliberately use Mesterolone and bears No Fault or Negligence for the presence of the Prohibited Substance, such that the otherwise applicable period of Ineligibility should be eliminated.

51. The Player asserts that she ingested the Mesterolone found in her system inadvertently, and it was due to contamination caused by her boyfriend [REDACTED]. More specifically that:

- The Mesterolone (or its metabolite) was ingested by her as a result of physical [REDACTED] contact with Mr [REDACTED] [REDACTED] in the early morning of 23/24 November 2020 before her Sample collection.
- Mr [REDACTED] was at the time, unbeknownst to the Player, taking [REDACTED] Mesterolone [REDACTED].
- Specifically, the transfer of the Mesterolone to her could have occurred via a number of means including: (i) consumption of [REDACTED] powder on Mr [REDACTED]'s lips, mouth, and/or fingers during kissing; (ii) consumption of saliva during kissing; (iii) [REDACTED]; (iv) [REDACTED]. Further, that those potential routes of ingestion must be considered cumulatively and not individually.

52. The Player further submits that she has never previously been charged with an anti-doping rule violation despite significant testing and she did not engage in deliberate doping as evidenced by the following:

- She is clear she has never doped, and her polygraph test confirms this;
- The hair sample test tested negative for Mesterolone which confirms it was not taken deliberately;
- Had she deliberately used Mesterolone between 9 November 2020 (the date of her previous anti-doping test) and 23 November 2020 she would "*surely have taken steps to miss the test on 24 November*" as she was aware the Doping Control Officers ("DCOs") were at her house before she returned. As she has never missed a doping test or committed a filing failure, she could have done so on that occasion without consequences;
- In relation to Mesterolone: (a) there is no scientific evidence confirming that it would enhance performance, in either men or women; (b) the consensus of steroid users is that it does not enhance performance but rather is used for its androgenic effects to counter the feminising

properties in male users and (c) the consensus of steroid users that it is not suitable for female use.

- The Player's 9 November 2020 anti-doping Sample tested negative and her 24 November 2020 test was positive. According to the expert evidence of the ITF the low Sample metabolite concentration could have been caused by "*a last administration of a single dose of 25 mg 4 to 5 days before*" 24 November 2020, thus inferring that the Player "could" have been on a doping regime for 10 or 11 days following her negative test. However, the low concentration of Mesterolone is inconsistent with its use as an anabolic agent and scientifically at least four weeks of using efficacious steroids (which normally excludes Mesterolone) is required to enhance performance.

53. The Player asserts that the ITF is wrong when it alleges that her AAF "could" have been caused by deliberate doping. The ITF does not provide a potential alternative source for the Mesterolone and therefore there are two consequences to this argument: First, that the Player is lying and therefore this must be a case of deliberate doping. Second, that the Player's case as to the source of the Mesterolone, must be assessed against the sole competing theory of deliberate doping. Consequently, the Tribunal is required to assess the competing theories to consider which is more likely. According to CAS (CAS 2011/A/2348 & 2386) the ITF cannot raise unevidenced theories as to how the AAF could have been caused without substantiating their theory as to why the scenario proffered by the Player is untrue or wrong.
54. The Respondent requests the Tribunal to grant the following reliefs:
- (a) *"Hold that the ADRV was committed without fault or negligence; and*
 - (b) *Thus hold that no sanction is to be imposed...*
 - (c) *To exercise its power under Article 8.5.4 of the 2021 TADP to make a cost order against the ITF awarding the Respondent her costs in these proceedings, not least because of the manner in which the ITF has conducted itself in this case."*

V. The Applicable Rules

55. The TADP at Article 1.8 provides that it "*is governed by and shall be construed in accordance with English law*". To the extent recourse to substantive law is required, English law shall apply to the instant proceedings. Article 3.2 of the Independent Tribunal's Procedural Rules provides that: "*...[t]he Independent Tribunal will determine the dispute in accordance with the applicable ITF Rules and these Procedural Rules, with English law applying subsidiarily*".
56. The applicable ITF Rules are the 2020 Tennis Anti-Doping Programme and the 2015 WADA Code on which it is based, and the 2021 Tennis Anti-Doping Programme and the 2021 WADA Code on which it is based. The 2020 Tennis Anti-Doping Programme comprises the substantive anti-doping rules that govern this case, (hereinafter the "TADP") while the 2021 Tennis Anti-Doping Programme will govern the procedural aspects of this case (hereinafter the "2021 TADP").
57. The Player accepts that she is bound by the 2020 TADP and 2021 TADP (as applicable) and that she is subject to the jurisdiction of the Tribunal to resolve this matter.

58. The following are the relevant provisions of the TADP:

“Doping is defined as the occurrence of one or more of the following (each, an Anti-Doping Rule Violation):

2.1 The presence of a Prohibited Substance or any of its Metabolites or Markers in a Player's Sample, unless the Player establishes that such presence is consistent with a TUE granted in accordance with Article 4.4.

2.1.1 It is each Player's personal duty to ensure that no Prohibited Substance enters their body. Players are responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary to demonstrate intent, Fault, Negligence, or knowing Use on the Player's part in order to establish an Article 2.1 Anti-Doping Rule Violation; nor is the Player's lack of intent, Fault, Negligence or knowledge a defence to an assertion that an Article 2.1 Anti-Doping Rule Violation has been committed.

2.1.2 Sufficient proof of an Anti-Doping Rule Violation under Article 2.1 is established by any of the following: (a) the presence of a Prohibited Substance or its Metabolites or Markers in the Player's A Sample where the Player waives analysis of the B Sample and the B Sample is not analysed; or (b) where analysis of the Player's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Player's A Sample; or...

(...)

8.6.2 Where this Programme places the burden of proof upon the Participant alleged to have committed an Anti-Doping Rule Violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability...

8.7 Methods of Establishing Facts and Presumptions:

The Independent Tribunal shall not be bound by judicial rules governing the admissibility of evidence. Instead, facts relating to an Anti-Doping Rule Violation may be established by any reliable means, including admissions...

8.7.5 Sufficient proof of an Anti-Doping Rule Violation under Article 2.1 is established (a) by an Adverse Analytical Finding in respect of a Player's A Sample if ... (ii) the Player's B Sample is analysed, and that analysis confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Player's A Sample; or... (...)

10.2 Imposition of a Period of Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method:

The period of Ineligibility imposed for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Participant's first anti-doping offence shall be as follows, subject to potential suspension pursuant to Article 10.6.

10.2.1 The period of Ineligibility shall be four years where:

(a) The Anti-Doping Rule Violation involves a Prohibited Substance that is not a Specified Substance, unless the Participant establishes that the Anti-Doping Rule Violation was not intentional...

10.2.2 *If Article 10.2.1 does not apply, the period of Ineligibility shall be two years, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6.*

10.2.3 *As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Participants who cheat. The term, therefore, requires that the Participant engaged in conduct that he/she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk... (...)*

10.4 *Elimination of the Period of Ineligibility where there is No Fault or Negligence: If a Participant establishes in an individual case that he/she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated...*

(...) *No Fault or Negligence. The Player or other Person establishing that he/she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he/she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1 the Player must also establish how the Prohibited Substance entered his/her system."*

VI. The Merits

59. The submissions of the Parties were considered in their totality by the Tribunal. This Decision, however, sets out only those matters which are necessary for the Tribunal's determination.

a. Burden of Proof

60. TADP Article 10.2.1 provides that the period for Ineligibility for an Article 2.1 ADRV for a first offence shall be four years where the ADRV involves a Prohibited Substance (such as Mesterolone). A presumption also arises under TADP Article 10.2.1(a) that the ADRV was intentionally used to enhance sports performance unless the Player establishes the ADRV was not intentional.

61. The Player accepts that Mesterolone was present in her Sample. The Player therefore admits that she has committed an Anti-Doping Rule Violation ("ADRV") under TADP Article 2.1. Consequently, the Player has the burden of rebutting the presumption that the presence of Mesterolone in her Sample was not there intentionally.

62. The TADP Article 8.6.2 provides that the Player is required to rebut the presumption by proving the source of the ingestion of the Mesterolone on the balance of probabilities. This is not a matter in dispute between the Parties and is consistent with the caselaw of the Court of Arbitration for Sport:

"... for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred" (ITF v Gasquet (CAS 2009/A/1926 & 1930), adopted and confirmed in WADA v Roberts (CAS 2017/A/5296, at para. 52)).

63. Under the TADP, which mirrors the WADA Code, if the Player rebuts that presumption of intent, a two-year rather than a four-year period of Ineligibility would apply (TADP Article 10.2.2). To avoid any period of Ineligibility the Player must also persuade the Tribunal that she bears No Fault or Negligence for her ADRV.
64. In this case the ITF has indicated its position on the intent of the Player, if she is successful in establishing to the Tribunal's satisfaction the route of ingestion of the Mesterolone was as a consequence of contamination from her boyfriend then they accept that: "*the Player could not be expected to have known there was a risk that she could be contaminated in this way, and therefore she did not intend to commit, and she bears No Fault or Negligence for, her ADRV, in which case no ban should be imposed.*" The corollary shall apply if the Tribunal determines it is not satisfied and, in that scenario, the Player's only route to mitigation is if she establishes that it is more likely than not that she did not ingest the Mesterolone intentionally.
65. In shouldering the burden of proving the source of the Prohibited Substance, the Player cannot seek to off-load any of that responsibility back on to the ITF, whether or not it asserts or infers that her AAF "could" have been caused by deliberate doping or otherwise. The sole burden is upon the Player to demonstrate how the Mesterolone came to be present in her Sample. It is not for the ITF to prove a potential alternative source or that this is a case of deliberate doping.
66. Consequently, the Tribunal rejects the Respondents assertion that there is any responsibility upon the ITF (once the burden of proof has shifted to the Respondent) to prove deliberate doping or that the Player's case as to the source of the Mesterolone, must be assessed against the sole competing theory of deliberate doping. While Anti-Doping Organisations may, in some circumstances, have an obligation to contribute to the finding of facts through substantiated submissions relating to the clarification of the corresponding facts (UCI v Contador CAS 2011/A/2384 & 2386 at para. 109), the rules are nevertheless clear on where the evidentiary burden lies.

b. The Issues

67. As the Player admitted the presence of Mesterolone in her Sample, the questions that the Tribunal considered it had to determine were:
- (i) whether or not the Player had satisfied it on the balance of probabilities that the route of ingestion of the Mesterolone was through contamination from her boyfriend;
 - (ii) if it is not accepted that contamination from the Player's boyfriend was the source, of the Mesterolone, does the other evidence that the Player has submitted prove that she did not take Mesterolone intentionally?;
 - (iii) whether the Player has satisfied the Tribunal that she bears No Fault or Negligence.
68. The Tribunal's first task, therefore, is to consider the Player's evidence that she ingested the Mesterolone unknowingly, through physical contact with Mr [REDACTED]. This involves the assessment of two issues:
- first whether it can be established that Mr [REDACTED] was taking Mesterolone; and

- secondly, whether the Mesterolone could have been transmitted from Mr [REDACTED] to the Player by one or more of the routes identified.

(i) Was the Player's boyfriend the source of the Mesterolone?

The Player's submissions

69. The evidence of the Player in relation to Mr [REDACTED]'s use of Mesterolone and the circumstances in which she alleges she was contaminated by Mr [REDACTED] was based upon the following:

70. The Player and Mr [REDACTED] began dating in August 2020. The Player placed reliance upon a witness statement from Mr [REDACTED] (16 January 2021) together with [REDACTED] to demonstrate that he was taking [REDACTED] Mesterolone.

71. [REDACTED]

72. [REDACTED]

73. [REDACTED]

74. [REDACTED]

■ [REDACTED]

78. Mrs Marina Yastremska, the Player's mother, confirmed in her witness statement that she and her family, including the Player, attended a family party at the house of her husband's brother to celebrate his birthday. Further that "Later that evening, Dayana was collected by her then boyfriend, [REDACTED]. I knew that Dayana would be going out into town with [REDACTED] that evening [REDACTED] as we had discussed it beforehand".
79. Further evidence was provided by the Player in relation to the fact that she and Mr [REDACTED] [REDACTED] were together on the night of 23 November 2020. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].
80. The testimony of the Player at the Hearing can be summarised as follows.
81. The Player is a professional tennis player and tennis has been her whole life since she was five years of age. She was adamant that she has never and would never take a Prohibited Substance and she did not engage in deliberate doping or take Mesterolone.
82. The Player presented in evidence the results of a polygraph test conducted by Dr Keith R. Ashcroft, a British & American accredited Forensic Polygraph Examiner & Consultant and a Chartered Psychologist, who conducted an interview and polygraph examination on the Player (on 11 January 2021 in Dubai, UAE) to investigate the credibility of her statement that she had never used any Prohibited Substance or intentionally taken Mesterolone.
- Dr Ashcroft detailed the procedure undertaken in his expert report of 16 January 2021 and addressed caselaw on the reliability of polygraph examination results in his supplemental report of 19 May 2021. He concluded in relation to the Player that:

"... Normative data indicate that only a small portion (< 1%) of deceptive persons are expected to produce a similar truthful test score under normal circumstances. The results support the conclusion that there is NO DECEPTION INDICATED by the physiological responses to the test stimulus questions during this examination."
 - Dr Ashcroft further elaborated that:

"...no type of testing (polygraph examinations or otherwise) is perfect, which means that even the best of today's polygraph examinations are not 100% accurate and 100% reliable. There will always be some chance that deception by a polygraph examinee will go undetected..." and went on to conclude "that Ms Yastremska was telling the truth with more than 99% confidence (i.e., there is a non-zero, though less than 1%, chance that Ms Yastremska was not telling the truth);"

■ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

89. The Player presented a number of further non-source arguments in support of her contention that she had not deliberately engaged in doping and thus to rebut the presumption of intentional use.

90. The Player noted that her hair sample tested negative for Mesterolone and submitted a report from Prof. Pascal Kintz, Pharmacist and Professor of Legal Medicine at the University of Strasbourg of 24 March 2021. Prof. Kintz concluded that the Player's hair sample (collected on 16 February 2021) showed no evidence of doping with Mesterolone in November 2020 or at any other time.

91. The Player gave evidence of the medications and supplements she was taking in the period before her anti-doping test. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]		
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]

92. Evidence was submitted on searches done on the *Rusada.ru* medical search engine and *Global Dro* search engine (which provides athletes with information about the prohibited status of specific medications based on the current World Anti-Doping Agency (WADA) Prohibited List) that none of these medications were prohibited. A certificate of analysis from Prof. Kintz in respect of six products provided by the Player for testing [REDACTED]

[REDACTED] confirming that Mesterolone was not detected in any of the submitted items.

93. The Player called each of Drs de Ronde and Smit to address the question of the likelihood of the Player taking Mesterolone for performance enhancing purposes. Dr Willem de Ronde is an Internist Endocrinologist and Founder of the Dutch Anabolic Steroid Centre of Expertise and Outpatient Clinic. Dr Diederik Smit is an Internist Endocrinologist and physician. In their work they have studied, treated and interviewed hundreds of athletes and bodybuilders who have abused steroids. A summary of their evidence is set out as follows:

94. The Doctors' concluded that "*it would be illogical, unusual and pointless for a female athlete to use mesterolone for performance enhancing purposes*" in the period proposed by the ITF (namely for 11 days or less), because:

- They are unaware of any studies (save the Jockenhovel F. et al study (1997)¹ on the effects of androgen substitution therapy on erythropoiesis) on either men or women which examined the potential for Mesterolone to enhance athletic performance, and they would expect athletes to use oral steroids other than Mesterolone which are proven to enhance performance e.g. oxandrolone.
- Further, they would expect an athlete intending to use Mesterolone to take heed of the anecdotal evidence and consensus from the bodybuilding / athletic communities who would only use Mesterolone in combination with another steroid, not to enhance performance but to counter the feminising properties in men of ceasing to use such other steroids; and they have never come across a female athlete or body builder using Mesterolone, presumably due to its weak anabolic properties and strong virilising effects (e.g. deeper voice). However, they accept that *“it cannot be ruled out that a female might deliberately use mesterolone, but it is difficult to understand why they would do so”*.
- Even assuming Mesterolone could enhance athletic performance, there is no basis in science or by consensus from the bodybuilding / athletic communities that such enhancing effects would be observed within 11 days or less. The earliest period from the studies identified by Prof. Handelsman appear to be 4 weeks post androgen administration. The mean duration of an androgen cycle taken by (male) bodybuilders to improve performance is 13 weeks (per Smit D., et al HAARLEM study (2019), where the consensus is that prolonged exposure is deemed necessary to achieve meaningful results.
- Given the Player was not training for the period of the contemplated Mesterolone use, its use would be *“even more illogical and futile...we cannot conceive of any benefit to using mesterolone in this manner”*.

The ITF’s submissions

95. The position of the ITF in relation to the Player’s evidence is that it does not meet the stringent requirements as to the source of the Mesterolone that was present in her Sample. For that, the Tribunal would have to accept that [REDACTED]. In [REDACTED]. In so considering the Tribunal would have to assess a number of factors.
96. That there is a real risk of collusion where a friend or relative takes the blame for an athlete’s positive test. The ITF submits that the jurisprudence is clear that the risk of collusion means that such evidence has to be treated with great caution - WADA v FILA & Stadnyk, (CAS 2007/A/1399, para 107), and UK Anti-Doping v Anderson, UK National Anti-Doping Panel (15 May 2013), noted that *“in alleged spiking cases, particularly when the substance ingested has clear performance enhancing potential, the tribunal must be especially cautious before accepting an athlete’s case because of the obvious potential for collusion, even where the alleged spiker is said to have admitted the spiking.”*

¹ Eur. J. Med. Research, 2(7) 293-298, which demonstrated that three weeks of Mesterolone administration did not cause a statistically significant increase in haemoglobin and haematocrit levels.

97.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

98. That there is no proof, with reliable evidence that Mr [REDACTED] took [REDACTED]. The ITF submits that the Player has not established that her boyfriend bought [REDACTED] as the purchase receipts have no link to him, or that he took it on the night of 23/24 November 2020 as she did not witness it. The only evidence the Player is relying upon is in the form of Mr [REDACTED]'s unsworn statement which could not be authenticated or tested on cross-examination at the Hearing as he was not present. Consequently, the ITF's position is that the *"Tribunal cannot place any meaningful weight on Mr [REDACTED]'s witness statement (or on any of the other evidence purportedly*

stemming from him, [REDACTED]). And in those circumstances there is no reliable evidence on which it can find that he purchased [REDACTED] or that he took [REDACTED] in the early hours of 24 November 2020.”

99. The ITF introduced the New Evidence and submitted it was a factor that the Tribunal needed to consider in assessing the admissibility and/or weight to be afforded to Mr [REDACTED]'s evidence.

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

100. The ITF further asserts that even if Mr [REDACTED] did take [REDACTED] on 23/24 November 2020, the Player still has to demonstrate by “concrete evidence” how the Mesterolone he ingested got into her system. The Player’s assertion that it got there through [REDACTED], was rejected by the CAS Sole Arbitrator in the CAS Decision as insufficient to support such a finding and the Player has produced no further evidence to rectify that fatal deficiency.

101. The ITF submitted that the Player’s non-source evidence is insufficient to rebut the presumption of intentional use under TADP Article 10.2.1(a). CAS has made clear that it is only in the ‘rarest

cases' that an athlete will be able to satisfy a hearing panel that their ingestion of a Prohibited Substance was not intentional.

102. As regards the Player's polygraph test results, the ITF position was that they did not add anything to the weight of the Player's denials as such results are inadmissible in many jurisdictions (including the UK) on the basis of unreliability and the CAS has taken a similar view e.g. *WADA v Swiss Olympic & Daubney*, (CAS 2008/A/1515, para 119): "*A polygraph test is inadmissible as per se evidence under Swiss law. Therefore, the CAS Panel may take into consideration the declarations of Mr [...] as mere personal statements, with no additional evidentiary value whatsoever given by the circumstance that they were rendered during a lie detector test*". The ITF also relied upon *Romero v IAAF* (CAS 2019/A/6319 at para 85): "*In this case the Panel does not accept that such test [i.e., a polygraph test] is reliable to establish the truthfulness of the Appellant's latest version of events. In previous CAS awards, such tests have been found inadmissible (see for instance: CAS 99/A/246, paras 14.1.1, 4.5 ff; CAS 96/A/156; CAS 2008/A/1515, para 119; CAS 2017/A/4954, para 128).*"
103. The fact that there was no Mesterolone found in the urine sample collected from the Player on 9 November 2020 and only 0.7 ng/mL of its metabolite found in her 24 November Sample does not rule out intentional doping.
- Prof. Handelsman did not consider that the negative analytical result from the Sample collected from the Player on 9 November 2020 or the low concentration of Mesterolone in her Sample ruled out doping. Single or multiple doses of Mesterolone could have been used during the 11 day period 9-24 November 2020 using 'off' cycles and a different dose to the assumed daily 25mg. He noted that "*There are no studies that tell us whether repeated dosing of a female subject such as the Player at much smaller doses (say, 5 mg or 10 mg) that ended five or more days before sample collection would have led to a higher urinary concentration of mesterolone than 0.5 ng/mL*".
 - While he agreed that 4 weeks was necessary to see the muscle effects of exogenous androgens (which depend upon tissue growth), "*the effects on hemoglobin, which does not depend upon tissue growth, may be faster*". He concluded that "*Based on the very few studies that have been conducted of urinary excretion of mesterolone and its metabolites, these analytical results are not inconsistent with the intentional administration of mesterolone for doping purposes.*"
104. The ITF clarified that Dr Kintz's report of the Player's hair analysis says only that, using a method with a limit of detection of 10 pg/mg, "*[n]o mesterolone was identified in DY SAMPLE 1, analyzed on 6 x 1 cm segments*" approximately corresponding to hair grown between September 2020 and February 2021, and those results "*are consistent with no repetitive consumption of mesterolone in the time periods indicated*".
- They referred to studies demonstrating that anabolic agents are badly incorporated into hair and that factors such as hair colour and cosmetic treatments could affect it.
 - They also considered various studies that Dr Kintz referenced and noted that there have been limited studies conducted of the incorporation of anabolic steroids into hair and the relationship between dose taken and concentration in hair has not been established. Dr Kintz himself said that "*we still do not know what can or cannot be detected in hair when it comes*

to anabolic steroids. It is commonly admitted that a single low dose would probably not be incorporated and detected nor would repeated low oral doses". Prof. Handelsman was also clear that "Nor does the fact that Dr Kintz detected no mesterolone in the Player's hair exclude intentional doping or exposure to mesterolone". This was based largely upon Dr Kintz's own interpretations and the caveats on the findings especially of a negative hair test.

105. In relation to the Player's argument that had she used Mesterolone between 9 and 24 November 2020 to dope, she "would surely" have taken steps to deliberately miss the doping control test, the ITF in addition to other arguments cited the CAS Decision– *"this argument could easily be invoked in all cases where an out-of-competition anti-doping test reveals an AAF. If accepted, it would severely undermine not only the effectiveness of the whereabouts system but the system of strict liability set out in the WADC[ode]"*.
106. In relation to the argument that female athletes do not choose Mesterolone to dope / use Mesterolone as a doping agent, the ITF relied upon Prof. Handelsman who explained that:
- Mesterolone is a synthetic androgen, a testosterone derivative with better bioavailability when taken orally, [REDACTED] and therefore Mesterolone is mainly offered for sale for bodybuilders (via websites) [REDACTED].
 - It was not a matter of dispute that Mesterolone is not suitable for use by females because it is androgenic and therefore has virilizing effects on the body and there are no studies confirming that Mesterolone enhances athletic performance. In response to Drs de Ronde and Smit, Prof. Handelsman drew a distinction between female androgen abuse outside sport (with *"unrestrained use of massive doses[s] of multiple androgens"*) and female androgen doping in sport (*"e.g. microdosing, dosing at night, variable on and off dosing regimen"*) and the danger of extrapolating any lessons from studies of the former category to the latter category *"of female androgen dopers with their additional strong motivation to evade detection"*.
 - The availability of Mesterolone in oral form made it more attractive for consumption by females² and that androgen improves muscle growth and strength when combined with training or even without training.³
 - In his opinion intentional doping cannot be ruled out in this case because *"Every synthetic androgen, including mesterolone, has an anabolic effect, and therefore a potential performance-enhancing effect, including stimulating muscle growth and increasing the level of haemoglobin in the blood. Unsurprisingly, therefore, there is evidence that mesterolone is used as a doping agent by both male and female athletes"*. He noted that in tennis the *"higher hemoglobin may be more important than increased strength from muscle growth"* and cited the 2019 WADA anti-doping lab statistics, positive tests for Mesterolone were recorded 38

² American College of Obstetricians and Gynecologists. Performance enhancing anabolic steroid abuse in women. Committee Opinion No. 484. Obstet Gynecol 2011;117:1016–18.

³ Bhasin S, Storer TW, Berman N, Callegari C, Clevenger B, Phillips J, Bunnell TJ, Tricker R, Shirazi A, Casaburi R 1996 The effects of supraphysiologic doses of testosterone on muscle size and strength in normal men. N Engl J Med 335:1-7.

times, of which 33 female athletes have had Adverse Analytical Findings for Mesterolone doping (nine of whom tested positive for Mesterolone on its own).

- The ITF argued that the fact Mesterolone is on the WADA Prohibited List for all athletes and not just males, is evidence that it is not suitable for use by females and does not rule out intentional doping. – as found in the CAS Decision.

Tribunal Finding on the First Issue

107. At this juncture the Tribunal considers it appropriate to make its initial determination on the first issue, as to whether Mr [REDACTED] was taking Mesterolone. In so considering, the creditability of the witness evidence of Mr [REDACTED] and the New Evidence had to be considered. It was noted that the Player made submissions concerning the relevance of the New Evidence and the timing of its submission before the Tribunal.

108. The Tribunal in reviewing the evidence noted that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] This is not an action which could be described as being consistent with a conspiracy.

109. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

110. The information provided in the witness statement of Mr [REDACTED] is in line with further evidence adduced, such as [REDACTED], which were not challenged by the ITF, and receipts of purchased [REDACTED]

111. While it is true that Mr [REDACTED] was not offered to be cross-examined, and while it is true that this does, to a certain extent, reduce the weight of the witness statement offered by him (cf. CAS 2020/A/6695 & 6700 & 7386, at para. 284), the Tribunal does not find that this annuls the evidentiary weight of his witness statement substantially, as credible reasons were presented as to why Mr [REDACTED] was not present at the hearing before the Tribunal.

112. Account was also taken of the New Evidence in relation to Mr [REDACTED] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

113. [REDACTED]
[REDACTED]

[REDACTED]

114. On the basis of the above, the Tribunal, while admitting the New Evidence, did not consider that it could apportion any weight to it given the timing and circumstances in which it arose, and has not done so.

115. [REDACTED]

116. [REDACTED]

117. [REDACTED]

118. Each of [REDACTED] and Mrs Yastremska were tendered as witnesses by the Player so they could be cross-examined by the ITF and the ITF elected not to request their attendance or to challenge their evidence. In light of that situation, the Tribunal determined that the evidence of these named witnesses was accepted and unchallenged.

119. Having considered the totality of the evidence, the Panel is disposed on the balance of probabilities to accept the Player's evidence on these matters for the following reasons:
(i) The evidence the Player presented [REDACTED] was convincing and not challenged to any large degree by the ITF.

(ii) To reject the evidence of the Player with regard to the source of the Mesterolone would require the Panel to find as a matter of fact that the Player, her boyfriend, [REDACTED], [REDACTED], the Player's mother and other lay witnesses, conspired together to mislead the Tribunal. The possibility that it could have been misled was considered by the Tribunal. In assessing both the evidence and in considering the witnesses' testimony the Tribunal came to the realisation that the level of co-ordination, management and likely ethical misconduct ([REDACTED]) that would be required to contrive the fiction and manage to do so in the expedited period between 22 December 2020 and 16 January 2021 (when the Provisional Suspension Application was made), would have been extraordinary.

(iii) Though the stakes for the Player were high, the Tribunal could not accept that the evidence was contrived and that a fiction was perpetrated from the outset right through to the Hearing. That would have taken something extraordinary akin to what the Panel in WADA v Roberts (CAS2017/A/5296) described as "an invented drama...and require a degree of sophistication that the Tribunal could not attribute to the alleged conspirators." The Tribunal finds itself of the same mind in this case.

120. Consequently, the Tribunal is satisfied on the balance of probabilities that the Player's boyfriend Mr [REDACTED] consumed it on the night of 23/24 November 2020 [REDACTED].

(ii) Was the Mesterolone transmitted to the Player from her boyfriend by one or more of the routes identified?

121. The Player submits that there is scientific evidence which supports the case that Mesterolone was transmitted to her by her boyfriend by one or more of a number of routes including: (i) [REDACTED]; (ii) by the Player intimately kissing her boyfriend's lips/mouth and other body parts (for example, his face and fingers) after his consumption of [REDACTED] and/or (iii) [REDACTED]; each occurring on the evening of 23/24 November 2020.

122. The Player called Dr Daren Austin OBE (Senior Fellow and Senior Director of Clinical Pharmacology at GlaxoSmithKline) to address the scientific aspects of the transmission across each of the three suggested means of contamination. In addition she called [REDACTED]

123. The position of the ITF in relation to the scientific basis of the Player's case was addressed both by reference to the outcome of the CAS Decision and in reliance upon the expert evidence of Professor David Handelsman as its expert witness to deal *inter alia* with each of the purported transmission sources for the Mesterolone.

124. For ease, the Tribunal has summarised the expert evidence under each of the relevant routes of ingestion that it had to consider.

Route (i) [REDACTED]

125. [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

126. [REDACTED]

⁴ Van Renterghem P., et al. (2016) *Stability of the alternative steroid profile (ASP) Part IV: influence of Exogenous steroids and finasteride on alternative steroid profiles.*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵ Goodman and Gilman: Buxton ILO 2018 Chapter 2: Pharmacokinetics: The Dynamics of Drug Absorption, Distribution, Metabolism, and Elimination. In: Brunton LL, Hilal-Dandan R, Knollmann BC eds. Goodman and Gilman's The Pharmacological Basis of Therapeutics. 13th ed: McGraw-Hill.

Route (ii) by the Player intimately kissing her boyfriend's lips/mouth [REDACTED] after his consumption of [REDACTED]

128. Dr Austin, in reliance upon the Van Renterghem Study, stated it would take just 1.4mcg of Mesterolone exposure to cause, 10 hours later (i.e., at the time of Sample provision), a urinary M1 Metabolite concentration of 0.5ng/mL and that this could be caused by; “swallowing traces of [REDACTED] tablet/powder (approx. 1/18,000th of a 25mg Mesterolone tablet, which although imperceptible would provide sufficient drug substance – present on the Boyfriend's lips/mouth/fingers after he consumed an uncoated [REDACTED] pill (i.e. excluding...in the saliva)”; and/or by consuming the same level present within the boyfriend's saliva shortly after he consumed a [REDACTED] pill; and/or the swallowing of Mesterolone parent compound and M1 Metabolite from the boyfriend's saliva as secreted by his salivary glands (i.e. excluding traces of [REDACTED] tablet/powder not swallowed by him).
129. [REDACTED]. [REDACTED] tablets are “uncoated”. The external surface of an uncoated tablet is formed of the active drug and can be subject to friability i.e. tablets can suffer from chipping, shedding, crumbling or breakage. The Player submitted therefore, that “[T]hus, it follows that, after the consumption of a [REDACTED] tablet, dust/residue from that tablet would have remained within the saliva and on the lips, mouth, and fingers of Mr [REDACTED]
130. Dr Austin considered that it was plausible that traces of [REDACTED] present within the boyfriend's saliva shortly after he consumed a [REDACTED] pill (approx. 1/18,000th of a 25 mg tablet) could have caused the contamination.
131. As to Dr Austin's second report on the plausibility of the scenarios of ingestion of the Mesterolone, Drs de Ronde and Smit conclude that his calculations are based upon reasonable principles and opined that Dr Austin's view that any one of the three scenarios could have caused the Sample results and the 26 March Report “provides a credible and good explanation of the Sample results”.
132. Professor Handelsman did not consider it plausible that granules of the uncoated Mesterolone tablet were transferred to the Player from her boyfriend either from her licking Mesterolone powder from his lips, mouth and/or fingers or from her swallowing his saliva containing same on the basis that: the [REDACTED] tablet information specified they were to be “swallowed whole with some liquid” and not chewed; that swallowed tablets are unlikely to leave particles remaining in the mouth due to the salivary washing mechanism and further that there is no empirical evidence of excretion of a synthetic androgen like Mesterolone in saliva.

Route (iii) [REDACTED]

133. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

134. [REDACTED]

135. [REDACTED]

136. [REDACTED]

137. [REDACTED]

138. The Player submitted that it is wrong to suggest that an athlete cannot succeed in establishing that an AAF was caused in a particular manner unless there has been a scientific study dealing

with that particular scenario. That would equate to requiring an athlete to prove their case beyond reasonable doubt and is unworkable and unfair - relying upon *Scott v. ITF (CAS 2018/A/5768)* “[t]he less scientific certainty there is, the easier may the applicable standard of proof be reached”.

139. The Player asserted that the ITF cannot rely upon the CAS Decision as the Sole Arbitrator applied the incorrect standard of proof further, it was an interim assessment of the evidence without the benefit of having heard from witnesses or experts and additional scientific evidence and case law is now before the Tribunal.

Tribunal Finding on the Second Issue and Non-Source Evidence

140. At the outset of the proceedings the Respondent took issue with the independence of Prof. Handelsman and in doing so relied *inter alia* on unredacted emails, and other materials, which they asserted revealed both Prof. Handelsman’s “friendship” with the ITF’s counsel and an approach to this case which went further than is expected of an expert witness and therefore sought that his expert opinion “*must be wholly disregarded*” by the Tribunal.
141. This matter, which is a significant one to level at an expert witness especially one with as distinguished a career as Prof. Handelsman, was considered with all due seriousness by the Tribunal. Having reviewed the materials and heard the testimony of Prof. Handelsman the Tribunal was of the view that Prof. Handelsman’s relationship with counsel for the ITF was a professional one based upon mutual respect and prior knowledge of their respective expertise, it was not one that could demonstrably be said to interfere with their professional obligations and in particular the expert’s primary duty to the Tribunal. The Tribunal was of the view that Prof. Handelsman, while certainly passionate about the subject matter of his report, performed his duties as an expert witness both independently and with candour. Therefore, his witness testimony and reports were regarded and afforded their due weight by the Tribunal.
142. In relation to the CAS Decision and its application to the instant proceedings, the view of the Tribunal is that it was issued at a point in time in the proceedings (dealing with the Provisional Suspension application). Since then, additional evidence has been submitted by the Player and the Tribunal has had the benefit of hearing first-hand the accounts of the expert witnesses proffered by the Player, who were adeptly cross-examined by counsel for the ITF. For the reasons that are included in this decision, the Tribunal therefore considers that a sufficient number of the deficiencies previously identified in the CAS Decision have now been resolved to enable the Tribunal to come to its determination.
143. In this case, The Panel was presented with a factually very difficult and complex set of circumstances. The thoroughness of the evidence presented by the Player as to the circumstances of the route of ingestion of the Mesterolone had to be balanced with the scientific analysis as to whether or not Mesterolone could be transmitted to the Player [REDACTED] from her boyfriend in the circumstances described.
144. In relation to the scientific aspects, the Tribunal noted a number of points:

- Dr Austin, who specialises in pharmacology modelling and simulation to estimate patterns of drug absorption, distribution and excretion, was particularly qualified when it comes to assessing how much Mesterolone the Player would have been exposed to [REDACTED] on 23/24 November 2020, and what that would have translated to in terms of Metabolite concentration in the Sample.
- Dr Austin's calculation of the potential amounts of Mesterolone and the M1 metabolite absorbed [REDACTED] rely on the scientific principles of dose proportionality for oral absorption of drugs over a wide dose range. Prof. Handelsman's challenge to these calculations and his opinion that there is a threshold below which nothing significant is absorbed was not accepted by Dr Austin on the basis that there was no scientific evidence to support his conjecture. The Tribunal preferred the evidence of Dr Austin in this regard.
- [REDACTED]
- [REDACTED]
- Dr Austin also accepted the possibility that sufficient quantities of mesterolone could be identified in the player's urine by [REDACTED] [REDACTED] oral absorption of traces of the mesterolone in Mr [REDACTED]'s mouth during kissing.

145. Given the substances involved in doping cases, "on point" scientific data is rarely available. It is therefore difficult to see how any determination could be made in a doping case about the provenance of a Prohibited Substance without some assumptions being made in the absence of "on point" data. The Player relied upon *WADA v Roberts (CAS2017/A/5296) (together with Adams (CAS2007/A/1312), Burke (CAS2013/A/3370), Santos (CAS 2019/A/6482) and X v. UKAD (SR/NADP/243/2019)*, the USADA cases of *Fuchs, Nickles*, and Canadian case of *Vincent*) in which the, female athletes submitted that the AAF was caused by sexual intercourse (Fuchs and Nickles) / "saliva, sweat and semen" (Vincent) and there was no 'on point' scientific study or papers which established that the substance in question would appear in semen. Further the relevant authorities did not expect an on-point study to be conducted. Instead, the account of the athletes was accepted, on the balance of probabilities, based – inter alia – on evidence that their partners were using the substance in question and that they were not. The Tribunal concurs with this rationale and does not consider that the Player, finding herself in similar circumstances should be held to a different scientific or legal standard.
146. The Tribunal considered the totality of the potential sources of ingestion of the Mesterolone expounded by the Player and tested by Prof. Handelsman. Given the proposed transfer methods of the Mesterolone each of the proposed routes [REDACTED] had to have occurred in the short window of the early morning of 23/24 November 2020. The Tribunal considered the plausibility of each suggested route and, where it was satisfied that the route was scientifically probable, assessed all such routes on a cumulative basis. It considered all of the expert witness evidence but on balance preferred the expert evidence of the Player's experts.
147. The Tribunal was satisfied that each of the routes of ingestion of Mesterolone, [REDACTED] [REDACTED] could probably have been a source of the Mesterolone contamination but that cumulatively they accounted for the Player's positive Sample for Mesterolone at a concentration of 0.05ng/mL (when adjusted for specific gravity).

148. Given the findings of the Tribunal in relation to the Player's boyfriend being the source of the Mesterolone and the further finding that it was scientifically possible for him to have contaminated the Player with Mesterolone on the early morning of 23/24 November 2020, the assessment of the non-source evidence by the Tribunal is largely rendered moot. However, there are a few discrete points which the Tribunal wishes to address.
149. Polygraph evidence is inadmissible in proceedings under English law and Swiss Law. The TADP is governed by English law and therefore the decision in *Allen v FCA*, ([2014] UKUT 0348 (TCC), para 15) that "*there is no place in a court or tribunal for such [polygraph] evidence*" which built upon the decision in *Fennell v Jerome Property Maintenance Ltd*, *The Times* (26 November 1986) which found that – "*As a matter of principle, evidence produced by the administration of a mechanically or chemically or hypnotically induced test on a witness so as to show the veracity or otherwise of that witness [is] not admissible in English law*". The Tribunal considers that *Allen* continues to hold weight. For completeness, the Tribunal also accords with the CAS jurisprudence on this point (previously referenced in the ITF submissions).
150. The Player's argument that she voluntarily submitted to the doping control test on 24 November is inconsistent with deliberate doping. In this regard the Tribunal shares the same view as the CAS Decision also previously referenced.

VII. Disposition

151. Although the violation has been admitted, the Tribunal is satisfied on the balance of probabilities that the Player has established the source of the Prohibited Substance. In the circumstances where the Tribunal is satisfied No Fault or Negligence has been established, no period of Ineligibility shall apply.

VIII. Costs

152. The Tribunal has discretion under 2021 TADP Article 8.5.4 to make costs orders "where it is proportionate to do so".
153. The Tribunal could not find any basis upon which to criticise the ITF for the manner in which it prosecuted this case. Indeed it noted that the case was one which was heavily weighted at the outset to address procedural matters and applications made by the Respondent which were, while legitimate, of a nature which had the effect of prolonging the ultimate determination of this case with the consequent time and costs implications for all those involved.

154. The Tribunal is also cognisant of the role and responsibility of the ITF as the regulator of the sport of tennis and the party obliged to bring proceedings in anti-doping matters to maintain the clean sport imperatives. In the opinion of the Tribunal it would place an undue burden on the ITF to be exposed to the risk of an adverse costs order on the basis solely that it properly brought proceedings and was unsuccessful. This would have a potentially adversely impact upon its
155. ability to undertake its duties as a regulator which could have far reaching consequences. The circumstances of this case do not warrant the making of a costs order against the ITF.
156. There is no order as to costs.

IX. Right of Appeal

157. This decision may be appealed to the Court of Arbitration for Sport (“CAS”), located at Château de Bèthusy, Avenue de Beaumont 2, CH-1012 Lausanne, Switzerland (procedures@tas-cas.org), in accordance with Article 13 ADR and its relevant sub-section.
158. In accordance with Article 13.8 TADP, parties shall have 21 days from receipt of this decision to lodge an appeal with the CAS.



Susan Ahern (Chair)

For the Independent Tribunal

London

21 June 2021

1 Salisbury Square London EC4Y 8AE resolve@sportresolutions.co.uk 020 7036 1966

Company no: 03351039 Limited by guarantee in England and Wales
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www.sportresolutions.co.uk

