INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF MR DAVID BUCK

Tim Kerr QC, Chairman (sitting alone)

Introduction

1. This is the decision of the independent Anti-Doping Tribunal ("the Tribunal") appointed by the the Anti-Doping Administrator of the International Tennis Federation ("the ITF") under Article K.1.1 of the ITF Tennis Anti-Doping Programme 2005 ("the Programme") to determine a charge brought against Mr David Buck ("the player") following a positive drug test result in respect of a urine sample no. 392165 provided by the player on 6 October 2005 at the US Open Wheelchair Tennis Championship in San Diego, California.

2. By a letter dated 14 February 2006 the player admitted the doping offence, with which he was charged by letter dated 31 January 2006 from Mr Jonathan Harris, the ITF's Anti-Doping Administrator. Accordingly by Article K.1.3 of the Programme a hearing before the Tribunal was not required. In the same letter the player confirmed that he wished the matter to be dealt with by the chairman sitting alone. I have therefore considered the evidence and written representations submitted by the player and his medical advisers, and on behalf of the ITF by Hammonds, the ITF's solicitors in London, in a letter dated 23 February 2006. I thank the parties for their considerable assistance.

The Facts

3. The player is (I presume) a citizen of the United States of America. He lives in Silverado, California. He was born on 12 July 1959 and is now therefore aged

46. He is paraplegic following a T5 complete spinal chord injury. He takes part in wheelchair tennis events organised by the ITF.

4. I have before me medical evidence and written evidence from the player, which is not disputed. This shows that from October 2003 the player started to inhale some 2.3 grams of cannabis each day to treat post-traumatic arthritis, degenerative arthritis, muscle spasm, insomnia and nausea. His use of cannabis is approved by his medical advisers on the ground that he derives more relief for his symptoms when using cannabis combined with conventional medication than when using conventional medication alone.

5. I do not have a full account of the relevant federal and state law governing use of cannabis for therapeutic purposes in the USA. It appears that use of cannabis is restricted under US federal law, but doctors are able to recommend its use, subject to safeguards, in some states apparently including California where the player lives. The player states, and I accept, that he does not use cannabis when travelling outside those states where it can lawfully be used for therapeutic purposes.

6. With effect from 1 January 2004 he became bound, in relation to events organised by the ITF, by the Programme. By what is now Article S8 of the 2005 version of the Programme, cannabinoids are a prohibited substance. They became prohibited for the first time on 1 January 2004 when the 2004 version of the Programme entered into force. The player however continued using cannabis.

7. I do not have evidence of any competitions in which the player took part between 1 January 2004 and October 2005. He did not attempt to wean himself off the drug and he did not apply for a therapeutic use exemption ("TUE"). Indeed, it appears that he did not become aware that he could apply for a TUE until after being tested in October 2005. To the extent that he took part in ITF

competitions after 1 January 2004 with cannabis in his system, he either knew or should have known that by doing so he would be violating anti-doping rules. However I do not have any evidence of any drug testing on the player during that period, still less of any doping offence having been committed.

8. On 6 October 2005 the player was taking part in the US Open Wheelchair Tennis Championship. He took part in both the single and doubles events. On that date he was selected for doping control. On the doping control form, he declared various types of conventional medication and he also frankly declared "medical use marijuana". He then, wisely, voluntarily abstained from competitive tennis from 10 October 2005 onwards. As he does not assert that he was ignorant of the fact that cannabis is a prohibited substance, I infer that he decided to abstain from competing in anticipation of a likely positive test result.

9. The player's A sample was tested at the WADA accredited laboratory in Montreal and found to contain a cannabis metabolite known as "11-nor-9-carboxy-delta-9-tetrahydrocannabinol". The certificate of analysis recorded a concentration of 203 ng/ml. This was reported on 24 October 2005 to the ITF's Anti-Doping Program Administrator, Mr Staffan Sahlström of International Doping Tests and Management ("IDTM") based at Lindigö, Sweden. Mr Sahlström convened a review board in accordance with the Programme to consider whether there was a case to answer. The members of the review concluded that there was.

10. On 25 October 2005 the player and his doctor signed a TUE application form seeking a TUE in respect of the player's use of cannabis. The application was received by IDTM on 30 October. The next day IDTM emailed the player stating that the application was not complete: most importantly, the route of administration was not indicated. Those defects were then remedied by the player.

11. On 2 November 2005 IDTM emailed the player notifying him that two of the TUE Committee doctors had asked for further medical information and clinical justification for indefinite use of cannabis for non-malignant pain. It was made clear that evidence from the player's doctor was required. A reminder email was sent by IDTM to the player on 9 November 2005. The next day the player emailed IDTM explaining that his doctor was on vacation and giving detailed and frank information about his use of cannabis and the therapeutic reasons for it. The player also explained very clearly that he did not use cannabis to enhance his sport performance.

12. The player did not then communicate further with IDTM and accordingly his application for a TUE was not granted and the case was closed. On 23 December 2005 IDTM wrote to the player notifying him of the positive test result and that the B sample would be analysed at the same laboratory on 9 January 2006. That was then done. On 13 January 2006 the laboratory reported to IDTM that the B sample analysis was positive and that the same cannabis metabolite was present in it in a concentration of 176.5 ng/ml.

13. On 26 January 2006 the player underwent an examination by a Dr Sterner, an anti-aging specialist in San Diego. On 26 and 27 January he and Dr Sterner completed a fresh application for a TUE in respect of his use of cannabis. Dr Sterner wrote a letter explaining that the player uses cannabis "adjunctively", i.e. in conjunction with conventional medicines to which he has an "inadequate clinical response".

14. By a letter dated 31 January 2006 the ITF formally charged the player with a doping offence under Article C.1 of the Programme, namely the presence of cannabis metabolite in the sample provided on 6 October 2005 at the US Open Wheelchair Tennis Championship in San Diego. The next day the player, apparently aware of the charge or of its imminent arrival, sent a fax to Mr

Jonathan Harris of the ITF in London, attaching his second TUE application and stating that he had voluntarily withdrawn from competition since the US Open.

15. The player's second TUE application was then received by IDTM on 8 February 2006. The next day IDTM emailed and faxed the player rejecting the application on the ground that the wrong form had been used, enclosing the correct form and warning the player that the case would be closed after 10 working days unless a fresh application on the correct form was received within that timescale. The defect in the form used was then remedied.

16. On 13 February 2006 IDTM then emailed the player stating that one of the TUE Committee doctors considering the application had requested more information, namely "further documentation as to the reason for the use, the clinical examination, the intended benefits and the previous other treatments attempted"; as well as "other medications that the patient is on".

17. The next day, 14 February 2006, the player sent a fax to Mr Harris of the ITF in London confirming that he wished the doping offence to be dealt with by a chairman sitting alone and stating that he uses cannabis as "a more agreeable substitute for the medication that I have to take to manage my condition" and that he only uses it "for medicinal purposes" and does not approve of the "recreational or sporting abuse of any substances". He also explained that he had applied for a TUE and that he was not aware (presumably until October 2005) that he could do so in respect of cannabis.

The Proceedings

18. The player's representations and evidence are contained in his letters of 1 and 14 February 2006 and also in the information submitted to IDTM, mentioned above, with his two TUE applications. The complete record of the player's

TUE applications was helpfully exhibited to a written statement from Mr Sahlström of IDTM dated 23 February 2006, produced by the ITF.

19. The ITF provided me with very helpful full written submissions and accompanying documents, including legal precedents, by means of a letter dated 23 February 2006 which was also copied to the player. The ITF invites me, first, to impose the mandatory consequences which under the Programme flow from a positive test result, namely disqualification of the player's results in both the singles and doubles events at the US Open, and forfeiture of ranking points and prize money in respect of the singles and doubles events in that competition.

20. As to any period of ineligibility, the ITF accepted that this was the player's first offence and that cannabis and its metabolites are Specified Substances; and accordingly the ITF accepted that provided the player could show he did not intend to enhance his sport performance, I have a discretion to impose, at a minimum a warning and reprimand and no period of ineligibility, and at a maximum a period of ineligibility of one year.

21. The ITF, through Hammonds, its solicitors in London, helpfully made detailed reference in the letter both to cases where players had tested positive for cannabis and to cases where players had used prohibited substances having failed to secure a valid TUE for the substance in question before doing so. Copies of the cases were attached for my consideration. The ITF referred to its recently introduced policy of recommending a two month ban for a first offence involving cannabis, without unusual features, and invited me to impose a period of ineligibility which would not be so long as to continue into the future, after the date of my decision.

The Tribunal's Conclusions, With Reasons

22. The player has admitted the commission of a doping offence under Article C.1 of the Programme. Accordingly pursuant to Article K.1.3 of the Programme, the Tribunal is required to confirm the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 31 January 2006: namely that a prohibited substance, cannabis metabolite, has been found to be present in the urine specimen that the player provided at the US Open Wheelchair Tennis Championship on 6 October 2005.

23. Irrespective of the player's intention or otherwise to enhance performance for the purpose of determining the applicability of Article M.3 of the Programme, the Tribunal is obliged by Article K.1.3 to apply the mandatory consequences provided for in Article L.1 of the Programme. Accordingly the player's results in the singles event in the US Open Wheelchair Tennis Championship must be disqualified and the two ranking points and US $105 earned from that event, must be forfeited.

24. Furthermore, as it is not suggested that the player bears "No Fault or Negligence" for the doping offence, it follows from Article M.1.1 of the Programme that the player's results in the doubles event at the US Open Wheelchair Tennis Championship must also be disqualified, and the two ranking points and US $26 prize money earned from that event, must be forfeited.

25. The player seeks to invoke Article M.3 of the Programme. This provides that in the case of a "Specified Substance", identified as such in the list of prohibited substances, where a player can establish on the balance of probabilities that the use of the substance "was not intended to enhance sport performance", the period of ineligibility for a first offence shall be, instead of a mandatory period of two years, at a minimum a warning and reprimand and no period of ineligibility, and at a maximum one year.

26. The ITF accepts that cannabis and its metabolites are Specified Substances. The issue is therefore whether the player can establish that his use of cannabis was not intended to enhance sport performance. The ITF does not dispute the player's account of the circumstances in which he took cannabis, nor does it contend that the player intended to enhance his performance. I have no difficulty in accepting the player's assurance that he did not intend to do so, and that his use of cannabis was for medicinal purposes only.

27. As this is the player's first offence, the Tribunal therefore has discretion under Article M.3 to impose, at a minimum, a warning and reprimand and no period of ineligibility, and at a maximum, one year's ineligibility. I must therefore now consider how to exercise that discretion in the present case. I bear in mind that the most important consideration is the degree of the player's personal fault. In the present case the prize money and ranking points lost are not of great significance.

28. The ITF points out that the player failed to obtain or even apply for a TUE in respect of cannabis before committing the offence, though he was taking it regularly and does not assert that he was ignorant of the ban which came into force on 1 January 2004. The player's explanation is that he did not know that he could obtain a TUE for cannabis. He does not explain why, in those circumstances, he continued to take it and to take part in ITF competitions. The case is therefore, regrettably, one of deliberate commission of a doping offence.

29. On the other hand, in mitigation I must bear in mind that the player has been completely frank and his explanations, including those given in this belated TUE applications, are quite full. He declared use of cannabis on his doping control form and appears to have realised as soon as he gave the sample that he would have to face up to having committed a doping offence. He did not attempt to maintain his innocence and enabled time and expense to be saved as

a result. His use of cannabis is medicinal, not recreational, though he has not yet satisfied the criteria for the grant of a TUE by showing to the satisfaction of the TUE Committee doctors that his use of cannabis is therapeutically necessary.

30. I have carefully considered the numerous cases helpfully supplied to me by the ITF. I bear very much in mind that the ITF now recommends a two month ban in a first offence case involving cannabis, without any unusual factors. Typically, such cases involve a single instance of recreational social use of cannabis as a result of a momentary lapse of judgment, followed by an admission of the offence, an apology and an assurance that the incident was isolated and will not be repeated.

31. Cases involving medicinal use of cannabis by disabled athletes, such as ***Moffat*** (decision of the ITF Anti-Doping Tribunal dated 8 August 2004) are rather different. In such cases, the player's use of the prohibited substance is in a sense more easily excusable in the sense that the disability causes pain to the player which he needs to alleviate. This is a disadvantage which is not suffered by the able-bodied social recreational user: the latter does not suffer the initial disadvantage of the disability; nor, in consequence, does he have any need to alleviate pain caused by it.

32. On the other hand, a case such as this, of extended use of cannabis for medicinal reasons with knowledge of the prohibition and without refraining from participation unless and until a valid TUE is obtained, is a case of sustained and knowing disregard of the anti-doping rules in the Programme, albeit in the circumstances of the player's disability and resulting pain and suffering, which are such as to command sympathy.

33. In the present case I cannot escape from the conclusion that the player was personally at fault for committing the doping offence, without having obtained

or even applied for, a TUE. Because he has no TUE, it is inescapable that he has not shown that his use of cannabis on the occasion of the US Open in October 2005 was therapeutically necessary.

34. I accept that he did not know he could apply for a TUE in respect of cannabis. But it would not have been difficult for him to discover that he could do so, as he has since done. As in ***Moffat***, "[h]is medical condition and treatment of it with cannabis … was such that he could be expected to concern himself with the question whether that treatment was consistent with anti-doping rules applicable in the sport in which he competes" (paragraph 27).

35. The decision in ***Moffat*** was made when the jurisprudence resulting from the Programme and from the World Anti-Doping Code was in its infancy. It pre-dated the ITF's practice of recommending a two month ban for normal first offences cases involving cannabis, mentioned above. The Tribunal has since accepted (see its decision in ***Fischer***, dated 30 January 2006, at paragraph 19) that if ***Moffat*** were decided today, the ban of six months imposed in it would probably have been shorter.

36. I note that in ***Coutelot*** (decision of the ATP Anti-Doping Tribunal dated 10 August 2004), a two month ban for a first offence involving cannabis was imposed where the player had, in response to the new prohibition against use of cannabis effective on 1 January 2004, weaned himself off the drug to which he had been chronically addicted, but had competed while remnants of the drug remained in his system. The player in ***Coutelot*** was not disabled and asserted no medicinal reason to take cannabis.

37. Taking all the above factors into account, I have reached the conclusion that the appropriate period of ineligibility in the present case is a period of 3½ months. Although the player's disability and consequent need to alleviate his pain are deserving of sympathy, I do not think it would be right to impose a ban any

shorter than that imposed in *Coutelot* where the player had made a conscious attempt to rid himself of the drug. Here the player neither ceased taking it nor sought to regularise his taking of it. That feature makes it unjustifiable, in my view, to treat this as a normal first offence case without unusual features meriting a two month ban.

38. As the player has voluntarily refrained from competing since 10 October 2005, the period of ineligibility runs from that date, pursuant to Article M.8.3(a) of the Programme. Accordingly, it has already, on 24 January 2006, expired. The player is therefore free to compete from the date of this decision, subject to repayment of the forfeited prize money.

39. Before concluding, I should record my concern that the player is currently at risk of committing further doping offences if he starts to compete at once, without waiting for any cannabis in his system time to be eliminated from it. Case law shows that cannabis is eliminated from the body more slowly than many other substances. He has also yet to satisfy the TUE Committee doctors that he should have a TUE in respect of his use of cannabis. It is very much in his interest to ensure, before competing again, either that his body is and remains free of cannabis, or that he acquires a valid TUE in respect of cannabis.

The Tribunal's Ruling

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

(1) confirms the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 31 January 2006: namely that a prohibited substance, 11-nor-9-carboxy-delta-9-tetrahydrocannabinol, a cannabis metabolite, has been found to be present in the urine specimen that the player provided at San Diego on 6 October 2005;

(2) orders that the player's individual result must be disqualified in respect of the singles and doubles events at the US Open Wheelchair Tennis Championships 2005, and in consequence rules that the two ranking points in respect of the singles event and the two ranking points in respect of the doubles event, and the prize money of US $105 in respect of the singles event, and of US £26 in respect of the doubles event, obtained by the player through his participation in that competition, must be forfeited;

(3) finds that the player has succeeded in establishing on the balance of probabilities that his use of cannabis leading to the positive test result in was not intended to enhance sport performance;

(4) declares the player ineligible for a period of 3½ months running from 10 October 2005 to 24 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.

Tim Kerr QC, Chairman of the Anti-Doping Tribunal

28 February 2006