INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF MS ILANIT FRIDMAN

Tim Kerr QC, Chairman (sitting alone)

Introduction

1. This is the decision of the independent Anti-Doping Tribunal ("the Tribunal") appointed by the Anti-Doping 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 Ms Ilanit Fridman ("the player") following a positive drug test result in respect of a urine sample no. 389272 provided by the player on 5 October 2005 at the US Open Wheelchair Tennis Championships in San Diego, California.

2. By a letter dated 1 February 2006 from Mr Edan Kleiman, the player's advocate in Tel Aviv, Israel, and a further letter dated 2 February 2006 from the player herself, she admitted the doping offence with which she was charged by letter dated 25 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.

3. In a further letter dated 4 February 2006 the player confirmed that she wishes the matter to be dealt with by the chairman sitting alone. The ITF supports that request and I am happy to grant it. I have therefore considered carefully the written representations and evidence (including medical evidence) submitted by and on behalf of the player in her helpful correspondence; and on behalf of the ITF by Hammonds, the ITF's solicitors in London, which are contained in a

letter dated 23 February 2006, copied to the player and her advocate. I thank the parties for the help they have given me.

The Facts

4. The player is an Israeli citizen, who was born on 19 July 1976 and is now therefore aged 29. As a result of a serious car accident she is paraplegic and confined to a wheelchair. At the age of about four she was diagnosed as suffering from asthma. She says she has used a "Bricalin" inhaler since childhood, which, she says, "contains terbutaline". The player made this statement in a letter to the Tribunal dated 2 February 2006.

5. However in a letter dated 9 June 2005 from Dr Luba Galitskaya of the Sports Medicine Department of the Wingate Institute in Netanya, Israel, addressed to "whom it may concern", Dr Galitskaya stated that the player is treated with a Ventolin inhaler containing salbutamol. It is likely that Dr Galitskaya obtained that information from the player, who may not appreciate or fully appreciate the difference between salbutamol and terbutaline.

6. I understand that terbutaline and salbutamol are not different names for the same substance, but are different substances. Under the Programme, both are prohibited substances, separately listed as such under the heading "Beta-2 Agonists". When inhaled, they are also "Specified Substances", as defined in the Programme, and when inhaled both may be the subject of an Abbreviated Therapeutic Use Exemption ("ATUE").

7. The player's asthma is serious and she needs her inhaler to avoid danger to her health. In or about 1997-98 she was hospitalised and had to be given oxygen from oxygen balloons. She also uses a nasal spray containing triamcinolone acetonide. Since 2005 she has taken part in wheelchair tennis events organised by the ITF. She thereupon became bound by the Programme. She understands

the nature of anti-doping rules and respects the need for them. Quite properly, she accepts her personal responsibility for complying with them.

8. By paragraph 8.4 a. of Appendix Three to the Programme, an application for an ATUE in respect of a substance such as salbutamol or terbutaline is effective to permit use of the substance in question immediately on receipt by the Anti-Doping Programme Administator ("APA") of "a complete notification". The remainder of that sub-paragraph provides: "Incomplete notifications must be returned to the Player". The APA has at all material times been Mr Staffan Sahlström of International Doping Tests and Management ("IDTM"), based at Lindigö, Sweden.

9. In June 2005 the player intended to take part in the US Open Wheelchair Tennis Championships due to take place in and around early October 2005 in San Diego, California. She and her advisers were aware of the need for her to obtain a therapeutic use exemption ("TUE") in respect of use of her inhaler to treat her asthma. On 9 June 2005 she underwent lung function tests, the results of which, with and without use of a Ventolin inhaler containing salbutamol, were documented in Dr Galitskaya's letter of the same date, already mentioned.

10. Also on 9 June 2005 the player and Dr Galitskaya filled in the necessary forms to apply for an ATUE in respect of salbutamol and triamcinolone acetonide. The player says, and I accept, that she or her advisers sent off the forms to the ITF. However, according to the Programme and as stated on the form itself, the forms should have been sent to IDTM, not the ITF. The player marked on the form the box indicating that she wished to receive a reply by email, and she included on the form her personal email address.

11. The forms were correctly and adequately completed. Had they been received by Mr Sahlström at IDTM, that would of itself have been effective to bestow a TUE upon the player in respect of her use of salbutamol, but not terbutaline. A

confirmation to that effect would no doubt have been emailed to the player. Had the forms been received by the ITF, it is probable that they would eventually have found their way to Mr Sahlström at IDTM.

12. In the event, the forms were received neither by the ITF, nor by Mr Sahlström. Accordingly, the player did not in 2005 receive any confirmation by email that they had been received. She did not take any step to check that the forms had been received by the proper person. Her advisers did not do so either. She was advised by Sport for the Disabled Israel, which is linked to the Elite Sport Department of Israel based at the Wingate Institute where Dr Galitskaya works. I have no evidence that any particular discussion took place between the player and her advisers concerning the status of her application for an ATUE.

13. However, I accept (see the letter from Dr Galitskaya to Mr Jonathan Harris of the ITF dated 27 December 2005) that the player went to the US Open Wheelchair Tennis Championships armed with a copy of the letter of 9 June 2005 addressed by Dr Galitskaya to "whom it may concern". The player then failed to bring that letter to the attention of the tournament organisers. Had she done so, it is possible that she could have obtained a TUE in respect of salbutamol before the start of the competition.

14. The player competed in the singles and doubles events at the US Open Wheelchair Tennis Championships. In the singles event she reached the last 16, earning 38 ranking points and prize money of US $78. In the doubles event she reached the quarter finals, earning 75 ranking points and prize money of US $20. On 5 October 2005 she was selected for doping control. On the doping control form she declared use of "Bricalin".

15. The player's A sample was analysed at the WADA accredited laboratory in Montreal, Canada, and found to contain terbutaline. The certificate of analysis was dated 24 October 2005 and was sent to IDTM in Sweden in the usual way.

The concentration was not stated on the certificate. In accordance with the Programme, Mr Sahlström convened a review board to determine whether there was a case to answer.

16. From 24-26 November 2005 the player took part in the Betit Halohem competition in Tel Aviv, Israel. She won the singles event, earning 40 ranking points and US $100 in prize money. She did not compete in the doubles event. I infer that the player was probably unaware that any problem was likely to arise from the test administered on 5 October 2005, since she subsequently ceased competing as soon as she became aware that she had tested positive. In any case, she did not take part in any competitions after 26 November 2005.

17. By 23 December 2005 all three members of the review board had concluded that there was a case to answer. Accordingly Mr Sahlström notified the player, by letter of that date, that the A sample analysis had revealed the presence of terbutaline and that the B sample would (unless the player waived her right to analysis of the B sample) be analysed at the same laboratory on 11 January 2006. The player voluntarily ceased competing from 24 December 2005 when she became aware of the positive test result. I do not know how many or which competitions, if any, she missed as a result.

18. On 27 December 2005 the coordinator of Sport for the Disabled Israel, Ms Yael Lander, wrote to Mr Harris of the ITF enclosing a copy of (I infer) the letter of 9 June 2005 from Dr Galitskaya, addressed to "whom it may concern", which letter referred to the player's use of a Ventolin inhaler containing salbutamol. Ms Lander went on to say that the player had received notification of a positive test "regarding the substances stated in our letter". According to my understanding, that was not correct: the substances dealt with in the original letter were salbutamol and triamcinolone acetonide; whereas the positive test result was for terbutaline.

19. Ms Lander went on to ask Mr Harris to locate the original letter and to pass it to Mr Sahlström "in order to clear up this unfortunate event". However Mr Harris and the ITF had, as already noted, not received any such original letter. Finally Ms Lander asked the ITF for help and accepted candidly that the player and her advisers had not followed the matter up the previous June "due to our lack of experience."

20. Then on 29 December 2005 IDTM received, under the abbreviated procedure, a complete notification which was effective to confer on the player a TUE in respect of salbutamol and triamcinolone acetonide. It did not exempt the player from the prohibition against use of terbutaline. Mr Sahlström of IDTM sent the player written confirmation of the TUE on 3 January 2006. That TUE will last until 31 December 2006.

21. On 11 January 2006 the player's B sample was analysed at the same WADA accredited laboratory in Montreal, and also found to contain terbutaline. The certificate of analysis was dated 13 January 2006.

The Proceedings

22. By a letter dated 25 January 2006 the ITF formally charged the player with a doping offence under Article C.1 of the Programme. The player and her advocate waived her right to an oral hearing and made written representations in letters dated in early February 2006, and enclosures, to which reference has already been made. These were most helpful and have assisted me considerably.

23. The ITF, through its solicitors in London, Hammonds, set out in detail the ITF's submissions in a very full and helpful letter dated 23 February 2006, which was also copied to the player and her advocate. The ITF has also submitted witness statements from Mr Harris of the ITF and Mr Sahlström of

IDTM, verifying their non-receipt of any ATUE application until after the positive test result.

24. The ITF invites me to disqualify the player's results and require her to forfeit her ranking points and prize money in respect of the singles and doubles events at the US Open Wheelchair Tennis Championships 2005; and further, unless I am satisfied that fairness requires otherwise, to disqualify the player's result and require her to forfeit her ranking points and prize money in respect of the domestic competition in Israel in which the player won the singles event in November 2005.

25. As to any period of ineligibility, the player invites me to show leniency and to impose only such sanction as will enable her to resume competing. The ITF accepts that terbutaline is a Specified Substance and that this is the player's first offence, and that accordingly, pursuant to Article M.3 of the Programme, provided the player can establish on the balance of probabilities that her use of terbutaline was not intended to enhance sport performance, the sanction is, 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. On the question as to how I should exercise my discretion under Article M.3 of the Programme, the ITF has helpfully sent me a file containing various case law precedents forming part of the rapidly growing body of jurisprudence that now exists, dealing with doping cases governed by the rules of national and international federations, including the ITF, which have adopted the World Anti-Doping Code and incorporated its provisions into their anti-doping programmes.

The Tribunal's Conclusions, With Reasons

27. 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 25 January 2006: namely that a prohibited substance, terbutaline, has been found to be present in the urine specimen that the player provided at the US Open Wheelchair Tennis Championships in San Diego, California, on 5 October 2005.

28. It follows that irrespective of whether or not the player intended to enhance her performance or did enhance it, 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 of the US Open Wheelchair Tennis Championships must be disqualified and the 38 ranking points and US $78 earned from that event, must be forfeited.

29. It is not suggested (and could not be realistically suggested) that the player bears "No Fault or Negligence" for the doping offence. Therefore, in accordance with Article M.1.1 of the Programme the player's results in the doubles event of the same competition must also be disqualified, and the 75 ranking points and prize money of US $20 earned from that event, must also be forfeited.

30. I turn next to consider what sanctions are appropriate under Articles M.7 and M.3 of the Programme. I approach the matter in the same way as in *Bogomolov* (decision of the Anti-Doping Tribunal dated 26 September 2005, see at paragraph 101ff), namely on the basis that the sanctions imposed under each head should be such that together they meet the justice of the case overall. I propose, however, to consider first the appropriate period of ineligibility, if any; rather than, as in *Bogolomov*, considering first the issue of participation in competitions subsequent to that in which the player tested positive.

31. 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. The issue is therefore whether the player can establish that her use of terbutaline was not intended to enhance her sporting performance.

32. There is no reason not to accept the player's assertion, supported by the medical evidence, that use of her asthma inhaler is for medical purposes only and that she did not intend to enhance her sporting performance. The ITF does not dispute that assertion, and accepts that terbutaline is, when inhaled, a Specified Substance. I have no difficulty in accepting the player's case and I find that she has discharged the onus on her of showing on the balance of probabilities that her use of terbutaline was not intended to enhance her sporting performance.

33. 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 will consider next how to exercise that discretion in the present case. In doing so, I bear very much in mind the helpful case law submitted to me by the ITF's solicitors for the purposes of comparison.

34. It is impossible to avoid the conclusion that the player was personally at fault for failing to ensure, by whatever steps were necessary, that she had a valid TUE for terbutaline as at 5 October 2005. Indeed, even now she does not have one, though she has one for salbutamol and triamcinolone acetonide. The offence is not merely technical; as in *Bogomolov* and other cases, the player circumvented the safeguards built into the rules to ensure fairness to other

competitors, and has not shown that her use of terbutaline at the US Open was therapeutically necessary.

35. The player made three errors. The first was that she failed to take any action to contact IDTM (or the ITF) upon not receiving any emailed response to the ATUE application sent to the ITF on 9 June 2005. She should have checked her personal email address and after not receiving any response, she should have contacted, or ensured that her advisers contacted, IDTM. Had she done so, she would have been informed that no ATUE application had been received, and she could then have made her application afresh.

36. Secondly, she should have ensured that her ATUE application corresponded to the substance that she was actually using as medication for her asthma. The player has not offered any explanation for the apparent confusion over whether her medication is terbutaline, or salbutamol, or both.

37. Thirdly, the player omitted to show to the organisers of the US Open Wheelchair Tennis Championships 2005 the letter of 9 June 2005 from Dr Galitskaya which she had brought with her to San Diego. Had she brought that letter to the attention of the organisers, it is quite likely that the doping offence would not have been committed.

38. In mitigation, I must bear in mind that the player, both personally and through her advocate and medical advisers, has been very frank and open with the Tribunal. She is inexperienced on the international wheelchair tennis circuit. The degree of fault here is not grave. She has honourably tendered an apology to the Tribunal and accepted responsibility for her omissions. She has not sought an oral hearing, with the result that time and expense have been saved.

39. I also bear in mind that Sport for the Disabled Israel has generously accepted some responsibility for its failure to prompt the player to fulfil her duty to

ensure her TUE was in place. This in no way absolves the player from her personal responsibility to do so. But I take into account the player's inexperience on the international wheelchair tennis circuit, which (as in *Bike NZ v. Mosen*, decision of the Sports Disputes Tribunal of New Zealand dated 31 May 2005) is such as to give rise to some expectation of assistance from her domestic organisation.

40. I have no evidence about the degree of information and education in anti-doping matters received by the player from Sport for the Disabled Israel or anyone else. There is no evidence that the player had previously been tested. Nor is there any evidence that she had attended any presentation on anti-doping policies, such as that which, I am aware, was given by Mr Richard Ings of the ATP in January 2004 to the ATP tour members playing in the Australian Open that year.

41. I take all the above into account. I take into account also that the player must necessary lose significant ranking points, and a small amount of prize money, from the US Open. I decide that it is appropriate to impose a period of ineligibility of one month, which pursuant to Article M.8.3(a) of the Programme should run from 24 December 2005 to 23 January 2006. Accordingly, the player's period of ineligibility has already expired, and she is free to compete again from the date of this decision, subject to repayment of the prize money that must be forfeited.

42. I turn to consider, next, the question of disqualification of results and forfeiture of ranking points and prize money in the Betit Halohem competition in Tel Aviv, in which the player participated from 24 to 26 November 2005 before she knew of the positive test result. She won the singles event and did not take part in the doubles event. I must start from the proposition that disqualification of subsequent results is the norm and not the exception. Furthermore, there was no unusual delay in this case.

43. There was no unfair enhancement of the player's sporting performance at the Betit Halohem competition. There would be no unfairness to other players in that competition if her result were allowed to stand. The player ceased to participate once she knew of the positive test result and the lack of a valid TUE for the substance in question. She would, probably, not have participated in the Betet Halohem competition had she known about those matters.

44. I bear in mind that the player has abstained from competing also during the period from 24 January 2006 up to the date of this decision even though, it is now known with hindsight, she need not have done. I do not know what competitions the player missed as a result, but I am impressed with the honourable stance she has adopted generally in this case and in particular by not competing until receiving confirmation from the Tribunal that she is free to do so. The rules encourage this approach but do not require it. Other players prefer to continue competing until told by an Anti-Doping Tribunal that they may not do so.

45. Having regard to the mitigating factors mentioned above and to the disruption to her tennis career she has already suffered, I am persuaded by a narrow margin that fairness requires me to leave the player's results, ranking points and prize money undisturbed in respect of the Betit Halohem competition.

46. Before concluding, I would like to remind the player that she still does not have a valid TUE in respect of her use of terbutaline. It is obviously in her interest to ensure that she obtains one, unless she decides to take salbutamol instead. For salbutamol, her current TUE will expire at the end of this year. I am confident that the player and those advising her will not forget to ensure it is validly renewed, if therapeutically necessary, in good time before then.

The Tribunal's Ruling

47. 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 25 January 2006: namely that a prohibited substance, terbutaline, has been found to be present in the urine specimen that the player provided on 5 October 2005 at the US Open Wheelchair Tennis Championships in San Diego, California;

(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 38 ranking points in respect of the singles event and the 75 ranking points in respect of the doubles event, and the prize money of US $78 in respect of the singles event, and of US $20 in respect of the doubles event, obtained by the player through her participation in that competition, must be forfeited;

(3) orders, further, that the player's individual results in the competition in which she took part subsequent to the US Open Wheelchair Tennis Championships 2005, shall not be disqualified but shall remain undisturbed;

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

(5) declares the player ineligible for a period of one month, running from 24 December 2005 to 23 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

2 March 2006