

**INTERNATIONAL TENNIS FEDERATION**

**and**

**Karol Beck**

**Decision of the Independent Anti-Doping Tribunal**

**Charles Flint QC, Chairman**

**Dr. Joe Cummiskey**

**Professor Vivian James**

**Date of Decision: 13 February 2006**

**Date of hearing: 17 January 2006**

**Jonathan Taylor and Iain Higgins of Hammonds for the ITF**

**Nicholas de Marco instructed by Louise Roberts of Max Bitel Greene for the Player**

**DECISION**

1. The tribunal has been appointed under Rule K of the ITF's Tennis Anti-Doping Programme 2005 ("the Rules") to hear a charge brought against Karol Beck ("the player") of a doping offence contrary to article C.1, that a prohibited Substance (Clenbuterol) had been found to be present in a urine specimen taken from the player on 24 September 2005 in the semi-final of the Davis Cup at Bratislava.
2. The player does not dispute that he committed the doping offence alleged, in that Clenbuterol, a prohibited substance, was found to be present in his body. However he asserts that he did not knowingly take Clenbuterol. He says that the

substance must have entered his body, without his knowledge, on 15 September 2005 by his drink being spiked at a club in Bratislava or when returning home he mistakenly took one of his mother's Clenbuterol tablets believing that it was a prescribed drug, Movalis, which he intended would cure his headache. In those circumstances it was argued that he bore no significant fault or negligence within the meaning of Rule M.5.2 so that the mandatory period of 2 years' ineligibility ought to be reduced. He accepted that the commission of a doping offence inevitably leads to disqualification of the individual results obtained by the player in the semi-final of the Davis Cup competition, together with loss of ranking points and prize money received from that and subsequent events.

3. The ITF and the player submitted written representations, attaching witness statements and documents. A hearing was held in London on Tuesday 17 January at which the player gave evidence, and was cross-examined on behalf of the ITF. Members of the player's family also attended and made statements and representations to the tribunal.
  
4. At the hearing the player applied for a postponement of the hearing on the basis that the public prosecutor in Bratislava had opened a criminal investigation into the case and that relevant evidence could be revealed in that investigation which would assist the player's case. We refused to postpone the hearing on the basis that there is a strong public interest in these anti-doping allegations being determined swiftly and, having read the evidence, we did not consider it likely that any further firm evidence was likely to emerge which would materially assist the player's arguments. We did not think it was in the interests of the player to have the case put off when it was accepted on his behalf that a doping offence had been committed and that he would inevitably face a period of ineligibility. We also considered that if further material new evidence emerged after the decision the player would be able to rely upon such new evidence in any appeal to the Court of Arbitration for Sport ("CAS") which has full

jurisdiction on the facts and the law under Rule O.5.1. The ITF indicated that it would not oppose the adducing of further evidence on the appeal and would not unreasonably refuse to agree the extending of time for the filing of an appeal if material new evidence emerged after the time for an appeal had lapsed. In case this point becomes material and contentious at a later stage this decision, at paragraph 27 below, allows the player to apply to the chairman for an extension of the time to appeal under Rule 0.4.

### **Legal Approach**

5. Under Article S the Rules are governed by English law. It is expressly provided that the programme is to be interpreted in a manner consistent with the applicable provision of the WADA Code, taking into account the commentary to that code. As the Rules are based on the WADA Code, it is clear that they must be interpreted consistently so as to accord with generally internationally accepted principles of sports law which would be applied by tribunals in other jurisdictions, and by the Court of Arbitration for Sport (“CAS”) to which any appeal lies under Article O.

### **The Doping Offence**

6. As previously mentioned the player does not dispute that he committed a doping offence under Article C.1 on the basis that Clenbuterol, a prohibited substance, had been found to be present in a urine specimen taken on 24 September 2005 in the semi-final of the Davis Cup at Bratislava.
7. It is a fundamental principle of the WADA Code that this is a strict liability offence for which no intent on the part of the player needs to be proved. This is

an essential principle of the anti-doping regime, necessary to make the controls effective. As the evidence in this case shows, if it were necessary in order to prove the offence that a tribunal should be able to form a clear view as to how a prohibited substance entered the body of a player, where he denies knowing ingestion, then the anti-doping regime would be practically unenforceable, save in most unusual circumstances.

8. The doping offence is established, and it follows that the player is automatically disqualified from the semi-final of the Davis Cup competition and forfeits any ranking points and prize money obtained in that semi-final.

### **Sanctions**

#### **Exceptional Circumstances**

9. The player contends that in the exceptional circumstances of this case he bore no significant fault for the offence, and thus the period of ineligibility which would otherwise apply should be reduced.
10. Article M.5.2 reads:

If a Player establishes in an individual case involving such offences that he or she bears No Significant Fault or Negligence for the offence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one half of the minimum period of Ineligibility otherwise applicable. When Doping Offence involves Article C.1... the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.
11. The relevant expressions are defined as follows:

No Significant Fault or Negligence. The Player establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No fault or Negligence was not significant in relation to the Doping offence.

No fault or negligence. The Player establishing that he or she did not know or suspect and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited substance or Prohibited method.

12. A precondition to the application of Article M.5.2 is that the player must be able to establish how the prohibited substance entered his system. The purpose of this provision is to confine the circumstances in which the automatic sanctions may be reduced to truly exceptional circumstances in which the player can show, the burden of proof lying upon him, how the substance did indeed enter his body. That burden of proof must be discharged on the balance of probability. The provision thus ensures that mere protestations of innocence, and disavowal of motive or opportunity, by a player, however persuasively asserted, will not serve to engage these provisions if there remains any doubt as to how the prohibited substance entered his body. This provision is necessary to ensure that the fundamental principle that the player is personally responsible for ensuring that no prohibited substance enters his body is not undermined by an application of the mitigating provisions in the normal run of cases.
13. Thus the first issue is whether the player can prove how Clenbuterol entered his body prior to 25 September 2005. The second issue, if it arises, is whether the player was not significantly at fault or negligent in relation to the occurrence of the doping offence.
14. We were referred to a number of cases in which other tribunals, including CAS, have considered the application of anti-doping rules reflecting the WADA Code.

On the issues which we have to decide we do not consider it necessary to refer to any of those cases. The first issue in this case is a pure question of fact. On the second issue it has not been necessary to consider the standard of fault or negligence which the Rules impose.

### The facts

15. The player gave evidence to the tribunal and was cross-examined on his written witness statement. His evidence was supported by a statement from his mother, and his father informed the tribunal of the circumstances of the report made to the police.
16. In his witness statement the player advanced two possible explanations for the ingestion, in both cases taking place on the night of 15/16 September 2005. He recalls feeling ill the following day and consulted his doctor. With hindsight, after he received notification of the positive test, he ascribed his illness on 16 September to the adverse effects of Clenbuterol and thus believes that it was on the night before that the ingestion happened.
17. He ascribes the ingestion either to the malice of one of his companions when he was out drinking and dancing for several hours at two clubs in Bratislava, or to a mistake on his return in the early hours when he took a tablet for a headache believing it to be a pain relief tablet when it was in fact one of his mother's Clenbuterol tablets which she was prescribed for asthma.
18. The motive for the serious allegation which he makes against a named companion is that of jealousy over a girlfriend. That motive does not appear particularly specific or compelling. It should be noted that paragraph 14 of his witness statement states that when he made a criminal complaint to the police,

some time after notification of the adverse result, he provided a number of names to the police stating that it was a “possibility” that he had been poisoned by someone. He provided an explanation as to why there was a delay in making the criminal complaint, but the nature of the complaint and his evidence reveals that there is no solid evidence at all to support his suspicion. It is clear from the player’s evidence that the companion would have had the opportunity to spike the player’s drink at some point during the evening, but there is no evidence of any suspicious behaviour or any other evidence to support, let alone prove, the suggestion that he maliciously placed Clenbuterol in a drink. The opportunity was there, the motive is asserted but any evidence is lacking.

19. The player gave evidence that his mother was staying with him, and that her Clenbuterol tablets would have been on the shelf in the bathroom when he returned home in the early morning. He produces evidence to show that Movalis and Clenbuterol tablets were in similar packaging, so that a mistake could easily have occurred.
20. At the hearing the player’s counsel pressed as the primary case that the drink was in fact spiked. In the light of the understandable lack of clarity in the player’s precise recollection of the events of that night the tribunal is unable to reach any conclusion to the effect that he took Clenbuterol by mistake when he returned home.
21. The fact that the player advanced two possible explanations for the ingestion illustrates the difficulty of his case. In order to prove the circumstances of ingestion he needs to be able to prove on the balance of probabilities that one of the suggested explanations was in fact the cause of the presence of Clenbuterol in his body 9 days’ later on 25 September, and thus that the other was not.

22. The tribunal does not find that the supporting medical evidence as to the player's illness on 16 September tends to suggest that he had been the victim of poisoning by Clenbuterol on the night before; it is too unspecific to allow any conclusions to be drawn. The tribunal has also not been presented with any expert evidence to suggest that ingestion of one tablet of Clenbuterol could explain the continuing presence of that substance in his system 9 days' later at the concentration indicated by the positive tests of the sample.
23. On all the evidence the tribunal finds that the player has clearly failed to discharge the burden of proving how the substance entered his body. The explanations put forward are no more than theoretical possibilities. Regrettably this is not a case where exceptional circumstances are proved, but a conventional case in which the player asserts his moral innocence but is unable to prove how the prohibited substance entered his body.
24. On that basis the tribunal is not able to make any finding as to the player's lack of fault. In the absence of proof of how the substance entered the player's body it is unrealistic and impossible to decide whether in those unknown circumstances he did, or did not, exercise all proper precautions to avoid the commission of a doping offence.
25. There was no dispute that any period of ineligibility should commence on 1 November 2005, and there was no argument that the player should be relieved of disqualification from subsequent events under Article M7. It was submitted that the forfeiture of prize money should take account of the fact that he had donated all his winnings from the Davis Cup. However the penalty prescribed under Article M.1.1 is automatic with no power in the tribunal to disapply its terms.



26. The player states that he has never knowingly taken drugs. He was strongly supported by members of his family at the hearing. We were informed of his considerable contribution to tennis in Slovakia and the fact that he has donated his prize money from the Davis Cup tournament to the Slovak Tennis Association for the support of young players. That is all to his credit, but in the circumstances of this case we are required to impose the mandatory penalties imposed by the Rules. As the player is aware the anti-doping rules are necessarily very strict, and the penalties very severe, in order to protect sport, and its participants, against the vice of drugs.

## Decision

27. For the reasons given above, and subject to the reservation of a right to apply to extend the time for any appeal to CAS as referred to at paragraph 4 above, the tribunal unanimously makes the following decision:

- (i) A doping offence contrary to Article C.1 has been established;
- (ii) Under Article L.1 the player is automatically disqualified in respect of the Davis Cup semi-final held at Bratislava, and forfeits any medals, titles, computer ranking points and prize money (without deduction for tax) obtained in that competition;
- (iii) Under Article M.7 the player shall be disqualified from any events subsequent to 24 September 2005, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax);
- (iv) Under Article M.2 the period of ineligibility to be imposed is 2 years;
- (v) Under Article M.8.3 the period of ineligibility shall commence on 1 November 2005.

Charles Flint QC

Dr. Joe Cummiskey

Professor Vivian James

A handwritten signature in black ink that reads "Charles Flint." The signature is written in a cursive style and is underlined with a single horizontal stroke.

signed on behalf of the Tribunal in London on 13 February 2006