

INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF MS MELIHA KARIC

Tim Kerr QC, Chairman

Dr José Antonio Pascual Esteban

Dr Joe Cummiskey

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 2006 (“the Programme”) to determine a charge brought against Ms Meliha Karic (“the player”) following a positive drug test result in respect of a urine sample no. 398120 provided by the player on 25 July 2006 at the British Open wheelchair event, held in Nottingham.
2. The player was represented by Mr Fabrice Chargelègue, her coach. The ITF was represented by Mr Jonathan Taylor and Mr Mike Morgan of Hammonds, the ITF’s solicitors in London. The player did not dispute the presence in her body of a prohibited substance, namely adrafinil or modafinil metabolite. In correspondence it eventually became clear that the player admits the doping offence.
3. By Article S.3 of the Programme, the proceedings before the Tribunal are governed by English law, subject to Article S.1, which requires the Tribunal to interpret the Programme in a manner that is consistent with applicable provisions of the World Anti-Doping Code (“the Code”). Article S.1 further

provides that the comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of the Programme.

The Facts

4. The player was born on 1 June 1979 and is a citizen of France. According to the ITF's website she is currently ranked 36th in women's wheelchair singles tennis. In or about 1993 she suffered tragic injuries in Sarajevo from a bomb, during the conflict in the former Yugoslavia. She survived her injuries and received treatment in Paris. However, she is confined to a wheelchair and is paraplegic.
5. In 1998 she became a patient of her present doctor, Dr Damien Foucault. He prescribed medication for her to take, including or consisting of, it appears, the stimulants which subsequently became prohibited substances and for which she subsequently tested positive. She began to play competitive wheelchair tennis some time after 1998; it is not clear to us exactly when. As at 1 January 2004, she was playing competitive tennis.
6. On that date, the Code entered into force and became applicable in the sport of tennis and thus to the player, through the 2004 version of the Programme which applied (as does the current Programme) to wheelchair events. There was considerable publicity on the entry into force of the Code, about the responsibility of all players for ensuring that their bodies remained free of any prohibited substance.
7. From 1 January 2004, adrafinil, modafinil and metabolites thereof became prohibited. They remain prohibited in competition (see in the 2006 version of the Programme category S.6, Stimulants). The player did not concern herself with the anti-doping regime applicable to her. She did not know exactly what

substances her prescribed medication contained. She continued taking it, not knowing that it contained substances that had become prohibited.

8. The player's doctor probably did not know exactly what substances were prohibited, either before or after 1 January 2004. It did not occur to him that the player might be at risk of committing a doping offence under rules applicable to wheelchair tennis. He therefore did not warn her that she might be at risk. The player did not realise that by following competent medical advice she could be committing doping offences.
9. The player's coach, for his part, was no doubt aware of the existence of anti-doping rules but was unaware what substances were contained in the player's prescription medication and did not know whether or not it contained any prohibited substances. It appears that neither he nor the player thought to enquire into this question, nor to apply for a therapeutic use exemption ("TUE") in respect of the player's use of adrafinil or modafinil.
10. The player does not speak English but speaks French. Mr Chargelègue can read and write in English but his command of the language is quite limited. The website of the World Anti-Doping Agency includes the list of prohibited substances, regularly updated, in French as well as English. The website of the ITF includes the list in English. The words "adrafinil", "modafinil" and "metabolite" are the same in English and French.
11. On 25 July 2006 the player was taking part in the British Open wheelchair event in Nottingham. She had taken her usual medication and also valium and oxybutynin. She was selected for a doping test on 25 July and provided a urine sample. This was her first test in any ITF competition. She declared on the doping control form recent use of "valium, driptane and olmifon". The latter contains adrafinil. Any performance enhancing effect from taking olmifon

would have been counteracted by valium and oxybutynin. We are satisfied that the player did not intend to cheat by enhancing her performance.

12. The player's A sample was analysed on or about 14 August 2006 at the WADA accredited laboratory in Montreal, Canada, and found to contain adrafinil or modafinil metabolite. The player's B sample was analysed at the same laboratory on 19 September 2006 and confirmed the presence of adrafinil or modafinil metabolite. Accordingly, a Review Board was convened and by 21 September 2006 had determined that there was a case to answer. The player has not played any competitive tennis since 25 July 2006.

The Proceedings

13. The player was charged with a doping offence by letter dated 26 September 2006 from the ITF's Anti-Doping Administrator, Mr Jonathan Harris. There was then a period during which it was difficult to establish effective contact with the player, and with her coach and representative, M Chargelègue. This led to some delay in the disposal of the case.
14. However it eventually became clear from various emails passing between the parties, and between the Chairman and the parties, that the player admitted the doping offence. Accordingly pursuant to Article K.1.3 of the Programme an oral hearing was not required, and the Chairman gave a ruling to that effect by email dated 28 November 2006.
15. The parties have made helpful written representations, for which we are grateful. We have considered these carefully during our deliberations and reached the following unanimous decision.

The Tribunal's Conclusions, With Reasons

16. 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,

we confirm the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 26 September 2006: namely, that a prohibited substance, adrafinil or modanfinil metabolite, has been found to be present in the urine sample that the player provided on 25 July 2006 at the British Open wheelchair event held in Nottingham, England.

17. Further, the Tribunal is obliged by Article K.1.3 of the Programme to apply the mandatory consequences provided for in Article L.1 of the Programme. Accordingly the player's results in the British Open wheelchair event must be disqualified and any ranking points and prize money earned from that event must be forfeited.
18. The player has not competed since 25 July 2006 when she provided the sample which tested positive. Accordingly, the question under Article M.7 of disqualification of results and forfeiture of any ranking points and prize money in respect of competitions subsequent to that which produced the positive test, does not arise. Further, by virtue of Article M.8.3(a) of the Programme, any period of ineligibility should (as the ITF accepts) commence on 25 July 2006.
19. In correspondence, the player's coach was asked whether the player sought to rely on Article M.5.1 or Article M.5.2 of the Programme. These provide, so far as material, that the otherwise applicable period of ineligibility shall be eliminated (Article M.5.1) or reduced by up to half the otherwise applicable minimum (Article M.5.2), if the player establishes (on the balance of probabilities, see Article K.3.2), that she bears "No Fault or Negligence" (Article M.5.1) or "No Significant Fault or Negligence" (Article M.5.2) for the offence. Where, as in the present case, the offence is committed under Article C.1 (presence of a prohibited substance in the body), the player has to establish also how the prohibited substance entered her system.

20. In order to establish “No Fault or Negligence” for the purpose of eliminating the otherwise applicable period of ineligibility, the player must establish (according to the definitions in Appendix One to the Programme) that she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that she had used or been administered with the prohibited substance.
21. In order to establish “No Significant Fault or Negligence” for the purpose of achieving a reduction of up to half of the otherwise applicable minimum period of ineligibility, the player must establish that 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 offence.
22. Through M Chargelègue, the player admitted that there was a degree of fault in that the player did not inform herself about anti-doping rules, but M Chargelègue went on to submit that the player should not be blamed for placing confidence in the doctors who had saved her life after she sustained the life-threatening injuries for which she was treated in 1993, and for accepting their advice on recommended treatment.
23. We take it that the player does not assert that she bore no fault or negligence for the offence. If she did, she could not hope to discharge the heavy onus of making good that defence in circumstances where she had not informed herself about the new anti-doping rules in force from 1 January 2004. The question which remains is whether the player can establish the defence of no significant fault or negligence. The player has shown, in our judgment, how the prohibited substance entered her system, namely by her taking of Olmifon as a prescription medicine.

24. The ITF, through Mr Taylor, relied on the decision of the Anti-Doping Tribunal in *Nielsen* (decision dated 5 June 2006), in which the Tribunal at paragraph 16 stated:

“... The player has a personal responsibility, from which he cannot be absolved by reliance on others. Rule B4 provides that it is the sole responsibility of each player to acquaint himself with all the provisions of the Rules. Any player has a clear duty to check whether any medication being taken by him, of which only he is aware, is permitted under the anti-doping rules. It is fundamental to the strict liability anti-doping regime that a player is responsible for any prohibited substance found to be present in his body and that ignorance of the rules or of the nature of any substance administered or ingested can be no defence”.

After citing certain authorities from the Court of Arbitration for Sport (“CAS”), the Tribunal went on to state (at paragraph 17) that “a player who is taking medication has a continuing duty to check properly whether that medication is permitted under the anti-doping rules”.

25. In the *Nielsen* case the player could not show that he was without significant fault because he “did not take any steps at all to check whether his medication infringed the anti-doping rules” (*ibid.* paragraph 19). It is also well established in other cases that a player may not normally rely on the fault of a medical adviser since players are responsible for their sporting entourage including medical personnel.

26. On the other hand, in *Mariano Hood* (decision of the Anti-Doping Tribunal dated 8 February 2006), the tribunal accepted, albeit “not without some reservations” (paragraph 26) that a player who had been taking prescription medicine before it became prohibited with effect from 1 January 2005 was not significantly at fault within the meaning of Article M.5.2 in circumstances where he had taken the trouble to ascertain before 1 January 2005 that the medication did not contain any prohibited substance, yet failed to discover – the website not clearly flagging up amendments taking effect from 1 January 2005 - that it had become prohibited with effect from that date.

27. In the present case it is impossible to escape the conclusion that the facts are similar to those in *Nielsen* and not comparable to those in *Hood*. Here, as in the *Nielsen* case, the player took no steps whatever to ascertain the status of her medication with respect to anti-doping rules. There is no evidence that she consulted any doctor with particular knowledge of sports medicine and anti-doping rules. She did not check the prohibited list each year, despite the advent of the Code from 1 January 2004 and the publicity that attended it.
28. It is true that the player, like Mr Hood, was taking her prescription medication before as well as after 1 January 2004, i.e. before as well as after it became prohibited. But she was doing so while showing no interest in the question whether it was prohibited or whether it was going to become prohibited or had become prohibited. We have no evidence that she made any enquiry at all about whether she might be taking prohibited substances. By failing to do so she was, without doubt, significantly at fault and any defence under Article M.5.2 must fail.
29. It follows that the Tribunal is obliged to apply the mandatory sanction provided for by Article M.2 of the Programme, namely a period of ineligibility of two years. As already noted, the ITF accepts that the period of ineligibility should commence on the date of the sample collection, i.e. 25 July 2006. It will therefore expire on 24 July 2008.
30. The Tribunal has much sympathy for this player, who has suffered greatly and triumphed over her injuries by achieving highly in her sport despite them. Unfortunately for her, we are unable to allow our sympathy to affect our analysis of the facts and the anti-doping rules which apply in this case. The provisions of the Programme and the Code are clear and it is our duty to apply them to all players alike.

The Tribunal's Ruling

31. 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 26 September 2006, namely that a prohibited substance, adrafinil or modanfinil metabolite, has been found to be present in the urine sample that the player provided at the British Open wheelchair event held at Nottingham, England;
- (2) orders that the player's results in the British Open be disqualified, and in consequence rules that any prize money and ranking points obtained by the player through her participation in events in that competition must be forfeited;
- (3) declares that the player shall be ineligible for a period of two years commencing on 25 July 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

Dr José Antonio Pascual Esteban

Dr Joe Cummiskey

Dated: 21 December 2006