INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF M. CHARLES IRIE

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 Manager of the International Tennis Federation ("the ITF") under Article K.1.1 of the ITF Tennis Anti-Doping Programme 2008 ("the Programme") to determine a charge brought against M. Charles Irie ("the player") following a positive drug test result in respect of a urine sample no. 2324700 provided by the player on 11 April 2008 at the Davis Cup tie held in Plovdiv, Bulgaria.

2. In emails sent by the player to the ITF in response to the charge, during the period from 16 July to 27 September 2008, the player did not dispute the presence of a prohibited stimulant, nikethamide (or a metabolite thereof), in his urine sample; stated that he did not know how that substance came to be ingested by him; and speculated that its presence in the sample could be attributable to consumption of various substances by him, namely the drug ecstacy, the pain killer Advil, eye-drops called Opcon-A, a drug called hydroprophine, a supplement called Guronsan, or coramine glucose.

3. In those emails the player also made it clear that he denies the charge against him; that he is not able to explain how the prohibited substance came to be present in his sample; that he says he did not deliberately consume any product

containing nikethamide or any other banned substance; and that he did not intend to enhance his sport performance. His case is that he is innocent of any intentional wrongdoing but cannot explain the positive test result except by deducing or presuming that it is the consequence of the ingestion of substances without intent to use a prohibited substance or enhance his sport performance.

4. The player has been advised to seek independent legal advice but, so far as I am aware, has not done so. He has not appointed a legal representative. He and the ITF have both confirmed in writing that they are content that the case should be determined by the chairman sitting alone, on the basis of written submissions, without an oral hearing. The player's case is as summarised above, set out in his emails.

5. The ITF has provided written submissions in a letter dated 29 September 2008 from its solicitors, Bird & Bird. In that letter the ITF submits that the charge should be upheld, i.e. that the player has committed a doping offence under Article C.1 of the Programme; that a two year period of ineligibility starting on 3 September 2008 should be imposed; that his results from the Davis Cup should be disqualified; and that his results from subsequent events should also be disqualified.

The Facts

6. The player was born on 7 September 1985 and was therefore aged 22 at the time of the alleged doping offence. He is now 23 years old. He is a citizen of Côte d'Ivoire and a student athlete who recently graduated from Fresno State University, California, USA. His ambition is to compete on the professional tennis circuit, in the ATP tour.

7. On 29 March 2008 the player took two ecstasy tablets during a social occasion. Then on 11 April 2008 he played in a Davis Cup tie in Plovdiv, Bulgaria. He

was selected for testing and provided a urine sample. On the doping control form he declared "eye drops", "advil" and "Hydroprophine" as medications used in the preceding seven days.

8. According to the ITF (see its solicitors' letter dated 29 September 2008, paragraph 7.3), the player played in two events subsequent to the Davis Cup tie in Plovdiv on 11 April 2008. Both were in the USA. In one, the player lost in the second round. In the other, he lost in the first round. In neither did he earn any prize money or ranking points. The player has not disputed that this is correct. I do not know the dates on which the player played in those competitions.

9. The player's A sample was transported to the WADA-accredited laboratory in Montreal, Canada. There it was analysed and found to contain nikethamide and metabolite, according to the certificate of analysis dated 30 April 2008. The finding was reported by the laboratory to International Doping Tests and Management ("IDTM"), in Lindigö, Sweden. IDTM carries out drug testing on behalf of the ITF and arranges analysis of urine samples at accredited laboratories. The player has not disputed the finding that nikethamide and metabolite were present in his A sample.

10. Mr Staffan Sahlström of IDTM convened a review board pursuant to Article J.2 of the Programme. By 10 June 2008 the review board had concluded that there was a case to answer. Accordingly, on 10 June Mr Sahlström wrote by courier to the player advising him that the matter would proceed to analysis of the B sample on 25 June, unless the player should admit the commission of a doping offence and waive his right to analysis of the B sample.

11. The player said in an email dated 3 September 2008 to Dr Stuart Miller, the ITF's Head of Science and Technical, that he voluntarily suspended himself from participation in all events after receiving notification of the positive test

result. The ITF has not contradicted that evidence, although it does not accept that the player notified the ITF in writing of his voluntary suspension until the date of that email, 3 September. I infer that the two events in the USA in which the player took part must have been played before the player received Mr Sahlström's letter of 10 June 2008.

12. Mr Sahlström's letter (third paragraph from the end) referred to Article M.8.3 of the Programme whereby any period during which a player voluntarily accepts a provisional suspension in accordance with Article J.4.2 shall be credited against the total period of ineligibility, "provided that to get credit for any period of voluntary provisional suspension the Player must have given written notice at the beginning to [sic] such period to the ITF" (see Article M.8.3(a), which appears to contain a typographical error).

13. Mr Sahlström's letter referred to the possibility that the player may wish to seek "urgent professional advice" but it did not refer to this notification obligation. Nor did it refer to Article J.4.2 whereby "if the Player voluntarily accepts a provisional suspension in writing and thereby foregoes any form of involvement in any Covered Event …. pending determination of the charge against him/her … then in accordance with Article M.8.3(c) [sic] that period of voluntary provisional suspension will be credited against any period of Ineligibility …" (see Article J.4.2(a)). However, there is no Article M.8.3(c) in the current version of the Programme.

14. The player's B sample was then analysed at the same laboratory on 25 June 2008. An independent observer, Monique Provost, was present when the B sample bottle was opened. The B sample was also found to contain nikethamide and metabolite, according to the certificate of analysis dated 27 June 2008. Again, the player has not challenged that finding and therefore must be taken to accept the presence of nikethamide and metabolite in his B sample.

The concentration found was lower than in the case of the A sample, but nothing turns on that point.

The Proceedings

15. By its letter dated 9 July 2008 the ITF formally charged the player with a doping offence under Article C.1 of the Programme. In this letter the ITF emphasised (at paragraph 10) the need to "confirm your voluntary suspension to me in writing as soon as possible" (underlining in original). The player responded by email dated 16 July 2008, admitting the use of nikethamide present in his urine sample. He went on to state that he had taken two pills of ecstasy on 29 March 2008 on a social occasion. He apologised for his conduct. He did not confirm in writing that he had ceased participating in tennis events.

16. In the same email, the player expressed regret for having taken ecstasy, said he was aware of the ITF's anti-doping programme and that he had had no intention to use any prohibited substance and did not intend to enhance his sport performance by doing so. He also mentioned that he had been taking the pain killer Advil each day to reduce pain in a shoulder injury at the time of the Davis Cup tie in Plovdiv, and that he used eye drops called Opcon-A to treat itching eyes. He said he was unaware that any of the substances he had ingested might contain nikethamide.

17. In response to a telephone call from Dr Miller, the player sent a further email on 1 August 2008, saying he had made a list of all the nutrients he could recall consuming while at the Davis Cup tie in Bulgaria. He mentioned only pasta, fish, chicken, red meat, salad, bottles of Coca Cola, Red Bull, beer and an occasional glass of vodka. On 8 August 2008 he sent a further email to Dr Miller, saying he had just heard from the doctor advising the Ivory Coast tennis team that he, the player, had been given a substance called Guronsan. He did not know whether that substance contained nikethamide.

18. On 11 August 2008 Dr Miller emailed the player stating that the player's explanations were not sufficient to identify the source of the nikethamide found present in his sample, and that the player would have the opportunity to review his admission of the use of nikethamide if he did so by 18 August 2008. The player then emailed Dr Miller on 13 August effectively withdrawing his admission that he had used nikethamide and explaining that he had only made that admission because he had consumed two ecstasy pills before the Davis Cup tie on 11 April.

19. On 19 August 2008 Dr Miller wrote to the player inviting him to clarify his position in relation to both procedural and substantive aspects of the case arising from the charge. Dr Miller also reminded the player that if he wished voluntarily to suspend his participation in ITF events pending determination of the charge, the period of such suspension would be counted towards any period of ineligibility, but that such voluntary suspension would be considered only upon receipt of written notification of voluntary suspension.

20. On 1 September 2008 a telephone conversation took place between the player and Dr Miller. I infer that Dr Miller must have impressed upon the player the need for him to respond to the ITF's letter of 19 August and, if the player was voluntarily suspending himself from participation in ITF events pending determination of the charge, to confirm that in writing urgently.

21. The player then sent an email dated 3 September 2008 confirming his position: that he had voluntarily suspended himself from participation since being notified of the positive test result; that he denies the charge; that he wished the charge to be determined by a chairman sitting alone, with written submissions only and without an oral hearing; that he did not purposely consume the nikethamide stimulant; and that he believed it may have come from a product called coramine glucose as in the case of *Torri Edwards*, though he could not

think of any product he had consumed that may contain or consist of coramine glucose.

22. The player also sent a further email dated 27 September 2008 to Dr Miller, saying that he had discovered that the medication he had been taking during the Davis Cup event was "Ibroprophin". He added that he may have mis-spelled the word on his "document", i.e. on the doping control form, which recorded consumption of "Hydroprophine" within the seven days preceding the tie on 11 April 2008. The ITF believes that the substance taken was in fact probably Ibuprofen (see its letter of 29 September 2008, paragraph 5.6).

23. The ITF sought an opinion from Professor Alexander Forrest, a consultant in medical and forensic toxicology and chemistry who is also an assistant deputy coroner and has a legal qualification as well as wide ranging scientific and medical qualifications and experience. Professor Forrest prepared a written report dated 28 and 29 September 2008 in which he considered in turn whether consumption of ecstasy, Advil, Opcon-A, Guronsan or Hydroprophine (or Hydroprofen) could be responsible for the presence of nikethamide.

24. Professor Forrest concluded in his unchallenged report as follows:

(1) nikethamide was widely used in the second half of the 20th century as a stimulant for medical purposes but is now regarded as too risky for general medical use, though it is still given by injection in some parts of the world such as South Asia. It was widely known by its proprietary name "Coramine".

(2) Nikethamide is not normally an ingredient of the drug ecstasy, and even if present in a drug sold as ecstasy, it would most likely have disappeared from the player's body completely by 11 April if he had taken two ecstasy tablets on 29 March, 13 days earlier.

(3) Advil is a trade name for a pain killer containing ibuprofen but none of the variants of Advil on the market is known to contain nikethamide as well as ibuprofen.

(4) Opcon-A contains components used to treat allergies such as hay fever and redness of the eyes, but does not contain nikethamide, and the components of Opcon-A would not be confused with nikethamide using standard analytical techniques such as gas chromatography.

(5) Guronsan is a trade name used for several different products and is used to treat general debility and hangover symptoms. It contains glucose and caffeine among other compounds but no variant is known to contain nikethamide.

(6) Hydroprofen is a proprietary medicine (Vicoprofen) containing ibuprofen and hydrocodone, the latter being a semi-synthetic opiate. Tablets described as "hydroprofen" do not contain nikethamide and a properly equipped and accredited laboratory would not confuse their metabolites with nikethamide.

(7) Accordingly, Professor Forrest concluded that the player's explanations for the presence of nikethamide in his urine were not sustainable.

25. The ITF then made its written submissions in a 14 page letter addressed to the chairman, dated 29 September 2008. The player confirmed by email to the chairman on 2 October that he had "no further informations [sic] to deliver". It was thus agreed between the parties that I should consider the papers and issue my decision in written form without the need for an oral hearing.

The Tribunal's Conclusions, With Reasons

26. Nikethamide is a prohibited substance: see S.6 (Stimulants) in Appendix 2 to the Programme. The player has not disputed the presence of nikethamide and metabolite in his urine sample. By Article C.1 of the Programme the presence in a player's urine sample of a prohibited substance or its metabolites is a doping offence, unless taken in accordance with a therapeutic use exemption. There is no relevant therapeutic use exemption in this case.

27. Therefore, I find that the ITF has proved the commission of a doping offence by the player. It is accepted by the ITF that this is the player's first offence under the Programme or any of its relevant predecessors. By Article M.2 of the Programme, the Tribunal is required to impose of period of ineligibility of two years, unless the player can establish a basis for reduction or elimination of the sanction in accordance with Article M.3 or M.5.

28. I will consider first the question whether the player may be able to establish "No Fault or Negligence" (under Article M.5.1) or "No Significant Fault or Negligence" (under Article M.5.2) in respect of this doping offence, for the purpose of achieving the elimination of, or a reduction of, the two year period of ineligibility. It is a pre-condition in both cases that the player must "establish how the Prohibited Substance entered his/her system". By Article K.3.2, the player must establish this on the balance of probability.

29. The ITF has cited relevant case law showing that this is not just a formal requirement and that the Tribunal must approach this issue quite strictly, since if the manner in which a substance entered an athlete's system is unknown or unclear it is logically difficult to determine whether the athlete has taken precautions in attempting to prevent the substance from entering his system.

30. The ITF relies on the following authorities: *WADA v Stanic & Swiss Olympic Association*, CAS 2006/A/I130, award dated 4 January 2007, para 39, paras 51-

55; *Karatancheva v. ITF*, CAS 2006/A/1032, award dated 3 July 2006, para 117; *ITF v. Karol Beck*, decision of the Anti-Doping Tribunal dated 13 February 2006l; *ITF v Martina Hingis*, decision of the Anti-Doping Tribunal dated 3 January 2008; *International Rugby Board v. Keyter*, CAS 2006/A/1130, award dated 13 October 2006 at paras 6.10-6.12; and *ITF v. Abel*, decision of the Anti-Doping Tribunal dated 29 April 2008.

31. Those authorities establish that the player must show by positive evidence, not merely speculation or deduction from a protestation of innocence, how the substance entered the player's system; and must show that the innocent explanation advanced is more likely than not to be the correct explanation. To discharge that burden the player must show the factual circumstances in which the prohibited substance entered his system.

32. In the present case, the player is plainly unable to discharge the onus on him of showing how nikethamide entered his system. Indeed, he does not assert that he knows how it entered his system. His case is that he does not know how it entered his system, and he has speculated that six possible products or compounds may be responsible: ecstasy, Advil, Opcon-A, Guronsan, "Ibroprophin" (or hydroprophine or hydroprofen or Ibuprofen) and coramine glucose.

33. The player does not contend that any one of those products or compounds is more likely than any other to be the source of the nikethamide found in his urine. Nor does he challenge Professor Forrest's evidence that five of the six contenders are not at all likely to be the source of the nikethamide found in the player's urine sample. As for the sixth, coramine glucose, the player does not claim to have taken this product, unlike the player in the *Torri Edwards* case. It follows that the player does not come near to establishing on the balance of probabilities how the prohibited substance entered his system.

34. It is therefore unnecessary to consider separately whether the player would be able to establish "No Fault or Negligence", or "No Significant Fault or Negligence". The ITF made submissions on these points and contended that the player would not be able to do so in the absence of any evidence from him about precautions taken to avoid ingestion of prohibited substances. There is no such evidence. If I had to decide the issue, I would have found that the player could not establish that he was not at fault, or not significantly at fault, within the meaning of those expressions in the Programme and the WADA Code from which the Programme is derived.

35. Nikethamide is a "Specified Substance", i.e. it appears on the list of specified substances appearing at the end of Appendix 2 to the Programme. The next question is therefore whether the player can establish under Article M.3, again on the balance of probability (see Article K.3.2) that his use of nikethamide "was not intended to enhance sport performance". If he can do so, the Tribunal may impose, instead of a two year period of ineligibility, at a minimum a warning and reprimand and no period of ineligibility, and at a maximum, a period of ineligibility of one year.

36. The ITF submits that a player who cannot establish how a particular substance entered his system will in practice be unlikely to be able to show that he did not intend to enhance his sport performance. The ITF gives examples from case law in which the player was unable to establish lack of intent to enhance sport performance in circumstances where he was unable to show the source of the prohibited substance or how it entered his system: see *NZ Rugby League v. Erihe*, NZSDRT decision dated 4 April 2005; and *N'Sima & WADA v. FIBA*, decision of FIBA Appeal Commission dated 16 January 2006 (upheld by the CAS on the player's appeal: TAS 2006/A/1038, 4 December 2006).

37. The ITF also very properly drew my attention to the decision of the FINA Doping Panel no. 01/04 in *FINA v. J*, in which the panel rejected a plea under Article 10.5 of the WADA Code because the swimmer had not shown how the

prohibited substance entered her system, but accepted a plea under Article 10.3 on the basis that the swimmer did not intend to enhance her sport performance.

38. The decision is brief and, with respect, I find the reasoning unconvincing. The panel appeared to suggest that while the swimmer may have deliberately taken a banned glucocorticosteroid, it accepted that she did not intend to enhance sport performance because of medical opinion that the substance is not performance enhancing. However, the issue is the player's intention, not the objective qualities of the substance ingested.

39. I accept the ITF's argument that it is normally necessary for a player to show the source of a prohibited substance and how it entered his system if he hopes to succeed under Article M.3. There could in theory be a case where (to take a perhaps far-fetched example) a player who had taken cannabis for recreational purposes, without intent to enhance sport performance, was unable to recall whether he had smoked it or eaten it in a cake. But such a case is unlikely in practice.

40. In the present case I conclude that the player cannot show, on the balance of probability, that he did not intend to enhance his sport performance. The unchallenged evidence of Professor Forrest is contrary to all the theories put forward by the player about how nikethamide may have come to be present in his urine sample. All the possible innocent sources of nikethamide suggested by the player are ruled out by Professor Forrest except coramine glucose, which the player does not claim to have taken. Rather, the player deduced it as a possible source of nikethamide from his discovery of the *Torri Edwards* case, in which nikethamide was said to have been contained in tablets labelled as coramine glucose.

41. It follows that I am required to impose a period of ineligibility of two years in this case. The next question is when that period should start. The ITF submits that it should start on 3 September 2008, when the player belatedly stated in

writing: "Yes, I did voluntarily suspend myself from all event participation since I received the letter stating my positive drug text [sic] result". However, I have concluded by a narrow margin that pursuant to Article M.8.3(b) of the Programme, fairness requires the period of ineligibility to start on 16 July 2008. This is for the following reasons.

42. I fully appreciate that the ITF strongly urged the player to take legal advice on more than one occasion and that IDTM in its letter of 10 June 2008 suggested he might want to take urgent professional advice. I also appreciate that the player is of full age and capacity. I appreciate also the repeated efforts of Dr Miller to make contact with the player and to explain to him the urgent need to confirm in writing his voluntary suspension.

43. I also take into account that it is the player's duty to be familiar with the anti-doping rules of the ITF and that, in the charge letter of 9 July, the ITF even underlined the passage inviting the player to confirm his voluntary suspension in writing, if he wished to benefit from crediting a period of voluntary suspension against any period of ineligibility.

44. However, the player did not have the benefit of legal representation. Nor is there any evidence that he received any legal advice. It is not always safe to assume that tennis players have easy access to good legal advice or that they can afford it. Where successful and wealthy professionals are concerned it may be reasonable to assume that they have easy access to good legal advice. That is less likely to be true in the case of young and inexperienced players on the fringes of the professional circuit.

45. The rules concerning notification of provisional suspension are not entirely clear. There are slight defects in the rules and these defects are "other aspects of Doping Control not attributable to the Participant", within Article M.8.3(b). The slight defects are these. Article J.4.2(a) refers to crediting a period of

voluntary suspension "in accordance with Article M.8.3(c)"; but there is no such provision in the current version of the Programme.

46. Article J.4.2(a) also refers to the situation in which a player "voluntarily accepts a provisional suspension in writing". This use of language would not necessarily be completely clear to a young inexperienced player whose first language is not English but whose command of English is such that he might not think to look for a translation into a more familiar language such as French.

47. In Article M.8.3 itself, the same use of language is replicated ("any period during which the Player voluntarily accepts a provisional suspension in accordance with Article J.4.2. ...."). There is then a proviso at the end of the same sentence, which ends with a phrase containing a typographical error ("... the Player must have given written notice at the beginning to such period to the ITF [sic]").

48. When he received Mr Sahlström's letter dated 10 June 2008 notifying him that his A sample had tested positive, the player was aged 22. It is at the beginning of a period of provisional suspension that the player is most likely to lack the benefit of legal advice, as it appears this player did. I accept his evidence, which the ITF does not contradict, that he stopped competing in tennis events when he received that letter.

49. However, I consider that he did not realise or understand fully the meaning of the combined effect of Articles J.4.2 and M.8.3 of the Programme. These provisions do not state explicitly and with the utmost clarity that the written notice which must be given to the ITF is written notice of voluntary provisional suspension, and that this is a separate requirement from the requirement to provide a written response to the charge.

50. To an experienced lawyer, the lack of clarity is only slight and not a serious problem. But in my view this young tennis player who is not a lawyer, who may lack the resources to consult one, and whose first language is not English,

might reasonably have thought that he had done enough to protect his position as best he could by making an admission of using nikethamide (see his email of 16 July), apologising for his conduct and ceasing to participate in tennis events.

51. The phrasing of the player's email of 3 September ("Yes, I did voluntarily suspend myself from all event participation since I received the letter stating my positive drug [test] result") indicates that he did not fully understand the difference between suspending himself from participation, and providing written notification to the ITF of having done so.

52. It is for those reasons that I have concluded that the period of ineligibility should commence on 16 July 2008 and not, as the ITF contends, on 3 September 2008. I would have accepted the ITF's contention if Mr Sahlström's letter had referred to the notice requirement in clear terms or, better still, if it had enclosed a form for the player to sign, date and return to the ITF verifying his decision to impose voluntary suspension on himself; and the player had then failed to sign and return the form.

53. The last issue is that of disqualification of results. This is uncontroversial. By Article L.1 of the Programme, the player's result in the Davis Cup tie in Plovdiv on 11 April 2008 must be disqualified. I understand from the ITF's submissions that the player did not receive any prize money or ranking points from his participation in the Davis Cup tie in April 2008.

54. I also accept the ITF's contention, which the player has not contested, that pursuant to Article M.7 of the Programme, his results in the two tournaments in the USA in which he took part after 11 April 2008 should be disqualified. I do not consider that there is any unusual factor which should lead me to conclude that fairness requires the player's results in those competitions to remain undisturbed. Again, I understand he did not earn any prize money or ranking points from those competitions.

55. By Article O.2 of the Programme this decision may be appealed to the Court of Arbitration for Sport.

The Tribunal's Ruling

56. 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 9 July 2008: namely that a prohibited substance, nikethamide and metabolite thereof, has been found to be present in the urine specimen that the player provided on 11 April 2008 at the Davis Cup tie in Plovdiv, Bulgaria;

(2) orders that the player's results in respect of the Davis Cup must be disqualified; and that the player's individual results in competitions subsequent to the Davis Cup shall be disqualified;

(3) finds that the player has failed to establish on the balance of probabilities that his consumption of a substance or substances leading to the positive test result was not intended to enhance sport performance; and

(4) declares the player ineligible for a period of two years, running from 16 July 2008 until midnight London time on 15 July 2010, 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

13 October 2008