Arbitration CAS 2010/A/2245 Andrey Plotniy v. International Tennis Federation (ITF), award of 11 April 2011

Panel: Judge James Robert Reid QC (United Kingdom); Mr Georg Engelbrecht (Germany); Prof. Ulrich Haas (Germany)

Tennis
Doping (carphedon)
Applicable standard in respect of the definition of "No Significant Fault or Negligence"
Additional sanction

1. **Only where the departure of the athlete from the required conduct under the duty of utmost care was not significant, the sanctioning body may apply *"No Significant Fault or Negligence"* and depart from the standard sanction.**

2. **The Tennis Anti-Doping Programme envisages that any reduced sanction would run concurrently with the original sanction imposed, as any other interpretation of the rules could result in players having a lengthy sentence in effect reduced through breaching the sanction of ineligibility, in circumstances where they breached their sanction early in their period of ineligibility with No Significant Fault or Negligence, and therefore restarted a period of ineligibility now reduced by up to half.**

Mr. Andrey Plotniy (the "Appellant") is a professional tennis player of Russian nationality.

The International Tennis Federation (ITF; the "Respondent") is the international governing body for the sport of tennis, based in London, United Kingdom.

A urine sample of the Appellant tested positive for the Prohibited Substance of Carphedon during the ATP Challenger tennis tournament in Astan, Kazakhstan, on 1 November 2009. On 9 March 2010, the Appellant signed an "Acceptance of Sanction" form in which he admitted the commission of a Doping Offence under Article C.1 of the 2009 Tennis Anti-Doping Programme ("the Programme") of the Respondent.

In the form, the Appellant also acknowledged and accepted the decision of the ITF made pursuant to Article K of the Programme, which included the imposition of a period of ineligibility of fifteen months, beginning on 1 November 2009, and therefore ending on 31 January 2011.

The form stated at point 3.2 that the Appellant acknowledged that he:

> *" may not play, coach or otherwise participate in any capacity in (a) a Covered Event, any other Event or Competition, or any kind of function, event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised, organised or sanctioned by the ITF, the WTA, or any National Association or member of a National Association; or (b) any Event or Competition authorised or organised by any professional league, or any international or national-level Event organisation (Article M.10 of the Programme); and*
>
> *3.3. If I fail to abide by this prohibition, a new period of Ineligibility may be imposed on me (Article M.10.5 of the Programme)".*

A press release dated 18 March 2010 was posted on the ITF website indicating that Mr. Plotniy had been suspended from participation for fifteen months, and the reason therefore.

The Appellant participated in five tennis tournaments in Germany in 2010: Stadtlohn on 19 to 24 May; Dülmen on 1 to 4 July; Hamm on 9 to 11 July 2010; Winnenden on 11 to 15 August and Waging am See on 18 to 22 August.

On 25 August 2010, Mr Niklas Börger, the organiser of the Dülmen event, contacted the Düsseldorf Sports Academies GMBH & Co. KG ("Düsseldorf Sports Academies"), the agent of the Appellant, attaching a letter from the German Tennis Federation ("DTB") of 24 August indicating that the Appellant had been suspended until 1 February 2011. Mr. Börger sought the repayment of EUR 600 prize money that the Appellant had won at the Dülmen tournament.

Again on 25 August 2010, the Appellant's legal representative sent an email to the ITF stating that he was not aware that he was ineligible to participate in tennis competitions at a national level that were not hosted by the ITF or the WTA. The email stated that the Appellant had participated in five tournaments, that he had just been informed that his participation may be regarded as an infringement of Article M of the Programme, and that he deeply regretted this error. The email went on to state that the Appellant would return any prize monies which he had received and certainly accepted the forfeiture of any ranking points in relation to the tournaments, and that he would immediately contact the respective tournament organisers and inform them accordingly and apologise to them.

On 28 August 2010, submissions were requested by the ITF from the Appellant in relation to *"any mitigation that demonstrated that the Appellant bore No Significant Fault or Negligence for his participation in the Events in question"*. These submissions were provided on 9 September 2010 and considered by the ITF. On 20 September 2010, the ITF confirmed that the Appellant had violated the prohibition against participation while ineligible pursuant to Article K of the Programme, that the Appellant could not establish No Significant Fault or Negligence on his own part such as would mitigate the sanction under Article M.10.5, and that the application of the sanction for the offence listed at Article M.10.4 of the Programme was not disproportionate.

As a consequence of the above findings, the ITF Anti-Doping Manager Stuart Miller decided, on 20 September 2010, that the original 15-month period of ineligibility imposed on the Appellant would start again as from the date of his last participation in the events listed above, being 22 August 2010. This prohibition is therefore to end on 21 November 2011.

On 7 October 2010, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (CAS) against the Respondent with respect to the above-referenced decision of 20 September 2010.

On 28 October 2010, the Appellant filed his Appeal Brief.

On 29 November 2010 the Respondent filed its Answer to the Appeal of the Appellant.

A hearing of the case took place on 24 March 2010 at the CAS headquarters in Lausanne, Switzerland. At the close of the hearing, the parties confirmed that they were satisfied as to how the hearing and the proceedings were conducted.

In addition to the Panel, Ms Louise Reilly, Counsel to the CAS, and Mr Roderick Maguire, ad hoc clerk, the following people attended the hearing:
- Mr. Andrei Plotniy, Appellant
- Dr. Mario Krogmann, Counsel for the Appellant
- Dr. Stuart Miller of the Respondent
- Mr. Jonathan Taylor, Solicitor for the Respondent
- Ms. Anna Blakeley, Solicitor for the Respondent

The following witness was heard in person by the Panel: Ms. Martina Petersen, Managing Director of Düsseldorf Sports Academies. Though the Appellant had indicated that four other witnesses were to be heard by conference call, the Appellant ultimately chose not to call these witnesses.

Ms Petersen stated in her evidence that she had known the Appellant for approximately six years, since he had been aged 16. She treated the Appellant as more than just a player, and the fact that this whole incident had occurred was a personal problem for her. She had found the first doping offence itself a tough thing to accept, but it had been accepted, and they had tried to keep going for the period of 15 months of the original ban. When the Appellant came to Germany to practice, he came to her office and said that he wanted to play tournaments. She said of course that could be done, as she only had in mind international tournaments as being the subject of the prohibition that had been imposed and accepted on 8 March 2010.

Ms. Petersen stated that as the Appellant's English was not so good, she had dealt with Mr. Krogmann and the ITF in relation to the initial ban imposed on him. She stated that she did not double check as she was *"one hundred per cent sure"*, without a doubt, that he could play in such tournaments.

The Appellant had subsequently been issued with a Player Identification without objection by the DTB. Only when an objection came in the form of an email from the organiser of the Dülmen Open on 25 August 2010 did Ms Petersen check the Acceptance of Sanction Form that the Appellant had signed and told Dr Krogmann that same day to tell the ITF that the Appellant did something wrong.

Ms. Petersen said that it was disproportionate in the extreme to have a ban imposed in this case on a young player when it was her fault, and he had trusted her.

Ms. Petersen agreed that the Appellant had applied for the Player Identification only on 29 June 2009. She indicated that the Appellant trained in Germany, and though he went home to Russia, he practised in Germany and played national tournaments from Germany. She stated, and it was accepted by the Respondent, that the five tournaments in which the Appellant had participated after 8 March 2010 were local tournaments which garnered only German national ranking points for participants, and not ATP international ranking points.

Ms. Petersen stated that the Appellant was registered automatically with his national federation, the Russian Tennis Federation, which was registered with the ITF. Each player has only one national federation that they are registered with, but can participate in national competitions in other countries. She stated that the DTB had recently altered its rules to require that players had a Player Identification which could be applied for through the internet, without payment. There was now a requirement in that country that each player had to have a Player Identification to take part in tournaments. This was the first time that the Appellant had registered in Germany with the DTB. Prior to his ban in March 2010, the Appellant had only played international tournaments and had used his ITF player identification. By playing in national tournaments in Germany, the Appellant would be able to stay in practice, and have match play. Ms. Petersen was not sure how the Appellant was able to participate in the first tournament in Stadlohn in May 2010 without a Player Identification, but he did have a wild card entry into that tournament, and had been invited to play. She did not know if it was necessary for him to have such an identification.

Ms. Petersen stated that she only knew of the prohibition after the sanction was imposed by the ITF in September 2010.

The Appellant stated that he had known Ms. Petersen for over six years, and she had helped him in all aspects of his professional life for that time. After the initial imposition of sanction by the ITF in March 2010, the Appellant stated that he did not practice for an extended period of time. He then approached Ms. Petersen to ask if it was possible to play some tournaments in Germany, and she said that it was possible. Subsequently, he received an invitation to play the tournament in Stadtlohn, and she told him he could play. He had trusted Ms. Petersen because she had never made a mistake. The issuance of the Player Identification in June 2010 had buttressed the Appellant's belief that Ms. Petersen was correct.

The Appellant stated that he had taken advice prior to signing the initial Acceptance of Sanction Form. Ms Petersen had involved Dr Krogmann in relation to the initial offence, and the Appellant had not talked to Dr Krogmann himself in relation to that.

The Appellant had become aware in or around the beginning of 2010 that he was on a list of disqualified players maintained by the Russian tennis federation. He was unable to be specific due to the time lapse. He had accessed the website to see the status of his friends in relation to the Russian national championship, and had seen that he was listed as one of two players that were prohibited from entering the championship which was to be played in October 2010. He said that he had told Ms. Petersen that he could not play in Russia when he approached her to ask if he could play in Germany. He did not read the form that he had signed, nor look at the rules. The Appellant was of the view that as he was a player, if he had an issue with rules, he asked Ms Petersen. He had not

specifically asked her to look at the rules, but trusted her advice. He had asked her in the office, or in a restaurant, whether he was able to play in tournaments in Germany. She had taken five minutes to tell him that he could.

LAW

Jurisdiction of the CAS

1. Article R47 of the Code of Sports-related Arbitration ("the Code") provides as follows:

   "An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

2. Article O.2.1 of the 2009 Programme provide as follows:

   "A decision that an Anti-Doping Rule Violation has been committed, a decision imposing (or not imposing) Consequences for an anti-doping rule violation, a decision that no anti-doping rule violation has been committed, a decision that a charge cannot go forward for procedural reasons (including, for example, because too much time has passed), a decision not to record an alleged Filing Failure or Missed Test, a decision under Article M.10.4 in relation to participation while Ineligible, a decision that the ITF lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, a decision by the ITF not to pursue an Adverse Analytical Finding or an Atypical Finding as an anti-doping rule violation, and a decision by the ITF not to bring a charge after an investigation under Article I may each be appealed by any of the following parties exclusively to CAS:

   (a) the Participant which is the subject of the decision being appealed;

   (b) the ITF;

   (c) the National Anti-Doping Organisation(s) of the Participant's country of residence or of countries where the Participant is a national or licence-holder;

   (d) the International Olympic Committee, where the decision may have an effect in relation to the Olympic Games, including decisions affecting eligibility for the Olympic Games;

   (e) the International Paralympic Committee, where the decision may have an effect in relation to the Paralympic Games, including decisions affecting eligibility for the Paralympic Games; and/or

   (f) WADA".

   The Appellant lodged his Appeal with CAS, and the Respondent acknowledged in its Answer that the CAS has jurisdiction. Further, the Respondent signed the Order of Procedure dated 1 February 2011 which also confirmed that the CAS has jurisdiction. It is accordingly undisputed that the CAS has jurisdiction over the Appellant's appeal.

Applicable Law

3. Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body whichhas issued the challenged decision is domiciled or according to the rules of law, theapplication of which the Panel deems appropriate. In the latter case, the Panel shallgive reasons for its decision".

4. In their submissions, the parties make reference to and rely on provisions of the 2009 and 2010 Programmes.

5. Article M.10.1 of the 2010 Programme states as follows:

"Prohibition Against Participation During Ineligibility:

No Participant who has been declared Ineligible may, during the period of Ineligibilty, play, coach or otherwise participate in any capacity in (a) a Covered Event, any other Event or Competition, or any other kind of function, event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised, organised or sanctioned by the ITF, the ATP, the WTA, or any National Association or member of a National Association; or (b) any Event or Competition authorised or organised by any professional league, or any international or national-level Event or Competition organisation".

6. Article M.10.5 of the 2010 Programme states as follows:

"If a Participant who has been declared Ineligible participates in any capacity, during such period of Ineligibility, in a Covered Event or any other Event or Competition, or other function, event or activity (other than authorised anti-doping education or rehabilitation programs) of the type referred to at Article M.10.1(a) or Article M.10.1(b), the period of Ineligibility that was originally imposed shall start over again as of the date of such participation. The new period of Ineligibility may be reduced under Article M.5.2 if the Player establishes that he/she bears No Significant Fault or Negligence for such participation. The determination of whether a Player has violated the prohibition against participation while Ineligible, and whether a reduction under Article M.5.2 is appropriate, shall be made by the ITF, and such decision shall be subject to appeal in accordance with Article O. In any case, any results obtained by the Participant in such Event(s), with all resulting consequences, including forfeiture of any medals, titles, computer ranking points and Prize Money obtained in such Event(s), shall be automatically Disqualified".

7. Article M.5.2 of the 2010 Programme provides that

"If a participant establishes in an individual case that he/she bears No Significant Fault or Negligence in respect of the anti-doping rule violation charged, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than eight (8) years. When the anti-doping rule violation is an Article C.1 offence (presence of Prohibited Substance or any of its Makers or Metabolites), the Player must also establish how the Prohibited Substance entered his/her system in order to have the period of Ineligibility reduced".

8. *"No Significant Fault or Negligence"* is defined in Appendix 1 to the 2010 Programme as *"The Participant establishing that his/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 relationship to the anti-doping rule violation in issue"*.

9. *"No Fault or Negligence"* is in turn defined in Appendix 1 to the 2010 Programme as *"The Participant establishing that he/she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he/she had Used or been administered the Prohibited Substance or Prohibited Method"*.

8. Article M.10.1 of the 2009 Programme states as follows:

"Prohibition Against Participation During Ineligibility:

No Participant who has been declared Ineligible may, during the period of Ineligibilty, play, coach or otherwise participate in any capacity in (a) a Covered Event, any other Event or Competition, or any other kind of function, event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised, organised or sanctioned by the ITF, the ATP, the WTA, or any National Association or member of a National Association; or (b) any Event or Competition authorised or organised by any professional league, or any international or national-level Event organisation".

9. Article M.10.5 of the 2009 Programme is identical to the provision in the 2010 Programme. Article M.5.2 of the 2009 Programme is identical to the provision in the 2010 Programme, except that the phrase *"Doping Offence"* is replaced with the phrase *"anti-doping rule violation"*. The definitions of these two phrases are the same at Article C respectively in the two Programmes, except for variations in relation to intention in respect of attempted use in the 2010 Programme, which is not relevant in this case. The definition of *"No significant fault or Negligence"* in the 2009 Programme is identical to the 2010 Programme, and the definition of *"No fault or Negligence"* in the 2009 Programme is identical to the 2010 definition, except that the term *"Doping Offence"* is used instead of *"anti-doping rule violation"*.

10. While the Appellant submitted that the applicable Programme for the purpose of the case was the 2009 Programme under which the Appellant was originally sanctioned in March 2010, the Respondent submitted that the Programme applicable was the revised Programme that came into force on 1 January 2010. The Panel finds that the relevant provisions of the two versions of the Programme are not substantially different. The phraseology of Article M.5 is the same, bar the fact that the phrase *"Doping Offence"* is replaced in the 2010 Programme with the phrase *"anti-doping rule violation"*. Similarly, the provisions of Article M.10 in the two versions of the Programme are identical, bar that in the later Programme, there is a further prohibition on players who have been deemed ineligible participating in any capacity in events or competitions organised by competition organisations under Article M.10.1(b). As there was agreement between the parties that there was a breach of the prohibition under Article M.10.1(a), and that the only matter for consideration was whether the Panel should reduce the sanction for such participation under Article M.10.5 and M.5.2, the Panel does not consider that it is necessary to determine which version of the Programme is applicable. However, as the Acceptance of Sanction Form that the Appellant signed used the terms of the 2009 Programme, and as his

original offence was an offence under that Programme, the Panel finds that it is the 2009 Programme that is applicable.

The Panel's Findings on the Merits

11. The Panel finds that the five events in which the Appellant played were all, at the very least, *"any other kind of function, event or activity (…) authorised, organised or sanctioned (…) by a National Association or member of a National Association"* under Article M.10.1 of the Programme, given that it was agreed by the parties that national ranking points of the DTB were awarded in respect of these events.

12. The Panel considers that in the particular circumstances of this case, it cannot be said that the result of the application of the provisions of the Programme is disproportionate. The Appellant made, on his own admission, no enquiry into the nature and extent of his sanction other than asking his own representative. At the time he made that enquiry, he knew himself to be ineligible to play in international tournaments, and in the national Russian Championship.

13. The Appellant had consented in writing, with legal and agent representation, to a sanction in respect of his original doping offence. The Acceptance of Sanction Form that he signed clearly set out the parameters of his ineligibility. Despite this, he entirely abdicated his responsibility to inform himself of the provisions of the Programme, when the ability to understand the nature and extent of those provisions was reasonably within his control. He abdicated this fundamental responsibility in respect of the nature of his sanction to his own agent, not because he considered that she had a technical or scientific expertise that he did not, but rather because he considered that he had no responsibility as a player to inform himself of this.

14. The Panel accepts the submission of the Respondent that the applicable standard in respect of the definition of *"No significant fault or Negligence"*, as laid down in the Programme, is illuminated by CAS 2005/C/976 & 986, at paragraph 75, where it states that only where *"the departure of the athlete from the required conduct under the duty of utmost care was not significant, the sanctioning body may apply art. 10.5.2 of the WADC and depart from the standard sanction"*. The Panel does not consider that the actions of the Appellant had No significant fault or Negligence such as to bring him within the provisions of the exception. The latter would only be the case had the Appellant taken at least all clear and obvious precautions which any human being would have taken in the same set of circumstances (cf. CAS 2005/A/847, paragraph 7.3.6). Furthermore, the Panel cannot find that there is either any implied term within the Programme, or any over-riding aspect of the principle of proportionality, that requires the provisions of the Programme to be altered, amended or not to be applied in the specific circumstances of this case.

15. If the Panel had considered that the sanction applicable should be reduced because the Appellant had established No significant fault or Negligence within the meaning of the Programme, the Panel considers that the Programme envisages that any reduced sanction would run concurrently with the original sanction imposed, as any other interpretation of the Rules in Article M.10.5 and M.5.2 could result in a player having a lengthy sentence in effect reduced

through breaching the sanction of ineligibility, in circumstances where they breached their sanction early in their period of ineligibility with No significant fault or Negligence, and therefore restarted a period of ineligibility now reduced by up to half.

Conclusion

16. The Panel accordingly upholds the Respondent's decision dated 20 September 2010 and dismisses the Appeal of the Appellant in its entirety.

17. The present award is rendered by majority, pursuant to Article R59 of the Code.

The Court of Arbitration for Sport rules:

1. The appeal filed on 7 October 2010 by Mr Andrey Plotniy is dismissed.

2. The decision rendered by the ITF Anti-Doping Manager on 20 September 2010 is confirmed.

(…)

5. All other prayers for relief are rejected.