



Arbitration CAS 2008/A/1488 P. v. International Tennis Federation (ITF), award of 22 August 2008

Panel: Mr Hans Nater (Switzerland), President; Prof. Richard H. McLaren (Canada); Mr Jose J. Pinto (Spain)

Tennis

Doping (hydrochlorothiazide; amiloride)

Duty of care of the athlete

Significant fault or negligence

Application of the transitional provisions of the 2009 WADA Code

1. In consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances. If the doctor is not a specialist in sports medicine and not aware of anti-doping regulations, it is of even greater importance that the athlete be significantly more diligent in his/her efforts to ensure that the medication being administered does not conflict with the Code.
2. While it is understandable for an athlete to trust his/her medical professional, reliance on others and on one's own ignorance as to the nature of the medication being prescribed does not satisfy the duty of care as set out in the definitions that must be exhibited to benefit from finding No Significant Fault or Negligence. It is of little relevance to the determination of fault that the product was prescribed with "professional diligence" and "with a clear therapeutic intention". To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules.
3. A player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent the very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.
4. In cases where a final decision finding an anti-doping violation has been rendered prior to 1st January 2009, but the athlete is still serving his/her period of ineligibility, the athlete may apply to the relevant body for reconsideration of the sanction in light of the 2009 WADA Code.

P. (“the player”) is a 23 year old Spanish professional tennis player.

The International Tennis Federation (ITF) is the international governing body for the sport of tennis worldwide.

On 19 June 2007 P. was requested to provide a urine sample at the Wimbledon Lawn Tennis Championships Qualifying Tournament in Roehampton, Great Britain. The specimen collected was split into an A Sample and a B Sample. The A Sample was analyzed at the WADA-accredited Laboratory INRS in Montreal, Canada.

On 12 September 2007, the player was notified by the ITF’s Anti-Doping Programme Administrator, Staffan Sahlström, that the results of her A Sample testing had returned an Adverse Analytical Finding (“AAF”) for Hydrocholorthiazide and Amiloride. These substances are Prohibited Substances under the Tennis Anti-Doping Programme (“TADP”) as category “S5. Diuretics and other masking agents”.

By letter dated 26 September 2007, the player accepted that the A sample had returned an AAF and waived her right to have her B sample tested.

In the same letter, the player advanced the explanation that she ingested a medication called Ameride for therapeutic purposes. The medication was prescribed in June 2007 by her physician, Dr. Neus Tomas Benedicto, a specialist in Nutrition and Food Science, who had been treating P. for the past year for “liquid retention and overweight”. On the doping control form completed at the time of the collection, however, P. did not declare that she was taking the medication Ameride.

On 1 October 2007 the ITF filed a formal charge against the player for the commission of a doping violation under article C.1 of the TADP.

On 11 October 2007, in light of the formal charge, the player voluntarily withdrew from competition and confessed to having committed a doping offence, and explained that “*pre menstrual symptoms, HTA and oedemas*” were the medical reasons which required her to ingest the medicine Ameride. The player requested that the case be heard on the basis of written submissions only.

On 25 January 2008 the ITF’s Independent Anti-Doping Tribunal (“the Tribunal”) confirmed the doping offence, declared that P. would be subject to a two-year period of ineligibility commencing 11 October 2007, ordered that P.’s individual results be disqualified in respect of the Wimbledon Qualifiers and subsequent competitions up until the date the player voluntarily withdrew from competition on 11 October 2007, and held that all prize money and ranking points obtained by P. by reason of her participation in these competitions be forfeited.

By e-mail dated 29 January 2008, counsel for the player informed the Tribunal of a factual error included in the player’s written submissions which incorrectly attributed medical qualifications to the player which, in fact, are those of her doctor and not those of the athlete.

On 31 January 2008 the Tribunal declined to alter their decision and held that even with the factual error being rectified, the player could not demonstrate that she bore No significant Fault or Negligence and stated that although the error was “*regrettable...it is not critical to the decision*”.

On 15 February 2008 the player filed her Statement of Appeal with the CAS against the decision reached by the Tribunal on 25 January 2008. The Appellant requested that the CAS Panel decide that:

“the mandatory period of 2 years’ ineligibility is reduced according to what is stated in clauses M.5.1, and alternatively as a subsidiary, in accordance with clauses M.5.2 of the Tennis Anti-Doping Programme”.

On 28 February 2008 the Appellant filed her Appeal Brief and requested from the CAS that the period of ineligibility be reduced.

On 1 April 2008 the ITF filed its Answer to player’s Appeal Brief.

On 20 June 2008 a hearing was held at the CAS headquarters in Lausanne, Switzerland. At the outset of the hearing, the parties declared that they had no objection with regard to the composition of the Panel.

LAW

Jurisdiction

1. The jurisdiction of the CAS is derived from article O.2 of the 2007 TADP which states:

“A decision that a Doping Offence has been committed, a decision imposing Consequences for a Doping Offence, a decision that no Doping Offence has been committed, a decision by the Review Board that there is no case to answer in a particular matter, and/or a decision that the ITF lacks jurisdiction to rule on an alleged Doping Offence or its Consequences, may be appealed by any other following parties exclusively to the Court of Arbitration for Sport (“CAS”), in accordance with CAS’s rules relating to Appeal Arbitration Hearings:

- (a) *the Participant who is the subject of the decision being appealed;*
- (b) *the ITF;*

[...]”.

2. Furthermore, Article R47 of the Code of Sports-related Arbitration (the “CAS Code”) states,
“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”.

3. In spite of Article O.5.1 of the TADP, both parties have agreed at the outset of the hearing to have a hearing de novo pursuant to Article R57 of the CAS Code which provides that:
“The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance”.
4. The jurisdiction of the CAS has been recognized by the parties through their execution of the Order of Procedure.

Applicable Law

5. Article R58 of the CAS Code provides the following:
“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 which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
6. As the specimen of the Appellant which testing resulted in an Adverse Analytical Finding was collected on 19 June 2007, the regulation applicable to the present case is the ITF’s Tennis Anti-Doping Programme 2007.

Discussion

7. The question the Panel must determine in this appeal is whether P., in the circumstances of this case, demonstrated that she bore No Significant Fault or Negligence, for her admitted doping offence. Therefore establishing the possibility that this Panel might exercise its discretion to reduce the period of ineligibility under TADP Article M.5.2.
8. The TADP and the WADC provide that to benefit from finding of No Significant Fault, the athlete must first meet the condition precedent of establishing how the prohibited substance entered into his or her system. The Panel notes that the ITF accepted P.’s explanation and confirms the first instance tribunal’s conclusion. The Appellant has therefore met this first threshold requirement.
9. In order to determine whether a period of ineligibility can be reduced under TADP Article M.5.2, the Panel must assess whether the athlete’s fault or negligence was not significant when viewed in the totality of the circumstances of the case.
10. This Panel finds that neither in P.’s written submissions, nor at the hearing before the Panel, did she provide any evidence that she had advised Dr. Neus Tomas of her very strict responsibilities as an athlete and the onerous provisions under the TADP and the Code to which she was subject. Her own testimony during the hearing revealed that she merely asked

the doctor if any of the ingredients in the medication would cause her performance to improve. The player did not bring the List of Prohibited Substances with her to the doctor, and she did not indicate that she was subject to random drug testing for a variety of different substances.

11. Her inquiry into whether the drug would result in her improved performance reveals that P. was sufficiently cognizant of her obligations under the TADP and the Code. Given this awareness, P. should have been able to understand that questioning whether the substance will improve one's performance is not synonymous to enquiring whether the drug contains any substances that are prohibited under the Code. Article B.4 of TADP provides that it is the sole responsibility of each player to ensure that anything that he or she ingests or uses as medical treatment does not infringe on the provisions of the Code.
12. In consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances.
13. The Respondent cited a number of cases in support of its position that P. did not demonstrate that she bore no significant fault or negligence in this case. The ITF specifically referred to cases where the athlete was able to establish how the substance entered into his or her system, yet was unable to show that he or she bore no significant fault or negligence in its ingestion in support of such a determination. In CAS OG 04/003, the CAS confirmed that it was not reasonable to accept and ingest a product without having properly examined and investigated the product for prohibited substances; and in *ITF v. Neilsen*, the Anti-Doping Tribunal dismissed the player's plea of No Significant Fault or Negligence, stating that the player "*did not take any steps at all to check whether his medication infringed the anti-doping rules*". Similarly in this circumstance the Panel finds that P. has not demonstrated that she took any responsibility in verifying that her prescribed medication did not violate the anti-doping regulations of the TADP or the Code.
14. The facts accepted by the Tribunal demonstrate that P. had been a patient of Dr. Neus Tomas for one year, a specialist in nutrition and food science. However, there is no evidence to suggest that the doctor was familiar with the provisions of the TADP or had knowledge of the WADC List of Prohibited Substances. The player testified during the hearing that she asked her doctor who prescribed Ameride, if there were any ingredients in the drug that would improve her performance. She testified that the doctor answered no, that if anything it would have the opposite effect. She further stated that she always sent her mother to pick up her prescriptions at the pharmacy and she always instructed her mother to ask if there were any ingredients in the medication that would cause her to test positive.
15. In light of the fact that Dr. Neus Tomas was not a specialist in sports medicine and not aware of anti-doping regulations, it was of even greater importance that P. be significantly more diligent in her efforts to ensure that the medication being administered did not conflict with

the Code. For any professional athlete, the most rudimentary of actions would have been to query the doctor prescribing the medication as to its composition and whether the substances complied with the Code.

16. P. relies on the argument that her doping violation was unintentional. The player's Appeal Brief directs the Panel to consider the violation's unintentional nature and P.'s lack of awareness as to the constituents of the administered medication, which she argues, reflects her intention to treat her physical ailments, and not to enhance her performance. The Panel is unable to accept these assertions in these circumstances as the basis that P. bore No Significant Fault or Negligence. First, while it is understandable for an athlete to trust his or her medical professional, reliance on others and on one's own ignorance as to the nature of the medication being prescribed does not satisfy the duty of care as set out in the definitions that must be exhibited to benefit from finding No Significant Fault or Negligence according to TADP Article M.5.2.
17. Secondly, it is of little relevance to the determination of fault that the product was prescribed with "professional diligence" and "with a clear therapeutic intention" as submitted by the Appellant. P.'s fault cannot be considered insignificant given that she did not conduct a thorough investigation into the composition of the drug and did not take even the most elementary of steps and advise her medical professional that she cannot ingest any Prohibited Substances. To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules.
18. As such a result is undesirable, the Panel must concur with the Tribunal's finding that "*the player clearly failed to comply with the duty of utmost caution, or to exercise any reasonable level of care to comply with the anti-doping programme*". In its Decision, the Tribunal listed the following reasons as the basis for declining to reduce the mandatory period of ineligibility:
"She did not give any consideration to whether the prescription medicine might contain a prohibited substance, by checking the constituents of Ameride against the prohibited list, which is available on the internet. She did not make any enquiry of her medical practitioner, nor ask her to check the position by reference to the ITF wallet card. She could not reasonably expect her medical practitioner who is not a specialist in sports medicine, to warn her that Ameride contained prohibited substances. She failed to take advantage of the telephone advice line offered by the ITF. She did not make any enquiry of her national federation or her national anti-doping organisation".
19. In the view of the Panel, based on the Tribunal's above reasons and the Panel's own findings, the particular circumstances of this case do not amount to exceptional circumstances within which P.'s fault can be described as insignificant. The Player had at her disposal several different methods to ensure that the prescribed medication did not infringe on the anti-doping rules, yet she failed to any steps whatsoever. Furthermore, in addition to failing to take any precautions, the Panel further relies on the player's failure to declare that she was taking this medication on her doping control form as support for the finding that P. fault cannot be described as insignificant. The lack of investigation and the non disclosure of the medication on the doping control form were acts that the player could have avoided and are not actions

that can illustrate No Significant Fault or Negligence. Taking into account the circumstances of the case and, in particular the Appellant's testimony, the Panel takes the view that the application of the sanctions provided for in the TADP is not disproportionate.

20. Indeed as was evidenced during the hearing, the player appeared truly ignorant of all the readily available resources at her disposal. While this is truly regrettable, the Panel finds that a player's ignorance or naivety cannot be the basis upon which he or she is allowed to circumvent these very stringent and onerous doping provisions. There must be some clear and definitive standard of compliance to which all athletes are held accountable.
21. It is therefore the conclusion of this Panel that the decision of the ITF's Independent Anti-Doping Tribunal's was in the circumstances, the correct one, and is upheld by this Panel. The Panel accepts the Tribunal's determination that there existed no circumstances in this case that would warrant the elimination or the reduction of the presumptive two year period of ineligibility and upholds the Tribunal's decision and reasons in awarding the sanction.
22. The Panel wishes to take note at this time of the new 2009 WADA Code provision under 10.4 provides the following.

"10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility. To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance.

The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility".
23. This provision along with the 2009 WADA Code is to take effect in January of 2009. While the Panel is keenly aware that the player is currently subject to the current TADP Rules, it nevertheless takes this opportunity to recommend that in January of 2009, when the new provisions are in effect, the player make an application under the WADA Code transition provision Article 25.3 to the relevant body of the ITF for reconsideration of the sanction. This Panel recommends that the ITF look favourably upon a reconsideration of the length of the sanction and at least seriously consider the possibility of an early reinstatement for the Player if a request is received.

The Court of Arbitration for Sport rules:

1. The appeal filed on 20 July 2008 by P. against the decision issued on 25 January 2008 by the ITF's Independent Anti-Doping Tribunal is denied.
2. The decision issued on 25 January 2008 by the ITF's Independent Anti-Doping Tribunal is upheld.

(...)