Arbitration CAS 99/A/223 International Tennis Federation (ITF) / K., award of 31 August 1999

Panel: Mr. Hans Nater (Switzerland), President; Prof. Richard McLaren (Canada); Mr. Michael Beloff (England)

Tennis
Doping (nandrolone)
Collection procedure
Exceptional circumstances

1. **Pursuant to the ITF Anti-doping Programme, any deviation or deviations from the anti-doping control procedures, including, but not limited to, sample collection, chain-of-custody or laboratory analysis, do not invalidate any finding, procedure or positive test result, unless that deviation or deviations raises a material doubt as to the reliability of the finding, procedure, decision or positive test result.**

2. **It is for the ITF to establish with appropriately convincing evidence the existence of a doping offence, including compliance with anti-doping control procedures. A player who seeks to rely upon 'Exceptional Circumstances' to mitigate penalty must do so on the balance of probabilities. Exceptional circumstances are defined to mean that circumstances occurred in which the player had no knowledge that he had taken or been administered the prohibited substance found in his body.**

Following his quarter final tennis match at the Wimbledon Grand Slam Tennis Tournament on 1 July 1998, K. provided a urine sample.

Based on the analysis of the "A" and "B" samples at the IOC accredited laboratory in Lausanne and the review procedures under the Tennis Anti-doping Programme ("the Programme") it was established that the Class 1 listed Prohibited Substance Nandrolone was found to be present in the body of K. resulting in a violation of the Programme.

K. appealed against this finding. In accordance with the Programme, an independent Appeals Committee ("AC") was appointed. At the hearing of 21 December 1998, both parties were represented by counsel and solicitors. The AC held in its Decision of 22 December 1998 that a Prohibited Substance, namely metabolites 19-norandrosterone and 19-noretiocholanolone of Nandrolone (an anabolic agent) were present in the sample. This resulted in an infraction of section (C)1(a) of the Programme. The AC decided that K. has to forfeit all computer ranking points earned

at the Wimbledon Tournament 1998 and to return to the ITF all prize money earned at that tournament.

On 8 January 1999, the ITF filed an appeal against the decision of the AC to the Court of Arbitration for Sport ("CAS"). The ITF requested (i) that the penalties prescribed by the Programme for a first offence involving a Class 1 Prohibited Substance should apply; (ii) that there are no "Exceptional Circumstances"; (iii) that, in the alternative, appropriate penalties should apply.

On 13 January 1999, K. issued an originating summons of the High Court of Justice, London, seeking a declaration that the ITF was not entitled to appeal to the CAS and an injunction restraining it from doing so.

On 29 January 1999, Mr. Justice Lightman made a declaration to that effect. He did not grant an injunction. Subsequently, the ITF lodged an appeal to the Court of Appeals which was allowed on 25 March 1999; leave to appeal to the House of Lords was refused. As a consequence, the ITF was held entitled to appeal against the decision of the AC to the CAS.

On 14 April 1999, K. filed his answer to the CAS and requested (i) that the Decision of the AC was in law final and binding; (ii) that the Panel of the CAS should dismiss the appeal brought by the ITF on a review of the documents alone or after a limited hearing; (iii) that, if the Panel determines to conduct a re-hearing, then he is entitled to contend that there was raised a material doubt as to the procedure, so that it should be determined that there was no violation of the Anti-doping-Programme and (iv) that the ITF is not entitled to call fresh evidence or to seek to cross-examine him.

The hearing was held in London on 29 July 1999. At the beginning of the hearing, the parties and arbitrators explicitly confirmed the nomination of the Panel.

LAW

1. There is no doubt in our mind that the Panel both can and should consider the matter *de novo* both as to fact and law.

2. First, CAS Rule 57 gives the Panel "*full power to review the facts and the law*". Subject only to a point being properly and fairly signalled in advance so as to enable the other party to be able to deal with it, we see no reason why the full power should be circumscribed in any way.

3. Secondly, the consistent jurisprudence of CAS is to the same effect (see CAS 96/149 C. v/FINA in *Digest of CAS Awards 1986-1998*, edited by M. Reeb, Stämpfli Editions, Berne 1998, p. 254; CAS 98/211 B. v/FINA, para. 2.2; CAS 98/213 UCI v. C., para. III, A3 further

shows that the power to review includes the power to reopen issues decided favourably to the Appellant by the body appealed from).

4. Thirdly, the (English) Court of Appeal inferentially anticipated a similar approach in this case (CA unreported 25/3/99 Clarke LJ at 12E-F).

5. The parties agreed that the Panel shall decide the dispute pursuant to the applicable regulations and pursuant to English law (Order of Procedure of 28 May 1999, para. 7).

6. The relevant rules are in the ITF Anti-Doping Programme 1998 ("the Programme"):

Doping Offences

Section (C)1 provides:

"*Doping is forbidden. Under this Programme the following shall be regarded as doping offences:*

(a) *A Prohibited Substance is found to be present within a player's body*".

Section (C)2 adds:

"*A player is absolutely responsible for any Prohibited Substance found to be present within his body. Accordingly, it is not necessary that intent or fault on the player's part be shown in order for a doping offence to be established under paragraph 1 of this Section (C); nor is the player's lack of intent or lack of fault a defence to a doping offence*".

This is reinforced by D(a) which states:

"*Many of the substances in the list set out in Schedule 1 of this Programme may appear either alone or as part of a mixture within medications which may be available with or without a physician's prescription. Players are reminded that they are responsible for any Prohibited Substances detected in samples given by them. Players must ensure that Prohibited Substances do not enter their bodies ...*".

Section (D)1 states that the expression

"*Prohibited Substances*" shall mean "*the substances and methods set out in Schedule 1*" ... and shall include ... "*Related Substances" ... "those substances that are structurally, chemically, pharmacologically or physiologically similar to the substances listed within each Class of Substances*".

Section (D)2 adds:

"*In this Programme, the expression 'Prohibited Substance' and 'Related Substance' shall include a metabolite characteristic of a Prohibited Substance and/or a Related Substance*".

In Schedule 1, Nandrolone, an anabolic agent, is categorised within a "*Class I Anabolic Agents and Related Substances*".

Testing

Section (G) provides for in-competition testing.

Section (I) entitled "Collection procedure" states:

"The testing for Prohibited Substances and Doping Methods shall be through analysis of a player's urine specimen. Each player shall provide, under direct observation, a specimen. The specimen shall be divided into

"A" and "B" samples. The "A" and "B" samples shall be sealed in collection bottles approved by the APA. All bottles will be identified by a control identification number, not by the player's name. The player shall be afforded the opportunity to witness the entire collection procedure. The samples shall be forwarded to an IOC accredited laboratory for analysis (See Schedule 3 of this Programme for procedural guidelines on sample collection)".

Section (J) deals with test results.

Procedural Deviations

Section (U) deals with Deviations from Anti-Doping Control Procedures as follows:

"(U) Deviations in Anti-Doping Control Procedures

Any deviation or deviations from the anti-doping control procedures including, but not limited to sample collection, chain-of-custody or laboratory analysis, do not invalidate any finding, procedure, decision or positive test result, unless that deviation or deviations raises a material doubt as to the reliability of the finding, procedure, decision or positive test result."

Schedule 3 "Procedural Guidelines for Sample Collection" states as its introduction:

"These Guidelines shall be followed as far as is reasonably practicable. However, in accordance with Section (U) of the Tennis Anti-Doping Programme, a deviation or deviations from these Guidelines shall not invalidate the finding of a doping offence, unless it was such as to raise a material doubt as to the finding".

The Procedural Guidelines include:

"5. Each player shall be requested to provide a minimum of 70ml of urine. However, any shortfall in the amount of urine provided shall not invalidate the test, provided that there is sufficient urine for the test, as determined by the APA [Anti-Doping Programme Administrator] or his designee, to be adequately performed.

6. When a player is unable to provide the required amount of urine, his sample should be sealed and kept secure in the collection suite. Once the player is ready to provide additional urine to that previously provided he may return to the relevant area in the collection suite and provide a further sample under the direct observation of the APA or his designee".

Sanctions

Section (M)1(a) states the sanction for a player who is (on a first violation) found to test positive for any Class I Substance, as follows:

"Class I Prohibited Substances and Doping Methods

A player who is found through the procedures set forth in this Programme to test positive for any Class 1 substance or Method shall be suspended from participation in any and all ITF sanctioned or recognised tournaments or events for a one (1) year period.

..."

Section (N) deals with the implementation of such a suspension and forfeiture of computer ranking points and prize money as follows:

"(N) Suspension and Forfeitures

1. Suspensions shall commence on the day following the deadline for receipt of notification that the player will appeal or the day after an admission by a player that he is in violation of the Programme, or, in the case of an appeal to the Appeals Committee, shall commence on the day after the appeal is unsuccessfully concluded.

2. If a player is found through the procedures set forth in the programme to test positive for a prohibited substance or doping method then such player shall forfeit all computer ranking points earned at the tournament or event where the player provided the positive sample and forfeit and return to the ITF all prize money earned at the tournament or event where the player provided the positive sample.

3. If a player is found through the procedures set forth in this Programme to test positive for a Prohibited Substance or Doping Method then such player shall forfeit all computer ranking points and prize money earned at all sanctioned and recognised events subsequent to the tournament or event at which the player provided the positive sample until the commencement of any suspension imposed by the ITF".

Appeals

In the event of a finding that a Prohibited Substance is found to be present within a player's body, sections (E)4 and (L) provide for an appeal to the AC of the ITF.

"E4. Appeals Committee

(a) The Appeals Committee shall hear on a confidential basis all appeals of violations of the Programme. The Appeals Committee shall be appointed by the ITF Medical Administrator or his designee and shall be composed of three (3) experts with medical, legal and technical knowledge of anti-doping procedures and shall act in accordance with Section (L) of this Programme. The Appeals Committee member with legal expertise shall act as the Committee's chairman.

(b) Subject to paragraph (c) below, the Appeals Committee shall not review, or consider, or have authority to modify the penalties prescribed under Sections (M) and (N) of the Programme.

(c) The Appeals Committee may reduce the penalties as set out in Section (M) and Sections (N)4 and (N)5 of the Programme (but not overturn the violation of the Programme) only if the player establishes on the balance of probabilities that Exceptional Circumstances exist and that as a result of those Exceptional Circumstances the penalties as set out in Section (M) and Sections (N)4 and (N)5 in the Programme should be reduced. For the purposes of this paragraph, Exceptional Circumstances shall mean circumstances where the player did not know that he had taken, or been administered the relevant substance provided that he had acted reasonably in all the relevant circumstances.

(L). Player's Appeal Process

(...)

2. The case shall be heard by the Appeals Committee on a confidential basis. The hearing shall ordinarily commence within sixty (60) days of the date of the player's written appeal. The Appeals Committee shall render its written decision on the case as soon as practicable following the conclusion of the hearing. The Appeals Committee shall determine whether there has been a violation of the Programme.

(...)

6. At any hearing before the Appeals Committee the following will apply:

(a) (...)

(b) Decisions must be unanimous; and

(c) The ITF shall have the burden of proving, on the balance of probabilities, that there has been a violation of the Programme.

(...)

8. The Appeals Committee's decision shall be the full, final and complete disposition of the appeal and will be binding on all parties. Such decision will be submitted confidentially in writing to the ITF Medical Administrator who shall forward the decision to the President.

(V) General

1. This Programme shall be governed in all respects (including, but not limited to, matters concerning the arbitrability of disputes) exclusively by the laws of England and Wales and subject to the exclusive jurisdiction of the English Courts.

(...)

3. Any dispute arising out of any decision made by the Anti-Doping Appeals Committee shall be submitted exclusively to the Appeals Arbitration Division of the Court of Arbitration for Sport which shall resolve the dispute in accordance with the Code of Sports Related Arbitration. The time limit for any such submission shall be 21 days after the decision of the Appeals Committee has been communicated to the player."

7. We accept that the criterion of balance of probabilities must be applied with reference to the general seriousness of the allegations and that for any player, an allegation of a doping offence is a very serious matter (See CAS 98/208 N., J., Y., W. v. FINA, para. 5.6).

8. Therefore it is for the ITF to establish with appropriately convincing evidence a violation of C(1) (doping offence), including compliance with anti-doping control procedures (in that context, however, it is necessary for the relevant Tribunal to bear in mind the anti-technicality clause). A player who seeks to rely upon "Exceptional Circumstances" to mitigate penalty must do so on the balance of probabilities (E4(c)).

9. The first issue (which goes to liability) is whether the test on the sample of K. was positive. There is no dispute that the final sample was accurately found to contain the metabolites (19-norandrosterone and 19-noretiocholanolone) of Nandrolone (an anabolic agent), a Prohibited Substance.

10. The AC concluded that a Prohibited Substance, namely metabolites 19-norandrosterone and 19-noretiocholanolone of Nandrolone (an anabolic agent) were present in K.'s sample. The conclusion of the AC to that effect (para. 4.6(1)) was supported by the evidence of R. H. Barry Sample, Ph. D (see his Report of 26/7/99).

11. At the hearing held by the CAS Panel, the ITF called as its expert R.H. Barry Sample, Ph.D. who was a member of the original Review Board. Dr. Sample quantifies the concentrations of 19-norandrosterone in the sample, as estimated by the athlete's witness before the AC, to be in the range of 50 ng/ml to 100 ng/ml.

12. Hence, subject to the point on the anti-technicality clause (see below), a prohibited substance, within the extended definition contained in Section D(2) was found within the respondent's body contrary to C(1).

13. The second issue (which also goes to liability) is whether there was a deviation from Anti-Doping Control procedures such as to cast material doubt as to the reliability of, *inter alia*, the finding.

14. The collection procedure of the Programme is described at Section (I) of the document and is entitled "Collection Procedure" and attached is Schedule 3 "Procedural Guidelines for Sample Collection". Section (J) of the Programme deals with the test results. Section U is entitled "Deviations in Anti-Doping Control Procedure". The AC found at paragraph 35 *"that the procedures for the collection of partial samples are unsatisfactory"*. They identified three general areas of concern. First, problems with the *"selection of the specimen bottle in which the partial sample is kept"*. Second, *"the absence from Schedule 3 to the Programme (though not from paragraph I of the Managed Athletic Testing Services ("MATS") procedure) of any provision requiring that the partial sample be reopened in the presence of the player"*. Third, the absence of provisions for *"coding to ensure correct identification of the partial sample when the player returns to complete the process"*.

15. The sample was collected by Stephen Your, a registered nurse, on behalf of the MATS, the specialist drug collection and administration agency retained by the ITF. The AC found at paragraph 35(3) that "*Mr. Your had little, if any, experience of partial sample procedures prior to Wimbledon. In general, he was experienced in medical sample procedures, but had limited experience in forensic collection procedures. It appeared to us that he had received very little training in partial sample procedures*". It was pointed out in these proceedings that Mr. Your initialled only one instead of both the A and B sample bottles.

16. The AC however at paragraph 38 of its decision rejected any explanation of the positive finding by reason of a mixing up of the sample with that of a female player.

17. K. initially provided a partial sample and was required to produce a second void 80 minutes later in order to satisfy the Programme requirements of a 70 ml sample. There were discrepancies between the Signature Form and the Daily Log which was not part of the ITF, but was a part of the MATS, procedure. Specifically, the partial sample is set out as 40 cc in the Log and as 60 cc on the Signature Form. The Daily Log does not record all tests in chronological order and in another case leaves blank the explanation box.

18. The AC found at para. 35(4):

"The contemporaneous documentation before us amounts to the Signature Form and the Daily Log. In the present case, there was a discrepancy between the two forms. The Log stated that a partial sample of 40cc was provided at 18.00 hours. The Signature Form stated that 60cc was provided at that time. Mr Your believed (but could not be sure) that the Signature Form was correct, but was unable to assist on when precisely the Daily Log was completed (before or after the Signature Form) or how the discrepancy had come about, save through error.

This was the only error identified and, in the light of other findings, it was not material. It is unnecessary for us to comment on the AC's criticisms of the partial sample collection procedure (AC para.35): what is important under the anti-technicality clause is whether there was any deviation from such procedure, not the intrinsic merit or lack of such procedure."

19. The AC also found at para. 37:

"Although we have set out our criticisms of the partial collection procedure, the ITF has satisfied us on a balance of probabilities (in fact it has satisfied us beyond a reasonable doubt) that:

1. *The partial sample was placed at 18.00 into a previously sealed and unused collection bottle. We heard no evidence which led us to doubt that Mr Your proceeded in that manner. Indeed, it would have been an extraordinary lapse from proper standards were Mr Your to have acted otherwise.*
2. *The collection bottle which was produced by Mr Your when the Appellant returned at 19.20 was the same collection bottle as contained the partial sample of this Appellant as provided at 18.00. The evidence (which we accept) is that no other test was conducted between 18.00 and 19.20, there were no other partial samples in the collection suite or in the refrigerator at that time, and Mr Your had placed his initials and the date on the collection bottle containing the Appellant's partial sample.*
3. *The collection bottle was not subjected to any tampering during the period 18.00-19.20. Mr Your confirmed (and we accept his evidence) that the tamper evident tape was undisturbed. We heard no evidence suggesting any reason for concern that tampering may have occurred.*

In these circumstances we are satisfied that, on the facts of this case, the unsatisfactory procedure did not affect the integrity of the test results. Indeed, we have no doubt about that."

We consider this to be an appropriate application of the anti-technicality clause.

20. The Respondent argues that any deviation from the procedures to be used invalidates the conclusion as to what the sample contained. The correctness or otherwise of this argument depends upon the true construction of the Rules, the relevant parts of which, in our view, are these:

- Collection Procedure: which states at the end of 1 "(see Schedule 3 of this Programme for procedural guidelines on sample collection)".
- Schedule 3 which contemplates deviations "from these Guidelines only" and refers back to Section (U) (i.e. the anti-technicality clause).
- Section U which states:

  "any deviation or deviations from the anti-doping control procedures including, but not limited to, sample collection, chain-of-custody or laboratory analysis, do not invalidate any finding, procedure, decision or positive test result, unless that deviation or deviations raises a material doubt as to the reliability of the finding, procedure, decision or positive test result".

21. The Respondent contends that (U) is a provision directed against all procedures ("the"), not just Schedule 3 procedures and observes that Schedule 3 does not refer to laboratory analysis at all: laboratory analysis is dealt with only at I(1). Thus far we agree: but with the proviso that the procedures referred to must be ITF procedures as set out in the Programme.

22. However, the Respondent also goes on to argue that "any" therefore refers to the procedures actually used i.e. here by MATS (in the parlance of the ITF rules, the designee) and relies upon alleged deviations from their procedures ("the broad submission"). The Appellant by contrast, argues that the deviation referred to must be from the Programme itself ("the narrow submission").

23. We do not accept the broad submission, which seems to us to fly in the face of the need to read the rules as an integrated whole. Schedule 3 itself contemplates ("in accordance with … Programme") that the narrow submission reflects the proper construction of Section (U). Furthermore, the broad construction puts the ITF at risk that departure from the procedures of a third party, which may have an unwarranted degree of sophistication, may undermine a finding which is unimpeachable by reference to the procedures which the ITF has considered adequate for proper doping control.

24. The Respondent's argument then develops along these lines. If the deviation from the procedures raises a material doubt as to their reliability, the procedures are invalidated. Consequently, the finding based on these procedures is invalidated. However, we note that the AC, who identified the deviation had no doubt that it did not invalidate the finding. There is no reason for us to find otherwise.

25. We cannot, even applying the *contra proferentem* rule, or the rule against doubtful penalisation support an interpretation which results in such a paradox. On the contrary, we consider that the anti-technicality clause was intended to limit reliance on deviations, not extend it. The factual premises (i) that there was a deviation (ii) that such deviation casts material doubt as to the reliability of the procedure were not made out: the legal conclusion is equally unsound.

26. The third issue goes to the issue of penalty. The Respondent argues that in accordance with CAS 96/157 FIN v/FINA (see *CAS Digest*, op. cit., p. 351) the Panel should approach questions of an appeal against penalty with a measure of circumspection. Para. 22 of the FINA case provided:

"*It is the holding of the Panel that it can intervene in the sanction imposed only if the rules adopted by the FINA Bureau are contrary to the general principles of law, if their application is arbitrary, or if the sanctions provided by the rules can be deemed excessive or unfair on their face. To the extent the properly constituted deciding body of the federation acts within the limits of the rules which have been validly laid down, it is the opinion of the Panel that the CAS cannot re-open an examination of the decision on the issue whether the measure of the sanctions imposed is fair and appropriate in light of the facts which the deciding body has established. It is the deciding body of the federation which is in the best position to decide which rules and which sanctions are fair and appropriate in light of the facts constituting the violation*."

27. It seems to us that the submission is not supported by the case. Section (E)(4)(c) has two main elements: (a) the establishment of a gateway to reduction of penalty e.g. Exceptional Circumstances (b) the possibility if the gateway be established, that the penalty should in consequence be reduced, and, if so, by how much. On (a) CAS 96/157 does not pronounce at all.

28. Furthermore, we do not see why an appellate body constituted as is the AC ("experts with medical, legal and technical knowledge of anti-doping procedures") has any particular expertise as to penalty, let alone gateway. Nor does the fact that the AC has under the ITF Rules competence on penalty reduction (E)(4)(c) impress us. Such competence cannot constrict CAS as an appellate body.

29. Section L "Player's appeal process" provides the AC's decision "*shall be the full, final and complete disposition of the appeal and will be binding on all parties*". It was authoritatively held by the (English) Court of Appeal (cit sup) that this provision was trumped by Section V(3) *"**Any** dispute arising out of any decision made by the (AC) shall be submitted exclusively to the Appeals Arbitration Division of the CAS which shall resolve the dispute in accordance with the Code of Sports Related Arbitration"*. The CAS Code, we repeat, provides R57 *"full power to review the facts and the law"*. Once it is held that the rules of the ITF do not constrain this appeal, there is no basis for CAS so doing of its own motion as to penalty or otherwise.

30. The key question is whether the player has established on the balance of probabilities that Exceptional Circumstances exist. Exceptional Circumstances is defined in the rules as set out in paragraph 11 herein.

31. This definition is capable of two interpretations. The first is that the exceptional circumstances are defined to mean only the lack of knowledge on the player's part that he had taken or been administered the relevant substance (i.e. the prohibited substance found in the test). The second is that exceptional circumstances means circumstances in which such lack of knowledge occurred. The first makes lack of knowledge a sufficient definition of circumstances. The second makes it a necessary but not a sufficient definition of circumstances.

32. We prefer the second interpretation for the following reasons:

    (i) it is the more natural meaning of all the words in the definition;

    (ii) it seems to us improbable in the extreme that the player should be able to rely on this mitigation where he offers a denial of a doping offence and no other evidence about the circumstances in which the prohibited substance was found in his body;

    (iii) it would also be odd indeed if a player could be "absolutely responsible" for the prohibited substance found to be present within his body (C2), so that a doping offence was committed *ipso facto* without knowledge, intent or fault, but that he could mitigate penalty solely by absence of knowledge. The provisions as to penalty (if so interpreted) would, in our view, fatally contradict the language and undermine the policy of the provisions as to liability;

    (iv) the Rule (E4(c)) provides that the player must establish "*all the relevant circumstances*" in order (thereafter) to establish the reasonableness of his actions. "Relevant circumstances" suggests a sifting out from circumstances, as previously defined, between what is relevant and what is irrelevant. This cannot be achieved if the player is ignorant of the circumstances or offers no evidence of or about them.

33. Both before the AC and before CAS, K. claimed unawareness as to how the prohibited substance was found to be present in his urine. (The "contaminated veal" explanation is no longer pursued).

The evidence of Dr. Sample before this Panel definitively rules out any possibility of the positive sample arising either from ingestion of meat or from endogenous production because in such circumstances the concentration levels would be in trace amounts and not in a range of between 50ng/ml to 100ng/ml as was found in the sample.

34. The AC at paragraph 44 states that they found K. "*to be an honest, open and reliable witness. His evidence was supported by the absence of any prior or subsequent positive result, by the absence of any medical evidence of chronic steroid abuse, and by ... character evidence*". There is evidence before us that supports the drawing of different conclusions.

35. K. provided a Statement to the AC and was then questioned by the ITF counsel. In accordance with the Procedural Orders of the Panel, set out in Part I above, K. was further questioned before this Panel. There are two areas of discrepancy between the cross-examinations before the AC and that before us:

(i) Injury suffered at Wimbledon: In the Transcript of the AC hearing dated 21 December 1998 at p. 170 of the Appeal Record, K. was asked if he had any particular problems with tendon injuries. He replied that the problems he experienced were with his groin and otherwise he had no problems. In the questioning before the Panel he was asked about his ankle injury in the round of 16 at Wimbledon. He testified that it was not a sprained ankle but that the ground was wet and in going for a shot he stretched the tendon in his ankle. He lost his quarter final match two days later. In the earlier proceedings there is a denial of any tendon problem. Before this Panel it is his tendon which is a direct contributing factor to his loss in the quarter final. We conclude that such problem could have tempted him into taking substances other than those which he has admitted. Such temptation could also have been intensified by the general run down physical state K. felt after the French Open.

(ii) Ingestion of Carnitargin: In the AC Transcript K. testified that he first learned of this product, which is not prohibited, when he was in the United States in 1994. It had been sent to him by a Czech family doctor who had looked after his daughter and who was ill at the time. At p. 165 of the Appeal Record he testifies that while in Prague just prior to Wimbledon, he went to buy vitamins and minerals and asked the pharmacist about Carnitargin. He did so because he was feeling tired after the French Open, had lost several kilos of weight, had flu and wanted to refresh his body in a natural way. In the statement of K. to the AC dated 9 December 1998 he stated at paragraph 15 that the only time he did not consult with Dr. Kolar, who was the Czech Davis Cup doctor, with official tournament doctors, or ATP trainers was in respect of Carnitargin. He stated that he "*took it for four days at the beginning of June 1998 until* [his] *coach told* [him] *that the bottles were out of date*". At p. 166 of the Appeal Record Transcript he confirmed by his testimony that he took Carnitargin.

36. Before this Panel K. testified that he bought new Carnitargin in June of 1998 in Prague, namely a case containing 10 days supply which he took to a tournament in Germany and then to the preparation week before Wimbledon. He was having his breakfast on the first Sunday in England when his coach, who did not testify, noticed the bottle and indicated it was out of date. He took no more after that time.

37. While it may seem to be a small matter, it is the player who brought the use of Carnitargin to the fore by mentioning it in his own statement. It stands out in his mind because it is the only time he did not consult his regular sources of advice about the use of something for medical or general health purposes. Yet his testimony is dramatically inconsistent with respect to how he acquired the Carnitargin. Before the AC it is his daughter's four year old Carnitargin which he took. Before this Panel it is new Carnitargin bought in Prague a few weeks before being taken. Which is it? It also strains credulity that this new product would then be stale within a few weeks of being purchased. This is no minor detail in relation to a subject raised by K. in his original Statement and for which he has so very different explanations in two different cross examinations.

38. The evidence therefore suggests to the Panel that K. had a reason for taking a Prohibited Substance to rectify his physical condition, the more so, as he also testified before the Panel that he had made an undisclosed decision in the form of a pact with himself to retire in 1998 if possible as a winner with a number one ranking. In order for him to fulfil his pact and achieve his goal he needed to place well at Wimbledon.

39. Dr. Sample testifies that the test result suggests that the scientific explanation of the positive test can only be consistent with a single oral ingestion of Nandrolone. He deduces this because of the successful testing at the French Open in June and subsequently in Toronto in August. In his statement to the Panel on Nandrolone, he indicates that 19-norandrosterone is detectable in urine for at least 2 months and 19-noretiocholanolone for one to two months because of the slow release from the muscle following injection. In contrast, with the oral administration of Nandrolone metabolites are detectable in urine for less than one week.

40. K. at paragraph 2 of his Statement says: "*I am not a drugs cheat. I have never knowingly taken or been treated with any banned substance under the Association of Tennis Professionals ("ATP") and the International Tennis Federation ("ITF") Anti Doping Programmes*". Throughout his testimony to the AC he maintains this general tenor of his Statement. At p. 151 of the Appeal Record Transcript of his testimony he denies any knowledge of how the positive test result occurred. In his testimony before this Panel he repeats that denial. When asked to explain the high concentration figures he said: *"No explanation. I don't know. I never was interested in doping and I really don't know these names"* {meaning 19-norandrosterone and 19-noretiocholanolone}. In short he denies any knowledge whatsoever of how the Prohibited Substance was in his urine sample. He provides a bald denial and nothing more.

41. The AC found (para. 44):

"We are satisfied that there are Exceptional Circumstances in this case. We so decide for the following reasons:

(1) We heard evidence from the Appellant. Each of us found him to be an honest, open and reliable witness. His evidence was supported by the absence of any prior or subsequent positive result, by the absence of any medical evidence of chronic steroid abuse, and by the character evidence from Mr. Boris Becker and from Mr. John Pickard. We accept the Appellant's evidence that he did not knowingly take (or have administered to him) a prohibited substance.

(2) In our judgment, the Appellant has established that he acted reasonably (as well as innocently) in all the relevant circumstances. Whatever the cause of the positive results, we are satisfied that the Appellant could not be faulted in any relevant respect. We reject Mr. Stoner's criticism by reference to the Appellant's willingness to take various other preparations (such as minerals and vitamins). There is no evidence to suggest that any of those other preparations contained Prohibited Substances".

42. We consider that the AC correctly recognised that there were two elements in the "Exceptional Circumstances" plea. We cannot fully accept this first finding. We find that the evidence compels us to our conclusion that K. had motive to take a prohibited substance and that the scientific evidence suggests that on a single occasion he did so by oral ingestion. We reluctantly conclude that he knew what he was doing. We cannot in any event accept their second finding whose very brevity betrays its poverty of analysis. The AC seems to us to regard (wrongly) the first finding as dictating the second. While it is true that it may be reasonable to differentiate between annulment of a competitive result and a consequential sanction (see CAS 95/141 C. v/FINA in *CAS Digest*, op. cit., p. 215 ff., para. 15-17), even in that case at para. 28 the Panel said "*it is vital that such athlete provide counter-evidence which allows it to be established with near certainty that he has not committed a fault cf. here on the balance of probabilities*". K. did not come within measurable distance of satisfying such a test. Even if contrary to our conclusion, he unconsciously broke the anti-doping rules, he fell short of these standards of vigilance in relation to what he took, which is demanded of a player who wishes to establish "exceptional circumstances" pursuant to ITF Rules. In any event, the Panel in the C. case stated expressly "*The Panel observes that such a development is possible only if the applicable rules allow it*" (para.19). The ITF rules do not.

43. On the interpretation of E4 (c) we have preferred, K. is therefore unable to establish the circumstances, and the relevant circumstances, the reasonableness of his actions, or therefore Exceptional Circumstances on the balance of probabilities or otherwise.

44. The AC found (para. 45):

"By reason of the contents of Section (E)4(b) and (c) of the Programme, we have no power to alter the mandatory sanction imposed by section (N)3 of the Programme: that is the sanction that the Appellant must forfeit all computer ranking points earned at the Wimbledon tournament (at which the positive sample was given) and return to the ITF all prize money earned at that tournament".

45. We accept that the CAS only has power to declare that such mandatory penalties as are provided for in the ITF Rules should be applied, and that apart from the "Exceptional Circumstances" provision at section (E)4(c) neither the AC (nor CAS) has any power to vary the penalties prescribed by them.

46. The relevant mandatory penalty is a one-year suspension under Section (M)1(a). The starting date for that suspension is prescribed by section (N)1 which provides:

"Suspensions shall commence on the day following the deadline for receipt of notification that the player will appeal ... or, in the case of an appeal to the Appeals Committee, shall commence on the day after the appeal is unsuccessfully concluded."

The ITF seeks a suspension of K. for a year from the date of our decision (if we uphold the appeal) and consequential forfeiture of points and prize money up to that date.

47. It is submitted by the Respondent that:

- the rules do not permit the suspension to commence at any later date than the day after the appeal to the AC is unsuccessfully concluded.
- in particular the rules do not make provision for the case where the ITF appeals against a decision of the AC which does not order any suspension and that the further section (N)4 provides for forfeiture or points and prize money up to the commencement of such suspension only.
- there is no power to grant any part of such penalty as ITF seek.
- the only power (if any) available to the CAS (if Exceptional Circumstances do not apply) is to declare that the Player should have been suspended for 1 year from 23 December 1998, the date after the date of the decision of the Appeals Committee ("qualified power").
- on that basis the period of suspension would run at most until 22 December 1999. The maximum period for which forfeiture of prize money and points could apply under (N)4 would be up to 23 December 1998.

48. The Respondent seeks to support this submission by reference to a tripod of interpretation rules (i) *contra proferentem* principle, (ii) the rule against doubtful penalization, (iii) the presumption against retroactivity.

49. We cannot accept the Respondent's arguments which, if carried to its logical conclusion would make ITF's appeal meaningless, since their success would (or might) not have any consequences in terms of sanction. Either the phrase in N(1) *"or the day after the appeal is unsuccessfully concluded"* refers to the complete appeal process, including the appeal to CAS, (in which case CAS has the power to impose the order sought by ITF) or it refers only to the appeal to the AC, in which CAS has no, not qualified, power to suspend.

50. We believe the former is the correct meaning. Nor are we persuaded that so to rule could wrongly involve penalizing a player for exercising a right of appeal. A player would not be penalized for appealing, he would be suffering the consequence of the initial doping offence. Moreover, if a player appealed to CAS, he would expect that any suspension would be stayed until conclusion of the CAS appeal. The Respondent's argument would deny him that right. What is sauce for the player gander must be sauce for the federation goose.

51. Finally, we reject the notion that a one year suspension is an unreasonable restraint of trade. Under Rule 58 of the CAS rules "*the Panel shall decide the dispute according to the applicable regulations and the rules chosen by the parties*": the ITC rules are governed by English law. Under English law a four year suspension for a doping offence in the field of athletics has been upheld: see Gasser v. Stinson: unreported (5th June 1988 Scott J). A one year suspension must *a fortiori* be valid.

52. Consequently, the penalties prescribed under the Tennis Anti-Doping Programme for a first offence involving a Class 1 Prohibited Substance apply.

The Court of Arbitration for Sport hereby rules:

1. The appeal by the ITF is upheld.

2. The decision of the Appeals Committee of the ITF of 22 December 1998 shall be modified as follows:

   K. is suspended for a period of 12 months from 1 September 1999 to 31 August 2000.

(...)