

**IN THE MATTER OF PROCEEDINGS BEFORE AN
INDEPENDENT TRIBUNAL COVERED UNDER ITF RULES**

Before:

Robert Englehart QC (Chair)
Professor Peter Sever
Dr Despina Mavromati

BETWEEN:

INTERNATIONAL TENNIS FEDERATION

Anti-Doping Organisation

and

ADELINE BERVOUX

Respondent

DECISION OF THE INDEPENDENT TRIBUNAL

INTRODUCTION

1. We were appointed as the Independent Tribunal to determine proceedings brought by the International Tennis Federation (“ITF”) against Adeline Bervoux for an infraction of the Tennis Anti-Doping Programme 2019 (“TADP”). We held a remote hearing on 5 November 2020 at which the ITF was represented by Mr Lavey, and Ms Bervoux appeared in person. For reasons which we shall explain, we have deferred issuing a decision in this most unfortunate case until

now. However, the point has now been reached where we have no option but reach a decision on the evidence before us. We regret that this is so, but there is no alternative.

2. Ms Bervoux is an inexperienced wheelchair tennis player who was born on 12 January 1980 and lives in France. Indeed, the tournament at which she provided the urine sample in issue in this case was her first ITF tournament. She is a French speaker and does not speak English. On 24 September 2019 Ms Bervoux was participating in the French Riviera Open tournament held at the Mouratoglou Tennis Academy in Biot, France, when she provided the urine sample which resulted in the Charge before us. The sample was found on analysis to contain a Prohibited Substance, acetazolamide, at an estimated concentration of 66.3 ng/ml.
3. Ms Bervoux is, quite apart from her physical disability, not in good health. Indeed, on the Doping Control Form she listed the following medications which she had taken on the day of the test: (i) Cymbalta: 60 mg (ii) Lyrica: 300mg x 2 (iii) Diamond: 60 mg and (iv) Lp voltarene: 100mg. She has nevertheless no Therapeutic Use Exemption (“TUE”) for any medicament. It is noteworthy that acetazolamide is in fact sold under the brand name Diamox. It seems likely that the reference by Ms Bervoux to Diamond on the Doping Control Form is a misnomer of Diamox.

THE CHARGE

4. Following consideration by the ITF Review Board, Ms Bervoux was served with a Notice of Charge dated 5 November 2019. The Notice stated:

Please therefore take this letter as formal notice, sent in accordance with TADP Article 8.1.1, that you are hereby charged with the commission of an Anti-Doping Rule Violation under TADP Article 2.1, on the basis that Acetazolomide [sic], which is prohibited, was found to be present in the urine sample A3143445 that you provided ...

Ms Bervoux was advised that the ITF was represented by Bird & Bird and strongly urged to take her own legal advice.

MS BERVOUX'S REACTION TO THE CHARGE

5. Ms Bervoux has never in fact formally admitted the Charge. She has, however, consistently maintained that she has been taking prescribed Diamox (the brand name of acetazolamide) since March 2014 for intercranial pressure, hydrocephalus due to a crushed optic nerve, lens spasm and sight loss. In the course of correspondence leading up to the hearing before us she did indeed provide some limited medical support for the fact that she has been taking Diamox under prescription for some time. Moreover, one member of the Tribunal is well aware that Diamox is a recognised treatment for Ms Bervoux's condition. Nevertheless, the fact remains that Ms Bervoux has never been granted, or made application for, a TUE.

THE ITF RESPONSE

6. The ITF and its legal representatives have consistently treated Ms Bervoux with the utmost sympathy and consideration. On 20 November 2019, after some chasing communication from the ITF, Ms Bervoux sent a message to Dr Miller of the ITF via the TADP portal:

Bonjour, j ai bien reçu vos mails, comment vous joindre mes justificatifs médicaux qui rendent mes analyses positives? Merci d avance

Mr Miller responded in both French and English with instructions on how to apply for a retroactive TUE. Further prompting followed from the ITF but received no response from Ms Bervoux. On 3 December 2019 the ITF, having heard nothing, wrote to Ms Bervoux in both French and English to say that the case would now have to proceed to a hearing in accordance with TADP Article 8. By the same letter Ms Bervoux was reminded of what the ITF had previously told her, that is that free legal advice was available via Sport Resolutions and that she could apply for a retroactive TUE which, if granted, would lead to the end of the case. Ultimately, in the absence of any reply from Ms Bervoux the Independent Tribunal was established.

THE COURSE OF THE PROCEEDINGS

7. On 28 January 2020 the Chairman held a preliminary hearing by telephone conference call. An interpreter assisted in order to ensure that Ms Bervoux could both understand and participate in the proceedings. Ms Bervoux reiterated that it must have been her medication which was the source of the Prohibited Substance in her urine. The Chairman himself emphasised to Ms Bervoux in French that she should be making application for a retrospective TUE, and Ms Bervoux agreed that she wished to do so. Counsel to the ITF briefly outlined what was required for a TUE application and said that he would follow this up in writing. Throughout the hearing Ms Bervoux was wholly coherent and gave every indication of understanding what was required. The Chairman then directed a stay of proceedings for a reasonable time to enable Ms Bervoux to make a retrospective TUE application.
8. Immediately after the preliminary hearing, Counsel for the ITF did email Ms Bervoux with a detailed explanation of what was needed for a TUE application. Possibly, Ms Bervoux was having difficulty with the technical aspect of an online TUE application and the use of English. In any event, however, through the good offices of Sport Resolutions highly reputable French speaking Counsel and solicitors were appointed to assist and represent Ms Bervoux *pro bono*.
9. Unfortunately, no TUE application was forthcoming from Ms Bervoux despite the ITF's repeated promptings and its clear indication that, if a retrospective TUE were in fact granted, the Charge would be withdrawn. Eventually, with no progress having been made, the legal advisers who had been representing Ms Bervoux terminated their retainer. A date of 5 November 2020 was then fixed for a hearing before us via Zoom. Ms Bervoux appeared in person. Again, an interpreter attended.
10. At the hearing we were referred by Counsel for the ITF to the evidence of Ms Bervoux's Adverse Analytical Finding and were taken through the relevant Articles of the TADP. Counsel also very fairly addressed the possibility that Ms Bervoux might wish to submit that there had been No or No Significant Fault or Negligence on her part although she had thus far never raised the point.

MS BERVOUX'S SUBMISSIONS

11. Before us Ms Bervoux accepted that she had committed an Anti-Doping Rule Violation. This had happened because of the medicine which she had been taking on a doctor's prescription. However, she had given no thought at all to the possibility of breaking anti-doping rules. She explicitly agreed that there was no room for her to claim that there had been No or No Significant Fault or Negligence on her part. The Anti-Doping Rule Violation was simply the result of her ignorance. However, there was a valid medical reason for her having ingested acetazolamide. And she really would now like to seek a retroactive TUE from the ITF.

THE DEFERRAL OF OUR DECISION AND SUBSEQUENT EVENTS

12. Despite all the previous unsuccessful attempts to have Ms Bervoux make application for a retroactive TUE, we were of the view that she should have one further final opportunity to apply. The indications were that there might well be sound medical reasons for the presence of acetazolamide in Ms Bervoux's system. It would be most unfortunate if Ms Bervoux had to be subject to a competitive ban without any investigation into her medical condition and needs. We were mindful of potential administrative difficulties due to Covid-19 and also bore in mind Ms Bervoux's lack of familiarity with the English language in which any TUE application had to be made. In the circumstances, we determined to defer giving our decision on the Charge until at least 31 December 2020. This was a rather longer period than Ms Bervoux had even asked for. The ITF consented to this course.
13. On 6 November 2020 Mr Lavey sent a long and detailed email to Ms Bervoux with information about the TUE application process. However, there was silence from Ms Bervoux. Nothing at all happened until 31 December 2020 when Ms Bervoux did begin to make an application on the TADP portal, but it was regrettably not an application capable of consideration; Ms Bervoux had simply provided her own email address when asked to provide the contact details of her doctor. The ITF immediately wrote to Ms Bervoux on 1 January 2021 pointing out the error and giving her until 8 January 2021 to rectify it. The Chairman agreed to continue deferral of our decision in the meantime. However, since 31 December 2020 nothing further has been heard from Ms Bervoux. In the circumstances, we cannot just leave matters in limbo. Ms Bervoux has now had over a year to make a valid retroactive TUE application but, despite the protestations

of her desire to make such an application, has not done so. We therefore feel that the point has now been reached where we must give our decision. We can only do so on the basis that Ms Bervoux did not have a TUE at the time of the Adverse Analytical Finding, nor has she been granted one retroactively.

OUR FINDINGS

14. Ms Bervoux did not contest the fact that she had committed an Anti-Doping Rule Violation. Nevertheless, it is right that we should briefly explain why we are satisfied of this. The evidence clearly establishes that on 24 September 2019 at the French Riviera Open there was acetazolamide in Ms Bervoux's system. That is a Prohibited Substance for which Ms Bervoux did not have, and has never been granted, a TUE. Its use is forbidden In-Competition, and it is listed under S5 of the WADA Prohibited List as one of the proscribed diuretics and masking agents.

15. Under TADP Article 2.1 Anti-Doping Rule Violations include:

The presence of a Prohibited Substance ... in a Player's Sample, unless the Player establishes that such presence is consistent with a TUE ...

The reason why a Prohibited Substance is present is irrelevant, as is the ignorance of a Player. Presence without a TUE is a strict liability offence. It is beyond argument that there was here an Anti-Doping Rule Violation. We therefore turn to consider the applicable sanction.

16. Under TADP Article 10.2.1 it is provided that for an Article 2.1 Anti-Doping Rule Violation:

The period of Ineligibility shall be four years where:

...

(b) The Anti-Doping Rule Violation involves a Specified Substance and the Anti-Doping Organisation can establish that the Anti-Doping Rule Violation was intentional.

Acetazolamide is a Specified Substance, but the ITF does not suggest that this was an intentional violation. Accordingly, Article 2.1 is not applicable, and Article 10.2.2 comes into effect:

If Article 10.2.1 does not apply, the period of Ineligibility shall be two years...

Thus, the sanction prescribed by TADP for Ms Bervoux's infraction is a two year period of Ineligibility.

17. As previously noted, in some circumstances there may be room for mitigating a two year period of Ineligibility where a Player can establish that there was No Fault or Negligence or No Significant Fault or Negligence (as defined). The relevant definitions are all predicated on a Player having taken some, albeit unsuccessful, steps to avoid ingestion of a Prohibited Substance. Ms Bervoux took no steps at all. She was entirely ignorant of any anti-doping requirements. She very honestly accepted before us that she could not suggest that there were any grounds for not applying the standard two year period of Ineligibility. In our view, she was right to do so. Given the absence of any TUE, a two year period of Ineligibility must follow.
18. Finally, we should say that we have noted that disqualification of results and forfeiture of prize money are automatic under the TADP. The only possible context where an Independent Tribunal could become involved arises under TADP Article 10.8 in relation to disqualification of subsequent results.

CONCLUSION

19. As set out above, we have been driven to reach our conclusion. We would willingly not have done so but have been left with no choice by Ms Bervoux's failure to engage with the process of applying for a retroactive TUE despite having had every possible opportunity and assistance to do so.
20. In the result, our conclusion is as follows:
 - (1) An Anti-Doping Rule Violation has been established.
 - (2) Ms Bervoux is subject to a period of Ineligibility of two years. The ITF has suggested that commencement of the two year period should be backdated by eight weeks, and we concur. The Ineligibility therefore runs from 20 November 2020.

We conclude by reminding the parties that either party may appeal against this decision by lodging an appeal with CAS pursuant to TADP Article 12.2.1. Ms Bervoux's deadline to appeal is 5 February 2021. Any appeal should be lodged with the Court of Arbitration for Sport. The Court is located at Château de Béthusy, Avenue de Beaumont 2, CH-1012 Lausanne, Switzerland, and contact can be made via procedures@tas-cas.org.



R. Englehart

Robert Englehart QC
On behalf of the Tribunal
15 January 2021
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