2022/ADD/ 56 International Surfing Association v. Vasco Ribeiro

ARBITRAL AWARD

delivered by the

ANTI-DOPING DIVISION
OF THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr John Boultbee, Lawyer, Sydney, Australia

in the arbitration between

International Surfing Association (ISA), USA

Represented by Mr Adam Klevinas, Counsel, International Testing Agency ("ITA"), Lausanne, Switzerland

Claimant

and

Vasco Ribeiro, Portugal

Represented by Ms Matilda Costa Dias, 14 Sports Law Firm, Porto, Portugal

Respondent

I. PARTIES

1. The Claimant, the International Surfing Association ("ISA") is the International Federation which promotes the development of the sport of surfing throughout the world. The ISA is a Signatory of the World Anti-Doping Code, and conducts a doping control program, the rules of which are set out in the ISA Anti-Doping Rules, 2021 (the "ISA Rules").

2. The Respondent, Vasco Ribeiro ("the Athlete") was at the time of the hearing, a 29-year-old surfer from Portugal. He is considered an International-Level Athlete within the meaning of the ISA Rules.

II. FACTUAL BACKGROUND

3. This dispute concerns the Athlete's refusal to submit to an out-of-competition urine doping test at his residence in Cascais, Lisbon, on 17 April 2022, which is alleged to constitute an Anti-Doping Rule Violation ("ADRV") under Article 2.3 of the ISA Rules which provides that:

   "*Evading Sample collection; or refusing or failing to submit to Sample collection without compelling justification after notification by a duly authorized Person"*

   constitutes an ADRV.

4. Below is a summary of the relevant facts and allegations based on the Request for Arbitration filed by the ISA, the Answer filed by the Athlete, the Parties' written submissions and exhibits, witness statements filed by the parties and evidence adduced at the hearing. Additional facts and allegations found in the above-mentioned documents, submissions and evidence may be set out where relevant, in connection with the legal discussion that follows. Whilst the Sole Arbitrator has considered all the facts, allegations. legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence considered necessary to explain his reasoning.

5. As an international-level surfer, the Athlete was notified of his inclusion in the ISA's registered testing pool ("RTP") on 24 January 2022.

6. On 28 January 2022, the Athlete returned a signed Acknowledgment of Receipt form, through which he confirmed that *inter alia* "*I understand that I am part of the [IF] International Registered Testing Pool.*"

7. The notification of inclusion in the RTP indicated that the Athlete was obligated to "*submit to Testing at any time and place upon request of an ADO [Anti-Doping Organisation] with Testing Authority over him*" and that the Athlete was "*personally responsible at all times for any failure to comply with the requirements of the [ISA Rules]"* and the Athlete could find the current ISA Rules on the ISA website.

8. At 9.00 p.m. on 17 April 2022, Mr Mario Simoes ("Mr Simoes") a Doping Control Officer working for a sample collection company retained by the ISA was tasked with collecting an out-of-competition urine sample from the Athlete at the address provided by the Athlete in his whereabouts information as required by his being included in the RTP.

9. It is common ground between the parties that Mr Simoes rang the bell at the gate to the property and the Athlete's mother Mrs Pessoa came to the yard and spoke to him. He identified himself and asked to see the Athlete. Mrs Pessoa confirmed that the Athlete was at home and returned to the house. The Athlete then came out of the house and confirmed his identity to Mr Simoes. At that stage Mr Simoes advised him that he was there on behalf of the ISA and that the Athlete had been selected for an out-of-competition urine sample. The Athlete then returned to the house with his mother. After some time, Mrs Pessoa came out again and told Mr Simoes that the Athlete had

telephoned his coach who had advised him not to give a sample, as he had been out drinking alcohol the previous night. Mr Simoes indicated to her that he would have to write the test down as a refusal to be tested and asked her to speak to the Athlete. Later the Athlete came out again and said he was not going to do the test as advised by his coach because he had been drinking alcohol the previous night. After some discussion the Athlete went back to the house and Mr Simoes did not see him again. Mrs Pessoa came out another time and confirmed that the Athlete refused to provide the sample and apologised. Mr Simoes called the Athlete's phone after that but it was not answered. He concluded the testing mission and left at about 9.33 p.m.

10. There are some differences in the evidence given by both Parties about the details of the conversations between Mr Simoes and the Athlete, and Mr Simoes and Mrs Pessoa, and about the Athlete's demeanour, which will be discussed later. Otherwise the facts in the previous paragraph are uncontested.

11. Mr Simoes thereafter filed a detailed "Unsuccessful Attempt Report" to his employer, and that report was submitted in evidence. The relevant parts of that report are as follows:

> *"the athlete's mother SOFIA PESSOA, came to the yard and asked me who was I. I asked for the athlete and identified myself and his mother confirmed he was home and went in. Just a few seconds after the athlete comes out to the yard together with his mother and he comes to the wall and we are face to face with a 1.50 meters height wall in between us. He confirmed he is VASCO RIBEIRO and I notify him verbally at 21.01 I was very clear when notifying the athlete, telling him my name, that I was there on behalf of ISA and that the athlete had been selected or a OOC* [Out of Competition] *urine only test, and when I am preparing to show the AL* [Authority Letter] *and my DCO* [Doping Control Officer] *card the athlete just says ok and turns his back to me and walks back into the house together with his mother that was close to the house door.*
>
> *At this point I thought he had gone into the house to open the door of the gate but I am waiting and nothing happens. I wait for 4 minutes and nothing happens and during this 4 minutes I thought about ringing the bell again but then at 21.05 I see his mother SOFIA PESSOA, coming out and walks towards me close to the wall and tells me that her son, the athlete VASCO RIBEIRO, will not do the doping control test, she tells me that the athlete has phoned his coach and has instructions from his coach not to do the test because the athlete went out on the previous night and had been drinking on the previous night.*
>
> *I ask her to call the athlete out in order to speak with him again. She says he is not coming out since he refuses to do the test. I tell her that a refusal is something very serious and there can be severe consequences for the athlete.*
>
> *She then goes in and at 21.11 the athlete comes out again and tells me immediately that he refuses to do the test and that he has spoken with his coach on the phone and that his coach has instructed him to refuse to do the test because the athlete had been drinking alcohol on the previous night. I again inform him that he has been selected by ISA for an OOC urine test and I try to show him the authorization letter and my DCO cards and keep telling him that a refusal can have severe consequences. The athlete then asks me to do a UA* [Unsuccessful Attempt] *instead of a refusal which of course I immediately tell him that this is not possible, he has been notified and this is not a UA and that I cannot act as I didn't notify him. He says again he refuses and does not want to see the authority letter so I ask him if I can speak with his coach but the athlete refuses. I ask him to sign the DCF* [Doping Control Form] *and to write the reason why he refuses to do the test but he refuses and walks towards the house. I still tell him not to refuse and to call his coach again but he went into the house and this was the last time I saw the athlete.*
>
> *3 minutes after his mother comes out and meets me again. She says she is sorry but her son, the athlete, refuses to do the test and that he is following the instructions of his coach.*
>
> *I ask who is the coach but she doesn't say the name. I keep asking her to convince the athlete, her son, to do the test by showing her the authorization letter with the athlete's name and telling her that there can be severe consequences, if he refuses. She looks at the authorization letter and says that there is no point because he refuses.*

I then ask her if its possible for her to ask the athlete to sign the notification and to write the reasons for the refusal or if she speaks English will she at least speak with my PM but SOFIA PESSOA tells me "I won't ask him anything else or speak with anyone else. He has his 2 young daughters in the house and is actually putting the youngest one to sleep and he won't do the Doping control test and that is it. I am very tired because I have been working all day and I am not in the mood or have the strength to argue with him"

She then says she is sorry and leaves.

This was the last time I saw them.

It was now 21.22.

At 21.25 I called the athlete's number provided in his whereabouts in order to again try to convince him to do the test but the phone was disconnected and went immediately into voicemail after listening to the mobile provider recording saying that the number was not available.

At 21.33 I left."

12. On 24 May 2022, the ITA notified the Athlete on behalf of the ISA that the ITA was considering asserting an ADRV against him. The Athlete was invited to provide written submissions, which he provided on 15 June 2022. In those submissions he explained that he is a single parent with two young girls and around 17 April 2022 he was having a hard time with his girlfriend. To cheer him up his friends from the surfing community organised a party on 16 April 2022 at which the Athlete consumed alcohol and was also offered and used cannabis and cocaine.

13. He explained that when Mr Simoes came to test him, he was putting his kids to bed and was startled by what he had consumed the night before and called a coach seeking advice, and was told not to take the test. He said he was stressed and was experiencing a high level of anxiety and could not think clearly. He had never had anti-doping education and did not know about the consequences of being included in in the ISA Registered Testing Pool and did not know that refusing to submit to sample collection constituted an ADRV, and his refusal could have been avoided had he received some anti-doing education from his national federation. He submitted the following factors in mitigation of any period of ineligibility:

- His subsequent full cooperation and express acknowledgement of taking the Substances of Abuse the night before the test.

- This is his first warning regarding a potential ADRV.

- The economic and professional impact that a period of ineligibility might cause him especially as a single parent.

- His availability to submit to sample collection in the days following the test to prove that he did not consume any prohibited substances other than potentially marijuana and cocaine.

14. On 2 August 2022, the ITA issued a Notice of Charge notifying the Athlete of an asserted ADRV under Article 2.3 of the ISA Rules for Refusing to Submit to Sample Collection. The Notice set out the potential consequences under Article 10.3.1 of the ISA Rules, being a period of ineligibility of four years, the fact that the period could be increased in a case of Aggravating Circumstances under Article 10.4 of the ISA Rules, and that all the results obtained by the Athlete from the date of the ADRV (17 April 2022) until the date of the period of ineligibility may be disqualified under Article 10.10 of the ISA Rules.

15. On 22 August 2022, the Athlete through his legal counsel challenged the assertion of an ADRV and indicated he did not accept the proposed consequences contained in the Notice of Charge and requested that the ITA reconsider the assessed period of ineligibility failing which the Athlete requested that proceedings before the CAS Anti-Doping Division ("ADD") be initiated.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 6 December 2022, the ITA on behalf of the ISA filed a Request for Arbitration under Article 8.1 of the ISA Rules and Article 13 of the CAS ADD Rules.

17. On 24 January 2023, the Athlete filed his Answer to the Request for Arbitration.

18. On 25 January 2023, the Parties were notified that the President of the CAS ADD had appointed Mr. John Boultbee, Lawyer of Sydney, Australia, to act as Sole Arbitrator in accordance with Articles A16 and A17 of the CAS Anti-Doping Division Rules, and the Parties were invited to indicate if they considered that a hearing would be necessary in this procedure.

19. On 25 and 31 January 2023 respectively, the Athlete and the ISA both requested that a hearing be held.

20. On 1 March 2023, the Athlete and the ISA signed and returned the Order of Procedure.

21. The Parties filed statements from the witnesses they wished to call to give evidence.

22. On 27 April 2023, a video hearing was held. The Sole Arbitrator was assisted by Mr Fabien Cagneux, Managing Counsel of the ADD, and joined by the following:

For the Claimant:

- Mr Adam Klevinas, External Legal Counsel of the ITA
- Mr. Mario Simoes, Witness

For the Athlete:

- Mr Vasco Ribeiro
- Ms Matilde Costa Dias, Counsel for the Athlete
- Mr Aakash Batra, Counsel for the Athlete
- Mr Jorge Viegas Faria, Witness
- Mr João Aranha, Witness
- Mrs Sofia Pessoa, Witness
- Mr Pedro Coelho, Witness
- Mr Nuno Telmo Bispo Florêncio, Witness

IV. SUBMISSIONS OF THE PARTIES

A. The Claimant

23. In its Request for Arbitration the Claimant outlined evidence of the inclusion of the Athlete in the ISA Registered Testing Pool and his notification thereof, as set out in paragraphs 5 to 7 above, and of the testing mission of the 17 April 2022, set out in paragraphs 8 and 9 above, and the details of the correspondence between the Parties set out in paragraphs 12 to 15 above.

24. In support of its submissions the Claimant filed a witness statement from Mr Simoes, the Doping Control Officer, which attached a copy of the Unsuccessful Attempt Report which he had completed on 18 April 2022, and which is set out in paragraph 11 above.

25. Mr Simoes also gave evidence at the hearing and was cross-examined by the Athlete's counsel.

26. The Claimant's principal submissions were that:

- There was no dispute that the Athlete had refused or failed to submit to sample collection under Article 2.3 of the ISA Rules

- The only issues to be determined were

  (i) whether there was "compelling justification" for the refusal or failure as set out in Article 2.3 as a defence to the charge, or

  (ii) whether there were other reasons to reduce the 4-year period of ineligibility to be imposed under Article 10.3.1 of the ISA Rules, being that the Athlete could establish that his actions were "a failure to submit" and were not intentional, which would lead to a reduction to 2 years, or

  (iii) that the Athlete can establish exceptional circumstances that justify a reduction of the period of ineligibility if the athlete's actions were "a refusal", in which case the period will be in a range from 2 to 4 years depending on the Athlete's degree of fault, and

  (iv) whether the Athlete was properly warned of the consequences of a refusal or failure to submit by the DCO at the time of the attempted testing and whether that might constitute compelling justification or exceptional circumstances.

- The athlete was properly warned by Mr Simoes at the time of the testing,

- The evidence does not establish that he was in a state of extreme anxiety which deprived him of cognitive ability, such that it would constitute compelling justification, rather the evidence shows an awareness of the situation and of the consequences.

- The directions given by the coach were not relevant to amount to compelling justification.

- The Athlete's claim of a lack of anti-doping education was not established and did not amount to exceptional circumstances which warranted a reduction of the sanction of a 4-year period of ineligibility.

B. The Athlete

27. In his Answer the Athlete noted that he did not contest the jurisdiction of the CAS ADD to adjudicate upon the present matter, and there was no contest as to admissibility, or the applicable law.

28. The Answer went on to assert that it was erroneous to maintain that the Athlete had not provided evidence of "compelling justification" as required in Article 2.3 of the ISA Rules and that the relevant evidence in this regard was:

- the events of the night of 16 April 2022 which made him incapable at that time of measuring the consequences of sharing some weed-cigarettes and cocaine, and his being oblivious to the possibility of an out of competition test;

- his being startled when confronted with the visit of the DCO when he was putting his children to sleep, and his realisation of what he had consumed the night before, which caused him severe anxiety and panic, which deprived him of his rationality and cognitive sense to take a reasoned decision;

- his desperation in telephoning one of his coaches Mr Nuno Telmo Bispo Florêncio, who had no training on doping related matters, and the wrong advice he received;

- his ignorance of the relevant anti-doping policies and of the consequences that his conduct could cause to his career, including the lack of any education from the Portuguese Surfing Federation or any other institution;

- the fact that the DCO only informed him and his mother that there could be serious consequences, and did not advise that one such consequence would be the possibility of a 4-year period of ineligibility.

- At the hearing the Athlete's counsel submitted that the issue of compelling jurisdiction should be assessed on a case by case basis, on both objective and subjective grounds on the balance of probabilities, and additionally referred to the effect of ingestion of cocaine on 16 April 2022 which did affect his anxious state and his ability to deal with the situation the next day,

- the taking of advice from an uneducated coach on that day, and

- his later actions to deal with his addiction and other mental health issues.

29. In respect of any sanction to be applied the Athlete first submitted that the provisions of Article 10.2.4.1 of the ISA Rules (relating to ingestion of substances of abuse) should apply, on the basis of the evidence of his ingestion of cocaine the night before the attempted test, rather than the period of ineligibility set out in Article 10.3.1 (relating to refusal or failing to submit to sample collection).

30. In terms of Article 10.3.1 of the ISA Rules, the Athlete contended that his conduct was not intentional and within Article 10.3.1.(i), or alternatively that there were exceptional circumstances within Article 10.3.1 (ii) of the ISA Rules.

31. The facts put forward by the Athlete as amounting to exceptional circumstances are the same as those propounded as compelling justification, and are set out in paragraphs 28 and 29 above, and certain elements which were described as mitigating factors, and are set out in paragraph 13.

V. JURISDICTION

32. The CAS ADD's jurisdiction was invoked by Article 8.1.1 of the ISA ADR and this was not contested as confirmed by both Parties in their written submissions and the signed Order of Procedure.

VI. APPLICABLE LAW

33. As confirmed by the Parties in the Order of Procedure, and in accordance with Article A20 of the CAS ADD Rules, the applicable Anti-Doping Rules, being the ISA Rules, apply to the merits to be decided by the Arbitrator, and in the absence of any choice of the laws of a particular jurisdiction, Swiss law applies.

VII. MERITS

34. The ADRV alleged to have been committed on 17 April 2022 by the Athlete is that set out in Article 2.3 of the ISA Rules:

> *Evading Sample collection, or refusing or failing to submit to Sample collection without compelling justification after notification by a duly authorized Person*

The evidence relating to the attempted doping control on 17 April 2022

35. The three persons present on the 17 April 2022, being the DCO Mr Simoes, the Athlete, and the Athlete's mother Mrs Pessoa, all gave evidence at the hearing.

36. Mr Simoes' statement incorporated the Unsuccessful Attempt Report which is set out in paragraph 11. In evidence at the hearing he confirmed the story outlined in his Report. He stated that the Athlete did not look anxious at all at any time. He said he was very calm, never excited, nor changed his tone of voice and was very normal. He also said that when the Athlete came out the second time (after calling the coach) he was very calm, not stressed, but said he was not going to do the test, and that he never looked panicked but was very calm.

37. Mrs Pessoa gave evidence in a statement where she stated the words of Mr Simoes "*had affected him in such a way that it triggered an extreme anxiety and panic reaction in my son, who unfortunately has a recurring history of these reactions in stressful situations*" and "*I felt him extremely disoriented"* and that when talking to the coach "*he told him he was extremely worried and embarrassed because he had been the night before with some friends with whom he had consumed cocaine, that would surely be confirmed if he were to be submitted to a urine test."* She said *"the coach had advised him not to provide any urine sample, which further increased my son's state of panic and anxiety, who - in a clear moment of pressure – asked me to go outside and inform* [Mr Simoes] *that he refused to provide a urine sample".* Her statement further said that at a later time "*he, in a state of rage, went to the door and said directly to* [Mr Simoes] *that he refused to provide a urine sample."*

> In her evidence at the hearing Mrs Pessoa said she did not recall the 17 April 2022 in absolute detail. Of her son, she said variously that he was very agitated, that he was distressed, and that she has seen him at that level of anxiety not often. When asked whether the Athlete was calm or stressed during the visit of Mr Simoes, she said that he was putting his daughters to bed, he was calm at first but then agitated when he understood that Mr Simoes was a Doping Control Officer.

38. The Athlete's evidence at the hearing was that when Mr Simoes told him he was from the doping or international federation he got nervous, panicked, and went inside. He described himself generally as "calm, chilled" but when using drugs, he was more agitated and would react way more. He gave evidence that he went into the house and tried to call the President and coach from the Federation, but got no answer, and called Nuno (Mr Nuno Telmo Bispo Florêncio), his coach. He said "*I was scared because I did cocaine and would test positive*." He gave evidence that when Mr Simoes visited it was 21 hours after he took cocaine and so he was still under the influence of the cocaine – "*I was not at my best, but not inhibited*". Importantly, when asked whether there was no impediment preventing him from following the DCO's instructions he answered "*No*". Also when asked in cross-examination whether it was incorrect to say he was suffering so much anxiety to prevent him going out to the DCO, he responded that "*It was severe but I didn't think about it. If I went out I could hide it.*"

39. The Athlete and his mother also gave evidence that he became addicted to cocaine to the extent that he sought and received treatment, but that was not until September 2022 according to the witness statement of Mr Jorge Viegas Faria, a therapist in the "O Farol ATT" therapeutic unit. The statement also referred to his diagnosis of cocaine/alcohol consumption disorder on 8 September 2022, his admission to that unit, and his treatment until 4 October 2022. Mr Faria gave evidence at the hearing that some symptoms of such addiction could be anxiety, craving, inability to stop, and a desire for

help, and that a loss of cognitive ability could be an effect which can diminish the ability to make sober decisions. Mr Faria did not know the Athlete in April 2022, and agreed that he was unaware of his state at that time. However, he agreed that in general terms, that having taken cocaine the day before the visit, that mental confusion, and anxiety can occur when the cocaine wears off and that could affect decision making.

Refusal or Failure to Sample Collection under Article 2.3

40. There is no allegation on the part of the Athlete to suggest that he did not refuse to subject himself to the sample collection on 17 April 2022. There is no suggestion that the Athlete was not notified by a duly authorised person, being Mr Simoes. Nor is there any suggestion that the circumstances constituted a failure to submit, rather than a refusal to submit to the sample collection. The distinction is of some importance because of Article 10.3.1 of the ISA Rules, where "failing to submit" is treated differently from "evading or refusing to submit" to a sample collection.

The language used by both Parties was always in terms of a refusal, and the submissions of the Athlete related mainly to the issue of compelling justification under Article 2.3 or exceptional circumstances under Article 10.3.1.

41. Thus on this basis and on the totality of the evidence the Sole Arbitrator is comfortably satisfied that the fact of a refusal to submit to sample collection is clearly established and so finds.

Failure of the DCO to warn as to the consequences

42. The evidence of Mr Simoes in his report is that he advised the Athlete's mother that *"a refusal is something very serious and there can be severe consequences for the athlete"* and that he did *"keep telling him* [the Athlete] *that a refusal can have severe consequences"*. At the hearing he went a bit further and said he mentioned "consequences on your career".

43. In her statement Mrs Pessoa said that Mr Simoes "*warned me that my son's refusal to submit to urine collection could have serious consequences, but he never specifically mentioned what kind of consequences, let alone that sanctions could be imposed that would prohibit him to compete for a determined period of time"*. At the hearing her evidence was that he said he would write down that he refused but he did not detail any consequences, and that he did not mention an impact on his career.

44. The Athlete's evidence was that he did not recall if he was told the consequences but agreed that the time spent with him was short (7-8 minutes) and there was no time to explain specific consequences.

45. In his Answer the Athlete claimed that his conduct would have been different if the DCO had sufficiently informed him of the potential consequences for refusal to provide a sample, and that Mr Simoes' failure to advise the Athlete or his mother of the potential imposition of a four-year ineligibility period contravened the *WADA International Standard for Testing and Investigations, 2021* ("ISTI"), specifically Article 5.4.1 which relevantly provides:

> *When initial contact is made, the….DCO…..shall ensure that the Athlete ……is informed…of the Athlete's responsibilities, including the requirement to…..comply with Sample collection procedures (and the Athlete should be advised of the possible Consequences of a Failure to Comply)* [emphasis added]

46. The evidence above establishes that Mr Simoes, even on his own admission, did not refer to the specific possibility of a four-year period of ineligibility for a refusal to submit to sample collection. However, both his and Mrs Pessoa's evidence is clear that he spoke about serious consequences, although the Athlete cannot recall that. The Sole Arbitrator accepts this evidence.

47. The CAS jurisprudence has considered the question of whether the DCO or other person undertaking the sample collection has an obligation under ISTI Article 5.4.1 or otherwise to provide advice as to the detailed sanction to which the Athlete might be subject if he refuses to submit to the sample collection. In the case CAS 2018/A/5885 the panel there noted that Article 5.4.1 of the ISTI stipulates that the athlete should be advised of the possible consequences of a failure to comply, not must be advised. The Panel noted that "the word 'should' implies some sort of recommendation or guideline and therefore does not impose an obligation on" the person in the position of Mr Simoes. In other words, the obligation to advise is not mandatory, and there is not any particularisation of exactly what that advice should consist of.

48. In another case of a refusal to submit to a sample collection (CAS 2008/A/1558), the Panel noted at paragraph 74 that the provision equivalent to Article 5.4.1 ISTI in that case, which provision was in the same terms as Article 5.4.1, "*placed no obligation on the DCO to advise* [the Athlete] *of the precise consequences of his refusal to comply, or to advise him of what specific sanction he was likely to incur.*"

49. In the present case, the evidence establishes that Mr Simoes provided advice to the Athlete that his refusal would produce serious consequences, and the fact that the exact consequences were not specified does not affect the validity of the testing process, or justify the Athlete's refusal to provide the sample. The Sole Arbitrator does note however that the Athlete's lack of specific understanding about the possible consequences of refusing to provide a sample is a circumstance to be taken into account in relation to his degree of fault under Article 10.3.1 of the ISA Rules.

Compelling Justification

50. The elements claimed by the Athlete to constitute Compelling Justification are set out in paragraph 28 above.

51. The concept of "compelling justification" is peculiar to Article 2.3 of the WADA Code and the ISA Rules. The use of the word "compelling" makes it clear that a high bar is being set to be able to rely on this defence. This has been considered in a number of cases concerning an ADVR of refusal to submit to sample collection heard in the Appeals Arbitration Division of CAS. In the case CAS 2013/A/3279, the Panel noted at paragraphs 2 and 9.15 that:

> *whether the Athlete had a compelling justification for failing to provide a blood sample needs to be determined objectively. The question is not whether the Athlete was acting in good faith, but, whether objectively, he was justified by compelling reasons to forego the test.*

52. Other decisions have thrown light on the type of compelling reasons that might reach the high bar that is set. In CAS 2005/A/925, the panel was of the view:

> *As established in CAS jurisprudence, the defence of compelling justification of the refusal to submit to sample collection is to be interpreted restrictively. The logic of the anti-doping tests demands and expects that whenever physically, hygienically and morally possible, the sample be provided despite objection by the athlete. If that does not occur, athletes would systematically refuse to provide samples for whatever reasons, leaving no opportunity for testing.*

53. Examples of the level of justification which might be considered compelling were outlined in CAS 2016/A/4631 at paragraphs 77-79, following the decisions mentioned above:

> *If it remains* "physically, hygienically and morally possible" *for the sample to be provided, despite objections by the athlete, the refusal to submit to the test cannot be deemed to have been compellingly justified.*
>
> *Obviously, this would not be the case if the athlete were to faint unconscious on the floor upon seeing the DCO's needle, or if he were stone drunk or would experience an epileptic fit at the time of the test. Even a refusal to*

submit to the test because the athlete must rush his expectant wife to hospital might qualify as a "compelling justification".

Examples of this kind in which it is established that an athlete is deprived of his rationality and cognitive sense will, in most cases, be sufficient to ground the excuse of "compelling justification". These situations present physical and moral hindrances to going ahead with the test.

54. The Panel in that case also referred to a case in the Sport Dispute Resolution Centre of Canada *C v B* on 31 May 2007 where the tribunal was more direct in noting that *"to be compelling [the]departure would have to have been unavoidable."*

55. The case CAS 2016/A/4631 is instructive in the current case, as it was also a case where the athlete was afraid and anxious and claimed he was having a "panic attack". The Panel observed at paragraph 82 that *"Panic implies the inherent loss of judgment and ability to discern, a situation characterized by a loss of voluntary control over one's cognitive faculties and actions"* and went on to consider the behaviour of the athlete and whether it showed a certain degree of lack of rationality.

56. In the present case, it is apparent from his and his mother's evidence that the Athlete exhibited fear and anxiety, although this was not apparent to Mr Simoes. The fear and anxiety were that he might test positive. It is hard to see that a fear of testing positive is a justification for refusing to submit to the test as required by the anti-doping rules. The nature of the substance for which he fears he might test positive does not alter this fact. But more significantly, the Athlete in this case showed a rationality of thought and action which is not consistent with a loss of voluntary control of his cognitive faculties and actions. The instances of this are:

- his immediate understanding that he might test positive for cocaine because of his night out the previous evening, which exhibits a thought process which was quite reasonable and rational.

- his attempts to contact first the president of the national federation, then the national coach and then his own coach, to seek advice, which exemplifies control over his thoughts and actions.

57. It was argued on behalf of the Athlete that the ingestion of cocaine the night before affected his state of anxiety and his ability to deal with the situation the next day. However, in his evidence at the hearing the Athlete agreed that although he was still to some extent under the influence of cocaine from the night before, he expressed it as "not being at his best, but not inhibited". He also agreed that there was no impediment preventing him following the DCO's instructions. This evidence is far from establishing a loss of control of his cognitive faculties and actions, such as might be the case of someone who was "stone drunk" as suggested in the examples above, to the extent that it could be compelling justification in the ordinary sense of those words, or in the way they have been interpreted in the cases mentioned above.

58. It was further argued that his lack of doping education and the absence of any specific warning from Mr Simoes that a long period of ineligibility might result from his refusal to submit to sample collection somehow constituted compelling justification, in the sense that he was unaware of the consequences. These issues might have relevance to the question of exceptional circumstances as discussed below, but are not matters which amount to compelling justification in line with the cases referred to.

59. It has also been held in the CAS cases that acting on advice from another trusted person – the father of the athlete in CAS 2016/A/4631, or the athlete's coach in CAS 2012/A/2791 - cannot in principle be a compelling justification. The advice which the Athlete in this case received from his coach Mr Florêncio is therefore not an excuse open to him.

60. It is clear that the Athlete refused to submit to the sample collection because of the fear of testing positive for whatever substance. This showed an awareness that failing a test might produce consequences, rather than of being oblivious to the fact that there would be consequences. This awareness itself is evidence of a significant amount of rationality and cognitive sense, albeit in a situation where the Athlete went on to make an inappropriate decision.

61. The Sole Arbitrator is satisfied on the balance of probabilities that the defence of compelling justification under Article 2.3 of the ISA Rules has not been established, and therefore that the ADVR has been established.

Period of Ineligibility

62. Article 10.3.1 of the 2021 ISA Rules provides:

> *For violations of Article 2.3 or 2.5, the period of Ineligibility shall be four years except: (i) in the case of failing to submit to Sample collection if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of ineligibility shall be two years; (ii) in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of ineligibility, the period of ineligibility shall be in the range from two years to four years depending on the Athlete or other Person's degree of Fault; […]*

Intention of the Athlete

63. The Athlete contended that his refusal to submit to the sample collection was not intentional and that he was entitled to rely on the exception (i) set out in Article 10.3.1 of the ISA Rules to reduce the period of ineligibility that might be imposed.

64. The Sole Arbitrator is satisfied that the Athlete exhibited the clearest of intention not to submit to the sample collection, in order to avoid a positive test. Moreover, he positively refused to submit to the sample collection, which was an intentional action. A pertinent case is CAS 2015/A/4063 where it was noted at paragraph 4 that:

> *A refusal to submit to sample collection cannot be considered to have happened unintentionally when, after a first notification of the obligation to comply with out-of-competition control by the DCO in front of his house, the athlete returns into his/her house and fails to respond to repeated active attempts by the DCO to re-establish the contact.*

65. In any case, exception (i) applies only to "the case of failing to submit to sample collection" where a lack of intention may be established, not to refusal, such as is found to be the case here. In the case of refusal, it is only exception (ii) that can apply in that refusal contemplates intentional conduct. This is also apparent from the Comment to Article 2.3 in the ISA Rules which points out:

> *"A violation of 'failing to submit to Sample collection' may be based on either intentional or negligent conduct of the Athlete while "evading" or "refusing" Sample collection contemplates intentional conduct by the Athlete."*

The 2015 WADA Code version of Article 10.3.1 was in a different form, and comments made in earlier decisions, especially in CAS 2016/A/4631 , about the interpretation of the comment to Article 2.3 in relation to Article 10.3.1 are pertinent to the Rules at that time. The change to Article 10.3.1 clarifies that exception (i) is not available in a case of refusal.

Exceptional circumstances

66. The facts which the Athlete put forward as constituting exceptional circumstances were the same as those submitted as amounting to compelling justification, namely:

- the state of anxiety in which the Athlete was at the time he refused to provide a sample for collection;

- the absence of particular advice from the Doping Control Officer as to the consequences of a refusal;

- the lack of doping education provided to the Athlete and his consequential ignorance.

The Athlete's state of anxiety

67. In respect of the Athlete's state of mind when confronted with the request to provide a sample, the Sole Arbitrator finds that his anxiety was not such as to deprive him of his ability to make rational decisions, or of his cognitive ability as set out in paragraphs 56 and 57 above. In fact it appears that his anxiety and fear of testing positive for cocaine led him to his decision to refuse. Making the wrong decision does not amount to a loss of rationality or of cognitive ability, neither of which were proven by the Athlete on the balance of probabilities. However, the circumstances in which he found himself following his use of cocaine the previous evening and being confronted with a doping control the next day are to be taken into account when looked at together with the other matters put forward as exceptional circumstances.

Absence of particular advice as to the consequences of refusal.

68. This circumstance is also dealt with in paragraphs 42 to 49 above. The Athlete contends that if he had been advised that refusal would constitute an ADVR, with a significant period of ineligibility, he would have taken a different course, that is, if Mr Simoes had been able to advise him that a refusal could lead to a 4-year period of ineligibility whereas a positive test for cocaine could lead to a period of 3 months, or one month with counselling. As set out above, Mr Simoes was not bound to provide this explanation, and also through the actions of the Athlete was not provided with any adequate opportunity to provide this advice in any case. Whilst this may constitute a circumstance which is somewhat exceptional, and thus can be considered together with other exceptional circumstances, the degree of fault of the Athlete is significant.

Lack of Doping Education

69. The Athlete gave evidence that he had undertaken no education on matters related to anti-doping and none was offered to him. The President of the Portuguese Surfing Federation ("FPS") Mr. Aranha gave evidence that the Federation had provided no such education to the Athlete either before or after he was entered on the Registered Testing Pool, despite its obligation to do so in collaboration with the ISA and national anti-doping authority under Article 18 of the ISA Rules. His statement which is in evidence argues that it is the responsibility of the national anti-doping agency (ADoP) to make "*sports practitioners, their support staff and young people in general, aware of the dangers and disloyalty of doping."* He acknowledged that the Athlete was included in the Registered Testing Pool ("RTP") of ISA in January of 2022, and that "*due to significant budgetary constraints, between January and April 2022, the FPS did not carry out any anti-doping education and awareness program or workshop for Mr. Vasco Ribeiro or any other athlete also included in ISA's RTP"* and "*no such program or workshop was organized by the ADoP during this timeframe"*. He outlined that *FPS has not provided the athletes included in the RTP with specific information about the special contents of the WADA Code, in particular…."potential ADRV"…, "refusal to provide a sample collection", or the consequences that could arise in case they infringed the relevant regulations."* He reiterated this quite extraordinary admission of dereliction of the federation's responsibility in the evidence he gave at the hearing, despite acknowledging that ISA had introduced the RTP in 2018 when a decision was made to include surfing in the Olympic Games, and that the Athlete was one of the FPS's best athletes and possible to qualify for the Olympics. There was not specific evidence of any ISA or ADoP education, but the Athlete gave evidence that he had not undertaken any such

education, although he admitted he had also not consulted the ISA Rules as he was invited to do by the ITP Notification in January 2022.

70. The Athlete's coach since 2004, Nuno Telmo Bispo Florêncio, gave evidence that the Athlete is "our top athlete", and confirmed the lack of doping education, in that he too was never informed about anti-doping matters in that it was not his area. Nevertheless he took it upon himself to advise the Athlete not to take the anti-doping test on 17 April 2022. He admitted he was not aware of the consequences of a refusal to submit to sample collection.

71. Whilst it is clear that both the President of the FPS and the Athlete's coach have an apparently clear interest in assisting the Athlete in his defence of the ADRV, it remains a fact which the Athlete has established on the balance of probabilities that he was not formally educated on matters anti-doping at the relevant time. However, as outlined below, it is also clear that the Athlete did nothing to educate himself, as required of an athlete of his standing, and as an athlete in the RTP.

72. This multiplicity of circumstances seen together create in the view of the Sole Arbitrator a set of exceptional circumstances which warrant consideration under exception (ii) of Article 10.3.1 of the ISA Rules which will entitle the Athlete to a reduction of the sanction of four years of ineligibility to between two and four years, depending on his degree of fault.

Athlete's degree of fault

73. In each of the circumstances considered above, the Athlete's behaviour exhibits fault on his part.

74. In the first element, his anxiety can be attributed largely to his use of cocaine and the fear of a positive test arising out of that. Use a prohibited substance, as cocaine is, by an elite athlete indicates a significant degree of fault on his part. Without this action, it can be deduced that there would be no fear or anxiety, and no refusal to take the test.

75. Secondly, the fact that he was not warned of the consequences in specific terms is partly his fault as well. As his, Mr Simoes's, and his mother's evidence establishes, he chose not to engage in any significant conversation with Mr Simoes, even when told that serious consequences would come from his refusal. Whilst it is not clear that Mr Simoes would have been in a situation to explain the exact consequence (four years, reducible to two) of an ADRV under Article 2.3 of the ISA Rules, or the potential alternative consequence of 3 months reducible to 1 month for an ADRV under Article 2.1 for presence of a substance of abuse, the fact that the Athlete agreed that he did not give Mr Simoes time to explain more than he did, and did not ask him questions about the consequences, nor for that matter mention to him that his concern was his use of cocaine the previous evening, meant that he did not give Mr Simoes the chance to provide more information to him in any case.

76. Thirdly, whilst his lack of anti-doping education is established on the facts, and the FPS President has sought to take the blame for this, the Athlete remains the person with the primary responsibility to be aware of the relevant provisions of the ISA Rules. This is the case with any Athlete, but in this case it is further established by his signed Acknowledgment of Receipt Form when notified of his inclusion in the ISA's RTP, which document was produced in evidence, and which stated *"I have read and understood the letter of notification and that ….I understand that I am part of the International Testing Pool.* The Notification, receipt of which he acknowledged, was clear in its terms that the Athlete was required to "*submit to Testing at any time and place upon request of an ADO [Anti-Doping Organization] with Testing Authority over him or her"* and was "*PERSONALLY RESPONSIBLE AT ALL TIMES for any failure to comply with the requirements of the ISA ADR".* Details of where to find the ISA Rules were provided. In his evidence he admitted that he did not consult the rules, did not check anything and never contacted the ISA to ask anything. Moreover, he did receive in March 2022 notification of a missed test in February of 2022. He cannot be said to be oblivious to the fact of there being rules

which applied to him, and of course his concern about the test indicated he at least knew that failing a test had consequences.

77. For these reasons, the Sole Arbitrator finds that his degree of fault was not slight but reasonably substantial.

78. There is a body of CAS Appeals Division jurisprudence about assessing the degree of fault in relation to Article 10.6.2 of the WADA Code, and reproduced in the ISA Rules, with the leading case being that of CAS 2013/A/ 3327 and 3335. Although that was a case which related to Article 10.6.2 – dealing with "no significant fault or negligence" in ADRVs under Article 2.1, 2.2 and 2.6, rather than Article 10.3.1 – dealing with "exceptional circumstances" in ADRVs under Articles 2.3 and 2.5, the Sole Arbitrator considers that the analysis in that case is nevertheless helpful in determining how to assess the degree of fault under Article 10.3.1, and the appropriate reduction of sanction that might be applied. Indeed, the comment to the definition of Fault in the Appendix to the WADA Code provides that "*The criteria for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered*". This analysis has been taken into account in determining the appropriate reduction in the period of ineligibility in this case as outlined below.

Period of Ineligibility

79. The Athlete mounted an argument that the appropriate sanction to be applied would be that set out in Article 10.2.4.1 of the ISA Rules. That paragraph is part of Article 10.2, which provides for sanctions where the ADRV is one of "*Presence, Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method* under Article 2.1, 2.2 or 2.6, and sets out the specific sanctions where the prohibited substance used is a *Substance of Abuse*, such as cocaine. As a pure matter of construction, Article 10.2 does not apply to this case as the ADRV is rather that of Refusal to Submit to Sample Collection under Article 2.3. It is Article 10.3.1 which relates to sanctions for this ADRV. Indeed, if as argued by the Athlete, the provisions of Article 10.2.4.1 could be imported into sanctioning for an ADRV of refusal, athletes would be encouraged to refuse tests in any circumstance, and plead that the refusal was based on fear of testing positive for a substance of abuse, and claiming the lighter sanction should then apply. This would be destructive of the testing regime of the World Anti-Doping Code, and circumvent the obligation to undertake out of competition tests, by allowing such a claim. The Athlete's submission is rejected.

80. The Athlete also argued that various mitigating factors set out in paragraph 13 should be taken into account in applying the principle of proportionality into the sanctioning decision. The Sole Arbitrator relies on CAS jurisprudence to the effect that the World Anti-Doping Code, and by extension the ISA Rules, themselves provide a system which assures proportionality in sanctioning, and the provisions of Article 10.3.1 and the exceptions thereunder are very much an example of the proportionality enshrined in the Code and the Rules. See in particular CAS 2018/A/5739, paragraphs 79 to 82.

81. Applying the relevant provisions of Article 10.3.1 and accepting that there were some exceptional circumstances in this case to be considered along with the athlete's degree of fault, the Arbitrator finds that the degree of fault being reasonably substantial, fits between the "light degree of fault" and the "significant degree of fault" expressed in CAS 2013/A/3327 and 3335, where the description of this middle degree of fault was expressed by the Panel as a "normal degree of fault". The Sole Arbitrator has also taken into account the reduction of the period of ineligibility in the "refusal" case of CAS/2016/A/4631, where the Panel applied the equivalent of Article 10.6.2 in deciding on a two year reduction in that case, and the reduction in a recent Article 2.5 'tampering" case CAS 2021/A/7983-8059, where applying Article 10.3.1, the Panel determined that a reduction of one year

was appropriate. The Sole Arbitrator finds that in this case the period of ineligibility should be reduced by one year from four years to three years..

82. In accordance with Article 10.13 of the ISA Rules the period of ineligibility shall commence on the date of the final hearing decision. There has been no provisional suspension, so there will be no credit therefor under Article 10.3.2.

Disqualification of Results

83. Under Article 10.10 of the ISA Rules, all competitive results obtained by the Athlete from the date of the ADRV, namely 17 April 2022, up to the date of the commencement of the period of ineligibility shall be disqualified with all resulting consequences, including forfeiture of any medals, points and prizes. The Sole Arbitrator notes that no submission was made as to any element of fairness that would require otherwise.

Financial Consequences

84. In respect of Article 10.12 of the ISA Rules, given that the maximum period of ineligibility has not been imposed on the Athlete, there is no entitlement to either ISA or ITA to impose financial sanction on the Athlete. No evidence or submissions were made to the Arbitrator in respect of any specific costs incurred by the parties.

VIII. COSTS

(…).

IX. APPEAL

89. This decision may be appealed as provided in Article 13 of the ISA Rules. Copies of the decision will be provided to the Athlete, to ISA and to other Anti-Doping Organisations with a right to appeal under Article 13.

90. Pursuant to Article A21 of the ADD Rules, this award may be appealed to the CAS Appeals Arbitration Division within 21 days from receipt of the notification of the final award with reasons in accordance with Articles R47 *et seq.* of the CAS Code of Sports-Related Arbitration, applicable to appeals procedures.

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ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The request for arbitration filed by the International Surfing Association against Vasco Ribeiro is partially upheld.

2. Vasco Ribeiro has committed a violation of Article 2.3 of the ISA Anti-Doping Rules and is declared ineligible to compete for a period of three (3) years commencing as of the notification of the present Arbitral Award.

3. All competitive results of Vasco Ribeiro from 17 April 2022 until the notification of the present Arbitral Award are disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

4. (…).

5. (…).

6. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 13 July 2023

THE ANTI-DOPING DIVISION
OF THE COURT OF ARBITRATION FOR SPORT

John Boultbee
Sole Arbitrator