SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/Adhocsport/844/2017

PROCEEDINGS BROUGHT BY THE INTERNATIONAL TENNIS FEDERATION UNDER THE TENNIS ANTI-DOPING PROGRAMME

BETWEEN:

International Tennis Federation (ITF) **Anti-Doping Organisation**

And

Mr Jake Mak **Respondent**

DECISION OF THE INDEPENDENT TRIBUNAL

Introduction and Summary

1. Jake Mak is now a 28 year old[1] Dutch national who entered the Portugal F1 Futures Tournament[2] held in Vale de Lobo in Portugal. It was scheduled to begin on 25th February 2017.

2. When Mr Mak signed in at the tournament venue on 24th February 2017 he was notified that he was required to provide a blood sample[3] under the 2017 Tennis

[1] Date of birth 2nd August 1989.

[2] Part of the ITF Pro-Circuit.

Anti-Doping Programme. In circumstances which we shall explain and analyse further, he declined[4] to give a blood sample explaining that he had good medical reasons for that decision. He offered to and eventually did provide a urine sample but, since he had refused or failed to submit to sample collection of blood, he was charged with an Anti-Doping Rule violation within Article 2.3 of the Tennis Anti-Doping Programme 2017 (hereafter 'TADP' or the 'Code').

3. It is for this Tribunal to decide whether Mr Mak has committed such an Anti-Doping Rule violation and, if so, what the appropriate consequences are.

Attendance/Representation/Evidence at the Tribunal

4. The ITF's case was presented by Mr Richard Bush of Bird and Bird, assisted by Ms Lauren Pagé. We are particularly grateful to Mr Bush[5] for the thoroughness and clarity of the written opening submissions and of his reply to the response submitted on behalf of Mr Mak. In addition, we thought Mr Bush presented the ITF's case with conspicuous fairness and balance. We are also grateful for having been provided with a manageable and well-arranged set of three files submitted long enough in advance for us to read them properly before the hearing began.

5. Mr Mak, who travelled to London for the purposes of the hearing, was represented by Ms Pippa Manby of counsel, instructed by Taylor Wessing LLP under the Sport Resolutions *pro bono* scheme. Given the complexity of fact and law which these cases so often involve, such a service is not only of huge value to the player

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[3] This was out-of-competition testing.

[4] We deliberately choose a neutral word at this point.

[5] And to Mr John Taylor QC who, with Ms Pagé, was the author of the ITF's 'Opening Brief'.

involved in the process, it also is an enormous help to the Tribunal. For that, we would wish to record our grateful thanks and further to acknowledge that Ms Manby was able to present her client's case with great skill, courtesy and balance.

6. As will be apparent from our discussion of the facts hereafter, much of what happened on the day is not in dispute. Nevertheless, there are some issues of fact that we shall need to resolve and the legal consequences of our findings remain controversial between the parties.

7. The written evidence and main documentation appeared in a single file entitled the "Hearing Bundle" (HB) with 18 tabs to which we shall refer in the course of this Decision. We had 2 further bundles of rules and authorities (AB).

8. At the beginning of the hearing we were provided with an indicative hearing schedule[6] on which it was recorded that:

> "*Witnesses' written statements/reports are to be taken as read. Brief direct examination will be allowed, then cross-examination, then Panel questions, then any re-direct (confined to matters raised in cross-examination or by the Panel). The ITF waives cross-examination of Gre Mak, Remco Reinhard, Dr Danielle van Oostendorp, Linda Stoeten and Esther van den Berg, and Mr Mak waives cross-examination of Neil Söderström, Ricardo Martins, Stuart Miller and Prof. Christiane Ayotte, but each party reserves the right to make submissions as to the effect and weight of that evidence.*"

9. The oral evidence called therefore came from Marco Romao (the ITF Supervisor at this event) by video-link, his written witness statement being at HB/9. A similar course was taken with Maria Carreno, the Doping Control Officer (DCO) and Blood Control Officer (BCO). She works for International Doping Tests and Management (IDTM) which is an organisation that provides testing and anti-doping services for various sports bodies including the ITF.

[6] The parties are to be congratulated for sticking to that schedule with great accuracy.

10. Each of those two witnesses affirmed the truth and accuracy of their witness statements and took us through the exhibits annexed thereto and answered questions from the parties and from the Tribunal.

11. The other evidence that the ITF submitted was in writing. The Tribunal reviewed witness statements from Ricardo Martins, a tennis coach at the Vale de Lobo Tennis Academy, who was helping Maria Carreno with doping control; Neal Söderström, who also works for IDTM and had a series of communication on the day from Sweden; and Dr Stuart Miller of the ITF who was also involved in the discussions taking place during the latter part of that afternoon. Their witness statements are at HB/11, HB/12 and HB/13 respectively.

12. In addition, the ITF submitted a short report from Professor Ayotte (HB/14). The effect of that evidence, in context, was to explain that urine and blood tests are not interchangeable because there are some substances and methods on the Prohibited List[7] which can only be tested in blood. Particularly, blood is used to measure three critical parameters, namely, haemoglobin, reticulocytes and hematocrits. In blood testing, deviations from the normal ranges are, she says, the only way in which to "*detect the use of substances or methods such as blood withdrawals or autologous transfusions for which there are no direct method of detection. While the presence of recombinant erythropoietin (EPO) could no longer be detected in urine, its effect on the blood parameters will be perceptible. Also, some erythropoiesis stimulating substances (ESA) like CERA, are more efficiently detected in blood than in urine*." It is for those reasons, Professor

[7] Under the World Anti-Doping Code.

Ayotte wrote – and we unreservedly accept – that blood samples have still to be collected from athletes and that urine is not an equivalent or substitute.

13. Mr Mak gave evidence in person in accordance with his witness statement at HB/15. He appended a copy of medical records provided by his general practitioner, Dr van Oostendorp who had already given an account of events in June 2012 when Mr Mak was taken ill when at the laboratory for blood tests. That report (at HB/4) had been obtained and provided to the ITF following the ITF's letter of charge dated 18th May 2017 (HB/1) and Mr Mak's response of 2nd June 2017 (HB/3).

14. Whether Dr van Oostendorp was writing from first-hand knowledge or was basing her report on the records is not known but that is not, in the view of the Tribunal, of particular importance in the circumstances. What is clear from that report is that, despite the attendances in 2009 and 2012, she was aware of no advice, treatment or support which Mr Mak had received until after the events with which we are concerned, notwithstanding the passage of five years since the episode in June 2012. Indeed, that treatment was evidently provided by psychologists later in 2017 (as confirmed by the report dated 13th September 2017 at HB/12 from Mrs Stoeten and Mrs van den Berg).

15. Mr Mak also submitted written evidence from a friend, Remco Reinhard (witness statement at HB/16) who was present with Mr Mak during the events with which we are concerned, and from his mother, Gre Mak (HB/17).

16. All of that written material was taken as read by the Tribunal in accordance with the written record of the parties' agreement as set out above.

Jurisdiction over the Player

17. Mr Mak is not a full-time professional and has only ever played tournaments on the ITF pro-circuit[8]. There is a gap of some years between the ITF Pro-Circuit Tournament in which he competed in 2009 and the event in February 2017 at which the incident which is the subject of this charge happened. In between, Mr Mak had played club events, a regional tournament and some national tournaments in 2016. He explained, and we accept, that he only decided to play in the ITF Pro-Circuit Tournament in Vale de Lobo in February 2017 because the tennis club to which he belonged happened to have organised a tennis training holiday in the same resort at the same time. He explained that he was there to help his club coach (a good friend) and that the two of them decided to enter the ITF Tournament, in effect, for fun.

18. Since there is no issue as to the application of the TADP (the 'Code') at this tournament or to Mr Mak, we have proceeded on the basis that he was at all relevant times bound by and required to comply with all the requirements of it. That is not to say Mr Mak agrees he was familiar with every part of it: he told the Tribunal that when he did go online, early in 2017, when activating his International Player Identification Number, the anti-doping training he obtained was 'basic'[9]. Nevertheless, he frankly acknowledged in evidence to us that he knew that he might be asked to give blood or urine if selected for doping control (albeit he said he thought that prospect unlikely).

[8] Which itself is a gateway to the elite-level ATP World Tour.

[9] See paragraph 6.2 of his witness statement at HB/15

19. So far as this Tribunal is concerned, Mr Mak had all the obligations of a player subject to the Code which, as the ITF explained in their opening, means that he had to:

- Acquaint himself with all the requirements of the Programme (Article 1.12.1).
- Know what constitutes an Anti-Doping Rule violation under the Programme (Article 1.12.2).
- Be available for sample collection at all times upon request (Article 1.12.3) where such "*sample*" is defined so as to include urine and blood (Articles 4.6.3, 5.2.2): see also the general provisions requiring players to be familiar with the Programme (Article 4.2) which includes specific and detailed procedures for the collection of blood samples.
- Be prepared to submit to testing upon demand by or on behalf of the ITF at any time or place whether out of competition or in competition (Articles 1.11, 2.3 and 4.1).

Material provisions of the Tennis Anti-Doping Programme ('Code')

20. For convenience, we shall set out the relevant provisions in full.

21. "*Anti-Doping Rule violations*" are defined as follows in Article 2

> *"Doping is defined as the occurrence of one or more of the following (each, an "**Anti-Doping Rule Violation**"):*
>
> *2.1 [Not applicable]*
> *2.2 [Not applicable]*

2.3 Evading Sample collection, or (without compelling justification) refusing or failing to submit to Sample collection after notification as authorised in applicable anti-doping rules."

22. The sanctions are dealt with in Article 10. Article 10.3 provides:

> *"10.3 Imposition of a Period of Ineligibility for Other Anti-Doping Rule Violations:*
>
> *The period of Ineligibility imposed for Anti-Doping Rule Violations under provisions other than Articles 2.1, 2.2 and 2.6 shall be as follows, unless Article 10.5 or 10.6 is applicable:*
>
> *10.3.1 For an Anti-Doping Rule Violation under Article 2.3 or Article 2.5 that is the Participant's first anti-doping offence, the period of Ineligibility imposed shall be four years unless, in a case of failing to submit to Sample collection, the Player can establish that the commission of the Anti-Doping Rule Violation was not intentional (as defined in Article 10.2.3), in which case the period of Ineligibility shall be two years."*

23. The reference in that provision to intention as defined in Article 10.2.3 is important. Article 10.2.3 provides:

> *"10.2.3 As used in Article 10.2 and 10.3, the term "intentional" is meant to identify those Participants who cheat. The term, therefore, requires that the Participant engaged in conduct that he/she knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance that is only prohibited In-Competition (a) shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Player can establish that it was Used Out-of-Competition; and (b) shall not be considered "intentional" if the Substance is not a Specified Substance and the Player can establish that it was Used Out-of-Competition in a context unrelated to sport performance."*

24. The next provision which was the subject of submissions by the parties and consideration by the Tribunal is at Article 10.5. This is headed "Reduction of the Period of Ineligibility based on No Significant Fault or Negligence". Paragraph 10.5.1 does not apply but 10.5.2 is directly relevant. It provides that:

> *"10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1:*
>
> *In an individual case where Article 10.5.1 is not applicable, if a Participant establishes that he/she bears No Significant Fault or Negligence, then*

(subject to further reduction or elimination as provided in Article 10.6) the otherwise applicable period of Ineligibility may be reduced based on the degree of Fault of the Participant, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight years."

25. Other parts of the Code to which we were referred include the definition section. Again, it will be convenient if we set out the relevant definitions in full.

- "Fault. Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Player or other Person's degree of Fault include, for example, the Player or other Person's experience, whether the Player or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Player or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that a Player would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Player only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

- No significant fault or negligence. The Player or other Person establishing that his/her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation. Except in the case of a Minor, for any violation of Article 2.1 the Player must also establish how the Prohibited Substance entered his/her system."

26. We were also referred to Appendix Five of the Code which provides some commentary/guidance on Anti-Doping Rule violations under Article 2. The relevant sections are as follows:-

"The following articles in the 2015 Code are directly relevant to the International Standard for Testing and Investigations:

Code Article 2 Anti-Doping Rule Violations

The following constitute anti-doping rule violations:

2.1 [Not applicable]

2.2 [Not applicable]

2.3 Evading, Refusing or Failing to Submit to Sample Collection.

> *Evading Sample collection, or without compelling justification refusing or failing to submit to Sample collection after notification as authorized in applicable anti-doping rules.*
>
> *[Comment to Article 2.3: For example, it would be an anti-doping rule violation of "evading Sample collection" if it were established that an Athlete was deliberately avoiding a Doping Control official to evade notification or Testing. 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 Player's Personal and Medical Background

27. We have already referred to this above. Whilst issues such as whether or not Mr Mak had a "*compelling justification*" if he refused to give a sample are to be judged objectively, his personal circumstances and background are nevertheless relevant if we come to consider issues of "*fault*" given the definition that we have quoted already. But in such consideration, we must remain mindful of the qualifications or limitations upon the definition of fault as expressed in the Code.

28. Mr Mak explains and it was not disputed that he is not and has no aspirations to become a professional tennis player. Indeed, he said that the largest amount that he ever earned from a tennis tournament was 1,100 Euros some 9 years ago. But tennis remains a very considerable interest for him and he enjoys playing the game in his spare time[10], in club matches and a few tournaments. Essentially, then, tennis is a serious hobby and, understandably, he would be significantly affected if he could not attend professional tournaments as a spectator. But it goes further than that because, as a qualified tennis coach, he told us that he might in the future like to use his coaching qualification (although he does not do so at present).

[10] His main job is working in a residential home for "*mentally handicapped individuals*". He also acts as a '*buddy'* for half a day a week assisting a young man with Down's syndrome.

29. An incident happened in 2009 which is material to the events of which the Tribunal is concerned. He will have been aged 20 at the time and says, and we accept, that on the 29th October 2009, he sought medical attention when visiting his doctor to discuss "*fainting episodes ... brought on by stress*".[11] The note in his medical records is to the effect that he had collapsed on 10 previous occasions "*particularly when having stress but also sometimes at night, looks deathly pale, regains consciousness rapidly, not confused, no biting of the tongue/incontinence, never when performing physical effort.*" What we understand to have been the record of the diagnosis on that occasion was of a "*vasovagal syncope*".

30. Following that consultation, the player's medical records contain nothing of significance until the first half of 2012 when, as we were told and again we accept, he visited the doctor on 31st May. The provisional diagnosis, apparently, was that he had suspected glandular fever and it was arranged that on 19th June 2012, he should attend an appointment with a nurse for a blood test. His brother[12] attended with him. He reports that when the needle entered his skin, his vision went "*black*" and he fainted and was told by the nurse when he woke up that he appeared to have some sort of "*epileptic seizure*".

31. Although corroboration of that diagnosis and, indeed, that presentation is lacking[13], we accept what the player told us. We also accept that he felt unwell thereafter but it nevertheless is a point of importance that he did not obtain any written record as to what had happened before he submitted or re-submitted

[11] We quote paragraph 4.1 of his witness statement.

[12] Tragically now deceased but this part of the evidence is not disputed.

[13] Dr van Oostendorp does not make it clear that her report at HB/4 is based on her own first-hand knowledge

himself to the TADP. Nor did he obtain any doctor's advice about what he might or should do in the event that he had to give blood in the future or a written note that he could have produced were it to become an issue in the future. Accordingly, whilst we accept, on the basis of the evidence of Dr van Oostendorp and the medical records of the events of 2009 and 2012, that he had "*jab anxiety*" in respect of which it was recommended that he should receive – and he has since had counselling- he had evidently not sought such advice nor had he taken any steps to obtain medical certification recording his problem prior to entering the tournament at which he was selected for anti-doping control.

32. We observe that, when he gave evidence to this Tribunal, Mr Mak said that his problem was not so much a fear of needles as a more specific "*phobia of giving blood*"[14].

33. He is supported in that more precise description of his condition by the Psychologists' report (HB/18) which refers to a DSM V classification for his phobia as 'blood injection injury'.

34. Self-evidently, the chronology demonstrates that this medical advice was only given approximately 5 months after the incident with which we are concerned.

Our finding as to the Player's state of mind in February 2017

35. Against that background, we find that in February 2017, the player did have a genuine anxiety - perhaps properly characterised as a "*phobia*" - about giving blood. On the other hand, as we have already observed, he had sought no

[14] See paragraph 4.11 of his witness statement (HB/15).

treatment in respect of that condition in the previous 4½ years, nor had he obtained any written advice from his family doctor as to what he should do in the event that he might be required to give blood for any reason. Rather, we find that he hoped that he was "*better*"[15] and that, whilst recognising that there was a chance that he might be required to give blood in the event of entering a competition[16], he thought that the risk was very remote.

36. As it turned out, however, the risk materialised. On the day in question, he was required to provide a blood test and it is to the events of the day to which we now turn. Making it clear that we accept that he genuinely feared it might be harmful to his health if he gave blood and that, accordingly, he was adamant in his own mind and in communicating his intentions to the Doping Control officers that he would not in fact do so.

The Events of the Day: Request for a Blood Sample

37. Those participating in the qualifying round (which included Mr Mak) were required to sign in at the registration desk between 1600 and 1800 hours on 24th February 2017. Mr Marco Romao was the ITF supervisor who was personally responsible for that process. In advance of that registration process, the ITF had decided that there would be out-of-competition doping control on day 1 where players selected at random would be required to give blood and there would be in-competition doping control (urine) on day 2 or subsequently.

[15] As explained to us in evidence.

[16] Something that he also acknowledged at cross-examination.

38. It was at around 17:00/17:30 hours but in any case before 18:00, that the Doping Control Officer, Mrs Maria Carreno, told Mr Morao that one player (Mr Mak) was refusing to provide a blood sample. Mrs Carreno[17] said that Mr Mak's first question was whether he had been selected to provide blood or urine. She told him that it was blood and he "*immediately said that he did not want to do the test ... explained that the last time he had had blood drawn, he had suffered an epileptic attack and so he was scared to have any blood drawn*". Her recollection is that he said that this had happened "*one or more times*" before and that he said he had some "*doctor's note or some other medical record about the incident or his condition*". According to her witness statement, when she asked for the note Mr Mak said "*that he did not have it on him*".

39. So far as the Tribunal is concerned, that was either a misunderstanding (which we accept is a possibility) or Mr Mak was saying something that simply was not true. If it was a misunderstanding, it may be that Mr Mak was indicating that his fears or reasons could be confirmed by a doctor although it seems more likely that he simply said something that was not correct. In any event, it is clear that there was in fact no such supporting record that he would have been able to show. That is interesting not least because, as we have already indicated, it is just such a record that a responsible player ought to have obtained if he or she was hoping to have and to provide a good reason for not performing a blood test. Simply hoping for the best or expecting that none would ever be required would not be sufficient.

40. Given that this apparent conflict of evidence was not closely examined in the evidence, the Tribunal prefers to go no further than we have in the preceding

[17] Paragraph 11 of her witness statement at HB/10.

paragraph and to observe that, whatever he may in fact have said, there is no proper basis for a finding that Mr Mak said something about a doctor's note which he knew to be untrue.

41. Subsequent events can, we think, be summarised fairly shortly. The Tribunal accepts that Mrs Carreno repeated her request on a number of occasions. Whilst we also accept that at this stage Mr Mak was continuing to volunteer to provide a urine sample instead of a blood sample, it is equally clear that he was consistent in his refusal to provide blood and maintained precisely the same reasons as he had given at the outset. We do not think it particularly matters whether at the beginning or at the end he was stressed and/or became calm. What matters is what he was told and what he said about the blood test and how the Doping Control Officers dealt with the issue of providing a urine test which he had offered at the beginning and was eventually allowed to give shortly after 21:00 hours.

42. Whilst the Tribunal does not find that either Mrs Carreno or Mr Romao or anyone else warned the Player that refusal to give a sample might result in a 4 year ban, we do accept that both Mrs Carreno and Mr Romao warned him that there might be "*anti-doping consequences*". Mr Romao said – and again, we accept – that Mr Mak must reasonably have understood that these "*consequences*" went further than just being refused permission to play in the particular tournament. We accept that Mr Romao referred to "*future tournaments*"[18] and we also accept that Mrs Carreno warned him that he might be subject to "*sanctions*".[19]

[18] See paragraph 10 of his witness statement at HB/9.

[19] See paragraphs 12 to 22 of her witness statement at HB/10.

43. If corroboration of those accounts is needed, it is to be found in the text at HB/10 MC-2 (at the bottom of the page) which we accept was read out to or explained clearly to Mr Mak.

44. In our judgment, therefore, there were a number of occasions on which Mr Mak made it crystal clear that he was refusing to give a blood test. We also find that, when he did so refuse, he realised there might be consequences extending well beyond that particular tournament. Were it otherwise, he would not have explained, as we find he did, that he "*did not care about playing tennis anymore ... was sure he did not want to do the blood test*"[20] in the context of telling Mr Romao that he was not a professional player and had only entered the tournament for fun.

45. A precise timeline of sequence of events which began before 18:00 may not be critical but it is assisted by the text exchanges annexed to Mrs Carreno's witness statement which are HB/10 MC-2. Further evidence of the exchanges between the officials at Vale de Lobo and those elsewhere are to be found annexed to Mr Söderström's witness statement and to that of Dr Miller.

46. As we have said, it is clear from the outset that Mr Mak adamantly and consistently refused to give a blood sample. His position never varied. He signed a Doping Control Form to that effect at 21:01 (HB/10 MC-5). However, he had also consistently offered to provide a urine sample, which request was refused on several occasions. It was in respect of that offer that the officials' position changed later in the evening.

[20] See paragraph 21 of Mrs Carreno's witness statement at HB/10.

Providing a Urine Sample

47. As Dr Miller and Mr Söderström confirm, those exchanges continued until shortly before 9pm (21:00 hours). As we have noted, part of the discussions that had been taking place between Tournament, ITF and Doping Control officials concerned whether or not Mr Mak should be allowed or asked to provide the urine sample that he had consistently offered throughout the process. What Mr Söderström says was his last call with Mrs Carreno was at 8:55pm (20:55 hours).

48. At this late stage, Mr Söderström discussed matters further with Dr Miller. It was decided that a urine sample should be collected and Mrs Carreno was advised accordingly by Mr Söderström at 20:55, as he records at paragraph 16 of his witness statement (HB/12).

49. She then told Mr Mak and, with Mr Romao assisting the process, Mr Mak subsequently provided a urine sample which was sealed at 21:07, this being after he had signed a Doping Control Form (HB/10 MC-5) in respect of blood at 21:01. Following the provision of the urine sample, he signed a second Doping Control Form (in relation to urine) at 21:08[21] (HB/10 MC-6).

50. An important issue with which the Tribunal was concerned was whether anyone involved in the process can have intended or may reasonably have understood that the provision of the urine sample was **in place of** the request for the blood sample. The starting point for consideration of this issue is, of course, to recognise that the Player had from the very outset of the process offered to give the urine sample **instead** of blood.

[21] Which was tested and found to be negative.

51. We must look at this from the perspective of both sides. We accept that no-one on the doping control side thought that the provision of a urine sample was a substitute for the blood test. At most, they thought it was better than nothing – a supplementary step and not a substitute for the blood test. On the other hand, how Mr Mak may reasonably have regarded and how he in fact regarded that change of position is not necessarily the same.

52. When Mr Romao and Mrs Carreno were asked about this during the hearing they said different things. Mr Romao said, in effect, that he could understand why the Player in those circumstances thought that he was, eventually, being allowed to give urine **instead of** blood. Mrs Carreno disagreed.

53. The Tribunal considers that Mr Mak should have been but was not told in the clearest possible terms that even though he was, after all, allowed to give a urine sample, it was not going to be treated as a true substitute for blood. Although Mrs Carreno thinks Mr Mak should have realised that was the position from what was said, we note that there is nothing in her (relatively) contemporaneous report in HB/10 MC-1 or in her witness statement which says in terms that is what he was told.

54. It may also be that Mr Mak believed that, having now given a urine sample, he would not only be allowed to play in the tournament but also that he would face no further action. Nevertheless, that does not alter the fact that he had already – and on several occasions - refused to give a blood sample. It can only have been because his refusal to do so was still operative that he signed two Doping Control Forms – one (in respect of blood) at 21:01 (HB/10 MC-5), one in respect of urine at 21:08 (HB/10 MC-6). In any case, whatever he was or might have been told

about why he was, after all, being allowed to give a urine sample had no material effect on his willingness to give a blood sample. He had made it clear – and we find as a fact – that he would not provide a sample of blood in any circumstances.

Was Mr Mak intending to cheat?

55. Nevertheless, we find as a fact that although he refused to provide a blood sample, Mr Mak was not intending to cheat. We find support for that conclusion in that he did offer to provide a urine sample. We acknowledge that a doper would not need to do much research to discover that some substances might show up in blood that will not show up in urine. But we do not consider Mr Mak was a doper nor do we think he had that degree of knowledge. In any case, we find as a fact that he had a genuine reason for his refusal even if, judged objectively, it was not a sufficient reason in the circumstances to justify refusing to give a blood sample.

56. Against that background, we turn to considering the legal consequences of those events in accordance with the provisions of the Code.

Was there an Anti-Doping Rule Violation under Article 2.3?
Refusal or Failure?

57. Two questions arise. First, we must decide whether Mr Mak "*refused*" or "*failed*" to submit to Sample collection. The choice of words is important because, as we have already recognised, it is only in cases of "*failing to submit*" (rather than "*refusal*") that Art.10.3.1 may arise.

58. We have already said that we find that Mr Mak refused to provide a blood sample and that he did so on more than one occasion during the late afternoon/early

evening. The distinction between "*refusal*" and "*failure*" is a real one. In the context of this case, a "*failure*" might have arisen had he tried to give a blood sample but then simply become ill or passed out.

59. The second question which is whether that refusal was negated in the sense that the request was "*waived*" or if the ITF is "*estopped*" from the contention that it made a legitimate request to provide a sample is one with which we shall deal with below.

Compelling Justification

60. The next issue is whether Mr Mak had a "*compelling justification*" for his refusal. Here the question of the later provision of a urine sample is not directly in point. The question of "*compelling justification*" requires us to look at the medical background and the reason that he gave (and, we accept,) for not giving blood, namely, that he was concerned about effects on his health because he had a genuine anxiety about giving blood.[22]

61. It is for the Player to show that he had any such "*compelling justification*" – see Art. 8.6.2 of TADP[23].

62. A proposition which the ITF advances in paragraph 4.2 of its opening and which we accept is that the plea of compelling justification needs to be determined objectively: that is, the issue is not "*whether the Athlete was acting in good faith, but, whether objectively he was justified by compelling reasons to forego the test*".

[22] Not just about needles.

[23] Confirmed in various authorities including *WADA v. CONI* etc., CAS 2008/8/1557-AB/21, para.73 and *Fazekas v. IOC*, CAS 2004/A/714 [AB/3 – para.68].

This is supported by reference to the cases of *Troicki v. ITF* CAS 2013/A/3279 [AB/5 – para.9.15] and by *Brothers v. FINA*, CAS 2016/A/4631 [AB/4 – para.87].

63. It follows that it is not enough that we accept that Mr Mak was acting in good faith and was not intending to cheat. Indeed, the ITF very fairly says that his good faith is "*not doubted*"[24]. Rather, by application of that objective test, it is for us to judge whether he has a 'compelling justification'. As some of the authorities recognise, it is possible to envisage ways in which, measured objectively, a player might have been able to make out such compelling justification in circumstances such as those arising here. We do not suggest this is an exhaustive list but he might, for example, have ensured that he sought treatment for the condition previously in preparation for entering in a tournament as opposed to what has happened here, well after the event. He could (and, we consider should) have gone to the trouble not only of seeking treatment but bringing with him a clear medical certificate stating in terms that he was physically or mentally incapable of giving blood and that it was contra-indicated from a medical perspective that he should do so.

64. By mentioning those factors we are not suggesting how our approach might translate to another case, since what is or is not objectively judged to be compelling justification will vary according to infinitely variable circumstances. Indeed, we go no further than to say that for such circumstances to be established in a case such as the present, the player needs to go well beyond having and expressing a genuine fear that he might be ill if he has to provide a sample in a particular form. All those who are subject to doping control must realise that,

[24] See paragraph 4.8 of the Opening.

from time to time, they may be required to give urine or blood according to the requirements of the particular anti-doping programme. Players who fail to prepare themselves for such an eventuality accordingly place themselves at obvious risk of committing anti-doping rule violations.

Waiver / Estoppel / Legitimate Expectation

65. In paragraphs 29 to 31 of the Response submitted on Mr Mak's behalf, it is contended that the "*request for a blood sample (was) withdrawn and / or waived and / or replaced by the request for a urine sample*". Arising out of those facts, it is said that "*by the time he signed the DCF, Mr Mak was not receiving warnings about non-compliance and (reasonably) considered that he had complied with his obligations*". Hence, it is argued, since he had a "*legitimate expectation*" that the testers would make it clear to him if he was, in fact, not complying with those obligations despite providing a sample at their "*belated*" request.

66. Even if, at the end of the process, Mr Mak thought that he was being allowed to provide a urine sample instead of a blood test and even if he thought that in doing so he had complied with the requirements of the Doping Control Officers, our conclusion is that he has not established that the request to provide a blood sample was either withdrawn or waived and we do not think the ITF is estopped from saying otherwise. At that stage, as we have explained, although he was eventually allowed to give a urine sample, there had already been several requests and several refusals in relation to provision of a blood sample.

67. Whatever Mr Mak felt about the ITF's reasons for allowing or asking him to give a urine sample, he cannot reasonably have concluded or have had a 'legitimate expectation' that the whole of the previous process of request / refusal was overridden. Nor did he rely on the ITF's change of position in the sense of acting to his detriment as the equitable doctrine of waiver/estoppel might require: all he did was give a urine sample in circumstances where he may have thought that he would be in no further difficulty but where nevertheless he was maintaining a resolute refusal to give blood.

68. We doubt it is helpful further to analyse legal authority on the issue of estoppel/waiver/legitimate expectation. Unsurprisingly, the ITF accepts that these doctrines are recognised in sports law jurisprudence[25] but, as we have found, they do not assist the player on the facts of this case. Instead, the factual history is critical when we consider questions of overall fairness, whether there has been a valid request to provide a sample (Art. 2.3), whether there may have been "*compelling justification*" for what the athlete did or did not do (also Art. 2.3) as well as deciding matters of intention under Art. 10.3, 10.2.3 and that of "*no significant fault or negligence*" and Art. 10.5.2.

Procedural failures alleged

69. In an appropriate case, a procedural failure might (for example) mean that there was no valid request for the provision of a sample or that a player's response

[25] See, for example, *ITF v Sharapova* in the decision of the Independent Tribunal (AB/30 at para 93-98), AEK *Athens and Slavia Prague v UEFA* CAS 1998/200 [AB/27, para 60] and in *IAAF v USA Track & Field* CAS 2002/0/401 [AB/28, para 133] and in several other CAS cases, such as *USA Shooting v International Shooting Union* CAS94/129 and *US Swimming v FINA* CAS 96/001.

could not fairly be characterised as a refusal or failure to submit to such sample collection. It might also be relevant to questions of intention and/or that of significant fault or negligence. But it would need to be a departure from prescribed procedure and good practice in a material respect – see the decision of the ITF Independent Tribunal in *ITF v Hingis* (AB/32), particularly at paragraph 133*ff.*

70. As far as this Tribunal is concerned, nothing here comes close to establishing that there was no valid request for a blood sample or that Mr Mak did not (or was entitled to) refuse to provide one. The principal complaint appears to be that he was not given a proper warning of the consequences of failing to provide such a blood test and, further, that the request for a blood test was not (as we find it should have been) repeated when he was allowed to give a urine sample.

71. We accept that it would have been better had the possible consequences been explained with clarity both at the outset and again at the final stage. However, as we have already found, by that final stage the player's refusals had already taken place. Further, we are entirely confident that whatever the Doping Control Officers might have said to the Player at or around 21:00 hrs would have had no effect at all in persuading him to change his mind about providing a blood test even at that late stage.

72. Nor do we find any substance in his complaint that the probable consequences of failing to provide a blood test were not adequately explained. On the contrary, we find that he was told that there would be 'consequences' and that such consequences clearly extended beyond participation in the particular tournament. To be blunt, if Mr Mak did not know that players who refuse to give a blood sample risk being banned for more than a tournament or two, then he had no business

entering as a competitor. And, in any case, however graphically possible consequences might have been explained to him, they would have made no difference given his resolute refusal to give a blood sample.

73. Some other unsatisfactory features of the process nevertheless deserve a mention. The blue "*Athlete's Notification*" document at HB/10 MC-3 should, we think, have been given to him rather than read, and we note that the one in the papers appears to refer exclusively to urine as opposed to blood samples. Similarly, our understanding is that the "*Letter of Authority*" (HB/10 MC-4) was simply placed on the wall, whereas it would be far better were a copy of the letter to have been placed in the hand of the athlete selected for testing.

74. As a further comment, the language of that Letter of Authority is probably sub-ideal in that it refers to the provision of "*urine and / or blood*", whereas it would be better were it to be drafted in such a way as to make it clear that these are separate (i.e. different) processes and cannot be viewed as alternatives to each other.

Article 10.3.1 / 10.2.3

75. Art. 10.2.3 provides that, "*as used in Articles 10.2 and 10.3, the term 'intentional' is meant to identify those Participants who cheat*".

76. We have already explained that we do not think that Mr Mak was trying to cheat the system by refusing to give a blood rather than a urine sample. We doubt that he had the sophistication to realise that there are some substances which will show up on a blood test but not on a urine test. We think he refused to give blood

because he was genuinely concerned that he would have an adverse reaction. Viewed objectively, his refusal was not justified for the reasons that we have explained but, viewed subjectively, we are comfortably satisfied that he was not intending to cheat.

77. That finding would be directly relevant under Art. 10.3.1 had he faced a charge of **failing** to submit to sample collection rather than **refusing** to do so. As we have already indicated, we accept that there is a proper distinction to be drawn between failing and refusing. The logic of the distinction has been considered in cases such as *WADA v Hill & Busch* – CAS 2008/A/1564 (AB/31) – at paragraph 94*ff*.

78. Those who drafted the TADP might have chosen to frame Articles 10.3.1 and 10.2.3 so that the "*intention to cheat*" qualification was applicable to both refusals and failures with the consequences for the period of ineligibility to be imposed. That would be consistent with the focus on the "*intention to cheat*" in the WADA Code generally and with cases such as *Azevedo v FINA* CAS 2005/A/925 [AB/7, para 91] which stress that failing to submit to a doping test is no less serious than a doping violation arising out of the presence or use of a prohibited substance.[26] However, it is for those who decide and define the policy and draft the Code to decide whether they wish to extend the definition of "*intention to cheat*" to 'refusal' cases in the same way as the definition applies to 'failures'. Our job is to apply the Code as it has in fact been drafted and that means that we must distinguish between refusal and failure in applying Art.10.3.1. But that does not mean that the 'intention to cheat' is not otherwise an important consideration in relation to the consequences which the Code prescribes for violations.

[26] Clearly, a refusal should have at least the potential to attract the same sanction as a positive result on a dope test, otherwise dopers could hope to improve their position by refusing rather than submitting to a test.

Significant Fault or Negligence: Art. 10.5.2

79. In our judgment, it is on this issue that the Player's intention as regards cheating or otherwise is very relevant. To ignore it at this stage, as well as in the other elements of our analysis, would be contrary to the elementary principles of fairness, justice and common sense.

80. Very properly, ITF's opening said as follows:

> "*5.3 For the sake of fairness, the ITF notes that a CAS Panel has ruled that an athlete who has intentionally refused or failed to submit to testing might nevertheless have his ban reduced on the grounds of No Significant Fault or Negligence and one first instance CAS Panel has reduced the four year ban to two years on proportionality grounds.*"

81. The authority cited for the first part of that contention is *Brothers v FINA* CAS 2016/A/4631 [AB/4, paras 93 – 99] and the authority on the "*proportionality*" point is *Klein v ASADA and Athletics Australia* CAS/A4/2016 [AB17].

82. ITF does, however, contend in that same submission that it "*strongly disagrees with those cases as a matter of law*". It goes on to say that the Code is a comprehensive scheme with no gap or lacunae departing from the clear wording of 10.3.1 "*whether on proportionality grounds or otherwise*".

83. As regards whether there is a free-standing and overarching principle of proportionality, we offer no view beyond recognising that CAS in *Sharapova* (at paragraph 99) noted that that the WADA Code has repeatedly been regarded as proportionate in its approach to sanction whenever the issue has been raised in other cases[27]. It may be that the concept is simply another way of expressing the

[27] The *Brothers* case, for example, at AB/7: see paras 61-3

need for a purposive approach to the interpretation and application of the Code which results in a fair, just, and common sense outcome.

84. Beyond that, however, we unreservedly endorse the approach taken by CAS in the *Brothers v FINA* case. That seems to us to be both appropriate as a matter of fairness, justice and common sense[28] and consistent with the restrictive approach we have taken to interpreting Art. 10.3.1 – that is, restrictive in the sense that absence of an intention to cheat is relevant only to failure rather than refusal cases under Art. 10.3.1. Were we to say that absence of an intention to cheat is also wholly irrelevant in 'refusal' cases, then we would, in reality, be applying the same four year sanction to someone like Mr Mak as we would to someone who had given a positive sample or who had refused to provide a sample for no reason at all (or on entirely spurious grounds).

85. We think that would be a thoroughly unattractive outcome and is not, we consider, required by the language of Art. 10.5.2, which is of (we consider) deliberately general application to all cases "*beyond the Application of Article 10.5.1*". It is also consistent with the approach of both the Independent Tribunal and CAS in *ITF v Sharapova* (AB/30, CAS 2016/A/4643), with the broad view of 'no fault/negligence' as explained in the case of *ITF v Dan Evans*[29]. It is also in line with other cases in the jurisprudence on the point including the *Troiki* case (AB/5: see particularly paragraphs 9:18 to 9:36)

[28] Essentially, we regard these are synonymous expressions in context.

[29] A recent decision of 3rd October 2017 which was added to the authorities bundle at the beginning of the hearing.

86. Our conclusion on this issue is that Mr Mak acted without significant fault or negligence as defined by Art. 10.5.2. We therefore regard it as appropriate to reduce the sanction otherwise applicable (a four year suspension) by half.

Summary of Ruling

87. For the foregoing reasons, we find that Mr Mak did commit an anti-doping rule violation under Art 2.3 of the Tennis Anti-Doping Programme (TADP) in that he intentionally refused to provide a blood sample after valid notification on 24 February 2017. We find, further, that such refusal was without compelling justification in all the circumstances.

88. Nevertheless, we also find that, in refusing to provide such blood sample, Mr Mak acted without significant fault or negligence since he genuinely believed that he had a good reason not to give blood. We also take account of the fact that he consistently offered to provide a urine sample (which we regard as indicating that he had no intention to cheat) and that, at the end of the process, he did indeed provide such a urine sample in circumstances in which (at least as far as he was concerned) there was some degree of misunderstanding as to whether he had thereby met all the demands of the Doping Control Officers.

89. In those circumstances, we consider that the appropriate sanction is one half of the period of ineligibility otherwise applicable – that is, we regard a two year period of ineligibility as appropriate.

90. In accordance with Art. 10.10.3(c),[30] we rule that that two year period shall be deemed to have started on 24 February 2017, since there has been (almost inevitable) delay in bringing this matter to a Tribunal, something which is nobody's fault and certainly not the fault of the Player who denied the charges set out in the letter of 18 May 2017 [HB/1] in a detailed email of 2 June 2017 [HB/3] (supporting his contentions with a letter from Dr Van Oostendorp in a letter of 23 June 2017 [HB/4]).

91. We also order the disqualification of all results that may have been obtained by Mr Mak subsequent to 24 February 2017 pursuant to TADP Art. 10.8.

92. The Player, the ITF, The Anti-Doping Authority Netherlands and WADA have a right of appeal in accordance with Article 12 of TADP. The timescale for filing an appeal is 21 days from the date of receipt of the decision by the appealing party save in respect of WADA where the timescale is as set out in Article 12.5.2 of TADP.

WILLIAM NORRIS QC
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07 November 2017

[30] To which provision our attention was helpfully drawn in paragraph 6.1.2 of the ITF's opening submissions.

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