SR/005/2022

IN THE MATTER OF PROCEEDINGS BROUGHT BY THE INTERNATIONAL TENNIS FEDERATION UNDER THE 2021 TENNIS ANTI-DOPING PROGRAMME

Before:
Dr Despina Mavromati (Chair)
Mr Alexander Engelhard
Mr Kwadjo Adjepong

BETWEEN:

International Tennis Federation — **Anti-Doping Organisation**

and

Mr Stéphane Houdet — **Respondent**

DECISION OF THE INDEPENDENT TRIBUNAL

A. INTRODUCTION

1. The International Tennis Federation ("ITF") is the international governing body for the sport of tennis. Further to its obligations as a signatory to the World Anti-Doping Code (the "Code"), the ITF has issued the 2021 Tennis Anti-Doping Programme ("TADP"), an annual update to the anti-doping rules applicable to players who compete in "Covered Events" as specified in Article 1.2 TADP.

2. Mr Stéphane Houdet (the "Player") is a French national born on 20 November 1970; the Player has competed in ITF wheelchair tennis events (which are Covered Events) and has been continuously ranked inside the top six since 2007, achieving outstanding results, including four Grand Slam singles titles, 19 Grand Slam doubles titles, and three Paralympic gold medals (including the doubles title at the Tokyo 2020 Paralympic Games). The Player has been bound by the TADP since 2005 and was required to submit to Out-of-Competition testing and provide his whereabouts upon request so that he could be located for such testing in accordance with Articles 1.11, 4.1, 4.4 and 4.5 TADP.

3. The ITF has charged the Player with the commission of an Anti-Doping Rule Violation ("ADRV") under Article 2.4 TADP for allegedly having three "Missed Tests" within a 12-month period. The facts of the case are further explained below.

B. FACTUAL BACKGROUND

4. By a letter dated 25 November 2008, the ITF notified the Player that he had been selected for inclusion in its International Registered Testing Pool ("IRTP") as of 1 January 2009. The Player also accepted that he remains in the IRTP (Article 5.4.2.4 TADP), is bound by the TADP and has not contested the content of the letter. This letter and the accompanying documents described the additional obligations that the Player would be subject to.

5. The Player's obligations include, among others, the filing of quarterly whereabouts information, with the specification for each day in the quarter of 1) the full address of the place where the Player would be staying overnight; 2) the name and address of each location where the Player would train, work or conduct any other regular activity, and the usual time-frames for such activities; and 3) a specific 60-minute time slot and specific location between 6 a.m. and 11 p.m. every day where the Player would be available and accessible for Testing.

6. Furthermore, the notification letter explained how to provide the information through the online Anti-Doping Administration and Management System ("ADAMS"), and how to update the information in case plans change, including the possibility to make last minute updates by SMS text message, telephone and email.

7. The letter further informed the Player that he is responsible for the accuracy and detail of the information provided to enable the Doping Control Officer ("DCO") to locate the Player for testing on any given day in the quarter, *"including, but not limited to, during the 60-minute time slot specified for that day. Declarations that are insufficiently accurate […] are likely to result in a Whereabouts Failure. Similarly, specifying a location to which the DCO cannot gain access (e.g. a "restricted-access" building or area) is likely to result in an unsuccessful test attempt and therefore a Whereabouts Failure"*.

8. Finally, the letter explained that failing to provide the whereabouts information required (a Filing Failure) and/ or failing to be available for testing within the 60-minute time slot specified (a Missed Test) could result in an ADRV with significant consequences, including the possible imposition of a period of Ineligibility of between 12 and 24 months: *"Whereabouts Failures may take two forms: Filing Failures, in which the player's submission does not meet the relevant requirements […], or; Missed Tests. Any combination of three Missed Tests and / or Filing Failures within an eighteen-month period […] shall constitute a Doping Offence […] the sanctions for which are a ban from the game for a minimum of 1 year up to a maximum of 2 years."*

9. International Doping Tests & Management ("IDTM"), an anti-doping service provider that the ITF commissions to conduct testing and other related services, instructed DCOs to test the Player Out-of-Competition on five occasions in 2021: two times with success and three times unsuccessfully. The three missed tests form the basis of the charge against the Player as follows:

First Missed Test

10. On 2 January 2021, the DCO visited the address indicated by the Player in ADAMS, accessed the hall of the Player's apartment building through the first restricted-access door, and regularly pressed the intercom buzzer next to the second restricted-access door throughout the specified 60-minute time slot. He received no answer to the rings on the intercom buzzer, could not otherwise locate the player at the specified location, did not see anyone else at the location to speak to, and received no answer to the three calls he made to the Player's mobile telephone number in the last five minutes of the 60-minute time slot ("First Disputed Test").

11. The Player was notified about the missed test by letter dated 4 January 2021.

12. The Player accepts that he was not in his ADAMS-indicated address on that day and that he was on vacation in Costa Rica. However, the Player disputes that this should be considered a Missed Test, arguing that he attempted to do a last-minute update to his ADAMS whereabouts information from his hotel in Corcovado National Park without success, due to the fact that the application required a two-factor authentication through SMS, but he lacked a phone signal in that location, for which he cannot be held responsible. The issue of whether this First Disputed Test was indeed a "Missed Test" in the sense of Articles 2.4 TADP and B.2.4 of the International Standard for Result Management ("ISRM") is further discussed in Section F (b) below.

Second Missed Test

13. On 26 July 2021, the DCO visited the ADAMS-indicated address, accessed the hall of the Player's apartment building through the first restricted-access door, and regularly pressed the intercom buzzer next to the second restricted-access door throughout the specified 60-minute time slot. She received no answer to the rings on the intercom buzzer, could not otherwise locate the player at the specified location, saw and spoke to one person at the location who was unable to assist her to locate the Player, and

received no answer to the two calls she made to the Player's mobile telephone number in the last five minutes of the 60-minute time slot ("Second Missed Test").

14. The Player was notified about the missed test on 30 July 2021.

15. The Player accepts the Second Missed Test and recognises that he acted negligently, forgetting to update his ADAMS whereabouts information accordingly. The issue of the Second Missed Test is therefore not further discussed in this decision.

Third Missed Test

16. On 27 September 2021, the DCO visited the ADAMS-indicated address, accessed the hall of the Player's apartment building through the first restricted-access door, and regularly pressed the intercom buzzer next to the second restricted-access door throughout the specified 60-minute time slot. She received no answer to the rings on the intercom buzzer, could not otherwise locate the player at the specified location, did not see anyone else at the location to speak to, and received no answer to the two calls she made to the Player's mobile telephone number in the last five minutes of the 60-minute time slot ("Third Missed Test").

17. The Player was notified about the missed test on 30 September 2021.

18. It is not disputed that the Player was in his ADAMS-indicated address on that day; having previously travelled to the South of France with his wife, the Player returned alone to his Paris apartment on 27 September 2021. It is also not disputed that during the 60-minute time slot later that day, the Player had turned off the lights in his apartment, went to his bedroom and closed the doors, which made it more difficult for him to hear the intercom buzzer.

19. Whether, during his availability time slot, the Player was sleeping or just “dozing on and off” is in dispute. The Player also disputes that the DCO did what was reasonable in the circumstances to locate him, asserting therefore that the Third Test should not be considered as a Missed Test. The issue of whether this Third Missed Test was indeed a “Missed Test” in the sense of Articles 2.4 TADP and B.2.4 of the ISRM is further discussed in Section F (c) and (d) below.

20. By a letter dated 19 October 2021, the ITF informed the Player that an independent Review Board Member had conducted an administrative review of the apparent Missed Test on 27 September 2021 and concluded that all the elements of a Missed Test as set out at Article B.2.4 ISRM were met, that the Player had a case to answer and therefore the ITF was recording a third whereabouts failure against the Player. The issue of whether this part of the procedure complied with the applicable rules and its impact on the validity of the overall process is further discussed as a preliminary issue in Section F (a) below.

21. It is not in dispute that in all ADAMS forms submitted until the Third Missed Test, the Player did not provide additional information about his specified location to assist the DCO in obtaining access and locating him (apart from the apartment’s floor, the code to access the interior door and the name on the buzzer in the internal door (locked unless opened with the intercom). However, the Player has provided more detailed additional information since the date of the Third Missed Test, including the phone numbers of the Player’s wife, his mother-in-law and the building’s concierge.

C. PROCEDURE BEFORE THE INDEPENDENT TRIBUNAL

22. On 27 October 2021, the ITF sent a Notice to the Player, notifying him under Articles 7.10 and 2.4 TADP that he may have committed an ADRV as he appeared to have had three Missed Tests within a 12-month period. The ITF enclosed copies of the relevant documentation and gave the Player ten days to provide an explanation for the possible ADRV.

23. On 6 November 2021, the Player responded to the Notice of Charge using the TADP portal, denying the ADRV and in particular the First and Third Missed Tests, while accepting the Second Missed Test.

24. On 29 November 2021, the ITF sent a Formal Notice of Disciplinary Charge to the Player as per Article 7.13 TADP, formally charging him with an ADRV under Article 2.4 TADP. The ITF gave the Player twenty days to respond to the charge and to request a hearing before the Independent Tribunal.

25. Following a series of messages exchanged between the Player and the ITF Anti-Doping Manager Dr Miller in December 2021, and after an extension of the deadline to respond, the Player's first counsel Mr M. K. responded on 7 January 2022 denying the charge.

26. The Chair of the Tribunal, Dr Despina Mavromati, and the Tribunal Members Mr Kwadjo Adjepong and Mr Alexander Engelhard, were appointed by the Chair of the Independent Panel by letters dated 19 January and 24 January 2022, respectively. The Parties raised no objections to the appointments of the Tribunal members upon disclosure of their declarations of independence and this was also confirmed by the Procedural Directions of 25 January 2022.

27. The Player was initially represented on a pro bono basis by Mr M. K. and, following the latter's resignation in March 2022, by Mr Alan J. Rich. The Player's first counsel requested -and was granted- a three-week extension in January 2022 to file his response to the Notice of Charge Letter. The Parties had initially agreed to the Procedural Directions dated 25 January 2022, according to which the ITF filed its Opening Brief on 21 February 2022. Even though the Player's response was due on 21 March 2022, the deadline was repeatedly extended, with the final full version of the Player's Pre-Hearing Brief filed on 1 June 2022. The ITF filed its Reply Brief on 9 June 2022.

28. One day prior to the hearing, counsel for the Player sent various emails including procedural requests and new evidence, to which the ITF responded. *Inter alia*, Counsel for the Player requested to be awarded fees and costs for the proceedings. The Tribunal informed the parties that it would decide on such request along with its final decision.

29. Furthermore, Counsel for the Player submitted new pieces of evidence for the attention of the Tribunal, regarding the review procedure conducted by the Review Board Members, claiming that an individual involved in the review should have been disqualified from his role for ethical violations as a legal professional in another capacity. The ITF objected to the admissibility of the new evidence since the Player had known of the identity of the Review Board members for almost four months but only raised this issue on the eve of the hearing. The ITF reserved its right to address the arguments raised orally at the hearing. The Tribunal decided to allow the oral pleadings of the parties reserving its right to decide on their admissibility and substance along with its final decision (see Section F (a) below).

30. Counsel for the Player further requested the hearing of Dr Stuart Miller, at the time of the relevant facts the ITF's Head of Anti-Doping and ITF Integrity Unit and currently ITF Senior Integrity Director, Integrity and Development, as a witness. The Tribunal decided to allow the hearing of the witness during the hearing.

31. Lastly, Counsel for the Player requested a public hearing for reasons of transparency. The ITF objected to such request for several reasons but suggested that the Player could request that a certain individual or certain individuals attend the hearing, and the ITF would act reasonably in considering such a request. Counsel for the Player responded that the Respondent did not have any immediate plans for invitees however, the video of the hearing would *"provide the opportunity for insight into a process that is certainly not understood by the overwhelming majority of players (…) Those who practice in this field can only benefit from such openness in an area where the secrecy of the process ordinarily, leads to virtual mystical understanding of the*

process and of this issue (…)". The Tribunal objected to the public hearing also in view of the very late request and the practical impossibility to meaningfully publicise such a hearing – and because the hearing had been postponed several times following the numerous requests for extensions of time filed by the Player's new counsel.

32. The hearing took place by video conference on 14 June 2022. The following persons apart from the Tribunal participated in the hearing:

On behalf of the ITF:

Mr Chris Lavey, ITF external counsel

Ms Simona Dean, Observer, ITIA Anti-Doping Coordinator

Ms A. S., DCO, Witness

On behalf of the Respondent:

Mr Stéphane Houdet, Respondent

Mr Alan J. Rich, Counsel for the Respondent

Mr Philippe Sermadiras, Player's father-in-law, Witness

Dr Stuart Miller, ITF Senior Executive Director, Integrity & Development, Witness

On behalf of Sport Resolutions, Secretariat to the Independent Panel:

Ms Kylie Brackenridge, Senior Case Manager

Ms Astrid Mannheim, Case Manager, Observer

D. POSITION OF THE PARTIES

33. Below the Tribunal sets out a summary of the parties' key submissions. Even though the Tribunal has carefully considered all evidence and arguments raised by the

Parties, the Tribunal will only refer to the elements that it considers most important to substantiate its decision.

The ITF's Position

34. In essence, the ITF submits that it has charged the Player with the commission of an Anti-Doping Rule Violation (ADRV) under Article 2.4 TADP for having three "Missed Tests" recorded against him within a 12-month period, i.e. the Player failed to make himself available for testing at the time and location that he declared for that purpose in his whereabouts filing three times within a 12-month period.

35. The Player was given notice on 25 November 2008 that he had been designated for inclusion in the IRTP and specifically advised of the consequences of being unavailable for testing during the 60-minute time slot specified in his whereabouts filing at the location specified for that time slot.

36. According to the ITF, all the requirements for the Missed Test under Article B.2.4 of the ISRM are met in relation to each Missed Test and hence all elements of Article 2.4 TADP are filled. Under Article 3.1.1 TADP, the burden is on the ITF to establish these elements, with the standard being greater than a mere balance of probability but less than proof beyond a reasonable doubt.

37. In all asserted Missed Tests, the DCO attempted to test the Player during the 60-minute time slot specified by the Player's whereabouts filing for that day, by visiting the location specified for that time slot. In each case, the DCO did what was reasonable in the circumstances to try to locate the Player in that location, short of giving him advance notice of the test.

38. In its Reply Brief filed on 9 June 2022, the ITF responded in detail to all the arguments raised in the Player's "Pre-Hearing Brief" as they are also exposed below (cf. Legal /

Regulatory Framework & Analysis). The ITF stated that the remaining disputed issues were *a) whether the Player could rebut his presumption of negligence with respect to the First Missed Test*, and *b) whether the ITF could establish that the DCO did what was reasonable in the circumstances to try and locate the Player short of giving advance notice*.

39. The ITF submitted that each attempt was not made until after the Player had received notice of the previous Missed Test. It reiterated its position in the Opening Brief that all three tests (see the "Facts" Section above) should be considered as "Missed Tests" and that the Player would need to rebut the presumption that he was "at least negligent". In the ITF's view, the Player could not establish that the failure to be available for testing and/ or to update his most recent whereabouts filing was not caused by his negligent behaviour.

40. As a consequence, the ITF requested that the Player be imposed with a period of Ineligibility of two years, in accordance with Article 10.3.2 TADP, and that there were no grounds for a reduction down to a minimum of one year since the Player's degree of Fault was high. Moreover, the ITF requested that the Player's results be disqualified from the date of the third Missed Test, i.e. 27 September 2021, up to the date of the Independent Tribunal's decision, with forfeiture of all medals, titles, ranking points and prize money won in the meantime, pursuant to TADP Article 10.10.

41. With respect to the issue of costs, the ITF did not seek costs from the Player and submitted that the Player should not be awarded costs.

The Player's Position

42. During the hearing, the Player stated that, following a serious motorbike accident which rendered him an amputee above the knee, he got involved with bridge, then golf and eventually with wheelchair tennis at a competitive level as part of his rehabilitation. A local tennis champion as a child, the Player was subsequently inserted to the IRTP

immediately after the start of the program in 2008 and accepted that he has been on the program ever since. The Player said that he is an advocate for anti-doping and has had numerous conversations with different people - including Dr Miller - about how to improve the anti-doping system.

43. In his written and oral pleadings, the Player submitted that he should not be held liable for an ADRV and contests two out of the three Out-of-Competition missed tests alleged by the ITF.

44. With respect to the First Missed Test, the Player submits that he logged into ADAMS while on vacation in Costa Rica, but he was unable to change the location, when ADAMS responded that he needed to enter an SMS code and he was unable to retrieve the SMS code for lack of a mobile phone signal in that remote location. This was the first time that the Player lacked a mobile phone signal and thus he submitted that he was not negligent in his actions and that he was *"not the cause of this "missed test" since he did what he was supposed to do by going on-line to change his location – rather, the cause of this missed test was in ADAMS blocking him, ADAMS being an Internet based program, which did not allow him to proceed via the Internet nor offer other 2 step [verifications] which did not require [a] mobile phone service, such as email, personal information for authentication purposes or even a phone number which he could have called via an Internet phone app."*

45. In essence, the Player supports that he was not negligent as the term is defined by English law. In his view, relevant case law requires that there is no finding of negligence if a "reasonable person" would not have thought the occurrence foreseeable, particularly when they have not had any reason to foresee the occurrence based on their personal experience. His actions did therefore not rise to the level of negligence as they were not "foreseeable" under the "reasonable person" test. Specifically, after travelling around the world to some very remote places, the Player never thought that by going to an expensive hotel in a tourist area in Costa Rica he

would not have mobile phone service or a two-step verification process would be required, as it had never occurred in the past.

46. With respect to the Third Missed Test, the Player submits that, for a first time in three years since he moved into that apartment, he did not hear the intercom from his bedroom as the intercom's volume was lower following a large party at this apartment attended by 70 people in celebration of his recent Gold Medal win at the Paralympics. Most importantly, the Player alleges that the DCO did not make the required reasonable efforts to locate him.

47. In essence, by referring in particular to the *ITF v Cornet* case law to corroborate his position *(ITF v. Cornet, Independent Tribunal Decision dated 15 May 2018, "Cornet")*, the Player submitted that the DCO did nothing other than to push his intercom buzzer which the Player did not hear and that the DCO should have pressed any of the adjacent intercom buzzers of the three other tenants of the interior portion of the building or knock on the apartment doors or knock on the concierge's lodge, all of which were inside the lobby which the DCO had access to.

48. The Player provided – among others - two statements from his neighbours that they were at home and would have ensured that the DCO could not only get into the interior of the building to his front door, but if necessary, would even have reached the Player's apartment door and opened it for them. The Player also provided a statement from the building's concierge who stated that he would also have ensured the DCO's entrance.

49. Therefore, the Player's defence with respect to the Third Missed Test is twofold: on the one hand, he submitted that the DCO did not do what was reasonable to locate the Player; on the other hand, even if one considered that the DCO did what was reasonable in the circumstances, the Player's behaviour should not be deemed as negligent since he would not have known that the buzzer was defective and its volume was lower than usual.

50. In application of the negligence theory above, the Player submitted that it was not foreseeable for him, after living in the same apartment for three years, to not be able to hear the intercom, given its volume had become very low after the party with 70 guests pushing the intercom over and over as they came to celebrate his Paralympics Gold Medal. In this respect, he produced a report by a judicial officer demonstrating that the volume level of the intercom heard from the bedroom was not entirely distinguishable from other ambient sounds. Therefore, the Player could not be deemed negligent. Even if this behaviour were found to be negligent, the Player submits that these facts could not meet the required standard of "comfortable satisfaction".

51. The Player further criticised the ITF for not citing in its Opening Brief the TADP ITF Out-of-Competition Whereabouts Test Protocol (2021) ("the TADP Protocol"), which sets out important guidelines for the DCOs.

52. He argues that the case law submitted by the ITF is not relevant in the present case or out of context and that the only relevant decision is *Cornet*, in which the DCO was found not to have made all reasonable efforts to locate the athlete.

53. Furthermore, the Player criticised the "no advance notice testing" policy in Out-of-Competition Whereabouts cases for being a misleading concept, to the extent that it is not strictly applied and that the TADP Protocol actually provided for situations which can be considered as "advance notice".

54. The Player also criticised the "review process" provided for in Article 7.7.3 of the ITF TADP (2021), on the administrative review of a Missed Test that the ITF Review Board carries out in accordance with ISRM Annex B.3.2 (f), which mandates that *"the administrative review shall be to determine anew whether or not all of the relevant requirements for recording a Whereabouts Failure are met"*. The Player submitted that the reviewer is provided with four statements to which they must respond "Yes" or

"No". According to the Player such questions do not reflect the ITF's actual policies, rules, guidance and the TADP Protocol, and that as a result, he was deprived of his guaranteed right to a *de novo* review based on the ITF's own actual policy, which constituted a separate ground for dismissing the charges on the missed test cases against him.

55. In his late submission filed one day before the hearing, the Player alleged that the misconduct of one Review Board Member (occurred in a context outside his involvement as a Review Board Member) should invalidate the procedure.

56. Finally, and on a supplementary basis, the Player submitted that, should the Tribunal find that an ADRV was committed, he should be entitled to the maximum possible reduction of the Ineligibility period and no disqualification of his results. This was submitted on the basis that the Player showed no pattern of last-minute whereabouts changes or other conduct raising a serious suspicion that he was trying to avoid being available for testing. With respect to the retroactive disqualification of results, to the extent that the Player was not under a Provisional Suspension and continued to compete in various tournaments, the Player requested that there should be no disqualification of the results due to the "Fairness exemption".

D. JURISDICTION

57. The Tribunal's jurisdiction to decide the present matter derives from Article 8.1 TADP which provides as follows:

> ***"Article 8.1 Jurisdiction of the Independent Panel***
>
> *The following matters arising under this Programme will be submitted for determination by an Independent Tribunal in accordance with the Procedural Rules Governing Proceedings Before an Independent Tribunal, as amended from time to time:*

8.1.1 A charge that one or more Anti-Doping Rule Violations has been committed (and any issues relating to that charge). Where such charge is upheld, the Independent Tribunal will determine what Consequences (if any) should be imposed, in accordance with and pursuant to Articles 9 and 10. (…)"

58. The jurisdiction of the Tribunal is not disputed by any of the Parties.

E. THE APPLICABLE REGULATORY FRAMEWORK

59. The applicable regulations are the TADP 2021. Other relevant rules include the ISRM as well as the TADP Protocol. While the respective provisions will be reproduced where relevant below, the most pertinent provisions are the following:

Article 2 TADP

Anti-Doping Rule Violations

Doping is defined as the occurrence of one or more of the following (each, an ***Anti-Doping Rule Violation):***

(…)

2.4 Whereabouts Failures by a Player.

Any combination of three Missed Tests and/or Filing Failures within a 12-month period by a Player in a Registered Testing Pool.

Article 5.4.2 TADP

5.4.2 International Registered Testing Pool:

5.4.2.1 The ITF may from time to time designate any Player or Players for inclusion in a pool of Players to be known as the ***'International Registered Testing Pool'****. Any Player designated for inclusion in (or removed from) the International Registered Testing Pool will be notified of such inclusion or removal in accordance with ISTI Article 4.8.7.*

5.4.2.2 A Player who is included in the International Registered Testing Pool is required (…):

(a) to advise the ITF of their whereabouts on a quarterly basis;

(b) to update that information as necessary, so that it remains accurate and complete at all times; and

(c) to make themselves available for Testing at such whereabouts.

Article 10.10 TADP

Disqualification of results in competitions subsequent to Sample collection or commission of an Anti-Doping Rule Violation

Unless fairness requires otherwise, in addition to the Disqualification of results under Articles 9.1 and 10.1, any other results obtained by the Player in competitions taking place in the period starting on the date the Sample in question was collected or other Anti-Doping Rule Violation occurred and ending on the commencement of any Provisional Suspension or Ineligibility period, will be Disqualified, with all of the resulting consequences, including forfeiture of any medals, titles, ranking points and Prize Money).

Article 10.13 TADP

10.13 Commencement of Ineligibility period

Where a Player or other Person is already serving a period of Ineligibility for an Anti-Doping Rule Violation, any new period of Ineligibility will start on the first day after the current period of Ineligibility has been served. Otherwise, the period of Ineligibility will start on the date of the final decision providing for Ineligibility, or (if the hearing is waived, or there is no hearing) on the date Ineligibility is accepted or otherwise imposed, save as follows:

10.13.1 Delays not attributable to the Player or other Person:

Where there have been substantial delays in the hearing process or other aspects of Doping Control, and the Player or other Person can establish that such delays are not attributable to the Player or other Person, the period of Ineligibility may be deemed to have started at an earlier date, commencing as early as the date of Sample collection or the date on which another Anti-Doping Rule Violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, will be Disqualified.

Article 4.8.8 ISTI

4.8.8 <u>Whereabouts Filing</u> Requirements

(…) 4.8.8.2 The Anti-Doping Organization collecting an Athlete's Whereabouts Filings may specify a date prior to the first day of each quarter (i.e., 1 January, 1 April, 1 July and 1 October, respectively) when an Athlete in a Registered Testing Pool shall file a Whereabouts Filing that contains at least the following information: (…)

c) For each day during the following quarter, the full address of the place where the Athlete will be staying overnight (e.g., home, temporary lodgings, hotel, etc.);

d) For each day during the following quarter, the name and address of each location where the Athlete will train, work or conduct any other regular activity (e.g., school), as well as the usual time frames for such regular activities; and (…)

e) The Athlete's Competition/Event schedule for the following quarter, including the name and address of each location where the Athlete is scheduled to compete during the quarter and the date(s) and time(s) at which they are scheduled to compete at such location(s).

4.8.8.3 Subject to Article 4.8.8.4, the Whereabouts Filing must also include, for each day during the following quarter, one specific 60-minute time slot between 5 a.m. and 11 p.m. each day where the Athlete will be available and accessible for Testing at a specific location.

(…)

4.8.8.5 It is the Athlete's responsibility to ensure that they provide all of the information required in a Whereabouts Filing as outlined in Articles 4.8.8.2 and 4.8.8.3 accurately and in sufficient detail to enable any Anti-Doping Organization wishing to do so to locate the Athlete for Testing on any given day in the quarter at the times and locations specified by the Athlete in their Whereabouts Filing for that day, including but not limited to during the 60-minute time slot specified for that day in the Whereabouts Filing.

a) More specifically, the Athlete shall provide sufficient information to enable the DCO to find the location, to gain access to the location, and to find the Athlete at the

location with no advance notice to the Athlete. A failure to do so may be pursued as a Filing Failure and/or (if the circumstances so warrant) as evasion of Sample collection under Code Article 2.3, and/or Tampering or Attempted Tampering with Doping Control under Code Article 2.5. (…)

d) Once the DCO has arrived at the location specified for the 60-minute time slot, if the Athlete cannot be located immediately, then the DCO should remain at that location for whatever time is left of the 60-minute time slot and during that remaining time they should do what is reasonable in the circumstances to try to locate the Athlete. See WADA's Guidelines for Implementing an Effective Testing Program for guidance in determining what is reasonable in such circumstances.

[Comment to 4.8.8.5(d): Where an Athlete has not been located despite the DCO's reasonable efforts, and there are only five (5) minutes left within the 60-minute time slot, then as a last resort the DCO may (but does not have to) telephone the Athlete (assuming they have provided their telephone number in their Whereabouts Filing) to see if they are at the specified location. If the Athlete answers the DCO's call and is available at (or in the immediate vicinity of) the location for immediate Testing (i.e., within the 60-minute time slot), then the DCO should wait for the Athlete and should collect the Sample from them as normal. However, the DCO should also make a careful note of all the circumstances, so that it can be decided if any further investigation should be conducted. In particular, the DCO should make a note of any facts suggesting that there could have been tampering or manipulation of the Athlete's urine or blood in the time that elapsed between the phone call and the Sample collection. If the Athlete answers the DCO's call and is not at the specified location or in the immediate vicinity, and so cannot make himself/herself available for Testing within the 60-minute time slot, the DCO should file an Unsuccessful Attempt Report.]

4.8.8.6 Where a change in circumstances means that the information in a Whereabouts Filing is no longer accurate or complete as required by Article 4.8.8.5, the Athlete shall file an update so that the information on file is again accurate and complete. The Athlete must always update their Whereabouts Filing to reflect any change in any day in the quarter in question in particular; (a) in the time or location of the 60-minute time slot specified in Article 4.8.8.3; and/or (b) in the place where they are staying overnight.

The Athlete shall file the update as soon as possible after they become aware of the change in circumstances, and in any event prior to the 60-minute time slot specified in their filing for the relevant day. A failure to do so may be pursued as a Filing Failure (…)

Article 4.8.9 ISTI

4.8.9 Availability for Testing

4.8.9.1 Every Athlete must submit to Testing at any time and place upon request by an Anti-Doping Organization with authority to conduct Testing. In addition, an Athlete in a Registered Testing Pool must specifically be present and available for Testing on any given day during the 60-minute time slot specified for that day in their Whereabouts Filing, at the location that the Athlete has specified for that time slot. (…)

Article B.2.4 ISRM

An Athlete may only be declared to have committed a Missed Test where the Results Management Authority can establish each of the following:

a) *That when the Athlete was given notice that they had been designated for inclusion in a Registered Testing Pool, they were advised that they would be liable for a Missed Test if they were unavailable for Testing during the 60-minute time slot specified in their Whereabouts Filing at the location specified for that time slot;*

b) *That a DCO attempted to test the Athlete on a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day, by visiting the location specified for that time slot;*

c) *That during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test;*

d) *That Article B.2.3 does not apply or (if it applies) was complied with; and*

e) *That the Athlete's non-availability for Testing at the specified location during the specified 60-minute time slot was at least negligent. For these purposes, the Athlete will be presumed to have been negligent upon proof of the matters set out at sub-Articles B.2.4 (a) to (d). That presumption may only be rebutted by the Athlete establishing that no negligent behaviour on their part caused or contributed to their*

failure (i) to be available for Testing at such location during such time slot, and (ii) to update their most recent Whereabouts Filing to give notice of a different location where they would instead be available for Testing during a specified 60-minute time slot on the relevant day.

Article B.3.2 ISRM

B.3.2 When a Whereabouts Failure appears to have occurred, Results Management shall proceed as follows:

a) If the apparent Whereabouts Failure has been uncovered by an attempt to test the Athlete, the Testing Authority shall timely obtain an Unsuccessful Attempt Report from the DCO. If the Testing Authority is different from the Results Management Authority, it shall provide the Unsuccessful Attempt Report to the Results Management Authority without delay, and thereafter it shall assist the Results Management Authority as necessary in obtaining information from the DCO in relation to the apparent Whereabouts Failure.

b) The Results Management Authority shall timely review the file (including any Unsuccessful Attempt Report filed by the DCO) to determine whether all of the Article B.2.1 requirements (in the case of a Filing Failure) or all of the Article B.2.4 requirements (in the case of a Missed Test) are met. It shall gather information as necessary from third parties (e.g., the DCO whose test attempt uncovered the Filing Failure or triggered the Missed Test) to assist it in this task.

c) If the Results Management Authority concludes that any of the relevant requirements have not been met (so that no Whereabouts Failure should be declared), it shall so advise WADA, the International Federation or National Anti-Doping Organization (as applicable), and the Anti-Doping Organization that uncovered the Whereabouts Failure, giving reasons for its decision. Each of them shall have a right of appeal against that decision in accordance with Code Article 13.

d) If the Results Management Authority concludes that all of the relevant requirements as set out in B.2.1 (Filing Failure) and B.2.4 (Missed Test) have been met, it should notify the Athlete within fourteen (14) days of the date of the apparent Whereabouts Failure. The notice shall include sufficient details of the apparent Whereabouts Failure to enable the Athlete to respond meaningfully, and shall give the Athlete a

reasonable deadline to respond, advising whether they admit the Whereabouts Failure and, if they do not admit to the Whereabouts Failure, then an explanation as to why not. The notice should also advise the Athlete that three (3) Whereabouts Failures in any 12-month period is a Code Article 2.4 anti-doping rule violation, and should note whether they had any other Whereabouts Failures recorded against them in the previous twelve (12) months. In the case of a Filing Failure, the notice must also advise the Athlete that in order to avoid a further Filing Failure they must file the missing whereabouts information by the deadline specified in the notice, which must be within 48 hours after receipt of the notice.

e) *If the Athlete does not respond within the specified deadline, the Results Management Authority shall record the notified Whereabouts Failure against them.*

If the Athlete does respond within the deadline, the Results Management Authority shall consider whether their response changes its original decision that all of the requirements for recording a Whereabouts Failure have been met.

i. *If so, it shall so advise the Athlete, WADA, the International Federation or National Anti-Doping Organization (as applicable), and the Anti-Doping Organization that uncovered the Whereabouts Failure, giving reasons for its decision. Each of them shall have a right of appeal against that decision in accordance with Code Article 13.*

ii. *If not, it shall so advise the Athlete (with reasons) and specify a reasonable deadline by which they may request an administrative review of its decision. The Unsuccessful Attempt Report shall be provided to the Athlete at this point if it has not been provided to them earlier in the process.*

f) *If the Athlete does not request an administrative review by the specified deadline, the Results Management Authority shall record the notified Whereabouts Failure against them. If the Athlete does request an administrative review before the deadline, it shall be carried out, based on the papers only, by one or more person not previously involved in the assessment of the apparent Whereabouts Failure. The purpose of the administrative review shall be to determine anew whether or not all of the relevant requirements for recording a Whereabouts Failure are met.*

g) If the conclusion following administrative review is that all of the requirements for recording a Whereabouts Failure are not met, the Results Management Authority shall so advise the Athlete, WADA, the International Federation or National Anti-Doping Organization (as applicable), and the Anti- Doping Organization that uncovered the Whereabouts Failure, giving reasons for its decision. Each of them shall have a right of appeal against that decision in accordance with Code Article 13. On the other hand, if the conclusion is that all of the requirements for recording a Whereabouts Failure are met, it shall notify the Athlete and shall record the notified Whereabouts Failure against them.

F. LEGAL/REGULATORY FRAMEWORK & ANALYSIS

60. As seen above, the Player admitted the second Missed Test (on 26 July 2021) by stating that *"I do not contest the second missed test of July 26th 2021. I was negligent in making the mistake that led to that missed test"*.

61. Therefore, the issues that the Tribunal needs to determine are the following:

a) Preliminary issue: The alleged misconduct of a Review Board Member and its impact on the validity of the procedure and the outcome of the case.

b) First Missed Test: Could the Player rebut the presumption that he acted negligently?

c) Third Missed Test:

i. Has the DCO done what was reasonable in the circumstances to locate the Player?

ii. If the Tribunal finds that the answer to the above is in the affirmative, could the Player rebut the presumption that he acted negligently?

d) If the Tribunal finds that an ADRV was committed by the Player, what should be the ineligibility period based on the Athlete's degree of Fault?

e) *If the Tribunal finds that an ADRV was committed by the Player, what should be the starting date of the period of Ineligibility? In addition, should the competitive results obtained since the Third Missed Test be disqualified?*

a) Preliminary issue: The impact on the misconduct of the Review Board Member on the validity of the procedure and the outcome of the case

62. As a preliminary issue, the Tribunal will consider the late submission by the Player alleging an ethical violation of a Review Board Member (which occurred in a context outside his involvement as a Review Board Member) and whether this should invalidate the charge brought against the Player.

63. The Tribunal does not need to deal with whether this submission is admissible – which is highly doubtful in view of the fact that it was only filed one day prior to the hearing even though the name of the individual in question was known to the Player for almost four months prior to the hearing. – His request is in any event without merit as will be shown below.

64. Regarding the alleged invalidity of the whereabouts procedure due to the misconduct of one Review Board member, the Tribunal first notes that the second Review Board member also found the Player had a case to answer for breach of Article 2.4 TADP. Furthermore, the Tribunal notes that the Player did not establish how the alleged ethical violation of the Review Board Member in the context of an entirely different capacity could seriously call into question his work as a Review Board Member, especially in the Player's case. The same is true regarding the allegation that the Review Board Member conducted work as a lawyer in the field of collective labor law, in which he might have advised employers how to defend against "union campaigns". When asked by the Player's counsel during the hearing, Dr Miller told the Tribunal that the appointment of a Review Board Member accused of misconduct - in the context of a matter unrelated to the ITF - would not likely have an impact on his performing his tasks properly in the context of the present case. While the Tribunal is of the view that it should be in the ITF's own interest to appoint Review Board Members who are

qualified and of impeccable character to not affect their work as a Review Board Member or the reputation of the ITF, the allegations raised by the Player against the Review Board Member in the present case do not reach a threshold which could possibly require the Tribunal to invalidate the process against the Player.

65. The Tribunal finds that any criticisms regarding the Review Board Member's qualification, misconduct etc. cannot impact on the present matter. As stated by the ITF, the role of the Review Board is not to determine whether or not the Player has committed an ADRV, but whether the Player has a case to answer for a breach of an ADRV. This is a *prima facie* review that does not give the right to a Review Board Member to issue any sanctions or decide on the case. Furthermore, the Independent Tribunal can – and must – in any event view all facts and the law anew and with full power, therefore any arguments related to the violation of the process cannot be retained. In the present proceeding, the Player is entitled to dispute the charge against him and to a hearing before the Independent Tribunal. Nothing that the Review Board did or did not do has any bearing on the facts of the three missed tests that are the subject of the present matter brought before this Tribunal (see Article 3.2.5 TADP, and *CAS 2011/A/2671, UCI v Rasmussen & DIF, para 74*).

66. The Tribunal applies the same reasoning regarding the Player's allegation that *"(…) the reviewers were deprived of the actual Out-of-Competition Protocol*", which in the Player's opinion, meant that the Review Board *"rubber stamp[ed] the prosecution of these charges".*

67. Because the Tribunal is assessing the Player's case *de novo*, the present proceeding will cure any such procedural defects alleged by the Player.

b) First Missed Test: Could the Player rebut the presumption that he acted negligently?

68. The Tribunal notes that, in accordance with Article B.2.4 IRSM 2021, four requirements need to be met by the ITF to the comfortable satisfaction of the hearing

authority in order to presume that the Player acted negligently, namely that a) the athlete was given notice of inclusion in the IRTP; b) that the DCO attempted to test the athlete in a given day in the quarter, during the 60-minute time slot specified in the Athlete's Whereabouts Filing for that day; c) that the DCO did what was reasonable in the circumstances to try to locate the Athlete, short of giving the Athlete any advance notice of the test; and d) that the athlete was given notice of one missed test or filing failure before a subsequent missed test can be pursued.

69. The Tribunal considers that the ITF has met the criteria for the presumption that the Player's failure to be available for testing and his failure to update his whereabouts information for the first Missed Test was at least negligent. It is then for the Player to rebut such presumption of negligence by establishing that no negligent behaviour on their part caused or contributed to their failure (i) to be available for Testing at such location during such time slot, and (ii) to update their most recent Whereabouts Filing to give notice of a different location where they would instead be available for Testing during a specified 60-minute time slot on the relevant day. In other words, the Player must show that he acted with *no negligence* and this will be examined below (*see e.g. USADA v. Rollins,* AAA award dated 14 April 2017, para. 7.8*; see also IAAF v. Ahye,* IAAF Disciplinary Tribunal decision dated 7 January 2020, para. 57).

70. The Player asserts that his behaviour cannot be considered to be negligent since "*he did what he was supposed to do by going on-line to change his location"* and that *"the cause of this missed test was in ADAMS blocking him"* by requiring him to complete a two-step verification process to change his password and log in before he could change his whereabouts information for that day; that process involved ADAMS sending him an SMS message which he could not receive because he was on a last-minute booked holiday in Corcovado National Park, Costa Rica, where he had no phone signal.

71. In the context of anti-doping proceedings, the notion of negligence, even though not explicitly defined in the TADP, is interpreted autonomously and not by having recourse to a specific national legal order. In light of the definition of Fault in the TADP, the

Tribunal interprets “negligence” in its normal meaning, as a failure to observe the duty of care expected of a reasonable person in a similar situation (cf. *USADA v Rollins*, AAA decision dated 14 April 2017, para. 7.4).

72. The Tribunal finds that the Player could not rebut such a presumption of negligence for several reasons: the Player does not dispute that he knew that he was selected for inclusion in the IRTP and was made aware of the numerous obligations that arise from his inclusion in the IRTP. Accordingly, the Player was informed of the possibility to make subsequent changes to his whereabouts information by multiple means. The initial document sent to the Player on 25 November 2008 stated that *“(…) In the unlikely event that (a) the ADAMS on-line system is not available, and (b) you cannot update your Whereabouts information using SMS, you may submit updates using the Whereabouts form described above, or by sending an email to anti-doping@itftennis.com“*. The same information is also available online.

73. Therefore, the Player knew – or was expected to know - that if his filed whereabouts information was no longer accurate, he should update his information by using ADAMS, by sending to the ITF a whereabouts form or by sending an email to the ITF. However, the Player failed to make use of the last two possibilities. His statements that *“he didn’t have access to the correct email addresses and telephone numbers (which are saved in ADAMS)”* and because *“with the time difference my original whereabouts timeslot in France was already for the day after”* rather confirm his negligent behaviour than rebut the presumption established by the ITF. This is because, in the Tribunal’s opinion, the Player should have updated his whereabouts information earlier in order to avoid taking any risk. It is the Player’s personal responsibility to make himself aware of his obligations and how to comply with them, and there were other things he could have done to successfully update his whereabouts information, even without a telephone signal to send or receive SMS messages (i.e., by email or using the online whereabouts form). Certainly, the Player’s defence that an ADAMS-related email sent by him to the ITF in 2011 remained unanswered at the time cannot reasonably explain why he refrained from sending an email to the ITF in December 2021 or January 2022 to update his whereabouts

information then, especially since the Player admitted in the hearing that he had exchanged anti-doping related emails with the ITF in previous years.

74. The Tribunal is further not convinced by the Player's argument that he could not have updated his information earlier, since it was shown – also during the hearing – that the Player knew, at a much earlier stage that he would not be in his ADAMS-indicated location (i.e. his Paris apartment) on the 2nd of January 2021. According to his whereabouts information he was in Costa Rica from 20 December 2020 to 31 December 2020. As was established during the hearing, the Player had purchased round trip tickets, thus knowing that he would not be in his apartment in Paris on 2 January 2022 and should have amended his location accordingly. By waiting to file an update on his whereabout information at the last minute, the Player assumed the risk of some technical issues preventing him from ensuring that his whereabouts information was logged accurately and/or missing a DCO's attempt to locate him for testing in Paris (*see also USADA v Arias,* AAA Award dated 27 March 2012, paras 12-13).

75. The Tribunal therefore is satisfied that the Player could not rebut the presumption established by the ITF that his behaviour was negligent, and therefore the first Missed Test of 2 January 2021 should be confirmed.

c) Third Missed Test:

i) Has the DCO done what was reasonable in the circumstances to locate the Player in the Third Missed Test?

76. The Tribunal needs to determine whether the ITF demonstrated, to the required standard of proof, that the DCO *"did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test"*. In other words, it must determine whether the ITF has met the criteria for the presumption that the Player's failure to be available for testing and his failure to update his whereabouts information for the third Missed Test was at least negligent.

77. The Player asserts that the ITF has not met its burden to demonstrate, in accordance with Article B.2.4 ISRM, that on 27 September 2021 the DCO *"did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test"* for various reasons:

    a) *because the DCO 'merely continued to press the player's same intercom buzzer';*

    b) *he 'made no attempt to contact anyone else to help to get to [the Player]';*

    c) *he 'did not press the intercom buzzers of any of the three neighbours',*

    d) *did not 'knock on the doors of the building residents who live on the ground floor next to the intercom she pressed'; and*

    e) *did not 'knock on the door nor attempt to contact the concierge' (all of whom might have answered and provided the DCO with access to the Player's apartment door).*

78. In essence, the Player asserts that the DCO *'made no effort whatsoever to locate the player'* and decided to *'sit back and wait for nothing to happen so that [she could] leave the site'*.

79. First, the Tribunal reiterates the obligation of the Player, under the ISRM whereabouts regime, to be present and available for testing at the time and location he has specified in his whereabouts filing, in order to be able to be found without any advance notice. Accordingly, the sole presence at the specified location is not in itself sufficient unless the athlete is also accessible at that location (*Drug Free Sport New Zealand v Gemmell, CAS 2014/A/2, paras 25-30 and 37-38).*

80. The Tribunal fails to understand the Player's criticism towards the *"no advance notice testing"* concept, which, according to him, is a "fiction": the meaning of this concept is that, in certain situations, the DCO has discretion (guided by the TADP Protocol) as to what is reasonable *'in the circumstances'* and *'given the nature of the specified*

location' to try to locate the player *'short of giving the [player] advance notice of the test'* (cf. Article B.2.4(c) ISRM). Even though there is a certain degree of flexibility, the general principle of no advance notice testing remains the basic principle in the determination of the "reasonableness" of the DCO's actions in any given circumstance.

81. Therefore, the Tribunal agrees with the ITF that the obligation of the DCO enshrined in Article B.2.4 ISRM to do *'what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the Athlete, short of giving the Athlete any advance notice of the test'*, must be assessed against the background **of the legal obligation of the athlete to make himself available for testing during the specified time** (emphasis added). Accordingly, an athlete who chooses the latest possible time for a test in his or her whereabouts information should take steps to ensure that he is in a position to hear a knock at the door or a ring of a buzzer. (*Drug Free Sport New Zealand v Gemmell, CAS 2014/A/2, para 88*).

82. Furthermore, the reasonable efforts of a DCO to locate an athlete must be assessed *objectively*, i.e. without reference to the particular situation of an athlete and not with the premise that the athlete was present but could not hear the DCO ringing the doorbell. This is corroborated by *the 2021 WADA Guidelines for Sample Collection, according to which (pp. 24-25): "If the attempt takes place at the athlete's residence, the [sample collection personnel] should ring the doorbell or knock upon arrival and then at regular intervals during their attempt".* The Guidelines do not state that (absent objective reasons for doing so) a DCO should have to assume some incapacity on the part of the athlete to hear the doorbell or the knocking or other initial contact attempt, and to go above and beyond in his / her attempts to locate the athlete.

83. The Tribunal does not agree with the Player's assertions that the DCO *"is required to get the sample"* irrespective of any *"potential risk of the possibility of some advance notice"* to the extent that the DCO has an obligation of *"means, not of result"* (*World Athletics v Stevens,* Disciplinary Tribunal decision dated 9 July 2020, para 61). As will be further shown below, an objective assessment of the DCO's actions shows that they were, in the Tribunal's opinion, reasonable.

84. The World Anti-Doping Code and the IDTM are the general frameworks, within each federation is free to construct its own rules as long as they are compliant with these rules (cf. *Coleman v World Athletics,* CAS 2020/A/7528, paras 159-160*).* In the present matter, which is governed by the ITF Rules, the Tribunal has recourse to the TADP, the IDTM and the TADP Protocol. The latter offers guidance to DCOs when seeking to locate tennis players for sample collection. It refers to what a reasonable attempt – at any given location and in all the circumstances – might be. The Tribunal does not consider that the ITF *"failed to even mention its existence"* in its Opening Brief because it is favourable to the Player. The Protocol was annexed to the DCO's statement that was produced along with the ITF's Opening Brief. In any event, the criteria included in this document seem to have been complied with.

85. The TADP Protocol notes that what constitutes a reasonable attempt will *"depend on the particular circumstances, and in particular on the nature of the location(s) where the player has said that he/she will be"*. Accordingly, the DCO should *"use his/her common sense"* and answer to the following question: *"Given the nature of the location specified by the Player, what do I need to do to ensure that if the Player is present, he/she will know that a Doping Control Officer is here to collect a Sample from him/her?"* (para. 11 TADP Protocol).

86. According to para. 12.1 TADP Protocol, *"Where the specified location is the Player's house or other place of residence, the DCO should ring any entry bell and/or knock on the door at the start of the 60-minute time slot (as appropriate for the location in question). If the Player does not answer, the DCO should <u>not</u> telephone the Player to advise him/her of the attempt <u>at that stage</u>. Instead, the DCO should wait somewhere close by (e.g. in his/her car) in a place where he/she can observe the (main) entrance to the residence. He/she should then knock and ring again a short time later (after no longer than 15 minutes), and should keep doing so at similar intervals until the end of the 60 minutes"*.

87. In the present case, the DCO checked the Player's whereabouts filing twice (around 8:30 pm and 9:45 pm) shortly before the 60-minute time slot began on 27 September

2021 to ensure that the Player had not made any last-minute changes to his whereabouts information (para. 6 TADP Protocol).

88. Para. 12.4 of the TADP Protocol further provides that *"Whatever the location specified, it may be appropriate for the DCO to speak to people he/she encounters during the attempt to see if they can assist in locating the Athlete. If so, the DCO should try to get the names and positions (e.g., neighbour, coach, receptionist) of the people with whom he/she speaks, for recording (along with relevant details of the conversations) on the Unsuccessful Attempt Report"*.

89. According to para. 13 TADP Protocol, *"Whatever the location specified, during the attempt to locate the Player the DCO should note any circumstances that could be relevant. For example, if the attempt is made at the Player's home, and no one answers the door, the DCO should note whether or not there are any lights on in the house, or if he/she notices any movement in the house. If there is a car in the driveway, the DCO might note the make/colour/licence plate number. […] This information should be included in the Unsuccessful Attempt Report"*.

90. Importantly, para. 14 TADP Protocol provides that *"If the location in question is inside a building to which the DCO does not have access and he/she sees anyone entering or leaving the building, the DCO should attempt to speak to them to see whether they (e.g.) know the player and/or can give the DCO access to the building in question and/or can knock on the player's door (or otherwise contact the player)".* As a last resort only, para. 15 provides that the DCO may telephone the player in the last five minutes of the 60-minute time slot.

91. Guided by the TADP Protocol including the paragraphs reproduced above, the Tribunal considers that the DCO did what was reasonable to locate the Player.

92. It is recalled that the DCO had already done two previous test attempts at the Player's address; after unsuccessfully pressing the Player's intercom buzzer, she would press

it regularly – approximately every five minutes - with no answer. During the 60 minutes, the DCO stayed inside the hall walking back and forth into the back courtyard. The DCO did not see any signs of activity in the Player's apartment, specifying in her witness statement that *"Between 10 o'clock and 11 o'clock at night at the end of September in Paris, it is quite dark outside. That means that for a person looking at an apartment window from the street, it is generally quite easy to see even a little light coming from inside apartments".* This matches the Player's admission that he had turned off the lights in his apartment during the 60-minute time slot on 27 September 2021.

93. Also, the DCO explicitly stated in her witness statement that "*While I was trying to locate the Player at […] on 27 September 2021, I did not see anyone leave or enter the apartment building. I did not see anyone in the courtyard (as I had during the test attempt on 26 July 2021). The light inside the hall is controlled by a button by the door. Once the button is pressed, the light stays on for around two or three minutes so, each time the light automatically turned off, I had to press the button again to turn it back on."*

94. The DCO did not know whether the apartment building has a concierge, since she did not see a concierge during her previous test attempts at this address. Furthermore, the DCO did try to call the Player twice. After hearing a ring tone, the call went to voicemail, and she did not leave a message. The DCO left the building at 11:02 pm.

95. Even though there is no automatic presumption in favour of the evidence of a DCO and *"the hearing body must evaluate the probabilities in the particular circumstances of the case in hand"*, the content of the DCO's witness statement in its relevant parts is not disputed by the Player and the Tribunal was convinced of the persuasiveness of her statement and her testimony during the hearing *(see WADA & World Athletics v Naser,* CAS 2020/A/7526 & 7559, para 134*).*

96. The Player seems to suggest that the DCO made no attempt to contact anyone else to help to get to the Player. In the Tribunal's view – and in accordance with para. 12.4

of the TADP Protocol – *"it may be appropriate for the DCO to speak to people he/she encounters during the attempt"* to see if they can assist in locating the Player. Apart from the discretionary character ("may"), the aforementioned paragraph refers to "encounters" during the attempt. The Tribunal fully agrees with the ITF that this suggestion does not give the DCO licence to actively try to locate people other than the Player at the specified location or other locations in order to ask those people for help, nor does it encourage DCOs to do. Therefore, whether or not there were lights on in other apartments of the apartment building, while the lights of the Player's apartment were undisputedly turned off, does not dissuade the Tribunal.

97. On 27 September 2021, the DCO did not encounter any other people at or inside the Player's apartment building and so she could not ask them to assist in locating the Player. There is no reason to believe that the DCO would not speak to a person she would encounter, all the more in view of the DCO's last experience with speaking with a man in the building courtyard during her last attempt to test the Player. In the present case there was no one entering or leaving the building that the DCO could talk to. This is also logical in view of the relatively late time slot selected by the Player, but this can by no means be attributed to the DCO.

98. During the hearing, when asked why she did not press the remaining buzzers of the Player's building, the DCO said that in such an upmarket area – and with the police right next to the Player's building – pressing other people's buzzers at that late time might have induced the neighbours to call the police. The DCO decided that this was not a reasonable act in the circumstances. The Tribunal agrees with the DCO and the ITF that she was under no obligation whatsoever to actively seek to locate people other than the Player at a restricted access location, for example, by knocking on other apartment doors, or by ringing other intercom buzzers to other apartments. The DCO was correct to not press any of the other three intercom buzzers in the hall or knock on the ground floor apartment doors, all the more in view of the late time (between 10 pm and 11 pm, which, again, was selected by the Player himself as the time he would be available for testing).

99. Importantly, the Tribunal notes that the DCO was not provided with additional information about the specific location in order to assist her in obtaining access and locating the Player. Even though the Player's father-in-law told the Tribunal that he knew everyone in the building and would have helped the DCO locate the Player if asked to do so, his testimony – as well as the witness statements of the various neighbours and the concierge - cannot be of further assistance to the Player's case. If the Player considered it important to provide any visiting DCO with additional information about his specified location to assist them in obtaining access and locating him, he could have done so on ADAMS (which he eventually did, albeit following the third Missed Test).

100. The Tribunal finds irrelevant the Player's criticisms that the DCO did not recall hearing a sound when she pressed the buzzer. She stated that she did not recall hearing a sound when she pressed the buzzer on several previous occasions, including an Out-of-Competition test in June 2021 when she could successfully locate the Player.

101. The Tribunal is further not convinced by the Player's arguments that the DCO should have knocked on the door of the concierge lodge or otherwise attempted to contact the concierge. Based on the DCO's witness statement, she did not see any lights on at the concierge lodge, and presumably if there was a concierge there at that time, they would have come out to investigate what the DCO and Blood Collection Assistant ("BCA") were doing in the restricted-access hallway. In any event, the concierge does not even claim to have been inside the lodge between 10 pm and 11 pm on 27 September 2021. It must further be noted that, in the photographs taken by the DCO on that day, there was no yellow post-it note as there is in the photographs taken by the Player at a later stage.

102. Even though each case must be decided on its own merits and based on its own specific facts, the Tribunal wishes at this point to draw a clear distinction between the present matter and the *Cornet* case, to which the Player refers in order to corroborate his case. It must be reminded that the issue of pressing other neighbours' buzzers

was a rather incidental one in the *Corne*t decision (and other panels have subsequently confirmed that there is no requirement for the DCO to press the neighbours' buzzers, see *CAS 2020/A/7528, Coleman v World Athletics; CAS 2020/A/7526 & 7559, WADA & World Athletics v Naser; and CAS 2020/A/6763, TTOC v World Athletics*); what was really decisive for the Tribunal in *Cornet* – and is clearly different from the case at hand - was that the DCO saw several individuals entering and leaving the building (including the flatmate of Ms Cornet, whom the DCO had met at previous tests) but failed to even talk to them. In the present case, however, the DCO clearly stated that she did not see anyone entering or exiting the building; this is also understandable in view of the late time, which was the free decision of the Player to suggest that specific time slot. Decisively, the DCO showed from her previous attempts at the same address that she would have approached anyone entering or leaving the specified location but did not see anyone that day.

103. When asked during the hearing, Dr Miller acknowledged that the TADP Protocol was subsequently amended in order to advise DCOs to approach the persons they encounter as they enter or leave the building during the allocated time slot; however, Dr Miller explicitly stated that pressing the buzzers of any neighbours would not be appropriate and reasonable and this is why this practice was not added to the TADP Protocol.

104. Further differences of the present case to the Cornet decision include the following: while it was accepted in *Cornet* that the player's doorbell was not working, the Player's intercom buzzer would have rung at 76.8 decibels (louder than the average doorbell) according to the Player's own admission. Moreover, while Ms Cornet was admittedly awake having breakfast in her apartment during her 8 am to 9 am 60-minute time slot, the Player was in his bedroom with the lights of his apartment turned off and with the doors of his bedroom closed. The Tribunal concludes that he put himself in a situation where there was a risk that he could not hear his intercom buzzer. While the DCO in *Cornet* pressed the player's apartment intercom buzzer only four times during the course of the hour and otherwise sat in her car watching

the door of the apartment building, the DCO in the present case states that she pressed the Player's intercom buzzer twelve times, walked around the building hall and courtyard in order to potentially encounter someone (as she had done in her last attempt), and looked at the Player's apartment windows to look for any lights or other signs of presence.

105. The Tribunal considers that the Player's reference to the case *CAS 2016/O/4712, UKAD v. X.* is not relevant in his case, since the location specified by that particular athlete in her whereabouts filing was a busy hotel with other athletes around, which is significantly different from a quiet residential apartment building in Paris, late on a Monday night.

106. The Player asserts that the DCO could have left a voicemail message which the Player would have heard and immediately let her in. Apart from the fact that such voicemail message is not allowed under para. 16.3 TADP Protocol, and since his phone was on silent mode and the numerous calls by the DCO had not caught his attention, it is highly questionable that such voicemail would have enabled the DCO to locate the Player prior to the end of the 60-minute time slot.

107. The Tribunal concludes that, in light of the evidence produced before it and the relevant rules, the DCO did what was reasonable under the circumstances to locate the Player. The DCO could not reasonably foresee that the Player was 'tired', 'dozing' or 'sleeping' in his bedroom with the bedroom door closed and the television on, all the more since this particular time slot (10 pm – 11 pm) was explicitly selected by the Player as the time he would make himself available for testing.

108. In view of the above, the Tribunal is comfortably satisfied that the DCO did what was reasonable in the circumstances to locate the Player and therefore the ITF has established the presumption that the Player's failure to be available for the Third Missed Test was at least negligent.

ii) Could the Player rebut the presumption of negligence established by the ITF?

109. The Tribunal must now consider whether the Player has rebutted the presumption that his failure to be available for testing and his failure to be available for the Third Missed Test was at least negligent.

110. The ITF notes that even if the DCO had managed (in whatever way) to gain access to the specific door to the Player's apartment and rang his doorbell and knocked on his door, it is *"illusory to suggest that the doorbell and/or the knocking would have been heard by the 'very tired' Player, who was 'dozing' and 'sleeping from time to time', over the noise of the television and with the bedroom door closed"*. As shown by the Player, the 76.8 decibel intercom buzzer inside the apartment was not heard by the Player in that time, despite being rung repeatedly, at least twelve times, throughout the 60-minute time slot, and the Player failed to answer the calls that were made to his phone at the end of the 60-minute time slot.

111. The Tribunal understands that the Player may have been tired from his recent trip to the South of France and that he was sleepy or even dozing on and off, with no lights on in the room apart from the light of the television; however, the Tribunal recalls that this specific time slot was explicitly chosen by the Player and it was his responsibility to ensure that he was available for testing; having missed at least twelve rings on his intercom buzzer operating at 76.8 decibels, and having missed two 'failsafe' calls to his mobile telephone at 10:55 pm and 10:59 pm because he was dozing and had admittedly put his telephone on silent during the selected time slot, the Player could not plausibly blame either the intercom buzzer or the DCO for his unavailability.

112. The Player asserts that the question for the Independent Tribunal is whether the Player was *"negligent for not hearing a buzzer that neither he nor his wife knew had become defective"* when, at the time of the test attempt, he *"was in his bedroom and was dozing on and off"* and he did not hear the DCO pressing the buzzer, even though in the past, *'he has always heard the intercom even under all those circumstances'*. Therefore, in the Player's view, those facts do not meet the ITF's

'burden that this negligence was established to [the Independent Tribunal's] "comfortable satisfaction".

113. It is recalled that the Player is presumed to have been negligent in relation to the 27 September 2021 test attempt, and it is his burden to establish that *"no negligent behaviour on their part caused or contributed to their failure (i) to be available for Testing at such location during such time slot, and (ii) to update their most recent Whereabouts Filing to give notice of a different location where they would instead be available for Testing during a specified 60-minute time slot on the relevant day"* (Article B.2.4 (e) ISRM).

114. The Tribunal finds that the Player could not reverse the presumption of negligence for several reasons: First, the Player has numerous years of experience at the highest level and has been part of the IRTP since 1 January 2009, while the evidence that he is a clean athlete is not directly correlated to the question of negligence that is examined here. Furthermore, the Player admitted that he was in his bedroom that evening, with his bedroom door closed, his phone on silent mode, exhausted from his morning trip, and *"probably lightly dozing on and off".* All these elements make it impossible for the Player to rebut the presumption of negligence *(cf. Drug Free Sport New Zealand v Gemmell, CAS 2014/A/2,* paras 91-95*; IAAF v Ahye,* IAAF Disciplinary Tribunal decision dated 7 January 2020, paras 62-65*).* In this respect, the Player's statement that he has done the same thing in the past and always heard the buzzer cannot be used as an argument to rebut his presumed negligence.

115. The Player further submitted that the buzzer was "low in volume" after a party at the apartment on 23 September 2021, where the intercom *"appears to have been damaged from extensive use"*. He submitted to this effect a judicial officer report, attesting that the buzzer, when standing next to the source of the noise in the apartment, is 76.8 decibels (with the average buzzer volume being at 70 decibels), and the volume in the Player's bedroom as *"42 decibels when doors are open"*, and *"36.7 decibels when doors are closed".*

116. However, the Tribunal understands that the Player voluntarily gave this time slot for testing, and this raises the question why he would close the door during that specific time-frame. The Tribunal finds the counter-evidence produced by the intercom manufacturer's technician compelling, whereby the average intercom buzzer or doorbell volume is around 70 decibels, which was the case here. Whether or not the doorbell was even louder prior to the party is therefore not decisive.

117. What is more, after two missed tests, the Player knew that he had only to miss one test or produce one filing failure and should thus have been even more cautious in dealing with his whereabouts obligations *(cf. WADA & World Athletics v Naser, CAS 2020/A/7526 & 7559, para 164)*. While the Player stated in the hearing that he was "on high alert" after the Second Missed test, he could not explain what exactly he did to ensure that the Third Missed Test could be avoided. The Player's behaviour on 27 September 2021 indeed suggests otherwise.

118. The Player could therefore not rebut, on a balance of probability, that his behaviour was not negligent and did not cause or contribute to his failure to be available for testing.

119. In view of the analysis above, the Tribunal considers that the Player committed three Missed Tests pursuant to Article 2.4 TADP and will determine the length and the start date of the period of Ineligibility in the next sections.

d) What should be the period of Ineligibility based on the Athlete's degree of Fault?

120. The commission of a first ADRV under Article 2.4 TADP calls for the application of Article 10.3.2 TADP, according to which *"the period of Ineligibility imposed will be two years, subject to reduction down to a minimum of one year, depending on the Player's degree of Fault".*

121. The reduction down to a minimum of one year is *not* possible "*where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the*

Player was trying to avoid being available for Testing". In the present case, neither the ITF makes such assertion, nor the Tribunal finds that there are any elements to suggest such conduct on behalf of the Player. The Tribunal will therefore examine whether there are elements that can lead to a reduction of the Ineligibility period, based on the Player's degree of Fault.

122. According to the ITF, *"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's or other Person's degree of Fault include, for example, the Player's or other People's experience, (…) 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 the ITF's view, there are no reasons to depart from the standard period of Ineligibility of two years. The Tribunal, however, understands that it has a broad discretion in the determination of the Player's degree of Fault and may take several factors into account as further shown below.

123. First, the Tribunal notes that the Player gave a truthful testimony and answered all questions raised by the Tribunal and the Parties in an open and honest manner. It has at no time been asserted by the ITF that the Player wilfully tried to evade the Out-of-Competition testing on these three occasions that led to his ADRV. Moreover, it is not disputed that the Player has long been an advocate for anti-doping, having had numerous discussions with the ITF anti-doping officials as to how to improve the system. In this respect, the Tribunal considers that his previous experience for nearly two decades should not only be viewed as a factor increasing his responsibility and his perceived risk but also as a mitigating circumstance in view of the fact that he had been successfully tested Out-of-Competition on numerous previous occasions over many years and never had whereabouts failures resulting in an ADRV.

124. Within the context of the whereabouts requirements, the Player was expected to file and keep updated accurate whereabouts information and be present and accessible for testing at the time and location he has specified. According to the Player's

testimony during the hearing – he is one of only ten persons in total in his sport to be part of the IRTP. Even though the Tribunal considers that the perceived level of risk was elevated, it still considers that the specific circumstances of wheelchair tennis should be taken into consideration, to the extent that it is a much less professionalised sport of high social importance and where very few athletes form part of the IRTP. The Tribunal gives particular importance to the fact that the Player has been a positive role model for his sport for many years, using wheelchair tennis as a vehicle for rehabilitation and social inclusion.

125. Moving now to the specific circumstances of the First Missed Test, the Tribunal notes that the Player never lied about his whereabouts on 2 January 2021 and this location was accurately added to his ADAMS until the end of the calendar year 2020. Even though the Player acted negligently and should have updated his ADAMS as soon as he knew that he would not return to his Paris apartment on 2 January 2021, the Tribunal considers that his degree of Fault is still reduced because the two-factor verification had never been requested in the past and the Player had the right to update his ADAMS until shortly before the commencement of the indicated time slot.

126. Regarding the Third Missed Test, the Tribunal notes that it was not disputed that the Player was in the ADAMS-indicated address at the determined time slot. It was further never asserted that the Player attempted to evade the testing. The Tribunal agrees with the ITF that the case law on similar issues is highly fact-specific and not particularly helpful, to the extent that each case must be decided on its own merits and the surrounding circumstances. In the Player's case, he should have made sure that the lights in his apartment were turned on, that the bedroom door was open and that his phone was not on silent. On the other hand, the Tribunal has some sympathy for the Player, who got up very early on 27 September 2022, and that the time slot for testing was late in the day. Therefore, even though the Player's Fault might not justify a sanction at the lowest end of the available range, the Tribunal considers that the appropriate sanction based on the facts of the particular case is still at the lower end of the scale, but not to at the very lowest end *(see also ASADA v Bannister, CAS Oceania Registry A1/2013, paras 64-66).*

127. Finally, the Player established that he had a serious intention to correct his mistakes as soon as he realised the nature and consequences of his behaviour. Albeit after the Third Missed Test, the Tribunal is mindful of the fact that the Player started disclosing additional information on his ADAMS in order to make sure that he would not miss another Out-of-Competition test in the future *(cf. FINA v. Ortiz, FINA Doping Panel decision dated 20 August 2010, para. 4.11)*. In view of the above, the Tribunal concludes that the Player's period of Ineligibility should be 15 months based on his degree of Fault.

e) What should be the starting date of the period of Ineligibility? Should the competitive results obtained since the Third Missed Test be disqualified?

128. Pursuant to Article 10.13.1 TADP, the general rule is that the period of Ineligibility starts from the date that it is accepted by the athlete or imposed by the Tribunal. However, the Tribunal notes that there are three important exceptions to that rule, one of which is of particular relevance in the present case. The Tribunal may consider its application even if it was not explicitly requested by the Parties (since it falls within its more general discretion to determine the appropriate sanction).

129. The said exception is stipulated in Article 10.13.1 TADP and permits the backdating of the start date of the ban to *"as early as the date of Sample collection or the date on which another anti-doping rule violation has occurred",* where there have been substantial delays in the hearing process or other aspects of doping control not attributable to the athlete. The two conditions for the application of this provision include therefore the substantial delays and the second that the delays are not attributable to the athlete.

130. While the burden lies with the Player to prove that the delays were not attributable to him, the Tribunal notes that the Player's first counsel resigned several months after the Notice of Charge, and the Player had to find a new counsel to represent him. This resignation substantively delayed the hearing process, and even though the Player's new counsel filed several subsequent requests for extension, this was – at least in

part - also linked to the first counsel's resignation. The Tribunal therefore finds, in the exercise of its discretion, that the backdating of the sanction to a date three months after the Third Missed Test is fair and appropriate in the particular circumstances of the case due to the delays in the process not entirely attributable to the Player.

131. The remaining question is whether, from the date of the Third Missed Test until the beginning of the backdated period of Ineligibility, all competitive results should be disqualified. The Player submitted that the competitive results should not be retroactively disqualified based on the "fairness exemption". The Tribunal considers that the fact that the Player tested negative before and after 27 September 2021 does not suffice in itself to apply the fairness exemption.

132. The Tribunal further agrees with the ITF that the mere argument that an athlete was not found guilty of using prohibited substances (but only of being unavailable for testing) is not enough to enact the fairness exemption and not disqualify previous results in Article 2.4 TADP cases. The Tribunal, however, understands that it enjoys a broad discretion in how it defines "fairness" in the particular case. In this respect, the Tribunal notes that the Player changed, as pointed out by the ITF and much to his credit, the way he disclosed information on ADAMS after the Third Missed Test: even though this is an indication that he himself acknowledged that he acted negligently in the past, at the same time he wanted to make sure that he would not miss another Out-of-Competition test in the future.

133. The Tribunal also reiterates that, even though the new counsel of the Player requested – and was granted – several extensions in order to prepare the answer to the ITF's Opening Brief, this was primarily due to the fact that the first pro bono counsel appointed to represent the Player resigned several months after the Third Missed Test (i.e. after 27 September 2021).

134. In view of the specific circumstances of this case, the Tribunal considers it fair not to retroactively disqualify the Player's results (nor to forfeit all medals, titles, ranking

points and prize money won by virtue of those results) from the date of the third Missed Test (27 September 2021) until the starting date of the period of Ineligibility.

G. COSTS

135. According to Article 8.5.4 TADP, the Independent Tribunal has the power to make a costs order against any party. The Player, through his counsel, made an application for costs one day prior to the hearing. The ITF did not seek costs but objected to the request of the Player to be awarded costs.

136. During the hearing, the Player stated that even though his counsel acted on a pro bono basis in the beginning, he subsequently had to charge for his fees in view of the high complexity of the case and, at least partly, due to his lack of experience in sports-related matters. The Tribunal notes that the Player had the possibility to be represented by a member of the Sport Resolutions Pro Bono Legal Advice Service but chose to be represented by another attorney. After hearing both parties and in view of the outcome of the case, the Tribunal decides that neither party will be awarded any costs. Accordingly, each party shall bear their own costs.

H. APPLICABLE CONSEQUENCES / OPERATIVE PART

137. In view of the above analysis, the Tribunal finds as follows:

1. The Player has committed an ADRV under Article 2.4 TADP as a result of the Missed Tests on (1) 2 January 2021, (2) 26 July 2021, and (3) 27 September 2021;
2. The period of Ineligibility imposed on the Player pursuant to Article 10.3.2 TADP will be 15 months, to commence from 27 December 2021 and end at 11:59 on 26 March 2023;
3. The Player's results (and any medals, titles, ranking points and prize money won by virtue of those results) will not be retroactively disqualified.

4. There will be no order on costs. Accordingly, each Party shall bear its own costs; and

5. All other requests for relief by the parties are dismissed.

H. RIGHT OF APPEAL

138. This decision may be appealed to the Court of Arbitration for Sport ("CAS"), located at Palais de Beaulieu Av. des Bergières 10, CH-1004 Lausanne, Switzerland (procedures@tas-cas.org), within 21 days of receipt of the decision, in accordance with Article 13.2.1 TADP.

Dr Despina Mavromati

Chair, on behalf of the Panel

London, UK

30 June 2022