

DECISION OF THE INTERNATIONAL TENNIS FEDERATION

PURSUANT TO ARTICLE 7.14 OF THE 2023 TENNIS ANTI-DOPING PROGRAMME

I. Introduction

1. The International Tennis Federation (**ITF**) is the international governing body for the sport of tennis and signatory of the World Anti-Doping Code (**Code**). The ITF issued the 2021 Tennis Anti-Doping Programme (the **TADP** or the **Programme**),¹ which sets out Code-compliant anti-doping rules applicable to players competing in Covered Events.²
2. Kyu-Seung Kim (the **Player**) is a 59-year-old wheelchair tennis player from the Republic of Korea. He has competed on the ITF Wheelchair Tennis Tour (in both singles and doubles competitions) since July 1998, and has achieved a career-high ITF ranking of 6 in quad singles and 5 in quad doubles. By virtue of (among other things) his ITF ranking and participation in ITF Wheelchair Tennis events in 2021 (which fall within the definition of ‘Covered Events’ under the TADP), the Player became bound by and was required to comply with the TADP. Furthermore, when he registered online for an International Player Identification Number (IPIN) in 2013 and in subsequent years, the Player expressly agreed to be bound by and to comply with the TADP.
3. The ITF charged the Player with the commission of an Anti-Doping Rule Violation and has proposed certain Consequences based on its analysis of the degree of fault that the Player bears for that violation. The Player has admitted the Anti-Doping Rule Violation charged and acceded to the Consequences proposed. The ITF therefore issues this decision further to 2023 TADP Article 7.14, which provides:

‘7.14.1 At any time prior to a final decision by the Independent Tribunal, the [ITF] may invite the Player or other Person to admit the Anti-Doping Rule Violation(s) asserted and accede to specified Consequences [...]

7.14.2 In the event that the Player or other Person admits the Anti-Doping Rule Violation(s) asserted and accedes to Consequences specified by the [ITF] [...], the [ITF] will promptly issue a reasoned decision confirming the commission of the Anti-Doping Rule Violation(s) and the imposition of the specified Consequences [...], will send notice of the decision to the Player or other Person and to each Interested Party, and will Publicly Disclose the decision in accordance with Article 8.6. [...]

7.14.3 Any decision issued by the [ITF] in accordance with Article 7.14.2 that an Anti-Doping Rule Violation has been committed [...] will address and determine (without limitation): (1) the factual basis of the decision that an Anti-Doping Rule Violation was committed; and (2) all of the Consequences to be imposed for such Anti-Doping Rule Violation, including the reasons for imposing the Consequences specified, and in particular the reasons for exercising any discretion not to impose the full Consequences available under this Programme.’

¹ The facts in issue arose in 2021, and therefore the 2021 edition of the TADP applies to substantive matters, whereas the current 2023 edition of the TADP applies to procedural matters. As from 1 January 2022, the ITF has delegated all aspects of Doping Control and Education to the International Tennis Integrity Agency, except for matters arising prior to that date (which includes Results Management in respect of this case).

² Any term that begins with a capital letter and is not otherwise defined in this Decision has the meaning given to it in the Programme.

II. The Player's commission of an Anti-Doping Rule Violation

4. On 3 November 2021, while competing at the NEC Wheelchair Singles Masters / UNIQLO Wheelchair Doubles Masters held in Orlando, Florida, USA, from 31 October to 7 November 2021 (the **Event**), the Player was required to provide a urine sample for drug testing pursuant to the TADP. The sample he provided was given reference number 3164590 and split into an A sample and a B sample, which were sealed in tamper-evident bottles and transported to the WADA-accredited laboratory in Montreal (the **Laboratory**) for analysis.
5. The Laboratory detected the presence in sample A3164590 of hydrochlorothiazide, and one of its metabolites, chloraminophenamide. Hydrochlorothiazide is prohibited at all times under Section S5 (Diuretics and other masking agents) of the 2021 WADA Prohibited List. Hydrochlorothiazide is a Specified Substance. The Player does not possess a Therapeutic Use Exemption (**TUE**) permitting use of hydrochlorothiazide.
6. The Adverse Analytical Finding in respect of the A sample was considered by an independent Review Board in accordance with TADP Article 7.4. The Review Board did not identify any apparent departures from the applicable sample collection and sample analysis procedures that could have caused the Adverse Analytical Finding. On 20 December 2021, the Review Board invited the Player to apply for a retroactive TUE by 20 January 2022 (which deadline was subsequently extended). On 30 April 2022, the Player applied for a retroactive TUE. On 15 August 2022, the Player's application was denied by the TUE Committee. On or around 21 August 2022, the Player requested that WADA review the TUE Committee's decision, in accordance with TADP Article 4.4.7.1(b). On 14 September 2022, WADA declined to review that decision. The ITF therefore referred the matter to the Review Board, which decided that the Player had a case to answer for breach of TADP Articles 2.1 (presence) and/or 2.2 (Use).
7. Accordingly, on 14 October 2022, the ITF sent the Player a (pre-charge) Notice, notifying him that he may have committed Anti-Doping Rule Violations under TADP Articles 2.1 and/or 2.2. Given that hydrochlorothiazide is classified as a Specified Substance under the TADP, the Player was not subject to a mandatory provisional suspension under TADP Article 7.12.1. The Notice informed the Player that if he did not admit the possible violations in the meantime, his B sample would be analysed at the Laboratory on 20 October 2022.
8. On 20 October 2022, the Laboratory opened and analysed the B sample, which confirmed the Adverse Analytical Finding for hydrochlorothiazide in the A sample.
9. On 26 October 2022, the Player replied to the (pre-charge) Notice, admitting the Anti-Doping Rule Violations, and waiving analysis of his B sample (although by that date the B sample had already been analysed).
10. On 1 November 2022, the ITF sent the Player a Charge Letter, formally charging him with the commission of Anti-Doping Rule Violations under TADP Articles 2.1 and/or 2.2. TADP Article 2.1 is a strict liability offence that is established simply by proof that a Prohibited Substance was present in the Player's sample, i.e., the ITF does not have to prove how the substance got into the Player's system or that the Player took the substance intentionally (or even knowingly).
11. On 4 November 2022, the Player voluntarily accepted a Provisional Suspension.
12. On 14 November 2022, the Player replied to the Charge Letter, admitting the charge, but asserting that his Anti-Doping Rule Violations were committed with No Significant Fault or Negligence, and therefore he should be entitled to a reduced period of ineligibility.

III. Consequences

III.A Period of Ineligibility

(a) How the hydrochlorothiazide got into the Player's system

13. The Player asserted that his positive test was caused by his use of tablets of Telmirotan plus-40/12.5mg (the **Telmirotan Plus Tablets**), which he was prescribed by his doctor to treat hypertension, and which (unknown to the Player) contained hydrochlorothiazide.
14. The Player further asserted that: (i) he was first diagnosed with hypertension in September 2021 and was prescribed Telmirotan-40mg (the **Telmirotan Tablets**); (ii) on receiving that prescription, he conducted a search using an application provided by the Korea Anti-Doping Agency (**KADA**) to identify whether any of the ingredients in the Telmirotan Tablets were on the 2021 WADA Prohibited List; (iii) the results of that search confirmed that the Telmirotan Tablets did not contain any Prohibited Substance; (iv) he was unaware that, at his follow-up appointment on 25 October 2021, his doctor changed his prescription from Telmirotan Tablets to Telmirotan Plus Tablets; (v) because he did not know that his prescription had changed, he did not conduct a further search using the KADA application (or elsewhere) to identify whether the Telmirotan Plus Tablets contained any Prohibited Substance; (vi) the packaging of the Telmirotan Tablets was similar to the packaging of the Telmirotan Plus Tablets and therefore the box he received at the pharmacy did not alert him to the change in prescribed medication; (vii) he ingested the Telmirotan Plus Tablets each day from 25 October 2021 onwards in the mistaken belief that they were Telmirotan Tablets; and (viii) when he identified, in late March 2022, that the Telmirotan Plus Tablets were the source of his Adverse Analytical Finding, he immediately ceased use of them.
15. In support of his explanation, the Player provided (among other things) prescriptions and additional evidence from his doctor confirming: (i) the diagnosis of hypertension and initial prescription of Telmirotan Tablets; (ii) the subsequent prescription for Telmirotan Plus Tablets on 25 October 2021; and (iii) that the doctor did not inform the Player that his prescription had changed from Telmirotan Tablets to Telmirotan Plus Tablets.
16. On 3 November 2021, when asked on the Doping Control Form to declare 'any prescription/non-prescription medications or supplements, including vitamins and minerals, taken over the past 7 days', the Player stated 'Medicine for blood pressure'.
17. In all the circumstances, the ITF accepts that the Player has established that it is more likely than not that the hydrochlorothiazide found in his sample 3164590 was caused by his ingestion of Telmirotan Plus Tablets in the week prior to collection of the sample.

(b) TADP Article 10.2

18. This is the Player's first Anti-Doping Rule Violation.
19. In order to calculate the relevant period of Ineligibility, TADP Article 10.2.1 specifies that a TADP Article 2.1 violation that is 'intentional' attracts a mandatory four-year ban. If the Prohibited Substance in question is classified as a Specified Substance (as here), TADP Article 10.2.1.2 specifies that the ITF has the burden of proving that the violation was 'intentional'. If the ITF cannot discharge that burden, TADP Article 10.2.2 provides for a two-year period of Ineligibility, subject to mitigation. TADP Article 10.2.3 explains that in this context 'the term 'intentional' is meant to identify those Players or other Persons who engage in conduct that they knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the

conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk'. The jurisprudence is clear that what counts in this context is what the Player actually knew, not what he should have known.³

20. Based on the facts of this case, the ITF does not assert that the Player's violation was 'intentional' within the meaning of TADP Articles 10.2.1 and 10.2.3. The period of Ineligibility prescribed by TADP Article 10.2.2 (two years) therefore applies, subject to possible reduction in accordance with TADP Articles 10.5 or 10.6.

(c) TADP Articles 10.5 and 10.6

21. For the sanction to be eliminated or reduced below two years, the Player must show that he bears 'No Fault or Negligence' for the violation under TADP Article 10.5, or (alternatively) that he bears 'No Significant Fault or Negligence' for the violation under TADP Article 10.6.
22. TADP Article 10.5 provides that if a player establishes that they bear No Fault or Negligence for the Anti-Doping Rule Violation in question, the otherwise applicable period of Ineligibility will be eliminated. No Fault or Negligence is defined in the TADP as follows: 'The Player or other Person establishing that they did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that they had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule'.
23. TADP Article 10.6.1.1 provides that where a Prohibited Substance found in a player's Sample is classified as a Specified Substance under the TADP (as here), and the player can establish that they bear No Significant Fault or Negligence for its presence in their system, then the otherwise applicable two-year period of Ineligibility may be reduced by between 0 and 24 months (i.e., by up to 100%, in which case there would be a reprimand only). No Significant Fault or Negligence is defined in the TADP as follows: 'The Player or other Person establishing that their Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Anti-Doping Rule Violation'. If No Significant Fault or Negligence is found, the amount of reduction to be applied depends on the degree of the Player's Fault.
24. It is a precondition of any mitigation of sanction for No (or No Significant) Fault or Negligence that the Player proves on the balance of probabilities how the Prohibited Substance(s) found in their Sample entered their system.⁴ As detailed above, the ITF accepts that the Player has met that burden on the facts of this case.
25. A plea of No Fault or Negligence or No Significant Fault or Negligence is assessed by considering how far the Player departed from their duty under the TADP to use 'utmost caution' to ensure that they would not ingest any Prohibited Substance or otherwise do anything that might

³ ITF v Sharapova, Independent Tribunal decision dated 6 June 2016, para 77 ('It is clear from the wording of article 10.2.3 that whether conduct is intentional is to be judged on the actual knowledge of the player, not on the basis of what she ought to have known or understood') and para 71 ('the concession that the player did not know that she was taking a Prohibited Substance resolves both elements of article 10.2.3. On neither basis was the conduct of the player intentional').

⁴ See definitions of 'No Fault or Negligence' and 'No Significant Fault or Negligence' ('[...] Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1 the Player must also establish how the Prohibited Substance entered their system').

constitute or result in the commission of an Anti-Doping Rule Violation.⁵ ‘The difference between the two [...] is one of degree: to establish No Fault or Negligence, the athlete must show that he took every step available to him to avoid the violation, and could not have done any more; whereas to establish No Significant Fault or Negligence, he must show that, to the extent he failed to take certain steps that were available to him to avoid the violation, the circumstances were exceptional and therefore that failure was not significant’.⁶

26. The standard of ‘utmost caution’ is very onerous and requires a player to show that they ‘made every conceivable effort to avoid taking a prohibited substance’.⁷ It follows that ‘even in cases of inadvertent use of a Prohibited Substance, the principle of the Athlete’s personal responsibility will usually result in a conclusion that there has been some degree of fault or negligence’.⁸
27. The Player (rightly) does not plead No Fault or Negligence. That is consistent with TADP Article 1.3.1, which places a personal responsibility on a Player to (among other things) ‘inform medical personnel of their obligation not to Use Prohibited Substances or Prohibited Methods’ and ‘ensure that any medical treatment they receive does not give rise to an Anti-Doping Rule Violation’.
28. However, in the specific circumstances of this case, the ITF accepts that the Player bears No Significant Fault or Negligence within the meaning of TADP Article 10.6.1 on the basis that when he was prescribed Telmirotan by his doctor in order to treat hypertension he reviewed the medication’s ingredients against the WADA 2021 Prohibited List to ensure that the medication did not contain any Prohibited Substance, and his doctor subsequently changed his prescription to Telmirotan Plus (a very similarly packaged medication) without notifying him, which is why the Player did conduct his usual precautions.
29. The ITF therefore has discretion to reduce the default two-year ban applicable by up to 24 months, depending on the Player’s level of Fault (see Article 10.6.1.1). Taking account of the specific facts of this case, the ITF has proposed, and the Player has acceded to, a period of Ineligibility of 12 months.

(d) Commencement of the period of ineligibility

30. The general rule, as stated at TADP Article 10.13 is that ‘the period of Ineligibility will start on the date of the final decision providing for Ineligibility’.
31. However, a player who has been subject to a Provisional Suspension pending determination of the charge (whether imposed by the ITF or voluntarily accepted, as here) will receive ‘[c]redit for any Provisional Suspension [...] served’ ‘against the total period of Ineligibility to be served’

⁵ See, e.g., Kutrovsky v ITF, CAS 2012/A/2804, para 9.49 (‘the athlete’s fault is measured against the fundamental duty that he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any prohibited substance’); FIFA & WADA, CAS 2005/C/976 & 986, paras 73-75 (‘The WADC imposes on the athlete a *duty of utmost caution* to avoid that a prohibited substance enters his or her body. [...] It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping violation has been identified’).

⁶ IBAF v Luque, IBAF Anti-Doping Tribunal decision dated 13 December 2010, para 6.10.

⁷ Knauss v FIS, CAS 2005/A/847, para 7.3.1; WADA v NSAM et al, CAS 2007/A/1395, para 80 (‘The burden is therefore shifted to the athlete to establish that he/she has done all that is possible to avoid a positive testing result’).

⁸ Adams v CCES, CAS 2007/A/131, para 155.

(TADP Article 10.13.2) on the condition that the period of ineligibility ‘has been respected by the Player’.⁹ If a player fails to respect the Provisional Suspension in its entirety (for example, by breaching the prohibition against participation during it), ‘he loses the entirety of the credit for such suspension (ie, both the period before and after any breach’.¹⁰

32. The Player voluntarily accepted a Provisional Suspension on 4 November 2022. In early 2023, the ITF became aware (and the Player admitted) that he had: (i) trained with the Korean national wheelchair tennis team between 4 November and 14 November 2022, and between 16 November and 18 December 2022; and (ii) participated in a Korean national wheelchair tennis team selection match on 15 November 2022.
33. Participation in such events and activities is in breach of the terms of the Provisional Suspension, specifically the prohibition against participation detailed at TADP Article 10.14.1. The Player’s results (if any) in such events and activities are disqualified with all resulting consequences (TADP Article 10.14.7), and the Player is not entitled to receive credit for any of the period of Provisional Suspension served. Accordingly, the Player’s period of Ineligibility will commence on the date of this decision and expire at midnight on 23 March 2024.

III.B Disqualification of results

(a) Singles results at the Event

34. The singles results obtained by the Player at the Event are automatically disqualified in accordance with TADP Articles 9.1, with all resulting consequences including forfeiture of any medals, titles, ranking points, and Prize Money received as a result of participation in the Competition.

(b) Doubles results at the Event

35. The doubles results obtained by the Player at the Event will also be disqualified in accordance with TADP Article 10.1, with all resulting consequences including forfeiture of any medals, titles, ranking points, and Prize Money received as a result of participation in the Competition.

(c) Subsequent results after the date of sample collection

36. While the general rule is that the results obtained by the Player in the period between the date of sample collection and the date of this decision will be disqualified pursuant to TADP Article 10.10, in the specific circumstances of this case (in particular, that the Player last used the Telmirotan Plus Tablets at the end of March 2022, and subsequently provided a sample on 16 May 2022 that was negative), fairness requires otherwise than to disqualify all of the Player’s results and, therefore, while the Player’s results between 3 November 2021 and 15 May 2022 will be disqualified, with all resulting consequences, the Player will retain his results obtained

⁹ See also TADP Article 10.14.7 (‘A Player [...] who violates the prohibition against participation during a Provisional Suspension set out in Article 10.14.1 will receive no credit for any period of Provisional Suspension served and any results they obtain during such participation will be Disqualified, with all resulting consequences, including forfeiture of any medals, titles, ranking points and Prize Money’).

¹⁰ IAAF v ADAK, AK & Ndegwa, CAS 2017/A/5175, para 79; WADA v Robinson & JADCO, CAS 2014/A/3820, para 111 (‘[...] even though Mr Robinson respected approximately half of the provisional suspension, he did not respect it in its entirety and the Panel therefore concludes that he cannot receive credit for the provisional suspension’); IAAF v ARAF & Dyldin, CAS 2016/O/4702, paras 83–84; IAAF v ARAF & Mokhney, CAS 2016/O/4504, para 153.

between 16 May 2022 and the date of this decision (subject to the disqualification of results addressed at paragraph 33, above).

III.C Costs

37. Each party will bear its own costs in relation to this matter.

III.D Publication

38. In accordance with 2023 TADP Articles 7.14.2 and 8.6, this decision will be publicly reported by being posted (in full and/or summary form) on the ITF's website.

III.E Acceptance by the Player

39. The Player has accepted the Consequences proposed above by the ITF for his Anti-Doping Rule Violation and has expressly waived his right to have those Consequences determined by the Independent Tribunal at a hearing.

IV. Rights of appeal

40. This decision constitutes the final decision of the ITF, resolving this matter pursuant to 2023 TADP Article 7.14.
41. Further to 2023 TADP Article 13.2, each of WADA and KADA has a right to appeal against this decision to the Court of Arbitration for Sport (**CAS**) in Lausanne, Switzerland, in accordance with the procedure set out at 2023 TADP Articles 13.8 and 13.9.
42. As part of the resolution of this matter, the Player has waived his right to appeal against or otherwise challenge any aspect of this decision (both as to the finding that the Player has committed an Anti-Doping Rule Violation and as to the imposition of the Consequences set out above), whether pursuant to 2023 TADP Article 13.2.1 or otherwise. However, if an appeal is filed with the CAS against this decision either by WADA or KADA, the Player will be entitled (if so advised) to exercise his right of cross-appeal in accordance with 2023 TADP Article 13.9.4.

London, 24 March 2023