TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2022/A/9031 Stéphane Houdet v. International Tennis Federation
CAS 2022/A/9137 International Tennis Federation v. Stéphane Houdet

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: The Hon. Dr. Annabelle Bennett AC SC, Barrister in Sydney, Australia

Ad hoc Clerk: Mr. Alistair Oakes, Barrister in Sydney, Australia

in the arbitrations between

Stéphane Houdet, Paris, France

Represented by Mr. Howard L. Jacobs and Ms. Lindsay S. Brandon of Law Offices of Howard L. Jacobs in Westlake Village, California, United States of America and Mr. Alan J. Rich of Law Offices of Alan J. Rich in Brooklyn, United States of America

Appellant and Cross-Respondent

and

International Tennis Federation, London, United Kingdom

Represented by Ms. Louise Reilly, Barrister in Dublin, Ireland and Messrs. Chris Lavey and Jumani Robbins of Bird & Bird in London, United Kingdom

Respondent and Cross-Appellant

I. PARTIES

1. Mr. Stéphane Houdet (the "Athlete") is a 52-year-old French wheelchair tennis player. He has numerous notable sporting achievements, 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).

2. The International Tennis Federal ("ITF") is the International Paralympic Committee-recognised international sports governing body for wheelchair tennis. The ITF is a signatory to the World Anti-Doping Code (the "WADC") established by the World Anti-Doping Agency ("WADA"). In accordance with its obligations as a signatory to the WADC, the ITF has issued the 2021 Tennis Anti-Doping Programme ("TADP").

3. The Athlete and the ITF are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced in these proceeding. Additional facts and allegations found in the Parties' written and oral submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. The Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings. However, she refers in this Award only to the submissions and evidence she considers necessary to explain the reasoning.

5. This proceeding concerns appeals from a decision of the ITF Independent Tribunal (the "ITF Tribunal"), which held that the Athlete had committed a whereabouts failure in violation of Article 2.4 of the TADP by having committed three 'missed tests' within a 12-month period.

6. The three missed tests that are the subject of the above finding occurred on 2 January 2021, 26 July 2021 and 27 September 2021.

a. 2 January 2021 test

7. As to the 2 January 2021 missed test, the Athlete's whereabouts filing listed his address in Paris with the relevant 60-minute time slot being 10pm to 11pm. At that time, the Athlete was in fact in Costa Rica at the Sirena Ranger Station in the Corcovado National Park.

8. The Athlete submitted that this incident did not constitute a missed test, on the basis that no negligent behaviour on his part caused or contributed to the incident.

9. Relevantly, the Athlete submitted that he had attempted, but was unable, to update his whereabouts filing for 2 January 2021. His unchallenged evidence was that, when he attempted to update his whereabouts filing on the relevant day by accessing his Anti-Doping Administration and Management System ("ADAMS") portal, he was asked to input a two-factor verification code, which, *inter alia*, required receipt of a pin code via text message. Unexpectedly, while he did have Wi-Fi access, he did not have cellular/mobile service at

his location in Costa Rica at that time and, as a result, could not receive the verification code. As addressed in more detail within this Award, the dispute centred around whether or not the Athlete should have updated his whereabouts filing earlier or whether he could (and should) have updated his whereabouts filing by other means accessible to him.

b. 26 July 2021 test

10. As to the 26 July 2021 missed test, the Athlete's evidence was that he arrived home from a dinner that evening later than he had expected and therefore was not at his residence in Paris during the 60-minute slot as recorded in his whereabouts filing. The Athlete did not challenge that missed test nor did he make any substantive submissions regarding mitigation of fault.

c. 27 September 2021 test

11. As to the 27 September 2021 missed test, the Athlete's whereabouts filing again listed his address in Paris with the relevant 60-minute time slot being 10pm to 11pm. The unchallenged evidence of the Athlete was that he was at home during that period but did not hear his doorbell buzzer.

12. The Athlete submitted that this incident also did not constitute a missed test because:

- the Doping Control Officer ("DCO") who was attempting to test the Athlete did not do what was reasonable in the circumstances to try and locate the Athlete, by failing to ring doorbells of any of the three other apartments in the building or to catch the attention of residents who were in those other apartments; and/or

- no negligent behaviour on his part caused or contributed to his missed test, as his doorbell was malfunctioning such that it did not ring (or rang at a reduced volume such that he was unable to hear it).

13. The ITF submitted that the DCO did do what was reasonable in the circumstances and that she was not required to ring other apartment doorbells or otherwise catch the attention of other residents in the building, particularly having regard to the time of night. Further, as to negligence, the ITF submitted that the Athlete could not rebut the presumption of negligence in circumstances where he was in his bedroom with the door closed and television on and, further, had his mobile phone on silent so did not answer calls from the DCO.

B. Proceedings before the ITF Tribunal

14. The ITF Tribunal issued its decision on 30 June 2022, confirming that all three incidents were missed tests and finding that, accordingly, the Athlete had committed an Anti-Doping Rule Violation ("ADRV") in contravention of Article 2.4 of the TADP. It imposed a period of ineligibility of 15 months.

15. The ITF Tribunal held that the Athlete could not rebut the presumption of negligence in respect of the 2 January 2021 test as the Athlete knew (or should have known) that he could make changes to his whereabouts information by multiple means, including by sending an email to the ITF or using the online whereabouts form. Further, the ITF Tribunal held that the Athlete could have updated his information earlier as he would have been aware at a

much earlier stage that he would not be at his ADAMS-indicated location (his Paris apartment) on 2 January 2021.

16. With respect to the 27 September 2021 missed test:

- The ITF Tribunal found that the DCO did what was reasonable in the circumstances to locate the Athlete. It found that the DCO pressed the Athlete's buzzer approximately every five minutes during the 60-minute slot, walked back and forth into the courtyard, searched for signs of activity in the Athlete's apartment (none were observed and the Athlete admitted that his lights were off), did not see anyone leave or enter the building and tried to call the Athlete twice. The ITF Tribunal held that the DCO was not required to actively locate people other than the Athlete to ask those people for help and therefore the fact that lights may have been on in other apartments in the building did not dissuade the ITF Tribunal from its conclusion. Further, the ITF Tribunal held that the DCO was not required to knock on other apartment doors or ring intercom buzzers for other apartments, particularly in view of the time selected by the Athlete for his 60-minute time slot (10pm to 11pm).

- The ITF Tribunal found that the Athlete could not rebut the presumption of negligence. Although the Athlete was tired, the late time slot had been chosen by the Athlete. The ITF Tribunal placed significance on the Athlete's admission that he was in his bedroom that evening, with his bedroom door closed, his phone on silent mode and probably lightly dozing on and off.

17. On considering the appropriate period of ineligibility based on the Athlete's degree of fault, the ITF Tribunal noted there had been no assertion of intentional attempts to evade out-of-competition testing, that the Athlete had long been an advocate for anti-doping and had been a positive role model in the sport of wheelchair tennis.

18. Dealing with the specific circumstances of the missed tests:

- The ITF Tribunal considered that the degree of fault for the 2 January 2021 missed test was reduced, as two-factor verification had not been required in the past and the Athlete had the right to update his whereabouts filing until shortly before the commencement of the relevant time slot.

- As to the 27 September 2021 missed test, the ITF Tribunal accepted that the Athlete had been awake since very early on the relevant day and the time slot was late in the evening.

19. The ITF Tribunal concluded that the Athlete's level of fault did not justify a sanction at the lowest end of the available range but was nonetheless at the lower end of the scale. It concluded that the appropriate period of ineligibility was 15 months (a reduction of nine months from the general sanction of 24 months).

20. The ITF Tribunal determined that it was appropriate to back-date the sanction to a date three months after the 27 September 2021 test (i.e. 27 December 2021) due to delays in the doping control process that were not entirely attributable to the Athlete.

21. The ITF Tribunal considered it fair not to disqualify retroactively the Athlete's results (nor to forfeit medals, titles, ranking points or prize money won by virtue of those results) from

the date of the 27 September 2021 missed test to the starting date of the period of ineligibility.

22. The orders made by the ITF Tribunal were 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.*"

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 14 July 2022, the Athlete filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the ITF in respect to the Appealed Decision of 30 June 2022 pursuant to Article R47 et seq. of the Code of Sports-related Arbitration (the "CAS Code"), including an application to stay the execution of the ITF Tribunal decision pending the outcome of the appeal. The Statement of Appeal nominated Maidie Oliveau as an arbitrator in the matter. The procedure was docketed as CAS 2022/A/9031.

24. On 18 July 2022, the Athlete's request for stay of the execution of the ITF Tribunal decision was rejected by the Deputy President of the CAS Appeals Arbitration Division.

25. On 29 July 2022, the ITF nominated The Hon. Michael J. Beloff KC as an arbitrator in this matter.

26. On 4 August 2022, the Athlete filed his Appeal Brief in accordance with Article R51 of the CAS Code.

27. On 30 August 2022, the Athlete informed the CAS Court Office that the Parties had agreed on the appointment of the Sole Arbitrator *in lieu* of a three-member Panel, which was confirmed by the ITF on 1 September 2022.

28. On 12 September 2022, the ITF filed its Answer in accordance with Article R55 of the CAS Code. In addition, the ITF filed a "Statement of Cross-Appeal". The procedure relating to the ITF's (Cross-)Appeal was docketed as CAS 2022/A/9137.

29. On 5 September 2022, the CAS Court Office, on behalf of the Deputy President of the CAS Appeals Arbitration Division, informed the Parties that the Panel appointed to decide the dispute was constituted as follows:

Sole Arbitrator: The Hon. Dr. Annabelle Bennett AC SC, Barrister in Sydney, Australia

30. On 21 September 2022, the CAS Court Office informed the Parties that Mr. Alistair Oakes, Barrister in Sydney, Australia had been nominated as *ad hoc* clerk in the matter.

31. On 10 October 2022, the Athlete filed his Reply to the (Cross-)Appeal.

32. On 27 and 28 October 2022, the Parties signed and returned the Order of Procedure.

33. On 2 and 3 November 2022 (Swiss time), a video hearing was held. The Sole Arbitrator was assisted by Mr. Alistair Oakes, *ad hoc* clerk, Mr. Björn Hessert, Counsel to the CAS, and joined by the following:

For the Athlete:

- Mr. Stéphane Houdet, the Athlete;
- Mr. Howard L. Jacobs, Law Offices of Howard L. Jacobs;
- Ms. Lindsay S. Brandon, Law Offices of Howard L. Jacobs;
- Mr. Alan J. Rich, Law Offices of Alan J. Rich;
- Ms. Cecile Dent, Interpreter; and
- Mr. Patrick Sarrazin, Witness.

For the ITF:

- Ms Louise Reilly, Barrister;
- Mr. Chris Lavey, Bird & Bird;
- Mr. Jumani Robbins, Bird & Bird;
- Dr. Stuart Miller, ITF Anti-Doping Manager; and
- Ms. Alisa Shamsutdinova, Witness.

34. At the conclusion of the hearing, the Parties confirmed that their right to be heard had been fully and fairly respected.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

35. The submissions of the parties have been summarised in the Factual Background above. Further details of the relevant facts and associated submissions are addressed within the section of this Award dealing with consideration of merits. The Sole Arbitrator confirms

that she has carefully considered all of the submissions made by the Parties, whether or not there is specific reference to them in the following.

36. This section sets out the requests for relief sought by each party.

37. The Athlete's requests for relief set out in the Statement of Appeal of 14 July 2022 were as follows:

> "*7.1.1 That the appeal of Stephane Houdet is admissible.*
>
> *7.1.2 That Mr. Houdet's sanction be stayed pending the outcome of the CAS Appeal.*
>
> *7.1.3 That the decision of the ITF Tribunal be set aside.*
>
> *7.1.4 That Appellant Stephane Houdet's sanction be eliminated, or in the alternative, reduced.*
>
> *7.1.5 That Respondent shall bear all costs of the proceedings including a contribution toward Appellant's legal costs.*
>
> *7.1.6 The Appellant reserves the right to amend or refine the prayers for relief in his Appeal Brief.*"

38. As regards the ITF's Appeal, the Athlete submitted the following prayers for relief:

> "*... Mr. Houdet respectfully requests that the CAS dismiss the ITF's Cross-Appeal.*"

39. The ITF's requests for relief set out in Statement of (Cross-)Appeal of 12 September 2022 were as follows:

> "*10.1.1. The ITF's appeal is admissible.*
>
> *10.1.2. The Decision is set aside.*
>
> *10.1.3. The Player is found to have committed an ADRV in breach of 2021 TADP Article 2.4 as a result of three Missed Tests on 2 January 2021, 26 July 2021, and 27 September 2021.*
>
> *10.1.4. The Player is sanctioned with a two-year period of Ineligibility in accordance with 2021 TADP Article 10.3.2, commencing on the date the CAS award is issued (TADP Article 10.13) with credit for the period of Ineligibility served to date (TADP Article 10.13.2).*
>
> *10.1.5. All competitive results obtained by the Player from the date of the third missed test (27 September 2021) until the date of the Decision (30 June 2022) are Disqualified, with all resulting consequences, unless fairness requires otherwise.*
>
> *10.1.6. Regarding costs:*

10.1.6.1. These proceedings properly fall within the ambit of Article R65.2 of the CAS Code (i.e. the proceedings should be free), consistent with CAS practice to treat appeals against anti-doping decisions of the ITF's Independent Tribunal (irrespective of who the appellant is or who administers the tribunal) as decisions exclusively of a disciplinary nature and rendered by an international federation.

10.1.6.2. If the Sole Arbitrator finds that these proceedings are deemed to fall within Article R64.2 of the CAS Code (i.e. the costs are to be borne by the parties), that reasons for that decision are provided, and the Player is ordered to bear the costs of the arbitration.

10.1.6.3. In either event, the ITF is granted a contribution towards its legal fees and other expenses incurred in connection with these proceedings (including a contribution towards its legal fees in relation to the Player's application for provisional measures, which was rejected)."

V. JURISDICTION

40. Article R47 para. 1 of the CAS Code provides as follows:

> "*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*"

41. It was common ground that Article 13.2 of the TADP provided each party an express right to bring its appeal and cross-appeal. Each party expressly confirmed that the CAS had jurisdiction to hear the present appeal and cross-appeal by signing the Order of Procedure.

42. The Sole Arbitrator is therefore satisfied that she has jurisdiction over the appeal and cross-appeal.

VI. ADMISSIBILITY

43. Article R49 of the CAS Code provides as follows:

> "*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.*"

44. No issue of admissibility was taken by either party.

45. Article 13.8.1.1 of the TADP provides a 21-day deadline for a party to file an appeal to the CAS. The decision of the ITF Tribunal was delivered on 30 June 2022 and therefore the 21-day period expired on 21 July 2022. The Athlete's Statement of Appeal was filed on 14 July 2022 and is therefore timely and admissible.

46. Article 13.9.4 of the TADP concerns timing of filing a cross-appeal. It requires a cross-appeal to be filed at the latest with a respondent's answer to an appeal. The ITF's Statement of (Cross-)Appeal was filed with its Answer Brief and is therefore timely and admissible.

VII. APPLICABLE LAW

47. Article R58 of the Code provides as follows:

> "*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*"

48. In this proceeding, the 'applicable regulations' are the TADP. English law, in accordance with Article 1.1.5 of the TADP, applies subsidiarily to the TADP.

VIII. MERITS

A. Relevant provisions and principles

49. Before addressing the Sole Arbitrator's factual findings and consideration of the merits, it is useful to identify the most relevant rules and other documents concerning whereabouts filings and whereabouts failures. While the applicable regulation is the TADP, this draws on rules contained in the WADA International Standard for Testing and Investigations ("ISTI") and WADA International Standard for Results Management ("ISRM") as well as the TADP Out-of-Competition 'Whereabouts' testing protocol (the "TADP Protocol").

a. Whereabouts Failures

50. The Athlete was found by the ITF Tribunal to have committed an ARDV in contravention of Article 2.4 of the 2021 TADP. That provides:

> "*2. 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."

51. It is common ground that the Athlete is a 'Player' in a 'Registered Testing Pool'. It is therefore not necessary to consider further those expressions in this Award.

b. Whereabouts Filings

52. The Athlete's responsibility to make whereabouts filings is contained in Articles 4.8.6.2, 4.8.8.2 and 4.8.8.3 of the ISTI. The obligations placed on athletes are undoubtedly onerous. They are required to make quarterly whereabouts filings setting out, for the following quarter, the address of where they will be staying overnight, as well the address of each location at which they will train, work or conduct any other regular activity together with the usual timings. Additionally, they are required to specify a 60-minute time slot between 5am and 11pm each day where they will be available for to submit to testing.

53. The ISTI recognises that whereabouts filings may become inaccurate and require updating. Article 4.8.8.6 provides (emphasis added):

> "***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 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. In any event, the Anti-Doping Organization shall consider Target Testing of the Athlete.*"

54. Athletes have personal responsibility of ensuring that the information in their whereabouts filing is accurate and sufficiently detailed to enable them to be located for testing: ISTI Article 4.8.8.5. The Comment to Article 4.8.8.5(a) has relevance in this proceeding and is extracted (in part) as follows:

> "*... Where an Athlete does not know precisely what their whereabouts will be at all times during the forthcoming quarter, they must provide their best information, based on where they expect to be at the relevant times, and then update that information as necessary in accordance with Article 4.8.8.5.*"

c. Out-of-Competition Testing

55. The purpose of whereabouts filing is so that athletes can be subjected to out-of-competition testing without advance notice. As was adverted to by the Athlete's counsel, they relinquish a considerable amount of privacy and autonomy in the name of clean sport which, in turn,

is to the general benefit of the entire sporting community and to athletes' health (see *National Federal of Sportspersons' Associations and Unions (FNASS) & Ors v. France* App. Nos. 48151/11 and 77763/13 (ECtHR, 18 April 2018) at [191]).

56. The concept of 'no advance notice testing' is defined in Article 3.5 of the ISTI as:

> *Sample collection that takes place with no advance warning to the Athlete and where the Athlete is continuously chaperoned from the moment of notification through Sample provision.*

57. It is separately identified as part of the objectives in the notification/sample collection process, in Article 5.1 of the ISTI:

> "***5.1 Objective***
>
> *The objective is to ensure that an Athlete who has been selected for Testing is properly notified with no advance notice of Sample collection as outlined in Articles 5.3.1 and 5.4.1, that the rights of the Athlete are maintained, that there are no opportunities to manipulate the Sample to be provided, and that the notification is documented.*"

58. The ISTI recognises that it is not always possible to ensure that an athlete has no advance notice whatsoever:

> "*5.3.1 No Advance Notice Testing shall be the method for Sample collection save in exceptional and justifiable circumstances. The Athlete shall be the first Person notified that they have been selected for Sample collection, except where prior contact with a third party is required as specified in Article 5.3.7. In order to ensure that Testing is conducted on a No Advance Notice Testing basis, the Testing Authority (and the Sample Collection Authority, if different) shall ensure that Athlete selection decisions are only disclosed in advance of Testing to those who strictly need to know in order for such Testing to be conducted. Any notification to a third party shall be conducted in a secure and confidential manner so that there is no risk that the Athlete will receive any advance notice of their selection for Sample collection. For In-Competition Testing, such notification shall occur at the end of the Competition in which the Athlete is competing.*
>
> ...
>
> *5.3.7 The Sample Collection Authority, DCO or Chaperone, as applicable, shall consider whether a third party is required to be notified prior to notification of the Athlete; in the following situations:*
>
> ...
>
> *d) Where required to assist Sample Collection Personnel to identify the Athlete(s) to be tested and to notify such Athlete(s) that they are required to provide a Sample.*

[Comment to 5.3.7 ... Should a third party be required to be notified prior to notification, the third party should be accompanied by the DCO or Chaperone to notify the Athlete.]".

59. Article 4.8.9.1 of the ISTI makes clear that not only must an athlete be present at the location specified in their whereabouts filing, they must also be available (emphasis added):

> "*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.*"

d. Missed Test

60. The expression 'Missed Test' is defined in Appendix 1 of the TADP by reference to the ISRM, which is at Appendix 6 of the TADP. The ISRM in turn defines a missed test as:

> "*A failure by the Athlete to be available for Testing at the location and time specified in the 60-minute time slot identified in their Whereabouts Filing for the day in question, in accordance with Article 4.8 of the International Standard for Testing and Investigations and Annex B.2 of the International Standard for Results Management.*"

61. Article B.2.4 of the ISRM provides that an athlete can 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;*
>
> *[Comment to Article B.2.4(c): Due to the fact that the making of a telephone call is discretionary rather than mandatory, and is left entirely to the absolute discretion of the Sample Collection Authority, proof that a telephone call was made is not a requisite element of a Missed Test, and the lack of a telephone call does not give the Athlete a defense to the assertion of a Missed 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 behavior 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."

62. As mentioned above, the Athlete only challenged the alleged Missed Tests of 2 January and 27 September 2021, on the basis of Articles B.2.4(c) and (e).

e. Reasonable steps to locate the Athlete

63. A DCO conducting an out-of-competition test must take reasonable steps to locate the athlete. This includes, but does not mandate, calling the athlete at the end of their 60-minute time slot. Article 4.8.8.5(d) of the ISTI provides (emphasis added):

> *"(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...".*

64. To supplement the TADP, ISTI and the ISRM, tennis governing bodies have issued the TADP Protocol. That document sets out guidance to DCOs when seeking to locate tennis players for sample collection.

65. Paragraph 4 of the TADP Protocol expresses its purpose:

> *"These guidelines aim to assist the DCO in determining what constitutes a 'reasonable effort' to locate the Player. They aim to reduce the risk that the DCO fails to locate a Player even though the Player is at the location where he/she said they would be during the 60-minute time slot in question."*

66. Paragraph 5 of the TADP Protocol provides (emphasis in original);

> "*The ITF only wants to declare a Missed Test where the Player is not at his/her nominated location and cannot be located within the 60-minute time slot. It does not want to declare a Missed Test where the Player was present at the location but the DCO has been unable to find him/her. In other words, if a Player is at his/her nominated location, then it is in everyone's interest that the DCO makes contact with him/her. It is ultimately, however, the Player's responsibility to ensure that he/she can be located for testing, and no excuses from the Player will be accepted if the DCO has been unable to find him/her despite making a reasonable attempt to do so. It is absolutely vital, therefore, that the DCO does everything reasonable in the circumstances to locate the Player. By following these guidelines, the DCO can ensure that is the case.*"

67. Paragraphs 8-10 of the TADP Protocol reiterate the general rule that advance notice of out-of-competition testing should be avoided as much as possible. The TADP Protocol recognises that advance notice may be unavoidable in certain exceptional circumstances such as where security personnel will not admit a DCO without first speaking to the athlete.

68. Paragraphs 11-14 provide further guidance on what constitutes a reasonable attempt to test an athlete. Paragraph 11 notes that what constitutes a 'reasonable attempt' will depend on the particular circumstances. Paragraph 12 provides some examples. In particular, it notes if the specified location is a house or place of residence, an unanswered entry bell or knock on the door should not be followed by a telephone call but rather the DCO should observe the entrance to the residence and knock or ring a short time later (no longer than 15 minutes) and continue to do so until the end of the 60 minute period

69. Paragraph 13 states that a DCO should note any relevant circumstances, such as whether there are lights on in the house, whether any movement has been noticed, whether there is a car in the driveway.

70. Paragraph 14 states that, if the location is inside a building to which the DCO does not have access, the DCO should attempt to speak to anyone entering or leaving the building to see whether they know the athlete or can provide access to the building or otherwise contact the athlete.

71. Paragraphs 15 to 17 of the TADP Protocol concern telephoning the athlete. Paragraph 15 emphasises that telephoning the athlete is "*as a last resort only*" and that the telephone call should be made around 5 minutes prior to the end of the 60-minute time slot.

B. 2 January 2021 attempted test

a. Matters not in dispute

72. The following matters concerning the 2 January 2021 attempted test are not in dispute between the Parties:

- at some point (the exact date is not clear), the Athlete made or updated his whereabouts filing for the period from 20-31 December 2020 with his location recorded as Costa Rica;

- on 16 December 2020, the Athlete updated his whereabouts filing for the period from 1-15 January 2021, selecting his location as his residence in Paris and his 60-minute time slot to be from 10-11pm;

- on 20 December 2020, the athlete flew to Costa Rica, with a return flight booked for 3 January 2021;

- on 20 December 2020, the Athlete also accessed ADAMS from Costa Rica. He received an email from ADAMS regarding a login from Costa Rica as well as a text message with a verification code;

- as the Athlete's itinerary for his trip to Costa Rica involved a lot of address changes, he decided to update his whereabouts filings in Costa Rica by changing the address he had initially submitted to the address of each new hotel upon arrival at that hotel;

- on 28 December 2020, the Athlete received a text message from his guide in Costa Rica advising him of his itinerary for 1 January 2021, including that they would be arriving at the Sirena Ranger Station in the Corcovado National Park that day and staying at that location overnight. The text message did not identify the address of the Sirena Ranger Station or any room number;

- on 29 December 2020, the athlete again accessed ADAMS, receiving a verification code;

- consistent with his itinerary, on 1 January 2021, the Athlete travelled to the Sirena Ranger Station. The Athlete discovered that, although he had Wi-Fi, he did not have cellular/mobile phone reception;

- after the Athlete had arrived at the station, he attempted to update his whereabouts filing in ADAMS. However, he was unable to log into ADAMS. This was because the ADAMS system again required him to input a two-factor verification code which it sent via SMS. As he did not have cellular reception, he was not able to receive the code.

- on 2 January 2021, an attempted test was conducted at the location and time identified by the Athlete in his whereabouts filing for that day, being his residence in Paris. The Athlete was neither present nor available for that attempted test; and

- each of the requirements of Article B.2.4(a)-(d) of the ISRM were satisfied in relation to the attempted test.

b. Negligence

73. The Athlete submitted that the 2 January 2021 attempted test did not constitute a missed test because he was able to rebut the presumption of negligence in Article B.2.4(e) of the ISRM.

74. To do so, the Athlete was required to establish that no negligent behaviour on his part caused or contributed to his failure (i) to be available for testing at his nominated location during his nominated time slot, and (ii) to update his most recent whereabouts filing to give notice

of a different location where he would instead be available for testing during the specified time slot on the relevant day. Only the latter was in issue.

75. Given the undisputed facts set out above, the question of whether the Athlete could rebut the presumption of negligence fell to two matters:

- whether the Athlete should have updated his whereabouts filing earlier, either when he first became aware that he would not be at his Paris apartment or, alternatively, when he became aware that he would be staying at the Sirena Ranger Station; and

- whether the Athlete, after realising he could not access ADAMS to update his whereabouts filing, should have updated his filing by other available means, such as emailing the ITF.

c. Standard of 'negligent behaviour'

76. The meaning of the expression 'negligent behaviour' as it appears in Article B.2.4(e) of the ISRM is not defined in that document, nor is it defined in the TADP or the WADC.

77. The ITF submitted that the most instructive aide was the definition of the term 'fault' in Appendix 1 of the TADP, which is identical to the definition in the WADC:

> "*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 Person's experience, whether the Player or other Person is a Protected Person, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Player's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that a Player would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Player only has a short time left in their career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.6.1 or 10.6.2.*"

78. In that regard, the ITF referred the World Athletics Disciplinary Tribunal decision of *World Athletics v Stevens* (9 July 2020), which considered the equivalent whereabouts failure rules contained in the IAAF Anti-Doping Rules. That Tribunal noted that the terms 'negligence' and 'fault' were used together in Article 10.4 and 10.5 of the WADC but nowhere else. That Tribunal stated that "[i]*t is not clear whether there is any distinction between the two ... it may well be a distinction without a difference.*" However, that Tribunal was not ultimately required to – and did not – make a decision on that question.

79. In the Sole Arbitrator's view, the expression 'negligent behaviour' as it appears in Article B.2.4(e) of the ISRM should not simply be treated synonymously with the definition of 'fault' in the TADP/WADC, for a number of reasons:

- the term 'fault' is not used at all in the ISRM;

- Article 3.1 of the ISRM contains defined terms from the WADC that are used in the ISRM. The definition of 'fault' is not such a term. This suggests against importing the definition of fault in the WADC, let alone imposing that definition on the concept of 'negligent behaviour';

- In the TADP/WADC, fault and negligence are treated as two separate concepts. This is demonstrated in use of the disjunctive 'or' in the expression 'No Fault or Negligence' as well as in Articles 2.1 and 2.2 which relevantly provide "*it is not necessary that intent, Fault, Negligence or knowing Use on the Athlete's part be demonstrated...*".

- The natural meanings of 'fault' and 'negligence' are not necessarily identical. Fault may include negligence but the application of the two words is not necessarily co-extensive. Without an exhaustive analysis of differences, fault may concern responsibility and may include a deliberate act, whereas negligence is a negative word, encompassing the absence of care, skill and diligence which the relevant person had a duty to bring to the performance of the matter in question. It is the omission to do something that a reasonable person would or would not do.

80. Therefore, in the Sole Arbitrator's view, negligence within the ISRM should not be construed by having regard to the definition of a different term in a different document. Rather, consistent with the determination of the ITF Tribunal whose decision is being appealed, it should be given its ordinary meaning, being a failure to observe the duty of care expected of a reasonable athlete similarly situated. Whether that meaning overlaps or intersects with the definition of 'fault' in the TADP/WADC is not presently relevant.

81. The standard of a reasonable person similarly situated requires consideration of:

- the obligations placed on athletes (even if onerous) in relation to the whereabouts scheme. Of particular relevance in this case is the obligation on athletes to file a whereabouts update as soon as possible after they become aware of the change in circumstances: Article 4.8.8.6 of the TADP; and

- the particular facts and circumstances of the case, including information known by the athlete or reasonable available to him/her.

d. Consideration – updating whereabouts filing at an earlier date

82. There is no dispute that, at least by 20 December 2020, the Athlete was aware that his whereabouts filing for 2 January 2021 was inaccurate. At that time, he was in Costa Rica and his return flights were not until 3 January 2021.

83. The Athlete was required by Article 4.8.8.6 of the ITSI to update his whereabouts filing as soon as possible after he became aware of the inaccuracy and in any event prior to his 60-minute time slot.

84. The Athlete was clearly able to update his whereabouts filing for 2 January 2021 prior to the time he attempted to do so (at the least, either on 1 or 2 January 2021). He was able to, and did, update his whereabouts filing for the period 20-31 December 2020 at a time when he was fully aware that this would also be required for the period 1-3 January 2021. His

evidence was that he updated the filing for that period to Costa Rica and then subsequently updated the specific address as he arrived at each relevant destination during his journey.

85. His explanation for why he did not do the same with his filings for 1-3 January 2021 (i.e. set them as Costa Rica rather than his apartment in Paris and then update the address each day) was that the ADAMS system does not allow updates to be made spanning over two quarters. That is, an update for the 1-3 January 2021 filings could not be done at the same time as for 20-31 December 2020. Rather, a separate update would be required.

86. The Athlete submitted that he was unable to update his filing for 2 January 2021 prior to arriving at the Sirena Ranger Station because he was not aware of its exact location or his room number. He therefore submitted that he could only provide an accurate update once he had arrived, at which time he could provide the specific GPS co-ordinates. Any update prior to that time would have been itself inaccurate.

87. In the Sole Arbitrator's view, this latter concern is inconsistent with the Athlete's prior process of making a generic whereabouts filing for 20-31 December 2020 identifying he was in Costa Rica and then subsequently updating addresses as he had more information. It is also inconsistent with the Comment to Article 4.8.8.5(a) of the ISTI:

> "... *Where an Athlete does not know precisely what their whereabouts will be at all times during the forthcoming quarter, they must provide their best information, based on where they expect to be at the relevant times, and then update that information as necessary in accordance with Article 4.8.8.5.*"

88. Further, at least by 28 December 2020, the Athlete was aware that he would be attending the Sirena Ranger Station on 2 January 2021. He accessed his ADAMS on 29 December 2020 where, again, he could have updated his filing for 2 January 2021 yet did not.

89. The Athlete's contention that he could only update his filing with exact GPS co-ordinates was unpersuasive. Evidence adduced by the ITF demonstrated that a Google search for the Sirena Ranger Station provided an address. If the Athlete assumed that the station did not have an address, he was wrong. A cursory internet search would have indicated that was the case. Such a search would be reasonably made and readily available if an athlete were staying at a hotel in a city and the same applies in respect of the Sirena Ranger Station.

90. Additionally, the Athlete operated upon an incorrect assumption that it was necessary to have a room number in his whereabouts filing. Article 4.8.8.5 of the ISTI required the Athlete to "*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*". There is no rule that a room number must be provided (although of course the more information provided, the better). The TADP Protocol expressly sets out the process for DCOs conducting a test where access is controlled (such as a hotel) and the DCO does not know the precise location of the athlete.

91. The Sole Arbitrator finds that, at least by 29 December 2020, the Athlete had the ability to update his whereabouts filing for 2 January 2021 and the information required to make an accurate update was reasonably available to him. Pursuant to Article 4.8.8.6 of the ISTI, he should have done so. Clearly the Athlete's failure to do so contributed to his failure "*to*

update [his] *most recent Whereabouts Filing to give notice of a different location where* [he] *would instead be available for Testing during a specified 60-minute time slot on the relevant day".*

92. The next question for the Sole Arbitrator is whether, noting the presumption of negligence, the Athlete can establish on the balance of probabilities (cf. Article 3.1.2 of the TADP) that his conduct was not negligent.

93. In the Sole Arbitrator's opinion, the obligations on athletes to provide the best information they have at the time (even if they do not have full information) (cf. Comment to ISTI Article 4.8.8.5(a)) and to file updates in respect of inaccurate filings as soon as possible (ISTI Article 4.8.8.6) are qualified by the additional clause in Article 4.8.8.6 of the ISTI, "*and in any event prior to the 60-minute time slot specified in their filing for the relevant day*". In the Sole Arbitrator's view, the effect of this qualification is that the other obligations are not absolute; it can be reasonable for an athlete to update their whereabouts filing prior to their chosen 60-minute time slot even if they could have updated their filing at an earlier time.

94. Therefore, the Sole Arbitrator finds that mere the fact that the Athlete could have updated his whereabouts filing at an earlier date (yet did not) does not constitute 'negligent behaviour' for the purposes of Article B.2.4(e) of the ISRM.

95. Further, having regard to the specific circumstances, the Athlete had been updating his whereabouts filings throughout his journey through Costa Rica. Although the Sirena Ranger Station was expected to be remote (such that the Athlete assumed GPS co-ordinates were necessary rather than an address), his unchallenged evidence was that he made sure that all accommodation in which he stayed at had Wi-Fi. Additionally, his evidence was that two-factor authentication was not required every time he tried to sign into ADAMS (though it had been required at least on 20 and 29 December 2020 as he received codes on those dates). In the Sole Arbitrator's view, it was reasonable for the Athlete to believe that he would be able to update his whereabouts filing upon arrival at the Sirena Ranger Station.

96. Having regard to the above, the Sole Arbitrator concludes that the Athlete could have updated his whereabouts filing for 2 January 2021 by at least 29 December 2020. However, the Sole Arbitrator is satisfied that the Athlete has established that his failure to do so was not negligent.

e. Consideration – updating Whereabouts Filing by other means

97. However, regardless of whether the Athlete could or should have updated his whereabouts filing at an earlier date, it was not in dispute that the Athlete had the means and ability to update his whereabouts filing on 2 January 2022.

98. During his cross-examination, the Athlete was taken to the TADP 2021 Whereabouts Program Summary (dated December 2020). He did not at any point suggest that he had not been provided with that document. It provides details of what an Athlete can do if ADAMS is not available. That information included (emphasis in original):

> "*In exceptional circumstances only (i.e. where ADAMS is not available when providing your quarterly whereabouts), you may contact the ITF Anti-Doping Department for assistance at anti-doping.admin@itftennis.com.*
>
> ...
>
> *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.admin@itftennis.com.*"

99. The Athlete had access to Wi-Fi. He was aware that his whereabouts filing was inaccurate and had attempted to update it. At the point that he realised he could not access ADAMS, he should have sent an email to the identified email address.

100. In his witness statement, the Athlete's evidence was "*it was not my understanding that I could simply e-mail the ITF as a means to update my Whereabouts*". In oral evidence in chief, he explained that he believed that an email to the ITF would only be to resolve issues with his password. While that conclusion may be reasonable based on the first paragraph in the TADP 2021 Whereabouts Program Summary extracted above (i.e. emailing the ITF for assistance), the second extracted paragraph makes clear that the Athlete could have updated his whereabouts information by sending an email. In cross-examination, the Athlete accepted that he could have sent an email to the ITF.

101. The Athlete's ignorance at the time of options available to him is not a satisfactory exculpation. He was provided with information regarding the various methods available to him to update his whereabouts filing. Although he was clearly unfamiliar with its contents (at least in relation to emailing the ITF to update a whereabouts filing), he provided no explanation or justification for his lack of familiarity.

102. The Sole Arbitrator is not satisfied that the Athlete has rebutted the presumption of negligence in this regard. Accordingly, the Sole Arbitrator finds that the incidents of 2 January 2021 amount to a missed test.

C. 26 July 2021 attempted test

103. The Athlete did not dispute that his failure to be at the location listed in his whereabouts filing during his chosen 60-minute time slot on 26 July 2021 amounted to a missed test.

104. The Athlete's (unchallenged) evidence regarding the reason for his whereabouts failure was:

> "... *I went to a restaurant with friends who just had a baby. The restaurant was just below their flat, and we ended up being very late to dinner because they could not get the baby to sleep. I simply was concerned for my friends and as the time passed, did not realize it bled into my one-hour window.*"

D. 27 September 2021 attempted test

a. Matters not in dispute

105. The following matters concerning the 27 September 2021 attempted test are not in dispute between the Parties (or were not challenged):

- the Athlete's whereabouts filing for 27 September 2021 was his residence in Paris and his chosen 60-minute time slot was 10-11pm;
- the Athlete had woken at around 5am that morning and caught a train from Nice to Paris. He arrived at his apartment by the early afternoon and stayed there for the remainder of the day;
- during his chosen time slot, the Athlete was present at his residence. He was located in his bedroom, with the lights off, door closed and television on. He was tired and probably lightly dozing on and off;
- the Athlete's phone was on silent;
- the DCO attended the Athlete's residence from around 9.45pm to around 11pm. She pressed the Athlete's intercom buzzer around every 5 minutes but without answer;
- the DCO intermittently searched for signs of activity in the Athlete's apartment. She did not see any lights visible in the Athlete's windows;
- the DCO did walk into the courtyard and outside the building but did not see anyone leave or enter the apartment building while she was there. She was not aware whether the building had a concierge and did not see one. She did not see any note or message identifying a concierge; and
- in the last five minutes of the hour (from around 10.55pm to 10.59pm), the DCO tried calling the Athlete twice. The call connected to a single ring tone and then went to voicemail;
- in providing his whereabouts information, the Athlete had the option of providing two telephone numbers that the DCO could contact. The Athlete's whereabouts filing for 27 September 2021 provided his own mobile number twice;
- each of the requirements of Article B.2.4(a), (b) and(d) of the ISRM were satisfied in relation to the attempted test (i.e. all elements other than DCO doing what was reasonable in the circumstances and negligence).

b. Matters in dispute

106. The Athlete primarily submitted that the DCO, Ms. Alisa Shamsutdinova, did not do what was reasonable in the circumstances to try and locate the Athlete. In the alternative, he submitted that he could rebut the presumption of negligence.

c. DCOs conduct

107. Article B.2.4(c) requires the DCO to do what was reasonable in the circumstances to try and locate the Athlete, short of giving the Athlete advance notice of the test.

108. The Athlete submitted that it was reasonable in the circumstances for the DCO to take the following actions which she did not take:

- ring the other three doorbells in the apartment building, noting that the DCO would have observed that there were lights on in at least two of the other apartments; and
- investigate whether a concierge was present.

109. As to ringing other apartments, the DCO was aware that the apartment building had four apartments, one on each floor. She had previously tested the Athlete at his residence and therefore, if given access to the building beyond the lobby, she would have been able to locate his front door and physically knock on it.

110. In cross-examination before the ITF Tribunal, the DCO gave evidence that she did not think it would be reasonable to press other buzzers at 10pm at night but that it would probably be reasonable to do so at 5pm. In her cross-examination in this proceeding, her view had changed and her evidence was that she did not consider that it was reasonable at any time. Although the Athlete's counsel sought to make much of this change of position, it was simply a change in opinion rather than a change in recollection of something she observed or in something that she did. The DCO's explanation for her change in opinion is that she had since consulted managers and noted that her instructions did not require her to ring other buzzers. In the Sole Arbitrator's view, this change in opinion did not otherwise undermine the credibility of the DCO's evidence. Further, as was ultimately conceded by the Athlete, the question of reasonableness is objective and therefore the DCO's opinion was not relevant.

111. The DCO also gave evidence that the apartment building was located in an upmarket area of Paris and there were regularly police vehicles in that area. She did not remember if there were lights on in any of the other floors of the building.

112. The Athlete relied on witness statements from two of his three neighbours. Each of them confirmed that they were present in their apartment at the relevant time and, if 'a sworn agent' had rung their intercom and said that they were looking for the Athlete, they would have assisted in giving the agent access to the building. One witness's statement confirmed that his regular schedule is for the dining room of his apartment to have its light on until very late (around 11.30pm) and that the windows of his dining room have no shutters, so the light is visible from the courtyard of the building. Neither of those witnesses were required for cross-examination.

113. In the Sole Arbitrator's view, whether or not the neighbours would have granted the DCO access is not the issue and it is not suggested that the DCO knew, or ought to have known, of their approach. The relevant question is whether ringing other doorbells in the building after 10pm was a reasonable step in the circumstances.

114. The relevant circumstances for the purpose of ringing other buzzers are:

- the 60-minute time slot was between 10pm and 11pm;
- the DCO knew that there were four apartments in the building and the floor on which the Athlete lived;
- the intercom had four buzzers, aligned vertically. They were not numbered but rather were identified by initials. Although the buzzer for the Athlete's apartment did not have his initials, his floor number and the initials on the buzzer for his apartment were recorded in his whereabouts filing. That buzzer's placement on the intercom corresponded to his floor number;
- in the courtyard of the building (to which the DCO had access) the DCO would have been able to see a light from one of the other apartments.

115. In the Sole Arbitrator's view, had the DCO seen an apartment light on in the courtyard, she would have been able to ascertain the relevant floor of the building. Given the layout of the intercom buzzer (which essentially reflected four floors) and the fact that the location of Athlete's buzzer on the intercom corresponded with the floor on which he lived, the DCO would have been able to deduce with reasonable likelihood which intercom buzzer corresponded with the apartment where the lights were on.

116. The Athlete relied on an earlier decision of the ITF Tribunal of *ITF v. Cornet* (SR/12/2018). That case also concerned access to an apartment block. There were 24 apartments, each with a separate buzzer on the intercom together with the name of the occupants. The DCO in that case did not press the buzzer for any other apartment. The DCO also observed two or three persons leaving or entering the apartment block during the 60-minute time slot. She did not approach any of them, citing concerns for privacy of the athlete and advance notice.

117. The Panel in *Cornet* acknowledged that it was a "*case close to the borderline*". However, a majority decided that the DCO did not do what was reasonable in the circumstances. Although contacting a neighbour would involve a form of advance notice, the majority considered that some level of advance notice was accepted within the DCO Testing Protocol, which expressly contemplated speaking to people (including a neighbour) encountered by the DCO to see if they could assist in locating the athlete. Further, the majority dismissed concerns about privacy as the DCO could simply mention that she was looking for the athlete without providing specific details regarding the purpose. The majority held that approaching the neighbours who entered or left the building was in accordance with the guidance in paragraph 12.4 of the DCO Testing Protocol and described the neighbour who did so as having "*made themselves available to the DCO by leaving the building*".

118. The majority in *Cornet* also observed:

> "*An alternative (or additional) course would have been to press a number of other intercom buzzers (perhaps those of adjacent buzzers as likely to be adjacent apartments to Ms Cornet). The DCO did not do this either.*"

119. The ITF submitted that there was a clear distinction between the facts of *Cornet* and the facts in these proceedings. In particular, the ITF noted that in this case, the DCO did not see anyone leave or enter the building. Accordingly, unlike in *Cornet*, those persons had not

'made themselves available to the DCO'. The ITF relied on the reasoning of the ITF Tribunal below that pressing other neighbour's buttons was only an 'incidental' issue in *Cornet*. It submitted that none of the three CAS panels that have considered the extent of a DCO's obligation in the context of testing at an apartment building have required a DCO to press intercom buzzers to other apartments: *CAS 2020/A/7528 Coleman v. World Athletics*; *CAS 2020/A07526 & 7559 WADA & World Athletics v. Naser*; *CAS 2020/A/6763 TTOC v. World Athletics*.

120. In the Sole Arbitrator's view, while the DCO could have pressed the other three intercom buzzers (or even just the one which she could have presumed corresponded with the apartment with lights on in the courtyard), the obligation to do what was reasonable in the circumstances did not extend that far. A requirement positively to search out neighbours rather than making use of neighbours who had 'made themselves available' by entering or exiting the building would involve an unwarranted extension of the reasoning in *Cornet*. In the present case, the Sole Arbitrator is strengthened in her view on this matter by the fact that the 60-minute time slot chosen by the athlete was 10pm to 11pm at night, at which time a decision not to attempt to make contact with the other occupants of the apartment building was reasonable.

121. Similarly, the Sole Arbitrator's view is that it was not necessary for the DCO to search out if there was a concierge. The Sole Arbitrator accepts the evidence of the DCO that she was not aware whether the building had a concierge and did not see one. She did not see any note or message identifying a concierge.

122. Accordingly, the Sole Arbitrator is satisfied that the ITF has discharged its burden of establishing that the DCO did what was reasonable in the circumstances to try to locate the Athlete.

d. Negligence

123. Given the findings above regarding the DCO's conduct, in accordance with Article B.2.4(e) of the ISRM, there is a presumption of negligence on the part of the Athlete. To succeed in defending the ITF's allegation of a missed test, the Athlete must establish, on the balance of probabilities (cf. Article 3.1.2 of the TADP), that no negligent behaviour on his part caused or contributed to his failure to (relevantly) be available for testing.

124. In that regard, Article 4.8.9.1 of the ISTI requires the Athlete to be not only present at the nominated place but also available. In context, this includes the obligation to make oneself accessible, that is, able to be accessed for the purpose of testing.

125. The Athlete's case in this regard turned on his submission that his intercom system was malfunctioning (because it had been subject to excessive use by guests at a party held by the Athlete) such that it either was not working at all or was working at a reduced volume. His evidence in that regard was:

- he did not hear his intercom ring. He had lived in the apartment for around three years and had previously been able to hear the intercom, even when in the bedroom with the television on, and even when dozing;

- on around 24 September 2021, the Athlete had held a party at his residence. Some 70 people attended the party, many of whom had to ring the intercom buzzer in order to gain access to the apartment (and re-access if they went outside to smoke);

- a report by a judicial officer from testing conducted on 16 November 2021 determined that the intercom made a noise of 76.8 decibels at the entry of the apartment. In the Athlete's room, the volume of the buzzer was 42 decibels with the door open and 36.7 decibels with the door closed. A standard prepared by a French organization known as "Bruitparif" equates a volume of 30-40 decibels as the sound of a quiet office or bedroom;

- video evidence demonstrates that it is possible during the day to hear the intercom buzzer in the apartment from the ground floor where it is pressed;

- a report by an electrician, Mr. Sarrazin, confirmed that the sound of the intercom buzzer is triggered electromagnetically by the vibration of one metal ring on another, and required an electrical connection. It did not have a backup battery. Mr Sarrazin identified a number of possible causes for malfunction.

126. The ITF embraced the report of the judicial officer. It asserted that the average intercom buzzer is around 70 decibels, by reference to a number of websites. The admissibility of such evidence was not challenged by the Athlete.

127. Further, a technician of STR Elektronik (the German manufacturer of the intercom used by the Athlete) performed a volume test and indicated that the maximum measured volume was 82 decibels. In later correspondence, that technician was asked the following questions and provided the following answers:

> *Q:* *Do you know whether all in-house telephones of this model have exactly this (maximum) volume or whether there can be certain deviations when testing e.g. five different inhouse telephones of this model? Could this result in a range of volume levels, e.g. 75 to 82 dB?*
>
> *A:* *There are no deviations. All telephones have built-in buzzers. These work electromechanically. This buzzer consists of a coil and a metal plate. These have an air gap of approx. 1 mm. If the air gap is too large because it was adjusted afterwards, the buzzer volume will be lower.*
>
> ...
>
> *Q:* *Can it happen that repeated ringing (over several times within a few hours, or over a longer period of months or years) reduces the volume?*
>
> *A:* *No matter how often you ring the bell, the volume will not change.*

128. The ITF cross-examined Mr. Sarrazin. In that cross-examination, he conceded:

- that he could not say what the noise level was like on 21 September 2022;

- that it was working very weakly but it was working on the day he tested it (15 July 2022); and

- that he did not measure the volume.

129. In re-examination, Mr. Sarrazin stated that he was not a specialist of intercoms and had not replaced intercoms.

130. In the Sole Arbitrator's view, the Athlete's evidence is not sufficient to establish that the intercom was malfunctioning on 21 September 2021. The (admittedly hearsay) evidence from the STR Elektronik technician was that the volume of the buzzer was set and would not change. There is no evidence that the Athlete had any repairs done to the intercom system between 21 September 2021 and 16 November 2021 when the judicial offer tested the volume. While Mr. Sarrazin was able to speculate on possible reasons why the intercom might malfunction, his evidence did not rise any higher than speculation. His evidence did not establish or support a conclusion that the intercom was in fact malfunctioning on 21 September 2021.

131. The Sole Arbitrator considers the more likely scenario to be that the Athlete was simply unable to hear the intercom buzzer due to a combination of being in his room, having his door closed and television on, and dozing in and out of sleep. If the volume of the buzzer in the room with the door closed was roughly the volume of a quiet office or bedroom (as suggested by the judicial officer's report), it is not surprising that the Athlete, in his bedroom, was not alerted to the buzzer.

132. Further, the DCO attempted to call the Athlete twice in the last five minutes of his 60-minute time slot but the call went to voicemail each time. The Athlete accepted that his phone was on silent. The Athlete had not provided alternative telephone numbers that could have been called.

133. The Sole Arbitrator considers that the Athlete's conduct in lying in bed in his bedroom with the door closed, television on, phone on silent with no alternative numbers provided and "*probably dozing on and off*", contributed (individually or together) to a failure to make himself available for testing and amounted to negligent behaviour. The consequences of this behaviour, in circumstances where he was aware that he had already had two missed tests in the past 12 months and therefore was, on his evidence, on "red alert", should have made the Athlete more careful.

134. Accordingly, the Athlete has failed to rebut the presumption of negligence and the 21 September 2021 attempted test constituted a missed test.

E. Interim conclusion

135. As the Athlete therefore had three missed tests within a 12-month period, he committed a whereabouts failure in contravention of Article 2.4 of the 2021 TADP.

F. Period of Ineligibility

a. Degree of fault

136. It is not in dispute that this contravention is the Athlete's first ADRV. Pursuant to Article 10.3.2. of the TADP (emphasis added):

> *"For an Article 2.4 Anti-Doping Rule Violation that is the Player's first doping offence,* ***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****. The flexibility between two years and one year of Ineligibility in this Article is not available 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."*

137. It was not submitted by the ITF (and the Sole Arbitrator does not consider to be the case) that there was a pattern of last-minute whereabouts changes or other conduct that raises a serious suspicion that the Athlete was trying to avoid being available for testing. Indeed, there is no suggestion or evidence that this was the case. Accordingly, the period of ineligibility is two years, subject to reduction depending on the Athlete's degree of fault.

138. As has already been addressed in this Award, the term 'fault' is defined in Appendix 1 of the TADP (emphasis added):

> *"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 Person's experience, whether the Player or other Person is a Protected Person, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Player's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Player's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that a Player would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Player only has a short time left in their career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.6.1 or 10.6.2."*

b. Considering all three whereabouts failures or any one of them

139. As addressed above, an Article 2.4 ADRV for a whereabouts failure must involve three missed tests and/or filing failures in a 12-month period. In addition, Article 10.3.2 of the TADP provides that the *prima facie* two-year ineligibility period for an Article 2.4 ADRV may be reduced depending on the athlete's degree of fault. However, the definition of 'fault' in the TADP does not expressly indicate whether, when considering any reduction of the period of ineligibility for such an ADRV, a decision-maker should consider an athlete's degree of fault as a composite of all three whereabouts failures or whether it should consider each whereabouts failure individually.

140. This question arises because each whereabouts failure is distinct and carries its own individual degree of fault. If any single incident was found not to constitute a whereabouts failure, then there would be no ADRV at all. It is of course possible that an athlete who has three missed tests could have a high degree of fault for two of them but only a *de minimis* degree of fault on the third. Would this warrant the maximum possible reduction or should there be some proportional approach applied, for example, a four-month reduction (being

one third of the available period of reduction) or an eight-month reduction (being one third of the general two-year period of ineligibility)?

141. This issue was not addressed in the Parties' written submissions but was raised with the Parties at the hearing. Counsel for the ITF submitted that, in assessing fault, it is appropriate for the Sole Arbitrator to look at each missed test separately. Counsel for the Athlete did not dispute that position.

142. There is a logic to that approach: if rebutting the presumption of negligence in the case of one test will obviate the entire ADRV, then a very low degree of fault in the case of one test could then warrant the maximum reduction (noting that the athlete would still be required to serve a minimum period of ineligibility of 12 months). Further, the assessment of the degree of fault requires consideration of the facts in relation to a particular set of circumstances that led to a particular outcome; it is far more complex, if not analytically unsound, to assess the degree of fault in a composite of three occasions. An alternative, to apply a mathematically proportional approach, is not specifically provided for in the TADP, nor was this advanced by either party.

143. Having said that, the Sole Arbitrator is conscious that the approach of assessing the degree of fault over all three incidents constituting the ADRV is not without merit. A whereabouts failure ADRV requires three separate incidents as an acknowledgement that inadvertence in a single incident should not itself lead to a concluded violation. It is the accumulation of three failures which constitutes the ADRV and, it can be argued, the athlete's degree of fault in committing the ADRV is a result of the accumulated fault in all three incidents.

144. Although not identified by the Parties, the Sole Arbitrator is conscious of CAS jurisprudence which suggests that all three whereabouts failures should be taken into account when assessing the degree of fault. Although perhaps not exhaustive, such decisions include:

- CAS 2020/A/7528 *Coleman v. World Athletics* (15 April 2021). In this case, the Panel noted that it was common ground between the parties that the Panel should take into account circumstances surrounding all three whereabouts failures. However, the Panel only in fact considered one missed test as "*the focus before* [the] *Panel was almost exclusively upon the facts, matters and circumstances surrounding the events*" of that test and so the Panel was "*not in any position to form a considered view of* [the] *earlier incidents*". The Panel reduced the period of ineligibility to 18 months.

- CAS 2020/A/7526 & 7559 *World Athletics v Naser; WADA v World Athletics & Naser* (30 June 2021). The Panel noted, without a fuller explanation, that it had to assess the athlete's degree of fault taking into account the circumstances pertaining to all three whereabouts failures. The Panel determined that, in all three failures, the athlete had shown an "*unacceptable degree of nonchalance and a worryingly lackadaisical approach to her whereabouts obligations*" and was deserving of no reduction.

- CAS 2021/A/8391 *Rastorgujevs v. International Biathlon Union* (26 August 2022). This proceeding was an appeal of an 18-month ban (i.e. the athlete had received a six-month reduction in the CAS ADD). The Panel accepted a submission of the

IBU that "*the sanction should take account of his fault on all three Whereabouts Failures*". It does not appear from the decision that that submission was disputed by the athlete. The Panel determined that all three failures were very serious and the athlete would have faced real difficulty in receiving any reduction on appeal if the ADD Award had imposed a two-year period of ineligibility. However, in the absence of any cross-appeal seeking an increase, the Panel upheld the 18-month ban.

- CAS 2021/A/8459 *WADA v. POLADA & Krzewina* (17 October 2022). The Sole Arbitrator in this proceeding concurred with *Naser* above that she was to assess the athlete's degree of fault taking into account the circumstances pertaining to all three whereabouts failures. The decision did not identify any qualitative difference between the degrees of fault in respect of the three failures. A 15-month period of ineligibility was imposed.

145. It is not apparent from any of the above proceedings that the Panel or Sole Arbitrator (as relevant) was required to determine a dispute between the parties on this issue (i.e. whether it was necessary to assess the degree of fault over all three whereabouts failures combined or whether the Panel was to consider all three but could determine the appropriate reduction based the degree of fault in any one incident). No decision contained a reasoned analysis for the approach taken on the issue, presumably because no dispute was raised. Further, *Coleman* only in fact had regard to one incident and, in each of *Naser*, *Rastorgujevs* and *Krzewina*, there did not appear to be any relevant difference in the degree of fault of each separate incident.

146. In the Sole Arbitrator's view, the CAS jurisprudence on this issue is somewhat unclear, and there are supportable arguments for both positions. Nonetheless, the position adopted by the Parties in this proceeding was that in assessing fault, the Sole Arbitrator should look at each incident separately. The Parties conducted their cases on that basis and made submissions accordingly. In the interest of fairness to the Parties, the Sole Arbitrator proceeds in this Award on that agreed basis: that the degree of fault in considering a reduction of the period of ineligibility can be determined having regard to each whereabouts failure individually, such that any reduction should be applied on the assessment of the degree of fault in any one of the whereabouts failures that resulted in the ADRV.

c. Parties' submissions

147. The ITF Tribunal determined, having regard to the Athlete's degree of fault, that it was appropriate to reduce the period of ineligibility to 15 months (i.e. a reduction of nine months). This was the subject of both the Appeal and Cross-Appeal.

148. The Athlete, in his Statement of Appeal, sought for his period of ineligibility to be reduced (in the alternative to having it eliminated). Although such relief was not addressed in his Appeal Brief, the ITF properly conceded that the relief had been sought by the Athlete in the Statement of Appeal and therefore the Sole Arbitrator had jurisdiction to consider it. As to the degree of fault, the Athlete relied on his submissions regarding his lack of negligence and said that the same submissions apply to assessing the degree of fault.

149. The ITF, in contrast, submitted that the Athlete's degree of fault was extremely high and did not warrant any reduction. In particular, it submitted:

a. in relation to the 2 January 2021 missed test, by choosing to update his whereabouts finding at the last minute, the Athlete assumed the risk of a lack of cellular reception or that some other issue might make it difficult to do so;

b. the Athlete had admitted negligence in relation to his 27 June 2021 missed test;

c. in relation to the 21 September 2021 missed test, the evidence did not support the Athlete's assertion that the intercom buzzer was malfunctioning and the Athlete otherwise engaged in inherently risky behaviour by dozing in his bedroom with the door closed, the television on and his phone on silent with only one telephone number provided, and therefore and must accept the consequences of that behaviour;

d. in relation to all three missed tests, the Sole Arbitrator should take into account that the Athlete is a very experienced wheelchair tennis player who has played at the highest level of his sport for almost two decades and ought to be well aware of the whereabouts rules.

150. The ITF also submitted that the ITF Tribunal had regard to irrelevant matters or erred in the way it considered certain matters. These submissions included:

a. the ITF Tribunal had regard to the fact that "*the two-factor verification had never been requested in the past*" as matter that favoured the Athlete. However, that was inconsistent with the evidence;

b. the ITF Tribunal failed to give sufficient weight to the Athlete's obligation to file his whereabouts updates as soon as possible after he became aware they were inaccurate;

c. the ITF Tribunal had regard to the fact (in the Athlete's favour) that the Athlete got up very early on 21 September 2021 and his 60-minute time slot that day was very late. However, that factor should have weighed against the Athlete, as he chose that time slot and could have chosen a different one if he had concerns about being tired, taking into account that his doctors had previously told him that he "*could fall asleep easily and had phases of deep sleep*";

d. the ITF Tribunal had regard to the 'specific circumstances of wheelchair tennis', in that it was a much less professionalised sport and one of high social importance. That was irrelevant;

e. the ITF Tribunal relied on the Athlete's assertion (during his personal statement at the end of the hearing rather than on his evidence) that he was one of only ten people in his sport to be in the ITF's International Registered Testing Pool ("IRTP"). However, that was incorrect as there are 31 such athletes. In any event, it was an irrelevant factor;

f. the ITF Tribunal had regard to the fact that (i) the Athlete gave truthful evidence and was open and honest; (ii) made additional disclosures in ADAMS; (iii) had been a positive role model for his sport and an advocate for anti-doping; (iv) had been successfully tested out-of-competition on numerous previous occasions

without any ADRV; and (v) manages his own whereabouts filing. These were all irrelevant factors.

d. Consideration

151. Having found that the Athlete committed the ADRV, the Sole Arbitrator has already concluded that the Athlete has been unable to rebut the presumption that his whereabouts failures were at least negligent.

152. The Sole Arbitrator notes that the TADP specifically provides for a reduction in the period of ineligibility despite a finding of negligence. The question for the Sole Arbitrator under Article 10.3.2 of the TADP is whether the Athlete's degree of fault (notwithstanding the existence of negligence) justifies any reduction in the *prima facie* two-year period of ineligibility.

153. The Sole Arbitrator agrees with the ITF's submissions that the following matters are not directly relevant to the Athlete's degree of fault in respect of any missed test:

a. the fact that the Athlete gave truthful evidence and was open and honest;

b. made additional disclosures in ADAMS after his third missed test;

c. has been a positive role model for his sport and an advocate for anti-doping;

d. has been successfully tested out-of-competition on numerous previous occasions without any ADRV.

154. The above matters are not (having regard to the definition of 'fault' in the TADP) "*specific and relevant to explain the Player's or other Person's departure from the expected standard of behaviour*". However, in the Sole Arbitrator's view, each of these matters is nonetheless significant in supporting the credibility of the Athlete's evidence. Although at times the Athlete was mistaken about certain matters (such as whether it was necessary to provide a hotel room number in a whereabouts filing), the Sole Arbitrator nonetheless finds the Athlete gave truthful evidence and explanations.

155. The Sole Arbitrator agrees that the 'specific circumstances of wheelchair tennis', the number of wheelchair tennis players in the ITF's IRTP and the fact that the Athlete managed his own whereabouts filing are not relevant to his degree of fault in respect of his missed tests.

i. Degree of fault – 2 January 2021 missed test

156. The Sole Arbitrator considers the following matters to be relevant in assessing the Athlete's degree of fault in respect of his 2 January 2021 missed test:

a. although athletes should seek to update their whereabouts filing as soon as possible after becoming aware of any inaccuracy, the Athlete had the right to update his ADAMS until shortly before the commencement of the indicated 60-minute time slot. For reasons given above, the Sole Arbitrator's view is that there was no negligence by the Athlete in not updating his whereabouts filing until the relevant day;

b. in any event, the Athlete's evidence is that the reason he did not update his whereabouts filing earlier was because of his (honest but mistaken) belief that he could not provide sufficient information regarding his precise location at the Sirena Ranger Station until he had arrived;

c. the Athlete had clearly given specific consideration as to how he would meet his whereabouts filing obligations while in Costa Rica. This included confirming that Wi-Fi would be available at all accommodation locations and setting a reminder alert on his phone at 4am each morning to remind him to update his whereabouts filing. This was demonstrated through a screenshot he took of his phone on 2 January 2021 showing the reminder notification (as well as the lack of cellular reception);

d. although the Sirena Ranger Station was somewhat remote, the Athlete (honestly but mistakenly) believed that he would be able to update his Whereabouts Filing upon arrival because he would have access to Wi-Fi;

e. the Athlete did in fact try repeatedly to update his whereabouts filing while at the Sirena Ranger Station. The reason he could not do so was because he did not have cellular reception to receive a two-factor authentication code. He tried to obtain cellular service while in different locations while staying at the Station, in order to receive the code. It was not suggested by the ITF that the lack of cellular reception was foreseeable. Further, while the Athlete's evidence showed that he had been required to input two-factor authentication codes at other times during his Costa Rica trip, the Sole Arbitrator accepts the Athlete's evidence that it was not required every time;

f. the Athlete did not realise that he could instead take steps to update his whereabouts filing via email as a backup. In that regard, his evidence was that he understood that he could email the ITF to change his password to ADAMS, but not that he could email the ITF as a means to update his whereabouts filing.

157. It is clear that the Athlete had all intentions of ensuring that his whereabouts filing on 2 January 2021 would be accurate and had taken steps to ensure that he would be in a position to do so once he had arrived at the Sirena Ranger Station. The reason he could not was due to the fact that there was no cellular reception and that was needed once ADAMS required the Athlete to input a two-factor authentication code. In circumstances where the Athlete was aware that Wi-Fi was available, the Sole Arbitrator considers it was not unreasonable for the Athlete to assume that cellular reception would also be available. The Sole Arbitrator considers the Athlete's level of care and investigation was satisfactory in the circumstances.

158. As to the Athlete's failure to email the ITF, the Sole Arbitrator has already given reasons regarding why that involved some negligence. However, when considering the Athlete's degree of fault, particularly in the context of the Athlete's very clear intent to do everything he believed available to him to ensure his whereabouts filing was accurate, the Sole Arbitrator does not consider this matter weighs significantly against the matters in the Athlete's favour in assessing the degree of fault.

159. Having regard to the above, the Sole Arbitrator's view is that the Athlete's degree of fault in respect of the whereabouts filing of 2 January 2021 was closer to the allowable minimum period of the scale. It should also be noted that the discretion granted to the Sole Arbitrator to reduce the period of ineligibility is limited; upon finding that the Athlete committed the ADRV, there is a mandatory period of ineligibility of 12 months. This recognises that negligence has been established in respect of each of the three missed tests.

160. Having regard to the Athlete's degree of fault, the Sole Arbitrator considers it appropriate to reduce the Athlete's period of ineligibility such that he serves a period of ineligibility that is close to the allowable minimum period, taking account of the procedural history of this case. Accordingly, the Sole Arbitrator reduces the general 24-month period of ineligibility to conclude with the publication of this Award, which the Sole Arbitrator notes is a period of 14 months.

ii. Degree of fault – 26 July 2021 and 27 September 2021 missed tests

161. For reasons addressed above, the Sole Arbitrator has proceeded on the basis that, in assessing the degree of fault in an Article 2.4 ADRV, the degree of fault for each individual whereabouts failure can be considered separately. As the Sole Arbitrator has determined that the degree of fault in respect of the 2 January 2021 missed test warrants a reduction of the period of ineligibility, it needs to be considered whether a further reduction is justified in consideration of the Athlete's degree of fault in respect to the 26 July 2021 and 27 September 2021 missed tests. As regards the 26 July 2021 missed test, the Sole Arbitrator holds that the Athlete has admitted negligence and that the circumstances of this missed test do not justify a further reduction of the sanction of ineligibility. In addition, the Sole Arbitrator considers that, for the reasons explained above, a further reduction is not warranted in consideration of the Athlete's degree of fault in respect to the missed test on 27 September 2021. As a consequence, the Sole Arbitrator concludes that a period of ineligibility determined above is appropriate in the present procedure.

G. Start date for period of ineligibility

162. Pursuant to Article 10.13 of the TADP, the period of ineligibility for an Article 2.4 ADRV is to start, as a general rule, on the date of the final decision providing for ineligibility. This is subject to two relevant exceptions:

a. Article 10.13.1 allows for the period of ineligibility to be deemed to have started at an earlier date where there have been substantial delays in the hearing process or other aspects of Doping Control and the delays are not attributable to the player.

b. Article 10.13.2 provides a credit for any period of ineligibility already served.

a. Delays not Attributable to the Athlete

163. Article 10.13.1 of the TADP provides:

> "*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.*"

164. The ITF Tribunal accepted that there were substantial delays that were not attributable to the Athlete, being that the Athlete's first counsel resigned several months after the Notice of Charge, requiring the Athlete to retain new counsel. The ITF Tribunal therefore exercised its discretion to backdate (pursuant to Article 10.13.1 of the TADP) the period of ineligibility to a date three months after the 27 September 2021. That is, the ITF Tribunal deemed the period of ineligibility to have started on 27 December 2021. As the ITF's decision was issued on 30 June 2022 and the Athlete had not agreed to a provisional suspension, this involved backdating six months and three days. The relevant order made by the ITF Tribunal was:

> "*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.*"

165. The ITF Tribunal's exercise of its discretion under Article 10.13.1 of the TADP to deem that the period of ineligibility started on 27 December 2021 was not part of the Athlete's appeal and the Athlete made no submissions on the matter. The ITF's Statement of (Cross-)Appeal, when dealing with the issue of disqualification, adverted to the fact that the ITF Tribunal deemed the start date of the period of ineligibility to be 27 December 2021. However, it made no submission that that exercise of discretion was incorrect, or that the starting date of the period of ineligibility, deemed by the ITF Tribunal to be 27 December 2021, was invalid or incorrect.

166. That is, pursuant to Article 10.13.1 of the TADP, the Athlete has served a period of ineligibility, from the deemed starting date to the date of this Award, that the Sole Arbitrator considers sufficient in this case.

b. Credit for periods of ineligibility already served

167. The ITF's Statement of (Cross-)Appeal against the orders made by the ITF Tribunal did seek, when addressing relief, to have the ITF Tribunal's decision set aside and the Athlete sanctioned with a two-year period of ineligibility commencing on the date of this Award, with "*credit for the period of ineligibility served to date*".

168. Article 10.13.2 TADP is stated to concern "*Credit for any Provisional Suspension or period of Ineligibility served*". However, each of the relevant sub-Articles concern only provisional suspensions rather than periods of ineligibility already served in respect of a decision that has been appealed.

169. Notably, Article 10.13.2.1 of the TADP bears some differences to Article 10.13.2.1 of the WADC. In particular, the former omits the following words that appear in the latter:

> "*If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal.*"

170. It is not clear whether that omission was inadvertent or intentional. The Sole Arbitrator notes that the 2022 TADP contains the same omission. The omission, on its face, appears to be inconsistent with the obligation of signatories to implement the WADC "*without substantive changes*" (cf. WADC Article 23.2).

171. Notwithstanding the omission, Article 10.13.2 of the TADP itself refers in the heading to credit for periods of ineligibility served. The Sole Arbitrator considers that the Article does provide that credit can be granted in respect of the period of ineligibility served by the Athlete pursuant to the decision of the ITF Tribunal, although no further guidance is given.

172. In its (Cross-)Appeal, the ITF accepted that the Athlete ought to receive credit for ineligibility already served and the "*period of ineligibility*" cited in the order sought by the ITF reflects the wording of the order appealed from which cited 27 December 2021 as the starting date. Accordingly, if the commencing date is the date of this Award and credit is given for the period of ineligibility served, which was not challenged, such credit should be granted to the Athlete from 27 December 2021. As set out in paragraph 166, the Sole Arbitrator considers this period of ineligibility already served sufficient in this case.

c. An alternative approach

173. While the ITF did seek an order that the period of ineligibility commence on the date of this Award, in the view of the Sole Arbitrator, this could only, taken at its highest, be an implicit challenge to the Tribunal's exercise of discretion to backdate the commencement of the period of ineligibility pursuant to Article 10.13.1 of the TADP. As mentioned above, the ITF made no express submissions on that matter or, in particular, as to why the ITF Tribunal's decision on backdating the period of ineligibility was incorrect. It was therefore no surprise that the Athlete did not address the issue in his response to the Cross-Appeal. In the Sole Arbitrator's view, the fact that the ITF made no express submissions on the issue is determinative that the issue, being the decision to backdate because of substantial delays not attributable to the Athlete, was not part of this appeal and the Sole Arbitrator has not reconsidered the exercise of that discretion. Thus, an alternative approach (to providing credit for the period of ineligibility served by the Athlete since 27 December 2022) could be to apply to this award the same period of backdating considered appropriate by the ITF Tribunal, being 6 months and three days (which was not the subject of appeal) and then provide the Athlete credit for ineligibility served since the ITF Tribunal handed down its decision on 30 June 2022. If this alternative approach were adopted, the expiry of the Athlete's period of ineligibility would be the same.

H. Disqualification of Results

174. Article 10.10 of the TADP provides:

> "*10.10 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."

175. As to the meaning of 'fairness' it has been said that this term should be broadly construed and can include matters such as the severity of the athlete's ADRV and the impact of the ADRV on any subsequent results (see *Glasner v FINA* CAS 2013/A/3274). The ITF drew the Sole Arbitrator's attention to the ITF Tribunal decision of *ITF v Koubek* (18 January 2005), in which it was stated that fairness should be assessed "*in the round*" (i.e. in conjunction with other sanctioning powers) so as to arrive at a result that "*meets the justice of the case overall*".

176. The ITF Tribunal considered it fair not to disqualify retroactively the Athlete's results from 27 September 2021 (i.e. the date the ADRV had been committed) to the starting date of his period of ineligibility. Although it considered the fact that the Athlete had tested negative both before and after 27 September 2021 was not sufficient to engage the fairness exemption in Article 10.10 of the TADP, it had regard to the fact that the Athlete had changed the way he disclosed information in ADAMS. The ITF Tribunal noted that it exercised a broad discretion in how it defined 'fairness'.

177. The Sole Arbitrator again notes that this is a *de novo* appeal (cf. Article R57 para. 1 of the CAS Code and Article 13.9.1 of the TADP). In the Sole Arbitrator's view, although the Athlete had missed three tests, there was no indication or suspicion that he had used any prohibited substances or that he was intentionally avoiding tests. All evidence pointed the other way. The Athlete tested negative in an in-competition test on 3 November 2021. There was no dispute between the Parties that the only result that would be in issue was the 2021 Wheelchair Tennis Masters tournament, which the Sole Arbitrator understands was the relevant competition where the Athlete was tested. Given the period of ineligibility imposed by the ITF Tribunal, he has not competed in the 2022 tournament and therefore whatever ranking points he earned from the 2021 tournament have in effect lapsed.

178. The Sole Arbitrator is satisfied that the Athlete's whereabouts failures are not likely to have affected his results at the 2021 Wheelchair Tennis Masters tournament, particularly given his negative test. In all of the circumstances, including the other sanctioning powers exercised by the Sole Arbitrator and the considerations taken into account in doing so, the Sole Arbitrator considers that fairness requires that the general disqualification not be imposed and that the justice of the case overall makes it appropriate not to disqualify the Athlete's results for the 2021 Wheelchair Tennis Masters tournament. Accordingly, the Sole Arbitrator declines to disqualify any results of the Athlete in the period from 27 September 2021 until the commencement of his period of ineligibility on 27 December 2021, from when the Athlete's results will be disqualified retroactively.

IX. COSTS

179. Both Parties submitted that this procedure fell under Article R65 of the CAS Code and accordingly the proceedings shall be free with the fees of the Sole Arbitrator, *ad hoc* clerk and the costs of CAS to be borne by CAS (other than the CAS Court Office fee of CHF1,000 in respect of each of the appeals).

180. Upon inquiries, the Sole Arbitrator has confirmed that the CAS Court Office has accepted this to be the case and accordingly, the costs of CAS are to be borne by the CAS.

181. As to contribution towards legal fees and other expenses (in respect of which the Sole Arbitrator still has a discretion pursuant to Article R65.3 of the CAS Code), the Sole Arbitrator has determined that there has been mixed success in each of Mr Houdet's Appeal and of the ITF Appeal. Accordingly, the Sole Arbitrator declines to make any order as to contribution and determines that each party is to bear its own costs.

* * * * *

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Stéphane Houdet on 14 July 2022 against the decision issued on 30 June 2022 by the ITF Independent Tribunal is admissible and is upheld in part.

2. The appeal filed by the International Tennis Federation on 12 September 2022 against the decision issued on 30 June 2022 by the ITF Independent Tribunal is admissible and is upheld in part.

3. The decision issued on 30 June 2022 by the ITF Independent Tribunal is set aside.

4. Mr Houdet is found to have committed an ADRV under Article 2.4 of the 2021 TADP as a result of three Missed Tests on (i) 2 January 2021, (ii) 26 July 2021, and (iii) 27 September 2021.

5. Mr Houdet is sanctioned with a period of ineligibility of 14 months.

6. The period of ineligibility is deemed to have started on 27 December 2021 and concludes upon notification of this Award.

7. Mr Houdet's results from 27 December 2021 to the date of this Award (and any medals, titles, ranking points and prize money won by virtue of those results) are disqualified.

8. Mr Houdet's results from 27 September 2021 to the commencement of his period of ineligibility on 27 December 2021 (and any medals, titles, ranking points and prize money won by virtue of those results) shall not be retroactively disqualified.

9. The award is pronounced without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by each of Mr Houdet in respect of his appeal and the International Tennis Federation in respect of its appeal, which is retained by the CAS.

10. Each party shall bear its own costs and other expenses incurred in connection with this arbitration.

11. All other and further motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 2 March 2023

THE COURT OF ARBITRATION FOR SPORT

The Hon. Dr. Annabelle Bennett AC SC
Sole Arbitrator

Alistair Oakes
Ad hoc Clerk