

**IN THE MATTER OF PROCEEDINGS BROUGHT BY THE INTERNATIONAL TENNIS
INTEGRITY AGENCY UNDER THE 2022 TENNIS ANTI-DOPING PROGRAMME****BEFORE:**

Charles Hollander KC (Chair)
Professor Dorian Haskard
Helle Qvortrup Bachmann

BETWEEN:**INTERNATIONAL TENNIS INTEGRITY AGENCY****Anti-Doping Organisation****and****ANDREJ MARTIN****Respondent**

DECISION OF THE INDEPENDENT PANEL

A. FACTUAL SUMMARY

1. The International Tennis Federation (“ITF”) is the international governing body for the sport of tennis and signatory of the World Anti-Doping Code (the “Code”). It delegated its responsibility to manage and administer the Tennis Anti-Doping Programme (“TADP” or the “Programme”), which sets out Code-compliant anti-doping rules applicable to players competing in Covered Events, to the International Tennis Integrity Agency (“ITIA”).
2. Mr Andrej Martin (“the Player”) is a professional Slovak tennis player, who is currently 33 years old. He has played in Covered Events, including ATP tournaments, since 2005, and has achieved a career-high ATP singles ranking of 93 and doubles ranking of 69.

3. He accepts that he is bound by the TADP and that he is subject to the jurisdiction of the TADP and of this tribunal to resolve this case. There is therefore no dispute as to jurisdiction.
4. On 7 June 2022, during the Player's participation in the 2022 Bratislava Open, an In-Competition urine sample (the "Sample") was collected from him and transported to the World Anti-Doping Agency ("WADA")-accredited laboratory in Montreal, Canada ("the Laboratory") for analysis.
5. The Laboratory analysed the Sample and reported an Adverse Analytical Finding ("AAF"), namely that the Sample contained SARM S-22, which is prohibited in the category of Other Anabolic Agents (section S1(2) of the 2022 Prohibited List). SARM S-22 is a non-Specified Substance.
6. On 22 July 2022, the ITIA notified the Player that he may have committed Anti-Doping Rule Violations ("ADRVs") under TADP Article 2.1 and/or 2.2. On 30 July 2022, the Player informed the ITIA that he denied committing an ADRV and requested analysis of the B Sample. On 2 August 2022, the Laboratory reported that the B Sample contained SARM S-22, thus confirming the finding.
7. By letter dated 26 September 2022, the ITIA formally charged the Player with ADRV under TADP Articles 2.1 and/or 2.2, on the basis that SARM S-22 was found to be present in the urine Sample provided.
8. The Player was made subject to a Provisional Suspension from 22 July 2022. He made an application to have the Provisional Suspension lifted and that application was rejected by the Chair on 22 November 2022.
9. On 5 September 2022, the Player filed a statement asserting that he had played in a floorball tournament between 3 and 6 June 2022 (the "Floorball Tournament") and through his investigations into the cause of his AAF, he had discovered that one of his teammates, Igor Gažo, had, unknown to the Player at the time of the Floorball Tournament, been using SARM S-22 at that Floorball Tournament by putting drops of it in his water bottle; and the Player must have inadvertently drunk from Mr Gažo's water bottle instead of his own, and thereby inadvertently ingested SARM S-22.

10. The hearing of this matter took place remotely on 23 March 2023. The ITIA was represented by Ms Louise Reilly, a barrister based in Dublin. The Player was represented by Dr Jan Šťovíček, a lawyer based in Prague. The case was well argued on both sides and we are grateful to counsel and their respective teams for their assistance.

B. THE RULES

11. Pursuant to TADP Article 3.1.1, the burden is on the ITIA to establish that each of the ADRVs charged had occurred *“to the comfortable satisfaction of the hearing panel”*.

12. Articles 2.1 and 2.2 of the 2022 TADP states that the occurrence of the following is an Anti-Doping Rule Violation:

“2.1 The presence of a Prohibited Substance or any of its Metabolites or Markers in a Player's Sample, unless the Player establishes that such presence is consistent with a TUE granted in accordance with Article 4.4.

...

2.2 Use or Attempted Use by a Player of a Prohibited Substance or a Prohibited Method, unless the Player establishes that such Use or Attempted Use is consistent with a TUE granted in accordance with Article 4.4.”

TADP Article 2.1.1 provides:

“[i]t is each Player's personal duty to ensure that no Prohibited Substance enters their body”

and that

“[p]layers are responsible for any Prohibited Substance or any of its Metabolites or Markers found to be present in their Samples.”

13. TADP Articles 10.2.1 and 10.2.2 state that the period of Ineligibility for an Article 2.1 and/or 2.2 ADRV that is the Player's first offence will be four years unless the Player establishes that the ADRV was not intentional. If the Player shows that the ADRV was not intentional, then by Article 10.2.2, the period of Ineligibility will be two years.

14. TADP Article 10.2.3 states:

'As used in Article 10.2, the term 'intentional' is meant to identify those Players ... who engage in conduct that they knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregard that risk'.

15. Save in the most exceptional of cases, this places the burden on the Player to show on a balance of probabilities how the Prohibited Substance entered his body. Thus:

The comment to Article 10.2.1.1 of the 2021 World Anti-Doping Code states:

"While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one's system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance"

and in *Abdelrahman v WADA and Egyptian Anti-Doping Agency* (CAS 2017/A/5016 and 5036), it was said that there was:

"a stringent requirement to offer persuasive evidence that the explanation [the athlete] offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence of his submissions".

16. If the Player rebuts the presumption of intent, the default period of Ineligibility is two years (TADP Article 10.2.2), subject to either elimination, if the Player shows he bears No Fault or Negligence for his violation (TADP Article 10.5); or reduction, if he shows he bears No Significant Fault or Negligence for his violation (TADP Article 10.6).

17. The relevant definitions under the TADP are as follows:

"No Fault or Negligence. The Player or other Person establishing that they did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that they had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1 the Player must also establish how the Prohibited Substance entered their system.

No Significant Fault or Negligence. The Player or other Person establishing that their Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Anti-Doping Rule Violation. Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1 the Player must also establish how the Prohibited Substance entered their system.”

18. The fundamental duty imposed on every player to exercise ‘utmost caution’ to avoid ingesting any Prohibited Substance equates to a duty on the player to do everything in his or her power to avoid ingesting any Prohibited Substance. Players are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink, and therefore even in cases of deliberate sabotage by a Person within the player’s circle of associates ‘No Fault or Negligence’ would not usually apply.
19. In order to establish that he bears No Significant Fault or Negligence for his violation, the Player must meet two threshold conditions: he must (1) demonstrate the source of the Prohibited Substance in his body, and (2) establish that his departure from his duty to use ‘utmost caution’ to keep Prohibited Substances out of his system was not ‘significant’. To do this, he must demonstrate that he took ‘at least all clear and obvious precautions which any human being would have taken in the same set of circumstances’. The test is objective, and subjective factors are irrelevant.
20. Thus, if the Player shows that his conduct leading to the AAF was not intentional or reckless, the ban is reduced from four years to two years. If he establishes “No Significant Fault or Negligence”, the Tribunal has a discretion to reduce the two-year suspension to a period between one and two years. If he shows No Fault or Negligence, the ban is eliminated.

C. THE FLOORBALL TOURNAMENT

21. The Player’s explanation for the AAF was that he played floorball (a form of indoor hockey) for an amateur Slovak team. When he was notified of the AAF, he says he did not know what could have caused it and made enquiries. There were floorball matches on 3 and 4 June 2022 in which he had played. He learned that one of his teammates on the floorball team, Mr Gažo, was taking ostarine at the time. Ostarine is another name for SARM S-22. Mr Gažo, who was the goalkeeper often sat next to the Player on the team bench at

matches, where players were regularly substituted on and off. Both played in the matches on 3 and 4 June 2022. The Player was accustomed to sponsor the provision of water bottles for the floorball team. Everyone had identical water bottles. The Player wrote his initials on his. The Player's hypothesis was that in the heat of the match he must have drunk from the goalkeeper's water bottle and thus accidentally ingested ostarine.

22. We heard from a number of the Player's floorball teammates: in addition to Mr Martin himself, we heard from Mr Kováčič, Mr Gažo, Mr Mikuš and Mr Šrámkó.

23. There was also medical evidence from Professor Saugy, for the ITIA, and Dr Zigmund, for the Player. Neither was required by the parties to give oral evidence before us. It was accepted in the medical evidence that the use of ostarine could cause the presence of SARM S-22. Initially, the Player had suggested that he might have drunk the entirety of the contents of Mr Gažo's water bottle. Professor Saugy said that would be likely to lead to a greater amount of SARM S-22 than was found in the Player's sample. However, Mr Gažo said that although he dissolved the ostarine in his water bottle before a match, he would refill the water bottle more than once, hence greatly diluting it. Consistent with Professor Saugy's evidence, it seems to us that could potentially have given rise to the level of SARM S-22 found in the Sample. Thus, whilst the medical evidence does not prove either party's case, the fair way to put the point is to say that the Player's hypothesis should not be regarded as inconsistent with the scientific evidence.

24. We approached the hypothesis involving the water bottle initially with a degree of scepticism. However, there are a number of evidential matters which supported it:

24.1 The first question is whether the witnesses who gave evidence as to the floorball matches and Mr Gažo's use of ostarine were being truthful. We have no reason to think otherwise and are not prepared to reach a conclusion that they all colluded to tell a false story. We accept their evidence as truthful.

24.2 Thus, the person who sat next to the Player on the bench in the matches on 3 and 4 June 2022 was at the relevant time taking ostarine, a substance which would, if ingested lead to SARM S-22 in the body. If that were not the cause of the Player's AAF, that seems a quite extraordinary coincidence.

24.3 The quantity of SARM S-22 in the Player's body was very small. The Player had tested negative at Roland Garros 20 days previously. If he had been taking SARM-22 intentionally after that for doping purposes, one would have expected a much higher concentration in his positive Sample. This is because of the amount and duration of dosing needed to obtain an effect. The small quantity found is more consistent with accidental ingestion.

24.4 Mr Gažo said that he dissolved the ostarine drops in water because they had an unpleasant taste. Thus, one might reasonably expect someone who drank from his water bottle to notice that unpleasant taste. But it must depend upon whether the water bottle had been refilled, and therefore the concentration of ostarine in the water. Mr Gažo was accustomed to refill the bottle more than once in the course of a match. The small quantity of SARM S-22 found and the failure to recognise an unpleasant taste can reasonably be explained by dilution.

24.5 The ITIA pointed out that no receipt had been produced by Mr Gažo for the ostarine drops he said he bought for €60 and thus there was no objective evidence to support the story. There is no particular reason why Mr Gažo should have retained a receipt if he ever had one. But Mr Gažo was giving evidence of his usage notwithstanding the consequent jeopardy to his career by volunteering such evidence and we see no reason to reject his evidence.

24.6 Whilst in one sense we recognise it is easy for a player charged with a doping offence to protest his innocence with apparent credibility, we were impressed by the Player's evidence. Although the ITIA criticised what they said were changes in his explanation in the light of the evidence produced against him (including the scientific evidence), his conduct and explanations are also consistent with an individual genuinely trying to work out for himself how an apparently inexplicable positive test could have occurred.

25. We reject the ITIA's submission that the explanation proffered was inadequately specific. We find that the Player has discharged his burden of proof to show the cause of the AAF.

26. The ITIA submit that even if we accepted the Player's explanation as to the cause of the AAF, it was apparent from his own evidence that he was reckless in his conduct and thus he

should be found to have failed to satisfy us (the burden being on the Player) that his conduct was not reckless. He knew, they submit, that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk and was thus reckless: drinking from another player's water bottle was, given that athletes are responsible for what they ingest, reckless conduct. We reject that submission. There was no question of the Player deliberately drinking from another player's water bottle. Accidental drinking in this way does not in our view constitute (i) knowledge of a significant risk or (ii) manifest disregard of that risk.

D. NO FAULT OR NEGLIGENCE

27. The next question is whether the Player acted with No Fault or Negligence or No Significant Fault or Negligence. Under the TADP, athletes are personally responsible for what they ingest. The caselaw on "No Fault" reflects this principle. It is only in the most exceptional cases that a tribunal will be able to find No Fault or Negligence. Thus in *Puerta v ITF* (CAS 2006/A/1025) the player's explanation for the etilefrine in his sample was that upon returning to the table where he had just eaten lunch with his wife after spending a few minutes in the changing room, he poured his own bottled water into a glass that he believed to be his. The player was unaware that in his absence his wife had changed seats and used his glass to take her colourless, odourless, tasteless medication containing etilefrine. The CAS Panel accepted the player's explanation but held that

"[a]thletes must be aware at all times that they must drink from clean glasses, especially in the last minutes before a major competition" and "...despite the extraordinary manner in which the contamination with etilefrine occurred, the Panel is forced to conclude that the requirements which might justify a finding of "No Fault or Negligence" [...] have not been met...".

28. Given the responsibility placed on athletes to monitor what they ingest, and the high burden of showing No Fault or Negligence, we reject the Player's submission that he can bring himself within this exceptional provision.

E. NO SIGNIFICANT FAULT OR NEGLIGENCE

29. However, we consider that the Player is entitled to a finding that he acted with No Significant Fault or Negligence. The test is whether the Player establishes that his departure from his duty to use 'utmost caution' to keep Prohibited Substances out of his system was not 'significant'. To do this, he must demonstrate that he took 'at least all clear and obvious precautions which any human being would have taken in the same set of circumstances'.
30. The Player marked his water bottle with his initials. His water bottle was under the bench. Floorball matches are inevitably intense, and the players are principally focused on the game. In drinking from what appeared to be the Player's own water bottle, it is hard to be critical of him failing on every occasion in the course of a game to check that he was not drinking from the wrong bottle. Nor would one expect him to have in mind the possibility that his teammate was taking a course of Prohibited Substances which might, if he drank from the wrong bottle, give rise to an AAF in a sample himself. In our view the No Significant Fault or Negligence threshold is met in the present case.
31. That finding entitles us as a matter of discretion to reduce the sanction from two years to a period of not less than one year. We consider the appropriate period in all the circumstances is a sanction of fourteen months.

F. BREACH OF THE PROVISIONAL SUSPENSION

32. The general rule, as stated at TADP Article 10.13 is that 'the period of Ineligibility will start on the date of the final decision providing for Ineligibility' subject to two exceptions.
33. One of the exceptions is that where a player has been provisionally suspended pending determination of the charge (as here), the player will receive credit for any Provisional Suspension served (TADP Article 10.13.2):
- "Any period of Provisional Suspension (whether imposed or voluntarily accepted) that has been respected by the Player [...] will be credited against the total period of Ineligibility to be served."*
34. If a player fails to respect the Provisional Suspension in its entirety, he loses the entirety of the credit for such suspension, both the period before and after any breach.

35. The Player admits that while provisionally suspended he has participated in ten floorball matches between 17 September 2022 and 15 January 2023 as well as a triathlon competition on 14 August 2022.

36. The terms of a Provisional Suspension are set out in the Programme.

“Provisional Suspension means the Player [...] is barred temporarily from participating in any Competition, Event, or other activity in accordance with Article 10.14”.

Article 10.14.1 outlines the prohibition against participation during Ineligibility or Provisional Suspension:

“While serving a period of Ineligibility or Provisional Suspension, a Player [...] may not participate in any capacity in (or assist any Player participating in any capacity in):

(a) any Covered Event;

(b) any other Event or Competition or activity (other than authorised anti-doping education or rehabilitation programmes) authorised, organised or sanctioned by the ITF, the ATP, the WTA, any National Association or member of a National Association, or any Signatory, Signatory's member organisation, or club or member organisation of that Signatory's member organisation;

(c) any Event or Competition authorised or organised by any professional league or any international or national-level Event or Competition organisation; or

(d) any elite or national-level sporting activity funded by a governmental agency.”

37. The ITIA have satisfied us that each of the events in which the Player participated during the Provisional Suspension is an ‘activity’ that is ‘authorised, organised or sanctioned by’ a ‘Signatory, Signatory's member organisation, or club or member organisation of that Signatory's member organisation’ because:

37.1 The Slovak Anti-Doping Agency (“SADA”) and the International Floorball Federation are Signatories of the Code,

37.2 The Slovak Floorball Association is a member of the International Floorball Federation,

37.3 The Slovak Floorball Association is bound to comply with the SADA Anti-Doping Rules,

37.4 The floorball matches that the Player participated in were part of the '2nd BA Men's League', a competition authorised, organised or sanctioned by the Slovak Floorball Association,

37.5 SADA and World Triathlon are Signatories of the Code,

37.6 The Slovak Triathlon Union is a member of World Triathlon,

37.7 The Slovak Triathlon Union is bound to comply with the SADA Anti-Doping Rules,

37.8 The Žilina triathlon that the Player participated in was 'organised' by a triathlon and swimming club in Žilina and 'authorised or sanctioned by' the Slovak Triathlon Union (the event also operated as the Slovak short (Olympic) triathlon National Championship).

38. We accept that the Player did not intentionally breach the Provisional Suspension; he assumed it applied only to tennis. But the effect of the breach is not one over which the rules give us any discretion. It means that the time spent during the Provisional Suspension does not count towards the period of Ineligibility. We regret this conclusion, but it is not one over which we have any power.

G. DISQUALIFICATION OF RESULTS

39. TADP Article 9.1 states:

"[a]n Anti-Doping Rule Violation committed by a Player in connection with or arising out of an In-Competition test automatically leads to Disqualification of the results obtained by the Player in the Competition in question, with all resulting consequences, including forfeiture of any medals, titles, ranking points and Prize Money obtained by the Player in that Competition".

40. TADP Article 10.1.1 states:

“[e]xcept as provided in Article 10.1.2 [which applies only if the Player is found to have committed his ADRVs with No Fault or Negligence], where a Player is found to have committed an Anti-Doping Rule Violation during or in connection with a Competition in an Event where the Player also participated in other Competitions, any individual results obtained by the Player in the other Competitions in that Event will be Disqualified, with all resulting consequences, including forfeiture of all medals, titles, ranking points and Prize Money’.

41. TADP Article 10.10 provides that results obtained by the Player subsequent to Sample collection (i.e., from 7 June 2022) will be Disqualified, ‘*unless fairness requires otherwise*’.

42. We order disqualification of all results from 7 June 2022.

H. DISPOSITION

43. We find that the Player has committed a breach of TADP Articles 2.1 and 2.2.

44. We find that the breach was not intentional.

45. We find that the Player acted with No Significant Fault or Negligence.

46. The period of Ineligibility will be one year and two months from the date of this decision.

47. The period of Ineligibility imposed on the Player will commence on the date of this decision and end at 23:59 on 5 June 2024. The Player will not receive credit for the period he was provisionally suspended.

48. The results obtained by the Player from 7 June 2022 are disqualified with all resulting consequences including forfeiture of all medals, titles, ranking points and Prize Money.

49. This decision may be appealed to the Court of Arbitration for Sport (“CAS”), located at Palais de Beaulieu Av. des Bergières 10, CH-1004 Lausanne, Switzerland (procedures@tas-cas.org), in accordance with Article 13.

50. In accordance with TADP Article 13.8, parties shall have 21 days from receipt of this decision to lodge an appeal with the CAS.



Charles Hollander KC (Chair)
On behalf of the Tribunal
London

5 April 2023

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