SPORT RESOLUTIONS

SR/381/2024

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE ENGLAND AND WALES CRICKET BOARD

Before:

David Sharpe KC (Chair)
Terry Crystal
Colin Murdock

BETWEEN:

Cricket Regulator **Anti-Doping Organisation**

and

Keith Barker **Respondent**

DECISION ON THE NATIONAL ANTI-DOPING PANEL

A. INTRODUCTION

1. On 10 October 2024, the Cricket Regulator charged Keith Barker ("the Respondent), a professional Cricketer employed at Hampshire County Cricket Club ("Hampshire") with two Anti-Doping Rule Violations ("ADRVs") under the England and Wales Cricket Board ("ECB") Anti-Doping Rules ("ADR") Articles 2.1 and 2.2. On 29 October 2024, the Respondent admitted those charges. These proceedings concern, therefore, the appropriate sanction that Respondent should receive under ADR Article 10.

2. The Cricket Regulator is the body within the ECB which has become responsible, on behalf of the ECB, for the enforcement of certain ECB rules and regulations, including the ECB ADR. The ECB is the national governing body for the sport of cricket in England and Wales. It has delegated authority for Results Management in anti-doping matters such as these proceedings from UK Anti-Doping ("UKAD").

3. The Parties agreed that the issues before the Panel were (a) whether the Respondent was able to rely upon the “No Significant Fault or Negligence” provision within ADR Article 10 and, (b) what was the appropriate sanction given the factual matrix of this case and the operation of ADR Article 10. The Cricket Regulator accepted that there was no intention on the part of the Respondent in committing the ADRVs and asserts that the correct period of Ineligibility is two years in accordance with the ADR. In the event that the Panel determines that the Respondent bears No Significant Fault or Negligence the sanction may range from a reprimand to a two-year period of Ineligibility. The burden of proving No Significant Fault or Negligence lies with the Respondent, on the balance of probabilities.

4. David Sharpe KC was appointed as Chair of the Tribunal by the President of the National Anti-Doping Panel (“NADP”), Kate Gallafent KC, pursuant to the ADR, on 5 December 2024. Mr Colin Murdock and Dr Terry Crystal were appointed on 10 February 2025.

5. A hearing was conducted via video conference on 5 March 2025. The Cricket Regulator was represented by Mr Ross Brown and Ms Hannah Kent of Onside Law and the Respondent by Mr Craig Harris, Counsel, of Furnival Chambers. The Panel records its gratitude to the legal representatives for the refined legal arguments and the clear, concise submissions made on behalf of their clients.

6. Additionally present at the hearing on 5 March 2025 were:

   For Cricket Regulator

   James Fuller, Anti-Doping and Illicit Drugs Programme Manager, Observer

   For UKAD

   James Laing, Lawyer, Observer

Grace Hartley, Observer

For the Respondent

Keith Barker, the Cricketer

Ian Thomas, Managing Director of the PCA, Observer

NADP Secretariat

Eleanor Stocker, Case Manager

B. JURISDICTION

7. The relevant ADR are the ECB ADR effective from 1 January 2024. Article 1 sets out the Scope and Application of the ADR and in particular they apply, inter alia, at ADR Article 1.1 to Cricketers who are members of clubs, teams, associations or leagues who are members, affiliates or licensees of the ECB, and to all Cricketers participating in Matches organised, convened or authorised by the ECB. ADR Article 1.2., inter alia, requires that Cricketers falling under ADR Article 1.1 are deemed to have agreed to be bound by and comply strictly with the ADR and to submit to the exclusive jurisdiction of any Anti-Doping Tribunal convened under the ADR.

8. The Respondent is a Cricketer for the purposes of the Rules and is subject to the jurisdiction of the Panel. The ECB is the relevant Results Management Authority with jurisdiction to bring these proceedings. The Respondent has not disputed jurisdiction.

C. ANTI-DOPING RULE VIOLATION

9. On 22 May 2024 UKAD collected a urine Sample from the Respondent Out-of-Competition at Hampshire. The Sample was split by the Respondent and both samples were tested at the Drug Control Centre, King's College London. Analysis returned an Adverse Analytical Finding ("AAF") for Indapamide which is listed under section S5 of the 2024 WADA Prohibited List as a "*Diuretic and Masking Agent*". It is a Specified

Substance that is prohibited at all times. Indapamide is also a therapeutic agent used in the treatment of hypertension.

10. On 4 July 2024, the Cricket Regulator informed the Respondent that he may have committed an ADRV under ADR Article 2.1 and/or ADR Article 2.2 and that he was subject to a Provisional Suspension as of that date. The Respondent was invited to provide an explanation and informed that he may be entitled to seek to apply to UKAD for a Therapeutic Use Exemption ("TUE") retroactively, pursuant to Articles 4.1 and 4.3 of the International Standard for TUEs and the UKAD Rules.

11. The Respondent accepted that he did not have a TUE for Indapamide and that as a Cricketer competing in men's first-class county cricket, he was included in UKAD's National TUE Pool for cricket. He admitted that he was required to obtain a TUE prior to the Use, Possession or Administration of one or more prohibited substances in accordance with the International Standard for TUEs and pursuant to ADR Article 4.3.1.2.

12. Following a request from the Respondent, the Cricket Regulator agreed to an extension of the deadline for his response until such time as any retroactive TUE application made by the Respondent was determined.

13. The Respondent made an application to UKAD for a retroactive TUE in late July 2024. This was rejected by the TUE Fairness Review Panel on 9 September 2024. The Respondent did not appeal that decision.

14. On 20 September 2024, the Respondent provided his written response to the allegations, enclosing the documents which were provided to UKAD in connection with the application for a retroactive TUE. He admitted the ADRVs but stated that he wished to make submissions in mitigation of sanction on the basis that he bore 'No Significant Fault or Negligence' for the ADRVs. The Respondent did not accede to the period of Ineligibility of two years as set out in the Cricket Regulator's notice. The Respondent confirmed that he relied on the evidential submissions made to UKAD as part of his retroactive TUE application.

15. Following a review of the evidence and the Respondent's written response, the Cricket Regulator determined that he may have committed ADRVs pursuant to ADR Article 2.1 and/or ADR Article 2.2, specifically:

    a) an ADRV pursuant to ADR Article 2.1.1 in that a Prohibited Substance, namely Indapamide, was present in a urine Sample provided by the Respondent on 22 May 2024; and/or

    b) an ADRV pursuant to ADR Article 2.2.2 in that the Respondent Used a Prohibited Substance, Indapamide, on or before 22 May 2024.

16. On 10 October 2024, the Cricket Regulator formally notified the Respondent that he was being charged with two ADRVs in accordance with ADR Article 7.8.1.

17. On 29 October 2024, the Respondent replied and indicated that he admitted the ADRVs. The Respondent also confirmed that he relied on all documentation appended to his initial response to the allegations and advised that he wished to make submissions in mitigation of sanction, supported by evidence where applicable, on the basis that he bore 'No Significant Fault' for the ADRVs.

D. <u>THE RESPONDENT'S EXPLANATION</u>

18. The Respondent explained that he was using Indapamide prior to providing the Sample that returned the AAF as it was prescribed by his personal doctor as part of treatment for hypertension. The Respondent also explained that the Hampshire club doctor, Dr Mark Wotherspoon, was aware of his condition and prescription of Indapamide. The previously prescribed medication for hypertension had not been prohibited under the ADR but had not successfully treated the condition.

19. The Respondent's position summary was that he relied upon the advice and assurances of his doctors when using Indapamide and was not informed, despite checking with them, that it was a Prohibited Substance. He was reassured in his approach and reliance upon the doctors' advice and failed to undertake further checks of his own volition, including through the Global Drug Reference Online tool ('Global DRO'), because of (i)

the necessity that he follow the medical advice he was given to take the Indapamide in any event, given the apparently increasing seriousness of his condition, and (ii) the algorithmic increase (by addition of components) to his medication being only an extension of a course of treatment that he was already receiving, but which was not having sufficient effect by that point, all of which had been in compliance with the ADR without requiring a TUE.

20. The Indapamide was/is prohibited under the ADR in the absence of an applicable TUE and the Respondent accepted that he did not have a TUE for that drug at the material time.

E. PROCEDURAL BACKGROUND

21. The sequence of relevant dates and procedural events is as follows:

    (a) 4 July 2024 - ‘Notification Letter’ sent to Respondent in accordance with ADR Article 7.2.3. indicating that he had returned the AAF and that he may have committed an ADRV under ADR Articles 2.1 and/or 2.2. The Respondent was provisionally suspended from that date;

    (b) 29 July 2024 - Respondent sends “Initial Submission” in support of the retroactive TUE application to UKAD;

    (c) 13 August 2024 - Respondent sent “Addendum Submission” to UKAD;

    (d) 23 August 2024 - Respondent sends “Further Submissions” to UKAD;

    (e) 9 September 2024 - UKAD refuses retroactive TUE application;

    (f) 20 September 2024 - Respondent sends ‘Initial Response’ to the Cricket Regulator not acceding to two-year period of Ineligibility and indicating desire to make submissions on sanction and that he bore “No Significant Fault or Negligence” for the ADRVs. Respondent seeks to rely upon all evidence that he had previously provided to UKAD.

(g) 10 October 2024 - Cricket Regulator charges the Respondent by "Notification of Charge" Letter.

(h) 29 October 2024 - Respondent sends "Response to Notification of Charge"

(i) 19 December 2024 – Tribunal issues Directions.

F. THE ADR FRAMEWORK

22. ADR Article 2.1 provides:

"*The presence of a Prohibited Substance or its Metabolites Markers Cricketer's Sample.*

2.1.1 It is each Cricketer's personal duty to ensure that no Prohibited Substance enters his/her body. A Cricketer is responsible for any Prohibited Substance or its Metabolites or Markers found to be present in his/her Sample. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Cricketer's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following (unless the Cricketer establishes that such presence is consistent with a Therapeutic Use Exemption granted in accordance with Article 4.3): (a) the presence of a Prohibited Substance or its Metabolites or Markers in the Cricketer's A Sample, where the Cricketer waives analysis of the B Sample and the B Sample is not analysed; (b) where the Cricketer's B Sample is analysed and the analysis of the Cricketer's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Cricketer's A Sample; or (c) where the Cricketer's A or B Sample is split into two parts and the analysis of the confirmation part of the split Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first part of the split Sample or the Cricketer waives analysis of the confirmation part of the split Sample.

23. ADR Article 2.2 provides:

"Use or Attempted Use by a Cricketer of a Prohibited Substance or a Prohibited Method, unless the Cricketer establishes that such Use or Attempted Use is consistent with a Therapeutic Use Exemption granted in accordance with Article 4.4.

2.2.1 It is each Cricketer's personal duty to ensure that no Prohibited Substance enters his/her body and that he/she does not Use any Prohibited Substance or Prohibited Method. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Cricketer's part be demonstrated in order to establish an anti-doping rule violation of Use of a Prohibited Substance or Prohibited Method under Article 2.2.

2.2.2 Without prejudice to Article 2.2.1, it is necessary that intent on the Cricketer's part be demonstrated in order to establish an anti-doping rule violation of Attempted Use under Article 2.2.

2.2.3 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. For an anti-doping rule violation to be committed under Article 2.2, it is sufficient that the Cricketer Used or Attempted to Use a Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.

2.2.4 Notwithstanding Article 2.2.3, however, a Cricketer's Use of a substance Out-Of-Competition that is not prohibited Out-of-Competition shall not constitute an anti-doping rule violation under Article 2.2. However, the presence of a Prohibited Substance or its Metabolites or Markers in a Sample collected In-Competition is a violation of Article 2.1, regardless of when that substance might have been administered."

24. ADR Article 10.2 provides:

"10.2 Imposition of a Period of Ineligibility for the Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method.

The period of Ineligibility imposed for a violation of Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers in a Sample), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Methods) that is the Cricketer or other Person's first offence shall be as

follows, unless the conditions for eliminating, reducing or suspending the period of Ineligibility (as provided in Articles 10.5, 10.6 and 10.7) are met.

10.2.1 The period of Ineligibility, subject to Article 10.2.4.1, shall be four years where:

(a) the anti-doping rule violation does not involve a Specified Substance or Specified Method, unless the Cricketer or other Person can establish that the anti-doping rule violation was not intentional;

(b) the anti-doping rule violation involves a Specified Substance or Specified Method and the National Cricket Federation establishes that the anti-doping rule violation was intentional;

10.2.2 If Article 10.2.1 does not apply, subject to Article 10.2.4.1, the period of Ineligibility shall be two years."

25. ADR Article 10.6 provides:

"Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.6.1 Reduction of the Period of Ineligibility for Specified Substances, Specified Methods or Contaminated Products ….

All reductions under Article 10.6.1 are mutually exclusive and not cumulative.

10.6.1.1 Specified Substances or Specified Methods

Where the anti-doping rule violation involves a Specified Substance (other than a Substance of Abuse) or Specified Method, and the Cricketer or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility and, at a maximum, two years of Ineligibility, depending on the Cricketer or other Person's degree of Fault.

26. ADR Article 10.12.2 provides:

"Credit for Provisional Suspension or Period of Ineligibility Served

10.12.2.1 Any period of Provisional Suspension respected and served by the Cricketer or other Person (whether imposed in accordance with Article 7.7 or voluntarily

accepted by the Cricketer or other Person) shall be credited against the total period of Ineligibility that may be ultimately imposed. If the Cricketer or other Person does not respect a Provisional Suspension (whether imposed in accordance with Article 7.7 or voluntarily accepted), then the Cricketer or other Person shall receive no credit for any period of Provisional Suspension served. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Cricketer 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."

27. Fault is defined in the ADR as:

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

28. No Significant Fault or Negligence is defined in the ADR as:

"*The Cricketer or other Person establishing that his/her Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Protected Person or Recreational Player, for any violation of Article 2.1, the Cricketer must also establish how the Prohibited Substance entered his or her system."*

G. PARTIES SUBMISSIONS

(1) The Respondent

29. The Respondent relied upon the advice and assurances of his doctors (one of whom worked within his own club/professional sport) when using Indapamide and was not informed, despite checking with them, that it was a Prohibited Substance. He was reassured in his approach and reliance upon the doctors' advice and failed to undertake further checks of his own volition, including through the Global DRO tool, because of (i) the necessity that he follow the medical advice he was given to take the Indapamide in any event, given the apparently increasing seriousness of his condition, and (ii) the algorithmic increase (by addition of components) to his medication being only an extension of a course of treatment that he was already receiving, but which was not having sufficient effect by that point, all of which had been in compliance with the ADR without requiring a TUE. He accepts that a Global DRO check would have been simple to conduct but that this does not worsen his failure. He believed it was safe to do so.

30. In support of that position, the Respondent relied upon, adopted, summarised and appended all evidence that had previously been provided to UKAD and the TUE Fairness Review Panel by way of various submissions in support of his retroactive application for a TUE; namely, his "Initial Submission" (dated 29 July 2024), "Addendum Submission" and "Further Submission" (dated 23 August 2024), with further explanation/submissions in respect of Dr Wotherspoon's evidence as had been part of the Further Submission.

31. The UKAD TUE Fairness Review Panel's decision to refuse the Respondent's retroactive application for a TUE must have no bearing on the considerations or decision of the NADP.

32. The question of how the Prohibited Substance entered the Respondent's system is clearly established by his own admission that he took it, voluntarily, in accordance with a medical prescription and advice, as is well established on the evidence.

33. The Respondent's failure to exercise the "utmost caution", which sets an extremely high threshold, does not render the level of Fault or negligence "Significant", which it is submitted the Respondent's level of Fault or negligence was not. His case falls between those thresholds, as defined, such that he bears No Significant Fault or Negligence.

34. The question for the Panel, with reference back to the definition, is whether, viewed in the totality of the circumstances, the Respondent's Fault or negligence was not significant in relationship to the ADRV. That is a matter to be determined at the Panel's discretion, on the facts.

35. A TUE would have been granted had it been applied for in advance.

36. Notwithstanding that the Prohibited Substance is a masking agent (not performance enhancing of itself), there is no suggestion, or even tenable basis for the same, that the Respondent's use of the Indapamide was in fact, or even might have been as a masking agent for any other Prohibited Substance or performance enhancing drug product of any kind, bearing in mind the reason he came to use it.

37. This is not a case in which the athlete has ingested or otherwise taken the Prohibited Substance by way of a contaminated substance, a product designed to improve their physical or mental condition, whether to enhance performance or not, which was not certified for safe use. In such cases, whilst unfortunate to have encountered contamination, the athlete has always committed a basic and fundamental failing, to have ingested or otherwise taken a non-essential, unaccredited, untested product with a view to their own physical or mental betterment, often with no certainty as to its actual ingredients, never mind the risk of contamination.

38. In The Cricket Regulator v Christopher Wright (SR/030/2024, 21 May 2024), the athlete ingested such a product, purchased through the Amazon website with no checks beyond its own label. The NADP still found (against the Regulator's submission) that he bore No Significant Fault or Negligence and accordingly imposed a period of Ineligibility of nine months, reminding itself, inter alia, of the decision in *Knauss v FIS* CAS 2005/A/847 to the effect that the standard of No Significant Fault or Negligence *"must not be set excessively high".*

39. In England and Wales Cricket Board v Tom Wood (SR/086/2022, 24 June 2022) Mr Woods ("TW") returned an Out-of-Competition AAF for terbutaline, a Specified Substance, as the result of his use of an asthma inhaler for which he had failed to apply for a TUE in advance. He made an unsuccessful retroactive application for a TUE, whereafter he admitted the ADRVs. The ECB accepted that his actions were not

intentional. TW established that he bore No Significant Fault or Negligence and that he would have been granted a TUE if he had applied. A period of Ineligibility of six months was imposed. The case may be distinguished on the basis that TW was a "second eleven" player who was called up to the first team and it was argued that he fell into a category of being able to make retroactive rather than advanced TUE applications. TW failed in his obligations due to his confusion and failure to check about his position as a first or second team player.

(2) <u>The Cricket Regulator</u>

40. The Cricket Regulator accepts the Respondent's explanation as to how the Indapamide entered his system and that he had not acted with intention in committing the ADRVs.

41. The starting point for any period of Ineligibility was two years, in accordance with ADR Article 10.2.2. If the Respondent could establish that he bears No Significant Fault or Negligence the period of Ineligibility is at minimum a reprimand and at a maximum two years depending on the degree of Fault.

42. The best analysis of the factual position and relevant case law is that the Respondent is unable to demonstrate that his degree of Fault is not significant, meaning his period of Ineligibility remains at two years.

43. There are two pre-conditions for the Respondent to meet before he can attempt to establish that he bears No Significant Fault or Negligence for his ADRVs under ADR Article 10.6.1.1. The first is that the substance in question must be a Specified Substance. Indapamide is a Specified Substance so that pre-condition is met. The second is to demonstrate how the Indapamide entered his system. The Cricket Regulator accepts the Respondent's explanation that it was ingested as a prescribed medication- therefore the second pre-condition is also met.

44. It then falls to the Panel to consider the test for No Fault or Negligence and use that to assess the Respondent's degree of Fault, before then considering whether the outcome that leads to is appropriate in the totality of the circumstance. Given the Cricket Regulator accepts that the Respondent did not know or suspect he had Used a Prohibited Substance, the relevant part of the test for these purposes is the well-known principle of

"utmost caution". The test of "utmost caution" is necessarily a very high and rigorous one, as the global anti-doping system is premised on the basis of the concept of strict liability.

45. In Knauss v. FIS, CAS 2005/A/847, the Court of Arbitration for Sport ("CAS") stated that an athlete must demonstrate that they have *"made every conceivable effort to avoid taking a prohibited substance".* The question is the extent to which the Respondent has departed from the "utmost caution" standard. This remains a high standard, but not as high as for No Fault or Negligence. It will depend on the steps the Respondent took prior to his Use of the Indapamide with the most well-known position being set out in Cilic v ITF CAS 2013/A/3327, which serves as a useful guide and sets out *"clear and obvious"* precautions athletes are expected to take. This is the objective element of the assessment of the Respondent's degree of Fault.

46. The starting point is that the Respondent knew he was taking a medication. That requires him to take particular precautions. ADR Article 1.4.2.2 is clear that each Cricketer must ensure *"that any medical treatment he/she receives does not infringe the Rules".* This has been interpreted in the CAS case law to mean that athletes must be proactive to ensure that any medication they might use does not contain any Prohibited Substance and that they must establish that they have "done all that is possible, within [their] medical treatment, to avoid a positive Testing result".

47. In addition, Cilic sets out the *"clear and obvious"* precautions an athlete is expected to take. There is very little the Respondent can assert that he did. He failed to perform various checks on the labelling (either via Global DRO or the internet)despite being well educated on anti-doping matters. The Respondent did, however, obtain the Indapamide from a medical practitioner but did not raise sufficient query with either Dr Hunter or Dr Wotherspoon. Given that summary, the Respondent's actions were a long way from meeting the Cilic test of *"clear and obvious"* precautions that could have been taken. The Respondent also failed to consider whether he required a TUE for his Indapamide medication.

48. Any factor that does not explain why the Respondent departed from the expected standards of behaviour already discussed, is not relevant for the purposes of assessing his degree of Fault.

H. LEX SPORTIVA AND CASE ANALYSIS

49. The Parties provided a significant number of authorities which were referred to in both the written and oral submissions. The following list of these cases were considered by the Panel:

a. *Knauss v FIS, CAS 2005/A/847*

b. *UCI v Munoz Fernandes, CAS 2005/A/872*

c. *WADA v Stauber & Swiss Olympic Committee, CAS 2006/A/1133*

d. *P v ITF, CAS 2008/A/1488*

e. *WADA v Turrini and CISM, CAS 2008/A/1565*

f. *Kendrick v ITF, CAS 2011/A/2518*

g. *UKAD v Grammer, NADP Tribunal decision dated 4 January 2012*

h. *Cilic v ITF, CAS 2013/A/3327*

i. *Sharapova v International Tennis Federation, CAS 2016/A/4643*

j. *Errani v ITF, CAS 2017/A/5301*

k. *World Athletics v Kitwara, AIU decision dated 20 December 2019*

l. *WADA v Swimming Australia, Sport Integrity Australia & Shayna Jack, CAS 2020/A/7579*

m. *ECB v Wood, SR/086/2022*

n. *Cricket Regulator v Wright, SR/030/2024*

50. In terms of the correct approach to the review and consideration of relevant cases in Stroman v FEI CAS 2013/A/3313, the CAS Panel commented at paragraph [82]:

> "[t]*he Panel repeats that in any event it is generally an unproductive exercise to seek to compare different cases decided at different times and/or under different rules and/or by different bodies, whose facts are not exactly comparable to the case under appeal and which do not lay down rules of general application (CF CAS 2013/A/3124 para 12.23).*"

51. Caution must therefore be exercised in the consideration of these case authorities, and it is also appropriate to note that the CAS decisions hold persuasive but non-binding authority. However, it is possible to distil key principles from relevant cases which assist in the analysis of the factual matrix of this case, and which offer direction to the determination of the correct sanction.

52. In Sharapova v ITF CAS 2016/A/4643, the CAS considered "No Significant Fault ('NSF')" at paragraph [84]:

> *"First, a period of ineligibility can be reduced based on NSF only in cases where the circumstances justifying a deviation from the duty of exercising the "utmost caution" are truly exceptional, and not in the vast majority of cases. However, in the Panel's opinion, the "bar" should not be set too high for a finding of NSF. In other words, a claim of NSF is (by definition) consistent with the existence of some degree of fault and cannot be excluded simply because the athlete left some "stones unturned". As a result, a deviation from the duty of exercising the "utmost caution" does not imply per se that the athlete's negligence was "significant"; the requirements for the reduction of the sanction under Article 10.5.2 of the TADP can be met also in such circumstances. It is in fact clear to this Panel (as noted in CAS 2013/A/3327, SS 74-75) that an athlete can always read the label of the product used or make Internet searches to ascertain its ingredients, cross-check the ingredients so identified against the Prohibited List or consult with the relevant sporting or anti-doping organizations, consult appropriate experts in anti-doping matters and, eventually, not take the product. However, an athlete cannot reasonably be expected to follow all such steps in each and every circumstance. To find otherwise would render the NSF provision in the WADC meaningless."*

53. In Knauss v FIS CAS 2005/A/847, the CAS Panel observed that the *"requirements to be met by the qualifying element 'no significant fault or negligence' must not be set*

excessively high… This follows from the language of the provision, the systematics of the rule and the doctrine of proportionality …"

54. In Cilic v ITF CAS 2013/A/3327 at paragraph [74], the CAS held that *"almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented if the athlete always (i) read the label of the product used (or otherwise ascertain the ingredients), (ii) cross-checked all the ingredients on the label with the list of prohibited substances, (iii) make an internet search of the product, (iv) ensure the product was reliably sourced and (v) consult appropriate experts in these matters and instruct them diligently before consuming the product."*

55. The CAS went on in Cilic at paragraphs [70] and [71] to give guidance as to the level of Fault and the applicable sanction together with the consideration of objective and subjective elements:

> *"[70]*
>
> *a. Significant degree of or considerable fault: 16 – 24 months, with a "standard" significant fault leading to a suspension of 20 months.*
>
> *b. Normal degree of fault: 8 – 16 months, with a "standard" normal degree of fault leading to a suspension of 12 months.*
>
> *c. Light degree of fault: 0 – 8 months, with a "standard" light degree of fault leading to a suspension of 4 months."*
>
> *"[71] In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities."*

56. A relevant case (not referred to by the Parties) dealing with reliance upon doctors in anti-doping matters – even highly experienced sports doctors - is FIS v Johaug CAS 2017/A/5015. The CAS considered, inter alia, whether the Appellant could rely upon "No Fault or Negligence" in the circumstances of her case to obtain full relief from sanction. The relevant facts in that case were that the Appellant, a successful and experienced

cross-country skier, suffered a sunburn and as a result obtained medication from her doctor, who was an extremely experienced sports medicine practitioner. Unfortunately, the athlete administered Trofodermin cream, which contains Clostebol. She sought assurances from the doctor that it did not contain a Prohibited Substance and was advised that it did not. However, she did throw away the packaging which displayed a clear anti-doping warning albeit in Italian and did not read the relevant drug data sheet. The athlete was, therefore, unable to rely upon "No Fault or Negligence" but was able to avail of "No Significant Fault or Negligence". In reaching its conclusion, the CAS noted previous jurisprudence including Knauss and commented at paragraph [180] that it was not necessary to follow all of the steps set out in that authority to determine the appropriate level of Fault but did comment that it was striking that the athlete did not check the packaging. The CAS also noted that it was established jurisprudence that it was necessary for athletes to cross-check assurances given by a doctor, even where such a doctor is a sports specialist.

I. DISCUSSION

57. The Panel had the benefit of hearing evidence via video conference by the Respondent who adopted his witness statement as evidence in chief and was then subject to cross-examination.

58. The Panel found the Respondent to be a credible witness but noted there was a failure to fully explain why he had not undertaken the same level of checks and scrutiny with the Indapamide that he had taken in respect of previously prescribed anti-hypertensive medication, including checks through Global DRO. Similarly. the Respondent's reliance on non-specific "family issues" as part of the explanation for any failings was a negative consideration in the determination of any Fault or negligence on his part. It was also clear that the Respondent had excellent training and knowledge regarding his anti-doping obligations.

59. However, the Respondent did explain that because of the increasing seriousness of his condition he considered it necessary to follow the medical advice he was given to take the Indapamide in any event, and that the addition of this medication was only a

modification of his pre-existing regime which had been in compliance with the ADR without requiring a TUE. He accepted that a Global DRO check would have been simple to conduct. The Respondent had been prescribed the medication by a medical practitioner for a bone fide condition and both his GP and club doctor were aware that he was a professional Cricketer, who was taking the Indapamide and had raised no concerns.

60. The Panel finds that the Respondent failed in respect of many of the tasks suggested in Cilic to prevent ADRVs relating to the taking of a product containing a Prohibited Substance and that he was correct in not attempting to argue “No Fault or Negligence”.

61. The Panel determines that the Respondent has satisfied the two pre-conditions necessary to establish that he bears No Significant Fault or Negligence for his ADRVs under ADR Article 10.6.1.1. The first is that the substance must be a Specified Substance – Indapamide is. The second is that the Respondent must establish how the Prohibited Substance entered his system. The Panel accepts that he ingested the Prohibited Substance as a prescribed medication for hypertension, and, in any event the Cricket Regulator accepts this.

62. The Panel concludes that the Respondent bore No Significant Fault or Negligence for his ADRVs. The Cricket Regulator has accepted, and the Respondent satisfied us in his evidence, that he did not know or suspect he had Used a Prohibited Substance. He had failed to satisfy the “utmost caution” test for the reasons outlined above but he relied upon the fact that the Prohibited Substance had been prescribed for hypertension, that previous medication had not infringed the ADR, that he needed the treatment for a refractory medical condition, and that two doctors (one of whom was his club doctor) who were aware of his professional sportsperson status did not draw attention or concern. Whilst it is self-evident that the Respondent failed many of the Cilic requirements, the case law is clear that the bar should not be excessively high.

J. PERIOD OF INELIGBILITY

63. In terms of the period of Ineligibility which is appropriate it is necessary to apply the principles established in Cilic to the factual matrix of this case. The Panel considers that there is a "standard" normal degree of Fault leading to a suspension of 12 months when all of the evidence is taken into account.

64. The period of Ineligibility will commence on the day the Respondent was provisionally suspended, namely 4 July 2024, given that the Panel understand he has not participated in sport since that date in accordance with ADR Article 10.12.2.

K. AWARD

65. The Tribunal makes the following Order:

    (a) A declaration that the Respondent *violated ADR Articles 2.1, in that he had the Presence of a Prohibited Substance in his Sample provided on 22 May 2024;*

    (b) A declaration that the Respondent *violated ADR Articles 2.2, in that he Used a Prohibited Substance on or before 22 May 2024;*

    (c) *A* declaration that the *ADRVs were not intentional, as defined in ADR Article 10.2.3;*

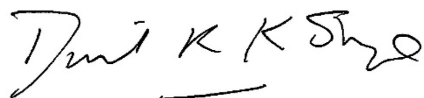
    (d) *A* declaration that the Respondent *has discharged the burden on him under ADR Article 10.6 to establish that he bore No Significant Fault or Negligence for the ADRVs;*

    (e) That the appropriate sanction is a period of Ineligibility of 12 months commencing on 4 July 2024 and ending 23:59 on 3 July 2025.

L. RIGHT OF APPEAL

66. In accordance with Article 13.5 of the NADP Procedural Rules any party who wishes to appeal must lodge a Notice of Appeal with the NADP Secretariat within 21 days of receipt of this decision.

67. Pursuant to ADR Article 13.4.2(b), the Appeal should be filed to the National Anti-Doping Panel, located at Sport Resolutions, 1 Paternoster Lane, London, EC4M 7BQ (resolve@sportresolutions.com).



David Sharpe KC
Chair, on behalf of the Panel
London, UK
25 March 2025