

**DECISION OF THE INTERNATIONAL TENNIS FEDERATION  
PURSUANT TO ARTICLE 7.14 OF THE 2021 TENNIS ANTI-DOPING PROGRAMME**

**I. Introduction**

1. The International Tennis Federation (the **ITF**) is the international governing body for the sport of tennis. Further to its obligations as a signatory to the World Anti-Doping Code (the **Code**) and its responsibilities as custodian of the sport, the ITF has issued the 2021 Tennis Anti-Doping Programme (the **TADP** or the **Programme**), which sets out Code-compliant anti-doping rules applicable to players competing in Covered Events.<sup>1</sup>
2. Elsa Wan (the **Player**) is an 18-year-old tennis player from Malaysia. She has competed on the Junior circuit since May 2017 and on the ITF World Tennis Tour (in both singles and doubles competitions) since March 2021. When she registered online for an International Player Identification Number (IPIN) in 2014 and in subsequent years, the Player expressly agreed to be bound by and to comply with the Programme. By virtue of that agreement, and by virtue of her participation in ITF World Tennis Tour events (which fall within the definition of '**Covered Events**' under the TADP), the Player became bound by and was required to comply with the Programme.
3. The ITF charged the Player with the commission of an Anti-Doping Rule Violation under the TADP and has proposed certain Consequences based on its analysis of the degree of Fault that the Player bears for that violation. The Player has admitted the Anti-Doping Rule Violation charged and acceded to the Consequences proposed. The ITF therefore issues this decision further to TADP Article 7.14, which provides:

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

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

7.14.3 Any decision issued by the ITF in accordance with Article 7.14.2 that an Anti-Doping Rule Violation has been committed [...] will address and determine (without limitation): (1) the factual basis of the decision that an Anti-Doping Rule Violation was committed; and (2) all of the Consequences to be imposed for such Anti-Doping Rule Violation, including the reasons for imposing the Consequences specified'.

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

4. On 13 October 2021, while competing in the women's singles competition at the ITF Tennis World Tour W15 event held in Piracicaba, Brazil, from 11 to 17 October 2021 (the **Event**), the Player was required to provide a urine sample for drug testing under the TADP. The sample was given reference number 3170518, and was split into an A sample and a B sample, which were sealed in tamper-evident bottles and transported to the WADA-accredited laboratory in

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<sup>1</sup> Any term in this Decision that begins with a capital letter and is not otherwise defined in this Decision has the meaning given to it in the Programme.

Montreal, Canada (the **Laboratory**) for analysis. The Laboratory reported an Adverse Analytical Finding for pseudoephedrine at an estimated concentration of 401 µg/mL. Pseudoephedrine is prohibited In-Competition under section S6.b (Specified Stimulants) of the 2021 Prohibited List, when its concentration in urine is greater than 150 µg/mL. The Player does not have a Therapeutic Use Exemption permitting use of pseudoephedrine.

5. The Adverse Analytical Finding reported by the Laboratory in respect of the A sample was considered by an independent Review Board in accordance with TADP Article 7.4. The Review Board did not identify any apparent departures from the sample collection procedures set out in the International Standard for Testing and Investigations or from the sample analysis procedures set out in the International Standard for Laboratories that could have caused the Adverse Analytical Finding. It therefore decided that the Player had a case to answer for breach of TADP Article 2.1 and/or TADP Article 2.2.
6. The ITF sent the Player a (pre-charge) Notice on 19 November 2021, notifying her that she may have committed an Anti-Doping Rule Violation under TADP Article 2.1 (presence of a Prohibited Substance in her Sample) and/or TADP Article 2.2 (Use or Attempted Use of a Prohibited Substance). Given that pseudoephedrine is classified as a Specified Substance under the TADP, the Player was not subject to a mandatory provisional suspension under TADP Article 7.12.1.
7. On 15 December 2021, in her preliminary response to the (pre-charge) Notice, the Player denied that she had committed an Anti-Doping Rule Violation, and requested analysis of her B sample.
8. On 18 December 2021, the ITF notified the Player of the results of the B sample analysis, which confirmed an Adverse Analytical Finding for pseudoephedrine.
9. On 19 December 2021, the ITF formally charged the Player with the commission of an Anti-Doping Rule Violation under TADP Article 2.1 and/or TADP Article 2.2. TADP Article 2.1 is a strict liability offence that is established simply by proof that a Prohibited Substance was present in the Sample, i.e., the ITF does not have to prove how the substance got into the Player's system or that the Player took the substance intentionally (or even knowingly).
10. On 7 January 2022, the Player replied to the Charge Letter, accepting that pseudoephedrine was present in her Sample, and therefore admitting that she had committed the Anti-Doping Rule Violation with which she was charged, but denying that her violation was 'intentional' within the meaning of TADP Article 10.2.3.

### **III. Consequences**

#### **III.A Period of Ineligibility**

##### **(a) How the pseudoephedrine got into the Player's system**

11. The Player has asserted that she did not intend to cheat and that her positive test was caused by her use of Nurofen Cold & Flu 200 mg (ibuprofen)/30 mg (pseudoephedrine hydrochloride) Tablets (the **Nurofen tablets**), which contained pseudoephedrine.<sup>2</sup> In summary, she asserts that (i) she has suffered from chronic allergic rhinitis since childhood, which she has treated over the years using herbal and over-the-counter medications, (ii) while she was training in Spain prior to the Event, her mother purchased the Nurofen tablets over-the-counter from a local pharmacy for her, and (iii) due to a flare-up of her condition in the build-up to the Event, she ingested two

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<sup>2</sup> Some Nurofen Cold & Flu Tablets contain ibuprofen (not a Prohibited Substance), while others (in certain countries) contain pseudoephedrine (a Prohibited Substance).

Nurofen tablets each evening between 8 and 12 October 2021 and two Nurofen tablets on the morning of 13 October 2021 (a few hours prior to competing at the Event).

12. In support of her explanation, the Player provided (among other things) medical reports evidencing her allergic condition and details of the pharmacy at which her mother purchased the Nurofen tablets.
13. The Player declared use of 'Nurofen' on her Doping Control Form (DCF) dated 13 October 2021, in the section requiring disclosure of 'any prescription/non-prescription medications or supplements, including vitamins and minerals, taken over the past 7 days'.
14. The ITF consulted Professor Christiane Ayotte, Director of the Laboratory, who indicated that the presence and concentration (401 µg/mL) of pseudoephedrine in the Player's Sample was consistent with the use of Nurofen tablets in the manner and at the times asserted by the Player and therefore could explain the Adverse Analytical Finding reported by the Laboratory.
15. In all the circumstances, the ITF accepts that the Player has established that it is more likely than not that the presence of pseudoephedrine found in her urine Sample 3170518 was caused by her ingestion of Nurofen tablets between 8 and 13 October 2021 in the manner and at the times asserted by the Player, in order to treat the symptoms of her allergic condition.

**(b) TADP Article 10.2**

16. This is the Player's first Anti-Doping Rule Violation.
17. In order to calculate the relevant period of Ineligibility, TADP Article 10.2.1 specifies that a TADP Article 2.1 violation that is 'intentional' attracts a mandatory four-year ban. If the Prohibited Substance in question is classified as a Specified Substance (as here), TADP Article 10.2.1.2 also specifies that the ITF has the burden of proving that the violation was 'intentional'. If the ITF cannot discharge that burden, TADP Article 10.2.2 provides for a two-year period of Ineligibility, subject to mitigation. TADP Article 10.2.3 explains that in this context 'the term 'intentional' is meant to identify those Players or other Persons who engage in conduct that they knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk'. The jurisprudence is clear that what counts in this context is what the Player actually knew, not what she should have known.<sup>3</sup>
18. The ITF accepts that the Player's commission of the violation was not 'intentional' within the meaning of TADP Articles 10.2.1 and 10.2.3, given the circumstances of ingestion (i.e. the ITF has accepted that the Player has shown that it was more likely than not that the source of pseudoephedrine in her Sample was the Nurofen tablets used by the Player to treat the symptoms of her allergic condition) and given that the Player declared use of Nurofen on her DCF. The period of Ineligibility prescribed by the application of TADP Article 10.2.2 (two years) therefore applies, subject to a possible reduction in accordance with TADP Article 10.5 or 10.6.

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

**(c) TADP Articles 10.5 and 10.6**

19. For the sanction to be eliminated or reduced below two years, the Player must show that she bears 'No Fault or Negligence' for the violation under TADP Article 10.5, or (alternatively) that she bears 'No Significant Fault or Negligence' for the violation under TADP Article 10.6.
20. TADP Article 10.5 provides that if a player establishes that they bear No Fault or Negligence for the Anti-Doping Rule Violation in question, the otherwise applicable period of Ineligibility will be eliminated. No Fault or Negligence is defined in the TADP as follows: 'The Player or other Person establishing that they did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that they had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule'.
21. TADP Article 10.6.1.1 provides that where a Prohibited Substance found in a player's Sample is classified as a Specified Substance under the TADP (as here), and the player can establish that they bear No Significant Fault or Negligence for its presence in their system, then the otherwise applicable two-year period of Ineligibility may be reduced by between 0 and 24 months (i.e., by up to 100%, in which case there would be a reprimand only). No Significant Fault or Negligence is defined in the TADP as follows: 'The Player or other Person establishing that 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'.
22. It is a precondition of any mitigation of a sanction for No (or No Significant) Fault or Negligence that the player proves on the balance of probabilities<sup>4</sup> how the Prohibited Substance(s) found in their Sample entered their system.<sup>5</sup> Otherwise, it is impossible to assess the degree of Fault that the player bears for the Prohibited Substance(s) being in their system. As detailed above, the Player has met that burden on the facts of this case.
23. A plea of No Fault or Negligence or No Significant Fault or Negligence is assessed by considering how far the player departed from their duty under the TADP to use 'utmost caution' to ensure that they would not ingest any Prohibited Substances or otherwise do anything that might constitute or result in the commission of an Anti-Doping Rule Violation.<sup>6</sup> 'The difference between the two [...] is one of degree: to establish No Fault or Negligence, the athlete must show that he took every step available to him to avoid the violation, and could not have done any more; whereas to establish No Significant Fault or Negligence, he must show that, to the extent he failed to take certain steps that were available to him to avoid the violation, the

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<sup>4</sup> See TADP Article 3.1.2 ('Where this Programme places the burden of proof on the Player or other Person alleged to have committed an Anti-Doping Rule Violation to rebut a presumption or establish facts or circumstances, then except as provided in Articles 3.2.4 and 3.2.5 the standard of proof will be by a balance of probability').

<sup>5</sup> See definitions of 'No Fault or Negligence' and 'No Significant Fault or Negligence' ('[...] Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1 the Player must also establish how the Prohibited Substance entered their system').

<sup>6</sup> See, e.g., *Kutrovsky v ITE*, CAS 2012/A/2804, para 9.49 ('the athlete's fault is measured against the fundamental duty that he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any prohibited substance'); *FIFA & WADA*, CAS 2005/C/976 & 986, paras 73-75 ('The WADC imposes on the athlete a *duty of utmost caution* to avoid that a prohibited substance enters his or her body. [...] It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping violation has been identified').

circumstances were exceptional and therefore that failure was not significant'.<sup>7</sup> The TADP definition of 'Fault' makes clear that the first question is how far the player departed from the duty of utmost caution (objective fault) and the second question is whether there is any acceptable explanation for that failure (subjective fault).<sup>8</sup>

24. The Court of Arbitration for Sport (**CAS**) jurisprudence is clear that the standard of 'utmost caution' is very onerous and requires a player to show that they 'made every conceivable effort to avoid taking a prohibited substance'.<sup>9</sup> It follows that 'even in cases of inadvertent use of a Prohibited Substance, the principle of the Athlete's personal responsibility will usually result in a conclusion that there has been some degree of fault or negligence'.<sup>10</sup>
25. The Player (rightly) does not plead No Fault or Negligence. However, for the reasons explained below, the ITF accepts that, in the specific circumstances of this case, the Player has established that she bears No Significant Fault or Negligence within the meaning of TADP Article 10.6.1.1, therefore justifying a reduction from the two-year starting point.
26. TADP Article 10.6.1.1 gives the ITF discretion to propose a sanction in the range between 0 to 24 months, based on the degree of Fault borne by the Player.

26.1 The CAS panel's decision in Cilic v ITF, CAS 2013/A/3327, paras 69 *et seq*, provides helpful guidance on assessing where a player's Fault lies within a range. In discussing Article 10.4 of the 2009 World Anti-Doping Code – where a reduction below two years was permitted if the athlete could establish how a Specified Substance entered their body and that such Specified Substance was not intended to enhance sport performance or mask the use of a performance-enhancing substance – the panel established the following three categories of fault: (a) a '[s]ignificant degree of or considerable fault: 16 – 24 months, with a "standard" significant fault leading to a suspension of 20 months'; (b) a '[n]ormal degree of fault: 8 - 16 months, with a "standard" normal degree of fault leading to a suspension of 12 months'; and (c) a '[l]ight degree of fault: 0 - 8 months, with a "standard" light degree of fault leading to a suspension of 4 months'.<sup>11</sup>

26.2 However, since the adoption of the 2015 World Anti-Doping Code – which did not contain a provision equivalent to Article 10.4 of the 2009 World Anti-Doping Code – a reduction below two years based on the degree of Fault borne by an athlete has been permitted only if the athlete can establish No Significant Fault or Negligence for their Anti-Doping Rule Violation. Consequently, CAS panels have adapted the Cilic framework accordingly: 'The time span of 24 months which is still available [under the 2015 WADA Code] now covers only two instead of three categories of fault: normal degree of fault

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<sup>7</sup> IBAF v Luque, IBAF Anti-Doping Tribunal decision dated 13 December 2010, para 6.10.

<sup>8</sup> See definition of 'Fault' ('[...] 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').

<sup>9</sup> Knauss v FIS, CAS 2005/A/847, para 7.3.1; WADA v NSAM et al, CAS 2007/A/1395, para 80 ('The burden is therefore shifted to the athlete to establish that he/she has done all that is possible to avoid a positive testing result').

<sup>10</sup> Adams v CCESS, CAS 2007/A/131, para 155.

<sup>11</sup> ITF v Cilic, CAS 2013/A/3327, para 70.

(over 12 months and up to 24 months with a standard normal degree leading to an 18-month period of ineligibility); and light degree of fault (0-12 months with a standard light degree leading to a 6-month period of ineligibility). The other guiding principles identified in *Cilic* in order to determine the degree of fault in an individual case continue to be applicable'.<sup>12</sup>

26.3 The CAS Panel in *ITF v Cilic* stated that:<sup>13</sup>

26.3.1 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';

26.3.2 'the objective element should be foremost in determining into which of the three relevant categories [now two relevant categories] a particular case falls'; and

26.3.3 'the subjective element can then be used to move a particular athlete up or down within that category' (or, exceptionally, between categories).

27. Assessing the Player's objective level of Fault, it is clear – and it is accepted by the Player – that she departed from the standard of utmost caution required of her:

27.1 It has long been well-known that medications may contain Prohibited Substances. Any player who ingests medication assumes the risk that it may contain Prohibited Substances.<sup>14</sup>

27.2 It is the 'sole responsibility' of each player bound by the TADP to 'know what constitutes an Anti-Doping Rule Violation under this Programme and what substances and methods are prohibited' and to 'ensure that anything he/she ingests or Uses, as well as any medical treatment he/she receives, does not give rise to an Anti-Doping Rule Violation' (TADP Article 1.12). Those responsibilities are personal to each player.

27.3 The Player should have identified the ingredients in the Nurofen tablets and cross-referenced them against the 2021 WADA Prohibited List to ensure that none of those ingredients was prohibited. Whilst the Player's ingestion of pseudoephedrine was inadvertent, this does not excuse her failure to abide by the standard of utmost caution. Consequently, the Player's objective level of Fault is towards the upper end of the 'normal' degree of Fault.

28. However, in light of the relevant subjective factors, the Player asserts that she bears No Significant Fault or Negligence for her Anti-Doping Rule Violation, and consequently a reduced

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<sup>12</sup> *Errani v ITF*, CAS 2017/A/5301, paras 194 – 195. See also *ITF v Kozlova*, ITF agreed decision dated 27 May 2015, para 2.12.1.

<sup>13</sup> *ITF v Cilic*, CAS 2013/A/3327, paras 71 – 73.

<sup>14</sup> *Fauconnet v ISU*, CAS 2011/A/2615, para 108 ('Athletes in general must be on their guard when considering the ingestion of any medication'); *ITF v Nielsen*, Anti-Doping Tribunal decision dated 5 June 2006, para 19 ('Appellants have a personal duty to ensure that medication which they are taking does not infringe that Code').

period of Ineligibility should be imposed. In particular, the Player notes that: (i) she used Nurofen – a widely available, commonly used, and legitimate medication to treat the symptoms of her long-term allergic condition (and, had she known that Nurofen contained pseudoephedrine, she never would have taken it); (ii) she used the Nurofen tablets for the sole purpose of treating the symptoms of her long-term allergic condition, (iii) she was only seventeen years old at the time of the Anti-Doping Rule Violation, and had limited international competition experience, having only started competing on the ITF World Tennis Tour seven months prior to the Event; (iv) as an independent athlete, she had not received any anti-doping education prior to the Event – indeed, the Player provided documentation confirming that her national tennis federation would not at that time have encouraged a junior player to undergo even a basic level of anti-doping education training to educate her on her anti-doping obligations and how to ensure her compliance therewith; and (v) her support network comprises solely of her parents (she is not advised by a doctor, nutritionist or coach), who are responsible for her training, care and supervision, and neither of whom have received any anti-doping education.

29. These subjective factors provide some explanation as to why the Player failed to take the precautions that were expected of her, and consequently are relevant to the Fault analysis. The ITF therefore considers that the Player bears a normal degree of Fault for her Anti-Doping Rule Violation, and has proposed, and the Player has acceded to, a period of Ineligibility of eighteen months. In accordance with TADP Article 10.13.1, this period of ineligibility will be deemed to have commenced on 9 March 2022 to account for the delay in the ITF drafting this Decision, and so will expire at midnight on 8 September 2023.

### **III.B Disqualification of results**

30. The Player's results at the Event are automatically disqualified in accordance with TADP Articles 9.1 and 10.1.1 (including forfeiture of any medals, titles, ranking points, and prize money received as a result of participation in the Event).
31. The Player competed in three events between the date of Sample collection (13 October 2021) and the date of this Decision. Whilst the general rule is that the results obtained by the Player in that period will be disqualified pursuant to TADP Article 10.10, in the specific circumstances of this case (in particular, that the Player last used pseudoephedrine on 13 October 2021, and would not have obtained any competitive advantage from that use in any of the subsequent Competitions), fairness requires otherwise, and so the Player will retain the results obtained between the date of Sample collection and the date of this Decision.

### **III.C Costs**

32. Each party shall bear its own costs of dealings with this matter.

### **III.D Publication**

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

### **III.E Acceptance by the Player**

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

**IV. Rights of appeal**

35. This Decision constitutes the final decision of the ITF, resolving this matter pursuant to TADP Article 7.14.
36. Further to TADP Article 13.2, each of WADA and the National Anti-Doping Agency of Malaysia (ADAMAS) has a right to appeal against this Decision to the CAS in Lausanne, Switzerland, in accordance with the procedure set out at TADP Article 13.9.
37. As part of the resolution of this matter, the Player has waived her right to appeal against or otherwise challenge any aspect of this Decision (both as to the finding that the Player has committed an Anti-Doping Rule Violation and as to the imposition of the Consequences set out above), whether pursuant to TADP Article 13.2 or otherwise. However, if an appeal is filed with the CAS against this decision either by WADA or ADAMAS, the Player will be entitled (if so advised) to exercise her right of cross-appeal in accordance with TADP Article 13.9.4.

London, 8 April 2022