Arbitration CAS 2011/A/2518 Robert Kendrick v. International Tennis Federation (ITF), award of 10 November 2011 (operative part 22 August 2011)

Panel: Mr Graeme Mew (Canada), President; Mr Jeffrey Benz (USA); The Hon. Michael Beloff Q.C. (United Kingdom)

Tennis
Doping (methylhexaneamine)
Specified substance
Scope of the panel's powers in an appeal procedure
No Fault or Negligence
No Significant Fault or Negligence

1. **Where, as is the case with Article R57 of the Code, rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where the tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. This is not, of course to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to a CAS panel. The more cogent and well-reasoned the decision itself, the less likely a CAS panel would be to overrule it; nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision. However, the fact that a CAS panel might not lightly overrule the decision of a first instance tribunal, would not mean that there is in principle any inhibition on its power to do so.**

2. **To succeed with a plea of "No Fault or Negligence", an athlete must show that he or she used "utmost caution" to keep him- or herself clean of any prohibited substances, *i.e.* that the athlete did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had ingested the prohibited substance. The athlete must show that he or she has fully complied with this duty of utmost caution, that is, that he or she has made every conceivable effort to avoid taking a prohibited substance and that the substance got into his or her system despite all due care on his or part.**

3. **The major difference regarding a plea of "No Significant Fault or Negligence" in a Specified Substance case compared to a Prohibited Substance case is that there is no 50% cap limiting a panel's discretion to reduce the presumptive period of ineligibility. Instead, the Panel can make whatever reduction it considers properly reflects the athlete's degree of fault, within the zero to 24 month spectrum. The analysis of relative fault is exactly the same that is made by reference to the degree to which the athlete has departed from the standards of behaviour expected of him or her.**

The Appellant, Robert Kendrick ("Kendrick") is a 31 year old professional tennis player from the United States.

The Respondent, International Tennis Federation (ITF) is the world governing body for the sport of tennis. Its responsibilities include the management and enforcement of the Tennis Anti-Doping Programme (the "Programme").

Kendrick appeals a decision of the Independent Anti-Doping Tribunal of the ITF (the "ITF Tribunal") dated 29 July 2011 (the "Decision") imposing sanctions upon him for a doping offence.

The appeal is against the sanctions only.

The facts in this case are straightforward and are not substantially in dispute.

Kendrick is an experienced 31 year old professional tennis player who was ranked in the top 100 in the ATP weekly rankings. He lives in Orlando, Florida, in the United States, but his tennis schedule requires him to travel internationally to compete in the top tennis events worldwide. He became a professional tennis player in 2000.

On 19 May 2011, Kendrick left his home in Florida to travel to Paris to participate in the Grand Slam French Open Championship (the "French Open") at Roland Garros. He arrived in Paris late the following morning and his first match was scheduled for 22 May 2011, just two days later.

Kendrick travelled to this tournament so close to his first competition date because his fiancée was very late in the term of her pregnancy with the couple's first child – she was 37 weeks pregnant – and he did not want to be away from her for longer than he was required to be. Kendrick was therefore keen to reduce his risk of suffering the negative effects of jetlag with respect to his participation in the French Open since he had suffered episodes of jetlag arising from similar tight scheduling when he had competed in Barcelona and Munich earlier in 2011.

Sometime during the week of 9 May 2011, approximately a week prior to his departure for the French Open, Kendrick discussed his jetlag concerns with an acquaintance, J., in the presence of his coach, R., at Kendrick's home practice facility, the Winter Park Racquet Club in Florida, where R. was the head teaching professional. Kendrick had known J. for approximately four years. J. was described as a US Tennis Association certified tennis teaching professional with over 30 years' experience who also coached at that facility.

During his discussions with Kendrick, J. suggested that Kendrick should try a product called Zija XM3 ("Zija"). J. also handed to Kendrick an unmarked package containing two Zija capsules. J. represented to Kendrick that he had previously given the product to several other athletes to assist with jetlag problems and that he had always received positive feedback about their effect. Kendrick asked J. if Zija contained anything that was illegal or banned and J. assured him that it did not. According to Kendrick, J. told him that Zija was *"an all-natural and organic product from the Moringa tree"*. J. also told Kendrick that he was not aware of any athlete ever having tested positive for a banned substance after taking Zija. R., Kendrick's long time coach, was present through this entire

conversation and did not express concerns to Kendrick, although he did suggest to Kendrick that he should do Internet research on the product before taking it. Because J.'s wife was a distributor of Zija, Kendrick considered J. a trustworthy source of information about Zija.

In his over 10 years on the professional circuit, Kendrick had been tested approximately 20-25 times prior to this episode without incident, so he was aware of his obligation to avoid ingesting prohibited substances and told us that, accordingly, he tried to fulfill it in this case. Kendrick also admitted at the hearing that he knew that nutritional supplements could be contaminated and could give rise to inadvertent positive tests for prohibited substances and that they *"were a risk area"*.

Kendrick acknowledged having received a wallet card from the ITF containing information about the Programme and the Prohibited List and providing a telephone number for doping-related inquiries. He conceded, however, that he had not retained the card. There was testimony from Kendrick and other witnesses that athletes in ITF events generally did not pay much attention to the wallet card. The Panel must express their concern about this phenomenon which tends to undermine the fight against doping.

Kendrick was apparently not prepared to rely solely on J.'s representations and spent some time researching Zija on the Internet. Kendrick testified that he spent about 30 minutes on the Internet doing his research the first day, after returning from the tennis facility, in trying to find an ingredient list for the product (in the proceeding below, Kendrick had estimated that he had spent an hour in this research). Kendrick also testified that he conducted further research the next day and *"another day"*. The amount of time he claimed to have spent varied between his testimony before the ITF Tribunal and before us, but as will be plain from our decision below, the amount of time under any of his estimates was not considerable and, in our judgment, insufficient given what was at stake. Kendrick was apparently unsuccessful in his efforts to locate an ingredients list or otherwise determine the ingredients contained in Zija on the Internet.

As a result of his search for "Zija XM3 and Approved by World Anti Doping Agency", Kendrick located two web pages on the Internet that stated the following about Zija:

APPROVED BY THE
WORLD ANTI DOPING ASSOCIATION
and WORLD ANTI DOPING ASSOCIATION APPROVED

> *Can you strength train and condition using the XM3 drink without the worry of a governing body (NCAA, NFL, MLB, NBA, IOC)?*
>
> *The answer is a resounding yes!!! XM3 is legal under all FDA regulations because it does not contain the alkaloids restricted by the Food and Drug Administration …*
>
> *With all the scrutiny regarding vitamins, hormones and supplements in today's athletic world, you can relax and enjoy the Zija XM3 with the knowledge that we are concerned for your health and follow the strictest protocols for acquisition of ingredients and manufacturing.*
>
> *XM3 is used as a training mainstay for many professional and amateur athletes. Names such as Anton Apollo [sic] Ono (Olympic speed skater), Monterio Hardesty (running back of Cleveland Browns), Chris*

> *Scott (offensive lineman for the Pittsburgh Steelers), and Tyler Smith (Former Tennessee men's basketball star) make the SM3 energy drink a daily part of their training regimen …*
>
> *XM3 is energy enhancement, appetite suppression and nutrition formulated from safe and all-natural ingredients.*

Kendrick also searched the web by searching in google.com the following search terms: "Zija", "banned substance", "approved by World Anti Doping Agency", "organic", "safe", "moringa", and "Apollo Anton Ohno".

As a result of finding the above websites, the claimed use of Zija by other high level athletes and his inability to discover anything negative about Zija, in particular that it contained banned or prohibited substances on the Internet, Kendrick concluded that it would be appropriate for him to take one capsule of the Zija that had been given to him by J. in the unmarked package.

Kendrick apparently overlooked numerous websites that would have been featured on the first page of his searches using his search terms that could have alerted him to the significant issues with the Zija websites he did find. Specifically, there was evidence that Kendrick missed websites listing the ingredients of Zija which showed that labelled packages for Zija indicating the presence of dimethylpentylamine, the ingredient for which Kendrick ultimately tested positive, was disclosed. In addition, there were blogs that were apparent from Internet searches using the terms used by Kendrick indicating that there were serious issues with the various claims made by the two webpages found by Kendrick, including the claim – incorrect as it emerged – that USADA and WADA had approved Zija and that Apolo Ohno used Zija.

Mr. Taylor, for the ITF, suggested to Kendrick that he was resiling from evidence that he gave to the ITF Tribunal concerning an Internet article entitled "Zija – Why I Don't Like It". A link to this article showed up on a Google search for "Zija XM3". Before the ITF Tribunal, Kendrick said that while he recalled identifying the link to the article, he had not looked at the article itself. In his evidence to the Panel, Kendrick said that he had been nervous when he gave evidence to the ITF Tribunal. He testified that if he had in fact seen the link to the article, it would have raised a red flag and he was sure he would have followed the link to the article. Whichever the correct version of events, he, on his own admission, did not read the article to which a link was indeed available.

Following his arrival in Paris, Kendrick ingested one Zija capsule on 20 May 2011 with his lunch. Later that evening he also took Ambien, a prescription sleep aid. Kendrick knew he would be subject to in-competition testing at the French Open but did not expect to test positive for a banned substance because, as a result of his research, he had no reason to believe that Zija contained any such substance.

Kendrick testified that at this time, due both to his fiancée being 37 weeks pregnant and to this being his swansong year on the tour, he had serious matters on his mind other than the tennis at hand, although he agreed that he nonetheless focused on competing the French Open.

On 22 May 2011, Kendrick played in his first round match in the French Open where he lost in four sets. Afterwards, Kendrick provided an in-competition urine sample. He did not disclose his use of either Ambien or Zija on the Doping Control Form which he completed at that time.

After being notified that his in-competition urine sample had tested positive for the prohibited substance dimethylpentylamine aka methylhexaneamine or MHA, Kendrick, to his credit, promptly (within two days) accepted a voluntary suspension from competition, so that the ITF could embark on the proceedings that ultimately led to this appeal.

There is no dispute over whether or not Kendrick ingested Zija to enhance his athletic performance. The evidence was uncontroverted – and the ITF accepted – that Kendrick took Zija simply to counteract the negative effects of jetlag and he made some effort to determine that Zija did not contain prohibited substances, however deficient that effort might have been.

On 29 July 2011, a hearing took place in London before the Independent Anti-Doping Tribunal of the ITF, which heard from Kendrick (via videolink) and from Dr. Stuart Miller, the ITF Anti-Doping Manager. The ITF Tribunal also had before it affidavits from J., R. and Kendrick himself. Following the hearing, the ITF Tribunal made the following determinations:

> … *the Tribunal:*
>
> *(1) Confirms the commission of the doping offence specified in the Charge;*
>
> *(2) Orders that Mr Kendrick's individual result must be disqualified in respect of the French Open 2011, and in consequence rules that the 10 ranking points and €15,000 in prize money obtained by him from his participation in that event must be forfeited;*
>
> *(3) Orders further that Mr Kendrick be permitted to retain the prize money obtained by him from his participation in the subsequent UNICEF Open;*
>
> *(4) Finds that Mr Kendrick has established that the circumstances of his doping offence bring him within the provisions of Article M.4 of the Programme;*
>
> *(5) Declares Mr Kendrick ineligible for a period of 12 months, commencing on 22 May 2011, from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised by the ITF or by any national or regional entity which is a member of the ITF or is recognised by the ITF as the entity governing the sport of tennis in that nation or region.*

On 2 August 2011 Kendrick filed an appeal with the Court of Arbitration for Sport (CAS) against the decision of the Independent Anti-Doping Tribunal of the ITF dated 29 July 2011 (the "ITF Decision") pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code").

Pursuant to Article R52 of the Code, the CAS, with the agreement of the parties, proceeded in an expedited manner.

On 5 August 2011, in accordance with Article R51 of the Code and the procedural timetable agreed upon by the parties, Kendrick filed his appeal brief.

On 12 August 2011, in accordance with Article R55 of the Code and the procedural timetable agreed upon by the parties, the Respondent filed its answer.

On 18 August 2011, a hearing was duly held at the premises of the International Centre for Dispute Resolution, a division of the American Arbitration Association, in New York, NY.

At the hearing the Panel heard the detailed submissions of counsel as well as the evidence of the following witnesses:

- Kendrick, who testified on his own behalf concerning his background and experience as a tennis player, his knowledge of anti-doping measures, his use of Zija, the efforts taken by him to ensure that not prohibited substance entered his body and the consequences of the sanction imposed by the ITF Decision.
- T., a national coach employed by the United States Tennis Association and a former professional tennis player, who testified by telephone about his acquaintance with Kendrick since Kendrick was a junior player, Kendrick's contributions to the sport as a player and role model and the consequences of the sanction imposed by the ITF Decision.
- B., a professional tennis player and a member of the Players' Council for two years, who also testified by telephone that he and Kendrick had played together on the professional tennis circuit since 2000. He said that Kendrick was a responsible, well-liked and respected professional. He too spoke of the consequences for Kendrick of the sanction imposed by the ITF Decision and about the ITF anti-doping wallet card and its use by players.

LAW

Jurisdiction of the CAS and Admissibility

1. Article R47 of the 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.

2. CAS jurisdiction in this matter is derived from Rule O of the Programme which states that a participant who is the subject of a decision may appeal an ITF decision regarding consequences for an Anti-Doping Rule Violation to the CAS within 21 days from the date of receipt of the decision.

3. The ITF Decision rendered its decision on 29 July 2011. Kendrick's statement of appeal was filed on 2 August 2011 and is therefore admissible.

Applicable Law

4. 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.

5. This appeal is governed by the Provisions of the Programme and the World Anti-Doping Code (WADC), as interpreted and applied by the CAS (with relevant decisions of lower panels of persuasive authority). The comments to the WADC are to be used as a guide to the interpretation of the Programme, and English law applies complementarily (Programme, Article A.8)

Issues

6. The standard of review on appeal and, in particular, whether there should be any deference to the ITF Decision; and

7. Whether Kendrick's degree of fault merits a reduction or change of the period of Ineligibility of 12 months imposed by the ITF Decision.

Merits of the Appeal

A. The Scope of the Panel's Powers in an Appeal Procedure

8. Mr Taylor for the ITF took a threshold point as to the scope of the Panel's powers in an appeal procedure. He contended that "due deference" should be paid to the ITF Decision and that the Panel should not simply substitute its own view as to appropriate sanction for that of the ITF tribunal, even if its assessment differed from theirs.

9. The Panel cannot accept this submission. Article 57 of the Code, the source of the Panel's powers, is phrased in the widest terms. The power is firstly a *"full one"* and, secondly *"to review the facts and the law"*; *i.e.* both. It has been described in awards too numerous to name as a *de novo* power. The Panel can, as it did in this case, hear the key witnesses and indeed receive oral testimony by telephone from those who did not give such evidence below.

10. It may well be that the main inspiration for providing for appeals to CAS from the decisions of sports related bodies was to ensure that sportsmen and women were not wrongly

disadvantaged by failures of due process or wrongly advantaged by "home town" decisions, but the text of the Rule does not confer upon CAS panels appellate powers limited to those – or any other – specified circumstances.

11. Mr Taylor said, however, that a consistent line of CAS jurisprudence supported his submission. He referred us in particular to CAS 2009/A/1870 where a CAS panel said (at para. 48):

In general terms, the Panel subscribes to the CAS jurisprudence under which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence.

12. To similar effect is the pronouncement of the panel in CAS 2009/A/1918 at para. 59.

13. In the Panel's view, Mr Taylor imposes more weight on those adverbs – "evidently and grossly" disproportionate – than they will properly bear. They can more compatibly with the rule be read as words of emphasis of the importance of proportionality in this context rather than as words imposing the limitation on a CAS panel's powers, which Mr Taylor contends for. It is notable that in neither case – nor in any other case known to this Panel – did the panel say that it would itself have come to a different conclusion to the first instance body but refrained from allowing the appeal because of application of some concept of "due deference". Even if they meant what Mr Taylor says they meant, they would be *obiter dicta* only.

14. Where, as is the case with Article R57 of the Code, rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where the tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. This is not, of course to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to the CAS Panel. The more cogent and well-reasoned the decision itself, the less likely a CAS panel would be to overrule it; nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision.

15. The Panel repeats and endorses what was said in the recent case CAS 2010/A/2283 where a similar argument was advanced and rejected. At para. 14.36 of that decision the Panel said:

The Panel would be prepared to accept that it would not easily "tinker" with a well-reasoned sanction, ie to substitute a sanction of 17 or 19 months' suspension for one of 18. It would naturally (as did the Panel in question) pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy. However, the fact that it might not lightly interfere with such a Tribunal's decision, would not mean that there is in principle any inhibition on its power to do so.

16. Finally on this issue, we consider that Mr Taylor's proposition that the time and money spent in constructing a fair and effective ITF tribunal system would be wasted, if an unrestricted appeal to CAS were permitted, is unduly pessimistic. If the ITF tribunal produces a convincing decision after observing due process, a sportsman or woman will be disinclined to

appeal, bearing in mind the possibility of adverse costs sanctions and the prospect that on appeal a sanction could be increased.

B. The Evaluation of Fault

17. The parties accept that the source of Kendrick's anti-doping rule violation was the Zija XM3 product that he used and that he did not take the supplement with the intent to enhance his sport performance or to mask the use of another illicit substance. Accordingly the preconditions of Article M.4 of the Programme (equivalent to Article 10.4 of the WADC) are met, so that the issue before the Panel is the appropriate sanction, which would include a period of Ineligibility in a range from 0 to 24 months, depending on our assessment of Kendrick's fault.

18. The Panel emphasises that even though the following discussions concern both Article M.4 of the Programme (Article 10.4 of the WADC) and Article M.5 of the Programme (Article 10.5 of the WADC) in order valuate Kendrick's fault, only Article M4 of the Programme is applicable to the present case.

19. Article M.4 of the Programme (Article 10.4 of the WADC) ("Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances"), like Article M.5 of the Programme (Article 10.5 of the WADC) ("Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances") applies to eliminate or reduce the presumptive sanction of two years Ineligibility for a first anti-doping rule violation for the presence of a Prohibited Substance.

20. Article M.5 applies to all Prohibited Substances (and Markers or Metabolites thereof) and enables a tribunal to reduce the otherwise applicable sanction by up to 50% if the athlete is able to establish that he or she bore No Significant Fault or Negligence for the anti-doping rule violation. If the athlete shows that the substance entered his or her system through No Fault or Negligence of his or her own, the otherwise applicable period of Ineligibility will be eliminated.

21. If the Athlete cannot surmount that evidential hurdle, then assuming that the athlete can show (i) how the substance got into his or her system, (ii) that the substance is a "Specified Substance", (iii) that he or she did not take it with intent to enhance his or her sport performance or for masking purposes, then the Panel has a discretion to reduce the 2-years presumptive sanction under Article M.4/Article 10.4 to something between zero and 24 months, and *"[t]he Athlete's or other Person's degree of fault shall be the criterium considered in assessing any reduction in the period of Ineligibility"*. Alternatively, if it is not a "Specified Substance" case, the Panel has discretion to reduce the period of Ineligibility (by a maximum of 50%) if it finds No Significant Fault or Negligence under Article M.5.2/Article 10.5.2.

22. In each case, the Athlete's fault is measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance. In CAS 2003/A/484 at para. 57 that panel stated:

We begin with the basic principle, so critical to anti-doping efforts in international sport (…) that "[i]t is each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body" and that "Competitors are responsible for any Prohibited Substance or its Metabolites or Markers found to be present their bodily Specimens". The essential question is whether [the athlete] has lived up to this duty (…).

23. In CAS 2005/C/976 & 986 a panel offered the following opinion at paras. 73 and 74:

The WADC imposes on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body (…). The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition (…). It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping violation has been identified. "No fault" means that the athlete has fully complied with the duty of care.

24. Any mitigating circumstances put forward on behalf of an athlete should be considered in the context of the standards which are expected of the athlete. To succeed with a plea of "No Fault or Negligence", an athlete must show that he or she used *"utmost caution"* to keep him- or herself clean of any prohibited substances, i.e. that the athlete did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had ingested the prohibited substance (CAS 2006/A/1025, para. 11.25; CAS 2005/C/976 & 986, para. 74). The athlete must show that he or she *"has fully complied"* with this *"duty of utmost caution"* (CAS 2005/C/976 & 986 at para. 74), that is, that he or she has *"made every conceivable effort to avoid taking a prohibited substance"* (CAS 2005/A/847 at para. 7.3.1) and that the substance got into his or her system *"despite all due care"* on his or part (commentary to WADC Article 10.5). If the athlete cannot surmount that evidential hurdle, then provided that he or she can meet the preconditions to Article M.4 of the Programme/Article 10.4 WADC (Specified Substances), he or she can get the period of Ineligibility reduced to between zero and 24 months, based on his or her relative fault.

25. The major difference between Article M.4/Article 10.4 and Article M.5/Article 10.5 is that there is no 50% cap limiting a panel's discretion to reduce the presumptive period of Ineligibility if it finds No Significant Fault or Negligence. Instead, the panel can, in a Specified Substances case, where the preconditions have been met, make whatever reduction it considers properly reflects the Athlete's degree of fault, within the zero to 24 month spectrum. We agree with the observation in the Decision that this is to provide the extra "flexibility" desired by stakeholders. We also agree with the submission of the ITF that the analysis of relative fault under Article 10.4 is exactly the same as under Article 10.5, that is, made by reference to the degree to which the Athlete has departed from the standards of behaviour expected of him or her. It follows that we disagree with Kendrick's argument that *"the level of scrutiny and review under 10.5 is significantly higher when determining whether an athlete bears no significant fault or negligence for committing a doping violation, then it is under 10.4"*. It also follows that the Panel rejects the argument that Article 10.5 non-Specified Substances cases are irrelevant to an Article 10.4 case. Rather, when a tribunal decides on what reduction is warranted below the two-year sanction established by Article 10.2 – based on its assessment

of the athlete's relative fault, *i.e.*, the degree to which the athlete departed from the accepted standards of behaviour – the Panel is not limited a 50% reduction but instead can go to the place on the spectrum (between zero and 24 months) that best reflects its assessment of the Athlete's relative fault.

26. Our conclusion that the analysis of fault under Article 10.4 is not different from the analysis of fault under Article 10.5 is supported and underscored by the commentary to the WADC, which uses similar language to describe the analysis under both Articles which is an admissible aid to construction: section 24.2 of the WADC provides that the comments annotating various provisions of the WADC shall be used to interpret the WADC.

Thus, the comment to Article 10.4 explains:

In assessing the Athlete's or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete 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 this Article

The comment to Article 10.5 states:

For the purposes of assessing the Athlete's or other Person's fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete has only 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 this Article.

27. The ITF submits, and the Panel agrees, that that fact that the language is effectively identical confirms that the analysis required is the same, *i.e.*, under each Article it is necessary to ascertain by how far the Athlete departed from the standards of care expected of him or her under the WADC. The Panel also notes that other CAS decisions and a decision of the NADP Appeal Tribunal in the U.K. have cited and applied Article 10.5.2 "non-Specified Substance" cases when assessing fault under Article 10.4: CAS A2/2011 at para. 54 citing CAS OG 06/001; *UKAD v. W.*, NADP Award dated 29 October 2010 at para. 46, citing CAS 2009/A/1870. It is important to note that the Panel is not limited to seeking such guidance as may be useful from cases involving the same substances: in any event under the WADC the Panel is required to evaluate the facts and circumstances of each case and the athlete's degree of fault in each case, as it often happens that two athletes can ingest the same substance in situations that indicate very different degrees of fault.

28. The Panel had the advantage over the ITF Tribunal of hearing and seeing Kendrick face-to-face (rather than through the medium of videoconferencing, as had occurred at the hearing before the ITF Tribunal). We also had the benefit of receiving the evidence of T. and B. As a result, we were able to revisit some of the evidence which had been regarded as unsatisfactory by the ITF Tribunal in the Decision (for example, the Decision had found a reference in

Kendrick's affidavit to the distributor role of J.'s wife to be *"likely to mislead"*; before the Panel Kendrick was able to provide an explanation which satisfied it that there was no intention to mislead).

29. In the Panel's view, circumstances favourable to Kendrick's position include the following:

a) The manufacturer of Zija XM3 appears to have lied about its properties. The representations that the product was approved by the "World Anti-Doping Association" and that Apolo Ohno used it were false.

b) Kendrick's anti-doping rule violation occurred at a very stressful time for him. The birth of his first child was imminent and he was preparing to participate in his swansong year as a top level professional tennis player before retiring from the sport.

c) Kendrick did undertake some Internet research in respect of the product prior to use.

d) Although Kendrick acknowledged that he could have consulted a doctor, he did not have his own personal doctor from whom he could have obtained immediate advice and plausibly (albeit wrongly) did not notice the discrepancy in the name "World Anti-Doping Association" (as opposed to "World Anti-Doping Agency"). He took further comfort from the references, in the online information he consulted, to the FDA (Food and Drug Administration), IOC (International Olympic Committee) and the names of various athletes who were said to use the product.

e) Kendrick, upon reflection, did not recall seeing an Internet article "Zija – Why I Don't Like It" (having said to the ITF tribunal that *"I probably read that"* and having heard and seen him we assess him as an honest witness and again accept what he says on this point).

f) Kendrick immediately accepted a provision suspension after learning of his positive test.

g) He had character references from distinguished contemporary competitors about his awareness of the importance of the need to eliminate doping from tennis.

30. Circumstances adverse to Kendrick include the following:

a) The Internet research which Kendrick undertook was inadequate, particularly for an experienced professional athlete who represented that he took great care not to ingest prohibited substances.

b) Kendrick both failed to consult the wallet card that had been provided to him by the ITF and failed to make any or sufficient efforts to contact the ITF's hotline.

c) Kendrick used a product which he received from someone who was not his own coach and which was contained in an unmarked wrapper.

d) Kendrick relied on unqualified people for advice on whether the supplement he used was "safe" or not. In conducting superficial Internet searches he was content to rely on "puff pieces" without any critical consideration of what he was reviewing.

e) While the stress which Kendrick was under may explain why he departed from the applicable standard of care, it does not reduce that standard of care.

f) He failed to disclose his use of Zija on the Doping Control Form which he completed at the time of testing.

C. The Appropriate Sanction

31. The Panel notes that the parties agree that whatever decision the Panel makes as to the length of the sanction, 22 May 2011 is the appropriate starting date.

32. We agree with Mr. Taylor that sanctions imposed by international federations and by national anti-doping organisations without adjudicated determination by an independent tribunal are of limited or no assistance. However, the decisions of national and international doping tribunals provide helpful guidance, particularly where they contain sufficient details of the circumstances and reasoning of the tribunal. Although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport.

33. It seems to us that, absent circumstances evidencing a high degree of fault bordering on serious indifference, recklessness, or extreme carelessness, a twelve month sanction would be at the upper end of the range of sanctions to be imposed in a MHA case falling within Article M.4 of the Programme/Article 10.4 WADC. In the present case, however, Kendrick's serious lack of due diligence and his failure to recognise at the time the risk of using an unfamiliar product contained in an unmarked wrapper is somewhat mitigated by the stressful circumstances that he found himself in at the time of the anti-doping rule violation.

34. Having regard to all of the circumstances, including the evidence which was not before the ITF panel, we have come to the conclusion that the twelve month sanction imposed by the ITF Decision was too severe. This Panel has not, however, been persuaded that a three month sanction, put forward by Kendrick, would be appropriate. Having regard to Kendrick's degree of fault and, to both the mitigating and aggravating factors listed above, the Panel concludes that an appropriate sanction would be a period of Ineligibility of eight months. This Panel emphasises that this is not simply a decision to, effectively, split the difference between the periods of Ineligibility urged by the parties but, rather, represents the Panel's own evaluation and weighing of the evidence and the submissions received, as well as our careful, if cautious, consideration of the authorities that we have found to have relevance.

Conclusion

35. The Panel would allow Kendrick's appeal to the extent that the twelve month period of Ineligibility imposed by the ITF Decision should be reduced to eight months. The starting date for the term of Ineligibility is 22 May 2011.

36. In coming to its decision, the Panel has attached considerable weight to the well reasoned and comprehensive decision of the ITF Panel. Our different conclusion is a reflection of the

evidence that was presented at the appeal hearing (which differed in some respects from that heard by the ITF Tribunal) together with our independent view that a consideration of all of the circumstances warranted a more proportionate – and in this case lesser – sanction than that imposed by the Decision.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Robert Kendrick on 2 August 2011 against the International Tennis Federation (ITF) concerning the decision taken by the International Tennis Federation Independent Anti-Doping Tribunal on 29 July 2011 is partially upheld.

2. The decision of the International Tennis Federation Independent Anti-Doping Tribunal of 29 July 2011 is set aside.

3. Mr Robert Kendrick is suspended for a period of eight months from 22 May 2011.

4. Mr Robert Kendrick's individual results obtained at the French Open 2011 are disqualified. The 10 ranking points and EUR 15,000 in prize money obtained by Mr Robert Kendrick at the French Open 2011 are forfeited.

5. Mr Robert Kendrick is permitted to retain the prize money obtained by him from his participation in the subsequent UNICEF Open.

(…)

8. All other or further claims are dismissed.