Arbitration CAS 2020/A/7536 Ashley Kratzer v. International Tennis Federation (ITF), award of 15 June 2021

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

Tennis
Doping (GHRP-6)
Duty of particular care of an athlete when applying medications
Distinction between "reckless" and "oblivious" conduct

1. **It is well-known in the world of sport that particular care is required from an athlete when applying or administering substances for therapeutic purposes, because the danger of a prohibited substance entering the athlete's system is particularly high in such context, i.e. significant.**

2. **In order to qualify a behavior as "intentional" the person concerned must have accepted or consented to the realization of the offence or at least accepted it for the sake of the desired goal. On the other hand, a conduct is negligent or oblivious only, if the offender does not agree with the occurrence of the offence that is recognized as possible and, in addition, credibly – not only vaguely – trusts that the offence will not materialize. Thus, in order to separate negligence from (indirect) intent one must – in particular – look at this voluntative element. Of course, such element is difficult to determine *ex post*. However, as a general rule one may say that the more remote the realization of the offence is in the offender's mind, the less he or she may be deemed to have accepted it and, thus, to have acted intentionally within the above meaning. Whether a certain behavior is "reckless" or only "oblivious" must be decided based on all relevant circumstances. Both types of behaviors are only separated by a very thin line.**

I. THE PARTIES

1. Ms Ashley Kratzer (the "Appellant" or "Player") is a professional tennis player born on 8 February 1999. She became a member of the International Tennis Federation (the "ITF") in December 2016 and has a career-high WTA singles ranking of 200.

2. The ITF (or the "Respondent") is the International Olympic Committee-recognised international sports federation for the sport of tennis. The ITF is a signatory to the World Anti-Doping Code (the "WADC") established by the World Anti-Doping Agency ("WADA"). Accordingly, the ITF has adopted the Tennis Anti-Doping Programme (the "TADP") to implement the provisions of the WADC in accordance with Article 23.2 of the 2015 WADC.

3. The Appellant and the Respondent are jointly referred to as the "Parties".

II. THE DECISION AND ISSUE ON APPEAL

4. The Player appeals a decision rendered by the Independent Tribunal on 28 October 2020 ("the Appealed Decision") in accordance with the 2020 TADP. The Independent Tribunal sanctioned the Player with a four-year period of Ineligibility following an adverse analytical finding ("AAF") for a prohibited substance belonging to the category S2 of WADA's International Standard for Prohibited Substances and Methods in effect in 2020 (the "Prohibited List"). Ms Kratzer is challenging the Appealed Decision in these proceedings.

III. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the Parties' written submissions and the CAS file. References to additional facts and allegations found in the Parties' written submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he deems necessary to explain his reasoning.

6. The Player is a professional tennis player. After joining the ITF in December 2016, she became the United States Tennis Association National Girls Champion in 2017. She has been participating on the ITF circuit since 2014 and, *inter alia*, competed in the first round of the 2017 United States Open Tennis Championships.

7. During her time as a professional athlete, the Player has received anti-doping education, including the information that she is responsible for all substances that enter her body.

8. Throughout her tennis career, the Player has suffered from severe blistering on her heels, toes and sides of her feet that caused extreme pain and open sores. The Player consulted doctors and physiotherapists and received medical treatments through, e.g., skin creams. She further taped and bandaged her feet to reduce her pain.

9. In April 2019, the Player was preparing for the Kunming Open Tennis Tournament held in Anning, China. On site, she trained with a local coach named Mr "Zhang". The coach was arranged by the hotel desk staff in Anning. The Player was told that Mr Zhang was affiliated with the Chinese tennis federation and that he regularly works with Chinese athletes.

10. During the practice session with Mr Zhang, the Player suffered from severe blistering. In order to lower the pain, "Zhang" gave her an unlabelled pump bottle of cream (the "Cream"). The bottle had neither a packaging nor a leaflet. Mr Zhang told the Player that the Cream was a "Chinese antibacterial cream" or a "Chinese Neosporin".

11. The Player started to use the Cream provided by Mr Zhang, but *"didn't use it on the days that I*

was actually playing the matches because I needed the tape to stick to my feet so I used it after I had lost on my way home and then once I got home I realised that it was actually starting to work coz it took about four days for my feet to start healing".

12. The Player took the Cream back home with her to the United States and continued using it for approximately five days twice a day. In addition, within the period between April 2019 and January 2020, she used the Cream about once a month to treat significant flare-ups.

13. In January 2020, the Player prepared for the Oracle Challengers Tournament in Newport Beach, California, USA. It is a tournament sanctioned by the Women's Tennis Association ("WTA") and therefore a Covered Event within the meaning of Article 1.10 of the TADP. During the preparation period, she suffered severe blistering on her feet and therefore decided to treat them with the Cream. She also used the Cream on the morning of her first round match of the Oracle Challengers Tournament on 27 January 2020.

14. On the same date, the Player was selected for doping control by the ITF and was therefore requested to provide a urine sample for drug testing purposes, which was assigned with the reference number 3141046A. This in-competition test was the second time in her tennis career that the Player was selected for doping control. On her Doping Control Form (the "DCF"), the Player provided information of the medication taken. However, she did not declare any skin creams or lotions, including the Cream.

15. On 14 February 2020, the WADA-accredited Montreal Laboratory completed its analysis of the Player's A sample and reported a certificate of analysis to the ITF, which indicated the detection of Growth Hormone-Releasing Peptide 6 ("GHRP-6" or "Prohibited Substance"). GHRP-6 is listed in the 2020 Prohibited List under S2. The substance is a non-specified substance prohibited at all time.

16. On 18 March 2020, the Player was notified by the ITF of the AAF and the charge, i.e. the commission of an Anti-Doping Rule Violation ("ADRV") under Article 2.1 of the TADP.

17. On 28 March 2020, a mandatory provision suspension was imposed on the Player in accordance with Article 8.3.3 of the TADP.

18. On 8 April 2020, the Player denied the charge and requested a hearing before the Independent Tribunal.

19. On 13 May 2020, upon request of the Player, the analysis of the Player's B sample (no. 3141046B) confirmed the results of the A sample.

20. On 15 May 2020, the Player was informed of the results of the B sample analysis.

IV. PROCEEDINGS BEFORE THE INDEPENDENT TRIBUNAL

21. On 28 May 2020, the members of the Independent Tribunal, namely Ms Carol Roberts, Professor Brian Lunn and Professor Isla Mackenzie, were appointed by the Chairman of the

Independent Panel, Charles Flint QC.

22. On 14 October 2020, the hearing before the Independent Tribunal took place in London, via video conference. During the hearing, the Parties agreed that the Player had provided compelling evidence to prove – on the balance of probabilities – that the Cream was the origin of source of the Prohibited Substance GHRP-6.

23. On 28 October 2020, the Independent Tribunal rendered the Appealed Decision.

24. The operative part of the Appealed Decision reads – in its pertinent parts – as follows:

> *"(ii) The Athlete has committed an Anti-Doping Rule Violation under Article 2.1 of the TADP;*
>
> *(iii) The Athlete is ineligible for a period of four (4) years for the Anti-Doping Rule violation, commencing on the date of this Order, with credit for the time the Athlete was provisionally suspended from 28 March 2020 onwards;*
>
> *(iv) Results obtained by the Athlete from 28 March 2020 are disqualified with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money pursuant to Article 9.1 of the TADP".*

25. Also, on 28 October 2020, the Appealed Decision with grounds was notified to the Player. Therein, the Independent Tribunal held – *inter alia* – as follows:

- *"The burden is on the Athlete to show that the ADRV was not intentional.*
- *[…] In the Tribunal's view, the Athlete engaged in conduct knowing that there was a significant risk that it might result in an ADRV and manifestly disregarded that risk.*
- *The Athlete was given the Cream by an individual she had met only a few days before, and whose full name she still does not know. She believes, but did not confirm, that the individual was associated with the Chinese Federation. She does not know, and did not ask, whether the individual has any medical training or experience. She relied on the statement of this individual that the Cream was 'like a Chinese Neosporin,' or that she understood, based on his explanation, that it was similar to Neosporin.*
- *Most significant however, the Cream was both unpackaged and unlabelled.*
- *[…] Athletes have a duty of care about what substance are found in their system, irrespective of the extent of their anti-doping education. The Tribunal finds that the Athlete failed to make even the most basic enquiries.*
- *It is not enough for the Athlete to say that there is no way she could have known that use of the Cream posed a significant risk. An Athlete cannot be 'wilfully blind' to obvious risks and then argue their wilful blindness should qualify them for a reduced sanction.*
- *The Tribunal finds that the Athlete has not discharged her burden of rebutting the presumption of intentional use. In light of this conclusion, the Tribunal need not consider whether she acted with No Fault or Negligence,*

or No Significant Fault or Negligence. Therefore, under Article 10.2.1 (a), the period of Ineligibility is four years".

V. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

26. On 18 November 2020, via email, and on 25 November 2020, via e-filing in accordance with Article R31 of the Code of Sports-related Arbitration (the "CAS Code"), the Appellant filed her Statement of Appeal with the CAS against the ITF in respect to the Appealed Decision of 28 October 2020 pursuant to Articles R47 *et seq.* of the CAS Code. In addition, the Appellant nominated Prof Ulrich Haas as arbitrator.

27. On 24 November 2020, via email, the Appellant requested a ten-day extension of the deadline to file her Appeal Brief.

28. On 26 November 2020, the CAS Court Office acknowledged receipt of the Appellant's Statement of Appeal and her email of 24 November 2020. In addition, the CAS Court Office, in accordance with Article R32 of the CAS Code, granted the Appellant's requested extension of the time limit to file her Appeal Brief.

29. On 8 December 2020, the Respondent informed the CAS Court Office that it has agreed with the Appellant to the appointment of Prof Ulrich Haas as a sole arbitrator in this procedure.

30. On 11 December 2020, the Appellant filed her Appeal Brief in accordance with Article R51 of the CAS Code.

31. On the same date, the Respondent requested an extension of the deadline to submit its Answer until 15 January 2021.

32. On 15 December 2020, the CAS Court Office granted the Respondent's request for an extension of the deadline to file its Answer.

33. On 15 January 2021, the Respondent filed its Answer in accordance with Article R55 of the CAS Code.

34. On 18 January 2021, the CAS Court Office acknowledged receipt of the Respondent's Answer. In addition, the Parties were invited to inform the CAS Court Office by 25 January 2021 whether they preferred a hearing to be held in this procedure. Furthermore, the CAS Court Office invited the Appellant to specify by 20 January 2021 whether or not it was her intention that Prof Ulrich Haas acts as a sole arbitrator in these proceedings.

35. On 19 January 2021, the Respondent informed the CAS Court Office that it does not consider it necessary to hold a hearing in this matter.

36. On 21 January 2021, the Appellant agreed to the appointment of Prof Ulrich Haas acting as sole arbitrator in this procedure.

37. On 24 January 2021, the Appellant requested for a hearing to be held in the present proceedings.

38. On 26 January 2021, the CAS Court Office informed the Parties that the Division President had decided to appoint Prof Ulrich Haas as the Sole Arbitrator in this matter, subject to the Parties' right to challenge the appointment pursuant to Article R34 of the CAS Code.

39. On 17 February 2021, the CAS Court Office confirmed the appointment of Prof Ulrich Haas acting as sole arbitrator ("Sole Arbitrator").

40. On 16 March 2021, the Appellant inquired with the CAS whether the Sole Arbitrator had already considered any possible hearing dates in the matter. Furthermore, the Appellant stated in her email on what dates she would be available for a hearing.

41. With letter of 17 March 2021, the CAS Court Office acknowledged receipt of the Appellant's email and advised the Parties that the Sole Arbitrator has decided to hold a hearing by video-conference.

42. With letter dated the same day the CAS Court Office on behalf of the Sole Arbitrator proposed several hearing dates in this matter based on the Appellant's availabilities and invited the Parties to state whether they would be available on any of these dates.

43. The Respondent provided its availabilities on the same day.

44. On 30 March 2021, based upon the Parties' respective availabilities the Sole Arbitrator decided to hold a hearing via videoconference on 4 May 2021. Furthermore, the letter invited the Parties to provide the names of all persons who will be attending the hearing on their behalf by 6 April 2021.

45. On the same date, the Respondent provided the requested information.

46. On 1 April 2021, the CAS Court Office, on behalf of the Sole Arbitrator, issued the Order of Procedure ("OoP") and invited the Parties to return a signed copy thereof.

47. On 6 April 2021, the Respondent returned a signed copy of the OoP and so did the Appellant on 9 April 2021. The CAS Court Office acknowledged receipt of the respective letters on 6 and 12 April 2021. Furthermore, in her email dated 9 April 2021, the Appellant communicated her list of attendees.

48. On 28 April 2021, the CAS Court Office provided the Parties with additional information on the hearing logistics.

49. On 4 May 2021, a hearing was held via video-conference. The Sole Arbitrator was assisted by Ms Andrea Sherpa-Zimmermann, Counsel to the CAS. The Appellant was present at the hearing and was assisted by Mr Howard Jacobs, Ms Linday S. Brandon and Mr Aaron Mojarras. The Respondent was represented by its counsels Mr Jonathan Taylor and Mr Chris Lavey and by Dr Stuart Miller, Anti-Doping Manager of the ITF. Furthermore, Mr Courtney McBride from the World Tennis Association ("WTA") attended the hearing as an observer with the consent of all Parties.

50. At the closing of the hearing the Parties confirmed that the Sole Arbitrator had observed their right to be heard and that they had ample opportunity to question / cross-examine the

witnesses and to present their case.

VI. SUBMISSIONS OF THE PARTIES

51. This section of the Award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Sole Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Position

52. In her Appeal Brief, the Player sought the following relief:

> *"9.1 For all of the foregoing reasons, it is respectfully submitted that that* [sic] *the Sole Arbitrator rule as follows:*
>
> *9.1.1 That the Award of the first instance tribunal be set aside;*
>
> *9.1.2 That this Sole Arbitrator find that any appropriate sanction in this case is 12 months, but under no circumstances should it exceed 2 years; and,*
>
> *9.1.3 That Ms. Kratzer receive credit for the provisional suspension imposed by the ITF and subsequent suspension imposed by the first instance.*
>
> *9.2 The Respondent shall bear all costs of the proceedings including a contribution toward Appellant's legal costs".*

53. The Appellant's submissions in support of her Appeal against the Appealed Decision of the Independent Tribunal may, in essence, be summarised as follows:

1. Intentional commitment of the ADRV

54. The Appellant submits that she did not deliberately use GHRP-6 and therefore did not commit the ADRV under Article 2.1 of the TADP intentionally:

(a) The definition of "intention" under Article 10.2.3 of the TADP expressly refers to the identification of those athletes who cheat. According to this definition, deliberate conduct requires engagement in conduct *"that she 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".*

(b) The Player had at no time the intention to cheat within the meaning of Article 10.2.3 of the TADP. Instead, she used the Cream for medical treatment purposes. She believed that the Cream provided by "Zhang" would reduce the pain suffering from blistering. On the contrary, she never anticipated that the Cream could contain a prohibited substance

or that there was a significant risk of an ADRV. Instead, she reasonably believed that a tennis coach would not provide her with something containing a prohibited substance.

(c) Her careless behaviour did not amount to intentional conduct within the ambit of Article 10.2.3 of the TADP, as wrongfully interpreted by the Independent Tribunal. In this respect, it is important to consider that the Player used skin cream for medical treatment rather than taking a pill for sports performance enhancing purposes or medication prescribed by a doctor. More specifically, the Player's conduct differs from cases decided by the CAS in which the athlete concerned acted with so-called "indirect intention", meaning that athletes recklessly used prohibited substances or methods to enhance their sporting performances.

(d) The case at hand is insofar different as the Player was suffering from severe blistering throughout her entire professional career. Therefore, she had used various skin creams in the past. The Chinese coach also provided her with a skin cream. The mere application of cream on her feet cannot be compared to the cases of indirect intention, because she was not *"running into a minefield while ignoring all stop signs"*. When using the skin cream, there was no indication that the cream could potentially contain a prohibited substance.

(e) To sum, the Player did not act intentional within the meaning of Article 10.2.3 of the TADP. Accordingly, the default sanction in the matter at hand is two years under Article 10.2.2 of the TADP.

2. No Significant Fault or Negligence

55. The Appellant submits that the basic sanction of a two-year period of Ineligibility should be further reduced on the grounds of No Significant Fault or Negligence under Article 10.5 of the TADP:

(a) In order to determine a further reduction of the Player's sanction, her degree of fault must be assessed in the light of the *Cilic* decision taken by the CAS (CAS 2013/A/2237). Therefore, the objective and subjective circumstances of the individual case are to be considered to determine the appropriate period of Ineligibility.

(b) Based on the objective circumstances, the Player followed the appropriate steps that are expected from responsible athletes in her situation. She read the labels and leaflets of the skin creams that she used to treat her severe blistering. The Cream provided by "Zhang" did not contain any label or packaging so that an internet search on the contained substances was not possible. However, the Chinese coach assured the Player that the Cream would not contain any prohibited substances. He knew that the Player was a drug tested athlete and informed the Player that many Chinese tennis players are using the Cream. Accordingly, the (objective) degree of fault must be considered as normal.

(c) With regard to the subjective degree of fault, various factors must be considered in favour of the Player, including her age and drug-testing history, the language barriers in China, the severe blistering problems and unsuccessful treatments, and her misunderstanding

that skin cream would not contain any prohibited substances. Her effort to find "Zhang" should also be taken into account.

(d) In the light of the objective and subjective degree of fault, the appropriate sanction in the matter at hand is between 12 and 16 months.

B. The Respondent's Position

56. In its Answer dated 15 January 2021, the Respondent submitted the following prayers for relief:

> *"6.1 Based on the foregoing, the ITF respectfully asks the Sole Arbitrator:*
>
> *6.1.1 to dismiss the Player's appeal in its entirety, without granting her any relief;*
>
> *6.1.2 to find that the Player has committed an anti-doping rule violation for which she must serve a period of ineligibility of four years, starting from 28 March 2020 (the date she was provisionally suspended);*
>
> *6.1.3 to disqualify the results that the Player obtained at the Newport Beach Event; and*
>
> *6.1.4 to order the Player to pay a contribution towards the ITF's costs".*

57. ITF's Answer may, in essence, be summarised as follows:

1. Intentional Commitment of the ADRV

58. The Respondent submits that the Appellant did not rebut the presumption of intent under Article 10.2.1(a) of the TADP:

(a) The definition of intent under Article 10.2.3 of the TADP generally refers to two forms where the athlete is subjectively at fault, namely deliberate commitment of an ADRV and knowledge of a potential risk for an ADRV and manifestly disregarding that risk.

(b) A particular risk is present if an athlete takes medication. In this situation *"it is established CAS jurisprudence that there is an inherent significant risk that medications may contain prohibited substances"*. It is therefore required that athletes carefully verify the content of medications before using it. It falls within the category of indirect intention under Article 10.2.3 of the TADP if athletes take substances for medical reasons without their content being checked. In turn, athletes' actions may not be characterised as intentional under Article 10.2.3 of the TADP if they either failed to recognise the risk of an ADRV or *"saw the risk and did not disregard it but did not do enough to address it"*.

(c) In the matter at hand, the Player knew that there was a risk that the unlabelled Cream provided by the Chinese coach could contain a prohibited substance and nevertheless manifestly disregarded that risk.

(d) In this regard, the Player cannot pretend that she did not know that there was a risk at the time of the application of the unlabelled Cream. She is a drug tested athlete who has received anti-doping education. She was further aware of her responsibility for what she puts into her body, as admitted in her witness statement of 17 August 2020.

(e) The element of "cheat" contained in Article 10.2.3 of the TADP is not a separate criterion to determine intention under said provision.

(f) Furthermore, she had no reason to believe that the unlabelled Cream could not potentially contain prohibited substances. The Chinese coach told her that the Cream was *"like a Chinese Neosporin"*. Neosporin is an antibiotic which is only purchasable in US pharmacies. She also used the Cream for several months due to its better therapeutic effect compared with other skin creams she had previously used. She was therefore aware of the fact that the Cream contained "stronger" substances. She further used the Cream in a sporting context to reduce the pain and to accelerate the healing process.

(g) Accordingly, the Player acted intentionally within the meaning of Article 10.2.3 of the TADP and therefore the appropriate sanction is a period of Ineligibility of 4 years in accordance with Article 10.2.1 of the TADP.

2. No Significant Fault or Negligence

59. If the Sole Arbitrator comes to the conclusion that the Player did not act intentionally, the Respondent submits that her sanction cannot be further reduced on the basis of No Significant Fault or Negligence:

(a) The Player received the Cream in an unfamiliar foreign country from a person who was neither a doctor nor otherwise medically qualified. She had no further information about "Zhang" and did not explain why he would not give her medications that contained prohibited substances.

(b) She was not able to do any research on the Cream, because it was unlabelled. Consequently, she was completely ignorant about the composition of the Cream.

(c) She did not seek advice from anyone else, even after she returned to the US. Instead, she continued using the Cream for several months. In line with the *Qerimaj* decision (CAS 2012/A/2822) taken by the CAS, her conduct can therefore be described as *"running into a minefield while ignoring all stop signs"*.

(d) To sum, the Player cannot invoke the No Significant Fault or Negligence plea under Article 10.5 of the TADP.

VII. JURISDICTION

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

"An appeal against the decision of a federation, association or sports-related body may be filed with the

CAS if the statutes or regulations of said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

61. Article 12 of the TADP provides as follows:

> *"12.1 Decisions Subject to Appeal:*
>
> *Decisions made under this Programme may be appealed only as set out in this Article 12 […]*
>
> *12.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Recognition of Decisions and Jurisdiction:*
>
> *12.2.1 A decision that an Anti-Doping Rule Violation has been committed, a decision imposing (or not imposing) Consequences for an Anti-Doping Rule Violation […] may […] be appealed by any of the following parties exclusively to CAS:*
>
> *(a) the Participant who is the subject of the decision being appealed; […]".*

62. The Appealed Decision constitutes both a decision that an ADRV has been committed by the Player and a decision imposing Consequences on the Player, i.e. a four-year period of Ineligibility.

63. In addition, the Appealed Decision further provides – in its pertinent parts – as follows:

> *"In accordance with Article 12 of the TADP, this decision may be appealed to the Court of Arbitration for Sport within 21 days of receipt of the decision […]".*

64. Furthermore, the jurisdiction of the CAS is not contested by the Parties and is confirmed by the OoP signed by all Parties.

65. It follows, therefore, that CAS has jurisdiction to decide on the present dispute.

VIII. ADMISSIBILITY

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

> *"In the absence of a time limit in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for the appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the parties".*

67. Article 12.5.1 of the TADP provides as follows:

> *"The deadline for filing an appeal to CAS shall be 21 days from the date of receipt of the decision in question by the appealing party".*

68. It follows from the above that the grounds of the Appealed Decision were communicated to the Appellant on 28 October 2020. The Appellant filed her Statement of Appeal on 18 November 2020, i.e. within the prescribed deadline of 21 days. The Appeal also complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

69. It, therefore, follows that the Appellant's Appeal is admissible.

IX. APPLICABLE LAW

70. Article R58 of the CAS Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in absence of such 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

71. Article 1.11 of the TADP provides as follows:

> *"Any player who enters or participates in a Covered Event or who has an ATP or WTA ranking […] in the 2020 calendar year […] is automatically bound by and required to comply with all the provisions of this Programme […]".*

72. The Oracle Challengers Tournament in Newport Beach, California, USA, in which the Player competed before the doping control is a Covered Event within the meaning of Article 1.10 of the TADP. Furthermore, the Player was ranked by the WTA in 2020.

73. According to Article 1.6.1 of the TADP, the 2020 version of it applies to all cases where the alleged ADRV occurred after its entry into force, i.e. 1 January 2020.

74. In the case at hand, the alleged ADRV occurred on 27 January 2020. Therefore, the 2020 TADP is primarily applicable to the merits of this Appeal. The Sole Arbitrator also notes that both Parties expressly rely on the WADC as well as various CAS jurisprudence interpreting these rules. Subsidiarily, English law will apply should the need arise to fill a lacuna in the TADP in accordance with Article 12.6.4 of the TADP. Neither Party took issue with this approach.

X. SCOPE OF REVIEW

75. Article R57 of the CAS Code reads – in its pertinent parts – as follows:

> *"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance".*

76. In addition, Article 12.6.5 of the TADP provides as follows:

> *"The scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issue or scope of review before the initial decision maker".*

77. In the light of the foregoing, the Sole Arbitrator is satisfied that he has full power to review *de novo* the dispute and the evidence before him in order to examine the appropriate consequences of the ADRV to be imposed on the Appellant and the commencement thereof.

XI. MERITS

78. It is undisputed between the Parties that the A and B samples of the Appellant, collected on 27 January 2020, contained the substance GHRP-6, which is a prohibited substance listed in the 2020 Prohibited List under S2.3 ("Peptide Hormones, Growth Factors, Related Substances, and Mimetics"). GHRP-6 is a non-specified substance and prohibited at all times, i.e. in-competition and out-of-competition.

79. Equally, it is uncontested between the Parties that the Appellant committed an ADRV within the meaning of Article 2.1 of the TADP. In addition, the Appellant did not challenge the disqualification of her results in accordance with Article 9.1 of the TADP, with all resulting consequences, including forfeiture of ranking points and prize money obtained by the Player in the Oracle Challengers Tournament in Newport Beach, California, USA. However, what is contested between the Parties is the appropriate period of ineligibility as a consequence of the ADRV committed.

A. The applicable Legal Framework

80. With respect to periods of ineligibility in cases involving the presence of a prohibited substance (Article 2.1 TADP), Article 10.2 of the TADP provides – in its pertinent parts – as follows:

> *"The period of Ineligibility imposed for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Participant's first anti-doping offence shall be as follows, subject to potential suspension pursuant to Article 10.6.*
>
> *10.2.1 The period of Ineligibility shall be four years where:*

> *(a)The Anti-Doping Rule Violation involves a Prohibited Substance that is not a Specified Substance, unless the Participant establishes that the Anti-Doping Rule Violation was not intentional.*
>
> *(b)The Anti-Doping Rule Violation involves a Specified Substance and the Anti-Doping Organisation establishes that the Anti-Doping Rule Violation was intentional.*
>
> *10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6.*
>
> *10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Participants who cheat. The term, therefore, requires that the Participant engaged in conduct that he/she 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. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance that is only prohibited In-Competition (a) shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Player can establish that it was Used Out-of-Competition; and (b) shall not be considered "intentional" if the Substance is not a Specified Substance and the Player can establish that it was Used Out-of-Competition in a context unrelated to sport performance".*

81. In addition, Article 10.5.2 TADP provides as follows:

> *"If an Athlete … establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete's … degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. …".*

82. Finally, Article 8.6.2 of the TADP provides as follows:

> *"Where this Programme places the burden of proof upon the Participant alleged to have committed an Anti-Doping Rule Violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability".*

B. Overview of the Questions at Stake in these Proceedings

83. The dispute at hand, i.e. the determination of the appropriate period of ineligibility pivots around the following questions:

> *i. Did the Player establish that she did not act intentionally within the meaning of Article 10.2.3 of the TADP?*
>
> *ii. In the affirmative, did the Player establish that she bears No Significant Fault or Negligence within the meaning of Article 10.5.2 of the TADP?*

iii. What are the appropriate Consequences of the findings under paragraph (i.) and (ii.), supra?

C. Did the Player act without intent?

84. In case of an ADRV involving a non-specified substance, an athlete is presumed to have acted intentionally (Article 10.2.1.1 TADP). However, the athlete can rebut such presumption. In the case at hand the substance found in the Appellant's sample is a non-specified substance. Consequently, the burden of proof rests on the Player to demonstrate that she did not commit the ADRV intentionally. She, thus, needs to convince the Sole Arbitrator by a balance of probability (Article 8.6.2 of the TADP) that she lacked intentionality within the meaning of Article 10.2.3 TADP.

a) Positions of the Parties

85. The Parties are in dispute whether the Player succeeds in rebutting the presumption that her ADRV was committed intentionally. The Appellant submits that the term "intentional" as defined under Article 10.2.3 of the TADP explicitly refers to athletes who cheat. The Appellant submits that she never intended to cheat. Instead, she used the Cream, which was provided to her by her Chinese coach in Anning, to treat severe blistering problems. The Appellant further submits that she never anticipated that the Cream could contain a prohibited substance, because (i) the Coach knew that she was a drug tested athlete and (b) because she was not aware that prohibited substances could be contained in skin creams. Therefore, she did not know that there was a risk of an ADRV and consequently did not manifestly disregard such risk. The Player submits that since she succeeded in rebutting the presumption that she acted intentionally, the starting point for determining the appropriate period of ineligibility is Article 10.2.2 of the TADP, i.e. a two-year ban (subject to further possible reductions based on her degree of negligence).

86. The Respondent submits that the definition of intention under Article 10.2.3 of the TADP covers two alternatives. The Respondent accepts that the Appellant did not engage *"in conduct that he or she knew constituted an anti-doping rule violation"*. However, Article 10.2.3 of the TADP also qualifies a conduct as intentional, if an athlete *"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 Respondent submits that the Appellant knew that there was such risk, because the latter is inherent when using medications, whether through pills, creams or other forms. As a consequence, athletes have the duty of care to check what substances are contained in medications before using them. In the case at hand, the Respondent submits that the risk was even more apparent, since the Cream applied by the Appellant was unlabelled. The Respondent further submits that the Player manifestly disregarded this risk, because she never checked whether or not the Cream contained prohibited substances, even after she returned to the United States. Instead, she regularly used the Cream for an extended period of time (nine months) without consulting a doctor or any other person with medical qualifications. Consequently, the Player acted intentionally within the meaning of Article 10.2.3 of the TADP and the default sanction under Article 10.2.1.1 of the TADP applies, which provides for a four-year period of Ineligibility.

b) Findings of the Sole Arbitrator

87. The Sole Arbitrator concurs with the Parties that the first alternative in Article 10.2.3 TADP is not applicable to the case at hand. The Player did not know when applying the Cream that such conduct constituted an ADRV. However, it is disputed between the Parties whether the second alternative in Article 10.2.3 TADP applies to the Player, i.e. whether or not she *"engaged in conduct which […] she […] 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"*. For the second alternative to apply, two prerequisites need to be fulfilled. First, the Appellant must have known that her conduct involved a significant risk. Second, the Player must have manifestly disregarded that risk. Thus, in order to rebut the presumption that she acted intentionally, the Player must either show (by a balance of probability) that she did not know that her conduct involved a significant risk or that she did not manifestly disregard such risk.

aa) Did the Appellant know that there was a significant risk?

88. It is well-known in the world of sport that particular care is required from an athlete when applying medications, because the danger of a prohibited substance entering the athlete's system is particularly high in such context, i.e. significant (e.g. CAS 2020/A/7299 no. 133 et seq.; CAS 2013/A/3327, no. 75; CAS 2016/A/4609, no. 68).

89. It is uncontested between the Parties that the Appellant received some anti-doping education. She stated that she is aware that supplements and medications must be checked for prohibited substances before being administered. Thus, in the abstract, the Appellant is and was aware that self-medication is associated with a significant doping risk. This is corroborated by the fact that the Appellant competes at an elite level already for many years and was at the relevant time "already" 21 years old.

90. What appears questionable, however, is whether the Appellant recognized the significant doping risk in relation to the specific circumstances of this case, i.e. whether she qualified the use of the Cream as administering or applying a medicine. Such assumption would be easier to make, if the Appellant had bought the Cream in a pharmacy, if the Cream had be given to her by doctor or if the Cream had been labeled as a medicine. This is not the case here. However, in the view of the Sole Arbitrator, it suffices that the Appellant – in a parallel evaluation from a layperson's perspective – knew enough to qualify her behavior as some form of self-medication.

91. In the view of the Sole Arbitrator this is the case here, since

- The Appellant from the age of 13/14 suffered from what she describes as a *"blistering problem"*. This term, however, is wholly inadequate to capture the Appellant's chronic pathological condition. It is sheer inconceivable for the Sole Arbitrator how someone suffering from such blistering is able to put on tennis shoes, to move and jump around and even less to play tennis at an elite level. The Appellant vividly and credibly described the pain she goes through when the blistering problem arises. She stated that in such case

"her feet feel like they're on fire" and that once *"the skin separates … it starts just bleeding through my shoes"*. It is, thus, a serious medical condition that the Player suffers from.

- The Appellant has recognized her blistering problem to be a serious medical condition, because she had consulted numerous doctors in order to find relief. However, she never got a precise diagnosis. She was prescribed different treatments that were of little or no help at all. She explained that only one of the products recommended to her by a doctor, "Neosporin", *"helped a bit"*. The latter is an anti-wound medicine, an antibiotic ointment that is sold in cream form. Neosporin does not contain a prohibited substance. The Appellant says that she regularly bought Neosporin at her local Target super market.

- The Cream was provided to the Player by Mr Zhang for therapeutic purposes, i.e. to treat her severe blistering.

- Once the Player applied the Cream she realized that it *"did help alleviate … [her] pain"* and that – from a therapeutic point of view – the product was fit for purpose. She stated at the hearing that when she applied the Cream the skin recovered. She, thus, understood that the Cream had a meaningful therapeutic effect that went well beyond those of home remedies, such as baking soda and water and moisturising creams.

- Once the Player realized that the Cream had a powerful therapeutic effect, she decided to keep the Cream and bring it back to the US for further use.

- In the time that followed, the Player applied the Cream similar to a medicine. She would not use it on a daily basis for preventive purposes, but only *"when the blisters got really bad"* i.e. in order to treat the medical condition. In the lead-up to the Oracle Challengers Tournament she again suffered from severe blistering and, therefore, applied the cream.

- The Appellant submits that she was unaware of a significant doping risk because she did not know that prohibited substances could be contained in creams and that the anti-doping education did not specifically refer to dangers stemming from creams. The Sole Arbitrator is not prepared to follow this. Medicines come along in different forms such as pills, creams, drops or syringes. This is well-known and one does not need specific anti-doping education to know that prohibited substances may enter into the athlete's system via ingestion, skin or bloodstream.

92. In view of all of the above, the Sole Arbitrator concludes that it is more likely than not that the Player recognized her conduct to be akin to self-medication and that she knew that there was a significant doping risk when applying or administering substances for therapeutic purposes.

bb) Did the Appellant manifestly disregard the risk?

93. In relation to the second prerequisite, i.e. whether the Player manifestly disregarded the risk, the Sole Arbitrator finds that – in view of the severe consequences flowing from intentional doping – such prerequisite should not be accepted lightly. This is also the purpose of the first

sentence of Article 10.2.3 of the TADP that clarifies that *"the term 'intentional' is meant to identify those Athletes who cheat"*. Thus, there needs to be some additional element in order to qualify such behavior as being *"beyond [gross] negligence"* (CAS 2016/A/4716, no. 70). In CAS jurisprudence this additional element is often referred to as recklessness (CAS 2016/A/4716, no. 61; CAS 2017/A/5022, no. 109 seq.). In CAS 2012/A/2822, para 8.14, e.g. the Panel described the kind of behavior targeted by Article 10.2.3 TADP as follows:

> *"However, it suffices to qualify the athlete's behavior as intentional, if the latter acts with indirect intent only, i.e. if the athlete's behavior is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If – figuratively speaking – an athlete runs into a 'minefield' ignoring all stop signs along his way, he may well have the primary intention of getting through the 'minefield' unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result (i.e. adverse analytical finding) may materialize and therefore acts with (indirect) intent".*

94. What follows from the above is that in order to qualify a behavior as "intentional" the person concerned must have accepted or consented to the realization of the offence or at least accepted it for the sake of the desired goal. On the other hand, a conduct is negligent or oblivious only, if the offender does not agree with the occurrence of the offence that is recognized as possible and, in addition, credibly – not only vaguely – trusts that the offence will not materialize. Thus, in order to separate negligence from (indirect) intent one must – in particular – look at this voluntative element. Of course, such element is difficult to determine *ex post*. However, as a general rule one may say that the more remote the realization of the offence is in the offender's mind, the less he or she may be deemed to have accepted it and, thus, to have acted intentionally within the above meaning.

95. Whether a certain behavior is "reckless" or only "oblivious" must be decided based on all relevant circumstances. The Sole Arbitrator is well aware that both types of behaviors are only separated by a very thin line. The Parties have submitted abundant jurisprudence to guide the Sole Arbitrator in his assessment. The Sole Arbitrator has read all these decisions and wishes to highlight two awards in particular:

- In CAS 2017/A/5015 the panel had to qualify the conduct of an *"extremely successful and experienced"* athlete that had sustained a severe blister on her lip from sunstroke. The athlete was aware that she had a medical condition that warranted therapeutic treatment. She therefore turned to the team doctor in order to obtain a product to ensure relief. Even though the athlete was aware that there is a high doping risk when administrating and applying medical products, the panel in the case rightly qualified the athlete's conduct as negligent and not intentional. In the athlete's mind the concrete risk of committing an ADRV was existent, but remote because of the source of the (medical) product. The latter was provided to her by the team doctor. She, thus, credibly – and not only vaguely – trusted that a possible doping risk will not materialize and consequently acted with negligence (for having relied blindly on the doctor's recommendation). However, such behavior – even though in clear breach of an athlete's duties according to which *"athletes cannot rely on the advice of their support personnel, including medical doctors"*, but must themselves investigate whether the medication does contain prohibited substances (CAS

2018/A/5581, no. 54; CAS 2012/A/2959) – does not amount to an intentional ADRV. The panel in CAS 2018/A/5581, no. 56 even found so in a case where the athlete relied on a product provided by his pediatrician that had *"zero knowledge of the anti-doping regime in sport"*.

- In AAA No. 01-16-0000-6096 the panel had to qualify the conduct of an athlete that had asked her grandmother *"for something to relieve her neck and menstrual pain"*. The grandmother gave the athlete a pill that looked familiar to the athlete, i.e. a product that she had used before (ibuprofen) and that was perfectly licit. Unfortunately, the athlete was mistaken and the pill was a different product containing a prohibited substance. It is obvious that the athlete breached her duty of care, because she had failed to make any inquiries with respect to the pill. In the panel's view, however, the athlete acted negligently and not intentionally when ingesting the pill. In coming to this conclusion, the panel took – inter alia – into account that the athlete was in a kind of state of exception at the relevant time. The panel found that the athlete was not thinking clearly when taking the pill, because she suffered from severe pain and stress. She only wanted to relieve the pain she was suffering from and did neither accept nor consent to any other "collateral goals". In other words, she did not have any other thoughts beyond this point.

96. The Sole Arbitrator notes that when Mr Zhang gave the Cream to the Appellant she was in acute pain, suffering from severe blistering, had no access to her support personnel (coach), because the latter did not accompany her to China. She was aware that Mr Zhang was not a doctor, but "only" a local coach that was somewhat affiliated to the Chinese tennis federation. However, he described the Cream as a Chinese version of Neosporin, i.e. a product the Player was familiar with, that is perfectly admissible in sport and does not contain any prohibited substances. Furthermore, Mr Zhang knew that the Player was submitted to doping tests and told her that other tennis players were also applying the Cream to treat blistering. Also, there was a language issue, since Mr Zhang *"spoke very little English"*. In the circumstances the Player found herself in, i.e. preparing for the Kunming Open Tennis Tournament held in Anning, China and with no access to professional advice she had only the option to either treat the blistering with the Cream or abandon the tournament. The Player explained that participating in the ITF circuit entails very high expenses. Her parents were paying for all her travels, accommodations, coaches and competition fees. In the first instance hearing the Player stated that *"[t]hey're the ones that pay for me to do this, so I don't want to let them down by me having a blister. It's not their fault, it's my fault, it's just the type of thing that I have to cope with and figure out on my own"*. Thus, she was under considerable pressure and "giving up" was under such circumstances not part of her mind-set. The Sole Arbitrator finds that in view of the specific facts of the case and in light of the jurisprudence cited the Appellant did not act intentionally / recklessly while preparing for and playing the tournament in China.

97. However, by the time the Appellant was tested at the Oracle Challengers Tournament in Newport Beach, California, USA the circumstances had changed. Many months had passed since the Player returned from China. She had become aware that the Cream clearly had therapeutic effects and that it was *"pretty much the only thing that's helped"* to treat the blistering. She would use the Cream only, if she got a significant flare-up, i.e. about once a month. In between these flare-ups she would use other products / creams, in particular Neosporin on a

daily basis. She, thus, had understood that the effects of the Cream went well beyond Neosporin. It is for this reason that she *"tried not to use the Cream too much"*. All of this indicates that she used the Cream like a medicine. Furthermore, she now had access to medical and other professional advice. It appears, therefore difficult to assume that as of this moment in time she credibly – not only vaguely – regarded the doping risk associated with the administrating of the Cream to be remote.

98. Furthermore, the Appellant was no longer in a state of exception. This is not to say that she was not under pressure or pain, because the Player credibly stated that the blistering problem turned her life into a constant struggle. However, the Appellant also stated that she did not play tournaments between August 2019 and January 2020, i.e. before the Oracle Challengers Tournament in Newport Beach. The Sole Arbitrator is, therefore, of the view that she had some time to reflect on the events in China and the risks associated with the Cream. Looking back and having the advantage of assessing the circumstances with some time decency she must have noted a series of red flags, i.e. that the Cream had a strong therapeutic effect, that the Cream was provided to her by somebody who was not a doctor and with whom she could barely communicate, that there was no label on the box, that she had no clue as to the contents of the Cream and that, in effect, she had no trust worthy of protection to assume that the doping risk associated with a product used for therapeutic purposes was remote. The Appellant stated that – after returning to the US from China – she found the time (and obviously also felt the need) to tell her parents about the Cream. She could not recall the contents of these conversations, but for sure they must have pivoted around the fact that the Cream was *"pretty much the only thing that helped"* against the blistering, i.e. that the Cream had noteworthy therapeutic properties. The fact that the Cream's container was unlabelled was no reason to stop any investigations into the matter, but – instead – should have turned on an additional warning light. To conclude therefore, the Sole Arbitrator finds that when the Player applied the Cream prior to the Oracle Challengers Tournament she acted intentionally.

D. What are the appropriate Consequences?

99. The Sole Arbitrator finds that the appropriate sanction in the present case is a period of Ineligibility of four years pursuant to Article 10.2.1 of the TADP. This finding excludes any reduction of the period of ineligibility based on fault. Accordingly, the Sole Arbitrator cannot consider the submissions of the Appellant in this respect. In addition, the results of the Player obtained at the Oracle Challengers Tournament in Newport Beach, California, USA are disqualified pursuant to Article 9.1 of the TADP.

100. The Sole Arbitrator notes that the ITF provisionally suspended the Player on 28 March 2020 in accordance with Article 8.3.1 of the TADP. Based on the evidence before the Sole Arbitrator, the Player has not breached her provisional suspension. Therefore, in application of Article 10.10.3 of the TADP, the Appellant's period of Ineligibility of four years shall commence on the date of the CAS hearing 5 May 2021 and the time served under the provisional suspension since 28 March 2020 shall be credited to the Appellant.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ms Ashley Kratzer on 18 November 2020 against the International Tennis Federation with respect to the decision rendered by the Independent Tribunal on 28 October 2020 is dismissed.

2. All results obtained by Ms. Ashley Kratzer from 28 March 2020 are disqualified, with all resulting consequences, including forfeiture of any titles, ranking points, and prize money obtained at the Oracle Challengers Tournament in Newport Beach, California, USA.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.