

**IN THE MATTER OF AN APPEAL TO AN INDEPENDENT TRIBUNAL CONVENED
UNDER THE RULES OF THE INTERNATIONAL TENNIS FEDERATION**

BETWEEN

ILIE NĂSTASE

Appellant

and

INTERNATIONAL TENNIS FEDERATION

Respondent

DECISION AND REASONS OF THE INDEPENDENT TRIBUNAL

INTRODUCTION

1. This is a decision of the Independent Tribunal (the "Tribunal") sitting as an Appeal Panel in relation to an appeal by Mr Ilie Năstase (the "Appellant") dated 11 August 2017 against a decision of the Internal Adjudication Panel (the "IAP") of the International Tennis Federation (the "ITF") dated 20 July 2017.

PROCEDURAL HISTORY

2. On 11 August 2017, the Appellant filed a Notice of Appeal against the IAP's decision of 20 July 2017.
3. During that month, in accordance with Article 2.2 of the Procedural Rules Governing Proceedings Before an Independent Tribunal convened under ITF Rules effective from January 2017 (the "Procedural Rules"), Charles Flint QC, the Chairman of the ITF's Independent Panel, appointed Mr Andrew de Lotbinière McDougall as Chair of the Independent Tribunal, and Ms Despina Mavromati and Ms Susan Ahern as Tribunal members. In accordance with Article 1.1 of the Procedural Rules, Sport Resolutions acted as secretariat to the Independent Tribunal.
4. On 7 September 2017, a conference call was convened by the Chair of the Tribunal and directions were issued to the parties as to the procedure and timetable to be followed in the proceedings.
5. On 6 October 2017, the ITF submitted its Answer.
6. On 17 October 2017, the Tribunal issued its decision on the Appellant's disclosure requests.
7. On 3 November 2017, the Appellant submitted its Reply.
8. On 24 November 2017, the ITF submitted its Rebuttal.
9. On 13 December 2017, an oral hearing took place before the Tribunal in London, England. The hearing was attended by the following persons:

Independent Tribunal:

- Andrew de Lotbinière McDougall (Chair)
- Despina Mavromati
- Susan Ahern

For Mr Ilie Năstase

- Ilie Năstase (Appellant)
- Jane Mulcahy QC (Counsel to Mr Năstase)
- Tom Cleaver (Counsel to Mr Năstase)
- Mihnea Săraru (Counsel to Mr Năstase)
- Carina Vermeșan (Counsel to Mr Năstase)

For the ITF

- Hannah McLean (ITF In-House Counsel)
- Catherine Ure (ITF Junior In-House Counsel)
- Max Duthie (Counsel to the ITF)
- Lauren Pagé (Counsel to the ITF)

Witnesses

- Ion Țiriac (for Mr Năstase)
- Razvan Itu (for Mr Năstase – by Skype)
- Andreas Egli (for the ITF – by Skype)

Secretariat (Sport Resolutions):

- Catherine Pitre
- Roxana Weich

Observer

- Julien Huet (trainee of the Tribunal Chair)

JURISDICTION

10. Pursuant to Article b.iv of the Welfare Policy of the 2017 Fed Cup Regulations (the “Welfare Policy”), decisions of the IAP may be appealed to the Independent Tribunal in accordance with Regulation 15. The Tribunal is satisfied that the appeal was brought in accordance with Regulation 15(a) as well as Article 9 of the Procedural Rules, and thus, that it has valid appellate jurisdiction over the matter.

FACTUAL BACKGROUND

11. This section is necessarily a summary. The Tribunal considered all the material placed before it as well as the written and oral submissions made. The fact that specific reference is not made in this decision to any part or aspect of such material does not mean it was not considered and given the appropriate weight.

12. The events that give rise to this appeal occurred in the lead-up to and during a Fed Cup tie held between the visiting Great Britain team and the host Romania team in Constanta, Romania in April 2017 (the “Tie”).

13. On 20 April 2017, during the Fed Cup official dinner ahead of the Tie, the Appellant, after welcoming the Great Britain team, asked the Great Britain team captain, Anne Keothavong, for her room number and said something akin to *“neither of us are playing any more so it doesn’t matter.”* When she responded that she was married, he replied to the effect that *“me too, that doesn’t matter.”*

14. The next day, on 21 April 2017, during a press conference after the official draw, while a member of the Romanian team was answering a question about the news of another tennis player’s (the American player Serena Williams) pregnancy, the

Appellant made a comment in Romanian that was overheard about Ms Williams's then-unborn child: *"Let's see what colour it is. Chocolate with milk?"*

15. Ms Eleanor Crooks, a tennis journalist, recorded the Appellant's comment and reported it in an article.
16. At a team photograph session during the same press conference and as the Appellant and Ms Keothavong were posing next to each other for a photograph, the Appellant put his arm around Ms Keothavong, asked her again for her room number, and said something along the lines of *"we keep being attracted."*
17. The next day, on 22 April 2017, Mr Andreas Egli, the Tie referee and onsite representative for the ITF, held a meeting with the Appellant prior to the start of the first match (called a rubber) that day to inform him that the ITF was conducting an investigation into the comments made about Ms Williams and to Ms Keothavong. Mr Egli had been asked by ITF representatives to meet with the Appellant the day before on 21 April 2017 and had attempted unsuccessfully to reach him to organize a meeting that day. The next morning, on 22 April 2017, after practice sessions, was when Mr Egli and the Appellant were able to meet. Mr George Cosac, President of the Romanian Tennis Federation, and Mr Razvan Itu, organiser of the Tie and Vice President of the Romanian Tennis Federation, also attended the meeting on 22 April 2017.
18. Following the meeting, the Appellant went to the press room, stood in the doorway, and said to Ms Crooks words along the lines of *"why did you write that, you're stupid, you're stupid."* He also threatened to sue Ms Crooks for having written the article about him, said that the English media were *"out to get him"*, and continued to call her stupid.

19. The Appellant then entered the Great Britain team lounge, sat on the sofa, and made one or more telephone calls before leaving the room.
20. The first rubber that day was played without incident.
21. However, during the second rubber, which was between Sorana Cîrstea of Romania and Johanna Konta of Great Britain (the "Match"), several relevant events occurred in and outside the stadium.
22. In the early part of the second set of the Match, the Great Britain team captain Ms Keothavong asked Mr Campistol, the Match umpire, to ask the crowd to be quiet because some spectators behind the British player Ms Konta were making noise during points. In response to the request, the Appellant said words to the effect of *"this is not an opera."* At around this time, the Appellant complained that Ms Konta was taking too long to serve.
23. The Match umpire Mr Campistol then made an announcement asking spectators to respect the players during points. Immediately after that announcement, the Appellant said *"what's the fucking problem?"* Mr Campistol then issued a first warning to the Appellant. After that warning, the Appellant said to Mr Campistol *"you're stupid too."*
24. During the next game changeover, the Appellant had on-court discussions with the Match umpire Mr Campistol and the Tie referee Mr Egli who had come on to the court. The Appellant twice said words to the effect of *"and now the LTA is controlling the ITF."* Mr Campistol then issued a second warning, and Mr Egli warned the Appellant that any further misconduct would result in his removal as captain.

25. The Appellant responded to the Tie referee Mr Egli with words to the effect of "*the LTA is paying the ITF and you are part of it, you fucking asshole, cocksucker.*" Mr Egli instructed Mr Campistol to order the Appellant's removal from the Match. However, the Appellant refused to leave the court and continued to swear at Mr Egli, including by repeating that Mr Egli was a "*cocksucker*",¹ a "*fucking asshole*" and "*fucking stupid*". He also said to Mr Egli "*you know that you are not going to leave the country*".²
26. When the Appellant finally agreed to leave the court and was walking towards the stands, he turned and walked behind the Match umpire's chair towards the Great Britain team bench, leaning forward toward the player Ms Konta and her captain Ms Keothavong and calling them "*fucking bitches*" before then turning away and stepping off the court into the stands.
27. The Appellant sat in the Romania team section in the stands. While Match officials continued their discussions on court, spectators began booing loudly and started chanting the Appellant's first name "*Ilie*." The Tie referee then ordered the Appellant's removal from the stadium, and the Appellant was asked to leave, which he did with a security escort, following which his accreditation pass was removed.
28. Shortly after the Appellant left the stadium and play had resumed, Ms Konta broke down in tears on the court and was unable to continue play, at which time the

¹ During the hearing, the Appellant, when questioned by counsel for the ITF and the Tribunal, asserted for the first time that this insult was actually uttered in German, with the intent to mean "*asshole*." Mr Egli, whose native language is German, testified that nothing was said to him in German and confirmed that these words were said to him.

² At the hearing, the Appellant initially denied saying to Mr Egli that he would not leave the country but later said that he did not remember what he had told him.

Match umpire and Tie referee suspended play for several minutes before play was resumed.

29. When the Appellant was escorted out of the stadium by around six security guards, a number of media representatives were outside the stadium filming the Appellant. One was the same journalist Ms Crooks, who was filming the Appellant on her mobile telephone. The Appellant turned and advanced towards Ms Crooks, causing the security guards to block him from advancing further although he continued to try to advance towards her and while shouting at her "*why are you filming me?*", to which she responded "*because it's my job.*" The Appellant then said "*you fucking [inaudible]³ you don't have a job, you're stupid.*" He also called her "*ugly.*" The security guards then led him away.

30. That evening, on 22 April 2017, Mr Itu (on behalf of the Appellant) asked Mr Egli whether the Appellant could enter the stadium the next day to apologise to the Great Britain team. Mr Egli said that he would be willing to meet the Appellant offsite.

31. The next morning, on 23 April 2017, a press officer from the Romanian Tennis Federation provided the Tie referee Mr Egli with an apology note that the Appellant wanted to be read aloud in the stadium before the first rubber that day. Mr Egli said that the note could not be read aloud before the rubber, but that it might be read aloud after. The note was not ultimately read aloud.

32. The same morning, the IAP provisionally suspended the Appellant.

³ At the hearing, the Appellant said that he believed the word he had said after "*fucking*" was "*stupid.*"

33. On 11-15 May 2017, the Appellant sent apology notes to Ms Williams, Ms Crooks, the Great Britain team, Mr Campistol and Mr Egli.

34. Six formal charges of breach of the ITF Welfare Policy were issued against the Appellant. Two rounds of written submissions were then exchanged by the parties. The Appellant made a request for an oral hearing before the IAP, which was denied.

35. In its decision issued on 20 July 2017, the IAP upheld four of the charges, finding that:

- the comment made about Ms Williams *"constitutes a violation of general introductory provisions of the Welfare Policy requiring him, as a Covered Person, to conduct himself in a 'professional manner at all times'. The comment also reflects unfavourably on the Fed Cup, the ITF and tennis, and so breaches Article a.v.b."*⁴
- the comments made to Ms Keothavong *"constitute a violation of Article a.iv.c of the Welfare Policy."*⁵
- the Appellant's entrance into the Great Britain lounge does not constitute a violation of the Welfare Policy.⁶
- the incidents between the Appellant and Ms Crooks *"constitute a serious violation of Article a.iii.b of the Welfare Policy by Mr. Năstase."*⁷

⁴ IAP's Decision, para 62.

⁵ IAP's Decision, para 67.

⁶ IAP's Decision, para 68.

⁷ IAP's Decision, para 71.

- the Appellant's *"on court conduct constitutes [a] serious violation of Articles a.ii.a, a.iii.a, a.iii.b and a.v.b of the Welfare Policy."*⁸
- the Appellant's overall conduct *"may have some bearing on the penalty imposed"* but is not considered *"as a separate charge under the Welfare Policy."*⁹

36. The IAP decided that the Appellant:

*"97.1 Is suspended from acting in an official capacity (including, but not limited to, team Captain) in all Official ITF Team Competitions included under Bye-Law 2.1(a) of the ITF Constitution, individual competitions included under Bye-Law 2.2(2), and Official ITF Tennis Circuits included under Bye-Law 2.2(3) until 31 December 2020.
97.2 Shall be denied access to, or otherwise granted accreditation for, the competitions and circuits described in paragraph 97.1 until 31 December 2018;
97.3 Is fined a sum of US\$10,000."*¹⁰

37. On 11 August 2017, in accordance with Regulation 15 of the 2017 Fed Cup Regulations and Article 9 of the Procedural Rules, the Appellant brought an appeal against the IAP's decision.

38. On appeal, the ITF maintained the four charges upheld by the IAP, i.e. the charges relating to the comments made about Serena Williams and to Anne Keothavong, the incident between the Appellant and Ms Crooks, as well as the Appellant's on-court conduct. In order to provide a better understanding of the charges brought against the Appellant, the Tribunal believes it helpful to set out the relevant provisions of the Welfare Policy.

⁸ IAP's Decision, para 83.

⁹ IAP's Decision, para 84.

¹⁰ IAP's Decision, para 97.

39. The introductory provision of the Welfare Policy states that “[a]ny team member coach, trainer, manager, agent, medical or para-medical personnel and/or family member, tournament guest, or other similar associate of any player or team (together ‘Player Support Team Member’), any player and any tournament personnel, such as an official, tournament director, staff, volunteer, sponsor, health care provider, ITF staff member and members of the media (together ‘Credentialed Person’) shall conduct himself/herself in a professional manner at all times and in accordance with this ITF Welfare Policy” and that “Player Support Team Members, players and Credentialed Persons shall be defined as ‘Covered Persons’”.

40. In addition to that introductory provision, the Appellant is alleged to have breached:

- Article a.ii.a: “Covered Persons shall not engage in unfair or unethical conduct including any attempt to injure, disable or intentionally interfere with the preparation or competition of any player”;
- Article a.iii.a: “Covered Persons shall not abuse his or her position of authority or control, and shall not attempt to or compromise the psychological, physical or emotional wellbeing of any player”;
- Article a.iii.b: “Covered Persons shall not engage in abusive conduct, either physical or verbal, or threatening conduct or language directed toward any Covered Person, parent, spectator or member of the press/media”;
- Article a.iv.c: “Covered Persons shall not engage in sexual harassment - for example, by making unwelcome advances, requests for sexual favours or

other verbal or physical conduct of a sexual nature where such conduct may create an intimidating, hostile or offensive environment”;

- Article a.v.b: *“Conduct in General – Covered Persons shall not conduct himself or herself in a manner that will reflect unfavourably on the ITF, any tournament, event or circuit owned or sanctioned by the ITF (the ‘ITF Tournaments’), any player, official or the game of tennis.”*

THE PARTIES’ POSITIONS

41. The Tribunal notes that the parties’ submissions were very comprehensive and well argued, and that all of them were considered by the Tribunal. The following summary is only intended to provide a brief overview of the parties’ respective positions.

The Appellant:

42. The Appellant contends that the charge relating to the comment about Serena Williams (the “Williams Charge”) should have been *“dismissed, or in any event no further sanction imposed beyond the interim suspension.”*¹¹ In particular, the Appellant argues that (i) conduct which did not fall within a prohibition in the body of the Welfare Policy could not be held to contravene the Welfare Policy because of *“general wording in the preamble”*, (ii) the comment *“reflected unfavourably on Mr Năstase, but it did not reflect unfavourably on the Fed Cup, the ITF, or tennis as a whole”*, and (iii) the comment was an isolated comment made on the spur of the moment.¹²

¹¹ Appellant’s Notice of Appeal, para 57.

¹² Appellant’s Notice of Appeal, paras 53 and 54.

43. Similarly, the Appellant argues that the charge relating to the comments made to Ms Keothavong (the “Keothavong Charge”) should have been “*dismissed, or in any event no sanction imposed beyond the interim suspension.*”¹³ The Appellant contends that the comments made were (i) made not as a sexual advance but as a joke, (ii) made in a light-hearted tone and in a public forum, which suggests that he did not expect an answer to a genuine request, and (iii) apparently well-received as it was “laughed off” and nobody suggested to the Appellant that the joke was unwelcome.¹⁴
44. With respect to the charge relating to the incidents with Ms Crooks (the “Press Charge”), the Appellant admits that there was a breach of the Welfare Policy but contends that he did not act in a threatening manner, that he did not intend to interfere with the freedom of the press, and that there is “*no basis for any substantial sanction in relation to the Press Charge*” given the fact that Ms Crooks had accepted the Appellant’s apology as well as other “*mitigating circumstances*”, which will be set out below.¹⁵
45. With respect to the charge relating to the Appellant’s conduct on court (the “On-Court Charge”), the Appellant argues that the IAP’s “*findings on the On-Court Charge [should] have been limited to verbally abusive comments made by Mr Năstase in contravention of Article a.iii.b. In relation to the issue of the appropriate sanction to be imposed, Mr Năstase relies on [...] mitigating circumstances*”.¹⁶ In particular, the Appellant (i) denies that he threatened Mr Egli, as the words “*you know you’re not going to leave the country*” could not

¹³ Appellant’s Notice of Appeal, para 68.

¹⁴ Appellant’s Notice of Appeal, para 18.

¹⁵ Appellant’s Notice of Appeal, paras 72-76.

¹⁶ Appellant’s Notice of Appeal, para 84.

reasonably have been interpreted as a threat, and were not perceived as such, (ii) denies that he intended to interfere with the Great Britain team's competition and compromise their psychological wellbeing, and (iii) asserted that the IAP had erroneously ignored the evidence *"with respect to the general tension created between Mr Egli and himself as a result of the inappropriate meeting called just two hours before the matches."*¹⁷

46. The mitigating circumstances invoked by the Appellant in relation to several charges are the following:

"a. First, the irregular and inappropriate way in which Mr Egli, a man who had been in conflict with Mr Năstase in the past, notified Mr Năstase immediately before the match that he was to be the subject of disciplinary action. There was no good reason why he needed to be informed at that time or by the Referee who was due to preside over the match itself, and it was obviously likely to provoke an adverse reaction and to put Mr Năstase under considerable strain.

b. Secondly, the fact that Mr Năstase already felt a sense of legitimate grievance at the fact that, in a Tie between British and Romanian teams, the ITF had chosen to appoint an Event Coordinator who was British rather than someone from a third country. That added to a legitimate sense of unfairness.

c. Thirdly, the conduct of Mr Egli and Mr Campistol during the match, which was unduly favourable to the GB Team.

¹⁷ Appellant's Notice of Appeal, paras 81-83.

d. Fourthly, the fact that Mr Năstase has made full and genuine apologies to all those whom he offended, even though (particularly in the cases of Mr Egli and Mr Campistol) he still feels aggrieved about what happened.

*e. Lastly, the fact that Mr Năstase was under pressure from the media's preconceptions of him resulting in an undue focus upon his actions."*¹⁸

47. The Appellant also argues that the IAP's decision on sanction "*was dramatically out of alignment with any remotely similar known case*", contravening its "*duty to act consistently and to treat like cases alike.*"¹⁹ In addition, the Appellant submits that the consequences of the existing suspension "*have already been severe enough, as other national and international tennis organisation have upheld the measure taken by the ITF and denied Mr Năstase accreditation or even access to prime tennis events (e.g. the WTA tour, Roland-Garros and Wimbledon).*"²⁰

48. On the basis of these considerations, the Appellant asserts that "*the appropriate order is that no further sanction is necessary*", and that, if a further sanction is necessary, it should be "*suspended so that it will take effect only in the event of a further infringement.*"²¹

The ITF:

49. Regarding the Williams Charge, the ITF submits that the IAP was "*right to find that the Serena Williams comment constituted both unprofessional conduct (in breach of the introductory provision of the Welfare Policy) and conduct that reflected unfavourably on the Fed Cup, the ITF and tennis (in breach of Article a.v.b of the*

¹⁸ Appellant's Notice of Appeal, para 88.

¹⁹ Appellant's Notice of Appeal, para 87.b.

²⁰ Appellant's Notice of Appeal, para 91.

²¹ Appellant's Notice of Appeal, paras 92-93.

Welfare Policy).²² In particular, the ITF argues that the IAP could properly rely on “the two catch-all provisions” of the Welfare Policy, which are “clearly aimed at upholding proper standards of good conduct at ITF tournaments.” Also, whether the Appellant had intended to make a racist remark is “beside the point” and that, by applying “an objective test in determining whether the Serena Williams comment could be interpreted as racist or was (at the very least) racially insensitive”, an objective observer would find that there was no justification for the comment. In addition, if the test to be applied were a subjective one, from the perspective of the person who is the subject of the comments, the ITF asserts that the test would “clearly” be met given Ms Williams’s reaction to the comment.²³

50. Regarding the Keothavong Charge, the ITF submits that the comments “constitute a breach of Welfare Policy Article a.iv.c (sexual harassment).”²⁴ In particular, the ITF contends that the Appellant’s actual intent is not relevant to the question of whether or not there was a breach, and that his comments (i) were of a sexual nature, as asking for a room number has a sexual connotation, (ii) were unwelcome, because, objectively, advances or jokes of a sexual nature have no place in a professional and public setting, and subjectively, because Ms Keothavong felt uncomfortable when the comments were made, and (iii) created an intimidating or offensive environment.²⁵

51. Regarding the Press Charge, the ITF contends that “on those two occasions Mr Năstase engaged in threatening conduct towards Ms Crooks, rendering his

²² ITF’s Answer, para 4.8.

²³ ITF’s Answer, para 4.5-4.7.

²⁴ ITF’s Answer, para 4.9.

²⁵ ITF’s Answer, para 4.12.

breach of Article a.iii.b far more serious."²⁶ In particular, the ITF claims that (i) the incident in the press room was objectively threatening, even though Ms Crooks did not feel personally threatened on that occasion, and (ii) the "*words [the Appellant] used and his aggressive body language during the second incident*" outside the stadium were both objectively and subjectively threatening.²⁷

52. Regarding the On-Court Charge, the ITF invites the Tribunal to "*make precisely the same finding*" as the IAP.²⁸ Regarding the Appellant's "*threatening conduct*", the ITF contends that the Appellant's words to the effect that Mr Egli would not leave Romania, in relation to his earlier comment that he was a Senator in Romania, objectively amounted to a threat, and was subjectively perceived as such by Mr Egli. Regarding the alleged breach of Article a.ii.a, the ITF contends that (i) the Appellant's conduct towards Ms Konta was "*deliberate and intentional conduct*" intended to "*unnerve his opposition*", and (ii) in the alternative, these comments were nevertheless unfair and/or unethical because they were abusive, uncalled for and "*disrupted the match and concentration*" of the opposite team. Finally, the ITF argues that the Appellant's on-court conduct reflected unfavourably on the ITF, the Fed Cup, and tennis, because (i) it was widely reported in the media, and (ii) the Appellant specifically called into question the integrity of the match officials and the ITF.²⁹

53. Regarding the Appellant's alleged mitigating factors, the ITF submits that "*none of them excuses his conduct or justifies any reduction in sanction.*"³⁰ In particular, regarding the earlier meeting with Mr Egli, the ITF argues that there is no evidence

²⁶ ITF's Answer, para 4.14.

²⁷ ITF's Answer, paras 5.1 and 5.2.

²⁸ ITF's Answer, para 5.4.

²⁹ ITF's Answer, para 5.5.

³⁰ ITF's Answer, para 6.1.

that *"anything said in the meeting could possibly have provoked Mr Năstase's subsequent misconduct"*. Regarding the citizenship of the ITF Event Coordinator, the ITF submits that (i) there is no evidence that Ms Clutterbuck was biased, and (ii) even assuming that she was biased, her role gave her no influence over the game on court. With respect to the conduct of match officials, their *"sole focus"* was, according to the ITF, to *"ensure respect for fair play during the Tie."* Finally, the ITF *"accepts that in principle (and subject to their timing, sincerity and content) apologies might be considered relevant in a case when determining what the appropriate sanction should be, any mitigation on that basis in this case should (in the ITF's view) be negligible at best."*³¹

54. With respect to the cases relied on by the Appellant, the ITF argues that (i) they are not binding as *"[c]orrectness trumps consistency"* and two rational decision-makers can reach different conclusions on the same or similar facts, and (ii) the cases do not suggest that the sanction imposed by the IAP was disproportionate.³² Moreover, the ITF claims that the fact that *"other tennis bodies have denied Mr Năstase accreditation to their tournaments (e.g. the WTA tour, Roland-Garros and Wimbledon)"* should have *"no bearing on the determination of a proportionate sanction in this case."*³³

55. Finally, regarding the final sanction to be imposed, the ITF contends that *"the appropriate sanction in this case lies in the range between (at the lower end) the sanction imposed by the IAP and (at the upper end) the position set out in the notice of charge."*³⁴

³¹ ITF's Answer, paras. 6.3-6.9.

³² ITF's Answer, para 8.6.

³³ ITF's Answer, para 8.7.2.

³⁴ ITF's Answer, para 8.4.

DISCUSSION

56. As a preliminary matter, the Tribunal notes that, in accordance with Article 9.5 of the Procedural Rules, this appeal has been heard *de novo*, as if the Tribunal were "*deciding the matter as the first instance decision-maker.*"³⁵ Accordingly, the Tribunal has assessed the matter independently, based upon the submissions made by the parties in these proceedings and the hearing held on 13 December 2017, and without giving any deference to the findings of and sanctions determined by the IAP.
57. Moreover, each party bears the burden of proving what it alleges, and the standard of proof is the balance of probabilities pursuant to Article 5.1 of the Procedural Rules. The Tribunal agrees with the ITF that there is no necessary connection between the seriousness and probability of an allegation and that the test is the balance of probabilities, nothing more and nothing less. In other words, the test is whether it is more likely than not that a fact has occurred, and the party that alleges a fact has to prove it to that standard (unless of course the fact is uncontested).
58. Also by way of introduction, the Tribunal recognizes the Appellant's many accomplishments and the significance of his career in the history of tennis, in Romania and worldwide. It also takes particular note of his concluding remarks at the hearing, in which he expressed what the Tribunal considered to be genuine remorse for his conduct and said in substance that leaving his beloved sport on such a note would be very difficult personally and would constitute a black mark on his career that he wishes were not there.

³⁵ See Article 9.5 of the Procedural Rules [AB Tab 2].

59. At the same time, while the Tribunal believes that these words from the Appellant made at the conclusion of the hearing in this proceeding were indeed genuine and sincere, they cannot excuse behaviour that is not acceptable according to the applicable standards and especially unworthy of someone who has been the number one tennis player in the world, among other accomplishments, setting an example for all tennis players of all ages in every country.

60. Moreover, as the Appellant was acting in his official capacity as captain of the Romanian Fed Cup team in April 2017 when all of the relevant events occurred, which was accepted by the Appellant when questioned at the hearing and in any event considered to be the case by the Tribunal, the Tribunal is satisfied that he was a "*Covered Person*" under the Welfare Policy.

61. The charges filed against the Appellant will be examined one after the other.

The Williams Charge

62. The Tribunal finds that the comment made about Ms Williams's then unborn child was quite simply inappropriate and unprofessional, in clear breach of the terms of the introductory provision of the Welfare Policy.

63. The Tribunal also finds that the comment reflects unfavourably on the ITF, the Fed Cup, and the game of tennis, in breach of Article a.v.b of the Welfare Policy.

64. Objectively, such a comment breaches the Welfare Policy, as the Tribunal considers that a reasonable person would find it inappropriate and unwelcome. The Tribunal also considers this to be the case from a subjective point of view, as

evidenced by the broad negative media coverage as well as Ms Williams's own reaction of outrage and disappointment.³⁶

65. The Tribunal finds no merit in the Appellant's argument that the comment was meant to be private because it was said in Romanian during a press conference in English. The press conference was held in Romania with many Romanian speakers around, and it was a press conference that the Appellant admitted he attended only because he was in his official capacity as captain of the Romania team. The Appellant should have known that there was a chance that his comment, which arguably was about the most high-profile player in women's tennis, would be overheard, understood, possibly caught on tape, and reported, whether in Romanian or translated into English. Indeed, that is exactly what happened.

66. The Tribunal acknowledges the evidence in the record, including the testimony of Mr Tiriac, which suggests that the Appellant is not a racist person as evidenced by his actions over his long career. The Tribunal finds that in the circumstances it could not conclude that the Appellant made the comments intentionally but rather recklessly. This finding of breach does not, for completeness, imply that the Appellant is a racist and the Tribunal does not make any such finding.

67. The damage to the ITF's reputation, to the Fed Cup, and to tennis is evidenced by the widespread media uproar the reported comments created, including the reaction from Ms Williams, again arguably the most high-profile female tennis player in the world. The Tribunal agrees that it is obvious that such a comment would be reported if overheard and would generate such negative coverage. The

³⁶ See Instagram post by Serena Williams dated 24 April 2017 [HB Tab 15].

Tribunal also considers that failing to take appropriate action in such circumstances would only compound the negative impact.

68. Therefore, the Tribunal finds that the Appellant breached the introductory provision and Article a.v.b of the Welfare Policy by failing to conduct himself in a professional manner at all times and by conducting himself in a manner that reflected unfavourably on the ITF, the Fed Cup, the Tie, Ms Williams, and the game of tennis.

The Keothavong Charge

69. The Tribunal finds that the Appellant's comments requesting Ms Keothavong's room number clearly amount to verbal conduct of a sexual nature, irrespective of whether they were meant as a joke or as an actual request for a sexual favour.

70. In addition, these comments created an intimidating and hostile environment, as explained in detail by Ms Keothavong, who laughed at the time because she wanted to "*minimise the situation*", not because she did not feel embarrassed.³⁷ As she explained in her evidence, the comments made her feel uncomfortable and disrespected and not treated as an equal, drawing attention to her gender, appearance, and sexuality rather than to her skills and experience. Indeed, the comments generated press coverage that was precisely to this effect. The fact that Ms Keothavong chose to react the way she did in no way diminishes the inappropriateness of the comments made and the fact that they were made in breach of the Welfare Policy.

³⁷ Witness statement of Anne Keothavong [HB Tab 10], para 6.

71. Accordingly, the Tribunal finds that the Appellant engaged in sexual harassment in breach of Article a.iv.c of the Welfare Policy by making unwelcome advances and other verbal conduct of a sexual nature where such conduct may create an intimidating, hostile or offensive environment.

The Press Charge

72. The Tribunal finds that, as admitted by the Appellant himself, the Appellant engaged in abusive conduct of a verbal nature toward a member of the press, in breach of Article a.iii.b of the Welfare Policy.

73. The Appellant's words were aggressive and insulting. He verbally abused Ms Crooks deliberately and more than once.

74. Regarding the existence of potentially aggravating factors, the question asked to the Tribunal is whether the Appellant acted in a threatening manner toward Ms Crooks. The Tribunal believes that the two incidents involving the Appellant and Ms Crooks need to be distinguished.

75. By her own account, Ms Crooks did not feel threatened during the incident which happened in the press room.³⁸ The Tribunal does not consider that the conduct of the Appellant at that time was threatening, whether objectively or subjectively. Nevertheless, the words used were harsh, insensitive and insulting, carried out in a public forum which was at that time the work environment of Ms Crooks.

76. However, later that day, outside the stadium, Ms Crooks did feel threatened by the Appellant, as she recalls wondering at that time what the Appellant would have

³⁸ Witness Statement of Eleanor Crooks [HB Tab 9], para 7.

done "*had he not been surrounded by security guards.*"³⁹ While the Tribunal takes no position as to what would have been likely to happen if the Appellant had not been surrounded by security guards, it finds that his conduct was indeed threatening on that occasion and that this is evident if nothing else from the video evidence.

77. While the Tribunal takes note of the fact that Ms Crooks accepted the Appellant's apology, this does nothing to change the nature of the Appellant's conduct at the time.

78. Accordingly, the Tribunal finds that the Appellant breached Article a.iii.b of the Welfare Policy by engaging in verbal, abusive conduct and threatening conduct directed at a member of the press.

The On-Court Charge

79. First, it is undisputed that the Appellant violated Article a.iii.b of the Welfare Policy on court during the Match. In particular, the Appellant admits that he engaged in "*verbally abusive*" conduct. Indeed, during the Match, the Appellant insulted the Match umpire Mr Campistol, the Tie referee Mr Egli, the visiting and opposing team captain Ms Keothavong, and the visiting and opposing team player Ms Konta, all of whom are Covered Persons under the Welfare Policy. Moreover, the Tribunal finds that the Appellant's conduct was threatening, as the words directed at Mr Egli could be interpreted as a threat.⁴⁰

80. Second, the Tribunal finds that the Appellant engaged in unfair conduct by intentionally interfering with the competition of Ms Konta in breach of Article a.ii.a

³⁹ Witness Statement of Eleanor Crooks [HB Tab 9], para 8.

⁴⁰ First Witness Statement of Andreas Egli [HB Tab 8a], para 12.

of the Welfare Policy and also abused his position of authority, compromising the psychological, physical and emotional wellbeing of Ms Konta in breach of Article a.iii.a of the Welfare Policy.

81. The Tribunal finds that the Appellant deliberately walked behind the Match umpire's chair and towards the player and her captain during the Match in order to swear at her, to call her and her captain "*fucking bitches*" to their faces. And this from the host team captain, former world number one, and legend in the tennis world 45 years senior to the visiting player. There can be no explanation for this action other than that the Appellant, who was in a position of authority as team captain, was intending to interfere with the opposing player's competition and attempting to compromise her wellbeing. And he did interfere with her competition and compromise her wellbeing – shortly after, the player broke down in tears on the court requiring suspension of the Match.

82. The Tribunal finds this behaviour to be particularly egregious and contrary to the spirit of fair competition and the Welfare Policy; the host team captain sought to and did intimidate the visiting team player during the Match, which cannot be condoned.

83. The Tribunal has reviewed the comments made by Ms Konta's opposing player, Ms Cirstea, during a post-Match press conference, saying that she has been called many bad things during matches in foreign countries in the past and suggesting that Ms Konta's reaction was exaggerated. However, having viewed the video evidence of the Match and considered the witness testimony, the Tribunal is not convinced that Ms Konta's reaction was anything but genuine, and no player,

under any circumstances, should be subjected to this kind of abuse during a match, especially from the opposing team's captain.

84. Third, the Appellant's conduct reflected unfavourably on the ITF, the Fed Cup, the player, the officials, and the game of tennis, in breach of Article a.v.b of the Welfare Policy, as the on-court incident was broadcast live on television and subsequently given wide media attention around the world.

85. Accordingly, the Appellant's on-court conduct breached Articles a.ii.a, a.iii.a, a.iii.b, and a.v.b of the Welfare Policy.

86. The Appellant has raised some mitigating factors in relation to the On-Court Charge which overlap significantly with the mitigating factors raised in relation to sanction more generally. Therefore, the Tribunal will address these arguments in the next section.

Mitigating Factors

87. The Tribunal has addressed the mitigating factors relating to a particular charge in the corresponding section. It will now examine the mitigating factors that the Appellant has raised in relation to more than one charge. As a preliminary matter, the Tribunal is mindful that some of these "*mitigating factors*", as they relate to the occurrence of a particular breach, may also be viewed as defences raised against a potential finding of breach. However, since the Appellant raised these elements as "*mitigating circumstances*" and that they were debated as such by the parties, the Tribunal will only consider them under this legal qualification.

88. The first mitigating factor raised by the Appellant is the manner in which Mr Egli notified the Appellant two hours before the Match that he would be subjected to an

investigation from the ITF in relation to the comments made about Ms Williams and to Ms Keothavong. While the Tribunal understands that this meeting may have upset the Appellant, it nonetheless considers that the meeting occurred at the earliest mutually convenient time, that there was nothing improper about giving the Appellant prompt notice of the investigation into his comments, and that this does not excuse the Appellant's subsequent actions or mitigate their consequences.

89. As an experienced player and coach, the Appellant should have known better.

90. The second mitigating factor raised by the Appellant is the fact that the ITF had chosen to appoint an "Event Coordinator" who was British. The Tribunal finds no merit in this argument, as there is no evidence that this could have favoured the Great Britain team over the Romania team, and there was thus no valid reason for the Appellant to feel that this situation was unfair. Indeed, this position was not pursued with vigour by the Appellant at the hearing.

91. The third mitigating factor alleged by the Appellant is the conduct of Mr Egli and Mr Campistol during the Match. The Tribunal does not consider that Mr Egli and Mr Campistol acted unfairly. While the Tribunal takes no position as to whether Ms Konta breached the time allowed per serve and whether she should have been sanctioned for it, these facts, even if true, could not justify the Appellant's reaction. Given the Appellant's conduct, there was nothing improper about the warnings Mr Egli and Mr Campistol issued to the Appellant or about the decision to remove him from the court and then the stadium.

92. The fourth factor relates to the apologies offered to the persons offended by the Appellant. While these apologies do not excuse the Appellant's behaviour, it is

appropriate to pay attention to their wording and the circumstances in which they were issued.

93. The fifth and final factor raised by the Appellant relates to the media's "*preconceptions*" of him. The Tribunal does not agree with this argument. The Appellant attracted the attention of the media through his own conduct and given his long experience as a tennis celebrity. After 50 years in the tennis world and as a legend in the sport, he should have known how to handle the situation and, again, should have known better than to conduct himself the way he did.

Sanction

94. The Tribunal, in reaching its determination with regard to sanction in this case, had regard to the submissions made by both parties with regard to appropriate sanctions. The Procedural Rules and the Welfare Policy are not accompanied by any form of guidance such as sentencing guidelines which could act as a barometer and therefore the Tribunal had to have regard to other means and decisions relating to tennis and other sports in reaching its conclusions. As a first step, the Tribunal adopted an approach to aid it in reaching a fair and balanced outcome with regard to each proven charge. That approach can be summarised in the following terms:

- First the Tribunal determined whether or not the charge alleged had been proven on the balance of probabilities;
- Second, with a proven breach it went on to consider whether, when taking into account the seriousness of the actions resulting in the breach, they

could be characterised as being “low-end”, “mid-range” or “serious” offending;

- Third, at that juncture mitigating factors were then considered; and
- Fourth, any aggravating features (e.g. repeated behaviour) were considered, if applicable.

95. The Tribunal has all of the sanctioning powers of the IAP, and thus, further to Article b.ii of the Welfare Policy “*may impose appropriate sanctions including (a) denial of privileges or exclusion of the person in question from any or all ITF Tournaments, or (b) such other sanctions including monetary sanctions as [it] may deem appropriate.*”⁴¹ In addition, Article 7.3 of the Procedural Rules states that “[t]he Independent Tribunal may award such relief as it sees fit, including declaratory and/or injunctive relief, and/or a monetary award. Where the Tribunal decides that a breach of the ITF Rules has been established, then (subject to any specific sanctioning provisions set out in those rules) the Independent Tribunal may impose such sanctions as it deems appropriate (any of which may be suspended), including (without limitation):

(a) a caution, reprimand and/or warning as to future conduct;

(b) a fine (which, unless otherwise specified, shall be payable within 30 days);

(c) a compensation payment;

(d) disqualification of results, with all resulting consequences, including forfeiture of any related medals, titles, ranking points, and/or prize money;

⁴¹ Rule 15 of the Fed Cup Regulations, Article 5.2.6 of the IAP Procedural Rules, and Article b.ii of the Welfare Policy.

(e) disqualification/expulsion from competitions or events,

(f) a specified period of ineligibility from participating in any aspect of tennis and/or in any activities organised, controlled, recognised and/or sanctioned by the ITF."

96. In its notice of charge, the ITF sought (i) a ban from acting as a Fed Cup captain for a period of 5-10 years, (ii) a ban from attending or receiving accreditation to any ITF tournaments for a period of 1-3 years, (iii) a fine of US\$ 20-30,000, and (iv) a requirement that the Appellant attend a diversity/racial awareness course.
97. The sanction imposed by the IAP was (i) a suspension from competitions and circuits run by the ITF until 31 December 2020 (almost three and a half years), (ii) denial of access and accreditation to such competitions and circuits until 31 December 2018 (almost a year and a half), and (iii) a fine of US\$ 10,000.
98. In this appeal, the Appellant seeks an order for "time served", in other words no sanction beyond what he has already suffered to this point, while the ITF seeks an increased sanction somewhere between what the IAP decided and the notice of charge.
99. The Appellant puts great emphasis on decisions rendered in other cases (by the ITF, by other tennis bodies, and in other sports) in arguing that the appropriate sanction should be determined by reference to decisions in other cases.
100. The Tribunal recognises the efforts made on both sides to give the Tribunal guidance on where the sanctions should appropriately lie. While the Tribunal has examined the cases brought to its attention, it agrees with the ITF that the cases relied upon by the Appellant are not binding and that none of them are sufficiently

comparable to the present case to provide a strong indication of what an appropriate sanction should be. As the ITF sets out, there does not appear to be any previous case in which a Fed Cup captain who was a famous and decorated player has used racially insensitive language about a current famous and decorated player, sexually harassed an opposing team captain twice, called a journalist stupid and ugly, used threatening and/or insulting and/or abusive language of the nature previously described towards a journalist, two match officials and an opposing team captain and player; and all in the space of three highly-publicised days.

101. The Tribunal also agrees with the ITF that the principle to apply is that of "*correctness trumps consistency*", as referred to in previous sports decisions. In other words, if a sanction granted in another similar matter – although, as was just said, there is no such case that the Tribunal is aware of – is greater or smaller than the one imposed by the IAP, this should not bind the Tribunal and prevent it from electing the sanction which it determines to be the fairest in light of all the circumstances of the case.

102. The Tribunal further agrees with the ITF that as a Fed Cup captain the Appellant was expected to act as a role model and to uphold the high standards expected of a person in that role. The Tribunal accepts the Appellant's evidence that he was asked by the Romanian players to take on the role of their captain and that he did so for them and without remuneration. However, in doing so he also took on the responsibility to act accordingly in the role of a Fed Cup captain in competition governed by the ITF's rules, which he failed to do by breaching not one but several provisions of the Welfare Policy as noted above.

103. The Tribunal considers that none of the mitigating factors advanced by the Appellant – including his apologies, which could legitimately be considered for mitigation purposes – excuse his conduct or justify a reduction of what would otherwise be the sanction. Moreover, the fact that other tennis bodies have denied him accreditation is neither here nor there, as the jurisdiction of the Tribunal is to sanction in the context of ITF events only. The Tribunal does recognise, however, the broader impact of this denial of accreditation on the Appellant's ability to attend other tournaments.

104. The Tribunal is also conscious of the message whatever sanction is ordered sends to the tennis world and the public more generally in a high-profile sports appeal such as the present one. For example, the Tribunal has regard to what young tennis players in clubs around the world take away from this decision in terms of what is inappropriate conduct in breach of the applicable rules and what is the appropriate sanction for such conduct. The Appellant did not have to take on the role of Fed Cup captain, but he did; and in doing so he accepted to conduct himself according to a certain set of standards and to lead by example, which regrettably, he failed to do. He must therefore receive an appropriate and proportionate sanction despite his long and illustrious career.

105. Among the four breaches – the Williams Charge, the Keothavong Charge, the Press Charge, and the On-Court Charge – the Tribunal considers that the On-Court Charge is the most serious breach given the number of events, the seriousness of the events, and the fact that they took place in the middle of the Match in front of thousands of tennis fans in the stadium and many more fans watching live on

television or watching afterwards via television, Internet or news and sports highlights.

106. The Appellant's conduct resulting in the On-Court Charge is thus categorised as "serious offending" as it goes to the heart and spirit of inappropriate behaviour during an international sporting competition. Accordingly, the sanction should be severe and should be directly related to competition and tournaments. In other words, the sanction should be to prevent the Appellant from being allowed to benefit from competition and tournaments. The Tribunal is thus of the view that a suspension from ITF competitions and circuits and denial of accreditation to such competitions and circuits for a certain time is appropriate and considers that three years is proportionate for suspension from such competition and tournaments and that one third of that, one year, is proportionate for being denied accreditation to attend them.

107. The Tribunal considers that the Press Charge should be categorised as "mid-range offending", such conduct occurring in part inside and outside the stadium during the Match. The Appellant has had 50 years of experience in dealing with the press in a well-known tennis career. Attacking the press verbally and threatening the press in the role of a Fed Cup captain is unacceptable conduct and must be sanctioned. The Tribunal considers that the sanction for such conduct should relate more to a suspension from competition and tournaments rather than to a denial of accreditation to attend them and that a six month suspension from ITF competitions and circuits is proportionate to the Appellant's conduct in this regard but that as such this conduct does not merit a denial of accreditation.

108. The Tribunal considers that the other two charges, namely the Williams Charge and the Keothavong Charge, should be categorised as “low-range offending” and does not consider it useful to distinguish one from the other in seriousness. Racially insensitive comments and sexual harassment are inappropriate and should not be tolerated and do not need to be ranked one against the other in seriousness as it were. It is true that the Appellant did not make his racially insensitive comments at the microphone, but the end result was as if he had. And the Appellant harassed Ms Keothavong not once but twice, once on each of the two days leading up to the Tie and in the same manner, continuing on the second day what he had started on the first day.

109. The Tribunal considers that in order to send a strong message that such conduct is unacceptable a three-month suspension from ITF competitions and circuits is appropriate for each of these two charges but that a denial of accreditation to attend them is not warranted.

110. Taking into consideration all of the above suspension sanctions together as a whole, the Tribunal determines that, in the interest of the overall proportionality of the total suspension sanction on the Appellant for his conduct as a whole, these suspensions from ITF competitions and circuits of three years, six months, and two times three months, and one year denial of accreditation to attend them, should all run concurrently rather than cumulatively.

111. Moreover, considering all of the charges upheld against the Appellant and the circumstances of the case as a whole, the Tribunal considers that an overall sanction of a fine of US\$ 20,000 is appropriate.

112. Accordingly, in total, the Tribunal determines that the proportionate sanctions for all of the breaches by the Appellant are (i) a suspension from ITF competitions and circuits running for three years, (ii) a denial of accreditation to such competitions and circuits running concurrently with the above suspension for one year, and (iii) a fine of US\$ 20,000.

113. The Tribunal considers that such suspension and denial of accreditation sanctions should run from the date the Appellant was provisionally suspended, which was 23 April 2017, as he has been suspended and denied accreditation since.

114. Thus, his suspension will expire on 23 April 2020 and his denial of accreditation will expire on 23 April 2018.

115. The Tribunal considers further that his fine is due immediately.

CONCLUSION

116. The Tribunal makes the following findings:

- in relation to the Williams Charge, the Appellant breached the introductory provision and Article a.v.b of the Welfare Policy;
- in relation to the Keothavong Charge, the Appellant breached Article a.iv.c of the Welfare Policy;
- in relation to the Press Charge, the Appellant breached Article a.iii.b of the Welfare Policy;
- in relation to the On-Court Charge, the Appellant breached Articles a.ii.a, a.iii.a, a.iii.b, and a.v.b of the Welfare Policy.

117. The Tribunal hereby imposes the following sanctions on the Appellant:

- A suspension from acting in an official capacity (including, but not limited to, team Captain) in all Official ITF Team Competitions included under Bye-Law 2.1(a) of the ITF Constitution, individual competitions included under Bye-Law 2.2(2), and Official ITF Tennis Circuits included under Bye-Law 2.2(3) for three years from 23 April 2017 to 23 April 2020;
- a denial of access to, or otherwise accreditation for, the competitions and circuits described immediately above for one year from 23 April 2017 to 23 April 2018; and
- a fine in the amount of US\$ 20,000 due immediately.

118. The Tribunal makes no award as to costs, save for any application made within seven (7) days of this decision.



Andrew de Lotbinière McDougall (Chair)

Susan Ahern

Despina Mavromati

Independent Tribunal

6 February 2018



Sport Resolutions (UK)
1 Salisbury Square
London EC4Y 8AE

T: +44 (0)20 7036 1966

Email: resolve@sportresolutions.co.uk
Website: www.sportresolutions.co.uk

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