CAS 2022/A/8558 Mohamed Talaat v. Fédération Équestre Internationale (FEI)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Jeffrey G. Benz, Attorney-at-law and Barrister, London, United Kingdom
Arbitrators: Mr Petros C. Mavroidis, Professor of Law, Commugny, Switzerland
Mr Alexis Schoeb, Attorney-at-law, Geneva, Switzerland & Sydney, Australia

in the arbitration between

Mr Mohamad Talaat, Germany

Represented by Mr Pierre Ducret, Attorney-at-law, Geneva, Switzerland

Appellant

and

Fédération Équestre Internationale (FEI), Lausanne, Switzerland

Represented by Ms Anna Thorstenson and Ms Ana Kricej, Legal Counsels at FEI, Lausanne, Switzerland

Respondent

I. INTRODUCTION

1. The Appellant, Mr Mohamed Talaat ("Athlete", "Appellant", or "Mr Talaat"), is a 33-year-old international level professional rider in the equestrian discipline of jumping who is registered with the National Equestrian Federation of Egypt. He has participated at the Olympic level in the sport since 2009. At the time of filing his statement of appeal herein, Mr Talaat was ranked 958 worldwide in the Longines Rankings. During the 2019 African Games-S in Rabat, Morocco from the 20-24 August 2019 ("Event") he was individually ranked number 5.

2. The Respondent, Fédération Équestre Internationale ("FEI" or the "Respondent"), is the worldwide governing body for the equestrian sport disciplines of jumping, dressage and para-dressage, eventing, driving and para-driving, endurance and vaulting, recognized as such by the International Olympic Committee. The FEI is headquartered in Switzerland. The FEI promulgates various regulations for governing equestrian, including but not limited to the FEI Anti-Doping Rules for Human Athletes ("ADRHA"), which are based on the World Anti-Doping Code.

3. The Appellants and the Respondent are jointly referred to as the "Parties" and individually as "Party".

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in his Award only to the submissions and evidence it considers necessary to explain its reasoning. The facts are generally not in dispute.

5. The Athlete was tested under the ADRHA during the Event on 22 August 2019 and retuned a positive test for the cannabis metabolite Carboxy-THC, a prohibited substance under the 2019 Prohibited List ("List") of the World Anti-Doping Agency ("WADA") which was in force at the time of the sample collection. Cannabis and its metabolite Carboxy-THC are prohibited in competition.

6. The urine sample was divided into an A Sample and a B Sample and sent to the WADA Accredited Laboratory in Lausanne, Switzerland ("Lab") for analysis. The Athlete's samples were given the reference number 4479312 (collectively, "Sample").

7. The Lab analysed the Athlete's A Sample and reported an adverse analytical finding ("AAF") of Carboxy-THC in the Sample.

8. The estimated concentration of Carboxy-THC in the Sample was 608ng/mL, which is greater than the Decision Limit of 180ng/mL. Any concentration above this threshold is considered to be in-competition use. *See* WADA Guidance Note for Anti-Doping Organisations on Substances of Abuse under the 2021 World Anti-Doping Code.

9. The FEI reviewed whether the Athlete had a Therapeutic Use Exemption ("TUE") that had been granted or would be granted as provided in the International Standard for Therapeutic Use Exemptions in accordance with Article 7.2.2 of the ADRHA, and the Athlete had not been granted a TUE for use of Carboxy-THC.

10. The Event was under the results management authority of the African Games 2019 organisation. Unfortunately, there were extensive delays in the process before the results management authority, including the B sample procedure, the partial decision, and the transfer of the results management to the FEI for further follow up of the case. The results management was not transferred to the FEI until the beginning of 2020.

11. On 16 September 2019, the African Games 2019 organisation notified the Athlete of his positive sample, but no provisional suspension was imposed. In this letter, the Athlete was notified of his right to request analysis of the B Sample, which request the Athlete made. The testing of the B Sample confirmed the AAF in the A Sample (the presence of Carboxy-THC), which was notified to the Athlete in January 2020.

12. The Disciplinary Committee of the African Games 2019 organisation issued a partial decision on 14 February 2020, where the results obtained by the Athlete at the Event were automatically disqualified, with all the resulting consequences, forfeiture of any medals, points, and prizes.

B. Procedure in the First Instance

13. Even though the 2019 African Games organisation had notified the Athlete of his positive test and certain action being taken, the FEI, once it had taken over results management and examined the file, notified the Athlete in a letter dated 28 April 2020, whereby the FEI charged the Athlete with a violation of Article 2.1 of the ADRHA (Use of a prohibited substance) based on the Lab's AAF for Carboxy-THC resulting from the Lab's analysis of the Sample.

14. In accordance with Article 7.9.2 of the ADRHA, the Athlete was not provisionally suspended because the substance found in the Sample was a Specified Substance. The FEI, however, recommended that the Athlete voluntarily suspend himself but he chose to not do so.

15. The FEI Tribunal held a hearing and, on 17 December 2021, issued its decision imposing the final period of Ineligibility of 2 years, and a fine of 7500 CHF and legal costs of 2000 CHF ("Appealed Decision"). The period of Ineligibility was set by the FEI Tribunal to commence on 17 June 2021, so, therefore, the Athlete will be ineligible until 16 June 2023.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 7 January 2022, Mr. Talaat filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision, in accordance with Articles R47 and R48 of the 2021 edition of the CAS Code of Sports-related Arbitration (the "Code"). In this submission, the Appellant requested the appointment of a three-member panel of arbitrators and nominated Ms Raphaelle Favre Schnyder as arbitrator. As a result of being part of the CAS ADD list of arbitrators, on 24 January 2022, the Appellant nominated Mr Petros C. Mavroidis.

17. On 25 February 2022, the Appellant filed its Appeal Brief, in accordance with Article R51 of the Code.

18. On 22 April 2022, in accordance with Article R55 of the Code, the Respondent filed its Answer. In its Answer, the Respondent nominated Mr Alexis Schoeb.

19. On 29 March 2022, in accordance with Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:

President: Mr Jeffrey G. Benz, Attorney-at-law and Barrister, London, United Kingdom

Arbitrators: Mr Petros C. Mavroidis, Professor of Law, Commugny, Switzerland

Mr Alexis Schoeb, Attorney-at-law, Geneva, Switzerland, and Sydney, Australia

20. On 7 April 2022, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing virtually.

21. On 2 May 2022, the CAS Court Office provided the Parties with an Order of Procedure, which was duly signed and returned by the Appellant on 18 May 2022 and by the Respondent on 2 May 2022.

22. On 18 May 2022, a hearing was held by video-conference. At the outset of the hearing, the Parties confirmed that they had no objection as to the constitution and composition of the arbitral tribunal.

23. In addition to the Panel and Ms Andrea Sherpa-Zimmermann, Counsel to the CAS, the following persons attended the hearing:

a) For the Appellant:
Mr Mohamed Talaat, the Athlete
Mr Pierre Ducret, Counsel, Attorney-at-law, CMS von Erlach Partners Ltd
Ms Melissa Bertholds, trainee at CMS von Erlach Partners LtD

b) For the Respondent:
Ms Anna Thorstenson, Legal Counsel, FEI
Ms Ana Kricej, Legal Counsel, FEI

24. The Panel heard evidence from the Parties.

25. All Parties were given full opportunity to present their cases, submit their arguments and to answer the questions posed by the Panel.

26. Before the hearing was concluded, all Parties expressly stated that they had no objection to the procedure adopted by the Panel and that their right to be heard had been respected.

27. The Panel confirms that it carefully heard and took into account in its decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral Award.

IV. SUBMISSIONS OF THE PARTIES

28. 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 Panel 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. Submissions of the Appellant

29. The Appellant made the following submissions in summary:

- That the maximum period of Ineligibility should be three months.
- That the Appellant bears No Fault or Negligence.
- That the Appellant bears No Significant Fault or Negligence.
- That the two-year period of Ineligibility is disproportionate.
- That backdating the start of the period of Ineligibility is detrimental to the Appellant.
- That no fine should be imposed on the Appellant.

30. The Appellant sought the following relief:

"*1. To declare the present appeal admissible.*

[ ]

2. To annul the Decision of the FEI Tribunal dated 17 December 2021.

3. To dismiss in full the two-year period of ineligibility imposed on Mr. Mohamed TALAAT.

Alternatively, to reduce the two-year period of ineligibility imposed on Mr. Mohamed TALAAT.

4. To dismiss in full the disqualification of Mr. Mohamed TALAAT's individual results at the 2019 African Games.

5. To dismiss in full the disqualification of Mr. Mohamed TALAAT's results at the 2020 Olympic Games 2020.

6. To order Federation Equestre Internationale to pay to Mr. Mohamed TALAAT a contribution to be fixed by the Panel towards his legal fees and other expenses

incurred in connection with these proceedings, including attorneys' fees and such other costs as Mr. Mohamed TALAAT will specify in due course.

7. To order Federation Equestre Internationale to bear the costs of the proceedings.

8. To dismiss any other relief sought by Federation Equestre Internationale."

B. Submissions of the Respondent

31. The Respondent made the following submissions in summary:

- There is sufficient proof of an anti-doping rule violation by the Athlete. The analysis of the B Sample establishes that it contains the same prohibited substance as the A Sample, and that the prohibited substance is above the threshold Decision Limit of 180 ng/mL. The amount of the Carboxyl-THC in the Athlete's sample should be considered in-competition use, and the burden is on the Athlete to establish that the use was out of competition. Because cannabis is on the List, all of the arguments from the Athlete about whether it enhances performance or not are irrelevant and should be ignored.
- The Athlete has failed to establish the source of the AAF, which is a threshold requirement to consider reduction of any sanction.
- The Athlete's plea of use out of competition and unrelated to sport performance cannot be accepted.
- That the Athlete has Fault and Negligence with his use of cannabis.
- That the Athlete's Fault and Negligence was significant.
- That the sanction is proportional and in accordance with the relevant rules.
- That the Athlete should be fined in accordance with the applicable rules.

32. The Respondent sought the following relief:

"a*) to confirm the FEI Tribunal Decision and leave it undisturbed;*

b) in accordance with Article R65.3 of the CAS Code of Sports-related Arbitration to reject the Appellant's request for an order that the FEI make a contribution towards the costs he has incurred in making this Appeal;

c) in accordance with Article 64.5 of the CAS Code of Sports-related Arbitration, to order the Appellants to pay all of the costs incurred by the CAS and payable by the Parties in these proceedings; and

d) in accordance with Article 64.5 of the CAS Code of Sports-related Arbitration to order the Appellant to pay a contribution towards the legal fees and other expenses (such as external scientific experts) incurred by the FEI in defending this appeal."

V. JURISDICTION

33. Article R47 of the Code provides as follows:

> "*An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the 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.*
>
> *An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned*".

34. Article 13.2 and 13.2.1 of the ADRHA provides that:

> "*A decision that an anti-doping rule violation was committed […] may be appealed exclusively as provided in this Article 13.2.*
> *[…]*
> *In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS*".

35. The Panel notes that the Decision qualifies as a "*decision that an anti-doping rule violation was committed*", and that the Athlete is an International-Level Athlete involved in an International Event.

36. The Panel therefore finds that CAS holds jurisdiction to decide on the present matter. Moreover, the Panel notes that jurisdiction of the CAS is not disputed by either party, both signed the Order of Procedure, and both Parties participated fully in the proceedings, all of which is further evidence of acceptance and appropriateness of CAS jurisdiction.

VI. ADMISSIBILITY

37. Article R49 of the Code provides as follows:

> "*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for 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 other parties*".

38. The Panel notes that the Statement of Appeal was filed with the CAS Court Office on 4 January 2022, i.e. within the time limit of 21 days from receipt of the Decision appealed against on 17 December 2021. Moreover, the other requirements provided for under Article R48 of the Code are also fulfilled. The appeal is therefore admissible.

VII. APPLICABLE LAW

39. Article R58 of the 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 the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision*".

40. Article 38.3 of the FEI Statutes further provides that:

> "*All disputes shall be settled in accordance with Swiss law*".

41. For these purposes the "*applicable regulations*" are the FEI ADRHA, with the law of Switzerland applying "*subsidiarily*". According to well-established CAS jurisprudence, that means that Swiss law is applied where necessary to resolve any "*issues that cannot be resolved solely on the basis of the rules invoked by the parties*", i.e., to fill any *lacuna*, or gap, left by the ADRHA. CAS 2002/O/373, at para. 15; *see also* CAS 2006/A/1180, at para. 14. Fortunately, there is no dispute as to applicable law and no lacunae appeared in this case, so there is no need to refer to the law of Switzerland to resolve this appeal.

42. The Code provides in Article R57, in pertinent part, that:

> "*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 . . .*"

43. Accordingly, the task of the Panel is to decide the matter *de novo*, anew, without reference or deference, or being constrained, in any manner to the decision below.

44. No Party disputed these fundamental legal principles.

45. The Panel shall therefore apply FEI's rules and regulations, in particular the FEI ADRHA, and, subsidiarily, Swiss law as the law chosen by the Parties. Moreover, since the relevant facts occurred on 22 August 2019, the Panel shall, in principle, apply the ADRHA version that was effective as from 1 January 2015.

46. The Panel shall revert to the issue regarding the application of the 2021 ADRHA as a matter of *lex mitior* in the next section regarding the merits.

VIII. MERITS

47. In the present proceedings, the Athlete does not dispute the presence in his Sample of a prohibited substance, namely carboxy-THC, above the decision limit of 180 ng/mL provided for in the WADA's Guidance note for Anti-doping Organisations for Substances of Abuse under the WADA Code 2021, which constitutes an ADRV under Article 2.1 of the ADRHA.

48. The present appeal only concerns the consequences to be applied to such ADRV. As a result of the Parties' requests and submissions, the Panel shall address the following issues:

i. Shall the appropriate period of ineligibility be reduced based on the principle of *lex mitior*?

ii. Shall the appropriate period of ineligibility be eliminated or reduced based on *No (Significant) Fault or Negligence?*

iii. What are the consequences of the answers to the above questions?

49. The Panel will consider each of those issues separately and in sequence.

A. The *Lex Mitior* Principle

50. The Appellant contends that he should benefit from the more lenient rules that were adopted after the rules that were applied by the FEI Tribunal in the Decision. Indeed, while the 2015 version of the ADRHA provided for a standard 2-year period of ineligibility for an AAF of carboxy-THC, the 2021 version of the ADRHA substantially lowered the possible period of ineligibility to three months only, with a further possible reduction to one month, pursuant to article 10.2.4 of the 2021 ADRHA.

51. The FEI agrees with the applicability of the *lex mitior* principle in theory, but submits that Article 10.2.4 of the 2021 ADRHA cannot apply in the present matter as the requirements for this provision to apply are not fulfilled.

52. The Panel first recalls that the *lex mitior* principle, which is provided for under the WADC (see Article 25.2 of the 2015 WADC and Article 27.2 of the 2021 WADC) and in the 2021 ADRHA (see Article 25.7.2 of the 2021 ADRHA), requires that, where a rule has been replaced in the meantime by a more lenient rule, the more lenient rule replaces the previous rule, to the benefit of the accused athlete. CAS case law has regularly applied the *lex mitior* principle in its case law related to doping cases:

> "*The lex mitior principle prevents the continued applicability of a disciplinary rule after it has been replaced by a more lenient one, and reflects, in favour of the accused, the evolution of a legislative policy, which translates into rules the opinion that the same infringement is less severe than it was previously perceived*". (CAS 2015/A/4005, para. 115; see also TAS 2000/A/289).

53. Moreover, the Parties agree with the applicability of the *lex mitior* doctrine as a matter of principle.

54. Article 10.2.4 of the 2021 ADRHA provides as follows:

> "*10.2.4 Notwithstanding any other provision in Article 10.2, where the anti-doping rule violation involves a Substance of Abuse:*
>
> *10.2.4.1 If the Athlete can establish that any ingestion or Use occurred Out-of-Competition and was unrelated to sport performance, then the period of Ineligibility shall be three (3) months Ineligibility.*
>
> *In addition, the period of Ineligibility calculated under this Article 10.2.4.1 may be reduced to one (1) month if the Athlete or other Person satisfactorily completes a*

> *Substance of Abuse treatment program approved by the FEI. The period of Ineligibility established in this Article 10.2.4.1 is not subject to any reduction based on any provision in Article 10.6.4.*
> *(…)*"

55. The Panel notes that according to the 2021 ADRHA, the Athlete would potentially be sanctioned with a period of Ineligibility of three months with a possibility to further reduce such period to one month, which is a much more lenient treatment than the ADRHA, which provides for a standard period of Ineligibility of two years.

56. However, the wording of Article 10.2.4 of the 2021 ADRHA makes it clear that such reduced period of Ineligibility can only apply if the use of the substance of abuse – carboxy-THC being a substance of abuse under 2021 ADRHA – occurred Out-of-Competition and unrelated to sport performance.

57. The Appellant accepted that, since the FEI met its burden to establish, in principle, a violation of article 2.1 of the ADRHA, the burden is now upon him to show that his consumption of cannabis occurred Out-of-Competition and unrelated to sport performance. Furthermore, the Appellant accepts that he must meet this burden by the standard of balance of probabilities, which is also the view of the FEI. The Panel therefore shall verify whether such requirements are met in the case at hand.

a. Did the Athlete consume Cannabis In-Competition?

58. The Appellant states that before this case he had no knowledge of cannabis and had never knowingly used it.

59. According to the FEI, the concentration level in the Sample was far above the decision limit of 180 ng/mL provided in WADA's Guidance Note for Anti-doping Organisations for Substances of Abuse under the WADA Code 2021, which indicates that the Athlete used cannabis In-Competition rather than Out-of-Competition.

60. Moreover, the FEI's cannabis expert Prof. Huestis confirmed that it is not plausible that the Appellant's consumption was Out-of-Competition given her prior studies and the levels that were found in the Athlete's system.

61. The Panel now turns to the question of whether the Appellant's consumption was Out-of-Competition. The Athlete bears the burden of proving, on balance of probabilities, that his consumption was Out-of-Competition.

62. The Panel first notes that WADA's Guidance Note for Anti-doping Organisations for Substances of Abuse under the WADA Code 2021 provides as follows:

> "*Presence of carboxy-THC at a concentration above (>) the Decision Limit (DL) of 180 ng/mL should be considered most likely to correspond to an In-Competition use of cannabis*".

63. In the present matter, the concentration level found in the Sample amounts to 608 ng/mL. As a result, the concentration level most likely corresponds to an In-Competition use of cannabis within the meaning of the WADA Code.

64. Prof. Huestis was of the opinion that this level of presence in his Sample could not have come from passive presence while someone else was smoking it, nor, based on her research, could it have come from him smoking cannabis mixed with his shisha. Rather, Prof. Huestis was of the opinion that the Athlete was a regular user of cannabis given the high level of concentration.

65. The Panel notes that the Appellant argued that Prof. Huestis had a predisposition against cannabis use because of her open academic position against cannabis spanning decades, including within the WADA committee of which she is a member. The Panel is however not convinced about such objection which is not supported by any evidence on record: the fact that she has expressed an opinion in the framework of her scientific activities does not mean *per se* that her opinion in the present matter should be disregarded for bias, though the Panel accepts that if established it should be weighed in light of the evidence and the nature of the present dispute. The Panel does not find that such bias was established sufficiently to cause the Panel to have concerns about her expert testimony.

66. Finally, the Panel also notes that the Appellant argues that the AAF resulted from In-Competition passive or unintentional exposure to cannabis at the Shisha Bar of the Sofitel Hotel he was staying at during the Event. In other words, the Athlete argues that the exposure did not occur Out-of-Competition but during the competition period. Since this is the only source of ingestion advanced by the Athlete, the Panel finds that this argument undercuts the Athlete's position that it was ingested Out-of-Competition.

b. Was the Athlete's consumption unrelated to sport performance?

67. The Appellant contends that cannabis is today rightly considered as a substance of abuse because it is often used in a recreational context and because it clearly has no performance-enhancing effect for Equestrian sports. The Athlete therefore contends that any use is unrelated to sport performance.

68. The Panel first notes that, given the level of the cannabis metabolite in his Sample, since the Appellant failed to demonstrate that he used cannabis Out-of-Competition, one of the two cumulative requirements for Article 10.2.4 of the 2021 ADRHA to apply as *lex mitior*, is not fulfilled. As a result, there is no need to address the issue of whether or not the Athlete's cannabis consumption was unrelated to sport performance in order to assess the possibility to reduce the period of ineligibility on the basis of Article 10.2.4 of the 2021 ADRHA.

c. Conclusion

69. The Panel therefore finds that the Appellant's submission that the period of ineligibility shall be reduced on the basis of Article 10.2.4 of the 2021 ADRHA (*lex mitior*) is dismissed.

I. The No (Significant) Fault or Negligence Assertions

a. Regulatory framework

70. Since the FEI met its burden of proving the presence in the Sample of a prohibited substance, carboxy-THC above the decision limit of 180 ng/mL, which constitutes an ADRV under Article 2.1 of the ADRHA, the Athlete shall be subject to a standard period of Ineligibility of two years, in accordance with Article 10.2.2 of the ADRHA subject to any reduction of the

ineligibility period based on No Fault or Negligence or No Significant Fault or Negligence ("N(S)FN").

71. Pursuant to Article 10.4 of the ADRHA, "*If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated*".

72. According to the definition list in the ADRHA, No Fault or Negligence ("NFN") refers to the situation in which "*[t]he Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system*".

73. Moreover, pursuant to Article 10.5 of the ADRHA, "*Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault*".

74. According to the definition list in the ADRHA, No Significant Fault or Negligence ("NSFN") refers to the situation in which "*[t]he Athlete or other Person 's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system*". Moreover, the footnote to the definition provides that: "*For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance*".

75. Based on the above definitions, in order for the Athlete to be eligible for N(S)FN, he shall first establish how the prohibited substance entered his or her system.

76. Moreover, to establish NFN, the Athlete shall further establish that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he violated an anti-doping rule.

77. To establish NSFN, the Athlete shall establish that his fault or negligence, viewed in the totality of circumstances, was not significant in relationship to the anti-doping rule violation. Finally, since this matter concerns the consumption of cannabinoids, for the Appellant to establish NSFN, he shall demonstrate that the use of cannabis was unrelated to sport performance.

78. Finally, the Parties accept that the applicable standard of proof is that of balance of probabilities.

b. Application in the case at hand

79. The Panel shall first determine whether the Appellant established how the prohibited substance entered his system.

80. After persisting in his written submissions and his lawyer's oral submissions, that he had never used cannabis, in his statement the Athlete admitted that he had consumed cannabis "many years ago" maybe "4 or 5 years ago" but not at the Event. Under cross examination, he admitted that he had tried cannabis at least 2 or 3 times before, and it made him feel sick and a little paranoid. After a question from one of the Arbitrators, he said that the last time he had smoked cannabis was "at least a year before".

81. He also relented on a theory that had been advanced previously that another team, perhaps the Moroccan team, had sabotaged him and others on his team intentionally. He stated during his oral statement that he believed that if he had ingested cannabis it was as the result of mistake not from the intentional conduct of anyone directed to him or his teammates.

82. The Appellant submits that he may have been exposed to passive smoking of cannabis, hashish or kief, while he was smoking shisha at the Shisha Bar of the Sofitel Hotel in Rabat, Morocco, during his stay for the purpose of the Event. He asserts he may have also ingested cannabis from his own shisha smoking, because it is common in Morocco to mix cannabis with shisha tobacco.

83. He stated that he stayed in the bar or lounge area for one hour, and others were there too from his team and the Egyptian team. He headed to his room, where he later did not feel well during the night, forcing him to take stomach medication. The next day he told the team leadership that he had a horrible night, did not feel well, and wanted to move hotels, so the team leaders moved his hotel. A few months later he saw that two Qatari athletes had the same problem he did after visiting the same shisha bar.

84. The written statement of the Egyptian team manager, Mr. Ahmed Assad, confirms the Athlete's visit to the Shisha Bar during his stay together with the rest of the team as well as Mr. Assad's enquiry at the Shisha Bar of the Sofitel Hotel as to how the shishas were prepared and the substances they contained. In his written statement, Mr. Assad makes clear that the hotel staff confirmed that shisha there was only prepared using tobacco and innocent flavorings, and not cannabis or any other illegal substance.

85. The Panel accepts that (i) the Athlete, together with the other members of his team, spent some time relaxing at the Shisha Bar of the Sofitel Hotel in Rabat during the Event; (ii) the Team's Manager took some precautionary measures by enquiring as to the type of shisha that was prepared at the Shisha Bar and what type of substances the shishas contained. The Panel therefore finds that the Athlete established on the balance of probabilities, that it cannot be excluded that by spending time at the Shisha Bar of the Sofitel Hotel, the Athlete may have accidentally consumed it himself as the cannabis might have been mixed with the shisha, despite the hotel staff's assurances to the contrary. As a result, the Panel finds that the Athlete successfully established how the prohibited substance entered his system.

86. The Panel now turns to the examination of whether the Athlete's Ineligibility period could be reduced based on NSFN. In order to establish NSFN, the Athlete may establish that his consumption of cannabinoids was unrelated to sport performance. The Panel already found that the Athlete's consumption of cannabis in large amounts on a daily basis prior to the Event at night after training, was unrelated to sport performance. The same clearly applies to the Athlete's possible passive exposure to cannabis or kief, as a result of other visitors in the Shisha Bar consuming such substances: such visits to the Shisha Bar were of a purely recreational nature and unrelated to sport performance. The Panel therefore concludes that the

Athlete's consumption of cannabinoids was unrelated to sport performance and the Athlete is therefore eligible for being considered for a reduction under the concepts of NSFN.

87. The issue of whether an athlete's fault or negligence is "significant" has been much discussed in the CAS jurisprudence, and chiefly so with respect to the various editions of the WADC (*e.g.*, in the *Cilic* case i.e. CAS 2013/A/3327 and 3335 as well as *inter alia* CAS 2004/A/690; CAS 2005/A/830; CAS 2005/A/847; CAS OG 04/003; CAS 2006/A/1025; 2008/A/1489&1510; CAS 2009/A/1870; CAS 2012/A/2701; CAS 2012/A/2747; CAS 2012/A/2804; CAS 2012/A/3029; CAS 2017/A/5301 & 5302 ("*Errani* case")). These cases offer guidance to the Panel. It is, however, to be underlined that all cases are "fact specific" and that no doctrine of binding precedent applies to the CAS jurisprudence.

88. In order to determine which category of fault or negligence is applicable in a particular case, CAS panels consider it helpful to analyse both the objective and the subjective levels of fault. While the objective element describes what standard of care could have been expected from a reasonable person in a given athlete's situation, the subjective element describes what could have been expected from that particular athlete, with regard to his personal capacities (*See* CAS 2013/A/3327 & 3335; CAS 2016/A/4416).

89. The Panel observes that, in light of the jurisprudence in the *Cilic* case as well as the subsequent amendments of the WADA Code and the *Errani* case, a distinction must be made between the following two categories of fault within the context of NSF:

- "normal" degree of fault: from 12 to 24 months with a standard normal degree leading to an 18-months period of ineligibility;
- "light" degree of fault: from 0 to 12 months with a standard light degree leading to a 6-months period of ineligibility (cf. CAS 2017/A/5301, paras. 194-195; CAS 2016/A/4416; 2015/A/3876, para. 84).

90. In the present case, the Panel notes the following elements:

<u>Against the Athlete</u>:

- The Athlete is an adult educated man with a long sporting career, who has competed in the Olympic Games, and is therefore educated on anti-doping rules.
- The Athlete knew cannabis qualifies as a Specified Substance prohibited in-competition under FEI rules; and
- While in Rabat for the purpose of the Event, the Athlete chose to smoke shisha at the Shisha Bar of the Sofitel Hotel in Rabat, thereby running the risk of passive or even active exposure to prohibited substances.

<u>In favour of the Athlete:</u>

- Smoking shisha is common practice in Arab countries;
- The Athlete was staying in five-star hotel in Rabat (i.e. Sofitel Hotel) and his Team Manager had enquired about the composition of the shisha served at the Shisha Bar and how they were prepared to ensure that they did not contain prohibited substances; and

- The Athlete had never tested positive before.

91. In the present matter, the Panel finds that the Athlete's objective level of fault is "light" *i.e.*, to be placed within the lower category within the context of the NSF analysis, but is at the upper limit of light fault. The Athlete appears, based on the level in his Sample, to have been a regular user of cannabis, a substance he knew or had to know was on the Prohibited List, even though he would not admit that at the hearing. By smoking shisha at the Shisha Bar of the Sofitel Hotel during the Event, the Athlete accepted the risk of being passively or possibly actively exposed to cannabis or kief, which is often used instead or with the shisha tobacco in Morocco. The Panel is however sympathetic to the fact that the Team Manager had enquired about the shisha composition at the Shisha Bar of the Hotel and had been reassured as to the fact that it contained no illegal substance.

92. As a result, the Panel finds that the Athlete's appropriate period of Ineligibility is one (1) year.

II. Consequences

a. Commencement of the Ineligibility Period

93. Article 10.11 of the ADRHA provides as follows:

> "*10.11 Commencement of Ineligibility Period*
>
> *Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed.*
>
> *10.11.1 Delays Not Attributable to the Athlete or other Person*
>
> *Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person the FEI Tribunal may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified*".

94. The Parties agree that the first instance proceedings before the FEI Tribunal suffered from substantial delays, which were - at least in part - not attributable to the Athlete. Delay in this sense is not a pejorative term, but it merely describes a condition of the length of time of the proceedings. As a result, the Parties agree to apply Article 10.11.1 of the ADRHA (or corresponding Article 10.13.1 of the ADRHA 2021) in the present matter.

95. The Athlete, however, sought to preserve his finish in the Olympic Games in Tokyo and backdate to the end of those Games rather than to the earlier date of Sample collection. The Panel finds that the Athlete cannot pick and choose on dates so selectively. Accordingly, the Panel therefore finds that the Ineligibility period shall start on 17 June 2021, i.e. the date of the Sample collection.

b. Disqualification of Results

96. Article 9.1 of the ADRHA provides as follows:

> "*An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes. Where applicable, consequences to teams are detailed in Article 11.*"

97. Moreover, Article 10.1 of the ADRHA provides that "*[a]n anti-doping rule violation occurring during or in connection with an Event may, upon decision of the ruling body of the Event, lead to Disqualification of all of the Athlete's individual results obtained in that Event with all Consequences (and the resulting consequences to teams as provided in Article 11), including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1*."

98. Considering the above, the Panel finds that the Athlete must be disqualified, in accordance with Articles 9.1 and 10.1 of the ADRHA, of all his individual results at the Event and during the period of ineligibility, with all consequences, as well as the resulting consequences to teams as provided under article 11, including forfeiture of all medals, points and prize money.

IX. COSTS

99. Article R65.3 of the Code provides as follows:

> "*Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties*".

100. Since the present appeal is lodged against a decision of an exclusively disciplinary nature rendered on behalf of an international federation, no costs are payable to CAS by the Parties beyond the Court Office fee of CHF 1,000 paid by the Appellant with the filing of his Statement of Appeal, which is in any event retained by CAS.

101. Having considered the outcome of the arbitration, the conduct of the Parties in the arbitration, and their respective financial resources, the Panel decides that each Party shall bear its own legal fees and other expenses.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 7 January 2022 by Mr Mohamed Talaat against the Fédération Équestre Internationale (FEI) with respect to the decision taken by the Tribunal of the FEI on 17 December 2021 is partially upheld.

2. The operative part of the decision rendered by the Tribunal of the FEI on 17 December 2021 is confirmed save for the item 2) a), which is so amended:

   "*2.) The Athlete shall incur:*

   a.) a period of ineligibility of one (1) year. The period of ineligibility will be effective from 17 June 2021. All competitive results achieved by the Athlete during the period of ineligibility are disqualified."

3. The Award is pronounced without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by Mr Mohamed Talaat, which is retained by the CAS.

4. Each Party shall bear its own expenses incurred in connection with these arbitration proceedings.

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

Seat of arbitration: Lausanne, Switzerland
Operative part issued 10 June 2022
Date: 15 January 2024

THE COURT OF ARBITRATION FOR SPORT

Jeffrey Benz
President of the Panel

Petros C. Mavroidis
Arbitrator

Alexis Schoeb
Arbitrator