



DECISION of the FEI TRIBUNAL

dated 16 August 2018

Positive Controlled Medication Case No.: 2018/CM04

Horse: AL WAFYAH **FEI Passport No:** 105PV77/UAE

Person Responsible/NF/ID: Asghar Ali MUHAMMAD FAIZ/PAK/10113525

Event/ID: CEI2* 120 – Dubai (UAE)/2018_CI_0523_E_S_01_01

Date: 1 February 2018

Prohibited Substances: Flunixin, Phenylbutazone, Oxyphenbutazone, Dexamethasone and Clenbuterol.

I. COMPOSITION OF PANEL

Ms. Constance Popineau (FRA), one member panel

II. SUMMARY OF THE FACTS

- 1. Memorandum of case:** By Legal Department.
- 2. Summary information provided by Person Responsible (PR):**
The FEI Tribunal duly took into consideration all evidence, submissions and documents presented in the case file, as also made available by and to the PR.
- 3. Oral hearing:** none.

III. DESCRIPTION OF THE CASE FROM THE LEGAL VIEWPOINT

1. Articles of the Statutes/Regulations which are applicable:

Statutes 23rd edition, effective 29 April 2015 ("**Statutes**"), Arts. 1.4, 38 and 39.

General Regulations, 23rd edition, 1 January 2009, updates effective 1 January 2018, Arts. 118, 143.1, 161, 168 and 169 ("**GRs**").

Internal Regulations of the FEI Tribunal, 3rd edition, 2 March 2018 ("IRs").

FEI Equine Anti-Doping and Controlled Medication Regulations ("EADCMRs"), 2nd edition, effective 1 January 2018.

FEI Controlled Medication Regulations ("ECM Rules"), 2nd edition, effective 1 January 2018.

Veterinary Regulations ("VRs"), 14th edition 2018, effective 1 January 2018, Art. 1055 and seq.

FEI Code of Conduct for the Welfare of the Horse.

2. Person Responsible: Mr. Asghar Ali MUHAMMAD FAIZ.

3. Justification for sanction:

GRs Art. 143.1: "Medication Control and Anti-Doping provisions are stated in the Anti-Doping Rules for Human Athletes (ADRHA), in conjunction with the World Anti-Doping Code, and in the Equine Anti-Doping and Controlled Medication Regulations (EADCM Regulations)."

GRs Art. 118.3: "The Person Responsible shall be the Athlete who rides, vaults or drives the Horse during an Event, but the Owner and other Support Personnel including but not limited to grooms and veterinarians may be regarded as additional Persons Responsible if they are present at the Event or have made a relevant Decision about the Horse. In vaulting, the lunger shall be an additional Person Responsible."

ECM Rules Art. 2.1.1: "It is each Person Responsible's personal duty to ensure that no Controlled Medication Substance is present in the Horse body during an Event without a valid Veterinary Form. Persons Responsible are responsible for any Controlled Medication Substance found to be present in their Horse's Samples, even though their Support Personnel will be considered additionally responsible under Articles 2.2 – 2.5 ECM Rules where the circumstances so warrant. It is not necessary that intent, Fault, negligence or knowing Use be demonstrated in order to establish a Rule violation under Article 2.1."

EADCMRs APPENDIX 1 – Definitions:

"Fault. Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Person Responsible and/or member of the Support Personnel's degree of Fault include, for example, the Person Responsible's and/or member of the Support Personnel's experience, whether the Person Responsible and/or member of the Support Personnel is a Minor, special considerations such as impairment, the

degree of risk that should have been perceived by the Person Responsible and/or member of the Support Personnel and the level of care and investigation exercised by the Person Responsible and/or member of the Support Personnel in relation to what should have been the perceived level of risk. In assessing the Person Responsible's and/or member of the Support Personnel's degree of Fault, the circumstances considered must be specific and relevant to explain the Person Responsible's and/or member of the Support Personnel's departure from the expected standard of behaviour. Thus, for example, the fact that the Person Responsible would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Person Responsible only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2."

"No Fault or Negligence. The Person Responsible and/or member of the Support Personnel 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 administered to the Horse, or the Horse's system otherwise contained, a Banned or Controlled Medication Substance or he or she had Used on the Horse, a Banned or Controlled Medication Method or otherwise violated an EAD or ECM 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 the Horse's system."

"No Significant Fault or Negligence. The Person Responsible and/or member of the Support Personnel establishing that his 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 EADCM Regulation violation. Except in the case of a Minor, for any violation of Article 2.1 of the EAD Rules and Article 2.1 of the ECM Rules, the Athlete must also establish how the Prohibited Substance entered the Horse's system."

IV. DECISION

Below is a summary of the relevant facts, allegations and arguments based on the Parties' written submissions, pleadings and evidence adduced. 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. Although the Tribunal has fully considered all the facts, allegations, legal arguments and evidence in the present proceedings, in its decision it only refers to the submissions and evidence it considers necessary to explain its reasoning.

1. Factual Background

- 1.1 AL WAFYAH (the "**Horse**") participated at the CEI2* 120 in Dubai, United Arab Emirates (UAE), on 1 February 2018 (the "**Event**"), in the discipline of Endurance. The Horse was ridden by Mr. Asghar Ali MUHAMMAD FAIZ who is the Person Responsible in accordance with Article 118.3 of the GRs (the "**PR**").
- 1.2 The Horse was selected for sampling during the Event on 1 February 2018.
- 1.3 Analysis of the urine and blood sample number 5560253 taken from the Horse at the Event was performed at the FEI-approved Laboratory, the Racing Laboratory, Hong Kong Jockey Club (the "**Laboratory**") in Hong Kong. The analysis of the blood sample revealed the presence of Flunixin, Phenylbutazone, Oxyphenbutazone and Dexamethasone. The analysis of the urine sample revealed the presence of Flunixin, Phenylbutazone, Oxyphenbutazone, Dexamethasone and Clenbuterol.
- 1.4 The Prohibited Substances detected are Flunixin, Phenylbutazone, Oxyphenbutazone, Dexamethasone and Clenbuterol. Flunixin, Phenylbutazone and Oxyphenbutazone are anti-inflammatory drugs with analgesic effects. Dexamethasone is a corticosteroid with anti-inflammatory effects. Clenbuterol is a bronchodilator used in treatment of bronchitis and allergic airway disease. All these substances are classified as Controlled Medication Substances under the FEI Equine Prohibited Substances List (the "**FEI List**"). Furthermore, no valid Veterinary Form exists for the respective substances. Therefore, the positive finding for Flunixin, Phenylbutazone, Oxyphenbutazone, Dexamethasone and Clenbuterol in the Horse's sample gives rise to a Controlled Medication Rule violation under the EADCMRs.

2. The Further Proceedings

- 2.1 On 22 February 2018, the FEI Legal Department officially notified the PR through the Pakistan National Federation ("**PAK-NF**"), of the presence of the Prohibited Substances following the laboratory analysis, the possible rule violation and the possible consequences.
- 2.2 The Notification Letter included notice that the PR was provisionally suspended and granted him the opportunity to be heard at a Preliminary Hearing before the Tribunal.

3. The B-Sample analysis

- 3.1 Together with the Notification Letter of 22 February 2018, the PR and the owner of the Horse ("**Owner**") were also informed that they were entitled (i) to the performance of a B-Sample confirmatory analysis on the positive sample; (ii) to attend or be represented at the B-Sample

analysis; and/or (iii) to request that the B-Sample be analysed in a different laboratory than the A-Sample.

- 3.2 The PR or the Owner did not request that the B-Sample be analysed. Hence, they accepted the results of the A-Sample analysis.

4. Written submission by and on behalf of the PR

- 4.1 On 8 May 2018, the PR and the Trainer submitted the following explanations for the positive finding:

"We are in Al Reef Al-Ain stables; have good medications records of all our horses, also we have good reputation among the endurance family, also the UAE Equestrian Federation, we never detected by a positive case.

For the above mentioned case, we did refer to our records and investigation in our stable, we found it was a matter of miscalculation and miscommunication between the staff at our stable, even we make sure every time we enter and horse in any event that it is free of any prohibited substances, as much we care about the horse welfare and to keep our high standards and reputation ,

For the mentioned above case, we accept the test results, and we wish the FEI would condor that we never been tested positive, and we will make sure in the future this not happen again, and be more careful."

5. Written Response by the FEI

- 5.1 On 31 May 2018, the FEI provided its Response to the explanations provided by the PR and Trainer.

- 5.2 In essence the FEI submitted that:

a) Article 3.1 of the ECM Rules made it the FEI's burden to establish all of the elements of the ECM Rule violation charged, to the comfortable satisfaction of the Tribunal. The elements of an Article 2.1 violation were straightforward. *"It is not necessary that intent, fault, negligence or knowing Use be demonstrated in order to establish an ECM Rule violation under Article 2.1"*. Instead it was a "strict liability" offence, established simply by proof that a Controlled Medication Substance was present in the Horse's sample. The results of the analysis of the A-Sample taken from the Horse at the Event confirmed the presence of Flunixin, Phenylbutazone, Oxyphenbutazone, Dexamethasone and Clenbuterol, and together constituted "sufficient proof" of the violation of Article 2.1 of the ECM Rules. In any event, the PR did not dispute the presence of the Prohibited Substances in the Horse's sample. Accordingly, the FEI discharged its burden of establishing that the PR had violated Article 2.1 of the ECM Rules.

- b) Where a Controlled Medication Substance was found in a horse's sample without a valid Veterinary Form, a clear and unequivocal presumption arose under the ECM Rules that it was administered to the horse deliberately in an illicit attempt to enhance its performance. As a result of this presumption of fault, Article 10.2 of the ECM Rules provided that a Person Responsible with no previous doping offence, but who violated Article 2.1 of the ECM Rules was subject to a period of Ineligibility of six (6) months, unless he was able to rebut the presumption of fault. To do this, the rules specified that he must establish to the satisfaction of the Tribunal (it being his burden of proof, on a balance of probability): (i) how the Prohibited Substances entered the Horse's system; and (ii) that he bore No Fault or Negligence for that occurrence, *i.e.*, that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had administered to the Horse (or the Horse's system otherwise contained) a Controlled Medication Substance; or, alternatively (iii) that he bore No Significant Fault or Negligence for that occurrence. If the PR failed to discharge this burden, the presumptive six-month ban under Article 10.2 of the ECM Rules applied.
- c) The ECM Rules stipulate and the jurisprudence of the Tribunal and the Court of Arbitration for Sport ("**CAS**") are very clear: it is a strict threshold requirement of any plea of No (or No Significant) Fault or Negligence that the PR prove how the substance(s) entered into the Horse's system. The FEI submitted that the PR has an obligation to provide clear and convincing evidence that proved how the Flunixin, Phenylbutazone, Oxyphenbutazone, Dexamethasone and Clenbuterol entered the Horse's system. The PR and the Trainer claim that a miscalculation and miscommunication occurred between the staff at their stable but they do not provide any explanation on how the Flunixin, Phenylbutazone, Oxyphenbutazone, Dexamethasone and Clenbuterol could have entered the Horse's system. The PR should have explained if he or any other person administered the Prohibited Substances to the Horse; the circumstances explaining why the Prohibited Substances were given; and the aim of giving such substances. So far such explanation was not provided; the PR has therefore not established how the substance entered the body of the Horse.
- d) In terms of the degree of Fault or Negligence by the PR for the rule violation, the starting point of any evaluation was the "*personal duty*" of the PR following from Article 2.1.1 of the ECM Rules, *i.e.*, his personal duty to ensure that "*no Controlled Medication Substance is present in the Horse's body*".
- e) The FEI argued that, through the FEI Clean Sport programme and in particular the "*Athletes Guide*"¹, it had gone to considerable lengths to communicate relevant information on the EADCMRs to Athletes.

¹ Athlete's Guide to the Equine Anti-Doping and Controlled Medication Regulations, effective 5 April 2010

It had to be noted in this context that, in the *Glenmorgan decision*², CAS had stated that the Athlete's Guide "contains straightforward advice both to PRs and Support Personnel in a non-technical, non-legal form" and described the Athlete's Guide as "required reading".

- f) Furthermore, the Sole Arbitrator in the *Royal des Fontaines case*³ had endorsed the rationale behind the FEI's policy of making the Athlete/rider the Person Responsible. The CAS Decision states as follows (at para 57):

"No doubt the degree of care is high; but horses cannot care for themselves. As the Respondent (the FEI) put it in its skeleton argument

"The FEI believes that making the rider the responsible in this way is necessary to protect the welfare of the horse, and to ensure fair play. It strongly incentivises riders to ensure compliance with the rules, whether by caring for the horse personally or else by entrusting that task only to third parties who are up to the job. In the case of such delegation, it protects the welfare of the horse, and clean sport, by requiring the rider to stay appraised of and be vigilant with respect to the way the horse is being prepared for competition, including as to any treatments given to the horse"

The Sole Arbitrator respectfully agrees."

- g) In the *Glenmorgan case* (in para 209) the Panel confirmed that the rider was best fit to control the Horse before a competition. "... Among them (any support personnel), the rider is best able to function as the "last check" on the physical condition of the horse immediately prior to and during the race, regardless of whether he knows the horse or mounts it for the first time. An experienced rider can quite often identify with the naked eye an irregularity in the condition and behaviour of the animal both before mounting and during the competition."

- h) The Panel further stated as follows (in para 203):

"The Panel wishes to emphasize again that the fault or negligence which determines the measure of the Appellant's sanction is not that of the Dr. It is the Appellant's own fault and negligence in not having exercised the standard of care applicable to a PR which, like the non-equine Athlete, is placed at the exercise of "utmost caution". It is the PR's personal duty to ensure that no Banned Substance is present in the Horse's body."

- i) In light of the stated CAS jurisprudence on this point, the FEI respectfully submitted that making the PR prima facie responsible for the condition of the Horse while competing, subject to his ability to

² CAS 2014/A/3591 Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan v. FEI

³ CAS 2015/A/4190 Mohammed Shafi Al Rumaithi v. FEI

prove he bore No (Significant) Fault or Negligence for the Horse's positive test results is a reasonable and justifiable stance. Furthermore, as the CAS jurisprudence confirmed, the rider was, no matter what, the Person Responsible for the horse he competed with, and could not delegate this duty to another person. The PR, therefore, has an obligation to ensure that no Prohibited Substance enters into the horse's system, and must act with the utmost caution to fulfil this duty. Conclusions to be drawn from the case law are that the duty of care is very high and that this duty of care cannot be delegated. In addition, the case law further provides that Persons Responsible are responsible for their Support Personnel and the medical treatments given to their horses by their veterinarians.

- j) In the case at hand, the PR has not established how the Prohibited Substances entered the Horse's system nor has the PR provided any evidence. The PR has therefore not discharged his burden of proving how the Flunixin, Phenylbutazone, Oxyphenbutazone, Dexamethasone and Clenbuterol got into the Horse's system. Further, the PR's deficient explanation of the happening was in the FEI's opinion not enough to establish No (Significant) Fault or Negligence according to Article 10.4 and Article 10.5 of the ECM Rules. Consequently, no elimination or reduction of the period of Ineligibility in this case was possible.
- k) In addition, the FEI highlighted that there were four (4) different Controlled Medication Substances present in the Horse's sample. This was an aggravating circumstance that should be considered in the final sanction, in accordance with Article 10.7 of the ECM Rules. The FEI therefore respectfully submitted that the applicable period of Ineligibility imposed on the PR in this case should be at a minimum six (6) months and up to one (1) year.
- l) The FEI also requested that the results of the PR and Horse combination obtained in the Competition be disqualified with all resulting Consequences, including forfeiture of any related medals, points and prizes. Furthermore, since this was a case with a Controlled Medication Substance, occurring during or in connection with an Event, and in order to safeguard the level playing field, all of the Person Responsible's individual results obtained in that Event, with any and all Horses with which the Person Responsible competed, with all consequences, including forfeiture of all medals, points and prizes, might be disqualified in accordance with Article 10.1.2 of the ECM Rules.
- m) As fairness did not dictate that no fine be levied in the case at hand, the FEI requested that a fine be imposed on the PR, and that the PR be ordered to pay the legal costs that the FEI had incurred in pursuing this matter. The FEI requested that the Tribunal fine the PR in the amount of 3,500 CHF, and order the PR to pay the legal costs of 1,500 CHF.

6. Jurisdiction

- 6.1 The Tribunal has jurisdiction over this matter pursuant to the Statutes, GRs and EAD Rules.

7. The Person Responsible

- 7.1 The PR is the Person Responsible for the Horse, in accordance with Article 118.3 of the GRs, as he was the rider of the Horse at the Event.

8. The Decision

- 8.1 As stated in Article 2.1.2 of the ECM Rules, sufficient proof of an ECM Rule violation is established by the presence of a Controlled Medication Substance in the Horse's A-Sample where the PR waives analysis of the B-Sample and the B-Sample is not analysed. The Tribunal is satisfied that the laboratory reports relating to the A-Sample reflect that the analytical tests were performed in an acceptable manner and that the findings of the Laboratory are accurate. The Tribunal is satisfied that the test results evidence the presence of Flunixin, Phenylbutazone, Oxyphenbutazone, Dexamethasone and Clenbuterol in the sample taken from the Horse at the Event. The PR did not contest the accuracy of the test results or the positive findings. In fact, the PR accepted the test results. The substances are classified as Controlled Medication Substances under the FEI List. The presence of Flunixin, Phenylbutazone, Oxyphenbutazone, Dexamethasone and Clenbuterol during an Event without a valid Veterinary Form is prohibited under Article 2.1 of the ECM Rules.
- 8.2 The FEI has, therefore, established an Adverse Analytical Finding and has sufficiently proven the objective elements of an offence by the PR, in accordance with Articles 3.1 of the ECM Rules.
- 8.3 In cases brought under Article 2.1 of the ECM Rules, a strict liability principle applies as described in Articles 2.1.1 of the ECM Rules. Once an ECM Rule violation has been established by the FEI, the PR has the burden of proving that he bore "No Fault or Negligence" for the rule violation as set forth in Article 10.4 of the ECM Rules, or "No Significant Fault or Negligence," as set forth in Article 10.5 of the ECM Rules.
- 8.4 However, to benefit from any elimination or reduction of the applicable sanction under Article 10.4 or 10.5 of the ECM Rules, the PR must first establish how the Controlled Medication Substances entered the Horse's system.
- 8.5 The Tribunal takes note of the PR's explanation for the positive finding, namely that after investigation they had found out that a miscalculation and miscommunication occurred between the staff at their stable. However, the PR did not further explain how the Prohibited Substances

entered the Horse's system, nor provide any evidence in this regard. Therefore, the Tribunal holds that the PR has not established - on a balance of probability, as required under Article 3.1 of the ECM Rules - how the Prohibited Substances entered the Horse's system.

- 8.6 In the absence of establishing on the balance of the probability how the Prohibited Substances entered the Horse's system, the Tribunal cannot evaluate the degree of fault of the PR for the rule violation.
- 8.7 Even if the source of the Prohibited Substances was established, the Tribunal would still conclude that No (Significant) Fault or Negligence does not apply in this case because under Article 2.1.1 of the ECM Rules, it is the PR's personal duty to ensure that no Prohibited Substances are present in the Horse's system during an Event without a valid Veterinary Form, and the PR has not provided any information/evidence on whether any procedures were in place or what due diligence was exercised to fulfil this duty.
- 8.8 Therefore, the Tribunal concluded that no elimination or reduction of the otherwise applicable period of Ineligibility is warranted.
- 8.9 In addition, the Tribunal takes note that four (4) different Prohibited Substances were detected in the Horse's sample, ultimately a Controlled Medication cocktail of anti-inflammatory drugs, a corticosteroid and a bronchodilator.
- 8.10 It follows from Article 10.7 of the ECM Rules, that the occurrence of multiple substances may be considered as a factor in determining aggravating circumstances. In taking into consideration the cocktail of Prohibited Substances found in the Horse's sample, the Tribunal finds that indeed aggravating circumstances are present in the case at hand. The Tribunal therefore decides to impose a period of Ineligibility greater than the standard sanction of six (6) months, as outlined in Article 10.2 of the ECM Rules.
- 8.11 The Tribunal takes note that the PR has been provisionally suspended since 22 February 2018.

9. Disqualification

- 9.1 For the reasons set out above, the Tribunal disqualifies the Horse and the PR from the Competition and the entire Event and all medals, points and prize money won must be forfeited, in accordance with Articles 9 and 10.1.2 of the ECM Rules.

10. Sanctions

- 10.1 As a result of the foregoing, and pursuant to Articles 10.2 and 10.7 of the ECM Rules, the period of Ineligibility imposed on the PR shall be nine (9) months.
- 10.2 The Tribunal imposes the following sanctions on the PR in accordance with Article 169 of the GRs and Article 10 of the ECM Rules:
- 1) The PR shall be suspended for a period of **nine (9) months**. The period of Provisional Suspension, effective from 22 February 2018 shall be credited against the Period of Ineligibility imposed in this decision. Therefore, the PR will be ineligible **until 21 November 2018**.
 - 2) The PR is fined **three thousand five hundred Swiss Francs** (CHF 3,500).
 - 3) The PR shall contribute **one thousand five hundred Swiss Francs** (CHF 1,500) towards the costs of this procedure.
- 10.3 No Person Responsible who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity that is authorised or organised by the FEI or any National Federation or be present at an Event (other than as a spectator) that is authorized or organized by the FEI or any National Federation, or participate in any capacity in Competitions authorized or organized by any international or national-level Event organisation (Article 10.11.1 of the ECM Rules).
- 10.4 Where a Person Responsible who has been declared Ineligible violates the rule against participation or attendance during Ineligibility, the results of any such participation shall be Disqualified and a new period of Ineligibility equal in length up to the original period of Ineligibility shall be added to the end of the original period of Ineligibility. In addition, further sanctions may be imposed if appropriate (Article 10.11.2 of the ECM Rules).
- 10.5 According to Article 168 of the GRs, the present decision is effective from the day of written notification to the persons and bodies concerned.
- 10.6 In accordance with Article 12 of the ECM Rules the Parties may appeal against this decision by lodging an appeal with the Court of Arbitration for Sport (CAS) within twenty-one (21) days of receipt hereof.

V. DECISION TO BE FORWARDED TO:

- a. The person sanctioned: Yes**
- b. The President of the NF of the person sanctioned: Yes**
- c. The President of the Organising Committee of the Event through his NF: Yes**
- d. Any other: No**

FOR THE PANEL



Ms. Constance Popineau, one member panel