Arbitration CAS 2016/A/4921 & 4922 Maria Dzhumadzuk, Irina Shulga & Equestrian Federation of Ukraine v. Federation Equestre Internationale (FEI), award of 30 May 2017

Panel: Prof. Jens Evald (Denmark), President; Mrs Vesna Bergant Rakocevic (Slovenia); The Hon. James Robert Reid QC (United Kingdom)

Equestrian (Dressage)
Disciplinary sanction for engaging in nationalistic judging
Nulla poena sine lege and nulla poena sine lege clara
Evidence required for finding of nationalistic judging under FEI Dressage Judges' Codex
Balance of probabilities as standard of proof
Scope of review by CAS panels of sanctions imposed by disciplinary body

1. **Provisions of an association must meet the principle of *nulla poena sine lege*; *i.e.* it is axiomatic that in order for a person to be found guilty of a disciplinary offence, the relevant disciplinary code must proscribe the misconduct with which he or she is charged. It is equally axiomatic that, in accordance with the *contra proferentem* rule, the relevant provision with which the person is charged to be in breach will have to be strictly construed (*nulla poena sine lege clara*). It is not sufficient to identify a duty but it is also necessary to stipulate that a breach of such duty will attract disciplinary sanctions. Disciplinary regulations must be explicit as otherwise they become a tool of arbitrary decisions. However, a distinction must be made between broadly drawn provisions and ambiguous provisions; put differently, disciplinary provisions are not vulnerable to the application of the *nulla poena sine lege clara* rule merely because they are broadly drawn.**

2. **In order to conclude that a violation of the prohibition of nationalistic judging stipulated in the FEI Dressage Judges' Codex has been committed by an FEI Dressage Judge it is not necessary to establish a motive; nevertheless, the inability to establish a motive may be a factor in determining whether a case has been proved. Furthermore, in order to establish any violation for nationalistic judging, the analytical information obtained (*e.g.* by analysing the results of all athletes that have taken part in the competition in question, any score deviations and whether or not satisfactory explanations are provided therefore) need to be supported by other, different and external elements pointing in the same direction. Relevant in this context are *e.g.* complaints/requests – directed by third sources/individuals or competitors to the sports governing body – to look into the results in question.**

3. **According to the standard of proof of "balance of probabilities", a sanctioning authority must establish the disciplinary violation to be more probable than not. This standard of proof is lower than the "comfortable satisfaction" standard widely applied by CAS panels in disciplinary proceedings.**

4. Even though CAS panels retain the full power to review the factual and legal aspects involved in a disciplinary dispute, they must exert self-restraint in reviewing the level of sanctions imposed by the disciplinary body and should reassess sanctions only if they are evidently and grossly disproportionate to the offence.

I. PARTIES

1. Ms. Maria Dzhumadzuk (the "First Appellant" or "Ms. Dzhumadzuk") is a member of the Equestrian Federation of Ukraine and a 4* FEI dressage judge of Ukrainian nationality[1].

2. Ms. Irina Shulga (the "Second Appellant" or "Ms. Shulga") is a member of the Equestrian Federation of Ukraine and a 3* FEI dressage judge of Ukrainian nationality.

3. The Equestrian Federation of Ukraine (the "NF") is the national governing body of equestrian sport in Ukraine and is member of the FEI.

4. The Federation Equestre Internationale (the "FEI") is a Swiss law association established in accordance with Articles 60 et seq. of the Swiss Civil Code, headquartered in Lausanne, Switzerland. It functions as the international governing body for the equestrian sport disciplines of dressage, jumping, eventing, driving, endurance, vaulting, reining and para-equestrian. Its members are the national bodies of the sport.

5. Ms. Dzhumadzuk, Ms. Shulga, the NF and the FEI are collectively referred to hereinafter as the "Parties".

II. FACTUAL BACKGROUND

6. Below you find a summary of relevant facts and allegations based on the parties' written submissions. Additional facts and allegations found in the parties' written submissions may be set out, where relevant, in connection with the legal discussion that follows. While the Panel considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

7. The present dispute arises out of the imposition by the FEI, following a disciplinary process, of a 3 (three) month period of suspension on each of the First and Second Appellant in April 2016

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1 According to the Respondent's Answer, FEI Dressage Judges are the judges authorized to judge at international FEI Dressage events. They are ranked according to 4 levels: 2* (being the lowest level) to 5* (being the highest level).

for breaching of the FEI Codex for Dressage Judges (the "Dressage Judges' Codex") by engaging in nationalistic judging at an international FEI dressage event in Lier, Belgium in March 2016 (the "Lier Event"). Both suspensions expired at the end of July 2016.

8. The Lier Event was held on 1-2 March 2016 and consisted of 4 separate Grand Prix Competitions, including a Grand Prix Special (the "GP Special Competition") at which the First and Second Appellant judged.

9. The results of the 4 Grand Prix Competitions counted towards the Olympic rankings for the Rio 2016 Olympic Games and thus the FEI Olympic Ranking Rules applied to the Lier Event. The Lier Event was one of the final events at which Olympic Ranking points could be earned.

10. After the Lier Event, the FEI received complaints/requests to look into the Lier Event, in particular to the scores awarded to the Ukrainian athlete Ms. Inna Logutenkova from the Polish National Federation and separately from the Portuguese athlete Mr. Goncalo Carvalho.

11. According to FEI Olympic Ranking Rules the FEI Dressage Committee "may decide not to include the scores obtained at an event in the rankings, should the event not have been organized in accordance with general principle of fairness. The Executive Board should confirm the decision of the Dressage Committee".

12. On 17 March 2016, the FEI Dressage Committee held a meeting (by teleconference) to review the Lier Event and decided to apply the so called "Fairness Principle" meaning that the results of the competition would not count towards the Olympic & World Rankings on the basis that *"nationalistic judging in favour of the UKR Athlete, Inna Logutenkova, by two Ukrainian judges occurred during the Grand Prix Special test of the CDI3* Lier on 2 March 2016"*.

13. The decision by the FEI Dressage Committee to apply the Fairness Principle was confirmed by the FEI Executive Board on 21 March 2016.

14. On 22 March 2016, the FEI Secretary General wrote to the Secretary General of the Ukraine NF to inform the FEI Dressage Committee decision (and its subsequent confirmation by the FEI Executive Board).

15. According to the FEI General Regulations, an FEI Dressage Committee decision can be appealed within 30 days of notification. Neither the Ukraine NF nor any other person filed an appeal against the decision.

16. On 1 April 2016, the FEI Secretary General, wrote separately to each of the First and Second Appellant to inform them that it was alleged that they had breached the FEI Codex for Dressage Judges and that the FEI intended to impose sanctions for the breach. Both Appellants were informed that the basis for this allegation was that, in the GP Special Competition, their scores in favour of Ms. Logutenkova exceeded the scores of the other (non-Ukrainian) judges by 8% and 9 % respectively.

17. The Appellants were informed by the FEI Secretary General that they would be *"afforded the right to be heard prior to the FEI taking a decision on the above matters"* and that they could exercise that right by making a written and/or oral submission.

18. The Appellants provided short written submissions by way of email. Both denied the allegations of nationalistic judging. Neither of the Appellants asked to make an oral submission.

19. The FEI Disciplinary Decisions, taken by the FEI Secretary General and the FEI Legal Director were issued to the First Appellant on 25 April 2016 and to the Second Appellant on 28 April 2016. The FEI Disciplinary Decisions concluded that each of the Appellants had failed to comply with Article 2 of the Dressage Judges' Codex at the GP Special Competition. A 3 (three) month period of suspension was imposed.

20. On 23 May 2016, the Appellants filed appeals against the FEI Disciplinary Decisions with the FEI Tribunal.

21. On 25 October 2016, a one-day, in-person hearing was held in Lausanne, Switzerland.

22. On 30 November 20016, the FEI Tribunal issued written decisions dismissing the Appellants' appeals on the merit, finding that both Appellants violated the Codex, independent and fair manner and that the Appellants, *"by not judging in a neutral, independent and fair position towards Ms. Logutenkova, and clearly in favour of Ms. Logutenkova, and by having the same nationality as Ms. Logutenkova, was therefore judging in a nationalistic way"*.

23. Different aspects of the FEI Tribunal's reasoning will be addressed in connection with the Parties' submissions in section IV below. In short, the findings of the FEI Tribunal were as follows:

- The Appellants' right to be heard in the disciplinary proceedings before the FEI had not been violated;
- Sufficient evidence had been presented in order for the FEI Tribunal to find that the Dressage Judges' Codex had been violated by the Appellants, and the scoring towards Ms. Logutenkova had not been neutral, independent and fair;
- The Appellants' judging strongly favoured Ms. Logutenkova and this amounted to "nationalistic judging"; and
- The sanction of a 3 (three) month period of suspension imposed by the FEI was not manifestly excessive to the seriousness of the conduct.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT ("CAS")

24. On 20 December 2016, the Appellants filed two separate Statements of Appeal against the FEI Tribunal Decision before the CAS in accordance with Article R47 et seq. of the Code of Sports-related Arbitration (the "CAS Code"). The Appellants jointly nominated Ms. Vesna Bergant Rakocevic as sole arbitrator.

25. In its letters dated 28 December 2017, the CAS Court Office invited the Appellants to inform the CAS Court Office within 3 days from receipt of the letter by courier whether they agreed to consolidate the procedure CAS 2016/A/4921 Maria Dzumadzuk & Equestrian Federation of Ukraine v. Federation Equestre Internationale, and CAS 2016/A/4922 Irina Shulga & Equestrian Federation of Ukraine v. Federation Equestre Internationale.

26. In its letter dated 4 January 2017, the CAS Court Office acknowledged receipt of the Appellants' Appeal Briefs dated 30 December 2016. The Appellants agreed to consolidate the procedures.

27. The Ukraine NF was named as an additional Appellant in each Statement of Appeal and Appeal Brief.

28. The Appeal Briefs were received by the FEI on 9 January 2017 and a 20 day time limit was set by the CAS Court Office for the FEI to submit its Answer.

29. In its letter, dated 11 January 2017, to the CAS Court Office, the FEI confirmed that it agreed to the consolidation of the two appeals. Regarding the composition of the arbitration panel, the FEI did not agree to the appointment of a sole arbitrator. The FEI noted that under Article R50 of the CAS Code the default number of arbitrators for appeal proceedings before the CAS is 3 (three). The FEI held the position that, for the present case, there were not any particular circumstances that warrant deviating from that default position.

30. In its letter to the Parties, dated 12 January 2017, the CAS Court Office confirmed the consolidation of the procedures and advised that in view of the Parties' disagreement on the number of arbitrators, it would now be for the President of the Appeals Arbitration Division, or her Deputy, to decide on such issue in accordance with Article R50 of the CAS Code and further information would follow in due course.

31. In its letter, dated 30 January 2017, the CAS Court Office informed the Parties that the President of the Appeals Arbitration Division had decided to submit the present case to a Panel composed by three arbitrators. Ms. Vesna Bergant Rakocevic was considered to be the arbitrator chosen by the Appellant and the Respondent was invited to nominate an arbitrator within 7 days of receipt of the letter by facsimile.

32. In its letter dated 31 January 2017, the CAS Court Office acknowledged receipt of the Respondent's Answer, dated 30 January 2017.

33. On 6 February 2017, in an email to the CAS Court Office, the Respondent nominated His Honour James Robert Reid QC as an arbitrator. In the same email the Respondent stated, that the FEI's preference would be for the CAS Panel to issue an award based solely on the Parties' written submissions.

34. On 6 February 2017, in an email to the CAS Court Office, the Appellants informed that they also preferred when the CAS Panel issued a verdict based on the written submissions of the Parties.

35. On 23 February 2017, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, confirmed that the Panel had been constituted as follows: Mr. Jens Evald, Professor of Law in Aarhus, Denmark (President of the Panel), Ms. Vesna Bergant Rakocevic, Higher Judge in Ljubljana, Slovenia (nominated by the Appellants), and His Honour James Robert Reid QC, Retired Judge in West Liss, United Kingdom (nominated by the Respondent).

36. On 23 February 2017, the CAS Court Office in its letter to the Panel noted that the Parties preferred that the CAS Panel issue an award based solely on the Parties written submissions.

IV. SUBMISSIONS BY THE PARTIES

37. The Appellants' submissions, in essence, may be summarized as follows:

- The FEI Tribunal Decision was erroneous, irrational, procedurally unsound and disproportionate and thus violating the rule of fair trial, cf. Article 6 of the European Convention on Human Rights ("EHRC").

- That "nationalistic judging" was not punishable at the time of the offence and therefore could not constitute a legal ground to suspend independent judges, thus, the FEI Tribunal apparently disregarded the *nulla poena sine lege* principle, cf. Article 7 of the EHRC.

- The Appellants deny having judged in a nationalistic manner during the Lier Event, and asserted the assumptions of the alleged violation were made solely on a mathematic comparison of the results and nationality.

- The sanctions imposed were disproportionate given the fact that the Appellants are first time offenders. Furthermore the Appellants had subjectively or objectively no interest whatsoever in judging the combination Ms. Logutenkova and her horse Fleraro in a "nationalistic manner", and the combination did not have any influence on the Olympic Rankings.

- The Appellants are of the opinion that the FEI acted in a discriminatory manner towards the Appellants and that the FEI Tribunal obviously disregarded this obvious discrimination against Ukraine.

38. In their Statement of Appeal, the Appellants request the CAS to:

> *"2.1 […] that the CAS Panel consider this matter a hearing de novo and upon hearing the evidence, decide that the FEI Tribunal Decision and the FEI Decision shall be annulled".*

39. In their Appeal Briefs, the Appellants request that the CAS:

> *"6.1. […] in all the circumstances of the case the FEI Tribunal Decision and the FEI Decision shall be annulled/nullified.*
>
> *6.2. In addition, [Ms. Dzhumadzuk/Ms. Shulga] and the NF respectfully request that the FEI bears the costs of these proceedings".*

40. The Respondent's submissions, in essence, are summarized by it as follows:

> *"The position of the FEI, which shall be set forth in detail below, can be summarized as follows:*
>
> – *Mrs. Dzhumadzuk and Mrs. Shulga engaged in nationalistic judging during the GP Special at the Lier Event;*
>
> – *The marks they awarded to the Ukrainian athlete Mrs. Inna Logutenkova, were disproportionately high and deviated significantly from the marks awarded by the other three non-Ukrainian judges. Neither Mrs. Dzhumadzuk nor Mrs. Shulga have offered any plausible explanation justifying the large difference in scoring:*
>
> – *Nationalistic judging is a punishable offence under the Dressage Judges' Codex and the FEI was well within its rights to impose a sanction on Mrs. Dzhumadzuk and Mrs. Shulga;*
>
> – *The three (3) month period of suspension imposed on Mrs. Dzhumadzuk and Mrs. Shulga was legitimate, warranted and proportionate; and*
>
> – *The FEI Tribunal was right, as a matter of fact and law, to find that Mrs. Dzhumadzuk and Mrs. Shulga did not judge in a "neutral, independent and fair" manner towards Mrs. Logutenkova and judged in a "nationalistic way".*

41. The Respondent makes the following requests for relief, asking the CAS:

> *"7.1.1 to reject the Appellants' requests for relief in their entirety and to dismiss the Appeals in its entirety, so that the FEI Disciplinary Decisions and the FEI Tribunal Decisions are left undisturbed;*
>
> *7.1.2 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*

7.1.3 in accordance with Article 64.5 of the CAS Code of Sports-related Arbitration, to order the Appellants to pay a contribution towards the legal costs that the FEI has incurred in these proceedings".

V. JURISDICTION AND ADMISSIBILITY

42. The jurisdiction of the CAS, which is not disputed, derives from Article 165.1.3. of the FEI General Regulations that provides for a right of appeal to the CAS in respect of decisions of the FEI Tribunal under the FEI General Regulations ("FEI GR") (2016 edition), and Article R47 of the CAS Code.

43. It follows that the CAS has jurisdiction to adjudicate on and decide the present dispute.

44. The appeal was filed within the 21 days set by Article 165.6.2. of the FEI GR. The appeal complied with all other requirements of Article R47 of the CAS Code including the payment of the CAS Court Office fee.

45. It follows that the appeal is admissible.

VI. APPLICABLE LAW

46. Article R58 of the CAS Code provides the following:

"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".

47. In accordance with Article R58 of the CAS Code, the FEI rules and regulations shall be applicable to the present case.

48. Article 39.1. of the FEI Statutes (2014 edition) provides *"the Court of Arbitration for Sport (CAS) shall judge all Appeals properly submitted to it against Decisions of the FEI Tribunal, as provided in the Statutes and General Regulations".*

49. Article 39.4. of the FEI Statutes provides that *"[t]he parties concerned acknowledge and agree that the seat of the CAS is in Lausanne, Switzerland, and that proceedings before the CAS are governed by Swiss Law".*

50. It follows that this dispute will be decided according to FEI regulations and additionally Swiss Law.

VII. THE APPELLANTS' DUE PROCESS RIGHTS

51. The Appellants claim that the FEI violated the rule of fair trial, cf. Article 6 of the ECHR due to procedural flaws in the earlier disciplinary and FEI Tribunal proceedings, *inter alia*, not granting the Appellants their full right to be heard. As a consequence, the Appellants contend that the appealed decision should be annulled.

52. The Respondent submits that whether the procedural flaws existed or not is largely irrelevant to the present proceedings, as the rules and jurisprudence of the CAS on the *de novo* nature of appeal are clear: Procedural irregularities or flaws in the underlying proceedings are not, of themselves, grounds for overturning the decision appealed against because they are cured by the *de novo* nature of the procedure before the CAS.

53. The Respondent denies that either the disciplinary or the FEI Tribunal proceedings were procedurally flawed and further denies that the Appellants' right to be heard was not respected. The Respondent summarizes its position:

> *"5.6. […]*
>
> – *In the course of the disciplinary proceedings, Mrs. Dzhumadzuk and Mrs. Shulga were given the opportunity to make written and oral submissions […]. The FEI cannot be held to be at fault for the fact that neither Mrs. Dzhumadzuk nor Mrs. Shulga exercised their right to make an oral submission and their written submissions were comprised of just one short email […].*
>
> – *The FEI Tribunal Regulations state that the general rule is that all cases, with three specific exceptions […], shall be dealt with by a one member panel. Despite this the Appellants insisted on a three member hearing panel for the FEI Tribunal proceedings. The Chair of the FEI Tribunal granted this request.*
>
> – *The FEI Tribunal Regulations provide, as a general rule, for one round of submissions by the parties […]. The Appellants requested and were granted the right to make an additional submission and were given a time period of almost one (1) month to do so.*
>
> – *The Appellants had the opportunity to apply for interim relief in the course of the FEI Tribunal proceedings. They did not do so.*
>
> – *A one (1) day, in-person, hearing was held before the three member FEI Tribunal Hearing Panel on 25 October 2016. The Appellants attended themselves and gave oral testimony. The witnesses summoned by the Appellants also attended […] and gave oral testimony.*
>
> – *The FEI Tribunal Decisions stated:*
>
> *"That even if the Appellant's right to be heard have been violated in the FEI proceedings, which is not the case in the present case, such shortcomings are cured in the present Appeal proceedings".*
>
> – *The FEI Tribunal Decision went on to note:*

"In this respect, at the end of the hearing both Parties expressly acknowledged that the Tribunal has respected their right to be heard and their procedural rights".

54. The Panel does not agree with the Appellants' submission. The CAS appellate arbitration procedure under Article R57 of the CAS Code entails a trial *de novo* (*"The Panel shall have full power to review the facts and the law"*) and that such review by the CAS, as repeatedly decided by well-established CAS jurisprudence, cures any procedural irregularities in the proceedings below, cf. CAS 2008/A/1545 (para. 14 f); CAS 2009/A/1880-1881 (paras. 142, 146); CAS 2013/A/3262 (para. 83); CAS 2014/A/3467 (para. 78 f); and MAVROMATI/REEB, 'The Code of the Court of Arbitration for Sports', 2015, p. 513 f.

55. Therefore, the Panel considers that any possible infringement of the Appellants' due process rights committed by the FEI are hereby cured and thus irrelevant. As a result, the Panel may proceed to rule on the merits of this case.

VIII. MERITS

56. The issues in dispute in the present proceedings are

(A) whether "nationalistic judging" was punishable at the time of the offence and, if answered in the affirmative,

(B) whether the Appellants violated the Dressage Judges' Codex and, if answered in the affirmative,

(C) what are the appropriate sanctions of such violation?

A. Was "Nationalistic Judging" Punishable at the Time of the Offence?

57. The main relevant rule in question in the present case is the Dressage Judges' Codex, and in particular sections 2 and 7, that read as follows:

"2. A Judge must avoid any actual or perceived conflict of interest. A judge must have a neutral, independent and fair position towards riders, owners, trainers, organizers and other officials and integrate well into a team. Financial and/or personal interest must never influence or be perceived to influence his/her way of judging.

Activities which will lead to or may lead to a "conflict of interest" when officiating at a CDI, include but are not limited to:

[…]

Nationalistic judging.

[…].

7. The FEI and the FEI Dressage Committee have the right to undertake disciplinary actions against judges who do not follow the Codes and FEI rules.

Such disciplinary actions may consist of: 1) Warning letter 2) Temporary suspension and 3) Removal from the FEI Dressage Judges' list".

58. In the Statement of Appeal, the Appellants take the position that the Dressage Judges' Codex and the Dressage Rules do not contain a definition of "nationalistic judging":

"V.) the term "nationalistic judging" has not been defined so far by the FEI so it may not constitute a legal ground to suspend independent judges. Otherwise this becomes a tool for "arbitrary decisions". The term may not be construed post factum by referring to various FEI regulations such as the Codex ("conflict of interest"), the Fairness Principle in the Olympic Ranking Rules, the FEI GRs (Article 169.6.3, 169.6.4) and the FEI Dressage Rules and more in particular to Article 438 thereof that provides a correction mechanism of the scores.

[…]".

59. In the Statement of Appeal, the Appellants further assert, that:

"VI.) The compounded and implied definition of "nationalistic judging" was for the first time introduced by the FEI during the meeting held between the NF and the FEI at the beginning of April 2016, therefore weeks after the event in Lier and weeks after the FEI Decision was issued".

60. In the Appeal Brief, the Appellants assert that the imposition of sanctions on Ms. Dzhumadzuk and Ms. Shulga is in violation of the *nulla poena sine lege* principle:

"3.11 With regards to Article 7 of ECHR the Appellants respectfully submit that The FEI Tribunal apparently disregarded the meaning of the nulla pennae [poena] sine lege principle. Such especially in the light of the FEI's submission that acknowledged that the FEI has not been following this principle. The FEI stated in its submission […] that the nationalistic judging was punishable at the time of the offence but regarding the definition of the nationalistic judging it stated […]:

"It is the submission of the FEI that it is not always possible, or even advisable, to provide a catch-all definition of a particular offence due to the fact that it is not always possible to predict all various actions/omissions which could be encompassed by the particular offence or to include an exhaustive list of examples. Insisting that every offence must be strictly defined would run the risk of depriving the relevant authority of the ability to punish obvious wrongdoing simply because the conduct in question had not come within the parameters of a fixed definition".

61. The Respondent submits that:

4.41. "The Dressage Judges' Codex clearly states that nationalistic judging is not permitted and is a breach of the conflict of interest provisions of the Dressage Judges' Codex. Furthermore, both the Dressage Judges' Codex and the FEI Dressage Rules state that a breach of the Dressage Judges' Codex, such as by engaging in nationalistic judging, is a punishable offence. Therefore, the FEI submits that it cannot be said that the offence was "not punishable at the time"; it clearly was".

62. The Panel notes that according to Swiss association law and to Article 7 EHRC provisions of an association must meet the principle of *nulla poena sine lege*. The Panel agrees with the analysis of the Panel in CAS 2014/A/3516 (para. 104), and its statement, that it is axiomatic that *"before a person can be found guilty of a disciplinary offence, the relevant disciplinary code must proscribe the misconduct with which he is charged. Nulla poena sine lege. It is equally axiomatic that the relevant provision with which he is charged to be in breach first in accordance with the contra proferentem rule will be strictly construed. Nulla poena sine lege clara (CAS 2007/O/1381 para 61; CAS 2005/C/976 & 986 para 126). It is not sufficient to identify a duty; it is necessary as well to stipulate that breach of such duty will attract disciplinary sanctions".*

63. The Panel finds that the Dressage Judges' Codex was in force of 1 January 2011, and it clearly states that "nationalistic judging" is prohibited and that the FEI and the FEI Dressage Committee have the right to impose sanctions on dressage judges who do not follow the Codex and the FEI rules. Furthermore, the Dressage Judges' Codex clearly describes the different disciplinary sanctions. In brief, the Dressage Judges' Codex has been properly adopted, describes the infringement and provides directly for the relevant sanction.

64. The Appellants assert that since the term "nationalistic judging" in the Dressage Judges' Codex had not been defined by the FEI at the time of the alleged rule violation, "nationalistic judging" was not punishable, and as a consequence the FEI Tribunal violated the *nulla poena sine lege* principle by imposing sanctions on the Appellants. The Panel does not agree with the Appellants' assertion. As earlier mentioned, the Dressage Judges' Codex clearly states that "nationalistic judging" is prohibited and therefore the principles of predictability and legality are met. The disciplinary provisions in the Dressage Judges' Codes are broadly drawn and need to be interpreted as set out below in section B.2. Legality and interpretation are different concepts. The FEI Tribunal has the final authority within the FEI to interpret and apply the Dressage Judges' Codex, cf. Article 38 of the FEI Statutes. The fact that in the present case there was a subsequent debate within the FEI and an attempt to define the meaning of "nationalistic judging" did not deprive the FEI Tribunal of the power of interpreting the term. It would be otherwise if the definition of the term had been extended after the events in question and the conduct alleged only fell within the new extended definition. The latter is not the case in the present dispute, and the Panel finds that the FEI Tribunal Decision did not violate the *nulla poena sine lege* principle.

B. Did Ms. Dzhumadzuk and Ms. Shulga Violate the Dressage Judges' Codex?

1. The Parties Submissions

The Appellants

65. In their Appeal Brief, the Appellants hold the following position:

> *"3.13 None of the regulations of the FEI contain the definition of the nationalistic judging. The Codex simply refers to "nationalistic judging". Moreover the definition of nationalistic judging introduced by FEI via the Codex, Fairness Principle, contained in FEI Olympic & World Ranking Rules for Dressage, and Article*

438 of the Dressage Rules (Judges Supervisory Panel) at an Event at which a JSP panel is present "… if a judge's final score for a Horse/athlete combination varies (above or below) by six (6) % or more from the average of the scores of the other judges for the same combination, the JSP may, by unanimous decision, change that particular score to the same as the next closets score", differs from the definition introduced by the Chair of the Dressage Committee Mr Kemperman during the FEI Tribunal hearing on 25 October 2016. Therein he stated that the nationalistic judging occurs when "the rider with the same nationality as the judges – if the rider's award better than it should have been […]".

3.14 Contrary to what the FEI stated in its submissions under paragraph 4.21 […] it is as not clear at all that a deviation of 6 % in the scores given by the judges goes beyond the limit of what is regarded as acceptable by the FEI. It is a blend of different regulations referring to different organs of the FEI and not in any way referring to "nationalistic judging". As submitted by the Appellants the FEI and the FEI Tribunal referring to Article 438 of the Dressage Rules failed to apply this rule correctly. The regulation as such was misused and used for a different purpose than it was obviously intended.

[…].

4.5 […] The Appellants further pointed out during the hearing before the FEI Tribunal that [Ms. Dzhumadzuk and Ms. Shulga] subjectively and objectively had no interest whatsoever in judging the combination Ms. Logutenkova and Fleraro in a "nationalistic way". This combination did not have any influence on the Olympic Rankings […].

4.6. The Appellants also pointed out that in accordance with the FEI highly respected expert, Mr David Stickland, nationalistic judging occurs predominantly by downscoring/downgrading of other competitors […]. Additionally the Appellants submitted that the validity of this statement is also supported by scientific observations in other disciplines and refer to a publication of the Stanford University from 2002 of Mr Eric Zitzewitz under the title "Nationalism in Winter Sports Judging and Its Lessons for Organizational Decision Making" […] in which similar conclusions to Stickland were drawn that where figure skating and ski jumping are concerned, the nationalistic judging occurs by downgrading the opponent.

4.7 The Appellant pointed out the FEI did not investigate this aspect taking for granted that the Dzhumadzuk and Ms. Shulga were guilty of judging in a nationalistic manner with regards to the Ukrainian combination. Such whereas the other option (downgrading/downscoring by the other members of the Ground Jury) is far more likely and should have been reviewed too. Interestingly, there was a member of the Ground Jury from Poland (Mr Pietrzak on position H). The appellants respectfully submit that Beata Stemler from Poland was Ms Logutenkova's direct competitor and it was in the end Poland that filed a protest to the FEI. The FEI Tribunal disregarded these objectively valid arguments and legitimized herewith the arbitrary conduct of the FEI with respect to the Appellants".

The Respondent

66. The Respondent's assertions may be summarized as follows:

a. The statistical evidence shows "nationalistic judging" by Ms. Dzhumadzuk and Ms. Shulga. The scores awarded by Ms. Dzhumadzuk and Ms. Shulga were over 8 % and 9 % higher than the average of the scores awarded by other judges.

b. The scores awarded by the Appellants favoured Ms. Logutenkova, which is confirmed upon examination of the ranking of Ms. Logutenkova by all the judges. The Appellants ranked Ms. Logutenkova 2nd and 3rd respectively and the other judges ranked Ms. Logutenkova from 11th to 14th.

c. Neither of the Appellants have provided any credible explanation for why their scoring of Ms. Logutenkova was so much higher than that of their judging colleagues whereas this was not the case for the non-Ukrainian competitors in the GP Special Competition.

d. The Appellants' interest was to make sure that their compatriot, an athlete whose performances both were familiar with, received a high score in the GP Special Competition. In any case, not having an interest for committing a rule breach is not a defence to that rule breach.

e. The vague allegations that the other non-Ukrainian judges underscored Ms. Logutenkova's performance appears to contradict the statement of Ms. Dzhumadzuk made during the FEI Tribunal hearing, where she stated that *"there was no reason to believe that her colleagues [i.e. the other judges] did not score correctly"*.

f. The Respondent does not accept that the Appellants could not reasonably have known what does and does not constitute nationalistic judging just because there is no strict definition on the term.

g. The term "nationalistic judging" in the Codex must be read in the context of the FEI Dressage Rules and the Codex as a whole and particular in light of the following sentence of paragraph 2 of the Codex: *"A Judge must avoid any actual or perceived conflict of interest. A judge must have a neutral, independent and fair position towards riders, owners, trainers, organizers and other officials and integrate well into a team"*. This sentence comes just before the list of examples of conflicts of interest where "nationalistic judging" is listed. Judging which does not meet the standard of being "neutral, independent and fair" is conduct which the FEI clearly intends can be penalized.

h. High-level dressage judges as the Appellants, should recognize that judging in such a way as to score an athlete from their own country over 8 % and 9 % more than the average of the other judges could be considered as "nationalistic judging" and a breach of the Dressage Judges' Codex.

i. Even if the particular term "nationalistic judging" was not defined in the Codex, the Appellants' failure to judge in a "neutral, independent and fair manner" is still a punishable offence under the Codex. By expanding on the general principles of paragraph 2 of the Codex by listing examples of conflicts of interest (including nationalistic judging), the Codex actually gives more clarity as what is and is not punishable in accordance under the Codex. Various laws, CAS and national court jurisprudence, do not require a strict certitude of the elements provided for disciplinary sanctions of the sports federation, as required by criminal law. Such case law rather recognizes general elements, which constitute the basis for disciplinary sanctions (CAS 2007/A/1437).

j. The fact that a violation is not defined and requires interpretation is not fatal to the application of the relevant rule. Grammatical, systematical, historical and teleological interpretation support the understanding of "nationalistic judging" relied on by the Respondent.

k. The "true purpose" of the rule ("nationalistic judging") is to ensure a level playing field for competitors (human and equine) and to ensure that judges do not allow themselves to be swayed by bias in favour of athletes of their own nationality. The term "nationalistic judging" must be interpreted in light of the key principle of the FEI as it is expressed in the FEI Statutes (*"1.3 To enable individual Athletes and teams from different nations to compete in international Events under fair and even conditions"*), and FEI General Regulations, Article 100 (1) (*"[T]he General Regulations (GRs) are established so that individual Athletes and teams of Athletes from different National Federations (NFs) may compete against each other under fair and equal conditions with the welfare of Horse as paramount"*.).

2. The Findings of the Panel

67. The Panel will address the issues as follows:

(a) The burden of proof

(b) Brief analysis of the Dressage Judges' Codex

(c) The judging at the Lier Event and the Appellants' explanations

(d) Evidence

(e) The Panel's conclusions

(f) Other issues

- The Appellants' accusation against other Ground Jury members of down-scoring
- The Appellants' accusation against the FEI of discrimination towards Ukraine.

(a) The Burden of Proof

68. With regard to the burden of proof, Article 19.23 of the FEI Tribunal Regulations provides as follows:

> *"19.23. The Claimant shall have the burden of proving that the Respondent committed the infringement(s) alleged in the Claim"*.

69. The Panel notes that this FEI provision is in line with the general principle for disciplinary cases according to which the burden of proof lies with the accuser. Hence, notwithstanding the fact that the FEI is the Respondent in this arbitration, it is up to the FEI to prove its case against the Appellants.

(b) Brief Analysis of the Dressage Judges' Codex

70. The Appellants assert that disciplinary regulations must be explicit otherwise they become a tool of arbitrary decisions. The Panel notes that a distinction must be made between broadly drawn provisions and ambiguous provisions. Disciplinary provisions are not vulnerable to the application of that rule merely because they are broadly drawn, cf. CAS 2014/A/3516 (para. 105). It follows from the discussion below, that the Panel finds that the Dressage Judges' Codex is broadly drawn, but not ambiguous.

71. One of the key issues related to the Dressage Judges' Codex is the understanding of the term "nationalistic judging". As mentioned, the Appellants maintain that, *"none of the regulations of the FEI contain a definition of nationalistic judging. The Codex simply refers to 'nationalistic judging'"*. The Respondent agrees that there is no *"strict definition of the term"*, but the term must be read in context of the FEI Dressage Rules and the Dressage Judges' Codex as a whole, and "nationalistic judging" is an example of a conflict of interest.

72. The Panel notes that it is common ground for lawyers that words in, or a provision of, any regulation are not construed in isolation from the rest of the regulation. Rather they must be construed in the context of the regulation as a whole, cf. CAS 2009/A/1948 (para. 39.d). It does not suffice to look at the term "nationalistic judging" in isolation from the rest of the Dressage Judges' Codex or from other FEI Regulations for that matter.

73. Therefore, the Panel agrees with the Respondent, that the term "nationalistic judging" in the Dressage Judges' Codex must be read in context of the FEI Dressage Rules and the Codex as a whole and particularly in the light of the following sentence of paragraph 2 of the Codex: *"A Judge must avoid any actual or perceived conflict of interest. A judge must have a neutral, independent and fair position towards riders, owners, trainers, organizers and other officials and integrate well into a team"*. This part of paragraph 2 is followed by different examples of activities that may lead to a "conflict of interest", e.g. "nationalistic judging". Although the FEI Regulations do not contain a strict definition of "nationalistic judging", the Panel finds that it is merely one of more examples of a "conflict of interest".

74. As to the purpose of the Dressage Judges' Codex, the Panel notes that disciplinary provisions of sport governing bodies in general are drafted to embrace the many different forms of behavior considered unacceptable in the sport in question. In the end and generally speaking, the purpose of disciplinary provisions are, *inter alia*, to ensure a level playing field for the athletes. Therefore, the Panel accepts the "true purpose" of the Dressage Judges' Codex (as construed by the Respondent) to ensure a level playing field for all competitors.

(c) The Judging at the Lier Event and the Appellants' Explanations

75. The Panel now proceeds to the judging at the Lier Event.

76. The Panel notes that it is undisputed *that* the scores awarded by the Appellants to Ms. Logutenkova exceeded the scores of the other judges by 8 % and 9 % respectively; *that* the

scores awarded by the Appellants for the other athletes in the GP Special Competition did not deviate from the scores awarded by the other judges by more than 1.525 % and 2.016 % respectively; and *that* the Appellants' scores awarded to Ms. Logutenkova favoured her as to her ranking in the competition.

77. The Panel notes the Appellants' explanations for the score deviations:

- In Ms. Dzhumadzuk written submissions to the FEI as part of the disciplinary proceedings, in denying the allegations of "nationalistic judging", she stated:

  "was guided by recommendations of dressage seminar directors namely that a judge has to be more friendly and evaluate in favor of an athlete. I follow this approach towards every rider regardless their nationality".

  "observing the outstanding performance of the combination on that very day and the massive development that combination had made prior to the event in Lier".

- In Ms. Shulga's written submissions to the FEI as part of the disciplinary proceedings, she stated:

  "As long as it goes about horse Fleraro, I would like to inform that it was its 5th test for the last six months that I have judged at CDI. From month to month this horse has been showing a constant progress. Before the Grand Prix I also judged this horse and with a final score of 72.8 %, my score 71.6 % was the lowest among 5 judges. Despite of the mistakes in some elements the Grand Prix Special was executed way better. There was more impulse and the horse generally looked better than previously".

(d) Evidence

78. The Panel finds the scores awarded by the Appellants to Ms. Logutenkova are way outside the dressage judges' margin of appreciation. The Panel's finding is based on the facts, *that* Article 438 of the Dressing Rules provides a 6 % threshold to *"ensure fair judging"*, and *that* the scores awarded to non-Ukrainian athletes by Ms. Dzhumadzuk and Ms. Shulga did not deviate from the score awarded by the other judges by more than 1.525 % and 2.016 % respectively.

79. Furthermore, the Panel takes note of the study carried out by Dr. Stickland where he concludes, that a deviation of more than 1.6 % between one dressage judge and his colleagues is the *"ultimate proof of biased judging"*, cf. "Biased and Nationalistic Judging Patterns", 2009 Global Dressage Forum.

80. The Panel further finds that the Appellants' explanations for the large score deviations in favour of Ms. Logutenkova are not credible. The Panel bases its findings on the fact *that* the statements are inconsistent with requirements of dressage judges as explained in the FEI Dressage Handbook – Guidelines for Judging, *that* the Appellants are experienced 4* and 3* Dressage Judges, and *that* both are educated and instructed to judge solely on basis of the performance before them.

81. The Panel concede that an infringement of the 'FEI Dressage Handbook – Guidelines Judging', does not necessarily constitute a violation of the Dressage Judges' Codex, but in the absence of any satisfactory explanation for the scores, the majority of the Panel finds that this strongly indicates a violation of the Dressage Judges' Codex.

82. Although the score deviation is large and lacks satisfactory explanations from the Appellants, the Panel concedes that this is not conclusive evidence that the Appellants violated the Dressage Judges' Codex.

83. In order to come to the conclusion that the Appellants violated the Dressage Judges' Codex, the Panel finds that the score deviation and lack of satisfactory explanations need to be supported by other, different and external elements pointing in the same direction, cf. CAS 2016/A/4650 (para. 86 f; where the Panel stated that the "analytical information" in the Betting Fraud Detection System report needed to be supported by other, different and external elements in order to come to the conclusion that a match had been fixed).

84. The Panel considers it important that the FEI immediately after the Lier Event received complaints/requests to look into the Lier Event and, in particular, to examine the scores awarded by the Appellants to Ms. Logutenkova. This is a factor that has been taken into account by CAS Panels in the past, cf. CAS 2016/A/4650 (para. 99).

85. The Panel considers it important that the FEI Dressage Committee decided that the results of the Lier Event would not count towards the Olympic & World Rankings on the basis of "nationalistic judging" by the Appellants, and neither the NF nor other persons filed an appeal against the decision.

86. The majority of the Panel observes the concatenation of circumstances in that the Event Director responsible for appointing the judges to the Lier Event was Deputy Director of the title sponsor of the event, which was also sponsor of Ms. Logutenkova.

87. The Panel notes that the Appellants submit that they *"had no interest"* in a favourable judging of Ms. Logutenkova. The Respondent states that the Appellants' interest was to make sure that their compatriot received a high score. The Panel notes that the establishment of motive is not necessary, though the inability to establish a motive may be a factor in determining whether the case has been proved. The majority of the Panel finds, without regard to the Appellants' motive, that the above-mentioned findings and observations all point in the same direction and support the assertion that the Appellants violated the Dressage Judges' Codex.

88. The Panel now comes to the standard of proof.

89. With regard to the standard of proof, Article 19.24 of the FEI Tribunal Regulations provides as follows:

> *"19.24. Unless otherwise stated in the relevant rules, the standard of proof on all questions to be determined by the Hearing Panel shall be by the balance of probabilities".*

90. The Panel notes, that, under Article 19.24 of the FEI Tribunal Regulations, the applicable standard of proof in the present case is the "balance of probabilities". According to this standard of proof, the sanctioning authority must establish the disciplinary violation to be more probable than not. It is a standard of proof, which is lower than the "comfortable satisfaction" standard widely applied by CAS panels in disciplinary proceedings.

(e) The Panel's Conclusions

91. On the basis of all the above, the Panel is unanimous that the violation of the Dressage Judges' Codex is strongly indicated by scoring so considerably in favour of the Appellants' compatriot and the majority finds this taken with the other external elements meets the requisite standard of proof. The majority of the Panel, though not the minority, is satisfied that sufficient evidence has been provided in order for it to find that the Appellants have violated the Dressage Judges' Codex, by not judging in a natural, independent and fair position towards Ms. Logutenkova.

92. As to "nationalistic judging", the majority of the Panel agrees with the FEI Tribunal Decision, that *"by not judging in a neutral, independent and fair position towards Ms. Logutenkova, and clearly in favour of Ms. Logutenkova, and by having the same nationality as Ms. Logutenkova",* the Appellants judged in an nationalistic way.

(f) Other Issues

93. The Panel refrains from entering into more detail in respect of the accusations expressed by the Appellants on alleged down-scoring of other members of the Ground Jury. The Panel considers this approach to be justified because the Appellants did not submit any specific evidence to support such allegation that makes it possible for the Panel to conclude that the present case rather concerned a down-scoring of the combination by the remaining three judges.

94. In respect of the Appellants' accusations that the FEI acted in a discriminatory manner towards not only the Appellants but *"against Ukraine",* the Appellants' referral to the *"many "mathematic" irregularities in judging across the FEI Events"* without any particularity does not suffice to support the conclusion that the FEI was motivated by ill will towards the Appellants or the country of Ukraine. Therefore, the Panel finds such accusations to be unfounded.

C. What are the Appropriate Sanctions?

95. According to well-established CAS jurisprudence, CAS panels should reassess sanctions only if they are evidently and grossly disproportionate to the offence, cf. CAS 2015/A/3875 (para. 108), where the Panel summarizes the CAS practice as follows:

> *"According to well-established CAS jurisprudence, even though the CAS panels retain the full power to review the factual and legal aspects involved in a disciplinary dispute, they must exert self-restraint in reviewing the level of sanctions imposed by the disciplinary body; accordingly, CAS panels should reassess sanctions only if they are evidently and grossly disproportionate to the offence".*

96. In the present case, the Appellants contend that the Panel should reduce their sanctions on the basis that the FEI Tribunal imposed sanctions were disproportionate. The Appellants submit that, *"the FEI Tribunal upholding the FEI Decision was disproportionate. Given the fact, that even if a violation of any FEI regulation had been established in this case, which is evidently not the case, the FEI and FEI could have imposed a less severe sanction like for instance a warning letter […]".*

97. In support of their contentions, the Appellants submit *that* the Appellants are first time offenders, *that* they both have denied to have to have judged in a nationalistic manner, and, *that* they *"subjectively and objectively had no interest whatsoever in judging the combination Ms. Logutenkova and Fleraro in a 'nationalistic way'".*

98. The sanctions provided for under the Dressage Judges' Codex are as follows:

- Warning letter
- Temporary Suspension
- Removal from the FEI Dressage Judges' List.

99. The Panel notes that, the FEI Tribunal has full discretionary power when it comes to sanctioning (Article 19.45.2 of the Internal Regulations of the FEI Tribunal). It must, nevertheless, in determining the disciplinary measure to be imposed consider both objective and subjective elements of the offence and take into account the gravity of the offence (Article 169, para. 5.2 of the FEI General Regulations).

100. The Panel finds that imposing a 3 (three) month sanction, the FEI acted within the framework of penalties provided for in the Dressage Judges' Codex.

101. The Respondent maintains that the Appellants were sanctioned accordingly, and its submissions can be summarized as follows:

a) The sanctions imposed did not affect Ms. Dzhumadzuk's or Ms. Shulga's livelihood.

b) The sanctions imposed expired at the end of July 2016. Since the expiration of their periods both Appellants have returned to dressage judging and been appointed at international dressage events.

c) The Appellants never requested interim relief by asking for the lifting of the suspension pending the outcome of the FEI Tribunal proceedings.

d) The Appellants never requested expedited proceedings in course of the FEI Tribunal proceedings.

102. After considering the submissions of the Parties, the Panel is not persuaded that the sanctions imposed by the FEI Tribunal were disproportionate. The Panel finds the mitigating factors advanced by the Appellants do not qualify as exceptional circumstances, which would enable

the Panel to modify the sanctions imposed by the FEI Tribunal. This appeal is therefore dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeals filed on 20 December 2016 by Ms Maria Dzhumadzuk and Ms Irina Shulga are dismissed.

2. The decisions of the FEI Tribunal issued on 30 November 2016 are confirmed.

(…)

5. All further and other requests for relief are dismissed.