



Arbitration CAS 2012/A/2959 World Anti-Doping Agency (WADA) v. Ali Nilforushan & Fédération Equestre Internationale (FEI), award of 30 April 2013

Panel: Mr Romano Subiotto QC (United Kingdom), President; Mr Quentin Byrne-Sutton (Switzerland); Mr Jeffrey Benz (USA)

Equestrian

Doping (phentermine; hydrochlorothiazide; carboxy-THC)

Admissibility of submissions by a body that did not exercise its right to appeal

CAS power of review

Lack of anti-doping education as a mitigating factor?

Reliance on a doctor as a mitigating factor?

Legitimate therapeutic use as a mitigating factor?

Effect on the sporting career as a mitigating factor?

Lack of intention as a mitigating factor?

Commencement of the period of ineligibility

- 1. Even if an international federation that has the right to appeal the decision from the first instance tribunal did not exercise that right, it is allowed in an answer to make submissions that the first instance tribunal ruled in error. If such answer does not seek any further relief than that claimed in WADA's appeal, it does not constitute a counterclaim no longer allowed by the CAS Code.**
- 2. As is the case with Article R57 of the Code, where rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where the tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. This is not, of course to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to the CAS panel. The more cogent and well-reasoned the decision itself, the less likely a CAS panel would be to overrule it; nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision. However, the fact that a CAS panel might not lightly interfere with such a tribunal's decision, would not mean that there is in principle any inhibition on its power to do so.**
- 3. In the absence of other mitigating factors such as exceptional youth or inexperience which in given circumstances may have a bearing, the lack of anti-doping education alone is not sufficiently exceptional to justify a reduction of the ineligibility period.**
- 4. There must be more than simply reliance on a doctor for a reduction based on no significant fault or negligence. An athlete must cross check assurances given by a doctor, even where such a doctor is a sports specialist.**

5. It is irrelevant to the determination of fault that the consumption of the prohibited substance was allegedly for a legitimate therapeutic use. This among others ensures a level playing field and is why the possibility, and the process, of applying for a TUE exists.
6. The effect that any ban could have on the athlete's sporting career is not a relevant factor on the evaluation of an athlete's degree of negligence.
7. Combined with a number of truly exceptional circumstances (the assessment requires viewing the *"totality of the circumstances"*), the absence of intention may form part of a matrix of facts which are sufficient to justify a reduction of the ineligibility period. However, lack of intention is a necessary but by no means sufficient condition alone for justifying a reduction of the ineligibility period.
8. A tribunal has discretion to back-date the commencement of the ineligibility period to the date of sample collection in case of early admission by the athlete of the charge of a doping offence. The request of documentation relating to the testing of the sample does not negate early admission, as it is a necessary aspect of an athlete's rights of defence. Also, it is not required that no positive case in mitigation is advanced. Moreover, the athlete's candour (or lack thereof) is not necessarily a relevant consideration.

1. THE PARTIES

- 1.1 The World Anti-Doping Agency ("WADA") is an independent international anti-doping agency, constituted as a foundation under Swiss Law and having its headquarters in Montreal, Canada. Its aim is to promote, coordinate and monitor, on an international level, the fight against doping in sport in all its forms.
- 1.2 The First Respondent ("Mr. Nilforushan") is an elite show-jumper. He was born in Tabriz, Iran. He now lives and competes in the West Coast League in California. He has been a competitive rider for more than 20 years. He represented Iran in the Sydney 2000 Summer Olympics and competed in the World Cup Jumping Finals in Malaysia in 2006.
- 1.3 The Fédération Equestre Internationale (the "FEI") is the international governing body for all Olympic equestrian disciplines, including show-jumping. Its responsibilities include the management and enforcement of the FEI Anti-Doping Rules for Human Athletes, whose relevant version for these proceedings became effective on 1 January 2011 and was updated on 1 January 2012 (the "ADRHA"). The ADRHA is based upon and, in the relevant parts, is identical to the 2009 World Anti-Doping Code (the "WADC").

2. THE DECISION AND ISSUES ON APPEAL

- 2.1 WADA appeals a decision of the FEI Tribunal (the “FEI Tribunal”) dated 3 September 2012 (the “Decision”) imposing a sanction of one year’s ineligibility on Mr. Nilforushan for a doping offence.
- 2.2 This appeal is against sanction only, *i.e.* whether Mr. Nilforushan was entitled under the ADRHA to: (i) a reduction in the standard period of ineligibility of two years; and (ii) have his period of ineligibility back-dated to commence from the date of his sample collection on 3 March 2012.

3. FACTUAL BACKGROUND

- 3.1 Mr. Nilforushan competed at the CS12*W international event in Thermal, California from 28 February to 3 March 2012 (the “Event”). On 3 March 2012, Mr. Nilforushan was selected for in-competition testing, and provided a urine sample (no.2670754). At the same time as submitting his sample, Mr. Nilforushan completed a doping control form on which he wrote the words “*no medicin*” (sic).
- 3.2 Analysis of the sample was performed at the WADA accredited laboratory, Deutsche Sporthochschule Köln, Institut für Biochemie. The sample returned an adverse analytical finding (“AAF”) for:
 - 3.2.1 Phentermine;
 - 3.2.2 Hydrochlorothiazide; and
 - 3.2.3 Carboxy-THC.
- 3.3 Mr. Nilforushan did not have a valid Therapeutic Use Exemption (“TUE”) under Article 4.4 ADRHA for any of the three substances. Therefore, the AAF gave rise to a potential anti-doping rule violation under the ADRHA.
- 3.4 Mr. Nilforushan was officially notified of the AAF by the Iranian Equestrian Federation and United States Equestrian Federation on 18 April 2012; the notification included the information that Mr. Nilforushan was provisionally suspended.
- 3.5 On 24 April 2012, Mr. Nilforushan submitted a statement from Dr. E Michael Tachuk (“Dr. Tachuk”) which confirmed that Mr. Nilforushan had been prescribed Phentermine and Hydrochlorothiazide “*as part of a comprehensive weight loss programme*”.
- 3.6 At a preliminary hearing on 27 April 2012, Mr. Nilforushan admitted the anti-doping rule violation and explained that he had recently suffered from depression and insomnia. As a consequence, he had gained a lot of weight. Mr. Nilforushan explained that in the USA,

Carboxy-THC was frequently prescribed in cases of sleeping disorders. During the preliminary hearing, Mr. Nilforushan waived his right to have an analysis of his B-sample performed.

3.7 The FEI Tribunal heard the matter on 18 June 2012. Both Mr. Nilforushan and the FEI were present and represented at the hearing. The hearing focused on Mr. Nilforushan's explanation for the presence of Phentermine in the AAF. In summary, Mr. Nilforushan submitted that:

3.7.1 He had taken part in a weight loss program directed by Dr. Tachuk's clinic, the "*Viva Wellness Center*" in San Diego, California.

3.7.2 He had informed Dr. Tachuk that he rode horses for a living, and had taken part in the Olympics. He did not inform Dr. Tachuk that he was subject to doping control (however, Mr. Nilforushan, in his pre-hearing written submissions to the FEI Tribunal, asserted that he had discussed with Dr. Tachuk that he was an elite equestrian athlete and was subjected to drug testing). He received two prescriptions which were given to him in "clear unmarked medicine bottles", and he obtained refills of both bottles on a monthly basis.

3.7.3 Dr. Tachuk had informed him that one of the pills was an appetite suppressant, and the other was to control his blood pressure. Mr. Nilforushan did not question Dr. Tachuk about the content of the pills, consult the website of the Viva Wellness Center (which disclosed that the pills contained Phentermine), or research the content of the pills. Mr. Nilforushan thought he was taking a mixture of green tea and herbals.

3.7.4 He had never received any anti-doping education and he thought that only horses were subject to doping control (although Mr. Nilforushan's Pre-Hearing Brief before the FEI Tribunal stated that he had been drug tested on numerous occasions without a positive test).

3.8 On 3 September 2012, the FEI Tribunal rendered its decision which declared: (i) Mr. Nilforushan was to be sanctioned with a period of ineligibility of 12 months; (ii) the period of ineligibility was deemed to start on the date of the sample collection, 3 March 2012; (iii) Mr. Nilforushan be fined 1000 CHF; and (iv) Mr. Nilforushan contribute 2000 CHF in costs.

3.9 In an agreed submission for the purposes of these proceedings, Mr. Nilforushan and the FEI stipulate the following (WADA does not object to the admission of the stipulation):

3.9.1 The FEI has conducted drug testing on human athletes since 1999 or 2000.

3.9.2 The FEI signed the WADC in 2003 and adopted the ADRHA on 1 June 2004.

3.9.3 Mr. Nilforushan competed for Iran in 2000 Summer Olympic Games in Sydney and the FEI World Cup Jumping Finals in Malaysia in 2006. He competed in 82 jumping competitions in North America between 2008 and 2012, all of which were international events and were subject to the ADRHA.

3.9.4 The ADRHA in force at the relevant time has always been posted on the FEI's official website.

3.9.5 Although the FEI has an anti-doping programme for elite riders, Mr. Nilforushan has never received any anti-doping education from the FEI. Before 3 March 2012, Mr. Nilforushan had never been subject to an in-competition drugs test.

4. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

- 4.1 On 19 October 2012, WADA filed a combined Statement of Appeal and Appeal Brief against the Decision with the Court of Arbitration for Sport (“CAS”) pursuant to Articles R47 and R51 of the Code of Sports-related Arbitration (the “Code”).
- 4.2 On 12 and 13 November 2012 respectively, CAS granted Mr. Nilforushan and the FEI a two-week extension to submit their Answer Briefs.
- 4.3 On 28 November 2012, pursuant to Article R55 of the Code, both Mr. Nilforushan and the FEI filed their Answer Briefs.
- 4.4 On 10 December 2012, both the FEI and WADA indicated they were content for CAS to decide the appeal on the basis of the parties’ written submissions. On 11 December 2012, Mr. Nilforushan similarly stated he was happy to dispense with an oral hearing.
- 4.5 By letter dated 4 January 2013, CAS notified the parties that the appeal hearing panel (the “Panel”) had been constituted as follows: Mr. Romano Subiotto QC as President of the Panel; and Mr. Quentin Byrne-Sutton and Mr. Jeffrey G. Benz as co-arbitrators. The parties did not raise any objections as to the constitution of the Panel.
- 4.6 On 31 January 2013, the FEI and Mr. Nilforushan submitted the agreed stipulation set out above at para. 3.9 of this Award pursuant to Article R56 of the Code. WADA indicated it had no objection to the admission of the stipulation.
- 4.7 Pursuant to Article R57 of the Code, the Panel may, if it considers itself sufficiently well informed, decide not to hold a hearing. On the basis of the stated preferences of the parties, and its consideration of the full and clear written submissions that it received, the Panel deemed itself to be sufficiently well informed and decided not to hold a hearing. The parties were advised accordingly on 4 February 2013. Furthermore, as set out more fully below, on the few issues where a factual dispute exists between the parties, the Panel is content to determine the matter on the basis of Mr. Nilforushan’s version of events.
- 4.8 On 4 February 2013, WADA submitted a request that a memorandum of the United States Equestrian Federation dated 14 October 2008 (the “USEF Memorandum”) be admitted to the file.
- 4.9 On 7 February 2013, Mr. Nilforushan objected to the USEF Memorandum being admitted to the file. The FEI indicated that it did not object to the USEF Memorandum’s admission.

- 4.10 On 11 February 2013, the parties signed and returned the Order of Procedure to CAS, confirming their agreement to waive the oral hearing and to accept an award rendered on the basis of the written submissions filed by the parties. WADA also made further short submissions in relation to the USEF Memorandum.
- 4.11 On 13 February 2013, the CAS informed the parties that due to the delay in filing the USEF Memorandum and the lack of established exceptional circumstances for such late submission (as required by Article R56 of the Code), the Panel had decided not to admit the USEF Memorandum to the file.

5. JURISDICTION OF CAS AND ADMISSIBILITY

A. Applicable Rules

- 5.1 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 the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.

- 5.2 Mr. Nilforushan was subject to the FEI’s anti-doping rules in force at the relevant time (namely, the ADRHA, which, in its relevant parts, is identical to the WADC) and the Decision was rendered under the ADRHA.
- 5.3 The relevant version of ADRHA for these proceedings became effective on 1 January 2011 (see Article 19.7 ADRHA) and was updated on 1 January 2012; consequently, it is on such basis that the admissibility of this appeal shall be determined.

B. WADA’s Right to Appeal

- 5.4 Article 13.2.1 ADRHA provides that where a decision has been taken to impose sanctions on an athlete for an anti-doping violation:

“In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court”.

- 5.5 The Event was a CS event, and is therefore an International Event within the meaning of the ADRHA.
- 5.6 Article 13.2.3 ADRHA provides as follows:

“In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: [...] (f) WADA”.

5.7 WADA therefore has standing to bring this appeal.

C. Deadline to Appeal

5.8 Article 13.6 ADRHA provides as follows:

“The time to file an appeal to CAS shall be thirty (30) days from the date of receipt of the decision by the appealing party.

[...] the filing deadline for an appeal or intervention filed by WADA shall be the later of:

(a) Twenty-one (21) days after the last day on which any other party in the case could have appealed, or

(b) Twenty-one (21) days after WADA’s receipt of the complete file relating to the decision”.

5.9 The Decision was notified to Mr. Nilforushan and the FEI on 3 September 2012. The last day on which Mr. Nilforushan or the FEI could file an appeal to CAS was 3 October 2012. WADA filed their appeal on 19 October 2012, within 21 days of 3 October 2012.

5.10 The appeal is therefore brought in time and is admissible.

5.11 Furthermore, none of the parties has disputed the jurisdiction of CAS and in fact all parties have submitted to these proceedings and the jurisdiction of CAS. The parties’ joint signing of the Order of Procedure on 11 February 2012 confirms their agreement and submission to CAS’ jurisdiction.

5.12 The Panel therefore finds that it has jurisdiction to hear this matter.

6. APPLICABLE LAW

6.1 Article R58 of the Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

6.2 Consequently, the Panels considers the appeal to be governed by the ADRHA. Where relevant, it may also refer to the equivalent WADC provisions.

7. SUBMISSIONS OF THE PARTIES

A. Appellant's Submissions and Requests for Relief

7.1 WADA requests the Panel to rule that:

7.1.1 *"The Appeal of WADA is admissible"*.

7.1.2 *"The decision rendered by the FEI Tribunal in the matter of Mr. Ali Nilforushan on 3 September 2012 is set aside"*.

7.1.3 *"Mr. Ali Nilforushan is sanctioned with a two-year period of ineligibility starting on the date on which the CAS Panel's award enters into force. Any period of ineligibility, whether imposed on, or voluntarily accepted by, the Athlete before the entry into force of such award, shall be credited against the total period of ineligibility to be served"*.

7.1.4 *"All competitive individual results obtained by the Athlete from 3 March 2012 (including the Event) through the commencement of the applicable period of ineligibility shall be annulled"*.

(i) *Article 2.1 Violation*

7.2 In summary, WADA submits that each of the three substances detected in Mr. Nilforushan's sample are prohibited substances on the WADC 2012 prohibited list. In particular:

7.2.1 Phentermine is a prohibited substance. It is classified under "S6(a)" (*Non-Specified Stimulants*) of the 2012 WADC Prohibited List. Phentermine is not a specified substance.

7.2.2 Hydrochlorothiazide is a prohibited substance. It is classified under "S5" (*Diuretics and Other Masking Agents*) of the 2012 WADC Prohibited List. Hydrochlorothiazide is a specified substance.

7.2.3 Carboxy-THC is a prohibited substance. It is classified under "S8" (*Cannabinoids*) of the 2012 WADC Prohibited List. Carboxy-THC is a specified substance.

7.3 WADA submits that Mr. Nilforushan did not challenge the presence of any of the substances and that therefore their presence, and the consequent three violations of Article 2.1 ADHRA, are established.

(ii) *Determining the Sanction: Article 10.5.2 Reduction*

7.4 WADA accepts that, since Mr. Nilforushan was notified of the three AAFs at the same time, they are to be treated as a single doping violation pursuant to Article 10.7.4 ADRHA. Accordingly:

- 7.4.1 the sanction is to be based on the violation which carries the most severe sanction (Article 10.7.4);
- 7.4.2 the violation which carries the most severe sanction is the presence of Phentermine, which is *not a specified substance*; and
- 7.4.3 there is no reduction in the period of ineligibility under Article 10.4 ADRHA.
- 7.5 WADA does not seek an aggravated sanction pursuant to Article 10.6 ADRHA.
- 7.6 WADA submits that Article 10.5.1 ADRHA does not apply since: (i) it is manifestly not applicable; and (ii) Mr. Nilforushan has not appealed against the Decision which imposed a period of 12 months' ineligibility.
- 7.7 Therefore, the standard sanction for a first violation of two years will apply (Article 10.2 ADRHA), unless Article 10.5.2 ADRHA applies.
- 7.8 In order for the period of ineligibility to be eliminated or reduced under Article 10.5.2, Mr. Nilforushan must establish: (1) how the Phentermine entered his system; and (2) that he bears no significant fault or negligence for its presence.
- 7.9 As to (1), although WADA contends that Mr. Nilforushan's evidence in this respect is "*threadbare, contradictory and, frankly, curious*", WADA has indicated that, subject to confirmation by Dr. Tachuk that Mr. Nilforushan had commenced weight loss treatment and was taking Phentermine pills prior to sample collection, it is prepared to accept Mr. Nilforushan's explanation as to how the Phentermine entered his system.
- 7.10 As to (2) and the question of whether Mr. Nilforushan bears significant fault or was negligent, WADA submits as follows:
- 7.10.1 A reduction to the otherwise applicable period of two years' ineligibility can only occur where the circumstances are truly exceptional (comments to Article 10.5.2 ADRHA).
- 7.10.2 It was Mr. Nilforushan's personal duty to ensure that no prohibited substance entered his body (Article 2.1.1 ADRHA).
- 7.10.3 Mr. Nilforushan took no precautionary measures:
- (a) he consumed pills "*blindly*" from an unlabeled bottle;
 - (b) he did not ask Dr. Tachuk about the contents of the bottles, or take any other steps to verify the bottles contents (for example, by consulting the Viva Wellness Center website); and
 - (c) he did not inform Dr. Tachuk that he was subject to doping controls (although Mr. Nilforushan's pre-hearing Brief before the FEI Tribunal asserted otherwise)

and that therefore he had no basis to believe the pills were free from prohibited substances.

7.10.4 According to CAS case-law, Mr. Nilforushan's failure to enquire or ascertain whether the pills contained a prohibited substance was conduct constituting significant fault or negligence (CAS OG 04/003, Nr. 5.11 et seq; CAS 2006/A/1067 Nr. 6.13 et seq.).

7.10.5 Dr Tachuk's role does not relieve Mr. Nilforushan of personal responsibility:

- (a) athletes are responsible for the choice of their medical personnel and the failure of a doctor does not exclude the personal responsibility of the athlete (CAS 2006/A/1133; CAS 2005/A/951);
- (b) the necessary exceptional circumstances do not arise where the athlete does not inform the doctor he is subject to doping controls;
- (c) Dr. Tachuk was not an expert in sports medicine, and athletes have been held to bear significant fault or negligence for relying on the assurances of a general practitioner rather than specialized sports medicine doctors (CAS 2008/A/1565); and
- (d) in any event, Mr. Nilforushan was under a duty to cross-check assurances given by a medical doctor (*ITF v Koubek*, Anti-Doping Tribunal decision of 18 January 2005).

7.10.6 The Decision found that Mr. Nilforushan was "highly negligent for several reasons" (paragraph 6.10 of the Decision).

7.10.7 In the circumstances, the FEI Tribunal erred in applying Article 10.5.2 ADRHR, and a fortiori erred in applying it to its fullest extent by halving Mr. Nilforushan's sanction.

(iii) *Commencement of Ineligibility Period*

7.11 WADA submits that the discretion conferred by Article 10.9.2 ADRHA to back-date the period of ineligibility to commence at the date of sample collection in circumstances where an athlete promptly admits the anti-doping rule violation should not be applied since:

7.11.1 Mr. Nilforushan did not admit the anti-doping rule violation promptly after being confronted with the sample by the FEI, since six weeks after Mr. Nilforushan was notified of the AAF on 18 April 2012, his counsel requested from the FEI "*the documentation related to the testing of the urine sample at issue*".

7.11.2 Mr. Nilforushan contended in his pre-hearing Brief for the FEI Tribunal that he bore no fault or negligence with respect to the AAFs, and that no period of ineligibility should be imposed.

7.11.3 Mr. Nilforushan had been less than candid throughout the FEI disciplinary hearings (for example, the discrepancy between Mr. Nilforushan's pre-hearing Brief and his oral testimony at the FEI Tribunal in relation to whether he informed Dr. Tachuk that he was subject to doping controls).

B. Mr. Nilforushan's Submissions and Requests for Relief

7.12 Mr. Nilforushan requests the following:

7.12.1 *"that WADA's appeal should be denied";*

7.12.2 *"that the one year sanction issued by the FEI Tribunal be maintained";* and

7.12.3 *"that WADA be condemned to contribute to the costs of this Answering Respondent in connection with this appeal".*

7.13 Mr. Nilforushan's submissions to this effect can be summarized as follows.

7.14 As to the Panel's scope of review, by R57 of the Code, the Panel shall review all of the facts and the law. However, as to determining sanction, CAS 2009/A/1870 provides that *"in general terms, this Panel subscribes to the CAS jurisprudence under which the measure of the sanction imposed by a disciplinary body in the exercise of discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate"*.

7.15 The posture of WADA's appeal makes the AAF for Hydrochlorothiazide and Carboxy-THC irrelevant. Further, the effect of Article 10.7.4 ADRHA means that the three AAFs are to be treated as a single anti-doping violation, and the sanction imposed is to be based on the violation which carries the most severe sanction. Mr. Nilforushan accepts that this violation is the AAF for Phentermine.

7.16 Mr. Nilforushan does not advance a case that he bore no fault or negligence for the presence of Phentermine (Article 10.5.1 ADRHA).

(i) *Determining the Sanction: Article 10.5.2 Reduction*

7.17 Instead, Mr. Nilforushan submits that he is entitled to a reduction under Article 10.5.2 ADRHA (*no significant fault or negligence*):

7.17.1 He has established how the Phentermine entered his system. Dr. Tachuk has confirmed by a letter dated 31 October 2012 that Mr. Nilforushan attended his weight loss clinic on 30 January 2012, where he suggested to Mr. Nilforushan a course of Phentermine (Dr. Tachuk had previously confirmed the same on 24 April 2012).

7.17.2 Dr. Tachuk has also stated that sometimes he speaks quickly and patients are too embarrassed to ask him to repeat his instructions; therefore *"it is quite possible that Mr.*

Nilforushan did not know he was taking a controlled medication that was forbidden for his sport". Further, Dr. Tachuk "did not realise Mr. Nilforushan was an Olympic athlete and competitor himself".

7.17.3 Mr. Nilforushan's lack of any anti-doping education can serve as the basis of a reduction based on a finding of no significant fault or negligence:

- (a) In CAS 2008/A/1490, the athlete had no experience with anti-doping regulation. The sole arbitrator at the national-level hearing stated that *"this does not excuse Mr. [...]’s lack of knowledge of the applicable anti-doping rules, but it is a relevant mitigating circumstance in the case of a young athlete with no available informed guidance"*. In upholding the reduction for no significant fault or negligence, CAS considered that the athlete's *"complete lack of experience in anti-doping matters"* was a factor.
- (b) In *WTC v. Moats* (AAA No.77 190 0021412), CAS reduced an athlete's suspension to one year on a finding of no significant fault or negligence partly based on the lack of anti-doping education received from his sporting federation.
- (c) In CAS 2010/A/2107, CAS considered that the athlete's lack of any formal anti-doping training was a relevant factor under Article 10.4 WADC (reduction for specified substance where substance not intended to enhance performance) when assessing her failure carefully to check the label of a product she took for therapeutic purposes.

7.17.4 Mr. Nilforushan was not even clear that human athletes were tested in equestrian sports. Accordingly, Mr. Nilforushan reasonably:

- (a) did not take any precautionary measures in relation to the weight loss pills; and
- (b) did not advise Dr. Tachuk that he was subject to doping controls.

(ii) *Commencement of Ineligibility Period*

7.18 Mr. Nilforushan submits that the FEI Tribunal was right to exercise its discretion under Article 10.9.2 ADRHA to back-date the commencement of the ineligibility period to the date of sample collection since:

- 7.18.1 Mr. Nilforushan admitted the offence on 24 April 2012 (alternatively 27 April 2012 at the preliminary hearing) within days of being notified on 18 April 2012.
- 7.18.2 Contrary to WADA's assertion, there is no rule in place that states that a request for the copy of the laboratory documentation negates the effect of Article 10.9.2 ADRHA.
- 7.18.3 There is no authority for the proposition that an argument of no fault or negligence negates an early admission under Article 10.9.2.

7.18.4 There is no rule that an athlete's "candour", or lack thereof, can retrospectively negate an athlete's early admission.

C. FEI's Submissions

(i) *Admissibility of the FEI's Submissions*

7.19 As noted by Mr. Nilforushan, the FEI has the right to appeal the Decision to CAS, pursuant to Article 13.2.3 ADRHA. It did not exercise that right. Instead, the FEI has submitted an Answer to WADA's appeal pursuant to Article R55 of the Code.

7.20 Mr. Nilforushan has pointed out that Article R55 of the Code no longer allows a counterclaim by a Respondent (in contrast to the 2004 Code which did expressly allow for Respondent's counterclaims). Therefore, Mr. Nilforushan submits that the FEI must not be allowed to make submissions that the FEI Tribunal ruled in error.

7.21 It is correct that no counterclaim is possible in CAS appeal cases. However, it is the Panel's view that the FEI's Answer does not constitute a counterclaim, as it does not seek any further relief than that claimed in WADA's appeal. Instead, the FEI's Answer reflects the essence of what a response to an appeal ought to be: it simply provides arguments with respect to the aspects of the appeal with which it agrees or disagrees. For that reason, the Panel finds that all of the FEI's submissions are admissible.

(ii) *Determining the Sanction: Article 10.5.2 ADRHA*

7.22 In relation to a reduction for no significant fault or negligence pursuant to Article 10.5.2 ADRHA, the FEI submits that:

7.22.1 Mr. Nilforushan's fault "*is measured against the fundamental duty that he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any prohibited substances*" (CAS 2012/A/2804).

7.22.2 The FEI Tribunal was correct to find that Mr. Nilforushan had been "*highly negligent*" (for example, by failing to inform himself of the applicable anti-doping rules, by accepting medication in unlabelled bottles, and not spelling out to Dr. Tachuk that he was subject to anti-doping rules).

7.22.3 The FEI Tribunal was correct to consider whether there were any good reasons why Mr. Nilforushan departed so far from the standard of care expected of him. However, the FEI Tribunal fell into error for the following reasons:

(a) Mr. Nilforushan's lack of anti-doping education should be discounted as an excuse since he was an elite-level athlete who had competed for his country at various World Championships, as well as at the Sydney Olympics. The FEI relies

inter alia on CAS 2009/A/2012, where it was stated that while it is desirable for sports associations to provide doping education, “it is principally the sole duty of the individual athlete to ensure that no prohibited substance enters his body”.

- (b) The FEI Tribunal incorrectly considered itself not bound by the comments to the ADRHA, which expressly state that the fact that an athlete only has a short time left in his or her career is not a relevant factor in reducing the period of ineligibility under Article 10.5.2 ADRHA.
- (c) That Mr. Nilforushan was using Phentermine to lose weight, which could potentially qualify as “use for therapeutic reasons” cannot be considered as a mitigating factor.
- (d) The fact that Mr. Nilforushan promptly admitted the anti-doping rule violation is not a relevant factor in explaining his gross departure from the standard of care.

(iii) *Commencement of Ineligibility Period*

7.23 The FEI submits that the FEI Tribunal was correct to exercise its discretion under Article 10.9.2 ADRHA to back-date the commencement of Mr. Nilforushan’s ineligibility period to the date of sample collection (3 March 2012), as opposed to the date Mr. Nilforushan was provisionally suspended (18 April 2012), since:

- 7.23.1 Mr. Nilforushan promptly admitted the violation within 9 days of receiving notice of the charge. This is not changed by the fact that counsel for Mr. Nilforushan asked for production of the Laboratory Document Package.
- 7.23.2 Mr. Nilforushan can still get the benefit of Article 10.9.2 ADRHA if he makes an unmeritorious plea of no fault or negligence, as such a plea does not contradict the admission of the violation.
- 7.23.3 Mr. Nilforushan’s candour is not a relevant consideration under Article 10.9.2 ADRHA. Further, the inaccurate claim in Mr. Nilforushan’s legal submissions that he had told Dr. Tachuk that he was subject to testing was retracted in Mr. Nilforushan’s live testimony.

8. MERITS OF THE APPEAL

A. The Panel’s Scope of Review

8.1 Under Article R57 of the Code, the Panel has full power to review the facts and law on this appeal *de novo*.

- 8.2 The Panel bears in mind the principle in CAS 2009/A/1870 (cited above) advanced by Mr. Nilforushan, that when a sanction is imposed by a disciplinary body in the exercise of discretion allowed by the relevant rules, that sanction can be reviewed only when the sanction is “*evidently and grossly disproportionate to the offence*”. However, the Panel is persuaded by the reasoning in the case of CAS 2011/A/2518, where the panel noted that, as is the case with Article R57 of the Code, where rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where the tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. This is not, of course to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to the CAS panel. The more cogent and well-reasoned the decision itself, the less likely a CAS panel would be to overrule it; nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision. However, the Panel repeats and endorses what was said in the recent case of CAS 2010/A/2283 where a similar argument was advanced and rejected:

“The [p]anel would be prepared to accept that it would not easily “tinker” with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months’ suspension for one of 18. It would naturally (as did the [p]anel in question) pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy. However, the fact that it might not lightly interfere with such a Tribunal’s decision, would not mean that there is in principle any inhibition on its power to do so”.

B. Issues in Dispute

- 8.3 Proof of Mr. Nilforushan’s anti-doping violation is established by the presence of the prohibited substances in his A sample, and Mr. Nilforushan’s decision to waive analysis of his B sample (Article 2.1.1 ADRHA).
- 8.4 The parties agree that Mr. Nilforushan’s three AAFs are to be considered a single violation, and that Mr. Nilforushan’s sanction is to be based on the violation that carries the most severe sanction, *i.e.* Phentermine, which is not a specified substance. Accordingly, Article 10.4 ADRHA (*lack of intention to enhance performance in relation to specified substances*) is of no application.
- 8.5 WADA has not advanced a case based on Article 10.6 ADRHA (*aggravating circumstances*). Mr. Nilforushan has not advanced a case based on Article 10.5.1 (*no fault or negligence*).
- 8.6 The Panel takes note of the parties’ analyses in this regard.
- 8.7 Accordingly, the two issues that fall to be determined are whether:
- 8.7.1 Mr. Nilforushan is entitled to reduction in the standard two-year sanction for a first violation pursuant to Article 10.5.2 ADRHA (he bore no significant fault or negligence for the presence of Phentermine in his system); and

8.7.2 the FEI Tribunal correctly exercised its discretion in back-dating the date of Mr. Nilforushan's commencement of ineligibility to the date of sample collection (3 March 2012).

C. Reduction in Period of Ineligibility Based on Article 10.5.2 ADRHA

- 8.8 The Panel considers, as is accepted by the parties, that Mr. Nilforushan has satisfied the first limb of Article 10.5.2 ADRHA: that the source of Mr. Nilforushan's AAF for Phentermine was the weight-loss medication prescribed by Dr. Tachuk.
- 8.9 In relation to Mr. Nilforushan's negligence or fault, the Panel notes as a preliminary matter that there is a factual dispute as to the precise advice that Mr. Nilforushan was given when he attended Dr. Tachuk's Viva Wellness Clinic, and whether Mr. Nilforushan informed Dr. Tachuk that he was an elite athlete subject to drug testing. However, the Panel is satisfied that it is able to determine this appeal on the basis of Mr. Nilforushan's explanation of events (as outlined in the right hand column of the table at paragraph 4.1 of Mr. Nilforushan's Answer brief).
- 8.10 With that in mind, the relevant question essentially crystallises into whether Mr. Nilforushan's lack of any anti-doping education relieved him of his fundamental duty to ensure that no prohibited substance entered his body (Article 2.1.1 ADRHA, CAS 2012/A/2804 (cited above)).
- 8.11 In making that assessment the Panel must consider whether Mr. Nilforushan can establish 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 anti-doping rule violation*" (the ADRHA definition of "*no significant fault or negligence*").
- 8.12 The criteria for "*No Fault or Negligence*" is that the athlete must establish "*that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of **utmost caution***" (emphasis added) that they had committed an anti-doping rule violation.
- 8.13 Additionally, the commentary to Article 10.5.2 ADRHA provides that "*Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are **truly exceptional*** (emphasis added) *and not in the vast majority of cases*".
- 8.14 Mr. Nilforushan relies on CAS 2008/A/1490 (cited above) to submit that he does not bear significant fault or negligence for the presence of Phentermine in his system. In that case, the athlete had no experience with anti-doping regulation. He was a naïve young man "*who had never competed in any athletic events at a level higher than Illinois high school sports*" (para 8.20). The athlete's circumstances meant that he was particularly reliant on his high school coaches, who failed to provide guidance or support (para. 8.24). The athlete consumed cocaine at a graduation party at the end of a school year, which represented "*an act of youthful exuberance*". These factors, combined with the athlete's lack of intention to influence or enhance his performance at the relevant time, led the panel to conclude that the exceptional nature of the case justified a reduction under Article 10.5.2 WADC in the athlete's period of ineligibility.

- 8.15 In *Moats* (cited above), Mr. Moats was an age group triathlon athlete. He used medically prescribed testosterone to treat andropause and hypothyroidism. Mr. Moats used the prescribed testosterone seven days before an out of competition test. Mr. Moats did not obtain a TUE for the testosterone. However, the World Triathlon Corporation's own website, which Mr. Moats had consulted, stated that no advance TUE was needed for age group athletes. The conflicting advice from the website, coupled with Mr. Moats' lack of anti-doping education, led the panel to reduce Mr. Moats' period of ineligibility to 12 months.
- 8.16 CAS 2010/A/2107 (cited above) concerned a reduction in sanctions under Article 10.4 WADC, which relates to specified substances and lack of intention to enhance performance. The athlete was a young cyclist who had risen in two years from being a weekend recreational cyclist to signing her first professional contract. The athlete took a substance named "Hyperdrive" which is an over the counter nutritional supplement. She had never received any formal drug education. The panel concluded that the athlete naively failed to check carefully the label of a product she took for therapeutic purposes and reduced her period of ineligibility from two years to 18 months.
- 8.17 The Panel considers that the circumstances surrounding Mr. Nilforushan's consumption of Phentermine lack the "*truly exceptional*" criterion required for a reduction under Article 10.5.2 ADRHA and as found in CAS 2008/A/1490, *Moats* and CAS 2010/A/2107 (and CAS 2010/A/2107 did not require a truly exceptional circumstance since that was an Article 10.4 WADC case). Unlike the athletes in CAS 2008/A/1490 and CAS 2010/A/2107, Mr. Nilforushan was an extremely experienced athlete. He had competed at the Sydney 2000 Summer Olympic Games 12 years before his AAF. He had competed at the FEI World Cup Jumping Finals in Malaysia in 2006. He has competed in over 80 further international jumping events since 2008. Unlike the case of Mr. Moats, the FEI provided clear advice on its website as to the applicable anti-doping rules. Mr. Nilforushan simply failed at any stage to consult the FEI website.
- 8.18 The Panel accepts that Mr. Nilforushan had not received any anti-doping education and had never previously been subject to a drugs test, and that the FEI did not provide him directly with anti-doping education. The Panel also takes note that circumstances may exist where this can be a factor in a reduction in penalty under Article 10.5.2 ADRHA. While the Panel considers that the system of anti-doping might well be benefitted by federations providing more anti-doping education to those that fall within the ambit of their anti-doping rules, the Panel does not consider that Mr. Nilforushan's lack of anti-doping education alone is sufficiently exceptional to justify a reduction. As recognized in CAS 2009/A/2012 at paragraph 70, "[w]hilst it is certainly desirable that a sports association should make every effort to educate athletes about doping, it is principally the sole duty of the individual athlete to ensure that no prohibited substances enter his body". In the absence of other mitigating factors such as exceptional youth or inexperience which in given circumstances may have a bearing, the Panel does not consider that the lack of anti-doping education in itself can operate to reduce Mr. Nilforushan's period of ineligibility under Article 10.5.2 ADRHA, since an athlete competing at the level of Mr. Nilforushan could and should have informed himself and been fully aware of the content of the anti-doping regulations that had been in force for a number of years. Even though the ADRHA are of relatively recent vintage in their implementation, Mr. Nilforushan simply failed at any stage to consult the FEI

website or to keep himself informed of this most basic aspect of competing in equestrian competition at the international level at which he was accomplished.

- 8.19 The Panel accepts WADA's submission (which is largely unchallenged by Mr. Nilforushan) that Dr. Tachuk's role does not relieve Mr. Nilforushan of responsibility. In CAS 2008/A/1488, the CAS panel commented at paragraph 12 that "*in consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances*". In CAS 2005/A/872, a CAS panel ruled that for a reduction based on no significant fault or negligence there must be more than simply reliance on a doctor. Further, *Koubek* (cited above) makes clear that an athlete must cross check assurances given by a doctor, even where such a doctor is a sports specialist (which Dr. Tachuk was not). In this case, there is no evidence of Mr. Nilforushan having taken any precautions of any nature when consulting Dr. Tachuk, neither as to Dr. Tachuk's qualifications as a physician knowledgeable in sports anti-doping matters nor as to Dr. Tachuk's methods or the medicines he prescribed and their status on the Prohibited Substances List of WADA.
- 8.20 Moreover, it is irrelevant that Mr. Nilforushan's consumption of Phentermine was allegedly for a legitimate therapeutic use. As was made clear in *ITF v. Neilsen*, ITF Independent Anti-Doping Tribunal decision dated 5 June 2006, athletes have a personal duty to ensure that any medication they are taking does not infringe the WADC code, and it "*is not relevant to this issue whether the player might have been granted a therapeutic use exemption if he had taken proper steps to check all his current medication against the prohibited list from time to time*". It was further affirmed in CAS 2008/A/1488 (cited above) that "*it is of little relevance to the determination of fault that the product was prescribed with 'professional diligence' and 'with a clear therapeutic intention'*". This among others ensures a level playing field and is why the possibility, and the process, of applying for a TUE exists (which is only granted if no competitive advantage is likely to be gained).
- 8.21 The Panel considers that the FEI Tribunal was correct to rule that Mr. Nilforushan was highly negligent and did not exercise "*utmost caution*", since he:
- 8.21.1 apparently failed to inform himself of the applicable anti-doping rules for human athletes despite his twenty year career as an elite show jumper;
 - 8.21.2 failed to inform Dr. Tachuk (who was not a sports medicine specialist) that he was subject to anti-doping regulations and drug testing;
 - 8.21.3 accepted medication provided to him by Dr. Tachuk in unlabeled bottles, without knowing the ingredients and without asking any questions about them or double-checking in any other manner;
 - 8.21.4 failed to take any precautionary steps such as checking the Viva Wellness clinic website (contrast this with the situation in CAS 2012/A/2804 where the athlete did in fact do some internet research but the online WADC prohibited list had not been

appropriately updated) to verify that that the products supplied to him by Dr. Tachuk did not contain prohibited substances; and

- 8.21.5 failed to disclose that he was taking medication, and in fact specified “*no medicine*” when giving his sample on 3 March 2012.
- 8.22 The Panel agrees with the FEI’s submission that the FEI Tribunal fell into error when it considered the effect that any ban could have on Mr. Nilforushan’s sporting career. As is made expressly clear by the commentary to Article 10.5 ADRHA (which by Article 19.6 ADRHA is to be used to interpret the ADRHA), such considerations are not a relevant factor in the Article 10.5.2 ADRHA assessment. Furthermore, it is not clear what bearing the “effect on sporting career” can have on the evaluation of an athlete’s degree of negligence.
- 8.23 The Panel also considers that other irrelevant mitigating factors the FEI Tribunal considered were: (i) Mr. Nilforushan’s promptness in admitting the anti-doping rule violation (this a consideration under Article 10.9.2 ADRHA); and (ii) that Mr. Nilforushan took the Phentermine for therapeutic reasons and without an intention to enhance sport performance.
- 8.24 As to (ii), the FEI has raised that the CAS authorities appear to be split as to whether lack of intention is a relevant factor in the Article 10.5.2 WADC assessment (for example in CAS 2008/A/1490 lack of intention to enhance performance was considered a mitigating factor; in contrast in CAS 2009/A/2012 “*alleged lack of intent to enhance performance cannot justify any mitigation from normal sanction* [under Article 10.5.2 WADC]”). In this Panel’s view, lack of intention is a necessary but by no means sufficient condition alone for justifying a reduction under Article 10.5.2 WADC. Thus, even if a lack of intention is deemed to have been established, it is not, in itself, sufficient to seek or obtain any form of reduction under Article 10.5.2 WADC, and if a lack of intent is not proven such provision cannot apply. In other words, combined with a number of truly exceptional circumstances (the assessment under Article 10.5.2 WADC requires viewing the “*totality of the circumstances*”), the absence of intention may form part of a matrix of facts which are sufficient to justify a reduction under Article 10.5.2 WADC. In this case, whether or not Mr. Nilforushan is deemed to have lacked intent, the Panel considers, for the reasons explained above, that his behaviour was too negligent for him to be able to benefit from any reduction of the suspension period under Article 10.5.2 ADRHA.
- 8.25 For these reasons, the Panel considers that the FEI Tribunal erred in considering that it had discretion to reduce Mr. Nilforushan’s period of ineligibility under Article 10.5.2 ADHRA.
- 8.26 In the absence of the necessary “*truly exceptional*” circumstances the question of discretion does not arise. The principle of CAS 2009/A/1870 (cited above) (which provides that a review of sanction imposed in the exercise of discretion is only allowed where the sanction is evidently and grossly disproportionate) does not apply.
- 8.27 Accordingly, the only sanction that can be imposed is the mandatory two year suspension.

D. Commencement of Period of Ineligibility

- 8.28 Under Article 10.9 ADRHA, Mr. Nilforushan's period of ineligibility is to start on the date on which the CAS award enters into force. Any period of provisional suspension shall be credited against the total period of ineligibility. Mr. Nilforushan was provisionally suspended from competition on 18 April 2012. Therefore, in the absence of Article 10.9.2 ADRHA factors, that is the date on which his period of ineligibility shall be deemed to start to run. However, the FEI Tribunal considered that Article 10.9.2 ADRHA did apply (although the FEI Tribunal did not explain its reasoning) and that the start date should be back-dated to the date of sample collection: 3 March 2012.
- 8.29 Mr. Nilforushan admitted the presence of the three substances in his system within 9 days of receiving notice of the charge. In the Panel's view, this would generally suffice to trigger the discretion of Article 10.9.2 ADRHA (for example, in CAS 2012/A/2804 (cited above), the athlete admitted the charge 11 days after he was charged with a doping offence; the panel chose to back-date the commencement of the period of his ineligibility to the date of sample collection). This is an important provision since it allows the inquiry swiftly to move on from disputes in relation to samples and onto its second stage (*i.e.* determining the appropriate sanction). In the case of a discretion applied in the correct circumstances, the Panel is loath to interfere with the exercise of such a discretion, especially in circumstances where the FEI Tribunal had the benefit of an oral hearing, whereas this Panel does not.
- 8.30 However, a number of satellite issues have been raised.
- 8.31 First, contrary to WADA's submission, the Panel does not consider that Mr. Nilforushan's counsel requesting documentation relating to the testing of the sample negates his early admission. Mr. Nilforushan was entitled to ensure that the laboratory testing had been carried out in the appropriate manner; that is a necessary aspect of his rights of defence. It does not preclude him from the discretion conferred by Article 10.9.2 ADRHA, if a tribunal chooses to exercise that discretion. The Panel notes that Mr. Nilforushan also waived his right to analysis of his B sample (and so was formally deemed to have accepted the A sample results) and that his lawyer admitted the presence of the three substances 11 days after requesting the laboratory document package.
- 8.32 Secondly, the Panel does not consider that Mr. Nilforushan's contention in his pre-hearing Brief before the FEI Tribunal that he bore no fault or negligence (Article 10.5.1 ADRHA) is relevant to the Article 10.9.2 ADRHA assessment. Article 10.9.2 ADRHA simply requires that the anti-doping rule violation (which is the presence of the prohibited substance in Mr. Nilforushan's system) be admitted promptly. Article 10.9.2 ADRHA does not additionally require that no positive case in mitigation is advanced. The Panel agrees with Mr. Nilforushan's submission that since a pre-condition of Article 10.5.1 ADRHA requires that an athlete must establish how the prohibited substance entered his system, this is consistent with a prompt admission of a violation under Article 10.9.2 ADRHA. To take advantage of the provisions of Article 10.9.2 ADRHA, an athlete is not required to give up any challenge they might have to the case in dispute, and to interpret the provision otherwise would create an injustice.

8.33 Thirdly, the Panel does not consider that Mr. Nilforushan's candour (or lack thereof) is necessarily a relevant consideration in the Article 10.9.2 ADRHA assessment. Of course, a tribunal may choose not to exercise its discretionary power to back-date the period of ineligibility in circumstances where an athlete has failed to be truthful at a hearing. That is in the inherent nature of an exercise of discretion. However, in this case the FEI Tribunal decided, after a full oral hearing, to exercise its discretion to back-date the period of ineligibility to 3 March 2012. In the circumstances of this case, based on the evidence established in this proceeding, this Panel accepts the FEI's position in this regard.

9. CONCLUSION

9.1 The Panel allows WADA's appeal to the extent that Mr. Nilforushan is sanctioned with a period of ineligibility of two years. The commencement date for the period of ineligibility is 3 March 2012.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Association on 19 October 2012 is partially upheld.
2. The sanction imposed at paragraph 8.1.1 of the decision of the Fédération Equestre Internationale dated 3 September 2012 (namely that Mr. Nilforushan be suspended for a period of 12 months commencing on 3 March 2012) is amended as follows: Mr. Nilforushan is suspended for a period of two years, commencing 3 March 2012.
3. All competitive individual results obtained by Mr. Nilforushan from 3 March 2012 (including at the CS12*W international event in Thermal, California on 3 March 2012) through the period of ineligibility shall be annulled.

(...)

6. All further and other claims for relief are dismissed.