


EQUESTRIAN ENDURANCE RACING: WORLD CHAMPIONSHIPS 2005

Barbara Lissarague and Fédération Française d'Équitation and Emirates International Endurance Racing, the Organising Committee of the FEI Endurance World Championships 2005 v Fédération Equestre Internationale ("FEI") and HH Sheikh Hazza Bin Sultan Bin Zayed Al Nahyan

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 Disciplinary procedures; Drugs;
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Facts: At the Fédération Equestre Internationale ("FEI") Endurance World Championship 2005 in Dubai, HH Sheikh Hazza (on Hachim) finished the race in the first position, and Barbara Lissarague arrived as the second rider.

After the race, Hachim's urine A sample tested positive to Methylprednisolone, a prohibited substance. HH Sheikh Hazza immediately requested from the local equestrian federation to attend any further testing of samples. In various letters and motions filed with the FEI in the months thereafter, he again and repeatedly requested his admittance to the B sample analysis as well as the nullification of the A sample analysis for procedural reasons. The head of FEI's Legal Department confirmed to HH Sheikh Hazza's representatives in a telephone conference that HH Sheikh Hazza would be granted access to the confirmatory analysis. The B sample, however, was analysed afterwards without his presence as he had not been invited.

When he was informed of the positive B sample analysis, HH Sheikh Hazza requested the negative qualification of the A and B sample tests from the FEI Judicial Committee. Among other things, he argued that his absence at the B sample analysis was irremediable. Without holding a hearing, the Judicial Committee held that the non-admittance of HH Sheikh Hazza to the B sample analysis disqualified the B sample analysis and therefore the entire urine test and that, as a consequence, HH Sheikh Hazza would receive the gold medal.

Barbara Lissarague *et al.* challenged this decision in an appeal to the CAS, requesting the disqualification of HH Sheikh Hazza because of his horse's positive doping testing. HH Sheikh Hazza, among other things, contested Barbara Lissarague's standing regarding this appeal as she had not been a party before the FEI Judicial Committee. On the merits, he argued that the World Anti-Doping Code ("WADA Code"), more specifically the athlete's right to be present at the B sample analysis stated therein, was applicable. According to HH Sheikh Hazza, the same right had to be granted to the person responsible for an allegedly doped horse, and the same right had apparently already been granted to other riders. He called on the Swiss constitutional rights to equal treatment, to be heard and to a fair procedure.

Held: Barbara Lissarague's right to appeal the FEI Judicial Committee's decision was confirmed by the CAS, based on the FEI regulation granting this right to anyone with a legitimate interest, not limited to the parties to the appealed decision. This was declared consistent with the WADA Code as the rights stated therein were not denied but rather extended by the FEI.

HH Sheikh Hazza's alleged right to attend the B sample analysis was not confirmed by the CAS. Article 16 of the WADA Code with regard to doping control for animals does not refer to Art.7.2 of the WADA Code, which provides for this attendance right of the athlete. Therefore the CAS held that the FEI regulations—not granting access to the B sample analysis to a person responsible for a horse tested positive in an A sample analysis—were fully compatible with the WADA Code.

The CAS then rejected the application of the Swiss constitutional rights, even though Swiss law was applicable to the present case, as those constitutional rights were relevant only in connection with measures taken by the state and not by a private entity like a sports governing body. However, the CAS examined the merits of the due process principles invoked by HH Sheikh Hazza without referring to a specific legal system.

In examining those due process principles, the CAS decided that HH Sheikh Hazza's right to be heard was not violated as it did not include the right to be present at the analysis of the B sample. The confirmation given at the telephone conference did not constitute such a right as it was not passed by the correct body. HH Sheikh Hazza had had other opportunities to exercise his right to be heard and his right to a fair trial that he partially even chose not to use. Also, the right to equal treatment was not considered hurt as other riders who had been present at their horses' B sample analysis were given access only as a courtesy and not based on the right to such presence.

Comment: The authors limit their comment to the application of Swiss law and do not go into details with regard to the WADA Code and the FEI internal regulations.

The CAS's refusal to apply Swiss constitutional rights such as the right to equal treatment, the right to a fair trial and the right to be heard is consistent with the standing jurisdiction of the Swiss Federal Supreme Court. Those rights stated in the Swiss Constitution protect individuals from the state, being the holder of the public power. Their scope, however, does not cover private relations. In Decision 127 III 429,¹ the Federal Supreme Court stated the non-applicability of a constitutional right within a case held before the judicial bodies of a sports organisation as they were not to be considered as arbitral tribunals bound by constitutional law principles. This opinion has been confirmed by various essays and decisions. As HH Sheikh Hazza argued before the CAS (being a court of arbitration) that the organisational and jurisdictional bodies within the FEI had violated his fundamental rights, Decision 127 III 429 is correctly applied to the present case.

The authors consider the findings of the examination of the merits of the due process principles invoked to be comprehensible. It is interesting, however, that the CAS still referred to the standing jurisdiction of the Swiss Federal Supreme Court and to Swiss law books with respect to the principle of equal treatment in tort and the right to be heard, after having declared that they were discussing the fundamental rights out of connection with a specific legal system only two paragraphs earlier. This referral was—substantially—correct, but it seems to be inconsistent with the decision that the Swiss constitutional rights were not applicable.

1 Which was called upon by the CAS and published in the ASA Bulletin 2001, p.566.

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