

IN THE MATTER OF DISCIPLINARY PROCEEDINGS BROUGHT BY THE FEDERATION INTERNATIONALE DE HOCKEY UNDER THE 2017 FIH ANTI-DOPING RULES AGAINST KUMAR SUBRAMIAM

REASONS FOR DECISION PURSUANT TO ARTICLE 7.10.1 OF THE 2017 FIH ANTI-DOPING RULES

I. Introduction

1. The Federation Internationale de Hockey (the **FIH**) is the international governing body for the sport of field hockey. Further to its obligations as a signatory to the World Anti-Doping Code (the **Code**) and its responsibilities as custodian of the sport, the FIH has issued the FIH Anti-Doping Rules (**FIH ADR**), which set out Code-compliant anti-doping rules applicable to all players under its jurisdiction.
2. Where the FIH asserts that a player has committed an anti-doping rule violation (**ADRV**) under the FIH ADR, FIH ADR Article 7.10.1 provides that at any time during the results management process the FIH and the player may agree on the consequences that should be imposed for that ADRV under the FIH ADR, and that agreement will stand as a decision resolving the matter for purposes of FIH ADR Article 13. This document reflects the agreement that the parties have reached under FIH ADR Article 7.10.1 in the above-referenced matter.

II. Commission of an anti-doping rule violation

3. Mr Kumar Subramiam (the **Player**) is a 38-year old from Malaysia who has played field hockey professionally for 20 years, including playing almost 300 games for the Malaysia men's senior national representative team. The Player has at all material times been bound by and required to comply with all of the provisions of the FIH ADR.
4. On 16 October 2017, while competing at the 2017 Men's Hockey Asia Cup in Dhaka Bangladesh (the **Event**), the Player was required to provide a urine sample for drug testing pursuant to the FIH ADR. The sample was split into an A and a B sample, given reference numbers A4170156 and B4170156 respectively, and sample A4170156 was analysed by the WADA-accredited laboratory in New Delhi, which detected metabolites of Sibutramine. Sibutramine is a stimulant prohibited in-competition under section S6.b of the WADA Prohibited List.
5. The FIH Anti-Doping Administrator conducted a review of this adverse analytical finding pursuant to FIH ADR Article 7.2.2 and determined that the Player had a case to answer under FIH ADR Article 2.1 (presence in a player's sample of a prohibited substance or its metabolites for which the player does not have a TUE). The Player does not have a TUE permitting use of Sibutramine. Accordingly the FIH sent the Player a formal notice of charge on 12 December 2017, asserting that the presence of Sibutramine metabolites in his sample A4170156 constitutes an anti-doping rule violation under FIH ADR Art 2.1.
6. Given that Sibutramine is a 'Specified Substance', the Player was not subject to a mandatory provisional suspension under FIH ADR Article 7.9.1. However, in accordance with FIH ADR Article 7.9.5 the FIH offered the Player the opportunity to accept a voluntary provisional suspension pending resolution of the charge, and he accepted that offer on 14 December 2017 by returning a duly completed form to the FIH.

7. FIH ADR Article 2.1 is a strict liability offence that is established by proof that the prohibited substance is present in the sample, i.e. the FIH does not have to prove that the Player took the substance intentionally or even knowingly. In his response to the charge on 20 December 2017, the Player waived his right to have his B sample analysed to confirm the adverse finding reported in respect of his A sample A4170156, thereby accepted the accuracy of the adverse finding made by the Delhi laboratory in respect of that sample, and accordingly admitted the charge that he has committed an ADRV under FIH ADR Article 2.1.

III. Consequences

III.A Period of ineligibility

a. FIH ADR Article 10.2

8. According to the FIH's records, this is the Player's first anti-doping rule violation. Given that Sibutramine is classified as a 'Specified Substance', FIH ADR Article 10.2.1.2 applies. Accordingly, the starting point is that a period of ineligibility of two years applies, unless the FIH can establish that the Player's violation was '*intentional*' within the meaning of FIH ADR Art 10.2.3. FIH ADR Art 10.2.3 explains that '*the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete [...] engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance*'.
9. Based on the facts set out below, the FIH accepts that it has no basis to assert that the Player intended to cheat. As a result, his ADRV was not '*intentional*' within the meaning of FIH ADR Article 10.2.3 and so the starting point is a two year period of ineligibility under FIH ADR Art 10.2.2.

b. FIH ADR Article 10.5

10. That two year period of ineligibility may be eliminated if the Player can establish under FIH ADR Article 10.4 that he bears No Fault or Negligence for the presence of Sibutramine in his sample. Alternatively it may be reduced if he can establish under FIH ADR Article 10.5 that he bears No Significant Fault or Negligence for the presence of Sibutramine in his sample.
11. It is a strict pre-condition of both pleas that the Player must prove on the balance of probabilities how the Sibutramine got into his system. The Player asserts that the Sibutramine found in his sample 4170156 came from his ingestion of '*Carbo Flex*', a chocolate drink marketed as a slimming product, which was (unbeknownst to him) contaminated with Sibutramine. He has provided witness statements and other evidence in support of that assertion, which show the following:

11.1 Carbo Flex is manufactured in Malaysia by a company called Adave. It is sold in a box that contains 15 individually wrapped sachets, each containing 20g of a chocolate-flavoured powder. The list of ingredients on the product packaging does not mention Sibutramine. The product packaging instructs users to '*[t]ake 1 sachet with 80ml of hot water as breakfast or before exercise*'.

- 11.2 A colleague of the Player's wife, who works with her at a hospital in Kuala Lumpur, recommended the Carbo Flex product to her and gave her a sachet of it to try. The Player tried the drink when his wife made it at home, liked it, and so suggested that she buy more. On or around 3 October 2017, the Player's wife bought a box of Carbo Flex from her colleague.
 - 11.3 The Player says that he consumed one sachet of Carbo Flex on each of 5, 6 and 8 October 2017. He then stopped taking it when he left for the Event on 8 October 2017.
 - 11.4 The Player says that there was no indication from the Carbo Flex ingredients list that it contains (or might contain) a prohibited substance. He therefore took the supplement without giving much further thought to it. While he normally checked all of his supplements with the National Sports Institute of Malaysia (**ISN**), which provides elite Malaysian athletes with (among other things) training facilities and medical/nutritional care, he did not make any enquiries about Carbo Flex.
 - 11.5 After receiving notice of the adverse analytical finding reported in respect of his sample A4170156, the Player carried out investigations to determine the source of the positive test. He had some sachets of Carbo Flex left over from the same box of sachets that he had used in early October 2017. With the assistance of the Malaysia Hockey Confederation, he sent a sachet for analysis to the Analytical Biochemistry Research Centre (**ABrC**) at the Malaysia Science University. The ABrC laboratory reported the presence of 60mg of Sibutramine in the 20g sachet of Carbo Flex. The Player therefore concluded that the Carbo Flex was the source of the Sibutramine found in his sample.
12. The FIH carried out its own investigation to test the Player's explanation:
 - 12.1 The FIH got the Player to send sachets of the Carbo Flex still in his possession to the WADA-accredited laboratory in Lausanne for further testing. The Lausanne laboratory reported that it had detected the presence of Sibutramine at a concentration of approximately 0.3%, which was consistent with the findings of the ABrC laboratory (i.e. of around 60mg Sibutramine in one 20g sachet).
 - 12.2 The FIH also purchased a new, sealed box of Carbo Flex through an independent third party in Malaysia, which was sent directly to the WADA-accredited laboratory in Lausanne, Switzerland. The Lausanne laboratory again detected Sibutramine in the powder at similar levels of around 0.3%.
 - 12.3 The FIH also asked the Lausanne laboratory to determine whether the estimated concentration of Sibutramine metabolites in the Player's sample collected on 16 October 2017 was consistent with the Player's ingestion of one sachet of Carbo Flex powder contaminated with Sibutramine at a concentration of approximately 0.3% on each of 5, 6 and 8 October 2017. The Lausanne laboratory noted that there are limited excretion studies for Sibutramine, but concluded based on its best assessment of the available data that it could not be said that the estimated concentration of Sibutramine metabolites in the Player's sample collected on 16 October 2017 was inconsistent with that explanation.
 13. Based on the evidence provided by the Player, and the results of its own investigation, the FIH accepts that the Player has established that it is more likely than not that the Sibutramine metabolites detected in his sample A4170156 came from his ingestion of the Carbo Flex chocolate drink containing Sibutramine on 5, 6 and 8 October 2017.

14. That finding is necessary but not sufficient to sustain a plea of No (or No Significant) Fault or Negligence. To sustain a plea of No Fault or Negligence, the Player must show that he did not depart from the duty imposed on him under the FIH ADR to use 'utmost caution' to ensure that no prohibited substance entered his body. Alternatively, to sustain a plea of No Significant Fault or Negligence, he must show that his departure from that strict standard of care was not 'Significant' (objective analysis) and/or that there are legitimate reasons why he failed to take all of the steps required (subjective analysis).
15. The Court of Arbitration for Sport (**CAS**), which is the ultimate appellate authority in all cases arising under Code-compliant anti-doping rules, has made it clear that, because contamination of supplement products (including weight loss products) is so common and so notorious (being the subject of multiple warnings to athletes over the years), an athlete who takes such a product thereby assumes the risk of such contamination and therefore cannot plead No Fault or Negligence if the risk transpires. However, he may be able to sustain a plea of No Significant Fault or Negligence, depending on the circumstances.
16. The FIH accepts that the Player bears No Significant Fault or Negligence for the presence of Sibutramine in his sample A4170156, for the following reasons:
 - 16.1 The Player was aware of his anti-doping obligations and took steps to educate himself on the issue. In particular, he completed the WADA Athlete Learning Program about Health & Anti-Doping (ALPHA) in April 2017. That is commendable.
 - 16.2 However, when it came to taking Carbo Flex, the Player failed to take a number of due diligence steps that were expected of him. The Player checked the Carbo Flex ingredients list to verify that it did not include any prohibited substances. However, he did not carry out any further research on the product, he did not consult an INS nutritionist (which he says he would generally do for all the supplements he would take), he did not consult a medical doctor or any other professional, or do anything to verify the quality/reputation of the product or of its manufacturer.
 - 16.3 On the other hand, the product came to his attention in circumstances that would not suggest any particular risk (recommended to his wife by one of her colleagues at the hospital where she worked), he took it while he was out of competition and not in a sports-related context, and there was nothing particular on the packaging or the ingredients list that suggested there may be any doping issue with the product. Therefore it is perhaps understandable that the Player did not perceive the risk of inadvertent doping to be high.
 - 16.4 Furthermore, even if the Player had taken additional steps to check Carbo Flex, he would have seen warnings of the general risk that products of this type might contain a prohibited ingredient not disclosed on the label, but it is unlikely that he would have found out specifically that this product contains Sibutramine. For example, the FIH has not been able, despite a reasonable internet search, to find any specific warnings that Carbo Flex contains Sibutramine. That means less weight should be placed on the Player's failures than would otherwise be the case. See, e.g., *ITF v Koubek*, Independent Tribunal decision dated 18 January 2005, para 98 (*'the Tribunal should be concerned primarily - though not exclusively - with operative fault. Greater weight should be placed on culpable conduct that is causative of the doping offence being committed than on culpable conduct forming part of the factual matrix in the case but which, even if absent, would not have prevented the offence from being committed'*), affirmed on appeal, CAS 2005/A/823.

17. Because the Sibutramine was an undisclosed ingredient of the Carbo Flex powder, the presence of which would not have been uncovered by a normal internet search, it qualifies as a 'Contaminated Product' under the FIH ADR, and therefore the finding of No Significant Fault or Negligence triggers discretion under FIH Art 10.5.1.2 to reduce the two year period of ineligibility to anywhere between two years down to a reprimand and no period of ineligibility, depending on the degree of the Player's fault.¹
18. The CAS Panel's decision in Cilic v ITF, CAS 2013/A/3327, paras 69 *et seq*, provides some helpful guidance on assessing where an athlete's fault lies within the range of a reprimand to two years. It sets out three categories of fault: light (0-8 months); normal (8-16 months); and considerable (16-24 months). The athlete's 'objective' fault is assessed to determine into which category he falls, and then his 'subjective' fault is assessed to move him up or down within a specific category (or into a different category in exceptional circumstances).
19. The FIH's view is that the Player's degree of fault falls towards the lower end of the 'normal' range. In WADA v Berrios, CAS 2010/A/2229, the CAS assessed the fault of an athlete who ingested a weight loss product that turned out to be contaminated with Sibutramine as worthy of a twelve month ban, but in that case the record was clear that if the athlete had done more research on the product he would have found FDA notices specifically warning that the product he took contained Sibutramine. Therefore the FIH considers that the Player should receive a slightly shorter period of ineligibility, of nine months. In addition, the FIH is willing to give the Player a further three-month reduction in that period of ineligibility on the basis of the time and money saved by avoiding the need for a hearing, which the FIH can then spend elsewhere in its anti-doping efforts. This is consistent with the practice of other international federations in similar cases, and as far as the FIH is aware neither WADA nor any other party has objected to that practice by appealing the decision to CAS. That brings the period of ineligibility down to six months.
20. Given that the Player promptly admitted his anti-doping rule violation, FIH ADR Article 10.11.2 permits the start date of his ban to be back-dated to the date of collection of his sample (i.e., 16 October 2017). FIH ADR Article 10.11.2 requires that at least half the ban must be served, but that would be satisfied here as the Player has served a voluntary provisional suspension since 14 December 2017.

¹ The FIH ADR define 'Fault' as follows: *'Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2. [Comment: The criteria for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered. However, under Article 10.5.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other Person was involved.]'*

21. Therefore, the Player will serve a six-month ban starting on 16 October 2017 and expiring at midnight on 15 April 2018. During his period of ineligibility, the Player's status will be as set out under FIH ADR Art 10.12.1, i.e., he may not *'participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by FIH or any National Association or a club or other member organization of FIH or any National Association, or in Competitions authorized or organized by any professional league or any international or national level Event organization or any elite or national-level sporting activity funded by a governmental agency'*. FIH ADR Article 10.2.2 permits the Player during the last six weeks of the period of ineligibility to return to training with a team or to use the facilities of a club or member organisation of the FIH (or FIH member).

III.B. Disqualification of results

22. The Player did not obtain any individual results at the Event or subsequently. Therefore, FIH ADR Article 9 (automatic disqualification of individual results in connection with an in-competition test) and FIH ADR Article 10.8 (disqualification of results subsequent to sample collection) have no application to this matter.
23. The Player was the only player on the Malaysia national team to test positive at the Event. Therefore FIH ADR Art 11.2 (consequences in team sports) has no application to this matter. Accordingly, the Player's anti-doping rule violation will have no impact on the results obtained by the Malaysia national team at the Event.

III.C Costs

24. Each party shall bear its own costs of dealing with this matter.

III.D Acceptance by the Player

25. In accordance with FIH ADR Article 7.10.1, the Player has accepted the foregoing consequences for his anti-doping rule violation specified by the FIH and has expressly waived his right to have the consequences determined by the Hearing Panel at a hearing.