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When Athletes Are Wrongly Sanctioned Under the World Anti-Doping Code

BY PAUL J. GREENE[†]

INTRODUCTION

Since the World Anti-Doping Code (“Code”) was first enacted in 2003, the creation of common standards across the globe has been central to its successful implementation.¹ This harmonization is at the core of the anti-doping movement’s mission and front and center in the Code’s introduction:

[I]t is critical for purposes of harmonization that all Signatories base their decisions on the same list of anti-doping rule violations, the same burdens of proof and impose the same Consequences for the same anti-doping rule violations. These rules must be the same whether a hearing takes place before an International Federation, at the national level or before the Court of

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1. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE (2015). The Code was enacted in 2003 and entered into force on January 1, 2004. The Code underwent revisions in 2009 and 2015. *The Code*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/what-we-do/the-code> (last visited Jan. 8, 2016).

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Arbitration for Sport [CAS].²

For the Code to be effective, each signatory must follow all of its rules. On the one hand, this empowers anti-doping organizations and international federations with the authority to pursue anti-doping rules violations committed by athletes anywhere in the world. On the other hand, this universally protects the individual rights of athletes charged with anti-doping rules violations by guaranteeing procedural safeguards. These safeguards include the athletes' right to test their B-sample, the athletes' right to analyze the lab packets for both their A-sample and B-sample, the athletes' right to have a timely hearing before an impartial panel and the athletes' right to be sanctioned in a manner consistent with other athletes who have similar degrees of fault.³

Unfortunately, there are instances where the system fails and athletes are not accorded these guaranteed rights. This article details three cases where I witnessed such failures first hand as counsel for athletes who were wrongly sanctioned under the Code: Caroline Maher, who was sanctioned for two years by the World Taekwondo Federation ("WTF") despite being innocent (*Caroline Maher v. World Taekwondo Federation*)⁴ and Sherone Simpson and Asafa Powell who were each wrongly sanctioned and denied the right to a timely hearing by the Jamaica Anti-Doping Commission ("JADCO") (*Asafa Powell v. Jamaica Anti-Doping Commission*⁵ and *Sherone Simpson v. Jamaica Anti-Doping Commission*⁶). In the end, the trio of Ms. Maher, Ms. Simpson and Mr. Powell were each vindicated by the Court of Arbitration for Sport ("CAS"). But the shameful way in which their cases were handled by the WTF and the JADCO left scars that each will carry with them for all time.

2. WORLD ANTI-DOPING CODE, *supra* note 1, at 17.

3. *Id.* at 19; 57. After an athlete provides a sample for anti-doping testing, the sample is split into an A-sample and a B-sample. The B sample may be used for backup testing. Kate Kelland, *Doping: Journey of a Sample at London 2012 Olympics*, REUTERS (Jan. 19, 2012, 3:59 PM) <http://www.reuters.com/article/us-olympics-doping-idUSTRE80IIZ520120119>. The Code defines sample as "[a]ny biological material collected for the purposes of *Doping Control*." WORLD ANTI-DOPING CODE, *supra* note 1 at 142.

4. *Maher v. World Taekwondo Federation*, CAS 2011/A/2538 (2012).

5. *Powell v. Jamaica Anti-Doping Commission*, CAS 2014/A/3571 (2015). The Simpson and Powell cases were given separate docket numbers by the CAS but, in effect, were heard together. The CAS did issue separate opinions in the Simpson and Powell cases but the language in each decision was nearly identical. *See generally, Simpson v. Jamaica Anti-Doping Commission*, CAS 2014/A/3572 (2015).

6. *Simpson v. Jamaica Anti-Doping Commission*, CAS 2014/A/3572 (2015).

I. CAROLINE MAHER V. WORLD TAEKWONDO FEDERATION

Caroline Maher was an Olympic hopeful from Egypt who competed in the sport of taekwondo.⁷ She first contacted me in August 2011 from Cairo where she was living. The international federation that governed her sport, the WTF, had decided to ban her for two years without providing her any of the rights guaranteed by the Code: (1) Ms. Maher was never provided her A-sample lab results; (2) Ms. Maher was never given the opportunity to test her B-sample; and (3) Ms. Maher was never accorded a hearing and the right to challenge the WTF's evidence.

Most importantly, Ms. Maher had been banned for two years by the WTF without any reliable evidence.⁸ The WTF was required under the Code to prove Ms. Maher's anti-doping rules violation to the comfortable satisfaction of the hearing panel, a burden that is greater than a balance of probabilities but less than proof beyond a reasonable doubt.⁹ But under any objective measure, the WTF had not actually done so.

The WTF's written "decision" to sanction Ms. Maher was barely two pages long and provided no reasoning.¹⁰ It stated only that the WTF had met its burden to prove that Ms. Maher had tested positive for a banned substance and that she was therefore being banned for two years. There was no mention of Ms. Maher's A-sample lab packet and/or whether the evidence of her anti-doping rules violation was reliable.

Ms. Maher called me on the eighteenth day after the WTF notified her of its decision. Under the CAS rules, an appeal must be filed within twenty-one days.¹¹ If she had called me four days later, she might never have been vindicated. I filed a timely statement of appeal on her behalf with the CAS in Lausanne, Switzerland the next day and subsequently filed a brief in support of Ms. Maher's legal position exposing the many fatal deficiencies in the WTF's decision. We anxiously waited more than a month for the WTF's response. It

7. See *Maher Yousry, Caroline*, TAEKWONDO DATA, <http://www.taekwondodata.com/caroline-maher-yousry.a7x7.html> (last visited Jan. 8, 2017).

8. Article 3 of the Code states that an anti-doping rules violation must be established through the presentation of reliable evidence. WORLD ANTI-DOPING CODE, *supra* note 1, at 25.

9. *Id.*

10. See generally, *Fought Like an Egyptian*, AL-AHRAM WEEKLY ON-LINE (Jan. 2012) <http://weekly.ahram.org.eg/archive/2012/1079/sp3.htm>.

11. Code: *Procedural Rules*, COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/arbitration/code-procedural-rules.html> (last visited Jan. 14, 2017).

was agonizing for Ms. Maher and her family. When the WTF finally responded, it claimed without foundation that our appeal with the CAS should not be heard because it was untimely. The WTF did not address the merits of our appeal or attempt to justify its decision to ban Ms. Maher for two years. The CAS rejected the WTF's arguments and assembled a three-member Arbitration Panel.¹² Once assembled, the CAS Panel ordered the WTF to produce Ms. Maher's A-sample lab packet and other evidence against Ms. Maher.

The revelations uncovered when the WTF produced Ms. Maher's A-sample lab packet were astonishing. First, Ms. Maher's A-sample was not clear and urine-colored as it should have been, but instead was dark and opaque. Additionally, the WADA lab that tested her A-sample raised serious doubts about the integrity of her samples. The lab further noted that when it sought clarification on the abnormalities it observed from the WTF, none were ever provided. As such, the lab deemed the results to be totally unreliable because Ms. Maher's A-sample had obviously been manipulated.

The WTF was ordered to respond and justify its decision to ban Ms. Maher for two years on the basis of completely unreliable evidence. The WTF responded by offering to test Ms. Maher's B-sample and hold its own internal hearing to discover what happened. We pushed back against the WTF's request and sought a hearing before the CAS Panel. The CAS Panel declined the WTF's request to divest itself of jurisdiction and a hearing date was set for late November 2011 in Lausanne where the CAS is headquartered.

I flew to Switzerland in advance of the hearing and Ms. Maher and her family prepared to join me. But just as I landed in Geneva and Ms. Maher arrived at the airport in Cairo, the WTF "surrendered." The WTF's Secretary General wrote Ms. Maher a letter that apologized for what had occurred and sought to lift the sanctions against Ms. Maher.

The same day, the CAS issued a decision that exonerated Ms. Maher in light of the WTF's decision to surrender.¹³ Ms. Maher had won. Her case was over except for a CAS determination on the issue of costs. A month later, the CAS ordered the WTF to pay Ms. Maher \$20,000 USD.¹⁴ The Panel recognized that this was a

12. See generally, Court of Arbitration for Sport, *Code of Sports Related Arbitration* (2004 edition).

13. *Maher v. World Taekwondo Federation*, CAS 2011/A/2538 (2012).

14. *Id.* at 9.

substantial sum by CAS standards, but considered the award entirely justified under the circumstances.¹⁵ The CAS Panel emphasized that it was of “vital importance” that any athlete charged with an anti-doping rules violation be accorded “the full procedural protection guaranteed by the Rules.”¹⁶

But had Ms. Maher really won? Her life was turned upside down by the reckless decisions made by the WTF, her faith in the system was shattered and if not for her timely filing of an appeal at the CAS, the injustice she had been forced to endure might never have been uncovered.

II. SHERONE SIMPSON AND ASAFA POWELL V. JAMAICA ANTI-DOPING COMMISSION

Sherone Simpson and Asafa Powell were victims of the Jamaica Anti-Doping Commission’s (“JADCO”) failures to adhere to the strictures of the Code. Olympic gold medal sprinters in the sport of track and field, Ms. Simpson and Mr. Powell are iconic figures in Jamaica.¹⁷ They hired me to represent them after both unknowingly took a banned substance not disclosed on a mislabeled supplement given to them by their shared physiotherapist. It was a “contaminated products case”, a minor offense under the Code where discretion is built-in for athletes who unknowingly ingest a banned substance to be given a sanction on the low end of the zero to twenty-four month range based on their lesser degree of fault.¹⁸

The rules of the International Association of Athletics Federations (“IAAF”), the international federation governing track and field, required that the JADCO hold a hearing within three months of the date the athletes were notified of their violations.¹⁹ Since they tested positive in July 2013, the JADCO was required to hold a hearing for them by October 2013. Unfortunately, the JADCO failed to convene a hearing until January 2014 by which time both had already been provisionally suspended for six months. It took six

15. *Id.* The CAS does not make monetary awards publicly available in any official way, but the \$20,000 USD award is believed to be one of the largest ever for an athlete against an anti-doping organization in a doping appeal at the CAS.

16. *Id.*

17. See generally *Sherone Simpson Athlete Profile*, IAAF, <https://www.iaaf.org/athletes/sherone-simpson-190293> (last visited Feb. 2, 2017); *Asafa Powell Athlete Profile*, IAAF, <https://www.iaaf.org/athletes/jamaica/asafa-powell-189571> (last visited Feb. 2, 2017).

18. *Id.* at 60-78.

19. *Powell v. Jamaica Anti-Doping Commission*, CAS 2014/A/3571 (2015), 42-43.

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more weeks for their hearings to actually be completed, finally finishing in late February 2014. And then another eight weeks for the sanctions to be handed down in a written decision that could be appealed to the CAS. The Jamaica Panel sanctioned each for eighteen months, which was grossly out of sync with the Code's harmonization requirement.²⁰

Ms. Simpson and Mr. Powell had each been provisionally suspended for nine months when we finally could appeal the decision to sanction them for eighteen months to the CAS in April 2014.²¹ We argued that the Code's harmonization requirement mandated a sanction of three to six months for each based on their degree of fault.

We asked the JADCO to agree to an expedited procedure at the CAS in light of the inexcusable delays that had already taken place. The JADCO refused. Since both parties must agree under CAS rules to expedite a matter, Ms. Simpson and Mr. Powell were forced to continue to wait on the sidelines for a couple of more months.²²

The IAAF and the World Anti-Doping Agency ("WADA") intervened and attempted to resolve the case in a way that would have permitted Ms. Simpson and Mr. Powell to return to the track immediately.²³ But all parties including the JADCO had to agree for the settlement to be approved and since the JADCO refused to sign the agreement, the deal died and with it any hope for expedited resolution.²⁴

The case continued at the CAS where a hearing date was set for July 2014. As the Jamaican Commonwealth Games trials approached in June 2014, we pursued a new strategy. We filed for provisional relief with the CAS Panel to permit Ms. Simpson and Mr. Powell to return to the track while their case at the CAS was still pending. In a historic decision, the CAS Panel granted our request for provisional relief determining that Ms. Simpson and Mr. Powell (1) were likely to succeed in their appeals, (2) would be irreparably harmed if not permitted to return to the track immediately, and (3) had interests that outweighed the interests of the JADCO.²⁵ The CAS had never granted provisional relief of this kind for two athletes in a doping

20. *Id.* at 5.

21. *Id.* at 6.

22. *Powell v. Jamaica Anti-Doping Commission*, CAS 2014/A/3571 (2015) at 43.

23. See David Bond, *Jamaica doping scandals tip of iceberg, says senior drug tester*, BBC (Nov. 11, 2013) <http://www.bbc.com/sport/athletics/24900565>.

24. *Powell v. Jamaica Anti-Doping Commission*, CAS 2014/A/3571 (2015) at 43.

25. *Id.*

appeal against an anti-doping organization before.²⁶

Ms. Simpson and Mr. Powell returned to competition in June 2014 pending the final outcome of their appeal under the protection of the provisional measures granted by the CAS.²⁷ A two-day hearing was held before the CAS Panel in July 2014 in New York City.²⁸ During the hearing, the Panel asked the JADCO to justify its continued denial of the procedural safeguards guaranteed under the Code to Ms. Simpson and Mr. Powell. JADCO could provide no satisfactory explanation. The JADCO was also asked to provide legal support for the decision to hand down eighteen month bans against Ms. Simpson and Mr. Powell. The JADCO could provide none. In the end, the CAS symbolically reduced Ms. Simpson and Mr. Powell's sanctions from eighteen months to six months in light of overwhelming precedent in their favor and blatant mishandling of their cases by the JADCO.²⁹ It was a symbolic reduction to six months because each had already served a twelve month ban when the CAS issued its decision. There was no way for Ms. Simpson and Mr. Powell to go back in time and get back the six months and millions of dollars in earnings they had lost. The exceedingly harsh language used by the CAS against the JADCO provided at least some solace for them.³⁰ The decision stated,

The Panel is persuaded that, considering the facts and circumstances, it is firmly of the view that the process in Jamaica has been conducted by [the] JADCO in egregious violation of multiple requirements of the WADA Code, and the result of that conduct has been to effectively punish an athlete well beyond what was reasonable, appropriate, or necessary under the circumstances.³¹

The CAS made a strong statement by awarding Ms. Simpson and Mr. Powell CHF 30'000³² an amount that exceeded the *Maher*

26. *Id.* at 7–11.

27. *Id.* at 8.

28. *Id.* at 12.

29. Paul A. Reid, *CAS reduces Sherone, Asafa ban to six months*, JAMAICA OBSERVER (Jul. 14, 2014, 1:19 PM) <http://www.jamaicaobserver.com/sport/CAS-reduces-Sherone—Asafa-ban-to-six-months>.

30. *Powell v. Jamaica Anti-Doping Commission*, CAS 2014/A/3571 (2015) at 45.

31. *Id.*

32. CHF = Swiss Francs; the overall award was about \$31,000 USD. *See* XE CURRENCY CONVERTER, <http://www.xe.com/currencyconverter/convert/?From=CHF&To=USD> (last visited Aug. 7,

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award.³³ The CAS Panel did so because in the CAS Panel's view Ms. Simpson and Mr. Powell would never be able to recover the opportunities lost to win races and profit from their success.³⁴ The CAS Panel also recognized the unnecessary emotional strain that Ms. Simpson and Mr. Powell had endured.³⁵ Despite this recognition by the CAS Panel, Ms. Simpson and Mr. Powell still suffered immeasurable financial and emotional distress from the ordeal that each still deals with today.

CONCLUSION

How do we ensure that the breakdowns in the anti-doping system that occurred in the *Maher* case and the *Simpson/Powell* case never happen to other athletes in the future? It starts with global recognition by the international sports community that the obligation to provide the full procedural protections guaranteed by the Code to each athlete charged with an anti-doping rules violation is of paramount import. If the procedural rights of athletes are brushed aside and the failures of the system revealed in the Caroline Maher, Sherone Simpson, and Asafa Powell cases are repeated, the system is not only discredited but also weakened. We must never forget that "harmonization" under the Code is a two-way street.³⁶ It is vital to the long-term health of the anti-doping system that each signatory understand and accept that athletes' rights are sacrosanct.

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33. *Powell v. Jamaica Anti-Doping Commission*, CAS 2014/A/3571 (2015) at 45; *Simpson v. Jamaica Anti-Doping Commission*, Case No. CAS 2014/A/3572 (2015).

34. *Id.*

35. *Id.*

36. WORLD ANTI-DOPING CODE, *supra* note 1, at 17.