

2014 April 17

iNADO Legal Note #8.1

The Balance between an Athlete's Strict Liability for Prohibited Substances and an ADO's Strict Compliance with the International Standard for Testing

The decision of the Court of Arbitration for Sport in the case *Veronica Campbell-Brown v. The Jamaica Athletics Administrative Association (JAAA) & The International Association of Athletics Federations (IAAF)* (CAS 2014/A/3487) is now circulating. The athlete's anti-doping rule violation was overturned. This is the first of a series of iNADO Legal Notes that will explore the decision.

The case has to do with partial sample collection and with how an anti-doping organisation (ADO) follows the requirements of the *International Standard for Testing* (IST) – or not. The Jamaica Anti-Doping Commission (JADCO) DCOs did not handle a partial sample according to IST requirements. It was not properly secured or sealed. The case also has to do with proving how a prohibited substance entered the athlete's sample and proving how a departure from doping control procedures might have caused an adverse analytical finding. There was conflicting expert evidence about the possibility of contamination of the partial sample. These issues will be explored in subsequent iNADO Legal Notes.

This Legal Note deals with the argument that there is a balance between the "strict liability" of the athlete and "strict compliance" of an ADO with the requirements of the IST. In *Campbell-Brown*, it was submitted that this balance is fundamental to the integrity of anti-doping and an imbalance against the athlete should void the anti-doping rule violation asserted against her.

The CAS Panel summarised the athlete's argument about this balance:

88. The Athlete submits that the JADCO DCOs were required to comply with certain fundamental procedural safeguards prescribed by the IST and the 2011 Regulations. Those safeguards are an essential counterbalance to the imposition of strict liability for ingestion of prohibited substances. They are specifically designed to protect the integrity of samples obtained during mandatory drug testing. In the present case the JAAA manifestly, knowingly and systematically failed to adhere to those fundamental safeguards. The JAAA's failures, which went to the very purpose of the IST, made it impossible to guarantee the integrity of the sample collected from the Athlete. The Athlete submits that the results of any analysis conducted on a sample obtained in fundamental violation of the IST must be declared inadmissible and invalid. If the Panel were to find that the violation does not matter, then it would effectively create a double standard where athletes are bound to follow rules but governing bodies and doping enforcement agencies are not.

[Emphasis added]

On this argument, anti-doping is a bargain between the athlete and the ADO. If the bargain is broken by the ADO, the athlete cannot be found to have doped, regardless of the formal rules for proving doping or not. (Those formal rules include Articles 3.2.1 and 3.2.2 of the *2009 World Anti-Doping Code*. They provide that departures from the International Standards do not automatically invalidate an adverse analytical finding.)

The CAS Panel was sympathetic to the argument, even if it did not formally determine the case on it:

147. The Panel accepts there is considerable force in the proposition that, in order to justify imposing a regime of strict liability against athletes for breaches of antidoping regulations, testing bodies should be held to an equivalent standard of strict compliance with mandatory international standards of testing. This is particularly important in view of the principal purpose of the WADA IST, namely to ensure ‘the integrity, security and identity of the Sample’ (section 7.1). The need for a balanced approach to a regime of strict liability, on the one hand, and strict compliance with international standards, on the other, contributes to that purpose.

148. Furthermore, the Panel takes note of the CAS jurisprudence that recognises the existence of certain international standards which are considered to be so fundamental to the fairness of the doping control regime and so central to ensuring the integrity of the sample collection and testing process that any departure from them will result in the automatic invalidation of the outcome of the testing procedure.

149. In *Tchachina v International Gymnastics Federation*, CAS 2002/A/385, for example, the Appellant submitted that the Respondent’s failure to invite her to attend the opening of her B Sample deprived her of her right to be present or represented during the testing of the B Sample and, therefore, the testing procedure could not be regarded as valid. The Panel observed that the athlete’s right to verify the integrity of the seal on the sample bottle, and to inspect the sample for any apparent variations or irregularities, ‘is completely taken away from the athlete when the analysis of the B-sample is conducted without the athlete or his/her federation being given due notification of the relevant date and time. The athlete is then simply treated as the object of the doping test procedure and not its subject’ (para 29). An IST departure of that nature is incapable of being remedied in the course of the arbitral process (para 33). The Panel therefore concluded that:

“As a matter of principle, the Panel is of the opinion that, even if a procedural error is unlikely to affect the result of a B-sample analysis, such error can be so serious as to lead to the invalidity of the entire testing procedure.” (Para 26)

150. In *Varis v IBU*, CAS 2008/A/1607, the CAS Panel endorsed the approach in *Tchachina*, explaining at para 32 that:

“an athlete’s right to be given a reasonable opportunity to observe the opening and testing of a “B” sample is of sufficient importance that it needs to be enforced even in situations where all of the other evidence available indicates that the Appellant committed an anti-doping rule violation.”

151. Similarly, in *Wen Tong v International Judo Federation*, CAS 2010/A/2161, the Panel stated that, ‘it is now established CAS jurisprudence that the athlete’s right to attend the opening and analysis of her B sample is fundamental and, if not respected, the B-sample results must be disregarded’ (para 9.8). The Panel went on to explain that, ‘[the] Appellant had a fundamental right to be present whenever her B sample was analysed, regardless of who asked for it... Violation of this essential right renders the B-sample analytical results invalid’ (paras 9.21 –

9.22). It followed that the results of the B-sample analysis could not validly confirm the A-sample analytical results, with the consequence that the Federation could not establish a doping violation by the Appellant.

152. These cases reflect a position whereby, notwithstanding [IAAF] Rule 3.2.1, certain IST requirements are considered to be so fundamental to the just and effective operation of the doping control system that fairness demands that any departure should automatically invalidate any adverse analytical finding. In other words, certain IST departures will be treated as so serious that, by their very nature, they will be considered to undermine the fairness of the testing process to such an extent that it is impossible for a reviewing body to be comfortably satisfied that a doping violation has occurred. In the light of the Panel's conclusion (see below) that the IAAF cannot rely on [IAAF] Rule.3.2.1, it is unnecessary to consider whether the appeal should be allowed on this basis as well.

[Emphasis added]

Articles 3.2.2 and 3.2.3 of the *2015 World Anti-Doping Code* are virtually identical to Articles 3.2.1 and 3.2.2 of the *2009 World Anti-Doping Code*. So the CAS Panel's analysis does bear on future cases beyond this year.

I predict that this balance between an athlete's strict liability and an ADO's strict compliance will be discussed more frequently in cases under the *2015 World Anti-Doping Code*. This will be especially true in cases where a four year ban is sought. ADOs will be held to a higher standard when it comes to compliance with anti-doping procedures. Where the balance tips against the athlete because of ADO error, thereby seeming to diminish the integrity of anti-doping, Panels will search for ways to avoid imposing four year bans.

To prevent such cases, NADOs and RADOs must continually improve. They must be able to demonstrate full compliance with the *2015 World Anti-Doping Code* and International Standards. They must review possible violations carefully and ensure that they take forward cases without procedural errors, or cases where any errors are clearly inconsequential to the integrity of the sample and the adverse analytical finding.

Joseph de Pencier, J.D.
Chief Executive Officer
jcdep@me.com
www.inado.org
+49 (0)175 829 6704 (m)

iNADO is the Institute of National Anti-Doping Organisations. It promotes best practices by NADOs and RADOs, and is their collective voice.