



**Arbitration CAS 2015/A/3925 Traves Smikle v. Jamaica Anti-Doping Commission (JADCO),
order of 13 March 2015**

Athletics (discus)

Doping (hydrochlorothiazide)

Request for a stay of the decision

Irreparable harm

It is not in itself sufficient that an athlete is prevented from competing in sports events to justify a stay in itself. However, CAS has consistently recognized that, given the finite and brief career of most athletes, a suspension (subsequently found to be unjustified) can cause irreparable harm, especially when it bars the athlete from participating in a major sports event. To the extent an athlete remains ineligible to participate in or qualify for a certain event which is necessary for consideration to compete in a major event (such as the Pan-American Games, the World Championships, or the Olympic Games), such athlete, on any objective view, sustains irreparable harm.

1. THE PARTIES

- 1.1 Mr. Traves Smikle (“Mr. Smikle” or the “Appellant”) is a Jamaican athlete competing in the sport of athletics in the discipline of discus. Among other notable athletics events, Mr. Smikle competed for Jamaica at the 2012 London Olympic Games as well as the 2010 International Association of Athletics Federation (“IAAF”) World Junior Championships and 2009 IAAF World Youth Championships.
- 1.2 The Jamaican Anti-Doping Commission (“JADCO” or the Respondent) is the organization responsible for Jamaica’s anti-doping programme, charged with implementing the World Anti-Doping Agency Code (“WADA Code”), directing the collection of samples, and conducting the results management and hearings at the national level.

2. INTRODUCTION AND FACTUAL BACKGROUND

- 2.1 This Order addresses an application (the “Application”) for a stay of execution of the decision rendered by the Jamaica Anti-Doping Appeals Tribunal delivered orally on 12 February 2015 (the “Appealed Decision”). A summary of relevant facts emerging from the parties’ submissions filed with respect to the Application, which have been reviewed and analysed in detail, is set out below.

- 2.2 On 21-23 June 2013, Mr. Smikle participated in the JAAA National Senior Championships at the National Stadium in Kingston, Jamaica. After competing in the Men's discus competition on 22 June 2013, Mr. Smikle was subjected to an in-competition doping control test (urine).
- 2.3 Mr. Smikle's urine sample was then forwarded to the INRS-Institut Armand-Frappier, a doping-control laboratory in Laval, Quebec, Canada. The analysis of Mr. Smikle's urine revealed the presence of hydrochlorothiazide (HCTZ), a prohibited substance under the WADA's List of Prohibited Substances and in violation of the Anti-Doping Rules.
- 2.4 Mr. Smikle immediately denied the anti-doping rule violation (the "ADRV") and on 23 August 2013, the ADRV was referred to the Jamaica Anti-Doping Disciplinary Panel (the "Disciplinary Panel") for review and, if necessary, the imposition of a disciplinary sanction.
- 2.5 On 1 July 2014, the Disciplinary Panel, following a hearing, informed Mr. Smikle that he was suspended from competition for two (2) years commencing on 22 June 2013 (the "Decision").
- 2.6 On 15 July 2014, Mr. Smikle filed an appeal with the Jamaica Anti-Doping Appeals Tribunal (the "Appeals Tribunal") challenging the Decision (the "Jamaica Appeal").
- 2.7 On 22 July 2014, Mr. Smikle also filed an appeal with the Court of Arbitration for Sport (the "CAS Appeal") challenging the Decision (see CAS 2014/A/3670).
- 2.8 On 4 November 2014, the CAS Appeal was dismissed (in operative part) as premature given that the Appeals Tribunal had not yet issued a decision on Mr. Smikle's internal appeal. The reasoned decision in support of such award was later rendered on 23 February 2015.
- 2.9 On 12 February 2014, the Appeals Tribunal orally dismissed Mr. Smikle's Jamaica Appeal and confirmed the two-year period of ineligibility (the "Oral Decision"). It is from the Oral Decision that Mr. Smikle now appeals.

3. PROCEEDINGS BEFORE THE CAS

- 3.1 On 13 February 2015, the Appellant filed an urgent request for a stay of the Oral Decision in accordance with Article R37 of the Code of Sports-related Arbitration (the "Code").
- 3.2 On 20 February 2015, the President of the Appeals Arbitration Division provisionally granted the Appellant's request on the basis that such order would be reconsidered once the Respondent filed its observations in response. In this regard, the Provisional Order granted the Respondent's request for an extension of time until 26 February 2015 to file its response.
- 3.3 On 24 February 2015, the Appellant filed his statement of appeal with the CAS in accordance with Article R47 *et seq.* of the Code.
- 3.4 On 26 February 2015, the Respondent filed its response to the Appellant's request for a stay.

3.5 The President of the Appeals Arbitration Division now renders an order on request for stay based upon the parties' complete submissions.

4. JURISDICTION OF THE CAS

4.1 In accordance with the Swiss Private International Law (Article 186), and generally and well accepted principles of *kompetenz kompetenz* in international arbitration, the CAS has power to decide upon its own jurisdiction.

4.2 Pursuant to Article R37, par. 3, of the Code, the extent of the jurisdictional analysis for the President of the Appeals Arbitration Division at this point is, however, to assess whether, on a *prima facie* basis, the CAS can be satisfied that it has jurisdiction to hear the appeal.

4.3 Article R47 of the Code provides that “[a]n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body”.

4.4 Article 13.5.4 of the Jamaica Anti-Doping Commission Anti-Doping Rules (the “JADCO Rules”) provides as follows:

“No final decision of, or Consequences of Anti-Doping Rule Violations imposed by, the Jamaica Anti-Doping Appeals Tribunal may be quashed, varied or held invalid, by any court, arbitrator, tribunal or other hearing body other than CAS for any reason including for reason of any defect, irregularity, omission or departure from the procedures set out in these Anti-Doping Rules provide there has been no miscarriage of justice”.

4.5 Based on the foregoing, and given that the jurisdiction of the CAS to hear this appeal is not challenged by the Respondent, the President of the Appeals Arbitration Division is satisfied that the CAS has *prima facie* jurisdiction to decide the Appellant's request for a stay in accordance with Article R52 of the Code.

5. ADMISSIBILITY

5.1 According to Article R49 of the Code, “[i]n the absence of a time limit set in the statutes or regulations of the federation, association, or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against”.

5.2 The JADCO Rules do not provide any time limit for the appeal to the CAS.

5.3 The Oral Decision was notified to the Appellant on 12 February 2015. Thus, the request for a stay filed on 13 February 2015 and the statement of appeal, filed on 24 February 2015, has been submitted in a timely manner.

6. LEGAL DISCUSSION

- 6.1 Article 37 of the Code permits provisional relief to be awarded by the President of the Appeals Arbitration Division upon a proper showing. In addition, the World Anti-Doping Code (2009 edition) expressly permits suspension of appeals in Article 13, Section 13.1 (providing that, “*Decisions made under the Code or rules adopted pursuant to the Code may be appealed as set forth below in Articles 13.2 through 13.4 or as otherwise provided in the Code. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise*”).
- 6.2 In accordance with regular CAS jurisprudence, and as a general rule, when deciding whether provisional measures may be granted, it is necessary to consider whether the measure is necessary to protect the Appellant from irreparable harm, the likelihood of the Appellant succeeding in the substantive appeal, and whether the interests of the Appellant outweigh those of the Respondent (see Award of CAS 2003/O/486; Orders of CAS 2013/A/3199; CAS 2010/A/2071; CAS 2001/A/329; and CAS 2001/A/324). These criteria are cumulative (see Orders of CAS 2013/A/3199; CAS 2010/A/2071; and CAS 2007/A/1403; and PATOCCHI P. M., Provisional Measures in International Arbitration, in BERNASCONI M. (ed.), International Sports Law and Jurisprudence of the CAS, Bern 2014, pp. 68-72).
- 6.3 Such criteria are also clearly set forth in Article R37 of the Code.
- 6.4 In evaluating whether the criteria are satisfied, the President of the Appeals Arbitration Division has taken into account the following submissions of the parties.
- 6.5 The Appellant’s main submissions were:
- The Appellant’s inability to compete in (and train for) major competitions and athletic events (such as the IAAF World Championships in August 2015 and the Olympic Games in 2016) entails damage that is difficult, if not impossible to remedy. In addition, the Appellant points to a number of qualifying meets through 2015 which to the extent he does not participate, his ineligibility represents a loss of opportunity to take part in and be selected for major events and competitions prior to the conclusion of his suspension.
 - Moreover, the Appellant asserts that to the extent such relief is not granted, he risks the loss of his four-year academic scholarship at the University of the West Indies. In support of his argument, the Appellant attached (Annex D) a letter from Mr. Dalton Myers, Director of Sports, which states that the current ban has serious negative impact on the Appellant’s scholarship with the university as it expires in June 2015 after most competitions are completed. Based upon the terms of his scholarship, such scholarship may be terminated if the Appellant does not meet his obligations, including participation at local, regional, and international competitions (in addition to maintaining the required grade point average).
 - The Appellant’s chances of success cannot be discounted and are higher than the chances of his appeal being dismissed. In this respect, the Appellant refers to the CAS award in

case CAS 2014/A/3487 and relies upon the similarities between the two cases (both factually and legally), while highlighting that the Appeals Tribunal, while reviewing his appeal, agreed that the collection samples taken during his sample collection were in breach of WADA's collection requirements.

- Finally, on the balance of interests, the Appellant asserts that granting his request will not undermine the fight against doping. Moreover, the Appellant refers to the irreparable harm and merits of his case (in addition to the potential loss of his scholarship) as a legitimate basis why his interests outweigh those of the Respondent.

6.6 The Respondent's main submissions were:

- It is indisputable that the Appellant is in the prime of his athletic career. However, the Appellant has provided no evidence that he is unable to compete, train or take part in training sessions, qualifying events, or major competitions as a result of his sanction. He attends the University of West Indies which provides for training facilities at the university and moreover, his CAS appeal will conclude before the qualifications for any major events take place. As for the qualifying events, such competitions are merely invitational events and development meets, and the Appellant has failed to demonstrate the significance of such events to his career.
- Moreover, special accommodations have been made by the Appellant's university such that he has not lost his scholarship throughout the duration of this proceeding. Indeed, the Appellant has not been able to compete since 12 July 2013 but such inability to compete has not affected his scholarship in any way.
- As for the Appellant's chances of success on the merits, the Respondent notes that some similarities between the Appellant's case and CAS 2014/A/3487 exist, but unlike CAS 2014/A/3487, the Appellant has not claimed environmental contamination as a basis for the positive result. Such environmental contamination is a key distinguishing factor between the two cases. Consequently, the Appellant's chances of success are negligible.
- Finally, the Respondent states that the Appellant has failed to establish that any irreparable harm exists and since his chances of success can be discounted, the balance of interests weighs in favour of the Respondent.

A. Irreparable Harm

6.7 In accordance with CAS jurisprudence, when deciding whether to stay the execution of the decision being appealed, the CAS considers whether such a stay is necessary to protect the applicant from substantial damage that would be difficult to remedy at a later stage (see CAS 2013/A/3199, quoting CAS 2007/A/1370-1376 (*"The Appellant must demonstrate that the requested measures are necessary in order to protect his position from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage"*)).

- 6.8 According to CAS case law (e.g. CAS 2008/A/1569), it is not in itself sufficient that an athlete is prevented from competing in sports events to justify a stay in itself. However, CAS has consistently recognized that, given the finite and brief career of most athletes, a suspension (subsequently found to be unjustified) can cause irreparable harm (see Preliminary Decision in CAS 2008/A/1453, p. 10, par. 7.1), especially when it bars the athlete from participating in a major sports event. The same holds true if an athlete is unable to compete in qualifying events necessary to compete in such major events.
- 6.9 The President of the CAS Appeals Division holds that the prerequisite of irreparable harm is met in the present case. As an initial matter, this athlete has already served almost his entire original suspension issued against him by Respondent. Secondly, the relative brevity of the any athlete's career (especially, as admitted by the Respondent, when such suspension comes at the prime of his career), coupled with the imminent approach of several intercollegiate and qualifying events aimed at the World University Games (which the President of the Appeals Arbitration Division deems a major event), Pan American Games, and World Championships. As the Respondent concedes, the selection of Jamaica's representative to the Pan-American Games, the World Championships, and the Olympic Games is primarily based on the Athlete's participation at the National Senior Championships scheduled for 25-28 June 2015. However, contrary to the Respondent's assertion, it is disingenuous to presume that because the Appellant's appeal *may* be over by these events, the Athlete will not sustain irreparable harm if he does not participate in such events.
- 6.10 To the extent an athlete remains ineligible to participate in or qualify for a certain event (i.e. the National Senior Championships) which is necessary for consideration to compete in a major event (such as the Pan-American Games, the World Championships, or the Olympic Games), such athlete, on any objective view, sustains irreparable harm.

B. Likelihood of Success of the Appeal

- 6.11 CAS jurisprudence also indicates that "*the Appellant must make at least a plausible case that the facts relied upon by him and the rights which he seeks to enforce exist and that the material criteria for a cause of action are fulfilled*" (see CAS 2010/A/2113, CAS 2011/A/2615, CAS 2012/A/2943).
- 6.12 At this stage, the President of the Appeals Arbitration Division does not deem it necessary to engage in a comparative analysis between the Appellant's case and that of CAS 2014/A/3487. Each case shall be reviewed on its own merits and to make such a comparison at this stage would undermine the integrity of the Panel's right to review this appeal on a *de novo* basis. Nevertheless, at this stage the Appellant has made plausible factual arguments as to his chance of success. Whether these arguments will prevail to the extent requested by the Appellant can only be fully addressed in the final award and need not be addressed at this preliminary stage of the proceedings. However, the President of the Appeals Arbitration Division holds that they are sufficiently plausible to justify the grant of a stay in this case which is enough to satisfy the second criterion.

C. Balance of Competing Interests

- 6.13 As indicated in the above-referenced decisions, the Appellant must demonstrate that the harm he would suffer from the refusal of the requested provisional measures would be comparatively greater than the harm or inconvenience than the Respondent would suffer from the granting of the provisional measures.
- 6.14 Were the Panel to ultimately find during the course of the full appeal that the suspension pronounced in the Appealed Decision should be upheld and accordingly that the appeal is dismissed, then the remaining four (or so months) of the sanction can be served out by the Athlete with little harm to the Respondent. By contrast, were the requested stay to be denied, but the Panel were to eventually determine that the anti-doping rule violation shall be nullified, then the Appellant will have lost the chance of competing in several major events forever. Therefore, the President of the Appeals Arbitration Division determines that the balance of interests tips decisively in favour of the Appellant.

7. CONCLUSION

- 7.1 The President of the Appeals Arbitration Division concludes therefore, that after considering the submissions of the parties, the applicable articles of the Code, and the relevant jurisprudence, the execution of the decision of the Jamaica Anti-Doping Appeals Tribunal orally rendered on 12 February 2014, be stayed until such time as the appeal filed by the Appellant has been heard and a decision rendered by a CAS Panel.

8. COSTS

- 8.1 According to standard CAS practice, the cost of this part of the proceedings are determined in the final award.

ORDER

The President of the CAS Appeals Arbitration Division rules that:

1. The request for a stay filed by Mr. Traves Smikle on 14 February 2015 in the matter *CAS 2015/A/3925 Traves Smikle v. JADCO* is granted.
2. The costs of the present order will be determined in the final award or in any decision terminating the procedure.