**Arbitration CAS 2014/A/3572 Sherone Simpson v. Jamaica Anti-Doping Commission (JADCO), award of 7 July 2015**

Panel: The Hon. Hugh Fraser (Canada), President; Mr Jeffrey Benz (USA); The Hon. Michael Beloff QC (United Kingdom)

*Athletics (sprint)*
*Doping (oxilofrine)*
*Distinction between answer and (cross) appeal (ultra petita)*
*Requirements related to the application of a reduced period of ineligibility for the use of a Specified Substance*
*Source of the Prohibited Substance in the Athlete's body*
*No intent to enhance sport performance*
*Assessment of the degree of fault*

1. **CAS rules provide strict time limits and formalities with regards to appeals with a perceptible and proper purpose of ensuring that the parties know at the earliest opportunity what issues can be raised before a CAS panel. It results from the party's omission to file its own appeal that it cannot seek an increased sanction over and above that ordered by the first instance body having rendered the challenged decision, as an answer to an appeal is not in substance or in form the same as a (cross) appeal. A party cannot take advantage of its own procedural omission albeit unintentional, as doing so would unfairly countenance consideration of a penalty that is the product of procedural unclean hands. That would be *ultra petita*.**

2. **In order to prove his/her entitlement to any reduced period of ineligibility under 10.4 of the JADCO Anti-Doping Rules which incorporates the WADA Code, an athlete must establish: 1) how the specified substance entered his/her body on a balance of probability; and 2) that the specified substance was not intended to enhance his/her sport performance. The athlete must also produce corroborating evidence in addition to his/her word which establishes to the comfortable satisfaction of the adjudicating panel the absence of an intent to enhance sport performance. If these requirements are satisfied, the athlete's "degree of fault" will be considered to determine whether the presumptive two-year period of ineligibility should be reduced, and if so, by what period of time.**

3. **The evidence of the test results establishing that a supplement contained the specified substance is sufficient to establish that the supplement purchased for the athlete was the source of the specified substance found in the athlete's urine sample.**

4. **The fact that the specified substance is a low grade, mild stimulant with little if any performance-enhancing benefit, that it is very easy to detect, the open disclosure by the athlete of his/her use of the specified substance and the fact that he/she gave**

**credible evidence that he/she used the product containing the specified substance as a nutritional supplement are objective circumstances which in combination might lead a hearing panel to be comfortably satisfied that the athlete did not intend to enhance his/her sport performance by unknowingly ingesting the specified substance (or indeed by knowingly ingesting the nutritional supplement).**

**5. It is incumbent upon any international level competitor to at the very least be aware of the risk of supplement use. While it would be unreasonable to expect an athlete to go to the lengths of having each batch of a supplement tested before use, there are other less onerous steps that could be taken, such as making a direct inquiry to the manufacturer and seeking the advice of professionally qualified doctors. The research of the ingredients of the supplement, the check of the supplement's website and the Google search engine constitute some significant steps to minimize any risk associated with the taking of the specified substance. The fact that there is no way short of a laboratory test in which the substance could have been identified as one of the ingredient of the supplement is also to be taken into account to assess the athlete's degree of fault.**

## 1. THE PARTIES

1.1 The Athlete, Sherone Simpson (hereinafter referred to as "Simpson", or the "Appellant"), is an internationally renowned Athletics sprinter who won a silver medal in the women's 100 meters at the Beijing Olympics in 2008, and was a member of Jamaica's 4 x 100 meter gold medal relay team at the 2004 Olympic games.

1.2 The Respondent, Jamaica Anti-Doping Commission (JADCO) (hereinafter referred to as "JADCO" or "the Respondent") is the independent organization responsible for Jamaica's anti-doping programme. JADCO is charged with implementing the World Anti-Doping Agency Code ("WADA Code"), as well as directing the collection of samples and conducting results management and hearings at the national level.

## 2. FACTUAL BACKGROUND

2.1 Below is a summary of the relevant facts, as established on the basis of the parties' written submissions and pleadings, and evidence adduced at the hearing.

2.2 Simpson was born and raised in Jamaica. She has been one of the world's fastest women over the past decade having won a gold medal in the women's 4 x 100 meter relay at the 2004 Olympic Games in Athens, a silver medal in the women's 100 meters at the 2008 Olympic Games in Beijing and a silver medal in the women's 4 x 100 meter relay at the 2012 Olympic Games in London.

2.3 From June 21, 2013 to June 23, 2013, the Jamaican National Senior Championships in Athletics were held at the National Stadium in Kingston, Jamaica. On June 21, 2013 Simpson participated in the 100 meter event finishing second. Following the completion of her event she was notified that she had been selected for doping control and she agreed to provide a urine sample for the said purpose.

2.4 Simpson was taken to the Doping Control Station at the National Stadium where she provided a urine sample under the supervision of the witnessing chaperone, Ms. Trishawn Royal. Simpson was accompanied to the Doping Control Station by her representative, Mr. Aundre Edwards.

2.5 Simpson's urine sample was transported to the JADCO office at 5-9 South Odeon Avenue, Kingston 10, where it was secured. On June 24, 2013 the said sample was delivered to the FEDEX office at 40 Half Way Tree Road, Kingston for safe dispatch to INRS Armand-Frappier, the Doping Control laboratory in Laval, Quebec, Canada. The said sample was received at the laboratory on June 25, 2013.

2.6 Analysis of the urine sample taken from Simpson was carried out at the laboratory and on July 11, 2013, a certificate was issued by Doctor Christiane Ayotte, Director of the Doping Control laboratory. The certificate revealed an adverse analytical finding for the said sample and that the substance present in the sample was Oxilofrine.

2.7 Oxilofrine is identified as a Category S6 substance in the WADA prohibited Substance List and is therefore considered a "Specified Substance". As such there is a presumptive two year period of ineligibility for anyone testing positive for such a substance.

2.8 On July 12, 2013, the JADCO Review Panel carried out a review in accordance with the provisions of Article 7.3.1 of the Anti-Doping Rules and on the same day a letter was written to Simpson by Dr. Herbert Elliott, Chairman of the JADCO notifying her of the adverse analytical finding and advising her of her rights. By email dated July 18, 2013, Simpson requested analysis of her "B" sample.

2.9 The "B" Sample analysis was carried out at the IRNS-Institut Armand-Frappier laboratory and on August 1, 2013, a certificate was issued by Dr. Ayotte, confirming the presence of Oxilofrine in Simpson's "B" sample. Simpson was duly notified on August 5, 2013.

2.10 On August 14, 2013, Simpson's attorneys-at-law, wrote to the JADCO advising that Simpson was admitting the Anti-Doping Rule violation and that she would accept a provisional suspension.

2.11 Paul Doyle has been Simpson's agent and manager since 2005. Part of Doyle's responsibilities included arranging for physiotherapists to treat Simpson. Over the years, Doyle had recommended many physical therapists who treated Simpson's teammate Asafa Powell with the understanding that they were to work with Simpson as well.

2.12 In May, 2013, Powell told Doyle that his hamstring muscles had been bothering him and that he was not able to train properly. He expressed concern that he would not be ready for the upcoming Diamond League competitions. Powell asked Doyle if he could find a physiotherapist or trainer to come to Jamaica to work with him on a full time basis to help him get ready for the summer season.

2.13 Doyle contacted Dr. Carmine Stillo a Canadian chiropractor who Powell had used in the past to see if he could assist. Dr. Stillo said that he was unavailable and that none of the other physiotherapists who had previously worked with Powell were available to go to Jamaica, but that he knew someone who was "*pretty good*" and that person would be available to go to Jamaica for a week to be tested out by Powell.

2.14 Chris Xuereb was the person recommended by Stillo to Doyle. Arrangements were made for Xuereb to travel to Jamaica. After Xuereb arrived in Jamaica and began to treat Powell, Simpson asked Doyle how he had secured the services of Xuereb. Doyle explained that Dr. Carmine Stillo, a chiropractor from Canada with whom Simpson was familiar, had recommended Xuereb.

2.15 Simpson was suffering from a nagging hamstring injury as she prepared to begin the outdoor season and was eager to receive treatment from Xuereb after meeting him at Powell's residence on May 16, 2013. Xuereb agreed to begin treating her as well as Powell.

2.16 In light of her agent Paul Doyle's approval of Xuereb, Simpson trusted him to work with her. Xuereb worked on Simpson for three days before she flew to China to take part in a competition on May 18, 2013.

2.17 Simpson found Xuereb's treatment of her hamstring injury to be very helpful and she quickly grew to trust Xuereb and allowed him into her very small circle.

2.18 Simpson was aware that Xuereb flew back to Canada to obtain supplements for her teammate Powell. When Xuereb returned to Jamaica he recommended certain supplements for Simpson that he said he had purchased from a trusted source on June 6, 2013.

2.19 Xuereb recommended seven (7) supplements for Simpson, one of them being Epiphany D1.

2.20 Simpson asked Xuereb if the supplements were "clean" and stated that Xuereb replied, *"I am not here to dope you up, I don't want you to take anything illegal"*.

2.21 Simpson conducted more than fourteen (14) hours of research over three days on her tablet to satisfy herself that the supplements were clean. She "Googled" each individual ingredient on the Epiphany D1 label because she was not familiar with them.

2.22 Simpson saw nothing on the Epiphany D1 bottle that appeared on the WADA Prohibited List for 2013, which she also searched.

2.23 Simpson also went to the Epiphany D1 website where she read about the ingredients which she recalled spoke mainly about plants and how they helped with the brain.

2.24 After completing her independent research, Simpson felt assured that Epiphany D1 was safe for her to take.

2.25 Following instructions given to her by Xuereb, Simpson took 2 Epiphany D1 capsules each day before breakfast starting on June 8, 2013 and continuing through the day of the Jamaica National Trials.

2.26 When she completed the Doping Control Form that evening, Simpson did not list all of the supplements that she had been taking including Epiphany D1, stating later that she had forgotten to list them, especially the new ones which she had only been taking for two weeks and *"did not think they were a big deal"*.

2.27 After competing in the Jamaican National Championships on June 21, 2013, Simpson travelled to Europe. She was in Madrid, Spain for a race when she learned of her adverse analytical finding.

2.28 Simpson's coach from the MVP Track Club, Mr. Stephen Francis, told her to get all of the supplements that Xuereb had given to her. Simpson did so and examined all of the supplements with her coach. She recalled that when they got to the Epiphany D1 he said to her "this could be it".

2.29 Simpson told Mr. Francis that she had checked all of the ingredients and was convinced that the Epiphany D1 was clean. Simpson said that Francis looked at the ingredients on the label of the bottle and agreed with her that he did not see any ingredients that concerned him.

2.30 After learning that Simpson as well as her teammate, Asafa Powell, had tested positive for the same substance, Oxilofrine, and suspecting that the source might have been one of the supplements recently introduced by Xuereb, Doyle arranged through the United States Anti-Doping Agency (USADA) and WADA for a raid by Italian police on the hotel where the Jamaican team had been staying.

2.31 Simpson then returned to Jamaica, and Doyle arranged for tests to be conducted on the Epiphany D1 that had been taken from a batch purchased by Xuereb.

2.32 The first test was conducted by Caritox, a laboratory at the University of the West Indies, in Jamaica, on a sealed bottle of the Epiphany D1 which had been taken from the batch purchased by Xuereb for Powell and Simpson. This test revealed the presence of Oxilofrine in the tablets.

2.33 A second test was conducted by HFL Sport Science Inc. of Lexington, Kentucky, USA, on another bottle of Epiphany D1 taken from the batch purchased by Xuereb for Powell and Simpson, and this test also revealed the presence of Oxilofrine.

2.34 USADA also tested a bottle of Epiphany D1 which they had independently obtained and found the presence of Oxilofrine in the test sample. USADA subsequently posted the results on their high risk list of dietary supplements located on their website.

2.35 Simpson was notified of the adverse analytical finding of her "B" sample on August 5, 2013, and was told that a hearing date would be set. She responded by letter dated August 14, 2013, that she was anxious for a hearing date before the Jamaica Anti-Doping Disciplinary Panel.

2.36 Under IAAF rules, a disciplinary hearing shall be held within three (3) months of the date on which the athlete requests a hearing after an adverse analytical finding.

2.37 Simpson's hearing date was ultimately scheduled to begin on January 7, 2014, which was more than six months after her adverse analytical finding.

2.38 The hearing which was originally scheduled to last two days, was held over four days, January 7, 2014, January 8, 2014, February 4, 2014, and February 25, 2014.

2.39 On April 8, 2014, the Jamaica Anti-Doping Disciplinary Board handed down its oral decision which rendered Simpson ineligible to compete for a period of eighteen (18) months from the date of sample collection, June 21, 2013.

2.40 The Chairman of the Panel also indicated that the written reasons for the decision would be delivered within a month.

2.41 On May 1, 2014 the Jamaica Anti-Doping Disciplinary Panel issued its written reasons for the decision that had been delivered on April 8, 2014.

2.42 In its written reasons, the Panel indicated that it accepted that Oxilofrine is a Specified Substance based on the WADA Prohibited List of 2013. The Panel also found that the HFL Sports Science Laboratory in the USA and Caritox Laboratory in Jamaica, supported the fact that Oxilofrine had been found in the batches of Epiphany D1 which were supplied to the Powell/Simpson camp. The Panel noted that in addition, USADA's Dietary Supplement High Risk List added Epiphany D1 as a source of Oxilofrine in September, 2013.

2.43 Based on the totality of the evidence the Panel accepted Simpson's assertions on a balance of probability that Oxilofrine entered her body as a result of the ingestion of Epiphany D1.

2.44 Consistent with the argument raised in CAS 2011/A/2495, the Panel found that the failure by Simpson to disclose Epiphany D1 or any of the new supplements given to her by Chris Xuereb on the Doping Control Form is not *per se* sufficient to conclude that there was an intention to enhance sport performance.

2.45 The Panel found that Simpson's evidence, which was corroborated by that of Asafa Powell, established to their comfortable satisfaction that Simpson did not intend to enhance her sport performance by knowingly ingesting Oxilofrine.

2.46 The Panel followed the CAS decision in CAS 2010/A/2107, rather than the decision in CAS A2/2011, and on that basis sought to determine the effect of the athlete's degree of fault or negligence if any on her sanction.

2.47 The Jamaica Anti-Doping Disciplinary Panel found that considering all the circumstances Simpson acted with fault and negligence greater than mere ordinary fault and negligence. The Panel found that although she took some steps to meet the due diligence requirement, she could have done much more.

2.48 The Panel concluded that Simpson's degree of fault and negligence was similar to that found in the cases of CAS 2010/A/2107 (*supra*), and CAS 2005/A/847, therefore an eighteen (18) month period of ineligibility was imposed.

## 3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1 On, April 22, 2014, Simpson filed an appeal at the Court of Arbitration for Sport ("CAS") against the decision of the Jamaican Anti-Doping Disciplinary Panel rendered April 8, 2014, pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code").

3.2 The statement of appeal included a request for an expedited hearing.

3.3 On April 23, 2014, Simpson filed her appeal brief, in accordance with Article R51 of the Code.

3.4 In her statement of appeal and appeal brief, Simpson expressed her hope that she could have a hearing and final decision on the merits prior to the deadline to enter the Jamaica Commonwealth Games Trials which were to be contested in Kingston, Jamaica from June 26 to June 29, 2014.

3.5 The deadline for submission of entries for the Commonwealth Games Trials was June 20, 2014.

3.6 On April 30, 2014, the Respondent wrote to CAS advising that it was unable to agree to an expedited hearing because the Jamaica Anti-Doping Disciplinary Panel had not yet issued their written reasons.

3.7 On May 1, 2014, the Jamaica Anti-Doping Disciplinary Panel issued their written reasons.

3.8 On May 8, 2014, WADA and the International Association of Athletics Federations (IAAF) sought leave to intervene in the proceedings. No objection was raised regarding their applications.

3.9 On May 22, 2014, the Respondent filed its answer, in accordance with Article R55 of the Code.

3.10 On May 30, 2014, the Parties were advised that permission was granted for the IAAF and WADA to intervene as parties.

3.11 On June 7, 2014, WADA advised that it was withdrawing its participation in the Appeal with immediate effect.

3.12 On June 10, 2014, the IAAF advised that it was withdrawing its participation in the Appeal with immediate effect.

3.13 On June 11, 2014, Simpson filed a request for a stay of execution of the appealed decision, in accordance with Article R37 of the Code.

3.14 On June 17, 2014, the Respondent filed its reply to Simpson's request for a stay of execution.

3.15 On June 18, 2014, the Panel issued the operative part of the Order which granted a stay of execution of the appealed decision, until a final determination of the Appeal was made by CAS.

3.16 On the same date as this award is notified, the Panel issues a fully reasoned Order relating to the June 18, 2014 Order providing simply the operative part. The reasoned Order provides, in its relevant parts, the following:

*"[…] 6.LEGAL DISCUSSION*

*6.1 Article 37 of the Code permits provisional relief to be awarded by CAS panels 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".) (emphasis added).*

*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; 2001/A/329; and CAS 2001/A/324. These criteria are cumulative. See Orders of CAS 2013/A/3199; CAS 2010/A/2071; and 2007/A/1403. Accord, Paolo Patocchi, "Provisional Measures in International Arbitration", in International Sports Law and Jurisprudence of the CAS (M. Bernasconi, ed.), pp. 68-72 (2012).*

*6.3 Such criteria are also clearly set forth in Article R37 (5) of the Code.*

*6.4 In evaluating whether the criteria are satisfied, the Panel has taken into account the following submissions of the parties.*

*6.5 The Appellant's main submissions were:*

- *The Appellant will not have another opportunity to compete in the Commonwealth Games if not permitted to enter the Trials by 20 June 2014, and compete in the Trials between 26 and 29 June 2014. If she is not permitted to contest the Trials, she will have irrevocably lost the opportunity to compete in the Commonwealth Games in Glasgow this summer even if the CAS panel ultimately reduces her sanction. This would result in irreparable harm to the Appellant.*
- *The Appellant is likely based on the facts of her case and on existing CAS jurisprudence to succeed on the merits of her claim and therefore to have her sanction reduced.*
- *The Appellant's interests outweigh those of JADCO in that if JADCO is successful in the final appeal before CAS they can retroactively alter the results of the Commonwealth Games Trials and disqualify the Appellant without any prejudice to anyone as long as the final award is handed down in time to allow for selection of a replacement team member. The same measures could be taken for any other competitions in which the Appellant takes part prior to the imposition of the final sanction.*

*6.6 The Respondent's main submissions were:*

- *It is indisputable that the Appellant will not be selected for the Commonwealth Games if he does not participate at the National Trials and that the damage occasioned by her inability to participate in the Trials could not be remedied even if the final ruling is in her favour. The Respondent accepts that in these circumstances it is open to the Panel to find that the Appellant could suffer irreparable harm if the application were denied.*
- *However, the Respondent submits that the Appellant has failed to demonstrate that she would suffer any damage if she were unable to participate in the upcoming Diamond League competitions since her inability to participate in one meet would not preclude her participation in other meets should the Court rule in her favour. The Respondent therefore submits that with regard to the Appellants participation in Diamond League competitions, the application for a stay should be dismissed.*
- *The Respondent submits that with regard to the consideration of the Likelihood of Success of the Appeal criteria, the Appellant has incorrectly stated the test in that the Panel is not required to make a determination on the merits of the case. Rather, the Respondent submits that the question for determination by the Panel is whether the Appellant has a plausible case or whether the Appellant's case is arguable, that is, it is not frivolous or vexatious, which is understood to be a low threshold. The Respondent submits therefore that it is open to the Panel to find that this condition has been satisfied.*
- *The Respondent acknowledges that the grant of the application would lead to a postponement and not a cancellation of the sanction and moreover only for a short period and submits that it is therefore open to the Panel to find that the balance of convenience condition has been satisfied.*

*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 While, according to CAS case law (CAS 2008/A/1569 […]), it is not in itself sufficient that a professional athlete is prevented from competing in sports events to justify a stay in itself, 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.*

*6.9 The Panel holds that the prerequisite of irreparable harm is met in the present case. It discounts the argument, sometimes advanced in such a context, to the effect that a suspension will always be without effect if a stay is granted, and so a stay should not be granted for that sole reason. In this case first this athlete has already served almost two thirds of the suspension issued against him by Respondent. Secondly, the relative brevity of the Athlete's remaining track and field career, coupled with the imminent approach of the pre-scheduled qualifying event for Jamaica for the 2014 Commonwealth Games, and other potentially remunerative athletics meetings, would, were the Athlete to remain ineligible to compete in those events, give rise, on any reasonable objective view, to irreparable harm.*

*LIKELIHOOD OF SUCCESS OF THE APPEAL*

*6.10 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.*

*6.11 Suffice is to say at this stage that the Appellant has more than nugatory arguments at her disposal regarding the length of her suspension. Whether these arguments will prevail to the extent requested by the Appellant, or less, can only be fully addressed in the final award after the hearing and need not be addressed at this interlocutory stage of the proceedings. However, the Panel holds that they are sufficiently plausible to justify the grant of a stay in this case which is enough to satisfy the second criterion.*

*BALANCE OF COMPETING INTERESTS*

*6.12 As indicated in the above referenced decisions as well as others, the applicant must demonstrate that the harm or inconvenience it would suffer from the refusal of the requested provisional measures would be comparatively greater than the harm or inconvenience the other parties would suffer from the granting of the provisional measures.*

*6.13 Were the Panel to find in the full hearing that the suspension pronounced in the Appealed Decision should be upheld and accordingly that the appeal dismissed, then the sanction can bite for the remaining albeit later months, with similar adverse consequences for the Athlete. By contrast, were the requested stay to be denied, but the Panel were to find in the hearing that the suspension should be lifted or materially reduced, then the Athlete will have lost the chance of medals and earnings forever. Therefore, the Panel holds that the balance of interests tips decisively in favour of the Appellant.*

*7. CONCLUSION*

*7.1 As can be seen from the above summary of its arguments the Respondent has in effect conceded that in these circumstances it would be appropriate to grant a stay of execution of the decision of the Jamaica Anti-Doping Disciplinary Panel so that the Appellant may compete in the Jamaican Commonwealth Games Trial. However, the Respondent submits that such a stay if granted should be limited to this competition only.*

*7.2 The Panel disagrees with the suggestion that the stay, if granted, should be so limited. The Panel takes the view that if it is appropriate (as it has found it is) to grant a stay of execution in this matter, the stay must remain in effect for all purposes until the Panel renders its decision after a full hearing on the merits of the case.*

*To draw the distinction sought by the Respondent would be unprincipled; what is good for one is good for the other and the principled basis for a stay relates to a period of time, not on the quality or characteristics of one event over another.*

*7.3 The Panel concludes therefore, that after considering the submissions of the Parties, the applicable artides of the Code of Sports Related Arbitration and the relevant jurisprudence, the execution of the decision of the Jamaica Anti-Doping Disciplinary Panel rendered on 10 April 2014, be stayed until such time as the Appeal filed by the Appellant has been heard and a decision rendered by CAS.*

*[…]".*

## 4. THE CONSTITUTION OF THE PANEL AND THE HEARING

4.1 On June 6, 2014, CAS confirmed the appointment of Mr. Jeffrey G. Benz as Arbitrator nominated by Simpson, the Hon. Michael J. Beloff, Q.C. as Arbitrator nominated by JADCO, and the Hon. Hugh L. Fraser, appointed by CAS as President of the Panel.

4.2 On June 30, 2014, an Order of Procedure was signed by Simpson.

4.3 On July 2, 2014, an Order of Procedure was signed by JADCO.

4.4 The Order of Procedure confirmed that a hearing had been scheduled for July 8, 2014, in New York, New York.

4.5 A hearing was held at the American Arbitration Association offices on July 8, 2014. The parties confirmed that they had no objection to the composition of the Panel.

4.6 The following persons attended the hearing:

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|---|---|
| For the Appellant: Mr. | Paul J. Greene, Counsel for Ms. Sherone Simpson,<br>Ms. Sherone Simpson,<br>Mr. Paul Doyle, Agent for Ms. Sherone Simpson. |
| For the Respondent: | Mr. Lackston L. Robinson, Counsel for JADCO. |

4.7 The Panel was assisted at the hearing by Mr. Christopher Singer, Counsel to CAS who served as Ad hoc clerk.

4.8 Simpson had been granted permission by the Panel to call witnesses by telephone but she indicated at the hearing itself that the only witnesses that the Panel would hear from would be herself and her agent, Paul Doyle. The Respondent did not call any witnesses at the hearing.

4.9 At the hearing the Panel heard the detailed submissions of counsel as well as the evidence of the following witnesses:

- Ms. Sherone Simpson testified about her dismay upon discovering that she had tested positive for a specified substance. She also testified about her relationship with her

manager Paul Doyle, her relationship with her physical therapist, Chris Xuereb, and the steps that she took to ensure that no prohibited substance entered her body.

- Mr. Paul Doyle, the agent and manager of Sherone Simpson testified about his relationship with Simpson, his involvement with Chris Xuereb, and the steps he took to discover the source of the positive test.
- Counsel for JADCO, Mr. Lackston Robinson, chose not to cross examine Mr. Doyle and had only a few questions on cross-examination for Ms. Simpson.
- Mr. Robinson indicated to the Panel that he would rely on the evidence presented in the hearing before the Jamaica Anti-Doping Disciplinary Panel since that evidence was available for the CAS Panel to consider in its deliberations.

4.10 The Parties, particularly JADCO, made lengthy oral arguments in closing. At the conclusion of the hearing, the Parties were satisfied that their right to be heard had been duly respected and, they had been treated fairly and equally in the arbitration proceedings.

4.11 The Parties were reminded that the Panel would render the operative part of the award at the earliest opportunity which was notified to them by the CAS Court Office on July 14, 2014.

## 5. JURISDICTION OF THE CAS AND ADMISSIBILITY

5.1 Article R47 of the Code provides as follows:

*"An 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.*

*An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".*

5.2 In her statement of appeal, Simpson relied on Section 23 of the Jamaica Anti-Doping in Sport Act which provides that:

*"Where an appeal is in respect of an international event or a case involving an international-level athlete, the decision of the Disciplinary Panel may be appealed directly to the Court of Arbitration".*

5.3 Both Simpson and the Respondent confirmed CAS' jurisdiction by signing the Order of Procedure, and there were no objections raised at any time to the CAS' jurisdiction by anyone. Based on the foregoing, the Panel is satisfied that it has jurisdiction to decide the present dispute.

5.4 Article R49 of the CAS Code provides as follows:

*"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt*

*of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document".*

5.5 The Jamaica Anti-Doping in Sport Act does not set a time limit to file an appeal with CAS, therefore Article R49 of the Code of Sports-related Arbitration applies. Simpson received the decision from the Jamaica Anti-Doping Disciplinary Panel on April 8, 2014. She filed her Appeal on April 22, 2014, making it a timely appeal. No objection to the admissibility of the appeal has been raised by JADCO. It follows that the appeal is admissible.

## 6. ISSUES

6.1 At the CAS hearing, Simpson maintained that the sole issue that the Panel was required to determine was the appropriate length of her period of ineligibility. Simpson sought to demonstrate to the Panel that her lack of intent to use a prohibited substance, her reasonable explanation as to how the prohibited substance entered her body, and her efforts to ensure that the nutritional supplements that she used did not contain any prohibited substances, should result in a sanction significantly less than eighteen months.

6.2 The Respondent submitted that Simpson would have to satisfy this Panel on a balance of probabilities as to how the substance entered her system and that Epiphany D1 was in fact the source of the positive test before any reduction of the presumptive two-year period of ineligibility could be considered.

6.3 The CAS Panel agrees that since this is a *de novo* appeal, Simpson would be required to establish the source of the Oxilofrine and also to establish the absence of an intent to enhance performance. However, the Panel does not agree that the Respondent can properly invite it to impose a sanction as high as two years. That would amount to seeking a different order rather than upholding the same order on different grounds and would be *ultra petita*. See 2010/A/2283 at para. 14.30.

6.4 More particularly if the Respondent intended to seek a sanction between eighteen months and two years it should have launched a cross appeal. The Panel notes that if WADA or the IAAF had wished to challenge the decision of the Jamaica Anti-Doping Disciplinary Panel, it would have been necessary for them to file an appeal. No such appeal seeking a sanction above the 18 month period was filed by any party.

6.5 The Panel recognizes that the Respondent's answer sets out clearly the remedy that they are seeking, inter alia, the imposition of a two-year sanction. However, an answer to an appeal is not in substance or in form the same as a Respondent's own (cross) appeal.

6.6 CAS rules provide strict time limits and formalities with regards to Appeals with a perceptible and proper purpose of ensuring that the parties know at the earliest opportunity what issues can be raised before a CAS panel.

6.7 The Panel acknowledges that this ruling creates a potential anomaly in that logically if Simpson does not succeed in establishing the first two requirements regarding the source of the Oxilofrine and the absence of intent to enhance performance, she will not be able to rely on Article 10.4 of the WADA Code to reduce sanction at all.

6.8 The fact, however, that the Respondent is constrained in our view, not to seek an increased sanction over and above that ordered by the Jamaica Anti-Doping Disciplinary Panel results from their omission to take the course contemplated by the CAS rules, and in the Panel's judgment they cannot take advantage of their own procedural omission albeit that it was unintentional, as doing so would unfairly countenance consideration of a penalty that is the product of procedural unclean hands, even if unintentional.

## 7. SCOPE OF THE PANEL'S REVIEW

7.1 With regard to the scope of the Panel's powers in this Appeal, Article R57 of the CAS Code provides:

*"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance […]".*

7.2 The Parties have acknowledged that this is a *de novo* review before this Tribunal and that the Panel has full authority to review the facts and the law and to undertake a *de novo* determination of the decision under appeal from the Jamaica Anti-Doping Disciplinary Panel.

7.3 Accordingly, the Panel was satisfied that it had the power to undertake a full *de novo* hearing of the issues determined by the Jamaica Anti-Doping Disciplinary Panel.

7.4 Nonetheless, in conducting that new hearing, it took into account to the extent appropriate, the factual findings and conclusions expressed in that decision, especially but with appropriate caution, where those findings were based on oral testimony of witnesses who did not appear before the Panel in this appeal.

## 8. APPLICABLE LAW

8.1 Article R58 of the Code provides as follows:

*"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

8.2 The Jamaica Anti-Doping Disciplinary Panel is established by Section 18 of the Anti-Doping in Sport Act, 2008 to conduct disciplinary hearings related to Anti-Doping Rules violations

referred to it by the JADCO which is the National Anti-Doping Organization established by Section 5 of the Anti-Doping in Sport Act, 2008.

8.3 The proceedings before the Jamaica Anti-Doping Disciplinary Panel were conducted and sanctions were imposed pursuant to the provisions of the JADCO Anti-Doping Rules which adopt the WADA Code.

8.4 On June 21, 2013 Simpson was selected for Doping Control at the Jamaican National Senior Championships in Kingston, Jamaica. She was found to have committed an Anti-Doping Rule violation under Article 2.1 of the JADCO Anti-Doping Rules and the hearing was conducted and sanctions imposed under the JADCO Anti-Doping Rules.

8.5 The Respondent submits therefore that the applicable law is Jamaican law since the Jamaica Anti-Doping Disciplinary Panel is domiciled in Jamaica.

8.6 The relevant JADCO and WADA anti-doping regulations are set out below:

*"1.2.1 JADCO Anti-Doping rules apply to all Persons who:*

*1.2.1.1 are members of a National Sports Federation of Jamaica, regardless of where they reside or are situated;*

*1.2.1.2 are members of National Sports Federation's affiliated members, clubs, teams, associations or leagues;*

*1.2.1.3 participate in any capacity in any activity organized, held, convened or authorized by a National Sports Federation of Jamaica or its affiliated members, clubs, teams, associations or leagues; and*

*1.2.1.4 participate in any capacity in any activity organized, held, convened or authorized by a National Event organization, or a national league not affiliated with a National Sports Federation.*

…

*1.2.3 The Roles and Responsibilities of Athletes are to:*

*1.2.3.1 be knowledgeable of and comply with all applicable anti-doping Policies and rules adopted pursuant to the Code;*

*1.2.3.2 be available for Sample collection;*

*1.2.3.3 take responsibility, in the context of anti-doping, for what they ingest and Use; and*

*1.2.3.4 inform medical personnel of their obligation not to use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate anti-doping policies and rules adopted pursuant to the Code".*

8.7 Section 10 of the Jamaica Anti-Doping in Sport Act, states:

*"10.--(I) Except in any case where an athlete holds a Therapeutic Use Exemption Certificate and is in compliance with the terms of such Therapeutic Use Exemption Certificate, the athlete shall be liable for the presence of any prohibited substance or its metabolites or markers found in his body.*

*(2) Subject to the exception mentioned in subsection (I), a reference in this Act to an Anti-Doping Rules violation shall mean any one of the following-*

*(a) the presence of a prohibited substance or its metabolites or markers in an athlete's specimen;*

*(b) the use or attempted use of a prohibited substance or a prohibited method";*

8.8 Sections 18 to 20 of the Jamaica Anti-Doping in Sport Act read as follows:

*"18. There is established for the purposes of this Act a body to be called The Jamaica Anti-Doping Disciplinary Panel and the provisions of the Second Schedule shall have effect as to the Constitution and Procedure of the Disciplinary Panel and otherwise in relation thereto.*

*19. Where it appears that there has been an Anti-Doping rules violation the Commission shall refer the matter to the Disciplinary Panel.*

*20. (1) The functions of the Disciplinary Panel shall be to:*

- *(a) receive, examine and hear evidence relating to an Anti-Doping Rules violation;*
- *(b) conduct disciplinary hearings related to Anti-Doping Rules violations referred to it by the Commission;*
- *(c) determine whether a violation of the Anti-Doping Rules has occurred;*
- *(d) impose consequences of Anti-Doping Rules violations;*
- *(e) perform any other functions that are conferred or imposed on the Disciplinary Panel by this Act,*

*(2) The Disciplinary Panel shall consequent on receiving a written reference from the Commission asserting an Anti-Doping rules violation:*

- *(a) within fourteen days of the date of receipt of the reference, commence a hearing:*
- *(b) within twenty days of the date of receipt of the reference, issue a written decision;*
- *(c) within thirty days of the date of receipt of the reference, issue written reasons for the decision given in paragraph (b)".*

8.9 Section 23 of the Jamaica Anti-Doping in Sport Act deals with appeals involving international athletes.

*"Where an appeal is in respect of an international event, or a case involving an international-level athlete, the decision ofthe Disciplinary Panel may be appealed directly to the Court of Arbitration".*

8.10 The relevant articles of the WADA World Anti-Doping Code read as follows:

*"2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample*

*2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.*

*2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is*

*analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in Athlete's A Sample. 2.1.3.*

*2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.*

*4.1 Publication and Revision of the Prohibited List*

*WADA shall, as often as necessary and no less often than annually, publish the Prohibited List as an International Standard. The proposed content of the Prohibited List and all revisions shall be provided in writing promptly to all Signatories and governments for comment and consultation. Each annual version of the Prohibited List and all revisions shall be distributed promptly by WADA to each Signatory and government and shall be published on WADA's Web site, and each Signatory shall take appropriate steps to distribute the Prohibited List to its members and constituents. The rules of each Anti-Doping Organization shall specify that, unless provided otherwise in the Prohibited List or a revision, the Prohibited List and revisions shall go into effect under the Anti-Doping Organization's rules three (3) months after publication of the Prohibited List by WADA without requiring any further action by the Anti-Doping Organization".*

8.11 The World Anti-Doping Code 2013 List of Prohibited Substances came into effect on January 1, 2013. Oxilofrine (methylsynephrine) is one of the specified stimulants contained in the list. Articles 10.2 and 10.4 of the Code state that:

*"10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods*

*The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met: First violation: Two (2) years Ineligibility.*

*10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances*

*Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Artide 10.2 shall be replaced with the following:*

*First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility. To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance. The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility".*

## 9. SUBMISSIONS OF THE PARTIES

9.1 The parties' submissions, in essence, may be summarized as follows:

*A. The Appellant*

9.2 Simpson's Appeal Brief asks the CAS to grant the following relief:

*"(a) Setting aside the Decision of the Jamaica Anti-Doping Disciplinary Panel of April 8, 2014.*

*(b) Reduce the eighteen (18) month period of ineligibility handed down by the Jamaica Anti-Doping Disciplinary Panel on April 8, 2014, to a period of ineligibility of three (3) months or less backdated.*

*(c) Order the Jamaica Anti-Doping Disciplinary Panel and/or JADCO to pay all of Simpson's costs and legal fees associated with this appeal within thirty (30) days of the Panel's award.*

*(d) Order any other relief for Simpson that the Panel deems to be just and equitable".*

9.3 Simpson submits that since Oxilofrine is a Specified Substance so designated in the WADA Code, Article 10 of the Code confers discretion on the CAS Panel to eliminate or replace the 24 month period of ineligibility with a period ranging from zero to twenty-four months if Simpson can establish: (1) how the Specified Substance entered her body; and (2) that the Specified Substance was not intended to enhance her sport performance or mask any other performance-enhancing substance.

9.4 Simpson submits that she has established on a balance of probability how the specified substance entered her body. She points to the fact that she took two capsules of Epiphany D1 on the morning of June 21, 2013, and that Epiphany D1 was seized from her hotel room by the Italian police in the aftermath of her adverse analytical finding. She also submits that Epiphany D1 was on the list of supplements sent by Chris Xuereb to Paul Doyle.

9.5 Simpson further submits that the subsequent testing of the Epiphany D1 also supports her contention as to how the specified substance entered her body. She notes in this context that Caritox, a laboratory at the University of the West Indies in Kingston, Jamaica tested a sealed bottle of the Epiphany D1 which was taken from the batch purchased by Xuereb and found that it contained Oxilofrine.

9.6 She notes as well that a second test was carried out by HFL Sport Science Inc. of Lexington, Kentucky on a bottle of Epiphany D1 taken from the batch purchased by Xuereb and this test also revealed the presence of Oxilofrine. Furthermore USADA also tested a bottle of Epiphany D1 and found the presence of Oxilofrine prompting that agency to post the results on their website as a high risk dietary supplement. Simpson submits that these tests are more than adequate to establish on a balance of probability that the Oxilofrine entered her body through her ingestion of Epiphany D1.

9.7 In support of her contention that the presence of the specified substance was not intended to enhance her performance or mask the use of a performance-enhancing substance, Simpson submits that she did not know that Epiphany D1 contained Oxilofrine, or what Oxilorfrine was. She refers to CAS 2010/A/2107 which holds that an athlete's lack of knowledge that a product contains a prohibited substance is sufficient evidence to establish to the comfortable satisfaction of the hearing panel that the athlete ingesting the product had no intent to enhance her sport performance or mask the use of a performance-enhancing substance.

9.8 Simpson highlights the following passage in CAS 2010/A/2107, in which the CAS Panel found that,

*"Article 10.4 requires the Athlete only to prove [their] ingestion of [a banned substance] was not intended to enhance [their] sport performance. This construction of Article 10.4 … is consistent with its explanatory Comment, which uses the term "Specified Substance" in providing "examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent".*

9.9 Simpson submits that the CAS 2010/A/2107 reasoning was upheld in CAS 2011/A/2645. In CAS 2011/A/2645, the CAS Panel said the following about the application of Article 10.4:

*"The Athlete did not even know that the Product contained [the prohibited substance] even though the [Federation] imputes the Athlete to a high level of fault, no concrete submission has been made by [the Federation] to claim that the [Athlete] actually knew that the Product contained a prohibited substance, which the Athlete used with the intent to enhance his sport performance or cover the use of another prohibited substance. As a result, no intent to use [the prohibited substance] for whatever purpose, can be imputed to the [Athlete]".* CAS 2011/A/2645 at para. 9.17.

9.10 Simpson submits that under the CAS 2010/A/2107 and CAS 2011/A/2645 rationale, which has been followed by many CAS panels, an athlete who is not aware that the specified substance was actually included in the supplement that she ingested can have no intent to enhance her sports performance. She also submits that if the Panel rejects the CAS 2010/A/2107 and CAS 2011/A/2645 approach and follows the approach taken in CAS A2/2011 which determined that an athlete must produce corroborating evidence sufficient to demonstrate the absence of his or her intent to enhance sport performance, she would still be able to derive the benefit from Article 10.4 because she has produced such corroborating evidence.

9.11 Simpson submits that the consideration of the following objective circumstances could lead a Panel to be comfortably satisfied that there was no intent on her part to enhance sport performance by use of Epiphany D1:

(1) Whether the nature of the specified substance which it contained would or would not have been beneficial to the athlete;

(2) Whether the timing of its ingestion would or would not have been beneficial to the athlete;

(3) Whether the athlete's use of the supplement was open or covert;

(4) The degree of the potential performance-enhancing benefit of the specified substance bearing in mind that the greater the potential performance-enhancing benefit, the higher the burden on the athlete to prove the lack of an intent to enhance sport performance;

(5) Whether the athlete did or did not take the supplement intending to give herself a "boost";

(6) Whether the athlete did or did not disclose the supplement on her doping form.

9.12 Simpson submits that by reference to those critieria the Panel can rely on the following evidence as corroborating her argument that she did not intend to enhance sport performance or mask the use of a performance-enhancing substance:

(1) Oxilofrine would not have been beneficial to her since it is a low grade, very mild stimulant with little performance-enhancing benefit;

(2) She took the Oxilofrine at 7 a.m. on the morning of June 21, 2013, more than 12 hours before the 100 meter final at the Jamaica National Championships, her ingestion of Oxilofrine would not have been beneficial to her so far ahead of her event if at all.

(3) She was open about her use of Epiphany D1, continuing to take it after the Jamaica National Trials, leaving it out in her room when she knew the Italian Police were coming to raid her room and willingly showing it to her coach, Stephen Francis in the aftermath of the adverse analytical finding;

(4) If the potential performance-enhancing benefit of Oxilofrine is slight, her burden to prove lack of intent to enhance sport performance is lower;

(5) She did not take the supplement intending to give herself a "boost" but rather took it each morning before breakfast at the same time every day, for her health, wellness and sustenance;

(6) She did not list the supplement on her doping control form but she provided a satisfactory explanation in that this was a new supplement which she forgot to list due to its recent introduction into her routine and without the assistance Chris Xuereb, the person most familiar with the new supplements who was not allowed in the doping control area since only one athlete's representative was permitted.

9.13 Simpson submits that her failure to list Epiphany D1 on the doping control form is in any event only one factor to be considered when determining whether she intended to enhance performance and should be given little if any weight since all the other factors overwhelmingly show that she did not intend to enhance performance.

9.14 If Article 10.4 of the WADA Code applies, Simpson then submits that her degree of fault is the criterion to be considered in assessing the appropriate period of ineligibility between zero (0) and twenty-four (24) months.

9.15 Simpson agrees with the Panel's finding in CAS 2011/A/2645 that the circumstances to be considered in the assessment of her fault *"must be specific and relevant to explain* [her] *departure from the expected standard of behaviour"*. She submits that in determining whether she has done everything in her power to avoid ingesting any prohibited substance, the Panel can consider the following:

(1) Her use of the supplement was not associated with sporting practice but rather as a way to supplement breakfast;

(2) Her use of the supplement was recommended by Chris Xuereb, a trusted medical advisor, for a non-performance related reason;

(3) Her use of the supplement was supervised by Chris Xuereb who told her to take two capsules each morning;

(4) Xuereb told Simpson he purchased Epiphany D1 from a reliable source, a nutrition supply store in Canada and not from an on-line supplier whose products could be associated with doping or intent to enhance performance. Simpson knew that her manager Doyle paid for Xuereb to fly to Canada specifically to purchase the supplements from a safe source;

(5) The Epiphany D1 label and the manufacturer's website did not contain any warning of the presence of a prohibited substance;

(6) The Epiphany D1 label did not contain the name "Oxilofrine" or a synonym for the banned substance;

(7) The search conducted by Simpson on her Samsung tablet prior to taking the supplement was more than 14 hours long and included a comparison of each ingredient on the Epiphany D1 label with the WADA Prohibited List. She Googled each individual ingredient of the Supplement, checked each individual ingredient against the WADA Prohibited List and extensively searched the manufacturer's website.

(8) She has a personal history and clean anti-doping record over many years and has tested clean more than 100 times and has always paid attention to anti-doping issues;

(9) Xuereb was recommended to her by her highly trusted agent Paul Doyle who told her that a highly trusted doctor, Dr. Carmine Stillo, with whom Simpson was familiar, had approved Xuereb.

9.16 Simpson submits that she falls within the range of sanction imposed in supplement cases such as CAS 2013/A/3075; CAS A2/2011; CAS 2011/A/2495; CAS 2011/A/2645; *UKAD v. Duckworth*; *CCES v. Toor*; *FIBA v. Weeden; RFU v. Steencamp*; *UKAD v. Dooler*; and CAS 2011/A/2518. She takes the position that her degree of fault is low when compared to the above referenced athletes.

9.17 Simpson argues that she could not have known that the Epiphany D1 contained a Specified Substance without conducting an analytical test in the lab since the Supplement did not contain the name of the banned substance or a synonym for it anywhere.

9.18 Simpson further submits that requiring her to do an analytical test in the lab prior to taking the Supplement is beyond the level of due diligence expected of any athlete under the Code.

9.19 Simpson concludes her submissions by stating that in accordance with the commentary to Article 10.2 of the WADA Code, her sanction must be harmonized so that the rules applied to other athletes in similar circumstances who have been sanctioned in the 0 to 6 month range will also be applied to her.

*B. The Respondent*

9.20 In its Answer to Simpson's brief, the Respondent JADCO asks the CAS for the following relief:

*"(a) That the appeal be dismissed;*

*(b) That the Panel find that Simpson has not established how the prohibited substance entered her body;*

*(c) Alternatively, that the Panel find that Simpson has not satisfied the requirements of Article 10.4 of the JADCO Rules;*

*(d) Alternatively that the Panel find that Simpson is significantly negligent within the meaning of Artide 10.5.2 of the JADCO Rules;*

*(e) That the Panel impose a sanction of two years ineligibility in accordance with the provisions of Artide 10.2 of the JADCO Rules;*

*(f) That Simpson pays the Respondent's costs".*

9.21 JADCO submits that Simpson's responsibility is one of strict liability. Therefore, except in the case of a threshold substance, for the purposes of the imposition of sanctions under Article 10.2 and Article 10.5.2 of the JADCO rules, the quantity of the substance ingested by Simpson or the duration for which Simpson was using the substance are not relevant per se in the absence of other objective circumstances.

9.22 JADCO is not persuaded that the Oxilofrine which was present in Simpson's urine sample entered her body as a result of her taking a dietary supplement called Epiphany D1.

9.23 JADCO contends that there is no evidence or no sufficient evidence which establishes that the Oxilofrine which was present in Simpson's urine sample originated in the Epiphany D1 supplement which she had taken. In those circumstances the Respondent contends that the sanction must be imposed in accordance with the provisions of Article 10.2.

9.24 In the alternative, JADCO submits that Simpson has not satisfied the conditions stipulated in Article 10.4 of the JADCO Rules and WADA Code which would permit the Panel to reduce her sanction in accordance with that provision.

9.25 JADCO also contends that there are no exceptional circumstances and that Simpson was significantly negligent, therefore she cannot rely on the provisions of Article 10.5.2 in mitigation of sanction.

9.26 JADCO submits that Article 10.4 allows for a reduction of sanction under specific circumstances which are as follows:

(1) The impugned substance must be a specified substance;

(2) The athlete must establish on a balance of probability how the substance entered her body or came into her possession as the case may be;

(3) The athlete must establish to the comfortable satisfaction of the hearing Panel that the presence or possession of the substance was not intended to enhance sport performance;

(4) The athlete must give evidence and adduce evidence from another person which supports her evidence and shows that she had no intention to enhance sport performance.

9.27 JADCO further submits that in order for Simpson to benefit from a reduction of sanction under Article 10.4 she must satisfy all four preconditions stipulated in that provision.

9.28 JADCO also submits that where an athlete takes a prohibited substance which is incapable of enhancing her performance or masking the use of performance enhancing substance, but she mistakenly believes that it would have such effect, it would not assist her if she were to argue that her intention could not be realized.

9.29 JADCO goes on to say that in order for an athlete to benefit from a reduction of sanction under Article 10.4 she must, inter alia, satisfy the onerous condition of proving to the comfortable satisfaction of the adjudicating Tribunal that she did not use the substance with the intention of improving her sport performance or masking the use of a performance enhancing substance. In order to achieve this objective she must present evidence from another person which corroborates her story that there was no such intention.

9.30 Additionally, JADCO submits that in order to satisfy the evidential burden Simpson's testimony must be intrinsically credible and the testimony of the supporting witness must also be credible since the purpose of corroboration is not to lend credence to evidence which is suspect or incredible and corroborative evidence will only fill its role if it is completely credible.

9.31 JADCO contends that the process under Article 10.4 must therefore commence with the testimony of an athlete who is open, frank, and truthful about the circumstances relative to the taking of the prohibited substance.

9.32 In considering the alternative remedy under Article 10.5.2, JADCO submits that the requirement for an athlete to prove:

*"that [her] fault or negligence when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in relationship to the Anti-Doping Rules violation"*

creates a very high standard to allow for the reduction of the standard sanction by a maximum of one-half where the circumstances are truly exceptional.

9.33 With regard to the evidence available for consideration by the Panel, the Respondent submits that no evidence was adduced by Simpson to show the reason for the use of each supplement other than to say that they were taken for her wellness.

9.34 JADCO submits that Simpson had little to do with having Epiphany D1 tested and more importantly that it is beyond doubt that the Epiphany D1 supplement that she was taking was not sent to any laboratory for testing for the presence of Oxilofrine.

9.35 JADCO also submits that either Simpson did not conduct the research that she claimed she had done or her wilful blindness prevented her from seeing the internet article warning of the dangers of Acacia Rigidula, one of the listed ingredients of Epiphany D1.

9.36 JADCO also contends that Simpson's failure to consult with anyone regarding the supplements that she received from Xuereb, is evidence of her gross negligence and her irresponsibility. They also submit that it would have been prudent for Simpson to ask Xuereb for the invoice for the supplements and to examine it in order to determine when the supplements were purchased or to determine if the invoice was proper.

9.37 JADCO further submits that Simpson knew nothing about Mr. Xuereb's antecedents and there is no evidence that she made any enquiries about Mr. Xuereb's qualifications.

9.38 It is submitted by the Respondent that Simpson has not provided a credible explanation for failing to advise the Doping Control Officer of her inability to recall the names of the supplements that she was taking.

9.39 It is also submitted by the Respondent that there should be some doubt concerning the extent of the research done by Simpson to ascertain whether the supplements she was taking contained a prohibited substance. The Respondent adds that merely comparing the ingredients on the Epiphany D1 label with the prohibited list would be insufficient to determine whether a substance had a similar chemical structure or similar biological effects.

9.40 It is further submitted by JADCO that Simpson is deemed to be aware of the publications by IAAF, WADA and others that have been in the public domain including the advisory published by the IAAF Medical and Anti-Doping Department in 2013.

9.41 In any event, JADCO submits that Simpson was aware of the possible contamination of supplements and the dangers thereof but was prepared nevertheless to take the risk. .

9.42 It is submitted by JADCO that an athlete who does not have a scientific test done on the supplements before she consumes them or who does not seek professional advice prior to consumption is significantly negligent.

9.43 The Respondent submits that the report prepared by Professor Wayne McLauglin and his team at the Caratox Laboratory is completely unreliable and the conclusions arrived at were not substantiated. The basis for this submission by JADCO is their belief that the testing procedure used by Caritox was fundamentally flawed.

9.44 JADCO submits that the Panel cannot be satisfied that the Oxilofrine detected in Simpson's urine sample would most likely have originated from the consumption of Epiphany D1 because no tests were done on the Epiphany D1 supplement which Simpson consumed. JADCO further submits that the Epiphany D1 which was submitted to the HFL Laboratory for testing was unmistakably counterfeit, and that legitimate Epiphany D1 does not contain Oxilofrine.

*C. Evidence adduced at the hearing*

a) Simpson's Oral Testimony

9.45 Sherone Simpson testified at the hearing. She was born in Manchester, Jamaica, and started running at eight years of age. She recalled that she first gained recognition at the boys and girls championships in Kingston. In her first senior national competition in 2004, she won a gold medal as a member of the Jamaican women's 4 x 100 Olympic relay team.

9.46 Simpson testified that she was experiencing a great deal of knee pain prior to the 2008 Olympics in Beijing. She had an MRI done on her knee and it revealed that she was missing significant cartilage. She was able to compete through the pain and won the silver medal in the 100 metre event. She had knee surgery after the Olympics. At the 2012 Olympic Games in London, she also won a silver medal as part of the Jamaican women's 4 x 100 meter relay team.

9.47 Simpson recalled meeting Paul Doyle in 2005. She agreed to have Doyle represent her about a week after their first meeting. She testified that she had a close relationship with Doyle and that he has been there for her since day one. She considers him to be more than an agent in that she can talk to Doyle about anything.

9.48 Simpson testified that her first introduction to Chris Xuereb was when she saw him working with her teammate Asafa Powell. She asked some questions and received information about their relationship. She recalled being told that Dr. Carm Stillo had recommended Xuereb to Doyle. Simpson stated that Dr. Stillo had been to Jamaica several times. He was a person whom she held in high regard and his recommendation of Xuereb was sufficient for her. With the agreement of Doyle, Xuereb began to work with Simpson on May 16, 2013.

9.49 Simpson recalled that Xuereb's treatment consisted of Active Release Techique (A.R.T.) and massage. She believed that his treatments were very helpful and when she went to a competition in Beijing on May 18, 2013, she felt much better. In her words *"he* [Xuereb] *was really good"*.

9.50 Simpson testified that she was impressed when she saw Xuereb encouraging Powell to get moving in the morning to get to his training. She thought that Xuereb was very good at what he did and she allowed him into her small circle of friends and colleagues. Simpson stated that she believed that Xuereb was really looking out for her, that he seemed to know a lot about injuries and would tell you what he was going to do and why he was going to do it. He seemed to be a hard worker who didn't mind being busy all day. Simpson added that she thought Xuereb was a *"cool person"*.

9.51 Simpson recalled that Xuereb told her that he had noticed that Powell was not taking care of his body and that he had introduced some supplements that Powell had already begun to take. Simpson told the hearing that she asked Xuereb about the supplements indicating at the same time that she did not want anything that was illegal. According to her recollection, Xuereb said, *"I didn't come here to dope you"*.

9.52 Simpson stated that she went home and started to do her checks on the supplements that Xuereb had recommended. She didn't check the protein or Vitamin D because she already knew about them. She recalled taking the Epiphany bottle and typing in all the ingredients from the label into her tablet computer. She recalled going into the WADA Prohibited List and also checking the Epiphany web site. She also recalled seeing a picture of a plant on the Epiphany web site and concluded that nothing illegal would come from that plant.

9.53 Simpson testified that as part of her check, she went through the list of ingredients. She recalled seeing caffeine and then cross referencing that ingredient. She recalled noting that caffeine was not banned. She then typed it into "Google" again. After completing approximately fourteen hours of research she was satisfied that it was safe to take the recommended supplements and she started to take Epiphany D1 two days after receiving her first supply from Xuereb. Simpson recalled that Xuereb had told her to take the Epiphany D1 tablets before breakfast and that she could take four, but she decided to take two prior to breakfast, because that is what the label on the bottle said.

9.54 Simpson admitted that she was responsible for everything that went into her body and gave evidence that when she was experiencing significant knee pain prior to the Olympics she did not take anything for the pain. She added *"I don't need to take anything to help me run fast. I think I've done all that I could"*. Simpson added that the only other thing that she could have done was to take the supplements to a lab to have them tested. She stated that she now knows of two athletes who have taken their supplements to a lab in Jamaica to have them tested as a result of her and Asafa Powell's positive tests.

9.55 Simpson recalled that she had been taking Epiphany D1 for about two and half weeks when she produced her positive sample. She stated that she did not put Epiphany D1 on her doping

control form because she had no suspicion of the supplement and because it was something that she had only been taking for a short time.

9.56 Simpson testified that on June 22, 2013 she left for the Jamaica training facility in Italy in preparation for an upcoming race in Madrid, Spain. She recalled receiving a phone call late at night from Dr. Elliott telling her that she could not compete the next day because she had failed a drug test. She said that she then met with Coach Francis and told him about the supplements that she had been taking. She remembered that Mr. Francis also looked at the ingredients listed on the label of the supplements bottle and that he told her that *"nothing popped out"*.

9.57 Simpson told the hearing that the past year has been very difficult for her and that she has experienced many emotional ups and downs. She was training in Miami and had to go back and forth to Jamaica. She recalled feeling very happy when she learned on June 6 that she would be able to compete again. She was preparing to drive to Orlando, only to experience disappointment again when she learned that she had not in fact been cleared to compete.

9.58 In response to a question from the Panel, Simpson stated that she did not conduct any research on Mr. Xuereb, and that she has never done any research on any physiotherapist that she has worked with. She believed that Xuereb was a physiotherapist and she recalled receiving one injection from him for a hamstring issue.

b) Paul Doyle's Oral Testimony

9.59 Paul Doyle, Simpson's representative, testified about the relationship that he had with Simpson, and circumstances which led to the introduction of nutritional supplements into her regimen.

9.60 Doyle testified that he first met Sherone Simpson when the athlete was 20 years old and he was immediately intrigued by her personality. He started to represent her shortly after their first meeting. She has stayed at his residence in Atlanta from time to time and has received physiotherapy from Kyle O'Dea a physiotherapist who also lives in Atlanta. Doyle described Simpson as the epitome of professionalism in the she goes by the book in everything that she does. He recalled a phone conversation that he had with Simpson in the past in which she called him to ask if it was safe to take an Ibruprofen tablet for a headache. Doyle added that Simpson has always been very much against doping.

9.61 In testimony given during the Asafa Powell hearing which the Parties agreed could be considered in the Simpson hearing Doyle testified that he interviewed Xuereb himself and liked the way that Xuereb described the therapeutic methods that he used. Doyle noted that in international track and field circles, there is no one standard certification. He stated that they had been using Carm Stillo for a decade and his recommendation of Xuereb carried much weight. He recalled that Dr. Stillo said that Xuereb had *"good hands"* and was a good physiotherapist.

9.62 Mr. Doyle testified that he did not do any background checks on Chris Xuereb based on the recommendations he had received from people he trusted.

9.63 Mr. Doyle's recollection was that he agreed to pay for Mr. Xuereb to fly back to Canada to obtain the supplements because Mr. Xuereb had assured him that he had been purchasing supplements at the same location for years and that he trusted the suppliers. Mr. Doyle also testified that Mr. Xuereb reiterated time and time again that he had done the research, that he had other athletes on the same supplements and that there had never been an issue.

9.64 Mr. Doyle gave evidence that it is difficult to find qualified physiotherapists in Jamaica and just as difficult to find physiotherapists who will come to Jamaica and commit to working with the athletes for a significant period of time. He recalled that any time a physiotherapist would go to Jamaica he would literally be attacked by the other athletes on the MVP club who were seeking treatment.

9.65 Mr. Doyle testified that after learning of the positive test, he was shocked and immediately suspected that the cause was something that Mr. Xuereb had given to Simpson and Powell because that was the only thing that had changed in their regimen. Mr. Doyle testified that he called Travis Tygart at USADA to apprise him of the situation. Since this was not a USADA matter, Mr. Tygart put Mr. Doyle in touch with Jack Robertson the lead investigator with WADA. Mr. Doyle recalled wanting to get ahead of the rumours and was subsequently informed by Mr. Robertson that he had a contact with the Italian police who could take some action.

9.66 In concluding his testimony, Mr. Doyle spoke of the devastating impact that this event has had on Simpson, including the loss of income from what has become a year-long ban, the damage to his client's image, and the difference in the mind of the public and meet directors between a three month ban and an eighteen month ban. Doyle expressed the belief that Simpson could not have done more than she did to minimize the risk of a positive test.

9.67 When questioned by the Panel about his knowledge of Xuereb's qualifications, Doyle testified that his interest was the pedigree that Xuereb had when it came to treating athletes. *"It was the hands on experience that mattered most"* he stated.

c) HFL Sport Science Inc. Report

9.68 The Panel has as an exhibit to these proceedings, the report from HFL Sport Science laboratory that was prepared for the Jamaica Anti-Doping Disciplinary Panel hearing. HFL Sport Science Inc. (HFL) was contacted by Paul Doyle to analyze a sample of Epiphany D1 for the presence of oxilofrine using a methodology that was based on HFL's accredited methodology for WADA prohibited substances in human supplements. In addition to the sample supplied by Mr. Doyle, Mr. Bellone of HFL purchased an additional sample of the same product over the open market from the Epiphany D1 Website.

9.69 The first sample (72265) was received via Fed Ex from Mr. Doyle on September 30, 2013. The second sample (75285) which was purchased by Mr. Bellone from the Epiphany D1 website, was received via UPS and submitted to the lab on October 14, 2013. The samples were tested and the preliminary screen showed different results for the two samples. Different re-verification procedures were utilized for each sample and the final result was that the portion of the product 72265 tested contained oxilofrine. The portion of the product 75285 tested did not contain oxilofrine.

9.70 The result of the HFL test was that the portion of sample analyzed for product 72265, the bottle that had been provided by Mr. Doyle, contained oxilofrine, whereas product 75285, the sample that was purchased by Mr. Bellone from the Epiphany D1 website, was negative for oxilofrine.

d) Evidence and Report of Professor Wayne McLaughlin

9.71 Professor Wayne McLaughlin is a Director of the Caritox Laboratory at the University of the West Indies, Kingston, Jamaica. Professor McLaughlin gave evidence at the hearing before the Jamaica Anti-Doping Disciplinary Panel. In his testimony before that Tribunal, he stated that the Certificate of Analysis dated November 8, 2013 reveals that the analysis of Epiphany D1 showed that it contained Methylsynephrine otherwise known as Oxilofrine. He also stated that the Certificate of Analysis dated November 15, 2013 confirms the presence of Oxilofrine in Epiphany D1.

9.72 Professor McLaughlin also stated that Oxilofrine is a drug prescribed for low blood pressure which affects the nervous system directly. He noted that the effect generally is that the heart beat increases and more oxygen goes to the tissues preparing the person for *"fight or flight"*.

9.73 Professor McLaughlin testified that Acacia Rigidula is one of the ingredients in Epiphany D1 and that it does not contain Oxilofrine. He added that Oxilofrine is used by athletes to burn fat quickly; but he does not support the argument that it helps athletes to boost their power-to-weight ratio with more lean muscles and less fat and so increase their speed; it increases cardiac output so that more oxygen is pumped to the cells and to the muscles.

9.74 Professor McLaughlin stated that the concentration of Oxilofrine in the urine samples that was reported by the laboratory in Montreal was too high to be considered a contaminant. He added that contaminants are very low traces, in most cases 6 nanograms.

9.75 Professor McLaughlin also noted that one would not be able to say whether a bottle of Epiphany D1 contains Oxilofrine just by looking at the ingredients on the label. An analytical test would have to be done. He also expressed the view that each batch could be different and he could not give assurance that once a test has been done on the product it could be taken indefinitely.

9.76 Professor McLauglin testified that tests were conducted using two systems – LC-MS/MS (Liquid Chromatography) and GC/MS (Gas Chromatography). He added that the latter is more sensitive and has a wider library of chemicals but is not more accurate. He explained that he did not run a standard in conducting the test in this case because there are approximately 800 different drugs in the LC-MS/MS Library. He noted that if a screen is run and the drug is in the library it would be detected in the unknown sample and he was aware that Oxilofrine was already in the library.

9.77 Professor McLaughlin stated that Oxilofrine is related to Methylsynephrine in that they have the same molecular formula but they are not identical.

9.78 Professor McLaughlin conducted tests on one bottle of Epiphany D1 which was received from Simpson's Attorneys. He testified that having done the screen, the library identified Methylsynephrine in the Epiphany D1 tablet. Seven runs were completed and Methylsynephrine was identified in all the runs. He added that controls (known drugs) were run to ensure that the machine was operating properly.

9.79 Professor McLaughlin admitted that Oxilofrine did not appear in the database but added that the synonym was present which is Benzenemethanol. He also admitted that the certificate which he issued showed that his finding was Methylsynephrine, although the reports show his findings as Benzenemethanol, which is the synonym for Oxilofrine.

9.80 Professor McLaughlin also gave evidence in the proceeding before the Jamaica Anti-Doping Disciplinary Panel that he had no concerns with the report and findings of the HFL Sport Science Inc. Laboratory.

## 10 MERITS OF THE APPEAL

10.1 The parties are in agreement that the principal issue for the Panel to decide is the appropriate period of ineligibility for Simpson's undisputed doping violation. The parties disagree as to whether Simpson is entitled to a reduction of the presumptive two-year period of ineligibility.

10.2 In order to prove her entitlement to any reduced period of ineligibility under 10.4 of the JADCO Anti-Doping Rules which incorporates the WADA Code, Simpson must establish: 1) how the specified substance (i.e. Oxilofrine) entered her body on a balance of probability; and 2) that the specified substance was not intended to enhance her sport performance and she must also produce corroborating evidence in addition to her word which establishes to the comfortable satisfaction of the Panel the absence of an intent to enhance sport performance. If these requirements are satisfied, the Panel will consider Simpson's "degree of fault" to determine whether the presumptive two-year period of ineligibility should be reduced, and if so, by what period of time.

*A. How Specified Substance Entered Simpson's Body*

10.3 Simpson contends that Oxilofrine entered her body after she ingested Epiphany D1 capsules, which she had taken as a nutritional supplement following the recommendation of Mr. Xuereb. On the morning of June 21, 2013, the day in which Simpson produced the urine sample which resulted in the adverse analytical finding, she ingested two capsules of Epiphany D1 which she had been taking for just over two weeks.

10.4 Simpson notes that Epiphany D1 was on the list of supplements sent by Mr. Xuereb to Mr. Doyle. In addition, she submits that the Caritox lab at the University of the West Indies tested a sealed bottle of Epiphany D1 taken from the batch that Mr. Xuereb purchased for Powell and Oxilofrine was found in that sample. Simpson also notes that a second test was conducted by HFL Sport Science Inc. of Lexington, Kentucky on a bottle of Epiphany D1 which was delivered from the batch bought by Mr. Xuereb. The sample taken from Powell's supply contained Oxilofrine. Furthermore, Simpson states that USADA independently purchased and tested a bottle of Epiphany D1 and found the presence of Oxilofrine in the test sample. Simpson maintains that this discovery prompted USADA to post the results on the high-risk list of dietary supplements contained on its website. For these reasons Simpson asserts that she has more than established on a balance of probabilities that Epiphany D1 was the source of her positive test for Oxilofrine.

10.5 JADCO contends that Simpson has not satisfied her burden of establishing how the Oxilofrine entered her body. JADCO maintains that the claim by Simpson that the presence of Oxilofrine emanated from the Epiphany D1 which she had taken is entirely speculative. JADCO further contends that the actual Epiphany D1 supplement taken by Simpson was not tested therefore there is no evidence that it was the source of the Oxilofrine.

10.6 JADCO also takes issue with some of the scientific evidence relied on by Simpson in submitting that Epiphany D1 was the source of the positive test. JADCO was particularly critical of the tests conducted by Professor McLaughlin at the Caritox laboratory, arguing that his analytical techniques were inadequate and that rather than identifying Oxilofrine, he identified Benzenemethanol and Methylsynephrine which are synonyms for Oxilofrine.

10.7 The Panel finds that while the evidence before it suggests that Benzenemethanol may be a synonym for, but not identical to Oxilofrine, Methylsynephrine and Oxilofrine appear to be the same substance with different names. The Panel ruled as inadmissible a letter from Dr. Christine Ayotte of the INRS Laboratory which JADCO sought to use in reply, since she was not identified or called as a witness. But without prejudice to that ruling, the Panel does note that in her letter of February 8, 2014, sent to Mr. Carey Brown, Executive Director of JADCO, Dr. Ayotte uses the words Oxilofrine and Methylsynephrine interchangeably. Her first reference states *"[…] this control did not contain methylsynephrine/oxilofrine"* while a later reference states… *"the [HFL] report concluded that Powell's product does contain oxilofrine (methylsynephrine) while the one purchased directly from the website did not"*.

10.8 The Panel finds that even if the conclusion arrived at by the Caritox lab were to be discounted, there remains the evidence of the test results from the HFL Sport Science Inc. lab, as well as the evidence of the testing done by USADA which established that some Epiphany D1 capsules contained Oxilofrine. This evidence in and of itself would be sufficient in the Panel's view to establish that the Epiphany D1 purchased for Powell and Simpson was the source of the Oxilofrine which was found in Simpson's urine sample.

*B. Athlete's Intent to Enhance Sport Performance*

10.9 JADCO has submitted that Simpson has not established on a balance of probability how the Oxilofrine entered her body. Therefore there is in their view no need to consider the second criteria of intent to enhance sport performance.

10.10 Simpson having satisfied the first criteria has asked the Panel to find that there could be no intent to enhance performance when she did not know that the substance she was ingesting (Epiphany D1) contained Oxilofrine and did not even know what Oxilofrine was.

10.11 Simpson has asked that this Panel follow the reasoning of the CAS Panel in CAS 2010/A/2107, para. 9.17 where it was held that an athlete's lack of knowledge that a product contains a prohibited substance is sufficient evidence to establish to the comfortable satisfaction of the hearing panel that the athlete ingesting the product had no intent to enhance her sport performance. In CAS 2010/A/2107 the Panel found that:

> *"[…]Article 10.4 requires [the athlete] only to prove her ingestion of Oxilofrine was not intended to enhance sport performance. This Construction of Article 10.4 harmonises the clear language in clause one with the differing and ambiguous language of clause two, and is consistent with its explanatory Comment which uses the term "Specified Substance" in proving "examples of the type of objective Circumstances which in combination might lead a hearing panel to be Comfortably satisfied of no performance-enhancing intent".*

10.12 Many CAS panels including the panel in CAS 2011/A/2645 have reiterated the CAS 2010/A/2107 line of reasoning. Under the CAS 2010/A/2107 rationale Simpson could not have ingested Oxilofrine with the intent to enhance her sport performance or mask the use of a performance-enhancing substance given the fact that she had never heard of Oxilofrine prior to her adverse analytical finding and would not therefore have known that Epiphany D1 contained Oxilofrine.

10.13 The Panel in CAS A2/2011 rejected the CAS 2010/A/2107 and CAS 2011/A/2645 approach, finding that an athlete's lack of knowledge that a supplement contains a substance is not enough. The CAS A2/2011 Panel determined that an athlete must produce corroborating evidence sufficient to demonstrate the absence of the athlete's intent to enhance sport performance. A number of CAS panels have followed the approach outlined in CAS A2/2011. At least one CAS Panel, that in CAS 2011/A/2518, has split over the appropriate approach.

10.14 This Panel finds that whichever approach is taken, the result would be the same in this case. Simpson denied that her use of Epiphany D1 was designed to enhance performance. She

averred that she used it as a breakfast supplement and for general wellness. Simpson was not cross-examined on this point, and counsel for JADCO indicated that he would rely on the evidence given by Simpson at the first instance Tribunal. The Panel takes the view that where such serious allegations are to be made against an athlete, fairness dictates that they be put to the athlete directly so that he or she can respond, thus enabling the Panel to assess the reaction to the challenge. The absence of any meaningful cross-examination of Simpson removed that opportunity from the Panel.

10.15 In her testimony before the Jamaica Anti-Doping Disciplinary Panel, Simpson stated that Xuereb recommended the additional supplements to her to improve her general health and wellness. She also testified that she has a personal doctor but had never had a nutritionist until after her positive test.

10.16 In her testimony before the CAS Panel Simpson reiterated that he did not take Epiphany D1 to enhance performance but took it as a nutritional supplement. The Panel had the opportunity to hear and observe Simpson as she gave her evidence and as the Tribunal before did; this Panel accepts Simpson's testimony that there was no intent to enhance performance.

10.17 JADCO argued that Simpson has not presented the corroboration required to support her denial of an intent to enhance performance. While her agent's confidence in her integrity might not represent adequate corroboration, the Panel notes that the commentary to the WADA Code Article 10.4 lists examples that are relevant to this matter.

*"Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport-related prescription for the Specified Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance".*

10.18 The evidence accepted by the Panel indicates that Oxilofrine is a low grade, mild stimulant with little if any performance-enhancing benefit. Dr. Christiane Ayotte, head of the INRS-Institut Armand Frappier laboratory was quoted in the Toronto Globe and Mail newspaper of July 16, 2013, as saying, *"it's ridiculously easy to detect"* in reference to Oxilofrine. Simpson was open about her use of Epiphany D1 even making it available for the Italian Police to seize. Simpson gave credible evidence that she used Epiphany D1 as a nutritional supplement.

10.19 While Simpson should have listed Epiphany D1 on her doping control form, her failure to do so is but one factor to be considered in determining whether she intended to enhance her performance. The Panel finds that Simpson's testimony along with the other corroborating evidence establishes to its comfortable satisfaction that she did not intend to enhance her sport performance by unknowingly ingesting Oxilofrine (or indeed by knowingly ingesting Epiphany D1).

*C. Athlete's Degree of Fault*

10.20 This in the Panel's view is the key issue. What degree of fault can be attributed to this Athlete? Both parties cited numerous cases many of which had little in common with the present matter. It might be beneficial to repeat what was stated by the Panel in CAS 2011/A/2518, para 9.21.

*"[…] the Panel should be very cautious about allowing sanctions decisions in other cases to determine its analysis of the sanction in this case, because each case depends very much on its own particular facts, and it is not always easy from the reports of the case in question to understand why the particular decision on sanction was reached. The Panel should be particularly wary of giving precedent weight to cases in which there was no hearing, but rather, the sanction was the result of agreement between the parties".*

10.21 A similar point was raised in CAS 2013/A/3124 where the Panel at paragraphs 12.23 and 12.24 addressed the issue of the utility of citing numerous cases before CAS Panels where fact scenarios will obviously vary:

*"In the Panel's view limited assistance can be gained from any previous case in which a tribunal from which an appeal is brought to CAS, simply applies an evaluation of all the circumstances to see whether the criterion of no significant fault or negligence is met. "Each doping case has to be considered as an individual case" (FIFA v. WADA, CAS 2005/C/976/986 at para 78 quoting and endorsing Richard Pound QC then WADA Chairman). Given that the exercise is multi-factorial, it would be highly unlikely that there could be an exact read across from earlier to later cases. If in Case 1 it was held that factors A, B, C and D established no significant Fault or negligence, it would not follow that in Case 2 with only factors A, B, and C or Case 3 with factor A, B, C, D and E the same conclusion would or should be reached, even putting aside the considerations first that the Panel in the latter case would not have the same 'feel' for the factors which in their particular context influenced the earlier Panel(s), secondly that the Panel in the latter case might have, on the factors in the earlier case(s) itself reached a different conclusion; it is axiomatic that reasonable persons can reasonably reach different conclusions on the same set of facts.*

*In any event while consistency is a virtue, like cases should presumptively be treated alike (FIFA v WADA, [supra] para. 137 – correctness is a greater one. Thus absent any precedent from the Swiss Federal Tribunal this Panel treats earlier cases decided on their facts as providing guidance but not direction, and would encourage a more sparing use of references than advocates sometimes feel constrained to provide, unless of course such cases contain statements of general un-fact specific principle or approach".*

10.22 This Panel reiterates that each case must be determined on its own facts and there is little to be gained by counsel citing numerous cases for the Panel's consideration, many of which were resolved without a hearing and many of which turn on facts very different from the situation being considered by this Panel. It is therefore rarely useful to cite earlier cases for their results as distinct from their reasoning. This Panel accepts that previous cases can identify certain principles which are material to this appeal, notably the decision in CAS 2013/A/3327, and can indicate what kinds of matter are relevant to the assessment of the degree of fault, and the references included in this award will be confined to those matters.

10.23 In CAS 2011/A/2645 and CAS 2011/A/2495, CAS Panels rejected the proposition that because an athlete has failed to submit a supplement to laboratory analysis before taking the

same, this by itself establishes that he or she has fallen short of an athlete's duty of care. This Panel respectfully concurs. While the bar for an athlete should not be set too low, equally it should not be set impossibly high. Requiring an athlete to secure a laboratory analysis before taking a supplement as the only means of fully satisfying an athlete's duty of care would be prohibitively expensive, hugely wasteful of time, and, in the end, might possible by entirely inconclusive given that the ingredients of supplements can vary from batch to batch.

10.24 This Panel also repeats the point made in the commentary to the WADA Code that the consequences for an athlete of suspension from competition or his or her prior clean record are irrelevant to the issue of degree of fault.

10.25 The critical exercise for this Panel is to find such facts as are relevant to fault or lack thereof, and then to evaluate those facts. Counsel for Simpson has emphasized the reference in the WADA Code to the need for harmonization of sanctions. But this must, in the Panel's view, not given an exaggerated meaning. The reference in the commentary to Article 10.2 bears repeating *"Harmonization means that the same rules and criteria are applied to assess the unique facts of each case"*.

10.26 The Panel accepts that sanctions should in principle be consistent (although correctness is more important than consistency). But this means no more than that in cases whose facts are identical (which will almost never be the case), or materially similar, different disciplinary bodies should seek not to come to discrepant decisions outside the limits within which reasonable persons can disagree. This does not mean that such bodies (or a CAS panel) should indulge in any kind of box ticking exercise, when none is required by or provided for in the Code, (or its domestic derivatives).

10.27 In CAS 2013/A/3075, the athlete took a supplement that had a synonym on the label for a specified substance. His brother gave him the supplement telling him it *"could do no harm"*. The athlete searched the supplement on the Internet, checking the ingredients on various websites and comparing the ingredients to the WADA Prohibited List. After completing his research and satisfying himself that the supplement was safe, the athlete ingested the product. However, the athlete missed the fact that one of the listed ingredients was a synonym for the specified substance.

10.28 The Panel in CAS 2013/A/3075 found that *"the fault* [of the Athlete] *is rather light and not significant",* reasoning that the athlete could have taken more steps to avoid ingesting a banned substance, but given what he had done, his negligence in not taking those steps was low. As a result, the Panel imposed a five month sanction.

10.29 In CAS A2/2011*,* the athlete purchased a supplement at a nutrition store. He examined the ingredients on the label against those identified on a banned list provided by the Australian Sports Anti-Doping Authority. After determining that none of the ingredients were identified on the prohibited list, the athlete ingested the product and subsequently tested positive for methylhexaneamine. The Panel recognized the athlete's efforts but noted that more inquiries could have been made and sanctioned the athlete with a six month period of ineligibility.

10.30 In CAS 2011/A/2645, the athlete took a prescription recommended by a trusted medical advisor that did not contain any warning of the presence of a banned substance. The product contained a banned substance and the athlete tested positive. The athlete did not consult with his trusted medical advisor immediately prior to using the product. The Panel noted that the athlete could have done more than he did to avoid the ingestion of a banned substance; he could have avoided taking the product at all, he could have tested the product before using it or he could have sought medical advice before taking it. However, the Panel concluded that such additional steps were not reasonable and the athlete was given a warning.

10.31 In CAS 2011/A/2518, the athlete displayed *"a serious lack of due diligence"* when he took a supplement wrapped only in a foil handed to him by a friend at his tennis club. The athlete conducted a 30 to 60 minute search on the internet, which was found to be *"insufficient"* since he failed to find a list of ingredients, which included the banned substance by name. The athlete had placed considerable reliance on the manufacturer's website which claimed that the supplement was *"approved by the World Anti-Doping Association"*. The CAS panel sanctioned the athlete for a period of eight months.

10.32 Simpson argues that her behaviour is most analogous to that of CAS 2011/A/2495 and CAS 2011/A/2645 in that while a doctor did not prescribe the Epiphany D1 that she ingested, it was nevertheless given to her by a trusted medical advisor. Simpson also maintains that similar to CAS 2011/A/2495 and CAS 2011/A/2645, her degree of fault was minimal since the only way in which she could have found the Oxilofrine was to analyze the Epiphany D1 in a lab prior to taking it. Simpson submits that this would have been a disproportionately expensive and time consuming precaution that was beyond what was required of her.

10.33 Simpson acknowledges that she could have done more than she did to avoid the ingestion of a banned substance. She could have avoided taking the product at all, or she could have tested the product before using it or she could have sought medical advice before taking it. But she argues that such steps were deemed not to be reasonable in CAS 2011/A/2645 and are therefore not reasonable in the present circumstances when assessing her degree of fault.

10.34 The Panel takes issue with Simpson's submission that her case is analogous to those in which a trusted medical advisor had recommended use of the supplement that contained the prohibited substance. An examination of Chris Xuereb's qualifications suggests that in no way could he be considered *"a trusted medical advisor"*. Mr. Xuereb is not a doctor in Ontario, Canada. He is not registered as a chiropractor in Ontario. He is not a registered massage therapist in Ontario. According to an article from the Globe and Mail newspaper of July 16, 2013, *"he is not registered with the province's college of physiotherapists, the self-regulating body that ensures people who hold themselves out as physiotherapists have passed the necessary competency test and have at least an undergraduate degree"*.

10.35 The fact that Mr. Xuereb was reputed to *"have good hands"* by a chiropractor, Dr. Carmine Stillo, does not bestow upon him a designation as a trusted medical advisor and that is one significant distinguishing point between this case and that of CAS 2011/A/2645.

10.36 In her testimony before the Jamaica Anti-Doping Disclipinary Panel, Simpson stated that she had never attended any seminar on doping. She testified in that proceeding that she had been informed of one seminar which was held at the University of the West Indies, but she had been unable to attend. Nevertheless, she confirmed her awareness that as an athlete it is her personal duty to ensure that no prohibited substance enters her body, that she is responsible for anything that enters her body and that ultimately it is her personal responsibility and not that of her coach or trainer.

10.37 Simpson has been an international level competitor for a decade. Although she maintains that her level of education regarding doping issues is minimal, as a world class sprinter who is registered with the IAAF testing pool, it would be incumbent upon her to at the very least be aware of the risk of supplement use. The IAAF has published an advisory note on the risks associated with supplement use which should be mandatory reading for all IAAF competitors. The advisory note states:

*"It remains the IAAF's primary position that athletes do not need to use supplements. And the strong advice is that they should not do so. Elite-level performance and results can be achieved simply through the application of a concerted, focused nutritional regime, conducive to the life of an international athlete.*

*If nevertheless, athletes decide to take supplements, they do so at their own risk, and should always ensure that they exercise caution and judgment in the products that they use.*

*Historically, and currently, many supplements have proven to contain or to be contaminated with, substances that are prohibited under both IAAF Rules and the WADA Prohibited List.*

*According to the principle of 'strict liability', "athletes are solely responsible for what is in their body at all times". As such, athletes must take all steps to verify the ingredients of any medicines and supplements that they choose to take, including talking to their doctors and using any resources made available by Anti-Doping Organizations.*

*And athletes should never purchase supplements from non-reputable sources. Online resources may be able to help in identifying reputable sources, but they cannot check all supplements, and it is well-known that product ingredients vary from country-to-country, and even from batch-to-batch. If in any doubt, the message is 'do not take it".*

10.38 Simpson in this case put far too much trust in the recommendation of someone who lacked any professional qualifications. Simpson did not query whether Mr. Xuereb had any experience, let alone qualifications as a nutritionist as distinct from a physiotherapist. While the Panel accepts that it would be unreasonable to expect an athlete to go to the lengths of having each batch of a supplement tested before use, there are other less onerous steps that could be taken, such as making a direct inquiry to the manufacturer and seeking a written guarantee that the product is free of any substances on the WADA Prohibited List or asking if the manufacturer makes any products that do contain prohibited substances at the plant where the supplement is produced.

10.39 Simpson in this case made no check into the credentials of the person recommending the supplement to her. She put her trust in someone that she had known for only a few weeks.

Simpson made no check with the manufacturers of the supplement. In fact, although Simpson was billed for the cost of the supplement, she had no knowledge of where the supplement was purchased other than the statement from Mr. Xuereb that the supplement was purchased from a trusted source in Canada that he had been doing business with for some time. Simpson did not seek the advice of professionally qualified doctors. She did not seek the advice of her own track club coach.

10.40 The Panel recognizes however, that Simpson did take a number of significant steps to minimize any risk associated with the taking of Epiphany D1. She spent fourteen hours over a three day period researching the ingredients of Epiphany D1 and the other supplements that were purchased for her by Mr. Xuereb. She checked the Epiphany D1 website, as well as the Google search engine. Simpson stated that she searched each ingredient in turn and the information received was compared with the WADA Prohibited List.

10.41 Simpson testified that she did not see the article entitled "Acacia Rigidula – avoiding the ban". The Panel finds that although further research might have taken Simpson to an examination of the 40 separate alkaloids including Amphetamine, and Ephedrine which are prohibited substances contained in Acacia Rigidula, there was no way short of a laboratory test in which Oxilofrine could have been identified as one of its ingredients.

10.42 The Panel finds that in all the circumstances the eighteen month period of ineligibility imposed by the Jamaica Anti-Doping Disciplinary Panel was excessive; and with all the reservations it has already articulated about comparables so far outside the broad run of cases are to excite a sense that an injustice has been done, it regards the Jamaica Anti-Doping Disciplinary Panel's reliance on CAS 2010/A/2107 and CAS 2005/A/847 (which they referred to but did not analyse) to justify a sanction of that length as unwarranted. While this Panel might not tinker with a well-reasoned decision of a disciplinary body with which it agreed (see CAS 2010/A/2283 para. 14.36) this Panel has no inhibition on exercising its *de novo* powers to the full in this case.

10.43 Given the length of time that Ms. Simpson has been suspended from competition, any period of ineligibility under twelve months would allow her a prompt return to competition, so that the figure the Panel selects, if lower than that would be significant only if at all, on the perception of the public and of meet directors as to her culpability. In the Panel's view by reference to the specific facts of this case, which are listed above, it considers a period of six months ineligibility to be sufficient. This Athlete is not, in the vernacular often used by the media, *"a drug cheat"*, but she did fall short, if not excessively, of the high standards imposed on an athlete to exercise utmost caution to avoid even inadvertent ingestion of a prohibited substance. The Panel would wish this case at least to serve as a further warning to all involved in sports which are subject to the WADA Code not to repose undue trust in others.

*D. Disqualification of Competition Results*

10.44 WADC Article 10.8 provides that, in addition to the automatic disqualification of competition results that produced the athlete's positive sample, *"[…] all other competitive results obtained from the date a positive Sample was collected [whether In Competition or Out-of-Competition] … through the commencement of any Provisional Suspension or Ineligibility period, shall unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes"*.

10.45 The Panel finds that fairness would not require otherwise, and therefore disqualifies all of Simpson's athletics competition results from the June 21, 2013 date of her sample collection through the date of the last race which she competed in before accepting her Provisional Suspension on August 13, 2013.

10.46 In summary, the Panel concludes that:

(a) The eighteen month period of ineligibility imposed by the Jamaica Anti-Doping Disciplinary Panel should be set aside and replaced with a period of ineligibility of six (6) months;

(b) The period of ineligibility commenced on June 21, 2013 and ended on December 20, 2013.

## ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by Ms Sherone Simpson against the decision of the Jamaica Anti-Doping Disciplinary Panel dated 8 April 2014 is partially upheld.
2. The decision of the Jamaica Anti-Doping Disciplinary Panel dated 8 April 2014 is set aside and replaced with the following:

   Ms Sherone Simpson is sanctioned with a period of ineligibility of six (6) months, commencing on 21 June 2013.
3. All sporting results obtained by Ms Sherone Simpson from 21 June 2013 up to the date of the expiring of the period of ineligibilty shall be invalidated.
4. (…).
5. (…).
6. All other or further requests or motions for relief are dismissed.