

THE MARIA SHARAPOVA DECISION – A DOUBLE FAULT?

- Gary Rice, Aidan Healy and Nial Sexton

The Court of Arbitration for Sport's (CAS) decision in the Sharapova has the potential to undermine the principle of personal responsibility which says that athletes are responsible for what they ingest.

The CAS decided to reduce Sharapova's ban to 15 months (from 2 years), finding that she bore 'No Significant Fault or Negligence'. WADA issued a statement acknowledging the decision, but it appeared to be issued through gritted teeth. Even the press release from the CAS was at pains to point out that the case "*was only about the degree of fault that can be*

imputed to the player for her failure to make sure that the substance contained in a product that she has been taking over a long period remained in compliance with the anti-doping rules." This point was not emphasised in the decision and reads like a line devised to say the principle we've used to decide this case isn't applicable in other cases.

THE MARIA SHARAPOVA DECISION - A DOUBLE FAULT? CONT...

The CAS found that athletes were entitled to delegate elements of their anti-doping obligations. Whilst this is not controversial, the decision that the athlete is not responsible for the failings or misdeeds (or fault) of the person to whom they've delegated their responsibility is very surprising. In this case, Sharapova's agent's failure to appreciate that she was taking a prohibited substance, namely meldonium (the name of the product was Mildronate) after it was added to the Prohibited List, did not mean she could avoid an anti-doping rule violation, but the length of the ban was to be determined by her level of fault (or negligence) rather than her agent's level of fault or negligence.

In reaching its decision the CAS relied heavily on the somewhat obscure decision of Al Nahyan. This case related to the level of fault of a rider in circumstances where his horse tested positive. The rider was not the owner of the horse and the horse was more often than not in the care of someone other than the rider. A vet administered a substance to the horse without properly checking it and this led to the positive test. The CAS decided that fault or negligence of the vet should not be imputed to the rider and that the rider "*employed highly qualified, properly instructed staff...and implemented a significant range of procedures to avoid positive tests*" and so he bore No Significant Fault or Negligence.

The eagle-eyed among you may have noticed a very clear distinction between the Al Nahyan and Sharapova decisions. The former case relates to a horse who is fed or administered substances by humans. A horse can obviously never be under the constant watch and supervision of a rider who may ride any number of other horses and may be in a different continent to the horse. There is a certain logic to assessing the rider's degree of fault as distinct from imputing the fault of others to him. We never thought we'd have to use the following words in a sentence - Maria

Sharapova is not a horse. One of the fundamental principles of the World Anti-Doping Code is that athletes are personally responsible for what they ingest and have a duty to exercise the utmost caution in this regard. Not only that, the rules at issue in the Al Nahyan are not under the World Anti-Doping Code (Code), albeit the FEI's Equine Anti-Doping and Controlled Medication Regulations mirror the Code in many ways.



Returning to Sharapova, the CAS went on to say "*a player who delegates his/her anti-doping responsibilities to another is at fault if he/she chooses an unqualified person as her delegate, if he/she fails to instruct him properly or set out clear procedures he/she must follow in carrying out his task, and/or if he/she fails to exercise supervision and control over him/her in the carrying out of the task.*"

The criteria considered by the CAS in determining an athlete's degree of fault (where he or she has delegated his or her anti-doping obligations) are:

1. Has the athlete chosen a suitably qualified person?
2. Did the athlete instruct the person properly and set out clear procedures as to how the tasks should be carried out?
3. Did the athlete exercise supervision and control over the person to whom the tasks were delegated?

THE MARIA SHARAPOVA DECISION - A DOUBLE FAULT? CONT...

Although the CAS found her agent was suitably qualified, it then went on to find that Sharapova had not given him any instructions or set out any procedures, or exercised any supervision or control whatsoever:

"The Player, however, did not give Mr Eisenbud [her agent] instructions as to how this task had to be performed. The Player did not tell Mr Eisenbud to check (and Mr Eisenbud did not check) whether Mildronate was only a 'brand name' or indicated the ingredient of the product; she did not put him in touch with Dr Skalny at the time she left the care of Dr Skalny, but simply supplied Mr Eisenbud with the names of the Skalny Products; she did not instruct Mr Eisenbud to consult with the WADA, ITF or WTA website, to call the ITF 'hot line', to open the flash drive supplied with the wallet card, or even to read the emails received, opening the 'links' contained therein. In other words, the Player chose a sufficiently qualified person as her delegate for the purposes of checking the Prohibited List.

In the same way, the Player did not establish any procedure to supervise and control the actions performed by Mr Eisenbud in the discharge of the tasks he was expected to perform: no procedure for reporting or follow-up verification was established to make sure that Mr Eisenbud had actually discharged the duty, for instance, of checking year after year the Skalny Products towards the Prohibited List....

Where the Player fell short, however, was in her failure to monitor or supervise in any way whether and how IMG was meeting the anti-doping obligations imposed on an athlete when IMG agreed to assist her. She failed to discuss with Mr Eisenbud what needed to be done to check the continued availability of Mildronate (as opposed to the procedure to check new substances she was prescribed), to put him in contact with Dr Skalny to understand the nature of the Skalny products, to understand whether

Mildronate was the name of the product or the substance, and whether he had made the necessary confirmation each year that the product had not been added to the Prohibited List."

Therefore, according to the CAS, the only of the above criteria Sharapova met was to choose a qualified person. Even this finding is open to question as if Sharapova's agent was sufficiently qualified to carry out the task he was assigned, one would expect that he would have obtained a list of the ingredients of all of the products she was taking and compared it to the new Prohibited List, told her to stop taking meldonium and there would have been no positive test.



No Significant Fault or Negligence is defined in the Code as "the Athlete establishing that his or 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 rule violation." Given the list of Sharapova's failures listed above, it seems questionable to say that her level of fault was not significant in relationship to testing positive for meldonium.

THE MARIA SHARAPOVA DECISION - A DOUBLE FAULT? CONT..

The decision would appear to create something of a loophole by allowing athletes not to be responsible for the failings of those to whom they delegate anti-doping activities as long as that person is sufficiently qualified. Many athlete support personnel would of course be sufficiently qualified and if they were to conveniently forget to check a particular

substance or its list of ingredients or even to check the Prohibited List, should the athlete's sanction be reduced?

This decision of the CAS will undoubtedly come under significant scrutiny and in our opinion could be overturned by another CAS panel if the opportunity to do so arises.

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DAC Beachcroft has the leading sports regulatory practice in Ireland and acts for regulators of sport and national governing bodies. Our practice includes anti-doping, integrity, cases before the Court of Arbitration for Sport and defending sports organisations in legal challenges in