

How do you solve a problem like Kamila? Provisional suspensions and protected persons in OG 22/08-010 International Skating Union v RUSADA

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Abstract

This paper explores the Court of Arbitration for Sport (CAS) Ad Hoc Division's ruling in *International Skating Union v. RUSADA*, colloquially known as the Valieva case. It provides the background to the dispute and details of the domestic disciplinary body's disposal of it before turning to the arguments advanced before the CAS and its determination of the issue. The paper focuses in particular on the implications of Valieva's status as a protected person, and the implications of that for the imposition of provisional suspensions. It notes how the CAS addressed the failure by the World Anti-Doping Agency (WADA) Code's drafters to ensure that Valieva's 'protected person' status carried tangible protections in this regard, and it highlights the CAS' legitimate role in addressing lacunae in the WADA Code. As the Panel said, doing so is a legitimate exercise in interpretation, not a rewriting of the rules – which, as it also acknowledged, is a role properly left to the sports bodies themselves.

Keywords

Doping, Olympics, WADA, protected persons, provisional suspensions, Valieva

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1. Introduction

To the casual sporting observer, and to frazzled sports lawyers, the 24th Winter Olympic Games were an uncomfortable experience. Against the backdrop of Russia's imminent and (by then) inevitable invasion of Ukraine, the world's best athletes plied their trade in venues that were empty as a consequence of the COVID protocols. The climate crisis meant they were the first Games to use 100% artificial snow, and they were hosted by a country whose dire human rights record made mockery of the argument that sport and politics should not mix. And in addition to those existential sporting concerns there were quite enough disputes to keep the lawyers entertained in the short term. The usual array of crashes, disqualifications, selection disputes, eligibility spats, equipment malfunctions and doping scandals led to several cases before the Court of Arbitration for Sport's (CAS) Ad Hoc Olympic Division² which in turn contributed to the ever-growing corpus of 'Olympic Law.'³ It was just another, surreal, day in the sports law office.

This paper is concerned with the most high-profile, and certainly the most troubling, of those CAS cases – the anti-doping rule violation involving the Russian skater, Kamila Valieva. Its bare facts were troubling enough. A child from a country notorious for its widespread and state-sponsored doping had failed a drug test for a substance capable of doing more harm than good to a young person; but the CAS decision reveals a far more complex and nuanced picture. It confirms many people's immediate perceptions of toxic, potentially abusive, relationships between an athlete and her coaches; but it also highlights shortcomings in the World Anti-Doping Agency (WADA) Code's drafting, along with failures in the testing and results management process which were easy to explain but hard to understand.

² Four of those hearings concerned the International Bobsleigh & Skeleton Federation's rules on the allocation of quota places: See *Henry v. IBSF* (OG 22-003); *Edelman v IBSF* (OG 22-004); *Irish Bobsleigh & Skeleton Association v. IBSF* (OG 22-005); *Fenlator-Victorian v. IBSF* (OG 22-007). *Makhnev v. International Ski Federation* (OG 22-002) case was concerned with whether the Ad Hoc Division had jurisdiction in respect of the United States Government's vaccine-related visa entry requirements (it did not). The last, *Bates v IOC* (OG-22/011) case was a failed attempt to challenge the IOC's decision not to hold a medal ceremony in the wake of Valieva's positive test.

³ James and Osborn (2023).

2. The background

Kamila Valieva is a Russian figure-skater. At the time of the 2022 Winter Olympics, she was fifteen years old. She was a member of the Russia team that won the Olympic Team event but on the day the event concluded, 7 February 2022, a WADA-accredited laboratory in Sweden issued an Adverse Analytical Finding which led to the medal ceremony being ‘delayed.’ There were early off-the-record assertions that Valieva was the athlete concerned, and that she had tested positive for trimetazidine in an in-competition sample that she gave in late December at the Russian Championships. Her victory in the short programme there had confirmed her selection for the Olympics.

On 8 February 2022, the Russian Anti-Doping Agency (RUSADA) - which was still suspended from WADA because of its role in the country’s state-sponsored doping programme - announced that in accordance with the Russian anti-doping rules and Article 7.4.1 of the WADA Code, Valieva had been provisionally suspended.⁴ On 9 February 2022, following a request by the athlete for a provisional hearing, the RUSADA Disciplinary Anti-Doping Committee (the committee) announced that it had cancelled the provisional suspension pursuant to clause 9.4.3 of the Russian Anti-Doping Rules (Russian ADR). This rule allowed for a provisional suspension’s removal if (inter alia) the athlete demonstrated to comfortable satisfaction that the violation was “likely” to have involved a contaminated product. Removing the suspension would thus allow her to take part in the Olympic individual event on 15 February 2022.

Trimetazidine is a metabolic modulator, similar to meldonium⁵ and similarly used in the treatment of heart disease.⁶ It is not a substance that one would expect a fifteen year-old figure skater to take, but as the International Skating Union (ISU) pointed out in its submission to the CAS, metabolic modulators are “popular in sports where strength is an important factor, and it can suppress the production of estrogen or prevent the normal conversion of testosterone into estrogen.”⁷ That is why it is banned. Under the WADA Code, both meldonium and

⁴ International Skating Union v. RUSADA (OG 22/08-010), para 15.

⁵ As of September 2023, there have been at least a dozen CAS hearings involving athletes’ alleged use of meldonium, the most well-known being Sharapova v. International tennis Federation (CAS 2016/A/4643).

⁶ European Medicines Agency (2012).

⁷ International Skating Union v. RUSADA (OG 22/08-010), para 94.

trimetazidine are prohibited both within and out of competition. They are non-specified substances, which means they are not recognised under the WADA Code as substances which might have been used for purposes other than enhancing sports performance.⁸

RUSADA had ostensibly asked the committee to uphold the provisional suspension “based on the fact that the substance detected... requires the prompt imposition of Provisional Suspension according to clause 9.4.1 of the Russian Anti-Doping Rules.”⁹ But the committee was persuaded that she had not used the prohibited substance intentionally. It noted that contamination was the most possible reason for her ingesting it (her grandfather used trimetazidine after heart replacement surgery), accepted that she had returned several negative results both before and after the positive sample, and said that any therapeutic effect required a regular intake.¹⁰ However, WADA subsequently noted that her results were also “compatible with the end of the excretion period after a full dose of trimetazidine.”¹¹

At the hearing where the decision which the ISU and others challenged had been reached, Valieva had been required to show on a ‘balance of probability’ that the anti-doping rule violation (ADRV) was more likely than not to have happened through contamination. However, the committee noted that because she was under the age of 16 she fell within the definition of a ‘protected person’ under both the WADA Code and the Russian ADR. This meant that in the ordinary course of events “a lower standard of evidence than a balance of probability is to be applied. The ‘protected person’ is in fact in a better position according to the Russian ADR and the (WADA Code).”¹² This enhanced protection is evident in comparable provisions of the WADA Code - for example, the standard required of a protected person seeking a sanction reduction on the basis of no significant fault was that of ‘reasonable possibility’ rather than ‘balance of probabilities,’ and CAS jurisprudence says that ‘reasonable possibility’ is “a possibility that is more real than fantastic.”¹³

⁸ World Anti-Doping Agency (2021), Article 4.2.

⁹ International Skating Union v. RUSADA (OG 22/08-010), para 22.

¹⁰ Ibid, paras 23-24.

¹¹ Ibid, para 71.

¹² Ibid, para 27.

¹³ Ibid, para 29. c.f. This is not quite what the CAS has said, however. In another provisional suspension case, Legkov v International Ski Federation (CAS 2017/A/4968), para 176 the Panel said “a reasonable possibility is more than a *fanciful* one; it requires evidence giving rise to individualised suspicion. The standard however is necessarily weaker than the test of ‘comfortable satisfaction.’” Fantastic and fanciful are not the same.

The committee decided that she had established to this lower, ‘reasonable possibility,’ standard that the violation had indeed arisen by virtue of contamination. And because she was a protected person, Valieva would thus be exempt from the usual requirement that the athlete has to explain the presence of the protected substance if they subsequently seek to establish no fault or no significant fault or negligence. Given this general principle that a protected person is in a better position than one not protected, the committee then took the view that “the general principle...can be applied in a similar way...when considering the lifting of a provisional suspension.”¹⁴ It lifted the provisional suspension because it was satisfied that there was a reasonable possibility that the ADRV had been caused by contamination.

3. The applicants’ arguments

On 11 February 2022, the IOC (later joined by WADA and the ISU) filed an application with the Ad Hoc Division to challenge the committee’s setting aside of the provisional suspension. Briefly, the IOC – while noting that as a minor Valieva would indeed benefit from “special evidentiary rules” in the ultimate hearing on the merits – thought there were doubts “as to the level of substantiation” regarding the assertion of contamination through her grandfather’s medication and rhetorically wondered “whether other circumstances were taken into account by (the committee)”.¹⁵ For its part, WADA noted that under Russia’s ADR, a ‘contaminated product’ is one that contains a prohibited substance that is not disclosed on the product label or in information available in a reasonable internet search.¹⁶ This was important because there was no plausible argument on this occasion that any ‘product’ had been contaminated in this sense: the athlete’s contention was that she and her grandfather had eaten and drunk from the same dishes and glasses, and that she had ingested trimetazidine as a consequence. Her application did not involve any contaminated product, and “this excludes by itself any basis to lift the mandatory provisional suspension.”¹⁷ The ISU made similar points and contended that the committee’s reasons for lifting the provisional suspension “fell outside the scope of the Russian (rules).” It said the committee had created a new standard of proof for protected persons and “allows also for a special term of ‘contaminated product’ when it comes

¹⁴ International Skating Union v. RUSADA (OG 22/08-010), para 28.

¹⁵ Ibid, para 61.

¹⁶ Ibid, para 72.

¹⁷ Ibid, para 75. For a plate to be a ‘contaminated product’ under the Code would be to stretch the bounds of interpretation beyond breaking-point.

to a protected person. It had in effect “provided a sophisticated model of how to escape a rule violation.”¹⁸

4. The respondents’ arguments

In response, RUSADA noted that the committee was independent of RUSADA and impartial. It emphasised the detriment to the athlete that had been caused by the delay in the laboratory’s analysis and dissemination of the results, which itself was caused by staffing shortages during the pandemic. This had given Valieva very little time to prepare her position and collect evidence, it said. It also noted, crucially, that neither the Russian ADR nor the WADA Code reduced the burden (sic) of proof on protected persons with specific regard to provisional suspensions. As with non-protected persons, it was ‘balance of probabilities.’¹⁹

The athlete’s submission also noted the “irregular delay” in the testing process, and she thereafter argued that the Ad Hoc division lacked jurisdiction - the appealed decision’s arising during the Olympic games was a “pure coincidence”, she said, and the expedited procedure did not give sufficient time to safeguard her due process rights.²⁰ She also argued that, under the Russian rules, her status as a protected person meant she did not need to prove contamination before the provisional suspension could be lifted; it would suffice if she could show contamination was ‘more likely’ than any other cause.²¹ “The source of inadvertent contamination had been established by (the committee) after careful analysis,”²² and the committee had agreed that all three of the requirements for lifting a provisional suspension had been met.²³

The Russian Olympic Committee broadly supported the other appellants’ arguments. However, it also stated that the day before the CAS hearing, it emailed the three independent members of

¹⁸ Ibid, paras 89-92.

¹⁹ Ibid, para 102. CAS Panels routinely use ‘standard’ of proof when they mean ‘burden,’ to the chagrin of those of us from a common law tradition. The latter identifies the party upon whom the obligation of proof is imposed; the former connotes the evidentiary level that the party bearing the burden must reach.

²⁰ Ibid, paras 110, 111.

²¹ Ibid, para 115.

²² Ibid, para 117.

²³ Ibid, para 121. The requirements are a) likelihood of success on the merits, b) irreparable harm, c) applicant’s interests outweighing those of the opposing party.

the WADA 2021 Code Drafting Team on whether the absence of a reference to ‘protected persons’ in Article 7.4 of the WADA Code had been deliberate or an oversight.

To recap, Article 7.4.1 stated:

The signatories...shall adopt rules providing that when an Adverse Analytical Finding...is received...a provisional suspension shall be imposed promptly upon or after the review and notification...A mandatory provisional suspension may be eliminated if i) the athlete demonstrates...that the violation is likely to have involved a contaminated product...²⁴

One of the independent members had promptly replied to the effect that “there had been no discussion...with respect to the specific issue to coordinate the provisions on ineligibility of protected persons with the provisions on provisional suspension.”²⁵ The lacunae was unintended, and “it was obvious that there should be a coordination between the provisions governing sanctions (including the possibility to reduce sanctions), and the provisions on provisional suspensions.”²⁶ The proper test to be applied by the Panel was “not whether the athlete proved how the substance entered her body, but whether her explanations are ‘likely’, bearing in mind that as a protected person she does not need to prove how the substance entered her body.”²⁷ Given that, as a protected person, Valieva would not have to show how the prohibited substance entered her body, it was quite possible that “on the merits, the athlete could be sanctioned with a reprimand for no significant fault or negligence without having to prove how the prohibited substance entered her body...any provisional sanction being harsher than the sanction that could be imposed after a full hearing of the case would be *per se* disproportionate.”²⁸

5. The Panel’s determination

First, the Panel determined that the objections to jurisdiction were misconceived. Rule 61(2) of the Olympic Charter states that “any dispute arising on the occasion of, or in

²⁴ World Anti-Doping Agency (2021), Article 7.4.1 of the Code.

²⁵ International Skating Union v. RUSADA (OG 22/08-010), para 139.

²⁶ Ibid, para 141.

²⁷ Ibid, para 145.

²⁸ Ibid, para 146.

connection with” the Olympic Games shall be submitted exclusively to the CAS. None of the parties had objected to its jurisdiction, but the athlete had contended that the CAS Appeals Body was the appropriate forum, not the CAS Ad Hoc Division.

However, the dispute was whether the provisional suspension should be reinstated. It was thus “uncontested that the dispute is directly connected with the Games, since the outcome...is relevant for the athlete’s further participation,”²⁹ and it was “irrelevant whether the initial facts at the basis of the dispute may have arisen at a previous stage.”³⁰ In response to her concerns that she had not been able to select an arbiter, as would normally be the case with CAS hearings, the CAS noted that if the case had been heard by the Appeals Body as she wished, it would have been heard by the President of the Appeals Division sitting alone, and she would have still had no say in the Panel’s composition.³¹ It was a good example of how Valieva’s case had necessarily been put together in a hurry and there was an increased likelihood that obvious points would be missed in the furore; but with respect, the people who advised her should have known this would be the case.

The Panel dealt at length with the key issue arising – the consequences of Valieva’s position as a protected person, with particular reference to preliminary suspensions. It was uncontested that the Russian ADR properly gave special protections to athletes in that position, and their status as such was discussed in at least ten provisions of the WADA Code. For example, protected persons were subject to reduced periods of unavailability in the event of whereabouts failures or sample evasion;³² in cases of sample tampering by their support personnel, those individuals would automatically be banned for life;³³ and in violations which involved no significant fault or negligence, the protected person’s penalty would normally be at the lower end of the range from a reprimand to a maximum of two years.³⁴ Note however that Article 10.6.1.3 of the WADA Code does not actually reduce that potential sanction range.

²⁹ Ibid, para 157.

³⁰ Ibid, para 162.

³¹ Ibid, para 163.

³² World Anti-Doping Agency (2021), Article 10.3.1 of the Code.

³³ World Anti-Doping Agency (2021), Article 10.3.3 of the Code.

³⁴ World Anti-Doping Agency (2021), Article 10.6.1 of the Code.

It was clear that the WADA Code's drafters had intended to give special treatment to protected persons, and notwithstanding some flaws in the English translation it was equally clear that the Russian rules intended to do the same. The difficulty was that "the RUSADA anti-doping rules and (the WADA Code) are silent with respect to provisional suspensions imposed on protected persons."³⁵ If the provisional suspension was imposed because of an unintended silence about provisional suspensions and protected persons, she would lose the opportunity to take part in the individual event. This seemed manifestly unfair because in the opinion of the Panel it was "not just possible but likely"³⁶ that she would receive a reprimand or a very short ban at the full hearing.

There was "a *lacuna*, or a *gap*," in both the Russian ADR and the WADA Code. Consistent with previous case law, it thus fell to the Panel to "ameliorate an overly harsh or inconsistent outcome... 'applying the overarching principle of justice and proportionality.'"³⁷ That was "an exercise in interpretation, not in rewriting rules or making policies that are better made by sporting bodies,"³⁸ and the Panel decided that provisional suspensions in respect of protected persons should be evaluated as "optional" under both the WADA Code and the relevant domestic provisions. Valieva was entitled to benefit from that, and the option not to impose a provisional suspension should be exercised. She was therefore free to participate in the individual programme.³⁹

In reaching that decision, the Panel was mindful of the risk of irreparable harm, the likelihood of the applicant succeeding, and where the balance of interest lie. It also considered the length of time it had taken the laboratory to submit its report, the timing of its eventual release in relation to the ongoing Olympics and the difficulties that caused Valieva in mounting her defence, in addition to the low level of sanction she would eventually face given that the arguments about her grandfather's medication were "more than nugatory"⁴⁰ (although let us remember again that no product has been 'contaminated').

³⁵ International Skating Union v. RUSADA (OG 22/08-010), para 193.

³⁶ Ibid, para 199.

³⁷ Ibid, para 200; Puerta v. International Tennis Federation (CAS 2006/A/1025), para 5.

³⁸ International Skating Union v. RUSADA (OG 22/08-010), para 201.

³⁹ Ibid, para 202.

⁴⁰ Ibid, para 215.

Previous CAS rulings had stated that provisional suspensions could cause ‘irreparable harm’ when they barred the athlete from participating in a major event⁴¹ such as the Olympics and such a likelihood of irreparable harm had arisen here: if the provisional suspension remained, Valieva would not be able to compete in the individual event. Further, the delay in processing the sample was no fault of hers, and neither was she responsible for the staffing challenges caused to the laboratory by the pandemic.

There was no allegation of improper conduct against the laboratory or anyone else, but WADA’s assertion that a processing period of 20 days was merely a ‘recommendation’ and its contention that the forty-day hiatus was “well within the range of what WADA usually sees” was not well-received by the Panel, and for good reason.

*Athletes are held to a high standard in meeting their anti-doping obligations and, at the same time, the anti-doping authorities are subject to mere recommendations on time deadlines that are designed to protect athletes from late- or inconveniently arising claims. The flexibility of the recommendations and guidelines applicable to WADA-accredited labs contrasts with the stringency of the rules on provisional suspensions.*⁴²

It concluded by saying that “athletes should not be subject to the risk of serious harm occasioned by anti-doping authorities’ failure to function effectively at a high level of performance.”⁴³

6. Conclusion

The Valieva case continues to drag. At the time of writing, and pursuant to a CAS announcement in June 2023,⁴⁴ the substantive hearing is due to take place in September. Apparently, WADA still seeks a four-year ban, which flies in the face of the ‘protected persons’ provisions, and the forfeiture of the Russian team’s gold medal. The medal ceremony has still not taken place and maybe never will, at least not in any meaningful sense.

⁴¹ Jamarillo v. CD Once Caldas (CAS 2008/A/1453).

⁴² International Skating Union v. RUSADA (OG 22/08-010), para 211.

⁴³ Ibid, para 220.

⁴⁴ Sankar ([2023](#)).

Valieva finished fourth in the individual final after an error-strewn performance which drew a childlike tantrum from her ghastly coach – a display of petulance and entitlement which only served to highlight the particular pressures placed on young athletes, especially female athletes in ‘appearance sports’ and those hailing from countries where winning is akin to a patriotic obligation. In the wake of the case the ISU increased the minimum age for international-event participation in figure skating and other events from fifteen years to seventeen.⁴⁵ That is the only good thing to come out of the whole sorry affair, other than the CAS Ad Hoc Panel’s valiant attempt to replace chaos with order by ensuring the proper application of provisional suspensions rules to protected persons. The Panel was right to castigate the testing authorities for failings which placed Valieva in an impossible position, but likewise WADA can afford able lawyers. A failure to appreciate that the well-established protections given to child athletes needed to be incorporated into the rules on provisional suspensions was, with respect, as unprofessional as Valieva’s advisors failing to appreciate the ramifications of the case being heard by the Appeals Body rather than the Ad Hoc Division.

The ISU’s raising the age limit and the CAS clarifying the position in respect of protected persons are as welcome as the delays in sample management and the flaws in legislative drafting were lamentable, but those should not detract from the inescapable reality. Valieva’s explanation may not be ‘fanciful’, but it is far less credible than the alternative explanation which is staring everyone in the face. How much she knew, or didn’t know, is, rightly, immaterial given her protected person status; but an explanation of ‘I must have licked my grandfather’s fork’ barely deserves the time of day.

So perhaps the last word should reside with IOC President Thomas Bach. In response to questions from a Russian journalist about whether the IOC was partly responsible for the ‘media chaos’ and ‘hate speech’ which was directed at Valieva, Bach simply replied “the ones who have administered this drug in her body, they are the ones who are guilty.”⁴⁶ Bach gets too many things wrong for a man in his position, but not on this occasion. And let us also remember that Valieva’s sample went to Sweden because the CAS had upheld WADA’s ban

⁴⁵ Burke (2022).

⁴⁶ Dunbar (2022).

on the Moscow Laboratory, imposed because of its complicity in Russia's doping programme.⁴⁷ It could not be dealt with closer to home.

The Russians doth protest too much; but there is a child at the heart of this case, and that is what turns it from a farce into a tragedy.

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