



Rewriting the World Anti-Doping Code

By Lindsay Borrell, J.D. Candidate 2023 | Queen's University

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The Beijing Winter Olympics were not short of controversy. Five athletes were caught doping, but only one dominated the media – Kamila Valieva (Valieva). The contentious decision issued by the Court of Arbitration for Sport (CAS) on February 13th, 2022 reaffirmed Valieva's ability to compete in the Women's Single event after testing positive for a banned substance merely six days prior. The CAS Panel (the Panel) held that Valieva's Protected Person status, irreparable harm and delay of test results were factors that swayed in her favour.

Provisional Suspension and CAS Appeal

On February 6th, 2022, Valieva became the first woman to land a quad jump at the Olympics and propelled the ROC team to win gold for the Figure Skating Team Event. Less than 24 hours later, the World Anti-Doping Agency (WADA) issued an "Adverse Analytical Finding" of a urine sample taken from her on December 25th, 2021, for the presence of trimetazidine (TMZ). On February 8th, 2022 Russian Anti-Doping Agency (RUSADA) notified Valieva of the positive test and provisionally suspended her.^[1] The following day, the Russian Disciplinary Anti-Doping Committee (DADC) lifted the provisional suspension, allowing her to compete in the Women's Single event scheduled for February 15th, 2022. On February 13th, 2022, the Panel dismissed WADA and the International Olympic Committee's (IOC) appeal application to reinstate Valieva's provisional suspension.

WADA's Statement

On February 18th, 2022, WADA released a statement criticizing the Panel's decision for ignoring "the clear and unambiguous terms of the 2021 World Anti-Doping Code" (WADC) and accused it of re-writing the WADC.^[2] Despite WADA's disagreement, CAS is an independent body from any sport organizations, and the accusatory nature of the statement devalues the system of sport-related settlement. The accusations are also an irresponsible response considering the unusual circumstances surrounding Valieva's case.^[3]

Protected Person Status

Valieva falls under the definition of "Protected Person" since she has not reached the age of sixteen when the anti-doping rule violation was alleged to have occurred.^[4] Within the WADC, special consideration is given to Protected Persons due to their age, lack of legal capacity, and immaturity.^[5] Article 10.6.1.3 of the WADC states that if a Protected Person (1) is found guilty of an anti-doping rule violation that is not a substance of abuse, and (2) can show no significant fault or negligence, the punishment is at minimum a public reprimand to a maximum of two years of ineligibility.^[6] However, the WADC remains silent on the treatment of Protected Persons regarding provisional suspensions. As per article 7.4.1, Valieva would be subject to a mandatory provisional suspension rather than an optional provisional suspension since she tested positive for a non-specified substance.^[7] Thus, a Protected Person could receive a public reprimand and no period of ineligibility, yet be subject to a mandatory provisional suspension preventing them from competing until their case is heard.^[8] Strict application of this article would likely result in a Protected Person serving a longer provisional suspension than the actual period of suspension.^[9] This seems to be an unintended gap as it can exempt older athletes from a mandatory suspension but not Protected Persons, creating a harsher punishment for the latter despite the lower standards of evidence and sanctions provided for in other articles.^[10] Despite WADC not providing an exemption to a mandatory provisional suspension for a non-specified substance, it is evident the WADC drafters intended for a more flexible approach towards Protected Persons.^[11] The Panel did not depart from the "clear and unambiguous terms of WADC" considering there were inconsistent treatments towards Protected Persons regarding provisional suspensions. The Panel exercised its discretion to rectify a gap between the articles that govern provisional suspensions and articles that govern sanctions where a harsher punishment of Protected Persons could result.



The Panel determined that Valieva was entitled to benefit from being subject to an optional provisional suspension and that she met the criteria for lifting the provisional suspension at the DADC hearing.

Irreparable Harm

The Panel considered the irreparable harm that could occur to Valieva should the suspension be reinstated.^[12] Two scenarios were considered. The first being if Valieva was barred from competing in the Women's Single event but later exonerated, she would have lost the chance to compete with no remedy. In contrast, if she did compete but was found guilty later, which would have prevented her from competing, Valieva's placement and medal could be stripped.^[13] Considering the balance of interest, the harm to Valieva exceeds the harm to the IOC and WADA's "Clean Sport" movement.^[14]

Delay of Test Results

The Panel considered the delay and untimely disclosure of the positive sample. Valieva was put on notice for the alleged anti-doping rule violation 40 days after the sample was received. WADA argued that 40 days is well within the acceptable range for laboratories to process samples as it is recommended they be processed within 20 days.^[15] The Panel dismissed this argument and criticized how unfair it is for WADA to hold athletes to such high standards, but anti-doping authorities are subjected to mere recommendations on deadlines that are intended to protect athletes from late or inconveniently arising claims.^[16] WADA responded that it is the responsibility of the National Anti-Doping Organizations to ensure the timely analysis of samples.^[17] Regardless of where the responsibility is placed, Valieva should not be punished for a failure or mistake of anti-doping authorities. It is unfortunate that WADA failed to acknowledge any hardship that this untimely disclosure placed on Valieva.

Conclusion

This case contained exceptional circumstances. The Panel was able to set aside the emotional aspect of the case and came to a fair and equitable decision that balanced the interests of all parties. Specifically, Valieva's Protected Person status, irreparable harm she could experience and delay by the laboratory for reasons unattributable to her tipped the balance of interest decisively in Valieva's favour. Whether the Panel made the "correct" decision will depend on the outcome of the anti-merits trial should Valieva receive a public reprimand or a definite period of ineligibility. Until then, an asterisk will remain next to ROC's first place finish in the Team Event.

[1] CAS *supra* note 1 at paras 15-16.

[2] World Anti-Doping Agency, News Release, "WADA statement on CAS award confirming the lifting of the provisional suspension of a ROC figure skater" (18 February 2022), online: *WADA Releases* <https://www.wada-ama.org/en/news/wada-statement-cas-award-confirming-lifting-provisional-suspension-roc-figure-skater>. [WADA Statement].

[3] "Frequently Asked Questions", online: CAS Court of Arbitration for Sport <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html>.

[4] World Anti-Doping Agency, *World Anti-Doping Code*, 2021, Appendix 1 Definitions.

[5] CAS *supra* note 1 at para 184 and 199.

[6] *Ibid.*

[7] *Ibid* at para 193.

[8] *Ibid* at paras 194-195.

[9] *Ibid* at para 199.

[10] *Ibid* at para 196.

[11] *Art. 10.6.1.3 supra* at note 13.

[12] *Ibid* at para 205.

[13] *Ibid* at para 217.

[14] *Ibid* at paras 217 and 221.

[15] *Ibid* at para 211.

[16] *Ibid* at para 211.

[17] WADA Statement *supra* note 8.