
ПРАВОВАЯ ЖИЗНЬ: НАУЧНО-ПРАКТИЧЕСКИЕ ЗАКЛЮЧЕНИЯ, КОММЕНТАРИИ И ОБЗОРЫ

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Contaminated product and lifting a mandatory provisional suspension: Is there a new standard of proof in case of the All-Russian Anti-Doping Rules?

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The story of the possible temporary suspension of Russian figure skating star Kamila Valieva during the 2022 Olympic Games was discussed as actively as the results of the competitions. The figure skater passed a positive doping test during the competition in December 2021 but only found out about it on February 8. The Russian Anti-Doping Agency (RUSADA) applied a mandatory provisional suspension to the athlete. However, on February 9, the RUSADA Disciplinary Anti-Doping Committee, at the appeal of the skater, lifted the decision of RUSADA on suspension and the athlete was able to take part in the Olympic games. The International Skating Union, the International Olympic Committee, and the World Anti-Doping Agency (WADA) filed appeals against the Anti-Doping Committee’s decision. The Court of Arbitration for Sport denied all appeals and affirmed the decision of the RUSADA Anti-Doping Committee. The key point was the status of the skater a protected person according to the view of the WADA World Anti-Doping Code — a protected person. At the same time, the special regime for a protected person did not extend to the standard of proof. Such an athlete, like any other athlete, must prove on the basis of a “balance of probability” that a prohibited substance was entered through a contaminated product to lift a mandatory provisional suspension. In the opinion of the RUSADA Anti-Doping Committee, the athlete was able to prove a “reasonable possibility” of a prohibited substance entering her body through a contaminated product. The literal application of the norm of the All-Russian Anti-Doping Rules, in contrast to the WADA Code, is required to prove that “the violation *most likely* occurred due to the use of a contaminated product”. The extraordinary situation is commented on by the author.

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1. Introduction

The Court of Arbitration for Sport (hereinafter CAS, sports arbitration, arbitration) in the decision of CAS OG 22/08&22/09&22/10¹ drew the attention of the World Anti-Doping Agency (WADA) to gaps in the provisions regarding the status of “protected person”. This institution appeared only in the WADA Code 2021, exceptions to the general strict approach to the consequences of anti-doping violations are due to special categories: age under 16; age under 18 in combination with non-participation in international competitions; incapacity or limited legal capacity following national laws. Under the provisions of the WADA Code², protected persons generally enjoy a privileged position. They are not required to prove the origin of a prohibited substance (unlike other athletes) to qualify, if the athlete proves no significant fault or negligence, for a sanction ranging from a warning to two years of ineligibility for any prohibited substances (not just specific ones, such as other athletes). At the same time, a mandatory temporary suspension does not imply differentiation depending on the status of the violator and is subject to a unified rule. Any athlete is required to prove either that the use of a contaminated product was the cause of the violation or that the violation was related to an addictive substance (Art. 7.4.1 of the WADA Code). The WADA Code calls the “balance of probability” the standard of proof for an athlete in such a situation.

2. Basic research

“Balance of probability” according to established CAS practice, means the subject of sport needs to convince the arbitrator that the occurrence of the circumstances to which he or she refers is more likely than their absence³. The Anti-Doping Organization is therefore subject to more stringent standards used by WADA for doping disputes, i. e. “comfortable satisfaction” considering the seriousness of the offense (Art. 3.1 of the WADA Code). The logic of the regulator is to try to balance the real possibilities of proof. The athlete does not objectively have the authority and resources of the Anti-Doping Organization to be used to collect evidence, and therefore the athlete’s evidence seems to be handled as leniently as possible.

The All-Russian Anti-Doping Rules (hereinafter referred to as the Anti-Doping Rules)⁴, developed in strict accordance with the WADA Code, should have adopted the

¹ Arbitration CAS OG 22/08, CAS OG 22/09, CAS OG 22/10. 2022. Accessed February 20, 2022. https://www.tas-cas.org/fileadmin/user_upload/OG_22_08-09-10_Arbitral_Award_publication_.pdf.

² The World Anti-Doping Code. 2021. Accessed February 20, 2022. https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf.

³ Arbitration CAS 2008/A/1515 WADA V/Swiss Olympic Association & Simon Daubney, award of October 2, 2008, para. 116. Accessed February 20, 2022. https://www.wada-ama.org/sites/default/files/resources/files/cas_2008_a_1515_daubney.pdf; Arbitration CAS 2012/A/2759 Oleksandr Rybka v. UEFA, award of July 11, 2012, paras. 11.31–11.32. Accessed February 20, 2022. https://arbitrationlaw.com/sites/default/files/free_pdfs/cas_2012.a.2759_oleksandr_rybka_v_uefa.pdf.

⁴ All-Russian Anti-Doping Rules. 2021. Accessed February 20, 2022. <https://rusada.ru/about/documents/all-russian-anti-doping-rules>.

same approach regarding the standards of proof for national-level athletes — a balance of probability. However, another interpretation of the athlete's evidence of grounds for overturning a mandatory provisional suspension is possible. A discussion of the new standard of proof took place in the dispute of lifting the suspension of figure skating star Kamila Valieva. The last decision, in this case, was pronounced on February 14, 2022, by sports arbitration at the Beijing Olympic Games⁵.

The basis for lifting a mandatory provisional suspension in accordance with the Anti-Doping Rules is the use of a contaminated product (Art. 9.4.3 of the WADA Code). However, let's pay attention to how the athlete's burden of proof is worded in the above rule: "...to provide evidence that the violation *most likely* (emphasis added. — *I. V.*) occurred due to the use of a contaminated product". In the CAS decision next translation was presented on the English language articles for anti-doping rules: "Mandatory Provisional Suspension may be eliminated if an Athlete provides evidence that the violation *was most likely caused* (emphasis added. — *I. V.*) by the Use of a Contaminated Product or pertains to a Substance of Abuse Use and proves the right to reduction of the period of Ineligibility pursuant to Clause 12.2.4.1 of the Rules". In comparison, the Russian translation of the WADA Code is as follows: "...the athlete will be able to prove to the experts conducting the hearing that the *violation occurred* (emphasis added. — *I. V.*) in connection with the use of the Contaminated Product". The initial English version of the Art. 7.4.1 of the Code is: "...the Athlete demonstrates to the hearing panel that *the violation is likely* (emphasis added. — *I. V.*) to have involved a Contaminated Product". Thus, there are two official wordings of the athlete's standard of proof and two translations. In the language of the WADA Code and Anti-Doping Rules: "likely" and "most likely", translations: "has occurred" and "most likely".

The Russian Anti-Doping Agency (RUSADA) Disciplinary Anti-Doping Committee (hereinafter — Anti-Doping Committee, Committee, DADC), considering the athlete's application for the lifting of the mandatory provisional suspension, literally applied Art. 9.4.3 of the Anti-Doping Rules. According to the position of the committee, in this situation, the third type of standard of proof should be used — "reasonable possibility", more lenient than "balance of probability"⁶. The Athlete is a protected person enjoying an increased level of protection of rights and interests following the WADA Code. As noted by the Anti-Doping Committee, "...because the athlete is a minor under the age of 16, she falls under the definition of a 'protected person' following the All-Russian Anti-Doping Rules and the WADA Code, which means that more than the low standard of proof"⁷. The committee's logic in constituting the third standard of proof for doping disputes seems quite convincing for the following reasons.

First, RUSADA deliberately pointed to a specific standard of proof, although not named in the WADA Code. Let us clarify. Global anti-doping regulations are unified and the question of the right of an anti-doping organization to introduce the third standard of proof remains. Will there be a situation of non-compliance of the anti-doping organization with its contractual obligations to WADA? WADA has named two standards of proof

⁵ Arbitration CAS OG 22/08, CAS OG 22/09, CAS OG 22/10. 2022. Accessed February 20, 2022. https://www.tas-cas.org/fileadmin/user_upload/OG_22_08-09-10_Arbitral_Award_publication_.pdf.

⁶ Arbitration CAS OG 22/08, CAS OG 22/09, CAS OG 22/10, para. 29. Accessed February 20, 2022. https://www.tas-cas.org/fileadmin/user_upload/OG_22_08-09-10_Arbitral_Award_publication_.pdf.

⁷ Arbitration CAS OG 22/08, CAS OG 22/09, CAS OG 22/10, para. 27.

for doping disputes, as these are used in all sports disputes not limited to disciplinary disputes. The International Skating Union (ISU) insisted on this position in the dispute: "...the ISU objects to the fact that the DADC created a new standard of proof for the protected person below the standard of the balance of probability and called it the 'standard of reasonable possibility'"⁸. In doping disputes, CAS recognizes that the balance of probability requires an athlete to "demonstrate the origin of a prohibited substance by providing factual evidence and not mere speculation"⁹. The use of the balance of probability for a protected person is no different from other athletes and requires the search for evidence that can confirm the source of the prohibited substance. Speculation about such a source has no prospects before the CAS. Thus, there is a significant imbalance in the legal status of a protected person. The arbitral tribunal may not be looking for the most likely version (as the "balance of probability" might imply), but for evidence, whose depth to a CAS sufficiency conclusion is quite unpredictable. This is also why it seems reasonable to deviate from the classical dyad of standards for doping disputes in favor of a special approach in proving for a protected person: more likely than any other explanation (deliberate ingestion of trimetazidine)¹⁰.

Second, the athlete's search for a version of prohibited substance ingestion is characterized by the uncertainty of the prospect of referring to circumstantial evidence. At the same time, only the latter can be at the disposal of the athlete when searching for a probable scenario for the existence of a contaminated product. The practice of arbitration attaches fundamental importance in connection with the contamination of the product to the conclusions of experts on the realism of the version built on indirect assumptions¹¹, even if such experts are not ready to declare an accurate opinion. It's good when the expertise works in the athlete's favor: "...due to the large differences in individual letrozole elimination times and the lack of reliable scientific studies, an explanation for inadvertent intake of letrozole in amounts equal to one tablet or less cannot be excluded that this is an acceptable explanation"¹². In any case, it seems rather strange to be skeptical of circumstantial evidence when the following statement can be found in CAS practice: "...circumstantial evidence can be compared with a rope consisting of several ropes: one thread of the cord may not be enough to withstand the weight, but three twisted together they can be quite strong enough"¹³. It turns out that the protected person has no differences from other athletes and has the same unclear prospects for the sufficiency of circumstantial evidence to support the version of the contaminated product as the source of the prohib-

⁸ Arbitration CAS OG 22/08, CAS OG 22/09, CAS OG 22/10, para. 89.

⁹ Arbitration CAS 2019/A/6319 María Guadalupe González Romero v. International Association of Athletics Federations (IAAF), award of July 2, 2020, para. 48. Accessed February 20, 2022. <https://jurisprudence.tas-cas.org/Shared%20Documents/6319.pdf>.

¹⁰ Arbitration CAS OG 22/08, CAS OG 22/09, CAS OG 22/10, para. 115.

¹¹ See, e.g., Arbitration CAS 2019/A/6541 Hiromasa Fujimori v. Federation Internationale de Natation (FINA), award of March 6, 2020, para. 81. Accessed February 20, 2022. <https://jurisprudence.tas-cas.org/Shared%20Documents/654.pdf>.

¹² Arbitrations CAS 2017/A/5301 Sara Errani v. International Tennis Federation (ITF) & CAS 2017/A/5302 National Anti-Doping Organization (Nado) Italia v. Sara Errani and ITF, award of June 8, 2018, para. 186. Accessed February 20, 2022. <https://jurisprudence.tas-cas.org/Shared%20Documents/5301,%205302.pdf>.

¹³ Arbitration CAS 2018/O/5713 International Association of Athletics Federations (IAAF) v. Russian Athletic Federation (RUSAF) & Yuliya Kondakova, award of February 1, 2019, para. 61. Accessed February 20, 2022. <https://jurisprudence.tas-cas.org/Shared%20Documents/571.pdf>.

ited substance. Similar unpredictability exists for the protected person in the absence of accurate expert opinions about the contaminated product.

Finally, protected persons should not be held hostage to WADA's regulatory inconsistency. Why can a protected person prove no significant fault or negligence without addressing the source of the prohibited substance but is required to prove the source of the substance when rebutting a mandatory provisional suspension? It seems that by removing the obligation to identify the source from the protected person, WADA has indicated its position on lowering the requirements for proof in the event. Note that for other athletes proving the source of a substance entering the body is often a stumbling block that negatively affects the prospect of establishing the level of guilt or negligence¹⁴. Why does WADA allow any athlete who is found to have a Specified Substance to exercise the right to a non-mandatory Provisional Suspension — that is, at the discretion of the Anti-Doping Organization? In comparison, for a protected person, WADA has not made a distinction between specific and non-specific substances to establish a sanctioned limit of two years of ineligibility for minor fault or negligence (appendix 1 “Definitions” of the WADA Code). On the one hand, we can recall the recognition in CAS practice of the principle of *inclusio unius exclusio alterius*: if something is expressly required under one rule, its omission in another rule must be considered as an intentional position¹⁵. On the other hand, in the case of a “protected person”, it is not a matter of WADA formulating a “requirement” (duty), WADA is expected to be consistent in creating a gap in the legal status of a “protected person”.

3. Conclusions

The arbitral tribunal responded unequivocally to the proposal to recognize the third standard of proof in doping disputes. “Most likely”, following the terminology of the English language, is a stricter standard of proof than “likely” — “balance of probability”. It turns out that RUSADA has set a stricter standard of proof for a protected person than WADA. Such a deliberate position of RUSADA when creating anti-doping rules seemed unlikely to the arbitration. In any case, RUSADA did not state this during the consideration of the dispute in CAS. Therefore, in the absence of evidence of a different reason, the discrepancy in terms was recognized by sports arbitration as a “translation error from Russian into English”¹⁶. From our point of view, the position of CAS about the error of reference to the standard is rather strange. Of course, no higher standard of proof than “balance of probability” could have appeared in the anti-doping rules to lift a mandatory suspension. But the divergence in terminology also could not be accidental: “most likely” is not identical to “likely”. On the one hand, the “balance of probability” standard will apply to all cases where the burden of proof is met by the athlete. The Art. 3.1 of the WADA Code does not make an exception for a provisional suspension. On the other hand, shouldn't the mention

¹⁴ See, e. g., Arbitration CAS 2014/A/3820 World Anti-Doping Agency (WADA) v. Damar Robinson & Jamaica Anti-Doping Commission (JADCO), award of July 14, 2015, para. 80. Accessed February 20, 2022. <https://jurisprudence.tas-cas.org/Shared%20Documents/3820.pdf>.

¹⁵ Arbitration CAS 2016/A/4534 Maurico Fiol Villanueva v. Federation Internationale de Natation (FINA), award of March 16, 2017, paras. 35, 37. Accessed February 20, 2022. <https://jurisprudence.tas-cas.org/Shared%20Documents/4534.pdf>.

¹⁶ Arbitration CAS OG 22/08, CAS OG 22/09, CAS OG 22/10, para. 191.

of “most likely” be regarded as a special rule and therefore not subject to the general rule of “balance of probability”? Thus, “most likely” is the intentional position of RUSADA, but not a translation error. The conflict of the two norms that arise in this case must be resolved in favor of the interests of the subject to which they are applied.

The Standard of proof “reasonable possibility” was once legitimized by CAS in a doping dispute with the International Ski Federation (FIS) for the cancellation of the athlete’s provisional suspension¹⁷. Arbitration formulated standard next way: “Rather, a reasonable possibility alone is sufficient to justify a provisional suspension”¹⁸. Thus, CAS confirmed the right of anti-doping organizations to expand the horizon of the standards of proof, not limited to two options from the WADA Code. It should be noted that in the decision to lift the temporary suspension of Kamila Valieva, sports arbitration did not note the incompetence of the regulatory establishment of the third standard of proof by anti-doping organizations. Because the CAS has postulated an optional provisional suspension for a protected person even in the presence of a non-specific substance¹⁹ our reflections on “reasonable possibility” are relevant to other athletes seeking a mandatory suspension waiver. The indicated problem of circumstantial evidence can be solved through the use of the third most lenient standard of proof. But for this, anti-doping organizations, as was made by FIS in the mentioned case, need to reinforce “reasonable possibility” in the provisions of the article on the grounds for lifting the mandatory provisional suspension.

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¹⁷ Arbitration CAS 2017/A/4968 Alexander Legkov v. International Ski Federation (FIS), award of August 31, 2017, paras. 189, 194. Accessed February 20, 2022. <https://jurisprudence.tas-cas.org/Shared%20Documents/4968.pdf>.

¹⁸ *Ibid.*, para. 195.

¹⁹ Arbitration CAS OG 22/08, CAS OG 22/09, CAS OG 22/10, para. 202.