

ЗАРУБЕЖНОЕ ПРАВО

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Exceptional circumstances beyond International Swimming Federation Doping Control Rules: The Sun Yang case of Court of Arbitration for Sport*E. G. Vetrova*¹, *R. I. Khalatova*², *A. A. Kashaeva*³¹ 2, Gavrskaya ul., St. Petersburg, 194017, Russian Federation² 55, pr. Stachek, St. Petersburg, 198096, Russian Federation³ 28, Zavodskaya ul., Morshansk, Tambovskaya obl., 393955, Russian Federation

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The authors refer to the exceptional circumstances surrounding Sun Yang's violation. The athlete intervened in the doping control procedure in several ways. First, he questioned the proper accreditation of the IDTM's (The company "International Doping Tests and Management") Samples Collection Personnel, one of which photographed him. This officer was suspended from urine sampling, but there was no longer a male specialist on the IDTM's Samples Collection Personnel. Therefore, the collection of urine samples did not take place due to the athlete's actions. A general distrust of IDTM's Samples Collection Personnel due to inappropriate photographing was the catalyst for follow-up action. Secondly, the athlete required IDTM's Samples Collection Personnel to confirm his credentials (accreditation) from the anti-doping organization, despite the submission of documents by IDTM's Samples Collection Personnel following the International Standard for Testing and Investigations. Not having received the additional and, in the opinion of the athlete, necessary documents, he refused to participate in the doping control procedure as a whole, tearing up his previously given written consent. Finally, the athlete took part in the destruction of blood samples with a hammer, but his role in this process was controversial. A prerequisite for the destruction process of the samples was the assistance of the IDTM's Samples Collection Personnel, who handed them over to the athlete in response to insistent demands. The listed circumstances, which are exceptional, however, could not affect the reduction of Sun Yang's period of ineligibility, since the FINA (International Swimming Federation) Doping Control Rules, based on WADA (World Anti-Doping Agency) Code 2015, do not imply such a basis. The new

WADA Code 2021 offers a more flexible concept of liability and takes into account exceptional circumstances that in subsequent disputes about tampering can be established based on the example of the dispute CAS 2019/A/6148.

Keywords: anti-doping rule violation, World Anti-Doping Agency Code, tampering, Doping Control Official, the doping control process, exceptional circumstances, fault or negligence.

...the logic of anti-doping tests and of the [Doping Control] Rules demands and expects that, whenever physically, hygienically and morally possible, the sample be provided despite objections by the athlete. If that does not occur, athletes would systematically refuse to provide samples for whatever reasons, leaving no opportunity for testing¹.

1. Introduction

The case of Sun Yang² (hereafter — athlete), a world-class Chinese swimmer, is impressive not only due to its public hearings, but also the swimmer's disqualification for a period of 8 years. Most impressive with this case is that tampering, prohibited by Art. 3.1 of FINA (International Swimming Federation) Doping Control Rules (hereafter — FINA DC)³, was not investigated in any of the hidden actions of the athlete. On the contrary, he publicly (1) instructed a security guard to destroy a glass ampoule containing blood he had previously provided, (2) tore up the Doping Control Form that he had signed at the outset of the samples collection session, and (3) prevented the Doping Control Official (hereafter — DCO) from collecting urine samples.

First, let us look at the legal definitions in the FINA DC, which are necessary for the case Court of Arbitration for Sport (hereinafter — CAS) 2019/A/6148.

Article 2.5 of FINA DC states that “tampering or attempted tampering with any part of doping control” is “conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, intentionally interfering or attempting to interfere with a Doping Control official, providing fraudulent information to an Anti-Doping Organization, or intimidating or attempting to intimidate a potential witness”. The main feature of this illegal action is the intention of an athlete, who must interfere / attempt to interfere, or provides fraudulent information, or intimidate/attempt to intimidate. The intention has to be proven on a relevant standard of proof with burden, which lies on one of the parties. Following this, Art. 3.1 and 10.3.1 of FINA DC can be taken into account. Art. 3.1 of FINA DC states: “FINA and its Member Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FINA or the Member Federation has established an anti-doping rule violation to the comfortable

¹ CAS 2005/A/925 *Laura Dutra de Abreu Mancini de Azevedo v. FINA*, para 75. 24.01.2006. Accessed August 13, 2020. https://cdn.swimswam.com/wp-content/uploads/2019/11/CAS-2005_A_925-Laura-Dutra-de-Abreu-Mancini-de-Azevedo-vs-FINA-S.pdf.

² CAS 2019/A/6148 *World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation*. Accessed August 13, 2020. https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_6148_website.pdf.

³ FINA Doping Control Rules. Accessed August 13, 2020. https://www.fina.org/sites/default/files/fina_dc_rules.pdf.

satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability”. So, the burden of proof of the athlete’s intention for an Art. 2.5 violation lies in the FINA as Anti-Doping Organization. In continuation, Art. 10.3.1 of FINA DC states: “For violations of DC 2.3 or DC 2.5, the Ineligibility period shall be four years unless, in the case of failing to submit to Samples collection the Athlete can establish that the commission of the anti-doping rule violation was not intentional (as defined in DC 10.2.3), in which case the period of Ineligibility shall be two years”. This article demonstrates the shift of the burden of proof onto the athlete who must establish his non-intentional violation. The problem of burden of proof in anti-doping disputes was recently discussed in a study by Russian sports lawyers (Vasilyev, Yurlov, Kisliakova 2019).

2. Basic research

2.1. What is “tampering”?

How does FINA understand the “tampering” as an anti-doping violation? Appendix 1 to the FINA DC provides us with a definition: “Tampering: Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring”. This definition, implemented from the World Anti-Doping Agency (hereinafter — WADA) Code 2015⁴, covers all specters of actions, which influence the doping control procedures in an aim to prevent the blood and urine samples from being gathered.

The “doping control” is defined in Appendix 1 to the FINA DC: “Doping Control: All steps and processes from test distribution planning through to ultimate disposition of any appeal including all steps and processes in between such as the provision of whereabouts information, Samples collection and handling, laboratory analysis, therapeutic use exemptions, results management, and hearings”.

Did Sun Yang tamper or did he make an attempt to tamper with the doping control? He and his group have chosen a strategy to refute DCO’s authorization in the blood and urine samples collection process. We will explore whether their efforts were effective.

The International Doping Tests and Management Company (hereinafter — IDTM) was represented by a Doping Control Officer (the DCO), a Blood Collection Assistant (the BCA), a Doping Control Assistant (the DCA), and a fourth unidentified individual who was the team’s car driver.

There is no doubt that every athlete has the right to proper doping control, which means the DCO, Chaperones and other Samples Collection Personnel not only affiliated by some matters with the Anti-Doping Organization (such as the Testing Authority Sam-

⁴ WADA Code 2015. Accessed August 13, 2020. <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf>.

ples and the Collection Authority), but also those in possession of the necessary documents. The WADA International Standard for Testing and Investigations⁵ proposed a normatively defined guide in Art. 5.3.3 for authorization of the Samples Collection Authority: (1) it should have official documentation (authorization letter) from the Testing Authority plus (2) the DCO should carry complementary identification which includes their name and photograph. The mentioned WADA International Standard does not identify the BCA and DCA, but this abbreviation had been used during the proceedings in the case. In terms of the International Standard, they should not be interpreted in the same manner. The DCA is similar to the DCO and as a result, they should also have identification. On the other hand, the legality of Chaperons, as for the DCO, has to be presumed by the presence of the authorization letter.

There is no space for the interpretation of Art. 5.3.3 of the FINA DC in another manner that obligates the DCO to have only two mentioned documents without any additional identification or authorization. The conclusion was presented by the Panel indisputably.

In comparison, the new WADA Code 2021⁶ in Appendix 1 defined tampering as an “Intentional conduct which subverts the Doping Control process, but which would not otherwise be included in the definition of Prohibited Methods...” The emphasis on the intentional character of violation resulted in only one possible defense for future athletes — there is no infraction. In addition to the comments regarding tampering in the WADA Code 2021, breaking the bottle is an example of tampering.

2.2. Chain of custody and doping control

Firstly, the DCO presented the athlete with a copy of his IDTM-issued ID card and a generic Letter of Authority from FINA to IDTM. This letter stated that IDTM was appointed and authorized by FINA to collect urine and blood samples from athletes within the framework of the doping controls organized as part of the FINA Unannounced out-of-Competition Testing Program. The DCA gave the athlete his government-issued ID card. The BCA presented the athlete with a copy of his Specialized Technical Qualification Certificate for Junior Nurses. The athlete questioned the documentation which was shown to him. Nevertheless, he signed the Doping Control Form and cooperated in providing two blood samples. The last action was, as we are concerned, one of the primary facts that oppose his future actions and defense strategy. Sun Yang was satisfied with the official documentation and complementary identification as he had taken part in the doping control procedure.

The whole process of doping control seemed to be quite ordinary until the DCA took a picture of the athlete. The athlete thought that it was unprofessional, and then he decided to re-review the documentation presented by IDTM's Samples Collection Personnel in more detail, in particular the credentials of the DCA.

The athlete considered the information provided by the DCA insufficient, so the DCA was removed from the testing mission upon the initiative or with the consent of the

⁵ WADA International Standard for Testing and Investigations. Accessed August 13, 2020. <https://www.wada-ama.org/en/resources/world-anti-doping-program/international-standard-for-testing-and-investigations-isti>.

⁶ WADA Code 2021. Accessed August 13, 2020. https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf.

DCO. The DCA was the only male in that “team” and as a result, after his exclusion from the testing mission the athlete’s urine could not be collected.

Following this, the athlete raised concerns about the documentation presented by the DCO and BCA. The athlete and his mother then summoned the athlete’s support staff and asked for advice. Dr. Ba Zhen, the athlete’s medical doctor, came over to the athlete’s residence. Dr. Ba Zhen was consulted by Dr. Han Zhaoqi, Chief Doctor of the School where Dr. Ba Zhen works, and Chief Doctor in the Affiliated Sports Hospital of Zhejiang College of Sport, by telephone. Mr. Cheng Hao, Team Leader of the Chinese national swimming team, was also consulted by telephone.

The discussion then began between Dr. Ba Zhen, Dr. Han Zhaoqithen, and the DCO about the accreditation and authorization presented by IDTM’s Samples Collection Personnel (the DCO, DCA, BCA). The athlete’s support staff informed both the athlete and the DCO that the documents, which were presented by the IDTM team, did not comply with the required standards, and decided that the collected blood samples could not be taken away by the DCO. Due to this, the athlete and his entourage started to take action to recover the athlete’s blood samples.

In response to these actions, the DCO sought to warn the athlete that any removal of the blood samples could be considered as a failure to comply with the samples collection process and that such action might give rise to serious consequences. Nevertheless, under pressure from the athlete, the DCO or the BCA took the glass containers from the storage box and handed them to the athlete. The DCO told the athlete that no IDTM material could be left behind. Then the athlete instructed his entourage to break one of the glass containers to extract the blood samples so that the DCO could retrieve the broken container, but not the blood samples themselves.

The glass container with the blood vessel was destroyed with a hammer by a security guard. The athlete assisted the security guard by illuminating the blood container with the flashlight of his mobile phone. The blood vessel remained intact and was retrieved by the athlete.

In conclusion, the IDTM “team” did not collect the athlete’s blood and urine that night, and the analysis could not be made. The collected blood vessels were taken by Dr. Ba Zhen (although they are no longer eligible to be tested because the chain of custody was broken).

While the DCO was still in the residence, the athlete destroyed the Doping Control Form. Upon the request of the athlete, Dr. Ba Zhen added his comments in regard to the collection process on a separate sheet of paper. This document was signed by Dr. Ba Zhen, the athlete, the DCO, DCA, and BCA. After some time, the IDTM reported to FINA that the requested samples (blood and urine) could not be collected.

The strategy of the athlete’s defense was formulated in the following way: “However, in the following process of blood and urine samples collection, [the Athlete] found that [the BCA], Blood Collection Officer, only provided her Nurse Qualification Certificate (Number [...]) but did not provide any other proof of certification for Blood Collection Officer. [The DCA] (classmate of [the DCO]), the Doping Control Officer for urine test, only provided his resident ID card ([...]) and did not provide any other certification of Doping Control Officer for urine. They were unrelated personnel. Under our repeated inquiries, among them, only [the DCO] (Card No. [...]) provided the certification of Doping Control Officer, and the rest two could not provide Doping Control Officer certifica-

tion and any other relevant authority. Therefore, the urine test and blood test cannot be completed. (The blood samples that has been collected could not be taken away.)⁷.

The athlete could have been subjected to the influence of his mother and support staff, and this could be why he changed his behavior from cooperation with the DCO to confrontation. Notwithstanding the decision to take part in doping control, his interruption turned out to be useless for him. There is no doubt, that the manner of decisions made at the particular time had a direct impact on CAS, albeit *venire contra factum proprium* was not mentioned in the Panel process of issuing decisions. That principle could be used in the case, which may have jurisdictional value, but Sun Yang by interrupting the doping control had only one proper outcome which did not impact his previous action in cooperation with the DCO.

2.3. Contradictions in estimating the factual background

Comparing the Factual Background and the Submission of the Appellant, we discovered several contradictions.

First of all, there are two versions of when the athlete questioned the DCA's authorization and documentation for a second time. According to the submission of the appellant, "When asked by the DCO to provide urine samples, the Athlete questioned the DCA's authorization and documentation to serve as a chaperone to observe the Athlete provide the samples. The Athlete refused to provide urine samples in the DCA's presence. The Athlete and his growing entourage (his mother and personal doctor were present at the clubhouse, and two other Chinese sports officials participated by telephone) steadfastly insisted that the DCA had not presented sufficient documentation so no urine samples would be provided"⁸.

According to the factual background, given by CAS, "At some point shortly thereafter, the Athlete discovered that the DCA had taken, or was taking, one or more photographs of him. The Athlete did not consider this to be professional, and it seems to have prompted him to re-review the documentation presented by IDTM's Samples Collection Personnel in more detail, in particular the credentials of the DCA. Because the Athlete considered the information provided by the DCA insufficient, the DCA was removed from the testing mission upon the initiative or with the consent of the DCO. Because the DCA was the only male member of the testing team, no urine samples could be collected from the Athlete"⁹.

It turns out that there are two fundamentally different versions of events, each of which has its own logic, and is contradictory. In the first version, it is said that the athlete, in response to a request to submit an analysis, asked to check the documentation, and in the second version, it says that the athlete asked to double-check the documentation after discovering that he was being photographed.

Secondly, there is a contradiction in how the events with the guard took place. According to the appellant, "Much argument ensued between the IDTM team and the Athlete, who was egged on by his support team. The stalemate eventually ended with blows

⁷ CAS 2019/A/6148 World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation. Para. 17. 28.02.2020.

⁸ Ibid. Para. 128.

⁹ Ibid. Para. 10.

from a hammer — specifically, with a security guard taking one of the Athlete's blood samples containers outside to break it with a hammer. As the security guard recalls, "Then a man who was not very tall handed me a bottle and told me to use the hammer to open the bottom of the bottle"¹⁰.

In the factual background used by CAS it is said that "When the DCO indicated to the Athlete that no IDTM material could be left behind, the Athlete instructed his entourage to break one of the glass containers to extract the blood samples so that the DCO could take back the broken container but not the blood samples. The glass container containing the blood vessel was destroyed with a hammer by a security guard"¹¹.

Thus, here we see that there is a difference in the versions of who ordered the guard to break the container. The appellant insists that someone unfamiliar to the guard gave him the container and told him to break it. The factual background contains information that the athlete immediately instructed his entourage about further actions.

Despite the fact that there are two contradictions of the facts presented in this case, CAS obviously made a decision in favor of the information provided from the factual background. CAS indirectly admitted the fact that the athlete asked to double-check the documentation after discovering he was being photographed. But still according to its position, "For the reasons set out above, which the Panel will not here repeat, it concludes that none of these circumstances have been established as justifying the cautions taken. The Panel finds no merit in this argument, which is not supported by the evidence before it or the legal principles that are applicable"¹². On the contrary CAS confidently admitted that "It is not contested that the Athlete instructed a security guard to destroy a glass container containing a blood vessel with blood he had previously provided"¹³.

2.4. Are there misunderstandings or illegal actions in the doping control process?

The act of taking a picture during the doping control process seems to have a very important role. This action of the DCA could not be found in the WADA International Standard for Testing and Investigations and it can be deemed an act of a voluntary behavior by one of the IDTM's Samples Collection Personnel. The International Standard for Testing and Investigations does not have any rule which would permit pictures to be taken of the athlete. The Standard does not even contain the word "picture"; it only mentions photo identification which is not applicable to the present situation.

What should the world-class athlete think when somebody is taking a picture of him? Perhaps he believes that the person is violating his rights as an athlete not only out of idle interest, but also for illegal purposes. Should the doping control group allow the DCO or the chaperons to depart from the WADA International Standard for Testing for a dubious purpose? Surely not.

When the DCA made the photo, the adequate reaction of the athlete was to re-check his and all the samples collection personnel's authorization and identification cards. There was not any other male person in the doping control group — this demonstrated a fatal

¹⁰ Ibid. Para. 128.

¹¹ Ibid. Para. 14.

¹² Ibid. Para. 354.

¹³ Ibid. Para. 198.

mistake by the IDTM. Then, as we think, Sun Yang did not refuse to submit an analysis of urine; he had reasons not to trust the DCA and to deny taking part in any further proceedings before new male samples collection personnel would join the IDTM. CAS approved this manner of the athlete's action: "Further, the evidence before the Panel shows, and it is not disputed, that the Athlete suggested that he should await the arrival of another DCA to be able to provide his urine samples. Accordingly, the Panel considers that it cannot be concluded that the Athlete failed to provide urine samples"¹⁴.

With that, the Panel did not comment on the peculiar situation with the photo taken, but "the mere fact that [one of the sample collection team) acted inappropriately in taking at least three photographs of the Athlete did not, as such, warrant the Athlete to abort the entire (blood and urine) testing mission"¹⁵.

Breaking the container with the blood samples of the athlete is highly likely to be considered tampering in connection with the meanings of the FINA DC. There is no possibility to justify such violent action. Although, were there any circumstances influenced by the past event? On the one hand, influencing the doping control is tampering, whether the athlete gave instructions himself or instructed his entourage. But on the other hand, the appellant could not present any pieces of evidence that the athlete had instructed the security guard. In their submission, WADA quoted the security guard that the initiator of breaking the blood samples was "a man who was not very tall". The athlete's victimization as a mastermind of destroying the container with his samples was not mentioned sufficiently, "the Athlete crouched next to the security guard during the hammering process, illuminating the blood samples container with the flashlight on his cell phone"¹⁶.

Formally, from the position of the standard of proof, his role in planning such a violent act has to be proven.

Why did the factual background highlight the athlete as a provocateur — it is a discussion. The burden of proof should be applied to the appellant as in the statement it was not mentioned that the athlete was the person, who had given the command to the security guard. We suppose that this question was not properly investigated by the CAS, the Panel simply relied on re-constructed grounds of contradiction. At the end, the CAS postulated that Sun Yang had decided "to take matters into his own hands by destroying a blood container, tearing up the Doping Control Form and refusing to let the DCO leave his house with the blood samples"¹⁷.

As a result, the Panel decided, claiming that proof was provided, that the athlete played a primary role in planning and destroying the samples. Although this does not influence the sanction itself, the question of satisfying the standard of proof is still relevant.

Tearing up the doping control form can be assessed in two ways. On the one hand, by destroying the form the athlete violated the doping control process: this action is tantamount to refusing to take part in the process. But on the other hand, did the athlete destroy the form with the purpose of denying the following anti-doping procedures? As we mentioned, this situation was connected with the destroying of the blood samples container, and it happened before the container was destroyed. In our opinion, the athlete de-

¹⁴ CAS 2019/A/6148 World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation. Para. 306.

¹⁵ Ibid. Para. 310.

¹⁶ Ibid. Para. 128.

¹⁷ Ibid. Para. 355.

stroyed the form without the desire of preventing the continuation of the doping control process, and his actions cannot be deemed as tampering. Sun Yang's decision had another dimension — he was tearing up the doping control form because of the uncertainty in the authorization of the IDTM's Samples Collection Personnel. At the same time, we understand that the border between the intention and motivation of the action is not presented in the FINA DC and it did not influence the sanction issued. Did the athlete understand that in the wording of the FINA DC (and also the WADA Code) “he was taking a huge risk by withdrawing a consent he had already given to cooperate in the blood samples collection session having refused to allow the samples”¹⁸.

2.5. Was Art. 2.5 FINA DC applied correctly?

“Tampering” requires proof that the athlete had an intention of violating the doping control. This can be understood as cheating or the intention to cheat. Was this aspect considered in the case at hand? We suggest examining two situations with the participation of Sun Yang separately.

The first situation is the question of asking for DCA's authorization and documentation for the second time. We agree with the CAS that there are no double or additional authorization procedures that then follow from the WADA International Standard for Testing¹⁹.

Therefore, refusal on the grounds of non-authorization is not legal and it should be considered as a violation of the FINA DC: tampering as a “conduct which subverts the Doping Control process”. Doping control essentially includes the collection of blood and urine samples. Then the athlete refused to begin the process of collecting urine samples which was tampering and committing an anti-doping violation (art. 2.5 FINA DC). FINA DC like WADA Code does not provide athletes with the right to reduce the period of disqualification on the basis exceptional circumstances. The concept of mitigating circumstances is also not addressed in the WADA Code 2015 and the FINA DC. That is why DCO's actions of taking the athlete's picture could not receive an adequate judgement and did not influence the sanction. The refusal to proceed with urine samples in the case of proper authorization of the Samples Authority Person, although it was connected with the illegal photo taken, has no chance of being justified²⁰.

Only the concept of exceptional circumstances may be introduced, but it was not presented in the FINA DC.

The second situation is the role of the athlete in the events with the guard and the blood samples. In the factual background, CAS stated that the athlete was the person who commanded the security guard to destroy the container with his blood samples. No matter how this action was done, it was tampering and illegal interruption of the doping control process. For this violation, the athlete was finally punished by CAS²¹.

The intentional character of tampering excludes any reasons for the “no significant fault or negligence”. This is the athlete's last chance to prove “no-fault or negligence”. As Art. 10.3.1 of FINA DC declares: “For violations of DC 2.3 or DC 2.5, the Ineligibility

¹⁸ Ibid. Para. 355.

¹⁹ Ibid. Paras. 254, 264, 282, 293.

²⁰ Ibid. Para. 309.

²¹ Ibid. Para. 382.

period shall be four years unless, in the case of failing to submit to Samples collection the Athlete can establish FINA DC Rules, that the commission of the anti-doping rule violation was not intentional (as defined in DC 10.2.3), in which case the period of Ineligibility shall be two years". Art. 10.2.3 of FINA DC: "As used in DC 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk". The Panel concluded with a discussion on the athlete's argument of the precedent's role in case CAS 2013/A/3341, "where the sole arbitrator articulated "a certain surprise in noting the circumstances surrounding the destruction of two urine samples collection containers", but found that on the facts of that case the requisite intent of the Athlete was not established and he was found not to be responsible for "tampering"²².

CAS pointed out that despite the DCO's repeated warnings, the athlete persisted in demanding that the blood samples be returned to him, to allow him to prevent the DCO from leaving with them. The evidence before the Panel established that the athlete intentionally sought to interfere with the doping control process by destroying an external container and tearing up the doping control form, intending to prevent the DCO from leaving the premises with the blood samples that had already been collected. The Panel found that such actions necessarily comprise intent. CAS determined that, on any reasonable and objective basis, the situation faced by the Athlete did not amount to a compelling justification to allow him to take the steps he did to prevent the DCO from leaving his home with the blood samples which were provided.

As was postulated by the Panel, it cannot be excluded that serious flaws in the notification process, or during any part of the doping control process, can mean that it might not be appropriate to require an athlete to continue a samples collection. Rather, they could invalidate the samples collection process as a whole. In the view of CAS, this could only be in the most exceptional circumstances²³.

And the factual circumstances in the case of Sun Yang were not among them, so it can be claimed that Art. 2.5 of FINA DC was applied correctly on legal grounds.

2.6. Factual circumstances for removing or reducing the sanction

Was it possible to find factual circumstances for applying Art. 10.4 of FINA DC (Elimination of the Period of Ineligibility where there is No-Fault or Negligence), Art. 10.5.1 of DC (Reduction of Sanctions for Specified Substances or Contaminated Products for Violations), Art. 10.5.2 of DC (Application of No Significant Fault or Negligence beyond the Application of DC 10.5.1 DC, Art. 10.6.1 of FINA DC (Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations), Art. 10.6.1 (DC 10.6.1 Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations), Art. 10.6.2 (Admission of an Anti-Doping Rule Violation in the absence of other evidence), or Art. 10.6.3 (Prompt admission of an anti-doping rule violation after being confronted with a violation sanctioned under DC 10.2.1 or 10.3.1) in the case of Sun Yang?

²² CAS 2019/A/6148 World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation. Para. 338.

²³ Ibid. Para. 208.

Article 10.4 requires the existence of exceptional circumstances. The main focus is to prove that an athlete demonstrates no fault or negligence. Looking ahead, not one of the circumstances we pointed out in the case of the athlete could prove no fault or negligence. It is very difficult to prove even the balance of probabilities that Sun Yang took due care during the doping control process. Refusal to provide urine samples based on doubts, although without legal grounds and justification on the FINA DC, has no chances of being interpreted as due diligence of the athlete. Simultaneously, interruption of the blood samples testing ended with the destruction of the container with samples, and this appears different from due diligence. It does not matter if Sun Yang was the person who ordered the security guard to destroy the blood samples, or if he was the only person who helped the security guard to retrieve samples. Due diligence was not applicable to this situation.

Article 10.5.1 of FINA DC concerns only anti-doping violations, in regard to Specified Substances and Contaminated Products, this was not the basis of Sun Yang's case. The Comment to Art. 10.5.2 of FINA DC hindered it from being used in regard to intentional violations such as tampering.

Article 10.6.1 of FINA DC requires substantial assistance in discovering or establishing anti-doping rule violations and accordingly do not apply to Sun Yang's case. Also, Art. 10.6.2 of FINA DC is not relevant here because it corresponds to the admission of an anti-doping rule violation in the absence of other evidence. At last, Art. 10.6.3 is clearly not relevant for the case as it applies to prompt admission of an anti-doping rule violation after being confronted with a violation sanctioned by the FINA DC Art. 10.2.1 or Art. 10.3.1.

3. Conclusions

The Sun Yang case cannot be typically regarded as "tampering" in connection with anti-doping regulations. The athlete was extremely self-confident and those present, the night of the incident, encouraged such self-confidence, which ultimately negatively impacted his own interests. As some sports lawyers point out: "The case is a painful set-back for Sun Yang at personal level and Chinese sports at an institutional level" (Guo 2020). And we can add that perhaps changes are also necessary to the country's criminal law (Pan, Zhao, Vasiljev 2019) in terms of the distribution of the burden of responsibility between the athlete and his environment in the case of anti-doping regulation violations.

The athlete's obstructions in the doping control process demonstrated several problems. Firstly, there were some flaws demonstrated by the IDTM's Samples Collection Personnel. We have not commented previously on the behavior of the IDTM who did not prevent the situation with the destruction of the blood samples. Perhaps the Samples Collection Personnel were nervous due to the tension of the situation and they decided to give the samples box to the security guard. Nevertheless, this only triggered a continuation of the violation. Without the passive role of the IDTM, the situation would have likely ended differently. Secondly, by taking a picture of Sun Yang one of the Samples Collection Personnel provoked the athlete not to trust the doping control process in general. We have no right to recognize this fact as one of the key elements of the case, nevertheless it played a role in the behavior of the athlete. However, the athlete's refusal to continue with the urine samples collection process was justified by CAS due to the absence in the IDTM of the necessary male personnel.

What is the role of Sun Yang in destroying the blood samples? Despite the CAS conclusion that the athlete ordered all persons involved in illegal activity, we are not satisfied. The burden of proof was on the athlete and his legal position was far from optimal. In our opinion, there is a distinction between a “mastermind” and the role of an individual, who only benefits from a situation in which tampering is in question. If we are talking about the second version, exceptional circumstances may have allowed this to occur. Then we should take a look on the following question of whether CAS satisfied with the burden of proof when determining that Sun Yang was the mastermind of destroying the samples? Apparently, yes, but this is not convincing.

In this dispute, the arbitration has confirmed an important conclusion for the prospect of considering anti-doping cases: “...cannot be excluded that serious flaws in the notification process, or during any part of the Doping Control process, could mean that it might not be appropriate to require an athlete to subject himself to, or continue with, a sample collection session”²⁴. Accordingly, Sun Yang should have performed the doping control procedure and only filed a complaint about this procedure upon completion. Since the athlete chose a different algorithm, he was obliged to meet the standard of proof, demonstrating to the arbitration that he had objective reasons for this.

The current version of the FINA DC, based on WADA Code 2015, does not take into consideration the exceptional circumstances mentioned in this article. Therefore, some sports lawyers have been discussing the fairness of the sanction: “In the author’s view, this does seem somewhat harsh on the athlete in question considering what was at stake for the athlete and the unfamiliarity of the surroundings and proceedings. Moreover, the extant CAS process does not provide in any meaningful way for a separate sentencing/pleadings element to proceedings and, if the above is to be an element or factor in sanctioning in doping cases etc...” (Anderson 2020).

The new WADA Code 2021 and Art. 10.3.1 permits the reduction of a sanction for tampering from two to four years, depending on the athlete’s degree of fault, if exceptional circumstances are justified by the athlete. Through repeat violations in the future, in situations with circumstances like in Sun Yang’s case, the flexibility of the new Code (and then new FINA DC) could result in rulings that are fairer.

Nowadays (if we do not take into account the ghostly prospects of an appeal to the Swiss Federal Tribunal), the athlete has to wait for the new WADA Code to take effect on January 1, 2021. As noted by CAS in the considered case: “The Panel notes that the new edition of the WADA Code, which enters into force on 1 January 2021, provides for additional exceptions to potentially reduce the period of ineligibility for violations of Article 2.5 WADA Code below four years, as well as for second anti-doping rule violations”²⁵.

By the time the article was published, the Swiss Federal Court had overturned the CAS decision due to the referee’s prejudice against the athletes from the People’s Republic of China and sent the case for a new trial. Despite this, we believe that the conclusions drawn in the article remain relevant.

²⁴ CAS 2019/A/6148 World Anti-Doping Agency v. Sun Yang & Fédération Internationale de Natation. Para. 208.

²⁵ Ibid. Para. 368.

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