



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

TAS/FSA Seminar | Lausanne, 30 September & 1 October 2022

First jurisprudential findings after the entry into force of the 2021 WADA Code

Fabien CAGNEUX | Managing Counsel, CAS Anti-Doping Division

Summary

- I. Sanction
- II. Tampering
- III. Substantial assistance
- IV. Protected Persons
- V. Questions



TAS / CAS

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I. Sanctions

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



TAS / CAS

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I. Sanctions

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

Episode I – Arbitral Award of 28 February 2022

- Panel concluded to its comfortable satisfaction that the Athlete violated Article 2.5 of the FINA Doping Control Rules (“DC” - edition 2017)
- Sanction : Article 10.3.1 FINA DC *“The period of Ineligibility for anti-doping rule violations other than as provided in DC 10.2 shall be as follows, unless DC 10.5 or 10.6 are applicable:*

DC 10.3.1 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 Sample 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.”



TAS / CAS

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- No discretion as to consequences: 4-year period of ineligibility, unless the Panel finds that Articles 10.5 (Reduction of Period of Ineligibility based on No Significant Fault or Negligence) or 10.6 (Elimination, Reduction, or Suspension of Period of Ineligibility or other Consequences for Reasons Other than Fault) of the FINA DC shall apply.
- Not disputed that Article 10.6 shall not apply as the Athlete did not provide any assistance.
- Athlete invokes Article 10.5.2 FINA DC: No Significant Fault/Negligence? No => “**intent**” is an element of Article 2.5 => in the Panel’s view, Article 10.5.2 is of no assistance.
- Second ADRV => in 2014 received a 3-month period of ineligibility.



TAS / CAS

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COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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WADA Code

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- Article 10.7.1 (c) of the FINA DC *“For an Athlete or other Person’s second anti-doping rule violation, the period of Ineligibility shall be the greater of two times the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under DC 10.6.”*
- 4-year period of ineligibility is to be imposed for the Athlete’s second ADRV if it were to be treated as a first violation, this period is then doubled => **8-year** period of ineligibility in accordance with Article 10.7.1 of the FINA DC.
- 22 December 2020: CAS Award annulled by the Swiss Federal Tribunal (“SFT”)



TAS / CAS

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COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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Episode II – Arbitral Award of 22 June 2021

- Restart of the arbitral proceedings, new Panel appointed, new hearing, etc.
- The “New Panel” also comfortably satisfied that the Athlete violated Articles 2.3 and 2.5 of the FINA DC.
- Sanction? => facts occurred in September 2018, application of the FINA DC 2015?
- **NO**: new WADC (so as the FINA DC) entered into force as of 1 January 2021



TAS / CAS

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COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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- ***Lex mitior*** principle prevents the “continued applicability of a disciplinary rule after it has been replaced by a more lenient one, and reflects, in favour of the accused, the evolution of a legislative policy” and, accordingly, the “set of rules most favourable as a whole is to be applied” (CAS 2015/A/4005, §115; CAS 2020/A/6755, §51).
- What sanction is to be imposed? Article 10.3.1 of the FINA DC “For violations of DC 2.3 or DC 2.5, the Ineligibility period shall be four (4) years except (i) in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility shall be two (2) years; (ii) in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility shall be in a range from two (2) years to four (4) years depending on the Athlete or other Person’s degree of Fault...”



TAS / CAS

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TRIBUNAL ARBITRAL DEL DEPORTE

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- 2021 FINA DC (and the 2021 WADC) => greater degree for mitigation in determining the period of ineligibility for violations of **Article 2.5** (Tampering) for “exceptional circumstances” => Panel finds that the period of ineligibility shall be reduced to 2 years due to exceptional circumstances.
- Mitigation is also possible, in principle, for certain violations of **Article 2.3** (Failing to Submit) => *in casu*, the athlete must be able to show that his commission of the ARDV “*was not intentional*”.



TAS / CAS

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COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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- Although Article 10.2.3 of the FINA not directly applicable to cases of **Failing to Submit**, *“intentional”* includes cases in which athletes *“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”*.
- Panel’s finding => **no mitigation** as the Athlete acted recklessly and in manifest disregard of the risk of potential consequences of his actions => “base” period of ineligibility remains at **4 years**.



TAS / CAS

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COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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- Second-time violations under the 2021 FINA DC: Article 10.9.1.1 (b) (i) *“For an Athlete or Other Person’s second anti-doping rule violation, the period of Ineligibility shall be the greater of a period of Ineligibility in the range between the sum of the period of Ineligibility imposed for the first anti-doping rule violation plus the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation”*
- Newly flexible approach: panels may select from a range based on their assessment of the *“entirety of the circumstances”*
- Panel considers that the circumstances surrounding the sample collection of 4-5 September 2018 merit a period of ineligibility at the lower end of the range, i.e. the addition of the 3-month period (2014) to the sanction that is otherwise applicable => 4 years and 3 months period of ineligibility.



TAS / CAS

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COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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II. Tampering

CAS 2021/A/7983 Brianna McNeal v. World Athletics & CAS 2021/A/8059 World Athletics v. Brianna McNeal

Brief factual background:

- 12 January 2020: Athlete failed a WA AIU's Doping Control Process.
- 30 January 2020: AIU notified the Missed Test to the Athlete.
- 13 February 2020: Athlete's explanations => Athlete was at the address indicated in her Whereabout Form at the specified one hour-period (06:00 – 07:00 am) but explained that she had undergone a “surprise medical procedure” in a clinic in L.A on 11 January 2020. Further explained that she was not aware that, due to pain medication and sedatives which had been prescribed to her (to assist recovery), she would be unable to wake up and undergo the doping control test at the specified hour.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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Brief factual background:

- Attached to the Athlete explanations: copy of a handwritten note dated 7 February 2020 signed a practicing physician at the clinic where the medical procedure occurred confirming the medical procedure of 11 January 2020 and describing the medication given to the Athlete.
- Inspection of the medical note => AIU considered that the date of the treatment on the note had been erased/alterred and, on 4 March 2020, AIU requested from the Athlete additional documentation in support of her explanations.
- 14 March 2020: two additional medical notes (same physician) indicating the same date of treatment, i.e. 11 January 2022, were provided by the Athlete.
- Further inspection of the second and third medical notes => AIU still considered that such notes had been manipulated and, on 30 March 2020, requested copies of the whole record concerning the Athlete's treatment for analysis.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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WADA Code

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Brief factual background:

- 15 April 2020: AIU received the full medical file related to the treatment undergone by the Athlete.
- Inside the medical file: original copy of the first medical note stating that the date of the Athlete's treatment was **10 January 2020**; pp. 11-12 of the medical file further confirmed 10 January 2020, and not 11 January 2020.
- Date of 10 January 2020 is inconsistent with the Athlete's explanations.
- 14 August 2020: Athlete interviewed by AIU to give explanations about these discrepancies => Athlete admitted the alteration of the date of the treatment in the medical notes because she actually recalled that treatment took place on 11 January 2020 (Saturday), and not on 10 January 2020 (Friday) / Athlete did not sought confirmation of the relevant date from anyone before altering the date inscribed in the medical notes initially provided to AIU.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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WADA Code

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Brief factual background:

- 13 January 2021: Notice of Charge issued by AIU charging the Athlete with a violation of Article 2.5 of the WA 2019 ADR => Tampering or Attempted Tampering with any part of Doping Control / Athlete provisionally suspended under Article 7.10.4 of the WA 2019 ADR.
- 7 April 2021: hearing by videoconference => both Parties agreed to the application of the WA 2021 ADR (*lex mitior*).
- Decision: Athlete committed an ADRV of Tampering (Article 2.5); period of ineligibility of 5 years starting as of 15 August 2020 / disqualification of competitive results from 15 August 2020 to 13 January 2021.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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Brief factual background:

- 21 May 2021: appealed filed with the CAS by the Athlete seeking for the annulment of the appealed decision or, if the Panel finds that an ADRV has been committed, the maximum reduction of the ineligibility period due to the disproportionality of the sanction and that the starting date of the sanction should be 15 April 2020 or, in the alternative, 14 August 2020.
- 17 June 2021: cross-appeal by WA on the sole basis that (i) the period of ineligibility imposed by the Disciplinary Tribunal was insufficient and that all competitive results obtained by the Athlete between 13 February 2020 and the date of the CAS Award be disqualified, with all resulting consequences.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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Panel's findings (*lex mitior* / burden of proof):

- *Lex mitior* principle => application of the WA 2021 ADR as (i) more favourable to the Athlete with respect to the imposition of sanctions and (ii) greater flexibility as to the consequences to be drawn from a finding of multiple ADRVs (Athlete already committed an ADRV in 2019).
- Burden of proof remains unchanged: WA shall demonstrate, to the comfortable satisfaction of the Panel, that the Athlete did indeed engage and commit an ADRV of Tampering (Article 2.5 of the WA ADR), which includes objective and subjective factors.
- However, the burden to prove that the Athlete was suffering from psychological or mental health issues during the period when the medical notes were changed, which affected her judgement and reason, **lies with the Athlete** => needs to demonstrate that the psychological/mental conditions as argued during the proceeding could lead the Panel to consider that she did not act with fault or negligence of even that her degree of fault is lower than what WA argues.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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Panel's findings (definition of Tampering):

- No definition of Tampering in the WA 2021 ADR => Annex I of that regulation: *“Intentional conduct that subverts the Doping Control process but that would not otherwise be included in the definition of Prohibited Methods.”*
- This includes (without limitation): offering or accepting a bribe to perform or fail to perform an act, preventing the collection of a Sample, affecting or making impossible the analysis of a Sample, [...] committing any other fraudulent act upon the Anti-Doping Organization (ADO) or hearing body to affect the RM or the imposition of Consequences;
- Comment to Tampering: also includes **misconduct** that occurs during the RM process.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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Panel's findings (definition of Tampering):

- Not necessary for a Doping Control Process to be actually subverted, in order for a violation of Rule 2.5 2021 WA ADR to exist; it suffices, for that purpose, that the conduct in question could, in theory, be capable of subverting the said process.
- Charge of Tampering can also be based on the circumstances provided in Rule 5.7.9 2021 WA ADR *“If an Athlete or other Person obstructs or delays an investigation (e.g., **by providing false, misleading or incomplete information or documentation and/or by tampering or destroying any documentation or other information that may be relevant to the investigation**), proceedings may be brought against them for violation of Rule 2.5 (Tampering or Attempted Tampering)”*.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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Panel's findings (definition of Tampering):

- **Intent:** commission of a violation of Rule 2.5 2021 WA ADR always requires satisfactory proof that the offender **intended** to subvert the investigation, even if he/she was unaware that he/she was violating an anti-doping provision.
- However: different forms of intent.
- Intent does not need to be direct in the sense that subverting the doping control process was the sole and only driving motive behind the athlete's actions => it is sufficient that the athlete recognizes the consequences of his/her actions and accepts that such consequences may subvert the Doping Control process.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021 WADA Code

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Panel's findings – did the Athlete commit and ADRV of Tampering?

- The Panel found that the alteration of the medical procedure's date was clearly capable of subverting the Doping Control Process, ***“as it would very probably have had a major impact on the acceptance, or rejection, of the Athlete's explanation of the Missed Test”***.
- Alteration of the dates on the medical note not only to be considered as a falsification of document under Rules 2.5 and 5.7.9 of the WA ADR, but also as a behavior tending to / being capable of subverting the Doping Control Process as it was intended to favour and give additional support to the explanations given by the Athlete.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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Panel's findings – did the Athlete commit and ADRV of Tampering?

- **Intent?** Yes => alteration on three medical notes on two separate occasions ; Panel does not accept that the Athlete considered not necessary to seek for confirmation of the true date of the medical procedure (contacting the Clinic, emails, phone calls, SMS records, etc.)
- Panel found the Athlete's defense contradictory: claims that no trust in the Clinic anymore, however: still have appointments at the same Clinic, with the same doctor further to postoperative complications, etc. => even in case of lack of trust, Athlete should have enquire with the Clinic about the exact date of the medical procedure.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021 WADA Code

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Panel's findings – did the Athlete commit and ADRV of Tampering?

- **Psychological effects** on the Athlete? No => Panel found that the Athlete had failed to prove (i) the existence of the alleged psychological condition and (ii) the causal nexus between such psychological condition and the person's conduct.
- Psychological effect of an abortion vary greatly from a person to another person => different reactions => **case-by-case analysis**.
- Reports provided by the Athlete based only on short conversations, Athlete's clinical record not taken into consideration => report is general and generic, rather than **personal** and **individual**.
- Panel concludes that the WA discharged its burden to prove the commission of an ADRV by the Athlete; the Athlete failed to comfortably convince the Panel that the psychological effects of the abortion made her unable to comprehend the consequences of her actions.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021 WADA Code

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Panel's findings – Athlete's degree of fault

- **Sanction?** Panel must take into consideration a first ADRV committed by the Athlete (Whereabouts Failure) => 1-year period of ineligibility.
- Article 10.3.1 WA ADR: ***“For violations of Rule 2.3 or Rule 2.5, the period of Ineligibility will be four (4) years except: (i) in the case of failing to submit to Sample collection, if the Athlete can establish that the commission of the anti-doping rule violation was not intentional, the period of Ineligibility will be two (2) years; (ii) in all other cases, if the Athlete or other Person can establish exceptional circumstances that justify a reduction of the period of Ineligibility, the period of Ineligibility will be in a range from two (2) years to four (4) years depending on the Athlete's or other Person's degree of Fault; or (iii) in a case involving a Protected Person or Recreational Athlete, the period of Ineligibility will be in a range between a maximum of two (2) years and, at a minimum, a reprimand and no period of Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault”.***



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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Panel's findings – exceptional circumstances & Athlete's degree of fault

- Basic sanction => 4 years
- “Exceptional Circumstances” allowing a sanction from 2 to 4 years?
- No clear definition of “Exceptional Circumstances”, but **“must be interpreted with the greatest possible care, so as only to include very unusual or abnormal situations”** and the aim is **“to ascertain whether the conduct at issue does, or does not, fall within a range of events that are so clearly beyond the bounds of “normal” or “foreseeable” conduct, that the imposition of a Period of Ineligibility of 2 to 4 years is justified”**.
- In *casu*: high level athlete (Olympic medalist), must act with great diligence to avoid the commissions of ADRV.
- Panel found that the Athlete’s **“conduct betrays a certain level of psychological disturbance which does not, however, alter the seriousness of her acts and the fact that she committed an ADRV”**.



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TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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Panel's findings – exceptional circumstances & Athlete's degree of fault

- Falsification of the medical notes on 3 occasions + failure to seek for confirmation of the abortion's date => blatant lack of diligence, "***which is abnormal for any athlete at this competitive level***"
- Psychological condition of the Athlete does not vitiate her intent to subvert the Doping Control Process, but these psychological factors amount to an abnormality that was "***not within the bounds of normal conduct***".
- **Conclusion:** Exceptional Circumstances justifying to impose a reduced sanction within a range from 2 to 4 years



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TRIBUNAL ARBITRAL DEL DEPORTE

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Panel's findings – exceptional circumstances & Athlete's degree of fault

- **Degree of fault?** Application of the Cilic case to the case at stake: “*considerable*” => 48 to 40 months; “*normal*” => 40 to 32 months; “*light*” => 32 to 24 months.
- Objective analysis: from a normal person's point of view, the Athlete acted with a considerable degree of fault.
- Subjective analysis: various aspects strongly indicates that the Athlete's faculties were negatively affected further to her abortion.
- Exceptional Circumstances are closely linked to the subjective aspect of the case => “normal degree of fault” => **3-year** period of ineligibility.



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TRIBUNAL ARBITRAL DEL DEPORTE

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Panel's findings – period of ineligibility

- 3-year (Tampering) + 1-year (first ADRV – Whereabout Failure) => 4-year period of ineligibility
- Application of Article 10.9.1. (a) (ii) WA ADR => period on ineligibility within the range 4 to 6 years, taking into account all the circumstances of the case + Athlete's degree of fault with respect to the second offence => period of ineligibility of **5 years**.
- **Starting date of the sanction?** Panel found that they have been substantial delays not attributable to the Athlete during the process (Rule 10.13.1 of the 2021 WA ADR) => period of ineligibility starts as of 15 August 2021, i.e. the day after the AIU Interview.
- **Disqualification of results:** although no use by the Athlete of a prohibited substance, the Panel finds no reasons not to disqualify all competitive result prior to 15 August 2020 (Rule 10.10 of the 2021 WA ADR) => all competitive results obtained from 13 February 2020 to 14 August 2020 are disqualified.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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WADA Code

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III. Substantial assistance

CAS 2021/A/8296 World Anti-Doping Agency v. Fédération Internationale de Football Association & Vladimir Obukhov

Factual background:

- Player underwent an out-of-competition doping control on 20 March 2013 in Novogork, Russia (sample No. 2783469).
- 30 August 2013: Moscow Laboratory reported in ADAMS a negative result for the sample No. 2783469
- 11 March 2021: FIFA notification regarding a potential ADRV sent to the Player => sample No. 2783469, although reported as negative in ADAMS, resulted in an AAF for the prohibited substance of **Methandienone** (S1.1a, Exogenous Anabolic Androgenic Steroids (AAS) => compelling evidence that AAF covered up by means of “alternative disappearing positive methodology (“DPM”).



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

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III. Substantial assistance

CAS 2021/A/8296 World Anti-Doping Agency v. Fédération Internationale de Football Association & Vladimir Obukhov

Factual background:

- 22 March 2021: Player admitted the ADRV + expressed intention to provide substantial assistance to FIFA pursuant to the FIFA ADR => sophisticated doping scheme at FC Torpedo Moscow => Player has information which can result in discovering ADRV committed by another Person.
- 24 March 2021: opening of disciplinary proceedings against the Player + Player given time to provide information about other possible ADRV
- 4 May 2021: information provided by the Player => Players took medication (allegedly vitamins) upon recommendation from the Team Doctor and his staff ; expiry dates on the prescribed medications erased manually. After return from a training camp in Turkey in March 2013 => Team Doctor continued to give the players medications (allegedly vitamins), started injection (allegedly glucose matrix) and ordered the players to drink an unidentified substance.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021 WADA Code

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III. Substantial assistance

CAS 2021/A/8296 World Anti-Doping Agency v. Fédération Internationale de Football Association & Vladimir Obukhov

Factual background:

- 27 May 2021: “Cooperation Agreement” proposed by FIFA to the Player further to his credible and substantial assistance
- 4 June 2021: Player provisionally suspended by FIFA in order to avoid any irreparable harm that might be caused by any delay in the negotiation and conclusion of the Cooperation Agreement
- 11 June 2021: Cooperation Agreement ratified by the FIFA Disciplinary Committee and the Player.
- 14 July 2021: the FIFA DC issued the Appealed Decision => period of ineligibility of 6 months imposed on the Player starting from 2 June 2021 and ending up on 2 December 2021
- 20 August 2021: FIFA forwarded the Appealed Decision to WADA.
- 8 September 2021: WADA filed its Statement of Appeal with the CAS challenging the Appealed Decision.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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III. Substantial assistance

CAS 2021/A/8296 World Anti-Doping Agency v. Fédération Internationale de Football Association & Vladimir Obukhov

Panel's findings:

- WADA requested that a 2-year period of ineligibility be imposed on the Player as it shall be considered that the Player did not provide Substantial Assistance and that FIFA made 3 mistakes.
- Mistake #1: Substantial Assistance based on mere speculations given by the Player; no charge has been brought against the Team Doctor; no sufficient information to initiate, still less successfully to prosecute, an ADRV against another person or persons.
- Mistake #2: FIFA decided to “reduce” the sanction as opposed to “suspend” part of the period of ineligibility.
- Mistake #3: FIFA applied the maximum “reduction” of 75% based on purely speculations, without providing and concrete/convincing evidence => Player failed to adduce evidence to establish the source of the prohibited substance in his body + information provided by the Player led to no other ADRV being imposed/charged.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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III. Substantial assistance

CAS 2021/A/8296 World Anti-Doping Agency v. Fédération Internationale de Football Association & Vladimir Obukhov

Panel's findings:

- Burden on proof => WADA seeks to establish that the Appealed Decision was wrong => it is for WADA to convince the Panel in this respect.
- Deference to be given to the discretion exercised by FIFA: Article 76 (2) of the 2021 FIFA ADR: ***“In making its decision, CAS does not need to give deference to the discretion exercised by the body whose decision is being appealed”*** => does not bar the Panel to give deference, but affords discretion to the Panel in this respect.
- In *casu*, sanction was, to a certain extent, “bargained” with the Player, including with respect to the provision of information which assisted FIFA to determine that the totality of the assistance provided amounted to Substantial Assistance => exercise of FIFA’s discretion shall be afforded some deference as to its determination of the length of the period of ineligibility => in line with the recognition of the freedom of an association to “govern” the relations with its members, within the limits of the applicable rules => however not excluding/limiting the Panel’s power to review the facts and the law of the case (Article R57 of the Code).



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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III. Substantial assistance

CAS 2021/A/8296 World Anti-Doping Agency v. Fédération Internationale de Football Association & Vladimir Obukhov

Panel's findings – did the Player provide Substantial Assistance?:

- Article 20 of the 2012 FIFA ADR (not materially modified by the 2021 version currently in force): *“1. Prior to a final decision being appealable ... or the expiration of the time to appeal, the FIFA Disciplinary Committee may **suspend** a part of the period of Ineligibility imposed in an individual case where the Player has provided Substantial Assistance to FIFA, an Association or other Anti-Doping Organisation, criminal authority or disciplinary body, which results in FIFA, the Association or other Anti-Doping Organisation discovering or establishing an anti-doping rule violation by another Person or which results in a criminal or disciplinary body discovering or establishing a criminal offence or a breach of professional rules by another Person.*
- 2. The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Player and the significance of the Substantial Assistance provided by the Player to the effort to eliminate doping in sport. No more than three-quarters of the otherwise applicable period of Ineligibility may be suspended. If the otherwise applicable period of Ineligibility is a lifetime, the non-suspended period under this section must be no less than eight years”*



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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III. Substantial assistance

CAS 2021/A/8296 World Anti-Doping Agency v. Fédération Internationale de Football Association & Vladimir Obukhov

Panel's findings – did the Player provide Substantial Assistance?:

- Comment on Article 10.7.1 of the 2021 WADC ***“The cooperation of Athletes, Athlete Support Personnel and other Persons who acknowledge their mistakes and are willing to bring other anti-doping rule violations to light is important to clean sport”***
- Fight against doping is a serious matter, and only **effective assistance** in its pursuit can entitle an athlete to obtain a benefit with respect to the ineligibility period he/she has to serve for his/her ADRV.
- Issue at stake => whether *“the information provided ... comprise[d] an important part of any case that is initiated, or, if no case is initiated, ... have provided a sufficient basis on which a case could have been brought”*
- Panel finds that, for this element to be satisfied, it was **not** necessary that the information given by the Player was in itself a sufficient basis to secure a finding of an ADRV.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021 WADA Code

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III. Substantial assistance

CAS 2021/A/8296 World Anti-Doping Agency v. Fédération Internationale de Football Association & Vladimir Obukhov

Panel's findings – did the Player provide Substantial Assistance?:

- a benefit is to be given to the Player for “*Substantial Assistance ... which results in ... **discovering or establishing** an anti-doping rule violation*” => Substantial Assistance may also result in “discovering” an ADRV– **irrespective** of its subsequent “establishment”, for which additional elements (such as a hearing of the accused) may be needed.
- It is not necessary that the information is a sufficient basis for a conviction, but only for the bringing of a case – which means that there is a likelihood, and not necessarily a certainty, of a violation.
- a simple indication of cooperation, which could hypothetically result in the discovery of an ADRV, is not sufficient for Substantial Assistance.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021 WADA Code

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III. Substantial assistance

CAS 2021/A/8296 World Anti-Doping Agency v. Fédération Internationale de Football Association & Vladimir Obukhov

Panel's findings – did the Player provide Substantial Assistance?:

- For Substantial Assistance to be found, **concrete** (and not merely speculative) information must be provided, which (at least) would be considered sufficient to bring a case – even though this information, however important, might need **further corroboration** in order to secure a finding against another person.
- The Panel found that the Player, in his Declaration - to be read together with the statements signed by four other individuals - gave details of a practice of the Doctor and the treatment he was made to undergo around the date on which he provided the urine sample that tested positive.
- Events with respect to another player of the Club, who tested positive for the same substance as the Player must be taken into consideration.
- The statements of the Doctor to the FUR (§ 16 above), however self-exculpating, indirectly confirm the credibility of the Player's indications regarding the medical routine followed at the Club. In other words, the Player's declarations appear to the Panel to offer "*a sufficient basis on which a case could have been brought*" against the Doctor: the fact that no case was eventually brought by FUR or FIFA goes beyond the Player's control and responsibility
- Cooperation given by the Player shall be considered as Substantial Assistance under Article 20 of the FIFA ADR.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

Fabien CAGNEUX | Managing Counsel, CAS ADD

III. Substantial assistance

CAS 2021/A/8296 World Anti-Doping Agency v. Fédération Internationale de Football Association & Vladimir Obukhov

Panel's findings – is the Player entitled to a “reduction” or a “suspension” of the period of ineligibility?:

- The Panel concurs with WADA's position: FIFA ADR only allow FIFA to “*suspend*” a portion of the ineligibility period, subject to later reinstatement if the Player ceased to co-operate.
- If FIFA DC wishes the Player to serve only a 6-month period of ineligibility => imposition of a sanction of 24 months, 18 months being suspended.
- Criteria to consider for the determination of the period of ineligibility to be suspended (non-exhaustive): number of individuals implicated, status of those individuals in the sport, scheme of **Trafficking** under Article 2.7 or **Administration** under Article 2.8, substance of method not readily detectible in Testing.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

Fabien CAGNEUX | Managing Counsel, CAS ADD

III. Substantial assistance

CAS 2021/A/8296 World Anti-Doping Agency v. Fédération Internationale de Football Association & Vladimir Obukhov

Panel's findings – is the Player entitled to a “reduction” or a “suspension” of the period of ineligibility?:

- FIFA clearly exceeded its power of discretion => applied a “reduction” in the maximum measure allowed by the rules (i.e. 18 months).
- Player's assistance not “very exceptional” => sufficient basis to bring charges against the Team Doctor, or at least to trigger further investigation about the Club's practice, but information provided did not lead to any ADRV being sanctioned or charged.
- Not of the significance that could support the maximum allowable suspension.
- However, Player promptly provided information in his possession about an ADRV that occurred 8 years ago => *de novo* power of the Panel: 2-year period of ineligibility of which **12 months** are suspended.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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IV. Protected Persons

CAS OG 22/08 – CAS OG 22/09 – CAS OG 22/10 IOC, WADA & ISU v. Kamila Valieva, RUSADA & ROC

Factual Background:

- 25 December 2021: during the 2022 Russian National Figure Skating Championships which took place in Saint Petersburg from 21 to 26 December 2021, the Athlete underwent an in-competition doping control test under the authority of RUSADA.
- On her DCF, Athlete disclosed that she was taking 3 substances, 2 of them being legible (l-carnitine and hypoxen).
- 7 February 2022: Athlete competed in the Team Event Free Skating at the OWG 2022 as a member of the ROC team, which ranked first.
- Still on 7 February 2022: issuance of an AAF for the presence of Trimetazidine (S4. Hormone and Metabolic Modulators) – non-specified substance; concentration estimated at 2.1 ng/ml.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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CAS OG 22/08 – CAS OG 22/09 – CAS OG 22/10 IOC, WADA & ISU v. Kamila Valieva, RUSADA & ROC

Factual Background:

- 8 February 2022: RUSADA notified the Athlete, WADA, IOC (through ITA) and ISU that the RM Process had been initiated; Athlete provisionally suspended on the basis of Articles 7.4.1 WADC and 9.4.1 of the Russian ADR on the same day.
- Still on 8 February 2022: ITA notified the Athlete of the implementation of her Provisional Suspension imposed by RUSADA.
- 9 February 2022: upon the Athlete's request a provisional hearing was held further to which the RUSADA Disciplinary Anti-Doping Committee lifted the provisional suspension imposed on the Athlete the day before.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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IV. Protected Persons

CAS OG 22/08 – CAS OG 22/09 – CAS OG 22/10 IOC, WADA & ISU v. Kamila Valieva, RUSADA & ROC

Panel’s findings – Protected Person:

- Definition (Russian ADR): ***“An Athlete or other natural Person who at the time of the Rules violation: (a) has not reached the age of sixteen years; (b) has not reached the age of eighteen years old and is not included in any Registered Testing Pool and has never competed in any International Event in an open category; or (c) for reasons other than age has been determined to lack legal capacity under applicable national legislation”.***
- Not disputed that the Athletes falls under lit. a) of the Russian ADR definition.
- WADC 2021 provides for a special regime for Protected Persons.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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CAS OG 22/08 – CAS OG 22/09 – CAS OG 22/10 IOC, WADA & ISU v. Kamila Valieva, RUSADA & ROC

Panel’s findings – Protected Person (examples of special treatments):

- **Article 10.3.1** reduces period of ineligibility for Whereabouts Failure or Evading Sample Collection from 4 years to 2 years and permit a reprimand;
- **Article 10.3.3:** Tampering or Attempted Tampering and Administration or Attempted Administration => *“violation involving a **Protected Person** shall be considered a **particularly serious violation** and, if committed by **Athlete Support Personnel** for violations other than for Specified Substances, shall result in **lifetime Ineligibility** for Athlete Support Personnel”.*



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

Fabien CAGNEUX | Managing Counsel, CAS ADD

IV. Protected Persons

CAS OG 22/08 – CAS OG 22/09 – CAS OG 22/10 IOC, WADA & ISU v. Kamila Valieva, RUSADA & ROC

Panel's findings – Protected Person (examples of special treatment):

- **Article 10.6.1.3:** reduction of the punishment for Protected Persons for **all substances other than Substances of Abuse** to the range of a reprimand to 2 years, if they are able to show No Significant Fault or Negligence involving only Specified Substances (other than a Substance of Abuse).
- **Article 14.3.7:** mandatory Public Disclosure not required in case of ADRV committed by a Protected Person. **Optional** Public Disclosure shall be **proportionate** to the facts and the circumstances of the case.
- **Fault for Protected Persons:** *“special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk.”*
- **No Fault or Negligence:** *“Except in the case of a Protected Person or Recreational Athlete, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered the Athlete’s system.”*



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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IV. Protected Persons

CAS OG 22/08 – CAS OG 22/09 – CAS OG 22/10 IOC, WADA & ISU v. Kamila Valieva, RUSADA & ROC

Panel's findings – Protected Person & Provisional Suspension:

- Article 9.4.1 of the Russian ADR => immediate and mandatory provisional suspension in case of presence of non-specified substance (or use prohibited method).
- Article 9.4.3 of the Russian ADR => mandatory provisional suspension may be eliminated if an Athlete provides evidence that the violation was **most** likely caused 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.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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IV. Protected Persons

CAS OG 22/08 – CAS OG 22/09 – CAS OG 22/10 IOC, WADA & ISU v. Kamila Valieva, RUSADA & ROC

Panel's findings – Protected Person & Provisional Suspension:

- Russian ADR and WADC 2021 => silent on Provisional Suspension imposed on Protected Persons, while several provisions of these regulations provide for different standards of evidence and lower sanctions in the case of Protected Persons.
- Highly relevant here as the Athlete is a Protected Person and is potentially subject to a minimum possible sanction of a public reprimand in the event she could establish No Significant Fault or Negligence.
- The Panels notes that “[T]he WADC 2021 does not provide an exemption to a mandatory Provisional Suspension for a non-specified substance used by a Protected Person even though the ultimate sanction range for the Protected Person is the same as for other categories of athletes who can avoid a mandatory Provisional Suspension. Put differently, as a Protected Person, Ms Valieva is **subject to the same ultimate sanction as other athletes who avoid a mandatory Provisional Suspension**. But only Protected Persons can potentially receive a public reprimand and no period of ineligibility and yet be subject to a mandatory Provisional Suspension preventing them from competing for months while their case is being handled. This different and harsher treatment for Protected Persons is **inconsistent with the soft-expressed intent of the Code drafters to make the Code apply more leniently and flexibly to Protected Persons in light of their age and inexperience, and their diminished responsibility for rule violations**”.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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CAS OG 22/08 – CAS OG 22/09 – CAS OG 22/10 IOC, WADA & ISU v. Kamila Valieva, RUSADA & ROC

Panel's findings – Protected Person & Provisional Suspension:

- Evidence brought at the hearing that the WADC 2021 drafting committee had apparently **not considered the issue of Protected Persons in the context of Provisional Suspensions** and whether the standards should vary in the case of Provisional Suspensions involving Protected Persons.
- Articles 9.4.1 and 9.4.3 of the Russian ADR shall not be considered as standalone provisions but must be considered in the context of the rest of the Russian ADR to ensure their consistent application.
- The Panel found that “[...] *under the relevant provisions of the WADC 2021 dealing with the notion of Fault, it is not just possible but likely that Protected Persons will receive anti-doping sanctions at the level of a reprimand or at the bottom end (a few months) of the 0 to 2 years possible, principally because of their lack of legal capacity and their youth and immaturity. [...] The Panel does not make any findings in this regard; that is to be done by the usual anti-doping results management process given the very narrow remit of this Panel and what it was called upon to consider. Having said that, it is clear that even if that process finds a doping rule violation, **the ability to show intention or fault of a minor athlete such as this one might be difficult, and, lacking that intention or fault, the sanction is likely to be on the low end of the range.** Strict application of the rules as written for Provisional Suspensions would almost certainly in every case involving a Protected Minor result in a Provisional Suspension longer than the likely period of actual suspension. This is not satisfactory from a legal point of view.*”



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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CAS OG 22/08 – CAS OG 22/09 – CAS OG 22/10 IOC, WADA & ISU v. Kamila Valieva, RUSADA & ROC

Panel's findings – Protected Person & Provisional Suspension:

- Panel concludes that there is a **lacuna** both in the WADC 2021 and the Russian ADR 2021.
- CAS 2006/A/1025: “[W]hen there is a gap or lacuna in the WADC, that gap or lacuna must be filled by the Panel... applying the overarching principle of justice and proportionality on which all systems of law, and the [WADC] itself, is based”.
- Panel ≠ rule maker => prerogative belonging to the sporting bodies, but emphasizes that, in this context, it shall interpret the rules and how they work and considered that **“the failure of the antidoping authorities to reconcile the special rules they have created for Protected Persons and rules they have created for athletes who are not Protected Persons requires the involvement of this Panel”**.
- The Panel finds that in cases involving Protected Persons, their Provisional Suspensions should be evaluated as **optional** Provisional Suspension under Article 7.4.2 WADC and the Panel determined that the Athlete **“was entitled to benefit from being subject to an optional Provisional Suspension as a Protected Person and that, under the facts and circumstances, the option not to impose a Provisional Suspension should have been exercised so that she would not be prevented to compete in the OWG 2022”**.



TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

First jurisprudential findings after the entry into force of the 2021
WADA Code

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TAS / CAS

TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

THANK YOU FOR YOUR ATTENTION !

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