Protecting the Vulnerable: Reassessing Mandatory Provisional Suspensions for Protected Persons Under the World Anti-Doping Code

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ABSTRACT

The most recent update to the World Anti-Doping Code (WADC), which came into force in 2021, introduced the idea that certain athletes and persons should be entitled to modified anti-doping rules due to their age, inexperience, and capacity. As such, these athletes and persons, referred to as Protected Persons, face different entitlements, obligations, and sanctions in certain situations. However, no explicit alteration of the rules relating to mandatory provisional suspensions with respect to Protected Persons was added. During the 2022 Beijing Winter Olympics, the Court of Arbitration for Sport (CAS) concluded this represented a gap in the WADC after 15-year-old figure skater Kamila Valieva challenged the validity of the mandatory provisional suspension imposed on her. The CAS determined that as a Protected Person, any provisional suspension imposed on her should be discretionary.

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This paper explores the reasoning of the CAS decision and considers how it aligns with the foundational principles of the WADC, the purpose of the Protected Person regime, and the treatment of non-Protected Persons. Providing Protected Persons with relief from mandatory provisional suspensions is consistent with the principle of proportionality and the human rights of children, the guiding principles of the WADC, and protecting immature athletes from the consequences of doping, the main purpose of the Protected Person regime. Furthermore, it is consistent with the treatment of other athletes, as a growing number have not been subjected to mandatory provisional suspensions. To provide better safeguards for vulnerable athletes, the forthcoming update to the WADC should explicitly adopt a discretionary provisional suspension regime in cases with Protected Persons.

I. INTRODUCTION

Mere days after smashing the world record he had previously set, track superstar Ben Johnson was sent home from the 1988 Summer Olympics in Seoul in disgrace without a gold medal or a place on the Canadian National Team.[1] The cause of this fall from grace: a routine anti-doping test that took place after his record-breaking run. An analysis of the urine sample provided by Johnson confirmed the presence of stanozolol, an anabolic steroid, in his system. Stanozolol, like many other performance-enhancing substances, was, and continues to be, a prohibited substance under anti-doping rules. As a consequence of its presence, Johnson was forced to leave Seoul stripped of his gold medal and clean reputation.

However, Johnson was not the only athlete at the 1988 Summer Olympics who engaged in doping; he was not even the only athlete in that particular Men's 100m Race who engaged in doping. Among the eight men who ran in that specific race, six of them, including the man who took gold after Johnson's disqualification, Carl Lewis, violated anti-doping measures at some point in their career.[2] Johnson's race, often labelled "The Dirtiest Race in History", along with other high-profile doping scandals, was a wake-

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1 SI Staff, "The Loser", *Sports Illustrated* (3 October 1988), online: <vault.si.com/vault/1988/10/03/the-loser> [perma.cc/A5JA-FXR4].

2 Robert Moore, *The Dirtiest Race in History: Ben Johnson, Carl Lewis and the 1988 Olympic 100m Final*, 1st ed (London: Bloomsbury, 2012).

up call to sports organizers around the world.[3] Doping had become a serious problem, and changes were needed for the sake of fairness, the integrity of sports, and the health of athletes.

To address widespread doping across a multitude of sports, organizations, and nations, the International Olympic Committee (IOC) and other key stakeholders banded together to establish the World Anti-Doping Agency (WADA) in 1999.[4] In 2003, WADA published its first World Anti-Doping Code (WADC), which provided a standard set of anti-doping rules that its signatories were required to adopt and implement. Today, the WADC has been nearly universally adopted with hundreds of International Federations, Major Event Organizers, National Olympic and Paralympic Committees, and National Anti-Doping Organizations accepting the requirements of the WADC.[5] As such, practically all elite athletes in all sports are bound by the anti-doping rules set out in the WADC.

Central to the WADC is a commitment to fairness and the integrity of sports. In line with this, the Introduction to the 2003 WADC makes multiple references to all sport participants being bound by anti-doping rules by virtue of taking part in events governed by the WADC.[6] However, in the pursuit of standardization and fairness, other important values such as justice and the protection of vulnerable athletes from the harm of doping were overshadowed and forgotten. While the consistent application of the rules contained in the WADC appears to provide a level playing field for all athletes, in practice, it ensures that certain athletes, such as child athletes, are subject to punitive measures that fail to consider their special characteristics and needs. As a result, while the WADC strives to promote fairness and equality, it actively punishes the athletes most vulnerable to doping instead of protecting and educating them.

A rigid and consistent application of anti-doping rules in cases involving child athletes was common practice before the advent of the WADC. At

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3 Paul David, *A Guide to the World Anti-Doping Code: The Fight for the Spirit of Sport*, 3rd ed (Cambridge: Cambridge University Press, 2017) at 1.

4 *Ibid* at 1-2.

5 WADA, "Code Signatories" (last visited 23 July 2025), online: <www.wada-ama.org/en/what-we-do/world-anti-doping-code/code-signatories> [perma.cc/Q4LL-RC6U].

6 WADA, *World Anti-Doping Code* (Montreal: WADA, 2003) [*WADC* 2003].

the age of 16, Andreea Raducan, a Romanian gymnast, competed in the 2000 Summer Olympics in Sydney.[7] Following her gold medal-winning performance during the Women's Team Final, Raducan reported cold and flu symptoms to the Romanian team's physician.[8] To help alleviate her symptoms, Raducan was provided with an over-the-counter cold and flu medication by her team's doctor.[9] However, this medication contained pseudoephedrine, a prohibited substance.[10] After taking the medication, Raducan continued to compete in gymnastics events at the Olympics.

The presence of pseudoephedrine was found in the urine sample Raducan provided anti-doping officials with after she won the gold medal of the Women's Individual All-Around Event. Raducan was immediately disqualified from the event and stripped of her medal.[11] Raducan challenged this decision; however, she was unsuccessful, and the Court of Arbitration for Sport (CAS) held that illness, low body weight, and a young age were irrelevant considerations in determining whether or not an athlete had engaged in doping.[12] Raducan and other child athletes competing before the enactment of the WADC received the same treatment as any other athlete, without consideration for their young age and the vulnerabilities that come with it.

The regular application of standard anti-doping rules to cases involving children and other vulnerable athletes continued once the WADC was implemented. In 2016, during her debut season on the Junior Grand Prix circuit, 13-year-old South Korean figure skater Yelim Kim was obligated to provide doping control officials with a post-competition sample.[13] However, Kim was unaware of this and returned to her hotel without

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7 *Andreea Raducan v International Olympic Committee* (CAS OG 00/011), online (pdf): <jurisprudence.tas-cas.org/Shared%20Documents/OG%2000-011.pdf> [perma.cc/GTM9-3SUQ].

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 *Ibid* at para 21-23.

13 *International Skating Union v Yelim Kim & Korean Skating Union* (Case No 2016-03), (ISU Disciplinary Commission), online (pdf): <isu-d8g8b4b7ece7aphs.a03.azurefd.net/isudamcontainer/CMS/fulldisciplinarydecisions/pdf/case201603isuvskimfinaldecision251120161731498042.pdf> [perma.cc/EZ86-33UX].

supplying the required urine sample.[14] Kim was subject to disciplinary measures for her mistake. In its decision on the matter, the International Skating Union Discipline Committee made it clear that anti-doping rules applied to all competitors, even if they were very young and inexperienced:

> [The] fact that the Alleged Offender was very young at the time of the anti-doping control (13 years old) is in this respect irrelevant.... If a young athlete is deemed by his parents mature enough to participate in an international event, she must be deemed mature enough to understand the applicable anti-doping rules.[15]

In the absence of clear rules that stated the contrary, adjudicators applying the WADC routinely treated children in the same manner as adults, ignoring the vast differences in their knowledge, control, and development, in favour of equal treatment.

Even at events like the Youth Olympic Games, where eligible competitors are all under the age of eighteen, young athletes have continued to be held to strict standards that are minimally different than the standards applied to adult athletes. At the 2010 Youth Olympics, Ecuadorian wrestler Johnny Pilay, who placed fifth in the Men's Freestyle 63kg event, provided anti-doping officials with a urine sample that contained furosemide, a prohibited substance.[16] Even though Pilay was only 17 years old at the time, Ecuador's Anti-Doping Commission sanctioned him with a two-year suspension, and the Disciplinary Commission of the IOC rescinded his Youth Olympics participation certificate after disqualifying him from the event.[17]

At the same Youth Olympic Games, 17-year-old Uzbek wrestler Nurbek Hakkulov, who won the silver medal in the Men's Greco-Roman 50kg event, was also discovered to have furosemide in his sample.[18] In light of

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14 *Ibid.*

15 *Ibid* at 3.

16 IOC Disciplinary Commission, "IOC Disciplinary Commission Decision Regarding Johnny Pilay Born On 17 May 1993, Athlete, Ecuador, Wrestling" (October 2010), online (pdf): <stillmed.olympics.com/media/Documents/News/2010/10/SYOG-001-Decision-Disciplinary-Commission.pdf> [perma.cc/8UQK-9AEZ].

17 *Ibid.*

18 IOC Disciplinary Commission, "IOC Disciplinary Commission Decision Regarding Nurbek Hakkulov Born on 13 March 1993, Athlete, Uzbekistan, Wrestling" (October 2010), online (pdf): <stillmed.olympics.com/media/Documents/News/2010/10/SYOG-002-Decision-Disciplinary-Commission.pdf> [perma.cc/CJL9-RFA3].

this, the Disciplinary Commission of the IOC disqualified Hakkulov from the event and withdrew the medal, diploma, and participation trophy that had been awarded to him.[19] Even though the event was only open to young athletes, anti-doping rule violations were addressed using the same framework that is applied to adult competitors, meaning child athletes largely faced the same consequences that older athletes would have faced in the same circumstances.

While the creation of the WADC has been instrumental in standardizing anti-doping rules and promoting drug-free sport, it has failed to adequately address doping infractions involving child athletes like those mentioned above. The 2003 WADC did not provide any guidance on addressing anti-doping rule violations with young athletes, with the exception of introducing lifetime bans for support staff who engage in trafficking or administering prohibited substances to minors.[20] The 2009 edition of the WADC took some additional steps to address child athletes specifically by including interpretive commentary that recognizes age and experience may be relevant to determining an athlete's degree of fault, but reiterates that minors are not given special treatment under the regime.[21] Until 2021, no version of the WADC addressed doping in young and vulnerable athletes in any substantial way. Consequently, all athletes governed by the WADC have been subject to the same anti-doping standards for the last two decades regardless of their age, experience, or mental capacity.

These early attempts to develop a comprehensive anti-doping regime have missed the mark, resulting in the protection of child athletes being overlooked in favour of a standardized set of rules for all athletes. This is particularly problematic, as common performance-enhancing substances, including caffeine, steroids, and stimulants, can have a greater impact on the health and wellness of child athletes than adult athletes. Caffeine consumption can result in headaches and insomnia, with children being more susceptible to these negative effects.[22] Androgen and anabolic steroid use in children can result in stunted growth due to irregular bone growth

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19 *Ibid.*

20 *WADC* 2006, *supra* note 6, art 10.4.2.

21 WADA, *World Anti-Doping Code* (Montreal: WADA, 2009) at 58.

22 David R Mottram, *Drugs in Sport*, 5th ed (London: Routledge, 2011) at 285; N Armstrong & A M McManus, *The Elite Young Athlete* (New York: Krager, 2011) at 55.

and development.[23] Ephedrine use is associated with high blood pressure, heart palpitations, and seizures.[24] The effects of doping on the health of young athletes can result in a multitude of unpleasant complications.

The most serious complication of doping that young athletes face is death. The sudden deaths of heptathlete Birgit Dressel and cyclists Johannes Draaijer and Tom Simpson, all of whom were in their 20s, have been attributed to the various performance-enhancing substances they consumed throughout their youth to be world-class competitors.[25] More recently, doping has been suspected to have played a role in the unexpected death of 17-year-old Qin Wenyi, a Chinese swimmer with no known health issues.[26] The pursuit of peak performance through doping can come at the cost of a young athlete's life and well-being, yet children have largely been ignored in modern anti-doping regulations.

Despite growing recognition that children are among the most vulnerable groups affected by doping, their rights and needs have largely been an afterthought in anti-doping schemes.[27] Ultimately, treating child athletes as mature adults and imposing lengthy suspensions on them fails to adequately address anti-doping rule violations involving minors. In addition to being more sensitive to the health effects of doping, there exists an inherent power imbalance between young athletes and members of their entourage, including parents, coaches, and doctors, that differentiates their doping from that of mature competitors. Compared to experienced adult

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23 *Ibid* at 57.

24 *Ibid* at 184.

25 Sarah Kettler, "9 Doping Scandals That Changed Sports", *History* (6 August 2024), online: <www.history.com/news/doping-scandals-through-history-list> [perma.cc/VC45-6EES]; Lawrence M Fisher, "Stamina-Building Drug Linked to Athletes' Deaths", *The New York Times* (19 May 1991), online: <www.nytimes.com/1991/05/19/us/stamina-building-drug-linked-to-athletes-deaths.html> [perma.cc/ZX39-RN3]; "Heptathlete Birgit Dressel: An Athlete Dying Young", *Time* (10 October 1988), online: <time.com/archive/6713455/heptathlete-birgit-dressel-an-athlete-dying-young/> [perma.cc/PR2Q-JCC4].

26 Amanda Coletta, "Swimming competition plagued by doping, top coaches say", *CBC* (14 December 2015), online: <www.cbc.ca/sports/olympics/summer/aquatics/swimming-doping-fina-coaches-1.3361697> [perma.cc/C87K-QB2L].

27 Marcus Campos, Jim Parry & Irena Martínková, "WADA's Concept of the 'Protected Person' – and Why it is No Protection for Minors" (2023) 17:1 Sport, Ethics & Philosophy 58.

athletes, young athletes are less likely to be educated on the risks associated with doping.[28] They are also more likely to rely on the adults around them to make decisions.[29] Despite this greater reliance on others due to their limited knowledge and capacity, it is young competitors who bear the brunt of the consequences of doping, in terms of sanctions and health, while coaches and other entourage members escape punishment. Acknowledging the role support personnel play in doping is critical for fostering safe training environments and a culture that does not support dangerous doping in young athletes. However, early editions of the WADC have mainly concentrated on ensuring that athletes are subject to consistent rules and sanctions, regardless of their vulnerability.

After a decade of leaving child athletes with little protection, the 2015 WADC introduced progressive changes to the modern anti-doping framework. Under the 2015 WADC, athletes under the age of 18 had reduced evidentiary burdens and greater privacy rights than other athletes.[30] The 2015 WADC also required signatories to automatically launch investigations into the entourages of minors who were found to be in breach of anti-doping rules.[31] Building off of these developments, the 2021 version of the WADC expanded the preferential rules for child athletes and allowed other vulnerable athletes to benefit from this treatment by creating a new class of athletes and persons: Protected Persons. A Protected Person is defined in the 2021 WADC as:

> An Athlete or other natural Person who at the time of the anti-doping rule violation: (i) has not reached the age of sixteen (16) years; (ii) has not reached the age of eighteen (18) years and is not included in any Registered Testing Pool and has never competed in any International Event in an open category; or (iii) for reasons other than age has been determined to lack legal capacity under applicable national legislation.[32]

Protected Persons are entitled to special treatment because they may not appreciate and understand the rules and consequences laid out in the 2021 WADC by virtue of their age, inexperience, and intellectual abilities.[33]

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28 Armstrong & McManus, *supra* note 23 at 101-104.

29 *Ibid.*

30 WADA, *World Anti-Doping Code* (Montreal: WADA, 2015).

31 *Ibid*, *arts* 20.3.10, 20.5.9.

32 WADA, *World Anti-Doping Code* (Montreal: WADA, 2021) at 174 [*WADC* 2021].

33 *Ibid.*

Under this new regime, the most vulnerable athletes finally have some protection from heavy-handed anti-doping measures.

Yet even these special rules for Protected Persons fail to represent a complete regime that meets the needs of child athletes. The reason for this: the vast majority of the provisions of the 2021 WADC are left completely untouched. There are no safeguards in place for Protected Persons who dope intentionally, for instance. There are no explicit exceptions to mandatory provisional suspension requirements for Protected Persons either. These oversights give rise to wide gaps in the anti-doping regulation regime, which leaves immature and ignorant athletes open to harsh sanctions for breaking rules they do not fully understand, a policy decision that does not reflect the underlying belief that Protected Persons have reduced autonomy compared to non-Protected Persons.

In 2022, the CAS grappled with the Protected Person concept when figure skater Kamila Valieva, who was 15 years old at the time, was subject to a provisional suspension after a failed doping control test. In its analysis, the CAS determined that the lack of explicit special rules for Protected Persons in relation to mandatory provisional suspensions constituted a lacuna in the 2021 WADC.[34] While progress has been made in making anti-doping schemes more mindful of the distinct needs and vulnerabilities of minors in elite sports, such gaps indicate there is still additional progress to be made to ensure children are safeguarded against doping.

This research paper aims to provide a comprehensive analysis of the rationale behind the CAS decision in the case of Kamila Valieva and how it can offer greater protection to other child athletes who fall under the Protected Person classification. It begins with an in-depth exploration of the concept of a Protected Person, including the unique benefits and considerations afforded to individuals within this classification. The subsequent section provides a thorough review of Valieva's anti-doping rule violation, detailing the relevant facts, parties involved, and key arguments presented. The paper then delves into a detailed examination of the CAS decision, accompanied by an analysis of the varying perspectives on its

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34 *International Olympic Committee & World Anti-Doping Agency & International Skating Union v Russian Anti-Doping Agency & Kamila Valieva & Russian Olympic Committee* (CAS OG 22/008 & 22/009 & 22/010) at para 200, online (pdf): <jurisprudence.tas-cas.org/Shared%20Documents/OG%2022-008,%20009,%20010.pdf> [perma.cc/7UE6-RZCY] [*Valieva*].

validity and implications for modern anti-doping law. Following this, the discussion shifts to how the CAS decision aligns with the principles of the 2021 WADC, the objectives underpinning the Protected Person regime, and the trends in the application of mandatory provisional suspensions to non-Protected Persons.

THE PROTECTED PERSON REGIME

The Protected Person regime in the 2021 WADC is designed to offer specific accommodations for athletes who are minors or otherwise considered to be vulnerable under its definition. Introduced to support the values of fairness and proportionality, this regime acknowledges that athletes under the age of 16, or 18 in limited situations, and athletes with certain intellectual limitations may have an insufficient awareness of both performance-enhancing substances and anti-doping rules. As such, the 2021 WADC allows for more lenient sanctions and a tailored adjudication process in cases involving Protected Persons, taking into account their level of responsibility, knowledge, and experience. The regime seeks to strike a balance between promoting integrity in sports while ensuring particularly vulnerable competitors are afforded some preferential treatment that recognizes their distinct circumstances. The following section will explore the specifics of the protection available to Protected Persons.

A. *FAULT AND SANCTIONS*

One of the most significant ways that Protected Persons are treated differently is when it comes to establishing a finding of fault. Under the 2021 WADC, fault is determined in light of the experience of the athlete, the degree of risk that the athlete should have been aware of, and how they managed that risk.[35] Decision makers are also required to consider whether or not the athlete in question is a Protected Person.[36] Depending on these factors, athletes may be eligible for a reduced sanction. Furthermore, the burden of proof required to establish a finding of no fault or negligence, or no significant fault or negligence, both of which attract lesser sanctions, is reduced for Protected Persons. In most cases, an athlete is required to prove on the balance of probabilities how the prohibited substance entered their

35 *WADC* 2021, *supra* note 32 at 168-169.

36 *Ibid.*

system. This is not the case for a Protected Person. Unlike their fellow competitors, a Protected Person is not required to establish how the prohibited substance entered their system.[37] This helps Protected Persons access reduced penalties, which may be more appropriate given their age and capacity.

The level of fault is an important component in determining the applicable sanction. When an athlete is not at fault, or not significantly at fault, they are able to receive a shorter sanction. While all athletes can receive a reduced sanction if they have little to no fault, the shortest penalties are reserved for Protected Persons. The 2021 WADC establishes that if a Protected Person is found to have no significant fault or negligence, the range of available sanctions includes, at a minimum, a reprimand with no period of ineligibility to a maximum period of ineligibility of two years.[38] However, unlike other athletes, Protected Persons are eligible for less significant sanctions solely because of their status as a Protected Person. Article 10.3.1 reduces the required 4-year period of ineligibility for violations of Article 2.3 and Article 2.5 to a maximum penalty of a 2-year period of ineligibility to a minimum of no ineligibility with a reprimand, for example.[39] This is particularly significant in sports where athletes only have a short time left in their careers or have upcoming events they plan to take part in, as these are not considered when reducing the period of ineligibility.[40]

These more lenient sanctions represent a shift away from the strict anti-doping regimes that preceded the 2021 WADC to a more proportionate scheme. Ensuring that the fault of Protected Persons is assessed in light of their age and vulnerability reflects the founding principle of the concept, which is that these athletes are less likely to engage in intentional doping, and instead are often victims of misinformation or are inadvertent rulebreakers.[41] The shift away from long periods of ineligibility also reflects the underlying belief that punitive measures are less appropriate for young

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37 *Ibid* at 172.

38 *Ibid*, art 10.6.1.3.

39 *Ibid.*

40 *Ibid* at 168-169.

41 Sarah Teetzel & Marcus Mazzucco, "Minor Problems: The Recognition of Young Athletes in the Development of International Anti Doping Policies" (2014), 31:8 Intl J History Sport 914.

athletes, whose careers could be unfairly compromised or even ended by stringent sanctions.[42]

B. *DISCLOSURE*

In addition to the modifications to the determination of fault and sanctions, Protected Persons have been granted greater privacy protection through alterations to the 2021 WADC's disclosure rules. Under Article 14.3.2 of the 2021 WADC, there is a requirement for the governing Anti-Doping Organization to disclose certain aspects of anti-doping rule violations to WADA and the public.[43] The information that must be disclosed includes the name and sport of the person who committed the anti-doping rule violation, the specific anti-doping rule that was broken along with the Prohibited Substance or Method, the consequences of the rule violation, and the result of any appellate decision. However, Article 14.3.7 provides an exemption to this requirement for Protected Persons.[44] Instead, any disclosure in cases involving Protected Persons is considered optional. In these cases, disclosure can still be made, but it must be proportionate to the facts and circumstances of the case.

C. *OTHER PARTIES*

The 2021 WADC has also instituted measures to keep Protected Persons safe from other people who violate anti-doping laws. Under Article 10.14.1, athletes who have been deemed ineligible for more than 4 years may partake in local events that do not contribute to official rankings after a period of 4 years, but they cannot work with Protected Persons in any capacity at these events.[45] In addition to this, Article 20.3.13 and Article 20.5.12 require International Federations and National Anti-Doping Organizations, respectively, to conduct automatic and mandatory investigations into the entourage of a Protected Person who has committed an anti-doping rule violation.[46] When a member of the support personnel of a Protected Person is guilty of trafficking, attempted trafficking, administration, or attempted administration of a Prohibited Substance or

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42 *Ibid.*

43 WADC 2021, *supra* note 32.

44 *Ibid.*

45 *Ibid.*

46 *Ibid.*

Method, this is considered particularly egregious and will result in a lifetime ban for the guilty entourage member.[47] These provisions represent a major shift away from punishing child athletes who are caught doping, to protecting child athletes caught doping by asking questions about the people around them who may be enabling or encouraging doping.

D. *INCOMPLETE REGIME*

The Protected Person regime modifies many standards within the 2021 WADC. In some cases, rules do not apply at all or are altered. This is a significant step forward towards an anti-doping regime that is sensitive to the needs of young athletes and offers them protection instead of punishment. While these changes are a step in the right direction, further reform is needed to ensure child athletes and other Protected Persons are fully protected from the harm of doping. The vast majority of the rules within the 2021 WADC are not changed for Protected Persons in any way. Intentional doping is addressed in the same manner for both Protected Persons and non-protected athletes, as are mandatory provisional suspensions. In that regard, the Protected Person regime is still incomplete.

This incompleteness has garnered attention from scholars and the CAS. Diaz et al. observes that, "the protected person category leaves one of the harsher legal tools in the Code, namely the 'strict liability' rule, untouched, to the disappointment of some anti-doping experts."[48] Campos et al., further notes that "While the [Protected Person] inclusion in the new Code shows some attempt at adaptation, it is clear that the limitation of the concept to the WADA's sanctions themselves does not provide a coherent harmonization throughout the Code."[49] During its ruling on the provisional suspension issued to Kamila Valieva, a Protected Person, the CAS recognized that the current rules for Protected Persons were insufficient and left a lacuna that needed to be remedied.

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47 *Ibid*, art 10.3.3.

48 Diaz et al, "(In)justice on Ice: Valieva and International Sport Governing Bodies' Justice Duties Toward Underage Athletes" (2022) 17:1 Sport, Ethics & Philosophy 70 at 74.

49 Campos et al, *supra* note 27 at 63.

THE KAMILA VALIEVA CASE

On 11 February 2022, the International Testing Agency (ITA) issued a press release confirming that Kamila Valieva, the 15-year-old Russian figure skater favoured to take home Olympic gold, had tested positive for trimetazidine, a banned substance, at the 2022 Russian Figure Skating Championships on 25 December 2021.[50] Trimetazidine is a heart medication that is not approved for use in children and has a number of side effects that impact coordination, such as dizziness.[51] The press release also confirmed that Valieva was provisionally suspended by the Russian Anti-Doping Agency (RUSADA) immediately once the anti-doping rule violation was reported.

A provisional suspension refers to temporarily preventing an athlete or other person accused of an anti-doping rule violation from participating in a competition or a specified activity before a final decision on their circumstances is made.[52] Under Article 7.4.1 of the 2021 WADC, a provisional suspension must be imposed when an Athlete is determined to have had an Adverse Analytical Finding or an Adverse Biological Passport Finding.[53] In essence, a provisional suspension is mandatory if there is a problem with the sample an athlete has submitted to anti-doping officials. The presence of trimetazidine in Valieva's urine sample constituted an Adverse Analytical Finding, leading to her being provisionally suspended by RUSADA as soon as the results of her anti-doping test from the 2022 Russian Figure Skating Championship were reported to them.

While Valieva's provisional suspension was mandatory under the 2021 WADC, there are some checks and balances built into the 2021 WADC to ensure mandatory provisional suspensions are applied in a just manner. First, Anti-Doping Organizations (ADO) must perform an internal review to verify the accuracy of the reported Adverse Analytical Finding or Adverse Biological Passport Finding.[54] Only after this step is completed can an ADO

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50 International Testing Association (ITA), "Beijing 2022: The ITA informs on figure skater Kamila Valieva" (11 February 2022), online: <ita.sport/news/beijing-2022-the-ita-informs-on-figure-skater-kamila-valieva/> [perma.cc/Z8BG-5E8B].

51 *Valieva*, *supra* note 34 at para 24.

52 *WADC* 2021, *supra* note 32 at 167.

53 *Ibid*.

54 *Ibid* at 56.

unilaterally impose a provisional suspension. Furthermore, a provisional suspension may not be issued unless the athlete has had, or will have, the opportunity to present their case in a provisional or expedited hearing.[55] Second, should the athlete's B Sample, a secondary sample provided to officials should additional testing be needed, fail to confirm the findings of the problematic A sample, the suspension will automatically be overturned.[56] Third, in the case of team sports, provisionally suspended athletes may be eligible to take part in future competitions, depending on the rules of the relevant governing body.[57] Fourth, athletes and others who have been provisionally suspended and comply with the terms of their suspension are able to receive credit for the period of time they were provisionally suspended.[58] This means that athletes are able to count the time they have been provisionally suspended towards the completion of their final period of ineligibility. This allows athletes to return to sport sooner.

In addition to the above, athletes are permitted to appeal the imposition of a mandatory provisional suspension. Article 7.4.1 allows for provisional suspensions to be lifted if one of the following criteria is met:

> A mandatory Provisional Suspension may be eliminated if: (i) the Athlete demonstrates to the hearing panel that the violation is likely to have involved a Contaminated Product, or (ii) the violation involves a Substance of Abuse and the Athlete establishes entitlement to a reduced period of Ineligibility under Article 10.2.4.1.[59]

The definition of a Contaminated Product is narrowly construed and requires the prohibited substance to be undisclosed on the product label or in the information compiled from a reasonable Internet search.[60] As trimetazidine is not listed as a Substance of Abuse, the only available ground of appeal to overturn Valieva's provisional suspension would have been if the drug was present because of a Contaminated Product.

In order to have her provisional suspension revoked, Valieva immediately filed an appeal with the RUSADA Disciplinary Anti-Doping

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55 *Ibid*, art 7.4.3.

56 *Ibid* at 56.

57 *Ibid.*

58 *Ibid*, art 10.13.2.

59 *Ibid.*

60 *Ibid* at 167.

Committee (DADC). Valieva's appeal asserted that the trimetazidine in her sample was due to contamination as a result of interactions with her grandfather, who has a prescription for the drug.[61] Valieva's mother testified that Valieva's grandfather regularly drives her to and from training sessions and eats meals with her.[62] Valieva also called on two medical experts who were of the opinion that the side-effects of trimetazidine would be detrimental to a figure skater, and any benefits would require long-term use, which is inconsistent with Valieva's extensive history of unproblematic anti-doping controls.[63] For these reasons, Valieva and her representatives argued that the most logical reason for the adverse finding was not intentional doping, but contamination, thus providing grounds for her provisional suspension to be revoked.

In its submissions, RUSADA argued that the provisional suspension should be upheld because it is mandatory under the anti-doping regime.[64] However, Valieva's appeal was successful, and her provisional suspension was lifted. In the opinion of the DADC, Valieva met the definition of Protected Person and was entitled to a reduced burden of proof when establishing a contamination defence as a result.[65] Typically, athletes must demonstrate that contamination was more likely than not on a balance of probabilities. However, because Protected Persons are not required to prove how a prohibited substance entered their sample in order to benefit from a reduced sanction, the DADC concluded that Protected Persons should also be entitled to a reduced burden of proof when establishing a contamination defence.[66] For this reason, the DADC determined that the appropriate burden of proof in this instance ranged from a reasonable possibility at a minimum to a balance of probability at a maximum.[67] The DADC held that based on the evidence submitted, Valieva met the burden imposed on her and agreed to lift the provisional suspension.[68]

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61 *Valieva*, *supra* note 34 at para 23.

62 *Ibid.*

63 *Ibid* at paras 23-25.

64 *Ibid* at para 22.

65 *Ibid* at para 28.

66 *Ibid* at paras 27-28.

67 *Ibid* at para 30.

68 *Ibid* at para 33.

Once it became public knowledge that Valieva had been reinstated, the IOC submitted an appeal to the CAS, challenging the decision made by the DADC.[69] In an unusual move, the IOC filed their appeal before having access to the reasons for the decision.[70] In its submissions, the IOC challenged the lifting of Valieva's provisional suspension on the grounds that, while she benefits from modified evidentiary rules as a Protected Person, she did not sufficiently substantiate her claims that the prohibited substance was present in her system due to contamination from her grandfather's medication.[71] The arguments raised in the IOC's appeal underscored the tension between the adjusted evidentiary standards for Protected Persons and the values of consistency and integrity of anti-doping decisions.

In addition to the IOC, the ISU and the WADA submitted appeals regarding the overturned provisional suspension. In its submissions, the ISU argued that in their determination, the DADC erred by creating a new, less intense standard of proof for Protected Persons, and a new, more expansive definition of a contaminated product for Protected Persons.[72] The ISU further submitted that the DADC came to its conclusion by erroneously applying the principles of irreparable harm, balancing of interests, and likelihood of success, and by engaging in speculation.[73] These arguments illustrated the ISU's position that the DADC's approach not only deviated from established legal standards, but also introduced unwarranted modification to the adjudication process.

Much like the IOC, WADA's submissions argued that provisional suspensions are mandatory unless they were the result of a Contaminated Product.[74] WADA argued that Valieva's claim that trimetazidine was present in her sample because of domestic interactions failed to meet the definition of a contaminated product. Per WADA, "The Athlete's explanation does not involve a Contaminated Product; this excludes by itself any basis to lift the mandatory provisional suspension… Therefore, the

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69 ITA, *supra* note 50.

70 *Valieva*, *supra* note 34.

71 *Ibid* at para 61, 62.

72 *Ibid* at paras 89, 93.

73 *Ibid* at paras 90, 93.

74 *Ibid* at para 72-73.

Athlete necessarily cannot meet the criteria to have her (mandatory) provisional suspension lifted."[75] In addition to the method of contamination being incompatible with the contaminated product defence, WADA further argued that Valieva failed to adequately discharge her burden of proof by failing to provide any independent scientific evidence that supported contamination being the most likely explanation for the anti-doping rule violation.[76] WADA's submission emphasized that Valieva's defence not only failed to satisfy the strict criteria for a contaminated product, but also fell short of the evidentiary standards required of all athletes to overturn a mandatory provisional suspension.

The three respondents, RUSADA, the Russian Olympic Committee (ROC), and Valieva each submitted their own arguments. RUSADA's submission asserted that RUSADA and the DADC are independent of each other and their positions should not be conflated.[77] In particular, RUSADA contended that the standard of proof applied by the DADC was incorrect.[78] However, RUSADA concluded that while Valieva's evidence in the previous hearing was insufficient, it was confident that she would be cleared of all wrongdoing in the present hearing and that the weaknesses with the evidence she provided before were related to the quick turnaround in adjudicating the case, not the actual merits of her claims.[79] RUSADA's submissions highlighted how procedural barriers can play a significant role in disadvantaging Protected Persons like Valieva.

Like RUSADA, the ROC also discussed the short window of time Valieva was given to gather evidence. The ROC argued that because Valieva had less than 48 hours to gather evidence, it would be impossible to meet the standard of proof required, and as such, she should be deemed to have met it.[80] The ROC further raised the argument that, in light of the reduced evidentiary burden and sanctions imposed on Protected Persons, which are not addressed in the provisional suspension parts of the 2021 WADC, there is a gap that the CAS should resolve by offering Protected Persons greater

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75 *Ibid* at para 76.

76 *Ibid* at para 78.

77 *Ibid* at para 103.

78 *Ibid* at para 102.

79 *Ibid* at paras 99, 101.

80 *Ibid* at para 131.

flexibility and eliminating provisional suspensions for them.[81] The ROC's argument underscored how traditional anti-doping rules can impose unjust requirements on Protected Persons, particularly in cases where harsh timelines and evidentiary standards hinder their ability to present a robust defence.

The arguments submitted by Valieva and her counsel further asserted that the recission of her provisional suspension was the only fair outcome in light of the countless procedural constraints that were present. Notably, there was a significant delay in the testing and reporting of Valieva's sample, and there was not adequate time before the DADC hearing to gather evidence and test her B Sample.[82] She further argued that, as a Protected Person, she had reduced evidentiary burdens, and that she had met those burdens, which resulted in her provisional ban being correctly overturned.[83] Valieva also suggested that the IOC and WADA were unjustly targeting her, as evidenced by the fact that they filed appeals before having access to the reasons of the DADC.[84] Valieva's submissions emphasized that the procedural irregularities, combined with her status as a Protected Person, could potentially justify the rescission of her provisional suspension.

The three appeals were heard together during a videoconference with the Ad Hoc Division of CAS, who is responsible for adjudicating legal issues during the course of the Olympic Games, on 13 February 2022. All three appeals were dismissed by the CAS the next day. After considering all of the arguments, the CAS decided not to reinstate Valieva's provisional sanction.[85] Based on the CAS's interpretation of the nature of Protected Person exceptions, which includes less serious sanctions and burdens, it found that, "It is clear by these mentions that the WADC 2021 intends to give special treatment to Protected Persons like the Athlete here."[86] Given Valieva's status as a Protected Person and the nature of the Protected Person scheme, the CAS elected not to restore her provisional suspension.

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81 *Ibid* at paras 141-146.

82 *Ibid* at para 110-113.

83 *Ibid* at paras 115, 118, 121.

84 *Ibid* at para 111.

85 *Ibid* at para 226.

86 *Ibid* at para 187.

In the opinion of the CAS, while Protected Persons are entitled to different treatment:

> The RUSADA Anti-Doping Rules and the WADC are silent with respect to Provisional Suspensions imposed on Protected Persons, while the several above-specified provisions provide for different standards of evidence and lower sanctions in the case of Protected Persons.[87]

In light of this:

> Exempting older athletes from mandatory Provisional Suspensions in most instances in which they might ultimately be able to establish basis for a short sanction or reprimand but not exempting younger, legally incapable, and immature Protected Persons who might be entitled to a short sanction or reprimand appears clearly to be an unintended gap in the Code.[88]

The CAS further noted that the:

> 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.[89]

These fundamental flaws suggested to the CAS that there was a significant gap in the 2021 WADC that must be addressed.[90]

To resolve the unfair consequences produced by the lacuna in the 2021 WADC, the CAS opted for a more flexible approach to provisional suspensions in the context of Protected Persons. In order to reconcile the gap, "the Panel [determined] that in cases involving Protected Persons, their Provisional Suspensions should be evaluated as optional Provisional Suspensions under WADC 2021 Article 7.4.2 and its progeny."[91] Under this rule, provisional suspensions may be imposed in situations not covered under the mandatory provisional suspension rules of Article 7.4.1 at the discretion of the relevant anti-doping body.[92] In this case, the CAS concluded that Valieva's provisional suspension should have been addressed under the rules governing optional ones, and that RUSADA

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87 *Ibid* at para 193.

88 *Ibid* at para 196.

89 *Ibid* at para 199.

90 *Ibid* at para 200.

91 *Ibid* at para 202.

92 *WADC* 2021, *supra* note 32, art 7.4.2.

should have exercised its discretion to not impose a provisional sanction.[93] Thus, Valieva was cleared to continue participating in the Olympics.

However, her participation continued to be surrounded with controversy. Discussion of Valieva's alleged anti-doping rule violation and her continued presence at the Olympics picked up significant traction on social media sites, leading to several athletes in the Women's Figure Skating Event opting to avoid using social media platforms such as Twitter and Instagram while in Beijing.[94] A number of her fellow competitors also publicly criticized the lifting of Valieva's provisional ban. American skater Mariah Bell notably stated that, "It seems wrong to punish people who have done things the right way."[95] Similarly, retired figure skaters, including the United States' Adam Rippon and South Korea's Yuna Kim, publicly condemned the lifting of Ms. Valieva's provisional suspension, on the grounds that it was unfair and inconsistent with anti-doping rules.[96] The controversy surrounding Valieva's participation generated deep criticism within the skating and Olympics community, with many athletes and former champions expressing concerns over fairness and the broader implications for the sport's credibility.

This criticism was not limited to onlookers and athletes. Organizing bodies, including WADA and the IOC, issued statements that expressed disapproval with Valieva's continued presence in Beijing. In their statement, the IOC stated that in an effort to maintain fairness, it would not award medals in any event where Valieva reached the podium.[97] Furthermore, WADA issued a statement in response to the CAS

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93 *Valieva*, *supra* note 34 at para 202.

94 Les Carpenter, "On a night when all the noise was about Kamila Valieva, she had nothing to say", *The Washington Post* (15 February 2022), online: <www.washingtonpost.com/sports/olympics/2022/02/15/competitors-kamila-valieva/> [perma.cc/B5FA-K7UR].

95 *Ibid*.

96 Juliet Macur, "Russia's Valieva stumbles in return, then floats into first place", *The New York Times* (15 February 2022), online: <www.nytimes.com/2022/02/15/sports/olympics/kamila-valieva-short-program-routine.html> [perma.cc/L6TA-KPP5].

97 IOC, "IOC EB decides no medal ceremonies following CAS decision on the case of ROC skater" (14 February 2022), online: <olympics.com/ioc/news/ioc-eb-decides-no-medal-ceremonies-following-cas-decision-on-the-case-of-roc-skater> [perma.cc/35X6-YQRU].

judgement, asserting that the decision to not enforce Valieva's provisional suspension was not in line with the requirements of the 2021 WADC, and that provisional suspensions are mandatory for all athletes who have an adverse finding, including Protected Persons.[98] Overall, the decision to not enforce a provisional ban was met with significant criticism.

However, there was some support for Valieva. Tara Lipinski and Johnny Weir, both retired figure skaters from the United States, expressed great sympathy for Valieva during their coverage of the Olympics for NBC.[99] Lipinski said, "It makes me angry that the adults around her weren't able to make better decisions and guide her and be there for her because she's the one now dealing with the consequences and she's just 15 and that's not fair."[100] Echoing Lipinski's sentiments was NBC News Host Mike Tirico, who described Valieva as "the victim of the villains".[101] IOC President Thomas Bach also criticized the actions of Valieva's entourage, describing their behaviour as lacking in warmth and support.[102] The support for Valieva emphasized her position as a young athlete caught in a deeply troubling situation outside of her control, and placed the blame on the adults around her for failing to protect her and uphold their responsibilities. Even though many viewed her as a villain or a cheater, others saw her as a victim deserving of special protection.

JUSTIFICATION

It is clear that the CAS's decision to treat provisional suspension as optional in the case of Protected Persons was controversial. However, it is

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98 WADA, "WADA statement following CAS decision not to reinstate skater's provisional suspension" (14 February 2022), online: <www.wada-ama.org/en/news/wada-statement-following-cas-decision-not-reinstate-skaters-provisional-suspension> [perma.cc/LA6A-LAFC].

99 Chad Finn, "NBC's Olympic figure skating team exuded empathy during an unprecedented event", *The Boston Globe* (19 February 2022), online: <www.boston.com/sports/olympics/2022/02/19/nbcs-olympic-figure-skating-team-exuded-empathy-during-unprecedented-event/> [perma.cc/4WCH-ZXGU].

100 *Ibid.*

101 Saphora Smith, "'Chilling': Olympics chief criticizes response of Russian skater's entourage", *NBC News* (18 February 2022), online: <www.nbcnews.com/news/world/olympics-kamila-valieva-russian-figure-skater-entourage-chilling-rcna16771> [perma.cc/CH8H-2PRY].

102 *Ibid.*

the position of this paper that the CAS's interpretation of the 2021 WADC is logical. It adheres to the principles of the 2021 WADC and other relevant legal frameworks, supports the goals of the Protected Person concept, and is consistent with other modifications made for Protected Persons. Additionally, it aligns with the outcomes of other anti-doping investigations. In the following section, this paper will explore how these pieces fit together to make the 2021 WADC more complete with the interpretation put forth by the CAS in its decision on Valieva's provisional suspension.

A. *PRINCIPLES OF THE WADC*

The 2021 WADC identifies the principles of proportionality and human rights as cornerstones of the anti-doping regime.[103] The concept of proportionality is grounded in the notion that punitive measures should not exceed what is necessary to achieve the intended regulatory objectives; in this case, objectives such as deterrence and fairness in sports. Proportionality strives to find a balance between effective anti-doping efforts and fairness to the athlete, thus necessitating penalties that fit the nature and context of each case.[104] In addition to including proportionality as a foundational value, the 2021 WADC provides flexible guidelines for sanctioning with provisions for reduced penalties in cases of reduced culpability, such as unintentional contamination or the use of specified substances.[105] By recognizing the impact of contextual factors present in an anti-doping rule violation, and reducing or increasing the sanction imposed in response, the 2021 WADC shows a commitment to the concept of proportionality.

In addition to WADA, other actors in the fight against doping have stressed the importance of having an anti-doping regime that incorporates proportionality. In past decisions, the CAS has generally concluded that while strict liability is a core part of anti-doping regimes, "a fixed rate system governing sanctions in doping cases is not desirable and the more flexible system, which provides a sliding scale of suspension periods depending on the level of fault of the athlete, is preferable."[106] A flexible and proportionate

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103 *WADC* 2021, *supra* note 32 at 17-18.

104 Marjolaine Viret, *Evidence in Anti-Doping at the Intersection of Science and Law* (The Hague: TMC Asser Press, 2016) at 133.

105 *WADC* 2021, *supra* note 32.

106 David, *supra* note 3 at 53.

approach to determining doping sanctions has also been supported by organizations such as the IOC.[107] These perspectives highlight a broad consensus within the anti-doping community that flexibility and proportionality are essential to ensuring fairness and justice in the enforcement of doping sanctions.

The 2021 WADC's emphasis on proportionality, while present in theory, often encounters practical limitations when applied in complex cases. Strict penalties for anti-doping infractions are considered necessary to establish a deterrent effect, yet these sanctions may disproportionately affect athletes who are unable to contest their sanctions due to a lack of resources or representation.[108] This illustrates why the CAS's decision to interpret provisional suspensions as discretionary for Protected Persons reflects proportionality. Each of the respondents included arguments in their submissions that acknowledged the tough evidentiary burden Valieva needed to meet, and how that was practically impossible given various procedural constraints and her age.[109] It was also noted that there was a reasonable chance Valieva would later be subject to a period of ineligibility that was shorter than her provisional suspension would be.[110] These outcomes do not reflect proportionality. In complicated scenarios involving Protected Persons, the only way to ensure a provisional suspension is fair and proportionate is to treat it as discretionary so the totality of the circumstances can be taken into account.

The other foundational principle of the 2021 WADC is compliance with and respect for human rights. WADA's anti-doping regime has long been criticized for its lack of respect for bodily autonomy and privacy.[111] Athletes bound by the 2021 WADC are subject to extensive anti-doping measures that include requirements to continuously provide up-to-date whereabouts and samples whenever requested.[112]. In response to criticism that requirements such as these are overly invasive, justice in sports has

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107 *Ibid.*

108 Richard W Pound, *Inside Dope: How Drugs Are the Biggest Threat to Sports, Why You Should Care, and What Can Be Done About Them* (Mississauga: John Wiley & Sons Canada, 2006) at 105-120.

109 *Valieva*, *supra* note 34.

110 *Ibid.*

111 Bengt Kayser & Barbara Broers, "The Olympics and harm reduction?" (2012) 9:33 Harm Reduction J 1.

112 *WADC* 2021, *supra* note 32.

increasingly been shaped by human rights.[113] In his assessment of the Protected Person addition to the 2021 WADC, Jean-Paul Costa, the former President of the European Court of Human Rights and arbitrator for the CAS, assessed WADA's new anti-doping rules and found them to be compliant with human rights obligations.[114] However, this assessment primarily addressed if the definition of a Protected Person aligns with international human rights instruments and does not include a robust review of the unique human rights of children.

Imposing mandatory suspensions on young athletes does not adequately respect the rights of youth. Instead, it treats them as guilty parties, robs them of opportunities, and punishes them for the things they are ultimately victims of. Such an approach disregards the unique human rights of child athletes and fails to take into account their limited autonomy, dependence on authority figures, and heightened need for protection. A strict application of the 2021 WADC would disproportionately infringe upon the human rights of Protected Persons such as Valieva. This is not in the best interests of the child athletes. Additional flexibility is essential to ensure that the anti-doping system upholds principles of fairness, proportionality, and child protection which are fundamental to the human rights of children.

Not imposing provisional suspensions on child athletes who are being investigated for anti-doping violations respects the rights of children contained within the United Nations Convention on the Rights of the Child (UNCRC). Article 36 obliges states to protect children from all forms of exploitation that could harm their welfare or development, such as doping in sports.[115] Suspending a child athlete before a full investigation unfairly stigmatizes them and exposes them to emotional and reputational harm, particularly when their doping may have been organized by adults. Similarly, Article 33 requires states to protect children from the illicit use

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[113] David Pavot, "A Gap or Lacuna in the World Anti-Doping Code? Remarks on the CAS Interpretation in IOC, WADA, and ISU v. RUSADA, Kamila Valieva and Russian Olympic Committee (CAS OG 22-08, CAS OG 22-09, and CAS OG 22-10)" (2022) 4 Frontiers in Sports & Active Living 1 at 5.

[114] Jean-Paul Coast "Legal opinion 2019 (expert opinion) on the World Anti-Doping Code" (26 September 2019), online (pdf): <www.wada-ama.org/sites/default/files/resources/files/avis_2019_code_mondial_en.pdf> [perma.cc/2ALA-9JRH].

[115] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 4.

of harmful substances and from being used in the illicit production and trafficking of such substances.[116] By refraining from imposing provisional suspensions, governing bodies acknowledge that these young athletes are more likely victims of adult wrongdoing than willful offenders, thereby upholding their rights to protection, care, and due process. While WADA has no significant obligations under the UNCRC and most other international human rights instruments, reframing provisional suspension requirements for Protected Persons, particularly child athletes, in the manner the CAS set out in its decision regarding Valieva would respect human rights, particularly the rights of children.

B. *PROTECTED PERSON RATIONALE*

Protected Persons consist of young athletes and athletes with intellectual disabilities or other specific vulnerabilities. It is undisputed that the category aims to recognize that younger athletes or those with diminished capacity should be exempt from some of the consequences of doping because they may lack the understanding of anti-doping regulations or may have been unwittingly influenced by external parties, such as coaches or guardians.[117] The CAS's decision to treat provisional suspensions as optional instead of mandatory is consistent with this objective. Having provisional suspensions be non-compulsory for Protected Persons reflects a steadfast commitment to balancing the enforcement of anti-doping rules with the need to account for the unique characteristics of these athletes.

The pursuit of such a purpose is important as blanket policies can exacerbate injustices for younger athletes. As Teetzel and Mazzucco articulate, "The stigma of a positive doping test can haunt a young athlete for the rest of his or her life."[118] These policies also fail to account for the physical toll doping takes on child athletes, and the way pressure from coaches disproportionately impacts children.[119] Recognizing these unique challenges, tailored policies for young athletes are essential to ensuring fairness, protecting their well-being, and mitigating lifelong consequences stemming from situations beyond their control.

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116 *Ibid.*

117 *WADC* 2021, *supra* note 32; *Valieva*, *supra* note 34; Diaz et al, *supra* note 48.

118 Teetzel & Mazzucco, *supra* note 41 at 926.

119 *Ibid.*

In addition to stigma and physical harm as a result of doping, young and vulnerable athletes face harm from other people in relation to doping. As Hessert posits, coaches, parents, and other officials will do almost anything to pursue success in sports, even if it results in harm to child athletes.[120] Coaches regularly put their athletes on doping regimens or look the other way when they are aware of athletes who are doping.[121] Even when doping is appropriately reported, minors are still at risk of being harmed as they need to provide adjudicators with access to personal information, which may include emails, health records, and text messages.[122] These realities underscore the critical need for policies that not only address doping, but also protect young and vulnerable athletes from exploitation, undue pressure, and the invasive scrutiny that can compound the harm they experience.

Considering both the purpose of the Protected Person scheme and the reasons why such a purpose is necessary, it is evident that the ruling CAS put forward in the Valieva case is in line with this objective. The simplest way to avoid the stigma and trauma of a suspension is to not impose one at all. By providing officials with the ability to not impose a provisional suspension, Protected Persons can avoid suspensions, and thus some of the harmful consequences that come with being accused of violating anti-doping rules. While provisional suspensions are still able to be issued when necessary, adjudicators will have the opportunity to assess the negative impact it may have on the athlete. This approach ensures that the Protected Person framework is applied thoughtfully, allowing adjudicators to balance the enforcement of anti-doping rules with the need to minimize unnecessary harm to young and vulnerable athletes, which is the goal of the Protected Person framework.

C. *OTHER ANTI-DOPING RULE VIOLATIONS*

Not only is CAS's decision to allow Valieva and other Protected Persons to benefit from discretionary provisional suspensions consistent with the principles of the 2021 WADC and the objectives of the Protected Person regime, but it is part of a growing trend in how anti-doping rule violations

120 Bjorn Hessert, "The protection of minor athletes in sports investigation proceedings" (2020) 21 Intl Sports LJ 62.

121 *Ibid.*

122 *Ibid.*

are addressed. Despite provisional suspensions being framed as mandatory when the anti-doping rule violation is due to an adverse finding, many athletes, both before and after Valieva, have either not been sanctioned with a provisional suspension as required or have had their provisional suspension arbitrarily lifted. With non-Protected Persons seemingly having some degree of flexibility in whether or not they serve a mandatory provisional suspension, it simply makes sense that those who are protected receive the same benefit.

After news broke of a systemic doping regime in Russia during the 2010s, two athletics athletes, Natalya Antyukh and Yuliya Kondakova, were revealed to have had positive anti-doping tests which were subsequently hidden. Neither woman was issued a provisional suspension, despite them being mandatory in cases where there is an adverse finding.[123] The exact reasoning for this departure from the rules in the applicable versions of the WADC is unclear. Both women were adults at the time of the adverse findings, and neither attempted to argue that the results were due to a Contaminated Product. In light of the fact that both women were ultimately sanctioned with a 4-year period of ineligibility, it is even more confusing. The lack of provisional suspensions in these cases raises serious questions about inconsistencies in the application of anti-doping rules and the enforcement mechanisms meant to ensure accountability and fairness.

In 2021, WADA discovered that the U.S. Anti-Doping Agency (USADA) was not reporting or sanctioning athletes who tested positive for prohibited substances. Despite these non-compliant actions by USADA, WADA did not choose to file an appeal after it was suggested that the security of the doping athletes would be jeopardized.[124] After confirming that the security threat was real, WADA decided not to pursue the matter further. Notably, this is not a ground for the removal of a provisional suspension under the 2021 WADC. While prioritizing the safety of athletes

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123 *Natalya Antyukh v World Athletics* (CAS 2021/A/8012), online (pdf): <jurisprudence.tas-cas.org/Shared%20Documents/8012.pdf> [perma.cc/FTJ7-XJPD]; *International Association of Athletics Federations v Russian Athletic Federation & Yuliya Kondakova* (CAS 2018/O/5713), online (pdf): <jurisprudence.tas-cas.org/Shared%20Documents/5713.pdf> [perma.cc/ZF2H-MN8P].

124 "WADA statement on Reuters story exposing USADA scheme in contravention of World Anti-Doping Code", WADA (7 August 2024), online: <www.wada-ama.org/en/news/wada-statement-reuters-story-exposing-usada-scheme-contravention-world-anti-doping-code> [perma.cc/SVW4-CA7F].

is noble, this decision highlights the flexible nature of sanctions when there is a risk of harm, despite their mandatory nature.

In a similar vein, no provisional suspension was imposed on any of the 23 Chinese swimmers who tested positive for trimetazidine in January of 2021.[125] Again, a situation like this requires a mandatory provisional suspension under the rules of the 2021 WADC. The most surprising aspect of this was that WADA chose not to appeal the lack of provisional suspensions here since it was satisfied that the reason for the adverse findings was likely contaminated food from the athletes' hotel, and there were no swimming events taking place during the investigation.[126] Based on this, it seems that WADA implicitly does recognize that it is not always appropriate to subject athletes to a provisional suspension, even when the WADC requires it.

Since the CAS ruling on Valieva's provisional suspension, little has changed. Non-protected athletes continue to escape provisional suspensions that are allegedly mandatory. For example, mandatory provisional suspension was not imposed on Yelena Korobkina in 2022 after tests indicated the presence of multiple prohibited substances in her sample.[127] The continued failure to impose mandatory provisional suspensions in high-profile cases involving adult competitors underscores just how flexible anti-doping rules can be. There is no reason that Protected Persons should not have access to the same flexibility these mature athletes seem to have.

Ultimately, mandatory provisional suspensions are not always treated as mandatory. If non-protected athletes are able to benefit from this varied imposition of provisional suspensions, in all fairness, Protected Persons, who are more vulnerable, should be able to have their provisional suspensions treated optionally too. The CAS's decision to treat the

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125 WADA, "Independent Prosecutor concludes WADA showed no bias towards China and decision not to appeal Chinese swimming cases was 'indisputably reasonable'" (09 July 2024), online: <www.wada-ama.org/en/news/independent-prosecutor-concludes-wada-showed-no-bias-towards-china-and-decision-not-appeal> [perma.cc/SXJ6-DH78].

126 WADA, "Contamination case of swimmers from China Fact Sheet / Frequently Asked Questions" (29 April 2024), online (pdf): <vmrw8k5h.tinifycdn.com/news/wp-content/uploads/2024/04/2024-04_fact_sheet_faq_chinese_swimming.pdf> [perma.cc/29W4-C7VQ].

127 *World Athletics v Russian Athletic Federation & Yelena Korobkina* (CAS 2023/O/9401), online (pdf): <jurisprudence.tas-cas.org/Shared%20Documents/9401.pdf> [perma.cc/QG6Z-NBMA].

Provisional Suspension in Valieva's hearing as optional instead of mandatory is not a serious departure from other cases. If anything, viewing provisional suspensions as optional for Protected Persons reflects a growing trend of provisional suspensions being viewed as optional.

CONCLUSION

Compared to other athletes, child athletes are uniquely vulnerable. These athletes are more susceptible to the negative health consequences of doping and overtraining yet have limited control over the decisions that produce those consequences. Despite these dangers, very little has been done to protect children in elite sports, leading to countless youth retiring from sports at a young age because of the negative impact of doping to their mental and physical well-being. Parents, coaches, and national federations have chosen to ignore these concerns in favour of glory and gold medals. This cannot continue.

WADA's development of the Protected Person concept is a major step forward in making the modern anti-doping regime more sensitive to the needs of children and other vulnerable athletes. The 2021 WADC provides greater privacy protections along with reduced sanctions and burdens for athletes who fall under the definition of a Protected Person. It also addresses the role of entourage members through mandatory investigations. However, the protection available to Protected Persons is still limited in some respects. Many components of the 2021 WADC are completely unaltered, leaving Protected Persons subject to mandatory provisional suspensions and other unfair punishments.

When 15-year-old Kamila Valieva was implicated in an anti-doping rule violation, the CAS corrected the gap in the 2021 WADC that left Protected Persons subject to mandatory provisional suspensions by interpreting the rules in a way that made them non-compulsory. The decision was met with significant backlash from the public and key anti-doping organizations, including WADA. However, this backlash is unwarranted as the interpretation put forth by the CAS conforms to the governing principles of the 2021 WADC and other applicable legal frameworks, furthers the Protected Persons purpose, and is not a departure from how other anti-doping cases have been addressed in recent years. Despite its negative reception by some stakeholders, the CAS's interpretation simply makes sense, and it is shocking that WADA did not draft the 2021 WADC to

explicitly state that mandatory provisional suspensions are not applicable to Protected Persons.

While the CAS's decision in Valieva's case represents a significant step forward in protecting vulnerable athletes, more needs to be done. While Valieva was not able to keep her anti-doping proceedings private, something she is entitled to under the 2021 WADC, some older, non-protected athletes have had the details of their anti-doping rule violations kept quiet. Italian figure skater Daniel Grassl, for example, was accused of missing three anti-doping tests after he began training with Valieva's coach, Eteri Tutberidze, at the age of 21. Despite not being a Protected Person, Grassl returned to competing without an explanation after sitting out the 2023-2024 season, and NADO Italia, Italy's National Anti-Doping Agency, has declined to comment on the situation.[128] Besides the inconsistent application of disclosure rules and exceptions, Valieva and other Protected Persons are also seeing their ability to benefit from shorter sanctions limited, as the CAS recently confirmed that all athletes who intentionally dope, regardless of age or other factors, are subject to the same sanction.[129] It is clear that while there is the potential for Protected Persons to reap the benefits of recent anti-doping rule changes, there are still barriers and inconsistencies that hinder this.

Kamila Valieva's story highlights major issues with the current rules relating to Protected Persons. Further research is needed to address inconsistent rules, other gaps in the 2021 WADC, and policy alternatives that better meet the needs of young and vulnerable athletes. Revisions to the 2021 WADC are directly shaped by submissions the WADA's Internal Drafting Team receives from stakeholders.[130] While revisions occur regularly, at this time, WADA is not planning to make any significant

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128 "National Anti-Doping Organization of Italy has declined to provide details of the decision regarding Daniel Grassl's case", *FS Gossips* (12 July 2024), online: <fs-gossips.com/12527/> [perma.cc/RJP7-2B5M].

129 *RUSADA v Kamila Valieva* (CAS 2023/A/9451), *ISU v Kamila Valieva and RUSADA* (CAS 2023/A/9455), *WADA v RUSADA and Kamila Valieva* (CAS 2023/A/9456) at para 364, online (pdf): <www.tas-cas.org/fileadmin/user_upload/9451-9455-9456_Arbitral_Award__publ._.pdf> [perma.cc/NC32-SFL9].

130 WADA, "2027 Code & Update Process – Timelines & Key Phases" (last accessed 23 July 2025), online (pdf): <www.wada-ama.org/sites/default/files/2024-09/2027_code_is_update_process_-_timelines.pdf> [perma.cc/L86Y-F73X].

changes to the existing Protected Person scheme.[131] However, with more research completed, there may be a greater appetite to create better, more complete safeguards for the most vulnerable athletes. Children and other vulnerable persons in sports deserve to be safe from doping, and if there is one takeaway from Valieva's experiences at the 2022 Winter Olympics, it is this: change is possible. Anti-doping law is always developing, and with additional advocacy, Protected Persons may finally get the full protection they deserve.

[131] WADA, "2027 Code & IS Update Process: Summary of Major Changes – World Anti-Doping Code", (last accessed 23 July 2025), online (pdf): <www.wada-ama.org/sites/default/files/2024-08/2027%20wadc-%20summary%20of%20major%20changes%20-%20final.pdf> [perma.cc/D2NQ-G7ZT].