

# When is a departure really a departure?

## Trends in procedural challenges to anti-doping rule violations highlighted by the Tai Cheau Xuen Case

*Tai Cheau Xuen v. Olympic Council of Asia (OCA)*

CAS AG 14/03, 3 October 2014.



### Key words:

*International Standard for Testing, chain of custody, procedural departures*

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In the Court of Arbitration for Sport (CAS) Ad Hoc division case *Tai Cheau Xuen v. Olympic Council of Asia (OCA)* AG 14/0, Malaysian wushu practitioner Tai Sheau Xuen won a gold medal during the XVII Asian Games, only to lose it ten days later after an *In-Competition* test revealed the presence of the *Specified Substance* Sibutramine. The contested issue in this case was whether a 16 hour delay between the time the wushu practitioner's *Sample* was collected and the time it arrived at the laboratory constituted a breach of the external chain of custody and thus a departure from the International Standard for Testing (IST). The panel found that the delay was not unreasonable and did not depart from the IST, thereby confirming the anti-doping rule violation.

### THE FACTUAL CIRCUMSTANCES

After Tai Cheau Xuen won the gold medal in the nanquan and nandao all-around event, she underwent an *In-Competition* urine test. The *Sample* was transported to the Doping Control Command Centre on the same evening, and arrived at the laboratory on the following day, approximately 16 hours after it was collected. On September 24, the wushu practitioner was notified of an *Adverse Analytical Finding* (AAF) for Sibutramine, and the next day she questioned the integrity of the external chain of custody, pointing at discrepancies between the *Doping Control* form and chain of custody documentation. Not fully satisfied with the response received, she requested the analysis of her *B-Sample*. The *B-Sample* confirmed the presence of Sibutramine. On September 30, the OCA decided to annul her results and to withdraw her gold medal. In this decision, the OCA noted that the alleged departure was not "material enough to invalidate the testing procedure and the analysis." The wushu practitioner appealed this decision to an Ad Hoc division of the CAS set up for these Asian Games, requesting that the panel annul the decision and reinstate her gold medal.

### THE CAS AD HOC PROCEEDINGS

The panel clarified that the only issue in dispute among the parties was whether the delay in the transportation of the *Sample* should preclude the finding of an anti-doping rule violation. It recalled the applicable regulations regarding *Sample* transport, as well as the burden of proof set forth in the applicable rules (in this case, the OCA Anti-Doping Regulations [OCA ADR]) for contesting an anti-doping rule violation based on a departure from the IST, as follows:

*If the Athlete or other Person establishes that a departure from another International Standard [i.e. other than the International Standard for Laboratories] occurred during testing then the OCA shall have the burden of establishing that such departure did not cause the Adverse Analytical Finding...*

Thus, the panel framed its inquiry to address two points: (1) Whether the 16 hour period between *Sample* collection and its delivery to the laboratory constituted a departure from the IST, and (2) if so, did the departure “in any way compromise the integrity of the sample such that it caused the Applicant’s adverse analytical finding.”

#### **Issue (1): Was there a departure from the IST?**

The panel concluded that there was no departure from the IST, based on two main lines of reasoning.

First, it noted that the wushu practitioner did not challenge the “veracity” of the *Sample*; she only suggested that there “might have been many things that could have occurred during this timeframe.” The panel dismissed this concern as “fears...in the unknown,” stressing that she did not question the “propriety of the methodology applied in collecting and testing [the] sample.”

Second, the panel analyzed the alleged departure itself, noting in particular that neither the OCA ADR nor the IST contain a “clear requirement” concerning the allowable time limit for delivering a *Sample* to the laboratory, beyond the need to transport the *Sample* “as soon as practicable.” It cited a previous CAS Award (*Vroemen v. Koninklijke Nederlandse Athletiek Unie & Anti-Doping Autoriteit Nederland*, CAS 2010/A/2296, 12 September 2011) in which the panel found that taking three and a half days to transport a *Sample* was “arguably not ideal” but still not unacceptable. Noting that the 16 hour period was much less than the three and a half days in this previous case, it held that the delay was not unreasonable, and did not violate the IST.

The panel continued to explain that “[i]n the absence of any evidence from the Applicant to prove that the sample was tampered with during this period of time and together with the fact that the Applicant confirmed that the B Sample was in good form when tested, the Panel determines that the time period of 16 hours during which the sample was transported to [the laboratory] cannot constitute a reason on which to make a finding that there

#### **Issue (2): Did the departure “in any way compromise the integrity of the sample such that it caused the Applicant’s Adverse Analytical Finding?”**

The panel found that the wushu practitioner failed to meet her burden to establish a departure from the IST and concluded that the “integrity of the chain of custody has not been compromised in any way.”

#### **COMMENTS ON CHALLENGES TO VIOLATIONS BASED ON PROCEDURAL DEFECTS**

Though no doubt influenced by the ad hoc context of the proceedings and the tight time frame within which the case needed to be prepared, the CAS decision nevertheless offers a good platform for highlighting a few trends that are generally observable in doping disputes.

Along with the recent *Pinzon (Omar Andres Pinzon Garcia v. FECNA*, CAS 2014/A/3170, 7 April 2014), and *Campbell-Brown (Veronica Campbell-Brown v. The Jamaica Athletics Administrative Association (JAAA) & The International Association of Athletics Federations (IAAF)*, CAS 2014/A/3487, 24 February 2014) awards, this matter illustrates that the “procedural defect argument” has come to be perceived as the most – perhaps the only - realistic manner for an *Athlete* to invalidate an anti-doping rule violation. The emphasis placed on procedural defects is certainly for a good part a collateral effect of the perceived futility of other all arguments for invalidating an anti-doping rule violation. Thus, the wushu practitioner did not even suggest that disqualifying her results could be unjust since the Sibutramine detected would not have enhanced her performance in the competition. Notoriously, under the WADC regime, arguments related to a lack of impact on performances in a particular matter are never considered when it comes to the automatic *Disqualification* under Article 9 of the WADC (respectively corresponding applicable rules).

Breaches in the chain of custody or otherwise excessive delays in *Sample* transport are among types of procedural defects most frequently invoked. This recurrence is understandable, especially in matters that have to be decided in an expedited manner, given that an *Athlete's* counsel can detect any such irregularity based on the transport documentation without the assistance of a scientific expert, possibly even without or before obtaining the Laboratory Documentation Package. Procedural defects tied to the manner in which the laboratory conducted the analysis are more difficult – if not impossible – to discover without qualified expertise.

The decision also demonstrates, however, that there is little prospect for an *Athlete* to obtain the invalidation of a violation based on alleged departures in connection with *Sample* transport, unless the *Athlete* simultaneously shows an additional, specific procedural defect or concrete risk that would cause the *Sample* to degrade, rather than just assumptions that “anything might have happened during transport.” This position is clearly reflected in the award, even though the burden of proof in the applicable rules (the OCA ADR) was apparently formulated akin to the 2003 Code, missing in relevant part the requirement in the 2009 Code that the *Athlete* establish a departure “which could reasonably have caused” the *Adverse Analytical Finding*. The panel nevertheless faulted the wushu practitioner for her failure to show that the departure alleged was more than a technicality and could actually lead to the anti-doping rule violation (e.g. through opening the door for someone to tamper with the *Sample*). The reasoning of the panel clearly shows the difficulty in separating the sheer existence of a procedural defect from its materiality for the outcome of the analysis, at least when a breach of the chain of custody is alleged. Though the two assessments are formally distinct, including with respect to the burden and standard of proof, in practice the two aspects cannot always be clearly distinguished in CAS awards. In effect, the reasoning in *Tai Cheau Xuen* implicitly reverses the assessment announced at the outset of the legal discussion, since the lack of evidence that the *Sample* could have been affected was used to conclude that no departure from the IST had occurred.

This approach is also reflected in other CAS awards, such as the *Hui* case (*Hui v. IWF*, CAS 2011/A/2612, 23 July 2012). In this case, a weightlifter argued that a lack of documentation for a one-week period regarding both the location and condition of the *Sample* constituted a breach in the external chain of custody. The panel dismissed this argument noting that the relevant technical document did not contain any specific requirements for the external chain of custody, nor was there any reason to suspect that the underlying purpose of the chain of custody - to “unequivocally” link the results of the *Sample* analysis to the *Athlete* - was violated. The *Athlete* appealed this finding to the Swiss Federal Supreme Court, which found no violation of public policy regarding the CAS panel’s treatment of the chain of custody requirement (*X. v. IWF*, 4A\_576/2012, 28 February 2012).

In sum, although defects related to *Sample* transport and the chain of custody are frequently invoked, this type of challenge on its own, even when alleging serious breaches of the applicable rules, carries little prospect to succeed before a CAS panel as a means to invalidate an anti-doping rule violation. (See, e.g. *Hui*, CAS 2011/A/2612, 23 July 2012). First, the burden is on the *Athlete* to establish an actual departure from a mandatory rule of the relevant WADA International Standard, which to start with is a difficult prospect, especially given the relative flexibility of the provisions regarding timing and conditions for transport. Second, under anti-doping rules implementing the 2009 & 2015 WADC, the *Athlete* also needs to show a plausible possibility that the departure actually caused the analytical findings compounds this difficulty.

Thus, irregularities related to the chain of custody may, at most, allow an *Athlete* to escape the finding of an anti-doping rule violation when the chain of custody record can be characterized as truly inexistent (*Pinzon*, CAS 2013/A/3170, 7 April 2014, para. 68 et seq.)

In other situations, panels have entertained claims related to procedural departures when the departures reflect an ADO's widespread and systematic disregard for the applicable technical rules. In a recent case (see, *Campbell-Brown*, CAS 2014/A/3487, 24 February 2014), the panel described the strict adherence to the applicable standards as an appropriate counter balance to the *Strict Liability* regime to which *Athletes* are subject for the presence of a *Prohibited Substance*. According to the panel in *Campbell-Brown*, when known, systematic and persistent shortcomings in the *Doping Control* process can be demonstrated, the burden on the ADO for establishing the lack of causality of the defect is assessed with particular severity. These two trends may indicate a desire on part of the CAS panels to create incentives for ADOs to have in place robust regulatory procedures for their *Doping Control* program, to adequately document the process, and to adhere to their own procedures.

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