

FINA Doping Panel 04/20

FINA Doping Panel

comprised of

Robert Fox (SUI) Chairman

In the proceedings against

the athlete Mr. **N. WILLSON SINGH NBHOROT**
affiliated to Indian Swimming Federation
Unrepresented by legal counsel

and

the **Fédération Internationale de Natation (FINA)**
Represented by Mr. Justin Lessard, Legal Counsel

1. THE PARTIES

1.1 FINA is the world governing body for the sport of Aquatics (meaning swimming, open water swimming, diving, high diving, water polo, artistic swimming and Masters programme). FINA has its headquarters in the city of Lausanne, Switzerland. According to FINA Rule C 5, one of the main objectives of FINA is to provide fair and drug free sport. In furtherance of this goal FINA has adopted and implemented, in accordance with FINA's responsibilities under the World Anti-Doping Code, the FINA Doping Control Rules.

1.2 Mr. N. Willson Singh NBHOROT (hereinafter the "Athlete" "N. Willson Singh" or "Mr. Willson Singh"), born on 3 July 2002, is a Water Polo player and is affiliated with the Indian Swimming Federation, a FINA Member Federation.

2. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

2.1 On 29 September 2019, Mr. Willson Singh provided a urine sample during the 10th AASF Asian Age Group Championships held in Bengaluru (India), a qualifying event for the Tokyo 2020 Olympic Games and organized by the

Asian Swimming Federation, a FINA Continental Organization. Assisted by the Doping Control Officer, Mr. Willson Singh split the Sample into two separate bottles, which were given reference numbers A6366805 (the "A Sample") and B6366805 (the "B Sample"). Mr. Willson Singh was therefore a minor on 29 September 2019.

- 2.2 Both samples were transported to the WADA-accredited Laboratory in Doha, Qatar (the "Laboratory"). The Laboratory analyzed the A Sample in accordance with the procedures set out in WADA's International Standard for Laboratories. Analysis of the A Sample returned an Adverse Analytical Finding ("AAF") for the substance Terbutaline.
- 2.3 Terbutaline is a prohibited substance as per Section S.3 of the 2019 Prohibited List.
- 2.4 On 3 March 2020, FINA wrote to Mr. Willson Singh notifying him about the AAF. Mr. Willson Singh was granted the possibility to request the analysis of the B sample.
- 2.5 By email sent on 20 April 2020, Mr. Willson Singh alleged that the AAF arose from his intake of a medication bought in a medical store in Benglaru, India in order to seek relief from a cough, headache and fever. He had been prescribed other medications before departing for Benglaru but he went to this medical store for an alternative as he did not obtain any relief with the medications prescribed. Furthermore, he indicated that he did not want to break the rules and that he honestly did not know that the medication contained a substance that is on the WADA Prohibited List. He said he did not declare the medication on the doping control form because he did not know its name. He provided the prescription he received before leaving for Benglaru as supporting evidence. This prescription mentions that the Athlete suffered from a respiratory infection, headache, fever and sore throat. He did not request the B sample analysis.
- 2.6 On 29 April 2020, FINA sent to Mr. Willson Singh the full documentation package, received from the Laboratory, related to the aforementioned AAF. In addition, FINA offered the opportunity to the Athlete to accept a

provisional suspension voluntarily pending the resolution of the matter. A final deadline was granted to him in order to request the analysis of his B Sample, as he had not yet provided his intentions regarding this. FINA specified that, without any answer from the Athlete by 8th May 2020 at the latest, it would consider that he accepted the results of the A-sample and waived his right of the B-sample analysis.

2.7 On 5 May 2020, Mr. Willson Singh sent supplementary explanations in which he clarified that he accepted the AAF and did not wish to proceed to the B sample analysis. He added that he was a minor from a very poor region and that he had no knowledge of the FINA DC Rules. He also sent a completed and signed Voluntary Acceptance of Provisional Suspension Form.

2.8 On 20 May 2020, FINA invited Mr. Willson Singh to indicate in writing by 3 June 2020 at the latest if he wanted a hearing in front of the FINA Doping Panel. In addition, FINA also explained the following to Mr. Willson Singh:

- if he decides to expressly waive his right to a hearing, he has the possibility, also by 3 June 2020 at the latest, to file a written defense instead. In such a case, FINA will then proceed according to FINA Rule DC 7.10.2, i.e. promptly issue a written decision setting out the full reasons for any period of ineligibility imposed, including (if applicable) a justification for why the maximum potential period of ineligibility was not imposed;
- if he decides to not request a hearing before the FINA Doping Panel in the deadline set under, i.e. by 3 June 2020 at the latest, it will be deemed that he has implicitly waived his right to a hearing. In such a case, FINA will then also proceed according to FINA Rule DC 7.10.2; and
- if he decides to timely request a hearing, the case shall be referred to the FINA Doping Panel for hearing and adjudication as per FINA DC Rule 8.1.

2.9 On 21 May 2020, Mr. Willson Singh replied by sending again what he had sent on 5 May 2020.

2.10. On 17 August 2020, FINA invited the Athlete to provide the following clarifications:

- *Whether he requests a hearing in front of the FINA Doping Panel;*
- *The exact name of the medication which would be responsible for Terbutaline entering his system;*
- *Pictures of this medication and of its label;*
- *Evidence that such medication contains Terbutaline;*
- *The exact date(s) on which he used this medication;*
- *The dosage he used each time;*
- *The exact name of the "local medical store" where the medication was obtained;*
- *Proof of purchase of the medication at the "local medical store" (receipt and/or statement from the store and/or statement from persons accompanying him);*
- *Any prescription provided by the "local medical store" with an English translation;*
- *Explanations from the "local medical store" as to why Terbutaline was prescribed;*
- *What are the precautions he took before ingesting this medication;*
- *Had he received anti-doping education before 29 September 2019;*
- *A clear English transcript of the prescriptions sent on 20 April 2020.*

2.11 On 26 August 2020, the Athlete provided the following clarifications:

- confirmation that he did not want a hearing;
- the name of the medication which would have caused the AAF (i.e. Glencoff Expectorant, a cough syrup) and pictures of its container and label which show Terbutaline as an ingredient;
- confirmed that he used this medication on 27 and 28 September 2019 (i.e. 2 days before and one day before the sample collection), three times a day and 5ml each time. Following assessment by FINA scientific expert, such use is considered consistent with the concentration found by the WADA-Accredited Laboratory in the Athlete's sample;
- the name of the local medical store which sold the medication (i.e. Srinivasa Medicals, Bengaluru);
- no prescription and no purchase receipt were provided by Srinivasa Medicals and that he could not obtain a statement from them;
- he had never received anti-doping education before the sample collection of 29 September 2019.

2.12 Considering the above, FINA referred the case of Mr. Willson Singh to the FINA Doping Panel on 29 September 2020 and requested in accordance with DC 7.10.2, that it promptly issue a written decision without proceeding to a hearing.

2.13 On 12 October 2020, the FINA Doping Panel Chairman informed the athlete of the charges against him asserted by FINA and gave him a deadline to 27 October 2020 to file his defence and request a hearing. He waived his right to a hearing and requested the FINA Doping Panel consider his age, the fact that he did not know the medication contained a prohibited substance, his low socio-economic background and his lack of intent to cheat, and the fact that he took this medication to treat an illness.. A copy of this letter was sent to FINA.

2.14 On 13 November 2020, the FINA Doping Panel rendered an operative decision without its grounds.

3. JURISDICTION & APPLICABLE RULES

3.1 According to DC 5.3.4.2, at every Competition conducted by either a Continental Organization recognized by FINA or by a regional organization consisting of Member Federations of FINA, the respective Continental Organization or regional organization shall be responsible for conducting Testing. Sanctions for violations of these Anti-Doping Rules at such Competitions beyond Disqualifications from the Competitions or the results of the Competition shall be heard by the FINA Doping Panel.

3.2 As per Articles 12.3 and 12.5 of the FINA Constitution, the FINA Doping Panel is the responsible body to adjudicate cases relating to violations of the FINA DC Rules.

3.3 The provision of the FINA DC Rules, entitled "Scope", stipulates that:

"These Anti-Doping Rules shall apply to and be binding upon FINA and each FINA Member Federation and its members, and each Continental Body or regional organization consisting of FINA Member Federations [...]"

3.4 In the present case, the Indian Swimming Federation is a Member of FINA and Mr. Willson Singh is an Athlete, affiliated with the Indian Swimming Federation, subject to the FINA DC Rules. As such, the Athlete is bound by the FINA DC Rules.

3.5 Pursuant to the FINA Constitution of 22 July 2017, art. C 22.9, *"Whenever necessary the Chair of the Doping Panel shall appoint one or three persons from the Doping Panel to adjudicate all matters before it."* The FINA Doping Panel Chairman chose to decide on this case sitting alone rather than convene a full 3-member Panel.

3.6 The FINA DC Rules in its version in force in 2019 applies to this case.

4. Did FINA successfully establish that the Athlete committed an ADRV within the meaning of Articles 2.1 and/or 2.2 ADR?

- 4.1 In the present case, the analytical report of the Sample A6366805 provided by the Athlete indicated the presence of the substance Terbutaline and the Athlete expressly waived his right to the analysis of the Sample B6366805 on 5 May 2020. Terbutaline is a Prohibited Substance under the Class S.3 as stipulated in the WADA Prohibited List 2019.
- 4.2 The Athlete's A Sample was analysed by a WADA-accredited laboratory. The Laboratory benefits from the presumption in DC 3.2.2 that it has conducted sample analysis and custodial procedures in accordance with the ISL. The Athlete did not rebut such presumption.
- 4.3 Also, the Athlete had not been granted a valid Therapeutic Use Exemption for this prohibited substance.
- 4.4 According to DC 2.1.1, each athlete is responsible for any Prohibited Substance present in his or her sample and it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated to establish an ADRV.
- 4.5 In addition, the Athlete did not challenge the assertion of this ADRV by FINA. To the contrary, he admitted the ADRV in his letter to the FINA Doping Panel on 21 October 2020.
- 4.6 Considering the above and in particular the athlete's admission, the Doping Panel is satisfied that FINA successfully established that the Athlete committed an ADRV within the meaning of Articles 2.1 and/or 2.2 ADR.

5. SANCTIONS AND CONSEQUENCES

Period of Ineligibility

- 5.1 FINA requested that an ineligibility period of 12 months should apply to the Athlete's ADRV.

- 5.2 Pursuant to DC 10.2, the base sanction for the presence of the Specified Substance Terbutaline is a two-year period of ineligibility, unless FINA can establish that the anti-doping rule violation for the specified substance was caused by the Athlete's intentional conduct.
- 5.3 As per DC 10.2.3, the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in a conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.
- 5.4 In the present case, FINA did not assert any element that would tend to evidence that the Athlete intentionally committed the violation. The base period of ineligibility applicable to the present case shall therefore be of two years pursuant to DC 10.2.2.
- 5.5 Under certain conditions, this two-year period of ineligibility can be either eliminated where there is No Fault or Negligence (DC 10.4), or reduced based on No Significant Fault or Negligence (DC 10.5.1.1).
- 5.6 For adult athletes, both Articles require that the athlete establish how the prohibited substance entered his or her system. The athlete is required to prove his or her allegations on the "*balance of probability*", which, according to long established CAS jurisprudence, means that the athlete needs to convince the Panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence:

"...for the Panel to be satisfied [...] on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51 % chance of it having occurred. (CAS 2009/A/1926 & CAS 2009/A/1930, ITF v. Richard Gasquet and WADA v. ITF & Richard Gasquet, §5.9; CAS 2011/A/2384, WADA and FINA v. Alberto Contador Velasco & RFEC, §209)."

5.7 In this respect, it has been expressly held and repeated by the CAS that mere assertions are not sufficient to establish the source of a Prohibited Substance, including:

“suggest[ing] that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce concrete evidence to demonstrate that a particular supplement, medication or other product that the athlete took contained the substance in question. Necessary are for example details about the date of the intake, the location and route of intake or any other details of the ingestion.”.

5.8 In sum, the Athlete shall provide actual evidence as opposed to mere speculation (CAS 2014/A/3820).

5.9 However, as per the Definitions of No Fault and No Significant Fault in the FINA DC Rules, the Athlete in this case does not have to establish how the Prohibited Substance entered his system in order to benefit from DC 10.4 and DC 10.5.1.1 because he was a minor at the time of the asserted the ADRV:

“No Significant Fault or Negligence: The Athlete or other Person’s establishing that his or her Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the antidoping rule violation. Except in the case of a Minor, for any violation of DC 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.”

5.10 In any event, FINA Doping Panel is satisfied that the Athlete established by balance of probability that Terbutaline entered his system through his use of the cough syrup Glencoff Expectorant on 27 and 28 September 2019 to treat a cough, headache and fever.

5.11 There is no room for the application of DC 10.4 in the present case. The threshold for “No Fault or Negligence” is high. The term is defined in the

Appendix 1 to FINA DC Rules as follows : "*The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule.*"

This notion of "*utmost caution*" is incompatible with the present case where the Athlete ingested the substance without conducting any checks to determine if it is prohibited or taking any other precautions. It should also be noted that as indicated on the medication label, it should only be used upon prescription from a medical professional. According to the information on file, the Athlete did not hold prescription for this medication.

5.12 However, there is room for the application of DC 10.5.1.1 in the present case, in determining Athlete's "degree of fault" pursuant to DC 10.5.1.1, the FINA Doping Panel has adopted the CAS decisions guidelines for determining the appropriate period of ineligibility based on the following three categories of fault and sanction ranges (CAS 2013/A/3327 Marin Cilic v. International Tennis Federation (ITF) & CAS 2013/A/3335 International Tennis Federation (ITF) v. Marin Cilic; CAS 2016/A/4371 Robert Lea v. USADA):

- a. "considerable degree of fault": 16 - 24 months, with a "standard" considerable degree of fault leading to a suspension of 20 months.
- b. "moderate degree of fault": 8 - 16 months, with a "standard" moderate degree of fault leading to a suspension of 12 months.
- c. "light degree of fault": 0 - 8 months, with a "standard" light degree of fault leading to a suspension of 4 months.

5.13 According to the CAS sentence in the matter Cilic vs ITF (CAS 2013/A/3327 Marin Cilic v. International Tennis Federation (ITF) & CAS 2013/A/3335 International Tennis Federation (ITF) v. Marin Cilic), an objective element

("what standard of care could have been expected from a reasonable person in the athlete's situation") "should be foremost in determining into which of the three relevant categories a particular case falls". (Para 71- 72). Applying this standard, FINA Doping Panel characterizes the Athlete's level of fault for not taking objectively reasonable action such as cross-checking the ingredients of the medication with the Prohibited List and informing the local medical store that he was subject to anti-doping rules as "considerable fault."

5.14 The Athlete simply did not perform any checks before ingesting the medication which caused the ADRV. In the "considerable fault" category, the range of the period of ineligibility under Robert Lea is "16-24 months, with a 'standard' considerable degree of fault leading to a suspension of 20 months. According to Cilic, after determination of the relevant category based on application of the objective element, the subjective element is "used to move a particular athlete up or down within that category." (Para 73). Recognizing that this is "the exception to the rule", FINA Doping Panel considers that in the Athlete's case, the subjective elements are so significant that they move him not only to the extremity this particular category, but also into a different category altogether.

5.15 Hence the application of the following subjective mitigating factors justifies moving him into the "moderate degree of fault" category and imposing a twelve-month period of ineligibility:

1. He was only 17 years old at the time of the sample collection and his level of education is allegedly low;
2. He was never provided with anti-doping education before the sample collection of 29 September 2019;
3. According to ADAMS, the Sample Collection of 29 September 2019 was the first anti-doping control of his career;
4. He was not an international-Level Athlete as per the FINA DC Rules;

5. His level of care might have been diminished by the fact that cough syrup medication does not raise as much suspicions of containing a prohibited substance as other medications.

5.16 Finally, provisions related to Substantial Assistance (DC 10.6.1), Admission of an anti-doping rule violation in the absence of other evidence (DC 10.6.2) or Prompt Admission (DC 10.6.3) cannot be envisaged in the present matter. In particular, it is noted that the provision related to prompt admission may only be envisaged when the athlete is potentially subject to a four-year sanction under DC 10.2.1 or 10.3.1.

5.17 In conclusion, FINA Doping Panel considers that a period of ineligibility of twelve months should apply in this case.

Commencement of the Period of Ineligibility and Credit for Provisional Suspension

5.18 As to the commencement date of the period of ineligibility, DC 10.11 provides that, as a general rule, the period of ineligibility shall start on the date of the Doping Panel's decision.

5.19 However, in accordance with DC 10.11.2, where the athlete promptly (which, in all events, means for an athlete before the athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by FINA, the period of Ineligibility may start as early as the date of sample collection. In each case, however, where this rule is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person was provisionally suspended, or accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed. In the present case, Mr. Willson Singh promptly admitted his violation on 20 April 2020 and then again on 5 May 2020. As he accepted a provisional suspension on 5 May 2020 and must serve at least half of the period of ineligibility going forward from this date, the Athlete's period of ineligibility should start on 5 November 2019.

5.20 DC 10.11.4 provides for credit for provisional suspensions. In this case, the Athlete has been provisionally suspended since 5 May 2020. The FINA Doping Panel concludes that the period of ineligibility is to start on 5 November 2019 (as requested by FINA). Hence, no credit shall be given for the time served under provisional suspension because the time served is already comprised within the period of ineligibility.

Disqualification

5.21 As per DC 9, a violation of these Anti-Doping Rules in Individual Sports in connection with an in-Competition test automatically leads to Disqualification of the result obtained in that Event with all resulting Consequences, including forfeiture of any medals, points and prizes. The results obtained by the Athlete during the Event in connection with the anti-doping test shall thus be disqualified.

5.22 As the FINA Doping Panel has decided to start the period of ineligibility on 5 November 2019, then it has no other choice but to disqualify all results obtained from the Athlete since 5 November 2019 as he was ineligible from this date and thus could not compete in any Competition.

5.23 In accordance with DC 10.8, all competitive results of the Athlete obtained from the date an anti-doping rule violation occurred, through the commencement of any provisional suspension or ineligibility period, shall, unless fairness requires otherwise, be disqualified with all resulting consequences including forfeiture of any medals, points and prizes. In this case, the athlete did not achieve any results between 19 September 2019 and 5 November 2019 so there is no need to apply this article.

5.24 Hence, all competitive results obtained by Mr. Willson Singh on 29 September 2019 and all results obtained since 5 November 2019 shall be disqualified with all resulting consequences including forfeiture of any medals, points and prizes.

Costs


- 5.25 According to C 12.3, Member Federations shall be obliged to reimburse FINA or the designated organization for all costs (including but not limited to laboratory fees, interpretation and hearing expenses and travel) related to an anti-doping rule violation committed by a Person affiliated with that Member Federation.
- 5.26 The Indian Swimming Federation shall be ordered to reimburse FINA for all costs related to the AAF in relation to the test conducted on the Athlete. In this case, the costs to reimburse are the costs of the Documentation Package (400 USD).

6. RULING

In the light of the above, the FINA Doping Panel decides as follows:

- 6.1 **Mr N. Willson Singh** is found to have committed an anti-doping rule violation under FINA DC 2.1 (Presence of a Prohibited Substance) and FINA DC 2.2(Use of a Prohibited Substance)
- 6.2 **Mr N. Willson Singh** is sanctioned with a year period of ineligibility of 12 (twelve) months;
- 6.3 The ineligibility period imposed on **Mr N. Willson Singh** is served from the 5 November 2019;
- 6.4 All results achieved by **Mr N. Willson Singh** on 29 September 2019 and as of 5 November 2019 are disqualified with all resulting consequences, including forfeiture of any medals, points and prizes;
- 6.5 The **Indian Swimming Federation** is obliged to reimburse FINA for all costs related to the present proceedings (USD 400-).

Done in Lausanne on 29 January 2021



FINA Doping Panel Chairman
Robert Fox