

FINA Doping Panel 04/20

FINA Doping Panel

comprised of

Robert Fox (SUI) Chairman

In the proceedings against

the athlete **Bibigul Menlibaeva**
affiliated to Uzbekistan 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 Ms. Bibigul Menlibaeva (hereinafter the "Athlete" or "Ms. Menlibaeva"), born on 12 June 2001, is a swimmer and is affiliated with the Uzbekistan Swimming Federation, a FINA Member Federation.

2. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

- 2.1 On 25 September 2019, Ms. Menlibaeva 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 Asian Swimming Federation, a FINA Continental Organization. Assisted by

the Doping Control Officer, Ms. Menlibaeva split the Sample into two separate bottles, which were given reference numbers A6366803 (the "A Sample") and B6366803 (the "B Sample").

- 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 5-methylhexan-2-amine (1,4-dimethylpentylamine).
- 2.3 5-methylhexan-2-amine (1,4-dimethylpentylamine) is a prohibited substance as per Section S.6 of the 2019 Prohibited List of WADA.
- 2.4 On 3 March 2020, FINA wrote to Ms. Menlibaeva notifying her about the AAF. Ms. Menlibaeva was informed that the aforesaid constituted a potential violation of the FINA DC Rules. Ms. Menlibaeva was granted the possibility to request the analysis of the B sample.
- 2.5 By email sent on 13 March 2020, Ms. Menlibaeva alleged that the AAF arose from her intake of a supplement named C4 at the 10th Asian Age Group Championships 2019 on 23 September 2019, without consulting a doctor or a trainer. Furthermore, she indicated that she did not want to break the rules and that she honestly did not know that the C4 supplement contained a substance that is on the WADA Prohibited List. She expressed her regrets. Her email was not accompanied by any supporting evidence.
- 2.6 On 29 April 2020, FINA sent to Ms. Menlibaeva the full documentation package, received from the WADA-accredited laboratory of Doha, related to the aforementioned AAF. Ms. Menlibaeva was formally charged with a possible violation of the FINA DC Rules 2.1 and DC 2.2. In addition, FINA offered the opportunity to Ms. Menlibaeva to accept a provisional suspension voluntarily pending the resolution of the matter. Finally, a final deadline was granted to Ms. Menlibaeva in order to request the analysis of her B Sample, as she had not yet provided her intentions regarding this. FINA specified that, without any answer from the Athlete by 8 May 2020 at

the latest, it would consider that she accepted the results of the A-sample and waived her right of the B-sample analysis.

2.7 On 1 May 2020, Ms. Menlibaeva sent a completed and signed Voluntary Acceptance of Provisional Suspension Form.

2.8 On 20 May 2020, FINA informed Ms. Menlibaeva that she had waived her right for the B Sample analysis since she did not request it by the granted deadline. FINA furthermore invited Ms. Menlibaeva to indicate in writing by 3 June 2020 at the latest if she wanted a hearing in front of the FINA Doping Panel. In addition, FINA also explained the following to Ms. Menlibaeva:

- if she decided to expressly waive her right to a hearing, she had the possibility, also by 3 June 2020 at the latest, to file a written defense instead. In such a case, FINA would 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 she decided to not request a hearing before the FINA Doping Panel in the deadline set, *i.e.* by 3 June 2020 at the latest, it would be deemed that she had implicitly waived her right to a hearing. In such a case, FINA would then also proceed according to FINA Rule DC 7.10.2; and
- if she decided to timely request a hearing, the case would be referred to the FINA Doping Panel for hearing and adjudication as per FINA DC Rule 8.1.

2.9 On 25 May 2020, Ms. Menlibaeva informed FINA that she waived her right to a hearing and she confirmed that she did not want to proceed to the analysis of her B-sample. She admitted her guilt and added that she repented for what she did.

2.10 Considering the above, by letter dated 19 August 2020, FINA referred the case of Ms. Menlibaeva to the FINA Doping Panel and requested the FINA Doping Panel to promptly issue a written decision without proceeding to a hearing. It requested the Doping Panel to make the following determination:

☐ Declaring that Ms. Menlibaeva has committed an anti-doping rule violation

☐ Imposing on Ms. Menlibaeva a period of ineligibility of two years, commencing on 25 September 2019.

☐ Ordering the disqualification of all results obtained by Ms. Menlibaeva from 25 September 2019 with all resulting consequences including forfeiture of any medals, points and prizes.

☐ Condemning the Uzbekistan Swimming Federation to reimburse FINA for the costs related to Ms. Menlibaeva ADRV (USD 400-.).

2.11 By letter dated 28 August 2020, the Chairman of the FINA Doping Panel informed the Athlete that the matter was under the jurisdiction of the FINA Doping Panel and set her a deadline to 11 September to inform him of her wish to hold a hearing. He also informed the Athlete of the FINA referral of the case and informed her of the prayers made on this occasion by FINA. He also informed her of the possibility pursuant to which he would render a decision alone, without convening a Panel.

2.12 By email dated 11 September 2020, the Athlete stated the following:
"I Bibigul Menlibaeva took a sports supplement S4 I don't know that this device is in prohibited devices, I very much regret it and very much regret that I broke the rules of the competition. I ask you not to judge me harshly, I repent of my mistake I don't want an audition and I don't want a sample B".

2.13 On 10 October 2020, the FINA Doping Chairman informed the Athlete of the decision rendered in this matter without reasons.

3. JURISDICTION & APPLICABLE RULES

3.1 According to FINA DC Rules 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 Uzbekistan Swimming Federation is a Member of FINA and Ms. Menlibaeva is an Athlete, affiliated with the Uzbekistan Swimming Federation, subject to the FINA DC Rules. As such, the Athlete is bound by the FINA DC Rules.
- 3.5 Considering the above, the FINA Doping Panel has jurisdiction to render a decision in this case.
- 3.6 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."*
- 3.6 The FINA DC Rules in its version in force in 2019 applies to this case.

4. LEGAL DISCUSSION

4.1 ESTABLISHMENT OF THE ADRV

- 4.1.1 As a starting point, FINA shall have the burden of establishing that an ADRV has occurred. The standard of proof shall be whether FINA has established an ADRV to the comfortable satisfaction of the FINA Doping Panel, bearing in mind the seriousness of the allegation which is made (see Article 3.1 of the FINA DC Rules).

4.1.2 In establishing that an ADRV has occurred, FINA benefits from certain presumptions, as set out in the following express provisions of the FINA DC Rules: DC 2.1.2 Sufficient proof of an anti-doping rule violation under DC 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

4.1.3 In the present case, the analytical report of the Sample A 6366803 provided by the Athlete indicated the presence of the substance 5-methylhexan-2-amine (1,4-dimethylpentylamine) and the Athlete expressly waived her right to the analysis of the Sample B 6366803 on 25 May 2020. 5-methylhexan-2-amine (1,4-dimethylpentylamine) is a Prohibited Substance under the Class S6 (Stimulants) as stipulated in the WADA Prohibited List 2019.

4.1.5 It is worth recalling that the Athlete's A Sample was analysed by a WADA accredited laboratory. Thus, and as noted, the Laboratory benefits from the presumption in Article 3.2.2 of the FINA DC Rules that it has conducted sample analysis and custodial procedures in accordance with the ISL. The Athlete did not rebut such presumption.

4.1.6 Also, the Athlete had not been granted a valid Therapeutic Use Exemption for this prohibited substance. Moreover, according to Article 2.1.1 of the FINA DC Rules, 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. In addition, the Athlete did not challenge the assertion of this ADRV by FINA. In view of all of the above, the Doping Panel considers that FINA has met its burden of proof to establish the ADRV of

Presence and that the only issues at stake in the present proceedings are the sanctions and consequences to be applied to the ADRV.

4.1.7 The Doping Panel notes that FINA also asserted an ADRV of Use under DC 2.2. However, in light of the fact that the Doping Panel has already held that the Athlete committed a violation of DC 2.1, the question of whether the Athlete also committed a violation of DC 2.2 is of no practical consequence, since both bear the same consequences. Thus, it is considered unnecessary to address the issue of whether the Athlete also committed a violation of DC 2.2.

4.2 SANCTION AND CONSEQUENCES

Period of Ineligibility

4.2.1 The Doping Panel considers that an ineligibility period of two (2) years, that is, the standard sanction set out in Article 10.2.1.2 of the FINA DCR applies to the Athlete's ADRV.

4.2.2 Pursuant to FINA DC 10.2, the base sanction for the presence of the Specified Substance 5-methylhexan-2-amine (1,4-dimethylpentylamine) 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.

4.2.3 As per Article 10.2.3 of the FINA DC Rules, the term "*intentional*" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

4.2.4 In the present case, FINA did not allege that Ms. Menlibaeva committed the violation intentionally. The base period of ineligibility applicable to the present case shall therefore be of two years pursuant to FINA DC 10.2.2.

4.2.5 Under certain conditions, this two-year period of ineligibility can be either eliminated where there is No Fault or Negligence (Article 10.4 FINA DCR), or reduced based on No Significant Fault or Negligence (Article 10.5 FINA DCR).

4.2.6 Both Articles require that the athlete establish how the prohibited substance entered his or her system. In this case, the Athlete merely asserted that the prohibited substance would have entered her system through the ingestion of a supplement from the brand C4. The Athlete did not specify which supplement from the brand C4 would have caused the AAF. She also failed to adduce any concrete evidence to establish that she took such supplement in the days leading up to the test. To the contrary, she did not declare the use of such supplement on the Doping Control Form she filed during collection of the sample which returned the AAF. Moreover, she failed to produce any evidence that such supplement contains the prohibited substance found in her sample. She also did not specify the dosage used and the dates on which she used the supplement.

4.2.7 In view of the above, the Doping Panel considers that the Athlete did not establish how the Prohibited Substance entered her system, and therefore Articles 10.4 and 10.5 FINA DCR cannot be applied in this case.

4.2.8 Finally, provisions related to Substantial Assistance (FINA DC Rule 10.6.1), Admission of an anti-doping rule violation in the absence of other evidence (FINA Rule DC 10.6.2) or Prompt Admission (FINA DC Rule 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 FINA Rule DC 10.2.1 or 10.3.1.

4.2.9 In conclusion, the period of ineligibility applicable in this case shall be of two years.

Commencement of the Period of Ineligibility and Credit for Provisional

Suspension

4.2.10 As to the commencement date of the period of ineligibility, the Doping Panel notes that Article 10.11 of the FINA DCR provides that, as a general rule, the period of ineligibility shall start on the date of the Doping Panel's decision.

4.2.11 However, in accordance with FINA Rule DC 10.11.2, where the athlete or 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 accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or date the sanction is otherwise imposed. In the present case, the Doping Panel considers that Ms. Menlibaeva promptly admitted her violation on 13 March 2020 and then again on 25 May 2020. the Doping Panel thus considers that the Athlete's period of ineligibility must start on 25 September 2019.

4.2.12 Moreover, Articles 10.11.4 of the FINA DCR provide for credit for provisional suspensions. In this case, the Athlete has been provisionally suspended since 1 May 2020. If it were decided to start the period of ineligibility on the date of its decision, the time she served under provisional suspension would have to be credited against the period of ineligibility imposed. The Doping Panel concludes that the period of ineligibility is to start on 25 September 2019 (as requested by FINA), and therefore 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

4.2.13 As per FINA DC Rule 9, a violation of these DC 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 in the Event in connection with the AAF during the 10th AASF Asian Age Group Championships shall thus be disqualified.

4.2.14 The Athlete was ineligible since 25 September 2019 and thus could not compete in any Competition.

4.2.15 Hence, all competitive results of Ms. Menlibaeva obtained in the Event in connection with the AAF during the 10th AASF Asian Age Group Championships and all results obtained since 25 September 2019 shall be disqualified with all resulting consequences including forfeiture of any medals, points and prizes.

Costs

4.2.16 According to FINA Rule 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.

4.2.17 FINA therefore submitted that the Uzbekistan Swimming Federation be ordered to reimburse FINA for all costs related to the AAF in relation to the test conducted on the Athlete. In this case, FINA stated that the costs to reimburse are the costs of the Documentation Package (400 USD). The Doping Panel admits this request.

5. RULING

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

- Bibigul MENLIBAEVA is found to have committed an anti-doping rule violation under FINA DC 2.1, Presence of a Prohibited Substance or Prohibited Method;
- Bibigul MENLIBAEVA is sanctioned with a two (2)-year period of ineligibility; the ineligibility period imposed on Bibigul MENLIBAEVA is served from the 25 September 2019;

- All results achieved by Bibigul MENLIBAEVA in the Event in connection with the AAF during the 10th AASF Asian Age Group Championships and all results obtained as of 25 September 2019 are disqualified and any medals, points and prizes forfeited;
- The Uzbekistan Swimming Federation is ordered to reimburse FINA for all costs related to the present proceedings (i.e. 400.- USD).
- All other and/or further-reaching requests are dismissed.

5.2 This decision may be appealed to the Court of Arbitration for Sport (CAS), pursuant to Article 13.2 of the FINA DCR. The time limit to file the appeal is governed by the provisions in Article 13.7 FINA DCR.

5.3 This decision will be notified to the Athlete, FINA, the Uzbekistan Swimming Federation, the Uzbekistan Anti-Doping Organisation, the Asian Swimming Federation and WADA.

Lausanne, 30 October 2020

A handwritten signature in black ink, appearing to be 'R. Fox', written over a horizontal line.

FINA Doping Panel Chairman
Robert Fox