



FÉDÉRATION
INTERNATIONALE
DE NATATION

FINA Doping Panel 11/14
23 March 2015

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In the proceedings against

the swimmer **Mr. Tae-Hwan Park**
affiliated to the Korea Swimming Federation (KSF)

represented by:

Mr. Howard Jacobs, Legal Counsel
Mr. John Choong Wook Ro, Legal Counsel
Mr. Sang Yoon Wo, Legal Counsel

I. THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing disciplines related to swimming. FINA has established and is carrying out, *inter alia*, a doping control program, both for in-competition as well as out-of-competition testing.

1.2. The Korea Swimming Federation is a member of FINA, and as such the aforementioned Federation is required to recognize and comply with FINA's anti-doping rules which are clearly set out in the FINA

Doping Control Rules ("FINA DC"). The FINA DC is directly applicable to and must be followed by *Competitors, Competitor Support Personnel*, coaches, physicians, team leaders, and club and representatives under the jurisdiction of the Korea Swimming Federation.

1.3 Mr. Tae-Hwan Park is a 25 year old male elite International Swimmer. He is currently resident in Korea, and has enjoyed extraordinary success as a swimmer since 2004.

1.4 Mr. Park began his swimming career at the age of six, and became the first Asian swimmer to win a gold medal at the Olympic Games, as well as being the first Asian swimmer to hold a World Record in in the men's 400 metre Freestyle.

1.5 Mr. Park has represented Korea in numerous international swimming competitions inclusive of being a member of the Korea Swimming Federation at the Beijing and London Olympic Games. He has also represented Korea at various FINA World Championships and competes at the 400m, 800m and 1500 meters distances in the Freestyle events, as well as competing for Korea in the Relay events.

1.6 During 2014 Mr. Park was selected to represent Korea at the 2014 Incheon Asian Games in Korea, as well as having been selected to compete in the Korean National Championship in Judo.

1.7 Mr. Park has been a member of FINA's registered testing pool for some considerable time, having first competed internationally in 2004, and has participated in regular FINA anti-doping testing since then.

II. NATURE OF THE CASE

2.1 On the 3rd September 2014 in Incheon Korea, Mr. Park underwent an out of competition doping control test, which test was conducted under the auspices of FINA.

2.2 Arising out of the aforementioned test, the WADA-accredited laboratory in Laval Quebec Canada reported and advised that an adverse analytical finding had been detected from the urine sample provided in the doping control test of Mr. Park. Such finding indicated “exogenous origin of Testosterone and metabolites” (Class S.1.1.b.Endogenous Anabolic Androgenic Steroids).

2.3 Upon receipt of the above report, FINA, through its Executive Director Mr. Cornel Marculescu, addressed a letter to Mr. Park on the 30th October 2014 advising him of the above and enclosing various annexures which consisted of:

- (a) the collection form (#3055639),
- (b) laboratory report for sample (3055639A)
- (c) full documentation package for sample 3055639A.

Such letter was also sent to the Korea Swimming Federation by means of a “cc” to the aforementioned letter.

2.4 The said notification letter was received by Mr. Park’s Management Company on the 31st October 2014 whilst Mr. Park was competing at the Korean National Championships.

2.5 Mr. Park duly became aware of the contents of the aforesaid letter on the 3rd November 2014, after he had competed at the Korean National Championships where he attained numerous gold medals in his designated events.

2.6 After becoming aware of the adverse analytical finding, the Korea Swimming Federation requested analysis of the B sample on the 6th November 2014.

2.7 On the 8th December 2014 the relevant WADA-accredited laboratory advised FINA that the B sample had also rendered a positive analysis for exogenous testosterone.

III. FACTS AND PROCEEDINGS

3.1 By letter dated the 30th October 2014 the FINA Executive Director notified Mr. Park as well as the Korea Swimming Federation of the adverse analytical finding, and the positive test result.

3.2 Mr. Park received advice via his Management Company of an adverse analytical finding.

3.3 On the 6th November 2014 the Korea Swimming Federation exercised their right in writing to FINA to have the B sample analysed.

3.4 On the 8th December 2014 arising out of the report from the relevant WADA-accredited laboratory, the Korea Swimming Federation was advised that the B sample had rendered an adverse analytical finding and a positive test result.

3.5 On the 11th December 2014 Mr. Park was advised that a FINA Doping Panel had been convened and would deal with this matter.

3.6 On the 13th January 2015 Mr. Park was advised by FINA of the composition of the FINA Doping Panel and that a formal hearing would take place in Lausanne on the 27th day of February 2015.

3.7 On the 26th January 2015 Mr. Park informed FINA that he wished to admit and acknowledge the presence of testosterone in the out of competition sample which was conducted on the 3rd September 2014 in Incheon, Korea, and he sought clarity regarding the provisions of DC Rule 10.6.1 with specific regard to Substantial Assistance. He further notified FINA of his impending report to request the initiation of criminal action charges against Dr. K , who was his medical physician at the time of the out of competition test. He indicated that this action was being taken as a result of his and/or his Management's investigation arising out of the positive adverse analytical finding which had been rendered against him.

3.8 Mr. Park's Attorney namely Mr. Antonio Rigozzi, requested a postponement of the hearing of the 27th February 2015 due to the fact that Mr. Park's Korean Attorneys had been instrumental in instituting the case of criminal prosecution against Dr. K , which case was now being proceeded with by the Korean Criminal Prosecutor assigned to the case.

3.9 Arising out of the request for postponement of the hearing of the 27th February 2015, FINA advised Mr. Park's Attorneys that their request had been granted and that the hearing would now be convened on the 23rd March 2015 in Lausanne.

3.10 On the 10th March 2015 FINA was advised in writing by Attorney Howard Jacobs that he had now been engaged to represent Mr. Park, and duly submitted his Power of Attorney reflecting representation, as well as submitting advance written submissions on Mr. Park's behalf, which submissions contained twenty-four (24) various exhibits in support of Mr. Park's case.

3.11 Upon receipt of the above, FINA duly advised Mr. Jacobs in writing that the relevant hearing would be convened, and would take place at the Lausanne Palace and Spa Hotel at 10h30 a.m. on the 23rd March 2015, and Mr. Jacobs was requested to furnish FINA with a list of the witnesses who would be testifying on behalf of Mr. Park.

3.12 Mr. Jacobs duly furnished FINA with the list of persons who would be attending and testifying on behalf of Mr. Park, if necessary. Such list bearing the names is reflected as per the attendance register referred to in this finding, marked Annexure "A".

3.13 Mr. Jacobs advised that the primary issues for the hearing concerned would be the appropriate period of ineligibility and the proper start date for the sanction, in view of the fact that Mr. Park had admitted and conceded the presence of an adverse analytical finding.

IV. JURISDICTION AND APPLICABLE RULES

4.1 Rule DC2 of the FINA DC provides for an anti-doping rule violation (ADRV) in circumstances where the presence of a prohibited substance is established in an athlete's doping control sample.

4.2 It was not contested that the presence of the prohibited substance testosterone was established in this case.

4.3 According to Rule DC 10.2 of the FINA DC, the default period for ineligibility for such an offence is two (2) years where there are no mitigating circumstances.

4.4 Jurisdiction of the FINA Doping Panel arises out of FINA Rules C 22.8, 22.9, and DC 8.1.

4.5 The applicable rules in this case are the FINA Doping Control Rules which were in effect since January 2009, (and amended at the FINA General Congress on 24 July 2009)

V. MOTIONS AND CONTENTIONS

Mr. Park:-

5.1 Accepted that he had violated DC 2.1, and contended that the exogenous original of testosterone and its metabolites had entered his system through a substance known as "Nebido" which he contended had been administered to him by means of injection through his then physician Dr. K and /or the nurse present at his consultation.

5.2 Advised that he had been introduced in October 2013 to Dr. (Dr. K), who, he had been informed was a beauty consultant whose practice was located in Korea's finest hotel. He was advised that the doctor had a high reputation specifically amongst public figures in Korea.

5.3 Informed the Panel that he had originally consulted with Dr. K in 2013 as a result of a dry skin condition which he had. Upon his visit to Dr. K she informed him that besides being a medical doctor she was an experienced chiropractor and physiotherapist who had served as a medical practitioner at Japan's prestigious Keio University Rehabilitation Centre, as well as having served on the New Jersey University Hospital Pain Clinic. She informed him that she was also a doctor at the Endocrinology Department of the Tokyo Geriatric Hospital, as well as being a member of the Korean and Japanese Rehabilitation

Academies, and that she was also an author who had published a book on rehabilitation.

5.4 Advised that upon his initial visit to Dr. K in October 2013, he was accompanied by his then Manager Mr. S

5.5 Through his Attorney Mr. Jacobs, advised the Panel that Mr. S had provided testimony to the Korean Prosecutor who had been assigned to prosecute Dr. K Mr. Park, (through his statement as highlighted in Exhibit 13 of the written statements and exhibits provided by his Attorney Mr. Jacobs) confirmed that in the aforementioned testimony Mr. S confirmed that Mr. Park had always been very careful with his medical treatment and wherever he attended only designated hospitals and clinics they were aware that Mr. Park was an elite athlete and that he required guidance on medications prescribed to him.

5.6 Confirmed that amongst the treatments that he received from Dr. K , she would take various blood tests and analyse same, and prescribe medication to him.

5.7 Testified that he was of the opinion that he had consulted with Dr. K approximately nineteen (19) to twenty (20) times since October 2013, but could only recall having approximately four (4) to five (5) blood tests having been carried out on him, and having received approximately five (5) injections as a prescribed treatment (the contents of the injections were not known to him.)

5.8 Testified that he had received various chiropractic treatments from Dr. K and believed that any injections prescribed by the doctor for him contained vitamins, due to the fact that he had advised the doctor that he was susceptible to colds, and as a result thereof

accepted her explanation that the injections would remedy his cold symptoms.

5.9 Testified that the reason for having requested the Korean Prosecutor to institute criminal procedures against Dr. K arose from the fact that during his investigations as to how and why an adverse analytical finding was recorded against him, he was of the opinion that it could only have arisen from his visit to Dr. K at her clinic on the 29th July 2014, where the doctor or the designated nurse had administered an injection to him after he had received chiropractic treatment.

5.10 Testified that all injections he had received were administered either by Dr. K or by Dr. K's nurse.

5.11 Confirmed that since being part of the registered testing pool since 2004 he had been subjected to various in and out of competition testing of between forty (40) to fifty (50) times, and had never previously tested positive. He had also obtained education in anti-doping by attending various lectures and had read various literature regarding the procedure followed in anti-doping testing.

5.12 Upon finding out he had obtained an adverse analytical finding, said that he had been in a state of shock and disbelief, and had expressed a furious reaction, as he believed that his standing in the Korean community had been compromised and his reputation had been completely damaged.

VI. THE FACTS

6.1 Mr. Park's urine sample was analyzed as a result of an out of competition doping control test conducted on the 3 September 2014,

and the said analysis report indicated the presence of exogenous testosterone and metabolites.

6.2 Arising out of such adverse analytical finding, the Korea Swimming Federation was informed of Mr. Park's situation on the 30 October 2014.

6.3 Mr. Park was informed of the positive analysis by his management committee on the 3 November 2014.

6.4 On the 6 November 2014 the Korea Swimming Federation requested analysis of the B Sample.

6.5 On the 8 December 2014 Mr. Park was informed that his B sample had also tested positive for exogenous testosterone. (Ex. 3)

6.6 On the 9 December 2014 following on the return of the analysis of 8 December, Mr. Park was informed by FINA of his provisional suspension in accordance with FINA's DC 7.1.11.

6.7 Mr. Park was then informed on the 11 December 2014 that a FINA Doping Panel had been constituted to hear his case.

6.8 On the 13 January 2015 Mr. Park was advised by FINA that the hearing would take place at FINA's office on the 27 February 2015.

6.9 On the 26 January 2015 Mr. Park informed FINA that he wished to admit the adverse analytical findings and the presence of testosterone in the relevant out of competition sample, and requested that such admission be taken into account in terms of the eventual sanction in accordance with FINA's article 10.9.2 of the FINA DC.

VII REGULATIONS AND LAW

The FINA Doping Control Rules are founded on the fundamental premise contained in FINA DC 2.1.1 that:

7.1 It is each competitor's personal duty to ensure that no prohibited substance enters his or her body. Competitors are responsible for any prohibited substance or its metabolites or markers found to be present in their samples.

7.2 Mr. Park clearly failed to uphold his duty to prevent a prohibited substance from entering his body and bears the fault for his positive test. He did however submit that it was not his fault as he had trusted Dr. K Consequently, Mr. Park must be sanctioned for his use of a prohibited substance.

7.3 With regard to mitigation an athlete is able to reduce or eliminate the default period of ineligibility on the basis of a number of provisions, most notably the following:

- (i) reduction of sanction to a period no less than 12 months for "no significant fault or negligence" (Rule DC 10.5.2); and
- (ii) reduction of sanction where the athlete provides "substantial assistance" as defined in Rule DC 10.5.3

As a result thereof, Mr. Park accepted that he must be sanctioned for the presence of testosterone in his system.

7.4 The period for ineligibility for the presence of an anabolic agent in his system shall be two (2) years unless the athlete can establish:

- (i) how the prohibited substance entered his system
- (ii) that he bears “no significant fault or negligence for the rule violations in terms of FINA DC 10.5.2.”

7.5 If no significant fault or negligence is generally found, and a reduction for the period of ineligibility given, this arises where the athlete is able to establish a lack of intent to enhance various sport performances.

7.6 Mr. Park contended that he had satisfied the requirements of Rule DC 10.5.2 as well as Rule DC 10.5.3, as well as having satisfied the requirements of DC 10.9 which states as follows:

(i) *“any period of ineligibility imposed on the athlete shall commence on the date of the hearing decision, and any period of provisional suspension shall be credited against the total period of ineligibility imposed”*

(ii) DC 10.9.2 *“ where the athlete promptly admits the ADRV after being confronted with it, the period of ineligibility may start as early as the date of sample collection.”*

7.7 Various case law was submitted by Mr. Jacobs on behalf of Mr. Park, namely:

CAS 2005/A/847 H. Knauss vs FIS

FINA Doping Panel 03/14 of 12 May 2014 FINA vs Efimova

AAA. 77 190 00462 13 JENF USADA vs Klymen

CAS 2009/A/1870 WADA vs Hardy

CAS 2005/A/830 Squizzato vs FINA

7.8 Mr. Jacobs finally submitted on behalf of Mr. Park the relevant provisions of Rule DC 10.5.3 dealing with Substantial Assistance.

VIII. CONCLUSION AND FINDING

After deliberation the Panel was unable to find that Mr. Park was able to satisfy fully the provisions of 10.5, as well as being unable to comply fully with the provisions relating to Substantial Assistance as set out in 10.5.3.

8.1 Regarding the issue of Substantial Assistance, according to FINA DC 10.5.3, The FINA hearing panel may, prior to a final appellate decision under DC 13 or the expiration of the time to appeal, suspend a part of the period of Ineligibility imposed in an individual case where the Competitor or other Person has provided Substantial Assistance to FINA or a criminal authority or professional disciplinary body which results in FINA's discovering or establishing an anti-doping rule violation by another Person or which results in a criminal or disciplinary body discovering or establishing a criminal offense or the breach of professional rules by another Person.

After a final appellate decision under DC 13 or the expiration of time to appeal, FINA may only suspend a part of the otherwise applicable period of Ineligibility with the approval of WADA. The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Competitor or other Person and the significance of the Substantial Assistance provided by the Competitor or other Person to the effort to eliminate doping in sport.

No more than three-quarters of the otherwise applicable period of Ineligibility may be suspended. If the otherwise applicable period of Ineligibility is a lifetime, the non-suspended period under this section must be no less than eight (8) years. If FINA suspends any part of the otherwise applicable period of Ineligibility under this Article, it shall

promptly provide a written justification for its decision to each Anti-Doping Organization having a right to appeal the decision. If FINA subsequently reinstates any part of the suspended period of Ineligibility because the Competitor or other Person has failed to provide the Substantial Assistance which was anticipated, the Competitor or other Person may appeal the reinstatement pursuant to DC 13.2.

Pursuant to the FINA DC comments accompanying the rules, it is noted that factors to be considered in assessing the importance of the Substantial Assistance would include, for example, the number of individuals implicated, the status of those individuals in the sport, whether a scheme involving Trafficking under DC 2.7 or administration under DC 2.8 is involved and whether the violation involved a substance or method which is not readily detectable in Testing. The maximum suspension of the Ineligibility period shall only be applied in very exceptional cases. An additional factor to be considered in connection with the seriousness of the anti-doping rule violation is any performance-enhancing benefit which the Person providing Substantial Assistance may be likely to still enjoy. As a general matter, the earlier in the results management process the Substantial Assistance is provided, the greater the percentage of the otherwise applicable period of Ineligibility may be suspended.

8.2 In this matter, the Panel considers that the athlete did not meet the requirements set forth in the statute above. Whilst at the time of the hearing, it is clear that he filed criminal charges, the Panel does not know the outcome of the charges. In addition, even though the athlete argued that successful prosecution of the criminal matter will result in keeping Dr. K away from sports in general, the Panel did not feel that this will impact greatly the fight against doping, as Substantial Assistance is required to do. The clinic, apparently, and on the athlete's own admission does not cater to athletes on a large scale. The parameters used to establish if the assistance provided is substantial or not, such as

the number of individuals implicated, the status of those individuals in the sport are clearly not met in this matter.

The above should however not be perceived as the Panel purely and simply discarding the information provided. It stands that Dr. K was not brought before the Panel and as such FINA Doping Panel considers it has no jurisdiction to directly sanction the Doctor. However, the Panel will recommend action to be taken if deemed appropriate by the Korea Swimming Federation, who will follow this aspect of the case closely.

8.3 Ultimately, the Panel holds a similar view to that of the CAS Panel in the matter *Knauss vs FIS* (CAS 2005/A/847 H. *Knauss vs FIS* § 7.5.5.6). The indication of the circumstances under which the athlete had the substance enter his body and the role played by his relationship with the clinic and Dr. K will be examined under FINA DC Rule 10.5.2. The Panel considers that there is a risk of overlapping circumstances which would be considered twice in mitigating the sanction to be imposed in this matter. Hence, it is considered that the conditions to be met in regard to Substantial Assistance must be applied circumspectly.

8.4 The second aspect of the athlete's defense to be considered is that of his bearing no significant fault nor negligence. As already outlined above, should the athlete be deemed by the Panel to bear no significant fault nor negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in a Competitor's Sample in violation of DC 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers), the Competitor must

also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

a) The Panel considers that the swimmer has established the manner in which the substance entered into his body and was the result of an injection of "Nebido". Dr. K is under investigation for administering this shot to Mr. Park and it has been confirmed by the nurse in question (and apparently accepted by the Korean prosecution) that the substance administered was in fact "Nebido" (i.e. testosterone). This explanation based on the evidence provided is accepted by the Panel on a balance of probability.

b) Turning to the examination of the behavior of the athlete, it is accepted that no significant fault or negligence may be defined as *"The Competitor'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 anti-doping rule violation."*

No significant fault or negligence is generally found, and a reduction of the period of ineligibility given, where the athlete establishes a lack of intent to enhance sport performance (cf. CAS 2009/A/1870 WADA v Jessica Hardy & USADA, (athlete had "no significant fault or negligence" and sanctioned for one year where she was established how the prohibited substance had entered her system. The Clenbuterol had entered her body through the intake of a contaminated food supplement); CAS 2005/A/830 Squizzato v. FINA, (swimmer had no significant fault or negligence under the FINA DC and was sanctioned for 12 months where he failed to read the label of a topical cream which contained an anabolic agent)).

The sole nature of the substance raises questions regarding the intent or on the part of the athlete to enhance his sporting performance. However, the Panel took into consideration various elements which allowed it to come to the conclusion that the athlete bore no significant fault or negligence.

First of all, the Panel accepted that the swimmer was typically very careful with the hospitals and other medical facilities that he attended and that he had checked out Dr. K and her clinic and was reassured by both Dr. K credentials and the fact that the Clinic was frequented by patients who would expect only the best of care.

The athlete accepted the injection from a professional who he trusted. He was reassured by her as she told him that what she was prescribing did not contain any prohibited substances. A subsequent check of this initial advice proved that Dr.Ki had been correct. He was also certainly reassured by the fact that during his time of treatment at this clinic, he had never been tested positive for any illegal substances.

He did not as a result question the nature of the substance that was being injected, given that the professional under whose care he had been treated for some time was supposed to be well aware of the restrictions and regulations under which he was subjected. As the Panel held in one of its previous decisions (cf. Enderica FINA Doping Panel 04/14 of 18 June 2014), one cannot hold athletes to the obligation of verification of the information and instructions that they receive from the persons who are qualified to providing knowledgeable instructions and information. It could not have been asked of the swimmer to consult another doctor before accepting to receive the injection.

IX. SANCTIONS

9.1 In setting the sanction in this matter, the Panel considered that a relatively recent case providing a significant degree of analysis in evaluating the various factors relevant to an arbitral panel's consideration of fault is *Cilic v. ITF, CAS 2013/A/3335*.

9.2 The *Cilic* Panel recognized three degrees (or ranges) of fault:

(i) Significant degree of or considerable fault, which the Panel said would support a sanction range of 16-24 months.

(ii) Normal degree of fault, which the Panel said would support a sanction range of 8-16 months.

(iii) Light degree of fault, which the Panel said would support a sanction range of 0-8 months. *Cilic*, 69-70.

9.3 The *Cilic* Panel also discussed fault in terms of the objective and subjective elements of the level of fault. *Cilic*, 71-77.

In terms of objective elements the *Cilic* Panel identified factors such as whether the athlete read the product label, cross-checked the label against the ingredients on the prohibited list, made an internet search of the product and consulted appropriate experts.

9.4 In this case, the swimmer does not fare very well on consideration of these traditional objective elements of fault, however, notably, one reason for his lack of curiosity or deeper critical analysis was due to the person treating him in whom, as stated above he totally trusted.

9.5 Hence, the Panel feels that pursuant to the scale as set forth by CAS in the *Cilic* case, one is in the range of 16-24 months, as

the athlete bears a significant degree of fault. The Panel feels that the athlete could have asked what he was being injected with, especially considering that injections were not a regular part of the treatment he was following.

9.6 After evaluating the unique circumstances in this case and applying FINA DC 10.5.2, the FINA DP believes an eighteen (18) month period of ineligibility is appropriate.

9.7 Pursuant to FINA DC 10.9.2, where the competitor promptly admits the anti-doping rule violation after being confronted with the anti-doping rule violation by FINA or a Member Federation, the period of ineligibility may start as early as the date of sample collection. In this instance, Mr. Park informed FINA very quickly after having been given the results of the B sample testing that he accepted the doping rule violation. The Panel therefore considers that this rule is applicable to the athlete, and it may be credited to him that he promptly admitted to a rule violation. Hence his ineligibility may start as of the date of sample collection.

X. SUMMARY OF THE DECISIONS

It was decided in Lausanne (Switzerland) on 23 March 2015:

10.1 The athlete is found to have committed an anti-doping rule violation under FINA Rules DC (2009) 10.5.2 and DC 2.1.

10.2 He shall be **ineligible for eighteen (18) months**, commencing on the 3 September 2014 and ending at the conclusion of 2 March 2016, for his first anti-doping rule violation.

10.3 All results obtained by Mr. Park on or after 3 September 2014 and through and including the date of this decision are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

10.4 All costs of this case shall be borne by the Korea Swimming Federation in accordance with DC 12.2.

10.5 Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of the complete judgement (FINA Rule C 12.11.4 and DC 13.6).

Robert Fox
Chairman

Raymond Hack
Member

Farid Ben Belkacem
Member

Signed on behalf of all three Panel Members



Robert Fox