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FINA Doping Panel 09/19
22 November 2019

FINA Doping Panel

comprised of

Robert Fox	(SUI)	Chairman
Farid Ben Belkacem	(ALG)	Member
William Bock, III	(USA)	Member

In the proceedings against

the swimmer **Mr. Ilya Zakharov** (the “Athlete”)

affiliated to the **Russia’s Diving Federation (“RSF”)**

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 Russia’s Diving Federation (RDF) is a member of FINA. RDF is required to recognize and comply with FINA’s anti-doping rules which are set out in the FINA Doping Code (“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 RSF.

1.3 The Athlete is a member of the RDF.

II. NATURE OF THE CASE

2.1 This case involves an alleged Whereabouts Violation in which the Athlete is contended to have committed three whereabouts failures within a 12 month period in violation of FINA DC 2.4.

2.2 The Athlete has been a member of the FINA registered testing pool (RTP) for about ten years.

2.3 On 31 August 2017 the FINA Executive Director sent the Athlete a letter advising that:

“It is very important to ensure that you file the required whereabouts information by the deadline specified below. A failure to do so without adequate excuse will constitute a Filing Failure under the DC Rules. It is also very important that you file accurate information about your whereabouts, and that you update this information as soon as you know of any change of plans, so that you are available for Testing at the declared whereabouts if an ADO seeks to test you. Failure to be available at the whereabouts you specified for the 60-minute time slot without adequate excuse is a Missed Test under the ADR. If you commit three Filing Failures and/or Missed Tests in one 12 -month period, that constitutes an Anti-Doping Rule Violation (ADRV) under the DC Rules, for which the sanction is a ban of 12 to 24 months (first offence) or more (for second and subsequent offences).”

2.4 On 22 November 2017 and on 5 December 2018, FINA sent the RDF emails specifying that:

“As per FINA DC 5.4.3, it shall be the obligation of each Athlete in the FINA Registered Testing Pool as well as that Athlete’s Member Federation, to keep FINA informed about where the Athlete can be met for unannounced Testing. It is the responsibility of each Athlete in the FINA Registered Testing Pool to: (a) advise FINA of his or her whereabouts on a quarterly basis; (b) update that information as necessary so that it remains accurate and complete at all times; (c) make him or herself available for Testing at such whereabouts.”

2.5 Both of the above referenced emails to the RDF specified that Mr. Zakharov was a member of the FINA registered testing pool (RTP).

2.6 Mr. Zakharov received an email from FINA on 2 April 2019 reminding him that:

“It shall be the obligation of each Athlete in the FINA Testing Pool as well as that Athlete’s Member Federation, to keep FINA informed about where the Athlete can be met for unannounced Testing. It is the responsibility of each Athlete in the FINA Testing Pool to:

- (a) advise FINA of his or her whereabouts on a quarterly basis;*
- (b) update that information as necessary so that it remains accurate and complete at all times;*
- (c) make him or herself available for Testing at such whereabouts.”*

2.7 The whereabouts rules are important to ensure that athletes can be regularly tested, and Mr. Zakharov as an elite athlete was aware of the whereabouts rules and the importance of following them to maintain his athletic eligibility.

III. ATHLETIC BACKGROUND AND DRUG TESTING EXPERIENCE

3.1 The Athlete, [REDACTED], is 28 years old and an experienced professional diver who has competed at or near the highest levels of his sport for more than ten years. He is a ten times European champion, and an Olympic champion (2012) and two time World champion in 2015 (Kazan) and 2017 (Budapest). At the 2012 London Olympic Games he was the gold medalist in the 3 meter springboard and silver medalist in the 3 meter synchronized event.

3.2 Mr. Zakharov has been drug tested more than a hundred times. He has never tested positive.

3.3 The Athlete has been in the FINA Registered Testing Pool since the beginning of 2010.

3.4 With respect to Whereabouts requirements, Mr. Zakharov understood that he was required to provide a one hour window each day in which he would be at a defined location and that he was required to provide a prompt update to FINA via the ADAMS system in the event he was unable to be available during his one hour window.

3.5 When his plans changed Mr. Zakharov was familiar with going to his computer and updating his whereabouts or changing his one hour window, or if a laptop was not available, he was able to modify his whereabouts on his cell phone.

3.6 From time to time Mr. Zakharov would also be assisted by his wife with his whereabouts responsibilities, and she was familiar with updating his whereabouts for him if asked to do so. She would use an iPad to modify his whereabouts filings.

First Whereabouts Failure

3.7 On 21 October 2018 Mr. Zakharov could not be located for testing during his one hour window.

3.8 On 30 October 2018 the FINA Executive Director sent a letter to Mr. Zakharov inviting him to respond to the charge that he had committed a missed test on 21 October 2018.

3.9 Mr. Zakharov did not respond to the charge that he had committed a missed test on 21 October 2018, consequently a whereabouts failure was recorded against him.

Second Whereabouts Failure

3.10 On 17 February 2019 Mr. Zakharov could not be located for testing during his one hour window.

3.11 On 22 February 2019 the FINA Executive Director sent a letter to Mr. Zakharov inviting him to respond to the charge that he had committed a missed test on 17 February 2019.

3.12 On 22 February 2019, Mr. Zakharov sent an email to FINA, responding as follows:

“With great regret I inform you that I missed test because several days ago I was injured during the training camp at our national training center “Ozero Krugloe” so on the 17th of February I had to go to the consultation with the doctor to Moscow, I did not have time to write my location, that is why I did not present at the base and missed the test. I do promise in future to put the data to the ADAMS more carefully. It was emergency.”

3.13 Based on the foregoing declaration, FINA determined to issue Mr. Zakharov a whereabouts failure against him based on his missed test on 17 February 2019, and so informed Mr. Zakharov by letter dated 25 February 2019.

3.14 In the letter to Mr. Zakharov on 25 February 2019, Mr. Zakharov was advised that FINA had determined that a missed test should be declared in relation to the test attempt on 17 February but that he could elect to have an administrative review of this decision.

3.15 However, Mr. Zakharov did not seek an administrative review. Consequently a second whereabouts failure was recorded against him.

Third Whereabouts Failure

3.16 On 11 June 2019 Mr. Zakharov could not be located for testing during his one hour window.

3.17 On 14 June 2019 the FINA Executive Director sent a letter to Mr. Zakharov inviting him to respond to the charge that he had committed a missed test on 11 June 2019.

3.18 On 27 June 2019, Mr. Zakharov responded via email as follows:

“Dear friends, hereunder is my explonation [sic] concerning my missed test on 11 of June 2019. On 11th of June 2019 at 5:20 AM I woke up because I felt strong stomach-ache. At 5:45 I am with my wife and child left our home [REDACTED] to the home of my parents [REDACTED] in order to leave our child to my parents and get to the nearest hospital [REDACTED] [REDACTED] Unfortunately we couldn’t find there a doctor that I needed, that’s why my wife took me to the Hospital of Dr. Paramonov [REDACTED] where we were waiting for a doctor (he came at 8:00 AM), The doctor performed a medical aid and my wife took me back to the home. While we were driving my cellphone on silent mode were on the backseat of my car, after the medical aid was performed I came back to the car and saw missed call, I immediately called back, but no one answered me. (Hospital Certificates attached).”

3.19 On 21 August 2019 FINA sent Mr. Zakharov a letter informing him that the FINA Doping Control Review Board (DCRB) had reviewed his explanation and supporting documents and concluded a missed test should be declared and that Mr. Zakharov should be found to have committed an anti-doping rule violation. Mr. Zakharov was given seven days to request administrative review of the DCRB’s determination.

3.20 Mr. Zakharov did not request administrative review, therefore, on 4 September 2019, FINA advised Mr. Zakharov that his case would be forwarded to the FINA DP for its consideration.

FINA's Charge

3.21 Via letter dated 22 October 2019 FINA formally charged Mr. Zakharov with a violation of FINA DC 2.4 based on the occurrence of three whereabouts failures within a twelve month period, and Mr. Zakharov was invited to accept a provisional suspension. Mr. Zakharov, however, did not accept a provisional suspension.

IV. PROCEEDINGS

4.1 The FINA Doping Panel ("FINA DP") was formed pursuant to provision C 22.9 of the FINA Constitution.

4.2 By letter dated 31 October 2019 Mr. Zakharov was advised of the composition of the FINA DP constituted for his case and given the opportunity to lodge an objection as to the participation of any Panel member assigned to his case. Mr. Zakharov did not object to the composition of the Panel.

4.3 The FINA DP hearing was held on 22 November 2019 in FINA Headquarters, Lausanne (SUI).

4.4 The Athlete was present but was not represented by legal counsel at the hearing before the FINA DP. He was accompanied at the hearing by Mr. Alexey Vlasenko, President of the RDF.

4.5 The Athlete testified and responded to questions from the FINA DP.

4.6 The hearing was conducted in English. Ms. Opehlie Calori served as interpreter at the hearing.

4.7 Ms. Irene Romero was an observer at the hearing,

V. JURISDICTION AND APPLICABLE RULES

5.1 The jurisdiction of the FINA DP arises out of the following provisions of the FINA Rules: C 22.8, C 22.9 and DC 8.1.

5.2 The applicable Rules in this case are the FINA DC in effect since 1st January 2015 (accepted in November 2014 in Doha).

5.3 Rules that bear on the decision of the FINA DP in this case include:

FINA DC 2.4 Whereabouts Failures

Any combination of three missed tests and/or filing failures, as defined in the International Standard for Testing and Investigations, within a twelve-month period by an *Athlete* in a *Registered Testing Pool*.

FINA DC 3.1 Burdens and Standards of Proof

FINA and its *Member Federations* shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FINA or the *Member Federation* has occurred. The standard of proof shall be whether FINA or the Member Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the *Athlete* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

FINA DC 5.4.2

FINA shall establish a FINA *Registered Testing Pool* of those Athletes who are required to comply with the whereabouts requirements of Annex I to the International Standard for Testing and Investigations. FINA should coordinate with *National Anti-Doping Organisations* the identification of such Athletes and the collection of their whereabouts information. FINA shall review and update as necessary its criteria for including Athletes in its *Registered Testing Pool* and shall revise the membership of its *Registered Testing Pool* from time to time as appropriate in accordance with the set criteria. All Athletes included or removed from the *Registered Testing Pool* and the *Member Federations* to which they belong shall receive written information about the inclusion or exclusion of an Athlete in the FINA *Registered Testing Pool*.

FINA DC 5.4.3

It shall be the obligation of each Athlete in the FINA Registered Testing Pool as well as that Athlete's *Member Federation*, to keep FINA informed about where the Athlete can be met for unannounced Testing. It is the responsibility of each Athlete in the FINA *Registered Testing Pool* to:

- (a) advise FINA of his or her whereabouts on a quarterly basis;
- (b) update that information as necessary so that it remains accurate and complete at all times;
- (c) make him or herself available for *Testing* at such whereabouts.

FINA DC 5.4.4

For purposes of DC 2.4, an Athlete's failure to comply with the requirements of the International Standard for Testing and Investigations shall be deemed a filing failure or a missed test (as defined in the International Standard for Testing and Investigations) where the conditions set forth in the International Standard for Testing and Investigations for declaring a filing failure or missed test are met. Furthermore, if the Athlete cannot be found for unannounced Testing due

to incorrect or insufficient information provided to FINA, the Member Federation to which the Athlete is affiliated shall be obliged to pay expenses for the unsuccessful attempt of Testing in accordance with DC 12.3 and DC 12.4.

DC 10 SANCTIONS ON INDIVIDUALS

FINA DC 10.3.2.

For violations of DC 2.4, the period of *Ineligibility* shall be two years, subject to reduction down to a minimum of one year, depending on the *Athlete's* degree of *Fault*. The flexibility between two years and one year of *Ineligibility* in this rule is not available to *Athletes* where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the *Athlete* was trying to avoid being available for *Testing*.

DC 10.11 Commencement of *Ineligibility* Period

Except as provided below, the period of *Ineligibility* shall start on the date of the final hearing decision providing for *Ineligibility* or, if the hearing is waived or there is no hearing, on the date *Ineligibility* is accepted or otherwise imposed.

VI. LEGAL DISCUSSION

6.1 Motions and contentions of the Athlete.

Mr. Zakharov contended:

6.1.1 That he did not intentionally commit a whereabouts violation and that he did not attempt to avoid testing.

6.1.2 With respect to the first alleged whereabouts failure, an alleged missed test, Mr. Zakharov contended that he was at home,

however, the security guard at his apartment did not allow the doping control officer to enter his apartment building.

6.1.3 With respect to the second alleged whereabouts failure, another alleged missed test, Mr. Zakharov contended that he was not in his room at training camp for his one hour window at 6 a.m. because he had injured his knee in training and at 3 a.m., being unable to sleep, he had gone to see a doctor at an emergency room one hour's drive away about the pain in his knee.

6.1.4 With respect to the third alleged whereabouts failure, a third alleged missed test, Mr. Zakharov contended that he was not at home for his one hour window set to commence at 6 a.m. because he had experienced stomach pain and at 5:20 a.m. had gone for treatment to the emergency room at a local hospital.

6.2 Factual findings of the FINA Doping Panel.

The FDP has found the following facts in this case:

First Alleged Whereabouts Failure

6.2.1 With respect to the first whereabouts failure alleged, Mr. Zakharov's explanation is inconsistent with the documentation provided by the doping control officer.

6.2.2 While Mr. Zakharov states that the doping control officer was unable to knock on his apartment door due to the intervention of the security guard in his apartment building, the doping control officer recorded that they knocked on the door of Mr. Zakharov's apartment [REDACTED] and heard a dog barking.

6.2.3 Mr. Zakharov concedes that he and his wife have a dog that they keep in their apartment, something the doping control officer would not have known unless the doping control officer had made it to Mr. Zakharov's door.

6.2.4 Additionally, the explanation that the security guard had not been told that he needed to admit doping control officers when they came to conduct testing appears to be inconsistent with Mr. Zakharov's claim to have been regularly tested out of competition and not to have had a whereabouts violation prior to the first missed test under consideration by the FINA DP. If a security guard had prevented prior attempts to test Mr. Zakharov it would seem likely that he would have had a violation earlier than 2018.

6.2.5 The FINA DP does not think that Mr. Zakharov was being dishonest about what happened on this test attempt. Mr. Zakharov chose not to challenge the missed test or provide an account about what happened closer in time to the missed test back in October 2018. The FINA DP concludes that it is most likely that he simply did not have a good recollection about the circumstances of his first missed test.

6.2.6 Based on all the available evidence the FINA DP concludes that it is probable that Mr. Zakharov was mistaken about being at home at the time of his first missed test and that there is no basis to question the description of the test attempt set forth in the "Unsuccessful Attempt Report" completed by the doping control officer.

6.2.7 In any case, it was Mr. Zakharov's responsibility to make his premises accessible to the doping control officer so that he could be tested. Therefore, even if Mr. Zakharov's account were accurate the FINA DP would still find that the first missed test should be upheld.

Second Alleged Whereabouts Failure

6.2.8 With respect to the second whereabouts failure alleged, Mr. Zakharov explained that he experienced persistent pain in his knee throughout the evening, and at 3 a.m. he and the team doctor traveled to Moscow via taxi to seek specialized medical attention.

6.2.9 Mr. Zakharov recalled that he went to an Army hospital that was open 24 hours a day and that he saw the doctor at 4 a.m. The doctor gave Mr. Zakharov painkillers and Mr. Zakharov returned to training camp.

6.2.10 Mr. Zakharov's one hour window began at 6 a.m. He was unsure why he did not make it back to the camp by 7 a.m., given that it was apparently about an hour from the hospital to the training camp. He stated that he did not get back to the camp until 9 a.m., but provided no clear explanation for what transpired between approximately 5 a.m. and 9 a.m. that morning.

6.2.11 Mr. Zakharov said he believed that the doping control officer's call must have come in while he was seeing the doctor in the emergency room. However, this explanation did not line up with the approximate time he would have been in the emergency room which was between 4 a.m. and 5 a.m.

6.2.12 Mr. Zakharov did not have an explanation for why he did not seek to change his one hour window when he left for Moscow at 3 a.m.

6.2.13 The FINA DP concludes that Mr. Zakharov did not provide a basis for missing his one hour window under these circumstances and that the second missed test should be upheld.

Third Alleged Whereabouts Failure

6.2.14 Mr. Zakharov concedes that after receiving a second whereabouts failure he was under a great deal of stress, and he knew that a third failure could result in his ineligibility.

6.2.15 With respect to the third whereabouts failure alleged, Mr. Zakharov's explained that he experienced stomach pain throughout the evening and that at 5:20 a.m., he and his wife arose to seek medical attention for him.

6.2.16 According to Mr. Zakharov they packed their children in the car, took the children to his wife's parents home, dropping the children off at 6:20 a.m., and then headed to the hospital, arriving at about 7:00 a.m., where they waited approximately one hour to be seen by a physician.

6.2.17 Mr. Zakharov provided his call log which reflected that he made an outgoing call at 6:55 a.m. This would have been 5 minutes before his one hour window expired. Mr. Zakharov did not recall anything about this call.

6.2.18 Mr. Zakharov's only explanation concerning why he did not attempt to change his one hour window when he left for the hospital is that he was in a great deal of discomfort.

6.2.19 The Panel accepts that Mr. Zakharov was likely experiencing significant stomach pain at the time he left his home about 40 minutes before his one hour window was to commence. However, given that he used his phone to place a call about 95 minutes later at 6:55 a.m., it would seem that the pain was not entirely debilitating.

6.2.20 Moreover, the Panel has noted that Mr. Zakharov could have enlisted his wife's assistance to change his one hour window in his whereabouts filing.

6.2.21 These are very unfortunate circumstances. The Panel recognizes it was not convenient for Mr. Zakharov to have to change his whereabouts at the last minute before going to the hospital (or in the car on the way to the hospital) in order to identify a one hour window later in the day when he could be tested. Yet, there was not a sufficient explanation for why he did not do so. Accordingly, the FINA DP has no choice but to conclude that Mr. Zakharov did not provide an adequate basis for missing his one hour window and that the third missed test should be upheld.

6.3 **Legal conclusions of the FINA Doping Panel**

The FDP has reached the following legal conclusions in this case:

6.3.1 The Athlete has committed his first anti-doping rule violation as a result of his three whereabouts failures within a 12 month period.

6.3.2 FINA has not sought to prove that the Athlete's anti-doping rule violation was part of a pattern of last minute whereabouts changes or other conduct raising a suspicion that the Athlete was trying to avoid being available for Testing. Nor does the FINA DP conclude that such a pattern of last minute changes exists.

6.3.3 The FINA DP accepts the Athlete's explanation that his missed tests were inadvertent and that the last two in particular were the consequence of health conditions which caused him to reasonably seek

medical treatment and to forget to update his one hour window on those days. Consequently, the FINA DP finds the Athlete's degree of fault to be moderate for his failures and imposes an eighteen month period of ineligibility which is midway between the highest sanction of two years and the lowest of one year that may be imposed under FINA DC 10.3.2 depending on the degree of fault of the Athlete.

6.3.4 The Athlete's period of Ineligibility shall start on 22 November 2019 the date of the hearing in his case.

VII. CONCLUSION

7.1 Mr. Ilya Zakharov is found to have committed an anti-doping rule violation under FINA DC Rule 2.4 as a result of three whereabouts violations in a twelve month period.

7.2 Mr. Ilya Zakharov receives **an eighteen month period of ineligibility** commencing on 22 November 2019, the date of the hearing in his case, for his first anti-doping rule violation.

7.3 All results obtained by Ilya Zakharov since 11 June 2019 are disqualified.

7.4 All costs of this case shall be borne by RDF in accordance with FINA DC 12.3.

7.5 RDF shall pay to FINA the expenses for the unsuccessful test attempts on Mr. Zakharov on 21 October 2018, 17 February 2019 and 11 June 2019 in accordance with DC 12.3 and DC 12.4.

7.6 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 this judgement (FINA Rule C 12.11.4 and DC 13.7.1).

Robert Fox
Chairman

Farid Ben Belkacem
Member

William Bock, III
Member

Signed on behalf of all three Panel Members

A handwritten signature in black ink, appearing to be 'R. Fox', written in a cursive style.

Robert Fox