FINA Doping Panel 08/19

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. Hiromasa Fujimori** (the "Athlete")

affiliated to the Japan Swimming Federation ("JSF")

represented by: Mr. Antonio Rigozzi, Mr. Masahiko Todo and Ms. Charlotte Fraye, legal counsels.

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 Japan Swimming Federation (JSF) is a member of FINA. JSF 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 *Competitor*s, *Competitor*

1.3 The Athlete, is a member of the JSF.

1.4 The Athlete was subjected to an in-competition test on 14 December 2018, following his participation in the 100-meter individual medley final at the FINA World Championships in Hangzhou, China. This test yielded an adverse analytical finding for methylephedrine at the extremely low estimated concentration of 16 micrograms/mL.

1.5 Methylephedrine is a prohibited substance under Class S.6 (Stimulants) of the 2018 Prohibited List International Standard adopted by the World Anti-Doping Agency (WADA) and is categorized as a Specified Substance which is prohibited only in-competition, pursuant to FINA DC 2.1 and DC 4.2.2.

II. NATURE OF THE CASE

2.1 As explained below, this case is, at least in part, about honesty and the commitment to integrity that may perversely cause a virtuous young athlete to lose his opportunity to compete in the Olympic Games.

2.2 Many young people are told by parents, teachers or coaches the timeless adage: “honesty is the best policy.”

2.3 Yet, we have all seen situations where honesty is not pursued with absolute vigor and where an individual may permits shades of grey, or of self-interest, to color their view on whether they will tell, as it is said, “the whole truth and nothing but the truth.”

2.4 The evidence in this case is that Hiromasa Fujimori was given advice about the importance of honesty by his mother and by his father,

who, as Hiromasa Fujimori's swimming coach, also helped develop his son into an elite international swimmer.

2.5 Mr. Fujimori's commitment to honesty was put to a test in this case when he was asked to identify what product likely caused his positive drug test for methylephedrine, a common stimulant found in over-the-counter cold medications.

2.6 Had Mr. Fujimori given the answer to this Panel that he believed an over-the-counter cold medication had caused his positive test, a high probability existed that, because he had identified the source of his positive, he would have received only a relatively light, *i.e.*, 3 to 6 month suspension, like other Japanese athletes who had tested positive for this same substance coming from a cold medication.[1]

2.7 Importantly, a 3 to 6 month suspension would have allowed Hiromasa Fujimori to compete in the upcoming 2020 Tokyo Olympic Games.

2.8 Moreover, the relevant anti-doping rules allow a reduction from a two year ban *only if* the athlete is able to identify the source of his or her positive test.

2.9 However, Mr. Fujimori tested all the supplements and medications he was using that he believed could have caused his positive test and none showed the presence methylephedrine.

2.10 And, Mr. Fujimori could not recall using a cold medication within the time period immediately prior to his positive test.

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[1] In fact, a review of methylephedrine cases on the Japanese Anti-Doping Agency website reveals 4 cases in which the athlete received sanctions with periods of ineligibility of 6 months or less. See, for instance: *Japan Anti-Doping Disciplinary Panel (JADDP) Case 2012-003, JADDP 2012-006, JADDP 2014-002, and JADDP 2015-005*.

2.11 Ultimately, valuing honesty and integrity even over the once-in-a-lifetime opportunity to participate in an Olympic Games held in his home country, Mr. Fujimori refused to permit his legal team to even suggest that he believed a cold medication might have caused his positive test.

2.12 Mr. Fujimori determined that he would not state that he had used a cold medication, even though this would likely have preserved his athletic eligibility for the most important competition in his life.

2.13 The FINA Doping Panel (FINA DP) deeply appreciates Mr. Fujimori's commitment to integrity which reflects the highest values of the Olympic movement and the best of what sport can offer to a world, inside and outside of sport that deeply needs a revitalization of virtue and honesty.

2.14 As discussed below, the FINA DP is firmly convinced that Mr. Fujimori did not intend to enhance his sport performance through the use of a prohibited substance, and we conclude that the most likely source of Mr. Fujimori's positive test was either a contaminated supplement or some contamination arising from a medication containing methylephedrine.

2.15 Regrettably, however, even though the substance at issue is a "Specified Substance," meaning that it is a substance categorized by WADA as "more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance,"[2] the rules do not permit a downward departure from two years ineligibility without Mr. Fujimori having identified the source of his positive test.

2.16 The FINA DP's hands are tied in this regard even though internet research reveals the extensive use of methylephedrine as an ingredient

[2] Comment to FINA DC 4.2.2.

(both listed and unlisted and as a product contaminant) in supplements[3] and in common over-the-counter cold medications[4] and the Athlete's positive test is susceptible to a multitude of possible (and this Panel finds on the facts of this case probable) non-doping, alternative causes.

2.17 The FINA DP regrets the lack of express authority within the rules to reduce Mr. Fujimori's sanction in this case.

2.18 The FINA DP considers that, on the facts of this case (which include a common supplement contaminant and Specified Substance, at a very low microgram level, coupled with strong evidence of lack of intent, an Athlete should not be prejudiced by telling the truth that he is unable to identify source and there should be some ability to depart downward from two years ineligibility.

2.19 Arguably, this is even more the case where, as here, the Athlete did not receive notice of his positive test as early as he might have and the delay of about two months between sample collection and notification of his positive A Sample may have made it somewhat more difficult to review his diet and possible exposures and identify the source of his positive test.

2.20 The FINA DP therefore urges WADA to promptly review this case and the relevant rules with a view to determining whether an exception can be made in this case or through amending the rules to permit discretion for a downward sanction departure to be exercised in unique circumstances involving:

2.20.1 exceptional circumstances (perhaps the final determination of which should involve scrutiny or oversight by WADA);

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[3] http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1015-51632014000300006 https://onlinelibrary.wiley.com/doi/full/10.1002/jms.1452

[4] https://www.drugbank.ca/drugs/DB11278

2.20.2 a Specified Substance in circumstances involving a low microgram estimated concentration of the Specified Substance in the Sample or other evidence suggestive of (though not necessarily dispositive of) product contamination;

2.20.3 general marketplace evidence reflecting the easy availability of the Specified Substance in supplements or over-the-counter medications and/or that the Specified Substance has been known to be a product contaminant in the past;

2.20.4 some delay in notifying the Athlete of his pending adverse analytical finding where more prompt notification could conceivably have helped the Athlete to identify the cause of his positive test;

2.20.5 the Athlete presenting convincing evidence of his overall honesty and lack of intent to enhance performance; and

2.20.6 thorough and reasonable, even though unsuccessful, efforts by the Athlete to identify the source of his positive test.

2.21 Ultimately, this Panel is hopeful that through the intervention of WADA and/or FINA (through amending its rules if necessary) Mr. Fujimori may receive a more lenient sanction than appears to be presently available to the FINA DP to issue under the FINA DC.

III. BACKGROUND OF THE ATHLETE

3.1 The Athlete, born 7 August, 1991, is 28 years old and an experienced professional swimmer who has competed at or near the highest levels of his sport for eight years, including competition in the

2016 Olympic Games where he was fourth in the 200 meter individual medley event and winning numerous medals in FINA World Cup events.

3.2 Over the time period since his first doping control on 11 July 2010 the Athlete has been drug tested a total of 51 times. His only positive test was the in-competition doping control on December 14, 2018, which had been preceded by a negative test only three days earlier on December 11, 2018.

IV. PROCEEDINGS

4.1 On 11 December 2018, at 21:30 p.m., following the 200-meter individual medley final at the FINA Short Course World Swimming Championships, Mr. Fujimori underwent a first doping control at the Championships which was negative.

4.2 On 14 December 2018, at 20:25 p.m., following the 100-meter individual medley final, Mr. Fujimori underwent a second doping control at the Championships which, as described above, was positive.

4.3 The WADA-accredited laboratory in Beijing reported the result of the A Sample test to FINA on 16 January 2019, although the WADA International Standard for Laboratories suggests that "*reporting of "A" Sample results should occur within ten working days of receipt of the Sample. The reporting time required for specific Competitions may be substantially less than ten days*".[5]

4.4 By letter dated 11 February 2019, the FINA Executive Director advised the Athlete that the A sample from his 14 December 2018 was

[5] *World Anti-Doping Code International Standard – Laboratories*, June 2016, s.5.2.6.5

positive. The Athlete was advised that he could arrange for a B sample analysis.

4.5 In light of his positive A Sample, since 13 February 2019 Mr. Fujimori has refrained from participating in any competitions or other activities organized by FINA.

4.6 On 19 February 2019 Mr. Fujimori requested that the B sample analysis be conducted.

4.7 By letter dated 27 March 2019 the Athlete was advised by the FINA Executive Director that the B sample analysis had confirmed the A sample finding of the presence of methylephedrine in his Sample. The Athlete was advised that his case would be forwarded to the FINA DP for further consideration.

4.8 On 28 March 2019, Mr. Fujimori immediately accepted a voluntary provisional suspension, effective as of 27 March 2019.

4.9 The FINA DP was formed pursuant to provision C 22.9 of the FINA Constitution.

4.10 The FINA DP hearing was held on 27 August 2019 in FINA Headquarters, Lausanne (SUI).

4.11 The Athlete was represented at the hearing by three attorneys: Mr. Antonio Rigozzi and Ms. Charlotte Frey of the law firm of Lévy Kaufmann-Kohler, Geneva, Switzerland and by Mr. Masahiko Todo of Ushijima & Partners, Tokyo, Japan.

4.12 The Athlete was present at the hearing and testified and responded to questions from the FINA Doping Panel.

V. JURISDICTION AND APPLICABLE RULES

5.1 The jurisdiction of the FINA Doping Panel 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:

> **DC 2.1** Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample.*
>
> **DC 2.1.1**
> It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, *Fault*, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping rule violation under DC 2.1.
>
> **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.

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.

DC 10 SANCTIONS ON INDIVIDUALS

DC 10.1 *Disqualification* of Results in the *Competition* during which an Anti-Doping Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with a *Competition* may, upon the decision of the ruling body of the *Competition*, lead to *Disqualification* of all of the *Athlete's* individual results obtained in that Competition with all Consequences, including forfeiture of all medals, points and prizes, except as provided in DC 10.1.1.

Factors to be included in considering whether to *Disqualify* other results in a *Competition* might include, for example, the severity of the *Athlete's* anti-doping rule violation and whether the *Athlete* tested negative in the other *Events*.

DC 10.2 *Ineligibility* for Presence, *Use* or *Attempted Use*, or *Possession* of a *Prohibited Substance* or *Prohibited Method*

The period of *Ineligibility* imposed for a first violation of DC 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension of sanction pursuant to DC 10.4, 10.5 or 10.6:

DC 10.2.1 The period of *Ineligibility* shall be four years where:

DC 10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance*, unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional.

DC 10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and FINA or the *Member Federation* can establish that the anti-doping rule violation was intentional.

DC 10.2.2 If DC 10.2.1 does not apply, the period of *Ineligibility* shall be two years.

DC 10.2.3 As used in DC 10.2 and 10.3, 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. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-*

Competition shall be rebuttably presumed to be not intentional if the substance is a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition*. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall not be considered intentional if the substance is not a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition* in a context unrelated to sport performance.

DC 10.4 Elimination of the Period of *Ineligibility* where there is *No Fault* or *Negligence*

If an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Fault or Negligence*, then the otherwise applicable period of *Ineligibility* shall be eliminated.

DC 10.5 Reduction of the Period of *Ineligibility* based on *No Significant Fault or Negligence*

DC 10.5.1 Reduction of Sanctions for *Specified Substances* or *Contaminated Products* for Violations of DC 2.1, 2.2 or 2.6.

DC 10.5.1.2 *Contaminated Products*

In cases where the *Athlete* or other *Person* can establish *No Significant Fault or Negligence* and that the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years *Ineligibility*, depending on the *Athlete's* or other Person's degree of Fault.

DC 10.5.2 Application of *No Significant Fault* or *Negligence* beyond the Application of DC 10.5.1.

If an *Athlete* or other *Person* establishes in an individual case where DC 10.5.1 is not applicable that he or she bears *No Significant Fault or Negligence*, then, subject to further reduction or elimination as provided in DC 10.6, the otherwise applicable period of *Ineligibility* may be reduced based on the *Athlete* or other *Person's* degree of *Fault*, 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 rule may be no less than eight years.

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.

DC 10.11.1 Delays not attributable to the *Athlete* or other *Person*.

Where there have been substantial delays in the hearing process or other aspects of *Doping Control* not attributable to the *Athlete* or other *Person*, the body imposing the sanction may start the period of *Ineligibility* at an earlier date commencing as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of *Ineligibility*, including retroactive *Ineligibility*, shall be *Disqualified*.

DC 10.11.2 Timely Admission.

Where the *Athlete* or other *Person* 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 or a *Member Federation,* the period of *Ineligibility* may start as early as the date of *Sample* collection or the date on which another anti-doping rule violation last occurred. 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. This rule shall not apply where the period of *Ineligibility* has already been reduced under DC 10.6.3.

DC 10.11.3 If a *Provisional Suspension* is imposed and respected by the *Athlete* or the other *Person*, then the *Athlete* or the other *Person* shall receive a credit for such period of *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. If a period of *Ineligibility* is served pursuant to a decision that is subsequently appealed, then the *Athlete* or other *Person* shall receive a credit for such period of *Ineligibility* served against any period of *Ineligibility* which may ultimately be imposed on appeal.

DC 10.11.4 If an *Athlete* or the other *Person* voluntarily accepts a *Provisional Suspension* in writing from FINA or a *Member Federation* and thereafter refrains from competing, the *Athlete* or the other *Person* shall receive a credit for such period of voluntary *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed. A copy of the *Athlete* or the other *Person's* voluntary acceptance of a *Provisional Suspension* shall be provided promptly to each party entitled to receive notice of an asserted anti-doping rule violation under DC 14.1.

DC 10.11.5 No credit against a period of *Ineligibility* shall be given for any time period before the effective date of the *Provisional Suspension* or voluntary *Provisional Suspension* regardless of whether the *Athlete* elected not to compete or was suspended by his or her team.

VI. LEGAL DISCUSSION

6.1 Motions and contentions of the Athlete.

The Athlete contended:

6.1.1 That he had never previously had a positive doping control in 51 prior anti-doping tests.

6.1.2 That he did not intend to use a prohibited substance.

6.1.3 That he acted reasonably and diligently to avoid a positive test.

6.1.4 That despite his diligence in testing all products which he believed could reasonably have been the cause of his positive test that he was unable to determine the source of his positive test.

6.1.5 That the most likely source of his positive test was some sort of contamination because:

- It would have made no sense for the Athlete to have used a prohibited substance on 14 December in-competition given he had been tested on 11 December in-competition and knew it was likely he would be tested again on 14 December;

- Methylephedrine is a common ingredient in supplements and medications;

- He was very careful and diligent in making sure that he only used safe products;

- He regularly checked product labels against the Prohibited List and did not use many supplements;

- He did not use any supplements during the period of the FINA Short Course World Championships; and

- In relation to supplements, the Athlete only used supplements certified by JADA – the Japanese Anti-Doping Agency.

6.1.6 That there was a substantial delay in notifying him of his positive test that should be taken into account pursuant to FINA DC 10.11.1 in order to adjustment the commencement date of his period of ineligibility, particularly because that delay may have contributed to his inability to identify the source of his positive test.

6.1.7 That because the Athlete's reasonable questions concerning some aspects of the analysis of his Samples, such as the estimated quantification of the B Sample, were not answered until the day of the hearing that it was still open to the Athlete to qualify for a timely admission which would also permit commencement of his period of ineligibility from the date of sample collection.

6.2 Factual findings of the FINA Doping Panel.

The FDP has found the following facts in this case:

Delay in Notice to the Athlete of His Positive Test

6.2.1 Notice to the Athlete of his positive test was delayed through no fault of the Athlete for nearly two months after sample collection and until 11 February 2019.

6.2.2 Neither FINA nor the WADA accredited laboratory provided any explanation for this delay.

6.2.3 A more prompt notification to the Athlete could have benefitted the Athlete in identifying the source of his positive test and the delay in notification may have prejudiced the Athlete by making it less likely that he would remember his diet and what he may have ingested around the time of his positive test.

The Athlete's Positive Test and Provisional Suspension

6.2.4 On 11 February 2019 the Athlete was notified of his positive test from the 14 December 2018 doping control.

6.2.5 From 13 February 2019 Mr. Fujimori refrained from participating in any competitions or other activities organized by FINA.

6.2.6 On 19 February 2019 Mr. Fujimori requested that the B Sample analysis be conducted on his Sample.

6.2.7 On 27 March 2019 the Athlete was advised that the B Sample analysis had confirmed the A Sample finding of the presence of methylephedrine in his Sample.

6.2.8 Thereafter, on 28 March 2019, Mr. Fujimori immediately accepted a voluntary provisional suspension, effective as of 27 March 2019.

6.2.9 Had Mr. Fujimori received earlier notice of his positive test he would likely have accepted a voluntary provisional suspension long before 27 March 2019.

Athlete's Diligence in Seeking to Avoid a Positive Test

6.2.10 The Athlete uses relatively few supplements and only uses supplements that have been certified by JADA.

6.2.11 The Athlete did not use supplements during the period of the FINA Short Court World Championships.

6.2.12 There is no evidence that the Athlete was less than reasonably diligent in seeking to avoid a positive test.

6.2.13 FINA was not represented at the hearing and sought to present no evidence that the Athlete lacked any diligence, nor after examining him does the FINA DP find any lack of diligence on his part in complying with the anti-doping rules.

Athlete's Diligence in Seeking to Determine the Source of His Positive Test

6.2.14 The Athlete and his legal team promptly sought to test a variety of products the Athlete was using around the time of his positive test.

6.2.15 There is no suggestion that the Athlete failed to test any product that was a reasonable possibility to have been the source of his positive test.

6.2.16 However, despite the exercise of due diligence, the Athlete was unable to identify the source of his positive test.

Athlete's Honesty in Not Advancing a Source for His Positive Test Where He Had Not Identified One

6.2.17 As explained above, it would perhaps have been a simple matter, though dishonest, for the Athlete to have sought to manufacture evidence that he had used a cold medicine and that this medication was the cause of his positive test.[6]

6.2.18 Regrettably, many athletes have been found by arbitration panels to have fabricated evidence of the source of their positive test in order to seek leniency in their sanction, a route which is perilous to the athlete's conscience and reputation and risks an additional sanction for tampering if the falsehood is found out.[7]

6.2.19 Nonetheless, a claim of use of a cold medication would likely be exceedingly difficult to disprove and might therefore have been considered by some to be a relatively simple deception to get away with.

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[6] However, "what a tangled web we weave, when first we practice to deceive," is an admonition that comes readily to mind. And, the cases cited below suggest that deception of an arbitration panel may not be as easy as some think.

[7] *IAAF v Rita Jeptoo*, CAS 2015/O/4128; *UKAD v Dr .George Skafidas*, SR/NADP/507/2015; *UCI v. Jure Kocjan,* UCI-ADT 05.2016; *WADA v. Lyudmila Vladimirvma Fedoriva*, CAS 2016/A/4700, 15 May 2017, p. 13, ¶ 59;

6.2.20 To his credit, however, Mr. Fujimori did not take the route of dishonesty and, regardless of the strictness of the rules which do not allow this FINA DP to show more leniency, Mr. Fujimori has maintained his integrity, a clear conscience and demonstrated himself to be an individual of high character and ethical standards, a person to whom his peers and fans of the sport of swimming can look to as a role model based on his upstanding conduct in the difficult circumstances of this case.

6.2.21 There is no doubt that Mr. Fujimori had a strong interest in achieving the lowest possible sanction for his rule violation. He testified compellingly and movingly about finishing tantalizing close to the podium at the 2016 Rio Olympic Games where he was fourth in the 100-meter medley.

6.2.22 Mr. Fujimori testified that his motivation in coming back for another Olympics was a hope to be able to put an Olympic medal around his father's neck at the 2020 Olympic Games in Tokyo.

6.2.23 Yet, Mr. Fujimori did not take the easy way out. He told the truth regardless of the cost.

6.2.24 The FINA DP found the following testimony by Mr. Fujimori to be straightforward, honest, and compelling:

QUESTION BY ARBITRATOR: Can you explain your general values related to honesty?

MR. FUJIMORI: What do you mean?

QUESTION BY ARBITRATOR: Are you honest?

MR. FUJIMORI: Yes.

QUESTION BY ARBITRATOR: Why?

MR. FUJIMORI: Because I don't want to live lying to people.

QUESTION BY ARBITRATOR: What made you decide you want to live without lying?

MR. FUJIMORI: It is a difficult question. Since I am little my parents always told me we had to live honestly without lying. My father as a coach told me and others that if we lack honesty it can influence the way competitions turn out.

QUESTION BY ARBITRATOR: Do you understand that you could have been dishonest and said that you used cold medication and perhaps gotten a less lengthy sanction?

MR. FUJIMORI: Yes.

QUESTION BY ARBITRATOR: Is that something you considered?

MR. FUJIMORI: Yes. I have considered.

QUESTION BY ARBITRATOR: Can you explain your process of thinking?

MR. FUJIMORI: I considered submitting this theory knowing I could have participated in the Olympic Games, but it is at odds with my intention of living truthfully.

6.2.25 The Panel commends Mr. Fujimori in acknowledging the temptation to lie and rejecting that temptation.

6.2.26 Truly, this is an example of the "Olympism" referenced in the Olympic Charter and of what is referred to as the "the spirit of sport" in the Introduction to the World Anti-Doping Code.

6.2.27 The FINA DP finds Mr. Fujimori to be a credible and honest witness.

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 the positive test for methylephedrine in his Sample.

6.3.2 FINA has not sought to prove that the Athlete's anti-doping rule violation was intentional, there is no evidence that his rule violation was intentional, and there was strong and persuasive evidence of the Athlete's honesty and integrity; therefore, the FINA DP finds that his rule violation was not intentional.

6.3.3 Despite due diligence, the Athlete has not established how the Prohibited Substance entered his system.

6.3.4 Because the Athlete has not established how the Prohibited Substance entered his system, the FINA DP is without authority under FINA DC 10.5 to lower the Athlete's period of ineligibility below two years.

6.3.5 Nevertheless, given the following factors the FINA DP considers that a two year period of ineligibility, may not be totally fair, but is only outcome available to the FINA DP under the rules.

6.3.6 All of the following issues were examined by the Panel and constituted the grounds based on which it was considered whether if there was any room to go below the sanction set forth in the FINA Doping Rules.

- The relatively ubiquitous nature of methylephedrine as a product ingredient and product contaminant in both over-the-counter medicinal products and supplements;
- The vanishingly small estimated concentration of methylephedrine found in the Athlete's sample;
- The due diligence exercised by the Athlete in testing products he was using at the time of his positive test and attempting to ascertain the source of his positive;
- The honesty demonstrated by the Athlete in his testimony
- The unlikelihood that the Athlete was using methylephedrine to enhance performance; and
- The frequency with which other athletes have received a significantly reduced sanction (in the range of 3-6 months total sanction) upon identifying the source of methylephedrine in their Sample.

The issue of proportionality been discussed by CAS Panels, notably CAS 2016/A/4534 Maurico Fiol Villanueva v. Fédération Internationale de Natation (FINA), award of 16 March 2017. In this matter, the CAS Panel held under the chapter in which it examined the question of proportionality that "*In the Panel's view it would be a wholly exceptional, if any, case to allow particular circumstances to trump the provisions of the WADC 2015 relating to sanctions for an ADRV*". Here in the present case, only exceptional circumstances could have allowed this Panel to consider that it could go below the sanction as set forth in the FINA Rules and the WADA Code. None of the circumstances highlighted above constituted sufficiently exceptional grounds to allow it to trump the provisions of the Code.

6.3.7 The Athlete's period of Ineligibility shall start on 1st January 2019 due to substantial delay in notification to him of his positive test which prevented him from earlier accepting a provisional suspension.

VII. CONCLUSION

7.1 Mr. Hiromasa Fujimori is found to have committed an anti-doping rule violation under FINA DC Rule 2.1 as a result of the presence of the prohibited substance methylephedrine in his sample.

7.2 Mr. Hiromasa Fujimori receives **a two year (i.e., 24 month) period of ineligibility** commencing on 1 January 2019, a date fixed by the Panel pursuant to FINA DC 10.11.1, and ending at the conclusion of 31 December 2020, for his first anti-doping rule violation.

7.3 All results obtained by Mr. Hiromasa Fujimori on 14 December 2018 are disqualified.

7.4 FINA is directed to communicate promptly with WADA and to determine whether a reduction of the foregoing two year period of ineligibility can be achieved as explained above in this decision.

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

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	**Farid Ben Belkacem**	**William Bock, III**
Chairman	Member	Member

Signed on behalf of all three Panel Members

Robert Fox