Arbitration CAS 2019/A/6482 Gabriel da Silva Santos v. Fédération Internationale de Natation (FINA), award of 14 February 2020

Panel: Mr Jeffrey Benz (USA), President; Mr Efraim Barak (Israel); Mrs Raphaëlle Favre Schnyder (Switzerland)

Aquatics (swimming)
Doping (clostebol)
CAS panels' adjudicatory role
Basis for the analysis of an athlete's claim of No Fault or Negligence
Limits to athletes' required endeavours to defeat doping
Athletes' anti-doping-related responsibility for their entourage

1. **It is not up to CAS panels to engage in a review, or revision, of the rules applicable to a dispute, supplementing its views for that of the drafters of said regulations.**

2. **Panels confronted with a claim by an athlete of No Fault or Negligence must evaluate what this athlete knew or suspected and what s/he could reasonably have known or suspected, even with the exercise of utmost caution. In addition, panels must consider the degree of risk that should have been perceived by an athlete and the level of care and investigation exercised by an athlete in relation to what should have been the perceived level of risk as required by the definition of Fault.**

3. **There are, and must be limits to which the anti-doping rules can extend in terms of imposing obligations on athletes. There are circumstances where it is not reasonable, nor can there have been any way for an athlete to have appreciated any degree of risk of testing positive. It is an unreasonable and impractical expectation to obligate an athlete to endeavor to survey the ailments of family members and the use by family members of various substances when visiting them in their home for a short stay.**

4. **A brother an athlete does not live with, and to whom the athlete does not assign any responsibility or participation in fulfilling his/her anti-doping obligations, is not a member of the athlete's entourage for whose actions the athlete bears anti-doping-related responsibility.**

I. PARTIES

1. Mr Gabriel da Silva Santos ("Appellant" or "Athlete" or "Mr Santos") is an elite international swimmer, swimming in the 50m and 100m freestyle disciplines, and is a member of the Brazilian national swimming team.

2. The Federation Internationale de Natation ("Respondent" or "FINA") is the international governing body and international sports federation for the sport of all international competition in water-based sports, including swimming, worldwide and is recognized as such by the International Olympic Committee. FINA's headquarters are in Lausanne, Switzerland.

3. The Athlete and FINA are jointly referred to as the "Parties" and individually as "Party".

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the Parties' written submissions and the evidence examined in the course of the present appeal arbitration proceedings. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal analysis.

A. The fundamental facts

5. The facts here were simple and straightforward.

6. Since 2017, Mr Santos has participated in the World Anti-Doping Agency ("WADA") Whereabouts Program, has been subjected to regular testing in competition and out of competition, and has never received a positive result for doping.

7. On 20 May 2019, Mr Santos provided a urine sample in a routine, out-of-competition test conducted by FINA as part of its program.

8. On 25 June 2019, Mr Santos received a letter from FINA notifying him that his sample had tested positive for the presence of the substance Clostebol. Clostebol appears on the Prohibited Substances List as a Class S1.1.A "Exogenous Anabolic Agent". In other words, Clostebol is a Non-Specified Substance.

9. Mr Santos put forward that the Clostebol entered his system as a consequence of cross-contamination through the sharing of cloths, towels, pillows, soaps etc. with his brother during a brief overnight visit at his mother's home to celebrate the birthday of his grandfather. Mr Santos's brother, used a cream with the brand name Novaderm that contains Clostebol. Mr Santos's brother was using the Clostebol cream for treatment of a skin condition on his face and genitals area, apparently under direction of a physician, a fact about which Mr Santos was unaware.

10. The Parties did not have any dispute on how the Clostebol entered the system of Mr Santos and in fact agreed upon it in this appeal.

11. The Parties disagreed, however, on the legal effect these facts should have on the sanction to be applied to Mr Santos.

B. Proceedings before the FINA Doping Panel

12. On 19 July 2019, a hearing was conducted before the FINA Doping Panel in Gwangju, South Korea. The FINA Doping Panel was satisfied and concluded that *"the cause of the* [adverse analytical finding ("AAF")] *is cross-contamination, as explained by the Athlete"*. Yet, the FINA Doping Panel has found that Mr Santos had committed an anti-doping rule violation under FINA DC Rule 2.1 and sanctioned him with a period of ineligibility of eight (8) months in accordance with FINA DC Rule 10.5.2.

13. On 22 July 2019, the FINA Doping Panel, *sua sponte*, rectified the prior decision by applying a one (1) year period of ineligibility in accordance with FINA DC Rule 10.5.2, with the sanction starting on 20 July 2019 and ending on 19 July 2020. The reason for the changed decision was not provided in evidence, and this procedural issue was not put forward by Mr Santos as a grounds for his appeal.

14. On 24 September 2019, FINA notified Mr Santos of the grounds for the decision (the "Appealed Decision").

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 25 September 2019, Mr Santos filed his statement of appeal with CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"), nominating Mr Efraim Barak, attorney-at-law, in Tel Aviv, as his party-appointed arbitrator.

16. On 16 October 2019, Mr Santos filed his appeal brief in accordance with Article R51 of the Code.

17. On 22 October 2019, FINA nominated Mrs Raphaëlle Favre Schnyder, attorney-at-law, in Zurich as arbitrator.

18. On 4 November 2019, FINA filed its answer in accordance with Article R55 of the Code.

19. On 28 November 2019, the CAS office notified the Parties that Mr Jeffrey Benz, attorney-at-law and barrister in Los Angeles and London, had been appointed as President of the Panel.

20. On 3 and 4 December 2019, the Appellant and Respondent, respectively, signed and returned the order of procedure in this appeal.

21. The hearing was held on 9 December 2019 at the offices of the CAS Anti-Doping Division in Lausanne.

22. The Panel was assisted by Mr Brent Nowicki, Managing Counsel for the CAS, and joined by the following:

- For Mr Santos:
  - Mr Bichara Abidao Neto, counsel (in person);
  - Mr Stefano Malvestio, counsel (in person);
  - Mr Gabriel de Silva Santos, witness and party (in person);
  - Mr Gustavo Santos, witness (by videoconference).
- For FINA:
  - Mr Jean-Pierre Morand, counsel (in person);
  - Mrs Katarzyna Jozwick, counsel (in person).

23. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution of the Panel. At the conclusion of the hearing, the Parties expressly confirmed that their right to be heard had been fully respected and that they were pleased that all rights had been respected.

IV. REQUESTS FOR RELIEF

24. Mr Santos' arguments may be summarized briefly as follows:

> *"31. (…) He acted with No Fault or Negligence and not with No Significant Fault or Negligence as the FINA Doping Panel wrongfully qualified it (although to a minimum degree); as such pursuant to FINA DC Rule 10.4 he should suffer no sanction;*
>
> *(…) Subsidiarily that he ingested Clostebol through a Contaminated Product* [the towel that had on it the cream that his brother was using that had in it Clostebol] *and should thus be imposed* [sic] *a reduced period of suspension in accordance with FINA DC Rule 10.5.1.2 (…).*
>
> *32. Furthermore, the Athlete will highlight how he was imposed* [sic] *a harsh sanction since he is subject an* [sic] *unfavourable treatment, because of the artificial distinction between Non-Specified Substances and Specified Substances, where two athletes who both bear No Significant Fault or Negligence (and have established how a certain substance entered into their organism)* [sic] *receive completely different sanctions under the same set of circumstances.*
>
> *33. In light of the above, any sanction deemed appropriate must fit the reality of the harem caused by the Athlete's actions. This must be measured by the extent of the wrongdoing, while considering that the Athlete's degree of carelessness is in itself inexistent* [sic]*".*

25. In the statement of appeal, Mr Santos sought the following relief:

> *"(i) Admit the present appeal against the decision rendered by the FINA Doping Panel on 19 July 2019 and rectified on 22 July 2019;*
>
> *(ii) Set aside the Appealed Decision;*
>
> *(iii) Decide that no sanction or ineligibility period shall be imposed on the Appellant;*
>
> *(iv) Alternatively, in the event that the Panel believes that the Appellant had any level of fault, to impose the minimum available sanction (taking into consideration that the Appellant will have already have served over 02* [sic] *(two) months of suspension by the date of the filing of this appeal);*
>
> *(v) The period of suspension eventually imposed be deemed to have started on 20 May 2019, the date of the sample collection;*
>
> *(vi) FINA shall bear any and all costs in connection with the present proceedings, as well as shall reimburse the Appellant of the costs and attorneys' fees already paid in association to the action taken by the FINA Doping Panel;*
>
> *(vii) The operative part of the Award is issued by 31 December 2019".*

26. In the Appeal Brief, Mr Santos changed his request for relief to read as follows:

> *"(i) Admit the present appeal against the decision rendered by the FINA Doping Panel on 19 July 2019 and rectified on 22 July 2019;*
>
> *(ii) Set aside the Appealed Decision;*
>
> *(iii) Decide that no sanction or ineligibility period shall be imposed on the Appellant;*
>
> *(iv) Alternatively, in the event that the Panel believes that the Appellant had any level of fault, to impose the minimum available sanction (taking into consideration that the Appellant will have already have served over five months of suspension by the date of the decision of this appeal);*
>
> *(v) Alternatively, rectify the Appealed Decision by clarifying that, in any event, the one (1) year sanction ineligibility period* [sic] *starting on 19 July 2019 shall expire on 18 July 2020;*
>
> *(vi) The period of suspension eventually imposed be deemed to have started on 20 May 2019, date of the sample collection, or alternatively on 26 June 2019, date in which* [sic] *the Athlete informed to FINA* [sic] *that he had voluntarily decided not to take part in any aquatic activities until a final decision would be rendered on the present matter;*
>
> *(vii) FINA shall bear any and all costs in connection with the present proceedings, as well as shall reimburse the Appellant of the costs and attorneys' fees* [sic]*;*

(viii) A final award or, alternatively, its operative part be issued by no later than 20 December 2019".

27. FINA's responsive arguments may be summarized succinctly as follows:

- The FINA Anti-Doping Panel sanctioned the athlete with a one-year Ineligibility period commencing 20 July 2019, which is the lowest possible sanction when applying the principle of No Significant Fault or Negligence.

- Article 10.5.1 does not enable a decision-making body to go below 12 months of ineligibility, which has been consistently confirmed by CAS Panels, given that Mr Santos tested positive for a Non-Specified Substance.

- There is no basis to build an argument that there is inequality of treatment between cases involving Specified and Non-Specified Substances as the FINA DCR, which mirror the World Anti-Doping Code provisions on the same point, say what they say and cannot be modified by a CAS Panel.

- In any event, the bar for No Fault or Negligence is extremely high and was not successfully overcome here because Mr Santos did not exercise utmost caution to investigate the medications present in his mother's home.

- The Contaminated Products provision of the DCR does not apply here because that rule requires that the Prohibited Substance must be contained in a relevant product and not disclosed on the label, that the contamination occurs at the time the product is manufactured (in other words, before the product label is made), and the admitted source of the Prohibited Substance was not a mislabeled or contaminated product but a product straightforwardly containing and declaring on its label the Prohibited Substance at issue here.

28. FINA sought the following relief in its Answer:

"1. The Appeal filed by Gabriel Da Silva Santos is dismissed.

2. FINA is granted an award for costs".

V. JURISDICTION

29. Article R47 of the CAS Code provides as follows:

"An appeal against a decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

30. The jurisdiction of the CAS arises out of Article C 12.1.3.2 of the FINA Constitution (2019 Edition), Article 13.2.1 of the FINA Doping Control Rules (2019 Edition), and Article R47 of the Code.

31. Article C 12.13.2 of the FINA Constitution provides as follows:

> *"C 12.13.2 A Member, member of a Member, or individual sanctioned by the Doping Panel, the Disciplinary Panel or the Ethics Panel may appeal the decision exclusively to the Court of Arbitration for Sport (CAS), Lausanne Switzerland. The CAS shall also have exclusive jurisdiction over interlocutory orders and no other court or tribunal shall have authority to issue interlocutory orders relating to matters before the CAS".*

32. Article 13.2.1 of the FINA Doping Control Rules ("FINA DCR") provides as follows:

> *"13.2.1 Appeals involving International-Level Athletes or International Competitions*
>
> *In cases arising from participation in an International Competition or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court".*

33. The provisions of the FINA Constitution, FINA Doping Control Rules and the Code quoted and referenced above confirm the jurisdiction of the CAS over this appeal.

34. In addition, the parties fully participated in these proceedings and no party objected at any time to the jurisdiction of the CAS or the Panel in regard to these proceedings.

35. The parties also confirmed on the record at the commencement of the evidentiary hearing that no party had an objection to the jurisdiction of the CAS or the Panel in this proceeding.

36. Moreover, the jurisdiction of the CAS is further confirmed by the Order of Procedure duly signed by the Parties.

37. It follows, therefore, that CAS has jurisdiction to decide the present dispute.

VI. ADMISSIBILITY

38. Article R47 of the Code states that:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body. An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".*

39. Beyond the default provisions of Article R47 of the CAS Code, Article 13.7.1 of the FINA Doping Control Rules permit an appeal to be lodged with CAS within twenty-one (21) days of notification of the decision in question:

> *"The deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party".*

40. Here, the Appealed Decision was issued by the FINA Doping Panel on 19 July 2019 and re-issued on 22 July 2019, and the reasons were notified to Mr Santos on 24 September 2019. Mr Santos lodged his statement of appeal on 25 September 2019, one day later.

41. No party challenged the admissibility of this appeal and in fact the parties participated fully in these proceedings.

42. It follows therefore that this appeal is admissible.

VII. APPLICABLE LAW

A. The relevant FINA Doping Control Rules on liability

43. The provisions of the FINA DCR that are relevant to this decision are as follows:

> FINA DCR Rule 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.*
>
> [Comment to DC 2.1.1: An anti-doping rule violation is committed under this Article without regard to an Athlete's Fault. This rule has been referred to in various CAS decisions as "Strict Liability". An Athlete's Fault is taken into consideration in determining the Consequences of this anti-doping rule violation under DC 10. This principle has consistently been upheld by CAS]*".*
>
> FINA DCR Rule 7.9.1 (titled *"Mandatory Provisional Suspension"*)
>
> *"The FINA Executive or Member Federation with results management responsibility shall impose a Provisional Suspension promptly after the review and notification described in DC 7.1 and 7.3 have been completed for an Adverse Analytical Finding involving a Prohibited Method or a Prohibited Substance other than a Specified Substance.*
>
> *A mandatory Provisional Suspension may be eliminated if the Athlete demonstrates to the hearing panel that the violation is likely to have involved a Contaminated Product. A hearing body's decision not to*

eliminate a mandatory Provisional Suspension on account of the Athlete's assertion regarding a Contaminated Product shall not be appealable".

FINA DCR Rule 10.2 (titled *"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".

FINA DCR Rule 10.4 (titled *"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.

[Comment to DC 10.4: DC 10.4 and DC 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (DC 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the

Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under DC 10.5 based on No Significant Fault or Negligence]*"*.

FINA DCR Rule 10.5.1.2 (titled *"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.

[Comment to DC 10.5.1.2: In assessing that Athlete's degree of Fault, it would, for example, be favourable for the Athlete if the Athlete had declared the product which was subsequently determined to be Contaminated on his or her Doping Control form]*"*.

FINA DCR Rule 10.5.2 (titled *"Application of No Significant Fault or Negligence beyond the Application of DCR 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.

[Comment to DC 10.5.2: DC 10.5.2 may be applied to any anti-doping rule violation except those rules where intent is an element of the anti-doping rule violation (*e.g.*, DC 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (*e.g.*, DC 10.2.1) or a range of Ineligibility is already provided in a rule based on the Athlete or other Person's degree of Fault]*"*.

FINA DCR Rule 10.8 (titled *"Disqualification of Results in Events subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation"*)

"In addition to the automatic Disqualification of the results in the Event which produced the positive Sample under DC 9, all other competitive results of the Athlete obtained from the date a positive Sample was collected (whether In- Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

[Comment to DC 10.8: Nothing in these Anti-Doping Rules precludes clean Athletes or other Persons who have been damaged by the actions of a Person who has committed an anti-doping rule violation from pursuing any right which they would otherwise have to seek damages from such Person]*".*

FINA DCR Rule 10.11.2 (title *"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".

FINA DCR Appendix 1 (definition of *"Fault"*)

Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as disability, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.

[Comment: The criteria for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered. However, under DC 10.5.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other Person was involved]*".*

FINA DCR Appendix 1 (definition of *"No Fault or Negligence"*)

"No Fault or Negligence: The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of DC 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system".

FINA DCR Appendix 1 (definition of *"No Significant Fault or Negligence"*)

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

[Comment: For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance]*".*

B. The relevant FINA Doping Control Rules on sanctions

44. In this case, which does not involve a Specified Substance, and where the anti-doping rule violation ("ADRV") involving the presence of Clostebol is admitted, the primary, actually the only, issue to determine is the question of the fault or negligence of the Athlete and, the resulting sanction to be imposed on the Athlete if the panel would find either fault or negligence. The mandatory sanction for the presence of Clostebol pursuant to FINA DCR 10.2 is a four-year period of Ineligibility unless the Athlete can establish that the ADRV was not intentional, so as to reduce the sanction from four years down to two years.

45. Here, it was accepted by the Parties that the presence of the Clostebol in Mr Santos' body was the result of conduct that was not intentional.

46. As a result, to further reduce the sanction below two (2) years, the Panel must consider Mr Santos' fault under FINA DCR Rules 10.4, 10.5.1, and 10.5.2.

47. If the Panel determines that there is No Fault or Negligence, then the Panel must eliminate any period of Ineligibility.

48. If the Panel determines that the presence of Clostebol in Mr Santos' sample was the result of a contaminated product, then the Panel may issue a penalty of at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility based on a consideration of Mr Santos' degree of fault.

49. If the Panel determines that there is Fault but the Fault is not significant then the minimum penalty is a period of Ineligibility of twelve (12) months, but after considering Mr Santos' level of Fault, the Panel may consider a penalty of a period of between twelve (12) months and twenty-four (24) months Ineligibility.

50. The FINA DCR are in all relevant and material respects identical to the corresponding provisions of the 2015 version of the World Anti-Doping Code ("WADA Code"). Accordingly, references herein to one include the corresponding reference to the other.

VIII. THE MERITS

51. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Panel refers in this Award only to the submissions and evidence considered necessary to explain its reasoning.

52. Given the Parties' agreement that the positive test here was not the result of intentional conduct by Mr Santos, the Panel must start with an analysis of whether Mr Santos bore any fault or negligence, and, if so, should he receive the benefit of the contaminated products rule, and if the facts and circumstances here do not fit within the scope of the contaminated products rule then what was his level of fault so that a determination of a reduction, if any, in his period of ineligibility could be computed. Before setting forth on this analytical road, the Panel must first address an argument advanced by Mr Santos that having Specified Substances and non-Specified Substances treated differently is unfair.

A. Fairness of special treatment of Specified Substances

53. Mr Santos argues that there is some disparity of treatment between assessing fault as between specified and non-specified substances that is unfair or otherwise violates some legal principle he refers to as "equal treatment". In other words, Mr Santos argues that there is some unfairness in the inequality of treatment in determining fault, and sanction, as between those who test positive for specified substances and those who test positive for non-specified substances when they engage in similar levels of fault.

54. Article 4.2.2 of the WADA Code provides that:

> *"For purposes of the application of Article 10, all Prohibited Substances shall be Specified Substances except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List. The category of Specified Substances shall not include Prohibited Methods".*

55. In the WADA Code, those testing positive for Specified Substances have the possibility for reduced punishment compared to Prohibited Substances that are not Specified Substances.

56. The Comment to Article 4.2.2 of the WADA Code provides the explanation for this different treatment:

> *"The Specified Substances identified in Article 4.2.2 should not in any way be considered less important or less dangerous than other doping substances. Rather, they are simply substances which are more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance".*

57. A version of WADA Code Section 4.2.2 and the comment thereto has existed in the regulations of international sport among World Anti-Doping Code signatories since at least the 2009 edition of the World Anti-Doping Code. No challenge has succeeded since on the basis that there is some procedural or legal infirmity in providing athletes who test positive for certain

substances with the opportunity for more favorable treatment than those athletes who test positive for other substances.

58. The legislator has spoken and it is not up to this Panel to engage in a review, or revision, of the WADA Code, supplementing the Panel's views for that of the WADA Code drafters (*See*, CAS 2010/A/2307, paras. 120-131).

59. It is black letter law that the Panel must apply the provisions of the WADA Code to the facts before us, and here the requirements of the WADA Code to consider the sanctions to be imposed for non-Specified Substances. There is no legal principle that has been presented to this Panel to compel a different conclusion.

60. Accordingly, the Panel rejects the argument advanced by Mr Santos for causing Specified Substances and non-Specified Substances positive tests to be treated identically on fairness grounds. The Panel accepts the provisions of the FINA DCR on their face and limits its analysis to those provisions and the application of those provisions to the facts established in this case.

B. Fault or Neglience

61. To reach its decision in this case, the Panel must, fundamentally, and simply, analyze fault.

62. When assessing fault, the Panel must start with the definition of Fault as contained in the FINA DCR Appendix 1, and the comment relating thereto, providing in relevant part as follows:

> *"Fault: Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as disability,* ***the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk****. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.*
>
> [Comment: The criteria for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered]*"* (emphasis added).

63. No Fault or Negligence is defined in the FINA DCR Definitions as *"the Athlete or other Person's establishing that he or she* ***did not know or suspect****, and* ***could not reasonably have known or suspected even with the exercise of utmost caution****, that he or she had Used or had been administered the Prohibited Substance or Prohibited Method or otherwise violated an ant-doping rule"* (emphasis added).

64. The Comment to Article 10.4 of the FINA DCR provides in relevant part that:

> *"DC 10.4 (…) will apply only in exceptional circumstances, for example where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (…) (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink)".*

65. As the FINA panel stated in paragraphs 6.21 and 6.22 in decision in the proceeding below, a panel confronted with a claim by an Athlete of No Fault or Negligence must evaluate *"(i) what the Athlete knew or suspected and (ii) what he could reasonably have known or suspected, even with the exercise of utmost caution"*. In addition, and this did not appear to have been considered by the FINA panel, the Panel must consider the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk as required by the definition of Fault.

66. The Panel is acutely aware of the fact that No Fault or Negligence cases are relatively few and far between, and that the applicable comments emphasize that the finding of No Fault or Negligence is to be reserved for the truly exceptional case.

67. The leading CAS case on this subject is CAS 2009/A/1926 *ITF v. Richard Gasquet* and CAS 2009/A/1930 *WADA v. ITF & Richard Gasquet* ("Gasquet case"). In the Gasquet case, the athlete was kissed by a stranger at a restaurant and the panel found that she was the source of the cocaine that had entered his system.

68. In reaching its determination that the athlete had no fault or negligence, the Gasquet case panel stated in pertinent part as follows:

> *"5.30. The Panel has to lay its focus on the facts that the Player met Pamela at a restaurant, "Vita", that he learned only then that she was also planning to go to "Set" later, and that he never saw her or anyone else, during the entire evening, taking cocaine or appearing to be under the influence of that drug.*
>
> *5.31. Considering these facts, the Panel concludes that it cannot find that the Player did not exercise utmost caution when he met Pamela in an unsuspicious environment like an Italian restaurant ("Vita"). He could not have known that she might be inadvertently responsible for administering cocaine to him if he were to kiss her that night. Also, the Panel concludes that it was impossible for the Player to know, still exercising the utmost caution, that when indeed kissing Pamela, she might inadvertently administer cocaine to him. As the Player did not know Pamela's cocaine history and did not see her, during the entire evening, taking cocaine or appearing to be under its influence, how could he imagine that she had been consuming cocaine? And even more, how should he have been in a position to know that, even assuming that he knew that she had been consuming cocaine, that it was medically possible to be contaminated with cocaine by kissing someone who had ingested cocaine beforehand? The parties' experts in the present matter concluded only after some study that this is*

possible. The members of the Panel are not reluctant to admit that they would not have believed, without having seen the statements of these experts that such a means of contamination is possible. The Panel's position is thus clear: even when exercising the utmost caution, the Player could not have been aware of the consequences that kissing Pamela could have on him. It was simply impossible for the Player, even when exercising the utmost caution, to know that in kissing Pamela, he could be contaminated with cocaine.

5.32. ***The question following this conclusion is thus the following: is it the intention of the Programme or of the WADA Code to make a reproach to a player if he kisses an attractive stranger whom he met the same evening, under the circumstances such as in the present case? This can obviously not be the intention of any Anti-Doping Programme. As a matter of course, no Anti-Doping Programme can impose an obligation on an athlete not to go out to a restaurant where he might meet an attractive stranger whom he might later be tempted to kiss. As the Player correctly emphasised, this would be precisely the sort of "unrealistic and impractical expectations" that the CAS identified in the CAS advisory opinion CAS 2005/C/976 & 986 FIFA & WADA, par. 73, and that should not be imposed by sanctioning bodies in their endeavours to defeat doping.***

5.33. In view of the above, the Panel comes to the conclusion that by kissing Pamela, and thereby accidentally and absolutely unpredictably, even when exercising the utmost caution, getting contaminated with cocaine, the Player acted without fault or negligence, in accordance with the respective definition in Appendix One of the Programme" (emphasis added).

69. Considering the principles in the relevant FINA DCR provisions and enunciated in the Gasquet case, the Panel is of the view that Mr Santos was not at fault or negligent under the circumstances.

a. Mr Santos was attending a celebration for his grandfather that included an overnight stay at his mother's house where his brother was also staying.

b. Mr Santos had no knowledge of his brother's use of the Novaderm cream containing Clostebol or that his brother had a condition that required its use.

c. While it is expected that a professional Athlete will apply a high degree of care with respect to food and beverage or to sharing plates or glasses in public places or even a reduced degree of care with respect to such elements in a known and safe environment, the Panel is satisfied that Mr Santos had no reason to make an inquiry about his family members' medical conditions or treatment, or the presence of any prohibited substances other than food and drinks in his mother's house as he was visiting for a very short time.

d. It was entirely likely, given that his brother was using the Clostebol for treatment of a skin condition in his genital region, the subject never would have been brought up in conversation given its very private nature.

e. Mr Santos did not entrust any of his anti-doping obligations to his mother or his brother, but took full responsibility for them.

f. There was nothing suspicious or even remotely dangerous about the environs in which Mr Santos was staying or how he contracted contact with the Clostebol. Quite the opposite, Mr Santos was in the safe environment of his mother's home.

g. It would not have been obvious to anyone that Mr Santos could have contacted Clostebol from a towel in his bathroom or pillow shared with his brother.

70. Here, even exercising the utmost caution, it is unlikely Mr Santos would have discovered that his brother was taking an over the counter treatment for a skin condition contained a prohibited substance or that such prohibited substance could or would transfer from his brother's topical use of it to a face towel in a bathroom or a pillow or even a piece of dress that they were sharing. It is simply not something that any family member, in their reasonable, or likely, discussions about a celebratory weekend for a grandparent involving a shared overnight in the mother's home, would ever bring up. In fact, given that there was some testimony that the skin condition involved his brother's genital area, it is likely that the condition is of the kind that family members would specifically not share with each other or that would come up in any conversation.

71. There are, and must be limits to which the anti-doping rules can extend in terms of imposing obligations on athletes. It is not reasonable here, nor would there have been any way for Mr Santos to have appreciated any degree of risk of testing positive on the facts presented, and accepted by all sides here. It is an unreasonable and impractical expectation to obligate an athlete to endeavor to survey the ailments of family members and the use by family members of various substances when visiting them in their home for a short stay. In this respect, the Panel fully agrees with the comment made by the panel in CAS 2005/C/976 & 986, FIFA & WADA in para. 73 stating that, *"However, the Panel reminds the sanctioning bodies that the endeavours to defeat doping should not lead to unrealistic and impractical expectations the athletes have to come up with".*

72. FINA suggests that the case of CAS 2017/A/5301 *Sara Errani v. ITF* & CAS 2017/A/5302 *National Anti-Doping Organisation Italia v. Sara Errani and ITF* ("Errani case") is dispositive here on the question of fault. In that case, the athlete, an elite level professional tennis player, tested positive for a cancer medication (letrozole, a prohibited substance) that she claimed that her mother, who was taking the medication, had inadvertently spilled into her food.

73. The panel in the Errani case, when evaluating and disposing of the athlete's claim of No Fault or Negligence, relied on three facts that are not here:

- Athletes are responsible for the actions of the members of their entourage and her mother, who was living in the same house as her, was a member of her entourage and her mother knew that her daughter was a high level professional tennis player subject to anti-doping obligations and testing (Errani case, para. 198).

- *"The degree of fault exercised by the Athlete's mother is to be imputed to the Athlete herself because she entrusted her mother to prepare the meal she ate. The Femara box was stored in the kitchen close to the space where meals were prepared; that situation was changed by her after she concluded that the Femara medication most likely was the source of the AAF. The Athlete's mother was a pharmacist and knew or must have known that Femara contained letrozole. She was aware or must have been aware of the doping warning on the back of the Femara box. She knew that her daughter was a high profile tennis player and, therefore, was under a strict obligation to avoid ingesting any prohibited substance. Previously, at least once, when she took her daily medication, a Femara pill had fallen out of the blister package. Femara pills do not quickly, if at all, dissolve in the broth or the tortellini filling and could have been removed"* (Errani case, para. 199).

- The athlete *"did not know that her mother was suffering from cancer and took Femara. Nevertheless, although she had a separate apartment in the house, she could and should have known that the Femara box was stored in the kitchen close to the spot where her mother was cooking because the kitchen and dining room, in a family house, are places common to the family. The pictures presented as evidence show that the Femara box was in plain sight. The Athlete, after having lived for years abroad had moved to her parents' house without establishing or suggesting even basic controls to ensure a safe and clean environment for a professional athlete. Similarly to suggesting what the Athlete needed or wanted to eat to ensure her condition, weight etc. she had to suggest basic actions to avoid contamination even if she did not know about the existence of the Femara box"* (Errani case, para. 200).

74. None of these factors are present in this case.

75. Here, the Athlete did not live in the house where the face towel or the pillow had become contaminated. He was visiting his mother's home for a celebratory dinner with a single overnight stay and then returning to his home. The Athlete did not know his brother was taking an over the counter medication for a skin condition. There is no case saying that a brother an Athlete does not live with, and to whom the Athlete does not assign any responsibility or participation in the Athlete fulfilling the Athlete's anti-doping obligations, is a member of an Athlete's entourage for whose actions the Athlete bears anti-doping-related responsibility. In addition, the product here containing Clostebol was not stored in plain sight. But even if the Novaderm cream had been discovered, it is unlikely that the Athlete could have been aware of the possibility of contamination by transfer. As a result of these significant distinctions, the Panel determines that the Errani case is of no assistance in this case.

76. The Panel is of the view that the circumstances of this case are truly unique, however they are a good example of circumstances were an Athlete may satisfy the Panel that there was no fault or negligence.

77. Accordingly, the Panel determines unanimously that this is a case of No Fault or Negligence by Mr Santos.

C. Consequences of Panel Decision

78. Where a finding of No Fault or Negligence is made, Article 10.4 of the FINA DC provides that any otherwise applicable period of Ineligibility shall be eliminated entirely. Therefore, the Athlete's suspension is lifted with immediate effect, and he will not serve any period of Ineligibility for his violation.

79. As Mr Santos tested positive in an out of competition test, and he accepted a provisional suspension almost immediately and has not been found to have violated that self-imposed suspension, there are no competitive results to be considered in rendering this decision.

80. Because the Panel has determined that this is a No Fault or Negligence case, the Panel need not take up the various other arguments advanced by the parties with respect to reduced fault or negligence.

ON THESE GROUNDS

1. The appeal filed by Mr Gabriel da Silva Santos against the Fédération Internationale de Natation with respect to the decision rendered by the FINA Doping Panel on 19 July 2019 (rectified on 22 July 2019) is upheld.

2. The decision rendered by the FINA Doping Panel on 19 July 2019 (rectified on 22 July 2019) is set aside.

3. Mr Gabriel da Silva Santos is found to have committed an Anti-Doping Rule Violation but bears no fault or negligence and no period of ineligibility shall be imposed on him.

4. (…).

5. (…).

6. All other motions or prayers for relief are dismissed.