



**Arbitration CAS 2017/A/5373 Japan Triathlon Union (JTU) v. International Triathlon Union (ITU), award of 28 June 2018**

Panel: Mr Murray Rosen QC (United Kingdom), Sole Arbitrator

*Triathlon*

*Disqualification of an athlete for intentional contact*

*Scope of the field of play doctrine*

The principles stated in CAS jurisprudence regarding the Field of Play (FOP) doctrine include the following: (i) a referee's decision affecting the result of a race or game cannot be reviewed on appeal absent proof of bias, malice, bad faith, arbitrariness or legal error; (ii) thus, if such a decision is made under the correct race or game rules, it can only be reviewed on appeal if there is sufficient evidence of prejudice for or against a competitor; (iii) this doctrine is part of the *lex sportiva* compatible with Swiss law and is based on appellate self-restraint, to protect the autonomy of officials, the completion of events without disruption and the certainty of outcomes; (iv) these principles preclude the appellate review of not only the merits of a "field of play decision" but also the procedural aspects leading to it, and apply to competition-specific sanctions (such as disqualification) although not necessarily where wider interests are concerned (such as suspension from future competitions). The prerequisites for the FOP doctrine to apply are that (i) the decision at stake was made on the playing field by judges, referees, umpires and other officials, who are responsible for applying the rules of a particular game and (ii) the effects of the decision are limited to the field of play. However, the field of play doctrine permits (full) review of "field of play" decisions "*in so far as the rules of the game themselves provide*" and where the rules provide for the possibility of review of the decision "*immediately after, or even proximate to the competition*" after the match.

**I. PARTIES**

1. The Japan Triathlon Union ("JTU" or the "Appellant") is the governing body for triathlon in Japan, affiliated to the world governing body, the International Triathlon Union ("ITU" or "the Respondent").
2. Ms Minami Kubono (the "Athlete") is a Japanese triathlete now aged 20 years old, a member of JTU who competes at international level and in particular at and since the Elite Woman ITU World Triathlon Series race on 5 August 2017 in Montreal, Canada (the "Race").

## II. FACTUAL BACKGROUND

3. The Panel has considered all the evidence and argument put forward by the parties and sets out the following only as a background summary and on the basis that if necessary additional facts may be referred to in the discussion below.

### A. The ITU Rules

4. The relevant ITU Rules included its Competition Rules approved by the ITU Executive Board as of December 2016 (the “CR”) and Disciplinary Rules under Article 17.2 of the ITU Constitution (the “DR”).

5. The CR provided as regards the conduct of athletes:

- (a) by CR 2.1(a) that among other things “*Athletes will (i) Practise good sportsmanship at all times (ii) Be responsible for their own safety and the safety of others [...]*” and so forth;
- (b) by CR 3.1(d) that “[...] *An athlete may be issued a verbal warning, punished with a time penalty, or disqualified for failing to abide by the ITU Competition Rules. Infractions and penalties are listed in Appendix K*” (“App K”);
- (c) by CR App K 6 “*Blocking, charging, obstructing, or interfering the forward progress of another athlete; [Penalty] – Unintentionally: warning [...] - Intentionally: DSQ [Disqualification]*”; and
- (d) by CR App K 7 “*Unfair contact. The fact that contact occurs between athletes does not constitute a violation. When several athletes are moving in a limited area, contact may occur. This incidental contact between athletes in equally favourable positions, is not a violation; [Penalty] – Unintentionally: warning [...] - Intentionally: DSQ [Disqualification]*”.

6. CR 13 and the DR set out a series of rules in relation to appeals by way of request for review of a decision of a Race Referee (Level 1) or Competition Jury (Level 2) or ITU Arbitration Tribunal (Level 3).

7. The DR relating to the ITU Arbitration Tribunal (the “AT”) include provisions addressing:

- (a) the right to be heard (DR 12) and evidence, representation and witnesses (DR 13-15);
- (b) the “*Appellant’s Factum*”, to include at a minimum arguments and a recitation of the facts with references identifying the source of each fact and a brief legal justification, appending all supporting documents (DR 33);
- (c) the procedure before the AT panel, including evidentiary proceedings over which it had full control, taking account of the specific needs and circumstances of the case (DR 42); and
- (d) appeals to the Court of Arbitration for Sport (“CAS”), referred to further below (DR 45).

## **B. The disqualification**

8. In the course of the Race an incident involving the Athlete at the end of the first lap of the swimming was referred by the Chief Swim Mr David Markham to Ms Kelly Mahoney the Race Referee, who decided on reviewing the video taken by Mr Markham (the “Video”) that the Athlete had intentionally touched another competitor, the Australian triathlete Ms Charlotte McShane.
9. The Race Referee considered this unfair contact which interfered with Ms McShane’s forward progress under CR K 6 and 7 as well as a violation of CR 2.1(a) and disqualified the Athlete from the Race, in which she finished twelfth.
10. On the afternoon of the same day, 5 August 2017, Mr Patrick Kelly, one of the Athlete’s coaches, appealed on her behalf to the 3-person Competition Jury chaired by Mr Felix Molina.
11. The Athlete’s Appeal Form makes it clear that the reason understood for her disqualification was “*Unfair contact in Swim Exit Lap*”. The Jury’s signed Minutes of the Appeal recorded “[...] *We listen the version of the coaches explaining that the contact was unintentional and the athlete from AUS probably slip. Then we heard the assistant swim official version and he was sure that the contact was intentional. Least we heard the RR [Race Referee], and she was sure the contact was intentional and deserved a DSQ [Disqualification] [...]*”.
12. The Competition Jury decided that the contact was indeed intentional and upheld the Race Referee’s decision.

## **C. The appeal to the AT**

13. On 1 September 2017 the JTU filed a “letter of appeal” with the AT seeking to investigate the case. The AT accepted jurisdiction and whilst it considered the JTU had failed to file an appropriate “factum” under DR 33, rendering its appeal inadmissible, nonetheless reviewed the facts and the application of the so-called “Field of Play” (“FOP”) doctrine referred to further below.
14. In its Decision dated 25 September 2017 (the “Decision”, emailed to the parties on 9 October 2017), the AT stated that the appeal was dismissed because even if it was admissible, the Referee’s decision was a Field of Play decision made in good faith and was binding, as was its confirmation by the Competition Jury.
15. In the course of the Decision, the AT also commented among other things, that the information and documents provided by the Appellant were hearsay insufficient to warrant reversing the Competition Jury and further held as follows:

“31. *The main issue to solve is whether the physical contact between Minami and the Australian athlete was unfair or constituted unsportsmanlike conduct deserving a disqualification.*

32. *The physical contact is obvious in the video at 8:44. In the Race Referee’s field of vision, Minami’s*

*right arm is fully extended to her right side and in contact with the left hip of the Australian athlete causing the Australian athlete to lose her balance.*

33. *Based upon the video, there is no doubt the Race Referee present on the field-of-play observed the physical contact, and the parties have not asserted, that the Race Referee did not observe the physical contact.*

34. *The decision of the Race Referee to disqualify Minami constitutes a field-of-play decision. That decision was made by the Race Referee in the performance of his duties and within the discretion inherent to his function”.*

16. On 27 October 2017, prior to the JTU’s appeal to CAS, the General Secretary of the ITU wrote to the JTU saying among other things:

*“In relation to you [sic] request to take out the expression ‘unsportsmanlike behavior’ from the official result on the ITU website, I will do all in my hands to take this out in the coming days”.*

17. Subsequently, i.e. on 2 November 2017, the expression “unsportsmanlike behavior” was removed from the ITU’s website.

### **III. THE PROCEEDINGS BEFORE CAS**

18. On 30 October 2017 the JTU filed a statement of appeal against the Decision before CAS in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2017 edition, the “Code”).

19. In accordance with Articles R28 and R29 respectively of the Code, the seat of the arbitration was Lausanne, Switzerland, and the language was English.

20. In accordance with Article R51 of the Code, the Appellant filed its appeal brief on 9 November 2017 and in accordance with Article R55 of the Code, the Respondent filed its answer on 17 December 2017.

21. The Panel appointed for the appeal comprised Mr Murray Rosen QC (President), Prof. Dr Ulrich Haas (nominated by the Appellant) and Prof. Dr Denis Oswald (nominated by the Respondent) who invited the Appellant to reply on jurisdiction only. The JTU filed a Reply on 27 December 2017.

22. In the light of the ITU’s confirmation that there was no finding of, or risk of further penalty against the Athlete based on “unsportsmanlike conduct”, the Athlete was invited to indicate whether she still pursued her appeal against the disqualification and stated that she did.

23. An Order of Procedure dated 18 February 2018 was confirmed by the signature of both parties.

24. In accordance with Article R57 of the Code, there was a hearing at Monday, 23 April 2018 at the CAS Court Office, Avenue de Beaumont 2, 1012 Lausanne, Switzerland.

25. The Appellant was represented by Ms. Wada Tomoko, JTU Executive Member, and Mr Yoshihisa Hayakawa with others from the law firm Uryu & Itoga.
26. Shortly before the hearing the Appellant served witness statements from (a) the Athlete, whom they called to give testimony through an interpreter, and (b) Mr Kelly whose statement was received without cross-examination but subject to submissions as to its relevance and weight.
27. The Respondent was represented by Mr Gergely Markus, its Sport Director, and by Mr Antonio Fernandez Arimany, its Secretary General and called as witnesses (by conference calls) Mr Markham, Ms Mahoney and Mr Molina.
28. Whilst Ms Mahoney stated that she had considered the Athlete's contact with Ms McShane to be contrary to CR 2(1)(a)(i) which required triathletes to practise good sportsmanship at all times, the ITU again confirmed that the Athlete's disqualification in this case arose only from allegedly intentional contact and that no further penalty or other sanction was available against her.
29. The Panel watched the Video with the parties and the Athlete, and they and the witnesses were directed on behalf of JTU to various numbered photographs taken from it.
30. The Panel was assisted throughout by Ms Delphine Deschenaux-Rochat, Counsel to CAS. At the beginning and at the end of the hearing both parties confirmed that they had no objections to the CAS procedures adopted, including the hearing before the Panel.

#### **IV. THE PARTIES' SUBMISSIONS**

31. The Panel has considered all the parties' submissions, and the following is again a summary to assist in the reasoning of what follows, rather than a comprehensive repetition of all they said.

##### **A. The Appellant**

32. The JTU's main submissions may be summarised as follows:
  - (a) there was in fact no physical contact between the Athlete and Ms McShane. In that regard the JTU (i) relied on hearsay statements from Ms McShane's coach Mr Stephen Moss dated 7 November 2017, Triathlon Australia dated 20 November 2017 and Mr Kelly dated 12 April 2018, and the Athlete's witness statement dated 30 March 2018; and (ii) criticised Mr Markham and Ms Mahoney for their considering otherwise on 5 August 2017;
  - (b) there were a number of procedural failures by the Competition Jury, particularly in (i) not calling for and receiving evidence from the Athlete and Ms McShane (ii) relying on the evidence of Ms Mahoney and Mr Markham and without checking on their locations

at the time of the alleged contact (iii) not confirming that Mr Kelly was authorized for the Athlete or sharing their minutes with the Appellant, for which the JTU criticised Mr Molina; and

- (c) the Field of Play Doctrine did not apply because the Athlete was penalised beyond disqualification and was stigmatised by the reference to allegedly unsportsmanlike conduct under CR 2.1(a)(i).

33. The JTU requested by way of relief that:

*“The Decision [of the AT] and the original decision rendered by ITU Competition Jury of the Race shall be set aside; and [the] Race Referee’s disqualification ruling against Minami Kubono shall also be set aside”.*

## **B. The Respondent**

34. The ITU’s main submissions were, again in summary:

- (a) the decision of the Race Referee was a FOP decision upheld by the Competition Jury and was not challenged on the basis, with evidence, that it was made in bad faith, arbitrarily or under the wrong rule(s), and was thus not open to review such that the appeal to CAS from the AT Decision should be dismissed on jurisdictional grounds without need for an evidentiary hearing; and
- (b) in any event, there had been no dispute before the Competition Jury that there was contact between the Athlete and Ms McShane, Mr Markham was located on the deck some 10 metres from the incident and the Video (as supporting evidence under CR 11.5(a)) bore that out, and there was no request for Ms McShane or any other witness to attend the Competition Jury, despite provision therefor in the Appeal Form.

35. The ITU requested by way of relief:

- 1. *That this CAS Panel confirms the decisions [of] the Referee, ITU Competition Jury and ITU Arbitration Tribunal, in relation to the Disqualification of Ms. Kubono;*
- 2. *that this CAS Panel dismiss the Appeal;*
- 3. *that this CAS Panel dismiss the any request of reimbursement made by the Appellant;*
- 4. *that this CAS Panel rule that the costs incurred by ITU [in respect of] this CAS Appeal process be covered by the Appellant”.*

## **V. JURISDICTION**

36. Article R47 of the Code states:

*“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. [...]”.*

37. The Appellant relied on DR 45 and CR 13.2(b)(v) and 13.2(c) as conferring jurisdiction on the CAS. The Respondent disputed that the CAS has jurisdiction to hear this matter on the basis of the FOP Doctrine.
38. Whether the FOP Doctrine is an issue of jurisdiction, admissibility or the merits is questionable. The Panel considers that the better arguments speak in favor of qualifying it as a merits issue. The effect of the FOP Doctrine is not to immunise a certain decision from any appeal whatsoever and, thus, to exclude it from the ambit of the arbitration agreement between the Parties. Instead, the effect of the FOP Doctrine is only to restrict the mandate of the CAS Panel enshrined in Article R57 of the Code, i.e. to review the facts and the law of the case. According to the FOP Doctrine a Panel is still mandated to examine whether or not the decision was issued in bad faith, arbitrarily or under the wrong rule(s). This, however, is a question of the merits and, thus, must be addressed accordingly (cf. CAS 2015/A/4208, para 43).

## **VI. ADMISSIBILITY**

39. Article R49 of the Code provides:

*“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late”.*

40. The Decision was notified to the JTU on 9 October 2017 and it filed its Statement of Appeal on 30 October 2017 and therefore, within the 21-day deadline set forth in Article R49 of the Code. The Appeal filed by the Appellant is accordingly admissible.

## **VII. APPLICABLE LAW**

41. Article R58 of the Code states:

*“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

42. In the present case the applicable regulations are those of the ITU, including CR and DR. Subsidiary recourse to the law of Switzerland as the place of domicile of the ITU and juridical seat of this appeal, is unnecessary.

## VIII. MERITS

### A. The contents and nature of the Decision at stake

43. It appears that there was some ambiguity as to what the contents of the Decision is, i.e. whether the Decision only deals with the disqualification of the results or whether it contains or carries any effect that “goes beyond the pitch”. The latter might be the case, if the Athlete had also been sanctioned for “unsportsmanlike behaviour”, because this would not only impact on the Athlete’s personality rights, but also threatens further sanctions outside the field of play.
44. It is clear from the testimony of Ms Mahoney that the original disqualification by her as Race Referee was also based on CR 2.1(a) (which requires “good sportsmanship at all times”) and she referred to CR 2.1(a) in the proceeding before the Competition Jury when being heard by the panel.
45. Whilst the AT’s Decision of 25 September 2017 does not itself explicitly refer to the particular CR allegedly breached by the Athlete, it was published on ITU’s website that the Athlete had committed “unsportsmanslike behaviour” and, thus, a breach of CR 2.1(a).
46. The Respondent submits that the reproach of “unsportsmanslike behavior” has been withdrawn in the meantime at the request of the JTU and, therefore, is no longer part of the Decision. The Appellant appears to think otherwise and refers in its submission to the Athlete still being stigmatised by this verdict. Whether there was a substantive change to the disqualification decision by deleting the reproach of “unsportsmanslike behavior” is not entirely clear from the ITU’s letter dated 27 October 2017, since it does not explicitly mention that the Decision was or was not being changed.
47. However, in the course of these CAS proceedings, the position was made certain. The Respondent stated formally for the record at the hearing with reference to its letter to the CAS Court Office dated 11 January 2018, that the “*results show the Appellant as disqualified*” and that the expression “unsportsmanlike behaviour” was “*indeed retired*” from the Decision and removed “*to avoid potential further sanctions to the appellant outside the field of play*”.
48. The Panel therefore finds that the contents of the Decision in dispute no longer contain any reproach of “unsportsmanlike behaviour”, and proceeds to deal with the disqualification of the Athlete for an alleged violation of CR App K 6 and CR App K 7 only.

### B. The Field of Play Doctrine

49. The jurisprudence of CAS is replete with cases in which it has enunciated and explained the Field of Play Doctrine: see *CAS 2004/A/727*, *CAS 2008/A/1641*, *CAS 2010/A/2090*, *CAS 2015/A/4208*.
50. By way of summary, the principles stated in those cases include the following:

- (a) a referee's decision affecting the result of a race or game cannot be reviewed on appeal absent proof of bias, malice, bad faith, arbitrariness or legal error;
  - (b) thus, if such a decision is made under the correct race or game rules (that is not made under legal error or without any possible grounds), it can only be reviewed on appeal if there is sufficient evidence of prejudice for or against a competitor;
  - (c) this doctrine is part of the *lex sportiva* compatible with Swiss law and is based on appellate self-restraint, to protect the autonomy of officials, the completion of events without disruption and the certainty of outcomes;
  - (d) these principles preclude the appellate review of not only the merits of a "field of play decision" but also the procedural aspects leading to it, and apply to competition-specific sanctions (such as disqualification) although not necessarily where wider interests are concerned (such as suspension from future competitions).
51. The prerequisites for the FOP Doctrine to apply are thus (i) that a decision at stake was made on the playing field by judges, referees, umpires and other officials, who are responsible for applying the rules of a particular game and (ii) that the effects of the decision are limited to the field of play.
52. According to established CAS jurisprudence, however, the field of play doctrine permits (full) review of "field of play" decisions "*in so far as the rules of the game themselves provide*" and where the rules provide for the possibility of review of the decision "*immediately after, or even proximate to the competition*" after the match, the CAS has been clear that "*prima facie the same doctrine applies*".
53. The Panel in CAS 2010/A/2090, paras 35(6) and 38 determined that:
- "The Competition Jury makes what are quintessentially field of play decisions. If there were no internal mechanisms for appeal, but an appeal was direct to CAS, CAS would not interfere other than if bias or other equivalent mischief or error of law were identified. The Appeals Commission (again on the same hypothesis that an appeal from its decision was direct to CAS) would enjoy the same qualified immunity from CAS review. Appeals to the Commission are at large: it determines appeals proximately to the competition. Its decisions could therefore be classified as field of play decisions"*.
54. In the present case, the Panel finds that the FOP Doctrine clearly applies. The decision by the Race Referee was taken on the playing field. It is true that this decision was appealable to the Competition Jury but since the latter made its decision on the day of the Race, it was in proximity of the competition and, thus, equally enjoys immunity according to the FOP Doctrine. The AT on the contrary is not entitled to review filed-of-play decisions according to the ITU rules and regulations.
55. Finally, whilst it was otiose to characterise the Athlete's behavior as "unsportsmanlike", the ITU expressly, as it put it, "eliminated" that otiose characterisation so that the decision is limited to the field of play and, consequently, there was no possibility of the Athlete or JTU's

wider interests (beyond the results of that single Race) being damaged by later suspension, fine or other penalty.

56. The further appeals process, to the AT and CAS, depended on disapplying the Field of Play doctrine as regards which the JTU failed. The futility of this was demonstrated by the Athlete's oral evidence, resiling from the assertion in her witness statement of less than a month earlier, that *"It is acceptable for me that the rank order or points obtained in the Race will stay unchanged as some time has already passed ..."*.

### **C. The grounds of disqualification**

57. Given the application of FOP in this case, it is unnecessary to deal in great detail with the factual question of whether there was indeed intentional contact between the Athlete and Ms McShane, as found by the Race officials and upheld by the Competition Jury.
58. In the light of the conditions to challenge a FOP decision, listed at paragraph 50 above, the Panel would comment only as follows:
- (a) the Race officials were very experienced in international triathlon events, and Mr Markham was in the correct position to observe and video-record the Race (from a tablet held at chest height) and promptly raised the issue and reviewed the Video with Ms Mahoney (in which the absence of "slo-mo" function was insignificant);
  - (b) the Video and photographs showed that the Athlete indeed appeared to stretch out her right arm as she and Ms McShane were on the steps exiting the first lap of the swimming and her right hand indeed appeared to touch Ms McShane's left hip and affect her forward progress. Whether she actually touched Ms McShane or not can be left unanswered, since in any event such conclusion by the Race officials does not seem arbitrary based on the Video and the photographs;
  - (c) whilst the Athlete now considers that she was merely seeking to keep her balance and did not make contact with Ms McShane, and the Australian team reported that Ms McShane could not recall contact, such subjective accounts (from competitors after the "heat of contest" months earlier) cannot be regarded as determinative; and
  - (d) if the Athlete's current account is not accepted on its face (and it was not raised before the Competition Jury or the AT), then it is impossible to gainsay the Race officials' decision that the Athlete meant to and did touch Ms McShane at the time.

### **D. The appeals process**

59. The Appellant has raised a variety of points about the Competition Jury and the further appeal to the AT but none of them affect the validity of the originating perception and decision by the Race Referee that there was unfair contact by the Athlete meriting her disqualification from the Race, or the integrity of the subsequent process.

60. In particular, the Panel does not accept the criticisms of the Competition Jury as regards its alleged failure to call or interview the Athlete or Ms McShane. The Athlete was represented by her coach Mr Kelly and did not request any witnesses, and did not seek to vitiate that choice. In principle, the burden of presentation and of proof is on the party that wishes to derive a benefit from establishing certain fact. This being said, of course it is within the discretion of the ITU to adduce evidence ex officio. However, such discretion does not lead to shifting of the burden on the Competition Jury, and does not stain the ITU's procedural conduct as arbitrary.
61. The Appellant's other criticisms seem to the Panel to remain well below the required threshold required to challenge a FOP decision, namely (a) that the Race Referee and the Competition Jury failed to render their decision in good faith) and (b) that the Race Referee and the Competition Jury acted arbitrary by determining that there was unfair contact by the Athlete.
62. The Appellant's central position – that the Video was inconclusive and that the later lack of recollection of contact by the Athlete and (by hearsay) Ms McShane should be enough to rescind her disqualification – was indefensible in view of the fact that the Decision was limited to the field of play and thus, could only be reviewed by this Panel on very limits grounds.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules that:**

1. The appeal filed by the Japan Triathlon Union against the ITU Appeal Tribunal Decision dated 25 September 2017 is dismissed in its entirety.
2. (...).
3. (...).
4. All and any other and further prayers and requests for relief are dismissed.