Arbitration CAS 2019/A/6179 Gambia Football Federation (GFF) v. Confédération Africaine de Football (CAF) & Fédération Togolaise de Football (FTF), award of 19 June 2019 (operative part of 6 April 2019)

Panel: Prof. Martin Schimke (Germany), Sole Arbitrator

Football
Eligibility to play of a player
Admissibility of late submissions
Applicable procedural law
Burden of proof
Standard of proof

1. **In principle, a CAS panel will only control the admissibility of a late submission if it considers that such submission is relevant.**

2. **With regard to procedural law, if certain aspects of the procedure are not addressed by the CAS Code, i.e. if there is *lacuna*, the procedure shall be determined, to the extent necessary, either directly or by reference to a law or to arbitration rules, in accordance with Article 182.2 of the Swiss Federal Act on International Private Law (PILA). If (i) the seat of the arbitral tribunal and of the federation which rendered the decision are in Switzerland and (ii) Swiss substantive law is complementarily applicable to the merits of the case, the rules of the Swiss Civil Procedural Code (CPC) are applicable, where/if there is a *lacuna* in the Code and if deemed appropriate.**

3. **In a disciplinary procedure involving a sanction, the burden of proof generally lies on the disciplinary body. In a procedure where a party derives rights from the allegation that a player was not eligible to be fielded during a match, the burden of proof with respect to the player's ineligibility lies with the party alleging this. If the party fails to adduce such evidence, the case must be decided against it. Furthermore, the burden of proof not only allocates the risk among the parties of a given fact not being ascertained but also allocates the duty to submit the relevant facts before the court/tribunal. It is the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court/tribunal.**

4. **Neither the CAS Code, nor Switzerland's PILA define any applicable standard of proof for CAS arbitrations. In the normal course the standard would therefore be the civil standard of the "balance of probabilities" and not the criminal standard of "beyond reasonable doubt", even in disciplinary cases. Absent a specific identification in the relevant regulations and/or agreement of the standard of proof, in any case the standard of proof shall therefore be on a sliding scale from, at a minimum, a mere "balance of probabilities" up to that of "comfortable satisfaction" at the most. However, each test**

of a standard must also take into account the specific circumstances of the case. In cases where serious allegations are made or serious offenses are at stake, although this (the serious allegations or offenses) should not lead to any higher standard of proof being applied overall, the adjudicatory body should have a high degree of confidence in the quality of the evidence in order to accept these allegations or offenses as true.

I. PARTIES

1. The Gambia Football Federation (the "Appellant" or the "GFF") is the national football association in Gambia. It is affiliated with the Confédération Africaine de Football (the "CAF") and with the Fédération Internationale de Football Association (the "FIFA"). It has its seat in Banjul, Gambia.

2. The CAF (the "First Respondent") is the governing body of football at the African level. It is one of the confederations recognised by FIFA. CAF has its seat in 6th October City, Egypt.

3. The Fédération Togolaise de Football (the "Second Respondent", and together with the Fist Respondent the "Respondents") is the national football association in Togo. It is affiliated with the CAF and FIFA. It has its seat in Lomé, Togo.

II. FACTS

4. The following is a summary of the relevant facts and allegations based on the Parties' written and oral submissions and the evidence examined in the course of the present appeal arbitration proceedings. Reference to additional facts and allegations found in the Parties' submissions and to evidence will be made, where relevant, in connection with the legal analysis that follows. While the Sole Arbitrator has considered all the facts and allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, he only makes reference in the award to the submissions and evidence he deems necessary to explain the reasoning.

A. Background Facts

5. In the qualifying stage of the 2019 Africa Cup of Nations (the "AFCON"), the Appellant was drawn in group D with Algeria, Benin and Togo.

6. On 9 September 2018, the national football teams of Togo and Benin played a qualifying match in Lomé, Togo. Mr James Adewale Olufade (the "Player") took part in the match for the national team of Togo and the match ended in a 0-0 draw.

7. On 12 October 2018, the national football teams of Togo and Gambia played a qualifying match in Lomé, Togo. The Player took part in the match for Togo and the match ended in a 1-1 draw. This was number 62 of the AFCON qualifiers ("Match 62").

8. On 16 October 2018, the national football teams of Gambia and Togo played a qualifying match in Gambia. The Player was listed in the squad on the team sheet, but he was not fielded by the Togolese coach. The match ended with Togo winning 0-1. This was match number 86 of the AFCON qualifiers ("Match 86", and together with Match 62, the "Matches").

9. Prior to the match on 16 October 2018, the GFF lodged a protest against the eligibility of the Player to take part in the match, as the GFF submits that he is a Nigerian national.

10. On 18 October 2018, the Appellant sent an official protest letter to the CAF. Since this letter did not mention the place of birth of the Player, the Appellant did not claim at this stage that his birthplace was not in Togo.

11. On 25 December 2018, the CAF informed the GFF that an investigation had been opened and that the case would be submitted to the CAF Disciplinary Board in due course.

12. On 30 December 2018, the Second Respondent provided the CAF with the Togolese passport of the Player, his official Togolese birth certificate as well as his official Togolese nationality certificate.

13. On 21 January 2019, the Appellant was notified of the decision of the CAF Disciplinary Board, rendered on 13 January 2019 (the "CAF Disciplinary Board Decision"). The CAF Disciplinary Board dismissed the protest lodged by the Appellant and confirmed the eligibility of the Player.

14. On 31 January 2019, the GFF filed an appeal against the CAF Disciplinary Board Decision with the CAF Appeal Board and submitted its appeal brief on 31 January 2019.

15. On 10 February 2019, the CAF Appeal Board held a hearing at the CAF headquarters. The Appellant attended the hearing via videoconference.

16. On 19 February 2019, the CAF secretariat notified the Appellant of the decision rendered by the CAF Appeal Board (the "Appealed Decision"), ruling:

"The Appeal Board decides:

DECISION:

1. *Declare the Appeal by Gambia FF admissible in law;*

2. *Declare the Appeal by Gambia FF inadmissible in substance;*

3. Confirm the decision of CAF Disciplinary Board with regard to the eligibility of player James Adewale Olufade to represent Togo National Team".

17. The final ranking of group D of the AFCON Qualifiers was as follows:

D									
	TEAM	**P**	**W**	**L**	**D**	**GF**	**GA**	**GD**	**PTS**
1	Algeria	6	3	1	2	9	4	5	11
2	Benin	6	3	2	1	5	6	-1	10
3	Gambia	6	1	2	3	6	6	0	6
4	Togo	6	1	3	2	4	8	-4	5

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 1 March 2019, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") in accordance with Article R47 et seq. of the Code of Sports-related Arbitration (the "Code"), and called the CAF as First Respondent, the Togolese FA as Second Respondent and the Player as an intervening party. In its submissions, the Appellant requested the Appeal to be submitted to a Sole Arbitrator.

19. On 5 March 2019, the CAS Court Office drew the Appellant's attention to Article R48 of the Code, quoting that the Appellant must pay a Court Office fee and that the court had not yet received said fee. The CAS Court Office requested to be provided with a swift proof of payment, within three days of receipt of the letter, otherwise the CAS Court Office would not proceed with the case.

20. On 6 March 2019, the CAS Court Office initiated the present procedure, invited the Respondent to comment on various procedural issues and inter alia mentioned that the costs of the arbitration must be paid by the Parties.

21. Also on 6 March 2019, the CAS Court Office informed the Player about the present appeal. It granted the Player the opportunity to participate as a party in the present arbitration by filing an application to that effect within ten days.

22. On 8 March 2019, the Appellant objected to the application of Article R64 of the Code stating that according to Article R65 of the Code, an appeal against a decision issued by an international federation or sports-body in disciplinary matters shall be without additional cost. It stated that in the present case, the appeal was directed against a decision of the CAF Appeal Board regarding a player's eligibility resulting from identity fraud. The Appellant furthermore pointed out that the CAF *"is an international non-governmental organisation with its own legal persona"*

and therefore constitutes an international sports-body in the sense of Article R65.1 of the Code.

23. On 8 March 2019, the CAS Court Office responded and stated that the Appealed Decision did not impose a disciplinary sanction on the Appellant – or on the Player – but merely addressed the Player's eligibility to represent the Togo national team and denied the Appellant's request. It once again informed the Parties that they would shortly be invited to pay an advance of such arbitration costs.

24. On 13 March 2019, the First Respondent stated that it did not agree to the appointment of a Sole Arbitrator and requested a Panel of three arbitrators instead.

25. On 14 March 2019, the CAS Court Office invited the First Respondent to inform the CAS Court Office by 18 March 2019, whether it intended to pay its share of the advance of costs that would soon be requested by the CAS Finance Director.

26. On 14 March 2019, the First Respondent confirmed that it would pay its share of the advance of costs upon the request of the CAS Finance Director.

27. On 18 March 2019, the Appellant referred to the CAS Court Office's response to its objection dated 8 March 2019 and relating to the arbitration~~s~~ costs. Referring to the award *CAS 2016/A/4831* it claimed that the facts of that case were identical to those of the present dispute and underlined that this award was classified on the CAS' website in the section *"Disciplinary"*. It requested the Court to render a preliminary ruling on the application of Article R65 of the Code.

28. On 22 March 2019, the CAS Court Office stated once more that the Appealed Decision neither imposed a disciplinary sanction on the Appellant, nor on the Player, but only concerned the Player's eligibility to represent the Togo national team. It furthermore stated that the reference to *CAS 2016/A/4831* was inaccurate and irrelevant as, in such case, a disciplinary sanction was actually imposed on the party concerned.

29. On 1 April 2019, the Second Respondent *inter alia* agreed with the conduct of the present procedure in English and with its submission to a Sole Arbitrator.

30. On 1 April 2019, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to submit the present case to a Sole Arbitrator.

31. On 9 April 2019, the Appellant submitted a request for provisional measures pursuant to Article R37 of the Code. In this brief it called the Fédération Algérienne de Football (the "Algerian FA") and the Fédération Béninoise de Football (the "Benin FA") as "Interested Parties" and requested the following provisional measures:

> *"1. Suspend the final ranking of group D of the 2019 Africa Cup of Nations until a final award is rendered as to the merits in the proceedings CAS 2019/A/6179;*

2. Order the CAF to proceed to the draw of the 2019 Africa Cup of Nations on the 12th of April including the Gambia FF – preserving the Gambia FF right to participate;

3. If not by including the Gambia FF in the draw, order the CAF to take any reasonable measures to ensure the participation of the Gambia FF in the AFCON ed. 2019 should the Gambia FF win the case on the merits;

4. Order the CAF to refrain from taking any measures detrimental to the Gambia Football Federation's right to take part in the 2019 Africa Cup of Nations until a final award is rendered as to the merits in the proceedings CAS 2019/A/6179.

On a subsidiary basis.

5. In the event that the request for provisional measures would be rejected, (i) decide to conduct the Appeal in an expedited manner and issue appropriate directions therefore in accordance with article R44.4 of the CAS-Code and (ii) deliver in any event an award at the latest 1 month before the start of the 2019 Africa Cup of Nations or at the latest at the date to be communicated by CAF as being the ultimate date for the CAF to be able to include the Gambia FF in the 2019 Africa Cup of Nations in case the Gambia FF wins the case on the merits".

32. On 10 April 2019, the CAS Court Office informed the Parties about the Appellant's application for provisional measures and the Appellant's request that a decision be issued by 12 April 2019, which was the date of the draw for the final stage of the 2019 AFCON. In accordance with Article R37, the Respondents were invited to file their position on the Appellant's request by 11 April 2019. Finally, the CAS Court Office noted that it did not have the power to "summon" a third party as requested by the Appellant in its brief.

33. On the same day, the CAS Court Office informed the Algerian FA and the Benin FA about the present appeal, provided them with a copy of the Statement of Appeal and of the Request for Provisional Measures and informed them that if either of them intended to participate as a party they should file with the CAS an application to this effect, together with the reasons therefore, within 10 days.

34. Still on the same day, the Appellant filed additional exhibits to its application for provisional measures, which were duly notified to the Respondents.

35. On 12 April 2019, the CAS Court Office acknowledged the receipt of the First Respondent's Answer to the Request for Provisional Measures filed on 11 April 2019. It further noted that the Second Respondent did not provide the CAS with its position on this matter within the prescribed deadline.

36. On the same day, the Parties were notified of the Operative Part of the Order on Provisional Measures in which the President of the CAS Appeals Arbitration Division rejected the Appellant's Request for Provisional Measures.

37. On the same day, the draw for the 2019 AFCON took place without the Appellant being included.

38. On 15 April 2019, the CAS Court Office invited the Respondents to inform the CAS within two days, whether they agreed with the Appellant's request for an expedited procedure and the issuance of a decision at least one month before the start of the 2019 AFCON. In case of objection or in the absence of an answer from the Respondents, no expedited procedure would be implemented and the deadlines set forth in the previous letters would apply.

39. On 17 April 2019, the First Respondent stated that it did not agree to the implementation of an expedited procedure at this stage.

40. On 17 April 2019, the CAS Court Office confirmed that in view of the First Respondent's disagreement, no expedited procedure would be implemented and the deadlines established pursuant to the Code would apply.

41. On 18 April 2019, CAS acknowledged receipt of the Second Respondent's letter, in which it also disagreed with the conduct of an expedited procedure.

42. On 23 April 2019 and within the time-limit as extended by the CAS Court Office upon requests and after due consultation with the Respondents, the Appellant filed its Appeal Brief. Within its Appeal brief, it submitted a request for disclosure, a request for the issuance of an award by the end of May 2019 and the following requests for relief:

"1. Declare this Appeal admissible;

2. Annul the Decision under Appeal of the CAF Appeal Board;

3. Hold that Mr James Adewale Olufade was born in Egijbo, Nigeria and holds the Nigerian nationality;

4. Hold that Mr James Adewale Olufade was ineligible to play an occasion of the game between Togo and Benin played on 9 September 2018 as well as on occasion of the game between Gambia and Togo played on 12 and 16 October 2018 respectively;

5. Hold that Togo lost the game played between Togo and Benin on 9 September 2018 in Lomé on a score of 0 – 3;

6. Hold that Togo lost the game played between Togo and Gambia on 12 October 2018 in Lomé on a score of 0 – 3;

7. Hold that Togo lost the game played between Gambia and Togo on 16 October 2018 in Banjul on a score of 3 - 0;

8. Order the Confédération Africaine de Football to give the corresponding coefficient points to the Gambia Football Federation and amend accordingly the CAF Official Ranking for National "A" Teams;

9. Establish a new end-table of the AFCON Qualification Group D whereby the Gambia Football Federation is given the right to participate in the final stage of the 2019 AFCON;

10. Order the Confédération Africaine de Football to allow the Gambia Football Federation to take part in the final stage of the 2019 AFCON and take all measures necessary to allow the Gambia Football Federation to be able to do so;

11. Impose to the Confédération Africaine de Football a fine of USD 1,000 or any other fine being reasonable per day of delay in reinstating the Gambia Football Federation in the final stage of the 2019 AFCON;

12. Suspend the Fédération Togolaise de Football from participation in the following two editions of the AFCON; or as an alternative, in case the Court of Arbitration for Sport would consider that no fraud was committed by the Fédération Togolaise de Football, suspend the Fédération Togolaise de Football from participation in the next edition of the AFCON;

13. Impose a fine on the Fédération Togolaise de Football;

14. Order the Confédération Africaine de Football and the Fédération Togolaise de Football to be jointly and severally liable, to reimburse the GFF:
- *the protest fee of USD 2,000,*
- *the appeal fee of USD 3,000,*
- *the CAS Court Office fee of CHF 1,000.*

15. Order the Confédération Africaine de Football and the Fédération Togolaise de Football to jointly and severally bear the costs incurred for retaining the Nigerian lawyer being USD 5,500,

16. Hold that the present procedure is free of costs as it concerns an appeal against a decision rendered by an international present sports-body in disciplinary matters and proceed to the reimbursement to the advance of costs in the amount of CHF 11,500 paid by the Gambia Football Federation,

Or alternatively, in case not free of charge,

17. Order the Confédération Africaine de Football and the TFF to jointly and severally bear the costs of proceedings before the Court of Arbitration for Sport and oblige both, to reimburse the advance of costs paid by the Gambia Football Federation.

18. Award a contribution to be established at its discretion to cover the legal fees and expenses of the Gambia Football Federation, including but not limited to the legal fees of its previous legal counsel for

the Confédération Africaine de Football internal procedures (EUR 10,000) and the current counsel for the CAS Appeal procedure (EUR 25,000).

Or as an alternative to point 10 above, in case the reinstatement of the Gambia Football Federation would be materially impossible:

19. Hold the Confédération Africaine de Football and the Fédération Togolaise de Football jointly and severally liable for the payment of USD 1,382,166, plus an interest of 5% p.a. as from 12 April 2019 until the date of effective payment, as compensation for the damages suffered by the Gambia Football Federation.

20. Adopt any and all measures it deems necessary to reach the above purposes".

43. On 25 April 2019, the CAS Court Office acknowledged receipt of the Appellant's Appeal Brief filed on 23 April 2019. Each Respondent was invited to submit its Answer as well as its observations on the Appellant's requests for disclosure of documents relating to the AFCON 2019 prize-money and of the Player`s Nigerian passport uploaded in the FIFA Transfer Matching System (the "FIFA TMS").

44. On 30 April 2019, the Appellant reiterated that the present case is a disciplinary matter of international dimension and that, therefore, no procedural costs could be requested by CAS pursuant to Article R65 of the Code. It urged the CAS Court Office to transfer the file to the appointed Sole Arbitrator.

45. On 6 May 2019, the CAS Court Office acknowledged receipt of the Appellant's payment of its share of the advance of costs for this procedure. The CAS Court Office furthermore informed the Parties that the Panel appointed to decide the present case was constituted as follows:

Sole Arbitrator: Prof. Dr. Martin Schimke, Attorney-at-law in Dusseldorf, Germany

46. On the same day, the First Respondent submitted its observations on the Appellant's request for disclosure together with a sought document and specified that a decision had been passed at its most recent Executive Committee meeting ("ExCo") in April 2019.

47. On 8 May 2019, the Appellant reiterated the content of its letter of 30 April 2019, maintaining its position expressed in the Appeal Brief and of the subsequent letter of the CAS Finance Director of 1 May 2019 whereby it invited the Appellant to pay the Second Respondent's share of advance of costs not later than 15 May 2019. In this regard the Appellant requested the suspension of said deadline until the appointed Sole Arbitrator had decided on the nature of this proceeding pursuant to Articles R65.1 and R65.4 of the Code. In addition, the Appellant pointed out to the Sole Arbitrator that the latest possible date for the Appellant to receive the award before the start of the AFCON 2019 was 31 May 2019.

48. In respect to the letter of the First Respondent, dated 6 May 2019, the Appellant requested the CAS or the Sole Arbitrator to invite the First Respondent to produce such decision or, if still not available in a definitive version, at least the minutes of the ExCo meeting which lead to said decision in the part regarding the above-mentioned increase. The Appellant also provided the Sole Arbitrator and the Respondents with a copy of the award in the case *TAS 2006/A/1154* as additional jurisprudence to the one quoted in its Appeal Brief, especially for the part related to the concept of "taking part" in a match.

49. On 8 May 2019, the CAS Court Office advised the Appellant that its objection concerning the application of Article R64 of the Code and its request that at least the operative part of the award be issued by 31 May 2019 had both been submitted to the Sole Arbitrator for his consideration. Furthermore the Respondents were invited to comment on the Appellant's request regarding the aforementioned increased Prize Money by 13 May 2019. In case of objection, it would be for the Sole Arbitrator to decide such issues pursuant to Article R44.3 of the Code. Finally the Appellant's request for suspension of the time limit to pay the advance of costs was submitted to the CAS Finance Director for his consideration.

50. On 10 May 2019, the Second Respondent stated that it did not have a Nigerian passport for the Player (containing the TMS watermark) on file and that the Player does not have a sports passport in the TMS system. Consequently, the Second Respondent stated that it could not provide such document in the present case.

51. On 13 May 2019, the First Respondent stated that the documents sought by the Appellant had not yet been finalised or approved and that the First Respondent would provide such documents, once finalised, if ordered to do so by the Sole Arbitrator.

52. On 14 May 2019, the CAS Court Office noted, *inter alia*, that the additional jurisprudence (TAS 2006/A/1154) filed by the Appellant was included in the case file.

53. On 15 May 2019, the Parties were notified of the Order on Request for Provisional Measures with grounds issued by the Court of Arbitration for Sport.

54. On 17 May 2019, the CAS Court Office informed the Parties that Mr Peter Rittinger, Attorney-at-Law in Salzburg, Austria had been appointed as *ad hoc* Clerk in this matter.

55. On 30 May 2019, the Appellant *inter* alia noted that the date originally proposed in its Appeal Brief would not be respected and submitted that the operative part of the award would need to be issued by no later than 17 June 2019.

56. On 3 June 2019 2019 and within the time-limit as extended by the CAS Court Office upon requests and after due consultation with the Appellant, the First Respondent filed its Answer Brief according to Article R55 of the Code, and submitted the following prayers for relief:

"Prayer 1: The Appeal shall be rejected, insofar as it is admissible.

Prayer 2: In any case, Gambia Football Federation shall bear the costs of the arbitration and it shall contribute to the legal fees incurred by Appellant at an amount of CHF 30,000".

57. On 7 June 2019 and within the time-limit as extended by the CAS Court Office upon requests and after due consultation with the Appellant, the Second Respondent informed its intention to participate by conference call at the hearing and filed its Answer brief, with the following requests:

"The Court of Arbitration for Sport is requested to:

- *decide that the player Adewale James OLUFADE was born in Togo and has Togolese nationality;*
- *Say and rule that the player is eligible to play for Togo representative team;*

Consequently:

- *Reject all requests from the Gambian Football Federation as unfounded;*
- *Confirm in all its provisions the decision of CAF Appeal Board".*

58. On 7 June 2019 and after consultation with the Parties, the CAS Court Office informed the parties of the hearing on 14 June 2019 at the CAS Headquarters in Lausanne, Switzerland.

59. On 13 June 2019, each of the Parties returned a signed copy of the Order of Procedure, which had been issued on 12 June 2019.

60. On 13 June 2019, the Appellant informed the CAS Court Office of the statements made by Mr Véron Mosengo-Omba who is the FIFA Director of Member Associations & Development Africa-Caribbean and submitted some additional documents. In particular, an extract of Mr Véron Mosengo-Omba's official Twitter account where he stated that *"FIFA President Gianni Infantino is clear: if the GA of June 15 turns into a fiasco, the competent bodies of FIFA may suspend Mali. This sentiment is echoed by the president of CAF, Mali risks being suspended from the CAN, which begins on June 21…"*. The Appellant deemed that the potential exclusion of Mali from the AFCON constitutes an exceptional circumstance in the sense of Article R56 of the Code. In particular, this exclusion would release a spot for a national team in the competition without any damaging consequences for CAF or any other federation involved in the AFCON 2019. The Appellant therefore requested the Sole Arbitrator to accept that these new submissions/evidence as well as their consequences for the present matter be considered and discussed at the hearing.

61. On 14 June 2019, the hearing was held at the CAS Headquarters in Lausanne, Switzerland. At the outset of the hearing, the Parties confirmed that they had no objections to the constitution of the composition of the Panel.

62. In addition to the Sole Arbitrator, the *Ad hoc* Clerk and Ms Pauline Pellaux, Counsel to the CAS, the following persons attended the hearing:

For the Appellant:

- Mr Luca Tettamanti, Counsel to Appellant (in person)
- Mr Olumide Braithwaite, witness (by phone)
- Mr Mattar M'Boge, witness (by phone)

For the First Respondent:

- Ms Carol Etter, Counsel to First Respondent (in person)
- Mr Marc Cavaliero, Counsel to First Respondent (via skype and by phone)
- Mr James Adewale Olufade, witness (by phone)
- Mr Anthony Baffoe, witness (by phone)
- Mrs Corinne Boissel-Sommerville, interpreter for Mr. Adewale James Olufade (in person)

For the Second Respondent:

- Mr Kossi Apow Bakoh, Counsel to Second Respondent (via skype)
- Ms Essi Sonia Sossoe, Senior Solicitor (via skype)
- Mr Tino Yaognon Hoffer, Solicitor (via skype)
- Ms Hansa Kapi, Legal assistant and translator (via skype)

63. Mr Bakary Papa Gassama, a licensed referee in Gambia, was also called as a witness by the Appellant, but was not contactable via phone during the hearing.

64. Before the hearing was concluded, the parties expressly stated that they did not raise any objection to the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

65. On 17 June 2019, the Appellant stated that the Player speaks perfect English. It provided the Sole Arbitrator with excerpts of conversation between the Player and Mr Saintfiet, the Head-Coach of the GFF, via social media platforms in the English language as evidence that the Player speaks English, contrary to what he alleged in the hearing. The Appellant stated that this evidence was relevant as English is the predominant language in Nigeria, the country where the Appellant submits the Player was born, whereas French is the predominant language in Togo, where the Respondents submit the Player was born.

66. On 17 June 2019, the CAS Court Office acknowledged the Appellant's letter of the same date and stated that it had been forwarded to the Sole Arbitrator.

67. On 17 June 2019, the Second Respondent requested that the documents filed by the Appellant on the same date must be declared inadmissible because they had been filed after the closure of the proceedings. It stated that the Player did not mention anywhere that he did not speak English.

68. On 17 June 2019, the First Respondent stated that the evidence presented by the Appellant on the same date was unfit to demonstrate anything and did not deserve any more attention.

69. On 19 June 2019, the CAS Court Office provided the Parties with a copy of the Operative Part of an Arbitral Award issued by CAS.

IV. SUBMISSIONS OF THE PARTIES

70. The Sole Arbitrator confirms that he has carefully taken into account in his decision all the submissions, evidence and arguments presented by the Parties, even if they are not specifically summarised or referred to in the present Arbitral Award.

A. The Appellant

71. The submissions of the Appellant, in essence, may be summarized as follows:

- First, the principles of due process and right to be heard were violated by the CAF Appeal Board (e.g. the Player was not summoned to the hearing in spite of the Appellant's request for confrontation to this effect). Although CAF opened, ex officio, a disciplinary procedure, it did not apply Article 33 of the CAF Disciplinary Code, which states *"[t]he onus of proof regarding disciplinary infringements rests on CAF"* (e.g. CAF had the responsibility and obligation, after being provided with the Nigerian passport of the Player, to contact the Nigerian authorities in order to further investigate, quod non, or at least confront the Player and the Second Respondent with said passport). Above that, no motivation or legal reasons can be found in the Appealed Decision (e.g. in the Appealed Decision only the documents from the Second Respondent were examined, whereas in the decision no reference was made to the copy of the Nigerian passport submitted by the Appellant). Thus, the Applicable Regulations were also violated.

- The Player is a Nigerian national born in Ejigbo, Nigeria. Thus, the Player was not eligible to play for the national team of Togo in the qualification group matches for the 2019 AFCON. As a consequence, the Second Respondent should be forfeited by losing the Matches, in which the Player took part, by a score of 3-0 according to the Applicable Regulations. The pronouncement of these forfeits would lead to a different end-table in qualification group D and the direct qualification of the Appellant for the AFCON 2019.

- The documents, submitted in the proceedings before CAS, namely: (i) a birth certificate issued by the National Population Commission of Nigeria, dated 31 December 2002 (ii) a copy of the Player's Nigerian (electronic) passport request (iii) sworn affidavits of the Player's cousin and uncle before the High Court of Lagos and (iv) a copy of a passport of the Player (valid from 10 August 2011 until 9 August 2016), confirm the Player's place of birth in Nigeria.

- Beyond that, the conducted investigations of (the called witness) Mr Braithwaite, a Nigerian lawyer, regarding the documents provided by the Appellant, came to the conclusion that the Player was born in Nigeria.

- When the Player was transferred from the Togolese Club Dynamic Togolais Lomé to the Cameroonian Club Panthère de Ndé, the transfer was introduced into the FIFA TMS by both clubs and validated by the Second Respondent. The Player's profile created in the FIFA TMS upon this transfer refers to the Player as a Nigerian national, *inter alia* by the uploaded Nigerian passport of the Player. The Second Respondent confirmed the accuracy of the information and the documentation related to the Player in the FIFA TMS and released the ITC in favour of the Cameroonian FA without objection.

- The birth certificate provided by the Respondent, stating the place of birth of the Player in Togo raises serious doubts regarding the genuine nature of the birth certificate (e.g. the signature space for the declarant [father] remains blank). Beyond that, on the birth certificate the Player's mother is named Bouraima Salematou, whereas on the nationality certificate, provided by the Respondent(s), she is named Alematou Bouraima. Furthermore, any passport bearing Togo as place of birth must be deemed a forged document containing false information; the birth and nationality certificates produced by the Second Respondent are likely to be forged. Consequently, these certificates cannot serve as a basis to conclude that the Player holds Togolese nationality by birth. For all the above reasons, the Second Respondent committed fraud regarding the Player's birthplace and nationality.

- Furthermore, in the FIFA TMS the name of the Player was spelled JAMES OLUFADE ADEWALE, whereas the match sheets of the games played on 9 September 2018 against Benin and on the 12 and 16 October 2018 against the Appellant refer to the player ADEWALE OLOUFADE. In the CAF's internal database ("CMS") the Player was registered twice, as ADEWALE JAMES OLUFADE, Nigerian nationality and as ADEWALE OLOUFADE, Togolese nationality.

- According to the Applicable Regulations the Player was ineligible to take part in the Matches. Even in case the CAS shall establish the Player holds dual citizenship, i.e. Nigerian and Togolese citizenship, the Player does not meet criteria established in Article 38.1 of the AFCON Regulation and Articles 5 and 7 of the FIFA Regulations. Therefore, he is not eligible to play for the national team of Togo.

- In the Request for Provisional Measures, dated 9 April 2019, the Appellant requested CAS to summon the Algerian FA and the Benin FA as Intervening Parties in the present procedure. Therefore, the Algerian FA and the Benin FA had the possibility to join the proceedings as Intervening Parties, but they refused to participate in the arbitration. However, according to CAS jurisprudence (esp. CAS 2016/A/4642) CAS can take a decision and grant the relief sought by the Appellant, even if the Algerian FA and the Benin FA are not Respondents in the present case. In other words, by granting the respective prayers for relief their right to be heard would not be violated. These football associations have an interest in the outcome of the present procedure, but they do not have a right to take part in the final stage of the 2019 AFCON, but merely a right to have the statutes and regulations of CAF correctly and fairly applied.

- The CAF further *ex officio* decided to only include the Second Respondent in the disciplinary procedure before it; it did not call the Algerian FA and the Benin FA. The legal remedies would therefore not have been exhausted with respect to these federations if they had been called for the first time before CAS.

- In addition to that, a decision, whereby the First Respondent is ordered to allow the Appellant to participate in the AFCON ed. 2019 must not necessarily negatively affect the Algerian FA. The decision would merely establish that the Appellant could participate as the 25th country in the 2019 Africa Cup of Nations.

- The Player took part in the Matches despite being ineligible: On 12 October 2018 in Match 62 the Player was fielded, which is undisputed by the Parties. On 16 October 2018, in the Match 86 the Player was listed on the team sheet of the Second Respondent. By interpreting the legal term "take part in the match" in a correct way, someone has to come to the bottom line that the Player, as a substitute, took part in Match 86, which is *inter alia* demonstrated by the fact that a protest shall be formulated before the match and thus before knowing who will be actually fielded. As consequence, also in respect to Match 86 the Second Respondent has to be sanctioned by forfeiting the match according to the Applicable Regulations.

- Although the Appellant filed a protest before the Match 86 and the follow up-letter, dated 18 October 2019, the First Respondent did not start disciplinary investigations *ex officio* according to the applicable CAF Disciplinary Code, which should concern the committed fraud forgery in its entirety, not just in regards to Match 86.

- In subsidiary order and only in case the Appellant cannot participate in the final stage of the 2019 AFCON, the Appellant requests to be awarded damages resulting from the impossibility to be reinstated in that competition.

- The present case is a disciplinary case according to Article R65 of the Code. The appeal is directed against a decision of the CAF Appeal Board regarding a Player's eligibility resulting from a fraud on his identity. The disciplinary nature of the decision is unquestionable as it was made on appeal of a decision of CAF Disciplinary Board and in accordance with the CAF Disciplinary Code. It is clear from the prayers for relief that disciplinary sanctions are sought against the Second Respondent.

B. The Respondents

72. The submissions of the First Respondent, in essence, may be summarized as follows:

- The alleged procedural flaw of the disciplinary proceedings undertaken by the judicial bodies of the First Respondent are completely groundless. In any event, under consistent case law of CAS, the power of the Arbitral Panel to hear the entire case ***de novo*** cures such alleged flaws. Thus, these arguments of the Appellant are meritless.

- The Player was born on 24 August 1994 in Agbélouvé in the Prefecture of Zio in Togo. At the time of the decision of the Disciplinary Committee of the First Respondent, the following official documents of the Player were available (these documents were submitted by the First Respondent also in the proceedings before CAS): (i) the Togolese passport issued on 7 December 2015 mentioning the Player's place of birth in Togo, (ii) the Togolese birth certificate issued on 2 September 1994 (the First Respondent refers to 2 September 1994 and to 2 December 1994 alternately as date of issuance in his answer and so do the submitted exhibits); and (iii) the official Togolese nationality certificate issued on 12 May 2014, certifying that the Player was born in Agbélouvé, Togo.

- Before the CAF Appeal Board, the Appellant presented an (expired) Nigerian passport stating a place in Nigeria as place of birth of the Player. For the First Respondent this information provided by the Appellant could not demonstrate any cause of fraud, in particular where the three aforementioned official documents from Togolese authorities all point in the same direction.

- Furthermore, it has to be highlighted that the Nigerian birth certificate, provided by the Appellant was issued in 2002, i. e. 8 years after the Player's birth. The provided Togolese birth certificate was issued on 2 December 1994, i.e. a few months following the Player's birth.

- In the proceedings before CAS the First Respondent submitted additional evidence regarding the state of birth of the Player, namely Togo: (i) Declaration on honour by the Player dated 31 May 2019, confirmed by the witness statement of the Player at the hearing on 14 June 2019; (ii) The confirmation of the authenticity of the Togolese Passport of the Player, issued by the Ministère de la Sécurité de la Protection Civile on 29 May 2019; and (iii) The confirmation of the authenticity of the birth certificate of the Player by the Ministère de l'Administration Territoriale de la Décentralisation et de la Collectivités Locales on 27 May 2019.

- A dual nationality (Togolese and Nigerian) of the Player has never been disputed by the Respondent. For all the above reasons, the Player was eligible to play for the national team of Togo in the Matches at stake according to the Applicable Regulations.

- In reply to the Appellant's assertions, the Second Respondent never responded to the ITC request and thus never *"confirmed the nationality of the Player"*.

- The Appellant failed to call the Algerian FA and the Benin FA as Respondent, whereas the key prayer for relief of the Appellant, namely its reintegration into the final stage of the 2019 AFCON, would entail the elimination of the Algerian FA from the 2019 AFCON. Thus, the request is directly directed at the Algerian FA. Likewise, the Appellant would have had to call the Benin FA as Respondent, because its position in the relevant table is also affected by the present Appeal. This flaw could not be corrected by calling these football associations as intervening parties during pending proceedings. These requests which affect the mentioned

football associations cannot be granted without having these football associations properly heard.

- In reply to the Appellant's assertion it must be stated that it is impossible to play the 2019 AFCON with 25 teams from a legal, sporting, logistical and security standpoint.

- The Player did not take part in Mach 86 because he was not fielded. As consequence no forfeit can be pronounced in at least Match 86. Thus, for reasons of mathematics, the Appellant will not be able to reach the second position of the qualifying group D and is not able to participate in the final stage of the 2019 AFCON.

- The Appellant did not lodge any protest regarding the Player's eligibility prior to the match played between the Togolese and the Gambian national teams on 12 October 2018 Match 62 according to the AFCON regulations. The protest (pre match protest on 16 October 2016 and the follow up letter on 18 October 2018) only concerned Match 86. Solely Match 86 was mentioned in the proceedings before CAF. Therefore, the Second Respondent was only heard in the context of the protest lodged prior to Match 86 and the decisions of the CAF Disciplinary Committee and the CAF Appeal Committee solely referred to Match 86. The protest lodged cannot be extended to any other match, including match No. 62. As a consequence, Match 62 was never part of and did not fall into the scope of the present proceedings.

- According to the Applicable Regulations, and in the absence of a protest the result of Match 62 became final and automatically homologated. Furthermore, according to Article 48 para. 3 of the CAF Statutes the present Appeal to CAS cannot extend to a matter that has not been previously decided.

- The Appellant does not have sufficient legal interest to prayers for relief No. 5,12 and 13, since it would only have an indirect interest in the outcome of match Benin v Togo (No. 5), or because the sanctions would not affect the Appellant (No. 12,13)

- The Appellant failed to demonstrate the fulfilment of all the necessary conditions for a liability to be borne by the First Respondent. The claim for damages must therefore be dismissed.

73. The submissions of the Second Respondent, in essence, may be summarized as follows:

- The Player was born in Agbélouvé in the Prefecture of Zio in Togo, which is proved by the citizenship certificate issued on 12 May 2004, stating the place of birth in Togo, which was authenticated by the *Ministère de l'Administration Territoriale de la Décentralisation et de la Collectivités Locales* on 27 May 2019. The Player also has Togolese citizenship, which is proved by the Player's Togolese passport issued on 7 December 2015, which was authenticated by the Ministère de la Sécurité de la Protection Civile on 29 May 2019. The alleged fraud concerning the Player's place of birth and nationality is therefore unfounded and must be dismissed.

- The reason why the Player stands as a Nigerian Player in the CMS system is because the Player took part in the Confederation Cup with the Cameroonian Club New Stars FC with his Nigerian passport. But as proved by the provided documents, the Player also obtained Togolese nationality.

- The Player never played for the national team of Nigeria, even though he was holding Nigerian nationality. Because the Player was born in Togo and because his father actually and permanently held Togolese nationality, the Player fulfilled not one but two of the conditions provided for in Article 7 of the Regulations governing the application of the (FIFA) statutes and is eligible to play for the national team of Togo.

V. JURISDICTION

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

> *"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".*

75. CAS' jurisdiction derives from this provision and from Article 48 para. 3 of the CAF Statutes, which determines that *"Only CAS shall be empowered to adjudicate on appeals against any decisions or disciplinary sanctions taken in the last instance by any legal body of CAF or FIFA, a national association, league, or club (…)"*. In addition, none of the Parties objected to the CAS jurisdiction and the Parties confirmed it by signing the Order of Procedure.

VI. ADMISSIBILITY

76. Since the appeal was submitted by the Appellant within the time-limit provided for by Article 48 par. 3 of the CAF Statutes, it is admissible. It also complies with all other requirements set forth in Article R48 of the Code. The Appeal Brief was further submitted within the time-limit as extended by the CAS and is thus admissible, which is undisputed.

77. The Answer of the First Respondent to the Appeal Brief was also filed within the applicable time-limit and thus admissible, which is also undisputed.

78. The Answer of the Second Respondent to the Appeal Brief was not filed in due time:

- At the hearing the Sole Arbitrator pointed out that the Second Respondent received the Appeal Brief on 29 April 2019. There was a suspension of the relevant time-limit between 15 May and 17 May 2019. An extension of 15 days to file the Answer was granted. Therefore the time limit for filing its Answer expired on 6 June 2019. The Answer of the Second Respondent with its exhibits was submitted on 7 June 2019. The Second Respondent tried to justify the late submission with the claim that on 5 June 2019 it was an official holiday in Togo.

Therefore, the Second Respondent did not even claim that the last day of the deadline (6 June 2019) was an official holiday in Togo, which could lead to an expiration of the time limit at the end of the first subsequent business day according to Article R32 of the Code. The First Respondent did not object to the inclusion of the Answer and its exhibits. The Appellant did not object to the inclusion of the Answer Brief, but objected to the inclusion of the exhibits submitted by the Second Respondent.

- Pursuant to Article R56 of the Code, the Sole Arbitrator accepts the late Answer Brief of the Second Respondent, because the Parties agreed to it. Regarding the late filing of the exhibits the Sole Arbitrator states that according to Article R56 para. 2 of the Code only exceptional circumstances would justify their acceptance. The Second Respondent did not allege such "exceptional circumstances", which could justify the delay in filing these exhibits. Therefore, the Sole Arbitrator does not accept the exhibits, provided by the Second Respondent, as admissible. Notwithstanding the above, the Sole Arbitrator notes, that all these exhibits were also submitted by the First Respondent and are thus part of the CAS file, anyway.

79. Evidence provided by the Appellant and the First Respondent at the hearing:

- At the hearing the First Respondent submitted a copy of a Nigerian Passport of Mr Jacob Ade Ojo, an alleged uncle of the Player. The First Respondent claimed that this was actually the person mentioned in the Player's Nigerian Electronic Passport, which was submitted by the Appellant. Thus, the person mentioned on the Player's Nigerian Electronic Passport would not be the alleged cousin who signed the provided affidavit, which stated that the Player was born in Nigeria.

- Furthermore, at the hearing, the Sole Arbitrator pointed out that the copy of the affidavit of Mr. J.A Ojo, which was provided by the Appellant, was not signed. Subsequently, the Appellant submitted a copy of the affidavit, which Mr. J.A Ojo had signed. In addition, it provided a readable copy of the Nigerian Electronic Passport, the Passport which the Appellant had already submitted with its Appeal Brief.

- The Parties did not object to the admission of the respective documents, but denied the accuracy of the other Party's submissions, respectively. As a result of the Parties' agreements the Sole Arbitrator accepts as admissible the documents, submitted at the hearing pursuant to Article R56 of the Code.

80. Evidence provided by the Appellant on 13 June and 17 June 2019:

- At the hearing the Sole Arbitrator made reference to the information and the documents provided by the Appellant on 13 June 2019. The First Respondent did not object to their admissibility, but stated that this information is irrelevant for the present proceedings. The Second Respondent objected to the admission of the submission/evidence filed by the Appellant on 13 and 17 June 2019.

- Article R56 of the Code provides as follows:

"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer".

- The Sole Arbitrator further refers in this respect to MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Article R56 para. 7, stating: *"In principle, the Panel will only control the admissibility of the late submission if it considers that such submission is relevant".*

- The Sole Arbitrator notes that the documents provided on 13 June 2019 were published on 9 June 2019. Therefore, the documents were provided only a few days after their publication and could not have been filed with the Appeal Brief. With regard to the evidence filed on 17 June 2019 the Appellant asserted that the 'language issue' was raised for the first time at the hearing because the Appellant was unable to examine the Player before the hearing.

- For the reasons outlined above, it is understandable why the submissions dated 13 June 2019 were made after the Appeal Brief was filed, and the Sole Arbitrator deems it appropriate that they should be admissible.

VII. APPLICABLE LAW

81. Article R58 of the Code provides the following:

"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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

82. In Article 48 of the CAF Statutes it is stipulated:

"The Code of Sports-related Arbitration shall govern the arbitration proceedings. With regard to substance, CAS shall apply the various regulations of CAF and FIFA or, if applicable, of national associations, members, leagues and clubs, and, as a last resort, Swiss Law".

83. At the hearing the Parties agreed on the application of the CAF rules and regulations (the "Applicable Regulations") and Swiss law subsidiarily.

84. The Sole Arbitrator notes that, with regard to procedural law, the above-mentioned provision of the CAF Statutes refers to the applicability of the provisions of the Code, which is therefore primarily applicable. However, if certain aspects of the procedure are not addressed by the Code, i.e. if there is *lacuna*, the Sole Arbitrator shall determine the procedure, to the extent necessary, either directly or by reference to a law or to arbitration rules (Art 182.2 of the Swiss Federal Act on International Private Law, PILA). Considering (i) that the seat of the arbitral tribunal and of the federation which rendered the decision are in Switzerland and (ii) that

Swiss substantive law is complementarily applicable to the merits of the present case, the Sole Arbitrator decides to apply the rules of the Swiss Civil Procedural Code (the "CPC") in the case at hand, where/if there is a *lacuna* in the Code and if he deems appropriate.

VIII. MERITS OF THE DISPUTE

A. Preliminary Remark

85. The Appellant submits that there were various procedural flaws in the disciplinary proceedings undertaken by the judicial bodies of the First Respondent. The Appellant claimed *inter alia* that the Appealed Decision was made in violation of the Appellant's right to be heard and of the basic principles of due process.

86. In this regard, the Sole Arbitrator first notes that the facts and the law are examined *de novo* by the Sole Arbitrator in accordance with the power bestowed on it by Article R57 of the Code. The Sole Arbitrator is therefore not limited to the facts and legal arguments of the previous instance. In relation to issues raised by the Appellant regarding the procedure at the lower instance, it is well-established in CAS case law that the alleged procedural defects in the lower instances would in any event be cured through the *de novo* hearing before the CAS (see inter alia CAS 2015/A/4162 paras 70 et seq., CAS 2014/A/3848 paras 53 et seq.).

87. The case further raises several - partly complex - issues regarding the merits of the case, including:

- Does the Scope of the Appeal include match No. 62, which took place on 12 October 2018?;
- Was the Player eligible to play for the representative team of the Second Respondent?;
- Did the Player take part in Match 86?;
- Is there a "lack of standing to be sued" of the First and Second Respondent alone?;
- Does the Appellant have a legal interest in respect to prayers for relief No. 5, 12 and 13?; and
- If all the questions above are affirmed, is the Appellant entitled to damages?

88. However, the main substantive issue remains the question of **whether the Player was eligible to play for the national team of the Second Respondent**. Therefore, the Sole Arbitrator focuses on this core question first, because all other topics in this case depend on the answer of said question.

89. As to said question, the relevant provisions are the following:

Article 38.1 of the AFCON 2019 Regulations (emphasis added):

> *"**Each Association shall select its national representative team from Players enjoying the citizenship of its country, subject to its jurisdiction and qualified for selection in conformity with the provisions of the regulations governing the application of the FIFA statutes.** All Players must present on request, to the Secretariat of CAF or to the match commissioner, their valid passport being".*

Regulations governing the application of the (FIFA) Statutes (emphasis added):

> Article 5 par. 1:
>
> *"Any person holding a permanent nationality that is not depending on residence in a certain country is eligible to play for the representative teams of the association of that country". (…)*
>
> Art. 5 par. 2:
>
> *"With the exception of the conditions specified in article 8 below, any player who has already participated in a match (either in full or in part) in an official competition of any category or any type of football for association may not play an international match for a representative team of another association".*
>
> Article 7:
>
> *"Any Player who refers to art. 5 par. 1 to assume a new nationality and who has not played international Football in accordance with art. 5 par. 2 shall be eligible to play for the new representative team only if he fulfils one of the following conditions:*
> *a)* ***He was born on the territory of the relevant association****;*
> *b) His biological mother or biological father was born on the territory of the relevant association;*
> *c) His grandmother or grandfather was born on the territory of the relevant association;*
> *d) He has lived continuously for at least five years after reaching the age of 18 on the territory of the relevant association".*

90. The Sole Arbitrator notes that according to the relevant Regulations, the Player has to fulfil two specific requirements to be eligible to play for the national team of the Second Respondent: 1) he has to be a Togolese citizen according to Article 38.1 AFCON Regulations; and 2) one of the provisions according to Article 7 Regulations governing the application of the FIFA Statutes has to apply, *in casu* the two Respondents assert that the Player was born in Togo (Article 7 lit a Regulations governing the application of the FIFA Statutes). For the sake of good order, the Sole Arbitrator notes that the Respondents do not dispute the fact that the Player holds a Nigerian passport (which expired in 2016), but the Respondents claimed that the Player obtained (in addition) the citizenship of Togo. Furthermore, it is undisputed by the Parties that the Player has never played for the national team of Nigeria.

91. In the proceedings before CAS it therefore has to be determined whether the elements of Article 38 AFCON Regulations in conjunction with Article 7 lit a Regulations governing the

application of the FIFA Statutes are fulfilled, notably, whether the Player was born in Togo or not.

92. The Appellant and the Respondents separately provided the Sole Arbitrator with the above-mentioned documents in order to substantiate their claims that the Player was born in Nigeria and Togo, respectively. In addition to that, the Parties called witnesses in the hearing to further substantiate their claims. At the hearing, the Player, (who was called as a witness by the First Respondent) and Mr. Braithwaite, a Nigerian lawyer, who was called as a witness by the Appellant, confirmed the (divergent) positions of the respective Parties on this crucial point.

93. With regard to the evidentiary proceedings, the Sole Arbitrator wishes to point out that the documents submitted were issued by state authorities of Nigeria and Togo, respectively. According to Article 179 Swiss Civil Procedure Code the conclusiveness of these documents is therefore very high.

94. In Article 179 Swiss Civil Procedure (CPC) it is provided:

"[P]ublic registers and official records are conclusive evidence of the facts stated therein, unless their content is proven to be incorrect".

95. Notwithstanding the question of whether or to what extent the above provision applies by analogy to documents from foreign countries, the special feature in the present case is that the documents issued by the state authorities contradict each other, particularly regarding the Player's place of birth.

B. Burden of proof

96. In relation to the available evidence, it is first worth stating at this point which of the Parties bears the burden of proof in the present proceedings regarding the eligibility of the Player.

97. In Article 33 of the CAF Disciplinary Code it is provided the following:

"1. The onus of proof regarding disciplinary infringements rests on CAF".

98. However, the case at hand is not a disciplinary case, but an eligibility one, and the various CAF regulations and AFCON 2019 Regulations do not include any provisions concerning the burden of proof as to the eligibility of a Player. Therefore, the Sole Arbitrator has to examine this issue through reliance on the Code, CAS jurisprudence, and subsidiarily Swiss Law for the reasons set out above at paragraphs 81 to 84.

99. According to well-established CAS jurisprudence (see e.g. CAS 2015/A/4177 para. 64) and Article 8 of the Swiss Civil Code, unless the law provides otherwise, each party must prove the facts upon which it is relying to invoke a right, thereby implying that the case must be decided against the party that fails to adduce such evidence. Furthermore, the burden of proof not only allocates the risk among the parties of a given fact not being ascertained but also

allocates the duty to submit the relevant facts before the court/tribunal. It is the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court/tribunal (ATF 97 II 216, 218 E.1; BSK-ZG/SCHMID/LARDELLI, 4th ed., 2010, Article 8 no. 31; DIKE-ZPO/GLASL, 2011, Article 55 no. 15).

100. In the present proceedings before CAS, the Appellant (by seeking to overturn the Appealed Decision) derives rights (i.e. the Appeal being upheld and the match being lost by forfeit) from the allegation that the Player was not eligible to take part in the Match(es) for the Second Respondent. The Sole Arbitrator thus concludes that the burden of proof with respect to the Player's ineligibility lies with the Appellant.

101. The Sole Arbitrator feels himself comforted in this analysis by citing the following paragraph of a previous CAS decision:

"According to the AFC Disciplinary Code, in a disciplinary procedure involving a sanction (forfeit-loss), the burden of proof lies on the AFC. In a procedure where a party derives rights from the allegation that a Player was not eligible to be fielded during a match, the burden of proof with respect to the Player's ineligibility lies with the party alleging this" (CAS 2015/A/4260).

102. Therefore, the burden of proof as to the Player's place of birth in this case lies with the Appellant. A possible *non-liquet* situation would be at the expense of the Appellant.

C. Standard of proof

103. As to the standard of proof to be applied, the Sole Arbitrator observes that there is also no specific rule concerning a Player's eligibility in the CAF Regulations and/or AFCON 2019 Regulations. The same applies to the Code and Swiss Law. In particular, neither the Code, nor Switzerland's Private International Law define any applicable standard of proof for CAS arbitrations.

104. Thus, it is up to the Sole Arbitrator to determine the standard of proof in the case at hand (and in eligibility cases in general).

105. Many CAS Panels have already dealt with this problem, namely to determine said standard of proof in the absence of a corresponding provision in the relevant regulations. For example, in CAS 2010/A/2267 para. 730 sec., the Panel held that – absent a specific identification and/or agreement of the standard of proof – the standard in match fixing cases is the standard of "comfortable satisfaction" (see also CAS 2013/A/3258 para. 120). In addition, CAS rejected the proposition that the standard of proof was the criminal standard of "beyond reasonable doubt" stating that in the normal course the standard would be the civil standard of the "balance of probabilities" (see i.a. CAS 2013/A/3258 ibid.)

106. In view of that, the Sole Arbitrator feels comfortable to state that in any case the standard of proof at hand shall be on a sliding scale from, at a minimum, a mere "balance of probabilities" up to that of "comfortable satisfaction" at the most.

107. However, CAS case law has also pointed out that each test of a standard must take into account the specific circumstances of the case (see, for example, CAS 2013/A/3258 para. 121).

108. A previous CAS Panel stated (emphasis added): *"In assessing the evidence the Panel has borne in mind that the Player has been charged with serious offences. While this does not require that a higher standard of proof should be applied than the one applicable according to the UTACP, the Panel nevertheless considers that it needs to have a high degree of confidence in the quality of the evidence"* (CAS 2011/A/2490). This standard has subsequently and consistently been applied in many CAS cases.

109. While the Sole Arbitrator does not overlook the fact that this requirement for a high degree of confidence in the evidence when "serious offences" are involved originated primarily within the framework of disciplinary cases (as opposed to a case dealing primarily with eligibility, such as this one), the context in which the allegations regarding the evidence are made in this case mark it out to the Sole Arbitrator as being clearly the correct standard to apply. Specifically, the Appellant alleges that the documents produced by the Respondent to substantiate their claims regarding the Player's birth are the result of fraud and forgery. In particular, according to the Appellant's submissions, the birth certificate and the nationality certificate presented by the Respondents are likely to have been forged. The Appellant *"raises serious doubts regarding the genuine nature of the birth certificate"*, due to inconsistencies. The inconsistencies mentioned are that the name of the mother is spelled differently on the birth certificate on the one hand and on the nationality certificate on the other hand. In addition, the father (declarant) of the Player did not sign the birth certificate, which is intended on said document. In order to substantiate its claims, the Appellant submitted the above-mentioned documents issued by Nigerian state authorities and called Mr Braithwaite, a Nigerian lawyer, as a witness. Mr Braithwaite testified in his witness statement that his research has revealed that the Nigerian documents in any case "prevail" over the provided Togolese documents.

110. These are clearly serious allegations, which if true would have potentially criminal implications for those involved. Indeed, if this "fraud theory" was proven to be true, it would have a fundamental impact on the outcome of the case, in particular with regards to the validity of the Appellant's own produced documents.

111. As demonstrated above, in cases of such serious allegations, the Sole Arbitrator finds that there is consistent CAS jurisprudence that an adjudicatory body should have a high degree of confidence in the quality of evidence. By accusing the Respondent(s) of having provided the Sole Arbitrator with forged documents, it goes without saying that serious allegations were made by the Appellant. Having considered the situation at hand, the Sole Arbitrator agrees that this (the serious allegations) should not lead to any higher standard of proof being applied overall, but that he should have a high degree of confidence in the quality of the evidence in order to accept these allegations as true.

112. As such, the Sole Arbitrator finds that he must have a high degree of confidence in the evidence submitted by the Appellant in order to determine, to his comfortable satisfaction,

that the Togolese documents produced by the Respondents are forgeries and that the player was in fact born in Nigeria.

113. Taking the above-mentioned considerations and relevant CAS case law into account, in the Sole Arbitrator's view the Appellant has not met this standard or proven that the documents provided by the Respondents were forged. The Sole Arbitrator duly notes the claimed inconsistencies in relation to the documents provided by the Parties. Nevertheless, in the view of the Sole Arbitrator these revealed "inconsistencies" as well as the misspelling the Player's name on the match sheet are not of such seriousness as to sufficiently substantiate the Appellant's allegations. While the Appellant claims that the Nigerian documents "prevail" over the Togolese documents, the Sole Arbitrator cannot concur with this conclusion and states that some questions regarding the provided Nigerian documents remain unanswered too - e.g. why the Nigerian birth certificate was issued 8 years after the birth of the Player.

114. The Sole Arbitrator also wishes to remark, that apart from being provided with the (contradictory) records of state authorities, the Appellant could not provide the Sole Arbitrator with further crucial decision-relevant evidence to put the Sole Arbitrator in a position to decide on the place of birth of the Player. Indeed, in the Sole Arbitrator's opinion, both Parties could have provided more relevant evidence in this respect. For example, neither Party called the Player's mother as a witness at the hearing on 14 June 2019. It goes without saying that a witness statement of the Player's mother could be of relevance in the question at dispute. The Appellant did not call the alleged relatives of the Player who signed the affidavits as witnesses. Nor did the Appellant present, for example, photographs which could prove a family relationship between the Player and the witnesses. The absence of such additional evidence is even more crucial considering that the Player testified at the hearing that he did not know these alleged relatives. Further measures like presenting or at least requesting an opinion of an independent expert to determine the validity of the disputed documents (CAS 2015/A/4177 para. 36) or presenting requests for the hospital's birth records, also come to mind, as evidence which the Appellant could have provided to further substantiate its claim regarding the Player's place of birth.

115. Considering the above, neither the Respondents nor - and crucially, considering where the burden of proof lies, the Appellant - have produced evidence which meets the requisite standard of giving the Sole Arbitrator a *"high degree of confidence in the evidence"* on which to come to a conclusion as to the Player's place of birth.

116. Therefore, by taking into account all the evidence, including the subsequently submitted evidence on 13 June 2019 and 17 June 2019, contradictory documents from two separate state authorities, contradictory witness statements, and inconsistencies in regard of evidence submitted by the Parties, the Sole Arbitrator is not in a position to determine, to his comfortable satisfaction, in which country the Player was born.

117. For the reasons stated above, the Appellant is burdened with a *non-liquet* situation as a result of the outcome of these proceedings. Therefore, the Appeal has to be dismissed in its entirety.

D. Conclusion

118. The Sole Arbitrator wishes to stress that he considered all the argumentations and evidence duly submitted by the Parties and that the case and all the pending questions were dissected carefully. For the reasons listed above, including not least the *non-liquet* situation regarding the Player's place of birth, the Sole Arbitrator dismisses the Appeal.

119. The Sole Arbitrator wishes to further stress that he has considered fully and at length the many other issues raised by the parties regarding the merits of the case, including those listed in para. 87 above. The number and complexity of the issues in this list reflect the fact that the Appellant would necessarily have been required to overcome several other hurdles in order for its Appeal to have been upheld. The *non-liquet* situation which exists in this case and leads the Sole Arbitrator to dismiss the Appeal renders any further evaluation of these issues a moot point, and as such will not be replicated in the text of this Award.

IX. COSTS

Preliminary Remark

The Appellant claims that the present case is a disciplinary case. It objects to the application of Article R64. The Sole Arbitrator states that the Appealed Decision neither imposes a disciplinary sanction on the Appellant, nor on the Player. It only concerns the Player's eligibility to represent the Togo national team. Therefore the Sole Arbitrator is of the opinion that the present case is clearly not exclusively of disciplinary nature and that Article R64 of the Code is applicable. While a decision as to a player's nationality may have disciplinary consequences (e.g. for fielding an ineligible player), disciplinary concerns do not cover the entirety of proceedings in the present case. For example, the Sole Arbitrator further notes that in the present case and, contrary to the case CAS 2016/A/4831, referred to by the Appellant, the Appellant also submitted before CAS a subsidiary request for the payment of a financial compensation. Therefore, the Sole Arbitrator is of the opinion that the present case is clearly not exclusively of disciplinary nature and that Article R64 of the Code is applicable.

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the Gambia Football Federation on 1 Match 2019 against the decision 002 – CAI – 10.02.2019 issued by the CAF Appeal Board is dismissed.

2. The decision 002 – CAI – 10.02.2019 issued by the CAF Appeal Board is confirmed.

3. (…).

4. (…).

5. All other and further motions or prayers for relief are dismissed.