Arbitration CAS 2021/A/8106 Kayhan Ozcicek-Takagi v. Judo Federation of Australia Limited (Judo Australia), award of 29 October 2021 (operative part of 12 July 2021)

Panel: The Hon. Annabelle Bennett AC SC (Australia), Sole Arbitrator

Judo
Nomination of athletes for selection to the 2020 Tokyo Olympic Games
Proper implementation of the nomination criteria

It is not for a court to come to a conclusion on the merits in the guise of making a finding that the decision-maker acted contrary to particular guidelines or criteria. Where there is no limitation other than reasonable grounds for a state of satisfaction of compliance to be achieved, the factors that may be taken into account are not circumscribed nor, in the absence of bad faith, dishonesty or perversity, must a decision-maker consider all available matters.

I. PARTIES

1. Mr Kayhan Ozcicek-Takagi (the "Appellant" or the "Athlete") is an athlete of Australian nationality in the sport of judo.

2. The Judo Federation of Australia Limited (the "Respondent", "Judo Australia" or "JA") is the national federation for judo in Australia, which is recognised by the Australian Olympic Committee ("AOC") and affiliated with the International Judo Federation ("IJF"), the international federation governing judo which is in turn recognised by the International Olympic Committee.

II. INTRODUCTION

3. The Appellant appeals a decision of the Respondent dated 27 June 2021 to not nominate the Appellant to the AOC for selection to the team for the 2020 Tokyo Olympic Games, which was communicated to the Athlete on 29 June 2021 (the "JA Decision").

III. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings, evidence adduced and submissions made at the hearing. Additional facts and allegations found in the Parties' written and oral submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the

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

5. On or around 4 January 2019, the Appellant and the Respondent entered into an agreement formalising their relationship ("Athlete Agreement").

6. On 11 June 2021, the Appellant competed in the Judo World Championships against Mr Tevita Takayawa ("Subject Bout"). At the conclusion of the Subject Bout, the Respondent was informed by its Head Coach, Mr Daniel Kelly, that the Appellant and the Respondent were being investigated for match-fixing. Correspondence was exchanged between the Respondent and the IJF in relation to this investigation, including as follows:

   a. On 13 June 2021, the IJF wrote to the Respondent stating that the Appellant's behaviour during the Subject Bout was *"very different and seems suspicious"* and that the IJF Disciplinary Commission had been informed;

   b. On 18 June 2021, the IJF Disciplinary Commission wrote to the Appellant (copying in the Respondent) informing him that the IJF Disciplinary Commission had opened a disciplinary procedure into the conduct of the Appellant on the basis that his behaviour during the Subject Bout on 11 June 2021 was suspicious;

   c. On 18 June 2021, the Respondent wrote to the IJF enquiring as to the effect of the Appellant's referral to the IJF Disciplinary Commission on his Olympic Qualification eligibility;

   d. On 21 June 2021, the IJF informed the Respondent that the Appellant had qualified for the Tokyo 2020 Olympic Games judo competition and requested confirmation of the Respondent's nominations by 2 July 2021;

   e. On 23 June 2021, the Respondent wrote to the IJF requesting an update as to the status of the Appellant's Disciplinary case;

   f. On 24 June 2021, the IJF Disciplinary Commission delivered its findings in relation to its investigation into the Subject Bout ("IJF Disciplinary Decision"). The IJF Disciplinary Decision concluded by recording that on the grounds set out therein, the IJF Disciplinary Commission pronounced against the Appellant a *"serious reprimand and warning"*.

7. On 27 June 2021, the Board of the Respondent met to consider whether or not the Appellant should be nominated for selection to the Tokyo Olympics. At that meeting:

   a. The JA Board Members were provided with a briefing pack by the Respondent's CEO which comprised the following documents:

i. a letter from Respondent to the IJF dated 13 June 2021 stating that the Respondent had been made aware of the IJF's investigation in relation to the Subject Bout, denying that the Respondent had any knowledge of any intention by the Appellant to intentionally alter the natural course of the Subject Bout and noting that the Respondent's coaches were shocked and alarmed by the Appellant's match performance at the Subject Bout;

ii. a letter from the IJF to the Respondent dated 13 June 2020 (as referred to in paragraph 6.a above);

iii. the statement of Ms Kate Corkery, President of the Respondent, attaching the following documents:

1. the statement of Mr Daniel Kelly (a Senior National Coach at the Respondent) dated 15 June 2021;

2. the signed Athlete Agreement between the Appellant and the Respondent dated 4 January 2019; and

3. the appendices to the Athlete Agreement;

iv. a letter from the Respondent to the IJF dated 18 June 2021 (as referred to in paragraph 6.c above);

v. an email from the IJF Disciplinary Commission to the Appellant (copying in the Respondent) dated 18 June 2021 (as referred to in paragraph 6.b above);

vi. a letter from the Appellant to the IJF dated 20 June 2021 containing the Appellant's explanation as to what occurred in relation to the Subject Bout;

vii. a letter from the IJF to the Respondent dated 21 June (as referred to in paragraph 6.d above);

viii. a letter from the Respondent to the IJF dated 23 June requesting an update as to the status of the Disciplinary Commission case against the Appellant (referred to above); and

ix. the IJF Disciplinary Decision dated 24 June 2021;

(together, the "Board Briefing Pack").

b. the Respondent's CEO conveyed to the Board the opinions of the Respondent's Technical Director Ms Maria Pekli and the Respondent's Head Coach Mr Daniel Kelly that the Appellant's performance at the 2021 World Championships was not to an acceptable standard and that there had been previous concerns about the Appellant's performance in past events;

c. after considering the Board Briefing Pack, the information conveyed by the Respondent's CEO, and the Board members' prior review and consideration of the video footage of the Subject Bout, the Board resolved not to nominate the Appellant for selection to the Australian Olympic Team. The minutes of that Board meeting dated 27 June 2021 record the *"[d]iscussion regarding considerations for not supporting nomination"*.

8. On 28 June 2021, the IJF published its World Rankings List. Under the International Judo Federation's *Qualification System - Games of the XXXII Olympiad – Tokyo 2020* dated 12 May 2020, the Appellant directly qualified for the Olympic Games, in the Men – 100kg weight class.

9. On 29 June 2021, at or around 12:55pm AEST, the Respondent wrote to the Appellant communicating to him the JA Decision, i.e. informing him that he had not been nominated to the AOC for selection to the team for the Olympics.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

10. On 30 June 2021:

a. in accordance with the Code of Sports-related Arbitration as in force from 1 July 2020 (the "CAS Code") and the AOC's Olympic Team Nomination and Selection By-Law dated 20 July 2020 (the "AOC By-Law"), the Appellant filed a Statement of Appeal dated 30 June 2021 with the Oceania Registry of the Court of Arbitration for Sport ("CAS"), and served copies of the Statement of Appeal on the Respondent and the AOC. The Statement of Appeal named Judo Australia as the Respondent, and sought to implement the Nomination Fast Track Appeal process pursuant to Clause 9.9(a)(i) of the AOC By-Law; and

b. the Appellant provided the CAS Oceania Registry with a receipt for payment of the non-refundable CAS Court Office fee, made by the Combat Institute of Australia Limited (CombatAUS) on behalf of the Appellant, pursuant to Article R64.1 of the CAS Code and Clause 9.9(b)(iv)(B)(2) of the AOC By-Law.

11. On 1 July 2021:

a. the Respondent confirmed that, in its opinion, there were no "Affected Parties" that needed to be notified of the Appellant's Statement of Appeal;

b. the Respondent provided the Appellant with its written statement of reasons supporting the non-nomination of the Appellant (the "Reasons"); and

c. the Appellant filed his amended Statement of Appeal dated 1 July 2021 (the "Amended Statement of Appeal"), which was amended to address the Reasons and

incorporate them as Annexure I, and served copies of it on the Respondent and the AOC.

12. On 2 July 2021, the Respondent filed its written submissions dated 2 July 2021, and provided a copy of them to the Appellant.

13. On 5 July 2021, in accordance with Clause 9.9(d)(i)(B) of the AOC By-Law and Article R54 of the CAS Code, the President of the CAS Appeals Arbitration Division appointed the Hon Dr Annabelle Bennett AC SC, Former Judge, Sydney, Australia, as sole arbitrator.

14. On 6 July 2021:

    a. the Parties agreed to a hearing date of 9 July 2021, and the hearing was scheduled by the Sole Arbitrator for 9:00AM AEST on Friday, 9 July 2021; and

    b. the Appellant sought the consent of the CAS to use Mr Andrew Migita-Meehan as a Japanese / English interpreter at the hearing.

15. On 7 July 2021:

    a. the Appellant provided the CAS, the Respondent and the AOC with a supplementary bundle of documents (the "Supplementary Bundle") on which it sought to rely, which included:

        i. the IJF Statutes, effective 22 August 2019 (pages 2 to 33);

        ii. the IJF Sport and Organisation Rules, Version: 8 July 2020 (pages 34 to 2410);

        iii. the Judo Federation of Australia Limited Constitution (downloaded from JA website on 7 July 2021) (pages 242 to 281);

        iv. a letter from the IJF dated 6 July 2021, signed by the IJF President and IJF General Secretary (page 282);

        v. a written statement of the Appellant dated 5 July 2021 (pages 283 to 285); and

        vi. a written statement of Morgan Endicott-Davies dated 5 July 2021 (page 286);

    b. the Sole Arbitrator decided to allow the Appellant to use the services of Mr Andrew Migita-Meehan as a Japanese / English interpreter at the hearing, subject to the Respondent also consenting.

16. On 8 July 2021:

a. the Respondent:

i. provided its consent to the Appellant using Mr Andrew Migita-Meehan as a Japanese / English interpreter at the hearing;

ii. initially informed CAS that it did not consent to the Appellant relying on the Supplementary Bundle at the hearing, on the grounds that they did not consider them relevant to the amended Statement of Appeal;

iii. after conferring with the Appellant, stated that it:

1. withdrew its objections to documents 1 to 4 in the Supplementary Bundle (see paragraphs 15.a.i-15.a.iv above);

2. maintained its objections to documents 5 and 6 in the Supplementary Bundle on the ground of relevance, stating that:

> *"… the respondent will* [sic] *considers that documents 5 and 6 are not relevant to the issues raised by the sole ground of appeal and by the amended statement of appeal but, rather, go to the merits of the original decision which is not a matter before the Court and which is not an available ground of appeal under cl 9.9(b)(i) of the By-Law. Document 5 also contains a number of serious, personal allegations made against employees of Judo Australia which, in addition to being irrelevant to the issues in the appeal, are scandalous and would call for detailed responses from the respondent".*

iv. provided CAS and the Appellant with a written statement of the Respondent's CEO, Ms Emma Taylor, dated 8 July 2021, the purpose of which was to confirm the material that was before the Respondent's Board when it made the JA Decision.

b. CAS sent a draft Order of Procedure to the Parties for their review.

17. On 9 July 2021:

a. at 8:36AM AEST, CAS sent a final Order of Procedure to the Parties for signature; and

b. at 9:00AM AEST, the hearing was held out of the CAS Oceania Registry Offices in Sydney, Australia. Due to COVID-19 restrictions, the Parties agreed that the hearing was to proceed by way of videoconference with all of the Parties and their representatives appearing by way of videoconference, as foreseen further to Articles R44.2 and R57 of the Code. The Sole Arbitrator was assisted by Mr Edward Copeman,

Solicitor, in Sydney, Australia, as *ad hoc* Clerk. In addition, the following persons attended the hearing:

For the Appellant

- Mr Kayhan Ozcicek-Takagi (Appellant);
- Mr Adam Casselden SC (Counsel);
- Mr Darren Kane (Solicitor); and
- Mr Andrew Migita-Meehan (Interpreter).

For the Respondent

- Mr Sandip Mukerjea (Counsel);
- Mr Thomas Clark (Solicitor);
- Mr Simon Read (JA Chair);
- Ms Emma Taylor (IJF CEO); and
- Ms Maria Pekli (IJF Technical Director).

18. At the commencement of the hearing:

a. the Parties confirmed that they had no objection to the appointment of the Sole Arbitrator;

b. the Parties confirmed that they consented to the terms of the final Order of Procedure that had been circulated to the Parties by the CAS Oceania Registry;

c. the Parties confirmed that they had no dispute about the admissibility of the Amended Statement of Appeal;

d. the Parties confirmed that had no objection to the Sole Arbitrator rendering the operative part of the Award with reasons to follow if that proved necessary because of the timing of the decision on selection;

e. the Parties agreed to admit:

i. documents 1-4 and 6 of the Supplementary Bundle in their entirety; and

ii. after an indication from the Sole Arbitrator as to the admissibility, in part, of document 5 of the Supplementary Bundle, being the written statement of the Appellant dated 5 July 2021, up to but not including the part of the statement

which commences at the paragraph on page 2 beginning *"In the last few days, I found out that…"* and continues through to the end of the statement; and

iii. the witness statement of the Respondent's CEO, Ms Emma Taylor dated 8 July 2021;

f. the Parties confirmed that they had no objection to the Appellant using Mr Andrew Migita-Meehan as a Japanese / English interpreter, and the Mr Migita-Meehan confirmed he understood that his role was to interpret matters without comment unless he wished something clarified; and

g. the Parties agreed that there was no dispute that the Appellant had qualified for the Olympic Games.

19. No witness testimony was heard during the hearing. The Appellant gave a party statement.

20. At the conclusion of the hearing, the Parties confirmed that their right to be heard had been fully respected.

21. On 9 July 2021, the Parties signed the Order of Procedure.

V. SUBMISSIONS OF THE PARTIES

22. As stated above, the Sole Arbitrator carefully heard and considered in this decision all of the submissions, oral and written evidence and arguments presented by the Parties. The submissions are set out, to the extent necessary, and dealt with in the consideration of the merits.

VI. JURISDICTION

23. 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".

24. It was common ground that Clause 9.9 (Fast Track Appeal Process) of the AOC By-Law applied to this appeal. Clause 9.9(a)(i) provides:

"Where, within 14 days of the Sport Entries Deadline a Non-Nominated Athlete receives notice of their non-nomination, the Non-Nominated Athlete may bring a Fast Track Appeal to the CAS in accordance with the Fast Track Appeal Process set out in this clause 9.9".

25. Article R57 of the CAS Code provides that the CAS has full power to review the facts and the law *de novo*. In accordance with Clause 9.9(d)(i)(D) of the AOC By-Law, the power of the Sole Arbitrator to review the facts and the law pursuant to Article R57 of the CAS Code will be initially limited to determining whether the Appellant has made out one or more of the grounds of appeal.

26. The Parties acknowledged in signing the Order of Procedure dated 9 July 2021 that the CAS has jurisdiction to determine this dispute pursuant to Clause 9.9(a) of the AOC By-Law.

27. The Parties also acknowledged in the Order of Procedure that the dispute has been filed in the Appeals Division of the CAS and that the decision of the CAS will be final and binding on all Parties.

28. The Sole Arbitrator, therefore, confirms that the CAS has jurisdiction to hear this appeal.

VII. ADMISSIBILITY

29. Article R49 of the CAS Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late".

30. Clause 9.9(b) of the AOC By-Law provides the procedure for commencement of a Nomination Fast Track Appeal relevantly applies as follows:

> *"(i) A Non-Nominated Athlete may bring a Nomination Fast Track Appeal to the CAS only on one or more of the following grounds:*
>
> …
>
> *(B) the applicable Nomination Criteria was not properly applied by the Non-Nominated Athlete's NF [National Federation – ie the Respondent];*
>
> …
>
> *(ii) A Non-Nominated Athlete wishing to pursue a hearing of their Nomination Fast Track Appeal must, within 24 hours of receiving notice of their non-nomination, (or within such time as the CAS may allow) provide the Chief Executive of their NF and the Chief Executive of the AOC with Written Notice that the Non-Nominated Athlete intends to pursue a Nomination Fast Track Appeal to the CAS.*

(iii) Within 24 hours of the NF receiving Written Notice of the Non-Nominated Athlete's intention to pursue a Fast Track Appeal in accordance with clause 9.9(b)(ii), the NF must provide the Non-Nominated Athlete with a written statement of the NF's reasons supporting the non-nomination of the Non-Nominated Athlete.

(iv) Within 24 hours of receipt of the NF's written statement in accordance with clause 9.9(b)(iii), the Non-Nominated Athlete must:

(A) where the Non-Nominated Athlete does not intend to pursue a Nomination Fast Track Appeal, provide Written Notice to the NF articulating that intention; or

(B) where the Non-Nominated Athlete does intend to pursue a Nomination Fast Track Appeal:

(1) file a CAS Application Form with the CAS Oceania Registry that sets out the grounds of appeal relied on by the Non-Nominated Athlete; and

(2) pay the non-refundable filing fee of CHF500 to the CAS.

For clarity, an extension of time may be granted by the CAS under this clause only in extenuating circumstances outside the control of the Non-Nominated Athlete concerned.

(v) Within 24 hours of filing their CAS Application Form with the CAS Oceania Registry, the Non-Nominated Athlete must provide a copy of their CAS Application Form to the NF, AOC and any Affected Party.

(vi) By no later than 24 hours after receipt of the Non-Nominated Athlete's CAS Application Form, the NF and any Affected Parties may respond to the Non-Nominated Athlete's grounds of appeal with written submissions to the CAS. The NF and any Affected Parties must file their submissions with the CAS Oceania Registry.

(vii) …".

31. The Appellant brings his appeal under Clause 9.9(b)(i)(B) of the AOC By-Law.

32. On 29 June 2021, the Appellant was informed of the JA Decision.

33. On 30 June 2021, the Appellant filed his initial Statement of Appeal with CAS and served it on the Respondent, and paid the non-refundable CAS Court Office fee pursuant to Clause 9.9(b)(iv)(B)(2) of the AOC By-Law.

34. On 1 July 2021:

a. having taken the Appellant's initial Statement of Appeal as written notice, pursuant to Clause 9.9(b)(ii) of the AOC By-Law, that the Appellant intended to bring a Nomination Fast Track Appeal to the CAS, the Respondent provided the Appellant

with the Reasons within 24 hours of receiving the initial Statement of Appeal, pursuant to Clause 9.9(b)(iii) of the AOC By-Law; and

b. within 24 hours of receiving the Reasons, the Appellant filed his amended Statement of Appeal with the CAS pursuant to Clause 9.9(b)(iv)(B)(1) of the AOC By-Law, and provided a copy of his Appeal to the Respondent and the AOC pursuant to Clause 9.9(b)(v) of the AOC By-Law.

35. On 2 July 2021, within 24 hours of receiving a copy of the amended Statement of Appeal, the Respondent filed written submissions with the CAS, pursuant to Clause 9.9(b)(vi) of the AOC By-Law.

36. On 7 July 2021, the Appellant provided a copy of the Supplementary Bundle to the CAS, the Respondent and the AOC.

37. On 8 July 2021, the Respondent provided a copy of the witness statement of the Respondent's CEO, Ms Emma Taylor, dated 8 July 2021, to the Appellant and the CAS.

38. On 9 July 2021 at the hearing, the Parties confirmed that:

a. they had no objections to the admissibility of the amended Statement of Appeal (see paragraph 18.c above); and

b. they agreed to admit (see paragraph 18.e above):

i. the Supplementary Bundle in part; and

ii. the witness statement of Ms Emma Taylor dated 8 July 2021 in its entirety.

39. The Sole Arbitrator considers that this appeal is admissible.

VIII. APPLICABLE LAW

40. Article R58 of the CAS Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

41. It was agreed by the Parties under the Order of Procedure that the law applicable to the merits is the law of New South Wales (Australia). The Sole Arbitrator notes that she will also apply the rules of the AOC and the Respondent that she deems relevant and applicable.

IX. MERITS

42. The Athlete's appeal is in respect of the nomination procedure for the Olympic Games in Tokyo, specifically for the sport of judo. It is not in dispute that the Athlete qualified for nomination. There is no dispute that the Athlete has complied with the procedural requirements to challenge the decision not to nominate him by way of this amended appeal.

43. It is helpful to note two matters, to put the consideration of this appeal into context:

44. First, the decision being appealed is a decision by the JA not to nominate the Athlete for selection for the 2020 Tokyo Olympic Games. Put simply, there are three stages in the process:

    a. first, the International Federation (IJF) determines which athletes have qualified for nomination and notifies the National Federation;

    b. secondly, JA as the National Federation applies the rules set out under the Judo Australia Nomination Criteria – Tokyo Olympic Games (the "Nomination Criteria") pursuant to the AOC By-Law to nominate athletes to the AOC for selection to the Games; and

    c. thirdly, the AOC Selection Committee is solely responsible for selecting nominated athletes to a team.

45. That is, there are separate bodies responsible for making decisions at the different stages of qualification, nomination and selection. Each operates under defined rules applicable to that body.

46. Clause 5 of the Nomination Criteria sets out the eligibility criteria for nomination. Importantly for this appeal, Clause 5 does not provide that a qualified athlete will be nominated unless certain conditions apply. Rather, the clause relevantly provides that (emphasis added):

> *"The National Federation* ***will not nominate*** *an Athlete* ***unless, as at the Nomination Date****, the National Federation* ***is satisfied on reasonable grounds*** *that the Athlete:*
>
> …
>
> *(g) is, and will remain until the conclusion of the Games, a positive ambassador for the Sport, National Federation and the Games".*

47. It is apparent from the wording of the relevant clause that there is no nomination unless the National Federation reaches a positive state of satisfaction of the matters in subclause (g). There was some dispute between the Parties as to whether Clause 5(g) of the Nomination Criteria provided an objective test, or a subjective test with objective elements. It is not necessary to characterise the test in such a fashion for the purposes of this appeal. The wording is clear and, importantly, it is not the case that there is a nomination unless the National Federation is satisfied, on reasonable grounds, that the Athlete is not a positive ambassador for the sport.

48. The Nomination Date is defined as 1 July 2021. Neither Party referred to, or made a submission concerning, the fact that this date was after the date of the decision, after the notification of the decision to the Athlete and after the date of the filing of the notice of appeal which commenced this proceeding, or that it had any relevance. Accordingly, the Sole Arbitrator will not have regard to this aspect of the chronology.

49. It is also useful to deal at this stage with some preliminary matters.

50. The IJF Disciplinary Decision is subject to an appeal the CAS, which was filed on 30 June 2021, after the JA Decision of 27 June 2021, notified to the Athlete on 29 June 2021. That appeal is pending. The Athlete also applied to the CAS for a stay of the IJF Disciplinary Decision. The application for a stay was refused by the President of the Appeals Arbitration Division of the CAS on 2 July 2021. Under normal principles, which have not been demonstrated not to apply, the IJF Disciplinary Decision remains in force pending the appeal.

51. The Athlete relies upon a letter of 6 July 2021, signed by the President and General Secretary of the IJF. In that letter it is clearly stated that the IJF Disciplinary Decision did not *"compromise Mr Kayhan Ozcicek-Takagi chances to participate in the 2020 Tokyo Olympics"* and that, knowing of the pending disciplinary hearing, the IJF informed the AOC that the Athlete had qualified for the Tokyo Games. Further, it stated, that the IJF confirms that it has *"always considered"* that he had *"legitimately qualified for the Tokyo 2020 Olympic Games Judo Competition"*. It may well be that the IJF Disciplinary Decision has no consequences for the Athlete's qualification but the view of the IJF is not relevant to the JA Decision as to whether or not to nominate an athlete for selection.

A. The notified JA Decision

52. In the letter dated 29 June 2021, notifying the Athlete of the decision not to nominate him, under the heading *"Reasons for Non-Nomination"*, the JA stated that

> *"…to nominate an athlete Judo Australia must be satisfied on reasonable grounds that an athlete is, and will remain until the conclusion of the Olympic Games, a positive ambassador for Judo, Judo Australia and the 2020 Tokyo Olympic Games"*.

53. The letter then referred to the decision of the IJF Disciplinary Commission to commence disciplinary proceedings against him after viewing videos of his performance at the June 2021 World Championships and the May 2021 Kazan Grand Slam. The letter continued by referring to the decision of that Commission which, it was stated, confirmed a number of matters by reference to:

a. the viewing of the videos by three IJF commissions: Refereeing, Sport and Education;

b. the Athlete's written response to the IJF Disciplinary Commission;

c. the fact that the Athlete had been reported for possible match-fixing; and

d. the pronouncement of a Sanction, being *"serious reprimand and warning"*.

54. The JA then explained that the reason for its non-nomination decision was based on Clause 5(g) of the Nomination Criteria, which was reproduced, and informed the Athlete of his rights of appeal.

B. The expanded reasons for the JA Decision

55. After receipt of the Athlete's notice of appeal, JA provided its statement of reasons for the non-nomination, pursuant to the procedure set out for a Nomination Fast Track Appeal to the CAS.

56. JA there states that, in deciding whether to nominate the Athlete for selection to the 2020 Tokyo Olympic Games, it *"was required to, and did, consider whether he met the eligibility criteria set out in clause 5 of the Nomination Criteria"*. It then set out a range of matters to which, it stated, it had regard, including:

a. the materials considered by the IJF in the Disciplinary Proceeding;

b. the IJF Disciplinary Decision;

c. the fact that a sanction had been imposed;

d. that JA personnel considered the Athlete's performance at the World Championships to be not of an acceptable standard;

e. this was not the first time that JA personnel had held concerns that the Athlete had not performed to the best of his ability when competing in high level competitions; and

f. the importance of Judo's moral code.

C. The grounds of appeal

57. An appeal can only be brought against a non-nomination decision on one of the grounds set out at Clause 9.9(b) of the AOC By-Law. The ground relied upon by the Athlete in paragraph 39 of the Amended Statement of Appeal is Clause 9.9(b)(i)(B), namely that JA did not properly apply the applicable Nomination Criteria. In paragraph 40 of the Amended Statement of Appeal, the Athlete specifies that JA improperly failed to take into account his right to appeal the IJF Disciplinary Decision which was referred to and relied upon in the JA Decision, and his right to apply for a stay of that IJF Disciplinary Decision.

58. JA sought to limit the Athlete to the matters in paragraph 40, as particulars of paragraph 39. In the Sole Arbitrator's view, the ground set out in paragraph 39 is not so limited. The heading of this section of the notice of appeal is *"**grounds** of appeal"* (emphasis added). Some of the

matters in that section are factual assertions and some may be regarded as separate grounds of appeal under Clause 9.9(b)(i)(B) of the AOC By-Law.

59. In oral submissions, the Athlete expanded on, and gave further particulars of, the case under Clause 9.9(b)(i)(B), that is, the asserted failure properly to apply the applicable Nomination Criteria. They were, in essence:

a. the failure to consider the Athlete's rights of appeal from the IJF Disciplinary Decision;

b. the failure to consider the Athlete's right to apply for a stay of the IJF Disciplinary Decision;

c. the absence of an adverse finding against the Athlete;

d. reliance on the IJF Disciplinary Decision without analysis of that decision;

e. the fact that the IJF Disciplinary Decision, based on the serious allegation of match-fixing, made no specific adverse finding and provided the least serious sanction available, namely a reprimand and warning, which itself is inconsistent with the seriousness of the allegation;

f. for the preceding reason, failure to consider the IJF Disciplinary Decision as *"perverse"*;

g. the failure to provide reasons for the JA Decision;

h. the failure in the JA Decision to refer to the whole of the evidence but merely reciting the evidence in the IJF Disciplinary Decision;

i. failure to consider and refer to the evidence known to JA that the Athlete was suffering from a back injury at the time of the events the subject of the complaint, which was supported by contemporaneous evidence;

j. failure to take into consideration the Athlete's poor command of English; and

k. the Nomination Criteria were not applied reasonably or properly and the findings were made without reasonable grounds.

60. The Athlete submitted that JA could not, on reasonable grounds, conclude that Clause 5(g) of the Nomination Criteria applied to the Athlete.

61. The Athlete's oral submissions expanded and added to the grounds set out in the amended notice of appeal. JA did object to that course but was able to, and then expressed itself content to, deal with the amended notice of appeal and the oral submissions made at the hearing.

D. The Disciplinary Decision

62. It is relevant to consider the matters set out in the IJF Disciplinary Decision, as it is not in dispute that this decision was before, and considered by, JA in the discussions leading to the JA Decision. They include:

a. the World Championship event in which the Athlete participated on 11 June 2021 *"drew the attention of several persons including the IJF Education Commission Director"*;

b. the video, with the link provided, had been viewed by three IJF Commissions and *"it appears that the behaviour of Mr Ozcicek-Takagi seems suspicious"*;

c. the Athlete's explanation given to the Disciplinary Commission, including his reference to his severe lower back pain and poor condition, and his stated reason for continuing to compete being that he had previously withdrawn for injury and could not *"willingly repeat this feeling of just giving up"*;

d. the Athlete's statement that he had done his best to perform despite the injury and back pain but *"did not have strength in my back and could not do anything"*;

e. the Athlete attached receipts for treatments for his lower back pain and offered a statement from his therapist;

f. the result of this fight *"surprised his coach"* who stated that the Athlete *"was ok and had no back problem"* and that the coach Mr Daniel Kelly was *"surprised and shocked"* by the performance;

g. the coach was surprised at the Athlete's lack of emotion after the match and said that the Athlete made no mention of back pain but said that he had made a mistake; and

h. a bolded reference to the fact that the decision is subject to appeal with the CAS with a time limit of twenty-one days from receipt.

E. The material before JA

63. There is no dispute as to the material that was before JA for the purposes of its decision. They include:

a. the IJF Disciplinary Decision;

b. correspondence from the IJF informing JA that a Disciplinary Commission had been formed concerning the Athlete and the match on 11 June 2021, and that, after viewing videos of this match and the Athlete's match at the Grand Slam of Kazan, it appeared to the three IJF Commissions that the Athlete's behaviour *"is very different and seems suspicious"*;

c. a statement from the President of JA stating, inter alia, that the Athlete had signed the Judo Australia Athlete Agreement, which provided relevantly for an obligation to give maximum effort at all times;

d. a statement from the Athlete's coach, Mr Daniel Kelly. This referred to the Athlete's assertion of back ache on the days prior to the World Championship match, the fact that he had trained with the Athlete prior to the match, where Mr Kelly stated, he felt strong and moved well, the fact that in the evening prior to the match the Athlete seemed in good spirits and ready to compete, the Athlete warmed up as normal, the lack of emotion on the part of the Athlete after the match; and

e. the letter sent by the Athlete to the IJF containing his explanation.

64. In addition to the above documents, JA's CEO conveyed to the Board the opinions of the JA Technical Director and the JA Head Coach (Mr Daniel Kelly), that the Athlete's performance was not to an acceptable standard.

65. JA emphasises in its submissions that it had regard not only to the IJF Disciplinary Decision but that it also considered for itself a number of other factors, including:

a. the viewing of the video of the match by the specialists in judo who made up the JA Board making the decision;

b. the statement of the coach Mr Daniel Kelly;

c. the Athlete's explanation;

d. the opinion that the performance at the World Championships was not to an acceptable standard;

e. the serious nature of the match-fixing allegation;

f. a decision not to perform to the best of his ability did not align with the values of the sport or of JA;

g. this was not the first time that JA personnel held concerns that the Athlete did not perform to the best of his ability; and

h. the findings of the IJF Disciplinary Commission.

66. The minutes of the JA Board meeting at which the JA Decision was made report the discussion of the *"considerations for not supporting nomination"*, which include:

a. *"values do not align when not 'performing to the best of his ability'"*;

b. the match fixing allegation and IJF Disciplinary Commission hearing brought the integrity of JA into question;

c. the Athlete's performance at the World Championships was not to an acceptable standard in the opinion of JA's Technical Lead and Head Coach; and

d. the Board's priority to uphold the integrity of the organisation.

F. Consideration

67. It is trite to state that this is not a merits appeal. Indeed, if the appeal is successful, the Athlete sought in the notice of appeal to have the matter referred back to JA for reconsideration, under the Nomination Fast Track Appeal process. It is also the case that the Sole Arbitrator is not qualified to make decisions based upon video footage of a judo match.

68. The appeal concerns the process adopted by JA and whether or not it correctly applied the Nomination Criteria in accordance with Clause 5(g) of the AOC By-Law, which required JA to achieve a state of satisfaction of compliance, failing which it cannot nominate an athlete for selection. That state of satisfaction must be based upon reasonable grounds.

69. The Athlete, in effect, challenges the JA Decision for a failure to take a number of matters into account. Bearing in mind the test in Clause 5(g) of the AOC By-Law and the positive requirement to reach a state of satisfaction (which did not occur), the Athlete's case can be characterised as an asserted failure to apply reasonable grounds by failing to consider matters other than the fact of the IJF Disciplinary Decision. Put another way, it is said that the grounds relied upon were not reasonable and that reasonable grounds would not have supported the JA Decision.

70. Initially, the Athlete relied upon the failure to take into account the possibility of an appeal from, or stay of, the IJF Disciplinary Decision. They had not yet been filed, nor had JA been notified of those applications, actual or intended, at the time of its decision. A clear reference to the possibility of an appeal was set out at the end of the IJF Disciplinary Decision, in bold. The Sole Arbitrator infers that this, at the least, would have been seen and understood by JA. The Sole Arbitrator further notes that, as set out in the minutes of the JA Board meeting of 27 June 2021, JA itself discussed the possibility of appeal (from its decision).

71. When consideration is taken of the minutes of the JA Board meeting of 27 June 2021, which record the discussions leading to the JA Decision and the reasons provided for that decision, it cannot be said that the grounds on which the decision was based were not reasonable. They were not limited to the fact of the IJF Disciplinary Decision but included expert consideration of the video recording of the Athlete's conduct of the match, the opinion of experts of that conduct, the explanation of the Athlete which included reference to treatment for his back, the contemporaneous views of his attending coach, the impact on JA itself of the Athlete and the fact that a sanction was imposed with respect to an allegation of match-fixing.

72. It was not asserted that these factors constituted unreasonable grounds. It has not been demonstrated that JA failed to consider all of the available material before it, which included the written explanation that the Athlete had given to the IJF Disciplinary Commission and the fact that he had asserted back injury which was supported by his coach for the period leading up to the match.

73. It is not for the Sole Arbitrator to determine whether appropriate weight was given to the different facts before JA, nor whether a different conclusion could have been reached on the merits. As has been pointed out in other analogous decisions in the CAS, it is not for a court to come to a conclusion on the merits in the guise of making a finding that the decision-maker acted contrary to particular guidelines or criteria (see CAS 2008/A/1540, at paragraph 22). Where, as here, there is no limitation other than reasonable grounds for a state of satisfaction of compliance to be achieved, the factors that may be taken into account are not circumscribed nor, in the absence of bad faith, dishonesty or perversity, must a decision maker consider all available matters. No case of bad faith, dishonesty or perversity has been made out. It has not been established that there was an absence of proper genuine and realistic consideration given in the making of the JA Decision (see CAS A3/2016 at paragraphs 60-63).

74. JA was not satisfied that the criterion in Clause 5(g) of the Nomination Criteria was met. Accordingly, it could not nominate the Athlete. The Athlete has not demonstrated that the JA Decision, or the process for making the JA Decision, were flawed. In any event, the grounds which were taken into consideration have not been shown to be unreasonable and it has not been demonstrated that JA failed to have regard to any substantive matter that may reasonably have changed that level of satisfaction. The original grounds identified, the possibility of appeal and/or stay, did not affect the existence of the IJF Disciplinary Decision as at the date of the JA Decision and, it is apparent that the IJF Disciplinary Decision was but one of the considerations taken into account. The JA Board is composed of experts who saw the video for themselves and took account of the views of other experts being the JA Technical Officer and the Senior Coach who was, himself, the Athlete's coach present at the match in question.

75. The Sole Arbitrator notes that there is no ground of appeal asserting procedural unfairness on the part of JA in its conduct of the inquiry leading to its decision. The ground of appeal that mentions procedural unfairness asserts that it is *"unsafe and procedurally unfair to the Appellant, for the Respondent's Non-Nomination Decision to be allowed to stand uncorrected"* in circumstances that relate to the consequences to the Athlete's sporting career where he has rights of appeal from, and the right to apply for stay of, the JA Decision. The Athlete did assert a denial of procedural fairness in his appeal to the CAS from the IJF Disciplinary Decision and as part of his application for a stay of that decision.

76. The Athlete points out that JA did not rely on Clause 5(d) of the Nomination Criteria as a reason for non-nomination. That provides that the National Federation must be satisfied on reasonable grounds that the Athlete is likely to satisfy the AOC Selection Criteria and the Athlete made a submission that seemed to be to the effect that the JA Decision was thereby internally inconsistent. First, having failed to reach a level of satisfaction as to Clause 5(g) of the Nomination Criteria, which precluded nomination, it was not incumbent on JA to consider

and notify compliance with each of the other criteria. Further, no submission was directly made that this rendered the JA Decision perverse and no supporting ground of appeal was identified.

G. Conclusion

77. It follows that the Athlete has not established that the JA Decision failed properly to consider and apply the Judo Australia Nomination Criteria. The Athlete has not established the ground relied upon in Clause 9.9(b)(i)(B) of the AOC By-Law.

78. The appeal is accordingly dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Kayhan Ozcicek-Takagi on 1 July 2021 against the non-nomination decision rendered by the Judo Federation of Australia Limited (Judo Australia) on 24 June 2021 is dismissed.

2. (…).

3. (…).

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