

NST-E23-157713

Ethan Calleja v Artistic Swimming Australia

Determination

National Sports Tribunal General Division

sitting in the following composition:

Panel Member

Professor Jack Anderson

in the arbitration between

Ethan Calleja

Applicant

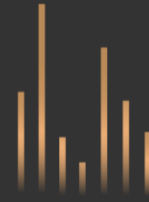
Unrepresented

And

Artistic Swimming Australia

Respondent

Represented by Ben Howard, Chair and Marijke Frantzen, Director



PARTIES

1. The Applicant is Ethan Calleja, athlete and unrepresented.
2. The Respondent is Artistic Swimming Australia (ASA), National Sporting Organisation, represented by Ben Howard, Chair and Marijke Frantzen, Director.

NST JURISDICTION

3. The jurisdiction of the NST is engaged by section 23 of the *National Sports Tribunal 2019* (NST Act), the ASA Selection Appeals Policy and the ASA Squad Selection Criteria World Championship 2023 (ASA SSC 2023).
4. This First Instance Appeal was referred to the NST under clause 8 of the ASA SSC 2023 and managed in accordance with clauses 4 and 5 of the ASA Selection Appeals Policy.

BACKGROUND & PROCEEDINGS BEFORE THE NST

5. This matter is the subject of an NST Arbitration Agreement (the Agreement, NST-E23-157713) entered into by the parties on 20/21 June 2023. Clause 5 and 6 of the Agreement describe the nature of the dispute:

5. Description of dispute

5.1 The Applicant disputes his non-selection to the Australian team for the World Aquatic Championships in Japan on 14 – 30 July 2023 (Event).

5.2 The Applicant lodged an Expression of Interest to compete in the Event as a solo competitor on 30 April 2023.

5.3 In accordance with clause 6 of the Team Australia Squad Selection Criteria (Selection Criteria) published on the Respondent's website for the Event, selected athletes are to be notified by a member of the Respondent's High-Performance Management Team on 1 June 2023.

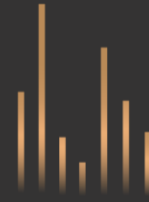
5.4 The Applicant was advised on 13 June 2023 by the ASA Secretary that he would soon receive formal notification of his non-selection. The Applicant claims he never received any further formal notification of his non-selection. Nonetheless, on the 13 June 2023, the Applicant notified the Respondent of his intention to appeal. The Respondent provided written reasons for the non-selection to the Applicant on 14 June 2023.

5.5 The Applicant had concerns that the World Aquatics (WA) registration deadline for the Event had already passed, and he was therefore unable to appeal his non-selection.

5.5.1 In these circumstances, the Applicant alleged due to the delayed notification of his non-selection, the Respondent had denied him natural justice and his right to appeal.

5.5.2 In the Event Summons (invitation), the registration deadline for all potential athletes that may attend the Event is 13 June 2023. Subsequently, registration of the sports entries of the athletes are to be lodged with WA by 27 June 2023.

5.5.3 The Applicant was not registered to attend the Event by the 13 June 2023. However, upon urgent request from ASA on 19 June 2023, WA granted the Respondent an exception and allowed the Applicant's name to be registered by 20 June 2023.



5.6 The Applicant also alleges discrimination and raised concerns that there may be a more general bias against eligibility of males in the sport from being selected.

6. Main issues identified by the Parties

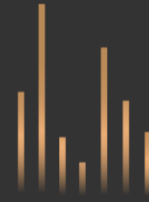
6.1 The Applicant disputes his non-selection to the Australian team for the World Aquatic Championships in Japan on 14 – 30 July 2023 (Event).

6.2 The Applicant disputes his non-eligibility for the Event.

6.3 The Applicant is seeking for further clarification on the selection of male athletes in the sport to compete internationally.

6.4 The Respondent asserts the Applicant has not been discriminated against, and that his non-selection is based on his non-adherence to the Selection Criteria, performance standards and athlete well-being.

6. In clause 8 of the Agreement, the parties agreed to supply written submissions per a timetable outlined in that clause (clause 8 materials). The parties supplied such submissions within the timeframe and the Tribunal is obliged for their cooperation.
7. I, as an NST member, was allocated the above matter in line with NST procedure on 21/22 June 2023. I confirm that I have read the clause 8 materials supplied by parties. My determination below refers only to those parts of the parties' submissions that I think salient and material to the nature of the dispute. I have to the best of my endeavours fully and properly instructed myself as to the factual matrix of the dispute, the parties' submissions, and all relevant documentation.
8. No objection was made to the composition of the Tribunal and the parties have confirmed that their procedural rights have been fully respected.
9. On 22 June, I issued two directions to the parties (via the NST Registry). One related to information sought by the applicant in relation to a contractual matter between ASA and another party. I deemed such information not of direct relevance to the matter at hand and one reserved only for the party's privity to that contract. The second direction is summarised below:
Direction on Oral Hearing
The Tribunal will not hold an oral hearing on Friday 23 June at 10am, though by that date and time, it does seek a brief written answer, primarily from the respondent, on one technical issue: Where, to the satisfaction of the ASA High Performance Management Team Selectors, an athlete is deemed eligible to compete and meets the selection criteria pursuant to clauses 2 and 3 of the ASA Squad Selection Criteria World Championship 2023, on what basis exactly (e.g., where in the Squad Selection Criteria or in ASA's constitutional documents etc) has the ASA Board the power not to confirm such a nomination by the HP Management Team?
10. In response to the above request, I received the following reply from the Respondent (by email, email addresses redacted)

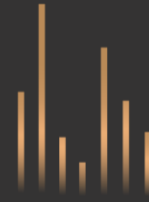


*From: Ben Howard | ASA Director
Sent: Friday, 23 June 2023 9:56 AM
To: NST Submissions; Ethan C. Calleja
Cc: ASAI Secretary
Subject: RE: NST - Ethan Calleja v Artistic Swimming Australia - Tribunal Directions
[SEC=OFFICIAL]*

Hi Natasha,

In terms of the requested information:

- *ASA would question what evidence shows that the applicant was nominated by the HP Management Team, noting they passed on the applicants EOI but that is not a nomination and/or trial*
- *Clause 19.1 of the Constitution states: The Directors may delegate any of their powers to Committees consisting of those persons they think fit (including Directors, individuals and consultants), and may vary or revoke any delegation.*
 - *Email used in evidence by the applicant (sent by Richard Vaughan on 31/05/23 to the applicant), shows the head of HP Management Team, confirming that if the delegation was in place, it have been revoked:*
 - *To avoid delays, Ben should be the contact to confirm worlds selection. Ethan's EOI was passed on at the EOI date, the board want to control all selections.*
 - *This was reiterated in the following evidence supplied by ASA*
 - *Email sent to head of HP Management Team on 14/05/23, which included the above mentioned email as an attachment*
 - *Email sent by ASA to a member of the HP Management Team, copying in the applicant, on 15/06/23*
 - *... any selection criteria and selections need to be signed off by the Board*
 - *Email used in evidence by ASA (sent to Richard Vaughan on 04/05/23) gives a direction to the head of HP Management Team, pertinent to any delegation that was in place or may have been revoked:*
 - *Any National Team athlete is supposed to be approved by the Board (by motion) prior to attending any event, which hasn't happened.*
- *Clause 1. c. of the selection criteria states: This policy can be amended at any time by ASA...*
- *Clause 1. D. of the selection criteria states: ASA shall not be responsible or liable in any way to anyone because of any such amendment.*
- *The Board Minutes from June provided by ASA in evidence, show a practice, by motion, of confirming Australian Selections.*



- *In line with the direction given in the email, listed above, used in evidence by ASA (sent to Richard Vaughan on 04/05/23)*

Please let me know if you require further information but note I will be offline for several hours today.

*Regards,
Ben Howard
Chairperson
Artistic Swimming Australia*

MATTER IN DISPUTE AND POSITION OF THE PARTIES

11. The gravamen of this dispute can be found in two clauses in the ASA Squad Selection Criteria World Championship 2023 (ASA SSC 2023) and namely clauses 2 and 3 and (to a limited extent) Appendix 1 thereof:

2. Eligibility Criteria

a. Athletes in the Team Australia Squad will have first consideration by selectors in the Team Australia Team. These athletes will be the priority in any event total athlete quota. In circumstances where there are disciplines where the Team Australia Squad is not selected for a particular position, then the selectors can consider external applications to fulfil those places if they are within World Aquatics quota regulations.

b. For disciplines where Team Australia is not entering directly, athletes need to submit an expression of interest application by the 1st May 2023 in writing to HP@artisticsswimming.org.au. This application needs to outline their results and justification for selection.

c. All athletes need to meet the eligibility criteria outlined in items 2.e – 2.i.

d. The confirmation of the disciplines Team Australia is entering, and which ones are open is covered in Appendix 1.

e. All athletes must be registered on the AIS Athlete Management System (AMS). Details can be found [here](https://www.artisticsswimming.org.au/learninghub/athletemanagementsystemamlh/) for registration: <https://www.artisticsswimming.org.au/learninghub/athletemanagementsystemamlh/>

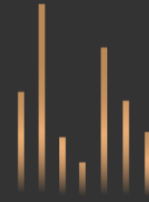
f. Athletes must be affiliated, and in good standing with ASA.

g. Athletes must be eligible to represent Australia according to the World Aquatics regulations. This requires that an athlete be born in Australia or be a citizen and hold a passport.

h. Athletes must not be currently under suspension or disqualification from ASA, the State Association or Sports Integrity Australia.

3. Team Australia Team- Athlete Selection Criteria

The ASA High-Performance Management Team Selectors will select a Team Australia Teams for events based on the following criteria:

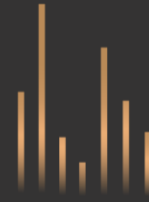


- a. *The ASA High-Performance Management Team Selectors will select a team that can both achieve the best result and develop the team to improve results in the future and may at its discretion select younger athletes based on their greater longer-term potential.*
- b. *The ASA High-Performance Team Selectors will consider training protocol results, training attitude, and commitment at the Centre of Excellence.*
- c. *The ASA High-Performance Management Team Selectors may consider results at World Aquatics or ASA events during the past two years.*
- d. *Should an athlete with an established record of high-level results become injured, the athlete may be considered for selection based on past performances subject to passing a suitable fitness test and providing medical evidence and updates throughout the process.*
- e. *Notwithstanding the above, the ASA High-Performance Management Team will consider all relevant factors, results, performances, and indicators at the discretion of the ASA High-Performance Management Team. This discretion is absolute, and it need not be exercised.*
- f. *In exercising its discretion, the ASA High-Performance Management Team may consider any factor, or combination of factors that is, in the opinion of the ASA High-Performance Management Team, relevant for consideration when selecting the Team.*
- g. *For selections in disciplines with athletes outside of the squad, the athlete needs to have met the same eligibility requirements as those athletes' undertaking trials.*
- h. *Appendix 1 outlines the benchmark event for selection and key dates.*

Appendix 1 – Japan World Championships

- *Event Dates – 14 – 23rd July 2023*
- *Event Location – Fukuoka, Japan*
- *EOI Submission Date (for non- Senior Squad entries) – Monday 1st May*
- *Selection Date – Thursday 1st June*
- *Selectors: Three member of the ASA High-Performance Pathway Team*
- *Events Selected (all from ASA squad unless stated):*
 1. *Team Technical*
 2. *Team Free*
 3. *Acrobatic Routine*
 4. *Women Duet Technical*
 5. *Women Duet Free*
 6. *Women Solo Technical*
 7. *Women Solo Free*
 8. *Mixed Duet (outside ASA squad selection)*
 9. *Male Solo (outside ASA squad selection)*

12. It appears agreed that the applicant is eligible per clause 2 of the ASA Squad Selection Criteria World Championship 2023 and did, for example, submit an expression on interest (EOI) on 30 April 2022. The respondents' case is that that eligibility notwithstanding, the reason they have informed the applicant that he will not go to the forthcoming World Championship is inter alia because he does not fulfill certain criteria in clause 3. The notification to the athlete, including reasons as to non-selection, was given in an email of 14 June 2023, which is reproduced below.



*From: Ben Howard | ASA Director
Sent: Wednesday, June 14, 2023 9:28 AM
To: Ethan C. Calleja
Cc: Krisztina Szedlak - National Pathway Coach; ASAI Secretary
Subject: RE: Meet
Importance: High*

Hi Ethan,

You'll have to excuse my late replies as I am quite unwell at present, though am prioritising working through this matter.

I did write to you this afternoon to request a meeting between the parties to discuss and resolve, the same offer made in the original email from Emma Gerovich. The facts are as follows:

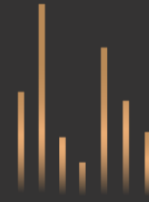
- *ASA is supportive of males in the sport and reiterated this to you in a meeting between two Board Members in April in Perth, Australia at the National Championships*
 - o *We reiterated our support for you to trial for the CoE*
 - o *We reiterated our support for you to go to the 2024 World Championships in Doha, Qatar*
 - o *We subsequently discussed (as a Board) what additional funding, from ASA – beyond AIS funding, we could provide to support this*
 - *The original criteria related to having to compete and win the National Championships*
 - o *Noting you did not compete at the National Championships*
 - *A subsequent criteria, not endorsed by the Board, had an EOI process and no mention of the National Championships*
 - *On two separate occasions, we wrote to the Performance Pathways Director to inform him that the Board didn't support this nomination*
 - *Our position at the time and still our position is based on a lack of competition and performance*
 - o *You have had several years out of the water*
 - o *You didn't compete at the recent National Championships*
 - o *There is no performance base to support your selection*
 - *The Board is fully supportive of you aiming towards the 2024 World Championships in both solo and mixed duet, should you qualify*
 - *The Board strongly feels that after so long out of training and competition, that the World Championships is not the best return to competition for you*
 - o *The Board will financially contribute for you to attend an agreed competition (or two) in the lead up to the 2024 World Championships*
 - *Your non-selection to the 2023 World Championships, won't negatively impact on your ability to qualify for the Australian National Team*

I reiterate our offer to mediate in the coming days but note your right to appeal through the National Sports Tribunal (NST). Please advise how you would like to move forward.

The NST is a new process but I am happy to call them in the morning and provide an update on the process, though there is quite a lot of information already on our website: <https://www.nationalsportstribunal.gov.au/>.

We look forward to hearing from you and working with you to resolve the matter as quickly as possible.

*Regards,
Ben Howard*

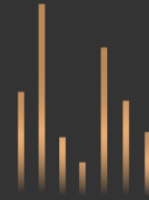


Chairperson
Artistic Swimming Australia

13. On noting the above email, the respondents' rationale for not selecting the applicant is, in summary, a combination of non-adherence to (a) the selection criteria (and namely, not competing at the most recent National Championships – clause 3(c) of ASA SSC 2023); (b) performance (and namely, no performance base - clause 3(e) of ASA SSC 2023) and (c) athlete well-being. The last factor seems to be a view by the Board that given the applicant's recent lack of a performance base, recent changes to various technical criteria in the discipline in question and that a World Championship is traditionally the highest level of this sport; selecting the applicant would be, to put it simply, "too much too soon" for the applicant – equivalent to a general discretionary factor found in clause 3(f) of ASA SSC 2023.
14. The applicant's appeal is, in summary, that he filed an EOI within the timeframe requested and asserts that with the support of ASA High-Performance/Management he has been rightfully nominated to represent Australia in the 2023 World Championships. The subsequent decision by the Board not to endorse the applicant's selection is, the applicant argues, tainted by such procedural and substantive failings that it should be quashed.
15. The procedural failings relate principally to the Board's tardiness in informing the applicant as to why his selection has not been supported, such that, for instance, his appeal rights have been restricted in breach of the principles of natural justice and fair procedure. The substantive failings relate to the Board relying on criteria (particularly relating to participation in Nationals and performance history); criteria which, the applicant argues, he was not given due notice of, and were not expressly mentioned, in the selection policy which he thought applied.

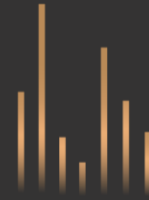
DELIBERATION

16. Both the respondents' and the applicant's positions are complicated by the following: while the Board has made it clear, relevant to the criteria in ASA SSC 2023, why the applicant ought not be selected; from the evidence made available to the Tribunal it appears never to have been made expressly clear why, and on what basis, key ASA High Performance/Management personnel (e.g., such as Performance Pathway Director, Richard Vaughan, and National Pathway Coach, Krisztina Szedlak) suggest the applicant ought to be selected relevant to the criteria in ASA SSC 2023, beyond a simple referral of the applicant's EOI to the Board.
17. During the material time, ASA appears to be going through an administrative transition (it currently has no CEO and the Chair acts in that capacity). There also appears to be some administrative strain between the High-Performance Team/ASA Management and the Board. In an admirably honest appraisal, the respondents acknowledge that the relationship between Management and the Board is currently "dysfunctional". Arguably, it goes too far to state that the applicant was a "pawn" in or "victim" of wider governance tensions at play in the ASA but certainly that background may contextualise how this matter has ended as it has – on appeal to the NST; and it does not generally reflect well on ASA.
18. That being said, the Board ultimately has the reserved constitutional power to endorse selections of this nature – through an assertion of its revocation power in clause 19.1 of the ASA Constitution. Moreover, in May and June, the Board wrote several emails to relevant ASA



staff (dated 4th May, 14th May and 6th June), expressly outlining the Board's lack of support for the applicant's selection and demanding that an explanation for the selection be justified against the criteria in ASA SSC 2023 – the Board's efforts were also reflected in Board meetings held at the material time. No adequate response was received from the HP Performance/Management Team despite the Board's urgings. On this basis, the Board's ultimate constitutional authority and the Board's express justification (Nationals, performance base, athlete well-being) must trump that of, and be contrasted with, the actions of the High Performance/ASA Management Team or, simply on an EOI by the applicant.

19. It follows from the above that the Tribunal determines that the Selection Criteria (ASA SSC 2023) was properly applied by the respondent in respect of the applicant and thus any ground of appeal by the applicant pursuant to clause 5.2(b) (i) of the ASA Selection Appeals Policy is dismissed.
20. It also follows from the above that the expressly justified reasons given by the respondent on why the applicant's selection could not be endorsed, are, to this Tribunal's satisfaction, reasonably based and thus any ground of appeal by the applicant pursuant to clause 5.2(b)(iv) of the ASA Selection Appeals Policy is dismissed.
21. For the applicant, and from a substantive perspective; expressing an interest by email in participating in the World Championships (which he did, as required, on 30 April 2023), meeting the eligibility criteria in clause 2 of ASA SSC 2023 (which he does); having the support of High Performance (which he appears to have) is not enough under the relevant ASA selection process as a whole – the criteria in clause 3 must also be met and justified to in order to secure the ASA Board's nomination for selection for the World Championships. For the reasons outlined, that ASA Board support has not been forthcoming, and the reasons why have been well-heralded to High Performance/ASA Management and appropriately communicated and justified to the applicant, notably in the 14 June email.
22. For the applicant, and from a procedural perspective; there has been some delay and miscommunication surrounding this matter as a whole. This is expressly acknowledged by this Tribunal, and certainly the 1 June "Selection Date" deadline set in Appendix 1 ASA SSC 2023 has not been met. Any procedural detriment to the applicant (as provided for in clause 5.2(b) (ii) of the ASA Selection Appeals policy) has however been cured by good faith efforts by the ASA Board to seek extensions on to deadlines from, among others World Aquatic (WA) in order to give the applicant an opportunity to compete at the World Championships. The expedited nature of this appeal process, primarily and rightly to facilitate the applicant, must also be noted.
23. Further, the primary reasons for the Board not endorsing the applicant's selection are objective rather than subjective in nature – did not participant in nationals; did not have a recent performance base. These are not criteria that could be meet retrospectively by the applicant even if given a "reasonable opportunity" in the May and June of this year by the ASA Board to do so. Participation in recent Nationals and recent applicable performance history are items/criteria that the applicant simply does not have and thus any appeal based on lack of reasonable opportunity to satisfy, per clause 5.2(b)(iii) of the ASA selection policy, must be dismissed.



24. One final point raised by the applicant is that of discrimination by the respondent both, it seems, against the applicant personally and with regard to the promotion of male athletes in the relevant discipline. The phrase “it seems” has been used in the previous sentence as no evidence of such discrimination was offered by the applicant to sustain such a ground of appeal. It must be noted that discrimination in its ordinary, and especially in its legal meaning, carries an onerous connotation. An allegation of discrimination against a sports body should not be made lightly but if supported by a cogent body of evidence may have serious consequences for that sports body. There is no evidence of discrimination here either direct or indirect by ASA against the applicant. The Tribunal draws the applicant’s attention to (a) clause 3(g) of the ASA SSC 2023 - for selections in disciplines with athletes outside of the squad, the athlete needs to have met the same eligibility requirements as those athletes’ undertaking trials and (b) the email of 15 June by the current chair of ASA outlining support for the male program.
- 25. This appeal is dismissed for the reasons outlined above.**
26. As a postscript, the Tribunal does note that there appears in the immediate future some significant governance issues for the Board and Management of ASA to work through and it is important that in that transition period no athletes are collaterally or adversely affected. With specific regard to the applicant; in the aforementioned 14 June email (reiterated in the respondents’ submissions on this matter), the respondent makes commitments to support the applicant and the “male program” post this matter and into 2024. This does not of course guarantee that the applicant or indeed any male athlete will be selected to represent Australia in artistic swimming in 2024 – the vicissitudes of life and a life in elite sport is no guarantee of anything; but it does commit ASA to supporting the applicant in various ways. Although this appeal by the applicant is dismissed, those commitments by ASA should, as far as is practicable, be upheld.



Professor Jack Anderson
23 June 2023