

NST-E24-96019

Juliet Lahood v Australian Taekwondo

Determination

National Sports Tribunal

General Division

sitting in the following composition:

Panel Member

Jack Anderson

in the arbitration between

Juliet Lahood

(Appellant)

Represented by Hayder Shkara, Legal Representative instructing Chris Tam of Counsel, and supported by Ali Khalil

And

Australian Taekwondo

(Respondent)

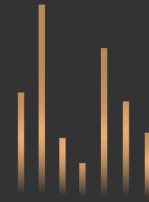
Represented by Tom Johnston, Legal Representative, Ben Exton, Acting CEO, and Robbie Wallace, National Participation Manager

And

Saffron Tambyrajah

(Interested party)

Represented by Ryan Carneli, Authorised Representative



PARTIES

1. The Appellant, Juliet Lahood, (**the Appellant or non-selected athlete**) is an international-standard athlete who has represented Australia in the sport of Taekwondo.
2. The Respondent, Australian Taekwondo, (**the Respondent or AT**) is the national sporting organisation for the sport of Taekwondo in Australia.
3. The Interested Party, Saffron Tambyrajah, (**the Interested Party or selected athlete**) is an international-standard athlete who has represented Australia in the sport of Taekwondo.

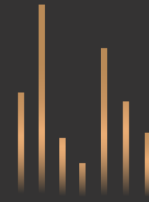
INTRODUCTION

4. The Appellant appeals (**the Appeal**) a decision by an Australian Taekwondo Selection Panel (**TSP**) held on 3 March 2024 not to select her for the Continental Qualification Tournament to be held at Honiara on 6 April 2024 (**the Tournament**).
5. The Appellant appeals pursuant to clause 5 of the current Australian Taekwondo Selection Appeals Policy (**the Policy**) and specifically clause 5.2(b)(iv) of the Policy which, in summary, states that a non-selected athlete may bring a selection appeal to the General Division of the NST for hearing on the following ground, which the non-selected athlete bears the onus of making out: *there was no material on which Australian Taekwondo's decision could be reasonably based*.
6. In asserting that there was no material on which the TSP's decision could be reasonably based, the Appellant pursued four reasons of appeal, which related primarily to the TSP's application and interpretation of clause 6.12 of the Australian Taekwondo's Nomination Criteria for the Paris 2024 Olympic Games (**the Criteria**). Clause 6.12 of the Criteria is reproduced below, as it is referred to throughout this Determination:

6.12 Factors to consider: *the TSP may have regard to any, all or none of the following factors, in its absolute discretion, which may or may not be exercised. For the avoidance of doubt, the following factors are not listed in preferential order:*

(a) the Athlete's performance during the Qualification Period at the following international competitions:

- 2023 World Championships
- 2023 Grand Prix events
- 2023 Grand Prix Challenge
- 2024 Any Grand Prix events scheduled within the Qualification Period.
- Mandatory Events
 - 2023 Senior World Championship Selections
 - 2023 National Championships
 - 2023 Australian International Open
 - 2023 Oceania Presidents Cup
- 2023 Defined G-ranked Open events:
 - US Open
 - Dutch Open
 - Belgium Open

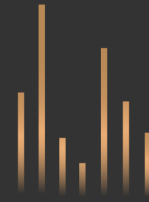


- additional Designated Open events (To be published on the National Federation's website at the URL: <https://austkd.com.au> and communicated through the National Federation's Facebook page at the URL: <https://www.facebook.com/AUSTKD>) and the National Federation's e-newsletters with a minimum of eight (8) weeks' notice)
 - 2024 Defined G-ranked Open events:
 - 2024 Designated Open events (To be published on the National Federation website at the URL: <https://austkd.com.au> and communicated through National Federation's Facebook page at the URL: <https://www.facebook.com/AUSTKD> and the National Federation's e-newsletters with a minimum of eight (8) weeks' notice)
 - (b) the Athlete's performances during the Qualification Period against Top 20 Olympic ranked athletes according to the World Taekwondo (WT) Olympic Ranking List as at 6 January 2024;
 - (c) if the TSP cannot determine an Athlete for nomination based solely on performances after 1 January 2023, then the TSP may also take into account the Athlete's performances at the following events:
 - 2022 World Championships; and
 - 2022 Grand Prix events
 - (d) the Athlete's physical form and fitness;
 - (e) the Athlete's ranking on the WT Olympic Ranking List as at 6 January 2024; and
 - (f) any other factors the TSP considers relevant.
7. Of importance to the Appeal is what, per clause 6.12(f) of the Criteria, the TSP considered as any other relevant factors. In the redacted minutes recording the decision of the TSP of 3 March 2024, the TSP noted the following:

"Any other factors the TSP considers relevant."

Through discussion, the following factors were emphasised by Panel members in the forming of their decision-making in the Female 49kg Weight Category, but with some variance between the Panel as to their preferences or weighting of factors:

- a. Overall performances in the specific events outlined in clause 6.12a of the Criteria.*
- b. Overall performances more specifically in the 49kg Weight Category at events outlined in clause 6.12a of the Criteria, both accumulative and comparative (events both competed at in 49kg).*
- c. Performances from across the Qualification Period against Top 20 WT Olympic Ranked athletes as at 6 January 2024 as outlined in clause 6.12b of the Criteria.*
- d. The athlete's WT Olympic Ranking as at 6 January 2024 as outlined in clause 6.12e of the Criteria.*
- e. The head-to-head records from across the Qualification Period of athletes in contention for selection in the Female 49kg division as an additional factor under clause 6.12f of the Criteria.*
- f. International performances from across the Qualification period at events not specified in clause 6.12a of the Criteria as an additional factor under clause 6.12f of the Criteria.*
- g. An emphasis on performances at the two most recent international competitions – the 2024 Canada Open and the 2024 US Open as an additional factor under clause 6.12f of the Criteria.*



h. Performances from across the Qualification Period against Top 20 WT Olympic Ranked athletes at the time of the competition as an additional factor under clause 6.12f of the Criteria.

i. The performance trends of athletes in contention for selection in the Female 49kg division as an additional factor under clause 6.12f of the Criteria.

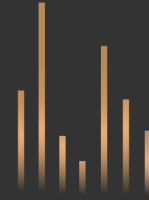
The Panel considered clause 6.12d but unanimously agreed that there was no data that would impact the decision-making process of the Panel for the Female 49kg Weight Category.

Given the extremely tight nature of the factors considered and the very marginal factors separating the athletes in contention for selection, the Panel noted the consideration of clause 6.12c as an available factor for consideration should it be required. This factor was a consideration for certain members of the Panel.

8. The four reasons of appeal raised by the Appellant were, in summary: (i) the Appellant's performance during the Qualification Period at the international competitions described in clause 6.12(a) of the Criteria was superior to the selected athlete; (ii) whilst the Appellant's WT Olympic Ranking as January 2024 was behind the selected athlete (29 vs 23), as at February 2024, the Appellant held a superior rank (21 vs 22) per clause 6.12(e) of the Criteria; (iii) the Appellant has a superior ratio of wins against top 20 Olympic ranked athletes as per factor (h) to clause 6.12(f); (iv) and the Appellant has beaten the selected athlete head to head on the two occasions that they have met and the Appellant has outperformed the selected athlete at notable international tournaments, including winning three Golds pursuant to the factors in clause 6.12(f)).
9. The Respondent, with reference to clause 5.2(b)(iv) of the Policy, contended that there was substantial and identifiable material basis for the TSP's decision which was, in any event, a reasonable one in the circumstances. The Respondent, with reference to clause 6.12 of the Criteria, noted that the TSP had an absolute discretion thereunder. The Respondent otherwise rejected and confronted each of the four reasons of appeal raised by the Appellant noted in summary above at paragraph [8].

NST JURISDICTION

10. Pursuant to section 13 of the National Sports Tribunal Act 2019 (NST Act), the presiding member has been appointed by the Minister by written instrument as a Member of the Tribunal, and pursuant to section 24 of the National Sports Tribunal (Practice and Procedure) Determination 2021 (NST Determination), was appointed by the CEO of the Tribunal to conduct this arbitration under section 23 of the NST Act in the General Division of the Tribunal.
11. Pursuant to section 16(1) of the NST Act and rule 6 of the National Sports Tribunal Rule 2020, a Tribunal member is obliged to notify the CEO of the Tribunal of any conflict of interest in a matter to which he or she is appointed. There is no such interest to be notified in this case.
12. Section 40 of the NST Act sets out general principles applicable to arbitration as follows:
 - (1) *In the arbitration:*
 - (a) *the procedure of the Tribunal is, subject to this Act, within the discretion of the Tribunal;*



(b) the arbitration must be conducted with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the Tribunal permit; and

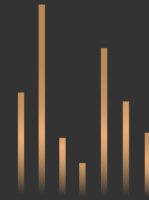
(c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

(2) The parties must act in good faith in relation to the conduct of the arbitration.

13. In addition, section 28 of the NST Determination provides that the Tribunal may inform itself in arbitration in a variety of ways. Most importantly, the Tribunal is not bound by the rules of evidence and evidence is not required to be given on oath, although the Tribunal may require the administration of an oath in its discretion. No party requested any evidence be given on oath, and the Tribunal did not consider sworn testimony to be necessary for the proper disposition of this arbitration. No party objected to this course of conduct.
14. No party objected to the procedure adopted by the Tribunal during the Arbitration. There was no objection to the Tribunal hearing and determining the outcome of the Appeal.
15. The jurisdiction of the National Sports Tribunal to hear and determine the present dispute arises pursuant to section 23 of the NST Act which provides that where a dispute arises between a person bound by one or more constituent documents by which a sporting body (in this case the Respondent) is constituted, and one or more of those documents permit the dispute to be heard in the General Division of the National Sports Tribunal, the person (in this case the Appellant) may apply to the Tribunal for arbitration of the dispute. As stated in paragraph [5] above, the Appellant appeals pursuant to clause 5 of the current Australian Taekwondo Selection Appeals Policy (**the Policy**) and specifically clause 5.2(b)(iv) of the Policy which, in summary, states that a non-selected athlete may bring a selection appeal to the General Division of the NST for hearing on the following ground, which the non-selected athlete bears the onus of making out: *there was no material on which Australian Taekwondo's decision could be reasonably based.*

PROCEEDINGS BEFORE THE NST

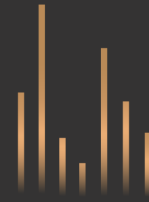
16. The Appellant's application to the NST was dated 5 March 2024. On 13 March 2024, the Member was allocated to this matter and on verification of the Member's declaration of no conflict of interest in this matter, the NST Registry supplied the Member with the Appellant's application form, the initial outline of the grounds of appeal supplied by the Appellant, the Criteria and the Policy. The Member was also notified that the Parties had been directed as follows (**the Directions**):
 - a. the Appellant to file with the NST Registry and serve on the other Parties her written submissions and any witness statement(s), evidence, and all other documents she wishes to rely on by 4:00pm AEST | 5:00pm AEDT Thursday 14 March 2024
 - b. the Respondent to file with the NST Registry and serve on the other Parties their written submissions and any witness statement(s), evidence, and all other documents they wish to rely on by 6:00pm AEST | 7.00pm AEDT Sunday 17 March 2024



- c. the Interested Party to file with the NST Registry and serve on the other Parties her written submissions and any witness statement(s), evidence, and all other documents she wishes to rely on by 6:00pm AEST | 7.00pm AEDT Sunday 17 March 2024
 - d. the Appellant to file with the NST Registry and serve on the other Parties her written submissions and any witness statement(s), evidence, and all other documents she wishes to rely on in reply by 3:00pm AEST | 4:00pm AEDT Tuesday 19 March 2024
 - e. An online hearing to be scheduled for 5:30pm AEST | 6:30pm AEDT on Wednesday 20 March 2024, with a decision to be given at the conclusion or within 24 hours.
17. The Parties abided by the above Directions. In her reply submissions, the Appellant slightly (but not materially) refined her original ground and reasons of appeal. In their submissions, the Respondent asked, pursuant to clause 5.2(f)(ii) – where the NST considers it appropriate to do so and all the involved Parties to the appeal agree, the NST may determine the appeal without a hearing – whether the matter could proceed “on the papers”. The Appellant, as was her right, did not consent and an oral hearing took place at the allocated time.
 18. At the oral (online) hearing, the Appellant was present. The Appellant was represented by Mr Chris Tam (counsel) as instructed by Mr Hayder Shkara. The Appellant was supported by Mr Ali Khalil. The Respondents were represented by Mr Tom Johnson (Principal, Johnson Legal +Advisory), with Ben Exton (Acting CEO, Australian Taekwondo) and Robbie Wallace (National Participation Manager, Australian Taekwondo) also online. The Interested Party was also present supported by her coach, Mr Ryan Carneli. Mr Andrew Carmody from the NST Registry was also online to provide administrative and technical support.
 19. At the oral hearing, the Parties were advised by the Member that the hearing would be recorded. The Member thanked the Parties for their detailed written submissions filed in advance as per the Directions. The Member informed the Parties that they would not receive an immediate Determination on the night of the oral hearing (Wednesday, 20 March 2024) but that a brief communication of the Member’s Determination would be sent to them via email by the NST Registry on the following day (Thursday, 21 March 2024) and that a full written Determination would be disseminated to them by Monday, 25 March 2024 – the date of this Determination.
 20. As a preliminary to their oral submissions, the Member confirmed that the Parties could take it that all filed written submissions had been read by the Member and further asked both Parties to address him on, but not otherwise confine themselves to, the following:

Appellant: (i) to address the Member on the definition and application of the word “reasonable” as used in clause 5.2(b)(iv) of the Policy; (ii) to address the Member on the meaning or relevance of the phrase “no material” as used in clause 5.2(b)(iv) of the Policy; and (iii) to address the issue of remedy i.e., if the appeal were to be successful ought the matter be heard by the Member or otherwise remitted to the TSP. On point (iii), the Appellant’s preference was for the former.

Respondent: (i) to address the Member on the nature of the “absolute” discretion given to the TSP pursuant to clause 6.12 of the Criteria; (ii) to address the Member as to why 6 January 2024 appeared to be the critical, material date of assessment of selection; and (iii) to address the issue of remedy i.e., if the appeal were to be successful ought the matter be heard by the Member or otherwise remitted to the TSP. On point (iii), the Respondent’s preference was for the latter.



Interested Party: the Interested Party was asked in the course of the oral hearing if (i) she had anything to add to what she had already submitted in written form; (ii) if she had anything to add following oral submissions by both sides; and/or (iii) if she had anything to say with reference to the possible outcome of the appeal if successful (whether it be heard by the NST or remitted to the TSP). The Interested Party, through her authorised representative, indicated that she had nothing further to add.

With regard to point (iii) noted above, clause 5.2 (h)-(l) of the Policy says the following:

“Selection Appeal Outcomes – Reconsideration and Redetermination”.

(h) The NST may uphold or dismiss a First Instance Selection Appeal.

(i) Subject to cl. 5.2(k), where the NST upholds a First-Instance Selection Appeal overturning the original selection decision, the NST must refer any subsequent decision regarding the Appellant’s non-selection or if required, any broader decision regarding selection of the Team for the Event back to the Australian Taekwondo for reconsideration and redetermination.

(j) In reconsidering and determining the Appellant’s non-selection or if required, any broader decision regarding selection of the Team for the Event, Australian Taekwondo must observe the principles of natural justice. Any decision made by Australian Taekwondo regarding the Appellant’s nomination after such referral, is final and binding on the Appellant, subject only to the Appellant commencing an appeal to the Appeals Division of the NST in accordance with cl. 5.3.

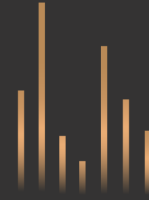
(k) Notwithstanding cl. 5.2(i) the NST may itself determine the issue of the Appellant’s selection, or broader decision regarding selection of the Team for the Event where the NST determines that:

(i) it would be impractical to refer the selection decision for redetermination to Australian Taekwondo given the time available; or

(ii) in making its original decision, Australian Taekwondo had such disregard for proper application of the Selection Policy that a reasonable person would apprehend that it is unlikely that the Selection Policy would be applied properly by Australian Taekwondo if the decision regarding the Appellant’s non-selection was referred back to Australian Taekwondo.

(l) Prior to making a determination under cl. 5.2(k) the NST must advise the Parties that the NST intends to make such a determination and provide the Parties with a reasonable opportunity to make submissions in relation to the NST’s proposed determination. The NST must give proper consideration to any submissions it receives pursuant to this cl. 5.2(l).

The oral hearing then proceeded on the basis of hearing first from the Appellant’s counsel and then from Respondent’s legal representative, and, thereafter, an opportunity to reply and make any closing submissions. Apart from a brief referral to Mr Robbie Wallace, only Mr Tam for the Appellant and Mr Johnson for the Respondent spoke at the hearing. As stated, the oral hearing was recorded, and that recording was accompanied by live captions.



As foreshadowed at the oral hearing, the Member communicated his short-form Determination to the NST Registry (for dissemination to the parties) on the following morning, 21 March 2024. A summary of that short form Determination is as below:

Dear Parties,

I refer to the above matter, which had an oral hearing last night, 20th March 2024. Having read and considered the written submissions made by the parties in advance of the hearing; having reflected on the final oral submissions made by the parties last night; I have determined that the appeal should be dismissed i.e., that the appeal made by Juliet Lahood pursuant to the section 5.2(b)(iv) of Australian Taekwondo Selection Appeals Policy – that there was no material on which Australian Taekwondo’s decision could be reasonably based - has not been made out. A full reasoned award will be made available to the parties on Monday 25th March.

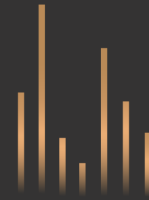
FACTUAL BACKGROUND

21. In reaching this Determination, although the Member has considered all the facts, allegations, legal arguments, and evidence submitted by the parties, he refers in his Determination only to the submissions and evidence he considers necessary to explain his reasoning. Unless otherwise attributed, the quotations noted in the section below – main submission of the parties – are taken directly from the Parties’ respective written submissions.

MAIN SUBMISSIONS OF THE PARTIES

Appellant

22. The gravamen of the Appellant’s appeal was that the TSP decision of 3 March 2024 was erroneous because they took into account irrelevant material and otherwise misunderstood the matters before them such that clause 5.2(b)(iv) of the Policy was enlivened. As noted at paragraph [8] above, the Appellant relied on four reasons of appeal and that any reasonable consideration of the four reasons of appeal with due reference to clause 6.12 of the Criteria; the data (essentially performance/competition histories of both the selected and non-selected athletes, which was supplied in advance by the athletes to the TSP on 29 February 2024, **the Data**) upon which the TSP based its decision; and the “reasons” proffered by the TSP in the redacted minutes of their meeting of 3 March 2024 as to why and whom they selected; would illustrate that the Appellant’s performance and standing by reference to the clause 6.12 of the Criteria, were, as of 3 March 2024, superior to those of the selected athlete.
23. Moving to reason 1 raised by the Appellant (clause 6.12(a) of the Criteria – Performance in International Competitions), the Appellant submitted that she was not invited to Grand Prix competitions in Rome and Paris in 2023; in contrast, the selected athlete automatically gained Olympic Ranking points for participating in these tournaments, even though she did not win a fight. The underlying point here was that the Appellant’s non-invitation to Rome and Paris adversely affected her WT Olympic points allocation, as compared to the selected athlete. The Appellant also noted, and in the oral hearing placed particular emphasis on, the fact that when the Appellant first participated in a 2023 Grand Prix event (in China), she performed better than

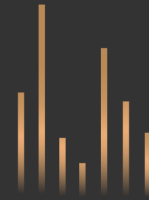


the selected athlete. The Appellant also submitted that the Appellant's record at the 2023 Dutch Open, the 2023 Belgium Open, and the 2024 US Open was superior to the selected athlete's and that at the 2023 National Championships, the Appellant had defeated the selected athlete. Finally, the Appellant acknowledged that "in the other cl 6.12(a) events not mentioned [above], that the selected athlete's results (not performances) were superior, but only by a bare margin and not in any material respect. The differential in these performances should be considered as a neutral."

24. With regard to reason 2 raised by the Appellant (clause 6.12(e) of the Criteria – WT Olympic Rank), the Appellant submitted that her WT Olympic Rank as at February 2024 was 21; in contrast the selected athlete was ranked 22. The Appellant acknowledged that, although clause 6.12(e) of the Criteria nominates the WT Olympic Rank as at 6 January 2024, there "is no reason why the more up to date ranking in February 2024 should be considered as the most up to date indication of the athlete's WT Olympic Ranking." The Appellant reinforced this ground of appeal by submitting that since January 2024, the Appellant's WT Olympic ranking "dramatically improved, from 29 to 21, whilst the selected athlete's ranking only improved by one space" and that the Appellant's year on improvement (from #60 to 29) was "equally dramatic".
25. With regard to reason 3 (clause 6.12(f) h of the Criteria– Performances against top 20 Olympic ranked athletes), the Appellant submitted that while she had a 3/5 win ratio against top 20 Olympic ranked athletes; in contrast, the selected athlete had won only two fights and had an inferior 2/7 ratio. The Appellant accepted that the "selected athlete has fought more top 20 athletes."
26. With regard to reason 4 (clause 6.12(f) of the Criteria – other Factors), the Appellant reiterated a point made in the opening and closing to their submissions as to the quality of the redacted minutes of the TSP meeting of 3 March 2024 such that it was "unclear whether the Selection Panel considered these matters [clause 6.12(f) etc], that demonstrate the Athlete's superior performance. The Tribunal should therefore infer that they were not considered." In this, the Appellant summarised that she had beaten the selected athlete head-to-head on the two occasions that they had met; that she had outperformed the selected athlete at notable international tournaments, that she had more wins against top 20 fighters at the time of competition; and that her "performance trend" was superior to the selected athlete.
27. As for remedy, the Appellant, because of the proximity of the Tournament, invited the Member to himself determine the matter of selection, pursuant to clause 5.2(k)(i) of the Policy.

Respondent

28. The Respondent's submissions were, in summary, based on five points:
 - a. that clause 5.2(b)(iv) of the Policy requires the Appellant to demonstrate that there was no material on which the TSP decision was based such that the TSP's decision was an unreasonable one. The Respondent submitted that there clearly was material (such as the Data) on which their decision was based and that in any event, the Appellant did not identify or particularise what she claimed to be "irrelevant material" taken into account by the TSP or how the TSP had otherwise "misunderstood" what was before them;
 - b. that the TSP's Decision was plainly valid, lawful and based on the Criteria, which included, critically, the Panel having "absolute discretion" to consider (or not consider) the clause 6.12 factors (as set out in the Criteria). In the oral submissions, the Respondent clarified that this



discretion applied to what factors within clause 6.12 of the Criteria the TSP could take into account, weigh against each other etc, as part of their deliberations. It was not an unfettered discretion such that the ultimate decision by the TSP was beyond review;

- c. that the Appellant had not established any error of law or fact nor any material defect in the TSP's decision, which may otherwise be contrary to clause 5.2(b)(iv) of the Policy;
- d. that the TSP comprised of a panel of experts (legal, combat sport and coaching expertise). To the Member it seems that the point being made here was that given the level of expertise involved in the TSP, a wide margin of appreciation or deference should be afforded to such a Panel; and
- e. that the Appellant's interpretation both of the Data and the TSP's decision-making process (such as the weight given by the TSP to various elements of clause 6.12 of the Criteria) – epitomised in the Appellant's four reasons of appeal - was selective and not reflective of the approach taken by the TSP. In this, the Respondent in their written submissions supplied a table in which they countered the interpretation given by the Appellant in each of the Appellant's four reasons of appeal. In their oral submission, the Respondent emphasised that the clause 6.12 factors and the accompanying Data were reasonably taken into account by the TSP, and just because ultimately the TSP's interpretation favoured the Interested Party, does not mean that the TSP's decision was an unreasonable one pursuant to clause 5.2(b)(iv) of the Policy.

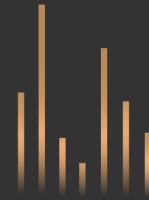
29. On remedy, the Respondent submitted that if the Member disagreed with their position and upheld the Appeal, that the Member should remit the matter, noting it would be neither impractical nor unreasonable to do so pursuant to clause 5.2(k)(i) and (ii) of the Policy.

MERITS

30. The Member determines that the Appeal ought to be dismissed on the following three grounds which, for ease of reference, are discussed as follows: (i) no material ground; (ii) the clause 6.12 factors; and (iii) reasonableness.

No material ground

31. In his oral submissions, counsel for the Appellant rightly stated that, although the Appeal was premised on clause 5.2(f) of the Policy and the reference therein to “no material on which [the TSP's] decision could be reasonably based”; his submissions had more “nuance” and related, not to the total absence of material in front of the TSP, and more to the relevance the TSP did or did not place on material or the Data available to it. The Member accepts this point. If the phrase *no material* in clause 5.2(f) of the Policy is taken literally then, so long as the Respondent can show that there was *some* material in front of it, clause 5.2(f) could not ever be enlivened. This is clearly not the intention of the clause.
32. The difficulty for the Appellant however is that her evidence on whether the Respondent properly and fully instructed itself on all relevant material is based primarily on the paucity of detail in the minutes of the TSP meeting of 3 March 2024 i.e., the Appellant's submission is that the minutes are unclear as to what materials the TSP relied upon and thus it can be taken that a breach of clause 5.2(f) follows. In fact, the minutes of the critical TSP meeting are particularly detailed as to how the TSP approached its task and how it reached its decision. They record and acknowledge that this was a close decision and one made by majority. The minutes give

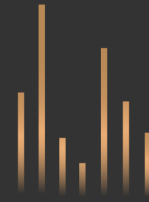


an insight into what clause 6.12 factors the TSP took into account, acknowledging that certain members gave greater weight to certain factors than others.

33. Moreover, one of the difficulties in selection or nomination disputes of this nature is that it is often the case that at least one of the criteria used by the selection committee will permit an element of subjectivity or may be “catch all” in its reach. In clause 6.12 of the Criteria, sub-clause (f) (any other factors the TSP considers relevant) is exactly of this subjective/catch all nature. Nevertheless, in the minutes of the meeting, it is recorded that the TSP sought expressly to lay out, in as an objective fashion as they could, what “other factors” they considered “relevant”. The extract from the TSP minutes to that effect is reproduced at paragraph [7] above.

Clause 6.12 factors

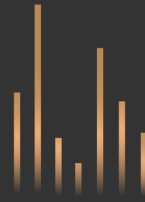
34. Each of the four reasons of appeal, such as they related to various sub-clauses in clause 6.12 of the Criteria and the Data supplied by both athletes have, to various degrees, been assessed in a subjective and selective manner by the Appellant.
35. For example, with regard to reason 1 raised by the Appellant (clause 6.12(a) of the Criteria – Performance in International Competitions and see paragraph [21] above): the reason the Appellant was not invited to Grand Prix competitions in Rome and Paris in 2023 was because she, unlike the Respondent, was not eligible to be invited. Moreover, while the Appellant’s performance might on one reading have been better than the Respondent’s at, for instance, the 2023 Dutch Open, the 2023 Belgium Open, the 2024 US Open and the 2023 National Championships, as the Appellant acknowledged, in other clause 6.12(a) events the selected athlete was superior.
36. With regard to reason 2 raised by the Appellant (clause 6.12(e) of the Criteria – WT Olympic Rank and see paragraph [22] above), the Appellant submitted that her WT Olympic Rank as at February 2024 was 21; in contrast the selected athlete was ranked 22. The Appellant acknowledged that, although clause 6.12(e) of the Criteria nominates the WT Olympic Rank as at 6 January 2024, there “is no reason why the more up to date ranking in February 2024 should be considered as the most up to date indication of the athlete’s WT Olympic Ranking.” The Appellant also mentioned that her recent improvements meant that by the date of the TSP meeting, her rankings etc placed her above the selected athlete. Put bluntly, the Appellant’s submission on this point must be rejected. The date in question – 6 January 2024 – is that expressly required in the Criteria. That date is, in effect, the finishing line or the final whistle. By analogy, the Appellant’s contention here equates to a fast-finishing athlete in a 5km race saying that if the race was 100 meters longer, they would have won; or a football team with scoring momentum saying that if the umpire had played another extra minute, they would have won the game.
37. With regard to reason 3, (clause 6.12(f) h of the Criteria– Performances against top 20 Olympic ranked athletes and see paragraph [23] above), the Appellant submitted that while she had a 3/5 win ratio against top 20 Olympic ranked athletes; in contrast, the selected athlete had won only two fights and had an inferior 2/7 ratio. In the oral submissions, counsel for the Appellant stated that “mathematically” the Appellant’s win ratio was better than the selected athlete. Mathematically, three wins is greater than two but, as noted by the Respondent, the selected athlete had more fights and, as the Appellant accepted, in those fights the selected athlete fought more top 20 athletes than the non-selected athlete.



38. With regard to reason 4 (clause 6.12(f) of the Criteria – other Factors and see paragraph [24] above), the Appellant reiterated a point made in the opening and closing to their submissions as to the quality of the redacted minutes of the TSP meeting of 3 March 2024 such that it was “unclear whether the Selection Panel considered these matters [clause 6.12(f) etc], they demonstrate the Athlete’s superior performance. The Tribunal should therefore infer that they were not considered.” This point was dealt with above by the Member at paragraphs [29] to [31] of this Determination.

Reasonableness

39. This point relates to the mention of the word “reasonable’ in clause 5.2(f) of the Policy. In the Appellant’s reply submissions, the Appellant noted, rightly, that the word must be interpreted in its administrative law context i.e, *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 AC 223; [1948] 1 KB 223, esp at 229-230). *Wednesbury* is an established feature of Australian administrative law, and it imposes a high threshold of review, see generally *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30. Divergence of opinion in the decision-making body does not mean that their decision is unreasonable. “Pernickety curial tooth-combing” of the decision-maker’s language is not appropriate (*Applicant S20/2002* [2003] HCA 30 at [170]). It must be shown that the decision-maker acted in a manner that was irrational, illogical, and not based upon findings or inferences of fact supported by logical grounds.
40. Applying such principles to this matter means that the decision of the TSP could be upset if it is proved to be unreasonable, in the sense that the Member considers it to be a decision that no reasonable body could have come to. The Member considers the decision made by the TSP on 3 March 2024 to have been reasonably made and one that was rational and supported by fundamentally logical grounds.
41. Moreover, in *Wednesbury*, Lord Greene MR stated as follows:
“Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.”
42. The Member holds that on all of the points noted above – properly directing themselves on their discretion and the law; calling their attention to all material matters; excluding irrelevant matters – the TSP acted reasonably.



THE TRIBUNAL THEREFORE DETERMINES:

1. The Appeal is dismissed.
2. The Appellant has not discharged, pursuant to clause 5.2(b)(iv) of the Australian Taekwondo Selection Appeals Policy, the onus on them to make out that there was no material on which the Respondent's decision could be reasonably based.
3. Subject to exercise of clause 5.3. of the Australian Taekwondo Selection Appeals Policy, this is a full, final, and binding Determination of the Appeal in this matter.

Date: 25 March 2024

Jack Anderson

Jack Anderson