

Case number: NST-E22-178986
Case Title: Sebastian Temesi v Judo Australia Limited

Determination
National Sports Tribunal
General Division

sitting in the following composition:

Panel Member Mr Christopher Johnstone (Presiding Member)

in the arbitration between

Sebastian Temesi *(Appellant)*

Represented by Mr Darren Kane of Advocatus Lawyers & Consultants

And

Judo Australia Limited *(Respondent)*

Represented by Mr John Mullins of Mullins Lawyers

And

Jake Bensted *(Interested party)*

Represented by Mr Paul Horvath of SportsLawyer

And

Commonwealth Games Australia *(Interested party)*

Represented by Ms Lisa Marcus of Thomson Geer Lawyers



I PARTIES AND PROCEDURE

1. The appellant in this proceeding, Sebastian Temesi, competes in the sport of Judo and is a current and financial member of the respondent, Judo Australia Limited (**JAL**).
2. JAL is the named respondent and is a company limited by guarantee and is the national federation for the sport of Judo in Australia.
3. Mr Bensted is named as an interested party because, the outcome of this appeal could, potentially, impact on his selection by the other interested party, Commonwealth Games Australia ACN 629 915 448 (**CGA**), as a team member in the sport of Judo, albeit in a weight category different to Mr Temesi.
4. Each party was represented by, and appeared through, lawyers.
5. Mr Temesi's application was filed on 28 June 2022 in this Tribunal in these terms: "*This is an appeal against a decision by Judo Australia not to nominate me to Commonwealth Games Australia for selection in the Australian Team for the 2022 Commonwealth Games*". A preliminary conference was conducted by the registry of the Tribunal on 30 June 2022 at which various directions were made for the filing of submissions and material.
6. As originally framed, Mr Temesi's appeal is as to the decision of JA to "not nominate" him to be a team member of the Australian team to compete in his particular weight category in the sport of Judo at the XXII Commonwealth Games to be held in Birmingham, United Kingdom from 28 July to 8 August 2022. As it turned out, the issue was not quite as confined as the appeal, as originally framed, suggested.
7. Because there was no factual dispute between the parties, at that directions hearing, the parties agreed that they were content for the matter to proceed on the basis of submissions only without the need for a hearing to be convened. They each subsequently confirmed this in writing.
8. Each party complied with the directions and filed extensive written submissions with exhibits including, reply submissions.
9. For the purposes of the record, the Tribunal has marked those submissions and exhibits as follows:
 - (a) Submissions of Mr Temesi dated 1 July 2022 together with exhibits 1 – 11 thereto: Exhibit A;
 - (b) Submissions of Judo Australia dated 1 July 2022 (filed on 4 July 2022) together with exhibits JA1-JA13 thereto: Exhibit B;
 - (c) Submissions of Mr Bensted dated 4 July 2022 together with Annexures 1 – 3 thereto: Exhibit C;
 - (d) Submissions of CGA dated 4 July 2022 together with enclosures (a) to (j): Exhibit D;
 - (e) Supplementary Submissions of Mr Temesi dated 5 July 2022: Exhibit E;
 - (f) Submissions of Mr Temesi in reply dated 5 July 2022: Exhibit F;
 - (g) Submissions of JA in reply dated 6 July 2022: Exhibits G and H; and



- (h) Supplementary Submissions of Mr Bensted dated 6 July 2022: Exhibit I.
10. Following the directions hearing, the Tribunal took further steps pursuant to its powers under the *National Sports Tribunal Practice and Procedure Determination 2021 (the Determination)*.
11. The first, on 3 July 2022 was a request made to CGA and JA pursuant to section 28 of the Determination, for the following further documents:
- (a) from CGA, documents as to the mandate from CGF referred in paragraph 3 of its letter to Mr Temesi of 22 June 2022 (p 63 of the submissions) and any correspondence from CGF which constitutes the confirmation from CGF as to the allocations referred in paragraphs 3 and 4 of the letter of 3 June 2022 (p 68 of the submissions); and
 - (b) from JA, any correspondence from CGA to it confirming the athlete allocations, and approving the nomination policy and the amendment to it.
12. The second, on 4 July 2022 was a direction pursuant to section 29 of the Determination in the following terms:
- “Having regard to the fact that the arbitral dispute is framed as follows:
- “This is an appeal against a decision by Judo Australia not to nominate me to Commonwealth Games Australia for selection in the Australian Team for the 2022 Commonwealth Games”,*
- the Tribunal directs that each party and interested party be given the opportunity to provide further submissions by 4pm on Tuesday 5 July 2022 as to:
- 1. the power of Judo Australia to purport to “not nominate” Mr Temesi in the circumstances it did; and/or
 - 2. whether, any additional or alternative relief is sought by any party or interested party against any other person regardless of their current status before the Tribunal; and
 - 3. whether any party or interested party wishes to file any amended application.”
13. CGA responded to the request made of it by including the requested documents and information in Exhibit D.
14. JA also responded to the request by stating *“We are instructed that all the relevant correspondence with CGA is exhibited to the submissions. Accordingly, JA will not be providing any further material requested in the email of 1.41pm yesterday unless required to do so.”*
15. As to the direction made, Mr Mullins on behalf of JA submitted as follows: *“I note the further direction issued at 10.42am today. In my view, the direction to allow parties ‘the opportunity to provide further submissions’ should have been made after the submissions of the parties were considered. If further submissions are required on these matters, please advise us.”*
16. Notwithstanding Mr Mullins’ submission as to the timing of the direction, the purpose was to ensure that the timeframe in which this arbitration was to be held and determined could be upheld with all relevant issues being raised, particularly where the arbitration was to proceed on the papers. Further, there is nothing in the Direction which is determinative of when the Tribunal may or should utilise its powers, once seized of a matter.



17. In any event, on 5 July 2022 JA, through Mr Mullins submitted, relevantly “...our submissions set out the power of Judo Australia (JA) to “purport to ‘not nominate’ Mr. Temesi in circumstances it did.”
18. JA however did not seek any alternative relief and reserved its rights in respect of any amended application filed.
19. Mr Temesi, through Mr Kane took the opportunity to file further submissions in the form of Exhibit E in which Mr Temesi said that he intended to file an amended application seeking the additional relief set out in paragraphs 11(a) to (d) of those submissions being:
 - (a) *That CGA be restrained from “de-selecting” Mr Temesi, either as that decision is purported by Exhibit 3 to have been made, or otherwise.*
 - (b) *That JA be restrained from “withdraw[ing]” Mr Temesi’s “nomination for the 2022 Birmingham Commonwealth Games”, either as that decisions [sic] is purported by Exhibit 7 to have been made, or otherwise.”*
 - (c) *That the nomination decision made by JA on or about 9 May 2022, in relation to Mr Temesi, is valid and therefore stands.*
 - (d) *That the selection decision made by CGA between 9 May 2022 and before 2 June 2022, in relation to Mr Temesi, is valid and therefore stands.*
20. Section 40 of the *National Sports Tribunal Act 2019 (Cth) (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; and
 - (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.
21. Having regard to section 40(1)(a) and (b), the Tribunal has proceeded to conduct this arbitration on the basis of the application as amended in the terms set out in paragraph 19 above.
22. As it will appear, this Tribunal has no power to make orders in terms of subparagraphs 11(a) and (b) of Exhibit E. Further, the relief sought in subparagraph 11(c) of Exhibit E is, in effect, what would flow should this Tribunal uphold the appeal of Mr Temesi as originally filed.
23. The relief sought in paragraph 11(d) of Exhibit E is however important. This relief makes CGA an alternative respondent, because the practical effect of this amendment is to frame the application as both an appeal against the non-nomination by JA of Mr Temesi to CGA, and also an appeal against the decision of CGA to (ultimately) not select Mr Temesi as a team member for the XXII Commonwealth Games.



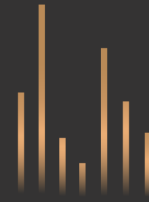
24. As noted above, further submissions were filed in reply by JA and Mr Bensted in the form of Exhibits G, H and I.

II JURISDICTION AND CONSTITUTION AND CONDUCT OF THE TRIBUNAL

25. The Commonwealth Games is a multi-sport event held once every four years under the auspices of the Commonwealth Games Federation (**CGF**). The CGF is a company limited by guarantee, incorporated in the United Kingdom pursuant to the *Companies Act 2006 (UK)*, and according to its Constitution, is the supreme authority in all matters concerning the Commonwealth Games.
26. CGA is a company limited by guarantee incorporated pursuant to the *Corporations Act 2001 (Cth)*. CGA is the sports body for the Commonwealth of Australia which is affiliated with the CGF in accordance with the “Articles and Byelaws” of the CGF.
27. Pursuant to Byelaw 14, quotas for each sport (called a discipline) are to be established for each games to be held and such quotas shall not exceed 3,800 unless otherwise agreed by the CGF Executive Board.
28. Pursuant to article 10 of the Articles of Association, each Byelaw is binding on all Affiliated CGAs.
29. CGA has adopted a by-law (called the *Team Nomination, Selection and Appeals By-Law*) which commenced on 15 October 2021 (**the CGA By-Law**) which governs the manner in which nomination by individual sports are to be made, selection by CGA for the team to compete at the XXII Commonwealth Games following nomination as well as how athletes may appeal their non-nomination or non-selection.
30. For present purposes the following aspects of the CGA By-Law are pertinent.
31. Section 4.1 provides that for the Commonwealth Games, each National Sporting Organisation (called an NSO) may nominate athletes to be considered by the CGA for selection as a team member in respect of (relevantly) an “Open Athlete Allocation Sport” (which is defined to include the sport of Judo). The effect of by-law 4.1 is that despite a nomination by an NSO, only the CGA may select a team member, however any team member the CGA selects must have been nominated by an NSO.
32. Pursuant to section 4.2, each NSO is obliged to develop and adopt a “Nomination Policy” which is required to be prepared in accordance with section 5 of the CGA By-Law, including by containing a Nomination Criteria defined (in section 2) to be:
- “...each sport-specific performance criteria and general eligibility criteria (which may include both subjective and objective criteria) that will be applied by the NSO in making its Nominations which must be compliance [sic] with the requirements set out in section 5.4 of this By-Law”.
33. Section 4 also is concerned with the contents of a relevant Nomination Policy. It prescribes, relevantly:
- (1) each NSO must submit its Nomination Policy to the CGA for approval by 31 October 2021 (4.2(a));



- (2) once a Nomination Policy is approved, it cannot be altered without the prior approval of the CGA (4.2(b));
 - (3) the Nomination Policy must be published on the relevant NSO's website and social media channels, communicated to all potential Athletes and the NSO must ensure that it is adhered to (4.2(c) to (f)).
34. Section 4.3 provides:
 - 4.3. General Principles for Developing a Nomination Policy
 - Each NSO must ensure that its Nomination Policy:
 - (a) is fair, reasonable, thorough, unambiguous, transparent and easy to understand;
 - (b) will be applied with fairness and without bias;
 - (c) identifies the relevant person(s) within the NSO that will be responsible for the Nominations;
 - (d) is consistent with the NSO's constitution and by-laws (if any) to the extent to which they do not contradict CGA's constitution and by-laws;
 - (e) is consistent with any Qualification System and the Selection Criteria applicable to a Program Sport; and
 - (f) exist within the framework of any applicable laws.
35. Section 4.5 mandates a number of terms to be included in a Nomination Policy. Section 4.9 states that all "Nomination Appeals" must be dealt with in accordance with the Nomination Appeals Policy".
36. Section 4.6 provides:
 - 4.6. Open Athlete Allocation Sports
 - (a) CGA will advise each NSO of the number of Athletes it has been allocated for each Open Athlete Allocation Sport by no later than 17 December 2021.
 - (b) NSOs are not permitted to nominate more Athletes for Open Athlete Allocation Sports than the number of allocations the NSO has been issued under section 5.6(a).
 - (c) NSOs are permitted to nominate less Athletes for Open Athlete Allocation Sports than it has been allocated under section 5.6(a).
 - (d) Where a NSO nominate less Athletes for Open Athlete Allocation Sports than it has been allocated under section 5.6(a), the NSO acknowledges that the unused allocations for Open Athlete Allocation Sports are returned to CGA for re-allocation to another Open Athlete Allocation Sport to be determined in CGA's sole and absolute discretion.
37. It is to be observed that section 4.6 clearly contains internal cross-referencing errors although nothing turns on this.
38. Section 5 contains the following relevant sections:
 - 5.1. Selection Requirements
 - (a) CGA is solely responsible for selecting Nominated Athletes and Officials to a Team.
 - (b) In respect of each Open Athlete Allocation Sport, CGA may only select Nominated Athletes to the Team if CGA is satisfied (in its sole and absolute discretion) that the Nominated Athlete:
 - (i) has satisfied the Nomination Criteria;
 - (ii) that the Nomination Criteria was properly applied by the each NSO in nominating its Nominated Athletes; and



(iii) has signed and will comply with the Team Membership Agreement for Athletes for the Games.

5.3. Notification of Selection of Athletes and Officials (a) CGA must notify each NSO in writing regarding which of its Nominated Athletes and Officials that have been selected by CGA as Team Members and which are Non-Selected Athletes and Non-Selected Officials (if any).

(b) Each NSO must then notify each of its Nominated Athletes and Nominated Officials (if any), in writing, of their selection or non-selection to the Team.

(c) CGA will not notify a NSO as to which of its Nominated Athletes have been selected to a Team until all Nomination Appeals involving that NSO's Nominated Athletes (if any) have concluded.

(d) NSOs may not publish or make public any information disclosed by CGA to the NSO regarding the identity of the Nominated Athletes, Nominated Officials, Non-Nominated Athletes, Selected Athletes, Selected Officials and Non-Selected Athletes and Non-Selected Officials without CGA's prior written consent.

(e) NSOs must ensure its Athletes, Officials, directors, officers, employees, agents and contractors are bound to observe an obligation of confidentiality substantially similar to that which is set out in section 6.3(d).

39. Section 5.3 also contains internal cross-referencing errors. Again, nothing turns on this.
40. Section 5.4 requires all "Selection Appeals" to be dealt with in accordance with the "Selection Policy". This cross-reference also seems to be an error as "Selection Appeals" is defined to mean appeals against selection by the CGA of a Nominated Athlete.
41. The Nomination Appeals Policy is set out in Schedule 1 of the CGA By-Law.
42. Relevantly, the Nomination Appeals Policy permits an Athlete who is not nominated by their respective NSO for selection by the CGA (called the Non-Nominated Athlete) to apply to the National Sports Tribunal (**the Tribunal**) for arbitration of a Nomination Appeal (except where a specific Nomination Policy excludes such a right). This right of arbitration is called a "First Instance Appeal" to be heard in the General Division of the Tribunal in the first instance (See 7.1).
43. No party disputed the jurisdiction of the Tribunal to determine this appeal by way of arbitration.
44. For completeness, a First Instance Appeal is to proceed in accordance with the process and procedure by which the Tribunal operates including as set out in the Act, the Determination and the *National Sports Tribunal Rule (the Rule)*.
45. Section 8.1 of the CGA By-Law sets out the grounds on which a Non-Nominated Athlete may appeal their non-nomination. It provides:
 - 8.1. A Non-Nominated Athlete (the Appellant) may bring a First Instance Appeal for hearing on one or more of the following grounds (which the Appellant bears the onus of making out):
 - (a) that the Nomination Policy was not properly applied by the NSO with respect to the Appellant;
 - (b) the Appellant was not afforded a reasonable opportunity by the NSO to satisfy the selection criteria set out in the relevant Nomination Policy;
 - (c) the NSO was affected by actual bias in making its decision to not select the Appellant; and or
 - (d) there was no material basis on which the NSO's decision could be reasonably based.



46. Pursuant to section 11 of Schedule 1 of the CGA By-Law, the power of the Tribunal in a First Instance Appeal is limited to:
- (1) upholding the decision of the relevant NSO not to nominate the Appellant for selection to the Australian Commonwealth Games team; or
 - (2) overturning the decision of the relevant NSO not to nominate the Appellant for selection to the Australian Commonwealth Games team in which case the Tribunal is to direct the relevant NSO to reconsider and determine its position regarding the Appellant's eligibility and suitability for nomination for selection in light of the determination.
47. Section 11.4 of Schedule 1 reiterates the requirement that in undertaking a reconsideration of eligibility for nomination the NSO must observe the principles of natural justice.
48. Because of the amendments made to the application, Schedule 2 is also relevant.
49. Section 4.1 says:
- 4.1. A Non-Selected Athlete may appeal against their non-selection to a Team in accordance with the procedures set out in this Selection Appeals Policy. For clarity, Athletes can only appeal their non-selection to a Team after CGA has formally notified the relevant NSOs regarding which of its Athletes have been selected to a Team in accordance with section 6.3 of the By-Laws.
50. Section 5.1 provides:
- 5.1. The Parties to a Selection Appeal will be:
 - (a) the Appellant;
 - (b) CGA; and
 - (c) subject to clauses 5.2 – 5.8, a NSO.
51. Section 8 sets out the grounds on which a Non-Selected Athlete may appeal. It says:
- 8.1. A Non-Selected Athlete (the Appellant) may bring a First Instance Appeal for hearing on one or more of the following grounds (which the Appellant bears the onus of making out):
 - (a) that the Selection Criteria were not properly applied by CGA with respect to the Appellant;
 - (b) the Appellant was not afforded a reasonable opportunity by CGA to satisfy the Selection Criteria;
 - (c) CGA was affected by actual bias in making its decision to not select the Appellant;and or
52. For all intents and purposes, the facultative provisions of Schedule 2 are the same as Schedule 1 and therefore do not need repetition.
53. Pursuant to section 13 of the NST Act, the presiding member has been appointed by the Minister by written instrument as a Member of the Tribunal, and pursuant to section 23 of the NST Act and was appointed by the CEO of the Tribunal under instrument to conduct this arbitration in the General Division of the Tribunal.



54. Pursuant to section 16(1) of the NST Act and rule 6 of the Rule, 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.
55. 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; and
 - (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.
56. In addition, section 28 of the Determination provides that the Tribunal may inform itself in arbitration in a variety of ways.
57. As noted above, certain requests and directions were made of the parties to which responses were received by the Tribunal.

III BACKGROUND FACTS AND JA NOMINATION POLICY

58. CGA submitted that (Exhibit D, encl (f)), on 19 November 2020, CGF sent to CGA a document entitled "Maximum Caps by CGA per Sport per Event B2022". In that document CGF said: "*CGAs [meaning Commonwealth Games Associations] must use their CGA Open Athlete Allocation Quota to enter athletes into the below sports/disciplines/events. CGAs must also comply with the discipline and event-specific rules listed below.*"
59. In respect of Judo the table provided "*Max 14 athletes per CGA. Max 7 Men and 7 Women. Max 2 athletes per event*".
60. Exhibit D, encl (h) is a document entitled "Birmingham 2022 Commonwealth Games Open Athlete Allocation Quota System" in which the CGF explained its rationale behind the athlete allocation which, relevantly for purposes indicated that the number of athlete allocations for individual sports had reduced to 2,298 from 2,632 at the previous games held on the Gold Coast.
61. The specific athlete allocation for Australia was initially set out in a document entitled "Birmingham 2022 Commonwealth Games Open Athlete Allocation Quota Australia" (Exhibit D, encl (i)) but that allocation was subsequently increased to 236 and was notified to CGA in a letter from CGF dated 26 August 2021 (Exhibit D, encl (j)).
62. Also at this time, there was a series of correspondence between CGA and JA in which:
- (a) CGA by letter dated on 18 March 2021, notified JA that it had allocated 8 Open Athlete Slots for Judo (and the reasons why) (Exhibit D, encl (g));
 - (b) CGA, in an email exchange of 19 May 2021, notified JA that it approved JA's Nomination Policy (Exhibit D, encl (c));



- (c) CGA by letter dated on 4 October 2021, notified JA that it had increased the number of Open Athlete Slots for Judo to 10 (Exhibit B, ex JA-2);
 - (d) CGA by letter dated on 11 March 2021, notified JA that it had increased the number of Open Athlete Slots for Judo to 12 (Exhibit B, ex JA-3);
 - (e) JA by letter dated 11 March 2022, notified CGA that it accepted the increased number of Open Athlete Slots for Judo of 12 (Exhibit B, ex JA-4).
63. Before turning to the JA Nomination Policy, it is important to note that the only correspondence in which the specific gender of athletes to be nominated by JA is referred to, is the letter of 4 October 2022 Exhibit B, exhibit JA 2 in which CGA said: *“I can therefore confirm that the CGA Board has approved the allocation of ten (10) Open Athlete slots for Judo for B2022, an additional two (2) athlete slots from initially advised. It is anticipated these additional slots will assist in entering athletes predominantly in female events.”* This anticipation was not reproduced in the JA Nomination Policy and no party made submissions about this aspect of the letter.
64. Further, in Exhibit B, ext JA-3 (in which notice of the increase of slots from 10 to 12 was given), Mr Mahon on behalf of CGA said:
- CGA has been advised B2022 has identified some judo events that are either “under subscribed” [sic] or “likely to be under subscribed”. These events are the men 90kg, the women +78kg and women 48kg divisions.
- The CGA Board has approved an allocation of an additional two (2) additional slots to Judo, one (1) for the men 90kg division (to enable two athletes to be entered) and one (1) for the women +78kg division. This allocation is on the performance expectation your sport has athletes able to be competitive in these divisions. Your acceptance of these slots is conditional on this expectation.
- With this addition, Judo Australia now has a total of twelve (12) Open Athlete slots for B2022.
- I would be grateful of you could confirm in writing that Judo Australia accepts these additional slots on the conditions prescribed.
65. In Exhibit B, exhibit JA-4 by way of response, Ms Taylor (CEO of JA) said:
- Further to your correspondence of 11 March 2022, Judo Australia confirms acceptance of the two (2) additional slots for the 2022 Birmingham Commonwealth Games, under the conditions as outlined in your letter.
66. To further matters which arise from the correspondence:
- (a) *first*, from a review of all of the documents relied on by the parties, at no stage after 19 November 2020 did CGA notify JA in writing that the athlete allocation for Judo for each CGA was limited by both a total number, and a total number for males and females (being seven per gender);
 - (b) *second*, no party has sought to lead evidence or advance a submission that it was a fact known to JA that CGF would not permit any CGA to have more than seven males and seven females competing in Judo; and
 - (c) *third*, the two additional athlete slots offered on 11 March 2022 were offered on certain (namely that one additional slot was available for a second athlete competing in the



men's 90kg division and that one additional slot for the women +78kg division) conditions, which conditions JA accepted.

67. It follows that if JA did not nominate for selection a second male athlete for the men's 90kg division, or a woman for the women's +78kg, the athlete allocations would reduce accordingly to 11, or back to the allocation (as originally increased by amendment) of 10.
68. Turning then to the JA Nomination Policy (called Selection Criteria for the 2022 Commonwealth Games (Updated 17 March 2022)) it provides under clause 2 CGA Quota Allocations:
- (a) at 2.2 the weight divisions for Judo at the XXII Commonwealth Games; and
 - (b) at clauses 2.2 – 2.5:
 - 2.2.** The Commonwealth Games Federation has reduced the overall athlete quotas (slots) available to CGA for Birmingham 2022 in the Open Athlete Allocation Sports. CGA has developed a quota distribution system to determine how many quotas each sport receives – the details of which can be seen here. Through this quota distribution system JA receives ten (10) quotas for the CG.
 - 2.3.** The maximum number of athletes per nation is two per weight category but the total number of athletes selected cannot exceed the quota allocated to JA by the CGA
 - 2.4.** Subsequent to clause 2.2, Judo Australia has been offered and has accepted two additional quotas from CGA. These quotas have been specifically allocated as a secondary quota for the Male Under 90kg division and as a single quota for the Female Over 78kg division. This takes the total quotas for JA for the CG to twelve (12).
 - 2.5.** Up to four reserve athletes may be selected to cater for any additional quotas JA may receive.
69. The eligibility requirements and Selection Procedure to be observed by JA is set out in Parts 3 and 4 respectively. There is no doubt that Mr Temesi was eligible and met the Selection Criteria of JA because, as explained below, JA nominated him to CGA for selection.
70. Clause 4.1.4 relevantly provides:
- Eligible athletes who do not satisfy the requirements in clause 4.1.1 to 4.1.3 above may be considered for selection to fill the remaining quota positions for the CG at the absolute discretion of the NSC. In exercising this discretion, the NSC will consider several factors, including (without limitation and in no particular order): ...
71. Clause 4.6 relevantly provides:
- The JA CEO will have final approval of all selections at their discretion. The approved selected athletes will be nominated to CGA.
72. As to the JA Nomination Policy, Mr Temesi submits that the policy in the form updated on 17 March 2022 was communicated to athletes by JA on 17 March 2022 and remained published on JA's website at least up to 24 June 2020. There seems no dispute about this. He submits that he has at all times relied on JA's actions in publishing, promoting and ensuring adherence to the JA Nomination Policy. The Tribunal has no difficulty accepting this submission.
73. As can be seen when a comparison is made between the correspondence referred to in paragraphs 62 to 66 above and clauses 2.2 to 2.4 of the JA Nomination Policy, nothing in that policy was inconsistent with anything that had been communicated to JA by CGA in writing regarding the number, and nature of, allocated slots for athletes in Judo.



74. CGA submits that the amended version of the JA Nomination Policy was never approved by it, but little turns on this. It does not contend that anything in the JA Nomination Policy as amended was incorrect and, having regard to the terms of clause 2.4 (and the absence of submissions to the contrary), it is reasonable to assume that so far as this appeal is concerned, the version that was approved by CGA on 19 May 2022 simply did not contain clause 2.4. If that be the case, then in that respect, the JA Nomination Policy also would have been consistent with that information that had been conveyed to JA by CGA prior to its approval.
75. For completion, it should also be noted that no party has submitted that the JA Nomination Policy did not meet the requirements of the CGA By-Law.

IV WHAT HAPPENED?

76. On 9 May 2022, JA by memorandum to CGA, nominated eight male athletes (including Mr Temesi as one of two athletes in the men’s 90kg division and a female athlete in the women’s over 78kg division) and 4 female athletes for the CGA team: (Exhibit B, ex JA-5). In that letter JA also confirmed that each nominated athlete had signed the 2022 Australian Commonwealth Games Team Membership Agreement – Athlete, and otherwise met all of the criteria prescribed by CGA.
77. The selection notes of the meeting of the National Selection Committee (NSC) held on 20 April 2022 (Exhibit A, ex 5) reveal that of the cascading levels of consideration to be applied as described in clauses 4.1.1 to 4.1.3 in the JA Nomination Policy, five athletes were selected pursuant to clause 4.1.3 and the balance were selected pursuant to clause 4.1.4. As to the latter, the NSC said “*The following athletes are selected as per clause 2.4, and through utilization of clause 4.1.4 – two athletes in the male 90kg division and one athlete in the female over 78kg division.*”
78. About Mr Temesi, the NSC said “*Sebastian Temesi (90kg) – second best athlete currently in Australia in the 90kg as demonstrated by his competition results in the National Event Series in 2022*”
79. Pausing there, in making these nominations, JA appears to have complied completely with its obligations under the JA Nomination Policy and the information provided to it by CGA.
80. Further, Mr Temesi in his submissions (para 47) says that he does not “quibble” with the nominations that were made on 9 May 2022 but complains as to the events that subsequently transpired.
81. On 11 May 2022, CGA confirmed in writing that it accepted all of JA’s nominations and had selected each nominated athlete as a member of the Australian Commonwealth Games team (Exhibit B, ex JA-6).
82. Unfortunately however, there had been a mistake in that the nomination of eight male athletes clearly was contrary to the quota mandated by CGF to CGA on 19 November 2020.
83. It is not clear when the mistake was discovered, but to correct the mistake, CGA wrote to JA on 3 June 2022 (Exhibit D, ex JA-7) referring to “*an unfortunate and regrettable error*” as to the “*communication and application of Judo Australia’s Open Athlete Allocation quotas...*”. CGA



went on to refer to clause 2.3 of the JA Nomination Policy and clause 4.6(b) of the CGA By-Law (incorrectly referred to as 5.6(b)) as to JA's obligation to not exceed its athlete quota.

84. It then said:

As the total number of the male athletes nominated by Judo Australia exceeds the quota that has been allocated to Judo Australia and the number of judo athletes inadvertently selected to the team for the Birmingham Games exceeds Judo Australia's quota by 1 male athlete

- a Judo Australia must rescind its nomination for one of the male athletes it nominated...; and
- b CGA must deselect that male athlete from the team for the Birmingham Games.

85. For reasons explained below, this somewhat mis-characterises what had, and what was required, to occur. In particular, JA's selection of eight male athletes was not "*inadvertent*" but rather was deliberate, and obviously consistent with what it thought it was able to do pursuant to the only information it had been provided by CGA.

86. It should be noted that CGA did also say that it would advocate to CGF for an exemption but as the evidence demonstrates, to no avail (Exhibit D, encl (d) and (e)).

87. On 14 June 2022, JA convened a meeting of the NSC to rank the 8 nominated male athletes.

88. On 16 June 2022, JA wrote to CGA (Exhibit B, ex JA-8) in these terms:

Following receipt of your letter dated 3 June 2022 and subsequent correspondence with yourself and Mr Tim Mahon, the Judo Australia National Selection Committee has determined the final ranking order of the 8 male athletes selected for the B2022 Judo Team.

The male athletes are ranked as follows:

1. Joshua Katz
2. Kayhan Ozcicek-Takagi
3. Nathan Katz
4. Harrison Cassar
5. Uros Nikolic
6. Liam Park
7. Jake Bensted
8. Sebastian Temesi

Our legal advice is that there is no basis for us to retract a nomination at this time. If it had been the case at the time of nomination that we were only required to nominate one -90kg athlete, then the second ranked -90kg athlete Sebastian Temesi, would not have been nominated.

89. Subsequently, on 17 June CGA wrote to JA confirming that it would "*regretfully ... commence the process of de-selecting Sebastian Temesi ...*".

90. On 22 June 2022 by letter, CGA wrote to Mr Temesi (Exhibit A, ex 6), and again referred to the apparent "*inadvertent*" nomination of 8 male athletes by JA before explaining that based on the ranking of the 8 male athletes nominated by JA, it had deselected him from the Australian Commonwealth Games Team.



91. The receipt of such a notice, after being led to believe that he had been selected must have been appalling for Mr Temesi, particularly where, as is the case, he had done nothing wrong and, so far as it seemed, there was nothing in the JA Nomination Policy which in anyway suggested that JA had mis-applied its own policy.
92. Be that as it may, it is in the context of the above recitation of the facts that the issues raised in this appeal fall for consideration.

V PRIMARY ISSUES FOR DETERMINATION

93. Mr Temesi's principal submission (paragraph 18) is that JA "*did not properly apply*" the JA Nomination Policy. It is to be observed that this submission proceeds on the basis that the ranking was the (or perhaps a) Nomination process for the purposes of JA Nomination Policy. This raises the subsequent issue as to whether once JA had nominated Mr Temesi, and he had been selected, it could, acting properly, rescind that nomination (and whether or not that is in fact what JA purported to do). That question is considered further below.
94. But remaining with the principal submission for the moment, in reality Mr Temesi advances the proposition that JA incorrectly applied the JA Policy when it made its subsequent decision on 14 June 2020 to rank the male athletes for the five reasons set out in paragraph 54 of Mr Temesi's submissions.
95. Those reasons can be summarised as:
 - (a) (at 54(a) and (b)) that JA has nominated only one athlete for the 90kg division where the JA Nomination Policy "*expressly states that a secondary quota (that is, a second slot) for a male under 90kg athlete was one (1) of the two (2) additional quota slots allocated to JA when the total number of quota sports [sic] for Australian judo athletes competing at the 2022 Games increased from 10 to 12*";
 - (b) (at 54(c) and (e)) that JA was mistaken in proceeding on the basis that it could only nominate 7 male athletes in the "renomination process" and has failed to give any consideration to whether all eight athletes should be renominated because the JA Nomination Policy says nothing about a minimum or maximum number of male athletes;
 - (c) (at 54(d)) the policy requires that two (2) under 90kg [male] athletes be nominated which would at least mean that Mr Temesi should be ranked higher than Mr Bensted because the Nomination Policy required that two (2) male under 90kg athletes be nominated for selection in the Australian Team".
96. The Tribunal rejects the principal proposition that the JA Nomination Policy "required" the selection of two athletes in the men's 90kg division. Whilst it is true that the JA Nomination Policy specifically refers in clause 2.4 to the additional quota it received as including one slot, relevantly, as a secondary quota for the male 90kg division, there is nothing in the policy by which JA undertakes that it must fill that specific quota.
97. Indeed the conditions attached to utilising the additional allocations was made plain in the correspondence of 11 March 2022 referred to above. That condition was that *if* JA determined to nominate 12 athletes for selection, two needed to be athletes in the male 90kg division and one needed to be a female in the women's over 78kg division.



98. Concomitantly, JA could not nominate 12 athletes if (relevantly), in so doing, it only nominated one in the male 90kg division. That would be contrary to the conditions imposed by CGA (based on the rationale of the CGF) as accepted by JA on 11 March 2022. The absence of any obligation on JA to utilise all of its allocations was contained in that correspondence but also in clause 4.6 of the CGA By-Law to which every NSO was subject.
99. Whilst it is not JA's case that that correspondence was known to Mr Temesi, it does not matter. That the JA Nomination Policy did not "require" that two athletes be nominated for the male 90kg division is also obvious from the fact that if it were the case, there would be no need for clauses 4.1.1 to 4.1.4 of the JA Nomination Policy apply to the athletes nominated for that division (as they clearly expressed to do).
100. Viewed in this way, there is no substance in the criticism of Mr Bensted's selection because that attack assumes the correctness of the primary proposition. Mr Temesi does not otherwise contend that as for Mr Bensted, as clauses 4.1.1 to 4.1.4 have been applied to him viewed objectively, JA has committed a reviewable error in his nomination such that it is appropriate that Mr Temesi's resulting "non-nomination" be set aside (even if that be what occurred).
101. As such, Mr Temesi's appeal on this basis also fails.
102. Turning then to the remaining proposition, that JA has mistakenly proceeded on the basis that it was only permitted to nominate seven male athletes in the "renomination process", it is obviously the case that in its actual nomination process, JA was not mistaken. It did not know that it could only nominate seven male athletes. Indeed, it would seem that CGA had forgotten this too when it selected the eight nominated athletes.
103. But when consideration is given to what in fact occurred in the "renomination process" it is plain from what it wrote (paragraph 88 above) that JA did not believe that what it was asked to do, or did, was a retraction (or withdrawal or rescission) of Mr Temesi's nomination, indeed it said that its legal advice was that it could not do that.
104. What it had done was provide to CGA a ranking of the nominated male athletes determined by reference to the CGA By-Law in Part 4 of the JA Nomination Policy to enable CGA to make a decision as to which athlete it proposed to "de-select" to cure the mistake.
105. Thus, whilst JA has submitted that Mr Temesi's appeal is a "non-nomination appeal, on the basis of the events as they transpired it is in fact a "Non-Selection Appeal". This necessarily also follows from the fact that the apparent breach by JA of the CGA By-Law is of the obligation that set out in clause 4.6(b) which applies, regardless of whether the number of allocations was known or unknown, and the obligation in clause 5.1(a) which reserves to CGA the sole discretion in making selections based on nominations.
106. The difficulty for JA was that once it was told of the additional mandate from CGF all of its nominees had been selected. In effect its role in the *nomination* process was spent. What it was able to do was, just as it did, provide to CGA the information as to how, in its discretion, it ranked the eight athletes it had nominated, from which CGA could make its decision. This would seem to be the ordinary extension of the discretions reserved to the NSC in clause 4.1.4 (and ultimately the CEO in clause 4.6) of the JA Nomination Policy.



VI ADDITIONAL ISSUES FOR DETERMINATION

107. The question then remains whether the facts support the granting of any of the further grounds of relief sought by Mr Temesi by way of amendment to his application.
108. The starting point are the limits of the powers of the Tribunal set out in clauses 11.1 of Schedules 1 and 2 of the CGA By-Law.
109. Again, those powers are to:
 - (a) uphold the decision of the NSO/CGA not to nominate/select the Appellant to the Team; or
 - (b) overturn the decision of the NSO/CGA not to nominate/select the Appellant to the Team.
110. Clearly then, the additional relief sought by Mr Temesi in subparagraphs 11(a) and (b) of Exhibit E cannot be granted by the Tribunal. The power to do so does not exist.
111. As to 11(c), as observed above, JA in its correspondence did not purport to withdraw or rescind its nomination of Mr Temesi. What it did was ascribe a ranking to him and the nominated male athletes on the basis of which CGA made its de-selection decision. Mr Temesi does not contend that the actual rankings given to the athletes were wrong and were caused by reviewable error.
112. It follows that if the CGA had the power to de-select, its decision should not be set aside, and this ground of appeal would also fail.
113. There is of course no express power contained in the CGA By-Law by which it may de-select an athlete after he or she has been selected. But the absence of such an expressly stated power is not decisive.
114. There are many cases in which superior courts have determined that an express discretionary power to decide certain things contained in a statute or legislative instrument (subject to certain exceptions) carries with it an implied power to revoke the effect of that decision. As both Perram J and Mortimer explain separately in *Minister for Indigenous Affairs and Another v MJD Foundation Ltd* [2017] FCAFC 37 at [27]ff, the common law once adhered to a doctrine that statutory power is exhausted by its first exercise. It is clear enough from the cases analysed therein, that such a doctrine, if it ever applied in absolute terms, no longer does, in particular where there has been a mistake of fact: see in particular the discussion by Mortimer J of the cases at [146] – [148].
115. Relevantly Gummow J in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193; 92 ALR 93, in rejecting an argument that a revocation of a decision was impermissible because of an estoppel said that “...the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding: see *New South Wales Trotting Club Ltd v Municipality of Glebe* (1937) 37 SR (NSW) 288; *Cudgen Rutile (No 2) Pty Ltd v Chalk* [1975] AC 520 at 533; 4 ALR 438; *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* [1962] 1 QB 416 at 423–5; [1961] 2 All ER 46; 125 JP 348.”
116. The power vested in the CGA is, of course, discretionary. Further there is nothing in the language of the CGA By-Law which suggests that once a decision by it was made, it could not



be revoked. There are many reasons why it may wish to revoke the selection of an athlete, the current case being an obvious example.

117. Mr Temesi's selection was clearly a mistake. Had CGA told JA of the CGF's gender limit on athletes, there is no reason to think JA would not have acted accordingly and only nominated seven athletes. Further, it is obviously the case that CGA made a mistake in selecting eight male athletes.
118. If CGA were to be held to its mistaken decision, then the result would be (presumably) that Mr Temesi could still not participate as a team member at the XXII Commonwealth Games. CGF, not CGA controls the Games. It has set the quotas and insisted on adherence to them.
119. In other words, to hold CGA to its decision would arguably increase the injustice already visited upon Mr Temesi.
120. In the circumstances, it seems clear that CGA had the power to revoke Mr Temesi's selection.
121. This ground of the appeal also fails.

VII CONCLUSION

122. As unfortunate as the circumstances are for Mr Temesi in this appeal, there is no basis upon which this Tribunal can either overturn the decision of JA to rank the eight male athletes or the de-selection by CGA of Mr Temesi.

THE TRIBUNAL THEREFORE DETERMINES:

1. The appeal is dismissed.

Date: 7 July 2022



Christopher Johnstone