



Arbitration Tribunal  
International Triathlon Union (ITU)  
Avenue de Rhodanie 54  
1007 Lausanne, Switzerland

ITU-AT/003-2017/JTU vs ITU: Japanese Triathlon Federation vs ITU Competition Jury  
of the Elite Women ITU World Triathlon Serie race held in Montreal - Canada on August 5,  
2017

## DECISION

delivered by the

### ITU ARBITRATION TRIBUNAL

Sitting in the following composition:

President of the Panel: **Geneviève Pellerin**, Attorney-at-Law in Ottawa,  
Canada

Members of the Panel: **Kevin S. Sullivan**, Attorney-at-Law in Massachusetts,  
United States of America

**Ize Matebese**, Attorney-at-Law in Lagos, Nigeria

in the appeal proceedings between

**Japanese Triathlon Union (JTU)**, 6F Daini Eirai Bldg. 1-3-8 Shibuya Shibuya-ku, Tokyo  
150-0002, Japan

**Appellant**

Against

Competition Jury of the Elite Women ITU World Triathlon Serie race held in Montreal -  
Canada on August 5, 2017, Avenue de Rhodanie 54, 1007, Lausanne, Switzerland (ITU HQ  
Office)

**Respondents**

## I. PARTIES

1. The Appellant, the Japanese Triathlon Union (hereinafter "JTU"), is the recognized national governing body in Japan for triathlon and its related disciplines, with headquarters in Tokyo.
2. The Respondent, the Competition Jury is the recognized body for Olympic Games and The Elite Races of the World Triathlon Grand Final constituted of three persons elected by the ITU Technical Delegate.

## II. BACKGROUND FACTS

3. Though minimal and lacking the “references identifying the source of each fact and a brief legal justification” required by Article 33 of the ITU/Disciplinary Rules, the Panel has considered all the facts, allegations, arguments, and evidence submitted by the parties. This decision contains the available relevant and material facts, allegations, and arguments of the parties as well as the Panel’s reasoning behind this decision.
4. The Elite Women ITU World Triathlon Serie race (“the Race”) took place on August 5, 2017 in Montreal - Canada.
5. The athlete with number 30, Minami Kubono (“Minami”), finished 12th but was disqualified by the Race Referee for physical contact in the exit of the swim segment of the race, causing an Australian athlete to slip. This contact was described in the evidence before us to be “unfair contact” and “unsportsmanlike behavior”.
6. Shortly after the race, Minami filed an appeal to the ITU Competition Jury of the Race Referee’s disqualification ruling.
7. The ITU Competition Jury, composed of three members, heard the Appeal, deliberated, and rendered a decision.
8. The Minutes of the Competition Jury reflected that:
  - a. The members introduced themselves.
  - b. The Jury listened to the coaches opining that the contact was unintentional.
  - c. The Jury heard the assistant swim official’s version, as well as the Race Referee’s version, both indicating their belief that the contact was intentional, the latter adding that the athlete deserved a disqualification.
  - d. The Jury unanimously agreed that the contact was intentional and decided to reject Minami’s appeal and maintain the Race Referee’s decision.
  - e. The Jury communicated the decision to the coaches.

## III. PROCEEDINGS BEFORE THE ITU ARBITRATION TRIBUNAL

9. On the 1st of September 2017, JIU filed a “Letter of Appeal” with the ITU Arbitration Tribunal seeking to *investigate the case*.
10. On the 7th of September 2017, the President of the ITU Arbitration Tribunal communicated a Procedural Order to the Parties indicating the composition of this ITU Arbitration Panel.
11. On the 8th of September, the ITU Arbitration Panel Chair communicated the following to the Parties by email, in accordance with Article 25.2 of the ITU Disciplinary Rules:

As established in the Procedural Order, I am the Chair of the Appeal Panel on this case. In order to proceed in an expedited and efficient matter, the Panel requests the Competition Jury to respond to the appeal letter from JIU and the Appellant to submit any additional information before Tuesday September 12, 6pm EST, should the parties wish to do so.

The Panel would like factual precisions on the location of the referee who made the decision to disqualify and the identity of the athlete in the video (e.g. Color of swimsuit).

If you have any questions, please forward them directly to me and I will pass them along to my fellow appeal panel members.

12. The Parties did not provide the Panel with any other material, evidence or information.
13. Therefore, the information and evidence before the Panel was limited to:
  - a. The Letter of Appeal by JTU.
  - b. A copy of the Appeal Form completed by Minami to the ITU Competition Jury.
  - c. A copy of the minutes of the decision of the ITU Competition Jury.
  - d. A link to the video footage of the swim segment of the Race (<https://www.dropbox.com/s/dklw1otg9wbi2sm/Montreal%20obstruction%20penalty%208.40%20appealed.mp4?dl=0>)
14. The Appeal letter from JTU includes a number of allegations and assertions which can be summarized as follows:
  - a. In response to the Letter of Appeal, ITU advised JTU that it was a field of play decision and that it could not be appealed.
  - b. The Athlete did not impede the Australian Athlete by her physical contact.
  - c. JTU's Head coaches asked the Competition Jury to interview the Australian athlete, but this interview did not take place.
  - d. According to JTU's Head coaches, the Australian coaches stated that the Australian athlete was not impeded by Minami.
  - e. The video device that the referee used as firsthand evidence did not have a slow-motion function, which was insufficient to make a judgement without clear evidence.
  - f. The Competition Rules 13.2 a) (vi)(xii)(xiv) were not observed upon the field of play decision.

#### IV. LEGAL ANALYSIS

##### A. JURISDICTION

15. The ITU Arbitration Tribunal has jurisdiction of this Appeal under:
  - Article 37.3 of the ITU Constitution, which provides that: *"The Arbitration Tribunal will resolve any appeal to decisions from the Competition Juries or from any ITU panels other than the Discipline Tribunal, as outlined in the ITU Competition Rules."*
  - Article 2.2 of the ITU Disciplinary Rules that provides the Arbitration Tribunal *"recognizes recourses submitted to it according to article 37 paragraphs 37.3 and 37.4 of the ITU Constitution."*

- Article 13.2. (b) (i) of the ITU Competition Rules, stating that “*Decisions from any Competition Jury and any ITU Panel (except the ITU AD Hearing Panel) may be appealed to the ITU Arbitration Tribunal*”.

16. Based on those provisions, the ITU Arbitration Tribunal has jurisdiction to decide this Appeal.

#### APPLICABLE LAW

17. Pursuant to Article 34 of the ITU Constitution, “*The governing law of the ITU shall be Swiss law*”. Article 1 of the ITU Disciplinary Rules states that “*These rules set out the applicable procedure before the ITU, within the limitations of Swiss law*”.

18. As the Protest and Appeal against the ITU Competition Jury concern a decision regarding an incident during a competition, the ITU Competition Rules and ITU Disciplinary Rules govern.

#### SCOPE OF PANEL’S REVIEW

19. According to Article 16 of the ITU Disciplinary Rules, “*The Panel has full power to review the facts and the law*”.

#### ADMISSIBILITY

20. The Japanese Triathlon Union filed its Appeal by mail to the ITU headquarters on the 1st of September 2017, 27 days after the contested decision.

21. Article 31 of the ITU Disciplinary Rules requires the appeal to be submitted by mail or by email at ITU headquarters, no more than thirty (30) days following the communication of the contested decision to the Appellant. Article 13 (2) (b) (ii) of the ITU Competition Rules contains the further condition that only appeals supported by a National Federation will be admitted. Therefore, the report was timely submitted by JTU, a National Federation.

22. Based solely on time, the Appeal would be admissible. However, based on Article 34 of the ITU Disciplinary Rules, the Panel is also required to conduct a Preliminary Review of the Appellant’s factum to determine its compliance and the admissibility of the Appeal.

23. The Appellant did not file a factum in accordance to Article 33.<sup>1</sup> Therefore the Panel must determine the Appeal inadmissible.

#### DISCUSSION

24. The Panel finds it unfortunate that the Appeal process as provided by the ITU Disciplinary Rules was not appropriately followed by the Parties. However, the parties are required to know and to comply with the applicable rules.

25. To the extent that JTU intended their “Letter of Appeal” to be its Appellant’s factum, the Panel still finds the Appeal inadmissible because the content of the “Letter of Appeal” lacks the structure and information required for a factum by Article 33 of the ITU Disciplinary Rules.

26. The Panel did not receive specific facts with references identifying the source of each fact and legal arguments to warrant reversing the Competition Jury’s decision to sustain the disqualification. The information and statement provided by the Appellant were not supported by evidence and constituted hearsay. Examples of evidence that could have been submitted are listed at Article 13.2 of the ITU Disciplinary Rules.

27. With this decision, the Panel emphasizes the importance of procedural compliance; that all Parties to an appeal must provide the Arbitration Panel with specific facts with references identifying the source of each fact and legal arguments to warrant reversing or upholding the Competition Jury's decision.
28. However, even if the appeal were admissible, the Panel would have analyzed the disqualification and determined that the Referee's Decision was a non-reviewable field of play decision.
29. Inasmuch as this is the Arbitration Panel's first decision finding an appeal inadmissible, we feel compelled to complete the field of play analysis bases upon the limited information submitted by the parties.
30. Article 13.1 b) ii) of the Competition Rules states b.) Decisions from any Competition Jury and any ITU panel may be appealed to the ITU Arbitration Tribunal, except: (i) (...) (ii) Field-of-Play decisions.
31. The main issue to solve is whether the physical contact between Minami and the Australian athlete was unfair or constituted unsportsmanlike conduct deserving a disqualification.
32. The physical contact is obvious in the video at 8:44. In the Race Referee's field of vision, Minami's right arm is fully extended to her right side and in contact with the left hip of the Australian athlete causing the Australian athlete to lose her balance.
33. Based upon the video, there is no doubt the Race Referee present on the field-of-play observed the physical contact, and the parties have not asserted, that the Race Referee did not observe the physical contact.
34. The decision of the Race Referee to disqualify Minami constitutes a field-of-play decision. That decision was made by the Race Referee in the performance of his duties and within the discretion inherent to his function.
35. According to the case law of the Court of Arbitration for Sport (see e.g. CAS 2004/A/727; CAS OG/12/010), decisions of referees are not reviewable unless there is evidence that the referee rendered (i) a decision in bad faith, (ii) an arbitrary decision or (iii) a decision, made not in appreciation of the state of affairs on the field at the time but in application of a wrong rule, or made by failing to apply the correct rule to the factual circumstances.
36. In the present case, there is no evidence that indicates the Race Referee acted in bad faith or in an arbitrary manner. In fact, the Appellant made no such claim.
37. What remains for determination is whether or not the Race Referee's decision to disqualify was made by application of a wrong rule, or made by failing to apply the correct rule to the factual circumstances.
38. The only Rules identified in the Appellant's "Letter of Appeal" are ITU Competition Rules 13.2 (a)(vi), (xii), and (xiv).<sup>2</sup> Those Rules apply to Level 1 Appeals before the Competition Jury.
39. Although the "Letter of Appeal" asserts those Rules "were no observed", the "Letter of Appeal" does not identify any specific facts with references identifying the source of each fact and legal arguments to support that assertion. Furthermore, the Appellant failed to respond to the Panel's September 8, 2017 written request for "additional information" and for "factual precisions on the location of the referee who made the

decision to disqualify and the identity of the athlete in the video (e.g. Color of swimsuit).”

40. For all these reasons, the Panel determines that the decision of the Race Referee cannot be changed, the decision of the Competition Panel is confirmed, and the appeal is dismissed.

#### **COSTS**

41. The Panel decides not to award costs.

#### **ON THESE GROUNDS**

The Panel of the ITU Arbitration Tribunal rules that:

1. The Appeal is inadmissible pursuant to Articles 33 and 34 of the ITU Disciplinary Rules.
2. Even if the Appeal had been admissible, the Referee’s decision was a Field of Play decision made in good faith, without any evidence that it was made arbitrarily, or with application of an incorrect rule.
3. The Referee decision and its confirmation by the ITU Competition Jury is binding, the Appeal by JTU is dismissed.
4. JTU is not ordered to pay any procedural costs to the ITU.

Made in Lausanne, on 25 September 2017

#### **ITU ARBITRATION TRIBUNAL**



Geneviève Pellerin  
President of the Panel



Kevin Sullivan  
Member of the Panel



Ize Matebese  
Member of the Panel

#### Appeal to CAS

According to Articles 38 and 39 of the ITU Constitution, and Articles 45 of the ITU Disciplinary Rules, any dispute relating to their application or interpretation, after internal recourses have been exhausted, may be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration. The request for

arbitration must be filed with CAS no later (21) twenty-one days following the receipt of the decision that is the subject of the arbitration procedure.

<sup>1</sup>

<sup>2</sup> 13.2. Levels of Appeal: a.) The following procedure will be followed in the event of a Level 1 Appeal: ... (vi) The appellant and the accused and/or their national representative must be present. If the appellant does not attend, the appeals hearing may be postponed or cancelled. The Competition Jury will determine if absence from the hearing is valid; ... (xii) The appellant and the accused will be given adequate time to give their accounts of the incident; ... (xiv) The Competition Jury will hear the evidence and render a decision, by simple majority;...