

IMPORTANT NOTE: *This version is a translation of the original French version.*

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)

CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)

File No.: SDRCC 21-0487

NICHOLAS PATRICK RIVEST

Claimant

And

KARATE CANADA

Respondent

And

MOHAMMAD REZA NIKBAKHSH

Affected Party

M^e Robert Néron, LL.B., LL.M., C.Arb.
Arbitrator

Appearing:

For the Claimant: Stéphane Rivest

For the Respondent: Adam Klevinas

Introduction

This appeal concerns the establishment of selection criteria to represent Canada in the Men's -75 kg Kumite category. The sport is Karate and is governed in Canada by Karate Canada (KC).

The dispute stems from the disruption that the global pandemic has caused for athletes and for sport itself. On January 17, 2021, KC cancelled the Internal Olympic Selection Tournament, and approved new selection criteria for the Olympic Qualification

Tournament and for the Senior National Team. As a result of these new criteria, the Claimant is ranked 2nd and does not qualify to represent Canada at the Olympic Games.

I have been appointed as Arbitrator in these proceedings by the SDRCC.

A preliminary meeting was held by conference call on February 24, 2021 with the Parties and the Affected Party, and an arbitration hearing was scheduled for March 12, 2021. The hearing proceeded as scheduled and at the hearing both parties submitted their evidence and arguments orally.

It should be noted that, at the request of the Parties, the Tribunal issued a preliminary decision on this appeal on March 1, 2021, regarding the Affected Parties hereto. The Tribunal concluded after considering the written submissions by the Parties that only Mr. Mohammad Reza Nikbakhsh was tangibly affected by this decision.

Prior to the hearing, the Claimant and KC had provided written submissions to assist the Tribunal.

Finally, because the proceeding is considered a team selection dispute, the burden of proof rests on KC to establish, on a balance of probabilities, that the new selection criteria are not unreasonable and are reasonably applied.

Context

The Claimant in this proceeding is Nicholas Patrick Rivest. He alleges that, until January 17, 2021, he was the highest ranked athlete in his category and, in principle, the athlete who would be selected to represent Canada at the Olympic Qualification Tournament.

According to him, this was confirmed by Karate Canada's Executive Director on May 8, 2020, in a letter of support, stating: "*[...] without the option of holding a prior domestic selection event, based on his current ranking, it is more likely that Nicholas-Patrick would be the athlete of choice in this category*", following the cancellation of the Canadian Championship due to COVID-19.

However, on January 17, 2021, KC cancelled the Internal Olympic Selection Tournament, and approved new selection criteria for the Olympic Qualification Tournament and for the Senior National Team.

The new Olympic selection criteria introduce a new calculation for the Tier 2 Qualification Process that had never been used before by KC and which would be based on results. Due to this new criterion, the Claimant would move from being the first-ranked to the second-ranked athlete.

However, anticipating the likely risk of having to cancel the domestic selection event due to COVID-19, the KC High Performance Committee studied the issue and considered the best possible method of conducting this final phase of selection for the Olympic Qualification Tournament in the absence of a domestic selection event.

As a result, the High Performance Committee submitted to the KC Board of Directors amendments to its Internal Nomination Procedure (INP), which were adopted on January 17, 2021, and published on January 21, 2021.

These amendments provide, in the event that it is not possible to hold a domestic selection event for the Tier 2 Selection process, to conduct the Tier 2 Selection based on the World Karate Federation's Olympic Standings.

In conclusion, KC contends that these amendments to the selection criteria were reasonable, that they were made by following the required steps, and that no actual or apparent conflict of interest exists in the amendment process.

On the other hand, the Claimant maintains that these amendments use results never considered before, namely the result of the Pan American Championships competition having taken place in March 2019, and that the new calculation is based on results that were known at the time of selection. In other words, the Claimant argues that the use of new selection criteria is prejudicial towards him, as well as being unreasonable.

Submissions by the Parties

Claimant

In summary, in his written submissions, the Claimant contends that he has always been ranked ahead of the Affected Party, Mr. Nikbakhsh, in KC's internal rankings. Furthermore, in 2019-2020, prior to the pandemic, the Claimant put his studies and career on hold in order to participate in a large number of WKF K1 and Series A competitions, in order to gain experience and develop his skills in competing against the best athletes in the world, in anticipation of a possible participation in the Olympic Qualification Tournament in Paris.

According to the Claimant, KC has been using the internal ranking system for several years to rank athletes by category, as well as to select athletes to participate in international competitions such as the Pan American Championships, World Championships, Pan American Games qualification events and even the 2015 Pan American Games in Toronto.

In addition, this same ranking system is also used to identify and select athletes for carding, as well as to allocate funding to athletes when the KC budget allows for it.

In preparation for the 2020 Olympics, KC released in October 2019 the Internal Nomination Procedure (INP) for selecting athletes to compete in the WKF Olympic Qualification Tournament. In July 2020, KC published a new version of the INP for the Tokyo Olympics (Tokyo INP), following the postponement of the Olympic Qualification Tournament, but no changes had been made to the INP for the Olympic Qualification Tournament.

The Claimant submits that the INP was changed in January 2021 following the cancellation of the March 2021 senior and U21 selection events. The change brought the addition of an athlete ranking and selection option based on the WKF World Standings for the Tokyo Olympics, amended to remove participation points.

In summary, on May 20, 2020, following the postponement of the 2020 Olympics to 2021, the WKF issued an update to its Tokyo Qualification System, including the postponement of the Olympic Qualification Tournament to 2021.

Yet, following this, KC released a new Olympic Team Nomination Procedure two months later, in July 2020, with only minor changes from the previous version. KC did not publish any changes to the Senior National Team criteria or to the INP for the Olympic Qualification Tournament.

On January 21, 2021, KC simultaneously announced three decisions made by the Board of Directors on January 17, 2021, namely:

- 1- Cancellation of the 2021 Senior and U21 National Team events.
- 2- Publication of the revised criteria for the selection of the Canadian Karate Team for the WKF Qualification Tournament for the Tokyo 2020 Olympic Games.
- 3- Publication of the 2020-2021 Senior National Team Criteria.

In the new 2021 version of this Internal Nomination Procedure, KC amended Section 5.1.1 *Qualification System* to include an additional option at the Tier 2 Selection process.

The addition reads as follows:

"Should KC be unable to conduct an identified domestic selection event nor the Challenge Matches before occurrence of the WKF Olympic Qualification Tournament, the Canadian athlete in each of the Tokyo 2020 Standings categories who possesses the highest number of WKF Tokyo 2020 Standing points (in a division/category and in the discipline where they are a current Senior National Team Roster member – or the closest equivalent when Olympic categories are different from divisions used for the Senior Team Roster), when participation points have been deducted, on February 1st, 2021 will be selected to represent Canada. WKF Tokyo 2020 Standing participation points are awarded to athletes solely for their participation in a WKF event and are not related to actual performance (matches won and position) at that event".

Without reiterating the impact that this amendment to the internal procedure has had on the Claimant's standing, the Claimant states that the implementation of this new qualification option for Tier 2 is in contradiction with all the other KC criteria that are based on the internal ranking of the athletes and that would not allow a continuum in the

Tier 2 criteria with what existed in the pre-COVID normality, both in terms of the INP and in terms of the criteria.

In addition, this new Tier 2 Selection option of the new Internal Nomination Procedure for qualification calls for a new calculation never before used by KC and is based on results known at the time of the decision.

Consequently, this new way of calculating rankings now takes into consideration a 5th place result by athlete Nikbakhsh, as well as points for his wins at the Pan American Championships competition, held in March 2019, whereas any result lower than a 3rd place, including a 5th place, as well as matches won at these Pan American Championships, were never taken into account in the internal KC rankings.

In applying these new criteria, using the WKF ranking for Tokyo 2020 provides Mr. Nikbakhsh with 360 points that KC has always considered to be participation points that held no value and still hold no value for the Senior National Team selection criteria, as well as for the allocation of cards.

In conclusion, the Claimant states that the decision to use the modified WKF ranking to select athletes in the non-combined -75kg category for participation in the Olympic Qualification Tournament is unreasonable, despite the context of cancelled events due to COVID-19, because:

1. The application of this new system was carried out at a date when all the results were known.
2. The application of a new athlete classification system after the qualification process has been completed may give way to malice.
3. This new selection system is not consistent with regular KC selection procedures and there is a significant deviation from the "regular" pre-COVID criteria.
4. There is no continuum for Tier 2 Selection of athletes between the original INP and the other criteria in relation to the amended INP.
5. The new system takes into account results considered irrelevant in the original version of the INP and the other selection criteria.

Respondent

In summary, KC confirms that this appeal relates to an amendment it made to its selection criteria published on January 21, 2021, which provides a contingency mechanism in the event that the Senior National Selection Tournament, scheduled for March 27-28, 2021 in Calgary, is cancelled due to the COVID-19 pandemic. This event was intended to allow Tier 2 athletes to compete in order to be selected to participate in the Olympic Qualification Tournament.

According to KC, Section 5.1.1 of the amended selection criteria states that if the Senior National Selection Tournament cannot be held in Calgary in March 2021, which has been confirmed, the Canadian athletes in each category of the World Karate Federation (WKF) Tokyo 2020 Standings who have the most points – after subtraction of participation points – in the WKF Tokyo 2020 Standings will be selected to represent Canada at the Olympic Qualification Tournament.

KC submits that the decision to use the official WKF rankings for Tokyo 2020 as of February 1, 2021 as the contingency plan for selecting Tier 2 athletes to represent Canada at the Olympic Qualification Tournament is justified and reasonable, and that the change in selection criteria was done appropriately and in accordance with KC's authority.

Furthermore, KC considers that there is no evidence of reviewable error, bias or conflict of interest on its part, which means that the Tribunal should defer to the technical expertise of KC's High Performance Committee and its High Performance staff, who made the decision to amend the selection criteria to ensure that the best Canadian athletes were selected to represent Canada at the Olympic Qualification Tournament.

For these reasons, KC believes that the Tribunal should not interfere with its decision to amend its selection criteria or grant the Claimant the remedies sought.

Testimony by Witnesses

Three witnesses were heard during this hearing: Mr. Craig Vokey, President of Karate Canada, Mr. Kraig Devlin, Director of Karate Canada's High Performance Committee and one of the National Team Coaches, and Olivier Pineau, Executive Director of Karate Canada.

I will highlight, in my analysis, the essential elements of their testimony in relation to the issue in dispute in this case, namely the decision to use the amended WKF ranking to select athletes in the non-combined -75kg category for participation in the Olympic Qualification Tournament.

Analysis

Firstly, I wish to point out that I found the three witnesses to be credible; they answered the questions without any hesitation, they stated what they knew and what they remembered. However, I noted that Mr. Olivier Pineau heard the testimony of the other two witnesses before testifying.

However, I did not find that this influenced his testimony. Mr. Pineau testified truthfully. He even acknowledged that he was unaware of some of the information or that he had only recently learned of it. In fact, I give probative value to the testimony of all three witnesses.

Secondly, I noted that there were questions from the Parties regarding the ranking of the athletes in the non-combined -75kg category, that of both the Claimant and the Affected Party. I understand that quantitative ranking is important and that the calculation of it is key for an athlete, as the results obtained at sporting events have an expiration date; nonetheless, the fact remains that results obtained in the past, while very interesting, are not the subject of this appeal.

As mentioned, the object of this appeal is the changes made by KC to the selection criteria on January 17, 2021 as well as reasonableness. On the one hand, the Claimant maintains that these selection criteria caused him to lose 1st place in the -75kg ranking, while on the other hand, the Respondent claims that he had never officially acquired this rank previously.

Whether or not the Claimant was surpassed by the Affected Party appears possible, but it does not seem relevant to me. I must keep in mind that the changes KC made to the criteria were made as an alternative plan to a National Qualification Tournament in Canada where both athletes could have competed in March 2021 in Calgary, which unfortunately was cancelled.

Unfortunately, like other sports federations, KC has had to revise its selection criteria due to the COVID-19 pandemic that we are experiencing. We must ask ourselves if the alternative mechanism for selecting athletes to represent Canada at the WKF Olympic Qualification Tournament was reasonable and not flawed by irregularities that would render it unreasonable.

As mentioned by Mr. Vokey, he reminded the KC Board of Directors of the importance of the change in selection criteria and that the change from the previous criteria will affect the Olympic dreams of athletes competing in karate. Mr. Vokey confirmed that a change in selection criteria for karate has occurred only on rare occasions. Therefore, Mr. Vokey wanted to ensure that, even in the challenging situation of the COVID-19 pandemic, KC had to do its best to develop the process appropriately and avoid any breaches related to conflicts of interest.

Mr. Vokey confirmed that he had not asked the KC Board to debate or discuss the High Performance Committee's proposed changes to the selection criteria.

In addition, Mr. Vokey added that the Board tried to be as transparent, straightforward, and ethical as possible, to make the selection process very clear to everyone. For this reason, Mr. Vokey reminded the Board and Mr. Devlin that real or perceived conflicts of interest must be disclosed.

On cross-examination, Mr. Vokey confirmed that if a Board member had a conflict of interest because a family member was on the karate team, KC would not send email communications to that member.

Mr. Vokey also mentioned that he sent an email on December 10, 2020 to Board members to submit any questions they had about the proposed changes to the selection criteria.

On re-examination, Mr. Vokey said that at the January 17, 2021 Board meeting, after the Director of the High Performance Committee explained the proposed selection criteria, there were no questions about them. In his opinion, the Board was satisfied with the explanation provided by the High Performance Committee Director.

Mr. Devlin confirmed that in March 2020, pandemic restrictions caused the cancellation of qualification events and that contingency measures were needed to deal with this situation. However, during the discussion of contingency plans, Mr. Rivest's and Mr. Nikbakhsh's coaches, Mr. Beaudoin and Mr. Varasteh, did not take part in the discussions.

In addition, Mr. Devlin stated that from March 2020 to August 2020, the basic structure of the general selection criteria was sent to the Board, but the Board did not review or adopt it. It was a period of uncertainty as competitions, one after the next, were cancelled. He added that it was on August 13, 2020 that the High Performance Committee met to finalize the selection criteria.

Mr. Devlin added that as of August 13, 2020, Mr. Beaudoin and Mr. Varasteh attended High Performance Committee meetings, but not all meetings, and they did not take part in the discussions relating to the selection criteria.

Mr. Devlin confirmed that the contingency selection plan of using the WKF Standings was accepted by KC as the best way to select a team for the Olympics, as Canadian athletes would be competing with the same groups of international athletes who are already ranked in the WKF Standings.

Mr. Devlin also mentioned that KC did not adopt an entirely new selection process in deciding to adopt the WKF Standings as an alternative or backup selection plan. According to him, these rankings have been used before and they did not represent a deviation from the criteria used by KC in the past.

In cross-examination, Mr. Devlin mentioned that no detailed evaluation had been made as to which athletes would be affected by the new selection criteria until a few weeks ago.

On re-examination, Mr. Devlin confirmed that when the High Performance Committee decided to use the WKF Standings as a contingency plan, it was not yet known that the March 2021 national selection event would be cancelled.

Also, in December 2020, when the High Performance Committee submitted the contingency plan to the Board of Directors, no one had any idea that the March 2021 National Selection event would be cancelled. So, at that time, the contingency plan was only a backup plan.

Finally, Mr. Pineau confirmed that as Executive Director of KC, he ensures that conflicts of interest are properly managed as soon as they become apparent in the process.

Mr. Pineau also submitted that with the amended draft criteria presented to the Board of Directors in December 2020, there was still hope for a national selection event, but as the weeks passed, it became more likely that it would not happen.

In addition, Mr. Pineau testified in cross-examination that while Mr. Beaudoin may have received emails, as confirmed in Exhibit R-23, he was not involved in the development of the amended selection criteria, nor was Mr. Varasteh.

Finally, on re-examination Mr. Pineau confirms, with respect to Mr. Toshihide Uchiage, that he began serving on the Board of Directors in September 2020, but that he was not involved in the development of the contingency selection plan that was presented to the Board of Directors in January 2021, nor was he involved in the decision to use the WKF Standings.

Changes to the Selection Criteria

With respect to the development as well as the adoption of the changes to the selection criteria, the evidence shows that the HPC was already developing, at the onset of the pandemic in March 2020, an alternative contingency plan to select athletes for the Olympic Qualification Tournament. However, upon the cancellation of the Olympic competition in 2020, this plan became increasingly likely and ultimately was adopted by KC, following the recommendation of the High Performance Committee on January 17, 2021.

In an email dated January 17, 2021¹, Mr. Pineau told the KC Board members as follows:

Dear Board members.

In light of very recently obtained information leading to close reconsideration of the current situation, our HP Committee has approved an amendment to recommended Revised (Paris) Olympic Qualification Tournament INP (Team Selection Criteria) provided mid-December, whereby they recommend an earlier cut-off date (Feb 1st, instead of mid-April) for Tier 2 Selection (last remaining 4 spots) using the WKF Olympic Standings (minor participation-only points), in case of cancellation of the domestic selection event (Sr Team Trials in March).

[...]

(Please note: I can confirm that very close monitoring and management of potential conflict of interest has taken place in discussing these items and in reaching this decision / recommendation, at the HP Committee Level).

[...]

¹ Exhibit R-19.

The content of this email from Mr. Pineau demonstrates the urgency of the situation and the need to have an alternative means of qualifying athletes in the event of the cancellation of the national selection event and also that close monitoring and management of potential conflicts of interest were undertaken when developing and adopting the amended selection criteria.

In addition, in an email dated December 11, 2020² to Kraig Devlin and Olivier Pineau, Mr. Vokey wrote:

A note about Conflict of Interest: If you are a parent, sensei, or main coach of an Athlete that has the possibility to be chosen for an alternate spot (not one of the four tier 1 athletes already selected) then you must recuse yourself from any open discussion and vote on this motion. If one of these athletes trains in your dojo then you must recuse, if you have such a close working relationship with one of these athletes through style affiliation, parental friendship, some other way, then please recuse yourself. This is likely one of our most important decisions for selection criteria ever, as it is the Olympic dream [...]

Based on this documentary evidence, it is clear that KC was not only aware, but was also conscious that an actual conflict of interest could invalidate the adoption of the selection criteria.

That said, I find the participation of one athlete, the athlete representative on the Board of Directors, Mr. Uchiage, who was aware of the proposed selection criteria and who presumably could be advantaged by them in the qualification of athletes for the Olympic Qualification Tournament, to be inappropriate.

However, the evidence shows that Mr. Uchiage joined the Board in September 2020 and that the criteria had already been thought out and developed by the High Performance Committee prior to that date.

Therefore, while I find it inappropriate for an athlete who is still active to vote on the adoption of selection criteria, especially when the conflict-of-interest guidelines were clear, this does not invalidate the process of adopting the amended selection criteria.

Finally, with respect to Mr. Beaudoin, the Claimant's coach, and Mr. Varasteh, the Affected Party's coach, I find that KC took the necessary steps to ensure that they were not included in the process of adopting the selection criteria, and I am satisfied that they did not participate in the development of said selection criteria.

² Exhibit R-10.

With respect to the selection criteria per se, I must say that I agree wholeheartedly with Arbitrator Pound when he wrote in *Blais v. WTF Taekwondo Association of Canada* that it is not the role of an arbitrator to rewrite or rework a selection process that has been developed by sport experts.

In other words, it is not for me to substitute my decision for the criteria chosen and developed by the High Performance Committee, a committee made up of experts in the field of karate. It goes without saying that if a decision was manifestly unreasonable in the adoption of the criteria, an arbitrator could intervene, but this is not the case here.

The Claimant alleges bias against him by members of the KC Board of Directors and possibly others who may have a grudge against him. These individuals were involved in either the development or adoption of the amended criteria. It is not necessary for me to name these individuals or to identify the sources of these potential conflicts as a result of complaints and/or resignations from the KC Board of Directors.

Nevertheless, I find this argument to be speculative. Not only do I not have sufficient evidence to support the Claimant's allegations, but there is nothing in the evidence that allows me to reach such a conclusion.

That said, it is possible that there was tension between the Claimant and his KC representative, but I have no evidence that this was a factor that was taken into consideration by KC in adopting its amended selection criteria for the express purpose of causing prejudice to the Claimant. In other words, I have found no evidence of bias against the Claimant on the part of KC.

I have read and listened carefully to the Claimant's arguments and I find that he places a lot of emphasis on past results. As mentioned, this is very interesting, but past results do not invalidate the amended selection criteria.

It must be concluded that no policy setting out selection criteria can be perfect. However, it is important for KC to set boundaries for selecting athletes and that these criteria apply to all, while being known and respected by all athletes.

Finally, without delving into detail in the debate regarding past procedure, and holding conflicting evidence on the matter, the Claimant accuses KC of employing a new calculation never before used, which is based on results which were known at the time of the decision.

However, we are experiencing exceptional circumstances due to a pandemic and that national and even international selection tournaments are cancelled because of this situation.

As aptly mentioned by KC in its submissions, there is no doubt that the COVID-19 pandemic has disrupted sport in unprecedented and unexpected ways and has upset the normal course of life.

Consequently, considering the exceptional context in which the sport world finds itself, it is reasonable to adopt exceptional alternative selection policies in order to select athletes in the absence of the regular mechanisms that we once knew.

I understand full well that the Claimant is not satisfied with the outcome of the application of these new criteria, but that does not make it an unreasonable process. It is not enough to say it, but it must also be demonstrated.

In this case, KC has provided evidence, on a balance of probabilities, that its amended selection criteria adopted on January 17, 2021, were reasonable and the Claimant has not demonstrated otherwise.

Furthermore, as mentioned above, the Tribunal cannot conclude that KC's purpose was to harm and disadvantage the Claimant. Not only is this speculative, but it is also not supported by the evidence filed. I must add that I find it unfortunate that the Claimant thinks this, because according to the evidence heard, none of this could be demonstrated.

I therefore conclude for all of these reasons that KC's decision to use the amended January 17, 2021 selection criteria is reasonable and I do not have sufficient evidence to conclude, on a balance of probabilities, that this decision is unreasonable.

In closing, I would like to thank the parties for their professionalism, the quality of their arguments and their conduct during this appeal. I would also like to thank the SDRCC staff for their work in coordinating all of the administrative aspects of this arbitration.

ORDER

The Claimant's appeal is dismissed.

OTTAWA, on March 22, 2021

Me Robert Néron, LL.B., LL.M.
Arbitrator