



Arbitration CAS 2000/A/278 Chiba / Japan Amateur Swimming Federation (JASF), award of 24 October 2000

Panel: Dr. Hans Nater (Switzerland), Sole Arbitrator

Swimming

Selection of athletes for the Olympic Games

Selection criteria

1. **A professional athlete has the right to know the criteria established by its National Federation or National Olympic Committee, which he or she must meet in order to qualify for the Olympic Games. Taking into consideration that the decision on the selection of an athlete may constitute the opportunity of a lifetime for an athlete, the Federation or National Olympic Committee should pursue a policy of transparency and open information.**
2. **The dispute concerning the selection of an athlete rather than another for a particular event at the Olympic Games is not one where the Court of Arbitration for Sport is being requested to make a choice as to which of two athletes is better or which is more likely to win a medal at the Games. They are matters for those properly qualified to make such a choice.**

On 24 May 2000, the Appellant Suzu Chiba filed an appeal challenging a decision (the decision), made by the Japanese Amateur Swimming Federation (JASF) not to select her as a member of the Japanese Olympic Swimming team for the purposes of competing in the 2000 Sydney Olympic Games. She claimed that she had competed in the Japanese Olympic Selection meet (2000 Nationals), held in Tokyo from 18 to 23 April 2000 and met the selection criteria, e.g. the FINA qualifying Time Standards and a first or second place at the 2000 Nationals.

The Appellant, in her Appeal Brief of 30 June 2000, requested the following relief:

§ 37

- “(a) A declaration that the decision of the JASF not to select the Appellant as a member of the Japanese Olympic swim team, and therefore denying her the opportunity to compete in the 2000 Sydney Olympic Games, was unfair and should be set aside;*
- (b) An order requiring that the JASF allow the Appellant to join the Japanese Olympic swim team for the purpose of competing in the 2000 Sydney Olympic Games;*

- (c) *In the alternative, if it is not possible for the Appellant to compete in the 2000 Sydney Olympics Games, an order that the JASF pay damages to the Appellant. Particulars of these damages will be provided in the evidence of the Appellant if necessary at the hearing;*
- (d) *An order that the JASF pay all of the Appellant's costs incurred by the Appellant with respect to this Appeal;*
- (e) *Any other relief to the Appellant, which the CAS may find appropriate.”*

The Respondent, in its Answer of 26 July 2000, requested the Arbitrator to decide as follows:

- “ *state that, based on the arbitration agreement, the court of arbitration has no jurisdiction to decide on any request for relief of the Appellant, other than the ones strictly dealing with the decision regarding the personal selection of the Appellant and therefore declare inadmissible and dismiss the requests for relief set forth under 37 (c) and (d) of the Appeal brief*
- *reject the requests for relief set forth under 37 (a) and (b) of the Appeal brief and confirm that the Appellant has no right to be selected for swimming events at the Olympic Games*
- *reject the request for relief set forth under 37 (d) and order the Appellant to pay to the Respondent an amount representing an appropriate compensation for the costs in the course of the appeal proceedings, in particular attorney's fees*
- *reject any contrary or other requests for relief of the Appellant.”*

The relevant facts can be summarised as follows:

The Appellant is a world class swimmer. She began swimming competitively as a member of the Japanese National swim team in 1989 and participated in the 1992 Barcelona Olympic Games and the 1996 Atlanta Olympic Games. Following the 1996 Atlanta Olympic Games, the Appellant retired from the sport of competition swimming. In September 1998, she came out of retirement because of her desire to compete in the 2000 Sydney Olympic Games. For this purpose, she began training in Canada with Mr. Mac Allister. Since 1988, the Appellant has been a member of the Itoman Swimming School, a registered club of the Respondent.

The Appellant applied to participate in the 2000 Nationals, held in Tokyo from 18 to 23 April 2000, through the Itoman Swimming School and competed in the women's 100 and 200 metres freestyle events. Despite alleged health problems which required her hospitalisation before and after the events, she was placed first in the women's 200 metres freestyle event with a time of 2:00.54 min and third in the women's 100 metres freestyle event with a time of 00:56.28 sec. The Appellant's time in the women's 200 metres freestyle event met the FINA “A” Time for the 2000 Sydney Olympic Games and her time in the 100 metres freestyle event met the FINA “B” Time for the 2000 Sydney Olympic Games.

On 24 April 2000, the Appellant inquired through Mr. Tanaka, a coach of the Itoman Swimming School, and learned that she was not selected for the 2000 Sydney Olympic Games. On 1 May 2000, Mr. Kuniaki Hashimawari sent a letter to the Chairman of Respondent and asked the Respondent, why the Appellant was not selected. The Respondent answered on 10 May 2000, that “*this selection*

was conducted by the Selection Committee legitimately and in a proper manner” and added that it “will not reveal the detail of our decision of each individual athlete to the public”.

The Appellant argued that it was and had always been her understanding that to qualify as a member of the Japanese Olympic swimming team and to compete in the Olympic Games, a swimmer must:

- a) meet the FINA qualifying time standards and
- b) be placed first or second in her event at a Japanese Olympic qualification swimming meeting.

However, according to Respondent, the applicable criteria were as follows:

- a) FINA minimum standards;
- b) First or second place at the qualifying meet;
- c) Time within the best 8th of the last season.

The disagreement between the parties relates to the third selection criterion: While the parties are in agreement as to the first two criteria, the Appellant was not aware of the existence of a third criterion, namely that the time achieved at the 2000 Nationals had to be within the best 8 times of the 1999 season.

The parties agreed that the Appellant missed that third criterion: Although she ranked 3rd in the 1999 season, her time in the 100 metres freestyle event at the 2000 Nationals was equivalent to the 27th place and her time in the 200 metres freestyle event was equivalent to the 17th place in the 1999 world rankings. Hence, she missed the target to swim a time at the 2000 Nationals which would have matched the 8th or a better time of the 1999 world ranking.

The Respondent freely admitted at the Hearing that the third selection criterion had never been explicitly communicated, either to the athletes or to the coaches or to the media. It insisted, however, that its general policy to select “few but best” among those who exceeded the FINA “A” time limit had been announced at the coaches' meeting held in October 1999, at the managers' meeting held on 17 April 2000, and in the media. Asked by the Arbitrator what the policy “few but best” meant, the Counsel for the Respondent explained at the Hearing that the exact definition was made by the selection committee meeting on 23 April 2000, that is after the 2000 Nationals. While the policy “few but best” had been determined and announced by the Respondent in advance, the third and decisive selection criterion had been defined after the 2000 Nationals, when the Selection Committee of the Respondent decided to select 8 women whose results corresponded to the 8th or a better time of the 1999 world ranking. Without doubt, the Appellant was not aware of the third selection criterion when she competed at the 2000 Nationals, and did not know that she had to swim a time equivalent to the 8th best time achieved in the 1999 world ranking in order to be selected for the 2000 Olympic Games in Sydney.

In its Answer, the Respondent explained the reason for choosing that third criterion: the 8th place was laid down as one of the selection criteria because the medal winners will be chosen among the eight athletes qualified to participate in the final at the Sydney Olympic Games.

The Respondent communicated the selection results to the Japanese Olympic Committee on 24 April 2000 and obtained its approval. The final decision of the Japanese Olympic Committee on the National Olympic Team was due to take place on 3 August 2000.

LAW

1. On 14 June 2000 the parties signed the following Arbitration Agreement:

“This is to agree that Suzu Chiba and the Japan Amateur Swimming Federation shall refer to the Court of Arbitration for Sport regarding the dispute not to select Suzu Chiba in the Japanese National Team for the Olympic Games in Sydney.”

The jurisdiction of the sole arbitrator to scrutinize the non-selection of the Appellant based on the Arbitration Agreement is undisputed.

2. This is an appeals case to be dealt with according to art. R47 et seq of the Code of Sports-related Arbitration (the Code).
3. In essence, the Appellant attacked the decision of the Respondent not to select her for the Olympic Games in Sydney on the grounds that the selection criteria were not fairly established and not evenly applied to Japanese swimmers. She complained that the decision on the selection criteria had not been announced before they were applied.
4. I have to examine whether the Respondent had authority to render its decision not to select the Appellant for the Sydney Olympic Games and whether that decision violated any Rules of the Olympic Charter, the Fédération Internationale de Natation Amateur (FINA), the Japanese Olympic Committee or the Respondent.
5. The authority of the Respondent and of the Japanese Olympic Committee to decide on the selection of the Appellant has not been challenged. Indeed, By-Law 8 to Rules 31 and 32 of the Olympic Charter provide that the National Olympic Committees decide upon the entry of athletes proposed by their respective national federations.
6. Rule 6 of the Olympic Charter names fair play as one of the fundamental principles of the Olympic movement. The same Rule expresses the idea that sport must be practised without discrimination of any kind. Article C2 of the FINA Constitution prohibits any discrimination against national federations and individuals. The principles of fair play and non-discrimination are valid for athletes and sports organizations and must be followed in the process of selecting athletes for the Olympic Games. It has to be examined whether the Respondent's decision not to select the Appellant for the 2000 Sydney Olympic Games violated any of those fundamental principles, which is not the case, as the result of my analysis will show.

7. The International Federations establish the criteria of eligibility to the competitions of the Olympic Games. In the case at hand, FINA published the qualification systems for the Olympic Games 2000 in the FINA handbook 1998 – 2000 and established in its By-Laws the following basic rules for swimming:

“For each individual event at the World Championships, each Member may enter a maximum of 2 competitors, regardless of standards. For each individual event at the Olympic Games the FINA Bureau will establish Standard Entry Times on two levels: A and B, of which B shall be easier to achieve. If a Federation/NOC enters only one swimmer per event all swimmers entered must meet the qualifying B standard time. If two swimmers are entered in the same event, both of them must meet the qualifying A standard time.

All Federations/NOC having no swimmers qualified may enter one man and one woman regardless of time standards in one competition each of their choice with evidence of participation in national and international competition.”

FINA set the Women's “A” Time Standard for 2 entries at 00:56.03 sec for 100 metres freestyle and at 2:01.02 min for 200 metres freestyle and provided that the qualifying time standards must be obtained in the 12 months prior to the entry deadline for the Olympic Games 2000 at National Olympic Trials, recognized by FINA, such as the 2000 Nationals, or Continental Championships, or International Competitions to be approved by FINA.

The Respondent is a member of FINA and as such obliged to abide by the FINA Rules.

8. As the Respondent stated, the FINA Time Standards are minimum requirements. The National Federations are free to set a higher standard.
9. In her Appeal Brief, the Appellant argued that, as a matter of legal interpretation, the FINA Qualifying Time Standards would apply, since the Respondent did not set out the selection criteria in its By-Laws. I cannot find a basis for such an interpretation in the FINA Rules. Moreover, the Respondent and the Japanese Olympic Committee indicated in their By-Laws that they wanted to guide the selection process. On 16 September 1999, the Japan National Olympic Committee issued a paper on the “Japan National Team Composition Policy”, in which the following principle on selecting athletes has been established:

“Athletes shall be selected from those who have the competitive capabilities to meet the expectations of the Japanese people, are qualified by the IF to compete, and also are expected to achieve satisfactory results”.

I conclude that the selection criteria established by the Respondent, as set out in paragraph 7.4 above, did not contravene FINA Rules.

10. I now turn to the issue, whether the selection criteria were fairly established, although they were decided upon and announced after the selection meet. As the Appellant put it at the hearing, *“the selection was the decision”*.

I would not hesitate to quash the decision, had the selection criteria been established before the selection, but not been communicated to the athletes. In my view, a professional athlete,

such as the Appellant, has the right to know the criteria established by its National Federation or National Olympic Committee, which he or she must meet in order to qualify for the Olympic Games. Taking into consideration that the decision on the selection of an athlete may constitute the opportunity of a lifetime for an athlete, the Federation and the National Olympic Committee should pursue a policy of transparency and open information.

However, in the case at hand, the Respondent made use of its wide discretion with respect to the selection of athletes and communicated its (general) selection policy in advance but not the specific selection criteria. It rendered its decision based on its previously communicated policy after the selection meet. Unlike in the case of Watt (Arbitration CAS 96/153, Watt / Australian Cycling Federation (ACF) and Tyler-Sharman, award of July 22, 1996 [See *Digest of CAS Awards 1986-1998*, edited by M. Reeb, Staempfli Editions, Berne 1998, p. 335 ff.]), where the Federation withdrew a guarantee of selection, the Respondent never indicated to the Appellant that she had the ticket for Sydney. Quite to the contrary, the Respondent announced at various meetings, at which the Appellant's club representatives were present, that in pursuing a policy "few but best" it intended to select the athletes among those who met the FINA "A" standard time. The Appellant argued that she had been selected for the 1992 Barcelona Olympic Games and the 1996 Atlanta Olympic Games based on the 1st and 2nd criteria only and that she relied on the application of the same criteria for the 2000 Sydney Olympic Games. The Respondent's counter-arguments that the selection criteria for the previous Olympic Games were not the same and that the criteria differed from games to games remained undisputed. The Appellant seems to have been aware that the Respondent would not be satisfied with the 1st and 2nd criteria and was considering another, yet unknown test, when, after the selection meet, she personally inquired through Mr. Tanaka of her club whether she was selected or not. Mr. Tanaka had been advised of the decision of the selection committee and informed the Appellant that she was not selected.

11. To summarize, the Respondent may have made extensive use of its discretion by fixing the selection criteria after the selection meet and may have followed a procedure which is not practiced any more in several countries, but it did not violate either the Olympic Charter, the FINA Rules, the Rules of the Japanese Olympic Committee or of the Respondent itself in rendering its decision not to select the Appellant. I conclude that, under the governing circumstances, the Respondent did not act unfairly in establishing the selection criteria for the 2000 Sydney Olympic Games.
12. The next issue raised by the Appellant is whether the selection decision taken on 23 April 2000 by the selection committee has been fairly applied by the Respondent. It is the Appellant's belief that there are several swimmers who failed to meet the Respondent's selection criteria but have been selected as members of the Japanese Olympic swimming team for the purpose of competing in the 2000 Sydney Olympic Games. In her oral pleadings, the Appellant replaced her written arguments put forward in her Appeal Brief by oral arguments. I share the Appellant's view that the fairness test requires that the selection criteria be applied equally to all athletes. After having heard the parties' arguments, I have come to the conclusion that the Respondent evenly applied the selection criteria to the Japanese swimmers. As this court has stated in the Watt case (Arbitration CAS 96/153, Watt /

Australian Cycling Federation (ACF) and Tyler-Sharman, award of 22 July 1996), a dispute concerning the selection of one athlete rather than another for a particular event at the Olympic Games is not one where a Court of Arbitration for Sport is being requested to make a choice as to which of two athletes is better or which is more likely to win a medal at the Games. These are matters for those properly qualified to make such a choice.

13. The examples of alleged unfair treatment presented by the Counsel of the Appellant in the course of her oral pleadings clearly fall into the category of cases which are outside the jurisdiction of the CAS:
 - a. The Appellant argued that it was not fair to prefer Ms. Minamoto over her. However, Ms. Minamoto met the Respondent's selection criteria for the 2000 Sydney Olympic Games. She won the women's 50 metres freestyle event at the 2000 Nationals with a time of 00:25.29 sec, which corresponds to 3rd place in the 1999 world ranking. As shown in the Answer, she missed the selection criteria in the 100 metres freestyle event, although she won that event ahead of the Appellant who ranked 3rd. As the Counsel of the Respondent admitted at the hearing, Ms. Minamoto might be entered to the 100 metres freestyle event at the 2000 Sydney Olympic Games. In her oral pleadings, the Counsel for the Appellant raised the question who had a better chance to win a medal in Sydney, Ms. Minamoto who achieved a time of 00:55.29 sec at the 2000 Nationals or the Appellant whose best time in 1999 was 00:54.01 sec. I can only refer to the cited findings in the Watt case and confirm that the selection proceedings have been fairly exercised by selecting Ms. Minamoto, who clearly met the selection criteria (for 50 metres freestyle) and by non-selecting the Appellant, who missed the selection criteria (for 100 and 200 metres freestyle).
 - b. The Counsel of the Appellant also criticized the fact that two male swimmers were selected based on their semi-final results at the 2000 Nationals. Mr. Kitajima in the semi-final of the 200 metres breast stroke event achieved a time of 2:13.47 min. which corresponds to the 3rd place in the 1999 world ranking. Mr. Tabuchi had been selected based on his record in the final of the 400 metres medley event. Both swimmers met the selection criteria.
 - c. In the case of Ms. Isoda, the Counsel for the Appellant compared Isoda's time of 2:28.04 min. reached in the 200 metres breast stroke event at the 2000 Nationals with the 1999 Standard Time to beat of 2:23.64 min. Again, I am satisfied that, in selecting Ms. Isoda, the Respondent did not deviate from its established selection criteria.
14. Based on the foregoing, I conclude that the Appeal directed against the decision rendered by the Respondent not to select the Appellant to the 2000 Sydney Olympic Games be dismissed.
15. In the alternative, if it should not be possible for the Appellant to compete in the 2000 Sydney Olympic Games, the Appellant requested an order that the Respondent pay damages to her. In her Appeal Brief, the Appellant stated that particulars of these damages would be provided in the evidence of the Appellant if necessary at the hearing. However, the Appellant did not substantiate any damages at the hearing. Therefore, the requested relief for damages is denied.

16. The Appellant requested an order imposing the Respondent all of the Appellant's costs incurred by her with respect to this appeal. In my view, the Appellant's request for costs is justified. There is no doubt that this Appeal would not have been initiated, had the Respondent announced the selection criteria before the qualification meeting. Under the governing circumstances, I find it fair to impose on the Respondent the burden to partially remunerate the Appellant for her costs incurred, such as travel expenses and legal fees. Neither in her Appeals Brief nor in her oral arguments, the Appellant detailed her expenses. I find that a reduced contribution towards the costs incurred by the Appellant of CHF 10'000.-- be adequate.
17. The Award should be rendered without costs, except for the Court Office Fee of CHF 500.--.

The Court of Arbitration for Sport hereby rules :

1. The Appeal dated 24 May 2000, directed against the decision of the Japan Swimming Amateur Federation (JASF) not to select Suzu Chiba for the Olympic Games 2000 is dismissed and the requests for relief by the Appellant are denied.
2. The award is rendered without costs except for the Court Office fee of CHF 500.- (five hundred Swiss francs) already paid by the Appellant, which is retained by the CAS (Art. R65.1 and R65.2 of the Code).
3. The Respondent JASF shall pay an amount of CHF 10'000.-- as a reduced contribution towards the costs incurred by the Appellant.