

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)  
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)**

No: SDRCC 19-0400

MARIAM ABDUL-RASHID  
(Claimant)

and

ATHLETICS CANADA  
(Respondent)

and

JOY SPEARCHIEF-MORRIS  
(Affected Party)

**Arbitrator**

Jeffrey J. Palamar

**Appearances:**

Mariam Abdul-Rashid on her own behalf

Jared MacLeod for Athletics Canada

Margaret MacKinnon and Tyler O'Henly for Joy SpearChief-Morris

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**DECISION WITH REASONS**

**Introduction**

1. Mariam Adbul-Rashid and Joy SpearChief-Morris are both athletes who compete in the women's 100-metre hurdles.
2. This an appeal by Ms. Abdul-Rashid of a decision by Athletics Canada made on or about May 23, 2019.
3. Athletics Canada's role is to nominate athletes to U SPORTS, the national governing body of university sport in Canada, which then formally selects and enters athletes into the 2019 Summer Universiade Games ("FISU 2019").
4. Selection of athletes for FISU 2019 by Athletics Canada is required to be done according to section 3.2 of the FISU 2019 Selection Criteria (the "Selection Criteria") which reads as follows:

### **Selection for Individual Events**

a) Athletes who have met the eligibility requirements of section 1.3 and achieved the necessary Qualifying Standard (see Appendix A) during the Qualifying Period (see section 1.2) will be known as "Qualified Athletes".

b) All Qualified Athletes will be ranked using their World Ranking – see section 3.3.

c) Qualified Athletes will be nominated in this ranking order until the Team Quota is filled (see section 1.8) or until no more Qualified Athletes remain.

d) If, using this ranking order, a number of Qualified Athletes tie for the remaining Team Quota spots then NTC will rank them in the order of that, in their sole opinion, they consider that they are likely to finish at the 2019 FISU Games in the corresponding event. Athletes will be selected in this ranking order until the Team Quota is full. The NTC may consider any factors that they consider relevant, in any order that they consider relevant, to rank athletes. These factors include, but may not be limited to:

- i. World and domestic ranking;
- ii. Current form and fitness;
- iii. Proven ability to perform on demand;
- iv. Head-to-head record against each other during the Qualifying Period if applicable.

5. In its decision, Athletics Canada chose to nominate Ms. SpearChief-Morris instead of Ms. Abdul-Rashid to compete for Canada at FISU 2019.
6. Ms. Abdul-Rashid appealed this through the SDRCC, and a hearing was held on May 31, 2019.
7. On June 2, 2019, I issued a Short Decision with Reasons to Follow, deciding as follows:

This is my decision pursuant to the Canadian Sport Dispute Resolution Code (January 1, 2015) (the "Code") arising from the hearing which took place on Friday, May 31, 2019.

The Claimant challenged the discretionary decision of the National Team Committee of Athletics Canada made in May, 2019 to not nominate her to U SPORTS for selection to Canada's 2019 Athletics team for the Summer Universiade (FISU2019) ahead of the Affected Party.

After considering all of the evidence and arguments advanced, I have decided to dismiss the Request of the Claimant.

Complete written reasons for my decision will follow within the timelines prescribed by the Code.

8. These are the reasons for my decision.

9. While in these reasons I do not refer specifically to everything presented in the hearing, in making my decision I have in fact carefully considered everything.

### The Evidence

10. Ms. SpearChief-Morris and Ms. Abdul-Rashid were competing in this instance for the second spot on the team, with another athlete having had the fastest time in the Selection Period, and therefore being the first selection.
11. The National Team Committee of Athletics Canada (the "NTC") is obliged to use section 3.2(d) of the Selection Criteria as both the athletes here had tied based on their world rankings as determined by their best performances within the Qualifying Period (here, this being January 1, 2018 – May 12, 2019). As the two athletes were tied, the NTC was obliged to rank the two athletes in the order that, in their sole opinion, the NTC considered they were likely to finish at the 2019 FISU Games [emphasis added].
12. In section 3.2(d) the NTC is allowed to consider any factors it considers relevant, in any order that considered relevant, to rank athletes. These factors specifically include but were not limited to:
  - a) World and domestic ranking;
  - b) Current form and fitness;
  - c) Proven ability to perform on demand;
  - d) Head-to-head record against each other during the Qualifying Period if applicable.
13. In this case, the first listed factor (world and domestic ranking) had ranked the athletes the same and the last listed factor (head-to-head record during the Qualifying Record) was not relevant because they had no head-to-head record during the Qualifying Period. This left to be considered, of the listed factors, the second and third factors (current form and fitness, and proven ability to perform on demand). It also left any other factors that might be considered relevant by the NTC.
14. Prior to undertaking the selection process, it was determined that two members of the NTC (the two athlete representatives) were believed to be in a potential conflict of interest and so those two members did not participate in the process. The NTC then determined it would not be possible to replace those members bearing in mind the tight timelines to make the selection, and so the NTC made the selection without them. The vote was 4-2 in favour of Ms. Abdul-Rashid and so she was to be nominated to U SPORTS for the remaining position in the women's 100-metre hurdles at FISU 2019.
15. Ms. SpearChief-Morris filed an appeal of that selection on or around May 16, 2019. This appeal challenged the decision of the NTC on the premise that the NTC was not properly constituted as required by the Rules and By-Laws of

Athletics Canada (the "Rules") at the time of the decision. Specifically, Ms. SpearChief-Morris argued that by section 126.04 of the Rules the NTC was required to include two athlete representatives and the NTC did not here due to the conflict of interest.

16. The Rules went on to state specifically that when a conflict of interest was declared "the member must be replaced by a person without a conflict of interest from a stand-by list appointed from the member's constituency".
17. Further, the Rules stated that a quorum for the NTC was five voting members, which had to include at least one Athletics Technical Staff or Event Coach, at least two athlete representatives, and at least one branch representative. Here, as the two athlete representatives had declared a conflict of interest and had not been replaced, the NTC was not validly constituted and therefore any decision by it was invalid.
18. In her appeal Ms. SpearChief-Morris also provided further information and comments respecting the factors of current form and fitness, as well as proven ability to perform on demand. She included an assessment of both her performances and those of Ms. Abdul-Rashid during the Qualifying Period, taking into account wind and altitude. Ms. SpearChief-Morris's submission suggested that when one considered these factors, her own performance during the Qualifying Period was indeed substantially stronger than that of Ms. Abdul-Rashid. She also noted comparisons of performances other than the best performance of each athlete, suggesting that Ms. Abdul-Rashid's performance in the 400-metre hurdles was not relevant in assessing current form and fitness for the 100-metre hurdles, and also made various submissions on proven ability to perform on demand. Her overall conclusion, not surprisingly, was that she should have been selected ahead of Ms. Abdul-Rashid.
19. The next day, Athletics Canada wrote to Ms. Abdul-Rashid to advise her that Ms. SpearChief-Morris had filed an appeal of the decision selecting Ms. Abdul-Rashid for the nomination. Information was provided to Ms. Abdul-Rashid about the appeal process. She was told in writing that in due course that she would be provided with a copy of the documents provided by Ms. SpearChief-Morris, and that she would be able to provide her comments and any input she wanted to provide.
20. Ms. Abdul-Rashid responded in writing to Athletics Canada asking who was making a complaint about her and why. In response, Athletics Canada wrote that no one had filed a complaint against her, but rather there was an appeal in place and as such she was an affected athlete and had the opportunity to make a submission if she wished to do so. Shortly thereafter that same day, the Athletics Canada's Commissioner forwarded the appeal documents (including specifically all the submissions made by Ms. SpearChief-Morris) to Ms. Abdul-Rashid with the written statement "Please let me know if you wish to make a submission to me".

21. Three days later and without any response from Ms. Abdul-Rashid, Athletics Canada wrote again to her to advise the team selection would be redone. It explained this was because when the NTC had made the initial selection, the vote had occurred without the participation of the two athlete representatives, which was contrary to the Rules. As a result, the NTC would vote again, but with the participation of non-conflicted athlete representatives. It was stated that the NTC would conduct a selection process by email as soon as two non-conflicted athlete representatives could be nominated for this purpose. A representative of Athletics Canada also wrote to Ms. Abdul-Rashid that:

Should you have any questions about this process, please feel free to get back to me by email. I will get back to you as quickly as possible.

22. Ms. Abdul-Rashid did not respond, did not indicate she wished to participate in some fashion in the process, did not provide a submission of any sort or any indication that she wished to provide a submission, or ask by when a submission would be required.
23. As a result, the properly constituted NTC convened for a second vote. It considered the material earlier provided, as well as the appeal materials and submission of Ms. SpearChief-Morris respecting current form and fitness as well as proven ability to perform on demand (which had referenced some performances in the Qualifying Period not on Athletics Canada's website).
24. Athletics Canada provided to the NTC a brief summary of the background events, as well as written instructions in terms of what was required of the NTC. Particularly, it noted that the NTC was required to make a decision based on section 3.2(d) of the Selection Criteria, and it quoted that section for the reference of the NTC. Athletics Canada provided data on performances in the Qualifying Period for both athletes from Athletics Canada's website, as well as from a commercial, athlete statistics site. The result was data on all performances of both athletes in the Qualifying Period was before the NTC.
25. The NTC members were instructed to use the information provided, plus any other facts any of them wanted to consider, and rank the two athletes in the order the NTC members would consider they would likely finish at the 2019 FISU Games. The NTC members were invited to make points to the group or ask questions if needed, but only before the vote, and they were instructed to vote by email sent to the group, including brief reasons for their vote.
26. The results of the vote were 7-1 in favour of Ms. SpearChief-Morris.
27. Ms. Abdul-Rashid then filed her appeal with the SDRCC which led to this hearing.

### **The Submissions of the Parties**

28. In her appeal, Ms. Abdul-Rashid challenged the analysis of the NTC in the second vote, suggesting particularly that, from some comments made in it, it was evident the selectors had not read or interpreted the results in the Qualifying Period appropriately, or at all, and effectively had misconstrued things. She noted a comment by a selector that Ms. SpearChief-Morris had not over-raced, and interpreted that to imply she (Ms. Abdul-Rashid) had in fact over-raced, which she found incorrect and an understatement of her own athletic abilities and the experience/knowledge of her coach, who would not have allowed her to over-race.
29. Ms. Abdul-Rashid asserted that it was unfair to base the decision in any way on the submission made by Ms. SpearChief-Morris in her appeal, and felt that instead the NTC should have considered all factors potentially relevant, including the fact that Ms. Abdul-Rashid competed in the NCAA, which was one of the most competitive circuits available, and had always performed well and particularly under pressure. Ms. Abdul-Rashid also argued that only the best performances should be considered and those were the only performances she had submitted to Athletics Canada for its ranking list.
30. Ms. Abdul-Rashid was also concerned with the fact that no specific deadline had been imposed on her to make a submission to the NTC prior to its second vote. She said that, had she known of a specific deadline, she would have provided a submission which would have been taken into account by the NTC. Indeed, in the appeal before me Ms. Abdul-Rashid did provide some information with her own analysis of the results during the Qualifying Period, and which she argued supported her own nomination for the spot ahead of Ms. SpearChief-Morris.
31. For its part, Athletics Canada indicated that the NTC had followed the selection process properly.
32. The Selection Criteria were established and published in a timely manner on the Athletics Canada website, and that was in no way in issue. The decision had been made based on the appropriate criteria, and accordingly the onus of proof shifted here to Ms. Abdul-Rashid to establish she should have been selected or nominated. She had not done so.
33. Athletics Canada referred me to the Selection Criteria themselves in which it was clearly stated that it was the responsibility of the athlete to submit eligible performances to Athletics Canada in order to be considered for selection. Athletics Canada said this included all performances that would be relevant during the Qualifying Period. The fact that Ms. Abdul-Rashid chose not to submit such performances that might be relevant was her choice, and not something which invalidated the process in any way. It also noted that regardless, care had been taken through the use of a commercial website to

access and provide all possibly relevant results of both athletes during the Qualifying Period.

34. Athletics Canada indicated as well that by section 3.2(d) of the Selection Criteria the factors to be considered were not limited to those specifically noted, but could include other factors as well. Therefore, the fact that the NTC had potentially taken other matters into consideration, in no way invalidated the process. The factors required to be examined here (current form and fitness, and proven ability to perform on demand) had been considered. The NTC had the full discretion to take into account any factors it considered relevant, in any order that was considered relevant, in order to rank the athletes. The NTC's job was to consider all such factors and make a decision based on the likely finish in the 2019 FISU Games, in the particular event. It had done just that.
35. The fact that Ms. Abdul-Rashid was not given a specific deadline for a submission to the NTC prior to the second vote was not relevant in the context. There had been correspondence with her inviting a submission, there had been no communication back from her to suggest that she intended to make a submission, and by her silence she effectively had elected not to make one. Matters were time sensitive and could not wait.
36. Overall, we were dealing with two very gifted athletes and it was very difficult to make a decision in terms of who was to be awarded the spot. The appropriate criteria had been considered, the process was fair and there was no reason to overturn the decision.
37. For her part, Ms. SpearChief-Morris's position was effectively that my role was very limited. Expert decision makers should be given deference when it was shown that a team selection was procedurally correct and the appropriate data were used, unless the decision was arbitrary, discriminatory or in bad faith.
38. Here, plainly things were procedurally correct and the appropriate data considered. There was no evidence at all of anything being arbitrary, discriminatory or in bad faith, and therefore no grounds to overturn the selection decision reached in the second vote, which was well-supported by the analysis undertaken.

### **Analysis and Decision**

39. As noted, the two athletes are very gifted and it is very difficult to choose between them. I add that it is unfortunate that we must do so, as I have little doubt that both would be fine representatives for Canada in FISU 2019.
40. However, it is not within my power to create an extra spot, but someone must make the hard decision as to which of these two athletes should be there based upon the Selection Criteria and the processes required to be undertaken.

41. In a case such as this, section 6.7 of the Code places the initial onus of proof on the respondent, Athletics Canada, to demonstrate the criteria were appropriately established and the selection decision made in accordance with such criteria. Once that has been established, the onus of proof shifts to the complainant to demonstrate she should have been selected or nominated in accordance with the approved criteria. Each onus is to be determined on the balance of probabilities.
42. I was told the Selection Criteria were established and published in a timely manner on the Athletics Canada website, and indeed that was in no way in issue. From the documents produced and everything I heard, I accept that the decision had been made based upon the criteria, and accordingly the onus of proof shifts here to Ms. Abdul-Rashid to establish she should have been nominated in accordance with the criteria.
43. My role is necessarily limited. The Selection Criteria itself expressly and clearly grant considerable discretion to the NTC in terms of what factors are to be assessed and in what order. This necessarily leads to the general conclusion that the selection process is a difficult one and probably left for the most part to those experts in the field who best understand what is really relevant and the extent to which something might be relevant.
44. There are many, many past cases where arbitrators have stated in a variety of ways the reality that the arbitrator's role, in a case such as this, is limited to determining whether:
  - a) there has been a fair communication of the rules of the selection process;
  - b) the selectors have reasonably adhered to those rules and have administered the process in a manner which is not arbitrary, discriminatory or in bad faith.
45. Little will be served by quoting at length from these cases, save needlessly lengthening this decision.
46. In some cases, it is most appropriate for an arbitrator to intervene. These would include cases where selectors patently acted so as:
  - a) to be arbitrary, discriminatory or act in bad faith; or
  - b) to fail to consider something that manifestly is required to be considered; or
  - c) to consider something which manifestly was not allowed to be considered.
47. The fact is that the original NTC was not properly constituted and so could not properly make a decision based upon whatever factors were before it at that time. Once properly constituted, other factors were brought to its attention which



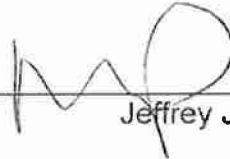
- it had the full right as per the Selection Criteria to take into account when making its decision.
48. I cannot find that it was wrong to consider these factors to the extent it did. It saw them as relevant, and so it would have been wrong not to consider them in fulfilling its role to rank the athletes in the order that they were likely to finish the 2019 FISU Games. In other words, the NTC was obliged to nominate the athlete it felt would have the best chance of success, and to do that it considered what it felt to be relevant.
  49. While Ms. Abdul-Rashid properly may suggest that a different conclusion could have been reached, I cannot find that such a different conclusion necessarily had to have been reached. I find no basis to believe that any of the selectors misinterpreted the material before them or had incorrect data before them. Rather, they reasonably considered accurate data and concluded that this supported the selection of Ms. SpearChief-Morris for the nomination.
  50. It is not surprising that we have different conclusions asserted based on the data provided. However, particularly when comparing two athletes who have not competed head-to-head, it would be extremely difficult to state categorically that the conclusion reached here is so inappropriate as to warrant being overturned by me.
  51. Ms. Abdul-Rashid did raise a concern before me that she had not been advised specifically of a deadline in which to file her submission prior to the second vote. While that is true, it was evident to all concerned that this was a very time sensitive matter. Despite knowing the appeal was underway and being invited to provide a submission, Ms. Abdul-Rashid did not respond, did not indicate she wished to participate in any way, did not provide a submission of any sort or indicate she wanted to provide a submission, nor did she ask by when a submission would be required.
  52. I find that proceeding in the absence of a submission from her, and not proactively imposing a hard deadline for a submission, do not amount to anything that could reasonably be considered to be arbitrary, discriminatory or in bad faith.
  53. I note Ms. Abdul-Rashid certainly did have the full opportunity to file whatever submission she chose in this process before me, and did so. I heard her assessment of herself and Ms. SpearChief-Morris based on the factors listed in the Selection Criteria, and certainly respect her opinion that she ought to have been selected ahead of Ms SpearChief-Morris. Indeed, four members of the initial NTC and one member of the reconstituted NTC shared the very same opinion based on the information before them, and I cannot criticize them one bit for that. That said, I personally find her submissions less compelling than those of Ms. SpearChief-Morris and find that, even if Ms. Abdul-Rashid's

submissions had been provided to the NTC prior to the second vote, it likely would not have changed the results of that second vote.

54. As a result, I must dismiss the appeal.

55. I thank all parties concerned and their representatives for the professional and courteous way in which they conducted themselves, and for the efficient and focused manner in which their cases were presented.

Signed in Winnipeg, Manitoba, this 10<sup>th</sup> day of June, 2019.

  
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Jeffrey J. Palamar, Arbitrator