



## **Introduction**

1. Kane Radford is a 17 year old swimmer who competes mainly in long distance freestyle events both in the pool and in the open water. He aspires to represent New Zealand in the marathon 10k open water event at the forthcoming Beijing Olympic Games. He has appealed against the decision of Swimming New Zealand Incorporated ("**SNZ**") not to select him for the World Open Water Championships to be held in Seville, Spain from 29 April to 5 May 2008 *"and the decision not to nominate him for the Olympics"*.
2. As entries for the World Championships close on 1 April 2008, it was necessary to expedite the hearing of the appeal. A hearing was held in Auckland on 20 March 2008. The hearing was arranged at a procedural conference prior to which SNZ had indicated that it accepted the Tribunal's jurisdiction. Shortly prior to the hearing it indicated through its solicitor that it challenged the jurisdiction. Because of the exigencies of time it was necessary to proceed with the hearing and consider both the jurisdictional and substantive issues at the same hearing.
3. After the hearing the Tribunal issued a decision, without reasons, dismissing the appeal. It stated it would give the reasons as soon as possible and now does so.

## **Background to the Selection Criteria and the Selection Process**

4. It is necessary to state the background to both the selection criteria and the selection to understand both the jurisdictional and the substantive submissions.
5. The marathon 10k open water event is being staged for the first time at an Olympic Games at Beijing. FINA has designated qualifying opportunities for competitors for the event.
6. The field is to comprise 25 competitors with a maximum of two from any one country. The qualifying requirements are:

- (a) The top 10 finishers at the World Marathon 10k Championship in Seville to be held in May next ("the **World Champs**") automatically qualify.
  - (b) The fastest swimmer in each of the five FINA regions and from a country not already qualified in the top 10, will be automatically qualified.
  - (c) China will receive one or possibly two entries.
  - (d) The field will be topped up to 25 by qualifying the top 9 or 10 finishers in an Olympic qualifying marathon 10k to be held in Beijing on 31 May 2008 ("the **Beijing Qualifier**").
7. It is apparent from the FINA qualifying criteria that Kane had three opportunities to qualify:
- (a) by finishing in the top 10 in the World Champs;
  - (b) by winning the Oceania regional event;
  - (c) by being one of the top 10 qualifiers at the Beijing Qualifier.
8. SNZ in consultation with the New Zealand Olympic Committee ("**NZOC**") determined that if a New Zealander finishes in the top 10 at the World Champs, he will be nominated for the Beijing Olympics, but if a New Zealander is offered a place through winning the Oceania event, he must also finish in the top 16 at the World Champs to qualify. The SNZ statement of defence in the appeal, although there was no direct evidence on this point, states that a decision was made by it and accepted by NZOC that to equate with pool events, qualification for the Olympics was required through one event only, the World Champs. A pool swimmer must qualify through the one qualifying event. The effect of these decisions was that for Kane to qualify for selection to the Olympics he has to finish in the top 10 at the World Champs, or in the top 16 if he won the Oceania event.

9. The SNZ selectors in consultation with the programme manager responsible for open water swimming, determined selection criteria for the 2008 Oceania Championships, the 2008 World Champs and the Beijing Olympics. In December 2006, it published this criteria on its website. The primary selection meet for the World Champs was the Australian 10k Open Water Championship to be held on 7 December 2006. No selection criteria were imposed for entry into this championship. The relevant criteria as it appeared on the website was in a document headed "Beijing Selection Pathway Criteria":

(a) World Open Water Championships:

Selection of up to two male and two female swimmers will be at the sole discretion of the SNZ selectors who will take into consideration the overall standard and depth of the Australian championship field and the potential world competitiveness of the NZ Swimmers under consideration.

(b) Olympic Marathon 10k:

The primary selection meet was to be the 2008 World Open Water Championships and the criteria was stated:

(i) Swimmers finishing in the top 10 will be selected.

(ii) Any swimmer receiving an invitation from FINA based on Continental (Oceania) qualification will be selected providing they finish in the top 16 at the primary selection meet.

The criteria also noted that no swimmer was to be sent to the Beijing Qualifier on 31 May.

10. It is SNZ's position that the qualifying criteria remained the same until early November 2007. Notwithstanding this, the administration of SNZ on 19 October 2007 sent to all swimmers intending to compete in the Australian Champs an email advising that those championships were the trials for both the Oceania Championship and the World Champs. It advised swimmers that they were required to finish in the top three or within 10 minutes of the winner of the Australian Championship to be eligible to compete in the Oceania Championship and *"must finish either in the top 3 or within 3 mins of the winner of the 2007 Australasian*

*OWS Championships*” to be eligible for the World Champs. SNZ says this email was not correct and was sent in error.

11. The position changed in early November 2007. Swimming Australia restricted entries to the Australian Championships to swimmers eligible to represent Australia. Evidently that decision was based on a concern that foreign swimmers who had already qualified for the World Champs would strategically target the top Australian swimmers, particularly Grant Hackett, with a view of eliminating them from the running. The event which was to be the qualifying event for New Zealand swimmers seeking to go to both the Oceania and the World Champs was no longer available.
12. Within a couple of days of receiving this advice, a conference call was held between the SNZ selectors, the programme manager responsible for open water swimming and the national open water coach. As a result, new selection criteria were agreed, such criteria being placed on the SNZ website on 7 November 2007 and emailed to the six swimmers who had indicated an interest in entering the Australian Championships. Those six New Zealand swimmers who had intended to go to Australia were invited to compete in the Oceania Championships. Kane Radford was included. The selectors advised that there were two alternatives to obtain selection for the World Champs but only one of those is relevant to the appeal. The swimmers were notified:

Selection of up to two male and two female swimmers will be at the sole discretion of the SNZ selectors who will take into consideration the overall standard and depth of the Oceania Championship field and the potential world competitiveness of the NZ Swimmers under consideration.
13. The advice made no mention of the Olympic qualifying standard, but SNZ says this was not necessary as it remained as had been advised in December 2006. The primary selection meet was the World Champs in Seville with the requirement that a swimmer finish in the top ten with also the possibility that a person invited by FINA because of winning the Oceania qualification was entitled to be selected provided he finished in the top 16 at that meet.

14. Seven competitors competed in the Oceania Championship at Lake Okataina on 3 February 2008. The event was won by Trent Grimsey of Australia in 1:59:34.8 with Kane Radford second in 1:59:53.2 and Blake Collis of Australia third in 2:00:06.9. It appears that the only other competitive swimmer in the event was Philip Ryan of New Zealand.
15. The SNZ selectors met after the event. They decided not to select a competitor to compete in the World Champs. It is, in effect, this decision that Kane Radford appeals.

### **Jurisdictional Challenge**

16. The basis of the Tribunal's jurisdiction is contractual, namely the contractual relationship between members of a national sporting organisation and the organisation itself. In the case of SNZ, the contractual appeal right is contained in rule 23.2 of its constitution which states:

NZOC Nomination Disputes

Where any member wishes to dispute his or her nomination or non-nomination by SNZ to the New Zealand Olympic Committee, SNZ and that member agree to refer that dispute to the sole and exclusive jurisdiction of the New Zealand Sports Tribunal for a final and binding decision.

17. In his notice of appeal, Kane Radford dealt with the jurisdictional basis of his appeal by stating:

SNZ did not select Kane Radford for the 2008 World Open Water Swimming Championships (the World Champs), the only event designated as a qualifying event for the 10k Open Water Swimming event at the 2008 Olympics, and in announcing that decision made it clear that it had decided not to nominate Mr Radford for the Olympics. Rule 23.2 of the SNZ Constitution provides that where any member wishes to dispute his/her nomination or non-nomination by SNZ to the New Zealand Olympic Committee, SNZ and that member agree to refer that dispute to the sole and exclusive jurisdiction of the New Zealand Sports Tribunal for a final and binding decision. It is submitted that Rule 23.2 of the SNZ Constitution applies.

18. At the hearing Mr David for Kane Radford also submitted that SNZ "*is barred by its express acceptance of jurisdiction before the Tribunal*". This submission is based on the following:
- (a) On receipt of the notice of appeal, the Tribunal sent a memorandum to the parties noting the urgent need to resolve the matter because of the date on which entries closed for the World Champs. A telephone conference was convened for 12 March 2008 and the memorandum convening the conference indicated the matters to be dealt with at the conference including:
    - (i) *Jurisdiction – is it accepted or is it challenged?*
  - (b) The memorandum was emailed to the parties on the afternoon of 10 March 2008. Approximately 24 hours later the Chief Executive of SNZ sent an email to the Registrar of the Tribunal and in reply to the jurisdictional question answered "Accepted".
19. At the hearing SNZ's position on jurisdiction was:
- (a) The Chief Executive's indication of "acceptance" could not be binding on SNZ as it had been given without seeking legal advice. It could not amount to an agreement as there was no consideration for such an agreement and it could not amount to an estoppel as Kane Radford had not acted to his detriment as a result.
  - (b) The plain wording of rule 23.2 was such that an appeal for non-selection to the World Champs did not fall within it. Because Kane Radford had not been selected for the World Champs he was not eligible to be nominated for the Olympics and the Tribunal therefore did not have jurisdiction.
20. The submission on behalf of Kane Radford was that a reasonable person would say that a decision not to select a person eligible for nomination for a trial at which he or she might qualify for the nomination for another event was a decision not to nominate the person for that other

event. It was a decision not to nominate for the final event taken at an earlier stage. A reasonably objective interpretation of rule 23.2, given its purpose of allowing athletes to refer disputes to this Tribunal, is that a decision not to send someone to a trial for the Olympics is in effect a decision not to nominate for the Olympics.

21. On the face of it, Mr Smyth's submissions for SNZ have force. Rule 23.2 applies to a "*non nomination by SNZ*" to the NZOC. SNZ has agreed with NZOC that it will not make a nomination unless a swimmer qualifies by finishing in the top ten or possibly the top 16 at the World Champs. Given its clear and ordinary meaning, rule 23.2 does not apply to a non-nomination to the World Champs. It is however necessary to consider whether in the circumstances of this case the term "*non-nomination by SNZ to the NZOC*" has a wider meaning.
22. SNZ was in an awkward situation when Swimming Australia prevented the New Zealand swimmers from swimming in the Australian Championships. Its pathway to Beijing required a successful nominee to have reached a certain standard at the World Champs, but also provided that to get to the World Champs, the swimmer had to swim at the Australian Championships. It altered its criteria for qualification for the World Champs by inviting those swimmers who were going to swim in Australia to swim at the Oceania Champs and decided to use that event as the qualifying event for the World Champs. It followed from its pathway to Beijing criteria that nomination or non-nomination for the World Champs had two possible effects:
  - (a) Non-nomination closed the pathway to the Olympics; and
  - (b) Nomination opened the pathway and thereafter nomination to the Olympics depended on performance at the World Champs. The placing at those championships was determinative as the criteria provided that a swimmer reaching the required standard "*will be selected*".



23. It follows from this analysis that the important selection decision for a swimmer was nomination or non-nomination for the World Champs. If nominated, his ultimate selection to the Olympics depended upon his own performance objectively assessed at Seville. Thus by not nominating Kane Radford the selectors effectively made the decision that he would not be nominated for the Olympics. It is correct, as Mr Smyth submitted, that if he had been nominated he still only had a chance of qualifying for the Olympics. However, the point is that the chance depended upon results and not upon any further selectorial decision. The important selectorial decision was made when it was determined he should not go to the World Champs. In these circumstances, the Tribunal considers that rule 23.2 should be given a wide interpretation to cover the circumstances of a case where, effectively, the decision to non-nominate a person for the Olympics is taken one step further back from the final Olympic trial. This is particularly so in a case where there is no other right of appeal against non-nomination. Each case will depend upon its own particular circumstances, but in the circumstances of this case, the Tribunal is of the view that the decision not to nominate Kane Radford for the World Champs was a non-nomination for the Olympics.
24. In the circumstances, it is not necessary to determine whether SNZ agreed to jurisdiction when its Chief Executive "accepted" jurisdiction. If it had been, the Tribunal would have determined that there was no agreement within the provisions of the Tribunal's Rules.
25. In the circumstances, the Tribunal accepted jurisdiction.

### **The substantive issue**

26. The grounds of appeal appearing in the Notice of Appeal were:
- (a) the applicable selection criteria were not properly implemented and/or followed; and

- (b) there was no material on which the selection decision could reasonably be based.
27. Some of the submissions made in support of Kane Radford went further than these grounds of appeal, particularly in the area of failure to observe natural justice. SNZ, in its constitution, does not have grounds for appeal so the grounds relied upon are those in the Tribunal's rules.
28. Mr David, in his submissions, suggested that both the process in changing the qualifying criteria in November 2007 and in the selectorial process deciding not to nominate Kane Radford were flawed. Before addressing these two issues, it is necessary to refer to the email sent out by the SNZ office to the swimmers on 19 October 2007 which SNZ now says was sent in error and did not contain the correct criteria. Mr Gordon, the author of the email, gave evidence by telephone but it is still unclear to the Tribunal as to how the error occurred. Mr Gordon said he does not recall where he got the criteria from but believed it was from a meeting with Mr Power, the Youth Programmes Manager of SNZ and that a copy of the email had been sent to Mr Rushton, the High Performance Programmes Director for SNZ. Mr Rushton believed he has not seen the email.
29. The Tribunal accepts that the criteria stated in the email was at variance with the policy which has been on SNZ's website since December 2006. It could have been a source of embarrassment for SNZ if the New Zealand swimmers had been allowed to swim in the Australian championship. However, the Tribunal has concluded that it is not relevant to this appeal. This is because if any athlete was confused, and there is no evidence of this, the confusion would have lasted for less than three weeks. The email of 7 November 2007 clearly stated the selection criteria. Further, the wrongfully advised criteria could not have been implemented because of the inability of New Zealand swimmers to compete in the Australian Championships.
30. When Swimming Australia prevented New Zealand swimmers from competing at the Australian championships, it was necessary for SNZ to

change its criteria for selection for the world champs. The new criteria differed in one respect only from the previous criteria. The event to be taken into consideration was the Oceania Championship and it was the standard and depth of that championship that was now to be considered, rather than the standard and depth of the Australian Championship. Under both criteria, the selectors were to have a "*sole discretion*" and were to consider "*the potential world competitiveness of the swimmers under consideration*". There were two principal complaints made relating to the change of criteria. First, that the swimmers were not consulted on the change to place the emphasis on the Oceania Championship and, secondly, that there was not a proper consideration of the other alternatives.

31. Mr Rushton's evidence was that when the Australian opportunity was closed, the New Zealand selectors, the programme manager responsible for open water swimming and the National Open Water Coach held a conference call at which it was determined that the only option was to use the Oceania Championship as the selection competition. Mr Follows, another selector who provided a witness statement, confirmed this view. Mr Follows stated that it was acknowledged "*that the selection going forward was going to have to be subjective as at the time the selection panel was unaware of the strength of the 2008 Oceania 10 Km Open Water Championship field and also, given the uniqueness of open water swimming, i.e. water and air temperatures, water conditions.*" Both Mr Rushton and Mr Gordon were cross-examined on the failure to look at other alternatives and both indicated that other alternatives had been looked at. It is clear that the swimmers concerned were not consulted.
32. The Tribunal is of the view that it would have been good practise to have consulted with the swimmers who were likely to be affected. There were only six of them. There are two reasons for this view. First, swimmers who were preparing for the Australian Championships in early December were now being asked to qualify in an event two months later. Their training schedules may have been affected.

Secondly, as appears below, there were other alternatives which could have been considered. The input of the swimmers may have assisted the decision-making process. It would have been prudent to have consulted with the swimmers who had, no doubt, trained for some time for a particular qualifying event on the changed criteria for qualifying. A decision made in good faith may well be undermined if proper consideration of the athlete's position is not taken into account. However, the Tribunal is of the view that there is no absolute requirement to consult. In the circumstances of this case, it is of the view that the lack of consultation does not undermine the selectorial decision.

33. Three possible alternatives to the criteria adopted were put to SNZ's witnesses in cross-examination. The three alternatives were:
- competing in the 5km race at the Australian Championships,
  - accepting an invitation from the Australians to stage a 10km time trial within the 25km marathon race at those championships; and
  - competing at the Beijing Qualifier.
34. The Tribunal accepts that these three alternatives were available although it is not in a position to judge the efficacy of a 5km race as a trial for a 10km race, or of the value of the time trial, possibly only between two or three New Zealand swimmers, in a much longer race. The Beijing Qualifier could obviously not be utilised as a qualifying race for the World Champs which, by agreement with the NZOC, were to be the primary selection meet for the Olympics.
35. In the circumstances, the Tribunal is not persuaded that the switch from the Australian Championships to the Oceania Championships was one that the selection panel was not entitled to make. It accepts that the standard of the Oceania Championships was likely to be much less than that of the Australian Championship, and this turned out to be the case. Nevertheless, in the circumstances, Kane Radford does not have any grounds of appeal based on the change of criteria.

36. It was also submitted on behalf of Kane Radford that the selectorial decision itself was flawed as procedures had not been properly followed, there was no material on which the selectors could reasonably base their decision, and there was a lack of fairness and natural justice. Matters which were particularly referred to included:
- (a) that the sole discretion criteria should not have been agreed and there should have been objective criteria;
  - (b) the grounds upon which the selection panel came to its decision were flawed;
  - (c) the selection panel failed to give reasons.
37. The Tribunal notes that Kane Radford has had considerable success in his swimming career and has received reasonably substantial support from SNZ. He represented New Zealand at the World Champs in 2006 and in 2007. He came 26<sup>th</sup> in the 10km event in 2006 and 36<sup>th</sup> in 2007. He has held NZ age group records and is obviously a very promising swimmer. Just prior to competing in the Oceania Championships in February, he was invited to train with the United States Open Water Swim Team at an altitude training camp and did so. Last year he was part of an SNZ youth development team that went to the United States, where he competed with some success. The Tribunal can understand his disappointment at not being nominated.
38. The SNZ selection panel comprises three experienced members, namely its high performance programme director Clive Rushton, Bret Naylor and Darryl Follows. All three selectors have had considerable success in swimming and in coaching. Messrs Rushton and Follows were at the Oceania Championships at Lake Okataina.
39. The evidence is that Mr Rushton called a meeting of himself, Mr Follows and Mr Power after the 10k race. Mr Power was asked to give his assessment. He made various comments, some of which form the basis of the reasons later given for the decision. These included alleged tactical errors. Mr Power was then excused from the meeting and a

conference call was held between the three selectors. Mr Naylor, who was not present at the lake, provided a witness statement in which he said the decision not to select Kane Radford was taken very seriously and every aspect of the selection process was carefully discussed. He did not elaborate on this.

40. Mr Follows' witness statement expressed the view that Kane Radford did not show enough aggression or tactical nous that he could compete at a higher level at this stage of his development. He was of the view that it was highly unlikely that he would be competitive at the World Champs. Mr Rushton who convened the meeting said that he was careful to ensure that they covered all aspects and considerations including the implication of any non-selection on Olympic nomination. He said the decision was unanimous. Mr Rushton prepared a report for SNZ. He noted the conditions on the lake were perfect and detailed the position of the selectors. In respect of Mr Radford he said:

Kane Radford showed neither aggression nor commitment to the race, at one point late in the race leading the Australians but then deliberately letting them take the lead and still not drafting closely to stay in touch. Kane ignored pre-race instructions regarding swimming inside the buoys which let the technically astute Australian gain a 30m lead which he held to the finish.

41. In respect of the decision not to select any New Zealand swimmer for the World Champs, the report said:

This decision was taken after thorough and detailed examination of the Oceania 10k race results and tactics. Selectors Clive Rushton and Darryl Follows were present at the event, Bret Naylor was included on the conference call and updated on the race and the OW Programme Manager Clive Power was included in the initial conference call discussions to ensure that all the vagrancies of open water were covered off given its uniqueness.

42. A submission on behalf of Kane Radford was that the published criteria and the email of October 2007 was replaced with the exercise of "*sole discretion*". It was submitted that it is impossible to know what this means and the athlete is completely in the hands of those who are exercising the discretion. As has been noted, the sole discretion aspect

was in the criteria from December 2006. It was further submitted that it was a breach of natural justice to select on sole discretion. An athlete does not know what he has to take into account and this is fundamentally wrong as he has no objective measures on which to base his performance.

43. The Tribunal agrees that an athlete is entitled if circumstances permit to have an objective criteria against which to measure expectations and performances. However, it does not agree that there were not objective criteria involved in the selection criteria for the World Champs. The selectors were required to take into consideration the overall standard and depth of the Oceania Championships and the potential world competitiveness of the New Zealand swimmers. As noted, there were three experienced persons on the selection panel.
44. In its statement of defence SNZ stated that certain factors had been taken into account. It did not provide evidence of some of these. If these indeed were the factors taken into account, it is unfortunate and in the Tribunal's view bad governance not to have advised Kane Radford of these before they appeared in a statement of defence filed in this hearing. Some of the matters relied upon may have assumed lesser importance if they had been discussed with Kane Radford before the selection meet. It is also surprising that some of these did not appear in the statements of the selectors filed in the hearing. In making this comment, the Tribunal appreciates that SNZ co-operated by having the statements filed at short notice in order to meet the strict time limits imposed by the Tribunal. However, one reason given, namely attention to nutrition, appears to have been an afterthought after the decision was made.
45. Notwithstanding the lack of communication between SNZ and the swimmer, the Tribunal is of the view that the three experienced selectors did form the view that taking into account both the standard and depth of the Oceania field (there were really only four competitive swimmers and the winner finished 16<sup>th</sup> in the Australian championship and will not represent Australia) and the manner in which Kane Radford

swam the race, that he is not potentially world competitive at the moment. The selectors expressed the view that he has potential. The Olympics can be expected to attract a very high standard of competitor and the Tribunal accepts that the selection panel formed the view that Kane Radford was not likely to be world competitive at this stage of his young career. It made a discretionary decision, based in part on objective factors but in doing so applied subjective judgment. In the circumstances, three experienced selectors were obliged to use their knowledge and experience in making the decision.

46. In retrospect, it is possible to point to matters that the selectors may not have taken into account and to suggest that if the selectors had reservations about certain aspects of the race they should in fairness have discussed the same with Kane Radford before determining not to nominate him. He may have been able to alleviate some of their concerns including the suggestion that he did not follow pre-race instructions. Although this allegation was made by SNZ, there was no evidence to substantiate it. However, as noted in *Wealleans v Basketball NZ Inc* ST 01/07, selectors are chosen for their expertise in making decisions and the practical difficulties of consultation prior to selection are obvious. The Tribunal does not consider that the failure to consult in this case is sufficient ground to overturn the decision.
47. The Tribunal accepts that the selectors acted with best intent and came to a decision they were entitled to make. They gave reasonable consideration to the non-nomination. However, on the evidence, they may have erred in taking into account a failure to follow race tactics without knowing what those tactics were. They did, however, have experience to assess potential world competitors in the one event, which by agreement with NZOC, was to be the one chance for selection. There are no grounds upon which the Tribunal can determine that this was a decision which no properly qualified panel was entitled to make.
48. It was suggested on behalf of Kane Radford that finance may have been a factor in the decision. SNZ denies this and the Tribunal does not find that finance was a factor.



49. In the circumstances, the Tribunal finds no grounds on procedural unfairness or breach of natural justice to set aside the decision of the selectors. It notes that if it had come to a contrary view it would not itself have made the selection in this case, but would have referred the matter back to the selectors with directions as to the matters which they were required to take into account to consider whether or not Kane Radford was potentially world competitive at this stage as required by the criteria.

Dated 8 April 2008



.....  
**Hon B J Paterson QC**  
**Chairman**