



Tribunal Arbitral du Sport
Court of Arbitration for Sport
Tribunal Arbitral del Deporte

COURT OF ARBITRATION FOR SPORT (CAS)
Ad Hoc Division – Games of the XXXII Olympiad in Tokyo

CAS OG 20/03 Jennifer Harding-Marlin v. St. Kitts & Nevis Olympic Committee & International Swimming Federation (FINA)

AWARD

in the arbitration between

Jennifer Harding-Marlin

..... (“Applicant”)

and

St. Kitts & Nevis Olympic Committee

..... (“First Respondent”)

and

International Swimming Federation (FINA)

..... (“Second Respondent”)

and

International Olympic Committee (IOC)

..... (“First Interested Party”)

and

St. Kitts & Nevis Swimming Federation

..... (“Second Interested Party”)

1. PARTIES

- 1.1. The Applicant is Jennifer Harding-Marlin, a citizen of St. Kitts & Nevis. She is a swimmer and a member of the St. Kitts & Nevis Swimming Federation (SKSF).
- 1.2. The First Respondent is the St. Kitts & Nevis Olympic Committee (SKNOC), which is the National Olympic Committee of St. Kitts & Nevis. Pursuant to the Olympic Charter (OC), Chapter 4, Rule 27.7.2, the SKNOC has *'the right to send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter'*.
- 1.3. The Second Respondent is the International Swimming Federation (FINA), which is the worldwide governing body for swimming.
- 1.4. The First Interested Party is the International Olympic Committee (IOC), which is the organisation responsible for the Olympic movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organise, plan, oversee, and sanction the summer and winter Olympic Games, fulfilling the mission, role and responsibilities assigned by the OC.
- 1.5. The Second Interested Party is the SKSF, which is the national federation responsible for the sport of swimming in St. Kitts & Nevis.

2. FACTS

- 2.1. The elements set out below are a summary of the main relevant facts as established by the Panel by way of a chronology on the basis of the submissions of the parties. Additional facts may be set out, where relevant, in the legal considerations of the present award.
- 2.2. Between 12 and 28 July 2019, the Applicant, represented the SKSF in the 18th FINA World Championships 2019 in Gwangju, Republic of Korea, finishing 41st out of 48 competitors in the Women's 50m backstroke.
- 2.3. On 14 August 2019, the Applicant informed the SKNOC about her experience participating in the FINA World Championships. She also indicated, *inter alia*, as follows:

"I have qualified for the Olympics with a Universality spot for swimming. In order to be eligible to compete, the St.Kitts & Nevis Olympic committee must confirm my universality spot (for 200 backstroke) when an invitation is extended. I think this could be a great opportunity for the country to promote sports and tourism."
- 2.4. On 15 August 2019, the Secretary General of the SKNOC acknowledged receipt of the Applicant's email dated 14 August 2019.
- 2.5. On 29 October 2019, the Minister of Foreign Affairs and Aviation of St. Kitts & Nevis informed the President of the SKNOC as follows:

“On behalf of the government of St.Kitts & Nevis, please accept this letter as an acknowledgement of our support for the St.Kitts & Nevis Swimming Federation to gain affiliation membership with the St.Kitts & Nevis Olympic Committee. We support the development of swimming programmes locally and do hope to obtain assistance from FINA to have a competitive swimming pool built in our country.

We also support St.Kitts & Nevis athlete, Jennifer Harding-Marlin, for the application of a Universality spot to compete at the 2020 Olympics in Swimming.”

2.6. On 5 December 2019, the Secretary General of the SKNOC responded to an email from the Applicant dated 3 December 2019, informing her that a formal process of affiliation of the SKSF to the SKNOC had been initiated and asking her that all further communication concerning such request for affiliation be channelled through President Crooke.

2.7. On 3 December 2020, the Applicant updated the SKNOC of her progress in swimming and indicating, *inter alia*, as follows:

“Following the St.Kitts & Nevis Olympic trials in Jamaica in February, I would like to continue to plan my season in preparation for the Olympic games. A lot of planning and work needs to be put into training as well as booking accommodations, flight tickets etc. I would like to request that the St.Kitts & Nevis Olympic Committee consider my application for the Universality spot in swimming and that hopefully an application can be made soon so that I can plan future training camps and make further arrangements. I am currently training mainly for the 100 meter backstroke where I do hope to continue to improve. I am very proud to represent St.Kitts & Nevis. It has been great to meet with top swimmers from other countries. Other swimmers and coaches are taking notice of St.Kitts & Nevis and the progression I am making personally as well as the development of the sport of swimming in St.Kitts & Nevis.”

2.8. On 6 February 2020, Mr Dennis Knight, Vice President of the SKNOC, informed the Applicant, *inter alia*, as follows:

“Thank you for your email of 3rd February 2020.

[...]

Your President has made formal contact with the SKNOC on both matters. That is, the application for membership of the SKNOC and the inclusion of a swimmer at the XXXII Olympiad in Tokyo. President Bridgewater, who is still officially out of office has now directly charged me with responding to both requests. I have, just recently, sent communication to Mr. Crooke, although the office had previously acknowledged his correspondence.

Now that these lines have been established I am asking that you direct all of your correspondences through your President, Mr. Crooke, as he will be my point of interaction with the St. Kitts and Nevis Swimming Federation.”

- 2.9. On 8 February 2020, the Applicant sent an email to the Vice President of the SKNOC to arrange for an in-person meeting.
- 2.10. On 30 March 2020, the Applicant sent an email to the Vice President of the SKNOC, *inter alia*, thanking him “for taking the time to meet with me last week” and indicating that she hoped “to continue to represent St.Kitts & Nevis at future swimming competitions and hopefully the Olympic games that will be held next July 2021”.
- 2.11. On 14 April 2021, FINA notified the SKNOC (sknoc@sisterisles.kn) and the SKSF that the Applicant was eligible to apply for an entry under the Universality Place for the Tokyo OG as the sole eligible swimmer representing the St. Kitts and Nevis. The letter was intended to inform both the SKNOC and the SKSF about, *inter alia*, the timeline concerning the application process, including the deadline of 7 May 2021 for the preliminary selection of the swimmers. Neither the SKNOC nor SKSF responded to FINA.
- 2.12. On 4 June 2021, FINA circulated a letter to the Presidents and Secretary Generals of the NOCs and NFs subject to Universality Places for Tokyo OG to advise that the final selection of their swimmers should be submitted by 20 June 2021. Neither the SKNOC nor SKSF responded.
- 2.13. On 5 July 2021, Mr Pere Miro of the IOC, informed Mr Richard Pound, IOC member, by email as follows:

“Let me update you about the situation that unfortunately and contrary to our expectations has not evolved in favour of the athlete inscription to the Games.

Since we were aware of the issue (thanks to you mainly), we have been in permanent contact with the NOC and FINA to understand better the situation and to help the athlete to be registered by the NOC.

After many talks and not easy discussion with the NOC, the main elements that lead to their current position are:

** They don’t know the athlete. She has never been in direct touch with them and they don’t know her real performance level and her personal behaviour, both aspects falling under the NOC responsibility when they bring athletes to the Games.*

** The Swimming NF is not member of the NOC, however its FINA membership. It seems that they never have applied.*

We will continue trying but I guess the possibilities are minimal. Maybe if the athlete speaks directly with them has a last chance. There are still a few days for exceptional cases registration. [...].”

- 2.14. On 5 July 2021, the Applicant issued an email addressed to the SKNOC, copying several representatives of the SKNOC, including the President, indicating as follows:

“It has been suggested that I contact you directly as a result of your responses to the IOC. It has been a few years that I have been communicating with you regarding my participation in the upcoming

Olympics in Tokyo and the development of the sport of swimming locally. I have met with Dennis Knight, the Vice President of the SKNOC, in person in the past and have previously provided you with reports on past performances. I have attached some of them below here for you.

I would like you to kindly reconsider your position on this matter. It would be great to have a swimmer representing St.Kitts & Nevis for the first time. I have been training for years and have competed at many competitions representing the country. I have won medals and set new national records at international competitions.

I note that a Universality spot was given to a track and field athlete and there is also one available universality spot for swimming which does not impact any other athlete in the country. I was wondering why I am not able to participate in representing S.Kitts & Nevis at the Tokyo Olympics? I am a citizen and have lived in the country for many years. I would be really grateful if we can come to a consensus as the clock is ticking down. I don't want to fight or argue with anyone. I just think it would be great for everyone involved for me to participate at the Olympics and hopefully this could lead to the increase in people's participation in the sport locally. There has been lot's of development of the sport of swimming locally over the years with the creation of the swim to win program and the in ocean swimming equipment from FINA. The St.Kitts & Nevis Cross Channel swim is an international swimming race that has been going on for years and draws in competitors from all around the world."

- 2.15. On 6 July 2021, FINA, learning that the Applicant had communicated with the SKNOC in relation to her participation in the Tokyo OG through the Universality System but noting that the SKNOC did not enter her, the Executive Director of FINA sent a follow-up letter to the President of the SKNOC, and the President of the SKSF to ask for reconsideration of their decision not to enter Ms. Harding-Marlin in Tokyo 2020.
- 2.16. On 13 July 2021, and in response to FINA's letter dated 6 July 2021, the President of the SKNOC, Mr. Bridgewater, informed the Executive Director of FINA that the SKNOC would not enter the Applicant in the Tokyo OG. No explanation was provided.
- 2.17. On the same date, the President of the SKNOC issued a letter (the Appealed Decision) to the Applicant informing her as follows:

"Your email of 9th July 2021 refers.

Please be advised that you have not been selected to represent St. Kitts and Nevis at the XXXII Olympiad in Tokyo. You have, therefore, not been registered or listed with any of the Games authorities in Tokyo. Any other information which you receive to the contrary is incorrect.

Please be so guided."

3. CAS PROCEEDINGS

- 3.1. On 18 July 2021 at 11 :55 am (time of Tokyo), the Applicant filed an Application with the CAS Ad Hoc Division against the Respondents with respect to the Appealed Decision.

- 3.2. On the same day, at 15 :37 pm (time of Tokyo), the CAS Ad Hoc Division notified the Application to the Respondents and invited them to file their Answer by 18 July 2021 at 9.00 pm, time of Tokyo. Within the same deadline, the Interested Parties were informed of their entitlement to file an *amicus curiae* brief if it wishes to do so. Furthermore, the CAS Ad Hoc Division notified the Parties that the Arbitral Tribunal is composed of:

President : Mr Manfred Peter Nan, Attorney-at-Law, Arnhem, the Netherlands;

Arbitrators :Prof. Lu Song, Professor, Beijing, China;

Prof. Avv. Luigi Fumagalli, Professor and Attorney-at-Law, Milano, Italy.

- 3.3. On the same day, at 19:58 pm (time of Tokyo), the IOC informed the CAS Court Office as follows: *“On behalf of Ms. Mariam Mahdavi, IOC Director of Legal Affairs, we note that the dispute at hand essentially concerns the relationship between the National Olympic Committee, the International Federation and the athlete. No applicable decision of the IOC is concerned. Furthermore, there is no legal basis for obliging the IOC to accept the entry of the Appellant. Subject to the above, the IOC defers to the CAS Ad Hoc Division on the merits of the case and does not intend to participate in further proceedings.”*

- 3.4. On the same day, at 20:59 pm (time of Tokyo), FINA filed its Answer with exhibits.

- 3.5. On 19 July 2021, the SKNOC requested time *“to engage a legal counsel, consider the appeal and prepare a response.”*

- 3.6. On 19 July 2021 at 09:00 am [time of Tokyo], a hearing was held by videoconference. The Panel was joined at the hearing by Mr Antonio DE QUESADA, Counsel to the CAS. The following persons also attended the hearing:

for the Applicant: Jennifer Harding-Marlin, by video;

Yoko Maeda, counsel, in person;

So Miyamoto, counsel, in person;

for the First Respondent: Alphonso E. Bridgewater, President, by video;

Glenville Jeffers, Secretary General, by video;

Dennis Knight, Vice-President, by video;

Lester Hanley, Chef de Mission, by video;

for the Second Respondent: Justin Lessard, in-house counsel, in person;

for the Second Interested Party: Winston Crooke, President, by video.

- 3.7. At the outset of the hearing, and after a discussion about the need and the possibilities to grant the requested extension, the First Respondent agreed to continue without any delay.

- 3.8. There were no objections to the constitution of the Panel or to the Parties' rights to be heard and treated equally in these proceedings.

4. PARTIES' SUBMISSIONS

4.1. The Parties' submissions and arguments shall only be referred to in the sections below if and when necessary, even though all such submissions and arguments have been considered.

a. *Applicant's Requests for Relief and Position*

4.2. The Applicant requests the CAS to rule as follows:

- “(i) The decision of the St. Kitts and Nevis Olympic Committee dated 12 July 2021 notified in the form of declaring that Jennifer Harding - Marlin was not selected to represent St. Kitts and Nevis at the Tokyo 2020 Olympics Games be annulled;*
- “(ii) The St. Kitts and Nevis Olympic Committee be directed that Jennifer Harding-Marlin be nominated for the Women's 100 meters backstroke at the Tokyo 2020 Olympic Games;*
- “(iii) FINA be directed to approve Jennifer Harding-Marlin to compete in the Women's 100 meters backstroke at the Tokyo 2020 Olympic Games;*
- “(iv) If Jennifer Harding-Marlin cannot be entered at the Tokyo 2020 Olympic Games, that the St. Kitts and Nevis Olympic Committee be directed to inform Jennifer Harding -Marlin of reasons why she was not selected to represent St. Kitts and Nevis at the Tokyo 2020 Olympic Games and be directed to give reasons why the St.Kitts & Nevis Swimming Federation has not been able to be an affiliate member of the NOC; and*
- “(v) If due to quarantine or travel complications the athlete is unable to swim the 100 metre backstroke that FINA be directed to approve Jennifer Harding – Marlin to compete in the Women's 100 meters freestyle at the Tokyo 2020 Olympic Games.”*

4.3. In support of her application, the Applicant submits that she fulfils all the requirements to be entered to the Tokyo OG in accordance with the FINA Qualification System for the Tokyo OG (the FINA Qualification System), and more specifically as an unqualified athlete eligible for an Universality Place.

4.4. In more details, according to the Applicant, under the Qualification System a swimmer can be entered to the Tokyo OG under the Universality System when (i) there are no athletes in the country who achieved OQT/“A” Time or an OST/“B” Time; (ii) the athlete participated in the 18th FINA World Championships 2019; (iii) the athlete is approved by FINA to compete; (iv) the athlete is the highest ranked men athlete or highest ranked women athlete based upon the FINA Points Table (2021 edition). The Applicant submits that:

- i. St. Kitts and Nevis has no swimmer who achieved OQT/“A” Time or an OST / “B” Time (the first requirement);

- ii. the Applicant participated in the 18th FINA World Championships 201915 (the second requirement);
 - iii. the Applicant is approved by FINA to compete and is the highest ranked women athlete based upon the FINA Points Table (2021 edition) and is offered a Universality Place from FINA to compete in the Tokyo 2021 Olympics (the third and fourth requirement).
- 4.5. The Applicant recognizes that SKNOC has discretion as to whether or not to enter an athlete at the Olympics and to whom SKNOC enters for the Tokyo OG. However, the Applicant underlines that the SKNOC is not allowed to abuse its discretion in an arbitrary, unequal, unfair and unreasonable manner. In addition, the SKNOC is not allowed to discriminate against any athlete based on “racial, religious or political reasons or by reason of other forms of discrimination” under Article 44(4) of the Olympic Charter. As recognized in CAS precedents (CAS OG 14/001, CAS OG 12/001, CAS OG 06/002), NOCs have a legal duty not to be arbitrary, unfair, unreasonable or to act in bad faith in the exercise of subjective discretion.
- 4.6. On that basis, the Applicant contends that the KNOC discriminated against the Applicant and/or used discretion in an arbitrary, unequal, unfair and unreasonable manner. Finally, the Applicant submits that her admission is not prevented by the Olympic Charter.
- 4.7. First, the Applicant contends that the Appealed Decision is a discrimination against her based on the type of sports that she plays, i.e., “by reason of other forms of discrimination” for the following reasons:
- i. SKNOC allowed a Universality Place for one (1) female athlete in track and field, while SKNOC has not entered the only other athlete in the country offered a Universality spot, the Applicant, despite the Applicant’s request;
 - ii. there is no legitimate reason for SKNOC not to allow the Applicant to be entered in the Tokyo OG under a Universality Place:
 - a. the Applicant is fully qualified for a Universality Place, and is offered a Universality Place by FINA;
 - b. the Applicant is the only swimmer in St. Kitts and Nevis who is qualified for a Universality Place, and there is no other swimmer who has been invited under a Universality Place;
 - c. a Universality Place in swimming is separate from a Universality Place in track and field and the Applicant’s Universality Place does not affect SKNOC’s decision on any other athlete in the country;
 - d. the Applicant can afford the cost for traveling and staying in Tokyo on her own, which means there is no financial burden for SKNOC to enter her in swimming at the Olympics;
 - e. the Applicant has demonstrated consistent good performances and improvements, and has won medals at international competitions;
 - iii. not allowing the applicant a Universality Place without any legitimate reason while allowing another track and field athlete a Universality Place consists of

discrimination against her based on the sport that she plays. SKNOC has not given the Applicant the same opportunity as other athletes to represent the country under a Universality Place. In that respect, the Applicant notes that SKNOC consists of only six (6) affiliate sports federations, but the SKNSF is not an affiliate member. Among the six affiliate federations, SKNAAA (St.Kitts Nevis Amateur Athletic Association), the national sports federation for track and field, controls the majority of the SKNOC. The SKNOC has only ever entered athletes in track and field to participate in previous Olympic Games. No other sport other than track and field has participated at the Olympic Games. Given the situation in SKNOC above, the fact that SKNOC has allowed a Universality Place only for an athlete in track and field, i.e., the athlete who belongs to SKNAAA, and refusing to allow the place for athletes in other sports whose national federations are not a member of SKNOC, is a clear discrimination against an athlete based on the type of sport they practice.

- 4.8. Second, the Applicant submits that the SKNOC discriminated against her based on race, whereas discrimination against an athlete based on “racial, religious or political reasons” is prohibited under Article 44 of the Olympic Charter. In that regard, the Applicant indicates that the population of St. Kitts and Nevis is predominantly Black (92.7%) or mixed (2.2%), and only 2.2% of the population is white. The board members, including the President of the SKNOC, are all Black and both of the two athletes in track and field are also Black. Being a white woman, the Applicant is an extreme minority in the country. Given the fact that there is no legitimate reason for not allowing her a Universality Place, and that she is a minority while the decision makers in SKNOC and the two athletes are all predominant majority, the discrimination against the Applicant stated above also consists discrimination based on the race of the Applicant.
- 4.9. Third, according to the Applicant, the decision of SKNOC to allow athletes in one sport a Universality Place and not allowing athletes in other sports the same Place without any legitimate reason, consists of abuse of discretion in an arbitrary, unequal, unfair and unreasonable manner and should not be allowed. The SKNOC has acted in bad faith by having made false statements to the IOC. The SKNOC have indicated to the IOC the reasons for not wanting to accept a Universality Place for the Applicant. The SKNOC false statements are in bad faith, against the spirit of the Olympic Charter and an abuse of their discretion in granting the Applicant a Universality Place. The SKNOC has failed to treat all athletes and all sports equally and uphold the principles of non-discrimination, equality and fairness which are fundamental principles of the Olympic Charter. The SKNOC has provided no justification why the athlete is not allowed to participate in the Olympics, breaching the principles of fairness and equity.
- 4.10. Fourth, according to the Applicant, the selection procedure of athletes for the Tokyo OG was improper and unfair. Indeed, NOCs have a legal obligation for assuring its procedure to select athletes be transparent. Moreover, when selecting an athlete to be entered into the Olympic Games, the NOCs are required to conduct the selection procedure by giving proper, genuine and realistic consideration to factors that are relevant to selection of an athlete. SKNOC’s selection procedure up to and after the Appealed Decision given to the Applicant on 13 July 2021 was the opposite of being transparent. The SKNOC did not give a proper, genuine and realistic consideration to

relevant factors in the selection process. SKNOC's procedure was totally improper and unfair. The Applicant was not given the reason or grounds for the decision of SKNOC, despite her repeated requests. Instead of disclosing the reason for not wanting to enter her, the SKNOC even gave the IOC inaccurate reasons. Such behaviour of the SKNOC clearly indicates that there is no legitimate reason for not entering her to Tokyo 2020. Such behaviour not only supports the Applicant's argument on discrimination and arbitrary, unreasonable and unfair treatment of the Applicant, but also consists unlawful procedure for SKNOC to determine the athletes to be allowed a Universality Place.

- 4.11. Finally, the Appellant contends that Article 44(5) of the Olympic Charter does not apply to Universality System in the same manner with selection of athletes under other criteria, and even if it applies the Applicant has proved high level of her skills. The fact that Applicant is listed in the table of FINA is sufficient to show that the Applicant is "prepared for high level international competition". Moreover, the Applicant has shown good performance and won medals in international competitions consistently.

b. *First Respondent's Requests for Relief and position*

- 4.12. The First Respondent submits that it has no issue with the Applicant, that it did not discriminate against her and that it did not lie to the IOC. However, the First Respondent does not consider individual applications of athletes for entry into the Olympics: designation should come from the national federation. However, the SKSF is not one of the members of the Respondent. Therefore, the First Respondent is not in a position to enter any athlete designated by the SKSF, as from any other non member: inter alia, sustainability of the system prevents it from making entrees for any sport for which a designation is received.
- 4.13. Finally, the First Respondent emphasizes that it has the final decision to enter athletes into the Olympics, and that it has to respect qualification standards. In that respect, the First Respondent requests the Panel to not set a precedent for the future, admitting an Applicant who has good connections. Autonomy and sovereignty of NOCs should be respected.

c. *Second Respondent's Position*

- 4.14. In its submissions to this Panel, FINA explains its position as to the Universality System in Olympic sport, sets out its indication as to the background facts, and summarizes its positions as follows:
- i. the Universality System allows smaller nations and those with developing swimming programs to send athletes to the Olympics. The main Olympic qualifying criteria set up 'A' and 'B' time standards for athletes to qualify. But if a country has no athletes selected in this way, the country may still be represented by one male and one female swimmer at the Olympics. Universality entry places are not, however, automatic. Both male and female athletes must still qualify and become eligible to represent their country. In addition, qualification does not guarantee entry. In fact, the right to enter an athlete through Universality belongs to the NOC;
 - ii. FINA perceives the Applicant's dispute as between her and the SKNOC. The

Applicant duly qualified for the Tokyo OG through the Universality Program and the SKNOC was duly invited to enter her accordingly. But for reasons unknown to FINA, the SKNOC did not accept this invitation. FINA, however, cannot force the SKNOC to enter an athlete. Therefore, it is for the Applicant to convince this Panel that the NOC wrongly failed to accept FINA's invitation;

- iii. FINA acknowledges that as per the Rule 40 of the Olympic Charter, participation in the Olympic Games lies with the NOC to enter the competitor, team official or other team personnel to participate in the Olympic Games. It is for this reason that FINA considers that this dispute is between Ms. Harding-Marlin and the SKNOC. Notwithstanding the foregoing, FINA wishes to note that its quota (878) for available swimming entries is now full and the deadline for entries expired. Therefore, to the extent the Applicant prevails in her appeal, the IOC would need to grant an additional entry spot for the Applicant in order for FINA to allow her to compete in either the 100m backstroke or 100m freestyle. FINA stated that it will cooperate as necessary in the enforcement of the Panel's award.

4.15. At the hearing, FINA confirmed that the entry of the Applicant in the Tokyo OG would not imply the removal of another athlete from the swimming programme, and that the Applicant would be eligible to be entered into the competitions mentioned in her request for relief. Finally, FINA confirmed that in order to submit the entry of the Applicant to the Tokyo OG it would need to receive a nomination from the SKNOC and the SKSF.

d. *First Interested Party's Position*

4.16. The IOC notes that the dispute at hand essentially concerns the relationship between the SKNOC, FINA and the Applicant. No applicable decision of the IOC is concerned. Furthermore, there is no legal basis for obliging the IOC to accept the entry of the Applicant. Subject to the above, the IOC defers to the CAS Ad Hoc Division on the merits of the case.

e. *Second Interested Party's Position*

4.17. The SKSF emphasizes that it entirely endorses the Applicant's position and requests.

5. JURISDICTION AND ADMISSIBILITY

5.1. Article 61.2 [*Dispute Resolution*] of the Olympic Charter provides as follows:

"Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration."

5.2. In view of the above, the Panel considers that the CAS Ad Hoc Division has jurisdiction to hear the present matter. The jurisdiction of the CAS Ad Hoc Division was not contested in the written submissions and/or at the hearing.

5.3. Article 1 [*Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)*] of the CAS Arbitration Rules for the Olympic Games (hereinafter: the "CAS Ad Hoc Rules") provides as follows:

“The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.

In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective”.

- 5.4. The Appealed Decision was issued on 13 July 2021.
- 5.5. In view of the above, and taking into account that the Applicant filed her request on 18 July 2021, the Panel considers the application admissible. In any case, the Panel notes that the admissibility was not challenged.

6. APPLICABLE LAW

- 6.1. Under Article 17 of the CAS Ad Hoc Rules, the Panel must decide the dispute *“pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate”.*

7. DISCUSSION

a. Legal framework

- 7.1. These proceedings are governed by the CAS Ad Hoc Rules enacted by the International Council of Arbitration for Sport (hereinafter: the “ICAS”) on 14 October 2003, amended on 8 July 2021. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (hereinafter: the “PIL Act”). The PIL Act applies to this arbitration as a result of the express choice of law contained in Article 17 of the CAS Ad Hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the Ad Hoc Division and of its panels of arbitrators, pursuant to Article 7 of the CAS Ad Hoc Rules.
- 7.2. According to Article 16 of the CAS Ad Hoc Rules, the Panel has *“full power to establish the facts on which the application is based”.*

b. Merits

- 7.3. The dispute submitted to this Panel concerns the entry of the Applicant into the Tokyo OG as a participant in swimming events (100 meters backstroke, or alternatively, 100 meters freestyle) on the basis of the Universality System set by FINA in its Eligibility Rules. The First Respondent denied such entry in the Appealed Decision. The Applicant on her side submits that the Appealed Decision is to be set aside and that steps have to be taken (or ordered to be taken) to enter her into the Tokyo OG.

- 7.4. Under Art. 17 of the CAS ad hoc Rules, the Panel must decide the dispute “*pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*”, which means that the Panel shall resolve the dispute pursuant to the rules of law it deems appropriate. As established in CAS jurisprudence, the interpretation of statutes and of similar instruments should be governed by Swiss law (cf. e.g. CAS 2001/A/354 & CAS 2001/A/355 para. 7 *et seq.*; CAS 2008/A/1502; CAS OG 12/002).
- 7.5. The Panel finds that although “*[t]he practice of sport is a human right*” and “*[e]very individual must have the possibility of practising sport, without discrimination of any kind*” (OC, Fundamental Principles of Olympism, 4), “*[n]obody is entitled as of right to participate in the Olympic Games*” (Rule 44.3 of the OC). Moreover, “*[a]ny form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement*” (OC, Fundamental Principles of Olympism, 6).
- 7.6. At the national level, a national Olympic committee (NOC) has the exclusive right to “*send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter*” (Rule 27.7.2 of the OC). According to CAS jurisprudence, “*[i]t is not in issue that it is for an NOC to select its competitors for the Olympics. No other body or person within a member country has that right*” (CAS OG 08/003).
- 7.7. Rule 44.4 of the OC provides that: “*[a]n NOC shall only enter competitors upon the recommendations for entries given by national federations. If the NOC approves thereof, it shall transmit such entries to the OCOG. The OCOG must acknowledge their receipt. NOCs must investigate the validity of the entries proposed by the national federations and ensure that no one has been excluded for racial, religious or political reasons or by reason of other forms of discrimination*”.
- 7.8. It is not in dispute that the Applicant was eligible to enter the Tokyo OG based on the recommendation of FINA and the SKSF.
- 7.9. The Applicant alleges that the First Respondent excluded her for “*racial, religious or political reasons and by reason of other forms of discrimination*” because the SKNOC excluded her, *inter alia*, based on i) the type of sports that she plays, ii) race, iii) abuse of discretion and bad faith, iv) improper and unfair selection proceedings.
- 7.10. The Panel is of the view that the allegations of racism are severe and considered them very seriously. However, the Panel finds that there is no compelling evidence on file to consider that the SKNOC did discriminate against the Applicant in violation of Rule 44.4 of the OC, more specifically that the Applicant was denied the entry on the basis of her race, economic conditions and/or social connections or sporting activity.
- 7.11. A NOC has a legal duty not to be arbitrary, unfair, or unreasonable. Based on the submitted evidence in the present case, the Panel concludes, subject to the consideration below (§ 7.16), that the Appealed Decision might be questionable, but that there is no conclusive evidence that the SKNOC exercised its discretion in an arbitrary, unfair, or unreasonable manner.

- 7.12. The Panel, in fact, notes that the First Respondent offered (at least at the hearing before this Panel) a reason in support of its decision not to enter the Applicant into the Tokyo OG. According to the First Respondent, in fact, the Applicant's entry was denied because the SKSF is not one of its members, despite being recognized as the national federation for swimming by FINA.
- 7.13. The Panel finds that this simple fact did not prevent per se the SKNOC from entering the Applicant into the Tokyo OG. The Panel indeed was not directed to any rule, in the SKNOC or even in the IOC system, so providing. However, the absence of rules as to the necessity that a national federation be a member of the local National Olympic Committee to see its athletes entered into the Olympics, on the other side, does not mean, in the Panel's opinion, that such condition is always irrelevant, and that basing on it a denial of entry is arbitrary.
- 7.14. In general terms, in fact, the requirement that a national federation be a member of the local National Olympic Committee in order to recommend athletes for entry into the Olympics pursuant to Rule 44.4 of the Olympic Charter could find justifiable bases, such as the necessity to verify the quality and diffusion of the specific sport at the local level, to guarantee the sound administration of sport, and to coordinate the efforts for the promotion of sport in the relevant country.
- 7.15. In the case at stake, then, the Panel remarks that no actual evidence has been given, beyond suggestions, that the SKNOC intentionally created the situation (absence of recognition of a national federation for swimming) in order to deny the possibility for swimmers to be entered as participants to the Olympics. The Panel understands that the "predominance" of the track and field federation (and that federation's desire to keep it unaffected) was hinted by the Applicant as a reason for the SKNOC not to admit the SKSF in its system as a member. However, no tangible evidence has been given or offered to prove that the SKSF was prevented from applying for membership of the SKNOC, or that the SKNOC unreasonably failed to decide on any such application. The Panel notes that the SKSF was invited to participate (and did participate) as an interested party in the arbitration proceedings, but provided no convincing evidence on the point.
- 7.16. This said, the Panel finds that the SKNOC could have been more forthcoming with the Applicant: nothing prevented it from entering her, allowing her to fulfil her Olympic dream. In addition, the SKNOC could have been more transparent to the IOC: the reasons given to the IOC and reported by Mr Mero to Mr Pound on 5 July 2021 for the SKNOC not to enter her as a participant in the Tokyo OG were at best not accurate. At the same time, the SKNOC could have been more cooperative in its relations with the SKSF, by directing them (or even inviting) them to become one of its members, and start an admission procedure. The Panel finds that such approach would be more in line with the Olympic spirit that a national Olympic committee has to promote in its country in accordance with Rule 27 of the Olympic Charter. Such failure, however, does not make the Appealed Decision discriminatory, arbitrary, unfair and/or unreasonable. In other words, the Appealed Decision might be inappropriate. However, it does not constitute an abuse of discretion by the SKNOC and there is no reason for the CAS Ad Hoc Division to impose the entry of the Applicant in such circumstances.

7.17. Based on the foregoing evidence and legal analysis, the Panel concludes that none of Applicant's claims have merit.

8. CONCLUSION

8.1. In view of the above considerations, the Applicant's application filed on 18 July 2021 shall be dismissed.

9. COSTS

9.1. According to Article 22 para. 1 of the CAS Ad Hoc Rules, the services of the CAS ad hoc Division "*are free of charge*".

9.2. According to Article 22 para. 2 of the CAS Ad Hoc Rules, parties to CAS *ad hoc* proceedings "*shall pay their own costs of legal representation, experts, witnesses and interpreters*". *In casu*, the Panel does not see any reason to deviate from such rule.

DECISION

The Ad Hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The application filed by Jennifer Harding-Marlin on 18 July 2021 is dismissed.
2. The decision of the St. Kitts and Nevis Olympic Committee dated 12 July 2021 notified on 13 July 2021 is confirmed.
3. All other requests for relief are dismissed.

Tokyo, 19 July 2021

THE AD HOC DIVISION OF THE COURT OF ARBITRATION FOR SPORT

Manfred Nan
President of the Panel

Lu Song
Arbitrator

Luigi Fumagalli
Arbitrator