

Case number: NST-E22-122770

Case Title: Sarah Cardwell v Squash Australia Ltd

Determination

National Sports Tribunal General Division

sitting in the following composition:

Panel Member/s

Mr Christopher Johnstone (Presiding Member)

in the arbitration between

Sarah Cardwell

(Appellant)

Unrepresented

And

Squash Australia Ltd

(Respondent)

Represented by Robert Donaghue CEO and Lachlan Johnston

And

Alex Haydon

(Interested party)

And

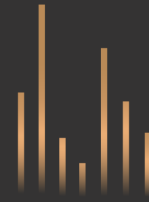
Jessica Turnbull

(Interested party)

And

Tamika Hunt

(Interested party)



PARTIES

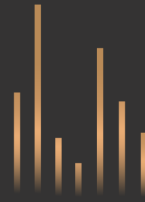
1. The applicant, Sarah Cardwell, is a squash player registered with the respondent, Squash Australia (**SQA**) and is the appellant in this proceeding.
2. SQA, is a company limited by guarantee and is the national federation for the sport of Squash in Australia and is the sole affiliated member of the World Squash Federation. It appeared through its CEO, Robert Donoghue (who appeared remotely) and Lachlan Johnston, the High Performance Manager who appeared in person.
3. Alex Haydon, Jessica Turnbull and Tamika Hunt are also squash players registered with SQA and are persons interested in the outcome of this arbitration.
4. In keeping with the objectives of section 40 of the Act, and because all parties agreed to conduct the arbitration in this manner, I will use first names for the balance of these reasons.
5. Sarah, Jessica and Tamika all appeared in person and made submissions.

INTRODUCTION

6. The Commonwealth Games is a multi-sport event held once every four years under the auspices of the Commonwealth Games Federation (**CGF**). The CGF is a company limited by guarantee, incorporated in the United Kingdom pursuant to the *Companies Act 2006 (UK)*, and according to its Constitution, is the supreme authority in all matters concerning the Commonwealth Games.
7. Commonwealth Games Australia ACN 629 915 448 (**CGA**) is a company limited by guarantee incorporated pursuant to the *Corporations Act 2001 (Cth)*. CGA is the sports body for the Commonwealth of Australia which is affiliated with the CGF in accordance with the “Articles and Byelaws” of the CGF.
8. The XXII Commonwealth Games are scheduled to take place in Birmingham, UK from 28 July to 8 August 2022.
9. Sarah was eligible for, but was not nominated, for selection as a team member (in particular for the women’s doubles event) for the upcoming Commonwealth Games by SQA and has appealed her non-nomination. Sarah has been nominated as a reserve

NST JURISDICTION

10. For the purposes of nomination, selection and appeals relating to nomination and selection in the Australian Commonwealth Games team to compete at the XXII Commonwealth Games, CGA has adopted a by-law (called the Team Nomination, Selection and Appeals By-Law) which commenced on 15 October 2021 (**the by-law**).
11. For present purposes the following aspects of the by-law are pertinent.
12. Section 4.1 provides that for the Commonwealth Games, each National Sporting Organisation (called an NSO) may nominate athletes to be considered by the CGA for selection as a team member in respect of (relevantly) an “Open Athlete Allocation Sport” (which is defined to include the sport of Squash). The effect of by-law 4.1 is that despite a nomination by a NSO,



only the CGA may select a team member, however any team member the CGA selects must have been nominated by a NSO.

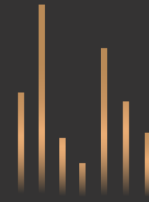
13. Pursuant to section 4.2, each NSO is obliged to develop and adopt a “Nomination Policy” which is required to be prepared in accordance with section 5 of the by-law, including by containing a Nomination Criteria defined (in section 2) to be:

“...each sport-specific performance criteria and general eligibility criteria (which may include both subjective and objective criteria) that will be applied by the NSO in making its Nominations which must be compliance [sic] with the requirements set out in section 5.4 of this By-Law”
14. Section 5.4 requires all “Selection Appeals” to be dealt with in accordance with the “Selection Policy”. This cross-reference seems to be an error as “Selection Appeals” is defined to mean appeals against selection by the CGA of a Nominated Athlete. Nothing turns on this.
15. Section 4 also is concerned with the contents of a relevant Nomination Policy. It prescribes, relevantly:
 - (1) each NSO must submit its Nomination Policy to the CGA for approval by 31 October 2021 (4.2(a));
 - (2) once a Nomination Policy is approved, it cannot be altered without the prior approval of the CGA (4.2(b));
 - (3) the Nomination Policy must be published on the relevant NSO’s website and social media channels, communicated to all potential Athletes and the NSO must ensure that it is adhered to (4.2(c) to (f)).
16. Section 4.3 of the by-law says (relevantly):

Each NSO must ensure that its Nomination Policy:

 - (a) is fair, reasonable, thorough, unambiguous, transparent and easy to understand;
 - (b) will be applied with fairness and without bias...;

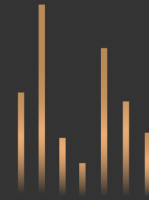
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17. Section 4.5 mandates a number of terms to be included in a Nomination Policy. Section 4.9 states that all “Nomination Appeals” must be dealt with in accordance with the Nomination Appeals Policy”.
18. The Nomination Appeals Policy is set out in Schedule 1.
19. Relevantly, the Nomination Appeals Policy permits an Athlete who is not nominated by their respective NSO for selection by the CGA (called the Non-Nominated Athlete) to apply to the National Sports Tribunal (**the Tribunal**) for arbitration of a Nomination Appeal (except where a specific Nomination Policy excludes such a right). This right of arbitration is called a “First Instance Appeal” to be heard in the General Division of the Tribunal in the first instance (See 7.1).



20. No party disputed that the Tribunal has jurisdiction to determine this arbitration.
21. A First Instance Appeal is to proceed in accordance with the process and procedure by which the Tribunal operates including as set out in the *National Sports Tribunal Act 2019 (Cth)* (**NST Act**), the *National Sports Tribunal Rule* (**the Rule**) and the *National Sports Tribunal Practice and Procedure Determination* (**the Determination**).
22. Section 8.1 of the by-law sets out the grounds on which a Non-Nominated Athlete may appeal their non-nomination. It provides:
 - 8.1. A Non-Nominated Athlete (the Appellant) may bring a First Instance Appeal for hearing on one or more of the following grounds (which the Appellant bears the onus of making out):
 - (a) that the Nomination Policy was not properly applied by the NSO with respect to the Appellant;
 - (b) the Appellant was not afforded a reasonable opportunity by the NSO to satisfy the selection criteria set out in the relevant Nomination Policy;
 - (c) the NSO was affected by actual bias in making its decision to not select the Appellant; and or
 - (d) there was no material basis on which the NSO's decision could be reasonably based.
23. Pursuant to section 11 of Schedule 1 of the by-law, the power of the Tribunal in a First Instance Appeal is limited to:
 - (1) upholding the decision of the relevant NSO not to nominate the Appellant for selection to the Australian Commonwealth Games team; or
 - (2) overturning the decision of the relevant NSO not to nominate the Appellant for selection to the Australian Commonwealth Games team in which case the Tribunal is to direct the relevant NSO to reconsider and determine its position regarding the Appellant's eligibility and suitability for nomination for selection in light of the determination.
24. Section 11.4 of schedule 1 reiterates the requirement that in undertaking a reconsideration of eligibility for nomination the NSO must observe the principles of natural justice.

Constitution and conduct of the Tribunal

25. Pursuant to section 13 of the NST Act, the presiding member has been appointed by the Minister by written instrument as a Member of the Tribunal, and pursuant to section 23 of the NST Act and was appointed by the CEO of the Tribunal under instrument to conduct this arbitration in the General Division of the Tribunal.
26. Pursuant to section 16(1) of the NST Act and rule 6 of the Rule, a Tribunal member is obliged to notify the CEO of the Tribunal of any conflict of interest in a matter to which he or she is appointed. There is no such interest to be notified.
27. Section 40 of the NST Act sets out general principles applicable to arbitration as follows:
 - (1) In the arbitration:
 - (a) the procedure of the Tribunal is, subject to this Act, within the discretion of the Tribunal; and



- (b) the arbitration must be conducted with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the Tribunal permit; and
 - (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.
 - (2) The parties must act in good faith in relation to the conduct of the arbitration.

- 28. In addition, section 28 of the Determination provides that the Tribunal may inform itself in arbitration in a variety of ways. Most importantly, the Tribunal is not bound by the rules of evidence and evidence is not required to be given on oath, although the Tribunal may require the administration of an oath in its discretion.

- 29. No party requested that any other party give any evidence on oath, and the Tribunal did not consider sworn testimony to be necessary for the proper disposition of this arbitration. No party objected to this course of conduct.

- 30. Further, no party objected to the procedure adopted by the Tribunal during the Arbitration.

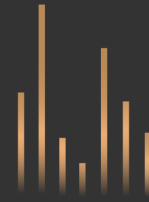
- 31. Pursuant to section 29 of the Determination, the Tribunal may give directions as to the conduct of the arbitration. For this purpose, a preliminary conference was conducted by the Tribunal at 12.30pm on 6 May 2022 with all of the parties, at which conference the date, time and place for the hearing of the First Instance Appeal was set and certain directions were made for the service of documentary evidence and submissions.

- 32. Without repeating those directions in full, section 6 of the by-law stipulates the time in which, following the lodgement of a Dispute Notice, that submissions and evidence to be relied on by the parties (together with the payment of the applicable fees) are to be lodged with the Tribunal.

- 33. Each of the parties appeared to have complied with those directions. No party suggested otherwise.

- 34. For the purposes of the conduct of the hearing, those submissions and evidence were compiled into a single paginated bundle and marked as exhibit 1 in the arbitration. With one exception, exhibit 1 constituted the entirety of the documentary evidence and written submissions before the Tribunal. Those documents were arranged as follows:
 - Section A – Preliminary Documents
 - 1. NST Application Form – 5 May 2022
 - 2. Arbitration Agreement – 8 May 2022.....
 - 3. CGA Team Nomination, Selection and Appeals By-Law
 - 4. Squash Australia Nomination Policy
 - 5. Dispute Notice Response...
 - Section B – Submissions
 - 6. Squash Australia’s Submissions.....
 - 7. Ms Cardwell’s Submissions.....
 - 8. Ms Cardwell’s Submissions – Appendix 1.....
 - 9. Ms Turnbull’s Submissions.....
 - 10. Ms Hunt’s Submissions.....
 - 11. Ms Hunt’s Submissions. – Annexure A.....

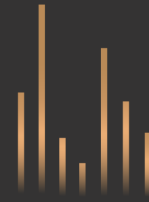
- 35. The Ethical Behaviour By-Law adopted by CGA on 9 March 2022 was admitted as exhibit 2.



36. No party submitted that any other failed to comply with the relevant directions.
37. In short, the arbitration was conducted in a manner in which Sarah, as the appellant, addressed first. Both Robert and Lachlan responded on behalf of SQA at appropriate junctures.
38. Tamika and Jessica were in difficult positions for different reasons despite their support for Sarah's appeal.
39. Jessica, as a nominated athlete was conscious of the fact that any reconsideration of Sarah's non-nomination could result in another athlete's nomination (including hers) being reconsidered. Nevertheless, it was common ground between Sarah and Jessica that, as doubles players, each preferred playing with the other and considered that they as a doubles pairing offered the best chance of success at the Commonwealth Games.
40. Sarah's principal submission was that had the discretion of SQA been exercised properly by reference to objective criteria and, in particular, her results from 2019 World Doubles Championships, the 2022 Australian Doubles Open, the 2022 Australian Doubles Invitational and the result of Alex and Jessica when paired at the 2022 World Doubles Championships, SQA should have nominated Sarah to be paired with Jessica for the Commonwealth Games women's doubles event.
41. Tamika, whilst also disappointed at being a non-nominated athlete, was not an appellant but offered helpful and considered submissions as to the nomination process adopted by SQA.
42. I say more about all of the submissions below. It is however apposite to observe here that all of the parties engaged in respectful and constructive dialogue and in a manner that revealed each to be passionate about the sport of squash.

SQA Nomination Policy, procedural fairness and the exercise of discretion

43. As referred to in the context of the discussion above as to the operative effect of the by-law, the SQA Nomination Policy was one which was required to meet certain criteria set out therein. No party suggested that the SQA Policy was not one which met the requirements of the CGA or that the SQA Policy was otherwise invalid. Indeed, Robert reiterated in oral submissions on behalf of SQA that the SQA Policy was one which was approved by the CGA for this purpose.
44. As will become clear, all three athletes had, to differing degrees concerns as to the flexibility available within the SQA Policy given the discretions conferred on SQA by it.
45. Sarah, in particular, acknowledged in oral submissions that the process required for team selection necessarily included objective and subjective elements. Robert and Lachlan considered this to be a process which SQA adopted being the assessment of both "performance and results" meaning that selectors not only looked at the result a player achieved in particular tournaments but how the player performed in particular matches in those tournaments (regardless of the result).
46. Before considering this further, it is important to have regard to the SQA Nomination Policy, and the following terms which are relevant to this arbitration:



2. Performance Objective

- a. SqA will nominate players and/or pairings in the Team who they consider, in their absolute discretion, to have the best chance of contributing to podium performances at the 2022 Commonwealth Games.

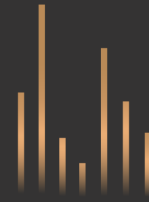
3. Team Composition

- a. The SqA High Performance Selection Panel (Selection Panel) will nominate players to CGA. CGA will then select the Team from these nominations.
- b. Players nominated for the Team will compete in one or multiple events played in the Squash competition at the Games. These events are: Men's Singles, Women's Singles, Men's Doubles, Women's Doubles and Mixed Doubles.
 - i. The event, or events, which players and/or pairings are nominated to compete in will be specified by the Selection Panel at the time of nomination.
 - ii. The event, or events, which players and/or pairings are nominated to compete in will be determined by the Selection Panel based on maximising the Team's potential to achieve the Performance Objective outlined in 2.
- ...
- d. The size of the team is subject to changes in the total player allocations available to the Team as determined by CGA. Neither this Policy, nor SqA, CGA or the Commonwealth Games Federation (CGF) require SqA to nominate, or CGA to select, the maximum number of athletes to the Team.
- e. The Selection Panel will nominate two (2) male and female reserve players. These reserve players will not be ranked in order of nomination priority.
 - i. Should a reserve be required to replace a nominated player in the Team, the National Coach will select the most suitable reserve player, subject to the approval of the Selection Panel.
 - ii. Enacting 3.e.i. may require pairings in the nominated Team to be changed in order to satisfy the Performance Objective outlined in 2. Should this be necessary, the National Coach will make suitable changes to the pairings, subject to the approval of the Selection Panel.
 - iii. For the avoidance of doubt, reserve players are not members of the Team.
- ...
- g. Final Team members and nomination of players and/or pairings to compete in each event are at the absolute discretion of the SqA Selection Panel as set out in this Policy.

5. Athlete Nomination Criteria

The Selection Panel will consider the following Criteria in determining their nominations.

- a. Performance which has demonstrated the player's and/or pairing's ability to contribute to the Performance Objective outlined in 2. This includes:
 - i. Medal winning performances in Commonwealth Games and World Championship events between 1 January 2018 and 18 April 2022.
 - ii. Performances at PSA events, WSF events, the Australian Doubles Open and Australian Doubles Invitational events up to 18 April 2022.
 - iii. PSA ranking, including PSA ranking trajectory.
- b. In exercising its discretion under 5.a, the Selection Panel may consider any factor, or combination of factors, and apply any weighting to those factors, that is, in the opinion of the Selection Panel, relevant for consideration when nominating players for selection to CGA who have the best chances of achieving the Performance Objective outlined in 2. This discretion is absolute and need not be exercised.
- c. Should a player with an established record of high-level results become injured, the athlete may be considered for nomination based on past performances at Commonwealth Games or World Championships, subject to passing a suitable fitness test and providing medical



evidence and updates throughout the process to the SqA High Performance Management Team.

47. The Tribunal directs itself that despite the express discretionary powers conferred on SQA in the SQA Policy, those powers are subject to limitations imposed by law and which are, generally reflected in section 8.1 of the by-law set out above.
48. Reasonableness has always been the touchstone by which the validity of administrative decisions may be tested. However, what reasonableness might mean in the context of a particular decision has proven far less easy to articulate.
49. It is of course well-settled that all relevant considerations must be taken into account and irrelevant considerations discarded, in the making of a decision. To do otherwise would be unreasonable.
50. But it is more usually in the manner in which particular weight has been ascribed to each relevant consideration, and more generally in the exercise of discretion, where the real difficulty of demonstrating that a decision was unreasonable, to the point where it ought be set aside, is found.
51. It is not necessary for a person challenging an administrative decision to prove the illogicality or irrationality of a decision. The difficulty with that test was explained by the majority of the High Court in this way:

But the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.¹

52. Indeed, in more recent times, the approach of the High Court in Australia has been to lessen the test for unreasonableness by explaining that a decision may well be *rational* but might still be considered *unreasonable*².

53. In *Li*, the majority said:

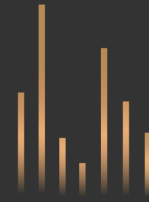
The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision — which is to say one that is so unreasonable that no reasonable person could have arrived at it.

54. Where legislation confers a discretion, the majority in *Li* emphasised that a discretionary power is to be exercised reasonably by reference to the scope and power conferred:

Whether a decision-maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, given disproportionate weight to some factor or reasoned

¹ *Minister for Immigration v SZMDS* (2010) 240 CLR 611 (per Crennan and Bell JJ (at [131])).

² *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.



illogically or irrationally, the final conclusion will in each case be that the decision-maker has been unreasonable in a legal sense.³

55. Speaking extra-judicially⁴, Robert French AC QC, the former Chief Justice of the High Court made these observations:

The decision-maker exercising a statutory power may tick all the logical boxes and yet make an unreasonable decision. Mere rationality may not take the decision-maker the whole distance to decision where a discretion is to be exercised. Reasonableness imposes an additional element which may partake of proportionality. Metaphorically speaking, while it might be rational to use a sledge hammer to crack a peanut it will generally not be reasonable to do so.

The limits may not only be encountered where a discretionary decision is to be made. Sometimes decisions have to be made in the face of unresolvable uncertainty or in the face of alternatives which are within power and where, on the basis of the materials before the decision-maker, no relevant distinction can be drawn between them.

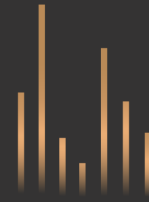
56. Whilst conscious that SQA was not exercising statutory power, the Tribunal approaches the consideration of the reasonableness of its decision not to nominate Sarah for the Commonwealth Games team with these articulated tests as to the reasonableness of its decision, having regard to its stated powers in the SQA Policy and section 8.1 of the by-law in mind.

The submissions of the parties

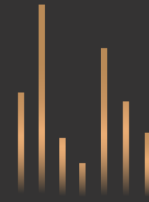
57. Most obviously, the focus of the oral submissions of Sarah, Jessica and Tamika was as to how the discretion of SQA was exercised. None of the parties challenged the right of SQA to exercise a discretion. Indeed, Sarah expressly accepted that in sport such as squash, there necessarily will be objective and subjective elements which are to be taken into account when making decisions as to the appropriate composition of a team. Further, these subjective elements are all-the-more in play when the consideration is as to which players will combine best as a doubles pairing to achieve the state objective of contributing to podium performances at the 2022 Commonwealth Games.
58. The submissions tended to focus on their perceptions that “goal posts were constantly changing” or that “normal processes” for selection were not followed.
59. Some context to understand these submissions is required.
60. As the Tribunal understood the submission, it referred to both the SQA Nomination Policy itself changing, and the information being given to various athletes in the lead-up to the nominations being made, that also apparently changed.
61. As to the former, it can be addressed at once. The SQA Policy was changed twice, once when CGA altered its limit on the number of squash players it would permit to be nominated (from 7 to 8) which was obviously advantageous to the sport and enabled SQA to nominate

³ Li at [72].

⁴ *Rationality and Reason in Administrative Law - Would a Roll of the Dice be Just as Good?:* Australian Academy of Law WA Chapter Lecture, Perth, 29 November 2017: https://www.fedcourt.gov.au/digital-law-library/seminars/r-french-20171120#_ftn36



- four male and four female athletes. The second change was to push back the date by which nominations were made to take account of the 2022 World Doubles Championships. It was not suggested that either of these changes rendered the SQA Policy ineffective.
62. In its submission, SQA identified the performances of eligible athletes in a series of tournaments held between 17 June 2019 and 15 April 2022 as being those which were considered for the purposes of the nominations.
63. Those tournaments included the 2019 and 2022 World Doubles Championships, the 2022 Australian Doubles Open and the 2022 Australian Doubles Invitational but also included a variety of other tournaments, a number of which were singles tournaments. Whilst the composition of the players at each of those tournaments was not the subject of detailed submissions, it is a reasonable summation of the evidence about these tournaments that the not all players played in each tournament and that the standard of opposition differed considerably depending on which tournament was played.
64. What became clear during the arbitration is that each of Sarah, Jessica and Tamika, to a greater or lesser extent, in the lead up to the nominations being made, were told by selectors (or people capable of influencing nominations), in (generally) one-on-one conversations, information as to the relative importance of particular tournaments, or the type of results which would be considered important for the purposes, ultimately, of nomination for the Commonwealth Games team. That information was apparently internally inconsistent, and, when they considered the submissions of SQA filed in this arbitration, believed what they were told was wrong.
65. Tamika in particular also referred by way of an example to the 2022 Doubles Open where players were paired with other players “who were not in contention” and not free to choose their own playing partners as an example of an unusual and unfair process which gave inconsistent results. SQA clarified that from its perspective, every player in that tournament was a “national categorisation athlete” being an athlete who met the requirements prescribed by the National Athlete Categorisation Framework developed by the Australian Institute of Sport, and who therefore, from the perspective of SQA, was available for nomination for the Commonwealth Games team. About this Tamika said “when I played with my preferred partner in mixed, I won, when I was not paired with my preferred partner in doubles, I didn’t win.”
66. By contrast, at that same tournament, Jessica and Sarah were paired together but due to injury to Jessica, were unable to compete as a pair, and as a result, Sarah was re-paired. However, as Sarah submitted (supported by Jessica), they competed successfully as a doubles pairing in the next tournament (being the Australian Doubles Invitational).
67. Tamika in her written submissions provided a quite detailed analysis of her own results in tournaments as well as a table demonstrating the various world-ranking trajectories of the apparently six leading female players in contention for nomination.
68. As to the messages from SQA, Tamika said (amongst other things):
- (1) Only one selector attended the events. An additional selector attended the doubles events only;



(2) No feedback was sought from players following either doubles events regarding their pairings or performances

(3) I raised my concerns regarding World Doubles selections and had a meeting from Lachlan and a phone call with Stewart... I still have not received a formal response from Squash Australia regarding my questions for the World Doubles selections.

69. By way of final submission, Tamika said:

The nomination policy makes it very difficult for athletes to understand what they need to achieve to be selected as any one result may be weighted differently at Squash Australia's discretion. ... players will not want to be involved in a sport that cannot use sufficient criteria and results to select a team

70. Clarity and consistency of the messages delivered by officials to athletes are a common source of complaint. There is no reason to assume that where inconsistencies in messaging did occur, it was in well-intentioned, but ultimately mistaken, circumstances. Nevertheless, these legitimate concerns of Sarah, Jessica and Tamika whilst of great concern to them (and, as unfair as (particularly as Tamika submitted) they might seem when the message did turn out to be incorrect) highlight what is in reality a communication issue between selectors and officials within SQA rather than facts that this Tribunal can consider given its limited powers on appeals of this type.

71. However, having ventilated those concerns in this forum, it may well be that SQA gives consideration as to how it delivers messages to its athletes about performance expectation in the future.

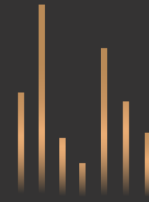
72. Sarah framed her submissions in response to each of the four potential avenues for review specified in section 8.1 of the by-law, perhaps reflecting a misunderstanding that each required satisfaction before a decision might be considered wrong in law. A decision made contrary to any of those four grounds would be infected by error. But as noted above, when her oral submissions were considered together with the written submissions, Sarah's substantial complaint is that SQA's Policy, and the discretions exercisable pursuant to it have been misapplied because incorrect weighting has been afforded to the various criteria specified in section 5 of that policy (notwithstanding that the questions of weighting or indeed the applicability of the criteria themselves is also a matter of complete discretion). In saying this, the Tribunal does not ignore that a ground of bias has also been raised. This is discussed separately below.

73. Sarah's written submissions also contained an analysis of her performance to a remarkable level given the time in which she had to prepare her submissions.

74. The submissions included a table in which Sarah had analysed the performance of players at what she submitted were (or should have been) the key doubles tournaments considered by SQA for nominations.

75. By way of example, Sarah's submission in this respect was as follows:

I am uncertain as to the Tribunal's exposure to the Doubles game of squash so think it's worth mentioning that tactics are decidedly different to the Singles game to an extent not always understood to singles squash players. Error count is critical as matches are best of 3 (not best of 5 as in Singles) and at 10-10



points, all games are decided by a sudden death point (not two advantage). This again places an extreme emphasis on the ability to attack with a low error count.

Because of the cut-throat nature of sudden death points and best of three games, handling pressure of big points is important and can be quite different in Doubles. Team awareness, trust, communication and comfort in a partner play a large role in this aspect. Both players need to have a complete understanding of each other's games.

Australian Invitational Doubles 2022

File name: Women's Doubles_Pool Match_CardwellTurnbull vs GrinhamShaikh.MTS

Result: Sarah Cardwell/ Jessica Turnbull beat Rachael Grinham/ Selena Shaikh 2-1 (11-9, 7-11, 11-10)

	Rach	Jess	Selena	Sarah
Balls hit	132	311	384	178
Unforced errors	2	6	11	2
Forced errors	0	2	2	1
Pressure point errors	1	0	2	0
Match point error	0	0	1	0
Set up opponent winner on partner	0	0	0	2
Stroke against	0	1	1	0
Balls not retrieved	1	10	3	4
Winners	9	11	9	4
Pressure point winners	2	2	2	1
Match point winner	0	1	0	0

76. Sarah provided additional submissions at the end of each of these tables as to the particular tournament or the relevant match. The Tribunal notes in particular the commentary regarding the match between Cheyna Tucker and Alex Fuller for South Africa and Alex and Jessica for Australia in the 2022 World Doubles Championships in which Sarah did not compete.
77. Sarah explained at the end of her series of tables why these performance factors were, in her opinion, important.
78. Sarah said:

Balls Hit: Number of balls that a player was made to play by their opponent (large discrepancies indicate a player is being targeted by the opposing team)

Unforced errors: Errors that an opponent's shot had no influence on (types of unforced errors included tin, out, fault, stroke).

Forced Errors: Hitting an error (usually tin or out) due to opponents winning shot forcing the error (eg. too tight to the wall/ too fast at the body).

Pressure point errors/ winners: Points at 8-8, 8-9, 9-8, 9-9 score lines, where a winner or unforced error has occurred.

Game Point errors: Regarding unforced errors at 10 points (10= Game point, 11= Game won). Pertains to ability to handle pressure.

Match point error: Regarding unforced error at point 10 in the final game. Pertains to ability to handle pressure.

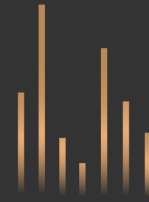
Set up opponents' winner on partner: Hitting a shot that set up the winning shot for the opposition, whereby the players partner has been blocked out of position.

Stroke against: Pertains to movement, court positioning and shot selection.

'Let's' involving: Pertains to movement (involvement in traffic issues against the opposition).

No Let against: Pertains to movement and court positioning, misjudgement of space.

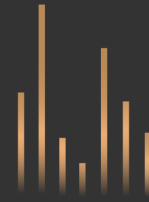
Balls not retrieved: Pertains to court positioning but is the most subjective measure listed, as it relates to balls not being picked up on the first bounce, but it is not always the players own fault (partner may have set them up or the opponents shot was too good).



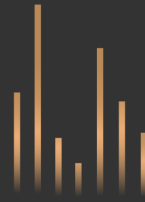
79. The Tribunal accepts that this level analysis as a measure of performance might well represent a legitimate manner in which comparisons between players can be assessed. Indeed, SQA did not submit to the contrary.
80. However, it is equally the case that results alone are not the only available measure. Given the nature of the sport and human factors, any one particular match or the performance of one particular opponent may mean that the analysis of an individual performance as represented by the analysis Sarah has undertaken results in an unfair representation, positively or negatively.
81. SQA framed its response in this way: “The are many factors which would contribute to a statistical analysis supporting one player over another. (I.e., quality of opponent’s shot, quality of partner’s shot).”
82. By way of one example, SQA submitted, and Sarah accepted, that the 2019 World Doubles Championships was considered to be a much weaker tournament as a result of the players who did not attend that tournament.
83. In addition, as the submissions of both the athletes and SQA demonstrated, the disruption to the playing calendar which the COVID-19 pandemic caused also had a significant impact on the quality of opposition at particular tournaments, or indeed, the ability of Australian-based players to train and/or play against quality opposition. The pandemic had a particular impact on Sarah who was based in Melbourne whilst that city was subjected to (as was widely reported) some of the lengthiest periods of lock-down globally.
84. All of these factors, in the mind of the Tribunal demonstrate why it is the case that the SQA Policy was drafted in the terms it was (in particular why the ability to exercise discretion is important).
85. Those terms, and SQA’s submissions as to how the policy was applied by it are considered immediately below.

The decision of SQA

86. SQA in its written submissions explained that all of the performances of the potential nominees were assessed in each of the tournaments to which it referred (in submissions which it amended following comments by Tamika and Sarah which were accepted). What SQA did not do, and the Tribunal accepts that it cannot do, is provide individualised comment on each performance at each tournament. Lachlan did clarify for the benefit of the Tribunal and the athletes that even if only one selector was present at a particular tournament, the other selectors watched the event either remotely, or a recording of the event.
87. Without reproducing SQA’s the written submissions in full as to the manner in which it determined its nominations, SQA submitted as follows:
 - Alex & Jess’ performance at World Doubles was considered stronger than any other doubles pairing seen at the Australian Doubles Open and Australian Doubles Invitational. It was also considered stronger than any other pairing which could potentially have been formed to compete at the Commonwealth Games (outside of Rachael and Donna).



- After being selected on the basis of the performances prior to 21 February for World Doubles, performances from all players at subsequent PSA events did not suggest that any of them, or any combination which could be formed between them, would be stronger than what Jess & Alex demonstrated at world Doubles.
 - Evaluation of PSA rankings and ranking trajectory by the panel didn't provide any conclusive evidence in identifying a clear difference between players.
88. As to Sarah's and Tamika's concerns regarding preferred pairings SQA submitted:
- Sarah and Jess both indicated their preference to play with each other at upcoming Doubles tournaments. The pairing of Jess and Sarah were set for the ADO, before Jess withdrew with injury. They were again set for the ADI, where they beat Alex and Tamika in the final in a close contest. As referenced earlier though, this performance was not considered stronger than the performance of Jess and Alex in several matches at World Doubles.
89. Regarding the success of Sarah and Jessica at the 2022 Australian Doubles Invitational, SQA said:
- Sarah & Jess won this event in a close contest against Tamika & Alex (5-11, 11-10, 11- 9). As above this was not *THE* selection event. Rather, it was an event considered under Clause 5.a.ii. in the Nomination Policy.
 - Sarah & Jess's performance at this event was not considered stronger than Alex & Jess's performance at World Doubles.
90. In the opinion of the Tribunal, these submissions and explanations are sufficient to demonstrate that SQA considered those factors which it considered to be relevant, and afforded to those factors the weight it considered appropriate in the exercise of the discretions afforded to it in determining which players or pairings would provided the best chance of contributing to podium performances at the 2022 Commonwealth Games. Moreover, there is nothing which suggests that it did not act reasonably in the approach that took.
91. Whilst the submissions of Sarah and Tamika, and to some extent Jessica suggest that SQA could, acting reasonably, have made a different decision to include Sarah as a nominated athlete, there is nothing apparent in the decision which SQA in fact did make, to suggest that the decision to not include her as a nominated athlete was unreasonable.
92. The Tribunal therefore is not satisfied that the decision of SQA not to nominate Sarah for consideration by CGA for selection in the 2022 Commonwealth Games team was made in error.
93. There is no basis for this Tribunal to interfere with the decision made by SQA on the basis of unreasonableness.
94. As noted above, a separate ground of bias has been raised by Sarah.
95. In decisions of the type made by SQA, it is incumbent on the person aggrieved to establish to an appropriate level (sometimes called comfortable or reasonable satisfaction or, in the civil context, the balance of probabilities) that the decision was infected by actual bias of the decision maker. This test is quite difficult to satisfy and in the absence of compelling and direct evidence, will not be satisfied. Sarah, in her submissions, raised the potential for bias to have been a factor made regarding her nomination for the team.



96. SQA submitted that Sarah's concern was not a factor.
97. The absence of direct evidence means that the Tribunal need not disclose any more about the particular concern raised by Sarah further.
98. As justified as she may believe her concern to be, the absence of direct evidence means that the Tribunal cannot do otherwise than conclude that there is insufficient reason to interfere with the decision made by SQA on the basis that the decision was affected by bias.

CONCLUSION

99. It follows that the decision of SQA is upheld.

THE TRIBUNAL THEREFORE DETERMINES:

1. The appeal is dismissed.

Date: 13 May 2022



Christopher Johnstone