SPORT RESOLUTIONS (UK)
SPECIALIST INDEPENDENT DISPUTE SERVICE

CASE 24 – Decision

1. Athlete Y (now aged [redacted]) appeals against the decision of the Respondent's International Panel on 25th June 2012, the effect of which was to nominate Athlete Z rather than herself to represent Great Britain in the sprint kayak discipline at the London 2012 Olympic Games. The familiar structure of that process is that the Respondent, having accepted the decision of the Selection Committee, will formally propose to the BOA that AE, rather than the Applicant, will be one of those representing Team GB in that discipline.

2. The Applicant argues that the selection process was flawed for a number of reasons and invites me as arbitrator to uphold the appeal and remit the matter to the International Panel to conduct a fresh selection process. I am invited to make a number of recommendations as to how that fresh process should be conducted in the event that I allow the appeal.

Arbitration Agreement

3. Section 3 of the BCU's Dispute Resolution in Disciplinary Procedures (Tab 15 of the bundle) provides, in relation to "*selection disputes*" that a competitive member dissatisfied with a decision can refer the matter to the Investigations Officer who may, in due course, refer the matter under the Dispute Resolution Procedure at Part C of that same document.

4. It was pursuant to that procedure that the matter comes to me as sole arbitrator, having "*jurisdiction to decide the Applicant's appeal against the selection of athletes for nomination to the British Olympic Association to represent Team GB in the sprint kayak discipline by the International Panel of GB Canoeing / British Canoe Union in accordance with the Sprint Racing Selection Policy and GB Canoeing / British Canoe Union*".

Representation & Evidence at the Hearing

5. The Applicant was represented by Mr Jamie Herbert of Bird & Bird LLP. With my leave (see below) he

called her to give oral evidence. He submitted detailed and thoroughly well argued written submissions which I received in advance of the hearing, in accordance with an agreed timetable which was set by me in a Directions Hearing (by telephone) on the morning of 29th June.

6. Mr Herbert also put before me a series of letters / Witness Statements of fact. I have taken account of these and which are, largely, uncontroversial. They include a letter from Witness A (Tab 11), a letter from three of the selected athletes for the Women's K4 (Witness B, Witness C and Witness D), together with an email dated 29th June 2012 from Witness E and a further short Statement from a Selector, Witness F. All that evidence, it should be noted, spoke in glowing terms of the Applicant's qualities as an athlete and as to her suitability for selection for the fifth place (as to which see further below). In short, they were supportive or strongly supportive of her appeal.

7. The Respondent was represented by Mr Chris Anderson of Brabners Chaffe Street LLP. He called three witnesses to give oral evidence, namely John Anderson, National Performance Director, Alan Williams, National Performance Manager and Brendan Purcell, National Performance Coach.

8. Mr Anderson also provided helpful written opening submissions which are set out in a Reply dated 3rd July 2012 which was served (in accordance with my directions) on the afternoon before this hearing.

Comment

9. I would like to pay tribute to the care, skill and good will which have been conspicuous features of every single aspect of this case. Written and oral submissions were well constructed, helpful and persuasively argued. All witnesses on both sides expressed themselves thoughtfully with great moderation. In this

particular, praise is due to the Applicant herself who, as I am very well aware, is a committed athlete for whom any Olympiad, particularly a home Olympics, represents the very pinnacle of her sporting career. The same is, of course, true of any other athlete who profits or loses by selection decisions, but the significance of the selection process and the importance of this appeal to the Applicant are certainly not underestimated by me.

10. At the end of today's hearing I gave a short Judgment in which I explained that I had dismissed the appeal and provided some short reasons. I repeat what I said at the conclusion of that short Judgment which was to wish the Applicant well and offer the fervent hope that she continues to develop her career and can find some consolation in future success and, hopefully, in selection at the next Olympiad.

11. It is inevitable that disputes like this have the potential to cause some friction between athlete and athlete, and between athletes and coaches or administrators. However, in present case, the Applicant and her representatives and the Respondents have consistently recognised the potential impact of the appeal on Athlete Z. Both sides have also acknowledged the courage shown by those fellow athletes who have supported her and have spoken sincerely and in accordance with what they thought right. I gained the clear and happy impression that no one in the world of canoeing will bear any grudges whatever the outcome of the appeal. That does everyone enormous credit.

Factual Background to the selection of AE rather than the Applicant as the 5th athlete

12. At the 2011 Sprint World Championships in Hungary, GB Canoeing entered a crew in the Women's K4 500 metre event. It comprised Witness B, Athlete Z, Witness C and Witness D. That crew finished fourth in this hugely prestigious event, only just missing out on a medal. It was a tremendously impressive result and

encouraged the Respondents to concentrate on the Women's K4 boat on the basis that it represented our best chance of winning a medal at London 2012.

13. I had very clear and cogent evidence (e.g from Mr John Anderson , National Performance Director of GB Canoeing) as to the relevance of medal winning in the context of securing ongoing funding for the wider canoeing programme.

14. The immediate consequence of that success was that the ***boat*** (i.e. a four person crew) had qualified for London 2012. However, it did not necessarily mean that any or all of those same competitors would necessarily be included in the final WK4 team.

15. Athletes also sought to qualify in the K1 and K2 disciplines but they were unsuccessful. In the event, therefore, until the International Canoeing Federation (somewhat belatedly) resolved that GB Canoeing would be awarded a fifth "*host nation place*", there were only 4 places available and no competitor at that stage could be assured of her place in the boat. The process of final selection was to take place in June 2012.

16. The possibility of a fifth 'host nation' place had been in the offing for some time and it was certainly recognised as a possibility at the beginning of June when there was a meeting on the 1st June 2012 (see, for example, the Witness Statement of Mr John Anderson at para. 8 et seq – Tab 22). Following that meeting, the K4 trials were held on 6th June and, after that regatta, the Selectors met to decide who they would recommend for the K4 nominations.

17. The Applicant was not selected as one of those four, nor was Athlete Z, but in an email provided by the Applicant in the course of the hearing, it was evident that the view of Mr John Anderson 'and the management team'

was the 'potentially final selection' for London 2012 was Witness D/B/A/C as the four with Athlete Z as the fifth athlete, in the event that a fifth athlete place were to be allocated.

18. It has not at any stage been suggested that the choice of the first four athletes for the 4 definite places was other than clear cut or, at the very least, that the selection made was other than a reasonable one.

19. Those four athletes then formed the new K4 crew which did very well at the 9th June regatta. Five days later, on the 14th June 2012, came the news that GB Canoeing would, after all, be allowed a fifth place. The Respondent's International Panel had then to decide who would fill it.

20. The Panel met on the 25th June 2012. The summary minutes of that meeting are at Tab 8 and are taken to be incorporated in full into this Judgment. The Members of the International Panel (who are listed at page 32) first decided four points, and did so unanimously. That is:-

(i) "*That they wanted to use the 5th athlete quota allocation*".

(ii) That WK4 is the Priority Women's boat for London 2012.

(iii) The sole objective of the meeting was to identify the best 5th athlete.

(iv) The best 5th athlete should be selected primarily to support the GBR Women's K4. This athlete should also be able to stroke the boat if the current stroke lost form.

21. The Panel considered three possible athletes for that last place. One (Witness J) was rejected early in the discussion. The Applicant and Athlete Z were the remaining two choices and, according to that note, the

"*...panel revisited the criteria discussed at the Athlete Squad meeting on the 1st June and the Coaching Meeting on the 6th June and reconfirmed the main criteria to be considered (as)*

(i) Who would be the best athlete to stroke the K4 should there be illness or injury in the selected Olympic crew?

(ii) Who had international race evidence that they could stroke the K4?

(iii) The Panel also took into consideration personal feedback from other athletes selected for the Olympic K4 crew."

22. According to the minutes of the meeting, the Panel thought that Athlete Z was "*clearly the best athlete*" as regards points 1 and 2 but that on point 3 the Applicant "*had the most athlete support*". The Panel noted that it also considered:

"International results for the last three years (in Olympic crew boats).

The individual K1 rankings from April assessment regatta 2012.

Raw data from the K4 time trials held on 6th June."

23. The minutes note that there was a "*lengthy discussion*" on the respective merits of the Applicant and Athlete Z, and concluded that "*both women had strong credentials from their individual and crew boat performances and would be great athletes to support the GB Olympic K4*". The Note goes on to take account of Athlete Z's "*proven track record of top six results at major internationals events*" and of the fact that she had "*been the stroke for some of the best GBR Women's K crews...*" (and) "*...had stroked the WK4 to fourth place at*

the 2011 World Championships" (which) "*had qualified the four Olympic places*". On the other hand, it noted that the Applicant was the "*most consistent athlete*" in the Women's K2 500 but that she did not have as good an international record as the K4 results and had had three attempts at qualifying unsuccessfully in K2 and K1. Individual performance in the April regatta was judged to be close and, likewise, they felt the athletes had been "*evenly matched*" in the trials on 6th June, albeit the Applicant had "*slightly better results*".

24. Apart from the reference to international records to which I shall return, those other judgments are essentially merits-based assessments made by those whose job it is to make such assessments. External arbitrators such as I should always be careful to accord proper respect to such judgments.

25. The conclusion of the meeting was a majority decision in favour of Athlete Z and it is that decision which this appeal/application challenges.

Two Preliminary Matters

26. I ruled on two preliminary matters at the outset of the hearing.

27. First, the Respondent suggests (at paragraph 12 to 14 of its Reply) that the appeal having been lodged on the 27th of June, whereas it should have been lodged within 24 hours of 25th of June, should be treated as out of time. However, it was conceded that Mr Owen, the Respondent's Chief Executive, has "*agreed that the Appeal Notice could be lodged outside this time frame*" but I was invited to consider whether or not that might have been beyond Mr Owen's powers.

28. It seems to me that even if one were to take a rigid or restrictive view of the timescale (and I am not persuaded that one should), what Mr Owen (very sensibly) said was within his powers and / or can properly be taken to have waived any right that the Respondent might otherwise have had to insist on that strict timescale.

29. The other preliminary matter is something to which I have already referred. It concerns whether or not the Applicant herself should have been entitled to give oral evidence in the absence of a witness statement served in advance in accordance with my directions. I ruled in her favour and gave the Respondent every opportunity to take instructions on anything that might otherwise create prejudice. No such problems arose and we proceeded.

The Grounds of Appeal

30. I hope I can do justice to Mr Herbert's submissions by taking them shortly, although I do so on the basis that the reader of this judgment should appreciate that the claim was fully argued as per the detailed Notice of Appeal (extending to 22 pages).

31. Summarising his submissions, therefore, and developing his Grounds of Appeal, Mr Herbert says:

(i) that the Respondent did not apply its own selection processes as prescribed in Section 12 in the Selection Policy Document at Tab 1;

(ii) the production of a Crew Boat Strategy (Tab 3) by Brendan Purcell constituted an expansion or modification of that formal selection policy; and

(iii) that being so, the Respondent failed to follow its own policy in that it had evidently attached considerable weight to the results in the 2011 World Championships where, although fourth place was extremely impressive, it did not actually qualify as a "*medal winning result*" within paragraph 12 of the Selection Policy of the International Panel (Tab 1)

(iv) Further, that those who are responsible for running the GB Women's Sprint Team have departed in very material respects from the Crew Boat Strategy. In that same context the Applicant relies on a number of considerations which are helpfully set out at paragraphs 7.1.1 et seq of the Grounds of Appeal. Particular complaints include the failure to provide her with an "*up-skilling opportunity*" as per page 3 of the Crew Boat Strategy and also the failure to provide her with any or adequate exposure to international K4 events. It is said that these shortcomings of process are compounded by the fact that the panel nevertheless then did take account of her lack of international profile whilst attaching positive weight to Athlete Z's international experience. This, it is argued, was directly contrary to what the Applicant understood was the effect of the strategy and was contrary to the assurances given to her by Brendan Purcell (see, for example, para. 7.1.2.3).

<u>The Selection Policy</u>

32. All relevant rules are contained in the 2012 Canoe Sprint and Marathon Handbook. Selection Policy (and other matters) are dealt with at C10-26. The only documents which are characterised as "*Selection Policy*" documents in the handbook are those at C14-21. The Crew Boat Strategy is not included.

33. On the other hand, the Crew Boat Strategy itself declares that it has "*been written to supplement the International Panel's 2012 Selection Policy and is to be administered by the SMT and executed by the Head Coach and the Women's Co-Coaches*". Furthermore, it was the (more or less) completely unchallenged

evidence of the Applicant and of Witness B, Witness C and Witness D that (and I quote from their Statement at Tab 12) that, when the Crew Boat Selection Strategy was outlined (by Brendan Purcell), it was "*made clear... by the management that this process would form the basis of the Olympic Crew Boat Selections*. *The management were adamant that this process would be carried out strictly*".

34. When asked about this, Brendan Purcell , to his credit, recognised that he may not have made himself clear and I think, if I may say so, that was a proper concession to have made. I would add, however, that at the stage when the Crew Selection Strategy was written and promulgated, it was still relatively early days in the training and competitive progress towards selection. I find that this document did ***not*** constitute a formal part of the Selection Policy and that its status was, effectively, to inform the Coaches as to the structure of their selection processes and to share that same information with athletes.

35. Of course, athletes were expected to take that policy seriously and to rely upon it, If it were the case that there was no good reason for the Applicant (for example) to be offered the opportunity to "*up-skill*" (which was identified at Tab 3 / page 14), then I would accept that the athlete might have a legitimate grievance against the Union. But that is not the same thing as saying that she would have any basis for objecting to such decision as the selectors might make in due course since, as I have already found, this document constituting guidance as to the policy rather than a statement of policy itself.

36. In my view, the Selection Policy as properly defined and as it should have been understood was contained in the Handbook and is in the bundle at Tabs 1 and 2.

37. As regards paragraph 12, I reject the submission that it means that selectors can ***only*** take account of medal winning performance. I accept it is not a passage that is very well drafted but it must be read purposively to give it proper meaning and not restrictively as one might read a statute. A decision 'based' on

particular results cannot, in context, mean that it is only those results which matter. What it does mean, in my view, is that priority would be given to medal winning performance in the 2011 World Championships but (logically) in the absence of an actual medal being won, performance in those championships would still be regarded as of great importance. After all, no sensible selector could regard a 4th place in such a World Championship, so close to a medal, as being anything other than hugely significant.

38. Nor should the considerable degree of discretion recognised in paragraph 14 of the Policy be ignored: likewise, one should note the terms of the Supplementary Information set out in Tab 3.

39. These conclusions mean that I reject what the Applicant's Grounds of Appeal refer to as her first Ground of Appeal,

The Decision of 25th June

40. If it were the case that the Crew Boat Strategy constituted selection criteria *as such*, then it is certainly true that reference to that document is singularly absent from the discussions on 25th June 2012 at which the decision to select Athlete Z rather than the Applicant was made. It is idle to speculate what might have been their decision had the Crew Boat Strategy been the key or a decisive document, since, as I have already held, it did not in fact form part of the policy.

41. The question which then arises is whether the three (numbered) criteria that were identified (Tab 8 / 33) were ones that could legitimately have been adopted and applied in the light of the four points on which the

Panel had already agreed unanimously. Then, if those were legitimate criteria, the further question that arises is whether they were fairly and properly applied by the decision makers.

42. The explanation for the choice of criteria is apparent from the minutes of the meeting and it has been fully explained by Mr John Anderson , as well as by Alan Williams and Brendan Purcell . In short, they continued their policy of giving priority to the K4 boat. They decided that the athlete that they wanted as a fifth paddler was to be selected on the basis that she would be the best person to support that team and, particularly, would be in a position to act as stroke if one of the existing four paddlers were to be injured or otherwise unable to participate.

43. I fully accept that these criteria were legitimately chosen and I reject the argument (in the Applicant's second ground of appeal) that because they did not appear in such terms in the Selection Policy, they had no place in the decision making process. As I have already held, the terms of that policy allowed the selectors the discretion to chose and apply such criteria.

44. I further, accept that they were honestly and reasonably applied and that they were entitled to take account of the information summarised in the minutes of the meeting and further explained in the witness statement.

45. I have no intention of ventilating the various arguments that are (very properly and thoroughly) canvassed in the parties' Statements of Case as regards the weight that should have been attached to performance in one regatta rather than another or in a time trial or otherwise. It is absolutely no part of the role of an arbitrator to get anywhere close to substituting his or her own judgement on the merits for what is essentially a selectoral decision, assuming that that decision has been reached without bias, on the basis of all relevant evidence and has resulted in a decision which satisfies the test of being one that a panel, properly informed, could reasonably have reached.

46. I note only that, whilst it is understandable that the Applicant feels that she was disadvantaged in various ways when it came to the final selectoral decision, so that she argues (for example) that it was unfair that an apparent lack of international experience counted against her, the selectors had clearly to take account of the facts and circumstances as they were on 25th June. Seen through the eyes of Athlete Z, looking at the matter from a different perspective, it might have seemed very unfair if her own performance in the World Championships of 2011 and other international experience had not counted strongly in her favour. But, as I say, all of these matters, in my opinion, lie within the broad discretion that the selectors had according to that which, properly so called, was their ***policy***.

47. It follows that I also reject the third Ground of Appeal.

Legal Test

48. My approach to the attack on the decision of 25th June 2012 will be apparent from the preceding sections. There is, of course, a considerable body of case law which has developed surrounding issue such as those that arise in the present case. The following reports were put before me:

[redacted] *v British Swimming* – Decision of the Appeal Committee of Sport Resolutions on 30th June 2012.

Hilton v National Ice Skating Association – Decision of Eady J in *Sports Law Reports* – SLR 75 in 2009.

Beashel & Czislowski v Australian Yachting Federation – Award February 2000 by Malcolm Holmes QC (sole Arbitrator).

Sullivan v Judo Federation of Australia – Award of a Panel in August 2000.

Samantha Michael v NZ Federation of Roller Sports – Decision of the Sports Tribunal, 19th July 2011.

Halsted v British Fencing Association – Decision and Award of Nicholas Stewart QC (Arbitrator).

49. The test I have applied is to find that a decision may be open to challenge if, but only if,

(i) It is not in accordance with Selection Policy as published; and /or

(ii) The policy has been misapplied or applied on no good evidence and / or in circumstances where the application of the policy was unfair (for example, because someone with selectoral authority had given a categorical assurance to an athlete that the policy would not be applied); and / or

(iii) The decision maker has shown bias or the appearance of bias or the selection process has otherwise been demonstrably unfair;

(iv) Where the conclusion is one that no reasonable decision maker could have reached.

50. That last conclusion is one that any Judge or Arbitrator has to approach with the utmost care. As I have already indicated, it is of fundamental importance that we should not substitute our own judgment on the merits for those of the selectors – i.e who would we have selected, or who is the better athlete or has the better performance figures and so forth. So long as selectors apply policy properly, and do so honestly, fairly and reasonably, and take account of relevant facts (they being best judged to decide what is relevant and what is not), then their decisions must be accorded the utmost respect.

51. That, in my judgement, is what happened here. I repeat that it is understandable that the Applicant felt that the Crew Boat Strategy was part of the Selection Policy and, further, that she felt that she had not been given what I might call a fair crack of the whip on the basis of the strategy as there outlined and in the light of the assurances she was given. I do not need to spend time on Brendan Purcell 's explanation of changing circumstances in general and the reason why there was a departure from the scheme as it had been intended to work and as it had been outlined in the Crew Boat Strategy in particular. As I say, that is because I am satisfied that it did not form an actual part of the policy and that this should have been apparent to anyone who studied the documentation as to "*policy*" which appears in the handbook.

Conclusion

52. In all those circumstances, I dismiss the appeal. It therefore becomes unnecessary to decide on what, if any, terms I might have remitted the matter to the Respondent's International Panel. I conclude only by repeating my thanks to all the parties for the care and cooperation with which they have conducted this case

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