



# CASE 28 – Decision

- 1 Athlete K seeks review of a 20 January 2014 decision of British Bobsleigh under the GBR Bobsleigh Olympic Selection Document XXII Olympic Winter Games - Sochi. British Bobsleigh decided under Clause 2.1 of the Selection Criteria contained in the Selection Document not to select Athlete K (provisionally) for nomination to the British Olympic Association for a place on Team GB.
- 2 In his Notice of Appeal lodged by midday on 21 January 2014, Athlete K asks for the question of selection to be remitted to British Bobsleigh for re-consideration, for the reasons developed by his Counsel, George Spalton, in that pleading. Gary Anderson, British Bobsleigh's Performance Director, served a Response to the Notice of Appeal, and in turn Athlete K served a further response. A hearing took place at 3pm on 21 January 2014, at which Athlete K's case and the governing body's case were succinctly and clearly set out. I have taken into account everything in all three pleadings and in the documents provided to me, and everything said at the hearing. After the hearing Mr Anderson delivered written notes on Athlete K's further response, which reiterated points he had already made in the hearing, and provided some further factual information, and Mr Spalton replied by email. I have taken these into account as well. Since the Olympic Selection Timeline at Appendix 1 of the Selection Document provides that this review must be completed by 17.00 on 21 January 2014, I do not expressly deal in this decision with every point developed before me in the pleadings or at the hearing.
- 3 For the reasons given below, the application for review of the decision is refused.

### The Selection Criteria

- 4 Clause 3 of the Selection Criteria is entitled "Athlete Selection Criteria. The Basis for Selection". It provides in material part (emphasis in original):
  - "3.1 All athletes wishing to be considered for selection to Team GB for the 2014 Olympic Winter Games agree that the selection decision is to be taken by Coaches together with the PD (selection panel) who will act as experts and will exercise their judgement as to which of the eligible athletes have the greatest medal winning potential for the 2014 Olympic Winter Games. **The selection process is an exercise of judgement and is guided by, but not determined by, results in competitions and statistical data.** The selection decision has a necessary subjective element to it and is an exercise of expert opinion. As such, selection decisions are not subject to the legal process of an 'appeal'. A process whereby an athlete can request a 'review' of the decision based on application of the process is provided.
  - 3.2 The selection of athletes will be based on the opinion of the British Bobsleigh Selection Panel who will together decide who in their opinion has the greatest medal winning potential for

the 2014 Olympic Winter Games...

### **3.5 Team Selection Criteria**

Criteria used for the selection of Athletes for the Olympic Teams will include assessment on the following measures:

### **3.6 Objective**

#### **criteria Pilots**

The pilot will be selected as per the FIBT ranking system and will need to meet the BOA Olympic Qualification Standards. Pilots will be selected in ranking order of securing the Olympic quota slot.

#### **Brakemen**

Results from 2013/2014 World Cup Season

Results from 2013 World Championships

Performance testing (as per squad testing battery)

Push Testing (ranking within combination)

Push Testing (ranking as individual)

Current Form

Notational Analysis of competition and training

Ability to raise game

High Performance Experience

Attendance at selection events and WCP programme adherence

Minimum number of required training sessions/runs on push track - "Athletes must achieve a minimum of 200 pushes as part of structured GBR program of which a minimum of 60% must be as part of a crew combination - these pushes can be on any track as part of a GBR sanctioned training session and meaningful data captured from the session

### **3.7 Subjective criteria**

Compatibility (e.g. weight

limits) Attitude

Team chemistry/cohesion

Communication...”

- 5 Clause 5 of the Selection Criteria is entitled “Appeals”. It provides in material part (emphasis, and typographical errors, in original):

5.1 Athletes and staff may make a request to the British Bobsleigh that any selection decision taken under this policy is reviewed by the Selection Committee and shall be entitled to produce in writing any evidence or argument in support of the review that they chose. Such a request must be made not later than **21 January 12:00 2014 (midday)** following notification of nomination and in accordance with the appeals policy. The athlete making such an appeal may only request a review on the grounds that the policy has not been followed.

5.2 The appeals committee will be named in due course and be administered by: SPORTS RESOLUTIONS UK, an independent organisation familiar with dealing with selection policy appeals.

5.3 The Appeals Committee will meet as soon as reasonably practicable upon receipt of the appeal **on or around midday 21st January 2014** to hear the appeal to consider the request or requests for a review.

5.4 In the event of an athlete requesting a review the Selection Committee shall consider which other athletes (if any) might be affected by the review. Where the review opens up the possibility that another athlete might have their provisional selection revoked or otherwise effected in any way that other athlete will be given notice of the review, and will be given copies of any documents submitted by the applicant, and will be asked to submit their comments on the review to the Selection Committee. The Selection Committee and the Independent Members (sitting as the Review Panel) shall consider the issues raised by the applicant to the review and any other athlete who might be affected by the review.

General rule is that only grounds for appeal is that the process set out in the selection

poli

y was not followed.”

- 6 Athletes are to sign a copy of the Selection Document confirming that they have received, read and understood “the selection policy documentation and its appendices”.

- 7 As a general proposition, a selection decision may be reviewable if the sports governing body has acted in breach of its rules, or has acted procedurally unfairly, or has taken into account irrelevant considerations or failed to take into account relevant ones, or has acted without a proper factual basis or contrary to legitimate expectation, or if its decision is irrational in the sense that no reasonable governing body properly instructing itself as to the facts and the law could have taken it.
- 8 A court or arbitral panel will not seek to put itself into the shoes of the expert and experienced selectors, and will afford them a wide margin of discretion in the exercise of their function. The court or arbitral panel is in no position to second guess the selectors' decision and replace it with its own. Rather on review it is appropriate to examine the way in which the decision was taken, and whether that fell short on one of the bases set out above. If the way in which the decision was taken did not so fall short, the court or arbitral panel will not assess whether the decision was in its view correct.
- 9 On occasion, selection rules themselves set an unequivocal basis for selection, such as that the athlete running the fastest time at particular trials, will be selected. That is not the case here. The British Bobsleigh Selection Criteria here set out in clear terms in Clauses 3.1 and 3.2 that the criteria that are identified fall to be taken into account, and act as a guide for selection, but do not determinate it. The Selection Criteria reiterate that selection is a matter for the exercise of expert opinion.
- 10 Furthermore, the Selection Criteria go on to provide at Clause 5.1 that the only ground for review is that the selection policy has not been followed by British Bobsleigh. That is consistent with the proposition that it is the process that falls to be examined, and not whether the court or arbitral tribunal regards it as correct.

### **Athlete K's complaints**

- 11 Athlete K makes essentially two complaints. First he complains that British Bobsleigh did not follow the selection policy, because (a) objectively measuring his past performance against the past performance of others selected, he made the sled move faster, and (b) the "summary" of concerns expressed by Mr Anderson were inaccurate, misplaced or outweighed by the objective indicia that he made the sled move faster.
- 12 Second, Athlete K complains that British Bobsleigh did not afford him a fair procedure, because one member of the Selection Panel, Selector A, has a vested interest in the selection of Athlete A and there is therefore an appearance of bias.
- 13 The first complaint is not, properly understood, a challenge to the way in which the decision has been taken, or a challenge put on the basis that the process has not been followed. It is a challenge to the correctness

of the decision. Athlete K is in effect saying too much weight was attached to one factor, or too little weight was attached to another, or that the exercise of discretion based on the various factors came to the wrong result. He is in effect asking the review panel to substitute its decision for that of British Bobsleigh.

- 14 I am not satisfied that British Bobsleigh failed to take into account the objective criteria listed in Clause 3.6. It is for British Bobsleigh to decide how much weight to attach to them in all the circumstances. It is for British Bobsleigh to evaluate the significance of the performances, and the number of them, and the places where they happened. I am not satisfied that British Bobsleigh's evaluation of who made the sled go faster, and on what occasions, and of the significance to attach to that when weighed against other factors, is impeachable in this context.
- 15 As for the "summary" of concerns expressed by Mr Anderson, it was relevant to take into account that Athlete K had only raced 6 times competitively, and only been in the sport for 5 months. Such experience is something that British Bobsleigh can legitimately regard as relevant to performance. While it may be the case that others were also relatively new to the sport and that Athlete K had had injuries, those points go only to how much weight to attach to the factors, which is a matter for British Bobsleigh. Because it is matter for British Bobsleigh, the further information about those athletes provided in the fourth pleading served by Mr Anderson after the hearing does not alter the analysis on this review, but merely illustrates what British Bobsleigh would be taking into account. Athlete K's weight (at 4.5 kilos over the set weight) is also a relevant factor, to be assessed by British Bobsleigh in its discretion. It is said that it was not taken into account when the decision was made. But even if that were correct, it would be relevant on remission. So too injury record, time keeping, and psychologist's report could be taken into account by British Bobsleigh, to the extent deemed by it to be appropriate in its experience and expertise. The facts that others had been injured, that Athlete K had struggled hard to recover and compete, that there had been no formal complaint about time keeping, and that the psychologist was examining team dynamics and may not have actually spoken to Athlete K, all go only to the weight to be attached to these matters, which is for British Bobsleigh.
- 16 In these circumstances I am not satisfied that British Bobsleigh failed to follow the selection process, or that its decision was on any other basis reviewable. Mr Spalton rightly disavowed any suggestion that the decision was irrational. It plainly did not fall outside the range of decisions reasonably open to the governing body.
- 17 As to the second complaint, I do not consider that an outside observer, properly informed of the facts, would consider that there was a real risk that the decision on selection would be affected by bias. Selector A was identified in Clause 3 of the Selection Criteria as one of the coaches whose assessment would be relevant. No objection was taken to that at any prior stage. Selector A was a British Bobsleigh coach who was available to all, and not just to Athlete A. I have not been shown anything that would lead an outside

observer to conclude that Selector A, instead of deciding who it was best to select in the interests of the sport, would select one particular individual knowing that he was not the best or not caring whether he was the best, or even to conclude that he would be influenced in his assessment. I do not consider that the two press reports provided, which identify Selector A as Athlete A's coach, would lead to such a conclusion.

18 In these circumstances, I do not consider that there is any basis on which to order that the matter be remitted to British Bobsleigh for reconsideration.

ADAM LEWIS QC

Blackstone Chambers

17.00 21 January 2014



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