SPORT RESOLUTIONS (UK)
SPECIALIST INDEPENDENT DISPUTE SERVICE

CASE 29 – Decision

At the conclusion of a hearing held yesterday, Friday 29 June 2012, the Appeal Committee denied the appeal brought by Coach A on behalf of Athlete T against the decision of British Swimming not to nominate Athlete T to compete for Team GB in the women's 200 metres breaststroke event at the 2012 Olympic Games. Set out below is the background to that ruling, followed by the reasons for it:

A. FACTS

A.1 The Selection Policy

1. On 19 December 2011, British Swimming's GB Technical Swimming Committee issued the Olympic Games 2012 Pool Swimming 28th July – 4th August Selection Policy (the 'Selection Policy'), setting out the process and criteria that British Swimming would follow in selecting the swimmers to be nominated to compete on behalf of Team GB at the 2012 Olympic Games.

2. Paragraph 1 of the Selection Policy provided, inter alia, that there was a maximum of 52 places available in total for *'athletes meeting the qualification standards outlined in this policy'*, including *'up to 2 places available in each individual event'*. The *'qualification standards'* for the individual events (as opposed to relay events) were as follows:

> *1.4 Initial selections will be made from performances at the 'Trials' as follows:*
>
> *1.4.1 The 1st place in each individual event will be filled by the fastest "available" swimmer in the final of that event on condition they have achieved the minimum FINA A standard in the "Trials" final of the said event.*
>
> *1.4.2 The 2nd place in each individual event will be filled by the 2nd fastest "available" swimmer in the final of that event on condition that they have achieved the World LC ranked Top 16 (2 per nation) time as set out in Table 1 in the "Trials" final of the said event. Such a nomination will be subject to clause 3.2.*
>
> *…*
>
> *1.5 Nominations for any remaining individual event places will be made following the British Gas ASA Nationals (subject to 3.5). Remaining place(s) will be filled by the fastest "available" swimmer(s) achieving the FINA A qualification standard from times identified in 1.5.1 or 1.5.2:*
>
> *1.5.1 Times recorded in the final of the relevant event at the British Gas ASA Nationals 2012.*
>
> *1.5.2 Times recorded in the final of the relevant event at the "Trials" by swimmers who have already qualified at the "Trials" in the relay or another individual event.*

(Neither paragraph 3.1 nor paragraph 3.5 of the Selection Policy is relevant here).

3. Therefore, the criteria for selection for the two slots available for each individual event were entirely objective, based on performances at the Long Course Championships on 3-10 March 2012 (the 'Trials') and (if necessary) at the ASA Nationals on 20-23 June 2012 (the 'Nationals'). The Selection Policy does not (at least expressly) give the selectors discretion to depart from those performance requirements in exceptional or extenuating circumstances, as some selection policies do.

A.2 The Selection Decision

4. In relation to the women's 200 metres breaststroke event:

4.1 The minimum FINA A standard time was 2:26:89.

4.2 Athlete A won the 200m breaststroke event at the Trials in a time better than that minimum standard, and so met the qualification standard set out at paragraph 1.4.1 of the Selection Policy for the first spot on Team GB for the women's 200m breaststroke event at the Games.

4.3 Athlete T came second at the Trials in a time (2:26:81) that was also better than the FINA minimum standard, but that was not as good as the World Top 16 time (2:25:99). Therefore, she did not meet the qualification standard set out at paragraph 1.4.2 of the Selection Policy for the second spot on Team GB for the women's 200m breaststroke event at the Games.

4.4 Athlete T won the 200m breaststroke event at the Nationals but in a time that was just outside the FINA minimum standard. Therefore, neither she nor anyone else met the qualification standard set out at paragraph 1.5.1 of the Selection Policy for the second spot on Team GB for the women's 200m breaststroke event at the Games.

4.5 No swimmer who qualified at the Trials for another event achieved the FINA minimum standard for the 200m breaststroke at the Trials. Therefore, no swimmer met the qualification standard set out at paragraph 1.5.2 of the Selection policy for the second spot on Team GB for the women's 200m breaststroke event at the Games.

5. The notes of the selectors' meeting, held on 23 June 2012, reflect the following discussion:

Selector Recommendation
[Athlete T] has not achieved the FINA A Time in the 200m BR during the ASA Nationals. Whilst she is the only swimmer to have achieved the FINA A time who has not been nominated to the team the following points were noted:

2012

a) In accordance with the policy her FINA A time achieved at the March trials could not be considered as she had not achieved selection to the Team in another event

b) As such she had to swim the FINA A time in the final at the ASA

Nationals 20-12 [sic] June

c) Her performance at the ASA Nationals was slower than her swim at the British Gas Swimming Championships in March, 2012

As [Athlete T] does not fulfil the criteria for selection and there is no leeway within the policy for discretionary selections it is the selector's recommendation not to nominate the swimmer for the 2012 Olympic Games squad.

This recommendation was confirmed by the group

6. On 25 June 2012, British Swimming announced the names of 44 swimmers that it had decided to nominate for selection for Team GB for the 2012 Olympic Games. It included only one swimmer – Athlete A – for the women's 200m breaststroke event at the Games. Neither Athlete T nor anyone else was nominated for the second spot for that event; rather it was left unfilled (the 'Selection Decision').

B. THE APPEAL

7. Paragraph 3.21 of the Selection Policy provides that *'[a]ny appeals against nominations in relation to this GB Technical Swimming Committee selection policy must be made in accordance with the British Swimming Team Selection Appeals Procedures'*. It is slightly strange that this provision does not also refer to decisions not to nominate but British Swimming (sensibly) did not take the point.

8. On 25 June 2012, Coach A filed an appeal on Athlete T's behalf against the Selection Decision (the 'Appeal'). In accordance with the Fast Track Team Selection Appeals Procedure for Olympic Games London 2012 (the 'Appeals Procedure'), initially the appeal was forwarded to the selectors, so that they could reconsider the Selection Decision in light of its contents. They decided not to change the Selection Decision, and so on 26 June 2012, British Swimming forwarded the Appeal to Sport Resolutions with a request that Sport Resolutions *'convene an Appeal Committee and in the first instance a Chairman to consider whether the application for Leave to Appeal is granted'*. By agreement of the parties, the undersigned was appointed to act as the Appeal Committee hearing the Appeal, sitting alone.

9. Paragraph 5 of the Appeals Procedure provides, in relevant part, as follows:

Leave to Appeal shall be granted only when the athlete shall have established a strong arguable case that, either

5.1 relevant information was ignored or not considered by the Selectors; or

5.2 the Selection process was tainted by unreasonable bias or conflict of interest; or

5.3 the provisions of the relevant Selection Policies were not adhered to. The Chairman may:-
i. refuse to grant permission to proceed with an Appeal Hearing because insufficient grounds

are identified. The decision of the Selectors shall stand and the athlete shall be notified accordingly.

ii. decide that he or she is sufficiently well informed in which event he or she may decide not to hold a hearing and to render a decision immediately.

iii. grant permission for the appeal to proceed to the full Appeal Committee in accordance with the procedures set out below.

The above procedure is designed to prevent unmeritorious appeals being made and to save unnecessary costs, time and other expenses being incurred.

10. By decision dated 27 June 2012, leave was granted to appeal against the Selection Decision on two of the grounds asserted in the notice of Appeal filed by Coach A, as follows:

10.1 That the Selection Policy was unclear and was misunderstood to mean that Athlete T would be selected if the time she achieved at Trials was not beaten at Nationals.

10.2 That there is a lacuna in the Selection Policy, ie an unanticipated set of facts for which no provision was made in the Selection Policy, namely that two swimmers might meet the FINA minimum standard (but not the World 16 time) at the Trials, but then no one would meet the FINA minimum standard at the Nationals, so that only one spot would be filled even though two swimmers had met the FINA minimum standard.

11. A hearing was held on the Appeal in London on Friday 29 June 2012. Coach A attended the hearing along with Athlete T and her father, and they were represented by Jonathan Crystal, instructed by Richard Cramer of Front Row Legal. Michael Scott (National Performance Director), and Dennis Pursley (Head Coach) attended the hearing on behalf of British Swimming, along with Ashley Cox (Senior Solicitor), instructing Chris Stoner QC. Prior to the hearing both counsel submitted short skeleton arguments, and British Swimming submitted a witness statement from Mr Pursley, with exhibits. At the hearing, Athlete T, Coach A and Dennis Pursley gave evidence and answered questions both from counsel and from the Appeal Committee. The Appeal Committee wishes to record its gratitude to both parties for the cooperative spirit in which the hearing was held, and to both counsel for the high quality of their submissions both prior to and at the hearing, particularly in light of the extreme time constraints under which they were working.

C. <u>SUBMISSIONS</u>

12. On the first ground of appeal (that the Selection Policy was unclear and was misunderstood to mean that Athlete T would be selected based on the time she achieved at Trials if she was not beaten at Nationals):

12.1 Athlete T testified that after Trials *'I knew I had to hit the time* [ie the FINA minimum standard]

again' at Nationals. However, a few days after Trials someone pointed out to her a tweet by Athlete B that suggested that her time at Trials would be enough to get her selected as long as no one beat that time at Nationals, and then she saw an article in the June 2012 edition of Swimming Times that stated that her time at Trials would be enough for her to qualify so long as no one other than Athlete A beat her at Nationals. She therefore spoke to her coach, and he told her that if she did not make the FINA minimum standard at Nationals, then the selectors could decide to nominate her for Team GB anyway. She did not talk about it much with him or anyone after that, because *'my main focus was to hit the time'.*

12.2 Coach A testified that he spoke to Dennis Pursley and Michael Scott at Trials, after Athlete T's race, and they told him very clearly that she would have to make the FINA minimum standard again at Nationals in order to be selected. However, he subsequently spoke to some other coaches that he respected, and the *'consensus'* was that even if Athlete T did not make the FINA minimum standard at Nationals, if no one else beat her time then the selectors were likely to consider putting her forward anyway. That chimed with Coach A's understanding that British Swimming selectors had made use of wild cards/discretionary entries for previous Games and World Championships. He said he spoke to the other coaches because he was looking for some comfort on the point, but he frankly acknowledged that he did not go back and speak to either Dennis Pursley or Michael Scott (whom he considered to be *'the decision-makers'* for British Swimming on the point) before Athlete T raced at Nationals.

12.3 Dennis Pursley, British Swimming's head coach, testified that the selection requirements had always been made clear, in all official communications from British Swimming, including the requirement that anyone who did not qualify for an individual event at the Trials would have to meet the FINA minimum standard at Nationals to qualify. He had not seen the contrary piece in the June 2012 edition of Swimming Times before these proceedings, but in any event he and his colleagues on the World Class Programme had always made it clear to swimmers on the programme and their coaches (including at the annual meeting in October 2011) that for definitive information they should consult the Selection Policy itself (which was posted on the British Swimming website from December 2011). He acknowledged, however, that he was not aware of any specific communication, after Trials, to swimmers who did not qualify at Trials, as to what they had to do to qualify at Nationals.

12.4 Mr Crystal submitted that, even if the Selection Policy itself was clear, given the conflicting information that she subsequently received, by Athlete B and by Swimming Times, it was quite reasonable in the circumstances for Athlete T, a 16-year-old in the middle of her GCSEs, to be uncertain about what was needed at Nationals, and in particular about whether the time she had achieved at Trials would *'come into play'*. He submitted that British Swimming must have known that everyone would be discussing selection after Trials, and that for those who had not qualified at Trials, the most obvious *'frequently asked question'* would be *'what do I have to do at Nationals to qualify?'* In such circumstances, where sources like Athlete B (a very prominent and influential voice in British swimming) and Swimming Times (the official publication of the Amateur Swimming Association) were suggesting that Athlete T could qualify at Nationals even if she did not make the FINA minimum standard, British Swimming should have published an official correction/clarification so that everyone was clear, and the failure to do so estopped British Swimming from excluding Athlete T from the team

on the basis that she had not met the FINA minimum standard at Nationals.

12.5 Mr Stoner responded that the requirements had been clearly communicated in the Selection Policy itself, and by Mr Pursley and Mr Scott to Coach A in person at Trials, as well as being repeated accurately in the April 2012 edition of Swimming Times. There was therefore no doubt that Athlete T had to meet the FINA minimum standard time at Nationals. He said that Athlete B's tweet was irrelevant, because no one could reasonably rely on tweets by persons unconnected with British Swimming as a statement of its selection policy. He accepted it was *'unfortunate'* that incorrect information had also been printed in the June edition of Swimming Times, but pointed to the disclaimer in that publication that stated that *'[v]iews expressed in articles are those of the authors and do not necessarily reflect those of the editor, the Board of Directors of Swimming Times or the ASA or IoS [Institute of Swimming]'.* He further noted that if there had indeed been any uncertainty, then Coach A could have consulted with British Swimming, and he had acknowledged that he had not done so. Mr Stoner also noted that there was no suggestion in any event that Athlete T had done anything differently in preparing for Nationals as a result of her apparent belief that she might still qualify even if she did not make the FINA minimum standard at Nationals, and therefore no harm had been caused in any event.

13. On the second ground of appeal (that there was a lacuna in the Selection Policy, ie an unanticipated set of facts for which no provision had been made, namely that two swimmers might meet the FINA minimum standard (but not the World 16 time) at the Trials, but then no one would meet the FINA minimum standard at the Nationals, so that only one spot would be filled even though two swimmers had met the FINA minimum standard):

13.1 Mr Pursley testified that he was on the committee that drafted the Selection Policy. He stated in his witness statement that *'[t]he essential ethos of the Policy is to select the most competitive team for the 2012 Olympic Games and not necessarily to fill every place'.* At the hearing, he confirmed this meant the selectors wanted to ensure that only swimmers who were likely to reach at least the semi-finals if not the finals of their events at the Olympic Games would be selected for Team GB. The selection requirements were set with that aim in mind. For example, the FINA minimum standard was an important benchmark, but anyone swimming only the FINA minimum standard will be unlikely to qualify for the semi-finals at the Games. Therefore, for the individual events, the policy was that the winner of the event at Trials would be selected if he or she met the FINA minimum standard, on the basis that he or she would then commit to a rigorous training programme to improve on that performance at the Games. However, the runner-up at Trials would not be selected unless he or she met not only the FINA minimum standard time but also the time of the 16th ranked swimmer in the world in that event. The rationale was that if the runner-up (and therefore the winner) met the World Top 16 time, they stood a good chance of being competitive at the Games, and there was little chance that any other candidate would be able to match that time at the Nationals. However, if the runner-up met the FINA minimum standard time but not the World Top 16 time at Trials, then he or she should not be selected unless he or she then won Nationals and met the FINA minimum standard in the process. The idea was that the runner-up at Trials would then be incentivised to keep training and improving, while other contenders would also be incentivised to try and beat

the runner- up. The selectors realised that this created the possibility that a swimmer might come second at Trials in the FINA minimum standard time, then win Nationals but not in the FINA minimum standard time, and therefore not qualify even though he or she had met the FINA minimum standard at the first of the trial events and had won the second trial event. They considered that acceptable, however, because that would mean the swimmer's performances were not improving from the FINA minimum standard achieved at Trials (as they would have to do if he or she was to be competitive at the Games) but instead were deteriorating. This might be tough on the swimmer, especially given the fine margins involved, but again the objective was not just to fill all available spots, but rather to make sure that the team was made up of swimmers who were likely to reach at least the semi-finals in their event at the Games.

13.2 Mr Stoner submitted that on that basis it was clear as a matter of fact that there was no lacuna in the Selection Policy, that no other finding on that point was possible, and the appeal therefore ended there. He further submitted that even if there were a lacuna (which there was not), to fill it would amount to a re-writing of the Selection Policy, which the Appeal Committee had no power to do. He said the Selection Policy said what it said, it could have provided that here was discretion to depart from the express requirements where appropriate, but did not, and in such circumstances no intervention was warranted or justified.

13.3 Mr Crystal in response asserted that strict application of the Policy to exclude Athlete T in circumstances that had not been foreseen or provided for in the Policy would be *'arbitrary, unfair or contrary to general principles of law'*. He made clear that Mr Pursley's evidence that this set of circumstances had been foreseen was not disputed. However, he questioned whether the Selection Policy did in fact make specific provision for what should happen in such circumstances. If it had been decided in advance that it would not be enough for selection to achieve the FINA minimum standard at one of the trial events, and to win the other trial event, it could fairly be expected that that would have been stated clearly and expressly in the Selection Policy, and it was not. It was never expressly stated in the Selection Policy that a non-winning swimmer's FINA minimum standard time from the Trials would be discounted. To the contrary, it was stated at paragraph 1.5.2 of the Selection Policy) that that time would count, at least for a swimmer who had been nominated to Team GB after the Trials for another event. In other words, if a swimmer had come in third in the 200m breaststroke final at the Trials, ie behind Athlete T, but still meeting the FINA minimum standard time, then if that other swimmer had qualified at Trials for another event, and so been nominated for Team GB after Trials for that other event, then by virtue of paragraph 1.5.2 of the Selection Policy that other swimmer could rely on her time in the 200m breaststroke at Trials to claim Team GB's second spot in the 200m breaststroke at the Games. If it was still maintained that Athlete T, in contrast, could not rely on her time at Trials to claim that second spot, then this was an inexplicable and unjustified *'mismatch'* that made the Selection Policy arbitrary, unfair and therefore *'contrary to general principles of law'*, so mandating intervention by the Appeal Committee. As for what that intervention should be, the Appeal Committee should recommend to British Swimming that (1) *'it should nominate [Athlete T] for selection if her time recorded in the final of the relevant event at the Trials or the Nationals was the minimum FINA A standard'*; or (2) *'in determining the fastest available swimmer in [Athlete T's] event it should take into account her time recorded at*

the Trials'. Alternatively, if that seemed too much like telling British Swimming that it had to select Athlete T, then at the very least the Appeal Committee should recommend to British Swimming that it come up with a policy to fill the lacuna or fix the *'mismatch'*, and then apply that policy to Athlete T's case, and either select her or not, as that (new) policy dictated.

14. At the end of the hearing, each side expressly confirmed that the procedure followed had been fair and that every opportunity had been provided to state their respective cases.

D. LEGAL PRINCIPLESGOVERNING THE APPEAL

15. As noted above, the Appeal Procedures permit appeals only on the following grounds: (1) that relevant information had been ignored or not considered by the Selectors; (2) that the selection process was tainted by *'unreasonable'* bias or conflict of interest; or (3) that the selection policy had not been followed properly.

16. What is very clear, then, is that no appeal is allowed on the merits of the selection decision, ie the issue is not, and must not be, whether the Appeal Committee agrees with the Selection Policy or with the decision made in implementation of that policy. I accept in this regard Mr Stoner's submission that *'[t]he purpose of providing an athlete with a right of appeal against non-nomination is not to give athletes a second chance of selection via a second tier selection panel. Instead it is to provide machinery for the correction of an error'.* The Appeal Committee is required to respect this intended restriction scrupulously. See Hutchison v British Fencing Association, Sport Resolutions appeal decision dated 29 May 2012, para 11 (*'the policy behind the appeal provisions which restrict an appeal to issues of due process only must be respected. The selection process is not a legal or adversarial process, and these proceedings are not equivalent to judicial review of public bodies. The selectors have a difficult task to balance the comparative merits of the candidates for selection and the overall interest of the association in maximising the changes of securing medals at the Olympics. These are matters of sporting or performance judgement and it is not for this panel to adjudicate on these questions'*).

17. Even if the Appeal Procedures were not so clear, however, the legal principles applied by the Court of Arbitration for Sport and other tribunals in selection disputes are to the same effect:

17.1 It is recognised that selectors are chosen for their experience and expertise, which is needed both to design a selection policy that maximises the team's chance of success at the event in question, and to make difficult decisions in the implementation of that policy. Mewing v Swimming Australia, CAS 2008/A/1540, award dated 9 May 2008, para 42.

17.2 As a result, the CAS is clear that it is for the experts to make those decisions, and it is not for an appeal body to review the merits of a selection policy or of a decision made in the implementation of that policy. See Mewing, ibid. at para 43; Watt v Australian Cycling Federation, CAS 96/153, award dated 22 July 1996, para 10 (appeal body should not set aside a selection decision simply because it thinks a better one could have been made).

17.3 Nor is it for an appeal body to rewrite a selection policy if it believes the result is unfair or not what was

intended. Instead, it must give effect to the plain meaning of the words in the policy, as written, whatever the result produced. See eg Roberge v Judo Canada, Arbitration Decision, Judo Canada. June 21, 1996 at p. 7, as quoted in Findlay & Corbett, *The Rights of Athletes, Coaches and Participants in Sport*, August
2000):

> What the [Appeal Panel] did, in effect, was to substitute its own decision as to who was the better athlete and accordingly manipulated the rules of the Handbook by reversing the order of the criteria to arrive at that conclusion. This is clearly inappropriate especially in a case such as this, where the tie-breaking formula contained criteria that were clear, concise, objective and nondiscretionary. It is not within the jurisdiction of the [Appeal Panel] to intervene into the affairs of Judo Canada and re-write their selection rules based on what the [Appeal Panel] thinks is fair, or what it thinks the criteria should be in order to select the best possible athlete. The tie-breaking formula involved, in essence, the mechanical application of the criteria set out in the Handbook: adding up points, identifying the highest category of tournament and counting the number of wins. There was absolutely no room for the abuse of discretion, subjective evaluation or ambiguity. In such circumstances, it is not for the [Appeal Panel] to become involved in whether the selection criteria enable Judo Canada to identify the best possible athlete. It is up to the experts in the sport organization which, in this case, as the Technical Committee ... The tie-breaking formula was set out in the Handbook so that all athletes knew well ahead of time what the "rules of the game" were in the event of a tie ... Decisions with respect to clear and concise criteria cannot be appealed simply because an athlete does not like the outcome and feels they are a better overall athlete than the person who won the tie-breaker. [To do this] would be grossly unfair.

18. This jurisprudence makes clear, then, that an appeal body should be very cautious about overturning a selection decision. It should only do so exceptionally, where the flaw in the decision goes well beyond a mere disagreement with the merits of the selection decision made. For example, intervention would, in principle, be justified, if it were shown that:

18.1 The selection policy was contrary to general principles of law, or its application was so arbitrary that it would not be fair and reasonable to apply it. Canadian Olympic Association v FIS, CAS AH DOG 02/002, award dated 8 February 2002, para 6; Dal Balcon v CONI & FISI, CAS OG Turin 06/008, award dated 18 February 2006, para 16. An example of the former would be where the selection policy discriminated between athletes on improper grounds (eg gender), either in terms or in the way it was applied. See eg Mewing v Swimming Australia, CAS 2008/A/1540, award dated 9 May 2008, para 38; Michael v NZ Federation of Roller Sports, NZST decision dated 19 July 2011, para 23. An example of the latter would be if the policy was introduced/changed too late and/or with insufficient notice for the athletes affected to react accordingly. Dal Balcon v CONI & FISI, CAS OG Turin 06/008, award dated 18 February 2006, para16.

18.2 The selection policy was lawful and not arbitrary, but the selectors failed to follow the policy, properly construed. See eg Sullivan v Judo Federation of Australia, CAS 2000/A/284, award

dated 14 August 2000, para 30; Beashel v Australian Yachting Federation, CAS 2000/A/260, award dated 2 February 2009, para 2; Hilton v NISA, [2009] ISLR SLR-75, QBD (Eady J.). See also Halsted v British Fencing Association, Sport Resolutions decision dated 22 June 2012 (while a failure to comply with policy does not automatically lead to setting aside of selection decision, *'an athlete appealing against that decision will normally be entitled to have the decision set aside unless it can be confidently said that the non-compliance could not realistically have made a difference to the actual decision. The athlete is to be given the benefit of any doubt on that issue. He does not have to prove that the non-compliance did affect the decision.'*). For example:

a. The selectors failed to apply the criteria set out in the policy. Either they did not give *'proper, genuine and realistic'* consideration to the factors identified as relevant in the selection policy, or they took into account irrelevant factors. Mewing v Swimming Australia, CAS 2008/A/1540, award dated 9 May 2008, paras 45-46; Michael v NZ Federation of Roller Sports, NZST decision dated 19 July 2011, para 84. However, particular care must be taken to ensure this ground is not really being used to attack the merits. See Mewing, ibid., at para 45 (*'The fact that someone else, similarly considering the matter, may have arrived at a different result, or even the fact that his decision is wrong, is insufficient to enable the appeal to be successful as such matters go to the merits of the decision not whether or not the decision-maker gave proper consideration to such matters'*).

b. The selectors failed to recognise that the policy gave them a discretion to depart from the criteria set out in the policy in extenuating circumstances, and so failed to consider whether or not the facts alleged amounted to sufficient extenuating circumstances for that purpose. Berchtold v Skiing Australia, CAS 2002/A/3161, award dated 19 February 2002, para 17.

18.3 The procedure followed in making the selection decision, taken overall, was tainted by bias (see eg Michael v Australian Canoeing, CAS 2008/A/1549, award dated 4 June 2008) or was otherwise unfair. See eg Watt v Australian Cycling Federation, CAS 96/153, award dated 22 July 1996, para 10 (appeal body's role is *'to determine whether the decision was arrived at fairly and with due and proper regard, if any was owed, to the interests of the appellant in the peculiar circumstances which existed'*); Hutchison v British Fencing Association, appeal decision dated 29 May 2012, para 12, 14 (*'There is no appeal from the merits of the selection decision. The role of the appeal panel is to decide, taking a broad and not over legalistic view, whether there was any substantial unfairness in the selection process or deviation from the selection policy'*). For example, if a selecting body makes a representation that gives rise to a legitimate expectation on the part of the athlete that he or she does not have to abide by the training and assessment requirements set out in the selection policy, knowing that the athlete would rely on that representation and 'chart her course' accordingly, it cannot then refuse to select her for failing to submit to those requirements. Watt, ibid. at 14-15, 26.

18.4 The selection decision was made in bad faith or dishonestly or perversely. Mewing v Swimming Australia, CAS 2008/A/1540, award dated 9 May 2008, paras 42, 45. Again, however, the appeal body must be careful not to come to a conclusion on the merits of the selection decision under the guise of a

finding that the selectors acted in bad faith or contrary to particular guidelines or criteria. Ibid. at para 43.

19. It is to be noted that, while there is a large degree of overlap between these legal grounds for appeal identified in the jurisprudence, and the three grounds for appeal permitted in the Appeal Procedures, the legal grounds for appeal appear to be broader than the three grounds for appeal permitted in the Appeal Procedures. I return to this below.

20. If grounds are established for overturning a selection decision, in the ordinary course it should be remitted back to the original selectors to make a new decision. See eg Berchtold v Skiing Australia, CAS 2002/A/3161, award dated 19 February 2002, para 19. Only in the most exceptional circumstances (e.g., extreme time pressures) would it be appropriate for the appeal body to proceed to make the new selection decision itself. Michael v Australian Canoeing, CAS 2008/A/1549, award dated 4 June 2008, para 16. That accords with paragraph 10.3 of the Appeal Procedures in this matter, which does not give the Appeal Committee power to make selection decisions itself, but instead provides simply that *'[t]he Appeal Committee has the power to make such recommendations to British Swimming as it deems appropriate'.*

E. REASONS FOR DENIAL OF THE APPEAL

21. The first ground for appeal (that the Selection Policy was unclear and was misunderstood to mean that Athlete T would be selected based on the time she achieved at Trials if she was not beaten at Nationals) is rejected for the following reasons:

21.1 Any confusion about the selection requirements arising from statements made by persons other than British Swimming is irrelevant. The misinformation published by Swimming Times is relevant, because of the official status of that publication (the disclaimer does not assist, because it disclaims only views expressed, not 'facts' stated). Crucially, however, neither Athlete T nor her coach was misled into thinking that she would be selected as long as she won at Nationals. To the contrary, they were both clear that she needed not only to win but to meet the FINA minimum standard at Nationals in order to ensure selection, but they hoped that if she did not meet that time the selectors might nevertheless exercise discretion to select her in any event. That is very different.

21.2 Even if (contrary to the above) they had been misled into thinking that Athlete T would be selected as long as she won at Nationals, Coach A knew that this contradicted the clear advice he had been given by Dennis Pursley and Michael Scott at Trials. If he had any doubt in the matter, he could and should have gone back to them for clarification. If he had done, there is no doubt they would have said (as they had throughout) that she had to make the FINA minimum standard at Nationals.

21.3 Furthermore, and unsurprisingly given the above, it is not suggested that Athlete T changed her behaviour or her preparations for Nationals in any way as a result of the uncertainty in her mind as to whether or not she had to meet the FINA minimum standard at Nationals. Instead, she testified that throughout she remained *'focused'* on reaching that standard at Nationals.

21.4 Given these findings, there is no factual basis for a ruling estopping British Swimming from enforcing the requirement to meet the FINA minimum standard at Nationals in Athlete T's case.

22. The second ground for appeal (that there was a lacuna in the Selection Policy, ie an unanticipated set of facts for which no provision had been made, namely that two swimmers might meet the FINA minimum standard (but not the World 16 time) at the Trials, but then no one would meet the FINA minimum standard at the Nationals, so that only one spot would be filled even though two swimmers had met the FINA minimum standard) is rejected for the following reasons:

22.1 With respect, I am not persuaded by Mr Stoner's submission that filling a lacuna would amount to an impermissible re-writing of the Selection Policy. It is not easy to see how one can 're-write' something that does not exist. I can see the concern that would arise if the Appeal Committee were to attempt to fill the lacuna itself, particularly in a way that effectively dictated the selection of a particular swimmer, but here that could be avoided by simply identifying the lacuna and recommending to British Swimming that it fill the lacuna however it sees fit.

22.2 However, this is a moot point because I do accept Mr Stoner's submission that, as a matter of fact, there is no lacuna in the Selection Policy. I accept entirely the evidence of Mr Pursley, who was a clear, thoughtful and highly impressive witness, that the committee that drafted the policy did foresee that, as a result of the requirements they were setting, they might not fill both spots for a particular event even if the runner-up at Trials had met the FINA time for the event, and I also accept his explanation that the drafters were ready to live with that, because they wanted swimmers on Team GB who would reach the semi-finals and finals of their events at the Games, and therefore they wanted swimmers whose times were getting better than the FINA minimum standard between Trials and Nationals, not swimmers whose times were getting worse. As a result, while it is true that he and others at British Swimming expressed sincere and genuine disappointment when Athlete T did not meet the FINA minimum standard at Nationals, this was tough- minded disappointment that her performances were not good enough to make her competitive (and so to warrant a place on the team), not sympathy for someone who had suffered an unintended injustice.

22.3 Mr Crystal's fall-back position -- that there was a *'mismatch'* in the Selection Policy (allowing swimmers who qualified for another event at Trials to rely on their time at Trials to get into the 200m breaststroke event, but not allowing Athlete T to do the same) that was arbitrary and

unfair and so contrary to *'general principles of law'* -- raises another threshold legal issue. Mr Stoner accepted that there may be various legal grounds for challenging a selection policy or selection decision, but his position was that unless they come within the three permissible grounds for appeal stated in the Appeals Procedure, then this Appeal Committee has no jurisdiction to hear them and instead they would have to be pursued in another forum (presumably, the High Court, unless there is provision for another dispute resolution mechanism somewhere in British Swimming's rules). If correct, this would seem to me to be an unhappy result, and one inconsistent with the pressing need, in disputes such as this, for a very speedy and efficient resolution of the entire matter. Nor do I think, with respect, that the argument is strengthened by his suggested solution of construing the three permissible grounds for appeal in the Appeals Procedure so broadly that they encompass all other possible legal grounds for appeal in any event (eg by saying that the third ground, failing to adhere to the Selection Policy, means failing to adhere to the Selection Policy insofar as it is legal). I fully acknowledge that the lack of time meant that this issue was not fully briefed or argued at the hearing, but with that important proviso my current view is that an Appeal Committee such as this should be entitled to consider any free-standing legal grounds for challenge to the Selection Policy and/or decisions made thereunder, whether or not those grounds fall easily within one of the three permissible grounds for appeal stated in the Appeal Procedures. Cf Hutchison v British Fencing Association, appeal decision dated 29 May 2012, para 9 (argument that process followed was not fair allowed to proceed on appeal notwithstanding that policy only permitted appeal on ground policy had not been followed, because *'[t]here must be implied a requirement for fairness in the application of the process'*).

22.4 Once again, however, the point is moot, because I do not consider that the perceived *'mismatch'* of which Mr Crystal complains in the Selection Policy comes anywhere close to being arbitrary or unfair, or in any way unlawful. Mr Pursley explained the reason for the difference in treatment of those who had already been selected after the Trials for another event was to allow them *'"to stand on their times" if they choose to do so and remain focused on a preparation cycle for the Olympic Games, as opposed to preparing for the ASA Nationals''.* Reasonable people might disagree with the selection criteria or approach chosen by Mr Pursley and his colleagues (the Appeal Committee is simply not qualified to say), but it was common ground at the hearing that any such disagreement would not be sufficient to justify any intervention or re-writing of the Selection Policy on the part of the Appeal Committee.

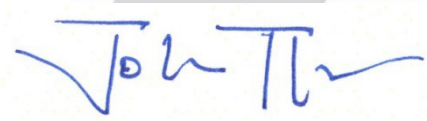
22.5 The fact that no other swimmer qualified for the second spot on Team GB for the 200m breaststroke event means this Appeal Committee does not have to be concerned that helping Athlete T would hurt another athlete. But that does not provide any basis for the Appeal Committee to ignore or to re-write the Selection Policy, even if it thought there were reason to do so (which it does not).

F. AWARD

23. For the foregoing reasons, the appeal against the decision not to nominate Athlete T for Team GB for the 2012 Olympic Games is denied.

24. Very appropriately, British Swimming agreed to bear the costs of convening the Appeal Committee to hear this matter. The remaining costs lie where they fall.

25. Athlete T is clearly a very talented and determined swimmer. She is also fortunate to have such a committed and dedicated coach as Coach A. With his guidance, it is to be hoped that her clear and very understandable disappointment at not being selected to compete at the 2012 Olympic Games will in time become just a small postscript to a long and successful career.



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Jonathan Taylor
Chairman, Appeal Committee
30 June 2012

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