SPORT RESOLUTIONS (UK)
SPECIALIST INDEPENDENT DISPUTE SERVICE

# CASE 30 – Decision

*References e.g. 6/41 are to sections and page numbers in the bundle supplied for the hearing on Monday 11 June 2012*

## Introduction

1. This is a decision of an Appeal Committee appointed under the British Swimming Team Selection Appeals Procedure ("the Appeals Procedure"), together with the reasons for our decision.

2. The members of the Appeal Committee are Nicholas Stewart QC (Chairman), Mr Geoff Parsons and Mr Jon Napier.

3. This appeal is brought by Athlete C ("the Appellant") who has had an indisputably distinguished career as a gold medal winning swimmer in Paralympics in Sydney 2000, Athens 2004 and Beijing 2008. His appeal is against the decision not to nominate him for the Great Britain team for the Paralympics 2012 to be held in London in August and September. Specifically, the Appellant wished and still wishes to be nominated for the individual 50 metres and 100 metres S7 men's freestyle events.

4. The procedure is that British Swimming, the Respondent to this appeal, nominates members of the GB team to Paralympics GB. Although it is Paralympics GB who finally confirm the selection, it is understood that in all normal circumstances they will adopt the nominations by British Swimming.

5. Accordingly, it is British Swimming which effectively makes the selection. That is reflected in its written selection policy: see document "LONDON 2012 PARALYMPIC GAMES (50M) 19th AUGUST- 11TH SEPTEMBER 2012 - SELECTION POLICY" [6/41]. A copy of the Selection Policy is Annex 1 to this decision. It is agreed that the equivalent document for the 100 metres event is in exactly corresponding terms.

## Grounds of appeal

6. Available grounds for an appeal are set out in paragraph 5 of the British Swimming Team Selection Appeals Procedure [7/47]. The particular grounds relied on by the Appellant are:

   - Relevant information was ignored or not considered by the Selectors (para. 5.1)

   - The provisions of the relevant Selection Policies were not adhered to (para. 5.3)

7. On 24 April 2012, in accordance with clause 5 of the Selection Policy the Chairman of this Appeal Committee gave the Appellant leave to appeal [8/51].

## Hearing on Monday 11 June 2012- Jurisdiction of Appeal Committee

8. The hearing of the appeal before the full Appeal Committee took place on Monday 11 June 2012 at Sport Resolutions, London EC4. The Appellant was represented by Jason Beer QC and the Respondent by Christopher Stoner QC. We have had the assistance of clear and helpful skeleton arguments and skilled oral submissions from both parties.

9. On the Appellant's side we received evidence from the Appellant himself [11/57] and his coach Witness A [12/120]. Evidence for the Respondent came from its National Performance Director Witness B [13/138] and from Witness C, who is the Executive Director of British Disability Swimming and a Selector for the London 2012 Paralympic Games [14/156]. All four witnesses had produced written witness statements in accordance with directions given by the Appeal Committee and all four attended and were cross-examined on Monday 11 June 2012.

10. It is important to be clear about the function and jurisdiction of the Appeal Committee. We are not a second-tier selection panel with a general power to review selection decisions. We have no jurisdiction to intervene in a selection (or non-selection) just because there is room for differing views about the fairness of the choice made by the selectors - even if (as will frequently occur with sometimes finely- balanced decisions) those views reflect sharp differences of judgment and are strongly felt by some of the involved parties to be unfair. Our task is limited to deciding whether one or other of the specified grounds of appeal has been established. On this appeal that means one or other of the two grounds set out in paragraph 6 above. A ground in paragraph 5.2 of the Appeals Procedure relating to bias or conflict of interest does not arise on this appeal.

11. The grounds of appeal applicable here can be distilled to consideration of two matters:

    - Has there been a failure properly to apply paragraph 1.3.1 of the Selection Policy?

    - Has there been a failure properly to apply paragraph 4.18 of the Selection Policy?

Main issues: Paragraph 1.3.1 and 4.18 of the Selection Policy (but not 1.5)

12. As far as paragraph 1.3.1 is concerned, there is an issue between the parties on its proper interpretation in the context of paragraph 1.3 and the Selection Policy as a whole. If we decide that issue in favour of the Appellant then it is accepted by British Swimming that paragraph 1.3.1 has not been followed correctly and the appeal then succeeds.

13. The issue in relation to paragraph 4.18 is different in nature. It does not involve any difficulty of interpretation. The Appellant's contention is that relevant information has been ignored or not considered

by the National Performance Director who is (as he clearly is) effectively the Selector when exercising his authority to decide who should be nominated under that paragraph. This aspect of the appeal is therefore based on the ground in paragraph 5.1 of the Appeals Procedure. It could also be said that if the Appellant is right there will also have been a failure to adhere to the provisions of the Selection Policy, which implicitly requires selectors to take into account all relevant information. But that would add nothing to the specific ground in paragraph 5.1.

14. Right up to the hearing on Monday 11 June 2012 the Appellant had also placed reliance on paragraph 1.5 of the Selection Policy and the following paragraphs or subparagraphs 1.5.1 to 1.5.6. However, at the beginning of the hearing it was correctly accepted on all sides that those provisions were not material to this appeal (except that the reference in 1.5.6 to a paragraph or subparagraph 4.8.1 is one of a number of illustrations of clearly defective drafting of the Selection Policy as there is no 4.8.1).

## Factual background

15. Before we tum to the two grounds of appeal, we summarise very briefly the factual background which has led to this dispute: The Selection Policy mentions two trial events: London 3-9 March 2012 and Sheffield 6-8 April 2012. The Appellant had become seriously ill with what turned out to be pneumonia when in South Africa for a training camp in January 2012, was quickly flown back to England and admitted to hospital on arrival. He did not recover in time to compete in the London trials. He did make a sufficient recovery to be able to compete in the Sheffield trials but says that he had no fully recovered from the effects of the pneumonia. It should also be noted that in April 2011 he had suffered a serious injury - a torn triceps, which he had only been able to use fully since September 2011.

16. The Appellant notified the National Performance Director and the Selectors by email dated 3 April 2012 [151160] in a form which it is accepted would have complied with the requirements in paragraph 1.3.1 · if that paragraph was applicable to the Appellant's situation - which British Swimming say it was not.

17. At the Sheffield trials the Appellant swam 29:77 seconds for the 50 metres S7, against a qualifying time of 29:29. In the 100 metres S7 he swam 1:05:18 against a qualifying time of 1:03:34.

18. It is important to note, therefore, that the Appellant had never achieved the published qualifying times referred to in paragraphs 1.1, 1.2 and 2 of the Selection Policy. That was a clear requirement that needed to be met by the Appellant if he was to avail himself of the procedures set out in paragraph 1.3 where a swimmer had been able to compete in neither of the London or Sheffield trials.

19. The Appellant had swum at the Swim Wales Winter Meet on 17 December 2011, which was not long after his resumption of training following his triceps injury, but had not achieved any qualifying time on that occasion.

Selection Policy paragraph 1.3.1

20. We deal now first with the ground in paragraph 5.3 of the Appeals Procedure, that the provisions of the Selection Policies were not adhered to. There is no ingredient of the Selection Policies beyond the Selection Policy at Annex 1, so that is what we have to consider.

21. The Appellant says that the Selectors have misunderstood and therefore misapplied paragraph 1.3.1. Reduced to its essentials, he complains that what the Selectors did was wrongly treat 1.3.1 as ancillary to paragraph 1.3 rather than as a separate provision applying to a different situation (i.e. impaired performance at a trial as opposed to inability to take part at all). By treating 1.3.1 in that way the Selectors therefore excluded the Appellant from consideration altogether under all parts of 1.3, 1.3.1, and 1.3.2.

22. It is acknowledged by British Swimming that they did exclude the Appellant from consideration under those provisions for exactly that reason. British Swimming say that was a correct application of 1.3 and 1.3.1 and that a swimmer who had not met the criteria including qualifying times as stated in paragraph 1.3 was not eligible for selection (apart from nomination under 4.18, which is a separate point considered below).

23. In our view British Swimming are right on that point. We fully recognise that there are aspects of the wording of 1.3 and 1.3.1 which might suggest that they are independent and largely self-contained provisions dealing with two different situations:

    - 1.3 covering the case where the swimmer misses both trials and is clearly and expressly required to have met the qualifying time at a medal event between 17 December 2011 and 5 April2012

    - 1.3.1 covering the case of a swimmer competing in at least one trial and there is not in that paragraph an equivalent express requirement or any implied requirement to have met the qualifying time.

24. However, we regard that distinction as unrealistic and out of line with the clear thrust and common sense of the Selection Policy. It is unrealistic and unnecessary to assume cases such as the example given by British Swimming's counsel of a swimmer with a broken wrist nevertheless competing in a trial in order to bring himself or herself within 1.3.1. However, we do find it artificial and unrealistic to interpret the

Selection Policy in such a way that simply by taking part in one of the trials a swimmer, whatever the degree of illness or injury, could effectively sidestep the requirement of having met the qualifying time at a medal event - a requirement unequivocally applicable to a swimmer who is prevented by illness or injury from taking any part in the two trials.

25. It must be acknowledged that this conclusion leaves a number of questions on the wording of the Selection Policy which are not entirely satisfactorily resolved. The difficulty with this Selection Policy is that it is so badly drafted that in ascertaining the intention of British Swimming in adopting the document in this form it is unrealistic to take the approach which would be taken towards, for example, a commercial contract which had clearly been carefully and expertly drafted so that one should pause long and hard before treating particular words and phrases as redundant or, worse, meaningless.

26. The Appellant's interpretation would not resolve all those questions either. If he is right, what is the point and effect of the words "established in accordance with 1.3.1 below" in paragraph 1.3. The Appellant's counsel's answer was that they do nothing - hardly a satisfactory answer, though we do not suggest that counsel could avoid it or that there is a better answer.

27. If we were to list the verbal difficulties or infelicities left by British Swimming's interpretation that list would be longer than the list left by the Appellant's interpretation. But where there is no entirely satisfactory reconciliation of the wording, the proper interpretation of the Selection Policy is not a contest of that nature. Our task is to decide what this Selection Policy means having regard to the nature of the selection process and the practical considerations which would have been contemplated as liable to arise.

28. We do not accept British Swimming's submission that 1.3.1 should be read so as itself to include the case of total non-participation in the trials. That would be stretching the wording too far. Our conclusion is nevertheless that 1.3.1, in dealing with the particular situation where a swimmer is claiming impaired participation, is ancillary to 1.3 and subject to the same basic requirements including achievement of the qualifying times within the time frame stated in 1.3.

29. Accordingly, the Selectors were right to treat the Appellant as ineligible for selection under 1.3 or 1.3.1. That means that there was no requirement for appointment of a medical practitioner under 1.3.1 as no conclusion by the doctor or British Swimming could restore eligibility.

30. We do not need to dwell on 1.3.2. Although its wording is also unsatisfactory it is clearly dealing with a situation where a swimmer has already been selected and his or her continuing fitness needs review.

31. In construing the relevant provisions of the Selection Policy we have been guided by the very helpful

summary of the applicable principles and approach set out by Mr Graeme Mew FCIArb in his 5 March 2012 decision in *Great Britain Rhythmic Gymnastics Group v British Amateur Gymnastics Association*, which was conveniently annexed to the Appellant's skeleton argument. The parties to this appeal are agreed those are the correctly applicable principles and approach.

32. Given the poor drafting of the Selection Policy (something British Swimming does not dispute), both parties agreed that the correct approach to the interpretation of the Selection Policy is to determine what a reasonable person with a background in disability sport would have understood the Selection Policy to mean. We are clear that a common sense reading of the Selection Policy from this person's standpoint (and taking the Selection Policy as a whole) is that paragraph 1.3.1 is intended to be ancillary to paragraph 1.3 and not a stand-alone power of nomination. It is incorrect to consider and interpret one section in isolation from the other sections of the Policy.

33. We also comment that the very last point listed by Mr Mew - that if a doubt or ambiguity cannot be resolved by the preceding principles of construction the document must be construed against the person (in this case British Swimming) putting it forward - is a last resort which is rarely needed. Construction of this Selection Policy is far from straightforward but we have been able to reach a conclusion without going to that last resort.

34. A more detailed analysis of the wording of the Selection Policy is unnecessary for this appeal and would also serve no useful purpose for the future. We are confident that this written Selection Policy will be scrapped as soon as the nomination and selection process for the 2012 Paralympics has been completed. It will already have become obvious to all concerned that time and money spent on the drafting and adoption of a new, clear and coherent selection policy will be well spent.

Selection Policy paragraph 4.18: National Performance Director's discretion

35. We tum now to 4.18 of the Selection Policy. It is agreed between the parties that this does give a residual discretion to the National Performance Director to make additional nominations after the main nominations have been made under the provisions under headings 1. Individual Events and 2. Relays. Of course it is not open to the parties to this appeal to write something into the Selection Policy by agreement between themselves, as others are affected by the Selection Policy. We conclude nevertheless that the effect of 4.18, when read together with the Athlete slot allocation matrix [6/46] which is part of the Selection Policy document, is to give that power.

36. It has sensibly never been argued by British Swimming that the reference to "the Selectors" in 5.1 of the Appeals Procedure excludes an appeal on that ground in relation to a 4.18 decision, even though that

is a decision of the National Performance Director and not the Selectors. That would be an unduly restrictive interpretation of the Appeals Procedure

37. The National Performance Director Witness B has exercised that power by nominating four male swimmers A, B, C and D but not the Appellant. In his witness statement and in cross- examination at the hearing Witness B explained how he had come to that decision.

38. The Appellant says that in reaching that decision Witness B did ignore or fail to consider relevant information, in which case his appeal would succeed on the ground in 5.1 of the Appeals Procedure and the question of his nomination by the National Performance Director under 4.18 of the Selection Policy must be reconsidered taking account of all relevant information currently available.

39. Having read Witness B's witness statement and received his answers and explanations in his oral evidence at the hearing, we accept that submission of the Appellant on the grounds of the failure to consider the Appellant's recent illness.

40. We conclude that Witness B clearly ignored or failed to consider the impact of the Appellant's recent illness with pneumonia. In stating that point by reference to the express wording of 5.1 of the Appeals Procedure, we should make clear that we should regard this ground as established where relevant information was given obviously insufficient weight in a way that was not within the ambit of a reasonable judgment. It would be an unduly restrictive reading of ground 5.1 to say that it was not satisfied and that relevant information had not been ignored or left unconsidered when a clearly relevant medical history had been noted by the National Performance Director but unjustifiably treated as being of no significant weight.

41. Obviously Witness B was aware of the Appellant's pneumonia as well as his 2011 injury. However, in cross-examination he said that when he exercised the discretion under 4.18 he did not take into account the Appellant's illness/injury because he did not consider the Appellant was medal potential. (We note that Witness B actually said "when *we* exercised the discretion" and "*we* did not take into account ....." That reflected the fact that he quite reasonably did discuss the matter with the selectors including Witness C and in our view nothing turns on his use of "we" rather than "I".)

42. We have given careful thought to how that evidence should be fairly understood and whether what really happened was that Witness B *did* take proper account of the Appellant's illness but concluded simply that it was outweighed by other considerations. Was he simplifying and overstating the case against himself (and British Swimming) when he said that he *did not take into account* the illness/injury of the Appellant, as opposed to regarding it as relatively unimportant?

43. Our conclusion is that Witness B did brush aside the effects of the Appellant's recent medical history and therefore did ignore and fail to consider relevant information. The clear impression we have gleaned from his evidence is that once he and the Selectors had dismissed the Appellant's eligibility under 1.3 and 1.3.1, because he had not met the requisite qualifying times, his medical history of illness and injury was not given any serious consideration at all in relation to his Sheffield trial times. While it is quite correct that, consistent with our conclusion on the meaning and effect of 1.3.1, there was no requirement and in fact no justification for appointment of a medical practitioner under 1.3.1, the evaluation of the impact of the Appellant's recent illness (and his 2011 injury) was clearly relevant. Our firm conclusion from the evidence we have received is that in Witness B's mind the Appellant was ruled out of consideration for nomination under 4.18 at the outset and relevant information about his illness and injury was ignored or not considered. It appears that the interpretation placed by Witness B (and the Selectors) on paragraphs 1.3 and 1.3.1 of the Selection Policy, though correct in itself, led him also incorrectly to disregard that important relevant factor in the exercise of his discretion under paragraph 4.18.

44. That conclusion is sufficient on its own to satisfy the ground of appeal in 5.1 of the Appeals Procedure, which means we allow this appeal and recommend reconsideration of the National Performance Director's discretion under 4.18 of the Selection Policy.

45. However, there are other aspects of Witness B's approach which also need to be examined.

46. In his witness statement Witness B has given an account of how he exercised his discretion under 4.18, as a result of which he decided not to nominate the Appellant but did initially nominate two swimmers Athlete A and Athlete D: see paragraphs 44ff [starting at 13/44] and the Athlete slot allocation matrix- Athlete nominations [34/321-2). Paragraph 47 contains the essential point that, in consultation with the Selection Panel, Witness B adopted as a test of genuine medal potential that a swimmer whose condition had affected their performance on the day of the trials should rank 3rd or 4th in the world based on that performance. On that test, as stated in paragraph 50 of Witness B's witness statement, neither of the Appellant's performances in Sheffield in the 50 metres and 100 metres freestyle S7 were good enough to rank him in the top 4 in the world.

47. In both evidence and submission there was considerable exploration of a process described at paragraphs 59-62 whereby the Appellant's Sheffield times were notionally inserted into the world rankings for the period 1 January 2011 to 8 April 2012 with a notional ranking then being based on those times. Witness B described it as standard practice to make that adjustment, i.e. not one made just in the Appellant's case. The effect on the Appellant's ranking was to move him from 4th to 7th place in both the 50m and 100m

events. In view of the test adopted as mentioned in paragraph 46 above, the effect was to exclude the Appellant from further consideration under 4.18.

48. There are some questionable features of that process, such as the fact that whereas a faster time achieved by the Appellant in 2011 (which would have placed him 4th in the world ranking for the whole period 1 January 2011 to 8 April 2012) was notionally removed from the rankings for the purposes of the 4.18 exercise, 2011 performances of swimmers from other countries were retained for comparison. The result was that other swimmers' best times for 2011 were not being compared with the Appellant's best times for that year, but with his slower 2012 Sheffield times.

49. Witness B gave a detailed explanation of the rationale behind that process of notionally replacing a faster 2011 time with a slower 2012 trial time. While we are doubtful about the validity and efficacy of that adjustment as a selection tool, we conclude, based on the oral evidence of Witness B, that the decision to adopt this approach lies within the reasonable range of discretion available to Witness B in exercising his professional judgment. However, we see the main flaw in Witness B's approach as both simpler and more serious: There was no attempt made to evaluate the effect of the Appellant's recent serious illness and the fact that he had only begun training again on 19 March 2012. We can see that those matters raise questions whether a suitable level of fitness can be achieved by the time of the London 2012 Paralympic Games. But those are questions to be weighed alongside the more obvious question of how far the Appellant's Sheffield times will have been adversely affected by his recent illness (and also following his muscle injury in 2011). It is that obvious question which appears to us to have been brushed aside by Witness B in the consideration of 4.18.

50. Paradoxically, it is paragraph 1.3.1 of the Selection Policy which throws that flaw into stark relief. That paragraph expressly recognises that where there is a case for saying that a trials performance has been adversely affected by recent illness or injury, it is necessary to appoint a medical practitioner in order adequately to assess the impact of the injury or illness on the trials performance. Although, as we have held, the specified procedure in paragraph 1.3.1 only applies where the swimmer has met the qualification requirements mentioned in paragraph 1.3, the same need arises for assessment of the impact of an injury or illness where it is potentially relevant to the exercise of discretion to nominate under 4.18 of the Selection Policy.

51. In the particular circumstances of his recent illness and his 2011 injury, it was unreasonable to have taken the Appellant's Sheffield times and to have used them on their own to adjust his world ranking from 4th down to 7th treating that 7th place as effectively disqualifying the Appellant from nomination under 4.18. In

our view, to adopt that approach without enquiring into the effect of the Appellant's injury and illness on his Sheffield times was to ignore relevant information, which is a ground of appeal under 5.1 of the Appeals Procedure.

52. This is essentially the same point as mentioned in paragraphs 37 to 39 above. The adoption of a benchmark of 3rd or 4th place in the world rankings as indicating medal potential and the adjustment of the tables which placed the Appellant below that benchmark were done in such a way as to exclude the obvious questions about the effect of the Appellant's recent illness and injury.

Timing of the decision under paragraph 4.18: 10 April 2012

53. The decision to nominate Athlete A and Athlete B under 4.18, but not the Appellant, was announced on 10 April 2012. The Appellant says that was a departure from the Selection Policy, as the date stated for making any decision under 4.18 was 6 June 2012, and that is therefore on its own a sufficient ground for allowing this appeal. We do not accept this submission. The date 6 June 2012 specified in the Athlete slot allocation matrix included in the Selection Policy [6/46] was inserted in anticipation of the likely timetable for allocation of slots by the International Paralympics Committee. As it turned out there were some changes in that timetable which made it practicable to decide earlier than 6 June on additional nominations under 4.18, even though the number of available slots had not been definitely confirmed at that date. We see no objection to British Swimming's having brought forward the date for the decision under 4.18 to the same date of 10 April 2012 applicable to nominations under other provisions of the Selection Policy. Paragraph 4.15 of the Selection Policy says that the final athlete nominations (which include those under 4.18) will be posted "no later than 1 pm, Wednesday 6th June 2012", just as the 1st round of nominations was to be posted "no later than 1 pm, Tuesday 10th April 2012". The table in the Athlete slot allocation matrix included in the Selection Policy set out the dates 10 April and 6 June 2012 as the projected dates but did not prevent the decisions being taken earlier.

Statements and events since 10 April 2012

54. Since 10 April 2012 there has remained the possibility of at least one further unused slot being available. We were informed by British Swimming at the hearing that as matters stand it appears that for male

athletes there will be 25 slots in all and that nominations have so far been decided for 24 of those slots. Confirmation of nominations to Paralympics GB is now due to take place on Monday 18 June 2012.

55. Statements by Witness B since 10 April 2012 have reinforced the impression of his mind having been closed against the nomination of the Appellant. At paragraph 12 of his witness statement [11/60] the Appellant says that after the announcement he asked Witness B what he could do to achieve selection and whether, if he improved and achieved a world record time prior to London 2012, he would be considered for selection. Witness B told him that he would not be selected even in those circumstances.

56. That evidence has not been disputed. We also see no reason to doubt the accuracy of comments by Witness B reported on the BBC Sport web pages on 10 April 2012. Witness B said that if more slots became available for the GB squad at a later stage they would be given to development level athletes rather than the Appellant. He is then quoted as saying: " [Athlete C] [the Appellant] has not and will not be selected because he failed to make the qualifying times in the two trials and because of illness and injury problems".

57. We note also that on the *walesonline* website Witness C is reported as saying, also on 10 April 2012, that the Appellant's best time in the 50m freestyle, "January 1st to the current day" would only rank him seventh in the world. That was wrong, as his best time of 29:15 in Manchester on 7 March 2011 placed him 41 in the rankings [see 34/211]. However, we see that as just a loose way of expressing what Witness B obviously knew, which was that the 7th place was based on the adjustment made by substituting the Sheffield trials time as his best time. Witness B's comment to the press was inaccurate but he did not make a mistake on that point when reaching his decision under 4.18.

58. We are concerned about a statement attributed to Witness B on 10 April 2012 on the *paralympics.channel4.com* web page [16/168] that if further slots became available those places would be available for development athletes who had been identified as serious medal contenders for Rio 2016 and that the appellant would not be considered in that group. In cross-examination Witness B was reluctant to accept the complete accuracy of that report on the Rio 2016 point. We have sufficient confidence, based on the number of reports from different outlets on the same or similar statements of Witness B, that the report is materially accurate on this point. Strictly, Witness B was talking about future decisions under 4.18 if further slots became available. In view of our decision to allow this appeal on the 4.18 issue on grounds already indicated, it is not necessary for us to reach a view on whether the

prospects for Rio 2016 were treated as a point in favour of the nominations which were made by him under 4.18 on 10 April (and therefore counted against the Appellant). What we do say clearly is that 4.18 of the Selection Policy does not allow any weight at all to be given to prospects of individual athletes at the next games beyond London 2012. The reference to maximisation of the team's medal potential in 4.18 is to London 2012 only.

59. Under this Selection Policy, each individual athlete has the right to insist that all nominations under 4.18 are made so to ensure the best possible team for London 2012 and to maximise the team's medal potential at those games. Rio 2016 and beyond must be completely excluded from consideration. This point must be scrupulously observed by Witness B when he reconsiders his 4.18 decisions in accordance with our recommendations under 13.3 of the Appeals Procedure.

## Decision on this appeal

60. Our decision on the appeal is therefore:

- We dismiss the appeal based on the ground that the provisions of the Selection Policies were not adhered to in the application of paragraph 1.3.1 of the LONDON 2012 PARALYMPIC GAMES (50M) 19th AUGUST – 11th SEPTEMBER 2012- SELECTION POLICY

- We allow the appeal based on the ground that in the exercise of his discretion under 4.18 of that Selection Policy the National Performance Director ignored or failed to consider relevant information about the illness and injury of the Appellant during the period April 2011 and April 2012 and the effect it may have had on the Appellant's performance at the British International Disability Swimming Championships in Sheffield 3-9 March 2012; and further, that in that respect the provisions of the relevant Selection Policies were not adhered to

- It follows that the National Performance Director's previous exercise of his discretion in relation to men's events at the London 2012 Paralympic Games must be set aside and he must reconsider the exercise of that discretion.

## Appeal Committee directions and recommendations

61. The Appellant asks this Appeal Committee to direct that the fresh exercise of the discretion under 4.18 of the Selection Policy should be done by a Selection Panel and not by the National Performance Director Witness B. We shall not take that course. The power is expressly placed in the hands of the National

Performance Director. We are confident that on reading this Decision he will understand the importance of an entirely fresh consideration of nominations under 4.18 taking account of all relevant information including particularly the relevant information which we have held he ignored or failed to consider the first time round. Our recommendations under 13.3 of the British Swimming Team Selection Appeals Procedure follow below.

62. We are not saying that the National Performance Director cannot discuss the matter with the Selectors. That was done before he made his initial nominations under 4.18 and it is apparent that there was extensive discussion with the Selection Panel expressing their views on the choice of athletes. There is nothing wrong with that, as long as the National Performance Director makes up his own mind independently at the end of the discussion. We do find it clearly unsatisfactory, however, that those discussions between Witness B and the Selectors were not minuted. That strikes us as bad practice and our recommendations for the conduct of a fresh exercise of the National Performance Director's discretion under 4.18 include specific recommendations on that point.

63. Under paragraph 13.3 of the Appeals Procedure, this Appeal Committee recommends to British Swimming as follows:

    a. the National Performance Director is to exercise his discretion afresh under paragraph 4.18 of the Selection Policy in relation to nominations for men's events at the London 2012 Paralympic Games;

    b. in exercising his discretion, the Director must give due weight as a relevant factor to the Appellant's medical history during the period since the beginning of April 2011 and the effect it had or may have had on his performance at the Sheffield trials in April 2012 (in addition to all other relevant factors);

    c. the Director must disregard entirely: (i) medal potential of the GB team or any individual for Rio 2016 or any other event except the London 2012 games; (ii) any disappointment or frustration which may be caused to any of the athletes A, B, C and D if they are not nominated despite their having been previously nominated by the exercise of discretion which has now been set aside; and

    d. all consultations by the Director with the Selection Panel or any officer or employee of British Swimming in relation to the fresh exercise of his discretion under 4.18 should be fully minuted.

e. the Director should give written reasons for his decisions on that fresh exercise of his discretion under 4.18 and should specifically identify all tables, figures and other written material considered by him in reaching that decision.

## Costs

64. Under paragraph 13.4 of the Appeals Procedure we order British Swimming to pay the costs of the Appeal. As directed by that paragraph, those costs may include any room hire, travel and other expenses incurred in attending any hearing (including all fees paid to members of the Appeal Committee) but do not include payment of the Appellant's own legal costs.

Nicholas Stewart QC Chairman

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15 June 2012

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