



# CASE 31 – Decision

1. This is an appeal by Athlete W (“the Appellant”) against the selection decision of the National Ice Skating Association of Great Britain and Northern Ireland (“NISA”) by which he has not been selected for the GB Non-Relay Team for the Winter Olympics to be held in Sochi, Russia, in February 2014. His notice of appeal is in the form of a letter dated 1 December 2013 to Sport Resolutions (UK), who have appointed this Appeals Panel in accordance with the procedure set out in *Dispute Resolution Policies and Procedures of the National Ice Skating Association of UK 2013/2014* (“the NISA Dispute Rules”). The NISA Dispute Rules set out the applicable procedure in paragraphs 1 to 18 and paragraph 19 then states: “The Appeal shall otherwise be governed by the Sport Resolutions (UK) Arbitration Rules”. We see no procedural difficulties on this appeal and it is therefore not necessary to set out any of those rules in this Decision.
2. The Appellant’s essential ground of appeal is that in reaching its selection decision NISA has failed to follow its own published *Selection Criteria for the British Short Track Speed Skating National Performance Pathway 2013/14 Season* (“the Selection Criteria”). The key part of the Selection Criteria is under the main heading “Sochi Olympic Games” and a sub-heading “Non-Relay Team Qualification”:

“The 1<sup>st</sup> place will go to the highest individual ranked skater from World Cups 1, 2, 3 & 4, in the 2013/14 season in a single distance. If we qualify two (2) places the second skater will be selected at the sole discretion of the Performance Director. If we qualify three (3) places the second selection will go to the second highest individual ranked skater from World Cups 1, 2, 3 & 4, in 2013/14 season in a single distance. This will be taken from the ISU World Cup Ranking List 2013/14. ***The third individual place will be selected by the Performance Director and approved by the WCMG [World Class Management Group]. The Performance Director will take into account performance indicators from the 2013/14 season and other past performances.*** A written report from the Performance Director will be emailed to each member of the World Class Management Group for approval. The written report will stay confidential until after the BOA have ratified the final selection. The approval of this decision is done at the sole discretion of the WCMG.”

We have put the crucial words in bold italics for the purposes of this Decision. The second sentence in bold italics is clearly linked to the previous sentence, i.e. it applies to the selection for the third individual place and only to that place. Where there is qualification for three places overall, as here, the specific directions for the first and second places expressly tie those selections to the World Cup rankings and therefore (unlike the direction for the third place selection) exclude any consideration of other performance indicators for

those two places.

3. The Appellant's complaint is that another athlete has been selected ahead of him for that third individual place but that the Performance Director reached that decision without taking into account the matters he was directed to take into account. He contends that the Performance Director's decision is therefore invalid and that on proper consideration of all the relevant performance indicators as directed, the Appellant should have been selected.
4. The NISA Performance Director is Mr Stuart Horsepool. His express written decision set out in the document "Sochi 2014 Winter Olympic Games Selection Nominations GB Short Track Speed Skating" is expressed as a recommendation (to the WCMG), which reflects the strict technical position. It is nevertheless clearly a selection decision by him and is an entirely proper subject of this appeal, as clearly recognised by the timetable set out in paragraph 10 of the NISA Dispute Rules.
5. Mr Horsepool stated his decision in writing as follows:

"The third place on the team is a Performance Directors (sic) selection and I continue with the same objective process that the third highest ranked skater from a single distance from World Cup Rankings 1, 2, 3 and 4 is [Athlete A] (see Appendix A for Ranking)"

The only performance data in Appendix A related to the World Cups 1, 2, 3 and 4. That statement was immediately followed by Mr Horsepool's express recommendation that Athlete A should be selected.

6. We have a written submission from Athlete A, who entirely understandably sets out his arguments for his selection.
7. We also have a statement from Mr Horsepool in which he says (among other things):

"My recommendation to the World Class Management Group was between [Athlete A] and Athlete W. A subjective argument for both skaters can be made using training times, lower level competitions, relay tests, time trials, but ultimately I took the view that as the skaters were similar in all areas, so a subjective view would be unfair, therefore, to use the World Cup ranking as we have used in every other decision so far was the fairest and most obvious objective analysis"

In our view that was the wrong approach.

8. The problem with Mr Horsepool's approach is that it goes against exactly what the Selection Criteria had directed

him to do. There would have been nothing unfair about his taking a subjective view, in the sense of making a judgment as opposed to applying a fixed measurement such as the World Cup rankings. Of course his decision was to be unbiased and to be based on all the relevant factual information reasonably available to him, and in the end simply to be fair (as we are fully confident he always set out to be). But for the third place selection he was required to exercise his judgment after weighing up all arguably relevant past performances and not just the 2013/14 performances. By contrast with the first and second places, he was required to go wider than just adopting the World Cup rankings. He did not do that, but instead applied exactly the same single criterion as for the first and second places.

9. What weight to give to the different ingredients of that wider information, including the 2013/14 World Cup performances, was always to be a matter for the Performance Director's own fair and honest judgment. However, for the third place selection he was not entitled to put all those other ingredients aside and fall back on to the simple test of the World Cup rankings.
10. We accordingly determine that the selection decision which is the subject of this appeal was invalid as it did not apply the process set out in the Selection Criteria. We are not, however, selectors and it is not for us to make the selection. That decision lies with Mr Horsepool, as Performance Director of NISA, and we do not express any view on the relative merits of the rival candidates.
11. We, like all concerned, understand the extreme urgency. We consider it helpful for us to give simple directions on how the Performance Director should now go about that task. We have the power to do that, as the fair application of the Selection Criteria is clearly a matter of contract between NISA and the athletes concerned and our directions therefore constitute an order for specific performance of that contract by NISA through its Performance Director: see our powers in 12.5 of the Sport Resolutions Arbitration Rules. In practical terms, however, we should like our directions to be seen as helpful, though also binding, guidelines so as to enable NISA and Mr Horsepool to act fairly towards all concerned in a delicate and urgent situation.
12. We proceed on the footing that the only athletes in serious contention for the third individual place are the Appellant and Athlete A, which is clear from the material before us.
13. In that spirit, we order as follows:
  - (1) We set aside the NISA Performance Director's recommendation that Athlete A is selected for the Non-Relay Team Qualification third individual place, which is a nullity.
  - (2) The Performance Director must proceed immediately to make his selection afresh for that third individual place, which he must then submit immediately for consideration and (if the WMCG thinks fit) approval by the

World Cup Management Group.

- (3) In making this selection the Performance Director must take into account performance indicators from the 2013/14 season and other past performances so far as that information is reasonably available to him and could reasonably have any bearing on his decision.
  - (4) He must also consider and give appropriate weight to matters which may have affected such performances, such as injury.
  - (5) The two candidates for selection are Athlete A and Athlete W. The Performance Director must treat this as if it were the first and only selection for the third individual place so must completely disregard the fact that he has previously selected and recommended Athlete A.
  - (6) The Performance Director need not (though he may) invite any further submissions, information or arguments from either candidate and is under no obligation to communicate with them in making his selection. Although he is free to consider any representations made by them, neither candidate has any further right to make representations or to communicate with the Performance Director in relation to this selection.
14. Any of the parties may apply to this Appeals Panel for further directions in the light of this Decision or for clarification of the order we have made.
  15. This is a successful appeal on written submissions only and the costs fall to be dealt with accordingly as set out under the heading "Costs" in the NISA Dispute Rules (which we note require a slight correction of numbering after paragraph 18). Those provisions apply automatically and no costs order or direction from this Appeals Panel is either needed or allowed under the applicable rules.



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