



CASE 32 – 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. It is his second appeal this month against a NISA selection decision in relation to the 1000m men's speed skating event.
2. The Appellant's first appeal was by a notice of appeal dated 1 December 2013 to Sport Resolutions (UK), who appointed an 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"). I chaired that Appeals Panel and the other members were Ms Janice Shardlow and Mr Gordon Barnes. The Appellant contended that in reaching a decision to select Athlete A and not the Appellant, NISA had failed to follow its own published *Selection Criteria for the British Short Track Speed Skating National Performance Pathway 2013/14 Season* ("the Selection Criteria"). Under the Selection Criteria that decision was made by the NISA Performance Director Mr Stuart Horsepool, subject to approval by NISA's World Class Management Group.
3. The key part of the Selection Criteria for that first appeal, as on this appeal, is under the main heading "Sochi Olympic Games" and a sub-heading "Non-Relay Team Qualification":

"The 1st 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."

I have put the crucial words in bold italics. 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.

4. That Appeals Panel allowed the appeal and its order ("the First Panel Order") was 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.*
5. That decision was handed down at around 5 pm on Thursday 5 December 2013. The Performance Director reconsidered the selection and at around 10 am the following morning Friday 6 December 2013 he informed the Appellant at training that he had again selected Athlete A. He provided the Appellant with a two-page note which I refer to here as "Mr Horsepool's Reasons".
6. By Notice of Appeal dated 9 December 2013 the Appellant, as he was entitled to do, began a new appeal against that second selection decision ("the 2nd Decision"). The Notice of Appeal was settled by counsel

Mr Daniel Saoul. NISA filed a written response on the following day Tuesday 10 December 2013 ("the NISA Response").

7. 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".
8. It has been expressly agreed between the parties that I should determine this second appeal on my own and that I therefore constitute the Appeals Panel on this second appeal, without any appointment of wing members as provided by the NISA Dispute Rules.
9. The Appellant appeals against the 2nd Decision on the grounds that it is:
 - (1) Contrary to the Selection Criteria.
 - (2) Contrary to natural justice and in particular to the duty on a sports governing body to take into account all relevant considerations when reaching decisions; and
 - (3) Contrary to the first Appeal Panel's direction (in paragraph (3) of its order) that the Performance Director must take into account performance indicators that could reasonably have any bearing on his decision.
10. Paragraph (3) of the First Panel Order did not add anything to what was required by the Selection Criteria and the general principle contained in that second ground of this appeal. It simply reflected those matters and directed what the Performance Director should do to comply with them.
11. After receiving the NISA Response on Tuesday 10 December 2013 I directed an oral hearing as a matter of my discretion under paragraph 13 of the NISA Dispute Rules. There had been a contingent request for an oral hearing in paragraph 28 of the Notice of Appeal but not in a form which exercised the Appellant's right to an oral hearing.
12. The oral hearing took place at my chambers Ely Place Chambers on the afternoon of Wednesday 11 December 2013.
13. The Appellant was unable to attend personally and was represented by Mr Daniel Saoul of counsel, accompanied by Mr Ian Braid of the British Athletes Commission. Mr Braid was supporting the appeal on the footing that the reselection had not been conducted properly and there should accordingly be a fresh selection process. However, that was on the clear basis that Mr Braid and the British Athletes Commission were quite properly entirely neutral as between the Appellant and Athlete A on the question

of which of them should be selected through that fresh selection process. The Respondent NISA was represented by its Chief Executive Mr Nick Sellwood, accompanied by Mr Horsepool. The only other person present at the oral hearing was Mr Chris Lavey of Sport Resolutions, who provide administrative support for this appeal.

14. The oral hearing was primarily to allow the parties an opportunity to develop and supplement their written submissions and a small amount of further written material was introduced on both sides at the hearing. It was not a formal hearing of oral evidence but Mr Horsepool did take the opportunity of adding to what Mr Sellwood had said and inevitably some of what Mr Horsepool said was evidence and some was argument. Counsel Mr Daniel Saoul, who presented the Appellant's case both fairly and skilfully, sensibly made no objection to that course. He also expressly acknowledged that I did question Mr Horsepool myself quite closely on some of his assertions.
15. It was clear to the first Appeals Panel, and remains clear to me on this appeal, that the only athletes in serious contention for the third individual place are the Appellant and Athlete A.
16. It is important to emphasise that my function as the Appeals Panel is to decide whether or not the 2nd Decision was valid and, if it was not valid, to direct a fresh selection process. It is no part of my function to enter into the question of which of these two outstanding athletes should be, or should have been, selected. This Appeals Panel is not the selector.
17. That leads directly into a crucial point in assessing the material before this Appeals Panel (i.e. before me). Among other items I have:
 - (1) Mr Horsepool's Reasons (the two-page note referred to in paragraph 5 of these Reasons).
 - (2) The three-page NISA Response, which sets out to meet the criticisms of the 2nd Decision which are made in the Notice of Appeal.

It is important to bear in mind what those two documents were doing and how they should be approached on this appeal.

18. The first document, Mr Horsepool's Reasons, was clearly prepared under very heavy time pressure – overnight between late afternoon or evening Thursday 5 December and early the following morning. It would be unrealistic and unfair to treat it as if it were intended as a polished and complete record of Mr Horsepool's reasons and the material he had taken into account in reaching the 2nd Decision.

Nevertheless, where Mr Horsepool Reasons do make clear statements of the basis of his 2nd Decision, he and NISA must be held to those statements.

19. The second document, the NISA Response, does different things which need to be differentiated for the purposes of my decision. It asserts Mr Horsepool's expertise and integrity, which are not in doubt anyway and were expressly acknowledged by Mr Saoul on behalf of the Appellant. It contains brief argument on the essential point of this appeal, as reflected in the grounds of appeal. There is also a fair amount of factual material, much of it responding to specific points in the Notice of Appeal. That factual material both explains and adds to points in Mr Horsepool's Reasons but also goes into further argument on why Athlete A should be the selected candidate.
20. In evaluating that material and the other items put before me, I have to keep my eye squarely on the key question whether Mr Horsepool did fairly take into account performance indicators from the 2013/14 season and other past performances so far as that information was reasonably available to him and could reasonably have any bearing on his decision. If the material before me, including particularly what Mr Horsepool himself has written and said, shows that he has not, then the 2nd Decision cannot stand and there must be a further fresh selection process.
21. Looking first at Mr Horsepool's reasons: It is possible to make criticisms of the way he has expressed himself. For example, he wrote that he would look "mainly" at the 1000m performances between the two athletes but then that it "would be unfair" to evaluate performances in other events, which suggests that he has excluded those other events entirely (so that he would not have looked just "mainly" but exclusively at 1000m performances). The same point recurs in the last paragraph of the document. However, it is the wrong approach to analyse Mr Horsepool's Reasons as if they were a carefully written judgment where any apparent contradiction or omission to mention a relevant matter can lead readily to an inference that material factors have been disregarded or given an obviously mistaken or unreasonable weight in reaching the judgment in question, i.e. the 2nd Decision.
22. A specific illustration will make the point. Mr Horsepool's Reasons include the following: "It is my opinion that International Competition is the best way to evaluate the performances of the two skaters. Using training times, internal domestic competition or time trials is not a true reflection on a skaters ability to compete at World level, this is because the domestic racing is a lot slower". That is a judgment, which Mr Horsepool as Performance Director was fully entitled and equipped to make. The Selection Criteria requirement to "take into account" performance indicators does not mean he has to attach weight to any

particular indicators. Mr Horsepool's Reasons do not show any failure on his part to "take into account" any material performance indicators. They are entirely consistent with his having a wide knowledge of the performance indicators available from the 2013/14 season and earlier, having considered them but having reached a judgment which means that some are given no weight at all in the end, some are given relatively small weight and others are regarded by him as being the main determinants of his decision. That was the right approach to this selection, consistently with the principles of fairness, natural justice and the express requirements of the Selection Criteria.

23. There was an ever-present risk that examination of Mr Horsepool's Reasons at the hearing would slip into argument about the merits of the rival candidates, despite the express acknowledgment by Mr Saoul that this was not an area to be explored on this appeal. In practice it can be difficult on a hearing of this nature to stay rigorously outside that no-go area, but I do so in reaching my decision.
24. That risk was even greater when it came to the NISA Response, which included point by point answers to specific criticisms made by the Notice of Appeal.
25. I did not find every answer from Mr Horsepool convincing. There was a point made in 16.2.1 of the Notice of Appeal that Athlete W had beaten Athlete A, who had come second, in a head to head race (i.e. actually in the very same race, not just in the same competition) in the 2012/13 World Cup semi-final in Shanghai but that there was no mention of this anywhere in Mr Horsepool's Reasons. In the NISA Response this was answered by stating that it had been a repechage race in which the first two athletes qualified for the next round and which at the hearing Mr Horsepool told me (as I did note at the time) had been a lower level of event. As it was a race to qualify to go back into the main pool and continue in the main competition, and as in fact only the winner of that race did actually qualify, I do not find that explanation convincing. It does not strike me as realistic to regard it as a lower level of race. It is clear, however, that in reaching the 2nd Decision Mr Horsepool was well aware of that particular race, had not overlooked it and had evaluated it in the light of his own correct understanding of what the race involved. The result was evidently that he had made a judgment that it did not outweigh the considerations in favour of Athlete A's selection. His labelling of the race as a lower level of race was in the course of his having to argue defensively against the attack on his decision and while I did not find the label convincing I do not consider that he failed to take that particular race into account to the extent required by the Selection Criteria and the applicable general principles governing the selection decision.

26. There were points where at the hearing Mr Horsepool convincingly explained his position on the facts: There was discussion about Athlete A having beaten a high-ranking athlete Athlete B in the heats of a World Cup 1 event. The Appellant showed that Athlete B had fallen over in that race, with the implication Mr Horsepool had therefore been wrong to attach any weight to it. However, Mr Horsepool then explained that Athlete B had fallen because he had been put under pressure by Athlete A and had made a mistake under that pressure so had fallen. I found this a convincing answer on the particular point and also a clear illustration not only of Mr Horsepool's extensive knowledge of the performances of the two rival athletes but of the important point that just because something had not been expressly mentioned in Mr Horsepool's Reasons it was not possible to draw the inference that it had not been taken into account.
27. The Notice of Appeal referred to Mr Horsepool's having conceded in a conversation with the Appellant's wife on 6 December 2013 that "he could not recall the details of the performances of Athlete A and Athlete W which he was referring to in the Justification [i.e. Mr Horsepool's Reasons]". With no suggestion from me that anybody is trying to mislead anybody, I should be very cautious about attempting to reach any firm conclusion from a second-hand report of a comment of that nature in a conversation in those circumstances. From what I have read and heard on this appeal, I do not think it likely that there are significant gaps in Mr Horsepool's knowledge of these two athletes' performances in the current or any earlier seasons. The same applies to other factors, such as the athletes' responses to stress. Mr Horsepool knows both athletes well and has worked with them both successfully for a long time now. It is part of his judgment to assess their stress levels and how they cope with them. There was an email from the NISA psychologist, submitted into evidence by the Appellant, which set out goals for Athlete W and was suggested for the Appellant to show that Mr Horsepool had wrongly attached weight to stress as a factor telling against the Appellant. I do not see that email as casting any useful light on the issue of stress, either one way or the other.
28. Mr Horsepool's Reasons were produced under strong time pressures and so were the additional details in the NISA Response. Mr Saoul was able to demonstrate an error on Mr Horsepool's side in relation to the participation of a French athlete in a World Cup competition. I regard that error as trivial. Moreover, it is practically inevitable that any detailed information given in support of a selection decision will contain errors here and there. Unless those errors are sufficiently material that they were at least capable of having affected the actual decision (without going into the question whether or not they actual did), the decision will stand.

29. Such errors in this case were either explained at the hearing as not having been errors at all (such as the race at World Cup 2 between Athlete A and Athlete C, where the Appellant identified what did appear to be a clear error but which it turned out involved a misunderstanding about the distance of the race in question) or were not so much errors as questions of how much extra detail was needed or (like the point mentioned in the previous paragraph) were simply not enough to cast any doubt on the correctness of the selection process followed by Mr Horsepool and the validity of his decision.
30. Accordingly, this appeal is dismissed. Subject to any agreement between the parties, 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.



Nicholas Stewart QC

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