

The concept of selection is something which applies as much to Sunday league football players as it does to elite athletes competing in major sporting events.

The criteria employed by national governing bodies (NGBs) to determine whether athletes are eligible for selection, and then whether those athletes should in fact be selected, come under closest scrutiny in the run-up to major sporting events such as the Olympic Games. The Olympic Games may be a once-in-a-lifetime opportunity for an athlete to represent their nation on the highest possible sporting stage. Selection can therefore make or break a career. As a result, disputes as to eligibility and selection are common in the months before the Olympic Games commence.

Ahead of the XXXI Olympic Games Rio de Janeiro this summer, this article explores the varying approaches taken by NGBs and other bodies to eligibility and selection criteria and sets out some reminders with the aim of avoiding disputes.

Eligibility For Selection

At the outset, it is important to distinguish between issues of eligibility and of selection. This is often harder said than done. In some cases, there will be overlap between eligibility and selection criteria. In other cases, an eligibility criterion employed by an NGB will also constitute a selection criterion. However, more often than not, before an athlete can be selected by an NGB, they must first satisfy separate eligibility criteria.

In any given sport, an athlete may have to comply not only with the eligibility criteria imposed by the relevant NGB but also with the criteria implemented by national federations (NFs), international federations (IFs), National Olympic Committees (NOCs), the Commonwealth Games Federation and/or the International Olympic Committee (IOC). The various interlinking regulations make this a ripe area for disputes and it is important that NGBs ensure their rules comply with any other applicable criteria imposed by other bodies.

The relevant eligibility criteria will differ from sport to sport and can include matters such as nationality, residency, membership, sex and age. There may also be other prerequisites, such as having competed in certain events in a prescribed period.

Nationality and Citizenship

A significant number of disputes relating to eligibility around the Olympic Games pertain to nationality and citizenship. These disputes will typically be determined on the basis of the interpretation of the relevant eligibility rules implemented by the appropriate body or bodies. It is therefore vital for NGBs to ensure that the wording of those rules is clear.

The European Courts have acknowledged that procedures which are based on the criterion of nationality are legitimate, provided that the selection has been made as a matter of sporting interest, rather than on the basis of economic activity:

- *Deliège v Ligue Francophone de Judo et Disciplines Associées ASBL*¹ concerned the refusal by the Ligue Belge de Judo to allow Ms Deliège, a judoka, to compete in the under-52kg judo category. The European Court ruled that, while the selection rules in question had the effect of limiting the number of national participants that could compete in an international tournament, that limit was inherent in an international sports event. It determined that such a rule was not, in and of itself, a restriction on the freedom to provide services or the freedom of movement (both of which are freedoms protected by European law).
- *Walrave v Union Cycliste Internationale*² concerned a provision in the rules of the Union Cycliste Internationale which required that motorcycle pacemakers must be of the same nationality as the 'stayer'. The European Court held that this rule did not offend European law.

While NGBs and other governing bodies are permitted under European law to implement eligibility criteria which are focused on nationality, disputes still regularly arise in relation to what can be a divisive topic:

- *Puerto Rico Amateur Baseball Federation v USA Baseball*³: This dispute concerned José Cruz, a baseball player who was born in Puerto Rico but who had US citizenship. The crux of the matter related to the fact that Puerto Rican nationals are citizens of both Puerto Rico and of the United States; they hold US passports which designate Puerto Rico as their place of birth. Cruz was no different and the case before the Court of Arbitration for Sport (CAS) related to whether he was entitled to play for the United States national baseball team, or whether he was limited to representation of the Puerto Rican national team.

¹ *Deliège v Ligue Francophone de Judo et Disciplines Associées ASBL* (C-51/96) and (C-191/97) [2000] ECR I-2549

² *Walrave v Union Cycliste Internationale* [1974] ECR 1405

³ *Puerto Rico Amateur Baseball Federation v USA Baseball* (CAS 95/132), award of 15 March 1996

CAS applied the Olympic Charter (which was referred to in the rules of the International Baseball Association) and decided that Cruz had dual nationality. The Olympic Charter acknowledged that it was possible for an athlete to possess two nationalities and that, in such circumstances, the athlete could choose which country he wished to represent (though he could not of course represent both). As Cruz had chosen to play for the US national team and had not previously played for Puerto Rico, the CAS determined that his choice was valid.

- During the 1990s and 2000s, a controversy now known as “Grannygate” took place. The rules of the International Rugby Board (IRB) in effect at the time provided that players could play for more than one nation and that they could be eligible for selection for a country on the basis of their parents’ or grandparents’ country of birth. This led to a number of players who had previously played for other countries, such as New Zealand, trading allegiances and playing for the Welsh rugby union side on the basis of grandparents who had been born in Wales. It subsequently transpired that the grandparents of certain of the players were not born in Wales and that, consequently, the players were ineligible for selection. As a result of this controversy, the IRB changed its rules so that a player could only play for one country at senior representative level.
- *Perez v IOC*⁴: During the Olympic Games in Sydney in 2000, the kayaker Angel Perez established a right to compete for the United States, his adopted country, rather than Cuba (his mother country). Cuba wanted Perez to represent it at the Olympic Games and therefore attempted to prevent him from competing for the United States. Perez had acquired US citizenship in the year before the Olympic Games and had initially been ruled ineligible to compete for the United States by the IOC on the basis of the Olympic Charter, which provided that individuals that have changed nationality may not compete for the new country until at least three years have passed since the competitor represented the former country. In his submissions before the CAS, Perez successfully relied upon a legal opinion given by Avelino J. Gonzales Esq, a Cuban lawyer. That opinion stated that Perez was “effectively deprived of his civil rights as a Cuban when he defected in 1993, and that he should therefore be treated as a stateless person from that date”. The CAS Ad Hoc Panel interpreted the expression “who has changed his nationality” in the Olympic Charter as including people who had become stateless. As a result, it held that Cuba could not require Perez to represent it in the Olympic Games. Perez subsequently represented the United States in the K-2 500m and the K-4 1000m events at the Sydney Olympic Games.

- *Irish Football Association v FA of Ireland and FIFA*⁵: This dispute concerned the interpretation of FIFA’s rules regarding the eligibility of players to play for national teams and, in particular, the impact of those rules on Daniel Kearns, a professional footballer who possessed dual Irish and British nationalities from birth but who had grown up in Northern Ireland. Kearns had played for the Northern Ireland representative sides on a number of occasions at youth level but had never competed for the Northern Ireland first team. The rules in question permitted a change of association on a single occasion in the case of players with dual nationality, provided the player in question had not played for the full representative side of the previous association. The CAS found that Kearns was therefore eligible to represent the Republic of Ireland, notwithstanding his previous participation in the youth teams of Northern Ireland.

Other Eligibility Disputes

While nationality and citizenship may form the majority of eligibility disputes, there are other issues which arise as regards eligibility. One of the more well-known eligibility disputes concerned Oscar Pistorius, the athlete known as “Blade Runner”. The dispute related to his use of prosthetic legs (Pistorius had his legs amputated from below the knee at the age of 11 months) and whether he was eligible for selection to compete in events which were sanctioned by the International Association of Athletics Federations (IAAF) against athletes who did not use prostheses. Then IAAF Rule 144.2 prohibited:

“(e) Use of any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device.”

The CAS⁶ held that Pistorius was eligible for selection, stating that a violation of Rule 144.2 “would only occur if the user of the prosthesis gained an overall net advantage over other runners.” The CAS held that the prostheses in question did not give him an advantage over other competitors and that he was therefore eligible for selection.

Another eligibility criterion which is commonly applied by NGBs, is the requirement that athletes have competed in certain events before they can be selected to represent their nation. This is an example of a criterion where eligibility and selection may overlap as participation in those events is a prerequisite for eligibility but performance in those events may also constitute a basis for selection. During the 2012 Olympic Games in London, for example, at least two judokas were selected by the British Judo Association but were subsequently found to be ineligible as they had not participated in the requisite events⁷.

4 *Perez v IOC* (CAS OG 00/001/005/009 (Sydney))

5 *Irish Football Association v FA of Ireland and FIFA* (CAS 2010/A/2071)

6 *Pistorius v IAAF* (CAS 2008/A/1480), award dated 16 May 2008

7 *Gosiewski v British Judo Association*, 2012 unreported

The Basis For The Selection Process

Being eligible for selection is usually only the first stage in the process of an athlete representing their country. Depending on the sport in question, NGBs and the relevant governing bodies will employ certain criteria which will be used to select representative athletes from the pool of eligible athletes available to them. These criteria will necessarily differ from sport to sport. By way of example, the criteria employed in selecting a 100 metre sprinter will not be the same as those employed in selecting a synchronised swimming team.

As noted above, in undertaking the selection process, the NGB in question may also have to consider the selection criteria implemented by other governing bodies, such as NFs, ISFs and the IOC. It is common for ISFs to nominate a pool of athletes, from which the NGB selectors must make their selection (or, indeed, vice versa).

There are three principal bases for selection criteria: objective, subjective and hybrid criteria.

Objective Criteria

Certain NGBs and other governing bodies employ objective criteria in their selection processes. Depending on the sport in question, these may include time, weight, distance, rankings or points gained at an event or over a series of events. These are typically referred to as 'first past the post' criteria.

Provided that objective criteria are clearly set out and that the selection process is properly complied with, there should be a narrow immediate scope for challenge, provided of course that the objective factors selected are appropriate (as to which see below).

Examples of such objective selection criteria can be noted from the following policies:

- In advance of the 2012 Olympic Games in London, UK Athletics (UKA) set out the process by which it arrived at its nominations for Team GB at the Games in its Athletics Selection Policy. The policy stated that UKA would organise trials for all disciplines (except the marathon, walks, 10,000 metres and combined events) and the first two eligible athletes in the final of each discipline at the trials would be automatically nominated for that discipline provided either that (a) they achieved "A" standard in the relevant discipline or (b) they were placed in the top eight of the discipline at the 2011 Daegu World Championship and had achieved at least one valid "A" standard in the discipline at any time within the qualification period. The "A" standard set out the times, distances and heights (as appropriate) that had to be attained in order for an athlete to be selected. Those are set out in detail in the policy. By way of an example, the "A" standard for the 100 metres race is 10.18 seconds for men and 11.29 seconds for women; a purely objective measure. Those nominated on the basis of success at the trial and compliance with the eligibility criteria were then nominated to the British Olympic Association (BOA) for final selection.

- Also in advance of the 2012 Games, the Australian Weightlifting Federation (AWF) produced its nomination criteria. In order to be chosen by the AWF, the athlete in question had to be an Australian citizen or a permanent resident, an AWF member and to have attained the minimum qualifying standard between 1 January 2011 and 16 June 2012. The minimum qualifying standards were then clearly set out by reference to weight category. Based on compliance with these standards, the AWF would then nominate the relevant athletes to the Australian Olympic Committee for selection⁸.

Where criteria are of an objective nature, it is usually much more difficult for an athlete who has not been selected to raise a grievance. That does not however mean that such policies are impervious to challenge. In *Renshaw v British Swimming*⁹, for example, the selection criteria in British Swimming's Olympic Games 2012 Pool Swimming Selection Policy were challenged on the basis that there was a lacuna in the rules, which were allegedly unclear. The rules stated that there were "up to two places available" for qualification. The athlete finishing first in trials would be selected on the condition that they achieved the FINA A minimum standard of 2:26.89. The second place would go to the athlete who finished second in trials provided that they had achieved the World Long Course ranked top 16 time of 2:25:99. At trials, the swimmer Molly Renshaw finished second. The winner achieved the FINA A time and was selected. Ms Renshaw finished in 2:26:81, which was within the FINA A time but outside of the World Long Course time. Ms Renshaw was not therefore selected on the basis of her performance at trials. At the subsequent National Championships, Ms Renshaw won her race but in a time just outside the FINA A standard. Again, Ms Renshaw was not selected. Andi Manley (on behalf of Ms Renshaw) appealed that decision, contending that the selection policy was unclear in that Ms Renshaw believed she would be selected for the team on the basis of the time achieved at the trials, if she was not beaten at the National Championships. It was argued that there was a lacuna in the policy in that no provision had been made for circumstances where the second placed swimmer at the trials met the FINA A standard (but not the World Long Course time) and no one met the FINA A standard at the National Championships. The panel held that the policy was clear and that there was no lacuna as the policy specifically allowed for a team to be nominated with "up to" two swimmers, thereby acknowledging that British Swimming would not necessarily always nominate two swimmers in all events. The Panel went on to state that the criteria were based solely on performances by athletes in particular events and that, as a result, they were "entirely objective" and therefore permissible.

Objective criteria are obviously inflexible notwithstanding that there may be differences in the conditions that underlie an athlete's performance. By way of example, the England badminton selection criteria requires that athletes have played in a certain number of qualifying events and to have achieved a certain world ranking by the end of the qualifying period in order to be selected¹⁰.

⁸ A similar objective process is set out in the AOC Cycling Nomination Criteria. This sets out certain minimum times achieved by the cyclists in order to qualify

⁹ *Renshaw v British Swimming*, Sport Resolutions, 30 June 2012

¹⁰ <http://www.badmintonengland.co.uk/landingpage.asp?section=5831§ionTitle=England+Selections%2C+Policies+%26+Principles>

Differences in the strength of draws, hall conditions, injury and illness could mean that a weaker player/pair qualify ahead of better players/pairs. Those players who do not meet the qualifying criteria will face a difficult prospect of winning an appeal against such decision as the objective criteria are so inflexible.

An NGB is not precluded from implementing such criteria but, depending on the sport in question, selectors may wish to reserve a degree of discretion and flexibility in order to select the best possible team for competition. In certain circumstances, a purely objective set of criteria may not be appropriate.

Subjective Criteria

Many NGBs and ISFs implement subjective selection criteria. For sports where achievement is not clearly measurable by objective terms (i.e. who ran the fastest, or jumped the furthest), subjective selection criteria will likely be appropriate. In this respect, team sports often make their selections based on subjective criteria. The best football team in the world will not be the eleven fastest, or strongest, or tallest players available for selection. A combination of factors will lead to team selection, which may vary, amongst other things, depending on a team's opposition.

Subjective selection processes will typically confer on selectors a degree of discretion. This will often be necessary to determine who has performed best in the run up to a major tournament or who is most capable of attaining the best performance at that tournament.

An example of such a subjective selection process is the 2012 Olympic Games Diving Selection Document for Great Britain, which was promulgated in advance of the 2012 Olympic Games in London. This stated that:

“Diving is an extremely subjective sport and thus there will be a significant component of subjective decision making in regard to final selection of the team.

The size of the Olympic Team will be up to a maximum of sixteen (16) athletes although some of the divers will double up in events reducing the amount of divers. The selection process and dates are outlined in this document. The British Swimming Diving Technical Committee endorses this selection policy.

Final selection is at the sole discretion of the British Olympic Association (BOA) and will be based on nominations made against this selection policy. Nominations will be submitted by the BOA and following ratification by the BOA, the term will be announced (by the BOA in consultation with British Swimming). It is important to note that an athlete being selected to the Olympic Team and nominated to the BOA does not guarantee participation in an Olympic Diving Event. The National Performance Director has sole discretion to decide the composition of the synchronised diving teams whilst at the Olympic Games.”

In *Couch v British Swimming*¹¹, consideration was given to this selection policy and whether the criteria implemented were valid. The Appeal Committee stated that “[d]iving is an extremely subjective sport and thus there will be a significant component of subjective decision making in regard to final selection of the team.”

As a result, it was found that the final selection of the team should be “at the sole discretion” of the National Performance Director.

Of course, where selection processes are subjective, there will be wider scope for appeal as the criteria applied are less easily measurable. The bases for appeal will be discussed in further detail below.

Hybrid Criteria

Given the difficulties identified above in respect of objective and subjective criteria, increasing numbers of NGBs and ISFs are employing a combination of objective and subjective criteria in undertaking their selection processes.

A hybrid approach will usually entail selectors using their discretion to select the athletes, but by reference to some set of objective criteria. An example of such a hybrid approach can be seen in the British Judo Association's selection policy for the 2012 Olympic Games, where selectors were required to consider various subjective factors, such as the judoka which the Selection Panel considered had the greatest potential to win a medal at the Olympic Games, together with a number of objective criteria, such as the judokas' results in certain specified competitions.

A further example of hybrid criteria can be seen in the British Dressage Selection Policy implemented in advance of the 2012 Olympic Games in London. This policy provides that selectors would take into account certain fixed criteria, as well as “the relevant statistical evidence available to them.” The fixed criteria include subjective factors such as the fitness and soundness of the horse, the fitness of the rider and the physical conditions in which the Olympic Games would be held. Yet the policy also permits selection on the basis of head to head competitions, providing an opportunity for objective measurement.

The combination of the flexibility allowed by subjective criteria, together with the certainty provided by objective criteria, has led to ever increasing numbers of NGBs, NFs and ISFs implementing some form of hybrid criteria in their decision making processes.

11 *Couch v British Swimming*, British Swimming Appeal Committee, 29 June 2012

Challenging Selection And Eligibility Criteria

Appeals against eligibility and selection criteria may be based on any number of grounds. While a particular dispute will turn on the facts of the case at hand and the precise wording of the relevant eligibility and/or selection criteria, the vast majority of appeals will be based on a failure to comply with one or a combination of the following, which are essentially quasi-public law standards:

Selectors Must Properly Follow and/or Implement the Relevant Selection Policy

It is vital that NGBs properly and consistently apply the appropriate selection/eligibility criteria in any given case. A failure to do so has been the basis for a number of successful appeals against selection decisions:

- *Elliot Hilton v The National Ice Skating Association of the United Kingdom Ltd*¹²: Our firm was instructed in this matter by Elliot Hilton, a then 19 year old British figure skater. The National Ice Skating Association (NISA) had introduced selection criteria for the 2008/09 season which included the criteria by which men would be selected for the senior Men's World Championships. These criteria were discussed and agreed with skaters and coaches then published on NISA's website. The selection criteria represented a change to previous selection procedures and were intended to achieve greater certainty and clarity. These contained certain 'first past the post' selection criteria which provided no basis on which to deviate from or override those criteria. Despite complying with these criteria, Elliot Hilton was not selected to represent the team. The court determined that NISA's criteria did not permit it to exercise a general discretion to ignore the specified criteria and that, as a result, Elliot Hilton was entitled to be selected as the Senior Men's' Singles Figure Skating representative for the 2009 World Championships.
- *D'Arcy v Australian Olympic Committee*¹³: This matter involved a dispute between Nicholas D'Arcy, an Australian swimmer, and the Australian Olympic Committee (AOC). D'Arcy had been arrested and, as a result, had his membership of the 2008 AOC team terminated. That decision was communicated to D'Arcy by the AOC President. D'Arcy successfully contended that his Membership Agreement with the AOC did not provide for automatic termination of his membership upon a finding of breach of membership condition. The CAS held that discretion to terminate lay with the AOC or the Chef de Mission, not with the President. As the President had communicated the decision to D'Arcy, the correct procedure had not been followed. As a result, the matter was remitted for the correct body to make the decision.

- *Michael v NZ Federation of Roller Sports*¹⁴: This matter involved a successful appeal by the athlete against the New Zealand Federation of Roller Sports' decision not to select the athlete. The athlete successfully argued that the selectors had not followed the appropriate selection criteria, namely they had not considered the possibility of the athlete finishing in the top 10 and had failed to adequately take into account her potential as an athlete. Further, the athlete argued that the selectors had not considered her fitness levels and that they had not attributed the appropriate weight to certain factors, including injuries suffered and previous results achieved. As a result of the athlete's contentions, the case was remitted to the federation and the athlete was subsequently selected.

Selectors Must Take into Account Relevant Considerations (and Should Not Take Into Account Irrelevant Considerations)

It is important that selectors stick to the parameters of the selection/eligibility criteria and do not take into account irrelevant considerations. However, this may be easier said than done where the criteria in question are an example of the subjective or hybrid types discussed above. These will often confer a degree of discretion on the selectors, in which case it can be difficult to know what are relevant, and what are irrelevant, considerations to be taken into account when making the selection decision. It is also worth noting that this reason for appeal will often overlap with the reason discussed above, namely a failure to properly follow or implement an eligibility or selection policy.

Examples of where this issue has arisen include the following:

- *Roberts v British Swimming*¹⁵: In this dispute, the Appeal Committee determined that the selectors had not taken into account certain relevant criteria, including the athlete's illness and injury and the consequent effect on performance. The Appeal Committee stated that grounds for successful appeal would be found where it could be demonstrated that "relevant information was given obviously insufficient weight in a way that was not within the ambit of a reasonable judgment". The matter was remitted back to the selectors for further consideration, albeit they subsequently reached the same decision.
- *Mewing v Swimming Australia*¹⁶: The CAS ruled that, if the athlete in question had been selected to swim at the Olympic Games, it was relevant to consider how likely (or rather, how unlikely) it would be that the athlete would actually get to swim at the Games. This is an example of a case where a factor which is not specifically mentioned in the selection policy is not automatically rendered irrelevant by virtue of its non-inclusion, provided of course that such factor is otherwise consistent with the policy in question.

12 *Elliot Hilton v The National Ice Skating Association of the United Kingdom Ltd* [2009] ISLR 75

13 *D'Arcy v Australian Olympic Committee* (CAS 2008/A/1539) award dated 27 May 2008

14 *Michael v NZ Federation of Roller Sports* NZST 02/11, 19 July 2011

15 *Roberts v British Swimming* Sport Resolutions, 16 June 2012

16 *Mewing v Swimming Australia* (CAS 2008/A/1540), award dated 9 May 2008

The Selection Process Should Not Be Tainted by Bias

It goes without saying that a selection or eligibility process should not be tainted by bias. Selection criteria will often include an element of discretion but this does not mean that the selectors have free reign to select who they wish. By way of example, it is not open to selectors to make a decision based on favouritism. Bias may appear to be present in circumstances where one of the selectors is related to the athlete, or has coached the athlete, or where that selector has had a disagreement or shown some form of hostility towards the athlete in the past.

The legal test for bias is “whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”¹⁷ However, this test is not necessarily easy to apply in practice and a consideration of whether bias is present will often entail a nuanced consideration of all factors in play.

In *Michael v Australian Canoeing*¹⁸, the CAS considered whether the selectors in question had shown actual bias when making their decision to select the athlete. The CAS determined that the selectors had shown actual bias as they had taken into account the athlete’s illness while failing to consider the known illness of the appellant. The reason given by the selectors for this course of action was as a result of their belief that there was a greater chance of the other athlete winning a medal.

Selectors should also be aware that actual bias may not even need to be present in order for a selection decision to be appealed. Provided that there is an appearance of bias (even if there is no actual bias), that may be sufficient ground for a decision to be overturned.

The issue of bias or of perceived bias is one which should be noted in particular by certain of Team GB’s NGBs. Team GB is ostensibly constituted of four independent member associations – England, Wales, Scotland and Northern Ireland. Team GB selection panels will typically have representation from all four of those nations but that will not always be the case in respect of the coaches that provide feedback and advice to the selection panel. By way of example, it may be that an English coach has a vested interest in ensuring that English athletes are selected for Team GB, even though that coach may spend significant time coaching Scottish, Welsh and Northern Irish athletes. NGBs should ensure that those making decisions (and contributing to those decisions) are not seen to be wearing “different hats” throughout the course of a selection process. If this is not avoided, there will be an increased risk of unfair and/or biased decisions (or at least the appearance of unfair/biased decisions).

The Selection Decision Must Not Be Made in Bad Faith, Dishonestly or Perversely and It Must Not Be Arrived at Unfairly

When considering the selection process, the selectors should ensure that their decision-making process is fair. This involves ensuring that all eligible athletes should be treated equally and in good faith. In this respect, it is imperative that attention is given to ensuring that there are no last minute changes to the rules as the athletes’ legitimate expectations as to selection must be protected.

That this right of the athletes should be protected has been demonstrated from the following cases:

- In *Peternell v SASCOC and SAEF*¹⁹, the CAS considered the purported attempt by the South African Sports Confederation and Olympic Committee and the South African Equestrian Federation to make a late alteration to the deadline for selection of the national team. The CAS refused to allow the late amendment. It stated that the athlete had been treated in an “arbitrary and manifestly unfair manner.” It went on to state that the applicable deadlines should have been notified publicly and clearly so that any potential nominee had the opportunity to make the relevant arrangements, which may have included selecting alternative qualifying events and/or seeking an extension of the time limit for qualification.
- *Watt v Australian Cycling Federation*²⁰: In this case, the Australian Cycling Federation (ACF) had provided the athlete with a written guarantee, confirming that she would be selected. This was a departure from the ACF’s ordinary selection policy and allowed the athlete to follow her own training schedule. The ACF subsequently required her attendance at a training camp and attempted to revoke her nomination. The CAS held that the ACF was not permitted to do so. By acting in this manner, the CAS found that the ACF had failed to act fairly and with due regard to the interests of the athlete. The athlete’s legitimate expectation that she would be nominated pursuant to the terms of the written guarantee provided to her had been violated.

Jurisdiction

In circumstances where disputes arise and athletes seek to appeal against the decision of the selectors, the rules governing the athlete’s relationship with the NGB (and any other governing body such as an NF, ISF, NOC and/or the IOC) should set out in clear terms the athlete’s right of appeal. This is vital in order to protect the athlete’s right to natural justice and prevents the athletes taking recourse in the courts, whose proceedings are invariably public.

Depending on the sport in question, the body or bodies which should deal with any appeal process will vary. It is common for NGBs to provide that any appeal will be dealt with at first instance by a specific appeal body which has been set up by the NGB itself. That appeal body must be independent of the selectors who made the decision which is appealed against.

In certain circumstances, it may be appropriate for an appeals process to contain a right of appeal to a further appellate body. Certain rules, for example, permit the aggrieved athlete to appeal the decision of the NGB appellate body to the CAS. It has also become more common for NGBs to provide recourse to other specialist sport dispute resolution fora, such as Sport Resolutions (a specialist sports dispute resolution tribunal).

Whichever route an NGB takes, it should ensure that its appeals process clearly states the relevant steps of the appeals procedure and the timescale within which those steps must take place.

¹⁷ *Re Medicaments and Related Classes of Goods* (No 2) [2001] 1 WLR 700 (CA)

¹⁸ *Michael v Australian Canoeing* (CAS 2008/A/1549), award dated 4 June 2008

¹⁹ *Peternell v SASCOC and SAEF* (CAS 2012/A/2845), award dated 23 July 2012

²⁰ *Watt v Australian Cycling Federation* (CAS 96/153), award dated 22 July 1996

Guidance

While the eligibility and selection criteria employed in any given sport will vary, it is possible to distil certain general principles from the cases outlined above as to good practice:

- The eligibility criteria should be clearly set out in the relevant rules.
- Where distinct from the eligibility criteria, the selection criteria employed should be clearly set out in the relevant rules.
- Those rules should make clear who will make the decision (including, where relevant, their name and/or position).
- The eligibility and selection criteria must be properly followed when reaching a decision. Selectors should ensure they do not take into account irrelevant factors when making their decision.
- Where the selection criteria involve a degree of discretion, the selectors should ensure they exercise their discretion without bias, applying the criteria honestly, fairly and in good faith.
- The selectors should avoid making late changes to the criteria, at least once the selection process has begun. This is imperative in order to protect the athletes' legitimate expectations.
- The relevant rules should provide an appeals process. The rules should clearly specify the relevant steps needed to be taken in order to effect the appeal procedure and the time periods in which the relevant steps need be taken in.
- Any appeal panel must be independent from those selectors who made the appealed decision.
- The rules should provide a de-selection process for circumstances where the athletes are no longer selected (i.e. through injury or disqualification etc.).

Stephen Sampson and Lloyd Thomas

Squire Patton Boggs (UK) LLP

Contacts

Stephen Sampson

Partner

T +44 207 655 1481

E stephen.sampson@squirepb.com

Lloyd Thomas

Associate

T +44 207 655 1041

E lloyd.thomas@squirepb.com