



Arbitration CAS ad hoc Division (OG Turin) 06/008 Isabella Dal Balcon v. Comitato Olimpico Nazionale Italiano (CONI) & Federazione Italiana Sport Invernali (FISI), award of 18 February 2006

Panel: Mr Richard H. McLaren (Canada), President; Mr Kaj Hober (Sweden); Mr Akira Kotera (Japan)

Snowboard

Selection process for the Olympic Games

Arbitrary change of the original selection criteria

- 1. The initial objective selection criteria had no provisions regarding how to use such criteria when an athlete is injured or does not race because the coach substitutes another athlete. To resolve this dilemma a new rule was announced the day prior to the final race to all present at the meeting of athletes. That rule was not communicated to the Applicant who was not present at the meeting. It was unknown to all the athletes until it was formulated two days before the competition and announced to all present the day prior to the final competition.**
- 2. The new rule is a radical alteration to the original criteria. It came too late in the selection process to be fair particularly as it was not announced in a complete fashion and communicated to the Applicant. Therefore, such new rule is considered to be arbitrary and it would be unfair and unreasonable in all the circumstances to apply it.**

The Applicant, Isabella Dal Balcon, is a 28-year old snowboarder of Italian nationality, competing at the international level in the alpine discipline. She is a member of the FISI snowboard club of Verona. As a member of that club she is a member of the Federazione Italiana Sport Invernali (FISI) who is in turn a member of both the Comitato Olimpico Nazionale Italiano (CONI) and the International Ski Federation (FIS).

The Applicant took part in the selection process jointly established by CONI and FISI to determine the members of the Italian snowboard team for the 2006 Olympic Winter Games (the Games) in Turin. On 1 February 2006 the Applicant was advised by FISI that she was not selected to be a member of the Italian team. That decision was subsequently confirmed in letters of the 13 and 15 of February 2006 by FISI and CONI, respectively.

As acknowledged by the parties, responsibility for selection of members of the snowboarding team is initially that of the FISI. Once selected by the national sport federation the athlete is proposed to CONI whose authority it is to determine who competes on the Italian Olympic team at the Games.

The number of positions permitted by the FIS for female snowboarder competitors in the discipline of Parallel Giant Slalom (PGS) is limited to four for Italy. Therefore, if the Applicant is successful in her case CONI and FISU will have to determine the other members of the female snowboard team.

On the morning of the hearing and upon request of the Panel, CONI produced a document titled “*D.A. SNOWBOARD – PROGRAMMA DI QUALIFICAZIONE PER I GIOCHI OLIMPICI TORINO 2006 – 31 GENNAIO-24 FEBBRAIO 2006*” (the “October 2005 criteria”). The Applicant advised the Panel that she had never seen this document until the day of the hearing.

Such criteria provided that the qualification to the Games would be based on the results obtained as from 14 September 2005 in World Cup competitions, applying an escalating coefficient to the three races prior to the Games and also taking into account any podium result obtained. In the circumstances of this case there were no podium results for any athlete.

Mr Andrea Grisa, trainer of the Italian snowboard team (Mr Grisa), testified that he held meetings with all of the female snowboard athletes prior to each event at which he discussed the selection criteria. He explained that the selection criteria were the subject of discussion at many of these meetings and that is how the selection criteria were made known to the athletes. The written October 2005 criteria were never provided to the athletes.

On 13 January 2006 Mr Grisa decided that the selection would be based only on the two best results (the 2-best rule) instead of the results, as referred to in the October 2005 criteria.

The 2-best rule resulted in the selection of Ms Marion Posch, Ms Carmen Ranigler, Ms Corinna Baccaccini and Ms Lidia Trettel (the “Selected Athletes”).

On 1 February 2006 FISU wrote a letter to the Applicant the implication of which appears to be that she was not selected for the Games.

By email of 3 February 2006 Mr Gianmarco Peri, FISU Sports Director, confirmed to Mr Gianni Storti, FISU Secretary General, that the Applicant’s non-selection derived from the application of the 2-best rule, namely: “*[f]or the classification, we have chosen the two best results obtained in the Parallel Giant Slalom races in the World Cup, starting from the race in Sölden 15-16/10/2005, until the race in Kronplatz, 15/01/2006*” (translation by the Panel). He also advised that the coefficient from the October 2005 criteria would be used to calculate results. On 10 February 2006 the FISU Secretary General forwarded that email to Mr Bortoluzzi and to “presidenza@fisu.org”.

On 8 February 2006 the Applicant through her lawyer asked for “*immediate modification of the decision taken by the CONI*”.

On 13 February 2006 FISU advised that the selection was “completely discretionary” and further stated that no modification was possible. The same answer was given two days later by CONI.

The Applicant's submission was that at the outset of the current season Italian snowboard athletes were told by Mr Grisa the criteria for the selection process for the World Cup. The criteria were stated to be:

- (a) *athletes' chronometric time obtained during the training; and,*
- (b) *the standings obtained during the competitions.*

The Applicant submits that no written selection criteria were ever provided to her. Mr Grisa only described the criteria orally at pre-race meetings.

The Applicant denied ever being informed of the amendment of the October 2005 criteria decided by Mr Grisa or FISU on 13 January 2006. The first time she was informed about this amendment was during the hearing.

The Applicant argues that it is unfair and arbitrary that the criteria be changed during the course of the snowboarding season.

The Applicant finally requested the Panel to issue an award granting the following relief:

1. *Annulment of the Decision of CONI and FISU of February 1 2006 regarding the selection in the Discipline Snowboard for the Olympic Winter Games 2006.*
2. *Order to the effect that Applicant is entitled to participate for the Italian team of snowboard to Olympic Winter Games 2006 (Parallel G Slalom).*
3. *Order to the effect that Respondent has the duty to take care of the Applicant as it does in favour of every other Italian Olympic Athlete.*
4. *Order to the effect that Respondent has to pay all costs of the arbitration and all expenses to be incurred by Applicant in connection with this arbitration, including lawyer's fees.*

Conservatory and interim measure: Order that applicant is entitled to take part and participate to the training sessions for the snowboard on Bardonecchia, loc. Melezet, on February 19 and 20, with 4 passes for her team and assistants with 5 beds there.

In its submission filed 18 February 2006, CONI submitted the following statement of facts:

- (a) *Decision taking [sic] on October 7 by FISU establishes that the selection criteria should be "as objective as possible" either with reference to the number of athletes and performances; it continues establishing that the athletes, included in the list, should present "particular capabilities and such curricula as to well performing in the Olympic Games". It says further that it accepts the proposal of the "Direzione Agonistica" (Technical Direction of Snowboard) establishing the qualification criteria (which is attached to the same decision), and finally it establishes the following: it remains "confirmed that the Federal Council, on the basis of its institutional prerogatives, reserves for himself any and all decisions and eventually integration on the choice made, following said criteria by the 'Direzione Agonistica Snowboard'.*
- (b) *For the qualifications, taking into consideration the best performances per athlete obtained starting from the World Cup events of Valle Nevado, "the athletes will be included in the list on the basis of the*

ranking obtained in each competition line by line. For the athletes classification one should consider the ranking made for ranking line by line of the World Cup 2005-2006. The World Cup points obtained in each event line by line, during the last three competitions (before the deadline, February 1) will be multiplied by a ratio of 1,1 (last but two), 1,2 (last but one), 1,3 (last competition), in order to increase the value of pre-Olympic competitions. The same will happen with the podiums obtained in the last three competitions (1,1 for the third place; 1,2 for the second; 1,3 for the first); any way the podiums obtained will have an assessment priority upon the general ranking position: In case of tie the ranking obtained in proximity of the last three qualification's competitions shall prevail. To sum it up the general evaluation for the selection will be based on the line's World Cup ranking, on the places obtained in the last three World Cup Competitions and on the podiums obtained".

At the hearing the Respondents submitted that the 2-best rule was adopted because it was in their view unfair to apply the October 2005 criteria to some athletes who missed World Cup competitions due to injuries or because of athletes' substitutions by the coach in certain events.

The Respondents requested the Panel to dismiss the application.

The Selected Athletes were advised of their right to participate in the hearing. Mr Peri confirmed at the hearing that he represented the Selected Athletes, who had been informed of these proceedings.

LAW

Jurisdiction of the CAS

1. These proceedings are governed by the CAS Arbitration Rules for the Olympic Games (the "CAS ad hoc Rules") enacted by the International Council of Arbitration for Sport (ICAS) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (the "PIL Act"). The PIL Act applies to this arbitration as the result of the location of the seat of the CAS ad hoc Division in Lausanne Switzerland, pursuant to art. 7 of the CAS ad hoc Rules.
2. The jurisdiction of the CAS arises from Rule 61 of the Olympic Charter.
3. The parties at the hearing confirmed that the CAS ad hoc Division had jurisdiction to hear and rule on the dispute.

Applicable Law

4. Under art. 17 of the CAS ad hoc Rules, the Panel must decide the dispute *“pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate”*.
5. According to art. 16 of the CAS ad hoc Rules, the Panel has *“full power to establish the facts on which the application is based”*.
6. The only applicable regulations provided to the Panel and relied upon by the parties are the October 2005 criteria. The regulations were also submitted by the Respondents to encompass the oral amendments to the criteria developed on 13 January 2006 (2-best rule).

Discussion

7. The October 2005 criteria are complex and take several readings to be understood in their full complexity. The oral discussion of such criteria are an imperfect method of explaining to athletes what the precise criteria are in order for all athletes to know what they must do and achieve in order to be selected.
8. The 2-best rule was only communicated orally to the team members the day prior to the final competition to be used for selection and was never put in writing. The Applicant was not present at that meeting. There was a telephone call from the trainer Mr Grisa to the Applicant. The Applicant advises the Panel that she was not informed of the changed criteria being the two best results of the five World Cup races. She recollects that the telephone conversation was about a portion of the October 2005 criteria, which permits a coefficient to be applied to results, which are the closest to the Games. The trainer agrees there was a telephone call but is unclear as to the precise contents of the call.
9. The Respondents provided a chart at the hearing, which summarises the selection results on the basis of the October 2005 criteria. On the application of the selection criteria the standings were:

Name	Totale WC PGS	Tot coef
Posch, Marion	1178.00	1305.60
Ranigler, Carmen	726.00	802.60
Boccaccini, Corinna	680.00	764.00
Dal Balcon, Isabella	660.00	681.20
Trettel, Lidia	529.40	652.40
Sponsale, Barbara	50.20	55.66

10. The 2-best rule changes the results to be:

Name	Best of 2
Posch, Marion	870.00
Ranigler, Carmen	686.00
Trettel, Lidia	633.00
Boccaccini, Corinna	608.00
Dal Balcon, Isabella	560.00
Sponsale, Barbara	55.66

11. On the basis of the 2-best rule the Applicant was not selected to the team because she was in fifth place. On the basis of the October 2005 criteria she would have been selected to the team because she was in fourth place.
12. The October 2005 criteria clearly state that the selection criteria should be “*as objective as possible*”. A statement of principle this Panel agrees with as did the Panel in the CAS OG 06/002 *Schuler v. Swiss Olympic Association* (the “Schuler decision”) at paragraph 5.16 et seq.
13. The FISU reserves to itself the discretion to determine the selections following the application of the criteria by the Direzione Agonistica Snowboard (the DA Snowboard). There is no indication by FISU that it exercised such discretion. The selection decision as the Panel understands the process was made by the DA Snowboard applying the 2-best rule and FISU accepting the recommendation from the DA Snowboard without resort to the use of its discretion.
14. The 2-best rule was established two days prior to the final competition. The athlete Ms Trettel did not compete in the first event due to injury and was withdrawn by the coach from the fourth event on 8 January 2006 in favour of a substitute athlete. She therefore, had only three competitive results to calculate under the October 2005 criteria. The 2-best rule had the effect of favouring Ms Trettel because she had an excellent result in the final race, which was increased by the highest coefficient.
15. The October 2005 criteria have no provisions regarding how to use the selection criteria when an athlete is injured or does not race because the coach substitutes another athlete. To resolve this dilemma the 2-best rule was announced the day prior to the final race to all present at the meeting of athletes. That rule was not communicated to the Applicant who was not present at the meeting. It was, of course, unknown to all the athletes until it was formulated two days before the competition and announced to all present the day prior to the final competition.
16. The 2-best rule is a radical alteration to the original criteria. It came too late in the selection process to be fair particularly as it was not announced in a complete fashion and communicated to the Applicant. Therefore, the Panel finds the 2-best rule to be arbitrary and it would be unfair and unreasonable in all the circumstances to apply it.

17. In this case, the snowboard athletes had to compete in training runs the morning following the hearing, otherwise an athlete could not compete in the Games event. The Panel is required to make a decision in accordance with the ad hoc rules within 24 hours of the application. The Panel was under a time pressure not normally found in selection proceedings. In other circumstances, the Panel might have referred the matter back to the FISU for reconsideration. That was not a possibility in this case. Therefore, the Panel took the step to annul the decision of the FISU and declared that the Applicant had met the October 2005 criteria having determined that the 2-best rule was of no effect because of its arbitrary nature. The selection declaration of the Panel is based upon the FISU chart of how the October 2005 criteria are to be applied and were in fact applied by FISU in that chart. A decision to that effect was issued by the Panel following deliberations immediately after the hearing, which ended at approximately 5pm.
18. This decision is consistent with the Schuler decision in that this Panel has found that there was no discretion used by the FISU in the final selection. FISU accepted the direction of the DA Snowboard albeit on the changed criteria that this Panel has found to be arbitrary and unfair and therefore to be disregarded. In contrast the Schuler decision was made using discretion that had been properly preserved to the Swiss National Federation. The Panel in Schuler declined to intervene in the legitimate exercise of discretion by the national federation. There was no discretion used in this case. On this basis the two cases are distinguishable.

On the basis of the foregoing facts and legal aspects, the ad hoc Division of the Court of Arbitration for Sport renders the following decision:

1. The decision of the Federazione Italiana Sport Invernali of 1 February 2006 is annulled insofar as it concerns the female snowboard athletes.
2. Ms Isabella Dal Balcon is declared selected to the Italian snowboard team for the Parallel G Slalom in the competitions at the XX Olympic Winter Games in Turin. It is for the Federazione Italiana Sport Invernali and the Comitato Olimpico Nazionale Italiano to determine the other members of the female snowboard team.
3. The Federazione Italiana Sport Invernali and the Comitato Olimpico Nazionale Italiano are ordered to place Ms Isabella Dal Balcon in the Olympic team of Italy.
4. The Federazione Italiana Sport Invernali and the Comitato Olimpico Nazionale Italiano are ordered to take all immediate steps to enable Ms Isabella Dal Balcon to participate in the training races starting the morning of 19 February 2006.
5. All other requests are denied.
6. (...).