CAS 2008/A/1540 Andrew Mewing v. Swimming Australia Limited, partial award of 9 May 2008

Panel: Mr Alan Sullivan QC (Australia), Sole Arbitrator

Swimming
Selection dispute
Men's 4 x 200 m freestyle relay squad selection for the 2008 Olympic Games
Proper implementation of the nomination criteria

Being entitled to consideration for nomination and being eligible for nomination is not the same as having a right to nomination. In selection disputes, in the absence of bad faith, dishonest or perversity, the CAS has consistently considered that an appeal against a selection decision cannot succeed when the national head coach acting as the relevant decision-maker, has properly followed and implemented the Nomination Criteria and has given proper, genuine and realistic consideration to the overall needs of the team.

By an Application Form dated 21 April 2008, the Appellant, Mr Andrew Mewing lodged an appeal against the decision of the Respondent, Swimming Australia Limited, made on or about 21 April 2008, not to nominate the Appellant for selection as a member of the Men's 4 x 200 Metres Freestyle Relay Squad for the 2008 Summer Olympics to be held in Beijing, China in August 2008. Swimming Australia is the peak national body controlling or administering the sport of swimming in Australia.

In accordance with clause 10.1 of the Olympic Team Selection By-Law ("the Selection By-Law") formulated by the Australian Olympic Committee ("AOC") the Respondent had established an Appeals Tribunal ("the Tribunal") to hear appeals against non-nominations for selection such as occurred in the present case.

The Appellant lodged an appeal against his non-nomination for the swimming team to the Tribunal and that appeal was heard on 8 April 2008 by a Tribunal comprising Mr Peter Kerr (Chairman), Ms Sue Dill-Macky and Mr Matt Dunn.

On 14 April 2008 the Tribunal handed down its decision, supported by a statement of reasons for its decision. It dismissed the Appellant's appeal against his non-nomination.

It is in these circumstances that the Appellant has lodged his appeal to CAS as outlined above. The relief which the Appellant seeks before CAS is as follows:

a) The decision of the Appeals Tribunal dated 15 April 2008 be set aside;

b) The Appellant be included as a member of the Men's 4 x 200 Metres Relay Squad for the 2008 Olympics;

c) The Respondents pay the Appellant's costs of the appeal.

Pursuant to the regime relating to selection for the Olympic Games, the Respondent's power is confined to nominating a swimmer for selection in the Olympic team. The actual selection is made by the AOC. In these circumstances, and by consent of the Appellant and the Respondent, the AOC was joined as an interested party to this appeal and represented here by its Director of Sport, Ms Fiona de Jong but on the condition that it did not have the right to address CAS on any particular issue and was merely present in an observer capacity.

Following preliminary telephone conference calls including, particularly, a preliminary conference call conducted on Friday 24 April 2008 each of the Appellant and the Respondent signed and agreed to an Order of Procedure dated 1 May 2008. In addition to containing the usual agreements concerning jurisdiction, the rules to be applied, the applicable law and the like, the Order of Procedure also evidenced and recorded a series of further agreements between the Appellant and the Respondent modifying or varying the powers and obligations conferred or imposed upon me as the relevant CAS arbitrator in the conduct of this appeal. In the preliminary conference call on Friday 24 April 2008 I signified my agreement to those alterations. The alterations are contained in clause 8 of the Order of Procedure.

Given that the jurisdiction of CAS in cases such as this is contractual in nature (see, e.g. *Reguz v Sullivan* (2000) 50 NSWLR 236), I am no doubt that the parties, at least with my concurrence, could reach such an agreement varying the rights and obligations of CAS in conducting an appeal such as this from those rights and obligations as set out in the Selection By-law which would otherwise, in conjunction with the CAS rules (where applicable), regulate my jurisdiction and the procedures to be followed in this appeal.

Clause 11.10 of the Selection By-law provided for only two grounds of appeal against a decision of the Tribunal. Ordinarily, therefore, I would have to determine whether one or other of those grounds had been established before embarking upon a hearing of the appeal proper. However, by clause 8.2 of the Order of Procedure, the parties have agreed that, in effect, one or other of the ground specified in clause 11.10 of the by-law is to be taken to be established. Thus, I am permitted to review the facts and law in this matter pursuant to Rule 57 of the CAS Rules to determine whether any of the matters set out in clause 11.5 of the Section By-law are established without making any preliminary finding in respect of the matters specified in clause 11.10. I shall return to the terms of clause 11.5 later.

The hearing of this appeal was conducted on the abovementioned basis in Sydney on Wednesday 7 May 2008. At the conclusion of the hearing I indicated that I intended to reserve my decision and hoped to hand it down on Friday 9 May 2008. At the conclusion of the hearing, the question of costs was raised and the parties agreed that submissions and evidence on costs should be deferred until after this partial award was handed down. The parties also agreed that, in this partial award, I could give directions for the filing of evidence and submissions in the event that either of them wished to make any application for costs.

As stated, the parties to this appeal are:

a) Mr Andrew Mewing as Appellant;

b) Swimming Australia Limited as Respondent;

c) The Australian Olympic Committee as an Interested Party.

On 23 March 2008 the Appellant competed in the heat and semi-final of the Men's 200 metres freestyle event at the Telstra Swimming Selection Trials for the Beijing 2008 Australian Olympic Team. In the semi-final he swum an Olympic "A" qualifying time of 1.47.75 and qualified for the final of the event to be swum the following evening.

On 24 March 2008 the Appellant competed in the final of the 200 metres freestyle event at the Trials, finishing in eighth place in an Olympic "A" qualifying time of 1.48.13.

Both the Appellants semi-final and final times were comfortably within the Olympic "A" qualifying time for the event which was 1.48.72. In fact all eight finalists in the final at the Trials posted times comfortably within the Olympic "A" qualifying time. It was one of the most evenly contested finals at the Trials with 1.1 seconds separating the eight finalists. The results of the final and the respective times of the swimmers were as follows:

Grant Hackett - 1.47.03;

Kenrick Monk - 1.47.10;

Nicholas Sprenger - 1.47.17;

Leith Brodie - 1.47.47;

Patrick Murphy - 1.47.50;

Grant Brits - 1.47.56;

Nicholas Ffrost - 1.47.70; and

Andrew Mewing - 1.48.13.

On 29 March 2008 the Respondent announced the team of swimmers it proposed nominating to the AOC for selection for the Beijing Olympics. The first seven placegetters from the Men's 200 metres freestyle final were nominated for selection but the Appellant was not nominated.

Since this is a matter which forms part of the Appellant's submissions, it should also be recorded that all eight placegetters in the final of the Women's 200 metres freestyle were nominated for selection as well as Mrs Libby Trickett who, although she did not compete at the Trials in the Women's 200 metres freestyle, is, like all other selected swimmers, eligible for selection in the Women's 4 x 200 Metres Relay Team which actually competes at the Beijing Olympics.

On 2 April 2008 the Appellant lodged his appeal against non-nomination for selection with the Respondent by letter addressed to Mr Glenn Tasker, the Chief Executive Officer of the Respondent. As stated, thereafter, the Tribunal heard and dismissed that appeal.

Also, as stated, the Appellant then decided to appeal to CAS. Given the obvious importance and urgency of the matter, both the parties and the CAS Registry have done all in their power to bring on the CAS appeal as quickly as possible. Likewise this Partial Award is being delivered as quickly as reasonably possible.

LAW

1. Clause 11.5 of the Selection By-law provides as follows:

"11.5 The sole grounds for any appeal to an Appeals Tribunal are that:

(1) The applicable Nomination Criteria have not been properly followed and/or implemented or

(2) The athlete was not afforded a reasonable opportunity by the NF to satisfy the applicable Nomination Criteria or

(3) The nomination decision was affected by actual bias or

(4) There was no material on which the nomination decision could reasonably be based".

2. Although the Appellant's submission, originally, sought to rely upon several of the clause 11.5 grounds, ultimately, in the course of his closing submissions, Mr Martin, on behalf of the Appellant, very properly indicated that the Appellant was only relying upon the ground that the applicable Nomination Criteria had not been properly followed and/or implemented.

3. The applicable Nomination Criteria for selection as a relay swimmer (it being common ground that the Appellant did not satisfy the criteria to be selected in an individual event) are contained in clause 3(7)(B) of the Respondent's Nomination Criteria. Clause 3(7)(B) relevantly reads:

*"**(B) Relay Event***

(i) Any additional athletes that have not met the requirements of clause 3(7)(A) will be considered for selection for a relay event using the following criteria provided they have achieved the "B" Qualifying Time Standard … for that individual event for the 2008 Olympic Games in the final of their respective individual event;

…

4 x 200 Freestyle Relay

(c) …

(d) Third, fourth, fifth, sixth, seventh or eighth in the final of the 100m and 200m freestyle events.

…

(ii) All individual event athletes selected as part of the 2008 Australian Olympic Team are eligible to participate in relay events where Australia has qualified a team. In addition to the athletes selected for individual events, the SAL National Head Coach will consider all available information regarding the

particular relay event, the overall number of relay places available, the current FINA world rankings of individual swimmers being considered and the overall needs of the team and recommend to the AOC the inclusion of up to a maximum of 16 additional relay only athletes to compete in particular relay events. The SAL National Head Coach will recommend to the AOC which athletes should be entered to participate in each relay event for which Australia has qualified a relay team.

***Meeting the relay performance requirements does not guarantee nomination for selection**" (underlining added for emphasis).*

4. It is common ground that the SAL National Head Coach referred to in the Nomination Criteria is Mr Alan Thompson who gave evidence in this appeal. It is also common ground that, in fact, although up to 16 additional relay only swimmers could have been nominated for selection, only 10 in fact were nominated comprising 4 male swimmers and 6 female swimmers.

5. Likewise, it is common ground that were the Appellant to be nominated for selection to the team, and ultimately selected in that team, his selection would not result in the displacement of any other swimmer from the team. He would simply be an additional member of the team filling one of the 6 remaining possible additional relay only athlete spots.

6. Furthermore, it is either common ground or beyond dispute that the Appellant satisfied the criterion set out in clause 3(7)(B)(i)(d) of the Nomination Criteria by finishing eighth in the final of the 200 metres men's freestyle and that none of the additional considerations referred to in clause 3(7)(B)(ii) of the Nomination Criteria would have disqualified the Appellant from consideration for nomination.

7. However, being entitled to consideration for nomination and being eligible for nomination is not the same as having a right to nomination. That obvious fact is reinforced by the concluding sentence of clause 3(7)(B)(ii) of the Nomination Criteria which is printed in the original in bold type for emphasis and states:

   "Meeting the relay performance requirements does not guarantee nomination for selection".

8. In the end, the critical point in this appeal was distilled by the parties to be whether or not Mr Thompson as the National Head Coach and thus the relevant decision-maker for the purposes of the Nomination Criteria, failed to properly follow or implement the Nomination Criteria because he failed to appreciate or recognise that the "overall needs of the team" consideration referred to in clause 3(7)(B)(ii) of the Nomination Criteria necessitated the inclusion of the Appellant in the 4 x 200 metres Men's Relay Squad.

9. It was common ground that, at the actual Olympics themselves, the relay teams for heats and finals are chosen based upon a then-current assessment of which swimmers in the team will make the best possible relay team for the relevant event. Thus, a swimmer who had only been nominated for selection in, say, the 100 metres breaststroke may be chosen to participate in the final of the 4 x 200 metres freestyle relay if he or she made a compelling case for such inclusion in the lead up to, or at, the actual Olympic games. One can readily appreciate the wisdom and commonsense of such an approach.

10. In order to assist the coaches at the Olympic Games themselves in the choice of swimmers who actually swim in the relay events at the Games, a document entitled "Relay Selection Guidelines" has been formulated. That document confirms that all selected swimmers are eligible for the relays and that the results at the trials do not guarantee a place in any particular relay. It indicates the matters which Mr Thompson and the Nominated Relay Coaches will consider in order to select swimmers for the actual events at the Olympics. It also states that:

"The Team selected will be the one that, in the opinion of the National Head Coach and the Relay Coach/es, is the best Team available at that time to represent our country".

11. The Appellant's submission is that having Mr Mewing in the team would ensure greater competition for actual places in the actual teams chosen to swim at the Olympic games. Such greater competition was likely to result in improved performance of the team and hence was in the "overall needs of the team". Furthermore, the Appellant pointed to the closeness of the result of the 200 metres final and the fact that Mr Mewing's best time was only .05 seconds slower than that of the seventh placegetter, Mr Ffrost. The Appellant asks rhetorically how it can be assumed that if Mr Mewing was selected, he wouldn't improve more in the period up to the Olympics than Mr Ffrost? It could also be asked, rhetorically, how can it be assumed that Mr Ffrost will not further increase his present advantage over the Appellant? Such rhetorical questions only serve to emphasise the speculative nature of such inquiries.

12. The Appellant also submits that the Relay Selections Guidelines document, or the policies contained therein, inherently must be considered by the National Head Coach as part of the "overall needs of a team" criterion when nominations are being considered. This submission can be dealt with briefly. Even if this is so, which I strongly doubt, the evidence clearly establishes that Mr Thompson was aware of that document and its contents at the time of nomination and that in making nominations he was acutely conscious of the need to nominate swimmers so the best possible teams for the heats and finals of the relays could be chosen at the Olympic Games bearing in mind all relevant factors and, in particular, the swimming programme at the Games and the racing commitments of the various potential relay swimmers.

13. The Appellant also points to the undisputed evidence that a factor which Mr Thompson took into account, in not nominating the Appellant for the team, after consultation with his fellow selectors and others, was the fact that Mr Mewing, if selected, was unlikely to get a swim at the Olympics in the relay event.

14. The reasoning of Mr Thompson and those with whom he consulted on this point was as follows:

a) The heats of the men's 4 x 200 metres relay were to take place in the next swimming session after the final of the individual men's 200 metres freestyle event;

b) Kenrick Monk and Nicholas Sprenger, Australia's two nominees for the individual event, were likely to make the final of the individual event;

c) Therefore, in the overall interests of the team, it was desirable to rest them from the heats of the relay event and keep them fresh for the final;

d) The winner of the 200 metres freestyle at the trials, Grant Hackett, had a very busy Olympic program. It was desirable to keep him as fresh as possible and thus also save him for the relay final;

e) Therefore, the appropriate selection strategy was to not consider Messrs Hackett, Monk and Sprenger for the heats of the relay but save them for the final. That would mean four other swimmers swimming the heat and, to provide an incentive for those four to perform at their optimum, the swimmer in the heat with the best time would be selected to join the three rested swimmers in the final.

15. On the basis of this reasoning, at the time the nominations were made, in Mr Thompson's mind, it was unlikely that the Appellant, if selected, would get a swim at the Olympic Games (he not having qualified in any other event). Also, based on this strategy, Mr Mewing was not "needed" because there were four other swimmers, who had all qualified faster than him, available to swim in the heat and the one who performed best in that heat would then participate in the final with the three rested swimmers, each of whom had significantly superior qualifications for selection to those of the Appellant.

16. The Appellant says that, in adopting this approach, Mr Thompson, in fact, took into account an irrelevant consideration, namely the unlikelihood that Mr Mewing would get a swim at the Olympic Games.

17. The Appellant also initially placed great weight on an alleged apparent difference in the nomination of swimmers for the women's 4 x 200 metres freestyle relay team pointing out that all eight finalists in the women's individual event were chosen for the relay squad and, as well, that it was inherently likely that Libby Trickett would be selected in the relay event even though she had not participated at the trials in the individual 200 metres event. As the hearing of the appeal progressed, this submission assumed less and less importance and I should indicate at the outset that I regard it as completely irrelevant in the absence of some submission that there was some form of discrimination or bias at play in the selection of the relay teams.

18. There is no such allegation made and, in the absence of such an allegation, the fact that different considerations might have been applied to the selection of the women's team is neither here nor there. In any event, in the light of the undisputed evidence of Mr Widmer, Mrs Trickett's coach, I would have found that Mr Thompson acted properly in proceeding on the basis that Mrs Trickett should not be considered, in the nomination process, as a possible 4 x 200 metres relay swimmer. Thus, to the extent to which the Appellant points to the women's relay nominations as contradicting an alleged nomination policy that only people who were likely to get a swim were to be nominated, I would have rejected such a submission.

19. Whilst it is obvious that the Appellant is an outstanding swimmer and would be likely to represent Australia with distinction if selected for the Olympic games, nevertheless, regrettably, in my firm view he has clearly failed to establish, in this appeal, that Mr

Thompson, as the relevant decision-maker, did not properly follow or implement the Nomination Criteria.

20. It is clear on the evidence that Mr Thompson did give consideration to the nomination of the Appellant for the 4 x 200 relay. It is also clear, on the evidence, that Mr Thompson did pay regard to all of the criteria or considerations set out in clause 3(7)(B)(ii). In particular, in my view, he did pay appropriate regard to the "overall needs of the team" in deciding not to nominate the Appellant.

21. On the selection strategy determined, at the time of nomination, by Mr Thompson, after consultation with his fellow coaches, the needs of the team, particularly the relay team, were adequately satisfied by the choice of seven swimmers for the relay squad as discussed in [35] above. It is not suggested, nor could it be on the evidence, that in coming to this conclusion, Mr Thompson acted in bad faith or dishonestly or perversely. Rather, in reality, the Appellant's attack seems, to me, to be upon the merits of Mr Thompson's decision. The Appellant, unlike Mr Thompson, considers that the overall needs of the team required his nomination. Mr Thompson, on the other hand, considered that choosing seven swimmers for the relay would adequately and properly cater for the overall needs of the team and that choosing anymore would be, as Mr Marshall SC put for the Respondent, surplus to the likely needs of the team. Selectors are chosen as such because of their experience and expertise. (See, e.g., CAS 2000/A/280 at [64]; see also CAS 2004/A/582 at 6.21 – 6.26, 6.36, 6.49 and *Kalil v Bray* [1977] 1 NSWLR 256 at 261). They must make difficult decisions based upon judgment, experience and expertise and, as the present case graphically demonstrates, if coaches as well, must formulate strategies appropriate to ensuring the best results for a team and then make selections consistently with those strategies. I am satisfied that was exactly what was done in the present case.

22. As I have said, the Appellant is really attacking the merits of the nomination or selection decision by Mr Thompson. This, in my view, is impermissible in such an appeal. In analogous circumstances courts have repeatedly warned against the impropriety of a Court or other Tribunal coming to a conclusion on the merits of the case under the guise of making a finding that the original decision-maker acted in bad faith or contrary to particular guidelines or criteria (see, e.g., *Australian Football League v Carlton Football Club Limited* [1998] 2 VR 546 at 558 – 559; *Foley v Padley* (1984) 154 CLR 349 at 370; *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 40 – 42 and *McInnes v Onslow-Fane* (1978) 1 WLR 1520 at 1535).

23. CAS has, in selection disputes, adopted an identical approach (see, for example, CAS 2000/A/280, at [26] – [28]; CAS 2004/A/582 at 6.31, 6.34, 6.46 – 6.49).

24. In the absence of bad faith, dishonest or perversity, this appeal could only succeed if it could be shown that Mr Thompson, in nominating the relay team, did not give "proper, genuine and realistic" consideration to the "overall needs of the team" (see e.g. *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 at 601 [62]; CAS 2004/A/582 at 6.33). Mr Thompson did give such consideration. The fact that someone else, similarly considering the matter, may have arrived at a different result, or even the fact that his decision is wrong, is insufficient to enable

the appeal to be successful as such matters go to the merits of the decision not whether or not the decision-maker gave proper consideration to such matters (in addition to the cases already mentioned, see, also, *Bruce v Cole* (1998) 45 NSWLR 163 at 186; CAS 2004/A/582 at 6.44).

25. Viewed in this light, Mr Thompson did not take into account an irrelevant consideration in paying regard to the fact that it was unlikely that Mr Mewing, if selected, would get a swim at the Olympics. The nomination decision is one which had to be made, and has to be scrutinised, at the time it was made. At the time, the selection strategy of selecting seven swimmers for the relay squad was perceived as being sufficient to satisfy the "overall needs of the team". Therefore the overall needs of the team did not require choosing a swimmer who would not get a swim and it was thus relevant that the Appellant would not get a swim.

26. In any event, I find it difficult to see how it could be suggested sensibly that the fact that someone is unlikely to participate in an event at the Olympics, was an irrelevant consideration in nomination or selection. It is an expensive process to take an athlete to the Olympic Games and competition for places is fierce. It is hard to see how it can be irrelevant to take into account in a nomination or selection process the fact that someone, if selected, would be unlikely to compete. The money involved in taking an athlete, surplus to the team requirements, could much better be spent in taking further steps to enhance the potential performance of those athletes likely to compete.

27. For all of these reasons, in my view, this appeal must be dismissed.

(…)

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Andrew Mewing on 21 April 2008 against the decision of Swimming Australia Limited not to nominate him for selection for the 2008 Summer Olympic Games in Beijing, China is dismissed.

2. The question of costs is reserved.