Arbitration CAS (Oceania Registry) A1/2016 Mitchell Iles v. Shooting Australia, award of 30 June 2016

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

Shooting (trap shooting)
Selection in the national Olympic Team
Discretion of a national federation to select its athletes for major competitions and Clause 3 of the Shooting Australia Nomination Criteria
The accepted test in Australia regarding reasonable and definite inference
Objective conditions to determine the existence of actual bias

1. **Discretion of a national federation to select its athletes for major competitions is not an unfettered one. Rather it is governed by principles as good faith and reasonableness both as to process and result. For selectors to exercise their nomination power in good faith and reasonably where there are three possible different groups of candidates to consider, those selectors must consider if any of the candidates for nomination fit within any of the three categories.**

2. **The accepted test in Australia for determining when an inference may be drawn is included in a judgment, according to which: *"The difference between the criminal standard proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a matter of conjecture… But if the circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, although the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise…".***

3. **Actual bias only exists where the decision maker has pre-judged the case against a party or acted with such partisanship or hostility as to show that the decision maker had his or her mind made up against the party and was not open to persuasion in favour of the party. Whether actual bias exists is an objective inquiry which requires an assessment of the state of mind of the decision maker, which is an objective inquiry to ascertain what the decision maker said and did.**

I. PARTIES

1. Mitchell Iles (the "Appellant") is an athlete in the sport of trap shooting.

2. Shooting Australia is the National Federation for the sport of shooting in Australia.

3. Adam Vella and Michael Diamond are athletes in the sport of trap shooting.

4. The Australian Olympic Committee ("AOC") is the National Olympic Committee for Australia.

II. FACTUAL BACKGROUND

A. Background Facts

5. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

6. The Appellant and Messrs Vella and Diamond are all vying for nomination for selection in the Australian Olympic Team in the men's Olympic trap shooting event at the 2016 Olympic Games to be held in Rio de Janeiro, Brazil in September 2016 (the "Rio Olympics").

7. Selection of all athletes for the Australian team to participate at the Rio Olympics is governed by the Olympic Team Selection By-Law (the "By-Law") issued by the AOC. Pursuant to the By-Law, all athletes nominated for selection by the AOC must be nominated in accordance with the Nomination Criteria issued by the relevant National Federation ("NF") and approved by the AOC (see clauses 5-8 inclusive of the By-Law).

8. In the case of the sport of trap shooting the NF is the Respondent, Shooting Australia and it is common ground that the relevant Nomination Criteria of Shooting Australia are as set out in Exhibit C before the Sole Arbitrator. It is also common ground that all relevant parties and affected parties have agreed contractually to be bound by the By-Law and the Nomination Criteria.

9. As noted by clause 5 of the Nomination Criteria, nominations by Shooting Australia must be received by the AOC by 4 July 2016 unless those nominations are made pursuant to a direction or award in respect of an appeal against non-nomination. At the hearing of the appeal on

Monday, 20 June 2016, counsel for Shooting Australia informed the Sole Arbitrator that, in practical terms, the nomination could be made at any time up and until 14 July 2016. That contention was not disputed.

10. It is common ground or beyond dispute that Australia has "two quotas" for the men's trap shooting event at the Rio Olympics. The Sole Arbitrator understands this to mean (and again it is common ground) that this means that two Australian athletes are entitled to be selected to compete at this event at the Rio Olympics.

11. In respect of the sport of men's trap shooting, Shooting Australia appointed what it called the Shotgun Selection Committee to decide who should be nominated for selection for the men's trap shooting event by the AOC for the Rio Olympics. The Shotgun Selection Committee ("SSC") relevantly comprised Mr Kelvyn Prescott as Chair, Mr Tim Mahon, High Performance Manager, Shooting Australia, Mr Val Timokhan, National Shotgun Coach, Shooting Australia and Ms Elaine Forward OAM of the Australian Clay Target Association.

12. The SSC met in Adelaide on 11 March 2016 to consider who to nominate for this event in accordance with the Nomination Criteria. A relevant extract of the minutes of that meeting is contained in Exhibit A before the Sole Arbitrator.

13. The SSC considered that there were 7 potential athletes eligible for selection for the event but narrowed down the potential nominees to three, being the Appellant, Mr Vella and Mr Diamond. It then considered the relevant and relative athletic performances of those three gentlemen in a little detail. It compared their overall performances in particular events and, in particular, their head-to-head performances in such events.

14. In respect of the first of the two places available, the SSC decided to nominate Mr Michael Diamond. Its stated reasons were as follows:

> *"Winning a quota on the open market, a superior head-to-head performance, higher qualification score and higher average of all qualification scores, higher average of qualification scores in World Cups since 1 January 2015 and higher average of his 5 best scores from 1 January 2015, the SSC nominates Michael Diamond to this quota to compete in the Trap Men event at the 2016 Olympic Games".*

15. In respect of the second nomination for selection for the event, this meant the potential nominees were the Appellant and Mr Vella. The SSC decided to nominate Mr Vella for the second spot. Its reasons were summarised as follows:

> *"Winning a quota through Oceania, his superior head-to-head performance, higher average of all qualification scores, higher average of qualification scores from 1 January 2015 and 1 July, the SSC nominates Adam Vella to this quota to compete in the Trap Men event at the 2016 Olympic Games".*

16. The SSC then nominated the Appellant as the reserve athlete for the event.

B. Proceedings before the Appeals Tribunal

17. As was his right, the Appellant appealed against his non-nomination for selection by the SSC to an Appeals Tribunal established pursuant to the Shooting Australia Appeal Process (the "Appeals Tribunal").

18. That appeal was heard in Adelaide on 29 March 2016 and the Appeals Tribunal delivered its reasons for decision on 4 April 2016. It dismissed the Appellant's appeal.

19. Before the Appeals Tribunal, the Appellant relied on two grounds of appeal as set out in the By-Law (clause 12.5) namely:

    a. that the applicable Nomination Criteria had not been properly followed and/or implemented; and

    b. the nomination decision was affected by actual bias.

20. The Appeals Tribunal rejected each of these grounds of appeal. It will be necessary later, in the course of these reasons, to address the Appeal Tribunal's reasons for that rejection and the Appellant's current attack on those reasons.

21. However, it is in respect of the Appeal Tribunal's dismissal of his appeal that the current appeal to the Court of Arbitration for Sport ("CAS") is brought by the Appellant.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 6 April 2016, the Appellant filed an application in the Appeals Division of the CAS, Oceania Registry, against the Respondent, pursuant to clause 12 of the By-Law and Article R47 of the Code of Sports-related Arbitration (the "Code").

23. On 13 April 2016, the Appellant filed his written submissions and evidence with the CAS Court Office.

24. The parties were unable to reach agreement regarding the number of arbitrators to be appointed to this appeal. Accordingly, pursuant to Article R50 of the Code, the President of the Appeals Arbitration Division decided to submit this appeal to Mr Alan Sullivan QC as Sole Arbitrator.

25. On 2 May 2016, the CAS Court Office informed the parties of Mr Sullivan's appointment and invited the Appellant to inform the CAS Court Office within seven days of any objection to Mr Sullivan's appointment. Neither party objected to the appointment.

26. On 23 May 2016, a preliminary directions teleconference was held between the Appellant, the Respondent, Mr Vella, the AOC and the Sole Arbitrator to confirm the Order of Procedure.

27. On 26 May 2016, representatives for the Appellant and the Respondent signed the Order of Procedure.

28. On 27 May 2016, the Appellant filed his revised written submissions with the CAS Court Office.

29. On 9 June 2016, the Respondent filed its written submissions with the CAS Court Office.

30. On 20 June 2016, the Appellant filed his written submissions in reply. No objection was taken to the reply submissions having been filed out of time.

31. On 20 June 2016, a hearing was held at the CAS Oceania Registry in Sydney, Australia. The Sole Arbitrator was assisted by Ms Kaelah Ford as *ad hoc* clerk and joined by the following:

For Mitchell Iles

- Mr Paul Hayes of counsel, instructed by Ms Sophie Marino

For Shooting Australia

- Mr Dominic Villa of counsel, instructed by Mr Garth Towan

- Mr Damien Marangon, Chief Executive Officer of Shooting Australia

32. Mr Mitchell Iles was also present at the hearing, together with his mother, Mrs Rachel Iles.

33. The Affected Parties did not appear at the hearing. It was noted at the outset of the hearing that each of the Affected Parties had been notified of the hearing and afforded the opportunity to participate in the appeal.

IV. SUBMISSIONS OF THE PARTIES

34. As noted, the Appellant, through its Counsel, Mr Paul Hayes, filed two sets of written submissions, the first dated 27 May 2016 and the second set, in reply to the Respondent's submissions dated 19 June 2016. In addition, Mr Hayes, on behalf of the Appellant, made valuable oral submissions before CAS at the hearing on 20 June 2016. CAS has carefully considered all such submissions made but, as noted in paragraph 5 above, will only summarise them to the extent considered relevant and necessary to dispose of the present appeal.

35. Before summarising the Appellant's submissions it is necessary to note that, by reason of clause 12.10 of the By-Law:

> *"The sole grounds for any appeal against a decision of the Appeals Tribunal are:*
>
> *(1) that there was a breach of the rules of natural justice by the Appeals Tribunal; or*
>
> *(2) that the decision of the Appeals Tribunal was in error on a question of law".*

36. The Appellant does not allege any breach of the rules of natural justice by the Appeals Tribunal but confines himself to alleged errors of law on the part of the Appeals Tribunal.

37. Although those alleged errors of law were sometimes expressed in slightly different ways during the course of written and oral submissions, ultimately, as understood by the Sole Arbitrator, the errors of law relied upon by the Appellant were as follows:

a. that the Appeals Tribunal erred in law in failing to appreciate that, on a proper construction of clause 3(2)(c) of the Nomination Criteria, the SSC was obliged to take into account in making its nominations what may be called "the Development/2020 Factor";

b. the Appeals Tribunal erred in law in finding, or appearing to find, to the extent necessary that the SSC had, in fact, taken into account the Development/2020 Factor in reaching its nomination decisions or in finding that the Appellant had not discharged any onus which lay upon him to show that the SSC had not taken that factor into account;

c. that the Appeals Tribunal had erred in law in failing to find that the nomination decision of the SSC were affected by actual bias.

38. To the extent necessary, these submissions are dealt with in this Award in Part VIII under the heading "Merits".

39. For its part, the Respondent denied that the Appeals Tribunal had erred in law as alleged or at all. The Respondent prepared written submissions dated 9 June 2016 and made oral submissions at the hearing on 20 June 2016. Once more, as noted in paragraph 5 above, it is not proposed to set out in detail all of the submissions but merely to summarise them to the extent necessary for the disposition of this appeal.

40. The Respondent's submissions may be summarised as follows:

a. On a proper construction of the Nomination Criteria, the SSC was not obliged to take into account the Development/2020 Factor when making its nomination decision. Such a factor was one which the SSC was permitted to take into account but it was not mandatory for it to do so.

b. Even if it was mandatory for the SSC to take into account the Development/2020 Factor, the Appellant bore the onus before the Appeals Tribunal of establishing that the SSC had not taken that matter into account and the Appeals Tribunal's finding that the Appellant had failed to discharge that onus was a decision of fact not a question of law and, hence, not appealable.

c. There was no error of law by the Appeals Tribunal in respect of the dismissal of the Appeal on the ground of actual bias. It rejected, as a matter of fact, the factual bases for the assertion of actual bias.

41. Once more, to the extent necessary, these submissions will be discussed under the heading "Merits" below.

V. JURISDICTION

42. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

43. It was common ground that clause 12 of the By-Law applied to this appeal. Clause 12.1 provides as follows:

Any appeal or dispute regarding an Athlete's nomination or non-nomination by an NF to the AOC for an Australian Olympic Team or Australian Olympic Winter Team will be addressed according to the following procedure:

(1) the appeal or dispute will be first determined by the Appeals Tribunal established by the NF controlling the relevant sport pursuant to clause 11; and

(2) any appeal from the determination of the Appeals Tribunal under clause 12.1(1) will be heard by the Appeals Arbitration Division of the CAS.

44. At the preliminary directions teleconference, the Respondent reserved its right to object to the jurisdiction of the CAS on the ground that the appeal was brought out of time, and to have the question of jurisdiction determined at the final hearing. However, the Respondent elected not to press its objection to jurisdiction at the final hearing.

45. Therefore, the Sole Arbitrator considers that the CAS has jurisdiction to hear this appeal.

VI. ADMISSIBILITY

46. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

47. Clause 12.13 of the By-Law provides as follows:

An Athlete wishing to appeal to CAS against a decision of an Appeals Tribunal must serve a written Notice of Appeal to CAS, upon the chief executive officer of the NF or its authorised delegate, within 48 hours of the Athlete having received written notice of the Appeals Tribunal decision (or within such time as the chief executive officer or its authorised delegate may allow) and must then file a Statement of the Grounds of Appeal with CAS by no later than close of business 5 working days after serving the Notice of Appeal (or within such time as CAS may allow). An extension of time may be granted under this clause only in extenuating circumstances outside the control of the Athlete concerned.

48. The Sole Arbitrator considers that this appeal is admissible.

VII. APPLICABLE LAW

49. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association

or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

50. It was agreed by the parties under the Order of Procedure that the law applicable to the merits is the law of New South Wales, in accordance with clause 12.11 of the By-Law.

51. Moreover, clause 8 of the Nomination Criteria expressly states that the Nomination Criteria document is to be governed by the law of New South Wales.

52. Accordingly, in construing the Nomination Criteria and determining whether there has been any non-compliance with them, as well as in determining whether or not there is any substance in the actual bias ground, it is the law of New South Wales which must be applied.

VIII. MERITS

A. The Development/2020 Factor

53. Clause 3(2)(c) of the Nomination Criteria relevantly reads:

> *"(2) For events where SA has confirmed two quota places granted by the ISSF, nominate:*
>
> *(a)* …
>
> *(b)* …
>
> *(c) If no Athlete wins the first or second Selection Event with a qualification score in that competition that meets or exceeds the Benchmark Score for that relevant event, then SA will nominate the Athletes that it determines, at its* ***sole discretion****, will have the best possible chance of winning a medal at the 2016 Olympic Games* ***and/or*** *where the selection of an athlete will enhance their long-term development towards success at the 2020 Olympic Games. Without in any way limiting the* ***discretion*** *of SA, in making a determination as to the Athlete(s) who will have the best possible chance of winning a medal at the 2016 Olympic Games and/or the Athlete(s) whose participation will enhance their prospects of medalling in 2020, SA may consider the following matters in relation to any Shadow Team Athlete under consideration for nomination to the AOC:*
>
> *(i)* …
>
> *(ii)* …
>
> *(iii)* …
>
> *(iv) any other matter considered relevant by SA; and*
>
> *(v) development and potential to achieve a medal result at the 2020 Olympic Games as demonstrated by the factors above;"* (emphasis added).

54. A difficulty involved in the construction of this clause is the use of the drafting device "and/or". It has been said that *"a careful drafter should avoid its use"* (See, e.g., *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Limited* (2010) 173 ACTR 33 at [85]-[86]).

55. However, both parties accept in this case, and the Sole Arbitrator agrees, that the use of the expression "and/or" in clause 3(2)(c) of the Nomination Criteria means that Shooting Australia (or its delegate, SSC) must nominate the Athletes that it determines, at its sole discretion, either:

a. will have the best possible chance of winning a medal at the 2016 Olympic Games;

b. will have the best possible chance of winning a medal at the 2016 Olympic Games and where the selection of those Athletes will enhance their long-term development towards success at the 2020 Olympic Games; or

c. whose selection will enhance their long-term development towards the success of the 2020 Olympic Games [even if those athletes do not have the best possible chance of winning a medal at the 2016 Olympic Games].

56. It is clear grammatically and syntactically that the expression "at its sole discretion" modifies or qualifies the verb "determine". That is confirmed by the second separate conjoint reference to "discretion" and "determination" in clause 3(2)(c).

57. The Sole Arbitrator does not accept that discretion is an unfettered one. Rather it is governed by principles as good faith and reasonableness both as to process and result (see SULLIVAN A., "*The Role of Contract in Sports Law*" (2010) 5 ANZ Sports Law Journal 3 at pp 21-22 and the cases there cited and *Bartlett v Australia and New Zealand Banking Group Ltd* [2016] NSWCA 30 at [39]-49]).

58. For selectors to exercise their nomination power in good faith and reasonably where there are three possible different groups of candidates to consider as set out in paragraph 55 above it follows inexorably that those selectors must consider if any of the candidates for nomination fit within any of the three categories. This necessarily entails obliging the selectors to consider the Development/2020 Factor.

59. Therefore, the Sole Arbitrator accepts the Appellant's submission that it was mandatory for the SSC to consider whether or not any of the candidates for nomination, including the Appellant, satisfied the criterion of being one whose selection would enhance his or her long-term development towards success at the 2020 Olympic Games.

B. Did the Appeals Tribunal err in failing to appreciate that the SSC was obliged to take into account the Development/2020 Factor?

60. With great respect to the members of the Appeals Tribunal and their thorough and thoughtful reasons, the Sole Arbitrator finds it difficult to determine conclusively whether or not the Appeals Tribunal made a finding that the SSC was obliged to identify those athletes, if any, who satisfied the criterion which has been termed "the Development/2020 Factor". The better reading of the Appeals Tribunal's reasoning is that it came to the conclusion that the SSC was obliged to consider this factor but that the Appellant had not demonstrated that the SSC had failed to consider the factor (see the first sentence on page 8 of the Appeal Tribunal's reasoning as to the need to consider the factor and pp 6-7 of the reasoning in respect of the failure to prove that the SSC did not consider the factor).

61. The Sole Arbitrator does not consider, therefore, that the Appellant has made out its first alleged error of law, namely that the Appeals Tribunal erred in failing to find that the SSC was obliged to consider the Development/2020 Factor.

C. Did the Appeals Tribunal err in failing to find that the SSC had not taken into account the Development/2020 Factor?

62. For the reasons which follow, however, the Sole Arbitrator considers that the Appeals Tribunal did err in law in failing to make a finding that there was no evidence that the SSC had taken into account the Development/2020 Factor. It also erred in law in finding that the Appellant bore the onus of proving that the SSC had failed to take into account that factor or had failed to discharge that onus.

63. The Appeals Tribunal correctly acknowledged that the SSC's reasons made no express reference to the Development/2020 Factor (page 6 of its reasons). There was no evidence before the Appeals Tribunal from members of the SSC as to what occurred, or what was discussed, at the Nomination meeting on 11 March 2016.

64. There was, thus, no direct evidence of any consideration of the Development/2020 Factor by the SSC. To the extent, therefore, that the Appeals Tribunal inferred that the SSC had taken the factor into consideration or that, put another way, it was not persuaded that the SSC had not, the Appeals Tribunal must have been making such findings by the process of inference. The Sole Arbitrator does not believe, as a matter of law, the Appeals Tribunal was justified in drawing such inferences in the present case.

65. The accepted test in Australia for determining when an inference may be drawn is contained in the judgment of Dixon Fullagar Kitto JJ in *Luxton v Vines* (1952) 85 CLR 352 at 358 where their Honours said:

> *"The difference between the criminal standard proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort,* ***where direct proof is not available****, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a matter of conjecture… But if the circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, although the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise…"* (emphasis added).

66. The SSC's Reasons set out in detail an analysis of the relevant shooting performances of the three athletes. But there is no mention anywhere of matters relevant to the satisfaction of the Development/2020 Factor which it was mandatory for the SSC to consider.

67. In those circumstances to infer that, despite the lack of express mention of the Development/2020 Factor, the SSC did in fact take it into account is, in the Sole Arbitrator's respectful view, an impermissible step. The Appeals Tribunal was not entitled, in the Sole Arbitrator's respectful view, to take some form of quasi-judicial notice that the SSC was likely to have taken such a factor into account. Absent the taking of some such form of "notice" all indications on the evidence were contrary to a finding that the SSC did take into account the Development/2020 Factor. If the SSC regarded the Development/2020 Factor as material to the nomination decision (as it was), in all the circumstances, it would have to be expected that it would have mentioned that factor in its reasons. The absence of any mention, as submitted by the Appellant, tells strongly against the drawing of any inference that the SSC did consider the factor (compare *Minister for Immigration v Yousuf* (2001) 206 CLR 323 at 330-331 [5] and 338 [35] and [37]).

68. In the opinion of the Sole Arbitrator, once the Appellant pointed to the lack of any mention of the Development/2020 Factor in the SSC's reasons, at least an evidential onus lay upon Shooting Australia to lead evidence to show that, despite that lack of mention, the factor had been taken into account. After all, it, and it alone, had access to such evidence. No such evidence was led. In those circumstances, if the Appellant bore the onus, it was discharged.

69. In such circumstances, in the opinion of the Sole Arbitrator, any finding that the SSC did consider the Development/2020 Factor is "mere conjecture or surmise" within the language employed in *Luxton v Vines*. Further, any finding that the Appellant had failed to discharge the onus of proof was wrong in law because in the absence of any indication that the SSC had considered the factor, there was nothing to disprove.

70. Therefore, in the opinion of the Sole Arbitrator, there was no evidence upon which the Appeals Tribunal could find, or from which it could infer, that the SSC had taken into account the mandatory Development/2020 Factor or that the Appellant had failed to discharge any onus of proof cast upon him.

71. It follows that the Appellant, conformably with clause 12.10(2) of the By-Law has demonstrated that the decision of the Appeals Tribunal was in error on a question of law.

D. Actual Bias

72. In the light of the conclusion to which the Sole Arbitrator has come, it is strictly speaking not necessary to determine this ground of appeal but because of the seriousness of the allegation, and for completeness, it shall be dealt with.

73. The Appellant submits that the Appeals Tribunal erred on the question of law by not considering the "facts" set out in Ground 2 of the Appeal collectively to infer actual bias against one of the members of the SSC, namely Mr Val Timokhan and, using such a finding as a springboard, to conclude that the whole of the SSC was actually biased upon the "one biased, all biased" principle.

74. In the Sole Arbitrator's opinion, there is no substance in this submission and the Appeals Tribunal did not err in either in law or in fact in coming to the conclusion that there was no evidence of actual bias on the part of any member of the SSC.

75. The matters which the Appellant says "collectively" give rise to an inference of actual bias are:

a. The failure of the SSC to consider at all the Development/2020 Factor;

b. The alleged "fact" that Mr Timokhan was the personal coach of Mr Vella;

c. The alleged fact that Mr Timokhan was a close friend and sometime personal coach of Mr Diamond;

d. The failure of Mr Timokhan to disclose his alleged coaching associations with Mr Vella and his friendship with Mr Diamond at the Nomination Meeting on 11 March 2016;

e. The failure of Mr Timokhan to disqualify himself from the Nomination decision.

76. The Appeals Tribunal carefully considered these allegations in its reasons at pages 9-12. Those reasons, with respect, not only do not reveal any error on the Appeals Tribunal's part but, on the contrary, appear to be completely correct.

77. It must be borne in mind at all times that the alleged bias is said to be actual bias not apprehended bias. Actual bias only exists where the decision maker has pre-judged the case against a party or acted with such partisanship or hostility as to show that the decision maker

had his or her mind made up against the party and was not open to persuasion in favour of the party (see, e.g. per North J in *Sun v Minister for Immigration and Ethnic Affairs* (1977) 81 FCR 71 at 134).

78. Whether actual bias exists is an objective inquiry which requires an assessment of the state of mind of the decision maker, which is an objective inquiry to ascertain what the decision maker said and did (*Michael Wilson and Partners Limited v Nicholls* (2011) HCA 48 at [33]).

79. Even if all the "facts" alleged by the Appellant were proven (and for the reasons given by the Appeals Tribunal, the Sole Arbitrator does not consider that to be the case) they would go nowhere near establishing the requirements of actual bias as outlined above. They might be relevant to be considered if the case was one of a reasonable apprehension of bias but that was not the case which was sought to be made.

80. It is therefore unnecessary to consider whether the facts might have established a case of apprehension of bias.

E. Consequences of Reasoning

81. It follows that the Appellant has succeeded on this Appeal, albeit on only one of the three grounds raised.

82. In paragraph 4 of his written submissions, the Appellant set out the orders sought in the event that the Appeal was upheld. Relevantly those orders are as follows:

a. That the Appellant's candidature for nomination by Shooting Australia to the AOC be remitted to Shooting Australia for reconsideration in accordance with the Nomination Criteria on the following terms:

i. that the reconsideration occur before a selection committee comprised of persons different to those who comprised the SCC on 11 March 2016; and

ii. that the new selection committee be directed to take into account and properly consider the development factors, when considering which athletes are to be nominated by Shooting Australia.

b. Alternatively to (a), that CAS determines the issue of the Appellant's nomination.

c. Such costs as the Appellant may be entitled to pursuant to clause 14 of the By-Law.

83. The Sole Arbitrator considers that the Appellant is entitled to have his candidature for nomination by Shooting Australia to the AOC remitted to Shooting Australia for consideration in accordance with the Nomination Criteria. Clause 12.19 of the By-Law provides that if CAS determines to uphold any appeal against non-nomination, it will *"as a matter of usual practice"* refer the question of re-nomination back to the relevant NF selection panel for determination in accordance with the applicable Nomination Criteria.

84. In the present case neither the Appellant nor Shooting Australia has suggested that there are circumstances which would dictate CAS departing from this "usual practice" and, in particular, the Appellant specifically abandoned, at the hearing of the Appeal, the alternative prayer for relief that CAS determine the issue of the nomination itself.

85. However, the Sole Arbitrator does not consider it appropriate to impose either of the two terms sought by the Appellant in respect of the remission of the matter to the SSC.

86. For the reasons given, the Appeals Tribunal was perfectly correct in finding that there was no actual bias on the part of any member of the SSC. The SSC is an expert body and its composition is a matter entirely for Shooting Australia. The CAS will not impose any term fettering the discretion of Shooting Australia to determine who should or should not be the members of the SSC who reconsider the nomination of the Appellant and the other potential nominees.

87. The second term sought by the Appellant is that the SSC be directed to take into account and properly consider the developmental factors. With respect the Sole Arbitrator considers this to be an inappropriate direction. Presumably the SSC will have regard to these reasons when reconsidering the nominations for the relevant event. Consistently with clause 12.19 of the By-Law, the Sole Arbitrator proposes making an order referring the question of re-nomination back to the SSC for determination in accordance with the Nomination Criteria. The Sole Arbitrator's view of the proper construction of the relevant nomination criteria is contained herein but the Sole Arbitrator does not consider he has the power to order the SSC to agree with and adopt that construction.

88. Clause 12.19 of the By-Law envisages that the process of reconsideration by the SSC of the non-nomination of the Appellant is a question of "re-nomination" and the Sole Arbitrator notes that the grounds of appeal in respect of a "re-nomination" are set out in clause 12.16 of the By-Law. It might be that if the SSC on a such a "re-nomination" was to do so contrary to the reasoning in this Award then that may be a factor to consider in determining whether any such ground of appeal was made out but, other than that, the Sole Arbitrator does not think he has the power to compel the SSC to accept the Sole Arbitrator's construction of clause 3(2)(c) of the Nomination Criteria.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Mitchell Iles on 6 April 2016 against the decision rendered by the Shooting Australia Appeals Tribunal on 4 April 2016 is upheld.

2. The decision of the Appeals Tribunal established pursuant to the Shooting Australia Appeal Process dated 4 April 2016 is set aside.

3. The matter of Mr. Mitchell Iles nomination is referred back to the Shotgun Selection Committee of Shooting Australia for determination in accordance with the 2016 Australian Olympic Team Shooting Australia (SA) Nomination Criteria and the reasons set forth in the present award.

4. (…).

5. (…).