



Arbitration CAS ad hoc Division (OG Turin) 06/002 Andrea Schuler v. Swiss Olympic Association & Swiss-Ski, award of 12 February 2006

Panel: Mr Massimo Coccia (Italy), President; Mrs Maidie Oliveau (USA); Mr Dirk-Reiner Martens (Germany)

Snowboard

Jurisdiction of the CAS ad hoc Division

Internal selection process for the Olympic Winter Games

Criteria of subjective nature

Use by the national federation of the discretion properly preserved to it

- 1. The condition precedent for the jurisdiction of the CAS ad hoc Division is that the dispute has to have arisen during the Olympic Games or during the period of 10 days preceding the Opening Ceremony. Even if the disputed decision was issued more than 10 days prior to the Opening Ceremony, it would not be possible to say that a dispute had arisen until the Appellant had decided to appeal and had filed a notice of the appeal.**
- 2. Unless selection rules set forth completely objective criteria (e.g., ranking or points in a given competition), a selection process must always rely in some fashion or other on the subjective judgment of the persons who select the athletes.**
- 3. The arbitrariness of a selection decision cannot be established if the athlete does not claim that the selection body acted in bad faith or in a discriminatory manner, or if the athlete does not provide any evidence that the selection process was unfair and that the selection decision was unreasonable under the circumstances.**

The Applicant, Ms Andrea Schuler, is a 30-year old professional snowboarder of Swiss nationality, competing at international level in the half-pipe discipline. Ms Schuler is a member of the Ski-Club Basel (SCB) and, consequently, a member of the Swiss Ski Federation (Swiss-Ski), which in turn is a member of both the Swiss Olympic Association (Swiss Olympic) and the International Ski Federation (FIS).

Like other top Swiss snowboarders, the Applicant took part in the selection process which Swiss Olympic and Swiss-Ski jointly set up and managed in order to determine the members of the Swiss snowboarding team at the 2006 Olympic Winter Games in Turin. Ms Schuler's application to this CAS Ad hoc Division concerns the selection process which has led to the Respondent's recent decision not to include her in the Swiss team. As is usual for the Olympic Games, Swiss-Ski has the

competence to propose the members of the Swiss snowboarding team to Swiss Olympic, while the authority to make the final decision and select the athletes competing in the Games rests with Swiss Olympic. As one would expect, this process implies frequent consultations between the two sports bodies and a shared responsibility.

The selection process for the 2006 Winter Olympics started on 5 November 2004, when the Executive Board of Swiss Olympic adopted the “Achievement guidelines for selection concepts”, outlining some general principles concerning the selection criteria to be subsequently adopted for the various team sports and individual sports (the “Achievement Guidelines”).

On 5 February 2005, Swiss Olympic and Swiss-Ski jointly signed and issued the “Selection Guidelines, Women and Men Snowboard, Definitive Version, 5.2.05, for the 2006 Olympic Winter Games in Turin” (the “Snowboard Selection Guidelines”). Section 3 of the Snowboard Selection Guidelines provided that the selection period would run from October 2005 to January 2006, that the selection commission of Swiss-Ski would make its proposal by 29 January and that the selection committee of Swiss Olympic would publish its final determination by 30 January 2006.

On 2 May 2005 Ms Schuler, like the other Swiss skiers and snowboarders attempting to qualify for the 2006 Winter Olympics, accepted an agreement with Swiss Ski (the “Athlete’s Agreement”). In particular, the parties agreed on the jurisdiction of the CAS for any future dispute between them (article 11.4 of the Athlete’s Agreement).

On 31 October 2005, Swiss Olympic issued a document entitled “Selection criteria for the Olympic Winter Games of Turin 2006. Sports discipline: snowboard” (the “Selection Criteria”), which outlined the IOC rules on athletes’ quotas, the FIS qualification criteria and the Swiss Olympic/Swiss-Ski selection criteria, indicated the competitions to be taken into account for the selection, and specified the date for the final determination (27 January 2006).

By letter dated 21 November 2005, Mr Werner Augsburg of Swiss Olympic sent to Messrs Gian Gilli and Franco Giovanoli of Swiss-Ski a document entitled “Additional Selection Concept Snowboard / Internal Selections” (the “Additional Selection Concept”), intended mainly to regulate the internal selection process lest the results obtained in international competitions might not definitively identify the snowboarders qualifying to make the Swiss Olympic team.

After the World Cup event in Leysin on 19-20 January 2006, six Swiss half-pipe snowboarders had met the qualification requirements as defined in the Snowboard Selection Guidelines and in the Selection Criteria. Only five slots were available for Swiss half-pipe snowboarders, men and women.

On 27 January 2006, the Respondent made its final determination selecting the sixteen members of the Swiss Olympic snowboard team, and in particular the five half-pipe specialists, and it did not include Ms Schuler (the “Decision”). The following day Swiss Olympic published the names of the selected snowboarders on its web site. The related official press conference followed on 31 January 2006.

On 31 January 2006, Dr Alain Meyer, president of SCB, wrote an e-mail on behalf of Ms Schuler to Swiss-Ski and Swiss Olympic asking for a written explanation of her exclusion.

On 1 February 2006, Mr Gilli of Swiss-Ski and Mr Augsburg of Swiss Olympic answered setting forth some reasons Ms Schuler was not selected and stating that an appeal was not possible.

Ms Schuler's appeal to the CAS ad hoc Division was made on 6 February 2006.

Ms Schuler argues that, since she fulfilled all criteria set forth by Swiss Olympic and Swiss-Ski, she has a right to participate in the 2006 Winter Olympics. In addition, she challenges the validity of the Additional Selection Concept; she considers that this amendment "*infringes the principle of good faith, is arbitrary and against the law*". Ms Schuler also submits that an e-mail sent by the coach Marco Bruni on 11 January 2006 rendered mandatory participation in the Leysin event, but Marcus Keller and Gian Simmen did not take part in such event.

Ms Schuler submits that the other criteria applied by the Respondent, such as the number of points gathered in World Cups or the so-called "medal potential" were never truly brought to her attention. Moreover, points to be awarded to athletes always depend on the level of each competition (the lower the level, the higher the results obtained because of the lack of competition). Also, coaches do not have a purely discretionary power since their authority, according to article 3.3 of the Snowboard Selection Guidelines, is limited to medical issues or issues regarding the trend of performance of an athlete.

Ms Schuler argued that, although her case is not a gender-discrimination case, the applicable regulations and guidelines do not provide a mechanism on the basis of which male and female competitors' results could be compared. Ms Schuler, therefore, asked the Panel to fill this gap by interpreting the applicable regulations and criteria and by creating an ad hoc rule.

Questioned by the Panel, the Applicant was unable to point out which other snowboarder should be excluded from the Swiss team in her place and submitted that the Panel could directly decide that or, alternatively, it could defer such determination to Swiss Olympic (possibly through an internal competition among the three men of the team who had comparable results).

Ms Schuler finally requested the Panel to issue an award granting the following relief:

- “1) *Annulment of the Decision of Swiss Olympic of 27 January 2006 regarding the selection in the Discipline Snowboard for the Olympic Winter Games 2006.*
- 2) *Order to the effect that Claimant is selected for the Olympic Winter Games 2006.*
 - 2a) *Order to the effect that Respondent has to accredit Claimant as soon as the relevant offices are opened on Friday, 9th [February] 2006, and in case of non-fulfilment until 3pm on Friday 9th [February] 2006, Arbitral Tribunal has to [determine] which are the five athletes which can participate in the Olympic Half-Pipe Competition.*
 - 2b) *Order to the effect that Respondent has to assist Claimant in the way it assists every other Swiss Olympic athlete.*
- 3) *Order to publish this award in a matter it deems appropriate.*

- 4) *Order to the effect that Respondent has to pay all costs of the arbitration and all expenses to be incurred by Claimant in connection with this arbitration, including lawyer's fees.*
- 5) *Provisional Measure: If Swiss Olympic does not accredit Claimant first thing in the morning, Claimant has to be entitled to participate in the morning practice".*

Swiss Olympic explained the selection process that it generally follows as well as the process followed in the case of half-pipe snowboard. The fact that only five Swiss athletes could compete in half-pipe brought up this "luxury problem", where more athletes (six) than available spots (five) satisfied the criteria.

However, Swiss Olympic argued that, according to the Snowboard Selection Guidelines, the selection process can never be understood as a mathematics exercise and that fulfilment of the performance requirements does *not* automatically grant a right to participate in the Olympic Winter Games. Therefore, by meeting the performance requirements, Ms Schuler only had the right to be among the qualified candidates for selection rather than the right to be selected.

Swiss Olympic stated that it adopted the proposal made by Swiss-Ski only after thorough consideration, also taking into account the difference in depth of field (so-called "density") between men's and women's competition as well as the points earned by the six competitors during the selection period which could indicate the "medal potential" of an athlete. In any case and despite acknowledging the difficulties it encountered in comparing male and female competitors, Swiss Olympic denied having changed the criteria at any stage of the qualification period.

Swiss Olympic strongly affirmed that it had used an absolutely fair process and that it is a difficult task to perform but, unfortunately, sometimes a deserving athlete ends up being left out of the Olympics.

Swiss Olympic submitted the following motions:

1. *To dismiss all the Applicant's requests.*
2. *To impose all costs of the arbitration to the Applicant and to order the Applicant to reimburse the Respondent for legal costs in an amount to be defined by the Panel".*

Swiss-Ski fully supported the arguments raised by Swiss Olympic.

LAW

Jurisdiction

1. As has been stated above, the Respondent's decision was published on 28 January 2006, and Ms Schuler's application was submitted on 6 February 2006.

2. Ms Schuler named Swiss Olympic as Respondent in this arbitration, due to the undisputed authority of Swiss Olympic to designate the members of the Swiss team for the Olympic Games. The CAS invited Swiss-Ski and Swiss-Ski participated – without any objection from the Applicant – in this arbitration as an Interested Party, given that this award could directly affect the composition of the snowboarding team managed and coached by Swiss-Ski. The CAS also informed the five Swiss half-pipe snowboarders who might be affected by this award of their right to take part in this arbitration, but they did not attend the hearing.
3. 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.
4. The jurisdiction of the CAS ad hoc Division is contained in Art. 1 of the Arbitration Rules for the Olympic Games (the “CAS ad hoc Rules”), which is in the following terms:
“Article 1 Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)
The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.
In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective”.
5. Rule 61 of the Olympic Charter provides:
“Rule 61 Disputes – Arbitration
Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration”.
6. According to its own Statutes and due to its participation in the Olympic Games, Swiss Olympic is undeniably bound by the Olympic Charter, and thus by the arbitration clause of Rule 61.
7. Article 11.4, last paragraph, of the Athlete’s Agreement sets forth the following clause:
“The parties agree to have any dispute settled finally and according to the Rules of the arbitration proceedings of the Tribunal Arbitral du Sport (TAS), Lausanne, excluding ordinary courts. Swiss Law is to be applied”.
(translation by the Panel).
8. Accordingly, both Ms Schuler and Swiss-Ski, as parties to the Athlete’s Agreement, have accepted the jurisdiction of the CAS.

9. In the present case, the only appeal available to Ms Schuler according to the above mentioned provisions is an appeal to the CAS. Ms Schuler has not signed an Olympic entry form but under the current CAS ad hoc Rules this is not required.
10. In addition, as the decision by Swiss Olympic was the final domestic decision, it follows that all “internal remedies” have been exhausted, as is required both by Article R47 of the Code of Sports-related Arbitration (applicable to the regular appeal arbitration procedure) and by art. 1 of the CAS Ad Hoc Rules.
11. The Panel is satisfied that the CAS has jurisdiction to hear this case but it must verify whether this is a dispute which should be referred to the regular CAS procedure or whether it may be dealt with by this CAS ad hoc Division.
12. The first condition precedent for the jurisdiction of the CAS ad hoc Division is that the dispute has to have arisen during the Olympic Games or during the period of 10 days preceding the Opening Ceremony, which for the 2006 Olympic Winter Games is on 10 February 2006.
13. The Panel, therefore, has to decide whether the dispute arose within the period of 10 days preceding 10 February 2006, that is on or after 31 January 2006. The official announcement of the disputed Decision occurred by publication on the Respondent’s web site on 28 January 2006. Ms Schuler received a written explanation of her exclusion on 1 February 2006. Then Ms Schuler considered the issue, and having done so, made this appeal through her attorney-at-law on 6 February 2006.
14. It was open to Ms Schuler to accept the Swiss Olympic’s determination or decide to appeal. Accordingly, in the Panel’s opinion, it would not be possible to say that a dispute had arisen until Ms Schuler had decided to appeal and had filed notice of her appeal. That notice was given within the 10 days preceding the Opening Ceremony and, also, well within the 21 days permitted for a regular appeal to the CAS Appeal Division.
15. The second condition precedent is that the dispute has arisen “*on the occasion of*” or “*in connection with*” the Olympic Games, as required by Rule 61 of the Olympic Charter. The Panel is satisfied that this second condition has also been met, as Ms Schuler has not been included in the Swiss Olympic team and is seeking as relief her selection for, and thus her participation in, the half-pipe snowboard competition of the 2006 Olympic Winter Games.
16. Accordingly, the Panel finds that the CAS ad hoc Division has jurisdiction to hear this appeal. Indeed, at the hearing both Swiss Olympic and Swiss-Ski explicitly acknowledged the jurisdiction of the CAS ad hoc Division and the authority of this Panel to settle this dispute.
17. 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*”.

Applicable law

18. 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*”.
19. Undeniably, the “applicable regulations” in this case are the rules and regulations of Swiss Olympic and Swiss-Ski.

Discussion

A. *The Legal Framework*

20. The selection process for the Swiss snowboarding team has been governed, as previously mentioned, by the Achievement Guidelines (dated 5 November 2004), the Snowboard Selection Guidelines (dated 5 February 2005), the Athlete’s Agreement (dated 2 May 2005), the Selection Criteria (dated 31 October 2005) and the Additional Selection Concept (dated 21 November 2005).
21. The Applicant takes issue with the application of the Additional Selection Concept and asks the Panel to consider it as void and disregard it, insofar as it was issued when the selection process was already in full swing and it was communicated to the athletes only on 11 January 2006. The Applicant argues that the Additional Selection Concept unfairly added some new criteria very late, when the selection process was nearly concluded.
22. The Panel notes that the Additional Selection Concept quotes or restates criteria which, essentially, can also be found in the previous (unchallenged) selection documents. The Panel also notes that the Additional Selection Concept was mainly meant to specify the details for the internal trials which could be used, in the event the objective criteria resulted in more qualified Olympic hopefuls than there were spots. Accordingly, the Panel does not find the Additional Selection Concept to be void.
23. However, the Panel is willing to assume, in the Applicant’s favour, that the application of the Additional Selection Concept might end up being unfair to the Applicant. Accordingly, the Panel is going to disregard this late document and decide this dispute only on the basis of the previous Swiss Olympic and Swiss-Ski documents setting forth the selection principles and criteria applicable to snowboard.
24. The Panel finds the Snowboard Selection Guidelines (written in German) to be the most relevant document to ascertain the selection criteria adopted by Swiss-Ski and Swiss Olympic, and to verify their proper application in this instance, for the following reasons:
 - (i) both Swiss-Ski and Swiss Olympic signed the Snowboard Selection Guidelines and published this document well before the beginning of the snowboarding season;

- (ii) it deals specifically with snowboard and, accordingly, it is *lex specialis* vis-à-vis the Achievement Guidelines, which are meant to apply to all sports;
 - (iii) it is much more elaborate and detailed than the subsequent Selection Criteria, which merely summarize some criteria already set forth in the Snowboard Selection Guidelines and specifies the international events to be used for selection purposes.
25. The Panel finds that the e-mail sent on 11 January 2006 by the coach to the half-pipe snowboarders requesting participation in Leysin was an informal communication and, as such, it did not affect the applicability of the Snowboard Selection Guidelines.

B. *The Selection Criteria*

26. Section 3.4 of the Snowboard Selection Guidelines (entitled in German “*Leistungsanforderungen*”) reads as follows:

“3.4 Performance Requirements

Athletes acquiring their selection through 1x Top 4 (men) 1x Top 3 (women) must achieve these performance confirmations as of December 05. The demonstration of the performance trend is mandatory in January.

Athletes acquiring their selection through two performance confirmations (2x Top 10 (men) or 2x Top 6 (women)), must achieve one of these performance confirmations in Dec 05/Jan 06.

If the performance requirements are fulfilled by more athletes than there are starting places, the selection is made according to the World Cup results with top results towards the end of the selection period being given more weight. If the performance trend can not be interpreted clearly on the basis of the results, the selection of the athletes concerned can be made on the basis of an internal selection...” (English translation by the Panel).

27. As is evident, there are different standards set out for men and women which are based on the different levels of competitiveness of the respective competitions (in particular, there are fewer women competing in snowboard disciplines than men). This differentiation between male and female snowboarders is accepted as common ground between the parties and is not disputed by the Applicant. In particular, Ms Schuler, questioned on this issue by the Panel, expressly acknowledged that neither the selection criteria nor the disputed Decision is the result of or gives rise to gender discrimination.
28. Paragraph 1 of section 3.4 of the Snowboard Selection Guidelines sets forth the first performance requirement: at least one Top 4 finish for men and one Top 3 finish for women, provided that the performance trend (“*Formkurve*”) is shown to be increasing in January 2006 (the rationale being that one “lucky shot” at the beginning of the season must be corroborated by some other result in the last month prior to the Olympic Games). It is undisputed that, among the half-pipe snowboarders, Mr Therry Brunner and Ms Manuela Pesko qualified because they met this requirement.
29. Paragraph 2 of section 3.4 of the Snowboard Selection Guidelines sets forth the second performance requirement (subordinate to the previous one): two Top 10 finishes for men and

two Top 6 finishes for women, provided that the *Formkurve* is shown to be increasing during the period December 2005/January 2006. It is undisputed that Ms Schuler and Messrs Gian Simmen, Frederik Kalbermatten and Markus Keller met this requirement.

30. Paragraph 3 of section 3.4 of the Snowboard Selection Guidelines sets forth some further performance requirements, such as the World Cup results and the performance trend and, in case of further uncertainty, internal trials to be set up specifically as tie-breakers. However, it is common ground between the parties that internal trials may be used only when two or more snowboarders of the same gender are involved, and that they would be meaningless in the case of uncertainty between a woman and a man.
31. Section 3.3 of the Snowboard Selection Guidelines states as follows:
“Additional Criteria:
– Coach’s judgment (performance trend, health)” (English translation by the Panel).
32. Furthermore, between sections 3.5 and 3.6 of the Snowboard Selection Guidelines the following warning is framed and highlighted in a box:
“Achieving the performance requirements does not entail an automatic selection for the OG Turin 2006” (English translation by the Panel).

C. *The Selection Decision*

33. It is undisputed that, as a result of the application of the first two paragraphs of section 3.4, there were six half-pipe snowboarders who had met the performance requirements. One had to be excluded by resorting to the other criteria set out by the Snowboard Selection Guidelines. As said, given that Ms Schuler had to be compared with some male snowboarders, internal trials would have been of no avail.
34. The Panel is of the opinion that the language of the Snowboard Selection Guidelines, and in particular that of section 3.4, third paragraph, which is the next evaluation step after the objective criteria specified in the first and second paragraphs, requires the assessment of the World Cup results not simply as objective criteria but assessed in relation to the performance trend towards the end of the selection period. This indicates a clear subjective evaluation. In addition, section 3.3 lends itself to an essentially subjective assessment by the coach. In the Panel’s view, the concept of *Formkurve* cannot be regarded as an objective criterion because even out-of-competition performances (i.e. practice sessions) may be considered by the coach in order to determine whether an athlete is reaching her/his peak level or whether she/he is performing in a declining trend.
35. In the Panel’s view, unless selection rules set forth completely objective criteria (e.g., ranking or points in a given competition), a selection process must always rely in some fashion or other on the subjective judgment of the persons who select the athletes. Moreover, as a comparison between male and female snowboard competitions is inherently subjective, the

Panel does not accept the Applicant's argument which relied on the fact that Ms Schuler ranked higher in some of her competitions than some male snowboarders in theirs.

36. The Panel was also not persuaded by the Applicant's argument that the Respondent's determination could be made only on the basis of objective criteria. If this were true, the Applicant should have been able to single out the athlete who was to be excluded from the Swiss Olympic team in her place. However, when questioned by the Panel on this point, the Applicant was unable to indicate the name of the athlete who should not have been selected.
37. The Applicant does not claim that the Respondent acted in bad faith or in a discriminatory manner, so any arbitrariness is excluded. Moreover, the Applicant did not provide any evidence that the selection process was unfair and that the Decision was unreasonable under the circumstances.
38. Accordingly, the Panel finds that the Respondent exercised its discretion in a reasonable, fair and non-discriminatory manner, and in accordance with the rules, in deciding not to select the Applicant.
39. The Panel quite understands the disappointment that Ms Schuler must have felt when she was not selected for the Swiss team. To take part in the Olympic Games is the peak of every athlete's career. The Panel expresses its sympathy for Ms Schuler, as well as for the other members of the Swiss team who went through a difficult selection process. However, the Panel's sympathy for Ms Schuler cannot, and does not, entitle the Panel to overturn a decision which has not been shown to have been made improperly by the Respondent.

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 appeal filed by Andrea Schuler against Swiss Olympic Association is dismissed.
2. (...).