



**Arbitration CAS ad hoc Division (OG Sochi) 14/002 Clyde Getty v. International Ski Federation (FIS), award of 5 February 2014**

Panel: Prof. Luigi Fumagalli (Italy), President; Prof. Gary Roberts (USA); Ms Alexandra Brillantova (Russia)

*Freestyle skiing (aerials)*

*Eligibility to compete in the freestyle skiing aerials*

*Conditions for entry*

*Legitimate expectations*

*Reasons other than legal for entry*

1. Under the Freestyle Skiing Qualification System (FSQS), for an athlete to be entered into the Olympic Games, at least two conditions have to be concurrently satisfied (subject to any additional condition contained in domestic qualification rules): (i) the athlete needs to be eligible; for the discipline of aerials, this means that competitors need to have placed in the top 30 in a FIS World Cup event or in the Aerials FIS Freestyle Skiing World Championships and have a minimum of 80 FIS points in the aerials on the Olympic FIS Points List; and (ii) his/her NOC needs to have been allocated a quota place.
2. No legitimate expectations estopping an International Federation from finding an athlete that does not satisfy the qualification criteria ineligible for participation to the competition can be created if the IF never made during the qualification period a representation that the athlete was eligible, never gave an individual assurance to the athlete that it would be the case, and did not even communicate directly with him.
3. Qualification for the Olympic Games follows specifically defined rules, which intend (as all rules of law) to provide for a predictable framework, and are intended to be applied in consistent and equal way. Reasons pertaining to fairness, age, sporting career or dedication to obtain an entry into the Olympic Games touch issues of policy and not questions of law. They are more for the IF to consider when adopting the eligibility rules for the Olympic Games but not for a CAS panel which is only asked to apply the existing rules.

**1. THE PARTIES**

- 1.1 The Applicant is Clyde Getty, an Argentinean freestyle skier competing in the Aerials discipline. Mr Getty was born in 1961 and started competing internationally in 1989. In his 26 year long

sporting career, Mr Getty competed *inter alia* at the Olympic Winter Games in 2002 and 2006. In the period between July 2012 and 19 January 2014, Mr Getty accumulated 65 FIS points.

- 1.2 The Respondent is the International Ski Federation (FIS), which is the International Federation responsible for the sport of skiing. In accordance with Chapter 3, Rule 26.1.5 of the Olympic Charter (OC), FIS has the “*mission and role*” within the Olympic Movement “*to establish ... criteria of eligibility for the competitions of the Olympic Games in conformity with the Olympic Charter, and to submit these to the IOC for approval*”.
- 1.3 The first Interested Party is the National Olympic Committee for Argentina (*Comité Olímpico Argentino* – COA). Pursuant to Chapter 4, Rule 27.7.2 of the OC, COA has “*the right to send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter*”.
- 1.4 The second Interested Party is the International Olympic Committee (IOC), which is the organisation responsible for the Olympic Movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organise, plan, oversee and sanction the summer and winter Olympic Games, fulfilling the mission, role and responsibilities assigned by the OC.

## 2. THE FACTS

- 2.1 The elements set out below are a summary of the main relevant facts as established by the Panel on the basis of the submissions of the parties. Additional facts may be set out, where relevant, in the legal considerations of the present award.
- 2.2 On 28 August 2013, the Applicant was requested by the Argentinean Ski Federation (the *Federación Argentina de Ski y Andinismo* – FASA) to complete the Sochi 2014 Eligibility Conditions Form.
- 2.3 On 23 September 2013, FIS published a Summary of Quota Allocation List, where COA was placed sixth in the “*Next Eligible*” category. Thereafter (on 16 October 2013, 11 November 2013, 17 November 2013, 28 November 2013, 11 December 2013, 16 December 2013, 23 December 2013, 30 December 2013, 7 January 2014, 9 January 2014, 13 January 2014, 16 January 2014, 17 January 2014), FIS published a number of updated Summaries of Quota Allocation Lists, where COA was placed in the “*Next Eligible*” category.
- 2.4 On 20 January 2014, the FIS Olympic Quota Allocation List was published in accordance with the regulations setting out the “*FIS Qualification Systems for XXII Olympic Winter Games, Sochi 2014*” (the “Sochi OWG”), and more specifically with the Freestyle Skiing Qualification System (FSQS). Attached to a document named “*Summary of Quota allocation as per 22.01.2014*”, a list called “*Quota calculation for freestyle*” mentions the countries having been allocated the 25 quota places in the Aerials discipline: COA was not in that list. After said list, however, a new list, entitled “*Next eligible NOC for freestyle*”, placed COA in the 8<sup>th</sup> place.

- 2.5 On 24 January 2014, at 7:49 am Swiss time (corresponding to 3:49 am Argentinean time), FIS sent an email to FASA as follows:

*“Dear Erik,*

*I have the pleasure to offer you 1 Aerials men OWG Quota spot.*

*Thank you very much for your urgent information if you are going to accept this spot or not.*

*Kind regards,*

*Kathrin Hostettler*

*Freestyle Skiing & Snowboard Assistant”.*

- 2.6 On 24 January 2014, at 11:27 am Swiss time (corresponding to 7:27 am Argentinean time), FASA sent an email to Mr Getty as follows:

*“Dear ... Clyde,*

*FIS just confirmed us 1 Aerials men OWG Quota spot!!!*

*Congratulations!!*

*We need to know urgently who will be traveling as coach with Clyde, since we only have 1 quota spot per officials.*

*...*

*Looking forward to your very urgent reply*

*Regards,*

*Magdi*

*Magdi Kast*

*FEDERACION ARGENTINA DE SKI Y ANDINISMO”.*

- 2.7 On 24 January 2014, at 13:07 Swiss time (corresponding to 9:07 am Argentinean time), FASA sent another email to Mr Getty forwarding the message received from FIS at 7:49 am Swiss Time (corresponding to 3:49 am Argentinean time).

- 2.8 On 24 January 2014, at 16:09 Swiss time (corresponding to 12:09 Argentinean time), COA sent an email to FIS as follows:

*“Dear Friends,*

*We are pleased to confirm that the Argentina NOC accepts the OWG Quota spot allocated for Aerials Men.*

*Please find enclosed updated quota confirmation form.*

*Kind regards,*

*Erik Zulcovsky*

*Tresorería – Finanzas*

*COMITE OLIMPICO ARGENTINO”.*

- 2.9 On 24 January 2014, at 16:36 Swiss time (corresponding to 12:36 Argentinean time), FASA received an email from FIS as follows:

*“Dear Erik,*

*Thank you very much for your answer.*

*I’m really sorry to tell you that ARG does not have an athlete that is eligible to participate in the Aerials men event and therefore we unfortunately cannot give you the spot.*

*We should have checked this before.*

*Kind regards*

*Kathrin Hostettler*

*Freestyle Skiing & Snowboard Assistant”.*

### **3. THE CAS PROCEEDINGS**

- 3.1 An application was received at 15:15 on 2 February 2014 with the CAS *ad hoc* Division, along with 31 exhibits. In such application, Mr Getty requested the following:

- “1 A declaration that Mr. Getty is eligible to compete in the Freestyle Aerials of the XXII Olympic Winter Games;*
- 2. An order that the FIS and/ or IOC allow Argentinian NOC to enter Mr. Getty in the XXII Olympic Winter Games to compete in the Freestyle Aerials on the terms that were offered on 24 January 2014; and*
- 3. An order that FIS and/ or IOC take all reasonable measures necessary to facilitate Mr. Getty’s actual participation in the Freestyle Aerials of the XXII Olympic Winter Games, including providing accreditation to Mr. Getty, his manager and his coach”.*

- 3.2 On 2 February 2014, the President of the CAS *ad hoc* Division appointed as arbitrators Prof. Luigi Fumagalli (Italy), President of the Panel, Prof. Gary Roberts (USA) and Ms Alexandra Brillantova (Russia).

- 3.3 On 2 February 2014, the Panel granted the Respondent and the Interested Parties a deadline until 3 February 2014, 17:00 Sochi time to file, if they so wished, written observations, including any evidence and witness statements, to the application.

- 3.4 The Respondent filed its answer on 3 February 2014 at 16:00 Sochi time, requesting the Panel:

- “1. to reject the Applicant’s appeal and to hold that he is not eligible to compete in the Freestyle Aerial of the XXII Olympic Winter Games ; and*
- 2. to reject all other requests of the Applicant”.*

- 3.5 No written submissions were filed by the Interested Parties.
- 3.6 A hearing was held on 4 February 2014 at the CAS *ad hoc* Division's offices at the Ayvazovsky Hotel, 1 Morskoy Boulevard, Adler District, 354340 Russia. It started at 17:00 and ended at 19:25. The Applicant, attending on the phone, was represented at the hearing by Mr Markiyan Kliuchkovskiy and Mr Roman Khodykin, counsel. FIS was represented at the hearing by Ms Sarah Lewis, its Secretary General, and by Mr Christopher Moore, Vice-Chairman of the FIS Legal and Safety Committee.
- 3.7 At the outset of the hearing the parties confirmed that they had no objections as to the composition of the Panel. During the hearing, all parties were given ample opportunity to present their views on the dispute, and answered questions asked by the Panel. Each party further – that is at the conclusion of the hearing and in response to the President of the Panel's query – affirmed that it had received a full and fair hearing, that it was treated equally and that there were no additional matters or requests that it wished to raise.

#### **4. THE PARTIES' SUBMISSIONS**

- 4.1 The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, indeed, has carefully considered, for the purposes of the legal analysis which follows, all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

##### ***a. The Applicant's Submissions***

- 4.2 The Applicant's submissions in support of his request for relief may be summarized as follows:

- a) *"Mr Getty is eligible to be entered into the Sochi Games by the Argentinean NOC irrespective of his current FIS points".*

More specifically, the Applicant underlines that apparently FIS meant in the email of 24 January 2014 that Mr Getty did not fulfil one of the qualification criteria set out by FIS – accumulation of 80 FIS points. However, the *"Applicant understood that for the purposes of quotas re-allocation, FIS points were no longer valid"*. In support of this contention, the Applicant preliminarily draws the Panel's attention to the fact that, according to the FSQS, quota places originally allocated to other countries were declined in a number sufficient to offer a quota place to Argentina, and that he is the next in the list to participate in the Sochi OWG, with two quota places unfilled. The Applicant, then, emphasizes that the last paragraph of Clause 3.3 of the FSQS, which is dealing with re-allocation of unused quota places, does not contain any requirements for the athletes to have any specific amount of points to be eligible to obtain a re-allocated quota place. Mr Getty is the only competitor representing COA in Freestyle Aerials. Consequently, in the Applicant's opinion, the confirmation by FIS, every time it published a Summary of Quota Allocation, that COA was *"Eligible"*, could have only meant that Mr Getty is also eligible to obtain a re-allocated quota place. Therefore, re-allocation of the unused quota

place should have come to COA and Mr Getty, and the FIS offer of the quota place to COA/Mr Getty on 24 January 2014 was legitimate and consistent with the obligation of FIS to reach the designated number of competitors for the event (25 in the case of the Sochi OWG). Finally, the Applicant refers to the *contra proferentem* rule of interpretation to submit that the ambiguous wording of the FSQS should be interpreted against the FIS.

b) *“FIS is estopped from denying the Applicant a quota place”.*

The Applicant submits that, even if FIS points requirement were relevant for the quota place re-allocation process under Clause 3.3, final paragraph of the FSQS, FIS would be estopped from denying the Applicant a quota place to participate in the Men’s Freestyle Aerials event at the Sochi OWG. In support of such contention, the Applicant invokes the doctrine of *venire contra factum proprium* existing in Swiss law, supported by “*a consistent body of CAS jurisprudence*”, under which where the conduct of one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party. More exactly, reference is made to CAS 2008/O/1455, award of 16 April 2008, to CAS OG 02/006, award of 20 February 2002, and to CAS OG 08/002, order of 1 August 2008. In the Appellant’s opinion, it is clear, from this jurisprudence, that an international federation such as FIS may not rely on its erroneous acts or omissions to exclude an athlete from the Olympic Games, if by making such acts or omissions it has induced the athlete to train for the particular event at the Olympic Games. Applying these principles to the case at hand, it is submitted that FIS should be estopped from finding Mr Getty ineligible to participate in the Sochi OWG, and must offer him a quota place to compete there. In fact:

- at least for a number of months, upon seeing COA in the “*Next Eligible*” section of the Summaries of Quota Allocation Lists, the Applicant had a legitimate and reasonable expectation that he was eligible to qualify to the Sochi OWG, and that he had a realistic chance to do so, subject to a sufficient number of declined quota places by other NOCs. This expectation was reaffirmed with each new edition of the list, and it grew stronger upon publication of the final Olympic Quota Allocation List that included the Applicant’s NOC;
- FIS finally made an express representation to the Applicant concerning his eligibility to participate in the Sochi OWG when a quota place was offered to the Applicant’s NOC on 24 January 2014.

These representations in respect of the Applicant’s eligibility by FIS induced the Applicant to train and compete specifically with the view to preparing for potential participation in the Sochi OWG. Therefore, it is submitted, FIS is now estopped from excluding Mr Getty from the competition on the basis of his alleged ineligibility.

c) *“Denying the Applicant Participation in the Sochi Games would be unfair and contrary to the spirit of the Olympic Movement”.*

Further or alternatively, there are a number of factors, which, it is submitted, should be taken into account while deciding whether Mr Getty should be allowed to compete in the Sochi OWG:

- there are two spots available and Mr Getty is the next in line to be entered. Therefore, a Panel's decision allowing Mr Getty to compete in the Sochi OWG would not adversely affect the chances of any other athletes to participate in the Sochi OWG;
- Mr Getty is the only male freestyle athlete representing South America;
- it would be in the spirit of the Olympic Movement to allow Mr Getty to compete at the Sochi OWG. Mr Getty is not a medal contender. However, he must be given a chance to represent his country in Sochi, consistently with the Coubertin's Olympic Creed;
- it is averred that, pursuant to Rule 44.5 of the OC, any NOC shall send to the Olympic Games only those competitors adequately prepared for high level international competition. Although not a medal contender, Mr Getty certainly meets the requirement of "*adequate preparation for high level international competition*";
- Mr Getty's dedication to sport is an inspiration to many;
- not only is the Applicant a fan favourite at the competitions where he participates; he also enjoys ultimate respect and support from the Freestyle Skiing community, including coaches and athletes. His inclusion in the Sochi OWG would serve as a means of promoting dedication to sports, the will to practice sports despite the age, and it would certainly promote Freestyle Skiing and the Olympic Movement in the countries such as Argentina;
- the Applicant does not have any evidence that the decision to withdraw his place was arbitrary or without proper justification. However, the Panel should have in mind that the Applicant has experienced hostile treatment from FIS over the past years.

***b. The Respondent's Submissions***

4.3 The Respondent's submissions in support of its request that the application of Mr Getty is dismissed may be summarized as follows:

- a) "*the Applicant's description of the qualification procedure is incorrect and misleading*", because:
  - the "*Quota Spots*" are assigned by FIS to a NOC, and not to a particular athlete;
  - the NOC may only enter an athlete if this athlete is eligible;
  - in fact, an athlete, to be entered, must meet some qualification criteria, which include the achievement of a defined level of minimum FIS points;
  - the list of "*Next Eligible*" athletes on the Quota Allocation List includes all athletes irrespective of their individual eligibility, in case the athlete achieves the minimum points in the meantime;
- b) even though COA was assigned a quota place, the Applicant never reached the minimum points for eligibility;
- c) there is no alternative qualification criterion based on age, personal uniqueness, dedication to sport, training efforts and the like;

- d) not qualifying the Applicant cannot be defined to be unfair, as rules need to be applied in a consistent and uniform manner to all athletes;
- e) FIS never treated Mr Getty in a hostile manner;
- f) FIS cannot be considered “estopped” from applying the qualification criteria, since:
  - these criteria apply throughout the world and for all athletes;
  - the Quota Summaries published by FIS concern the NOCs and not the individual athletes;
  - the Applicant had a chance to participate only if he achieved the minimum points;
  - FIS email of 24 January 2014, by which a quota place was allocated to COA, was revoked only a few hours later and could not create any legitimate expectation;
  - the Applicant’s position is not supported by the CAS case law.

## 5. APPLICABLE PROCEDURAL LAW

- 5.1 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 10 July 2012. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (PIL Act). The PIL Act applies to this arbitration as a result of the express choice of law contained in Article 7 of the CAS *ad hoc* Rules and as the result of the choice of Lausanne, Switzerland, as the seat of the *ad hoc* Division and of its panels of arbitrators, pursuant to Article 7 of the CAS *ad hoc* Rules.

## 6. JURISDICTION AND ADMISSIBILITY

- 6.1 The jurisdiction of the CAS *ad hoc* Division is defined in Article 1 of the CAS *ad hoc* Rules and Article 61 of the OC.
- 6.2 The wording of Article 1 of the CAS *ad hoc* Rules is the following:

*“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”.*



6.3 Article 61.2 of the OC provides as follows:

*“61 Dispute Resolution*

*[...]*

*2. 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 (CAS), in accordance with the Code of Sports-Related Arbitration”.*

6.4 Except if a respondent is in default, the arbitral tribunal examines the validity and the scope of an arbitration clause only if an exception is raised (KELLERHALS/BERGER, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Rz. 626; HEINI A. in: *Zürcher Kommentar zum IPRG*, N 7 to Article 186 CPIL). In addition, the objection of a lack of jurisdiction must be raised prior to any defence on the merits (HEINI A. in: *Zürcher Kommentar zum IPRG*, N 10 f. to Article 186 CPIL). In fact, Article 15 lit. a CAS *ad hoc* Rules indicates that respondents have to raise an objection to jurisdiction at the latest at the start of the hearing. Afterwards their right to raise a plea of non-jurisdiction is forfeited.

6.5 The Respondent did not dispute the jurisdiction of the CAS. The Panel has therefore jurisdiction to decide the present matter.

## **7. APPLICABLE SUBSTANTIVE LAW**

7.1 Under Article 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”*.

7.2 The Panel notes that the *“applicable regulations”* in this case are the rules and regulations of FIS.

7.3 The applicable rules do not contain any provisions regarding their interpretation. According to Article 17 of the CAS *ad hoc* Rules, the Panel shall resolve the dispute pursuant to the rules of law it deems appropriate. As FIS is an association under Swiss law, the interpretation of its statutes and regulations is governed by Swiss law.

7.4 Under Swiss law, the interpretation of statutes has to be rather objective and always to start with the wording of the rule. The adjudicating body – in this instance the Panel – will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association that drafted the rule, and such body may also take account of any relevant historical background that illuminates its derivation, as well as the entirely regulatory context in which the particular rule is located (CAS 2008/A/1673; CAS 2009/A/1810; CAS 2009/A/1811; see also ATF 87 II 95 consid. 3; ATF 114 II 193, p. 197, consid. 5.a; decision of the Swiss Federal Court of 3 May 2005, 7B.10/2005, consid. 2.3; decision of the Swiss Federal Court of 25 February 2003, consid. 3.2; and ZEN-RUFFINEN P., *Droit du Sport*, 2002, par. 168, p. 63).

7.5 The regulations of FIS that are relevant in this case are contained in the FSQS as follows:

<b>1. EVENTS</b>
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- *MEN*
  - Moguls*
  - Aerials*
  - Ski Cross*
  - Ski Halfpipe*
  - Ski Slopestyle*
  
- *WOMEN*
  - Moguls*
  - Aerials*
  - Ski Cross*
  - Ski Halfpipe*
  - Ski Slopestyle*

<b>2. ATHLETE/ NOC QUOTA</b>
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*ATHLETES QUOTA* 282 (*maximum quota*)

*ATHLETES QUOTA PER EVENT*

*Men*

<i>Moguls</i>	<i>30</i>
<i>Aerials</i>	<i>25</i>
<i>Ski Cross</i>	<i>32</i>
<i>Ski Halfpipe</i>	<i>30</i>
<i>Ski Slopestyle</i>	<i>30</i>

*Women*

<i>Moguls</i>	<i>30</i>
<i>Aerials</i>	<i>25</i>
<i>Ski Cross</i>	<i>32</i>
<i>Ski Halfpipe</i>	<i>24</i>
<i>Ski Slopestyle</i>	<i>24</i>

*MAXIMUM NOC QUOTA* 26 *per NOC*  
*A maximum of 14 males or 14 females*

*Maximum per event*  
*4 athletes*

## QUALIFICATION SYSTEM

### 3.1 Qualification Standard

Competitors are eligible who have placed in the top 30 in a FIS World Cup event or FIS Freestyle Skiing World Championships in the event concerned (Moguls, Aerials, Ski Cross, Ski Halfpipe, Ski Slopestyle) and have the following minimum FIS points in the event concerned on the Olympic FIS Points List:

Moguls:	80 FIS points
Aerials:	80 FIS points
Ski Cross:	80 FIS points
Ski Halfpipe:	80 FIS points
Ski Slopestyle:	50 FIS points

### 3.2 Host Nation

The host nation is expected to enter (a) competitor(s) into all events. If the host nation has not earned at least one quota place, one competitor per event will be permitted to enter providing that the competitor is eligible according to point 3.1 above. All competitors must have been entered as part of the NOC quota.

### 3.3 Allocation of Quotas

Quota places per NOC according to the above number of participants per event defined in article 2. will be allocated using the Olympic Quota Allocation List which contains the FIS World Cup Standings per event from July 2012 until 19 January 14 and the FIS Freestyle Skiing World Championship 2013 placing.

The allocation will be made by assigning one quota place per competitor from the top of the Olympic Quota Allocation List downwards until the maximum total per event in Moguls, Aerials, Ski Cross, Ski Halfpipe, Ski Slopestyle per gender (as defined under article 2.1) is reached. Once a NOC has achieved the maximum number of four (4) places its remaining competitors will no longer be counted and the next eligible NOC on the Olympic Quota Allocation List will be allocated a place.

In the event a NOC is allocated more than the maximum of 26 competitors, it is up to the NOC to select a team of maximum 26 (14 per gender) competitors across the various events by 22.01.2014.

Following the allocation of quota places by FIS and confirmation of entries by the NOCs, a re-allocation of unused quota places per event will be made by FIS to the next eligible NOC on the Olympic Quota Allocation List in the respective event (Moguls, Aerials, Ski Cross, Ski Halfpipe, Ski Slopestyle) and gender.

## 4. PROCESS AND TIMELINE FOR NOC COMMUNICATION OF QUOTA PLACES

- 4.1 The quotas will be calculated after the FIS World Cup event taking place on 19.01.2014 and communicated to the National Ski Associations and NOCs through the FIS Website, as well as to Sochi 2014 on 22.01.2014.

- 4.2 *Following the NOC confirmation of the use of allocated quota place by 24.01.2014, quota places that are not taken up will be re-allocated by FIS, from 24.01.2014 to 27.01.2014, to the next eligible NOC in the respective event of the Olympic Quota Allocation List.*
- 4.3 *The list of re-allocated quota places will be based on the same Olympic Quota Allocation List used for the calculation of the original quota places (i.e. status at 20.01.2014).*

## 5. QUALIFYING TIMELINE

<i>Qualification Period:</i>	<i>July 2012 - 19 January 2014</i>
<i>Publication of the Olympic Quota Allocation List and the Olympic FIS Points List:</i>	<i>Monday 20 January 2014</i>
<i>FIS allocation of quota places to NOCs:</i>	<i>Monday 20 January 2014</i>
<i>NOCs to confirm to FIS use of quota places:</i>	<i>Wednesday 22 January 2014</i>
<i>FIS to inform relevant NOCs regarding reallocation of quota places for qualified athletes:</i>	<i>Thursday 23 to 24 January 2014</i>
<i>End of re-allocation process*:</i>	<i>Friday 24 January 2014</i>
<i>Sochi 2014 deadline to receive entry forms submitted by the NOCs:</i>	<i>Monday 27 January 2014</i>

- *\* NOCs may not decline quota places after the entry deadline of 27 January 2014. After this date the reallocation of quota places may only occur in the specific cases listed below:*

- 1. An athlete is declared ineligible by the IOC after the sport entries deadline.*
- 2. A ruling from the Court of Arbitration for Sport, which takes place after the sport entries deadline, results in the need for further reallocation of quota places.*
- 3. An athlete whose quota place has been allocated to their NOC is injured or unable to participate due to exceptional circumstances after the sport entries deadline.*

*In all three cases above, the quota place will be reallocated by FIS to the next eligible NOC in consultation with Sochi 2014 up until (date to be agreed upon by IOC/ Sochi 2014). After this date, no reallocation will be allowed.*

*Sochi 2014 reserves the right to adjust an NOC's entitlements after the Delegation Registration Meeting (DRM) in the event that a quota reallocation results in a change to the size of the delegation.*

## 6. SPECIAL CONSIDERATIONS

### 6.1 Replacement

*A replacement of the entered competitors by a NOC in case of injury or force majeure is possible until the Technical Meeting before the start of the first event based on the admitted quota for the NOC concerned and in line with the IOC/Sochi 2014 Late replacement policy. In such a case, the replaced competitor will have to return his/her accreditation before the replacement competitor can be accredited.*

## 8. THE MERITS

8.1 By his application to the CAS *ad hoc* Division, Mr Getty is in essence requesting an order admitting him to compete at the Sochi OWG. In support of his application, Mr Getty advances a threefold line of reasoning. Such request, and the reasoning supporting it, is denied by the Respondent, which asks that Mr Getty's application be dismissed.

8.2 In light of the Applicant's reasoning, this Panel needs to answer three main questions:

- i. is Mr Getty eligible to be entered into the Sochi OWG by COA irrespective of his current FIS points?
- ii. is FIS estopped from denying Mr Getty a quota place to be entered into the Sochi OWG?
- iii. are there other reasons under which Mr Getty should be entered into the Sochi OWG?

8.3 The Panel shall address each of these questions separately.

### ***i. Is Mr Getty eligible to be entered into the Sochi OWG by COA irrespective of his current FIS points?***

8.4 According to his first line of reasoning, the Applicant submits that he satisfies the qualification criteria set forth in the FSQS, as the condition of minimum FIS points therein established is not applicable to him, because COA (one of the "Next Eligible" NOCs) was assigned a quota place following their re-allocation, and "*for the purposes of quotas re-allocation, FIS points were no longer valid*".

8.5 The Panel does not agree with the Appellant's contention and his interpretation of the FSQS.

8.6 Under the FSQS, for an athlete to be entered into the Sochi OWG, at least two conditions have to be concurrently satisfied (subject to any additional condition contained in domestic qualification rules):

- i. the athlete needs to be eligible in accordance with Clause 3.1; for the discipline of Aerials, competitors need to have placed in the top 30 in a FIS World Cup event or in the Aerials FIS Freestyle Skiing World Championships and have a minimum of 80 FIS points in the Aerials on the Olympic FIS Points List;

- ii. his NOC has been allocated a quota place, in accordance with Clause 3.2 or Clause 3.3.
- 8.7 As a result, a competitor eligible under Clause 3.1 of the FSQS could not be entered to participate if his/her NOC has not been allocated a quota place pursuant to Clause 3.2 or Clause 3.3. In the same way, a competitor cannot be entered to participate even if his/her NOC has been allocated a quota place pursuant to Clause 3.2 or Clause 3.3, if he is not eligible under Clause 3.1 of the FSQS.
- 8.8 In that context, the FSQS makes no difference between quota places directly assigned and quota places granted to a NOC following a re-allocation. However, if the NOC earns a quota place, the competitor it enters needs to comply with the individual eligibility requirements set at Clause 3.1 of the FSQS.
- 8.9 The Panel finds that such conclusion is based on the clear language of the FSQS and on its general purpose. A good faith common sense reading leads to the conclusion that the rules unambiguously require all competitors to meet the individual eligibility requirements set at Clause 3.1 of the FSQS.
- 8.10 The fact that the Applicant cannot point to a single instance in the past where an athlete was allowed to compete in the Olympic Games without meeting the eligibility requirement of Clause 3.1 of the FSQS is further evidence of this conclusion; there is no precedent where Clause 3.3 has ever been interpreted or applied as the Applicant claims.
- 8.11 From the first point of view, the Panel notes that:
- i. Clause 3.1 makes no distinction and refers to all competitors, regardless of how their NOC received the quota places they are allowed to fill;
  - ii. Clause 3.2, dealing with the host nation, which has not earned at least a quota place through the allocation of quota system, confirms that it can enter only a competitor who is eligible pursuant to Clause 3.1;
  - iii. therefore, all the athletes who are nominated to compete on the basis of the allocation of quota places need to satisfy the individual eligibility criteria.
- 8.12 The FSQS serves at least two purposes in accordance with the OC: (i) offer a possibly universal participation in the Olympic Games while controlling the number of competitors each NOC may enter; (ii) guarantee the level of the competition. Indeed, in accordance with Rule 44.5 of the OC, *“the NOCs shall send to the Olympic Games only those competitors adequately prepared for high level international competition”*. The Panel notes that the first purpose is served by the system of quota allocation to the NOCs and the limits in that framework provided for the number of quota places that could be allocated to each NOC; the second purpose, on the other hand, is served by the individual eligibility conditions for the athletes: achieving a minimum point level ensures the high level of the Olympic competition. Implying, as the Applicant does, that for athletes nominated to fill a quota place given to a NOC following a reallocation would contradict such purpose.

- 8.13 Contrary to such conclusion, the Panel cannot derive arguments from an alleged violation by FIS of an obligation to enter into the Aerials event of the Sochi OWG 25 athletes. The Panel, in fact, remarks that the number of 25 is expressly defined by the FSQS to be the maximum, and this implies that a lower number of actual competitors was possible.
- 8.14 In the same way, and in light of the foregoing, the Panel finds in the FSQS no obvious ambiguity calling for the application of the *contra proferentem* rule of interpretation.
- 8.15 As a result, the Panel, answering the first question, concludes that Mr Getty is not eligible to be entered into the Sochi OWG by COA irrespective of the FIS points he had at the end of the qualification period.

**ii. *Is FIS estopped from denying Mr Getty a quota place to be entered into the Sochi OWG?***

- 8.16 According to his second line of reasoning, the Applicant submits that, even if he does not satisfy the qualification criteria set forth in the FSQS, he should nonetheless be entered into the Sochi OWG, because FIS is estopped from finding him ineligible. In fact, in the Applicant's opinion, FIS made repeated representations that he was eligible to compete at the Sochi OWG, inducing him to train and compete specifically with a view to that event. Those representations allegedly were made in the Quota Allocation Lists published by FIS in the period between October 2013 and January 2014, and in the email sent to COA on 24 January 2014.
- 8.17 The Panel does not agree with this Appellant's contention. The Panel in fact notes that:
- i. FIS never made during the qualification period a representation that Mr Getty was eligible. FIS only published, during that period, documents listing the quota places that might be allocated (at the date of the document) to the various NOCs: COA always appeared in the "*Next Eligible*" section. In other words, FIS indicated to COA, in the same way as to all other NOCs, that it might get a quota place if its position had improved, or a sufficient number of the NOCs preceding it in the list declined the quota place given to them. Such position of COA was confirmed at the end of the qualification period;
  - ii. there is no evidence that during the qualification period Mr Getty received from FIS an individual assurance that he was eligible;
  - iii. the fact that COA might ultimately obtain a quota place did (and could) not suggest that FIS would waive the minimum individual qualification requirement for any athlete assigned to that quota place. Therefore, Mr Getty's purported reliance on the position of COA in the various Summaries of Quota Allocation Lists was unjustified;
  - iv. Mr Getty, by reading the various Summaries of Quota Allocation Lists, and knowing the number of points he had during the qualification period, could only draw the reasonable conclusion that he needed to train and compete to increase his points and contribute to the improvement of the position of COA in those lists – which is what he did, however unsuccessfully;

- v. no legitimate expectation could be drawn by the email the Applicant received on 24 January 2014 from FASA (not FIS, which did not communicate directly with Mr Getty), as the indication that he might compete at the Sochi OWG was withdrawn only a few hours later;
- vi. all correspondence between FASA or COA and FIS on 24 October 2014 did not contain any express and individual reference to Mr Getty;
- vii. while this Panel would be ready to subscribe to the doctrine of “estoppel” set out in the CAS jurisprudence, the position of the Applicant finds no support in the CAS precedents he invokes, which clearly refer to situations that differ from his case in vital point: in CAS OG 02/006 and in CAS OG 08/002, the athlete had been given specific and individual assurances about his eligibility, which were withdrawn at a very late stage; in CAS 2008/O/1455, the international federation changed its rules with retroactive effects, depriving an athlete of the eligibility that could be assumed on the basis of prior rules.

8.18 As a result, the Panel, answering the second question, concludes that FIS is not estopped from denying Mr Getty a quota place to be entered into the Sochi OWG.

***iii. Are there other reasons under which Mr Getty should be entered into the Sochi OWG?***

- 8.19 According to his third line of reasoning, the Applicant submits that denying his participation in the Sochi OWG would in any case be unfair and contrary to the Olympic spirit. In support of this contention, the Applicant invokes several elements, and chiefly the fact that (a) his participation would not adversely affect any other athlete, (b) he is the only male freestyle athlete representing South America, (c) it would be in the spirit of the Olympic Movement to allow Mr Getty to compete at the Sochi OWG, (d) he meets the requirement of “*adequate preparation for high level international competition*”, (e) Mr Getty’s dedication to sport is an inspiration to many, (f) he is a fan favourite at the competitions and enjoys ultimate respect and support from the Freestyle Skiing community, (g) the Applicant has experienced hostile treatment from FIS over the past years.
- 8.20 The Panel notes indeed that the points so raised by the Applicant touch issues of “policy”, and not questions of law. The qualification for the Sochi OWG follows specifically defined rules, which intend (as all rules of law) to provide for a predictable framework, and are intended to be applied in consistent and equal way. The concerns raised by the Applicant are more for FIS to consider when adopting the eligibility rules for the Olympic Games; they are not for this Panel which is only asked to apply the existing rules. The latter, as set in the FSQS, do not allow Mr Getty to invoke reasons pertaining to fairness, age, sporting career, or dedication to obtain an entry into the Sochi OWG.
- 8.21 As a result, the Panel, answering the third question, concludes that there are no other reasons under which Mr Getty should be entered into the Sochi OWG.



## **9. CONCLUSION**

- 9.1 This Panel fully understands the desire of Mr Getty to continue his illustrious career by participating in his third Olympic Winter Games. The Panel indeed admires his achievements over his long career; such admiration, though, is no reason for the Panel to grant his application.
- 9.2 In light of the foregoing, the application filed by Mr Getty is to be rejected.

### **The ad hoc Division of the Court of Arbitration for Sport renders the following decision:**

1. The application filed by Mr Getty is rejected.
2. (...).