



**Arbitration CAS ad hoc Division (O.G. Salt Lake City) 02/007, Korean Olympic Committee (KOC) / International Skating Union (ISU), award of 23 February 2002**

Panel: Mr. Peter Leaver QC (United Kingdom), President; Mr. Hans Nater (Switzerland); Mr. Olli Rauste (Finland)

*Short track speed skating*

*Disqualification of an athlete*

*Appeal against a technical decision from the referee*

- 1. CAS Panels do not review “field of play” decisions made on the playing field by judges, referees, umpires or other officials, who are responsible for applying the rules or laws of the particular game.**
- 2. Before a CAS Panel will review a field of play decision, there must be evidence, which generally must be direct evidence, of bad faith. If viewed in this light, each of those phrases, such as “arbitrary”, “breach of duty” and “malicious intent”, means that there must be some evidence of preference for, or prejudice against, a particular team or individual. CAS accepts that this places a high hurdle that must be cleared by any Applicant seeking to review a field of play decision. However, if the hurdle were to be lower, the flood-gates would be opened and any dissatisfied participant would be able to seek the review of a field of play decision.**

The Korean Olympic Committee (“KOC”) appeals from a decision of the Council of the Respondent, the International Skating Union (“ISU”), made on 21 February 2002. The Council then denied the Applicant’s protest in respect of the disqualification of a Korean skater, Kim Dung-sung (“Mr. Kim”), in the final of the men’s 1’500 metre short track skating event which took place on 20 February 2002.

The Applicant contends that Mr. Kim was disqualified by the Lead Referee, Mr. Hewish, as a result of the improper influence of public pressure and that the disqualification was “contrary to accepted social norms and arbitrary”.

The relevant facts can be shortly stated. In the final of the event to which reference has been made, Mr. Kim crossed the finish line ahead of the American skater Apolo Anton Ohno (“Mr. Ohno”). However, Mr. Kim was disqualified by Mr. Hewish for improperly crossing Mr. Ohno’s course, contrary to Rule 292.2(b) of the Special Regulation for Short Track Speed Skating (“the Special Regulations”). As a result of the disqualification, Mr. Ohno was awarded the Gold Medal.

At the hearing, the Applicant drew attention to the fact that Mr. Hewish was also the referee on 16 February 2002 during the men's 1000 metre short track speed skating event. Mr. Hewish then disqualified a Chinese skater, Jiajun Li, for impeding other skaters, again contrary to Rule 292.2(b) of the Special Regulations. As a result of Jiajun Li impeding those other skaters, four skaters fell, and the Australian skater, Steven Bradbury, who had been in last place, won the Gold Medal. Mr. Ohno, who was one of the skaters who fell, recovered and won the Silver Medal.

The Applicant contends that Mr. Hewish should have exercised his discretion to order that the race to be re-run, pursuant to the provisions of Rule 292.5(a) of the Special Regulations. The Panel notes that Rule 292.5(a) commences in the following terms: "*The Referee decides whether an infringement of the racing rules has taken place and whether the competitors concerned shall be disqualified*". Rule 292(5)(d) further provides: "*Protests against any decisions concerning infringements of the racing rules will be not accepted*". The ISU relied upon the latter provision in refusing to entertain the Applicant's protest about Mr. Hewish's decision in the 1'500 metre event, dated 21 February 2002.

Mr. Hewish did not order the 1'000 metre short track speed skating race to be re-run. That was clearly a decision that was open to him, and one within his discretion under Rule 292.5(a) of the Special Regulations. There was no appeal from the decision. In the Panel's opinion, that decision cannot now be reviewed. However, the Applicant contends that Mr. Hewish's decision in the 1'000 metre race is a relevant background fact, which the Panel should bear in mind when considering his decision in the event which has led to this application.

In summary, the Applicant contends that the adverse public reaction to the earlier decision, together with the crowd's reaction when Mr. Ohno failed to overtake Mr. Kim, caused Mr. Hewish to make an arbitrary decision to disqualify Mr. Kim and, that his decision should be overturned.

## LAW

1. These proceedings are governed by the CAS Arbitration Rules for the XIX Olympic Winter Games in Salt Lake City (the "CAS ad hoc Rules") enacted by the International Council of Arbitration for Sport ("ICAS") on 10 April 2001. 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 art. 17 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 art. 7 of the CAS ad hoc Rules.
2. The jurisdiction of the CAS ad hoc Division arises out of the entry form signed by each and every participant in the Olympic Games as well as out of Rule 74 of the Olympic Charter.

3. 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”.
4. 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”.
5. At the start of the hearing, Mr. Jeffrey Benz, Counsel for the United States Olympic Committee (“USOC”), which had been named as an interested party, made an application to dismiss the complaint on the ground that there was “no factual evidence of any impropriety by any of the referees at the event”. He submitted that “absent an allegation or showing of impropriety, the complaint should be dismissed on its face”. Mr. Benz’s application was supported by Mr. James Hawkins and Mr. Gerhardt Bubnik, Legal Advisers of the ISU, and by the Canadian Olympic Association, another interested party. Neither COC, CONI nor CNOSF attended the hearing.
6. The Panel decided not to make a ruling on Mr. Benz’s application at that time, but indicated to Mr. Manning, Counsel for the Applicant, that the Panel first wanted to hear from him as to how he put the case for the Applicant. Mr. Manning frankly accepted that the onus was on the Applicant to prove bad faith in the making of the decision or that the decision was arbitrary. He also accepted that the Panel would not attempt to “second guess” decisions made by referees on technical “field of play” issues, such as the application of the rules governing the playing of the particular game.
7. Mr. Manning wished to call the Lead Referee, Mr. James Hewish, and the Referee Assistants to prove that the decision to disqualify was made in bad faith. The Panel permitted him to do so, but reminded Mr. Manning that if he did so, those witnesses would be his witnesses and that he would not be permitted to cross-examine them. Mr. Manning accepted that ruling.
8. Mr. Hewish, Mr. Stein Andersen (the 1<sup>st</sup> Referee Assistant), Mr. Jim Chapin (the 2<sup>nd</sup> Referee Assistant) and Mr. Joseph New (the 3<sup>rd</sup> Referee Assistant) gave evidence. Mr. Weihua Bian (the 4<sup>th</sup> Referee Assistant) was not called to give evidence, although he was present at the hearing. Mr. Hewish was the Lead Referee at the 1’500 metre event, as he had been at the 1’000 metre event which had taken place on the previous Saturday. He had also then been assisted by Messrs. Andersen, Chapin and New. Although he accepted that he had the discretion to order the 1’000 metre event to be re-run, Mr. Hewish said that he had decided, with his colleagues, not to make that order, but to allow the result to stand. It was suggested to Mr. Hewish that as a result of the criticism of that decision in the press and by the public, he was under pressure to make a decision favourable to Mr. Ohno in the 1’500 metre event. Mr. Hewish denied that he was under any such pressure, or that he had been approached by anybody who requested that he should favour Mr. Ohno in the 1’500 metre event. The Panel accepts Mr. Hewish’s evidence and found him to be an honest and straightforward witness.
9. Mr. Hewish told the Panel that the decision to disqualify Mr. Kim was a joint decision by the Referees, although the ultimate decision was his. He said that three of the Referees told him

the number of the offending skater, the offence (cross-tracking) and the suggested penalty (disqualification). He had not had a clear view of the incident, nor had Mr. Weihua Bian.

10. Messrs. Andersen, Chapin and New each told the Panel that he had not been under any pressure to make a decision favourable to Mr. Ohno, and each also said that he had not been approached by anybody to make such a decision. Again, the Panel accepts that evidence: each of the witnesses was honest and straightforward. Each of them had informed Mr. Hewish of the number of the offending skater, the offence and the suggested penalty. None of the witnesses was affected by the crowd's support for Mr. Ohno. Indeed, Mr. Hewish told the Panel that he had headphones on and was unable to distinguish the crowd's noise as disapproval.
11. At the conclusion of the oral evidence from the Lead Referee and the Referee Assistants, Mr. Manning invited the Panel to look at the video of the event which he asserted would show that the decision was wrong. The Panel declined to look at the video; it seemed to the Panel that to do so would be to embark on a review of a purely technical "field of play" decision, which would be an illegitimate exercise, absent some evidence of bad faith in the making of the decision. After hearing the Referee and the Referee Assistants, there was, in the Panel's opinion, no such evidence. The Panel should not be understood to be saying that video evidence should never be permitted. However, before such evidence is permitted, there must be some factual basis justifying its admission. There was no such evidence in the present case. Besides, it is obvious that a camera can only show what it sees from its particular angle. What it shows will depend upon where it was in relation to the particular incident when that incident took place. A different camera showing the same incident from a different position may well give an entirely different perspective of the same incident.
12. But there is a more fundamental reason for not permitting trial, by television or otherwise, of technical, judgmental decisions by referees. Every participant in a sport in which referees have to make decisions about events on the field of play must accept that the referee sees an incident from a particular position, and makes his decision on the basis of what he or she sees. Sometimes mistakes are made by referees, as they are by players. That is an inevitable fact of life and one that all participants in sporting events must accept. But not every mistake can be reviewed. It is for that reason that CAS jurisprudence makes it clear that it is not open to a player to complain about a "field of play" decision simply because he or she disagrees with that decision.
13. Mr. Manning then called Mr. Jun Myung Kyn, the Coach of the Korean Short-Track Team. Mr. Jun did not speak English sufficiently well to enable him to give evidence without the assistance of an interpreter. He told the Panel of a conversation he had with Mr. Hewish on the morning of 22 February 2002. He asked Mr. Hewish why he had disqualified Mr. Kim. Mr. Hewish said "Cross-track". Mr. Jun asked Mr. Hewish, "What reason?" He said that Mr. Hewish had replied "2-step", and Mr. Jun then demonstrated to the Panel what that meant in skating parlance. Mr. Hewish said that he could not remember precisely what he had said to Mr. Jun. He certainly said "Cross-track", and may have said more.

14. Mr. Manning sought to rely upon Mr. Jun's evidence as showing bad faith. He submitted that many Korean coaches, who were present at the hearing, would say that Mr. Kim had not cross-tracked or "2-stepped", and that it was evidence of Mr. Hewish's bad faith that he had told Mr. Jun that Mr. Kim had "2-stepped" when he had not. The Panel rejects that submission. In the Panel's opinion, little weight can be attached to a statement which, even if it had been made, was made two days after the event. Absent some other evidence of bad faith, such a statement has little probative value.
15. No more oral evidence was called, although it should be recorded that the Panel discouraged the Canadian Olympic Association from calling witnesses to give more detail of the conversation between Mr. Kim and Mr. Hewish.
16. The jurisprudence of CAS in regard to the issue raised by this application is clear, although the language used to explain that jurisprudence is not always consistent and can be confusing. Thus, different phrases, such as "arbitrary", "bad faith", "breach of duty", "malicious intent", "committed a wrong" and "other actionable wrongs" are used, apparently interchangeably, to express the same test (*CAS OG 96/006 M. v/ AIBA* and *CAS OG 00/013 Segura v/ IAAF*).
17. In the Panel's view, each of those phrases means more than that the decision is wrong or one that no sensible person could have reached. If it were otherwise, every field of play decision would be open to review on its merits. Before a CAS Panel will review a field of play decision, there must be evidence, which generally must be direct evidence, of bad faith. If viewed in this light, each of those phrases means that there must be some evidence of preference for, or prejudice against, a particular team or individual. The best example of such preference or prejudice was referred to by the Panel in *Segura*, where they stated that one circumstance where a CAS Panel could review a field of play decision would be if a decision were made in bad faith, eg. as a consequence of corruption. The Panel accepts that this places a high hurdle that must be cleared by any Applicant seeking to review a field of play decision. However, if the hurdle were to be lower, the flood-gates would be opened and any dissatisfied participant would be able to seek the review of a field of play decision.
18. The decision of Mr. Hewish and his team of officials was a "field of play" decision. Accordingly, the onus is on the Applicant who challenges that decision, to prove that in making the decision on technical matters specific to short track speed skating, the Respondent, by its appointed referees acted in bad faith in the sense described above.
19. It is not simply the making of a decision that Mr. Kim disagrees that is a wrong against him which would entitle the Panel to overturn Mr. Hewish's decision. When the CAS jurisprudence speaks of the commission of a wrong in this context, it is speaking of a breach of duty and not merely the making of a decision with which the Applicant disagrees.
20. It is clear that CAS Panels do not review "field of play" decisions made on the playing field by judges, referees, umpires or other officials, who are responsible for applying the rules or laws of the particular game. The Panel notes that all Referees and Judges subscribe to the Olympic oath.

21. The issue to be decided by the Panel, therefore, is whether the Applicant has discharged the heavy burden on it of proving that the Respondent acted in bad faith against Mr. Kim.
22. Mr. Manning submitted that the decision to disqualify was “arbitrary”, and referred the Panel to certain dicta in *M. v/ AIBA*. The Panel does not believe that CAS jurisprudence would be assisted if it were to attempt to state a definitive definition of what is meant by “arbitrary”. It may be that no exact definition is possible, and that any definition of the word “arbitrary” would be similar to the well-known definition of an elephant: “Hard to describe, but you know one when you see it”.
23. If “arbitrary” means no more than that, because of bad faith, the factual basis for a decision is destroyed, then the Panel finds that the decision of Mr. Hewish and the other referees was not “arbitrary”. But the Panel does not base its decision on such narrow grounds. On the basis of the evidence presented, no case of bad faith began to be made, and the Panel has considerable sympathy with the regrets expressed by the ISU regarding the filing of such an application in the absence of any evidence of bad faith on the part of Mr. Hewish or his colleagues.
24. The Panel quite understands the disappointment that Mr. Kim must have felt when he was disqualified. To experience briefly the glory of attaining an Olympic Gold Medal only to have your victory taken away is an experience few will ever endure and one that no one would ever wish to repeat. Indeed, Mr. Kim’s frustration and disappointment with the decision is no doubt compounded by the fact that his team, and likely all of South Korea, disagrees with Mr. Hewish’s decision. Again, the Panel expresses its sympathy for Mr. Kim. However, the Panel’s sympathy for Mr. Kim cannot, and does not, entitle the Panel to overturn a decision which has not been shown to have been made improperly by the Referees in charge of the decision making at the event.

**The CAS ad hoc Division rules:**

The Application is denied.