Arbitration CAS 2016/A/4657 Sergiu Ciobanu v. Athletic Association of Ireland Limited (AI) & Olympic Council of Ireland (OCI), award of 5 October 2016 (operative part of 22 July 2016)

Panel: The Hon. Michael Beloff QC (United Kingdom), Sole Arbitrator

Athletics (marathon race)
Failure of an athlete to be nominated/selected to represent his country in the Olympic Games
Lack of jurisdiction of the CAS
Regularity and transparency of the selection process

1. **CAS lacks jurisdiction where an appellant fails to establish that his offer to submit the dispute to CAS has been accepted by the respondent. In this respect, an answer made by the respondent which is neither a nay or a yea is not itself an acceptance. Up and until it makes an unreserved submission on merits, the respondent is entitled to reserve its position on jurisdiction. An *ad hoc* agreement entered into during previous Olympic Games to which the national federation concerned was party whereby it or an athlete could appeal a decision of the National Olympic Committee (NOC) to CAS does not constitute a precedent. Likewise, purposeful drafting action to give legal effect to the NOC's intention to have a third-tier appeal to the CAS that remained unfulfilled cannot have any effect. Finally, an agreement reached between an athlete and its NOC whereby the athlete could, in the interest of a timely resolution of the dispute, bypass the NOC panel and proceed straight to CAS, might bind the NOC but not the federation in the absence of its own agreement to such procedure so as to expose the latter to a third appeal to CAS.**

2. **Selection mechanisms can be divided into three categories: (a) where the criteria are purely objective; (b) where the criteria are a hybrid of objective and subjective; and (c) where the criteria are wholly subjective (e.g. where the selectors have an unfettered discretion). A selection mechanism that purports to give selectors "sole discretion" but lists certain factors which may be taken into account and which are expressly said not to be exclusive is located on the boundary between category (b) and category (c). As long as the selectors take into account only athletics-specific factors (e.g. form, fitness, competitive record, etc.) and discard obviously irrelevant factors such as skin colour or religious or political beliefs, there is no abuse of the procedures but rather adherence to them. A selection policy should also be transparent, i.e. it should not introduce objective criteria into a published existing selection policy without notice to the athletes potentially affected.**

I. INTRODUCTION

1. Sergiu Ciobanu ("Mr. Ciobanu" or the "Athlete") appeals against the decision of the Appeals Panel of Athletics Ireland ("Appeals Panel") dated 27 May 2016 (the "AI decision") dismissing his appeal against his failure to be nominated as one of three male marathon runners to represent Ireland in the 2016 Games of the XXX Olympiad (the "Rio Games") and the decision of the Olympic Council of Ireland dated 3 June 2016 (the "OCI decision") confirming the AI decision and selecting, *inter alia*, Paul Pollock as one of the three runners.

II. PARTIES

2. The Athlete is a Moldovan-born marathon runner who has lived in Ireland since 2006. He became an Irish citizen in February 2015 and declared to compete for Ireland in July 2015.

3. The Athletic Association of Ireland Limited (the "First Respondent" or "AI") is a company limited by guarantee and is the national governing body for the sport of athletics throughout the Republic of Ireland. AI is a member of the Olympic Council of Ireland.

4. The Olympic Council of Ireland (the "Second Respondent" or "OCI") is the National Olympic Committee of the Republic of Ireland. Its mission is *"[t]o manage and enhance the performance of Team Ireland at Olympic Games whilst developing the Olympic Games whilst developing the Olympic Movement in Ireland"*.

III. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced therein and at the hearing. 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. Mr. Ciobanu has been competing in the men's marathon event since 2008. In 2012 and 2014, he was ranked the fastest Irish-based marathon runner and was 27 seconds outside the qualification time for the 2012 London Olympic Games. In 2015, he competed in the Berlin Marathon and was second of the ten Irish athletes competing for qualification for the 2016 Games – the top four were Kevin Seaward 2.14.52, Sergiu Ciobanu 2.15.14, Mick Clohisey 2.15.35 and Paul Pollock 2.15.38.

7. Mr. Ciobanu is a member of AI and is bound by its rules and regulations. AI is responsible for nominating athletes for the Irish Olympic Team to OCI; OCI then selects athletes for the Irish Olympic Team. The process is governed by AI's Nomination Policy for the 2016 Games of the

XXXI Olympiad (the "AI Policy") and the 2016 Olympic Summer Games – Rio, Agreement for the Selection of Athletes for the Sport of Athletics (the "OCI Agreement").

8. Athletes wishing to be considered for nomination by AI must meet the Entry Standard determined by the IAAF Qualification System – Games of the XXXI Olympiad – Rio 2016 (incorporated into AI's Policy). A maximum of three athletes may be selected in individual events. Where more than three athletes meet the IAAF Entry Standard, AI will nominate three individuals in accordance with AI's Policy.

9. On 23 May 2016, AI held its selection meeting and selected three athletes for the men's marathon, namely Kevin Seward, Mick Clohisey and Paul Pollock. Following the meeting, Mr. Ciobanu received a phone call from Kevin Ankrom, Selection Panel Manager, stating that with regret he had not been nominated to represent AI at the Olympic Games, but had been selected as first reserve. Later that day, Mr. Ankrom sent the Athlete an email confirming the above selection, and stating *"[t]he Panel felt that the three athletes selected were the better overall choice to represent Ireland at the Olympic Games in Rio"*.

10. On 24 May 2016, the Athlete filed an appeal to AI's Appeals Panel against the decision of the selection panel not to select him.

11. On 27 May 2016, the Athlete was advised that his appeal had been denied by the AI Appeals Panel. The AI Appeals Panel did not give any reasons for its decision.

12. On 3 June 2016, the OCI announced its formal selections for the Irish team for the Rio Games including the men's marathon runners: Mick Clohisey, Paul Pollock and Kevin Seaward.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 17 June 2016, the Athlete filed his statement of appeal against the AI decision with the Court of Arbitration for Sport (the "CAS") in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration. In his statement of appeal, the Appellant nominated Prof. Petros Mavroidis as arbitrator. However, given the urgency of the case, by letters dated 23 June 2016, the Appellant and Second Respondent agreed to refer this procedure to a Sole Arbitrator; the First Respondent, however, objected and noted its preference for a three-member Panel.

14. On 27 June 2016, the Appellant filed his appeal brief in accordance with Article R51 of the Code.

15. On 13 July 2016, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed that this procedure would be referred to the Hon. Michael J. Beloff QC, barrister in London, United Kingdom as Sole Arbitrator.

16. On 18 July 2016, the Respondents filed their answers in accordance with Article R55 of the Code. In its answer, the First Respondent objected to jurisdiction and the Appellant and Second Respondent were invited to file a written response accordingly.

17. On 19 July 2016, the Appellant filed a response to the First Respondent's objection to jurisdiction.

18. On the same day, 19 July 2016, the parties all signed and returned the orders of procedure to the CAS Court Office.

19. A hearing was held on 20 July 2016. The Sole Arbitrator was assisted by Mr. Brent J. Nowicki, counsel to the CAS, and was joined by the following:

For the Appellant

Mr. Sergiu Ciobanu (Athlete)
Mr. Sam Saarsteiner (solicitor)
Ms. Louise Reilly (counsel)

For the First Respondent

Mr. Gary Rice (counsel)
Mr. Niall Sexton (counsel)
Mr. Antonio Rigozzi (counsel)
Mr. Kevin Ankrom (witness)
Mr. Paul McNamara (witness)

For the Second Respondent:

Mr. Barry MacCarthy (by telephone)

20. At the start of the hearing the parties confirmed that they had no objection to the Sole Arbitrator and at the conclusion confirmed that they had had a fair hearing and that their procedural rights had been respected.

V. SUBMISSIONS OF THE PARTIES

21. The Appellant's submissions, in essence, may be summarized as follows: (1) CAS has jurisdiction to entertain his appeal against the AI decision and the OCI decision; (2) The AI decision was vitiated by a failure to follow or apply the relevant selection procedure and the OCI decision was in consequence also vitiated.

22. The Appellant seeks the following relief:

1. *The appeal of Sergiu Ciobanu is admissible.*
2. *The decision of the Athletics Ireland Appeals Panel of 27 May 2016 is set aside.*

3. *The selection decision announced by the Olympic Council of Ireland on 3 June 2016, to the extent that it selected Paul Pollock to compete in the marathon event at the 2016 Games of the XXXI Olympiad is set aside.*

4. *Sergiu Ciobanu meets the Athletics Ireland and Olympic Council of Ireland criteria for nomination and selection for the Irish Olympic Team and the 2016 Games of the XXXI Olympiad.*

5. *Sergiu Ciobanu shall be nominated by Athletics Ireland for selection by the Olympic Council of Ireland to compete in the marathon event at the 2016 Games of the XXXI Olympiad, in lieu of Paul Pollock.*

6. *Sergiu Ciobanu shall be selected by the Olympic Council of Ireland to compete in the marathon event at the 2016 Games of the XXXI Olympiad, in lieu of Paul Pollock.*

7. *Sergiu Ciobanu is granted an award for arbitration costs and a contribution towards his legal fees and expenses.*

23. The First Respondent's submissions, in essence, may be summarised as follows: (1) CAS lacks jurisdiction to entertain an appeal against either the AI decision or the OCI decision and (2) the Appellant has not identified any departure from or failure to apply the relevant selection procedure.

24. The First Respondent seeks the following relief:

a. With respect to the decision issued by Athletic Association of Ireland Limited's Appeals Panel:

Athletic Association of Ireland Limited respectfully requests the Court of Arbitration for Sport to:

i. Decline jurisdiction to hear the appeal filed by Mr Sergiu Ciobanu against the decision issued by Athletic Association of Ireland Limited's Appeal Panel dated 27 May 2016.

OR

ii. Dismiss the appeal filed by Mr Sergiu Ciobanu against the decision issued by Athletic Association of Ireland Limited's Appeals Panel dated 27 May 2016.

OR, subsidiarily and only in the event that Court of Arbitration for Sport sets aside the decision issued by Athletic Association of Ireland Limited's Appeals Panel dated 27 May 2016 and announced by the Olympic Council of Ireland on 3 June 2016.

Refer the matter back to Athletic Association of Ireland Limited's Selection Panel to issue a new decision;

b. With respect to the decision announced by the OCI on 3 June 2016

Athletic Association of Ireland Limited respectfully requests the Court of Arbitration for Sport to:

i. Decline jurisdiction to hear the appeal filed by Mr Sergiu Ciobanu against the decision announced by the OCI on 3 June 2016:

OR

ii. Dismiss the appeal filed by Mr Serbgiu Ciobanu against the decision announced by the OCI on 3 June 2016.

c. In any event

i. Order Mr Sergiu Ciobanu to pay the full amount of the CAS arbitration costs;

ii. Order Mr Sergiu Ciobanu to pay a significant contribution towards the legal costs and other related expenses of Athletic Association of Ireland Limited.

25. The Second Respondent's submissions, in essence, may be summarised as follows: (1) it adopts the Appellant's submissions on CAS jurisdiction; (2) it abstains from making submissions on the merits of the Appellant's appeal other than to assert that AI and OCI acted in good faith throughout; and (3) it undertakes to abide by CAS's decision.

26. The Second Respondent seeks the following relief:

The OCI respectfully requests that given the manner in which it has found itself a party to these proceedings that the Panel award its arbitration costs as well as its legal fees and expenses, pursuant to Article 64.5 of the Code to be paid by either the Appellant or the First Respondent, as directed by the Panel.

VI. ADMISSIBILITY

27. 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.

28. The OCI decision was rendered on 3 June 2016. The Appellant filed his statement of appeal on 17 June 2016. In the absence of any contrary statutes or regulations amending the above twenty-one day deadline, the Sole Arbitrator determines that this appeal is timely and admissible, subject only and always to jurisdiction being established.

VII. APPLICABLE LAW

29. 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.

30. The applicable regulations for primary consideration are (1) the AI Policy and (2) the OCI agreement. Considering that both Respondents are domiciled in Ireland, Irish law will therefore apply subsidiarily.

VIII. JURISDICTION

31. 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.

32. In order to resolve the issue as to whether CAS can entertain an appeal against either the AI decision or the OCI decision, it is necessary to consider initially the respective powers of the two Respondents.

33. It is not in dispute that AI as the national federation for the sport of track and field. But the OCI (as the Irish NOC) actually selects and enters athletes for those Games. Usually, the OCI will endorse the AI nomination – the Sole Arbitrator was informed that SC's challenge was a solitary one – but it is not obliged to do so. An athlete may wish to challenge his failure to be nominated/selected. This raises the question whether, and, if so, how she/he can do so.

34. There is no doubt that the AI decision can be challenged before the AI panel. There is a (detailed) appeals procedure as part of the AI policy, which is indeed required by the OCI Agreement (OCI Agreement, para. 5.1).

35. The next question is whether this is the only means of challenge to the AI decision or whether there is a further tier of appeal. According to the Second Respondent, *"Clause 5.2. of each template agreement provides that each National Federation will have an appeals process and that the outcome of that appeals process may then be appealed to the OCI. This clause has been inserted into the template selection Agreement to ensure that the parties have a right of audience before an appellate body (i.e. the OCI) which was not involved in the original nomination procedure"*.

36. It is necessary for the Sole Arbitrator to consider whether this benign objective has actually been achieved. The answer depends upon the proper construction of Clause 5.2. Clause 5.2 is the second limb of Clause 5 which provides in its entirety:

5.2 Appeals to the OCI may be heard by the OCI Executive Committee or a sub-committee appointed by the OCI Executive Committee for that purpose. It is agreed by the parties that the decision of the OCI is final.

37. On one interpretation, Clause 5.2 does not endow OCI with appellate jurisdiction. It merely provides for which OCI body will entertain any appeal accorded by some other provision. It was so held in relation to a predecessor provision in the OCI London 2012 agreement, which used exactly the same words, by an ad hoc panel of the CAS (OG 12/003 *Lynch v. HIS and OCI* dated 29 July 2012) which stated, in the Panel's view, that clause 5.2 does not confer any jurisdiction on the OCI to hear any appeal. Rather, Clause 5.2 merely provides which body or committee within the OCI may hear an appeal which is otherwise provided for somewhere in the contractual documentation.

38. On another interpretation, Clause 5.2 does indeed endow OCI with such appellate jurisdiction. This was accepted by AI itself (and by OCI) in an appeal to the OCI from an AI nomination decision based on the OCI London 2012 agreement in the case of *Catriona Cuddihy v. Athletics Ireland* dated 23 July 2012 (para 8). The parties made a series of acknowledgements which were briefly summarised in the Second Minutes of the Appeal Tribunal (and reconfirmed at the outset of the hearing by all parties) as follows:

It is acknowledged by the Parties that:

1. *The OCI holds the exclusive rights of selection in respect of the athletes (including the athletics team) to represent Ireland at the Summer Olympic Games 2012.*
2. *All internal appeal processes in respect of the selection of athletes by Athletes Ireland for nomination to the OCI to become members of the Irish Olympic Team at the Summer Olympic Games 2012 have been exhausted;*
3. *They have no objections to the Appeal Tribunal (and its constituent members) appointed by the Executive Committee of the OCI for the purposes of hearing the present Appeal;*
4. *The Appeal tribunal has the power to set its own procedures;*
5. *The procedures in respect of the Hearing were outlined to and agreed by the parties, and*
6. *The decision of the Appeal Tribunal of the OCI in respect of the within Appeal shall be final, without prejudice to any right of appeal by the Parties to the Court of Arbitration of Sport.*

39. The *Lynch* dictum was obiter; CAS jurisdiction, which rather than the jurisdiction of the OCI was the main focus of the ad hoc panel's ruling, was rejected on other grounds. With due respect to such distinguished panel, the Sole Arbitrator is unable to adopt the dictum. It seems to the Sole Arbitrator that (i) Clause 5.1 and 5.2 must be read to together; (ii) so read they provide a coherent structure of a two-tier appeal process - Clause 5.1 provides for an AI appeal. Clause 5.2 provides for a further appeal to the OC1; (iii) it would be peculiar if the former conferred jurisdiction, but the latter depended upon jurisdiction being conferred elsewhere; (iv) Clause 5.1 describes the appeal to the AI appeal panel as *"an internal appeals process"* so implying that there may be an external appeal (i.e. to OCI); (v) Clause 5.2 says that the OCI decision *"is final"* so implying that a decision will be taken by OCI (i.e. as provided for by Clause 5.2 itself, there being no other power conferring provision); and (vi) Clause 5.2 speaks of *"appeals to the OCI"*. This would be inappropriate if Clause 5.2 were concerned with appeals against OCI's own selection decision, in such case the preposition would be *"from"*.

40. The Sole Arbitrator has, in this context and for this purpose, borne in mind para 1.4 of the AI Policy and, in particular, its concluding words suggesting that the parties, including the athlete, will not pursue a legal challenge before *"other dispute resolution body"* which would appear to include OCI. However, as the introduction to the AI Policy specifies: *"Where there is any conflict with the provisions in this policy the Olympic Council of Ireland's Agreement for Selection will prevail"*. In short, Clause 5.2 of the OCI Agreement trumps Clause 1.4 of the AI Policy.

41. However, even assuming that the Sole Arbitrator is correct in his analysis of the Irish appeal structure for athletics, non sequitur that there is a further appeal to CAS. There is, contrary to Second Respondent's suggestion, no inherent CAS jurisdiction merely because a dispute relates to sport, which is a necessary but not a sufficient condition. CAS jurisdiction has to be established; it cannot be assumed. An agreement to arbitrate is an agreement to opt out of the assignment of dispute resolution to the state organs. The material to support the existence of such an agreement must reach an appropriate level of cogency.

42. The Appellant relied upon two routes to his desired destination (i.e. that CAS had the requisite jurisdiction) – the first was an alleged ad hoc agreement by the parties; the second was by reference to the regulatory scheme incarnated in the AI Policy and OCI Agreement. The Sole Arbitrator finds that each route is a cul-de-sac.

43. The first route depends upon the interpretation of a single letter from AI. On 15 June 2016, the Appellant invited both AI and OCI to agree to *"the submission of this matter (*i.e. his non selection*) to CAS for the purposes of an appeal"*. The material part of AI's reply of 16 June 2016 was to this effect to note that *"you wish to refer the matter to CAS and if that is your instruction from your client, Athletics Ireland will respond to CAS in any manner required"*. It can fairly be said that this was not a rejection of the offer to submit to CAS jurisdiction but it can no less fairly be said that it was not an acceptance of such an offer. It was in short neither a nay nor a yea; but since it was for the Appellant to establish that his offer to submit the dispute to CAS had been accepted by AI he has, in the Sole Arbitrator's judgement, failed to do so. What response AI might have made if and when approached by CAS is a matter of speculation; it could have been an acceptance of CAS jurisdiction – far more likely given AI's stance in these proceedings, it would have been a rejection of CAS jurisdiction. But the main point is that the AI reply was itself not an acceptance and to construe it as an acceptance, as the Appellant sought valiantly to do, it imposes more weight upon it than it can reasonably bear. AI properly reminded the Sole Arbitrator that up and until it made an unreserved submission on merits, that AI was entitled to reserve its position on jurisdiction. That Rubicon was never crossed.

44. The second route depends upon a purposive construction of the two key applicable regulations. The problem for the Appellant is that neither mentions CAS jurisdiction at all. It was not suggested that there was any such reference express or even implied in the AI Policy. Likewise, there was no such reference express or implied in the OCI Agreement (nor indeed in the 2012 agreement).

45. The Appellant (and by agreement the Second Respondent) relied on the fact that, notwithstanding the absence of such reference in the London 2012 agreement, the OCI panel in Cuddihy appeared to accept that an appeal against its decision could go the CAS (see para. 38 above).

46. However, there is nothing in the 2012 agreement which itself provided any foundation for such acceptance. The Sole Arbitrator is therefore constrained to conclude that there was in 2012 simply an ad hoc agreement, to which AI was a party, that either it or the athlete could appeal

the OCI decision to CAS. Such an agreement would be lawful and effective. It would not, however, constitute a precedent. And it is clear that AI have made no similar agreement in 2016.

47. The OCI candidly confessed that it had been OCI's intention in 2016, as in 2012, to have a third-tier appeal to the CAS. Regrettably the obvious step (i.e. to make an express provision in the 2016 agreement in a manner which would have bound AI), was overlooked. Absent purposeful drafting action to give it legal effect, OCI's intention remained unfulfilled. The OCI indicated to the Sole Arbitrator an intention to embody an athlete's right to appeal to CAS in the 2020 Agreement for the Tokyo Games (as well as to put beyond doubt the existence of a right earlier to appeal an AI decision to OCI). This would appear a consummation devoutly to be wished so as to avoid similar jurisdictional issues to those in the present case arising in the future.

48. It is a feature of the history of the Appellant's case that in fact he did not make use of the second-tier appeal to OCI. It appears to be common ground between the Appellant and OCI that an agreement was reached with OCI that the Appellant could, in the interests of a timely resolution of the dispute, bypass the OCI panel and proceed straight to CAS. While such agreement might bind OCI it could not bind AI, in the absence of its own agreement to such procedure so as to expose AI to a third appeal to CAS (after the first appeal to its own panel Clause 5.1, and the second - but bypassed - appeal to OCI Clause 5.2). That would have needed a Clause 5.3 or its equivalent.

49. Late in the day, reference was made to Clause 61.2 of the Olympic Charter which provides *"Any dispute arising on 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"*. It was not suggested that this was an autonomous source of CAS jurisdiction over the present dispute. Nor was any authority drawn to the Sole Arbitrator's attention which held or suggested that it could have such wide reaching effect (see CAS OG 02/003, para. 21 – requiring a specific link to the Games). It is obvious that if it did have such effect any internal appeal mechanism for national selection disputes would become redundant. All appeals would go straight to CAS. Clause 61.2 was rather relied upon by OCI as the inspiration for its (unavailing) attempt to create in its own regime for the Rio Games such an appeal to CAS.

IX. CONSIDERATIONS ON THE MERITS

50. At the request from all parties and for the possible assistance of those who may wish to redraft the AI Policy in the future, the Sole Arbitrator encapsulates his conclusions on the merits, in dicta and without legal effect, briefly as follows:

    (1) Selection mechanisms can be divided into three categories (a) where the criteria are purely objective - the classic example being the USA first 3 past the post system; (b) where the criteria are a hybrid of objective and subjective; and (c) where the criteria are wholly subjective (e.g. where the selectors have an unfettered discretion).

(2) The AI Policy is located on the boundary between category (b) and category (c). It purports to give the selectors *"sole discretion"* but in para 2.5 lists certain factors which may be taken into account.

(3) Those factors are, however, expressly said not to be exclusive:

Marathon

2.5 If more than three athletes have achieved the Entry Standard for the marathon event (e.g. 4 women) other factors (but not limited to) that may be considered by the Selection Panel for the marathon nominations are:

A. Consideration for the course speed rating (average race time bias) of athletes with comparable achieved Entry Standards that are within (one minute +/- .7%) of each other.

This was re-echoed in (media article Irish Runner 9 March 2016 and the remarks of Mr Ankrom quoted therein).

(4) Since all the key contenders for places in the Irish men's marathon team achieved their times in the first period, the factors in para 2.5 did not require consideration. Yet the selectors still had to make a choice.

(5) Accordingly, as long as the selectors took into account only athletics-specific factors (e.g. form, fitness, competitive record, etc.) and discarded obviously irrelevant factors such as skin colour or religious or political beliefs, they were free to choose those 3 athletes who they thought would best represent Ireland in the Rio men's marathon event.

(6) The evidence before the Sole Arbitrator shows that in reaching that multi-factorial decision there was no departure from abuse of the procedures in the AI Policy but rather adherence to them. Certainly there was no hint of discrimination against SC because of his Moldavan origins nor any subordination of the selectors' powers to outside media influence.

(7) The Appellant may have hoped that as the second fastest Irish runner in the Berlin marathon he ought to have had an Olympic place; but was unable to identify any provision of the policy that so stated.

(8) Nor could the Appellant claim that it was ever represented to him that his Berlin achievement would be decisive his favour. Indeed, his concern was that he did **not** know with any confidence what other factors would be taken into consideration. He did know, however, that there were other factors which could be taken into account. So much emerged from both his own evidence and the evidence of Paul Macnamara from AI (endurance events) of a conversation that they had in March of this year.

(9) A selection policy should be transparent (i.e. it should **not** introduce objective criteria into a published existing selection policy without notice to the athletes potentially affected as happened in CAS 2000/A/278). This did not happen here. The AI selectors, as vouched for by the AI appeal panel, made their selection in exercise of their discretion by reference and by reference only - to athletic - specific factors; there was no legal constraint on their doing so.

(10) It is possible that other selectors might have ranked the contenders for the men's marathon team differently; indeed the record shows that at least one participant in the discussion initially favoured the Appellant. But while the Appellant may understandably feel disappointment with the outcome, in the judgement of the Sole Arbitrator he has no basis for saying that there was some fatal flaw in the process leading to the AI decision and OCI decision.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. It does not have jurisdiction to decide on the appeal filed by Mr. Sergiu Ciobanu against Athletic Association of Ireland Limited & Olympic Council of Ireland on 17 June 2016 against the decision rendered on 27 May 2016 by the Athletics Ireland Appeals Panel.

2. The appeal filed by Mr. Sergiu Ciobanu is dismissed.

3. The arbitration procedure *CAS 2016/A/4657 Sergiu Ciobanu v. Athletic Association of Ireland Limited & Olympic Council of Ireland* is removed from the CAS roll.

4. (…).

5. (…).