



**Arbitration CAS (Oceania Registry) A3/2014 Matthew Karwalski v. Squash Australia, award of 18 July 2014**

Panel: The Hon. Judge Arthur Emmett (Australia), Sole Arbitrator

*Squash*

*Selection in the Commonwealth Games Squash team*

*Inconsistency between two sets of rules*

*Denial of procedural fairness*

1. Clause 38 of the 2014 Commonwealth Games Athlete Selection Policy provides that the Appeal Committee, when considering an appeal against a decision of the Selection Committee, “*will conduct the appeal de novo*” but, as Clause 37 provides, the Appeal Committee must also conduct the appeal process in accordance with the Guidelines to the Selection Policy. Clause 7 of the Guidelines provides that the Appeal Committee “*will function as a committee of review and will not take on the role of an alternate [sic] Selection Committee*”. There is thus necessarily an inconsistency between the requirement of Clause 38 of the Selection Policy and Clause 7 of the Guidelines. The better view must be that, in the event of inconsistency between the Selection Policy and the Guidelines, the former prevails. At least in respect of its consideration of Clause 22 of the Selection Policy related to the nomination criteria for each athlete in the squash team, the Appeal Committee must therefore conduct the appeal *de novo*.
2. Procedural fairness is denied if, in the hearing by the Appeal Committee, the athlete is not provided with some requested relevant documents. In so doing, the Appeal Committee denies itself the opportunity of any submissions that might have been advanced on behalf of the athlete in response to the material contained in those documents.

## INTRODUCTION

1. A dispute has arisen concerning the nomination by Squash Australia of athletes for selection in the 2014 Australian Commonwealth Games team to represent Australia in the squash competition at the Commonwealth Games in Glasgow commencing on 23 July 2014. The nomination resulted from a decision made on 4 April 2014 by the Squash Australia selection committee (**the Selection Committee**). On 15 May 2014, the Commonwealth Games Association announced the team to represent Australia in the squash competition.

2. The team was to consist of five women as well as five men. The five men are Messrs Cameron Pilley, Ryan Cuskelly, Zac Alexander, Steven Finitis and David Palmer. Mr Matthew Karwalski was named as non-travelling reserve. Mr Karwalski appealed to an appeal committee constituted by Squash Australia (**the Appeal Committee**) from the decision not to include him in the team. On 12 June 2014, the appeal was upheld and the matter was referred back to the Selection Committee with specific directions concerning the selection decision. On 17 June 2014, the Selection Committee decided that the athletes as originally selected in April would remain in place. Mr Karwalski was notified of that decision by letter of 18 June 2014.
3. On 3 July 2014, Mr Karwalski appealed to the Appeal Committee from the second decision of the Selection Committee. On 4 July 2014, the Appeal Committee resolved to dismiss the appeal. On 4 July 2014, Mr Karwalski made an application to the Oceania Registry of the Court of Arbitration for Sport (**the Court**) for arbitral relief in the Appeals Division of the Court. Squash Australia was named as respondent and Mr Zac Alexander was named as an Affected Party.
4. By Order of Procedure signed on 7 July 2014 on behalf of Mr Karwalski and Squash Australia, those parties agreed that the Court has jurisdiction to determine, by arbitration, the dispute that is the subject of the appeal brought by Mr Karwalski against Squash Australia, and agreed to refer the dispute to the Court for determination by arbitration. The parties agreed that, for the purposes of the arbitration, the Court would be constituted by me as sole arbitrator, with the object of arbitrating on the dispute and rendering an award in conformity with the agreement between the parties according to the Code of Sports-Related Arbitration published by the Court (**the Code**). Because of the imminence of the 2014 Commonwealth Games in Glasgow, there is considerable urgency in having the dispute resolved.
5. On 7 July 2014, I received evidence in the form of documentary material and witness statements. I have also had the benefit of written submissions from the parties, including Mr Alexander, and have heard oral argument from counsel on behalf of those parties. Before dealing with the issues, it is desirable to say something about the regulatory framework that governs the selection process, as well as the procedural history of the dispute.

## THE REGULATORY FRAMEWORK

6. In June 2013, Squash Australia published its 2014 Commonwealth Games Athlete Selection Policy (**the Selection Policy**). The Selection Policy acknowledges that control of the selection and appointment of the Australia Commonwealth Games Team is the responsibility of the Australian Commonwealth Games Association. The Selection Policy outlines the procedures that Squash Australia proposed to undertake to prepare a nomination to the Australian Commonwealth Games Association for the inclusion of athletes in the Australian Commonwealth Games Team Squash Section.
7. By Clause 7 of the Selection Policy, Squash Australia was to appoint a Commonwealth Games Selection Committee. The Selection Committee was to consist of Squash Australia's National Head Coach, the National Senior Men's and Women's Coaches and the National Selectors.

8. Clauses 20 to 26 of the Selection Policy deal with the selection of athletes for the Commonwealth Games Squash Team. Clause 20 provides that up to ten athletes are to be included in the Squash Section, with no more than five males or five females to be nominated. Under Clause 21, the athletes nominated were to be “on the basis of” Squash Australia being able to maximise the opportunity for the team to achieve the **Team Goal**. Under Clause 6, the Team Goal was to win a minimum of one gold, one silver and two bronze medals.
9. Clause 22 provided that each athlete’s nomination into the Squash Section was to be based on the following criteria:
  - 22.1 The Australian and world rankings that are current at the time of team selection;
  - 22.2 Performances in singles competitions in the previous six months;
  - 22.3 The past record of athletes in major events and in pressure situations in international tournaments;
  - 22.4 Outcomes of doubles competitions/camps conducted in the twelve months prior to the selection date;
  - 22.5 The outcome of any medical examination pursuant to paragraph 27 [which conferred on the Selection Committee the right to require any athlete being considered to undergo a medical examination by a doctor nominated by Squash Australia];
  - 22.6 Each athlete’s ability to “fit in” to a team situation with fellow team members, the appointed Section Manager and/or Coaches, taking into account previous involvement in State, Territory or National teams; and
  - 22.7 The athlete’s future potential.
10. Under Clause 23, the pair considered by the Selection Committee to have the best prospects of winning gold in the respective doubles competitions was to be nominated. Other doubles combinations were to be nominated on the basis of achieving the best possible medal result. The Selection Committee’s consideration of doubles pairing was to include performances in official doubles competitions during the 12 months prior to the selection date played on international doubles courts.
11. Clause 24 provided that the Selection Committee was to advise the Board of Squash Australia in the first two weeks of April 2014 of its intended recommendation for the Board’s consideration and approval. Clause 25 provided that the team was to be announced in May 2014 by the Australian Commonwealth Games Association.
12. Clauses 30 to 38 of the Selection Policy deal with appeals. Under Clause 30, in the event of an athlete lodging an appeal against non-selection in the Commonwealth Games Squash Team, an Appeal Committee was to be appointed by the Board of Squash Australia. Clause 37 provides that the Appeal Committee is to conduct the appeal process in accordance with guidelines detailed in an annexure to the Selection Policy (**the Guidelines**). Under Clause 38, the Appeal

Committee was required to conduct the appeal as a hearing *de novo* and had power to uphold, reverse or vary the decision appealed from. It also had power to refer the matter back for rehearing by the Selection Committee with or without the Appeal Committee's direction in relation to the conduct of the rehearing.

13. The Guidelines require the Appeal Committee to conduct the appeal in an objective and impartial manner and to decide whether the decisions made by the Selection Committee were fair and reasonable. The Appeal Committee is to function as a committee of review and was not to take on the role of an alternative Selection Committee. (That provision raises a question of inconsistency with Clause 38 of the Selection Policy, a matter to which I will later turn.) The Guidelines further provide that the Appeal Committee should, where practicable and when time permits, refer the matter back to the Selection Committee with appropriate directions in the event that the Appeal Committee decides not to uphold the decisions made by the Selection Committee. The Appeal Committee is to reverse or vary a decision, rather than referring it back to the Selection Committee, only when the Appeal Committee is of the opinion that the correct decision is clear and undisputable, a correct procedure was not followed or there is insufficient time for the matter to be referred back to the Selection Committee.
14. Clauses 39 to 41 of the Selection Policy deal with appeals against a decision of the Appeal Committee. By Clause 39, an athlete may lodge an appeal against a decision handed down by the Appeal Committee. Such an appeal must be solely and exclusively resolved by the Court, whose decision is to be final and binding on the parties. Neither party is to be entitled to institute or maintain proceedings in any court or tribunal, other than Court.

## THE PROCEDURAL HISTORY

15. Mr Gordon Young, the Performance Pathway Manager of Squash Australia, prepared a Board Issues Paper dated 4 April 2014 (**the April Board Paper**), for the Board of Squash Australia to consider the approval of the recommendations put forward by the Selection Committee, constituted by Ms Sarah Fitz-Gerald, the Commonwealth Games Women's Coach; Mr Rodney Eyles, the Commonwealth Games Men's Coach; and the National Selectors. In the April Board Paper, Mr Young said that the Selection Committee was now ready to make its recommendations on the nominations for the Commonwealth Games Squash Section. He said that the recommendations contained in it were extracted from the Coaches' Report to the Selection Committee, which was attached to the April Board Paper.
16. Ms Fitz-Gerald set out her observations before making a recommendation of five women for the women's team. Ms Fitz-Gerald then provided observations on six men, being the five men selected and Mr Karwalski. Ms Fitz-Gerald said about Mr Alexander that it seemed that he had recovered well from hip surgery and had shown the right motivation to get back into the team. She characterised him as a "*strong and talented player*" and said he would be the "*the coaches' discretion as his ranking does indicate his level of play due to the time he was off the tour in recovery*". She said that Mr Karwalski "*has been injured and has had surgery to correct a hip injury*". She said that he had "*recovered well*" but was "*not ready to compete*" at the 2014 Glasgow Commonwealth Games.

17. In his report, Mr Eyles made the following comments about Mr Alexander and Mr Karwalski:

**Zac Alexander:** Prior to my departing for the Houston PSA15K Event to observe Zac and Matt, I was favouring towards Matt being selected. However, both players lost in the first round. Zac won 2 matches in qualifying (the first in 5 and then backing up to win in 3). I spoke to him about his matches and he took on the advice very well - to his credit. His fitness was under a cloud prior to my going, but I am pleased to say he was moving well and his skills are far better suited for doubles in a Commonwealth Games environment. Following Zac's 3 matches I then got him to play against Matt the next day. Both players consented and understood that it wasn't a play off with an official capacity but clearly they knew what was at stake. Zac defeated Matt 11/4, 11/3, 11/9. The first 2 games were not even a contest. Zac was superior in movement, agility and reading the game. His finishing shots were his assets and clearly he is only going to get stronger in this next period prior to the Games. I recommend Ryan and Zac as a doubles combination. They will certainly compliment [sic] each other having Ryan on the left wall and Zac on the right. Zac will be our third singles player because I feel this will be invaluable experience for 2018.

**Matthew Karwalski:** Unfortunately time has not been on Matt's side as from my observations in Houston. He is still not at the level I was hoping for. He has rehabilitated well and is extremely professional in his preparations but I feel his movement (which is his best asset) is not quite there. I don't think Matt has the skills compared to Zac to warrant him moving into this 2014 Commonwealth Games Team. With Doubles being on the new 13 inch format, this will make life a little tougher for him as well.

18. The comments by the coaches were included verbatim in the April Board Paper and Mr Young said in it that, after some discussion and questions, the following men had been put forward as team members for the 2014 Commonwealth Games, with their world ranking in brackets:

(17) Cameron Pilley, (36) Ryan Cuskelly, (111) Zac Alexander, (50) Steven Finitsis, (NR) David Palmer, (59) Matthew Karwalski non-travelling reserve.

As I have said, the teams were announced on 15 May 2014.

19. On 21 May 2014, Mr Gary O'Donnell, the Chief Executive Officer of Squash Australia, sent an email to Mr Karwalski in response to a telephone call requesting information on his non-selection in the team. Mr O'Donnell said that the Selection Policy was silent on such a request but felt that the provision of comments on Mr Karwalski would be appropriate. Mr O'Donnell then set out the two comments made about Mr Karwalski by Mr Eyles and Ms Fitz-Gerald. No other information was provided.
20. At some time prior to 12 June 2014, Mr Karwalski initiated the appeal process contemplated by Clauses 30 to 38 of the Selection Policy. In that connection, he provided two medical reports to Squash Australia dated 22 May 2014 and 27 May 2014. The report of 22 May 2014 was from Professor Patrick Weinrauch, an orthopaedic surgeon who had carried out surgery on Mr

Karwalski in December 2013. The report of 27 May 2014 was from Dr Andrew Smith, consultant to Squash Australia.

21. Professor Weinrauch reported that it was his usual recommendation that high-grade physical pursuits and athletic performance be substantially reduced for a period of at least 16 weeks from surgery. He said that it would not at all be his anticipation that Mr Karwalski would be fully recovered during March 2014 as a result of the surgical intervention that he conducted on 16 December 2013. Professor Weinrauch said that Mr Karwalski had last been reviewed on 24 April 2014 and that at that point he was able to return to high-grade competitive squash in a pain free manner. No further ongoing treatment was recommended nor any further follow up on the merits of Mr Karwalski's symptom resolution and high grade functional capability.
22. Dr Smith said that Mr Karwalski had presented to him on 26 November 2013 with a six-week history of right hip pain and it was decided to refer him directly to Professor Weinrauch for arthroscopy. Dr Smith said that Mr Karwalski's surgery had been successful and that he was then currently fully fit to compete in squash at any level.
23. On 12 June 2014, Mr O'Donnell prepared an Appeal Outcome Summary on behalf of the Appeal Committee (**the June Appeal Summary**). The June Appeal Summary recorded that the Appeal Committee had met by teleconference on 12 June 2014 and had considered Mr Karwalski's appeal application together with the April Board Paper of 4 April 2014. The decision of the Appeal Committee was that the matter be referred back to the Selection Committee with a number of directions to the Selection Committee as follows:
  - The match played in Houston between Mr Karwalski and Mr Alexander (referred to in Mr Eyles's report annexed to the April Board Paper) was not to be considered by the Selection Committee or form part of the recommendation of the coaches.
  - The Selection Committee was not to consider the opinions of the coaches as to Mr Karwalski's physical recovery from injury, meaning his medical fitness.
  - The Selection Committee was to consider the medical reports provided by Mr Karwalski as evidence of his current medical fitness and recovery from surgery, and was to treat those reports as though they had been obtained by the Selection Committee under Clause 28 of the Selection Policy.
  - The medical reports were to be provided to the coaches, who were to be asked to resubmit their recommendations. In doing so, the coaches were to take into account the directions of the Appeal Committee, consider the way in which the athletes met the selection criteria set out in Clauses 20 to 23 of the Selection Policy and set out any information relevant to the athletes' performance against any of the selection criteria.
  - The Selection Committee was to consider the players to be chosen against the selection criteria set out in Clauses 20 to 23 of the Selection Policy, with the assistance of the reports of the coaches.

24. On 17 June 2014, Mr Eyles sent an email to Mr Young (**the 17 June Recommendation**) setting out *“an outline of the date timeline, players’ results and my recommendations”*. The 17 June Recommendation referred to a timeline, consisting of the decision by the Selection Committee and submission of nominations to the Australian Commonwealth Games Association on 4 April 2014, the announcement of the team by the Australian Commonwealth Games Association on 15 May 2014 and two doctors’ reports for Mr Karwalski of 22 May 2014 and 27 May 2014, both of which were said to be past the announcement and selection dates. Mr Eyles pointed out that the medical report of 22 May 2014 stated that Mr Karwalski was fit to compete on 24 April but that the report was not received prior to 4 April 2014 or 15 May 2014. It is difficult to follow the relevance of that observation in the light of the directions set out in the June Appeal Summary.
25. The 17 June Recommendation then proceeded to deal with playing results. Mr Eyles said that he had travelled to the United States to observe the progress of Mr Karwalski and Mr Alexander in the Houston Open from 27 to 30 March 2014. He said that, without considering the “practice match” between those two players in Houston, and going on their individual performances just prior to selection, he had come to the conclusion that Mr Alexander was going to be more appropriately suited to play in a doubles combination *“due to his current level of fitness and skills”*. He said that he believed that Mr Alexander’s style of game would complement *“any of our Australian players”*.
26. Mr Eyles then set out the results at the Houston Open. Mr Alexander had won two qualifying rounds while Mr Karwalski did not need to qualify. Both were defeated in round one of the Houston Open. Mr Eyles ended by expressing his opinion that, when both players are fully fit, Mr Alexander is *“the more complete player at the higher level”*, having had a career high ranking of 36, whereas Mr Karwalski’s highest ranking had been 49. Mr Eyles then set out an overview of their recent results *“from the PSA World Tour website”*. He observed that, since 4 April 2014, Mr Alexander had won two PSA events and Mr Karwalski had made a semi-final in Brazil and a final in New Zealand. The 17 June Recommendation asserted that, excluding the items that were not to be considered, the information set out in it *“very clearly outlines the rationale”* for the selection of Mr Alexander.
27. Mr Karwalski, in evidence to the Court, complains that the statement about results in the 17 June Recommendation is misleading because it does not inform the reader of the different levels of Professional Squash Association (**PSA**) tournaments played. The two events won by Mr Alexander were “Challenger 5 Tournaments” which, he says, are the lowest level of PSA event. He says, in contrast, that he has played events of “Challenger 10 and 15 level” which are more difficult events to play than the entry level Challenger 5. He points out that he made the semi-final in one Challenger 10 tournaments, the final in another Challenger 10 tournament, and the semi-final in a Challenger 15 tournament.
28. Mr Karwalski also points out that, following surgery in August 2013, Mr Alexander’s world ranking slid from 50 in August 2013 to 110 as at July 2014 and has not shown any significant improvement. On the other hand, Mr Karwalski says, he had the same surgery for the same condition later in the year but during his period of recovery, his ranking fell only from 49 to 72.

Since recovering from surgery, his ranking has begun to rise and is now 61. He challenges the relevance of the fact that Mr Alexander's highest ranking was 36, as against his own of 49, in circumstances where the ranking of 36 was achieved almost two years ago and Mr Alexander's current ranking is no higher than 110.

29. A Selection Committee summary dated 17 June 2014 (**the June Selection Summary**) records that the Selection Committee returned a recommendation that the athletes as originally selected in April remain in place as originally recommended. The June Selection Summary contained material under the heading "Background", which appears to constitute the reasons for the recommendation. The Background states as follows:

1. After considering [Clause 23 of the Selection Policy], the pairing of Ryan Cuskelly and Zac Alexander will give Australia the best chance of another medal in the Men's Doubles at the 2014 Glasgow Commonwealth Games.
2. The pairing of David Palmer and Cameron Pilley remain [sic] as Australia's best chance for a gold medal in [the] Men's Doubles. The second pairing of Ryan Cuskelly and Zac Alexander remain [sic] Australia's next best pairing to win a medal in [the] Men's Doubles at the Commonwealth Games.
3. The [Selection Committee] recommended those pairing[s] as the highest priority to Australia's medal chances in [the] Men's Doubles in Glasgow.

Mr Karwalski complains that the Selection Committee approached its task from the wrong direction, in so far as it appears to have allowed the pairings in the doubles competition to control the original selection of athletes.

30. Mr O'Donnell wrote to Mr Karwalski's solicitors on 18 June 2014 informing them that his "non-selection appeal" had been unsuccessful and that the determination of the Selection Committee was to make no change to the original selection. A copy of the June Selection Summary was attached to the letter.
31. On 26 June 2014, Mr Karwalski sent an email to Mr O'Donnell requesting "*the full notes from both Selection Committee meetings for discovery of evidence for the court case*". There was apparently no response.
32. After a premature application to the Court in respect of the decision of the Selection Committee of 17 June 2014, Mr Karwalski lodged a further appeal from that decision to the Appeal Committee. The appeal application was accompanied by a document of 12 pages entitled **Grounds of Appeal**, which summarised the dispute up to the time of the second decision of the Selection Committee, and which included submissions, and not merely grounds. The Grounds of Appeal then made detailed submissions in relation to each of the criteria set out in Clause 22. The conclusion was that "*on any objective application of the selection criteria*", Mr Karwalski should qualify ahead of Mr Alexander and that the Appeal Committee should vary the decision made by the Selection Committee by substituting Mr Karwalski into the team at the expense of Mr Alexander. The Grounds of Appeal ended by submitting that the evidence provided made him an ideal candidate for doubles pairing with Mr Palmer or Mr Cuskelly and that he should be nominated in the doubles pairings under Clause 23.



33. The Grounds of Appeal was accompanied by 11 documents as follows:
- 1 A letter from David Palmer saying that he had “full confidence” in winning a medal if he and Mr Karwalski were partnered together in the men’s doubles.
  - 2 The report from Professor Weinrauch of 22 May 2014.
  - 3 The report from Dr Smith of 27 May 2014.
  - 4 Senior Australian men’s player rankings as at 14 February 2014, showing Mr Karwalski ranked 3 and Mr Alexander ranked 7.
  - 5 World rankings showing Mr Karwalski ranked 61 and Mr Alexander ranked 110.
  - 6 Results from the A J Bell Squash Championships held in October 2013.
  - 7 Results from the Houston Open in 2014.
  - 8 Results from the Darwin International Doubles Squash Championship in 2013.
  - 9 A long letter dated 3 July 2014 from Mr Palmer comparing the performances of Mr Alexander and Mr Karwalski. Mr Palmer expressed the view that, in the doubles environment, Mr Karwalski will prove to be a “*substantially greater asset*” for the Australian team and will significantly increase Australia’s chances of winning medals. He pointed out that he is Mr Karwalski’s coach but said that he made those comments having observed and carefully considered “*each of the players up for selection*”. He pointed out that, as a member of the team, he has a vested interest in its success and would “*decisively prefer*” Mr Karwalski to be nominated in the doubles pairing ahead of Mr Alexander. He noted, however, that Mr Finitsis deserved to be selected ahead of Mr Karwalski in relation to the singles event.
  - 10 Results of a New Zealand International classic in 2014 showing that Mr Karwalski was defeated in the final.
  - 11 A letter from Mr Byron Davis of 23 June 2014 saying that the inclusion of Mr Karwalski in the team would provide Australia with “*its best opportunity of maximising the number of medals*” it could win. Mr Davis had been the National Head Coach for Squash Australia and had been responsible for the preparation of the Commonwealth Games Squash Team until approximately 12 months ago.

## THE DECISION OF THE APPEAL COMMITTEE

34. The decision of the Appeal Committee is recorded in a document entitled “Appeal Outcome Summary” dated 4 July 2014 (**the July Appeal Summary**). The July Appeal Summary records that the Appeal Committee, which met by teleconference on 3 July 2014, had available to it the following:
- Mr Karwalski’s selection appeal form;
  - The Grounds of Appeal;

- The 11 documents attached to and referred to in the Grounds of Appeal;
- The April Board Paper;
- The 17 June Recommendation; and
- The June Selection Summary.

The July Appeal Summary stated that the Appeal Committee had resolved to dismiss the appeal. It also suggested that the April Board Paper and the 17 June Recommendation be provided to Mr Karwalski. That appears to be a recognition by the Appeal Committee that those materials had not been previously been provided to Mr Karwalski. They were in fact not provided to him until after the decision of the Appeal Committee had been communicated to him. That is one of the matters about which Mr Karwalski complains in this appeal.

35. The July Appeal Summary then contained several numbered paragraphs described as “comments”. The comments appear to be in the nature of reasons for the decision. First, the Appeal Committee noted the short time frame provided to undertake the appeal and the fact that there was no information concerning written notice of Mr Karwalski’s desire to appeal or that any athlete potentially affected had been notified by Squash Australia. The comments also stated that Squash Australia had indicated that Mr Alexander had been updated in relation to the appeal.
36. The comments then went on to state that the Appeal Committee considered that Clause 21 of the Selection Policy had an “overarching role” in considering team selections. The Appeal Committee felt that Mr Karwalski’s argument that the selection process should be guided first by Clause 22 followed by Clause 23 “was flawed and would not be consistent with the performance objectives as outlined in Clause 21”. The Appeal Committee considered that the contemplation that the players should be selected, then the team they play in, showed “*a significant lack of understanding of the Commonwealth Games competition structure*”, consisting of men’s doubles, women’s doubles, mixed doubles, men’s singles and women’s singles.
37. The Appeal Committee felt that the balance and weight applied by the Selection Committee to the criteria in Clause 22 were appropriate and consistent with the overarching Team Goal, as outlined in Clause 21. The Appeal Committee said that the selection of David Palmer showed the Selection Committee’s understanding of the Team Goal and how to apply appropriate weighting, given that Mr Palmer has no international ranking but remains an integral part of the doubles team – something that “*the world squash community understands*”.
38. Finally, the Appeal Committee noted that Mr Karwalski’s submission regarding Mr Alexander’s match play was erroneous, in stating that in the last six months prior to selection Mr Alexander had not been playing tournaments due to injury. The Appeal Committee said that Mr Alexander had in fact played in a number of tournaments in the previous six months.

## THE APPEAL TO THE COURT

39. By his application to the Court, Mr Karwalski seeks the following relief:

- 1 The Court vary the decision of the Appeal Committee so as to select Mr Karwalski for the team in place of Mr Alexander in both the men's singles and the men's doubles events.
- 2 In the alternative to 1, the Court vary the decision of the Appeal Committee so as to select Mr Karwalski for the team and to nominate him in a doubles pairing to be determined in accordance with Clause 23 of the Selection Policy.
- 3 Squash Australia pay Mr Karwalski's legal costs, including the costs of both appeals to the Appeal Committee and of the arbitration.

40. In his application to the Court, Mr Karwalski raises the following grounds of appeal:

- He was denied procedural fairness in that Squash Australia failed to provide him with the reasons for the decision of the Selection Committee against which he was appealing.
- He was denied procedural fairness because Squash Australia did not provide to him the documents that were provided to the Appeal Committee that formed the basis of the Appeal Committee's decision and he was therefore not in a position to assess the evidence before the Appeal Committee as part of his appeal.
- The Appeal Committee failed to comply with Clause 38 of the Selection Policy, which required the Appeal Committee to conduct the appeal as a hearing *de novo*, in that the Appeal Committee merely read the decision of the Selection Committee and endorsed it.
- The Appeal Committee took into account irrelevant information, namely, the performance of Mr Karwalski at the Houston Open during a time when he had not recovered from surgery and was under instructions from his coach "*to play within himself*", rather than taking into account his performance and ability at the time the Appeal Committee made its decision.
- The Appeal Committee failed to take into account relevant considerations, namely, the selection criteria set out in Clause 22, the failure of Mr Alexander to meet those selection criteria, and the failure of Mr Alexander to improve his world ranking since his return from surgery.
- The Appeal Committee interpreted Clause 23 to be a team selection criterion rather than a guideline for nominating doubles pairings following team selection in accordance with Clause 22.
- The Appeal Committee failed to consider properly the way in which the athletes met the selection criteria in the Selection Policy.

While those grounds were propounded in the application to the Court, they were not all addressed in the written or oral submissions. In the light of the urgency involved in these proceedings, I shall deal only with the grounds that were supported in submissions.

41. In addition to the material that was before the Appeal Committee on 3 July 2014, I had as evidence on the hearing of this appeal to the Court a statement from Mr Karwalski dated 5 July 2014, together with an additional statement of Mr Palmer dated 4 July 2014 and a further letter from Mr Davis dated 4 July 2014, in which they each repeated their views concerning their preference for Mr Karwalski over Mr Alexander.
42. Mr Alexander made a brief email submission to the Court, in which he said that he had found *“this whole ordeal”* to be *“quite overwhelming”*. He said he believed that he had earned the place in the team and that that conclusion had been strongly supported by the governing body of, and everyone involved in, Squash Australia. He said that the last two failed appeals by Mr Karwalski were evidence enough that the right team had been chosen and he believed that he had been playing better than Mr Karwalski over the last six months, he having won two PSA events and Mr Karwalski having won none. He said that he believed that he had *“better chemistry”* with Mr Cuskelly and that there were countless other reasons that had been highlighted by the continuing support given to him by the governing body of Squash Australia. He expressed the wish that he could still play in Scotland. There was no suggestion that any “support” given to Mr Alexander went beyond the materials to which I have referred and which were before the Appeal Committee.
43. Mr John Lee, a director of Squash Australia, who represented Squash Australia at the hearing before me, submitted that the Appeal Committee gave consideration to all relevant matters, and that the Appeal Committee had the relevant material before it, gave consideration to that material and did not consider any irrelevant matter.
44. Mr Lee contended that, even if the appeal process were infected with invalidity by reason of a denial of procedural fairness, a *de novo* determination of the issue would result in the same conclusion. He said that the opinion of Mr Palmer must be ignored because he is *“hopelessly compromised”*, and pointed out that the opinions expressed by Mr Eyles in his original report and in the 17 June Recommendation were given in the context of his expertise as National Head Coach. Further, Mr Lee contended, the opinion of Mr Davis carried little weight as against that of Mr Eyles, the current National Head Coach, whose very task is to express an opinion about the optimal team composition. Mr Lee also pointed to the fact that Mr Eyles received support from Ms Fitz-Gerald, the women’s coach. On the other hand, the only support from Ms Fitz-Gerald is that contained in the material attached to the April Board Paper and there was no indication that Ms Fitz-Gerald has been informed of any of the subsequent exchanges.
45. Mr Karwalski accepts that the Court must find error on the part of the Appeal Committee. He contends for three errors. The first is that the Appeal Committee adopted an erroneous construction of Clauses 20 to 26 of the Selection Policy. Secondly, he says that the Appeal Committee failed to apply those clauses, which, for the most part, he says, called for an objective assessment of candidates for selection by reference to the criteria specified. Mr Karwalski says that the Appeal Committee placed overdue emphasis and gave too much weight to the subjective assessment of Mr Eyles, as National Talent Development Coach. Thirdly, he contends that he was denied procedural fairness by the Appeal Committee in several respects.

46. Mr Karwalski complains about the approach to Clauses 20 to 26 adopted by the Appeal Committee. The Appeal Committee rejected Mr Karwalski's argument that the selection process should be guided by dealing first with Clause 22 followed by Clause 23. He complains that that view also motivated the Selection Committee. He says that such a view about the operation of the relevant clauses of the Selection Policy involves a clear mistake and the adoption of an incorrect procedure. Mr Karwalski contends that the relevant clauses should be read in the ordinary way in which a document is normally read, namely, from the beginning onwards. He says, that, on that approach, the team members should be selected first, by the application of the criteria in Clause 22. Once the team has been chosen, the allocation of members to doubles pairings under Clause 23 would then be undertaken. He says that Clause 23 would not come into operation until each member had been selected by application of the criteria in Clause 22.
  
47. Mr Karwalski also complains about the reliance placed by the Appeal Committee on Clause 21 as having an overarching role. He suggests that, based on the statement in the June Selection Summary that the decision "*will give Australia the best chance*", it is implicit in the Selection Committee's decision of 17 June 2014 that a similar view drove that decision. Mr Karwalski complains that the approach of the Appeal Committee was erroneous in suggesting that there was some sort of discretion at large to pick athletes that are subjectively thought to constitute Australia's best chance of winning a medal at the Games.
  
48. While the Appeal Committee may not have expressed its reasoning as felicitously as it might, I do not consider that there was error in the approach adopted by it. That is to say, it was not erroneous to have regard to the exhortation in Clause 21 that the athletes were to be nominated on the basis that the opportunity of the team achieving the Team Goal be maximised. The Team Goal, set out earlier in Clause 6 of the Selection Policy, was clearly enough the object of selecting a team to compete at the Commonwealth Games. The fact that Clause 21 refers back to the Team Goal suggests that it is a consideration to be borne in mind by the selectors when applying the specific criteria set out in Clause 22. Further, the Selection Policy must be read as a whole. Certainly, to make sense of any document, one begins at the beginning and proceeds to the end. Nevertheless, it is appropriate to have regard to the object of the exercise that is being undertaken. That exercise is to choose a team to represent Australia at the Commonwealth Games with a view to achieving the Team Goal. In applying the specific criteria set out in Clause 22, it would be unrealistic to ignore the direction contained in Clause 23 that the pair considered to have the best prospects of winning gold will be nominated for doubles competitions. It is not inconsistent with the application of the specific criteria in Clause 22 to have regard to the fact that there are both singles competitions and doubles competitions.
  
49. Of course, it would not be consistent with the Selection Policy to ignore the criteria in Clause 22 in order to achieve the best prospects of winning gold medals in the doubles competition. However, that is not the approach adopted by the Appeal Committee. It did not ignore Clause 22; on the contrary, it set out the criteria listed in that clause and concluded, as I have recounted above, that the "*balance and weight*" applied to those criteria by the Selection Committee were "*appropriate*" and "*consistent with the overarching Team Goal*".

50. However, the manner in which the Appeal Committee considered the selection criteria contained in Clause 22 demonstrates that it approached the appeal not as a hearing *de novo* but as a review of the Selection Committee's 17 June decision. While that matter was not explicitly addressed in submissions, it warrants comment. Clause 38 of the Selection Policy provides that the Appeal Committee "*will conduct the appeal de novo*" but, as Clause 37 provides, the Appeal Committee must also conduct the appeal process in accordance with the Guidelines. Clause 7 of the Guidelines provides that the Appeal Committee "*will function as a committee of review and will not take on the role of an alternate [sic] Selection Committee*". There is thus necessarily an inconsistency between the requirement of Clause 38 of the Selection Policy and Clause 7 of the Guidelines. The better view must be that, in the event of inconsistency between the Selection Policy and the Guidelines, the former prevails. At least in respect of its consideration of Clause 22 of the Selection Policy, then, it is clear that the Appeal Committee did not comply with Clause 38 of the Selection Policy.
51. In addition, it is clear enough that there has been a quite serious denial of procedural fairness in the hearing by the Appeal Committee on 3 July 2014, in so far as Mr Karwalski was not provided with either the April Board Paper or the 17 June Recommendation. Further, he was not provided with any of their contents, except the extracts from the coaches' reports that related to him. I consider that the Appeal Committee denied itself the opportunity of any submissions that might have been advanced on behalf of Mr Karwalski in response to the material contained in those documents. It follows, in my view, that the decision of the Appeal Committee of 3 July 2014, as evidenced by the July Appeal Summary, should be set aside. The question remains, however, as to what further relief should be granted by the Court.
52. Mr Karwalski contends that, having regard to the history of the dispute, in which there have been two recommendations by the Selection Committee and two decisions by Appeal Committees, the Court should substitute its own decision. That submission is made in the context where the Commonwealth Games are due to begin in Glasgow in less than three weeks and arrangements must be put in place with some urgency if there is to be any change in the team. Squash Australia submitted, on the other hand, that, if the decision of the Appeal Committee were to be set aside, it is nevertheless appropriate for the matter to be remitted to the Appeal Committee for further consideration. With some reservation, having regard to the history of the dispute and the imminent commencement of the Commonwealth Games, I have concluded that the preferable course is to remit the matter back to the Appeal Committee for reconsideration in the light of these reasons.
53. The Appeal Committee's deliberation should be based upon the material presently before the Court, including the statements from Mr Karwalski, Mr Palmer and Mr Davis. While the views expressed by Mr Eyles are clearly relevant, they should not be determinative. The Appeal Committee must make its own judgment based on Clauses 20 to 26 and, in particular, the criteria in Clause 22. The Appeal Committee should have regard to the material that was previously furnished to it on behalf of Mr Karwalski and any additional material that Mr Karwalski may wish to place before it in the light of these reasons. Importantly, the Appeal

Committee's deliberation should be conducted *de novo*, as required by Clause 38 of the Selection Policy.

54. Now that Mr Karwalski has had the opportunity of considering the April Board Paper and the 17 June Recommendation, his responses to that material must be considered by the Appeal Committee. Despite the contention advanced on behalf of Squash Australia, the result of further deliberation by the Appeal Committee must not be regarded as foregone conclusion. The Appeal Committee must bring an open mind to bear on the selection process in the light of all of the material now available to it. The weight that it gives to the respective opinions of Mr Eyles, Mr Palmer and Mr Davis are a matter for the Appeal Committee, in the light of any submissions that may be made on behalf of Squash Australia or Mr Karwalski.

## CONCLUSION

55. The appeal to the Court should be allowed. The decision of the Appeal Committee of 4 July 2014 should be set aside. The matter should be referred back to the Appeal Committee for further consideration in the light of these reasons.

## ON THESE GROUNDS

**The Court of Arbitration for Sport rules that:**

1. The appeal be allowed.
2. The matter be referred back to the Squash Australia Appeal Committee for further consideration in the light of these reasons.
3. (...).
4. (...).