



Arbitration CAS ad hoc Division (OG Sochi) 14/001 Daniela Bauer v. Austrian Olympic Committee (AOC) & Austrian Ski Federation (ASF), award of 4 February 2014

Panel: Mr Patrick Lafranchi (Switzerland), President; Judge Robert Decary (Canada); Prof. Matthew Mitten (USA)

Freestyle skiing (ski halfpipe)

Selection for the Olympic Games

Legitimate expectations

Lack of requirement for a National Federation to recommend an athlete for nomination

Discretion of the National Federation for recommending an athlete to its NOC for nomination

1. **Email and verbal representations made to an athlete by the person responsible for a department of a National Federation (NF) may create towards an athlete an expectation that that NF will recommend to its NOC the nomination of the athlete for a quota allocation if he/she meets the International Federation minimum qualification standards. However, this can only happen if the person responsible has the authority on behalf of the NF to guarantee or promise that this will occur.**
2. **No Olympic Charter provision or FIS rule require a NF to recommend to its NOC that an athlete who has satisfied the FIS minimum Olympic Games qualification requirements be nominated for a quota allocation. The FIS allocation quotas establish a maximum number of participants for an event and the means for filling these spots, but they do not establish any requirement that its NF must follow in making recommendations to their respective NOCs regarding quota allocation nominations.**
3. **There is a legal duty not to be arbitrary, unfair or unreasonable in the application of objective criteria or in the exercise of subjective discretion. However, a National Federation which has a legitimate sports performance justification for not recommending to its NOC the nomination of an athlete for an allocation quota does not exercise its discretion in an arbitrary, unfair, or unreasonable manner.**

1. THE PARTIES

- 1.1 The Applicant is Ms Daniela Bauer, a member of the Austrian Ski Federation. She is an Austrian halfpipe freestyle skier.
- 1.2 The first Respondent is the Austrian Olympic Committee (AOC). It is the National Olympic Committee of Austria. Pursuant to the Olympic Charter (OC), Chapter 4, Rule 27.7.2, the AOC

has *“the right to send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter”*.

- 1.3 The second Respondent is the Austrian Ski Federation (ASF). It is the national federation responsible for the sport of skiing in Austria.
- 1.4 The first Interested Party is Ms Heejin Park. She is a South Korean halfpipe freestyle skier and a member of the South Korean Ski Federation.
- 1.5 The second Interested Party is the International Olympic Committee (IOC), which is the organisation responsible for the Olympic movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organise, plan, oversee and sanction the summer and winter Olympic Games, fulfilling the mission, role and responsibilities assigned by the OC.
- 1.6 The third Interested Party is the International Ski Federation (FIS). It is the International Federation responsible for the sport of skiing.

2. THE FACTS

- 2.1 The elements set out below are a summary of the main relevant facts as established by the Panel on the basis of the submissions of the parties. Additional facts may be set out, where relevant, in the legal considerations of the award.
- 2.2 In October 2012, Mr. Christian Rijavec, the person responsible for the Freestyle department of the ASF, and Nathan Zentfeld, the trainer of the Applicant, communicated by email concerning the qualification criteria and the quota places for the Olympic Winter Games in Sochi 2014.
- 2.3 In October 2013, the AOC made a public announcement on its website indicating that all quota places allocated to Austria would be accepted.
- 2.4 On 20 January 2014, the FIS published its list of “[q]uota calculation detail for FREESTYLE” and a list of next eligible NOCs for Freestyle. Three female halfpipe freestyle spots were reallocated to the next eligible NOCs after the Canada, Japan and Norway NOCs each had declined one spot. Those spots were reallocated respectively to the NOCs of Austria, Japan and Germany. Only the NOC of Germany accepted one of the spots; the two other NOCs, including the one of Austria, declined. The two remaining spots were reallocated to the NOCs of Russia and Canada, and only the former accepted the spot. The final spot was then reallocated to the NOCs of the Netherlands and Sweden (which each declined) and finally to the NOC of South Korea, which accepted.
- 2.5 On 20, 21 and 22 January 2014 however, Mr. Christian Rijavec indicated to the Applicant by email that she should be able to participate in the Olympic Games if Austria obtained a quota place and in view of the fact that Ms. Elizabeth Gram, another Austrian halfpipe freestyle skier,

was injured. The Applicant was provided with a travel schedule and a pre-Olympic training program.

- 2.6 On 25 January 2014, the FIS published the final list of the Olympic Games female participants in Freestyle Skiing (the “List”). The Applicant was not listed therein.
- 2.7 On the occasion of a telephone conversation on 26 January 2014, the Applicant was informed by Mr. Hans Pum, the ASF Sporting Director, that the AOC had declined to use the quota place for female halfpipe freestyle. The same day, the Applicant received copy of an email that Mr. Bartl Gensbichler, President of the Salzburg Ski Federation, had sent to Mr. Christian Rijavec, in which he expressed his surprise that the Applicant was not on the List.
- 2.8 On 27 January 2014, the Applicant was informed by Mr. Christian Rijavec by email that she had not been recommended by the ASF on the “*basis of sporting estimates*”. In response to this email, the Applicant was critical of Mr. Christian Rijavec in an email which she published on the Internet and forwarded to several persons.
- 2.9 On the same day, Mr. Christian Rijavec responded to this email and stated the following: “[w]here Elisabeth and you are in a world ranking list is irrelevant, as you are competing in every worldcup there is, whereas Elisabeth Gram can only participate in certain worldcups due to her schooling. At the worldcups she was always better than you by far – to nominate her (for Sochi) would have thus been a normal process that happens in every country and discipline”.
- 2.10 On 28 January 2013, Mr. Hello Haas, member of the Committee for freestyle skiing of the ASF, responded to the Applicant’s email and stated that the Federation did not accept reallocated quota places in moguls on the basis that the sporting performances of the Austrian athletes in this discipline were not good enough and would adversely affect the overall perception of the Federation and its athletes at the Olympics.
- 2.11 On 30 January 2014, the Applicant’s counsel submitted a formal written request to the ASF and the AOC to be provided with an explanation for the Applicant’s non-confirmation for a quota place. Neither Respondent provided any response to this communication.

3. THE CAS PROCEEDINGS

- 3.1 An application, along with 14 exhibits, was received at 8 am on 2 February 2014 with the CAS ad hoc Division.
- 3.2 In her Application, the Applicant requested the following:

“(1) *To annul the decision of the Austrian Ski Federation dated 23 or 24 January 2014 in the form of failure to recommend Mrs. Daniela Bauer to the Austrian Olympic Committee as a participant of Freestyle Halfpipe discipline at the XXII Olympic Winter Games in Sochi;*

- (2) *To annul the decision of the Austrian Olympic Committee dated 23 or 24 January 2014 in the form of non-confirmation of the quota place allocated for participation in the XXII Olympic Winter Games in Sochi, Freestyle Halfpipe discipline;*
 - (3) *To declare Mrs. Daniela Bauer selected to represent Austria in the Freestyle Halfpipe discipline at the XXII Olympic Winter Games in Sochi;*
 - (4) *To order the Austrian Olympic Committee and the Austrian Ski Federation to place Daniela Bauer in the Olympic Team of Austria and to make all arrangements necessary to enable Mrs. Daniela Bauer to represent Austria in the Freestyle Halfpipe discipline at the XXII Olympic Winter Games in Sochi, including obtaining the corresponding accreditation of the International Olympic Committee;*
 - (5) *To grant any other relief that the Arbitration Tribunal will find just and appropriate”.*
- 3.3 On 2 February 2014, the Panel gave the Respondents and the Interested Parties a deadline of 3 February 2014, 1 pm, to file, if they so wished, written observations, including any evidence and witness statements, to the application.
- 3.4 On 2 February 2014 at 1 pm, the Applicant filed three new exhibits.
- 3.5 The Respondents filed a joint response on 3 February 2014 at 1 pm, requesting that the Application be dismissed.
- 3.6 On 3 February 2014 at 4 pm, the second Interested Party filed its observations.
- 3.7 The first and third Interested Parties did not file any observations.
- 3.8 A hearing was held on 3 February 2014 at the CAS ad hoc Division’s offices at the Ayvazovsky Hotel, 1 Morskoy Boulevard, Adler District, 354340 Russia. It started at 5.15 pm and ended at 6.45 pm. The Applicant attended the hearing via telephone and was represented by her two lawyers, Mr. Anton Vasin and Mr. Alan Bayramkulov. The Respondents were represented at the hearing by Mr. Hannes Maschkan, the Chef de Mission of the AOC. The Interested Parties did not attend the hearing.
- 3.9 At the outset of the hearing, the parties confirmed that they had no objection as to the composition of the Panel. At the conclusion of the hearing, in response to the President of the Panel's query, each party affirmed that it had received a full and fair hearing, that it was treated equally, and that there were no additional matters or requests that it wished to raise.

4. THE PARTIES' SUBMISSIONS

A. *The Applicant's Submissions*

- 4.1 The Applicant challenges the ASF's failure to recommend her to the AOC as a participant in the Women's Freestyle Halfpipe discipline and the AOC's failure to nominate her for the quota place reallocated to Austria.
- 4.2 The Applicant's arguments may be summarized as follows:
- a) The ASF and the AOC, by their public conduct, undertook an obligation that every Austrian athlete qualified under the FIS Rules would be selected to participate in the Olympic Games through the acceptance by the AOC of all quota places allocated to it. The Respondents' conduct induced legitimate expectations in the Applicant that having qualified under the FIS Rules she would be selected through the use of quota places. The Respondents, in view of this situation, are estopped from changing their course of action, i.e. from relying on their authority in any given case to decline the quota allocated to Austria. The Applicant does not question the discretion afforded to the Respondents to decline the quota. She rather questions the fact that the Respondents had agreed not to exercise their discretion in that fashion.
 - b) The right of the ASF to recommend an athlete to the AOC (Rule 44.4 of the OC) as well as the right of the AOC to select an athlete for the Olympic Games (Rule 27.7.2 of the OC) cannot be exercised in an unreasonable manner. In the present case, both Respondents failed to observe the standard of reasonableness:
 - i) no reasons were given, neither at the time of the decisions nor upon formal request made by the Applicant;
 - ii) the Respondents' discretion not to recommend and select her was exercised arbitrarily, i.e. it was not based on any objective grounds and was, rather, based *post facto* on a criterion (the sporting perspective) that cannot be verified by any objective means;
 - iii) the Applicant was never notified that reference would be made to the above-mentioned criterion of sporting perspective, which is materially different from the FIS Rules;
 - iv) the AOC violated Rule 44.4 of the OC by not investigating whether the ASF's non-recommendation was based on discrimination;
 - v) the AOC should accept all the quotas allocated to it, irrespective of the potential results of the nominated athletes; and
 - vi) the Applicant should have been immediately informed of the decisions taken by the ASF and the AOC.
 - c) In addition, the Respondents violated the principle of equal treatment provided in the OC as the Applicant was treated less favourably than other Austrian athletes in Freestyle for whom the Respondents confirmed the quota places.

B. *Respondents' Submissions*

4.3 The Respondents' submissions may be summarized as follows:

- a) No person has the authority to bind the ASF and the AOC with respect to the Applicant's participation in the Olympic Games.
- b) The performance and results of the Applicant were and are not sufficient enough to allow her to reach a positive result at the Olympics.
- c) The AOC has the exclusive authority under Rule 27 of the OC to decide which athletes shall take part in the Olympic Games; an athlete does not have an individual right to reach a quota place.

4.4 At the hearing, Mr. Hannes Maschkan, Chef de Mission of the AOC, declared the following:

- the AOC has the exclusive authority to make the nomination and it does so based on the recommendation of the ASF;
- when no recommendation is made by the ASF, the AOC does not overrule or question the decision of the ASF not to recommend the athlete;
- Mr. Christian Rijavec reports to Mr. Hello Haas, who in turn reports to Mr. Hans Pum and the latter reports to the board of directors of the Federation, which has authority to make participation recommendations to the AOC;
- the FIS Qualification Systems for XXII Olympic Winter Games, Sochi 2014 (the "Qualification Rules") do not establish any requirements that its national federations must follow in making athletes' recommendations;
- the FIS Qualification Rules only establish the total maximum number of participants and the slots available to a country;
- the AOC nominates all athletes recommended by a national federation, including the ASF;
- the ASF has not published criteria regarding its standards for selection of freestyle skiers or qualifications for quota allocations;
- the ASF changed its qualification system a few years ago in order to provide it with more discretion and flexibility to choose athletes with strong future athletic performance potential;
- the ASF has no objective athlete qualification criteria; its recommendations are largely subjective based on its evaluation of an athlete's level of technical skill;
- in recommending athletes to the AOC, the ASF may give preference to young athletes with strong performance potential;
- the decision not to recommend the Applicant was not made for personal reasons, but was made because the ASF determined she lacked the technical skill level to achieve a strong showing at the Olympic Winter Games in Sochi;

- in addition to freestyle skiing, the ASF did not recommend otherwise eligible athletes to the AOC in the disciplines of cross-country, biathlon and bobsleigh even though there were quota places available for the AOC.

4.5 The Respondents request from the Panel that the application be dismissed.

C. Second Interested Party's Observation

4.6 The second Interested Party indicated that it will not agree to add an additional quota spot as the present matter "*is an internal NOC dispute which should not lead to any changes to the current athletes' quota*".

5. APPLICABLE PROCEDURAL LAW

5.1 These proceedings are governed by the CAS Arbitration Rules for the Olympic Games (the "CAS ad hoc Rules") enacted by the International Council of Arbitration for Sport (ICAS) on 10 July 2012. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (PIL Act). The PIL Act applies to this arbitration as a result of the express choice of law contained in Art. 7 of the CAS ad hoc Rules and as the result of the choice of Lausanne, Switzerland, as the seat of the ad hoc Division and of its panels of Arbitrators, pursuant to Art. 7 of the CAS ad hoc Rules.

6. JURISDICTION AND ADMISSIBILITY

6.1 The jurisdiction of the CAS ad hoc Division is defined in Art. 1 of the CAS ad hoc Rules and Rule 61 of the OC. Generally, the Panel has to examine the existence of the procedural requirements *ex officio*. However, the validity and the scope of an arbitration clause only have to be analysed if an exception of inadmissibility is raised (KELLERHALS/BERGER, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Rz. 626; HEINI A., in: *Zürcher Kommentar zum IPRG*, N 7 to Art. 186 CPIL).

6.2 At the beginning of the hearing, all the Parties expressly accepted the jurisdiction of the CAS ad hoc Division.

6.3 In view of the above, the Panel determines that the CAS ad hoc Division has jurisdiction to deal with the present application.

7. THE MERITS

- 7.1 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*”.
- 7.2 The Panel notes that the “*applicable regulations*” in this case are the rules and regulations of the ASF, the AOC and the FIS which apply in addition to the OC and the other applicable IOC rules.
- 7.3 The applicable regulations do not contain any provision regarding their interpretation. According to Art. 17 of the CAS ad hoc Rules, the Panel shall resolve the dispute pursuant to the rules of law it deems appropriate. As established in CAS jurisprudence, the interpretation of statutes and of similar instruments should be governed by Swiss law (cf. e.g. CAS 2001/A/354 & CAS 2001/A/355 para. 7 *et seq.*; CAS 2008/A/1502; CAS OG 12/002).
- 7.4 The Panel finds that although “[*t*]he practice of sport is a human right” and “[*e*]very individual must have the possibility of practising sport, without discrimination of any kind” (OC, Fundamental Principles of Olympism, 4), “[*n*]obody is entitled as of right to participate in the Olympic Games” (Rule 44.3 of the OC). Moreover, “[*a*]ny form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement” (OC, Fundamental Principles of Olympism, 6).
- 7.5 At national level, a national Olympic committee (NOC) has the exclusive right to “*send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter*” (Rule 27.7.2 of the OC). According to CAS jurisprudence, “[*i*]t is not in issue that it is for an NOC to select its competitors for the Olympics. No other body or person within a member country has that right” (CAS OG 08/003).
- 7.6 Rule 44.4 of the OC provides that: “[*a*]n NOC shall only enter competitors upon the recommendations for entries given by national federations. If the NOC approves thereof, it shall transmit such entries to the OCOG. The OCOG must acknowledge their receipt. NOCs must investigate the validity of the entries proposed by the national federations and ensure that no one has been excluded for racial, religious or political reasons or by reason of other forms of discrimination”.
- 7.7 The Applicant does not allege that the Respondents discriminated against her for “*racial, religious or political reasons*” but claims that she has been excluded “*by reason of other forms of discrimination*” because the ASF recommended and the AOC nominated a female athlete for slopestyle and a male athlete for halfpipe for quota allocations.
- 7.8 However, the Panel finds that the AOC did not discriminate against the Applicant in violation of Rule 44.4 of the OC as she is not in the same situation as these other two athletes. Unlike these athletes who were recommended for a quota allocation by the ASF, the Applicant had not been recommended by the ASF for sports performance-related reasons when the AOC declined its women’s halfpipe quota allocation on 20 January 2014.

- 7.9 The Panel considers that the AOC's refusal to nominate the Applicant is consistent with a quote attributed to Mr. Maschkan on the homepage of the Austrian Television ORF dated 30 October 2013 which states that "[w]e will of course after talking to the respective federations, accept all quota places" (<http://sport.orf.at/stories/2194782/2194783/>). At the hearing, Mr. Maschkan testified that the ASF officials were concerned that the Applicant would not perform well at the Sochi Olympic Games because she did not have the necessary technical skills for this level of competition.
- 7.10 Furthermore, the Panel decides that although the Applicant satisfied the FIS minimum qualification standards and the AOC was below its maximum athlete quotas for all freestyle events, the AOC would have violated the OC by nominating her for a quota allocation for women's halfpipe as she had not been recommended by the ASF.
- 7.11 The Panel notes that Rule 44.5 of the OC, in relevant parts, provides that "[t]he NOCs shall send to the Olympic Games only those competitors adequately prepared for high level international competition (...)".
- 7.12 In essence, this is a dispute between the Applicant and the ASF. Mr. Maschkan testified that the AOC would have nominated her for a quota allocation for women's halfpipe if she had been recommended by the ASF. Email and verbal representations made to her by Mr. Rijavec may have created an expectation that the ASF would recommend to the AOC that she would be nominated for a quota allocation in women's halfpipe had she met the FIS minimum qualification standards and finished in the top 17 in a World Cup event. However, Mr. Rijavec did not have any authority on behalf of the ASF to guarantee or promise that this would occur. In this respect, the Panel notes that it is undisputed that Mr. Rijavec was not authorized to make any representations, promises, or guarantees regarding whether the AOC would nominate her if she satisfied these standards.
- 7.13 Referring to Rule 29 of the OC, a national federation (NF) must "*comply in all aspects with both the Olympic Charter and the rules of its IF*". The parties have not identified any OC provision or FIS rule requiring a NF to recommend to its NOC that an athlete who has satisfied the FIS minimum Olympic Games qualification requirements be nominated for a quota allocation. The FIS allocation quotas establish a maximum number of participants for an event and the means for filling these spots, but they do not establish any requirement that its NF must follow in making recommendations to their respective NOCs regarding quota allocation nominations.
- 7.14 A NF must not discriminate against an athlete "*on grounds of race, religion, politics, gender or otherwise*" (OC, Fundamental Principles of Olympism, 6). The Applicant does not allege that the ASF discriminated her on the basis of race, religion, politics, or gender. Mr. Maschkan testified that the AOC and the ASF do not have a maximum age limit for freestyle skiing. Although the Panel notes that the ASF would have nominated Elizabeth Gram, an athlete younger than the Applicant, for the women's halfpipe quota allocation (if she had not been injured) because of her perceived stronger performance potential, the Panel determines that this does not constitute age discrimination. Furthermore, although the ASF recommended two other freestyle skiers (a male halfpipe skier and a female slopestyle skier) for allocation quotas based on its judgment

that they were promising young athletes with upward performance potential, the Panel finds that the ASF's conclusion that the Applicant did not possess similar potential does not constitute discrimination.

- 7.15 According to Mr. Maschkan, the ASF does not have any published criteria regarding its standards for selection of freestyle skiers or qualifications for quota allocations. Thus, the ASF has a significant degree of subjective discretion (which must be exercised in accordance with the requirements of the OC and the FIS regulations) and the ASF's regulations do not contain any qualification rules and therefore no objective criteria in this respect which would qualify a freestyle skier for the Austrian Olympic team if satisfied. The Panel finds that this is in contrast to a situation in which a NF has 1) purely objective criteria as in CAS OG 06/008; or 2) objective criteria which requires the exercise of subjective discretion in applying them as in CAS OG 06/002. In all three situations, a NF has a legal duty not to be arbitrary, unfair, or unreasonable. Based on the submitted evidence in the present case, the Panel concludes that the ASF did not exercise its discretion in an arbitrary, unfair, or unreasonable manner because it had a legitimate sports performance justification for not recommending that the AOC nominate the Applicant for an allocation quota in women's halfpipe.
- 7.16 Notwithstanding that the ASF acted within its discretion, the Panel wishes to express in clear terms that it does not condone its lack of published qualification criteria that misled the Applicant by failing to provide clear and timely notice of the performance standards she was required to meet in order to be recommended by the ASF for nomination by the AOC to the Austrian Olympic team. To avoid any future confusion, uncertainty, qualification conflicts, and athletes' disappointed expectations, the Panel strongly recommends that the ASF establish, identify, and publish clear criteria to enable athletes to determine in a timely manner the Olympic Games qualification standards they are required to meet to be recommended for selection by the AOC.
- 7.17 Based on the foregoing evidence and legal analysis, the Panel concludes that none of Applicant's claims have merit.

8. OVERALL CONCLUSION

- 8.1 The application filed by the Applicant against the Respondents is dismissed and their decisions are hereby confirmed.

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

1. The application filed by Ms. Daniela Bauer is rejected.
2. (...).