Arbitration CAS ad hoc Division (OG Sochi) 14/003 Maria Belen Simari Birkner v. Comité Olímpico Argentino (COA) & Federación Argentina de Ski y Andinismo (FASA), award of 13 February 2014

Panel: Judge Annabelle Bennett (Australia), President; Prof. Brigitte Stern (France); Mr David Wei Wu (China)

Alpine skiing
Selection for the Olympic Games
Jurisdiction ratione temporis of the CAS ad hoc Division
Duty of the national association not to discriminate in the selection of athletes

1. **The CAS ad hoc Division only has jurisdiction to deal with disputes which arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony. The date when a dispute arises cannot, *per se*, be the date when a request for arbitration is filed. A dispute has to be distinguished from a claim; the dispute will have arisen before the formal presentation of a claim to a tribunal. In general, the date when a dispute arises is the date of the decision with which the applicant disagrees. Such a date can arise later, in some cases, if, for example, the decision is not self-explanatory and requires some explanation in order for the parties to know with certainty that they are in disagreement. Evidence would however be required to establish whether a later date than the date of the decision should apply.**

2 **There is a legal duty not to be arbitrary, unfair or unreasonable in the application of objective selection criteria or in the exercise of subjective discretion for the selection. A discretion based on sports performance or on *"the evolution and projection in the future"* is legitimate and is not arbitrary, unfair or unreasonable.**

1. THE PARTIES

1.1 The Applicant is Ms Maria Belen Simari Birkner, an Argentinean skier born in 1982 and competing in the discipline of Alpine Skiing. Ms Simari Birkner competed *inter alia* at the Olympic Winter Games in 2002, 2006 and 2010. There are three other children in the Simari Birkner family, two of whom are members of the Argentinean team for the XXII Olympic Winter Games in Sochi ("the Sochi Olympic Games").

1.2 The First Respondent is the National Olympic Committee for Argentina (*Comité Olímpico Argentino* – COA). Pursuant to Chapter 4, Rule 27.7.2 of the OC, COA has *"the right to send*

competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter".

1.3 The Second Respondent is the Argentinean Ski Federation (the *Federación Argentina de Ski y Andinismo* – FASA). It is the national federation responsible for the sport of skiing in Argentina.

1.4 The First Interested Party is Ms Julietta Quiroga, an Argentinean alpine skier competing under the auspices of FIS. The COA has allocated Ms Quiroga an Olympic quota.

1.5 The Second Interested Party is Ms Salome Bancora, an Argentinean alpine skier competing under the auspices of FIS. The COA has allocated Ms Bancora an Olympic quota.

1.6 The Third Interested Party is the International Ski Federation (FIS), which is the International Federation responsible for the sport of skiing. In accordance with Chapter 3, Rule 26.1.5 of the Olympic Charter (OC), FIS has the *"mission and role"* within the Olympic Movement *"to establish … criteria of eligibility for the competitions of the Olympic Games in conformity with the Olympic Charter, and to submit these to the IOC for approval"*.

1.7 The Fourth Interested Party is the International Olympic Committee (IOC), which is the organisation responsible for the Olympic Movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organise, plan, oversee and sanction the summer and winter Olympic Games, fulfilling the mission, role and responsibilities assigned by the OC.

2. THE FACTS

2.1 Set out below is a summary of the background facts as found by the Panel on the basis of the evidence and submissions presented by the Parties. Additional facts are set out, where relevant, in the consideration of the merits. The facts make reference to documents, a translation of which has been provided by the Applicant from Spanish to English. In some cases, the Panel has included terminology as set out in the translation provided; in one case, a corrected translation was agreed by the Parties at the hearing.

2.2 In March 2010, FASA instituted a National Team program in Argentina. The program included many of the country's top athletes in alpine skiing. It did not include the Applicant or her siblings.

2.3 The qualification process for participation in the Sochi Olympic Games started in July 2012 and ended on 19 January 2014.

2.4 In that period, the Applicant participated in numerous FIS events, including different events in the European Cup, Argentinean and South American National Championships, North American Cup and South American Cup.

2.5 On 6 December 2013, after alleged earlier oral requests, the Applicant's coach made a request in writing for the criteria for determination of the Olympic athletes. A first response from the *"chef de mission"* and member of COA of the same date did not provide specific criteria but referred generally to *"objective and subjective"* variables that *"could be, or not, with the form of a regulation"*.

2.6 By letter dated 20 January 2014, FASA conveyed its decision, that the Applicant was not selected for the Argentinean National Team for participation in the Sochi Olympic Games.

2.7 By a letter to the Applicant's coach dated 20 January 2014 (but said by the Applicant to have been received on 22 January), FASA stated that the *"evolution and projection in the future"* was the main criterion for the evaluation of the merits of the athletes. We note that the English translation of this part of the letter does not convey the sense of the original Spanish. The Spanish is as follows: *"[p]or ello FASA privilegio la evolución y proyección a future como un criterio objetivo para evaluar los meritós de las atletas"*. The translation provided was: *"[t]hat is why FASA hopes for the evolution and projection in the future of objective criteria to evaluate the merits of the athletes"*. At the hearing, it was agreed that the correct translation is: *"because of this, FASA prioritises the evolution and projection in the future as an objective criterion to evaluate the merits of the athletes"*.

2.8 The letter stated *"[a]s you know, in FASA we work with a technical committee for alpine ski since last year 2013"*. The letter also attached a report from the Technical Committee (the "Report") concerning the selection of the women members of the Argentinean team for the Sochi Olympic Games.

2.9 The evidence as to the timing of the formation of the Technical Committee is not clear. There was evidence that it was formed in 2012 but more cogent evidence that it was formed in early 2013. In any event, it was formed some time before the team selection was made. In October 2013, the President of the club of which the Applicant and her parents are members, who is also a member of FASA, attended the annual meeting of FASA at which the Respondents say that the Technical Committee's role was referred to. The Applicant and her parents say that they were not informed of this fact.

2.10 The Report stated that the Technical Committee analysed the performance, training and results of the qualified athletes and the coaches' reports related to the *"physical form and situation with injuries"*. In addition, the following *"elements"* were considered (as translated):

- *"Age and future projection of athletes.*
- *Performance in the last season, ranked in SAC [South American Cup].*
- *Dedication to the training, physical and technical.*
- *Participation in the competitions organized by FASA.*
- *Behaviour on and off the slopes.*
- *Formation of the athletes in the structures of clubs, regional federations and national federation.*
- *Priority to the technical disciplines, that is possible to race and training in the country, with consideration of significant results in speed disciplines, if their (sic) exist".*

2.11 The Report continued to set out the consideration concerning the Applicant and the first and second Interested Parties. It stated that the women were all on *"the same technical level in technical disciplines"* but that the first and second Interested Parties were national champions in Slalom and Giant Slalom and winners of the South American Cup. Further, it was *"a defining advantage"* that they worked in the National Team Program in considering *"the projection views for the next Olympic cycle"*. Accordingly, the first and second Interested Parties were given priority over the Applicant. However, the Applicant's sister was awarded the first place, noting that she can race in the five disciplines.

3. THE CAS PROCEEDINGS

3.1 An Application, together with 17 exhibits, was received at 4.25 pm on 11 February 2014 by the CAS *ad hoc* Division (the "*ad hoc* Division").

3.2 In her Application, the Applicant sought the following order from the Tribunal:

"(1) An order that the Argentinean NOC enters Ms. Maria Belen Simari Birkner in the XXII Olympic Winter Games to compete in the Alpine Skiing events of Slalom, Super G and Giant Slalom; and

(2) An order that FIS and/or IOC take all the reasonable measures necessary to facilitate Ms. Maria Belen Simari Birkner's actual participation in the Alpine Skiing events of the XXII Olympic Winter Games, including providing accreditation to Ms. Maria Belen Simari Birkner".

3.3 On 11 February 2014, the Panel gave the Respondents and the Interested Parties a deadline of 12 February 2014, 8 am, to file, if they so wished, written observations, including any evidence and witness statements, in respect of the Application. The Panel also asked the Respondents to provide, if possible, a written outline of their position as to jurisdiction by that time. No response was received.

3.4 A hearing was held on 12 February 2014 at the *ad hoc* Division's offices at the Ayvazovsky Hotel, 1 Morskoy Boulevard, Adler District, 354340 Russia. It started at 10 am and ended at 3 pm. The Applicant attended the hearing via telephone and was represented by her two lawyers, Mr. Markiyan Kliuchkovski and Mr. Roman Khodykin. The First and Second Respondents attended the hearing and were represented by Mr Mario Moccia (Secretary General of COA), Mr Carlos Ferrea (General Manager of COA), Mr Mariano Rodriguez Giesso (Chef de Mission of COA) and Mr Erik Zulcovsky (Olympic Attache to COA). The Interested Parties did not attend the hearing.

3.5 The Applicant called two witnesses to appear at the hearing: Mr Mario Hector Simari (Alpine Ski Coach) and Mrs Teresita Guadalupe Birkner Logan de Simari (Alpine Ski Coach). The witnesses are the Applicant's parents. They are also the Applicant's coaches.

3.6 During the hearing, the First Respondent filed eight (8) documents.

3.7 The Third and Fourth Interested Parties did not attend the hearing.

3.8 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.

3.9 Because of the urgency of the decision and the timing of the Application and the hearing, the Panel delivered the operative part of the decision immediately after the conclusion of the hearing and its reasons for that decision the following day.

4. THE PARTIES' SUBMISSIONS

4.1 The following is a summary of the Applicant's case and does not necessarily include every contention advanced. The Panel has carefully considered, for the purposes of the analysis which follows, all of the evidence and submissions advanced by the Parties, even if there is no specific reference to that evidence and submissions in the following summary. The Panel has not separately set out the Respondents' evidence and submissions. They are reflected in the consideration.

4.2 The Applicant is challenging the decision of COA not to select her in the Argentinean National Team in Alpine Skiing, specifically the Slalom, Giant Slalom and Super G events at the XXII Olympic Winter Games in Sochi ("the Decision"). She was informed of the Decision in a letter from FASA dated 20 January 2014, which she asserts was received by her on 22 January 2014.

4.3 The Applicant's case is primarily one of bias on the part of COA. Her primary assertion is that she was discriminated against on the basis of her being a member of her family which is, she says, a *"legendary family … that has dominated Argentinian Alpine Skiing for over 30 years"*. She asserts that being a member of that family is *"unfavourable"* in Argentinean Alpine Skiing. She alleges discrimination on the basis of her family affiliation, a form of discrimination prohibited by and incompatible with the OC, Fundamental Principles of Olympism, 6 and Rule 44.4 of the OC. To the extent that the Decision of FASA and COA was discretionary, the Decision was, she asserts, impermissibly unfair, arbitrary or unreasonable (CAS OG 14/001) and not based on reasons related to sport-performance.

4.4 As to the allegations of bias, the Applicant's case as set forth in her Application may be summarised as follows:

- The Applicant and her siblings consistently comprised the core of the Argentinean alpine team in three previous Olympic Winter Games and intended to continue at these Games;
- A number of years ago, FASA instituted the *"National Team"* program, designed and maintained so as to promote the skiers with strong ties to FASA management;
- Selection for the National Team was arbitrary. The lack of inclusion of the Applicant in the program was unfair, arbitrary and discriminatory;

- The National Team included most of the country's top athletes, with the exception of the Applicant's family. Members of the program benefited from the resources available to FASA, which were essentially denied to the Applicant and her family;
- FASA instituted the National Team program for the specific purpose of limiting the dominance of the Applicant's family in Argentinean alpine skiing;
- Two of the Applicant's siblings were chosen to represent Argentina in Sochi but this was because FASA could not justify their exclusion as they were well above the competition;
- With respect to the Applicant, FASA gave priority to participants in the National Team;
- The Applicant participated in the qualification process for participation in the Olympic Winter Games in Sochi between July 2012 and 19 January 2014 and gained FIS eligibility for participation in all five Alpine disciplines, being ranked No 1 or No 2 in each of three disciplines among Argentinean female skiers;
- The women chosen to participate in the relevant events, the Slalom, Giant Slalom and Super G have, unlike the Applicant, never participated in FIS World Cup events and did not do well, or did not participate, in secondary international competitions. Those women, the First Interested Party and the Second Interested Party, are both members of the National Team;
- The Applicant became eligible to participate in all disciplines (except Downhill), compared to the eligibility of the First Interested Party and the Second Interested Party in three and two disciplines respectively;
- Throughout the qualification process, the Applicant was not aware of qualification criteria used by FASA/COA for selection of athletes. They were not published or communicated to the Applicant, despite requests for specific parameters;
- On 20 January 2014, the Applicant received notification from FASA that she was not selected to participate in the Olympic Games, without an explanation;
- By letter dated 20 January 2014, an explanation was given of the criteria applied to the *"ladies selection"*. Specifically, FASA said that it worked with the Technical Committee, said to be comprised of persons of *"undisputed capacity and impartiality"*. The Report was attached to the same letter;
- The Applicant says that this was the first time that she was aware that the Technical Committee had been established or that there were specific criteria for selection;
- Had the Applicant known of the selection criteria in advance and that they were based on domestic and regional competitions, she would have trained and competed differently;
- It followed that, because the Applicant was not included in the National Team program, her non-selection was unfair and arbitrary;
- The selection criteria were designed to discriminate against the Applicant and in favour of the first and second Interested Parties, in particular concerning local rather than international competitions. The Applicant was not informed of the criteria until after selection;
- The operation of the Technical Committee was biased in favour of at least one of the Interested Parties, in that while the Applicant's coach was not consulted, contrary to the asserted criteria, that person's coach was;

- Her family have been further discriminated against by COA/FASA in respect of accommodation and the withdrawal of national scholarships.

5. JURISDICTION

5.1 The jurisdiction of the *ad hoc* Division is defined in Article 1 of the CAS *ad hoc* Rules and Article 61 of the OC.

5.2 Article 1 of the CAS *ad hoc* Rules reads as follows:

"Article 1. Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS)

The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or ***during a period of ten days preceding the Opening Ceremony of the Olympic Games****.*

In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective" (emphasis added).

5.3 The wording of Article 61.2 of the OC is as follows:

"61 Dispute Resolution

[…]

Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration".

5.4 The Applicant has raised three lines of reasoning in order to justify the existence of the jurisdiction of this Panel, in the following terms:

"48. It is submitted that the Argentinian NOC does not have internal dispute resolution bodies empower (sic) hear this dispute. Therefore, there seems to be no internal remedy, which the Applicant is to utilize, let alone, exhaust.

49. Further or alternatively, even if there are internal remedies available to the Applicant*, the Respondent is invited to waive the requirement to exhaust all the internal remedies in relation to the present case, to ensure swift and effective resolution of this dispute by the CAS Ad hoc Division.*

50. Further or alternatively, even if there were internal remedies available the Applicant, and if they are not waived, it is submitted that the time needed to exhaust internal remedies would make the appeal to the CAS Ad hoc Division ineffective. Only a few days are left before the start of the relevant Alpine Skiing competitions of the XXII Olympic Winter Games. The Applicant is currently training in Italy. If he (sic) is allowed to participate, she will have to make necessary travel arrangements and arrive in Sochi as soon as possible to be able to prepare for the Games, including the need to acclimatize. It is clear that the need to exhaust all the internal

remedies, if any exist, will frustrate the purpose of the CAS ad hoc Division and will render the Applicant's appeal to CAS ad hoc Division ineffective.

51. Therefore, CAS Ad hoc Division has jurisdiction to hear the merits of the present matter".

5.5 At the hearing, the Respondents stated their position. First, they denied the existence of a basis of jurisdiction of the Panel, stating that there were indeed internal remedies in COA but that the Applicant did not notify a claim to any authority. Secondly, asked by the President if the Respondents were ready to waive the necessity of exhaustion of the local remedies, the Respondents declined to do so. No comment was made concerning the third argument raised by the Applicant.

5.6 The Panel will therefore examine the different possible bases of jurisdiction presented by the Applicant, the existence of which was denied by the Respondents.

5.7 It has to be stated at the outset that some aspects of the *ad hoc* Division jurisdiction are uncontested. This is first the case concerning jurisdiction *ratione personae*, as the Applicant is an athlete to which Art. 1 of the CAS *ad hoc* Rules gives the right to apply to CAS. It is also common ground between the Parties that the conditions for the existence of jurisdiction *ratione materiae* of the *ad hoc* Division provided for in Article 61 of the OC are fulfilled, as there can be no issue that the present Request for Arbitration, which relates to qualification for the Sochi Olympic Games, deals with a *"dispute arising on the occasion of, or in connection with, the Olympic Games"*. Lastly, the jurisdiction *ratione voluntatis* is also satisfied. The Respondents submitted to the jurisdiction of the *ad hoc* Division under Rule 61 of the OC. The Applicant did not sign the Entry Form by which the jurisdiction of the *ad hoc* Division is accepted, but has clearly consented to jurisdiction by filing the Request for Arbitration.

5.8 Some other aspects of jurisdiction are contested by the Respondents.

Are the conditions provided for in Article 1 § 2 of the CAS *ad hoc* Rules fulfilled, i.e. are there any local remedies to exhaust?

5.9 In order to answer this question, the Panel requested the Statutes of COA and of the FASA from the Respondents, during the hearing. The documents were produced, but only in Spanish, the language in which they will therefore be quoted in this decision. The Respondents directed the Panel to what they said were the relevant sections of the Statutes.

5.10 The Statute of the Argentinean Olympic Committee (*Estatuto del Comite Olimpico Argentino*) does provide for an Appeals Tribunal, whose decisions can then be appealed to the CAS in Lausanne. The Chapter dealing with this Tribunal has five articles, which provide the following:

"ART. 56º: El Tribunal de Apelación estará integrado por tres Vocales Titulares y tres Vocales Suplentes,siendo función de estos últimos reemplazar – de acuerdo al orden en que hayan sido elegidos – a cada uno de los tres primeros, en caso de que los mismos – o algunos de ellos – fallezca, renuncie o sea inhabilitado para el ejercicio del cargo por autoridad competente. En cualquiera de tales casos, el reemplazo del Vocal Suplente por el Vocal Titular se producirá de manera automática.

ART. 57º: Para que las decisiones del Tribunal de Apelación resulten válidas, deberán ser tomadas por el voto favorable de dos de sus Vocales Titulares, como mínimo.

ART. 58º: El cargo de Vocal del Tribunal de Apelación es incompatible con el de Asambleísta o empleado del Comité Olímpico Argentino, Miembro de su Consejo Ejecutivo o de sus Comisiones Internas;Asambleísta, empleado o Miembro del Directorio o de Comisiones Internas de las Federaciones afiliadas.

ART. 59º: ***El Tribunal de Apelación tiene como función conocer, en grado de apelación, de las sancionesde cualquier tipo que el Consejo Ejecutivo imponga*** *a alguno de sus integrantes, a sus afiliadas, a losatletas u oficiales de ellas.*

ART. 60º: La decisión final del Tribunal de Apelación podrá ser recurrida, por escrito fundado, dentro del término máximo de veintiún días corridos a partir de la fecha en que fue notificada al afectado; debiendoel recurso ser resuelto por la Corte de Arbitraje del Deporte sito en la Ciudad de Lausana, Suiza o por el Tribunal Arbitral de Derecho del Deporte de la República Argentina – según a cual de ellos se recurriere – a quien el Tribunal de Apelación del Comité Olímpico Argentino deberá remitir todas las actuaciones dentro del término de diez días de deducido el pertinente recurso; que no suspenderá los efectos del fallo. El laudo que la Corte de Arbitraje del Deporte o el Tribunal Arbitral dicte será vinculante, definitivo e inapelable, con la única salvedad de los recursos previstos en la legislación vigente para el proceso arbitral" (emphasis added).

5.11 This Appeals Tribunal is an internal review mechanism. However, it appears that such mechanism only provides for the review of any type of sanction imposed by the Executive Council. Eligibility for selection is not a sanction.

5.12 As far as the Statutes of the FASA (*Estatutos de la Federación Argentina de Ski y Andinismo*) are concerned, the following can be found in relation to appeals and selection of athletes for the competitions:

"ARTICULO 28º: Son obligaciones y deberes de la C.D. … l) Aplicar a personas e Instituciones penas disciplinarias que podrán ser apeladas ante la Asamblea más próxima. … p) Designar a las personas que deben representar a la FASA en los concursos nacionales e internacionales".

5.13 In other words, the Board of Directors (*Comisión Directiva*) has important functions, among which is to decide disciplinary sanctions and to designate the athletes that are selected for sport competitions. In the Statutes, there is an appeal mechanism to the Assembly when the Board adopts a sanction. In other words, as is the case in COA Statute, there is only an internal review mechanism in disciplinary matters. No review mechanism is provided for in the FASA Statutes for reviewing decisions concerning athlete selection for competitions.

5.14 Accordingly, as the Panel has determined that there were no internal remedies to exhaust, the Applicant is not barred from bringing a claim to the *ad hoc* Division on the basis that she has not exhausted internal remedies.

5.15 Consequently, the question of waiver is irrelevant, as it was only an issue in the event that there were internal remedies available to the Applicant.

5.16 It follows that the third argument of the Applicant does not have to be dealt with, as such argument implied that there were remedies but that the time needed to use these remedies would make the appeal to the *ad hoc* Division ineffective.

Are the conditions provided for in Article 1 § 1 of the CAS *ad hoc* Rules fulfilled, i.e. did the dispute arise in the required time frame?

5.17 The issue here is the jurisdiction *ratione temporis* of the *ad hoc* Division.

5.18 The *ad hoc* Division only has jurisdiction to deal with disputes which *"arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games"*.

5.19 In other words, the dispute, in order to enter into the jurisdiction *ratione temporis* of the Panel, should have arisen after 28 January 2014 which is 10 days before the Opening Ceremony, which was celebrated on 7 February 2014.

5.20 The issue is therefore to determine when the dispute arose. This is a vexing issue in many international fora and often has important implications for the jurisdiction of an international tribunal or arbitral body.

5.21 It has to be stated at the outset that the date when the dispute arose cannot, *per se*, be the date when the Request for Arbitration is filed. A dispute has to be distinguished from a claim. It is clear that the dispute will have arisen before the formal presentation of a claim to a tribunal. Otherwise, any required time frame in which the dispute has to arise for it to be able to be submitted to a dispute resolution mechanism would have no useful meaning.

5.22 It remains to determine when the present dispute arose, which requires the Panel to determine what constitutes a dispute. Many dispute settlement bodies have reflected on such a question, but the most famous and often cited definition was given by the International Court of Justice (ICJ) a century ago, and constantly repeated. It is not the place here to cite the extensive international jurisprudence referring to this definition, but the Panel finds it relevant to cite the initial definition of a dispute: *"A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"* (PCIJ, *The Mavrommatis Palestine Concessions*, Serie A, n° 2, August 30th 1924, Rec. p. 11).

5.23 During the hearing, the Applicant referred to the *Schuler* case (CAS OG 06/002), presumably in order to argue that the dispute did arise in the required time frame and submitted that this Panel should follow similar reasoning. The Panel does not consider that the reasoning in *Schuler* can be used as guidance for its decision, as will be explained below.

5.24 The facts in the *Schuler* case were somewhat different from the facts in the present case. Relevantly, those facts were:

"On 27 January 2006, the Respondent made its final determination selecting the sixteen members of the Swiss Olympic snowboard team, and in particular the five half-pipe specialists, and it did not include Ms Schuler (the

Decision). The following day Swiss Olympic published the names of the selected snowboarders on its web site. The related official press conference followed on 31 January 2006.

On 31 January 2006, Dr Alain Meyer, president of SCB, wrote an e-mail on behalf of Ms Schuler to Swiss-Ski and Swiss Olympic asking for a written explanation of her exclusion.

On 1 February 2006, Mr Gilli of Swiss-Ski and Mr Augsburger of Swiss Olympic answered setting forth some reasons Ms Schuler was not selected and stating that an appeal was not possible.

Ms Schuler's appeal to the CAS ad hoc Division was made on 6 February 2006.

(…)

The first condition precedent for the jurisdiction of the CAS ad hoc Division is that the dispute has to have arisen during the Olympic Games or during the period of 10 days preceding the Opening Ceremony, which for the 2006 Olympic Winter Games is on 10 February 2006.

The Panel, therefore, has to decide whether the dispute arose within the period of 10 days preceding 10 February 2006, that is on or after 31 January 2006. The official announcement of the disputed Decision occurred by publication on the Respondent's web site on 28 January 2006. Ms Schuler received a written explanation of her exclusion on 1 February 2006. Then Ms Schuler considered the issue, and having done so, made this appeal through her attorney-at-law on 6 February 2006".

5.25 The Panel considers that the facts are not the same as in the present case, as in *Schuler*, the explanation for the exclusion from the Olympic Games was inside the required period for the *ad hoc* Division to have jurisdiction *ratione temporis*. In the present case, to the contrary, the explanation was not given on a date inside the required period, as it was either on 20 January 2014, which is the date of the letter of explanation, or on 22 January 2014, which is the date on which the Applicant says that she received that letter. The Panel did not consider it necessary to make a finding as to the date of notification, as both dates are well outside the period for which the *ad hoc* Division has jurisdiction.

5.26 More importantly, the Panel has not been convinced by the legal reasoning adopted in the *Schuler* case, which was not based on the date on which she received the explanation for the Decision, *i.e.* on the date on which the Applicant understood the elements of the dispute, but the date on which she decided to file her case after having *"considered the issue"*:

"It was open to Ms Schuler to accept the Swiss Olympic's determination or decide to appeal. Accordingly, in the Panel's opinion, it would not be possible to say that a dispute had arisen ***until Ms Schuler had decided to appeal and had filed notice of her appeal****. That notice was given within the 10 days preceding the Opening Ceremony …"* (emphasis added).

5.27 Such conclusion could extend the jurisdiction of the *ad hoc* Division outside the precise and limited framework set by the Rules, which this Panel is required to respect and apply. An athlete having been excluded one month before the Olympic Games could come to the *ad hoc* Division and bring his/her case 10 days before the Opening Ceremony, arguing that he/she had to consider the issue before filing an application and that the dispute only arose when he/she decided to file an application. This would make a mockery of Article 2 § 1 of the CAS *ad hoc* Rules.

5.28 It is accepted that the date when a dispute arises is in general – in fact in most cases – the date of the decision with which the Applicant disagrees (*"a disagreement on a point of law or fact"* as stated by the ICJ). Such a date can arise later, in some cases, if, for example, the decision is not self-explanatory and requires some explanation in order for the Parties to know with certainty that they are in disagreement. Evidence would be required to establish whether a later date than the date of the decision should apply. There was no such evidence in the present case. General distress, which the Applicant says she has suffered, does not of itself delay the date on which the dispute arises.

5.29 It is the Panel's analysis that the dispute arose as soon as the Applicant was notified of her non-selection – with which she was in total disagreement without any need to receive explanations on the reasons for the Decision – and therefore that the date when the dispute arose was 20 January 2014, well before the 10 days before the Opening Ceremony, with the consequence that the Panel has no jurisdiction to entertain the case. The Panel adds that, even adopting the most favourable analysis for the Applicant, and using a more flexible interpretation of the time when the dispute arose, which would be the date when the Applicant received the explanation for the Decision, such date would be 22 January 2014. This remains well before the 10 days before the Opening Ceremony, with the consequence that the Panel still would have had no jurisdiction to entertain the case.

5.30 Despite the absence of jurisdiction, as the Parties have dealt extensively with the question of the merits, through the Request for Arbitration, numerous exhibits, witness statements and oral submissions, the Panel has decided that, in view of the Parties' efforts and the expectation of a decision, it will consider the merits of the case. The conclusion is that, even if the *ad hoc* Division had jurisdiction, the Applicant's claims on the merits would have failed.

6. APPLICABLE LAW

6.1 Under art. 17 of the *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"*.

6.2 The Panel notes that the *"applicable regulations"* in this case are the rules and regulations of the COA and FASA which apply in addition to the OC as well as the FIS regulations.

6.3 These proceedings are governed by the *ad hoc* Rules enacted by the International Council of Arbitration for Sport (ICAS) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("PIL Act"). The PIL Act applies to this arbitration as a result of the express choice of law contained in art. 17 of the *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 *ad hoc* Rules.

6.4 According to art. 16 of the *ad hoc* Rules, the Panel has *"full power to establish the facts on which the application is based"*.

6.5 It is not in dispute that the OC prohibits *"[a]ny form of discrimination with regard to a country or person on grounds of race, religion, politics, gender or otherwise"* (Fundamental Principles of Olympism, 6). This Principle forms the basis of the Applicant's claim.

6.6 It should also be noted that Rule 44.4 of the OC obliges the COA to investigate the validity of entries proposed by national federations and to ensure that no one has been excluded by reason of discrimination.

6.7 At a national level, a national 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; CAS OG 14/001).

7. MERITS

7.1 As the Panel has made a finding of lack of jurisdiction, it will deal with each aspect of the merits of the Applicant's claim shortly.

7.2 The Applicant alleges that the decision not to select her for a position to represent Argentina in the Sochi Olympic Games was discriminatory on the basis of family affiliation, that is membership of her family. The Applicant contends that the decision, including any exercise of discretion, not to include her in the team to represent Argentina in the Sochi Olympic Games was unfair, unreasonable or arbitrary. She submits that her case is not about the law but about the facts.

7.3 As presented, the Applicant's case raises the following allegations:

- Bias against her family;
- Bias in that the National Team was formed for the specific purpose of limiting the dominance of the Applicant's family;
- Bias in that the Applicant was not included in the National Team and did not receive associated support;
- Bias because the selection was made in favour of the National Team, membership of which was said to be *"the deciding criteria"*;
- Bias in the establishment by FASA of a qualification process with the formation of a Technical Committee which applied selection criteria designed to discriminate against the Applicant;
- Bias in the consultation process of the Technical Committee;
- Bias in that she was not informed of the selection criteria whereas the interested skiers were so informed.

Bias against the family

7.4 The instances of alleged bias given by the Applicant and by her parents in evidence are numerous and relate generally to the fact that none of the family are in the National Team and, consequently are, and have been, deprived of financial and operational support. She asserts that her family have been denied opportunities and, in her case, a place in the Argentinean team for the Sochi Olympic Games.

7.5 However, two of the Applicant's siblings are in the Argentinean team, as is a cousin. In addition, her brother was given the honour of carrying the flag at the Opening Ceremony. Further, of the five women who had appropriate qualifications for inclusion in the three available places, the other woman not chosen was a member of the National Team. Further, her parents were both selected as coaches and are present in Sochi. Her younger sister has been selected to represent Argentina in the Youth World Cup of 2014.

7.6 The Applicant also complains of the level of financial support in that, as she and her siblings are not members of the National Team, they are discriminated against in lack of funding available to team members. However, the Applicant and her siblings have, during 2013, received funding from Olympic Solidarity on the recommendation of FASA, as well as funding from two national sources: *Ente Nacional de Alto Rendimento Deportivo (ENARD)* and the Ministry of Sport, in each case with the support of FASA.

7.7 In making these observations, which are relevant to the case of discrimination sought to be made by the Applicant, the Panel is not deciding that it has jurisdiction over decisions to fund athletes.

Bias in the formation of the National Team

7.8 From the evidence, the National Team was formed approximately four years ago. The Applicant's evidence is that, in the past, Argentina has not had numbers of skiers for international representation. Her evidence is that her family has, in effect, dominated Argentinean skiing for many years and that the National Team was formed to break this dominance.

7.9 However, the Applicant has not adduced evidence that establishes that the National Team was formed for the alleged purpose. The evidence only establishes the formation of the team some four years ago. In correspondence with the Applicant's father, FASA states an important criterion for it is the future of skiing in Argentina. The inference is equally open that the National Team was formed to promote this objective.

7.10 This allegation is not established.

Bias in that the Applicant was not included in the National Team and did not receive associated support

7.11 The Applicant says, and it is not disputed, that neither she nor her parents or siblings were invited to join the National Team. However, the evidence does not establish that this amounted to discrimination. The Respondents say that it was known that they would not be interested. In any event, the choice of members of the National Team is not directly before the Panel and is only raised as a matter supporting a finding of relevant discrimination. The Applicant has not established this allegation in support of her claim. Further, as stated above, the Applicant and her family received alternative sources of financial support.

7.12 Although membership of the National Team was *"a defining advantage"* for the three girls who participated in the National Team program, one of them was not selected and the Applicant's sister was. In any event, this advantage was stated to be in the context of projections for the next Olympic cycle. It has not been suggested that such a consideration was inappropriate. It does not provide support for the allegation of discrimination.

Bias in selection of members of the National Team for the Sochi Olympic Games

7.13 The Applicant's evidence in support of this allegation is sparse. From what has been set out above, the Applicant's siblings, who were not members of the National Team, were selected for the Sochi Olympic Games, whereas another woman, member of the National Team, was not selected.

7.14 Further, in evidence, the Applicant's parents made it clear that, even if asked, they would not, for reasons they explained, permit their children to join the National Team.

7.15 The Applicant has not established that such bias exists.

Bias in the establishment of the qualification process, the Technical Committee and the selection criteria

7.16 There is little evidence to establish these allegations. The Applicant makes it clear that she does not challenge the way in which the selection criteria may have been applied. She says that the criteria were chosen in order to exclude her. She complains that the qualification process, the formation of the Technical Committee and the asserted application by them of the selection criteria were not made known to her and were devised in order to eliminate her from selection.

7.17 Those allegations are assertions without evidentiary foundation. It is not disputed that the Applicant was unaware of these matters until after the selection process, although the existence of the Technical Committee was apparently announced at the annual meeting of FASA, attended by representatives of various clubs, including the club to which the Applicant and her family belong, but not by individual members.

7.18 The Applicant understood, reasonably, that the FIS rules would apply and that her international standing would be relevant to the selection criteria. She was not informed that placings in national championships and the South American Cup would, rather, be the relevant criteria. This, in turn, was important, she says, because skis used in FIS events were different to those still used in national championships and in the South American Cup and were slower. Although she was aware of this latter fact, had she known that those races were so important, she would have used the older style of ski rather than interrupt her continued usage of the more modern style allowed by FIS. She attributes her lack of first place in the relevant events to the equipment differences. She submits that selection based on races that permit the use of equipment that is not permitted in the Olympics is arbitrary and contrary to good sense.

7.19 It is unfortunate for the Applicant that her international results did not form a basis for selection. However, it cannot be said that the selection criteria said to be applied were arbitrary or unreasonable. Indeed, she does not challenge them per se. Rather, she says that they were deliberately chosen to discriminate against her. There is no evidence to support that assertion and it does not necessarily arise by inference. This is not a case where the Applicant had been informed of certain selection criteria which were then changed during the season and without notification to her (cf. CAS OG 06/008).

7.20 The Applicant contends that the selection criteria were not formulated until after the selection process was completed. She points out that they were not communicated to her when her father first requested them verbally in June 2013 or in writing on 6 December 2013. However, that does not establish that the selection criteria that were applied for membership of the Women's Olympic Ski Team were designed to discriminate against the Applicant. It is again worth noting that other members of her family were selected.

7.21 This allegation of bias has not been established.

Bias in the consultation process of the Technical Committee

7.22 The membership of the Technical Committee at the relevant time consisted of, according to the Respondents, four persons of whom three were the only FIS technical delegates in Argentina and the fourth was the Ski Secretary of FASA. The Report stated that *"[w]e considered the coaches' reports, related to the physical form and situation with injuries"*. The Applicant points out that there were at the time only four coaches, of which two were her parents. They were not consulted. Further, one of the other coaches was the coach and close friend of the First Interested Party and, the Applicant says, could not have been or considered to have been objective. It is however not established on the facts that this coach was consulted.

7.23 However, even if he had been consulted, in circumstances where the statement was that the coaches were consulted in relation to physical form and injuries and there is no evidence that there were any relevant physical or other injuries of relevance, the Panel does not see that the

lack of consultation with the Applicant's coaches constituted bias, even if another coach was consulted.

Bias in that the Applicant was not informed of the selection criteria when other skiers were so informed

7.24 The Applicant complains that she was not informed of the selection criteria but that the Interested Parties were. This, however, has not been established. Asked by one member of the Panel how she knew that the Interested Parties were so informed, the mother of the Applicant, in her oral evidence, answered: *"I can imagine"*. But this is not evidence.

7.25 It appears from the facts in the file that none of the skiers or their coaches were notified of the selection criteria in advance. Therefore this allegation of bias is not established.

8. CONCLUSION

8.1 For all the above-mentioned reasons, it follows that the Applicant has not established that the challenged decision was discriminatory as alleged.

8.2 This case bears some similarity to CAS OG 14/001 where the Panel ("the *Bauer* Panel") found there were no published criteria regarding the standards for selection of skiers or qualifications for quota allocations, and thus the relevant Ski Federation was said to have had a significant degree of subjective discretion (which had to be exercised in accordance with the requirements of the OC and the FIS regulations) and the regulations contained no qualification rules or objective criteria for qualification. The *Bauer* Panel observed that there was a legal duty not to be arbitrary, unfair or unreasonable in the application of objective criteria or in the exercise of subjective discretion but that the exercise of discretion was not so characterised where there was a legitimate sports performance justification for selection.

8.3 Such a justification was advanced by the Technical Committee in this case. Similarly, a discretion based on *"the evolution and projection in the future"* is not arbitrary, unfair or unreasonable.

8.4 However, this Panel endorses the statement of the *Bauer* Panel, to the effect that this Panel recommends that FASA establishes, identifies and publishes clear criteria in a timely manner to enable athletes to understand those criteria and the Olympic Games qualification standards that they are required to meet in order to be recommended for selection by COA. In this case, a dedicated athlete with an outstanding history of representing her country, who had successfully competed in many international as well as national events, was devastated by the decision made not to select her, when she had believed that, on the criteria that she had mistakenly understood had applied, she would represent her country at the Sochi Olympic Games.

8.5 The Panel does not have jurisdiction to hear the Application. If the Panel had jurisdiction, it would dismiss the Application and confirm the Decision.

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

1. The *ad hoc* Division of the Court of Arbitration for Sport has no jurisdiction to deal with the Application filed by Ms Maria Belen Simari Birkner on 11 February 2014.

2. (…).