

Inn the Field of Play

Kate Allass and Tom Rudkin | 27 August 2015

How to avoid selection disputes

With less than a year until the Olympic torch arrives in Rio de Janeiro, thousands of athletes around the world will be intensifying their preparation in the coming months, dreaming of winning. Inevitably some will be left disappointed, be it through falling short in an event they expected to win or not being selected at all.

London 2012 saw a high rate of challenge to Olympic selection decisions and a string of complaints about opaque procedures. Hugh Robertson, then the Minister for Sport and the Olympics acknowledged these concerns and called for "much more transparent and accountable selection procedures". As the national governing bodies ('NGBs') around the world gear up for Rio 2016, we set out some of the pitfalls to avoid when preparing to take selection decisions.

When drafting the policy:

1. Avoid ambiguity

Deservedly the number one rule - be clear!

Ambiguous selection policies leave room for multiple interpretations. They create an increased risk of appeals from disaffected athletes whose preparations have been based on a different understanding of the rules. Alternatively the opportunistic challenger may try to take advantage of any lack of clarity to argue that the outcome of the selection process is unfair. One way of seeking to avoid such problems, is to involve athlete representative(s) in the creation of the policy.

If a dispute proceeds to arbitration, the arbitrator will consider how the document reads *objectively*, regardless of the NGB's subjective intentions. There is always the risk that the dispute will be resolved in the athlete's favour and the selection strategy will be overturned. Even if it is resolved in the NGB's favour, a selection dispute can generate negative press and cast a shadow over team preparations.

Achieving clarity involves precision. The document must be internally consistent, and small points must be checked. This was illustrated well by the appeal of the GB Rhythmic Gymnastics group against their non-selection for London 2012, which turned on the question of whether a qualifying standard achieved on 18 January 2012 counted as having been achieved "*at the 2nd Olympic qualification, CI, 15th-18th January 2012*". The arbitrator agreed with the gymnasts that it was not clear from this phrasing that only scores achieved during the "CI" (qualification) stage of the competition held on 16 and 17 January 2012 were eligible, and their appeal was allowed.

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Particular areas for improvement identified by Shahab Uddin, Head of Legal at the British Olympic Association ('BOA'), are:

- minimum eligibility criteria are often not well-defined, or require participation in events pre-dating the selection policy which is challengeable;
- the interaction and ranking of multiple selection criteria (both objective and subjective). It is important to make it clear which takes priority; and
- grounds for appeal are not spelled out clearly enough.

2. Avoid inconsistency with external legal frameworks

Draft policies should also be checked to ensure that they are compatible with applicable legislation and case law (eg. discrimination laws) and any regulations imposed by International Federations. It must also be enacted in accordance with the NGB's constitution and by-laws.

3. Don't be too liberal with discretion

A common complaint following London 2012, reiterated by Shahab Uddin at the BOA, is that selection policies often rely too heavily on a decision-maker's discretion, with no clear parameters for how and when it should be exercised.

It is legitimate for an NGB equipped with specialist knowledge about a sport to take account of relevant subjective criteria, even though they may not be easy for an athlete or his/her coaches to pin down: for example, an athlete's predicted potential to win medals at an event some months or even years in the future. This was recognised by Court of Arbitration for Sport upon the appeals of two skiers ahead of the Sochi games.

From the NGB's perspective, the major advantage of this approach is flexibility, allowing the selectors to pick what, in their view, is likely to be the best possible team at the crucial moment. Another advantage is that a decision based on subjective criteria is harder to criticise; ie. it is trickier to point to a specific flaw in the reasoning leading up to that decision. As long as the rationale is not biased, based on incorrect information, arbitrary or wholly irrational, the discretion is likely to be found to have been exercised properly.

Subjective criteria are disliked by athletes, who would unsurprisingly rather have fixed targets to aim for. The broader the discretion, the more likely it is to be considered opaque and unfair. This in itself can provoke discontent at the outcome of the process, and appeals (even if they are unlikely to succeed). To avoid disputes there is therefore a careful balance to be struck between introducing justifiable elements of discretion, and rendering the process generally vague.

4. Take care with amendments

Policies should contain a right for the NGB to amend; but this should be exercised with caution. Once it has been published, a selection policy will be relied upon by athletes who may develop a "legitimate expectation" that it will

form the basis of selection decision. Any significant change to the criteria and the athlete's chances of qualification may breach that expectation and lead to a legal challenge. An amendment made after the selection decision has taken place may be unenforceable or invalidate earlier selection decisions.

If it is necessary to amend selection criteria, the safest course is to engage in consultation with athletes' representatives and secure a measure of acceptance before the amendment is introduced and widely published. The earlier the amendment, the better, as the athletes have more time to adjust their training before selection.

Publication:

5. Aim for transparency

It is good practice to publish selection policies on NGB websites. Coupled with a robust policy, increased transparency helps to avoid allegations that the procedure is unfair or biased.

It may also be helpful to communicate clearly with athletes about the meaning of the policy, particularly where changes have been made to longstanding rules or there are known areas of confusion or controversy. This kind of communicative approach can only assist when it comes to the actual selection process when some athletes will inevitably be left disappointed. It is sensible to keep copies of the communications so as to address the "I wasn't told" line.

Implementation:

6. Ensure that the selection policy is followed to the letter

The failure to follow published selection criteria is one of the most common grounds for successful appeals. Selectors should be extremely careful to follow the policy to the letter, taking account of every criteria which is listed in the policy and ignoring irrelevant considerations.

It is also important to ensure that decisions are taken by the persons named in the policy or possessing the qualifications required by the policy.

7. Avoid conflict in the selection panel

It is important to minimise the potential for conflict within the selection panel. This might arise, for example, when a selector coaches an athlete vying for selection, is aligned with their club, has a family connection or history of dispute with the athlete.

A selector with a conflict of interest should declare it to the chair of the selection panel and, wherever possible, abstain from that part of the decision-making process. Conflict is sometimes inescapable; for example some level of conflict will exist where NGB performance directors and coaches who are the best placed to judge medal contenders may also work closely with some of those athletes. As Shahab Uddin of the BOA notes, it is useful in those situations to

arrange for the meetings to be attended by independent observers and/or legal representatives in order to mitigate the potential conflict.

8. Inconsistency

It is also imperative to be able to demonstrate that the procedure has been applied uniformly to all athletes throughout the selection process. To this end, there should be clear statements within the policy of the structure and order of selection meetings, and the selection panel should adhere to any such requirements.

9. Record keeping and disclosure

It is also extremely important to take full minutes of the selection meeting. This can be invaluable in demonstrating that all relevant criteria (as set out in the policy) have been taken into account and that there have been no factual errors in reaching the decision. It is also particularly important in respect of decisions that are likely to cause some controversy. NGBs should be in a position to provide clear and concise reasoning for non-selection of athletes who were considered. Keeping a record of the meeting also proves the ability to demonstrate a consistent approach, as set out in 8 above.

NGBs should be prepared to disclose to the athlete and the appeal panel all documents which were considered by the selection panel when taking the decision.

10. Appeals

Of course, no matter how fool-proof a selection policy might be, some athletes are inevitably going to consider their non-selection unfair and unjustified. It is incumbent upon NGBs to provide athletes with the opportunity to challenge selection decisions.

Whilst not the principal focus of this article, it is worth noting that any appeals procedure relating to selection for the Olympic Games in 2016 ought to provide for a rapid resolution of an athlete's complaint, whilst also giving them the chance to advance their case properly. Clearly, it is not in the interests of NGBs or athletes for selection matters still to be unresolved in the near run up to the Games. Indeed it may be sensible to have a separate appeals procedure relating specifically to selection issues arising out of major events like the Olympics.

Grounds of appeal should be clearly set out and defined within the selection policy and a decision will need to be taken as to whether an athlete's case can be heard again in its entirety or (more common) the appeal panel is simply to consider the process by which the original selection decision was reached.

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