Arbitration CAS 2008/A/1605 Chris Jongewaard v. Australian Olympic Committee (AOC), award of 19 September 2008

Panel: The Hon. Justice Tricia Kavanagh (Australia), President; the Hon. Robert Ellicott (Australia); Mr. Alan Sullivan QC (Australia)

Cycling
Selection dispute
Selection of an athlete in the Australian team for the 2008 Olympic Games
Breach of a membership condition: conduct bringing an athlete into disrepute
Ineligibility for selection

1. **By signing the Team Membership Agreement, an athlete has a contractual obligation to not engage in publicly known conduct which, in the absolute discretion of the President of the AOC, brought or would be likely to bring him into disrepute.**

2. **An athlete nominated for the Australian Olympic Team is presumed to be a person of good repute. He/she is perceived as both a leader and a role model within the Australian community. The presumption of innocence is no answer to a determination by an AOC Selection Committee and its President that the athlete has, by particular conduct whereby he/she faces severe statutory penalties if found guilty, brought himself/herself into disrepute and therefore is found not eligible for selection to the Australian Olympic Team.**

3. **The Decision of the AOC Selection Committee that an athlete has brought himself/herself into disrepute, because he had been drinking and was driving and likely to be under the influence of alcohol, and therefore should not be selected as a member of the Australian Olympic Team cannot be held to be so unreasonable or perverse as to be "irrational".**

Mr Chris Jongewaard (the "Appellant"), is an elite Australian mountain bike cyclist.

The Australian Olympic Committee Inc (AOC; the "Respondent") is an incorporated body charged with the task of controlling or administering Australian Olympic athletes and each Australian sport included on the Olympic program for the Summer and Winter Olympic Games.

On 16 February 2007, the Appellant was driving a vehicle which struck another cyclist, Matthew Rex. The Appellant faces two charges under the *Criminal Law Consolidation Act*, 1935 (Sth Australia) as follows:

- The first charge is: "Aggravated Causing Serious Harm by Dangerous Driving" (Section 19A(3) of the *Criminal Law Consolidation Act, 1935*). The aggravated element to the charge is the allegation the Appellant committed the offence by dangerous driving while there was present in his blood a concentration of 0.08 grams or more of alcohol in 100 millilitres of blood (Section 5AA(la)(d) of the *Criminal Law Act*).
- The second charge is: "Leaving the Scene of an Accident After Causing Harm" (Section 19AB(2) of the *Criminal Law Consolidation Act*, 1935). July 2008, Cycling Australia nominated the Appellant for selection to the Australian Olympic Team for the 2008 Beijing Olympics.

On 14 July 2008, Cycling Australia nominated the Appellant for selection to the Australian Olympic Team for the 2008 Beijing Olympics.

On 19 July 2008, following the exercise of the President's discretion under clause 7.2(3) of the AOC's Selection By-Laws, the AOC Selection Committee declined to select the Appellant as a member of the Australian Olympic Team. The Decision was conveyed to the Appellant in a letter from the President of the AOC, Mr John Coates (also a member of the AOC Selection Committee).

By an application dated 21 July 2008, the Appellant lodged an appeal with the CAS Oceania Registry against the decision of the AOC dated 19 July 2008 not to select him for the 2008 Australian Olympic Team.

The Appellant appeals to the Appeals Division of the CAS under the clause 11.16(2) of the AOC Olympic Team Selection By-Law dated 30 June 2008 (the "Selection By-Law") asserting that the Decision of the AOC Selection Committee regarding his non-selection was "…obviously or self evidently so unreasonable or perverse that it can be said to be irrational".

It is necessary for a consideration of the Appellant's submissions on appeal to recite the Decision of the Selection Committee (and the President) as conveyed in a letter of 19 July 2008 from the President, Mr John Coates, to the Appellant:

> *"… Based on the information available … I note the following matters relevant to your conduct:*
>
> *1 you were involved in an accident with a cyclist while you were driving a car;*
>
> *2 you were drinking alcohol during the course of the day before driving the car;*
>
> *3 the cyclist, Matthew Rex, had also been drinking alcohol during the course of the day before riding a bicycle. He was very seriously injured in the accident and taken to hospital. Mr Rex has apparently suffered significant physical and psychological injuries;*
>
> *4 your conduct relating to the accident was such as to cause members of the South Australian Police reasonably believe that you were guilty of serious criminal charges;*
>
> *5 it is alleged that your blood alcohol level while driving the car at the time of the accident was .094 or at least in excess of .08;*
>
> *6 it is also alleged that you did not stop at the scene of the accident;*
>
> *7 members of the public are aware of your conduct and the charges relating thereto through various media reports; and*

8 the criminal proceedings are not likely heard until after the Beijing Olympic Games.

Putting to one side the allegations of criminal misconduct, your conduct namely your admitted consumption of alcohol during the course of that day, driving while likely in my view to be under the influence of alcohol and being involved in an accident while in that state are sufficient for me to form the view, within the discretion I have under the Selection By-Law, that your conduct was likely to and did bring yourself into disrepute.

I am also aware that before a police officer lays charges, the officer must form the belief on reasonable grounds that it had committed the offences charged. As a result, members of the public are aware that your conduct was such as to cause members of the South Australian Police reasonably believe that you are guilty of serious criminal charges arising out of the incident.

A reasonable member of the public would or would be likely to think considerably less of you on account of the conduct, believed by the police to have occurred, albeit realising that you may have a defence to the criminal proceedings and might be acquitted at trial. That is another basis upon which your conduct was likely to or did bring you into disrepute.

…".

A Panel was then constituted in accordance with the CAS Code.

The Panel convened a preliminary conference call on Tuesday, 22 July 2008 and in accordance with the directions given by the Panel, the Appellant and Respondent each filed an appeal brief on 24 July 2008. An Order of Procedure was also agreed by the parties in which they confirmed the jurisdiction of the Panel to hear the Appeal and agreed that the arbitration would be conducted according to the CAS Code.

A hearing took place on Thursday, 24 July 2008 in Sydney.

LAW

The Arbitration Agreement and Jurisdiction of the CAS

1. All parties to this Appeal have agreed and consented to the jurisdiction of the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration (2004 Edition) (the "CAS Code"), to hear and determine this Appeal.

2. In any event, the jurisdiction of the CAS to hear this Appeal arises from clause 11.14 of the Selection By-Law, which states as follows:

"Subject to the Olympic Charter, any dispute regarding an Athlete's selection or non-selection as a member of a Team by the AOC will be solely and exclusively resolved by the Appeals Arbitration Division of CAS according to the Code of Sports-Related Arbitration (subject to clause 11.18) and applying the law of New South Wales. The decision of CAS will be final and binding on the parties and no party will institute or

maintain proceedings in any court or tribunal other than CAS. In particular, and without restricting the generality of the foregoing and for further and better assurance notwithstanding that such provisions have no applicability, there will be no right of appeal under section 38 of the Commercial Arbitration Act, 1984 (NSW) or equivalent in any of the Australian states or to apply for the determination of a question of law under section 39(1)(a) of such Act or equivalent in any of the Australian states".

3. Clause 11.16 of the Selection By-Law provides as follows:

"The sole grounds of appeal against a decision of the AOC regarding selection or non selection of an Athlete are that the decision:

(1) was affected by actual bias; or

(2) is obviously or self-evidently so unreasonable or perverse that it can be said to be irrational".

4. Clause 11.18 of the Selection By-Law provides as follows:

"The power of the CAS panel to review the facts and the law pursuant to Rule 57 of the Code of Sports Related Arbitration will be initially limited to determining whether the appellant has made out one or more of the grounds of appeal pursuant to clauses 11.10 or 11.16 as appropriate. If the CAS panel so determines in favour of the appellant, the hearing will then only proceed as a hearing de novo confined, in the case of a dispute as to nomination or non-nomination of an Athlete, to a hearing as to whether one or more of the grounds of appeal pursuant to clause 11.5 have been established and subject to the CAS panel observing the requirements of clause 11.19".

5. Clause 11.19 of the Selection By-Law provides as follows:

"If CAS determines to uphold any appeal in respect of the nomination or non-nomination of an Athlete, it will as a matter of usual practice refer the question of re-nomination back to the relevant NF selection panel for determination in accordance with the applicable Nomination Criteria. CAS may itself conclusively determine the issue of nomination or selection of Athletes:

(1) …

(2) in the case of an appeal against selection or non-selection by the AOC, where CAS has advised the parties and all persons whose interests may be affected by the outcome of the appeal of the possibility that it may itself conclusively determine the issue of selection of Athletes and permitting the parties and all such persons the opportunity to make submissions and give evidence in respect thereof".

Consideration

6. The Appeal is brought under Clause 11.16(2) of the Selection By-Laws. The ground for Review by the CAS Appeal's Tribunal is limited. It must be a Decision so unreasonable as to be "irrational". The Tribunal must make a determination that the Decision was so unreasonable that no reasonable person could have come to it [*Associated Provincial Picture House Limited v Wednesbury Corporation* (1948) 1 KB 223 (at 230, 233-234); *Minister for Aboriginal Affairs v Peko Wallsend Limited* (1986) 162 CLR 24 per Mason J (at 40-42); see also CAS 2004/A/675; CAS 2008/A/1574].

7. The AOC is not a court, nor is it bound by the laws of evidence. A number of documents went before the Selection Committee (and the President) and are again tendered before the Tribunal. Particular conduct was drawn to the attention of the President of the AOC and he and the AOC Selection Committee determined the Appellant did not meet the criteria for selection under clause 7.2(3) in that the conduct particularised was likely to, and did, bring the Appellant into disrepute. Relevantly, clause 7.2 of the Olympic Team Selection By-Law states:

"7. SELECTION OF ATHLETES

7.1 …

7.2 Selection of each Athlete to a particular Team will be conditional upon the AOC confirming to its own satisfaction that the Athlete has met all applicable criteria for nomination and selection and the Athlete:

(1) signing the applicable Team Membership agreement for that Team;

(2) …

(3) at all times having not engaged at any time in conduct which:

(a) is publicly known and in the absolute discretion of the President of the AOC has brought or would be likely to bring the Athlete, the Athlete's sport, the AOC or the Team into disrepute or censure, or

(b) …".

8. The AOC through its Selection Committee therefore had an obligation to satisfactorily confirm that the Appellant at all times had not engaged in conduct, publicly known, which (within the discretion of the President) had brought/or would be likely to bring the Appellant into disrepute (or censure). This is a negative test and sets a severe obligation upon the AOC. It obliges the AOC Selection Committee (and the President) to review an athlete's conduct (in this circumstance conduct publicly known) and consider the effect of that conduct on his reputation.

9. We accept, as does the Respondent to the appeal, the AOC Decision was dictated by the reasons elucidated in the President's letter and was ultimately made because of the President's determination in accordance with clause 7.2(3).

10. In conveying its Decision in its letter of 19 July 2008, the Selection Committee (and the President) revealed consideration was given to eight matters relevant to the Appellant's asserted criminal conduct. The Selection Committee then put to one side the allegations of misconduct and gave consideration to the particular conduct of the athlete and its effect on his reputation. The AOC accepted the Appellant's assertion that the description of the conduct brought into question by the President was that contained in the paragraph of the letter as follows:

"… your admitted consumption of alcohol during the course of that day, driving while likely…to be under the influence of alcohol and being involved in an accident while in that state…".

11. The Appellant asserted an analysis of this statement provides there was no warrant for the finding the Appellant's reputation was one of disrepute which allowed for his non-selection.

12. We accept that the Respondent's submission that the community accepts a blood alcohol reading by the police is accurate. The Selection Committee noted, as to the Appellant's conduct, he was driving a car involved in a motor vehicle accident with a cyclist (Point 1 Matter of Conduct) and had been drinking alcohol during the course of the day (Point 2 Matter of Conduct). It was agreed the Appellant was driving the car which, in the evening, struck Mr Matthew Rex, another cyclist (one with whom he had been drinking) and who was seriously injured (Points 1 & 5 Matter of Conduct). It had been reported in the media, the Appellant had a blood alcohol reading of .094 or at least in excess of .08 (the statutory limit in South Australia) (Point 5 of Matter of Conduct). On those facts, the Committee (and the President) expressed the view the Appellant was driving "while likely . . . to be under the influence of alcohol". Further, from the statements before them, the manner of the Appellant's driving was brought into question. These were statements relevant to the consideration as to whether the Appellant had been drinking and was driving and likely to be under the influence. We accept, from those documents and matters of conduct, the statement in the Decision as to the Appellant being "likely to be under the influence of alcohol" was a reasonable conclusion by the Selection Committee (and the President).

13. Another element of the decision was the expressed view that the conduct called into question, was "publicly known". We accept the relevant conduct was known by the public through media reports. However, the validity of the statement "reasonable members of the public would or would be likely to think considerably less 'of the Appellant' given the media reports of his conduct" was challenged. Such a statement does not, in our view, negate that the public would also realise the charges are allegations to be proven at trial (a fact also acknowledged in the letter of the AOC (and the President)). We adopt the view expressed by Mason J in *Mirror Newspapers Ltd v Harrison* (1982) 149 CRL 293 (at 299) when considering whether a "mere" newspaper report of the fact of an arrest and a charge is capable of imputing guilt held:

"It is inevitable that the ordinary reasonable reader of a newspaper report that the plaintiff has been arrested and charged with a crime would conclude that the charges "are not ordinarily laid without grounds, and that many of the people charged with crimes are guilty" ((1965) Ill S.A.L.R. at 564). The reader, though withholding final judgment, would attach importance to the fact that the police have concluded that there are grounds to support the charge and would accordingly view the plaintiff with suspicion as a person who may be found guilty of the crime charged".

14. A challenge was made to the further statement made in the Decision that police held "a reasonable belief" the Appellant was guilty. The DPP was the informant for these charges. It proceeds to prosecute a charge where there is a reasonable prospect of a conviction being secured (DPP guidelines). Evidence also revealed the Appellant has proceeded through the committal process and is now before the District Court of South Australia for trial. A magistrate has therefore also reviewed the police brief and formed a view the Appellant should be sent to trial on the two charges. At committal, the test applied by the Magistrate is: could a reasonable jury convict on the standard of proof beyond reasonable doubt (s104-197, Summary Procedures Act 1921, Sth Australia). We therefore accept the statement that a

"reasonable member of the public would or would be likely to think considerably less" of the Appellant "on account of the conduct" was a reasonable view open to the Selection Committee in the circumstance.

15. Another matter, not focused on in submissions, but considered by the AOC (and the President) as relevant conduct to the criminal matters was the fact the Appellant faces a second charge namely: that he did not stop at the scene of the accident (Point 6 Matter of Conduct). This circumstance was canvassed in media reports and was also an issue canvassed in statements tendered. It is conduct publicly known. Mason J's reasoning in Mirror Newspapers Ltd v Harrison, which we have adopted, concludes this charge is also likely to be understood by a member of the public (a reasonable person) as an allegation not a conviction. Nonetheless, it also was conduct publicly known and reasonably taken into account by the Selection Committee.

16. Further, we do not accept the proposition that while there are charges laid and the Appellant intends to mount a defence to both matters that can be used to negate the contractual obligations made by the Appellant in the Team Membership Agreement at clause 2 to not conduct himself, in such a manner publicly known, as to bring himself into disrepute.

17. The Appellant is an elite athlete. He had signed a Team Membership Agreement and under clause 2 of that Agreement, as a Condition of Membership, he had acknowledged:

"… that my selection and continued membership of the Team is at the discretion of the AOC and is conditional upon me having met the AOC selection criteria (which I acknowledge subject to the Participation and Qualification Criteria for the Games determined from time to time by my IF and the IOC) and my NF nomination criteria as approved by the AOC (if applicable) and, in particular:

1. signing this agreement;

2. have not engaged at any time in conduct which is publicly known and in the absolute discretion of the President of the AOC (or, during the period of the 2008 Olympics Games, in the absolute discretion of the Chef de Mission of the 2008 Australian Olympic Team) has brought or would be likely to bring me, . . . into disrepute or censure, or

3. …

4. …

5. …

6. …

7. …

8. …

If I have not met the above conditions, I agree that the AOC or the Chef de Mission in their respective sole and absolute discretion may terminate my selection to, and continued membership of, the Team …".

18. The Appellant, therefore, had a contractual obligation to not engage in (publicly known) conduct which, in the absolute discretion of the President of the AOC, brought or would be likely to bring him into disrepute.

19. An athlete nominated for the Australian Olympic Team is presumed to be a person of good repute. He/she is perceived as both a leader and a role model within the Australian community. The Appellant has to answer two serious criminal charges. He faces severe statutory penalties if found guilty. The presumption of innocence is no answer to a determination by an AOC Selection Committee that the Appellant has, by particular conduct, brought himself into disrepute and therefore is found not eligible for selection to the Australian Olympic Team.

20. On the facts before us the Tribunal cannot accept that the Decision of the AOC Selection Committee (and the President) that the Appellant has brought himself into disrepute and therefore should not be selected as a member of the Australian Olympic Team can be held to be so unreasonable or perverse as to be "irrational". In fact we find the Decision of the AOC (and the President) to be a reasonable Decision.

The Court of Arbitration for Sport rules:

1. The Appeal filed by Mr Chris Jongewaard dated 21 July 2008 is dismissed.

2. The decision of the Australian Olympic Committee Inc dated 19 July 2008 is confirmed.

(…)

5. This Award be made public.