

**BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND**

ST 06/19

BETWEEN

MICHAEL BIAS

Appellant

AND

CYCLING NEW ZEALAND

Respondent

**DECISION OF SPORTS TRIBUNAL
17 July 2019**

Hearing 15 July 2019

Tribunal Sir Bruce Robertson (Chairman)
Dr Lynne Coleman
Ruth Aitken

Present Cathleen Bias, Appellant's Mother
Martin Barras, Convenor, BMX elite selection panel, Cycling NZ
Bruce Northwood, Cycling NZ appointed selector
Tony Takurua, BMXNZ appointed selector

By teleconference Michael Bias, Appellant (by phone)

Registrar Mike Selwyn

Background

1. This appeal by Michael Bias is against the decision by Cycling New Zealand (CNZ) not to select him to compete at the 2019 BMX World Championships ("the World Championships") in Zolder, Belgium later this month.
2. On 29 April 2019, Mr Bias was informed that he had not been selected to the pool from which the team selection would be made. He appealed, and the matter was resolved without the need for a hearing.
3. On 24 May 2019, Mr Bias learned that he had been successful in being nominated to the pool for the World Championships team. On 27 May 2019, he was advised that he had not been selected to go to the World Championships. The following day, he lodged an appeal.
4. On 7 June 2019, a without prejudice meeting was held, but there was no accommodation reached.
5. Mr Bias advised CNZ that he intended to continue with the appeal, which was then referred to the Selection Ombudsman, Paul Morten.
6. On 25 June 2019, the Selection Ombudsman issued his decision on the matter. Mr Bias had raised three grounds of appeal: (1) actual bias in the non-selection decision; (2) that CNZ's Selection Regulation had not been properly followed and/or implemented; and (3) that there was no material on which the selection decision could reasonably be based.
7. As to (1), the Selection Ombudsman found no evidence of bias. He considered (2) and (3) to be related concepts and considered them together. Ultimately, relying on prior authority from the Sports Tribunal, he held that selection criteria should be clear, communicated in sufficient time to enable a rider to set a course for nomination and selection, and clearly marked, not to select from outside base criteria without clear warrant.

8. He concluded that selectors could exercise discretion, but that this must be exercised on grounds that are easily understood otherwise substantial unfairness would follow. He held that if there was a policy that went outside performance, that must be understood and it should also be known if this applies only when everything else is equal or as a consideration in its own right.
9. The Selection Ombudsman found that the Selection Panel acted in good faith, but they did not properly follow the Selection Regulation. He granted the appeal and referred it back to the Selection Panel for reconsideration.
10. On 26 June 2019, CNZ's Selection Panel requested further information from Mr Bias, which was provided. On 1 July 2019, CNZ informed Mr Bias that the decision not to select him had been reconsidered and upheld. The following day, Mr Bias filed his appeal with the Sports Tribunal.

Appeal

11. The grounds of appeal to the Sports Tribunal are limited. Section 2 of CNZ's Selection Regulations provides:
 2. **Grounds for Appeal**
 - 2.1 A rider (the Appellant) may lodge an appeal against a decision of his or her non-selection to a Cycling New Zealand Team in accordance with clause 5.1 (Process) ("Decision") on one or more of the following grounds (but no other grounds):
 - 2.1.1. The Cycling New Zealand Selection Regulation has not been properly followed and/or implemented;
 - 2.1.2. The Appellant was not afforded a reasonable opportunity to satisfy the requirements in the Cycling New Zealand Selection Regulation;
 - 2.1.3. The Decision not to select the rider was affected by actual bias; and/or
 - 2.1.4. There was no material on which the selection Decision could reasonably be based.

Discussion

12. There is nothing in this case which provides a basis for finding deviation from the Selection Regulations, failure to afford a reasonable opportunity to satisfy the Regulations or actual bias. It means the appeal is concerned only whether there was material on which the decision could be reasonably based.
13. The case is unusual in that it falls into a very narrow compass. We have an athlete who has the base qualifications for appointment to the team; there is a relevant vacancy available and no other cyclist would be put in jeopardy of participation by his appointment; and he has a long involvement in the sport including having previously been part of teams to the World Championships.
14. The task of the Tribunal is to consider whether the decision taken in accordance with the Selection Regulations was properly available to the selectors.
15. The Tribunal is not another tier of selection. If we had been making the decision we may well have reached a different conclusion as we might have placed greater weight on some factors not least the opportunity for an athlete to have further and better exposure to strong international competition.
16. The legal position is however very clear; that we can and should only intervene if there was no basis or justification for the decision reached by the selectors.
17. This is the first year in which these particular men have carried out the task. They are unable to assist us with information as to what has happened in the past. There is nothing before us to displace the anticipation of Michael that as in the past he would in these circumstances be selected and given the opportunity to compete.
18. There are new selection regulations in place this year. They are on the website and have been promulgated to all BMX clubs. They do not change the core situation and very specially set out the subjective appraisals which will occur. It may be arguable that more might have been done by CNZ to ensure that potentially affected cyclists understood a change in the environment in which they were involved. Effective and meaningful communication is essential in the sensitive space of selection procedure and process. Merely posting legalese on a website may not cut the mustard. However any such criticism of administrative process could not be a basis for us to second guess the appointed selectors.

19. The selectors have adopted the simple stance that they are required to follow precisely the demands and requirements of the selection policy and to make a decision accordingly. At its core their assessment of the history of Michael in BMX, and his current position, is that he is just not good enough to represent New Zealand at the World Championships. It is their duty to assess and evaluate the particular results within their full circumstances. Unless their conclusion is irrational or perverse then it has to be accepted.
20. A substantial concern we have is to the future of this cyclist and men's BMX in general. We are told men's BMX is not a priority for Cycling New Zealand. Michael gets no financial support or assistance of any sort from them. He is self-funded, self-motivated and on his own.
21. We would have thought that there could be a case for saying that he should be encouraged to maintain his interest and participation in the sport and that anything which would increase his level of skill and experience was to be encouraged. We do not see how there is anything about his record and skill level which would bring discredit to the sport or the country. In a very volatile sport there is the possibility of his bringing credit to himself and cycling in New Zealand.
22. All that however involves a judgment call which depends on an exercise of discretion and the making of a value assessment. There is nothing before us which suggests that the selectors have misunderstood or misapplied the requirements of the procedure.
23. There have been a multitude of considerations and reconsiderations of the case by the selectors. There was an exhaustive inquiry by the relevant Ombudsman and his concerns were further considered and the selectors again weighed the various issues.
24. The question of extenuating circumstances was noted and addressed. We do not see the classification of being or not in a development phase as critical. These three men were appointed to do the selection and are of the clear and consistent view that Michael does not make the cut.

Conclusion

25. The decision taken is formulaic and harsh but it could not be said that it was unavailable.

26. Accordingly, the Tribunal has no option but to dismiss the appeal.

Dated: 17 July 2019



Sir Bruce Robertson
Chairman