BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 05/15**

BETWEEN **ANDREW ROY**

Appellant

AND **CANOE RACING NEW ZEALAND**

Respondent

DECISION OF SPORTS TRIBUNAL

21 May 2015

Tribunal: Dr Jim Farmer QC (Deputy Chairperson)
Rob Hart
Paula Tesoriero

Hearing: 11 and 18 May 2015 in Auckland

Present: David Fraundorfer, counsel for Appellant
Andrew Roy, Appellant
John Bryant, Head Coach, Mount Maunganui Lifeguard Service
Alan Thompson, Canoeing Coach
Paul David QC, Maria Clarke and Shaun Maloney, counsel for Respondent
Mark Weatherall, CEO, Canoe Racing New Zealand (CRNZ)
Steve Richards, Selector, CRNZ
Mark Watson, Selector and Coach, CRNZ
Greg Owen, Sport Development Manager, CRNZ
Mike Taylor, CRNZ Board

Registrar: Brent Ellis

Introduction

1. This is an appeal by Andrew Roy against a decision by Canoe Racing New Zealand [CRNZ] not to select him for the Under 23 K1 200 event at the 2015 World Championships.

The Appellant

2. Andrew Roy is a 21 year old who competes in Kayaking sprints, the standard distance being known as K1 200 for a single paddler and K2 200 for a pair. The 200 represents 200 metres. He came to kayak racing from a background of swimming, water polo and surf life saving and surf ski events. In 2009 he turned to kayaking and the following year was named in the Under 19 team to compete in Australia. In 2011 he won the National Under 19 K1 200 championship and also was in the team that won the U19 K4 1000 national championship. He went on to further successes and, among other achievements, in 2012 was placed 2nd in the Under 19 National K1 200. By this time he was also competing with distinction in Open events. In 2013 he won the U23 National Championships although competing against much older athletes in that class. At this time he was also paddling with another athlete and together they won the National Championships on both the Open K2 200 and Open K2 500. This run of successes in both K1 and K2 events continued the following season and with his paddling partner he was chosen to compete in K2 200 events in World Cup events in Italy and other European countries.

3. About this time, he began to experience difficulties with a wrist injury, the effects of which initially came and went. During the World Cup events in Europe, without the benefit of a coach, he and his partner, according to Andrew's evidence had discussions at times that became "heated". On returning to New Zealand, he sought medical advice for his wrist and, after x-ray and MRI testing, he was advised by a specialist that he would be able to compete in the 2014 World Championships later that year. He thought that matters with his partner were fine but it turned out that this was not so and that the latter had complained to Mr Weatherall, the CEO

of CRNZ (the organising authority for kayak racing in New Zealand) that he had lost confidence in Andrew. The evidence that Andrew gave to the Tribunal was that he was accused at a meeting by Mr Weatherall that he had asked the specialist to falsify medical records to clear him of the injury. That was denied in evidence by Mr Weatherall, though he did say that he had asked Andrew if he was withholding medical evidence. Evidence was given by another doctor, Dr Paterson, who had been involved with the diagnosis and treatment of Andrew's wrist problem. His evidence was that he had been contacted by Mr Weatherall enquiring about the injury but had not said anything that might suggest that Andrew was withholding information from CRNZ about the injury.

4. We do not believe that we need to take this matter further by resolving evidential conflicts but it is a fact that CRNZ decided to withdraw the K200 team consisting of Andrew and his partner from the 2014 World Championship. Mr Weatherall's evidence was that this was partly on the view that had been formed that Andrew was withholding medical information from CRNZ and partly because it was not felt that the team could work together to achieve optimal performance. It would seem that these events may have been the genesis of views later expressed by Mr Watson, one of the selectors for the 2015 World Championship selection, which is the subject of the present appeal.

5. Probably as a result of these events, Andrew decided to concentrate on the K1 200 event, with his immediate goal being selection in that event for the 2015 World Championship which he saw as a key achievement to his ultimate goal of Olympic selection for the 2016 Olympic Games.

6. The sequence of events that occurred in the 2014-2015 season culminating in his non-selection for the 2015 Worlds is discussed in detail below. In essence after a promising start to the season and, at his own expense but with a small grant from CRNZ, he attended a training and racing camp in Perth and raced credibly against strong Australian competition in the GP1 Regatta before returning to New Zealand in time for the National Championships at Lake Karapiro in February of this year. His performance at those championships in both the Open and Under 23

K1 200 events was less than he had expected, based on his past record. Subsequently he travelled to Australia with a New Zealand team for the GP2 Regatta where he performed with credit, finishing 2nd in the Open K1 200 event B final against strong Australian competition. Of the under 23 athletes competing in that event, he was 5th.

7. However, at that Regatta, he had what appeared to be a strong disagreement with Mr Mark Watson, one of the New Zealand selectors, over a number of issues which were traversed in evidence. Mr Watson complained in particular that Andrew had remonstrated disrespectfully with him in front of others. That was disputed but if that were the case we think it important that athletes are careful at all times to show respect to officials and coaches (who are usually giving up their time for the benefit of the sport) and to ventilate any grievances in a measured way. On the evidence however we are not able to resolve the propriety or otherwise of how the athlete handled this. The clear point that does emerge is that this confrontation was to carry through, first, in a tense meeting that took place between Andrew and Mr Watson at the selection camp held the following month and, secondly, in Mr Watson's informal report and recommendation by email to his fellow selectors that Andrew should not be selected for the 2015 World Championships. That email, which initially went to Mr Owen, an administrator, who later forwarded it to the other selectors and to the Chief Executive, said:

> *The only selection decision that needs to be made is on Andrew Roy. My recommendation is that he is not selected:*
>
> - *Performances are not at required level – 1000m paddlers are performing as well if not better over 200m.*
> - *Behaviour – rude, aggressive,*
> - *Character traits – fixed mindset, looks to blame, has no self awareness of self and can't talk about it.*

We return to this later.

The CRNZ Selection Policy

8. CRNZ published its Under 23 Sprint Selection Policy for the 2015 season in December 2014. The Selection Panel was named as Steve Richards, John Trotter and the "U23 relevant coach", who was Mr Watson. The events for which selection was to take place were the U23 Australian GP2 event referred to above and the U23/Junior World Championships to be held 24-26 July 2015. Andrew was selected for the former but not the latter.

9. The Policy identified a number of specific New Zealand regattas in which candidates for selection must compete and also an U23 "Team Boat Trial" if invited to be held after the National Championships and the GP2 Regatta. Andrew was invited to that trial but did not receive a trial as such. We return to this later. There was also listed in the Policy document a number of other criteria, including earlier domestic and international performances. These criteria included the "development potential of the athlete to be able to fulfil the Overall Objective in the future". The Overall Objective was stated as being "whether the Athlete … is capable of achieving a top 9 placing in 2015 or 2016 in the Category at the regatta or is showing a strong improvement in performance with potential to achieve a top 9 placing". In this respect, it was stated that the athlete's performance at the 2014 U23 World Championships should be taken into account. As recited above, Andrew's K2 200 team was withdrawn from that Championship event and so he was not able to prove himself there.

10. At the hearing, the case for CRNZ was that Andrew was not capable of a top 9 placing in the U23 K1 200 event and that he had not shown improvement. It was argued to the contrary for him and attention was drawn to the fact that he would still be under 23 in 2016.

11. The Policy document provided for appeals to this Tribunal. In particular clause 8.1 stated the grounds (and only grounds) of appeal as being:

> *8.1 An Athlete may lodge an appeal against their non-selection ("Appellant") to an Under 23 Team in accordance with clause 8.2 of this Policy on one or more of the following grounds (but no other grounds):*

(a) this policy has not been properly followed and/or implemented;

(b) this Appellant was not afforded a reasonable opportunity to satisfy the requirements in this Policy;

(c) the decision not to select the Appellant was affected by actual bias; and/or

(d) there is no material on which the selection decision could reasonably be based.

12. In broad terms, these grounds for appeal are analogous to the principles of judicial review in administrative law. In particular, the right of appeal under the Policy is not an unfettered appeal on the merits of the decision under challenge but is limited to the grounds stated. The Court of Arbitration for Sport, in a different case and different foundation document, has warned against the Tribunal substituting its own views of the merits of the assessment of the selection decision for those of the Selection Panel (*Yachting New Zealand v. Murdoch and others*, cited below, at para. 6.34). Counsel for CRNZ delivered us the same warning more than once during his submissions. We believe we are mindful of the danger of trespassing on the domain of the selectors in that respect and have endeavoured to confine ourselves to the stated permitted grounds of appeal.

13. Finally (for present purposes), clause 8.2 of the Policy document provided that there was no further right of appeal from the decision of the Sports Tribunal.

The Hearing before this Tribunal

14. The hearing took place over 2 full days. The first day's hearing took place on Monday 11 May and, the case not being finished, the second day was held on Monday 18 May. The Appellant filed 5 affidavits including one from himself. CRNZ filed 8 affidavits, including 4 from the 3 selectors and one from the Chief Executive. No affidavits were filed by members of the Board of CRNZ notwithstanding that the Board was required to give the final approval to the selection recommendations of the selection panel and the Chief Executive. Having regard to our findings below as to the failure of the selectors and of the Chief Executive to follow the procedures laid

down in the Selection Terms of Reference, we think it incumbent on the Board to take some responsibility for these failures and to take remedial measures to improve the selection processes.

15. All witnesses were cross examined except one from each side who were not present and who, despite arrangements that had been put in place by the parties, were not available by telephone for cross examination. After discussion both counsel agreed that the affidavits could be taken as read with the Tribunal giving weight to the fact that there had been no cross examination on them. We do not in any event think that the evidence of those deponents would have affected the outcome of this appeal.

16. A major issue that arose during the opening by the appellant's counsel was that the procedures laid down in the Selection Terms of Reference – a CRNZ document published on its website and referred to in the Policy document – had not been adhered to by the selectors or by the Chief Executive. There had been no mention of this in the Notice of Appeal which simply repeated the grounds of appeal contained in clause 8.1 of the Policy document set out above. No objection was taken to this although it was commented on critically by counsel for CRNZ. However, responsibly, he dealt with the point during submissions even though, as discussed below, it has become one of major importance in this case. In case there is any further comment on this issue, we note that had objection been taken and an application made to amend the grounds of appeal we would have been inclined to grant it. Counsel for CRNZ reminded us more than once that this Tribunal is not as restricted as the High Court and should ensure that the real issues of the case are fully addressed.

Analysis and Tribunal's Reasons for Decision

17. We turn now to analyse the evidence and submissions and give the reasons for our ultimate decision.

18. We start with the prescribed procedures that bind those involved in the selection process as contained in the Selection Terms of Reference. The procedures relating to meetings and selection recommendations of the

Selection Panel are detailed and require a degree of formality. It is anticipated that Minutes (which must be kept) will be available to the Chief Executive and the board (clause 6.5), which highlights the fact that entire decision-making process is not confined to the Selection Panel but also involves the Chief Executive and the Board, who have their own, distinct, roles in the final selection decisions.

19. This raises the next - in our view important – procedural requirement which is that of reports. Clause 7 requires the Selection Panel to report to the Chief Executive at least 7 days before the selection date in relation to "proposed selection decisions". That report must set out: (a) an outline of the information considered by the Panel; (b) an outline of the processes followed by the Panel; and (c) the proposed selection decisions. This raises an issue that was the subject of competing arguments as to whether "proposed selection decisions" is limited to those athletes who were being recommended for selection, notwithstanding that Mr Watson himself referred to the appellant's non-selection as a selection decision. On that view and as in effect argued for CRNZ, the failure to refer to the appellant's non-selection and the reasons for it would be of no consequence.

20. Again, we cannot agree. That would exclude the Chief Executive and the Board from being part of the decision-making process which, in our view, would be contrary to the whole scheme of decision-making provided in the document. It would necessarily severely limit the following review provisions in clause 8 which provide that, first, the Chief Executive is to be responsible for reviewing the Selectors Report and then recommending approval to the Board and, secondly, that the Board is to be responsible for reviewing and, if satisfied, approving all "proposed selection decisions".

21. The appellant, through his counsel, put much emphasis on the failure of CRNZ, and the selectors and CEO in particular, to comply with the mandatory processes contained in the Terms of Reference for the appointment of a Selection Panel and for the conduct by the selectors, the Chief Executive and the Board in performing the selection function. There is little doubt but that the persons involved paid scant, if any, regard to

those requirements. Indeed, when the Terms of Reference, were produced to the Tribunal as an exhibit to the affidavit of one of the selectors, it later emerged that the version so produced was not the current edition of the document.

22. The failures to comply with the Terms of Reference - some of which are more serious than others but which we have considered cumulatively - consisted of the following:

(1) The selectors failed to comply with the formal requirements of selector meetings, the keeping of minutes of those meetings (which would be made available to the CEO, the High Performance Manager and the Board);
(2) The selectors failed to vote formally on selection proposals and record those votes;
(3) The selectors failed to comply with timing requirements in relation to a specified selection date;
(4) The selectors failed to prepare a report which dealt with specified matters;
(5) The Chief Executive failed to require a selectors' report that would illuminate and explain the rationale of their decisions for the benefit of the Chief Executive and the Board, when one was not provided, to be completed and forwarded to him;
(6) The Chief Executive failed to take steps to ensure that the selectors did comply with the processes prescribed by the Terms of Reference;
(7) The Chief Executive, having been advised informally of the appellant's non-selection failed to advise the Board of that fact and thereby deprived the Board of the ability to make further enquiries as to whether the truncated reasons for non-selection given in Mr Watson's email were adequate or valid;
(8) The Board failed to make proper enquiry as to whether the prescribed processes had been followed and approved the recommendations without an adequate report.

23. Counsel for CRNZ sought in submissions to downplay the importance of the breaches of the Selection Terms of Reference and said that they could be ignored for the purposes of this appeal unless it could be established that the breaches impacted on the implementation of the 2015 Selection Policy. In particular, he said that the requirements for minuted meetings and the compilation and provision of formal reports were mere procedural irregularities that could in effect be ignored. We disagree. We also think that the continued failure to attribute importance to CRNZ's own processes does not augur well for any reconsideration of the non-selection decision, a matter to which we return later in this Judgment.

24. Before setting out our reasons for this last statement, it should be first noted that it was also argued on behalf of CRNZ that the Terms of Reference were not part of the contractual arrangements that required consideration and they were therefore irrelevant. We disagree also with that proposition. The Policy document itself in clause 2.3 refers to the Selection Panel Terms of Reference (in terms of the appointment of the Selection Panel) and clause 9.1 defines "Selection Panel Terms of Reference" as meaning the Selection Panel for Under 23 Athletes Terms of Reference "located at www.canoeracing.org.nz". In our view, that is sufficient for us to find that the Policy and the Terms of Reference are to be regarded together as an overall contractual arrangement between CRNZ and those athletes seeking selection. An athlete, in our view, is entitled to go to the website, read the Terms of Reference and the processes for selection that are set out there and to regard these as the processes that will be followed by the selectors and the others (Chief Executive and Board) involved in the decision-making process. Indeed, we would add that the whole purpose of the Selection Terms of Reference is to lay down procedures and requirements that will ensure that all those involved in the selection process are best able to reach outcomes that achieve the principles and policies laid down in the Policy document. Put another way, the Selection Terms of Reference are intended to facilitate the implementation of the Policy and it would be counter-productive if both documents were not read together, to the benefit of both the decision-makers and the athletes.

25. We have listed above the respects in which the selection processes were not observed. That translates into a breach of the Policy and triggers one or more of the grounds for appeal contained in the Policy. In summary, as discussed above, the Chief Executive was advised – not by a full report but informally by email – that the appellant was not proposed for selection and a brief statement of the reasons for that – but the Board was not. In our view, the report to the Board by the Chief Executive should have advised of the appellant's non-selection and that of others who had in effect been short-listed and the reasons for that recommendation. That did not happen which does not seem to us to satisfy the requirements of 8.1(b) of the Policy that the athlete should be "afforded a reasonable opportunity to satisfy the requirements in this Policy".

26. We regard these as not only breaches of the requirements of the Terms of Reference but breaches that meant that the appellant did not receive consideration by the ultimate decision-makers, namely the Board. We also think that the brief statement of the factors that led the Selectors to consider that the appellant should not be selected, as contained in Mr Watson's email, did not comply with the requirement that they should provide in a report to the Chief Executive an outline of the information considered by the Panel. The specific matters that concerned the Selectors about the appellant were not outlined with sufficient particularity to enable those receiving such a report to understand – and therefore be able effectively to review – the reasoning of the Selectors in relation to the appellant.

27. We think also that there are good policy reasons for requiring formality around selection processes. The formality of meetings and minutes and the compilation of reports for the purposes of review higher up in the selection decision chain provide a degree of discipline around the whole process that reduces the possibility of a subjective assessment being made by an individual selector or selectors and of that assessment not being adequately tested collectively by the selectors as a group. It seems to us that this has probably happened in the present case in terms of the interactions between Mr Watson and the appellant and which explain the

rather cryptic but seriously adverse conclusions and summary by Mr Watson as to why the appellant should not be selected because of what were described by him as bad behaviour and deficient mental and character traits. These views, although on the evidence discussed informally with the other selectors separately by Mr Watson, were not analysed, in terms of their relevance and the weight that should be given to them, in a formal report that was the outcome of disciplined discussion. They were clearly heavily influential in the decision not to recommend the appellant for selection and were therefore prejudicial to him and in our view it can be said that, in terms of clause 8.1(b) of the Policy he was "not afforded a reasonable opportunity to satisfy the requirements in this Policy".

28. It was put to us by counsel for CRNZ in effect that we should take a benevolent view to the wholesale failure to follow the Terms of Reference processes, particularly in the light of the fact that selectors perform their services on a voluntary, unpaid, basis. We certainly do not wish to denigrate the considerable contribution that selectors make to their chosen sports and we acknowledge the qualifications and experience of those in the present case. However, it is incumbent on them to respect and abide by the processes laid down by their own sporting organisation. Those processes are intended to ensure sound decision-making through following set procedures that are designed to ensure that athletes contending for selection receive – as it is put in clause 8.1(b) of the Policy – a reasonable opportunity to satisfy the requirements of the Policy. We would add that there was a disconnect between the submission by CRNZ's counsel referred to above and a further submission (with which we agree) that the grounds of appeal set out in the Policy must be adhered to.

29. We note that one of Mr Watson's brief summary points as to why the appellant should not be selected was that his performance was "not at the required level". In this respect, Mr Watson noted that 1000m paddlers are performing as well if not better over 200m". We take this last point to be a reference to the results of the 2015 National 200m Championship races, which is a matter which we consider further below and about which we

think the Selectors failed to take adequate (or any) account of the difficulties that the appellant faced in that event.

30. Once again, we think that an assessment of the appellant's performance and also his potential to perform to a Top 9 finish at either the 2015 World Championships or those in 2016 (when the appellant will still be under 23) would have benefited greatly from compliance with the meeting and report requirements of the Terms of Reference. As it was, one of the other selectors, Mr Richards, tendered in evidence an analysis in the form of a written document that he had compiled comparing the appellant's finishes and times with other athletes in Australia and New Zealand, and with one Australian athlete especially, in relation to the GP2 regatta where the appellant finished second in the B final in the Open K200 event, as described above. When that document was challenged, it emerged that it had been compiled after the appeal had been filed and was therefore not available to the other selectors at the relevant time. Mr Richards did not say either in his first brief or in his supplementary brief, when he acknowledged that the document had been compiled ex post facto, that he had shared this analysis with the other selectors at the time. Nor was there any evidence from the other selectors that they had received that analysis and taken it into account. We would have expected such evidence to be given if Mr Richards' analysis was an important part of the collective recommendations made by the selectors. We are not satisfied that it has been established that any comparative study that Mr Richards did at the time was shared then with the other selectors.

31. The third selector, Mr Trotter, was overseas during the period after GP2 and at the time of the selection camp but we draw no adverse inference from that fact and accept that he did have a telephone conversation in relation to selection decisions with Mr Richards, though apparently not with Mr Watson, at that time.

32. We think there is force also in the submission that was made that no other athlete was subjected to the same kind of analysis that Mr Richards conducted in respect of the appellant and that this was surprising given

that two selected athletes in the GP2 Regatta, in which the appellant performed so creditably, had not made B finals.

33. We are therefore left with the impression that the assessment of the appellant's performances and potential to finish in the Top 9 either in 2015 or 2016 was too undisciplined and casual to be regarded as reliable. In relation to the appellant's present and potential capability, there was evidence from Mr Alan Thompson, a former double Olympic Gold Medallist, that the appellant "has the potential to perform at the highest level especially given his relatively young age". In this respect, he noted in particular the appellant's performance at the highly regarded Australian GP2 Regatta in February of this year in which, as referred to more than once above, the appellant finished 2nd in the B final of the Open K1 200. Mr Thompson described the appellant as being highly competitive and as comprising the best performance of all the New Zealand U23 athletes in all events. Of the under 23 athletes who competed in the Open event – there was no U23 K1 200 at the regatta – Mr Roy was the 5th to finish. Our view is that the selectors took little, if any, account of that result. Mr Roy had also earlier in the season finished 9th in the A final of the Open K1 200 event at the GP1 Regatta in Australia in a field which included an Olympic Gold Medallist and other elite athletes. The depth of talent in the Australian regattas had been acknowledged in the CRNZ coach's report of the GP2 Regatta.

34. There were other features of the considerations that were given to the appellant's non-selection that have given us concern. The first is that, as described above, he was deprived of the opportunity to take part in the 2014 World Championships in the K2 200 event, despite being selected earlier. There was much evidence relating to the reasons for this. In an earlier event he had been paired with another athlete and their performance was not to the level expected, first, because Mr Roy had a wrist injury referred to above and, secondly, because of what appear to have been differences between the pair, no doubt exacerbated by the injury. The sequel to that involved allegations and counter-allegations that, as we have said, we do not think we need to traverse and determine

the rights and wrongs of. However, there was medical evidence that the injury quickly repaired and that Mr Roy would have been able to have taken part later in the year in the World Championships. The decision that was taken however was not to send a K2 200 team to the Championships and it appears to us that Mr Roy was, rightly or wrongly but probably through no fault of his own, deprived of the opportunity to compete in the Under 23 2014 World Championships, which was one of the listed selection events for the Under 23 2015 World Championships.

35. Secondly, there was the fact that, although he had been invited to participate in the Under 23 boat trials in a Camp conducted between 20-23 March 2015, which was one of the prescribed selection events listed in the Policy document, the scope for his displaying his credentials at that camp was largely limited to off-water testing and he had no opportunity for an on-water timed performance in his event. However, his off-water strength testing performances were impressive as against all other competitors. They were completely discounted however by Mr Richards who said they were not really relevant or helpful. We find that an odd and illogical statement, given the purpose of the camp to which Mr Roy had been expressly invited for selection purposes. We view it as a further example of Mr Roy not being given a reasonable opportunity to satisfy the requirements of the Selection Policy, as required by 8.1(b) of the Policy document.

36. Perhaps most seriously of all, we think that Mr Roy was unfairly assessed, for selection purposes, in relation to the so-called behavioural and character issues. We have referred above to Mr Watson's email of 23 March 2015 to Mr Owen, who was the administrator charged with organising the selection process, recommending that Mr Roy not be selected, first, because his performance was not at the required level and, secondly and thirdly, because his behaviour was rude and aggressive and because of his character traits described as "fixed mindset, looks to blame, has no self awareness of self and can't talk about it". Mr Owen forwarded this email to the CEO and the selectors and to others. The predecessor to Mr Watson's personal criticisms of Mr Roy can be found in

Mr Watson's report on the GP2 regatta, in which he noted the depth in the Australian regatta and the greater performance therefore required of New Zealand athletes, but in which he then went on to single Mr Roy out for strong behavioural criticism. The sequel to that was a tense meeting between Mr Watson and Mr Roy (at which a coach Mr Gyertyanos was present) at the end of the camp (around the time when the selectors were arriving at their recommendations). Mr Watson's views of Mr Roy's conduct and "mindset" were discussed at that meeting. It is sufficient for present purposes to say that Mr Roy did not agree with Mr Watson's negative opinions of him.

37. Finally, there is the question to be considered of Mr Roy's performance in the 2015 National Championships. At that time, he competed first (after qualifying) in the Open K1 200 event. The evidence was that there was weed in his lane and that he was handicapped by this fact, finishing 5th. Mr Richards was of the contrary opinion but there was other evidence from those who were present and we accept that he was so handicapped. Mr Restall, the CRNZ High Performance Coach also accepted this fact in an email of 21 February 2015 that he sent Mr Roy.

38. Mr Roy then took part only 45 minutes later in the Under 23 K1 200 final and finished 3rd. His evidence, supported by that of Mr Thompson and Mr John Bryant, an experienced coach and selector, was that this was deficient regatta programming and that Mr Roy was seriously disadvantaged in terms of any assessment of his Under 23 result.

39. It would seem to us that that result strongly influenced the selectors' minds when considering Mr Roy's performance capability and, as stated above, more creditable performances by him in other events including the Australian GP2 regatta, which was one of the listed selection events, were effectively ignored. The National Championships were a listed selection event (though only one of them). Indeed Mr Restall in his email of 21 February 2015 expressly said to Mr Roy: "There is an acknowledgment there was a weed issue at 2015 Nationals in some races but the selectors don't look at one race in isolation."

40. We think that Mr Roy's performance at the National Championships was, to the contrary, given huge weight in the decision not to recommend his selection. Mr Richards said in his evidence in chief that that result "did not indicate that Mr Roy was capable of achieving a top 9 placing at the 2015 World Championships in this event." In so concluding, he rejected the claim that Mr Roy had been detrimentally affected by weed and regatta programming. As stated, we accept the evidence to the contrary and are of the view that the selectors, in the weighting that they gave to Mr Roy's results at the National Championships, did not implement the selection policy as set out in clauses 5.2 and 5.3 of the Policy document correctly, a fact which was contributed to substantially by the failures found above in relation to the procedures laid down for selection decision-making.

41. The second major selection factor considered in relation to Mr Roy was the view taken, initially by Mr Watson and then adopted by the other selectors and then it would seem by the Chief Executive Officer but not by the Board (because they did not know of it), of the behavioural and mind-set issues discussed above, in respect of which our conclusion was that Mr Roy had been unfairly assessed. There was debate at the hearing as to the extent to which these factors could or should be taken into account by the selectors. We do not dispute that, in some exceptional cases, conduct of an athlete off the field or the water may be a relevant factor but we think that in the present case the views formed by the selectors (in particular Mr Watson) formed of the appellant's conduct and character drove the final non-selection decision to an inappropriate extent and precluded the appellant from receiving objective consideration of whether he should be selected on the basis of his performances and potential.

42. That leads us inevitably to the conclusion that the decision not to select Mr Roy did not conform with the Policy which was, in terms of the Selection Terms of Reference which we have held must be read together with the Policy, not properly followed and/or implemented [clause 8.1(a) Policy]. We also think that the further appeal ground contained in clause 8.1(b) (the appellant was not afforded a reasonable opportunity to satisfy the

requirements of the Policy) has been made out. We do not find it necessary to make a finding on clause 8.1(d) (no material on which the selection decision could reasonably be based) but we do not discount the arguments advanced to that effect.

43. The appeal therefore succeeds.

44. That leaves the question of remedy. Selection appeals are dealt with specifically in rule 49 of the Tribunal's Rules. That provides:

> *If the appellant succeeds on such an appeal, the Tribunal may:*
>
> *(a) as a matter of usual practice, but in the discretion of the Tribunal, refer the question of selection back to the NSO and/or the NZOC for determination in accordance with the relevant selection criteria;*
>
> *(b) allow the appeal and conclusively determine the issue of selection of the appellant if:*
>
> *(i) it would be impracticable to refer the question of selection back to the NSO and/or the NZOC in the time available in which the entries to the relevant event or competition are to be submitted; or*
>
> *(ii) there has been such disregard of the selection criteria by or on behalf of the NSO and/or the NZOC that a reasonable person could reasonably conclude that it is unlikely that the selection criteria will be properly followed and/or implemented.*

45. We are conscious that there is no case in which the Tribunal has ever exercised the powers under rule 49(b)(ii) to make the selection decision itself. That is for the very good reason that the members of the Tribunal are not selectors and lack the knowledge of the athletes and of the sport to the extent that the selectors in that sport have. In addition, there is the fact that in most cases the Tribunal is considering appeals by an unsuccessful athlete who is claiming that he or she should have been selected in preference to another athlete that has been selected. A decision by the Tribunal to select the appellant therefore necessarily is also a decision to set aside the selection of the athlete first selected about whom the Tribunal may not be in a good position to make an assessment. Fortunately that situation does not arise here as Mr Roy's selection would not displace another athlete. Nor would it appropriate CRNZ funds as all the athletes going to the World Championships will be paying their own expenses.

46. The only statement of principle on the exercise of this power to which we have been referred is that of the Court of Arbitration for Sport in the case of *Yachting New Zealand v. Murdoch and others* (Award 2 April 2004). In that Award, the Court said:

> *… the power can only be exercised if the Tribunal comes to the view, under [clause 49(b)(ii)], that the performance of the Nomination Panel has been so unsatisfactory that it could not be trusted to follow the Nomination Criteria on a reference back.*

47. It is plain therefore that this power is one that will not be lightly exercised. However, and with regret, we have come to the conclusion that, having regard to the wholesale disregard of the processes laid down in the Selection Panel's Terms of Reference and to what we regard as quite serious deficiencies in the assessment of Mr Roy's performance and character and conduct, and including also the failure to advise the Board of his non-selection and the reasons for it, we do not have confidence that a reference back will result in a reconsideration that a reasonable person would conclude was likely to comply with the selection criteria. We have also referred above to the fact that at the hearing CRNZ downplayed the importance of its rules as to process, a matter that does not give us confidence that, even with the benefit of this Judgment, on a reconsideration of the decision not to select Mr Roy, the process would be faithfully adhered to.

48. Indeed, to be fair, given the findings that we have made, we think that it is not a task that the selectors should properly be asked to undertake objectively and dispassionately or can reasonably be expected to undertake without regard to their earlier views.

49. Our decision therefore is that Andrew Roy be selected for the K1 200 Event for the 2015 World Championships.

50. The final question that arises is that of costs. The appellant by his counsel asked for costs if the appeal was successful. The Tribunal does have power to award costs but in general its practice has been to be reluctant to do so even in the case of unsuccessful appeals. In cases where costs

have been awarded the level of the award has been modest and the Tribunal has not regarded it as appropriate to apply the principles or amounts of cost that would be awarded in the Courts. However, we do think that, in the light of our findings, a costs award, comprising a modest contribution to the likely costs incurred by the appellant in prosecuting this appeal and having to deal with a determined defence supported by no less than 8 affidavits, should be made.

51. We direct CRNZ to pay $4,000 costs to the appellant, which sum shall be deemed to include the $500 appeal filing fee paid by the appellant.

52. By way of postscript, we would add that we are very conscious that this Judgment will inevitably be received as being critical, perhaps harshly critical of CRNZ and those involved in the selection decisions, particularly because, as we freely acknowledge, our normal role is not that of making selections and we have no canoe racing selection experience. That is why we have reached this decision and in particular the decision not to refer the matter back reluctantly. However, for the reasons given above, taken cumulatively, we feel that on the particular facts of this case we have had no option but to come to the ultimate decision that we have. We trust that this will not be heralded as an indication that this Judgment will be anything other than a most exceptional outcome based on particular facts.

53. Finally but very importantly, we note that both parties indicated that they wished to work together to re-establish good relationships. We commend them for this. Many sporting bodies and athletes incur difficulties from time to time but, for the good of the sport, usually resolve and put them behind them.

Dated 21 May 2015

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Dr James Farmer QC

(Deputy Chairperson)