

BETWEEN **KANE RADFORD**

Appellant

AND **SWIMMING NEW ZEALAND**

Respondent

**DECISION OF SPORTS TRIBUNAL
27 June 2016**

Hearing: 27 June 2016 in Auckland

Tribunal: Dr Jim Farmer QC (Deputy Chairperson)
Georgina Earl

Present: Paul David QC and John Munro, counsel for Applicant
Bronwen Radford
Christian Renford, Mark Saunders, and John West, Swimming
New Zealand
John Rooney and Ashton Welsh, counsel for Respondent
Tara Pryor, New Zealand Olympic Committee

Registrar: Megan Lee-Joe

1. This is the Decision of the Tribunal following a hearing this morning at which evidence was given, with cross-examination of the key witnesses, and submissions from counsel for the parties. The decision must be made this afternoon as a result of the time expiring for acceptance (or otherwise) of the quota allocation set by FINA tomorrow morning. Arrangements have been made for the Swimming New Zealand [SNZ] selectors to convene later this afternoon to reconsider their decision not to nominate Mr Radford [Kane] for selection for the Olympic Games to be reviewed if our decision is that they should do this. Further arrangements have been made for the New Zealand Olympic Committee selectors to meet this evening to consider whether to accept the nomination and select Kane for the Olympics if the SNZ selectors do on review decide to nominate Kane.
2. Because of these extreme time constraints the Tribunal will not in this Decision be able to set out all the issues, evidence and submissions that were put before them this morning or to provide as full a statement of reasons on the key issues that we think the case can be determined on as we would have liked.
3. In our view, the appeal can be decided on the basis of 2 issues, one factual and one relating to how the selectors interpreted the selection criteria.
4. The factual issue concerns Kane's performance in the Qualifying event, a 10 kilometre swim in Portugal earlier this month. This race had been selected as the "Marathon Swimming Nomination Event" in which the "performance and results" of the athlete were to be given particular weight in deciding whether the athlete had satisfied the "overriding nomination criteria". We shall return to this event below. In summary, these criteria were that the selectors must be satisfied "overall", before nominating an athlete for selection by the NZOC, that:
 - (a) The athlete is capable of achieving a top 16 placing at the Games with the potential to achieve a top 8 placing; and
 - (b) The athlete has a "track record" of sufficient quality and depth that SNZ believes demonstrates the athlete will be competitive at the Games and will perform credibly.
5. As to (a), Mr John West, one of the 2 SNZ selectors, said in evidence (witness statement, para. 16) that Kane had the potential to be "perhaps 3-4 places either side of 16". We think therefore that criterion (a) has been satisfied.
6. As to (b), Mr West's view was that, based on his observations of Kane's races that he is aware of he did not believe he had the potential for a top 8 finish. In this respect, he also commented that in terms of events other than qualifying competitions, there is really only the FINA World Championship from 2015 which could be an indicator of performance as, he said, "Kane has not swum many World Cup events recently". We take the view that an athlete's "track record" goes beyond qualifying events and that there were 2 World Cup events (which are not named as qualifying events) in which Kane performed very creditably and which, in our view, the selectors should have given considerable weight having regard to the quality of the opposition. Kane finished 11th in the Portugal World Cup event in June 2015 (in which he was only 8 seconds off third place) and 16th in the Mexico World Cup

event in May 2015 (in which Kane finished 16 seconds behind the winner). In addition, we think that the selectors were wrong to downplay Kane's result of 3rd in the Pan Pacific event in Hawaii in August 2014. European swimmers did not swim in this event (a fact which seems to have strongly influenced the selectors). Only 2 seconds covered the first 3 places. The second finisher was Jarrod Poort, who has qualified for the Olympics this year and who is regarded as a top ocean swimmer.

7. Another matter that we think was highly relevant to Kane's track record and to which the selectors gave no or little weight was a report from Donna Bouzaid, SNZ's High Performance Development Coach, who said, with admittedly short reasons, that Kane "can definitely achieve a top 16 place and has an outside chance of making top 8". Mr Saunders, the Convenor of the selectors, said her view was not backed up by any factual evidence and he took it as only her "gut feeling". With respect, we do not think this is a fair characterisation of Ms Bouzaid's report and, having regard to her status, we think her views should have been given proper weight.
8. Returning to the Qualifying event in Portugal earlier this month, we note that Kane finished 19th some 34 seconds behind the winner. It should be noted that this field was made up of all swimmers seeking a place in the Olympics in a field limited to 25 other than the first 10 who had already been selected as having filled the first 10 places in the 2015 World Championships (an event in which Kane finished 30th).
9. Kane however testified that in the final 250 metres of the Qualifying event, when placed about 10th and poised for a sprint finish, he was interfered with by an Israeli swimmer who pulled the shoulder strap on his suit and then swam over the top of him causing him to stop dead in the water in a vertical position. He said that he lost momentum and that the incident caused him substantial loss of time. His coach, Paul Bruce, later wrote to the selectors advising of this incident (for which the Israeli swimmer was disqualified) and said that this "almost certainly" cost Kane "a couple of seconds in the incident itself and untold amounts of momentum and rhythm in the finishing stretch". Expert evidence was given by Phillip Rush, an experienced ocean swimmer, who said that in that situation an impact of 15 seconds could be expected and that falling off the back of the pack with which Kane had been swimming would be significant. We agree with that assessment.
10. Mr West, apart from being a selector, was also a FINA referee for the Portugal qualifying race and was on the water in that capacity in a boat close to the swimmers. His evidence was that the boat on which another referee blew the whistle for the foul by the Israeli swimmer was some way back covering what was in effect a third pack and therefore Kane must have been considerably further back from what he said. He did not however testify that at the time of the foul he was observing Kane and he fairly said that he did not at the time even assume that it was Kane who had been fouled. We think that, having regard to the actual finishing time – Kane finished 10 seconds behind the 13th place getter – we are satisfied that he would have finished much further down the field had he been as far back at the time of the foul as Mr West has deduced.
11. We should add that we were greatly assisted by a video recording of the race and evidence interpreting it and we think that the latter was consistent with Kane's evidence as to where he was placed in the race at the crucial time.

12. We record also that we have not been able to address a number of other issues that were argued, because of the extreme time constraints, but that we do not think that any of them would have affected the outcome.
13. We therefore are of the view that the appeal should be allowed and the matter referred back to the SNZ selectors to consider whether Kane should be nominated having regard to our findings that:
 - (1) Kane was interfered with on the finishing strait at a time when he was placed approximately 10th;
 - (2) The selectors should have taken into serious account his performances in the World Cup events and the Pan Pacific events referred to above as a part of his track record that was highly relevant to the question of whether he should be nominated for selection.
 - (3) The selectors should have had regard to the views of Donna Bouzaid, the High Performance Development Coach, that Kane could definitely achieve a top 16 place and had an outside chance of making the top 8.

Dated: 27 June 2016



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Dr Jim Farmer QC

Deputy Chairperson