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## A. Introduction

1. Liza Hunter-Galvan is an endurance athlete based in the United States. She has appealed against the decision of Athletics New Zealand Incorporated ("ANZ") not to nominate her for the women's marathon at the 2008 Beijing Olympic Games.
2. In her appeal brief, she put her position in this way "(she) is just seeking a fair opportunity to present all of the facts and to be judged fairly – without any undisclosed additional criteria, and without any bias against her". She then set out Grounds of Appeal discussed below.
3. Ms Hunter-Galvan (whom we also refer to as "the athlete" and "the Appellant") filed extensive material before this Tribunal, as did ANZ, which was the subject of evidence and submissions at a teleconference hearing conducted on Friday 6 June 2008, with the Tribunal based in Auckland together with ANZ Counsel and witnesses, and the Appellant, her counsel, and other representatives attending by telephone from Texas. Following the hearing the parties filed further submissions with the Tribunal.

## B. The Appeal

### Background submitted by Appellant

4. Ms Hunter-Galvan has competed in a number of marathons over the past four years, and her performance was tabled as follows:

2-15-04	Austin	2:36:16	4 <sup>th</sup> place
4-18-04	Hamburg	2:36:27	5 <sup>th</sup> place
8-22-04	Athens (Olympic Games)	2:50:23	51 place
12-12-04	Dallas	2:34:40	1 <sup>st</sup> place
4-14-05	Hamburg	2:34:40	9 <sup>th</sup> place
8-13-05	Helsinki (World Championship)	2:36:47	39 <sup>th</sup> place
12-11-05	Dallas	2:33:51	3 <sup>rd</sup> place
3-19-06	Melbourne (Commonwealth Games)	DNF	
10-21-07	Amsterdam	2:30:39	5 <sup>th</sup> place 6 <sup>th</sup> all time best NZ Women's time
This Table did not include the USA Marathon in 2006 when she ran a time of		2:46:07	

5. She also referred to her performances in other long and middle distance events as part of her contention that her Lydiard training is based on a long term development programme which builds year upon year, that she is

familiar with training and running in a hot weather climate, and has considerable personal motivation to perform well.

6. She referred to her “*other performances*” in a table as follows.

1-29-06	Vera Cruz, Mexico	Half Marathon	1:14:17	3 <sup>rd</sup> place Personal Best
5-6-07	Spokane, Washington	12km	41:02	8 <sup>th</sup> place Personal Best
3-14-08	San Antonio, Texas	3km	9:51	1 <sup>st</sup> place Personal Best
3-28-08	Houston, Texas	5km	16:44	1 <sup>st</sup> place Personal Best
4-18-08	Walnut, California	10km	33:48	2 <sup>nd</sup> place

7. She also referred to the ranking kept by the International Athletics Federation (“IAAF”), for runners who qualified under the IAAF/International Olympic committee (“IOC”) selection criteria, the “A” standard 2:37:00, “B” standard 2:42:00. Under those rankings, with a time of 2:30:40 achieved in Amsterdam in October 2007, she was ranked number one in New Zealand. This should be seen in context, that her Amsterdam time was 82<sup>nd</sup> best in the world for 2007.

8. Into the chronology of these performances, she has referred in depth to an accident in Texas in which she and family members suffered injury on 4 February 2007 when an 18 wheel tractor-trailer collided with the Galvan family pickup truck. She suffered a broken nose with bruising and swelling on the right side of her head, back pain, cuts and abrasions, and a severely bruised right hip. Her daughter Amber was put on life support, and was comatose for 5 days as the result of severe head injuries. Her many injuries do not require detail by this Tribunal, except to record that she was in a coma for approximately 3 weeks, and Ms Hunter-Galvan remained at her daughter’s side during this period. A lengthy rehabilitation process followed, and to provide the care necessary she quit her employment as a teacher. In due course her daughter Amber returned home, permanently affected by her injuries.

9. Her planned first attempt to meet the “*Performance Standard*” of 2:33:00 required by the Olympic Criteria to qualify for the Beijing Olympics (as discussed below) was missed during this period, but she began training with difficulty in April 2007, and on 16 June 2007 she attempted to run what is called the Grandma’s Marathon in Minnesota, but did not finish in circumstances which we discuss below.

10. The Osaka World Championships were to be held on 2 September 2007. The athlete was in communication with Mr Bowden of ANZ, and a fitness test was discussed, with a view to her competing in those championships. Mr Bowden proposed a half marathon performance in a hot environment in 1:15:00. Ms Hunter-Galvan considered that her recovery from the effects of the accident, including her own physical condition, were not such as to warrant that attempt, and she advised ANZ. Mr Kevin Ankrom had been appointed High Performance Director for Athletics NZ, and on 27 June 2007 he acknowledged her confirmation that she would not be running a fitness test in respect of the World Championships, and she had explained she was addressing:

*"... the bigger picture and working for a mark towards the Olympics and would run another marathon soon to try and qualify. I hope and wish you all the best and hope that we can do our best to help you in this endeavour ...".*

11. Part of her case is that her decision not to compete at Osaka, and thus not run a fitness test, was a matter of commonsense, evaluating her own fitness and readiness, and has been held against her in the nomination process. She contends that read together these documents establish Performance Standards being set at a level to select athletes *"who should make the semi-final or Top 16 in their chosen event"*, and while not a basis for automatic nomination, that her time in Amsterdam of 2:30:39 was more than two minutes under the New Zealand Performance Standard, 6½ minutes within the IAAF Standard, and 11½ minutes under the IAAF "B" Standard.

12. In August 2007 Ms Hunter-Galvan was *"preselected"* for the 2008 Beijing Olympics. Information was sought from her by ANZ, and she responded. This was indicative only that she was under consideration for the Olympics and formalities were required.

13. On 21 October 2007 she was accepted for the Amsterdam marathon. She intended to try and meet the Performance Standard of 2:33:00 and as she describes it, motivated for and by her daughter, she achieved her personal best time of 2:30:40, well under the Performance Standard of 2:33:00. In her own words, drawn from her appeal brief, she thought she was *"... all but assured a spot in the New Zealand Olympic Team."* This perspective was far from accurate, given what followed. Yet it is beyond question that nomination and selection are not automatic consequences of meeting the Performance Standard.

14. In the period December 2007 – March 2008 litigation arising out of the accident saw motions filed by different parties in South Texas and the Western District of Texas. Law suits proceeded in the Federal and State Courts, with a Federal law suit scheduled for September 2008. Ms Hunter-Galvan gave evidence of the extent to which she was required to commit to the legal process, which resulted in settlement in April 2008. Her involvement with these processes was extensive.
15. In the period February – April 2008 she received communications concerning formalities associated with the Olympic Team, as to travel, passports, fitness tests and other details, which correspondence is reviewed further in this decision.
16. The short narrative of events set out above is viewed from the Appellant's perspective, and given more detailed attention further in this decision. The grounds for appeal were developed in the Appeal Brief as follows.
17. First she points to the Athlete Application Form for Nomination/Selection, which had to be returned to Athletics New Zealand by 7 September 2007. The form records the New Zealand Olympic Committee (NZOC) Nomination Selection Criteria for the 2008 Olympic Games, including the Nomination Criteria for the athlete's sport, available on the NZOC website [www.olympic.org.nz](http://www.olympic.org.nz). The athlete when applying to be considered for nomination and selection agrees to comply with and be bound by the terms of the NZOC nomination and selection criteria.
18. The athlete also agrees that any right of appeal from decisions made in that process in that regard must be exercised in accordance with the Application, Nomination and Selection Process Agreement between the NZOC and the NSO ("ANZ"). The application form, and associated criteria and agreements, are analysed below.
19. The athlete acknowledged the relevance of the "*Nomination Criteria*" for the 2008 Olympic Games, and refers to a "*General Selection Policy for New Zealand Representative Teams, Track and Field and Non Stadia International Events 2008 Calendar Year*" – issued by Athletics New Zealand.
20. Apart from meeting the Performance Standard, Ms Hunter-Galvan submitted that her marathon and other times have consistently improved, on average through 2004, 2005, and 2007 (See the Tables at paragraphs 4 and 6 above). At the same time Ms Hunter-Galvan complains that to review performances

prior to September 2006 is "*unfair*", as that marks the beginning of the period to achieve the Performance Standard.

21. A summation of this element of the appeal is that Ms Hunter-Galvan said she had no reason to believe she needed to meet additional criteria beyond the Performance Standard, and that nothing was received from Athletics New Zealand to indicate that there was any difficulty with her "*manner of qualification*". This element is of consequence, having regard to what emerged at the Hearing, which demonstrated that her history of performance **prior** to meeting the Performance Standard was such that it was highly unlikely she would be nominated.
22. In that sense, the "*pre-selection*" and other Olympics related communications were meaningless unless some additional factor was brought to bear, such as another performance which countered her previous history. What that might be was never discussed with her.
23. It is also part of her appeal case that ANZ decided she had to be able to compete well in heat, but no communication of such was made to her.
24. She says her understanding is that she missed nomination because:
  - she had failed to achieve the Performance Standard on more than one occasion
  - her assumed inability to run in the heat
  - failure to perform well in a "*major event*" such as Athens
  - dissatisfaction with her decision to run the Grandma's Marathon in Minnesota.
25. Apart from her understanding of these elements, her case is that there is no indication that her improvement in performance had been brought to account, nor her personal situation arising out of the accident.
26. The Tribunal observes that Ms Hunter-Galvan gave evidence that she chose not to run at Osaka, for reasons other than the half marathon fitness test proposed, and her explanation was, at least on the face of correspondence, accepted. Ms Hunter-Galvan believes that she was penalised by her decision to run in the Grandma's Marathon in Minnesota, in some way "*in violation*" of the criteria set for selection for the World Championships. She is adamant that there was no requirement that she run in the World Championships, nor

was her decision "*rebellious*" to run in the Grandma's Marathon. There was evidence about the nomination of Nina Rillstone for the Beijing Marathon, and the process of nomination compared with that of Liza Hunter-Galvan. At this point it is sufficient to note that she contends that ANZ had "*all but disqualified*" Ms Hunter-Galvan from competing in Osaka, by "*insisting*" on her competing in a half marathon in 1:15:00 and that Ms Rillstone was given the same standard but "*the half marathon is her race*" and her personal best was well under that standard.

### **C. Formal Grounds of Appeal**

The Appellant contends:

- (i) That she was not afforded a reasonable opportunity to satisfy the applicable selection criteria as she was not given notice of the "*pre-determination*" that regardless of her meeting the "A" standard, an adverse decision would be taken based on her earlier performances. Her appeal ground is that if there were additional requirements of her to put aside this predetermination, including her ability to run in hot temperatures, she should have had an opportunity to meet these. This ground marries closely with the allegation of a breach of natural justice. The Appellant submits that the selection process was based on "*secret ANZ selection criteria*". The basis for this ground of appeal is that Ms Hunter-Galvan was judged on her performances between 2-4 years past, ignoring her performance improvement over the immediate 2 years.
- (ii) That the ANZ and selectors acted outside their powers and jurisdiction by not following the "*appropriate criteria*".
- (iii) That natural justice was denied including violation of the New Zealand Bill of Rights Act 1990. There are two components to this, one subsumed in alleged "*apparent bias*", but her principal ground for otherwise alleging breach of natural justice is her not being given "*fair notice of the additional requirements being placed on her*", relevant past performances, including running in hot weather and how she might address these considerations. This is equivalent to the first ground. Breach of natural justice is not a ground of appeal in itself available to the Appellant, but the principles of natural justice permeate the other grounds.
- (iv) That the selection decision was affected by apparent bias. This is based on the indication that she should pass a fitness test for the World Championships at Osaka, that this favoured Nina Rillstone, and that her



decision not to compete in a half marathon as a fitness test was held against her. She associates this with an allegation that Mr Bowden as Chair of Selectors was Ms Rillstone's coach.

- (v) That there was no material on which the nomination decision could reasonably be based, and there was a failure to consider the effects of the February 2007 accident.
- (vi) That Clause 7.1 of the 2008 Olympic Games Selection Criteria was not applied, which allows the selectors to take into account "*extenuating circumstances*" in evaluation of an athlete's performance or attendance at various required events, and that there was a failure to recognise the overall impact of the February 2007 accident.

#### **D. Athletics New Zealand – Statement of Defence**

27. ANZ adopted a fundamental position that the principal criteria were those under the 2008 Olympic Games Selection Criteria, which by Clause 2.1 required a decision whether the athlete **had the ability** to finish in a Top 16 placing in the marathon in Beijing.

28. Correctly the Defence noted that the achievement of a Performance Standard was not a guarantee of selection – pursuant to Clause 4.4. ANZ submitted that the Criteria clearly provided for the selectors to consider the athlete's ability to perform to Top 16 level by reference to his or her competitive record – Clause 4.7. As such the nomination process was an expert evaluation within the province of the selectors.

29. ANZ submitted that the Criteria were all properly addressed, and a range of matters brought to account in a proper way.

30. As to natural justice while not a separate ground of appeal, ANZ submitted "*the overall approach should be to ask whether, in the particular circumstances of the matter, the individual has been dealt with fairly. In this context, the criteria represent the framework of fairness for the process of considering the athlete's nomination, and by way of example, the circumstances in which extenuating circumstances may be raised.*"

31. In essence, and correctly, ANZ submitted that the athlete knew or ought to have known what would be covered in the nomination process, and achievement of a Performance Standard was not a guarantee of selection for the Olympic Games.

32. As to extenuating circumstances, ANZ submitted the appellant had not made any request for an extension of the time to qualify, nor given notice of any extenuating circumstances as provided by the Criteria.
33. ANZ also submitted that there was material on which the decision could reasonably be based.
34. In the event that relief was granted ANZ submitted that there should be no order that Ms Hunter-Galvan be nominated or selected for the Olympic Games, and if any of the grounds of appeal were held established, the appropriate direction should be that ANZ reconsider the non-nomination decision.
35. The Tribunal accepts the principle that selectors are appointed to bring their experience to bear in carrying out a difficult job, and as submitted, they must make many difficult decisions "*which will regularly be met by applause or derision, depending on your point of view*". Mr David submitted that the Tribunal is required "*...to adopt what might be termed a deferential approach to the review of selectors' decisions.*"
36. This approach, which involves a review of process not merits, has been affirmed in decisions by the Tribunal and CAS (Court of Arbitration for Sport) (refer **Murdoch and others v. Yachting New Zealand, CAS, 2 April 2004**).
37. As to construction of the relevant documents, Mr David submitted that they are "*often not drafted with legalistic precision, but the aim is to arrive at a workable approach by a common sense approach to meaning*". It was submitted that the Olympic Criteria govern the nomination process but are expressed to be read in conjunction with the General Policy. The statement of the Olympic Criteria is submitted to be the "*main document*".
38. There was focus by Mr David on Clause 2.1 of the Olympic Criteria, which was described as establishing a "*clear, overriding objective...*" that the selectors must be satisfied that "*the athlete has the ability to finish in the Top 16 placing*". Achieving a Performance Standard is no guarantee of selection – Clause 4.4, and the selectors must be satisfied that the overriding objective is met.
39. Mr David also submitted that as part of the analysis of the over-riding objective being met, they must be satisfied that the athlete has the potential to perform **consistently** at the required performance level, pursuant to

Clause 4.1. Further, they must be satisfied of the capability to perform with distinction at an international meeting, to be assessed by reference to an athlete's competitive record with particular account being given to performances at meetings such as previous global championships – Clause 4.7. He submitted that there is thus properly a predictive element drawn from consideration of past performances, and bringing to account reaching the Performance Standard.

40. Mr David submitted that the task of the selectors is to assess performance by applying their experience, against the Criteria. He submitted that the selectors did have regard to the Performance Standard being met, previous performances, including "*other performances in other minor marathons*", and the conditions at events where the appellant had run, against the likely conditions in Beijing.
41. They were aware of the accident and injuries to Ms Hunter-Galvan and her daughter but there was no claim by her through the period leading up to the Nomination Process for the consideration of "*extenuating circumstances*" as set out in the criteria, so these factors were not considered. Mr David submitted that Ms Hunter-Galvan did not seek to employ Clause 7.1 of the Olympic Criteria to make a declaration in advance of events as to her expected performance in the Grandma's Marathon. He submits that she now seeks to explain that "*non performance*" by reference to injury, and that is not a relevant consideration where no application was made for extenuating circumstances to be considered. Otherwise, he says "*the door would be open to all manner of reasons for non performance advanced after the event.*" Having said that he submitted that the Grandma's Marathon in Minnesota was not a major part of the selectors' consideration and their focus was on major championship performance as directed by the Criteria.
42. Mr David put it at paragraph 16 of his closing submissions "*To any objective observer it makes transparent commonsense to conclude that an athlete who has met Performance Standards in the past, had been selected, but has underachieved at major championships she was selected for, will not perform to the Top 16 standard in Beijing. The basic facts of athletic performance were, it is submitted, obvious.*" Yet, as we discuss below that was to put Ms Hunter-Galvan's chances as nil, as against the significant improvement in her personal best time, and her finishing well within a rigorous Performance Standard which was clearly expressed as of high significance in the process, as an objective measure.

## **E. The Contractual Relationship**

43. This appeal must be assessed against the interlocking set of agreements which govern the relationship between the athlete, ANZ, and the NZOC. These include the Athlete's Application Form for Nomination/Selection, the Athlete's Agreement Acceptance Form, and the Application Nomination/Selection Process for the 2008 Beijing Olympic Games. **The Athlete's Application** acknowledges that the decision whether to nominate is at the discretion of ANZ, and that nomination is not a guarantee of selection.

44. **The Application, Nomination and Selection Process for the 2008 Beijing Olympic Games** is the product of agreement between the NZOC, and ANZ. This records:

- NZOC has the sole and exclusive power to determine its representation at Beijing.
- NZOC shall adopt Nomination and Selection Criteria which athletes must meet for nomination and selection.
- The Nomination Criteria must indicate how objective criteria shall be assessed in determining nomination (including specified results, performances or standards).
  - how subjective criteria, where specified, shall be assessed in determining nomination.
  - how, where both objective and subjective criteria are specified, the decision whether to nominate an athlete or not will be made.
- Any inconsistency between the Nomination Criteria for the sport and NZOC Nomination and Selection Criteria should be resolved by the application of the NZOC criteria.
- Selection is conditional upon meeting NZOC Nomination Selection Criteria and the athlete continuing to train and achieve results consistent with such criteria.

45. The grounds for nomination appeals are:

**"9.2.1 Grounds of Appeal:** *A Nomination Appeal may be made on any one or more of the following grounds:*

- (a) *That the applicable Nomination Criteria were not properly followed and/or implemented; or*
- (b) *The Athlete was not afforded a reasonable opportunity by the NSO to satisfy the applicable Nomination Criteria; or*
- (c) *The nomination decision was affected by apparent bias; or*
- (d) *There was no material on which the nomination decision could reasonably be based."*

46. Ms Hunter-Galvan acknowledged she had been provided with a copy of the Nomination Criteria for the Beijing Olympic Games, and agreed to comply with and be bound by it and that the decision whether to nominate her was at the discretion of ANZ.

47. **The Selection Criteria for the 2008 Beijing Olympic Games** require that the athlete seeking nomination must satisfy the Nomination Criteria. The relevant parts are:

By Clause 2.1 *"ANZ and the NZOC have identified that the general over-riding objectives in determining the nominated athlete will be 'to have the ability to finish in a Top 16 placing in all events'."*

By Clause 4.1 *"An athlete should attain the required performance standard on at least one occasion. An athlete must demonstrate his/her potential to perform consistently at the required performance level and athletes are encouraged to better the required standard on more than one occasion, particularly in non endurance events."*

By Clause 4.2 *"The qualifying period is 1 January 2007 to 30 March 2008, except for the Marathon, 50km Walk where the qualification period will be between 1 September 2006 to 27 April 2008."*

By Clause 4.4 *"Achieving these standards does not automatically guarantee selection. All other criteria need to be achieved as well."*

By Clause 4.7 *"An athlete must demonstrate that they capable of performing with distinction at an international meeting. The Selectors will determine this by reviewing the athlete's competitive record, and will take particular account of their performances at meetings such as previous global championships, National Championships*

*(both New Zealand and Australian), Grand Prix meetings, and other major international meets."*

*By Clause 5.1 "An athlete for the Marathon or 50km Walk will not compete in a similar distance event nor in an event exceeding 10km after 1 June 2008 without the expressed written permission of the High Performance Director."*

*By Clause 6.1 "Athletes will have to demonstrate their competition fitness prior to 01 August 2008 to the High Performance Director and the Convenor of Selectors, by attaining appropriate performance at or close to the selection standard. Athletes seeking to demonstrate their fitness will advise, in writing, to the Convenor of Selectors, Team Manager and the High Performance Director in advance and must do so during the period 1 June 2008 to 1 August 2008."*

*By Clause 6.4 "The 2008 Beijing Olympic Games Selection nomination and selection criteria must be read in conjunction with Athletics New Zealand's General Selection Criteria Policy document. This is available at [www.athletics.org.nz](http://www.athletics.org.nz)."*

*By Clause 7.1 "In considering the performances of athletes at events, trials, training camps or other attendances required under this Nomination Criteria, the selectors may in their discretion give weight to extenuating circumstances. For the purpose of the Nomination Criteria, 'extenuating circumstances' means the inability of the athlete to compete in and/or attend event, trials, training camps or other required attendances arising from:*

- (a) Injury or illness of the athlete;*
- (b) Equipment failure;*
- (c) Travel delays;*
- (d) Bereavement;*
- (e) Such other circumstances as the selectors reasonably consider constitute 'extenuating circumstances'."*

48. **The General Selection Policy for New Zealand Representative Teams, Track And Field And Non-Stadia Events for the 2008 Calendar Year** are expressly to be read against the 2008 Olympic Selection Criteria. The General Statement provides:

*"These General Criteria will be applied for the selection of athletes to compete for New Zealand in international events. Specific Selection criteria will also be applied for particular events and selection will be governed by both the Specific and the General Criteria. Athletics New Zealand has determined that athletes may be selected for two broad categories of event: Performance Events and Development Events. The Olympic Games, World Championships, and Commonwealth Games are all Performance Events.*

*"These Criteria may be used together with Specific Selection Criteria for the selection of athletes for nomination to the New Zealand Olympic Committee for selection for the team to represent New Zealand. Where this occurs, the selection of athletes for the New Zealand team will be governed by the NZOC criteria."*

49. The reason for use of Performance Standards is explained as follows:

*"Performance standards will be used to assess athletes for selection to Performance Events. The use of performance standards as the basis for selection to represent New Zealand has been adopted for the following reasons:*

*"A. It is an objective measurement of an athlete's performance.*

*"B. It provides a goal for the athlete and coach at the commencement of the athletic season and reaching the performance standard represents a level of commitment and performance commensurate with the standard required to perform with credit at a Performance Event."*

50. Reaching the Performance Standard leads to a degree of expectation as follows:

*"If an athlete achieves the performance standard set out in the selection criteria for a specific event at a championship then that athlete can **expect** to be selected (subject to the possible application of clause 17 below). The application of Clause 17 may mean that an athlete who has reached the performance standard is not selected and all other conditions set out in these criteria.*

*"The performance standards for selection to a Performance Event will be set at a level to select athletes who should make the semi final or top 16 in their chosen event."*

51. The selection process includes:

- "C. Where an athlete meets or exceeds the performance standard for a Performance Event the Selectors will investigate and confirm that the athlete has met all other selection criteria, contained in the General Selection Criteria and the Specific Event Selection Criteria.*
- "D. Where the Selectors confirm that the relevant criteria have been met they will advise the High Performance Director that all selection criteria have been met and that, subject to the consideration of the possible application of the Exception Criteria in Clause 17, the selection of the athlete as a New Zealand representative at the Performance Event should be confirmed.*
- "E. The High Performance Director will consider the possible application of Clause 17 and after such consideration will either confirm the decision of the Selectors and recommend that the selection of the athlete be confirmed by the Board of Athletics New Zealand or decide that the athlete should not be selected due to the application of the Exception Criteria. Where the High Performance Director confirms the selection, he will submit the selection to the Board of Athletics New Zealand for approval."*

52. Exception Criteria are dealt with in Clause 17:

*"Where an athlete has achieved the Performance Standard set out by the Selectors, the High Performance Director will take into account the performance of that athlete at previous Performance Events and the behaviour of the athlete as a member of a New Zealand representative team at previous Performance or Development Events, before confirming the selection of that athlete and recommending approval of the selection to the Board of Athletics New Zealand.*

*"Where, in the opinion of the High Performance Director, that athlete has a history of non-performance at Performance Events, then the High Performance Director may decline to confirm the selection of that athlete.*

*"A history of non-performance is considered to be two examples of performance below the level considered by the High Performance Director to be acceptable at the particular Performance Events."*



53. Clause 17 does not have **direct** application because it relates to selection.

### **Relationship between Olympic Criteria and General Selection Policy**

54. Clause 6.4 of the Olympic Selection Criteria says that the general policy **must** be read in conjunction with Athletics New Zealand's General Selection Criteria policy document and is inexorably linked to it. The General Policy Statement records the names of the selectors who are the Olympic selectors. The General Selection Criteria under the heading "*Selection Process – Outline*" records that "*This General Selection Policy is to be read in conjunction with specific event selection policies. **Both policies** will be used as the basis for team selection.*"

55. The Beijing Selection Criteria at paragraph 1 records that the general criteria **will** be applied. At paragraph 2 it says these criteria **may be used together** with Specific Selection Criteria. The last paragraph says the selection of athletes for the New Zealand Team **will be governed** by the NZOC criteria which links back to the General Policy. In our view the Selectors must bring to account the stated objectivity of the Performance Standard and what the athlete should reasonably take from that.

### **F. Hearing**

56. The hearing was conducted by teleconference on 6 June 2008. The Tribunal received further material from the parties up to 10 June 2008.

57. Mr Nash as Counsel made submissions for Ms Hunter-Galvan beginning with a proposition that there was a "*violation*" of the Agreement entered into by the athlete, in the failure to implement the relevant selection criteria. He submitted there was a "*legitimate expectation*" which followed from setting a Performance Standard but that the selectors had applied a "*shifting standard*", which Ms Hunter-Galvan had no reasonable opportunity to meet. It was submitted that there was a failure to take into account the "*extenuating circumstances*" in particular with reference to her performance in the "*Grandma's Marathon*". He then referred to what he said was "*apparent bias*" in the role of Mr Bowden as the "*paid coach*" for Ms Rillstone.

58. Mr Nash enlisted the assistance of Mr Lazor, an attorney who has represented the Galvan family in the civil process. He made submissions which were in effect evidence that entry in the Grandma's Marathon came some 4 months after the accident, and in the circumstances in which she had been involved in the care of her daughter Amber and her own injuries, he submitted that her

entry and performance was without recognition of just what a toll the accident and its aftermath had taken on her. The point of this submission (evidence) was that her performance in Minnesota, and her choosing to compete, should not be held against her.

59. Mr Nash submitted that it is an undisputed element of the appeal that if Ms Hunter-Galvan met the Performance Standard, she could expect to be nominated and selected, as the Performance Standard was expressly set against an expectation of finishing in the Top 16.

60. He submitted that reference to such expectations being subject to Clause 17 of the "General" criteria regarding "Previous Performance Events" must be limited in time, as it was "inconceivable" that the selectors might consider any previous event. He said this reference to earlier performances should be interpreted "within the four corners of the contract" between the athlete and ANZ, and nowhere was there any provision which allowed an open ended reference back to her running history. He said that Clause 17 in its reference to the role of the High Performance Director must be to "Performance Events" as defined, Olympics, World and Commonwealth meetings.

61. His submission was that past performances were "simply not on her mind" and had she understood that they would weigh decisively against her, then she would simply have returned to her work as a teacher. Nor did she understand how her previous "non-performances" would be seen as such. She had not received any advice that she had "failed" at the Athens Olympics where she finished 51<sup>st</sup>, nor at the Melbourne Commonwealth Games where she did not finish. Nor did she see her performance at Helsinki as a "failure".

62. Ms Hunter-Galvan gave evidence which supplemented the statements that she had put before the Tribunal in writing. She said that if she had understood that anything in her past would have qualified as "non-performance" so as to effectively end her prospect of nomination, then she would have either gone back to work as a teacher, or found out what she needed to do for nomination. It was never apparent to her what was necessary or might have been necessary in this regard.

63. She pointed to a chain of correspondence which indicated that at least from the time she met the Performance Standard she was pre-selected for Beijing, and subject to nomination and selection, and post selection fitness testing, she could expect to go to Beijing.

64. She was questioned closely by counsel for ANZ about the circumstances in which she advised Mr Ankrom why she pulled out of the Grandma's Marathon. She gave evidence to the Tribunal that she felt a hamstring strain, but up to 18 miles had run a "quality time". She sent an email on 14 June 2007 to Mr Ankrom which referred to her having pulled out as a result of heat. This was an uncomfortable exchange for Ms Hunter-Galvan who was tested as to why she gave two different explanations of injury and heat. She told the Tribunal that she said "*what I had to tell him*", and that athletes had to deal with their injuries in their own way.
65. If we simply had regard to the way Mr Bowden explained the Selectors' assessment of her ability to compete in hot temperatures, this issue has less moment, but the record of the Selectors' deliberations does refer to discussion about her ability to compete in the heat. She was referred to an undated report from a San Antonio newspaper May 2007, where she explained her not finishing the Grandma's Marathon because of heat, and a further reference to "*she hoped to finish at least 39<sup>th</sup>*" in the Olympics. This she put down to her being "*cute*", as she is 39 years of age and it was not a serious remark
66. She said she had planned a fitness test for April 2008, but there was a change in the policy announced to athletes in this regard, putting back the period for the test.
67. She said that her performance in the Melbourne Commonwealth Games was the result of her being sick some 2 weeks before. She was trying for a personal best of 2 hours 36 minutes. Her half was completed in 1 hour 18 minutes or thereabouts, but at 16 miles she began cramping and despite endeavouring to push on she ended up having to withdraw with dizziness and low blood pressure, and was taken to hospital.
68. As to her performance at Athens she said she discussed this with Mr Tony Rogers of ANZ who gave no indication of it being an unsatisfactory performance. She said she was aware of Clause 17 of the General Selection Criteria discussed below, but did not believe the reference to Performance Events pertained to her in a relevant way and such considerations were never discussed with the High Performance Director. She also said no-one ever told her of any perspective held that she could not run in the heat, and that she trains in a hot climate.

69. Before reviewing the evidence for ANZ being that of Kevin Ankrom, John Bowden, Scott Newman, Barry Ellis and Craig Motley, the Tribunal refers to the record kept of the selectors' meeting as follows:

*"Liza Hunter-Galvin [sic]  
"Event: Women's Marathon*

*"Performance summary presented by JB using information derived from [www.tiastopaja.org](http://www.tiastopaja.org) and other athletics sources e.g. IAAF, Athletics NZ website.*

*"General discussion around relevant sections of Selection Policy between Cross Country and Road Selectors.*

*"**Clause 3.1** is not applicable to Liza as there is no marathon event at the NZ National Championships*

*"**4.1 recommends that the athlete achieve the performance standard more than once.** Liza has achieved the "A" standard on one occasion (October 2007).*

*"**4.7 suggests selectors consider the athletes past performances at major championships and events.***

*"Broad discussion regarding Liza's ability to perform at major Championships based on her previous performance record. Liza has had some successes in the marathon however at the major meets, including previous Olympic Games, World Championships and Commonwealth Games she has not performed well.*

*"**BE:** Asks the HP Director for input on Liza's preparation plan and whether or not in his opinion she is on track to perform at the Games.*

*"**KA:** Has a training and competition plan for Liza up until December 2007 however has struggled to have any correspondence with Liza to find out her plans moving forward. In the brief contact the HP department has had with Liza in 2008 she has indicated that she will be running 5km/ 10km races in Texas during April and May, with the view of then building into a couple of half marathons. The HP department needs more information from Liza as to what her exact plan. In 2007, with out prior approval from the Selectors / HP Director Liza ran a race further than 10km prior to the World Championships. As part of the Selection policy approval was required the HP department would like to avoid any similar scenarios.*

*"There is a broad discussion and debate by the Selectors on Liza's past performances, in particular her ability to bring her pre-Championship form into the major meets and her ability to run in the heat.*

*"The Selectors revisit the Olympic Selection Policy and the clauses relevant to making a decision on Liza's nomination.*

*"The Selectors reach a unanimous decision that Liza Hunter Galvan will not be nominated to the New Zealand Olympic committee to represent at the 2008 Beijing Olympics in the Women's Marathon event."*

## **ANZ Evidence**

70. Mr Ankrom began working for Athletics New Zealand in June 2007 as the High Performance Director. He is not a selector. The Olympic Criteria and the General Selection Policy were in place, and he was involved in amendments to the Olympic Criteria to prevent endurance athletes competing in distance events leading to the Olympic Games, and the fitness test period was amended in March 2008 to June/August instead of March/June. The General Selection Policy was e-mailed to carded athletes on 9 November 2006 and on the ANZ website from 22 December 2007, and an amended version was put on the ANZ website on 15 February 2008.
71. The Olympic Criteria were advised to all carded athletes on 13 February 2007, and the amendments then advised by e-mail. There was a further reminder of the selection policies on 20 October 2007. The original version of the Olympic Criteria was on the NZOC website from February 2008.
72. Carded athletes, to obtain funding, must complete a training and competition plan and are provided a template for this purpose, Ms Hunter-Galvan being sent this on 14 October 2007. She responded on 6 November, and there were further communications from Mr Ankrom on 19 December, 4 March 2008 and April 2008, to which she replied on 18 April. These e-mails do not demonstrate any qualification as to her possible selection. There was an earlier exchange with Ms Hunter-Galvan between March and May 2007, immediately in the aftermath of the accident. ANZ wanted to know if she was planning to run a half marathon to confirm selection for the World Championships in September. In April she advised her training was proceeding well and she planned to run a full or half marathon over the next few months. On 23 May she indicated she would run the Grandma's Marathon in Minnesota, scheduled for 16 June. Mr Bowden had advised "she should run a half marathon", and she replied to say she was intending to run a full

marathon. At that stage she had not achieved the Performance Standard. Because it was against World Championships selection policy, she was advised she should not run at Minnesota, through Raylene Bates of ANZ. On 13 June, Ms Bates sought confirmation that she would compete in the half marathon, and on 14 June Ms Hunter-Galvan said she would not change events and explained her reasons.

73. Mr Ankrom says that she spoke with him, and was told she had pulled out of the Grandma's Marathon because of the heat. On 25 August 2007 he advised her she had been "preselected" to the Long List, with material to be filled out, and a link which set out the terms of the agreement between NZOC and athletes selected to compete. Ms Hunter-Galvan responded as required. She also received information regarding logistics at the Olympics including plane tickets, measurements, and asthma testing. He said that the last e-mail was sent on 4 March 2008 asking about her planning, but there was no response to that.

74. For the selectors, Mr Ankrom provided the 2007/2008 results for the athletes seeking nomination, and they had before them a document sent by Mr Bowden as Chair, which Mr Ankrom supplemented with details about the athletes' training and competition progress. He says the discussion about Ms Hunter-Galvan was in the same form as for other athletes, about 7 – 10 minutes, and her performances at major championships were considered, as he recalls. He says that the notes Ms Louise Burns kept "generally reflect the discussion" and there was some mention of Ms Hunter-Galvan having been involved in an accident, but they were not aware of any injury which would give rise to consideration of "extenuating circumstances". While not a selector, Mr Ankrom records:

*"It was unanimously decided by the three selectors that Liza would not be able to finish in the Top 16 at Beijing".*

75. Mr Ankrom was aware that there had been an accident, but it was not discussed with her, nor had she raised it. If it had been advised to him, then for any particular event she was expecting to compete in, the Selection Panel could have taken that into account. The relevant Clause requires notification no later than 12 hours before the event, so that circumstance can be assessed as part of the performance.

76. Ms Rillstone was not in competition with Ms Hunter-Galvan for nomination, as there is provision for three athletes, but Mr Ankrom referred to Ms Rillstone's performance record 2006/08 in his brief.
77. Mr Ankrom says the Olympic Games, World Championships and Commonwealth Games are "*major international global events*" but on the world scene, Berlin, London, New York, Boston, Chicago, known as the "*Big 5*" are globally recognised. They attract most of the top ranked marathon runners, and they are classified "*IAAF Gold Label Road Races*". "*Silver Label Road Races*" as classified by IAAF, are a lower tier and include the ING-Amsterdam Marathon, Tokyo Marathon, Seoul International Marathon, ING-Brussels Marathon, classified as "*development events*" by Athletics New Zealand. Outside this category, there are "*minor, regional or local*" marathons including Grandma's Marathon, Dallas, Auckland, Austin, and Gold Coast.
78. He said the heat in Beijing is a specific issue, and a formal acclimatisation plan has been prepared.
79. Mr Bowden's evidence is as a National Selector of some 12 years standing. He has a long history of representation in sport, and is a carded coach with the New Zealand Academy of Sport North Island. He has been on selection panels which have selected Ms Hunter-Galvan for New Zealand, including her nomination and selection to Athens, Helsinki, the Melbourne Commonwealth Games, and selection to the World Marathon Championships in Osaka 2007, which she decided not to compete in.
80. Mr Bowden did not have any role in formulating the General Selection policy, but he did have input into the Olympic Criteria. While the 2007 version of the General Selection Criteria indicated that meeting a Performance Standard automatically resulted in selection, his input was around the decision to remove this "*automatic*" effect in the Olympic Criteria. He was also behind the reference to assessment of past performances as a relevant factor, in order to satisfy the NZOC requirement of a Top 16 placing.
81. Of consequence is the fact the meeting with Raylene Bates Acting Athletics New Zealand High Performance Manager and Barry Maister of the NZOC in December 2006, included discussion about **the requirement of a Top 16 placing as the "*over-riding objective*"**. The discussion identified the IAAF Qualification Standard and those previously in place, and the decision was taken to raise the Performance Standard for some events, including the

marathon. The reference to the "*past performance clause*" was to "*ensure that meeting the Performance Standard was not a 'one-off' and there would be an assessment of whether an athlete could perform at the Olympic Games. The whole idea was to raise the bar and to try and make sure that, as far as possible, the athlete selected would be able to finish in the Top 16*".

82. On 12 February 2008, an e-mail was sent through Louise Burns as the then Athletics New Zealand High Performance assistant to all athletes on the Athletics New Zealand Long List, the letter recording congratulations "*on your season so far*" and meeting the "A" Performance Standard. The e-mail emphasised that that was "*just the starting point to your journey to the Olympics*". There was reference to the "*Athletics New Zealand Olympics' policy*" and encouraging a careful reading of the document and the selection protocol. There was then reference to clauses 2.1 "*over-riding objective*"; 4.4 "*Performance Standards and Qualifying Periods*"; 4.7 "*Performance Standards and Qualifying Periods*"; 6.1, a demonstration of competition fitness prior to 1 July 2008; and 6.2, the requirement to provide the individual athlete's competition schedule from selection date to competition date. The letter concluded "***therefore Liza we believe a fitness test and a 15 – 25km Road Race on or before July 1<sup>st</sup> 2008 would satisfy the requirements of section 6.1 of the Athletics New Zealand Olympic Policy. We wish you every success with your preparations for a best performance in Beijing***". The e-mail of course was highly encouraging in one context, indicating a specific fitness test, with no reference at all to any other form of qualification for a nomination.

83. The reference to specific clauses did emphasise that meeting the Performance Standard would not automatically guarantee selection, and there was particular reference to performances at "*previous global championships, national championships New Zealand and Australia, Grand Prix meetings, and other international meets*".

84. Up to the World Championships in Osaka, Mr Bowden had indirect communications with Ms Hunter-Galvan, including the need to do a half marathon as the fitness test, for all seven athletes intended to go to the World Championship.

85. On 20 March 2008, Mr Bowden sent an e-mail to the selectors, with information relevant to their task, and on 11 March he received from Mr Ankrom results for each athlete who had achieved the Performance Standard.



This included an e-mail from Mr Ankrom, which set out information from the website [www.tilastopaja.org](http://www.tilastopaja.org) for each athlete.

86. At the selection meeting these results were examined, together with the IAAF website results for each athlete, and this included the personal best at Amsterdam, and the performances in Dallas on 11 December 2005, (2:33:51), and Hamburg on 18 April 2004 (2:36:27). It also included the Athens and Helsinki results but not the Melbourne Commonwealth Games. They followed a process for all athletes, and his notes against Ms Hunter-Galvan recorded a negative assessment under Clause 4.7 of the Olympic Criteria, the need to demonstrate that the athlete is "*capable of performing with distinction at an international meeting*". The selectors had information that her Amsterdam time was 82<sup>nd</sup> best in the world for the year, but this did not figure in the evidence or record of the Selectors' deliberations. This is surprising given the reason for the Performance Standard as an objective measure of a Top 16 finish being possible and may be compared with that for Ms Rillstone – also well outside Top 16 in 2007, as the Tribunal understands it.
87. Mr Bowden referred to a conflict of interest in respect of Ms Rillstone's nomination, and did not take part in discussion about her nomination, with the agreement of the other selectors Barry Ellis and Craig Motley. In discussing Ms Hunter-Galvan, Mr Bowden said the selectors considered her marathon record, the weather, and the nature of the competition at Beijing. Discussion about her Amsterdam performance was of the cool, flat and perfect conditions, "*not akin*" to the conditions at Beijing. The selectors went over the four years of competition and major championships, and concluded "*we noted she had not performed well at major events*", and the Grandma's Marathon, "*which she did not finish*", and the USA Marathon she completed in 2006 in 2:46:07. The IAAF website gave a description of conditions in the various marathons run.
88. The essence of the reasoning regarding Ms Hunter-Galvan was that while she had achieved personal best times, such preceded a "*World International Event*" and she had not then performed in that world event. "*This suggested to us that although she could achieve the Performance Standard, there were real doubts that she would be able to repeat this kind of performance in events that counted – in this case the Olympic Games*".
89. They also reviewed her training programme, through Mr Ankrom. The selectors had no detail of Ms Hunter-Galvan's injury nor how it may have

affected her performance, but understood that she had "*hurt her hip*" through the media. Mr Ankrom said he understood she had been "*ready to run*" the Grandma's Marathon in June, and there had been no application for extenuating circumstances, relating to the accident, and Mr Ankrom had told the selectors she had not finished in that marathon "*because of the heat*".

90. Mr Newman as Chief Executive Officer of Athletics New Zealand referred to the experience of the selectors, twelve years in the case of Mr Bowden, and thirteen years in the case of Mr Ellis. Mr Motley is in his first two-year term. Mr Newman described the faith that the ANZ Council, Board, and he have in the selectors' ability to make the right decisions. He said that prior to the selectors' meeting on 29 March 2008, he did not discuss the Olympic prospects of any individual athletes. He was at the meeting, as an Independent Observer. He considered this was important in the context of good process and record keeping of selection meetings, and his own notes were provided.

91. His handwritten notes record "*Top 16 unlikely*", and he referred to the notes taken by Ms Burns.

92. He gave evidence that from his recollection the Performance Standard was discussed, performances over the last four years, and in particular, at Athens, Helsinki, Melbourne, Minnesota, and the USA marathon in 2006, her ability to perform in warmer conditions, and reference to the motor vehicle accident. He recorded "*the selectors were in agreement that Liza Hunter-Galvan would not be able to finish in the Top 16 in Beijing based on their assessment of her past and recent performances*".

93. Mr Ellis, a selector only for the Non-Stadia athletes, said discussion about Ms Hunter-Galvan took about 10 – 15 minutes, and followed the same course as for all other athletes. He said "*I did not think that Liza had performed to expectations at events that counted, i.e. major internationals*". He went on that it seemed to the selectors that that there was "*a definite picture of Liza being unable to peak and perform at the major events. She also seemed not to be able to cope well with heat and humidity*". This was then referenced to Beijing where the conditions were "*likely to be fairly hot and difficult*".

94. The accident was not discussed at length, other than her competing in a marathon about four months later, and there was no explanation given for her "*poor showing*" which Mr Ellis said was "*unusual*".

95. Mr Ankrom referred to the explanation given him that the "*did not finish*" was due to heat. But that did not have any real influence on Mr Ellis' decision, which he put down to "*basically that factor just added to the tally of under-achieving in major marathons*". The conclusion was that she was "*not capable of finishing in the Top 16 at the Beijing Games*".

96. Mr Motley said "*the key question*" was whether the athlete would be able to finish in the Top 16, and in relation to Athens, Helsinki and Melbourne, that she had "*never reached Top 16 level*". They also considered the Grandma's Marathon, and the ideal conditions at Amsterdam. This evidence essentially married with that of Mr Ellis. As to her accident, he said "...*we did not know the details of that injury, or have any indication that this had affected her training or performance*".

## **G. Decision**

### **The relevance of the accident**

97. The extensive publicity surrounding the accident, as relevant to nomination and selection, was brought before the Tribunal in a highly developed form. Without qualification the Tribunal accepts the extremely traumatic effect on Ms Hunter-Galvan and that she was affected both physically and emotionally as the result of the accident and the subsequent litigation process. It was a surprise to note her communications to ANZ in April 2007 indicating that her training was progressing well in these circumstances, but the Tribunal concludes that this was part of her affirmative attempt to deal with an acute problem, and to restore some normality to the life of her family.

98. What should be recognised is that her personal best time in the marathon, and her comfortably meeting the Performance Standard, came against the backdrop of these traumatising circumstances. She does not need to offer "*extenuating circumstances*" to explain her performance in that regard, because the very opposite occurred.

99. To the extent that the accident constitutes an explanation for her performance in the Grandma's' Marathon, there is greater moment in the ANZ submission. That marathon was attempted in the context of her decision that she did not want to take a fitness test, and then compete in the World Championships in Osaka. It seems this explanation was not to be held against her, at least in the correspondence referred to, but later figured in the Selectors' deliberations when she did not finish. She should then have advised any possible impact on her from the accident but did not do so.

100. The other way of looking at the accident and its aftermath is in a more positive light. The selectors knew little about the consequences to Ms Hunter-Galvan and her family, other than that there had been an accident, and had they known all the circumstances it may well have been that they would have recognised a far more affirmative element, that in the overall exercise of their discretion, to have suffered so much, then to have performed so well in October in Amsterdam, showed a degree of resolve and courage which should be brought to account. This certainly is the tenor of the supporting evidence from Dr Peter Snell, Ms Lorraine Moller, and Ms Kathy Switzer, who also collectively emphasised that past performance may mislead, by reference to their own performances prior to their remarkable international success.

101. We have tried to emphasise that we recognise the courage and tenacity of Ms Hunter-Galvan in dealing with an horrific event, but it has not blunted her performance. This rather emphasises the remarkable achievement in Amsterdam. This decision is not intended to press for nomination on those grounds, yet they cannot be ignored in addressing the Grandma's Marathon and the Amsterdam run, and the mental element involved in performance.

### **Allegation of bias**

102. The Tribunal, after considering the evidence, does not find this ground of appeal made out, nor any foundation for it. It turns essentially on the fact that Mr Bowden as Chairman of Selectors was also involved in the nomination of Ms Nina Rillstone, whom he coaches and that she was in some way favoured. The Tribunal can see nothing in the evaluation of Ms Rillstone's performances to suggest that she should not have been nominated. Further, there was no contest between Ms Rillstone and Ms Hunter-Galvan. There was a place available for both should they be nominated.

103. While the ground of appeal is based on apparent bias, as opposed to actual bias, we can see nothing here to indicate that the simple fact of involvement of Mr Bowden in the decision to nominate or otherwise is contaminated by his connections with Ms Rillstone so as to constitute an appearance or suspicion of bias as the law requires. In considering the evidence before it the Tribunal has no hesitation whatsoever in concluding that Mr Bowden did not act in any way motivated by a bias towards Ms Rillstone or a bias against Ms Hunter-Galvan, and he stood aside from Ms Rillstone's nomination decision, nor to any careful evaluation should his involvement constitute an undermining suspicion of bias. There should be none.

104. As the allegation of bias whether actual or apparent has been rejected, focus falls on whether the Selection Criteria have been properly followed and/or implemented, and whether Ms Hunter-Galvan was afforded a reasonable opportunity to satisfy the applicable Selection Criteria, and whether there was no material on which the nomination decision could reasonably be based.

### **The Performance Standard**

105. The Tribunal recognises that meeting the Performance Standard does not guarantee selection. But the standard has been set with a quite specific aim of indicating by an objective standard an ability to finish in the Top 16. There is a very clear indication to the athletes that meeting the standard, which is set at a more testing level than the IAAF standard, is a strong pointer to selection.

106. If the Selection Criteria for the 2008 Olympic Games are read in isolation, they first point to performance criteria, met comfortably here by Ms Hunter-Galvan. There is no guarantee of selection. The desirability of having achieved the standard more than once is expressed, but qualified for endurance events, and seems to relate in part to the lengthy qualifying period between 1 September 2006 to 27 April 2008.

107. The issues for determination are whether the selectors in determining not to nominate the appellant failed to properly follow and/or implement the nomination criteria (ground in 9.2.1(a)) or whether they failed to afford her a reasonable opportunity to satisfy the applicable nomination criteria (9.2.1(b)).

108. We conclude that the selectors did not penalise Ms Hunter-Galvan for not running at Osaka. They did consider her performance in the Grandma's marathon, although one of the selectors stated that this was not a major factor. The evidence does not suggest that a negative view was taken of her only running the qualification time once. Nor should it have been in view of both the circumstances and the qualification to paragraph 4.1 of the nomination criteria. The substantive decision was made on the basis of her performances in the Olympic Games in 2004, the World Championships in 2005 and the Commonwealth Games in 2006. There was also consideration of her performance at the USA marathon in 2006. Her ability to run in the heat was another factor and in reviewing her performances and her qualifying time, a comparison was made between the Amsterdam conditions and the likely conditions in Beijing.

109. In considering the grounds of appeal, we are of the view that the matter can be resolved substantially within the nomination criteria for the Olympic Games with limited reference to ANZ's General Selection Criteria Policy. The latter policy states that specific selection criteria will be applied for particular events. The nomination criteria have been approved by the NZOC and the basis of the selectors' decision is clearly a consideration of the matters contained in paragraph 4.7 of the nomination criteria. The obligation under that provision is on the selectors and it is for them to make the determination. In making the determination, they will obviously draw on information held by ANZ and are entitled to discuss the matter with the High Performance Director. However, the High Performance Director does not make the decision.

110. The relevant provisions in the nomination criteria are:

- The general overriding objective is that the athlete is "to have the ability to finish in a Top 16 placing".
- The athlete should attain the required performance standard on at least one occasion.
- Acquiring the standard does not automatically guarantee selection. The athlete must demonstrate that he/she is capable of performing with distinction at an international meeting. The selectors are to review the athlete's competitive record and to take particular account of other major international meets.
- There is an "extenuating circumstances" provision, which has limited application in this case. It cannot on its terms apply to events from 2004 to 2006.

111. In determining whether the nomination criteria were properly followed and/or implemented and whether she was given a reasonable opportunity to satisfy the applicable nomination criteria, it is necessary to briefly return to some of the factual issues, namely:

- Mr Bowden candidly replied to a question from the Tribunal that in the circumstances of this case Ms Hunter-Galvan had no prospect of being selected. This in fact means that no matter what time she had run at Amsterdam and by how much she had broken the qualifying standard, the selectors would have decided not to nominate her because of her past performances.

- Mr Ankrom spoke to Ms Hunter-Galvan prior to 25 August 2007 and noted in an email dated 28 June 2008 to another member of ANZ that she had pulled out of the Grandma's marathon because of the heat. On 25 August 2007, he sent an email to the appellant advising her she had been pre-selected for the Long List of athletes for the Olympics.
- On 21 October 2007, the appellant ran her qualifying time of 2 hrs 30 minutes 40 seconds at Amsterdam, a time well under the qualifying time.
- On 12 February 2008, Mr Bowden wrote to the appellant and congratulated her on her season so far and her achievement of obtaining the "A" standard for the Olympics. He reminded her that the achievement in Amsterdam was merely the starting point and that there were other sections of the nomination criteria which had to be adhered to, to ensure participation in the Olympics. He brought to her attention the overriding objective of having the ability to finish in the Top 16 and the provisions of Clause 4.7 under which the selectors were ultimately to determine that she was not capable of performing with distinction at an international meeting. He advised that a fitness test in a 15-25 km road race on or before 1 July 2008 would satisfy the fitness requirements. There was no indication or suggestion that she should run a further marathon, or any other race relevant to nomination.
- There was no further contact between the selectors or other ANZ officials and the Appellant between 12 February 2008 and the selection meeting on 29 March 2008 relating to her past performances or problems running in the heat.

112. There is a compelling argument on the basis of the above information that the selectors did not give the appellant a reasonable opportunity to satisfy the criteria. On the basis of Mr Bowden's acknowledgement the dye was already cast.

113. There is a sense of unfairness to the athlete in respect of the heat ground. If this was to be used against her in the overall reckoning, fairness suggests that she should have been asked for an explanation or that there should have been on file in the records of ANZ, an assessment of her ability to run in hot humid conditions. This was particularly so when two of the marathons which she had run in respectable times in 2004 and 2006 were in hot humid

conditions, and she trains and runs in Texas. The athlete arguably should have been given an opportunity to counter the factor of heat which was subsequently used against her. The results on which she was judged could not have been altered, but again in fairness the athlete could have been asked for her explanation. ANZ does not have a file on Ms Hunter-Galvan as this was made clear during a preliminary hearing when her attorney requested ANZ's file for her.

114. It is applying a counsel of perfection to suggest that the selectors should have assessed the nomination prior to 29 March 2008. But their failure to do so, combined with Mr Bowden's letter of congratulations of 12 February 2008, and other communications from ANZ understandably gave the appellant an expectation of nomination. However, these aspects do not enable this Tribunal to determine that she was not given a reasonable opportunity to satisfy the nomination criteria, except on the heat issue.

115. The central issue is, in our view, whether the selectors acted correctly in accordance with their obligations when they implemented the provisions of Clause 4.7 of the nomination criteria. In other words, were the past performances which they took into account sufficient to enable them to conclude that Ms Hunter-Galvan was not able to perform with distinction at an international meeting.

116. Notwithstanding that the qualifying time was run on a course which may not have been as difficult as some other marathon courses, it was well within the nomination criteria and well below both the A and B standards set by the IOC. Ms Hunter-Galvan is possibly entitled to some credit for running such a time after the difficult situation she had been through. However, the selectors can be excused from not knowing of that situation as the appellant did not make them aware of it. However, having run so clearly within the qualifying time, it behoved the selectors, in the Tribunal's view, to satisfy themselves that she was not capable of performing with distinction at an international meeting. After all, Amsterdam was an international meeting. No marathon can be easy and Lorraine Moller says it cannot be "fluked". In doing so, they were required to review her competitive record. It appears from the evidence adduced on behalf of ANZ that they did have statistical records of two of the main events, namely the Athens Olympics and the World Championship at Helsinki. Although the result did not appear on any of the sheets which they considered, they would have also known that she did not finish at the Melbourne Commonwealth Games. The information sheets do not refer to the US marathon which was also taken into account, nor did they refer to



Grandma's marathon, but the fact that she did not finish and gave a reason for this as heat, was known to the selectors.

117. The selectors, in such circumstances, had to satisfy themselves that Ms Hunter-Galvan did not have the ability to compete at an international meeting of Olympics standard. She had run well within a time which had been set as being necessary to be a Top 16 performer in the Olympics. They appear to have made their decision almost entirely from her finishing position in various events. There appears to have been no examination or consideration of the reasons for her finishing position in such events. If there had been, one would have expected this to have been detailed in the evidence.

118. The question is whether a decision made on the statistical information without reference to her, and those who managed or coached her on those occasions, and a reasonable examination of the circumstances of each race, is in itself sufficient. There is no suggestion in the evidence that any of the selectors assessed the reasons for her performances in those events. She has now given reasons and whether they are correct is not for the Tribunal to determine. However, in our view the selectors had a duty to go further than the statistical information and to determine the circumstances in which the appellant ran the times which they have taken into account. On the appellant's own evidence, Mr Rogers, the manager at Athens was not dissatisfied with her performance. If that is a correct statement then the selectors should have taken that into account. It was for the selectors to examine further the performances to determine whether there may well have been valid reasons for them, and whether, in fact, they showed an inability to compete at international level. Ms Hunter-Galvan claims that there were.

119. In the circumstances, we conclude that the nomination criteria were not properly followed and implemented in this respect. The same comment applies to the decision to take her inability to run in heat into account, notwithstanding that this was said not to be an important factor in the decision.

120. For the above reasons, we would allow the appeal and remit it back to ANZ for further consideration. While the Tribunal has the power to consider the nomination itself, it does not believe it appropriate to do so. The issues for determination require selectorial judgment, and this Tribunal would only consider exercising such a role if there were no other alternative.

121. We have considered whether the remittance back should contain a suggestion that a new panel of selectors look at the matter. On reflection, it is not necessary to make this recommendation as the selectors are experienced people and the Tribunal is confident that they will reconsider the matter on the basis of their obligations under the nomination criteria, with a fresh eye.

122. We have thus upheld the appeal on the basis that Criteria have not been followed or implemented as contemplated and there was an unfairness to Ms Hunter-Galvan in the indication that the Performance Standard was of high significance in nomination, itself indicating the ability to reach Top 16 Standard, and with the intimation of a July fitness test. If there was more needed then she was not to know this, nor what that was. That time has passed, which emphasises the need for a thorough reassessment of the Criteria.

123. It seems to us that the selectors must now bring to account the following, as it is probably too late for a "*forcing*" performance to compel a nomination. The matters which should be considered some of which we believe have not been properly brought to account in the sense of insufficient or inadequate exploration, are:

- 1) The "*objective*" Performance Standard was recently achieved, against a rigorous time, and well within the Performance Standard.
- 2) That Standard has deliberately been set at a stringent level, and expressly against an expectation of the ability to finish in the Top 16.
- 3) The performance should not be **discounted** for the track and conditions (in Amsterdam) unless there is a compelling reason to do so.
- 4) The "*Performance Events*" should only militate against her nomination if there was a "*failure*" measured against enquiry into the circumstances of that performance, and that of other athletes, to conclude the inability to "*step up*" as a systemic failure.
- 5) Her achieving the Performance Standard only once is expressly qualified for an endurance event.
- 6) Her performance in heat could only be brought to account after careful consideration of all the significant events in which she has run as to

temperature, and whether it truly can be said that she has exhibited an inability to perform in the heat.

- 7) She has steadily improved her Personal Best times.
- 8) Her not running the half marathon as a fitness test for the World Championships should not be counted against her.
- 9) She exhibited courage and tenacity in meeting the Performance Standard after such a debilitating year, and her disposition and attributes are relevant.

124. In coming to this conclusion we have given full weight to a submission made to us after the formal hearing concluded, through Mr David for ANZ. Spurred by the questions asked by the Tribunal, and in particular those addressed to Mr Ankrom, he emphasised that the Olympic Criteria govern the nomination process, and with particular reference to Clause 17 of the General Criteria, Mr David pressed the primacy of the NZOC Olympic Criteria. Mr David's point was that the power of the High Performance Director to veto a selection made after the consideration of the specific Olympic Criteria is not consistent with the obligation on the selectors to assess the particular matters under the Olympic Criteria. The Tribunal was not postulating, as he submits, an approach whereby the General Criteria, Clause 17 should be applied to the Olympic Criteria in the nomination process. We recognise that the High Performance Director's role under Clause 17 comes effectively at the end of the process by consideration of veto on selection. But given that there is specific reference in the Olympic Criteria to the General Criteria, we think it inevitable that some of the considerations which could lead to a veto, would be included in the sort of matters considered by selectors in the nomination process. There is much about Clause 17 which corresponds with the Olympic Criteria.

### **Formal Decision**

The appeal is allowed. The Order of this Tribunal is that ANZ by its Selectors reconsider Ms Hunter-Galvan's application for nomination in terms of this Decision.

The Tribunal reserves any other issue arising, including that of costs.

Dated this 20th day of June 2008.

Signed by *Nicholas Davidson*

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**For The Hon Barry Paterson QC Tribunal Chair**

**Nicholas Davidson QC**

**Adrienne Greenwood**