

BETWEEN RYAN TAYLOR

Appellant

AND NEW ZEALAND OLYMPIC COMMITTEE

Respondent

**AND NEW ZEALAND SHOOTING FEDERATION
INCORPORATED**

Interested Party

AND NATALIE ROONEY

Interested Party

REASONS FOR DECISION GIVEN ON 6 JULY 2012

Dated 20 July 2012

Hearing: By telephone conference on 5 July 2012

Counsel: D Kaldermis and J Upson for Appellant
T Castle and M Clarke for Respondent
G Paton representing New Zealand Shooting
Federation
P David and K Morrison for N Rooney

Others Present: R Taylor (Appellant)
G Taylor (in support of Appellant)
K Smith and S Wickham (for Respondent)
G Rooney (in support of Natalie Rooney)

Tribunal: Barry Paterson QC, Chairman
Anna Richards
Rob Hart

Registrar: Brent Ellis

INTRODUCTION

1. On 6 July 2012, this Tribunal gave a decision in this matter without reasons. A copy of that decision is appended as Appendix 1. It now gives its reasons for its decision.
2. Mr Taylor's Notice of Appeal advised that the decision being appealed against was:
 - (a) The NZOC's non-selection decision of 12 June 2012, being a decision that the appellant did not meet criteria for selection to the 2012 New Zealand Olympic Team, made as justification for the Committee's refusal to agree to the New Zealand Shooting Federation's application to reallocate New Zealand's quota to the appellant's event.
 - (b) The Notice of Appeal was filed on 29 June 2009 on a precautionary basis, as in accordance with the respondent's (**NZOC**) procedures, there had been a "without prejudice" meeting on 28 June 2012 between Mr Taylor, and representatives of both the NZOC and the New Zealand Shooting Federation Incorporated (**NZSF**).
3. A telephone conference was convened by the Tribunal for the morning of 2 July 2012 at which Ms Rooney participated by invitation as she had been named as a potentially interested party. Both Ms Rooney and the NZSF were joined as interested parties during that conference and timetable orders were made to bring the matter to an early hearing. An urgent decision was required if the matter was to be resolved before the closing date of 9 July 2012 for the NZOC's team naming for the London Olympic Games. A further time complication, which added to the urgency, was the need to have a quota allocation reallocated if the appeal were to succeed.
4. At the conference, counsel for the NZOC advised that as a result of the "without prejudice" meeting with Mr Taylor, the NZOC now

wished to support the appeal and sought a consent order that the appeal be allowed. The NZOC selectors wished to have the quota allocation reallocated to Mr Taylor's event, the Men's 50m Prone Rifle and to select Mr Taylor. This Tribunal has no jurisdiction in the quota reallocation. It could not make a consent order without giving Ms Rooney the opportunity to make submissions.

5. In one sense, this appeal was moot. However, both Mr Taylor and the NZOC sought a determination by the Tribunal. This was because the International Shooting Sport Federation (**ISSF**), the international controlling body for shooting, required a decision from this Tribunal if it was to consider reallocating the quota to Mr Taylor's event.
6. Further, in the Tribunal's view, it was necessary to consider whether it had jurisdiction to make the order. It subsequently transpired, when the appeal bundle was filed, that NZOC's solicitor had, on 26 June 2012, advised Mr Taylor's solicitors that it did not consider that Mr Taylor "has jurisdiction to bring an appeal in the Sports Tribunal against its decision not to approve a quota reallocation to Men's 50m Prone Rifle."
7. Finally, natural justice required Ms Rooney to be given the right to participate.
8. To ensure that the appeal was not rendered nugatory, it was necessary to abridge the time for filing documents in accordance with the Tribunal's powers under r 18(b) of the Tribunal's Rules. Because of the urgency of the matter, very tight time limits had to be imposed and this allowed for the hearing to proceed during the evening of 5 July 2012.

Background

9. The essential facts are not in dispute. The chronology of events up until Mr Taylor's present appeal is:

Date	Event
29/02/12	NZSF advises NZOC that a quota place had been won in Women's Air Rifle.
12/03/12	NZOC advised NZSF that it confirmed the latter's recommendation that the quota in the Women's Air Rifle be retained.
29/05/12	As no athlete in Women's Air Rifle achieved the minimum qualifying standard (MQS) twice, as was required by the NZSF Olympic selection criteria, the NZSF requested a transfer of the quota allocation to Men's 50m Prone Rifle.
30/05/12	NZOC received a request from NZSF to agree to the reallocation of the quota to Men's 50m Prone Rifle and nominated Mr Taylor for Olympic selection in that event.
	NZOC selectors considered the position and were not satisfied that Mr Taylor met one of their criteria, namely "capability of being 16 th or better in the world (in an Olympic context) with the prospect of top 8 (Olympic Diploma) finish at the games."
31/05/12	The NZOC selectors sought further information from NZSF.
01/06/12	NZSF supplied an updated submission on Mr Taylor.
07/06/12 – 10/06/12	After two further requests from NZOC, NZSF supplied further submissions on 7 and 10 June.
12/06/12	NZOC selectors make a decision which is the decision appealed against. Further details of the decision will be given below.
13/06/12	NZSF sends a submission on Ms Rooney to NZOC and NZOC seeks further information which was supplied. Further information sought by NZOC selectors
15/06/12	NZOC advise NZSF that Ms Rooney had met the selection criteria and that NZSF should apply to ISSF to have the quota reallocated to Women's Trap.
19/06/12	ISSF confirms the reallocation of the quota place to Women's Trap.
21/06/12	NZSF nominates Ms Rooney for selection.
	NZOC selectors select Ms Rooney.
	Mr Paton of NZSF advised by NZOC of selectors' decision and was advised that he could advise Ms Rooney of the decision and that NZOC would seek to

	make an announcement the following week. However, events intervened when Mr Taylor appealed and an announcement was not made.
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10. The chronology in respect of Mr Taylor's appeal to this Tribunal is:

Date	Event
22/06/12	Mr Taylor's solicitors write to NZOC advising of Mr Taylor's intention to appeal the 12 June decision (the first decision).
26/06/12	NZOC's solicitors write to Mr Taylor's solicitors advising that it did not consider Mr Taylor had jurisdiction to bring the appeal.
	Mr Taylor files an appeal with the NZOC against first decision.
28/06/12	In accordance with the procedures set out in agreement between NZOC and NZSF relating to "Application, Nomination and Selection process for the London 2012 Olympic Games" (the selection agreement), a "without prejudice" meeting between the NZOC selectors, Mr Taylor's representatives and Mr Paton of NZSF was held to endeavour to resolve the appeal. NZOC was provided with further information at that meeting which it says caused it to question the information it had previously been provided with.
29/06/12	Mr Taylor's Notice of Appeal and supporting documents filed with this Tribunal.
30/06/12	NZSF provided correction to some of the data it had previously supplied to the NZOC. NZOC selectors also sourced further information, including results of the athletes who had confirmed quota places in the Men's Prone Rifle 50m for the London Games.
	Mr Taylor also supplied further information through his solicitors to NZOC selectors.
	NZOC selectors determined that Mr Taylor was capable of being 16 th or better in the world in an Olympic context with the prospect of a top 8 finish at the London Games.
01/07/12	NZOC advises Mr Taylor that it had reconsidered its decision and now supported Mr Taylor but advised unless the quota was reallocated he would not be eligible for selection.
02/07/12	NZOC advise Ms Rooney of the decision.

	First conference in this appeal at which NZOC advises that it now supported Mr Taylor and would seek an order upholding the appeal by consent of all parties which would include Ms Rooney.
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11. The first decision of 12 June 2012 is the decision against which Mr Taylor appeals. The email advising Mr Taylor of the decision included:

We advise that NZOC are not in a position to agree to the quota reallocation. In determining whether a reallocation for the quota place can occur, NZOC must consider whether the athlete who has been nominated for the transfer of the quota place has met all the Performance Criteria as set out in the NZSF 2012 Olympic Games London Selection Policy.

To meet the first of the four Performance Criteria, NZSF must provide credible international evidence that Ryan has the *"capability of being 16th or better in the world (in an Olympic context) with the prospect of a top 8 (Olympic Diploma) finish at the Games."*

NZOC do not believe that such evidence has been provided.

In the event you wish to continue to pursue the quota reallocation, within the remaining priorities, as set out in the NZSF nominated criteria, please submit the relevant evidence in support of those priorities.

The email gave the rationale for the NZOC's position that Mr Taylor had not met the particular performance criteria.

12. The decision to support Mr Taylor and not Ms Rooney was made after the "without prejudice" meeting and was as a result of discussions and reviews in the period 30 June 2012 and 1 July 2012. The decision made was communicated to Mr Taylor and to his solicitors on 1 July 2012. The summary of the discussions records the matters which caused the selectors to change their decision. The summary concludes with the following:

As a result of all of this further information and analysis, the NZOC Selectors are now of the view that...[Ryan Taylor is]... capable of being 16th or better in the world in an Olympic context with a prospect of a top 8 finish at the Games.

In doing so, they agreed he satisfied all the performance criteria under the NZSF selection criteria for the London Games.

Jurisdiction

13. Mr David, for Ms Rooney, challenged the Tribunal's jurisdiction to hear this appeal on two grounds. First, it was submitted that this is not a selection appeal under clause 9 of the selection agreement. Secondly, if it is a selection appeal, Mr Taylor has failed to fulfil certain requirements under clause 9 of the selection agreement. It is noted that in a letter of 26 June 2012 to Mr Taylor's solicitors, the NZOC solicitor challenged the Tribunal's jurisdiction on grounds similar to the first ground referred to above. NZOC has since stated that it accepts that the Tribunal has jurisdiction.
14. The basic submission that this is not an appeal under the agreement is based on the premise that the first decision (paragraph 11 above) was a decision not to support the reallocation of the quota, and this decision is distinct and different from a nomination or a selection decision. There is no provision in the agreement for an appeal from a reallocation decision.
15. It was further submitted that a quota allocation decision precedes either a nomination or a selection decision and occurs prior to nomination and that there are no provisions in the selection agreement allowing an appeal from such a reallocation decision. In part, there is a reliance upon statements from the NZOC which suggested that reallocation preceded even nomination. These statements included an email letter from the NZOC to the NZSF advising that the selectors considered Ms Rooney met the four performance selection criteria and that NZOC would support a reallocation application. It stressed that the decision was not a selection decision and that NZOC would still require to receive a nomination prior to receiving confirmation of the quota

reallocation. In Ms Rooney's case, the reallocation application was made before nomination and selection.

16. The Tribunal accepts that Mr Taylor had been nominated by NZSF prior to the first decision. The Executive Committee of the NZSF determined at a meeting on 28 May 2012 that as Mr Taylor had now shot the second international qualifying score, which was required under the selection criteria, he should be nominated for Olympic selection. Mr Paton planned to see the NZOC the next day and it was agreed that the nomination was to be forwarded to the NZOC and that there would be an application to the NZOC and the ISSF for the quota to be transferred. There was an email exchange between Mr Paton of the NZSF and the NZOC. It does appear as if there was no specific nomination but it is clear from the exchange that the NZOC selection panel was to consider the matter on 1 June. The matter to be considered was whether the NZOC would support the quota reallocation but implicit in this decision was the need to consider whether Mr Taylor satisfied the selection criteria.
17. The decision under appeal, namely the first decision, was not made on 1 June but rather on 12 June. This was because of the additional information that the NZOC selectors sought. They determined that they were not prepared to support the quota reallocation and the reason for this was that the selectors would only support a quota reallocation if the athlete met all the performance criteria set out in the NZSF selection policy for the London Olympics. They determined that Mr Taylor, in their view, did not satisfy one particular criteria, namely the capability of being 16th or better at the Olympics. NZSF was therefore advised on 12 June of this decision.
18. A purposive interpretation must be given to the selection agreement. That is, this Tribunal must give effect to the purpose of the agreement in allowing for both nomination and selection appeals. In particular, an athlete who is not selected because the

selectors have not properly followed the selection criteria agreed to with the NSO has a right of appeal.

19. It follows from a practical point of view that the Olympic selectors when faced with a request to support a reallocation, which support is a requirement of the ISSF, are required to be satisfied that the athlete will be selected if the reallocation is applied for and approved. The first decision notified on 12 June 2012 contained two findings. First, Mr Taylor had not, in the selectors' view, satisfied the performance criteria and was therefore not eligible for selection. Secondly, because he was not eligible for selection, the reallocation application would not be supported and would therefore not proceed.
20. The procedure to be followed when a reallocation of quota is required is not set out in the selection agreement. The Tribunal does not see the actions of the NZOC referred to in paragraph 15 above as in any way being indicative of the correct interpretation of the procedure to be followed when a reallocation application is required. It is possible that different circumstances may apply in different cases, particularly when there are possible appeal rights to be exhausted.
21. A matter which is an aid to interpretation in this case is that if Mr Taylor did not have an appeal right as a result of the first decision, he in fact, had no appeal right at all. It cannot be right, in the Tribunal's view, that an athlete whom the selectors determine has not satisfied the NZSF selection criteria in what is in effect a selection decision, is denied a right of appeal.
22. The Tribunal is therefore of the view that Mr Taylor did have a right of appeal from the first decision. That decision was a reallocation decision. However, in coming to their decision the NZOC selectors also made a selection determination, namely that Mr Taylor would not be selected because he did not satisfy the relevant selection criteria.

23. It is possible to refer to provisions in the selection agreement which may not have been strictly complied with before the first decision was made. However, where as in this case there is a need to consider whether an athlete satisfies the selection criteria before the NZOC will support a quota reallocation it is necessary to give effect to the purpose of the selection appeal provisions in the selection agreement. That purpose is to give an athlete a right of appeal if the athlete believes that the selectors have not properly followed the selection criteria. The only redress such an athlete has is to implement the appeal rights in clause 9.6.1 of the selection agreement. Such an appeal must be available to give effect to the purpose of the agreement.
24. The second challenge to jurisdiction is that Mr Taylor has not complied with the procedural requirements under clause 9 of the selection agreement.
25. There are two procedural matters raised. First, Mr Taylor did not give written notice of appeal within two days of the nomination date, as required by clause 9.3.1(a) of the selection agreement. Secondly, there is a requirement that an athlete wishing to be nominated and selected must complete and submit an athlete application and athlete agreement to the NZOC (clause 5.1 of the selection agreement).
26. Clause 9.3.1(a) of the selection agreement applies to nomination appeals. As the Tribunal has determined that this is a selection appeal, this clause has no application.
27. It is correct that the athlete's agreement was not submitted until after the appeal, initially to the NZOC, was lodged. It was not submitted before nomination. However, the Tribunal considers this to be a procedural matter which can be waived by the NZOC and which was waived in this case. Once Mr Taylor lodged his appeal, the NZOC accepted it and entered into the consultation process referred to in clause 9.6.1(b) of the selection agreement.

In the circumstances of this case, the Tribunal is of the view that the late production of the athlete's agreement is not an impediment to considering this appeal.

28. It was submitted that if the Tribunal had jurisdiction, it had a discretion whether or not it would hear the appeal. The issue of discretion will be referred to later.

The Substantive Appeal

29. As a result of Mr Taylor's appeal and the further information provided, the NZOC selectors determined that Mr Taylor met the performance criteria for the Olympic Games. They accordingly made the second decision on 1 July. As a result, the NZOC supported Mr Taylor's appeal to this Tribunal.

30. Clause 7.6 of the selection agreement includes:

The NZOC may... terminate the Athlete Agreement of a Selected Athlete (and in so doing withdraw a Selected Athlete from the Team) and select another Nominated Athlete in their place as a result of a... Selection Appeal brought in accordance with the procedure set out in clause 9 of this Agreement.

31. The Olympic selectors were acting within the powers given by clause 7.6 when they made their second decision on 1 July 2012. They withdrew Ms Rooney from the team and appointed Mr Taylor in her place subject to the necessary quota reallocation. Their decision of 1 July 2012 has not been attacked on substantive grounds.

32. In the Tribunal's view, the second decision made on 1 July 2012 could not have been challenged on substantive grounds and was appropriate in the circumstances. Mr Taylor had exercised a right of appeal and the NZOC selectors on receiving further information were satisfied that he was entitled to do so and that his appeal should succeed.

33. It is noted that if the positions of Mr Taylor and Ms Rooney were to be considered together on the basis that both had satisfied the selection criteria, Mr Taylor had precedence. On a quota reallocation, he was in Priority 2 (quota to remain within discipline) whereas Ms Rooney was on Priority 3 (quota to stay within sport). The decision of 1 July 2012 could not be impugned.

General

34. The Tribunal has sympathy for Ms Rooney and accepts she will be disappointed. However, it was required to determine this matter in accordance with the provisions of the agreement.
35. The Tribunal does have reservations as to whether it does have a discretion in this matter, as suggested on Ms Rooney's behalf.
36. The grounds upon which an appeal may be made to it under clause 9.5.1 of the selection agreement do not suggest it has a discretion. Nor do the Tribunal's own rules expressly give it a discretion. Section 38(b) of the Sports Anti-Doping Act 2006, which contains a provision stating that the Tribunal has a discretion whether to hear a matter or not, deals with sports-related disputes other than appeals which fall within s 38(c) of that Act. The present dispute is an appeal falling within s 38(c). Section 38(c) contains no reference to the Tribunal having a discretion whether or not to hear such an appeal. The Tribunal's jurisdiction in Olympic selection appeals is tightly prescribed by the selection agreement and its own rules.
37. However, the Tribunal does not need to decide whether it has a discretion because if it has a discretion it does not believe that this is an appropriate case to exercise it. There were factors which favoured both Mr Taylor, as well as Ms Rooney, if a discretion were to be exercised and this is not a case where discretionary factors clearly favour Ms Rooney, albeit that she is the innocent victim of circumstances.

Result

38. For the above reasons, the Tribunal issued its decision on 6 July 2012 upholding Mr Taylor's appeal.

Dated 20 July 2012

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B J Paterson QC
Chairman

APPENDIX 1

**BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND**

ST 02/12

BETWEEN RYAN TAYLOR

Appellant

AND NEW ZEALAND OLYMPIC COMMITTEE

Respondent

**AND NEW ZEALAND SHOOTING FEDERATION
INCORPORATED**

Interested Party

AND NATALIE ROONEY

Interested Party

DECISION DATED 6 JULY 2012

Hearing: By telephone conference on 5 July 2012

Counsel: D Kalderimis and J Upson for Appellant
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G Paton representing New Zealand Shooting
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P David and K Morrison for N Rooney

Others Present: R Taylor (Appellant)
G Taylor (in support of Appellant)
K Smith and S Wickham (for Respondent)
G Rooney (in support of Natalie Rooney)

Tribunal: Barry Paterson QC, Chairman
Anna Richards
Rob Hart

Registrar: Brent Ellis

INTRODUCTION

1. This is an appeal by Mr Taylor against his non-selection for the London Olympic Games. Because of the time exigencies, dictated by the closing date of 9 July 2012 for competitors for the London Olympics, this decision is being given without reasons. The reasons will follow in due course.

2. The essential findings for the Tribunal are:

- (a) The appeal is a selection appeal under the provisions of clause 9 of the Agreement between the New Zealand Olympic Committee Incorporated (NZOC) and the New Zealand Shooting Federation Incorporated (NZSF) detailing the application, nomination and selection processes for the London Olympics (the Agreement).
- (b) The Tribunal has jurisdiction to determine the appeal.
- (c) The decision of the NZOC selectors dated 12 June 2012, against which Mr Taylor appeals, was revoked by a further decision of the NZOC Selection Committee on 1 July 2012 when Mr Taylor was held to have satisfied the selection criteria for the London Olympic Games.
- (d) The NZOC selectors were acting within their powers when making the decision of 1 July 2012. Clause 7.6 of the Agreement allows the selectors to terminate the selection of an athlete and select another athlete in that athlete's place.
- (e) Ms Rooney's selection was terminated and Mr Taylor has been selected to compete in the London Olympic Games subject to the quota available to the NZOC being reallocated for the benefit of Mr Taylor.

3. The Tribunal has no jurisdiction in respect of the quota reallocation but would expect that both the NZOC and the NZSF will now co-operate to apply for the reallocation of the quota to Mr Taylor.

Decision

4. Mr Taylor succeeds on his appeal which is allowed.

Dated 6 July 2012

A handwritten signature in blue ink, appearing to read 'B J Paterson', is positioned above a dotted line.

.....
B J Paterson QC
Chairman