

BETWEEN **MICHAEL BIAS**
 Appellant

AND **CYCLING NEW ZEALAND**
 Respondent

AND **NEW ZEALAND OLYMPIC COMMITTEE**
 Interested Party

**REASONS (Given 12 July 2024) FOR RESULTS DECISION OF SPORTS TRIBUNAL
5 JULY 2024**

Hearing 5 July 2024 via Teams

Present Michael Bias, Appellant
 Cathleen Bias, appellant's support
 Paul David KC and Maria Clarke, counsel for Respondent
 Ryan Hollows, Cycling New Zealand
 Tara Pryor, NZOC

Tribunal Warwick Smith, Deputy Chair
 Pippa Hayward

Registrar Helen Gould

1. Mr Bias (the Appellant) filed an urgent appeal against the decision of Cycling New Zealand (CNZ, the respondent) not to nominate him for selection to the New Zealand Olympic Team.
2. The issues for determination were whether:
 - (i) CNZ had properly followed and/or implemented the criteria from its 2024 Paris Olympic Games Nomination Criteria (the “Nomination Criteria”); and
 - (ii) The nomination decision was affected by bias.
3. A virtual hearing was held on 5 July 2024 under urgency. The Tribunal concluded that neither ground of appeal had been made out and dismissed the appeal.
4. What follows are the reasons for that decision.

Background

5. The appellant is one of New Zealand’s leading BMX riders. He has been riding on the BMX circuit for over 11 years and is now 30 years old. Unusually, the appellant describes himself as a “privateer”: by that he means that he is not financially supported by CNZ when he attends competitions or during his training periods.
6. The appellant is the highest ranked New Zealand rider for UCI World rankings, UCI Olympic rankings and UCI World Cup rankings. The UCI Olympic rankings are based on the results of the top 3 riders of each nation to attain a nation quota.
7. BMX is an Olympic Sport, and New Zealand earned a quota spot for the 2024 Paris Olympics.
8. There was a three-step process for a BMX rider to be selected for the 2024 Paris Olympics. First, the CNZ Discipline Panel (the “DP”) had to recommend the rider from its “Long List” of riders who might be in contention for the Olympic spot, to the CNZ Olympic Nomination Panel (the “Nomination Panel”). The Nomination Panel would consider the DP’s recommendation, and if satisfied that the rider should be nominated, would nominate the rider to the New Zealand Olympic Committee (“NZOC”) for Olympic Games selection. The third and last step was for the NZOC to select the rider in the New Zealand Olympics team.

9. In this case, the appellant was not recommended for nomination by the DP, and was not nominated by the Nomination Panel to the NZOC. Instead, the nomination for the one available quota spot went to the only other rider in contention, a younger rider, Rico Bearman, who had joined the Men's Elite World BMX circuit only at the beginning of 2024. Mr. Bearman is associated with and supported by CNZ. The appellant was nominated as a non-travelling reserve.
10. Mr. Bearman was served with this proceeding as an Interested Party, but he elected to take no part. He did not appear at the hearing.

The Nomination Criteria

11. The following clauses of the Nomination Criteria are the principal clauses relied on by the appellant and / or CNZ:

3.1 **Primary Objective:** Discipline and Nomination Panels must be satisfied that the whole group of athletes it nominates to the NZOC are collectively capable of achieving the greatest number of medals at the 2024 Games.

3.2 **Performance Standards:** In determining whether the whole group of athletes it nominates to the NZOC meets the Primary Objective in cl. 3.1, the Discipline and Nomination Panels must consider athlete performances, during the Performance Window in Schedule 1, in the Discipline(s) and Event(s) for which they are seeking nomination. Weight will be given to athletes consistently meeting Performance Standards listed in Schedule 1.

4.1 **Discretionary Considerations:** Discipline and Nomination Panels may also consider any other information they deem relevant when considering the athletes performances during the Performance Window in Schedule 1, such as:

- a. the ability to ride in support of a medal objective in more than one discipline at the 2024 Games;
- b. the ability to enhance another athlete's medal success at the 2024 Games in competition;
- c. developing the potential of an athlete for the Los Angeles 2028 Olympic Games;

- d. the conditions in which results and performances were obtained, including but not limited to: the nature of the course, equipment used, environmental factors, team composition, and level of competition;
- e. the nature of the Event course(s) and environmental factors at the 2024 Games;
- f. athlete performances outside of events listed in Schedule 1, including in competition, training, or trials;
- g. the ability to train and compete with others in team Events (such as for the Road Race, Team Pursuit, Team Sprint, and Madison);
- h. the number and nature of Events an athlete may compete in at the 2024 Games;
- i. an athlete's attendance, and conduct at past competitions, training sessions, training camps, testing sessions, assessments, and other events; and
- j. an athlete's performance behaviours, including active engagement in the IPP process, ambition, hunger, attention to detail, and ability to perform under pressure.

4.2 Relevance & Weight: Discipline and Nomination Panels have absolute discretion to decide the relevance and weight of these Nomination Factors and any Extenuating Circumstances (see cl. 5.1).¹

4.6 Minimum Standard: Notwithstanding the Primary Objective set out in cl. 3.3, the Discipline and Nomination Panels must be satisfied that each athlete (or a group of athletes for team Events) has demonstrated the capability to achieve a top 16 placing in their Event at the 2024 Games, with the potential to achieve a top 8 placing in their Event at the 2024 Games.

Schedule 1, Table 2.

12. Table 2 of the Nomination Criteria set out the "Performance Standards" that BMX racing athletes would need to meet in the "Performance Window", for the purposes of cl 3.2 of the Nomination Criteria. To meet the Performance Standard in the Elite Men category, the athlete had to have had at least one top 8 placing at a UCI BMX Racing World Championships event and/or a top 6 placing at a UCI BMX Racing World Cup

¹ The appellant did not rely on any Extenuating Circumstances in support of his appeal.

event. The Performance Window was the period between 1 August 2022 and 4 June 2024.

The appeal

13. It was common ground that both the appellant and Mr. Bearman had met the Minimum Standard set out at cl. 4.6 of the Nomination Criteria, that each had met one of the Table 2 Performance Standards within the Performance Window, and that both were eligible to be considered for nomination under the Primary Objective in cl .3 of the Nomination Criteria. The only issue on the first part of the appeal (whether CNZ properly followed and/or implemented the Nomination Criteria) was accordingly which of the two athletes should have been nominated. The appellant says that he should have been nominated, not Mr. Bearman.
14. In his first statement of evidence, the appellant contended that CNZ did not properly follow and/or implement the Nomination Criteria, in the following respects:
 - (i) Clause 3.2 performance standards: the appellant's late 2022 performances, including his top 5 finish in Round 5 of the BMX Racing World Cup event in Colombia in September 2022, were not referred to at all in the explanation provided to him in June 2024 as to why he had not been nominated. The DP and the Nomination Panel were required under clause 3.2 to consider the athlete's performances throughout the Performance Window, and not just in 2024, as appeared to be their focus. The explanation also referred to results in 2023, when Mr. Bearman was predominantly competing in World Under 23 ("U23") events. Cl. 3.2 required that the DP and the Nomination Panel consider performances during the Performance Window in the particular Event in which they were seeking nomination. Mr. Bearman's U23 results in 2023 were irrelevant to the determination required by cl. 3.2. Cl. 3.2 also required that the DP and the Nomination Panel give weighting to athletes consistently meeting the Performance Standards. The appellant met the Performance Standards twice within the Performance Window (two World Cup top 6 placings), while Mr. Bearman only met the Performance Standards once (one top 8 placing at the 2024 World Championship event).
 - (ii) On the discretionary consideration of developing potential for the Los Angeles Games in 2028 (cl. 4.1 (c)), no or inadequate consideration was

given to the appellant's potential development over the next 4 years. Although much of his season was plagued with injury, he showed much improved form in 2024 (including another BMX Racing World Cup top 6 placing at the World Cup event in February 2024), and he has shown he has much potential. Age should not be a barrier – although the appellant is now 30 years old, the current World Champion, Joris Daudet, is now aged 33.

- (iii) On the discretionary issue of the conditions in which results and performances have been obtained (cl. 4.1 (d)), the appellant submitted that the only track where Mr. Bearman achieved the Performance Standard (a top 8 placing at the 2024 World Championships held in Rock Hill, South Carolina, USA) is very different from the Paris Olympic track, which is very technical. Rock Hill is the only track on the circuit that does not have a single jump on the first straight, and has a left-hand turn.
- (iv) On the discretionary consideration at clause 4.1 (e), the nature of the track for the Paris Olympics, the appellant submitted that the track is very suitable for him. This was demonstrated at the Olympic Test event, where the appellant was placed 12th. The appellant resides in France, and the Olympic track is the same design as many of the French tracks on which the appellant regularly races. He has ridden the Olympic track numerous times, including since the Olympic Test event.
- (v) The appellant's results outside of the UCI World Championships and World Cup events generally, were not considered, or not adequately considered, in the exercise of the DP's and the Nomination Panel's discretion under cl. 4.1 (f). No or inadequate consideration was given to the Olympic rankings, which take account of performances outside of World Championships and World Cups, and the appellant is ranked higher than Mr. Bearman in the Olympic rankings. Account should also have been taken of the appellant's 2nd placing in the Continental Championships in February 2024 (an event in which Mr. Bearman was placed 6th), and the fact that the appellant is leading the French national series. France is a top BMX nation, with a depth of talented riders. The appellant also referred in this context to his 12th placing in the Olympic Test event, held in April 2024.

- (vi) In its reply explaining the appellant's non-nomination, CNZ referred to Mr. Bearman reaching "semifinals" at two World Cup events. While reaching a semifinal is not one of the prescribed Performance Standards, the appellant noted that he too has reached a semifinal outside his final placings. If reaching the semifinals in those two events were counted, his "semifinal count" would surpass that of Mr. Bearman.
15. Summarizing his position on the issue of whether CNZ properly followed and / or implemented the Nomination Criteria in his reply evidence, the appellant submitted that Mr. Bearman opted to race U23 while all the best riders in the world in that age group were racing in the Men's Elite level, trying to meet the performance criteria and score ranking points. In every other country you cannot be considered for the Olympic Games without scoring points in the Elite competitions through the qualification cycle. The appellant leads Mr. Bearman in all of the rankings and believes that CNZ is wrong when it apparently does not accord any weight to that factor.
 16. The appellant also contended that the DP and /or the Nomination Panel's nomination decisions were affected by bias. He referred to his ten- year history of non-selections, alleging that the same personnel have remained in their selection roles over the period, and their personal prejudices have affected his career. In his view, the CNZ panels have favoured their own team member and HPSNZ funded rider (Mr. Bearman) over himself, a "privateer". He says that he has been denied funding, sports science coaches, and access to High Performance gyms for training.
 17. The appellant also alleged that he has not been receiving communications from CNZ and does not receive acknowledgements of his achievements. He expressed annoyance over the manner in which his non-nomination was notified, without any explanation. He had to email and request that information twice in the week he filed his appeal.
 18. Finally in support of his bias claim, the appellant contended that Mr. Bearman did not meet the primary criteria of the selection regulations but was selected on the "secondary basis" of the quota spot being available. The appellant has previously been denied entry to the World Championships even when he had met the primary criteria, the quota spot being returned.

19. In addition to his own evidence in support of the appeal, the appellant submitted an unsworn statement from Mr. Klavs Lisovskis, who has been a BMX racing coach at a high level for many years.

The Minutes of the Recommendation meeting of the DP

20. The DP met on 13 June 2024 to consider its recommendation for the Men's and Women's Olympic quotas.
21. The Minutes record that the DP considered whether, in applying cl. 4.2 of the Nomination Criteria, it wanted to weigh results or performances. Considering the length of the Performance Window, the DP agreed that recent results would hold greater value. Strength of the field in a given event was said to be relevant, but hard to measure. World Championships results were considered to sit higher than World Cup results, but only slightly because of the somewhat restricted fields at World Championships (where national quotas apply).
22. The DP confirmed that only two riders in the Men's BMX racing event had met the Performance Standards – the appellant and Mr. Bearman. In respect of the appellant, the Minutes record:

[The appellant] is older and more experienced than the other riders but would likely not see the same improvements over a four-year period. Noting that current performances would still have him in consideration for 2028.....The panel acknowledged [the appellant's] outstanding World Cup weekend in Brisbane and commented that he is showing career-best form in 2024, however they believe his Elite results through the remainder of the performance window are inconsistent, especially through 2023. Through 2024 he has been outperformed by other riders being considered.

23. Comparing the early 2024 block of racing, the DP noted that both the appellant and Mr. Bearman were showing their best form. A comparison graph produced for the DP showed that in five of seven events, where both riders competed in Elite, Mr. Bearman achieved the better result and is showing better consistency.
24. The Minutes noted in respect of Mr. Bearman that: "*Making final in his first Elite World Championships is an impressive achievement on the back of being the top ranked U23 World rider in 2023.....The consistency of [Mr Bearman's] results in 2023,*

acknowledging that he was racing U23, show a higher level of consistency than [the appellant's] results.”

25. The DP considered that Mr. Bearman's consistent results earned him the start. That was reinforced by the recency of the results which could be directly compared and show one rider standing out above the other.

The Minutes of the Nomination Panel Meeting

26. An updated matrix document summarizing athletes' relevant results was provided to the Nomination Panel, before it met on 17 June 2024 to consider the DP's recommendations. The convenor, Mr. Hollows, reported on the work of the DP and how it was able to thin down the riders in contention for the Men's BMX quota spot to just two.
27. Mr. Hunn attended the meeting in his capacity as a member of the Nomination Panel, and he had also convened the DP meeting (but with no vote). Mr. Hunn spoke to the recommendation of the DP, saying that the DP had weighted recent results in 2024 above other results. He noted specifically that in this period both the appellant and Mr. Bearman competed in the same category, with Mr. Bearman having the better results. Results in 2022 and 2023 were also considered and they showed that the appellant had some good results early in the Performance Window, but they showed a lack of consistency when compared with Mr. Bearman, acknowledging that he was racing in U23 both those years. The Minutes record the following summary of this part of the discussion:

*“...[Mr.Bearman] has better consistency and growth towards 2028.
[The appellant] has potential for 2028 but the panel would not expect
the same growth. The graph clearly reflects consistency...”*

Evidence for CNZ

Mr. Takarua

28. Mr. Takarua was a member of the DP that recommended Mr. Bearman for the Paris Olympics quota spot. He has held various roles in BMX racing over 25 years, and has been a selector for CNZ in BMX racing for 10 years for World Championships and World Cup events. He is clearly very experienced in the world of BMX racing at the elite level.

29. Mr. Takarua has known both the appellant and Mr. Bearman from the start of their BMX racing careers. He described both athletes as having shown skills and abilities that put them at the top end of the sport in New Zealand.
30. The DP comprised Mr. Takarua and Mr. Adam Coker, with Mr Hunn acting as a non-voting convenor. The DP received a number of documents in advance of its recommendation meeting scheduled for 13 June 2024. Among them were a “BMX Matrix” document that included considerable detail about the contending riders’ performances, submissions made by the 5 riders who were seeking the BMX nomination (including the appellant), a “BMX Results” document, and a “BMX Data Compare” document. Mr. Takarua reviewed this material before the meeting of the DP, and was satisfied that he had all the information the DP would need to make a decision. It was clear to him before the meeting that it was going to come down to a decision between the appellant and Mr. Bearman.
31. Mr. Takarua attended the DP recommendation meeting on 13 June. He confirmed that the Minutes of that meeting provide an accurate summary of the meeting, and that he has approved those Minutes. At the end of the meeting, he and Mr. Coker agreed that Mr. Bearman should be recommended for the nomination, with the appellant nominated as a non-travelling reserve.
32. Mr. Takarua referred in his evidence to the good results the appellant had achieved in September 2022 (placing 5th at the World Cup) and February 2024 (placing 6th at the World Cup), but the DP considered that Mr. Bearman’s 6th placing at the (Men’s Elite) World Championships event in May of 2024 was the most recent result showing better current form. The DP took the view that, with only three Performance Standard results between the two riders, one of them in September 2022 and the other two in 2024, consistency of performance² could not be assessed across just the results that met the Performance Standards. In looking at results from 2023, it concluded that, while Mr. Bearman had very consistent results in making the finals in World Cup and World Championship U23 events, the appellant’s results were very inconsistent, and he did not achieve any Performance Standard results.
33. Mr. Takarua confirmed that the DP looked at consistency of performances through the cl. 4.1 discretionary factors by considering all the riders’ results in the Performance Window, with a focus on the recent results. In that context it did take into account Mr.

² Mr. Takarua expressed the view that “consistency” of results meant consistently placing in the top 16 at major events.

Bearman's results in 2023 in the U23 competition, and it also took into account the appellant's good result in the Continental Championships held in Australia in February 2024 and his good form and results competing in Europe.

34. The DP looked at each rider's potential for the future, under cl. 4.1 (c). It noted Mr. Bearman's rise to near the top of the world U23 ranks, and that his times in U23 events (that are raced on the same tracks as Men's Elite events) have been similar if not faster than Top 16 Elite Men. With Mr. Bearman now stepping into the Men's Elite class, the DP could only see his abilities progressing further with more experience in this level of racing. By contrast, the appellant is older and more experienced than other riders, but would likely not see the same level of improvement over a 4-year period.
35. On the question of which rider would be more suitable for the Paris track, Mr. Takarua said that all tracks are different, and that, by the time you reach Elite level, the track configuration or the height of the jumps does not change the skill level of the Elite athletes. However, some aspects are the same for every track, including the start gate and start ramp, speed of the gate and the angles of the start ramp. He expressed the view that the appellant does not have the same consistency in these parts of his racing as Mr. Bearman does. Top athletes who perform and place well have these race areas mastered, and gain advantages leading into the first and second turn corners. That is important, as 90 per cent of top riders lead from the first corner to the finish line.
36. Mr. Takarua said that any race where the appellant and Mr. Bearman competed together in an event would obviously provide a good measure of their respective levels as against each other. That could not be done over a full two-year period, because they were competing in different classes. However, on the 7 occasions on which both have raced at Elite level events, Mr. Bearman has been ahead 5-2 over the appellant, with all race fields having a high-level calibre athlete.
37. Mr. Takarua said the DP did not place much weight on rankings, because the appellant's ranking would be higher simply because he has been competing for longer in the Elite class. In Mr. Takarua's opinion, it was clear that if Mr. Bearman had had more time racing in the Elite class he would have been ahead of the appellant in the rankings. For that reason, the DP looked more at results.
38. Mr. Takarua rejected the appellant's allegations of bias. He said that the DP followed the required process, and based their decisions on the information provided.

Mr. Hunn

39. Mr. Hunn is the “Pathway Lead” for CNZ, a role that involves participating as a selector and / or panel convenor, providing expertise in quota and qualification systems, and monitoring and tracking quotas and qualifications. He was the convenor of the DP that recommended Mr. Bearman for Olympic nomination, and he participated as a member of the Nomination Panel. He is a very experienced administrator and selector in cycling, having acted as coach / manager of New Zealand cycling teams, and as CNZ’s High Performance Athlete Development Lead. He is currently the convenor of 7 of the 8 CNZ discipline recommendation panels.
40. It was Mr. Hunn who collated relevant race results for the 5 riders seeking nomination in the Men’s BMX racing event at the Paris Olympics. The results were obtained from the UCI website, and put into a draft matrix for all riders who were seeking nomination. Also, submissions were invited from the riders, and these were provided on 10 June 2024, with the BMX matrix, the BMX Results document, and the BMX Data Compare document, to the members of the DP.
41. Prior to the meeting of the Nomination Panel, an updated matrix document was prepared. This document was provided to the members of the Nomination Panel on 14 June 2024.
42. Mr. Hunn attended the meeting of the Nomination Panel, which was held on 17 June, 2024. The outcome of the meeting was to confirm Mr. Bearman as the CNZ nominee for the BMX Men’s racing event, with the appellant as non-travelling reserve. A letter was sent to the appellant on 19 June advising him of his nomination as a non-travelling reserve for the Olympics.
43. Mr. Hunn denied the appellant’s allegations of bias in the nomination process or generally. He acknowledged that some selection panel members at CNZ have been in those roles for well over 10 years, but said that is what makes them experts. He said that he did not believe there was any prejudice against the appellant.
44. Mr. Hunn agreed that Mr. Bearman has an Athlete Agreement with CNZ and that he receives funding (a development grant) via High Performance Sport New Zealand (“HPSNZ”). The reason for the development funding is that Mr. Bearman’s race results have met HPSNZ’s criteria for developing athletes (which include demonstrating “realistic (future) winning capabilities against sport benchmarks”). Mr. Hunn said that the appellant would not have met the “Potential Athlete” criteria because he is not a

developing athlete, having had many years' international experience. The appellant's results to date would also not have satisfied certain other categories for which such grants are provided.

45. An application was made for a funding grant for the appellant in March 2023, but it was declined because HPSNZ considered that he did not meet any of the funding criteria. Nevertheless, and although he was not a contracted or development-funded athlete, in late 2023 CNZ did provide the appellant with \$3,000 in direct campaign support for a World Cup event in Argentina. On other occasions CNZ has declined requests from the appellant that it make funding applications for him, on the basis that he had not met the funding criteria.
46. On the appellant's concerns about CNZ's alleged failures to communicate with him, Mr. Hunn said that CNZ has, through its member organisations, 20,000 cyclists, 500 of whom are in the Elite /U23/ junior riders seeking consideration. It is impossible to communicate with all of them, so CNZ seeks to communicate via newsletters or emails to specific groups. CNZ's primary focus is on those riders in its high-performance programmes. He said that, as far as he is aware, CNZ has replied to the appellant every time he has communicated with it.

Appellant's evidence in reply

47. In his reply evidence, the appellant took issue with a number of statements in Mr. Takarua's evidence. He contended that Mr. Bearman's successes in 2023 in the U23 class were "totally irrelevant", as U23 is a lesser standard of race ability than Elite, and most to the top U23 riders chose to ride up in the Elite class for the best chance of Olympic selection.
48. The appellant accepted that 2023 was not his best season. First, he changed his coach in the course of the year. Secondly, CNZ provided him with no funding. Thirdly, CNZ denied him access to a gym. He said that, in combination, these factors took a toll on his mental state and confidence, and affected his form. He found it hard to turn his form around. He came back to New Zealand in December 2023, and things began to improve for him almost immediately.
49. He contended that his European results, although very strong, were not in the matrix and used for consideration.

50. He contended that the DP's and Nomination Panel's views on future potential were purely subjective. He pointed out that the 2024 World Champions in both the Men's and Women's events are both aged 33, and they are still at the top of their game.
51. The appellant acknowledged that Mr. Bearman's strength is his gate, but when he isn't leading in the Elite events he is "very rarely first and struggles for consistency". By contrast, the appellant's strength is his track speed (although his starts have improved immensely over the last 6 months).
52. The appellant also took issue with Mr. Takarua's statement to the effect that all BMX tracks have similar characteristics. In the appellant's view, all tracks are very different, and the result is seen in local riders tending to do better on their own tracks.
53. The appellant said that he and Mr. Bearman have in fact faced each other in direct competition at Elite level on 8 occasions, finishing at 4-4. Of the three races in which the appellant beat Mr. Bearman, the appellant advanced to the next round and Mr. Bearman was eliminated, or one race was a final where the appellant beat Mr. Bearman. The times Mr. Bearman beat the appellant, either they were first and second in the qualifying round, or when the appellant crashed and Mr. Bearman did not advance.
54. On the DP's apparent view that rankings were not so important because, over a longer period, Mr. Bearman's ranking would have been higher than the appellant's, the appellant contended that this is a subjective comment that did not take account of the fact that the UCI ranking points system takes the higher of the points of either class where a rider has ridden both U23 and Elite (a rider cannot combine the points from both classes). As the appellant put it, "The time is now, not the future".
55. The appellant maintained his allegations of bias, saying that there is a "personal history" between himself and Mr. Takarua, whose son he has raced against. He said he had had "petty selection issues" with both Mr. Takarua and the CNZ High Performance Director, but when there was a different High Performance Director he was provided with HPSNZ funding and given other opportunities. On return of the return of the first High Performance Director, his funding was removed and repeated requests for support and funding have been refused.

Hearing

56. A Teams hearing was held before a panel of the Tribunal to determine the issue of whether CNZ did or did not properly follow and/or implement the Nomination Criteria, and/or were biased against the appellant. The appellant was cross-examined by Mr. David, and he cross-examined Mr Hunn and Mr Takarua. The appellant and Counsel for CNZ each made opening and closing submissions, and the appellant's mother and support person, Ms Cathleen Bias, also made brief submissions.
57. Mr. Lisovskis was unable to attend the hearing, and was not cross-examined.

Discussion and conclusions

Legal considerations – what is the Tribunal's jurisdiction to review the decisions of nominators and selectors?

58. In the Court of Arbitration for Sport ("CAS") decision of *Yachting New Zealand v Murdoch*³, the CAS made it clear that it is not for an appellate tribunal such as this Tribunal to review decisions of nominators or selectors on the merits of their decisions. Rather, the tribunal's role is to determine, as a matter of law, whether the nomination panel breached its contract with the athlete by not following the nomination process, or by acting so unreasonably that the Panel's decision should not stand.⁴ On the facts in *Yachting New Zealand v Murdoch*, the CAS panel came to the view that ... *a perusal of the Tribunal's reasoning reveals that it fell into the error of seeking to review the merits of the Nomination Panel's decisions rather than the process by which those decisions were arrived at.*⁵
59. On the particular facts in *Yachting New Zealand v Murdoch*, the CAS panel accepted that the nomination panel was entitled to "bring to bear their collective experience, expertise, skill, and knowledge"⁶. It said of the nomination panel that had made the challenged decision:⁷

"....They relied upon their expertise to give varying weight to the numerous factors to be taken into account in assessing and considering [the results]. They took into account the circumstances

³ *Yachting New Zealand v Murdoch*, Reasons for CAS decision, 2 April 2004.

⁴ At [6.31].

⁵ At [6.48].

⁶ At [6.24].

⁷ At [6.26].

in which the relevant results were achieved by the particular participants, the nature of the competition, fleet size and other “varying factors” affecting the different Regattas or performance at those Regattas. They were, in our view, entitled to do so.”

60. In this case, the DP and the Nomination Panel were given a very broad discretion in applying their expertise, experience, skill and knowledge to the recommendation and nomination processes. The introductory part of cl.4.1 made it clear that they could consider any information they might deem relevant when considering the athlete’s performances during the Performance Window, and cl. 4.2 made it clear that they had an “absolute discretion” to decide the relevance and weight of the various nomination factors.
61. The bar for the appellant then, was a high one. As a general proposition, he had to show that the decisions of the DP and / or the Nomination Panel were infected by some failure to follow or implement the Nomination Criteria, or were so unreasonable that one or both of them should not be allowed to stand. In making his arguments, he would not in the ordinary course be entitled to challenge the views the DP or the Nomination Panel may have come to on the relevance of particular discretionary considerations, or the weight to be given to them.

The test for bias

62. Bias affecting a selection or nomination decision may be either actual or apparent bias. In this case, the appellant does not point to any evidence of actual bias, so the case appears to be one of alleged apparent bias.
63. In *Miller v Olympic Weightlifting New Zealand Ltd*⁸, this Tribunal adopted the test for apparent bias set out by the Supreme Court in *Saxmere Company Ltd. v Wool Board Disestablishment Ltd.*⁹

“Whether a fair-minded lay observer might reasonably apprehend that the decision maker might not bring an impartial mind to the resolution of the question the decision-maker is required to decide.”

⁸ *Miller v Olympic Weightlifting New Zealand Ltd*; decision ST 09/16 at [25]

⁹ *Saxmere Company Ltd v Wool Board Disestablishment Ltd.* [2010] NZLR 356 (SC).

Application of law in this case

Alleged failure to properly follow and / or implement the Nomination Criteria

64. The Tribunal is not satisfied that the appellant has demonstrated any failure by CNZ to follow and / or implement the Nomination Criteria.
65. On the issue of consideration of the appellant's 5th place finish at the World Cup event in Colombia in September 2022, the result was clearly reported to the DP in the "Matrix document" (CNZ Document 5), in the "BMX Results" document (CNZ document 6), and in the "BMX Data Compare" document (CNZ Document 6). Mr. Takarua referred to the September 2022 result in his evidence, saying that: "With only three events achieved between [Mr. Bearman] and [the appellant] in the performance standard (top 6 / top 8) we couldn't assess consistency across those results with just these events." So the DP looked at results in 2023, finding that Mr. Bearman had achieved consistently and well at U23 level that year (finals in U23 World Cup and World Championship events), but the appellant's results were very inconsistent. Given that the total number of performances that met the Performance Standard was only three in the period between 1 August 2022 and 4 June 2024, and that there was a 19 months gap between the appellant's two World Cup successes, the Tribunal considers that it was open to the DP and the Nomination Panel to take the view that there was no "consistent" meeting of the Performance Standard by either athlete in the Performance Window.¹⁰ The appellant submitted that Mr. Bearman's U23 results in 2023 were irrelevant, and that may be correct as far as cl. 3.2 considerations are concerned. But the U23 results were not considered under cl. 3.2 – they were considered under the discretionary provisions of cl. 4.1. Having considered the documents that were put before the DP and the Nomination Panel and the Minutes of both meetings, and heard Mr. Takarua's evidence, the Tribunal is also satisfied that the appellant has failed to establish that CNZ failed to follow or implement the Nomination Criteria by not "considering" the competing athletes' respective performances in the BMX racing event during the Performance Window, as required by cl. 3.2.
66. Turning to the discretionary factors raised by the appellant, the Tribunal cannot inquire into the DP's and the Nomination Panel's views on issues such as the potential of each of the two athletes for future success (or the weighting to be given to that factor). In

¹⁰ The Tribunal rejects the view expressed by Mr. Lisovskis in his statement that the cl. 3.2 factors here favoured the appellant, and that in such circumstances there should have been no need to go further to the secondary (cl. 4.1) criteria.

accordance with *Yachting New Zealand v Murdoch*, that sort of consideration is quintessentially a matter for the expert panels who were involved in the decision making. The same applies in respect of the issues of which rider would be best suited for the Paris Olympic track, the extent to which tracks around the world may differ (and in what respects), and whether adjustments should be made in assessing performances based on the particular track where an event took place. This Tribunal has no expertise in such matters, and they are properly the province of those who have experience, knowledge and skill in the field of Elite BMX racing.

67. The appellant was critical of the CNZ panels' failure to have regard to the respective UCI rankings of the appellant and Mr. Bearman¹¹. But UCI rankings was not a factor listed in cl. 4.1, and it was for the CNZ panels to decide what weight it would give to them if any. The Tribunal cannot say that the CNZ panels were not entitled to take the view that the rankings would not be helpful in circumstances where Mr. Bearman had only been competing at Elite level for a few months. It was a matter for the CNZ panels' expertise to form a view on whether or not Mr. Bearman might have had the higher ranking if he had joined the Elite ranks earlier.
68. Mr. Takarua's evidence was that the appellant's result in the Continental Championships in February 2024 was considered, as were his European results. The CNZ panels were also aware of his 12th placing in the Olympic test event, although Mr. Takarua's oral evidence, given in response to questions from the Tribunal, was that the test event was not a UCI event, and national teams generally do not go to such events to win them. And riders who win test events generally do not go on to win gold at the Olympics. In those circumstances, he took the view that you could not "bring that [the test event] into scale" (which the Tribunal takes to mean that the it would be very difficult to assess the weight to be given to success in these events). The Tribunal accepts Mr. Takarua's evidence on this issue, and finds that the appellant has not shown that the CNZ panels failed to adequately consider his results outside of UCI World Championships and World Cup events.
69. We do not think it matters whether the head-to-head competitions between the appellant and Mr. Bearman after he entered the Elite competition field are to be scored at 5-2 to Mr. Bearman, or at 4-all as the appellant contends. Either way, it is clear that Mr. Bearman, who had had outstanding results at World U23 level, had "hit the ground running" when he joined the Elite field in early 2024. If the CNZ panels placed

¹¹ The UCI BMX rankings (UCI World Cup Final Ranking 2024) ranked the appellant at No. 17 and Mr. Bearman at No. 19. The overall UCI World Rankings 2024 ranked the appellant at No. 26 and Mr. Bearman at No. 41.

significant weight on Mr. Bearman's future development potential as a result of those factors, they were clearly entitled to do so – the relevance and weighting of the discretionary factors were entirely matters for them under cl 4.2. Nor is there any significant point in which athlete may or may not have secured the most places in semi-final events – that was entirely a matter for the CNZ panels to consider (or not) at their discretion, and any calculation error that may have occurred in such consideration could not be elevated to the point of being described as conduct so unreasonable that the CNZ panel decisions should not be allowed to stand.

Alleged bias.

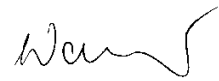
70. The Tribunal is not satisfied that the appellant has shown that the decisions of the CNZ panels were affected by actual or apparent bias. The appellant's evidence goes no further than suspicion arising from his non-selection or nomination over a number of years by CNZ for major events, CNZ's failure to procure funding for him (or support his efforts to obtain funding), CNZ's failure to provide him with gym access and high-performance coaching / support, and CNZ's inadequate communications with him. The non-selections over a lengthy period are entirely consistent with the selectors having formed the good faith view that he did not merit selection for a given event, and, as Mr. Hunn explained, the funding was not made available because it was considered that the appellant did not meet the HPSNZ criteria.
71. Insufficient details were provided of the issues the appellant says he has had with Mr. Takarua and the CNZ High Performance Director in the past, and the appellant did not explain his apparent view that he was entitled to gym access or high-performance coaching or support.
72. Finally, none of the documents produced by CNZ for the CNZ panels, or the Minutes of the two CNZ panel meetings in June 2024, show the slightest evidence of any bias or animus against the appellant. His application for nomination appears to have been treated fairly. In the Tribunal's view, a fair-minded lay observer would have no reasonable apprehension that one or both of the CNZ panels might not bring an impartial mind to its recommendation or nomination task.
73. The one area where some criticism might be directed at CNZ is the area of its communications with Mr. Bias. Although from time to time producing world class results, he appears to have been relatively isolated overseas, without much in the way of support or encouragement from CNZ. That is not evidence of any apparent bias

against him, but it is an area that CNZ may wish to look at if it wishes to see the best of the appellant in the future.

Reasons for the Tribunal's 5 July 2024 Decision

74. Having assessed the evidence and the oral submission of all parties, the Tribunal concluded that neither of the grounds of appeal had been made out. The appeal was dismissed accordingly.

Dated: 15 July 2024



Warwick Smith
Deputy Chair



Pippa Hayward