

**IN RELATION TO THE APPEAL ARBITRATION
BEFORE SPORT RESOLUTIONS UK
PURSUANT TO THE NATIONAL ICE SKATING ASSOCIATION ("NISA") 2015/2016
SEASON NATIONAL TEAM AND UK TALENT SQUAD INTERNATIONAL SELECTION MANUAL**

BETWEEN

TEAM SPIRIT

Appellant

AND

NISA

Respondent

**REASONED DECISION OF PANEL REGARDING THE NISA DECISION TO NOT TO SELECT
TEAM "SPIRIT" FOR THE 2016 ISU SYNCHRONISED SKATING WORLD CHAMPIONSHIPS**

The Panel in the above-referenced case, consisting of Jeffrey Benz, Chair, Amanda Knight and Jon Napier (collectively, "the Panel" or "this Panel"), proceeding and appointed pursuant to the published NISA Appeals Process for ISU Championships, after considering the written submissions, evidence, and argument of the parties and deliberating thereon decides, orders, and awards as follows:

1. **INTRODUCTION**

1.1 The Panel was appointed to determine a dispute arising from a decision concerning the selection of synchronized skating teams to represent Great Britain at the 2016 International Skating Union ("ISU") World Championships ("World Championships") to be held in late March of 2016. The Appellant, Team Spirit, asserts that the Respondent sport governing body, NISA, improperly applied its selection procedures in not selecting Team

Spirit as one of the United Kingdom representatives at the World Championships.

2. **FACTUAL AND PROCEDURAL BACKGROUND**

2.1 It is common ground that the relevant selection policy (the "selection policy") for the 2016 World Championships is set out in the NISA National Team and UK Talent Squad International Selection Manual for the 2015/2016 season ("the Manual") (pages 1 to 20 of the paginated bundle of documents provided to the Panel), a copy of which is publicly available on NISA's website (the link to which is <http://www.iceskating.org.uk/index.cfm/athletes/figure-skating1/performance/athlete-agreement-national-team-and-uk-talent-squad/>). Relevant parts of this Manual include:

- (a) The "Qualification and selection to the National Team and UK Talent Squad – Synchro" [page 6];
- (b) Paragraph 1b entitled "Worlds" [page 7]; and
- (c) The right hand column of the "Timeline" [page 19].

2.2 The three teams in contention for selection to represent Great Britain ("GB") at the World Championships, to which this appeal relates, were the Appellant, Team Spirit ("Spirit"), Zariba, and Wight Jewels. Spirit is from the Wales & West Synchronised Skating Club. Zariba is from the Aberdeen Skating Club. Wight Jewels is from the Isle of Wight. GB is allocated only one place at the World Championships. Accordingly, no more than one of these teams could be selected. Wight Jewels have not appealed, nor are they referred to in the appeal, so, for the purposes of this appeal, consideration is given to Team Spirit and Zariba.

2.3 NISA's Performance Group, which acted as the selection panel ("the Performance Group"), had relevant expertise and experience, and comprised:

- (a) Hilary Selby, NISA's Performance Director and interim President. In respect of ice dancing, she is currently a Championship Judge and Referee; Championship Technical Controller and member of the Officials' Assessment Commission.
- (b) Maggie Worsfold, NISA's Judges and Officials Director. She is currently a Championship Judge and Referee for Singles and Pairs.
- (c) Ann Findlay, a former technical director of NISA. She is currently a Championship Judge for Singles and Pairs.
- (d) Chris Buchanan, NISA Finance Director. He is Chairman of the ISU Synchronised Skating Technical Committee and a Championship Referee and Championship Technical Controller for Synchronised Skating. He is currently also a Championship Judge, Referee and Championship Technical Controller for Ice Dance.

2.4 The Performance Group consulted by email between 14th and 16th February 2016, in order to meet the deadline shown on the Timeline. It had the benefit of expert advice from Mr. Buchanan, and each member had a chart showing relevant scores for the teams in contention, as per the selection policy. After due consideration, the decision made was that the result indicated by the respective scores of the teams in the relevant events should be followed.

2.5 The "2015/16 season" referred to in the selection policy [page 7] is 1st July 2015 to 30th June 2016, but the international ISU competitions started at the beginning of January

2016 and will end with the World Championships on 8th and 9th April 2016 (for which this selection was made).

2.6 Team Spirit has asserted the following, verbatim, as the bases for its appeal as contained in its Notice of Appeal:

1. Paragraph 1b states that NISA reserves the right to consider for selection other teams in lieu of the team with the highest score in any circumstances where:

sub paragraph 1 "NISA considers the other team that are likely, in NISA's opinion, to produce a better performance at this event, but failed to achieve the highest score for a valid reasons including ...whether due to injury or otherwise";

Team Spirit scored a low result at the British Championships due to unforeseen circumstances involving equipment failure.

We do not feel that NISA have given due consideration to this paragraph as Team Spirit went on to score 13.66 higher marks than Team Zariba at the Trophy D'Ecosse ISU competition, on 13th and 14th February, this being an international panel thereby indicating that they are likely to produce a better performance at the World Championships.

2. Neither Team Zariba or Team Spirit have scored the required technical mark set down by NISA in order to attend the World Championships. However, Team Spirit have scored consistently higher technical marks than Team Zariba over the current season, and previous seasons
3. Paragraph 1b states "all scores obtained before the ISU Worlds entry closing date will be considered". Team Spirit have yet to compete at a further ISU competition in Milan on 20th & 21st February. NISA have made a decision without waiting to take into account the scores obtained by Team Spirit at this ISU competition. With the closing date for entry to the World Championships being 16th March 2016.

3. ANALYSIS

The Basic Legal Standard for Review of Selection Decisions

3.1 "It is well established that, in the vast majority of cases, it is not the role of an appeal panel to review the merits of a selection policy or a selection decision, i.e. the issue is *not* whether the appeal panel agrees with the selection policy or selection decision in question". Adam Lewis, QC and Jonathan Taylor, *Sport: Law and Practice* at H.6.46 (3rd ed. 2014). The Panel subscribes to the following formulation of the issues, and limitations, for arbitrators to review selection cases, be they relating to athletes or officials:

"The test I have applied is to find that a decision may be open to challenge if, but only if,

- (i) *It is not in accordance with Selection Policy as published; and / or*
- (ii) *The policy has been misapplied or applied on no good evidence and / or in circumstances where the application of the policy was unfair (for example, because someone with selectoral authority had given a categorical assurance to an athlete that the policy would not be applied); and / or The decision maker has shown bias or the appearance of bias or the selection process has otherwise been demonstrably unfair;*
- (iii) *Where the conclusion is one that no reasonable decision maker could have reached.*

That last conclusion is one that any Judge or Arbitrator has to approach with the utmost care. As I have already indicated, it is of fundamental importance that we should not substitute our own judgment on the merits for those of the selectors – i.e. who would we have selected, or who is the better athlete or has the better performance figures and so forth. So long as selectors apply policy properly, and do so honestly, fairly and reasonably, and take account of relevant facts (they being best judged to decide what is relevant and what is not), then their decisions must be accorded the utmost respect.”

(Belcher v. British Canoe Union, Sport Resolutions (5 July 2012)). It is well established that “an appeal body should be very cautious about overturning a selection decision. It should do so exceptionally, where the flaw in the decision goes well beyond a mere disagreement with the merits of the selection decision made.” (Renshaw v British Swimming, Sport Resolutions (30 June 2012)).

The Relevant Selection Policy Standards

3.2 The selection policy provides that the team with the highest total score in relevant events will normally be selected. The relevant events were:

- (a) The British Senior Championships, the score for which was to count double. This doubling provision, which is also used in selection for other disciplines (singles, pairs and dancing) controlled by NISA, was introduced as NISA has control of the quality of judging at the British Championships and can, therefore, ensure the reliability of the results. The scores were 79.75 for Spirit and 92.40 for Zariba respectively, which, once doubled, gave scores of 159.50 and 184.80, yielding a difference of 25.30 in Zariba’s favour.
- (b) The “*current season’s best score taken from any ISU listed Senior International event*” There had been a number of such events, by the time of the selection, namely the Leon Lurje in Sweden (16th-17th January 2016); the Mozart Cup in Austria (22nd-24th January 2016), the Neuchatel in Switzerland (30th -31st January 2016) and the French Cup in France (5th – 6th February 2016). The only one in which Team Spirit and Zariba had both participated, however, was the Trophy d’Ecosse, in which Spirit scored 91.09 and Zariba scored 78.43, a difference of 12.66 in Team Spirit’s favour (the Panel notes that the appeal incorrectly, and likely accidentally, inflates this figure in Ground 1 to “13.66”).

3.3 Accordingly, Zariba had a total score of 263.23 as against Team Spirit’s total score of 250.59, a total difference in Zariba’s favour of 12.64. [page 21]

3.4 The Appellant seeks to rely on the exception at sub-paragraph 1, the full text of which is set forth below (sub-paragraphs 2 and 3 are not referred to, or relied upon, in the Grounds and - by their nature - have no relevance to this appeal):

"1. Where NISA considers the other skater(s)/teams that are likely, in NISA's opinion, to produce a better performance at this event, but failed to achieve the highest score for a valid reason including, but not limited to, non-attendance at or withdrawal from or disappointing performance at any ISU listed senior international event, senior Grand Prix or British Senior Championship, whether due to injury or otherwise." [page 7]

3.5 The "unforeseen circumstances involving equipment failure" at the British Championship, referred to by the Appellant, was the snapping of the team captain's skate tape following which his laces came undone. Team Spirit requested time to remedy that, which was allowed, but Team Spirit was deducted 5 points for this in accordance with the rules. Even if this was disregarded, Team Spirit's score would still be well below that of Zariba, and this would remain the case when added to the scores obtained in the Trophy d'Ecosse. The British Championship (as with other Championships) has two parts, the Short Programme and the Long Programme. The equipment failure occurred in the second part, the Long Programme, but Team Spirit had also ranked lower than Zariba in the earlier Short Programme.

The First Asserted Ground of Appeal

3.6 The fact that Spirit scored higher marks and that there was an international panel at the Trophy d'Ecosse is one of the reasons why the score in this ISU listed international event is included in the scoring for selection and for appeal. The Panel agrees with NISA that it is speculation to suggest, as the appeal does, that this indicates that Team Spirit "are likely to produce a better performance at the World Championships". Since the appeal was lodged, Team Spirit has competed before an international panel in Milan, and achieved a score of 73.46 [page 25] which is lower than any of the teams under consideration (including Wight Jewels) achieved at any event this season [page 24]. At the World Championships in 2014, Team Spirit (representing GB) scored 78.59 (coming 21st out of 23 teams), and in 2015 Team Spirit (representing GB) scored 82.59 (coming 21st out of 25 teams).

The Second Asserted Ground of Appeal

3.7 The same selection policy is used for disciplines other than synchronised skating. The reference to "minimum total technical score" in the first paragraph of 1b is a reference to the scores which are specified by the ISU for the various disciplines, as set out on page 20. Because synchronised skating is a relatively new sport, and there are only a limited number of nations seeking to participate in the World Championships, the ISU has not set a Minimum Technical Score requirement for it. As a means of quality control, however, NISA has imposed minimum "Technical Element Scores" ("TES"), which are set out on page 6.

3.8 As neither Team Spirit nor Zariba had achieved the minimum TES for the 2015/2016 season, as set out on the charts on pages 6 and 22, NISA was not obliged to select either team, or to follow the provisions of the selection policy (as explained in the first paragraph of 1b at page 7), and did both of these things only as an exercise of its sole and absolute discretion. Nor was this exercise of discretion a foregone conclusion because to send a team to the World Championship would incur additional costs for NISA (met from

public funds) and NISA must also consider a team's ability to compete sufficiently well at World Championship level to be permitted to represent GB.

3.9 No evidence has been supplied to the Panel in support of the assertion that Spirit "have scored consistently higher technical marks than Team Zariba over the current season...", and this statement is not correct. Zariba have beaten Team Spirit in two out of the three competitions this season, the scores for which are set out in the schedules which appear at page 22-24 (each of which shows the same data in slightly different ways, for convenience of reference).

3.10 The reference by Team Spirit to previous seasons was unsupported by any evidence but, in any event, the selection policy does not require this to be considered.

The Third Asserted Ground of Appeal

3.11 Whilst it was admitted by NISA that the provision providing that, "*All scores obtained before the ISU Worlds entry closing date will be considered*", is poorly and unfortunately worded, the Appellant could not have been, and in the Panel's view was not, in any genuine doubt about the correct position which was set out clearly in the Timeline [page 19]. This specified that the selection panel would make their recommendation on 16th February 2016, and listed the dates of subsequent events including this appeal process. This Timeline has been publicly available on NISA's website since 21st October 2015. Notwithstanding this fact, the Panel wishes to note that it would behoove NISA to revisit its drafting of its selection procedures so that they are clear and not capable of conflicting interpretation.

3.12 This is the same procedure as was used in 2014 and 2015, during both of which it was expressly confirmed by email to Team Spirit's Team Manager Gill Moore, and their Coach, Katrina Cotterall, that the timing of selection would follow what was set out on the Timeline [re. 2014: pages 27 to 28 and re. 2015: pages 29-31]. Incidentally, these emails also record that NISA has exercised its discretion to send Team Spirit to the World Championships for the last two years (despite Team Spirit not achieving the qualifying TES score); that the same scoring system was used in 2014 [page 31] (as it was also in 2015); and that these previous selections also took place in late January/early February, well before the closing date for the World Championships.

3.13 The meaning contended for in the appeal would leave no time for an appeal process, or for the ISU to ratify NISA's provisional selection. It is clear to the Panel that the timeline in the process was designed to permit any selection appeals to work their way through the system before entries were required by the ISU. It is also relevant that the interpretation proffered by Team Spirit would leave only three weeks, from the closing date of 16th March, for the booking of flights, and accommodation in the official Hotel, for up to 20 skaters along with accompanying team members prior to the World Championships on 8th and 9th April with the attendant inconvenience and additional cost, not least for the skaters themselves.

3.14 By way of background, NISA submitted that the sentence in question was intended to allow some flexibility in disciplines other than synchronised skating where skaters had not achieved the qualifying Total Technical Score at the time of the selection meeting (and, therefore, no selection could be made), in order to allow as much time as possible for athletes to achieve a qualifying score. Total Technical Scores do not apply to synchronised skating, Further, although this procedure has worked in other disciplines (notwithstanding that it should be re-worded), where only a small number of athletes are in the position of still trying to achieve the qualifying score at the last minute. It would be wholly impractical for a team of synchronised skaters given the difficulty of arranging flights and

accommodations and other logistics (as explained above). In the Panel's view, this gives additional weight to the argument that the correct interpretation of the policy in this case is that any competition up to and including the 16th February was to be considered.

3.15 The Panel was provided evidence that the Performance Group did consider delaying the selection until after the ISU competition in Milan on 20th and 21st February [page 26], but decided not to as this would have been contrary to its selection policy, as set out in the Timeline (and could have entitled Zariba to appeal against this). Further, Mr. Buchanan's advice was that it was unlikely to affect the outcome of the selection process. Mr. Buchanan was proved right since, as stated, Team Spirit scored 73.46 points [page 25] which, as it was less than their Trophy d'Ecosse score, would have made no difference to the selection process. If the Milan event had been considered, Team Spirit would have had to score over 100 points to overhaul Zariba's advantage, which would have been significantly higher than any of their other scores this season [page 24].

An Additional Overriding Basis for the Panel's Decision

3.16 Finally, the Panel notes that it cannot overlook the fact that the published selection criteria gave complete discretion to NISA in making its selections. The wording at issue is set forth again below:

*"Where **NISA considers** the other skater(s)/teams **that are likely, in NISA's opinion**, to produce a better performance at this event, but failed to achieve the highest score for a valid reason including, but not limited to, non-attendance at or withdrawal from or disappointing performance at any ISU listed senior international event, senior Grand Prix or British Senior Championship, whether due to injury or otherwise." (emphasis added)*

Clearly, NISA has the ability to determine if the outcome we have been asked to consider is "likely" and "in NISA's opinion". In other words, it is a completely discretionary decision of NISA to make any determination about exceptions to going in placement rank order for making selections. Whether such broad authority is proper, enforceable, or otherwise consistent with best practice or appropriate sport performance philosophy is not something on which this Panel is equipped to opine. However, the Panel is clear that this complete, nearly unfettered discretion reserved for NISA completely overcomes any argument for any other outcome than is the result of NISA's exercise of its discretion.

3.17 Accordingly, the appeal of Team Spirit is denied.

4. AWARD

4.1 For the foregoing reasons, the appeal against the decision of NISA not to nominate Team Spirit to represent GB in the 2016 ISU World Synchronised Skating Championships is denied.

4.2 The Selection Procedures provide, in a section titled "NISA Appeals Process for ISU Championships" at paragraph 18, that the parties shall bear their own costs other than the filing fee paid by Appellant, and the Panel sees no basis for deviating from this allocation.

4.3 This Award is in full and final settlement of all claims and counterclaims submitted to the Panel. All claims not expressly granted herein are hereby denied.

25 FEBRUARY 2016

JEFFREY BENZ, PANEL CHAIR
AMANDA KNIGHT, MEMBER
JON NAPIER, MEMBER





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