


## Switzerland

### SNOWBOARDING: SELECTION FOR THE OLYMPIC GAMES

*Andrea Schuler v Swiss Olympic Association*

Court of Arbitration for Sport ("CAS"),  
Ad hoc Division for the XX Olympic  
Winter Games in Turin, CAS OG'06/002

 Discrimination; Olympic Games;  
Reasonableness; Sporting organisations;  
Switzerland

### Andrea Schuler v Swiss Olympic Association

**Facts:** The Swiss Olympic Association ("SOA") conducted the selection process for the Olympic Winter Games 2006. In 2005, they established and published selection criteria. Among others, criteria were defined for half-pipe snowboarders in co-operation with the Swiss Ski Federation. The selection criteria contained competition performance requirements for the months preceding the Olympic Games. A disclaimer was included that achieving the performance requirements would not entail an automatic selection for the Olympic Games. Also, the Swiss selection criteria stated that, if more athletes fulfilled the criteria than there were starting places for Swiss athletes, the World Cup results and the latest performance trends would be decisive, and that, in case of further uncertainty, internal trials would be held. The coach's judgment was cited as an additional criterion.

At the point of time when the athletes participating in the Olympic Games had to be named, six snowboarders (four male and two female)

had fulfilled the performance requirements, but only five slots were available for Swiss half-pipe snowboarders (male and female). Therefore the SOA nominated five of the eligible snowboarders and decided not to include Andrea Schuler who had also met the performance requirements.

Andrea Schuler appealed to the CAS Ad Hoc Division for the XX Olympic Winter Games in Turin. She stated, among other things, that she was ranked higher in some of her competitions than other athletes being selected for the participation in the Olympic Games, that the SOA's nomination could (and therefore should) be made on the basis of objective criteria only and that the applicable regulations and criteria did not provide a mechanism on the basis of which male and female results could be compared.

**Held:** The CAS Ad Hoc Division stated that the wording of the selection criteria showed that not only objective factors (performance requirements, World Cup results, internal trials) but also subjective factors (performance trend, coach's judgment, both colloquially summarised as "medal potential") were part of the selection criteria. The fact that a comparison between male and female athletes was inevitable as the five slots were granted to the Swiss team without allocation to a gender also contributed to the qualification of the selection process as partially subjective.

During court examination, the CAS Ad Hoc Division asked Andrea Schuler to single out the athlete who was to be excluded from the Swiss Olympic snowboard team in her place. She did not name an athlete and requested either a direct decision by the panel or a deferring of such determination to the SOA. This was held against her. The CAS Ad Hoc Division stated that as Andrea Schuler was not able to single out the athlete to be excluded in her place, she showed that her nomination for the Olympic team could not be made on the basis of objective criteria only.

The fact that Andrea Schuler ranked higher in some of her competitions than some male snowboarders in theirs was not judged to be relevant. The different standards applied to men and women were based on the different levels of competitiveness of the respective competitions, and the smaller number of female athletes competing in snowboard in comparison to the number of male athletes was taken into consideration as well.

Therefore, the CAS Ad Hoc Division for the XX Olympic Winter Games held that the SOA had exercised its discretion in a reasonable, fair and non-discriminatory manner, and that it had decided not to select Andrea Schuler in accordance with the selection criteria.

**Comment:** While the CAS Ad Hoc Division did not have to decide on the correct application of the objective criteria, as this remained undisputed, it was asked to rule on the fair application of the subjective criteria. The decision of the CAS Ad Hoc Division not to overturn the decision made by the SOA partially on subjective criteria seems correct. The SOA had published the selection criteria, reserving discretion by setting forth various subjective criteria. These criteria were not changed. Some further documents regarding the selection process were admittedly produced at a later stage, not altering the criteria, however, but specifying the details. The discretion reserved and used should not be (and correctly was not) subject to a detailed review by the CAS Ad Hoc Division or generally by any other jurisdictional body. Subjective criteria are considered applied properly if discretion is exercised reasonably, fairly and non-discriminarily. However, the amount of discretion to be contained in fair and sporting selection criteria might be discussed after this decision—which is admittedly not easy in a case in which a female athlete has to be compared with male athletes.

*Isabella Dal Balcon v Italian National Olympic Committee and the Italian Federation for Winter Sports*

CAS, Ad hoc Division for the XX Olympic Winter Games in Turin, CAS OG 06/008

## Comparison with *Isabella Dal Balcon v the Italian National Olympic Committee and the Italian Federation for Winter Sports*

**Facts:** The Italian National Olympic Committee and the Italian Federation for Winter Sports published their selection criteria for the participation in the snowboarders' parallel giant slalom of the Olympic Winter Games 2006. According to these criteria, the results achieved before the Olympic Games were multiplied with certain factors. The four best snowboarders according to the selection criteria were to be qualified. Applying the criteria set forth, Isabella Dal Balcon ended up in fourth place and expected to qualify for participation.

She then was told that the trainer of the snowboard team had orally informed the athletes before the last qualifying race that the selection criteria would be completely changed. However, she was not present at the meeting in which this change allegedly was communicated. According to the new selection criteria, she was fifth out of the six athletes trying to qualify and therefore not nominated. She also appealed to the CAS Ad Hoc Division.

**Held:** The CAS Ad Hoc Division decided that the radical change in selection criteria was made too late in the selection process to be fair, particularly as it was neither communicated to Isabella Dal Balcon at all nor to the other athletes in writing. Therefore the new selection criteria were declared arbitrary and its application unfair and unreasonable. As a consequence, the CAS Ad Hoc Division declared Isabella Dal Balcon selected to the Italian snowboard team.

**Comment:** Unlike in the *Schuler* case, the CAS Ad Hoc Division rendered a decision in which it directly applied the selection criteria set forth by a body competent for the selection of athletes for the Olympic Games and, based on this application, overruled its decision. This decision was based on the same manner of argumentation and therefore is consistent with the *Schuler* case.

In a first step, the CAS Ad Hoc Division established the selection criteria to be applied in both cases. Whereas, in the *Schuler* case, it held that the selection criteria applied to the decision that led to the non-qualification of the athlete were consistent with the applicable criteria, it held in the *Dal Balcon* case that the selecting body had applied their new selection criteria in an arbitrary way and that therefore the previously announced selection criteria were to be applied.

In a second step, the CAS Ad Hoc Division sought to establish whether the relevant criteria were applied correctly. In the *Schuler* case, subjective criteria were provided, asking for the application of discretion by the selecting body. The CAS Ad Hoc Division only reviewed if this discretion was applied in a fair way which, in this case, had to be confirmed. In the *Dal Balcon* case, the selection criteria to be applied were objective only and could mathematically be calculated by anyone. This made a review of the application of the criteria possible and led to the result that the criteria had not been applied correctly.

## Comparison with *René Grossen v Swiss Amateur Wrestling Federation*

**Facts:** The Swiss Amateur Wrestling Foundation ("SAWF") had the right to nominate one wrestler for each weight class in each wrestling style for the 1989 world championships. Therefore the SAWF decided on a

qualification system which disadvantaged wrestlers not starting in the same weight class as before. For the weight class of 68 kilos, René Grossen fulfilled the requirements (among others, the participation in an international tournament and in a training camp), qualified for the world championships and was listed on the public participants' list. However, Ludwig Küng, a previously very successful wrestler who had put on weight after an injury and who now wanted to participate in the same weight class as René Grossen, did not qualify as a result of the qualification system not providing a satisfactory solution for weight class changes. This resulted in a lot of pressure being applied to the SAWF to nominate Ludwig Küng instead of René Grossen. The SAWF therefore decided that the two wrestlers had to fight against each other and that the winner would be nominated for the world championship. Ludwig Küng won and consequently was nominated for participation. René Grossen addressed the state courts and sued the SAWF for compensation of his expenditures regarding the participation in the international tournament and in the training camp as well as of his loss of income during this time.

**Held:** In 1995, the Swiss Federal Supreme Court ("FSC", third and last instance) awarded René Grossen a compensation of about 50 per cent of his claim. It held that the SAWF had not acted according to the principle of good faith but rather committed a *venire contra factum proprium* by changing the qualification system after its completion. René Grossen had correctly believed in his qualification and had therefore correctly invested unpaid holidays and money in the participation in the international tournament and the training camp as required by the SAWF. As there was no contractual relationship (no agreement and no direct club membership) between the parties, and as there was no damage caused by tort, the FSC resorted to a third damages compensation category not stated in the Swiss Code of Obligation and newly introduced to Swiss jurisdiction, namely damages awarded due to breach of trust. It held that the SAWF had to compensate René Grossen for first creating an expectation in which he was reasonably able to trust and in which he really trusted, and for then, secondly, acting against the principle of good faith and changing the whole circumstances on which René Grossen had based his expectation and therefore agreed to certain expenditures.

**Comment:** As a difference from the two snowboarding cases, the FSC in the *Grossen* case did not decide on the right of participation of an athlete in a specific competition. This would, for time reasons, not have been possible. It rather decided whether the selection criteria were applied correctly, which was, according to the FSC, not the case. Therefore it awarded compensation to the athlete who was incorrectly not selected for participation in the world championships.

Although this case was decided by a state court and did not concern the right of participation itself, there are more parallels to the *Dal Balcon* case than between the two aforementioned snowboarder cases. Both Dal Balcon and Grossen trusted in and fulfilled selection criteria that were publicly announced and later changed, during the selection period or even after this period was over. Schuler, however, was not affected by a change of system but was the "victim of a luxury problem" that arose because more athletes had fulfilled the selection criteria than could finally be nominated.

Sports federations will notice from these cases that, if they change a selection criteria system during or even after the qualification period, litigation is to be expected. As both changes were decided on owing to injuries of qualifying athletes, sports federations should pay more attention to taking possible injuries into account when outlining the selection criteria.

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The *Schuler* case might lead the sports federations to the conclusion that the more subjective criteria are included in the selection criteria and the more discretion is reserved for the nominations, the less a court will be able to change their nomination. Whether an extensive weakening of criteria would help to advance the reputation and credibility of the sports federations may, however, remain unanswered in this place.