

INTRODUCTION

1. The appellant (Mr Hearn) appeals against the decision of the respondent ("NZSF") not to nominate him to the New Zealand Olympic Committee ("NZOC") for selection in the Shooting Team for the forthcoming Beijing Olympics. Mr Hearn seeks an order that NZSF nominate him to the NZOC for selection for the New Zealand Olympic team.
2. Mr Hearn met the NZSF qualifying standard for selection for the Olympic selection for the men's prone event. However, NZSF holds only one quota for that event and a Mr Eastham has secured the nomination. That nomination is not challenged in this appeal.
3. The International Shooting Sports Federation ("ISSF") allows a national federation to transfer a quota place held for one event to another event. NZSF has six quota spots but does not have a nominee who has satisfied the Olympic selection criteria in three such events. The ISSF has indicated its preparedness to permit the transfer of one, but not two, of the unused quotas to another event.
4. NZSF has determined that the one unused quota permitted to be transferred should be transferred to the men's air pistol event and has nominated a Mr Wang for selection to the New Zealand Olympic team in that event. Mr Hearn's appeal, in effect, challenges the transfer of the quota to men's air pistol and the nomination of Mr Wang. Consequently, the Tribunal, on its own volition, joined Mr Wang as an interested party.

RIGHT TO APPEAL

5. The procedure for a national sporting organisation such as the NZSF to nominate athletes for selection for the Olympic Games is set out in an

agreement between NZOC and NZSF. An athlete for consideration for nomination to the NZOC must complete and sign the Athlete Application Form for Nomination/Selection ("nomination form") and the Athlete Agreement Acceptance ("athlete agreement form"). The nomination form signed by Mr Hearn is in the standard form and he agrees, amongst other things, that his application "*will be considered and determined in accordance with the application nomination and selection process agreement*" between the NZOC and the NZSF. He acknowledged "that any right of appeal and the process for such an appeal in relation to nomination or non-nomination must be exercised in accordance with that agreement".

6. The relevant provisions of the agreement between the NZOC and the NZSF relating to appeals provide that an athlete who has not been nominated but is otherwise eligible may appeal in accordance with the procedure set out in the nomination agreement.
7. Mr Hearn has complied with the procedure and relies on one of the four specified grounds of appeal, namely:

"That the applicable Nomination Criteria were not properly followed and/or implemented".
8. The agreement contains provisions for the NZOC and the NZSF to agree Criteria. Once the NZOC has approved the Nomination Criteria, it may not be altered without the written approval of the NZOC. The Nomination Criteria referred to below was approved by the NZOC.

THE NOMINATION CRITERIA

9. There is no challenge to the Nomination Criteria which has been modified since the 2004 Olympics. NZSF's position is that one of the reasons for the changes was to meet the NZOC rationale of raising the bar in terms of scores delivered at future Olympic Games. The criteria

require a shooter to twice shoot the NZSF MQS ("Minimum Qualifying Score") and for the criteria to be pitched at the top 16 level. While Mr Hearn's appeal addresses "Quota Place Reallocation", it is relevant to consider the criteria applying to quota allocation.

10. The Nomination Criteria provides that for a shooter to be eligible for nomination, the requirements are:
 - (a) The shooter must obtain the NZSF MQS twice during the period of 1 January 2007 until the end of each discipline's Olympic ranking event in 2008 (which occurred in February and March 2008).
 - (b) The athlete must also attain the Olympic MQS at an approved pre-Olympic event as per ISSF Rules (the Olympic MQS was actually lower than the NZSF MQS).
 - (c) The athlete must be a member of either the National A or B Squad at the end of December 2007.
 - (d) An Olympic Ranking List was to be compiled from three ranking events between 1 January 2008 and 31 March 2008. The aggregate from all three events counted to select the potential quota nominees.
11. As a result of the Olympic ranking events, Mr Eastham obtained the nomination for the men's prone position, having an aggregate of 1,754 against Mr Hearn's 1,753. Mr Hearn does not challenge Mr Eastham's nomination.

12. The Nomination Criteria has both a Quota Allocation section and a Quota Place Reallocation section which read:

“Quota Allocation

In the event we do not have any qualifiers for an event in which we hold a quota, we will try to exchange this quota through the ISSF for the following:

Discipline – Retained within the discipline. e.g. Pistol, Shotgun or Rifle.

Open – Stays within the sport so other disciplines can qualify to take the quota spot.

If more than 1 discipline have [sic] eligible shooters for selection then the following formula will used [sic] to ascertain a ranking order for placement of the acquired quota spot or spots.

Quota Place Reallocation

At the conclusion of all ranking events, all eligible shooter/s who have not been awarded one of the NZ quotas will have their highest qualification match trial score evaluated against the score from the same event at the 2006 World Championships in Croatia, to determine a place ranking this score would have attained.

For this evaluation, the qualification match scores only and ranking thereof will be used.

In the event of a tie in ranking between two or more shooters for the reallocation of the quotas, the second highest score from those shooters in the designated matches will be evaluated in the same manner. If still a tie, the third score will be evaluated in the same manner.

The quota/s will be awarded to the shooter/s with the highest place ranking.

An application will then be made to the NZOC and the ISSF to have the quota transferred to the events of the qualified shooter/s. If successful, these shooters will also be nominated for the Olympics Team.”

13. It is the interpretation of the Quota Place Reallocation which is at the heart of Mr Hearn’s appeal.

GROUND OF APPEAL

14. The ground of appeal is that the NZSF has incorrectly interpreted the quota place reallocation criteria and failed to determine the relevant ranking of Mr Hearn and Mr Wang on the basis of their highest match scores gained during the entire series of qualification matches between the periods of 1 January 2007 to end March 2008.

AGREED FACTS

15. Although not formally agreed, there was no contest about the essential facts, the contest relates to the interpretation of the quota reallocation criteria.
16. The factual background is that Mr Hearn had succeeded in meeting the basic qualification criteria by shooting two MQS in designated events in December 2007. Mr Wang shot his two qualifying MQS in the three designated ranking events held in February and March 2008.
17. Mr Hearn's qualifying score in the Mana event in December 2007 would have ranked him fifth at the 2006 World Championships in Croatia. Mr Wang's two qualifying scores in the February/March 2008 ranking events would have placed him between seventh and tenth at the 2006 World Championships in Croatia. Accordingly if the selection criteria provided for comparison between the highest scores shot by both shooters during the period 1 January 2007 to end March 2008 then Mr Hearn, rather than Mr Wang, would have been entitled to nomination for the reallocated quota. However, Mr Hearn did not have as good a series of scores in the three Olympic ranking events held in February/March 2008 and would only have ranked 57th in comparison with the results at the 2006 World Championships in Croatia. Accordingly if reallocation is to be determined on the basis of the three

Olympic ranking events in February/March 2008 then Mr Wang was properly selected and nominated by the NZSF.

18. It should be recorded that all parties recognised that the situation which has arisen is unfortunate and the result of the ISSF not being prepared to allow New Zealand to reallocate two quotas. It was common ground at the hearing that both Mr Wang and Mr Hearn were appropriately qualified to represent New Zealand at the Olympics and the NZSF would have preferred to have nominated both for selection. However, the decision of the ISSF means that only one can be nominated.

MR HEARN'S CASE

19. In summary, Mr Hearn's case is that the comparative ranking should be determined on the basis of the highest scores shot by each of himself and Mr Wang during the entire series of designated events which served as potential qualifying events during the period 1 January 2007 to end March 2008. If that basis of comparison were applied then it is common ground that his ranking would exceed that of Mr Wang's in comparison to the results at the 2006 World Championships in Croatia.
20. Mr Hearn's case rests on the proper interpretation of the phrase "their highest qualification match trial score" contained in the criteria. This is the score which is to be compared to the score from the same event at the 2006 World Championships to determine a place ranking.
21. Mr Hearn's submission is that this phrase is not specifically defined anywhere in the criteria document but that the term must refer to any and all of the matches which are designated in the period 1 January

2007 to end March 2008 at which a qualifying score could be shot. Reliance is also placed on the reference to "designated matches" in the second paragraph of the criteria. It was submitted that "designated matches" was commonly understood by shooters as those matches at which qualifying scores can be shot which are used for national ranking lists.

22. Evidence was given by Mr Hudson, a former CEO of the NZSF and a current member of the ISSF Executive Committee, as to the general understanding within shooting of the term "designated matches". There was a challenge to the admissibility of this evidence but the Tribunal determined that it should be accepted while recognising that it was in part a submission.
23. It was further submitted for Mr Hearn that the overall intent of the criteria was to identify the most highly qualified shooter and consideration would therefore have been intended to have been given to all designated events within the overall period. As well it was said that the ranking matches, being the designated events in February and March 2008, were intended to produce an aggregate score to be used for the basis of selection whereas the scores for determining allocation of quota were to be individual match scores. And finally the submission was made that had the intention been to treat the three ranking events as the exclusive basis for nomination including reallocation that could easily have been stated.

FEDERATION'S CASE

24. For the Federation it was submitted that, when interpreted in context, the criteria confirmed that the three ranking events in February and March 2008 were to be the events both for primary nomination

purposes and for quota reallocation purposes. Emphasis was laid on the retention of the phrase "highest qualification match trial score" from the 2004 criteria and the identification of three scores to be compared in the event of ties, it being submitted that the identification of three scores confirmed the reliance on the three identified ranking events.

25. In respect to the submission based on the use of the phrase "designated matches" the Federation's evidence and submissions were that the term "designated" had no significance other than it was applied to identified events for particular purposes. So accordingly there were designated matches for qualifying purposes and designated matches for ranking purposes. In the Federation's submission the use of the phrase was neutral and used by the draftsman as an identification of the matches which were the designated ranking matches.
26. It was further submitted for the Federation that such a construction of the rules would be consistent with the purpose of the criteria to select shooters through a consistent process. Because the Olympic ranking events were used to identify the shooter to be nominated for an allocated quota it was similarly consistent to use those events to nominate a shooter for a quota reallocation.

THE INTERESTED PARTY

27. Mr Yelavich, Mr Wang's coach, represented Mr Wang at the hearing as Mr Wang is currently competing overseas. Mr Yelavich is a former New Zealand representative and in effect adopted the submission made by NZSF. He acknowledged that it was unfortunate that the matter had got to the stage it had. He was sworn in as a witness and asked to give his view on one or two matters including the meaning of "designated matches". He said that it had no recognised meaning other than being a group of matches in any particular period.

DISCUSSION

28. The Tribunal accepts that there is some ambiguity in the 2008 criteria. The Tribunal is obliged to resolve this ambiguity by an objective interpretation within the appropriate contextual matrix.
29. The 2008 criteria for reallocation of quota was an amended form of the 2004 criteria. In 2004 the criteria were expressed as follows:

At the conclusion of all the trials, all eligible trialists who have not been awarded one of the NZ quotas will have their highest qualification match trial score evaluated against the score from the same event at the 2002 World Championships at Lahti, to determine a place ranking this score would have attained.

For this evaluation the qualification match scores only and ranking thereof will be used.

In the event of a tie in ranking between two or more shooters for the reallocation of the quotas, the second highest score from those shooters in the designated trials will be evaluated in the same manner. If still a tie, the third score will be evaluated in the same manner.

The quota/s will be awarded to the shooter/s with the highest place ranking.

30. In 2004 three trial events were intended for the purpose of nomination for initial quota. It is also apparent from the 2004 criteria that those same three trial events were to be used for quota reallocation. In short, the issue which is now before us would have not arisen under the 2004 criteria. The question is whether the amendments to the 2004 criteria have altered the position.
31. We were told, and it was common ground again between the parties, that one purpose of amendment to the 2004 criteria was to give priority to any reallocated quota staying within the same discipline. As

well, as will be evident from comparison of the 2004 criteria with the 2008 criteria the term "trial" was generally substituted with a reference to ranking events, albeit that there were to be the same number (3) of ranking events as there had been intended trials and, at least for initial nomination to an existing quota, the purpose of the ranking events and the intended trials in 2004 was the same.

32. The only difference in wording in respect to the specific reallocation criteria was to substitute at the commencement reference to the "conclusion of all ranking events" in place of a reference to trials, substitute "shooter/s" for "trialists" in the first line, and in the third paragraph to substitute "designated matches" for "designated trials". However, the term "highest qualification match trial score" was not amended.
33. As we have already said, it is the substitution of "designated matches" which creates a potential ambiguity and allows for the submissions made on behalf of Mr Hearn. Ultimately the question before us is whether that substitution is such that the 2008 criteria contemplate a different series of designated matches for the purpose of reallocated quota to the three trials contemplated in 2004 or the three ranking events held in 2008.
34. In our view, read in the context of the 2004 criteria and the overall context of the 2008 criteria, we accept the Federation's position that the reference to "highest qualification match trial score" is implicitly a reference to a score shot in one of the three ranking events. This interpretation, in our view, is consistent with the reallocation criteria comparison potentially against three individual scores with the ultimate reference, if a tie still existed, to "the third score". That appears, as it expressly was in the 2004 criteria, as a specific reference to the third score of the three scores attained at the three ranking events or trial events as they were in 2004. That

interpretation also results in a consistency between the events and scores which are used to determine nominations for quota places and those used to determine nominations for reallocated quotas. In our view such consistency would be the usual or objective expectation. We therefore regard the reference to "designated matches" as being neutral and a shorthand, although regrettably rather opaque, reference to the three ranking events which had been designated.

35. Accordingly for those reasons, the Tribunal has determined that the appeal does not succeed.
36. We have considerable sympathy for Mr Hearn's position, both because of the narrowness of his loss in the ranking series and his earlier successful qualifying scores, and also because the redraft of the criteria did result in some uncertainty in the meaning of the criteria, albeit that we have ultimately determined that interpretation against his position. We would add that it was unfortunate for Mr Hearn that an email sent by NZSF to all squad members reminding them of the criteria was not received by him as he was not a squad member at the time. That is not a criticism of NZSF, as the email was widely circulated, but possibly events may have unfolded differently had he received it.

Dated 12th June 2008



Hon B J Paterson QC
Chairperson