

Case number: NST-E24-72453

Case Title: Natalie Smith v Shooting Australia

Determination

National Sports Tribunal General Division

sitting in the following composition:

Panel Member

Jon Erbacher

in the arbitration between

Natalie Smith

(Appellant)

Represented by Rebecca Gall of Counsel, instructed by Hilliard and Berry Solicitors, legal representatives

And

Shooting Australia

(Respondent)

Represented by Ian Fullagar, Lex Sportiva, legal representative



PARTIES

1. The Appellant, Natalie Smith (**Ms Smith**), is an international representative athlete in the sport of Target Shooting, who has previously competed at the Paralympic Games in London, Rio and Tokyo winning a bronze medal at the London Games.
2. The Respondent, Australian International Shooting Limited trading as Shooting Australia (**SA**), is the governing body for the sport of Shooting (including Target Shooting) in Australia. SA is responsible for selecting athletes to compete at competitions.
3. There are no interested parties.

INTRODUCTION

4. Pursuant to the “*2024 WSPS World Cups and Grand Prix Team Selection Criteria*” (**2024 Criteria**), Ms Smith was selected by SA to the Australian National Shooting Team (**National Team**) to compete at the World Shooting Para Sport World Cup event to be held in New Delhi, India from 6 to 15 March 2024 (**WSPS WC New Delhi**) in certain events. However, she was not selected for two events for which she sought selection, namely:
 - a. R3 10m Air Rifle Mixed Prone event (**R3**); and
 - b. R6 50m Rifle Mixed Prone event (**R6**).
5. Pursuant to SA’s “*Appeal Process*” (**Process**), Ms Smith appeals the decision of SA not to select her for the R3 and R6 events at the WSPS WC New Delhi (**Appeal**).
6. The issue for determination by the Tribunal in this Appeal is whether or not SA’s decision (by its panel) to not select Ms Smith for the R3 and R6 events complied with the procedural requirements of the 2024 Criteria. If not, the decision should be set aside and the matter of Ms Smith’s inclusion in the National Team for the R3 and R6 events at the WSPS WC New Delhi should be remitted to SA for fresh consideration.

NST JURISDICTION

7. Pursuant to section 13 of the *National Sports Tribunal Act 2019* (**NST Act**), the presiding Member has been appointed by the Minister by written instrument as a Member of the Tribunal.
8. Pursuant to section 24 of the *National Sports Tribunal (Practice and Procedure) Determination 2021* (**Determination**) the presiding Member was appointed by the CEO of the Tribunal to conduct this arbitration under section 23 of the NST Act in the General Division of the Tribunal.
9. Pursuant to section 16(1) of the NST Act and rule 6 of the *National Sports Tribunal Rule 2020*, a Tribunal Member is obliged to notify the CEO of the Tribunal of any conflict of interest in a matter to which they are appointed. There is no such interest to be notified in this case.
10. The jurisdiction of the Tribunal to hear and determine this Appeal arises pursuant to section 23 of the NST Act which relevantly provides, *inter alia*, that:
 - a. where a dispute arises between a person bound by one or more constituent documents by which a sporting body (in this case SA) is constituted;



- b. none of those documents permits the dispute to be heard in the General Division of the Tribunal;
 - c. the person and the sporting body agree in writing to refer the dispute to the General Division of the Tribunal;
 - d. the person or the sporting body may apply to the Tribunal for arbitration of the dispute.
11. In this case, the parties have agreed in writing to have the Appeal determined by the Tribunal, and SA has applied to the Tribunal for an arbitration of the dispute.
12. Section 40 of the NST Act sets out general principles applicable to arbitration as follows:
 - (1) *In the arbitration:*
 - (a) *the procedure of the Tribunal is, subject to this Act, within the discretion of the Tribunal; and*
 - (b) *the arbitration must be conducted with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the Tribunal permit; and*
 - (c) *the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.*
 - (2) *The parties must act in good faith in relation to the conduct of the arbitration.”*
13. In addition, section 28 of the Determination provides that the Tribunal may inform itself in arbitration in a variety of ways. Importantly, the Tribunal is not bound by the rules of evidence and evidence is not required to be given on oath, although the Tribunal may require the administration of an oath in its discretion.
14. Although Ms Smith chose to give her evidence by affidavit whereas SA responded in written submissions, no party requested any evidence be given on oath, and the Tribunal did not consider sworn testimony to be necessary for the proper disposition of this arbitration. No party objected to this course of conduct.
15. No party objected to the procedure adopted by the Tribunal during the Arbitration.
16. There was no objection to the Tribunal hearing and determining the outcome of the Appeal.

FACTUAL BACKGROUND

17. In late 2010, Ms Smith took up the sport of shooting following a hiking accident that resulted in her becoming a T6 paraplegic.
18. Since about 2011, Ms Smith has competed at the international level in the sport of Target Shooting, representing the Australian National Shooting Team (**National Team**).
19. During the period from 25 July 2022 until 10 October 2022, Ms Smith took a leave of absence from her participation in the National Team, due to mental health reasons. This was approved by SA.



20. In late 2022, Ms Smith re-applied for membership of the 2023 National Squad. She was informed by SA that her application was unsuccessful as she had not met the relevant selection criteria. SA further informed Ms Smith that:
 - a. she could reapply for membership of the National Squad in late 2023;
 - b. if she would like to discuss how she could improve the likelihood of being selected, she should contact Ms Kathryn Periac, Performance Manager for SA;
 - c. she should keep training hard and engaging regularly in SA-endorsed competitions throughout 2023.
21. As a consequence of not being in the National Squad, Ms Smith says that:
 - a. she had no contact with SA coaches or staff and was therefore not aware of the National Team selection policies or plans, other than as was published on SA's website;
 - b. she read the "2023 WSPS World Cup and World Championships Team Selection Criteria" (2023 Criteria);
 - c. she developed a training and competition strategy leading up to the Paris 2024 Paralympic Games which was focussed on the R2 and R8 events, with a view to refocussing on the R3 and R6 events later in 2023 and 2024.
22. In or around mid-2023, Ms Smith injured her shoulder, although it is unclear on the evidence what effect this had on her ability to participate in events relevant to the issues in question.
23. During the course of 2023, Ms Smith experienced difficulty in being selected to the National Team for various international events under the 2023 Criteria, including on the bases that she was not part of the National Squad, was not a "Categorised Athlete" (in accordance with SA's Athlete Classification Policy) and/or had a limited relevant performance record.
24. On or about 16 November 2023, SA published on its website the 2024 Criteria for the purposes of the upcoming 2024 WSPS World Cups and Grand Prix. The 2024 Criteria provided that the 2024 WSPS World Cups and Grand Prix may be used by SA for the purpose of preparing athletes for podium performance at the Paris 2024 Paralympic Games and to maximise the opportunity to achieve quota allocations and a WSPS Minimum Qualification Score (MQS) for the Paris 2024 Paralympic Games.
25. On 17 November 2023, Ms Smith was offered a position on the National Squad, which she subsequently accepted.
26. In late 2023 and early 2024, Ms Smith had discussions with representatives of SA in respect of her categorisation and her desire to participate in the WSPS WC New Delhi.
27. On 30 January 2024, SA informed Ms Smith that she had been provisionally selected for the R2 and R8 events for the WSPS WC New Delhi.
28. On 31 January 2024, SA informed Ms Smith that she had not been selected for the R3 and R6 events for the WSPS WC New Delhi (**Decision**). The explanation provided by SA, which accompanied the Decision, was as follows:



“You were not selected to compete in R3 or R6 as you have no MQS in either, and you are ranked below two or more Australian Athletes in both of those events.”

29. The team for the WSPS WC New Delhi was announced on SA’s website on 26 February 2024.

30. Pursuant to the Process:

- a. on 5 February 2024, Ms Smith submitted to SA a request for reasons for the Decision;
- b. on 7 February 2024, SA provided to Ms Smith reasons for the Decision (**Reasons**). Relevantly, the Reasons provided as follows:

“As per Clause 3 of the Criteria, the Selection Panel (the Panel) was comprised of me and a member from each of the relevant SA Member Organisations (i.e. Target Rifle Australia and Pistol Australia). The Panel considered all eligible athletes for selection to the Team subject to and in accordance with Criteria.

In relation to your request, Clause 7 a) (i) requires that in order to be considered for selection to the WSPS World Cup New Delhi, an athlete must have achieved at least one Minimum Qualification Score (MQS) at WSPS Recognised Competitions (as defined by WSPS and listed in the Criteria) between 1 January 2022 and 15 July 2024 (inclusive) to be selected.

... as you have not achieved one or more MQS in the R3 or R6 events within the requirements of Clause 7 a) (i), you were not selected in those events.”

- c. on 14 February 2024, Ms Smith submitted to SA a notice of appeal of the Decision.

31. While the Tribunal has considered all the facts, allegations, legal arguments, and evidence submitted by the parties, it has referred in this Determination only to the submissions and evidence it considers material to explain its reasoning in the Introduction and immediately below.

PROCEEDINGS BEFORE THE NST

32. By Application Form to the Tribunal dated 19 February 2024, SA commenced this Appeal, seeking an urgent determination in circumstances where the WSPS WC New Delhi is due to commence on 6 March 2024. The Application Form names SA as the “*Applicant*” and Ms Smith as the “*Other Party*”, however in circumstances where Ms Smith brings this Appeal of the Decision, Ms Smith is in effect the Appellant and SA is the Respondent to this Appeal, and the parties have proceeded on that basis.

33. The Tribunal made initial directions for the filing of material by the parties, with an oral hearing available to the parties, if they considered it necessary, prior to the delivery of the Tribunal’s determination.

34. In accordance with those directions, the parties filed submission as follows:

- a. on 26 February 2024, Ms Smith filed written submissions together with an affidavit of Ms Smith and annexures;



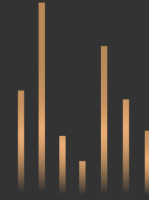
- b. on 28 February 2024, SA filed written submissions together with an athlete performance tracking document for Ms Smith;
 - c. on 1 March 2024, Ms Smith filed written submissions in reply to SA's submissions.
35. The Tribunal sought the parties' further submissions as to a discrete question, as follows:
"Is the "Minimum Qualification Score" (MQS) as referred to in the 2024 Selection Criteria one and the same as the "Minimum Performance Standard" (MPS) as referred to in the 2023 Selection Criteria? i.e. Could these terms be used interchangeably?"
36. Only SA provided a response to that question posed by the Tribunal.
37. Both parties informed the Tribunal that they did not require an oral hearing, and so the Appeal was heard on the papers.

APPLICABLE RULES

38. The relevant provisions of the 2024 Criteria are as follows:
- a. clause 1, under the heading "Background", provides that:
 - "d) SA may select athletes (see clause 5) to the team (Team) to participate in the 2024 WC and GP. SA is under no obligation to select any, or the maximum number of, athletes to compete at any event at the WC or GP.
 - e) This Selection Criteria (Criteria) details the process established by SA for the consideration for selection of athletes to the Team to represent Australia at the 2024 WC and GP."
 - b. clause 2, under the heading "Objectives", provides that:
 - "a) In 2024 SA may use the WC and GP events prior to the 2024 Paralympic Games for the purpose of:
 - (i) preparing athletes for podium performance at the 2024 Paralympic Games; and
 - (ii) maximising the opportunity to achieve quota allocations and WSPS Minimum Qualification Score (MQS) for the 2024 Paralympic Games.
 - b) For the avoidance of doubt, the objectives in clause 2(a) simply provide context for these Criteria and in no way impact on the selection of the Team by the SA Selection Panel (Panel) or the exercise of discretion by the Panel."
 - c. clause 4, under the heading "Events", provides that:
 - "a) The Panel may select athletes to the Team for the following events (Events) at the 2024 WC and GP:

...

R3 – 10m Air Rifle Prone Mixed SH1



...

R6 – 50m Rifle Prone Mixed SH1

...”

d. clause 5, under the heading “*Team Size*”, provides that:

“c) *Neither this Criteria, nor SA or WSPS require SA to select any, or the maximum number of, athletes to the Team for the WC and GP. For the avoidance of doubt, nothing in this Criteria operates to require the Panel to exercise any discretion to select any athletes to the Team or fill all available positions on the Team. Final Team members and composition of the Team are determined at the absolute discretion of the Panel.*”

e. clause 6, under the heading “*Athlete Eligibility*”, provides that:

“a) *To be eligible for consideration for selection to the Team for the WC and GP an athlete must:*

(i) *Be a registered financial member of and in good standing with the relevant SA Member Organisation;*

(ii) *Be eligible to compete for Australia in Shooting events in future Paralympic Games and WSPS World Championships;*

(iii) *Meet this Criteria and all eligibility requirements imposed by the WSPS including:*

A. *Hold a WSPS Athlete License for the 2024 season;*

B. *Be internationally classified in an eligible Sport Class with a Sport Class Status of Confirmed; or Review with a Fixed Review Date of 2025 or later;*

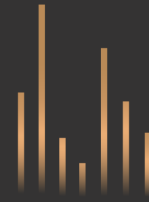
(iv) *Sign and abide by the SA Athlete Agreement as per clause 11.”*

f. clause 7, under the heading “*Selection Process*”, provides that:

“a) *Subject always to clauses 5 and 6, the athletes to compete in a WC or GP listed in clause 1, in the Events listed in clause 4, may be selected to the Team by the Panel according to the Selection Process for each event.*

(i) *WSPS WC New Delhi, India – Athletes who have achieved at least one Minimum Qualification Score (MQS) at WSPS Recognised Competitions (WSPS Championships, WSPS Sanctioned Competitions, WSPS Approved Competitions or IPC Games) between 1 January 2022 and 15 July 2024 (inclusive) may be selected;*

(ii) *WSPS WC Changwon, Korea – Athletes who have won a quota place for the 2024 Paralympic Games and/or have satisfied the 2024 Paralympic Games Qualification System including the attainment of*



two (2) MQS' at two (2) WSPS Recognised Competitions (WSPS Championships, WSPS Sanctioned Competitions, WSPS Approved Competitions or IPC Games) in the same medal event between 1 January 2022 and 15 July 2024 (inclusive) may be selected;

- (iii) *WSPS GP Hanover, Germany – Subject to confirmation of this event, at the sole discretion of the Selection Panel athletes who are selected for the WSPS WC Changwon may also be selected for this GP.”*

- g. clause 8, under the heading “*Appeals Process*”, provides that:

“Appeals will be conducted in accordance with, and governed by, the process detailed in the SA Appeals Policy, a copy of which may be downloaded from the SA website: Shooting Australia Appeals Policy or obtained by request from the SA office.”

39. As to the Process:

- a. clause 2(a) provides that:

“Any athlete is entitled to appeal against their non-selection to a Team as set out in this Process.”; and

- b. clause 3 provides that:

“(a) The sole ground of appeal to a Decision is that the applicable Selection Policy has not been properly followed and/or implemented in the selection of the Team.”

(b) For the avoidance of doubt, the basis of the appeal can only address procedural matters under the Selection Policy and not matters of merit.”

MAIN SUBMISSIONS OF THE PARTIES

40. Ms Smith relies upon submissions made in her notice of appeal of the Decision (much of which is not further addressed in submissions filed with the Tribunal), an affidavit sworn by her as well as two sets of written submissions prepared by her legal representatives and filed with the Tribunal.

41. As to the construction of the 2024 Criteria, Ms Smith argues (in summary) that:

- a. the selection panel has a broad discretion to select athletes;
- b. the requirement to achieve a MQS in a particular event is not mandatory for selection;
- c. athletes are entitled to be afforded procedural fairness in applying the 2024 Criteria.

42. The key bases for Ms Smith’s argument that the Decision was not made in accordance with the Process or was procedurally flawed, are as follows:

- a. she was given inadequate notice of the 2024 Criteria, in circumstances where, if the requirement to have a MQS is strictly applied, upon SA publishing the 2024 Criteria,



- the question of Ms Smith's possible selection was predetermined, because it was impossible for her to ever satisfy them;
- b. in light of the panel's broad discretion, it failed to take into account relevant considerations such as why Ms Smith did not have a MQS and whether Ms Smith had other results which may be taken into account;
 - c. the Decision not to select Ms Smith was legally unreasonable, given the late timing of the notification of the 2024 Criteria to Ms Smith and the panel's failure to take into account relevant considerations as set out above;
 - d. the panel's failure to consider Ms Smith for selection on the basis that she did not have a MQS, without affording her the opportunity to explain why she did not or to explain her other results, constituted a failure by the panel to give Ms Smith an opportunity to be heard.
43. On the above basis, Ms Smith seeks that:
- a. the Decision be set aside and the matter of her inclusion in the R3 and R6 events at the WSPS WC New Delhi be remitted to SA for fresh consideration;
 - b. Ms Smith be refunded "*the costs of the arbitration*";
 - c. recommendations be made to SA for a smoother selection process.
44. SA filed submissions in response to those made by Ms Smith. SA's position is (in summary) that:
- a. there is no avenue for appeal available to Ms Smith, because:
 - i. the 2024 Criteria concerns selection to "*the Team*", as opposed to individual events (such as the R3 or the R6);
 - ii. Ms Smith was in fact selected to the Team (albeit for events other than the R3 and the R6);
 - b. the 2024 Criteria provides the panel with a broad discretion, but there are no considerations that the panel may, or must, consider and the panel is not obliged to select any athlete;
 - c. an MQS was used by SA (in the 2024 Criteria) as "*a key eligibility criterion for the selection of the Team to the WSPS WC New Delhi because SA is at 'the business end' of the Paralympic qualification period and the MQS are also a key eligibility criterion for the Games themselves*";
 - d. Ms Smith was not eligible for selection because she did not satisfy the objective criterion of having a MQS. In those circumstances, the panel was unable to act in any way other than to not select Ms Smith;
 - e. even if Ms Smith satisfied the key eligibility criterion of having a MQS, the panel may not select her on the basis of the discretion provided for in clause 5(c) of the 2024 Criteria;



- f. there is no exceptional circumstances clause in the 2024 Criteria, or other obligation, which might require the panel to consider Ms Smith’s particular circumstances and the reasons why she did not have a MQS;
 - g. Ms Smith was not denied an opportunity to meet the 2024 Criteria. She had ample opportunity to achieve the requisite MQS, at five competitions between June 2022 and December 2023, but she was either unavailable for selection or did not meet the selection criteria for those competitions;
 - h. SA followed the 2024 Criteria strictly and there was no procedural error.
45. In reply, Ms Smith submits (in summary) that:
- a. SA’s interpretation that the 2024 Criteria governs selection to “*the Team*” as opposed to individual events is incorrect;
 - b. the MQS requirement is not an eligibility requirement. In circumstances where Ms Smith satisfied the eligibility requirements in clause 6, SA was required to consider Ms Smith for selection, properly exercising its broad discretion in good faith and reasonably;
 - c. the MQS requirement is not mandated by clause 7, but is “*merely one of the selection criteria to which regard could be had*”;
 - d. the panel’s discretion under the 2024 Criteria is not unfettered and is governed by principles of good faith and reasonableness both as to process and result;
 - e. a strict application of clause 7 is an impermissible fetter on the discretion of SA under the 2024 Criteria;
 - f. the panel’s failure to consider whether Ms Smith should be selected amounted to a failure by the panel entirely to exercise its discretion in relation to whether or not to select Ms Smith.

MERITS

Entitlement to pursue an appeal

46. The Tribunal is not persuaded by SA’s preliminary argument which is to the effect that there is no appeal available to Ms Smith, because the 2024 Criteria concerns selection to “the Team” (as opposed to individual events) and Ms Smith was, in fact, selected to the Team, albeit not in the R3 and R6 events. Such an interpretation of the 2024 Criteria would be inconsistent with the express wording of the 2024 Criteria which:
- a. provides, by clause 4(a), that the panel may select athletes to the Team “...*for the following events...*” before listing the various Rifle events (R1 to R9) and Pistol events (P1 to P4);
 - b. provides, by clause 7(a), that the panel may select athletes to compete “...*in the Events listed in clause 4...according to the Selection Process for each event*” (being those competitions which are listed in clause 7(a)(i) to (iii)).



47. Although the term “*event*” is used in different contexts throughout the 2024 Criteria, it is clear that the 2024 Criteria provides for the selection of athletes to the National Team for the Rifle events and Pistol events which are listed in clause 4(a), and not simply to the National Team more broadly. That is evident from the nature of the Decision which was made, and the Reasons which were provided for it.
48. Accordingly, as Ms Smith was not selected to the National Team for the R3 and R6 events, she is entitled to pursue an appeal of that non-election decision under clause 2(a) of the Process.

The MQS Criterion

49. A further key issue in dispute between the parties, and relevant to the determination of this Appeal, is the proper construction of the 2024 Criteria and, in particular:
 - a. the effect of clause 7(a)(i) – and specifically, whether an athlete is required to have a MQS for a particular event in order to be considered for selection in that event (**MQS Criterion**);
 - b. the extent of the panel's discretion and whether it may be exercised notwithstanding that an athlete does not satisfy the MQS Criterion.
50. Ms Smith correctly points out that:
 - a. clause 6 sets out the “*athlete eligibility*” criteria, whereas clause 7 sets out the “*selection process*” – there being a clear distinction between the two processes;
 - b. clause 7 is expressed to be “*subject always to clauses 5 and 6*”, which includes the broad discretion in clause 5(c) that “*Final Team members and composition of the Team are determined at the absolute discretion of the Panel*”;
 - c. the language used in clause 7 is permissive - stipulating that athletes who have achieved at least one MQS “*may*” be selected – and is not exclusive.
51. Had the drafters of the 2024 Criteria intended that only athletes who had achieved at least one MQS be eligible for selection, they could have either:
 - a. used the word ‘only’ or ‘exclusively’ in clause 7 – thereby precluding any athlete who does not have a MQS from being selected; or
 - b. included the MQS Criterion as a further mandatory eligibility criterion under clause 6.
52. Neither was done.
53. Moreover, the clear change in approach as between the 2023 Criteria and the 2024 Criteria is instructive as to the intentions of the drafters of the 2024 Criteria.
54. Relevantly, the 2023 Criteria:
 - a. stipulated the requirement of a “*Minimum Performance Standard*” as an additional eligibility criterion under clause 6, stating as follows:
 - “a) *To be eligible for consideration for selection to the Team for the WCH and WC an athlete must:*



(v) Have achieved the Minimum Performance Standard (MPS) for the relevant event in accordance with clause 8.

...

b. further stated in clause 8, under the heading “*Minimum Performance Standards (MPS)*”:

“b) To be eligible for consideration for selection to the Team athletes must have achieved the MPS for the relevant event as detailed in clauses 8(c) and 8(d).

c. stated in clause 9, under the heading “*Selection Process*”:

“a) Subject always to clauses 5, 6, 7 and 8, the Selection Panel may select athletes to the Team according to the following process (Selection Process):

b) World Cup 1 Changwon (WC #1) -After the completion of Selection Events #1 and #2:

(i) All Rifle and Pistol athletes who have achieved the WC MPS in at least one of the 2023 Selection Events #1 or #2 may be selected to the Team.

(ii) All Shotgun Trap athletes who have achieved the WC MPS in at least one 2023 SA Endorsed Event (Shotgun) may be selected to the Team.

c) World Cup 2 Al Ain (WC#2) - only 2023 National Squad Members will be considered for discretionary selection by the Selection Panel. Without in any way limiting the discretion of the Selection Panel, when selecting National Squad Members for WC #2, the Selection Panel may consider any of the following Factors, and in no particular order:

(i) The value to the development of the athlete of competing at WC #2 in achieving the Objectives as per clause 2 of this criteria.

(ii) Based on the results of the athlete at Selection Events #1, #2, #3 and/or #4, that the athlete is capable of achieving the WSPS MQS for Paris 2024 in competition in Al Ain.

d) World Championships (WCH) -After the completion of Selection Events #1, #2, #3 and #4:

(i) Up to two (2) positions in each event may be allocated to athletes who have demonstrated medal winning performance/s in WSPS WC competitions in 2023:

a. The athlete with the highest number of WSPS WC medals shall be selected to the first position on the Team;



- b. *The athlete with the second highest number of WSPS WC medals shall be selected to the second position on the Team;*
 - c. *If two (2) or more athletes are tied based on medal winning performances in WSPS WC competitions during 2023, positions on the Team will be selected at the absolute discretion of the Selection Panel;*
 - d. *If less than two (2) athletes have demonstrated medal winning performances at WSPS WC competitions in 2023, all remaining positions on the Team will be determined in accordance with clause 9(c)(ii).*
 - ii) *Subsequent to the application of 9(c)(i) above, athletes who meet all criteria as described in clauses 5, 6, 7 and 8 may be selected to the Team.”*
55. In response to the Tribunal’s question in paragraph 35 above, SA informed the Tribunal that:
- a. the MQS and MPS are not one and the same thing;
 - b. the MQS is a standard set by WSPS and is relevant to athletes’ eligibility for the 2024 Paralympic Games; whereas
 - c. the MPS is a standard set by SA and is relevant to athletes’ eligibility for selection to National Teams to WSPS competitions outside of the Paralympic Games (eg: World Cups and World Championships).
56. In any event, in light of the similarities in structure and content between the two Criteria, and in the absence of any evidence to the contrary, it is reasonable to infer that the 2024 Criteria is an adapted version of the earlier 2023 Criteria and that it was by design of the drafters, and not by accident, that for the purposes of the 2024 Criteria:
- a. the MPS eligibility criterion was removed; and
 - b. the MQS Criterion was included as a selection criteria under clause 7, and not as an eligibility criteria under clause 6.
57. The fact that the drafters of the 2024 Criteria removed the mandatory MPS eligibility criterion, but did not replace it with the MQS Criterion in the same manner (i.e. as a mandatory eligibility criterion), indicates that the intention was that:
- a. the MQS Criterion would not be a mandatory eligibility criterion for the purposes of the 2024 Criteria; but nonetheless
 - b. the MQS Criterion would remain an important selection criterion under the 2024 Criteria, whilst giving the panel more flexibility, in the event that the MQS Criterion is not met, to exercise its discretion to select an athlete (should it wish to do so, in its absolute discretion).



58. In the circumstances, the Tribunal considers that the proper construction of the 2024 Criteria, insofar as the MQS Criterion is concerned, is that:
- a. the MQS Criterion is one – and likely the primary¹ – objective selection criterion, as part of the broader selection process;
 - b. a failure to meet the MQS Criterion does not necessarily preclude an athlete from being considered for selection and any athlete that meets the eligibility criteria in clause 6 is entitled to be considered for selection;
 - c. regardless of whether or not the MQS Criterion is met, the panel may exercise its broad discretion under clause 5(c) of the 2023 Criteria to select an athlete, but is under no obligation to do so (having absolute discretion).

Determination

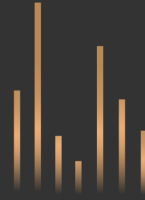
59. In light of:
- a. the Tribunal's views as to the proper construction of the 2024 Criteria;
 - b. the fact that the panel did not consider Ms Smith for selection for the R3 and R6 events at all, on the basis that she did not meet the MQS Criterion (as is evident from the Reasons for the Decision as were provided by SA and as acknowledged in SA's written submissions²);
 - c. the fact that there is no evidence that Ms Smith otherwise failed to satisfy the eligibility criteria in clause 6 of the 2024 Criteria,

it follows that the panel failed to properly follow and implement the 2024 Criteria in selection of the National Team and, therefore, the ground of appeal has been established by Ms Smith.

60. In the above circumstances, and taking into account the urgency of this matter, it is unnecessary for the Tribunal to determine the further grounds of appeal which are in dispute between the parties.
61. Accordingly, the matter of Ms Smith's inclusion in the R3 and R6 events for the WSPS WC New Delhi is remitted to SA for fresh consideration. In circumstances where that competition is due to commence imminently, the panel should consider and inform Ms Smith of its further decision as a matter of urgency. In that regard, the Tribunal notes that SA acknowledges in its submissions that the matter will be dealt with "*immediately*". It is further noted that, in accordance with clause 7 of the Process, the further decision of the panel shall be final and binding and there shall be no further right of review or appeal.
62. Finally, by her submissions, Ms Smith seeks to be refunded "*the costs of the arbitration*". It is not clear whether Ms Smith seeks to recover her legal costs of pursuing this Appeal, or whether she merely seeks to recover the \$1,000 deposit paid to SA upon lodging her notice of appeal.

¹ Particularly in light of SA's submission that "SA is at 'the business end' of the Paralympic qualification period and the MQS are also a key eligibility criterion for the Games themselves".

² The initial explanation for the Decision provided on 31 January 2024 included that Ms Smith was ranked below two or more Australian Athletes in both events, however the Reasons which were ultimately provided and SA's submissions to the Tribunal are consistent with the conclusion that, in fact, Ms Smith was not considered for the R3 and R6 events at all, on the basis that she did not have a MQS in those events.



In any event, clause 4(d) of the Process provides that “*Costs incurred by an athlete in relation to the appeal are to be met by the athlete in all cases*” and that is appropriate in these circumstances.

THE TRIBUNAL THEREFORE DETERMINES:

1. The matter of consideration of Ms Smith’s inclusion in National Team for the R3 and R6 events at the World Shooting Para Sport World Cup event to be held in New Delhi, India in March 2024 be remitted to SA for fresh consideration.
2. Pursuant to clause 4(d) of the Process, the \$1,000 deposit be returned to Ms Smith.
3. The parties otherwise bear their own costs of this Appeal.

Date: 4 March 2024



Jon Erbacher