

NST-E24-120580

Benjamin Manning v Paddle Australia

Determination

National Sports Tribunal General Division

sitting in the following composition:

Panel Member

The Honourable Steven Strickland KC

in the arbitration between

Benjamin Manning

(Appellant)

Represented by Tim Fuller, Legal Representative

And

Paddle Australia

(Respondent)

Represented by Ian Fullagar, Legal Representative, Phil Jones, CEO, Kim Crane, National Performance Director and David Foureur, General Manager Performance – Canoe Sprint & Paracanoe

INTRODUCTION

1. This is an appeal by Benjamin Manning (“the Appellant”) against Paddle Australia (“the Respondent”) pursuant to clause 9.4(a) of the Olympic Team Nomination and Selection By-Law (“By-Law”) in relation to his non-nomination to the 2024 Open MC1 1000 Australian Canoe Sprint Team for the 2024 Paris Olympics.
2. The Appellant was notified of his non-nomination by the Respondent on 10 March 2024.
3. The parties then complied sufficiently with all relevant requirements pursuant to clause 9.6(a) of the By-Law. In particular, pursuant to clause 9.6(a)(ii) the Appellant provided written notice to the Respondent that he disputed his non-nomination, provided reasons to support his notice of dispute, and pursuant to clause 9.6(a)(iii) the Respondent provided the Appellant with a written statement of the Respondent’s reasons for his non-nomination.
It is noted though that the statement by the Respondent was provided outside of the 24 hour period provided for in the clause, but that was to allow the Appellant more time to respond pursuant to clause 9.6(a)(iv) and no issue is taken with this delay.
4. The appeal is a first instance appeal being heard in the general division of the National Sports Tribunal (“the Tribunal”) pursuant to clause 9.6(c) of the By-Law.
5. Pursuant to clause 9.6(c)(iii), on 22 March 2024 the Appellant lodged an application with the Tribunal in accordance with the Tribunal’s procedure, and, as the Tribunal understands it, notified the Australian Olympic Committee that he had lodged the application, and paid the application fee required by the Tribunal on 8 April 2024.
6. On 27 March 2024 the Tribunal conducted a preliminary conference and made the following directions:
 - 6.1 On 27 March 2024, the Appellant is to confirm:
 - a) The grounds of appeal he intends to rely on in accordance with clause 9.6(c)(ii) of the By-Law; and
 - b) If he intends to request the Tribunal appoint an expert to assist with the arbitration pursuant to clause 9.6(c)(v)(C) of the By-Law.
 - 6.2 The procedural timetable to be adhered to is as follows:
 - a) The Appellant file with the Tribunal and serve on the Respondent any submissions and evidence he intends to rely on by 4:30pm (AEDT) 3 April 2024;
 - b) The Respondent file with the Tribunal and serve on the Appellant, any submissions and evidence it intends to rely on by 4:30pm (AEDT) 10 April 2024; and
 - c) The Appellant file with the Tribunal and serve on the Respondent any further submissions and evidence he intends to rely on in reply by 4:30pm (AEDT) 15 April 2024.
 - 6.3 In accordance with clause 9.6(c)(v)(D) of the By-Law, if the Tribunal member considers it appropriate and the parties agree, the determination may be made on the papers. Alternatively, if required, a short hearing will take place in the afternoon of 16 April 2024. The commencement time to be confirmed in due course.

- 6.4 The parties confirm no opposition to the proposed appointment of the Honourable Steven Strickland KC to be the sole arbitrator to hear this matter. Accordingly, the Tribunal will proceed with his appointment.
7. On 27 March 2024 the Appellant advised that the ground of appeal on which he intended to rely was:
- Clause 9.6(c)(ii)(C) of the By-Law: The National Federation (the Respondent here) was affected by actual bias in making its decision with respect to the non-nominated athlete.
8. Also on 27 March 2024, and pursuant to clause 9.6(c)(v)(C) of the By-Law, the Appellant requested the Tribunal to appoint an expert to assist with the arbitration in accordance with s.68 of the National Sports Tribunal Act 2019 and clause 34 of the National Sports Tribunal (Practice and Procedure) Determination 2021.
9. On 28 March 2024 the Tribunal requested the Appellant provide reasons for the request for an expert to be appointed, and those reasons were to accompany the submissions and evidence due to be lodged by the Appellant with the Tribunal on 3 April 2024.
10. On 2 April 2024 the Appellant advised the Tribunal that he wished to amend the ground of appeal to be relied upon. In effect he sought to withdraw the previous ground of appeal and rely solely on the following ground:
- Clause 9.6(c)(ii)(B): The applicable Nomination Criteria was not properly applied by the non-nominated athlete's National Federation (the Respondent here).
11. There was no objection to this amendment and accordingly this is now the sole ground of appeal relied upon.
12. The request for the Tribunal to appoint an expert witness was approved by the Tribunal and Ms. Bernadette Wallace was appointed to assist the Tribunal, if necessary. No objection was made to this appointment.

THE JURISDICTION OF THE TRIBUNAL

13. The jurisdiction of the Tribunal is engaged by s.23(1) of the National Sports Tribunal Act 2019, clause 9.6(c) of the By-Law and clause 16 of Paddle Australia Nomination Criteria – Paris Olympic Games Sprint Canoe/Kayak.
14. As referred to above the Tribunal conducted a preliminary conference on 27 March 2024 and made directions for the conduct of the arbitration.
15. Clause 52 of the National Sports Tribunal (Practice and Procedure) Determination 2021 provides that where the Tribunal considers it appropriate to do so and all the parties to the dispute agree, the Tribunal may determine the dispute without a hearing. That is echoed in clause 9.6(c)(v)(D) of the By-Law.
16. In this instance all parties indicated that a hearing was not required and the Tribunal has accepted that position. Accordingly the determination is being made on the papers.

THE DOCUMENTS BEFORE THE TRIBUNAL

17. As referred to above, at the preliminary conference a timetable was agreed for the filing of written submissions, relevant evidence and witness statements. The parties substantially complied with that timetable and the Tribunal now has their respective written submissions

before it. There was no evidence as such and no witness statements provide by either party; only submissions were provided.

18. The Tribunal notes though that despite there being no provision for the Respondent to reply to the submissions in reply of the Appellant, the Respondent, without seeking the approval of the Tribunal or the consent of the Appellant, provided such a reply. Fortunately, that reply did not add anything new, and in effect repeated the tenor of the Respondent's responding submissions, and thus the Tribunal has received it.
19. Relevantly, and pursuant to the request of the Tribunal, the Tribunal also has before it:
 - 19.1 The written notice sent by the Appellant to the Respondent in accordance with clause 9.6(a)(ii) of the By-Law following the advice of his non-nomination, advising that he disputes that non-nomination and provides the reasons therefor; and
 - 19.2 The written statement sent by the Respondent to the Appellant in accordance with clause 9.6(a)(iii) of the By-Law setting out the reasons for the non-nomination.

THE EXPERT WITNESS

20. Pursuant to the direction of the Tribunal, on 3 April 2024 the Appellant provided written reasons in support of the request for the appointment of an expert witness.
21. In short, the express reason for requesting the appointment was that the selection panel of the Respondent "lacked the requisite expertise to make decisions specific to canoeing". However, the problem with this is that its relevance to the ground of appeal relied on by the Appellant, namely that the applicable nomination criteria was not properly applied by the Respondent, was neither apparent nor explained.
22. In any event, on the papers that are before the Tribunal, the Respondent does not agree that the panel lacked the requisite expertise to make the challenged decision. Given that the parties, and in particular the Appellant, have not sought a hearing, there has been no opportunity to test the accuracy or otherwise of the allegation made by the Appellant, if it was necessary to do so. Thus, the Tribunal is in no position to determine which proposition is correct, and indeed, because the onus is always on the Appellant to establish his case, not having done so means that the Tribunal proceeds on the basis that the panel had the necessary expertise.
23. Further, as will be seen, the reasons for the determination of the Tribunal herein do not require the input of an expert witness, and I hasten to add, do not require a determination as to whether the panel had the requisite expertise. Thus, the Tribunal has not sought the assistance of the expert witness. As an aside, that is fortunate because clause 34 of the National Sports Tribunal (Practice and Procedure) Determination 2021 provides for the expert to prepare a report, for that report to be made available to the Tribunal and the parties, and which report then becomes admissible in the proceedings, and following that the expert can be cross-examined on its content. That of course would have required a hearing but to repeat, neither party, and in particular the Appellant, required a hearing.

THE GROUND OF APPEAL AND THE OUTCOMES SOUGHT

24. To repeat, the ground of appeal is as follows:

"The applicable Nomination Criteria was not properly applied by the Non-Nominated Athlete's National Federation".

25. As for outcomes, the Appellant seeks that if the appeal is upheld, the Tribunal, in accordance with clause 9.6(c)(vi)(C) determine the issue of the Appellant's nomination. On the other hand, the Respondent seeks that the appeal be dismissed, but if it be upheld, then pursuant to clause 9.6(c)(vi)(B) the Tribunal refer the decision regarding the non-nomination back to the Respondent for reconsideration and redetermination.

THE NOMINATION CRITERIA

26. The relevant provisions of Paddle Australia's Nomination Criteria are as follows:

26.1 Clause 2.2 provides that the Respondent "may only nominate Athletes to the AOC in accordance with this Nomination Criteria".

26.2 Clause 6.1 provides that:

"Unless otherwise stated, the National Federation will use the following competitions to nominate Athletes to the AOC for selection to the Team:

- a) **Nomination Trial 1:** Paddle Australia Canoe Sprint GP2 and the Oceania Championships (16-18 February 2024) otherwise known as the "2024 Oceania Olympic Qualification Competition".
- b) **Nomination Trial 2:** Paddle Australia Canoe Sprint Championships (6-10 March 2024)."

26.3 Clause 8 provides as follows:

MEN'S CANOE (MC)

8.1 If only one (1) Athlete quota place is qualified at Nomination Trial 1, the National Federation will nominate the highest placed eligible Athlete in the MC1 1000 Event at Nomination Trial 2, subject to the Athlete having achieved the PS in the MC1 1000 Event at any Nomination Trial.

8.2 Not applicable.

8.3 If after applying clauses 8.1 and 8.2, Australian has remaining quota places to be filled under the Qualification System, then the Selection Panel may identify an Athlete(s) according to the discretionary criteria at clauses 11.2 and 11.3 and, if the Selection Panel does so, the National Federation will nominate that Athlete(s) to the AOC for selection to the Team.

26.4 Clause 11.2 provides as follows:

"Where in this Nomination Criteria the Selection Panel has discretionary power to decide whether or not to nominate an Athlete or Athletes, the National Federation may exercise its discretion to nominate Athletes who, in the opinion of the Selection Panel, at its absolute discretion:

- a) will be most likely to achieve the highest competitive results at the Games;
- b) have the best potential to enhance the National Federation's medal outcomes at future Olympic Games; and

- c) are, and will remain until the conclusion of the Games, a positive ambassador for the Sport, the National Federation and the Games.

26.5 Clause 11.3 relevantly provides as follows:

“In considering an Athlete against the criteria in clause 11.2, the Selection Panel may have regard to any, all or none of the following considerations, in its absolute discretion and in no order of priority or weighting:

...

- (e) An Athlete’s national and international performances over the past 12 months;

- (f) Extenuating Circumstances as outlined in clause 13;

...

For the avoidance of doubt, the Selection Panel need not have regard to any of these considerations and may apply such weighting or otherwise to any of them as it considers appropriate.”

27. The “PS” in clause 8.1 is defined in clause 1.1 of the Nomination Criteria as meaning the 2024 Performance Standard Time set out in Appendix B. In that Appendix the Performance Standard Time for the event in which the Appellant competed was 3:59.56.

28. Relevantly Appendix B also provides detail of how the Performance Standard Time will be assessed, namely:

“Where the PS is listed as a requirement in this Nomination Criteria that the Athlete must achieve for a relevant event, the following process will be applied:

- (l) An Athlete will meet the necessary PS if it achieves the relevant time in neutral conditions in the Heat, Semifinal or Final during any of the Nomination Trials set out in this Nomination Criteria.

- (m) Whether an Athlete has achieved the PS in neutral conditions is at the absolute discretion of the Selection Panel. The Selection Panel will base its assessment on the influence of external conditions on Athlete performances in a particular race at the Nomination Trials. Such conditions may include, but are not limited to, wind speed/direction, water temperature, wave size and currents.

- (n) If there are unsuitable conditions and the Selection Panel requires further evidence of the ability of the Athlete to achieve the PS, it may consider any, all or none of the following and deem an Athlete to have satisfied the PS following such a consideration:

- relevant performance times in relation to the 2024 PS from the Athlete in neutral conditions within the past 12 months;
- relative performances against other Athletes who have achieved PS in neutral conditions within the past 12 months; or
- Extenuating Circumstances according to clause 13.”

29. Here, the Appellant failed to achieve the necessary Performance Standard Time at either of the Nomination Trials. Further, the Selection Panel assessed the conditions as neutral, and it was able to do that in its absolute discretion.
30. The submissions of the Appellant in support of the ground of appeal can be summarised as follows:
- 30.1 The Selection Panel failed to use the discretionary powers available to it under the Nomination Criteria, and instead based their decision on time criteria alone.
 - 30.2 Specifically, the Selection Panel failed to exercise their discretionary powers to consider clauses 11.2(a) and 11.3(e) of the Nomination Criteria.
 - 30.3 It is suggested that in considering those clauses it is incumbent on the Selection Panel to consider all the evidence and find that the Athlete is worthy of nomination.
 - 30.4 As for the evidence that should have been considered the submissions point to the Appellant's past national and international performances as per clause 11.3(e) of the Nomination Criteria.
 - 30.5 The submissions also pointed to what was said to be the adverse conditions during the Nomination Trials, suggesting that they were not neutral, and as a result the Appellant was not provided a fair and realistic opportunity to paddle an International Performance Standard Time.
 - 30.6 The submissions sought to draw comparisons with the nomination of Athletes in other Olympic sports.
31. The submissions of the Respondent in seeking dismissal of the appeal can be summarised as follows:
- 31.1 The discretions provided in clauses 8.3, 11.2 and 11.3 of the Nomination Criteria are absolute and need not be exercised.
 - 31.2 The Selection Panel did not identify the Appellant to be an Athlete under clause 8.3. The Panel did not consider the Appellant for a remaining quota and thus he was not identified under clause 11.2.
 - 31.3 If the Athlete was so identified the factors which may be considered under clause 11.2 are absolutely discretionary. If any of the clause 11.2 factors were considered, the clause 11.3 factors too are clearly discretionary and the Panel may or may not consider any of them, and if it does there is no weighting, referring also to the last paragraph of clause 11.3.
 - 31.4 The Respondent at all times properly applied the criteria and there is no evidence that it did not.
 - 31.5 Further, the Respondent at all times properly exercised its discretionary powers under the criteria. The Respondent is not obliged to consider all the evidence to find that the Athlete is worthy of nomination.
 - 31.6 Approaches to nomination taken by other Olympic sports is irrelevant.
 - 31.7 Although not relevant, the Respondent disagrees with the Appellant's assessment of the conditions and says that all the conditions were neutral for all Nomination Trials.

DISCUSSION

32. It is readily apparent that the process to be applied by the Selection Panel appointed by the Respondent is as follows:
- 32.1 Because it is not otherwise stated, the Respondent is to use the two Nomination Trials to nominate Athletes to the AOC for selection to the Team (clause 6.1). The Respondent did that here.
- 32.2 The Respondent is then to consider clause 8. Here there was only one Athlete quota place qualified at Nomination Trial 1 and there can be no dispute that the Appellant was the highest placed eligible Athlete in the MC1 1000 event at Nomination Trial 2, but nomination of the Athlete was subject to him having achieved the Performance Standard Time at any Nomination Trial, and that was not the case; the Appellant failed to meet the Performance Standard Time of 3:59.56 at either Trial, and the conditions were assessed by the Panel as neutral. Thus clause 8.1 could not apply to allow the Appellant to be nominated.
- 32.3 The next step was for the Respondent to consider clause 8.3. As can be seen that provides that the Selection Panel may identify an Athlete according to the discretionary criteria at clauses 11.2 and 11.3, and if so identified, the Respondent will nominate that Athlete to the AOC for selection to the Team. It is at this point that the Appellant submits the Selection Panel failed to exercise its discretionary powers under clauses 11.2 and 11.3.
- 32.4 As can be seen, under clause 11.2 the Selection Panel has an absolute discretion to nominate an Athlete or not on the basis of the factors in (a), (b), or (c). The Tribunal notes that those factors are cumulative.
- 32.5 As can also be seen, under clause 11.3 the Selection Panel, in considering an Athlete against the criteria in clause 11.2, has an absolute discretion to have regard to any, all or none of the considerations therein set out. And further, it is clearly stated that the Selection Panel need not have regard to any of the considerations. Here the Appellant submits that the Respondent failed to exercise its discretion to take into account clauses 11.2(a) and 11.3(b). Incorrectly though the Appellant limits the consideration to clause 11.2(a) when it must be to clause 11.2(a)-(c) given they are cumulative. As will be seen later in these reasons the Tribunal also considers that the Respondent in this submission did not appreciate the interrelationship between clauses 11.2 and 11.3.
33. The Appellant's primary position in effect is that the Respondent failed to exercise their discretionary powers as they must, and take into account the relevant considerations in clauses 11.2(a) and 11.3(e), and thus identify the Appellant as the Athlete to be nominated in accordance with clause 8.3.
34. However, that position is plainly wrong. Pursuant to clause 8.3 the Respondent has a discretion to identify an Athlete to be nominated according to the discretionary criteria at clause 11.2 and 11.3. That is a discretion that need not be exercised, and whether it is or not, and how it is exercised if it is exercised, is a matter entirely for the Respondent. That position becomes even clearer when it is seen that under clause 11.2 the Selection Panel may exercise its discretion to nominate an Athlete who, in the opinion of the Selection Panel, at its absolute discretion comes within (a), (b) and (c), and under clause 11.3, in considering an Athlete against the criteria in clause 11.2, the Selection Panel may have regard to any, all, or none of the considerations in its absolute discretion. Then, to avoid any doubt there is a statement at the end of clause 11.3.

35. Importantly though, the Selection Panel only needs to go to clause 11.3 if it intends to exercise its discretion under clause 11.2.
36. Thus, in summary, it is entirely a matter for the Selection Panel whether they exercise their discretion to have regard to any of the matters in clause 11.3 in order to consider the Athlete against the criteria in clause 11.2, and then only if it intends to exercise its discretion under clause 11.2.
37. It must not be forgotten though that the Selection Panel only needs to consider exercising its discretion under clause 11.2 if it determines to exercise its discretion in clause 8.3 to identify an Athlete according to the discretionary criteria at clauses 11.2 and 11.3 to be nominated.
38. Unlike the submission of the Appellant, the Respondent is not obliged to exercise its discretion in any particular way. For example, the Respondent can decide to not exercise its discretion to identify an Athlete under clause 8.3, and that is the end of it. If though it did decide to exercise the discretion to identify an Athlete to be nominated then it could in its absolute discretion take into account the relevant considerations in clause 11.3 in considering an Athlete against the criteria in clause 11.2, and then exercise its discretion under that clause.
39. For completeness, I make three further comments as follows:
 - 39.1 It necessarily follows from what is said above that the submission of the Appellant that it was incumbent on the Respondent to consider all the evidence to find that the Athlete is worthy of nomination cannot be and is not the case.
 - 39.2 There is clearly a dispute as to whether the conditions at the Nomination Trials were neutral. Given that the parties and particularly the Appellant have not sought a hearing where for example witnesses can be called and cross-examination can take place, the Tribunal is not able to determine which position is correct. The Appellant though has the onus of proof in this appeal and clearly that has not been satisfied in respect of this issue. Thus the Tribunal can only proceed on the basis that the conditions were as assessed by the Selection Panel.
 - 39.3 The Tribunal is told in the statement given by the Respondent setting out the reasons for the non-nomination of the Appellant, that the Appellant did not present to the Respondent any extenuating circumstances during the Nomination Trials that might impact on his performance. Pursuant to clause 13.1 of the Nomination Criteria, and bearing in mind the definition of extenuating circumstances in clause 1.1, it is apparent that the Appellant in his submissions to this Tribunal is attempting to make a case that there were circumstances in existence which if taken into account by the Selection Panel might have led them to exercise their discretion to nominate the Appellant. However, it is now too late; that should have been done at the time, and cannot be a basis for the ground of appeal to succeed.
In a similar vein, in the Respondent's statement, the Tribunal is told that an invitation was extended to the Appellant to meet with the Selection Panel whilst on site at Nomination Trial 2, but that invitation was not taken up by the Appellant. It seems to the Tribunal that that would have been an opportunity to raise with the Selection Panel any concerns that the Appellant had with the conditions and/or the circumstances that he now says hampered his performance.
40. On the basis of a consideration of the respective submissions of the parties the appeal must fail.

41. However, that is not the end of the matter, and in the context of the ground of appeal it is necessary to look at what the Selection Panel says it in fact did in determining to not nominate the Appellant.
42. The Respondent correctly submits that the discretions “are absolute and need not be exercised” (paragraph 15), and then says that the Panel “did not identify the Appellant to be an Athlete under clause 8.3.” (paragraph 16). However, incorrectly, the Respondent says that because of this latter circumstance “he was not identified under clause 11.2 (paragraph 16)”. That is incorrect because as explained above the identification in clause 8.3 is to be undertaken according to the criteria in clauses 11.2 and 11.3, and not discretely before then considering the criteria in clause 11.2.
43. The Respondent maintains this error in the opening sentence of paragraph 17 of its submission, but then correctly suggests that “if any of the 11.2 factors were considered the clause 11.3 factors too are clearly discretionary and the Panel may or may not consider any of them”, referencing the last statement in clause 11.3. However, the Tribunal makes the comment here that it seems to the Tribunal that the Respondent does not appreciate the relationship between clauses 11.2 and 11.3, and specifically the fact that the considerations in clause 11.3 are looked at in considering an Athlete against the criteria in clause 11.2; i.e. clauses 11.2 and 11.3 are not to be given separate and distinct consideration.
44. Pausing there, it is readily apparent that the Respondent is saying in its submission that here the discretionary powers in clauses 8.3, 11.2 and 11.3 need not be exercised, and they were not, and thus the Appellant was not identified as an Athlete to be nominated for selection pursuant to clause 8.3.
45. This interpretation is slightly clouded by what is said in paragraphs 18 and 19 of the submission, namely, in 19 that, “at all times the Respondent properly exercised its discretionary powers under the Criteria.” However, to be consistent with paragraphs 15 and 16 and perhaps paragraph 17 of the submission, this can only mean that because the discretions need not be exercised, they were not.
46. However, the difficulty the Tribunal has with that is what the Respondent said in the statement of reasons as to why the Appellant was not nominated. The statement began by indicating that the decision was made after “observing and assessing” the Appellant’s performances in the Nomination Trials specified in clause 6.1 of the Nomination Criteria; then the Respondent recorded the fact of the Appellant not achieving the Performance Standard Time in neutral conditions; and then the Respondent referred to the email sent by the chairman of the Selection Panel to the Appellant after Nomination Trial 1 on 21 February 2024 stating that it was the intention of the Selection Panel to nominate Athletes who then meet the criteria specifically (8.1), namely achieving the Performance Standard Time.
47. Pausing there, one would be forgiven for thinking that the decision was made solely on whether the Performance Standard Time was achieved or not. However, the statement went on to refer to what is described as “additional considerations within the Canoe Nomination Criteria”, namely clauses 8.2 and 8.3. Clause 8.2 was correctly identified as being not applicable, but with respect to clause 8.3 this was said:

“The Nomination Panel noted their discretionary power and considered a range of matters, including but not limited to all matters listed under clauses 11.2(a) to (c) and 11.3(a) to (h) of the Criteria. Having considered these matters the Nomination Panel, at its discretion, decided not to nominate Ben Manning under clauses 11.2 and 11.3.”
48. To put it bluntly, this is not consistent with the submission of the Respondent to the Tribunal. In the statement of reasons the Respondent is saying in effect that they exercised their

discretionary power by considering a range of matters therein described, although with no detail as to the particular facts to which regard was had, whereas in the submission, the Respondent says in effect that the discretions need not be exercised and they were not. If not inconsistent, at the very least it is confusing as to in fact how the Selection Panel made the decision. In other words, did they just rely on the failure of the Appellant to achieve the Performance Standard Time, or did they exercise their discretionary powers, and if so how.

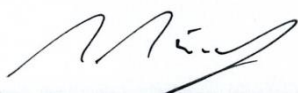
49. Thus the Tribunal is left in some doubt as to how the applicable Nomination Criteria was applied, and the Tribunal cannot find that they were properly applied. Accordingly, the appeal must be upheld.
50. As referred to above, pursuant to clause 9.6(c)(vi)(B), if the Tribunal upholds a nomination appeal the Tribunal must, subject to clause 9.6(c)(vi)(C) refer the decision regarding the Appellant's non-nomination back to the Respondent for reconsideration and redetermination. Pursuant to clause 9.6(c)(vi)(C) the Tribunal may itself determine the issue of the Appellant's nomination if the Tribunal determines that:
 - 50.1 It would be impractical to refer the issue back in the time available, or
 - 50.2 In making its original decision, the Respondent had such disregard for proper application of the Nomination Criteria that a reasonable person would apprehend that it is unlikely that the Nomination Criteria would be applied properly by the Respondent if the decision regarding the Appellant's non-nomination was referred back to the Respondent.
51. Again, as referred to above, if the appeal is upheld, the Appellant seeks that the Tribunal determines the issue of his nomination and nominate him, whereas the Respondent says that the matter should be referred back to the Respondent.
52. Neither party made any submissions in support of the outcomes that they sought. Thus, although I understand that there is some urgency in finalising the Appellant's nomination or otherwise, the Tribunal is not able to find that it would be impractical to refer the issue back in the time available. The Tribunal would expect though that the Respondent would reconsider and redetermine the issue promptly. Further, absent any specific submissions as to this, but having regard to the submissions that have been made generally the Tribunal is not able to find that clause 9.6(c)(vi)(C)(2) is satisfied.

THE TRIBUNAL THEREFORE DETERMINES:

1. The appeal be upheld.
2. The decision regarding the Appellant's non-nomination be referred back to the Respondent for reconsideration and redetermination as a matter of priority.

Date: 24 April 2024 (decision given 22 April 2024)

Signature:



The Honourable Steven Strickland KC