

## **ATHLETES' SELECTION RIGHTS: THE CASE OF TONY DAVIS**

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Some of the most bitter controversies in sport have surrounded the selection of teams for major international competitions. This is not surprising given that the decisions facing selectors are often extremely complex. In most sports, selectors must balance delicately not only factors such as fitness, 'skill and tactical knowledge, but temperament and the capacity to respond to the stress of high level competition'.<sup>1</sup> The difficulty inherent in this process is often compounded by an abundance of excellent and worthy athletes. Moreover, the stakes are high. An athlete's performance may affect a sport's public standing and its chances for government funding and corporate sponsorship, as well as the careers of coaches and administrators. For elite athletes 'selection can mean improved performances, the rewards of self-satisfaction, new opportunities for income, [education] and employment and the pleasures of travel'.<sup>2</sup> For example, an Australian company offered swimmer Duncan Armstrong an employment and sponsorship package, involving on-the-job training, a guaranteed job when he retires and a regular 'wage' as a company employee, following his gold medal winning performance at the 1988 Olympics.<sup>3</sup> Similarly, Debbie Flintoff King was tipped to earn at least \$1 million in sponsorship after her win in the 400 metres hurdles.<sup>4</sup>

The assertion of this paper is that, as selection is of such obvious importance to the athlete, Australia's sports officials must aim to Select

the best possible team in a manner consistent with 'fairness' or more precisely, the 'rule of law'. The 'rule of law' in a sporting context requires that selection criteria be stated in sufficiently clear language that athletes know exactly what they have to do to make the team. If the rules confer discretionary powers on selectors, the 'rule of law' requires that their discretions be carefully confined and structured.<sup>5</sup>

Unfortunately, the procedures used to select Australian athletes have sometimes failed to satisfy these standards. Athletes have been victimised by the oppressive application of loosely worded selection criteria. Where selectors enjoy wide, unfettered discretions, the risk of bias in team selection has been increased. Moreover, the chances of an athlete appealing an adverse selection decision are remote; a recourse to the courts is often impractical and expensive and most sports do not have a formal internal appeal procedure.

The events leading up to the omission of 1988 national cycling champion, Tony Davis, from the Seoul Olympics team highlight the range of injustices an athlete may endure during the selection process. The Davis case also demonstrates the urgent need to reform the selection procedures of many sports so that they conform with the 'rule of law'. Such reform seems to be the only way of ensuring that athletes' rights in selection are properly recognised and protected.

### **The Cycling Selection Controversy**

Tony Davis' troubles began with his unexpected triumph at the Australian track cycling championships at Shepparton, Victoria, in March 1988. The titles were supposedly the selection trials for the 1988 Olympics.<sup>6</sup> In the 4000 metres individual pursuit Tony Davis defeated

the favourite, Los Angeles gold medalist Dean Woods, by 2.5 seconds in a new unofficial outdoor world record time of 4 minutes 36.57 seconds. As each country is permitted only one representative in each Olympic track cycling event, Davis was thought to have ousted Woods as Australia's rider in the individual pursuit.<sup>7</sup>

Davis himself initially believed his win had earned him selection for the individual pursuit.<sup>8</sup> However, he was advised several days after his victory that it had earned him only selection in the Olympic squad, not necessarily in a particular event.<sup>9</sup> Developments following the national titles exacerbated Davis' problems. The President of the ACF, Mr Ray Godkin, advised Davis after the Shepparton Championships that he would have to undergo further selection trials for the individual pursuit position and the national coach had informal talks with Davis, which indicated he was not the 'favourite' for the position.<sup>10</sup>

In June 1988 it was reported that both Davis and Woods had been nominated for the individual pursuit, but that no decision had been made on how the final starter would be chosen.<sup>11</sup> Davis was eventually advised that there would be a three race ride off in Brisbane, scheduled for early September.<sup>12</sup> It was then reported that there would be no ride off and that the final nomination would be made on the day before the event, after consultation between the national coach and the team manager.<sup>13</sup> It was finally decided that there would be a single time trial on 15 September 1988, just days before the start of the Olympic pursuit event. All of the above changes occurred within a month of the Games.<sup>14</sup>

Davis was advised of the ride off neatly twenty-four hours after Woods and within twenty-four hours of the trial. The team manager admitted this anomaly.<sup>15</sup> As well, Woods was noted to be in light

training two days before the time trial), which could be interpreted as him having received advanced notice of the trial.<sup>16</sup> In the trial itself, which Woods won decisively, Woods rode a special pursuit bike provided by Australian cycling authorities, while Davis rode a conventional bike. The one race ride off in no way simulated the complete pursuit event where a rider must compete five times in three days to win the gold medal. The single time trial apparently favoured Woods whose record at previous World Championships suggested his performances faltered over multiple rounds.<sup>17</sup> No Australian team member offered assistance to Davis for the trial.<sup>18</sup> Davis used a member of the media and a member of the English cycling team to hold a stopwatch and call his race schedule.<sup>19</sup> By contrast, Woods' support came from the national coach and the rest of the Australian cycling team.

### **Selection Criteria: fairness and bias**

The omission of Tony Davis from the Seoul Olympics cycling team obviously raises serious questions about the rights of athletes in the selection of representative teams and the extent to which these rights are protected. It is therefore pertinent to examine the rules pursuant to which the cycling team for the Seoul Olympics was selected. Prior to an amendment of the ACF by-laws in March 1988, there were no written criteria for the selection of Australian cycling teams. The by-laws empowered the national coach to formulate selection policy and for the seven person selection committee to apply it.<sup>20</sup> There was no requirement that the criteria be published in advance and nothing to prevent the coach or committee changing their minds.

The amended by-law 10 reduced the selection committee to three members (the current committee includes the national coach). It further provided that the Committee was to 'determine the selection criteria that will enable it to reach its conclusion [sic]' and that the criteria 'may' include amongst other events, the national championships. The by-law gives selectors an enormously wide, unfettered discretion in deciding whom they will Select. Cyclists are given no precise guidelines as to what performances will definitely be taken into account when selecting the Olympic team. Tony Davis was obviously victimised by the capricious application of these sloppily drafted selection rules. A couple of examples will suffice to illustrate this point. First, the national selection trials should not have been advertised as Olympic selection trials, thus implying that winners would ride at Seoul, unless the selectors were prepared to treat them as such. By contrast, in the United States track and field Olympic selection trials, the first three placegetters in an event are automatically entitled to participate in their discipline at the Olympics. The ACF's disclosure that the trials only guaranteed a place in the Olympic squad and not the right to ride, was not only grossly unfair to Tony Davis but to all cyclists vying for Olympic selection. Secondly, the selectors' vacillation with respect to their method of selecting the individual pursuit rider and later, the dates for the ride off, was inexcusable. The uncertainty generated by the numerous changes to the dates for the trial clearly jeopardised Davis' preparation and could explain why he rode almost five seconds slower than his previous best in the trial. Thirdly, Davis was the only 1988 national titleholder required to participate in a trial to secure his place at Seoul. This was patently unjust. There cannot be one rule for one rider and another for the rest.

The grossly unequal treatment of Davis in the pursuit trial smacked of a crudely organised campaign to ensure a Woods victory at the expense of Tony Davis' rights.

Selection criteria in accordance with the 'rule of law' could have avoided all of the above injustices. In particular, if the ACF believed that some discretion was necessary and unavoidable, the rules should have stated mandatory objective criteria, in order of priority, to provide the basis of selectors' decisions. As well, the selectors could have 'confined and structured their own discretion by announcing in advance [at least six months] what criteria they would use in selecting teams, and the tests or measures they would use to determine which cyclists best met the criteria.'<sup>21</sup>

The treatment of Tony Davis leading up to the ride off with Dean Woods raises the issue of the efficacy of trials as a selection mechanism. If trials must be conducted, it is essential that they be conducted fairly. The selection rules should specifically indicate the circumstances under which a trial will be held. Participants must be informed simultaneously and well in advance of the date and nature of the trial. If possible the trial should replicate the complete event. There should, as far as is practicable, be equality of access for all participants to training facilities, equipment and support mechanisms. None of these requirements were observed in Davis' case.

The Davis fiasco also raises the question of bias in the selection of the Olympic cycling team. Vaguely worded selection criteria, conferring excessive discretions on selectors, create the potential for favouritism. This is especially so where the national coach is also a selector and as well, personally coaches candidates for the Olympics - as was the case

with Charlie Walsh.

If a strict legal test of bias was applied to athlete selection procedures, coaches like Walsh, who have personal or professional relationships with athletes vying for places on national teams would be ineligible to sit on selection committees.<sup>22</sup> In this regard, it is significant that, according to De Smith's *Judicial Review of Administrative Action*, 'the courts have often quashed decisions on the strength of the reasonable suspicions of the party aggrieved, without having made any finding that a real likelihood of bias in fact existed.'<sup>23</sup> It is obvious that if this strict test was applied in all cases the most appropriately qualified selectors would often be eliminated. But even if all qualified selectors are biased to a certain extent, it is vital that measures be taken to minimise the risk of these biases distorting selection decisions. For instance, bias could have been checked if the cyclists had been allowed to elect a retired cyclist to sit on the selection committee.<sup>24</sup> More importantly, most suggestions of bias could have been avoided if the selection criteria had been stated exhaustively in advance by the Australian cycling selectors.

### **The Right of Appeal and the Need for Reform**

As a last resort Tony Davis might have taken his case to the courts. However, in the unlikely event that his case had been heard prior to the Olympics, it is unclear what action could have been taken. Given the importance of selection to Davis' career, it would have been preferable if the ACF's constitution had provided for a formal internal appeal procedure. Such a mechanism would be simpler, cheaper and swifter than a recourse to the courts.<sup>25</sup> The grounds for an appeal would need to be precisely enunciated but could include allegations that

selection was not made according to the rules or that there was a reasonable apprehension of bias or conflict of interest in one or more of the selectors. In turn, the existence of an appeal mechanism would provide an incentive for the articulation of precise selection criteria and the even application of them.<sup>20</sup> It would also assist the ACF in avoiding the adverse media attention generated by controversies like that involving Tony Davis.

It may be the case that, after a successful appeal, the selectors find it impossible to separate two athletes vying for one position in a team. The selectors might then decide to award one of the athletes another benefit, such as an automatic placement on another team.<sup>27</sup> For example, Australia's cycling selectors could have offered Tony Davis a place in the four man teams pursuit, which went on to win a bronze medal, as 'compensation' for being overlooked for the individual pursuit.

Tony Davis' case indicates that neither 'fairness' nor any other basic protections that Australians enjoy have been built into the administration of Australian amateur cycling. The Davis affair is not a new phenomenon in Australian sport. Every couple of years, as Olympic or Commonwealth Games approach, athletes and officials become embroiled in controversies over questionable selection decisions. It is now imperative that new structures and practices recognise athletes' rights. The ACF's and other sports bodies' rules must be carefully redrafted. New procedures should be adopted. For, as the Canadian campaigner for athletes' rights, Bruce Kidd, has argued 'excellence without basic rights is simply not excellence.'<sup>28</sup>

## NOTES

1. B. Kidd and M. Eberts, Athletes' Rights in Canada (Toronto: Ministry of Tourism and Recreation, 1982) p. 13.
2. ibid. p.13.
3. The Sun, Melbourne, 23 February 1989.
4. The Herald, Melbourne, 3 October 1988.
5. B. Kidd and M. Eberts, op.cit., pp37-8.
6. The Australian, 25 March 1988. The programme issued at the 1988 Australian track championships carried statements on the cover and in the President's message indicating they were the Olympic selection trials.
7. ibid.
8. Personal correspondence with Wally Foreman, 7 December 1988. Mr Foreman is the Director of the Western Australian Institute of Sport. Tony Davis is a scholarship holder at the Institute. Mr Foreman was also Davis' unofficial spokesperson at the Seoul Olympics.
9. ibid. See also The Australian, 14 September 1988.
10. ibid.
11. The Herald, Melbourne, 8 July 1988.
12. Personal communication with W. Foreman, op.cit.
13. ibid. See also Australasian Cycling and Triathlon News 4, No. 3, (September, 1988).
14. ibid. See also The Sun, Melbourne, 13 September 1988.
15. ibid.
16. ibid. See also The Age, Melbourne, 14 September 1988.
17. The Sun, Melbourne, 13 September 1988; The Australian, 10-11 September 1988.
18. Personal correspondence with W. Foreman, op.cit.
19. ibid. See also The Age, Melbourne, 14 September 1988.
20. By-law 10.
21. B. Kidd and M. Eberts, op.cit., p.45.
22. ibid. p.46.
23. J.M. Evans, de Smith's Judicial Review of Administrative Action, 3rd Edition (London: Stevens, 1973), p.231.
24. B. Kidd and M. Eberts, op.cit., p.46.
25. Davis and WAIS decided not to pursue his case through the courts because it would have been a complex and expensive procedure. Personal communication with W. Foreman, op.cit.
26. B. Kidd and M. Eberts, op.cit., pp47-8.
27. ibid. p.48.
28. ibid. p.10.