

IN THE MATTER OF AN APPEAL TO
THE OLYMPIC COUNCIL OF IRELAND ("OCI")

Between/

GATRIONA CUDDIHY

Appellant

AND

ATHLETICS IRELAND

Respondent

AND

JOANNA MILLS

Notice Parties

Collectively the "Parties"

BEFORE AN APPEAL TRIBUNAL OF THE OLYMPIC COUNCIL OF IRELAND
APPOINTED PURSUANT TO RULES 27 AND 28 OF THE OLYMPIC CHARTER,
THE OCI CONSTITUTION AND PURSUANT TO THE "2012 OLYMPIC SUMMER
GAMES - LONDON AGREEMENT FOR THE SELECTION OF ATHLETES FOR THE
SPORT OF ATHLETICS."

Appeal Tribunal

William O'Brien, First Vice President OCI
Dermot Sherlock, Honorary General Secretary OCI
Susan Ahern, Executive Committee Member (Chair)

Appellant

Michael Lanigan (Poe Kiely Hogan Lanigan Solicitors)

Respondents

Judy Goldman (Beauchamps) instructing David Casserly BL

Notice Parties:

Eoghan Devlin BL (Instructed by John Fahey & Co.)
Ian Neely, Coach

Appearances and Attendances

Orlaith Byrne, Gilles J Kennedy & Co. Solicitors (Counsel to the Tribunal)

The Appeal was held on Thursday 19th July 2012 ("Hearing") at Huguenot House, St. Stephen's Green, Dublin 2.

DECISION OF THE APPEAL COMMITTEE

INTRODUCTION

1. The Athletics Ireland ("AI") Selection Panel for the Women's National Relay Programme selected the Appellant Ms Cuddihy to be nominated to the OCI as a member of the Women's 4 x 400m Relay team for the London Olympic Games 2012. A Notice of Appeal was submitted by the Notice Party Ms Mills against such selection on 4th July, 2012 to the Athletics Ireland Appeals Panel ("AIAP") pursuant to the Athletics Ireland Selection Appeals Procedure (the "AI Appeals Procedure"). The AIAP determined on 7th July, 2012 to uphold the appeal of the Notice Party and permit her to take the place of the Appellant on the Team.
2. The Appellant Ms Cuddihy, has appealed the decision of the AIAP to the Olympic Council of Ireland pursuant to the 2012 Olympic Summer Games – London Agreement for the Selection of Athletes for the Sport of Athletics (hereinafter the "London 2012 Agreement") signed between the OCI and AI on 8th February, 2011.
3. The Appeal Tribunal were selected as a sub-committee of the Olympic Council of Ireland to hear this matter, pursuant to clause 5.2 of the London 2012 Agreement and in accordance with the OCI Constitution (including in particular Articles 5.2 and 5.8 thereof) and the Olympic Charter (in particular Rules 27 and 28 thereof). The Appeal Tribunal members are all presently serving members of the OCI Executive Committee and the Chair is a qualified legal practitioner.
4. The facts in this matter were set out in brief in paragraph 10 below.
5. The Appeal Tribunal met in person on 11th July to consider if the appeal was properly constituted and to examine documentation requested from the Respondent including the Decision Minute of the AIAP. The Tribunal determined that the Appeal should proceed to be considered and arranged an expedited timetable and for the Parties to be appropriately notified.
6. A Directions Hearing was heard by the Appeal Tribunal with Counsel for the Appellant and Respondent (by telephone conference) on 16th July, 2012. The Notice Party was properly advised but not represented at the Directions Hearing. A series of directions were issued by the Tribunal with regard to the pre-hearing provision of evidence

(including witness statements) and submissions together with the procedures to be applied by the Appeal Tribunal at the scheduled Appeal Hearing on 19th July, 2012.

7. At the time of the Directions Hearing Counsel for the Appellant anticipated calling two witnesses but subsequently elected not to do so. The Respondent did not propose calling any witnesses (and the Notice Party neither sought to nor called any witnesses subsequently). The Appeal Tribunal directed the Respondent to make available at the Hearing on Thursday 19th July, 2012 any member of the AI Appeal Panel.
8. The Parties made a series of acknowledgements which were briefly summarised in the Second Minute of the Appeal Tribunal (and reconfirmed at the outside of the Hearing by all Parties):

"It is acknowledged by the Parties that:

 1. *the OCI holds the exclusive rights of selection in respect of the athletes (including the athletics team) to represent Ireland at the Summer Olympic Games 2012;*
 2. *all internal appeal processes in respect of the selection of athletes by Athletics Ireland for nomination to the OCI to become members of the Irish Olympic Team at the Summer Olympic Games 2012 have been exhausted;*
 3. *they have no objections to the Appeal Tribunal (and its constituent members) appointed by the Executive Committee of the OCI for the purposes of hearing the present Appeal;*
 4. *the Appeal Tribunal has the power to set its own procedures;*
 5. *the procedures in respect of the Hearing were outlined to and agreed by the parties, and*
 6. *the decision of the Appeal Tribunal of the OCI in respect of the within Appeal shall be final, without prejudice to any right of appeal by the Parties to the Court of Arbitration of Sport."*
9. The rules and procedures governing the conduct of the Hearing were outlined in the Directions Hearing of 11th July, 2012 and agreed by all the parties present and reconfirmed at the outset of the Hearing. All parties present accepted that the burden of proof was upon the Appellant to demonstrate on the balance of probabilities that there had been a failure to follow due process and/or the AI selection procedures for the Women's National Relay Programme on the part of the AIAP in reaching its decision to allow the appeal of Ms Mills. The Tribunal considered the appeal on a *de novo* basis.

Background

10. The facts can be summarised as follows:

10.1 The London 2012 Agreement agreed between the OCI and AI sets out agreed selection standards and procedures for the selection of athletes for the 2012 Olympic Summer Games.

10.2 AI developed the selection process for the Women's Relay Programme in the form of the Women's National Relay Programme Agreement (the "Relay Agreement") which included fundamental principles, identification of the pool of athletes for development/selection, eight (8) selection factors, timelines and details regarding roles and responsibilities of the relay coach, athletes and their support personnel and communications. The selection process which would be applied to a pool of eight (8) athletes who would be developed with the intent of choosing six (6) athletes who will run at the 2012 Olympic Games. It is clearly stated in the Relay Agreement that "Selection of the team will be at the sole discretion of AAI High Performance appointed relay staff" and includes eight (8) Selection Factors as follows:

- *"Expression of interest and a 100% commitment to the Relay Programme (Athlete/Coach).*
- *Competition results (2011/12), win/loss record against opponents, seasons averages/best, performance ranking list and;*
- *Consistency and Repeatability of performance in the 2011 and 2012 domestic and international seasons. Repeatability indicates consistency of performance and soundness of athlete preparation necessary to compete at the 2012 Olympic Games and;*
- *On-Demand Performance and success at the Olympic Games requires the ability to compete on-demand at a level equal to or better than the individual's seasons best. The ability to achieve a performance results at specific high performance competitions is a principle for selection. The history and performances at previous Olympic Games, European and World Championships, in particular the history of the athlete's on-demand performances at those major championships by reference to the level of performance expected of the athlete at those championships will be considered and;*
- *The Final Phase Readiness and achievement of a fitness standard in the final build-up phase to and during the Olympic Games is a fundamental principle for selection.*
- *The Athlete/Coach submit a FULLY detailed Performance Plan/ Competition Schedule.*

- *An athlete must compete in the AAI Outdoor National Championships in order to be eligible for the relay pool, except in emergency situations where a waiver based on medical or exceptional circumstances may be given by AAI, at its discretion.*
- *Signed "Relay Programme" Agreement."*

10.3 Selection of the Women's Relay Team was undertaken by the AAI High Performance appointed relay staff, namely Kevin Ankrom, Steve Maguire and Patsy McGonagle (AI Team Manager for London 2012). They undertook a grading exercise based upon their assessment of the Selection Factors. In their Final Relay Pool Selections document they noted that:

"In summary of the "selection factors" (from our Relay Programme document) this Pool of 6 OG Team members will be selected based on their overall relay experience, overall experience in major championships (individual and relay), potential to improve, personal best(s) (2011/12); season average(s) (2011/12), relay average splits (2011/12); 400m ranking (2011/12) : 2011-12 both years will be used and in some cases combined). With the combination of objective and subjective factors all the information will be combined together and taken into consideration for selection".

Immediately following the European Championships, the selectors choose the relay team and in 6th position Catriona Cuddihy was selected, therefore Joanna Mills was not selected for the London Games.

10.4 Ms Mills appealed to the AIAP on 4th July, 2012 within the 24 hour appeal window provided for in the AI Appeals Procedure. She was afforded an additional time period of 24 hours by the AIAP to submit more detailed grounds of appeal (pursuant to Article 3.1 of the Appeals Procedures) and a second Notice of Appeal was duly submitted and considered.

10.5 AI advised the six (6) selected athletes of Ms Mills appeal exclusively by e-mail communication between 19:47 and 19:53 on 5th July, 2012 notifying them that "as your selection for the 4x400m relay for the Olympic Games 2012 may be affected by the decision of the Appeal Panel, the Appeal Panel invites you to comment on the merits of the Appeal. You will find the relevant documents attached to this email as set out in the Schedule to this letter. Please send any comment you wish to make to John Foley, Secretary of the Appeal Panel...by 7pm, Friday 6th July 2012". The Letter also quoted Article 7.5 of the AI Selection Appeals Process which stated that "...it is likely that the decision of the Appeal Panel will determine the rights of all the affected athletes (not just the appellant) and therefore the Third Party will be prohibited from

raising again by way of a separate or further appeal matters which have already been decided upon".

- 10.6 The athletes acknowledged receipt of the notification at various stages from the afternoon of 7th July to 9th July, 2012. In essence none of them was aware of the appeal by Ms Mills prior to it taking place (during the morning of 7th July) and their invited comments were received after the hearing.
- 10.7 The AIAP met to consider the appeal of Ms Mills and issued their finding by way of a Minute dated 7th July 2012. It upheld Ms Mills appeal based on two factors summarised as follows:
- "1. The analysis of the Selector under selection factor #1 was too narrow in scope. JM did not get credit for her previous relay experience.*
- 2. The analysis of the Selector under selection factor #2 was too narrow in scope. The Selector did not consider JM's performances which should have been considered. The Agreement refers to performances in "Olympic Games, World Championships and European Championships". JM had competed in these as a youth and junior athlete and should have been considered".*
- 10.8 Ms Cuddihy was advised by AI by telephone on 8th July of her de-selection by the AIAP. This was the date of the Irish National Championships at which she was a competing athlete. It was a stipulated condition in the Relay Agreement that *"An athlete must compete in the AAI Outdoor National Championships in order to be eligible for the relay pool, except in emergency situations where a waiver based on medical or exceptional circumstances may be given by AAI, at its discretion."* All of the athletes originally selected by the AI High Performance relay staff (the "Selectors") competed in this Championship except Ms Mills.
- 10.9 The Appellant now brings this appeal against the decision of the AIAP. The Appellant is a student of physiotherapy who has taken a year out from her studies to train and compete with a view to competing in the 4 x 400m team at the London Games. *"I have taken a year out of my studies (physiotherapy) to commit myself fully to my goal - I am 100% committed to the Relay Programme."*
- 10.10 The Respondent, Athletics Ireland is the national governing body for athletics in Ireland and is duly recognised by the Irish Sports Council and the Olympic Council of Ireland. Pursuant to the London 2012 Agreement, AI agreed (at clause 2.1) to *"submit to the OCI its nominations of any individual(s) or team(s) eligible for consideration under clause 3 below within the relevant deadlines set out in clause 9 below"*. The "Key Deadlines" were in fact set out in clause 10.1 of that Agreement.

- 10.11 Ms Joanna Mills joined the proceedings as a Notice Party, did not make written submissions and was represented at the Hearing by Counsel. Ms Jessie Barr was given an opportunity to become a Notice Party but declined.. The other members of the Women's 4 x 400m relay team being Claire Bergin, Joanna Cuddihy, Marian Heffernan and Michelle Carey, were all pre-selected (having competed at the 2011 World Championships in Athletics -- in accordance with the AI Relay Agreement), and therefore their selection will be personally unaffected by the outcome of this appeal.

Scope of the Proceedings

11. The London 2012 Agreement at clause 5.1 requires AI to *"have an appeals process available to Team members and have submitted same to the OCI no later than 20th May 2011. Any internal appeals process must be concluded prior to nomination to the OCI"*. AI had in place such a process in the form of the AI Appeals Procedure which applied for *"all International Individual team selection decisions"* (clause 1.1). Selections thereunder are required to *"take place in accordance with the selection policies published annually on the Athletics Ireland website and supplemented by any other published addenda for that particular year"* (clause 1.2) and the decisions made pursuant to the Appeals Procedure were final and binding (clause 1.4).
12. The AIAP considered the question of whether the Selectors for the Women's Relay team followed the selection criteria appropriately and fairly in reaching their decision not to select Ms Mills to the Women's 4 x 400m Relay Team for the London Games. It now rests with this Appeal Tribunal to review the AIAP decision and determine if the AIAP review of the Selectors' decision and their application of the selection criteria were appropriately and fairly carried out in relation to the AIAP's decision to uphold the appeal and select Ms Mills.

Grounds of Appeal

- A. *Failure by the AIAP to follow due process and/or the selection procedures*
13. Counsel for the Appellant argued a number of grounds in the appeal across both technical and substantive grounds that the AIAP should not have allowed the appeal from Ms Mills and in doing so there was a failure on the part of the AIAP to properly apply the selection criteria. These arguments were fully considered by the Tribunal which had the benefit of full argument by all the Parties during the course of the Hearing.
14. The Appellant argued that AI did not comply with the terms of the London 2012 Agreement on a number of fronts:
- 14.1 *The applicable nomination date to OCI:*

That on the applicable nomination date for the Women's Relay Team, being 2nd July, 2012, the Appellant was the valid nominee and that was the only date by when a valid nomination could be made. The Tribunal was content that the Irish Women's Relay Team by virtue of its 13th place position in the IAAF (International Association of Athletics Federations) ranking list as at 2nd July rendered the Team eligible for nomination to the OCI for selection for the London Games. This is consistent with Section D paragraph 5(c) the IAAF Qualification System – Games of the XXX Olympiad for Relays which states that *"The deadline for national relay teams to record qualifying performances for the Olympic Games Athletics competition is 2 July 2012. On 3 July 2012, the final rankings (top 16) in each of the relays will be published on the IAAF website"*. However it seems clear to the Tribunal that the 2nd July, 2012 was the final cut-off date for ranking purposes under the IAAF Qualification System. The validation of the final rankings (top 16) were not to be published until 3rd July by IAAF, therefore it appears logical to the Tribunal that a properly founded nomination by AI could not have been made to the OCI before 3rd July, which was the date AI nominated the Women's Relay Team to the OCI.

Notwithstanding the above the Tribunal had cause to consider clause 4.1 of the London 2012 Agreement which provides *"The closing date of the nominations to the OCI of athletes for the sport of Athletics is 11th July for all events"*. Therefore notwithstanding the reference to the Key Deadline date of 2nd July in clause 9.1.1 (which refers to the IAAF deadline date for relay qualifications) and/or in clause 10.1 (which refers to 2nd July, 2012 as the nomination date for Relay Teams to be received by the OCI), the Tribunal finds these provisions are subject to the overall nominations cut off date for athletics of 11th July, 2012 stipulated in clause 4.1 of the London 2012 Agreement.

14.2 *The pre-notification of the selected team:*

That the publication of the nominated Women's Relay Team members prior to the selection of such persons by the OCI was a breach of the London 2012 Agreement. The Tribunal noted the apology of AI to the Appellant for any embarrassment or difficulty caused by their announcement of the nominations to the OCI. While such announcement should have been made in compliance with the provisions of the London 2012 Agreement the fact of its announcement does not bar the application of the normal Appeals Procedures and ultimately recourse pursuant to the London 2012 Agreement for any unselected or de-selected athlete (as the case may be). The breach

Itself is admitted and it is a matter which the OCI may wish to pursue with the Respondent separately but does not affect the instant decision.

15. The Appellant argued that AI was *ultra vires* in entertaining and deciding an appeal on the Women's Relay Team selection;

15.1 *That AI is not the selection body and therefore no appeal to an AI Appeals Panel was permissible:*

The Tribunal has addressed the contractual framework in place between the OCI and AI at paragraph 11 above. It is a condition of the London 2012 Agreement that the National Federation (AI) has in place an appeals procedure in respect of its nomination to the OC for selection of athletes for the London Games. The Appeal Process of the AI was a mandatory requirement of the Agreement and not therefore *ultra vires*. Counsel for the Appellant conceded during the hearing that the AI Appeals Procedure applies to all athletics team selections and therefore to the selection of the Women's Relay Team for the London Games.

15.2 *Selection by anyone other than the AI High Performance relay staff is ultra vires;*

The Tribunal understands the plain meaning of the wording in the Relay Agreement that "*selection of the team will be at the sole discretion of the AAI High Performance appointed relay staff*". However, that does not mean, as argued by the Appellant, that such decision cannot be subsequently challenged or the subject of review to ascertain if such decision was made in a fair, reasonable and appropriate manner and that the Selectors applied the applicable selection criteria in the correct fashion. The appeal by Ms Mills to the AIAP was no more than a challenge to the underlying assessment of the AI High Performance relay staff and for which a separate and distinct appeals process was established. The assessment of the AIAP is itself subject to further review as demonstrated by the instant appeal. The appeal to AIAP was therefore not *ultra vires* on this ground.

Alternative grounds of appeal were also laid by counsel for the Appellant in the event the Tribunal found that the AIAP appeal was in fact validly constituted. These alternative grounds are addressed below:

15.3 *That the appeal by Ms Mills before the AIAP was not in time;*

This ground of appeal was withdrawn at the Hearing by Counsel for the Appellant as evidence of the first Notice of Appeal by Ms Mills had in the interim been provided by the Respondent.

15.4 That the means of communication of the appeal before the AIAP were inadequate and unjust;

The Tribunal had some sympathy for the Appellant in terms of the limited timeframe afforded to the potentially affected athletes in the appeal before the AIAP and the fact that a direct phone call or text did not accompany the e-mail communication. However, the terms of the AI Appeals Procedure are quite clear in this regard and provide for *"any reasonable method of communicating with athletes which will include oral announcements to groups of athletes, telephone calls, text messages, e-mail or fax and athletes must be aware of this and keep a constant review of these communication channels to receive the selection decision"*. AI is not in breach of the letter of its Appeal Procedure in this regard, but given the significance of the outcome, with an Olympic Games participation on the line, it would not have been unreasonable for more diligence to have been exercised by AI to ensure the affected athletes had received the communication and were on actual notice before the expiry of the period within which they could make a comment on the appeal and indeed before they potentially lost their right *"from raising again by way of a separate or further appeal matters which have already been decided upon"* (per clause 7.5 of the Appeals Procedures).

15.5 The AIAP was inquorate;

Two members of the listed AIAP self-declared a conflict of interest due to their being members of the same athletics clubs as two of the six athletes selected in positions 5 to 7 for the Relay team. They were replaced by a fourth member, the former President of AI. The Tribunal is clearly of the view that what the AIAP did was clearly preferable to retaining the five named members and subsequently exposing itself to a challenge on the grounds of bias or otherwise. The fact that two members were replaced by one alternate does not breach the terms of the Appeals Procedures and even were it to do so (which in our view it does not) the Tribunal is of the view that it would be adequately remediable under clause 9.1 of the Procedures which permits deviations from the Procedures *"unless there is a clear and significant risk that the deviation has affected the decision of the Appeal Panel to the detriment of any of the parties"*. The Tribunal does not consider that there has been any detriment to any of the parties on this score.

15.6 *The AIAP considered the appeal based upon grounds of appeal which were not submitted by Ms Mills, and therefore acted ultra vires:*

The Appellant argued that the AIAP took unargued factors into account and substituted its own view for that of the Selectors. The AIAP reached a number of conclusions in its assessment of the Selection Factors applied and the manner in which they were applied by the Selectors. It was well within their remit to do so. The output of those deliberations is considered further below.

16. The Tribunal had much documentation before it but did not have the benefit of questioning either the original selectors or any members of the AIAP to ascertain in particular areas the precise weight and in particular aspects the meaning accorded by them to relevant Selection Factors. Consequently the Tribunal has had to rely upon the material provided and in reviewing the decision of the AIAP and the manner in which it interpreted the Selection Factors, to do so based upon a reasonable assessment of what the ordinary and reasonable athlete would understand them to mean. The Tribunal notes that it did not take into consideration the comments of the athlete subsequent to 7th July as these had not been considered by the AIAP at the time of its deliberations on the Mills appeal.
17. The essence of this appeal is whether the AIAP in reviewing the decision of the Selectors to select the Appellant in the first instance and the application of the Selection Factors by them and determining that the application of such factors by the Selectors was on two grounds "too narrow" were correct in reaching such a conclusion (when taking into account the "Selection Factors" which were set out in the Relay Agreement as per para.10.2 above).
18. The Selection Factors were set out in the Relay Agreement which the interested athletes signed up to. Some of the eight Selection Factors are objective in nature e.g. personal bests (2011/12) while others are subjective in nature and fall to be assessed by the Selectors. The Selectors set out eight factors in their selection report under the heading 'Selection Factors for the Final 6 Pool' (as set out in para.10.3 previously). Upon reflection of the marking system and the summarised selection factors the AIAP notes in its decision *"that the factors set out above [being the summary factors in the Selectors report] did not exactly mirror the Selection Factors in the Women's National Relay Programme Agreement (the "Agreement"). However it appears that they sufficiently cover the elements set out in the Agreement and do not stray into inappropriate areas"*. This Tribunal understand this statement to mean that they, the AIAP, were content that the summary criteria in the Final Selection Process and Timeline of Events was a satisfactory summary of the Selection Factors.

In contrast to the Selectors who clarified that the selection factors are "*In summary of the "selection factors" (from our Relay Programme document..."*", the AIAP provided no clarification as to whether they progressed solely upon the summary criteria or whether they at all times referenced such summary criteria back to the Selection Factors. The AIAP minute uses the summary selection criteria language and refers only to the Selection Factor language at page 5 when it references "*performance in Olympic Games, World Championships and European Championships.*" A clarification of this point would have been useful to the Tribunal.

19. The Selectors considered each of the eight (8) Selection Factors in coming to their view with regard to who the selected six (6) athletes would be for the Relay Team. The first five (5) athletes stood out against the criteria and therefore the race for 6th place was between the Appellant and the Notice Party. The AIAP who reviewed their decision decided that in the Identified Selection Factor No.1 "overall relay experience" and Selection Factor No.2 "overall experience in major championships (individual and relay)" the Selectors used too narrow a scope of review the consequence of which was that under each such factor the Notice Party was disadvantaged.
20. This Appeal Tribunal felt it necessary to compare the reviews undertaken by the Selectors on the one hand and the AIAP on the other against the Selection Factors in order to ascertain which party interpreted and applied the criteria correctly in all the circumstances. In the Selection Process and Timelines of Events document completed by the Selectors (and reviewed by the AIAP) it clearly outlines under the heading Summary of Selection (on page 7) what the Selectors considered Factor No.1 to mean: "*overall relay experience: (This criteria looked at what was the overall relay experience that athletes have had with the Irish Relay Olympic Games programme) I looked back only from which I started working with the team June 2011 to 1 July): I took into consideration practices with team, relay racing with team, 100% commitment from the athlete, team cohesiveness, and stepping back and looking at just a basic general overall time and experience that the athlete had with the team*".

In contrast, the AIAP had an issue "*with the application of this criterion and its narrow scope of review*". It considered that previous competitions (e.g. Commonwealth experience in the 4 x 400m and previous European Junior and other (unspecified) competitions in which the Notice Party partook (prior to the period commencing June 2011) should have been considered. They also reflected upon the age of Ms Mills and appeared to disapprove when "*there also did not seem to be consideration of the fact that she is a 19 year old and one does not expect young athletes to be pushed as hard nor that she was, justifiably, focusing on the World Junior Championships (the "WJCs")*". In reaching this conclusion the AIAP differed in its interpretation of Factor

No.1 to that of the Selectors and in so doing reduced the weighting which had been applied by the Selectors to the Appellant and increase the weightings awarded to Ms Mills.

21. There are a number of issues which emerge from the approach adopted by the AIAP in relation to their interpretation of Selection Factor No.1 (as set out in paragraph 20 above) and the manner in which they sought to rectify a perceived misinterpretation of that Selection Factor.

a. In the first instance the AIAP itself applied a narrow interpretation to Factor 1 (overall relay experience) by focusing on competitive relay experience. They went back in time prior to June 2011 and considered (specific) competitions in which Ms Mills had participated, while simultaneously noting that the Appellant "has been out of the sport for four years but received two tick marks for her overall relay experience". In so doing the AIAP (on the face of their decision) appear to this Tribunal to have failed to take account of the other factors which the Selectors had considered in their assessment of Selection Factor No.1, including specific experience within the Irish Relay Olympic Games Programme, practice, racing and cohesiveness with the team and 100% commitment from the athlete and the overall time spent and experience the athlete had with the team. Given the Selectors gave the Appellant a 50% score and the Notice Party a 25% score under this category (based on their assessment of the criteria and its meaning as outlined) it would appear that Ms Cuddihy marked strongly in these team and commitment areas notwithstanding that she had been out of racing for a long period. Ms Mills also obtained marks from the Selectors based upon her experience notwithstanding her level of commitment (a component of the assessment of this Factor) to and time spent with the team was not at the level of the Appellant;

"Whilst Joanna was running individual 400m the other girls including Catriona were all at specified relay camps and running in Poland where at a key time they could have gone to Geneva just to post a better time on a fast track. They all made the 100% commitment to the Relay Programme...

She [Joanna] did not actively seek selection/interest in the relay until I contacted her...

Joanna and her coach continued to say that the priority was not the Olympic Games Relay team but the priority for them was the World Junior Championships and the second thought was the Olympics. I can totally accept the goal is the World Junior Championships but the Relay Programme states that 100% commitment is the priority for the Relay Team."

(Kevin Ankrom)

- b. For the AIAP to mark the Appellant down and Ms Millsup based on competition experience was to (i) penalise the Appellant for clear weightings she received by the Selectors from their experience of working with the relay team preparation programme and to (ii) ignore the factors beyond pure relay competition participation that had been equally applied by the Selectors to both candidates within the June 2011-12 period. This approach by the AIAP in effect results in a narrowing of the scope of Selection Factor No.1 to one involving at least a primary focus on competition results and in the view of the Tribunal this does not sit companionably well when the Selection Factors are considered as a whole. The Tribunal members though not experts in athletics are from experience aware of the cohesiveness necessary in any team sport and the practice and commitment that all members must contribute if the team is to do well in competition. Such factors were specifically considered by the Selectors under Selection Factor No.1 and were largely ignored by the AIAP who placed a greater reliance upon competitive relay experience over a longer period of time than 2011/2012 – this Tribunal does not consider this to be a reasonable reinterpretation of the Selection Factors by the AIAP.
- c. By taking into account the age (and youth) of Ms Mills the AIAP applied consideration to a criteria which is entirely out-with Selection Factor No.2 and not provided for expressly in the Relay Agreement. In so doing they gave the Notice Party an advantage as against the Appellant when it is imperative that the Selection Factors are applied equally to all contenders.
- d. The AIAP appears in its decision to give credit to Ms Mills for the fact that she was putting the World Junior Championships as a primary focus and this was justifiable. When one considers that what is in contention in this appeal is a place on the Irish Olympic Women's 4 x 400m Relay Team and all members of the pool of athletes who wish to be selected for consideration must as a condition of selection give "a 100% commitment to the Relay Programme (Athlete/Coach)" it is somewhat out of kilter to give an athlete additional credit for not giving the Relay Team a significant commitment – which is what the criteria contemplates – namely "a 100% commitment". It is also at odds with the position of the Selector Kevin Ankrom who in communications to the athlete Ms Mills and her coach gives Ms Mills every opportunity to both commit fully to the Relay Programme while at the same time focusing on the World Junior Championships, he states "I really would like to express that I want you on the relay squad. There is no reason why you cannot do both with a focus of World Juniors...." However when it came to marking under Factor No.1 the Selectors could not give Ms Mills high

marks to reflect her commitment as *"Joanna had only committed to the relay programme at the last minute, did not see the relay as the priority for the year and only did one team activity Euro Champs. Her priority for the year was and is the World Junior Championships. She got 1 check for her involvement with the team at the Euro Champs"*. Commitment is also a criteria under Selection Factor No.8 which is touched upon by the AIAP but not considered in any great detail by it as it did not consider it could review this selection factor *"unless inappropriate factors were considered in making the subjective analysis."* The AIAP did not identify any *"inappropriate factors"* the Selectors took into account under this heading and neither does this Tribunal.

22. The AIAP took issue with the Selector's interpretation of Selection Factor No.2 (*"overall experience in major championships (individual and relay)"*), and it sought to rectify a perceived improper application of the criteria under this heading. This Tribunal gave consideration to the interpretation and approach of the AIAP in this regard.
- a. The Selectors are clear that under this Factor No.2 criteria they *"looked at who had experience in major championships with our Irish Relay Team and the experience that athletes have had in major championships"*. The AIAP took issue with the scope of their interpretation of the Selection Factor considering it too narrow in scope and that the failure to consider Ms Mills' major championship experience under this criterion at both senior and junior level was erroneous. The Tribunal acknowledges that the Selectors did appear to consider only senior championships (see referral at page 8 of the Selection Process and Timeline of Events document under this criteria refers to major championship experience and this being important in the context of Olympic selection as *"we need athletes whom know what the pressure is like at a senior championship and how to perform on the day at a big meet and have proven it"*). However, the pertinent question is whether the Selectors were correct to do so based upon the Selection Factors.

When the totality of Women's Relay Programme Agreement is considered, including the Selection Factors, it is evident to this Tribunal that the focus for the Selector centred around the Irish Relay team, commitment to the team and performances with and for the team (focusing on the period 2011/12). No one factor in isolation determines the selection of a candidate and all factors need to be considered in their totality. The Selectors were entirely focused on the team experience, cohesiveness, ability to perform at the Olympic Games, improvement potential based upon current running times and personal performances. All these Factors have to be considered as a whole under this

second criteria heading and were so considered with the overall focus on the Irish Women's Relay team selection. In doing so the Selectors applied the same criteria and assessment factors to all the candidate athletes, so there is no unfairness in that regard.

The AIAP interpreted Selection Factor No.2 such that its scope was expanded to take account of all the experience of Ms Mills including in the period prior to June 2011 (the starting point for the Selectors assessment) and major championships at junior level on the basis that it concluded that "*Due regard was not given to JM's performances prior to 2011*". The AIAP also stated that "*JM might have been disadvantaged in the markings for the selection process due to the fact that CC had not run for four years*". If the AIAP are inferring by this statement that the pre-2011 competitive period was not part of the selection criteria applied by the Selectors in order to give advantage to the Appellant or by corollary disadvantage to Ms Mills then they should have clearly said so. There is no evidence before this Tribunal which supports the statement that Ms Mills might have been disadvantaged due to the Appellants non participation in competitive events for a 4 year period.

However, the Selectors were looking at both individual and relay experience at major championships (the World Championships in Korea and European Championships were specifically considered by the Selector - per the Minute of AIAP at page 5). Even had the pre-2011 experience of Ms Mills been considered by the Selectors there is no basis to believe they would have awarded her significantly higher marks than they did in light of the other factors contemplated as part of Selection Factor No.2, namely, experience in major championships with the Irish Relay Team. Further there is no evidence that Ms Mills' scoring was or could have been reduced based upon the Appellants non-competitive participation in the period prior to 2011. To move from one tick (representing 25%) to two ticks (representing 50%) is a significant leap to make and the experience must also be considered in the context of the experience of the other athletes selected in positions 1 – 4 (who scored 100%) and in 5th position (who scored 50%). This Tribunal therefore considers that the AIAP gave too great a scoring credit to Ms Mills based upon here past experience when they reassessed Selection Factor 2.

- b. The Tribunal did not consider it necessary to itself engage in a consideration of whether or not it was appropriate to take account of junior level major championships as well as senior championships. What is clear is that the Selectors approach was confined to senior major championships in 2011/12 and

the AIAP expanded the scope of this Factor this to include junior major championships over a longer unspecified period.

23. When the approach of the AIAP to its review of the Selection Factors as they affected Ms Mills is considered as a whole there are a number of beneficial assumptions which appear to have been made by the AIAP in favour of Ms Mills but which are unsupported by extrinsic evidence e.g. Factor 5 (season's average(s) 2011/12) the AIAP refer to the fact that "*JM may not have pushed as hard to avoid peaking too early*"; Factor 6 (relay average splits) the AIAP appear to imply that it was unfair not to take JM's 2010 Commonwealth 4x400m and prior 2011 competitions into consideration – despite the applicable period for consideration being 2011/12; Factor 8 (subjective) the AIAP appear to accept Ms Mills' explanation on 18 May that she incorrectly submitted a declaration of interest in the 400m rather than 4 x 400m relay for the Olympic Games. However as at the date of the Hearing no signed Athlete Relay Agreement has been submitted by Ms Mills in order to rectify the position on the record. Other: Ms Mills did not compete in the AAI Outdoor National Championships (July 7/8), which was a condition of eligibility to the relay pool. A note in the Tribunal papers (undated) from AAI notes that "*Joanna was travelling to compete at the World Junior Championships at the time of the Irish National Championships*". In the absence of any further evidence the Tribunal must assume that the attendance at the World Junior Championships constituted an "*exceptional circumstance*" and a waiver of this condition was afforded to Ms Mills by AI but this was not addressed by any Party.
24. It is the Tribunal's view that the exercise in re-marking the Selection Factors by the AIAP based upon the revised Interpretation of two of the Selection Factors by the AIAP clearly marks a straying from the duties of an appeal panel to assess whether the Selectors followed the selection criteria appropriately and fairly when reaching their decision. The AIAP therefore moved into the realm of individual selection assessment, standing as it were into the shoes of the original Selectors. The remedies available to the AIAP were threefold (per Article 8 of the Appeal Procedures);
- a. They could rescind the decision of the Selection Panel and confirm the selection of the appellant "*only in clear cases where the Selection Policy has not been followed and it is plain that had it been followed the appellant would have been selected*"; or
 - b. Confirm the decision of the Selection Panel; or
 - c. Quash the decision of the Selection Panel and remit the matter back to it identifying the apparent errors in the conduct of the selection process and see a new decision (which may or may not confirm the earlier decision).

The AIAP upheld the appeal of Ms Mills and opted for the remedy under Article 8.1. It found that *"the Selector has failed to follow the selection policy by limiting his consideration under the "overall" categories to only 2011/2012"*.

25. It is the view of this Tribunal that such a conclusion was ill-founded on the basis that the Selectors did follow and apply the selection policy outlined in the Relay Programme and did so with diligence and acumen. This Tribunal finds that the AIAP did not properly construe Selection Factor No.1 and by imposing the interpretation it did, the AIAP itself applied a narrow interpretation which was not contemplated under the Selection Factors. The Tribunal further finds that in relation to Selection Factor No.2 while a broader interpretation could have been applied to the scope of this criteria, namely to include pre-2011 major championship experience including at junior level that the additional weighting accorded by the AIAP to the experience of Ms Mills in this regard was disproportionate when the totality of the components within Selection Factor No.2 and the weighting accorded to the other athletes based upon their major championship experience and contribution to the relay team were considered.
26. The Tribunal noted that it was a condition of the Relay Programme that all interested athletes who want to be considered for selection sign the Athletics Ireland Relay Team Statement of Conditions (which requires them to participate in all relay team activities prior to the 2012 Olympic Games in London). The Appellant signed the Agreement in March 2012, Ms Mills did not sign the Agreement. Despite not signing the Agreement, the Selectors invited Ms Mills to commit to the Relay Programme and ultimately considered her for selection. While it was open to the Selectors to exclude Ms Mills for not complying with a stated Selection Factor they did not do so. The AIAP could further have considered this as an issue during its appeal but found that *"it would be inappropriate to discount her after the fact for failing to sign the Athletics Ireland Relay Team Statement of Conditions when she was allowed to be considered for the pool regardless."* This Tribunal is of the view that this could have been an important factor in the earlier proceedings but given the acquiescence to the consideration of Ms Mills as an athlete candidate at the Selection and AI Appeal stages this Tribunal did not consider it open to us to re-consider this position.

Decision

27. Based on the findings of the Appeal Tribunal the appeal is upheld.
28. In accordance with Clause 5.2 of the 2012 Olympic Summer Games - London Agreement for the Selection of Athletes for the Sport of Athletics signed by AI and the OCI in 2011 this decision is final.

29. Nothing herein prevents recourse by the Parties to the Court of Arbitration for Sport.

Costs

30. The Tribunal received submissions from the parties in respect of costs. Having considered the matter carefully and taking into account the loss of the Appeal by the Appellant and the lack of total transparency of the Respondent in applying the process, the Tribunal determines that the costs of the Hearing should be borne by the Respondent. In this regard it is noted a deposit of €3,000 has been made by the Respondent, a matching figure should now be paid within 10 days to the OCI to defray the costs of the Hearing. The OCI shall refund the Appellant the sum of €3,000 previously received.

31. The Parties shall bear their own legal costs.



Susan Ahern (Chair)

William O'Brien

Dermot Sherlock

Monday 23rd July, 2012