Arbitration CAS ad hoc Division (O.G. Sydney) 00/001 United States Olympic Committee (USOC) and USA Canoe/Kayak / International Olympic Committee (IOC), award of 13 September 2000

Panel: Mr. Robert Ellicott (Australia), President; Mr. Jan Paulsson (France); Mr. Dirk-Reiner Martens (Germany)

Canoe/Kayak
Eligibility for the Olympic Games
Nationality of an athlete pursuant to the Olympic Charter

1. **There is a distinction between "citizenship" and "nationality" under U.S. law but the characterisation of a person as a U.S. national traditionally refers to residents of U.S. territories, and must ordinarily be satisfied at birth.**

2. **A "national of the United States" is either a citizen of the United States or a person who, though not a citizen of the United States, owes permanent allegiance to the United States. It is thus clear that U.S. law contemplates the possibility of a "non-citizen national".**

3. **With one exception, the only cases of "non citizen nationals" recognised under U.S. law have been ones of persons holding that status at birth. Such persons are generally individuals born in territories holding special relationships with the U.S., whether currently (such as Guam) or historically (such as the Philippines). Persons who were not U.S. nationals or citizens at birth were, ipso facto, originally aliens. They typically cease to be aliens by way of naturalisation, when they for all purposes simultaneously become citizens and nationals.**

These proceedings have been brought by the Claimants in order to enable Mr. Angel Perez to participate for the United States in the kayak competition of the Sydney 2000 Olympic Games.

Mr. Perez was born in Havana in 1971. He competed for Cuba in the 1992 Olympic Games in Barcelona.

In May 1993, Mr. Perez did not return to Cuba after a competition in Mexico. He entered the United States and immediately made an application for asylum under the U.S. immigration laws. He has since been a resident of Miami, and has never returned to Cuba.

In 1994, Mr. Perez married a U.S. citizen. He and his wife had a child in 1995, born in Miami.

On 11 September 1995, Mr. Perez was awarded permanent residence status as a "Resident Alien" in the U.S. ("Green Card").

Mr. Perez competed for the U.S. in the kayak World Championships in 1997, 1998 and 1999 in accordance with the Rules of the International Canoe Federation.

In September 1999, Mr. Perez obtained U.S. citizenship.

On 21 August 2000, the Claimant USOC requested the IOC to grant Mr. Perez the right to participate in the Sydney 2000 Olympic Games. The IOC denied his request on 28 August 2000, for the following reasons:

> *"The facts of this case clearly fall within paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter. In particular, in view of:*
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> *(i) Mr. Perez having previously represented Cuba in an international competition as referred to in Paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter.*
>
> *(ii) Less than three years having passed since Mr. Perez has become a national of the United States; and*
>
> *(iii) The NOC of Cuba not agreeing to reduce this three years period referred to in Paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter,*
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> *Mr. Perez is not eligible to represent the United States at the 2000 Sydney Olympic Games*."

In their written and oral submissions the Claimants argue that according to Rule 46 Bye-law 2 of the Olympic Charter Mr. Perez should be allowed to participate in the Sydney 2000 Olympic Games because more than 3 years have passed since he changed his nationality or acquired a new nationality.

The Claimants contend that the terms "citizenship" and "nationality" should not be equated as is demonstrated by the wording of the U.S. Immigration Laws which define a "national as (A) a citizen of the U.S:, or (B) a person who, though not a citizen of the U.S., owes permanent allegiance to the U.S."

The Claimants further argue that as early as May 1993 when Mr. Perez defected from Cuba his "rights as a Cuban national were rendered ineffective and removed at that time." The Claimants aver that Mr. Perez pledged allegiance to the U.S. at the time of his request for political asylum. "*At that point, Mr. Perez effectively lost his Cuban nationality and sought to change his nationality for purposes of Rule 46 … Certainly by no later than 11 September, 1995 Perez had effectively changed his national status*." (Claimants' Application to CAS dated 10 September 2000, page 4).

The Respondent argues that the question whether an athlete is a national of a country under the Bye-law of Rule 46 must be determined in accordance with the law of that country, i.e. in the case at hand the law of the United States.

The Respondent agrees that there is in fact a distinction between "citizenship" and "nationality" under U.S. law but that "*the characterisation of a person as a U.S. national traditionally refers to residents of*

U.S. territories, [and] must ordinarily be satisfied at birth" (Edwards v. U.S: Immigration and Naturalisation Service, 952 F 2d 406 (9R Cir. 1992)). The Respondent argues that as Mr. Perez was not born a U.S. national, the only way for him to be eligible for the Sydney 2000 Olympic Games was to become a naturalised citizen more than three years before the Games. According to Respondent the "Green Card" awarded to Mr. Perez in 1995 identified him as a "Resident Alien" and according to U.S. law an alien is defined as "any person not a citizen or national of the U.S." [8 U.S.C.A. § 1101 (a) (3)]. The Respondent further argues that there is no evidence that Mr. Perez took any step formally to affirm his permanent allegiance to the USA before becoming a citizen in 1999. But even such evidence would not fulfil the requirements for national status as defined under U.S. statute and case law which predominantly require that to qualify to such status, a person must be born in the U.S. or one of its territories, or be born to parents who are U.S. nationals.

The Respondent notes that although in United States v. Morin [80F. 3d 124, 126 (4th Cir. 1996)] a U.S. court found that a permanent resident alien of the U.S. who had applied for U.S. citizenship was indeed a "national" of the U.S. because "application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself", applications for citizenship may not be made any earlier than three months before the applicant meets the residency requirements for citizenship. The earliest Mr. Perez might have met these requirements was May 1998, five years after he first arrived in the United States and fewer than three years ago.

In conclusion, the Respondent contends that Mr. Perez does not meet the eligibility requirements under Rule 46.

The case was heard on 12 September 2000 between 1:30pm and 3:15pm at the Court of Arbitration for Sport.

Pursuant to the Arbitration Rules for the Games of the XXVII Olympic Games in Sydney, the time for the Panel to give a decision was extended by the Co-president until midnight on 13 September 2000.

LAW

1. These proceedings are governed by the CAS Arbitration Rules for the Games of the XXVII Olympiad in Sydney (the "ad hoc Rules") of CAS enacted by the International Council of Arbitration for Sport ("ICAS") on 29 November 1999. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("PIL Act"). The PIL Act applies to this arbitration as a result of the express choice of law contained in Article 17 ad hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division and of its panels of Arbitrators, pursuant to Article 7 of the ad hoc Rules.

2. The jurisdiction of the ad hoc Division arises out of the entry form signed by each and every participant in the Olympic Games as well as out of Rule 74 of the Olympic Charter.

3. Under Article 17 of the ad hoc Rules, the Panel must decide the dispute *"pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate."*

4. According to Article 16 of the ad hoc Rules, the Panel has *"full power to establish the facts on which the application is based."*

5. One limb of the Claimants' argument is the contention that the laws of the United States of America recognise a status of nationals who are not citizens, with the argued effect that Mr. Perez became a U.S. national well before being granted U.S. citizenship, and at any rate more than three years before the opening of the Sydney Games.

6. In the course of the hearing, the Claimants thus called the Panel's attention to the fact that the U.S. Immigration and Naturalization Act defines a "national of the United States" as *either* a citizen of the United States or *"a person who, though not a citizen of the United States, owes permanent allegiance to the United States"* [8 U.S.C.A. §1101 (a) (27)].

7. It is thus clear that U.S. law contemplates the possibility of a "non-citizen national" (although the reverse does not obtain; any citizen is necessarily a national).

8. With one exception, the only cases brought to the attention of the Panel of "non citizen nationals" recognised under U.S. law have been ones of persons holding that status *at birth*. ["National status depends primarily upon place of birth," U.S. v. Salem, 762 F. 2d 1013 (6th cir. 1985)]. Such persons are generally individuals born in territories holding special relationships with the U.S., whether currently (such as Guam) or historically (such as the Philippines).

9. Persons who were not U.S. nationals or citizens at birth were, ipso facto, originally aliens. They typically cease to be aliens by way of naturalisation, when they for all purposes simultaneously become citizens *and* nationals.

10. To prevail, the Claimants must demonstrate that Mr. Perez, who was Cuban, somehow became a U.S. national some two years before he became a U.S. citizen.

11. From the materials provided to the Panel, it appears that U.S. courts, while arguably recognising a theoretical possibility of becoming a national before being granted citizenship, have emphasised the difficulty of demonstrating that an alien has qualified as a U.S. national by coming to "owe permanent allegiance to the United States."

12. Such statements have generally been made when rejecting claims of national status. Thus, aliens do not become nationals by virtue of a long stay in the U.S. (Edwards v. US

Immigration and Naturalisation Service, 952 F. 2d 406), nor by dint of subjective belief that they owe allegiance to the U.S. [U.S. v Sotelo, 109 F 3d 1446 (9th Cir. 1997)].

13. The sole exception put before the Panel was the case of Morin v. United States (80 F 3d 124, 4th Cir. 1996) where the question arose whether an accused had conspired to murder "a national of the United States" for the purposes of a criminal-law statute. The intended victim was a Mexican citizen who had resided in the United States for a sufficient period of time to qualify for naturalisation, and moreover had applied to be naturalised. The Court accepted that he was a U.S. national on the basis that: "*an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of Citizenship itself*". The *Morin* case is however, hardly a conclusive precedent. In the first place, it concerned an appeal – on a number of grounds – against a criminal conviction; it did not concern a claim of U.S. nationality by the individual whose status was in question and contested by the Department of Justice. Indeed, there is no discussion of legislative history or precedents with regard to the notion of "owing permanent allegiance". The judgment seems more focused on the desire not to allow a murderer to seek refuge on a technicality than on an intent to analyse, let alone establish, the criteria of "nationality." Moreover, even if *Morin* were read as standing for the questionable proposition that qualified applicants for naturalisation become nationals as of the moment of their application, even though they are not yet citizens, Mr. Perez has not sought to prove that he was in a position even to make such an application more than three years before the Sydney Games (He could have done so in May 1998, five years after arriving in the U.S., but less than three years ago). The U.S. Act explicitly provides that a declaration of *intent* to apply for citizenship does not confer nationality [8 U.S. C.A. § 1445 (f)]. By parity of reasoning, a declaration of allegiance at the time of requesting asylum, which leads to no more than the status of resident alien, could not confer nationality.

14. The Claimants have presented to the Panel an impressive list of factors which eloquently testify to Mr. Perez's predominant personal participation in and commitment to American social life. If it were the case that such factors could suffice to confer nationality upon persons who have not (yet) qualified for citizenship, it seems compellingly obvious that there would be numerous instances of attempts – indeed *successful* attempts – by aliens to acquire U.S. nationality on such a basis. Yet the Panel has not been directed to a single example of national status having been conferred by any U.S. authority, whether judicial or other, in this fashion.

15. The Panel must thus conclude that the Claimants have not demonstrated that Mr. Perez would, under U.S. law, be deemed to have acquired U.S. nationality before he was granted citizenship in September 1999.

16. But another limb of the Claimant's argument posits that the Olympic Charter is a *sui generis* document which requires interpretation and application at an international level, with the effect that U.S. law should not be dispositive. In support of this contention, the Applicants cite the venerable precedent of the International Court of Justice in the *Nottebohm* case (Second Phase, judgement of 6 April 1955). The circumstances of that case are instructive in terms of creating a context for comparison.

17. Friedrich Nottebohm was a German who went to Guatemala in 1905. He there made his residence, as well as the centre of his prosperous business activities. In early 1939, he travelled to Germany; in October, about one month before the German invasion of Poland, he found himself in Liechtenstein where he successfully applied for naturalisation before returning to Guatemala. In 1943, he left Guatemala as a result of war measures which also adversely affected his property interests in Guatemala. In due course, the Principality of Liechtenstein seized the International Court of Justice of an application against Guatemala for the protection of Nottebohm, seeking restitution and compensation.

18. Guatemala successfully avoided the claim on the grounds that Liechtenstein did not have sufficient title to exercise protection in respect of Nottebohm as against Guatemala. The Court agreed with Guatemala that Nottebohm did not have "effective" Liechtenstein nationality for this purpose, because his naturalisation (a) was not based on any real prior connection with Liechteinstein, and (b) did not in any way alter his manner of life. In the circumstances, it was held that Guatemala was not obliged under international law to answer a claim the admissibility of which was based on the proposition that Nottebohm was a Liechtensteinian national.

19. The *Nottebohm* case is often cited as indicative of a notion that formal nationality or citizenship may be disregarded if it is not effective in the sense suggested by the facts of that precedent.

20. That notion may indeed be relevant in deciding to disregard formal status of nationality (as in *Nottebohm* itself).

21. It may also be relevant in disposing of conflicting claims in circumstances where two States have conferred nationality upon the same individual. International arbitrators, or courts of third states, may then have to look beyond the two national laws (because they conflict) and decide which is the predominant nationality. In such circumstances, it may be correct to speak of a significant distinction between the concept of nationality and that of citizenship.

22. Neither of these situations, however, arises in the present case. The Claimants do not seek to resist the assertion by a State of ties of nationality, but to establish that they existed de facto even in the absence of any evidence that the relevant State (the U.S.) sought – or would even have a legal basis to seek – to assert such ties prior to the formal grant of citizenship in 1999. This would, in the Panel's view, be an extension of *Nottebohm* for which no warrant may be found in that judgement. The Claimants' recital of the numerous indicia of Mr. Perez's unquestionably close connection with the U.S. since 1993 is therefore unavailing for this purpose.

23. Nor is this an instance of two conflicting nationalities (Cf. CAS Case 94/132 Puerto Rico Amateur Baseball Federation v. USA Baseball, *Digest of CAS Awards 1986-1988*, p. 53.). The issue is simply whether there are grounds to conclude that Mr. Perez acquired U.S. nationality sometime before September 1997 even though he was not naturalised until 1999.

24. The Claimants have been incapable of proving that any such grounds are defined in the Olympic Charter, or under international law, or indeed under U.S. law. The Panel is unwilling to engage in an act of legislation. The existing rule is clear; it may work hardship in individual cases, but that does not prove that the rule was not enacted in the pursuit of legitimate general interest.

25. Thus the Claimants' arguments fail on both limbs.

26. This leaves the Panel in the position of having to conclude, on the basis of a straightforward reading of Bye-law 2 of Rule 46 of the Olympic Charter, that Mr. Perez acquired his new nationality less than three years ago, and that the Cuban Olympic Committee did not agree to a reduction of this period. Unlike the case of *Miranda v. IOC*, also decided today, the Applicants have not argued that the failure of the Cuban NOC to give its agreement was contrary to the Olympic Charter in terms of either procedure or motivation. This Panel has no authority, or indeed any cause or reason to initiate an investigation into such matters, and therefore must conclude that the Claimants – and Mr. Perez – are frustrated by a clear rule which intrinsically operates in such a fashion as to cause the overall duration of an emigrating athlete's future Olympic ineligibility to depend on the particular naturalisation regime of the country in which he or she chooses to relocate. Contrary to the Claimants' arguments, there is no rule of "fairness", to be derived from the Olympic Charter's acknowledgement that the practice of sport is a fundamental human right, which would under such circumstances create an outer time limit of Olympic ineligibility.

The CAS ad hoc Division rules:

The application is dismissed