



Arbitration CAS ad hoc Division (OG Beijing) 08/002 Christel Simms v. Fédération Internationale de Natation (FINA), order of 1 August 2008

Panel: Mr Sharad Rao (Kenya), President; Mr Thomas Lee (Malaysia); Mr Liu Chi (China)

Swimming
Olympic Games
Conditions for the change of sport nationality

Whereas the validity of the FINA rule regarding the conditions for the change of sports nationality is confirmed, FINA is estopped from denying the entry of an athlete in the Olympic Games after having induced without reservation the national federation concerned to train the athlete for the particular discipline for which they seek to enter the athlete in the OG.

Ms. Christel Simms, 17-years old is a Philippine national (mother 100% Filipina and father 75% Filipino). She was born in Hawaii, USA and holds dual citizenship.

Ms. Simms represented the USA in January of 2007 at a competition held in Hawaii called “1st Junior Pan Pacific Swimming Championships”.

Ms. Simms applied for membership with the Philippines Amateur Swimming Association (PASA) in February 2007. Her application was accepted.

Realizing her potential, PASA and the Philippine Olympic Committee (POC) offered Ms. Simms a place on the Philippine Olympic Team to the 2008 Beijing Olympics, provided that she achieves the FINA qualifying times.

In April of 2007, Ms. Simms achieved the FINA “B” qualifying time in the 100 meter freestyle at the 2007 US Junior Nationals in Indianapolis, Indiana.

PASA requested FINA that Ms. Simms be granted a change of Sport Nationality in compliance with the FINA General Rules applicable to dual citizens, and those wishing to transfer affiliation from one national swimming federation to another.

On 28 November 2007, FINA informed PASA that Ms. Simms’ application for change of sports nationality was denied.

However, a letter from FINA dated 4 February 2008 states: *“Reference is made to your correspondence concerning the qualifying status from the Philippines Amateur Swimming Association for his participation in the XXIX Olympiad-Beijing 2008”*.

It confirmed that the swimmers mentioned in the letter which include the Applicant, Ms. Simms, *“may enter and participate the XXIX Olympiad-Beijing 2008, subject to approval by the Philippines NOC and the submission of entries to BOCOG by the deadline of 23 July 2008”*. This confirmation is not qualified or subject to any other requirement, i.e. change of residence or nationality.

PASA interpreted this to mean that change of nationality of Ms. Simms was accepted and she may be entered in the competition for the XXIX Olympiad-Beijing 2008.

The Panel notes that following this letter PASA entered Ms. Simms in the World Championships in Manchester in April 2008, *a FINA event*, where she represented the Philippines in six events.

Following the World Championships, FINA on 21 April 2008 wrote to PASA that the change of sports nationality *was* not approved by FINA.

In reply, PASA wrote, stating:

“After you fax of February 4, our NOC accepted Christel as a member of the Philippine Team to Beijing 2008 and we sent her as our representative to the World Swimming Championships in Manchester. FINA funded her participation in Manchester, as it was her name and the name of swimmer Miguel Molina that we applied for the travel assistance for. Both swimmers did very well in Manchester and since then, Christel continues to be in programs supervised by PASA. Today, she will be leaving Hawaii for Olympic Training Center in Bolles School, Florida to be with the other members of the Philippine Team preparing for the Olympics. She will compete for the Philippines in numerous meets, hoping to achieve more Olympic qualifying times and on 24 July come to the Philippines for the pre-Olympic training camp at our newly built Center of Excellence”.

On 29 July 2008, the FINA, through its Executive Director, issued the following decision:

“The swimmer, Mrs Christel Simms, cannot represent the Philippines Amateur Swimming Association in any international competition, including the Beijing 2008 Olympic Games”.

Ms Simms requests that such decision be stayed so that the Philippines Olympic Committee will be able to present a request for the IOC Executive Board approval before its meeting in Beijing.

LAW

Jurisdiction

1. These proceedings are governed by the CAS Arbitration Rules for the Olympic Games (the “CAS ad hoc Rules”) enacted by the International Council of Arbitration for Sport (ICAS) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (the “PIL Act”). The PIL Act applies to this arbitration as the result of the location of the seat of the CAS ad hoc Division in Lausanne Switzerland, pursuant to art. 7 of the CAS ad hoc Rules.
2. The jurisdiction of the CAS 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 61 of the Olympic Charter.
3. Under art. 17 of the CAS 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 art. 16 of the CAS ad hoc Rules, the Panel has “*full power to establish the facts on which the application is based*”.

Merits

5. The Panel has considered FINA rules GR.2.5 and GR.2.6 and additions to Rule GR.2.6 introduced at FINA Congress on 8 April 2008 and published in May 2008.
6. The Panel is of view that the additions to the Rule GR.2.6 do not materially alter *in this case* the requirement regarding the residence of twelve months as provided by Rule GR. 2.6. It is conceded that Ms. Simms does not live in the Philippines.
7. The relevant provision as to change of nationality in regard to the Olympic Games is governed by Bye-law to Rule 42 of the Olympic Charter, in particular Rule 42.2, which reads:
“A competitor who has represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognized by the relevant IF, and who has changed his nationality or acquired a new nationality, may participate in the Olympic Games to represent his new country provided that at least three years have passed since the competitor last represented his former country. This period may be reduced or even cancelled, with the agreement of the NOCs and IF concerned, by the IOC Executive Board, which takes into account the circumstance of each case”.
8. Also relevant is Rule 42.4, which read:
“Furthermore, in all cases in which a competitor would be eligible to participate in the Olympic Games, either by representing another country than his or by having the choice as to the country which such competitor intends to represent, the IOC Executive Board may take all decisions of a general or individual nature with regard to

issues resulting from nationality, citizenship, domicile or residence of any competitor, including the duration of any waiting period”.

9. The IOC rules prescribe for change of nationality and residence of a minimum period of three years since the competitor last represented the former country. This period may be reduced or even cancelled with the agreement of NOCs and the IF concerned.
10. In this case, NOCs of the Philippines and the USA had both agreed to change of the sport nationality of the Applicant, but not by the IF concerned, namely, FINA.
11. The Panel is of the view that both bodies acted honorably in the process. However there is genuine miscommunication which gives rise to PASA’s mistaken belief that FINA had approved the change of Ms. Simms’s sports nationality. The Panel believes that the miscommunication between PASA and FINA was contributed to by FINA in not specifically mentioning the change of nationality in its letter of 4 February, 2008, and permitted her to represent the Philippines in the World Championship in April 2008.
12. The Panel notes that in a previous decision of CAS ad hoc Division (CAS OG 02/006), that Panel drew an analogy to the doctrine of “estoppel by representation”. That doctrine the Panel applied as the general principle of law (Art.17 of CAS ad hoc Rules) is defined as:
“An estoppel that arise when one makes a statement or admission that induces another person to believe something and that results in that person’s reasonable and detrimental reliance on the belief (Black’s Law Dictionary, 7th ed., 1999)”.
13. Under the circumstance described above, the Panel is of the view that FINA is estopped from invoking Rule GR.2.6 of FINA Rules by non reference to the requirement of Rule GR.2.6 in the letter of 4 February 2008, and the acceptance of the Applicant to represent the Philippines at the said World Championships. Thus, FINA induced PASA to prepare and train the Applicant for the particular discipline for which they seek to enter her. To exclude her from competing under these circumstances will be unfair and contrary to the rule of estoppel.
14. The Panel points out that this recommendation applies purely to the particular circumstances in regard to this Applicant for her participation in this Beijing Olympic Games, and it is not to be taken to disregard Rule GR.2.6 of FINA and FINA’s interpretation of that rule, with which the Panel respectfully agrees.

The ad hoc Division of the Court of Arbitration for Sport rules:

The application for a stay of the execution of the FINA decision dated 29 July 2008 filed by Ms Joan Christel Simms on 31 July 2008 is granted.