Arbitration CAS ad hoc Division (O.G. Sydney) 00/003 Arturo Miranda / International Olympic Committee (IOC), award of 13 September 2000

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

Diving
Eligibility of an athlete for the Olympic Games
Nationality of an athlete pursuant to the Olympic Charter

1. **According to Bye-law 2 to Rule 46 of the Olympic Charter *"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 international federation, and who has changed his nationality or acquired a new nationality, shall not participate in the Olympic Games to represent his new country until three years after such change or acquisition. This period may be reduced or even cancelled with the agreement of the NOCs and IF concerned and the approval of the IOC Executive Board."***

2. **This provision confers on the relevant NOCs an absolute discretion as to whether or not to agree to the period being reduced In administering this Rule, the IOC is not required to investigate the reasons why a particular NOC refuses to agree. The IOC is entitled to act on the mere refusal of a NOC, and as a result to find that an athlete cannot participate in the relevant Games. Therefore, the athlete has no right to call for an investigation into the legitimacy of the grounds relied upon.**

3. **There is clearly room in international law, and in the municipal law of some countries, to draw a distinction between "citizenship" and "nationality". It can be expressed in the proposition that all citizens are nationals but not all nationals are necessarily citizens. That is to say, there may be a point in a person's relationship with a particular country where a person may become a national of that country notwithstanding he or she is not a citizen. In international law, there is a concept of "effective nationality" but it has been used only to deny artificial claims of nationality rather than to confer nationality.**

Mr. Arturo Miranda has been nominated by the Canadian Olympic Association as a member of its diving team for the 2000 Sydney Olympics.

On 11 September 2000, he appealed to the ad hoc Division of this Court in relation to a dispute which had arisen between him and the International Olympic Committee (IOC).

When he filed his appeal on 11 September 2000, there was a dispute but no actual decision against him had been made by the IOC.

On 12 September 2000, the IOC made a decision to the effect that he is not eligible to represent Canada at these Games. It was communicated by letter of that date in the following terms:

> "*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. Miranda 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;*
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> *(ii) less than three years having passed since Mr. Miranda has become a national of Canada; and*
>
> *(i) the NOC of Cuba not agreeing to reduce this three year period referred to in Paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter,*
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> *Mr. Miranda is not eligible to represent Canada at the 2000 Sydney Olympic Games.*
>
> *The IOC regrets that the parties concerned were not able to resolve this matter so as to allow Mr. Miranda to compete for Canada, especially in view of the fact that it has been approximately nine years since Mr. Miranda last represented Cuba".*

The basic facts are not in dispute. The Claimant was born in Havana, Cuba, on 19 January 1971. He represented Cuba in diving internationally, on the last occasion at the Pan–American Games in Havana in 1991. He retired from diving in 1992 and began working in tourist–related activities. Through his work, he met and fell in love with a Canadian woman who was working in Cuba. They were married in 1994. The contract under which the Claimant's wife was working in Cuba was coming to an end, and the Claimant applied for admission to Canada as what is known under the Canadian Immigration Act, a "landed resident". His application was successful, and he then entered Canada on 8 October 1995 with lawful permission to establish permanent residence there.

He did not enter Canada as an athlete. No special measures were taken for him to immigrate into Canada.

Since his arrival in Canada on 8 October 1995, the Applicant and his wife have resided there continuously. He has been in continuous employment as a professional diving coach, sports administrator and bartender. He has been liable for and paid taxes in relation to his earnings in accordance with Canadian Government requirements. Having being accorded the status of a landed resident, the Claimant apparently has been entitled to Canadian social and welfare benefits, e.g. medicare and hospitalisation benefits.

In 1999, the Claimant became a Canadian citizen after complying with Canadian residency requirements.

His activities as a coach led him to take up diving again as a competitor, five years after his competitive retirement in Cuba. From about July 1992, the Claimant had ceased any participation in Cuban Swimming Federation activities. In the last five years, the Claimant has been involved

extensively in the Canada Amateur Diving Programme. In 1996, he became a member of the Canadian Amateur Diving Association, and attended his first national diving competition in Canada in 1997. As a result of his hard work and dedication, Mr. Miranda was able to qualify to compete in Spring Board Diving for the Canadian Olympic Team in 2000. He has travelled to Sydney as a member of the Canadian Olympic Team receiving accreditation from the Sydney Organizing Committee for the Olympic Games (SOCOG), and is prepared to compete at these Games.

The Claimant could not be named to the Cuban Olympic Team as a result of FINA Rules which would require him to reside in Cuba for at least 12 months prior to the Olympic Games. He has resided exclusively and continuously in Canada for the past five years and asserts that he has lost his residency rights in Cuba.

The Claimant still retains a Cuban passport and has regularly visited Cuba for limited periods since he left there in October 1995. He has done so on at least one occasion as the coach of a local Canadian team. That local team was competing in a Grand Prix diving event in Cuba.

LAW

1. An urgent hearing of Mr. Miranda's claim took place at the CAS premises on Tuesday, 12 September between 7:30pm and 10:15pm.

2. The Claimant was represented by Mr. Henric Nicholas QC and Ms Tricia McDonald both of the New South Wales Bar. The IOC was represented by Mr. Howard Stupp, head of its legal department.

3. At the hearing, the Claimant was accompanied by his lawyer, his personal coach and the Canadian head diving coach.

4. Prior to the hearing, the Cuban Olympic Committee was invited to attend as a third party as it was clear that they were interested in the matter. They responded to that invitation only by letter as follows:

   "*El Comité Olímpico Cubano no autorizó la participacíon del Sr. Miranda formando parte del equipo canadiense.*

   El Sr. Miranda no cumple lo establecido en la norma 46 de la Carta Olímpica, al no tener los 3 años de nacionalización que se exigen".

   (Translation:

   "The Cuban Olympic Committee does not authorise the participation of Mr. Miranda as member of the Canadian Team.

Mr. Miranda does not fulfil the requirements provided by Rule 46 of the Olympic Charter, as he did not comply with the three year time limit provided by such Rule").

5. The Panel was informed during the hearing that the Canadian Olympic Association was aware of the proceedings, and that it supported the Claimant's application.

6. During the hearing, oral evidence was received from Mr. Miranda. This related to the visits he has made to Cuba – roughly once a year – since 1995 and particularly his involvement there in a Grand Prix competition for the Cuba Cup where a Canadian club team participated. On those occasions, he travelled on a Cuban passport. He also produced his Canadian passport, issued in 1999, for inspection by the Panel.

7. Pursuant to the Arbitration Rules for the Games XXVII Olympiad in Sydney, the time for this matter to be dealt with has been extended by the Co-president until midnight on 13 September.

8. At the conclusion of the oral hearing, it was agreed by the IOC representative, Mr. Stupp, that the athlete would be given an "Aa" accreditation in order that he could involve himself in preparation for the Games pending the determination of this matter. This avoided the necessity for considering interim relief.

9. 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.

10. 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.

11. 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"*.

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

13. Fundamental to the determination of this application is Rule 46 of the Olympic Charter and the Bye-law to it. Rule 46.1 provides: "*Any competitor in the Olympic Games must be a national of the country of the NOC which is entering him*."

14. Paragraphs 2 and 4 of the Bye-law of Rule 46 provide:

2. 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, shall not participate in the Olympic Games to represent his new country until three years after such change or acquisition. This period may be reduced or even cancelled with the agreement of the NOCs and IF concerned and the approval of the IOC Executive Board.

4. In all cases not expressly addressed in this Bye-law, in particular in those cases in which a competitor would be in a position to represent a country other than that of which he is a national, or to have a choice as to the country which he intends to represent, the IOC Executive Board may take all decisions of a general or individual nature, and in particular issue specific requirements relating to nationality, citizenship, domicile or residence of the competitors, including the duration of any waiting period.

15. Mr. Nicholas in written and oral submissions made two basic submissions:

a) That the Claimant had achieved Canadian nationality on 8 October 1995 when he was granted landed resident status under the Canadian Immigration Act and therefore three years had elapsed since that acquisition and there was no need for any agreement by NOCs concerned, or

b) if this was not correct, that the Cuban Olympic Committee had denied the Claimant natural justice and acted arbitrarily and capriciously in failing to agree to the period being reduced under Paragraph 2 of the Bye-law, that this had had the effect of bringing into operation Paragraph 4 and that as a result the IOC Executive Board should deal with the matter pursuant to that Paragraph and find the Claimant eligible to represent Canada at these Games.

16. On the issue of nationality of the Claimant, the Panel was provided with copies of the Canadian Immigration Act and Citizenship Act. The Immigration Act was relied on for the purposes of establishing the rights to which the Claimant became entitled on being granted lawful permission to establish permanent residence in Canada. Under the Citizenship Act, the Minister grants citizenship. One of the matters to be considered is whether the person applying has been lawfully admitted to Canada for permanent residence. The Panel was not directed to any provision in either of these Acts which draws a distinction between "citizenship" and "nationality".

17. The Panel can find no basis upon which it could hold that the Claimant no longer has the Cuban nationality which he acquired on birth. He also clearly acquired Canadian nationality as a result of the grant of citizenship in 1999.

18. Because he competed for Cuba in a regional championship, namely the Pan-American Games in Havana in 1991, he falls under the terms of Paragraph 2 of the Bye-law: a competitor who has represented one country, Cuba, in regional games recognised by the International Federation (FINA) and who has acquired a new nationality, namely Canadian nationality. In those circumstances, the Rule is clear that unless the period of three years is reduced or cancelled he is not entitled to participate in Olympic Games to represent his new country, Canada, until three years after he acquired Canadian nationality.

19. The Panel finds that Paragraph 2 of the Bye-law expressly addresses this case. On the issue of nationality, the only question is whether Mr. Miranda acquired Canadian nationality three years prior to these Games.

20. He claims that he acquired it on 8 October 1995.

21. There is clearly room in international law, and in the municipal law of some countries, to draw a distinction between "citizenship" and "nationality". It can be expressed in the proposition that all citizens are nationals but not all nationals are necessarily citizens. That is to say, there may be a point in a person's relationship with a particular country where a person may become a national of that country notwithstanding he or she is not a citizen. The Panel finds no basis for so finding in this case. In international law, there is a concept of "effective nationality" but it has been used only to deny artificial claims of nationality rather than to *confer* nationality and the Panel does not believe that it assists in relation to the issue here, namely whether the Claimant had Canadian nationality as of 8 October 1995, or at any other date three years prior to these Games.

22. Nor has the Panel been referred to any Canadian law which could support a distinction in Canadian law between "citizenship" and "nationality" with the effect that a person granted landed immigrant status necessarily becomes a national of Canada. The Panel does not find that the facts which the Claimant relies upon (set out above) could possibly found a successful argument that he became a national prior to acquiring citizenship. The Panel accordingly rejects the Claimant's first submission.

23. As to the second submission, it is apparent from the preceding discussion that the Claimant's case is expressly addressed in the Bye-law, namely in Paragraph 2 thereof. Therefore there is no room for the application of Paragraph 4.

24. This leaves for consideration the application of Paragraph 2.

25. Having regard to the Panel's finding in relation to the Claimant's nationality it is clear that he is not eligible to participate in these Games unless the period of three years is reduced or cancelled with the agreement of the NOCs and IF concerned and the approval of the IOC Executive Board. At the hearing, Mr. Stupp indicated that the reasons for the IOC deciding that the Claimant was not eligible was the refusal of the Cuban Olympic Committee to agree. Although there was no actual written consent by FINA (the International Federation), both sides expressed the expectation that this agreement would readily have been given. The IOC representative agreed that if that were the only matter outstanding, the IOC would not object to FINA giving its approval later if the present application were determined favourably to the Claimant. The Canadian Olympic Association of course has clearly agreed, having nominated the Claimant.

26. Mr. Nicholas made a forceful attack on the failure of the Cuban Olympic Committee to agree to reduce the time so that the Claimant could represent Canada.

27. A threshold question in considering the second submission is whether or not the failure of a NOC to agree to reduce or cancel the time under Paragraph 2 of the Bye-law is examinable by this Court. Mr. Nicholas argued that this would be the case if it were shown that the NOC ignored certain basic provisions of the Charter, and also if it could be shown that it was arbitrary or capricious or there had been a denial of natural justice.

28. Mr. Nicholas relied heavily on the provisions of Rules 3, 9 and 31 and the Bye-law to Rules 31 and 32 to support his submission. He emphasised that under Rule 3.1. the athletes' interests constitute a fundamental element of the Olympic Movement's actions, and that under Rule 3.2. any form of discrimination on the grounds of politics or otherwise is incompatible with belonging to the Olympic Movement. Rule 9, he urged, provides that the Olympic Games are competitions between athletes in individual or team events, and not between countries, and that the authority of last resort on any question concerning the Olympics rests with the IOC.

29. In relation to NOCs, he drew attention to the fact that under Rule 31 their mission is to develop and protect the Olympic Movement in their respective countries in accordance with the Olympic Charter, and that in order to fulfil their mission, the NOCs must never associate themselves with any activity which would be in contradiction with the Olympic Charter. He also sought assistance from the Bye-law to Rules 31 and 32, particularly Paragraph 2, which provides that if there is any doubt as to the implication or interpretation of the statutes of an NOC, or a contradiction between such statutes and the Olympic Charter, the Charter takes precedence.

30. He relied heavily on three letters which were attached to the Claimant's application, namely:

a) A fax dated June 5, 2000 from Eldon C. Godfrey, Past President, Canadian Amateur Diving Association, Inc. to Mr. Guillermo Martinez of the Federacion Cuban de Natacion.

b) A reply from Mr. Martinez to Mr. Eldon C. Godfrey undated but clearly a reply to the fax of June 5.

c) A letter dated 25 August 2000 from Mr. Fernandez, President, Cuban Olympic Committee to Mr. Warren, President, Canadian Olympic Association.

31. In his letter of 5 June, Mr. Godfrey sought confirmation of "*the previous understanding of Mitch Giller, the Canadian National Team coach of diving that Arturo Miranda satisfies the requirements to participate in the Sydney Olympic Games as a representative of Canada*". In his reply, Mr. Martinez stated:

"As I talked previously by phone with Mr. Mitch Geller, the diver Arturo Miranda satisfies the requirements of FINA, Canada, and IOC to represent Canada, and it is important to clarify that your Federation don't need any letter from us to agree with that.

I appreciate very much the way your Federation has conduct this point that is the best example of good understanding between National Federations."

32. The letter written by the Cuban Olympic Committee of 25 August 2000, states (translation):

"I greatly regret that false hopes may have been created with respect to the possible participation of the aforementioned athlete as a representative of Canada in the Olympic Games in Sydney, and I reiterate that the position adopted by the Cuban Olympic Committee with respect to all cases of athletes who do not meet nationality requirements as established in the Olympic Charter is a position of principle and as such is invariable and is not subject to any other decision before or after the fact by any person or national sports organization.

The second paragraph of NORM 46, in its final part, establishes that it is the National Olympic Committee that can act in such cases and not national federations, and accordingly I wish to reiterate to you that the Cuban Olympic Committee does not approve the participation of Mr. Arturo Miranda as a representative of Canada in the Sydney Olympic Games."

33. Mr. Nicholas submits that the letter from the Cuban Olympic Committee is arbitrary because it does not consider the individual position of the athlete but simply gives effect to policy determination which it regards as "invariable". He also emphasised that this is not a case of an athlete who has left Cuba for political reasons or in order to achieve great rewards by representing another country such as Canada or the United States. The Claimant on the contrary gave up diving before he left Cuba and took up another occupation. It is only since after his migration to Canada that he has recommenced competitive diving. If his position were considered on an individual basis the only proper course, or so Mr. Nicolas argues, would be for the Cuban Olympic Committee to agree, that the Claimant may represent Canada.

34. As indicated earlier, the first question to decide is whether the last sentence of Bye-law 2 to Rule 46 confers on the relevant NOCs an absolute discretion as to whether or not to agree to the period being reduced. If so, the Claimant's other submissions will not arise.

35. It should be noted at the outset that the first sentence of Bye-law 2 makes it clear, on the facts of this case as this Panel has determined them, that *prima facie* the Claimant should not participate in these Games. The second sentence, if it were satisfied, would relax that prohibition.

36. The Panel has carefully considered the Bye-law, and is of the opinion that the NOCs were intended to and do have an absolute discretion to determine whether or not to reduce or cancel the three year period in a given case, unexaminable in the absence of clear proof of abuse or ill will.

37. In administering this rule, the IOC is not, in the Panel's view, required to investigate the reasons why a particular NOC refuses to agree. The IOC is entitled to act on the mere refusal of a NOC, and as a result to find that an athlete cannot participate in the relevant Games. Therefore, the athlete has no right to call for an investigation into the legitimacy of the grounds relied upon.

38. Under these circumstances the refusal of the Cuban Olympic Committee under Bye-law 2 is not examinable by this Panel. This makes it unnecessary to consider and make findings as to

other submissions on behalf of the Claimant concerning the validity of the Cuban Olympic Committee decision.

39. Although the Panel finds that the IOC was entitled to act on the mere refusal of the Cuban Olympic Committee to agree and that, as a result, the Claimant is not entitled to participate in these Games, the circumstances justify further comment.

40. The effect of this decision is that under Paragraph 2 of the Bye-law to Rule 46 the IOC is entitled to rely on the good faith of the NOCs to exercise their discretion, make decisions, and take actions in accordance with the principles laid down in the Olympic Charter.

41. It is clear that those decisions should be guided by the basic principles of the Charter such as the primacy of the interests of athletes in the Olympic Movement, avoidance of discrimination on political and other grounds, and the central concept that the Games are competitions among athletes rather than between countries.

42. The IOC has expressed its regret that it had to conclude that Mr. Miranda is ineligible. It did so especially in view of the fact that it is approximately nine years since the Claimant last represented Cuba.

43. On the facts before the Panel, there is no doubt that the athlete did not leave Cuba, the country of his birth, to gain higher rewards in his sport or for political reasons. It is a familiar story. He simply fell in love in Cuba with a Canadian girl and they have chosen to live in Canada. This was after he gave up his diving having previously represented Cuba in regional games. Later, after taking up residence in Canada, he resumed his diving activity both in coaching and as a participant. He continues to visit Cuba on a Cuban passport. Since 1995, he has been involved in competition there as a coach of a Canadian club team. There has been obvious good will between the Cuban Federation and the Canadian Amateur Diving Association with regard to his participation in these Games. Significantly, there is only one country for which he can compete in these Games, namely Canada – provided the agreement of the Cuban Olympic Committee is given. It is nine years since he last competed for Cuba. It is not a case where he could, if he was willing, compete for Cuba.

44. On the facts of this case, it seems to the Panel that the application of Bye-law 2, in the absence of approval by the Cuban Olympic Committee, operates considerable hardship on Mr. Miranda. The Panel finds it inexplicable why an "invariable" policy should cause the Cuban Olympic Committee to prevent Mr. Miranda's first–ever participation in Olympic Games by refusing to agree to a reduction of the period of his Olympic ineligibility. This is particularly so in the case of an athlete who retired from competition before he left Cuba, who last competed for Cuba nine years ago, and who violated no Cuban law when emigrating. To prevent Mr. Miranda's participation in these Games seems difficult to justify in light of the principle that the interests of *athletes* "constitute a fundamental element" of the Olympic Movement. The Panel therefore requests the IOC to ask the Cuban Olympic Committee to reconsider its decision in light of the present award. The Panel also recommends that the IOC

reexamine Paragraph 2 of the Bye-law to Rule 46 as presently worded with a view to determining whether an amendment could reduce unintended hardship in individual cases.

The CAS ad hoc Division rules:

The application is dismissed.