Arbitration CAS ad hoc Division (O.G. Sydney) 00/008 Arturo Miranda / International Olympic Committee (IOC), award of 24 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
Notion of "statelessness"

An athlete may be held to have "changed nationality" within paragraph 2 of the Bye-Law to Rule 46 of the Olympic Charter where he or she has become de facto stateless. This is so even though the athlete may formally remain a national of a particular state. The CAS is of the opinion that this view is consistent with principles of international law applicable to the interpretation of the Olympic Charter.

Mr. Arturo Miranda was nominated by the Canadian Olympic Association as a member of its diving team.

On 12 September 2000, the IOC made a decision that he is not eligible to represent Canada at the Sydney Olympic Games. The decision was based upon Paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter. He had not been a national of Canada for more than three years and the NOC of the country (Cuba), which he had previously represented, had not agreed to reduce that period so as to allow him to compete for Canada.

Mr. Miranda appealed to the ad hoc Division of CAS against that decision and in that arbitration (CAS arbitration N° SYD 3, 13 September 2000) the Panel dismissed the application.

On 23 September 2000, Mr. Miranda, the Canadian Olympic Association and the Canadian Amateur Diving Association Inc (the "Claimants") lodged a further appeal against the IOC decision.

The basic facts are set out in the Panel's earlier decision.

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 as 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.

In this application, the Claimants tendered and the Panel admitted into evidence the following:

(a) the application including annexes and correspondence in the earlier application - CAS arbitration N° SYD 3;

(b) a legal opinion from Mr. Avelino J. Gonzalez, Esq. of Miami Florida;

(c) a document dated 8 October 1995 recording Mr. Miranda's landing in Canada on that date, on the basis of which he thereafter became entitled to permanent residence in Canada;

(d) a letter from The Honourable Sheila Copps, P.C., M.P., Minister of Canadian Heritage dated 22 September 2000.

In CAS arbitration N° SYD 3, the Cuban Olympic Committee was invited to attend as a third party. It responded only by letter. It was again invited to attend in relation to this application. On this occasion, the Committee appeared as an interested third party. The Panel received in evidence from the Committee the following:

(a) Legal opinion of Dr. Rodolfo Dávalos Fernández Ph.D, Professor of the Faculty of law at the University of Havana;

(b) Certificate under the hand of Lic. Pablo Antonio Rodríguez Vidal, Legal Director of the Ministry of Foreign Affairs of Cuba, and

(c) Legal opinion of Lic. Martha Prieto Valdés, Main Professor of Constitutional law of the Law Faculty of the University of Havana.

Reference was made at the hearing to the Panel's decisions in CAS arbitration N° SYD 3 (*Miranda v. IOC*) and in CAS arbitration N° SYD 5 (*Perez v. IOC*).

An urgent hearing of the Claimants' application took place at the ad hoc CAS premises on Saturday 23 September 2000 at 6:00 pm. Because of the urgency of the matter, the Panel notified the parties, following the hearing, that it had decided to dismiss the application and would give its reasons as soon as practicable.

As stated earlier, the Cuban Olympic Committee was served, attended the hearing and made submissions as an interested third party. It was represented by its President.

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. The Claimants submit that Mr. Miranda became a stateless person in 1995 when he migrated from Cuba to Canada and acquired permanent resident status. They rely on the opinion of Mr. Avelino J. Gonzales to support this conclusion and also on the reasoning of the Panel in CAS arbitration N° SYD 5 (*Perez v. IOC*) particularly paragraphs 26 to 28 thereof.

6. On this basis, they submit that the IOC's decision should be overturned and Mr. Miranda declared eligible to compete on behalf of Canada at the Sydney Olympic Games.

7. The IOC submits that the Panel should not review its earlier decision in CAS arbitration N° SYD 3. It stated, however, that it did not object to the Court considering the issue of statelessness raised by the Claimants in reliance on Mr. Gonzalez' opinion. It indicated it did not wish to take sides on the issue and left it to the Panel to decide on the basis of the material before it.

8. The Cuban National Olympic Committee strongly opposed the application, relying on the legal opinions it had tendered in evidence. It contended that the question of nationality and statelessness was a matter for Cuban municipal law, that Mr. Miranda was still a Cuban national and was neither *de facto* nor *de jure* stateless. It relied heavily on paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter which, it said, gave it an absolute discretion in the circumstances to say "no" to a reduction in time to allow Mr. Miranda to compete. It indicated that it had nothing against Mr. Miranda personally or the other Claimants and that its attitude was based on a matter of principle. It also objected to the Panel's reconsidering Mr. Miranda's claim because the Panel had already dismissed it in CAS arbitration N° SYD 3.

9. This application is the second challenge to the IOC's decision to declare Mr. Miranda ineligible to compete for Canada. Although, in this application, there are two additional parties, a serious question arises as to whether, on the basis of *res judicata* or estoppel, the Panel should entertain this application. However, since the arbitration process is basically consensual and as the IOC does not object to the Panel now considering Mr. Miranda's rights on the basis of his claim to statelessness, the Panel has decided to consider the merits of the application. If it had proceeded to consider the question of *res judicata* it may well have dismissed the application on that ground. The Panel considers that, in the absence of consent, it should not revisit prior decisions, where essentially the same parties are involved.

10. In the Panel's decision in CAS arbitration N° SYD 5 (*Perez v. IOC*) (paragraph 26) it noted that that case was fundamentally different from that of *Miranda v. IOC* (CAS arbitration N° SYD 3) *"where the Claimant was not a defector and travelled annually to Cuba on a Cuban passport thus reaffirming his Cuban nationality until the moment he acquired Canadian citizenship"*. The Panel has now had the opportunity to consider directly the circumstances of Mr. Miranda in light of the principles discussed by it in *Perez v. IOC* (CAS arbitration N° SYD 5).

11. As decided in that case, an athlete may be held to have "changed nationality" within paragraph 2 of the Bye-Law to Rule 46 where he or she has become de facto stateless. This is so even though the athlete may formally remain a national of a particular state. The Panel was of the opinion that this view is consistent with principles of international law applicable to the interpretation of the Olympic Charter.

12. The legal opinions, put in evidence by the Cuban Olympic Committee, strongly affirm that, under the Cuban law, Mr. Miranda is still a Cuban national and not stateless. This, however, does not, in the Panel's opinion, determine the matter. Although Mr. Miranda may be a Cuban national under Cuban law, whether he is "stateless" is a matter for the Panel to decide in light of Article 17 of the Arbitration Rules for the Sydney Olympic Games which commands it to rule on a dispute pursuant to the Charter, the applicable regulations, general principles of law and the rules of law which it deems appropriate to apply. In the Panel's opinion "statelessness" is an issue to be decided by it guided by the Charter and relevant principles of international law which were referred to in *Perez v. IOC* (CAS arbitration N° SYD 5).

13. The Panel does not propose to repeat its discussion of these matters in *Perez v. IOC*. They are to be found in its reasons as applied to Mr. Perez at paragraphs 18 to 32 (inclusive).

14. The Panel having considered Mr. Miranda's position has decided that he did not, at any time, become stateless.

15. The situation in the *Perez* and *Miranda* cases are fundamentally different. Mr. Perez had not received authorization to leave Cuba when he left his team in Mexico and subsequently made his way to the United States. He was a defector and, on the evidence, had lost fundamental civil rights. Mr. Miranda was not a defector. At the time of his departure from Cuba, he was a retired athlete. Mr. Miranda's relations with his former country have apparently been good; he has travelled back on several occasions.

16. Mr. Miranda has not alleged that his property in Cuba has been confiscated. He does not contend, as Mr. Perez did (with reference to uncontradicted evidence of law), that he would face imprisonment upon his return to Cuba.

17. The position of Mr. Miranda is, in effect, that he should be treated as a stateless person because of the *theoretical* proposition that as a non-resident Cuban he may be deprived of fundamental civic rights. The important rights identified in Case N° SYD 005 were those of physical freedom to travel and the right to private property.

18. Mr. Miranda has not, however, alleged that he has ever sought entry to Cuba and been refused; or that he has sought to reestablish residence there and been rejected; or that there has been any interference with his property rights.

19. The conclusion of the Panel in Case N° SYD 005 was that nominal nationality may be disregarded, if the treatment of a particular person is shown to be that of someone who is *de*

facto stateless. Mr. Miranda has not, in the Panel's opinion, established that from 8 October 1995 he did not enjoy the protection of any government, which is an indicia of statelessness. Mr. Miranda has sought to show no more than that Cuban law *might* operate in such a way as to deprive Mr. Miranda of crucial civic rights. These allegations, which in his case do not extend to an uncontradicted apprehension of imprisonment, have been challenged by evidence proffered by the Cuban Olympic Committee.

20. Even if this were not so, Mr. Miranda has not alleged, let alone proved, that he has in fact been treated by the Cuban government in any manner different than that of any other government vis-à-vis an emigrating national.

21. As it happened, Mr. Miranda chose to settle in a country where the naturalisation process was subject to formalities which – whether caused by inherent incompressible waiting periods, or by the degree of alacrity of the candidate for citizenship – took considerable time to accomplish. This fact, coupled with the text of paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter, puts Mr. Miranda in the position, however unfortunate and irrespective of the sympathy the Panel has for him, that, as of the time of the Sydney Olympics, his participation was subject to Cuban approval.

22. In the circumstances the Panel considers it has no alternative but to dismiss the application.

The CAS ad hoc Division rules:

The application filed by Mr. Arturo Miranda, the Canadian Olympic Association and the Canadian Amateur Diving Association on 23 September 2000 is dismissed.