



COURT OF ARBITRATION FOR SPORT (CAS)
TRIBUNAL ARBITRAL DU SPORT (TAS)
Ad hoc Division – Games of the XXIX Olympiad in Beijing

CAS arbitration N° CAS OG 08/02

PROCEDURAL ORDER RULING ON AN APPLICATION TO STAY
THE EXECUTION OF A DECISION BEING CHALLENGED BEFORE CAS

in the arbitration between

Ms Joan Christel Simms.....
(the "Applicant")

and

Fédération Internationale de Natation (FINA).....
(the "Respondent")

* * * * *

* * *

*

1 Facts

- 1.1. 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.
- 1.2. Ms Simms represented the USA in January 2007 at a competition held in Hawaii called "1st Junior Pan Pacific Swimming Championships".
- 1.3. Ms Simms applied for membership with the Philippine Amateur Swimming Association ("PASA") in February 2007. Her application was accepted.
- 1.4. Realizing her potential, PASA and the Philippine Olympic Committee ("POC") offered Ms Simms a place on the Philippine Olympic Team for the Games of the XXIX Olympiad, Beijing 2008, provided that she achieved the FINA qualifying times.
- 1.5. In April 2007, Ms Simms achieved the FINA "B" qualifying time in the 100 meter freestyle at the 2007 US Junior Nationals in Indianapolis, Indiana.
- 1.6. PASA requested from 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.
- 1.7. On 28 November 2007, FINA informed PASA that Ms Simms' application for a change of sport nationality was denied.
- 1.8. However, a letter from FINA dated 4 February 2008 states: "Reference is made to your correspondence concerning the qualifying status from the Philippine Amateur Swimming Association for his participation in the XXIX Olympiad - Beijing 2008".
- 1.9. It confirmed that the swimmers mentioned in the letter, which include the Applicant, Ms Simms, "may enter and participate at the XXIX Olympiad - Beijing 2008 subject to approval by the Philippine 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.

- 1.10. PASA interpreted this to mean that the change of nationality of Ms Simms had been accepted and she could be entered in the Games of the XXIX Olympiad, Beijing 2008.
- 1.11. The Panel notes that following this letter PASA entered Ms Simms in the World Championships in Manchester in April 2008, a FINA competition, where she represented the Philippines in six events.
- 1.12. Following the World Championships, on 21 April 2008, FINA wrote to PASA that the change of sport nationality was not approved by FINA.
- 1.13. In reply, PASA wrote, stating:

“After your 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 the 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.”

- 1.14. On 29 July 2008, 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.
- 1.15. Ms Simms requests that such decision be stayed so that the Philippine Olympic Committee may present a request to the IOC Executive Board for approval at the IOC Executive Board meeting in Beijing.

2 Jurisdiction

- 2.1. 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 ("PIL Act"). The PIL Act applies to this arbitration as a result of the express choice of law contained in art. 17 of the CAS 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 art. 7 of the CAS ad hoc Rules.

- 2.2. 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 59 of the Olympic Charter.
- 2.3. 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."
- 2.4. 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."

3 Reasons

- 3.1. The Panel has considered the FINA rules GR 2.5 and GR 2.6 as well as the additions to Rule GR 2.6 introduced at the FINA Congress on 8 April 2008 and published in May 2008. We quote the relevant clauses in full below:

GR. 2 International Relations (*approved by FINA Extraordinary Congress in Manchester (8 April 2008) and published in the addendum to the FINA Handbook in May 2008*)

GR. 2.5 When a competitor or competition official represents his/her country in a competition, he/she shall be a citizen, whether by birth or naturalization, of the nation he/she represents, provided that a naturalized citizen shall have lived in that country for at least one year prior to that competition. Competitors, who have more than one nationality according to the laws of the respective nations must choose one « Sport Nationality» and be affiliated to one Member only.

GR.2.6. Any competitor or competition official changing his affiliation from one national governing body to another must have resided in the territory of and been under the jurisdiction of the latter for at least twelve months prior to his first representation for the country.

GR. 2.6.1 Proof of Residence

- 1) Residence means the place/country where the competitor or competition

official “lives and sleeps” and where he/she can be found in the majority of days of the year.

- 2) The proof of residence must include documentation establishing the applicant resides in the country. In this regard the official school or university confirmation or employment contract or any other relevant documentation may constitute evidence.
- 3) Certified registration of an address in the “new” country for at least twelve (12) months prior to first representation of the competitor or competition official for the “new” country must be sent to FINA.

GR. 2.6.2 Proof of Jurisdiction

- 1) Certified membership in a club of the new country;
- 2) Confirmation from the FINA Member of that country;
- 3) Official result lists from national championships, national, regional or international club competitions in which the applicant has participated for his/her “new” club during the GR. 2.6. requested time;
- 4) Applicants cannot represent any of the countries during the “transfer period”.

3.2. The Panel is of the view that the additions to Rule GR 2.6 do not materially alter in the present case the requirement regarding the residence of twelve months as provided by Rule GR. 2.6. It is conceded that Ms Simms does not currently live in the Philippines.

3.3. The relevant provision as to change of nationality with regard to the Olympic Games is governed by the Bye-law to Rule 42 of the Olympic Charter, in particular paragraph 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.”

3.4. Also relevant is paragraph 4 of the Bye-law to Rule 42, which reads:

“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”

3.5. The IOC rules prescribe for change of nationality 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 the NOCs and the IF concerned.

3.6. In this case, NOCs for the Philippines and the USA both agreed to change the sport nationality of the Applicant, but not the IF concerned, namely, FINA.

3.7. The Panel is of the view that both bodies acted honourably in the process. However, there was a genuine miscommunication which gave rise to PASA’s mistaken belief that FINA had approved the change of Ms Simms’s sport nationality. The Panel believes that this 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 by permitting her to represent the Philippines in the World Championships in April 2008.

3.8. The Panel notes that in a previous decision of the CAS ad hoc Division (CAS OG 02/006 New Zealand Olympic Committee/ Salt Lake Organizing Committee for the Winter Games of Olympics 2002), the Panel drew an analogy to the doctrine of “estoppel by representation”. The Panel applied said doctrine as a general principle of law (Art.17 of CAS ad hoc Rules) which is defined as:

“An estoppel that arises 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 (Blacks Law Dictionary, 7th ed.1999)”.

3.9. Under the circumstances described above, the Panel is of the view that FINA is estopped from invoking Rule GR 2.6 of the FINA Rules as it has referred to the requirement of Rule GR 2.6 in the letter of 4 February 2008, had accepted 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.

3.10. The Panel points out that this recommendation applies purely to the particular circumstances with regard to this Applicant for her participation in the Games of the XXIX Olympiad, Beijing 2008, and it is not to be taken to disregard FINA Rule GR 2.6 and FINA's interpretation of that rule, with which the Panel respectfully agrees.

4 Decision

On the basis of the foregoing facts and reasons, the ad hoc Division of the Court of Arbitration for Sport renders the following decision:

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.

Beijing, 1 August 2008

THE AD HOC DIVISION OF THE COURT OF ARBITRATION FOR SPORT

Sharad Rao

President of the Panel

Thomas Lee
Arbitrator

Chi Liu
Arbitrator