Nationality—Individuals—Change of nationality—Loss of former nationality — Defection — Whether leading to automatic forfeiture of nationality—Cuba—Acquisition of nationality — United States nationality — Cuban defector given asylum in United States of America—Marrying United States citizen—Formal grant of nationality in 1999—Whether becoming United States citizen at earlier date—Whether stateless at some point—Proof of nationality—International Olympic Committee—Rule that person who had represented one State could not represent another until three years after change of nationality

International tribunals—Arbitration—Court of Arbitration for Sport—Evidence—Proof of nationality under national law—Whether letter from Ambassador conclusive

PEREZ *v.* INTERNATIONAL OLYMPIC COMMITTEE[1]

(CAS Arbitration No SYD 5)

Court of Arbitration for Sport (Ad Hoc Division: Sydney Olympic Games)

(Ellicott, *President*; Paulsson and Martens, *Members*)

19 *September* 2000

SUMMARY: *The facts*:—The applicant had represented Cuba in the Olympic Games in 1992. In 1993 he had defected and was granted asylum in the United States of America, where he had lived since then. In 1994 he had married a United States citizen and in 1995 had been granted resident alien status in the United States of America. He had competed for the United States of America in sports events in 1997-9. In 1999 he had formally been granted United States citizenship. On being selected for the United States team for the 2000 Sydney Olympics, he was told by the International Olympic Committee ("IOC") that, under paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter, he was not eligible to compete, because he had not been a United States national for three years prior to the 2000 Olympics and the Cuban National Olympic Committee had refused to waive the rule. Paragraph 2 of the Bye-law provided that "a competitor who has represented one country in the Olympic Games . . . 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".

The applicant challenged the IOC decision before the Court of Arbitration for Sport. He produced a letter from the United States Ambassador to Australia

[1] For a list of counsel, see para. 12.

that he had become a United States citizen more than three years earlier and an opinion from a Cuban lawyer to the effect that, under Cuban law, he had forfeited his Cuban citizenship when he defected from Cuba.

Held (unanimously):—The application was allowed. The applicant was eligible to participate as a United States competitor in the 2000 Olympics.

(1) Although the letter from the United States Ambassador was a considered statement by an accredited representative of the United States of America, it was not conclusive as to whether, under United States law, the applicant had acquired United States nationality before he was formally granted United States citizenship. Expert evidence as to the application of United States law to the applicant's case was needed and had not been produced (paras. 25-9).

(2) The uncontroverted evidence of Cuban law was that the applicant had been deprived of his civic rights and thus of his Cuban citizenship when he defected in 1993 (paras. 30-6).

(3) It followed that he had become stateless between 1993 and the date when he had acquired United States nationality. The concept of a stateless person was well known in international law. Statelessness could exist *de facto* where a State withheld its protection from a person. The purpose of nationality was not to give the State some kind of proprietary interest in the citizen. To permit Cuba to continue to control the destiny of the applicant when for the previous seven years it had withheld from him its protection and all fundamental civic rights was contrary to core principles of the Olympic Charter. Paragraph 2 of the Bye-law to Rule 46 had to be interpreted in such a way that a person changed his nationality when he became stateless, whether *de jure* or *de facto* (paras. 37-51).

The following is the text of the award of the Tribunal:

1. FACTS

1. The present proceedings have been commenced by Mr Angel Perez (the Claimant) seeking a declaration that he may compete in the 2000 Sydney Olympic Games as a member of the US Olympic Team.

2. The Claimant was born in Havana in 1971 and competed for Cuba in the 1992 Olympic Games in Barcelona.

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

4. In 1994, the Claimant married a US citizen. He and his wife had a child in 1995, born in Miami.

5. On 11 September 1995, the Claimant was awarded permanent residence status as a "Resident Alien" in the US ("Green Card").

6. The Claimant competed for the US in the kayak World Championships in 1997, 1998 and 1999 in accordance with the Rules of the International Canoe Federation.

7. In September 1999, the Claimant obtained US citizenship.

8. On 21 August 2000, the United States Olympic Committee and USA Canoe/Kayak requested the IOC to grant Mr Perez the right to participate in the Sydney 2000 Olympic Games. The IOC denied this 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:
> (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,
> Mr Perez is not eligible to represent the United States 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 Perez to compete for the United States, especially in view of the fact that it has been approximately eight years since Mr Perez last represented Cuba.

9. On 12 September 2000, the USOC and USA Canoe/Kayak commenced proceedings before the Court of Arbitration for Sport Ad Hoc Division Sydney Olympic Games seeking a decision which would allow Mr Angel Perez to participate for the United States of America in the Kayak competition of the Sydney 2000 Olympic Games.

10. On 13 September 2000, the CAS Ad Hoc Division for the Sydney Olympic Games delivered an award dismissing the application.

2. PROCEDURE

11. On 17 September 2000, the Claimant filed the application instituting the present proceedings. To the application was attached a letter dated 14 September 2000, signed by Edward W. Gnehm, Ambassador of the United States of America, addressed "To Whom it May Concern" and affirming that the Claimant had been a national of the United States under US law "for a period considerably in excess of three years" before the beginning of the 2000 Olympic Games.

12. Hearings were conducted on 18 September 2000. The following persons were present:

For the Claimant: Mr Angel Perez (Claimant)
Mr Mark Williams SC, Attorney at law for Perez
Ms Tricia McDonald, Attorney at law for Perez
Mr Paul Garazzi, Sparke Helmore, Solicitor for Perez
Mr Paul Podjorski, US Canoe / Kayak coach

For the Respondent: Mr Howard Stupp, Director Legal Affairs

Interested party: Mr Gary L. Johansen, Associate General Counsel, USOC
Mr John W. Ruger, Athlete Ombudsman, USOC

13. The Cuban National Committee was provided a copy of the application and invited to attend the hearings as a third interested party entitled to be heard and to adduce evidence. It did not attend, but prior to the hearings filed a letter bearing the caption "CAS arbitration N° SYD 5", and reading in its entirety as follows (translation):

The Cuban Olympic Committee has restated on various occasions that Mr Angel Perez, athlete in Canoe-Kayak, has not complied with the requirements of Rule 46 of the Olympic Charter.

In view of the above, the Cuban Olympic Committee confirms that Mr Angel Perez is not eligible, and does not authorise him to represent the US Olympic Committee at the Sydney Olympic Games.

14. At the hearing, the Applicant produced an opinion on relevant Cuban law signed by Avelino J. Gonzales, Esq., a Cuban lawyer now practising in Florida who is a graduate and former Adjunct Professor of the University of Havana. The Respondent stated that it neither accepted nor rejected the opinion, but did not seek the opportunity to provide additional evidence.

3. THE PARTIES' ARGUMENTS

3.1. *The Claimant's Contentions*

15. The Claimant argues that he became a US national more than three years before the opening of the Sydney Olympic Games, and that therefore he is entitled to participate, and to represent the United States, irrespective of the objection sought to be raised by Cuba under paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter.

16. Secondly, the Claimant argues that even if it is found that he did not become a US national until 1999, he nevertheless should be treated as a stateless person as of 1993, with the consequence that he "changed his nationality" for the purposes of Rule 46 more than three years ago, and thus may participate as a US national irrespective of the Cuban objection.

3.2. *The Respondent's Contentions*

17. The Respondent considers that the Claimant has not proved that he acquired US nationality before 1999, and that on that basis Cuban

approval was necessary for the Claimant to participate and represent the US in the Games.

18. As to the contention that the Claimant became stateless as of 1993, the Respondent takes the position that it does not wish to act adversarially in the context of what could be viewed as a debate between the Claimant and the Cuban National Committee, but that its only concern is the proper application of the Charter. Although invited to attend the hearing, the Cuban National Committee did not.

4. LEGAL ANALYSIS

4.1. *Legal Framework*

19. 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 subject to Chapter 12 of the Swiss Private International Law Act of 18 December 1987 as a result of the express choice of law contained in Article 17 ad hoc Rules and 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.

20. The jurisdiction of the Ad Hoc Division is based on the entry form signed by all participants in the Olympic Games and on Rule 74 of the Olympic Charter.

21. Article 17 of the ad hoc Rules requires the Panel to 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".

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

23. Article 18 of the ad hoc Rules requires the Panel to "give a decision within 24 hours of the lodging of the application".

4.2. *Admissibility*

24. The Respondent has objected to the fact that this case raises many of the same issues that were raised and dealt with in *USOC and USA Canoe-Kayak* v. *IOC* (CAS arbitration N° SYD 1). It is legitimately concerned that matters already decided should not be relitigated. This concern has, of course, a firm foundation in the principle of *res judicata*. In the present case, however, as a formal matter the Applicant is Mr Perez himself. Although he testified in the CAS arbitration N° SYD 1, he was neither summoned nor joined as a party to those proceedings. For this reason, the Panel considers that the application must be deemed admissible on its merits.

4.3. *Merits of the Application*

A. *The Claimant's contention that he was a national of the United States for more than three years prior to the 2000 Sydney Games*

25. The only evidence additional to that which was before us in CAS arbitration N° SYD 1 is the letter signed by the Ambassador of the United States in Australia (see Paragraph 11).

26. The award in that case held, at para. 11, that the Claimants there had not demonstrated that Mr Perez had acquired US nationality before he was granted citizenship in September 1999. The Panel indicated (para. 10) that, if factors such as those invoked by the Claimants could suffice to confer nationality, there would be numerous examples of attempts—indeed successful attempts—to obtain it.

27. What is now contended is that the letter by the Ambassador is conclusive as to what it states, i.e. that the Claimant became a US national for a period considerably in excess of three years before the beginning of the 2000 Olympic Games.

28. The Panel accepts that the Ambassador's letter is a considered statement by an accredited representative of the United States. The Panel nevertheless does not regard it as conclusive. Although it appears to be the case that under US law a person may become a US national before being granted citizenship, the question remains whether this has occurred. If the Claimant became a US national at least three years prior to the 2000 Olympic Games as a result of the operation of US law, the Panel anticipates that this could be the subject of opinion evidence from United States lawyers competent in the field who could so opine and cite either judicial or administrative authority to support the conclusion. No such opinion evidence has been tendered.

29. The Panel therefore rejects the Claimant's submission that on the material in evidence before it, one should conclude that he acquired US nationality more than three years before the 2000 Olympic Games.

B. *The Claimant's alternative contention that Cuban consent is not required because he should be deemed to have become a stateless person in 1993*

30. Paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter provides that

> a competitor who has represented one country in the Olympic Games . . . , 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.

31. The Claimant argues that as a result of the Cuban legal regime, he became a stateless person after his defection in 1993, and that even

if he did not *acquire US nationality* until 1999, he should be deemed to have *changed his nationality* when he became stateless.

32. Unlike the Claimants (USOC and USA Canoe / Kayak) in CAS arbitration N° SYD 1, Mr Perez provided evidence of Cuban law, in the form of the opinion by Mr Gonzales referred to in paragraph 14 ("the Gonzales Opinion"). The Respondent has not contradicted the propositions contained in the Gonzales Opinion. The Cuban National Olympic Committee, although invited to attend the hearing, has not sought to make any contribution to the Panel's understanding.

33. The conclusion of the Gonzales Opinion is that "*Mr Perez became stateless when he defected from Cuba back in 1993.*"

34. The substantive foundations of this conclusion are as follows:

—under Article 135.1 of the Cuban Penal Code, Law N° 62 of 29 December 1982, a defector in Mr Perez's position could be sentenced to a minimum sentence of three years in prison, with a maximum of eight years;
—Mr Perez would not be allowed to travel to Cuba without a visa granted by the Cuban Immigration Department; a Cuban living abroad could be sentenced to up to three years in prison for illegal entry under Article 214.1 of the Cuban Penal Code;
—Cubans residing abroad may not own a business or real property in Cuba;
—irrespective of past social-security contributions when they lived in Cuba, Cubans who leave the country may not collect such benefits when they become eligible, if they live abroad;
—under Law 989 of 5 December 1961, individuals who have "abandoned definitively the country" are susceptible to the confiscation of all their property.

35. Mr Gonzales thus concludes that Mr Perez was effectively deprived of his civic rights as a Cuban when he defected in 1993, and that he should therefore be treated as a stateless person from that date.

36. In the absence of any contrary evidence or explanation offered by the Cuban National Olympic Committee, which did not avail itself of the opportunity given to it to appear, the Panel concludes that the Gonzales Opinion constitutes sufficient evidence to ground the conclusion that Mr Perez was, as of 1993, deprived of what is generally recognized as fundamental civic rights. Issues of national law, when presented to an international tribunal such as this Panel, must be established by competent evidence adduced by the parties. The Panel is conscious of the fact that the propositions articulated by Mr Gonzales may be susceptible to significant qualifications, or indeed rebuttal, but the Panel has no reason to question the evidence proffered in the absence of any challenge to it. This consideration is particularly relevant in circumstances where all interested parties, including the Cuban National

Olympic Committee, know or should know that CAS is bound to operate with great speed in order to ensure that its decisions are not pointless given the exigencies of the Olympic schedule.

37. It remains to be examined whether there is an international notion of statelessness that may be applicable in Mr Perez's situation, and if so what its consequence may be for the purposes of paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter.

38. It is clear that "statelessness", as both a concept and status, is well known in international law.

39. The Panel was referred to several authorities, including Paul Weis, *Nationality and Statelessness* (2nd Edn 1979, pp. 161-9), and Guy S. Goodwin, *The Refugee in International law* (2nd Edn 1996, pp. 196-204).

40. Weis, a former Legal Adviser of the Office of the United Nations High Commissioner for Refugees, states (pp. 161-2) that a person may become stateless by losing one nationality without acquiring another. There have been a number of international conventions dealing with statelessness which, generally speaking, have been directed to reducing instances of involuntary loss of nationality.

41. In its second session in 1947, the Commission on Human Rights of the United Nations adopted a Resolution on Stateless Persons in which it expressed the wish that early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any government, "in particular pending the acquisition of nationality as regards their legal and social protection and their documentation". (Weis, page 163.)

42. The UN Secretariat (Social Department) has given the term "stateless persons" a meaning which includes persons who are not only *de jure* but also *de facto* stateless, i.e. "persons who without having been deprived of their nationality no longer enjoy the protection and assistance of their national authorities". (Weis, page 164.)

43. Rule 46 of the Olympic Charter requires that "Any competitor in the Olympic Games must be a national of the country of the NOC which is entering him." The Bye-law to Rule 46 is directed to circumstances in which, broadly speaking, the right of an athlete to compete may be restricted notwithstanding he or she is at the time of the relevant Games a national of a particular country which has selected him or her as a competitor.

44. The purpose of nationality in international law is not to give governments any form of proprietary interest in individuals, as though they were chattels. Nor is it to enable those who govern a country to use individuals as the instruments of their policy. These considerations are reinforced in circumstances where, as here, the uncontradicted evidence is that in return for the dominion sought to be exercised over Mr Perez seven years after his leaving the country, Cuba apparently withholds from him the benefits of fundamental civil rights, such as

those of freedom of movement and respect for property. (The present case is thus fundamentally different from that of *Miranda* v. *Cuban Olympic Committee*, 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 notion that Cuba in these circumstances should be in a position to prevent Mr Perez from competing is offensive to two core principles of the Olympic Charter, namely that the interests of athletes are fundamental (Rule 3 (1)), and that Olympic competition is among athletes and not countries (Rule 9 (1)).

45. Having regard to the principles of the Charter, particularly those expressed in Rules 2, 3, 9 and 31, the Panel considers that the word "nationality" in Rule 46 and its Bye-law should be construed broadly. In so far as it is relevant to consider whether a person has lost his or her nationality, the Panel is of the view that a person may be found to have lost it both in circumstances where he or she is *de jure* or *de facto* stateless.

46. As it is the only evidence of Cuban law before us and because the opinion is consistent at least with the Claimant having become *de facto* stateless, the Panel is of the view, based on the Gonzales opinion, that in 1993, the Claimant at least became *de facto* stateless. In other words, as a result of his defection, he was no longer effectively a national of Cuba for the purposes of Rule 46 notwithstanding that he may in a formal sense have remained a national of Cuba and been so regarded by the government of that country. Whatever may have happened between 1993 and 1999, he has clearly now become a national of the United States, and may, prima facie, be entered as a competitor in these Games by his new country.

47. The final question remains whether, under Bye-law 46.2, the Claimant "changed" his nationality more than three years prior to the 2000 Sydney Olympic Games.

48. By definition the word "change" means to "become or make different" or "alter" or "pass from one form to another" (*Oxford Advanced Learners Dictionary*).

49. If this word were construed literally, it could be argued that a person does not change nationality until he or she changes to another nationality.

50. It is the Panel's view that the word "change" should be given a broad meaning to include the situation where a person becomes stateless. If a text may be interpreted in two ways, the Panel has no hesitation in resolving the ambiguity in favour of an athlete who is guilty of neither wrong-doing nor even negligence in terms of the Olympic Charter. The word "change" is appropriate to describe the passing from one form to another, that is from "nationality" to "statelessness". Based on the evidence of Cuban law before the Panel which, in the absence of

evidence of the contrary, it feels bound to accept, that is what happened here.

51. The Panel therefore concludes that the Claimant "changed his nationality" in 1993 for the purposes of paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter, and that therefore consent under that Bye-law by the concerned NOCs, including the Cuban Olympic Committee, is not necessary for him to compete.

52. The Panel further concludes that the Claimant is eligible to participate in the 2000 Olympic Games on behalf of the United States.

5. DECISION

1. The application is allowed.

2. The decision of the IOC dated 28 August 2000 finding that the Claimant is not eligible to represent the United States at the 2000 Sydney Olympic Games is overturned.

3. The Claimant is eligible to participate and represent the United States in the 2000 Sydney Olympic Games.

[Report: Transcript]

Human rights—Jurisdiction—State responsibility for securing rights and freedoms—Whether limited to the territory of a State—State exercising effective control of territory outside its borders as a result of military action—Whether violations of human rights in that territory imputable to the State—Whether State responsible for acts of local administration—Cyprus—Whether northern Cyprus within the jurisdiction of Turkey for purposes of Article 1, European Convention on Human Rights, 1950—Whether Turkey responsible for acts of "Turkish Republic of Northern Cyprus"

Human rights—Remedies—Courts of "Turkish Republic of Northern Cyprus"—Whether to be treated as courts for purposes of European Convention on Human Rights—Relevance of illegality of establishment of "Turkish Republic of Northern Cyprus"—*Namibia* doctrine—Whether courts of northern Cyprus affording remedies — Duty to exhaust domestic remedies—Whether courts of northern Cyprus independent and impartial tribunals—European Convention on Human Rights, 1950, Articles 6, 13 and 35