

CAS 2001/A/357 NABOKOV & RUSSIAN OLYMPIC COMMITTEE (ROC) & RUSSIAN ICE HOCKEY FEDERATION (RIHF) V. INTERNATIONAL ICE HOCKEY FEDERATION (IIHF)

ARBITRAL AWARD

of 31 January 2002

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

Dirk-Reiner Martens, Sole Arbitrator

between

Nabokov & Russian Olympic Committee (ROC) & Russian Ice Hockey Federation (RIHF)

Appellant

and

International Ice Hockey Federation (IIHF)

Respondent

1. IIHF Bylaw 204 (1) c provides that:

When once a player has represented a country in any IIHF championship or in the qualification to these competitions he will not be eligible to represent another country excepting if the player was under eighteen years of age when he represented the country (the starting day of the competition being decisive), then he may apply to the IIHF to represent another country provided that (a) he is a citizen of that country and (b) he has participated for at least two consecutive years in the national competitions of his new country during which period he has neither transferred to another country nor played ice hockey within any other country. Such change will be allowed only once in a player's life and is final and irrevocable.

This rule has always been interpreted as providing a possibility of representing two countries but only for players who were under the age of eighteen when they represented their first country. This is a valid interpretation of the rule which has been interpreted in that way ever since it was implemented. This is in the interest of fairness to all other players whose eligibility for playing for another country has previously been denied because of this particular interpretation of Bylaw 204 (1) c.

2. IIHF Bylaw 204 (1) c does not violate the Olympic Charter. The Olympic Charter provides minimum standards, which the federations cannot exclude. It does not deny the federation the right to impose stricter rules than the Olympic Charter, in which case the player needs to comply with both.

3. The fact that some players have, in the past, been able to violate the rules cannot mean that other players should benefit from their misconduct. The Panel is not aware that the IIHF ever allowed another player to represent a different country after turning eighteen. Therefore, this is not a case of unequal treatment.

The present appeal seeks relief against the Respondent's decision of December 14, 2001, whereby the Appellant, Evgeny Nabokov, was denied eligibility for playing for the Russian Olympic Ice Hockey Team at IIHF Championships, including the Olympic Games in Salt Lake City 2002.

Evgeny Nabokov was born on July 25, 1975 in the city of Ust-Kamenogorsk in the former Soviet Union. The city is located in the former Soviet Republic of Kazakhstan, which is an independent state since December 1991.

While living in Kazakhstan, the Appellant played in three games for the national Kazakh Ice Hockey Team at the World Championship Pool C in 1994.

By decision of December 14, 2001, Respondent denied Mr. Nabokov eligibility to play for the Russian Olympic Ice Hockey Team at IIHF Championships. The IIHF Council based its decision on an alleged violation of the IIHF Bylaw 204 (1)c, which states:

When once a player has represented a country in any IIHF championship or in the qualification to these competitions he will not be eligible to represent another country excepting if the player was under eighteen years of age when he represented the country (the starting day of the competition being decisive), then he may apply to the IIHF to represent another country provided that (a) he is a citizen of that country and (b) he has participated for at least two consecutive years in the national competitions of his new country during which period he has neither transferred to another country nor played ice hockey within any other country. Such change will be allowed only once in a player's life and is final and irrevocable. The council determined that, since Mr. Nabokov had previously represented Kazakhstan he is no longer eligible to represent the Russian Federation.

The Appellants claim that the IIHF's Bylaw 204 (1)c does not apply in this particular case for two reasons: First, because it was constituted after Mr. Nabokov had already played for Kazakhstan and therefore would have an illegal retroactive effect. Second, according to the Appellants, Mr. Nabokov was never a citizen of Kazakhstan and his representation of Kazakhstan was therefore not valid.

The present version of the IIHF rules was implemented in 1998, after Mr. Nabokov had represented Kazakhstan in the 1994 World Championship. The Appellants argue that, in the absence of a regulation in the IIHF rules, according to R58 Code of Sports-related Arbitration (hereinafter referred to as "the CAS Code"), the validity of retroactivity should be determined according to the Swiss Civil Code which forbids such retroactivity. Therefore, the IIHF rules do not apply to facts which took place before the implementation of the IIHF rules in 1998.

Furthermore, the Appellants claim, that Bylaw 204 (1)c does not apply in the instant case because Mr. Nabokov never held Kazakh citizenship. He never had a passport issued by the Republic of Kazakhstan. According to the Appellants, under Russian law, Mr. Nabokov has always been considered a Russian citizen, regardless of his place of birth, because both his parents are ethnic Russians, as stated in his birth certifi-

cate. The Appellants therefore argue that, even if the IIHF rules did apply to Mr. Nabokov's participation in the 1994 World Championships, they would invalidate that representation because the IIHF rules require that the athlete is a citizen of the country he represents, which Mr. Nabokov never was. The Appellants also state that Mr. Nabokov served in the Russian army while playing for Dynamo Moscow 1994-1996.

Regarding the Olympic Games specifically, the Appellants claim that the council's decision is incorrect because the IIHF's Bylaw 204 (1)c violates both Rule 46 and the Bye-law to Rule 46 of the Olympic Charter, which state:

Rule 46 Olympic Charter:

1. Any competitor in the Olympic Games must be a national of the country of the NOC which is entering him.
2. All disputes relating to the determination of the country which a competitor may represent in the Olympic Games shall be resolved by the IOC Executive Board.

Bylaw to Rule 46 Olympic Charter

1. A competitor who is a national of two or more countries at the same time may represent either one of them, as he may elect. However, after having represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognized by the relevant IF, he may not represent another country unless he meets the conditions set forth in paragraph 2 below that apply to persons who have changed their nationality or acquired a new nationality.
2. A competitor who has represented one country in the Olympic Games, in continental or regional games or in world or regional championships recognised 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 circumstances of each case.

3. If an associated State, province or overseas department, a country or colony acquires independence, if a country becomes incorporated within another country by reason of a change of border, or if a new NOC is recognised by the IOC; a competitor may continue to represent the country to which he belongs or belonged. However, he may, if he prefers, choose to represent his country or be entered in the Olympic Games by his new NOC if one exists. This particular choice may be made only once.

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.

Since Bylaw to Rule 46 provides for athletes to represent a different country upon change of citizenship on the condition that at least three years have passed since the competitor last represented his former country, it is more lenient than the corresponding Bylaws of the IIHF. The Appellants therefore argue that the stricter rules of the IIHF violate the Olympic Charter and Mr. Nabokov's eligibility should therefore be determined by the Olympic Charter only, which would find him eligible to compete.

The Appellants further claim that Mr. Nabokov has not been afforded equal treatment because, in the past, several athletes have indeed been allowed to represent two different countries in IIHF championships.

In conclusion, the Appellants request that:

1. The decision of the Respondent dated December 14, 2001 be declared null and void.
2. Mr. Evgeny Nabokov be declared eligible to play for the Russian Olympic Hockey Team during the Olympic Games in Salt Lake City 2002.
3. Costs and fees be borne by the Respondent.

Respondent requests that:

1. All prayers for relief as per Appellants' Appeal dated 21 December 2001 be entirely rejected;
2. All arbitration costs and fees be borne by the Appellants.

In response to the Appellants' arguments the Respondent states that Bylaw 204 (1)c does apply because the eligibility rules in question have been in force for more than thirty years and have not been changed in essence during that period. The Respondent further argues that, even if this were not the case, there would still be no retroactivity because the rules are applied to the 2002 Olympic Winter Games, which are due to take place after implementation.

The Respondent denies that Mr. Nabokov was already a citizen of the Russian Federation at the 1994 World Championship, because at that time he presented the IIHF with a Soviet Union passport containing a stamp, which, according to the Respondent, confirmed Mr. Nabokov's citizenship of Kazakhstan. Mr. Nabokov also signed the required IIHF Eligibility Form on which he confirmed his citizenship of Kazakhstan.

Regarding the alleged violation of the Olympic Charter, the Respondent argues that the IIHF has the sole competence to set up the eligibility criteria for competing in the Olympic Games. Respondent quotes primarily Rule 45 of the Olympic Charter, which states:

Rule 45 Olympic Charter:

To be eligible for participation in the Olympic Games a competitor must comply with the Olympic Charter as well as with the rules of the IF concerned as approved by the IOC, and must be entered by his NOC. He must notably:

- respect the spirit of fair play and non violence, and behave accordingly on the sportsfield;
- refrain from using substances and procedures prohibited by the rules of the IOC, the IFs or the NOCs;
- respect and comply in all aspects with the Olympic Movement Anti-Doping Code.

ByLaw to Rule 45

1. Each IF establishes its sport's own eligibility criteria in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for Approval.

2. The application of the eligibility criteria lies with the IFs, their affiliated national federations and the NOCs in the fields of their respective responsibilities.

3. Except as permitted by the IOC Executive Board, no competitor who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.

4. The entry or participation of a competitor in the Olympic Games shall not be conditional on any financial consideration.

The Respondent argues that, even though Rule 46 of the Olympic Charter establishes criteria for determining the nationality of competitors, it does so without any prejudice to the competence of a sports governing body to set forth its own eligibility criteria in accordance with Rule 45 of the Olympic Charter. The eligibility rules of the IIHF are such rules and received the necessary approval by the International Olympic Committee. Therefore, the Respondent denies that the IIHF's Bylaw 204 (1)c violates the Olympic Charter.

The Respondent equally denies the Appellants' claim of not having been afforded equal treatment. The Respondent does, however, concede that there were indeed five players who represented two different countries in IIHF tournaments. However, the Respondent states that this happened illegally and without the consent or even knowledge of the IIHF. The Respondent argues that this was due to the fact that the control of player's eligibility was not as effective at that time as it is today, the reason being that at that time not all players were registered on computers.

Upon receipt of the IIHF's decision dated December 14, 2001 the Appellants filed an appeal with the Court of Arbitration for Sport (CAS) on December 21, 2001.

On January 4, 2002 the CAS informed the parties that by a decision of the President of the Appeals Arbitration Division the case would be heard before a sole arbitrator.

By letter of January 9, 2002 the Respondent filed its Response to the Appeal.

The hearing was held on January 24, 2002 in Munich, Germany.

## Law

1. The CAS's jurisdiction is based on Articles 45 and 46 of the IIHF Statute:

### 45. Subject Matter of the Arbitration

*Any dispute concerning the interpretation and/or application of the Statutes, Bylaws, Regulations and official rules or decisions of IIHF bodies or the decision of any duly authorized representative of the IIHF and the appeal and/or review processes within the IIHF having been fully exercised must be settled by Arbitration – except those specified in Statutes 21 C.....*

### 46. Court of Arbitration for Sport

*Any dispute to be settled by Arbitration must be submitted exclusively by way of appeal to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, which will resolve the dispute definitively in accordance with the Code of Sports-related Arbitration. The time limit for the appeal is twenty-one days after receipt of the decision concerning the appeal.*

2. Neither party raised any objection to the jurisdiction of the CAS before or during the hearing.
3. Pursuant to Article R58 of the CAS Code, the Panel is required to decide the dispute according to the applicable regulations of the IIHF and Swiss law since the Respondent has its seat in Switzerland and the parties did not choose a different governing law.
4. For the interpretation of the IIHF rules the Panel will have special regard to Swiss law in accordance with Article R58 of the CAS Code.
5. After very careful consideration of the subject matter, the Panel upholds the Respondent's decision, denying Mr. Nabokov eligibility to compete in IIHF championships and in particular the Olympic Games, Salt Lake City 2002 as a representative of Russia.
6. The Panel comes to the conclusion that Bylaw 204 (1)c is applicable to Mr. Nabokov.



7. However, the Panel did notice that the wording of Bylaw 204 (1)c leaves room for interpretation. It is not clear whether the passage which reads "*then he may apply to the IIHF to represent another country*" refers to any and all players who have ever represented another country or only to players under the age of 18; the former interpretation would open up a general possibility of representing another country upon application.

8. Previous CAS Panels have already expressed their view that they will interpret the applicable rules in a way "which seeks to discern the intention of the rule maker, and not to frustrate it" (CAS 96/149, A.C. v/FINA, Award of 13 March 1997, in Reeb (ed.) Digest of CAS Awards 1998, p. 251, 259; CAS 2001/A/317, A. v/FILA, Award of 9 July 2001, p. 16).

9. The Panel therefore has to acknowledge that the rule has always been interpreted as providing a possibility of representing two countries but only for players who were under the age of eighteen when they represented their first country. Since the Panel finds this to be a valid interpretation of the rule and since it has been interpreted in that way ever since it was implemented, the Panel will not interpret it differently. This is in the interest of fairness to all other players whose eligibility for playing for another country has previously been denied because of this particular interpretation of Bylaw 204 (1)c.

10. The Panel also very seriously considered following a decision of the OGH, Austria's highest civil court, regarding an injunction (see Austrian OGH, *SpuRt* 1999, p. 22). The OGH, applying Swiss law, ruled that this particularly harsh rule of the IIHF Bylaws can, in some cases, be invalid because of a violation of moral principles.

11. The facts of this OGH case were similar to the one at hand. The OGH granted injunctive relief to an ice hockey player who was born in 1966 as a citizen of Canada and emigrated to Austria in 1991, where he was awarded Austrian citizenship in 1996. The player was originally denied eligibility to play for Austria in the 1998 World Championships. The Panel noted that, although the Austrian Court ruled in favor of the player, he subsequently withdrew his claim and in the end did not play in the 1998 IIHF World Championships.

12. After very careful consideration the Panel decided not to follow this decision, which is not a binding precedent for the Panel. The Austrian Court only rendered an interlocutory judgement for injunctive re-

lief. Furthermore, the decision did not give very detailed reasons. The scope of the OGH's review therefore seems to have been smaller than the Panel's scope of review in the present case (see Article R57 CAS Code).

13. Furthermore, the player in question had last played for Canada in 1986 where he participated in the junior national team. Mr. Nabokov, on the other hand, played in Kazakhstan's senior national team and less time has passed since he represented Kazakhstan.

14. Therefore, the Panel decided to uphold the validity of Bylaw 204 (1)c in this particular case. However, in the light of the Austrian decision the Panel strongly urges the Respondent to modify this rule at the next possible opportunity, bearing in mind its potential invalidity.

15. The Appellants allege that the IIHF rules have been applied retroactively.

16. The Panel decided not to follow this argument because the rules in force at the time of the 1994 World Championships were even more restrictive than the ones in force now, which were implemented in 1998. Indeed, the 1998 rules are actually a modification of the prior version, which didn't provide for any exceptions at all.

17. The Appellants claim that the IIHF rules violate the Olympic Charter.

18. The Panel finds that this is not the case. The Olympic Charter provides minimum standards, which the federations cannot exclude. It does not deny the federation the right to impose stricter rules than the Olympic Charter.

19. Rule 45 of the Olympic Charter states that "To be eligible for participation in the Olympic Games a competitor must comply with the Olympic Charter as well as with the rules of the IF concerned as approved by the IOC...". This implies that the Olympic Charter accepts that the rules of the federations may deviate from its own rules. Otherwise it would not be necessary to state that a player must comply with both sets of rules.

20. Also, this section of the Olympic Charter only makes sense if the IF rules can indeed be more restrictive than the Olympic Charter. If the IF rules were more lenient than the Olympic Charter, a player would definitely comply with them if he were complying with the Olympic Charter.

21. Thus, rule 45 of the Olympic Charter is directly applicable to this particular case because it allows for the possibility of the IF rules being stricter than the Olympic Charter, in which case the player needs to comply with both. Furthermore the IIHF rules were approved by the IOC in compliance with rule 45 of the Olympic Charter. Therefore Bylaw 204 (1)c does not violate the Olympic Charter.

22. The Panel is not willing to follow the Appellant's argument that Mr. Nabokov's participation in the 1994 World Championship has to be ignored because he was not a Kazakh citizen at that time. Even if he was not, he is bound by his own declarations to the contrary.

23. Mr. Nabokov has been entered as a Kazakh citizen in the 1994 players' list and he has personally signed the eligibility form confirming his Kazakh citizenship. Based on these facts the Appellant cannot now argue that he made a false declaration when signing the eligibility form. This would be against the principle of good faith as set forth in Art. 2 Swiss Civil Code ("venire contra factum proprium").

24. Finally, the Panel is convinced that Mr. Nabokov was not treated unequally.

25. The Respondent does concede that there have indeed been players in the past, who have represented two different countries. However, since this happened without the consent or even knowledge of the Respondent, those players cannot be taken into account when deciding the present case. They were simply able to violate the IIHF rules because no one noticed at the time, due to lack of computerization.

26. Since those players were not "treated" by the Respondent at all, Mr. Nabokov cannot have been treated unequally. The fact that some players have, in the past, been able to violate the rules cannot mean that other players should benefit from their misconduct. The Panel is not aware that the IIHF ever allowed another player to represent a different country after turning eighteen. Therefore, this is not a case of unequal treatment.

27. For the reasons stated above, Respondent's decision denying Mr. Nabokov eligibility to represent Russia in the Olympic Games and IIHF Championships is valid and is upheld by the Panel.

The Court of Arbitration for Sport rules:

1. The appeal is dismissed.
2. The decision of the IIHF of 14 December 2001 is upheld.
3. (...)