



**Arbitration CAS ad hoc Division (OG Beijing) 08/006 Moldova National Olympic Committee (MNOC) v. International Olympic Committee (IOC), award of 9 August 2008**

Panel: Judge Deon H. Van Zyl (South Africa), President; Mr Jingzhou Tao (France); Prof. Luigi Fumagalli (Italy)

*Swimming*  
*Olympic Games*  
*Change of sport nationality*

**A change of sport nationality is possible only after a period of three years has elapsed since the competitor last represented his former country. Such period can be reduced or waived only with the approval of the relevant National Olympic Committees (NOC) and the relevant International Federation. If the NOCs concerned have both given their agreement but not the International Federation, the athlete is not entitled to the change of sport nationality.**

This is an application by the National Olympic Committee of Moldova (MNOC) to set aside the decision of the International Olympic Committee (IOC), dated 7 August 2008, in terms of which it held that one Mr Octavian Gutu was not eligible to represent the Republic of Moldova in the Beijing 2008 Olympic Games.

The parties interested in or affected by the present application are, as will become clear later, the National Olympic Committee of Romania (RNOC) and the International Swimming Federation (FINA).

MNOC was represented by pro bono counsel, Mr Peng Cai, and Mr Victor Peicov, Vice President of the MNOC. The IOC was represented by Mr Howard Stupp, IOC Director of Legal Affairs, Mr Jérôme Poivey, IOC Project Manager NOC Relations Department and Mr André Sabbah, IOC Legal Counsel. The Panel expresses its appreciation for their assistance.

The basis of the written application submitted to ad hoc Division of the Court of Arbitration for Sport (CAS) and placed before this Panel for adjudication is that Mr Gutu is a citizen of Moldova, where he was born and educated and of which the government has financially supported him. He has represented Moldova as a swimmer and was a national swimming champion there in 2008. At the 2007 Swimming World Championships held in Melbourne, Australia, however, he represented Romania. This representation, the MNOC stated, was “without any approval by Moldova” and was hence “illegal”. As such he should be divested of all awards arising from his performances at the championships and he should be allowed to represent Moldova once again.

The difficulty arising from this succinct presentation of the facts is that it omits to append any supporting documentation, in the form of an identity certificate, passport or the like, to identify Mr Gutu and to indicate his nationality. It likewise omits to indicate under what circumstances he was able to represent Romania in the Swimming World Championships of 2007 without the necessary approval of the relevant authorities of Moldova or Romania and without the sanction of FINA.

At the hearing of the application a document signed by one Mr G. Popovici, the Secretary General of the MNOOC and Chef de Mission of the Moldova Olympic Team to Beijing, was submitted. It was dated 6 August 2008 and was directed to one Mr P. Miró, the Director of the NOC Relations Department of the IOC. From this it appears that Mr Gutu represented Moldova in the Athens 2004 Olympic Games. His participation in the Swimming World Championships of 2007 on behalf of Romania was without the permission of the Moldova Swimming Association and he has not, since that time, represented Romania. It is then baldly stated, without reference to any dates, times or specific events, that he complied with the Beijing Olympic standard and won the championship of Moldova in 2008. Furthermore the RNOOC and the Romanian Swimming Association do not object to his representing Moldova at the Olympic Games.

In this regard Mr Popovici referred to a letter dated 11 June 2008 from the Romanian Swimming and Modern Pentathlon Federation to the President of the MNOOC stating that Mr Gutu is not a member of the Romanian Olympic team and as such it had no objection to his participation on behalf of Moldova in the Beijing Olympics. The RNOOC likewise, in a letter to the MNOOC dated 9 July 2008, voiced no opposition to his participating in the Beijing Olympics as a member of the Moldova team. Significantly, no mention was made of the fact that he represented Romania in the 2007 World Swimming Championships and whether or not, as the MNOOC has suggested, such representation was not approved and was hence illegal.

Mr Cai submitted, without tendering any evidence or supporting documentation, that Mr Gutu in fact has dual nationality, namely that of Moldova and Romania. He realised, however, that he was not entitled to represent Romania in the 2007 World Swimming Championships without the necessary permission and for that reason was prepared to have his participation at such championships invalidated. As a citizen and national of Moldova he was entitled to represent it in the Olympics.

In his argument on behalf of the IOC, Mr Stupp relied on Rule 42 of the Olympic Charter, the by-law to which requires a period of three years to lapse since the competitor in question last represented his former country. This period may be reduced or waived only with the approval of the relevant National Olympic Committees and the relevant International Federation. In the present case the said time period has not expired and there has been no approval by FINA placed before the Panel. In this regard it may be pointed out that the CAS office attempted to communicate with FINA with a view to inviting it to participate in the hearing. Unfortunately no contact was made and the hearing proceeded without any input from FINA.

## LAW

### Jurisdiction

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 (the “PIL Act”). The PIL Act applies to this arbitration as the result of the location of the seat of the CAS ad hoc Division in Lausanne Switzerland, pursuant to art. 7 of the CAS ad hoc Rules.
2. The jurisdiction of the CAS ad hoc Division arises out of Rule 59 of the Olympic Charter.
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*”.
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*”.

### Applicable Law

5. Sections 1 and 2 of the Bye-Law to Rule 42 of the Olympic Charter read thus:
  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 recognised 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.*

### Consideration of the Facts and the Applicable Law

6. When these Charter provisions are considered against the background of the facts set forth above, it is quite clear that the MNOC has come nowhere near establishing that Mr Gutu is entitled to participate in the Beijing Olympic Games as a member of the Olympic Team of Moldova. It may well be that the RNOC and MNOC have not opposed his participation, but

there is clearly no indication whatever that the relevant international federation, FINA, has considered and approved it. In any event the glaring omissions in the application render the proper consideration thereof difficult, if not impossible.

7. The fact that Mr Gutu is allegedly prepared to have his participation for Romania in the 2007 Swimming World Championships invalidated, is quite irrelevant for purposes of the present application. The provisions of the cited Bye-Law to Rule 42 of the Olympic Charter is couched in peremptory terms and this Panel has no authority to waive any part thereof. For the rest the legality or otherwise of Mr Gutu's participation for Romania at such Championships is a matter for the consideration of FINA and not this Panel.
8. In this regard the Panel understands that the drafters of the Charter had the following objective: the holder of dual or multiple nationalities should not be entitled to switch allegiance from the one to the other at his or her convenience. This would make it possible for an athlete to move, opportunistically, from one team to another should the former not select him or her and the latter be willing to include him or her in its national team. Such conduct would not be compatible with the spirit of Rule 42 of the Olympic Charter.

**The ad hoc Division of the Court of Arbitration for Sport rules:**

In view of these considerations it must be held that the MNOOC has failed to persuade this Panel that it is entitled to the relief sought.