Arbitration CAS 2007/A/1377 Melanie Rinaldi v. Fédération Internationale de Natation (FINA), award of 26 November 2007

Panel**:** Mr. Quentin Byrne-Sutton (Switzerland), Sole Arbitrator

Swimming
Change of sport nationality
Interpretation and purpose of the requirement of the 12 month prior residence before a change of nationality
Compatibility with Swiss Law of FINA GR 2.6 in particular with the principle of protection of personality rights and with the principle of Equality of treatment

1. **The wording of GR 2.6 is clear in that it requires that a competitor have truly lived in the country for at least one complete year in order to qualify for a change of national affiliation. Separate stays that correspond to forms of visits rather than to establishing a home would not qualify as periods of residence even if they are numerous.**

2. **The purpose of GR 2.6 is to regulate changes of sports nationality in manner which preserves the interest of sport, of national federations that "invest" in their athletes and of the athletes. More specifically, in order to be indicative of a real "change" and to prevent "nation shopping", residence needs to correspond to the centre of the athlete's activity (in terms of everyday life, training and competing at national level) for a sufficiently significant period of time to establish that the new residence is not fictitious. The wording employed in GR 2.6, which is that a competitor must have resided in the new country for a full year prior to the request for change of affiliation, corresponds to the purpose of the clause.**

3. **To preserve the meaning and concept of national representation, sports associations have an interest in trying to prevent athletes becoming sports "mercenaries" involved in "nation shopping". A regulation which contains no conditions that are discriminatory *per say* but provides for a change of affiliation that is subject to objective and identifiable conditions – i.e. 12-months prior residence – and leave little room for discretionary application does not violate the principle of equality of treatment. Moreover, the solution of requiring 12 months effective residence in the new country does not seem disproportionate or unreasonable in light of the goal of circumventing "nation shopping".**

Mélanie Rinaldi ("Ms Rinaldi" or "Appellant") is a bi-national (Canadian and Portuguese) elite diver, who after originally being affiliated with *Diving Plongeon Canada* is seeking a change of affiliation to the Portuguese Swimming Federation (FPN).

The *Fédération internationale de natation* (FINA or "Respondent") is the international body governing disciplines related to swimming.

Ms Rinaldi was born in Canada where she lived until leaving to attend college in the United States.

She was a member of the *Club de natation de Pointe-Claire* in Canada and competed for Canada in international diving events via her affiliation with the *Diving Plongeon Canada*.

From the year 2000 through May 2006, Ms Rinaldi was a full-time student in the United States, where she attended the University of Miami on an athletic diving scholarship. Although she graduated in April 2006, the University of Miami authorized her to continue using its pool and training facilities, where she has benefited from coaching, physical therapy and the use of specialized equipment.

In 2004, Ms Rinaldi suffered a bad fall resulting in reconstructive knee surgery, which kept her off the diving board for six months. After her injury, she underwent an intensive program of physical therapy in Miami overseen by her doctor.

In 2005 Ms Rinaldi had fully recovered and returned to competition, notably competing for Canada in the 2005 World Aquatic Championships.

In March 2006 Ms Rinaldi represented Canada in the Commonwealth Games, achieving excellent results.

Thereafter, Ms Rinaldi made the decision to relinquish her sports affiliation with Canada and to become affiliated with Portugal.

On 3 April 2006, Ms Rinaldi sent an email to the President of the FPN, Ms Frischknecht. Ms Rinaldi indicating that although she was born in Canada, she was of Portuguese descent (her mother being in Barreiro, Portugal) and was interested in representing Portugal on the international diving circuit with the hope of competing for Portugal at the Beijing 2008 Olympics.

In her initial email response of 4 April 2006, Ms Frischknecht stated, among others:

> *"On behalf of the Portuguese Swimming Federation (FPN) I thank you for your kind message. In fact, it was a complete surprise for FPN to have a Diver interested in representing us, and thus her native Country, in the next Olympics, as well as competing for Portugal in the International Diving Circuit. As you might imagine several issues arise from this sudden situation…*
>
> *[…] Do you realize that, once completed that process, and formalized the representation of Portugal in future competitions, there's no turning back on your Canadian status of FINA, for Beijing?! Considering that in 3m Springboard, you're amongst the best in the world, and definitely the best in Canada, are you sure of the step you're about to take!?*
>
> *We'll be more than glad to have you but, there are some previous facts that you should be aware of. FPN only holds activity in Diving for youngsters, and with educational purposes only;*

We DO NOT have any Diving Sports Facility, that an experimented Top-Athlete like you, can use to workout; …".

In her reply of 5 April 2006, Ms Rinaldi indicated the following, among others:

"I first became interested in diving for Portugal some years ago when I began diving on the international circuit and noticed that there were no Portuguese divers. I am a friend of Jane's and she had mentioned to me that she represented Portugal in the Olympics. Then, when I won a silver medal for Canada at the commonwealth games in past March, my mother and I spoke about how wonderful it would be if I could one day do the same for her native country. Apon (sic) my return to the US, I began research on obtaining a Portuguese passport. My mother has obtained her birth certificate from Portugal and it is being translated into English right now.

[…]

… I am coached by an excellent 2-time Olympian who also coaches Alexandre Despatie (2-time world champion at the 2005 World championships in Montreal). We plan to work together here in Miami until the Olympics".

In her foregoing e-mail to the FPN, Ms Rinaldi also enquired in the following manner about the requirements for a change of sport nationality:

"My goals are as follows; I intend to continue training full-time and compete in the majority of the FINA grand prix events (so to obtain points for FINA rankings) as well as international games, European championships and the Olympics, all for which I hope to represent Portugal. Would you happen to know the FINA regulations associated with switching country representation?".

In her e-mail reply of 6 April 2006, Ms Frischknecht offered support to Ms Rinaldi to help clarify the legal issues:

"Concerning the legal issues involved – Passport or Nationality – I'd like you to consider any support or help we can provide you through our lawyer, and legal representative for these matters, Margarida Dias Ferreira … I suggest you contact Mrs. Dias Ferreira, directly, raising any dubious concerns and procedures that you're going through".

On 20 April 2006, Ms Rinaldi obtained permission from the FPN to become an affiliated member athlete of Portugal. At the same time, given the absence of any competitive diving programme or national championship in Portugal, she maintained her club memberships in the USA and Canada in order to be able to continue competing at national level.

In order to accelerate the application for Portuguese nationality, the FPN sought the support of the Ministry of Foreign Affairs, the Sports National Secretary and the National Olympic Committee.

Thereafter, Ms Rinaldi continued to train and compete in the USA at club level, and in January and July 2007 competed respectively in the winter and the summer Canadian national championships.

Ms Rinaldi's application for Portuguese nationality was successful and culminated with her obtaining a Portuguese passport with 12 April 2007 as the date of issuance.

On 23 April 2007, the FPN informed FINA that Ms Rinaldi *"… has recently achieved her Portuguese citizenship"* and would henceforth *"… be representing Portugal at International Diving Competitions"*.

FINA answered on 26 April 2007 by stating that:

> *"… in order to approve the change of "sports nationality" we must receive the following documents:*
> 1. *A copy of her Portuguese passport*
> 2. *Proof of her residence in Portugal for at least twelve (12) months*
> 3. *A correspondence from Diving Canada indicating the last time Mrs. Rinaldi represented Canada in an international event"*.

On 27 April 2007, the FPN provided FINA with a copy of the passport and the copy of an email from *Diving Plongeon Canada* indicating that the Appellant had represented Canada for the last time in March 2006. The FPN added the following observation:

> *"As far as Melanie's residence is concerned she has been leaving (sic) and training in the U.S.A and she comes to Portugal twice a year. Her address in Portugal since past few years is* [followed by the indication of an address in Barreiro]*"*.

By letter of 4 May 2007, the FPN wrote to FINA to provide further details. It indicated that in April 2006 the FPN had received a request from Ms Rinaldi to become an affiliated member and that, given her simultaneous application for Portuguese nationality, FNP *"… had accepted her affiliation process"* while backing her application for Portuguese nationality. The FPN added that *"In order to accomplish FINA Regulations and although we knew the importance of competing in Melbourne World Championships (to obtain Olympic access) she did not enter that competition, for FPN felt GR 2.6 was not yet met accordingly"*. The FPN concluded its letter by requesting that FINA *"… consider Melanie to be under the Portuguese Swimming Federation's Jurisdiction since April 2006, whilst training and competing in the USA at Club level"*.

On 9 May 2007, FINA answered by repeating the three requirements listed in its letter of 26 April, and concluded that: *"Considering your correspondence indicating that there is no diving in Portugal and that she doesn't reside in Portugal, Mrs. Rinaldi does not fulfil the requirement 2 and 3 and consequently her request for change of sport nationality cannot be approved according to the FINA rules"*.

On 10 May 2007, the FPN replied by invoking that *"… Melanie Rinaldi has had a residence in Portugal for all her life, at her mother's home town"* and submitting that nothing prevented her from being validly affiliated in Portugal while training in the USA.

On 23 May 2007, FINA responded that its legal commission had been consulted and had unanimously concluded that Ms Rinaldi *"… did not fulfil the requirement of FINA Rule GR 2.6, residence in the territory of Portugal 'for at least twelve months prior to his first representation for the country'"*. FINA ended its letter by stating that: *"Until that requirement has been met, the change of sport nationality cannot be approved"*.

On 8 June 2007, Ms. Rinaldi filed her own request with FINA, by means of a letter submitted on her behalf by an American legal counsel. In this letter, her lawyer submitted that: *"Residency does not*

always mean continuous full time occupancy in a territory…" and, in that relation, underlined that *"… Melanie Rinaldi's mother is from Portugal. Her grandmother, aunts and other close relatives continue to live in Portugal. Melanie has resided with them for significant periods of her entire life – well over the 12 months required by FINA GR 2.6"*.

In the foregoing letter, her lawyer further submitted that *"Although the General Rules do not define the term "reside", we believe that under the totality of the circumstances, Ms. Rinaldi, has, in fact resided in Portugal for "at least 12 months" prior to her first competition for Portugal in May 2007. This is true despite the fact that during that time her education, training, and medical treatment took place in the United States"*.

In the conclusion to the letter, Ms Rinaldi's lawyer added the following arguments and factual allegations in relation to the requirements deriving from FINA Rule GR 2.6:

> *"At the same time, FINA must be vigilant of athletes seeking to change nationality merely to gain an individual competitive advantage. Athletes should not be permitted to "game the system" by switching nationalities on a whim, without having demonstrated a genuine commitment to establishing a long-term residence in their new country. Any reasonable interpretation of GR 2.6 must require an athlete to take concrete steps that unequivocally demonstrate the athlete's intent to change residency. We submit that Ms. Rinaldi has, in fact, taken such steps and has demonstrated beyond doubt her commitment to residency in Portugal.*
>
> *Had it been necessary, Ms. Rinaldi would certainly been willing to purchase a house or apartment in Portugal in May 2006 to demonstrate her change of residency. However, in Ms. Rinaldi's unique case, such a purchase was not necessary. Ms Rinaldi has deep roots in Portugal where her mother was born and raised, and where numerous relatives live. Ms. Rinaldi's family has maintained a home in Portugal her entire life, where Ms. Rinaldi always stays. In addition, Ms. Rinaldi's parents promised her that they would buy her a condominium to live in if she changed her residency. They have now bought the condominium, which Rinaldi will live when she is not training or competing"*.

In a response of 13 June 2007, FINA maintained its position on the basis of explanations concerning the purpose, history, wording and meaning of FINA General Rules (GR) 2.6.

At this point, Ms Rinaldi decided to challenge FINA's position in front of the Court of Arbitration for Sport (CAS) and therefore also instructed Swiss counsel, who, on 20 July 2007, wrote to FINA as follows:

> *"I refer to Mr. Marculescu's email of 13 June 2007 and inform you that I have been instructed to act together with Mr. Kleiman on behalf of Ms. Rinaldi in this matter.*
>
> *As it is unclear on behalf of which body Mr. Marculescu is writing, I hereby reques[t] the FINA to issue a formal and final decision that can be appealed in front of the Court of Arbitration for Sport"*.

Thereafter, on 24 July 2007, FINA sent a fax letter to the FPN with the following content:

> *"Dear Mr. Frischknecht,*
>
> *Related to the request for a change of "Sport Nationality" for the diver Ms. Melanie Rinaldi, please note that the FINA Executive, after consulting the FINA Legal Commission, and in accordance with the FINA Rule C 17.6 decided not to grant the change of "Sport Nationality" to Ms, Rinaldi as she does not fulfil the*

provisions of the FINA Rule GR. 2.6".

By letter of 25 July 2007, *Diving Plongeon Canada* wrote to Ms Rinaldi's Swiss counsel to indicate in the following terms that it fully supported Ms. Rinaldi's request for change of affiliation: *"I write on behalf of Diving Plongeon Canada to affirm that we support Ms. Melanie Rinaldi's application to change her sport nationality so that she may represent the Portuguese Swimming Federation at future international competitions. We wish Ms. Rinaldi continued success in her diving career".*

Having not received a reply to his enquiry of 20 July 2007, Ms Rinaldi's Swiss counsel wrote to FINA again on 23 August 2007 requiring that FINA issue a formal decision by the end of August 2007.

In a response dated 27 August 2007, FINA sent Ms Rinaldi's Swiss counsel a copy of the fax letter it had sent to the FPN on 24 July 2007.

Having thus been informed of FINA's final position, Ms Rinaldi decided to file an appeal with CAS.

On 17 September 2007, Ms Rinaldi filed a Statement of Appeal with CAS.

On 5 October 2007, Ms Rinaldi filed her Appeal Brief.

On 24 October 2007, FINA filed its Answer with CAS.

By letters of 1 November 2007 constituting a procedural agreement, the parties agreed to renounce having a hearing and to exchange instead a second round of written submissions to consist of a rejoinder by Ms Rinaldi and a sur-rejoinder by FINA.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS is not contested.

2. It is based on art. R47 of the Code of Sports-related Arbitration (the "CAS Code") in application of section 25 of the FINA Constitution, whereby:

   "Disputes between FINA and any of its Members or Members of its Members, individual members of Members or between Members of FINA shat are not resolved by a FINA Bureau decision may be referred for arbitration by either of the involved parties to the Court of Arbitration for Sports (CAS), Lausanne. Any decision made by the Arbitration Court shall be final and binding on the parties concerned".

Applicable Rules and Law

3. Article R58 of the CAS Code provides that:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate".

4. In their submissions both parties are invoking and relying on the FINA Regulations and on Swiss substance law.

5. Consequently, the dispute shall be resolved on such basis.

6. Reference is made, *inter alia*, to the following rules within the FINA Regulations:

- FINA Constitution ("C") in particular art 17.6, 17.12.2 and 25
- FINA General Rules ("GR") in particular art. 2.3, 2.5 and 2.6
- FINA By-Laws ("BL") in particular 8.3.8.2 and 8.3.8.3.

7. FINA GR 2.5 to 2.7 provide the following:

GR 2.5: *When a competitor represents his/her country in a competition, he/she shall be a citizen, whether by birth or naturalisation, of the nation he/she represents, provided that a naturalised 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 chose one "Sport Nationality" and be affiliated to one Member only.*

GR 2.6: *Any competitor 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 2.7: *Any application for change of affiliation must be approved by FINA.*

FINA's Refusal to Approve a Change of National Affiliation

8. In the parties' submissions and exhibits the terms "change of affiliation" have been used interchangeably with the terms "change of sports nationality".

9. Accordingly, for the purpose of this award both terms shall be deemed to cover the same issue, i.e. whether, on the date Ms Rinaldi applied to FINA, she was entitled to obtain approval from FINA of her change of affiliation from the Canadian national body to the Portuguese national body.

10. In this case the essential facts are either undisputed or have been agreed upon by the parties.

11. On the one hand, it is undisputed and/or agreed that *"Ms. Rinaldi has resided with her grandmother, aunts and other close relatives living in Portugal for significant periods of her entire life lasting well over 12 months"* and that *"Ms. Rinaldi has genuine affective links and feeling of belonging with Portugal as well deep roots in that Country"*. In addition, the foregoing circumstances tend to be confirmed by the documents on record.

12. On the other hand, it is undisputed that during the 12 months prior to 23 April 2007, when FPN informed FINA that Ms Rinaldi "… *has recently achieved her Portuguese citizenship*" and would henceforth *" … be representing Portugal at International Diving Competitions"*, she did not physically reside in Portugal at all (except perhaps for a holidays and/or other short stays) or effectively become involved with any competitive diving in Portugal at club or any other level (this would in any event have been impossible due to the lack of development of the discipline in Portugal as underlined by the FPN). This is made clear in the submissions filed with FINA on behalf of Ms Rinaldi between April and June 2007 by the FPN and her US counsel, according to which during that 12-month period she was living, training and competing in the United States. In that relation, her US counsel also pointed out that: *"Had it been necessary, Ms. Rinaldi would certainly been willing to purchase a house or apartment in Portugal in May 2006 to demonstrate her change of residency. However, in Ms. Rinaldi's unique case, such a purchase was not necessary"*.

13. Consequently, the only issues to be determined are legal ones.

14. The questions to be decided and which will now be examined in turn relate to the meaning of GR 2.6 with regard to the 12-month prior residence requirement (A.) and to the compatibility of GR 2.6 and/or of the decision based thereon with Ms Rinaldi's rights of protection under Swiss law, notably her personality rights (article 28 CCS) and the principles of equality of treatment and proportionality (B.).

A. The Notion of 12-Month Prior Residence under GR 2.6

15. The parties each have a different interpretation of what is meant by that part of GR 2.6 according to which, to be entitled to change her/his affiliation, *"Any competitor … must have resided in the territory of* [the new national governing body] … *for at least twelve months prior to his first representation for the* [new] *country"*.

16. In essence, the Appellant is contending that *"resided … for at least twelve months"* does not necessarily mean a stable presence in the country for that period of time, but can be constituted by a series of stays (in this case mainly holidays) that add up to at least one year, providing such stays are linked to close ties with the country in question and demonstrative of an attachment to that country.

17. In essence, the Respondent is contending the opposite, i.e. that *"resided … for at least twelve months prior to his first representation"* must necessarily mean a stable and relatively uninterrupted presence over the 12-month period preceding the first representation of the new country by the competitor.

18. Under Swiss law there is some controversy regarding the method of interpretation that applies to the rules of an association, i.e. whether they should be interpreted using the method applicable to provisions of law or using the method applicable to contracts. However, in practice the principles of interpretation overlap to a large degree and both methods converge in considering that the literal meaning (the wording) of the provision or clause is the starting point. Consequently, the Sole Arbitrator shall begin by examining the wording of GR 2.6.

19. The Sole Arbitrator considers the literal meaning of the term "resided" to be unambiguous.

20. In English, in a non-legal sense, when someone indicates they "reside" somewhere it means where they live. In other words, in common English, residing and living are essentially used as synonymous terms.

21. For example, in the "Collins Dictionary of the English Language", one of the main definitions of the verb "live" is *"to reside or dwell: to live in London"* and in "The Shorter Oxford English Dictionary" one finds the same, i.e. the verb "live" includes the definition *"To dwell, reside"*. In those same dictionaries, the first definition of the verb "reside" is respectively: *"to live permanently or for a considerable time (in a place); have one's home (in): he now resides in London"* (Collins) and *"To settle; to take up one's abode …"* (Oxford).

22. The term "residence" (as compared e.g. to "domicile") can have specific legal meanings in different legal systems and fields of law, but in such case the term simply corresponds to the definition in question, i.e. the term has the meaning the legislator or courts intended in the legal context in question.

23. In FINA's Regulations there is no definition of the term "reside" and therefore no reason to consider it has any other meaning than the common meaning such verb has in the English language as defined above.

24. If that is the case, by referring to residence GR 2.6 means that the competitor in question must demonstrate that she or he has been effectively living in the country.

25. With respect to the period during which the competitor must have lived in the country, the Sole Arbitrator considers the literal meaning of GR 2.6 to be equally clear.

26. In theory, the words "twelve months" could be detached from the word "reside" to possibly mean any period of cumulative stays amounting to a year.

27. However, since these words all form part of the same sentence and the words "twelve months" qualify the verb "reside", they need to be thought of in conjunction to determine their meaning. If, as discussed above, the verb "reside" commonly means to live in a place, in the sense of settling in for a period of time to make it one's home, then the words "twelve months" that qualify the word "reside" can only serve to reinforce that meaning and signify that a living spell of at least twelve months in the country is required, rather than e.g. a living

spell of only three, six or nine months. *A fortiori*, shorter separate stays that correspond to forms of visits rather than to establishing a home would not qualify as periods of residence even if they were numerous.

28. For the above reasons, the Sole Arbitrator finds that independently from the question of when the twelve months of residence must occur, the wording of GR 2.6 is clear in that it requires that a competitor have truly lived in the country for at least one complete year in order to qualify for a change of national affiliation.

29. The Sole Arbitrator also considers the word "prior" to be self explanatory within the sentence in question because although, in theory, "prior" could mean at any time in the past, the words *"prior to his first representation for the country"* link the required period of twelve months residence to a specific event (the "first representation"), thereby giving the sense that the first representation follows the 12-months residence.

30. In addition, the literal meaning of the sentence examined above fits with what would be its meaning if one accounts for the purpose and rationale of GR 2.6.

31. The purpose of GR 2.6 is to regulate changes of sports nationality in manner which preserves the current meaning of national representation, in the interest of sport (which for the moment still partially functions around the concept of nationality), of national federations (that "invest" in their athletes) and of the athletes (fairness requiring that their opportunities be as equal as possible). Of course, just as human beings are born with unequal opportunities, athletes cannot hope to always be on equal footing. Nevertheless, the regulators of sport can try to tend in the direction of equality.

32. When it comes to regulating changes of nationality the matter is complex and there are different possible means of trying to achieve the above ends.

33. Despite them being important factors, it is obviously delicate to define, evaluate and prove the emotional, sentimental and cultural ties an athlete feels she/he has with a given country, because to a large degree these are subjective matters. Effective ties must therefore also be sought using more objective and identifiable criteria. In addition, such criteria may in a sense have a higher chance of achieving a certain form of equality of treatment, due to them being predictable and leaving less room for appreciation.

34. To the extent GR 2.6 is based essentially on objective criteria, i.e. a given period of residence in the country coupled with the fact of being under the jurisdiction of the new national governing body, those criteria must be interpreted in light of its purpose.

35. The criteria of residence used in GR 2.6 can only serve the purposes outlined above if it means the competitor must effectively be living in the country in question.

36. More specifically, in order to be indicative of a real "change" and to prevent "nation shopping", residence needs to correspond to the centre of the athlete's activity (in terms of

everyday life, training and competing at national level) for a sufficiently significant period of time to establish that the new residence is not fictitious.

37. By basing the requirements for a change of national affiliation on proof of residence of such nature rather than on more subjective factors, the rule also accounts for the fact that a request for change of nationality may be triggered in certain cases by practical necessity, e.g. when an athlete moves to a different part of the world for family or other private reasons, thereby needing to make another country the centre of her/his sports activity.

38. For the above reasons, the Sole Arbitrator finds that the common meaning of the wording employed in GR 2.6, which is that a competitor must have resided in the new country for a full year prior to the request for change of affiliation, corresponds to the purpose of the clause.

39. The fact that apparently FINA has embarked upon a process of revision of GR 2.6, which involves defining even more precisely what is meant by "residence" and how it must be proven, does not detract from the fact that the common meaning of the current words is already clear. Moreover, the wording of the draft revision being invoked ties in with the common meaning of the word "residence" discussed above, since according to the draft text: *"Residence must be interpreted in accordance with the law of the country in which the competitor "lives and sleeps" and where he/she can be found in the majority of days of the year"*.

40. Because the wording of GR 2.6 is clear and fits with its purpose, it is difficult to consider that the FINA Regulations are unpredictable with regard to the requirements for a change affiliation. Ms Rinaldi invokes the CAS *Quigley* award. However, in the present case, Ms Rinaldi was not confronted *"with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders"*.

41. On the contrary, GR 2.6 is straightforward and clear. Given the common meaning of "residence", an average person reading GR 2.6 should understand that it requires a competitor to have been living in the new country for one year before applying for approval to change affiliation.

42. In addition, if Ms Rinaldi had any hesitations regarding the exact meaning of the word "resided" employed in GR 2.6, she could simply have enquired with FINA. In case of doubt, the logical and material time to ask this question would have been in April 2006 when she had made the decision to change affiliations and was investigating the conditions for doing so.

43. In her emails of that date to the FPN, Ms Rinaldi had apparently not yet read the rules since she asks: *"Would you happen to know the FINA regulations associated with switching country representation?"*. However, in response, the FPN offered her access to legal support in order to clarify any questions: *"… I'd like you to consider any support or help we can provide you through our lawyer, and legal representative for these matters, Margarida Dias Ferreira … I suggest you contact Mrs. Dias Ferreira, directly, raising any dubious concerns and procedures that you're going through"*.

44. Consequently, if Ms Rinaldi failed to seek clarification or took the risk of relying on her own interpretation of the word "resided" which is different from its common use, she would be the "victim" of her own choice and not of an unpredictable rule, especially since in case of doubt, the natural or at least more prudent and easiest approach would have been to enquire with FINA.

45. There is no evidence that Ms Rinalidi sought clarification with FINA. There is however some indication that in 2006 she apparently chose not to take any steps in Portugal to establish an effective residence there. According to her US lawyer: *"Had it been necessary, Ms. Rinaldi would certainly been willing to purchase a house or apartment in Portugal in May 2006 to demonstrate her change of residency. However, in Ms. Rinaldi's unique case, such a purchase was not necessary. Ms. Rinaldi has deep roots in Portugal where her mother was born and raised, and where numerous relatives live…".*

46. Thus, it would appear that, in May 2006, Ms Rinaldi either had a misguided interpretation of the requirements of GR 2.6, or did not wish to or could not, for whatever reason, establish an effective residence in Portugal.

47. For the above reasons, it cannot be considered that Ms Rinaldi fell foul of unpredictable requirements

B. Compatibility with Swiss Law of GR 2.6 and of FINA's Refusal

48. The Appellant contends that any interpretation of GR 2.6 that would prevent her from changing her national affiliation would be unlawful under Swiss law because it would infringe her personality rights protected by article 28 CCS and/or the principles of equality of treatment and of proportionality.

49. It is uncontested that the freedom of a Swiss sports association to regulate the field of activity of its members is not unlimited and that among the bounds thereto are the protection of personality rights and the requirements of equality of treatment and of proportionality. These limits will be examined in turn.

50. According to article 28 CCS:

> *"1. Celui qui subit une atteinte illicite à sa personnalité peut agir en justice pour sa protection contre toute personne qui y participe.*
>
> *2. Une atteinte est illicite, à moins qu'elle ne soit justifiée par le consentement de la victime, par un intérêt prépondérant privé ou public, ou par la loi".*

51. The Appellant offered the following free translation of article 28 CCS:

> *"1. Where anyone suffers an illicit infringement to his personality, he can apply to the judge for his protection against any person participating to the injury.*
>
> *2. An infringement is illicit, except when justified by the victim's consent, by an overriding private or public interest, or by the law".*

52. Whether or not the mere fact of restricting an athlete's right to change her/his national affiliation can, in itself, be deemed an infringement of an athlete's personality rights can be left open in this case.

53. Indeed, paragraph 2 of article 28 CCS provides that an overriding private interest can justify an encroachment on personality rights.

54. One of the tenets of international competitive sport today is that entrance to many international competitions is restricted to individuals or teams representing a nation. This is a legitimate goal that simply mirrors human society's current political organization as nation states and its emphasis on patriotic endeavours.

55. Consequently, to preserve the meaning and concept of national representation, sports associations have an interest in trying to prevent athletes becoming sports "mercenaries" involved in "nation shopping".

56. In addition, athletes consent to and take advantage of the concept of sports nationality when engaging in international competition via national associations, since it is notably thanks to the system of national teams that they obtain financial and other benefits allowing them to compete and to gain personal satisfaction and prestige from representing their country.

57. For the above reasons, FINA must be deemed to have an overriding interest in regulating the attributes of sports nationality for the international competitions it governs, notably by defining and imposing conditions on changes of national affiliation; and neither the existence of article GR 2.6 nor FINA's refusal to approve her change of national affiliation can be deemed to infringe Ms Rinaldi's personality rights.

58. As already discussed, equal opportunity in sport cannot be guaranteed in an absolute manner and there are a number of possible ways in which to define sports nationality and the requirements for changing national affiliation.

59. GR 2.6 contains no conditions that are discriminatory *per se* and a change of affiliation is subject to objective and identifiable conditions – i.e. 12-months prior residence – which leave little room for discretionary application.

60. Consequently, the formulation of GR 2.6 does not expose it to being applied in a fashion that would violate equality of treatment.

61. Moreover, among the different possible approaches to the problem of regulating changes of affiliation, the solution of requiring 12 months effective residence in the new country does not seem disproportionate or unreasonable in light of the goal of circumventing "nation shopping".

62. Finally, there is no reliable evidence on record that FINA has in past cases followed a practice that contradicts its own rule, or any evidence that FINA provided Ms Rinaldi with any information between April 2006 and April 2007 that might have confused her.

63. For the above reasons, the Sole Arbitrator finds that FINA's strict application of GR 2.6 and the resulting refusal to approve Ms Rinaldi's change of national affiliation cannot be deemed to violate the principle of equality of treatment or to be disproportionate, despite Ms Rinaldi having other important ties with Portugal. On the contrary, to allow an exception would have been to sow the seeds of possible unequal treatment in the future.

64. From a purely human perspective it would of course be much nicer to enable Ms Rinaldi to represent Portugal internationally at this juncture, particularly since the two national federations are in apparent agreement and she has a strong desire to do so based on real feelings for and existing ties with that country. In addition, the Appellant's counsel has argued very ably and diligently in her favour. However, GR 2.6, which is a clear and legitimate rule, prevents any exception being made.

The Court of Arbitration for Sport:

1. Dismisses the appeal filed by Ms Mélanie Rinaldi on 17 September 2007.

2. (…).

3. Dismisses all other prayers of the parties.