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Migration Law and Issues in Sports

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Abstract: The international migration of athletes has become an essential feature of sports competition. These days foreign travel is often the name of the game. The purposes and duration of such migration range from participation in single events to long-term, even permanent relocation involving professional transfers. Each purpose or duration may generate a different body of law and regulations. Varying national visa, residence and other requirements for territorial entry of non-citizens are of course essential. Regional, especially European Union law may also be foundational as it was, for example, in defeating a practice within the EU of transfer payments between clubs in different member states that impeded freedom of movement. Also applicable is international law, notably that of the several institutions within the Olympic Movement insofar as it is one of the very few NGOs vested with international legal personality. Supporting that legal authority or extending beyond it are bilateral treaties of friendship and cooperation. More broadly, international human rights law applies, particularly in reinforcing the rights of athletes to be free of political discrimination against their participation in international competition.

Keywords: migration; sports; athletes; competition; Olympic Charter; IOC; discrimination; EU; nationality; eligibility

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I. Introduction

The globalization of sports has generated substantial migration of athletes and related issues for sports institutions, such as those within the Olympic Movement and national governing bodies in each sport.[1] At the grass roots, sports clubs and teams have become ethnically mixed and multicultural. Both amateur[2] and professional competition are affected. European football/soccer clubs are perhaps the best examples

[1] The comprehensive Olympic Movement is one of few nongovernmental organizations (NGOs) with international legal personality and agency. It includes numerous institutions, ranging from International Federations representing each sport, to National Olympic Committees, the International Olympic Committee and the World Anti-Doping Agency that govern not only the Olympic and Paralympic Games and participation in them but other sanctioned international competition as well. Today's open competition in most sports means that compensated professional athletes are to that extent participants in the Olympic Movement and are bound by its rules in the open competition.

[2] Historically, an amateur is simply an athlete who is not compensated for his or her sports activity. That is still its colloquial meaning, but for nearly a half-century, as a term of legal art, it has had a broader meaning to refer to any eligible participant in sanctioned international competition within the Olympic Movement. *See,* e.g., The Ted Stevens Olympic and Amateur Sports Act, 36 USC ss.220501 b (1): "amateur athlete" means an athlete who meets the eligibility standards established by the national governing body or paralympic organization for the sport in which the athlete competes."

of dependency on international migration of talent from within the continent as well as from outside. In North America, too, the teams in the professional leagues have become increasingly international. In basketball an estimated 23 % of the players are foreign, in baseball, 29 %, and in hockey 72 %.[3]

Even in amateur sports the significance of migration is apparent, as athletes seek to travel outside their national country for promising educational opportunities either directly related to or simply consonant with their athletic activity, as well as improved sports infrastructure, better training facilities, exemplary coaching, greater access to professionalization, and other means to fulfill their aspirations. More than 20,000 foreign students compete as student-athletes in United States colleges and universities. Educational advantages, especially, encourage migration, which is often being viewed to transcend normally short athletic careers. In an in-depth study of migrant swimmers, one interviewee observed that "education could be my winning lottery ticket for future life after swimming is over" (Vaicaitis, 2021, p. 42).

Short-term migration, more a matter of authorized travel under national immigration laws, is also critical. Indeed, coveted eligibility for imminent participation in the Olympics, regional Games and other sanctioned international competition may be at least as important to many athletes as long-term resettlement in a foreign country. Obviously, such competition relies on international cooperation in admitting foreign athletes into territory that is hosting particular competition. International agreements and protocols help ensure the necessary measures of cooperation but face political barriers such as boycotts, often highly technical visa disabilities and discriminatory policies.

II. The Olympics

II.1. The Legal Framework Under the Olympic Charter

The Olympic Charter[4] repeatedly asserts its mission to promote and protect universality and international harmony through solidarity

[3] *See* National Foundation for American Policy, Report, July 2020.

[4] The Olympic Charter (last republished in 2021) is the basic instrument of the Olympic Movement. It includes a brief Introduction, a Preamble, seven Fundamental Principles and 61 detailed Rules, many with attached Bye-laws.

of competing athletes,[5] but offers very little specific support in its 103 pages of detailed provisions. Instead, its overarching Principles and detailed Rules establish an authoritative framework to pursue its lofty mission. In selecting the venues for the Summer and Winter Games and derivatively for the Paralympic Games, the International Olympic Committee (IOC) relies primarily on local Organizing Committees that have been authorized by National Olympic Committees (NOCs). Under Rule 36 of the Charter the IOC enters into a tripartite agreement (an "Olympic Host Contract") with the selected local organizer and the NOC of the country concerned.

That binding agreement determines the responsibilities of the host NOC and local Organizing Committee concerning the organization, financing and staging of particular Games. Rule 36 provides that "[o]ther entities such as local, regional, state or national authorities… may also become parties to the Olympic Host Contract." Thus, the Olympic Charter does provide a general institutional framework that provides ample space within which a prospective host state's obligations to admit foreign athletes may be negotiated and agreed upon. Under Rule 52 of the Charter an official Olympic Identity Accreditation Card, together with a passport or other travel document, "authorizes entry into the country of the host," allowing the holder of the Card to "stay and perform" during the Games, "including a period not exceeding one month before and one month after the Olympic Games."

A prospective host of the Games must enlist the support of the national government of the prospective host state to assume several fundamental obligations. Under Rule 33(3) of the Charter, "[t]he national government of the country of any candidate must submit to the IOC a legally binding instrument by which the said government undertakes and guarantees that the country and its public authorities with and respect the Olympic Charter." More specific sovereign obligations, such as to grant eligible athletes short-term immigration rights, are subject to negotiation and agreement given the lack of specific provisions to that effect in the otherwise detailed Olympic Charter.

[5] *See,* e.g., Olympic Charter, Fundamental Principles 1, 2, 3. Rule 1(1) establishes that "[t]he goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practiced in accordance with Olympism and its values."

Other issues arise out of the staging of the Olympic Games. For example, those involving potential environmental impact. It can be enormous, from the creation of athlete and visitor villages to the construction of sports facilities. More to the point of migration law and practices, the protection of typically large numbers of foreign workers to build the sites demands substantial attention by the IOC. It has therefore pledged to intervene in the event of "abuse of migrant workers" and to comply with national labor laws and international standards such as those under agreements of the International Labor Organization (ILO); in practice this commitment has not prevented serious abuses of migrant workers including forced labor (Gauthier, 2017, pp. 88–90).

II.2. The Issue of Discrimination Against Russian Athletes

In the context of the war in Ukraine a particularly challenging issue involves the capacity of Russian athletes to gain admission into foreign territory for international competition. Both international (for example, Olympic) and national authorization are required. A salient example is the predicament of the Paris Organizing Committee for the 2024 Summer Games. It must rely on both the French government and the IOC to support the short-term admission of the Russian athletes. The French government, however, somewhat surprisingly supported by the mayor of Paris, has joined 33 other governments, mostly in Europe and North America, in seeking to bar participation in those Games by the Russian athletes despite Rule 33 (3) (Roush, 2023).

On the other hand, the IOC, having changed its mind between 2022 and 2023, supports at least a qualified participation of Russian athletes in the Games.[6] Its legal basis is the Charter's prohibition of political discrimination. The Charter not only establishes a fundamental human right to practice sport under Fundamental Principle 4, but under Fundamental Principle 5 provides that sport organizations within the Olympic Movement "shall apply political neutrality." Fundamental Principle 6 then amplifies Fundamental Principle 4's requirement of practicing sport "without discrimination" to include, specifically,

[6] Germano, S. World Athletics Upholds Ban on Russian Athletes Ahead of Paris Olympics, *Financial Times,* 23 March 2023.

"political or other opinion." Finally, one of the first and most basic Rules in the Charter is number 6, which confirms that "[t]he Olympic Games are competitions between athletes in individual or team events and not between countries." To be sure, it is often difficult to protect athletes from nationalism, but to do so is essential whenever it threatens to extend substantially beyond inevitable patriotism, which can be constructive in marshaling support for sports activity. These fundamental provisions of international sports law (recalling that the Olympic Movement enjoys international legal personality) have additional resonance in soft law and expressions of concern by two rapporteurs appointed by the United Nations Human Right Council to provide advice on the issue of the Russian athletes.

Of course, within the margins of this international legal framework, geopolitics may establish modest requirements for the participation of a national group of athletes, for example, by minimizing his or her national identity, prohibiting certain colors in wearing apparel and so on, just as the rules of participation normally impose constraints on the blatant commercialization of athletes or highly visible political gestures by them. Such qualifications are entirely acceptable so long as all meritorious and otherwise eligible athletes are assured of participation without political constraints. Indeed, Russian athletes between 2014 and 2023 have been subject to special requirements, initially because of violations of the World Anti-Doping Code by the Russian NOC and later the discovery of its coverup of prohibited practices.

III. Beyond the Olympics

Other international authority bearing on migration in sports includes a broad array of authority including, for example, environmental law, refugee law and human right law (for an introduction to sports-related treaties, *see* Zakharova, 2018, pp. 37–39). For example, the Convention for the Protection of Refugees[7] inspired a new classification of Olympic

[7] Convention Relating to the Status of Refugees, concluded 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954); Protocol Relating To the Status of Refugees, concluded 31 January 1967, 606 UNTS 267 (entered into Force 4 October 1967).

athletes that is defined not by nationality but by refugee status (Michelini, 2023; Spaaij et al., 2019, p. 12). Refugees can therefore join their own team. An example of human rights law is the Convention on the Rights of a Child,[8] which provides for the educational opportunities and general welfare of minority-age, often migrant athletes. For example, Canadian teenagers playing in the minor league of hockey in the United States must be housed in authorized private homes, enrolled in local schools and otherwise given benefits of social welfare befitting their age.

IV. Regional (EU) Level

At the regional level European Union (EU) law stands out in protecting migration of athletes. Art. 21 the European Union on the Functioning of the European Union (TFEU)[9] provides for freedom of movement among member states. Also, the overlapping Schengen Area encompasses 26 European states, including some but not all EU members together with several non-members. This pact establishes visa-free travel among the parties in the area without border controls, thereby securing freedom of movement for both nationals and non-nationals of those parties.

Art. 21 of the EU agreement has had profound effects on migration in sports. A landmark decision in *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman*[10] has been particularly significant. There the European Court of Justice struck down a traditional practice in football/soccer that had required a club acquiring a player after his contract had expired with another club to pay that club a transfer fee. More indirectly the Court in the same case also struck down a migration-inhibiting norm that, in the interest of

[8] Convention on the Rights of the Child, concluded 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[9] Treaty on the Functioning of the European Union, done 13 December 2007, OJ C202 (entered into force 1 December 2009.

[10] *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman,* case C-415/93, 1995, *European Court Reports* 97. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0415 [Accessed 04.06.2023].

national identity, had strictly limited the number of players from other EU member states who could become members of a club. The *Bosman* decision was later extended to benefit players from non-member states that were in the process of applying for EU membership.[11]

Other regions have similarly ensured international travel for invited players. These commitments are established under both bilateral agreements (e.g., Australia and New Zealand) and multilateral pacts (e.g., among the Mercosur member states of Argentina, Brazil, Paraguay and Uruguay).

V. National Level

Last, but certainly not least, national laws govern migration of athletes as well as determinations of nationality that may affect the migratory capacity of an athlete (on the compatibility of eligibility criteria and nationality law, with reference to "nationality swapping" and quickie citizenships to acquire foreign athletic talent (Wollmann, 2016, p. 295 et seq). For example, among foreign citizens seeking to enter the United States, the country's immigration law distinguishes more permanent immigrant or "green card" status from from non-immigrant or more temporary, typically visiting status. Most foreign athletes have non-immigrant status. Of these the law has several alternative categories of required visas unless a foreign citizen is a national of any of several dozen visa-waiver countries. The most important of these categories for athletes are the "O"[12] and "P"[13] categories that between them require alternative levels of recognized athletic achievement and provide alternative periods of duration.

The visa and admission process of nearly every country can be complicated and prolonged. Problems may in effect preclude an athlete's admission into a foreign country even if he or she possesses a visa to enter its territory. For example, a visa may be rejected at an

[11] *Deutscher Handballbund eV v. Kolpak*, case C-438/00, 2003, *European Court Reports* 1-04135. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000CJ0438:EN:HTML [Accessed 04.06.2023].

[12] Immigration and Nationality Act s. 101 (a)(15)(O).

[13] Immigration and Nationality Act s. 101(a)(15)(P).

athlete's port of entry into that country. Or, if an athlete receives a visa contingent on being a member of a foreign team scheduled to compete in the visa-issuing country and at least one key player on that team is denied a visa, the team may not be able to compete as planned, and contingent visas are simply canceled (*see* Nafziger, 1991, p. 68 noting actual consular interview; for a concise description of "O" and "P" visas, see Aleinikoff et al., 2016, p. 405).

VI. Conclusion

In all, the international regime for both long and short-term immigration of athletes is creditable. As one study concluded, "[i]n the twenty-first century, sports activity is open and global, leaving fewer and fewer barriers to the free movement of athletes" (Vaicaitis, 2021, p. 33). Even so, international sports competition, however hallowed it may be as an agent of global solidarity and peace, is subject to a complex array of migration-related laws and sometimes creditable issues.

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