SPORT RESOLUTIONS (UK)
SPECIALIST INDEPENDENT DISPUTE SERVICE

CASE 23 – Decision

A. Introduction

1. The present dispute concerns:

   (a) The International Tennis Federation (the "**ITF**")'s introduction and implementation of Regulation 35 of the 2015 Davis Cup Regulations ("**Regulation 35**") in place of Regulation 34(a) of the 2014 Davis Cup Regulations ("**Regulation 34(a)**"); and

   (b) The ITF's decision not to grant an eligibility exemption in respect of Player G to represent Great Britain in the 2015 Davis Cup (the **"Decision**"). Player G and the LTA were represented by Tom de la Mare QC and Maurice Holmes, who were instructed by Jamie Singer of Onside Law. The ITF was represented by Marie Demetriou QC, who was instructed by Kendrah Potts of Mishcon de Reya LLP.

2. By a written agreement dated 6 January 2017, Player G, the Lawn Tennis Association (the "**LTA**"), and the ITF agreed to submit the present dispute to arbitration. I was appointed sole arbitrator.

3. In these proceedings, Player G seeks an order for:

   (a) A decision exempting him from Regulation 35; and

   (b) Damages to be assessed.

The Davis Cup

4. The Davis Cup is an annual international tennis competition organised by the ITF. During the Davis Cup, tennis players representing different national teams compete against each other.

5. Pursuant to the ITF's constitution, the ITF manages the Davis Cup in accordance with its regulations (i.e. the Davis Cup Regulations) which may be altered from time to time by the ITF Board provided that the amendments are approved by ITF members in the relevant Annual General Meeting ("**AGM**").

6. Among other things, the Davis Cup Regulations set out the eligibility criteria of participants both in terms of the nations that may enter the competition and the players who are eligible to compete for a nation.

The Change in Eligibility Regulations

7. Prior to Regulation 35 coming into effect, a player's eligibility to represent a country in the Davis Cup was governed by Regulation 34 of the 2014 Davis Cup Regulations:

> *"**34. ELIGIBLITY OF PLAYERS***
>
> *Any tennis player… shall be qualified to represent that Country if he:*
>
> *(a) Is a national of that country, has a current valid passport of that country, has lived in that country for 24 consecutive months at some time and has not represented any other country during the period of 36 months immediately preceding the event.*
>
> *…*
>
> *(d) A National Association may appeal to the Board of Directors to nominate a player who is not eligible under the above Rules and the Board of Directors may agree the application if the full circumstances warrant an exception being made…"*

8. In around September 2013, the ITF began reviewing Regulation 34(a). One of the reasons for the review was to consider the issue of eligibility of players who have or wish to change their nationality. In particular, the ITF was concerned with the ease in which players may switch nationalities in order to become eligible to compete in the Davis Cup.

9. In a memorandum dated 20 February 2014 and addressed to members of the Davis Cup Committee, Ms. Justine Albert (Executive Director - Professional Tennis Events of ITF), proposed two potential options with regards to players who wish to switch, or have switched, to playing for different countries:

   (a) The first option was the adoption of a rule whereby players who have switched nationality successfully will not be allowed a further switch, or to

revert to their previous nationality; and

(b) Alternatively, to adopt a rule where once a player has represented a country at the senior level, he may not switch affiliations. This was to be subject to exceptional circumstances e.g. war, refugee status which would "merit review by the Committee".

10. During the Davis Cup Committee meeting of 5 March 2014, members of the committee were unanimously in favour of changing the regulations to only allowing a player to represent one country at the senior professional level (i.e. the latter option referred to above).

11. The proposed revisions to Regulation 34(a) were formally set out in the agenda for the 2014 AGM of the ITF. In the "Report of the Board of Directors" the principal objective for the proposed adoption of the "one country rule" was stated to be:

> *"To protect the integrity of tennis at national level by the introduction of the "one country only" principle, the same as exists in football…"*

12. During the 2014 AGM of the ITF, ITF members voted in favour of amending Regulation 34(a) to give effect to the "one country rule". As a result, Regulation 34(a) was amended to what became Regulation 35, the relevant provisions of which are as follows:

> *"**35. ELIGIBILITY TO REPRESENT A NATION***
>
> *A player or captain is entitled to represent one nation only at senior professional international level.*
>
> *…*
>
> *(d) A National Association may appeal to the Davis Cup Committee to nominate a player who is not eligible under the above Rules and the Davis Cup committee may agree the application if the full circumstances warrant an exception being made…"*

13. Regulation 35 has remained materially unchanged in the 2016 Davis Cup Regulations.

<u>Player G</u>

14. Player G was born on [redacted] in Country A.

15. As a tennis player, Player G represented Country A at the under 14, under 16 and under 18 levels.

16. In 2008, Player G moved to the U.K. where he continued playing tennis professionally.

17. At the senior level, Player G represented Country A in three ties of the senior Davis Cup: first, against Norway in March 2010, second, against Italy in July 2011, and thirdly, against Denmark in February 2012. In 2013 Player G was nominated to represent Country A in the 2013 Davis Cup although he did not play in any ties. He signed a contract to play for Country A in 2013 on 10 January 2013 and was photographed as part of the Country A squad before a Davis Cup tie in 2013.

18. In September 2012, Player G's then agent, Agent B, approached the LTA for advice as to how Player G could obtain British citizenship. To assist in Player G's application for citizenship, the LTA instructed an immigration solicitor, Mr Jonathan Goldsworthy, to facilitate the application.

19. On 22 December 2014 Player G submitted his application for citizenship to the Home Office which was approved on 4 March 2015.

The Application for Exemption

20. On 24 March 2015 Mr. Stephen Farrow, Legal Director of the LTA, emailed Ms. Albert, inquiring about the possibility of Player G being eligible to represent Great Britain in the Davis Cup given the change in eligibility rules.

21. On 5 May 2015, the LTA applied for an exemption for Player G to the Executives of the ITF. This request was rejected on 7 May 2015 on the ground that Executives of the ITF were unable to grant exemptions.

22. On 8 May 2015, the LTA submitted an appeal before the Davis Cup Committee which was rejected on 30 May 2015.

23. On 20 March 2016, the LTA further appealed against the committee's rejection to the ITF Board of Directors who, after considering the appeal *de novo*, rejected the

appeal on 23 March 2016. Before the ITF Board Player G and the LTA were represented by Adam Lewis QC and the ITF had submissions from Andrew Hunter QC.

B. Player G: General Comments

24. Player G has been very successful as a tennis professional and has reached a world singles highest ranking of 45. There is no doubt that he would be a worthy addition to the Great Britain Davis Cup squad. I have no doubt that his desire to settle in the UK has been genuine and that he has a genuine desire to play for Great Britain.

25. He has been in the unfortunate position that the ITF change in rules has come at precisely the wrong time for him. He cannot be characterised as one of those players who desire to adopt a "flag of convenience".

26. To make matters worse, the Country A's Tennis Association (the "[redacted]") have not taken kindly to his defection. [redacted].

27. There is no need for me to make findings of fact on these matters. It is sufficient to say that I have the greatest sympathy for Player G and his predicament and consider that he has acted in good faith throughout. I should also say that the LTA has acted creditably in supporting Player G's case throughout and giving him not inconsiderable assistance.

C. The Stance of the Respective Parties

28. Player G and the LTA contend that the implementation of Regulation 35 in place of Regulation 34(a) and the Decision not to grant an eligibility exemption pursuant to Regulation 35(d) is unlawful as:

(a) The combined effect amounted to an unjustifiable restriction on Player G's freedom of establishment which has direct effect under Article 49 of the Treaty on the Functioning of the European Union (the "**TFEU**");

(b) Even if Regulation 35 is justifiable in general, unless Player G is exempted from its operation, it is discriminatory and disproportionate; and

(c) Further or alternatively, as a matter of contract, the Decision not to grant Player G an exemption was unfair and/or irrational.

29. As a result of the above unlawful conduct, Player G claims to have suffered the following direct losses (which he claims from the ITF as damages) on the basis that, but for his ineligibility, he would have:

(a) Represented team Great Britain for each of the six 2015 Davis Cup ties and have been paid [redacted] (being his match fees; PILA / prize money; and profit share); and

(b) Been considered by the LTA for funding, in the sum of [redacted], to support his development, which is restricted to players eligible to represent Great Britain in the Davis Cup.

30. Player G also claims to have suffered indirect losses to be assessed.

31. In reply the ITF submits as follows:

(a) Article 49 TFEU has no application in this case as Regulation 35 constitutes a rule or practice that is justified on non-economic grounds which relate to the particular nature and context of Davis Cup;

(b) Even if Article 49 TFEU is applicable, Regulation 35 does not constitute a restriction within the meaning of that provision as it is a selection rule for the Davis Cup and that it is inherent in the nature of the tournament for a rule like Regulation 35 to be applied;

(c) Even if Regulation 35 does constitute a restriction to the freedom of establishment, it is objectively justified and lawful as it is proportionate to a legitimate objective;

(d) There is, in any event, no breach of procedural fairness / legitimate expectation such to render the Decision unfair or irrational; and

(e) As for Player G's claim for damages, the claim: (1) is not available for breaches of Article 49 TFEU; and (2) in any event, not supported in terms of causation as even if Regulation 34(a) remained in place, Player G would not have met the eligibility criteria having been nominated (and having accepted the nomination) to represent Country A in the 2013 Davis Cup.

32. Although the damages claim falls outside the Arbitration Agreement entered into between the parties, I was informed that no jurisdiction issue arises as to damages, but that I am asked to consider liability and breach first, and if I found for the Applicants, issues of damages would be dealt with subsequently.

D. Is Article 49 Applicable?

33. Article 49 TFEU provides that:

> *"Within the framework of the provisions set out below, restriction on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited."*

34. It is well established that the practice of sport may constitute an economic activity that is subject to Community law. This is especially apparent in the context of modern day professional sports where the sporting activity will usually take the form of gainful employment or the provision of services for remuneration: *Meca-Medina* [2006] ECR I-6991 at [§§22-23].

35. That the ability of representing team Great Britain in the Davis Cup is of substantial economic concern is not in dispute. As Mr. Leon Smith makes clear, for every appearance in the 2015 Davis Cup tie, a player would have received £xxxxxx and on top of that a share of the profits for some of the ties. Participation in the Davis Cup must therefore be a practice of sport that constitutes economic activity that is subject to Community law.

36. Governing bodies fall within the scope of Article 49 when making rules of any nature aimed at regulating sporting activity which takes the form of gainful employment and the provision of services in a collective manner. As the Court of Justice of the European Union (the "**CJEU**") said in *Deliège* [2000] ECR I-2549 at [§47]:

> *"the Community provisions on the free movement of persons and services not only apply to the action of public authorities but extend also to rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner. The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy."*

37. However not every rule concerning a sporting activity falls to be affected by the Treaty. From as early as the CJEU's decision in *Donà* [1976] ECR 1333 at [§§14-15] it has been held that:

> *"14. … those provisions* [of Community law concerning freedom of movement of persons and of provision of services] *do not prevent the adoption of rules or of a practice excluding foreign players from participation in certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries.*
>
> *15. This restriction on the scope of the provisions in question must however remain limited to its proper objective."*

38. Whether Article 49 is applicable in the present case therefore depends on the precise scope of this "sporting exception" and whether the nature and context of the Davis Cup and Regulation 35 meet the exception.

39. Player G and the LTA submit as follows:

(a) First, while the adoption of Regulation 35 was for a legitimate objective, given the nature and context of the Davis Cup, the reason for its adoption

was of an economic nature as it was designed to prevent a player, who has already represented Country A, from switching and establishing himself as a Davis Cup player for Country B, even if he is doing so for economic reasons (being a form of economic migration); and

(b) Second, once it is accepted that participation in the Davis Cup is a form of economic activity and that there is a restriction on Player G's freedom of establishment, even if the rule was adopted for non-economic reasons, a court or tribunal must still determine whether the rule was proportionate to its objective in a manner that is akin to the ancillary restraint analysis in competition law terms.

40. In support, Mr. de la Mare drew my attention to the line of authorities decided since *Donà*. In *Meca-Medina*, after referring to §§14-15 of *Donà* at [§26] of the judgment, the CJEU held at [§27] that:

> *"… it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaged in the activity governed by that rule or the body which has laid it down."*

and then later, in the context of applying Article 81 EC at [§47]:

> *"… It follows that in order not to be covered by the prohibition laid down in Art. 81(1) EC, the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport…"*

41. This, according to Mr. de la Mare, marks the CJEU rejecting the "sport is special" argument and instead harmonising the *"limited to its proper objective"* consideration of Article 49 with the ancillary restraint consideration under Article 81(1).

42. In response, the ITF submits as follows:

(a) First, Article 49 is inapplicable in the present case because Regulation 35 is a rule that seeks to exclude foreign players from playing in matches between national teams from different countries which has been long recognised to fall outside the EU free movement provisions; and

(b) Regulation 35 was clearly introduced and implemented for reasons which are not of an economic nature as the very point of a rule like Regulation 35 relates only to the nature and context of the sporting activity in question (i.e. who is eligible to represent a national team in the Davis Cup - a tournament between nations).

43. In response to the point of ancillary restraint, Ms. Demetriou disputes that it was ever the position of the CJEU to introduce the competition law consideration of ancillary restraint and proportionality to Article 49 cases.

44. On the contrary when, as in *Donà* (supra) at [§15], the CJEU speaks of the *"restriction on the scope of the provisions in question must however remain limited to its proper objective"*, it was to ensure that where there is a rule that is of sporting interest only, only those "chunks" of the sporting activity that are affected may be carved out from the application of the TFEU and it cannot therefore be used to justify the exclusion of the whole of the sporting activity.

45. Furthermore, Ms. Demetriou submitted that there was no CJEU authority which had ever applied TFEU to rules of sporting bodies which were concerned with eligibility to play for national teams, and to do so would be inconsistent with *Donà;* the well-known passage from *Donà* had been consistently cited in subsequent CJEU decisions. It was necessary for there to be a rule defining who was eligible for a national team, and Regulation 35 was such a rule.

46. Alternatively, relying on the analysis of the CJEU in *Deliège* Ms. Demetriou submitted that to the extent that Article 49 applied at all, there was no relevant restriction because, by analogy with the ancillary restraint cases, Regulation 35 was a necessary provision to identify who should be entitled to play for a national team in the Davis Cup, and thus not a restriction subject to review.

Analysis

47. This is the most interesting and knotty legal issue in the case. I do not think the answer is straightforward or free from doubt. I can see the question could readily tax the CJEU.

48. It is undisputed that the primary reason why Regulation 35 was introduced was to weed out cases of "cheque book nationality" and "flags of convenience" which the ITF considers to be against the spirit of the Davis Cup. In so doing, it must have been envisaged that Regulation 35 will act as a barrier to players who, having played in the senior Davis Cup, now wish to switch national affiliations for economic reasons.

49. It does not appear consistent with the objectives of TFEU to exclude the operation of Community law in relation to rules designed to restrict the ability of players to transfer their national affiliations for economic reasons. The issue is whether the rule change falls within the *scope* of Article 49. When considering that question it is relevant to refer again to CJEU in *Meca-Medina* (supra) at [§§26-27]:

> *"With regard to the difficulty of severing the economic aspects from the sporting aspects of a sport, the Court has held (in Donà, cited above, at [14] and [15]) that the provisions of Community law concerning freedom of movement for persons and freedom to provide services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain sporting events. It has stressed, however, that such a restriction on the scope of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty (Bosman at [76], and Deliège at [43], both cited above).*
>
> *… it is apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down."*

50. I accept Mr. de la Mare's submission that rather than being a rule based on the principle of nationality, the "one country rule" as promulgated by Regulation 35, is in fact a rule based on the change of nationality which brings it squarely within Article 49. Indeed, under Regulation 35, it does not matter whether Player G is a British national trying to play for Great Britain. His ineligibility stems from him *switching* sporting affiliations as opposed to his nationality at any given time.

51. In the circumstances, Regulation 35, being a rule which seeks to target and deter those who wish to change affiliations must necessarily become a rule that restricts freedom of movement as it will act as a barrier to free movement i.e. as a result of

Regulation 35, a Country A player will be less likely to move to Britain (a precondition to change of affiliation) because the movement will not generate economic benefit.

52. Ms. Demetriou submits, relying on *Deliège,* that even if Regulation 35 falls within the scope of Article 49 TFEU, it still does not constitute a restriction within the meaning of Article 49 as selection rules or criteria of this nature are themselves necessary for the operation of the Davis Cup. In one sense, that was simply an alternative route by which the conclusion which she advocated can be reached. It does not seem to me that it provides an answer to the reasoning I have given above for the applicability of Article 49.

53. In the circumstance, I consider it is necessary for the ITF to justify the restriction placed on Player G's freedom of establishment in Regulation 35.

E. Is Regulation 35 Proportionate to the Proper Objective?

54. Mr. de la Mare submits that in order for Regulation 35 and its implementation to be lawful either:

(a) The rule must expressly contain sufficient transitional provisions (such as a list of mandatory relevant considerations which the ITF must consider when deciding the issue of exemption); or

(b) In a case of a player like Player G who has taken detrimental and irreversible steps to switch affiliations and would have been eligible under Regulation 34(a), to grant the exemption under Regulation 35(d).

55. The disproportionality, so it is submitted, stems from the fact that in the absence of the above, any potential justification for the imposition of Regulation 35 were outweighed by the restriction on the freedom of establishment for persons, like Player G, who had, in good faith, taken irreversible steps to switch affiliations, and which Regulation 35 had never intended to catch in the first place.

56. In response, Ms. Demetriou submits that Regulation 35 is clearly proportionate to its proper objective given that it expressly provides for a mechanism of granting exemption to address cases of potential hardship.

57. Indeed, she contends, given the difficulty in drafting express transitional provisions that were capable of catching all marginal cases, Regulation 35 is plainly suitable to meet all of its legitimate objective while at the same time being sensitive to meritorious "transitional" cases.

Analysis

Was the rule itself unlawful?

58. It is common ground that Regulation 35 has a legitimate objective. It protects smaller national associations who may have invested money and support in bringing on a player only to find that he defects to a wealthier national association. It prevents changes of nationality for economic reasons and supports the ethos of the Davis Cup which is a competition between nations.

59. The case of the LTA and Player G is not therefore that Regulation 35 has no objective justification. Their argument is a narrower one which focus on the lack of transitional provisions which would protect someone such as Player G who had relied on the old rules.

60. However, Regulation 35 does not give rise to an absolute prohibition. The ITF recognises that there may be cases where an exemption under Regulation 35(d) should be given to the athlete:

> *"(d) A National Association may appeal to the Davis Cup Committee to nominate a player who is not eligible under the above Rules and the Davis Cup committee may agree the application if the full circumstances warrant an exception being made…"*

61. Whilst it is possible to understand an argument that Regulation 35 might involve an unjustifiable restriction in breach of Article 49 were it couched in absolute

terms, this is not the case. Once one sees Regulation 35(d), and the ability to apply for an exemption, it is difficult to understand the complaint.

62. Indeed, this seems to have been the prior view of the LTA. In their submissions to the ITF Board in support of an exemption, drafted by (different) leading counsel, the LTA stated:

> *"… it is also common ground that the LTA does not ask the ITF Board to rule on the legality of the ITF's rule change:*
>
> *This is because the new (2015) rules provide that an exception can be granted. The availability of an exception allows the ITF to ensure that players already in the process of transferring (in reliance on the former rules) are not treated disproportionately and unfairly, and therefore unlawfully, as a result of the rule change, which the LTA maintains gave such players insufficient time to complete that process in order to comply with new rules, without any justification."*

63. It can be seen that what the LTA were seeking to do in these submissions was to argue that the existence of the exemption was precisely what made Regulation 35 lawful. The purpose of that submission was to advance the case for an exemption. Having had an exemption refused, the LTA now take the opposite tack.

64. It seems to me that the submission there made in support of the exemption was plainly correct. It is precisely because of the existence of the right to apply for a discretionary exemption that Regulation 35 is unobjectionable. Cases that the ITF regard as deserving of an exemption can be dealt with under Regulation 35(d). Once that is taken into account, I can see no basis for a contention that Regulation 35 is itself in breach of Article 49.

Was the Decision to refuse an exemption unlawful?

65. The alternative case put forward by the Applicants is that in all the circumstances, the decision of the ITF to refuse an exemption was unlawful, as a matter of contract.

66. Mr de la Mare argued that Player G had relied on the pre-2015 regulations when the "one country rule" was not in place, in three material ways:

(a) Firstly, in playing for Country A at senior level (which Player G believes he probably would not have done had he been aware of the terms of the new rule);

(b) Secondly, in making clear his desire to requalify to play for Great Britain, the effect of which was, in effect, to burn bridges with the [redacted]; and

(c) Thirdly, in deciding not to play for Country A once the decision to requalify for Great Britain was made.

67. As a result of these steps, Player G had a legitimate expectation of being eligible under the 2014 Davis Cup Regulations. In such circumstances, it was simply not open to the ITF, in accordance with Community or English law, to refuse him an exemption under Regulation 35(d). For this purpose, if, as I have found, the rule change falls within the scope of Article 49, there is no material distinction between the position under Community law or under English contract law.

68. This contention was argued with commendable attractiveness and cogency. But when one examines it in detail, it becomes apparent what a hugely difficult argument it really was.

69. The ITF refused the application without giving reasons. As the ITF Board by convention votes on matters such as this, the ITF regards it as inappropriate to provide reasons. Thus, this is not a case where the reasons given are known or can be attacked.

70. Further, this is not a case where there is or can be an allegation of procedural unfairness.

71. Nor is there any realistic suggestion that the matter could be remitted to the ITF for reconsideration in the light of a direction by this tribunal.

72. It follows that Mr. de la Mare's contention was, of necessity, that *any* decision by the ITF other than the grant of an exemption was unlawful. In other words, on the facts before the ITF, they could not lawfully do other than grant an exemption.

73. Put this way, one can see many difficulties.

74. Firstly, it is necessary to recognise that the best body to determine the circumstances in which exemptions should be granted is the ITF Board itself. It is well-established that courts and tribunals should exercise great caution before interfering with the decision of a specialist sporting body on a matter where the expertise and experience of that body is relevant. But the Applicants' argument takes all material power to refuse exemptions away from the ITF Board and gives it to the court or tribunal.

75. The basis for the Applicants' contention was that Player G had relied upon the pre-2015 regulations before he became aware of its successor rule. So does that mean that any applicant for an exemption who had in any respect, however small, "irreversibly" relied upon the old rule must succeed? Surely that must follow from the argument? Why should this be the case? There is no principle of law which requires such a conclusion. Mr de la Mare criticised the lack of some sort of guidance defining or otherwise identifying relevant factors for the ITF to take into consideration in reaching a decision on an exemption. But the obvious difficulty in formulating guidance or relevant factors that are capable of distinguishing between cases of "irreversible" and "reversible" reliance, is precisely the reason why an exemption must be assessed, by the ITF, on a case by case basis. Surely it follows if his argument is correct that any guidance which limited the circumstances when an exemption was likely to be given would be likely to be unlawful itself? The proposition that the ITF Board were *obliged* to give an exemption to a person who has relied on the pre-2015 regulations is difficult to countenance.

76. The absence of reasons means one does not know why the ITF Board did in fact refuse the exemption. The ITF said that at the time when the 2015 Davis Cup Regulations came into effect, Player G had only fulfilled one of the four criteria for eligibility under the 2014 Davis Cup Regulations. Even at the time of the application for exemption, the ITF said that Player G still would not have met the "36 months requirement" under Regulation 34(a) to make Player G a truly "marginal case". It is simply not known whether these were the reasons for the decision to refuse the exemption and it is inappropriate to speculate.

77. Moreover, the opposition of the [redacted] and a series of disputed facts about the end of Player G's career playing for Country A meant that the facts relating to Player G and his intentions were not agreed at the time of the hearing before the ITF Board. As Ms. Demetriou pointed out, it would have been open to the ITF without misdirecting itself to take a less generous view of Player G's conduct and intentions and to take the view that his application did have elements of economic nationalism or opportunism. I emphasise that I do not myself in any sense take this view; however, when one is considering the argument that *any* decision of the ITF Board other than the grant of an exemption would have been unlawful it is necessary to recognise that it would have been open to the ITF without error of law to take a different and less generous view of the facts before them.

78. Ultimately, to contend that the ITF were as a matter of law obliged to give Player G an exemption under Regulation 35(d) and to exercise the discretion granted to them to refuse an exemption was of necessity unlawful is, in my view, simply unsustainable.

F. Conclusion

79. In the circumstances, this application fails and must be dismissed. I am grateful to the advocates for very well-argued submissions on both sides.

80. In the course of the hearing, I asked the ITF whether it would be permissible for Player Gto make a further application for an exemption in due course. I was told on instructions that the ITF sees no reason in principle why a further application should not be made. The advantage of a further application will be that it could be made at a time when Player G will be able to satisfy ITF that he has fulfilled all the prerequisites of the 2014 regulations. Of course, it will be a matter for the ITF to decide whether such an application should succeed. But I hope that the passage of time, and perhaps some mended fences with the [redacted], will be sufficient to persuade the ITF that Player G is a worthy candidate for an exemption under Regulation 35(d).

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