

## Case 23 – Eligibility Decision Appeal

### 2015 Davis Cup

#### Keywords

*Nationality; Article 49; TFEU; Unjustifiable Restriction; Eligibility; Sporting exemption; Economic activity; [Fair Selection of Athletes](#)*

#### Summary

Player G, together with the Law Tennis Association (LTA) appealed a decision by the International Tennis Federation (“ITF”) to not grant Player G an eligibility exemption to represent Great Britain in the 2015 Davis Cup. The matter was referred to the ITF Independent Tribunal for determination.

#### Background Facts

Player G was born in Country A and represented Country A in the 2010, 2011, 2012 and 2013 Davis Cup. In December 2014 the athlete applied to obtain British citizenship, which was approved in March 2015. At the time, the ITF had also changed the eligibility criteria to compete in the 2015 Davis World Cup. Eligibility was previously governed by Regulation 34(a) of the Davis Cup Regulations, but was replaced by Regulation 35, which became effective for the 2015 Davis Cup competition. Regulation 35 gave effect to the “one country rule”. This rule prevented athletes from competing in the Davis Cup if they had already represented one nation at the senior professional international level.

Noting the change to the Davis Cup Eligibility Rules the LTA applied for an exemption on behalf of Player G under Regulation 35(d). However, the Athlete was not granted an eligibility exemption to represent Great Britain in the 2015 Davis Cup.

## Reasoning and Decision of the Tribunal

Player G and the LTA appealed the decision on the basis that the implementation of the new rule and the decision to not grant an eligibility exemption was unlawful. They argued as follows: i) the combined effect amounted to an unjustifiable restriction on the Athlete's freedom of establishment which has direct effect under Article 49 of the Treaty on the Functioning of the European Union ("TFEU"); ii) even if Regulation 35 is justifiable, unless the Athlete is exempted from its operation it is discriminatory and disproportionate; and iii) as a matter of contract the Decision not to grant the Athlete an exemption was unfair and/or irrational. As a result of the unlawful conduct the athlete also claimed he suffered direct financial losses.

The ITF argued that: i) Article 49 of the TFEU had no application in the case. Regulation 35 constitutes a rule or practice that is justified on non-economic grounds relating to the nature and context of the Davis Cup ; ii) Regulation 35 does not constitute a restriction within the meaning of Article 49 as it is a selection rule for the Davis Cup and is inherent to the nature of the tournament; iii) Regulation 35 is objectively justified and lawful as it is proportionate to a legitimate objective; iv) there is no breach of procedural fairness/legitimate expectation to render the Decision to not grant the Athlete an exemption unfair or irrational; and v) the Athlete's claim for damages is not available for breaches of Article 49.

The Tribunal noted that whilst sport may constitute an economic activity and that representing team Great Britain in the Davis Cup was of substantial economic concern, not every rule concerning a sporting activity is affected by the TFEU. In this case it was found that because Regulation 35 is a rule based on the change of nationality it did fall within Article 49.

The Tribunal considered the applicability of Article 49 and held that it depended on the scope of the "sporting exception" set out in *Donà* [1976] ECR 1933 and whether the nature, and context, of the Davis Cup and Regulation 35 met that exception. The Tribunal then assessed Regulation 35 and looked at whether the rule was proportionate to the proper objective, focusing on whether the rule itself was unlawful and whether the decision to refuse the exemption was unlawful. The

Tribunal concluded that whilst Regulation 35 does have the effect of restricting movement, it was not unlawful because it did not give rise to an absolute prohibition and recognised that there might be cases where an exemption under Regulation 35(d) should be given to the Athlete.

For the reasons above the Tribunal dismissed the appeal. However, it was left open to the Athlete to make a further application for an exemption in due course.

### **Learning points**

- Governing bodies fall within the scope of Article 49 TFEU when they make rules aimed at regulating professional sport, unless the 'sporting exception' principle applies (e.g. rules excluding foreign players for non-economic reasons, which protect sporting interests only)
- If Art 49 TFEU applies, there is a secondary question about whether the restriction is lawful. This is determined by whether the restriction was proportionate to the legitimate objective to be achieved and objectively justifiable. If there are provisions for athletes to be granted exemptions from application of the rule where justice of individual cases so requires, this is likely to be a persuasive factor in determining if the rule is proportionate.