

**IN THE MATTER OF AN ARBITRATION UNDER RULE K OF THE RULES OF THE
FOOTBALL ASSOCIATION**

**BEFORE MR. CHARLES FLINT Q.C. SITTING AS A JOINTLY APPOINTED SOLE
ARBITRATOR**

B E T W E E N:

ASTON VILLA F.C. LIMITED

Claimant

and

THE FOOTBALL ASSOCIATION LIMITED

Respondent

AWARD

1. By a decision of a Football Association Exceptions Panel ('the Panel') made on 20th January 2016 the Club's application for a Governing Body Endorsement ('GBE') with respect to [REDACTED] ('the Player') was refused.
2. By a notice of arbitration dated 25th January 2016 the Club challenged the legality of the decision. On the same day I was appointed by the parties as sole arbitrator under Rule K of the FA rules.

3. The Club contends that the refusal of the GBE was unlawful and it seeks a declaration to this effect along with the necessary associated relief to enable the Player's application to be reconsidered on a lawful basis.
4. A hearing was held on 28th January during which oral submissions were made by Nicholas Randall QC for the Club and Adam Lewis QC for the Football Association. The hearing bundle had been agreed, which included the decision of the Panel and all the material considered by the Panel.
5. In view of the urgency of this arbitration and under the procedures agreed by the parties I was required to give my decision at the end of the hearing. This award now sets out in short form my reasons for the decision.
6. It is common ground that under rule K I have jurisdiction to decide that the Panel decision was unlawful, as being vitiated by unfairness, inconsistent with the rules under which the GBE requirements are to be assessed, or irrational. It is also common ground that I should assess the questions of legality and fairness on substantially the same basis as a court would decide an application for judicial review of a decision subject to public law.
7. However the application of the principles of construction and the exercise of what is only a supervisory jurisdiction must take account of the sporting context. The applicable rules must not be construed as if they constitute a statutory scheme. They are designed to be applied by an expert body with practical knowledge of the sport. That is not an expertise necessarily possessed by an arbitration tribunal which is

concerned only with the legality of the decision. A considerable margin of appreciation must be conceded to a body such as the Panel dealing with applications which depend upon an assessment of the experience and value of a player in the context of the GBE requirements.

8. The applicable requirements are set out in a document entitled "Points based system - Governing Body Endorsement Requirements for Players - 2015/2016 Season" ("the Requirements"). The Requirements were adopted by the FA following consultation and agreed with the Home Office. As a matter of background the Requirements were intended to introduce a more objective evidence based process, thus introducing greater certainty into the system. However at various points in the Requirements it is made clear that the Panel will have considerable discretion and that the issue of whether a GBE is to be granted is, save where the criteria for automatic qualification are met, not to be decided by points alone. It is made very clear that the Panel is to apply both objective and subjective criteria, and retains, even where the objective criteria are met, a discretion as to whether to recommend a GBE.

9. The applicable Requirements do not constitute rules of the FA. They are expressed, at section 2.2, to be a statement of the procedures and guidance, as set out in the appendix ("the Procedures"), which will be followed by the Panel in considering a case. It is common ground that these procedures must be followed by the Panel, but accepted that they must be construed in a commonsense way which supports their structure and purpose. Each party disavows an unduly legalistic interpretation, whilst contending that this is the effect of the other's submission as to what the Procedures mean.

10. The purpose of a GBE is to certify whether a player is an *“elite player who is internationally established at the highest level, whose employment will make a significant contribution to the development of football at the highest level in the UK and who intends to base himself in the UK”*.

11. Section 2.2 of the Requirements is entitled *“Discretionary Criteria under which a Governing Body Endorsement will be granted”*, and states:

“If a player does not meet the automatic criteria set out above, an applicant club can request that an Exceptions Panel consider the player’s experience and value in order to determine whether a [GBE] should nevertheless be granted.”

That sets out the function of the Panel and it is with that function in mind that the applicable requirements must be interpreted.

12. In argument there were three submissions made on behalf of the club:

- (1) A member of the panel, [REDACTED], had failed to disclose an actual or potential conflict of interest;
- (2) The Panel misapplied the Requirements in considering at the primary review stage impermissible factors relating to the objective criteria which had been satisfied on a points basis;
- (3) The decision was irrational in holding that there was no subjective evidence which it was appropriate to take into account at the secondary review stage.

16. The conflict of interest alleged is thus a [REDACTED]
[REDACTED]
[REDACTED]. That the argument is tenuous is indicated by the fact that it was described as a potential conflict of interest, rather than, as the law requires, an actual or ostensible conflict, or, as the Requirements state, "an actual or perceived conflict". There is no evidence or suggestion that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED], and no grounds for suspecting that [REDACTED]
[REDACTED] could possibly have been influenced by that consideration. In those circumstances the fair-minded and objective observer could not conclude that there was a real possibility that [REDACTED] was affected by bias.

Error of law at the primary stage

17. The Club's submission is that at the primary review stage the relevant circumstances which the Panel may take into account must exclude factors which relate to the criteria on the basis of which points are awarded. The interpretative basis for the argument is that the statement that the Panel "may take into account other circumstances or facts that, even though the player has achieved four (4) points or more, suggest that a GBE should not be granted" can only extend to circumstances and facts which are "other" than the criteria on the basis of which the points are awarded. The logic of the argument must therefore be that although the Panel is

expressly stated not to have an obligation to recommend a GBE, in deciding whether or not to recommend a GBE at the primary stage it may not take into account any factors which relate to the experience and financial value of the Player.

18. It is fair to note that the Requirements do contemplate a different approach at the primary and secondary review stages. At the first stage “the Exception Panel will consider objective criteria to assess the experience and financial value of a player” whereas at the secondary stage “the Exceptions Panel will then conduct a mixed objective and subjective review”. Mr. Randall argued that the Panel incorrectly confused the two different stages of assessment. On other hand if the Panel has power not to recommend a GBE at the first stage, even where the objective points criteria are met, it is difficult to see what factors could be taken into account which would not be subjective, in the phraseology adopted in the Procedures. If they were to be relevant factors, as opposed to capricious, inadmissible or legally irrelevant factors, then those factors would, in the absence of unusual circumstances, necessarily relate to the value and experience of the player. It is only by assessing value and experience that the Panel could assess whether the Player is an elite player established at the highest level.

19. The Requirements are clear in emphasising the discretionary assessment which is required and stressing more than once that the Panel is not required to grant a GBE even if the points score is established. That applies both to the primary and secondary review stages. So there is no room for any argument that the points scored should be determinative of the issue whether a player has the required experience and value to be considered an elite player.

20. It was argued by the Club that its construction of the Procedures did not deprive the Panel of all power to decline to recommend a GBE at the primary stage. There could be circumstances which might permit the Panel to decline to recommend a GBE notwithstanding that 4 points or more had been scored. Those factors could relate to the question whether the player's employment would make a significant contribution to the development of football or whether he intended to be based in the UK. I regard the examples given of such cases as likely to arise very rarely. It is difficult to see why an unfettered discretion not to recommend a GBE at the primary stage should be expressed in such general terms if the power was to be confined to such exceptional circumstances and, more significantly, should exclude any consideration of the experience and value of the player.

21. As a matter of construction of paragraphs 1 and 2 of the Procedures my conclusions are as follows:

- (1) the power to decline to recommend a GBE, notwithstanding the achievement of 4 points at the primary stage, is framed as an unfettered discretion;
- (2) the power to take in account "other circumstances or facts" is the power to take into account any relevant considerations in addition to the points scored;
- (3) there is no basis for reading "other circumstances or facts" as referring only to considerations which do not relate to the criteria by reference to which the points are awarded, for that would, contrary to the general purpose of the Requirements, deprive the Panel of the power to consider factors relating to the experience and value of the player, which is the core function of the Panel;
- (4) it would take very clear wording to circumscribe the Panel's power to consider all and any factors relating to the question whether the player could properly be

regarded as an elite player, and there is no such wording in paragraphs 1 and 2 of the Procedures.

22. The fact that at the secondary stage there is express power to consider the degree to which a player exceeds the points criteria cannot by implication preclude such consideration at the primary stage. Paragraph 1 of the Procedures draws no distinction between the primary and secondary stages in the factors that may be taken into account in declining to recommend a GBE, notwithstanding the scoring of sufficient points. It would be perverse for a Panel to be permitted only to consider relevant factors relating to experience and value at the secondary stage.
23. Thus interpreted I consider there is a logical and fair structure to the procedures. The Panel is not required to recommend a GBE even if the player has scored 4 or more points. The points scored at the primary stage are not determinative of the issue, nor is the Panel given any guidance at this stage to make a positive recommendation if the points score is met. If the Panel has any reservations at the primary stage then it may decline to make a recommendation. If it so declines the review moves automatically to the secondary stage. The secondary stage introduces further objective factors, which are scored, and the Panel will consider "any subjective criteria that it deems appropriate in its absolute discretion". Such criteria will include any factors relating to the experience and value of the player. That will include, as expressed at the third bullet point, the reasons why the criteria were not met at the primary stage. So the primary stage filters out the clear cases where sufficient points are scored and the Panel has no ground to question the elite status of the player. It is at the secondary stage that the club has a right to seek to adduce evidence and make oral submissions, and at that stage that the Panel forms a final view (subject to any

highly extenuating circumstances) on all the relevant factors, including those given any consideration at the primary stage. The secondary stage is a continuation of the first and it would be anomalous if the Panel was required at the filter stage not to take into account factors relating to experience and value which it would be required to consider at the secondary stage. It would be inconsistent with the general structure and purpose of the Procedures to treat the points scored at the primary stage as determinative of the elite status of the Player.

24. In my judgment there is no proper basis in the text of the Procedures for holding that the Panel is not entitled to take into account at the primary stage factors which relate to value and experience of a player which the points are intended to score and which it is the core function of the Panel to assess. The Panel made no error of law in its reasoning at paragraph 13 of the decision.

Irrationality

25. At paragraphs 19 and 20 of the decision the Panel stated that it had found no subjective criteria or evidence which it deemed appropriate to take into account at the secondary stage. Read literally and in isolation those statements appear to convey the point that there was no evidence to take into account in relation to the subjective criteria to be assessed at the secondary stage. Mr. Lewis described the drafting of those sentences as “not ideal”.
26. Just as one must in this sporting context adopt a commonsense and practical approach to the construction of the Requirements, so one must look fairly for the true meaning of the decision. Read as a whole I have no doubt that Panel was stating that,

having considered the relevant evidence as they clearly did at paragraphs 17 and 18, there was no sufficient evidence to be taken into account which could persuade the Panel to recommend a GBE. To read paragraphs 19 and 20 as stating that there was no relevant evidence to be considered would clearly be inconsistent with the careful analysis of the relevant evidence carried out at paragraphs 17 and 18. The conclusion of the Panel was very clear at paragraph 22 in stating:

“In this case, the Panel did not find, as indicated above, sufficient evidence of the player being of this calibre.”

That conclusion was based on proper consideration of all the relevant evidence.

27. For those reasons I find no irrationality, or error of law, in the reasoning of the Panel at paragraphs 19 and 20 of the decision.

Conclusion

28. This is an important case for the Club and this challenge was entirely proper and well argued. However having heard full oral argument, which at least persuaded me that the error of law argument was arguable, I am bound to conclude that the points of law advanced do not support the case that the Panel’s decision may be reviewed and set aside. In my judgment the decision was a careful and well reasoned analysis of the evidence which did properly and fairly follow the Procedures laid down.

29. For the reasons set out above I hold that the Panel's decision was lawful, and dismiss the application for an order setting aside the decision.

30. Under Rule K 12 I order the Club to pay the costs of this arbitration, and the legal costs of the Football Association on the standard basis, to be assessed by me if not agreed.

A handwritten signature in black ink, reading "Charles Flint.", is written above a single horizontal line that extends to the right.

Charles Flint QC

29 January 2016

Blackstone Chambers

London