



**FOOTBALL
NSW**

APPEALS TRIBUNAL OF FOOTBALL NEW SOUTH WALES

DETERMINATION IN THE FOLLOWING MATTER:

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| Player/Official/Member/Association Member/Participant/Club | Albury Wodonga Football Association v Wangaratta City Football Club |
| Decision appealed | Appeal from the decision of Albury Wodonga Football Association Appeal Tribunal |
| Date of Decision | 18 May 2016 |
| The basis upon which the matter is before the Appeals Tribunal | Sections 9.1(c) & 9.2 of the Football NSW Grievance and Disciplinary Regulations, 2016 |
| Ground(s) of Appeal | Sections 9.3(a) and 9.3(d) of the Football NSW Grievance and Disciplinary Regulations, 2016 |
| Date of Hearing | 18 August 2016 |
| Date of Determination | 19 August 2016 |
| Appeals Tribunal Members | Anthony Lo Surdo SC, Chair Iain Rennie, Member David Stanton, Member |

INTRODUCTION AND JURISDICTION

1. The Appeals Tribunal (**AT**) has been established in accordance with sections 4 and 9.1 of the Football NSW Grievance and Disciplinary Regulations, 2016 (**FNSW Regulations**) to determine appeals from the Disciplinary Committee (**DC**), the General Purposes Tribunal (**GPT**) and Member Appeals Committees (**MAC**). "Body" is defined in the Regulations to mean a body established under section 4 of the Regulations and relevantly includes the purposes of an appeal to the AT, the DC and the GPT.
2. The sole grounds of appeal prescribed by section 9.3 of the FNSW Regulations are as follows:
 - (i) a party was not afforded a reasonable opportunity to present its case;
 - (ii) lack or excess of jurisdiction of a Body or a Member Appeals Committee;
 - (iii) the decision of a Body or Member Appeals Committee was affected by actual bias;
 - (iv) the decision was one that was not reasonably open to a Body or Member Appeals Committee having regard to the evidence before the decision-maker
 - (v) severity, only where the decision imposed a sanction of at least:
 - (a) Fixture/Match Suspension of 6 or more Fixtures/Matches (excluding Trial Matches, Tournaments, the NPL Pre-Season Competition, the FFA National titles or any Football NSW Representative Matches); or
 - (b) Time Suspension of three (3) or more months; or
 - (c) a fine of three thousand dollars (\$3,000) or more; or
 - (d) a bond to be of good behaviour of three thousand dollars (\$3,000) or more;
 - (e) a deduction, loss or ban on accruing six (6) or more competition points; or
 - (f) exclusion, suspension or expulsion of a Club or Team from a competition; or
 - (g) relegation to a lower division;

(h) leniency, but only in the case of an appeal brought by Football NSW or an appeal allowed by the Executive pursuant to section 9.2(h) (Appeal from a MAC).

3. Upon the hearing of an appeal, the AT may:
 - (a) dismiss, allow in whole or part, or vary (whether by way of reduction or increase) a Determination, including any sanction or penalty made by a Body or a MAC, as the case may be;
 - (b) subject to any applicable Minimum Suspension, impose any sanction, measure or make any order it thinks fit or that a Body or MAC, as the case may be, could have imposed under the Regulations or its regulations, as the case may be;
 - (c) conduct a fresh hearing of the matter (*hearing de novo*); or
 - (d) refer the matter to the Body or the MAC from which the appeal originated, or to the Tribunal (or similar) that dealt with the matter at first instance for rehearing and issue any directions or orders in relation to the rehearing of the matter that the AT deems appropriate. (s 9.4(b) of the FNSW Regulations)
4. By notice of appeal filed on 15 June 2016, the Albury Wodonga Football Association (**AWFA**) appeals against a decision of the AWFA Appeal Tribunal dated 18 May 2016 in which it upheld an appeal from the AWFA GPT dated 2 May 2016. In the decision the subject of this appeal, the AWFA Appeal Tribunal found that a visa exemption should be granted to a Mr Stoycho Ivanov (**Player**) to play with the Wangaratta City Football Club (**WCFC**) and provided reasons for that decision.
5. On a date that is not apparent from the appeal papers, the AWFA made application to Football Riverina, the relevant Branch (as that term is defined in the Football NSW Regulations) for, in effect, leave to appeal the decision of the AWFA Appeal Tribunal. That application was made in accordance with the procedure set out in a document headed "Football Riverina Appeals Process & Information". On 24 June 2016, Football Riverina informed the AWFA that its application to appeal was declined and provided short reasons for that decision.
6. The AWFA Appeal Tribunal is a MAC for the purposes of the FNSW Regulations. An appeal to the AT from a decision of a MAC only lies where a "Member" which includes an "Association Member" such as the AWFA, has exhausted that member's own disciplinary/grievance Rules and regulations (see, s 9.6(a) of the

FNSW Regulations). We are satisfied that the AWFA has exhausted the avenues available to it under its own Rules and regulations for review of the decision the subject of this appeal.

7. The AT is accordingly of the view that it has jurisdiction to hear the appeal. Further, at the commencement of the hearing, the AT requested the parties to indicate whether either had any objection to jurisdiction. Neither party raised any objection to the AT's jurisdiction.

BACKGROUND FACTS

8. This matter concerns an application by the WCFC for the Player to be exempted from the visa rule. An application was made by WCFC to the AWFA on 8 March 2016 for such exemption to be granted. The application was denied.
9. WFC is a member of the AWFA.
10. Under the AWFA Constitution a "Member Club" is defined to be "a club in accordance with the Regulations, which is a member, or is otherwise affiliated with the Association." "Member" is defined in the AWFA Constitution as "...a member for the time being of the Association under clause 5." Clause 5 sets out the categories of members which include "Member Clubs" such as WCFC.
11. Members are bound by the AWFA Constitution and are, as a consequence, obliged to comply with and observe the Constitution and the Regulations (see clause 8).
12. Clause 36.2 of the AWFA Constitution provides that all Regulations are binding on the Association and all members. Regulations are defined to mean any regulations made by the Management Committee under clause 36.
13. The AWFA Regulations (By-laws) were created pursuant to the powers contained in clause 36.2 of the AWFA Constitution.
14. The AWFA Regulations define a visa player as "...any player who is not a permanent resident of Australia." (see Glossary).
15. The AWFA Regulations make the following provisions in relation to visa players at Section 4, Item 2 "Team Rules":-

"32. All open age divisions men and women are limited to three non-resident players (visa holders) with a limit of two players on any match sheet.

Visa players are to be marked with a "V" on the match sheet.

33. EC exemptions may apply upon application for exchange students and refugees (AWFA 18 form)."

(Regulations 32 & 33)

16. The parties agreed that Regulations 32 & 33 are the only provisions relevant to Visa players
17. The parties also relevantly agreed that, at all material times, the Player:
 - (a) was not a permanent resident of Australia;
 - (b) was not an exchange student; and
 - (c) was not a refugee.
18. The WCFC applied to the AWFA General Purposes Tribunal (**GPT**) regarding the refusal by the AWFA to provide the Player with an exemption from the visa rule.
19. On 2 May 2016, the GPT decided that the Player was and remained a visa player under Regulations 32 and 33. The GPT said as follows:-

"The AWFA visa laws are very simply expressed, stating that if a player is in Australia under any visa, then they are considered a visa player. Even though it is clear player Stoychov Ivanov's intention is to remain in Australia, the current regulation does not allow for any latitude to be given."
20. The GPT also recommended that the AWFA review Regulations 32 and 33 prior to the commencement of season 2017.
21. The decision of the GPT was appealed to the AWFA Appeal Tribunal. It upheld the appeal, finding that the Player should be granted a visa exemption by the AWFA.
22. An application by the AWFA to Football Riverina to appeal the decision of the AWFA Appeal Tribunal was refused on 24 June 2016.
23. It is from the AWFA AT determination that this appeal is brought.

THE GROUNDS OF APPEAL

24. The Notice of Appeal articulates the following grounds:
 - (a) A party was not afforded a reasonable opportunity to present its case (clause 9.3(a) of the FNSW Regulations); and
 - (b) The decision was one that was not reasonably open to a body or a member appeals committee having regard to the evidence before the body or the member appeals committee (clause 9.3(d) of the FNSW Regulations).

THE HEARING

25. On the evening of 18 August 2016 the AT heard the appeal. The members of the AT convened in Sydney. Owing to the fact that each of the parties and their

representatives reside outside of the Sydney Metropolitan Area, the Chair of the AT dispensed with the requirement for the parties to appear in person and instead directed that they appear by telephone.

26. The AWFA was represented at the hearing by its secretary, Ms Kiera Hayes. The WCFC was represented at the hearing by Mr Paul Horvath, solicitor. Also in attendance for the WCFC were Mr Scott Grant and Mr Dean Campagna, neither of which took any active role.
27. Both parties relied upon written submissions (those submissions are each undated but identified in the appeal bundle as documents 14 [appellant] and 17 [respondent] respectively). The AT was also assisted by a statement of agreed facts jointly prepared by the parties. The parties were each afforded an opportunity to and did supplement their written outlines orally at the hearing. For the sake of brevity we do not propose to repeat those submissions but will address them to the extent that it may be necessary to do so in disposing of the appeal.
28. Section 9.4(e) of the FNSW Regulations requires that the AT use its reasonable endeavours to issue a short oral or written summary of its determination (preliminary determination) within 5 working days of the completion of the hearing with a formal written determination, with reasons given for the decision (final determination) to be provided within 21 working days of the completion of any hearing. These are the AT's reasons for final determination.

CONSIDERATION AND DETERMINATION

Relevant Legal Principles

29. An appeal involves the consideration of whether the decision under consideration is affected by legal, factual or discretionary error (see, for example, *Allesch v Maunz* (2000) 203 CLR 172). The question as to whether there is any evidence of a particular fact is a question of law. Likewise, the question as to whether a particular inference can be drawn from facts found or agreed is also a question of law (see, for example, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355 per Mason CJ).
30. The question of whether, and to what extent, a domestic tribunal (and relevantly the MAC) is obliged to conduct its proceedings consistently with the principles of natural justice and procedural fairness is an issue that turns upon the proper construction of the FNSW Regulations.
31. Following *McClelland v Burning Palms Surf Life Saving Club* [2002] NSWSC 470:

“In Australia, the preferable view is that natural justice comes to operate in private clubs and associations by the rules of those private organisations being construed on the basis that fair procedures are intended, but recognising that possibility that express words or necessary implication in the rules could exclude natural justice in whole or part” (per Campbell J at [97]).

32. This is consistent with earlier authority, including *Dickason v Edwards* (1910) 10 CLR 243 (per O’Connor J at 255):

“The rules of a society may give power to decide disputes on any principle the members think fit. The rules may be of such a nature as to empower a judicial body to decide in violation of all principles of natural justice. If the parties choose to agree to a tribunal having power of that kind the Courts will not interfere.”

33. These principles were recently affirmed in *Sharp v National Rugby League* [2016] NSWSC 730 (per Stevenson J).

34. In *Kioa v West* (1985) 159 CLR 550 (at 585), Mason J said:

“The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?”

35. In this sense, the rules of natural justice have a “variable, chameleon quality” (*McClelland v Burning Palms Life Saving Club* [2002] NSWSC 470, [102] per Campbell J).

36. The AWFA Regulations do not prescribe the manner in which the disciplinary bodies of the AWFA, that is, the DC, the GPT and the AT are to conduct hearings before them. However, the AWFA Regulations do not exclude the principles of natural justice and, in the absence of any proscription in this regard, we are of the opinion that hearings would normally be expected to comply with those principles.

37. Natural justice involves, at its most basic, a duty to act judicially, to deal with the matter for decision without bias, that a person be given a fair hearing, the opportunity to present one’s case and to have a decision based on logically probative evidence (see, eg, *Salemi v MacKellar (No. 2)* (1977) 137 CLR 396).

38. A decision is not reasonably open to a tribunal having regard to the evidence before it (and is thus affected by error) if that evidence in its totality preponderates so strongly against the conclusion found by the tribunal that it can be said that the conclusion was not one that a reasonable tribunal member could

reach (see, for example, *Calin v The Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 and *Mainteck Services Pty Limited v Stein Heurtey SA* [2013] NSWSC 266).

39. Further, the AT will only intervene to set aside a determination on the ground that it is unreasonable if “*there was no information available to the tribunal on which reasonable and honest minds could possibly reach the conclusion* (see the decision of the Appeal Committee of the Football Federation of Australia in the *matter of Roy O’Donovan*, 25 January 2016 at [16] and the cases there referred to).
40. For the purposes of an appeal generally, it will be necessary to demonstrate legal error, not merely an erroneous ruling, and the error must be material to or likely to affect the outcome of the decision appealed from; that is, the decision must be one which is vitiated by error (see, for example, *Hamod v Suncorp Metway Insurance Ltd* [2006] NSWCA 243 at [11], *Yates Property Corp Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156 at 177).

Consideration

41. The Player was a visa player. The only relevant exemptions permitted by the AWFA Regulations for visa players are contained in Regulation 33, that is, for exchange students and refugees. The Player was neither an exchange student nor a refugee.
42. Mr Horvath submitted that clause 36.4 of the AWFA Constitution was also relevant to the question of power. Mr Horvath submitted that:
 - (a) clause 36.4 of the Constitution enables the Executive (as defined) of the AWFA to relevantly make interpretations regarding the operation of the AWFA Regulations; and
 - (b) the Executive had chosen to interpret the Visa exemptions in the AWFA Regulations in broader terms than appear in those regulations. He referred the AT, in particular, to the exemptions provided by the AWFA to the Twin Town Wanderers Players (see paragraph 49 below) and to exemptions apparently provided by the AWFA to players Gray. McHugh and Follows (referred to in the minutes of the Management Committee of 17 February 2014).
43. Clause 36.4 provides that any, relevantly, “interpretations” of the AWFA Regulations must be advised to Members by means of “...bulletins approved by

the Executive and prepared and issued by the Executive Officer..." and that the matters in those bulletins, once issued are "...binding on all Members."

44. It was common ground that no such bulletins had been issued. Indeed, Mr Horvath adverted to the absence of any such bulletins at pages 3 & 4 of his letter of 24 March 2016 to the AWFA. Ms Hayes stated that nothing in the nature of "Bulletins" as contemplated by clause 36.4 had been issued but that it was common practice for the minutes of Management Committee meetings to be circulated to Member Clubs once approved.
45. Mr Horvath submitted that we should construe the contents of the minutes of the Management Committee of 17 February 2014 which, in accordance with the AWFA's practice would have been distributed to Member Clubs as relevantly a "Bulletin" concerning the interpretation of the Visa exemptions. That submission is rejected for the following reasons:
- (a) It is not clear to us that the Management Committee and the Executive, as that term is defined in the Constitution, is one and the same organisation. If as appears to be the case, these are differently constituted bodies, then any communication or dissemination of the minutes of Management Committee cannot constitute a "Bulletin" for the purposes of clause 36.4 of the Constitution;
 - (b) Turning, however, to the substance rather than the form of the communication, in so far as the minutes refer to Players Gray, McHugh and Follows, the minutes do nothing more than describe why each of those players was considered not to be a visa player. It does not address whether and, if so, what Visa exemptions were applied to them much less provide any guidance on the circumstances in which such exemptions would be granted by the AWFA; and
 - (c) The minutes also state that "*Any player on visa shorter than 12 months should be considered a visa import player.*" Again, this observation firstly, provides no guidance as to the circumstances in which a visa exemption would apply for the purposes of the interpretation of clauses 32 & 33 of the AWFA Regulations. Secondly, and in any event, it provides no assistance to the Player because at the time that he made application for exemption he had only been in the country for approximately 4 months. Therefore, even if the observation in the minutes could be construed as an "interpretation" of the AWFA Regulations concerning Visa exemptions (which, for the reasons mentioned is not, in our view, an available

construction), the Player would not have satisfied that criteria for exemption at the time that the application was made

46. Ms Hayes submitted that the AWFA's power to grant Visa exemptions is derived from clause 14 of the Constitution. That clause empowers the Executive to exercise the powers of the AWFA and requires that it act in accordance with the "Objects" as enumerated in clause 3 of the Constitution.
47. Clause 14 does nothing more than first, identify the fact that the AWFA can only operate through its Executive and secondly, that the Executive must act in accordance with the Objects. The Objects of the AWFA find expression and are implemented through the AWFA Regulations. The power to consider and grant Visa exemptions is found solely in the AWFA Regulations.
48. There is and was no power under either the Constitution or the AWFA Regulations for the AWFA to grant an exemption from the Visa player regulations to the Player. The only ground upon which an exemption could be provided is under Regulation 33 and only in the case of a player who is an exchange student or a refugee. The Player did not satisfy either criteria to be considered for exemption.
49. In its reasons for determination, the AWFA AT places considerable weight on what it refers to as "*a clear precedent in the granting of two Twin City Wanderers Football Club...visa player exemptions for the 2014 and 2015 seasons.*" However, what is abundantly evident from those reasons is that the AWFA AT had no information available to it for what it refers to as the "*rationale behind the granting of those exemptions...*" It was erroneous for the AWFA AT to have applied what it considered to be a precedent in circumstances where it had no knowledge of the circumstances which pertained to the grant of the exemptions in issue and whether those circumstances were relevantly analogous.
50. Further, in our opinion, the decision of the AWFA AT ignores in its totality the clearly expressed language and effect of Regulations 32 & 33. The AWFA AT appears to proceed on an assumption that the Executive Committee (**EC**) of the AWFA has a general discretion to grant an exemption. There is no such discretion. The circumstances in which it may, but is not required, to grant an exemption for Visa players are prescribed by clause 33 of the AWFA Regulations. The grant of an exemption to the Player would, in our opinion, be beyond the power of the EC of the AWFA and the AWFA AT erred in finding to the contrary.

Determination

51. Ground 2 of the Notice of Grounds of Appeal has been established, namely that the decision of the AWFA AT was not one reasonably open to it having regard to the evidence before it.
52. By reason of this finding, it is unnecessary to consider the remaining ground of appeal as to whether the AWFA was afforded a reasonable opportunity to present its case. However, for the sake of completeness we make the following observations concerning this ground.
53. There was no transcript of the hearing before the AWFA AT. Therefore, we are unable to assess whether the AWFA AT engaged in any procedural or other irregularity which could be construed as having denied the AWFA a reasonable opportunity to present its case. Further, and in any event, the AWFA has not identified any relevant circumstance in either its written submissions or orally during the course of the hearing relevant to this ground of appeal. Accordingly, and whilst the issue does not arise for determination having regard to the conclusion that we have reached regarding the second ground of appeal, we are of the view that the first ground of appeal would not have been established.

RELIEF

54. The appeal is allowed.
55. The determination of the AWFA AT dated 18 May 2016 is set aside.
56. The determination of the AWFA GPT of 2 May 2016 is reinstated with immediate effect.
57. Pursuant to 12.14 of the FNSW Regulations, each party shall bear its own costs of the appeal.

CONCLUDING OBSERVATIONS

58. The issues the subject of this appeal have highlighted, in drastic terms, the need for the AWFA to urgently review, first, whether Visa exemptions are necessary to further the interests of football in the Region, and secondly, if such exemptions are considered of some utility, to urgently implement amendments that provide transparency and clarity for all Member Clubs and participants.
59. Much time has been spent and ink spilt on a matter that could and should have been dealt with by the Association in a manner consistent with its Constitution. Whilst we have found for the AWFA, we are of the firm opinion that the issues

the subject of the appeal could have been avoided if the AWFA had acted in the manner referred to in the preceding paragraph.

60. We understand that the Player has been participating in the relevant competition in reliance upon the AWFA AT's determination which we have found to have been attended by error. The appeal has taken some time to be prepared for hearing. Though we consider that we have no power to bind the AWFA in this regard, it is our sincere hope that, for the reasons outlined in the preceding paragraph, the AWFA, in its capacity as competition administrator will take no action to prejudice either the Player or the WCFC arising from his or its participation in the competition in reliance upon the AWFA AT's determination.



Anthony Lo Surdo SC
Chair
Appeals Tribunal
Football NSW