DISPUTES RESOLUTION AUTHORITY
AN CORAS EADRANA

DRA 10/2012

AODHAN BREATHNACH & MICHEAL O BAOILL

Claimants

V

COMHAIRLE ARDOIDEACHAIS

Respondent

DECISION OF THE TRIBUNAL

Introduction

1. On 31 October 2012, Michéal Ó Baoill (otherwise Michael Boyle) submitted an Application Form for Special Permission to Play to An Comhairle Ardoideachais [CA]. The Tribunal understands that a similar Application Form for Special Permission to Play was submitted to the CA on behalf of Aodhán Breathnach (otherwise Aidan Walsh) on or about the same date. The applications sought permission for both players to participate in third level competitions with Dublin City Univeristy [DCU].

2. On 5 November 2012, An Coiste Feidhmiúcháin Comhairle Ardoideachais determined, separately, that Michael Boyle and Aidan Walsh would not be granted permission to play for the 2012/13 academic year. The basis for those decisions made by the CA was the same:

> *"as a student's participation shall be subject to the limit of the duration of no more than two recognised courses of study. This decision was taken pursuant to CA Constitution & Bye-Laws 2012/13 (31)(b)(ii)."*

3. By letter dated 8 November 2012, enclosing a Request for Appeal, Aidan Walsh appealed to An Lár Coiste Achomhairc [CAC] against the decision of the CA made on 5 November 2012. Again, a similar appeal was made by Michael Boyle to the CAC against the decision of the CA made, on 5 November 2012, in respect of his application for permission to play.

4. By way of separate decisions dated 30 November 2012, the CAC refused the appeals made by both Michael Boyle and Aidan Walsh. The grounds for the appellate decisions made by the CAC differed somewhat as between the appeals brought by Michael Boyle and Aidan Walsh. In relation to Michael Boyle's appeal, the CAC decided that:

> *"An Coiste Feidhmiúcháin, Comhairle Ardoideachais did not misapply Comhairle Ardodieachais* (sic.)*(CA) Constitution & Bye-Laws 2012/13 (31)(b)(ii).*

The Appellant did not establish that CA were incorrect in finding that the course he attended in 2007/08 in Limavady was a recognised course of study pursuant to CA Constitution & Bye-Laws and that he was, therefore, not entitled to play for DCU during a third course of study."

5. As regards Aidan Walsh, the CAC determined that:

"An Coiste Feidhmiúcháin, Comhairle Ardoideachais did not misapply Comhairle Ardoideachais (CA) Constitution & Bye-Laws 2012/13 (31)(b)(ii).

The Appellant did not establish that CA were incorrect in finding that the course he attended in 2008/09 in Cork IT was a recognised course of study pursuant to CA Constitution & Bye-Laws and that he was, therefore, not entitled to play for DCU during a third course of study."

6. In these circumstances, the Claimants submitted separate Requests for Arbitration to the Secretary of the Disputes Resolution Authority [DRA] dated 7 December 2012. On both the Request for Arbitration Forms, a single unit of the Association was named as "the Respondent": Comhairle Ardoideachais [CA].

7. By email dated 11 December 2012, the Acting Secretary of the CAC wrote to the Secretary of the DRA noting that the CAC was not a respondent to the cases brought by the Claimants. It was stated in that email that the CAC would not be providing a response at that time but, if requested by the Tribunal, would provide a written submission.

8. By way of Response to Request for Arbitration Forms, dated 14 December 2012, the CA stated as follows:

"We wish to have An Lar-Choise (sic.) Achomhairc added as a co-respondent in this claim, as they heard the appeal of the claimant and made the latest decision in this case."[1]

9. In an email dated 17 December 2012, the Claimants' solicitor sent an email to the Secretary of the DRA indicating the Claimants' consent to the joinder of the CAC.

10. A hearing of the referrals to the DRA was convened on 22 January 2013. At that hearing, it was established that the Request for Arbitration Forms dated 7 December 2012 had been emailed (at 5.24 p.m. and 5.26 p.m. by the solicitor for Messrs. O Baoill and Breathnach, respectively) to the Secretary of the DRA and copied, *inter alia*, to the Acting Secretary of the CAC.

[1] The Tribunal notes that this submission was resiled from by the solicitor appearing on behalf of the CA at the hearing convened on 22 January 2013.

11. Subsequent to the hearing on 22 January 2013, the Tribunal directed the Secretary of the DRA to write to the CAC to request the CAC's submissions in relation to the status of the CAC on this reference. Those submissions were received from the CAC on 25 January 2013 and submissions were received from the legal representatives of the CA and the Claimants on 28 January 2013.

Preliminary Issue Determined by the Tribunal

12. A preliminary issue determined by the Tribunal was whether the within referrals to arbitration made on 7 December 2012 are valid and, if so, whether the said referrals may proceed against the CAC, in circumstances where the CAC was not named as a respondent on the Claimants' Request for Arbitration Forms. The parties are referred to the Ruling of the Tribunal which was given on 25 February 2012.

13. In essence, whilst the Tribunal expressly recognised that it is a matter of significant regret that the Claimants' Request for Arbitration Forms did not expressly identify the CAC as a respondent to the referrals, in circumstances where the CAC's decision in each instance was the final decision from which the referrals were taken, the Tribunal came to the view that, by virtue of being served with the Request for Arbitration Forms by email on 7 December 2012, the CAC was *de facto* a party to the referrals, albeit not as a named respondent.

14. Accordingly, the Tribunal concluded that the within referrals to arbitration made on 7 December 2012 are valid and, in addition, that both the said referrals may proceed against the CAC (in addition to the CA) notwithstanding the failure of both Claimants to name the CAC as a respondent on the Claimants' Request for Arbitration Forms.

15. Consequently, the Tribunal directed that its Ruling should be served by the Secretary of the DRA on the legal representatives of the Claimants and the CA and, in addition, the appropriate officer of the CAC. Moreover, the Tribunal directed that the hearing on the referrals should be reconvened at the earliest convenience of the Secretary of the DRA and the parties to the referrals, including the CAC. Finally in this regard, the Tribunal directed that, in advance of the reconvened hearing, the CAC should make disclosure of documentation to the Secretary of the DRA (and to the legal representatives of the Claimants and the CA).

16. In accordance with the directions of the Tribunal, on 31 January 2013, An Rúnaí Sealadach, CAC, wrote to the Secretary of the DRA enclosing, *inter alia*, draft minutes of the CAC meeting held on 28 November 2012, his handwritten notes and those of the Chairman of CAC. On the same date, i.e., 31 January 2013, the DRA re-convened the hearing on the referrals.

17. At the hearings held on 22 and 31 January 2013, Michael Boyle was represented by Brian O'Sullivan, Blaine Nugent B.L. appeared on behalf of Aidan Walsh and the CA was represented by Paul Keane, Solicitor. The CAC was represented at the re-convened

hearing on 31 January 2013 by Liam Keane, Cathaoirleach and Joe Flynn, Acting Secretary.

The Material Provisions of CA Constitution & Bye-Laws 2012/13

18. Riail 36 of the CA Constitution & Bye-Laws 2012/13 requires certain categories of player to submit applications for permission to play and provides that such an applicant shall not play in the relevant CA competition(s) or for the relevant college team(s) without receiving permission from the CA's An Coiste Feidhmiúcháin. It was with this provision in mind that both Michael Boyle and Aidan Walsh submitted applications to the CA for permission to play for DCU.

19. Riail 30 defines the eligible colleges and institutes of higher education to comprise "all educational establishments in the post-secondary education sector, including:

    (i) University Colleges.
    (ii) Institutes of Technology.
    (iii) […].
    (iv) […].
    (v) Institutes of Further and Higher Education.
    […].

20. Riail 31(a) sets out the definition of student eligibility in the following terms:

    "A **bone** (sic.) **fide** *student is defined as a person whose main preoccupation is the pursuit of higher education."*

21. Thereafter, Riail 31(a) stipulates four criteria, all of which must be met in order to play for a Higher Education team. The stipulation which is the subject of both referrals to arbitration before the DRA is that a student must:

    "be in attendance at a recognised Higher Education establishment, as prescribed in Riail 30(b)."

22. As the interpretation and application of Riail 31(b) is central to the Tribunal's decisions on the referrals made to it, the provisions of Riail 31(b) are set out in full below:

    "A student's participation in Comhairle Ardoideachais competition shall be subject to the following limits:
    (i) a maximum number of six academic years while registered and studying on a recognised course(s), and
    (ii) the duration of no more than two recognised courses of study. This limit applies to CA Clubs competing in the Senior Division 1 Leagues, Sigerson Cup and Fitzgibbon Cup Competitions Only.

Where a student formally de-registers from his first course of study on or before 31st October of the first academic year, that period of registration shall not be counted for (a) and (b) above.

Where a student, having successfully completed an undergraduate course at a particular level, progresses from that level to a cognate course at a higher level, he shall be considered as studying the same course provided the higher level course shall be at a level not higher that (sic.) *Level 8. This applies only to undergraduate courses which include both an ab initio honours primary degree and one obtained on the ladder system in an Institute of Technology following the Higher Certificate, plus Ordinary Degree, plus honours degree model (2+1+1)."*

Determination of the Tribunal

23. Whilst the Tribunal was, at all times, mindful of the objections which had been made on behalf of both the CA and the CAC as to the jurisdiction of the Tribunal to deal with the submissions made on behalf of the Claimants in respect of the "two recognised courses of study" rule and retrospectivity issues, the Tribunal was also cognisant that DCU is due to play its next match in the Sigerson Cup on Wednesday 6 February 2013. Accordingly, without prejudice to its entitlement to rule as to whether it had jurisdiction to consider the ""two recognised courses of study" rule and retrospectivity issues, the Tribunal decided to receive all submissions from all parties and, thereafter, make its decision in advance of the scheduled Sigerson Cup fixture.

24. The Tribunal is cognisant of the requirements on claimants to ensure that all material points are made, and relevant evidence adduced, before the decision-makers at first instance and, in particular, on appeal. Indeed, it is most regrettable that the retrospectivity issue was not, as was accepted on behalf of the Claimants, canvassed at all before the CA or CAC and that a number of submissions were made and evidential point emerged for the first time at the re-convened DRA hearing. It is important for all parties to referrals to the DRA to be aware that the DRA is not an appellate body and does not, therefore, hear cases *de novo*. Rather, the DRA is akin to a review body which considers the decisions made by the authorities at first instance and on appeal with a view to pronouncing on the correctness of those decisions.[2] In this context, it is particularly important, therefore, that claimants avail of the opportunities to canvass any and all points and evidence of relevance and adduce all before the appellate decision-maker, which can hear cases *de novo* and, consequently, all the more important that the appellate body is formally named as a respondent to any referral to the DRA, in addition to the decision-maker at first instance.

25. However, notwithstanding these observations, in order to do justice between the parties to these referrals, the Tribunal has considered the merits of the submissions

[2] See, for example, the statement of general principle in DRA 01/2005, wherein it was decided that the DRA will *"afford great latitude to a decision of a decision-maker under review"* and unless, for example, the decision is unreasonable or irrational, then that decision will not be disturbed by the DRA, notwithstanding the fact that the DRA may have a different view on the merits of the decision.

made on behalf of the both Claimants in relation to the "two recognised courses of study" rule and the issue as regards retrospectivity.

(I) Three-Course Exception to the Two Recognised Courses of Study Rule

26. As set out above, Riail 31(b)(ii) contains a general rule that a student's participation in CA competition shall be subject to a limit of duration of no more than two recognised courses of study. However, this general rule is subject to the following exception:

    - where a student, having successfully completed an undergraduate course at a particular level, progresses from that level to a cognate course at a higher level, he shall be considered as studying the same course provided that the higher level course shall be at a level not higher than Level 8.

27. However, in turn, this exception to the general limitation of two recognised courses of study is applicable only to undergraduate courses which include both:

    - an *ab initio* honours primary degree; and
    - a degree obtained on the ladder system in an Institute of Technology.

28. In relation to the referral made on behalf of Michael Boyle, the Tribunal finds that the following facts have been established:

    - the Claimant registered at Letterkenny Institute of Technology in Autumn 2005;
    - the Claimant registered at Limavady College of Further Education in Autumn 2007; and
    - the Claimant registered at DCU in Autumn 2008.

29. In addition, the evidence of the only person called to give evidence at the hearings on the referrals (i.e., Michael McMahon) establishes, and the Tribunal finds as facts, that:

    - the course on which the Claimant registered at Limavady College of Further Education is a cognate course to that on which he is registered at DCU;
    - however, the Claimant did not "successfully complete" that course at Limavady College of Further Education.

30. In order to qualify for the exception to the rule as regards two recognised courses of study, there is a requirement that, amongst other things, a student must "successfully complete" the relevant undergraduate course before progressing from that level to a cognate course at a higher level. Whilst the Tribunal concludes that the course on which Michael Boyle was registered at Limavady College of Further Education is a cognate course to the course on which he is registered at DCU (and that the DCU course is at a higher level to that at Limavady College of Further Education), Michael Boyle cannot avail of the exception to the two registered courses of study rule because, on the basis of the evidence adduced before the Tribunal, he did not "successfully complete" the undergraduate course at Limavady College of Further Education.

31. Before leaving this aspect of Michael Boyle's referral to the DRA, it is noteworthy that Riail 30 defines the eligible colleges and institutes of higher education to comprise "all educational establishments in the post-secondary education sector" including, Institutes of Technology. The Tribunal understands that Institutes of Technology are educational establishments which exist only in the 26 Counties. The Tribunal finds it regrettable that An Comhairle Ardoideachais appears to have provided for an exception to Riail 31(b)(ii) which can only be availed of by students attending the applicable educational establishments in the post-secondary education sector in the 26 Counties. It would appear that, by definition, students attending equivalent educational establishments in the post-secondary education sector in the Six Counties (if any) cannot avail of the exception to the two recognised courses of study rule. Whilst this distinction appears to run counter to the Basic Aim of the Association as set out at Rule 1.2 of Part 1 of the Official Guide (i.e., the strengthening of the National Identity in a 32 County Ireland through the preservation and promotion of Gaelic Games and pastimes), the Tribunal has no role in amending the Constitution & Bye-Laws of An Comhairle Ardoideachais. The jurisdiction of the DRA is restricted to reviewing the decisions made by the appropriate decision-makers and, in that context, interpreting and applying the relevant provisions.

32. At all events, even if the provisions of the exception to the two recognised courses of study rule applied to students who have successfully completed an undergraduate course at Colleges of Further Education in the 6 Counties (which it does not appear to do), such a provision would not have availed Michael Boyle in circumstances where he did not complete the course on which he enrolled at Limavady College of Further Education. It is the view of the Tribunal that, in order to "successfully complete" an undergraduate course, it is necessary to "complete" the course in the first instance, which, again on the evidence before the Tribunal, Michael Boyle did not do. Accordingly, the Tribunal concludes that Michael Boyle does not come within the exception to the two recognised courses of study rule contained in Riail 31(b).

33. In relation to the referral made on behalf of Aidan Walsh, the Tribunal finds that the following facts have been established:

    - the Claimant registered for one course at Cork Institute of Technology [CIT] in Autumn 2008 and did not complete that course;
    - the Claimant registered for a second course at CIT in Autumn 2009, which he completed; and
    - the Claimant registered at DCU in Autumn 2012.

34. In addition, the evidence of the only person called to give evidence at the hearings on the referrals (i.e., Michael McMahon, lecturer in Athlone Institute of Technology, educationalist and Rúnaí, CA) establishes that:

    - the second course on which the Claimant registered at CIT, which he successfully completed, was a Bachelor of Business degree in Sports and Leisure Management;

- the course on which the Claimant is registered at DCU is a Bachelor of Science degree in Physical Education and Biology;
- degrees awarded by Business and Science faculties are not cognate courses.

35. In order to qualify for the exception to the rule as regards two recognised courses of study limitation, there is a requirement that, amongst other things, a student must successfully complete the relevant undergraduate course before progressing from that level to a "cognate course" at a higher level. In the absence of any evidence to the contrary and relying on the evidence of the only witness called or the hearing, the Tribunal concludes that the Bachelor of Business degree which Aidan Walsh was awarded in CIT is not a cognate course to the Bachelor of Science degree on which course he is registered at DCU. Accordingly, the Tribunal concludes that Aidan Walsh cannot avail of the exception to the two registered courses of study rule because he has failed to establish that his second course of study at CIT is a "cognate course" to the higher level course on which he is currently registered. Rather, the only evidence adduced before the Tribunal is that the two courses concerned are not cognate.

(II) Retrospective Application of Riail 31(b)

36. Before the DRA, the Claimants (for the first time) advanced the proposition that the provisions of Riail 31(b) could not apply to either Michael Boyle or Aidan Walsh because the provisions of the rule cannot operate retrospectively as a matter of law. Much of the hearing on 31 January 2013 was taken up with arguments as to the nature and effect of the rule against retrospective application. Indeed, the Tribunal was referred to a large number of Irish and other authorities in this context, which the Tribunal has carefully considered.

37. Perhaps the most succinct statement of the principle against retrospective application is that of the High Court in *Aer Rianta cpt v. Commissioner for Aviation Regulation* [2003] I.E.H.C. 168. In that case, which involved a challenge to the setting of a maximum charge or cap *per* person chargeable by Aer Rianta to the users of Dublin, Cork and Shannon airports, O'Sullivan J. held:

> *"In the first place it is clear that the rule against retrospective application is a rule of interpretation. And that it comprises a presumption that, in the absence of clear language to the contrary, an Act is to be interpreted as having effect on circumstances which come into existence after the date of its coming into force. So much is clear from the authorities already cited...*
>
> *A distinction is to be drawn between an Act which operates prospectively in the sense that it is applied so as to have effect on circumstances which come into existence after the Act itself comes into operation on the one hand, and on the other, the taking into consideration by the operator of the Act for purposes of carrying out the relevant statutory functions thereunder of circumstances which were in existence when the Act came into operation. This latter activity is perfectly commonplace and can be described as retrospection in the sense that in the present case the respondent takes into consideration and looks at elements of the applicant's CAPEX*

which because they are already in existence were the subject of decisions by the applicant and the Minister which took place before the Act of 2001 came into effect. The applicant takes no exception to such retrospective scrutiny by the respondent."

38. In both referrals to the DRA, the Claimants contend that they have a "vested right" as that phrase is used in the context of the relevant jurisprudence on the rule against retrospective application. This issue was considered recently by the Supreme Court in *Bailey v. M.J.E.L.R.* [2012] I.E.S.C. 16. O'Donnell J. distinguished between two "closely related presumptions in common law":

    (i) legislation is presumed to not to have retrospective effect unless clear words are used; and
    (ii) legislation is not intended to affect vested rights, again unless the contrary intention appears.

39. Whilst, as O'Donnell J. acknowledged, the first presumption becomes, at least to some extent, a constitutional rule in Ireland by virtue of the provisions of Article 15.5 of the Constitution, the Tribunal is of the view that the coming into force of Riail 31(b) does not constitute a civil wrong, much less a criminal offence, as to fall foul of the prohibition on retrospective legislation contained in Article 15.5. The Tribunal is strengthened in its conclusion by the statement by the authors of *J.M. Kelly: The Irish Constitution* (4th ed.) who conclude that the combined effect of recent cases appears to be that, *"retrospective legislation dealing with essentially procedural, remedial and adjectival matters falls outside the scope of Article 15.5.1°."*

40. In the context of common law (as opposed to Constitutional) theory, O'Donnell J. went on to state the classic proposition that a person can be said to have a right to do that which is not specifically prohibited by law. O'Donnell J. continued:

    "Accordingly, since most Acts of the Oireachtas change the legal position, they will necessarily interfere with existing rights (in that sense) and that indeed is their purpose."

41. This was contrasted with the second presumption considered by the Supreme Court, namely, pursuant to section 27(1)(c) of the Interpretation Act 2005, a presumption against interference with "rights…acquired or accrued" or "vested rights". The essential elements of this rule were stated for the Supreme Court by Fennelly J. in *Minister for Social, Community and Family Affairs v. Scanlon* [2011] 1 I.R. 64:

    "The two essential elements of the rule… are: firstly, it is designed to guard against injustice, in the sense that new burdens should not be unfairly imposed in respect of past actions; secondly, the rule is one of construction, not of law."

42. The issue of vested rights has been considered, to some extent at least, by the Superior Courts in Ireland in the context of rules applied by sporting bodies. However, a cautionary note was sounded in *Doyle v. Croke* [Unreported, High Court, May 6, 1998] when Costello P. stated that:

> *"The courts must not interfere officiously in the affairs of private associations, and when considering what procedures can properly be regarded as fair it must consider procedures which would be appropriate to the type of organisation or association which is to adopt them, and the nature and scope of the decision to which they relate."*

43. In *Clancy v. I.R.F.U.* [1995] 1 I.L.R.M. 193, the High Court considered the retrospective application of the then applicable I.R.F.U. rules which precluded the plaintiff from playing for Blackrock R.F.C. until after 31 December 1994 because he had played in three or more matches for another club in the 1993/1994 season. Counsel for the plaintiff submitted that the rule was introduced by the I.R.F.U. and became effective only at the time when the plaintiff had already, by playing in more than three league matches for his former club, become disqualified from playing for his new club. The plaintiff submitted that this was an improper and unlawful interference with his right to freedom of association and that the rule should not have been binding on the plaintiff. However, Morris J. stated as follows:

> *"In my view, it is not correct to regard the plaintiff in the same light as someone affected by retrospective legislation."*

44. In this context, the Tribunal is of the view that cases involving substantive rights vested by statute, for example, *Dunne v. Hamilton & Hamilton* [1982] I.L.R.M. 290, can be distinguished from the facts of the instant referrals. Whilst the Tribunal understands that the effect of its decision to uphold the decisions of the CA and CAC is to preclude the Claimants from playing in the Sigerson Cup competition this year, the Tribunal has come to the conclusion that neither Claimant has a "vested right" as that term is understood in the consideration of whether legislation passed by the Oireachtas is retrospective or not. This conclusion is strengthened by the distinction between the application of the rules of the Association and the public law nature of rights granted under statute, which may only be affected or interfered with under statute. In addition, the Tribunal has been conscious of the necessity to exercise caution in applying principles of retrospectivity, which are derived from the provisions of the Interpretation Act 2005 and which apply to statute, to the rules of An Comhairle Ardoideachais. Moreover, it is a factor of some consequence that a "period of grace" of 12 months was afforded to all players before the provisions of Riail 31(b) were commenced for the 2012/13 academic year.

45. Moreover, the Tribunal concludes that the provisions of section 3.42(g) of Part 1 of the Official Guide, which contains a provision that, *"A new Rule or amendment shall not have retrospective application"*, can have no application to the Tribunal's consideration of the instant referrals, as the provisions of section 3.42 relate expressly to motions to Congress and new and amended rules passed by Congress. The express prohibition against retrospective application in section 3.42(g) can have no application to the consideration by the Tribunal of Riail 31(b) of the CA Constitution & Bye-Laws.

46. Finally in this context, the Tribunal concludes that the submissions made on behalf of the Claimants based on an apparent infringement of the provisions of the European

Convention of European Rights by the CA and/or the CAC are unmeritorious and cannot avail either Claimant on his referral to arbitration.

(III) Conclusion

47. The Tribunal has decided that the CA and CAC did not err in their respective consideration of the application of the provisions of Riail 31(b) to the applications made by both Michael Boyle and Aidan Walsh for permission to play for DCU. Accordingly, the Claimants' referrals to the DRA against the decision of the CA, and by extension, the decision of the CAC, cannot succeed and are dismissed.

48. In circumstances where the Claimants have not succeeded on their substantive grounds argued before the Tribunal, it is not necessary to consider whether, in the exercise of its discretion, the Tribunal would have refused relief in any event because of the failure of the Claimants to argue any and all points before the appellate decision-maker, i.e., the CAC.

49. Finally, in circumstances where both referrals made by the Claimants to the DRA have been dismissed, pursuant to the provisions of section 2.3 of the Disputes Resolution Code, the Tribunal directs that total expenses of the DRA in respect of these referrals shall be paid out of the deposit paid by the Claimants and each of them.

JARLATH FITZSIMONS

DARA BYRNE

DECLAN HALLISSEY

4 FEBRUARY 2013