IRB eligibility criteria & immigration rules for sportspersons

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HENDRE FOURIE VS. THE UK BORDER AGENCY

The recent controversy surrounding the injury-forced retirement of England rugby international, Hendre Fourie, and the immigration complications arising as a result has sparked considerable debate. The case drew attention to contentious issues including the eligibility criteria for international rugby and the application of UK immigration rules to high profile sportsmen and women from outside the European Union (who do not possess UK nationality).

Factual Background

Talented rugby player Carel Hendrik Fourie (affectionately nicknamed 'Shrek' by his teammates) was born in South Africa in 1979. Fourie was educated in South Africa and played rugby at both university and provincial level. In 2005 Fourie moved to England, initially on a working holiday visa; during his first year in the UK he worked as a teaching assistant and played rugby for Rotherham Titans. The following year, whilst still playing for Rotherham, he studied for a Masters degree in education. Fourie's performances for the Titans garnered widespread praise and earned him a move to newly-promoted Leeds Carnegie in 2007, where he remained until 2011.

Pursuant to the International Rugby Board's ("IRB") Eligibility Criteria (as to which, see further below), in 2008 Fourie became available for selection for England. Following a string of impressive domestic club performances he was selected for his international debut in November 2011 (coming on as a substitute against New Zealand at Twickenham) and earned his first international start the following month against Samoa).

During the summer of 2011 Fourie was signed by Sale Sharks for an undisclosed transfer fee. Unfortunately, owing to a succession of injuries, Fourie was ultimately restricted to making only three appearances for Sale. A persistent shoulder injury has been widely reported as the cause of premature retirement – Fourie's contract of employment with Sale was terminated on or around 3 January 2013. Prior to his retirement, Fourie had earned a total of eight caps for England.

On 7 January 2013 it was widely reported that Fourie had been notified by the UK Border Agency ("UKBA") that he was facing deportation from the UK, within 60 days of the date on which Sale had informed the UKBA of the termination of his employment, owing to the expiration of his working visa. In light of the press coverage, UKBA issued a statement in response, insisting that:

"We have not curtailed Mr Fourie's visa at this time and he is not required to leave the UK.

His employment contract with Sale Rugby Club has been terminated and his employer has rightly informed UKBA of this decision.

We are considering what action to take next. If an individual's circumstances change and they no longer meet the terms of their specific visa they can apply for a visa of a different type.

Mr Fourie has been informed of the process and the various options available to him. It is entirely up to him if he chooses to explore any of them further."

Whilst Fourie has publicly expressed his regret, anger and disappointment at recent events, it seems that he has elected not to explore the "various options" mentioned in the UKBA statement; and has instead – albeit somewhat reluctantly – chosen voluntarily to return to South Africa with his wife and young son (who was born in the UK).

This article considers how this state of affairs came to exist; what legal avenues were in fact available to Fourie, had he chosen to assert a right to remain in the UK; and possible scope for reform of the system.

Representing England: the IRB Eligibility Criteria

Whilst at first blush it may seem surprising, it is by now fairly well known that players need not possess English nationality in order to represent England at international level. Regulations 8.1 and 8.2 of the IRB Eligibility Criteria provide as follows:

8.1 Subject to Regulation 8.2, a Player may only play for the senior fifteen-a-side National Representative Team, the next senior fifteen-a-side National Representative Team and the senior National Representative Sevens Team of the Union of the country in which:

a. he was born; or
b. one parent or grandparent was born; or
c. he has completed thirty six consecutive months of Residence immediately preceding the time of playing.

8.2 A Player who has played for the senior fifteen-a-side National Representative Team or the next senior fifteen-a-side National Representative Team or the senior National Representative Sevens Team of a Union is not eligible to play for the senior fifteen-a-side National Representative Team or the next senior fifteen-a-side National Representative Team or the senior National Representative Sevens Team of another Union.

Fourie was not born in England, nor did he have a parent or grandparent born in the country. He was, however, entitled to avail himself of the benefit of clause 8.1 (c) above and represent England at international level on eight occasions (including against his native South Africa).

The UKBA's Immigration Rules

Part 6A of the UKBA's Immigration Rules ("the Immigration Rules") set out, in some considerable detail, the "Points-based system" for permission to live and work in the UK. Sections 245H – 245HF govern the application of this system to "Tier 2" Migrants, including Sportsperson Migrants. The Immigration Rules provide that an individual applying for permission applying for entry clearance or leave to remain as a Tier 2 (Sportsperson) Migrant "must have a minimum of 50 points" for attributes, which is to be assessed by reference to paragraph 93 to 100 of Appendix A. In practical terms, in order to be granted a Tier 2 visa the applicant must generally establish the existence of the following:

- A valid 'Certificate of Sponsorship' from an 'A-rated sponsor' (i.e. an approved employer);
- An intention to work for that employer and to base him/herself in the UK;
- That s/he is qualified to do the job in question;

- That s/he has been endorsed by the Governing Body of their sport;
- That s/he is a person "internationally established at the highest level whose employment will make a significant contribution to the development of his/her sport at the highest level in the UK, and that the post could not be filled by a suitable settled worker"
- That s/he will comply with the conditions of his/her leave, if the application is successful.

Once a visa has been grated, the successful applicant is entitled to remain in the UK for: (i) a period equal to the length of the period of engagement plus 1 month, or (ii) a period of 3 years and 1 month (whichever is the shorter). A visa may be renewed / extended, provided the individual continues to satisfy the eligibility criteria. As a general rule, once an individual has lived continuously in the UK for a period of five years pursuant to an 'eligible' visa, such as a Tier 2 visa (NB. working holiday / student visas are, for example, excluded from this computation), s/he may acquire the right to settle in the UK. Alternatively, an individual may acquire the right to settle in the UK by virtue of having lived continuously in the UK for a period 10 continuous years, pursuant to any valid visa.

Hendre Fourie: Application of the Immigration Rules

Notwithstanding the fact that Fourie had moved to the UK more than five years ago (in 2005), at the time of the termination of his employment with Sale Sharks (and with it, his sponsorship licence), it would seem that Fourie had not fulfilled the eligibility criteria for settlement in the UK (outlined above). Whilst I have not been privy to any of the underlying visa documentation in this case, the simple point is that once Fourie's "engagement" with his sponsor (Sale Sharks) was terminated, his right to remain in the UK – pursuant to that certificate of sponsorship – was liable to be curtailed.

The recent UKBA guidance on "Curtailment of Leave" (dated December 2012) is abundantly clear on this point: it provides that where a Tier 2 migrant stops being employed by their sponsor (and has not acquired a right to settle in the UK), then a UKBA caseworker must curtail that person's leave (pursuant to paragraph 323A (a) (i) of the Immigration Rules), unless one of the exceptions in paragraph 323A (b) (iv) of the rules applies. These exceptions are narrowly defined, although the mandatory curtailment of leave may be disapplied in circumstances where the migrant has a dependent child under the age of 18 (see paragraph 323A (b) (iv) (2) of the Immigration Rules); in such circumstances, the migrant's leave to enter or remain in the UK "may be curtailed, or its duration varied" (emphasis added). Importantly, however, the fact that the migrant in question has represented his/her 'adopted country' on the international sporting stage (in Fourie's case on multiple occasions) does not give rise to a right to remain in the UK, nor does it constitute a discretionary exception to the generally applicable rule.

Discussion

This case has prompted considerable criticism of the 'unjust' and 'unpatriotic' application of the Immigration Rules to a sportsman who represented his 'adopted' nation on the international stage with courage and commitment, and who through no fault of his own suffered a premature end to his professional playing career. At the other end of the spectrum, eyebrows have been raised and questions asked about the appropriateness of the IRB Eligibility Criteria, which allowed Fourie to represent England in the first instance.

With regard to the former criticism, it is important to remember that whilst Fourie may have been notified of the UKBA's intention to curtail his leave to remain in the UK, there were (as the UKBA indicated) other options available to him. In theory Fourie could have:

- Sought alternative employment with a recognised sponsor (perhaps in a coaching or teaching capacity) and re-applied for leave to remain under the points-based immigration system;
- Applied to the UKBA / Home Secretary for discretionary leave to remain, on the basis of (inter alia) his length of residence in the UK; commitment and contribution to the national rugby team; and (perhaps most significantly) family ties with the UK – in particular his young son, who was born in the UK;
- Failing the above, returned to South Africa on a temporary basis and – once a suitable opportunity had been identified – submitted a fresh application for leave to live and work the UK.

Fourie has reportedly described the process as a "red-tape nightmare", and suggested that fighting for leave to remain in the UK was not "worth all the hassle".

Turning to the broader 'political' debate regarding the desirability of providing a specific exception in the Immigration Rules for sportspersons in a similar position to Fourie, some interesting points for discussion may include the following:

- Should it make a difference whether the termination of the sportsperson's employment was on grounds of injury, or for some other reason outside of their control (such as the sponsor going into administration / liquidation)?
- In the case of career-ending injuries, should it make a difference whether the injury was sustained by the sportsperson: (a) in the course of representing his/her country; (b) representing his/her domestic club; or (c) outside the course of employment?
- Should it make a difference whether the injury was the result of negligence on the part of the sportsperson's sponsor and/or a third party; or (at the other end of the spectrum) recklessness on the part of the individual sportsperson?
- Should there be a 'threshhold' for the number of international caps which a sportsperson must possess, before s/he qualifies for exceptional treatment?
- In the case of a coach (rather than a player), how would any such 'threshhold' criteria be applied?

These queries, by definition, pose questions rather than purport to provide answers or solutions. They do, however, serve to demonstrate the difficult task of introducing exception(s) to the generally applicable Immigration Rules, on which a broad consensus could be achieved (as between politicians, governing bodies and/or sportspersons themselves). Plainly, any exception(s) which are introduced should be: (a) reasonably certain in scope, (b) fair and (c) workable – an aspiration which is easy to state but often difficult to achieve in practice.

As mentioned above, some commentators have been rather less sympathetic to Fourie's plight, and have instead focused their criticism on the IRB Eligibility Criteria, questioning the propriety of Regulation 8.1 (c); in essence, asserting that the 36 month residency requirement does not properly reflect the principles of international representation. It is perhaps worth noting also that Regulation 8.1 (b) of the IRB Eligibility Criteria has not been immune from criticism or misapplication – see for example the Welsh 'Grannygate' controversy, back in 2000.

The IRB itself defines the rationale for Regulation 8.1 (as it presently stands) in the following way:

"The rationale/philosophy of Regulation 8 is to ensure that Players selected to represent either the senior and next senior fifteen-a-side National Representative Teams of a Union or a Union's senior National Representative Sevens Team have a genuine, close, credible and established national link with the country of the Union for which they have been selected. Such a national link is essential to maintain the unique characteristics and culture of elite international sporting competition between Unions. The integrity of International Matches between Unions depends upon strict adherence to the eligibility criteria set out in the Regulations."

Can it really be said that, simply by virtue of a professional sportsperson having lived in a country for a period of three consecutive years, it should automatically be assumed (as Regulation 8.1 (c) seems to do) that s/he has a "genuine, close, credible and established national link" with that country? In the author's view, that proposition is perhaps somewhat dubious. The current residency requirement is, self-evidently, 12 months shorter than the length of a single World Cup cycle.

In order to provide some additional context to the debate, the residency criteria applied by the English Cricket Board (with effect from 30 April 2012) are as follows:

a. four consecutive years for all players who begin their residence in England or Wales before their 18th birthday; or

b. seven consecutive years for players who begin their residence in England or Wales after their 18th birthday (subject to the ECB's discretion to reduce that term to four years, in respect of those players who have come to England and Wales from non-ICC full member countries, or who commenced residency in England and Wales before April 25 2012).

With regard to international football, pursuant to the FIFA Statutes (see in particular Article 17), players who are not nationals of the country they wish to represent must complete a five year period of residency (after the age of 18) before they may be deemed to have "acquired" a new nationality; and be eligible for selection by that 'adopted' country.

This manifest lack of consistency gives rise to a broader debate regarding the desirability of seeking to achieve a more coherent, joined-up approach to this issue (i.e. as between the international sporting community). In practice, however, it seems likely that significant variations across sports (both individual and team pursuits) will remain. It is inevitable that whatever eligibility criteria or residency requirements are imposed by the various international and/or domestic sporting bodies, sports fans will continue to disagree as to where the line in the sand should properly be drawn.

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Andrew is a barrister practising from Matrix Chambers in London. He is an employment law specialist, and has a keen interest in sports law and sport generally. Andrew's work in the field of sports law includes acting on behalf of the claimant in Iain Dowie v Charlton Athletic FC (2010), a case before the FA Premier League Managers Arbitration Tribunal.

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Comments (2)

- **Cormac Wilde**

  26 February 2013 at 17:48 | #
  Hi Andrew,

  Notwithstanding the UKBA's immigration rules, is this not more appropriately a matter of EU law and the rights that flow to Fourie from same? (Zambrano case)

  Cormac
  reply

  - **Andrew Smith**

    06 March 2013 at 17:05 | #
    Hi Cormac,

    As I'm sure you will be aware, the essence of the Zambrano judgment was that:

    "..Article 20 TFEU [Treaty on the Functioning of the European Union] is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State..." (para. 45 of the CJEU's ruling)

    At a domestic level, the Immigration (EEA) Amendment (No 2) Regulations 2012 came into force on 8 November 2012; the purpose of this statutory instrument, according to paragraph 7.2 of its Explanatory Memorandum, was (inter alia):

    "...in order to give effect to the ECJ judgment of Ruiz Zambrano. That judgment created a further derivative right to enter and reside for the primary carer of an EU citizen who is living in his/her own country and where a refusal to confer such a right would force the EU citizen to leave the EEA. In the United Kingdom, the judgment therefore enables the primary carer of a British citizen to acquire a right to enter and reside in the UK whilst they remain the primary carer of that British citizen and where the refusal of such a right would force the British citizen to leave the EEA."

    Perhaps unsurprisingly, the UK government has adopted a fairly narrow interpretation of the CJEU's decision in Zambrano; and it may be that this is subject to challenge in due course. However, what is clear is that in order for the 'Zambrano principle' to bite, there must be a dependent who is a citizen of an EU Member State. The short point, I think, with regard to the Fourie case is that I am not aware Fourie's young son – whilst born in the UK – is in fact a British citizen.

    The British Nationality Act 1981 provides various possible bases for registration as a British citizen. On the facts of this case, it seems to me that a section 3 (1) application would have been the appropriate route for Fourie Jr. – i.e. children born in the United Kingdom to parents who are not settled in the United Kingdom and are not British citizens. Registration in this category is at the UKBA's / Home Office's discretion, if deemed reasonable under the circumstances. I am not aware that any such application was ever submitted on behalf of Fourie Jr. by his parents; and/or granted was by the UKBA / Home Office.

    It would be pretty surprising if Fourie's lawyers had missed the Zambrano point altogether (if in fact Fourie Jr. had obtained UK citizenship by the time Fourie's employment contract was terminated by Sale), although not of course impossible!

    Finally, the Zambrano case does not answer wider point discussed in the article – namely whether there should be some kind of specific exemption in the UK Immigration Rules for national sporting representatives who are not themselves UK citizens; and if so, how such an exemption should be framed.

    Best wishes,
    Andrew
    reply