TWO COUNTIES CRICKET CHAMPIONSHIP
APPEAL TRIBUNAL

IN THE MATTER OF AN APPEAL UNDER RULE 13a OF THE RULES OF THE TWO COUNTIES CRICKET CHAMPIONSHIP

Before:
Mr David Lamming (barrister), Chairman
Mr Philip George (solicitor)
Mr Toby Pound (solicitor)

BETWEEN:

(1) FRINTON-ON-SEA CRICKET CLUB
(2) BLAKE PETER REED

Appellants

- and –

THE TWO COUNTIES CRICKET CHAMPIONSHIP MANAGEMENT SUB-COMMITTEE

Respondents

Mr Douglas Frame (solicitor, Hill & Abbott) for the Appellants
Mr Ross Brown (solicitor, Onside Law) for the Respondents

Hearing date: Friday 4 August 2017

JUDGMENT

Abbreviations used in this judgment:

EAPL	East Anglian Premier League
ECB	England and Wales Cricket Board
HO	Home Office
IR	The Immigration Rules
MSC	Management Sub-Committee of the TCCC
NECL	North Essex Cricket League
SSHD	Secretary of State for the Home Department
TCCC	Two Counties Cricket Championship
The Rules	The TCCC rules
WACA	Western Australian Cricket Association

Unless otherwise indicated, reference to pages prefaced by 'A' are to pages in the Appellants' bundle, and those prefaced by 'R' are to those in the Respondents' bundle.

INTRODUCTION

1. Rule 13a of the rules of the Two Counties Cricket Championship ("the Rules") provides:

> "Any club adjudged to have fielded an ineligible player shall be penalised by forfeiting any points gained in that match plus a further sixteen points. In addition, the opposing team will automatically be awarded the match and receive 20 points. The player involved may be banned from the Championship for the remainder of the season. There will be a right of appeal for both the player and the club." (A19)

2. Rule 10b of the Rules provides:

> "The Competition shall be managed by a Sub-Committee. The Management Sub-Committee ('the MSC'), consisting of the Officers of the Competition and one representative from each of four member clubs, two in Suffolk and two in Essex, to be elected annually at the Annual General Meeting. (A18)

3. On 3 July 2017, at a meeting held at Ipswich Cricket Club, the MSC determined that Frinton-on-Sea Cricket Club ("Frinton") were in breach of rule 13a by fielding an ineligible player, Blake Reed ("Mr Reed"), in a TCCC Division One match against Maldon Cricket Club on 1 July 2017. The MSC agreed that Frinton should forfeit the points gained in the match and a further 16 points; also that Maldon CC should be awarded the match and receive 20 points (A65). The MSC decision was communicated to Pat Patel (Frinton's TCCC representative) and Christopher Armstrong (a club member[1]) by an e-mail from the TCCC acting secretary, Alan Rogers, on 5 July 2017 (A64). Mr Armstrong replied immediately by e-mail indicating that Frinton would be appealing. The appeal was heard on Friday 4 August 2017 at the offices of Birkett Long, solicitors, in Colchester. Frinton and Mr Reed were represented by Mr Doug Frame and the MSC by Mr Ross Brown. At the conclusion of the hearing we reserved judgment and this is our judgment on the appeal.

PROCEDURAL MATTERS

4. While rule 13a of the Rules states that there will be a right of appeal for both player and club against an adverse decision under that rule, there is nothing in the Rules to indicate how such an appeal is to be conducted. This was acknowledged by Mr Rogers in an e-mail to Mr Armstrong on 11 July 2017 in which he wrote: "*There is no set precedent for an appeal of this nature in the Two Counties Cricket Championship rules so we shall*

[1] Mr Armstrong's precise role in Frinton-on-Sea CC is unclear from the papers before us. It is not given in his witness statement dated 24th June 2017 [sic] in which he states (para 1, A9) that he is "duly authorised by Frinton-on-Sea Cricket Club to make this statement in support of the application for an injunction to allow Mr Blake Reed to play cricket for the club…"

adopt the procedure for a disciplinary appeal as set out in paragraph 6.3 on page 17 of the Two Counties handbook."

5. The paragraph 6.3 referred to in Mr Rogers's e-mail is in the part of the ECB 'Model Disciplinary Regulations' dealing with Appeals Procedure. This provides:

> "The Appeal shall be by way of re-hearing before a different Committee. The composition of the Committee shall be at the discretion of the Chairman of the League or of the League Disciplinary Committee and shall consist of not less than three persons, none of whom shall be connected with the player, the Club, or their opponents at the time of the alleged breach. The player or the Club shall have the same rights of attendance and representation, and to call witnesses as they had before the Disciplinary Committee." (A24)

6. Despite Mr Frame's assertion in paragraph 19 of his written submissions to the appeal tribunal that the decision to deduct Frinton its match points and impose a further penalty of 16 points "*was to all intents and purposes a disciplinary hearing*", this is not a disciplinary matter. Disciplinary action may be taken for failure to comply with the provisions of paragraph 1 of the Model Disciplinary Regulations, essentially breaches of the Code of Conduct, the Spirit of Cricket, and various provisions in the Laws of Cricket defining fair and unfair play. The issue in this case relates solely to Mr Reed's eligibility to play cricket for Frinton in the TCCC. As will appear, that requires us to consider certain provisions in the Immigration Rules ("IR"). It has nothing to do with any disciplinary issue. However, in the absence of any procedural provisions in the Rules for an appeal under rule 13a, we agree that the disciplinary appeals procedure provides an appropriate framework for this appeal.

7. In his e-mail of 11 July 2017, Mr Rogers said that the appeal committee would consist of "*three out of the following four members of the legal profession*." The first two people named were Mr Pound and Mr George. In the event, the TCCC chairman, Mr Norman Atkins, invited Mr Lamming to be the third member of the tribunal. None of us is connected with Mr Reed, Frinton or Maldon CC. Mr Lamming is chairman of the North Essex Cricket League, of which Frinton is also a member and play in Division One of that league. It is understood that Mr Blake played for Frinton in a NECL match against Mistley Cricket Club on 9 July 2017, but to date the NECL's management committee have not considered whether his participation in that match constituted a breach of the NECL rules. Mr Lamming, who the panel members agreed should act as chairman, mentioned this at the outset of the hearing on 4th August and invited Mr Frame to say whether he had any objection to Mr Lamming serving as a tribunal member: Mr Frame confirmed that he had none.

8. Paragraph 6.3 (set out in full above) provides that the player or the Club "*shall have the same rights of attendance and representation, and to call witnesses as they had before the Disciplinary Committee*." In an e-mail sent to Mr Armstrong at 12.44 on 2 July 2017 by Mr Rogers on behalf of the MSC, Frinton were invited "*to send a representative(s) to attend the meeting of the MSC tomorrow evening to discuss the appearance of Blake Reed in your Division 1 team yesterday*." In the event, due partly to the short notice and to

other reasons explained to us at the hearing but which we need not set out, no one from Frinton attended the MSC meeting on 3rd July. (We note that Frinton did not ask that consideration of the matter by the MSC be adjourned to a date when a representative of the club could attend.) However, since, as Mr Frame and Mr Brown agreed, this appeal is a re-hearing, we considered that we were not concerned with what happened at the MSC meeting on 3rd July. Accordingly, we indicated to Mr Frame that we were not interested in the various criticisms of the way the matter was dealt with at the MSC meeting, or of statements allegedly made by members of the MSC, set out in paras 16 to 27 of his written submissions. What is important is that both parties were able to set out their cases fully on the key issue in the case in their written submissions to the appeal tribunal, and in their oral submissions at the hearing.

9. Paragraph 6.3 confers a right to call witnesses at the appeal. In an e-mail sent to the parties on 3 August 2017, Mr Lamming indicated that it would assist if Mr Frame and Mr Brown would let him know in advance of the hearing whether either of them intended to call oral evidence (and, if so, from whom) and/or would seek to cross-examine any witness for the other party. Alternatively (if it was the case), they were asked to indicate that they would be making submissions based solely on the submitted documents. Mr Brown replied later on 3rd August to confirm that he would "*not be calling oral evidence and intend to make submissions based only on the documents.*" Mr Frame, in an e-mail on the Friday morning (4th August) confirmed that he would not be calling oral evidence "*as there is sufficient documents [sic] to decide the issue*." It follows that we have had to make our decision in this appeal solely on the material contained in the submitted documents, assisted by the parties' submissions. We expressed some concern about this at the hearing, at the same time making it clear that it was for the parties, not the appeal tribunal, to decide whether to call oral evidence and, if so, from whom. The consequences of Mr Frame's decision, in particular not to call Mr Reed or to make him available to answer any questions from the appeal tribunal, will appear later in this judgment.

10. We note, in passing, that paragraph 6.1 of the disciplinary Appeals Procedure (A24) requires any Notice of Appeal to set out the grounds of the appeal in writing to the league secretary, together with a £50 deposit. In this case, no grounds of appeal were lodged. We make no criticism of this, as rule 13a makes no provision for such grounds. In the event, as we set out in paragraph 16 below, we had the benefit of written submissions which identified the issue between the parties that we are required to determine. As for the £50 appeal fee, we note from the documents that this was paid by Frinton by BACS on 8th July. Although Frinton paid the £50 deposit, we doubt whether this could be required under the Rules as they stand. We note that in an e-mail sent to Mr Armstrong on 7 July 2017, Mr Rogers wrote: "*As agreed by the member clubs at the 2016 AGM, a deposit of £50 is required to set up the appeal…*" We have not seen the minutes of the 2016 AGM, so cannot comment on the accuracy of this statement. However, we would suggest that the MSC amend the Rules at a suitable opportunity to make express procedural provision for appeals under rule 13a, including any provision for payment of a deposit.

11. Originally, the appeal was to be heard on Wednesday 19 July 2017. However, on 17 July 2017 Hill & Abbott (Frinton's solicitors) sent a letter by e-mail to Mr Rogers suggesting that the appeal hearing "*be vacated pending the outcome of matters before the ECB and if no resolution, the courts*." (A88-89). Mr Frame (who wrote the letter) added: "*We trust, in the light of the issues involved, you will agree that there is little to be gained from the meeting going ahead as it is for the authorities higher above to decide the status of any affected players*." The reference to 'authorities higher above' was, in effect, a reference to the Home Office. As we indicated at the hearing, it seemed to us that, ultimately, the issue between the parties is, indeed, one that needs to be resolved in High Court proceedings between Frinton and the Home Office. However, as we now explain, it does fall to us to adjudicate on the central issue.

12. The hearing scheduled for 19 July 2017 was vacated in the light of Hill & Abbott's letter, but rather than take proceedings against the Home Office for a declaration as to Mr Reed's immigration status (as might have been expected), on 24 July 2017 Frinton and Mr Reed commenced proceedings in the Chelmsford County Court against the "Two Counties Cricket Board", naming six of the MSC members as the 2nd to 7th defendants (A1-3). In fact, the 2nd Defendant (Allison Heathcote) had resigned as a member of the MSC in June 2017, and when this was pointed out to Mr Frame he confirmed that her name would be removed from the proceedings. The proceedings took the form of an application for an interim injunction, with a return date of Thursday 27 July 2017 (A4-5). The relief sought was an order against "the Defendant" (1) permitting Mr Reed to play in the TCCC and (2) to "refrain from penalising [Frinton] for including [Mr Reed] in its team playing in [the TCCC]".

13. We note that, in the meantime, the MSC had decided to call a Special General Meeting ("SGM") of TCCC member clubs, to be held on 16 August 2017, to discuss the issues. (A85-90).

14. As a result of the pending injunction application, [telephone] discussions took place between the MSC and the ECB and on 26 July 2017 Online Law were instructed to represent the MSC members. We need not go into the detail of those discussions but, as appears from an e-mail from Mr Brown, at 10.53 on 27 July 2017 (R47-48), they also involved the Home Office. Mr Brown's e-mail set out an approach which involved, inter alia, discontinuance of the injunction application and the cancellation of the SGM. He invited Frinton and the Home Office to confirm their written agreement to what he set out in his e-mail. Frinton agreed, and the terms of the agreement, as between Mr Reed and Frinton on the one hand, and the TCCC officers on the other hand, are set out in a Tomlin Order (R49-50) that we understand was approved by His Honour Judge Lochrane on 27th July. Relevantly for our purposes, the agreed terms, set out in the schedule to the Tomlin Order, included the following:

- An appeal tribunal to be constituted to hear an appeal by Mr Blake Reed and Frinton. The appeal hearing to be heard in the evening of either Thursday, 3 August 2017 or Friday 4 August 2017
- Written submissions to be submitted by Tuesday, 1 August 2017.
- Judgment of the appeal tribunal to be provided on Monday, 7 August 2017.

- Mr Blake Reed be allowed to play cricket on Saturday, 29 July 2017 and Saturday, 5 August 2017.
- Frinton will not be penalised or deducted points for fielding Mr Reed in the above games.

15. It seems to us that this was a sensible compromise of the court proceedings save, as we pointed out to the advocates at the hearing, it involves us in being required to decide the immigration status of Mr Reed which Mr Frame, in his letter of 17 July 2017, said that it was for the "the authorities higher above" to decide. (We cannot refrain from observing, as we did at the hearing, that it was both presumptuous and discourteous to include a provision in the Tomlin Order requiring the appeal tribunal to provide its judgment on Monday 7 August 2017 and to include this without reference to any of us or our other commitments. Nonetheless, at some considerable time cost, especially by the Chairman, we have endeavoured to comply, albeit that it will be on Tuesday 8 August 2017 that this judgment is handed down.)

16. Written submissions, together with bundles of supporting documents, were duly provided to us, for which we are grateful. We have read all the papers and it must not be assumed that if we do not refer to all of them in this judgment that we have not taken them into account. Some submissions, as we have already explained, are not relevant to the issues that we have to determine.

17. Among the documents are witness statements by Christopher Armstrong (A9-14) and Mr Reed (A66-72) that were prepared for the purpose of the injunction application. Those statements both end with the customary declaration as to the contents being 'true and correct' to the best of the maker's belief and knowledge and, in answer to a specific inquiry at the hearing, Mr Brown said that he did not challenge anything in Mr Reed's statement. However, as will appear below, there are a number of 'gaps' in that statement which, since Mr Reed was not called to give evidence before us, remain unfilled.

18. Mr Brown's e-mail of 27th July included this paragraph (para 3)(A47):

> "In addition, the Home Office has agreed to provide a document in advance of the Appeal Tribunal in which they set out the legal position as they see it including relevant guidance.
> For the avoidance of doubt, the Home Office will confirm a) the nature of the enquiry they received from the ECB on behalf of the TCMSC, b) the law they consider relevant in this area, c) the factual information they consider relevant to this matter, d) their interpretation of the application of the law in this case in light of the factual information, e) the conclusions they make as a result and f) the impact of their conclusions for Blake Reed, Frinton and the TCMSC."

19. In the result, whatever may have been said in the telephone discussions (to which we are not privy), the Home Office declined to provide any realistic guidance that might have assisted us in our decision. It may be that it was unrealistic to expect them to do so but,

if so, this serves to emphasise that a definitive answer to the issue between Frinton and the Home Office as to Mr Reed's immigration status can really only be given by the High Court in proceedings between them. (We set out below such 'guidance' as the HO has provided in various e-mails.)

20. Although the Home Office have not provided any helpful guidance, two documents in the bundles have assisted us in understanding the issues we have to determine. They are: (1) an Advice, dated 27 June 2017, by Mr Ian MacDonald QC, provided to Frinton (A55-62), and (2) a note, "Issues for Appeal Tribunal," (R56-57) prepared by Mr Tom Mountford, counsel instructed by Mr Brown and who, we understand, would have appeared for the defendants at Chelmsford County Court on 27 July 2017, had the injunction application not been compromised. We are grateful to both counsel for the assistance they have given: we regret that we cannot say the same about the Home Office.

THE FACTS

21. Having set out at some length these preliminary matters, we turn to the relevant facts, which are largely not in dispute. We take these from the papers before us.

22. Frinton-on-Sea CC is a member of both the EAPL and the TCCC. Its 1st XI plays in the EAPL and its 2nd XI in Division 1 of the TCCC. (Also, as mentioned in para 7 above, it has a team playing in Division 1 of the NECL – these matches are played mainly on Sundays.)

23. Mr Reed is an Australian citizen. He is 22 years of age and was born in Perth, Western Australia. He is clearly a good cricketer. Indeed, on his own admission "*not only did I enjoy cricket, I became very good at it*." (witness statement, para 4; A67.)

24. In 2013 Mr Reed was selected to play for Western Australia in the under 19 Australian Chamionships and played some six matches for Western Australia. However, he is "*no longer affiliated with the Western Australian Cricket Association at State level*" and "*since his last match in 2013 at the Cricket Australia U19 championships he has not been involved in the WACA programs since*." (Letter from Mr David Fitzgerald, WACA Talent Development Manager, dated 20 June 2017, A49.) Mr Reed states that he was never paid for playing for Western Australia (A70, para 22.)

25. During his first year at university in Western Australia (studying for a Sports Science degree), Mr Reed decided he wanted to go travelling and he put his studies on hold. He applied to come to England and, on 16 May 2016, he was granted a Tier 5 (Youth Mobility) Visa, valid for two years. (A32 and A74). He came to the UK specifically to play for Exeter Cricket Club in Devon. (A67, para 6). He says that while in Devon he did bar work for which he was paid. (A67, para 7).

26. It is clear that at the end of the 2016 season Mr Reed returned to Australia, but his statement is silent as to what work he did during the Australian 2016-17 summer season.

27. At the beginning of the 2017 season in England, as the result of contact between Frinton and a former player based in Perth, Mr Reed contacted the club and expressed interest in being their nominated overseas player for the season. (A11, para 6). Mr Reed applied for player registration on 15 May 2017. (A30). In that application he confirmed that he had read and agreed to abide by "the ECB Regulations on player eligibility and qualification." His nominations to play for Frinton were confirmed the same day by the TCCC and the EAPL (A36 and A37.) He then made arrangements to come to England.

28. Mr Armstrong says that on arrival in the UK, Mr Reed "*was helped with accomodation and he found work with a local employer in Frinton. These arrangements have not changed since this matter has come to light. I say this because Mr Reed is not dependant on income from cricket.*" (A11, para 8). However, we note that neither Mr Armstong nor Mr Reed specifies the work Mr Reed is doing in Frinton, nor the name of the local employer or what he is being paid. These are matters we would have wished to explore had Mr Reed given evidence at the hearing on 4th August. We were told by Mr Frame that Mr Reed was staying with Mr Armstrong, and this seems to be correct as the same address (17 Hadleigh Road, Frinton) is given as their address by both Mr Armstrong and Mr Reed at the head of their respective witness statements (A9 and A66). However, the terms of the accommodation provided to Mr Reed by Mr Armstrong are not stated by either witness.

29. Following his arrival in Frinton, Mr Reed was selected for three games in the club's 2nd XI – i.e. playing for Frinton in the TCCC. (A11, para 8)

30. On 12 June 2017, Geoff Eveling, Essex Representative on the MSC, sent an e-mail to Frinton as follows:

> "Following a recent meeting of the management subcommittee an issue has been raised for which we require clarification from your club. We are aware that Blake Reed is an overseas player currently playing for you. We have researched the player and find that he has played u19 cricket for Western Australia in the Australian National Championship. Therefore we require from you clarification and proof of the visa held and or the means by which they are [sic] in the country, ie ancestry visa or EU passport holder.
>
> We require you to provide us with this information as soon as possible to enable us to ensure that they are [sic] an eligible player under league rules and in accordance with the Home Office / ECB Guidance document, provided to all clubs prior to the start of the season. We also advise that the player may not continue to play Championship matches until this information has been provided to us." (A39)

31. Mr Armstrong replied the following day, stating that Mr Reed held a Youth Mobility Visa and setting out the chonology we have summarised above. He said that a copy of the Visa was sent to the EAPL with a 'category 3' application, and that Mr Reed's registration with the EAPL and the TCCC was accepted "with no further query" (A41). Mr Armstrong said that as amateur clubs they looked to their governing bodies for

guidance, adding "*We thought that as Reed was on an existing visa that the terms of that visa would not be changed mid-term but to be sure applied as above before telling him to travel.*" Mr Armstong suggested that where a club has acted in good faith but has been the subject of defective registration by leagues, no penalty should be applied. We note that Mr Armstrong did not assert that as an amateur Mr Reed was eligible to play for Frinton.

32. The reference to the "Home Office / ECB Guidance document" appears to be a reference to the document "Overseas Players & Managed Migration – Immigration Rules (Home Office) January 2017", that was published on the TCCC website (R7-11). So far as relevant, this includes the following:

> ***Tier 5 Youth Mobility Scheme:***
> This provides individuals (aged 18 to 30) from certain countries an opportunity to come to experience living and working in the UK.
> **Can**: Seek employment (but not as a sportsperson or coach). Act as a Coaching Assistant, providing it is under direct supervision of a qualified coach.
> Receive reasonable expenses for travel and accommodation (a reasonable amount would be based on the cost of living in that geographical location).
> **Cannot**: Act as a professional sportsman – paid or unpaid.
> Play or Coach sport as an amateur if they are classified as a 'Professional' by the Home Office. (R9)

33. The guidance contains a section "Home Office definition of Professional vs Amateur", and sets out the definitions of "Amateur" and " Professional Sportsperson" as they appear in paragraph 6 of the IR. However, it then adds this gloss (R10):

> Deriving a living is defined as receiving payment for playing cricket and does not need to be the sole earnings.
>
> A person may also be considered as "seeking to derive a living" if they have played as part of a player pathway.**
>
> **Player "Pathway": A player may be considered to be on a "Pathway" and therefore classified as a "Professional Sportsperson", if that person has played cricket above U17 at state/province/territory level (paid or unpaid) in any country.

34. Further, the guidance includes this (R11):

> **ECB**:
> If any club found to be playing an individual who is in breach of their visa the process is:
> - Inform the Home Office of the breach
> - Recommend to the club that they no longer use the player

- Inform the league and request that they take the appropriate action as per the league rules.

35. We deal below with what is the central issue in this appeal, namely whether Mr Reed was in breach of his Tier 5 visa by playing for Frinton in the TCCC match on 1 July 2017, but we note that the fact that Mr Reed was granted a Tier 5 visa in 2016 and played for Exeter Cricket Club in 2016 is not determinative of this issue.

36. Following Mr Armstrong's e-mail of 13 June 2017 to Mr Eveling (A41), Frinton obtained the letter from the WACA, dated 20 June 2017, referred to at para 24 above (A49). The club also sought legal advice from Mr Ian MacDonald QC, who we note is a specialist in immigration law. The instructions to Mr MacDonald are set out in the document from Mr Armstrong at pages A51-53. They refer to the 'Player Pathway' paragraph as being 'critical' to the matter on which Mr MacDonald's advice is sought. Mr Armstrong states that Mr Reed received no payment for the six games he played for Western Australia in 2013 and progressed no further with his provincial career, adding "*he now plays purely for personal enjoyment*." (A52).

37. Mr MacDonald provided his Advice to Frinton on 27 June 2017 (A55-62). Mr MacDonald advised (i) that the term player 'pathway' "*has no place in the immigration rules definition of amateur and professional cricketers and its use would require an amendment to these definitions*" (Para 2, A55), and (ii) that whether Mr Reed is an amateur "*will largely depend on the evidence, which in most cases will be easily ascertained. Each case will be fact sensitive and easily proved one way or another*." (Para 22, A62) Mr MacDonald concludes by giving his opinion that the evidence is "abundantly clear" and that Mr Reed "is an amateur" (Para 23, A62). Having considered all the evidence presented to us in this case, we are not as sanguine as Mr MacDonald as to the clarity of the evidence or the conclusion to be drawn.

38. On 27 June 2017 Mr Armstrong e-mailed Mr Eveling, attaching a copy of the WACA letter (A49), saying that "*more information will follow in the next few days*." (R20). Mr Eveling responded later that evening, saying that all the correspondence had been put together and would be "*discussed at our upcoming Management sub committee meeting on Monday 3rd July.*" He added: "*We will correspond with you further following that meeting with regard to Blake Reed and his appearance in the Championship*." (R19).

39. On 28 June 2017 (a Wednesday), Mr Armstrong e-mailed Mr Eveling referring to Mr MacDonald's advice and quoting this extract: "***The Youth Mobility Visa lasts for 2 years and cannot be changed. It gives Mr Reed the immigration status to play amateur Cricket… He is an amateur and I so advise***." (R18). Mr Armstrong stated that Mr MacDonald's full legal advice had been sent that day to Mr Paul Bedford at the ECB "*as he will be meeting the Home Office in the next few weeks*." He added this:

> "We appreciate the league is in an impossible position awaiting advice from the ECB who in turn are awaiting meeting with the Home Office with no firm date for a resolution. Frinton are, however, now full [sic] confident we have not broken any laws regarding Reed and consequently will be fielding him on

> Saturday against Maldon in the Two Counties League. We will also be applying to re-register him with the East Anglian Premier League. Out of courtesy we have informed our friends at Maldon so that there will be no issue on Saturday." (R19)

40. The same evening, Mr Eveling e-mailed Emma Davis-Bidgood at the ECB, forwarding the e-mail from Mr Armstrong. He stated:

> "This therefore puts us as a committee in a difficult position as we have followed the guidelines set out by the ECB and advised our clubs that players deemed ineligible should not play. However the legal advice received from Frinton put us directly at odds with this and most awkwardly Frinton intend to play their player on Saturday. With this situation, we must ask the ECB for direct and urgent advice on this subject as we have two clubs whose overseas player could with this advice play their overseas player on Saturday. The second club being Braintree CC, player Mason Hughes, whose situation is the same as Blake Reed on all counts." (R22-23).

41. Ms Davis-Bidgood replied the next day, 29 June 2017. In her e-mail to Mr Eveling she wrote this:

> "I cannot provide an [sic] comment with regards to the advice that Frinton CC has been been provided. The Home Office Sports Policy unit has confirmed to us on several occasions that it would consider any person who has played in the Australian U19 championships, paid or unpaid, no matter how long ago those matches were, would meet the Home Office definition of a 'Professional' for immigration purposes. Therefore Blake is not eligible to play cricket here paid or unpaid on a Youth Mobility visa." (R22)

42. As intimated by Mr Armstrong in his e-mail of 28th June, Frinton duly fielded Mr Reed in their TCCC Division 1 game against Maldon CC on Saturday 1 July 2017. Frinton did so notwithstanding their knowledge that the issue of Mr Reed's eligibility was to be discussed by the MSC the following Monday, 3rd July. It was in these circumstances that Mr Rogers invited Frinton to send a representative(s) to that meeting "*to discuss the appearance of Blake Reed in your Division 1 team yesterday*." (see para 8 above.)

43. As indicated in paragraph 3 above, at the meeting on 3 July 2017 the MSC agreed that Frinton should forfeit the points gained in the match against Maldon CC and a further 16 points; also that Maldon should be awarded the match and receive 20 points. Their adjudication, as subsequently posted on the TCCC website, reads as follows:

> "On the 3rd July 2017 the Two Counties (TC) Management Sub Committee dealt with a breach of the Championship Rule 13a by Frinton on Sea CC.
>
> Frinton on Sea CC played Blake Reed in their 2nd XI match v Maldon in Division 1 on the 1st July 2017. Blake Reed is an overseas player who the Home Office (Immigration Dept) and the England and Wales Cricket Board (ECB) had

deemed ineligible to play cricket in this country. Frinton on Sea had submitted Counsel's opinion to the Home Office and the ECB asking for that decision to be reversed. The ECB replied in an email dated 29th June 2017 as follows:

'We cannot provide a comment with regards to the advice that Frinton CC has been been provided.
The Home Office sports Policy Unit has confirmed to us on several occasions that it would consider any person who has played in the Australian U19 championships, paid or unpaid, no matter how long ago those matches were, would meet the Home Office definition of a 'Professional' for immigration purposes. Therefore Blake is not eligible to play cricket here paid or unpaid on a Youth Mobility visa.'

This email was forwarded to Frinton on Sea CC on the 29th June 2017.

The Two Counties is an ECB feeder league and the MC have no choice but to abide by their decision. The MC unanimously agreed that Frinton on Sea fielded an ineligible player on the 1st July and should forfeit the points gained in the match with Maldon CC and also a further 16 points. In addition, Maldon CC will be awarded the match and receive 20 points." (A65)

44. As explained above, Frinton did not send a representative to the MSC meeting, nor did they request an adjournment. The MSC were not provided with Mr MacDonald's full Advice and, in the circumstances, it is not surprising that the MSC made their decision based on the e-mail from the ECB of 29th June. Members of the MSC are volunteers and, so far as we are aware none is a lawyer. However, as we have set out above, this appeal is a re-hearing and the parties have been able to deploy their full cases to us in their written and oral submissions.

THE SUBMISSIONS

45. Mr Frame began his written submissions by stating that they were provided "*in respect to whether or not Mr Reed is an amateur for the purposes of the sanction imposed on him.*"[2] As will appear, we agree that this is the key issue in this appeal. At paragraphs 12 to 14 he set out the relevant provisions of the IR, in particular the definitions of "Amateur" and "Professional Sportsperson". He set out his argument at paragraphs 34 to 38 for submitting that Mr Reed "is an amateur and therefore [not[3]] in breach of his

[2] In fact, the only sanction imposed by the MSC was a points penalty on Frinton. The MSC did not ban Mr Reed from playing in the TCCC for the remainder of the 2017 season, as they might have done. However, we recognise the reality that Frinton would be at risk of further points deductions should they field Mr Reed again this season (subject to our decision and the agreement between the parties, set out in the Tomlin Order, that Mr Reed be allowed to play cricket on Saturday 29 July 2017 and Saturday 5 August 2017, and that Frinton will not be penalised or deducted points if they field him in these two games.)

[3] We have inserted the word 'not', which was clearly intended.

visa." (Para 37.) He pointed out (para 35) that there is "*no legal principle that would allow a person deciding immigration status to draw a conclusion that a person is a professional sportsperson under the immigration rules simply because that person has played cricket at State, Province or Territory level above the age of seventeen*," and he referred us to authority (***Pankina v SSHD*** [2010] EWCA Civ 719; [2010] 3 WLR 1526), which we consider below, that for this to be a proper consideration would require a change in the immigration rules.[4]

46. Mr Frame amplified his argument in his oral submissions, saying that the MSC should have gone back to the IR and not relied on HO guidance. He submitted that the ECB guidance (A78-81) goes beyond the IR. He accepted that the MSC followed the advice given to them by the ECB, but said that it was wrong advice.

47. In a 'speaking note' for his oral submissions (for which we are grateful), Mr Frame referred to an e-mail dated 2 July 2017 from Mr Bedford to Mr Armstrong (A43) which quoted from an e-mail dated 30 June 2017 from Darren Carter of the HO[5] to Ms Davis-Bidgood sent in response to seeing Mr MacDonald's Advice:

> "Blake Reed is, by his own admission,[6] an aspiring cricketer. He played in the U19 national championships for Western Australia in 2013 and is still playing at top level grade cricket in Australia. That being so, we are happy to maintain the line that he appears to satisfy our definition of a professional sportsperson in that he appears to have embarked on a course towards seeking a living from cricket and still has such aspirations."

48. The 'admission' that Mr Reed is "an aspiring cricketer" is taken from a page of a website, cricketmentoring.com, featuring Blake Reed, which includes a quote from Mr Reed, "*As an aspiring young cricketer myself…*" Mr Frame submitted (para 12 of his speaking note) that the mentoring website "*was written for the benefit of young cricketers looking to utilise his services. On its true construction what Mr Reed was saying here is that he has represented Western Australia at under age level and knows the difficulties which can arise for young cricketers along the way. At the time of the website being constructed Mr Reed was already aware that he was no longer part of the Western Australian Cricket Associations player pathway and therefore was not considering a living from playing cricket in the future*."

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[4] At the hearing Mr Frame also provided us with a copy of the Supreme Court judgments in ***R (Alvi) v SSHD*** [2012] UKSC 33; [2012] 1 WLR 2208. He referred us in particular to para 97 of the judgment of Lord Dyson ([2012] 1 WLR at p. 2239): "The key requirement is that the immigration rules should include all those provisions which set out criteria which are or may be determinative of an application for leave to enter or remain."

[5] In his e-mail Mr Carter gives his position as "Tiers 2 and 5 Sponsorship Policy, Migration Policy, Border, Immigration and Citizenship Policy and Strategy Group" at the Home Office in Sheffield.

[6] The emphasis is that of Mr Carter.

49. Mr Reed dealt with this in paragraph 23 of his witness statement (A70) in which he asserts that his 'admission' to be an aspiring cricketer was taken out of context. He explains: "*What is meant by that statement is that I aspire to be the best I can be. It is for this reason I say I can relate to young cricketers and help them achieve their own goals. It's to do more with mental toughness and how a young player copes with pressure, nothing more.*" Unfortunately, since Mr Reed did not attend the appeal hearing, we were unable to ask the questions about the website and Mr Reed's mentoring role that we would have wished.

50. Mr Frame concluded his speaking note by inviting us to agree that "*Mr Reed is, and has been at all times, an amateur. It follows that the 36 points deduction levied against Frinton CC be quashed.*" (para 20.)

51. Mr Brown, in his written submissions on behalf of the MSC, made clear (para 3) that the MSC "*has no issue with Mr Reed personally or Frinton and approach this Appeal from an essentially neutral standpoint.*" At paragraph 25 he said that the MSC "*is in an invidious position in this matter, being in the firing line of Mr Reed and Frinton in circumstances where it has followed the guidance of the Home Office to date in its decision-making.*" Nonetheless, when asked to make clear the Respondents' position, Mr Brown said it was that we should dismiss the appeal.

52. Mr Brown began his oral submissions by saying that the MSC were "*entirely justified in relying on ECB advice*" and that Frinton should either (i) discuss [the issue] with the Home Office and other interested clubs, or (ii) take judicial review proceedings against the Home Office. He pointed out (and we agree) that the TCCC is a volunteer-run league who cannot be expected to have a detailed understanding of complicated immigration law. This was the first time that the TCCC had had to grapple with the issue, and it was not surprising that the MSC looked at the ECB guidance (at R2-5).

53. Mr Brown pointed out that the MSC did not have the benefit of Mr Carter's e-mail of 30 June 2017 (R36). However, he accepted that Mr Carter's view about a player "pathway" was, as he put it, a "red herring", and that this was only informal guidance. We were somewhat surprised to be told that Mr Carter accepts that this is only informal guidance: i.e. not part of the IR and thus, effectively, acknowledging the judgments in the ***Pankina*** and ***Alvi*** cases.

THE HOME OFFICE GUIDANCE

54. Before setting out our conclusions on the key issue, having regard to the evidence and submissions, we wish to re-iterate our view that the HO has been singularly unhelpful in its various communications. We have set out above (para 47) the bulk of Mr Carter's e-mail to Emma Davis-Bidgood of 30 June 2017 in which he referred to Mr Reed's 'admission' to being an aspiring cricketer. That e-mail was prefaced with this sentence: "*Thanks for sight of the legal opinion. It is very interesting but not without its flaws.*" If there were flaws in Mr MacDonald's Advice, then in our view Mr Carter should have identified them.

55. The other HO e-mail on which we wish to comment is that dated 27 July 2017 from Mr Carter to Mr Brown (copied, inter alios, to Mr Frame, Mr Rogers and Mr Bedford.) (R59). This was sent in response to Mr Brown's "without prejudice" e-mail earlier that day (R59-61) asking for Frinton and the HO to agree the approach to compromising the injunction application. We have set out at para 18 above what Mr Brown was saying that the HO had agreed to provide in a document ahead of the appeal tribunal hearing.

56. The e-mail reply from Mr Carter (at 17.15 on 27 July 2017) was as follows:

> "Thank you for your email. However, we do not consider that the bullet points fully reflect our conversation, nor do we consider it appropriate to enter into any written agreement with you or your client in relation to the matter. We can confirm that, in order to assist the Tribunal, we will provide you with details of the relevant Immigration Rules and copies of our correspondence with the ECB in relation to the present matter [subject to ECB's consent to the latter.[7]] As you are aware, that correspondence sets out the Home Office's preliminary view, based on the information then available to it, as to the application of the relevant provisions to Mr Reed's circumstances. However, as you will appreciate, it would be wholly inappropriate for the Home Office to comment further on the position of Mr Reed, given the on-going litigation.
>
> Moreover, we note your proposal at (8). Of course, the contents of communications between TCMCS[8] and its constituent clubs are a matter for the former. However, for the avoidance of doubt, the Home Office reserves the right to take appropriate enforcement action in circumstances in which it considers that individuals are acting in breach of their conditions of leave, or that sponsors are contravening their obligations." (R59)

57. In our view these are weasel words. Previous e-mails did not suggest that the HO view as to Mr Reed's immigation status was only 'preliminary'. The HO are not party to the litigation in the Chelmsford County Court, so in our view this was not a valid reason for it being "wholly inappropriate" to comment further on Mr Reed's position. We have already pointed out the HO's failure to engage with Mr MacDonald's Advice, while asserting that it was "not without its flaws." If there are such flaws, or if the HO consider that there are such flaws, it would have been assistance to us for Mr Carter to have identified them. Then, having failed to give the Appeal Tribunal any real assistance (assistance that Mr Brown clearly thought the HO had agreed to provide), there is the thinly-veiled threat to Mr Reed and Frinton (and other players and clubs in a like position) to take enforcement action – presumably under section 25 of the Immigration Act 1971

[7] It is to be noted that the ECB gave their consent and the correspondence was provided to us.

[8] Sic. This is clearly meant to be a reference to the MSC.

which makes it an indictable offence[9] to do an act which facilitates a breach of immigration law by an individual who is not an EU citizen.

DISCUSSION

58. With this rather long prelude (for which we do not apologise, given the importance of the case to the parties but also, we understand, to many other league clubs—not just TCCC clubs—in a similar position[10]) we turn to our response to the submissions and the evidence set out in the documents.

59. We deal first with a matter we have identified but on which no submissions were made by the parties. Rule 13a of the Rules starts by saying that there is to be registration of players using the ECB registration form on the Two Counties website, and that all players must be registered on play-cricket. No player can be registered after 1st August without permission of the TCCC (presumably given by the MSC.) Players cannot play for more than one club in the EAPL feeder system (the constituent leagues are named), nor be a registered player for any Premier League, and any connected feeder system, during a season without permission from the TCCC. Two exceptions (immaterial for present purposes) are then set out. (See page A18). There follows as part of rule 13a the provision, set out at paragraph 1 above, for penalising clubs adjudged to have fielded an ineligible player.

60. On first reading, it would appear that an ineligible player is simply one who has not been registered in accordance with the preceding provisions, or where the requisite permission of the TCCC has not been obtained. Rule 13a says nothing about compliance with immigration rules. However, rule 13f states:

> No more than one overseas player per team shall be allowed to play in the Championship. (An overseas player is one who is not normally resident in the United Kingdom.) Any Category 3 players must also comply with all visa conditions. (A19).

61. It is apparent from this that compliance with visa conditions is identified as a requirement of the TCCC in its rules. Moreover, no submission was made to us by Mr Frame that rule 13a was inapplicable on the basis that it did not contain any reference to compliance with visa conditions. We proceed, therefore, on the basis that there is an implicit acceptance by Frinton and Mr Reed that rule 13a properly covers the circumstances with which we are concerned. We do however, suggest, if only for the

[9] Punishable on conviction on indictment, to imprisonment for a term not exceeding 14 years, to a fine or to both. On summary conviction the offence is punishable by imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both: section 25(6).

[10] At paragraph 13 of his witness statement (A68), Mr Reed states that he understands that there are "about 100 others who have come to enjoy the UK in its entirety, including the ability to play sport on the weekends and have been deemed for one reason or another ineligible because they have played a higher standard of amateur cricket in their home countries."

avoidance of doubt, that the TCCC Rules be amended to spell out precisely what may constitute "an ineligible player."

62. It will be apparent from what we have already said that this appeal turns on the interpretation of certain provisions of the IR and their application to the facts. Indeed, this is the burden of Mr MacDonald's Advice, and we accept the submission (which, as we have indicated above, Mr Carter of the Home Office also accepts) that any 'guidance' from the HO as to how the immigration rules are to be applied cannot override the actual terms of the rules, which are to include "*all those provisions which set out criteria which are or may be determinative of an application for leave to enter or remain*[11]", or, in the context of this appeal, are determinative of whether Mr Reed is in breach of the IR by being a professional sportsperson rather than an amateur.

63. Accordingly, we must now set out the relevant parts of the IR. They were helpfully supplied to us on a single A4 sheet.[12]

64. Paragraph 6 (Interpretation) contains the following definitions of "Amateur" and "Professional Sportsperson":

> An **"Amateur"** is a person who engages in a sport or creative activity solely for personal enjoyment and who is not seeking to derive a living from the activity. This also includes a person playing or coaching in a charity game.
>
> A **"Professional Sportsperson"**, is someone, whether paid or unpaid, who:
>
> is providing services as a sportsperson, playing or coaching in any capacity, at a professional or semi-professional level of sport; or
> being a person who currently derives, who has in the past derived or seeks in the future to derive, a living from playing or coaching, is providing services as a sportsperson or coach at any level of sport, unless they are doing so as an "Amateur".

65. "Tier 5 (Youth Mobility) Temporary Migrant" is defined as meaning "a migrant granted leave under paragraphs 245ZI to 245ZL of these Rules."

66. Paragraph 245ZL describes the conditions of grant for a Tier 5 (Youth Mobility Scheme) visa:

> "Entry clearance will be granted for a period of 2 years subject to the following conditions:
>
> (a) no recourse to public funds,

[11] Lord Dyson in ***R (Alvi) v SSHD*** [2012] 1 WLR 2208, para 97 at p. 2239B.

[12] We note that the IR provided to us are those shown on the Government website (www.gov.uk) as updated on 2 May 2017.

(b) registration with the police, if this is required by paragraph 326 of these Rules,

(c) no employment as a professional sportsperson (including as a sports coach), and

(d) no employment as a Doctor or Dentist in Training, unless the applicant has obtained a degree in medicine or dentistry at bachelor's level or above from a UK institution that is a UK recognised or listed body, or which holds a sponsor licence under Tier 4 of the Points Based System, and provides evidence of this degree.

(e) no self employment, except where the following conditions are met:

(i) the migrant has no premises which he owns, other than his home, from which he carries out his business,

(ii) the total value of any equipment used in the business does not exceed £5,000, and

(iii) the migrant has no employees.

(f) study subject to the condition set out in Part 15 of these Rules.

67. Finally, **"employment"** unless the contrary intention appears, includes paid and unpaid employment, paid and unpaid work placements undertaken as part of a course or period of study, self employment and engaging in business or any professional activity.

68. It will be noted that the definitions of a "Professional Sportsperson" and an "Amateur" are somewhat circular. A professional sportsperson is (inter alia) someone, whether paid or unpaid, who seeks in the future to derive a living from playing or coaching and is providing services as a sportsperson or coach **at any level of sport**, unless they are doing so as an Amateur, while an Amateur is defined to be someone who engages in a sport or creative activity solely for personal enjoyment "and who is not seeking to derive a living from the activity." (Our emphasis).

69. In the note "Issues for Appeal Tribunal" drafted by Mr Mountford (see para 20 above), it is suggested that the following questions arise for determination on this appeal (R57):

(a) Does Mr Reed fall within the definition of a professional sportsperson under the Immigration Rules because he is a person who seeks in the future to derive a living from playing or coaching cricket, and is presently providing services as a sportsperson at any level of the sport of cricket?;
(b) If so, is he nevertheless presently providing services as a sportsperson as an amateur in that he is engaging in cricket solely for personal enjoyment and is not seeking to derive a living from the activity?

70. It is clear and indisputable that Mr Reed is currently providing services as a sportsperson to Frinton. The key question is whether he is a person who is seeking in the

future to derive a living from playing or coaching cricket. Further, is he seeking to derive a living from his present engagement as an overseas cricketer with Frinton.

71. We have already observed that there is a number of questions that we would have wished to put to Mr Reed had he attended to give evidence. Given the importance that both he and Frinton attach to this case and this appeal, we have to say we are surprised that he did not attend the hearing on 4th August, for whatever reason. It follows that we have no evidence before us to rebut what we take to be reasonable inferences that we can draw from the documents. In saying that, we take the view that it is for the appellants to persuade us (albeit on the balance of probabilities) that Mr Reed was playing as "an Amateur" when he played for Frinton on 1 July 2017, and thus was not in breach of the terms of his Tier 5 visa and thus not an ineligible player under the TCCC rules.

72. We have already noted that we have been given no information as to the nature of Mr Reed's current employment (outside cricket) in Frinton-on-Sea (or elsewhere in Essex). We note, too, that although Mr Reed states (witness statement para 16, A69) that he does not, and has not, earned a living from cricket and plays as an amateur in Perth, he gives no information as to his employment or means of living in Australia. We consider that we cannot ignore Mr Reed's own statement on the cricket mentoring website in which he not only describes himself as "an aspiring young cricketer" but also "a top order player." We note, too that the webpage (R53) is headed "World's leading online cricket coaching service." It seems to us inconceivable that Mr Reed would not expect to be paid for the services he is effectively advertising. Accordingly, we conclude, on the balance of probabilities, that despite his assertion to the contrary, Mr Reed is not *engaging* in cricket solely for personal enjoyment and that he is, whether directly or indirectly, seeking to derive a living from cricket. Accordingly, he was an ineligible player and in breach of his visa when he played for Frinton against Maldon CC on 1 July 2017.

73. We are conscious that at root the dispute in this case (as Mr Armstrong recognised in his e-mail to Mr Eveling of 28 June 2017) is between Frinton and the Home Office and ultimately it may require a ruling from the High Court in proceedings directly between Frinton and the HO to resolve the issue as to Mr Reed's current immigration status. However, as we have explained, we have been required to decide the issue of Mr Reed's eligibility to play cricket for Frinton's Two Counties team as the result of an agreement between Frinton and the MSC set out in the Tomlin Order.

74. Although it is not included in the Schedule to the order, we note that one term of the "agreed approach" set out in Mr Brown's e-mail of 27 July 2017 was that "*Frinton and TCMSC acknowledge that they will abide by the terms of the Appeal Tribunal's decision subject to the terms of the consent order*." We trust that this does represent Frinton's position and that they will abide by our decision. Indeed, we note that the decision of an Appeals Committee "shall be final and binding" (paragraph 6.5 of the Model Disciplinary Regulations, pursuant to the framework of which it was agreed this appeal tribunal should act.)

75. As noted at para 31 above, in his e-mail of 13 June 2017 to Mr Eveling (A41), Mr Armstrong suggested that "*where Clubs (such as Frinton) have acted in good faith but have been subject to defective registrations by leagues that no penalty should be applied*."

It is not necessary for us to comment on the assertion that Mr Reed's registration with the TCCC was (or may have been) "defective". It is sufficient to note that rule 13a contains no discretion in respect of the points penalty for a club adjudged to have fielded an ineligible player. It follows, therefore, from our decision that we uphold the points penalty set out in the MSC's decision of 3 July 2017 as recorded in the document at A65. However, we do so for the rather different reasons explained above. It follows, too, that the MSC may now amend the Division One league table to reflect that decision, since we understand that it has not been implemented pending the appeal ruling.

DECISION

76. For the reasons set out above, we dismiss the appeal by Frinton-on-Sea Cricket Club and Mr Blake Reed against the MSC decision of 3 July 2017 to impose a points penalty on Frinton for fielding an ineligible player in their match against Maldon CC on 1 July 2017.

COSTS

77. We note that paragraph 6.4 of the Model Disciplinary Regulations (A24) empowers an Appeals Committee to award costs of the appeal hearing. No submissions were made to us about costs, and no application for costs was made by either party. Accordingly, we make no award of costs and each party will bear their own costs of the appeal.

8 August 2017.