



Arbitration CAS 2010/A/2071 Irish Football Association (IFA) v. Football Association of Ireland (FAI), Daniel Kearns and Fédération Internationale de Football Association (FIFA), award of 27 September 2010 (operative part issued on 22 July 2010)

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Michael Beloff QC (United Kingdom); Mr Michele Bernasconi (Switzerland)

Football

Admissibility of new documents submitted after the filing of the Appeal/ Answer

Principles governing the interpretation of rules

Rules governing the eligibility of players to play for the representative teams of national associations

Distinction between a “shared” and a “dual” nationality

Hierarchy of norms

1. Pursuant to the Code of Sports-related Arbitration, new documents can only be entertained before a CAS Panel on the basis of the agreement of both parties and with the prior consent of the Panel itself. Documents originally submitted as attachments to a written statement are admissible because their production had been foreshadowed in the appeal brief.
2. The interpretation of the statutes and rules of a sport association has to be objective and always start with the wording of the rule. The adjudicating body will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. The identification of the intentions of the association which drafted the rule will be further taken into consideration, as well as any relevant historical background and the regulatory context in which the particular rule is located. In this respect, according to article 8 of the Swiss Civil Code, the party alleging an analysis bears the burden of demonstrating the accuracy of it. It is not sufficient for it simply to make an assertion as to the relevant rules' derivation.
3. The eligibility of players to play in association teams is governed by Articles 15 to 18 of the Regulations Governing the Application of the FIFA Statutes (2009). Two general principles emerge from the Regulations. The first one is that a player can be selected for the representative teams of the association of the country of which he holds the nationality. Exceptions to this principle are found, under certain conditions, where a player, is entitled to represent more than one association on account of his *“shared nationality”* and where a player has acquired a new nationality and has not played international football. The second principle is that a player who has already been selected for the team of an association and participated in any match in an official competition may not thereafter switch to another association for which he would also be eligible unless he fulfils the requested prerequisites.

4. **A distinction must be drawn between a player having a “shared nationality” that is a single nationality that entitles a player to represent two or more associations (article 16 of the 2009 Application Regulations) and a player having a “dual nationality” or several nationalities who can choose to play for one or the other national association according to his passports. This situation is not governed by Article 16, but by the general principle set forth by Article 15 par. 1 of the Regulations. In this respect, a player having a dual nationality and fulfilling the objective requirements provided by Article 18 of the Regulations Governing the Application of the FIFA Statutes, since he never represented one of the national team for which he has the relevant nationality in an official competition at “A” International level, is eligible to play for another national team on account of the other nationality he has.**
5. **The regulations put in place by FIFA are binding and must be observed at all times by every member association. The compulsory nature of the FIFA regulations flows from the need for FIFA to be able to achieve its objectives as set out in the FIFA Statutes. As regards the issue of eligibility to play for representative teams, only Article 16 par. 2 of the 2009 Application Regulations authorises associations to come to an agreement in very limited circumstances.**

The Irish Football Association (IFA or the “Appellant”) is the governing body of football in Northern Ireland. It has its registered office in Belfast, Northern Ireland. It was founded in 1880 and is affiliated to the Fédération Internationale de Football Association since 1911.

The Football Association of Ireland (FAI or the “First Respondent”) is the governing body of football in the Republic of Ireland. It has its registered office in Dublin, Republic of Ireland. It was founded in 1921 and is affiliated to the Fédération Internationale de Football Association since 1923.

Mr Daniel Kearns (“Mr Kearns” or the “Second Respondent”) is a professional football player. He has both Irish and British nationality.

The Fédération Internationale de Football Association (FIFA or the “Third Respondent”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of international football at worldwide level. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players world-wide.

Mr Kearns was born on 26 August 1991 in Antrim, Northern Ireland. His parents were also born in Northern Ireland and held passports of the Republic of Ireland at the time of his birth.

It is undisputed that Mr Kearns has had dual British and Irish citizenship from birth.

Mr Kearns was selected in several international matches for the U-15 and U-16 schoolboy teams of Northern Ireland as well as for the Northern Ireland U-17 and U-19 teams. However, he has never played a match in an official competition at “A” international level for the IFA.

On 11 August 2009, Mr Kearns filed an application before FIFA for a change of association team, from the IFA to the FAI. On 2 November 2009, he confirmed to FIFA his request, acknowledging the fact that such a change would be irreversible.

On 3 November 2009 and in compliance with the applicable FIFA regulations, the FAI submitted a formal request to FIFA for Mr Kearns’ change of association team. It fulfilled all the administrative requirements at the latest by 21 December 2009.

On 4 February 2010, the Single Judge of the FIFA Players’ Status Committee (the “Single Judge”) accepted the request made by the FAI and by Mr Kearns for the change of association team.

In particular, the Single Judge dismissed the submission of the IFA that Mr Kearns was not eligible to play for the FAI because he did not fulfil any of the criteria contained in Article 16 of the Regulations governing the application of the 2009 FIFA Statutes (the “2009 Application Regulations”). The Single Judge found that said provision applied exclusively to players eligible to represent several associations on the basis of one single nationality. As Mr Kearns has both the British and Irish nationality, the Single Judge concluded that he did not need to comply with the requirements of Article 16 of the 2009 Application Regulations. Hence, in light of the fact that Mr Kearns a) has more than one nationality, b) had not played for the IFA in an official competition at “A” international level, c) had the Irish nationality at the time of his appearance in international matches in official competitions with the team of the IFA, the Single Judge concluded that only Article 18 of the 2009 Application Regulations had to be considered. In this regard, he reached the conclusion that Mr Kearns fulfilled the objective prerequisites of this provision.

As a result, the Single Judge decided the following:

- “1. *The request made by the Football Association of Ireland and the player Daniel Anthony Kearns for change of Association team is accepted.*
2. *The player Daniel Anthony Kearns is allowed to represent the national team of the Football Association of Ireland as from the notification of the present decision”.*

The IFA claims that it was notified of the decision issued by the Single Judge (the “Appealed Decision”) only on 12 February 2010.

On 2 March 2010, the IFA filed a statement of appeal with the Court of Arbitration for Sport (CAS) to challenge the above mentioned Appealed Decision. The Appellant named as respondents to the appeal FAI, Mr Kearns and FIFA (collectively the “Respondents”) and submitted the following request for relief:

- “4.1 *that the Decision be reversed and that the request of the Football Association of Ireland and Daniel Anthony Kearns for change of Association be refused;*

4.2 *that the player Daniel Anthony Kearns be not allowed to represent the national team of the Football Association of Ireland*".

The statement of appeal contained also an application for the stay of execution of the Appealed Decision. After an exchange of submissions, on 6 April 2010 such application was dismissed. The Order on the request for provisional and conservatory measures, with the reasons supporting it, was subsequently issued on 10 June 2010.

On 12 March 2010, the IFA filed its appeal brief, containing a statement of the facts and legal arguments accompanied by supporting documents. In support of its request to have the Appealed Decision set aside, the IFA specified three grounds of appeal: the first based on the application of Article 16 of the 2009 Application Regulations; the second referred to Article 17 of the 2009 Application Regulations and to the FIFA Circular Letter No. 901, dated 19 March 2004; the third alleging the failure of the Single Judge *"to consider the 1950 FIFA ruling and the subsequent accord between the IFA and FAI"*.

On 12 April 2010, the FAI filed an answer, with the following request for relief:

"Based on the foregoing submissions, the FAI respectfully requests the CAS to:

- *Reject the IFA's appeal,*
- *and -*
- *Order the IFA to pay the full costs of this arbitration,*
- *and -*
- *Order the IFA to pay a contribution of no less than CHF 25,000 towards the legal fees and other expenses incurred by the FAI in connection with this arbitration"*.

On 19 March 2010, Mr Kearns' counsels, Beauchamps Solicitors, sent a letter to the CAS Court Office stating that *"We see no reason why Mr. Kearns should be prevented from playing for the Republic of Ireland"*.

On 12 April 2010, FIFA filed an answer, with the following request for relief:

1. *In conclusion of all of the above, we respectfully request the CAS to reject the present appeal as to the substance and to confirm, in its entirety, the decision passed by the Single Judge of the Players' Status Committee on 4 February 2010.*
2. *Finally, we request the CAS to order the Appellant to cover all costs incurred with the present proceedings as well as the legal expenses of the third Respondent related to the present procedure"*.

A hearing was held on 19 July 2010 at the CAS premises in Lausanne. All the members of the Panel were present. The Parties did not raise any objection as to the constitution and composition of the Panel.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from Articles 62 ff. of the FIFA Statutes and Article R47 of the Code of Sport-related Arbitration (the “Code”).
2. It follows that the CAS has jurisdiction to decide on the present dispute.
3. Under Article R57 of the Code, the Panel has the full power to review the facts and the law.

Applicable Law

4. Article R58 of the CAS Code provides the following:
“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
5. Pursuant to Article 62 par. 2 of the FIFA Statutes, “[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.
6. As a result, subject to the primacy of applicable FIFA’s regulations, Swiss law shall apply complementarily.
7. Mr Kearns filed an application before FIFA for a change of association team, from the IFA to the FAI, after 2 August 2009, which is the date when the 2009 edition of the FIFA Statutes came into force. Consequently, the case is to be assessed according to the 2009 edition of the FIFA Statutes and the 2009 Application Regulations.

Admissibility

8. The IFA asserts that it received the Appealed Decision, dated 4 February 2010, only on 12 February 2010 and the FAI did not take issue with this assertion. The statement of appeal was filed on 2 March 2010 and therefore within 21 days of the IFA receiving notification of the Appealed Decision, consistently with the deadline set out in the FIFA statutes and the decision itself.
9. No further recourse against the Appealed Decisions is available to IFA within the structure of FIFA or the CFA.

10. Accordingly, the appeal was filed in due time and is admissible.

New Documents

11. On 1 and 16 July 2010, the IFA filed respectively a written statement of Mr Patrick Nelson, dated 1 July 2010, backed up by supporting documents, and a 30 pages long paper entitled "*Skeleton argument for the Appellant*" accompanied by three "*hearing bundles*" of various papers.
12. Pursuant to Article R44.1 par. 2, second sentence of the Code, "*after the exchange of the written submissions, the parties shall not be authorized to produce further written evidence, except by mutual agreement or if the Panel so permits on the basis of exceptional circumstances*".
13. In its appeal brief, the IFA described the content of the "*1950 FIFA Ruling*", but explained that it was not certain of the form it took, so was in the process of seeking a copy of the original ruling.
14. The Panel decided to admit into the file some documents, originally submitted as attachments to a written statement of Mr Patrick Nelson dated 1 July 2010. Such documents consisted of excerpts of the FAI's webpage, exchange of letters between the IFA, the FAI and/or FIFA, and minutes of meetings relating to the football situation in Ireland during the early and middle of the last century, because their production had been foreshadowed in the appeal brief, they constituted best evidence, their authenticity could not be doubted, and no unfairness would be caused to the respondents by their admission. The request to file all the other submissions and documents (Mr Patrick Nelson's statement itself, the "*Skeleton argument for the Appellant*" and the three bundles) was denied. While agreed bundles of documents (already annexed to pleadings or witness statements) in chronological (or other rational) sequence and skeleton arguments can be of considerable assistance to Courts or Tribunals if produced in advance of a hearing, their admission can only be entertained before a CAS Panel on the basis of the agreement of both parties and with the prior consent of the Panel itself.

Merits

15. The modern history of Ireland and its division into North and South has engendered, as is well known, acute political controversy, and aroused strong emotions on each side of the border and indeed elsewhere. The Panel, in its arbitral capacity, while aware of this, wishes to emphasise that it is seized only of the interpretation of the relevant legal instruments (which are universal in their ambit in the football world) and in its application of those instruments, so interpreted, to the facts of the instant case. It is concerned with the position of Mr Kearns and not with any wider implications which others may perceive to flow from its ruling in the context of football or otherwise.

16. FIFA as the records shows, has from time to time commendably sought to reconcile the competing ambitions of the IFA and FAI with the rules, but it is undisputed that the eligibility of players to play in association teams is currently governed by Articles 15 to 18 of the 2009 Application Regulations. In such respect, the IFA contends that Article 16 of the 2009 Application Regulations applies to Mr Kearns' specific situation, whereas the FAI and FIFA contend that only Articles 15 and 18 fall to be considered. More specifically, on the one hand, the IFA submits that Article 16 applies to cases of dual nationality cases; on the other hand, the FAI submits that Article 16 is only applicable to players with a "*shared nationality*", i.e. to those who are eligible to represent more than one association on account of a single nationality.
 17. As an alternative ground of appeal, the IFA submits that based on the "*1950 FIFA Ruling*" and the subsequent accord which arose between the two associations, the IFA and the FAI accepted to confine themselves to selecting players with a territorial connection to their respective areas of jurisdiction.
 18. In light of the above, the main issues to be resolved by the Panel, in order to verify whether Mr Kearns was entitled to a change of association under the 2009 Application Regulations, are the following:
 - What is the proper construction of the FIFA regulations regarding the eligibility of players to play in association teams?
 - Are the IFA and the FAI bound by a contract, the terms of which supersede any applicable provision of the 2009 Application Regulations?
- A. *What is the proper construction of the FIFA regulations regarding the eligibility of players to play in association teams?*
19. Chapter VII of the 2009 Application Regulations [*"Eligibility To Play For Representative Teams"*] contains the following four provisions:
 - "15 Principle**
 1. *Any person holding a permanent nationality that is not dependent on residence in a certain country is eligible to play for the representative teams of the Association of that country.*
 2. *With the exception of the conditions specified in Article 18 below, any Player who has already participated in a match (either in full or in part) in an official competition of any category or any type of football for one Association may not play an international match for a representative team of another Association.*
 - 16 Nationality entitling players to represent more than one Association**
 1. *A Player who, under the terms of art. 15, is eligible to represent more than one Association on account of his nationality, may play in an international match for one of these Associations only if, in addition to having the relevant nationality, he fulfils at least one of the following conditions:*
 - (a) *He was born on the territory of the relevant Association;*

- (b) *His biological mother or biological father was born on the territory of the relevant Association;*
 - (c) *His grandmother or grandfather was born on the territory of the relevant Association;*
 - (d) *He has lived continuously on the territory of the relevant Association for at least two years.*
2. *Regardless of par. 1 above, Associations sharing a common nationality may make an agreement under which item (d) of par. 1 of this Article is deleted completely or amended to specify a longer time limit. Such agreements shall be lodged with and approved by the Executive Committee.*

17 Acquisition of a new nationality

Any Player who refers to art. 15 par. 1 to assume a new nationality and who has not played international football in accordance with art. 15 par. 2 shall be eligible to play for the new representative team only if he fulfils one of the following conditions:

- (a) *He was born on the territory of the relevant Association;*
- (b) *His biological mother or biological father was born on the territory of the relevant Association;*
- (c) *His grandmother or grandfather was born on the territory of the relevant Association;*
- (d) *He has lived continuously for at least five years after reaching the age of 18 on the territory of the relevant Association.*

18 Change of Association

1. *If a Player has more than one nationality, or if a Player acquires a new nationality, or if a Player is eligible to play for several representative teams due to nationality, he may, only once, request to change the Association for which he is eligible to play international matches to the Association of another country of which he holds nationality, subject to the following conditions:*
- (a) *He has not played a match (either in full or in part) in an official competition at “A” international level for his current Association, and at the time of his first full or partial appearance in an international match in an official competition for his current Association, he already had the nationality of the representative team for which he wishes to play.*
 - (b) *He is not permitted to play for his new Association in any competition in which he has already played for his previous Association.*
2. *If a Player who has been fielded by his Association in an international match in accordance with art. 15 par. 2 permanently loses the nationality of that country without his consent or against his will due to a decision by a government authority, he may request permission to play for another Association whose nationality he already has or has acquired.*
3. *Any Player who has the right to change Associations in accordance with par. 1 and 2 above shall submit a written, substantiated request to the FIFA general secretariat. The Players’ Status Committee shall decide on the request. The procedure will be in accordance with the Rules Governing the Procedures of the Players’ Status Committee and the Dispute Resolution Chamber. Once the Player has filed his request, he is not eligible to play for any representative team until his request has been processed”.*
20. The interpretation of the statutes and rules of a sport association has to be rather objective and always to start with the wording of the rule, which falls to be interpreted. The adjudicating body – in this instance the Panel – will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the

association which drafted the rule, and such body may also take account of any relevant historical background which illuminates its derivation, as well as the entirely regulatory context in which the particular rule is located (CAS 2008/A/1673, para. 33; CAS 2009/A/1810; CAS 2009/A/1811, para. 73; see also ATF 87 II 95 consid. 3; ATF 114 II 193, consid. 5.a; Decision of the Swiss Federal Court of 3 May 2005, 7B.10/2005, consid. 2.3; Decision of the Swiss Federal Court of 25 February 2003, consid. 3.2; and ZEN-RUFFINEN P., *Droit du Sport*, 2002, p. 63, par. 168).

21. As its first ground of appeal, the IFA contends that the historical element is decisive in the construction of the modern FIFA regulations applicable to the present case. It contends in particular that the Articles 15 to 18 of the 2009 Application Regulations were developed in response to the particular situation of IFA-FAI. According to the IFA, an interpretation taking due account of the regulatory prehistory will inevitably lead to the conclusion that, under the applicable regulations in their contemporary form, the FAI is not authorized to select for its representative teams players born in Northern Ireland and with no connection to the territory of the Republic of Ireland by residence, by birth, by parental or grandparental birth.
22. The Panel notes that the IFA bears the burden of demonstrating the accuracy of its analysis (Article 8 of the Swiss Civil Code, ATF 123 III 60 consid. 3a, ATF 130 III 417 consid. 3.1). It is not sufficient for it simply to make an assertion as to the relevant rules' derivation. Hence the Panel has had to consider with care the historical record to which it now turns.
 - a) The historical interpretation
 - aa) The 1940s and 1950s
23. The dispute between the IFA (founded in 1880) and the FAI (founded in 1921) as to which players could be selected for which international teams has a considerable ancestry; and complaints of poaching have been made at different times by each association. It is, in the Panels view, not necessary for the purpose of the appeal, to consider in detail any period before the end of the Second World War.
24. On 7 October 1946, because at that time the IFA were selecting players born anywhere in Ireland for its international teams, the FAI requested FIFA to confirm that *“players born within the area of [FAI’s] jurisdiction [were] not eligible for selection for International purposes by any Association other than the Football Association of Ireland”*.
25. On 18 October 1946, the General Secretary of the FIFA, Mr Shriker, answered as follows:

“Art. 21 al. 2 of the Regulations of the F.I.F.A. (...) reads as follows: “The players (NB. of International Matches) must be selected by the National Associations concerned and be subjects of the country they represent”.

This rule is binding on the British Associations since they have rejoined the F.I.F.A, and, in the future players born in the area of your jurisdiction will not be authorised to play in International match for the Irish F.A.”

26. The IFA did not accept that Mr Shriccker's approach applied to matches against the other British associations, which, at the time, were not governed by the FIFA regulations. The issue was raised on several occasions before FIFA, which initially deemed that it was not in a position to interfere in the matter, but later accepted to intercede when the IFA brought to its attention the fact that the FAI was putting pressure on players from within its jurisdiction to sign an undertaking not to play for the IFA.
27. On 17 April 1951, the General Secretary of the FIFA wrote the following letter to the IFA:
"The Executive Committee of the F.I.F.A. considered the complaint made by your Association against the F.A. of Ireland at its meeting in Madrid, and have directed us to confirm that the Football Association of Ireland would act contrary to the F.I.F.A. regulations if they imposed conditions or restrictions before a player was transferred to another association in membership with the F.I.F.A., if his transfer documents were otherwise completely in order.
On the other hand, the Executive Committee consider it inadmissible to select players, being citizens of Eire, for the representative teams of a country other than Eire. An exception from this rule is only allowable in respect of the international matches between the four British Associations if those countries agree and the F.A. of Ireland do not object, but not for matches played in Jules Rimet Cup".
28. The IFA submits that the effect of this letter was to extend the "ruling" of 18 October 1946 to matches between the British associations.
29. The Panel reminds itself that the purpose of historical interpretation is to consider the historical conditions in, from and because of which the current legal text originated. It requires ascertainment of not only the genesis of but also the entire development underlying the text so as to ascertain how it obtained its final linguistic expression and to enable useful comparison to be made of the present with any previous rules regulating the same legal matter. It is as a result of such a comprehensive exercise that the historical interpretation can assist in establishing the meaning of a legal text (ATF 133 III 257, consid. 2.4 and 2.5.2). In the present appeal, however, the IFA limited its presentation of the historical facts to the events surrounding the FIFA letter dated 17 April 1951. It gave no consideration, and provided no exposition to the Panel, of how the situation has evolved since the 1950's and, in particular, how the FIFA regulations have developed between the 1950 and the 2010. This is particularly important as this period of time was marked by significant political changes in Ireland and elsewhere.
30. What the IFA calls the "1950 FIFA ruling" is no more than an exchange of letters between the FAI, the IFA and/or then the General Secretary of the FIFA. The FAI has not been able to demonstrate that (or how) such letters have the force of law or that (or how) they have a binding effect on the rights and duties of the member associations of the FIFA. Furthermore, the General Secretary of the FIFA took his position on particular issues that were brought to its attention; but the exact nature of those issues is unclear, notably whether they were linked to matters of citizenship or nationality. The FAI for its part contends that the status of Irish citizens living in Northern Ireland has never been discussed and that the FAI has never accepted that Irish citizens could not be selected for its team, whether they were living in

Northern Ireland or elsewhere. Moreover, as appears from his letter, the FIFA General Secretary based his position on “*Art. 21 al. 2 of the Regulations of the F.I.F.A.*” which stated that the players must be “*subjects of the country they represent*”. Such a wording does not on its face exclude the possibility that a player may be selected on the basis of his citizenship alone and without any other connection to the country he represents.

31. In light of all the above considerations, the Panel is of the opinion that the “*1950 FIFA Ruling*” does not provide any helpful guideline as regards to the interpretation of the Articles 15 to 18 of the 2009 Application Regulations. The most recent developments, discussed below, are inconsistent with the “*1950 FIFA Ruling*” having any residual influence on the shape of the modern regulations and give the lie to the contention of the IFA that players’ eligibility to play for IFA or FAI has always been determined by the sole application of the territorial connection test, regardless of the citizenship.

32. For instance, the minutes of the meeting of the FIFA Players’ Status Committee, held in Zurich on 17 May 1994, read as follows:

“*3. REGULATIONS GOVERNING THE STATUS AND TRANSFER OF PLAYERS*”

In this connection, two points were raised from the national associations of Belgium and Northern Ireland: (...)

b) Irish Football Association (Northern Ireland)

The Committee considered this association’s statement that almost any player can obtain a Republic of Ireland passport in order to secure eligibility to play for this country.

The Committee discussed this very serious matter at length and had to come to the unfortunate conclusion that FIFA cannot interfere with the decisions taken by any country in the question of granting passports.

The only way that the national associations could prevent their nationals from being systematically granted passports by another country to enable them to play for its national teams would be to field them in an official match for one of their national representative teams, which would bind them to this particular association”.

ab) Since 2004

33. Between 2004 and 2009, the eligibility to play for association teams was governed by one Article (Article 15 of the Regulations Governing the Application of the 2004 Statutes) (the “*2004 Application Regulations*”), which contains the following provisions:

Par. 1: “*Any person holding the nationality of a country is eligible to play for the representative teams of the Association of that country. The Executive Committee shall decide on the conditions of eligibility for any Player who has not played international football in accordance with par. 2 below, and either acquires a new nationality or is eligible to play for the teams of more than one Association due to his nationality*”.

Par. 2: sets the principle that a player who has been fielded by an association in an international match is barred from playing for another association.

Par. 3: defines the conditions under which a player who has more than one nationality, or who acquires a new nationality or who “*is eligible to play for several Associations’ teams due to nationality*” can request to change the association for which he “*is eligible to play international matches to the Association of another country of which he holds nationality*”. Those conditions were the following ones:

- “(a) *He has not played a match (either in full or in part) at “A” international level for his current Association, and if at the time of his first full or partial appearance in an international match in an official competition for his current Association, he already had the nationality of the Association’s team for which he wishes to play.*
- “(b) *He is not permitted to play for his new Association in any competition in which he has already played for his previous Association. A player may exercise this right only once*”.

Par. 4: deals with the situation where the player loses his nationality without his consent or against his will.

Par. 5: describes the procedure to be complied with by the player in order to file his request for a change of association.

34. In its Circular Letter No. 901, dated 19 March 2004, the FIFA explained to its member associations that the above provision appeared not to be operating satisfactorily as some players and associations tried to exploit to their advantage the apparent latitude of its first paragraph. In particular it was reported that a number of Brazilian players intended to assume the Qatari nationality in order to be eligible to play for the Qatari association. In this context, the FIFA informed its member associations of the following:

“The first sentence of Article 15 par. 1 (...) means that if a player has never played for a national team, he may assume another nationality and play for the national team of the new country, irrespective of his age. However, this basic provision does not expressly provide for players being able to play without any impediment, for another national team for no obvious reason. If a player changes his nationality or if he accepts another nationality simply in order to be able to play for new national team, he is clearly breaching Article 2(e) of the FIFA statutes (...)

(...) on 16 March 2004, the FIFA Emergency Committee ruled as follows:

1. *Any player who refers to the first sentence of Article 15, paragraph 1 (...) to assume a new nationality shall only be eligible to play for the new national team if he fulfils one of the following conditions:*
 - a) *the player was born on the territory of the relevant Association;*
 - b) *his biological mother or biological father was born on the territory of the relevant Association;*
 - c) *his grandmother or grandfather was born on the territory of the relevant Association;*
 - d) *he has lived continuously for at least two years on the territory of the relevant Association.*
2. *The decision outlined in point 1 above enters into force immediately (...)*”.

35. On 1 July 2005, the Regulations for the Status and Transfer of Players (edition 2005) came into force. Annexe 2 [“*Eligibility To Play For Association Teams For Players Whose Nationality Entitles Them To Represent More Than One Association*”] provides as follows:

Article 1 Conditions

1. *A player who, under the terms of Art. 15 of the Regulations Governing the Application of the FIFA Statutes, is eligible to represent more than one Association on account of his nationality, may play in an international match for one of these Associations only if, in addition to having the relevant nationality, he fulfils at least one of the following conditions:*
[same conditions as those mentioned in the FIFA Circular Letter No. 901, dated 19 March 2004]
 2. *Notwithstanding par. 1 of this Article, Associations sharing a common nationality may make an agreement under which item d) of par. 1 of this Article is deleted completely or amended to specify a longer time limit. Such agreements must be lodged with and approved by FIFA.*
36. The FIFA Commentary on the Regulations of the Status and Transfer of Players confirms that the said Annexe 2 applies to players with “shared nationality”, i.e. to players “who [have] a nationality that entitles [them] to represent more than one association” (see FIFA Commentary, ad. Annexe 2, page 98).
37. As to the particular position of the British associations, the FIFA Commentary provides as follows (*ibidem*):
1. *There is a specific agreement, stipulating the conditions to play for a national team, for the four British associations. Besides having British nationality, the player needs to fulfil at least one of the following conditions*
 - a) *he was born on the territory of the relevant association;*
 - b) *his biological mother or father was born on the territory of the relevant association;*
 - c) *his grandmother or grandfather was born on the territory of the relevant association.*
 2. *If a player has a British passport, but no territorial relationship as provided for in conditions a-c above, he can choose for which of the British associations he wants to play.*
[Footnote] e.g. a player who was born on the Cayman Islands and holds British nationality can choose to play for any of the four British associations if called up by a British association.
38. In this context, the following exchange of correspondence took place between FIFA, the IFA and the FAI:
- On 19 January 2007, the IFA formally complained before FIFA of the alleged poaching by the FAI of Northern Irish players.
 - On 7 March 2007, FIFA informed the FAI of the complaint made by the IFA and stated as follows: “As the FIFA Legal Committee understands it, the situation in Northern Ireland is such that all Northern Irish footballers could opt to play for your association teams, given that they have a birthright to an Irish passport. Evidently, the same is not applicable to the footballers of the Republic of Ireland, who do not have such a claim to a UK passport. This means that the [IFA] is exposed to a one-way situation, where players can choose to play for your association teams but the vice-versa is not possible. This circumstance is rather unique and the FIFA Statutes and regulations do not provide for a solution”.

In view of this finding, the FIFA Legal Committee invited the FAI voluntarily to confine itself to selecting for its association teams Northern Irish players who meet one of the following requirements: a) the player was born in the Republic of Ireland, b) his biological mother or father was born in the Republic of Ireland, c) his grandmother or grandfather was born in the Republic of Ireland, or d) he has lived continuously, for at least two years, in the Republic of Ireland.

In this context and in order to underline its point, FIFA drew attention to Annexe 2 of the Regulations of the Status and Transfer of Players (applicable to players who hold a nationality that enables them to represent more than one association) and its Circular Letter No. 901, dated 19 March 2004 (applicable to players who obtain a new nationality). FIFA noted that in both cases additional conditions were imposed on the players to demonstrate a connection between them and the country or association for which they are playing.

However, in its letter, FIFA emphasised the fact that the above proposal was only a recommendation, not based on regulatory considerations but on self-imposed restrictions, which *“would not only be appropriate to ensure that the players joining [FAI’s] association teams are actually linked, in a closer manner with the Republic of Ireland, but that this would put an end to all accusations of ‘poaching’ of players raised by the [IFA]”*.

- On 5 November 2007, FIFA informed the IFA that the FAI did not accept its proposal of 7 March 2007. FIFA also came to the conclusion that the applicable regulations did not provide for avoidance of the *“one-way situation”* described in its letter dated 7 March 2007. Hence and in order to find an amicable solution to the Irish eligibility issue, the FIFA Legal Committee made a *“new proposal”* and invited the IFA as well as the FAI to express its position on the following *“suggested approach”*: *“(…) every player born on the territory of Northern Ireland, holding the UK nationality and being entitled to a passport of the Republic of Ireland or born on the territory of the Republic of Ireland and holding the Irish nationality could either play for the [FAI] or the [IFA], under the condition that all other relevant prerequisites pertaining to player’s eligibility for a specific Association team are fulfilled”*.
- On 8 November 2007, the IFA expressed its disagreement with the proposal of the FIFA Legal Committee, which was however accepted by the FAI on 20 November 2007.
- On 28 December 2007, the FIFA wrote to the IFA and the FAI the following:

“(…) on the occasion of its recent meeting held on 15 December 2007 in Tokyo, Japan, the FIFA Executive Committee deliberated on the abovementioned issue in order to pass a decision with respect to the eligibility of players to play for the respective Association teams of the two Irish Associations.

In this respect, the FIFA Executive Committee first and foremost acknowledged that both proposals for an amicable settlement of the issue at stake submitted to the two Associations concerned by FIFA on behalf of its Legal Committee were not accepted either by one or the other of your Associations.

On account of the above, as well as having thoroughly considered the existing applicable provisions of the regulations of FIFA, the FIFA Executive Committee was of the opinion that the current regulatory framework is sufficient to properly cover also the situation at hand. As a consequence, it does not appear to be appropriate to make any changes to the existing regulations, in particular not to art. 15 of the

Regulations Governing the Application of the FIFA Statutes. The Executive Committee therefore concluded to adhere to the status quo”.

ac) The Panel’s Position

39. It appears that, in the years 2004-2009, the eligibility to play for association teams was conclusively governed by the then-applicable Article 15 of the 2004 Application Regulations. According to this provision, the right to represent a country was exclusively determined by the nationality of the player. The cases of players with more than one nationality, or who acquired a new nationality, or who were eligible to play for several associations’ teams due to nationality, were to be decided by the FIFA Executive Committee. At that time, the applicable regulations did not require any territorial connection for eligibility for international representation.
40. This regime proved to be inadequate as associations could easily circumvent it by naturalising talented foreigner players in order to allow them to be selected for their national teams, resulting in unfair competition between associations in respect of international matches. The attempt of Qatar to naturalise Brazilian players in 2004 prompted a reaction from the FIFA Emergency Committee, which decided that a player, who acquires a new nationality without having a clear connection to the country involved, is not entitled to play for the national team of this country. The FIFA member associations were notified of this decision by means of the FIFA Circular Letter No. 901, dated 19 March 2004.
41. In 2005, the situation of players “*whose nationality entitles them to represent more than one association*” was expressly dealt with by annexe 2 of the Regulations for the Status and Transfer of Players (edition 2005). According to this document, players with multi-eligibility due to one single nationality were required to have a territorial connection in order to establish a genuine link between them and the country concerned.
42. To sum up, the following is the chronological order of the amendments to the regulations covering the eligibility of the players for international matches, to be deployed in aid of the historical interpretation of the current rules:
 - In the beginning of 2004, Article 15 of the then-applicable 2004 Application Regulations was the only provision dealing with the matter of eligibility of players to be selected for representative teams of member associations. According to this provision, eligibility was dependent on the legal nationality of the player.
 - On 19 March 2004, the above Article 15 was amended by the FIFA Circular Letter No. 901, which governed the situation of players acquiring a new nationality.
 - On 1 July 2005, the Regulations for the Status and Transfer of Players (edition 2005) came into force and their Annexe 2 completed the then-applicable Article 15 with regard to players with multiple eligibilities because of their “*shared nationality*”.

43. It appears that all the above amendments were incorporated in Articles 15 to 18 of the 2009 Application Regulations.
44. The exchange of letters between FIFA, the IFA and/or the FAI happened in 2007, i.e. long after the last amendment to the original Article 15. In other words, there is no basis for a claim that the particular IFA/FAI situation inspired the form of the modern rules. On the contrary, the examination of the correspondence quite clearly reveals that: FIFA applied to the IFA/FAI conflict its then-applicable regulations, which resulted however in an unfair “*one-way situation*” Players born in Northern Ireland have a right by birth to an Irish and British passport which entitles them to be selected for the representative teams of the IFA as well as of the FAI, whereas, in contrast, players born in the Republic of Ireland do not have such dual-nationality from birth and, as a consequence, are confined to playing for the association teams of the FAI. Under such circumstances, the FIFA Legal Committee made two proposals, respectively on 7 March and 5 November 2007, which were both rejected. Those proposals were not binding upon any party and FIFA did not commit itself to adapt its regulations to the specific IFA/FAI situation. Once it was clear that the two associations declined FIFA’s offer to resolve the situation through a specific and unique agreement, FIFA came to the conclusion that “*the current regulatory framework is sufficient to properly cover also the situation at hand. As a consequence, it does not appear to be appropriate to make any changes to the existing regulations, in particular not to art. 15 of the Regulations Governing the Application of the FIFA Statutes*”.
45. It results from the foregoing that there is no basis for concluding that FIFA has drafted its current regulations, in particular Article 16, as a way of responding to the Irish issues of players’ eligibility. Contrary to the IFA’s allegation, nothing suggests that the struggle for players between the IFA and the FAI influenced the FIFA Congress when it voted the amendments to the FIFA’s statutes and regulations.
 - b) The proper construction of the FIFA Regulations regarding the eligibility of players to play in association teams
46. Two general principles emerge from Article 15 of the 2009 Application Regulations:
 - The first one is that a player can be selected for the representative teams of the association of the country of which he holds the nationality. The nationality must be permanent and not dependent upon residence in the country concerned (Article 15 par. 1). Exceptions to this principle are found in Articles 16 and 17.
 - The second principle is that a player who has already been selected for the team of an association and participated in any match (either in full or in part) in an official competition may not thereafter switch to another association for which he would also be eligible (Article 15 par. 2). However, if the player satisfies the conditions specified in Article 18, he can make on a single occasion only a request for change of association.

ba) Article 16

47. This provision governs the situation where a player, under the terms of Article 15 par. 1, is entitled to represent more than one association “*on account of his nationality*”. Under such circumstances, the player must meet one of the four territorial connections set out in the said provision.
48. Whether the player’s multiple eligibilities are based on one single nationality and/or on two or more nationalities is disputed. The IFA submits that Article 16 is applicable to any player who is entitled to play for several associations on the basis of multiple nationalities whereas the FAI submits that it is only applicable to a player who is entitled to play for several associations on the basis of a “*shared nationality*”, i.e. a single nationality that entitles him to represent two or more associations.
49. Based on the historical interpretation, it appears that the current Article 16 implements Annexe 2 of the Regulations for the Status and Transfer of Players (edition 2005). Both provisions have a quasi-identical wording. The title of Annexe 2 (“*Eligibility to play for association teams for players whose nationality entitles them to represent more than one association*”) as well as the FIFA Commentary compel the conclusion that Article 16 covers exclusively the situations of players with “*shared nationality*”.
50. The fact that Article 16 applies only to players with “*shared nationality*” is also confirmed by its wording as well as by the systematic interpretation:
 - The term of nationality is used in the singular form in the title as well as in the par. 1 of the provision, according to which “*A Player who (...) is eligible to represent more than one Association on account of his nationality*”. The IFA contends that the use of the singular form is acceptable English and does include individuals with more than one nationality. The Panel observes that such would not be the case in French or German. In this regard, the French version (“*sa nationalité autorise à représenter plus d’une association*”) and the German version of the 2009 Regulations (“*Ein Spieler, der gemäß Art. 15 aufgrund seiner Staatsbürgerschaft für mehr als einen Verband spielberechtigt ist*”) also use the term “nationality” in the singular form.
 - Par. 2 of Article 16 expressly states that associations “*sharing a common nationality*” may make an agreement “*to vary item (d) of para 1 of the Article*”.
 - As already noted, Article 18 provides exceptions to the second principle set out in Article 15. Its first paragraph begins with the following three sentences: “*If a Player has more than one nationality, or if a Player acquires a new nationality, or if a Player is eligible to play for several representative teams due to nationality*”. In other words, Article 18 identifies the various categories of individuals who are allowed to change associations notwithstanding the Article 15 par. 2. In such a context, it is obvious that the first sentence deals with players who have dual (or more) nationality, i.e. are in a situation falling within Article 15, the third sentence with players who fall under Article 16 and the second sentence with players who fall under Article 17. If the IFA analysis were correct, it would follow that the first and third sentences would deal with the exactly same situation, which

would inconsistent with any intelligible intention to be attributed to the rule-maker. The FAI analysis by contrast endows the Articles with a certain symmetry.

51. For all the above reasons, the Panel concludes that Article 16 of the 2009 Application Regulations is only applicable to players with a “*shared nationality*”. Whatever force the IFA’s submissions might have, if based exclusively on the complex language of the relevant provisions and an assumption that they were designed with the Irish situation specifically in mind, they must yield to an interpretation which recognizes both their historic origins and the wider issues they were designed to address.
52. In the case at hand, Mr Kearns has a dual nationality. He can choose to play for the IFA given his British passport and for the FAI given his Irish passport, without any added territorial connection. He would not have such an option if he held either British or the Irish nationality but not both. Under such circumstances, the Appellant cannot reasonably claim that Mr Kearns’ situation is to be equated with shared nationality as provided under Article 16 or that he requests a changed of association from a starting point of a shared nationality. His situation, with respect to his Irish nationality, is not governed by Article 16, but by the general principle set forth by Article 15 par. 1 of the said Regulations. No further connection (as described by Article 16) has to exist between Mr Kearns and the Republic of Ireland to make him eligible to play for the FAI’s representative team.
53. The Panel noted that IFA also advanced an alternative argument that Mr Kearns had shared nationality because, as an Irish national (irrespective of his British nationality), he could play for either IFA or FAI and Mr Hunter asserted that it had always been the case that the IFA could select Irish nationals with a territorial connection to Northern Ireland. The absence of Irish nationality from the commentary on Annexe 2 is, he submitted, inconclusive. It was apparent to the Panel that the factual basis for the assertion was controversial and disputed by the FAI’s counsel. Since neither the factual nor legal basis for this argument was sufficiently established, the Panel is in no position to find in its favour.

bb) Article 17

54. According to this provision and as an exception to Article 15 par. 1, a player must also meet one of the four territorial connections set out in Article 17 if he acquires a new nationality.
55. As accepted at the hearing by the IFA, the exception to the general principle provided under Article 17 is not engaged in the present matter: Mr Kearns was born an Irish citizen. His claimed eligibility to play for the representative team of the FAI is therefore not the result of the acquisition of a new nationality. There is thus no reason to give any further consideration to this provision. Save to observe that its origins lie in the FIFA Circular Letter No. 901, dated 19 March 2004 which is exclusively related to the change of nationality. Therefore, contrary to its submissions, IFA cannot find any assistance in this circular to support its argument that players with dual citizenship fall under Article 16 and must have a territorial connection with the association of the concerned representative team.

bc) Article 18

56. By way of exception to the general principle set out in Article 15 par. 2, Article 18 authorizes players to operate a switch from one association for which they are eligible under Articles 15 to 17 to another association. It provides that a player with dual (or more) nationality (*"If a Player has more than one nationality"* – Article 15 par. 1) or with *"shared nationality"* (*"or if a Player is eligible to play for several representative teams due to nationality"* – Article 16), or players who *"acquires a new nationality"* (Article 17), may change association on only one occasion subject to the three following requirements:
- *"He has not played a match (either in full or in part) in an official competition at "A" international level for his current Association"*.
 - *"... at the time of his first full or partial appearance in an international match in an official competition for his current Association, he already had the nationality of the representative team for which he wishes to play"*.
 - *"He is not permitted to play for his new Association in any competition in which he has already played for his previous Association"*.
57. It is undisputed that Mr Kearns fulfils the above prerequisites and must therefore be recognized to enjoy the right to a change of association, from the IFA to the FAI.
- B. *Are the IFA and the FAI bound by a contract, the terms of which supersede any applicable provision of the 2009 Application Regulations?*
58. The 2009 Statutes and the 2009 Application Regulations were adopted at the Congress in Nassau on 3 June 2009 and came into force on 2 August 2009. The Congress is the supreme and legislative body (Article 21 of the 2009 Statutes) responsible for amending the Statutes and the regulations governing their application (Article 26 par. 1 of the 2009 statutes). FIFA member associations have to comply fully with the Statutes, regulations, directives and decisions of FIFA bodies at any time as well as with the decisions of the Court of Arbitration for Sport (CAS) passed on appeal on the basis of Article 62 par. 1 of the FIFA Statutes (Article 13 par. 1 lit. a of the 2009 FIFA Statutes).
59. In other words, FIFA provides global rules which must be universally applied and which were not designed for the purpose of a single situation. The regulations put in place by FIFA are binding and must be observed at all times by every member association. The compulsory nature of the FIFA regulations flows from the need for FIFA to be able to achieve its objectives as set out in Article 2 lit. e of the FIFA Statutes. As regards the issue of eligibility to play for representative teams, only Article 16 par. 2 of the 2009 Application Regulations authorises associations to come to an agreement in very limited circumstances. In any event, such an agreement must *"be lodged with and approved by the Executive Committee"*.

60. In the case at hand, the Panel observes at the outset primarily that the IFA has not claimed to have contested the decision of the Congress regarding the adoption of the current FIFA Statutes and of Articles 15 to 18 of the 2009 Application Regulations.
61. The IFA claims that based on the “1950 FIFA Ruling”, the IFA and the FAI accepted to confine themselves to selecting players with a territorial connection to their respective area of jurisdiction. According to the IFA by “poaching” Mr Kearns, the FAI breached a contract implied by conduct. IFA contends that as a matter of fact during the last 60 years there was a harmonious relationship between the two associations, each of which accepted that it should select players exclusively on the basis of a territorial connection and applied this approach without any variation to hundreds, if not thousands, of players.
62. In contrast to non-binding rules of conduct such as gentlemen’s agreements, contracts forming a binding agreement require the mutual agreement of the parties. Such agreement may be either express or implied (Article 1 of the Swiss Code of Obligations). There is an implied agreement only when the behaviour of the party alleged to have agreed is consistent only with its having done so. In general, a passive behaviour cannot be held to amount to an agreement to be bound by a contract (ATF 123 III 53, 59). In other words, silence does *not* imply consent (DESSEMONTET F., in Commentaire Romand, Code des Obligations I, Bâle 2003, p. 14, ad Art. 1, N. 32).
63. For all the reasons already noted, the IFA cannot plausibly argue that Article 16 was drafted in response to the IFA/FAI situation or that this provision should be construed to give effect to the convention between the IFA and the FAI. Moreover, the alleged contract has never been submitted to the FIFA Executive Committee for approval. Finally, the existence of a “*contract implied by conduct*” is denied by the FAI, which disputes that it has ever discussed the status of Irish citizens living in Northern Ireland or accepted that Irish citizens could not be selected for its teams, whether living in Northern Ireland or elsewhere. The contrary has not, in the Panel’s view, been established by the IFA. In any event the IFA’s evidence fell short of establishing the binding nature of the alleged agreement or the legal/regulatory basis which would allow it to supersede Articles 15 to 18 of the 2009 Application Regulations.
64. In any event, the alleged tacit agreement may not be used to defeat the claim of Mr Kearns, who was of course not a party to any such agreement and who, in any event, is entitled to exercise his rights as provided under Article 15 and 18 of the 2009 Application Regulations.

Conclusion

65. Based on the above, the Panel finds that the Appealed Decision must be upheld in its entirety, without any modification. This conclusion makes it unnecessary for the Panel to consider the other requests submitted by the parties. Accordingly, all other prayers for relief are rejected.

The Court of Arbitration for Sport rules

1. The appeal filed by the Irish Football Association against the decision issued by the Single Judge of the Players' Status Committee of FIFA on 4 February 2010 is rejected.
2. The decision issued by the Single Judge of the Players' Status Committee of FIFA on 4 February 2010 is confirmed.
- (...)
5. All other motions or prayers for relief are dismissed.