

Crossing the bridge from 'mind sport' to 'real sport'

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Commercial analysis: James Pheasant, senior associate at Burges Salmon, explains the significance of the latest High Court ruling dealing with the thorny issue of whether bridge should be defined as a sport.

Original news

R (on the application of English Bridge Union Ltd) v English Sports Council (Secretary of State for Culture, Media and Sport intervening) [2015] EWHC 2875 (Admin), [2015] All ER (D) 115 (Oct)

The claimant English Bridge Union (EBU) sought judicial review of the defendant English Sports Council's adoption of a definition of 'sport', which incorporated physical activity. The Administrative Court, in dismissing the application, held that the defendant's adoption of the definition of 'sport' had been in line with both a proper interpretation of section 3 of the Physical Training and Recreation Act 1937 (PTRA 1937), and a proper construction of the objects and powers contained within its Royal Charter.

What was the recent High Court case about?

There are the legal aspects and then the financial considerations which were behind the EBU's challenge.

On the legal side, the case involved a challenge to the legality of Sport England's decision not to recognise bridge as a sport. As a public body, Sport England's decisions are open to judicial review by the courts where it is claimed that it has acted unlawfully in reaching its decision.

The key issue was whether Sport England had acted unlawfully in adopting a definition of sport for the purposes of its recognition policy which necessitated an element of physical activity, the effect of which was to exclude 'mind sports' like bridge.

There were two key elements to the EBU's case, both of which concerned matters of interpretation. The first ground was that Sport England had misconstrued the phrase 'sport and physical recreation' within the objects in its Royal Charter so as to include only physical activity. The second was that it had misconstrued the phrase 'physical training and recreation' contained in PTRA 1937, which Sport England had regard to in exercising its functions, again wrongly to require an element of physical activity.

On both counts, the court found in favour of Sport England's approach to interpretation with a requirement for physical activity being an integral part of its Royal Charter and PTRA 1937. The adoption of the definition used by Sport England was therefore lawful and the EBU's application for judicial review was dismissed.

Driving the claim behind the scenes was access to the pot of public and lottery funding available from Sport England for the sports that it recognises. There is also the potential for tax exemptions available to activities which HMRC classes as sports. At present, HMRC does not recognise bridge as a sport and it collects 20% VAT on competition entry fees. Bridge players in France, Holland, Belgium, Ireland or Poland are all exempt from such tax, however, as bridge has received sporting status in those jurisdictions.

Should bridge be recognised as a sport?

As the court observed, the answer here depends very much on the context and the particular objectives of the organisation that is being asked to recognise it as such.

Certainly, there are a number of jurisdictions and bodies which take into account the wider and arguably more nebulous health benefits that sport can promote such as mental well-being, that do recognise bridge as a sport. These include the International Olympic Committee and the umbrella organisation for international sports federations, Sport Accord. Indeed, Sport Accord specifically incorporates mental activity within its definition and recognises four other 'mind sports' as well as bridge.

However, in the context of Sport England's objectives, which are focused firmly on fostering, supporting and encouraging the development of 'sport and physical recreation', it is hard to see how bridge can ever demonstrate the necessary degree of physical activity. While some have pointed to the involvement of a degree of physical activity when dealing, shuffling and playing cards, it is clear that, unlike sports even at the lower end of the physical scale such as darts and snooker, the physical elements do not determine the outcome of the game.

What impact did bridge's recognition (or non-recognition) as sport by other bodies have on this debate?

While the fact of other bodies' recognition of bridge informs the wider debate and serves to highlight other important benefits of sport which may warrant recognition, in the context of the EBU's challenge, it was almost completely irrelevant. Indeed, the court specifically observed that the fact that other bodies, applying their own 'distinctive approaches and definitions' had recognised bridge as a sport had 'very limited relevance' to the issues it had to determine (see para [51]).

As the court also observed (see para [5]), the answer to whether or not bridge is a sport depended upon the particular definition adopted by the organisation in question. To put it another way, there is no one single correct answer to the question of whether bridge should be recognised as a sport--it all depends upon the context in which the question is being asked.

In this instance, the court's role was to review the legality of an interpretation, not to create new policy objectives. The question was therefore whether the decision not to recognise Bridge as a sport, based on a requirement for physical activity, was correct in the context of Sport England's fundamental aims, objectives and underlying legislation. It was not a matter of determining whether it is right to impose a need for physical activity in principle, just whether it was correct in this case.

Does the decision mean that the legal definition of 'sport' will now be restricted?

The effect of the decision was essentially to uphold the status quo in terms of Sport England's existing approach to determining recognition. In this sense, the legal definition of sport, in the context of Sport England's decisions, is neither more restricted nor wider than it was previously.

In reaching its decision, however, the court did confirm its view that the passage of time and changing social context has done nothing to alter the focus on the requirement for physical activity which is at the heart of the underlying legislative provisions in PTR 1937. The scope for challenges by other 'mind sports' to future Sport England recognition decisions based on the physical activity requirement would therefore appear limited.

As regards the wider context, as highlighted above, there is no universally recognised legal definition of sport and a range of potentially conflicting approaches are apparent in the recognition decisions of sports (and other) bodies across the world. These are all unaffected by the court's decision to uphold Sport England's approach.

What other potential ramifications might the decision have?

This may not yet be the end, as it is understood that the EBU may be considering appealing the decision.

While the court's decision does not directly affect other sports recognised by Sport England, it is possible that the physical activity requirement will receive even greater scrutiny in future recognition decisions. This may involve particular focus being paid to the degree of physical exertion involved in the sport and how integral that activity is to the outcome.

One of the key themes to emerge from the case has been the role of sport as a promoter of general health, of which mental well-being has justifiably been recognised as a key element. As the court made clear, while the policy in question was clear on the need to promote physical activity, there may also be good reasons for public policies to promote mental activity and agility. Whether this helps create a platform for 'mind games' and other non-physically based activities to push for support and public funding, in recognition of the contributions they make, remains to be seen.

Interviewed by Alex Heshmaty.

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