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Whose Rules are we playing by?

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ABSTRACT

This intervention examines the recent case of Flaherty v National Greyhound Racing Club [2005] EWCA Civ 1117 and the ongoing debates over the public law versus private law nature of sports governing bodies' decision making processes. In particular, it

focuses on the economic impact of such decisions and the different approaches to sporting self-regulation of the European and UK courts.

KEYWORDS

Judicial Review - Sports' Regulation - Governing Bodies - Fairness - Article 6 - Self-regulation

INTRODUCTION

Most sports regulators would like to think that they are unaffected by the laws and principles that apply to public authorities. Their potential exposure to such a challenge has recently come into focus again in *Flaherty*, where the Court of Appeal suggested that sporting bodies should be given as free a hand as possible to run their own disciplinary processes. The idea that the regulation of sport should be kept out of the Courts is a pervasive one, clearly articulated in the familiar case of *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1 WLR 909.

Can the sports regulators therefore relax and, subject to ensuring that their processes are essentially 'fair' as discussed in *McInnes v Onslow Fane* [1978] 1 WLR 1520, be satisfied that the Courts will not want to interfere with their procedures? For a number of reasons we suggest not, but perhaps it is worth trying to analyse the areas where the Courts may still feel it necessary and proper to intervene. Can lines be drawn between the differing functions of sports' regulators to ascertain when the Courts may have jurisdiction? Three possible approaches are to look at the public/non public functions, the regulation of economic activities, and the disciplinary functions which may affect the right of an individual to earn a living undertaking their sport.

PUBLIC FUNCTIONS?

Flaherty involved the administration of a banned substance to a greyhound. This was in breach of the rules of racing which by which the greyhound owner was bound under his contract as a member of the NGRC. A similar issue arose in the case of *R (on the application of Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197, where the High Court decided that decisions made by the Appeal Board of the Jockey Club were not amenable to judicial review. Again the case related to breaches of the rules of a sporting club; the trainer's horse had been disqualified from a race after morphine was found in a sample of the horse's urine. Both judgments made it clear that the Court's approach was that the 'rules of the game' were contractual matters between clubs and their members and not issues with which the Courts should interfere.

In *Mullins*, in an attempt to persuade the Court that the decision was amenable to judicial review, the applicant argued that sport now occupies a more substantial place in our society and that the decisions of sports regulators are now of greater importance than was the case in 1993 when the *Aga Khan* case was decided. There was an attempt to demonstrate that the functions being exercised by the Jockey Club's Appeal Board were 'functions of a public nature'. However the argument was not entirely new. In the *Aga Khan* case it was acknowledged that sports' regulators exercise powers which affect the public, and are exercised in the interests of the public. The Master of the Rolls even accepted that if certain sports' regulators did not exist the government would probably be driven to create public bodies to undertake these functions. Even so it was decided then and more recently in *Mullins*, that these points, in this particular type of case, did not make the Club's functions 'public'.

The concept of hybrid organisations, organisations which are private but are on occasion exercising public functions, has been a matter of much judicial consideration particularly since the enactment of the Human Rights Act 1988. In *Parochial Church Council Of Aston Cantlow & Wilmcote With Billesley, Warwickshire v Wallbank* [2003] UKHL 37, the court reviewed the parameters which define when a non-governmental

organisation may be deemed to be exercising a public function. While some commentators may seek to assure sports' regulators that they are not carrying out any public functions, others will caution that the factors outlined by Lord Nicholls, including whether the relevant function is publicly funded or is providing a public service, may well catch some of the regulators' functions. At the moment what seems to be saving much of a sporting regulator's work from being caught within the definition is that the work undertaken by them is not usurping the role of government. Over time perhaps the way in which certain functions are viewed may change.

The door has certainly not been shut entirely on the idea that the exercise of some of the regulators functions might be 'public' and be capable of being challenged in the Courts. As an obiter comment in another Jockey Club case, *R v Jockey Club ex parte RAM Racecourse Limited* [1993] 2 All ER 225, Simon Brown J indicated that 'certain cases' might find a natural home in judicial review proceedings, for example review might be possible where the issue was quasi-licensing, rather than the allocation of races as it was in the particular case. What seems to be clear from the recent cases is that when administering the rules of the game the judiciary will be extremely reluctant to be drawn in. 6

ECONOMIC FUNCTIONS?

However in other areas the Courts, especially the European Courts, have not shown any reticence in becoming involved in sporting issues. The well-known case which resulted in football's 'Bosman Ruling', *Union Royal Belge Des Societes De Football Association Asbl & Ors V Jean-Marc Bosman & Ors* [1996] ECJ 15/12/1996, demonstrated that when the rules of sports' regulators relate to economic activity (and not to matters, rules or events which are of an exclusively sporting nature) the Courts are prepared to intervene. In that case the European Court of Justice ruled that European law precluded the application of rules laid down by sporting associations under which professional sportsmen and women could not transfer to a club of another Member State unless the latter club had paid to the former club a transfer, training or development fee. 7

There have since been a number of attempts to draw the courts into cases with an economic aspect but they have been slow to become involved. In particular a series of doping related cases in tennis, athletics and swimming amongst others, have been the focus of challenges. The aggrieved athletes, seeking the involvement of the Court, have argued that bans (after doping offences) are economic in nature and the European laws relating to freedom of economic activity should apply. 8

In *Wilander and Novacek v Tobin and Jude* [1997] 2 CMLR 346, the International Tennis Federation's rules were found to be valid and not to amount to restraint of trade and for contravening the provisions of Art.59 of the EC Treaty. The relevant rule was found to be proportionate with ample protection for players in the position of the plaintiffs. Woolf MR went on to indicate at paragraph 28 that, 'the courts must be really vigilant in preventing the courts' procedures being used unjustifiably to render perfectly sensible and fair procedures inoperable.' 9

Lightman J also gave the judgment in the athletics case of *Paul Michael Edwards v The British Athletic Federation and The International Amateur Athletic Federation* [1998] 2 CMLR 363, unreported, who sought to overturn a four-year doping ban as being disproportionate. The judge indicated that the critical question was whether the drug control provisions of the IAAF Rules, and in particular those relating to sanctions, constituted an exclusively sporting rule. He concluded that 10

The rules merely regulated the sporting conduct of participants in athletics; they were designed to ban cheating in the form of drug-taking and thus secure a level playing field for all. The imposition of penalties was essential for the effectiveness of the rules, and whilst the imposition of the sanction may have serious economic consequences on the person who had broken the rules, this was a mere incidental and inevitable by-product of the rule against cheating.

In *Meca-Medina and Majcen v European Commission* [2004] CFI 30/9/04, the role of the International Olympic Commission was considered when the applicants (professional swimmers) argued that certain anti-doping practices of the IOC were contrary to EC competition law. The applicants objected in particular to the fact that, in connection with the detection of nandrolone the IOC continued to apply a maximum level which had been found to lack scientific merit. The European Court of Justice, Court of First Instance, held that the prohibition of doping was based on purely sporting considerations and therefore had nothing to do with any economic considerations and accordingly did not come within the Treaty provisions. The Court made it clear that provided that the rules remained limited to this proper objection (safeguarding the spirit of fair play) they would not cease to be purely sporting rules notwithstanding that the sanctions (lengthy participation bans) for particular athletes found guilty would undoubtedly affect their economic freedoms. 11

A CIVIL RIGHT TO PLAY SPORT?

If rules of the field or sport represent one extreme in which the Courts will not interfere, and the purely economic transfer of players is at the other extreme, where on the scale might we find those cases which affect a player's right to earn a living? Particularly those cases which, unlike *Meca-Medina*, arise from misconduct of a player who has breached a rule which might not be purely a rule of the game. 12

Whilst most sports regulators might confidently look at the Rules of Conduct or similar texts and feel satisfied that a very large proportion of their rules do relate to 'safeguarding the spirit of fair play' not all of the rules may fall into this category. Many sports now have provisions which relate to bringing the sport into disrepute. High profile cases have hit the press in recent years relating to the disciplinary action against athletes whose misdemeanours off the pitch have brought them to the attention of the regulators. Many regulators now have child protection codes, a breach of which can be viewed as a most serious matter; similarly criminal matters off the pitch can be brought to the attention of the regulator 13

In such cases a player may face losing their right to earn a living through a suspension or ban. Could this be another category of case where the Courts might feel there was a justification in interference? Many regulated professions have recognised that the right of an individual to have membership of a regulated profession is a 'civil right' protected by Article 6 of the European Convention of Human Rights, as in *Albert and Le Compte v Belgium* (1983) 5 EHRR 533 and *Fleurose v Securities and Futures Authority* [2002] EWCA Civ 2015. What would it mean for sports regulators if this principle extended to sports professionals? Article 6 secures an individual a right to a fair hearing within a reasonable time before an independent and impartial tribunal. If these rights were not met by a regulator's procedures perhaps the Courts would be prepared to interfere – quashing decisions that had taken 'too long' to determine and imposing their own judgments where the independence of the tribunal was considered not to be independent. 14

Could this be the chink left open by Simon Brown J in the *Aga Khan* case? Could this be the area where the Courts finally determine that the sports regulators are exercising public functions? If this right is granted to so many of our twenty-first century non-sporting professionals why should it not also be available to highly paid and well-regarded sports professionals? After all it is an area ripe for contention given the earning potential of those at the very top echelons of their sport. Why should a top sportsman have less protection in law against unfair disciplinary proceedings than a doctor or accountant? 15

One inevitable by-product is that the 'one size fits all' approach to regulation may no longer be viable; what happens at grass roots levels or for amateur members of the sport may not be appropriate at the top levels of the game. For those who face losing their right to earn a living more rigorous standards will need to apply. 16

WHOSE RULES THEREFORE APPLY? – A CONCLUSION

If the regulators want to keep smiling confidently from outside the Courtrooms of the UK and Europe there are perhaps three guiding principles: 17

1. Rules of the Game – it would seem these are sacrosanct save for the comments made in passing in several of the cases that the processes should be 'fair'. To ensure a fair process for investigations and disciplinary hearings processes should ensure, as a minimum, the opportunity for:

- hearing from all sides
- independence and impartiality from the adjudicators
- reasoned decisions and,
- arguably a degree of transparency.

2. Disciplinary Rules for issues not directly relating to rules of the game may need to be 'Article 6' compliant. However the positive note is that many of the principles of fairness and natural justice, which should be applied in any event, are the same as the Article 6 requirements.

3. Where sports regulation seeks to deal with purely economic functions it should be aware that it could be offending some of the fundamental principles of European law.

By observing these principles, sports regulators can for the most part enjoy the benefits of true 'self-regulation'. As long as they continue to strive to operate a robust system which delivers a fair disciplinary process, their fortunate position free from the interference of the courts should remain for some years to come. 18

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