Biography

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Drugs in Sport

Abstract: In this article Peter Charlish addresses the controversial issue of the use of performance enhancing drugs in sport. He looks at the legal basis for regulation via the World Anti-Doping Code and the nature of a sports participant's relationship with their governing body and the anti-doping organisations. He explains in the context of proportionality, the measures designed to combat doping in sport; the importance to the Code of the central principle of strict liability. Also, he highlights the use of non-analytical positives as a further method of detection of doping violations, whilst taking consideration of the impact of these measures on the human rights of participants.
Keywords: sports law; drug abuse

INTRODUCTION

Peter Charlish

The Olympic Games in London in 2012 will be the 30th of the modern era. One of the major and on-going news stories surrounding the Games will undoubtedly be that of the use of performance enhancing drugs. These, we are told, will be the most tested Olympic Games ever, for this has been the story of the Olympic Games through time – a progressively increasing number of tests at each successive summer and winter Olympic Games, the most recent numbers being a total of 4770 tests at Beijing in 2008, (with 20 failures, including six horses), and 2149 tests at Vancouver in 2010, with three positives reported (although these figures do not include figures relating to the biological passport).[1]

The use of performance enhancing drugs is nothing new. Evidence suggests that the Ancient Greeks used crude combinations of different potions in an attempt to fortify themselves.[2] Abuse of substances gathered pace in the modern era, with the first reported case occurring as far back as 1904, with the American Thomas Hicks using a combination of substances including strychnine and brandy to help him to victory in the marathon.[3] In the 1920s and 1930s, international sports governing bodies began to recognise the threats posed by performance enhancing drugs and began to ban particular substances, although, without any form of tests, these restrictions remained ineffective.[4] A wake up call occurred at the 1960 Olympic Games in Rome, when Danish cyclist Knud Jensen crashed and died. A subsequent autopsy revealed traces of amphetamines in his system.[5]

Progress in the fight against doping in sport began to gather pace with the Union Cycliste Internationale (UCI) and Federation Internationale de Football Association,

(FIFA) both introducing tests in their respective World Championships in 1966.[6] The death of former world champion cyclist, Tommy Simpson, near the summit of Mount Ventoux in the 1967 Tour de France provided impetus for further developments.[7] These developments came in the shape of compulsory tests for amphetamines at the 1968 Winter and Summer Olympics at Grenoble and Mexico City respectively.[8]

The 1970s and 1980s saw the emergence of evidence of widespread and often systematic doping, even going as far as a national conspiracy with state plan 14–25, which was enacted in the former East Germany in the 1970s with the intention of achieving Olympic sporting success through a large scale doping programme of young, usually female, athletes and swimmers, in particular.[9] The landmark moment in 1988, when Ben Johnson, the Canadian sprinter, was stripped of his Olympic 100m title in Seoul, provided some evidence of success in the fight against the use of anabolic steroids. However, the dopers were finding other, perhaps more sophisticated ways of cheating, as emphasis switched to manipulation of haematological parameters through blood doping and the ingestion of substances such as EPO. The tipping point in this phase of the fight came in 1998 with the Festina scandal in the Tour de France.[10] Festina were the world's leading cycling team and due to the scandal, were expelled from the Tour de France. What this scandal highlighted was the need for a global approach to the problem of drugs in sport and, as WADA explain:

> The IOC[11] took the initiative and convened the First World Conference on Doping in Sport in Lausanne in February 1999. Following the proposal of the Conference, the World Anti-Doping Agency (WADA) was established on November 10, 1999.[12]

With WADA ultimately came the World Anti-Doping Code (WADC), the first edition of which arrived in 2003. This was the first attempt to harmonise the approach to combatting doping in sport across different sports and nations. By the Athens Summer Olympics in 2004, all International Federations had adopted the Code,[13] with funding being provided for the organisation by a mixture of IOC and matched governmental funding.[14] In 2005, the International Convention Against Doping in Sport was unanimously adopted by UNESCO's general conference. This is now the third most ratified of all UNESCO conventions and covers 168 states and 96% of the world's population.[15] 2005 also saw the launch of the Anti-Doping Administration and Management System (ADAMS), which aids, amongst other things the management of the athlete's whereabouts system.[16] 2008 brought the signing of a memorandum of understanding with Interpol, and then in 2009 the revised Code and International Standards came into force. Consultation is on-going over the next edition of the Code and this is due to take effect in January 2015.

This paper will move on to look at the relationship between an athlete[17] and their governing body, examining the legal basis for doping control and specifically the role of WADA and the WADC in the regulation of anti-doping policy.[18] The fundamental principle upon which the Code is built, that of *strict liability*, will be examined in particular in relation to the question of the proportionality of the sanctioning and monitoring measures contained within the Code, and also the compatibility of that fundamental principle with the human rights of the athletes it affects. The paper will conclude with a brief overview of some issues currently testing the application of the Code.

THE LEGAL BASIS OF REGULATION

An athlete's relationship with their governing body is a contractual one. This has very clear implications for the provision of regulations, the sanctioning, and any remedies that an athlete may either be subject to, or have the opportunity to pursue. The nature of this relationship has been examined in several cases, most notably perhaps in *Korda v ITF Ltd*,[19] where Petr Korda, the Czech tennis player, was seeking to challenge the right of his governing body to appeal an anti-doping sanction imposed upon him in the Court of Arbitration for Sport (CAS). The basis of his challenge was that there was no contractual relationship between them and therefore they had no right to appeal the sanctioning decision to the CAS. As is common with many situations involving sports participants, there was no formal written contract between the parties. However, the Court was happy to infer the existence of a contract due to issues such as Korda's previous acquiescence with the initial appeal hearing and the anti-doping procedures of the International Tennis Federation.[20] Lightman J., concluded:

> I have no doubt that such a contractual relationship has been established. There is no written agreement signed by the parties and there is no oral agreement either. Such an agreement is however plainly to be inferred.[21]

It is therefore clear from *Korda* that the relationship between a sports participant and their governing body is a contractual one and that, further, enforcement of anti-doping control from the WADA, to the International Governing Bodies (IGBs), the National Anti-Doping Organisations, (NADOs), and the National Governing Bodies (NGBs), is based on this contractual relationship.

One of the most important aspects of worldwide anti-doping policy is its predication upon the principle of *strict liability*. The WADC explains:

> Under the strict liability principle an athlete is responsible and an anti-doping rule violation occurs, whenever a Prohibited Substance is found in an Athlete's Sample. The violation occurs whether or not the Athlete intentionally or

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> unintentionally used a Prohibited Substance or was negligent or otherwise at fault.[22]

The application of the principle of *strict liability* is a contentious feature of the Code. However, it has found favour in the English High Court, where it was examined in *Gasser v Stinson*,[23] 1988. In this particular case, Swiss athlete, Sandra Gasser, failed a drugs test and alleged that the application of *strict liability* meant that she was unable to prove her innocence. She challenged the International Amateur Athletic Federation (IAAF) anti-doping rules as being an unreasonable restraint of trade. In affirming the legality of the IGB rules, the High Court drew attention to the public policy reasons central to the fight against doping in sport and further emphasised that the reasonableness or otherwise of the provisions must be measured in the context of maintaining a drug free sport.[24] Similarly, the CAS has also recognised the clarity and utility of the principle, commenting;

> It appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently.[25] Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations – particularly those run on modest budgets – in their fight against doping.…For these reasons, the Panel would as a matter of principle be prepared to apply a strict liability test. The Panel is aware that arguments have been raised that a strict liability standard is unreasonable, and indeed contrary to natural justice, because it does not permit the accused to establish moral innocence. It has even been argued that it is an excessive restraint of trade. The Panel is unconvinced by such objections and considers that in principle the high objectives and practical necessities of the fight against doping amply justify the application of a strict liability standard.[26]

Alongside legal approval, there has also been a moral dimension underlying support of the provision, reinforcing the public policy reasons cited approvingly by the High Court and the CAS, with double Olympic gold medallist Sebastian Coe[27] commenting:

> "…The rule of *strict liability* — under which athletes have to be solely and legally responsible for what they consume — must remain supreme, … we cannot, without binding reason and cause, move one millimetre from *strict liability* — if we do, the battle to save sport is lost".[28]

Whilst *strict liability* is a test that evidently provides clarity, certainty, and perhaps above all else, a cost economy, over conventional burdens of proof, it is also the case that there are very clear ethical concerns over the exceptionally harsh effects it can sometimes have, where participants may face very harsh sanctions despite exhibiting no fault or no attempt to improve performance in their positive test.[29] It is without doubt a principle which means that an athlete confronted with a doping charge following a positive test is facing an uphill task in any attempt to prove their innocence.

The conduct of the procedure of testing contains assumptions which further stack the deck against individual athletes. The WADC makes clear:

> WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories.[30]

With such a harsh potential impact, it is therefore entirely in keeping with the principles of proportionality[31] that the effects may be mitigated by provisions in the Code relating to *exceptional circumstances*. Under Article 10.5 of the Code, an athlete may reduce the length of their sanction, or even eliminate it, for testing positive for a *prohibited substance* if they can demonstrate either that they bore no fault or negligence,[32] or no significant fault or negligence[33] for the positive test. Understandably, the requirements for athletes to overcome these burdens are high and it has been made clear that *exceptional circumstances* should only succeed where the circumstances are truly exceptional.[34] In the first instance, the athlete must demonstrate *on the balance of probabilities* how the substance entered their system. If they cannot demonstrate this at that stage, then the case is lost.[35] If the athlete, however, is able to overcome this initial hurdle, then they must go on to demonstrate to the *comfortable satisfaction* of the Panel qualification under articles 10.5.1,[36] or 10.5.2,[37] if they are to gain a reduction or elimination in sanction for their positive test.

In addition to the provisions relating to *Prohibited Substances*, the WADC also contains similar measures aimed at alleviating the harsh effects which *strict liability* may bring with regards to *Specified Substances*. These substances are ones which may be more readily associated with non-doping explanations and hence the test required to reduce a sanction, is perhaps a more forgiving one. The WADA comment:

> A specified substance is a substance which allows, under defined conditions, for a greater reduction of a two-year sanction when an athlete tests positive for that particular substance. The purpose is to recognize that it is possible for a substance to enter an athlete's body inadvertently, and therefore allow a tribunal more flexibility when making a sanctioning decision. Specified substances are not necessarily

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> less serious agents for the purpose of doping than other prohibited substances, and nor do they relieve athletes of the strict liability rule that makes them responsible for all substances that enter his or her body. However, there is a greater likelihood that these substances could be susceptible to a credible non-doping explanation, as outlined in section 10.4 of the World Anti-Doping Code. This greater likelihood is simply not credible for certain substances – such as steroids and human growth hormone – and this is why these are not classified as specified.[38]

To recognise the difficulties which may be associated with such *specified substances*, the WADC therefore allows for particular provision where a positive test results from these substances. Article 10.4 of the Code,[39] makes clear that, where an athlete can demonstrate how the substance got into their system, and further that there was no attempt to improve performance (or mask the use of other substances), to the *comfortable satisfaction* of the hearing panel, then the period of ineligibility imposed following the failure may be reduced or even eliminated.

NON-ANALYTICAL POSITIVES

The reach of the Code and anti-doping measures extend beyond the apparent simplicity offered by a failed test. The provision of what are termed *non-analytical positives*[40] have performed an important role in breaking some of what may be viewed as perhaps more high-tech attempts to cheat through the provision, of performance enhancing drugs. A *non-analytical positive* occurs where an athlete is found guilty of doping despite not failing a test. This measure proved highly significant in helping to unravel the Bay Area Laboratory Cooperative (BALCO)[41] conspiracy. At the heart of the battle to break BALCO lay the question of the appropriate burden of proof to apply in attempting to prove the doping violation. Key in the analysis of the applicable burden of proof was the case involving sprinter Michelle Collins.[42] With no failed test evident, it would therefore be down to the United States Anti-Doping Agency (USADA), to demonstrate that Collins had indeed been abusing performance enhancing drugs. Prior to March 1st 2004 the relevant rules of the International Governing Body,[43] required proof *beyond reasonable doubt*. The change, however altered this to the, "comfortable satisfaction of the relevant hearing body bearing in mind the seriousness of the allegation which is made".[44] The justification for the change in the IAAF rules was essentially two-fold as explained;

> The comfortable satisfaction standard was adopted by the WADA Code in 2003[45] before the IAAF adopted it in 2004. This standard had previously been used by various CAS panels. It derives from court decisions in Australia and other Commonwealth countries that created a standard for cases involving personal reputation more stringent than balance of the probabilities but less burdensome than beyond a reasonable doubt.[46]

The WADC explains;

> …The standard of proof shall be whether the Anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt …[47]

That this approach has been approved by the Swiss Federal Tribunal (SFT),[48] has some significance, as explained;

> The view of the Arbitral Tribunal that the [r]espondent must prove a doping [offense] "to the comfortable satisfaction of the hearing panel" does not violate public policy but refers to the allocation of the burden of proof and the standard of evidence which, in the area of application of private law — even where disciplinary measures of private sporting [organizations] are under review — cannot be determined from the perspective of criminal law concepts such as the presumption of innocence or the principles of "in dubio pro reo" or on the basis of the guarantees which result from the ECHR. Even with respect to her [defense] that the standard of evidence on which the decision was based leads to disregard of the principle of proportionality, the [a]ppellant does not point out a violation of public policy.[49]

A key issue must be as to the appropriateness of applying this particular standard in assessing issues which may have a grave effect on the future wellbeing of athletes. It is unsurprising, therefore, that the adoption of this *comfortable satisfaction* standard has not been without criticism.[50] Dawer argues vehemently that such a standard is inherently unfair to the athletes and that a more appropriate approach would be an application of the criminal burden of proof, asserting that;

> The ambiguity of this evidentiary standard threatens athletes' due process rights. In an ordinary criminal proceeding, the defendant receives specific due process protections, including a fair and full trial and discovery. Chief among these protections is the establishment of a clear evidentiary burden for the prosecutor: guilt must be proven beyond a reasonable doubt in order to convict.[51]

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In drawing attention to the similarities between the anti-doping control system and elements of the criminal justice system, Straubel highlights the concerns and dangers in denying athletes basic due process rights,[52] concluding persuasively;

> As a criminal system, an athlete should be afforded the protections of the criminal process. The burden of proof should always rest with the sports governing body. The athlete should be given a full and fair hearing, including full discovery, before being punished. And the punishment should fit the crime. If athletes are not afforded the protections of the criminal system, the stability, legitimacy, and effectiveness of the doping control process will always be in jeopardy. If the system wrongfully punishes or harshly treats athletes it will lose the support of those it governs, perhaps lose the support of the ticket buying public. …The best way to eliminate drugs is to build a thorough testing system that is fair and operates with a high level of integrity.[53]

The recent developments in the realms of cooperation between anti-doping organisations and law enforcement agencies[54] have perhaps pushed the issue of the appropriate burden of proof and release of information further up the agenda, as action to investigate anti-doping violations moves further away from a purely sporting endeavour and the margins of a criminal investigation, as opposed to a purely sporting one, become further blurred. One has to ask whether it remains defensible to maintain a position whereby the standard of proof utilised[55] to demonstrate guilt is acknowledged to be more appropriate for matters of professional reputation, when the resources utilised to pursue athletes suspected of committing doping violations now engage with organisations at the very heart of serious international criminal investigations.

In addition to facing the near impossible task of proving their innocence in the face of a positive test for a prohibited substance, an athlete also faces the prospect of suspension from all competition in advance of any hearing designed to prove or disprove their guilt. Article 7.5 of the WADC details "Principles Applicable to Provisional Suspensions",[56] with article 7.5.1 specifying;

> … when an A Sample[57] Adverse Analytical Finding is received for a Prohibited Substance, other than a Specified Substance, a Provisional Suspension shall be imposed promptly after the review and notification described in Articles 7.1 and 7.2..[58]

The implications of this of course means that an athlete may be deprived of their chance to earn their living in advance of a full hearing designed to establish guilt or innocence (in a procedure which is further slanted in favour of the anti-doping organisation). Furthermore, at this stage, once interested parties have been informed of the adverse analytical finding, under article 14.2 relating to *Public Disclosure;*

> The identity of any Athlete or other Person who is asserted by an Anti-Doping Organization to have committed an anti-doping rule violation, may be publicly disclosed by the Anti-Doping Organization with results management responsibility only after notice has been provided to the Athlete or other Person in accordance with Articles 7.2, 7.3 or 7.4, and to the applicable Anti-Doping Organizations in accordance with Article 14.1.2..[59]

What we may then left be with is an athlete who has not been conclusively found guilty but who *may* be either provisionally suspended from earning their living, and/or publically named, (and shamed?). Left with the prospect of public disclosure, or perhaps worse, a possible leaking of their details, an athlete may feel they have little option other than to try and take a modicum of control of the situation and reveal their own name as someone who has failed a test.[60]

Perhaps in an effort to soothe the concerns that many may have of imposing a *standard* seemingly ill at ease with the overtly criminal nature of the anti-doping investigative and prosecution process, it has been suggested that an approach utilising the standard of *comfortable satisfaction* does enough to at worst pay lip service to traditional burdens of proof in criminal matters, and at best is sufficiently closely related to the standard of *beyond reasonable doubt* as to render concerns redundant. In *United States Anti-Doping Agency, (USADA), v Gaines*,[61] the CAS addressed concerns about the appropriate burden of proof, stressing;

> As often becomes evident when the question of standard of proof is debated, the debate looms larger in theory than practice. …In all cases the degree of probability must be commensurate with and proportionate to those allegations; the more serious the allegation the higher the degree of probability, or "comfort", required. That is because, in general, the more serious the allegation the less likely it is that the alleged event occurred and, hence, the stronger the evidence required before the occurrence of the event is demonstrated to be more probable than not.[62]

Quite obviously, as acknowledged by the Panel, a guilty verdict in an anti-doping hearing can have extremely serious consequences, for an athlete, and with these very serious circumstances would therefore come the necessity to demonstrate a very clear notion of guilt before any Panel would be *comfortably satisfied.* Therefore, the reality was, that on many occasions, there would be little practical

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difference between the application of the two seemingly competing standards, the panel concluding;

> From this perspective, and in view of the nature and gravity of the allegations at issue in these proceedings, there is no practical distinction between the standards of proof advocated by USADA and the Respondents. It makes little, if indeed any, difference whether a "beyond reasonable doubt" or "comfortable satisfaction" standard is applied to determine the claims against the Respondents.[63]

One, of course may ask the question that, if it is tantamount to *beyond reasonable doubt*, then why not name it as such, and leave the question unanswered about those violations that are perhaps considered less serious and therefore the circumstances that are necessarily applied are less akin to a standard of *beyond reasonable doubt*.

PROPORTIONALITY AND HUMAN RIGHTS[64]

What is clear, is that any sanctions to be applied to athletes who fall foul of the anti-doping system, must be a *proportionate* response to the perceived threat. One must therefore question two aspects of this dichotomy. First, the nature of the threat perceived by doping, and second, what has been the sanction applied and could any other less stringent measure have achieved the same effect?

The threat perceived by doping is the compromising of ethical and moral considerations central to notions of fair play within sport. These issues have been addressed directly by the WADC and explicitly defined as encompassing what has been termed, "the spirit of sport". The fundamental rationale of the Code is described thus;

> Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as "the spirit of sport", it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is characterized by the following values: ethics, fair play and honesty; health; excellence in performance; character and education; fun and joy; teamwork; dedication and commitment; respect for rules and laws; respect for self and other Participants; courage; community and solidarity.[65]

The WADA promote educational programmes and reference to the philosophy and rationale behind these is contained within Article 18 of the Code;[66]

> The basic principle for information and education programs for doping-free sport is to preserve the spirit of sport, as described in the Introduction to the Code, from being undermined by doping. …The programs should promote the spirit of sport in order to establish an environment that is strongly conducive to doping-free sport and will have a positive and long-term influence on the choices made by Athletes and other Persons.[67]

This, then, is the threat posed by the exploitation of drugs in sport, and in order to address this threat, the world's IGBs have signed up to the harmonisation of rules designed to combat those who may be tempted to the shortcuts promised by prohibited substances. That this global harmonisation is a central aim of the anti-doping system suggests therefore that the degree of flexibility or room to manoeuvre so as to permit the specific circumstances of the individual case to be taken into account, should be limited and therefore it will be extremely difficult to discern a disproportionate response where the sanctions imposed are stated clearly within the Code. Opinion from the SFT has suggested that it is perfectly within keeping with the principle of proportionality, that anti-doping rules may severely restrict the breadth of circumstances which may be taken into consideration when assessing the severity of sanctions which might be imposed upon any given individual.[68] As long as the restriction on the rights of individual is not excessive, then they will not be deemed to be unlawful;

> The mechanism of fixed sanctions according to the WADC is incorporated into the ISR Doping Regulations, At least in the opinion of the Swiss Federal Tribunal, sports bodies can limit in their rules the circumstances to be taken into account when fixing sanctions and thereby also restrict the application of the doctrine of proportionality. However, in the opinion of the Swiss Federal Tribunal, the sport associations exceed their autonomy if these rules constitute an attack on personal rights, the nature and scope of which is extremely serious and totally disproportionate to the behaviour penalised. In the Sole Arbitrator's opinion, this threshold has not been exceeded in the present case. The Sole Arbitrator holds that a two years period of ineligibility is not out of proportion, excessive or disproportional.[69]

The acceptance of the generic harmonised approach to anti-doping sanctions has been identified beyond traditional sports dispute resolution mechanisms. The English High Court in *Gasser v Stinson* emphasised that a two year ban for a doping violation was not an unlawful restraint of trade,[70] and such an approach has also been approved within the context of the Netherlands Civil Code;

> This opinion is not contrary to the standard as set out in section 2:8 of the Netherlands Civil Code. This provision implies that a judging body is not allowed to apply a rule when the result of the application of that rule will be unacceptable. As

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> said above, the application of the mandatory rule of a two years suspension is not unacceptable according to standards of reasonableness and fairness in the given circumstances.[71]

The wide-scale adoption of a two year ban for a first doping offence can be traced back to a case which came before a German District Court in Munich. In this particular case, the sprinter Katrin Krabbe submitted a urine sample that contained traces of chlenbuterol, a performance enhancing substance.[72] Krabbe was initially suspended for one year by the German Athletic Federation (the substance was not at the time on any banned list). This ban was subsequently extended to three years by the IAAF Council, despite Krabbe not having the opportunity to be heard before the sanction was imposed. Krabbe then sued before the District Court of Munich. The most significant issue from this case was the confirmation that a suspension of three years for a first doping offence would be unlikely to withstand scrutiny by national courts. Therefore, we saw the emergence of the two year sanction, with the Court in *Krabbe* holding that a two year ban, "represents the highest threshold admissible under the fundamental rights and democratic principles",[73] and that a three year ban for a first doping offence was both inappropriate and disproportionate.[74] The implications of this decision reverberated around the sporting world and resulted in the default imposition of a two year ban for a first doping offence. Rigozzi et al conclude;

> The reason for choosing this period of ineligibility[75] can be traced back to the *Krabbe* case, in which the Munich courts held that a suspension exceeding two years must be considered to be disproportionate. Following this decision, almost every sports governing body reduced the length of its suspension for a first offence to two years. This sanction for a first offence subsequently withstood scrutiny by several national courts and CAS Panels.[76]

The restriction imposed upon athletes (that of a ban from all competition), has been seen to be a proportionate and reasonable response to the threat to sport posed by the spread of doping practices. Rouiller explains;

> a measure that restricts fundamental rights[77] is admissible only if it is suited to the achievement of the public interest objective sought (suitability or appropriateness), if no less intrusive measure is capable of achieving such a result (necessity) and if, in practical terms, the measure does not go beyond what is required for this purpose (proportionality as such).[78]

The key issue when fixing sanctions is that they do not unfairly restrict these fundamental rights in a disproportionate manner. Fixed sanctions are a necessary part of the push to harmonise the global approach to the legal regulation of doping in sport, and this being the case, it makes the imposition of these fixed punishments both more palatable and justifiable. Whilst acknowledging that doping sanctions must comply with the principle of proportionality, the CAS acknowledge that due to the threats posed by doping and the aims behind global sanctions, it is reasonable to restrict the application of the principle. The CAS comment;

> As a general rule when determining the period of ineligibility the Respondent must observe the principle of proportionality. However, it is open to question which facts, if any, must be taken into consideration. …The WADC and the FIS-Rules, which follow it considerably restrict the application of the principle proportionality. …The athlete's age, the question of whether taking the prohibited substance had a performance-enhancing effect or the peculiarities of the particular type of sport are not – according to the WADC – matters to be weighed when determining the period of ineligibility. To be sure, the purpose of introducing the WADC was to harmonise at the time a plethora of doping sanctions to the greatest extent possible and to un-couple them from both the athlete's personal circumstances (amateur or professional, old or young athlete, etc.) as well as from circumstances relating to the specific type of sport (individual sport or team sport, etc.).[79]

The CAS has made clear that a two year ban for a first offence is an appropriate response, declaring;

> in the opinion of the Swiss Federal Tribunal, sports bodies can limit in their rules the circumstances to be taken into account when fixing sanctions and thereby also restrict the application of the doctrine of proportionality. However, in the opinion of the Swiss Federal Tribunal, the sport associations exceed their autonomy if these rules constitute an attack on personal rights, the nature and scope of which is extremely serious and totally disproportionate to the behaviour penalised. In the Sole Arbitrator's opinion, this threshold has not been exceeded in the present case. The Sole Arbitrator holds that a two years period of ineligibility is not out of proportion, excessive or disproportional.[80]

There are now provisions contained within the latest incarnation of the WADC which allow for a ban of more than two years for a first offence. These are contained in a new article 10.6, which relates to *aggravating circumstances*. The Code lays out the conditions under which it may be appropriate to apply an ineligibility period greater than two years. Such conditions may include issues such

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as involvement in a larger doping scheme, impeding an anti-doping investigation, or evidence of the use of illegal substances on multiple occasions. The case involving Carl Fletcher is an example of the kind of cooperation now possible between UKAD and law enforcement agencies following the signing of the memorandum of understanding between UKAD and the Serious Organised Crime Agency (SOCA) signed in 2011. At the time of Fletcher's conviction, Andy Parkinson, the Chief Executive of UKAD commented;

> This case proves the invaluable role that law enforcement agencies have in the fight against doping in sport and demonstrates that our intelligence system is working effectively. … I would like to thank the Merseyside Police and SOCA for their vital assistance in helping our intelligence team with this case. By attacking the supply chain and those that supply performance-enhancing substances, we stand a better chance of protecting the right of the clean athletes to compete in doping-free sport.[81]

As cooperation between organs of the State and those private organisations seeking to eradicate doping in sport grows and increases in complexity, questions and concerns over the compatibility of anti-doping processes and basic human rights will continue to grow. It has been suggested that the element of strictly enforced common sanctions promoted by the WADC is compatible with the human rights of individuals. Kaufmann-Kohler et al explain;

> the rigid system of fixed sanctions in the WADC considerably restricts the doctrine of proportionality, but is nevertheless compatible with human rights and general legal principles. These experts justify this characteristic by citing the legitimate aim of harmonising doping penalties.[82]

This though perhaps does not deal fully with the whole story, and this short section will provide a brief overview which considers whether the ambit of the anti-doping machine has now grown to such an extent that it does indeed violate one or more of an athlete's basic human rights.

Based on classic interpretation of human rights law, the contractual relationship between an athlete and their governing body, and hence anti-doping provision, has meant that remedies via the *Human Rights Act* (HRA) 1998, would remain unavailable to participants fighting an anti-doping charge. Human rights retain vertical applicability,[83] meaning that all public authorities[84] must comply with the legislation. However, the traditional view of sports governing bodies is that they are private entities and therefore not subject to the *HRA*. Whilst this may be the traditional view, it is not one that can be accepted without some qualification. There remains a degree of uncertainty, as was highlighted by the then Home Secretary Jack Straw, when during the passage of the Bill to introduce the *HRA* through Parliament, referred to the Jockey Club,[85] and by implication other sports governing bodies as performing public functions and therefore by definition within the ambit of section 6 of the HRA,[86] meaning that their decisions may require compatibility with the legislation. Note, however the decision in *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan*,[87] a pre-HRA judicial review case, in which the relationship between the jockey club and its members was held to be private in character.[88] The requirement, pursuant to section 3(1) of the HRA 1988, all domestic legislation in England and Wales must, so far as is possible to do so, be interpreted and given effect in a manner which is compatible with the European Convention on Human Rights (ECHR), opens the door to indirect horizontal applicability. The position of sports governing bodies becomes even more intriguing when viewed in the context of the approach that some countries take to the applicability of human rights measures. Oliver, D., reports;

> So what are the arguments around extending horizontal effect to human rights generally? Professor Joerg Fedtke of the UCL Faculty of Laws and I have recently completed a comparative study of the extent, if any, to which fourteen countries (and the European Court of Human Rights) give effect to civil and political rights "in the private sphere".[89]

Each of those fourteen countries to a greater or lesser extent provide either direct horizontal effect (both India and Spain have this requirement within their constitutions), or some degree of indirect horizontal effect. The point is made more compelling by the position adopted by the IOC outlined in the Olympic Charter;

> The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play[90]

That compliance with the WADC is a requirement for any sport to be featured in the Olympic Games raises some interesting issues about the comment above from the IOC perspective and any reluctance that may exist to hold anti-doping measures to account via basic human rights considerations. Set in this context, it may be suggested that the requirement for the WADC to be fully compliant with human rights becomes more compelling, regardless of whether Sports Governing Bodies are seen as being public, quasi-public or fully private authorities.

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Reinforcing the likelihood of human rights challenges confronting sports governing bodies, Rigozzi et al comment;

> because sports governing bodies exercise a monopolistic "quasi-public" position in their relation with the athletes, there is an understanding among lawyers that sports governing bodies can no longer ignore fundamental rights issues in their activities, at least if they want to avoid governmental intervention.[91]

The most obvious cause for concern that one may identify in the measures designed to combat doping in sport lies in the application of the principle of *strict liability*, with potential reference to a breach of the ECHR, in particular, Article 6(2).[92] Although some of these issues were rehearsed as long ago as 1983 in *Gasser v Stinson*,[93] they have not been addressed with specific reference to the HRA. Sport is not alone in applying the principle of *strict liability*,[94] and the courts outwith of sport, both domestically,[95] and in the European Court of Human Rights,[96] have addressed these issues. In *Salabiaku v France*, it was made clear that;

> Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.[97]

And further that;

> Presumptions of fact or law operate in every legal system. Clearly, the convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law…. [Article6(2)] requires states to confine [presumptions] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.[98]

It is clear, therefore, that the presumption of innocence, although inarguably important, is not absolute. The key issue is whether the rationale behind the provision of anti-doping measures is sufficiently important to justify the departure from the presumption of innocence that *strict liability* effectively creates. It is submitted that the overarching aims of the elimination of doping set in the context of issues such as; the threat posed to fair-play and honesty in sport, to the health of participants, the educational messages transmitted by a tacit acceptance of the practice of doping and to the financial costs that may be wrought by a fault based system; may be viewed as both laudable and legitimate objectives. Coupling these with the moderating effects of measures contained in Article 10 of the WADC,[99] lead to a sense of proportionality in pursuance of legitimate aims and therefore compatibility of article 2.1.1. of the WADC[100] with Article 6(2) of the *ECHR*.

CONCLUSION

This note has just touched on the concerns about potential breaches of an athlete's human rights. Due to limitations of space, it has concentrated on the concerns raised by the central principle of *strict liability*. The elephant in the room however is a potential breach of article 8,[101] writ large by the athlete whereabouts system designed to facilitate no notice, out of competition testing. This system requires elite athletes in the registered testing pool to submit their whereabouts to the online ADAMS system[102] entering where they will be for one hour each day between the hours of 6am and 11pm, three months in advance. If a tester turns up at the location stipulated and the athlete is not in attendance then that is a whereabouts failure. Three whereabouts failures within the space of eighteen months and this is a doping violation. The provision has faced criticism and is currently being challenged under a violation of European privacy laws in Belgium.[103] Such a violation following three whereabouts failures would also currently mean that a British athlete is banned for life from the Olympic Games due to the British Olympic Association (BOA),[104] by law 25. This by law is currently facing a challenge in the CAS from the WADA, claiming that it is an additional penalty, over and above the conventional two year ban faced by athletes for a first doping violation and further that as it is a British rule, it compromises the harmonised approach to anti-doping that the WADC tries to promote. The BOA is defending their stance on the basis that the lifetime ban is actually an eligibility rule, (i.e. no athlete who has committed a doping offence is eligible for Olympic selection), rather than an additional punishment and further that all athletes have a right to appeal against any ban imposed. Their stance is compromised by the fact that the CAS ruled late in 2011 that the Osaka rule, based on rule 44 of the Olympic Charter[105] was unlawful,[106] and it is likely when the decision is announced sometime in April, the CAS will rule against the BOA.[107]

Footnotes

[1] http://sportsanddrugs.procon.org/view.resource.php?resourceID=004420 – last accessed 22nd January 2012

[2] http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping/ – last accessed 22nd January 2012

[3] http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping/ – last accessed 22nd January 2012

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[4] http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping/
[5] http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping/
[6] http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping/
[7] http://www.telegraph.co.uk/sport/columnists/brendangallagher/2316933/Tom-Simpson-haunts-Tour-40-years-on.html
[8] http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping/
[9] http://www.pbs.org/wnet/secrets/features/doping-for-gold/the-state-sponsored-doping-program/52/; http://www.la84foundation.org/SportsLibrary/ISOR/ISOR2004t.pdf
[10] http://news.bbc.co.uk/1/hi/special_report/1998/07/98/tour_de_france/134842.stm; http://news.bbc.co.uk/sport1/hi/other_sports/988530.stm (Festina timeline)
[11] International Olympic Committee
[12] http://www.wada-ama.org/en/About-WADA/History/A-Brief-History-of-Anti-Doping/
[13] http://www.wada-ama.org/en/About-WADA/History/WADA-History/
[14] Matched funding stood at only 16% in 2003 but had risen to 100% by 2008 see http://www.wada-ama.org/en/About-WADA/History/WADA-History/
[15] Fahey J. President of WADA at http://www.wada-ama.org/Documents/News_Center/Speeches_Presentations/2012/2012-02-07-WADA-Media-Symposium-President-Speech.pdf; Lausanne, Feb 7th 2012
[16] The system which requires athletes to submit their location for one hour each day up to three months in advance.
[17] The term athlete will be used throughout this paper to refer to a sports participant.
[18] Their role is aided by the fact that it is a condition of inclusion in the Olympic Games that any sport is compliant with the Code.
[19] *Korda v ITF Ltd (t/a the International Tennis Federation)* The Times 4 February 1999
[20] *Korda v ITF Ltd (t/a the International Tennis Federation)* The Times 4 February 1999 at p8 of unrecorded transcript
[21] *Korda v ITF Ltd (t/a the International Tennis Federation)* The Times 4 February 1999 at p7 of unrecorded transcript
[22] *The World Anti-Doping Code (2009)*, The World Anti-Doping Agency, Montreal, Canada, Comment to article 2.1.1
[23] *Gasser v Stinson* (1988), QBD, Unreported
[24] *Gasser v Stinson* (1988), QBD, Unreported. Citing with approval arguments put forward by Holt, (then IAAF General Secretary) at p26 unreported transcript
[25] This may of course be a laudable policy where the substance is indeed a performance enhancing one but the reasoning is more questionable where the substance ingested inadvertently is not one which will enhance performance, (see Amos, A., & Fridman, S., (2009): "Drugs in sport: the legal issues", *Sport in Society: Cultures, Commerce, Media, Politics*, 12:3, 356–374 p362
[26] *Arbitration CAS 94/129 USA Shooting & Q./Union Internationale de Tir (UIT)*, award of 23 May 1995. At paras 15–16
[27] Now Lord Coe
[28] Coe, S., "We cannot move from strict liability rule", *Daily Telegraph*, 25 February 2004
[29] For example, Scottish skier, Alain Baxter lost his Olympic bronze medal following a positive test for a banned stimulant at the 2002 Winter Olympics despite the CAS acknowledging that he had made no attempt to cheat whatsoever and that the positive test was the result of inadvertent consumption of the banned substance in a Vicks nasal spray taken to relieve congestion. See http://www.ukad.org.uk/resources/video/alain-baxter; http://tinyurl.com/7mjdclk; last accessed 18th March 2012.
[30] *The World Anti-Doping Code (2009)*, The World Anti-Doping Agency, Montreal, Canada article 3.2.1
[31] Discussed in more detail later
[32] Article 10.5.1 WADC 2009
[33] Article 10.5.2 WADC 2009
[34] *Kicker Vencill v USADA* CAS 2003/A/484
[35] CAS 2006/A/1067 *IRB* v *Keyter*
[36] No fault or negligence
[37] No significant fault or negligence
[38] http://www.wada-ama.org/en/Science-Medicine/Prohibited-List/QA-on-2012-Prohibited-List/# (last accessed 18th March 2012)
[39] Article 10.4 WADC 2009
[40] These may be where an athlete has interfered with or manipulated their sample but technically have not failed a test or where an athlete has tested with no apparent failure. (See McLaren, R., An Overview of Non-Analytical Positive & Circumstantial Evidence Cases in Sports, 16 *Marq. Sports. L. Rev.* 193 (2006)
[41] This consisted of an attempt to create the world's fastest human being through the provision of a new artificial steroid, (THG). This presented a particular problem as there existed no test to detect this newly created drug and with no test, could come no failure.
[42] *U.S. Anti-Doping Agency v. Collins*, AM. ARBITRATION ASS'N No. 30 190 00658 04 (N. Am. CAS Panel Dec. 10, 2004).
[43] The International Amateur Athletic Federation, (IAAF)
[44] IAAF 2004 rules 33.2, 38.9 cited in *U.S. Anti-Doping Agency v. Collins*, AM. ARBITRATION ASS'N No. 30 190 00658 04 (N. Am. CAS Panel Dec. 10, 2004). At para 3.3

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[45] WADC article 3.1
[46] *U.S. Anti-Doping Agency v. Collins*, AM. ARBITRATION ASS'N No. 30 190 00658 04 (N. Am. CAS Panel Dec. 10, 2004). At para 3.4.
[47] World Anti-Doping Agency, *WADC 2009* article 3.1
[48] The CAS is based in Lausanne in Switzerland and is therefore subject to Swiss Law. The SFT acts as the final Court of Appeal for decisions of the CAS.
[49] See Tribunal fédéral [TF] [Federal Tribunal] Feb. 10, 2010, 4A_612/2009 (Switz.), 6.3.2.
[50] http://www.utexas.edu/cola/progs/plan2/_files/pdf/worthington/dawer08.pdf (last accessed 25th March 2012)
[51] http://www.utexas.edu/cola/progs/plan2/_files/pdf/worthington/dawer08.pdf. At p2, (last accessed 25th March 2012)
[52] Straubel M. "Doping Due Process: A Critique of the Doping Control Process in International Sport", 106 *Dick. L. Rev.* 523*569
[53] Straubel M. "Doping Due Process: A Critique of the Doping Control Process in International Sport", 106 *Dick. L. Rev.* 523*569–570
[54] See WADA & Interpol cooperation as per http://www.interpol.int/News-and-media/News-media-releases/2009/PR006 (last accessed 29th March 2012) and the memorandum of understanding concerning information gathering signed by United Kingdom Anti-Doping, (UKAD) and The Serious Organised Crime Agency as per http://www.legislation.gov.uk/uksi/2010/1955/pdfs/uksiem_20101955_en.pdf (last accessed 29th March 2012)
[55] That of *comfortable satisfaction*
[56] World Anti-Doping Agency, *WADC 2009* article 7.5
[57] An A sample and a B sample are always taken from an athlete, the urine sample is divided into two different sealed containers, (A & B). An athlete has the right to have both theoretically identical samples tested before a conclusive finding of guilt can be established.
[58] World Anti-Doping Agency, *WADC 2009* article 7.5.1
[59] World Anti-Doping Agency, *WADC 2009* article 14.2.1
[60] http://www.guardian.co.uk/sport/2012/feb/06/alberto-contador-case-chronology; (last accessed 29th March 2012)
[61] *United States Anti Doping Agency v Gaines* CAS 2004/O/649
[62] *United States Anti Doping Agency v Gaines* CAS 2004/O/649 at p13
[63] *United States Anti Doping Agency v Gaines* CAS 2004/O/649 at p15
[64] It is beyond the remit of this note to go into detail on the compatibility of anti-doping measures with the *HRA*. It will therefore only address the principle of *strict liability*, the foundation of the WADC in this context. For a wide ranging analysis of the compatibility of the WADC with Human Rights see Kaufmann-Kohler, G., Rigozzi, A., and Malinverni, G., "Doping and fundamental rights of athletes: comments in the wake of the adoption of the World Anti-Doping Code", *I.S.L.R.* 2003, 3(Aug), 39–67.
[65] World Anti-Doping Agency "Fundamental Rationale For The World Anti-Doping Code", World Anti-Doping Code, 2009, Montreal, Canada.
[66] Article 18 specifically refers to Education
[67] World Anti-Doping Agency, articles 18.1 & 18.2, World Anti-Doping Code, 2009, Montreal, Canada
[68] Arbitration *CAS 2005/A/847 Hans Knauss v. FIS*, award of 20 July 2005, at para 32
[69] CAS 2009/A/2012 Doping Authority Netherlands v/ Mr Nick Zuijkerbuijk at para 77
[70] The doctrine of restraint of trade is based on principles of proportionality
[71] CAS 2009/A/2012 *Doping Authority Netherlands v/ Mr Nick Zuijkerbuijk* at para 78
[72] http://www.iilj.org/GAL/documents/Lang.pdf
[73] *Krabbe v IAAF et al*, Decision of the LG Munich 17th May 1995, SpuRt, 1995, p161, p167
[74] *Krabbe v IAAF et al*, Decision of the OLG Munich 28th March 1996, SpuRt, 1996, p133, p138
[75] Two years for a first offence
[76] Kaufmann-Kohler, G., Rigozzi, A., and Malinverni, G., "Doping and fundamental rights of athletes: comments in the wake of the adoption of the World Anti-Doping Code", *I.S.L.R.* 2003, 3(Aug), 39–67 *61
[77] Quite clearly here sanctions imposed as a result of doping violations do restrict fundamental rights.
[78] Claude Rouiller, "Legal Opinion – WADA Code", October 2005 at p30, located at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Legal_Library/Advisory_and_Legal_Opinions/Article_10_2_WADC_Swiss_Law.pdf
[79] Arbitration *CAS 2005/A/847 Hans Knauss v. FIS*, award of 20 July 2005, paras 29–30
[80] CAS 2009/A/2012 *Doping Authority Netherlands v/ Mr Nick Zuijkerbuijk* at para 77
[81] British shot-putter Carl Fletcher was recently banned for a period of 4 years in addition to receiving a prison sentence for trafficking drugs. See http://tinyurl.com/czhz68r last accessed 31st March 2012
[82] Kaufmann-Kohler G., Rigozzi A., and Malinverni G., "Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law", 26 February 2003
[83] S6(1) *Human Rights Act* 1998
[84] S6(3) *Human Rights Act* 1998
[85] Then the Governing Body of Horseracing in the United Kingdom

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[86] See House of Commons Hansard Debates, May 20, 1998, http://tinyurl.com/6wapjzs, at col. 1020
[87] *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1 WLR 90
[88] http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf (last accessed 2nd April 2012)
[89] Oliver, D., "Human Rights and the Private Sphere", *UCL Human Rights Review*, vol. 1, no. 1, 2008 pp. 8–16
[90] International Olympic Committee, "Olympic Charter", 2011, p10, para 4, Lausanne, Switzerland.
[91] Kaufmann-Kohler, G., Rigozzi, A., and Malinverni, G., "Doping and fundamental rights of athletes: comments in the wake of the adoption of the World Anti-Doping Code", *I.S.L.R.* 2003, 3(Aug), 39–67*49
[92] Article 6(2), *ECHR*, Right to a fair trial, and specifically the presumption of innocence, which is incorporated into UK law by virtue of section 1 of the HRA 1998
[93] *Gasser v Stinson* (1988), QBD, Unreported
[94] For example s5, *Road Traffic Act* 1998, (in relation to driving with excess alcohol) and s92(5) *Trademarks Act* 1994, (in relation to possession of counterfeit goods) both create offences of *strict liability*.
[95] *Attorney General's Reference No 4 of 2002* (On Appeal from the Court of Appeal (Criminal Division)) *Sheldrake (Respondent) v. Director of Public Prosecutions* (Appellant) (Criminal Appeal from Her Majesty's High Court of Justice) (Conjoined Appeals) [2004] U.K.H.L. 43, [2005] 1 A.C. 264
[96] *Salabiaku v France* (1988) 13 EHRR 379
[97] *Salabiaku v France* (1988) 13 EHRR 379 at para 27
[98] *Salabiaku v France* (1988) 13 EHRR 379 at para 28
[99] Article 10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances; Article 10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances;
[100] *Strict liability*
[101] Article 8 Right to Respect for Private and Family Life ECHR
[102] Anti-Doping Administration and Management System, see http://www.ukad.org.uk/athletes/my-adams/; http://tinyurl.com/ctfjvn9 (last accessed 2nd April 2012)
[103] http://news.bbc.co.uk/sport1/hi/front_page/7844918.stm (last accessed 2nd April 2012)
[104] The BOA are responsible for selecting the British Olympic Team
[105] The rule stated that any athlete who had been banned for a period of more than six months for a doping violation was automatically prohibited from the next Olympic Games
[106] http://tinyurl.com/6d4hf8o (last accessed 2nd April 2012)
[107] On April 30th 2012 the CAS ruled that the BOA By Law was not in compliance with the WADC, stating clearly that the By Law was a doping sanction and not an eligibility criteria: http://www.tas-cas.org/d2wfiles/document/5878/5048/0/Media20Release20BOA20WADA20final.pdf

Biography

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