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The Jockey Club, (Horseracing Regulatory Authority), as the effective governing body of horseracing in this country, has obligations to all jockeys competing in the UK. If it breaches those obligations then mistreated jockeys may find remedy in the courts.

Discuss those obligations and explain their application with particular reference to the recent Kieron Fallon dispute.

Word Count: 2,198

This question relates to governance in sport and the obligations that governing bodies have towards participants. This essay will firstly look at the ways in which public bodies are usually held accountable by the courts and then look at the specific obligations courts impose on governing bodies. Finally the possible effects of the Human Rights Act 1998 will be discussed. All of the above will be discussed with particular reference to Fallon, who was banned from UK horseracing in 13/06/2006[1]. This decision was upheld in *Fallon* v *Horse Regulatory Authority*[2].

There is has been a debate as to whether or not the law should intervene with governing bodies' decisions. Self regulation allows 'benefits of rapid adjudications… [and] use of specialist expertise'[3]. However intervention by the courts allows for 'a "copper bottomed" guarantee of ultimate justice for individual sportsman'[4]. It is for this reason intervention is supported.

[1] http://news.bbc.co.uk/sport1/hi/other_sports/horse_racing/5166314.stm
[2] [2006] EWHC 2030
[3] Little G. & Morris P., *'Challenging Sports' Bodies Determinations'*, CJQ 1998, 17(APR) at p. 129
[4] Ibid

The traditional approach to hold public bodies to account has been to subject them to Judicial Review (JR). This allows a court to scrutinise whether correct procedures have been followed in and, if necessary, order the body to examine its judgment again. However as will be shown below the courts have been unwilling to allow the decisions of sports governing bodies to be subject to JR. The extension of JR to sports governing bodies has been an area of some debate with the main focus being whether or not governing bodies should be classified as public bodies.

In *Law* v *National Greyhound Racing Club Ltd*[5] Law was suspended from greyhound racing when his greyhound was found to be doped. The National Greyhound Racing Club (NGRC) sought to challenge Law's private law action by stating his action should be dealt with by JR. Lawton LJ stated; 'In my judgment, such powers as the stewards had to suspend the claimant's license were derived from a contract between him and the defendants'[6], and, 'there was no public element in the jurisdiction itself'[7]. Therefore as there was no public element and there was a contract the courts ruled that the NGRC was not subject to JR, his remedy lay in private law. This basis of looking at the contract became known as the source of the powers test and ignores the functions that the body provides.

[5] [1983] 1 WLR 1302
[6] Ibid at p. 1307
[7] Ibid at p. 1307

In *R* v *City Panel on Take-overs and Mergers ex p Datafin*[8] the Court of Appeal appeared to depart from the reasoning in Law. The court had to decide whether or not the panel was a public body and therefore subject to JR. The panel had no statutory footing, was a self-regulating body that adhered to a voluntary code of practice and had government backing.

The court ruled that the panel was could be subject to JR. Lloyd LJ stated:

> **'I do not agree that the source of the power is the sole test …Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute… then clearly the body… will be subject to judicial review… if at the other end of the scale, the source of power is contractual… then clearly the arbitrator is not subject to judicial review.'**[9]

Lloyd LJ then went on to state; 'but in between these extremes… it is helpful to look not just at the source of the power but at the nature of the power.'[10] It may then be possible for a governing body to be subject to JR as it may fall in between the 'extremes'.

This possibility was explored in *R* v *Disciplinary Committee of the Jockey Club ex p. Aga Khan*[11]. The Aga Khan wished to overturn a suspension placed on him by the JC claiming their decision was *ultra vires*. The Aga Khan claimed that the JC was in the de facto control of a major industry and should subsequently be

[8] [1987] 2 WLR 699
[9] Ibid at p. 847
[10] Ibid at p. 847
[11] [1993] 1 WLR 909

subject to JR. Hoffman LJ noted the monopoly that the JC has on racing on racing in the UK, stating there was 'no alternative market'[12]. However the court refused to allow an application for JR. Hoffman LJ stated '[the private power governing bodies operate] does not subject it to the rules of public law. If control is needed, it must be found in the law of contract… [and] the doctrine of the restraint of trade.[13]'

Anderson claims this reasoning is incorrect:

> **"It is respectfully submitted that the stated view of the… Court somewhat evaded the issue at hand. The Jockey Club, and a number of other leading sporting bodies, are not 'indisputably' private bodies. They regulate in a largely unfettered and monopolistic fashion an important aspect of national life."**[14]

It is submitted that for the reason above the extension of JR to governing bodies would be welcomed. However the courts have preferred to rely upon the traditional sources based test.

Despite not allowing JR to be applied to sports governing bodies the courts have specified some obligations that must be upheld. One of these is that bodies must abide by are the rules of natural justice. These rules were first formulated by Dicey writing at the turn of the 20th Century. Two major notions were that the law should operate freely from bias and that everyman is subject to the rule of law. These rules are a key foundation of the legal system, and sports governing

[12] Ibid at p. 916
[13] Ibid at p. 932-3
[14] Anderson J, *'An Accident of History: Why the Decisions of Sports Governing Bodies are not Amenable to Judicial Review'* (2006) CWLR 35 3 (173)

bodies must also adhere to them, illustrated by the case of *Enderby Town FC* v *The Football Association Ltd*[15]. Enderby Town claimed, inter alia, that the Football Association (FA) had failed to abide by natural justice rules in refusing to let the club be represented by a lawyer at a FA hearing.

Lord Denning MR, ruling on whether the refusal to allow legal representation was legal, stated, 'the party has no absolute right to be legally represented. It is a matter for the *discretion* of the tribunal'[16] and 'the long and short of it is that if the court sees that a domestic tribunal is proposing to proceed in a manner contrary to natural justice, it can intervene to stop it'[17].

Little and Morris note that 'when natural justice does apply to a sports body it will be obliged to comply with the twin fundamental pillars of the fair hearing rule and the rule against bias'[18]. This is important when they have the power to dispense penalties that can have a huge impact upon the lives of participants. However Morris and Little also note that the rules of natural justice are 'rather amorphous, uncertain nature and poor predictive value'[19]. Therefore other avenues of redress may be sought by Fallon, other than a private law action based on natural justice. One such avenue is the restraint of trade doctrine.

[15] [1971] 1 Ch 591
[16] Ibid at p. 605
[17] Ibid at p. 606
[18] Little G. & Morris P., *'Challenging Sports' Bodies Determinations'*, CJQ 1998, 17(APR) at p. 132
[19] Ibid at p.147

The doctrine of restraint of trade evolved during the early 20th century[20]. The function of this doctrine is 'to render partially or wholly void contracts or agreements that are found to be unreasonably in restraint of trade'[21]. Three rules that govern restrain of trade can be derived from Lord Macnaughten's judgment in *Nordenfelt* v *Maxim Nordenfelt Guns and Ammunition Co Ltd*[22] and are listed below;

(i) there must be an interest meriting protection;
(ii) the restraint must be reasonable; and
(iii) the restraint must not be contrary to the public interest[23].

If these conditions are satisfied then the contract is void. The most significant sports case on this doctrine is *Greig* v *Insole*[24]. In this case Greig and a number of other professional cricketers decided to play cricket in the newly formed World Series Cricket (WSC), set-up to compete against Test matches. The International Cricket Council (ICC), who previously governed all international cricket and the Test matches subsequently and retrospectively banned all WSC players from playing Test match cricket. The ICC also advised national governing bodies (the Test and County Cricket Board (TCCB) in England and Wales) to ban their

[20] Gardiner S et al, *'The Legal Regulation of Sports Governing Bodies'*, in *Sports Law*, 3rd Ed., Cavendish, (2006) p210
[21] Ibid
[22] [1984] AC 535
[23] Gardiner S et al, *'The Legal Regulation of Sports Governing Bodies'*, in *Sports Law*, 3rd Ed., Cavendish, (2006) p210
[24] [1978] 1 WLR 302

players at a national level. The TCCB reserved judgement until after the case but had proposed a similar retrospective ban.

Slade J decided that both the ICC and TCCB had interests to protect and that they were not acting contrary to public interest; the contentious issue was whether or not the ICC and TCCB were acting reasonably in introducing a retrospective ban to protect itself from the threat of WSC competition. In deciding if the ICC ban was reasonable Slade J stated;

> **"These three threats, however, could have been adequately met by merely imposing a prospective disqualification from Test cricket… I do not say that a merely prospective ban of this nature would necessarily have been valid. However… it would clearly have been more easy [sic] to justify."**[25]

Here Slade J clearly states that a retrospective ban was an unreasonable step to take by the ICC, however a prospective ban may have been legal. The resolution of the TCCB to introduce a retrospective ban was viewed as being much more serious. If this ban were to be allowed it would effectively prevent 'those who are qualified [to] earn their living by playing cricket throughout the English summer'[26]. This would mean that two of the claimants, Snow and Proctor, would be unable to earn a living during the English season. Therefore the TCCB resolution was 'ultra vires and void as being in unreasonable restraint of trade.'[27]

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[25] Ibid at p. 352
[26] Ibid at p. 355
[27] Ibid at p. 363

Following this precedent it may seem then that a ban by the HRA on Fallon from competing in the UK may be an unreasonable restraint of trade. If horse racing was a sport merely confined to the UK then this may well be true, yet horse racing has a global following and Fallon is still able to earn a comfortable living in many other countries around the world (until his recent drugs ban which is a separate issue). This was not the case with Snow and Proctor in Greig. This situation may have been different if Fallon had also been banned from competing in world-wide horse racing whilst investigations were on going.

One important piece of legislation that may offer some recourse to participants like Fallon wishing to hold a governing body to account is the Human Rights Act 1998. In this act s.6(1) states; 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'. Furthermore s.6(3)(b) defines a public authority as 'any person certain of whose functions are functions of a public nature'. This in itself is unlikely to classify sports bodies as 'public' for the purposes of JR, as is stated by Boyes, 'given that the courts have consistently refused to accept them as being public bodies for the purposes of the application for judicial review'[28]. However they may be classified as quasi-public authorities and although may not be subject to JR may face an action under the act itself.

Boyes notes that during the act's passage through parliament that the Lord Chancellor commented that bodies such as Railtrack may be classified as being quasi-public. They perform a public function in ensuring railway safety but have

[28] Boyes S, *'Regulating Sports after the Human Rights Act 1998'*, [2001] 151 NLJ 444

private law contracts with employees. It is this public function that could be regulated by the act[29]. It is submitted that governing bodies have a similar structure to Railtrack (having both public and private elements) and so similarly may be classed as a 'quasi-public' authority.

As noted by Boyes[30], and with particular regard to the HRA and JC, Mr Straw (then Home Secretary) comments; 'The Jockey Club is a curious body; it is entirely private, but exercises public functions in some respects, and to those extents, but to no other, it would be regarded as falling within [s.6]'[31]. As long as the participant's grievance lay with the governing body acting in its public function then a challenge based on that grievance may well be successful.

This could lead to the real possibility for an action under s.7(1)(a). This section states; 'A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by s.6(1) may bring proceedings against the authority under this Act in the appropriate court or tribunal'. This could lead to 'the possibility of the opening of a new avenue by which to challenge the activities of sports governing bodies'[32]. This could lead to action against governing bodies where participants feel they have had an unfair trial, under Art 6 of the convention.

[29] Boyes S, *'Regulating Sports after the Human Rights Act 1998'*, [2001] 151 NLJ 444
[30] Ibid
[31] Hansard HC, May 20, 1998, col 1020
[32] Boyes S, *'Regulating Sports after the Human Rights Act 1998'*, [2001] 151 NLJ 444

In conclusion governing bodies do have obligations towards participants, namely to abide by the doctrines of restraint of trade and natural justice. However it is submitted that the current position is not satisfactory. Participants, such as Fallon, do not currently have any remedy to seek if their governing body does not follow its own procedures correctly. Considering the huge role that sport now plays in society and the numbers of potential participants affected this current position is not desirable. The introduction of the Human Right Act 1998 may alter the current position, depending on the courts views as the distinction between public and private acts and; 'This will be the key actor in determining the overall impact of the Act upon these bodies'[33].

Word Count: 2,195

[33] Boyes, S., '*The regulation of sport and the impact of the Human Rights Act 1998'* [2000] 6 (4) EPL 517

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