

## Sports Law Coursework

The Jockey Club has historically been the regulator of horse racing in this country for many years. The Club relies on self-regulation in disciplining its members and gains this power through the contractual relationships it holds with these members.<sup>1</sup> It has certain obligations to its affiliates, such as having to encompass the principles of natural justice into its decision-making processes. In addition the Club must ensure any decisions it makes are not in breach of the restraint of trade doctrine. This essay will discuss the above points and the amenability of decisions of sports governing bodies to judicial review, with particular emphasis on the Jockey Club. In addition the possible effects the introduction of the Human Rights Act (HRA) (1998) may have on the decisions of these bodies will be discussed. The jockey Kieren Fallon will also be considered in this essay. He has recently been accused of conspiracy to defraud through race fixing; as a consequence of this he has been banned from racing in the UK.

Self-Regulation is the method used by sports governing bodies to regulate sport, such as 'Self-regulatory associations combine the governmental function of regulation with the institutional and often legal structure and interests of a private body.'<sup>2</sup> 'Self-regulation is perceived as having many benefits, most significantly that the costs of the regulation are 'internalised', thus reducing the burden on the public purse.'<sup>3</sup>

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<sup>1</sup> S. Gardiner et al, *Sports Law*, 3<sup>rd</sup> ed (2006), Cavendish Publishing, p 201

<sup>2</sup> Black, J, 'Constitutionalising Self-Regulation' (1996) 59 *Modern Law Review* 24

<sup>3</sup> S. Gardiner et al, *Sports Law*, 3<sup>rd</sup> ed (2006), Cavendish Publishing, p 180

There are said to be a number of positive features in utilising self-regulatory techniques, these are mainly expertise and efficiency.<sup>4</sup> Self-regulatory bodies can demand higher levels of expertise in their specific field than independent or State regulated bodies can afford to.<sup>5</sup> This level of expertise is imperative so the regulator can come to a balanced expert judgement, while being able to weigh competing interests, values and opinions.<sup>6</sup> Self-regulation is often the most efficient way of carrying out disciplinary procedures. This is due to such bodies having access to the people under its control and any required information.<sup>7</sup> They are also very flexible allowing them to adapt to the individual case, because of the informal nature of the proceedings.<sup>8</sup> It has however been suggested that self-regulation mainly related to sport should be scrutinised by the courts in order to meet the requirements of democratic legitimacy and ensure accountability.<sup>9</sup>

One of the most contentious issues in relation to bodies such as the Jockey Club is Judicial Review. ‘The English courts have held consistently that challenges to actions of sports governing bodies should be brought in private law proceedings and not by way of judicial review.’ This is due to the contractual nature of these relationships, giving rise to private rights on which actions may be based without judicial review.<sup>10</sup> This issue was addressed in *Law*<sup>11</sup> where Lawton LJ dismissed the suggestion that the power to suspend a licence had any public element, even though such a decision may affect the public. Due to the fact that only those who voluntarily submitted themselves

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<sup>4</sup> S. Gardiner et al, *Sports Law*, 3<sup>rd</sup> ed (2006), Cavendish Publishing, p 180

<sup>5</sup> Black, J, *Rules and Regulators*, (1997) Oxford: Clarendon, pp 103, 219

<sup>6</sup> S. Gardiner et al, *Sports Law*, 3<sup>rd</sup> ed (2006), Cavendish Publishing, p 180

<sup>7</sup> Braithwaite, J, ‘Restorative Justice and Responsive Regulation’ (2002) Oxford: OUP, p 247

<sup>8</sup> Baldwin, R and Cave, M, ‘Understanding Regulation: Theory, Strategy and Practice’ (1999), Oxford: OUP, p 126

<sup>9</sup> S. Gardiner et al, *Sports Law*, 3<sup>rd</sup> ed (2006), Cavendish Publishing, p182

<sup>10</sup> Anderson, J, ‘An Accident of History: Why the Decisions of Sport Governing Bodies are not Amenable to Judicial Review’ (2006), *Common Law World Review* 35 3 (173)

<sup>11</sup> *Law v National Greyhound Racing Club Ltd* (1983) 1 WLR 1302

to the stewards jurisdiction were affected. This is an important decision as it has emphasised that the scope of judicial review had not been extended to domestic tribunals such as sports governing bodies.

This issue has been addressed in a number of different cases one of the most important being *Datafin*.<sup>12</sup> Lloyd LJ suggested that one should look not only at the nature of the power or the source of the power individually, but ‘in-between the extremes.’ If the body in question is exercising public functions or functions that have public law consequences, then that may...be sufficient to bring said body within the reach of judicial review. Therefore if it is the case that the body in question has been sufficiently woven into the fabric of public regulation it should be held amenable to judicial review.

Arguably the most important authority in this field is now<sup>13</sup> *Aga Khan*.<sup>14</sup> Effectively the Court of Appeal in *Aga Khan* refined the ratio in *Law* to a single question: Whether the domestic tribunals in question are ‘sufficiently governmental in operation and nature to be susceptible to judicial review.’ There was ample debate on the matter by the judges in the case. Hoffmann LJ believed the power of the Jockey Club to be entirely private in its nature. Bingham MR stated that the powers exercised in this area were public in nature. He was also of the opinion that if the Jockey Club ceased to exist, the government would be required to create an alternative body to fulfil its functions. Farquharson LJ disagreed with the opinion that a government body would need to be set up to assume control of racing. Bingham MR was unable to identify any governmental nature and operation in the powers exercised by the club, thus the

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<sup>12</sup> *R v City Panel on Take-overs and Mergers ex p Datafin* (1987) 1 All ER 564

<sup>13</sup> S. Gardiner et al, *Sports Law*, 3<sup>rd</sup> edn (2006), Cavendish Publishing, p191

<sup>14</sup> *R v Jockey Club ex p Aga Khan* (1993) 1 WLR 909

Jockey Club was not susceptible to judicial review. Although in *Mullins*<sup>15</sup> it was put forward that the Jockey Club receives substantial sums of money from government through the betting levy, therefore giving it a governmental and public function. However in *Mullins* Stanley Burton J stated:

**“State funding is a weak indication that a body or its functions are public. Many...private bodies such as...many charities receive state funding; this does not make them governmental in nature.”**

This combined with the decision in *Aga Khan* will mean that it is highly unlikely that the decision to ban Fallon from racing will be amenable to judicial review.

The principles of natural justice have, however infiltrated the contractual relationships of private entities, despite them being a public law feature. This is in order to achieve procedural fairness akin to that in public law.<sup>16</sup> There are two rules of natural justice, one of these principles is the rule against bias, this:

**‘Essentially mandates adjudicators who cannot be reasonably suspected of bias and is designed to bolster the confidence in ‘administrative justice’ of those on the receiving end of it.’<sup>17</sup>**

The other principle is the right to a fair hearing and includes things such as the right to hear the opposing case and the right to legal representation etc.<sup>18</sup> This rule was

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<sup>15</sup> *William Mullins v The Board of Appeal of the Jockey Club* (2005) EWHC 2197 (Admin)

<sup>16</sup> Morris, P, and Little, G, ‘Challenging Sports Bodies’ Determinations’ (1998) 17 Civil Justice Quarterly 128

<sup>17</sup> Cane, *An Introduction to Administrative Law* (2006), Oxford: OUP p161

addressed in the early case of *Russel*.<sup>19</sup> Here it was held that where a licence was withdrawn and coupled with disqualification, having the effect of taking away a persons livelihood:

**‘Common justice...requires that before any man be found guilty of an offence carrying such consequences, there should be an inquiry at which he has the opportunity of being heard.’**

In *Russel* the court recognised that the monopolistic nature of the Jockey Club combined with the significant effect that its decisions could have, would be reason enough to subject it to the requirements of natural justice. The panel making the decision against Keiren Fallon will have been required to adhere to these rules. It could be said that the panel was in breach of Fallon’s right to a fair hearing, as they would not look at videos and police interviews. The reason the panel gave for not looking at the evidence was; it is not for them to decide whether Fallon is guilty of the offence. The panels’ job is to weigh his rights against the integrity of the sport.<sup>20</sup>

Participants in sport can also rely upon the restraint of trade doctrine; the doctrine ‘serves to outlaw agreements in which powerful bargaining positions are abused.’<sup>21</sup> The doctrine can also be applied to challenge the reasonableness of disciplinary measures, as in *Greig v Insole*.<sup>22</sup> The three cricketers involved sought a declaration that the changes of rules by the ICC and those proposed by the TCCB were *ultra vires*

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<sup>18</sup> Morris, P, and Little, G, ‘Challenging Sports Bodies’ Determinations’ (1998) 17 Civil Justice Quarterly 128

<sup>19</sup> *Russel v Duke of Norfolk* (1949) 1 All ER 109

<sup>20</sup> The Horseracing Regulatory Authority: [www.thehra.org](http://www.thehra.org)

<sup>21</sup> S. Gardiner et al, *Sports Law*, 3<sup>rd</sup> edn (2006), Cavendish Publishing p 210

<sup>22</sup> (1978) 1 WLR 302

and in unlawful restraint of trade. Slade J decided that 'both the ICC and the TCCB had legitimate interests that they were entitled to protect. It was accepted that World Series Cricket (WSC) did pose a threat to test cricket. Nevertheless the threat was not serious enough to warrant the retrospective ban, a prospective ban would seem more easily justifiable. Yet both 'deprive the professional cricketer the opportunity to be employed in an important part of his professional field.' The TCCB lending its support to the ICC was considered to be a lot more serious. This is because first class cricket was the only opportunity for the claimants to earn a living playing cricket. This had particular implications for two players, Snow and Procter, who with the length of their contracts with WSC and their ages meant they would never play first class cricket again. Slade J also stated that it is in the public interest that top players such as the claimants are allowed to play in the sport; to remove them could be injurious to cricket. Thus the decisions of the ICC and the TCCB were held to be *ultra vires* and void as being an unreasonable restraint of trade. Keiren Fallon could claim that his ban constitutes an unreasonable restraint of trade, as it is denying him his right to earn a living, and would also effectively end his career. The Jockey Club like the ICC and the TCCB also have interests they are entitled to protect, namely the integrity of horse racing. However Fallon has been accused of a serious offence that could have an extremely detrimental effect on the integrity of horse racing, whereas the integrity of the sport in *Greig* was not at stake. Also it is in the public interest that Fallon not be allowed to race, unlike in *Greig*, so the Jockey Club not letting him race seems lawful. Furthermore Fallon has also said that he would retire if the situation were not resolved by the start of the next flat season.<sup>23</sup> It would appear as though this is his own decision therefore he must want to retire and must be able to afford to do

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<sup>23</sup> The Times Newspaper, [www.thetimesonline.co.uk](http://www.thetimesonline.co.uk)

so. Furthermore the ban on Fallon is only a domestic ban, in *Greig* the ban was international. Taking all of this into account the decision could not be said to be an unreasonable restraint of trade.

The coming into force of the HRA is likely to signal change for self-regulators such as sports governing bodies.<sup>24</sup> The effect of the HRA is to give further effect to the provisions of the European Convention of Human Rights (ECHR) (1950) in the UK.<sup>25</sup> ‘There appear to be two mechanisms by which the Convention Rights incorporated by the Act are likely to impact upon the activities of sport governing bodies.’<sup>26</sup> One such mechanism is the “horizontal” impact of the Act, in the Acts passage through parliament it was made clear that the Act was not to be extended to private relationships. Despite this there appears to be argument that ‘the Act will, even must impact on purely private relationships.’<sup>27</sup>

**‘Section 6(3)(a) of the Act defines public bodies that are compelled by S 6(1) to act in accordance with rights laid down as including a ‘court or tribunal.’ When considered in combination with S2 of the Act, requiring the courts to take into account the case law of the Strasbourg institutions, it is well arguable that this may have an impact on purely private relationships. However it is clear that the Act makes no provision for the creation of new causes of action for potential litigants.’<sup>28</sup>**

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<sup>24</sup> Boyes, S, ‘Regulating Sport After the Human Rights Act 1998’, (2001) 151 New Law Journal 444

<sup>25</sup> S. Gardiner et al, *Sports Law*, 3<sup>rd</sup> edn (2006), Cavendish Publishing p 217

<sup>26</sup> Boyes, S, ‘Regulating Sport After the Human Rights Act 1998’, (2001) 151 New Law Journal 444

<sup>27</sup> Boyes, S, ‘Regulating Sport After the Human Rights Act 1998’, (2001) 151 New Law Journal 444

<sup>28</sup> Boyes, S, ‘Regulating Sport After the Human Rights Act 1998’, (2001) 151 New Law Journal 444

It is also arguable that where there is a pre-existing cause of action between the parties, the courts may be influenced by the rights protected under the ECHR. Meaning when individuals can identify a cause of action, they may be able to argue that:

**‘It is relevant to the case to attach a convention right to a pre-existing cause of action. This might impact upon the manner in which the courts interpret contractual relationships between the athlete and governing body or the way in which they choose to apply the restraint of trade doctrine.’<sup>29</sup>**

This means that certain aspects of the HRA may apply to the decision against Fallon. In addition it also means that there is a greater likelihood of the decisions of governing bodies being amenable to judicial review.

In relation to Kieren Fallon it would appear that the panel have exercised their self-regulatory power fairly and lawfully, as they applied the principles of natural justice and are not in breach of the restraint of trade doctrine. The panel were justified in their decision because, it would have an exceedingly detrimental effect on the integrity of racing if a person charged with conspiracy to defraud many in connection with race riding, were to be permitted to continue riding pending resolution of the issue.<sup>30</sup> ‘The decision was not disproportionate, as the same decision would be passed on any individual of any profession being charged with such a serious crime.’<sup>31</sup> With

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<sup>29</sup> Boyes, S, ‘Regulating Sport After the Human Rights Act 1998’, (2001) 151 New Law Journal 444

<sup>30</sup> The Horseracing Regulatory Authority: [www.thehra.org](http://www.thehra.org)

<sup>31</sup> The Horseracing Regulatory Authority: [www.thehra.org](http://www.thehra.org)

regard to decisions not being amenable to judicial review, it would be fair in the Fallon case for the reasons given above and the fact that using the methods available the decision was adequate. However there are still challenges to the decision and claimants are continually attracted to the contention that the decision in *Aga Khan* is vulnerable and endorses an unnecessary preclusion of public law in the regulation of sporting bodies. Nevertheless 'save a decision by the House of Lords, the ruling of the Court of Appeal in *Aga Khan* is likely to be followed in almost all analogous circumstances.'<sup>32</sup>

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<sup>32</sup> Anderson, J, 'An Accident of History: Why the Decisions of Sport Governing Bodies are not Amenable to Judicial Review' (2006), *Common Law World Review* 35 3 (173)

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