

Within sport there is an “internal running...from the governing body through regional and county bodies to the individual sports club.”¹ Therefore the main governance within sport is internal. This method of governance has been both criticised and commended by academics and the courts alike. This essay will highlight the main arguments for and against internal governance within sport and the association of this to the process of Judicial Review. It will also explore the obligations that sports associations, especially the Horseracing Regulatory Authority have to athletes.

Academic, Simon Boyles states that the Courts reluctance to intervene involves sporting bodies having more expertise and specialist knowledge.² However, self-regulation can be criticised as sporting bodies themselves are powerful and monopolistic and can affect many athletes’ lives without backlash. Self-regulation shows a huge gap in the methods of holding sport governing bodies accountable and this arguably can be seen quite clearly when considering Judicial Review. Judicial Review is a way of holding public bodies accountable and confusion has arisen as to whether sport-governing bodies are in fact private or public.

*Mullins*³ is one of the most recent cases to ask the question ‘is the Jockey Club amenable to Judicial Review?’ In this case it was held that the appeal board of the Jockey Club was not amenable to judicial review and was bound by the decision in *Aga Kahn*⁴.

In *Aga Kahn*⁵ the Court of Appeal⁶ asked whether the sporting body was “governmental in operation and nature.” It was considered amongst other things that the Jockey Club received public funding and was a ‘significant national activity’⁷.

¹ Gardiner, S. (2006) “Sports Law, Third Edition” Cavendish.

² Boyles, S. (2001) Regulating Sport After The Human Rights Act. *New Law Journal*, 151 (6977) pp. 444

³ *Mullins v Board of Appeal of the Jockey Club* (2005) EWHC 2197 (Admin)

⁴ *R v Disciplinary Committee of the Jockey Club, ex p Aga Kahn* [1993] 2 ALL ER 853

⁵ [1993] 2 ALL ER 853

⁶ C/A

⁷ [1993] 2 ALL ER 853

Kerry Smith
Sport Law Assignment
Word Count: 2198

Despite these considerations the C/A held that the Jockey Club ‘neither by its framework or rules or function did it fulfil a governmental role.’ However Bingham MR did state that had the body ceased to exist the government would be required to fulfil its functions. This indicates that the Club was in fact fulfilling public functions and so should be held accountable to Judicial Review.

Hoffman LJ stated:

“...power, even over a substantial area of economic activity is not enough...If control is needed, it must be found in the law of contract, the doctrine of the restraint of trade...and all the other instruments available in law for curbing the excesses of private power.”⁸

This idea was discussed firstly in *Law v National Greyhound Club Ltd*⁹ when the Defendants considered whether ‘proceedings for judicial review where the appropriate remedy’¹⁰ where the Greyhound Club held that the remedy should be Judicial Review. It was held there was no relief in Judicial Review and in fact the claimant could go through private law proceedings due to there being a contract between the parties. This has been seen in cases hereinafter.

Anderson states:

“Arguably, aspects of the judicial review process such as its limitation periods, the non-availability of damages, the discretions as to relief, disclosure, cross-examination and interim relief would seem to portray judicial review in a more attractive light for a governing body and less so for an individual applicant.”¹¹

⁸ [1993] 2 ALL ER 853

⁹ (1983) 1 W.L.R 1302

¹⁰ Under the Supreme Court Act 1981 (c.54) S. 31 (1) (2)

¹¹ Anderson, J. (2006) An Accident of History: Why the Decision of Sports Governing Bodies are not Amenable to Judicial Review. *Common Law World Review*. 353 (173).

Therefore according to Anderson the Sporting Bodies in theory should encourage Judicial Review however as shown in the *National Greyhound Club*¹² this did not happen.

*Datafin*¹³ was one of the first major cases to consider Judicial Review and sporting bodies. It was held that:

“...The source of the entity's power is, usually, the decisive test. If the source of power is statutory in nature, clearly the body is subject to judicial review. If the source is contractual in nature, then the body is subject to private law only”¹⁴

Therefore, they would look at the ‘nature of the body in question’. It appears from this statement that as the Jockey Club receives public funding and affects the public at large, Judicial Review would affect it under this ruling. However this was never the courts intention as in *Aga Khan*¹⁵, Bingham MR stated that ‘The source of power was inconclusive but not irrelevant’. Also in *Datafin*¹⁶ it was susceptible to Judicial Review, as it had been sufficiently woven into ‘fabric of public regulation’:

“...It had been sufficiently woven into the fabric of public regulation (in the field of take-over and mergers) to be held amenable to judicial review...in *Aga Khan*...the Jockey Club was not sufficiently woven into the fabric of public regulation as to be susceptible to judicial review.”¹⁷

Post *Datafin* were various cases including *Massingberd-Mundy*¹⁸ where Nell LJ and Roch J stated that they would have considered that some of the Jockey Clubs

¹² *Law v National Greyhound Racing Club Ltd* [1983] 1 W.L.R 1302

¹³ *R v Panel on Take-overs and Mergers, ex parte Datafin and Prudential-Bache Securities Inc* [1987] BCLC 104

¹⁴ [1987] BCLC 104

¹⁵ [1993] 2 ALL ER 853

¹⁶ [1987] BCLC 104

¹⁷ Anderson, J. (2006) *An Accident of History: Why the Decision of Sports Governing Bodies are not Amenable to Judicial Review*. *Common Law World Review*. 353 (173).

¹⁸ *R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy* [1993] 2 All ER 207

decisions would have been amenable to Judicial Review had there not been other authority in the form of a contract.

The HRA¹⁹ appears an effective way of holding sporting bodies accountable. Article 6 states there is a 'Right To a Fair Trial.' Article 6(1) makes it 'unlawful for a public authority to act contrary to Article 6. There is confusion as to whether sporting bodies for the benefit of 6(1) falls under the definition of a public body. Article 6(3)(b) states that a public body is 'any body who's function is public in nature'. Simon Boyles proclaims that Sporting Bodies are likely to be affected by the HRA and states that, "Sports Bodies will have to respect not only economic rights but also fundamental rights."²⁰ He draws attention to the former Home Secretary stating that sporting bodies would be expected to fall within section 6(3)(b) as a 'quasi-public' category. 'Quasi-public' bodies are only accountable for their 'public acts'.

In *Aga Kahn*²¹, Bingham MR stated: "many of the powers exercised by the Jockey Club were essentially of a public nature." This statement therefore would have held *Aga Kahn*²² susceptible to section 6²³. In the recent *Aston* case²⁴, Lord Nicholls stated the criteria in assessing whether a quasi-public authority is bound by s.6 is to include: whether it is publicly funded, if it is exercising state power, whether it is taking the place of government and whether it provides a public service. It appears then that the Jockey Club fulfils that criteria and in *Jockey Club v Buffham*²⁵ it was held by Gray J that the Jockey Club is 'a public authority in every sense of the term.'

Case law since *Ridge v Baldwin*²⁶ suggests that all decision-making bodies have obligations to abide by Natural Justice. It focuses on procedural fairness and is

¹⁹ HRA 98

²⁰ The Human Rights Act 1998 and The Amsterdam convention

²¹ [1993] 2 ALL ER 853

²² [1993] 2 ALL ER 853

²³ The Human Rights Act 1998 s.6

²⁴ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2003] UKHL 37.

²⁵ *The Jockey Club v Buffham* [2002] EWHC 1866 (QB)

²⁶ *Ridge v Baldwin* [1963] 2 All ER 66

regarded as essential to any system geared toward justice. This demonstrates to private bodies that the courts are still overriding. The natural justice principles are firstly, the 'rule against bias' and secondly 'the right to a fair hearing'.

Within *Enderby Town*²⁷ when a sportsman claimed that he had a right to be represented, it was held that the F.A did not fall contrary to natural justice. Lord Denning held that the sporting bodies decision must be 'discretionary' and not 'absolute' and they must act 'honestly without bias'. Therefore it appears that as long as a decision is considered before being denied then the decision will be held valid i.e. as long as they acted 'fairly'. This obviously begs the question of whether this does actually hold sporting bodies accountable when they can very easily manipulate the rules of natural justice and still come to the same decision they would have done without it.

Sporting bodies also have obligations to only reasonably restrain trade. A contract held to be an unreasonable restraint of trade is void unless there is an interest meriting protection, the restraint is reasonable or the restraint is not against public interest. According to Morris and Little the restraint of trade doctrine is a 'powerful weapon for challenging sport bodies rules or practices which unreasonably interfere with the right of an individual to earn a livelihood'²⁸

*Grieg v Insole*²⁹ involved a challenge to the rules of the ICC³⁰ and the TCCB³¹. The players of the WSC³² after being banned from playing cricket domestically and from international 'Test Match Cricket' issued a writ seeking against TCCB and ICC. The Court declared that they had acted Ultra Vires and that their decision was void in being an unreasonable restraint of trade. Some legal issues centred around: the TCCB knew that their act would be unlawful and the bans introduced were retrospective as

²⁷ *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch. 591

²⁸ Morris, P; Little, G. Challenging Sports Bodies' Determinations. *Civil Justice Quarterly*. 1998 (17)

²⁹ *Greig and Others v Insole and Others* [1978] 1 W.L.R. 302

³⁰ International Cricket Council

³¹ Test and County Cricket Board

³² World Series Cricket

the players had already signed in the past and were now being affected by the TCCB altering their rules so that the WSC could not play domestic games. Other factors that were taken into consideration included, that Test Match cricket provided a large proportion through which games at lower levels were financed. This suggests that the WSC ban could threaten the existence of test match cricket, which brings into consideration public interest. Also the ICC and TCCB had “acted unlawfully themselves by acting without adequate regard to the fact that WSC had contractual rights with the players concerned, which were entitled to the protection of the law.”³³ Taking these factors into consideration and various others it was held that there was an unreasonable restraint of trade.

Another recent enquiry concerned *Keiron Fallon*³⁴. Fallon sought to challenge a domestic racing ban made by the disciplinary body of the Jockey Club, on the grounds that the ‘prohibition had been unlawful and disproportionate.’³⁵ It was held that the decision had been reached in a ‘lawful and proportionate manner’³⁶. The Court decided there was no unreasonable restraint of trade. It is interesting to consider that had the ban in *Greig v Insole*³⁷ been purely a domestic ban there may not have been an unreasonable restraint of trade concluded.

Andy Gwillam explores the idea of public interest and states that within *Greig v Insole*: “The ban would deprive the public of watching star players.”³⁸ If WSC could have played cricket internationally the domestic ban may have been held reasonable as it did not restrict their income completely. The fact that TCCB knew of the illegality will also have been a major factor.

Slade J suggested that there were nine questions that the court must consider including, “Subject to the provisions of the Act of 1974, are the new rules of the ICC

³³ URL at <<http://news.bbc.co.uk/sport1/hi/cricket/1968299.stm>> Last looked at on 13/12/2006

³⁴ *Fallon v The Horseracing Regulatory Authority* [2006] ALL ER (D) 427 (Jul)

³⁵ [2006] ALL ER (D) 427 (Jul)

³⁶ [2006] ALL ER (D) 427 (Jul)

³⁷ [1978] 1 W.L.R. 302

³⁸ Gwillam, A. (2000) They thought it was all over. *New Law Journal*. 150 (1896)

void as being in restraint of trade?" Slade J answered, "Cricket in New Zealand depends for its financial viability considerably on the profits made by it from Test Matches played both in New Zealand and on overseas tours." ³⁹ Which suggests that the lack of income earned from banning WSC from playing Test Match Cricket would have dramatically reduced the overall income for New Zealand Cricket and therefore would threaten the existence of the game. Compared to *Fallon's* case whereby there was no evidence that his ban would threaten the existence of the sport.

Sampson suggests, "Sport lawyers accept *Aga Kahn* as a bar to seeking Judicial Review which Mullins subsequently confirms."⁴⁰ It will be interesting to see whether the HRA will have a profound effect on future cases. Anderson states, "the sporting interpretation of s.6 is yet to be considered."⁴¹

Sporting bodies clearly have obligations in the interests of natural justice and to only reasonably restrain trade. Under HRA it appears that Jockeys such as Keiron Fallon having been mistreated may find remedy in the court under the instruction that the Jockey Club would fall under the new category of a quasi-public body. This revolution seems that *Aga Kahn* may no longer be a bar on bodies being accountable to Judicial Review. It does appear that the judiciary are still reluctant for sporting bodies to seek remedy in the courts due to reasons, such as they are "largely voluntary and socially beneficial organisations"⁴² and are more specialist than the courts. Of course if sporting specialists were included in Judicial Review proceedings then Judicial Review may be more appropriate.

Firth argues that for Sporting Bodies seeking remedy, the courts would not be appropriate anyhow due to sporting bodies, "concentrate on fairness rather than

³⁹ [1978] 1 W.L.R. 302

⁴⁰ Sampson, S. A Sporting Chance? *New Law Journal*. 156 (8)

⁴¹ Anderson, J. (2006) An Accident of History: Why the Decision of Sports Governing Bodies are not Amenable to Judicial Review. *Common Law World Review*. 353 (173).

⁴² Anderson, J. (2006) An Accident of History: Why the Decision of Sports Governing Bodies are not Amenable to Judicial Review. *Common Law World Review*. 353 (173).

‘legalistic rules’⁴³ However he also states that within a sporting body the claim will be based on written evidence only. This is obviously very different and unfair compared to courts with “the standard and burden of proof and explaining the reasons for the court's decision.”⁴⁴

It appears that the most appropriate argument lies with the fact that bodies such as the Jockey Club powers are ‘essentially public in nature’ as stated by Bingham MR⁴⁵. Anderson further adds that in today’s society sporting bodies are of more ‘socio-economic’⁴⁶ importance than at the time of *Aga Kahn*⁴⁷, therefore views should change to reflect this. Therefore, extra accountability can only be positive in the interests of justice. Even if there were just certain decisions that were to be held accountable, as would be as a quasi-public body.

Anderson argues additionally that England should consider the views of other jurisdictions such as New Zealand who have been ‘willing to entertain the idea of public law challenges to sport bodies determinations’⁴⁸.

There are other methods of accountability that may be more appropriate such as mediation, conciliation or arbitration. The Olympic court of arbitration seems to be a successful body and it would be a positive step to apply it to other sports. Ian Blackshaw states, “Sport should be regulated on a global basis and should be modeled on the World Trade Organisation.”⁴⁹

Word Count: 2198

⁴³ Firth, P. (2006) One-Nil To The District Judge. *New Law Journal*. 156 (275)

⁴⁴ Firth, P. (2006) One-Nil To The District Judge. *New Law Journal*. 156 (275)

⁴⁵ Bingham MR

⁴⁶ Anderson, J. (2006) An Accident of History: Why the Decision of Sports Governing Bodies are not Amenable to Judicial Review. *Common Law World Review*. 353 (173).

⁴⁷ [1993] 2 ALL ER 853

⁴⁸ Anderson, J. (2006) An Accident of History: Why the Decision of Sports Governing Bodies are not Amenable to Judicial Review. *Common Law World Review*. 353 (173).

⁴⁹ Blackshaw, I. Regulating Sport Globally. *New Law Journal*. 150 (617)

Kerry Smith
Sport Law Assignment
Word Count: 2198

Bibliography

Statutory References

Supreme Court Act 1981 (c.54) S. 31 (1) (2)

Human Rights Act 1998

The Amsterdam Convention

List of Cases

Mullins v Board of Appeal of the Jockey Club (2005) EWHC 2197 (Admin)

R v Disciplinary Committee of the Jockey Club, ex p Aga Kahn [1993] 2 ALL ER 853

Law v National Greyhound Racing Club Ltd [1983] 1 W.L.R 1302

R v Panel on Take-overs and Mergers, ex parte Datafin and Prudential-Bache Securities Inc [1987] BCLC 104

R v Disciplinary Committee of the Jockey Club, ex p Massingberd-Mundy [1993] 2 All ER 207

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another [2003] UKHL 37

The Jockey Club v Buffham [2002] EWHC 1866 (QB)

Ridge v Baldwin [1963] 2 All ER 66

Enderby Town Football Club Ltd v Football Association Ltd [1971] Ch. 591

Greig and Others v Insole and Others [1978] 1 W.L.R. 302

Fallon v The Horseracing Regulatory Authority [2006] ALL ER (D) 427 (Jul)

Text Book References

Gardiner, S. (2006) "Sports Law, Third Edition" Cavendish

Journal References

Kerry Smith
Sport Law Assignment
Word Count: 2198

Boyles, S. (2001) Regulating Sport After The Human Rights Act. *New Law Journal*, 151 (6977) pp. 444

Anderson, J. (2006) An Accident of History: Why the Decision of Sports Governing Bodies are not Amenable to Judicial Review. *Common Law World Review*. 353 (173).

Morris, P; Little, G. Challenging Sports Bodies' Determinations. *Civil Justice Quarterly*. 1998 (17)

Gwillam, A. (2000) They thought it was all over. *New Law Journal*. 150 (1896)

Sampson, S. A Sporting Chance? *New Law Journal*. 156 (8)

Firth, P. (2006) One-Nil To The District Judge. *New Law Journal*. 156 (275)

Blackshaw, I. Regulating Sport Globally. *New Law Journal*. 150 (617)

Web References

URL at <<http://news.bbc.co.uk/sport1/hi/cricket/1968299.stm>> Last looked at on 13/12/2006

Kerry Smith
Sport Law Assignment
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