

**SPORTS LAW**

**The Jockey Club, (Horseracing Regulatory Authority), as the effective governing body of horseracing in this country, has obligations to all jockeys competing in the United Kingdom. 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 Kieren Fallon dispute.**

This assignment shall illustrate the legal regulation of sports governing bodies in Britain, these governing bodies are responsible for controlling the majority of aspects in sport, thus are powerful regulators who are increasingly involved with the law<sup>1</sup>. The importance of governing bodies in sport is often underestimated, they act as control devices through enforcing the rules which regulate a particular sport, their decisions are often scrutinised in much the same way as might be expected of the state<sup>2</sup>.

In Britain, the majority of people would acknowledge the significance of sport, It plays a part in many peoples everyday life. Although it is reasonable to consider sport as a function of society, there is little state intervention and regulation under British laws. Sports are regulated by private governing bodies which were initially formed from establishing the basic rules during the particular sports inception. From the outset, the state appears not to have realised the importance of sport, however this is slowly changing as the government demonstrates greater involvement through providing sponsorship, facilities and occasionally controlling matters such as doping.

In relation to the question, the HRA is the governing body responsible for managing Horseracing in Britain, they create and enforce the rules of racing, license and register

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<sup>1</sup> Hoult, P, 'The beautiful game' (2004) 101 (12) LSG 26.

<sup>2</sup> Gardiner, Simon [et al.]. Sports Law, 3rd Edition. (2006) Cavendish Publishing. Pg 179.

rating participants, and aim to protect the integrity of the sport<sup>3</sup>. Sports governing bodies can be classified as self-regulating, this capacity enables the organisation to regulate itself free from intervention. Although they are self regulating, “they still have the capacity to act governmentally while still possessing the institutional and legal structures and interests of private bodies”<sup>4</sup>. Due to this nature there are various advantages and disadvantages.

There are many advantages of self regulating sports governing bodies, the most obvious ones are that they do not require government funding, and they are made up of experts who have considerable knowledge of their particular sport. Self regulators are also efficient; they generally have reasonable operating costs and are frequently successful when carrying out day to day duties. Their efficiency is based upon their flexibility, this is due to the relatively informal procedures that are used to govern sport. The major criticisms of self-regulating bodies are in respect to mandate, accountability, and procedural fairness. Mandate concerns the obligations which a governing body has to perform, with little democratic legitimacy it is difficult to demonstrate that decisions are independent and in the public interest. Sports governing bodies should also be accountable, should their decisions be scrutinised to a greater extent through normal democratic procedures<sup>5</sup>, such as using judicial review. The final common criticism regards their procedural fairness. Criticisms have occurred in the past due to the injustices in certain cases, such as unfair restraint of trade, and breaches to natural justice.

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<sup>3</sup> <http://www.thehra.org>

<sup>4</sup> Gardiner, Simon [et al.]. Sports Law, 3rd Edition. (2006) Cavendish Publishing. Pg 180.

<sup>5</sup> Gardiner, Simon [et al.]. Sports Law, 3rd Edition. (2006) Cavendish Publishing. Pg 182.

The Kieren Fallon dispute is of interest to sports fans and participants as it incorporates many different challenges regarding the law and governance in sport. Kieren Fallon, one of horse racing's most popular jockeys, faces charges brought by the CPS following a two-year investigation. The dispute surrounding the case arises from whether it is justifiable for the HRA, to ban a participant prior to the conclusion of criminal proceedings.

Kieren Fallon faces trial for conspiring to defraud Betfair. Fallon, was said not to ride horses on their merits, and by placing bets on horses to lose, Fallon could cheat Betfair. The estimate of the fraud is said to amount to £10 million<sup>6</sup>. In light of these charges, the HRA decided to ban Fallon from racing in Britain until the conclusion of the criminal proceedings. Kieren Fallon has proclaimed his innocence<sup>7</sup>.

The HRA, decided to intervene in the matter as it was in the interest of the sport. This decision was made using a disciplinary, it took place in front of a Special Panel in July 2006 which consisted of a former High Court judge, and two other experienced members in horseracing disciplinary proceedings. Fallon, unhappy with the decision, demanded a rehearing via a separate Appeal Board. This board also comprised of experts, however these were a different former High Court judge, a former Chief Constable and a Solicitor. The Appeal Board similarly upheld the decision to ban Fallon, the structure under which the Board operated, identified the HRA's rules of racing<sup>8</sup>. The breaches identified were to rules 155-158. Rule 155, reads "Every horse which runs in a race shall be run and be seen to be run on its merits". Rule 156 and 157, highlight the Negligence and Intent of a jockey during racing. Lastly, rule

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<sup>6</sup> Judd, Terri. Former champion jockey Fallon is charged over £10m betting fraud (2006). The independent online, <http://news.independent.co.uk/uk/crime/article1159279.ece>

<sup>7</sup> Hughes, Sarah. High stakes: Kieren Fallon's Toughest Battle. The Observer, 1/10/2006.

<sup>8</sup> <http://www.thehra.org>

158 regards the failures to take all reasonable measures to win the race. Fallon, has a history of violating the rules, he has served a 21 day ban because he did not run the horse Ballinger Ridge on its merits in 2004<sup>9</sup>.

Fallon's legal advisers subsequently attacked this decision. Pannick, Fallon's QC said both the Panel and Appeal Board were wrong in refusing to consider Fallon's evidence regarding the weaknesses of the CPS case. By failing to do this, they were failing to consider significant factors. Pannick also stated the ban was made on impulse and it was disproportionate. Consequently, it is Fallon's argument that unlawful disciplinary action had occurred. In response, the HRA indicated it would be a timely procedure to analyse the evidence, the Panel Chairman, Connell, stated;

"I do not take the view that it is the job of our Panel to second guess the... CPS...the situation here is that after lengthy investigation the... Police have charged these men... In due course the jury will have to decide whether or not the charge is proved. We know only the wording of the charge and certain other limited details either given to us by the representatives of Kieren Fallon or which we have come by in the normal course of our regulatory duties ... It is not for us to seek to assess the strength of the case for the prosecution".

The Appeal Board then went on to say;

"the idea of a regulatory body sifting through available prosecution evidence for the purpose of deciding whether a current prosecution case is 'weak' or 'strong' is... very unattractive"<sup>10</sup>.

Warby, the legal representative of the HRA, expressed that the Panel consisted of experts who balanced the rival interests of racing and the defendant. In this case the ban a proportionate to protect integrity of racing.

The HRA did realise the controversy over the decision to ban Fallon, they acknowledged it would "effectively... end his career as a leading jockey". The HRA

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<sup>9</sup> Honeyball, Lee. REVIEW OF THE YEAR: HORSE RACING: MOUNTING DRAMA: From dawn raids to Derby glory, Kieren Fallon won't forget this year. The Observer Sports Magazine, Pg. 46. (28/11/2004)

<sup>10</sup> Kieren Fallon v. Horseracing Regulatory Authority (2006) EWHC 2030 (QB).

also acknowledged that Fallon's financial income would be affected. However, Fallon had already been paid to ride until March 2007, was in ongoing receipt of prize money, and still had the opportunity to ride outside of Britain. The right to race outside Britain still remained as Fallon's jockey licence was issued by the Irish Turf Authority. This does not amount to an unfair restraint of trade.

Fallon, still unhappy with the impartiality of the HRA, challenged their decision, and the matter came on for decision by court. Fallon essentially wanted to use judicial review<sup>11</sup>, a public law remedy to scrutinize the disciplinary proceedings of the HRA. The English legal system does not extend judicial review to the private law, and this is the reason why it is difficult for affected sports participants, to get the state to scrutinise the conduct of governing bodies to any sufficient extent. The justification for excluding judicial review is due to the nature of the power of governing bodies, this is non governmental because it is not derived from statute. The English courts have stated that sporting disputes are private law matters, this is because of the contractual basis between a participant and a governing body, it is said contracts are entered into freely. Consequently judicial review does not apply, it "is a traditional means by which public bodies are held to account through the courts"<sup>12</sup>.

The case of *Law*<sup>13</sup> concerned the initial application for judicial review to scrutinise the decision of a sports governing body. A dog trainer, whose dog was doped, was banned due to breaching the rules of the Greyhound Racing Club. The trainer suggested the governing body had abused their power, consequently he tried to apply

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<sup>11</sup> Anderson, Jack. An Accident of History: Why the Decisions of Sports Governing Bodies are not Amenable to Judicial Review, 1 September 2006. Vathek Publishing Licence, Common Law World Review.

<sup>12</sup> Gardiner, Simon [et al.]. Sports Law, 3rd Edition. (2006) Cavendish Publishing. Pg 182.

<sup>13</sup> *Law v National Greyhound Racing Club* (1983) 1 W.L.R. 1302.

for judicial review. However, due to the contractual nature between the parties, judicial review could not be used.

The high profile case which denied the right of application for judicial review is in *Aga Khan*<sup>14</sup>. The Jockey Club banned one of Aga Khan's horses for a doping offence, he challenged the decision on different grounds. Khan claimed that he was unaware of the origins of the banned substance, and that it was damaging to his reputation as a horse breeder, owner and religious leader. It was held, that the decision was fair as the governing body consisted of experts. The Court of Appeal said that as the Jockey Club is not a division of the government, its decisions are not amenable to judicial review. The *Mullins*<sup>15</sup> case is a recent litigation which affirmed the *Aga Khan* case.

The High Court upheld the ban to prevent Fallon from riding in Great Britain. They highlighted that the decision was made by two responsible panels with vast experience in horseracing matters, who had taken into account that a person was innocent until proven guilty. Because Fallon had voluntarily entered into a private agreement with the HRA, he agreed to be bound by their rules and disciplinary procedures. Although Fallon could not use judicial review to scrutinise the decision of the HRA, he argued that he should be able to because sport is more of a 'public' than 'private' matter, this is because it receives substantial public funding, and its decisions are in the public interest. However, the case law demonstrated shows the contractual basis of the parties is the primary reason to deny judicial review.

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<sup>14</sup> R. v Disciplinary Committee of the Jockey Club Ex p. Aga Khan (1993) 1 W.L.R. 909.

<sup>15</sup> William Mullins v Nigel McFarlane and the Jockey Club (2006) EWHC 986 (QB).

Compensation, arbitration and mediation are the only remedies available in private law<sup>16</sup>.

Although the courts rarely interfere with the decisions of sports governing bodies, they retain the right to, because they act as a supervisory jurisdiction. Instances of when the courts are willing to intervene, are most likely to occur when governance in sport appears to be immoral or biased. The case of *Modahl*<sup>17</sup> highlighted the injustice of a decision to ban the former running champion, Modahl after testing positive for a banned steroid. Modahl stated "I have never taken any banned substance"<sup>18</sup>, and this was later proved because the methods used in the drug testing were flawed, the ban was lifted after several years. The case of *Jones*<sup>19</sup>, also demonstrated the unfairness of a governing body's rules. Following the decision to suspend Jones, a disciplinary committee hearing was conducted under WRFU's rules. Jones had not been allowed an opportunity to present his case or to be represented during the hearing, and this amounted to a breach of natural justice.

The *Greig*<sup>20</sup> case concerned 'The International Cricket Conference' and the 'Test and County Cricket Board' governing bodies. These bodies excluded professional cricketers from test and county cricket on the basis that they had privately contracted to play in the Packer series. The cricketers appealed and it was held their rulings were unlawful because the claimants could not earn a living through their trade. In respect to Fallon's ban, it does not amount to an unfair restraint of trade.

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<sup>16</sup> Stewart, William, Sport and the law: the Scots perspective (2000) T and T Clark.

<sup>17</sup> *Modahl v. British Athletic Federation Ltd* (2002) 1 W.L.R. 1192

<sup>18</sup> Modahl, Diane.1994: Modahl banned for drug taking,  
[http://news.bbc.co.uk/onthisday/hi/dates/stories/december/15/newsid\\_2559000/2559981.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/december/15/newsid_2559000/2559981.stm)

<sup>19</sup> *Jones v Welsh Rugby Football Union* (1997) The Times, 6 March (1998).

<sup>20</sup> *Greig v Insole* (1978) 1 W.L.R. 302.

The article titled '*Challenging sports bodies' determinations*'<sup>21</sup> highlighted potential instances of bias in the decisions of sports governing bodies, it suggested they should "resist the quite natural temptation to pack disciplinary tribunals with their own officials". This as a consequence, could cause bias especially when dealing with such high profile cases, such as shown above.

Due to the private nature of law in sports disputes, the most frequently used remedy is to apply to The Court of Arbitration for Sport (CAS). This resolution body was created to settle sporting disputes outside of the court, in a fast and cost effective manner<sup>22</sup>. CAS, established in 1984 dealt initially with Olympic disputes. In 1992, a jockey, Gundel lodged an appeal to CAS to challenge a suspension, CAS reduced the suspension to one month from three<sup>23</sup>. Fallon has not applied for a hearing by arbitration

To conclude, it has been illustrated that protection in public law is far superior to the protection in private law, hence the reason why so many sports participants appeal for judicial review. This will continue to occur as it is the best way to scrutinize decisions. As demonstrated, the decisions of governing bodies affect the participants in sport, hence they must be made fairly, if participants feel decisions are made illegitimately, it should be possible for these to be scrutinised to a greater extent. Many people would welcome the extension of judicial review to the private law, however until a case reaches the House of Lords, the Aga Khan case will take precedent and the less protective private law remedies can only be used. This

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<sup>21</sup> Morris, P, and Little, G, '*Challenging sports bodies' determinations*' (1998) 17 Civ JQ 128, Pg 139-140.

<sup>22</sup> <http://www.tas-cas.org/default.htm>

<sup>23</sup> Reeb, Matthieu. THE COURT OF ARBITRATION FOR SPORT, CAS Secretary General, accessed on 17/10/2006 online at URL <http://www.tas-cas.org/en/present/frmpres.htm>

illustrates the importance for governing bodies to continue to control their sports efficiently, the HRA have recently developed relationships with Crimestoppers and the Police to regulate their sport proactively.

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