THE WHEREABOUTS RULE: IMPLICATIONS ON PRIVACY AND DATA PROTECTION RIGHTS

LLM DISSERTATION BY KELVIN C. OMUOJINE

CHAPTER 1

INTRODUCTION

1.1 The Zeal to Win

Sport is synonymous with competition - striving to outplay one's fellow competitor(s) is the aim. Whether during a school break, at amateur or professional level, any form of sport entails the attempt to win at the expense of an opponent. The European Sports Charter, Article 2, of the Council of Europe defines sport as "all forms of physical activities which, through casual or organized participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels". [1] Flowing from this definition, common features that transcend virtually all forms of sport are physical exertion, mental exercise as well as competition. Exerting oneself in order to win, pushing one's physical and mental abilities to the limit in order to excel in competition; that is what sport is about, whether casual or organised participation. Especially at the professional level, there is the obvious need to prime the human body to perform at its peak. The need to push the human body to its limits of endurance and stamina in order to gain competitive edge has

[1] Revised in 2001.

made many sportspersons resort to what is generally referred to as doping.[2] Generally illegal and regarded as a means of cheating, doping has become an unwelcome feature of professional sport – a vice that sport governing bodies are battling to curb. Indeed, the world of sport has on many occasions been rocked by doping scandals, raising questions as to the integrity of sport in the light of its traditional moral values. Indeed, at whatever level it is being played, any person who steps out onto the field, court or track to participate in any sporting activity normally has victory as the aim. When the zeal to win makes an individual resort to means that are illegal and contrary to the rules in order to gain competitive edge, the repercussions are not only borne by the individual when caught. Apart from the health hazards to the athlete, doping impacts negatively on the integrity of sport and on the larger society as well.

1.2 The Integrity of Sport

Traditionally, sport boasts of a host of inherent moral values such as fairness, hard work, team work, responsibility, integrity, and so forth. Sports jurisprudence is never complete without phrases such as "level-playing-field". Victory should be the reward for hard work and aptitude but when victory is attained in the absence of fair-play, there is the question of integrity.

Sport governing bodies are charged with the responsibility of maintaining the integrity of sport, including a level-playing-field for all participants. That is why an athlete can be subsequently stripped of medals purportedly won if in retrospect it is discovered that the athlete had cheated. This flows directly from the need to protect integrity of competition

[2] A detailed look at the meaning of the term is undertaken in chapter 2.

which has been threatened by doping scandals. From the Festina Affair which rocked the 1998 *Tour de France*, to the confession of former ace sprinter Marion Jones, to the use of anabolic steroids[3] as part of the BALCO[4] doping scandal in 2007, the virtues of professional sport have been beclouded by high profile doping cases. One interesting feature of the Marion Jones confession is the exposure of the limitations of doping detection technology – the inability to detect the banned substance. This revealed more clearly than ever before the need for more efficient measures to combat doping in sports.

1.3 The Commercial Angle

It is now a common trend to talk about the business of sport. Indeed, with the commercial boom of sport in the last couple of decades, sport has truly become big business. From broadcast deals for live English Premiership matches to sponsorship packages for the Olympic Games, sport has evolved into a money spinning venture. Notable amongst the beneficiaries are the professional sportspersons themselves. The widely reported football transfer of Christiano Ronaldo from Manchester United to Real Madrid, for which he is reported to earn about £11 million a year gives insight to the vast commercial potential sport has accrued over the years.[5]

The enhanced commercial value of sport has certainly raised the stakes since professional sport has now become a major source of livelihood. For sportspersons, not only does fame

[3] Tetrahydrogestrinone (usually referred to as 'THG').

[4] Bay Area Laboratory Cooperative.

[5] The Guardian.co.uk, 11 June 2009: http://www.guardian.co.uk/football/2009/jun/11/cristiano-ronaldo-manchester-united-real-madrid1 (last viewed on 22 September 2009).

beckon, but fortune as well. To be amongst the top earners, one necessarily has to be among the top performers all resulting in more incentive to strive for success. Just like other forms of human endeavour, in sport there will be those who try to circumvent the legitimate path to success by resorting to means such as doping in order to gain competitive advantage.

1.4 Striking a Balance

The issue of doping is a complex one as it is imperative to strike a balance between the legal and illegal means of performance enhancement as well as the need to respect the rights of sportspersons. While special diets or the use of nutritional supplements may not necessarily be prohibited, certain levels of performance enhancement substances are not permitted in the body. The rationale is that the existence of such performance enhancing substances or such prohibited quantities of such substances in the human body is beyond the natural quantity and as a result amounts to an unfair means of gaining competitive advantage. The most significant anti-doping strategy remains periodic tests on athletes. This in recent times has been modified to include out-of-competition[6] testing, the aim of which is the elimination of the certainty of an upcoming test, whereby athletes are aware of impending tests and may suspend such use prior to the test, only to resort to it after the test would have been completed. This otherwise would allow the anti-doping system to be circumvented while the illegal use of banned substances continues to have an effect on the body of the athlete. It is in this light that the World Anti-Doping Agency (WADA) has introduced the Whereabouts system of doping

[6] The Guideline for Out-of-Competition Testing (Version 2) published by WADA in June 2004 defines "In-Competition" test as a test where an Athlete is selected for testing in connection with specific Competition; whereas "Out-of-Competition" refers to any doping control which is not In-Competition.

control whereby athletes are required to file their whereabouts information three months in advance. The aim is to remove the certainty of drug testing so that athletes can be located, without prior notice, at the location earlier filed for the purposes of sample collection and testing.

Our concern borders on the equilibrium between the anti-doping measures and the rights of sportspersons with specific regard to the new whereabouts rule under the World Anti-Doping Code (WADA Code) and other anti-doping rules and regulations of the World Anti-Doping Agency (WADA). This has led to complaints and reactions of defiance from sports organisations and sportspersons alike. Notable among such are sporting organisations like Fédération Internationale de Football Association (FIFA) and elite professional sportspersons like Rafael Nadal. The latter who is one of the top-ranked tennis players in the ATP Men's Tennis ranking, described the implementation of the rule as a "high price to pay to practice your sport".[7]

The crux of the resistance to the whereabouts rule borders on its implications on the privacy and other rights of sports persons. Despite being branded as intrusive and draconian, WADA has defended the rule as being justifiable and necessary to ensure clean sport. In the light of the above, the necessity of more efficient measures in the fight against drugs in sport is evident. Be that as it may, the implementation of the whereabouts rule seems sure to have an impact on statutory guaranteed rights such as those of privacy, personal freedom and data protection. We seek to evaluate the extent of this impact with a view to analysing whether the implementation of the whereabouts rule in its current form is consistent with these rights.

[7] Published in the Telegraph.co.uk, 29 May 2009: http://www.telegraph.co.uk/sport/tennis/frenchopen/5410931/French-Open-2009-Rafael-Nadal-is-no-exception-to-the-drug-testing-rules.html (last viewed on 10 July 2009).

Chapter 3 will deal with the impact on privacy rights while chapter 4 covers the impact on data protection rights. A couple of other issues such as the missed tests ban will be highlighted in chapter 5 and the final chapter will include suggestions and considerations which anti-doping agencies should take cognisance of in order to avoid legal challenges arising from their efforts to curb doping in sport. Notably, there is a lack of direct judicial guidance by way of precedent since the commencement of the WADA Code containing the rule is from January 1 2009. However, a 'team' of 65 footballers, cyclists and volleyball players have challenged the validity of the whereabouts rule in Belgium's Council of State High Court. Reminiscent of the *Bosman*[8] ruling, this case has the potential to significantly impact upon the regulation of sport from the anti-doping perspective. As a prelude to evaluating the necessity of measures such as the whereabouts rule and the compatibility with established rights of sportspersons, in the next chapter we shall discuss the theory of doping in sports leading up to the emergence of the rule. The chapter will end with a detailed look at the whereabouts rule.

Furthermore, it is pertinent to note that a discussion of the impact of the whereabouts rule on established legal principles such as the rights to privacy and data protection is beset with the same issue that presently affects sports-related cases – the application of legal principles to sport-specific cases. This has fuelled the debate as to whether a distinct field or jurisprudence of sports law actually exists and one point to be made here is the notable dearth of case law touching specifically on this subject. We are thus left with the task akin to that faced in the earlier days of the development of 'sports law' jurisprudence – the task of applying secular legal principles to sport-specific cases. However, we are guided by the well established

[8] Case C-415/93, *Union Royale Belge des Societes de Football Association (Asbl) and Others v. Jean-Marc Bosman* [1996] 1 C.M.L.R. 645; the ruling made the freedom of movement of workers in the European Community applicable to sport.

principle embodied in the decision of the European Court of Justice in cases such as *Walrave and Koch v. Association Union Cycliste Internationale*[9] to the effect that sport is subject to Community law only in so far as it constitutes an economic activity; the exception being where it is a question of purely sporting interest having nothing to do with economic activity. Indeed, it goes without saying that with the implementation of the whereabouts rule among athletes competing at professional and international level, it is hard to see how the rule can escape the application of community law.

[9] Case 36/74, [1975] 1 C.M.L.R. 320, at 332 – 333.

CHAPTER 2

DOPING IN SPORTS AND THE EMERGENCE OF THE WHEREABOUTS RULE

2.1 What is Doping?

At this stage, the obvious take off point would be to tackle the definition of “doping”, a term which has become an established component of sporting vocabulary. Although the term is sometimes used synonymously with the expression ‘drug use in sport’, in its truly broad context, doping encompasses a lot more. A pointer to this is the fact that not all anti-doping rule violations necessarily imply some form of drug abuse directly. For instance, a missed test or failure to provide required sample in line with anti-doping regulations constitutes a breach whereas not exactly amounting to drug abuse. Hence while such inaction or failure to act would constitute a doping violation, the same may not necessarily constitute drug abuse. From another perspective, it is useful to distinguish the concept of doping from that of drug use in sport. The latter does indeed encompass some aspects of the former. Four major reasons for which drugs may be used by competitors have been identified, which are: therapeutic purposes (prescription drugs or self-medication); performance continuation (treatment for

sports injuries); recreational drug use (legal and illegal), and performance enhancement. [10] The last two reasons that have been identified are usually covered and prohibited by anti-doping regulations – the use of drugs for recreational or performance enhancement purposes are contrary to sporting ideals.

Although the phenomenon of doping is widely understood, attempts to categorically define it have not enjoyed similar wide acceptance. This scenario was expressed by Sir Arthur Porrit, the first chairman of the IOC Medical Commission in the following words:

> To define doping is, if not impossible, extremely difficult, and yet everyone who takes part in competitive sport or who administers it knows exactly what it means. The definition lies not in words but in the integrity of character.[11]

The definition article of the World Anti-Doping Code 2009, Article 1, defines doping as "the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of the Code". The anti-doping rule violations stipulated in Article 2 include, *inter alia*, the following:

Article 2.1: presence of a prohibited substance or its metabolites or markers in an athlete's sample;

Article 2.2: use or attempted use by an athlete of a prohibited substance or a prohibited method;

[10] British Medical Association, *Drugs in Sport: the Pressure to Perform*, (BMJ Books, London, 2002), at p. 14.

[11] Quoted in Verroken M, *"Drug Use and Abuse in Sport"* in D.R. Mottra (ed.), *Drugs and Sport*, 2nd ed. (E.&F.N. Spon., 1996).

Article 2.3: refusing or failing without compelling justification to submit to sample collection after notification as authorized in applicable anti-doping rules, or otherwise evading sample collection.

The above stipulations buttress the point earlier made that doping or anti-doping rule violation constitutes more than the act of wrongful use of drugs in sport. This seems broader than the definition given by the International Olympic Committee Medical Commission in the Olympic Movement Anti-Doping Code of 1999 wherein "doping" was defined as the use of an expedient substance or method which is potentially harmful to athletes' health and capable of enhancing their performance, or presence in the athlete's body of a prohibited substance or evidence of the use thereof, or evidence of the use of a prohibited method.

The WADA Code definition as cited above amounts to a working definition for the concept of doping, at least from their perspective, which indeed is fundamental to an effective system of doping control.[12] It flows from that definition that an anti-doping rule violation occurs not only as a result of the act of wrongful use of drugs or performance enhancement substances, but also as a result of failure to comply with rules of anti-doping procedure such as availability for sample collection or for the provision of sample.

2.2 Brief History of Doping

Sport has in recent times been beset by a number of high-profile doping scandals and anti-doping policy and campaigns are more resolute than ever before to clamp down on the trend which has the potential of ruining the very essence of sport. The illegal use of drugs by

[12] S. Gardiner et al, *Sports Law,* 3rd ed., (Cavendish Publishing, 2006), at p. 273.

athletes for performance enhancement and or recreational purposes dates back to many decades ago. There are accounts of significant occurrences in the history of doping in sports. Many writers have traced the history of doping in sports to the third century BC, predominantly, the quest of the ancient Greeks, Egyptians and Romans to gain competitive edge through the use of performance enhancing substances such as mushrooms, special diets, stimulants and other substances derived from plants.[13] From various accounts, the landmark periods include the nineteenth century, the twentieth century up until the present-day twenty-first century.

The nineteenth century is reportedly significant for the use of substances such as strychnine, caffeine, morphine, cocaine, ether, opium-based drugs and so on.[14] However an indelible mark would probably be what is believed to be the first death caused by doping in sport, which occurred in the 1886 Bordeaux – Paris cycling race.[15] After Arthur Linton from the United Kingdom finished the race in second place, he died a few weeks later and although his death was reported to have been as a result of doping, there still remains some controversy, including certain accounts that his death was due to tuberculosis. One fact however remained clear – the fact that professional athletes[16] were experimenting with perceived performance enhancing substances. The extent of coaches involvement in preparing performance enhancing 'potions' for their athletes in long distance and physically exerting sports such as

[13] British Medical Association, *Drugs in Sport: the Pressure to Perform*, (BMJ Books, London, 2002), at p. 5; B. Houlihan, *Dying to Win*, 2nd ed., (Council of Europe Publishing, 2002), at p. 33; J. Puffer, *The Use of Drugs in Swimming*, Clinical Sports Medicine, Vol. 5.77, 1986; Vol. 2, 1983, at p. 13-17.

[14] B. Goldman and R. Klatz, "Death in the Locker Room II" (1992) Chicago: Elite Sports Medicine Publications.

[15] World Health Organisation Programme on Substance Abuse, *Drug Use and Sport: Current Issues and Implications for Public Health*, (Geneva: WHO, 1993).

[16] Used in the broadest of terms to include their coaches, mentors and medical personnel.

cycling seemed to feature in many reports about sports doping in the second half of the nineteenth century.[17] These reports, which included the complicity of cycling coaches in preparing performance enhancing mixtures for their cyclist in the continuous 144-hour races and the rumoured fatalities arising from the use of drugs such as strychnine which are known to stretch the limits of human endurance, seemed inadequate to stem the growing tide of doping in sports. It seemed the widely acknowledged health risk was not enough to keep athletes from doping.

By the turn of the century, the use of amphetamines and anabolic steroids featured predominantly as performance enhancing drugs just as the increased focus on and exploitation of the effects of such drugs came about as a result of the Second World War. Drugs such as amphetamines and steroids were being used by the military in prosecution of the war.[18] The use of amphetamines came to light in the 1936 Berlin Olympics and between 1960 and 1968, three athletes, all of them casualties of the physically exerting sport of long distance cycling, were reported to have died as a result of the use of the drug. Notable amongst them was Tom Simpson, who died during the 1967 *Tour de France*. Having earlier become the first man from England to wear the coveted 'yellow jersey' of the sport, the death of such a high profile athlete being caught on television would go on to increase the interest in and awareness of doping in sport after the autopsy results revealed traces of amphetamine. With the growing profile of doping in sports being heightened by the increasing number of fatalities, the 1972 Munich Olympics witnessed a rather comprehensive anti-doping programme involving the testing of athletes for illegal substances which led to the disqualification of no fewer than

[17] R. Voy, *Drugs, Sports and Politics: The Inside Story about Drug Use in Sport and its Political Cover-up*, (Champaign, Ill: Leisure Press, 1991).

[18] B. Houlihan, *Dying to Win: Doping in Sport and the Development of Anti-doping Policy*, 2nd ed., (Strasbourg: Council of Europe, 2002), at p. 34.

seven athletes including the American swimmer Rick DeMont, who was consequently stripped of his 400m freestyle gold medal.[19]

The negative impact that doping was having, not only on the athletes but also on sport and the society in general was not going to be overlooked by the regulatory bodies and the next step taken was to convene the World Conference on Doping in Sport. The conference, held in February 1999, brought together representatives of governments, of inter-governmental and non-governmental organizations, of the International Olympic Committee (IOC), the International Sports Federations (IFs), the National Olympic Committees (NOCs), as well as representatives of the athletes. At the end of the conference, a six-point declaration – the Lausanne Declaration on Doping in Sport – was arrived at and amongst the points agreed upon by the stakeholders was the establishment of an independent International Anti-Doping Agency ahead of the Sydney 2000 Olympic Games. The Anti-Doping Agency was to be responsible for co-ordinating the various anti-doping programmes and it was clearly stated that consideration should be given to, *inter alia*, out-of-competition testing. By the following year, in the Sydney 2000 Olympics, the largest number of doping tests ever carried out was recorded, two thousand eight hundred and forty six (2846) in total, with thirty one (31) positive results. Despite the fact that only eleven of those positive results led to a hearing, it was a major statement from the sport regulatory bodies and the anti-doping agencies as to their determination to combat the menace that doping had become.

Going into the twenty-first century, the vigour with which the sport regulatory bodies approach the war against doping seemed to bring about a corresponding vigour by doping villains to circumvent the anti-doping mechanism. The major feature of the doping evolution

[19] *Ibid* at p. 38.

in the first decade of this century has been the effort to find ways of beating the system such as the use of undetectable performance enhancing substances. The Marion Jones and BALCO scandal mentioned in the first chapter readily comes to mind. Sceptics of the anti-doping movement consistently argue that anti-doping efforts will always be a step behind, playing catch-up with the dopers and trying to decipher the new doping methods. Like the proverbial saying goes, "when the birds learn to fly without perching, the hunter must learn to shoot without aiming",[20] the anti-doping authorities have continued to develop new means of combating doping in sports. One of such is exploiting the efficacy of out-of-competition testing. The period in-between competitions has been identified as a time when athletes can implement doping methods only to refrain in time for the traces to go unnoticed during in-competition testing. As such, the regulators have risen to address this area of vulnerability. In order to be at par with doping, the newly-introduced whereabouts rule has emerged as the latest out-of-competition testing tool. Prior to a discussion on the new rule, it would be useful to highlight the organisation responsible for this anti-doping campaign – WADA – which is on the end of current and anticipated litigation stemming from the implementation of the rule.

2.3 WADA: The Need for More Effective Anti-Doping Strategy

In order to keep pace with the notoriety of doping in sports, there was an obvious need for the regulatory bodies to adopt a more effective and efficient approach to the war against doping. To this end, the need for global co-ordination of anti-doping policy via a specific body became apparent and this led to the convening of the World Conference on Doping in Sport, Lausanne, 1999. WADA, the offspring of the 1999 Lausanne Declaration, is the international

[20] African proverb.

agency responsible for the co-ordination of anti-doping policy around the world. As sport regulation strengthened in terms of globalisation, there was a corresponding need for the regulators to stream-line efforts in the war against doping in sports. Prior to the establishment of WADA, anti-doping efforts were basically decentralised with sport governing bodies at different levels responsible for drafting their own anti-doping codes.[21] The result was that without proper guidance, many governing bodies' efforts at combating doping were plagued either by incompetence or lip-service. With the emergence of WADA, sport governing bodies can now speak with one voice and benefit from larger collective resources in prosecuting the war against doping in sport. With its structure, WADA is better positioned for competence in terms of the technical, legal, scientific, financial and other requirements needed to keep abreast with and counter the developments on the other side of the doping war. The more comprehensive anti-doping campaign during and after the 2000 Sydney Olympic Games is testament to this, barely a year after the Lausanne Declaration which paved way for the establishment of WADA as the fore-runner in the anti-doping campaign.

After its establishment, it was going to be only a matter of time before WADA came up with some sort of uniform code aimed towards guiding sport governing bodies and harmonising anti-doping policy. Up until March 2003, the Olympic Movement Anti-Doping Code constituted the basis for the fight against doping in sport.[22] However, in March 2003, by virtue of the Copenhagen Declaration on Anti-Doping in Sport, governments declared their intention to formally recognize and implement the World Anti-Doping Code. The venue was the World Conference on Doping in Sport, Copenhagen and to date the Copenhagen

[21] M. Beloff, *"Drugs, Laws and Versapaks"* in J. O'Leary (ed.), *Drugs and Doping in Sport*, (London: Cavendish, 2000) at p. 40.

[22] Lausanne Declaration on Doping in Sport, Article 2.

Declaration has no fewer than 193 signatories.[23] The WADA Code constitutes a significant landmark in the harmonisation of anti-doping policy and regulations. It contains minimum anti-doping policy standards and model regulatory requirements which governments, international sport federations and sport regulatory bodies generally are required to comply with. The Introductory Clause of the WADA Code states as follows:

> The Code is the fundamental and universal document upon which the World-Anti Doping Program in Sport is based. The purpose of the Code is to Advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed upon anti-doping principles are implemented.

The acquisition of governmental support was obviously a boost for the implementation of the WADA Code. Nonetheless another hurdle, one which held significant practical implications for the fight against doping in sport, was securing the support commitment of the governing bodies of various sports. Worthy of note is the disagreement that ensued between WADA and FIFA - the world governing body of football, as to whether or not the anti-doping rules of the latter were in compliance with the WADA Code. The disagreement was heightened by the prospects of the sport of football being consequentially ruled out of the Olympic Games, a dire consequence indeed considering the fact that football is arguably the most popular sport in the world. Despite the fact that FIFA adopted the WADA Code at its Congress in 2004, WADA had insisted that the anti-doping rules of the football world governing body were not in compliance with the rules and regulations of the WADA Code. For instance, FIFA was determined to implement a case-by-case system of sanctions of between 6 months to two

[23] WADA, *Copenhagen Declaration on Anti-doping in Sport*, List of Signatories as of 7 December 2007: http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=391 (last viewed on 22 September 2009).

years ban, whereas the WADA Code stipulated a minimum ban of two years for doping offences. The matter was referred to the Court of Arbitration for Sport (CAS) for an advisory opinion, which was delivered on 24 April 2006. Although the CAS stated that the anti-doping rules of FIFA were not incompliance with those of the WADA Code, it further affirmed that being an association governed by Swiss law, FIFA was free to adopt such anti-doping rules and sanctions as it deemed appropriate and even establish lower minimum sanctions than those provided in the WADA Code.[24] With FIFA thus being required to amend its anti-doping rules for the sake of affiliation to WADA and the International Olympic Committee (IOC) in order to participate in the Olympic Games, the issue remained as to whether a uniform set of rules across all sports was ideal. Part of this issue relates to the different competition calendars of various sports and how much WADA Code rules such as out-of-competition testing would affect sports such as football. For instance, while football leagues usually have an end of season period of about three months, in tennis the calendar is different with different tournament spaced out in different months within the year. FIFA has thus argued for a modification of anti-doping rules taking into consideration the peculiarities of different sports and the need for professional athletes, like other employees, to be guaranteed a period of break without being bothered by interference from regulatory bodies.. The WADA Code is viewed as comprising a number of basic requirements which sport regulatory bodies that sign up to the code are required to comply with. There are also additional recommendations[25] but there is a strict requirement of compliance with the basic requirements.

[24] CNNInternational.com, 24 April 2006: http://edition.cnn.com/2006/SPORT/football/04/24/doping.fifa/index.html (last viewed on 22 September 2009).

[25] Gardiner *et al*, *Sports Law* 3rd ed., (Cavendish Publishing, 2006), at p. 272.

2.4 The WADA Code

As a background to a discussion on the whereabouts rule, it is helpful to highlight some key features of the entire WADA Code 2009. The declarations of the purposes of the WADA Code and the World Anti-Doping Programme which support it are stated as:

> To protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide, and
>
> To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.

The fact that athletes all over the world are guaranteed a 'fundamental right' to participate in doping free sport is instructive. There is a school of thought hinged on the belief that an individual athlete should be allowed to defy the negative consequences drugs might have on his or her body, after all, it is their body. However, the strong stance of the anti-doping campaign stems from the need to secure this right to a doping free sport for all (other) athletes. As with rights generally, the consensus is that where an individual's right ends is where the right of another begins. Hence, any perceived freedom to dope (albeit subject to the general legality of the use of certain substances such as cocaine) would not be allowed to prejudice the fundamental right to a doping free sport. In addition, it is not difficult to understand the zeal with which the anti-doping campaign is being pursued, when one considers that doping is regarded as fundamentally contrary to the spirit of sport. The intrinsic value of sport, referred to as 'the spirit of sport', regarded as the essence of Olympism and seen as the celebration of the human spirit, body and mind is characterized by values such as ethics, fair play, honesty, respect for the rules, regard for other participants, and so on. [26]

[26] WADA Code 2009, *Fundamental Rationale for the World Anti-Doping Code*.

By virtue of the Introduction clause under Part One of the WADA Code, athletes are said to accept the stipulated sport rules (including those relating to doping) as a condition for participation. This principle hinges on the idea of a contractual relationship binding both the participant and the regulator. However, the theory of the existence of such a contract is not a hard and fast rule as the Court of Appeal decided in the case of *Modahl v. British Athletic Federation Ltd.*[27] It was held that a court should not merely assume the existence of a contract but must examine all the surrounding circumstances to determine whether the existence of a contract can properly be implied. The truth however seems to be that in modern sport it is almost inevitable to deduce the existence of a contract due to the nature of sport regulation where an athlete has to subscribe to the rules of the governing body. According to the Latham LJ:

> if a legally enforceable contract can be created, as seems to me is inevitable, where an athlete expressly agrees in an entry form to be bound by the relevant rules, I can see no escape from the conclusion that a contract can properly be implied when the circumstances make it clear that that is, in essence, what the athlete has promised.[28]

The argument is that the monopoly sport governing bodies possess in their particular sport means that those wishing to have significant involvement in that sport especially at the professional level have little or no choice but to submit to the authority of the relevant governing body. The members of the sport thus lack bargaining power as the rules are said to be laid down on a 'take it or leave it' basis.[29] On the imbalance of bargaining power, the painting of this relationship in contract colours was described by Lord Denning MR. as fiction, the truth of which is that such rules amount to a legislative code laid down by the

[27] [2002] 1 W.L.R. 1192 at p. 1209.

[28] *Ibid* at p. 1210.

[29] S. Gardiner, *op. cit.*, p. 186.

governing body to be binding on members.[30] This lack of bargaining power means the athletes have little or no choice but to submit to whatever anti-doping rules govern their sport as there is usually no alternative or parallel governing body for the sport at the professional level.

In the light of the globalization of modern sport, the same introductory paragraph also makes a point of describing the anti-doping rules as comprising 'sport-specific rules and procedure', aimed at a global and harmonized enforcement of anti-doping rules. Consequently, they are intended to transcend the national jurisdiction requirements and legal standards applicable to criminal proceedings or employment matters. Hence, courts, arbitral hearing panels, tribunals and other adjudicating bodies are urged to take cognisance of the distinct nature of the anti-doping rules and the fact that they represent the consensus of a broad spectrum of sport stakeholders around the world. An instance under this heading relates to marijuana; although it is one of the items prohibited under anti-doping rules,[31] in certain jurisdictions possession and consumption of the substance is legal. A uniform enforcement of anti-doping rules is therefore necessary for the efficacy of the anti-doping campaign.

Another significant feature of the WADA Code is the adoption of the rule of strict liability. Article 2.1.1 makes it the personal duty of each athlete to ensure that no prohibited substance enters his or her body. Hence, in the event of the presence of any prohibited substance or its metabolites or markers in an athlete's sample, it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping violation. This exclusion of the requirement of *mens rea* which is a common feature of criminal proceedings is another point of distinction between anti-doping regulations and

[30] *Enderby Town Football Club Ltd v. The Football Association Ltd* [1971] Ch. 591, at p. 606.

[31] The 2009 Prohibited List, International Standard, World Anti-Doping Code, S8.

secular jurisdictional legal requirements. Despite the application of the doctrine of strict liability, the WADA Code seeks to strike a balance with the possibility of modified sanctions where it is established that the finding of a prohibited substance in an athlete's sample is due to no fault or negligence or no significant fault or negligence on the part of the athlete. Another factor which has the effect of modifying liability or sanction is Therapeutic Use. This is provided for in Article 4.4 which covers the granting of Therapeutic Use exemption, by which International Federations are required to ensure the existence of a process whereby athletes with documented medical conditions requiring the use of an otherwise prohibited substance or an otherwise prohibited method may request a therapeutic use exemption for international events. Therefore, the use of such substance or method which would have otherwise been illegal becomes permitted without any liability being incurred. This form of 'drug use' as distinguished from doping is one of the reasons identified by the British Medical Association why drugs may be used in sport, as discussed at the beginning of this chapter.

It is worthy of note that anti-doping rules do not only envisage actions or the presence of prohibited substances or the use of prohibited methods as amounting to a violation. Inaction of failure to follow or submit to procedure could also be deemed a violation of the rules. For instance, Article 2.3 states that refusing or failing without compelling justification to submit to Sample collection or otherwise evading Sample collection after notification as authorized under the rules constitutes an anti-doping rule violation. Furthermore, Article 2.4 makes it a violation where there is any combination of three missed tests and/or failure to file required whereabouts information within an eighteen-month period. Athletes like the footballer Rio

Ferdinand and track runner Christine Ohuruogu have received bans on account of the missed tests rule.[32]

2.5 The Whereabouts Rule

The rationale behind the Whereabouts rule may be summed up thus:

> The concept is a simple one: drug-testers must be able to administer no-notice, out-of-competition tests anytime and anywhere. This is believed to be the only effective deterrent against drugs cheats. To do this, however, the testers must, of course, be able to locate the athletes and, thus, the whereabouts system is the answer. But is it legal? [33]

The whereabouts rule was indeed designed to keep track of athletes even when out of competition for purposes of drug testing. The essence is for drug cheats not to be confident of the existence of any particular period of time during which they would certainly not be subjected to drug testing, the efficacy of which is underlined by the fact that some drugs have a limited detection window period which may last no more than days or hours. The challenges of the whereabouts system on the itinerary of athletes are obvious and form the crux of arguments against the legality of the rule. Our aim at this point is to take a look at the rule itself, its requirements and implementation. This will form the foundation for a subsequent analysis of its implication on athlete's rights, the basis for challenges against the rule, its legality and so on.

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[32] The missed tests rule will be discussed in chapter 5.

[33] Ian Blackshaw, 2007 "World Anti Doping Agency Rule on the whereabouts of Athletes Rule challenged on Human Rights Grounds" T.M.C. Asser Instituut: http://www.asser.nl/default.aspx?textid=35931 (last viewed on 22 September 2009).

The Whereabouts Rule is covered in detail under the revised version of the International Standard for Testing, published on 16 May 2008 by WADA to be effective from 1 January 2009. Article 11(1)(1) acknowledges that the concept of out-of-competition testing without advance notice to athletes is at the core of an effective system of doping control; but also that without accurate information as to the whereabouts of athletes, such a system could be inefficient and often impossible. This is what could be regarded as the fundamental rationale behind the whereabouts system. In essence, the ability to test an athlete based on accurate information as to his or her whereabouts and, significantly, without advance notice to the athlete would invariably be an effective tool in deterring the act of doping. According to Ian Blackshaw, this is believed to be the only effective deterrent measure against drug cheats.[34]

Article 11(1)(2) requires each International Federation (IF) and National Anti-Doping Organisation (NADO) to create a Registered Testing Pool of Athletes meeting the specified criteria. These athletes would be subject to and required to comply with the whereabouts requirements. The details of compliance with the whereabouts requirements are provided for as follows:

> 11.1.3 An *Athlete* in a *Registered Testing Pool* is required to make a quarterly Whereabouts Filing that provides accurate and complete information about the *Athlete's* whereabouts during the forthcoming quarter, including identifying where he/she will be living, training and competing during that quarter, so that he/she can be located for *Testing* at any time during that quarter: see Clause 11.3. A failure to do so amounts to a Filing Failure and therefore a Whereabouts Failure for purposes of *Code* Article 2.4.
>
> 11.1.4 An *Athlete* in a *Registered Testing Pool* is also required to specify in his/her Whereabouts Filing, for each day in the forthcoming quarter, one specific 60-minute time slot where he/she will be available at a specified location for *Testing*: see Clause 11.4. This does not limit in any way the *Athlete's* obligation to be available for *Testing* at any time and place. Nor does it limit his/her obligation to provide the information specified in Clause 11.3 as to

[34] *Ibid.*

> his/her whereabouts outside of that 60-minute time slot. However, if the *Athlete* is not available for *Testing* at such location during the 60-minute time slot specified for that day in his/her Whereabouts Filing, and has not updated his/her Whereabouts Filing prior to that 60-minute time slot to provide an alternative time slot/location for that day, that failure shall amount to a Missed Test and shall therefore constitute a Whereabouts Failure for purposes of *Code* Article 2.4.

It is worthy of note that the whereabouts system is not entirely novel. The International Association of Athletics Federations (IAAF) had been implementing a whereabouts system as part of its anti-doping campaign with an even more stringent 24-hour time slot as against the 60-minute time slot provided for in Article 11(3)(2) (see below). In its opinion on the new whereabouts requirements, the IAAF acknowledged that the twenty-four-hour time slot system was neither practicable nor fair on athletes and therefore considers the 60-minute time slot as a good compromise between athletes providing little or no whereabouts information, and having to provide twenty-hour-hour details.[35] So as to ensure that the flexibility is not used to circumvent the anti-doping system, the 'missed tests ban' was put in place. By virtue of Article 11(1)(6), an athlete shall be deemed to have committed an anti-doping rule violation under Article 2.4 if he or she commits a total of three Whereabouts Failures (which may be any combination of Filing Failures and/or Missed Tests adding up to three in total) within any eighteen-month period.

The Whereabouts Filing Requirements as listed under Article 11(3) must include at least the following:

a) a complete mailing list;

[35] IAAF Athletics, 5 March 2009, "IAAF Opinion on New Whereabouts Requirements": http://eua2400001-vip1.eu.verio.net/antidoping/news/newsid=49573.html (last viewed on 22 September 2009).

b) details of any disability of the *Athlete* that may affect the procedure to be followed in conducting a Sample collection session;

c) specific confirmation of the athlete's consent to the sharing of his/her Whereabouts Filing with other Anti-Doping Organisations (ADOs) having authority to test him/her;

d) for each day during the following quarter, the full address of the place where the *Athlete* will be residing (e.g. home, temporary lodgings, hotel, etc);

e) for each day during the following quarter, the name and address of each location where the *Athlete* will train, work or conduct any other regular activity (e.g. school), as well as the usual time-frames for such regular activities; and

f) the *Athlete's* competition schedule for the following quarter, including the name and address of each location where the *Athlete* is scheduled to compete during the quarter and the date(s) on which he/she is scheduled to compete at such location(s).

Furthermore, in Article 11(3)(2), the Whereabouts filing is required to include, for each day during the following quarter, one specific sixty-minute time slot between 6 a.m. and 11 p.m. each day during which the Athlete will be available and accessible for Testing at a specific location. It suffices to say that any fraudulent or misleading information provided by an athlete with regards to the Whereabouts Filing constitutes an anti-doping rule violation.[36]

It is indeed clear from the above that the implementation of the whereabouts rule portends some form of privacy limitation and overall impact on the social being of athletes. Due to the

[36] Article 11(3)(4).

fact that the arguments for and against this rule are indeed tenable, it appears that any ruling on its legality or otherwise would be determined by weighing the impact the rule has on the guaranteed rights of athletes. Just as WADA recognises the fundamental right of athletes to a drug-free and clean sport, the courts would not hesitate in upholding the rights of athletes to privacy, freedom, data protection and so on. Hence, it boils down to the question of proportionality – striking a balance between the quest for a clean sport and the rights of athletes, who generally must be presumed to be 'clean' until proven otherwise. The next chapter attempts to weigh the impact of the whereabouts rule on privacy rights and freedom.

CHAPTER 3

IMPLICATION ON PRIVACY RIGHTS

3.1 Privacy Right for Athletes/Sportspersons

Indeed, in certain context it would not be wrong to refer to the right to privacy as encompassing that of data protection. The latter somewhat envisages that an individual's personal information or data may not be used for unauthorised purposes without the consent of the individual, thus entitling him to some privacy over such information or data. However, for our current purposes, privacy rights and data protection rights would be discussed under separate chapters. The aim is to allow for detailed academic discourse about both concepts, which can be used as separate fronts to analyse or challenge the whereabouts rule and/or other anti-doping measures such as the collection of urine and/or blood samples. We will proceed with the analysis of the impact of the whereabouts rule on privacy rights.

It is trite knowledge that the right to privacy is generally guaranteed to individuals within the United Kingdom by virtue of the Human Rights Act 1998, which ratifies and makes

applicable locally the The Convention for the Protection of Human Rights and Fundamental Freedoms (popularly referred to as the "European Convention on Human Rights" and "ECHR"). Article 8, Schedule 1[37] guarantees the right to respect for private and family life within the European Community as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The recognition of privacy rights under English law has been emphasised by the courts. According to Sedley LJ in *Douglas v. Hello,*[38] English law has reached a point at which it can be said with confidence that the law recognizes and will appropriately protect a right of personal privacy. This dictum was reinforced by the Court of Appeal in the same case.[39] The court in reference to the interpretation of section 8 of the Human Rights Act, acknowledged the obligation to protect an individual from unjustified invasion of private life as well as to interpret legislation in a way which will achieve that result.

In the rest of Europe, generally, the position is basically the same since all member states of the Council of Europe are expected to ratify the European Convention on Human Rights. In

[37] Human Rights Act 1998.

[38] [2001] Q.B. at p. 967.

[39] [2005] 3 W.L.R. 881 at p. 900, para. 49.

the United States of America however, there is no straitjacket approach to privacy rights, rather some form of privacy rights have been gleaned by the courts from the provisions of various statutes. For instance, in *Griswold v. Connecticut*[40] the Supreme Court of the United States ruled that a right to marital privacy was protected under the US constitution and in *Katz v. United States*,[41] the court also ruled that there exists a right to privacy from government surveillance into an area where an individual has a reasonable expectation of privacy. However, some states in the US have express statutory provisions which guarantee the right to privacy. The State of California is one of such states. The Declaration of Rights contained in Section 1 Article 1 of the State Constitution provides for inalienable rights which include the right to privacy.

Despite the scope and content of privacy rights in legal jurisdictions such as the European Community and the US, it has to be considered that the anti-doping regulations of WADA transcend these political and legal settings as they are meant to be applied with uniformity amongst sporting organisations all over the world. Therefore, the implications on privacy rights may eventually raise individual issues which could be a question of the scope and particular context of privacy rights within a particular jurisdiction. Nonetheless, regard must be had to Part 1 of the WADA Code which, as cited in chapter 2 above, requires anti-doping rules and procedure to be regarded as sport-specific, distinct from and not intended to be subject to or limited by any national requirements or legal standards.

In respect of sport persons, it suffices to say that the privacy rights which are statutorily guaranteed accrue to them by virtue of the fact that they are individuals. More so, the right to

[40] 381 U.S. 479 (1965).

[41] 386 U.S. 954 (1967).

privacy as enshrined constitutes a fundamental and inalienable right, subject only to overriding public interest or the protection of the rights of others.[42]

3.2 Possible Areas of Conflict

In August 2009, the Board of Control for Cricket in India (BCCI) backed the refusal of Indian cricketers to sign up to the whereabouts requirements of WADA's anti-doping rules, citing privacy and security concerns.[43] The Indian cricketers had failed to meet the August 1 deadline for whereabouts registration insisting on their objection to the clause. The world governing body for the game of cricket, the International Cricket Council (ICC) became a WADA signatory in 2006 and its board has approved and adopted out-of-competition tests in line with the WADA anti-doping rules and regulations, including the whereabouts rule.[44] Thus, players from other major cricket nations have signed up to the whereabouts system fuelling the possibility of Indian cricketers being barred from future ICC-organised events. Describing the whereabouts requirements as "unreasonable", the Indian objection to it is three-fold as discussed below.[45] This provides a case-study of some of the potential areas of conflict inherent in the whereabouts rule.

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[42] Schedule 1 of the Human Rights Act 1998, Article 8(2).

[43] Guardian.co.uk, 29 August 2009, "Indian Cricket Board Rejects Wada's 'Whereabouts' Testing Rule": http://www.guardian.co.uk/sport/2009/aug/02/india-rejects-wada-whereabouts-rule (last viewed on 22 September 2009).

[44] International Cricket Council, "Overview – Anti-Doping": http://icc-cricket.yahoo.net/anti_doping/overview.php (last seen on 22 September 2009).

[45] Guardian.co.uk, *op. cit*.

First of all is the argument that the requirement to divulge accurate information as to their exact whereabouts over a period of three months in advance constitutes a security risk. This is hinged on the theory that prominent players such as Sachin Tendulkar and Mahendra Singh Dhoni require security cover due to militant threats as a result of which their whereabouts could not be divulged. A counter-argument from WADA's perspective could naturally be reliance on the security and confidentiality measures put in place to safeguard the information relating to athletes. Specifically, under the whereabouts system the International Federation is charged with the responsibility of:

> establishing a workable system for the collection, maintenance and sharing of Whereabouts Filings, preferably using an on-line system (capable of recording who enters information and when) or at least fax, e-mail and/or SMS text messaging, *to* ensure that:
>
> (i) the information provided by the *Athlete* is stored safely and securely (ideally in ADAMS or another centralized database system of similar functionality and security);
>
> (ii) the information can be accessed by (A) authorized individuals acting on behalf of the IF on a need-to-know basis only; (B) *WADA*; and (C) other *ADOs* with *Testing* jurisdiction over the *Athlete*, in accordance with *Code* Article 14.3; and
>
> (iii) the information is maintained in strict confidence at all times, is used by the IF exclusively for the purpose of planning, coordinating or conducting *Testing*, and is destroyed in accordance with relevant confidentiality requirements after it is no longer relevant.[46]

What is clear from the above is that the information gathered under the whereabouts system is intended to be treated as confidential and accorded sufficient security to assuage security concerns such as militant or other threats as well as guarantee privacy. Whether the subjects of such information will feel so assuaged is another matter entirely.

[46] International Standards for Testing 2009, Article 11(7)(1)(d).

The second line of argument is that the privacy of an individual cannot be impeded. Indeed, in some jurisdictions such as the State of California Constitution cited earlier, the right to privacy is described as an inalienable right. Hence, apart from the need to protect the rights of other citizens or the overriding good of society, the right of an individual to privacy, be it of personal or family life, cannot be impeded. The ultimate question would then be whether or not the whereabouts system falls within such scope as to justify such apparent encroachment into the privacy of athletes as individuals. While an athlete could argue that the requirement to divulge information as to his specific whereabouts encroaches on his right to privacy, a tenable argument on the part of WADA could be that the need to "protect the Athlete's fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide" justifies such an interference.

The third argument, similar to the second, is hinged on the guarantee given by the Indian constitution to every citizen regarding his or her privacy, which the Indian athletes contend cannot be impeded constantly twenty-four hours a day, seven days a week for three hundred and sixty-five days. The detailed information and all-round supervision that the implementation of the whereabouts rule entails may indeed seem cumbersome especially when viewed from the perspective of the decision of the Supreme Court of the US in *Katz v. The United States*[47] cited earlier. The decision therein that a right to privacy exists from government surveillance into an area where an individual has a reasonable expectation of privacy may raise issues here. For instance, the fact that an athlete is required to divulge details of where he or she would be living, training, etc may be seen as cumbersome, restrictive and invasive. Although the sixty-minute slot provided in Article 11(1)(4) requires

[47] *Op. cit.*

the athlete to be available at his or her specified location for possible testing during that specific period only, the same provision further provides that it does not limit the athlete's obligation as to his or her whereabouts outside that sixty-minute time slot. The negative impact that doping has had on sport over the years has been so grave that proponents of the whereabouts rule would regard the requirements under the rule as a worthy sacrifice in the interest of clean sport. Nonetheless, while strong measures seem to be required to combat the scourge of doping, the point can never be over-emphasized that the measures have to also be right measures and take cognisance of established legal rights and principles.

Another area of potential conflict which the whereabouts rule may have with established legal principles of privacy rights may indeed be the capacity of the sports regulatory bodies to actually impose a limit to privacy rights guaranteed by statutes. Citing the Human Rights Act as an example, the only possible limitation to the privacy rights guaranteed an individual would stem from a public authority acting in accordance with the law and only when necessary, in the interests of national security, public safety, the protection of the rights and freedom of others and so on.[48] Therefore, it could be argued that for a sport governing body to legally implement such restrictions, two factors must exist: it must be a public body and must act in the overriding interest of the general public. What is instructive at this point is the principle established by case law, in England for instance, that sport governing bodies are not public authorities. The categorisation of sports governing bodies as private bodies under English law has been discussed in other writings:[49] In *R v. Disciplinary Committee of the*

[48] Human Rights Act 1998, Article 8, Schedule 1.

[49] Kelvin Omuojine, "The Extent to which English Law Deals Satisfactorily with the Supervision of Sports Governing Bodies", LLM Sports Law: Sports Law and Regulation Module, Nottingham Trent University 2008/2009.

Jockey Club ex parte Aga Khan[50], the Court of Appeal accepted the Applicant's argument that the Jockey Club effectively regulated a significant national activity in the course of which it exercised powers affecting and in the interest of the public; also that if the Jockey Club did not perform those functions the government would probably be driven to create a public body to do so. Nonetheless, the court went on to hold that the Jockey Club was not a public body and therefore, its decisions were not amenable to judicial review. Although the Jockey Club was incorporated by Royal Charter and was responsible for regulating horse racing and training in Great Britain, the powers which the club exercised did not derive from any form of legislation but from contract entered into with members of the sport who thereby agreed to be bound by the rules governing the sport.

The tone was set about a decade earlier in *Law v. National Greyhound Racing Club*[51]. The claimant instituted a private law action founded on contract for a declaration that the decision of the National Greyhound Racing Club suspending his licence, on account of his dog being found to have been doped, was void and *ultra vires*. The defendants contended that the claim amounted to one against alleged abuse of power such as was required to be instituted by means of judicial review. The Court of Appeal held that the power of suspension derived from contract and that although the exercise of jurisdiction by the National Greyhound Racing Club could have consequences beneficial to the public, there was no public element in the jurisdiction itself[52]. Somewhere in between both decisions discussed above lay one which appeared to give impetus to the argument that because of the nature of their functions, sports governing bodies should be placed on the same pedestal as public bodies. The 1987 decision

[50] [1993] 1 W.L.R. at p. 909.

[51] [1983] 1 W.L.R. at p. 1302.

[52] *Ibid*, at p. 1307.

in *R v. City Panel on Take-overs and Mergers ex parte Datafin*[53] embraced the argument that although self-regulatory associations derived their powers from contract as against primary or secondary legislation, where the exercise of those powers places them within the public law domain, they should be regarded, for the purposes of judicial review, as public bodies[54].

For purposes of analogy, in Scotland by virtue of the decisions in *St. Johnstone Football Club Ltd v. Scottish Football Association*[55] and *Gunstone v. Scottish Women's Amateur Athletic Association*[56] it has become established that sports governing bodies are subject to judicial review due to the "quasi-judicial" nature of their disciplinary proceedings.[57] However, in *Irvine v. Royal Burgess Golfing Society of Edinburgh*[58], Lady Smith conceded that the courts should not be too ready to interfere in the business of voluntary associations.

As it appears from the above that WADA as a sport regulatory body is not a public body but a private body lacking capacity to limit the privacy rights of an individual, it seems unnecessary to discuss the other factor, which is the requirement that the interference with an individual's exercise of privacy rights must be in accordance with the overriding interest of the public or the need to safeguard the rights of others. Nonetheless, for academic purposes, as has been mentioned earlier, the need to protect the fundamental right of all athletes all over the world to a doping-free sport may justify certain compromises by an athlete by way of contract.

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[53] [1987] 1 All. E.R. at p. 564.

[54] *Ibid*, *per* Lloyd LJ at p. 582: "If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may … be sufficient to bring the body within the reach of judicial review".

[55] (1965) S.L.T. at p. 171.

[56] (1987) S.L.T. at p. 611.

[57] Colin Munro, "Sports in the Courts", (2005) P.L. Win. 681 at p. 682.

[58] (2004) S.C.L.R. at p. 386.

From the *Law*[59] and *Aga Khan*[60] cases, we see that the relationship between the sport governing body and the athlete is one established by contract. This accounts for the powers the sport governing body exercises over the athletes and it is by reliance on the existence of such contract that WADA seeks to enforce its anti-doping rules and regulations including the whereabouts rule. The introduction clause in Part 1 of the WADA Code stipulates that athletes accept the anti-doping rules, being sport rules, as a condition of participation and thus the athletes are to be bound by them. The apparent effect is to create a contract by virtue of an athlete's accreditation and participation in sports events which are governed by the anti-doping rules. One may recall that the issue of the existence of a contract between an athlete and the relevant sport regulatory body is not automatic. Flowing from the dictum of Lord Denning M.R. in the *Enderby Town* case,[61] where he described the contract scenario as fiction, the truth of which is that such rules amount to a legislative code laid down by the governing body to be binding on members, to the *Modahl* case[62] - a court should not merely assume a contract to exist, but must consider all the surrounding circumstances to determine whether or not the contract can properly be implied – it is indeed possible that the assumption that athletes are bound to comply with the whereabouts rule, in order to participate, is without sufficient merit.

3.3 The Belgian Challenge

[59] *Op. cit.*

[60] *Op. cit.*

[61] [1971] Ch. 591, at p. 606.

[62] [2002] 1 W.L.R. at p. 1192.

Indeed, with the controversy surrounding the new out-of-competition testing measure it is not hard to imagine that the whereabouts rule would become the subject of litigation. The growth and development of sports over the past few decades which has led to emergence of what many refer to as the 'sports law' discipline has been triggered largely by a significant volume of sports-related cases and their unique judicial decisions. Many of these cases which have been taken to the courts have to do with athletes challenging the decisions of or sanctions imposed by sport governing bodies, especially in relation to doping. However, the legal challenge of an entire anti-doping system such as the whereabouts rule is rather novel although previous legal challenges have involved aspects of anti-doping regulations, such as having to provide blood sample, by people who object to such on grounds such as religious belief. The setting for this novelty is Belgium, where a group of sixty-five athletes have instituted a legal challenge, asking the Belgian Council of State High Court to rule on whether the whereabouts rule breaches European Community privacy laws.[63] The legal action has been instituted by Belgian lawyer, Kristof de Saedeleer acting on behalf of the sixty-five Belgian athletes (including footballers, volleyball players and cyclists) against the Flemish Regional Government, which is the body responsible for anti-doping programme in the Dutch-speaking part of Belgium and is still in its early stages.

The case is hinged on the provisions of both the Belgian constitution and the European Convention on Human Rights and Fundamental Freedoms of the Council of Europe which guarantee a right to privacy. Similar to the provision of Article 8 of the European Convention, Article 22 of the Belgian Constitution guarantees everyone "the right to the respect of his private and family life, except in the cases and conditions determined by law." Reminiscent of

[63] BBC.co.uk, 22 January 2009, "Legal Threat to Anti-Doping Code": http://news.bbc.co.uk/sport1/hi/front_page/7844918.stm (last viewed on 22 September 2009).

another case involving a Belgian athlete – *Bosman*[64] - this present case could have a significant impact on the anti-doping efforts of WADA. Precisely, if the court decides in favour of the athletes, by virtue of the fact that the decision would be based on the provisions of the European Convention on Human Rights (as ratified by Belgium), athletes within other EU jurisdictions which have similar provisions would invariably consider themselves to be armed with a precedent with which to challenge the rule locally. It would indeed be foreseeable that athletes from other jurisdictions would also challenge the whereabouts rule. Meanwhile, in the absence of judicial precedent the debate as to the validity of the rule rages on with the anti-doping agents arguing that the 2009 International Standards for Testing were drafted with the protection of athletes in mind by providing appropriate, sufficient and effective privacy protection, taking into account various international and regional data protection laws; and that the whereabouts rule is "a justifiable and proportionate response to the problem it was brought in to address - the endemic cheating that has ravaged the likes of the Tour de France and international track and field."[65]

[64] Case C-415/93, *Union Royale Belge des Societes de Football Association (Asbl) and Others v. Jean-Marc Bosman* [1996] 1 C.M.L.R. 645, had far-reaching effects regarding free movements of workers within the European Union, permitting professional EU footballers to move freely from one club to another upon the expiration of their contract.

[65] BBC, "Legal Threat to Anti-Doping Code", *ibid*.

CHAPTER 4

IMPLICATION ON DATA PROTECTION RIGHTS

4.1 Sport Globalisation and Data Protection Regimes

The concept of data protection could be subsumed within the concept of privacy if the latter is to be construed in a very broad sense[66] but for our present purposes both concepts are being treated distinctly. In talking about the distinction and the recognition accorded to data protection as an autonomous right under the Charter of Fundamental Rights of the European Union 2000, Rodota puts it thus:

> ... the Charter draws a distinction between the conventional "right to respect for his or her private and family life" ... and the "right to the protection of personal data".... The distinction between the right to respect for one's private and family life and the right to the protection of personal data is more than an empty box. The right to respect one's private and family life mirrors, first and foremost, an individualistic component: this power basically consists in preventing others from interfering with one's private and family life. In other words it is a static, negative kind of protection. Conversely, data protection sets out rules on the mechanism to

[66] Stefano Rodota, "Data Protection as a Fundamental Right" in S. Gutwirth et al. (eds.) *Reinventing Data Protection?* (Springer, 2009).

> process data and empowers one to take steps – i.e., it is a dynamic kind of protection, which follows a data in all its movements.[67]

Under the whereabouts system, information/data relating to athletes is required and in the United Kingdom, Section 1(1) of the Data Protection Act 1998 (DPA) defines 'processing' in relation to information or data as, *inter alia*, "obtaining, recording or holding the information or data". Therefore, from the point at which data is obtained from athletes, the application of the legislation becomes a live issue. Generally, the persons to be protected are those whose personal data are processed by Community institutions or bodies in any context whatsoever, for example because they are employed by those institutions or bodies.[68] The basis of the data protection regime in Europe is the perceived need for privacy in the context of the use by organisations of an individual's personal data.[69]

The point that modern regulation of sport has taken a globalized framework cannot be undermined. With sport governing bodies such as the IOC and FIFA at the helm of their various regulatory spheres, any athlete or sports body that is to have any reckoning in terms of professional sport cannot help but subscribe to the central regulator. The point is underlined by the recent dispute between the IOC and FIFA over the latter's non-compliance with the anti-doping regulations of the former, with football under FIFA facing expulsion from the Olympic Games is compliance had not been attained. The globalisation that has characterised the regulation of modern sport is not a feature that is shared by legal concepts such as data protection as not all legal jurisdictions are at the same level as far as data protection is

[67] *Ibid*, at p. 79–80.

[68] Paragraph 7 of the Recital of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

[69] P. Carey, *Data Protection* 3rd ed., (Oxford University Press, 2009) at p. 129.

concerned.[70] With the EU possessing the most comprehensive data protection regulatory framework, it is very likely that the resolution of issues relating to data protection would ultimately impact significantly on the global regulation of doping in sports.

With the Council of Europe Convention of 1981 setting the standard to be attained by Member States in respect of data protection, the United Kingdom towed the line by enacting the Data Protection Act 1984. More recently however, the Data Protection Directive[71] was adopted in 1995 to set the standard for data protection. The obligatory legislation passed by the United Kingdom was the Data Protection Act 1998. This current legislation complies with the regulatory framework of the Data Protection Directive, being the attainment of the protection of an individual's privacy in relation to the processing of personal data and the harmonization of data protection laws of Member States.[72] The ruling of the European Court of Justice in *Von Colson and Kamann v. Land Nordrhein-Westfalen*[73] is that national courts must interpret their national law in the light of the wording and the purpose of the Directive; therefore, it follows that the provisions of the DPA 1998 must not only be couched but also interpreted in such manner as to give effect to the Data Protection Directive. Article 6 of the Directive provides certain principles which govern the processing of personal data, relating to data quality and requires Member States to ensure that personal data must be:

(a) processed fairly and lawfully;

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for

[70] L. Bygrave, *Data Protection Law*, (Kluwer Law International, 2002) at p. 79-80.

[71] Directive 95/46/EC.

[72] Peter Carey, *Data Protection* (3rd ed.), op. cit. at p. 6.

[73] C-14/83, [1984] E.C.R. at p. 1891, paragraph 26.

historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected and for which they are further processed, are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use."

To this end, eight data protection principles have been enshrined in Schedule 1 of the Data Protection Act 1998, as follows:

(1) Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless:

(a) at least one of the conditions in Schedule 2 is met; and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

(2) Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

(3) Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

(4) Personal data processed shall be accurate and, where necessary, kept up to date.

(5) Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

(6) Personal data shall be processed in accordance with the rights of data subjects under this Act.

(7) Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

(8) Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

With regard to the application of data protection law to the whereabouts rule, WADA and its agents, by requiring and obtaining whereabouts and related information/data from athletes and determining the manner in which such data are processed, constitutes a data controller.[74] Also, by virtue of being the subject of such personal data an athlete would be the data subject under the Act.[75] As such, WADA is required to comply with the principles of data protection in the implementation of the whereabouts rule and indeed the entire anti-doping policy.

For practical purposes, the starting point would be to determine whether the information being processed amounts to data,[76] defined in Section 1(1) of the Act[77] as information which:

> (a) is being processed by means of an equipment operating automatically in response to instructions given for that purpose,
>
> (b) is recorded with the intention that it should be processed by means of such equipment,
>
> (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system,
>
> (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record, or
>
> (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d).

There is no gainsaying the fact that the information required to be filed under the whereabouts system amounts to data. The next step would then be to determine whether the relevant data amounts to personal data, which is the type of data that is accorded protection under the

[74] DPA, Section 1(1) 1998.

[75] *Ibid*.

[76] Peter Carey, *Data Protection*, op. cit. at p. 17.

[77] The Data Protection Directive on the other hand does not contain a definition of 'data'.

relevant statutes. Article 2(a) of the Data Protection Directive defines 'personal data' as any information relating to and identified or identifiable natural person (the data subject); an identifiable person being one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental economic, social or cultural identity. The Data Protection Act also defines 'personal data' as data which relate to a living individual who can be identified from those data or from those data as well as other information which is in the possession of, or is likely to come into the possession of the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual. The data relation to identity, bio data, DNA, and so on, of an athlete as required under the whereabouts system can be described as personal data from the definition given above; and Carey lists geographical location and destination of air travel as examples of information capable of amounting to personal data.[78] According to Lord Justice Auld in the case of *Durant v. Financial Services Authority,*[79] persona data is information which affects an individual's privacy, whether in his personal or family life, business or professional capacity.

4.2 Article 29 Working Party Opinion and Related Issues

Article 29 of the Data Protection directive establishes a "Working Party on the Protection of Individuals with regard to the Processing of Personal Data", generally referred to as 'Article 29 Working Party' or as 'the Working Party'. Comprised of representatives of stakeholders

[78] op. cit. at p. 18.

[79] [2003] EWCA Civ. At p. 1746.

from each Member State, representatives of authorities established for the Community institutions and bodies, and of a representative of the Commission, the Working Party is given an advisory status and empowered to act independently.[80] Though advisory in its role and without any legally binding effect, the opinions of the Working Party are indeed influential and are regarded as representing a sort of crystallisation of legal opinion on issues handled by the body.[81]

As with other issues pertaining to data protection, the Article 29 Working Party has responded to the controversy surrounding the whereabouts rule by publishing its Opinion on the perceived issues. In a press release following the 71st Plenary Session of the Working Party held in Brussels, Belgium on 16th and 17th June, 2009, the support for WADA's initiative in the fight against doping was reiterated; however, it was insisted upon that the fight must be pursued with respect for the fundamental rights of athletes, particularly for the right to protection of their privacy and personal data. This followed the clamour by professional athletes and sporting organisations against the implementation of the whereabouts rule. Certain issues identified by the Working Party in its published Opinion are discussed below.

Firstly, the Article 29 Working Party identified that although WADA had adopted the International Standard on the Protection of Privacy and Personal Protection, it would be erroneous to conclude that it would guarantee, throughout the world, an adequate level of protection for personal data processed from within the EU, as required by EU law. It should be recalled that the eight principles of data protection contained in Paragraph (8) Schedule 1 of the Data Protection Act, enacted pursuant to the Data Protection Directive, requires that

[80] Article 29(1) and (2).

[81] C. Kuner, *European Data Protection Law: Corporate Compliance and Regulation*, 2nd ed., (Oxford University Press, 2007) at p. 9.

personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedom of data subjects in relation to the processing of such personal data. This becomes a live issue when one considers that just as the whereabouts rule applies to athletes all over the world, international sports events take place in different continents of the world, including countries that lack adequate data protection regimes, when compared with that available in Europe. Thus, invariably the transfer of data regarding whereabouts would transcend the European jurisdictions where data protection is regarded as being relatively adequate. It therefore behoves WADA and the anti-doping agencies and institutions to put in place a mechanism for safeguarding the data protection rights according to the standard acceptable in Europe, otherwise there would be apparent conflict with the applicable legal provisions within such European Community jurisdictions. To this end, measures to safeguard the relevant data are being taken by the anti-doping agencies. For instance, Article 11(7) of the International Standards for Testing 2009 vests International Federations with certain responsibilities aimed towards data protection, such as the requirements of strict confidence and ensuring that the information is used exclusively for the stipulated purposes and are not divulged to third parties without the consent of the data subjects.

Referring to the transfer of data under the whereabouts system, the Working Party opinion specifically stated that data transfers to the ADAMS database established in Canada and onward transfers from ADAMS will have to meet the requirement of an adequate level of protection in the destination country, and if this level cannot be considered adequate, transfers can only take place on the basis of certain exceptions mentioned in Article 26 of the Directive. This however is provided that they are not regular or massive, which would “make the exception the rule”. The exception in Article 26 is basically with regard to the consent of the

data subject, given unambiguously, or the necessity of the data transfer for purposes of performance of a contract, and so on; these are the stipulated exceptions where data can be transferred to another country where there is a lack of adequate data protection. With WADA having various accredited laboratories in different regions of the world and with data concerning athletes having to be transferred to different parts of the world, the EU institutions would be eager to ensure that the data protection regime is not watered down as a result. On the part of WADA, the provision of Article 14.5 of the International Standards for Testing is relevant, and it provides thus:

> WADA shall act as a central clearinghouse for Doping Control Testing data and results for International-Level Athletes and national-level Athletes who have been included in their National Anti-Doping Organization's Registered Testing Pool. To facilitate coordinated test distribution planning and to avoid unnecessary duplication in Testing by the various Anti-Doping Organizations, each Anti-Doping Organization shall report all In-Competition and Out-of-Competition tests on such Athletes to the WADA clearinghouse as soon as possible after such tests have been conducted. This information will be made accessible to the Athlete, the Athlete's National Federation, National Olympic Committee or National Paralympic Committee, National Anti-Doping Organization, International Federation, and the International Olympic Committee or International Paralympic Committee.
>
> To enable it to serve as a clearinghouse for Doping Control Testing data, WADA has developed a database management tool, ADAMS, that reflects emerging data privacy principles. In particular, WADA has developed ADAMS to be consistent with data privacy statutes and norms applicable to WADA and other organizations using ADAMS. Private information regarding an Athlete, Athlete Support Personnel, or others involved in anti-doping activities shall be maintained by WADA, which is supervised by Canadian privacy authorities, in strict confidence and in accordance with the International Standard for the protection of privacy. WADA shall, at least annually, publish statistical reports summarizing the information that it receives, ensuring at all times that the privacy of Athletes is fully respected and make itself available for discussions with national and regional data privacy authorities.

Therefore, WADA is clearly not oblivious of potential data protection issues and seeks to attain compliance, even as Article 14.6 goes further to require each anti-doping organisation to “ensure that it complies with applicable data protection and privacy laws with respect to

their handling of such information, as well as the International Standard for the protection of privacy that WADA shall adopt to ensure Athletes and non-athletes are fully informed of and, where necessary, agree to the handling of their personal information in connection with anti-doping activities arising under the Code".

Secondly, the Article 29 Working Party stressed that consent cannot be the basis for a legitimate processing, whether it relates to sensitive data within the meaning of articles 7 and 8 of Directive 95/46/EC or not. Article 7 stipulates certain criteria for making the processing of personal data legitimate, which include, *inter alia*, the unambiguous consent given by the data subject. Article 8 goes further to deal with the processing of certain categories of data referred to as 'special'. It provides in paragraph 1, as a general rule, that "Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life".

With the samples to be taken and data to be processed under the whereabouts system, it is thus apparent that the system falls at least within the "processing of data concerning health" covered by Article 8. The Therapeutic Use Exemption, which under the anti-doping regulations permits athletes with specific health conditions to use or have in their bodies a certain amount of substances which would be otherwise prohibited, is an instance. The operation of the therapeutic use exemption necessarily implies that the anti-doping agencies would possess and indeed process such 'special' data regarding the respective athletes. With the general rule being in effect that WADA would be prohibited from processing such sensitive data pertaining to athletes of EU citizenship, exceptions are provided for in paragraph 2. The specific provision relating to consent is sub-paragraph (a), which stipulates that the prohibition in paragraph 1 shall not apply where "the data subject has given his

explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent".

In analysing the point made by the Article 29 Working Party that consent cannot be the basis of legitimate processing under the whereabouts system, one needs to consider that both Article 7(a) and Article 8(2)(a) require that the consent must be 'unambiguous' and 'explicit' respectively. However, despite the fact that the introductory clause of the WADA Code states that athletes accept the anti-doping rules as a condition of participation and requires signatories to establish rules and procedures to ensure that all athletes under their authority consent to the dissemination of their private data as required or authorised by the Code, the supposed consent is deemed inadequate. As part of its defence of the whereabouts system, WADA has frequently maintained that before the rule was laid down there had been consultations with stakeholders including representatives of the athletes. Nonetheless, the rule has been criticised by many professional athletes, including world renowned and elite athletes such as tennis player Raphael Nadal. The fact remains that any consent in this regard must be unambiguous and explicit and it is tenable to argue that same cannot be said of the relationship that exists between athletes and the regulatory bodies. Indeed, as Lord Denning MR. stated in the *Enderby Town*[82] case as discussed earlier, the athletes have little or no bargaining power when compared to the sports regulatory bodies with the rules actually being laid down on a 'take it or leave it' basis.[83] An individual who desires to pursue a professional career in sport must subscribe to the rules laid down by the regulatory body and modern professional sport is such that a single regulatory body is at the apex of the worldwide

[82] *Op. cit.* at p. 606.

[83] S. Gardiner et. al, 3rd ed., *op. cit.* at p. 186.

regulatory hierarchy. In practice, whether or not a footballer is not satisfied with the rules and regulations of FIFA, for instance, he would be left with no alternative football regulatory body to subscribe to. Hence, the reality is that he has to either subscribe to the FIFA rules and regulations or give up any desire for professional football. Article 2(h) of the Data Protection Directive defines 'the data subject's consent' as any "freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed". In addition, the Article 29 Working Party posits that in order for consent to be legally valid, it must satisfy four criteria viz:

1) Consent must be a clear and unambiguous indication of wishes;
2) Consent must be freely given;
3) Consent must be specific;
4) Consent must be informed.[84]

In a situation where an athlete is left with no choice but to sign up to a specific Code in order to participate in sport, it is difficult to establish that consent is freely given. If the whereabouts system were to concede on the issue of consent, relevant provisions that are worth considering are sub-paragraphs 7(a) and 8(2)(d), which provide another exception (other than consent) to the processing of personal or sensitive data. The latter provision states that the general prohibition shall not apply where:

[84] Article 29 Working Party, "Working Document on a Common Interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995" (WP 114, 25 November 2005) at p. 10-12.

> processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects.

It would then seem that the operation of the whereabouts system, with the appropriate data safeguards in place, could indeed be covered by this particular provision.

Another issue raised by the Article 29 Working Party was that of data retention, meaning that in order not to be in conflict with data protection legislation, data processed under the whereabouts system cannot be retained for an inordinate period of time. Furthermore, if indeed consent cannot be the basis for retention of athletes' sensitive data, it therefore means that the anti-doping bodies would need to find some other exception to the rule prohibiting the processing of such data under Article 8. One question that may be asked stems from the principle regarding retention of sensitive data established in cases such as *S and Marper v. United Kingdom*.[85] It was held in that case that where no offence is committed, sensitive data including finger prints cannot be retained. Thus, the question is as to how such sensitive data can be retained in sports.

The Working Party also raises the issue of the proportionality of certain punitive measures under the whereabouts system. Specifically, it was stated that the publication of sanctions on the internet for a duration of one year is more than necessary to achieve the intended purposes. The Working Party expressed the belief that it can be achieved in a way that would be less damaging for the persons concerned; hence it considered the measure disproportionate. The theory of proportionality will be discussed in more detail in chapter 5.

[85] [2008] E.C.H.R. 1581.

CHAPTER 5

OTHER ISSUES

5.1 The Principle of Proportionality

The principle of proportionality is one which is a significant feature of European Community law and it has been established in a plethora of cases. It cuts across various aspects of law including the law governing human rights and employment.[86] Basically, there are three facets to the principle; according to Bygrave and Schartum, they are as follows:

(i) suitability – is the measure concerned suitable or relevant to realising the goals it is aimed at meeting?;

(ii) necessity – is the measure concerned necessary to realising the goals it is aimed at meeting?; and

(iii) non-excessiveness (proportionality *stricto sensu*) – does the measure go further than is necessary to realise the goals it is aimed at meeting?[87]

The crux of the matter herein is that the anti-doping rules and regulations must attain equilibrium between the guaranteed rights of individual athletes and the legitimate aims of the prosecution of the war against doping in sport. They must also strike a balance between the

[86] Aaron Baker, "Proportionality and Employment Discrimination in the UK", (2008) I.L.J. 37(4) 305.

[87] Lee Bygrave and Dag Wiese Schartum, "Consent, Proportionality and Collective Power" in Serge Gutwirth et al. (eds.) *Reinventing Data Protection?* (Springer 2009).

rights of individual athletes and community interests.[88] Institutionally, the courts will not hesitate to enforce the rights to which individuals are guaranteed by law but in the light of the limitations or restrictions traditionally permitted for safeguarding public interests as well as the rights of others, the courts are permitted to assess the necessity, suitability and proportionality of any administrative action. With the apparent certainty that the whereabouts rule treads into the domain of privacy and data protection rights, it seems quite obvious that the principle of proportionality would be a significant factor in determining whether or not the whereabouts rule does infringe on established legal rights.

Indeed, the threat to sport that the vice of doping has constituted cannot be over-emphasized - the casualties, the side-effects and even erosion of the tenets of integrity of competition and fair-play means that it amounts to a clear deviation from the traditional spirit of the game. Doping impacts negatively on not only the individual, but the sport as well as the wider society in general. Therefore, as far as doping is concerned, the bare issue is as to what measures should be taken to combat it, especially since previous measures such as in-competition testing have put the anti-doping bodies on the back foot and consistently playing catch-up. Whereas it seems that the out-of-competition testing system under the whereabouts rule is likely to keep the anti-doping bodies somewhat at par with drug cheats, the issues regarding privacy and data protection rights cannot be ignored. The task of determining whether the whereabouts rule in its present form is proportionate and indeed legitimate rests on the courts and judicial authorities. It is feasible that the first real answer will emerge from the case which has been instituted in Belgium.

[88] Barrie Houlihan, *Dying to Win*, op. cit., at p. 142.

5.2 Strict Liability

On the issue of strict liability as applied in anti-doping principles, although the application of the doctrine may *prima facie* seem harsh, it may however be tenable to argue that it is well suited. As discussed earlier, the WADA Code makes it the responsibility of the athlete to ensure that no prohibited substance is found in his or her body and Article 10 prescribes sanctions against individuals for anti-doping rule violations. Article 10(2) provides as follows:

> The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:
>
> First violation: Two (2) years Ineligibility.

Furthermore, Article 10(3) provides thus:

> The period of Ineligibility for anti-doping rule violations other than as provided in Article 10.2 shall be as follows:
>
> 10.3.1 For violations of Article 2.3 (Refusing or Failing to Submit to Sample Collection) or Article 2.5 (Tampering with Doping Control), the Ineligibility period shall be two (2) years unless the conditions provided in Article 10.5, or the conditions provided in Article 10.6, are met.
>
> 10.3.2 For violations of Articles 2.7 (Trafficking or Attempted Trafficking) or 2.8 (Administration or Attempted Administration of Prohibited Substance or Prohibited Method), the period of Ineligibility imposed shall be a minimum of four (4) years up to lifetime Ineligibility unless the conditions provided in Article 10.5 are met. An anti-doping rule violation involving a Minor shall be considered a particularly serious violation and, if committed by Athlete Support Personnel for violations other than Specified Substances referenced in Article 4.2.2, shall result in lifetime Ineligibility for Athlete Support Personnel. In addition, significant violations of Articles 2.7 or 2.8 which may also violate non-sporting laws and regulations, shall be reported to the competent administrative, professional or judicial authorities.
>
> 10.3.3 For violations of Article 2.4 (Whereabouts Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years based on the Athlete's degree of fault.

While the sanctions prescribed above would seem harsh in a situation where an athlete is found guilty in the absence of *mens rea*, this is well mitigated by the provisions of Article 10(4) and 10(5) viz:

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance. The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

10.5.1 No Fault or Negligence

If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

10.5.2 No Significant Fault or Negligence

If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight(8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

It is clear from the above that where an athlete is able to sufficiently establish the absence of *mens rea*, the mitigating substances could reduce the sanction to the barest minimum which could indeed amount to no liability at all in some cases. Further, with the burden of proof being placed generally on the anti-doping organisation by virtue of Article 3(1), where the burden is placed on the athlete to rebut a presumption or establish specified facts or circumstances, the standard of proof is stipulated to be by a balance of probability. However, with regard to Article 10(4), under which periods of ineligibility could either be reduced or eliminated, a higher standard of proof is required to be satisfied. Nonetheless, it would be immensely difficult, if not impossible, to fault the conclusion that the application of the doctrine of strict liability is sufficiently mitigated where necessary.

5.3 The Missed Tests Ban

Article 2(4) of the WADA Code stipulates that any combination of three missed tests and/or filing failures within an eighteen-month period as determined by anti-doping organisations with jurisdiction over the athlete shall constitute an anti-doping rule violation. Indeed, it is the responsibility of the athlete to ensure that he or she is available for testing at the whereabouts declared on his or her whereabouts filings.[89] The provisions are clear and in effect three missed tests within an eighteen-month period amount to a violation of the anti-doping rules and attracts sanctions. By virtue of Article 10(3)(3) of the WADA Code, the sanction incurred thereby is a 'period of ineligibility' for a minimum of one year and a maximum of two years based on the athlete's degree of fault. In summary, a missed tests ban would be for no less than one year and no more than two, taking into account the circumstances of the case.

[89] International Standards for Testing 2009, Article 11(3)(7)(b).

The missed tests ban precedes the current whereabouts rule, having been part of previous out-of-competition testing systems and its implementation has seen elite athletes fall under the hammer. In 2006, the United Kingdom's Commonwealth 400metres Champion, Christine Ohuruogu was banned for missing three drug tests within the stipulated eighteen-month period.[90] Her claim that the missed tests were as a result of changes in her training schedule was immaterial as far as the strict liability rule governing the anti-doping legislations was concerned. Moreover, the filing and updating of whereabouts information is made the responsibility of the athlete.[91] Similarly, Rio Ferdinand of Manchester United Football Club was banned in 2003 for missing drugs test.[92]

Whereas the need for the anti-doping campaign to be handled with firmness can be appreciated, there may be arguments against the perceived harshness of the missed tests ban, especially under the current whereabouts system. With the lack of information prior to an athlete being located for the carrying out of a test, it becomes tedious adjusting to impromptu itinerary. It is not totally unforeseeable that an athlete could miss three tests within an eighteen-month period without any dishonest motives. The implication, regardless, would be at a ban for at least a year, during which period the athlete could be cut off from his source of livelihood. Apart from the ineligibility to participate, the negative impact such a ban could have on the career progression of an athlete cannot be ruled out. Therefore, an issue may arise in the future in respect of the proportionality of such lengthy sanctions in the light of the economic realities and as being potentially in restraint of trade. In such a case, it would

[90] BBC Sport, 6 August 2006, "Ohuruogu Banned for Missing Tests": http://news.bbc.co.uk/solpda/ifs_sport/hi/newsid_5251000/5251180.stm (last viewed on 22 September 2009).

[91] International Standards for Testing 2009, Article 11(3) and (4).

[92] BBC, 19 December 2003, "Ferdinand Banned for Eight Months": http://news.bbc.co.uk/sport1/hi/football/3333091.stm (last viewed on 22 September 2009).

consequently lead to a series of litigations with professional athletes seeking to challenge the decisions of the governing bodies.

CHAPTER 6

RECOMMENDATIONS AND CONCLUSION

6.1 Recommendations

It is not an ideal scenario that the debate surrounding the Whereabouts rule relates not to its efficacy in combating the scourge of doping in sports but relates to its compatibility with well established legal principles and the rights of athletes. Although antagonists of the system might concede that the approach of out-of-competition testing may be the most efficient weapon yet in the war against doping, they are adamant that it is an excessive measure. With a number of top professional athletes also venting their displeasure at the whereabouts rule,[93] the concerns cannot be ignored even as there are obvious potential areas of conflict with established laws. While the merits of the rule can indeed be appreciated, there are considerations and issues that must be taken into cognisance if the anti-doping campaign is to avoid being besieged by a series of litigation. Flowing from the discussions in the previous chapters, below are some recommendations, the implementation of which would very likely augur well for the efficacy of anti-doping methods as well as reduce the risk of conflict with established legal principles.

[93] Telegraph.co.uk, 29 May 2009, "French Open 2009: Rafael Nadal is No Exception to the Drug Testing Rules": http://www.telegraph.co.uk/sport/tennis/frenchopen/5410931/French-Open-2009-Rafael-Nadal-is-no-exception-to-the-drug-testing-rules.html (last viewed on 22 September 2009).

(a) Focus Should Also Go Beyond the Athlete

First of all, it is worthy of note that the focus of the anti-doping campaign has been primarily on the athletes themselves. The phenomenon of doping has become institutional and the athletes can even be regarded as the victims in certain cases. The BALCO scandal revealed the complicity of medical practitioners/chemists, coaches/personal trainers as well as athletes.[94] Also, in the doping scandals that rocked the *Tour de France* as discussed in chapter 2, teams were discovered to have been institutionally doping their athletes in violation of the rules of the sport. These and the related large-scale doping incidents reveal the enormity of resources at the disposal of those involved in doping. Indeed, it may not be incorrect to describe athletes, especially the younger and up-coming ones, as being at the bottom of the doping chain. It is the awareness of this fact that accounts for the provisions included in Article 10(3)(2) of the WADA Code to the effect that where an anti-doping rule violation involving a minor is committed by an Athlete Support Personnel, the sanction shall be a life-time ban. Therefore, it is suggested that the anti-doping agencies need to spread their focus beyond the athletes alone. It is even clearly unethical for doctors or General Practitioners to aid sports persons in doping.[95]

It is important to note that focus should not be on sanctions alone, as it would be of greater benefit if sport regulatory bodies could collaborate with the respective professional regulatory bodies as a preventive measure. Indeed, having medical associations or the body of coaches,

[94] USA Today, 27 November 2007, "BALCO Investigation Timeline": http://www.usatoday.com/sports/balco-timeline.htm (last viewed on 22 September 2009).

[95] British Medical Association, *Drugs in Sport, op. cit.*, at p. 12 and chapter 7.

personal trainers, physiotherapists committed to the fight against doping would serve as a major boost.

(b) The Need for Harmonised National Laws

With the support that sport regulatory bodies such as WADA and the IOC have from the governments of various countries, it may be of use if this political support is channelled towards some legal ends. With the widespread acknowledgement of the legal issues and jurisprudence emerging from the development of sports, it may not be unreasonable to expect that national legislatures would soon begin to enact laws relating specifically to sport. This is without prejudice to the role of sport governing bodies as self-regulators. Similar to the enactment of laws such as the Football Offences Act 1991 regulating certain aspects of sport, State enactments can also cater for doping. Just as the boom in telecommunications, information technology, internet, and so forth have been grounded by legislative enactments, a situation where sport-specific legislations would emerge is indeed foreseeable. Furthermore, governments all over the world have come to acknowledge the vast socio-economic potential that sport possesses and even within the European Community, sport is seen as a tool which can be used to convey the message and Community objective.[96] Huge amounts of resources are expended for purposes of sport involvement and participation as well as hosting international sporting events. Therefore, sport has clearly become a significant part of the socio-economic make-up of different countries. For instance, when a country like Brazil is mentioned, their football prowess readily comes to mind and likewise Jamaica is renowned all

[96] Europa - European Commission, 13 July 2007, "Game, Set and Match": http://ec.europa.eu/news/culture/070713_1_en.htm (last viewed on 22 September 2009).

over the world for the feats accomplished by its sprinters. The point being made is that the political support sport regulators have can be channelled towards the anti-doping cause in the form of statutory enactments. Just as laws have been enacted to govern disciplines such as information technology, capital markets and telecommunications without comprehensive government involvement in their regulation, the same approach may be of use in sport. The current scenario is that in most countries there are no criminal sanctions for doping in sport although certain drugs banned by sport governing bodies (e.g. cocaine and cannabis) are also illegal in jurisdictions such as the UK.[97] Article 12 of the WADA Code provides that signatories or governments that have accepted the Code are free to enforce their own rules for the purpose of imposing sanctions on a sporting body over which such signatory to government has authority. Specifically, there is the need for national laws to be patterned after a universally acceptable code with regard to drug use in sport. This will serve two purposes – not only will it aid uniformity and harmonisation in the war against doping in sport, but it will also greatly reduce the burden of ensuring that anti-doping regulations are not in conflict with established legal principles which differ from one legal jurisdiction to another.

(c) The Need to Take Cognisance of the Peculiarities of Certain Sports

One area of dissent that has trailed the whereabouts rule is its broad-based application. Not only does it seek to harmonise anti-doping policy across geographical borders but also across different sports. Whereas it has been conceded thus far that a uniform approach to anti-doping rules and policy is essential for an effective system, cognisance may need to be taken of the peculiarities of different sports with regard to the imposition of sanctions. Certain issues

[97] British Medical Association, *op. cit.*, at p. 6.

arising from the harmonisation of sanctions across different sports have been the subject of debate.[98] In respect of the impact of uniform sanctions across various sports, one may consider the average period of active participation - while some sports such as equestrian and shooting have a relatively lengthy average period of active or competitive participation, more intense or more physically demanding sports such as gymnastics and boxing have a significantly shorter period. Putting the point in perspective, where two athletes from different sports at either end of this categorisation are penalised with a 2-year ban, for instance, the impact of such punishment on their respective careers would vary significantly. Likewise, in some sports athletes compete as true professionals, earning a living solely from the sport whereas others are not so financially rewarding. Thus, a 2-year ban would have significantly greater economic impact on a professional football or basketball player when compared to a table-tennis player. Conversely, it may be argued that a situation where two individuals receive varying sanctions for the same offence would seem to be unfair. However, just as the peculiar facts and circumstances of each case are taking into consideration before a just decision can be arrived at, it seems only fair that all these considerations are taken into account in the process of implementing a system of sanctions.

(d) The Need to Uphold Fairness, Natural Justice and the Rule of Law

Despite the fact that sport regulatory bodies govern a significant field of human endeavour which accounts for the livelihoods of many people, their regulatory sphere is categorised

[98] Comment to Article 10.2 of the WADA Code 2009.

under private law.[99] There have been complaints about the arbitrariness of regulatory bodies which have led aggrieved persons to seek redress from the courts. At the Tour de France which was held in 2007, the Danish cyclist Michael Rasmussen was withdrawn from the race and fired by his team Rabobank for allegedly "violating internal rules" by giving false whereabouts information. However, according to research carried out by Professor Verner Møller from the Department of Sports Science at the University of Aarhus, Denmark, two of the four warnings given to Rasmussen were wrong as per the WADA Code.[100] In the words of the Professor, the sanctions system under the whereabouts rule is "managed arbitrarily without sufficient protection of the athlete's rights and it collides with the ideal of a level playing field". He concluded that there was the need for WADA to begin developing a strategy for overseeing anti-doping campaigners concerning their responsibility to act fairly, impartially and within the letter and the spirit of the governing rules". Indeed, the courts are inclined towards undertaking a review of the procedural aspects of sports regulatory bodies with a view towards upholding and enforcing the tenets of natural justice and fairness.[101] According to Lord Denning MR. in *Enderby Town,*[102] where a court sees that such a body is proceeding in a manner contrary to natural justice, it can intervene to stop it.

[99] *R* v. *Disciplinary Committee of the Jockey Club ex parte Aga Khan*, op. cit.; *Law* v. *National Greyhound Racing Club*, op. cit.

[100] Play the Game, "Doping and Legal Rights": http://www.playthegame.org/news/detailed/doping-and-legal-rights-4513.html (last viewed on 22 September 2009).

[101] Simon Gardiner *et. al*, *op. cit*., at p. 201.

[102] *Op. cit.* at p. 606.

In addition to the above, highlighted below are some of the recommendations made by the Board of Science and Education of the British Medical Association.[103] The recommendations stem from their report on the issue of drugs in sport and are four-fold:

Firstly, in terms of education and information, the Board suggests that there is the need for the code of practice of the medical profession to take cognisance of sports medicine and the responsibility to respect ethical principles of the profession for the preservation of the health of the sportsperson. This responsibility should be inculcated in aspiring medical practitioners as part of the undergraduate medical curriculum. In respect of athletes, the recommendation is that an awareness campaign as to the details of prohibited drugs and methods should be undertaken from the level of the national governing bodies to private sports clubs, gymnasiums as well as coaches and parents working with child athletes. Also, that there is the need for development of rehabilitation programmes specifically suited to sportspersons. From the public perspective, awareness of the implications of doping should be raised at the school level, amateur level and even amongst those who intend to take up professional sport practice.

Secondly, in terms of policy, the fact that existing policy and regulation has not led to any apparent reduction in the number of doping incidents is noted. Consequently, the Board recommends that the scope of policy emphasis should be extended from being sanction-based to include other policy instruments such as education, harm reduction and rehabilitation.

Thirdly, that further research is necessary in order to establish facts such as the motives for drug use and the differences between sports, gender and age; to confirm the adverse effects of certain drugs used for doping, particularly as a result of long-term high-dose use; and the health consequences of training methods and medical approaches to improve performance.

[103] British Medical Association, *op.cit*., chapter 8.

Finally, that there is the need for pharmaceutical companies to consider using markers to enable the detection of particular substances during tests. Interestingly, this would have forestalled the scandal that trailed BALCO and the use of the THG drug. Also, that there is the need for tighter control over the supply of drugs for therapeutic purposes and for all dietary and nutritional supplements to be clearly and comprehensively labelled to prevent sportspersons from inadvertently ingesting banned substances; this is more significant in the light of the current application of the strict liability principle.

6.2 Conclusion

The negative effect of doping is multi-faceted. Not only does it portend health hazards for the athletes themselves, it also diminishes the integrity of sport and has a negative influence on society as a whole. Apart from the long-term side effects which sometimes result in death, some prohibited substances have effects which include aggression and impairment of judgement. These can also constitute a hazard to other athletes or competitors, especially in contact sports. In addition, if doping is allowed to thrive, the concept of a level-playing-field would become largely eroded and competitive advantage would tilt in favour of drug cheats. Therefore, tenets such as hard work and fairness which are pillars of sport would lose their value. Also, with the media publicity that modern sport receives and the growth of spectatorship, elite sportspersons have become notable figures in society. As a result of excellence in competition they are idolised by the youth who dream of similar achievements. These athletes are thus seen as role models and where such an athlete is indicted in a doping scandal it amounts to a case of setting a bad example.

There is no gainsaying the fact that the efforts to curb the menace of doping in sports are indeed noble and necessary. It is also glaring that the whereabouts rule emerged as a result of the need to step up the measures previously employed, which left the anti-doping agencies on the back-foot. Be that as it may, it would be of no use in the long run if any anti-doping measure is implemented without regard to necessary considerations and consequently becomes the result of endless disputes and litigation. Invariably, the system will fail. Indeed, as sports regulatory bodies strengthen their anti-doping control, the perceived freedoms of athletes would somewhat diminish.[104] However, with proper consultation agreements and compromises can be reached to attain an effective, efficient and widely acceptable anti-doping system. The advantages are obvious even as sports governing bodies may not always have the abundance of resources to cope with a large number of legal challenges.

In the build-up to the London 2012 Olympic Games, it is pertinent that the base of anti-doping rules and policy be well established and in the light of current developments in the pharmaceutical industry, it seems that the most viable anti-doping programme is that involving out-of competition testing. The way forward may not require any radical change from the whereabouts system; however it does appear strongly that the issues and considerations which have been highlighted need to be addressed.

[104] Simon Gardiner *et. al*, *Sports Law*, *op.cit.* at p. 297.

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