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BRITISH OLYMPIC ASSOCIATION V. WORLD ANTI-DOPING AGENCY: AN EXAMINATION OF THE ETHICAL ISSUES GOVERNING ANTI-DOPING INITIATIVES

SHIVAM SINGH*

The sacrosanctity of sport is acutely impacted by doping, biased refereeing, hooliganism, and match-fixing. They all raise serious questions about a sporting event's purity and the damage they cause is often irreversible because they leave lingering suspicions about a contest's authenticity.¹ Identifying and punishing individuals guilty of these malpractices remain critical to sport's health and indicate the sporting community's robust alignment with the ideals of fair play.² Despite the urgent need to crack down on such infractions, though, the measures aimed at achieving this end are seldom in perfect sync and at times come into sharp conflict.

These divergent approaches came to a head very recently in *British Olympic Association v. World Anti-Doping Agency*,³ in which the Court of Arbitration for Sport ("CAS") dealt with their application to punishing individuals guilty of doping offenses. The case assumed added significance

* LL.M. Candidate 2013, Columbia Law School and B.A. LL.B. (Hons.), National Law School of India University (2010); Associate State Attorney with the Advocate General of Bihar (India) from 2010 to 2012.

¹ Richard H. McLaren, "Corruption: Its Impact on Fair Play," 19 Marq. Sports L. Rev. 15.

² Eoin Carolan, "The New WADA Code and the Search for a Policy Justification for Anti-Doping Rules," 16 Seton Hall J. Sports & Ent. L. 1, 42 (2006).

³ CAS 2011/A/2658.



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because it was decided in the lead-up to the 2012 London Olympics and had a critical bearing on the eligibility of several prospective British Olympians. At the crux of the dispute lay a 1992 by-law of the British Olympic Association (“BOA”):

Any British athlete “who has been found guilty of a doping offence . . . shall not . . . thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games or any European Olympic Youth Festivals.”⁴

The BOA’s avowed aim in adopting this by-law was to signal its absolute intolerance towards doping offenders by selecting a national contingent untainted by doping allegations. The by-law was directed to ensure that British athletes guilty of doping offenses, regardless of the offenses’ severity and terms of punishment, were deemed forever ineligible to represent Great Britain in any sporting event. This was in total contrast to practices in other countries wherein a player gained re-eligibility to represent his national team upon completing his mandatory suspension period.⁵ This ban gave rise to a piquant situation in which British athletes, due to their nationality alone,

⁴ By-law 7.4 cited from John T. Wendt, “*Toward Harmonization: British Olympic Ass’n v. World Anti-Doping Agency*,” 23 Marq. Sports L. Rev. 155, 164 (2012).

⁵ Daniel Gandert, “*The Battle Before the Games: The British Olympic Association Attempts to Keep its Lifetime Ban for Athletes with Doping Offenses*,” 32 Nw. J. Int’l L & Bus. 53A (2012).



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were subject to far stiffer punishments than athletes of other nationalities for committing the same offenses.

In 2008, Dwain Chambers, a British sprinter convicted of doping, unsuccessfully challenged the ban as being an unfair restraint on trade.⁶ His plea for an injunction was rejected, as the UK High Court held that denial of participation in the Olympics was only a speculative loss to his livelihood. The Court also rejected his argument that the by-law was inconsistent with the World Anti-Doping Agency (WADA) Code, relying upon the IOC's "Osaka Rule."⁷

This rule provided that any person sanctioned for over six months by any anti-doping organization was deemed ineligible to participate in the subsequent Olympics even after such suspension's expiry, and effectively allowed penalties harsher than the WADA Code to be administered against

⁶ See *Chambers v. British Olympic Ass'n*, [2008] EWHC 2028 (QB) (U.K.); Peter Charlish, "Dwain Chambers Runs Out of Time," 10 *Tex. Rev. Ent. & Sports L.* 57, 61 (2008).

⁷ "The IOC Executive Board, in accordance with Rule 19.3.10 OC and pursuant to Rule 45 OC, hereby issues the following rules regarding participation in the Olympic Games:

1. Any person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations, may not participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension.
2. These regulations apply to violations of any anti-doping regulations that are committed as of 1 July, 2008. They are notified to all International Federations, to all National Olympic Committee and to all Organizing Committees for the Olympic Games."



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doping offenders.⁸

However, the CAS in *United States Olympic Committee v. International Olympic Committee*⁹ subsequently struck down the “Osaka Rule” by holding that it acquired the character of a disciplinary sanction as soon as it prevented an athlete from competing in the Olympics.¹⁰ As a result, the WADA declared By-law 7.4 to be running afoul of the WADA Code and struck the by-law down. Aggrieved by WADA’s decision, the BOA appealed it to the CAS, resulting in the present litigation.¹¹

The BOA contended that the impugned provision’s title (“Membership of Team GB”) clearly indicated that the by-law was a selection policy, over which it enjoyed autonomy, and was not tantamount to a disciplinary sanction, over which WADA reigned. It also argued that under Article 23.2.1 of the WADA Code, different responsibilities are placed on National Olympic Committees (“NOCs”) and National Anti-Doping Organizations (“NADOs”) and since the Article’s application was limited to NADOs as opposed to NOCs, the BOA’s selection policy could not be constrained by the WADA Code.¹² It finally argued that the existence of an appellate procedure allowed athletes to seek appropriate sentence reductions through appeals and therefore adequately limited the possibility of disproportionate

⁸ Howard L. Jacobs, “A Successful Challenge to the IOC’s ‘Osaka Rule:’ An Insider’s Look at a Landmark Sports Arbitration,” 29 Fall Ent. & Sports Law 1, 24 (2011).

⁹ CAS 2011/O/2422.

¹⁰ CAS 2011/O/2422 at Paras 8.15-8.19.

¹¹ Gandert, *supra* note 5 at 57A.

¹² CAS 2011/A/2658 at Para 5.10.



sentences.¹³

WADA argued that the titular suggestion of the provision as a selection policy for British athletes did not detract from its pith of imposing sanctions over and above those allowed by the WADA Code, and thus the BOA's punishments under By-law 7.4 were therefore impermissible. On the idea of jurisdictional over-reach, WADA contended that it was not encroaching upon the BOA's autonomous preserve. WADA said that it was instead incumbent for the BOA to respect its contractual commitment under the WADA Code because as a WADA Code signatory, the BOA could not include provisions that contradicted the WADA Code itself. WADA argued that By-law 7.4 put in place a host of sanctions that served as additional punishments not approved by WADA and that its effect was to ensure deterrence, therefore it could not be described as merely a selection policy.¹⁴

In adjudicating this dispute, the CAS felt it imperative to preserve a measured balance between an NOC's autonomy in selecting its national team and ensuring that these selection rules did not dilute the consistent stance against doping under the aegis of WADA.¹⁵ In rejecting the BOA's appeal, the tribunal weighed these competing policy rationales. It placed heavy reliance upon Article 23.2.2 of the WADA Code, under which a signatory such as the BOA is precluded from introducing new provisions

¹³ Andrew Nixon, "BOA lose bye-appeal," May 4, 2012, available at <http://www.lawinsport.com/articles/anti-doping/item/boa-lose-bye-appeal> (last visited on February 11, 2013).

¹⁴ *Id.*

¹⁵ Wendt, *supra* note 4 at 165.



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that may in any manner alter the WADA Code's substantive effect, stating that the anti-doping initiatives must remain in harmony with one another.¹⁶

In disregarding the BOA's argument about the by-law being a selection policy and not a doping sanction, the CAS ruled that the distinction was illusory since the by-law visited athletes with sanctions that were in excess of those prescribed by the WADA Code and therefore unwarranted.¹⁷

It is my view that the CAS correctly decided the instant case, as I believe the Court accurately followed its previous decision in *United States Olympic Committee v. International Olympic Committee*.¹⁸ The instant decision reaffirms the idea that it is inequitable to allow an international instrument signatory to pursue measures antithetical to that instrument, as such measures would introduce disparate standards for the exact same offenses and be inconsistent with the desired goal of harmonization.¹⁹ Additionally, it reinforces the principle that a signatory must follow the original international law instrument until it has been amended through the proper consultative process.²⁰ I also support that the CAS' reasoning was heavily influenced by the constitutional law doctrine of double jeopardy, by which no person can be punished twice for the same offense. Furthermore, this

¹⁶ CAS 2011/A/2658 at Para 8.41.

¹⁷ Wendt, *supra* note 4 at 165-66.

¹⁸ CAS 2011/O/2422.

¹⁹ Nixon, *supra* note 13.

²⁰ Kris Lines & Jon Heshka, "From a small cede a mighty code may grow: An analysis of CAS 2011/A/2658 BOA v. WADA," September 1, 2012, <http://sportslawnews.wordpress.com/2012/09/01/from-a-small-cede-a-mighty-code-may-grow-an-analysis-of-cas-2011a2658-boa-v-wada/> (Last visited on March 23, 2013).



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decision is also in sync with the ideas of sentence proportionality and offender rehabilitation; the mere fact that an athlete commits a doping infraction does not justify the imposition of excessive punishments.

Dissimilar punishment regimes such as the one under the BOA's erstwhile by-law create a wholly incongruous situation wherein fairness and consistency are neglected.²¹ The setting aside of this by-law rightly allowed previously ineligible athletes such as Dwain Chambers²² and David Millar,²³ who have served their mandatory suspension periods, to be rightfully included in Team Great Britain for the London Olympics in 2012.

I believe that the BOA's next available step is to lobby for a provision similar to by-law 7.4, by which a single doping infraction would operate as lifetime ban, to be included in the proposed 2015 WADA Code. However, until WADA adopts such a provision, the BOA as a WADA Code signatory must conform to it, because it has knowingly and voluntarily ceded its autonomy in the interest of installing a harmonized anti-doping regime as

²¹ Gabriel Kaufmann-Kohler & Antonio Rigozzi, *Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes* (Nov. 13, 2011), http://www.wada-ama.org/rtecontent/document/Legal_Opinion_Conformity_10_6_complete_document.pdf (Para 179). (Last visited on March 23, 2013).

²² "London 2012: Dwain Chambers picked for GB athletics squad," July 3, 2012, <http://www.bbc.co.uk/sport/0/olympics/18685730> (Last visited on March 23, 2013).

²³ Brendan Gallagher, "London 2012 Olympics: Former Drug-Cheat David Millar selected in Team GB Cycling Squad for Games," June 13, 2012, <http://www.telegraph.co.uk/sport/olympics/cycling/9328916/London-2012-Olympics-former-drug-cheat-David-Millar-selected-in-Team-GB-cycling-squad-for-Games.html> (Last visited on March 23, 2013).



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per Article 23.2.2 of the WADA Code.