

## **Dwain Chambers runs out of time**

CHARLISH, P. <<http://orcid.org/0000-0002-3733-7374>>

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### **Published version**

CHARLISH, P. (2008). Dwain Chambers runs out of time. Texas review of entertainment and sports law.

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Texas Review of Entertainment & Sports Law  
Fall 2008

Article

DWAIN CHAMBERS RUNS OUT OF TIME

Peter **Charlish**

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**Charlish**

Abstract

Dwain Chambers was the British sprinter who in 2003 was exposed as one of the central characters in the BALCO conspiracy when he tested positive for THG and other illegal performance enhancing substances. In addition to his standard two year ban imposed by WADA, he was also banned from Olympic competition for life by the British Olympic Association. This paper examines the background to that ban and the challenge to the legal status of his lifetime exclusion that Chambers undertook in the High Court.

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## I. Introduction

Five years ago, Dwain Chambers was the poster boy of British athletics. He was only the second British man to run the 100 meters in less than 10 seconds, [\[FN1\]](#) and he was widely seen as a potential medalist at the 2004 Athens Olympic Games, having won the European 100 meters title in 2002. [\[FN2\]](#) In 2003, however, Chambers became caught up in what was to become known as the “BALCO” scandal that rocked the American sports world. [\[FN3\]](#) BALCO, an organization headed by Victor Conte, had as one of its aims the development of the world's fastest human by utilizing the administration of illegal performance enhancing substances, [\[FN4\]](#) specifically an artificial steroid, Tetrahydrogestrinone, (“THG”). [\[FN5\]](#) BALCO accomplished its goal when one of its clients, Tim Montgomery, broke the world record for 100 meters, running a time of 9.78 seconds in September 2002. [\[FN6\]](#) Shortly afterwards the original BALCO team disintegrated acrimoniously and the organization turned its attention to Chambers and his potential to further lower the record with the help of the THG program. Elliot Almond and his co-authors for The Mercury Sun commented “[b]y last season, Montgomery had been supplanted by a young English sprinter, Dwain Chambers, as Balco's chosen one. Chambers and two other sprinters with Balco connections, Kelli White and Chryste Gaines, had emerged as world beaters.” [\[FN7\]](#)

The acrimony over the split of the original BALCO team proved important. In June 2003, a syringe sample of the steroid was sent to the United States Anti Drugs Agency, (“USADA”) by a disgruntled coach, [\[FN8\]](#) apparently tired of his clean athletes being beaten by those on THG. Once USADA had a sample of the artificially created steroid they were able to develop a test to detect it and subsequently implicate the athletes taking the product.

In February 2004, Dwain Chambers was banned by UK Athletics [\[FN9\]](#) for two years in accordance with the World AntiDoping Agency, [\[FN10\]](#) (“WADA”) Code. Article 2.1 of the 2003 Code defines a doping violation as, “The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen”. [\[FN11\]](#) Article 10.2 details that for a first offense an athlete would be banned for a period of two years. [\[FN12\]](#) Chambers was dealt a further blow when, in accordance with bylaw 25 of the British Olympic Association (“BOA”), he was banned for life from competing in the Olympic Games. [\[FN13\]](#) The BOA introduced this bylaw in 1992. Bylaw 25 states:

(1) Any person who has been found guilty of a doping offence, either (i) by the national governing body of his or her sport in the United Kingdom; or (ii) by any sporting authority inside or outside the United Kingdom whose decision is recognised by the World Anti-Doping Agency (‘a sporting authority’) shall not, subject to as provided below, thereafter be eligible for consideration as a member of 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 . . . [\[FN14\]](#)

Yet, despite this hard-line stance by the BOA, the ban has been overturned regularly. For example, in November 2007, Christine Ohuruogu “became the 27<sup>th</sup> athlete to successfully appeal against the ban”. [\[FN15\]](#)

Thirty sports participants have challenged the life bans imposed by the BOA and of those thirty, twenty seven have had successful appeals. Just three have failed; athletes Carl Myerscough and Janine Whitlock, and swimmer Michael Fibbins. [\[FN16\]](#) These three failed their tests rather than merely missing them, as was the case for Christine Ohuruogu. Despite the leniency shown to Ohuruogu, it was not in dispute that she had committed a doping offence according to the WADA Code. Article 2.4 of the WADA Code states: “[v]iolation of applicable requirements regarding Athlete availability for Out-of-Competition Testing including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules”. [\[FN17\]](#)

Further, the comment included in the Code on Article 2.4 stresses the importance of compliance with this regime, emphasizing: “Unannounced Out-of-Competition Testing is at the core of effective doping control. Without accurate Athlete location information such testing is inefficient and sometimes impossible.” [\[FN18\]](#)

Ohuruogu had missed not one, but three out-of-competition tests, an offense for which she originally received a one year ban from all competition and a lifetime ban from Olympic competition. She appealed and, as has become customary, the Sports Dispute Resolution Panel [\[FN19\]](#) overturned the life ban, citing mitigating circumstances surrounding her failure to comply with “UK Sport’s ‘whereabouts rule’, by which athletes have to designate an hour a day for five days a week when they are available for drug tests.” [\[FN20\]](#) Similarly, Peter Cousins, an International Judo competitor, cited mitigating circumstances for his failure to comply with the same “whereabouts rule” in his successful appeal in November 2006 to have his life ban from the Olympics overturned. [\[FN21\]](#)

It was always highly unlikely that an appeal directly to the BOA against bylaw 25 would have been successful for Chambers, particularly bearing in mind the remarks directed against Chambers by figures such as BOA Chairman, Lord Moynihan, who commented:

What matters is the principle--we will send a clean team to Beijing and there will be no room for doping cheats. . . . But if anyone is implying there is a way I can sit down with him, somehow select him and ignore the byelaw then forget it. Completely. [\[FN22\]](#)

Furthermore, Chambers was unable to bring his case within the remit of conditions for an appeal against the lifetime ban laid out in Rule 5 of the by-law. Alex Wade reported for the Times that “Rule 5 of the byelaw states that an athlete can appeal if the doping offence was minor; if, for offences committed after the WADA code came into force, [\[FN23\]](#) there was no finding of fault or negligence; or if there were ‘significant mitigating circumstances.’” [\[FN24\]](#)

Chambers's systematic consumption of THG and other substances within the BALCO program failed to fall within the confines of any of these categories, thus eliminating any chance of success through an appeal. An appeal to the Court of Arbitration for Sport (“CAS”) would have been the typical route for a sports participant to take but at this late stage such an option would simply have been too time-consuming for Chambers. An application to seek Judicial Review of the BOA decision would likely have proved a failure. Case law has consistently demonstrated that the decisions of sports governing bodies are not subject to

judicial review, [\[FN25\]](#) on the grounds that they are private bodies and so public law remedies are not available. [\[FN26\]](#) Dwain Chambers instead challenged the BOA bylaw under three theories: (a) the common law doctrine of restraint of trade; (b) conflict with Articles 81 and 82 of the European Community Treaty and Competition Law; and (c) that it is irrational and should be set aside under the court's inherent supervisory jurisdiction. [\[FN27\]](#)

Justice MacKay, summarized the issues facing the court, commenting:

Therefore the key issue in this appeal can be framed in this way: am I satisfied to a high degree of assurance that this claimant will establish at trial that the decision to impose and retain bylaw 25, viewed against the context in which BOA operates, fell outside the range of reasonable responses of a body in its position? . . . I must ask myself this question, acknowledging that, though the court must not shrink from exercising a supervisory power which it has if it affects the claimant's right to work (for which see later), the BOA, if acting honestly and not capriciously and within its powers, is and must be a body better fitted to judge what was needed than me, or any court. [\[FN28\]](#)

Put bluntly, the court was charged with deciding whether or not the BOA was acting proportionately in enacting a bylaw banning an athlete from Olympic selection set against the context of the Olympic charter "to serve as an example for the youth of his country." [\[FN29\]](#) The remainder of this article examines the merits of Chambers' unsuccessful action and explores the reasons for the challenge's failure.

## II. Restraint of Trade

Chambers went to the High Court seeking an injunction prohibiting the BOA imposing bylaw 25 upon him. [\[FN30\]](#) He was effectively asking for a declaration that the lifetime ban from competing in the Olympic Games authorized in bylaw 25 was an unreasonable restraint of trade and therefore unlawful. [\[FN31\]](#) The central point which the court was required to address was perhaps best summed up by Lord Denning in *Nagle v Fielden*, a case involving the refusal by a Jockey Club [\[FN32\]](#) to grant a training license to a female applicant. Lord Denning in arguing for a right to work commented:

The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it. [\[FN33\]](#)

If Chambers had been successful, the bylaw denying him Olympic participation would have been declared unlawful and would have had to be repealed or reframed. Chambers had to convince the court that the bylaw fell outside the range of reasonable responses a body in the BOA's position may make and further that Chambers' trade had been significantly restrained due to the bylaw. Such precedent appears, at first glance, to suggest that Chambers would be likely to be unsuccessful.

In *Gasser v Stinson*, [\[FN34\]](#) Swiss track and field athlete Sandra Gasser contended

that the imposition by the International Athletic Federation [\[FN35\]](#) (“IAAF”) of a two year ban for a doping violation [\[FN36\]](#) was an unreasonable restraint of trade and therefore void. She also argued that the application of the principle of strict liability denied her the opportunity to adequately defend herself and therefore failed to discriminate between an athlete knowingly taking performance enhancing drugs and those who unknowingly ingest such substances. It was also alleged that the testing procedures followed were not consistent with the correct guidelines and therefore the IAAF could not rely on the tests and ban her.

In terms of assessing the rules under which Gasser was served with her ban, Justice Scott in the High Court commented: The critical question, in my judgment, is whether or not the IAAF Rules 53(iv) and 144 are reasonable. They are the Rules by which the IAAF seek to discourage and prevent the practice of doping as an aid to performance. I need not emphasise the importance to world athletics, both in the public interest and in the interest of the athletes themselves, that the practice of doping should be firmly dealt with. [\[FN37\]](#)

It was, suggested Justice Scott, a reasonable response to the threat posed to the sport by the proliferation of doping to impose a two year ban for a violation and further to base the fight against doping upon the principle of strict liability. [\[FN38\]](#) This being the case, the undeniable restraint of trade in the form of such doping bans was deemed not to be unreasonable and therefore not unlawful. [\[FN39\]](#) Justice Scott concluded “[f]or my part I am not persuaded that the IAAF’s absolute offence and mandatory sentence applicable to an athlete who is found to have dope in his or her urine is unreasonable. On the contrary, I think that in the circumstances the restraints are reasonable.” [\[FN40\]](#)

Justice Scott’s reasoning appears to have been based on two distinct arguments: those of public interest and the interests of athletes themselves. To satisfy the public interest argument, Chambers would have had to establish that such a life ban, as imposed by the BOA bylaw 25, was not in the public interest. In order to answer this question it is necessary to attempt to define what we may view as the “public interest.” One may certainly raise the question of whether it is in the public interest for someone who has served the sentence that has been deemed appropriate by the World Anti Doping Agency and most sports international governing bodies (as Chambers did when he was banned for two years) to then be required to serve an additional sanction (that of a life ban from the Olympic Games) to which other international athletes are not subject. Chambers might also argue that the inconsistency in handling of this issue amongst the individual nations of the United Kingdom and the Commonwealth Games further supports the unreasonableness of the life ban. [\[FN41\]](#) The counterpoint can be made that the use of performance enhancing drugs is cheating, and that any sport that is perceived as having such an issue will necessarily have its integrity questioned. As the former IAAF general secretary commented at the time:

The use of drugs is widely regarded as a disease in sport. Competitors who use drugs to enhance their performance are simply cheating. Any sport which is infiltrated by drugs and in respect of which it becomes common knowledge that its participants use drugs is likely to suffer substantially in its public image and reputation. [\[FN42\]](#)

The problem, however, is not limited to perceptions of the guilty athlete. Public confidence in a system will also begin to evaporate if there are perceived injustices within a testing and punishment regime. This point was picked up by Hayden Opie when he

presented the Eighth Annual Robert K. Boden Lecture. He commented “[t]he public and fellow athletes can quickly become disaffected with anti-doping regimes if they are perceived to produce unfair results.” [\[FN43\]](#)

There have, of course, been athletes who have fallen foul of the testing regime only to be eventually cleared, [\[FN44\]](#) and similarly athletes who, whilst technically guilty of a doping violation have been subjected to punishment under most unfortunate circumstances and have suffered disproportionately when set against their “offense.” [\[FN45\]](#)

The public interest argument is potentially wide ranging. On the one hand, there are very clear health implications associated with the abuse of drugs - the litany of sports participants whose deaths or ill health has been linked at least in part with the abuse of performance enhancing drug is depressingly lengthy. [\[FN46\]](#) Viewed from this perspective, the public interest is obvious: how can we direct our children to careers in professional sports or even encourage them to take part in recreational sports when their role models apparently have feet of clay? The health risks associated with taking performance enhancing substances is well documented. For example, Tokish et al. comment “[s]tudying the side effects and health risks of anabolic steroid use in athletes is difficult. . . . Nevertheless, a number of studies [\[FN47\]](#) have investigated the health consequences associated with these drugs and have provided strong evidence of their risks, including hepatic cellular damage, testicular atrophy, cardiovascular disease, and psychological disturbance.” [\[FN48\]](#)

The evidence of side effects produced by other performance enhancing substances is concerning and widespread enough for it to be abundantly clear that such substances are injurious to health, especially if taken without medical supervision. With this in mind the rationale for maintaining the fight against such substances grows more compelling. It has been estimated that between one and three million Americans have used anabolic steroids and that 5% of 16 year olds have tried human growth hormone. [\[FN49\]](#) Armed with such figures it seems that many of the nation's young sports participants are sleepwalking into a life marred by health problems, a scenario which runs directly counter to one of the acknowledged reasons for taking part in sport: its health benefits. It cannot therefore be in the public interest to give succor those who seek to cheat the system in the manner that Chambers did. Such health concerns provide a compelling justification for the maintenance of the two year ban imposed by WADA and the additional lifetime ban imposed by the BOA.

While there remains no successful legal challenge to a general two year competition ban for taking performance enhancing drugs as laid out in the WADA Code 2003, case law has shown that bans imposed on sports participants for other reasons may be deemed an unreasonable restraint of trade and therefore held to be unlawful. In Greig and Others v. Insole and Others, [\[FN50\]](#) former England cricket captain, Tony Greig, England international Jon Snow and South African Mike Proctor successfully argued that a change in the rules imposing a worldwide playing ban upon them and others by the International Cricket Council [\[FN51\]](#) (“ICC”) and the Test and County Cricket Board [\[FN52\]](#) (“TCCB”) for their participation in the rebel World Series Cricket (“WSC”) were ultra vires and an unreasonable restraint of trade and therefore unlawful. [\[FN53\]](#)

Finding in favor of the athletes, Justice Slade made several important points. The first relevant issue concerned the players' status as professionals and their right to make their living, particularly during the cricket "off-season." Justice Slade stated:

A professional cricketer needs to make his living as much as any other professional man. I think it is straining the concept of loyalty too far for authorities such as the defendants to expect him to enter into a self-denying ordinance not to play cricket for a private promoter during the winter months, merely because the matches promoted could detract from the future profits made by the authorities, who are not themselves willing or in a position to offer him employment over the winter or to guarantee him employment for the future. [\[FN54\]](#)

The Court made it clear that the new rules of the ICC and TCCB, if implemented, would amount to a restraint of trade. The key issue was whether such restriction was reasonable or not. Quoting Lord Macnaghten from *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd*, [\[FN55\]](#) Justice Slade commented that a restraint would be void unless the rules were:

. . . [R]easonable . . . in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. [\[FN56\]](#)

Unsurprisingly, it was found that the new rules were unreasonably restrictive, particularly the ban from domestic cricket by the TCCB which prevented the players from earning a living. [\[FN57\]](#) The test match ban imposed by the ICC, while being a clear restraint, did not on its own prevent the players from earning a living from professional cricket. If imposed alone, it may not have been deemed unreasonable. It was emphasized that the only nation that might suffer any adverse financial consequences as a result of the creation of WSC was Australia, and that consequently the bans imposed by the ICC and the TCCB were not a reasonable response to the threat posed by WSC. [\[FN58\]](#)

Justice Slade acknowledged the importance of strong governance in sport, not merely for the participants but also for the public interest. He commented "[t]he public interest in my judgment no less requires that the game should be properly organized and administered." [\[FN59\]](#)

The authorities that run sports are, as the court pointed out, "custodians of the public interest," [\[FN60\]](#) and it is implicit that administration of their sports will be conducted upon fair and reasonable grounds, with treatment of all participants being equitable and ensuring that any disciplinary panel adheres to principles of natural justice. [\[FN61\]](#) The public interest implicit in the fight against doping in sport as has been suggested is a powerful and wide-ranging one, impacting participants, potential participants and all sports. Without effective doping control equality of opportunity within sports would disappear. The pressure placed on all athletes, particularly the young, to take performance enhancing drugs would be intolerable. There would be little or no choice but to take such substances, a position that no responsible governing body could possibly countenance.

It is quite clear from previous case law and as shown above, that drugs bans per se are



not an unreasonable restraint of trade. [\[FN62\]](#) The courts take the view that the fight against doping in sport is so important that the principal of strict liability, leading to a two year restriction for any first offence and a life ban for any second offence, is a reasonable and proportionate response to the threat posed to sport by athletes taking performance enhancing substances. [\[FN63\]](#) Dwain Chambers, however, was not arguing against the original two year ban imposed for his drugs violation. Chambers was arguing against the lifetime ban from the Olympic Games as imposed by the BOA. Chambers commented:

Other people are allowed to get on with their lives once they have served a punishment, so why can't I get on with mine? At the moment, I am doing everything on my own. I am training from a local park, without a coach. Imagine what times I could do if I was back on the tracks, with a proper trainer and support. I respect people have opinions about me and they are entitled to those. I'm not going to get into a slanging match with them. But they should remember I'm only doing what I'm legally entitled to do. If the law forbade me from running, I wouldn't be doing it. [\[FN64\]](#)

His position bears some similarities with that of Tony Greig, Jon Snow and Mike Proctor. However, there are important differences which lead one to suggest that the courts may find his lifetime ban not to be an unlawful restraint of trade. Perhaps most crucial is that, although Chambers has a lifetime ban from ever competing for Great Britain at the Olympic Games, he is still technically free to continue to earn a living (albeit a reduced one) as a professional athlete on "the circuit." He is not banned from athletics and he can represent Great Britain in major championships outside of the Olympic Games. While his absence from the Olympics will undoubtedly impact his opportunities to earn sponsorship money and to raise his profile, it does not deny him his trade completely. This issue was picked up in *Currie v. Barton & Another*, [\[FN65\]](#) which involved a tennis player who was banned for refusing to compete for his county. While the county play itself brought no remuneration, it was suggested that the ban from selection would impact his ability to earn his living as a coach, since he would not be able to tout his services as a "county player." While at a lower level than Chambers, the principle remains pertinent. Lord Justice O'Connor, in discussing the projected impact on earning potential commented:

[I]t was not suggested that the ban had any effect on his freedom to continue with his profession, to coach, to be sponsored and to take part in tournaments. Those were his sources of living. I can understand that there might possibly be some diminution of his standing in the tennis world which might have been increased by being chosen and by having played, for example, for England in July 1983. But I cannot see that it in any way fits the language which I have cited from the judgment of Lord Justice Salmon. [\[FN66\]](#) [\[FN67\]](#)

The Court of Appeal dismissed his appeal stating very clearly that playing for the county brought no monetary remuneration and therefore the ban was not compromising his ability to earn his living. Lord Justice O'Connor continued:

Therefore, to be told that you will not be selected for two or three years might affront one's tennis pride or one's personal pride, but in itself would cause no financial loss. It would in no way interfere with the profession which the appellant followed inasmuch as he was a tennis professional. A tennis professional makes his living by coaching, by sponsorships, by participating in tournaments, where he may earn some

money for going on the court and he will certainly earn money if he wins or, indeed, in different grades where he is runner-up and so forth. So that ban had no effect other than that he would not be chosen to play for Essex during that period. [\[FN68\]](#)

Lord Justice Nicholls concluded by explaining the context of the doctrine of restraint of trade and the autonomy of sporting governing bodies to select their own teams. He stated:

Whatever ultimately may prove to be the limits of this flexible, developing principle, I think that at present the principle does not go so far as to apply, in general, to a case where the exercise is of a “monopoly” power over a sporting activity, such as choosing who should play in a particular team, provided that that exercise is not one which significantly affects a person's ability to earn money as he pleases. [\[FN69\]](#)

These comments would make things difficult for Dwain Chambers. No one is paid, at least directly, to run in the Olympic Games, and that single fact it is suggested created a significant hole in all of Chambers's arguments. Justice MacKay, in arguing against the notion of restraint of trade, made the point simply and clearly. No payment was received for competing in the Olympics and on the available evidence Chambers would be unlikely to derive much indirect financial benefit from successful achievement at the Games. Justice Mackay commented:

Even if there is a sufficiently strong case for arguing that indirect financial benefit from Olympic participation would so qualify, the [British Olympic Association] argues that, on the current form, Mr. Chambers' prospects of success are, at best, speculative. Put bluntly, his ten second time achieved last weekend is confronted by the fact that there will be nine other athletes in Beijing who have run better times than that. [\[FN70\]](#)

The ban on Chambers was a milder and more lenient ban than the initial international one originally imposed in Greig and Others v. Insole and Others. [\[FN71\]](#) There was the suggestion in Greig and Others v. Insole and Others, that had the ban imposed been restricted solely to test cricket rather than a worldwide ban from all cricket then it is doubtful that it would have been deemed to be unreasonable. [\[FN72\]](#) Justice Slade commented:

[The three threats posed by World Series Cricket on the worldwide game], however, could have been adequately met by merely imposing a prospective disqualification from Test cricket [\[FN73\]](#) on all players who should thereafter contract with or play for World Series Cricket or other unapproved private promoters. [\[FN74\]](#)

Therefore the suspicion must remain that a ban that only prevents Olympic competition may not be deemed to be unreasonable and therefore not unlawful. While the court is denying him the opportunity to showcase his talent at the very highest level and further denying him the chance of being able to add after his name, “Olympic medal winner” which would undoubtedly increase his value, it may nevertheless be viewed as a reasonable restriction. However, one must question whether the lifetime ban is indeed proportionate: does it go further than necessary to protect the interest of a drug-free sport? This point is where the BOA may encounter difficulties. Great Britain is apparently the only country in the world that imposes such a lifetime ban. [\[FN75\]](#) There is also, as already mentioned, a disturbing lack of consistency amongst the individual nations of the United Kingdom in relation to this issue and participation in the Commonwealth Games, which perhaps further suggests that any life ban should be deemed disproportionate.

However, attempts to cheat or defraud sporting activities are likely to be treated with the utmost gravity. This became evident in *Graham Bradley v. The Jockey Club*. Graham Bradley concerned allegations of corruption in horseracing, where Bradley (a very successful jockey and, following his retirement, bloodstock agent) was found to have passed privileged information to members of a gambling organization. [\[FN76\]](#) For this offense he was initially banned from all activities related to horseracing for a period of eight years. [\[FN77\]](#) On appeal this was reduced to five years. Amongst the reasons cited for the initial ban of eight years were the seriousness of the offense and the deterrent effect of such a punishment. [\[FN78\]](#) What this ban amounted to was a very obvious restraint of trade. The court was charged with determining whether this restraint was unlawful or not. In order to answer this question it had to assess whether Bradley's ban from horseracing was "reasonable and proportionate in the interests of the parties and the public." [\[FN79\]](#) The court continued: "we had to consider the importance of protecting the integrity of racing against the impact on Mr. Bradley of disqualifying him for such a period as puts his bloodstock business either in serious jeopardy or at an end." [\[FN80\]](#)

This has similarities to the situation the court found itself in with regards to Dwain Chambers. However, the situation facing Bradley was, if anything, more serious than that facing Chambers. In both cases there was a requirement to protect the integrity of the sport: in Bradley's case the integrity interest was in preventing privileged information being passed to undesirable third parties, and in Chambers' case it took the form of preventing an athlete from very deliberately taking previously undetectable performance enhancing drugs. The end result of both athlete's actions was a severe detrimental impact on the integrity of their sports. The cost to Bradley of any ban would be the complete destruction of his livelihood. To Chambers, the consequences were not as serious. He would retain the ability to pursue his professional career in other competitions, his restriction only relating to the Olympic Games. Thus his earning capacity in his profession, while compromised, would not completely disappear.

The court ruled in Bradley that a five year ban from all forms of racing was a proportionate and reasonable response to the offense committed, commenting, "[h]e concluded that the Board was fully entitled to conclude, as the final result of its balancing exercise, that a period of five years disqualification was a proportionate penalty. This conclusion was plainly correct". [\[FN81\]](#)

Quite obviously, this result would serve as an ominous precursor to Chambers. For what many would argue was a more serious offense, it would appear that Chambers was challenging a more lenient and forgiving "ban" than the one that Bradley faced. In weighing the relevant issues concerning proportionality, Justice MacKay stressed the arguments put forward by the BOA, specifically the incompatibility of taking performance enhancing drugs with the Olympic ideals; the fact that all the athletes know of the punishments and that they only apply to those guilty of serious drugs offenses; that surveys taken had found overwhelming support for the sanctions from the athletes themselves; and finally that the ban only applied to the Olympics and not further afield. [\[FN82\]](#) Faced with such a position, it is perhaps unsurprising that the court declined to grant Chambers his injunction.

### III. Human Rights

The European Convention on Human Rights offers Chambers a possible outlet in his quest to overturn the lifetime ban from the Olympic Games. Under Section 6(3) [\[FN83\]](#) of the Human Rights Act, sports governing bodies qualify as quasi public bodies [\[FN84\]](#) and thus their decisions would appear to fall within the remit of the European Convention on Human Rights, (“ECHR”). A central principle of the ECHR is that of proportionality. [\[FN85\]](#) A question that may be raised is whether the lifetime ban imposed on Chambers by the BOA is proportionate to the goal it is trying to achieve. While similar to the arguments raised concerning restraint of trade, they become more specific and targeted when set in this context. It could be argued that the entire doping regime predicated on the WADA Code fails the test of proportionality. In the ten years prior to the adoption of the WADA Code (1993-2003), roughly 2% of all drugs tests resulted in test failures. This figure has remained at around 2% in the three measured years since the adoption of the WADA Code. This suggests that the harshness associated with the code has had no discernible impact in reducing the proportion of test failures and therefore one may question whether the measures adopted in the WADA Code 2003, which are not as harsh as the lifetime Olympic ban imposed by the BOA on Dwain Chambers, are proportionate and in the public interest. It may also be argued that if the punishments have no impact on behavior then they cannot be proportionate. These determinations may also lead one to suggest that the current punishments simply do not work and therefore may present an argument for increasing the current standard tariff from two years to something greater. However, from the perspective of athletes from other countries, the punishment handed out to Chambers goes far beyond what is thought necessary to combat the threat posed by athletes' abuse of performance enhancing drugs. The new WADA Code, due for adoption in January 2009, appears to acknowledge the need for harsher punishments. It implements a potential minimum ban of four years for a first offence under certain circumstances. Article 10.3.2 states, “[f]or violations of Articles 2.7 (Trafficking) or 2.8 (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.” [\[FN86\]](#)

Further, the court reports that the IOC itself has moved to treat doping violations more harshly with an alteration to its rules relating to doping and the Olympic Charter:

“(1) Any person who has been sanctioned with a suspension of more than six months by any anti-doping organisation for any violation of any anti-doping regulations may not participate in any capacity in the next edition of the Games.

(2) These regulations apply to violations of any anti-doping regulations that are omitted as of 1st July 2008.” [\[FN87\]](#)

The end product of this rule will mean that a participant found guilty of a doping violation will face an Olympic ban in excess of any domestic ban that will be likely to be enforced upon them by the WADA Code. This does not bode well for Chambers. While a four year ban as envisaged by the WADA Code is well short of a life ban it is still a significant length of time in the career of a world class performer in a sport such as track and field athletics. Whether such a four year ban would withstand any challenge in the courts is an interesting question. It would not be the first time that drug control has at least in part been predicated on the possibility of a four year ban for a first anti-doping violation. [\[FN88\]](#) In the days before the WADA Code, the IAAF unsuccessfully tried to enforce a four

year ban for such a violation on the East German sprinter Katrin Krabbe. John O'Leary reports:

In 1991, the IAAF increased the period of ineligibility for a first offence involving anabolic steroids from two to four years. After a decision by the regional Appeal Court in Munich, Germany, declaring the three year suspension of Katrin Krabbe invalid because a suspension of 'more than two years contravenes the constitutional principle of proportionality', the IAAF decided to decrease the period of ineligibility for a first offence involving anabolic steroids from four to two years. [\[FN89\]](#)

On the heels of this decision, British shot putt star Paul Edwards appealed against a decision by the British Athletic Federation and the IAAF to ban him from competition for a period of four years following a doping violation. [\[FN90\]](#) The IAAF followed the practice that an athlete would be banned for four years but where their national law prevented a ban exceeding two years, (as was the case with Katrin Krabbe), the athlete would be reinstated after a period of two years. Edwards eventually brought his appeal to the High Court suggesting that this practice was discriminatory on the grounds of nationality and therefore contrary to Article 59 E.C. [\[FN91\]](#) Unfortunately for Edwards the Chancery Division ruled that these anti-doping rules were of a purely sporting nature and therefore were not covered by Community Law. [\[FN92\]](#) Justice Lightman, commenting:

Community law only applied to sport in so far as it constituted an economic activity and had no application to rules of an exclusively sporting nature. The IAAF's drug control rules, including rule 60, being designed to prevent cheating, were indeed of an exclusively sporting nature and so were outside the scope of Article 59 E.C. [8]-[11]. [\[FN93\]](#)

That this decision was eventually overruled in the Meca-Medina [\[FN94\]](#) case may only serve to undermine the efforts of individual member states of the European Union to unilaterally depart from the two year norm that has been established for a first offense doping violation. This could further undermine any effort by WADA to strengthen the sanctions imposed upon sports participants found guilty of anti-doping violations and may be one explanation as to why the new WADA Code has been so reluctant to embrace harsher sanctions under particular circumstances. Whilst not being directly applicable to Dwain Chambers, the situation demonstrates the difficulty in formulating any sanction beyond two years for a first offense, much less a lifetime ban as has been imposed on Chambers by the BOA.

The furor surrounding Dwain Chambers almost has the feel of a witch hunt and one may suggest that Chambers received especially harsh treatment from the BOA purely because of his profile and notoriety. The animosity towards Chambers runs to the highest levels in the BOA where Chairman Lord Moynihan stated clearly his opposition to Chambers, despite him having served his "time." Moynihan commented:

There will be no room for cheats in the British team as long as I am involved with the BOA. . . . There are absolutely no grounds whatsoever for compromise. . . . I will robustly and vigorously defend our by-laws in the interest of all the athletes who seek to represent us both in this generation and future generations - and I'm not going to trade that in for any financial interest. . . . We will pay whatever is necessary to have

top lawyers represent us and put the strongest case in support of that ban. [\[FN95\]](#)

It is hard to reconcile Moynihan's comments as Chairman of the BOA with the fact that the appropriate bylaw has been overturned on 27 occasions out of 30 attempts at its imposition. The suspicion therefore remains that the BOA was treating Chambers rather differently than some of their other athletes.

Chambers expressed a desire to help UK Sport in its fight against doping. To this end he obtained from Victor Conte full details of the cocktail of drugs Chambers took and how he was able to avoid detection. [\[FN96\]](#) Chambers likely hoped that such action would improve the attitude of the BOA towards him. Cooperation with the anti-doping authorities is specifically addressed in the WADA Code as being a factor which may help to reduce the period of ineligibility that a participant may face. [\[FN97\]](#) While this was not specifically relevant to Chambers, it may have enabled him to suggest that the tone of comments directed at him, such as those attributed to Moynihan above, were inappropriate and that more constructive and conciliatory dialogue would have been preferable. Early indications from UK Sport appeared to be encouraging for Chambers. John Scott, the organization's anti-doping chief commented:

[Dwain] has provided a detailed account of his doping program which highlights the level of sophistication that goes into these systematic regimes. . . . it is through this sort of information that we are able to better understand both the mindset of why athletes choose that path and the network that sits behind them. . . . It is these networks of manufacture, trafficking and supply that we need to be able to tap into if we are to get to the heart of doping in sport. . . . We have got the sense from Dwain that he wants to help us ensure others don't fall into the same trap as him. We appreciate his openness and honesty and look forward to further dialogue in the future. . . . Any athlete like Dwain who has taken drugs and is prepared to engage with us can potentially bring information which will help us develop the effectiveness of our anti-doping programme. [\[FN98\]](#)

However, there was clearly a risk that the revelations by Victor Conte may have turned the tide further against Chambers as his systematic and cynical circumvention of the anti-doping measures was revealed in stark detail. [\[FN99\]](#) One might ask whether it was really in the public interest to overturn the lifetime Olympic ban currently imposed under bylaw 25 on participants who so deliberately set out to cheat the system.

#### IV. E.U. Rules

The issue of drug bans in sport was recently examined by the European Court of Justice ("ECJ") in *David Meca-Medina and Igor Majcen v. Commission of the European Communities*. [\[FN100\]](#) Briefly, the case involved two long-distance swimmers who in January 1999, following a World Cup meeting, tested positive for the banned anabolic steroid nandrolone. At a disciplinary hearing in August 1999, both swimmers were banned from competition for a period of four years. In February 2000 the CAS, confirmed this suspension. However, in January 2000, new scientific evidence had come to light which suggested that the steroid could be "produced endogenously by the human body at a level which may exceed the accepted limit when certain foods, such as boar meat, have been consumed". [\[FN101\]](#) In the light of these findings, in April of 2000 the world governing body

of swimming, Fédération Internationale de Nataion (“FINA”) agreed to remit the case back to the CAS for reconsideration and in May 2001, the CAS reduced the ban to two years.

In May 2001, Meca-Medina and Majcen filed a complaint with the Commission challenging certain aspects of the doping regulations of the IOC and FINA. The most important aspect of the complaint was that the anti-doping rules were an, “infringement of the athletes’ economic freedoms, guaranteed inter alia by Article 49 EC,” and a breach of EU Competition Law under articles 81 and 82. [\[FN102\]](#) In August 2002 the Commission rejected the athlete’s complaint. [\[FN103\]](#) The applicants then brought an action before the Court of First Instance (“CFI”) to have the decision of the Commission set aside. The CFI rejected the appeal on the grounds that the anti-doping rules were of a purely sporting nature and were therefore not covered by the “prohibitions laid down by Articles 39 EC and 49 EC.” [\[FN104\]](#) It has been long established that where sport is an economic activity, it is subject to EU law. [\[FN105\]](#) However, the decision of the CFI in relation to this issue was unhelpful, categorizing the anti-doping rules as being of a purely sporting nature and therefore not subject to EU Competition Law. [\[FN106\]](#) The CFI explained its reasoning by suggesting that the primary objective of the anti-doping rules is to preserve the notion of fair play and further that the secondary objective, that of the protection of an athlete’s health, are both social rather than economic objectives. [\[FN107\]](#) Weatherill sums up the reality of the imposition of a doping ban on an athlete when he states, “[t]his conclusion may be perfectly true--but an athlete subjected to an anti-doping ban faces immediate and dramatic economic hardship. Attempts to present the rules as “sporting” and not “economic” are unhelpful. They are both.” [\[FN108\]](#)

The economic realities of a doping ban have been vividly demonstrated by the difficulties that Dwain Chambers has faced since returning to competition. He has had to repay prize money won while competing under the influence of THG, [\[FN109\]](#) and since his return he has found it almost impossible to secure invitations to track meets throughout Europe. [\[FN110\]](#) Indeed, there appears to have been an agreement amongst the major meet promoters not to invite Chambers to their events. John Goodbody reports, “[h]is chances of fulfilling this obligation [\[FN111\]](#) have been cut by the announcement last week by the organisers of the main meetings that he would not be invited to their events in Britain and the rest of Europe.” [\[FN112\]](#)

Broadbent, more specifically comments:

The Association of Athletics Managers said that its members will not represent those who are banned for two years, while Euromeetings, a body of 40 event organizers [sic], has urged its members not to offer invitations to anyone who causes negative publicity. Although Euromeetings has no authority over the promoters, Rajne Soderberg, the organisation’s president, said that Chambers was precisely the sort of person it would not want. If the promoters agree, Chambers will be barred from the Golden League, the IAAF Grands Prix and most European permit meetings. [\[FN113\]](#)

Chambers likelihood therefore of ever being able to earn a sufficient amount to repay his debts appears negligible unless the agreement breaks down. If reports are to be believed however, this would seem to be happening. The Daily Telegraph reports:

Euromeetings, the umbrella body who represent 51 leading track events across the Continent, announced in March that athletes who had served bans for drug offences would not be invited to their meetings this summer, effectively leaving Chambers with nowhere to run. But one of the first Euromeetings events of the season, the Gotzis meeting for the world's top decathletes and heptathletes in Austria from May 31-June 1, has broken ranks by accepting an entry from Lyudmila Blonska, the Ukrainian who was suspended for two years for testing positive for a banned anabolic steroid in 2003. [\[FN114\]](#)

The meet director who broke rank cited a predictable argument as the reason why they were renegeing on the policy:

Konrad Lerch, the Gotzis meeting director, said: 'Blonska has competed in our meeting for three years and it would be very difficult to tell her, 'Sorry but now you are not welcome'. . .Everybody in Euromeetings is fighting against doping but at our last meeting there was also a big discussion about human rights. If somebody goes to jail for two years, when he comes out he has a new chance to continue his life. [\[FN115\]](#)

This is a development which has been met with disapproval by the Euromeetings President [\[FN116\]](#) and it may turn out to be a false dawn for Chambers. If he were not invited to any of the major athletic meetings then it would effectively prevent him from pursuing his livelihood. However, if the Euromeetings policy disintegrates then he may at least be able to continue to earn his living as a professional athlete. This may come a poor second to the lost opportunity to redeem himself at the Olympic Games. It may also, however, be the best scenario possible for Dwain Chambers.

## V. Conclusion

In launching his bid for inclusion in the BOA team for the Olympic Games at such a late stage, Chambers ensured that the bylaw preventing him from being selected for those Olympics failed to receive a thorough and conclusive examination in the courts. The fact that he was unable to receive an injunction against the BOA would appear to put to an end any debate about the legality of bylaw 25. There nevertheless remains at least a possibility that had his appeal been brought earlier then a full hearing may have come to a different conclusion. His decision to bring his action only at the last moment is perhaps understandable but was met with little sympathy from the court. In *Stevenage Borough Football Club Ltd v. The Football League Ltd.*, [\[FN117\]](#) the Court of Appeal made it clear that they would hesitate to overturn the rules relating to membership criteria established by the Football League particularly at a late stage. Lord Justice Millett commented:

In the present case Stevenage has known of the position since at least August 1994. It had sixteen months in which to bring its ground up to the required standard if it wished to be considered for promotion to the League in time for the 1996-7 season. It did not do so. By November 1995 Mr. Green knew that Stevenage could not meet the criteria by the deadline of 31st. December 1995 and that the League would not grant an extension of time. He knew that Stevenage would not qualify for promotion in 1996-7 unless it won the Conference championship and succeeded in challenging the criteria. He decided to mount a legal challenge but only if Stevenage won the championship and to conceal his intentions in the meantime. The inevitable



consequence was that he was compelled to ask the Court, not merely to declare the parties' "rights" for the future, but retrospectively to upset the basis upon which the previous season's competitions had been held. In my judgment the Court should be extremely slow to accede to such an invitation. [\[FN118\]](#)

Dwain Chambers fell into the same trap as Stevenage Borough. He was aware of the entry criteria imposed by the BOA and could at any time have chosen to challenge those rules. That he failed to do so until the last possible moment met with similar disapproval from the Court to the challenge brought by Stevenage Borough against the Football League. All athletes entered the Olympic trials knowing that only those who had not failed a drug test and finished in the first two would be selected for the Olympic team. It may have been more astute of Chambers to challenge the BOA bylaw earlier. While financial considerations must have played their part in his decision to delay his challenge until he was certain that he met all other entry criteria, it is also the case that successful participation in the Olympic Games would have brought with it substantial indirect monetary benefits. Chambers was asking the court to retrospectively change rules of which he had ample notice. He waited until the race for selection was over before launching his challenge of the very rules upon which that race was run. This was evidently a misguided approach. Justice MacKay, acknowledged as much, stating:

[T]he Stevenage case is an example of the apparently hard but necessary rule that waiting for sporting outcomes is not a good reason where other sportsman's interests are adversely affected. . . . In addition, there are two other athletes - a shot-putter and a cyclist - who are in the same position as Mr. Chambers. They have not made any applications to the court, though one of them briefly looked as if he might and used as his solicitors the same solicitors as Mr. Chambers. They might be tempted, if this application was granted, to try applications of their own, though there even greater delay would be even more likely to deny them any success. But the harmony and management of the British Team would certainly be upset and the BOA's orderly administration of it undermined. [\[FN119\]](#)

Ultimately, courts have consistently displayed an unwillingness to get involved in sports disputes unless there are compelling reasons. For instance, Justice Drake in *Elliott v. Saunders*, [\[FN120\]](#) commented:

But in both cases there is some natural feeling of repugnance when what happens during a sporting event is made the subject of legal proceedings. I understand and sympathise with that view and I would certainly not encourage lawsuits arising from any sporting activities unless there are very good grounds to justify them. [\[FN121\]](#)

Similarly, Chief Justice Lord Woolf in *R v. Barnes* [\[FN122\]](#) suggested that wherever possible, it was preferable for sporting organizations to administer their own disciplinary sanctions rather than the courts. He commented:

[T]he starting point is the fact that most organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable that there should be any criminal proceedings. [\[FN123\]](#)

While both of these cases are some way removed from the case in hand, it is important

to remember that if the court had found for Chambers then they would necessarily be overturning the decision of a governing body on an issue which goes right to the heart of whether an athlete should be eligible to compete or not. Vice Chancellor Megarry, in *McInnes v Onslow-Fane*, [\[FN124\]](#) perhaps best summed up the reluctance of the courts to interfere unnecessarily with the decisions of sports governing bodies when he said:

I think that the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities. The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens. Bodies such as the board which promote a public interest by seeking to maintain high standards in a field of activity which otherwise might easily become degraded and corrupt ought not to be hampered in their work without good cause. [\[FN125\]](#)

Such an approach would obviously resonate strongly with the position of Dwain Chambers. The victory for the BOA against Dwain Chambers may be seen as a triumph and a restating of the independence of the decision-making powers of sports governing bodies. It may also be seen as a very sad final chapter in the professional career of a supremely gifted young athlete who yearned for success, and found it at a severe price.

[\[FN1a\]](#). Peter **Charlish**, (B.A. Hons, PGCE, M.A. Law, M.Phil). Principal Lecturer in Law and module leader for Sports Law at Sheffield Hallam University in the United Kingdom. I would like to thank Dr Kevin Williams and Jim Hanlon for their help and advice in the writing of this article.

[\[FN1\]](#). Linford Christie, the gold medalist from the 1992 Barcelona Olympic 100 meters, had been the first. Christie, unlike Chambers, had a history of failing drugs tests, having first fallen foul of the testing regime after the 1988 Olympic 100 meters and then again much later while in semi-retirement in 1999. See UK: Athletics, Hall of Fame Athletes: Linford Christie, [http:// www.uka.org.uk/e-inspire/hall-of-fame-athletes/linford-christie/](http://www.uka.org.uk/e-inspire/hall-of-fame-athletes/linford-christie/) (last visited Nov. 24, 2008). No one else has ever broken the 10 second barrier. See Linford Christie, Mastersathletics, <http://www.mastersathletics.net/Linford-Christie-100-metres-Dash-Track-a.638.0.html> (last visited Nov. 24, 2008).

[\[FN2\]](#). See Chambers Dwain, IAAF Athletics, <http://www.iaaf.org/athletes/biographies/country=GBR/athcode=50331/index.html> (last visited Nov. 24, 2008).

[\[FN3\]](#). USATODAY.com, Balco Investigation Timeline, Nov. 27, 2007,, <http://www.usatoday.com/sports/balco-timeline.htm>.

[\[FN4\]](#). Elliot Almond, Mark Emmons & Pete Carey, How Balco Built the World's Fastest Man, *The Mercury News*, May 26, 2004, available at [http:// eamelje.net/linkrot/8756628.htm](http://eamelje.net/linkrot/8756628.htm). (hatched plan in November 2000. Almond, the reporter who broke the news of the scandal also reveals in the same article that Charlie Francis, former coach of Ben Johnson was part

of the project).

[FN5]. THG: 2003's Designer Steroid of the Year, CBC Sports, Jan. 19, 2003, [http://www.cbc.ca/sports/indepth/drugs/stories/thg\\_faq.html](http://www.cbc.ca/sports/indepth/drugs/stories/thg_faq.html). (THG much like other anabolic steroids increases muscle strength and muscle growth thereby enabling athletes to train longer and harder. Its key feature was the inability of the testers to discover it due to it being a new, artificially created steroid).

[FN6]. Christopher Clarey, Track and Field: Montgomery's 9.78 Sets New Standard for the 100 Meters, N.Y. Times, Sep. 15, 2002, § 8, at 1.

[FN7]. Almond, et al., supra note 4.

[FN8]. The coach in question was eventually revealed to be Trevor Graham, who was originally part of the project hatched in 2000 but had fallen out with the group. He was subsequently banned from operating within the USA after nine of his athletes including Olympic 100 meters Champion, Justin Gatlin, failed drugs tests. See Mark Zeigler, Ex-Track Coach Accused of Lying to Investigators, San Diego Union-Trib., May 19, 2008, <http://www.signonsandiego.com/sports/20080519-9999-1s19trevor.html>.

[FN9]. UK Athletics is the governing body of track and field athletics in the United Kingdom. See UK Athletics, <http://www.ukathletics.net/welcome/> (last visited Nov. 19, 2008).

[FN10]. The World Anti-Doping Agency coordinates the international fight against doping in sport. All sports which take part in the Olympic Games must comply with the WADA Code. See World Anti-Doping Agency, <http://www.wada-ama.org/en/> (last visited Nov. 19, 2008).

[FN11]. World Anti-Doping Agency, World Anti-Doping Code art. 2.1 (2003) [hereinafter W.A.D.C.].

[FN12]. World Anti-Doping Agency, W.A.D.C. art. 10.2 (2003).

[FN13]. The BOA is an independent organization which selects and supports the British teams for the Olympic Games. It is funded through commercial sponsorship and private fundraising. See British Olympic Association, <http://www.olympics.org.uk/home2.aspx> (last visited Nov. 24, 2008); See also *Chambers v. British Olympic Ass'n*, [2008] EWHC 2028 (Q.B.) (U.K.).

[FN14]. *Id.* at 6.

[FN15]. Michael Phillips, Ohuruogu's race for Beijing gathers speed after appeal to overturn ban, *The Guardian*, Nov. 27, 2007, <http://www.guardian.co.uk/sport/2007/nov/27/athletics.sport> (last visited Mar. 7, 2008) (Ohuruogu won the World Championship gold medal in 2007 following her return to international competition after her one year ban for missing three out-of-competition tests).

[FN16]. *Id.*

[FN17]. World Anti-Doping Agency, W.A.D.C. art. 2.4 (2003).

[FN18]. World Anti-Doping Agency, W.A.D.C. art. 2.4 Comment (2003).

[FN19]. The Sports Dispute Resolution Panel has recently been rebranded Sports Resolutions (UK). They are an independent resolution service for sport in the United Kingdom. They also administer the National Anti-Doping Panel which is the independent body established to determine anti-doping disputes in the United Kingdom: See Sports Resolutions, <http://www.sportresolutions.co.uk/default.asp?section=2&sectionTitle=Homepage> (last visited Nov. 22, 2008).

[FN20]. Tom Knight, Christine Ohuruogu to run for Olympic Gold, *The Daily Telegraph*, Nov. 28, 2007, available at <http://www.telegraph.co.uk/sport/main.jhtml?view=DETAILS&grid=A1YourView&xml=/sport/2007/11/28/soathl128.xml> (last visited Nov. 22, 2008).

[FN21]. British Olympic Association, Peter Cousins Cleared for Olympic Selection, Nov. 23, 2006, <http://www.olympics.org.uk/news.aspx?ne=1714> (last visited Nov. 22, 2008).

[FN22]. BBC Sport, Olympic Chief to take on Chambers, Mar. 13, 2008, <http://news.bbc.co.uk/sport1/hi/olympics/7292786.stm> (last visited Nov. 22, 2008).

[FN23]. This was the case with Chambers.

[FN24]. Alex Wade, Dwain Chambers's legal sprint for a place in the Olympic Games, *TimesOnline*, Jul. 3, 2008, <http://business.timesonline.co.uk/tol/business/law/article4256111.ece> (last visited Nov. 22, 2008).

[FN25]. *Mullins v. McFarlane*, [2006] EWCH 986 (Q.B.) (U.K.); *Regina v. Disciplinary Comm. of the Jockey Club ex parte Aga Khan*, (1993) 1 W.L.R. 909 (CA) (U.K.); *Law v Nat'l Greyhound Racing Club Ltd.*, (1983) 3 All E.R. 300 (CA) (U.K.).

[FN26]. See, e.g., *Mullins*, supra note 25.

[FN27]. *Chambers v. British Olympic Ass'n*, [2008] EWHC 2028, 28 (QB) (U.K.).

[FN28]. *Id.* at 38-39.

[FN29]. *Id.* at 40.

[FN30]. *Id.*

[FN31]. *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd.*, [1894] A.C. 535 (H.L.) (U.K.) (appeal taken from C.A.). A full hearing that would explore all of the issues would not take place until a later date. However, the granting of an injunction would suggest

that Chambers certainly had an arguable case for such a declaration.

[FN32]. *Nagle v. Fielden*, (1966) 2 Q.B. 633, 644 (C.A. 1966) (U.K.) (stating that the “stewards of the Jockey Club controlled horseracing on the flat throughout Great Britain.”).

[FN33]. *Id.* at 644-45.

[FN34]. *Gasser v. Stinson*, (Q.B.D. June 15, 1988) (LEXIS, England and Wales Reported and Unreported Cases) (U.K.), at \*26.

[FN35]. International Athletic Foundation, [http:// www.athleticfoundation.org/iaf.html](http://www.athleticfoundation.org/iaf.html) (last visited Nov. 18, 2008). See Plus: Track and Field:, Governing Body Drops ‘Amateur’, Aug. 2, 2001, [http:// query.nytimes.com/gst/fullpage.html?res=9402E1DD143CF931A3575BC0A9679C8B63](http://query.nytimes.com/gst/fullpage.html?res=9402E1DD143CF931A3575BC0A9679C8B63) (last visited June 2, 2009).

[FN36]. She had tested positive for a metabolite of methyl-testosterone, an anabolic steroid, and been banned from competition on September 29<sup>th</sup> 1987 for a period of two years. See *Gasser*, supra note 34.

[FN37]. *Gasser*, supra note 34, at \*26.

[FN38]. *Id.*

[FN39]. *Id.*

[FN40]. *Id.* at 27.

[FN41]. Athletes from England and Scotland who have committed a doping violation are banned for life from competing in the Commonwealth Games. However, those from Wales and Northern Ireland do not suffer this same sanction. Once their usual period of ineligibility from all competition is over, they are free to compete in the Commonwealth Games. (Do not worry about this for now: we are finding authority through the author).

[FN42]. *Gasser*, supra note 34, at \*26 (the current perceptions of road race cycling, weightlifting and sprint events in athletics are perhaps examples of this public image problem).

[FN43]. Hayden Opie, [Drugs in Sports and the Law - Moral Authority, Diversity and the Pursuit of Excellence](#), 14 *Marq. Sports L. Rev.* 267, 274 (2004).

[FN44]. British athlete Diane Modahl, for example. See BBC Home, On This Day, [http://news.bbc.co.uk/onthisday/hi/dates/stories/december/15/newsid\\_2559000/2559981.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/december/15/newsid_2559000/2559981.stm) (last visited Nov. 24, 2008).

[FN45]. *Raducan v. IOC*, Ct of Arbitration for Sport O.G. Sydney 00/011 (Sept. 28, 2000); *Baxter v. IOC*, Ct. of Arbitration for Sport 2002/A/396 (Sept. 30, 2002); See Plus:

Gymnastics, Romanian Loses Gold-Medal Appeal, <http://query.nytimes.com/gst/fullpage.html?res=9B04E1D8103FF930A25751C1A9669C8B63>, New York Times, Dec. 13, 2000; see also Jim White, Interview with Alain Baxter, Nov. 11, 2000, [The Guardian, http://www.guardian.co.uk/sport/2002/nov/11/olympicgames.winterolympics2002](http://www.guardian.co.uk/sport/2002/nov/11/olympicgames.winterolympics2002).

[FN46]. For example, former American Football star Lyle Alzado and Cyclist Tommy Simpson.. See Raiders Online, Lyle Alzado, [http:// www.raidersonline.org/lyle-alzado.php](http://www.raidersonline.org/lyle-alzado.php) (last visited Nov. 25, 2008). See also BBC Home, Remembering a Sensation, <http://www.bbc.co.uk/insideout/northeast/series6/cycling.shtml> (last visited Nov. 25, 2008).

[FN47]. John M. Tokish, Mininder S. Kocher, and Richard J. Hawkins, Ergogenic aids: A Review of Basic Science, Performance, Side Effects and Status in Sports, 32 *Am. J. Sports Med.* 1543 (2004), available at [http:// ajs.sagepub.com/cgi/content/abstract/32/6/1543](http://ajs.sagepub.com/cgi/content/abstract/32/6/1543) (last visited Nov. 22, 2008).

[FN48]. *Id.*

[FN49]. *Id.*

[FN50]. *Greig v. Insole*, (1978) 1 WLR 302 (Ch.) (U.K.).

[FN51]. The International Governing Body of Cricket, Mission Statement, <http://icc-cricket.yahoo.net/about-icc/mission-statement.html> (last visited Nov. 22, 2008).

[FN52]. At the time the governing body of cricket in England and Wales. See England and Wales Cricket Board, <http://www.ecb.co.uk/> (last visited Nov. 22, 2008).

[FN53]. *Greig*, supra note 50, at 304.

[FN54]. *Id.* at 317.

[FN55]. *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd.*, [1894] A.C. 535, 565 (H.L.) (U.K.) (appeal taken from C.A.).

[FN56]. *Greig*, supra note 50, at 346.

[FN57]. *Id.*

[FN58]. *Id.* at 353.

[FN59]. *Id.* at 348.

[FN60]. *Id.* at 348.

[FN61]. Simon Gardiner et al., *Sports Law* 219-220 (2001); Urvashi Naidoo & Neil Sarin, Dispute Resolution at Games Time, 12 *Fordham Intell. Prop. Media & Ent. L.J.* 500, 500

(2002).

[FN62]. Gasser, *supra* note 34.

[FN63]. *Id.*; Case C-519/04, David Meca-Medina and Igor Majcen v. Comm'n, 2006 E.C.R. I-6991, 5 CMLR 1023 (2006).

[FN64]. Charlie Caroe, Outcast Dwain Chambers Misses Grand Prix, THE DAILY TELEGRAPH, Feb. 13, 2008, <http://www.telegraph.co.uk/sport/othersports/athletics/2291688/Outcast-Dwain-Chambers-misses-Grand-Prix.html>.

[FN65]. *Currie v. Barton and Another*, The Times, Feb. 12, 1988, at 1 (Feb. 11, 1988) (unreported case).

[FN66]. Citing Lord McNaghten from *Nordenfelt*, *supra* note 31, who suggested that the court would deem unlawful any decision making body who acted to unreasonably deprive a man of a means of earning his living.

[FN67]. *Currie v. Barton and Another*, The Times, Feb. 12, 1988, at 7 (Feb. 11, 1988); See also *Nordenfelt*, *supra* note 31 (holding that the court would deem unlawful any decision making body who acted to unreasonably deprive a man of a means of earning his living).

[FN68]. *Id.* at 2.

[FN69]. *Id.* at 8.

[FN70]. *Chambers* *supra* note 13, at 46.

[FN71]. Greig, *supra* note 50.

[FN72]. *Id.* at 352.

[FN73]. Referring here only to the International Game.

[FN74]. Greig, *supra* note 50, at 353.

[FN75]. See Matt Slater, Chambers Starts Beijing Challenge BBC Sport, May 16, 2008, <http://news.bbc.co.uk/sport2/hi/olympics/athletics/7402836.stm>, although the Court heard that Denmark and China operate similar sanctions; *Chambers*, *supra* note 13, at 50 (although the Court heard that Denmark and China operate similar sanctions).

[FN76]. *Graham Bradley v. The Jockey Club* [2005] EWCA Civ 1056 (U.K.).

[FN77]. *Id.* at 9.

[FN78]. *Id.* at 9.

[FN79]. Id. at 13.

[FN80]. Graham Bradley, *supra* note 76, at 14.

[FN81]. Id. at 25.

[FN82]. Chambers, *supra* note 13, at 53.

[FN83]. Human Rights Act, 1998, §6(3)(b) (U.K.).

[FN84]. See House of Commons Hansard Debates, May 20, 1998, <http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmhansrd/vo980727/debtext/80727-32.htm>, at col. 1018. (Then Home Secretary Jack Straw suggesting that the Jockey Club and by implication other sports governing bodies would fall within such classification).

[FN85]. See European Parliament, Charter of Fundamental Rights of the European Union - Article 49: Principles of Legality and Proportionality of Criminal Offenses and Penalties, [http://www.europarl.europa.eu/comparl/libe/elsj/charter/art49/default\\_en.htm](http://www.europarl.europa.eu/comparl/libe/elsj/charter/art49/default_en.htm) (last visited June 2, 2009).

[FN86]. World Anti-Doping Agency, W.A.D.C. art. 10.3.2 (2007).

[FN87]. Chambers, *supra* note 13, at 23.

[FN88]. John O'Leary, *Drugs and Doping in Sport: Socio-Legal Perspectives* 158 (2001).

[FN89]. Id. at 37.

[FN90]. *Paul Edwards v The British Athletic Federation and the International Amateur Athletic Federation*, [1998] 2 C.M.L.R. 363.

[FN91]. Id. at 365.

[FN92]. Id. at 364-65. This has since been overruled by *David Meca-Medina*, *supra* note 63, which held that anti-doping rules of sports organizations were not of a purely sporting nature and therefore did fall within the remit of EU Law..

[FN93]. Id.

[FN94]. Id.

[FN95]. *Olympic chief to take on Chambers*, *supra* note 22.

[FN96]. BBC Sport, *Conte's prescription for success*, May 16, 2008, <http://news.bbc.co.uk/sport1/hi/olympics/athletics/7403158.stm>.



[FN97]. World Anti Doping Agency, W.A.D.C. art. 10.5.3 (Jan. 1, 2004), available at [http://www.wada-ama.org/rtecontent/document/code\\_v3.pdf](http://www.wada-ama.org/rtecontent/document/code_v3.pdf).

[FN98]. Slater, *supra* note 75.

[FN99]. See Conte's Prescription for Success, *supra* note 96 (revealing that Chambers took a combination of seven different banned substances including THG, Human Growth Hormone, EPO and Testosterone).

[FN100]. David Meca-Medina, *supra* note 63..

[FN101]. *Id.* at 11.

[FN102]. *Id.* at 17.

[FN103]. *Id.* at 20.

[FN104]. *Id.* at 25.

[FN105]. Case C-13/76, Gaetano Dona v. Mario Mantero, 1976 ECJ CELEX LEXIS 2849 (Jul. 14, 1976).

[FN106]. David Meca-Medina, *supra* note 63 at para. 9.

[FN107]. Stephen Weatherill, Anti-Doping Rules and EC Law, 26 *Eur. Competition L. Rev.* 416, 419-420 (2005).

[FN108]. *Id.*

[FN109]. John Goodbody, Drugs Cheat Dwain Chambers is '50-50' to make Olympics, *Times Online*, Feb. 17, 2008, [http://www.timesonline.com.uk/tol/sportmore\\_sport/athletics/article3382191.ece](http://www.timesonline.com.uk/tol/sportmore_sport/athletics/article3382191.ece).

[FN110]. Great Run, Chambers Faces Tough Future Despite World Indoor Selection, Feb. 13, 2008, [http://www.greatrun.org/onrunning/news\\_article.asp?id=4805](http://www.greatrun.org/onrunning/news_article.asp?id=4805).

[FN111]. Goodbody, *supra* note 109.

[FN112]. *Id.*

[FN113]. Rick Broadbent, Dwain Chambers at the centre of new selection controversy, *Times Online*, Feb. 12, 2008, at 64, available at [http://www.timesonline.co.uk/tol/sport/more\\_sport/athletics/article3353391.ece](http://www.timesonline.co.uk/tol/sport/more_sport/athletics/article3353391.ece) (last visited June 2, 2009).

[FN114]. Simon Hart, Chambers given hope by U-turn on drug cheat, *Daily Telegraph*, May

14, 2008, at 20.

[\[FN115\]](#). Id.

[\[FN116\]](#). Id.

[\[FN117\]](#). Stevenage Borough Football Club Ltd. v. The Football League Ltd., [1996] EWCA Civ. 569, available at <http://www.bailii.org/ew/cases/EWCA/Civ/1996/569.html>.

[\[FN118\]](#). Id.

[\[FN119\]](#). Chambers, *supra* note 13, at 61-65.

[\[FN120\]](#). Elliot v. Saunders (June 10, 1994) (unreported Q.B.D.) (involving a negligence action brought by one professional footballer against another for damages for personal injury).

[\[FN121\]](#). Id.

[\[FN122\]](#). R v. Barnes [2004] EWCA Crim. 3246 at 5, (2005) 1 W.L.R. 910, 912 (C.A.) (involving a charge of unlawful and malicious wounding committed on the football field contrary to section 20 of the Offences against the Person Act 1861).

[\[FN123\]](#). Id.

[\[FN124\]](#). McInnes v. Onslow-Fane (1978) 1 W.L.R. 1520 (Ch.D.) (involving the refusal by the British Boxing Board of Control to grant a boxer's managers license to the plaintiff).

[\[FN125\]](#). Id. at 1535.

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