

## **Lance Armstrong, It wasn't just about the bike**

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# Lance Armstrong - It Wasn't Just About The Bike

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## ABSTRACT

The paper "Lance Armstrong, It wasn't just about the bike", examines the Lance Armstrong saga from a comparative perspective, examining what might happen if such a high profile saga erupted in other common law jurisdictions. In doing so, it draws on wider questions around the concept of cheating and the specific nature of doping and the measures in place to combat the threat of widespread abuse of performance enhancing substances. The standard of proof required in questions around non-analytical positives is examined and questions around next steps for sport such as a general amnesty are raised. It is also suggested that the code of silence pervading some sports around doping issues may be combatted by provisions such as the Freedom of Information Act 2000 and that this legislation may help to combat some of the mist that surrounds doping control in sport.

## 1. INTRODUCTION

Cheating has been a malign influence in sport for many years, from the match-fixing scandal of the "Chicago Black Sox" that rocked American baseball in 1919, [2] to the "Hand of God" incident at the 1986 World Cup, [3] to the Paralympics scandal involving the Spanish basketball team. [4] All in their own way have threatened the integrity of the sporting competition. However, whilst match-fixing and race-fixing in particular have been high profile challenges for sport, [5] it is the threat posed by the use of performance enhancing drugs that has become perhaps the most pervasive example of cheating and corruption and the biggest threat to its integrity that sport now faces.

Doping in sport is of course nothing new. [6] However the scandal surrounding Lance Armstrong has provided a fresh insight into the measures that some will take in order to gain an advantage over their competitors. This paper considers the reasoned decision [7] issued by the United States Anti-Doping Agency, (USADA), and places it in the context of the scale of the corruption surrounding Lance Armstrong. This will be considered and viewed in relation to the philosophy that convinces some to cheat and others to resist that temptation.

The issues raised by the whole Armstrong saga present particular difficulties for those responsible for the regulation of sport. This article will focus on some of the key regulatory issues that would face sports bodies in the United Kingdom and other common law jurisdictions if a case similar in scale and profile to Armstrong were to erupt. In so doing, this article will address three key issues that have vexed all those with an interest in the fight against doping.

1. The standard of proof in disciplinary/doping proceedings, particularly when set against what can often appear to be the very penal nature of punishments resulting from adverse doping findings.
2. The difficulties surrounding supervision of the decision making of sports governing bodies. This issue has again been thrown into the light by the scandals of governance engulfing both association football and athletics. Remedies appear to be in short supply, particularly in the light of the traditional unavailability of judicial review as a

remedy not just to athletes against their governing bodies but also perhaps more intriguingly as a way for journalists and pressure groups to challenge anything that may have the feel of a whitewash or bias about it with regard to the conduct of the governing body or anti-doping agency. Despite the unavailability of Judicial Review as a remedy against sports governing bodies, it will be shown that similar remedies are available which could enhance transparency for anti-doping efforts in UK sport. It may also be suggested that this process would be enhanced if governing bodies were added to the list of organisations subject to duties under the Freedom of Information Act 2000 and some of the key regulatory issues around this will be outlined.

The question will be raised in concluding this piece as to whether or not an Armstrong type situation would either be more unlikely to occur or conversely would be more thoroughly investigated in the event that it occurred in the United Kingdom. It is certainly possible that the suggested application of judicial review and the potential listing of sports governing bodies under the Freedom of Information Act would help to shine the light necessary to prevent or at least moderate the kind of ill governance that appears to have blighted the UCI across the whole Armstrong saga.

## **2. BACKGROUND**

Lance Armstrong has been an icon of American and world sport since he first won the Tour de France in 1999. It should not be forgotten however that he did not come from nowhere. His journey to the top was not the trajectory of a stereotypical "doping cheat". Lance had history of exceptional achievement. He was World Champion in 1993 at the precocious age of 22, [8] but then in October of 1996 disaster struck when he was diagnosed with testicular cancer. [9] The cancer ultimately spread to his lungs, abdomen and brain, at which point doctors suggested that his survival chance lay at around 40%. [10] That Armstrong survived and flourished, going on to win one of the toughest sporting events in the world a record seven consecutive times became the stuff of legend. However, his triumphs were mired in controversy almost from the word go, and it seemed that rumour and innuendo followed Armstrong as his victories continued, [11] until his final win in 2005. [12]

What has become clear subsequent to Armstrong's "outing" is that every single one of his victories was built on the back of performance enhancing drugs. However, one of the key questions that remains unanswered though is how on earth did Armstrong get away with it and for so long? His first victory came in 1999, the Tour following the Festina scandal. [13] That Tour is perhaps significant in the genesis of the Armstrong legend. Cooke J., in discussing the importance to cycling, (and the Tour in particular), of Armstrong at that moment in time commented;

Professional cycling desperately needed a knight in shining armour and he duly arrived ... for the reputation of the sport he needed to be seen to be clean. [14]

It was of course against that background that Armstrong forged the first of his seven victories. He truly was, (or at least appeared to be), the figure that cycling desperately needed. Those that administered cycling wanted his to be a true story because of the desperate state of cycling at the time and further they saw him as the opportunity to break into the American market. The Cycling Independent Reform Commission, (CIRC), commented:

UCI saw Lance Armstrong as the perfect choice to lead the sport's renaissance after the Festina scandal: the fact that he was American opened up a new continent for the sport, he had beaten cancer and the media quickly made him a global star. [15]

Those that followed cycling wanted his to be a true story because of him and the inspirational account that he was able to tell in surviving cancer and going on to prosper in the Tour. It was this perfect storm of human emotion that contributed to the successful perpetration of the Armstrong myth. It may also have been this that at least in part, persuaded those with questions to ask to refrain from addressing those questions. It is not as if there were not suspicions about Armstrong even then, during his first Tour victory. The French rider Christophe Bassons was writing a daily column throughout the 1999 Tour for the magazine, "Le Parisien". In that column, Bassons commented after one stage that the peloton had been "shocked" by the proficiency and strength that Armstrong had shown in the most recent mountain stage. [16] Armstrong berated Bassons on the following stage for his insinuation that essentially suggested Armstrong may have used an artificial aid to improve his climbing performance. In his attack on the Frenchman, Armstrong suggested that Bassons should leave cycling altogether for his comments. That it has subsequently been revealed that Armstrong tested positive for banned substances on four occasions during the 1999 Tour [17] provides an interesting insight into his *modus operandi*.

For Armstrong, the first real difficulties arose in 1999 when but for a backdated prescription for cortisone [18] might have ended his pre-eminence in the Tour de France before it had even started. [19] Further problems arose in 2001 during the Tour de Suisse when Armstrong returned what according to the Union Cycliste Internationale, (UCI) were "questionable" tests. These included results for EPO which the UCI confirmed were strongly suspicious but not actually positive. This rather murky explanation was perhaps then exacerbated by Armstrong's donation of \$125,000 apparently, (according to then UCI President Pat McQuaid), to help in their anti-doping efforts rather than as many people may have assumed to help cover up a failed or suspicious drugs test. [20] Importantly though this revealed vulnerabilities within his entourage as suddenly there were staff on his team, in addition to the inner sanctum of his teammates who were clearly aware of and indeed aided this falsification [21] and this would ultimately prove significant in his unmasking. Nevertheless Armstrong's success continued despite the rumours and innuendos and he easily passed the old record of five victories in the Tour which had been jointly held by four individuals. [22]

Controversy however continued to follow Armstrong this time via a confrontation with another member of the peloton, Filipe Simeoni. Armstrong had worked with the controversial Italian doctor, Michele Ferrari regularly until Ferrari was convicted in the Italian courts of *sporting fraud*. Whilst he was cleared of the more serious allegations of providing performance enhancing drugs this was nevertheless a serious issue which brought Ferrari a 12 month suspended sentence. [23] This guilty verdict was based predominantly on the evidence provided by Filipe Simeoni and Armstrong subsequently accused Simeoni of lying which prompted Simeoni to sue Armstrong for defamation. [24] It is in response to this that Armstrong allegedly made his infamous "zip the lips" gesture to Simeoni, [25] following his unprecedented chase down during the 18th stage of the 2004 Tour of a lead group which Simeoni had joined. [26] It is instructive that Armstrong suggested that following Ferrari's conviction he ended his association with the doctor and that Armstrong's agent even went as far as testifying under oath [27] that their professional relationship had been terminated. [28] However, evidence suggests that this was not the case. Bank records showing payments between the two and witness statements demonstrate

clearly that close contact remained during 2005, [29] and further affidavits make clear that Armstrong retained his professional relationship with Ferrari in the build up to and throughout his comeback in 2009-2010. [30]

Further difficulties emerged for Armstrong in 2004 following his sixth consecutive victory in the Tour. This came in the shape of the SCA Arbitration hearing, [31] where Armstrong lied under oath when questioned about his apparent admission to a doctor made in hospital whilst undergoing treatment for his cancer that he had never used performance enhancing drugs prior to his illness. [32] Then in 2005 the rumours really began to gather pace when the French newspaper L'Equipe published "The Armstrong Lie," which connected him to six urine samples which had been taken during the 1999 Tour. These it is claimed tested positive for EPO. They were however only labelled by number rather than name and furthermore were only single samples rather than A and B samples [33] and therefore were insufficient, absent of any other evidence, to bring an action against Armstrong. In 2005, following his record breaking seventh successive Tour victory, (for which he recorded the highest ever average speed at 41.7 Km/h [34] ), Armstrong announced his retirement and there perhaps might have ended his "story". However on 9th September 2008, he announced his return to cycling with the specific aim of winning the Tour once again. [35] What followed however was not the glory that he had hoped for but rather relative failure on the road, [36] and further controversy and ultimately sanction off the road as first federal prosecutors pursued him and then USADA, culminating in the USADA *reasoned decision* and associated fallout which resulted in Armstrong being stripped of all of his titles and banned from competitive cycling for life.

The remainder of this paper will look at the *reasoned decision* focussing not only on the allegations that were put forward in the report but also questioning what was known and by whom with reference to Armstrong's practices throughout his career. Limitations on space prevent anything more than questions being raised but nevertheless in light of the rumours detailed above and his final confession to Oprah Winfrey [37] it seems pertinent to ask just how he managed to "get away with it" for so long?

### **3. THE REASONED DECISION**

On 24th August 2012, Lance Armstrong was formerly stripped of his seven Tour de France titles and suffered disqualification of all results from 1st August 1998. [38] Following that decision it then rested with the USADA as the organisation with results management authority [39] to issue Armstrong with an explanation for its actions, which it duly complied with when it issued the *reasoned decision* [40]. There is a danger that all attention will remain on this document, perhaps at the expense of a thorough examination of the Federal investigation into allegations of doping by Armstrong that was formerly and perhaps surprisingly discontinued on 3rd February 2012, following reported political pressure. [41] The point is made that none of the evidence gathered by the USADA came from that Federal investigation. [42] It seems astonishing that, despite us living in times where the signing and apparent effectiveness of memorandums of understanding between anti-doping organisations and various arms of law enforcement agencies at both a national level, [43] and an international level [44] are proudly announced and further, that we are told that Armstrong could not have escaped detection for so long had he committed his sporting offences today, [45] that he was nevertheless able to maintain a doping regime throughout his illustrious career. It is clear that this was an open secret within the peloton. The *reasoned decision* highlights some almost farcical indicators of Armstrong's guilt, some of which were apparent even before his first Tour victory. Indicators such as the carrying of a

thermos flask, which seemed to be a tell-tale sign of EPO use. [46] The *reasoned decision* explains:

Jonathan Vaughters also believed Armstrong was likely using EPO-there were some tell-tale signs, such as Lance carrying around a thermos. However, prior to the 1998 Vuelta a España Vaughters could not be absolutely sure of Armstrong's EPO use. During this time frame several riders, in addition to Vaughters, saw Armstrong carrying a thermos and associated it with him using EPO. [47]

With such behaviour, one again has to question the rigour with which those responsible for policing their sport were actually acting. With such anecdotal evidence of EPO use, one might have expected a concentrated campaign of target testing of Armstrong and his teammates. In the aftermath of the Armstrong debacle it is perhaps instructive that Irish journalist and former Tour de France competitor Paul Kimmage launched an action against both the President and former President of the UCI for "slander/defamation, denigration and strong suspicions of fraud", [48] and further that there has been a distinct lack of cooperation between the UCI and the World Anti-Doping Agency, (WADA), culminating in the refusal of the WADA to engage with the UCI's commission to investigate corruption which was established in the wake of the Armstrong scandal. [49] With this kind of atmosphere surrounding the organisation charged with protecting the integrity and wellbeing of their sport, it is perhaps unsurprising that many have questioned the role of the UCI [50] in the obviously ineffective anti-doping regime which allowed Armstrong to evade detection throughout his career.

What perhaps is even more troubling is the atmosphere evident between the UCI on one side and the USADA on the other. These are two organisations apparently seeking the same goal - that of a drugs free sport and yet the open hostility evidenced between these two organisations even before the *reasoned decision* was published as they bickered over who had jurisdiction in pursuing Armstrong [51] displays for all to see that there were other agendas at play rather than a desire to work towards a common goal of dealing with drug abuse in the sport.

The UCI has had at times a difficult association with not just USADA but other organisations, and individuals who are involved in anti-doping and in particular with the WADA and it is likely that problems with this relationship helped to sour that with USADA. The origins of the problems may be traced back to the relationship between Dick Pound, (the first President of the WADA), and Hein Verbruggen, (President of the UCI from 1992-2005). Verbruggen supported Jacques Rogge over Pound in his successful action to succeed Juan Antonio Samaranch as President of the International Olympic Committee and it appears that this may have been the starting point for the conflict [52] which would ultimately spill over to have serious consequences for anti-doping policy in cycling. The CIRC comments:

It is the CIRC's view that the conflict between these two men as well as their very different philosophies of fighting doping in sport soured the relationship between the UCI and WADA, which adversely affected the fight against doping. [53]

The CIRC relates that the problems between the WADA and the UCI appeared almost from the very birth of the former. From a resistance to the standard two year ban for a doping offence, to a reluctance to adopt the first WADA Code, [54] it seemed that the UCI were reluctant to work in partnership with the fledgling organisation. Perhaps more important

however was a fundamental disagreement over the very nature of the organisation. The personal animosity between the two men seemed to spill over to their professional relationship as they adopted radically differing views of the nature of the WADA, (and by definition other anti-doping agencies too). On the one hand, Verbruggen viewed the WADA very much as an agency to support and help governing bodies. He commented, "Pound is positioning WADA as the watchdog and that is not its role. It should be an aid agency, not a police agency against sport". [55] Pound's view on the role of the WADA on the other hand was far from that envisaged by Verbruggen. Bose reports his comments:

We are not just a support agency, quite the opposite ... WADA is the international agency whose job is to report on compliance and non-compliance with the code. [56]

This viewpoint is clearly shared by the USADA which makes the point in the Reasoned Decision that:

USADA exists to enforce the rules against cheating through the use of performance enhancing drugs regardless of whether those rules are broken by the famous or the anonymous. [57]

This would clearly involve at times holding governing bodies to account in the event of perceived failures in anti-doping policy and may therefore be viewed as something that would impact on the independence of governing bodies and their role as sole governors of their sports. The potential conflict, that these differing opinions on the role of the WADA and the USADA may cause are obvious. Whilst one might expect personal relationships to alter over time, particularly when the personnel involved change, this proved not to be the case when Verbruggen stepped down to be replaced by Pat McQuaid as President of the UCI in 2005. The CIRC report;

Pat McQuaid inherited the difficult relationship between Hein Verbruggen and WADA/Dick Pound. Pat McQuaid did not disassociate himself from that dispute. Instead, it appears that he sided from the beginning of his presidency with Hein Verbruggen and that did little to ease the conflict. Examples of this can be found in Pat McQuaid's published letter to the French Ministry of Sport and Dick Pound (dated 3 July 2006) and in his calling publicly for Dick Pound's dismissal from WADA. [58]

The relationship continued to deteriorate when the UCI launched defamation proceedings against Dick Pound, and indeed several other stakeholders around that time and prompted the CIRC to comment:

It seemed to have been part of the UCI's strategy to threaten and/or serve their opponents or critics with legal actions, be it before state courts or ethical commissions. [59]

That this antipathy might affect the relationship that the UCI had with other stakeholders, (in particular other anti-doping agencies such as USADA), seemed likely and indeed that was acknowledged by the CIRC. [60] The most worrying aspect of this was of course the impact that these problematic relationships might have on anti-doping within cycling. Indeed it has only been subsequent to USADA's Reasoned Decision that reforms have been put in place at least in part to separate anti-doping operations within cycling from the UCI leadership. [61]

The aftermath of the pursuit of Armstrong has shown little or no signs of leading to a thaw in the relationship between the two organisations as further tensions remain evident. [62] It can only be hoped that the appointment of Brian Cookson as new President of the UCI, [63] replacing Pat McQuaid, in September 2013 will facilitate a more positive relationship between the organisations.

It is clearly tempting to view the USADA as the "clean" organisation seeking to maintain a drug free sport and to pursue those it suspects of cheating to the fullest extent and the UCI as the organisation mired in controversy and seemingly dragging its heels in attempting to maintain a drug free sport. One might argue that the UCI as the guardian and promoter of its sport has a conflict of interests that might tempt it to maintain a silence around doping issues - a conflict that the USADA do not have. However the USADA do not escape judicial criticism, an issue which they appear to gloss over in the *reasoned opinion*. Their "woefully inadequate charging letter", [64] drew criticism from the Court in *Armstrong v Tygart* [65] and it is certainly possible as one or two appear to have done, to view the pursuit of Armstrong as something of a personal mission for Travis Tygart and the USADA. [66] The bottom line though remained the desire of the USADA to maintain a drug free sport on the one hand against Lance Armstrong's right to protect his past and future career on the other.

In seeking to address concerns about the balance of rights, The Court made clear reference to the safeguards in place that may serve to ease fears that Armstrong would not be treated fairly. However, despite their obvious misgivings with the process and balance of power, they concluded, "the Court finds the USADA arbitration rules ... are sufficiently robust to satisfy ... due process". [67] The Court was comfortable with Armstrong's options and the degree of protection offered to Armstrong via the operation of International arbitration system and in particular the Court of Arbitration for Sport. Sparks commented;

Alternatively, even if the Court has jurisdiction over Armstrong's remaining claims, the Court finds they are best resolved through the well- established system of international arbitration, by those with expertise in the field. [68]

The Court continued:

Armstrong has ample appellate avenues open to him, first to the Court of Arbitration for Sport, (CAS), where he is entitled to de novo review, and then to the courts of Switzerland, as permitted by Swiss law, if he so elects. [69]

The question may however be asked, particularly in the light of the ongoing case involving German speed-skater Claudia Pechstein as to whether the Court was right to have such faith in the International arbitration process.

The balance in terms of the protection of athlete rights offered by the Court of Arbitration for Sport and the Swiss Federal Tribunal, (SFT) has recently been thrown into doubt by the decision of the Munich Court of Appeals to refuse to recognise the CAS arbitration award in the case of Claudia Pechstein who had originally been banned from competing due to irregularities with her Biological Passport profile. That this case had been through the CAS, the Swiss Federal Tribunal, and a further request for revision before the SFT proved irrelevant as the Munich Court to whom Pechstein had brought her case cited concern over compatibility with German cartel law and public policy.[70] The progress of the case raises



real concerns about the finality of decisions rendered by the CAS and therefore calls into question the status of sports ability to govern itself. Diathesopoulou comments:

Challenging the validity of CAS awards before national courts, however, is something new under the sun of sports arbitration and could prove fatal for the finality of CAS awards, which is a sine qua non safeguard of procedural equal treatment among athletes and legal coherence in sports law. [71]

The particular problem was not with the award itself but more the process by which it was arrived at. The ISU, (the governing body), much like the vast majority of sports governing bodies, (absent perhaps boxing and to a lesser degree darts), enjoys a monopolistic position in the governance of their sport and essentially force their participants to accept compulsory arbitration by the CAS. This in itself may not be problematic when one considers it in the light of the acknowledged *specificity of sport*, [72] and the clear need for there to be consistency in the administration of sports. What made the CAS decision problematic were processes around the decision. Diathesopoulou comments:

... the Court hold that the arbitration agreement as a prerequisite to the athlete's participation in competitions does not constitute per se an abuse of a dominant position, since it responds to the specificity of sport and particularly to the need of consistency in sports disputes. However, considering the decisive influence of sports organizations on the selection and appointment of arbitrators under the CAS regulations, the Court concluded that the independence of CAS is questionable. In this light, forcing the athletes to sign an arbitration agreement in favour of a rather dependent and partial tribunal would constitute an abuse of the international sports organizations' dominant position in the market, thereby infringing the mandatory German antitrust law. [73]

The Court's conclusion was that the dominant position enjoyed by the ISU meant that the terms it imposed upon Ms Pechstein, (compulsory arbitration in the CAS), were contrary to the German Act against restraints of Competition. Further that the choice of arbitrators under the then existing rules was biased in favour of the ISU and therefore by definition other governing bodies. Voser comments:

The court furthermore noted that the structural imbalance between athletes and sports-related bodies is aggravated by the fact that in all disputes concerning decisions of sports-related bodies, the president of the arbitral tribunal is directly appointed by the President of the CAS Appeals Division who is a member of the International Council of Arbitration for Sport ("ICAS"), a body that is highly dependent on the sports-related bodies. According to the Higher Court, athletes accept this one-sided designation of the CAS arbitrators only because they have no choice if they want to compete at an international level. [74]

Pechstein's case was heard by the CAS before the reforms of 2012 which brought greater independence to the process of selecting arbitrators, removing the quotas of arbitrators nominated by governing bodies and similar organisations. [75] It is therefore possible that this case may prove to be a one off and that the rendering of sports arbitration decisions will continue to rest easily with the CAS. Should this prove not to be the case then we may be in for further CAS reform. Diathesopoulou, in making this point stresses;

Therefore, a potential institutional reform of the CAS to ensure independence and impartiality coupled with a more stringent review of its awards by the SFT should bring about a more restraint approach of national courts when reviewing CAS awards' compliance with domestic public policy and ensure the subsequent finality of CAS awards. [76]

Sport can ill-afford to be left without a common final dispute resolution mechanism and it is possible to see how this process may not be the safeguard for Armstrong that perhaps the Texas Court had suggested.

The Court in *Armstrong v Tygart*, [77] also drew attention to perhaps an issue of concern in the USADA's pursuit of Armstrong. It stated, "it appears USADA's evidence will revolve more around eyewitness testimony than lab results". [78] What this meant of course was that the *smoking gun* of a failed test was lacking and that this therefore left a slightly unsatisfactory taste in the mouth. The consequences of the lack of a test failure meant that the USADA had to prove to the *comfortable satisfaction* [79] of the hearing panel as per Article 3.1 of the WADA Code, that Armstrong was guilty of doping and that it was clear that the evidence presented to try and achieve this was based on banking records and affidavits from some of Armstrong's closest associates. [80] With these sworn statements, there was sufficient evidence that had stacked up against Armstrong to satisfy the standard necessitated by Article 3.1. The *standard* itself has been the subject of some conjecture. McLaren explains the origin of the approach:

This standard of proof originates from court decisions in Australia and other Commonwealth countries that created a standard of proof that involved the personal reputation of the athlete; the standard is more stringent than the balance of probability but less burdensome than beyond a reasonable doubt. [81]

Whilst the applicability of the approach to some doping violations seems reasonable enough, it may also be suggested that the approach is inappropriate for more serious allegations of doping such as those faced by Armstrong. The issues facing Armstrong were obviously career threatening and potentially chronically serious in terms of his personal reputation, [82] his financial security [83] and his future prosperity. Athletes who are subsequently cleared of any wrongdoing can see the stain of doping remain on their public persona. A problem acknowledged following the case involving Andrus Veerpalu who had been accused of taking Human Growth Hormone. Alexander wrote in the aftermath of him being cleared:

Veerpalu fought the doping charges, taking the case all the way to the Swiss-based Court of Arbitration for Sport (CAS). With Berry and Fischer acting as expert witnesses on Veerpalu's behalf, the arbitration panel found for Veerpalu in 2013, saying the WADA test was "unreliable." As Fischer and Berry point out, despite being exonerated, Veerpalu emerged irrevocably tarnished, with many, including WADA, insisting he got off on a technicality. To Berry and Fischer, this exemplifies why tests must be as scientifically rigorous as possible, to avoid unfairly leaving an athlete's reputation in ruins. [84]

Similarly, the Australian Lawyers Alliance highlighted that, "the consequences from adverse findings for sports people can be devastating both personally and professionally". [85] It is therefore imperative that mistakes are not made and evidence and standards of proof are as rigorous as possible. Bearing this in mind it is arguable that the proof must be higher in the more serious cases than that required in less serious cases of doping. Those charged with

outing doping offenders would argue that the approach outlined in Article 3.1 [86] is entirely appropriate. It is the case that the *standard* has clearly been approved by the CAS, [87] which has taken the view that a doping violation is a disciplinary issue rather than a criminal one and that therefore the approach should be somewhere between the civil *standard of on the balance of probabilities* and the criminal standard of *beyond reasonable doubt*. [88] But is it the case that this should justify the utilisation of a *standard of proof* that places athletes in a vulnerable position against the much more powerful adversaries [89] who may be attempting to end their careers and potentially cause associated serious financial losses. It may be suggested that the article itself clearly accounts for those in a similar position to Armstrong who may find their careers in jeopardy. The *standard* overtly accounts for the "seriousness of the allegation" being brought and that may be seen as a sufficient safeguard for any participant - therefore in effect, the more serious the allegation then the more stringent the proof needs to be. In principle, this sounds straightforward. In practice however, the question pertaining to the appropriate *standard of proof* is a complicated one. Davis comments:

...there are established common law principles that determine who has the burden of proof in both criminal and civil cases. The question that then arises is what the standard of proof should be. The basic principle of the common law system is that the standard of proof in criminal cases is beyond reasonable doubt. Where the defendant raises a defence, the lower civil balance of probabilities standard applies. A closer examination, however, shows that it is a little more complicated in relation to civil matters, and that it is in fact a sliding scale that operates, depending on how serious the allegation is. [90]

The origin of the approach adopted in Article 3.1 World Anti-Doping Agency Code, (WADC) 2015, (that of *comfortable satisfaction*), is an Australian divorce case where Justice Rich commented:

In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion. The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion. But to say this is not to lay it down as a matter of law that such complete and absolute certainty must be reached as is ordinarily described in a criminal charge as "satisfaction beyond reasonable doubt." A petition for dissolution of marriage is not quasi-criminal, whatever the grounds. [91] (emphasis added)

It is of course questionable whether what was originally intended to help manage divorce cases is appropriate in doping investigations where both a person's livelihood and reputation may be very publically at risk. There are arguably some analogies with divorce in terms of reputational damage, particularly given the context of the time this case was considered when perhaps divorce was a more serious issue than may be the case today. But whilst such reputational damage may have been present, it would not have been so open to the public gaze and in no way would have posed the same risk to the livelihood of the individuals concerned that a doping investigation and subsequent conviction does.

Perhaps of greater relevance in discussing the appropriate standard of proof may be the case *Birmingham City Council v Riaz*, [92] which involved attempts by Birmingham City

Council to keep a vulnerable 17 year old girl safe from ten identified males by obtaining a Secure Accommodation Order. In the case, the Court made wide-ranging injunctions preventing the men from approaching not just named individuals but *any* female under the age of 18, not already known to them in *any* public place. It was assessed that there was no possibility of securing a criminal conviction against these men, hence the reason for the innovative use of process to obtain such far reaching injunctions against them. The men were named in Court and more interestingly were able to be named by the Press. The standard of proof applied here was that of *the balance of probabilities*. It is clear that the reputational damage that these men may potentially face is far beyond that of a divorce case and also that of any doping violation, (even one as serious as that of Armstrong), but here mechanisms were used which ensured that a standard of proof below the criminal one was used. This aspect of the decision has drawn criticism perhaps best summed up by Downs who commented:

Keehan J just asserted that the civil standard of proof applies but he does not address the case law which has developed concerning ASBOs [93] (e.g. R (on the application of Cleveland Police) v Haggas [2009] EWHC 3231; [2011] 1 WLR 2512 which emphasised that whilst these are civil proceedings, because of the seriousness of the matters to be proved and the implications of the resulting Orders, the criminal standard of proof or something virtually indistinguishable from it should be used. [94]

This then returns us to the standard of *comfortable satisfaction* in the circumstances i.e. the more serious the circumstances the more rigorous the proof would need to be to leave the panel comfortably satisfied. As far as the Court of Arbitration for Sport is concerned, the protections offered by this standard match the rigorous requirements highlighted above by Downs:

As often becomes evident when the question of standard of proof is debated, the debate looms larger in theory than practice. ... In all cases the degree of probability must be commensurate with and proportionate to those allegations; the more serious the allegation the higher the degree of probability, or "comfort", required. That is because, in general, the more serious the allegation the less likely it is that the alleged event occurred and, hence, the stronger the evidence required before the occurrence of the event is demonstrated to be more probable than not. ... From this perspective, and in view of the nature and gravity of the allegations at issue in these proceedings, there is no practical distinction between the standards of proof advocated by USADA and the Respondents. It makes little, if indeed any, difference whether a "beyond reasonable doubt" or "comfortable satisfaction" standard is applied to determine the claims against the Respondents. [95]

It is the circumstances that are crucial in deciding at what level the panel becomes *comfortably satisfied*. Thus the more serious the allegation and ergo the consequences of a proved allegation then the more compelling the proof must be. That at least is the theory. It is here that the cumulative effect of evidence becomes crucial. Davis comments further:

the analogy that is often made is that of the cumulative strength of the strains of rope, or the links in a chain, though in the latter it is to emphasise that the evidence may only be as strong as its weakest 'link'. [96]

A concern over the appropriate standards of proof in sports disciplinary cases has not been limited to doping sanctions. This very issue was the subject of an appeal to the British Horseracing Authority in the case involving race fixing. [97] The rules of racing were quite clear on the applicable standard - that of the balance of probabilities. Schedule (A) 6 paragraph 16 stated;

Where any fact or matter is required to be established to the satisfaction of the Authority, the standard of proof shall be the civil standard which is to say the standard applied in the civil courts of England in a dispute between private Persons concerning a matter of comparative seriousness to the subject matter of the enquiry. [98]

Nevertheless the appellants contended that due to the seriousness of the allegations against them, that the balance of probabilities was inappropriate and that the criminal standard should have been applied. It was made clear in the hearing that the matter of the appropriate standard of proof in disciplinary proceedings in general is far from settled, with different approaches being adopted in areas such as health, where the approach is typically on the balance of probabilities and is similarly the case in policing matters. In questions around exclusion of pupils from school, the standard also remains that of the balance of probabilities. [99] In the sports world, in anti-doping, the preference has been for a standard of *comfortable satisfaction*, [100] where the anti-doping organisation is trying to establish a doping violation and similarly the same approach is taken in in cricket disciplinary tribunals. [101] The panel concluded in this particular instance that;

Although, as we accept, the charges against these appellants were serious and the consequences, particularly for the jockeys were serious, they were not criminal proceedings. ... Since the simplification of the position in civil litigation brought about by the decision in *Re B*, the Panel decided that the Rule requires decision of all matters before the Panel by application of the balance of probabilities test. [102]

It is interesting to note that Lord Phillips in *R (on the application of McCann)*, made the point concerning the imposition of anti-social behaviour orders:

Many injunctions in civil proceedings operate severely upon those against whom they are ordered. In matrimonial proceedings a husband may be ordered to leave his home and not to have contact with his children. Such an order may be made as a consequence of violence which amounted to criminal conduct. But such an order is imposed not for the purpose of punishment but for protection of the family. This demonstrates that, when considering whether an order imposes a penalty or punishment, it is necessary to look beyond its consequence and to consider its purpose. [103]

The effect of these is typically to exclude individuals from particular areas at particular times. The argument had been made that these were criminal proceedings and therefore hearsay evidence should have been excluded. That being the case, the criminal standard of proof would apply, (the discussion was centred around what standard was appropriate). In rejecting that argument, Lord Phillips as can be seen, highlighted the intention and impact of such an order. The intention is to protect potential victims such as family, and to look at the broad purpose behind the imposition of such orders which is preventative rather than punitive. It is possible to extrapolate this rationale to doping bans. The broad purpose must be to protect sport in general from the corruption of doping and more specifically to enable other athletes to compete in a drug free environment. In other words to protect the family

involved in sport from the actions of the doper. The words of Lord Phillips resonate with the vision of the WADA which is, "A world where all athletes can compete in a doping-free sporting environment" and its mission, "to lead a collaborative worldwide movement for doping-free sport". [104] Intended impact is preventative and wide ranging rather than being targeted at punishment of individuals. The impact upon guilty individuals may be restrictive but arguably not punitive and therefore arguments in favour of the civil standard of proof to apply should perhaps gain greater credence.

In *French v Australian Sports Commission*, the CAS accepted that where the allegations are serious, then the standard must be at a higher level than that of the balance of probabilities, [105] and that at times this standard may end up being, in echoes of the *Gaines* reasoning, almost indistinguishable from that of *beyond reasonable doubt*. [106] One may question that if this is the case, then why not simply apply an overt criminal standard and remove the possibility for debate completely? Dame Elizabeth Butler-Sloss hinted at this very point in *re U (A Child) (Department for education and Skills intervening)*, commenting on the submission of care orders:

We understand that in many applications for care orders counsel are now submitting that the correct approach to the standard of proof is to treat the distinction between criminal and civil standards as 'largely illusory'. In our judgment this approach is mistaken. [107]

Recent dicta from the House of Lords and the Supreme Court in the United Kingdom would appear to cast some doubt on the applicability of any hybrid civil approach of *comfortable satisfaction* and further whether the reality really is or should be that the approach is almost indistinguishable from the criminal standard. [108] It would appear in *Gaines*, highlighted above that there is the possibility of confusion between the applicable *standard of proof* and the likelihood of an event taking place. Lord Hoffman in *re B*, commented on this issue:

Some confusion has however been caused by dicta which suggests that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned. [109]

Further Lady Hale in *S-B Children* [110] affirmed that there exists no elevated civil standard of proof. It seems that the confusion has arisen when; in echoes of Hoffman above; assessing the probability of whether an event has taken place or not. Lady Hale, citing Lord Nicholls in *re H (Minors) (Sexual Abuse: Standard of Proof)* went on:

... this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur, before, on the balance of probability, its occurrence will be established.

To put it into Armstrong's context, the likelihood that he was able to get away with doping for so long was extraordinary and therefore the proof to "convict" him must be extremely rigorous in order to satisfy the standard of proof. Lord Hoffman concluded clearly on the issue of the existence of a hybrid or modified civil standard of proof, stating:

I think that the time has come to say, once and for all, that there is only one civil standard of proof and that it is proof that the fact in issue more probably occurred than not. I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann's* case (at 812) that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard. [111]

This would seem to be an eminently sensible route to take with regards to proof of doping violations and would undoubtedly ease some concerns that athletes may have around due process worries and in practical terms it would appear that it would actually make little tangible difference to the results from hearing panels.

There is further protection for the accused athlete beyond concerns over the applied standard of proof, in that if they seek to rebut any particular presumptions in a doping charge, (such as the reliability of laboratory analysis/chain of custody etc), then they will only need to overcome the burden of *on the balance of probabilities*, [112] in order to win their case.

Whilst the approach for an athlete accused of a doping offence therefore appears to have some safeguards, it is curious that in another area of sporting corruption, (that of match fixing), the balance of power shifts even further towards the accusatory body. *Köllerer v ATP*, [113] made it clear that the standard of proof should be that of *apreponderance of the evidence*, (i.e. the *balance of probabilities*). [114] At the heart of this reasoning lay the contractual nature of the relationship between the participant and his governing body. [115] This was the standard contained in the governing body rules and the standard to which *Köllerer* had agreed to be bound in previous years. [116] It is the case that some mild criticism is made in *Köllerer* concerning the lack of a universal standard in all sports for match fixing cases. [117] However, the point is made:

The CAS has neither the function nor the authority to harmonise regulations by imposing a uniform standard of proof, where, as in the current case, an association decides to apply a different, specific standard in its regulations. [118]

It would therefore seem perverse to advocate a change in the approach, to that of *comfortable satisfaction*, which is explicitly accounted for in the WADC and further the *standard* to which Armstrong and all other competitors across the world who are subject to the WADC have signed up to. The solution for change would be to lobby WADA to amend the Code. It is the contractual nature of the relationship that is fundamental to the acceptance of this standard and this has been confirmed by the Swiss Federal Tribunal which is similarly of the view that it is private law that governs doping disputes due to the contractual nature of the relationship between the parties. [119]

It is the private law nature of the relationship between a participant and governing body which has enabled the English Courts to justify their refusal to allow the remedy of *Judicial Review* for particular issues involving sports participants and their governing bodies. [120] This reasoning hence justifies the refusal to require proof *beyond reasonable doubt* of a doping violation in order to secure a doping "conviction". It is though arguable that the adherence to the notion that the relationship is a contractual one between participants and their governing bodies is based more on dogma and history than on any sound legal basis, one which fails to acknowledge the nature of the relationship involved

and instead focuses too clearly on the structure of that relationship. [121] It is nevertheless an important issue in the context of the difficulties faced by participants such as Lance Armstrong for it is the private law principal that appears to lie at the heart of the refusal of the CAS and SFT to countenance a preference for *beyond reasonable doubt* over the less forgiving standard of *comfortable satisfaction*.

There have been several cases in England that have explored the relationship of participants and their governing bodies in the context of whether Judicial Review should be available as a remedy for participants. The Courts have always answered this question in the negative, although this has not prevented remedies which have to a degree matched those offered by Judicial Review from emerging in recent years. It may therefore be instructive at this juncture to briefly examine the notion of Judicial Review and the notion that whilst the relationship may be a contractual one, this has nevertheless not prevented suitable remedies from emerging via the inherent supervisory jurisdiction of the Courts. [122] As stated above, it is arguably the case that the private law nature of the relationship has encouraged the application of the standard of *comfortable satisfaction* but this has not prevented suitable remedies from emerging via the supervisory function of the Courts in the absence of Judicial Review, so it should perhaps be the same with regards to the appropriate standard to be applied in doping cases.

The origins of Judicial Review can be traced back to *Rooke's case*, [123] where in a dispute concerning the maintenance and repair of a river bank, the decisions made by The Commissioners of Sewers in relation to collection of monies were examined in the Court of Common Pleas. In concluding that their decisions must be made in accordance with the law and with reason, the Court stated:

... and notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law (A). For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections. [124]

The principle that decisions taken by such administrative bodies as the Commissioners of Sewers must be reasonable and that this would if necessary be supervised by the courts was strengthened in 1608 by *Dr Bonham's case*. [125] The case itself involved Bonham, (a Cambridge graduate in medicine), who was refused permission to practice in London unless he first obtained a licence from the Royal College of Physicians. This he refused to do and ultimately he was imprisoned by the College under authority of a royal grant, which had been expressly confirmed by an Act of Parliament. Bonham brought an action for false imprisonment. The key issue was the authority granted to the Royal College by the statute. It was clear that it gave authority for the College to administer fines against Bonham, (of which the College were permitted to retain 50% of any fine levied, with the other 50% going to the crown). However, Sir Edward Coke, (the Chief Justice and fellow Cambridge graduate), expressed concern that the effect of the legislation was such as to permit the College to both bring the action against Bonham and to act as Judge in the trial. Coke commented:

And it appears in our books, that in many cases, the common law will controul [sic] Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament



is against common right and reason, or repugnant, or impossible to be performed, the common law will controul [sic] it, and adjudge such Act to be void. [126]

The youthful concept was supported later in *Day v Savadge*, [127] where Hobart, the new Chief Justice of the Court of Common Pleas stated, "...even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in itself". [128]

It can be seen that even in these very old cases the issue of possible bias or at least of a conflict of interests was of real concern to the courts and further that they felt it appropriate to intervene even where this may mean setting a collision with Parliament and the Crown. Thus we saw the beginnings of the concept of judicial review.

In *Council for Civil Service Unions v Minister of the Civil Service*, [129] Lord Diplock laid out what he saw as three distinct grounds upon which an applicant may launch an action for Judicial Review against a susceptible body. He commented:

The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety ... By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it ... By "irrationality" I mean what can by now be succinctly referred to as *Wednesbury* unreasonableness [130] ... I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. [131]

The first significant sporting case in this area was that of *Law v National Greyhound Racing Club Ltd*. [132] The facts of the case are fairly typical of the cases that have come before the courts in this area. The plaintiff's training licence had been suspended for six months by the defendant, (a limited company who were effectively the governing body of greyhound racing in England, Wales and Scotland), on the grounds that one of his greyhounds had tested positive for a banned substance in breach of rule 174(ii)(a) of the rules of racing. Beyond the bare facts of the case however, there was one very obvious difference between *Law* and the other significant cases in this area. [133] In the case in hand, it was the governing body, the National Greyhound Racing Club, (NGRC), who attempted to establish that Judicial Review was the appropriate mechanism for challenging the decisions of the disciplinary panels of sports governing bodies. Lawton L.J. commented:

They have tried to persuade this court that, on the correct construction of section 31 of the Supreme Court Act 1981, when a domestic tribunal is alleged to have made, in abuse of its powers, a decision which affects a member of the public or the public generally, the complainant must apply for judicial review and cannot proceed by way of an action or an originating summons for either a declaration or an injunction. [134]

In contrast, in the other significant cases exploring this issue, it has been the governing body seeking to persuade the Court to deny an application for Judicial Review to the participant. It is therefore the governing body remaining faithful to the principal that the athlete is in a contractual/private law relationship with their governing body and that this justifies

denying Judicial Review as a remedy concerning issues around disciplinary processes. It may be argued that it is this adherence to the concept of the nature of the athlete's relationship that is used to justify retaining the *standard* of proof laid out in *Collins*, [135] *Boevski*, [136] *Gundel* [137] and more latterly in the WADA Code itself. Should that though be the end of the matter? If we are to accept the public/private law distinction outlined briefly above as justification for denial of Judicial Review then it would seem that this thinking might also be applied to the *standard of proof* in relation to doping. However, it is arguable that the reasoning demonstrated in the line of cases relating to Judicial Review [138] is wrong. The thinking behind the decisions is neatly summed up in one of the most recent cases in this area, where, Stanley Burton J. noted:

... the Jockey Club cannot enforce its rules otherwise than by means of its contracts, or the exercise of its property rights. None of its rules have any statutory force. [139]

It is perhaps possible to make the point that due to the threat to the integrity of sport and more widely to the health and wellbeing of participants, that the on-going pharmaceuticalisation of sport at the highest level warrants greater judicial scrutiny than is currently afforded via very clearly private law mechanisms. The value of sport to society is clear [140] and the importance attached to fair competition and equality of access would appear to provide compelling justification for removing at least in part the level of self-regulation enjoyed by sport. If we are to remove a pillar of that self-regulation then does this mean that we also compromise the nature of the contractual relationship that sports governing bodies have with their governing bodies?

The Courts in England and Wales have gradually used private law remedies to ape the effects of Judicial Review and this has led to around the nature of the obligations owed by governing bodies. van Kleef comments:

Since *Bradley*, it can be argued that sports governing bodies owe broadly the same obligations as a matter of private law as they would if their decisions were susceptible to the public law remedy of judicial review. [141]

Oliver has argued forcefully that the public/private notion necessitated by Judicial Review is misleading and that the key consideration lies in the nature of the role of supervision. She comments:

Another way of describing these grounds would be as principles of good administration. Public lawyers are, of course, familiar with the way in which such duties are imposed in judicial review. But duties of this kind are also implied in many contracts, especially contracts of employment; in the rules of trade unions relating to membership and office-holders; in the relations between students and universities; and in the fields of mutual insurance, self-regulatory bodies in business and sport and the duties of company directors. [142]

In highlighting what she views as an artificial distinction between the notion of Judicial Review *per se*, and the impact of the principles of Judicial Review, she concludes;

The privileges afforded by Order 53 [143] may be justified where political mechanisms are in place to check their abuse, but not in the absence of such protections. Thus central and local government and other bodies under direct or indirect political control may be entitled to

rely on Order 53, but bodies such as regulators in sport should not logically be so entitled. Such bodies may nevertheless be under duties of legality, fairness and rationality. [144]

Thus the distinction offered by the contractual relationship in terms of Judicial Review ineligibility may be an artificial one, with, as Oliver points out in Scotland for instance the term Judicial Review applies to the Court's supervisory jurisdiction inconsequential of whether the relationship is a public or private one. [145]

In the USA, Statute precludes such judicial scrutiny, [146] at least where amateur and Olympic sports are concerned, citing the precedence of internal measures and then arbitration with the opportunity for judicial scrutiny only arising if the alternative measures would cause unnecessary delay. [147] However, the position is not or at least perhaps should not be quite so straightforward. The nature of the role of sports governing bodies is complex and some might suggest a *quasi*-public one as explained by Jack Straw who commenting on the specific nature of the Jockey Club stated:

The Jockey Club is a curious body: it is entirely private in nature, but exercises public functions in some respects, and to those extents, but to no other, it would be regarded as falling within [this classification of a quasi-public body]. [148]

Such sports governing bodies, whilst not having their authority drawn from statute or delegated legislation, nevertheless possess the kind of relationship with their athletes normally reserved for public bodies or private ones carrying out a public function. The status of *quasi-public* bodies became more nuanced in relation to the Human Rights Act once the Bill was passed and the question persisted as to whether or not sports governing bodies may be defined as falling within the remit of the legislation. Lord Nicholls in *Aston Cantlow* [149] made reference to some of these issues commenting on the nature of public function:

What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service. [150]

Gray J. went further in *The Jockey Club v Buffham*, [151] stating, (obiter), that, "the Jockey Club is a public authority in every sense of that term". Anderson in summing up his reading of the position in reference to the Human Rights Act 1998 comments:

It is further suggested that Lord Nicholls's view is consistent with the broad reading of the HRA 1998 intended by the legislature. In alluding to that parliamentary intention, it is noteworthy that the Jockey Club itself was of the view that its authority would be encompassed by s. 6(3)(b), as premised on remarks made by the then Home Secretary, Jack Straw, during the committee stage of the Human Rights Bill. [152]

This question was later referenced directly in the case *Rubython v Federation Internationale De L'automobile and another*, [153] where the claimant was seeking injunctive relief against the decision of the Federation Internationale De L'automobile, [154] (FIA), to deny him press

accreditation and therefore access to "The Paddock", which in turn would inhibit his ability to publish his new Formula 1 magazine. The central point in question was summed up by Gray J., who, in contrast to his view on the Jockey Club commented:

Mr Price has to put his case on the footing that the FIA, because of its governing position in relation to motor sport, is a public authority. If it is not a public authority, Mr Price accepts that there can be no question of an entitlement to sue under the Human Rights Act. There is authority, admittedly in the context of judicial review, that a governing sports body is not a public authority, namely *R (on the application of Aga Khan) v Jockey Club* [1993] 2 All ER 853, [1993] 1 WLR 909. [155]

The conclusion on this matter was that the decision of the FIA in refusing to grant accreditation was not a public authority function and that therefore:

... by virtue of s 6(3) and (5) of the Human Rights Act that a remedy would not in those circumstances be available against the FIA in respect of acts of that nature. [156]

This issue in relation to the possibility of the availability of Judicial Review as a remedy has been addressed by several commentators, such as Kelly E., [157] Morris P, Oliver D., [158] and Little G., [159] Downward et al, [160] and Anderson J., who, when discussing the nature of the Jockey Club wrote:

The Jockey Club, and a number of other leading sporting bodies, are not 'indisputably' private bodies. They regulate in a largely unfettered and monopolistic fashion an important aspect of national life and were it not for their existence it would be necessary for Parliament to create a public body (and only a public body would suffice) to perform their functions. [161]

Furthermore as Anderson continues, The Horserace Betting Levy Board receives substantial sums from the betting levy. This money, in part contributes to the Jockey Club's "integrity unit" responsible for the fair administration of horseracing in the United Kingdom. The interest in combatting doping in sport in some respects is as much an issue around integrity in sport as illegal betting in horseracing. Where of course such actions differ is that invariably illegal betting is done to produce typically large financial gain for third parties whereas doping in sport is more often practised by individuals aiming for personal gain which may also benefit third parties. Nevertheless with the threat to the integrity of sport very real, note the recent allegations made suggesting Nation State wide doping conspiracy, [162] is it really sufficient to leave scrutiny of doping issues to simple contract, however closely such scrutiny may mirror that provided by judicial Review?

Where the integrity of sport is threatened by suspicious betting patterns, the response of the authorities is very different to the response engendered by doping violations. One may question the reasons behind this when in some respects at least they have the same aim and the same result as can be seen from the quote below discussing the impact of betting and consequent match-fixing on sport:

Eventually the credibility of results will be called into question. Sport is based on a hierarchy that derives its social and moral values from the concept of merit. The winner should be the one who has poured the most lawful resources into their preparation or who has worked the hardest. If in future the concept of a champion as a model of excellence becomes tarnished

by the manipulation of matches or the corruption of players, then the entire credibility of sport will vanish. [163]

This comment could very easily have been made about doping in sport rather than about the threat posed by betting and match-fixing but whereas the latter can give rise to criminal sanctions and a subsequent jail sentence, unless the transgressor is involved in smuggling and supply, the former will not. Perhaps it is time that sport viewed doping in the same vein that it views match-fixing? There are clear similarities between doping and match-fixing and whilst it is true that the practice of lay betting, (where bets are placed on individuals or teams to lose rather than win), has shifted the emphasis and penetration of corrupt betting, both nevertheless compromise what has been referred to as the "glorious uncertainty of sport". [164] It seems that there are battle lines being prepared to change this. Lord Moynihan has recently introduced a Bill into the House of Lords looking at the governance of sport. Amongst the provisions of this Bill is the intended criminalisation of doping in sport:

(2) An athlete is guilty of an offence if he or she knowingly takes a prohibited substance with the intention, or one of the intentions, of enhancing his or her performance.

(3) A person belonging to the entourage of an athlete is guilty of an offence if he or she encourages or assists or hides awareness of the relevant athlete taking a prohibited substance with the intention, or one of the intentions, of enhancing such athlete's performance.

(4) Any person guilty of an offence under subsection (2) or (3) shall be liable-

(a) on summary conviction, to a fine not exceeding the statutory maximum or imprisonment for a term not exceeding six months, or to both; or

(b) on conviction on indictment, to a fine not exceeding the statutory maximum or imprisonment for a term not exceeding two years, or to both. [165]

Whilst this Bill is highly unlikely to be made law due to time pressure, [166] the intention as further explained by Lord Moynihan is to promote debate and discussion both within The Houses of Parliament and beyond. It is though perhaps indicative of the way thinking is now moving in this area. This is further evidenced by the situation emerging in Germany where there are also moves to make doping a crime, [167] a move that will affect foreign athletes competing in Germany as well as the 7000 or more in Germany's registered testing pool. This would then raise the spectre of an athlete being found guilty under the current regulations with the associated standard of proof, (that of the *comfortable satisfaction*) and suffering a two year or now four year ban under the new Code in front of the Court of Arbitration for Sport and yet there being insufficient evidence to convict of a criminal act under Germany's new law. This is hardly a satisfactory state of affairs and will perhaps increase the sense of injustice that many feel about the imbalance of power which underpins the current anti-doping regime. [168] However, whilst the dogma of adherence to the reality of the contractual relationship remains, the *standard* is likely to remain some way short of beyond reasonable doubt which may afford athletes greater protection than that currently offered. It is though the case, as *Korda v ITF Ltd* [169] clearly confirms that a contract, (albeit at times perhaps a rather one sided contract), exists between sports participants and their governing bodies despite the fact that there may be no express agreement. Lightman J. affirms:

There is no written agreement signed by the parties and there is no oral agreement either. Such an agreement is however plainly to be inferred... [170]

Important factors which dictate the implication of the existence of a contract included in this instance Korda's knowledge of the existence of an anti-doping programme administered by the ITF, his provision of previous urine samples in support of the programme and his previous agreement to be bound by the programme when attempting to assert other rights. [171] Lightman J., goes on,

Mr Flint for Mr Korda has submitted that his conduct is consistent with merely submitting to the jurisdiction of the AC rather than such as to establish in the circumstances the creation of a contractual relationship. This appears to me to be totally unreal. Any submission to the jurisdiction of the AC must in the circumstances be part of an acceptance of a contractual relationship on the terms of the Programme which defines the status, jurisdiction and procedures of the AC. [172]

With that acceptance of a contract comes the implied acceptance of the standard of *comfortable satisfaction* as laid out in the doping regulations rather than that of *beyond reasonable doubt*.

The applicability of the standard of *comfortable satisfaction* was explored in *Collins v USADA*. [173] It was subsequent to the adoption of the *standard of comfortable satisfaction* by the WADA in the first incarnation of the Code in 2003 that the International Amateur Athletic Federation, (IAAF), removed the requirement for securing proof *beyond reasonable doubt* when they amended their own rules which came into effect 1st March 2004. [174]

Successive case law has helped to define what may amount to *comfortable satisfaction*, [175] and it is clear that the standard is very much dependent on the circumstances of each case and that the more serious the consequences then the higher this standard will be. [176] Of course the circumstances facing Lance Armstrong were arguably more serious than for any other "doping cheat" - the complete ruin of the reputation that he had so carefully constructed and protected throughout the course of his career, but more than that, his legend, his legacy and his charitable works. [177] All were threatened by the possibility of his exposure as a drug-cheat and this is why the case against him had to be flawless. The circumstances for Armstrong were toxic and to reach a standard of *comfortable satisfaction*, one would imagine would require very significant evidence. It is therefore disappointing that the USADA were not more careful with their charging letter and were never able to obtain anything more than circumstantial, (albeit potent), evidence. This evidence did include powerful testimony from former teammates such as George Hincapie and others [178] and numerous references to suspicious banking transactions, [179] but there was never the smoking gun of a conclusively failed test to damn Armstrong.

It is clear that if greater care and attention had been devoted to policing cycling in the early days of Armstrong's career then the deceit may never have gone so far. It is arguable that the failings of cycling to construct a rigorous anti-doping regime indirectly created and then destroyed the Armstrong myth. But for their failings, he would never have had the success and so would not have been able to build his reputation which has subsequently been so dramatically deconstructed. The likelihood may have been that with an effective anti-doping regime, he would have been caught and punished and then returned to cycling all within a

few years of his comeback from cancer, rather than being able to construct his legend only for it to ultimately be destroyed by the USADA.

Armstrong of course has been stripped of all of his competitive results from 1st August 1998. This sanction runs far beyond the conventional statute of limitations as defined by Article 17 of the WADA Code, which states: [\[180\]](#)

No action may be commenced against an Athlete or other Person for a violation of an anti-doping rule contained in the Code unless such action is commenced within eight years from the date of the violation occurring. [\[181\]](#)

The question must therefore be posed as to why the USADA were able to ignore this very clear provision from the WADC. The first point that needs to be made is that the statute as laid out in the WADC is not absolute. Whilst this in itself is not necessarily a bad thing, its application nevertheless does draw some concerns as it raises the possibility of inconsistency, at least between different sports if not within sports. The CAS in ruling on the matter of the application of the statute of limitations has commented:

interruption, suspension, expiry or extension of such [eight-year] time-bar ... should be dealt with in the context of the principles of private law of the country where the interested sports authority is domiciled. [\[182\]](#)

It is the case that this was merely an advisory opinion issued by the CAS but nevertheless the implications are clear - it is possible to disregard the provisions from Article 17 if the circumstances dictate. The relevant provisions at play here which enabled the USADA to go back much further than the conventional 8 years, (10 years under WADC 2015), enabled by the WADC revolved around Armstrong's behaviour in so vociferously protecting and propagating his image, his maintenance of the Armstrong myth. This had been built upon lies, fraud and even perjury, [\[183\]](#) and according to United States law, this dictated that the conventional statute of limitations could be dis-applied. One must distinguish in this instance between passive inaction by an athlete in not owning up to their doping past and the kind of concerted affirmative action taken by Armstrong over a long period of time to conceal his behaviour. [\[184\]](#) As the reasoned decision makes clear:

Mr. Armstrong fraudulently concealed his doping from USADA in many ways, including lying under oath in the SCA case; lying in the 2000 French judicial investigation; intimidating witnesses; and soliciting false affidavits. Mr Armstrong cannot benefit from the running of a statute of limitation when a violation would have been asserted by USADA earlier but for his fraudulent concealment. [\[185\]](#)

Whilst on the face of it this would appear to be a fairly logical state of affairs, the practical implications of the policy threaten to bring inconsistency to anti-doping policy. The CAS advisory opinion quoted above [\[186\]](#) makes it clear that these issues should be dealt with under the private law provisions of the country where the sports body is located. Whilst that should maintain consistency within sports it may mean that there will be issues between sports which may have their headquarters located in different places. The most obvious response to this is to make clear that as the CAS is domiciled in Switzerland then Swiss law should universally govern these issues, but it is not immediately apparent that this will happen. The danger of inconsistency creeping into anti-doping policy is something that needs to be considered if the policy, as stated by the *reasoned decision* is pursued. It is

therefore unfortunate that Armstrong did not take his case to the CAS which was one of the safeguards to his rights under due process that the Court in Texas cited. [187] Similar provisions to those outlined above in the *reasoned decision* that allowed the USADA to override Article 17 exist in England and Wales under the *Limitation Act* 1980. Specifically s32 states:

Postponement of limitation period in case of fraud, concealment or mistake.

(1) Subject to [F4subsection (3)][F4subsections (3) and (4A)] below, where in the case of any action for which a period of limitation is prescribed by this Act, either-

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. [188]

The conventional limitation period for a simple contractual issue is one of six years. [189] It is possible to suggest that therefore this should be the limit contained within Article 17 rather than the 8 years outlined in the WADC 2009 and the 10 years in WADC 2015. It has after all been made clear consistently that the relationship between a sports participant and their governing body is contractual. [190] Therefore it is legitimate to question the validity of the current 8 year limitation period contained in Article 17. Why should sports participants be compelled to submit to particular procedures due to essentially one sided "contractual" agreements when they are not able to exploit the very limited advantages that such a relationship may bring? It is pertinent to note that a compelling reason from their perspective for the USADA to bring their charges against Armstrong in the arbitration process was due to his agreement to submit to arbitration procedures in several of his International Cycling Licence applications. [191] This it was suggested amounted to a clear contractual agreement to submit to procedures of the choosing of the governing body and their acolytes. The advantages to Armstrong are arguably less clear. Whilst it must be acknowledged that the Appeal Court in Texas was satisfied that arbitration procedures were capable of protecting Armstrong's interests, commenting, as we have already seen that "the Court finds the USADA arbitration rules ... are sufficiently robust to satisfy ... due process", [192] it is nevertheless a fact that that the usual inevitable conclusion to a doping case taken before the CAS or indeed domestic tribunals is one where the individual athlete loses their case and therefore their livelihood. [193]

Outwith such concerns however, there are clearly sound reasons for the suspension of any limitation period. Whether such sound reasons extend to those exhibited in the case in hand is more contentious. If we examine the wording of the *Limitation Act* 1980, it is clear that the limitation period can be postponed where there has been fraud or concealment. Further, it is clear that the actions of Lance Armstrong, over an extended period of time, fit squarely within these parameters. What is more difficult to reconcile though is the second limb of the equation which states, (to reiterate):



the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. [194]

The "discovery" of Armstrong's fraud has been well documented in the *reasoned decision* and contains the ammunition necessary for postponing the running of the limitation period detailed in Article 17 of the WADC. That however should not necessarily be the end of the matter. One has to question when his concealment should have been discovered. With reasonable diligence, could his fraud have been discovered much earlier? Black's Law Dictionary defines *reasonable diligence* thus:

A fair, proper, and due degree of care and activity, measured with reference to the particular circumstances; such diligence, care, or attention as might be expected from a man of ordinary prudence and activity. [195]

The circumstances of each scenario are thus of critical importance in assessing whether *reasonable diligence* has been followed. Could the USADA and/or the UCI have discovered Armstrong's fraud much earlier than they eventually did so? If the answer to this question is affirmative then this must surely prevent them from postponing the limitation period contained in Article 17. If we turn to examine the particular *circumstances* surrounding Lance Armstrong, it seems surprising that his actions were not "discovered" far earlier, especially given the signs outlined earlier in this article. The simple answer appears to be that no one was looking particularly carefully. It may be suggested that there was a culture of denial amongst those intimately involved in the safeguarding of their sport which seemed to run even as Armstrong was about to be unmasked. Leading anti-doping expert Dr Michael Ashenden [196] writing after Armstrong's unmasking commented:

If the UCI failed to examine Armstrong's raw data when he placed third at the 2009 Tour de France, the UCI were derelict in their obligations to faithfully run the passport on behalf of the riders, teams and race organizers who contribute 85 percent of the costs of running the passport program. [197] Those stakeholders deserve to know that their program is being run by competent and diligent managers. [198]

He continued:

If, on the other hand, the UCI did examine Armstrong's raw data but failed to recognize that flat line blood values in tandem with suppressed bone marrow activity in the third place getter of a major tour was consistent with the possible use of blood transfusion, they have proven themselves to be biologically illiterate. This immediately puts into question the veracity of the UCI's repeated statements that their interpretation of the peloton's blood values indicates a decrease in the extent of doping since 2008. There could be 50 cyclists doping like Armstrong and the biologically blind UCI could be completely unaware of their existence. [199]

One possible explanation for this apparent lack of due diligence in pursuing Armstrong may lie in a conflict of interests that was again highlighted by Ashenden:

The fact that the UCI demanded \$100,000 from Armstrong, and later failed to share his suspicious blood results with their expert panel, is a damning pair of facts that must be scrutinized by an independent agency, ... Because Armstrong's blood results were also accessed by the Lausanne laboratory, who were given a free analyzer paid for by Armstrong, their involvement in this highly questionable scenario must also be included in a forensic scrutiny of the triangular relationship between the laboratory, Armstrong and the UCI. [200]

There may be a simpler answer of course which perhaps has more to do with sheer stubborn refusal to accept the inevitable, an attitude built upon foundations of familiarity and friendship nurtured by Armstrong with the great and good of world cycling, epitomised in particular by his relationship with Hein Verbruggen, [201] who in the aftermath of the damning broadcast by Tyler Hamilton in 2011 on CBS television, [202] in which several allegations were made against Armstrong, protested:

That's impossible, because there is nothing. I repeat again: Lance Armstrong has never used doping. Never, never, never. And I say this not because I am a friend of his, because that is not true. I say it because I'm sure. [203]

It was of course just a short while later that the Armstrong myth finally evaporated and he was revealed to everyone as a serial doping cheat. Hindsight is a seductive mistress but it seems inconceivable that more could not have been done to unravel any fraud or misrepresentation on the part of Armstrong and perhaps therefore questions the disregarding of the limitation period as outlined in Article 17 of the WADC.

Armstrong is currently serving a lifetime ban [204] from cycling imposed by USADA and the UCI in the wake of the *reasoned decision*. Cycling continues to suffer from innuendo with each subsequent winner of the Tour de France inevitably having to face a barrage of questions linked to the Armstrong era. [205] Each seeks redemption or at least, (in Armstrong's case), release from the finality of his ban, whilst cycling has instigated its Independent Commission [206], to which Armstrong himself has given evidence. [207] He has recently begun what some may see as a charm offensive, [208] which has included his first television interview [209] since the confessional he gave to Oprah Winfrey in January 2013. Armstrong's suggestion is that he merely seeks equity with other convicted drugs cheats, insisting that he is being treated more harshly due to his high profile and notoriety. Roan reports:

Over his seven-year reign at the Tour between 1999 and 2005, an incredible 87% of the top-10 finishers were confirmed dopers, or suspected of doping.

It is on this basis Armstrong believes he has been harshly treated, with other dopers given shorter bans, and keeping their titles while he lost his. [210]

The former President of the UCI [211] has gone on record as stating that Armstrong has in part been made a scapegoat for the sins of cycling and has indeed been treated more harshly than others. [212] A reduction in the length of his ban for Armstrong in the light of his discussions with the Commission may be edging closer. It would though undoubtedly be opposed by many from within and outside the sport who might suggest that cycling itself has not yet atoned for its systematic complicity with the doping regime prevalent in the sport for many years. Cycling simply cannot erase its past in the way that it has erased Armstrong's seven Tour de France titles. To further the Commission's investigations it may

be appropriate to consider some kind of limited amnesty for those who choose to cooperate with the investigation. This path though has some difficulties which will now be briefly explored.

#### 4. AN AMNESTY

It has been mooted that a possible way forward for cycling is to implement an amnesty in order to purge the sport of its previous wrongdoings. This would be a far-reaching move and may be pursued as a specific measure to cycling, in part at least to encourage witnesses to come forward, [213] or a more generic amnesty, the scope of which remains unclear. [214] Whilst perhaps this may be an interesting idea, one must question whether such a course of action would be appropriate for cycling to take and whether there is legal justification for it?

The Oxford English Dictionary defines amnesty thus:

- An official pardon for people who have been convicted of political offences.
- An undertaking by the authorities to take no action against specified offences or offenders during a fixed period. [215]

The desire for an amnesty is seductive. It may avoid many years of difficult and explosive prosecutions and it could also promote reconciliation and a building of trust between the cyclists, the governing body and the anti-doping organisations. Such a move though would almost be unprecedented in sport. [216] We are perhaps familiar with them in a political context, most notably of course in South Africa following the dismantling of apartheid. [217] But for sport and particularly for a provision as thorny and apparently as widespread as doping it would be a problematic proposal. Whilst there is no provision for such a measure contained within the WADC, [218] with consensus from key stakeholders such as the UCI, the WADA and the International Olympic Committee some form of pardon or plea-bargaining approach may be possible. Article 10.6.1.1 states in part:

The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Athlete or other Person and the significance of the Substantial Assistance provided by the Athlete or other Person to the effort to eliminate doping in sport. No more than three-quarters of the otherwise applicable period of Ineligibility may be suspended. If the otherwise applicable period of Ineligibility is a lifetime, the non-suspended period under this section must be no less than eight years. [219]

The WADC goes further in encouraging cooperation and in endeavouring to promote this kind of approach, and article 10.6 of WADC 2015, provides for reduced or removed ineligibility in circumstances where the accused provides *substantial assistance* in the anti-doping investigation. This approach however is still some way short of any kind of amnesty. With this approach the threat of murky backroom deals looms large and is enabled by further provision in the Code which goes on:

In unique circumstances where WADA determines that it would be in the best interest of anti-doping, WADA may authorize an Anti-Doping Organization to enter into appropriate

confidentiality agreements limiting or delaying the disclosure of the Substantial Assistance agreement or the nature of Substantial Assistance being provided. [220]

Whilst the provision of such confidentiality agreements displays a pragmatic and common-sense approach to the circumstances under which an athlete may be in a position to offer such *substantial assistance*, caution must nevertheless be the watchword. The governance and practice of sport is littered with allegations of corruption, as the ongoing allegations involving FIFA, the International Amateur Athletic Federation, (IAAF) and now the Association of Tennis Professionals, (ATP), [221] all indicate. Past history in cycling also suggests that where it may be judicious to maintain an *omerta* then extreme measures may be taken to protect those who might be central or at least complicit in such an approach. With this provision now contained in the new code there is a real danger that justice will not be seen to be done and even where a silence has been maintained for sound, genuine reasons the suspicion may linger that foul practice is being pursued by a sport for its own particular means. [222] There is a danger that in the rush to expose a wider ring of drug cheats, the impetus will be lost in dealing with the individual. [223]

In relation to any possible amnesty, it may be difficult to justify directing it towards any one particular sport such as cycling. It would be a particular challenge to justify applying an amnesty to cycling for example but not to other sports which may be considered to have a doping problem. [224] It would almost certainly need to be some kind of generic amnesty administered by the WADA. [225] Such a precedent would be dangerous in that it would be rewarding, (or at least ignoring), previous corrupt behaviour and would arguably increase future motivation by individuals to engage in doping practices if they thought they may be subject to a future amnesty. The very financial future of the sport may be put at risk by such a move as it would appear at least possible that many mainstream sponsors might desert rather than continue to be associated with a sport where such a measure was considered to be the only way forward. Such an event has again recently been highlighted in relation to the IAAF which seems likely to lose the sponsorship of Adidas in the wake of the doping scandal which has engulfed the organisation. [226] Further complications may arise in countries where doping in sport is a criminal offence and therefore there would need to be consultation and agreement with state prosecutors if such a policy was to be pursued.

There is a clear tension between on the one hand the possibility of secrecy, or some form of information blackout being erected around those rendering *substantial assistance* as outlined in Article 10.6.1.3 and the guidance issued on amnesties in a political context by the Inter-American Commission which in 1992 looked into the issue of amnesties relating to criminal acts in Argentina, El Salvador and Uruguay. Cassel comments on the work of that Commission:

It offered two guidelines for nations grappling with the problem. First, only amnesties enacted by democratically elected bodies, not self-amnesties by the abusive regime itself, have legal validity. Second, even democratically enacted amnesties must respect the need to investigate, because both society and the families of victims have the right to know the truth. [227]

There is certainly an argument that might suggest that the UCI could be portrayed as the abusive regime central to the doping scandals in cycling over the years, [228] and it is also the case that truth and reconciliation commissions would invariably have open truth as a pre-requisite of any amnesty but it is perhaps taking the right to truth a step too far to

suggest that this kind of right might apply to doping in sport. These are not after-all gross human rights violations for which a right to truth must be justified to bring reconciliation and closure to victims and family and friends of victims. They are rather merely instances of sporting fraud and breach of contract so any attempt to invoke a "right to truth" would be unlikely to be fruitful. However, whilst this avenue may not produce any positive response in the event of secrecy being invoked by *substantial assistance*, there may be another avenue that may enable light to be shone.

## **5. THE FREEDOM OF INFORMATION ACT 2000**

This avenue may lie in the United Kingdom within The *Freedom of Information Act 2000*, (FOI), which grants a general right to information from public authorities to anyone requesting such information. [229] Schedule 1 of the legislation lists the designated *Public Authorities* subject to the FOI and UK Sport is one of those listed and therefore is subject to the UK FOI, [230] and they publish details of their obligations under the legislation on their website. [231] Similarly and perhaps more pertinently UK Anti-Doping, (UKAD), is also subject to the legislation. [232] It is well known however that sports governing bodies being private entities are not subject to Judicial Review, [233] and nor are they subject to the FOI Act [234] *per se*, albeit there has been some pressure for this position to be reassessed. For example the Football Supporters Federation has actively campaigned for the Football Association to be brought within the remit of the legislation. [235] Whilst not currently listed in Schedule 1 as being subject to the FOI, there is nevertheless provision within the legislation for further designation of public authorities. Section 5 states:

5 Further power to designate public authorities.

(1)The [F1Secretary of State] may by order designate as a public authority for the purposes of this Act any person who is neither listed in Schedule 1 nor capable of being added to that Schedule by an order under section 4(1), but who-

(a) appears to the Secretary of State to exercise functions of a public nature, or .

(b) is providing under a contract made with a public authority any service whose provision is a function of that authority. [236]

The door therefore is left open for the reclassification of certain governing bodies to be brought within the remit of the FOI. With the temptation to ignore or overlook transgressions that may portray their sports in an unfavourable light, something is perhaps needed to "encourage" those that run sports to embark on a policy of greater disclosure around doping and other issues related to corruption. The best route to achieve this aim may ultimately lie in the application of the FOI. Whilst such a move may be unlikely at present, if UK Sport, however, were to hold any information regarding the areas of concern expressed above concerning the application of article 10.6.1.3, [237] then this could be subject to an FOI request which may raise some interesting issues which might otherwise have remained shrouded.

The power of the FOI to shine a light into anti-doping provision was illustrated in a decision by the Information Commissioners Office in an appeal in July 2013 following the refusal of UKAD to disclose information pertaining to details of drug tests which had been carried out on competitive British Olympic weightlifters over a 24 month period.[238] UKAD had attempted to refuse to release the information under either section s36(2)(c) as being conduct

which would likely prejudice the effective conduct of public affairs or s40(2) as being information of a personal nature the disclosure of which may violate the Data Protection Act. [239] Under the first limb of s36(2), UKAD were successful in arguing that disclosure would prejudice the administration of an effective anti-doping programme. The Commissioner stated:

the disputed information would be likely to assist athletes, support personnel or other relevant parties in making deductions about the public authority's testing programme in relation to weightlifting. It is conceivable that those deductions could assist athletes so inclined to plan their doping activities accordingly to avoid detection. The Commissioner therefore accepts that the likelihood of prejudice to the ability of the public authority to conduct effective testing on competitive British weightlifters in the event of disclosure is real and significant. [240]

However, there is also a public interest requirement to be satisfied under s36(2)(c) and it was here that UKAD failed to convince the Commissioner that disclosure would prejudice the relationships between UKAD, governing bodies and other related personnel and influence them to curtail cooperation with UKAD in the anti-doping regime. The Commissioner made the point that there was a serious reputational risk to any governing body which refused to cooperate and any athlete faced the possibility of sporting sanctions if they withdrew their cooperation. [241] UKAD was also unsuccessful under s40(2) of the legislation relating to personal information, and the information was released. The Commissioner commented:

Athletes generally expect that details of their test results could be made public as part of measures to prevent doping and/or to reassure the public that a competition was free of doping or that a particular sport is subject to rigorous anti-doping measures. In the circumstances of this case where there is already a clear precedent for similar disclosures by the international governing body for weightlifting, the Commissioner is of the view that the athletes would have been under no illusion when they provided samples for testing that details of the tests could be made public. Given the athletes' expectations in relation to drug testing, the Commissioner is satisfied that disclosure would not constitute a significant intrusion on their private lives. As mentioned, the public authority had also revealed that British Olympians were tested at least once in the run up to London 2012. [242]

In concluding, the Commissioner reported that, "He is satisfied that in the circumstances, disclosure was necessary to meet the legitimate public interest in transparency".[243] Essentially therefore it can be seen that it is the public interest argument that made sure this particular information was released. Arguably though in relation to this case, the continuing argument around possible non-disclosure in order to maintain, and the at-least-arguable public interest in maintaining a properly functioning anti-doping regime was won by UKAD; and it remains to be seen if the same public interest arguments would still hold sway with the new WADA Code in place, which now specifically references the need under certain circumstances to maintain secrecy.

It is the case however that the WADC 2015 explicitly references material disclosure of details of athletes' tests. Article 14.4 of the Code states:

Anti-Doping Organizations shall, at least annually, publish publicly a general statistical report of their Doping Control activities, with a copy provided to WADA. Anti-Doping

Organizations may also publish reports showing the name of each Athlete tested and the date of each Testing. (emphasis added). [244]

It is certainly the case that the point made by the Commissioner above that athletes expect their details to be made public would no-longer be true due to the presence of the new article 10.6.1.3 and therefore this may lead to greater likelihood that the Commissioner would rule against disclosure in any future case. The ideal position can perhaps be best summed up in the Decision Notice concerning UKAD (referenced above):

A body funded with public money must be transparent. The public authority cannot expect the public to consider it beyond reproach simply because it says it is, it has to prove it. Its actions must be open to media and public examination. It is only through such transparency that procedures can be reviewed, suggestions made and protocols improved. The argument that disclosure could allow unscrupulous individuals to determine a 'testing pattern' is exactly the kind of reason why the disputed information should be disclosed so that any shortcoming in the system can be identified. If predictable test patterns exist, then the system is already flawed. If there is nothing in the testing protocol which would cause embarrassment then there is no reason not to disclose the disputed information.[245]

With the recent problems that have emerged in relation to the UCI and the IAAF with regards to doping and with FIFA [246] and the ATP, [247] with other forms of corruption, the call for greater transparency in sports governance is likely to increase. It can already be seen that there have been moves to compromise the traditional independent pyramid nature of sports governance and decision making, which highlights:

An increasing number of people want to be involved in sport at all levels and in different capacities. This has led to more interest and intervention from national governments in sporting matters and the activities of sports bodies including verification of whether sports bodies are fit for public funding. [248]

Without fit and proper governance, then there is a clear danger that we will see more of the kinds of scandals referenced above that have recently come to light in football, athletics, tennis and cycling. It is arguable that measures empowered by the FOI 2000 and seen to operate in the Decision Notice involving UK Anti-Doping, [249] may enable a degree of scrutiny that may satisfy those seeking to compromise the hierarchy of decision making in sports governing bodies.

## **6. CONCLUSION**

Armstrong's reluctance to challenge the USADA has denied the sporting world the opportunity to hear all sides of this case. His acceptance of defeat to Travis Tygart and the USADA suggests that all of the allegations contained within the *reasoned decision* are true which in itself is not surprising and therefore perhaps is not the main issue that those who are interested in drug free sport should be concerned about. Of far more importance is the action, (or inaction) of the UCI during Armstrong's long reign at the summit of world cycling and the apparent conflict between the UCI and the USADA, both of whom were seemingly working to the same aim, (that of a drug free sport). These conflicts were summed up in *Armstrong v Tygart* where District Judge Sparkes commented:

there are troubling aspects of this case, not least of which is USADA's apparent single-minded determination to force Armstrong to arbitrate the charges against him, in direct conflict with UCI's equally evident desire not to proceed against him. Unfortunately, the appearance of conflict on the part of both organizations creates doubt the charges against Armstrong would receive fair consideration in either forum. [250]

There are many questions that need to be answered, (just a few of which have been considered in this paper) and the danger now is that these will be left, perhaps only to be considered at a much later date. The puzzling response of the UCI has perhaps best been summed up by Dr Michael Ashenden referenced earlier. [251]

It is interesting to consider this case in the context of whether something similar is more or less likely to occur in the future in the United Kingdom. Would or should governing bodies face greater scrutiny and accountability for their actions? Should this scrutiny come via judicial review? It is apparent that unless there is a fundamental shift then this particular avenue is out of the question. Successive case law has made this abundantly clear however desirable it may be, [252] and it is unlikely to change, irrespective of whether or not such scrutiny may make a massive sporting fraud on a par with Armstrong less likely. Where there may be an avenue for an elevated level of scrutiny around the practice of the UCI or any other governing body may lie in an examination of the Freedom of Information Act. Whilst there is the requirement in this instance for there to be someone interested in obtaining the information and that therefore it is more likely to be a detection rather than prevention tool, there is certainly an argument to put forward that the potential availability of information under the legislation means that it is more likely that the sporting organisations will be disposed to follow rigorous process in their implementation of anti-doping policy and programmes. It is just possible that the threat of the exposure of poor practice under something similar to the FOI might have meant that the UCI would have sharpened up their act and pursued the cause of a drug free sport with rather more rigour than appears to have been the case with Lance Armstrong.

Where though does this leave cycling? There is a clear lack of trust between the anti-doping authorities and the governing body which threatens to derail any measures or initiatives that may be suggested. [253]

These are difficult times for cycling but they have been the authors of their own downfall, from the actions of the participants to more seriously the behaviour of those that are charged with running and safeguarding their sport. It is to those individuals that the spotlight now needs to turn.

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[1] Author: Peter Charlish, Principal Lecturer in Law, Sheffield Hallam University. The author would like to thank Mr Jamie Grace, Senior Lecturer at Sheffield Hallam University, for his help and guidance in putting this article together.

[2] <http://www.chicagohs.org/history/blacksox.html> accessed 23rd March 2013



[3] [http://www.bbc.co.uk/worldservice/learningenglish/newsenglish/witn/2005/08/050823\\_maradona.shtml](http://www.bbc.co.uk/worldservice/learningenglish/newsenglish/witn/2005/08/050823_maradona.shtml) accessed 23rd March 2013

[4] [http://news.bbc.co.uk/sport1/hi/other\\_sports/1039129.stm](http://news.bbc.co.uk/sport1/hi/other_sports/1039129.stm) accessed 23rd March 2013

[5] <http://www.telegraph.co.uk/news/uknews/8456002/Claims-of-multi-million-pound-race-fixing-scandal-to-be-investigated.html> 24th March 2014

[6] Author (2012)

[7] *USADA v Lance Armstrong* 2012 Reasoned Decision of the USADA on Disqualification and Ineligibility

[8] <http://www.abc.net.au/news/2012-10-22/lance-armstrong-chronology/4327966> accessed 14th January 2016

[9] *Ibid*

[10] Armstrong L., *"It's Not About The Bike: My Journey Back to Life"*, Yellow Jersey Press, London,

[11] <http://www.heraldsun.com.au/news/a-brief-look-at-some-of-those-who-havent-believed-lance-armstrong/story-e6frf7jo-1226395160311> accessed 14 th January 2016

[12] [http://www.nytimes.com/2005/07/25/sports/sportsspecial/25bike.html?\\_r=0](http://www.nytimes.com/2005/07/25/sports/sportsspecial/25bike.html?_r=0) accessed 2nd April 2013

[13] <http://www.theguardian.com/sport/gallery/2008/jul/09/tourdefrance.cycling> [http://news.bbc.co.uk/1/hi/special\\_report/1998/07/98/tour\\_de\\_france/134842.stm](http://news.bbc.co.uk/1/hi/special_report/1998/07/98/tour_de_france/134842.stm) accessed 2nd April 2013

[14] Cooke, J., "Doping And Free Speech", *ESLJ* vol 5 no2 para 71 <http://www.entsportslawjournal.com/articles/10.16997/eslj.67/> accessed 2nd April 2013

[15] Cycling Independent reform Commission, (CIRC), "Report to the President of the Union Cycliste Internationale", February 2015 at p7

[16] Prior to his cancer, Armstrong had not been known as a particularly strong climber. Excellent climbing ability is a key constituent of success in any one of the Grand Tours, (La Vuelta, Giro D'Italia and the Tour de France), in cycling. See *USADA v Lance Armstrong* 2012 Reasoned Decision of the USADA on Disqualification and Ineligibility at p35

[17] <http://www.bbc.co.uk/sport/0/cycling/22193315> accessed 23rd April 2013

[18] <http://www.si.com/vault/2012/10/22/106246058/a-massive-fraud-now-more-fully-exposed> accessed 24th April 2013

[19] <http://www.telegraph.co.uk/sport/othersports/cycling/lancearmstrong/9819760/French-newspaper-suggests-Lance-Armstrong-escaped-ban-in-1999-after-blunder-by-cyclings-world-governing-body.html> last accessed 29th April 2013

[20] <http://www.cyclingnews.com/news/two-armstrong-doping-controls-at-2001-tour-de-suisse-suspicious-but-not-positive-uci-says/> accessed 29th April 2013

[21] <http://www.telegraph.co.uk/sport/othersports/cycling/lancearmstrong/9608824/Lance-Armstrongs-masseuse-Emma-OReilly-claims-she-worked-as-drug-runner-for-US-Postal.html> accessed 29th April 2013

[22] Jacques Anquetil, Eddy Merckx, Bernard Hinault and Miguel Indurain

[23] [http://news.bbc.co.uk/sport1/hi/other\\_sports/cycling/3708036.stm](http://news.bbc.co.uk/sport1/hi/other_sports/cycling/3708036.stm) accessed 29th April 2013

[24] Jason Steiner "Genetic Doping: The Lance Armstrong Case" in Kellen Bradley (ed) *Sports and Entertainment Law Journal Vol 1*, (Arizona State University 2011) at p57

[25] *Op Cit 7* at p73

[26] <http://www.theguardian.com/sport/2004/jul/24/tourdefrance2004.tourdefrance1> accessed 29th April 2013

[27] *Op Cit 7* at p79 - At the SCA Arbitration hearing

[28] *Ibid* at p74

[29] *Ibid* at p77-78

[30] *Ibid* at p82-86

[31] SCA were a company that provided insurance coverage against Armstrong winning his sixth consecutive Tour. They were reluctant to pay the \$5million bonus due to the drug abuse rumours and consequently Armstrong took them to court to recover the money. See <http://www.telegraph.co.uk/sport/othersports/cycling/lancearmstrong/9602544/Lance-Armstrong-could-face-perjury-charges-following-USADA-allegations.html> accessed 29th April 2013), for more details.

[32] *Op Cit 7* at pp146, 147

[33] [http://velonews.competitor.com/2011/02/news/lance-armstrong-timeline-pre-comeback\\_160299](http://velonews.competitor.com/2011/02/news/lance-armstrong-timeline-pre-comeback_160299) accessed 30th April 2013

[34] [http://velonews.competitor.com/2011/07/news/186088\\_186088](http://velonews.competitor.com/2011/07/news/186088_186088) last accessed 14th January 2016

[35] [http://usatoday30.usatoday.com/sports/topstories/2008-09-09-2518014136\\_x.htm?siteID=je6NUbpObpQ-CS7dsXoCoJSy6eSQL03ZSw](http://usatoday30.usatoday.com/sports/topstories/2008-09-09-2518014136_x.htm?siteID=je6NUbpObpQ-CS7dsXoCoJSy6eSQL03ZSw) accessed 14th January 2016

[36] He finished 3rd in 2009 and 23rd in 2010

[37] <http://www.theguardian.com/sport/2013/jan/18/lance-armstrong-admits-doping-oprah-winfrey> accessed 30th April 2013

[38] It is an interesting point of debate not addressed here whether the USADA actually had the authority to strip him of these results and titles rather than the governing body

[39] *Op Cit* 7 : That results management authority stemmed from Armstrong's required membership of USA Cycling and their adherence to USADA protocols

[40] *Op Cit* 7

[41] *Op Cit* 15 at p56

[42] *Ibid* at p3

[43] <http://www.telegraph.co.uk/sport/othersports/athletics/8905453/Anti-drug-agency-follows-new-leads-after-shot-putter-Carl-Fletcher-is-jailed-for-trafficking.html> accessed 30th April 2013

[44] <https://www.wada-ama.org/en/what-we-do> accessed 30th April 2013

[45] <http://www.telegraph.co.uk/sport/othersports/cycling/lancearmstrong/9603149/Lance-Armstrong-would-get-caught-today-says-Wada-director-general-David-Howman.html> accessed 30th April 2013

[46] EPO to remain effective needs to be kept cool at all times, hence the need for a thermos flask for this purpose

[47] *Op Cit* 7 at p18

[48] <http://www.telegraph.co.uk/sport/othersports/cycling/9649732/Paul-Kimmage-sues-UCI-president-Pat-McQuaid-in-wake-of-Lance-Armstrong-scandal.html> last accessed 30th April 2013

[49] <http://www.cyclingweekly.co.uk/news/wada-turns-back-on-uci-independent-commission-35154> accessed 30th April 2013

[50] <http://www.cyclingnews.com/news/ashendens-view-on-armstrong-doping-allegations/> accessed 30th April 2013

[51] <http://www.theguardian.com/sport/2012/oct/11/lance-armstrong-uci-doping-scandal> accessed 14th January 2016

[52] *Op Cit* 15 at 2.1.3 p93

[53] *Ibid* at 2.1.3 at p93

[54] *Ibid* at 2.2.1.1 at p107

[55] Mihir Bose 2004, at <http://www.telegraph.co.uk/sport/olympics/2384475/Drugs-agency-under-fire-from-big-guns.html> , accessed 19th January 2015

[56] *Ibid*

[57] *Op Cit* 7 at p164

[58] *Op Cit* 15 at 2.2.1.1 pp108-109

[59] *Ibid* at 2.2.1.1 p109

[60] *Ibid* at 2.2.1.1 p110

[61] *Ibid* at 2.2.1.1 p112

[62] [http://velonews.competitor.com/2013/06/news/usadas-tygart-uci-playing-stall-game-in-cleaning-up-cycling\\_290072](http://velonews.competitor.com/2013/06/news/usadas-tygart-uci-playing-stall-game-in-cleaning-up-cycling_290072) accessed 9th July 2013

[63] <http://www.bbc.co.uk/sport/cycling/24300072> accessed 16th June 2014

[64] *Armstrong v Tygart* F. Supp.2d (2012) at \*8

[65] *Ibid* where Armstrong was challenging amongst other things USADA authority to bring charges against him.

[66] <http://www.thedailybeast.com/articles/2012/07/06/lance-armstrong-rips-deal-with-accusers-in-doping-case-as-vendetta.html> ;<http://www.opposingviews.com/i/sports/other-sports/usada-s-travis-tygart-plays-prosecutor-jury-and-judge-lance-armstrong-case> accessed 6th October 2014

[67] *Op Cit* 64 \*8

[68] *Ibid* \*6

[69] *Ibid* \*8

[70] <http://www.asser.nl/SportsLaw/Blog/post/the-aftermath-of-the-pechstein-ruling-can-the-swiss-federal-tribunal-save-cas-arbitration-by-thalia-diathesopoulou> Accessed 25th January 2016

[71] *Ibid*

[72] For a comprehensive analysis of this see Robert Siekmann: "The specificity of sport: sporting exceptions in EU Law", *Zbornik radova Pravnog fakulteta u Splitu*, god. 49, 4/2012.,

str. 697.- 725 and Robert Siekmann, Is Sport 'Special' in EU Law and Policy?, in: Roger Blanpain (Ed.), "The Future of Sports law in the European Union - Beyond the EU Reform Treaty and the White Paper", Alphen aan den Rijn 2008, pp. 37-49.

[73] *Op Cit* 70 Accessed 26th January 2016

[74] Nathalie Voser, "The Most Recent Decision in the Pechstein Saga: Red flag for Sports Arbitration" at <http://kluwerarbitrationblog.com/2015/01/22/the-most-recent-decision-in-the-pechstein-saga-red-flag-for-sports-arbitration/> accessed 26 th January 2016

[75] Article s14 CAS Code. Available at <http://www.tas-cas.org/en/icas/code-statutes-of-icas-and-cas.html> accessed 26th January 2016

[76] *Op Cit* 70 Accessed 26th January 2016

[77] *Op Cit* 64

[78] *Ibid* \*8

[79] This standard has been criticised, however it is a common standard used where there are issues of professional reputation at stake and it has been successfully defended in some of the cases which stemmed from the BALCO scandal.

[80] Perhaps the most significant of these was that provided by George Hincapie, the only rider who was with Armstrong for all of his seven Tour victories and someone who could be thought of as Armstrong's closest Lieutenant.

[81] McLaren R., "An Overview of Non-Analytical Positives and Circumstantial Evidence Cases in Sports", 16 *Marq. Sports L. Rev.* 193\*203

[82] Even the least well known athletes typically have their names made public certainly once they have been found guilty and more often than not before that event. For example see <http://www.ukad.org.uk/anti-doping-rule-violations/current-violations/> , accessed 11th December 2014, which contains a full list of British sports participants currently serving a ban for a doping violation. On a global scale, see [https://en.wikipedia.org/wiki/List\\_of\\_doping\\_cases\\_in\\_athletics](https://en.wikipedia.org/wiki/List_of_doping_cases_in_athletics) accessed 11th December 2014), for an easily accessible list.

[83] Note the various cases either settled or being brought against him seeking compensation: see <http://www.bbc.co.uk/sport/cycling/27935519> for details. Last accessed 23rd June 2014

[84] Brian Alexander, 'What's Wrong with the World Anti-Doping Agency?', <http://www.outsideonline.com/1925761/whats-wrong-world-anti-doping-agency> accessed 11th December 2014

[85] Australian Lawyers Alliance, 'ALA expresses concern over new anti-doping body powers', at <http://www.lawyersalliance.com.au/news/ala-expresses-concern-over-new-anti-doping-body-powers> accessed 11th December 2014

[86] *Comfortable satisfaction* of the hearing panel bearing in mind the seriousness of the allegation which is made.

[87] CAS 2004/A/607 Galabin Boevski v/IWF

[88] *United States Anti-Doping Agency v Michelle Collins*, Arbitral Award, AAA No 30 190 00658 04 10th December 2004 at p16 para 3.4

[89] It is usually, (although not always), the case that the sport governing bodies and anti-doping organisations have greater resources and financial muscle than the individuals.

[90] Davis C, 'The "comfortable satisfaction" standard of proof: applied by the Court of Arbitration for Sport in drug-related cases'.(2012) 14 *UNDALR* pp1-2

[91] *Briginshaw v Briginshaw* 60 CLR 336 at \*350

[92] *Birmingham City Council v Riaz and others* [2014] EWHC 4247 (Fam)

[93] Anti-Social Behaviour Orders

[94] Martin Downs, (2014) 'Birmingham's Grooming Injunctions: what does the judgment say?', from <http://ukhumanrightsblog.com/2014/12/24/birminghams-grooming-injunctions-what-does-the-judgment-say/> (Accessed at 2nd February 2015)

[95] *United States Anti-Doping Agency v Gaines* CAS 2004/O/649 at pp13-15

[96] Davis C, 'The "comfortable satisfaction" standard of proof: applied by the Court of Arbitration for Sport in drug-related cases'.(2012) 14 *UNDALR* p6

[97] [http://www.britishhorseracing.com/press\\_releases/appeal-board-decisions-regarding-the-appeals-of-maurice-sines-james-crickmore-peter-gold-nick-gold-and-kirsty-milczarek/](http://www.britishhorseracing.com/press_releases/appeal-board-decisions-regarding-the-appeals-of-maurice-sines-james-crickmore-peter-gold-nick-gold-and-kirsty-milczarek/) last accessed 20th January 2016

[98] [http://www.britishhorseracing.com/press\\_releases/appeal-board-decisions-regarding-the-appeals-of-maurice-sines-james-crickmore-peter-gold-nick-gold-and-kirsty-milczarek/](http://www.britishhorseracing.com/press_releases/appeal-board-decisions-regarding-the-appeals-of-maurice-sines-james-crickmore-peter-gold-nick-gold-and-kirsty-milczarek/) at para 38 last accessed 20th January 2016

[99] *R v Independent Appeal Panel for Tom Hood School* [2010] EWCA Civ 142

[100] WADA Code 2015 article 3.1

[101] [http://www.britishhorseracing.com/press\\_releases/appeal-board-decisions-regarding-the-appeals-of-maurice-sines-james-crickmore-peter-gold-nick-gold-and-kirsty-milczarek/](http://www.britishhorseracing.com/press_releases/appeal-board-decisions-regarding-the-appeals-of-maurice-sines-james-crickmore-peter-gold-nick-gold-and-kirsty-milczarek/) at para 61 last accessed 27th January 2016

[102] *Ibid*

[103] *R. (on the application of McCann) v Manchester Crown Court* [2001] EWCA Civ 281 at para 39

[104] <https://www.wada-ama.org/en/who-we-are> accessed 21st January 2016

[105] *Mr Mark French v Australian Sports Commission and Cycling Australia* CAS 2004/A/651 at para 42

[106] *USADA v Montgomery* CAS 2004/O/645

[107] *re U (A Child)(Department for education and Skills intervening)* [2004] EWCA Civ 567 at para 13

[108] *re B (Children) (FC)* [2008] UKHL 35; *S-B Children* [2009] UKSC 17

[109] *re B (Children) (FC)* [2008] UKHL 35 at para 5

[110] *S-B Children* [2009] UKSC 17 at paras 10-11

[111] *Op Cit* 109 at para 13

[112] *Op Cit* 100, Article 3.1

[113] *Daniel Köllerer v Association of Tennis Professionals* CAS 2011/A/2490

[114] *Ibid* at para 88

[115] *Ibid* at para 85

[116] *ibid* at para 59

[117] *Ibid* at para 86

[118] *Ibid* at para 86

[119] *G v Federation Equestre International* , in DIGEST OF CAS AWARDS 1986-1998

[120] *Law v National Greyhound Racing Club Ltd* [1983] EWCA Civ 6R *v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1 WLR 90; *Mullins v Jockey Club* [2006] EWHC 986

[121] *R v City Panel on Takeovers exp Datafin* [1987] QB 815, *R v Football Association Ltd, ex parte Football League* [1993] 2 All ER 83

[122] *Bradley v Jockey Club* [2004] EWHC 2164 (QB)

[123] (1598) *Rooke's Case* Hil 40 Eliz 5 Co Rep. 99b

[124] *Ibid* at 100b

- [125] *Dr Bonham's Case* (1609) 8 Coke Reps 113b; 77 ER 646
- [126] *Ibid* \*653
- [127] *Day v Savadge* (1614) Hobart 85; 80 ER 235
- [128] *Ibid* \*238
- [129] *Council for the Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 HL
- [130] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223
- [131] *Op Cit* 129 \*410
- [132] *Law v National Greyhound Racing Club Ltd* [1983] 1 W.L.R. 1302
- [133] *Law v National Greyhound Racing Club Ltd* [1983] 1 W.L.R. 1302; *R v Football Association of Wales ex p Flint Town United Football Club* [1991] COD 44; *R v Jockey Club ex p Aga Khan* [1993] 1 WLR 909; *R v Football Association Ltd ex p Football League Ltd*; *Mullins v Jockey Club* [2006] EWHC 986 (QB)
- [134] *Op Cit* 132 \*1307
- [135] *Op Cit* 88
- [136] CAS 2004/A/607 *Galabin Boevski v/IWF*
- [137] *G v Federation Equestre International* , in DIGEST OF CAS AWARDS 1986-1998
- [138] *Law v National Greyhound Racing Club Ltd* [1983] 1 W.L.R. 1302; *R v Football Association of Wales ex p Flint Town United Football Club* [1991] COD 44; *R v Jockey Club ex p Aga Khan* [1993] 1 WLR 909; *R v Football Association Ltd ex p Football League Ltd*; *Mullins v Jockey Club* [2006] EWHC 986 (QB)
- [139] *Mullins v Jockey Club* [2005] EWHC Admin 2197 at para. [30].
- [140] Sport and the Economy <http://www.sportengland.org/research/benefits-of-sport/economic-value-of-sport/> accessed 9 July 2014
- [141] Rosmarijn van Kleef, "Reviewing disciplinary sanctions in sports", *Cambridge Journal of International and Comparative Law* 2015, 4(1), 3-28
- [142] Dawn Oliver "Common values in public and private law and the public/private divide", *Public Law* 1997, Win, 630 \*631
- [143] Rules of the Supreme Court Order 53 - the procedure under which applications for Judicial Review are brought.
- [144] *Op Cit* 142 \*645



[145] Dawn Oliver "Public law procedures and remedies - do we need them?", *Public Law* 2002, Spr, 91 \*95-96

[146] Ted Stevens Olympic and Amateur Sports Act 1978  
[http://www.feminist.org/education/pdfs/TedStevens\\_womeninolympics.pdf](http://www.feminist.org/education/pdfs/TedStevens_womeninolympics.pdf)

[147] Ted Stevens Olympic and Amateur Sports Act 1978 S220527 (b) (1)(2)

[148] Jack Straw then Home Secretary speaking during the committee stage of the Human Rights Bill, Hansard HC Deb, vol 312 , col 1020 (20 May 1998).

[149] *Aston Cantlow v Wallbank* [2003] UKHL 37, where he highlights the stress on the public function of a body in the legislation rather than the governmental function of that body.

[150] *Aston Cantlow v Wallbank* [2003] UKHL 37 at para 12

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

[152] Anderson J., "An Accident of History: Why the Decisions of Sports Governing Bodies are not Amenable to Judicial Review", *CLWR* 35 3 (173) at p183. For those comments by Jack Straw see footnote 102

[153] *Rubython v Federation Internationale De L'automobile and another* [2003] EWHC 1355 (QB)

[154] Effectively the governing body of Formula 1 motor racing.

[155] *Op Cit* 153 at para 26

[156] *Ibid* at para 28

[157] Eileen Kelly, "Judicial Review of sports bodies' decisions: comparable common law perspectives", *International Sports Law Review* (2011), at p71

[158] Dawn Oliver "Common Values in public and private law and the public/private divide", *P. L.* 1997, Win, 630-646; "Public law procedures and remedies - do we need them?", *P.L.* 2002, Spr, 91-110

[159] Gavin Little and Philip Morris, "Challenging sports bodies' determinations", *Civil Justice Quarterly*, (1998) p128

[160] Paul Downward, Richard Parrish, Geoff Pearson and Anna Semens, "An assessment of the compatibility of UEFA's home grown player rule with article 45 TFEU", *European Law Review* 2014, p493

[161] *Op Cit* 152 at p179

[162] Russia Doping Allegations; Federation threatened legal action, <http://www.bbc.co.uk/sport/athletics/30355895> accessed 10th December 2014

[163] Jacques Rogge, then President of the International Olympic Committee (IOC) 1 March 2011, reported in: Sport Accord, 'Sports Betting and Corruption; How to Preserve the Integrity of Sport', 2011 at p4

[164] Sport Accord, 'Sports Betting and Corruption; How to Preserve the Integrity of Sport', 2011 at p4

[165] Governance of Sport Bill (HL Bill 20) s16(2)(3)

[166] A fact acknowledged by Lord Moynihan  
see <http://www.sportsthinktank.com/news/2014/06/lord-moynihan---governance-of-sport-bill>

[167] Germany threaten jail for athletes under new doping law  
at <http://www.bbc.co.uk/sport/30007100/a> accessed 11th December 2014

[168] ALA expresses concern over new anti-doping body powers  
at <http://www.lawyersalliance.com.au/news/ala-expresses-concern-over-new-anti-doping-body-powers> accessed 11th December 2014

[169] *Korda v ITF Ltd (t/a the International Tennis Federation)* [1999] All ER (D) 84

[170] *Ibid* at p90

[171] *Ibid*

[172] *Ibid* at p91

[173] *Op Cit* 88

[174] *Op Cit* 88 para 3.3, IAAF 2000 Rules 33.2, 38.9.

[175] See McLaren R., "An Overview of Non-Analytical Positives and Circumstantial Evidence Cases in Sports", 16 Marq. Sports L. Rev. 193

[176] *Ibid* \*204

[177] He was the founder of the LiveStrong foundation.  
See <http://www.livestrong.org/> accessed 13th June 2013

[178] *Op Cit* 7, references evidence from former teammates George Hincapie, Frankie Andreu, Tyler Hamilton, Jonathan Vaughters, Christian Vande Velde and also from team masseuse Emma O'Reilly at p16 and further throughout the document

[179] *Ibid* at p2 and then goes on to provide more detail including a staggering array of banking records evidencing payment to amongst others Dr Michele Ferrari at pages 60, 69, 77, 78, 99 and 107

[180] WADC 2009, Article 17

[181] Under the 2015 Code which came into effect 1st January 2015 this time period in article 17 has been extended to ten years.

[182] CAS 2005/C/841 CONI at para 78

[183] <http://www.telegraph.co.uk/sport/othersports/cycling/lancearmstrong/9602544/Lance-Armstrong-could-face-perjury-charges-following-USADA-allegations.html> accessed 7th May 2013

[184] <http://www.minterellison.co.nz/publications/detail.aspx?publication=729> accessed 6th May 2013

[185] *Op Cit* 7 at p155. The disregarding of Article 17 due to fraudulent concealment was further reinforced by the American Arbitration Association case: AAA CASE NO. 77 190 168 11 JENF, *USADA v Eddy Hellebuyck*

[186] *Op Cit* 182

[187] *Op Cit* 64 \*9

[188] *Limitation Act* 1980 s32

[189] *Limitation Act* 1980 s5

[190] *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909, *Modahl v British Athletics Federation (No1)* [1999] UKHL 37

[191] *Op Cit* 64 \*12

[192] *Ibid* \*9

[193] There have been no occasions which have come to UKAD where an athlete has tested positive for a banned substance and has subsequently been either exonerated or just given a warning. Source: Email correspondence with UKAD representative 27th January 2015

[194] *Limitation Act* 1980 s32

[195] <http://thelawdictionary.org/reasonable-diligence/#ixzz2Un4hNsPT> accessed 30th May 2013

[196] Ashenden had overall responsibility for reading and interpreting blood profiles from the Biological Passport programme for the UCI before his resignation in 2012

[197] Armstrong maintains to this day that he rode "clean" during his comeback in 2009 until his final retirement in 2011. However, Travis Tygart CEO of USADA suggests that the chances that Armstrong's blood samples would occur naturally are one-in-a-million

[198] [http://velonews.competitor.com/2013/02/news/ashenden-mcquaid-misleading-public-over-armstrongs-biological-passport\\_274676](http://velonews.competitor.com/2013/02/news/ashenden-mcquaid-misleading-public-over-armstrongs-biological-passport_274676) accessed 28 January 2015

[199] *Ibid*

[200] *Ibid*

[201] President of the UCI from 1991-2005

[202] <http://www.bbc.co.uk/news/world-us-canada-13465590> accessed 14th January 2016

[203] <http://www.telegraph.co.uk/sport/othersports/cycling/lancearmstrong/9604549/Lance-Armstrong-revelations-prompt-David-Millar-to-call-for-UCI-honorary-president-Hein-Verbruggen-to-resign.html> accessed 28 January 2015

[204] <http://www.cyclingnews.com/news/uci-confirms-lance-armstrongs-life-ban/> accessed 28th January 2015

[205] <http://www.telegraph.co.uk/sport/othersports/cycling/tour-de-france/9398052/Tour-de-France-2012-Bradley-Wiggins-says-he-would-stand-to-lose-everything-if-he-doped.html> accessed 28th January 2015  
and <http://www.bbc.co.uk/news/magazine-23368970> accessed 28th January 2015

[206] <http://www.uci.ch/news/article/cycling-independent-reform-commission-circ/> accessed 28th January 2015

[207] <http://www.cyclingnews.com/news/lance-armstrong-gives-evidence-to-cycling-independent-reform-commission/> accessed 28th January 2015

[208] <http://www.bbc.co.uk/sport/cycling/30993315> accessed 28th January 2015

[209] <http://www.bbc.co.uk/sport/cycling/30986137> accessed 28th January 2015

[210] *Ibid* accessed 28th January 2015

[211] Pat McQuaid

[212] <http://www.bbc.co.uk/sport/cycling/31012367> accessed 28th January 2015

[213] <http://www.bbc.co.uk/sport/cycling/21051947> accessed 8th May 2013

[214] <http://www.sport.co.uk/cycling/dope-amnesty-only-way-to-save-cycling-armstrong/3683660/#0OSFSLYctlbs2hj5.97> accessed 8th May 2013

[215] The New Oxford Dictionary of English 2001, Oxford University Press, Oxford

[216] There have been limited recent attempts in response to match-fixing allegations in South Korean football, (see [http://au.eurosport.com/football/international-football/2010/k-league-faces-shutdown\\_sto2853346/story.shtml](http://au.eurosport.com/football/international-football/2010/k-league-faces-shutdown_sto2853346/story.shtml) <http://www.telegraph.co.uk/sport/football/news/9791719/Fifa-bans-41-South-Korean-players-following-investigation-into-alleged-corruption.html> accessed 8th May 2013) and English cricket

(see <http://www.independent.co.uk/sport/cricket/amnesty-for-english-cricketers-to-report-any-match-fixing-6288954.html> accessed 14th January 2016).

[217] <http://www.justice.gov.za/trc/> <http://www.justice.gov.za/trc/> accessed 8th May 2013

[218] Article 10.5.3 does provide provision for part of an ineligibility period of an athlete to be suspended in the event of *substantial assistance* in any investigation which results in other offences being discovered

[219] *Op Cit* 100, Article 10.6.1.1

[220] *Ibid* , Article 10.6.1.3

[221] Simon Cox accessed at <http://www.bbc.co.uk/sport/tennis/35319202> last accessed 1st February 2016

[222] <http://www.insidethegames.biz/articles/1020082/david-owen-plea-bargaining-and-doping-you-ain-t-seen-nothing-yet> accessed 8 July 2014

[223] <http://www.theguardian.com/sport/blog/2014/may/04/tyson-gay-wada-drug-cheats-amnesty> accessed 8 July 2014

[224] Witness the recent allegations made in relation to Russian track and field athletes - see <http://www.bbc.co.uk/sport/athletics/30324812> accessed 28th January 2015

[225] <http://www.bbc.co.uk/sport/cycling/20009005> accessed 3 July 2014

[226] <http://www.bbc.co.uk/sport/athletics/35385415> accessed 27th January 2016

[227] Cassel D., 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities', *Law and Contemporary Problems* Vol 59, No4, 197-230 at p208

[228] See [https://en.wikipedia.org/wiki/List\\_of\\_doping\\_cases\\_in\\_cycling](https://en.wikipedia.org/wiki/List_of_doping_cases_in_cycling) for chapter and verse on the litany of cases and incidents stretching back to 1896 and [https://en.wikipedia.org/wiki/Doping\\_at\\_the\\_Tour\\_de\\_France#The\\_Convicts\\_of\\_the\\_Road](https://en.wikipedia.org/wiki/Doping_at_the_Tour_de_France#The_Convicts_of_the_Road) for specific reference to the Tour de France

[229] *Freedom of Information Act* 2000 s1

[230] <http://www.legislation.gov.uk/ukpga/2000/36/contents> accessed 4 July 2014

[231] <http://www.uksport.gov.uk/freedom-of-information> accessed 4 July 2014

[232] <http://www.ukad.org.uk/uk-anti-doping-freedom-of-information> accessed 8 July 2014

[233] *R v Jockey Club ex parte Aga Khan* [1993] 1 WLR 909

[234] *Freedom of information Act 2000*

[235] <http://www.fsf.org.uk/latest-news/view/Football-Needs-the-Freedom-of-Information-Act.php> accessed 4 July 2014

[236] *The Freedom of Information Act 2000 s5(1)(a-b)*

[237] *Op Cit* 100, Article 10.6.1.3

[238] *Freedom of Information Act 2000 Decision Notice 22nd July 2013, ref FS50468810* at [https://ico.org.uk/media/action-weve-taken/decision-notice/2013/878834/fs\\_50468810.pdf](https://ico.org.uk/media/action-weve-taken/decision-notice/2013/878834/fs_50468810.pdf) accessed 14th January 2016

[239] *Data Protection Act 1998*

[240] *Op Cit* 200 at para 26

[241] *Ibid* at para 38

[242] *Ibid* at para 54

[243] *Ibid* at para 61

[244] *Op Cit* 100, article 14.4

[245] *Information Commissioners Office, Freedom of Information Act 2000 (FOIA) Decision Notice - reference FS50468810, UK Anti-Doping, 22nd July 2013* at para 21

[246] For example see <http://www.bbc.co.uk/news/world-europe-32897066> last accessed 1st February 2016

[247] *Op Cit* 221

[248] *EU Work Plan for Sport 2011-2014, Expert group "Good Governance". Deliverable 2, Principles of good governance in sport* at p2

[249] *Op Cit* 238

[250] *Op Cit* 64 \*13

[251] *A leading scientific expert in anti-doping. See* <http://www.bbc.co.uk/news/science-environment-17586597> accessed 7th May 2013 *Op Cit* 159, 160

[252] *R (on the application of Aga Khan) v Jockey Club* [1993] 2 All ER 853, *R v Football Association Ltd ex p Football League Ltd* [1993] 2 All ER 833, *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin)

[253] <http://www.telegraph.co.uk/sport/othersports/cycling/9834557/WADA-blasts-UCI-as-arrogant-and-deceitful-after-cycling-body-calls-for-truth-and-reconciliation-commission.html> accessed 8th May 2013

