

ROAD TO RIO

8: Regulation and Judicial Review in Sport



Philippa Kaufmann QC took silk in 2011. Her expertise spans the public and private law arenas. She is equally at home in complex trials requiring mastery of large volumes of evidence and skilled cross examination as before the Administrative Court, Court of Appeal or Supreme Court arguing novel and difficult points of law. Philippa was awarded ‘Human Rights and Public Law Silk of the Year’ at the 2014 Chambers Bar Awards. She is an ADR Group Accredited Civil and Commercial Mediator.



Sarah Hannett practises in all areas of public law and human rights. She is ranked in Chambers & Partners in five practice areas: education, administrative and public law, local government, community care and planning. She is ranked in education law and public and administrative law in the Legal 500. Chambers & Partners 2015 describes her as being “a rising star”, as being “expert on the crossover between public law and education”, as having “excellent” oral and written advocacy and as “very client-friendly”. Legal 500 2015 describes Sarah as being “great with clients and an excellent advocate”.

Sport in the twenty first century is big business and sporting governing bodies wield very considerable power and control over the large numbers of individuals and organisations, be they sportsmen, employees, fans, or the broadcast media. Public law, the body of law concerned with regulating how public power is exercised, is an obvious vehicle to confine and regulate how the powers of these sporting bodies are exercised, particularly where the public interest is affected.

To qualify as ‘public’ the power being exercised must be ‘governmental’: that is, the business of government. What is and what is not the business of government is itself highly contestable and contested. But wherever the boundaries lie, the courts have repeatedly stated that sporting bodies exercise purely private power and do so on the basis of a contractual relationship between the parties. Hoffmann LJ (as he then was) said this in *R v Jockey Club ex parte Agha Khan* [1993] 2 All ER 853:-

“..the mere fact of power, even over a substantial area of economic activity, is not enough. In a mixed economy, power may be private as well as public. Private power may affect the public interest and the livelihoods of many individuals. But that does not make it subject to the rules of public law. If control is needed, it must be found in the law of contract, the doctrine of restraint of trade, the Restrictive Trade Practices Act 1976, arts 85 and 96 of EEC Treaty and all the other instruments available in law for curbing excesses of private power”.

Since 2005 no further attempts have been made to persuade the courts that sporting governance is an aspect of state governance more generally (see *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197). But that does not mean that public law has no role to play in sporting governance. On the contrary the principles of public law play a defining role in the judicial supervision of sports governance - including in the decision making of governing bodies in their regulatory role - but they do so indirectly. The courts have side-stepped the public/private law divide by injecting into the contractual or other relationships by which governance is established in sporting bodies those public law principles fashioned at common law to regulate governmental decision making (*Bradley v Jockey Club* [2004] EWHC 2164 QB; upheld on appeal [2005] EWCA Civ 1056; and *Flaherty v The National Greyhound Racing Club Limited* [2005] EWCA Civ 117). This is hardly surprising. The principles underlying the exercise of democratically conferred power fashioned to ensure compliance with the rule of law have ready application to the job of governance within a voluntary organisation operating a body of agreed regulatory rules.

So what are the key public law principles that are engaged? Public law is about regulating the regulators – it is about ensuring ‘good governance’ and thereby the legitimacy of the governing structures in the eyes of those who are governed. It comprises a body of principles aimed at making sure that when governmental power is exercised over the governed, that exercise is: (1) within the four corners of the powers conferred upon them; and (2) discharged in a manner that is fair to those affected by the decision. Allied to these requirements is the equally critical principle that it is the role of the governing body, which has both the authority and expertise, to govern, not the Court; the Court’s function is exclusively supervisory, that is to ensure that principles (1) and (2) above are adhered to.

Making sure regulatory decision-making is within the four corners of the powers conferred

This has two key elements. The first is to ensure that the decision maker exercises a power conferred on it by the sporting body’s rules and regulations. This is generally a matter for the court, or relevant sporting tribunal, because it involves construing the meaning of a legal document.

But even if, second, the nature of the power has been properly understood by the decision maker, it may still be guilty of exercising it beyond permissible limits. A decision maker will always have a choice as to how to exercise a power and principles of good governance respect that ambit of discretion. But power can also be abused and where this is so the courts will strike the resulting decision down. Abuse of power takes a number of forms – it can be exercised maliciously for an improper or ulterior purpose, or its exercise can be irrational, that is so unbounded by reason as to be arbitrary and incomprehensible, or exercised without taking key considerations into account, or without any factual foundation. The constraint that the power must be exercised rationally is something of a moveable feast in practice. The greater the impact of a decision upon the fundamental rights of an individual, the narrower will be the ambit of discretion and the more the courts will be prepared to subject to rigid scrutiny not just the rationality but the proportionality of a decision. This is particularly

important when it comes to the sanctions it is open to a sporting body to impose on those who transgress its norms.

Acting fairly

All public bodies owe a duty to those affected by their decision-making to act fairly. The requirements of fairness vary according to the nature of the decision being taken and its impact. The greater the focus and impact of the decision on a particular individual the more extensive will be the procedural protections that are required to ensure fairness. The same is true of the governance functions of sporting bodies. Thus, when a sporting body is exercising disciplinary functions against a particular individual the duty of fairness will be stronger than when it is taking a decision to reorganise its league structures where a multiplicity of factors must be taken into account beyond the impact on any particular club. The duty to act fairly will ordinarily entitle the person affected to know the case against him/her, to be able to make informed representations in relation to the decision to be taken, and in some cases, to an oral hearing before the decision making body. The decision maker must be free from bias and in some cases, independent. Where the public law doctrine of legitimate expectation is engaged, the decision maker may even be substantively restricted in the kind of decision that can be taken.

When is the supervisory jurisdiction of the Court capable of being invoked?

The trigger for the exercise of this supervisory jurisdiction has not been fully worked out by the courts but, like conventional public law challenges it appears to rest on a concept of standing (albeit a more restrictive one), that to establish an entitlement to invoke the court's supervisory jurisdiction the person or body must be able to establish that the decision adversely affects an important interest which they possess. In most cases this is likely to be their interest in pursuing a profession or trade. Where such an interest can be demonstrated, then the courts will assert its supervisory jurisdiction whether or not the relations between the governing body and the person affected are contractual. The court will also allow a claim to be brought against the governing body even if the decision in question was that of an independent body established by or under the relevant rules.

While challenges have most often arisen in relation to disciplinary decision making, there is no basis in principle or otherwise to restrict the supervisory jurisdiction of the courts to these sorts of decisions. Thus, in *Park Promotion Ltd (t/a Pontypool Rugby Football Club) v Welsh Rugby Union Ltd* [2012] EWHC 1919 (QB) the court entertained a challenge by the Welsh rugby club to the WRU's selection of the clubs to play in the Welsh Premier Division. Further, in *R (English Bridge Union Limited) v. Sport v. English Sports Council* [2016] 1 WLR 957 the court entertained a challenge by the claimant to English Sports Council's decision not to recognise bridge as a sport.

How to invoke the Court's supervisory jurisdiction

As judicial review is not available the claimant must instead seek a declaration or injunction. The procedures established under CPR Part 8 will often be appropriate as there will be no factual issues for the courts to resolve.

Where the parties have agreed to arbitration

The parties may have agreed to the resolution of disputes by arbitration rather than the domestic courts. In such cases public law principles are likely to remain critical in framing the tribunal's supervisory role.

Phillippa Kaufmann QC
Sarah Hannett

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