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Case No: IHQ/08/0558/
IHQ/08/0584

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 18th July 2008

Before:

MR JUSTICE MACKAY

Between:

DWAIN CHAMBERS	<u>Claimant</u>
- and -	
BRITISH OLYMPIC ASSOCIATION	<u>Defendant</u>

MR JONATHAN CRYSTAL Q.C. and MS KATHERINE APPS (instructed by **Messrs Ford E. Warren**) for the **Claimant**
MR DAVID PANNICK Q.C. and MR ADAM LEWIS (instructed by **Messrs Baker McKenzie**) for the **Defendant**

Approved Judgment

Digital Transcription by Marten Walsh Cherer Ltd.,
12-14 New Fetter Lane, London EC4A 1AG
Telephone No: 020 7936 6000. Fax No: 020 7427 0093
Email: info@martenwalshcherer.com

MR JUSTICE MACKAY:

1. Dwain Chambers is an Olympic athlete who is now 30 years old - a sprinter whose main event is the 100 metres. He has a substantial record of past success. His personal best time was 9.97 in 1999. He came fourth at the Sydney Olympics in the final with the time of 10.08 and the following year broke 10 seconds, coming fourth in the World Championships. He was part of the Team GB Squad which won the gold medal in the 4 x 100 metre relay in the European Championships in 2002. Last Saturday, 12th July, he won the Olympic Trial staged by UK Athletics in a time of 10 seconds flat. He can justifiably claim that he is currently the fastest man in the country. He wants to be included in the British team (known as "Team GB") to compete in this event in Beijing in the Olympic Games which start in a few days' time.
2. In August 2003 he tested positive for Tetrahydrogestrinone ("THG") a banned substance. In February 2004 UK Athletics found him guilty, after a contested hearing, of doping. He received a mandatory two-year ban with effect from October 2003. Though he had contested the charge, he was later to admit that he had used THG for 18 months before it was detected, it being thought to be an undetectable substance, and he also used a cocktail of six other banned drugs: testosterone/epitestosterone cream; erythropoietin; insulin; human growth hormone; modafinil; and liothyronine.
3. He has, since his ban, remained drug free and indeed has spoken against drug taking in sport. The consequences of this were, for him, severe. He was stripped of all the medals he won during the period when he ran on drugs: that is to say, the 2002 European Championship gold medal and the 4 x 100 relay gold. His three colleagues in that team also lost their medals. He has agreed with IAAF and UK Athletics to reimburse something over \$100,000 in prize money won in this period.
4. After his ban ended he returned to athletics in the 2006 season and won gold with the 4 x 100 relay team at the European Championships. He then gave up athletics. He spent 2007 playing American football and has had an unsuccessful rugby league trial as well, but in 2008 he returned to track athletics and in March won the silver medal in the World Indoor Games.
5. Between him and his goal - competing in the Beijing Olympics which start on 8th August - stands a problem in the form of the eligibility criteria set by the British Olympic Association ("BOA") for selection for Team GB. That byelaw is byelaw No. 25, and it reads in its relevant parts as follows (recital (3)):

"(3) The BOA, in compliance with the World Anti-Doping Code ("WADC"), recognises adjudication of competent authorities under the WADC by not selecting athletes or other individuals for accreditation to Team GB whilst they are subject to a ban from competition under such adjudications.

(4) The BOA does not regard it as appropriate to select athletes or other individuals for accreditation to Team GB who have at any point committed a serious doping offence involving fault or negligence and without any mitigating factors.

(5) The BOA regards it as appropriate to take as a starting point that any athlete or individual guilty of a doping offence at any point should be ineligible for selection for Team GB, but to provide that an athlete or individual who can establish before an Appeals Panel that, on the balance of probabilities, his or her offence was minor or committed without fault or negligence or that there were mitigating circumstances for it, may be declared eligible for selection."

6. With those principles in mind, the BOA therefore enacted and adopted this byelaw:

"(1) Any person who has been found guilty of a doping offence, either (i) by the national governing body of his or her sport in the United Kingdom; or (ii) by any sporting authority inside or outside the United Kingdom whose decision is recognised by the World Anti-Doping Agency ('a sporting authority') shall not, subject to as provided below, thereafter be eligible for consideration as a member of Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB Delegation for or in relation to any Olympic Games ...

(2) The Executive Board of the BOA shall establish an Appeals Panel made up of three individuals, two of whom shall be drawn from members of the Executive Board or elsewhere, and the third of whom, the chairman, shall be appointed by the Sports Dispute Resolution Panel to consider any appeal by a person made ineligible pursuant to paragraph (1) above."

7. There then follow provisions as to the constitution and procedure for that panel, and byelaw 5 reads as follows:

"A person made ineligible pursuant to paragraph (1) may appeal on one or more of the following grounds (but not otherwise): (i) the doping offence was minor; or (ii) for an offence that was committed after the WADC came into force and was adopted by the relevant body that there was a finding of no fault or negligence, or of no significant fault or negligence in respect of the doping offence; or (iii) the appellant can show that, on the balance of probabilities, significant mitigating circumstances existed in relation to the doping offence. In the event of a successful appeal, the Appeals Panel shall restore eligibility for selection at such time and subject to such conditions as it considers appropriate."

8. I am told in evidence that there have been 31 appeals under that provision over the sixteen years that this byelaw has been in force; of those, 28 have succeeded and three have failed.

The History of these Proceedings

9. This matter comes before the court at the eleventh hour, and later I shall have to consider the impact, if any, of its delayed start. It has meant that the parties and I have had a less than ideal amount of time to produce and assimilate the written evidence and arguments. There was one day for the hearing of oral submissions. This judgment is being given after overnight reflection at the conclusion of the argument. It is therefore of necessity not as full or elaborate as some of the other decisions cited to me, for I noted (with a tinge of envy) that several days had been spent on those hearings and in one key case the judgment had been reserved for three months. Such time for reflection is not available because of pressing events which I will outline. Nevertheless, I am confident I have been able, with the excellent help of counsel on both sides, to grasp the real issues in this application and reach my conclusions.
10. Mr Chambers has qualified for selection (the byelaw apart) by virtue of winning the UK trial on 11th July and having previously run within the Olympic qualifying time on 28th June. UK Athletics will nominate the team, including three runners for the 100 metre event, on Saturday, 19th July, tomorrow, less than 24 hours from now. On the following day (Sunday, 20th July at 1.00 am BST) the BOA has to submit details of its team to the IOC in Beijing.
11. Mr Chambers started proceedings on 3rd July under Part 8 of the Civil Procedure Rules, applying for relief - in effect the full relief of his claim form - to be determined on 11th July. But two days before, by agreement, I vacated that hearing and ordered that the matter proceed as a normal action as if proceeded under Part 7, it being a case where factual and expert evidence would be needed. Directions were made towards achieving a trial in early 2009. The claimant re-issued his proceedings and within them, as had been indicated at that hearing, issued this application for interim relief.

The Form of the Relief Sought

12. The relief sought is in these terms:

"The defendant be restrained, whether by itself, its servants, agents or otherwise howsoever, from applying the BOA byelaw 25 ... to the claimant in respect of his eligibility and/or nomination to participate in Beijing 2008."

It is interesting to compare the relief sought in the Part 7 proceedings, which was:

"(1) A declaration that the byelaw ... is void and unenforceable against first-time offenders;

(2) a declaration that the claimant is eligible for inclusion in Team GB for Beijing 2008;

(3) an order directing the BOA to include the claimant in Team GB for Beijing 2008, subject to his achieving a first or second place at the trials event."

13. In the skeleton argument Mr Crystal said this was only a claim for an interlocutory prohibitory order restraining the BOA from applying the byelaw. The defendants argue it is not preserving the *status quo*: it is mandatory in its effect. It is designed to compel the defendant to select him for the team in advance of a final ruling on the enforceability of the byelaw, which would be based on full consideration of the claim, when evidence (including expert evidence) can be led and tested; and which might result in the byelaw being upheld.
14. In my judgment, it plainly is, in effect, a mandatory order that is being sought and, with characteristic candour, Mr Crystal concedes as much. That being so, it is well established that the court must feel a high degree of assurance that the claimant will succeed in demonstrating the unlawfulness of the byelaw at trial (see the Court of Appeal's decision in *Zockoll Group Ltd v. Mercury Communications* [1998] FSR 354 per Phillips LJ at 366), unless the risk of injustice, if the injunction is refused and a decision is later shown to be wrong, is such as sufficiently to outweigh the risk of injustice if it is granted. Further, it is common ground the application will dispose of the issue of the claimant's entitlement to run in Beijing, and that is the entire object of this application.
15. The defendants go further and say that, if he does succeed today, the claimant will surely not take this claim to trial for a final ruling, as on his own evidence he will be too old to be a serious candidate for London 2012 and therefore it is not in his interests to pursue this action further as a moot or academic point. I accept this argument. The prospect of the claimant ever seeking a full trial of the issues in this dispute is therefore unlikely in the extreme.
16. It is not therefore a contentious proposition that I should give more consideration to the merits of his underlying claim than is stipulated in the familiar *American Cyanamid* test, namely, is there a serious issue to be tried. But I must not, on the other hand, fall into the error of trying the case on paper. The strength of the claimant's case is something I must consider, but it is no more than one factor to put in the scales when assessing the risks of injustice either way being caused by the grant or refusal of relief at this stage.

The BOA

17. The modern Olympic Movement has at its centre the International Olympic Committee (the "IOC"), which is based on the Olympic Charter. That states the fundamental principles of Olympism as including the following:

"(1) Olympism is a philosophy of life exalting and combining in a balanced whole the qualities of body, will and mind; blending sport with culture and education. Olympism seeks to create a way of life based on the joy of effort, the educational value of good example and respect for universal, fundamental, ethical principles ...

(4) The practice of sport is a human right. Every individual must have the possibility of practising sport without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship,

solidarity and fair play. The organisation, administration and management of sport must be controlled by independent sports organisations."

18. To that end, there are 205 National Olympic Committees, or NOCs, worldwide, and the BOA is the NOC for Great Britain and Northern Ireland. It receives no Government funding. It relies on donations and sponsorship for its existence. Only NOCs have the power to nominate competitors in the Games, and in turn they can only enter competitors recommended by their national federations (in this country UK Athletics). The Olympic Charter byelaw 45(2) and (3) read as follows:

"(2) Only NOCs recognised by the IOC may enter competitors in the Olympic Games. Any entry is subject to acceptance by the IOC which may at its discretion at any time refuse an entry without indication of grounds. Nobody is entitled to any right of any kind to participate in the Olympic Games.

(3) An NOC shall only enter competitors upon the recommendations for entries given by national federations. If the NOC approves thereof, it shall transmit such entries to the OCOG."

19. The tasks of the NOC are also defined in the Charter and include this:

"The NOCs perform the following tasks:

2.1 They decide upon the entry of athletes proposed by their respective national federations. Such selection shall be based, not only on the sports performance of an athlete, but also on his ability to serve as an example to the sporting youth of his country."

20. A further stipulation of the Charter, which will be relevant, is the following:

"The World Anti-Doping Code is mandatory for the whole Olympic Movement."

21. BOA has never banned Mr Chambers from anything; nor has it banned any other athlete because it has no power to do so. As has been seen, it has only the power to decide eligibility and that only for one event in the sporting calendar, the Olympic Games. In his evidence Lord Moynihán, its chairman, says why he thinks the byelaw is important. He says this:

"It reflects a deliberate and considered view by the BOA that it does not want any athletes who have deliberately or negligently taken a prohibited substance from representing Great Britain and Northern Ireland in the Olympic Games. There are a number of reasons why the byelaw is important for BOA, including:

- (a) doping goes against the principle of fair play which is an essential part of the Olympic Movement and contravenes the fundamental principles of olympism;
 - (b) it serves to protect the reputation of the BOA and the athletes comprising Team GB;
 - (c) it serves to safeguard the health of athletes;
 - (d) it protects and enhances public interest in Olympic sport and makes it more likely that new entrants will participate in Olympic sports at all levels of those sports;
 - (e) it enjoys substantial support among the athletes themselves and protects team morale and cohesion;
 - (f) it tackles cheating in sport."
22. If the Olympic ideals that I have set out may invite cynicism in some quarters - given the controversies attaching to the Movement and the Games, the political in-fighting and the funding issues which dog it - it remains, in my judgment, plainly the fact that the IOC and the NOCs are unique institutions. They make no profits. They pay no wages to the athletes. They offer no prizes beyond the medals for the first three places. I accept that as a movement it has an idealistic basis. It attracts the cream of athletes from all countries. It captures the public imagination worldwide. Central to this, say BOA, is the athletes' reputation for clean and fair competition.
23. It is perhaps interesting that this is no new phenomenon. In classical times, more than two and a half thousand years ago, the Olympian Games, as they were called, (on which the modern games are modelled to an extent) were held in such respect that in times of conflict an Olympic truce was called, under which athletes and spectators could pass through war zones unharmed on their way to Olympia. Once arrived, athletes had to swear a solemn oath to Zeus that they would not resort to any unfair trick in the course of their contest. But I do not develop this historical digression, and I stress that it forms no part of the basis of my decision, which must turn on the evidence before me as to the modern Olympic Movement and its administration.
24. As I have mentioned, byelaw 44 of the Olympic Charter makes the WADA Code mandatory for the whole Olympic Movement. WADA was a body set up on the initiative, it seems, of the IOC in 1999, together with other public and private organisations who were interested in combating doping. Its Code includes these statements:
- "That the policies and minimum standards set forth in it represent the consensus of a broad spectrum of stakeholders with an interest in fair sport."
- It deals with sanctions on individuals who offend against the Code and lays down, broadly, a two-year minimum ban for a first offence in circumstances similar to those in which Mr Chambers found himself.

25. The claimant's argument is that the purpose of the WADA's Code is to harmonise the approach of all those administering anti-doping regulations worldwide, and can be put simply, as Mr Crystal put it graphically, "I have done my time. I'm entitled to move on", and, it is said, pursue his rehabilitation as a clean athlete. He argues that the byelaw creates a result which is excessive, unfair and goes beyond what is necessary for the proper conduct of this competitive sport.
26. I should read what the Code appears to say about harmonisation at the note to article 10.2, or rather I should summarise it. It is dealing expressly with harmonisation of sanctions as between different sports. It says that disqualification can have a more significant effect on an athlete whose career is short than on, for example, an equestrian performer whose career will be much longer. A primary argument in favour of harmonisation, it says, is that it is simply not right that two athletes from the same country who test positive for the same prohibited substance under similar circumstances should receive different sanctions only because they participate in different sports. It seems to me, however, a point with some force in to say that an NOC bound by the Code ought to have careful regard to it and ought to have in mind what others do.
27. In June of this year the IOC itself, controlling participation in the Games and rule 45 of the Olympic Charter, issued a new rule relating to doping, replacing its previous rules. It reads as follows:

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

(2) These regulations apply to violations of any anti-doping regulations that are omitted as of 1st July 2008."

This rule therefore envisages, with the sanction of the IOC, an Olympic disqualification persisting for a longer period than the domestic ban.

The Legal Approach to the Issues in this Case

28. The claimant mounts his challenge to the byelaw under three heads: (a) the common law doctrine of restraint of trade; (b) conflict with Articles 81 and 82 of the European Community Treaty and Competition Law; and (c) that it is irrational and should be set aside under the court's inherent supervisory jurisdiction.
29. I will deal with the second of these first. It was not developed in any detail, either on paper or orally before me. If it had been, under the relevant Practice Direction, issues engaging Articles 81 and 82 must be assigned to, or transferred to, either the Chancery Division of the High Court or the Commercial Court, in neither of which I reside. This is because such claims are not straightforward and subject to quite specific requirements, which have not been complied with in this case, where the competition point made its first appearance in the claimant's skeleton argument.
30. But in any event the case law relied on (specifically *Meca-Medina v. Commission* [2006] EU ECJ 519/04) is, as I understand it, advanced by Mr Crystal really to this

extent only: that it supports the claimant's argument that sporting regulatory bodies are not immune to supervision by the courts and their actions and decisions would be judged according to a test of proportionality. With one important qualification Mr Pannick for the defendant accepts this proposition. His qualification is that the actions and decisions must be in relation to a person's right to work. Mr Crystal says they need only refer to his freedom of action, which, in my judgment, goes too far.

31. The clearest help I find in this regard is from the case of *Bradley v. The Jockey Club* [2004] EWHC 2164. It was a decision of Richards J (as he then was) considering a private law claim against a defendant which had been ruled authoritatively not to be amenable to judicial review in public law terms, and which operated as a regulator within the sport. The claim was put under the common law doctrine of restraint of trade on a non-contractual basis. He said this (at paragraph 34):

"It is nevertheless common ground that, even in the absence of any contractual relationship, the decision of the Appeal Board is subject to the supervisory jurisdiction of the court in accordance with the principles stated in *Nagle v. Fielden* [1966] 2 QB 633. For all the doubts expressed about the jurisprudential basis of *Nagle v. Fielden*, it has become an accepted part of the law and has perhaps assumed an even greater importance since the courts came to adopt a restrictive approach towards the application of judicial review to the decisions of sporting bodies. In *Modahl v. British Athletic Federation Ltd* [2002] 1 WLR 1192 ... Latham LJ referred to a number of the earlier authorities on the court's power to grant remedies against domestic tribunals, and continued ...:

'However this particular debate has been resolved, certainly in this court, in *Nagle v Fielden* ..., in which the court unanimously held that, where a man's right to work was in issue, a decision of a domestic body which affected that right could be the subject of a claim for a declaration and an injunction even where no contractual relationship could be established.'

32. So, developing that, the judge continued at paragraph 35, having noted the issue as to whether *Nagle v. Fielden* was, truly analysed, a restraint of trade case, in these terms:

"Of the further authorities on restraint of trade to which I was referred, the most interesting was the detailed exposition by Carnwath J at first instance in the *Stevenage Borough Football Club* case (unreported judgment of 23 July 1996). What he said was dealt with only briefly by the Court of Appeal on appeal in the same case ... For present purposes, however, I think it unnecessary to get caught up in the subtleties of Carnwath J's analysis. It is sufficient that even in the absence of contract the court has a settled jurisdiction to grant declarations and injunctions in respect of decisions of domestic tribunals that affect a person's right to work."

33. Later, he continued at paragraph 37:

"That brings me to the nature of the court's supervisory jurisdiction over such a decision. The most important point, as it seems to me, is that it is *supervisory*. The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits. It is a review function, very similar to that of the court on judicial review. Indeed, given the difficulties that sometimes arise in drawing the precise boundary between the two, I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision-maker, and so forth."

34. Then, having referred to other cases, he continued at paragraph 38:

"In *McInnes v Onslow-Fane* [1978] 1 WLR 1520 ... Megarry V-C referred to the various requirements of natural justice or fairness that have to be observed according to whether a case is a forfeiture case or an application case. He endorsed counsel's concession that in an application case the relevant board was 'under a duty to reach an honest conclusion without bias and not in pursuance of any capricious policy' ... He also expressed the view that 'the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts ...' In the *Stevenage Borough Football Club* case, Millett LJ stated that those observations had won subsequent approval and suggested that the role of the court was essentially supervisory."

35. Finally, at paragraph 43, he said that the issue in the case before him was not one of procedural fairness, but proportionality of the penalty. He put it this way:

"Different decision-makers may come up with different answers, all of them reached in an entirely proper application of the test. In the context of the European Convention on Human Rights it is recognised that, in determining whether an interference with fundamental rights is justified and, in particular, whether it is proportionate, the decision-maker has a discretionary area of judgment or margin of discretion. The decision is unlawful only if it falls outside the limits of that discretionary area of judgment. Another way of expressing it is

that the decision is unlawful only if it falls outside the range of reasonable responses to the question of where a fair balance lies between the conflicting interests."

36. The Court of Appeal approved that analysis in its rejection of the appeal. Lord Phillips MR said this:
- "Richards J dealt at length with the role of the court in a case such as this and conducted a careful analysis of the relevant authorities. I would commend the entirety of his analysis."
37. I have quoted at length from *Bradley* therefore, both because I consider it to be binding upon me, and, secondly, because I consider it to be convincing and persuasive as an exposition of how the court should go about tasks such as the one that I face. The claimant's attack on *Bradley* I find to be misconceived. There is nothing in it which was inconsistent with *Secretary of State for the Home Department, Ex parte Daly* [2001] AC 532, and Richards J was right to say so in terms. The doctrine of proportionality, *Daly* tells me, is in effect sensitive to context.
38. Therefore the key issue in this appeal can be framed in this way: am I satisfied to a high degree of assurance that this claimant will establish at trial that the decision to impose and retain byelaw 25, viewed against the context in which BOA operates, fell outside the range of reasonable responses of a body in its position?
39. I must ask myself this question, acknowledging that, though the court must not shrink from exercising a supervisory power which it has if it affects the claimant's right to work (for which see later), the BOA, if acting honestly and not capriciously and within its powers, is and must be a body better fitted to judge what was needed than me, or any court.
40. Specifically, therefore, I have to consider whether it is proportionate for them to enact a law which says that an athlete proved to have cheated over drugs (albeit that he has served the blanket ban passed upon him) is not a proper or appropriate person to represent his country, given the terms of the IOC Charter "to serve as an example for the youth of his country".
41. There are then, therefore, two questions to be asked. First, is this a right to work case? The claimant says that the opportunity to compete in an Olympic Games is an unrivalled opportunity to compete with the very best, as Mr Crystal put it, and that is plainly right. Even if he merely participates without winning a medal, says Mr Crystal, that will directly impact on his career in terms of the fees he could command in subsequent professional appearances at paid events, in terms of spin-off in the form of a collaborative autobiography, or sponsorship deals he might attract. The fact that the event itself is amateur is not preclusive.
42. The defendant argues that the terms of *Bradley* are clear: this supervisory jurisdiction is engaged when there are issues about a person's right to work. It indicates other cases that have considered this issue. In *Currie v. Barton* the claimant was a professional lawn tennis player and a coach. In a rather complicated way, he fell out with the powers that were, as a result of which he was disqualified from selection for

the county team, which would not itself have been a paid engagement. Scott J (as he then was) said this:

"Equally well founded, in my judgment, is Mr Hillier's submission that the Essex County Lawn Tennis Association has no restraint of trade arrangements with the LTA or with anyone else, implementation of which might interfere with the right of a tennis professional to earn his living. No fee is paid to players who are playing in county teams. No fee is paid by the LTA to players playing in national teams. The decision of the Tennis Association to ban the plaintiff for three years from selection for county teams did not bar the plaintiff from any employment or gainful activity ...

Mr Grayson [counsel for the claimant] submitted that the ban had damaged the plaintiff's reputation and adversely affected his ability, both to obtain commercial sponsorship and attract pupils for coaching. There was no evidence that either of these consequences had in fact been caused to the plaintiff by the ban. But, even if Mr Grayson's submission had been correct, and even if those consequences had been predictable consequences of the ban, the conclusion that the rules of natural justice ought to be imported into the Committee's deliberations would not, in my judgment, be justified.

The authorities on which Mr Grayson relied establish, in my view, that observance of the rules of natural justice, the obligation to proceed fairly, may be required where an adverse decision will bar the object of the decision from some gainful activity. Where all that can be said is that reputation may be affected, I agree with Mr Hillier [counsel for the defendants] that there is no reason for importing the rules of natural justice."

43. Those words seem to me to be apt to describe the position in relation to the more developed doctrine of supervision apparent in *Bradley*. That case went to the Court of Appeal. O'Connor LJ cited a passage from *Nagle v. Fielden* where Salmon J said:

"In the days when this doctrine [common law restraint of trade] was evolved, the sanctity of contract was certainly no less regarded than it is today. The courts then afforded protection to a man against an unreasonable restraint upon his right to work, even though he had bargained that right away. I should be sorry to think that since those days we have grown so supine that today the courts are powerless to protect a man against an unreasonable restraint upon his right to work, to which he has in no way agreed but which a group with no authority, save that which it has conferred upon itself, seek capriciously to impose upon him."

44. O'Connor LJ himself then continued:

"I cite that passage to deal with the submission that was made that the decision to ban the appellant from playing for the Essex team was an interference with his right to work. The learned judge held there was no evidence whatever that he had suffered any financial harm as a result of this ban. It seems to me that, although the issue of damage was not before the learned judge and none of the suggested heads of damage was therefore investigated, it was not suggested the ban had any effect on his freedom to continue with his profession to coach, to be sponsored and to take part in tournaments. Those were his sources of living.

I can understand there might possibly be some diminution of his standing in the tennis world which might have been increased by being chosen, by having played, for example, for England in July 1983. I cannot see that in any way fits the language which I have cited from the judgment of Salmon LJ ...

In the present case I do not think one could fairly say the decision of the Committee to order the appellant should not be considered for selection for playing for the county for three years can possibly be described as affecting his livelihood in the ordinary meaning of the word."

45. A year later, the same judge, Scott J, returned to the issue in a different case of *Gasser v. Stinson*, reported 15th June 1988, and, consistently with his earlier decision, made a similar finding in the case of a runner, interestingly, who was concerned about the imminence of a certain Olympic Games. He said this:

"The policy underlying the restraint of trade law is that people should be free to exploit for their financial gain the talents and abilities that they may have. I would accept that restraint of trade law would not be applicable to activities that were undertaken for no financial reward at all (for example, school sport ...) nor is it in my opinion in point that a particular ban may deprive a would-be competitor of a chance of building up a reputation and to later exploit it for commercial gain. But in a sport which allows competitors to exploit their ability in the sport for financial gain and which allows that gain to be a direct consequence of the participation in competition, a ban on competition is, in my judgment, a restraint of trade."

46. Mr Crystal invited me to discard these authorities, but I decline to accept the invitation, particularly as one of them was approved by the Court of Appeal, and I do not see that any subsequent authority has thrown doubt on them. His prospects of arguing, therefore, that this is a right to work case are not good. Even if there is a sufficiently strong case for arguing that indirect financial benefit from Olympic participation would so qualify, the defendant argues that, on the current form, Mr Chambers' prospects of success are, at best, speculative. Put bluntly, his ten second

time achieved last weekend is confronted by the fact that there will be nine other athletes in Beijing who have run better times than that.

47. Mr Crystal criticises this approach as "miserly" and repeats that a proper opportunity to win an Olympic medal is something of value to him as a top athlete; that effectively the form book can lie. He makes the point, which is undoubtedly true, that, of all the British athletes, he is the one with the best chance of finishing on the podium.
48. Next, is the byelaw proportionate? This is the second question which arises if this is a right to work case appropriate for review for restraint of trade. Does the byelaw, when subjected to the intensity of review described in *Bradley*, go further than is reasonable or necessary to achieve the legitimate aims of the BOA?
49. The claimant points to the following. As we have seen and as has been noted, the IOC and BOA both endorse and purport to comply with the WADA Code. The effect of the byelaw 25 is to go much further than it and is inconsistent with it. The defence answer to that is that the byelaw is not a ban - certainly not a worldwide ban - and therefore the comparison is not a fair one. It is a rule disqualifying the claimant from attendance at one event every four years. Also, the WADA Code stipulates a minimum ban of two years and, as has been seen, the new 2008 IOC rule is inconsistent with Mr Crystal's mantra of "You've done your time. You can carry on."
50. Secondly, the claimant argues no other IOC has a comparable eligibility requirement. The defendant at this stage points to Denmark and China and says there may be others, but that the shortness of time in preparing this case and a preoccupation with even more important matters (namely, the Games themselves) has prevented further research at this time. This is an example of something that one could expect to see more thoroughly ventilated if there were a full trial of this issue.
51. The Commonwealth Games Council, who are relied on by the defendants because they have an identical byelaw, are described boldly by Mr Crystal as being "as wrong as the defendants are", and incapable therefore of giving support to what is, he argues, an unlawful proscription. It is, perhaps at least, an interesting comparison, as are the criteria of the World Marathon Series (who run the major city marathons, such as London and New York and other cities) which has the same eligibility policy, say the defendants. Mr Crystal says there is no documentary evidence of this. Again, time has not been kind to the parties.
52. The claimant points out names - three past competitors at Olympic or Winter Olympic Games between 1996 and the present time - who have been allowed to compete despite previous drugs suspensions and that there will be one US athlete in Beijing in the same boat. He also cites sportsmen, and there are many of them, in other sports in this country and otherwise, who have been re-integrated into national teams after drugs bans have been served.
53. The defendants argue:
 - i) that this law is in pursuit of a legitimate aim - the Olympic ideal and the fundamental principles in other passages which I have already cited.

- ii) The system set up is rational and it is also proportionate in its effect. All athletes (and that includes the claimant) know about it. It only applies to those who cheat, either deliberately or recklessly, and it has a developed and fair appeal system, which is used.
 - iii) It is not a general sanction as the claimant is free to compete anywhere else at any other time, apart from these Games. Put shortly, their case is that they are entitled to exercise the authority given to them to put forward a national team and decide who is appropriate for inclusion in it at this one event. The practice of other nations is of interest, but not determinative of the approach of the British National Committee which reaches a view as to what is best for its country.
 - iv) They say it enjoys a wide support from the majority of British athletes. This is supported by the fact that at the last two Olympic events (Athens 2004 and Torino 2006) 90% and 96% respectively of the Olympic athletes surveyed said they supported the continued application of byelaw 25. There are also a substantial number of past Olympians who have given reasoned support for its continuance.
 - v) The defendant argues that a more relaxed criterion such as that contained in the 2008 code of the IOC would still have worked in such a way as to exclude the claimant from Beijing.
54. My conclusion is that I am not able on this evidence to find that the claimant's prospects of proving that there was a reviewable restraint of trade here, or that if there was the byelaw was not proportionate viewed in its context, are such as to give me the degree of assurance I would require to justify the relief that is claimed.
55. If I am wrong about that, there are two further final issues I have to consider in the exercise of my discretion in this application.
56. First, delay. As a general principle, it is well settled that this is capable of leading to discretionary interim relief being denied, even where there is otherwise shown to have been an entitlement to it. A good example of this is the *Stevenage Borough Council Football Club v. Football League Ltd* case (unreported) 23rd July 1996. There the claimant had shown that the Football League rules were objectionable in two ways as being an unreasonable restraint of trade, but was nevertheless refused relief on the grounds of its delay in making the application. The application was one that would have, if successful, entitled it to promotion and therefore consigned a Football League club to demotion. It had argued that it was reasonable for it to delay challenging the rules until it knew whether in fact it would receive any benefit from the challenge if it succeeded, which meant it had to wait until it had won its league and the time when the objectionable criteria for promotion came into play.
57. Notwithstanding that argument, Carnwath J exercised his discretion to refuse relief on this ground, because of the effect of delay on the other clubs involved who had adjusted their affairs and made their decisions on the assumption that, in the case of Torquay United, it would remain a Football League club. In that, he was upheld by the Court of Appeal. There is a similar decision in the Football Arbitration Panel's award in the case of *Leeds United v. Football League Limited*, 1st May 2008.

58. The chronology of this application is set out very fully by the defendants in an appendix to their skeleton argument. I accept that as essentially accurate, and it should be treated as if incorporated in this judgment, but the salient events include these. The parties have made extensive use of the media in this dispute, as happens, and in early February of this year the claimant told the media he was considering challenging this byelaw. There followed correspondence throughout the year between BOA and the claimant's solicitors, with BOA saying, in February, that, if he was going to do so, time was of the essence. They received a reply that he would not give the matter further consideration until after the World Indoor Championships in the first and second week of March. At the beginning of April the defendant's solicitors expressly said that, if he wanted to issue a High Court challenge as opposed to a byelaw appeal, he should do so immediately in the interests of all athletes and sport generally.
59. In the event, no proceedings were issued until 3rd July. It is undoubtedly the case that, if proceedings had been issued early this year when the claimant resolved to pick up his athletic career and when he knew that this byelaw stood in the way of his ambitions, given the efficiency of the solicitors on both sides of this case, I, or another judge, could have been trying this case not on an interim basis, but on a final basis, some weeks ago; so that, instead of the position I now face, there could have been a ruling one way or the other as to the lawfulness of this byelaw. The parties could have researched their evidence much more fully and better than they have been able to do.
60. The claimant says, in explanation of this, first, that he did not want to incur the expense. He is not a man of means. As I have indicated, he has very substantial financial obligations (and I accept that is a fair point) and did not want to incur legal expenses until he knew he could reach the Olympic qualifying standard, which he did not do until towards the end of June.
61. I find difficulty in accepting that his ability to do that could have been substantially in doubt, but, in any event, the *Stevenage* case is an example of the apparently hard but necessary rule that waiting for sporting outcomes is not a good reason where other sportsman's interests are adversely affected. Mr Crystal suggested that there could be a respectable argument in favour of delaying such an application positively until close to the final selection decision. I have to say that, if there is one, I cannot see it.
62. The result of this delay has not just made for difficulties in the presentation of the case (that is a minor feature), but, more importantly, what it has done for other athletes and the proper administration by the BOA of the running of the British Olympic effort. The adverse effects of this delay is such that I consider that I would have denied relief on this ground alone.
63. But I shall turn first to the balance of convenience. Here, the effect of a grant of this injunction on third parties is clearly of prime importance, by definition. One athlete, the athlete who came fourth in the trials, will, if the order is made, be excluded from the 100 metres (not just probably but as a matter of near certainty), and it is possible additionally that another will be excluded from the relay team.
64. Mr Crystal grasps this problem and says, frankly, "Well, such are the misfortunes of the life of a professional sportsman. They cannot run as fast as Mr Chambers can",

and he argues that they would have to accept that. On the other hand, those excluded will be clean athletes who I think I should assume have planned their year and their training professionally, will have known of the byelaw and will therefore have conducted themselves on the basis that one obstacle they did not have to overcome to get to Beijing was Dwain Chambers. If they were present at this hearing, and if they were represented at this hearing, I suspect they would have had much to say about that opportunity being taken from them.

65. In addition, there are two other athletes - a shot-putter and a cyclist - who are in the same position as Mr Chambers. They have not made any applications to the court, though one of them briefly looked as if he might and used as his solicitors the same solicitors as Mr Chambers. They might be tempted, if this application was granted, to try applications of their own, though there even greater delay would be even more likely to deny them any success. But the harmony and management of the British Team would certainly be upset and the BOA's orderly administration of it undermined.
66. An injunction at this stage would not, as a matter of law, amount to a declaration that the byelaw was unlawful. Many people however, inside and outside the sport, would see it and describe it as such, understandably, having little interest in the niceties of the legal issues with which I have attempted to deal in this judgment. In my judgment, it would take a much better case than the claimant presents to persuade me to overturn the *status quo*, that is to say, the validity of this byelaw at this stage and thereby compel his selection.
67. For all the reasons I have given, I refuse this application.
