

CAS 2011/A/2658 British Olympic Association (BOA) v. World Anti-Doping Agency (WADA)

AWARD

delivered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Prof. Richard H. McLaren, Barrister in London, Ontario, Canada

Arbitrators: Mr. Michele A.R. Bernasconi, Attorney-at-law in Zurich, Switzerland
Mr. David W. Rivkin, Attorney-at-law in New York, USA

Ad hoc Clerk: Ms. Erin C. McDermid, Barrister and Solicitor in London, Ontario, Canada

in the arbitration between

British Olympic Association (BOA), London, United Kingdom
Represented by Lord David Pannick QC and Mr. Adam Lewis QC, Blackstone Chambers, London, United Kingdom, and Mr. Tom Cassels and Ms. Gemma Willingham, Baker & McKenzie LLP, London, United Kingdom

- Appellant

and

World Anti-Doping Agency (WADA), Montréal, Quebec, Canada
Represented by Mr. Jonathan Taylor and Ms. Elizabeth Riley, Bird & Bird LLP, London, United Kingdom and Mr. Olivier Niggli, Carrard & Associés, Lausanne, Switzerland

- Respondent

1. THE PARTIES

- 1.1 The British Olympic Association (“BOA” or the “Appellant”) is the National Olympic Committee of the United Kingdom (“UK”), responsible for UK Olympic Teams. It is a company incorporated under the laws of England with registered company number 01576093. Its address is 60 Charlotte Street, London W1T 2NU.
- 1.2 The World Anti-Doping Agency (“WADA” or the “Respondent”) is a Swiss private law foundation whose headquarters is in Montréal, Canada, but whose seat is in Lausanne, Switzerland. Its address is Stock Exchange Tower, 800 Place Victoria, Montréal (Quebec), H4Z 1B7, Canada. WADA is the global regulator of the World Anti-Doping Agency Code (“WADA Code”).

2. FACTUAL BACKGROUND¹

- 2.1 This Award concerns a Bye-Law that the BOA adopted about twenty years ago and has been amended several times since; the most recent version is in force since 1 January 2009. The Bye-Law essentially provides that any British athlete *“who has been found guilty of a doping offence ... shall not ... thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games or any European Olympic Youth Festivals”* (the “Bye-Law”).
- 2.2 WADA challenged the Bye-Law following and on the basis of an award of the Court of Arbitration for Sport (“CAS”) issued by a panel on 4 October 2011: *U.S. Olympic Committee v. International Olympic Committee*, CAS 2011/O/2422 (the “USOC Award”). The USOC Award, which is described in more detail below, considered the validity of a rule of the International Olympic Committee according to which *“any person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations may not participate ... in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension”* (the “IOC Regulation”). The USOC Award held that the IOC Regulation was invalid and unenforceable because it violated Article 23.2.2 of the WADA Code, which provides that a Signatory must implement enumerated Articles of the Code *“without substantive change”* and that no Signatory to the WADA Code may *“add additional provisions”* to its rules *“which change the effect of ...”* the enumerated Articles. The

¹ This section of the Award contains a summary of the principal relevant facts and allegations, based on the Parties’ written submissions, pleadings, and the hearing. In this Award, additional facts and allegations may be set out, where relevant, in connection with the legal discussion and decision that follows. The Panel has considered all of the factual allegations, legal arguments and evidence submitted by the Parties in the present proceedings. The Award, however, only refers to evidence and arguments that the Panel considers necessary to explain its reasoning.

IOC Regulation was found to have changed the substance of the sanctions imposed in the WADA Code.

- 2.3 After the USOC Award was issued, the WADA Foundation Board reviewed at its 20 November 2011 meeting in Montréal, Canada, a document entitled “WADA Compliance Report” (the “Compliance Report”) and available at the website of WADA. The Compliance Report, under the heading “National Olympic Committees”, stated the following:

The BOA’s non-compliance is based on the Court of Arbitration for Sport (CAS) decision of October 4, 2011 that advised the International Olympic Committee (IOC) that its Rule 45 was non-compliant because it was, in effect, a double sanction. In light of this ruling, the BOA’s bye-law number 74 [sic: 7.4] renders the BOA non-compliant.

- 2.4 Therefore, in a letter dated 21 November 2011, WADA advised the BOA “... *that the British Olympic Association has been determined to be non-compliant with the (WADA) Code because your rule on selection for the Olympic Games is an extra sanction, and non-compliant for the same reason the IOC eligibility rule was deemed non-compliant by the Court of Arbitration for Sport*”. This determination constitutes the decision against which BOA appeals in this proceeding (the “Decision”).
- 2.5 As noted above, the Bye-Law has been in effect for about twenty years, including for more than 10 years before the WADA Code was introduced in March 2003.² The current revised version of the Bye-Law has been in effect since 1 January 2009.
- 2.6 The present Bye-Law, titled “*Bye-Law of the National Olympic Committee: Eligibility for Membership of Team GB of Persons Found Guilty of a Doping Offence*” contains six recitals and reads, in part, as follows:

- “1. *Any person who has been found guilty of a doping offence either*
- (i) by the National Governing Body of his/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*

² The WADA Code came into effect on 1 July 2004.

Anti-Doping Agency (a “Sporting Authority”)

shall not, subject as provided below, thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games or any European Olympic Youth Festivals.”

...

Paragraphs 2 through 7 provide for the establishment of an Appeals Panel (“AP”) and the procedures to be followed “*to consider any appeal by a person made ineligible pursuant to paragraph 1 above*”.³

- 2.7 Since March 1992, a number of British athletes have been ineligible for selection for the Olympic Games as a result of the Bye-Law. Leaving aside equine cases relating to the doping of horses, to date there have been 25 appeals under the procedures described in paragraphs 2 through 7 of the Bye-Law. All but one of the 25 athletes who appealed the effect of the Bye-Law have been successful in having the application of the Bye-Law ameliorated. Two athletes⁴ affected by the Bye-Law never activated the AP process, and one⁵ was unsuccessful in commencing the AP process.
- 2.8 Prior to the hearing in this matter, the most recent oral hearing in a non-equine appeal under the Bye-Law had been that of Christine Ohuruogu (“Ohuruogu”). In December 2007, Ohuruogu had received a one-year ban for a third missed doping control test. Ohuruogu successfully invoked the Bye-Law appeal process, so she could represent the country as part of Team GB after her one year ban was served.⁶
- 2.9 As part of the implementation of the 2009 version of the WADA Code, each National Olympic Committee (“NOC”) had to present to WADA its WADA Code compliant anti-doping rules.⁷ On 11 February 2008, the BOA submitted to WADA a draft of its anti-doping rules, which included a reference to the Bye-Law. In a letter dated 3

³ The text of the Bye-Law is set out in detail below at paragraph 7.5.

⁴ Dwain Chambers (sprinting) and David Millar (cycling). Dwain Chambers was unsuccessful in an application for an interlocutory prohibitory interim injunction order restraining the BOA from applying the Bye-Law so as to preclude him from attending the Summer Olympic Games in Beijing. *See* [2008] EWHC 2028 (QB) (18 July 2008). Following judgment on this aspect, Chambers withdrew the action. Therefore, the proceedings did not go to a full trial

⁵ Carl Myerscough (shot put).

⁶ Re: Christine Ohuruogu – Decision of the Appeal Panel of the British Olympic Association, dated 4 December 2007, and filed as Exhibit J43 of the BOA.

⁷ WADA Code Article 20.4.1 and 2.4.2.

March 2009, WADA advised the BOA that: “... *the Rules are in line with the 2009 World Anti-Doping Code. This correspondence therefore constitutes your assurance that the Rules are in line with the 2009 World Anti-Doping Code*”. [Emphasis Added].

- 2.10 Therefore, on 11 March 2009, the BOA accepted the revised 2009 WADA Code as a Signatory. On that day, the BOA adopted a “*Bye-Law Relating to Anti-Doping*” (the “Anti-Doping Bye-Law”). The Anti-Doping Bye-Law refers to and incorporates in Rule 7.4 the Bye-Law under consideration in this matter in the following manner:

“7.4 *Any Person who is found to have committed an Anti-Doping Rule violation will be ineligible for membership or selection to the Great Britain Olympic Team or to receive funding from or to hold any position with the BOA as determined by the Executive Board in accordance with the BOA’s Bye-Law on Eligibility for future membership of the Great Britain Olympic Team.*”

- 2.11 From March 2009 until the USOC Award of 4 October 2011 was issued, both Parties acted under the presumption that the Bye-Law was not contrary to the WADA Code. However, in a letter dated 7 October 2011, the day following the publication of the USOC Award, WADA wrote to the BOA about the impact of that award. WADA stated that it had previously viewed the Bye-Law as being a selection policy and not an anti-doping rule and therefore not falling within the scope of the WADA Code. This position had been consistent with WADA’s view that Rule 45 of the Olympic Charter had been considered by the IOC to be an ineligibility rule and not a sanction. However, WADA elaborated that because the USOC Award “*has determined Rule 45 to be non-compliant with the Code, [i]t is possible that your selection policy [i.e. the Bye-Law] now falls into the same category*”.⁸ WADA invited the BOA to consider the Bye-Law in light of the USOC Award.⁹
- 2.12 Following this letter, there was various correspondence between the BOA and WADA, in which the BOA took the position that the Bye-Law was a selection policy and neither a rule of ineligibility nor a sanction, and that it therefore did not fall within the scope of the WADA Code. The BOA also noted that, as WADA had itself

⁸ In the 8 July 2011 version of the Olympic Charter (“OC”), Rule 45 is renumbered as Rule 44.

⁹ WADA sent similar letters to the NOCs of Canada, Denmark and New Zealand, which had provisions similar to the IOC Regulation. These NOCs subsequently abandoned their respective rules following the CAS decision in the USOC Award. None of the remaining 199 NOCs in the Olympic movement has ever adopted a provision similar to the BOA Bye-Law, except for Norway, which dropped it upon the introduction of the 2003 version of the WADA Code.

noted in its 7 October 2011 letter, WADA had previously found the Bye-Law to be compliant with the WADA Code.

- 2.13 As noted above, on 20 November 2011, the WADA Foundation Board found that the Bye-Law was not compliant with the WADA Code, and WADA so advised the BOA on 21 November 2011.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

- 3.1 On 12 December 2011, the BOA filed an appeal against the Decision with the CAS in accordance with Article R47 of the 2010 Edition of the Code of Sport-related Arbitration and Mediation Rules (the “CAS Code”).

- 3.2 In the Statement of Appeal, the BOA advised the CAS that the Parties had agreed to a timetable for the filing of the Appeal Brief, including a request to extend the time for filing and to have a second round of written submissions. These and other interim relief matters were set out in the Statement of Appeal and were the subject of agreement by the Parties or disposal by CAS or by the Panel.

- 3.3 The Parties executed a Procedural Order on 12 January 2012, which was subsequently amended by agreement of counsel for the Parties and the Panel on 3 February 2012.

- 3.4 The BOA filed its Appeal Brief on 13 January 2012. It sought the following relief pursuant to Articles R57 and R64.5 of the CAS Code:

- The annulment of the WADA Decision;
- The issue of a new Decision replacing the WADA Decision, to the effect that:
 1. The BOA’s rule on selection for the Olympic Games is not an extra sanction for commission of a doping offence contrary to the WADA Code;
 2. The BOA is therefore compliant with the WADA Code;
- Costs.¹⁰

- 3.5 The BOA filed the following witness statements:

- Lord Colin Berkeley Moynihan, the Chairman of the BOA;
- Richard W. Palmer CBE, the Executive V.P. of the BOA;
- Sara J. Sutcliffe, the Director of Legal and HR of the BOA;
- Derek Mapp, the Chairman of the British Amateur Boxing Association; and,
- Sarah Winckless, an Olympian and bronze medal holder in double sculls at the 2004 Olympic Games and Chairwoman of the BOA Athletes Commission.

¹⁰ At the Hearing, the BOA stated that its preferred position was that each party bear its own costs.

3.6 WADA filed its Answer Brief on 10 February 2012. Its requests for relief were as follows:

- The Bye-Law is correctly characterized as a doping sanction additional to those set out in Code Article 10;
- The BOA Bye-Law is therefore contrary to Code Article 23.2.2;
- The BOA is therefore non-compliant with the Code;
- The WADA Foundation Board's Decision is therefore correct, and the BOA's appeal should be dismissed in its entirety;
- In accordance with Article R65.3 of the CAS Code, the BOA should be required to pay the costs that WADA has been forced to incur on this appeal (which have been unnecessarily increased by the voluminous and largely irrelevant submissions and evidence submitted by the BOA on this appeal); and finally
- The fees and costs of the CAS Panel should be borne by the CAS, in accordance with Article R65.2 of the CAS Code.

3.7 In WADA's covering letter enclosing the Answer Brief, it advised that it did not intend to call any witnesses at the Hearing. WADA further stated that the witness statements filed by the BOA could stand as their direct evidence and that it had no intention of cross-examining any BOA witness. These intentions were confirmed by correspondence on 6 March 2012.

3.8 In accordance with the amended Procedural Order, the BOA filed its second written submission on 24 February 2012, and WADA filed its second written submission on 5 March 2012.

3.9 The BOA's Reply addressed only the main points made by WADA in its Answer. According to the BOA, the points made in WADA's Answer did not defeat the propositions on which the BOA's defence of the Bye-Law was based.

3.10 WADA's Reply was likewise brief in response to the Reply of BOA. It emphasized WADA's analysis of the Bye-Law and the Bye-Law's operation in light of the WADA Code.

3.11 The Parties were asked at the Hearing to provide written submissions regarding the issue of the costs of the arbitration by 21 March 2012. Both submissions on costs were timely filed.

4. THE CONSTITUTION OF THE PANEL

4.1 At the outset of the present proceedings, the Parties sought the concurrence of the CAS Court Office to appoint jointly the same three arbitrators who had rendered the USOC Award. The CAS Court Office accepted the request and confirmed the appointment of the three arbitrators by letter dated 23 December 2011. As a result,

the Panel to hear the appeal of the BOA was constituted as follows: Professor Richard H. McLaren (Canada), Me. Michele Bernasconi (Switzerland) and David W. Rivkin, Esq. (USA). In accordance with the Parties' joint request that the Panel be the same as in the USOC case, Richard McLaren was appointed as President.

- 4.2 On 23 December 2011, the Panel held a conference call with the Parties to plan the further course of the proceedings.
- 4.3 In accordance with the Procedural Order, the Panel held a Hearing on 12 March 2012 at the offices of Debevoise & Plimpton LLP in London, United Kingdom. Present on behalf of the Parties were those individuals listed in the title page above. Also present were CAS Counsel, Louise Reilly; Alex Lloyd and Colm O'Grady, Trainee Solicitors at Baker & McKenzie LLP; and Felicity Passmore, Trainee Solicitor at Bird & Bird. Present on behalf of the BOA were Lord Moynihan, Chairman of the BOA; Sara J. Sutcliffe, Legal Director of the BOA; Shahab Uddin, Lawyer for the BOA; and Darryl Seibel, Communications Director for the BOA.
- 4.4 At the Hearing, the Parties were given a full and complete opportunity to make oral arguments based upon their written submissions. At the conclusion of the Hearing, counsel for both Parties agreed that they had been given a full and complete opportunity to be heard and so advised the Panel.

5. THE PARTIES' SUBMISSIONS

- 5.1 In accordance with the Procedural Order, the Parties made extensive written submissions in this arbitration procedure, and the Panel has considered all of the evidence and legal arguments submitted by the Parties. The Panel does not propose to set out the arguments of the Parties in full in this Award. They are amply covered in the paper record of this proceeding. Therefore, the discussion in this section is an overview of the Parties' submissions.

A. Appellant's Submissions and Requests for Relief

- 5.2 The BOA's submissions are grouped into three themes:
- (i) Construing the WADA Code to ascertain precisely what constraints it imposes on the actions and policies of the signatories;
 - (ii) Assessing the true purpose, nature and effect of the Bye-Law to ascertain whether it is caught by those constraints; and
 - (iii) Comparing the Bye-Law to the IOC Regulation considered by CAS in the USOC Award.

(i) Proper Construction of the WADA Code

- 5.3 The Decision of the WADA Foundation Board was wrong. The Bye-Law is not an extra sanction.

- 5.4 In order to interpret the Bye-Law and its proper construction, the Panel must first choose the proper legal principles of interpretation and then apply those principles to the WADA Code.
- 5.5 The most appropriate legal principle to be applied here is the *Vienna Convention on the Law of Treaties* (the “Convention”). In applying the principles of the Convention, one must first have regard to what the words do and do not say.
- 5.6 On a proper construction of the WADA Code, it does not preclude an autonomous NOC from declining to select, or adopting a policy that it will not select athletes who have previously deliberately doped to represent its team and country.
- 5.7 Furthermore, the absence of express words in the WADA Code precluding an NOC from making a selection decision or adopting a selection policy of this nature leaves the BOA free to have acted as it did.
- 5.8 Having looked at what the words of the WADA Code do not say, it is then proper to look at what the words do say.
- 5.9 This argument commences with a review of the mandatory provisions of the WADA Code and, in particular, Articles 9 (automatic results disqualification) and 10 (sanctions).¹¹ Articles 9 and 10, when properly construed, clearly apply to disciplinary proceedings and do not prohibit any extraneous selection decision or policy that may later be applied by a wholly separate body in respect of its team for one class of event.
- 5.10 Furthermore, Article 23.2.1 WADA Code makes it clear that a different level of responsibility is placed upon Anti-Doping Organisations as opposed to other Signatories of the WADA Code. Anti-Doping Organisations are defined in the WADA Code to include National Anti-Doping Organisations (“NADOs”) and the IOC and others; however, they are not defined to include NOCs such as the BOA. Therefore, an “*extraneous selection decision*” or policy applied by a wholly separate body such as the BOA and which is not the relevant Anti-Doping Organisation is unaffected by the constraints of the WADA Code.
- 5.11 Moreover, the language of these articles is consistent with the WADA Code being confined to tackling doping problems and issues, while not interfering in the selection decision and policies of autonomous NOCs. That conclusion is reinforced by the fact that, until now, WADA had never found that the Bye-Law was non-compliant with the WADA Code.

¹¹ Article 23.2.2 of the WADA Code provides that these articles must be implemented by Signatories without substantive changes and that no additional provision may be added to a Signatories’ rules which changes the effect of Articles 9 and 10.

5.12 Thus, the WADA Code cannot properly be construed as precluding an autonomous NOC from declining to select, or adopting a policy that it will not select, to represent its team and country athletes who have previously deliberately doped.

(ii) The Purpose, Nature and Effect of the Bye-Law

5.13 According to the BOA, the Bye-Law, in its purpose, nature and effect, is a selection policy, and it does not involve the imposition of an extra-sanction.

5.14 In order to determine the purpose, nature and effect of the Bye-Law, the Panel ought to have regard to the following: (i) the wording of the Bye-Law; (ii) WADA's acceptance of the Decision appealed against; (iii) the purpose of the Bye-Law; and lastly; (iv) the nature and effect of the Bye-Law.

5.15 Looking first to the wording, the title of the Bye-Law "*Membership of Team GB*" makes it clear that it is a selection policy. This proposition is further demonstrated by the recitals to the Bye-Law which set out the BOA's selection policy in relation to athletes who have doped. Further, there is nothing in the wording of the Bye-Law to suggest that its aim is to impose an additional sanction for a doping offence.

5.16 Second, WADA itself accepts that the Bye-Law is a "*rule on selection*".

5.17 Third, the purpose of the Bye-Law is to pursue the Olympic ideals and the goals of the BOA, Team GB, British athletes and the development of British Olympic Sport. It accomplishes this purpose by defining the nature of the people selected for the team.

5.18 Fourth, for the athlete who falls within the Bye-Law's class of deliberate cheats, the nature and effect of non-selection by loss of eligibility for Team GB is different than a disciplinary sanction imposed following conviction of an anti-doping violation. The non-selection flows not from the doping conviction, but from the athlete's very character as a deliberate cheat. The policy does not impact every person who has committed a doping infraction, as is indicated by the preponderance of successful appeals in non-equine matters (22 in total).¹²

5.19 The BOA, as an autonomous body, may concern itself with the specific question of who is an appropriate person to be selected to represent the country in the Olympic Games as a member of Team GB. The BOA may decide, having regard to the previous conduct of an athlete – whether it is having committed a doping offence or having engaged in some other conduct such as criminal or sexual misconduct or harassment – that a particular person is not an appropriate person to be selected for Team GB.

¹² This is leaving aside the fact that two athletes did not invoke the appeal process and one invoked it improperly.

(iii) Comparison of the IOC Regulation to the BOA Bye-Law

- 5.20 BOA puts forward six comparisons to demonstrate why the situation of the IOC Regulation that the USOC Award found to be invalid is different from that of the Bye-Law:
- (a) The IOC and BOA are different bodies;
 - (b) The IOC Regulation was not a selection policy, while the Bye-Law is;
 - (c) The purpose of the IOC Regulation was to prevent and sanction doping, which is not the purpose of the Bye-Law;
 - (d) The IOC regulation involved strict liability and appeared to be of a disciplinary nature, whereas the Bye-Law applies only to non-selection of deliberate cheats;
 - (e) The analysis in the USOC Award involved a different question, and the reasoning simply does not apply in the context of the Bye-Law; and
 - (f) The need for identity of purpose.
- 5.21 First, in the matrix that makes up international sporting bodies, the IOC and BOA are very different bodies. The IOC is the world body under whose umbrella every other body is sheltered, including the International Federations (“IFs”), the NOCs and the Anti-Doping Organisations (“ADOs”).
- 5.22 The IOC is the world governing body for the organizing and running of the Olympic Games. In that capacity, it is defined in the WADA Code as being an ADO. In contrast, the BOA does not perform any of the aforementioned activities. The BOA selects the athletes who will be members of Team GB and manages and administers the team during the games.
- 5.23 Second, in contrast to the Bye-Law, the IOC Regulation is not a selection policy brought into existence by an autonomous NOC. Rather, the IOC Regulation is a rule that provides that all athletes convicted of, and who have served, a doping sanction in excess of six months will be barred from the next Olympics.
- 5.24 Third, the purpose of the IOC Regulation was to prevent and to sanction doping. This is not the purpose of the Bye-Law. The purpose of the Bye-Law is to pursue the Olympic ideals and to protect the BOA and Team GB by defining the nature of the people to be selected for the team.
- 5.25 Fourth, in contrast to the Bye-Law, the IOC Regulation imposed an automatic, unappealable, additional sanction on any athlete who had received a doping sanction of six months or more. The Bye-Law permits appeals by athletes to demonstrate that it should not apply to them.
- 5.26 Fifth, the analysis in the USOC Award involved a different question from that in this arbitration. Accordingly, the reasoning in that case does not apply to the case at hand.

The Bye-Law is not an extra sanction and thus cannot be contrary to the WADA Code on the same basis that the IOC Regulation was held to be contrary to the WADA Code. As an NOC, the BOA is entitled to adopt and to apply a selection policy that excludes those persons who it thinks, in its judgment, have behaved in a manner which makes it inappropriate to select them to participate as a representative of the country and an example to youth in the Olympic Games.

5.27 Finally, in footnote 11 of the USOC Award, the Panel stated that:

“If the IOC issued a rule that persons convicted of a violent felony were not eligible to participate in the Olympic Games, such a rule would likely not violate the principle of ne bis in idem, because the effective purpose of that sanction would be different from the purpose of the criminal penalty associated with that violent felony”.

5.28 The IOC Regulation was regarded as breaching the WADA Code because the effective purpose of the IOC Regulation was the same as the effective purpose of the original disciplinary sanction imposed. By contrast, the effective purpose of the Bye-Law is to avoid selection of inappropriate athletes to represent the country, so that it is different from the purpose of the original disciplinary sanction imposed as a consequence of the doping offence.

5.29 On the basis of the above arguments, the BOA made the requests set out at paragraph 3.4 above.

(iv) Reply to WADA’s Answer

5.30 In reply to WADA’s Answer, the BOA states that its selection policy is distinct in principle from a sanction for a doping offence for two reasons. The selection policy:

- (i) Applies only to a particular event – an event that celebrates sporting values and is designed to set an example for youth; and
- (ii) Does not apply to all those guilty of a doping offence, but rather only to deliberate doping cheats.

5.31 The WADA Code, on its proper construction, does not prevent an NOC from declining to select athletes for the Olympic Games because the NOC believes them to be unsuitable persons to represent the country.

5.32 WADA misread the USOC Award. That decision involved a much different rule.

5.33 The issue in this matter depends on the substance of the Bye-Law, not on form.

5.34 WADA’s approach focuses too much on one supposed effect (inability to attend an event) and elevates that effect above all other effects and purposes in assessing the true nature of the Bye-Law. Any other effect or purpose is only incidental to the true

nature and purpose, which is to apply a selection policy. There is no substantive evidence that the purpose of the Bye-Law is to punish athletes.

5.35 The IOC Regulation is distinguishable from the Bye-Law in several ways:

- The Bye-Law is merely one aspect of a broader general policy that a person will not be selected if not a suitable representative of the country;
- The content of the Bye-Law is concerned with the particular facts of each individual case;
- The IOC Regulation was deliberately drafted as a supplement to the sanctions under the Code. Further, the IOC and the BOA are very different bodies, with very different responsibilities under the WADA Code.

B. Respondent's Submissions and Requests for Relief

5.36 WADA states that the issue before this Panel is whether the same reasoning found in the USOC Award can be applied to the BOA and its Bye-Law, and whether that same reasoning, when applied to the Bye-Law, ought to lead to the same conclusion: namely, that the Bye-Law is an extra sanction and therefore contrary to the WADA Code.

5.37 The key question that arises is whether or not the Bye-Law is an additional sanction for doping. From this perspective and context, much of the argument of the BOA is an attempt to demonstrate the necessity, fairness, and proportionality of the Bye-Law, and the broad popular support for it in Great Britain. This argument is irrelevant in the context of this arbitration. If the Bye-Law is properly characterised as an additional sanction for doping over and above the Code sanctions, then it infringes Article 23.2.2 of the WADA Code and therefore must render the BOA to be non-compliant with the WADA Code.

5.38 To address the question, WADA groups its arguments into four themes:

- (i) The commitment BOA made not to apply any rule that operates as an additional doping sanction;
- (ii) Whether the WADA Code should include a provision like the Bye-Law is not in issue in this appeal;
- (iii) The BOA Bye-Law is an additional doping sanction; and
- (iv) Footnote 11 of the USOC Award does not save the Bye-Law.

(i) The Commitment Not to Apply a Rule that Operates as an Additional Doping Sanction

5.39 WADA submits that:

- (a) Respecting BOA's autonomy means enforcing BOA's commitment under the WADA Code;

- (b) WADA’s previous forbearance in relation to the Bye-Law is irrelevant;
- (c) Nothing in the OC overrides Article 23.2.2 of the WADA Code; and
- (d) Article 23.2.2 of the WADA Code applies in full to the BOA.

(a) *The autonomy of BOA means enforcing BOA’s commitment:*

5.40 The Decision is not an unauthorized and improper intrusion by WADA into the autonomy conferred upon the BOA to decide what type of persons should represent it at the Olympic Games. Rather, WADA’s role is simply to enforce the constraints on the BOA’s selection autonomy that the BOA has voluntarily accepted as a Signatory to the WADA Code. Part of that process is to make a compliance assessment, as WADA did in this matter.

5.41 The BOA as a Signatory to the Code constrained its own autonomy. It committed itself to ensuring that it did not include any provision which negated, contradicted or otherwise changed the mandatory WADA Code articles, such as the sanctions provisions. Contrary to its obligation under the WADA Code, in enacting the Bye-Law, the BOA changed the mandatory articles by providing for an additional consequence above those already provided for in the WADA Code.

(b) *Previous forbearance of WADA:*

5.42 WADA made no agreement with the BOA that its Bye-Law was a selection policy when it stated in 2009 that the BOA’s Anti-Doping Rules were WADA Code compliant. It simply decided not to challenge the BOA’s stance on the Bye-Law pending a ruling from a competent tribunal. Once the USOC Award was released, WADA was required to challenge the Bye-Law’s compliance.

(c) *Nothing in the OC overrides Article 23.2.2:*

5.43 The general commitment in the OC to select athletes based on their performance and their exemplary behaviour does not override the specific obligation in the OC imposed on NOCs by article 27.2.6 to adopt and to implement the WADA Code.

(d) *WADA Code Article 23.2.2 applies in full to the BOA:*

5.44 Article 23.2.2 of the WADA Code applies to more than the defined term “Anti-Doping Organizations”. The BOA is obliged by its Anti-Doping Rules to co-operate with its NADO, UK Anti-Doping in “*initiating, implementing and enforcing the Doping Control process in the United Kingdom*”. That co-operation is required to be both indirect (by recognizing and enforcing Code-compliant sanctions) and direct (by imposing out-of-competition testing requirements on athletes who wish to be selected for Team GB and pursuing charges against athletes against whom Code-specified sanctions have been imposed). Therefore, the BOA is an Anti-Doping Organization for the purposes of the Code and is obliged to observe Article 23.2.2 WADA Code.

5.45 In the alternative that the BOA is not found to be an “Anti-Doping Organization”, it is nevertheless a Signatory to the WADA Code. As a Signatory, BOA is bound by Article 23.2.2 WADA Code. Accordingly, it is incumbent upon the BOA to demonstrate that the Bye-Law does not change the effect of any mandatory WADA Code Articles.

(ii) Should the WADA Code Include a Provision Like the BOA Bye-Law?

5.46 Such a question is not and should not be an issue on appeal from a Decision involving compliance. There is no doubt that the BOA and its supporters genuinely hold the view that the Bye-Law is necessary, fair and proportionate.

5.47 What ought to be in the WADA Code or an NOC’s bye-laws is a matter of legislative competence and not within the jurisdiction of this Panel. All stakeholders will be given the opportunity to consider and to debate the various arguments and counterpoints on the issue of subsequent bans from the Olympics when they come to consider amendments to the WADA Code for 2013 and beyond.

(iii) Is the Bye-Law an Additional Doping Sanction?

5.48 In characterizing the Bye-Law, the exercise should be one of substance and not form, as was done in the USOC Award. The Panel must determine the nature, scope and in particular the effect of the Bye-Law.

5.49 The BOA asserts that there are crucial distinctions between the Bye-Law and the IOC Regulation, so that applying the reasoning of the USOC Award to the Bye-Law will lead to a different outcome. In contrast, WADA submits that these distinctions are either without value or are contradicted by the BOA’s own evidence.

5.50 WADA evaluates three aspects of the Bye-Law to make a proper determination regarding its characteristics:

- (a) The Wording of the Bye-Law;
- (b) The Purpose of the Bye-Law; and
- (c) The Effect of the Bye-Law.

(a) *The Wording of the Bye-Law:*

5.51 The wording of the Bye-Law is of no real consequence. The Bye-Law must be examined in substance, rather than in form. Simply because the wording is not suggestive of a sanction does not mean that it is not a sanction as a matter of substance.

5.52 Several features of the Bye-Law indicate that it is a sanction. Further, the BOA documents contain express terminology to the same effect, including:

- The first three versions of the Bye-Law gave the appeal committee power to “*restore eligibility at such time and subject to such conditions and/or impose such other penalty as it considers appropriate.*” [Emphasis WADA]
- Although this wording was removed from the current version of the Bye-Law, it still appears in the “BOA Rules for the BOA Appeals Panel”;
- The fact that the Bye-Law pre-dates the BOA Anti-Doping Rules and is thus not contained within those rules is another distinction without a difference. In any event, the link between the two Bye-Laws is found in paragraph 7.4 in the section titled, “British Olympic Association Imposed Sanctions.” There the Bye-Law is listed alongside other anti-doping sanctions that the BOA may impose for anti-doping rule violations.
- The USOC Award also took account of how the rule might be perceived. The BOA supporters – be they the British Government, Members of Team GB, their own appeals panel, or British Athletes – all continually refer to the Bye-Law as a “sanction” or “penalty” or “life ban”. Such a perception is also held by the Chairman of the BOA, as indicated in his witness statement. Therefore, the true nature of the provision is a sanction.

(b) *The Purpose of the Bye-Law:*

5.53 Even if the main purpose of the Bye-Law is “non-sanctioning”, it is clear from the USOC Award that that alone would not save the Bye-Law if its effect is to sanction. The Bye-Law, according to WADA, has all the aims of a doping sanction (with the exception of rehabilitation): namely, (i) punishment for cheating; (ii) protection against/prevention of further cheating by the same athlete; (iii) deterrence from cheating by other athletes; and (iv) maintaining public confidence in the integrity of sport.

5.54 The BOA’s claim that the purpose of the Bye-Law is not to punish cheating is contradicted by a recent proclamation of the BOA Chairman, which stated, “*It is the BOA’s belief [...] that the willful, consistent, and illicit use of banned performance enhancing drugs use [sic] is the most heinous reprehensible form of cheating in sport and so in this specific case the toughest sanctions should apply*”.

5.55 Other evidence introduced by the BOA further supports the position that it is a sanction, including:

- The purpose of its introduction that because British athletes did not think it was right that dopers should be able to serve out a ban and then participate in the Games again; and
- Numerous statements made by the BOA Chairman.

- 5.56 The BOA’s evidence also makes it clear that the purpose of the Bye-Law is to protect clean athletes, including statements by the BOA Chairman such as “[*without the Bye-Law*] *the cheat, possibly with a life long benefit of a course of growth hormones and other drugs is back again*”.
- 5.57 Several statements made on behalf of the BOA also make it clear that the quintessential purpose of the Bye-Law is to deter such behaviour by others. The BOA Chairman, in a recent speech explaining and justifying the Bye-Law, stated “*The arguments for overturning the BOA Eligibility Bye-Law have singularly failed to acknowledge the importance of an effective deterrent in the fight to stamp out drug use in sport [...]*”.
- 5.58 Comments made by athletes in support of the Bye-Law also point to its use as a strong deterrent.
- 5.59 Finally, it is clear from various statements made by the BOA and supporters of the Bye-Law that a key purpose of the Bye-Law is the maintenance of public confidence in the integrity of the Olympics and the BOA’s commitment to keep Olympic sport drug free.

(c) *The Effect of the Bye-Law:*

- 5.60 The crucial factor for characterization purposes is the effect of the rule in operation. If the effect of the rule is to bar participation in an event on account of past behaviour, then it is a sanction.
- 5.61 The distinction between “selection for the team” and “participation in the event” is a distinction without a difference.
- 5.62 The effect of the Bye-Law is a bar on participation in the Games at the penultimate hurdle (selection to the team) in just the same way as the IOC Regulation was a bar on participation at the last hurdle (registration for the Games).
- 5.63 While WADA Code Article 10 bars an offender from participation in all competitions for the period of ineligibility, the Bye-Law bars the offender from participation in the Olympic Games for the rest of his or her life.

(iv) Footnote 11 in the USOC Award does not save the Bye-Law

- 5.64 Footnote 11 of the USOC Award should not be read as a ruling that “identity of purpose” is a prerequisite for the *ne bis in idem* rule to apply. The CAS Panel noted that the IOC Regulation fell afoul of the rule because its purpose was the same as the anti-doping rule, the underlying behaviour was the same, and the consequences were the same.

- 5.65 The Bye-Law (much like the IOC Regulation) is motivated (at least in part) by exactly the same objectives as the underlying anti-doping rules imposing the original ban; it is triggered by an anti-doping rule violation; and it has the same consequences in the sport context as the underlying doping ban.
- 5.66 In reply to the secondary submission of BOA, WADA stated that the BOA has misinterpreted footnote 11 of the USOC Award. The footnote does not discuss the test for a doping sanction under Article 23.2.2 of the WADA Code. Rather, it is talking about the *ne bis in idem* rule. In relation to Article 23.2.2 WADA Code, the CAS in the USOC Award made it clear that the sanctioning effect of the IOC Regulation (i.e., barring from participation) overrode the IOC's claim that the Regulation pursued a wholly different purpose than an anti-doping ineligibility sanction.
- 5.67 The lifetime ban imposed by the Bye-Law is not merely incidental to the purposes and other effect of the Bye-Law; it is the whole point.
- 5.68 The differences BOA points to between the IOC Regulation and the Bye-Law are of no consequence. They do not change the fact that the Bye-Law operates as a sanction.

6. JURISDICTION OF THE CAS

- 6.1 Article R47 of the CAS Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

- 6.2 Both Parties agree that CAS has jurisdiction (as confirmed by their signature of the Order of Procedure). That jurisdiction is established under the Appeal Procedure of the Code and pursuant to Articles 13.5 and 23.4.4 of the WADA Code.
- 6.3 Article R57 of the CAS Code provides that a CAS panel “*shall have full power to review the facts and the law*”. In that respect, both Parties agree that the Panel may issue a new decision replacing or annulling the challenged Decision or confirming the correctness of the Decision.

7. APPLICABLE LAW

7.1 Article R58 of the CAS Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

7.2 The “*applicable regulations*” within Article R58 of the CAS Code are those of the WADA Code, the Bye-Law and the BOA Anti-Doping Bye-Law.

7.3 The BOA submitted that the WADA Code should be interpreted according to the special principles applicable to international treaties between state parties. WADA submitted the applicable principles are those of the private law of contract. The Panel held in the USOC Award at paragraph 8.21 that “*the WADA Code is neither a law nor an international treaty. It is rather a contract instrument binding its signatories in accordance with private international law*”. The Panel is applying its prior conclusion to this proceeding.

7.4 Both Parties agree that the Bye-Law is governed by and is to be construed in accordance with English law.

7.5 The Bye-Law reads in full:

*“Bye-law of the National Olympic Committee:
Eligibility for Membership of Team GB of Persons
Found Guilty of a Doping Offence*

Whereas

(i) the British Olympic Association (the “BOA”) is responsible for the selection of athletes and other support personnel to represent Great Britain and other territories as specified by the International Olympic Committee (“Team GB”);

(ii) the BOA strongly disapproves of doping in sport and does not regard it as appropriate that Team GB should include athletes or other individuals (including but not limited to coaches, medical and administrative

staff) who have doped or been found guilty of a doping offence including but not limited to the supply or trafficking of prohibited substances;

- (iii) the BOA, in compliance with the World Anti-Doping Code (“the WADC”), recognizes adjudication of competent authorities under the WADC by not selecting athletes or other individuals for accreditation to Team GB while they are subject to a ban from competition under such adjudications;*
 - (iv) 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;*
 - (v) 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;*
 - (vi) the BOA has accordingly adopted this by-law.*
- 1. Any person who has been found guilty of a doping offence either*
 - (i) by the National Governing Body of his/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 as provided below, thereafter be eligible for consideration as a member of a Team GB or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team GB delegation for or in relation to any Olympic Games, any Olympic Winter Games or any European Olympic Youth Festivals.

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 (“SDRP”)) to consider any appeal by a person made ineligible pursuant to paragraph 1 above. The respondent to the appeal will be the British Olympic Association. None of the members of an Appeals Panel shall (a) be from or connected with the National Governing Body of the appellant, (b) have presented an appeal under this bye-law for an/or on behalf of the BOA or (c) discuss any appeal in progress with any member of the BOA, the BOA Executive Board or the National Olympic Committee unless such member is a member of such an Appeals Panel hearing such an appeal.*
3. *The Executive Board shall instruct the SDRP to act as secretariat to the Appeals Panel. The costs associated with SDRP carrying out its duties as secretariat will be borne by the BOA.*
4. *The Appeals Panel shall first consider written submissions by or on behalf of the appellant and the respondent and shall,*

where possible, render its decision based on those submissions. If the Appeals Panel is not minded to allow an appeal based on written submissions or if requested by an appellant the Appeals Panel shall allow the parties to appear in person and/or be represented before it. Subject thereto, it shall regulate its own procedure as set out in the BOA's Rules for the Appeal Panel under the BOA Bye-law (in force at the time any appeal is commenced).

5. *A person made ineligible pursuant to paragraph 1 above 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 circumstance 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.

6. *In determining whether a doping offence is minor for the purposes of paragraph 5 above, the Appeals Panel shall take account of the Olympic Movement Anti-Doping Code or the World Anti-Doping Code in force at the time the offence was committed (the "Codes") and the rules relating to doping of the National Governing Body or the International Federation of the appellant. The Appeals Panel shall consider as minor any offence which under*

the Codes carries a suspension of less than or equal to six months.

7. *In determining whether significant mitigating circumstances exist the Appeals Panel shall take account of all relevant facts and matters including any circumstances permitting greater leniency under the Codes. The Appeals Panel shall not consider as a significant mitigating circumstance (without more) any admission of guilt by or on behalf of the appellant.*
8. *The above provisions apply only to persons found guilty of a doping offence as referred to in paragraph 1 above committed on or after 25th March 1992.*
9. *Each National Governing Body in membership of the BOA shall inform the Chief Executive of the BOA forthwith of the name of any person found guilty under the rules relating to doping of that National Governing Body or any Sporting Authority and supply a certified copy of the decision of the body making such findings and, where possible, a full transcript of the proceedings.*

This bye-law was passed by the National Olympic Committee on 25th March 1992 and modified on 25th March 1998, 14 February 2001 and 3 November 2004.”

7.6 WADA Code, Article 23.2.2, reads as follows:

“The following Articles (and corresponding Comments) as applicable to the scope of the anti-doping activity which the Anti-Doping Organization performs must be implemented by Signatories without substantive change (allowing for any non-substantive changes to the language in order to refer to the organization’s name, sport, section numbers, etc.):

- Article 1 (Definition of Doping)*
- Article 2 (Anti-Doping Rule Violations)*
- Article 3 (Proof of Doping)*

- *Article 4.2.2 (Specified Substances)*
- *Article 4.3.3 (WADA’s Determination of the Prohibited List)*
- *Article 7.6 (Retirement from Sport)*
- *Article 9 (Automatic Disqualification of Individual Results)*
- *Article 10 (Sanctions on Individuals)*
- *Article 11 (Consequences to Teams)*
- *Article 13 (Appeals) with the exception of 13.2.2 and 13.5*
- *Article 15.4 (Mutual Recognition)*
- *Article 17 (Statute of Limitations)*
- *Article 24 (Interpretation of the Code)*
- *Appendix 1 – Definitions*

No additional provision may be added to a Signatory’s rules which changes the effect of the Articles enumerated in this Article.”

7.7 WADA Code, Article 10.2, reads as follows:

“Ineligibility for Presence, Use or Attempted use, or Possession of Prohibited Substances and Prohibited Methods

The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Two (2) years Ineligibility.”

8. MERITS

- 8.1 Based on the information disclosed by the Parties, the Panel does not have any reason to doubt that both Parties are strong advocates in the fight against doping in sport. In fact, BOA and WADA both recognise that doping is fundamentally contrary to the spirit of sport. Neither party condones doping in sport and both recognise the need to pursue aggressively the goal of its eradication. Therefore, neither party should be seen to be “soft” or easy on doping in sport.
- 8.2 The dispute between the Parties here involves one means of pursuing the fight against doping, not the fight itself. The Bye-Law prevents an athlete who has had a doping

offence from being selected to represent the British Olympic Team. The core issue to be determined here is whether BOA may pursue that policy on its own or whether that policy must be pursued, if at all, through the world-harmonized WADA Code.

- 8.3 The essential issues for this appeal are framed by this Panel’s decision in the USOC Award. As described above, that decision involved an IOC Regulation that any athlete suspended for doping and sanctioned for a period of six months or more may not participate in the next Olympic Games following the end of the suspension. The CAS Panel in the USOC Award held that the IOC Regulation violated Article 23.2.2 of the WADA Code, because it made a “*substantive change*” to the sanctions for doping found in Article 10 of the WADA Code. The IOC Regulation was incorporated into the Olympic Charter (“OC”) in violation of the WADA Code and of the principles of the OC itself. Therefore, the IOC Regulation was held to be invalid and unenforceable because the IOC had not complied with its own statutory rules.
- 8.4 In reaching the decision in the USOC Award, the Panel noted that sanctions under Article 10 of the WADA Code are described as a “*period of ineligibility*”, which in turn is defined as the athlete being “*barred for a specified period of time from participating in any Competition*”. The Olympic Games are such a Competition. Thus, the requirement in the IOC Regulation that an athlete “*may not participate*” in the next Olympic Games is identical to the WADA Code’s definition of “*ineligibility*”. The essence of both provisions is disbarment from participation.¹³
- 8.5 As a result, the IOC Regulation operated as a sanction in the same manner as Article 10 of the WADA Code. The effect on the athlete – ineligibility to participate in a Competition, the Olympic Games – is the same. However, the IOC Regulation prevents an athlete from participating in a Competition after the sanction provided in the WADA Code has been completed. By implementing this additional sanction, the IOC Regulation made a substantive change to Article 10 of the WADA Code, which Article 23.2.2 WADA Code does not permit. The Panel added, “*Even if one accepts that the Regulation has elements of both an eligibility rule and a sanction, it nevertheless operates as, and has the effect of, a disciplinary sanction*”.¹⁴
- 8.6 The WADA Foundation Board Decision followed and was based upon the reasoning of the USOC Award. The WADA Foundation Board determined that the BOA was likely non-compliant with the WADA Code because the Bye-Law was an “*extra sanction*” and “*non-compliant for the same reason the IOC eligibility rule was deemed non-compliant by the Court of Arbitration for Sport*” in the USOC Award. The WADA Compliance Report used by the WADA Foundation Board to inform its decision described the non-compliance as “*in effect, a double sanction*”.

¹³ USOC Award, ¶8.12.

¹⁴ USOC Award, ¶8.19. Please refer to the full text of the Award for the Panel’s complete reasoning.

8.7 The issue before this Panel is thus whether the Bye-Law is not compliant with the WADA Code because it is an extra sanction, in the same way that the IOC Regulation was held to be non-compliant in the USOC Award.

(a) The Roles of Selection Policies and the WADA Code

8.8 The BOA states that the Bye-Law is part of an overall team selection policy. That policy is aimed at choosing the most appropriate athletes to be representatives of Team GB at a sporting festival that celebrates athleticism and fair play. In developing a selection policy, and in selecting appropriate athlete representatives for Team GB, the BOA enjoys autonomy as expressed in the OC.¹⁵

8.9 When the Bye-Law has effect on an athlete, it operates to preclude selection of that person to Team GB. The BOA calls this effect “*non-selection*”. The BOA argues that the non-selection is not a sanction, but rather is the simple application of a selection policy. According to the BOA, the non-selection results from the fact that the athlete is not an appropriate person to represent the country in sporting competition in relation to any Winter or Summer Olympic Games or European Olympic Youth Festivals, and it is based on the spirit of Olympism.

8.10 The Panel accepts the proposition of counsel for the BOA that generally the application of a selection function is separate and distinct from the imposition of a sanction for a doping offence. NOCs may develop criteria for selection to their Olympic teams. At the same time, the WADA Code prescribes the various forms of doping infractions and the consequent sanctions arising from such infractions.

8.11 As the BOA argued, NOCs have great autonomy to develop their selection of representatives to a national Olympic team. The WADA Code does not and is not intended to intrude upon the autonomy of an NOC (such as the BOA) in developing these policies. In the normal course of events, the WADA Code and an NOC’s selection policy rarely intersect each other.

8.12 However, NOCs like BOA have agreed to limit their autonomy by accepting the WADA Code. In particular, Article 23.2.2 WADA Code, requires that its Signatories, including NOCs, do not make any additional provisions in their rules which would change the substantive effect to any enumerated provisions of the WADA Code, including its sanctions for doping. The purpose of Article 23.2.2 WADA Code is indeed the very purpose of the WADA Code: the harmonization throughout the world of a doping code for use in the fight against doping. This worldwide harmony is crucial to the success of the fight against doping. The WADA Code is intended to be an all-encompassing code that directs affected organizations and athletes. The WADA Code ensures that, in principle, any athlete in any sport will not be exposed to a lesser or greater sanction than any other athlete; rather, they will be sanctioned

¹⁵ See Rules 27(3), 27(7) and Rule 28; together with the Bye-Law to Rules 27 and 28 in particular 2.1.

equally. By requiring consistency in treatment of athletes who are charged with doping infractions or convicted of it -- regardless of the athlete's nationality or sport -- fairness and proper enforcement are achieved. Any disharmony between different parties undermines the success of the fight against doping. For these good reasons, NOCs and other Signatories agreed to limit their autonomy to act within their own spheres with respect to activities covered by the WADA Code.

- 8.13 The Panel determines that the Bye-Law operates within the sphere of activity governed by the WADA Code. The Panel comes to this conclusion because:
- The Bye-Law is based on the same considerations and operates in connection with the same behaviour as the WADA Code; and
 - The Bye-Law has the same effect as a sanction under the WADA Code: “ineligibility”.

Moreover, because the Bye-Law imposes an additional sanction beyond those provided in the WADA Code, it is not compliant with the Code.

(b) The Characterisation and Operation of the Bye-Law

- 8.14 While BOA has argued that it is applying principles of character and Olympism in defining the policies of the Bye-Law, an examination of the Bye-Law terms and the manner in which it has been applied shows that in fact the Bye-Law relies on the same principles and conduct as the WADA Code. This can be seen immediately in the Recitals to the Bye-Law:
- Recital 2 states that the BOA strongly disapproves of doping in sport;
 - Recital 3 references compliance with the WADA Code; and
 - Recital 5 sets out the need for an Appeal Panel to assess if a doping offence is minor, committed without fault or negligence, or where other mitigating circumstances make it suitable to declare the athlete as eligible for selection.
- 8.15 Once an athlete has been found guilty of committing a doping offence pursuant to the WADA Code, a sanction may be imposed under Article 10 of the WADA Code. That same doping offence also triggers the application of the BOA selection policy: Under the Bye-Law, the individual who committed the doping offence is ineligible for membership in Team GB. Without a sanction under the WADA Code, the Bye-Law has no applicability: The foundation for the application of the Bye-Law is not present.
- 8.16 The non-selection, or ineligibility, effect of the Bye-Law may be reversed by the Appeal Panel (“AP”). However, once again, the provisions of the WADA Code are essential in guiding the AP in its assessment of the application of the Bye-Law to the particular athlete. Notably, paragraph 5 of the Bye-Law permits a person to appeal the effect of the Bye-Law on three grounds:

- (i) Minor offences;
- (ii) There was a finding under the WADA Code of no fault/negligence or no significant fault/negligence; or
- (iii) If significant mitigating circumstances existed in relation to the doping offense.

8.17 In applying these criteria, paragraph 6 of the Bye-Law guides the AP in its assessment of “*minor offence*” by referring to the WADA Code. The AP is specifically directed, in determining whether a doping offence is minor for the purposes of paragraph 5, to “*take account*” of the WADA Code, among others,¹⁶ and to find that it is minor if the offence carries a suspension of six months or less “*under the Code*”.

8.18 Similarly, the second ground of appeal to the AP is if the offence committed was one which would be considered under the WADA Code to be of “*no fault or negligence or no significant fault or negligence*”. The AP must thus assess the athlete’s degree of fault in respect of the doping offence within the framework of the WADA Code.

8.19 The other ground of appeal under paragraph 5 is if “*significant mitigating circumstances existed in relation to the doping offence*”. It is only on this ground that the AP is relatively free to exercise its discretion in a manner less directly connected to the WADA Code. However, even on this ground of appeal, paragraph 7 directs the AP to take account of any “*circumstances permitting greater leniency under the Codes*”.

8.20 These provisions of the Bye-Law itself show that, far from being divorced from the WADA Code, the Bye-Law rests on the foundation of the WADA Code. It follows the same rationale – “*strongly disapproves of doping in sport*” – and, the applicability of the Bye-Law, both in determining the initial non-selection and in considering an appeal of that non-selection, depends on the same criteria as laid out in the WADA Code.

(c) The Effect of the Bye-Law

8.21 Once an athlete is found guilty of a doping offence in accordance with the WADA Code, that finding, by operation of the Bye-Law, automatically makes an athlete ineligible to be selected to Team GB: “*Any person ... found guilty of a doping offence ... shall not ... thereafter be eligible for consideration as a member of a Team GB ... in relation to any Olympic Games ...*”.¹⁷

¹⁶ The Bye-Law in paragraph 6 also makes reference to the Olympic Movement Anti-Doping Code (the “OMADC”). That Code is based upon the WADA Code but is implemented by the IOC for the particular Olympic Games and carries with it the same obligation as Article 23.2.2 of the WADA Code. This process of adopting the WADA Code by the IOC is similar to the exercise engaged in by the IFs. The OMADC for the Summer Olympics in London, England was filed as Exhibit 2 to the BOA’s Reply Brief.

¹⁷ Paragraph 1 of the Bye-Law.

- 8.22 As described in the USOC Award, e.g., paragraphs 6.9 and 8.12, in dealing with “Sanctions on Individuals” Article 10.2 of the WADA Code prescribes a “period of ineligibility” to be imposed for a doping offence.
- 8.23 The Panel there found that the IOC Regulation was a sanction because it made an athlete ineligible to participate and, thus, compete in the next Olympic Games.¹⁸ That ineligibility fell squarely within the nature of sanctions provided in the WADA Code. Once the IOC Regulation was used to bar the participation of an athlete from the Olympics, its effect was disqualification from the Olympics, a Competition within the meaning of the WADA Code. Such a consequence, according to the Panel, was undeniably disciplinary in nature and within the scope of the WADA Code.
- 8.24 Similarly, the effect of the Bye-Law in rendering the athlete found guilty of a doping offence to be ineligible to be selected to Team GB is immediate, automatic and for life.¹⁹ While the BOA argues that the athlete is ineligible for “*consideration to be a member of Team GB*” and not to compete, disbarment from the Team for life carries with it the direct consequence of never being able to participate in the Olympics and as a consequence to compete in the Games. That is the underlying reality of ineligibility.
- 8.25 The difference in the wording of the Bye-Law and the IOC Regulation is inconsequential. Any athlete who had committed an anti-doping offence as described in the Bye-Law for which he or she was sanctioned becomes, by virtue of the operation of the Bye-Law, automatically ineligible for consideration as a member of the Team GB delegation in relation to any Summer or Winter Olympic Games or any European Olympic Youth Festivals. Whether he or she cannot be selected or whether he or she is ineligible is, as counsel for WADA stated, a distinction without a difference. As has been noted, the WADA Code itself defines “*ineligibility*” as the inability to “*participate*” in a Competition, including the Olympics. The fact of the matter is that, by operation of the Bye-Law, an athlete is unable to participate in the Olympics.
- 8.26 Accordingly, this Panel finds that the Bye-Law renders an athlete ineligible to compete – a sanction like those provided for under the WADA Code.
- 8.27 The availability of the AP does not change this analysis. While the BOA argued that this ability to apply to the AP has the effect of ensuring that only deliberate cheats are affected by this rule, the Panel finds that this is not exactly the case.²⁰ In order to

¹⁸ See USOC Award, ¶8.12.

¹⁹ In contrast, the IOC Regulation discussed in the USOC case had only a one time effect at the next Olympic Games, and there could be no appeal of that effect. In the Panel’s view while these are distinctions in the operation of the IOC Regulation and the BOA Bye-Law, they have no impact upon the substantive merits of the analysis.

²⁰ The same observation was made in passing by Nicholas Stewart QC in the most recent oral hearing under the appeal process involving the athlete Christine Ohuruogu in December 2007.

avoid the ineligibility that arises from the first paragraph of the Bye-Law, an athlete must choose to activate the appeals process. Otherwise, the Bye-Law automatically makes the athlete ineligible for membership of Team GB and, therefore, participation on the Olympic Team at the Olympics.

- 8.28 Moreover, this ineligibility is caused by an anti-doping violation as the relevant prior undesirable behaviour, which is the hallmark of an anti-doping sanction.²¹ The foregoing analysis of the operation and text of the Bye-Law reveals that such criteria as Olympism and appropriate representation may be values reflected in the Bye-Law, but they are not what actually triggers the operation of the Bye-Law. While the BOA claims this selection policy is part of a greater policy that the BOA will select only athletes of good character, the fact is that the only behaviour that is explicitly referred to in the Bye-Law and that renders one ineligible to compete is the commission of a doping violation under the WADA Code.
- 8.29 The focus by the Bye-Law on the behaviour of the athlete can be further illustrated by a review of the appeals process. If the selection policy were purely designed as a means by which the BOA could have only the athletes of the best character, it would be unnecessary to have an appeals process to assess the “proportionality” of the application of the Bye-Law. In other words, the only thing that matters in a proportionality determination is the behaviour of the individual. Whether the punishment fits the crime is purely an analysis of an individual’s character and prior behaviour.
- 8.30 It is also noted that the Rules for the AP at paragraph 1.2 explicitly state that in the event of a finding in favour of the athlete, “*the Panel shall restore eligibility at such time and subject to such conditions and/or impose such penalty as it considers appropriate*”. [Emphasis added]
- 8.31 An examination of the AP decision in the Whitlock²² case is helpful in describing the purpose of the Bye-Law as nothing other than sanctioning an athlete for prior undesirable behaviour. In that case, Ms. Whitlock contended that significant mitigating circumstances existed in relation to her doping offence which ought to allow her to compete in the Olympics in Athens in 2004. The BOA had considerable sympathy for Ms. Whitlock’s position in that case and itself did not seek to suggest that there was evidence to indicate that she had deliberately cheated. However, the BOA stressed the importance of ensuring that athletics was “drug-free” and therefore nevertheless sought to have her appeal denied. The AP likewise in its reasoning stated that, while there was no reason not to accept the statement of Ms. Whitlock that she did not knowingly ingest the banned substance, “*drug use is a cancer on the good name of the sport*”. The AP relied on this reasoning in choosing not to restore Ms.

²¹ See USOC Award at para. 8.10.

²² Re: Janine Whitlock – Decision of Appeals Panel of British Olympic Association dated 9 March 2004 (Exhibit 19 – WADA).

Whitlock's eligibility. Unfortunately, it simply does not follow that, if the purpose of the rule is to select persons of good character, Ms. Whitlock ought not be selected.

8.32 In the Ohuruogu matter, the AP specifically stated that “*we also reject the related submission by the BOA that the BOA Bye-law is a selection rule and not an anti-doping rule. We see no value in any such distinction. It is clearly an anti-doping rule*”. Inherent in any anti-doping rule is the imposition of a sanction on an athlete for engaging in the undesirable behaviour of committing a doping offense. Furthermore, the factors on which the AP chose to restore Ms. Ohuruogu's eligibility were all related to her behaviour and degree of fault, namely:

- The fact that she had never intended to use prohibited substances;
- The fact that she never sought to deliberately avoid an advance notice out of competition testing;
- There were deficiencies and difficulties in training athletes about providing whereabouts information during the relevant time; and
- This was her first and only offense.²³

8.33 For all of the foregoing reasons, the Panel finds that the Bye-Law renders an athlete ineligible to compete and does so on the basis of prior undesirable behaviour: the commission of a doping offence under the WADA Code. The fact that the Bye-Law foresees a possibility of an Appeal Procedure is certainly a good instrument to avoid totally disproportionate decisions. However, this does not change the nature of the (disciplinary) consequences of the Bye-Law and, accordingly, its non-compliance with the WADA Code: The proportionality of sanctions for anti-doping offences shall be evaluated within the worldwide harmonized system of the WADA Code – and cannot be the object of an additional disciplinary proceedings triggered by the same offence.

(d) Inconsistency with the WADA Code

8.34 The WADA Code defines Ineligibility as “*the Athlete or other Person is barred for a specified period of time from participating in any Competition or other activity or funding*”. [Emphasis added]

8.35 A Competition, according to the WADA Code is “*A single race, match, game or singular athletic contest. For example, a basketball game or the finals of the Olympic 100-meter race in athletics [...]*”. The Olympic Games is, according to the WADA Code definition of an Event, a series of individual Competitions.

8.36 When an athlete is, by virtue of the operation of the Bye-Law, not eligible “*... for consideration as a member of Team GB*”, he or she is barred from ever being selected to Team GB, assuming either no appeal or an unsuccessful appeal to the AP. The

²³ *Supra* note 6.

Panel finds that the effect of that non-selection or inability to be selected to the Olympic team is (permanent) disbarment from participating in a Competition, the Olympic Games. That inability to participate is similar in effect to the sanction provided in the WADA Code for a doping offence. The Bye-Law imposes a permanent ineligibility to participate in the Olympic Games, which does not appear in Article 10 of the WADA Code or anywhere else in that Code. Therefore, the non-selection is a sanction in addition to those in the WADA Code, and it is of a much lengthier duration.

- 8.37 Article 23.2.2 of the WADA Code provides that certain provisions must be implemented by Signatories without substantive change (including the provisions regarding sanctions found in Article 10 WADA Code). Article 23.2.2 WADA Code further provides that: “*no additional provision may be added to a Signatory’s rules which changes the effect of the Articles enumerated in this Article*”. [Emphasis added]
- 8.38 As a Signatory to the Code, the BOA bound itself through Article 23.2.2 of the WADA Code not to add any additional provision to its “*rules which changes the effect of the Articles enumerated in this Article [being 23.2.2]*”.
- 8.39 The Bye-Law has the effect of changing the sanctions and their effect under the WADA Code as set out in the above analysis. Therefore, the BOA has breached its obligation not to add any provisions to its rules that change the effect of Article 10 WADA Code.
- 8.40 When the BOA chose to become a Signatory of the WADA Code, it in fact gave up – like any other Signatory – some of its autonomy, including agreeing not to impose a sanction other than those imposed by Article 10 WADA Code. Contrary to this obligation, no British athlete can ever compete in the Olympic Games as a result of a doping offence. That consequence is an “*extra*” or a “*double sanction*”, as referred to in WADA’s Decision.
- 8.41 In making the foregoing determination, the Panel wishes to reiterate its comments in paragraph 8.27 of the USOC Award, which indicate that the Panel’s Award is not an opposition to the sanctions imposed by the IOC Regulation or, in this case, the BOA Bye-Law. Rather, the awards in both cases simply reflect the fact that the international anti-doping movement has recognized the crucial importance of a worldwide harmonized and consistent fight against doping in sport, and it has agreed (in Article 23.2.2 WADA Code) to comply with such a principle, without any substantial deviation in any direction. In addition to those comments, the Panel notes that the BOA and the IOC are free, as are others, to persuade other stakeholders that an additional sanction of inability to participate in the Olympic Games may be a proportionate, appropriate sanction of an anti-doping offence and may therefore form part of a revised WADA Code. At the moment, the system in place does not permit

what the BOA has done. It is for this reason that the Panel said at the outset that the Parties are apart only on an isolated issue as to the appropriate process to further the fight against doping. They are not apart on the fundamental issue of the eradication of doping.

9. CONCLUSION

- 9.1 For the reasons set out in this Award, the Panel concludes that the Bye-Law is a doping sanction and is therefore not in compliance with the WADA Code. It confirms the view of the WADA Foundation Board as indicated in its Decision. Therefore, the appeal of BOA is rejected, and the Decision of the WADA Foundation Board is confirmed.
- 9.2 Based on the prayers for relief submitted by the Parties, the Panel does not have any jurisdiction to implement further directions. It is up to the Parties to give effect to the present Award in good faith and in accordance with the spirit of Olympism shown by the Parties already in the course of these proceedings.
- 9.3 All further and other claims for relief are dismissed.

10. COSTS

- 10.1 Article R65.1 of the CAS Code provides that proceedings which satisfy the criteria set out in that rule shall be free, and that the fees and costs of the arbitrators shall be borne by the CAS.
- 10.2 The Parties raised cost issues with respect to R65.1 of the CAS Code at the Hearing. Pursuant to a direction at the Hearing by the Panel, both Parties filed costs submissions on 21 March 2012. In those submissions, both Parties contend that the present proceedings are disciplinary in nature and the appeal directed against a disciplinary decision of an international sports-body. Thus, in the view of the Parties, the criterion set out in R65.1 of the CAS Code has been met for the present case to be free under R65.2 CAS Code, with the CAS to bear the costs of the arbitrators on the CAS fee scale together with the cost of the CAS.
- 10.3 The CAS Code does not assign explicitly to the CAS Court Office the function of deciding whether or not R65 CAS Code applies to a given appeal. However, the CAS Code assigns to the CAS Court Office the competence to determine the amount of the advance of costs, if any, to be paid by the parties (cf. Article R64.4 of the CAS Code). Accordingly, the Panel is satisfied that the rationale of such attribution of competences is for the CAS Court Office not only to determine at the outset of procedure the amount of any advance, but also if at all an advance is due, i.e., whether arbitration costs shall be paid by the parties or not.
- 10.4 The CAS Code does not specify whether or not the determination by the CAS Court Office to impose arbitration costs on the parties can be subject of a review by the

Panel. The wording of R64.4 of the CAS Code (“*At the end of the proceedings, the CAS Court Office shall determine the final amount of the costs of arbitration ...*”) speaks rather in favour of a final decision to be taken by the CAS Court Office. The same rationale can be seen in S20 of the CAS Code, which foresees that it is a decision of the CAS Court Office whether a proceeding shall be assigned to the Appeals Arbitration Division or the Ordinary Arbitration Division. It may be noted that this decision cannot be subsequently reviewed by a panel; rather such assignment “may not be contested by the parties”, and even in case of a change of circumstances, a re-assignment can be decided by CAS Court Office, with only a consultation of the panel. Against the above background, it seems that the CAS Code would rather leave the decision on assignment and on costs in the hands of the CAS Court Office.

- 10.5 In the present case the Panel is satisfied that in any event, even assuming, for sake of reasoning, a power of the Panel to review the determination of the CAS Court Office, there is no reason to decide in a different manner than the CAS Court Office has already done: The WADA Foundation Board stopped short of taking any of the disciplinary action permitted by Article 23.5 of the WADA Code in the case of non-compliance with the Code. In the view of this Panel, such action would have been necessary before the present procedure could be considered to be an appeal proceeding in the meaning of Article R65 of the CAS Code, i.e., an appeal directed against a decision of an international sports-body which is exclusively of a disciplinary nature. Therefore, the Panel is satisfied that the present proceedings shall not be free, assuming an entitlement of the Panel to review the (therefore correct) determination of the CAS Court Office.
- 10.6 In accordance with R64.4 of the CAS Code, the CAS Court Office shall, upon conclusion of the proceedings, determine the final amount of the costs of the arbitration, which shall include the CAS Court Office fee, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, the contribution towards the costs and expenses of the CAS, and the costs of witnesses, experts and interpreters. In accordance with Article R64.4 of the CAS Code and with the practice of the CAS, the Award states only how these costs must be apportioned between the Parties. Such costs are later determined and notified to the Parties by separate communication from the CAS Secretary General.
- 10.7 Taking into consideration the outcome of the proceedings, the Panel orders the BOA to pay all of the costs of the arbitration.
- 10.8 In respect of the Parties’ own legal fees and expenses, the Panel is of the view that upon due consideration of the outcome of the proceedings, the conduct and the financial resources of the Parties, each Party shall bear its own costs.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal is dismissed, and the decision of the WADA Foundation Board of 21 November 2011 is confirmed.
2. The costs of the arbitration, to be determined and served on the Parties by the CAS Court Office, shall be borne by the British Olympic Association.
3. Each Party shall bear its own legal fees and other expenses in connection with this arbitration.
4. All further and other claims for relief are dismissed.

Lausanne, 30 April 2012

THE COURT OF ARBITRATION FOR SPORT

Professor Richard H. McLaren
President of the Panel

Michele Bernasconi
Arbitrator

David W. Rivkin
Arbitrator

Erin C. McDermid
Ad Hoc Clerk