



**Arbitration CAS 2011/A/2658 British Olympic Association (BOA) v. World Anti-Doping Agency (WADA), award of 30 April 2012**

Panel: Prof. Richard McLaren (Canada), President; Mr Michele Bernasconi (Switzerland); Mr David Rivkin (USA)

*Doping*

*Legal nature of the WADA Code*

*Purpose of the WADA Code*

*Meaning of a sanction according to the WADA Code*

*Appeal procedure at national level and non-compliance with the WADA Code*

*Inconsistency of a regulation of a National Olympic Committee (NOC) with the WADA Code*

- 1. The WADA Code is neither a law nor an international treaty, but rather a contract instrument binding its signatories in accordance with private international law.**
- 2. National Olympic Committees (NOCs) have agreed to limit their autonomy by accepting the WADA Code. The 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 the WADA Code is the harmonization throughout the world of a doping code for use in the fight against doping. 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.**
- 3. A provision rendering an athlete found guilty of a doping offence to be ineligible to be selected by the NOC for the national team to the Olympics is a sanction. 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. That ineligibility falls squarely within the nature of sanctions provided in the WADA Code. Once a regulation is used to bar the participation of an athlete from the Olympics, its effect is disqualification from the Olympics, a Competition within the meaning of the WADA Code. Such a consequence, according to the Panel, is undeniably disciplinary in nature and within the scope of the WADA Code.**
- 4. The fact that a regulation 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 regulation 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.

5. When a NOC chooses to become a Signatory of the WADA Code, it in fact gives 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. If a NOC provides that no athlete can ever compete in the Olympic Games as a result of a doping offence, such consequence is an “extra” or a “double sanction”. 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 to comply with such a principle, without any substantial deviation in any direction.

The British Olympic Association (BOA; 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.

The World Anti-Doping Agency (WADA; the “Respondent”) is a Swiss private law foundation whose headquarters is in Montréal, Canada, but whose seat is in Lausanne, Switzerland. WADA is the global regulator of the World Anti-Doping Agency Code (WADA Code).

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”).

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

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*”.

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”).

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 (and came into effect on 1 July 2004). The current revised version of the Bye-Law has been in effect since 1 January 2009.

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 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*” (the text of the Bye-Law is set out in detail below under “applicable law”).

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 athletes (Dwain Chambers, sprinting, and David Millar, cycling) affected by the Bye-Law never activated the AP process, and one (Carl Myerscough, shot put) was unsuccessful in commencing the AP process.

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 (Decision of the Appeal Panel of the British Olympic Association, dated 4 December 2007).

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 (WADA Code Article 20.4.1 and 2.4.2). 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 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].

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".*

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" (In the 8 July 2011 version of the Olympic Charter (OC), Rule 45 is renumbered as Rule 44). WADA invited the BOA to consider the Bye-Law in light of the USOC Award (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).

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

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.

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).

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.

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.

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

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.*

## LAW

### CAS Jurisdiction

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.*

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.
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.

### Applicable Law

4. 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.*

5. 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.
6. 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. Both Parties agree that the Bye-Law is governed by and is to be construed in accordance with English law.
8. 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 bye-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".*

9. 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”.*

10. 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”.*

## **Merits**

11. 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.
12. 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.

13. 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.
14. 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 (USOC Award, ¶8.12.).
15. 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*” (USOC Award, ¶8.19).
16. 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*”.
17. 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*

18. 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 (Rules 27(3), 27(7) and Rule 28; together with the Bye-Law to Rules 27 and 28 in particular 2.1).
19. 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.
20. 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.
21. 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.
22. 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 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.

23. 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*

24. 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.

25. 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.

26. 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.

27. 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 and to find that it is minor if the offence carries a suspension of six months or less *“under the Code”* (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 International Federations).

28. 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.
29. 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”*.
30. 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*

31. 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 ...”*. (paragraph 1 of the Bye-Law).
32. 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.
33. 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 (see USOC Award, para. 8.12). 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.

34. 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 (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). 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.
35. 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.
36. Accordingly, this Panel finds that the Bye-Law renders an athlete ineligible to compete – a sanction like those provided for under the WADA Code.
37. 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 (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). In order to 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.
38. 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 (*see* USOC Award at para. 8.10). 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.

39. 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.
40. 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].
41. An examination of the AP decision in the Whitlock case is helpful in describing the purpose of the Bye-Law as nothing other than sanctioning an athlete for prior undesirable behaviour (see Janine Whitlock – Decision of Appeals Panel of British Olympic Association dated 9 March 2004). 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 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.
42. 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 offence. 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.
43. 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*

44. 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].
45. 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.
46. 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 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.
47. 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].
48. 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]*”.
49. 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.
50. 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.

51. 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.

### **Conclusion**

52. 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.
53. 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.
54. All further and other claims for relief are dismissed.

### **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.
- (...)
4. All further and other claims for relief are dismissed.