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Citar este artículo como: Oskar MacGregor, Richard Griffith, Daniele Ruggiu, Mike McNamee. (2013): Anti-doping, purported rights to privacy and WADA's whereabouts requirements: A legal analysis, *Fair Play. Revista de Filosofía, Ética y Derecho del Deporte*, vol. 1, núm.2, 2013, pp. 13-38.

RECIBIDO: 15/8/2013
ACEPTADO: 25/9/2013

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Abstract

Recent discussions among lawyers, philosophers, policy researchers and athletes have focused on the potential threat to privacy posed by the World Anti-Doping Agency's (WADA) whereabouts requirements. These requirements demand, among other things, that all elite athletes file their whereabouts information for the subsequent quarter on a quarterly basis and comprise data for one hour of each day when the athlete will be available and accessible for no advance notice testing at a specified location of their choosing. Failure to file one's whereabouts, or the non-availability for testing at said location on three occasions within any 18-month period constitutes an anti-doping rule violation that is equivalent to testing positive to a banned substance, and may lead to a suspension of the athlete for a time period of between one and two years. We critically explore the extent to which WADA's whereabouts requirements are in tension with existing legislation on privacy, with respect to UK athletes, who are simultaneously protected by UK domestic and EU law. Both UK domestic and EU law are subject to the European Convention on Human Rights (ECHR) Article 8, which establishes a right to "respect for private and family life, home and correspondence". We critically discuss the centrality of the whereabouts requirements in relation to WADA's aims, and the adoption and implementation of its whereabouts rules. We conclude that as WADA's whereabouts requirements appear to be in breach of an elite athlete's rights under European workers' rights, health & safety and data protection law they are also, therefore, in conflict with Article 8 of the ECHR and the UK Human Rights Act 1998. We call for specific amendments that cater for the exceptional case of elite sports labour if the WADA requirements are to be considered legitimate.

Keywords: doping, privacy, data protection, human rights.

Abstract

Las recientes discusiones suscitadas entre juristas, filósofos, expertos en política legislativa y deportistas han estado centradas en la posible amenaza a la privacidad que plantea los requerimientos de localización de la Agencia Mundial Antidopaje (WADA). Dichos requerimientos demandan, entre otras cuestiones, que todos los atletas de élite pongan a disposición de ciertas autoridades la información relativa a su localización a lo largo de los tres meses siguientes. Dicho informe tendrá que repetirse cada trimestre y comprenderá la indicación de una hora de cada día en la que el deportista tendrá que estar disponible y accesible para, sin previo aviso, poder llevar a cabo un control en el lugar de su elección. La falta de indicación de la localización del atleta, así como la falta de disponibilidad en el lugar indicado para la ejecución de los controles en tres ocasiones seguidas dentro de un periodo de 18 meses, constituye una violación a las reglas establecidas contra las prácticas de dopaje. Dicha situación, según los preceptos que regulan la materia, es equivalente a dar positivo en una prueba de consumo de una sustancia prohibida, y puede conllevar a la suspensión del deportista

por un periodo de tiempo que puede oscilar entre uno y dos años. Analizaremos, de forma crítica, los conflictos posiblemente existentes entre las previsiones de la WADA sobre requerimientos de localización de los deportistas británicos, con la normativa británica y europea relacionada con la protección de la privacidad de dichas personas. Recordemos que tanto la legislación inglesa como la europea están sujetas a las disposiciones que emanan del Convenio Europeo de Derechos Humanos (ECHR), particularmente a lo dispuesto por el artículo 8 que establece el derecho que tiene toda persona al “respeto de su vida privada y familiar, de su domicilio y de su correspondencia”. Se discutirá críticamente la centralidad de los requerimientos de localización en relación con los objetivos de la WADA, así como las cuestiones derivadas de la adopción e implementación de las normas relacionadas con dicho tema. Concluiremos con la idea de que, como los requerimientos de la WADA parecen colisionar con los derechos de los deportistas consagrados en la legislación europea en materia de derechos de los trabajadores, protección de la salud, seguridad e información personal, dichas exigencias son, también, contrarias a la previsión del artículo 8 de la ECHR, así como a la Ley Británica sobre Derechos Humanos de 1998. Propondremos algunas modificaciones específicas que podrían servir para el ajuste de dichas previsiones en los casos excepcionales del trabajo relacionado con los deportes de élite, siempre y cuando los requerimientos de la WADA sean considerados válidos.

Términos clave: dopaje, intimidad, protección de datos, derechos humanos.

1. WADA's Whereabouts Requirements

The World Anti-Doping Agency (WADA) is an international foundation established by the International Olympic Committee (IOC) in 1999 with the mission to “promote, coordinate and monitor the fight against doping in sport in all its forms”.¹ Comprised in equal parts of representatives from the sporting movement and from world governments, its primary activities include scientific research, education, development of anti-doping capacities and monitoring of the World Anti-Doping Code (WADC) – the document that harmonizes anti-doping regulations in all sports and countries. While in-competition testing forms an important part of WADA’s monitoring activities, out-of-competition testing is seen as crucial to its success, to the extent that WADA specifically advocates that sports’ International Federations (IFs) with a “high risk” of out-of-competition doping ought to make out-of-competition testing “a priority”.² Insofar as “a number of prohibited substances and methods are detectable only for a limited period of time in an athlete’s body while maintaining a performance-enhancing effect”, WADA views out-of-competition testing as “one of the most powerful means of deterrence and detection of doping”.³

¹ WADA (2009) *About WADA*, URL: <http://www.wada-ama.org/en/About-WADA/> (accessed May 25, 2010).

² WADA (2009) *International Standard for Testing (IST)*, Montreal: WADA, §4.3.5.

³ WADA (2009) *Q&A on Whereabouts*, URL: <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards/IST/QA-on-Whereabouts/> (accessed May 25, 2010).

For out-of-competition testing to be effective, it is important for an IF or National Anti-Doping Organization (NADO) not only to know where athletes are, but also to be able to test them during those times at which cheaters would be most likely to use prohibited substances or methods. To overcome the practical limitations, WADA implemented whereabouts requirements with their original Code in 2004, which specified the obligations of selected elite athletes (those belonging to so-called *registered testing pools*), to report their whereabouts to their relevant IF or NADO. The initial whereabouts requirements were drafted to provide Anti-Doping Organizations (ADOs) with a certain amount of flexibility regarding (a) what whereabouts information to collect; (b) what would constitute a missed test; (c) how many whereabouts filing failures or missed tests would constitute an anti-doping rule violation (ADRV); and (d) what sanctions to impose as a result of such violations. Arising from this discretionary element however, was a lack of standardization wherein different ADOs/IFs might not accept or “recognize” the findings of another ADO/IF. A further consequence was that athletes from different sports could be subjected to different levels of sanctions, which some considered inequitable.⁴

In consequence, new whereabouts requirements were implemented in January 2009 that sought to harmonize the existing regulations. More specifically, the changes included precise definitions of what constituted an ADRV in relation to whereabouts and missed tests, and what potential sanctions could be applied in such cases. WADA’s Athlete Whereabouts Requirements are now specified in Article 11 of the International Standard for Testing (IST). According to section 3 of the article, concerning “Whereabouts Filing Requirements”, all athletes belonging to a registered testing pool – that is, the higher levels of an IF or NADO responsible for the testing of its members – are required to file a Whereabouts Filing with their ADO prior to each annual quarter. This filing should contain, among other points, the following:

1. A complete mailing address.

⁴ WADA (2009) *Q&A on Whereabouts*, The point should be made, however, that not all differences in sanctions ought to be viewed as inequities. As Aristotle’s formal principle of equality runs: treat like subjects in a likewise way, and treat difference in different ways.

2. The consent of the athlete to the sharing of their Whereabouts Filing with other ADOs with the authority to test them.
3. For each day of the subsequent quarter, the full residential address of the athlete (home, hotels, etc.).
4. For each day of the subsequent quarter, the name and address of every location used by the athlete for regular activities (training, work, school, etc.), as well as the expected time-frames for those activities.
5. For the subsequent quarter, the athlete's competition schedule.⁵

In addition to this, the Whereabouts Filing also requires athletes to specify, for the subsequent quarter, "one specific 60-minute time slot between 6 a.m. and 11 p.m. each day where the Athlete will be available and accessible for Testing at a specific location".⁶ Athletes can update their 60-minute time-slot and their whereabouts at all times by, for instance, emailing or text messaging their relevant ADO.

Failure to file one's whereabouts with the relevant ADO, or filing incorrect whereabouts, may result in a missed test, and, on the current system, three missed tests within any 18-month period (starting from the date of the first missed test) constitute a Whereabouts Failure – a serious ADRV – and a subsequent suspension of the athlete for a time period of between one and two years, depending on the athlete's "degree of fault".⁷ Given that individual athletes are held responsible for filing their whereabouts to their ADO, there have been various complaints as to the impracticality and severity of the new whereabouts requirements.⁸ And although WADA resists the claims as based on a misunderstanding of its new system, the whereabouts

⁵ WADA (2009) *IST*, § 11.3.1.

⁶ WADA (2009) *IST*, § 11.3.2.

⁷ See WADA (2009) *IST*, § 11.6; WADA (2009) *WADC*, Montreal: Canada, §§ 2.4, 7.4, 7.5.2, 10.3.3. We note that this is a diversion from their application of the "strict liability" principle that operates in the WADC (see McNamee and Tarasti (2010) "Ethical and juridical peculiarities of anti-doping legislation", *Journal of Medical Ethics*, 36, 165-9; Soek (2007) *The Strict Liability Principle and the Human Rights of Athletes in Doping Cases*, Cambridge, MA: TMC Asser Press).

⁸ Cf. BBC (2009) *Athletes Air Issues Over Testing*, URL: http://news.bbc.co.uk/sport1/hi/front_page/7892590.stm (accessed Apr. 26, 2010).

requirements have nevertheless generated heated public debate, both popular and academic. One of the more serious criticisms of the policy pertains to privacy, questioning the extent to which it may infringe on individual athletes' rights to privacy. For instance, the International Federation of Association Football (FIFA) and the Union of European Football Associations (UEFA) jointly and officially opposed the whereabouts requirements, arguing not only that the training regimes of team-sports differ to a sufficient extent from individual sports to warrant separate sorts of whereabouts requirements, but also taking issue with what they see as an infringement of player privacy:

FIFA and UEFA want to draw attention to the fact that, both on a political and juridical level, the legality of the lack of respect of the private life of players, a fundamental element of individual liberty, can be questioned.⁹

Such a post-Millian construal of privacy as a “fundamental element of individual liberty” brings out the potential tension between the whereabouts requirements and individual privacy particularly clearly: a requirement to report one's whereabouts every day of the year to an official body is difficult for many to accede. Given the various vested interests of the parties to the debate, however, proper argumentation has given way to rhetorical flourishes, making an initial diagnosis more difficult. While the issue is subject respectively to ethical critique and defense,¹⁰ it may nevertheless be possible to mount a strong critique of WADA's whereabouts requirements on the basis that they infringe athletes' legal rights to privacy. We will focus exclusively on this latter legal concern, that is, to what extent WADA's whereabouts requirements are in conflict with existing UK and European legislation.

2. A Purported Right to Privacy

While commentators frequently appeal to a right to privacy, it is a separate matter to establish the *legal* extent of any such purported right, not least due to the fact that such appeals to “privacy” often refer to a multitude of separable concepts. These include the protection of one's private information from public dissemination; the protection of such information from other

⁹ FIFA (2009) *FIFA and UEFA Reject WADA “Whereabouts” Rule*, URL: <http://www.fifa.com/aboutfifa/developing/releases/newsid=1040455.html> (accessed May 5, 2010).

¹⁰ See McNamee and Tarasti (2010); McNamee and Møller, eds. (2011), *Doping and Anti-Doping Policy in Sport: Ethical, Legal and Social Perspectives*, London: Routledge.

forms of misuse (such as undesired targeted advertising); a right to “time off” during which certain standard obligations may not be considered to hold; a right to keep secrets; or a right to non-interference.

No specific right to privacy currently exists under UK common law. Instead, legal matters pertaining to privacy in the UK have been approached through a variety of legal instruments. A number of these pertain to the particular context of WADA’s whereabouts requirements.

First, there is the possibility of seeking remedy within UK common law. Since there is no specific common law right to privacy, doing so would instead require bringing an action for private nuisance and harassment.

Second, the right to be free from interference in one’s life and the right to restrict disclosure of personal information was traditionally based on the law of contract. Express or implied terms in a contract may oblige the parties to respect privacy and confidentiality. Where the contracts of elite athletes contain terms authorizing disclosure and use of personal information or requiring respect for privacy of information, the athlete and their employing body are bound by those terms. These contract terms could include the requirement to disclose whereabouts information and would be binding as long as they did not breach the athlete’s rights under the European Convention of Human Rights (ECHR).¹¹

A third, indirect, privacy challenge is also available under European Union law relating to the right to work and the right to free time. The status of certain elite athletes as workers means that unfair contract terms, restraint of trade, and right to work are subject to the treaties and laws of the European Union (EU). As workers, these elite athletes are also entitled to the protection of the Working Time Directive 2003 that requires a daily rest period of 11 hours, an additional weekly rest period of 24 hours and an annual leave entitlement of 5.6 weeks.¹²

¹¹ Human Rights Act 1998, Schedule I, Part I. Council of Europe (1950) European Convention on Fundamental Human Rights and Freedoms Rome: Council of Europe (Article 8). The treaty was adopted in Rome on November 11, 1950 and entered into force on September 3, 1953.

¹² Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9, Articles 3, 5 & 7.

A fourth potential challenge stems from the Council of Europe normative framework, wherein the right to privacy is set forth by the ECHR. The framework of the Council of Europe includes the Anti-doping Convention¹³ and its Protocol,¹⁴ affirming potentially relevant obligations for member States. The first obliges States parties to adopt appropriate legislation, regulation or administrative measures aimed at restricting the availability of banned doping agents, including provisions to control movement, possession, importation, distribution and sale.¹⁵ This provision might be interpreted to entail whereabouts requirements. In this regard States should encourage and facilitate sports organizations in the provision of doping controls,¹⁶ by ensuring that they respect the fundamental rights of athletes. The latter requires the States to recognise the competence of WADA and other doping control organizations.¹⁷ Both the Anti-doping Convention and its 2002 Protocol provide no enforcement mechanism, although the European Court of Human Rights (ECtHR) can, as usual, interpretatively refer to their norms in its decisions.¹⁸ It is worth noting that the 2002 Protocol was neither signed nor ratified by the UK, although the Anti-doping Convention clearly enunciates a State's responsibility for sport organization activity.

Finally, a fifth privacy challenge to the whereabouts requirements is available through UK and European data protection law. Briefly, the Data Protection Act 1998, a replacement of previous legislation such as the Data Protection Act 1984 and the Access to Personal Files Act 1987, is a UK Act of Parliament which defines the law on the processing of the data of identifiable living people. The Act establishes the legal requirements pertaining to data collection and processing, such as the right of access to information being held about oneself, non-

¹³ Council of Europe (1989) Anti-doping Convention, Strasbourg: Council of Europe. It has been signed and ratified by the UK on Nov. 16, 1989 and entered into force the March 1, 1990.

¹⁴ Council of Europe (2002) Protocol to Anti-doping Convention, Warsaw: Council of Europe. The treaty has not yet been signed by UK.

¹⁵ Council of Europe (1989) Anti-doping Convention, Article 4.1.

¹⁶ Council of Europe (1989) Anti-doping Convention, Article 4.3c.

¹⁷ Council of Europe (1989) Anti-doping Convention, Article 1.3.

¹⁸ Ruggiu (2012) "Synthetic Biology and Human Rights in the European Context: Comparison of the EU and the Council of Europe Regulatory Frameworks on Health and Environment", *Biotechnology Law Report* 31(4), p. 349.

disclosure of data to third parties unless there is prior consent from the individual whose data is being processed (or unless it is required for certain activities such as crime prevention), a time limit on the storage of data, and a requirement on all data processing agencies to have sufficient security measures in place.¹⁹ The legislation was enacted in order to bring UK law into line with the requirements of the European Data Protection Directive of 1995 to protect the fundamental rights and freedoms of individuals with respect to the processing of personal data.²⁰ An athlete could argue that the whereabouts requirements were neither consensual, nor in line with European legal restrictions on data collection and processing, as well as human rights.

A number of potential avenues are thus available to UK elite athletes wishing to challenge the lawfulness of the WADA whereabouts rules. The UK's membership of the EU and the supremacy of its law together with the incorporation of the main articles of the ECHR by the Human Rights Act 1998 mean that whereabouts requirements must *inter alia* comply with UK domestic law, European Union law and Human Rights law. We explore the related issues in the following section.

3. Challenging the whereabouts rule in law

3.1. Privacy and the UK Common Law

A right to non-interference is an essential component to any purported right to privacy and the courts acknowledge that such a right does not exist under UK common law. In *Kaye v Robertson and Another*,²¹ a Sunday newspaper entered the private hospital room of a famous actor and took photographs. The court acknowledged that the actor could not bring an action for breach of privacy as, "it is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy". The circumstances of the case led the Court of Appeal to urge the UK Parliament to consider statutory provision to protect the privacy of individuals; a request Parliament has ignored up until now although a cross-party

¹⁹ Data Protection Act 1998.

²⁰ Council Directive (EC) 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

²¹ [1991] FSR 62.

committee of senior MPs and peers is examining the law surrounding privacy and the rules for reporting to Parliament.²²

The only way to enforce non-interference in the name of privacy under UK common law is to bring an action for private nuisance or harassment. The courts have established that there must be persistent distressing interference for nuisance to arise.²³ Persistent unsolicited phone calls to a person's home from men who, due to a misprint in an advert, thought they were ringing a sex line amounted to a private nuisance²⁴ but the mere presence of a building interfering with the television reception of a neighbouring property was not thought serious enough to be a nuisance. WADA's whereabouts requirements and their implementation by UK Athletics (UKA) are not, we hold, sufficiently serious or intrusive to amount to a public nuisance.

It is also very unlikely that the policy amounts to harassment under UK common law. To bring a successful action in harassment the athlete would need to show that the behaviour of the defendant could have, or did, cause physical or psychiatric illness to the recipient. The behaviour does not have to be threatening – persistent pestering would suffice – but the crucial element would be the need to show that the behaviour was sufficient to cause a physical or mental illness.²⁵ The current provisions of the whereabouts requirements would therefore be unlikely to meet this threshold and no action in harassment is likely to be successful.

It can be seen that UK common law does not create a general right to privacy that upholds the right to be free from interference in the way a person conducts their private life.

3.2. Privacy and contract

As there is no specific right to privacy under UK common law, the right to be free from interference and the right to restrict disclosure of personal information is based on the law of contract. Express or implied terms in a contract can oblige the parties to respect privacy and confidentiality.

²² Watt (2011) "Twitter revelations prompt MPs and peers to examine privacy rules", *Guardian*, 23 May 2011, p. 3.

²³ *Sewell v Harlow DC* [2000] EHLR 122.

²⁴ *Pell v Walker (t/a The Media Group)* [1997] (Bow County Court, 3 Dec.).

²⁵ *Khorasandjian v Bush* [1993] QB 727.

In *Modahl v British Athletic Federation*,²⁶ the UK House of Lords held that the relationship between an athlete and their national sports federation (UK Athletics) was based in contract. The terms of the contract are laid out in the rules of the federation and include the rules of the IF to which they are affiliated.

Where the contracts of elite athletes contain terms authorising collection, use and disclosure of personal information then the athletes are generally bound by those terms. In *Ohuruogu v UK Athletics Ltd & International Association of Athletics Federations*, Ohuruogu (a professional UK athlete) appealed to the Court of Arbitration in Sport (CAS) against a 12-month ban for failing to supply accurate whereabouts information.²⁷ The ban was imposed by UKA in accordance with the rules set out by the IF, the International Association of Athletics Federations (IAAF). CAS dismissed the appeal and held that as a matter of English law, the relationship between UKA and the athlete was contractual and that although the burden of supplying accurate whereabouts information was onerous, the athlete was bound by the terms of that contract, on pain of disciplinary measures, to provide them.

What *Ohuruogu* shows is that decisions of sports regulatory bodies and their disciplinary tribunals are subject to supervision from the courts. For international level athletes CAS has supervisory jurisdiction, but given their decision in *Ohuruogu* it is very unlikely that an athlete's challenge to WADA's whereabouts requirements on the grounds of privacy would be successful.²⁸

A challenge under UK contract law is also likely to be problematic. Contesting the imposition of the whereabouts requirements by UKA on the grounds of privacy is unlikely to be achieved through an application for judicial review.²⁹ A key feature of an application for judicial

²⁶ [1999] All ER (D) 484.

²⁷ (2007) CAS 2006/A/1165.

²⁸ Halt (2010) "Where is the privacy in WADA's 'whereabouts' rule?", *Marquette Sports Law Review* 20 (1), pp. 267-289.

²⁹ Pendlebury and McGarry (2009) "Location Location Location: the Whereabouts Rule and the Right to Privacy", *Cambrian Law Review* 40, pp. 63-75.

review is that it must be in relation to a public law claim against a public body.³⁰ That is, the issue raised in an application for judicial review must be a public law issue and the respondent in the case must be a public body. Pendlebury and McGarry rightly argue that the UK courts have held on numerous occasions that the activities of sports governing bodies are not public in nature and so are not susceptible to an application for judicial review.³¹ This does not mean, however, that bodies such as UKA fall completely outside the supervision of the courts. In *Chambers v British Olympic Association*,³² the High Court confirmed that it had jurisdiction where decisions affected an athlete's right to work. This supervisory jurisdiction applies even where there was no contract between the athlete and the governing body. In *Nagle v Fielden*,³³ the Court of Appeal held that where a person's right to work was in issue a decision of a domestic body that affected that right could be the subject of a claim both for declaration and injunction.

Nevertheless, the approach of the courts in exercising this supervisory jurisdiction in relation to sports bodies reveals a process that in practice is almost indistinguishable from a judicial review. In its analysis of the procedure in *Stevenage Borough Football Club Ltd v Football League Ltd*,³⁴ the Court of Appeal accepted that the nature of the court's supervisory jurisdiction was just that: supervisory. The function of the Court was not to make the primary decision, but rather to ensure that primary decision makers (the relevant sport's regulatory bodies) operate within lawful limits. Again, the process is very similar to judicial review where the concern of the court is the lawfulness of the rule or decision, the fairness of the procedure, whether any errors of law were made and whether the decision fell within the authority of the sports body or their tribunal.

³⁰ Supreme Court Act 1981, section 31 and RSC 53.

³¹ Pendlebury and McGarry (2009) "Location Location Location".

³² [2008] EWHC 2028 (QB).

³³ [1966] 2 QB 633.

³⁴ (1997) 9 Admin LR 109.

When considering anti-doping measures the court held in *Chambers*,³⁵ that two questions have to be addressed. Firstly, in following *Nagle*,³⁶ does the case concern a right to work and, secondly, is the anti-doping measure fair and proportionate.³⁷

In *Chambers*, an athlete found guilty of doping by the UKA disciplinary tribunal returned to athletics after his ban and qualified for nomination by UKA to be selected as a member of the British Olympic team. In addition, however, a by-law stated that any athlete who had been found guilty of doping was ineligible for selection for the British Olympic team. The athlete claimed that the by-law amounted to an unfair restraint of trade and was illegal. The court dismissed his claim as the Olympic Games were an amateur event in the sense that participation in it secured no direct prize beyond the medals for the first three places, and thus there was no restraint of trade. Furthermore there was no evidence that the by-law was not proportionate.

Although the claim in *Chambers* largely failed on the basis of the amateur status of the Olympic Games, this is unlikely to affect athletes subject to WADA's whereabouts requirements who are drawn from a pool of elite professional athletes. The athlete would thus need to convince a court that the rule applied by UKA was both unfair and disproportionate.

3.3. Right to work, anti-doping and European Union Law

Matters of contract, restraint of trade and right to work in the UK are subject to the treaties and laws of the EU. The EU, the European Commission, and the European Court of Justice, which settle disputes between Member States, institutions, businesses and individuals, have long recognised that decisions of sporting bodies concerning restraint of trade or right to work must comply with the laws of the EU.

In *Union Royale Belge des Societes de Football Association (ASBL) v Bosman (C-415/93)*,³⁸ a Belgian footballer sought an order restraining his club and the Belgian football association from preventing his transfer to another club in France. The question was whether EC (EEC)

³⁵ [2008] EWHC 2028 (QB).

³⁶ [1966] 2 QB 633.

³⁷ *McInnes v Onslow Fane* [1978] 1 WLR 1520.

³⁸ [1995] ECR I-4921 (ECJ).

Treaty, Article 48, which guaranteed free movement of workers between Member States of the EU, applied to rules governing the transfer system of European football associations. The European Court of Justice held that the EC (EEC) Treaty, Article 48, applied not only to rules laid down by public authorities but also to both national and international sporting associations who dealt with the employment terms of professional athletes. The transfer fee system was incompatible as it prevented the free movement of players who wished to join a club in another Member State even after their contracts had expired.

Bosman shows that the decisions of European sporting bodies can fall within the scope of EU law but it does not necessarily follow that they extend to rules on anti-doping measures. In *Edwards v British Athletic Federation*,³⁹ an athlete was banned for four years under IAAF rules following a positive drug test. This was two year longer than similar bans in other EU countries and the athlete challenged the lawfulness of IAAF's refusal to remit the last two years of the ban under the EC (EEC) Treaty, Article 59. He contended that the ban was an interference with his freedom to earn a living as an athlete within the EU.

The court dismissed the action and concluded that EC (EEC) Treaty, Article 59, did not apply as drug control rules regulated the sporting conduct of athletes. The fact that the imposition of a penalty for transgressors might have serious economic consequences was merely an incidental and inevitable side-effect. The imposition of sanctions was seen as essential to prevent cheating and the four year ban was deemed reasonable and proportionate.

The enforcement body of the EU, the European Commission, took a similar view on the status of anti-doping rules when they considered the position of two long distance swimmers suspended by their international governing body the International Swimming Federation (FINA) when they were found guilty of doping. The swimmers argued the anti-doping rule was a contravention of EU competition law.⁴⁰ The Commission rejected the complaint on the same grounds as the Chancery Division of the High Court in *Edwards*, namely that anti-doping rules were sporting rules and were not applicable to restraint of trade or right to work.

³⁹ (1997) 94(30) LSG 29.

⁴⁰ Subiotto (2010) "The adoption and enforcement of anti-doping rules should not be subject to European competition law", *ECLR* 323.

However, when the swimmers appealed, the European Court of Justice took a very different view. In *Meca-Medina v Commission of the European Communities (C-519/04 P)*,⁴¹ the ECJ held that as the swimmers were professionals who were paid for their services, any rule that banned them from earning a living from swimming fell within the scope of anti-competition and restraint of trade laws of the EU. In their final ruling however the ECJ held that the anti-doping measures applied by FINA were justifiable and proportionate restrictions that ensured fair competition, protected the health of athletes and preserved the integrity of the sport of swimming.

This decision of the ECJ shows that anti-doping measures can be challenged under European Union Law and that a challenge to the whereabouts requirements could be brought on both the grounds of disproportionality, and breach of EU law.

Halt⁴² argues that the best way to challenge the whereabouts policy under EU law is through the Working Time Directive 2003, which requires a daily rest period of 11 hours, an additional weekly rest period of 24 hours and an annual leave entitlement of 5.6 weeks, as noted earlier.⁴³

The applicability of the Working Hours Directive 2003, however, depends on the athlete's status. The directive does not apply to the genuinely self-employed, only to employees and workers. It is likely that many elite athletes would not be classified as employees as they are not directly employed by their sporting body. It is also arguable that they are not genuinely self-employed as they are subject to the rules and contractual obligations of their sports federations. It is more likely that they will be considered for EU law purposes as "workers".

This is a unique EU term that defines those who are not employees but who agree under a contract to perform services for another party who is not a client or customer of any profession or business carried out by the individual.⁴⁴ Where athletes are considered workers then, they are entitled to the protection of the Working Time Directive 2003 and are able to argue that their

⁴¹ [2006] ECR I-6991 (ECJ 3rd Chamber).

⁴² Halt (2010) "Where is the privacy in WADA's 'whereabouts' rule?".

⁴³ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9, Articles 3, 5 and 7.

⁴⁴ *Brown v Secretary of State for Scotland (C-197/86)* [1988] ECR 3205 (ECJ).

obligation to provide whereabouts information and be available for testing for an hour a day every day, would mean they were unable to have an uninterrupted rest period, or a weekly 24 hour rest period, or to take their annual leave entitlement.

3.4. Proportionality of the whereabouts rule

In the case of the whereabouts rule we have demonstrated that UK contract law does not offer a remedy to the elite athlete unless the rule amounts to a disproportionate restriction on the right to work or breaches the Working Time Directive (2003). In considering proportionality the courts acknowledge that they are obliged to take into account the European Convention on Human Rights.⁴⁵ This is because the ECHR imposes a *positive obligation* with regard to Convention rights and State bodies must act positively to prevent breaches of the right between individuals.⁴⁶ This fact prompts a consideration of the normative framework of the Council of Europe, especially the ECHR, regarding the matter of privacy and the articulation of the judgment on its violation.

While there is no right to privacy under UK domestic law, in the ECHR the right exists and falls under Article 8.⁴⁷ Private life is a broad term not susceptible of exhaustive definition. Article 8 protects, *inter alia*, a right to identity, including a person's physical and psychological

⁴⁵ *Stevenage Borough Football Club Ltd v Football League Ltd* (1997) 9 Admin LR 109; *Chambers v British Olympic Association* [2008] EWHC 2028 (QB).

⁴⁶ Belgian Linguistic Case (No .2) judgment of 23 July 1968 (application nos. 1474/62;1677/62;1691/62;1769/63; 1994/63;and 2124/64), Series A 6 § 1: "the rights recognised by the Convention are not all 'negative': 'one must examine each question' and 'each provision in its own right without being led astray' by a legal theory of 'some antiquity' - the classic doctrine of individual freedoms". See also Mowbray (2004) *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart Publishing; Akandji-Kombe (2007) *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights*, Strasbourg: Council of Europe.

⁴⁷ Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

See also Human Rights Act 1998, schedule 1, part 1, Article 8.2.

integrity,⁴⁸ and personal development, without any outside interference of the personality of each individual in their relations with other human beings.⁴⁹ Elements such as, for example, gender identification, name, sexual orientation and sexual life, ethnic origin, a person's health, genetic features of the individual, and whereabouts information fall within the personal sphere protected by the meaning of Article 8.⁵⁰ In fact, private life does not cover only the mere "inner circle" of the individual, but also "activities of a professional or business nature". There is, therefore, a zone of interaction of a person with others, even in public context, which may fall within the scope of 'private life'.⁵¹

In this regard, the movement data of a person are at issue. In the whereabouts requirements, two types of information of elite athletes are concerned: information coming from biological samples⁵² and individuals' movement data.⁵³ Both fall within the scope of Article 8 provision but with different intensity, and lead to different levels of protection. While the storage and retention of human biological samples determines *per se* a strong constriction of the individual sphere of a person and, indirectly, of his relatives, the existence of measures of the surveillance of an individual's movements are, according to the Strasbourg Court, less invasive.⁵⁴ This different gradation of a State's interference gives rise to two distinct judgment of proportionality of the measures concerned. In fact, while the retention of samples containing the genetic code is of

⁴⁸ *Pretty v the United Kingdom*, judgment of 29 Jul. 2002 (application no. 2346/02), Reports of Judgments and Decisions 2002-III, § 61.

⁴⁹ *Von Hannover v Germany* (No. 2) judgment of 7 Feb. 2012 (application no. 40660/08), Reports of Judgments and Decisions 2012 § 50.

⁵⁰ *S and Marper v the United Kingdom*, judgment of 4 Dec. 2008 (application nos. 30562/04 and 30566/04). Reports of Judgments and Decisions 2008, § 66.

⁵¹ *Shimovolos v Russia*, judgment of 28 Nov. 2011 (application no 30194/09), § 64.

⁵² On the retention, storage and use of genetic information see *S and Marper v the United Kingdom*, judgment of 4 Dec. 2008 (application nos. 30562/04 and 30566/04), Reports of Judgments and Decisions 2008; *van der Velden v. the Netherlands*, decision of 7 Dec, 2006 (application no. 29514/05). Reports of Judgments and Decisions 2006-XV; *W v the Netherlands*, decision of 4 Dec. 2008 (application no. 20689/08).

⁵³ On the matter of whereabouts and movements of individuals see *Shimovolos v Russia*, judgment of 28 Nov. 2011 (application no. 30194/09); *Uzun v Germany*, judgment of 2 Sep. 2010 (application no 35623/05), Reports of Judgments and Decisions 2010; *Copland v the United Kingdom* judgment of 3 Jul. 2007 (application no. 62617/00), Reports of Judgments and Decisions 2007-I.

⁵⁴ *Uzun v Germany*, judgment of 2 Sep. 2010 (application no. 35623/05), Reports of Judgments and Decisions 2010, § 66.

great relevance for the individual (and his relatives) and is likely to be, in itself, sufficient to conclude that it amounts to an interference with the right to the private life of the individual,⁵⁵ the systematic collection, use and storage of personal data on an individual's whereabouts and movements interfere to a much lesser extent with private life. This latter instance leads to a deeper judgment of proportionality of the interference as according to Article 8.2.

First, the interference needs to be executed by a public authority that is empowered to resort to relevant surveillance measures. In this regard, according to the Court, although the object of Article 8 is to protect the individual against interference stemming from public authorities, in addition to this primarily negative undertaking, the State also has under the ECHR a positive obligation to adopt measures to assure the respect of private life even in the sphere of individuals between themselves,⁵⁶ as in the case of sports organizations and elite athletes, regardless of the existence of the approval by the person regarded. In this regard, it has been acknowledged that “the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals”.⁵⁷ Here a reasonable balance between the competing interests of the individuals and the community has to be struck, and the State enjoys a certain margin of appreciation.⁵⁸ Then the interference should result “in accordance with the law”, that is that the measure needs to have

⁵⁵ *S and Marper v the United Kingdom*, judgment of 31 Jul. 2012 (application no. 21203/10), Reports of Judgments and Decisions 2008, § 72, 75.

⁵⁶ *Von Hannover v Germany* (No. 2) judgment of 7 Feb. 2012 (application no. 40660/08), Reports of Judgments and Decisions 2012 § 57; *Gaskin v the United Kingdom*, judgment of 7 July 1989 (application no. 10454/83), Serie A160, § 38.

⁵⁷ *Costello-Roberts v the United Kingdom*, judgment of 25 March 1993 (application no. 13134/87), Serie A247-C, § 27; *Waite and Kennedy v Germany*, judgment of 18 February 1999 (application no. 26083/94), Reports of Judgments and Decisions 1999-I, § 67: “The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution”. See Reinisch (2005) “The Changing International Legal Framework for Dealing with Non-State Actors”, in Alston (ed.) *Non-State Actors and Human Rights*, Oxford: Oxford University press, pp. 37-89, p. 81ff.

⁵⁸ *Von Hannover v Germany* (No. 2) judgment of 7 Feb. 2012 (application no. 40660/08), Reports of Judgments and Decisions 2012 § 57; *Gaskin v the United Kingdom*, judgment of 7 July 1989 (application no. 10454/83), Serie A160, § 40.

some basis in domestic law that should be accessible for the person concerned and its consequences should be foreseeable for her/him and be compatible with the rule of law.⁵⁹

In this context, the fact that the right to privacy is or is not provided by the domestic law could be relevant, although not the only element to consider. Moreover the law must be sufficiently clear in its terms to give the person an adequate indication of the conditions and circumstances in which the authorities (i.e. the sports organizations) are empowered to resort to any such measure. Then, the “Court must be satisfied that there exists adequate and effective guarantees against abuse”.⁶⁰ This assessment depends on the nature, scope and duration of the measure concerned, the grounds required, the authorities competent to permit, carry out and supervise them, and the kind of remedy provided by the national law.⁶¹ In this instance if it is clear that private organizations are authorized to survey whereabouts and movements of athletes, the issue of what role and task of control should be exerted by the State in view of avoiding any abuse, that is the issue of the limits and guarantees provided according to the rule of law, remains open. In other terms, the Court can examine whether statutory limits on duration of this monitoring are fixed in domestic law by distinguishing, first, private life from work life. This corresponds with the meaning of the last part of Article 8.2, which provides that the measure must be “necessary in a democratic society [...] for the protection of health or morals, or for the protection of the rights and freedoms of others” by identifying, thus, an exemplifying list of legitimate aims pursuable by law. If the measure does not possess the aforementioned features (in particular, where its aim is not legitimate or the measure exceeds the terms of law), it is deemed disproportionate and thus fails the judgment of proportionality by the Court.

Under UK law the judgment of proportionality steers the courts’ reasoning in privacy matters and consequently reflects the logical framework of that of the ECtHR, especially as regards the existence of a legitimate aim and the judgment of “necessity” of the measure concerned (i.e. that the measure must be necessary in a democratic society). The Privy Council in *de Freitas v*

⁵⁹ *Uzun v Germany*, judgment of 2 Sep. 2010 (application no. 35623/05), Reports of Judgments and Decisions 2010, § 60.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing,⁶² held that when considering proportionality the court has to consider whether:

- the legislative objective is sufficiently important to justify limiting a fundamental right;
- the measures designed to meet the legislative objective are rationally connected to it; and
- the means used to impair the right or freedom is no more than is necessary to accomplish the objective.

Proportionality thus requires a balance to be struck between competing interests and the courts recognise that there is an overriding requirement to balance the interests of the individual against those of society.⁶³

In *Whitefield v General Medical Council*,⁶⁴ the Privy Council held that a condition attached to a doctor's registration requiring him to refrain from the consumption of alcohol was a proportionate response to the pressing social need to protect patients whilst allowing the doctor to continue to practice medicine. In this case the proportionality of the provision has been carefully weighed against the level of interference to the article 8 rights of the individual. The conditional registration is not an arbitrary provision that applies to all doctors or even all doctors who suffer from depression or drink alcohol. It is a proportionate response to this particular doctor's case.

It is arguable that imposing a whereabouts rule in contravention of an athlete's rights under the Working Hours Directive 2003 not only affects the athletes work life but also their private life in breach of article 8 of the ECHR.⁶⁵ This interference may be disproportionate as it applies indiscriminately to all elite athletes regardless of intelligence about doping/behaviour or past doping offences, and does not have its basis in law.

3.5. Data Protection Law

⁶² [1999] 1 AC 69.

⁶³ *Huang v Secretary of State for the Home Department* [2007] 2 AC 167.

⁶⁴ [2002] UKPC 62.

⁶⁵ *Uzun v Germany*, judgment of 2 Sep. 2010 (application no. 35623/05), Reports of Judgments and Decisions 2010, § 63.

European Union laws protecting workers are not confined to rest and holiday periods or stipulations of private lives, they also extend to the processing of data. Council Directive (EC) 95/46 on the protection of individuals with regard to the processing of personal data, and Directive 2002/58/EC of the European Parliament and Council on privacy and electronic communications provide broad legal protection of a worker's privacy with regard to the collection, use, storage and transmission of personal data.⁶⁶ The UK implemented these EU laws protecting personal information under the provisions of the Data Protection Act 1998 and Privacy and Electronic Communications (EC Directive) Regulations 2003.⁶⁷

To ensure harmonisation of EU data protection laws throughout all Member States article 29 of Council Directive (EC) 95/46 requires representatives of national data protection commissioners to form a working party to ensure uniform EU wide interpretation and application of these measures.

The article 29 working party held that personal data protection extends to monitoring and surveillance of workers and includes email use, internet access and, crucially, location data.⁶⁸ In their view such data can only be processed with consent or on the grounds of necessity. Furthermore, reliance on consent must be confined to cases where the worker has a genuine free choice and thus is subsequently able to withdraw the consent without detriment. This would not be the case for an athlete who objected to whereabouts data being collected as refusal would exclude them from competing in their sport.

The lawful processing of location data under the whereabouts requirements would therefore have to be justified on the grounds of necessity. Necessity in the context of data processing under European Union law is confined to;

- Contractual obligations such as processing payment

⁶⁶ Council Directive (EC) 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31; Directive 2002/58/EC of the European Parliament and Council on Privacy and Electronic Communications [2002] OJ L. 201/37.

⁶⁷ (SI 2003/2426).

⁶⁸ Article 29 Working Party (2001) *Opinion On The Processing Of Personal Data In The Employment Context*, Brussels: European Commission.

- Health and safety requirements and
- Compliance with legal requirements

A challenge to the Code could therefore be mounted by an athlete who argued that requiring whereabouts information was in breach of European data protection law as its collection and processing was not on a genuinely consensual basis and could not be justified on the grounds of necessity allowed by European law. The athlete could further argue that European data protection laws were breached because the processing of data in this context also amounts to a breach of human rights.⁶⁹

Although a supranational organisation that stands outside the Council of Europe, the EU implements the provisions of the ECHR through the Charter of Fundamental Rights of the European Union and the Treaty on European Union 2006.⁷⁰ EU law must be applied in a way that is compatible with the articles of the ECHR, which includes data protection law.

This conclusion is consistent with ECJ case law. According to the Court the provisions of Directive 95/46, in particular Articles 6, 1 (b) and (c) and 7 (c) and (e) must be interpreted in light of Article 8 of the ECHR. Thus, the publication of personal data (such as employee income for bodies subject to control by public authorities and names of the recipients, but we can imagine any personal data) can amount to an interference with private life if this information is not justified by the economic well-being of the country as a legitimate purpose as requested by the second paragraph of Article 8 of the Convention.⁷¹ In this regard, according to the Luxembourg Court the aim of the free movements of goods and data (Articles 26.2 and 16.2 of

⁶⁹ *Copland v the United Kingdom* judgment of 3 Jul. 2007 (application no. 62617/00), Reports of Judgments and Decisions 2007-I.

⁷⁰ Council of Europe (1950) European Convention on Fundamental Human Rights and Freedoms Rome: Council of Europe; Charter of Fundamental Rights of The European Union 2000 (OJ C 364/01). The Nice Charter became legally binding on 1 Dec. 2009 when the Lisbon Treaty entered into force. Article I-6 § 2 of the Treaty of Lisbon provides that in the near future the EU shall accede to the ECHR. Consequently on 17 Mar. 2010 the Commission proposed a negotiation directive for the Union's accession to the Council of Europe's Convention and on 3-4 Jun. 2010, the Council of the European Union adopted the aforementioned negotiating mandate for the EU's accession

⁷¹ *Rechnungshof v Osterreichischer Rundfunk (C-465/00, C-138/01, and C-139/01)* [2003] Reports of Cases I-4989, § 21 (ECJ).

the Treaty on the functioning of the EU) cannot be affirmed in contrast with the EU fundamental rights and the provisions of the ECHR.

The context of application of the norms of the ECHR is also shaped by the other texts of the Council of Europe which are relevant with regard to personal data collection. In particular, the Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data (also known as “the Data Protection Convention”),⁷² which entered into force for the UK on 1 Dec. 1987, defines “personal data” as any information relating to an identified or identifiable individual (“data subject”).⁷³ These data can be stored only for legitimate purposes provided by law, usually connected with criminal matters, necessary for the prevention of criminal offences under the provision of specific guarantees set by the judicial authorities and of limits of duration, the control of Parliament or of other public bodies.⁷⁴ The ECHR and the Data Protection Convention provide exceptions for the interest of the suppression of criminal offences and the protection of the rights and freedoms of third parties that may fall within the freedom of movement of a person.

In *Copland v United Kingdom* the Strasbourg Court held that the monitoring of a worker’s telephone, email, internet usage and location while at work constituted a violation of her right to respect for private life and correspondence under article 8 of the ECHR and it was irrelevant that the data were not disclosed to anybody or used against the worker in disciplinary proceedings. This information is the type of data collected under the WADA whereabouts rule. More explicitly, according to the Court “collection [...] and storage of data concerning that person’s whereabouts and movements in the public sphere was also found to constitute an interference with private life”.⁷⁵

⁷² Council of Europe (1981) *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data*, Strasbourg: Council of Europe. The treaty was adopted in Strasbourg on 1 Jan. 1981 and entered into force on 1 Oct 1985.

⁷³ *S and Marper v the United Kingdom*, judgment of 31 July 2012 (application no. 21203/10), Reports of Judgments and Decisions 2008, § 41.

⁷⁴ *Ibid.*, § 50.

⁷⁵ *Shimovolos v Russia*, judgment of 28 Nov. 2011 (application no 30194/09), § 65.

In *Copland*, the ECtHR acknowledged that the right to respect for a private and family life, home and correspondence is a qualified right. According to the second paragraph of Article 8 interference with the right to respect for private life can only be justified where it is in accordance with the law. In *Copland* the ECtHR held that this element of the article required the terms for monitoring a worker had to be explicitly stated in law and had to be sufficiently clear in its terms to give an adequate indication of the conditions authorities may use to justify this type of activity. The UK government argued that the statutes creating public bodies and quasi-autonomous non-governmental organisations, in this case a Further Education college, empowered them to do anything necessary and expedient in the course of their undertakings including the collection of monitoring information. The ECtHR rejected this argument as there was no domestic law regulating monitoring and so the interference in the *Copland* case was not “in accordance with the law” as required by Article 8.2 of the Convention. Monitoring is therefore likely to be unlawful in the absence of specific laws and regulations to authorise it.

This conclusion is meaningfully confirmed by the decisions on the collection of data on whereabouts and movements of individuals in the case of secret surveillance, stating that “the measure should have some basis in domestic law” that must give citizens “an adequate indication of the conditions and circumstances in which the authorities are empowered to resort to any measures of secret surveillance and collection of data”. For these reasons “the following safeguards should be set out in statute law: nature, scope, and duration of the possible measures, the grounds required to for ordering them, the authorities, competent to permit, carry out and supervise them, and the kind of remedy provided by national law”.⁷⁶

These general requirements of the domestic law cannot be excluded in instances where the surveillance is grounded generally on the law of contract. Whether elite sports contexts, with their history of anti-doping obligations and the nature of their voluntary participation thereto, constitute a lawful exception is a debatable point. It is nevertheless clear that a statute law should exist for anti-doping authorities in the light of elite sports and the whereabouts provisions thereof; it should set out limits on nature and duration, and, above all, safeguard measures

⁷⁶ *Shimovolos v Russia*, judgment of 28 November 2011 (application no 30194/09), § 67, 68.

against abuse even in the case where non-state authorities are at issue, though with the approval of the persons concerned. In the absence of such specific provisions, a state of disproportionality in the face of the norms of the ECHR might emerge from detailed scrutiny by the Court. It is argued that in the absence of such, implementation of the WADA whereabouts requirements is in tension with existing anti-doping policy in the UK. Although the UK Government's adoption of the WADC is based on the Copenhagen Declaration on Anti-Doping in Sport (Second World Conference on Doping in Sport 2003) and ratification by the UK Parliament of the International Convention against Doping in Sport (UNESCO 2005), these international treaty obligations have not been incorporated into domestic UK law. In *Ohuruogu*,⁷⁷ CAS held that anti-doping measures were implemented under UKA anti-doping rules and the IAAF rules rather than UK law. It follows therefore that in the absence of a law specifically authorising the monitoring of athletes' whereabouts may not be in accordance with the law and is in breach of Article 8.

4. Conclusion

WADA views out-of-competition testing as one of the most powerful means of deterrence and detection of doping and argues that its whereabouts requirements are the only way of achieving an effective deterrent.

The whereabouts requirements, however, give rise to serious concerns over the privacy of elite athletes in terms of their right to work, right to a work-life balance, and right to respect for a private and home life under EU law and the ECHR (in particular Article 8, the right to respect for a private and family life).

Although WADA's anti-doping code is an international instrument, in Europe its provisions must be compatible with the laws of the EU, its Member States and the ECHR, and the European Court of Justice has held that decisions of sporting bodies that affect an athlete's right under EU law come under their jurisdiction. Irrespective of its permissibility in the UK, no direct challenge to the WADA whereabouts requirements on the grounds of privacy is likely there. Nevertheless, we have argued that athletes may have grounds to bring a legal challenge through more indirect means. As WADA's whereabouts requirements do not have their basis in European law they

⁷⁷ (2007) CAS 2006/A/1165.

appear in breach of elite athletes' rights under European workers' rights, health & safety and data protection law and may also, therefore, be in conflict with Article 8 of the ECHR and the Human Rights Act 1998.

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