

‘Just One of the Challenges of 21st-Century Life’: Oscar Pistorius in the Court of Arbitration for Sport

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1. Introduction

On May 16th 2008, the Court of Arbitration for Sport handed down its decision in *Oscar Pistorius v The International Association of Athletics Federations*.¹ Pistorius is a class-43 (double amputee) athlete from South Africa, born in November 1986. His legs were amputated below the knees when he was 11 months old because he had been born without fibulas (a lower-leg bone which supports about 15% of an adult’s body weight). He started running at the beginning 2004 to assist his rehabilitation from a serious rugby injury,² but such was his progress in the discipline that he competed in the September 2004 paralympics, using prosthetic titanium lower legs manufactured by a company in Iceland.³ He came first in the 200m. At the 2006 Athletics World Championships he won gold medals in the 100, 200 and 400m events and he remains the world record holder at all those distances for class-43 athletes.⁴ Pistorius asked to be considered for selection in South Africa’s 2008 Olympic squad in the 400m and in the 4 x 400m relay, using his prostheses but in all other respects running on equal terms against the other participants.

In the second half of 2007, Pistorius had participated in various tests at the IAAF’s behest, namely the ‘Rome Observations’ (video recordings of his performance at a specially-organised race in July 2007) and the ‘Cologne Tests’ (laboratory analysis conducted by personnel at the German Sport University between July and December, and the report detailing their results). The Rome Observations indicated that while neither his stride length nor the length of time his prostheses were in contact with the ground were significantly different to the able-bodied runners, in the 400m event Pistorius was quicker on the straight than he was around the bends, and overall he ran more quickly in the second half of the race whereas the able-bodied runners slowed in the second half. The mechanics of the ‘Cologne Test’ were devised on the basis of instructions given by the IAAF and were “designed to evaluate Mr Pistorius’ sprint movement using an inverse dynamic approach⁵ and also to study (his) oxygen intake and blood lactate metabolism over a 400m-race simulation.”⁶

Having considered the results of those tests, the IAAF Council concluded that Pistorius' prostheses enabled him to exert less mechanical effort than able-bodied athletes, "with a mechanical advantage of the blade in relation to the healthy ankle joint of an able bodied athlete higher than 30%"⁷ and that his energy loss was "significantly lower" than the others'.⁸ Consequently, in January 2008 the IAAF ruled he was ineligible for consideration because his prosthetic legs contravened the IAAF's Rule 144.2(e) on technical aids – a rule that had been changed six months after his success at the World Championships specifically to prohibit the use of any device that incorporated springs, wheels "or any other element that provides the user with an advantage over another athlete not using such a device."⁹ The IAAF said the studies had indicated his prosthetic legs constituted a 'technical device' which gave him such an 'advantage' over an able-bodied runner of similar ability.¹⁰

In accordance with the IAAF's Competition Rule 60.25, Pistorius appealed against that decision to the Court of Arbitration for Sport – an appeal which, pursuant to Rule 60.26, necessarily took the form of a *de novo* review and re-hearing¹¹ of "the facts, the provisions of the relevant Rules and the applicable law."¹² Pistorius asked the CAS to vacate the IAAF decision and rule that he could participate in IAAF-sanctioned events (which in effect means any track and field event that attracts elite-level competitors), and the appeal lasted for two days at the end of April.

2. *The CAS Proceedings*

First, the bad news. The new UN Convention on the Rights of Persons with Disabilities, which have been advanced by colleagues¹³ as being potentially highly relevant to Pistorius' case and the interests of disabled athletes more generally, were despatched by CAS in four short paragraphs. While the Panel duly noted that signing and ratifying the Convention and/or the Optional Protocol¹⁴ would create obligations to signatory states, it also noted that the Principality of Monaco, whose laws govern the IAAF by virtue of Article 16 of the latter's constitution, has neither signed nor ratified either and so its provisions cannot place obligations on the IAAF at this time. The relevance of the Convention to the IAAF will become germane only if Monaco ratifies it, so that the question of whether Monaco's laws bind the IAAF to the Convention's provisions becomes relevant - but it will not be germane for long because if it is faced with the possibility of being bound by Convention rights the IAAF will simply relocate to another jurisdiction whose laws are more to its liking.¹⁵ That

would probably be Switzerland (where most international sports federations still have their seats, but it could possibly be the United Arab Emirates, which has wooed several sports federations in recent years (neither of those states has signed the Disabilities Convention). The potential impact of human rights provisions on sports participation are discussed below, if only to help raise awareness of the issues should such an eventuality come to pass, but it is this writer's view that the IAAF will not be bound by the terms of the Disabilities Convention any time soon.

But back to Pistorius. Prior to his appeal, it would have been reasonably anticipated that Pistorius would argue that the use of technical aids such as his prosthetic limbs should not be considered in solely biomechanical terms, which the Cologne analysis had done, because other aspects - such as energy loss and the degenerative impact on the knee and hip joints and the site where the amputated limb came into contact with the prostheses - should also be considered. Those arguments certainly had validity, but of greater significance to the CAS decision was the fact that the whole process had been procedurally unsound. Specifically, the Rome Observation had already confirmed that Pistorius ran at his quickest on the straight parts of the track in the 400m race, but under the IAAF's instructions the Cologne tests concentrated solely on how he performed 'on the straight', and gave no consideration to how he performed at the start or during the first 50m of the race – the crucial 'acceleration phase' in that discipline. The CAS pointed out that,

(H)aving viewed the Rome Observations ... the IAAF's officials must have known that, by excluding the start (of the race) and the acceleration phase, the results would create a distorted view of (his) advantages/disadvantages by not considering the effect of the device on the performance of Mr Pistorius over the entire race. The panel considers that this factor calls into question the validity and relevance of the test results on which the Cologne report was based.¹⁶

The CAS thus determined that "the Cologne Report does not answer the question that (CAS) is required to decide,"¹⁷ namely, whether the prostheses gave Pistorius an 'advantage' over the other competitors.

CAS was also concerned to note that the scientist who represented Pistorius "was effectively 'frozen out' to such an extent that he declined to attend the Cologne tests." He had previously

been informed by the IAAF that he would be able to attend as a mere observer and would have no input on the testing protocol or the subsequent analysis, and the IAAF had ignored letters and emails from him in relation to the testing procedure.¹⁸ Moreover, the scientist who had conducted the tests was not presented with the IAAF's summary of his report (on the basis of which the Council had taken the decision to exclude Pistorius), and when it was presented to him at the hearing he confirmed that the summary contained material inaccuracies. Furthermore, there had been several fundamental flaws in the IAAF Council's voting procedure on the matter, not the least of which was the IAAF's informing the media before the vote was even taken that Pistorius would be banned, and its indication to Council Members that any abstentions would actually be counted as positive votes to declare Pistorius ineligible – a decision which, CAS indicated, meant the IAAF's press statement¹⁹ to the effect that the decision on Pistorius' eligibility had been taken unanimously was misleading.²⁰ Finally, the CAS had already noted that the same prosthetic legs had "been used by many single and double amputees, almost unchanged, since 1997"²¹ and was clearly troubled by the fact that only in March 1997 had the IAAF changed its rules on technical aids – the inference being that the IAAF had changed its rules simply to head-off Pistorius once his participation at the Olympics had become a clear possibility given his performance in class 43 events.

In summary, the Panel's impression is that ... by November (2007) some IAAF officials had determined that they did not want Mr Pistorius to be acknowledged as eligible to compete in international IAAF-sanctioned events, regardless of the results that properly conducted scientific studies might demonstrate.

In the Panel's view, the manner in which the IAAF handled the situation of Mr Pistorius in the period from July 2007 to January 2008 fell short of the high standards that the international sporting community is entitled to expect from a federation such as the IAAF.²²

The wording of the new rules on technical aids, rather than the motives underpinning those changes, was no less significant factor in persuading the CAS to rule in Pistorius' favour and conducting a hearing *de novo*. The relevant rule, Rule 144.2(e) as amended, states that:

For the purposes of this rule, the following shall be considered assistance and are therefore not allowed:

...

(e) Use of any technical device that incorporates springs, wheels, or any other element that provides the user with an advantage over another athlete not using such a device.²³

The Panel regarded this provision as a ‘masterpiece of ambiguity’²⁴ and was not convinced that Pistorius’ prosthetic leg was a ‘technical device’. Although CAS took the view that it was, if only for the sake of expediency, it was debatable whether it was a ‘technical device’ that ‘contained’ a spring because, just like the human leg, Pistorius’ prosthesis was a ‘spring’ in its own right – ‘almost every non-brittle object is a ‘spring’ in the sense that it has elasticity’²⁵ and ‘based on current scientific knowledge, it appears to be impracticable to assess definitively whether the *Cheetah Flex-Foot* prosthesis acts as more than, or less than, the human ankle and lower leg, in terms of ‘spring-like’ quality.’²⁶ Equally importantly, while the Cologne Tests had ostensibly identified some ‘advantages’ to Pistorius in his use of the prosthesis, they had failed to establish (having not been requested by the IAAF to consider) whether there was an *overall* advantage to him in using it because the Cologne Tests had not been at all concerned with whether the drawbacks to Pistorius outweighed the benefits. While the IAAF had contended that a device which provided an athlete with *any* advantage should render him ineligible under Rule 144.2(e), CAS took the contrary view:

(T)o propose that a passive device...should be classified as contravening that Rule without convincing scientific proof that it provides him with an *overall net advantage* over other athletes flies in the face of both legal principle and commonsense.... If the use of the device provides more disadvantages than advantages, then it cannot reasonably be said to provide an advantage over other athletes.²⁷

Although the CAS agreed with the IAAF that the applicable standard of proof was ‘balance of probability’ rather than anything higher, it decided the evidence on which the IAAF had based its decision had not reached even that standard. The IAAF had been wrong to assert that the requirements of Rule 144.2(e) would be satisfied by any single advantage (as opposed to an overall net advantage) being found to accrue from the use of prostheses, and the Cologne Report had not satisfactorily established that there was any metabolic advantage to a double amputee in using the prosthetic limbs.

In the last conferencing session between (both sides') experts and the (CAS) Panel, the experts accepted that comparisons between the effective energy that can be used to increase the speed of sprinters using natural legs and prosthetic legs cannot be treated as providing definitive conclusions in the light of current scientific knowledge. They could not opine with certainty that the conflicting hypotheses they were advancing were indeed more than unprovable (sic) hypotheses. In particular, the scientists do not know if the fact that able-bodied runners create more vertical force than Mr Pistorius is an advantage or a disadvantage. There is at least some scientific evidence that sprinters, including 400m runners, train themselves to bounce more (i.e., to use more vertical force) because it creates more speed. Thus the Cologne report's findings, on which the IAAF Decision relied, that Mr Pistorius uses *less* vertical force and runs in a flatter manner may be a *disadvantage* rather than an *advantage*.²⁸

Furthermore, CAS pointed out that although both the Cologne Report and a subsequent investigation by Pistorius' own scientific advisers carried out in early 2008 (the 'Houston Report') agreed that a mechanical advantage in prosthetic limbs would necessarily result in a metabolic advantage to the user, the Cologne Report had not included consideration of whether Pistorius displayed those advantages. In contrast, those who compiled the Houston Report had considered the matter and discovered that no metabolic advantage had accrued to Pistorius²⁹ - he used the same amount of oxygen and fatigued at the same rate as an able-bodied runner would do.³⁰ Finally, CAS pointed out that although the same prostheses had been in use for over ten years, no single- or double-amputee 'has run times fast enough to compete effectively against able-bodied runners until Mr Pistorius has done so.'³¹ The remarkable factor in this case was not the prosthesis, but the man who used it.

Thus, the CAS declared that Pistorius was eligible to compete in IAAF-sanctioned events (which included Olympics trials and, in principle, the Olympics themselves) notwithstanding the provisions of Rule 144.2(e) and the findings of the Cologne tests. It went on to clarify the limits to its ruling, emphasising that it allowed Mr Pistorius to compete in IAAF-sanctioned events only when using the particular version of the prosthesis he used during the Cologne tests - 'it is not a general licence for him to use any further developments ... that might be found to provide him with an overall net advantage'³² - and stressing that it remains

permissible for the IAAF to devise and carry out new tests which might show that prosthesis does indeed carry an overall net advantage to those who use it.³³ CAS confirmed the decision has no application to any other athlete or any other type of prosthetic limb, so any future cases will have to be decided on their own merits, and while the Panel noted that this could have an additional burden on the IAAF, 'it must be viewed as one of the challenges of 21st Century life.'³⁴

3. Discussion

Given the irrelevance of the Disabilities Convention to the case, and the absence of any discussion of other legal or human rights principles by the CAS, it seems that *Oscar Pistorius* does not have much to contribute directly to the broader issues of disabled peoples' participation in sport. However, the media attention his case has garnered and the broader issues of the link between sport and human rights that holding the Olympics in China has highlighted, along with the coming into force of the Disabilities Convention, justify a preliminary consideration of the broader issues of whether disabled athletes could ever have a 'right' to participate in a given sports practice at a level reflecting their particular competence.

First, it should be noted that the opportunities for redress that the CAS provides are only available in respect of those participating at the elite level. The CAS is closed to recreational and sub-elite level performers, disabled or not. Second, it is a matter for reflection that the two 'big' cases to date on disabled sports participation (*Casey Martin*³⁵ and *Oscar Pistorius*) have concerned wealthy, white males who aspired to participate at the elite level as professionals, rather than concerning people who just want the opportunity to play for the 'love of the game' or for direct or indirect health benefits that accrue from sports participation. That is not a criticism of the CAS, which was established under the IOC's aegis in the early 1980s specifically to arbitrate on commercial or disciplinary (usually doping) disputes arising from the decisions of sports federations and it provides a relatively quick and inexpensive remedy for misjudgement or downright bad faith on the part of individuals or federations as well as providing some welcome common sense in the 'war against doping.'³⁶ But the disabled man who cannot gain access to the beach,³⁷ or the disabled child who is denied the opportunity to go on the school watersports trip,³⁸ must make do with whatever remedies are afforded by the ordinary courts, which may or may not include access to Convention rights. The legal avenues that will be of relevance in such cases are not without

significance - those afforded by individual states' disability discrimination laws (notably the rights afforded by legislation dealing with disability discrimination in employment and in education) are the most obvious, but planning law, health and safety law, personal injury and other aspects of tort law have the potential to be highly relevant to disabled participants. It is to be hoped that *Pistorius* will stimulate policy debate and scholarship which addresses those other aspects of law, rather than the focus remaining primarily on the rights of professional athletes such as Casey Martin. The Convention's value may prove to be in utilising non-traditional legal procedures which could be used as a catalyst for policy change and monitoring by Non-Governmental Organisations (NGOs), but its utility may be limited by the inherent difficulties of monitoring and enforcement, which are problems associated with other international instruments, and also by the specific flaws in the general drafting of the Convention and in Article 30.5 in particular.³⁹

Beyond the sports-specific provisions of the Disabilities Convention, it should be noted that there has been some recognition of a putative 'right to sport' in other instruments. But in comparison with the right to a fair trial, to life, or to free speech, the very notion of a 'right' to sport is far less convincing. Sport has, at most, been a trivial afterthought in the development of human rights – perhaps exemplified in the United Kingdom by the failed attempts to apply ECHR Article 8 rights to sporting activities, for example in *Smith and Gough v Chief Constable of Derbyshire*⁴⁰ (the imposition of football banning orders on complaint) and *R (on the Application of Countryside Alliance and Others) v Attorney General and Another*⁴¹ (the legality of the ban on hunting with hounds). That said, the International Covenant on Economic, Social and Cultural Rights (ICESCR) contains a right to rest and leisure and to take part in cultural life (which relates indirectly to participation in sport); the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) contains antidiscrimination provisions to ensure that women are treated equally in relation to sport (Articles 10 and 13); the Convention on the Rights of the Child (CRC) contains provisions to protect the rights of children to rest, leisure, play and recreational activities (Article 31) and makes provision for 'recreation' among disabled children with special requirements (Article 23). There are also non-binding international provisions such as the UNESCO Charter of Physical Education and Sport 1978 which specifies a 'fundamental right' to physical education and sport (Article 1) while the Olympic Charter claims that the practice of sport is a human right (Fundamental Principle 4). However, although these provisions all relate to sport, they either do so indirectly (by virtue of sport being a subgroup

of 'leisure', or via antidiscrimination principles) or they are non-binding, and while the Disabilities Convention may in time herald the emergence of a more tangible, direct right to sport for disabled people – in the sense of being a provision that can be relied upon before the domestic courts – at the time of writing 130 states have signed the Convention (a list that does not include Monaco or Switzerland but does include the United Arab Emirates) and only thirty have ratified it.⁴² Its sports provisions will probably have more to offer through its potential to stimulate debate and raise awareness of disability rights issues, especially if it is considered in connection with other rights that are more firmly established.

4. Postscript

Sadly, Oscar Pistorius did not make it to Beijing. His best times in the sprint events fall far short of the Olympic qualifying times, and although Athletics South Africa (the domestic governing body) had a discretion to choose him for its six-man 4 x 400m relay squad, it chose instead four 400m runners who had better times than he, and he was not selected as one of two 'reserve' athletes for that squad.⁴³ Purely coincidentally, Pistorius' non-selection for the relay squad came three days after IAAF General Secretary Pierre Weiss expressed concern that the prostheses could cause a danger to other athletes while they jockey for position in the relay change-over. Weiss said "we (the IAAF) would prefer that (South Africa) don't select him for reasons of athletes' safety," while IAAF spokesman Nick Davies opined that "there is a potential for massive disaster on the changeovers."⁴⁴ Pistorius said his ongoing dispute with the IAAF had prevented him from focussing fully on meeting the qualification standard, but that he will be competing in the Paralympics in Beijing and he hopes to be selected for the London 2012 Olympics. Finally, his legal team has lately threatened legal action against the IAAF over Davies' allegedly defamatory comment that it did not have the resources to check Pistorius' blades every time he runs⁴⁵ (the presumed insinuation being that he would try to use prostheses other than those sanctioned by the CAS). Whatever Oscar Pistorius may go on to achieve in his running career it seems that the case will make not an iota of difference to

the participation opportunities afforded to other disabled people; but I do hope to see him at the London Olympics.

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¹ CAS 2008/A/1480, available at <http://www.tas-cas.org/recent-decision> (last accessed 1st August 2008).

² *Pistorius*, op cit, at para 31.

³ <http://www.ossur.com>.

⁴ At 10.91s, 21.58s in the 100m and 200m

(http://www.paralympic.org/release/Summer_Sports/Athletics/Records/) and, as of July 17th 2008, 46.25s in the 400m (<http://www.ossur.com/?PageID=631&NewsID=2310>), both last accessed 1st August 2008.

⁵ Inverse dynamics is concerned with the analysis of what muscles ‘do’ during exercise, in respect of their rate of contraction and the amount of force generated by them: <http://www.univie.ac.at/cga/teach-in/inverse-dynamics.html> (last accessed 1st August 2008).

⁶ *Pistorius*, op cit, para 45.

⁷ <http://www.iaaf.org/news/kind=101/newsid=42896.html>, last accessed 1st August 2008.

⁸ *Pistorius*, op cit, para 51.

⁹ <http://www.iaaf.org/mm/document/imported/38361.pdf>, last accessed 19th April 2008.

¹⁰ <http://news.bbc.co.uk/sport1/hi/olympics/athletics/7141302.stm>, last accessed 19th April 2008.

¹¹ IAAF Competition Rules 2008, available at <http://www.iaaf.org/search/index.htm?q=competition+rules> (last accessed 1st August 2008).

¹² *Pistorius*, op cit at para 8.

¹³ Roy, E (2007) ‘Aiming for Inclusive Sport: The Legal and Practical Implications of the United Nations’ Disability Convention for Sport, Recreation and Leisure for People with Disabilities’ 5(1) Entertainment and Sports Law Journal (available at <http://go.warwick.ac.uk/eslj>); Wolbring, G (2008) ‘Oscar Pistorius and the Future Nature of Olympic, Paralympic and Other Sports’ (2008) 5(1) *Scripted* 139-160.

¹⁴ The Optional Protocol is important in terms of enforcement. Article 1 provides that ‘1. A State Party to the present Protocol... recognizes the competence of the Committee on the Rights of Persons with Disabilities... to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention. 2. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.’

¹⁵ The IAAF has form. While its previous relocation, in 1993 from London to Monaco, was motivated in large part by tax considerations, the IAAF must have been surprised and perturbed by the English courts’ willingness, in *Gasser v Stinson* (1988) unreported 15 June (QBD), to allow an athlete who had failed a drugs test to pursue a claim of unreasonable restraint of trade. The claim failed on its merits, but the fact it was even entertained had established that the IAAF was not ‘above’ the law (at least, not in England) and would have caused internal consternation.

¹⁶ *Pistorius*, op cit, at para 61.

¹⁷ *Pistorius*, op cit, para 62.

¹⁸ *Pistorius*, op cit, para 63.

¹⁹ <http://www.iaaf.org/news/kind=101/newsid=42896.html>

²⁰ *Pistorius*, op cit, para 67.

²¹ *Pistorius*, op cit, para 33.

²² *Pistorius*, op cit, paras 69, 70.

²³ IAAF Competition Rules 2008, available at <http://www.iaaf.org/search/index.htm?q=competition+rules> (last accessed 4th August 2008).

²⁴ *Pistorius*, op cit, at para 80.

²⁵ *Pistorius*, op cit, at para 81.

²⁶ *Pistorius*, op cit, at para 96.

²⁷ *Pistorius*, op cit, para 83 (emphasis in original).

²⁸ *Pistorius*, op cit, para 95 (emphases in original).

²⁹ *Pistorius*, op cit, para 97.

³⁰ *Pistorius*, op cit, para 91.

³¹ *Pistorius*, op cit, at para 99.

³² *Pistorius*, op cit, para 102.

³³ *Pistorius*, op cit, para 103.

³⁴ *Pistorius*, op cit, para 104.

³⁵ *PGA Tour Inc. v Martin* (2001) 532 U.S. 661. For consideration of the (perhaps merely superficial) similarities between Oscar Pistorius' case and that of Casey Martin, see Charlish, P and Riley, S (2008) 'Should Oscar Run?' 18 *Fordham Intellectual Property, Media and Entertainment Law Journal* 929 - 957.

³⁶ *Marinov v Australian Sports Anti-Doping Authority* CAS 2006/A/1311, available at <http://www.tas-cas.org/recent-decision> (last accessed 4th August 2008)

³⁷ *Botta v Italy* (1998) 26 EHRR 241

³⁸ *White v Clitheroe Royal Grammar School* (2002) unreported CC Claim No. BB 002640.

³⁹ Condry, S (2008) 'Sport, Disability and the Limits of Law'. Unpublished MPhil Thesis, University of Stirling. [2002] EWCA Civ 351.

⁴⁰ [2006] EWCA Civ 817

⁴¹ <http://www.un.org/disabilities/default.asp?id=257>, last accessed 29th July 2008

⁴² 'Blade Runner Fails to Make South African Olympic team' www.insidethegames.com/show-news.php?id=2891, last accessed 1st August 2008.

⁴³ 'Relay Safety Fears Over Pistorius' www.news.bbc.co.uk/sport1/hi/olympics/athletics/7508399.stm, last accessed 5th August 2008.

⁴⁴ 'Blade Runner Fails to Make South African Olympic team' www.insidethegames.com/show-news.php?id=2891, last accessed 1st August 2008.