

IN THE MATTER OF ANTI-DOPING DISCIPLINARY PROCEEDINGS
BROUGHT UNDER THE FOOTBALL ASSOCIATION'S ANTI-DOPING
REGULATIONS 2014/2015

BETWEEN:

THE FOOTBALL ASSOCIATION

-and-

MR. JAKE LIVERMORE

WRITTEN REASONS OF THE REGULATORY COMMISSION

Regulatory Commission:

David Casement QC (Chairman)

Stuart Ripley

Paul Raven

Introduction

1. By letter dated 22 July 2015 ("the Charge Letter") The Football Association ("The FA") charged Jake Livermore with a breach of Regulation 3 of The FA Anti-Doping Regulations ("the Regulations"). Mr Livermore is a first team member for Hull City FC. It was alleged by The FA that the player provided a urine sample during an In-Competition Test on 25 April 2015 after the Crystal Palace v Hull City game which sample tested positive for the presence of Benzoyllecgonine, a metabolite of Cocaine. Cocaine is a Prohibited Substance in S6(a) (Non-Specified Stimulants) of Schedule 3 of the Regulations.
2. The FA notified the player of the positive finding by letter dated 13 May 2015 and provisionally suspended him from participating in all First

Team Competitive Matches and Non-First Team Matches until such time as the charge against him was determined. Following the players request the B Sample was tested on 20 May 2015 and was found positive for the Prohibited Substance. The player admitted the Anti-Doping Rule Violation (“ADRV”) by letter dated 24 June 2015. As a result of that admission the Regulatory Commission is solely concerned with sanction.

3. The hearing of these proceedings took place at Wembley Stadium on 2 September 2015. Those in attendance apart from the Commission were as follows:

Dario Giovannelli, Counsel for The FA
Robert Henderson, The FA Anti-Doping Manager
Claire Parry, UKAD

Jake Livermore, Player
Nick De Marco, Counsel
Matthew Chantler, Solicitor, Mills & Reeve
Nick Cusack, Professional Footballers Association
Dr Philip Hopley, Psychiatric Consultant
Kevin Livermore, Player’s Father
Michael Standing, Agent

Mark Ives, Head of Judicial Services, The FA
Robert Marsh, Judicial Services Manager, The FA

Background

4. Mr Livermore was born on 14 November 1989 and is presently 25 years old. He was born and raised in Enfield, London and is a professional footballer who began his professional career with Tottenham Hotspur. At the beginning of the 2013-14 season he went on loan to Hull City.

5. There is no substantial dispute between The FA and the player as to the relevant facts and the deeply tragic background in respect of the offence which is admitted. Those facts will be summarised in these written reasons however for reasons of privacy including sensitive medical information a substantial section concerned with the circumstances leading up to the commission of the ADRV ("the Circumstances") will be redacted. The information that will be redacted is simply so sensitive and private that it is common ground between the representatives of The FA and the player that there should be redaction.
6. Mr Livermore has been in a long-term relationship with his partner since 2009. In 2011/12 they celebrated together with family the player's debut appearance with Tottenham. In Mid-July 2013 the player moved to Hull and was delighted to have been signed by that club and to be working with Steve Bruce. The couple and their families were further delighted to receive the news in September 2013 that Mr Livermore's partner was pregnant with their first child.
7. As a couple they conducted research and decided upon a private hospital to ensure the best care and attention for both mother and baby. Other planning took place including planning a nursery and buying baby clothes in the usual way and they discovered in due course that the baby would be a boy. Mr Livermore attended all of the scans and was fully involved. All of this was a very happy time for the couple and they decided on the name Jake. During the course of these proceedings he has been referred to as Jake Junior and that is how he will be referred to in this document.
8. Mr Livermore's partner was admitted to hospital to give birth on 18 May 2014. There had been no complications with the pregnancy and the staff assured her that everything was well. Everything appeared to be as it should for a normal birth but in the event and following a long labour Jake Junior was delivered by caesarean section. Tragically Jake Junior did

not survive. The Coroner's report obtained quite some time later records that tragically Jake Junior was pronounced dead at 01:37am on 19 May.

9. Mr Livermore, his partner and their families were totally devastated by the death of Jake Junior. This Commission has read the statements concerning the impact of the death and the circumstances leading up to it and how it could have been avoided. For the purposes of these proceedings it is necessary to focus upon the effect of the death and circumstances of the death of Jake Junior upon Mr Livermore to ascertain the extent of impairment to his thought processes and judgment at the time in question.
10. At the hearing oral evidence was given by Mr Livermore and also Dr Hopley, an experienced consultant and forensic psychiatrist. Both were cross-examined by The FA in respect of the degree of impairment faced by the player in the run up to the commission of the ADRV. Further evidence was presented to the Commission in the form of witness statements from Mr Livermore's partner, Kevin Livermore the player's father, Steve Bruce manager of Hull FC, Robert Price physiotherapist at Hull FC, Dr Mark Waller club doctor at Hull FC and Tom Huddlestone player at Hull FC. The evidence of these witnesses, who were not called, was accepted by The FA save where it referred to opinion or hearsay.
11. The Commission found Mr Livermore to be an entirely honest and compelling witness who gave his evidence without exaggeration. Dr Hopley is a greatly experienced consultant psychiatrist who gave his evidence in a clear and measured way. The evidence of Dr Hopley was also presented along with substantial and compelling written documentary evidence in support of the player's contention that his cognitive functions and judgment were severely impaired at the time in question.

12. The Circumstances have to some extent been set out above. The tragic death of Jake Junior had a devastating effect upon Mr Livermore, his partner and their families. The Commission has the clearest medical evidence as to the effect of this on Mr Livermore's mental health however the matters set out above do not set out the full extent of the tragedy and the impact upon Mr Livermore. The Commission is in a position to make clear findings on the clear evidence, the bulk of which is unchallenged, about the impact upon Mr Livermore. That is set out in the following section which is to be redacted.

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14. The Circumstances as identified above including those redacted place this tragic case in a category of case properly regarded as exceptional and indeed unique in the judgment of the Commission. The degree of

impairment was such that concepts such as fault and appropriateness of sanction are entirely inappropriate in the Circumstances:

- 14.1 there was no intention on the part of Mr Livermore to enhance his performance as an Athlete;
- 14.2 Mr Livermore had been tested on ten previous occasions and all tests had returned negative;
- 14.3 this was a one-off incident in respect of the use of cocaine. He had never used recreational drugs previously;
- 14.4 the incident ADRV only occurred as a result of the severe impairment of Mr Livermore's cognitive functions and judgment caused by the Circumstances for which he was in no way at fault.

The Rules

- 15. The relevant rules of The FA are The FA's 2014/15 Anti-Doping Regulations referred to herein as the Regulations. The ADRV took place on 25 April 2015. The Word Anti-Doping Code 2015 came into effect on 1 January 2015 and to the extent necessary The FA amended its Anti-Doping Regulations at the end of the 2014/15 season rather than mid-way through ie on 1 January 2015. The Regulations therefore reflect the Word Anti-Doping Code 2009. To the extent that subsequent version of the regulations for anti-doping, namely those for 2015/16, are more advantageous to the player he may be able to pray those in aid by reason of the principle of *lex mitior*.
- 16. The Regulations provide as follows:

Regulation 3

The presence of a Prohibited Substance or its Metabolites or Markers in a Sample provided by a Player is prohibited unless the Player establishes that the presence is consistent with a Therapeutic Use Exemption that has been granted to the Player. The presence of any quantity of a Social Drug or its Metabolites or Marker in a Sample provided by a Player is prohibited both In Competition and Out of Competition.

Cocaine is a Prohibited Substance listed in S6(a) (Non-specified Stimulants) of Schedule 3 of the Regulations

Regulation 42

Subject to the provisions of Regulations 43 and 64-81 (inclusive) for a violation committed by a Player under Regulation 3 (the presence of a Prohibited Substance), Regulation 4 (the use/attempted use of a Prohibited Substance/Prohibited Method), or Regulation 10 (possession) the following penalties must be imposed:

- (a) for a first violation - 2 years suspension; and
- (b) for repeated violations – refer to the table at Regulation 51.

Regulation 67

If the violation was committed by a Player under Regulation 3 (the presence of a Prohibited Substance) and the Player:

- (i) establishes that he bears No Fault or Negligence and;
- (ii) proves how the Prohibited Substance entered his body then the minimum period of suspension shall be eliminated.

Regulation 70

If the violation was committed by a Player under Regulation 3 (the presence of a Prohibited Substance) and the Player:

- (i) establishes that he bears No Significant Fault or Negligence and;
- (ii) proves how the Prohibited Substance entered his body then the penalty may be reduced but the reduce period of suspension (if it

is a first violation) may not be less than twelve months. If the minimum penalty would otherwise be a permanent suspension the reduced period under this provision would be no less than eight years.

17. The starting point for sanction under Regulation 43 in respect of a breach of Regulation 3 of the Regulations is a 2 year suspension.

Regulations

18. In his submissions Mr De Marco on behalf of Mr Livermore advanced three lines of argument in the following order for the reduction of the sanction from that starting point of 2 years given the Circumstances:
 - 18.1 Mr Livermore is entitled to have the sanction eliminated completely on the basis that he comes within Regulation 67 in that there is No Fault or Negligence;
 - 18.2 the Commission should find pursuant to Regulation 70 there is No Significant Fault or Negligence and the sanction should be reduced to the minimum of half, namely 12 months;
 - 18.3 the Commission should find that this is such an exceptional case that even the 12 month period under Regulation 70 is such an affront to fairness and proportionality that it is possible to go below the period provided for under Regulation 70 (which in turn reflects WADC 10.5.2).

Findings

No Fault or Negligence

19. Regulation 67 is relevant only if the Commission finds there was No Fault or Negligence. Those are capitalized terms which are strictly defined in the Regulations as they are in the WADC. No Fault or Negligence means as follows:

“the Participant is able to establish that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.”

20. As far as proving the threshold criterion of proving on the balance of probabilities how the Prohibited Substance entered his body the Commission is entirely satisfied that he consumed cocaine on the night of 21 April 2015. That aspect of Regulation 67 and indeed Regulation 70 is made out.

21. However Regulation 67 is very narrow and applies only where the Athlete did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had Used a Prohibited Substance. In the present case Mr Livermore knew that he was taking cocaine and intended to take it. This is not a case where he did not know what he was consuming. The medical evidence given by Dr Hopley is clear that the degree of impairment did not go so far that Mr Livermore did not know what he was consuming. Regulation 67 is therefore a provision which cannot be relied upon by Mr Livermore.

No Significant Fault or Negligence

22. The definition of No Significant Fault or Negligence is as follows:

“the Participant is able to establish that his fault or negligence, when viewed in the totality of the circumstances and taking into account the

criteria for No Fault or Negligence, was not significant in relation to the Anti-Doping Rule Violation.”

23. It is clear from CAS authorities that depression can amount to such an impairment as to amount to a basis for asserting No Significant Fault or Negligence. Vlasov v ATP Tour Inc CAS 2005/A/873 was a case in which the Athlete was diagnosed with depression which impacted his cognitive functioning. The substance in question was Pemoline which is a powerful stimulant. The Tribunal found as a result of the impairment in that case there was No Significant Fault or Negligence and imposed the minimum period sanction namely 12 months. That decision was upheld on appeal to CAS.
24. In WADA v USADA & Thompson, CAS 2008/A/1490, CAS heard another cocaine case but with very different facts. There a young and naïve athlete had deliberately ingested cocaine at a graduation party and it was held that his sanction could be reduced to one year for No Significant Fault or Negligence. The authority refers to a number of facts including ignorance that the cocaine was a Prohibited Substance, the fact that it was a one-off act of “youthful exuberance” and the fact that the ingestion could not have had any performance enhancing effect.
25. USADA v Cosby (5 May 2010, American Arbitration Association, 77 19000543 09) was a “specified substance case” namely diuretics and other masking agents. It was held that “*a person suffering severe depression is subject to suggestion and is not in full control of her decision making abilities*” and that “*Ms Cosby’s judgment was adversely affected by depression and that she thus bears less responsibility than normal for what happened to her.*” (p. 26). The panel reduced the two year sanction to four months.
26. As is noted Lewis & Taylor, Sport: Law and Practice (3rd Edn) paragraph C2.248:

“the CAS has shown a willingness in appropriate cases to impose a lesser sanction that would otherwise have applied where the athlete’s failure to meet the standards expected of him was due in part.. [to} The fact that his judgment was impaired by illness or by extreme stress.”

27. It is the judgment of the Commission that the Circumstances as set out above are such that Mr Livermore was guilty of No Significant Fault or Negligence. Indeed The FA accept that Mr Livermore is entitled to the benefit of Regulation 70 and to the minimum sanction thereunder. The Circumstances were such and the impairment was such that the Commission would have imposed no more than the minimum period of suspension namely 12 months. However in the judgment of the Commission taking into account all of the evidence and the Circumstances this case is in a very different category to those of cases such as Vlasov, Thompson and Cosby referred to above and the impairment in the present case was far greater and the Circumstances so much more extreme.

Proportionality

28. The proportionality between the breach of the rules and the sanction which is imposed is a fundamental aspect of disciplinary proceedings in general and in respect of Anti-Doping in particular. Principles of proportionality are already, for the most part, given full expression within the World Anti-Doping Code. Attempts have been made by Athletes to argue that the penalty imposed even taking into account No Significant Fault or Negligence is disproportionate. However the Code, which is reflected in the Regulations in the present case, does provide for reductions in sanctions and a scale of suspension period albeit within clearly defined parameters. It must be accepted that there will always be cases where the sanction appears to operate harshly in one case or another. The benefits of consistency in the battle against Doping outweigh

those detriments incurred in certain cases where the sanction appears to operate somewhat harshly. However there is no general discretion to depart from the sanctions set out in the WADC in those cases where it is felt to operate somewhat harshly even if it leaves the Tribunal feeling “uneasy”: *Hipperdinger v ATP Tour CAS 2004/A/690*, *Squizzato v FINA CAS 2005/A/830*, *Edwards v IAAF CAS 2006/A/1032*.

29. The position was set out very clearly in *M. Puerta v ITF CAS 2006/A/1025*:

“But the problem with any “one size fits all” solution is that there are inevitably going to be instances in which the one size does not fit at all. The Panel makes no apology for repeating its view that the WADC works admirably in all but the very rare case. It is, however, in the very rare case that the imposition of the WADC sanction will produce a result that is neither just nor proportionate. It is argued by some that this is an inevitable result of the need to wage a remorseless war against doping in sport, and that in the war there will be the occasional innocent victim. There may be many innocent victims in wars where bullets fly, but the Panel is not persuaded that the analogy is appropriate nor that it is necessary for there to be undeserving victims in the war against doping. It is a hard war, and to fight it requires eternal vigilance, but no matter how hard the war, it is incumbent on those who wage it to avoid, so far as is possible, exacting unjust and disproportionate retribution.” (paragraph 11.7.18)

30. The case of Puerta was concerned with a situation where there was a second ADRV which would have resulted in an eight year ban even with a finding of No Significant Fault or Negligence. That period of a ban would have ended the Athlete’s career. The degree of negligence however in that case was so slight that the Panel regarded the sanction provided by the Code as entirely disproportionate. In that lacuna which it identified the

Panel identified oppressiveness which the drafters of the Code could not have intended:

“The Panel has already expressed its view that (a) there is a gap or lacuna in the WADC in relation to the circumstances of the present case; (b) such circumstances may never arise again; (c) the WADC provides a just and proportionate sanction in all but the very rare case; and (d) its decision does not weaken either the WADC or WADA. Equally, the Panel does not believe that WADA, as a responsible law-maker, would want the WADC to be seen as an instrument of oppression and injustice in the very rare case in which it could, with justification, be seen to have that effect.”

(paragraph 11.7.32)

31. Similar statements were made in S v Fina CAS 2005/A/830 in respect of proportionality in the context of extreme and unique circumstances in which the Tribunal has a flexibility to properly reflect the circumstances of the case. As was made clear in Puerta and in Warren v USADA, CAS 2008/A/1437 it would be difficult to imagine any recourse to the proportionality principle in any case where there was a Prohibited Substance and any suggestion of a performance enhancing effect.
32. The Circumstances as identified herein, including those parts which are redacted, provide an extreme and unique case in which the imposition of a one year suspension pursuant to Regulation 70 would be wholly unfair as well as evidently and grossly disproportionate. The degree of impairment in the present case was so severe and the Circumstances giving rise to it so extreme as to be unique.
33. The Commission having carefully considered and taking into account all the evidence relating to the Circumstances and the degree of impairment in this case concludes that Mr Livermore was not negligent or at fault in any real sense.

34. The unanimous view of the Commission is that the proportionality principle is engaged in the present case such that given the Circumstances, as they have been evidenced and found by the Commission to exist, the imposition of any period of suspension would be wholly unjust and disproportionate. Indeed in the Circumstances it would be unconscionable to impose any period of suspension.

Conclusion

35. This decision is not intended to set a precedent. Each case must be considered on its merits and individual facts. It will be a very rare case that does not fall within the express sanctions provided under the Regulations and the World Anti-Doping Code. This case however is a very rare case.
36. The rules as to whether an ADRV has been committed are based upon strict liability and Mr Livermore has admitted the presence of the Prohibited Substance. However given the Circumstances as identified herein and the application of principles of proportionality in what is a very rare case the Commission imposes no Period of Ineligibility upon Mr Livermore.
37. We wish to take this opportunity to commend both counsel for the way in which they have dealt with this case. We have received great assistance from both counsel and the case has been addressed with appropriate sensitivity. The FA in bringing these proceedings were fulfilling their duty as a regulatory body and the testing procedures implemented under the Regulations have proved to be very beneficial in this case as it enabled a player in need of support to be identified.
38. The emphasis in this case must now be upon support for Mr Livermore. The Commission therefore directs that he will undertake a course of rehabilitation and education. In the present case that will need to be

tailored so as to complement the counseling and treatment that he is already receiving. To assist with that process Mr Livermore will also be the subject of Target Testing for a period of one year.

39. There will be no order as to costs.

DAVID CASEMENT QC

Chairman

8 September 2015

Signed by the Chairman on behalf of the Regulatory Commission