

THE DISCIPLINARY COMMISSION

Sitting on behalf of Amateur Football Alliance

NON-PERSONAL HEARING

of

Taliesin Kiwanuka

Old Thorntonians FC

[CASE REFERENCE 11422707M]

THE DECISION AND WRITTEN REASONS OF THE COMMISSION

Disclaimer:

These written reasons contain a summary of the principal evidence before the Commission and do not purport to contain reference to all the points made, however the absence in these reasons of any particular point, piece of evidence or submission, should not imply that the Commission did not take such a point, piece of evidence or submission, into consideration when determining the matter. For the avoidance of doubt, this Disciplinary Commission has carefully considered all the evidence and materials furnished with regard to this matter.

I. INTRODUCTION

1. The Football Association (“**The FA**”) convened a Disciplinary Commission (the “**Commission**”), on behalf of the Amateur Football Alliance (“**AFA**”) on 6 December 2023 to adjudicate upon disciplinary charges levied against Mr Taliesin Kiwanuka (“**Mr Kiwanuka**”) (Case ID number: 11422707M).
2. The Disciplinary Commission was constituted of a single member, Mr André Duarte Costa, an Independent FA appointed Chair.

II. THE CHARGES

3. In summary, by Misconduct Charge Notification dated 24 November 2023 (the “**Charge Notification**”) issued by AFA against Mr Kiwanuka, Mr Kiwanuka was charged with two charges relating to alleged misconduct in a match against Fulham Compton Old Boys on 14 October 2023:
 - a) it was alleged that Mr Kiwanuka used abusive and/or indecent and/or insulting language contrary to FA Rule E3.1 (“**Charge 1**”); and
 - b) it was also alleged that Charge 1 amounted to an aggravated breach as defined by FA Rule E3.2 because it included a reference to Nationality and/or Ethnic Origin (“**Charge 2**”).
4. The Charge Notification referred to the comment: “*he is an Irish Gipsy*” or similar (the “**Alleged Comment**”).
5. The Charge Notification also referred to the Standard Sanctions and Guidelines. Furthermore, a reference to an administration fee and/or a potential fine was also made.
6. Mr Kiwanuka was required to submit a response by 8 December 2023. On 6 December 2023, Mr Kiwanuka submitted on the Whole Game System, the FA's administration system, a not guilty plea denying both charges and requested for his case to be dealt with in his absence, *i.e.* Non-Personal Hearing.

III. THE RULES

7. The Rules of the Association are foreseen in Section 10 of The FA Handbook 2023/2024¹.
8. Under the title "Misconduct" Section E of the Rules of the Association sets out the rules to be observed by Participants².
9. Bearing in mind the charges levied against Mr Kiwanuka the relevant rule to take into account for the purpose of the present case is FA Rule E3, in specific FA Rules E3.1 and E3.2.
10. According to FA Rule E3.1: *A Participant shall at all times act in the best interests of the game and shall not act in any manner which is improper or brings the game into disrepute or use any one, or a combination of, violent conduct, serious foul play, threatening, abusive, indecent or insulting words or behaviour.*
11. According to FA Rule E3.2: *A breach of Rule E3.1 is an "Aggravated Breach" where it includes a reference, whether express or implied, to any one or more of the following:
- ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability.*

IV. EVIDENCE

12. The following is a summary of the principal evidence provided to the Commission. It does not purport to contain reference to all the points made, however the absence in these reasons of any particular point, or evidence, should not imply that the Commission did not take such point, or evidence, into consideration when the members determined the matter. For the avoidance of doubt, the Commission has carefully considered all the evidence and materials furnished with regard to this case.
13. The evidence which the AFA relied upon in support of the charges consisted of:

¹ Available at: <https://www.thefa.com/football-rules-governance/lawsandrules/fa-handbook>.

² means an Affiliated Association, Competition, Club, Club Official (which for the avoidance of doubt shall include a Director), Intermediary, Player, Official, Manager, Match Official, Match Official observer, Match Official coach, Match Official mentor, Management Committee Member, member or employee of a Club and all persons who are from time to time participating in any activity sanctioned either directly or indirectly by The Association, as per The FA Handbook 2023/2024, Section 10, Part A, para. A2.

- a) Extraordinary Incident Report by Mr John Doe (“Mr Dow”), the Referee, dated 16 October 2023³;
- b) Email from Mr Doe, the Referee, dated 16 October 2023 at 11:01⁴;
- c) Email from Mr Andrew Parratt (“**Mr Parratt**”), Manager for Fulham Compton Old Boys Reserves, dated 24 October 2023 at 00:19⁵;
- d) Email from Mr Parratt, Manager for Fulham Compton Old Boys Reserves, dated 26 October 2023 at 16:48⁶;
- e) Email from Mr Andrew Parratt, Manager for Fulham Compton Old Boys Reserves, dated 27 October 2023 at 00:33⁷;
- f) Email from Mr Matt Mint, Chairman for Fulham Compton Old Boys Reserves, dated 31 October 2023 at 17:02⁸;
- g) Email from Mr Andrew Parratt, Manager for Fulham Compton Old Boys Reserves, dated 6 November 2023 at 17:49⁹;
- h) Email from Mr Andrew Parratt, Manager for Fulham Compton Old Boys Reserves, dated 20 November 2023 at 11:38¹⁰;
- i) Statement of Mr Scott Sheehan (“**Mr Sheehan**”), Player for Fulham Compton Old Boys Reserves, dated 6 November 2023¹¹;
- j) Statement of Mr James Fox (“**Mr Fox**”), Player for Fulham Compton Old Boys Reserves, undated¹²;
- k) Statement of Mr Conor Denham (“**Mr Denham**”), Player for Player for Fulham Compton Old Boys Reserves, dated 23 October 2023¹³;

³ P. 7 of the case bundle.

⁴ P. 10 of the case bundle.

⁵ P. 11 of the case bundle.

⁶ P. 17 of the case bundle.

⁷ PP. 17-18 of the case bundle.

⁸ P. 19 of the case bundle.

⁹ P. 22 of the case bundle.

¹⁰ P. 26 of the case bundle.

¹¹ P. 28 of the case bundle.

¹² P. 29 of the case bundle.

¹³ P. 30 of the case bundle.

- l) Statement of Mr Andrew Parratt, Manager for Fulham Compton Old Boys Reserves, dated 23 October 2023¹⁴; and
- m) Email from Mr Colin Paterson (“**Mr Paterson**”), Secretary for Old Thorntonians FC, dated 30 October 2023 at 19:43¹⁵.

14. There was no evidence submitted in defence of the charges.

V. THE STANDARD OF PROOF

- 15. The Disciplinary Regulations are foreseen in Section 11 of The FA Handbook 2023/2024.
- 16. Under the title “General Provisions” Part A of the Disciplinary Regulations sets out in Section One the provisions applicable to All Panels and in Section Two the provisions applicable to Regulatory Commissions.
- 17. Paragraph 8 of the above mentioned “General Provisions” states that *save where otherwise stated, the applicable standard of proof shall be the civil standard of the balance of probabilities.*
- 18. Therefore, the applicable standard of proof required for this case is the civil standard of the balance of probability. This standard means, the Commission would be satisfied that an event occurred if it considered that, on the evidence, it was more likely than not to have happened.

VI. FINDINGS & DECISION

A. GENERAL CONSIDERATIONS

- 19. The Commission reminded itself that the burden of proving a charge falls upon the AFA.
- 20. In a Commission such as this, the assessment of the evidence is entirely a matter for the Chair sitting alone to consider. I have to assess the credibility of the witness (that

¹⁴ P. 31 of the case bundle.

¹⁵ PP. 32-33 of the case bundle.

is whether a witness is attempting to tell the truth) and the reliability of the witness (that is whether, even though a witness may be attempting to tell the truth, their evidence might not be relied upon).

21. Where there are discrepancies between witnesses, it is for me to decide which witnesses to accept and which to reject. Even where there are discrepancies between witnesses or within a witness's own evidence, it is for me to assess if the discrepancy is important. Having considered which evidence I accept and reject, I then have to decide if, on the balance of probabilities, the alleged breach of the FA Rules is established.
22. In assessing liability, the Commission was mindful of the issues to be determined in the present case. The issues were whether the Commission was satisfied to the requisite standard that the evidence before it proved that Mr Kiwanuka made the Alleged Comment and, if so, whether the comments were either:
 - a) Foul and/or abusive, for the purposes of Charge 1; and/or
 - b) Made reference to Nationality and/or Ethnic Origin so as to satisfy the aggravated Charge 2.
23. In this context, the terms "foul" and "abusive" are not strictly defined by the Regulations, therefore the Commission considers that they should be given their ordinary meaning.
24. The ordinary meaning of abusive language generally refers to offensive and insulting words directed at another person. In respect of foul language its meaning does not appear to be contentious.
25. In regard to the wording of Charge 1 and 2 as set out in the Charge Notification, specifically to the word "and" in "foul and abusive language", the Commissions found it important, for the sake of clarification, to address such wording as it can lead one to understand that both foul and the abusive language must be present for a charge to be found proven, that is not correct. As put forward in *The FA v. Neil Fishman* heard on 15th February 2021¹⁶: *"For the sake of completeness, the Commission considers it*

¹⁶ Available at: <https://www.thefa.com/football-rules-governance/discipline/written-reasons>.

prudent to address the issue in any event. The E3 Charge [...] is not intended to be conditional on both elements being found proven, namely foul and abusive language. Indeed, the Rule E3 does not even contain a provision dealing with "foul language" per se, although this can be implied into the extremely wide scope of the Rule. To find otherwise and require foul language to be proved would be contrary to the actual Rules, it would lead to a triumph of form over substance and further, open the way to an array of irregularities where obvious abhorrent language may circumvent sanction. This is entirely inconsistent with the General Provisions of the Disciplinary Regulations.¹⁷" This is an approach with which this Commission respectfully agreed.

26. Furthermore, in cases such as this the success of an FA Rule E3.2 – Aggravated charge is dependent on the prior success of an FA Rule E3.1 – Improper Conduct (including foul and abusive language) charge. Whereas the latter could be found proven on its own merits if a Commission finds, on the balance of probabilities, that foul and/or abusive language was indeed expressed by a Participant, that cannot happen with the former. This is because the reference to a person's ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability does not constitute, *per se*, discriminatory behaviour, but needs to be subjected to the objective test previously mentioned. Therefore, if a Commission, when considering the charges, finds that there was no foul and/or abusive language expressed by a Participant, the Commission is barred from considering the aggravated charge, unless the reference is itself, considering the context in which it was made, of an abusive nature.

27. The appropriate test is an objective one, commonly known as the "reasonable observer" test. In other words, the Commission was to consider how a reasonable observer would perceive the words used in the given context. The objective person would be someone of reasonable fortitude.

¹⁷ Para. 16 of the Written Reasons.

B. FINDINGS

28. In the present case the allegation was that Mr Kiwanuka, the Participant charged and a Player for Old Thorntonians FC, used abusive and/or indecent and/or insulting language contrary to FA Rule E3.1, and that it was an aggravated breach as defined by FA Rule E3.2 because it included a reference to Nationality and/or Ethnic Origin.
29. According to the evidence provided to the Commission the allegation was that Mr Kiwanuka had called an opposition player *“he is an Irish Gypsy”* or similar.
30. According to Mr Doe’s report *“a foul tackle was committed, I then cautioned a Fulham Compton player, before play restarted I was informed by the Fulham Compton Captain that the phrase “he is an Irish Gypsy” had been said, I did not hear this”*. The alleged responsible for such comment was identified as being Mr Kiwanuka, who Mr Doe then cautioned, although incorrectly as he did not hear the Alleged Comment himself. Mr Doe also stated that three other individuals heard the Alleged Comment.
31. The Commission noted that Mr Parratt was one of those individuals who heard the Alleged Comment being made by Mr Kiwanuka. As per his evidence, *“He [number 9 for Old Thorntonians, i.e. Mr Kiwanuka] first shouted a racial slur at one of our players”*. Moreover, in his statement Mr Parratt further developed what he had witnessed and stated that *«As our player got up and spoke to the ref, I heard the number 9 for Thorntonians call him an “Irish Gypsy” and he continued to shout a barrage of aggressive remarks towards our player.»*
32. Apart from Mr Parratt, also Mr Fox and Mr Denham allegedly heard the comment being made by Mr Kiwanuka, although Mr Fox’s statement did not provide much detail on the allegation. On the contrary, Mr Denham provided a detailed statement on how events unfolded. Mr Denham stated that the incident happened after a tackle from Mr Sheehan on Mr Kiwanuka. After said tackle, Mr Denham witnessed Mr Sheehan going *«to speak to the referee **the opposition player called him an “Irish Gypsy” to his back along with various notions that he would fight him and hurt him. I play in centre midfield with Scott and so was close to the incident. I immediately told the referee about the racial slur that was used, the referee yellow carded the player.**»* (our

emphasis). The Commission was satisfied that it was Mr Denham who first reported the Alleged Comment to Mr Doe. Mr Denham did so promptly.

33. The evidence of Mr Denham is coherent with that of Mr Sheehan in that it was when the former was speaking with the referee that the Alleged Comment was said. Mr Denham stated that, after the tackle had happen, one of his teammates interrupted the conversation he was having with the referee to report the Alleged Comment to the latter.

34. On the other hand, the Commission was not provided with any statement by Mr Kiwanuka – at least one signed by himself – but rather with an e-mail by means of which Mr Paterson reproduced what Mr Kiwanuka allegedly said to him. Mr Kiwanuka made reference to a conversation he had with one opposition player which could have been the Alleged Comment. However, the Commission was satisfied that the evidence was that the comment was said when Mr Sheehan was talking with the referee and not when talking with Mr Kiwanuka. If that was not the case, then Mr Sheehan would have had reported the Alleged Comment to the referee, but he did not. In fact, Mr Sheehan did not even hear the Alleged Comment.

35. Mr Paterson also reproduced Nima Naghdi's ("**Mr Naghdi**") statement in the same email. However, Mr Naghdi's evidence did not offer much to the Commission as he did not witness anything. Notwithstanding, Mr Naghdy did confirm that an opposition player told him "*that [his] striker said something derogatory*".

36. In light of the above, the Commission was satisfied, on the balance of probabilities, that Mr Kiwanuka made the Alleged Comment.

37. As a result of the aforementioned, the Commission found, on the balance of probabilities, the Charge 1 and 2 proven.

VII. SANCTION**A. GENERAL CONSIDERATIONS**

38. The use of discriminatory language has no place in society, and football is no exception. Its use should be considered with the utmost seriousness and should be dealt with accordingly.
39. The FA's revised standard sanctions and guidelines for Aggravated Breaches came into force on 10 August 2020.
40. Paragraph 27 of Part A "General Provisions" of the Disciplinary Regulations provides as follows: *In addition, the following paragraphs of this Section Two shall apply to matters of Misconduct proceeding before Disciplinary Commissions: paragraphs 28, 31, 39 to 43, 47 and 48 and 50 to 51 and Appendix 1 to Part A: Section One: General Provisions. The content of those paragraphs shall be construed accordingly (e.g. references to The Association shall be taken to mean the relevant Affiliated Association).*
41. Paragraph 47 of Part A "General Provisions" of the Disciplinary Regulations provides that: *Where an Aggravated Breach is found proven, a Regulatory Commission shall apply The Association's sanction guidelines for Aggravated Breaches set out at Appendix 1 to Part A: Section One: General Provisions.*
42. Appendix 1 - Standard Sanction and Guidelines for Aggravated Breaches (in part) further provides that:
- "A finding of an Aggravated Breach against a Player, Manager or Technical Area Occupant will attract an immediate suspension of between 6 Matches and 12 Matches ("Sanction Range").*
- A Regulatory Commission shall take all aggravating and mitigating factors into account, including but not limited to those listed in these guidelines when determining the level of sanction within the Sanction Range.*
- The lowest end of the Sanction Range (i.e. 6 Matches) shall operate as a standard minimum punishment (the "Standard Minimum")*

Where a Player is aged 12-15 (inclusive) a Regulatory Commission may suspend any number of Matches on terms and for such period as it considers appropriate provided that a suspension of no less than one Match is served.

A Regulatory Commission may impose an immediate suspension in excess of 12 Matches in circumstances where aggravating factors of significant number or weight are present.

Exceptions to the Standard Minimum

A Regulatory Commission may only consider imposing a suspension below the Standard Minimum where the following specific (and exhaustive) circumstances arise such that the Regulatory Commission determines that the Standard Minimum would be excessive:

- *Where the offence was committed in writing only or via the use of any communication device **and**:*
- *Where the Regulatory Commission is satisfied that there was no genuine intent on the part of the Participant Charged to be discriminatory or offensive in any way and could not reasonably have known that any such offence would be caused; or*
- *The age of the Participant at time of the offence (e.g. where the Participant was a minor at the time the offence was committed); or*
- *The age of the offence (e.g. a social media post made a considerable time ago).*

For the avoidance of doubt, the existence of the circumstances above will not necessarily result in a departure from the Standard Minimum. A Regulatory Commission must be satisfied that the unique circumstances and facts of a particular case are of such significance that a departure from the Standard Minimum is justified to avoid an unjust outcome for the Participant Charged. In reaching a decision, the Regulatory Commission must also consider whether or not it is in the best interests of the game in tackling all forms of discrimination to depart from the Standard Minimum.

In any event, a Regulatory Commission shall impose a suspension of no less than 3 Matches.

Where a Player is aged 12-15 (inclusive) a Regulatory Commission may suspend any number of Matches on terms and for such period as it considers appropriate provided that a suspension of no less than one Match is served.”.

43. Accordingly, the starting point for the Commission’s consideration is that a first aggravated offence would ordinarily attract a suspension between 6 to 12 matches and the imposition of an FA Education Course with a fine being at the discretion of the Commission, pursuant to the provisions of Appendix 1 set out, in part, above and the Recommended Sanction Guidelines.
44. In turn, for a second aggravated offence a suspension of more than seven matches with an entry point of 11 matches and an FA Education Course must be imposed by the Disciplinary Commission, as per the Recommended Sanction Guidelines.

B. SANCTION

45. As the offence was not committed in writing only or via the use of any communication device, the Commission excluded the applicability of the provisions related to the Exceptions to the Standard Minimum to the present case.
- a. The Commission was informed that Mr Kiwanuka had previously unblemished disciplinary history.
46. With respect to aggravating factors, the Commission considered that there were none. Despite the reference to Nationality and/or Ethnic did constitute in itself an aggravating factor, it is already reflected on the minimum sanctions to be imposed as per the recommended sanction guidelines. For this reason, the seriousness of the offence should not be taken into account for the purpose of aggravating the sanction.
47. In relation to mitigating factors, the Commission considered Mr Kiwanuka’s disciplinary record.

48. Mr Kiwanuka contested the charge, as was his right, but naturally he could not avail himself of any credit he would have otherwise been entitled to had he entered a guilty plea.
49. Having considered all the circumstances in the case, the sanction guidelines and the aggravating and mitigating factors present, the Commission imposed the following sanction:
- a) A 6-match suspension;
 - b) Compulsory attendance of an online FA Education Course to be completed before the match-based suspension is served. Whereby the Participant fails to comply with the order, a *Sine Die* suspension shall be imposed until such time the Participant becomes compliant with the order of the Disciplinary Commission; and
 - c) 7 Club Disciplinary Points.

VIII. RIGHT TO APPEAL

50. This decision is subject to the right of appeal under the relevant FA rules and Regulations.

André Duarte Costa (Chair sitting alone)

12 December 2023