

A HEARING BEFORE A REGULATORY COMMISSION OF THE FOOTBALL ASSOCIATION

William Norris QC (Chair)

Alan Hardy (Independent Football Panel Member)

Udo Onwere (Independent Football Panel Member)

BETWEEN

THE FOOTBALL ASSOCIATION

- and -

BAMBO DIABY

DECISION OF THE REGULATORY COMMISSION

Introduction

1. Bambo Diaby (BD) is a professional footballer who signed for Barnsley Football Club on 5th July 2019 from KSC Lokeren in Belgium having played previously for clubs in Spain and Italy. He was then aged 21.
2. It is accepted that, at all material times, BD was obliged to comply with the Anti-Doping programme administered by The Football Association (FA) and the Anti-Doping Regulations which are set out within the FA Handbook 2019/2020.
3. Following a match against Blackburn on 23rd November 2019, BD provided an in-competition urine sample to The FA and UK Anti-Doping officials. Subsequent analysis of that sample disclosed the presence of Higenamine. This substance, which is typically taken to reduce weight (what is commonly known as a 'fat burner'), is classified under S3. Beta-2 Agonists of the 2019 Prohibited List of the World Anti-Doping Code.
4. Accordingly, having been notified of the adverse finding on 17th January 2020, in respect of which he provided a response on 24th/30th January and 4th February and was interviewed on 24th February, BD was charged (on 19th March 2020) in accordance with FA Rules pursuant to

Rule E1(b) for a breach of Regulation 3 of The FA Anti-Doping Regulations 2019-20 (p.265 of The FA Handbook 2019-20).

5. As will be apparent from what follows, the process of investigation of this case both by the player, his club and his advisers and by the FA has a considerable history. However, we do not think it necessary to recite or to analyse that chronology or to examine whether the player or The FA might have conducted any part of their investigation or preparation of the case any differently.

The relevant provisions

6. The relevant provisions of the Anti-Doping Regulations are set out at page 262ff of the FA Handbook 2019/2020. If a fuller decision were required, we would have quoted them in full.
7. The question of the appropriate sanction is addressed in paragraphs 50 and 51 of the Handbook (at page 275). These we will quote to explain the basis of the parties' agreement (explained below) and of our decision:-

50. The term "intentional" as used in this Part Six is meant to identify those Participants who cheat. The term therefore requires that the Participant engaged in conduct which he knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Participant can establish that the Prohibited Substance was Used Out-of-Competition. An Anti-Doping Rule Violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Participant can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

51. Subject to the relevant provisions of Part Eight of these Regulations, for a violation committed by a Player under Regulation 3 (presence) or Regulation 4 (Use or Attempted Use), or committed by a Player or Player Support Personnel under Regulation 8 (Possession), the following penalties must be imposed:

- (a) Where the Anti-Doping Rule Violation does not involve a Specified Substance, 4 years' suspension, unless the Player or Player Support Personnel establishes that the violation was not intentional, in which case 2 years' suspension;*
- (b) Where the Anti-Doping Rule Violation does involve a Specified Substance, 2 years' suspension, unless The Association establishes that the violation was intentional, in which case 4 years' suspension.*

Directions Hearing – 1st September 2020

8. In advance of the hearing scheduled for 3rd September 2020, some matters arose which needed to be resolved at a Directions Hearing which took place remotely in 1st September. The Chair was asked to resolve three issues:-

8.1 First, whether Professor David Cowan should be permitted to give evidence in accordance with a report served on 12th August 2020 (and other subsidiary issues which are related to that evidence).

8.2 Second, whether BD should be required to submit a further Statement of Case explain his answer to the Charge.

8.3 Third, whether a transcript should be made of the forthcoming hearing.

9. Professor Cowan's evidence would, if admitted, be relevant to the following issues

9.1 Whether the circumstances in which the sample was stored could have affected the integrity and/or quality of that sample.

9.2 Whether the admitted irregularities in the way in which the sample was packaged could or might have enabled the sample to be tampered with in some way.

9.3 Whether BD's account of his consumption of throat lozenges (Strepsils) could explain the adverse finding (bearing in mind a study which BD had submitted as part of his evidence which might support such a hypothesis).

10. We mean no disrespect to the parties' written and oral submissions on those issues if we summarise them very briefly.

11. As regards Professor Cowan's evidence:-

11.1 Mr Steven Flynn of counsel, on behalf of BD, submitted that this evidence, whilst clearly relevant, should have been served by The FA on or by 9th July 2020 when it served its evidence in response to BD's Reply of 19th June. He added that the necessity for the evidence of Professor Cowan on which The FA wishes to rely should have been appreciated when it reviewed the material served by BD. To serve it only on 12th August

was, therefore, out of time and Mr Flynn further submitted it would therefore be for The FA to apply to serve late evidence, which application he opposed.

11.2 The FA, through Mr Yousif Elagab of Counsel, Senior Regulatory Advocate, contended that, to the contrary, it was entitled to adduce this evidence and that it was for BD to show why it should not be admitted. In any case, he submitted, by reference to a helpful chronology he provided, that The FA had acted appropriately in obtaining and serving Professor Cowan's evidence as and when it did. He rejected the submission that the framework provided by the Regulations governing these disciplinary proceedings (in particular, Regulations 9 and 10) gave The FA only one opportunity to serve evidence on which it relied and that was on 9th July 2020.

12. We accept that the Rules regarding service are not prescriptive to the extent that there can be no departure from them even where justice demands it and the party immediately affected is not prejudiced. That is the effect of paragraphs 4 to 7 and 9 of the General Provision (A) at p139 of The FA Handbook (2019/2020) and of Regulations 9 to 11 of the Non-Fast Track Regulations (B) at p 149.

13. We do not consider that it is necessary to decide whether this is The FA's application to include this evidence or BD's to exclude it. It was plainly evidence of considerable potential importance to the issues arising in this case and we would only have contemplated excluding it if we had felt that BD's analysis of the history were clearly correct and (more significantly) if his case might otherwise have been significantly prejudiced by its admission. It is therefore important that we note that Mr Flynn was not able to identify any additional material BD might have sought to gather had the evidence objected to been served sooner. More important still. Neither did he seek an adjournment of the hearing on 3rd September to examine that possibility or otherwise to prepare the defence to the charge.

14. Mr Flynn did, however, submit that BD's preparation of his defence might have been conducted differently had The FA's evidence been served at what BD would regard as having been 'in time'. As an example, BD might not have indicated otherwise that he did not require Professor Cowan to attend for examination.

15. There was no suggestion that BD's representatives would be unable to address any issues arising out of the service of Professor Cowan's report in time for the hearing on 3rd September. In particular, whilst one might have been sympathetic to any request for an adjournment, none was sought. Accordingly, it was decided that the hearing should go ahead as arranged. On the other hand, the Chair ruled that BD would not be bound by anything (such as the indication in relation to Professor Cowan's evidence) that The FA might otherwise characterise as a concession in the correspondence between the parties which has taken place since 9th July.
16. As to whether BD should now be required to serve a fresh Statement of Case, we made no formal order given that Mr Flynn, in response to the Chair's invitation, agreed that it would be helpful to serve a short skeleton Opening which he said he would serve by 1600 BST on 2nd September, The FA having the liberty to do likewise in a written submission which could be served on the morning of the hearing.
17. As regards transcription, given that English is not BD's first language and that these are matters of personal and public importance where a hearing is to be held remotely (and where the Microsoft Teams recording facility may not provide ready access when, say, we are hearing or reviewing submissions), we ordered that there should be such a transcription provided and said that we would consider the costs of that at the end of the case.

Hearing 3rd September 2020

18. During the late afternoon of 2nd September 2020, the Regulatory Commission was notified that, following the hearing on 1st September, the Parties have had a number of discussions as a consequence of which they have agreed that they will invite the Commission to issue a Decision in the following terms:

'The FA does not pursue this charge on the basis that Mr Diaby intentionally consumed Higenamine. The FA Anti-Doping Regulation mandate a two-year ban in circumstances where a Participant is unable to show that they meet the strict requirements to sustain a plea of No Fault or Negligence, or No Significant Fault or Negligence. In order to do so, the Participant must identify how the prohibited substance entered his system. Mr Diaby has made efforts to identify the source of the Prohibited Substance but, despite these efforts, has been unable to do so. In the circumstances, a two-year ban is mandatory and that is what is imposed, backdated to 17 January 2020 to reflect the period since Mr Diaby's provisional suspension.'

19. We consider that this is an agreement which we can and should endorse. The nature of the burden on the athlete or player who returns an Adverse Analytical Finding and what he/she has to establish if trying to make out a plea of No or No Significant Fault or Negligence has been the subject of a number of recent decisions by UK Anti-Doping/National Anti-Doping Panel and the Court of Arbitration for Sport. There is no need for us to revisit the arguments as to whether there can be truly exceptional circumstances justifying a departure from the strict approach which the parties here recognise (and we agree) would be appropriate on the facts of a case such as the present.
20. Accordingly, as we say, we accept and endorse the agreement recorded above which will stand as our decision. We also wish to record our thanks to their parties and to their representatives for their constructive approach to this case.
21. There was therefore only a brief hearing on 3rd September 2020. Mr Flynn, who again appeared for BD asked us to dispense with the mandatory requirement (per paragraph 30 (1), page 152 of the FA Handbook 2019/2020) that the player should attend the hearing in person. Mr Elagab, who appeared again for The FA, did not resist that application and, in accordance with our power to dispense with any otherwise strict requirements of the procedure (see paragraphs 25(3) and 25(8) on page 151), we were content to dispense with BD's attendance
22. At the conclusion of the hearing, The FA sought an order that BD should pay the costs of the Commission (as yet unascertained) and the sum of £840 each in respect of the stenographer/transcriber and the translator i.e. a total of £1,680.
23. Despite Mr Flynn's helpful submissions to the contrary, we unanimously concluded that BD should be ordered to meet those costs. We are very sensitive to the difficulties he faces financially until he is able to play again and that there are other family members who depend on him. Even so, he has now admitted a serious charge under the Anti-Doping Regulations even if, as the agreement set out above acknowledges, he did not act intentionally.
24. It will be apparent from the agreement recorded above that BD now faces a two year ban (which will not expire until January 2022). It goes almost without saying that this will have

major personal and financial consequences for him and those members of his family that he supports. We are very sensitive to that reality and even had we been asked to consider the imposition of a fine in addition to the sanction agreed and order for costs made (which, very fairly, we were not) we should record that we would not have imposed one.

Order

25. We order as follows: -

25.1 BD is suspended for two years with effect from 17th January 2020 running up to and including 16th January 2022. The effect of the suspension is pursuant to Regulation 42(a) of the Anti-Doping Regulations: During the period of suspension BD cannot participate in any capacity in any Match or any other football-related activity or in any other activities under the jurisdiction of another World Anti-Doping Code (Code) signatory or member of a Code signatory, other than anti-doping education or rehabilitation programmes.

25.2 BD shall pay the costs of the stenographer/transcriber and the translator in the sums stated and the costs of the Commission (the amount of such sum to be referred to the Chair of this Commission for determination if it is not agreed). As the Club signed off on the financial obligation arising from these proceedings in the reply form, the overall sum, which shall be confirmed by The FA Judicial Services in due course, shall be added to the next administration fees and fines club invoice.

25.3 The £100 personal hearing fee shall be retained.

26. This decision may be appealed in accordance with The FA Non-Fast Track Appeal Regulations.

William Norris QC

Alan Hardy

Udo Onwere

Dated 10th September 2020