

IN THE MATTER OF THE REGULATORY COMMISSION OF THE FOOTBALL ASSOCIATION

Charles Hollander QC (Chair)

Prof Peter Sever

Udo Onwere

BETWEEN

THE FOOTBALL ASSOCIATION

AND

NATHANIEL MENDEZ-LAING

DECISION OF THE REGULATORY COMMISSION

1. On 12 November 2020 the FA sent a charge letter to Mr Nathaniel Mendez-Laing (“the Player”), a player with Cardiff City FC, as follows:

“You will recall that pursuant to The FA’s Anti-Doping Programme, you provided an in-competition urine sample to The FA and UK Anti-Doping officials on 4 July 2020. Subsequent analysis of that sample disclosed the presence of Benzoyllecgonine & Methylecgonine, metabolites of Cocaine. Cocaine is classified under S6a. Non-Specified Stimulants of the 2020 Prohibited List of the World Anti-Doping Code. Accordingly, you are hereby charged 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).”

2. The FA had notified the Player that the sample disclosed the presence of benzoyllecgonine and methylecgonine by a letter dated 14 August 2020. That letter also notified the Player that he was provisionally suspended from participating in all first team competitive matches and non-first team matches, including friendlies, until further notice.
3. The Player admitted the presence of cocaine and does not challenge the jurisdiction of this Regulatory Commission because of his registration as a Cardiff City player. His submissions focus on the appropriate sanction.
4. Mr Thomas Horton of Counsel acted for the player. We were appointed members of the Regulatory Commission to determine this case but neither the Player nor the FA required an oral hearing. We have therefore reached this decision on the written materials and submissions placed before us. We are grateful for the submissions from both sides, which were cogent and helpful.
5. On 9 December 2019, the Player previously provided an out of competition urine sample to UK Anti-Doping officials which disclosed the presence of benzoyllecgonine, a metabolite of cocaine. The Player was provisionally suspended by a letter dated 7 February 2020. By a letter dated 21 April 2020, the Player was charged with a breach of the

FA's Social Drugs Policy, Regulation 4.1.1. The Player received a 3-month suspension, which was backdated because of the Player's provisional suspension.

6. The Player details the circumstances in which he says he took cocaine which gave rise to the present charge in his witness statement. He says he took cocaine on the evening of 3 July 2020 at about 10pm. The significance of the time is explained below.
7. Cocaine is stated in the Prohibited List (ADR Sch 3) and is specified in the 2019 WADA Prohibited List S6.A as a Non-Specified Stimulant.
8. The starting point for an ADR violation ("ADRV") is ADR Regulation 36, which states:

'In disciplinary proceedings brought pursuant to [the ADR], if it is found that an [ADR] Violation has been committed, a penalty shall be imposed in accordance with Parts Six and Seven of [the ADR]. Unless the Participant establishes that there are grounds to eliminate or reduce such penalty in accordance with any applicable provision of Part Eight, the Regulatory Commission or Appeal Board shall have no discretion to reduce those penalties.'

9. Regulation 51 in Part Six of the ADR states:

'Subject to the relevant provisions of Part Eight of [the ADR], 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 [ADR] 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.'

10. The 2021 WADA Code came into effect on 1 January 2021. Article 27.2 states:

'Any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, and not by the substantive anti-doping rules set out in this 2021 Code, unless the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstances of the case'

11. In *Jakub Wawrzyniak v Hellenic Football Federation* (CAS 2009/A/2019), the Panel stated at 16]:

'The principle of non-retroactivity is however mitigated by the application of the "lex mitior" principle. In this respect the Panel fully agrees with the statements contained in the advisory opinion CAS 94/128 rendered on 5 January 1995, UCI and Coni (Digest of CAS Awards (1986-1998), p. 477 at 491), which read (in the English translation of the pertinent portions) as follows:

"The principle whereby a criminal law applies as soon as it comes into force if it is more favourable to the accused (lex mitior) is a fundamental principle of any democratic regime... This principle applies to anti-doping regulations in view of the penal or at the very least disciplinary nature of the penalties that they allow to be imposed. By virtue of this principle, the body responsible for setting the punishment must enable the athlete convicted of doping to benefit from the new provisions, assumed to be less severe, even when the events in question occurred before they came into force. This must be true, in the Panel's opinion, not only when the penalty has not yet been pronounced or appealed, but also when a penalty has become res judicata,

provided that it has not yet been fully executed. The panel considers that... the new provisions must also apply to events which have occurred before they came into force if they lead to a more favourable result for the athlete. Except in cases where the penalty pronounced is entirely executed, the penalty imposed is, depending on the case, either expunged or replaced by the penalty provided by the new provisions”.

12. So too in *WADA & FIFA v Cyprus Football Association & Ors* (CAS 2009/A/1817) at [28]:

‘The principle of non-retroactivity is however mitigated by the application of the “lex mitior” principle... the new provisions must also apply to events which have occurred before they came into force if they lead to a more favourable result for the athlete. Except in cases where the penalty pronounced is entirely executed, the penalty imposed is, depending on the case, either expunged or replaced by the penalty provided by the new provisions’.

13. The 2021 Code is unchanged insofar as ADR Regulation 51 is concerned. However, 2021 Code, Article 10.2.4 (Ineligibility for Presence Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method) (see also FIFA ADR 2021, Regulation 20.4) states:

‘Notwithstanding any other provision in Article 10.2, where the anti-doping rule violation involves a Substance of Abuse:

10.2.4.1 If the Athlete can establish that any ingestion or Use occurred Out-of-Competition and was unrelated to sport performance, then the period of ineligibility shall be [3] three months Ineligibility.

In addition, the period of Ineligibility calculated under this Article 10.2.4.1 may be reduced to one (1) month if the Athlete... completes a Substance of Abuse treatment program approved by the Anti-Doping Organization with Results Management responsibility...’

10.2.4.2 If the ingestion... occurred In-Competition, and the Athlete can establish that the context of the ingestion... was unrelated to sport performance, then the ingestion... shall not be considered intentional for purposes of Article 10.2.1 [and therefore shall be 2 years as opposed to 4 years]”

14. Pursuant to the 2021 Code, Article 4.2.3 (see also FIFA ADR 2021, Regulation 17.4)

‘Substances of Abuse shall include those Prohibited Substances which are specifically identified as Substances of Abuse on the Prohibited List’.

15. The 2021 WADA Prohibited List, which also comes into effect on 1 January 2021, states:

‘Pursuant to Article 4.2.3 of the Code, Substances of Abuse are substances that are identified as such because they are frequently abused in society outside of the context of sport. The following are designated Substances of Abuse: cocaine...’

16. Accordingly, the *lex mitior* principle will apply to the Player’s ADRV so that the player may rely on the less severe penalties under the 2021 Code if the Player proves that the use of cocaine was out of competition and was unrelated to sport performance.

17. FA initially served an expert report from Prof Cowan who expressed the opinion, that the administration of cocaine may not have occurred during the in-competition period as defined by the FA Anti-Doping Regulations, but also suggested an alternative scenario that the player took a smaller amount of cocaine within the In-Competition period as defined in the FA Anti-Doping Regulations. He was unable to give an opinion as to which of these two scenarios was more likely.

18. When he served his witness statement, the Player also served an expert report from Prof Pascal Kintz, who opines that the features of the positive test result are consistent with the Player's explanation that he took cocaine before midnight on the evening of 3 July.

19. Prof Cowan's original report was prepared on the basis of the information he had from the facts disclosed by the Player's interview with the FA. He has now seen the Player's witness statement as to the circumstances in which he says he took cocaine. In the light of this, and on the basis of the explanation in the witness statement, Prof Cowan very fairly accepts that the scientific evidence is equivocal as to whether the cocaine was ingested before or after midnight. In their written submissions, FA recognise this, and, also very fairly, say that they are not in a position to dispute the Player's version of events as set out in his witness statement.

20. In the light of the explanation set out by the Player in his witness statement as to the circumstances in which he ingested cocaine, the details of which it is unnecessary to go into here, we accept his evidence that he took cocaine on the evening of 3 July before midnight in circumstances which were unrelated to sport performance.

21. In such circumstances, we also accept the submission from the Player that he is entitled to rely on the principle of *lex mitior* and to the benefit of the significantly more lenient sanctions under the WADA 2021 Code. They give us no discretion as to sanction.

22. We therefore do not need to consider whether the ADRV involved conduct that was "intentional" or whether there was "no significant fault or negligence" on the part of the Player.

23. We note that the Player's provisional suspension has continued already beyond a 3 month period.

[REDACTED]
[REDACTED], it technically would not affect the length of his suspension.

Disposition

24. The Regulatory Commission finds the ADR proved to the necessary standard but finds that the ADR was out-of-competition and unrelated to sport performance.

25. The sanction (under WADA 2021 and taking into account *lex mitior*) will be a period of Ineligibility of three months from 14 August 2020 PROVIDED THAT the period of Ineligibility may be reduced to one (1) month if the Player completes a Substance of Abuse treatment program approved by the Anti-Doping Organization with Results Management responsibility

26. In the light of the provisional suspension which has already occurred, the period of Ineligibility shall cease immediately.

Charles Hollander

Charles Hollander QC

For the Regulatory Commission

20 January 2021

London, England