IN THE MATTER OF AN APPEAL BEFORE THE FOOTBALL ASSOCIATION

BETWEEN:

THE FOOTBALL ASSOCIATION

Appellant

-and-

IMRAN LOUZA

Respondent

WRITTEN DECISION OF THE APPEAL BOARD

David Casement KC (Chairperson)	Independent Specialist Panel Member
Francis Duku	Independent Legal Panel Member
Laura McCallum	Independent Legal Panel Member
Paddy McCormack	Judicial Services Manager - Secretary
Nick De Marco KC	Counsel for the Respondent
Iain Taker	Head of Legal Watford Football Club
Adam Lewis KC	Counsel for The Football Association
Yousif Elagab	Senior Regulatory Advocate, The Football Association
Charlie Kendrick	Paralegal, The Football Association (Observer)

Introduction

1. This appeal raises important issues regarding the normal standard of proof in disciplinary proceedings. In particular it concerns the meaning and application of the civil standard of proof namely the balance of probabilities set out in The Football Association Disciplinary Regulations Part A – General Provisions Regulation 8. The debate between the parties has included a detailed analysis of first instance and appellate case law as well as decisions of Regulatory Commissions and Appeal Boards in which, it is said, the standard of proof has been at times wrongly set, wrongly applied, misunderstood or wrongly described. It has included discussion of the criticisms, at times subtle at other times less so, by some judges of the judgements of other judges even at the highest level of the courts of England and Wales. Expressions such as "heightened standard of proof" and "the more serious the allegation…the stronger must be the evidence before a court will find the allegation proved" have all come under forensic scrutiny in this appeal.

2. The appeal is brought by The Football Association against the decision of the Regulatory Commission of 21 October 2022. The Respondent was charged on 10 October 2022 with a breach of FA Rule E1.1 by allegedly spitting at Ryan Manning during the Watford v Swansea game on 5 October contrary to Law 12 of the FIFA Laws of the Game. The Commission found that the charge was not proven and provided its written reasons on 26 October 2022 ("the Decision").

3. The experienced Commission was composed of Simon Parry (Chair), Faye White (MBE) and Marvin Robinson who proceeded to deal with the case pursuant to Fast Track 2 under which The FA charged the matter. The Chair of the Commission is a Barrister of many years' experience. The other members of the Commission are experienced former footballers.

4. The case was determined on the papers at the request of the Respondent and in the absence of any objection from The FA. In its conclusion the Commission held: "We find that, on the evidence presented to us, there is simply insufficient convincing

evidence that could lead us to the conclusion that we prefer one party's evidence to that of another. The burden of proving the case rests on The FA. In our judgment, the evidence is quite simply not sufficiently compelling to drive us to the conclusion that The FA has discharged its burden of proving the case. Accordingly, we find the Charge not proven."

5. The FA appeals the decision of the Commission on the basis that it materially misdirected itself in respect of and misapplied the standard of proof that was applicable to the case. At paragraphs 23 and 24 of the Decision the Commission said:

"23. Both parties agree that the Commission is to apply the flexible civil standard of proof, namely the balance of probabilities. Mr De Marco reminded us of the case of The FA v Peter Beardsley, 18 September 2019, where Lord Dyson (chair) said at para 16:

"The civil standard of the balance of probabilities is applied flexibly: see for example R(N) v Mental Health Review Tribunal (Northern Regions) and Others [2006] QB 468 at paras 62 to 64. Thus, as Richards LJ said at para 62, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. In our view, this flexibility is reflected in the language of Regulation 24. The words "clear and convincing evidence" serve the purpose of requiring evidence to have that quality before the presumption is rebutted on the balance of probabilities. They are ordinary words. If we are not persuaded that the evidence relied on by Mr Beardsley is clear and convincing, then he will not have rebutted the presumption on the balance of probabilities."

24. Therefore there must be clear, cogent and convincing evidence presented before we could consider that The FA has proved the Charge. We note that the automatic sanction of a 6-match suspension for an offence of spitting means that this is a particularly serious allegation and thus the strength of the evidence to satisfy this Charge is at a much higher threshold."

6. It is contended by The FA that this erroneous approach to the standard of proof infected all of the Commission's findings of fact and the only appropriate course is to set aside the Decision and remit the matter to a newly constituted regulatory commission. The FA contends that the Appeal Board whilst it would have the power to carry out its own assessment of the papers afresh and would be in as good a position as any new commission, it would be more appropriate to remit the matter to a newly constituted commission to preserve appeal routes. There is no appeal from a decision of this Appeal Board under Track 2.

7. It is a notable feature of this case that the Commission, which dealt with matters on the papers, were presented with a bundle consisting of some 83 pages of which the evidence consisted of approximately 12 pages. They were also provided with some video clips. There was little by way of case law cited to the Commission. By contrast this Appeal Board has proceeded as an in person hearing with both parties represented by Kings Counsel. The bundle consists of 1583 pages including some 24 authorities including many House of Lords and Supreme Court cases. The detailed written submissions of leading counsel were supplemented by detailed oral submissions.

The Issues

8. The first issue is whether The FA is entitled to advance these matters on appeal. It is submitted by the Respondent that the matters now complained of by The FA were set out in its written reply to the Charge before the Commission at paragraph 8. It is further asserted by the Respondent that The FA not only took no issue with the Respondent's submissions but in fact should be taken to have adopted them. It is therefore said to be inappropriate to criticise the Commission for having proceeded on the basis there was common ground between the parties based upon the written submissions of the parties. It is also contended that it would be unfair and prejudicial to the Respondent for The FA now to argue a point of law which it could and should have advanced below which may lead to prejudice including delay, a further hearing and possibly another appeal with the attendant costs which cannot be recovered.

9. Secondly, there are the grounds of appeal advanced by The FA. The basis for the appeal is Fast Track Regulation 5 which sets out the grounds of appeal including that the relevant decision "misinterpreted or failed to comply with the Rules and/or regulations of The Association." Under that head of appeal The FA sets out its specific grounds of appeal at paragraph 17 of the Notice of Appeal:

   9.1 The Commission erred in law in concluding that "the strength of the evidence to satisfy this Charge is at a much higher threshold" and in applying an incorrect test for the standard of proof of the balance of probabilities and for the quality of evidence necessary to establish breach on that standard,

   9.2 The Commission erred in law in concluding that "there must be clear, cogent and convincing evidence presented before we could consider that The FA has proved the Charge",

   9.3 In any event, the Commission erred in law in regarding any trigger for any higher threshold or for any requirement for more cogent evidence if it exists (quod non) as having been pulled by the fact that an offence of spitting carries an automatic sanction of a 6-match suspension.

10. Those three alleged errors, as particularised by The FA, are summed up in paragraph 1 of the Notice of Appeal which says the appeal is on the narrow ground that the Commission erred in law and misinterpreted or failed to comply with The FA Rules or regulations by applying an incorrect test for the standard of proof of the balance of probabilities and for the quality of evidence necessary to establish breach by the Respondent. It is therefore central to this appeal whether the Commission did apply an incorrect test for the standard or proof or the quality of the evidence necessary to establish the breach.

11. Thirdly, what should be the consequences in the event the appeal is successful. Should the matter be referred to a newly constituted commission or should the Appeal Board determine the matter afresh, based upon the evidence that was before the Commission, given it is accepted by both sides that the Appeal Board is just as well placed to make that determination.

12. It was common ground between the parties that, irrespective of the outcome of this appeal, it would be of assistance if guidance could be given as to the present state of the authorities on the civil standard of proof so as to reduce the possibility of disputes arising in future cases.

Submissions on behalf of The Football Association

13. The thrust of The FA's submissions made by Adam Lewis KC is that the case law over recent years has clarified the position in respect of the civil standard of proof. Mr Lewis took the Appeal Board to a number of the authorities cited in his detailed submissions beginning with Otkritie International Investment Management Limited and others v Urumov and others [2014] EWHC 191 (Comm) in particular paragraphs 83 to 89. That was a fraud case in the Commercial Court before Eder J in which the defendants argued "the standard of proof was "high" in a serious fraud, namely the more serious the allegation the higher the standard of proof must be and that this requirement has a sound rationale: that it is inherently improbable that a person would carry out such conduct" (paragraph 87) and citing another High Court authority "although the standard of proof is the civil standard, the balance of probabilities, the cogency of the evidence relied upon must be commensurate with the seriousness of the conduct alleged" (paragraph 86).

14. Eder J said at paragraph 88:

"In my judgement, as formulated, these submissions are at the very least confused. As submitted by Mr Berry, the suggestion that the standard of proof might vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned is, in my view, based upon a common misconception arising in part from an erroneous interpretation of Lord Nicholl's judgment in Re H [1996] AC 563, [1996] 1 ALL ER 1, [1996] 1 FCR 509: see Re B [2008] UKHL 35, [2009] AC 11 at para 5, [2008] 4 All ER 1 per Lord Hoffman, Re S-B [2009] UKSC 17, [2010] 1 AC 678 at paras 11-13, [2010] 1 All ER 705 per Baroness Hale. In a series of decisions

of the House of Lords and the Supreme Court following Re H, it has been firmly established that:

"i) First, there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not: Re B at para 13 per Lord Hoffman
ii) Second, the proposition that "the more serious the allegation, the more cogent the evidence needed to prove it is wrong in law and must be rejected": Re S-B at para 13 per Baroness Hale; Re J [2013] UKSC 9, [2013] 1 AC 680 at para 35, [2013]] 3 All ER per Baroness Hale.
iii) Third, while inherent probabilities are relevant in considering whether it was more likely than not that an event had taken place, there is no necessary connection between seriousness and inherent improbability: Re S-B at para 12 citing Lord Hoffman in Re B at para 15: "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities. If a child alleges sexual abuse by a parent, it is common sense to start with the assumption that most parents do not abuse their children. But this assumption may be swiftly dispelled by other compelling evidence of the relationship between parent and child or parent and other children. *It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely.* If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator". (Emphasis added)"

15. Mr Lewis contends that on the basis of the Eder J's analysis in Otkritie, including the authorities that are cited therein and the subsequent approval of Eder J's analysis in other cases cited in Mr Lewis's submissions, the Decision cannot be allowed to stand

given its misdirection on the standard of proof and the quality of the evidence required to discharge it.

16. In relation to the second point in the three-point analysis of Eder J, Mr Lewis also referred to In re S-B at paragraphs 11 to 14 in which Baroness Hale, after citing In Re B, said at paragraph 13 "All are agreed that In re B [2009] AC 11 reaffirmed the principles adopted In re H [1996] AC 563 while rejecting the nostrum, "the more serious the allegation, the more cogent the evidence needed to prove it", which had become a commonplace but was a misinterpretation of what Lord Nicholls had in fact said." The "nostrum" was also dealt with by Baroness Hale in Re J (Children) [2013] UKSC 9 paragraph 35 and had been addressed In re B by both Lord Hoffman and Baroness Hale: see paragraphs and 13 to 15 and 62 to 70 respectively.

17. It is submitted by Mr Lewis that the Commission made several fundamental errors in their reasoning:

17.1 at paragraph 24 the Commission adopted the wording used by the Commission in the Beardsley case "clear and convincing" (although they also added "cogent") when those words were from Regulation 24 which, while in issue in the Beardsley case because that case concerned the evidence required to rebut a presumption, it had no application in the instant case;

17.2 by saying in paragraph 24 "there must be clear, cogent and convincing evidence presented before we could consider The FA has proved the Charge" they adopted the "nostrum" which has been consistently rejected in recent years by the highest authorities including those set out above;

17.3 by saying in paragraph 24 "this is a particularly serious allegation and thus the strength of the evidence to satisfy the Charge is at a much higher threshold" is to adopt a higher standard of proof than the balance of probabilities or to require more cogent evidence based upon the seriousness of the allegation which has consistently been rejected as set out in the authorities.

18. Mr Lewis submitted that there was only one standard of proof namely the balance of probabilities such that the issue was whether it was more likely than not that a fact occurred. The seriousness of the allegation and the consequences of the allegation did not affect the standard of proof and, on their own, did not mean there was necessarily any improbability that would be required to be taken into account when assessing the evidence. He accepted that if an improbability was identified in an individual case then that may, depending on the circumstances of a given case, require more cogent evidence to establish that fact. However he submitted that the act of spitting at another player was not in such a category as to be so serious as to be improbable. It was not analogous to the type of matter often cited in cases giving rise to improbability such as fraud. In an exchange during submissions he accepted whether there was an improbability or not was a matter for the Commission but, given the misdirection on the standard of proof, he contended any such finding in the present case was tainted by the error of law.

19. It is submitted on behalf of The FA that those errors by the Commission have contaminated all of the factual findings of the Commission such that this Appeal Board should not speculate as to whether any of its factual findings are safe and whether the correct outcome was arrived at nonetheless. The appropriate course is to remit the matter to a newly constituted commission so that it can make fresh findings and leave the parties with their appeal routes in the event either wish to appeal.

20. Mr Lewis rejected the suggestion by the Respondent that The FA was precluded from advancing this because it did not take these points before the Commission. It was submitted that:

    20.1 The FA could not have known that the Commission was going to make the findings that it did in respect of the standard of proof before it received the Decision and it did not understand the Respondent to be advancing submissions that would have led to the Commission taking such a course;

20.2 Even if the points, with hindsight could and should have been taken below, this is a point of law of general interest. There is no injustice and no prejudice to the Respondent in dealing with this point of law on appeal. The Respondent is not entitled to win on an erroneous direction on the standard of proof therefore it is not unjust if the matter is remitted even if there are some additional costs and delay. This is particularly so in the Fast Track system where there is no entitlement to recover party costs in any event. The authorities of Singh and Dass [2019] EWCA Civ 360 paragraph 18 and Camden LBC v Robert Gordon Humphreys [2017] EWCA Civ 24 paragraph 29 do not assist the Respondent.

21. In respect of the treatment of the standard of proof in the Beardsley case Mr Lewis submitted that case was only concerned with the application of Regulation 24 which is of no application in the present case. The Chair noted the precise wording used by Lord Dyson which was addressing the balance of probabilities more generally and approved the wording used by Richards LJ in R(N) v Mental Health Review Tribunal (Northern Regions) and Others [2006] QB 468 at paragraphs 62, "the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation provided on the balance of probabilities." Mr Lewis submitted that the dictum was either per incuriam, the authorities referred to above not having been cited to the Commission, or it was simply wrong.

Submissions on behalf of the Respondent

22. On behalf of the Respondent Nick De Marco KC submitted that the approach of The FA is surprising in bringing this appeal because it could and should have raised the points before the Commission. He drew attention to the Reply on Behalf of the Player dated 13 October 2022 which said at paragraph 8:

"The flexible civil standard applies: the more serious the charge/consequences of the charge, and/or the less likely it is that a player commits the conduct alleged, the stronger the evidence must be for The FA to prove the case."

Paragraph 8 then went on to set out the extract from Beardsley set out above in support of that proposition.

23. In response on 17 October The FA did not take issue with the Respondent's submissions on the standard of proof but rather said at paragraph 18 "The FA has provided cogent and compelling evidence in this matter that clearly satisfies the requisite burden". Therefore, not only did the Respondent set out his position fairly and squarely, which includes what is said to be "the nostrum", but The FA actually adopted those submissions by asserting it had provided "cogent and compelling evidence."

24. The authority of Singh and Dass is said to be helpful in these circumstances in deciding whether a Respondent is entitled to bring an appeal in such circumstances. The Respondent would be put to additional cost which he cannot recover: this would involve one or possibly two hearings if there was a further appeal which may turn out to be in-person hearings. In addition, this matter would hang over his head for a further period. Had these points been addressed below and The FA succeeded, the 6-match suspension would have been spent by now during a period in which he was injured.

25. Turning to the merits of the appeal it was submitted by Mr De Marco that there were really two questions:

    25.1 was the wrong standard of proof applied?

    25.2 even if the standard of proof was misdescribed would it have made any difference?

On behalf of the Respondent it is submitted that the answer is in the negative.

26. It is submitted that the Commission was aware the standard of proof was the balance of probabilities and it made this clear at paragraph 23 of the Decision. It is essential, submitted Mr De Marco, to differentiate between a heightened standard of proof and a heightened evidential threshold. The former is never appropriate because there is only one standard. The latter may be appropriate on the specific facts of a case. The Commission referred to a "heightened threshold" and not a "heightened standard."

27. It was further submitted that the language used in some of the authorities and perhaps even by the Commission itself may be infelicitous drafting but nonetheless the correct standard was identified and correctly applied. If the Commission was of the view that there was an improbability of the conduct alleged that was a determination it was entitled to make. In the present case the Commission found, based upon their experience and common sense, the conduct alleged, namely spitting at someone, to be "rare, unusual and disgusting" (paragraph 32). It is against that finding, which is uncontested on this appeal and unconnected to the issue of direction on standard of proof, that the Commission was entitled, together with the uncontested submissions of the Respondent on standard of proof, to look for "cogent and compelling evidence" (to use The FA's own words). That is not an error of law.

28. It was also submitted on behalf of the Respondent that irrespective of the wording used by the Commission in describing the standard of proof and the evidence required that the Commission found the case to be no more than one person's word against another. The video evidence did not show any spitting. There was no identification by the referee of any evidence of spitting whether by seeing it happen or seeing saliva on the complainant when he approached the referee. As the Commission explained "We find that, on the evidence presented to us, there is simply insufficient evidence that could lead us to the conclusion that we prefer one party's evidence to that of another (paragraph 35)."

29. On the question of whether to remit or not, in the event the appeal is successful, there was no good reason to remit to a new commission. The Respondent was content to waive any appeal rights to allow this Appeal Board to make a fresh determination of the evidence which was before it. If The FA was not prepared to waive its appeal rights that was a self-inflicted injury because it failed to address the points below. The prejudice to the Respondent that would arise from a remittal was unjustifiable.

Discussion

The Authorities on Standard of Proof

30. The Appeal Board begins by considering the civil standard of the balance of probabilities. The standard of proof in disciplinary proceedings that come before Regulatory Commissions and Appeals Board of The Football Association is, unless The FA Rules and regulations otherwise state, that which is set out in FA Disciplinary Regulations Part A – General Provisions Regulation 8 namely the civil standard of the balance of probabilities. The balance of probabilities is simply whether it is more likely than not that some fact in issue occurred. That civil standard does not vary irrespective of the seriousness of the allegations or the consequences of those allegations being accepted. Talk of a "heightened standard" is simply wrong: the standard neither gains height nor loses height.

31. Over the years, even at the highest judicial levels, there has been language used which may be prone to lead to a misunderstanding that there was some higher standard of proof other than the balance of probabilities or that some particular cogency of evidence was necessarily required because of the seriousness of the allegations. The caselaw itself sets out the criticisms: Re B paragraphs 5, 12, 13, 62, 67 and Re BR (Proof of Facts) [2015] EWFC 41 paragraph 7.

32. The correct position was set out by Lord Nicholls in re H as more fully explained in Re B and in Otkritie. One common feature of the cases is that in fraud or abuse cases

generalised submissions are often made that are far wider than is permissible on the authorities in respect of the standard of proof. The main principles in the Otkritie decision are set out in full above and are summarised again here:

32.1 First, there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not;

32.2 Second, the proposition that "the more serious the allegation, the more cogent the evidence needed" to prove it is wrong in law and must be rejected;

32.3 Third, while inherent probabilities are relevant in considering whether it was more likely than not that an event had taken place, there is no necessary connection between seriousness and inherent improbability.

33. Those principles were set out by Eder J in Otkritie and have been endorsed by many other courts subsequently and represent a correct statement of the law in so far as they go. However it is important to consider the entirety of Eder J's judgment in particular the following paragraph 89 which was not set out in the written submissions but which is set out in full here given its importance:

"As submitted by Mr Berry, the last point is important – or at least potentially important – in this case. I am prepared to accept that in a very broad general sense, it may well be true to say that it is inherently improbable that a particular Defendant will commit a fraud. But it all depends on a wide range of factors. For example, if the court is satisfied (or it has been admitted) that a Defendant has acted fraudulently or reprehensibly on one occasion, it cannot necessarily be considered inherently improbable that such Defendant would have done so on another; or if, for example, the court is satisfied (or it has been admitted) that a Defendant has created or deployed sham or false documents, the court cannot assume that it is inherently unlikely that such Defendant did so on other occasions. For the avoidance of doubt, I should make absolutely plain that this is not to say that inherent probability is irrelevant. On the contrary, as submitted by Mr Casella, I accept, of course, that the court should take into account the inherent probability of an event taking place (or

not taking place) as is made abundantly plain by Baroness Hale in the passage from *Re S-B* quoted above. However, as it seems to me, the court must in each case consider carefully what is – and is not – inherently probable having regard to the particular circumstances – but the standard of proof in civil cases always remains the same ie balance of probability." (emphasis added)

34. Close analysis of the authorities shows that references to serious allegations requiring more cogent evidence may at times have been a shorthand for referring to improbability. Put another way, if the allegation is serious it must be inherently improbable and therefore requires more cogent evidence to rebut that improbability. That is too broad an assertion and is simply wrong. Analysis of the facts of a case may suggest, notwithstanding the seriousness of the allegation, the allegation is not at all improbable and may in fact be probable. Future commissions may find it more helpful to focus on the specific facts and identify, with such reasons as are appropriate, why something is said to be inherently improbable on the particular facts of the case. It is a fact specific exercise. Broad sweeping generalisations should be avoided. The identified improbability, if such exists, and the related evidence is something which a commission is entitled to take into account when deciding if the civil standard of the balance of probabilities has been established.

35. On a practical level some may mistakenly think this is mere semantics and instead of referring to "serious allegations" one should refer instead to "the inherent improbability in the instant case". That would be to underestimate the importance of the analysis. It is an exercise in mind concentration in respect of the specific facts of the case and the central point which is whether or not there is an inherent improbability or probability that should be taken into account when weighing the totality of the evidence.

36. In applying the civil standard of proof commissions are obliged to make factual determinations on the balance of probabilities namely that it is more likely than not that the fact in issue occurred. There is no other standard in the absence of express

rules. References to “heightened standard” or some generalised requirement for more cogent evidence because the allegation is serious should be avoided.

The Present Case

37. The Appeal Board is satisfied that the Respondent set out its position on the standard of proof clearly, as set out above, in its reply to the Notice of Appeal. The FA did not take issue with that approach to the standard of proof which largely reflected what was set out in the Beardsley case. Indeed the Appeal Board finds that the test as set forward by the Respondent was accepted by The FA which responded that it had in fact provided “cogent and compelling evidence” to make out the charge. That wording of The FA was then adopted by the Commission. The reference to a “higher threshold” in the Decision flowed from the description of the standard of proof adopted by the parties.

38. Whilst this is a point of law it is a point that was open to The FA to challenge below and it ought to have done so if it wished to challenge it. To seek to set aside the Decision now would result in prejudice to the Respondent in terms of not only risk as to further costs that cannot be recovered but also the delay in obtaining a final determination of the charge. If the matter were remitted as requested the commission would have the power to order an in-person hearing which would add even further to the costs that cannot be recovered. It is not for this Appeal Board to make directions that will bind how a commission would conduct its proceedings eg to direct that the matter must proceed as a hearing on the papers to reduce costs. This is in circumstances where, if the point had been addressed below as it should have been, the matter would have been fully resolved by this stage, this appeal might have been avoided and the penalty would have been served. The Appeal Board dismisses the appeal for that reason.

The Present Case: Merits of the Appeal

39. Given the detailed submissions that were made in respect of the Decision and in the event that the Appeal Board is incorrect to dismiss the appeal on the basis set out above, it is appropriate to consider the merits of the appeal itself and deal with those in the alternative.

40. The starting point is that the Commission correctly identified from the outset the applicable standard of proof at paragraph 23 – "civil standard of proof, namely the balance of probabilities." No other standard of proof was identified in the Decision.

41. In paragraph 32 the Commission reflected upon the inherent improbability of the allegation based upon the common sense and experiences of the members of the Commission. They found that the act of spitting at someone was "rare, unusual and disgusting." Those words are directly related to improbability. That was a finding the Commission was entitled to make. Contrary submissions made to the Appeal Board that they were wrong to find such conduct rare and unusual are misplaced. The finding is not the subject of this appeal, there being no appeal on the facts, and there is no evidence from The FA to the contrary. Neither can it be said that the finding can be impugned by the alleged misdirection on the standard of proof. That particular finding was based upon the Commission's own experience and common sense.

42. In the circumstances the criticisms of paragraphs 23 and 24 of the Decision fall away. While it is clear that the Commission felt on the facts of the case it needed clear, cogent and convincing evidence to overcome the improbability it identified that was part of the ordinary evaluation of evidence as set out in the authorities. The Commission used the language "serious allegation" but that was the uncontested language between the parties on the submissions. It is at most infelicitous drafting and might better have referred to the inherent improbability. The Commission did not impose a different standard of proof than that which was set out in paragraph 23 or conduct an inappropriate application of the standard.

43. The reference to a "higher threshold" in paragraph 24, while potentially misleading out of context, read in context it is not the same thing as a higher standard of proof. It is a reference to the evidence was that required to overcome the improbability identified by the Commission. It would however be better if future commissions did not use expressions such as "higher threshold" or the like to avoid confusion and simply identified that they were taking into account the identified improbability, if it exists, as part of their overall assessment of the evidence in that particular case.

44. Further and in any event, the Appeal Board is satisfied that the Commission's specific findings of fact were not infected by any alleged misdirection on the standard of proof. In short, the alleged misdirection was not material to the conclusion of the case. The Commission found, in what was a hearing on the papers, this was a case of one person's word against another in paragraph 35: "Ultimately, the evidence before us has not shifted from being one person's word against another's." The video footage took the matter no further and the evidence from the officials was not of assistance. Given the findings that were made the Appeal Board is satisfied that the Commission would have reached the same conclusion even if it had directed itself that the standard of proof was the balance of probabilities and said nothing further.

45. The Appeal Board would therefore have also dismissed the appeal on the merits for the reasons set out above.

Appeal Consequences

46. If the appeal had been allowed the Appeal Board would have refused to remit the case to a newly constituted commission. To do so would have been wasteful of costs and resources. This is particularly so when it is common ground between the parties that this Appeal Board is just as well placed to read the papers and to consider the evidence.

47. The Appeal Board has considered the papers as well as the video footage. Properly directing itself that the standard of proof is the balance of probabilities the Appeal

Board would have concluded, if this appeal had been allowed, that the charge against the Respondent was not proven to that standard. In short it would have arrived at the same conclusion as the Commission. This case was solely one person's word against another. The video evidence does not show the act complained of and the complaint to the referee is not probative in these circumstances. The evidence may have been different if the Appeal Board had the benefit of live testimony from the Respondent and the complainant. However, this case proceeded as a hearing on the papers.

Conclusion

48. The appeal is dismissed. It is common ground that the costs of the Appeal Board should follow the event and will therefore be paid by The Football Association.

David Casement KC

Chairperson

18 November 2022

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