CASE NO: FT/TA/18/0404

IN THE MATTER BEFORE
A FOOTBALL ASSOCIATION REGULATORY COMMISSION

B E T W E E N:-

THE FOOTBALL ASSOCIATION

-v-

JOSE MOURINHO

WRITTEN DECISION AND REASONS OF THE REGULATORY COMMISSION

Regulatory Commission:

William Norris QC (Chairperson)
Udo Onwere (Independent Football Panel Member)
Aisling Byrnes (Independent Legal Panel Member)

Judicial Services Manager & Secretary:

Paddy McCormack
Benjamin Stingmore – Judicial Services Administrator - Observing

Venue:

Wembley Stadium

Appearances:

José Mourinho
Paul Gilroy QC – Counsel representing Mr Mourinho
Matthew Bennett – Partner, Centrefield LLP – Solicitor representing Mr Mourinho
Patrick Stewart – General Counsel, Manchester United FC – Representative of the Club

The FA Regulatory Legal
Jonathan Laidlaw QC – Counsel for the FA
Amina Graham – Head of Regulatory Advocates – The FA

Introduction

1. The match between Manchester United ("**MUFC**") and Newcastle United FC ("**NUFC**") at Old Trafford on 6th October 2018 was one in which emotions ran high. NUFC took a 2-0 lead but then MUFC recovered to win 3-2. This was, no doubt, a very considerable relief not only to MUFC's supporters and players but also to their manager, Mr José Mourinho[1], who had been the subject of considerable media attention (and criticism) in the run-up to the match.

2. As Mr Mourinho left the field of play at the end of the match, and as he walked along the touchline, he was followed by one or possibly two broadcast cameras. It is understandable that he felt (as he explained subsequently) that there had been "*no escape*" from the camera which had been focused on and was so close to him.

3. The video films of this incident, which we have viewed on a number of occasions, demonstrate that, as Mr Mourinho walked along the touchline, he was gesturing with a clenched fist and muttering something under his breath which was inaudible to anyone including the broadcast audience. Very shortly thereafter, he glanced towards the camera[2]. As he did so, he can be seen to be saying something else which was also inaudible but which would have struck the viewer as being mouthed in an angry or possibly aggressive manner.

4. It was subsequently established that the words that he mouthed, and which could be lip read by anyone interested in doing, were these: "*Vão levar no cu, filhos da puta*".

5. Whilst the literal meaning of those words was largely agreed, there was a considerable issue between the parties as to their idiomatic meaning in context. That was the subject of differences of expert opinion all of which were thoroughly examined at the hearing in front of a Regulatory Commission on 31st October 2018 and at an Appeal Board hearing on 14th November 2018.

6. Suffice it to say, for present purposes, that those words constituted swearing / the use of a profanity albeit the words were mouthed rather than spoken audibly. As a comment,

[1] Referred to as JM at some points hereafter
[2] The duration and significance of this glance was an issue in the case

we think the ordinary viewer would almost certainly have realised this[3] or, at the very least, would have realised that Mr Mourinho was probably not mouthing terms of endearment.

7. The question which arose thereafter is whether Mr Mourinho's conduct constituted a breach of the FA Rules and, if so, how that could and should be dealt with.

The Regulatory Process

8. On 16 October 2008, the Football Association ("***the FA***") charged Mr Mourinho with Misconduct in breach of FA Rule E3 ("***the Charge***"). The FA alleged that language used by Mr Mourinho after the end of the fixture and captured by the broadcast camera had been "*abusive and/or insulting and/or improper*".

9. The proceedings proceeded under the Fast Track Regulations set out in Part E of the Disciplinary Regulations. Mr Mourinho denied the Charge. He did not request a personal hearing and requested that the Charge be dealt with on the papers only.

10. The relevant part of Rule E3(1) reads as follows:

> "*[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 which 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. There was an exchange of factual and expert evidence and the charge was considered by an FA Regulatory Commission on 31st October 2018. The Regulatory Commission made various finding of fact[4] and, having preferred the opinion of Mr Mourinho's expert, Mr Valente, held as follows:

> "*29. Mr Valente's opinion was that the contextual translation of "fuck yeah" or "hell yeah", spoken in a celebratory manner, was the most accurate for those reasons. We could see no reason to reject his evidence. The burden is on The FA to prove their case and their expert, Mr Xavier, did not provide a contextual translation. Indeed, he did not address context meaningfully, if at all, in his report. His evidence on the offensiveness of the words did not specifically address the actual context of their use. It did make reference to*

[3] Whether this was directed to anyone in particular or just to himself is a point to which we shall return
[4] To which findings we shall also return below.

situations where the words used are specifically targeted at another identifiable person however we did not consider this to be probative in this case. Further a section of Mr Xavier's report appeared contradictory in relation to the phrase where he stated, "Among friends (normally men) it can occur as a joke or a teaser", as in his conclusion Mr Xavier states, "…but in any instance they are considered highly inappropriate and unprofessional." Mr Xavier also did not consider, or at least did not address within in his report, the words used in the context of professional football. Whilst profanity is of course not to be condoned, it is commonplace in football and spectators who view matches in stadia or on television frequently do hear or interpret Participants swearing. The FA had the opportunity upon receipt of Mr Valente's report to specifically put these matters to their expert for his opinion, particularly as The FA did exercise their right of response with detailed submissions and relied upon new evidence."

12. The FA appealed and that appeal was heard by an Appeal Board, chaired by Mr Graeme McPherson QC. It allowed the appeal on what they called a "*narrow ground*". The relevant findings appear at paragraph 11 of the Appeal Board's Written Reasons and we quote only the following:

> "*11. (a) The Board allowed the appeal and quashed the decision of the Commission to dismiss the Charge. We did so on the narrow ground*
>
> *(i) That although the Commission had correctly identified the need to apply the 'reasonable bystander' test when considering whether JM's utterances breached FA Rule E3, and*
>
> *(ii) That although the Commission had correctly identified the need to consider all relevant facts and circumstances relating to the utterances under scrutiny (i.e. to consider 'context') when applying the 'reasonable bystander' test, and*
>
> *(iii) That although there was no justification for us to interfere with any findings of fact made by the Commission in that regard*
>
> *The Commission had incorrectly applied the 'reasonably bystander' test to those facts in this case…*"

13. The Appeal Board deliberately declined to address a separate issue that had also been raised[5]. This was conveniently summarised by the Appeal Board at paragraph 13 of its decision, which records that:

> "*13. The important caveat to our conclusions to which we have referred above relates to a limb of JM's defence to the Charge which became labelled 'the Legitimate Expectation defence' during the appeal hearing. In a nutshell, JM had contended (as an alternative to what one might term his substantive defence on the merits to the Charge) that he in any event had a legitimate expectation that swearing ('the simple use of a profanity') would not be considered or charged by the FA as a breach of FA Rule E3.*"

14. At paragraph 86 of its Written Reasons, the Appeal Board analysed the competing interpretations and idiomatic meaning attached to the words used. It took the view that the "*reasonable bystander*"[6] would have considered that these words were "*abusive, insulting (and) improper*" – see paragraph 87 of the Written Reasons. In terms that would be familiar to any administrative or public lawyer, the Appeal Board ruled at paragraph 88 that:

> "*Any reasonable body tasked with determining whether JM's words would be perceived by a proper-characterised reasonable bystander as being abusive, insulting or improper would, in our view, conclude that they were.*"

15. It therefore allowed the FA's appeal on the proper application of the '*reasonable* bystander' test[7]. Nevertheless, the Appeal Board considered it inappropriate to deal with the "*legitimate expectation*" defence and so remitted that for consideration by a fresh Regulatory Commission.

16. We are that fresh Regulatory Commission and the defence of "*legitimate expectation*" is therefore a matter to be determined by us.

Material & Evidence

[5] There was some debate at the Appeal Board and before us as to exactly when it was raised. Suffice it to say, for present purposes, that we accept that, either expressly or by implication, it was raised at an early stage of the disciplinary process and was maintained consistently thereafter.

[6] A test which both parties accept was the appropriate way in which to judge whether conduct was indeed abusive, insulting, improper or offensive.

[7] As summarised in paras 96 to 99 of its decision.

17. We were very considerably assisted by the Written Submissions and other material submitted by the parties. We wish to record our thanks to both Leading Counsel and those who assisted and instructed them for the clarity and thoroughness with which the competing arguments were analysed.

18. The written material presented to us included everything that was available to the Regulatory Commission and the Appeal Board[8]. We also received a Witness Statement from Mr Mourinho, dated 28 November 2018, to which there were a number of exhibits, including two emails, respectively 9 October 2018 and 17 October 2018, both of which make it clear that his concern was that he had been unfairly treated. This complaint foreshadowed the "*legitimate expectation*" defence.

Our Approach to the Facts

19. Paragraph 95 of the Written Reasons of the Appeal Board was in these terms:

> *"Nothing in this Decision and Written Reasons is intended to fetter how the fresh Regulatory Commission undertakes the task of determining the Legitimate Expectation defence.*"

20. A question which arose, therefore, was whether it was open to this Regulatory Commission to consider afresh all the circumstances which gave rise to the charge (that is, both as regards what happened and the context) or whether we should regard ourselves as being bound by the findings of the original Regulatory Commission as qualified by the Appeal Board.

21. In our view, we ought not to reinterpret or qualify that which has been found by those bodies. We have already recorded that the Appeal Board's qualification of the Regulatory Commission's original finding as to the nature or meaning of the profanity. That we must uphold and apply. However, there are a number of others factual findings made by the Regulatory Commission which were clearly accepted as accurate by the Appeal Board. Those we must also follow.

[8] The material for our hearing was divided into 2 files. One (we shall call this File 2) contained material prepared specifically for this fresh hearing. File 1 contained the material that was available to the Appeal Board.

22. In particular, the original Regulatory Commission conducted a careful analysis of the video clips which appears in paragraph 4 of their Written Reasons [File 1/AB 20]. The most important factual findings are set out at paragraphs 31 to 33[9] of decision of that Regulatory Commission – see File 1/AB29.

> "*31. We find that JM was celebrating victory without aiming the words at anyone in particular. His words were inaudible. We do not accept that he shouted the expression, as stated by Mr Xavier in his report. JM repeats the words, first looking away and then the second time we do accept that he is seen briefly glancing towards the lens of the broadcaster's camera. The words mouthed were a Portuguese colloquial profanity. Thus, the objective person would have had to lip read JM's mouth and interpret Portuguese colloquialisms to accurately decipher the comments.*"

> "*33. Similarly, we did not consider the simple use of profanity of itself to be improper in this context so as to breach FA Rule E3. These issues turn on factual nuances that present itself on a case by case basis, and this decision should not be interpreted as authority for a general principle that swearing alone could not breach FA Rule E3 in any scenario. In this case, JM was celebrating victory following a significant and dramatic conclusion to the game, without aiming the words at anyone in particular, the comments were inaudible, said in another language, and even if a Portuguese speaker could decipher what was said by lip reading, this translated to "fuck yeah" or "hell yeah" which we find is not improper in the context and manner in which it was said.*"

23. Although, as we have explained, the Appeal Board took a different approach to the application of the "*reasonable bystander*" test in the context of the words found to have been used, the Appeal Board also made it very clear that it had no intention of interfering with any other finding of fact.

24. This is expressed at paragraph 30 of the Appeal Board's decision [File 2/FRC 223]:-

> "*30) While we return to this issue below, we make clear from the outset that we do not accept that the Commission*
>
> *a) Made any finding of fact that was without evidential foundation at all, or*
>
> *b) Made any finding of fact that was wholly contrary to the weight of the evidence before it, or*

[9] Paragraph 32 was directed to the application of the "*reasonable bystander"* test which we shall not recite as it was overtaken by the decision of the Appeal Board.

c) Overlooked any material evidence when making findings of fact.[10]

While we accept that different Regulatory Commissions might have made different findings of fact on the available evidence that is (for the purpose of this appeal) neither here nor there given what we have said in (a), (b) and (c) above. We therefore confirm that, when determining this appeal, we have proceeded on the basis of the factual findings made by the Commission."

25. At paragraph 57 of its Written Reasons, the Appeal Board returned to the factual differences between the parties, insofar as they had been ventilated on appeal. There was, for example, an issue about the nature, extent and timing of what happened when, as we were able to see for ourselves, Mr Mourinho turned his head towards the camera.

26. The FA had contended that this was not so much a glance as the act of someone who was "*looking directly into the camera*". The Appeal Board addressed this contention in its reasons [File 2/FRC 232] and rejected The FA's contentions in the following terms:

"*57) That said, we do accept that on occasion the language used in the FA's written submissions*

a) Does not accord precisely with the wording in the Commission's Written decisions, and

b) Might be described as 'spin' on the wording used by the Commission.

For example, as we have set out above, the Commission found that JM had 'briefly glanced towards the camera lens' while making his second utterance, whereas the FA's written Submissions described JM as 'looking directly into the camera on the second occasion.

58) However, since we have found no reason or basis to justify interfering with the key findings of fact made by the Commission, nothing turns on that. We have ignored any 'spin' that the FA might have sought to put on the Commission's factual findings for the purpose of deciding this appeal."

[10] There was discussion at our hearing as to whether the Regulatory Commission had 'overlooked' the contents of the 11 October 2018 letter sent on Mr Mourinho's behalf by way of explanation and clarification of his conduct following the fixture. That debate had at its heart the question of whether the Commission had overlooked that Mr Mourinho's own position was that he had uttered a '*Portuguese profanity*'. We do not need to decide whether or not the Commission had that letter in mind when it reached its decision because (at paragraph 31 of its Decision and Written Reasons) the Commission described the '*words mouthed*' as a '*Portuguese… profanity*', albeit that the Commission qualified 'profanity' with the word 'colloquial' for the reasons that we set out below.

27. The Appeal Board returned to the issue yet again at paragraph 64 [File 2/FRC 235]. Suffice it to say that it is again made clear there that the Appeal Board felt there was "*no justification for interfering with any (such) factual findings*" made by the Regulatory Commission. They continued:

> "*While other Regulatory Commissions might have interpreted the evidence differently, and so made different factual findings about the context in which JM used the words that he did, that is of no consequence on this appeal.*"

28. And then again, at paragraph 65, the Appeal Board said that it had concluded that "*the Commission's factual findings as to 'context' are not ones with which we should interfere*".

29. Accordingly, the facts and context that we must accept are:

(i) Mr Mourinho did utter inaudible profanities under his breath, albeit profanities which would only be recognised as such when lip-read by someone paying close attention, especially if familiar with the Portuguese language.

(ii) He did so in the immediate aftermath of a tense and emotional match.

(iii) Though Mr Mourinho was obviously aware of the presence of the cameras, the first expression of such a profanity was uttered as he was simply walking along the touchline and looking ahead.

(iv) He did then[11] briefly glance towards a camera and, as he did so, repeated the same or similar words under his breath before turning his head back to continue walking.

30. For the avoidance of doubt, we emphasise that neither the original Regulatory Commission nor the Appeal Board found that these words were being mouthed directly or deliberately into the camera. Similarly, the finding of the Regulatory Commission

[11] Here we simply summarise what the previous Regulatory Commission found – see paragraph 4 of its Written Reasons [File 1/AB20]

was that the profanity was not aimed at any person or body in particular: it was simply a profanity which, according to the findings we must respect, had no particular object[12].

A Breach of the Rules

31. Clearly, a breach of Rule E 3(1) renders a '*participant*[13]' liable to a misconduct charge.

32. Given the Appeal Board's application of the '*reasonable bystander*' test, there can be no question but that Mr Mourinho's conduct was a technical breach of the rules. The question which arises, as we have said, is essentially whether it is fair or unfair for the FA to charge him with that breach, bearing in mind that it is common ground that there are many circumstances – swearing on the pitch being the most obvious example – in which (save exceptionally) the FA does not take and has not taken action in respect of conduct which nevertheless constitutes a technical breach.

The Doctrine of Legitimate Expectation

33. Both parties accept that a sporting body such as the FA is subject to the supervisory jurisdiction of the law and must abide by the principles of public law.

34. In its formulation in the early cases (though not in the sporting context) the doctrine of '*legitimate expectation'* was sometimes likened to that of an estoppel[14]. Whilst, subsequently, the doctrine has been developed in the field of administrative and public law, both parties acknowledge that it is capable of applying to the conduct of the governing bodies of sports[15].

35. As we shall explain, '*legitimate expectation'* is a doctrine which, both in administrative law and in the sporting context has developed significantly over time. In a classic case, applying it in a sporting context, a '*participant*' might be able to identify a clear and

[12] See paragraph 31 of the Regulatory Commission's Written Reasons [File 1/AB 29]
[13] That is a technical term used in the FA Rules: it includes, obviously, players, officials and managers, amongst others.
[14] See, for example, the Judgment of Simon Brown LJ in *R v Devon CC, ex p Baker* [1995] 1 All E.R. 73. See also Lord Hoffmann in *R v East Sussex CC* [2002] UKHL 8.
[15] Each party cites an extract from Lewis and Taylor's '*Sports Law and Practice*" (3rd Edition) although the FA relies on it to counsel caution about the development and application of what it characterises as a concept that "is certainly not obviously defined" – File 2/FRC 127, para 6.

unambiguous representation by the sports regulator upon which he (a participant) had relied in acting in a particular way. However, it is now clearly the law that the doctrine does not depend upon establishing either such an unequivocal representation on the one hand or actual reliance on the other.

36. The following brief discussion of the jurisprudence can usefully begin with a reference to the decision of the Court of Appeal in *R v North and East Devon HA, ex p. Coughlan* [2001] QB 2013. In that case, the Court of Appeal, finding for the claimant, found that if a public body had made a promise as to how it would behave in the future, such as to induce a legitimate expectation as to how it would behave, then to act in a different way so as to frustrate that expectation might amount to an abuse of power.

37. A very much more recent decision[16] is that of the Administrative Court in *R (on the application of Jefferies) v Secretary of State* [2018] EWHC 3239 (Admin). In that case, the claimants sought to rely on an oral assurance given in a private meeting with the Prime Minister as to whether there would be a second part to a public inquiry. In that case, it was said to have been the promise itself (which had to be shown to have been clear and unambiguous) which gave rise to the legitimate expectation. As we shall see, however, the doctrine also applies where the claimant seeks to establish that the defendant has departed from a clear and established previous policy or practice. But whilst *Jeffries* was a 'promise' case, the present is said to be a 'policy' or 'practice' case.

38. Further analysis of the development of the doctrine is to be found in the judgment of Laws LJ in *R (o/a Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755. In that case, Laws LJ, in a masterful exposition, identified the central feature of legitimate expectation as being that of fundamental fairness in public administration[17]. That means, he explained, recognising a principle which constrains the power of public authorities, namely,[18] that a change of policy which would otherwise be legally unexceptional may be held to be unfair by reason of that authority's prior action, or inaction.

[16] Understandably, this case did not feature in the submissions of the parties, no doubt because it appeared on Lawtel only on the day of our hearing.
[17] See also para 65 of *Jefferies*.
[18] See paragraph 50 of the Judgment.

39. Laws LJ's judgment shows how far the principle had been developed from its original formulation based upon express or implied promise and / or formulated as an estoppel. He identified three categories of legitimate expectation. What he called the "*paradigm case*" of procedural expectation is where a public authority has distinctly promised to consult those affected and has not done so. The second category would be where, without any promise, the public authority establishes a policy distinctly and substantially affecting a person or a group, such that they might reasonably rely upon its continuance and then changes its policy without proper explanation or consultation in advance of so doing[19].

40. The third category he identified is where a public authority has distinctly promised to preserve an existing policy for people who would be substantially affected by any change and, having done so, it would be held to that promise: this, as Laws LJ explained, would be a "*substantive*" legitimate expectation.

41. It follows that, in the present case, we are looking at what is procedural expectation; that is Laws LJ's second category.

42. An issue which arose during this hearing before us was whether it was necessary for Mr Mourinho to establish that he actually relied upon any pre-existing policy or practice in acting as he did at the end of the game on 6 October 2018. This was something which, unsurprisingly, has been considered in several cases, including ***R v Secretary of State for Education & Employment, ex p. Begbie*** [2000] 1 WLR 1115 and ***R (o/a Niazi)***, to which we have already referred.

43. What should be regarded as settled law[20] is best expressed by Lord Hoffmann in ***R (o/a Bancoult) v Secretary of State for Foreign & Commonwealth Affairs*** [2008] UKHL 61. We quote what he said at paragraph 60 of his speech:

> "*It is not essential that the Applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest.*"

[19] This would also be characterised as '*procedural*' expectation.
[20] As also recognised and explained at paras 75-76 of *Jefferies.*

44. Cases based on a legitimate expectation in relation to a policy or practice will vary considerably according to their particular circumstances. It would be wrong for us to try and offer a comprehensive exposition of principle as it might apply to widely differing cases. As *Jefferies*[21] establishes, whilst '*reliance*' is not an essential ingredient which the claimant needs to establish, it will nevertheless be relevant to the overall question of whether it is fair for a public body to depart from an existing practice or policy if the claimant has actually relied on such practice or policy in acting as he did.

Reliance in the present case

45. Although it might seem more logical to examine the FA's policy before deciding to what extent it affected or is otherwise relevant to the behaviour in question, it can conveniently be considered here since we have already recorded how far (as a matter of law) reliance is something to be considered in such a case.

46. Whilst Mr Mourinho does not go so far as to claim that he made a conscious decision to behave as he did in the light of his understanding of the FA's previous policy, he does assert that he did not expect that the FA would say he had crossed the line between that which was acceptable and what was not[22].

47. In our judgment, it is reasonably to be inferred that at the time Mr Mourinho, at least in general terms, was aware of the fact that some forms of misbehaviour were tolerated by the FA and some were not. That explains why he was genuinely surprised – and aggrieved – to be told he faced a charge. He speaks of his experience and expectations at paragraph 7 of his Witness Statement at File 2/FRC24 and expressed himself in rather more vivid, but certainly clear, terms in two emails received after the FA wrote to him on the 9 October 2018 when they sought his written observations on his action, words and gestures following the match. The first of those emails is dated 9 October 2018 at 15.36 (File 2/FRC26) and the later email (File 2/FRC28) is dated 17 October 2018, which would be four days after he was charged with a breach of FA Rule E3.

[21] See para 76 of the judgment of Davis LJ in *Jefferies*
[22] See para 7 to 9 of his statement at File 2/FRC 24.

48. We recognise that Mr Mourinho saw himself as being victimised – that is, as singled out for special treatment when others were not[23]. Nevertheless, we do not think that argument has been substantiated. We think it probable that the FA decided to charge Mr Mourinho simply because it was such a high-profile event, because his inaudible but visible words on a live broadcast immediately attracted a considerable amount of media attention and because those responsible for the decision to charge genuinely felt he had breached the rules. But that does not mean they were necessarily acting consistently with the previous FA's practice[24].

Formulating the Test of Legitimate Expectation in this Context: Discussion

49. It was common ground between the parties that the burden of establishing a "*legitimate expectation*" is on the party who raises it – that is, on Mr Mourinho. To explain how the doctrine arises here, the first premise upon which we proceed is that there was an existing practice as to what conduct would be the subject of charge and what would not. The second premise is that Mr Mourinho, when acting as he did on 6th October, was, as we have just explained, at least in general terms aware of that practice to the extent that it would be unfair for the FA to proceed to charge him because to do so would be so significant a departure from existing practice. The third premise is that to charge Mr Mourinho in the circumstances of this case in fact constituted a departure from such practice.

50. The key to this whole analysis is fairness: in context, the question we must answer is whether it would be fair for the FA to proceed against Mr Mourinho if the same or similar behaviour had not previously resulted in disciplinary action? As we have already said, there is no need to show that a participant's reasonable expectation that a body such as the FA will behave in a certain way is based on an express promise: establishing that there was a previous practice and that what has now happened is a significant departure from such practice for no good reason will suffice[25].

[23] We were given several examples of participants (including managers) who were not the subject of charges and some who were

[24] There was a degree of argument about semantics in our hearing: the FA preferred to refer to its previous 'approach' whereas Mr Mourinho referred to a 'practice' or 'policy'. In context, we regard all three words as more or less synonymous. We shall therefore call it a 'practice'.

[25] See, for example, *Council of CSUs v Minister for Civil Service* (the GCHQ case) [1985] AC 374

51. In considering that question of "*fairness*", it is of fundamental importance to recognise that a regulator such as the FA has a broad discretion as to the application of its rules. Indeed, the FA draws to our attention the fact that the literal terms of FA rule E 3(1) can readily be applied to Mr Mourinho's conduct. That, it argues, is exactly what the Appeal Board has done.

52. The FA also reminds us of the terms of the "*Fast Track*" regulations which are in these terms:

> "*Fast track 2 will apply where the association charges a Participant with Misconduct under the Rules for an incident before, during, or after a game, on or around the field of play (including the tunnel area), for an incident outside the jurisdiction of Match Officials but reported to The Association or for media comments. The case types are broken down below. Incidents of Misconduct reported to The Association, other than a breach of the Laws of the Game, which occurred on or around the field of play before during or after a game. Examples include, but are not limited to: Threatening, abusive, indecent or insulting words or behaviour by Players or Managers or behaviour which otherwise is improper or brings the game into disrepute…*"

53. The FA suggests[26] that the terms of the Fast Track Procedure and of Rule E 3(1) have the effect of putting Mr Mourinho on notice that he might be in breach if he behaved as he did. We do not agree: the words may tell him what the rule says and, in general terms, that there is a particular practice[27] as to its enforcement. But they do not go so far as to warn him that what he did on this occasion would be regarded as covered by that practice or that his conduct probably would, or could well, result in a sanction.

54. We repeat that we respect the principle that a regulator such as the FA has a wide discretion in the application of its rules. Any outside body, such as the Regulatory Commission or a Court, should think long and hard before deciding that a discretion has been unfairly applied. Nevertheless, as we have said, the keynote is fairness and whether there has been a rational application[28] of the rules to the facts of the particular case. That in turn depends on there being a reasonable measure of clarity and consistency in any practice governing such application.

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[26] In para 1 (iii) of the written submissions for this hearing [File 2/FRC 126]
[27] Or 'approach' or 'policy'
[28] As explained by Lewis and Taylor at p844 of *Sports Law and Practice*, 3rd Ed, cited at pars 2, 3 of the FA's submissions at File 2/FRC 127

55. In making his submissions about the nature and extent of our supervisory jurisdiction, Mr Laidlaw QC submitted that we should only find that a legitimate expectation has been frustrated if the conduct of the regulator (in this case the FA) was akin to the kind of conduct which, in the context of criminal proceedings, would amount to an abuse of process. He went on to add, with the benefit of his considerable experience of criminal practice, that the criminal courts would only go so far as to strike out a case as an abuse of process where that was a "*last resort*".

56. We do not accept that this is the test for the present kind of case. We recognise that there are some parallels with cases of abuse of process in criminal law, but these proceedings are not criminal. Here we consider that what is or is not fair (in the context of legitimate expectation) has a broader meaning just as the concepts of a '*fair trial*' and '*abuse of process'* have a broader meaning in civil litigation generally[29] than in criminal cases.

The FA's Response

57. In a helpful summary of the FA's case [File 2/FRC 129], Mr Laidlaw QC provides five answers to the case Mr Mourinho advances on legitimate expectation.

58. First, it is asserted that Mr Mourinho did not rely on such practice as the FA may have had. We have already addressed and disposed of that argument. As a matter of law, he need not go so far as to establish actual reliance. That he was, as we have found, in general terms aware of the FA's usual practice so that this is likely to have influenced his behaviour is (as we have explained) a relevant factor in the overall analysis.

59. Second, the FA says that it has no "*clear and established policy*" nor has it made any unequivocal undertaking or expression of that policy[30]. As to the second part of that, we accept that to be a fair point but, as we have also explained above, it is not decisive of the issue. As to the first part, which is an important point in the case, we address this in terms under the next heading.

[29] See, for example, the discussion of what constitutes a '*fair trial*' and '*abuse of process*' in, for example, *Summers v Fairclough Homes* [2012] UKSC 26.
[30] Which we treat as a synonym for '*practice*' or '*approach*'.

60. Third, it is said that Rule E 3(1) and the FA Fast Track procedure "*explicitly put Mr Mourinho on notice*" that he might be charged for such conduct. As we have also explained above, we do not consider either went that far.

61. Fourth, the FA explains what it says is its "*approach*"[31]. We also deal with that in the next section.

62. Fifth, the FA reminds us (as we have already acknowledged and accepted) that it retains a broad discretion. It contends that its "*approach is proportionate and sensible*" which is, of course, the real issue in the case.

FA Policy / Practice/Approach

63. As we have already said, we consider the difference between an "*approach*", a "*policy*" and a "*practice*" is essentially semantic rather than material, at least in a case such as the present.

64. Against that background, we turn to considering whether or not the FA's treatment of Mr Mourinho constituted a significant departure from its previous practice (the word which, as we have said, we consider the most appropriate label) and, if so, whether such departure is unfair in the sense of being unreasonable, unjustified or capricious.

65. Mr Laidlaw QC, in his Written Submissions [File 2/FRC 126], explained the FA's position as follows:

> "*1(iv) The FA's approach is not to take action for swearing alone in respect of incidents that take place on or around the field of play and which might inadvertently be picked up by live broadcast cameras. Achieving absolute consistency with this approach, bearing in mind the sheer number of incidents and the myriad of circumstances in which it might be suggested the behaviour falls outside that which is tolerated, would be quite impossible for any decision-maker.*"

[31] Again, in contradistinction to a '*policy*' or *'practice'*.

66. This approach, which Mr Laidlaw QC argued could not properly be characterised as a "*promise*" or a "*policy*", or as an "*unequivocal representation*" was further explained at paragraphs 19 to 20 of his submissions. The effect, he contended, was that the FA's approach ordinarily left what happened on the pitch to the referee except in some exceptional cases such as in the use of discriminatory language. Otherwise, he explained, "*participants caught, inadvertently, on camera swearing on or around the field of play will not, ordinarily, find themselves the subject of retrospective action*".

67. That is, we think, an entirely realistic approach and is readily justified by the additional sentence included in paragraph 19 of those written submissions: "*To do otherwise would fill Commissions with literally hundreds of cases every week of the season*".

68. Nevertheless, Mr Laidlaw QC explained in paragraph 20 of those written submissions, the FA "*takes a different view to instances of swearing addressed into live broadcast cameras, to swearing at Match Officials and to Participants swearing at or gesturing towards crowds. In the Annex to these Submissions, the FA has produced examples of such cases. There is a catalogue of cases which concern the abuse of Match Officials which the Commission has not been troubled with*".

69. Again, we have no hesitation in recognising that this is a reasonable practice to follow. What remains in issue, then, is whether charging Mr Mourinho in the circumstances of this case is consistent with that practice or whether it represents a material departure from it.

Application of this "Approach" or "Practice"; Discussion

70. We began by considering not whether Mr Mourinho was, technically, in breach of Rule E 3(1) - for that has already been determined - but whether charging him was within the terms of the practice that the FA has relied upon and whether doing so constituted a material departure from or unfair extension of that practice.

71. At paragraph 1 (iv) of Mr Laidlaw QC's written submissions the FA's approach is said to be not that it does not take action for "*swearing alone*" – which this was, though not audibly – in respect of incidents "*on or around the field of play which might*

inadvertently be picked up by live broadcast cameras". To our minds, that formulation comes very close to covering the conduct in the instant case, albeit the match itself had just ended, to the extent that someone in Mr Mourinho's position might expect that he would not be charged.

72. Nevertheless, in establishing what was in fact the FA's practice it was, of course, necessary to look beyond its own formulation of that practice for the purposes of this case and consider whether charging Mr Mourinho was in fact consistent with the practice as evidenced by what it had done or not done previously.

73. The FA therefore sought to substantiate its submission to the effect that it was acting in accordance with its usual approach by looking at certain other examples. It identified two which it submitted were reasonably close to the behaviour of Mr Mourinho on the instant occasion. Both involved players swearing whilst beside the pitch after matches had ended.

74. The first involved Wayne Rooney who, in April 2011, approached a broadcast camera at the end of the match and swore aggressively into it and certainly used the "*F*" word. For that he was disciplined by way of a two match suspension.

75. The second example involved Pontus Jansson, who was interviewed after a match in October 2018 and said that he felt "*shit*" and went on to be critical of the referee. For that he received a suspension of one match and a £1,000 fine.

76. This Regulatory Commission thought that the Pontus Jansson case bore no material similarity to that involving Mr Mourinho not least because Mr Jansson's strong words, apart saying that he felt "*shit*", were directly critical of the referee.

77. Mr Rooney's case was therefore the only one of the two examples offered with which any useful comparison could be made. However, there are very obvious factual distinctions to be drawn between Mr Rooney's conduct and that of Mr Mourinho. As we said, Mr Rooney sought out and deliberately and aggressively approached the camera. He swore into it using the "*F*" word audibly in manner that was consciously directed at least towards the viewers.

78. In Mr Mourinho's case, by contrast, the original Regulatory Commission[32] found that in no sense were Mr Mourinho's words, spoken under his breath, directed towards the camera nor did they (nor would we) find that they were directed towards any particular person or people. So we regard Mr Rooney's case as very different.

79. The FA identified a number of other examples of the application of its practice (which are set out in our papers at File 2/FRC133 to 135). As we have already indicated, we do not find that any of those provided a useful parallel with the case of Mr Mourinho. We also considered yet further examples of the FA's practice that Mr Mourinho himself drew to our attention, which are set out at File 2/FRC 37 to 39 and at File 2/FRC 212.

80. This is not the place to conduct a detailed review of the very many instances in which the FA did not take action, any more than we have devoted too much attention to those in which it did, except in the case of Wayne Rooney.

81. What we do accept, however, is the submission Mr Gilroy QC, made on behalf of Mr Mourinho, that there were a number of instances where the FA has not taken action in circumstances which some might regard as bad or, possibly, far worse than those which arose here. An example of the latter category involved Mr Mourinho himself: we saw film of him at a Chelsea match swearing at the club doctor, Dr Carneiro, in an incident in 2015 which became notorious for other reasons. As we understand it, Mr Mourinho was not charged under Rule E3 (1) for that conduct.

82. It follows that we accept that throughout the period of several years[33] from which examples were taken no participant has previously been charged for behaving in the way that it has already been established that Mr Mourinho behaved. Further, we consider that there are several examples of conduct which was more objectionable than the conduct in the instant case.

Conclusions

[32] Which finding, as we have explained, we must respect
[33] We were given examples going back as far as 2008. The most recent example came for October 2018

83. If the FA's practice hitherto has been[34] "*not to take action for swearing alone in respect of incidents that take place on or around the field of play and which might inadvertently be picked up by live broadcast cameras*", then, as we have said, it is arguable that Mr Mourinho's conduct fell within that category of behaviour in respect of which the FA says that it does not normally take action. We repeat that the only arguable distinction could be between something that happened in the immediate aftermath of the game rather than something which happened during the course of the match if that is the literal meaning of the expression "*field of play*". As we explained above, if there is such a distinction to be drawn, it is a very fine one.

84. As regards the second aspect of the FA's previous practice – not to take action in respect of swearing alone which might "*inadvertently be picked up*" by live broadcast cameras – we consider that the findings of the original Regulatory Commission as to the manner in which Mr Mourinho actually behaved and its finding as to the very limited time during which he glanced towards the camera, means that this could easily be characterised as "*inadvertent*" conduct. In reaching that conclusion, we recognise that some might have thought that Mr Mourinho was well aware of the cameras and that he continued to mutter, albeit under his breath, with an awareness that others would understand his meaning. But it is not our business to speculate in such terms given the findings of fact that we must respect.

85. Even if one were to consider that charging Mr Mourinho is not inconsistent with the strict and literal terms of its practice, the issue which arises is whether to do so is a material and unjustified departure from what that previous practice was <u>in fact</u>. It is that which, as a matter of law, is said to be the foundation for Mr Mourinho's '*legitimate expectation*' that the FA would not depart from such practice without good reason and fair warning.

86. In simple terms, then, it comes down to deciding whether it is fair or unfair for Mr Mourinho to have been singled out for disciplinary action when – as we have found – there is no comparable example of a player or of a manager having been disciplined for behaving in that way and there are several other examples of reasonably comparable and, arguably, more serious conduct where no action has been taken.

[34] See paragraph 1(iv) at FRC126.

87. Whilst we entirely accept Mr Laidlaw QC's submission about allowing the FA a wide discretion, we think that this discretion has been unfairly exercised in the instant case. We completely appreciate the FA is in a difficult position in trying to police bad language and offensive gestures on and off the pitch. Their approach as explained is, we accept, generally fair and reasonable but to charge Mr Mourinho in the circumstances of this case was, we consider, a material departure from previous practice for which no good justification has been provided. Putting it another way, it was not, we consider, within the wide margin of appreciation that we should allow the authority such as the FA in its application of its rules.

88. We emphasise that we do not consider that he has been unfairly singled out for a disciplinary charge because of any bad feeling or bias towards him on the part of the FA[35]. Rather, we think the FA acted in good faith being aware of the attention paid to the film and reports of the incident even if, in hindsight, charging him was, as we have held, a material departure from its previous practice.

89. It follows that we think it was unfair that he was charged and hence this was a breach of his legitimate expectation that the disciplinary rules would be fairly and consistently applied. As a comment, we add only that if the FA wishes to put players, managers and all other participants on notice that in future it intends to treat words heard in such circumstances, or words that are inaudible but where the meaning is obvious, or conduct to a similar effect, as a breach of the rules, then it could easily do so. Indeed, it is arguable that it may have done that by bringing this charge against Mr Mourinho.

90. In all the circumstances and in the light of the FA's practice as it was at the time, we think it was not fair to have singled Mr Mourinho out for special treatment without due warning. In those circumstances, we uphold his defence of legitimate expectation.

Order / Directions

91. We consider that the appropriate course is to direct that the charge against Mr Mourinho should be dismissed. We make no Order in relation to the costs as they arose at the Appeal Board: paragraphs 100 to 102 [File 2/FRC247] of the Appeal Board's

[35] Which is what he asserted in his email of 17th October 2018 [File 2/FRC 28]

Written Reasons make it clear that it has reserved questions of costs until after we have determined the issue of legitimate expectation.

92. As regards the costs of this Regulatory Commission hearing, those will be borne by the parties themselves in the usual way, in accordance with the Rules. However, the costs of this Regulatory Commission will be borne by the FA.

Dated this 13 day of December 2018

WILLIAM NORRIS
(Chair)

UDO ONWERE
(Independent Football Panel Member)

AISLING BYRNES
(Independent Legal Panel Member