

IN THE MATTER OF THE REGULATORY COMMISSION OF THE FOOTBALL ASSOCIATION
BETWEEN:

THE FOOTBALL ASSOCIATION

-and-

[REDACTED]

Regulatory Commission and Secretariat

David Casement QC - Chairman

Udo Onwere

Matt Williams

Paddy McCormack – Judicial Services Manager – Secretary

Tanya Pariz – Chairman’s Mini-Pupil (Observer)

For the Player:

[REDACTED]

- Player

Rosie Kight

- Counsel for the Player

Catherine Forshaw

- Solicitor – Brabners LLP

[REDACTED]

- Player’s father and witness

[REDACTED]

- Player’s mother and witness

[REDACTED]

- Appropriate adult

[REDACTED]

- Appropriate adult

For The Football Association:

Max Baines

- Counsel for The Football Association

Amina Graham

- Head of Regulatory Legal (observer)

Nisha Dutt

- Head of Case Management (Counsel), UKAD (observer)

Tom Middleton

- Solicitor, UKAD (observer)

[REDACTED]

- Head of Legal, a Premier League Club (observer)

[REDACTED]

- Witness

[REDACTED]

- Witness

DECISION AND REASONS OF THE REGULATORY COMMISSION

Introduction

1. ██████████ is a young footballer registered with a Premier League Club. ██████████ was born on ██████████ and is presently 16 years of age. At the time of the alleged events giving rise to the charges he had only just turned 15.

2. On 30 September 2019 ██████████ went to live with ██████████ and her family in ██████████. ██████████ acts as a “host” on behalf of the Club and provides living accommodation for young players who are signed to the Club and whose family reside too far away for the player to return home every day. ██████████ family live in ██████████. As host ██████████ provided accommodation and food for the young player who was thereby able to attend school from that accommodation as well as attend training at the Club. The player would be free to return home each weekend to see his family who were also free at all times to visit the young player and communicate with him.

3. It is contended by The Football Association (“the FA”) that on 1 October 2019 ██████████ observed a pen-type dispenser in a bag in the personal fridge ██████████ brought to ██████████ house. It is not disputed between the parties that the pen-type dispenser contained Somatropin, a Growth Hormone which is a Prohibited Substance classified under S2 “Peptide Hormones, growth Factors, Related Substances, and Mimetics” in the 2019 Prohibited List of the World Anti-Doping Code. Somatropin is prohibited at all times and is not a Specified Substance. It is also the FA’s case that ██████████ saw plastic caps, which are intended to be used with the pen-type dispenser, lying on the floor of the room used by ██████████ as well as outside of her house. On 11 December 2019 ██████████ mentioned in passing to representatives of the Club, during a visit to her home, that ██████████ had medication of which the Club had not made her aware prior to him moving in. This comment led to an investigation including an examination of the dispenser as well as interviews of ██████████ and his parents.

4. On 12 December 2019 ██████ was asked to return to his parents' home pending the investigation. His belongings including his personal fridge were retrieved and sent to his parents' home. ██████ returned to ██████ house for a brief period, without his fridge, in January but then left after a short period.

5. Following a series of interviews in February and March 2020 a charge letter was issued on 17 March 2020 alleging ██████ had failed to provide his mobile phone to the FA, further to a request as part of its investigation into the suspected Anti-Doping Rule Violation (ADRV), in breach of FA Rule F3. Then on 8 July 2020 the FA issued a further charge letter under FA Rule E25 alleging a breach of:
 - 5.1 Regulation 4(a) of The FA's Anti-Doping Regulations 2019/20 ("Use or Attempted Use of a Prohibited Substance") and/or
 - 5.2 Regulation 8(a) of The FA's Anti-Doping Regulations 2019/20 ("Possession of a Prohibited Substance").

6. The charge letter of 8 July 2020 also gave notice under Regulation 13 of the Disciplinary Regulations 2019/20 that these charges had been consolidated with the charge notified by letter dated 17 March 2020 in respect of ██████ failure to provide his mobile phone. It therefore follows that the Commission is seized of all three disciplinary charges.

Rules and Regulations

7. The starting point for any consideration of The Football Association Anti-Doping Regulations (FAADR) is Regulation 3 which sets out the "Participants' Responsibilities." In broad summary those who participate in football regulated by The Football Association must be aware of and comply with all applicable anti-doping policies and Rules and Regulations adopted by the Association.

8. Regulation 4(a) of the FAADR provides: "The Use or Attempted Use of a Prohibited Substance or Prohibited Method by a player is prohibited unless the Player establishes

that the Use or Attempted Use is consistent with a Therapeutic Use Exemption that has been granted to the Player.”

9. Regulation 4(b) provides: “It is a Player’s duty to ensure that no Prohibited Substance enters his body and that he does not Use any Prohibited Method. It is not necessary that intent, Fault, negligence or knowing Use on the Player’s part be demonstrated in order to establish an Anti-Doping Rule Violation of Use pursuant to Regulation 4. A Player’s lack of intent, Fault, negligence or knowledge is not a valid defence to a charge that an Anti-Doping Rule Violation of Use has been committed pursuant to this Regulation. However, it is necessary to demonstrate intent on the Player’s part to establish an Anti-Doping Rule Violation of Attempted Use pursuant to Regulation 4.”

10. Regulation 8(a) provides: “... (i) Possession by a Player In Competition of any Prohibited Method or any Prohibited Substance; ... is prohibited unless the Player...establishes that the Possession is consistent with a Therapeutic Use Exemption that has been granted to a Player or other acceptable justification.”

11. Possession is defined in the FAADR as: “the actual physical possession, or the constructive possession (which shall be found only if the person has exclusive control or intends to exercise control over the Prohibited Substance or Prohibited Method or the premises in which a Prohibited Substance or Prohibited Method exists); provided, however, that if the person does not have exclusive control over the Prohibited Substance or Prohibited Method or the premises in which a Prohibited Substance or Prohibited Method exists, constructive possession shall only be found if the person knew about the presence of the Prohibited Substance or Prohibited Method and intended to exercise control over it. Provided, however, there shall be no Anti-Doping Rule Violation based solely on possession if, prior to receiving notification of any kind that the person has committed an Anti-Doping Rule Violation, the person has taken positive action demonstrating that he never intended to have possession and has renounced possession by expressly declaring it to an anti-doping organisation. Notwithstanding anything to the contrary in this definition, the purchase (including by

any electronic or other means) of a prohibited substance or prohibited method constitutes Possession by the person who makes the purchase;”

12. The burden and standard of proof are addressed at Regulations 26 and 27. In proving an ADRV it is for the FA to prove such to the comfortable satisfaction of the Commission. Comfortable satisfaction is more than a mere balance of probabilities but less than beyond reasonable doubt. Where any regulation places a burden on a player to rebut a presumption or to prove a specific fact the player must discharge that burden on a balance of probabilities.
13. If either of the ADRVs are proven by the FA the starting point for the sanctions is a suspension from all football activity for four years. However, if the player is able to prove on the balance of probabilities (the burden being upon him because the Prohibited Substance is not a Specified Substance) that his actions were not “intentional” that starting point may be reduced to 2 years. Regulation 50 of the FAADR defines the term ‘intentional’ as: ‘The term “intentional” ... is meant to identify those Participants who cheat. The term therefore requires that the Participant engaged in conduct which he knew constituted an Anti-Doping Rule Violation or knew that there was a significant risk that the conduct might constitute or result in an Anti-Doping Rule Violation and manifestly disregarded that risk...’
14. It is contended on behalf of ██████ that if the ADRV are made out the sanction also falls to be eliminated or reduced on the basis of No Fault or Negligence or No Significant Fault or Negligence. In Schedule Two FAADR the relevant definitions are as follows:
“No Fault or Negligence” means that the Participant is able to establish that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an Anti-Doping Rule....

“Fault” means any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing a Participant’s degree of Fault include, for example, the Participant’s experience, whether they are a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Player and the level of care and investigation exercised by the Player in relation to what should have been the perceived level of risk. In assessing the Participant’s degree of Fault the circumstances considered must be specific and relevant to explain the Participant’s departure from the expected standard of behaviour. Thus, for example, the fact that a Player would lose the opportunity to earn large sums of money during a period of suspension, or the fact that the Player only has a short time left in his or her career, or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of suspension under the provisions of Part Eight.

“No Significant Fault or Negligence” means the Participant is able to establish that his Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relation to the Anti-Doping Rule Violation...”

15. Further on 7 November 2019 the World Anti-Doping Agency Foundation Board approved a new World Anti-Doping Code which came into force on 1 January 2021. This was notified to the FA by FIFA in a circular dated 13 July 2020 and as a member association it is obliged to incorporate the new rules into its own regulations. Given these proceedings are taking place after that date of the regulations coming into force there is a potentially a more lenient sanction regime that is applicable, the principle of *lex mitior* applies, and this Commission will apply the new regulations. The relevant material change in this case is the introduction of a new Rule 10.6.1.3 in the Code which states:

“10.6.1.3 Protected Persons or Recreational Athletes

Where the anti-doping rule violation not involving a Substance of Abuse is committed by a Protected Person or Recreational Athlete, and the Protected Person

or Recreational Athlete can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum two (2) years Ineligibility, depending on the Protected Person or Recreational Athlete's degree of Fault."

The relevant associated definitions are as follows:

Protected Persons means An Athlete or other natural Person who at the time of the anti-doping rule violation: (i) has not reached the age of sixteen (16) years; (ii) has not reached the age of eighteen (18) years and is not included in any Registered Testing Pool and has never competed in any International Event in an open category; or (iii) for reasons other than age has been determined to lack legal capacity under applicable national legislation."

16. It is clear that the purpose of the 2021 amendment to the Code is to give the Commission a much wider discretion as to the appropriate sanction in all the circumstances, where the player is able to establish that he had No Significant Fault or Negligence.

Procedural History

17. This matter was first listed for hearing on 4 November 2020. On the application of the FA and due to ██████████ being in isolation due to testing positive for Coronavirus the hearing was adjourned to 9 December 2020. The original hearing date of 4 November was nonetheless used to give directions and to narrow certain issues.
18. Prior to the hearing on 9 December the player's legal representatives raised the issue of lex mitior and the forthcoming change in the Rules. Understandably they wished for the decision to be handed down after 1 January 2021 to ensure that the player had the benefit of any changes in the rules. The FA agreed with that approach as did the Commission. In the event the hearing of the evidence on 9 December was a very full day including allowing for short breaks every hour for the benefit of ██████████ given his age. It was agreed by the parties and the Commission that it was too late for

submissions to commence immediately after the evidence and an alternative date was agreed upon. The date for the filing of written submissions was fixed for 8 January 2021.

19. At the oral hearing on 11 January 2021 the advocates for the parties supplemented their written submissions on both the law and the facts and took the opportunity to address the arguments of the opposing party. All hearings in this case have been conducted by video conference given the ongoing health pandemic. The technology worked well and there were no significant problems.

Submissions and evidence on behalf of The Football Association

20. The FA contends that the two ADRVs are clearly made out to the comfortable satisfaction of the Commission. The player himself admits that he was in possession of the Prohibited Substance. He has provided a different account of how it came to be in his possession and for how long, but this is irrelevant given the definition of the offence. In any event the FA relies upon the evidence of ██████████ to the effect that she saw the pen in the player's fridge along with its caps on 1 October 2020. She then says that she saw it on various occasions thereafter and eventually she removed the pen from the player's school bag and at his request threw the pen into the bin on 11 December 2020. The room used by the player was not shared with anyone else and neither was his fridge. ██████████ also gave evidence that she picked up the caps, which were for use with the pen, from off the floor of the player's room. She did not know that they contained needles. She assumed the medication in the pen was to be taken orally. Nonetheless she said she picked up the caps from the floor of the player's room and threw them into a bin. She said this started about two weeks from the date that the player arrived. She also said that in December or January she found caps outside where her garden abuts the pavement.

21. The FA contends that not only does this evidence make out the case for possession of the Prohibited Substance but it also proves that the player used it, that is to say he

injected himself with the Prohibited Substance. It is contended that any other explanation for the use of the caps/needles is incredible and should be rejected.

22. The FA rely upon a number of other matters to establish the charges of use and possession of a Prohibited Substance as well as to undermine the credibility of the evidence adduced on behalf of the player. These include the following:

22.1 ██████ and his parents lied to the Club and to the FA during interviews. When they were first asked about the pen they said that ██████ had it in his possession by mistake and that it was in fact the property of his cousin ██████ and there had been a mix up of bags. Subsequently it was contended by ██████ parents that the pen was in fact the property of ██████ father, ██████ and that his parents had made up the story about ██████ in order to save ██████ embarrassment about using human growth hormone to treat his depression;

22.2 ██████ in his initial interview denied any knowledge of caps or needles or how such could have been found lying on his floor at ██████ house. However in a subsequent interview he said that he did know about the caps and that he had in fact used the needles to access the sim card on his mobile phone so as to push it back in to remove an error message that appeared on his phone;

22.3 ██████ in his initial interview said that he only became aware of the presence of the pen and the caps in his orange bag the day before they came to the attention of the Club. He said he called his mother to ask her what they were. He said she told him it was his cousin ██████ and then told him just to "throw it." However during his second interview on 11 March there was the following exchange:

"JK: Well, you moved to ██████ on the 30th September. How long into being at ██████ before you started using the needles, would you say?

██████ About three, four days."

Following an intervention from his solicitor ██████ said he did not know how long. He could not even give a vague timeframe. (pages 233-236).

He did however during the same interview give a timeframe for the fault on his phone occurring:

“JK: How often does it happen, would you say?

█████ Don’t know. Whenever it happens it happens.

JK: Is it more than once a week?

█████ No. I don’t know. It could happen one day then the next day, then after that about two weeks later, then three days, I don’t know, it could happen at any time.

JK: Okay, so then was the first time it happened at ██████ house, the time that it first happens at ██████ house, you’ve used this as the first way of getting your SIM card out at ██████ house.

█████ Yes.

JK: You’ve not got your SIM card out using any other method at ██████ house other than the needles.

█████ No.” (pages 241-242)

The FA says this knowledge of and use of the needles (even if for another purpose) for a period going back to the beginning of October 2019 undermines the player’s assertion that he did not know he was in possession of pen and caps until the day before they came to the attention of the Club. The FA however asserts that it goes further and supports the FA’s case that ██████ was using the pen to inject himself during that period of almost 2 ½ months.

- 22.4 The FA contends that the alleged mixing up of bags is incredible. On the evidence of ██████ the same orange bag was used during the period from 30 September through to December. A different orange bag was then produced by ██████ in January when he returned briefly to the house. If the bag that was present from September to December was in fact ██████ and contained ██████ pen it is incredible that no one noticed it was missing or that it was being used by ██████ even though he was going home with it every weekend.

- 22.5 The refusal by ██████ to provide details of who supplied the Prohibited Substance is relied upon by the FA as undermining his credibility and the account of events now put forward on behalf of ██████. He was only prepared to say he bought it from a friend in a car park and that the friend had obtained it legally in Turkey. Even at a contested hearing ██████ was not prepared to be fully open and transparent about details surrounding the pen.
- 22.6 The refusal to hand over the mobile phone during the course of an investigation is said to be not merely proof of an offence in itself but it is also evidence that enables the Commission to draw an adverse inference, namely the reason the phone was not handed over was because it would likely reveal damaging evidence about the use of the Prohibited Substance and the communications between the player and his parents. The phone was requested by email on 12 March 2020 to be handed over the following day. The fact it may have been stolen on 14 March 2020 is irrelevant as it is clear there was no intention to comply with the request.
23. In respect of sanction the FA contends that the player has no basis upon which to seek a reduced sanction. The starting point is four years for a first offence in respect of either possession and/or use of a Prohibited Substance. At the forefront of the FA's case is that it contends ██████ used the Prohibited Substance and that he knowingly had it in his possession for an extended period, namely 1 October through 11 December. In those circumstances the offences committed must be considered intentional and further there can be no room for mitigation on the basis of No Significant Fault or Negligence let alone No Fault or Negligence.

Submissions and evidence on behalf of the Player

24. On behalf of ██████ it is accepted that his story changed and that lies were told to the Club and to the FA during interview. It is accepted that the story about the pen belonging to cousin ██████ was a lie. It is said that this was to protect both ██████ and his father ██████ from the truth that ██████ used it to treat his depression. It is emphasised

that ██████ himself was misled by his parents' false story about ██████ and that he relayed the same in good faith. It is further accepted that when ██████ said he did not know how the caps were found on his floor that was also a lie. It was said that he did not want his parents or anyone else to think he had been messing about with needles. Subsequently when he told his parents they encouraged him to tell the truth about it. It was revealed during the parents' interviews and then subsequently by ██████ in interview.

25. It is said on behalf of ██████ that it is important to bear in mind that he was only 15 at the time. As a minor with his first experience of disciplinary proceedings it is understandable that he was afraid, extremely nervous and that remembering dates and periods of time going back a number of months would be difficult.

26. The case advanced by ██████ was that there was a mix up of orange bags in December 2019. ██████ bag containing the pen was given to ██████ and ██████ own bag was placed in a fridge in his parents' house. When ██████ discovered the pen he contacted his mother who said that it must be his cousin ██████ and he should "throw it." This in fact occurred the following day when ██████ placed it in a bin prior to the Club becoming aware of it, later that same day.

27. It is denied that the pen and caps were present in ██████ bag on 1 October 2019. It is said that ██████ recollection is unreliable and her evidence to the Commission was vague. Further it is said that if the pen had been in the bag for a period of nearly 2 ½ months it is extraordinary that she did not report it to the Club or even mention it to his mother during their telephone conversations as well as one in-person visit. This is all the more so when ██████ said she was annoyed that the Club did not tell her of any medication in advance of ██████ arriving at her home.

28. On the defence case, ██████ was in possession of the pen for a relatively short period of time. He informed his mother that he found it and he then acted on her instructions in disposing of it, or causing ██████ to dispose of it. This is directly contrary to the FA

case which is that [REDACTED] was in possession of the pen for 2 ½ months and used it during that period.

29. It is contended that there was no use of the pen by [REDACTED] and there is no medical or other evidence to suggest that he used the pen. It is further submitted that even if an ADRV was committed there was no intention to cheat. This is particularly so as he did not inject himself which, on the FA's case, he could have done and had plenty of time to do so. That reduces the starting sanction from four years to 2 years.
30. It is further submitted that, taking into account the definition of Fault under the rules, which includes consideration of whether the player is a Minor, and all of the circumstances including the limited period he was in possession of the pen, his lack of anti-doping education, his reliance upon his parents to do the right thing, there is No Fault or Negligence alternatively No Significant Fault or Negligence. If the Commission is satisfied of that as it should be the player is entitled to the benefit of the change in the rules effective January 2021.
31. In respect of the mobile phone it is said that the charge letter of 17 March 2020 is not made out because [REDACTED] was unaware of the request and the phone was not in the possession or control of [REDACTED] at the relevant time. [REDACTED] gave evidence that he was concerned about handing over the mobile phone because it contained personal information such as photographs. He was clear that he never brought the request for the phone to the attention of [REDACTED] because he did not want to upset him. [REDACTED] confirmed he never saw the written request from the FA dated Thursday 12 March 2020, sent by email at 17:40, for the mobile phone. The mobile phone was to be handed over for downloading the following day ie 13 March. Evidence has been adduced that the mobile phone was in fact stolen from a vehicle on the evening of 14 March during a period when the phone was in the possession of [REDACTED] mother.

Issues

32. The main issues to be determined are therefore as follows:

- 32.1 Have the FA proved to the comfortable satisfaction of the Commission that the player committed the ADRVs (Use and/or Possession)?
- 32.2 Have the FA proved on the balance of probabilities that the player acted in breach of Rule F3 by failing to provide his mobile phone following a request as part of the investigation into the ADRVs?
- 32.3 If the FA satisfies the Commission that one or both of the ADRVs was committed has the player proved on the balance of probabilities that he did not intend to cheat?
- 32.4 Has the player satisfied the Commission on the balance of probabilities that he had No Fault or Negligence?
- 32.5 Has the player satisfied the Commission on the balance of probabilities that he had No Significant Fault or Negligence?
- 32.6 Does Rule 10.6.1.3 of the WADA Code apply and if so what is its effect on sanction?
- 32.7 Is the player entitled to avail himself of the principle of proportionality and if so to what effect?
- 32.8 What, if any, is the appropriate sanction in respect of the ADRVs?
- 32.9 What, if any, is the appropriate sanction in respect of the failure to provide his mobile phone?

Regulatory Commission Findings

33. The player's age and his lack of experience of disciplinary matters in general and anti-doping rules in particular are important contextual matters for the Commission. The Commission expresses its great concern that no anti-doping education was given to the player in this case. There was some suggestion during the evidence that a difference is made between young players who are scholars and those who are not. The former receive anti-doping education as a matter of course and the latter may not receive any. If that is the case it represents a major failing in the system and needs to be rectified as a matter of urgency. Likewise hosts, who carry the responsibility of looking after young players, should be equipped with the information about anti-doping and means to

enable them to provide relevant information and any concerns quickly to the clubs to ensure regulations are complied with.

34. The burden of proving the ADRVs rest upon the FA. The standard of proof is not the balance of probabilities but rather the comfortable satisfaction of the Regulatory Commission. Comfortable satisfaction is a higher standard than the balance of probabilities test and less than the criminal standard of beyond reasonable doubt. In the context of serious offences such as those alleged the Commission must look at all of the evidence and consider all of the submissions to decide if the FA has discharged its burden of proof in respect of each charge. The Commission has done exactly that.
35. The Commission is comfortably satisfied that the player was in actual possession of a Prohibited Substance. It is not necessary for the FA to establish that he knew the pen contained the Prohibited Substance and was a breach of the rules. It is sufficient that he knew he was in possession of the pen which was in his bag, in his own fridge in the room of which he had sole use. It is unclear precisely the period of time in which he had the pen in his possession but it was sufficiently long for him to have known the pen was there and not immediately take action to dispose of it or draw it to the attention of an anti-doping organisation. It is likely to have been a period of at least several weeks. He did not hold a Therapeutic Use Exemption and there was no other acceptable justification for him being in possession of it.
36. The Commission is not comfortably satisfied that the player used the Prohibited Substance. There was no medical evidence to support the FA case on Use and no evidence of any witness that they saw the player inject himself or mention using it. [REDACTED] categorically denies use. The FA quite understandably seeks to draw the adverse inference that the player must have used the pen from the following in particular: (1) the period of time that the player was in possession of the pen – nearly two and a half months is a long time to be in possession without using it (2) the presence of the needle caps on the floor and in particular the needle caps were covered requiring them to be reattached to the pen to put the cap back on (3) the change in the story told by the player and his parents.

37. The matters relied upon by the FA clearly give rise to serious suspicions and the investigation and charges are clearly justified. As Mr Baines said there is a clear prima facie case. However, the standard of proof required is high. The period of time for which the player was in possession is not clear. ██████████ was an honest witness but in important respects her evidence was, understandably, vague. She did not think ██████████ was doing anything wrong and she knew nothing about anti-doping. She had received no education or information about such matters. It is however surprising, that if the player was in possession of the pen since he arrived at her house that at no point was the issue of any medication ever discussed with the Club or his parents before a period of nearly 2 ½ months had elapsed. The Commission does not accept that he was in possession of the pen for that length of time although he was likely in possession of it for at least a period of several weeks. The presence of the caps on the floor is highly suspicious however the player has demonstrated that there is an alternative use for those caps and the needles inside namely to access his sim card. In the context of a 15 year old who has demonstrated how he used the needles to open his phone sim card that explanation cannot be simply dismissed.

38. That then leaves the changes of story by ██████████ and his parents. Again that gives rise to suspicion which in turn supports a prima facie case of use. However it is important to distinguish between ██████████ on the one hand and his parents on the other. ██████████ information about where the pen came from, namely his cousin, was likely provided to him by his parents. The information was admitted to be false. It is clear to us that ██████████ parents did come up with a story to cover up the truth and caused ██████████ to lie to the club and to the FA in interview. It is also clear that ██████████ himself knowingly gave false information in interview about not knowing anything about why there were needles and caps on the floor. He later accepted that he had used them for his phone and said he lied because he was afraid in case he got into trouble for messing about with needles. The Commission accepts that is the reason that he gave false information initially in respect of the needles.

39. The Commission was very unimpressed with the accounts given by [REDACTED] and his parents about the switching of a bag thereby placing the pen, now said to be the property of [REDACTED], into the possession of [REDACTED]. It was a story that did not make sense. Two bags that were orange, but otherwise clearly distinguishable, were said to be switched so that one with inhalers was left at home and another with a pen containing a Prohibited Substance and needles was taken in its place. Apparently no one noticed this even though [REDACTED] returned home every weekend with the bag. We regard that as a fabrication to cover up how [REDACTED] actually came to be in possession of the pen. The Commission considers it very likely that someone put the pen into the possession of [REDACTED] and it is difficult to escape the conclusion that the intention of whoever did so was that [REDACTED] should use it. Exactly who that person was is a matter of speculation. It is sufficient that for the purposes of this decision that the Commission concludes that it is not comfortably satisfied that [REDACTED], although he was only 15, succumbed to that influence.

40. A further matter relied upon by the FA is the failure to provide his mobile phone for investigation. It is important to the Commission that no direct request was made of [REDACTED] to deliver up his mobile phone for imaging. He was interviewed by the FA on 11 March 2020 but during the interview or indeed immediately before or after the interview, he was not asked directly to deliver up his phone. The request for the phone was made in an email on 12 March 2020 and this was sent to [REDACTED] and [REDACTED] solicitor. Further the FA contacted [REDACTED] solicitor on 12 March who then appears to have spoken with [REDACTED] rather than [REDACTED]. [REDACTED] was adamant no one told him of the request. The phone itself was stolen on 14 March. Whilst communication of the request to [REDACTED] solicitor for the mobile phone was sufficient as a request under F3 and it should have been delivered up on 13 March for imaging, it is not appropriate to draw any, and certainly not sufficient, adverse inference against [REDACTED] when he was not aware of the request at the time. Nonetheless the request was received by [REDACTED] solicitor who is deemed to have been acting on his behalf. The failure to comply was a breach of Rule F3.

41. Looking at the evidence in its entirety the Commission finds that the FA has not made out the charge of Use to the high standard required. In the judgment of the Commission there are alternative explanations to the points made by the FA and the adverse inference that is sought to be drawn is not strong enough on the evidence of this case to meet that standard so as to prove Use.

Sanctions

42. The Commission is therefore dealing with a case of a 15 year-old with no anti-doping education at all. A pen and capped needles were placed into his possession by someone. The pen contained a Prohibited Substance and the player remained in possession of that pen for a period of at least several weeks but did not actually use it. He used the needles for a purpose related to his phone but not to inject himself. The Commission in considering the issue of intention, as defined in the rules, notes that the burden of proof is on the player to prove on the balance of probabilities that the breach was not intentional as that is defined in the rules and as explained in the NADP Appeal Board decision of Goodfellow v Rugby Football Union SR/063/2020 (see §20-26). The Commission finds on the balance of probabilities that the player did not possess the requisite intention. He did not know that the pen contained a Prohibited Substance or that there was risk that it might. He made no attempt to hide the pen or the needles which, with caps in place, were left on the floor for ██████████ to pick up. There was no indication in the evidence that ██████████ was ever evasive with ██████████ about the pen or the needles. Had he known that what he was doing was or might run the risk of being a breach of the rules his behaviour would likely have been very different. Further, his information about the pen appears to have been incorrect. On 11 December 2019 he informed ██████████ that the pen was empty and she could throw it out. That was before the Club was aware or anyone raised an issue about the pen. In fact the pen was not empty – it had one sixth of its contents left in it. If ██████████ had any interest in the pen, whether using it or otherwise, he would not have said it was empty and would not have asked for it to be thrown out.

43. The player seeks to rely upon various bases to reduce the sanction. The Commission can immediately dismiss the argument that there was No Fault or Negligence in his case. The player has not established that on the balance of probabilities he “could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an Anti-Doping Rule” (underlining added). The contents of the pen could have been researched quite easily with an internet search and also easily identified as a Prohibited Substance. Further given the findings that the Commission makes, there is no basis for saying that the sanction imposed by the rules would be disproportionate. The rules themselves provide a code which provides for proportionate penalties and there is no basis for suggesting that this case falls outside of it.
44. The Commission finds that the player has established that there was No Significant Fault or Negligence. The player was a Minor, he was 15 at the time and was provided with no education on anti-doping. He was in possession of a pen, which he did not use, for a period of at least several weeks and then, prior to any confrontation or raising of any concern, he asked an adult to dispose of it. Fault as it is defined in the rules requires consideration of all the circumstances and these include whether the player was a Minor, which he was. It also requires consideration of the degree of risk that should have been perceived by the player which is relevant to the total absence of any anti-doping education in his case. The host did not realise it was a Prohibited Substance and, without any anti-doping education, that was understandable. The two representatives from the Club who attended on 11 December did not know the pen contained a Prohibited Substance and it is notable that at least one representative from the Club did have some anti-doping education.
45. Given the finding of No Significant Fault or Negligence the Commission applies the amendment to the Code which has effect from 1 January 2021. There is a broad discretion to reflect the degree of Fault as the player was under 16 when the ADRV was committed taking into account the circumstances of the case. The Commission takes into account all of the matters set out above. Balancing the various factors and taking

into account the mitigating factors the Commission concludes that the appropriate period of suspension is one of 9 months in respect of possession and a period of 3 months in respect of the breach of F3, these periods are concurrent. The decision to make the sanctions concurrent is a reflection of the Commission's view of the totality of the sanction, the overall seriousness of the charges and that the failure to provide the mobile phone, whilst there is substantial mitigation, also aggravates albeit to a limited extent the ADRV. Therefore the total period of suspension is 9 months from the date of provisional suspension, namely 7 August 2020, and will end on 7 May 2021.

46. The FA has not requested any financial penalty or costs. The hearing fee is forfeited.

Conclusion

47. The Commission finds the player to be in breach of Regulation 8(a) of The FA's Anti-Doping Regulations 2019/20 and also in breach of FA Rule F3.

48. In respect of the breach of Regulation 8(a) of The FA's Anti-Doping Regulations 2019/20 the player is suspended from all football activity for a period of 9 months from 7 August 2020 until 23:59 on 7 May 2021.

49. In respect of the breach of FA Rule 3 the player is suspended from all football activity for a period of 3 months from 7 August 2020 until 23:59 on 7 November 2020 which suspension is concurrent with that set out in paragraph 48.

50. The hearing fee is forfeited.



David Casement QC - Chairman

Udo Onwere

Matt Williams

12 January 2021