

IN THE MATTER OF A FOOTBALL ASSOCIATION
INDEPENDENT REGULATORY COMMISSION

B E T W E E N :-

THE FOOTBALL ASSOCIATION

and

KIKO CASILLA

DECISION AND WRITTEN REASONS
OF THE INDEPENDENT REGULATORY COMMISSION
AND
DECISION AND WRITTEN REASONS ON PENALTY
OF THE INDEPENDENT REGULATORY COMMISSION

Regulatory Commission	Graeme McPherson QC (Chairperson) Marvin Robinson (Independent Football Panel Member) Stuart Ripley (Independent Football Panel Member)
Secretary to Regulatory Commission	Michael O'Connor (Regulatory Commissions & Appeals Officer)
Date	19 & 20 February 2020
Venue	Wembley Stadium
Appearances	<p><u>For the FA</u> Yousif Elagab (Barrister for the FA) Sam Shurey (Barrister for the FA)</p> <p><u>Observers (the FA)</u> Tom Courtney (FA Regulatory Legal Administrator) Barney Ellis (Senior Legal Counsel, West Bromwich Albion FC) Luke Dowling (Technical Director, West Bromwich Albion FC) Neil Pugh (FA Integrity Investigator)</p> <p><u>For Mr Casilla</u> Ian Mill QC (Leading Counsel) Philip Edmondson (Solicitor, McCormicks)</p> <p><u>Observers (Mr Casilla)</u> Angus Kinnear (Managing Director, Leeds United FC) Hannah Cox (Club Secretary, Leeds United FC) Valeria Luna (Interpreter) James Mooney (Head of Communications, Leeds United FC)</p>
Witnesses	<p><u>For the FA</u> Jonathan Leko (West Bromwich Albion FC) Eddie Nketiah (Arsenal FC) [<i>via Webex</i>] Macauley Bonne (Charlton Athletic FC) Johnnie Jackson (Charlton Athletic FC) John Brooks (Match Official)</p> <p><u>For Mr Casilla</u> Kiko Casilla (Leeds United FC) Ben White (Leeds United FC) Kalvin Phillips (Leeds United FC) Liam Cooper (Leeds United FC) Gaetano Berardi (Leeds United FC) Tyler Roberts (Leeds United FC) Matthew Grice (Leeds United FC) Adam Forshaw (Leeds United FC) [<i>via Webex</i>]</p>

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(A) Introduction

i) The Incident

- 1) On 28 September 2019 Leeds United FC (*'LUFC'*) played Charlton Athletic FC (*'CAFC'*) in the Football League Championship (*'the match'*). The match took place at CAFC's home ground, The Valley.
- 2) Jonathan Leko (*'JL'*) played centre forward for CAFC during the match. Francisco Casilla Cortes – known to friends, family and colleagues as Kiko Casilla (*'KC'*) - played in goal for LUFC during the match.
- 3) Shortly before the 72nd minute CAFC won a corner (*'the Corner'*). Prior to the Corner being taken there was an altercation – which we describe in greater detail below – between JL and KC in which John Brooks (*'the Match Referee'*) intervened.
- 4) The Corner was then taken in the 72nd minute of the match, and KC punched the ball clear. It is alleged by the FA that immediately thereafter KC audibly directed at JL the words *'you fucking nigger'*. In these Written Reasons we refer to that alleged use of those words as *'the Incident'*.

ii) The Charge

- 5) By letter dated 4 November 2019 the FA charged KC with Misconduct for a breach of FA Rule E3 (*'the Charge'*). The FA alleged that
'... in or around the 72nd minute of [the match] [KC] used abusive and/or insulting words towards [JL], contrary to Rule E3(1). It is further alleged that this breach of Rule E3(1) is an 'Aggravated Breach' as defined in Rule E3(2), as you made reference to race and/or colour and/or ethnic origin.'
- 6) FA Rule E3(1) provides 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 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.'

FA Rule E3(2) provides

'A breach of Rule E3(1) is an "Aggravated Breach" where it includes a reference, whether express or implied, to any one of more of the following: ethnic origin,

colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability.'

- 7) With the Charge the FA served *inter alia*
- a) A witness statement from JL
 - b) A witness statement Eddie Nketiah ('**EN**'). EN played in the match for LUFC, although by the time of the hearing before us he had returned to Arsenal FC, from whom he had been on loan to LUFC at the relevant time
 - c) A witness statement from Macauley Bonne ('**MB**'). MB played in the match for CAFC
 - d) A witness statement from the Match Referee
 - e) A witness statement from Johnnie Jackson ('**JJ**'). JJ is the Assistant Manager of CAFC
 - f) A witness statement from Neil Pugh, an FA Integrity Investigator, which exhibited
 - i) The transcript of an interview that had taken place with KC on 24 October 2019 ('**KC's interview**')¹
 - ii) The Match Referee's Extraordinary Incident Report Form
 - iii) The Match Referee's original notes from the match
 - iv) A screenshot of a WhatsApp conversation between JL and Tyler Roberts (of LUFC) that had taken place shortly after the match
 - v) Certain video footage of the match before, during and after the Incident ('**the FA footage**').
- 8) The FA also served as Unused Material
- a) A signed witness statement from Adam Forshaw ('**AF**'). AF had played in the match for LUFC, and
 - b) A draft, unsigned witness statement for Matt Grice ('**MG**'). MG is the LUFC Team Manager.

iii) KC's response to the Charge

- 9) By his '*Disciplinary Proceedings: Reply Form*' dated 25 November 2019 KC
- a) Denied the Charge, and

¹ The exhibit was an English translation of that interview. With the Charge the FA also served a Spanish transcript of that interview. As we describe further below, it subsequently emerged that both the English and Spanish versions of the transcript contained errors and inaccuracies. Further, accurate versions of both were therefore subsequently produced, and it is those accurate versions to which reference was made during the hearing and which we considered for the purpose of reaching our Decision.

b) Requested a personal hearing before an Independent Regulatory Commission.

By email dated 4 December 2019 those representing KC clarified (at the FA's request) the basis upon which KC denied the Charge. That email explained *inter alia* that KC denied using the words attributed to him (or using any abusive or insulting words towards JL) during the match.

10) Prior to the hearing KC served

- a) A witness statement from KC, together with 2 exhibits
- b) A further witness statement from EN
- c) A witness statement from Ben White ('**BW**'). BW – who was at the relevant time on loan from Brighton & Hove Albion - played in the match for LUFC
- d) A witness statement from Kalvin Phillips ('**KP**'). KP played in the match for LUFC
- e) A witness statement from Liam Cooper ('**LC**'). LC played in the match for LUFC
- f) A witness statement from Gaetano Berardi ('**GB**'). LC was an unused substitute for LUFC in the match
- g) A further witness statement from AF
- h) A witness statement from Tyler Roberts ('**TR**'). TR was an unused substitute for LUFC in the match
- i) A witness statement for MG. That statement made reference to the draft statement served by the FA, and *inter alia* clarified one aspect of that draft statement
- j) A witness statement from Marcelo Bielsa ('**MB**'). MB is the Head Coach of LUFC
- k) A witness statement from Pablo Hernandez ('**PH**'). PH is a LUFC player, although he did not play in (or travel to) the match
- l) Letters and emails from
 - i) Thomas N'Kono ('**TK**'). TK is the goalkeeping coach at Espanyol in Spain
 - ii) Mubarak Wakaso ('**MW**'). MW plays for Alaves in Spain
 - iii) Kemar Roofe ('**KR**'). KR plays for Anderlecht in Belgium
 - iv) Jose Maria Garcia Tomas ('**JMGT**'). JMGT is the Director of Human Resources at Real Madrid in Spain
 - v) Rafael Benitez ('**RB**'). RB is the Head Coach of Dalian Yifang in China
 - vi) The first team squad at LUFC.

iv) Certain pre-hearing procedural matters

- 11) Prior to the hearing
 - a) Those representing KC identified various errors in the versions of the transcripts of KC's interview that had been served by the FA. *Inter alia*
 - i) The Spanish translation was an inaccurate record of what had been said in Spanish
 - ii) The English translation was an inaccurate translation of what had been said in Spanish, and also
 - (1) Wrongly recorded certain words that had been spoken in English, and
 - (2) Wrongly attributed to identified individuals certain words that had in fact been spoken by different individuals present at KC's interview
 - b) Efforts were accordingly made – for which we are extremely grateful – to prepare and agree accurate Spanish and English versions of the transcript of KC's interview.
- 12) In addition, the FA and those representing KC agreed
 - a) That the witness statements of PH and MB were to be taken by us 'as read' at the hearing, and
 - b) That EN and AF would (for different reasons) give their evidence by Webex.Both matters were acceptable to us.
- 13) Shortly before the hearing we received short written skeleton arguments on behalf of the FA and on behalf of KC, together with copies of the various authorities referred to therein. We read those skeleton arguments, together with all of the evidence and documentary materials, before the hearing began. We also watched the FA footage, and certain YouTube footage that formed part of the evidence (see below), before the hearing began.

v) The hearing

- 14) The personal hearing of the Charge requested by KC took place before us at Wembley on Wednesday 19 and Thursday 20 February 2020:
 - a) On Wednesday 19 February 2020 we heard
 - i) Brief oral opening submissions on behalf of each party

- ii) Oral evidence
 - (1) (on behalf of the FA) from JL, EN (by Webex), MB, JJ and JB
 - (2) (on behalf of KC) KC², BW, KP, LC, GB, TR, MG and AFall of whom were cross-examined

- b) On Thursday 20 February 2020 we heard oral closing submissions on behalf of each party

- c) We also viewed video clips which showed the match in the minutes before and after the Incident. We viewed
 - i) The FA footage
 - ii) A YouTube video taken by a member of the crowd from behind KC's goal (*'the YouTube footage'*).

- 15) At the conclusion of the hearing we informed the parties that we intended to reserve our Decision and to provide our Decision with Written Reasons in due course. This is now our Decision and Written Reasons. Before setting them out, we confirm that prior to reaching our Decision and in the course of preparing these Written Reasons we considered with great care the entirety of the materials, the written and oral evidence and the submissions that each party put before us.³ If we do not explicitly refer to a particular document, piece of evidence or submission below, it should not be inferred that we have overlooked or ignored it; as we say, we have considered the entirety of the materials put before us.

(B) Certain preliminary matters

- 16) It was common ground between the parties
 - a) That the words '*you fucking nigger*' are abusive and insulting,
 - b) That a breach of FA Rule E3(1) would be committed by a Participant who addressed such words to a Player, and

² KC gave his evidence in Spanish. His evidence was simultaneously translated into English for the benefit of those at the hearing, including us, who are not Spanish speakers. All other witnesses gave their evidence in English. Their evidence was simultaneously translated into Spanish for the benefit of the Spanish speakers at the hearing. We found the simultaneous translation to be extremely helpful in this case.

³ In that regard we were greatly assisted by the transcript of the evidence and submissions with which we were provided.

- c) That such breach would be an ‘Aggravated Breach’ as defined in FA Rule E3(2), because the words used make reference to race, colour and/or ethnic origin.
- 17) It thus followed that the central issue for us to determine was whether the Incident had in fact occurred as alleged by the FA – in particular, as it was put on behalf of KC in his Skeleton Argument
- a) Whether the words ‘*you fucking nigger*’ had been uttered during the Incident
 - b) Whether those words had been uttered by KC
 - c) Whether those words had been addressed to/at JL.
- 18) The burden of establishing the Charge – and of establishing each of those matters – of course rests with the FA. There is no burden on KC to prove or disprove anything.
- 19) The standard to which the FA must prove the Charge – and thus each of those matters - is the balance of probabilities: FA Disciplinary Regulations: General Provisions - Regulation 8).
- 20) We heard submissions as to the approach that we should adopt (as a number of previous Regulatory Commissions have adopted) when considering whether the FA had proved the Charge to that requisite standard:
- a) First, that the civil burden of ‘balance of probabilities’ should be applied ‘*flexibly*’, such that the more serious the allegation and/or the more serious the consequences if the allegation is proved, the stronger (or more cogent) must be the evidence before the tribunal should find the allegation proved on the balance of probabilities: see *R(N) v Mental Health Review Tribunal (Northern Regions) & Others* [2005] EWCA Civ 1605 @ paras 62-64 per Richards LJ
 - b) Secondly, that the more serious the allegation, the less likely it is that it occurred i.e. the inherent improbability of an event should be taken into account when weighing the probabilities and deciding whether on balance an event occurred: see *In Re H and Others (Minors)* [1996] AC 563 @ 586 per Lord Nicholls:
 - i) That dictum has been clarified in subsequent authorities

- ii) Contrary to what was suggested for a period after *In Re H*, Lord Nicholls was not saying that a ‘*heightened standard of proof*’ was applicable where allegations were serious. *In Re H* simply establishes that, if an event is inherently improbable, it will take better evidence to persuade a tribunal that it had happened than would be required if an event was a commonplace one: see for example *Re B (Children)* [2009] 1 AC 11 @ paras 13-15 per Lord Hoffman; *Re S-B* [2009] UKSC 17 per Lady Hale
 - iii) A tribunal must take care when working out what in a particular case is inherently probable or improbable: see for example *JSC BM Bank v Kekhman* [2018] EWHC 79 per Bryan J
 - (1) ‘*when considering what is or is not probable it is necessary to have regard to the facts of the particular case*’,⁴ since those facts may well modify what otherwise would have been an ‘inherent probability’ or ‘inherent improbability’ [paragraph 57]
 - (2) ‘*it is generally correct that, absent other information,⁵ the more serious the wrongdoing, the less likely it is that it was carried out, because most people are not serious wrongdoers*’ (emphasis added by us) [paragraph 50(3)].
- 21) In light of the above, we confirm that our assessment of the evidence presented to us proceeded on the basis
- a) That the standard of proof that we were to apply was the balance of probabilities, but
 - b) That given the gravity of the allegation and Charge (which we accept are of a serious nature, with potentially serious consequences for KC, his reputation and his career) we were obliged to ask ourselves
 - i) Whether there was an inherent improbability that KC would have used the words attributed to him
 - ii) If so, whether there was any relevant contextual information or material which might cause us to modify our view as to what was/was not inherently probable or improbable in this case, and in any event

⁴ And at paras 63 *et seq* of the judgment Bryan J referenced certain examples given by Eder J in *Otkritie v Urumov* [2014] EWHC 191 @ para 89 of ‘facts’ which could or would cause a tribunal to modify its view of what was or was not inherently probable or improbable in a particular case

⁵ In *National Bank Trust v Yurov* [2020] EWHC 100 (Comm) @ para 50(3) Bryan J explained that, absent other information, ‘... *more cogent evidence is required to prove fraud than to prove negligence or innocence because the evidence has to outweigh the countervailing inherent improbability*’

iii) Whether the evidence was sufficiently cogent and compelling for us to find the Charge proved in light of the guidance in cases such as R(N) v Mental Health Review Tribunal (Northern Regions) & Others.

22) It was also submitted on behalf of KC that

- a) In circumstances where the allegation is of a very serious nature and reputational and career consequences for KC are ‘*of the gravest character*’, we should look at the evidence ‘*more critically and anxiously than would otherwise be the case*’⁶, and
- b) That we should therefore in this case subject the evidence adduced by the FA to ‘*the greatest possible critical scrutiny and give it the most anxious consideration*’.

23) That is what we have done. In doing so, we have also reminded ourselves of the cautionary dicta to be found in the authorities which emphasise

- a) The fallibility of memories of witnesses, and the fact that persons can convince themselves of the veracity of false recollections of events, and retain confidence in their false recollection
- b) That a fact-finding tribunal’s own ability to evaluate the honesty and reliability of evidence merely from a witness’s demeanour can similarly be fallible
- c) That accordingly, where possible, a fact-finding tribunal should rely on contemporaneous, objectively-provable factual evidence (such as contemporaneous or near-contemporaneous documents or other records) or, if such material is not available, to the inherent plausibility or implausibility of witnesses’ accounts.⁷

24) Against that background, we turn to the factual matters in issue.

(C) Some preliminary factual findings about KC

i) KC’s career

25) KC is 33 years old. He has played the majority of his career in Spain:

⁶ See Re D (Secretary of State for Northern Ireland Intervening) [2008] UKHL 33 per Lord Carswell @ para 28

⁷ See for example the observations of Moore-Bick LJ in Jafari-Fini v Skillglass Ltd [2007] ESCA Civ 261 @ paras 76 & 80

- a) Between 2004 and 2007 he played for Real Madrid's C and B teams
- b) Between 2007 and 2015 he played for Espanyol (in various teams), and also had loan spells with Cadiz and Cartagena. During that time he also won 1 cap for Spain
- c) In 2015 he rejoined Real Madrid, for whom (although primarily the reserve goalkeeper) he made multiple league, cup and Champions League appearances.

We accept that KC had a long and distinguished footballing career in Spain.

- 26) In January 2019 KC joined LUFC. That was the first occasion on which he had played for a club outside Spain.

ii) KC's attitude to matters such as ethnic origin, colour and nationality

- 27) It is important that we record at the outset of this section of our Written Reasons that it was no part of the FA's case that KC is a racist.

- 28) We heard evidence from KC (and others) about what we loosely term KC's attitude towards matters such as ethnic origin, colour and nationality. From that evidence – almost all of which was unchallenged - we concluded that there was no reason for us to conclude that KC lacked appropriate understanding or sensitivity about such matters:

- a) His witness statement recorded that he has '*too much education, experience, international travel, teammates and coaches from all sorts of countries whom I respect and love*' to use language such as that alleged in the Incident
- b) He describes himself as an '*internationalist [who] thinks it is excellent that my family and I get to interact with families of different origins, cultures, races and belief systems*'.

- 29) In support of that position KC made particular reference to 2 individuals who have had a significant influence on his career:

- a) The first was Thomas N'Kono ('*TNK*'). In 1982 TNK became the first black goalkeeper to play first class football in Europe. He went on to represent Cameroon over 100 times. More recently, he has been goalkeeping coach at Espanyol, where he trained and mentored KC:

- i) KC's evidence in his witness statement was that he has the '*deepest respect for [TNK's] professional skill, what he represents and who he is as a person*'
 - ii) TNK has provided a character reference for KC in extremely positive terms – he referenced his respect towards colleagues, his leadership skills and his '*explanatory (sic)*⁸ *moral conduct [and] professional behaviour*'. TNK's view is that he '*simply cannot believe*' that KC would use language of the kind said to have been used in the Incident
- b) The second was Mubarak Wakaso ('*MW*'). MW is Ghanaian. He played alongside KC at Espanyol for a season in 2012/13. They roomed together at away games. They were and remain close friends; their families are close:
- i) KC's evidence in his witness statement was that he had learned a great deal from MW – a practising Muslim – about respecting different approaches to religions
 - ii) MW also provided a character reference for KC in very positive terms. Once again, MW finds it '*impossible to think*' that KC would have used the language attributed to him.
- 30) We also heard and read evidence from numerous other individuals that was supportive of KC and whose gist was
- a) That they had themselves never witnessed KC use language that made improper reference to ethnic origin, colour or nationality, and
 - b) That they would be extremely surprised if KC had used such language.

iii) KC's disciplinary record

- 31) KC told us of his disciplinary record while at LUFC and of his attitude to discipline generally. None of the red and yellow cards that he has received have been for matters of any relevance to the Charge. Indeed, quite the reverse is true; there was no evidence that KC was prone to using threatening, abusive, indecent or insulting words or behaviour during matches.

iv) The relevance of the above matters

- 32) In light of that evidence we accept and find

⁸ We have assumed that this was intended to read '*exemplary*'

- a) That KC is not someone who has historically demonstrated an attitude towards matters such as ethnic origin, colour and nationality that is in any way open to criticism, and so
 - b) That for KC to have used language such as that now alleged by the FA to have been used by him in the Incident would have been wholly out of character.
- 33) We also concluded (applying the legal test to which we have referred above)
- a) That there was indeed an inherent improbability that KC would have used the words attributed to him by the FA
 - b) That that was an important factor to be taken into account when weighing the probabilities and deciding whether the Incident had, on balance and applying the relevant legal principles described above, occurred as alleged by the FA
 - c) That absent sufficiently cogent and compelling evidence to adequately rebut that inherent improbability, the Charge should be dismissed.
- 34) In reaching that conclusion we took into account each of the matters set out at paragraph 10 of the skeleton argument submitted on behalf of KC.

v) KC's ability to communicate in English

- 35) KC moved to LUFC – and away from Spain for the first time – in January 2019. At that time, apart from a basic school education in Spain, he had never learned or spoken English. Since joining LUFC (on his evidence)
- a) He has learned relatively little English – mainly basic words relating to football (enabling him to have a basic interaction with English-speaking teammates in training and matches), including swear words as emphasis when he wishes teammates to react more quickly or urgently. His evidence was that he cannot hold a conversation with someone who does not speak Spanish and, although he understands a little English when it is spoken to him, he cannot reply in English due to the limitations in his English vocabulary
 - b) He generally uses an interpreter (usually a bilingual player or member of the LUFC management or coaching staff) to translate if he needs to hold a conversation with an English speaker. MG frequently fulfils that role.

36) Importantly in the context of the Charge KC's position was that, prior to being interviewed by the FA as part of the investigation that led to the Charge

- a) He was unaware of the existence of the English word '*nigger*', and
- b) (As inevitably follows from his claimed ignorance of that word *per se*) he was unaware of the meaning or connotations of that English word.

His evidence was that it was only during KC's interview on 24 October 2019 that he learned that the word '*nigger*' existed.⁹

37) As we explain further below, we did not accept KC's evidence in that regard. We concluded that, contrary to his claims

- a) KC was aware of the English word '*nigger*' prior to 24 October 2019 (and in particular, was aware of that word as at the date of the match), and
- b) KC was aware of the meaning and connotation of that word, and that it was a racial insult.

(D) Further factual findings about certain background matters

i) The match per se

38) There was no evidence before us of any 'history' between LUFC and CAFC. There was no suggestion that tensions between the teams were heightened before the match.

39) In his witness statement JJ suggested that the CAFC coaching team had, during the second half of the match, perceived that LUFC players were trying to '*target*' JL in order to '*wind him up*' and potentially get him sent off. He described that as '*just ... a feeling*' that those on the CAFC bench had had. His statement suggested that the CAFC coaching team '*may*' have told JL during the second half to '*make sure he stays calm*'.

40) To a man, the LUFC players from whom we heard evidence denied

- a) That they had been told to engage in any such tactics during the match, and
- b) That they had in fact engaged in any such tactics during the match.

⁹ He explained in his witness statement that, while he was familiar with the Spanish word '*negro*' – which he describes as a word that '*can be acceptable to use towards people you know in a friendly way in some countries which speak Spanish*' – he maintained that that was still '*not a good word to use. It can be misunderstood if you use it with the wrong tone, even in Spanish*' and explained that he '*would not risk insulting somebody by using it in a way that could be interpreted as insulting*'.

Evidence in the same terms was given by MG, the LUFC Team Manager, and also by MB, the LUFC Head Coach, in his witness statement.

- 41) We reject any suggestion that LUFC had been deliberately attempting to ‘target’ or ‘wind up’ JL (or any other CAFC player) during the match:
- a) Given that the FA had already agreed that we should take MB’s statement ‘*as read*’, the FA implicitly accepted that no such instruction had been given by MB
 - b) There was no evidence that MG or any other member of the LUFC management or coaching staff gave such an instruction, and we find that none of them in fact gave such an instruction
 - c) We saw no reason to disbelieve the evidence given by each of the LUFC players to the effect that they were unaware of any such instruction having been given
 - d) No evidence was given before us to suggest that, prior to the Corner (to which we turn below), there had been anything ‘out of the ordinary’ with the match:
 - i) There was no evidence that the match had been particularly acrimonious
 - ii) There was no evidence
 - (1) That JL had been fouled excessively or with an unusual frequency
 - (2) That JL had in fact been the target of an unusual amount or degree of attention from LUFC players
 - iii) The only ‘incident’ mentioned by JL during the match in which he had been involved (prior to the Corner) was an occasion during the second half when an LUFC player had stood on his toe. That had led to words between them, but (in his words) ‘*it ended up with us shaking hands and that was it ... it wasn’t a major issue and didn’t carry on*’.

ii) JL and KC

- 42) Prior to the match JL and KC had never met or played against each other:

- a) KC moved to LUFC in January 2019. He played regularly for LUFC for the remainder of the 2018/19 season and during that part of the 2019/20 season which preceded the match
 - b) During the 2018/19 season JL played for West Bromwich Albion FC. JL did not however play in the fixture that took place between West Bromwich Albion FC and LUFC on 1 March 2019
 - c) The match was the first occasion on which CAFC (to whom JL moved on loan during the summer of 2019) played LUFC during the 2019/20 season.
- 43) Indeed
- a) JL's evidence was that prior to the match he did not know KC's name, and
 - b) KC's evidence was that prior to the match he did not JL's name.
- 44) It was also common ground that until the Corner there had been no unusual or significant interactions between JL and KC during the match.
- 45) To put it colloquially, prior to the Corner there had been no 'bad blood' between JL and KC.

(E) Factual findings about what happened in the period immediately before the Corner

- 46) JL's role at corners was to stand close to and in front of KC - that was what he had been instructed to do¹⁰ - before getting to the front post and flick on the ball.
- 47) KC was not surprised that a CAFC player had been instructed to perform that role; it is common for attacking players at corners to stand so as to obstruct him from moving towards where the ball might arrive from the corner. He was not annoyed or irritated by JL's presence there *per se*.

¹⁰ During KC's interview the FA explored with KC whether JL carrying out this role might have led to KC having become annoyed with JL during the match prior to the 72nd minute. However, that was not the case, not least because the Corner was one of only two corners won by CAFC during the match, and so it does not appear that JL in fact had cause to play this role during the match prior to the matters that we describe in this section of the Decision.

48) It is common ground that before the Corner was taken there was an altercation between JL and KC:

- a) JL, KC and others gave evidence about that altercation
- b) The altercation can be seen in the FA footage
- c) The period immediately after the altercation can be seen in the YouTube footage.

However, exactly what happened during that altercation, and the extent (if any) to which the altercation might have impacted on KC, was very much in issue. It was therefore necessary for us to analyse the evidence about the altercation with care, which we did. We set out below a summary of the evidence given in relation to the altercation, before then setting out our conclusions in relation thereto.

i) JL's evidence

49) In his witness statement JL described the altercation as follows:

- a) *'The keeper had his hand on my upper arm and I slapped his hand away to get him off me'*
- b) *'He [KC] then grabbed my hand and we have said a few words to each other'*
- c) *'I remember him looking at the name on my shirt and said "Leko ? Who's Leko ?" as if to show that he doesn't know who I am'. JL's evidence*
 - i) was that KC spoke those words in English, and
 - ii) was that those words were part of *'quite a lot of conversation prior to the corner being taken'*, albeit that he was unable to recall the specifics of anything further said by KC prior to the Corner
- d) *'I started laughing in his face and said "I have never heard of you, I don't know who you are"'*
- e) *'We were kind of in each other's face and so the referee has come over and told us to stop. Due to the fact that I had been involved in the previous scuffle with the centre half¹¹ he said I need to calm down or I'd be booked. I replied by saying I haven't done anything and that was the end of it'.*

50) JL gave oral evidence about the altercation:

¹¹ A reference to the earlier incident that JL recalled with an LUFC player who had stood on his foot, leading to words being exchanged between them.

- a) In his evidence in chief he described it as *'a little argument'*
- b) He repeated that description in cross-examination. He also described it as
 - i) *'a little scuffle'*, and
 - ii) *'a little more than [a little banter]'*
- c) He confirmed that even after the Match Referee had spoken to him and KC, they were *'still like going back and forth', 'still talking, ... still arguing'*
- d) He stood by his recollection that KC
 - i) had said *'Leko, who is Leko ?'*, and
 - ii) had also said other things that he could not remember
- e) He stated that he believed the altercation had made KC angry or annoyed, although it had not made him (JL) angry. As was identified on behalf of KC, that was not something that he had said in his witness statement or in his evidence in chief
- f) He disputed the suggestion put to him that a *'pat on the back'* from KC after the Match Referee had spoken to them both, visible in the FA footage, had been friendly
- g) In answer to questions from us at the end of his oral evidence, JL also stated that KC had pulled his shirt. As was pointed out on behalf of KC, that was not something that JL had ever asserted previously.
- h) He stated that the referee had warned him along the lines of *'you are on a yellow, so just calm down, or something along them lines'*:
 - i) JL had not in fact been cautioned during the match, and so was not *'on a yellow'*
 - ii) JL accepted that his recollection (and thus his evidence) in that regard was wrong, and that the referee had in fact just warned him and KC to calm down

ii) EN's evidence

51) In his witness statement EN stated

'[I] noticed [KC] was involved in a bit of back and forward with [JL]. I think that JL was backing into KC and KC was moving him off him. I think there were a few

words which were being said between the two of them, but I don't recall hearing anything specific as this was just normal behaviour at a corner. I recall that the referee came over to speak to them, but I assumed that this was because of the back and forth that I just described. I couldn't hear what the referee said to them'.

- 52) EN also referenced the altercation in his oral evidence. He described having heard JL and KC *'swear at each other ... I just remember hearing swear words ... chit chat throughout the corner being taken'*.

iii) MB's evidence

- 53) In his witness statement MB stated

'... I heard JL and [KC] having a few verbals with each other. I heard [KC] say 'who are you ?' but it was just usual banter and I don't remember much else that was said between them. The Referee came over and told them both to stop it, and that was about it.'

- 54) In cross-examination he stood by that evidence – that he had heard each of JL and KC saying *'Who are you ? Who are you ?'* to each other, and that that was normal and nothing out of the ordinary in a football match.

iv) Match Referee's evidence

- 55) The Match Referee also described the altercation in his witness statement:

'At 71.35 on my watch I had to intervene in a minor verbal altercation between JL and [KC] just prior to a corner being taken. When I went over to the two players I told them not to commit a stupid foul and that I was watching them. That message was given to both players equally.'

- 56) He confirmed in his oral evidence that that was *'very normal for a corner kick situation'*.

v) KC's evidence

- 57) In KC's interview KC described the moments before the Corner in the following terms:

'I touched [JL] just to indicate to a teammate that he should be marked by one of ... So just touching him on the shoulder like I was indicating, just to indicate to a teammate that 'Look, this guy is free, he's open. So mark him'. So, when I touched him he reacted in a way, with a gesture, he reacted badly with a gesture as if to say 'Get your hand off me', using his elbow. So I said things to him 'What's up ? Who are you to do this ?' I know he said some things to me, but I don't know what they were, because I didn't understand. So I said to him words to the effect of, you know,

'What is your fucking name ?' I did this just so that teammates knew to mark him, with no further connotations. Just that, simply that.'

58) KC also explained in interview

- a) That it was normal for him to touch an opposition player as a way of indicating to his teammates that that player needed marking
- b) That he felt JL's reaction to being touched was *'strange ... if I was pushing him or doing something more I'd be able to understand, but all I was doing was just touching him, and I felt like it was out of proportion. I'd understand if it was different, but I just said to him like 'Look, calm down' ... I didn't say to him 'Calm down' exactly, but it was more in the way I conveyed it. My reaction to this was to just be like 'Look calm down'*
- c) That he had also said words to the effect *'What's your fucking name ?'* or words to that effect. He explained that he had said words to that effect *'a few more times'*
- d) That he had not understood what JL had said to him during the verbal exchange: *'he spoke really fast and I don't speak English'*
- e) That the referee came after *'[JL's] elbow went flying'* in order to *'find out what was going on'* and told them to *'calm down'*. He clarified *'... the referee saw that there were some looks between us, its not like we were facing up to each other but we were close to each other, and the referee took action based on that ... I remember that he came over to get us to calm down and that was that'*
- f) That he had not been annoyed by JL's elbow.

59) When asked in KC's interview about how he viewed the altercation at the time – in particular, whether he viewed it as *'just normal, what goes on at a corner'* KC stated

'... I didn't see it as anything else, other than just a situation where there's a tussle, the referee comes over to tell you to calm down, and then you carry on with the game ... [I felt] normal. It wasn't anything that, you know.'

60) KC further described the moments prior to the Corner in his witness statement. That explanation was consistent with what he had described in interview:

- a) He further explained that, by acting as he did, he was attempting to communicate to JL that he should *'calm down and not act as though he was an important player with a big name who could push me around'*

- b) He explained that the nature of his interaction with JL was not unusual, and indeed was common; he described it as *‘a real non-event ... it was something which happens between teams in most football matches’*
 - c) He emphasised that nothing that had happened before the Corner had made him angry or upset, or caused him to want to continue to insult JL; he was calm.
- 61) KC was cross-examined about the moments prior to the Corner at some length. The evidence that he gave was generally consistent with the evidence that he had given in interview and in his witness statement. In addition
- a) He described the manner in which JL had slapped away his hand as *‘rather aggressive’*
 - b) He accepted that the verbal exchanges with JL had been started by him (KC)
 - c) He described them as a *‘heated exchange of words’*.
- 62) KC was also cross-examined at some length his state of mind during and immediately after the altercation. It was suggested that KC considered that JL was behaving in a manner that was *‘above his level’* and was disrespecting KC. KC rejected those suggestions.
- 63) Before leaving KC’s evidence, it was common ground (as we describe below) that after the match the Match Referee briefly spoke with each of JL and KC separately. KC’s evidence – in his witness statement and orally – was that he had told the Match Referee that he had said *‘what was your fucking name’* or *‘fucking name’* or *‘something like that’*. However
- a) We were provided with a copy of a note that the Match Referee made of that meeting. The relevant part of that note (i.e. the part recording what KC said to the Match Referee) reads *‘No No you are fucking shit, what is your name’* (emphasis added by us)
 - b) It was not suggested to the Match Referee that that note was inaccurate or did not reflect what KC had said
 - c) Although he doubted that he had said to JL *‘you’re fucking shit’*
 - i) He accepted that could not remember either way, but

- ii) He accepted that, if he had used those words, that was ‘*a bit more*’ than just ‘*who are you ?*’. In answer to the question ‘*[Those words are] more pointed than saying ‘Who are you ?’*’ KC responded ‘*Yes, it is more aggressive*’.

vi) The FA footage

64) The Footage shows

- a) The physical exchanges that took place between JL and KC i.e. KC placing a hand on JL, JL swinging an elbow to remove KC’s hand, and KC grabbing JL’s hand,
- b) The Match Referee’s approach to JL and KC, and
- c) The events after the Match Referee intervened, including KC touching JL’s back.

The FA footage of course does not help us know what was said between them.

vii) Our conclusions about the altercation

65) We concluded that, while much of what happened immediately before the Corner was anodyne and not particularly out of the ordinary, JL’s behaviour – particularly in using his elbow as he did and in laughing at KC, all the while saying things to KC which KC largely did not understand – did indeed irritate or needle KC; to put it another way, JL ‘got under KC’s skin’ prior to the Corner. That is consistent

- a) With his description of JL ‘*reacting badly*’ to being touched and with his description of that reaction as ‘*strange*’
- b) With the fact that the verbal exchange that took place between them, instigated by KC, and the ‘facing off’ between them, was sufficiently heated to require intervention by the Match Referee
- c) With the fact that KC had been provoked to use the ‘*more aggressive*’ insult ‘*you are fucking shit*’.

It therefore follows that we did not accept KC’s evidence that he was calm throughout the altercation; he was irritated and annoyed by JL and his behaviour. That annoyance and irritation remained in the immediate aftermath of the Corner.

66) We also concluded that KC wanted to make clear to JL – as he had explained in KC’s interview – that he (JL) should not act as though ‘*he was an important player with a big name who could push [KC] around*’. We find that was not because KC considered himself to be ‘senior to’ or ‘bigger than’ than JL; it was simply because he felt that JL

was acting in a manner that was inappropriate and that JL needed taking down a peg or two.

(F) Analysing the evidence about events immediately after the Corner: did KC say something after the Corner ?

67) The following is clear from the FA footage and the YouTube footage:

- a) The Corner was taken, and the ball was punched clear by KC
- b) The various players who had been in the penalty area – including JL and MB – began to leave the penalty area
- c) Very shortly after KC punched the ball clear MB and JL – the 2 players closest to KC - reacted to something:
 - i) MB (who was closest to KC) turned sharply to face KC and can be seen to say something to KC
 - ii) JL turned his head to the left in the direction of MB. He did not turn fully to face towards KC. He continued jogging out of the penalty area in the direction in which the ball had been punched and remained in play
- d) Play continued until the ball went out for a throw in. During that time
 - i) MB can be seen on the edge of the penalty area having a short verbal exchange with a CAFC player, Mouhamadou-Naby Sarr ('MNS'), and pointing towards KC
 - ii) A few seconds later MB and JL can be seen in relatively close proximity to each other on the edge of the penalty area
 - iii) MB appears to say something to JL – albeit extremely briefly
 - iv) Each then begins to jog back towards the half-way line, with MB moving ahead of JL
 - v) Very shortly thereafter MB waves an arm in the direction of the halfway line, towards the spot where the Match Referee was standing
 - vi) JL runs to the Match Referee (having increased his speed shortly before MB waved his arm) and speaks with the Match Referee near the halfway line for a few seconds
- e) Play then continued again. When the ball next went out of play

- i) The Match Referee can be seen to speak again with JL
- ii) While MB can be seen close to the Match Referee, unfortunately the footage finishes before it can be seen whether MB speaks with the Match Referee
- iii) The Match Referee can be seen leaving the pitch in the direction of the Fourth Official.

68) According to JL and MB

- a) It was immediately after KC had punched the ball clear that each heard him use the words ‘*You fucking nigger*’, and
- b) It was hearing those words that caused each of them to react as they did.

It is therefore possible to pinpoint accurately exactly when it is asserted that KC uttered the words alleged. Neither the FA footage nor the YouTube footage gives a ‘head on’ view of KC at that moment, and so does not enable us to see whether KC in fact uttered anything at all, let alone the words alleged, at that moment.

69) While not ruling out the possibility that KC had said nothing at all after the Corner, in his closing submissions Mr Mill QC for KC accepted that it was more probable than not that KC had said something immediately after he had punched the ball clear. We agree, and we find as a fact that KC did indeed say something, although at this stage we make no observations as to *what* KC said at that time. That is because

- a) We accept the evidence of JL and MB that they each independently heard something. The reactions of JL and (particularly) MB immediately after the punch are consistent with each of them having heard something
- b) EN’s evidence was also that he had heard KC say something after the Corner. We return to his evidence in this regard below
- c) In his closing submissions Mr Mill QC confirmed that he did not suggest that whatever might have been heard had originated from the crowd; it must have come from KC
- d) KC did not (and has never) positively asserted that he said nothing after punching the ball clear. While we return to this below, his position has always been
 - i) That he might have said something, but
 - ii) That he did not utter the words allegedly heard by JL and MB.

70) The critical question is then of course – what did KC say ? In order to determine that question we considered

- a) First, whether we were satisfied to the requisite standard on the evidence before us that JL and/or MB
 - i) Had genuinely heard CK utter something, and
 - ii) Genuinely believed that they had heard KC utter the words ‘*You fucking nigger*’; and if so

- b) Secondly, whether we were satisfied to the requisite standard on the evidence before us that those were the words that had in fact been uttered by KC and heard by JL and/or MB, or whether instead
 - i) Other, innocent words had been uttered by KC, and
 - ii) JL and/or MB had misheard those words as ‘*You fucking nigger*’.

(G) The first part of the critical question: did MB and JL believe that they had heard KC use the words alleged ?

- 71) Although in a letter dated 4 December 2019 those representing KC had reserved the right to argue that the evidence of JL and MB that they had each heard KC use the words ‘*You fucking nigger*’ was not truthful, at the hearing it was not in fact suggested on KC’s part that either JL or MB was being dishonest in the evidence that each gave before us in that regard. Having accepted that it was more likely than not that he had said something after the Corner, KC’s case at the hearing was
 - a) That each of JL and MB had misheard whatever it was that KC had said, and so
 - b) That the belief held by each of them that KC had said ‘*You fucking nigger*’ – while genuinely held – was wrong.

- 72) Although he was not the first witness from whom we heard, we turn first to the evidence given by MB:
 - a) In his witness statement MB stated
 - i) that he heard KC say ‘*you fucking nigger*’ in a loud voice at JL immediately following the Corner, and that it was hearing those words that caused him to react and turn to face KC
 - ii) that as he turned to face KC, he briefly made eye contact with JL, who had looked to his left at the same time

- iii) that after hearing those words, he '*went straight for [KC] and said "what the fuck was that ?"*', in response to which KC uttered something in Spanish which MB could not understand
 - iv) that he was incensed by what he had heard and, for a short while, '*lost the plot*' and would have (to use his word) '*smashed*' KC had the ball gone back into the penalty area
 - v) that a few moments later he had a brief exchange with JL – asking '*you cool, you cool*' – to make sure that JL was all right
 - vi) that he saw JL speak with the Match Referee during the next stoppage in play
 - vii) that he spoke with LUFC's centre half and said '*your goalie is fucked*', but had received no response
 - viii) that when play stopped for a second time a short while later, he ran to the Match Referee himself and told him that KC had '*said something racist*', although he did not believe that he had reported to the Match Referee the exact words used
 - ix) that later in the match, when TR had come onto the pitch as a substitute, he had said to TR '*Geez, your keeper's racist*', but had received no response from TR
 - x) that after the match he had said in the changing room '*it's a fucking shambles*' in relation to what he had heard, which had prompted JL to explain to the CAFC players what had happened
- b) In his evidence in chief MB
- i) Confirmed that he was sure that he had heard the words '*You fucking nigger*' after the Corner and that those words had been uttered loudly by KC
 - ii) Stated that when he turned to face KC he had said '*Oi, don't you fucking say that, mind your words*'
 - iii) Stated that his exchange with JL immediately after the Incident had been limited to asking if JL was OK:
 - (1) He accepted that he had probably shared '*a few more words*' with JL, but
 - (2) He denied that during their exchange he had told JL that KC had said something racist, or had called JL a '*nigger*'; MB's evidence was that '*JL [had] heard it for himself*'
- c) MB stood by his evidence in cross-examination and in answer to questions from us. In particular

- i) He stood by his evidence that he had heard the words ‘*You fucking nigger*’ uttered loudly by KC towards JL
- ii) He stood by his evidence that he had reacted to those words, both by turning towards KC and by swearing at KC. When asked about the discrepancy between how he had described the words used by him towards KC in his witness statement and in his evidence in chief, his answer was that he had been ‘mixed up’
- iii) He stood by his evidence that his verbal exchange with JL following the Incident had been along the lines of ‘*you cool*’ in order to ask JL if he was OK. He maintained a firm denial that he had said to JL anything to the effect that KC was racist, or had made a racist comment, or had used the words now alleged. He did however accept that he had wanted to encourage JL to report the Incident to the Match Referee, hence the gesture with his hand as he and JL were jogging back towards the half-way line when the ball next went out of play
- iv) He identified a short exchange that can be seen on the FA footage between him and MNS a few seconds earlier as being the occasion on which he was wanting the ball put into the penalty area so that he could ‘smash’ KC
- v) He stood by his evidence that he had verbal exchanges with 2 LUFC players¹²
- vi) He stood by his evidence that he had himself spoken to the Match Referee at the second stoppage and said ‘*the keeper is being racist*’, but had not used the actual words that he believed he had heard used by KC. That, he explained, was because he felt uncomfortable using those words.

73) In his closing submissions Mr Mill QC suggested that we should treat MB’s evidence with considerable care. He identified a number of discrepancies and other features in MB’s evidence which, he suggested, should lead us to conclude

¹² Neither of the LUFC players to whom MB stated he had spoken after the Incident had any recollection of MB saying anything to them. However (1) as above, MB identified the first of those individuals simply as the LUFC centre half. BW and LC were the LUFC centre halves during the match. BW had very little recollection of anything relating to the match, we were not impressed by him as a witness, and we were not assisted by his evidence in any material respect. The fact that BW stated that he did not recall any such exchange with MB did not therefore of itself undermine MB’s evidence in that regard to any degree. LC was a more impressive witness, and we accept his denial that MB had made any comment about KC to him during the match. It therefore follows that MB must have spoken to BW, and we accept that he did; (2) MB identified the second of those individuals as TR. TR was not an impressive witness and, save where his evidence was corroborated, we found that we could not safely place weight on it. The fact that TR stated that he did not recall any such exchange with MB did not therefore of itself undermine MB’s evidence in that regard. We accept that MB spoke with TR as he claimed.

- a) That MB's confidence in his own recollection and evidence was misplaced, and that he had been over-confident and simply wrong on certain key matters, and
 - b) That MB had also exaggerated in certain important respects.
- 74) While we considered that submission with care, we considered that MB was a witness on whose evidence we could place considerable weight:
- a) He gave his evidence in an extremely straightforward way and in our view was an impressive witness
 - b) We find that he did not exaggerate in any material respect, although it is correct that he used figures of speech to emphasise matters¹³
 - c) While it is correct that there were certain internal discrepancies between his statement and his oral evidence, those were moderate and, when it was apparent that he had made a mistake, MB was willing to accept that. On the central issues however – in particular, what he believes that he heard after the Corner - MB's evidence was firm and consistent
 - d) We therefore accept that MB genuinely believed at the time, and continues to genuinely believe, that he heard KC utter the words '*You fucking nigger*' at JL immediately after the Corner.
- 75) We turn next to the evidence given by JL:
- a) In his witness statement JL stated
 - i) that he also heard KC say '*you fucking nigger*'
 - ii) that KC said those words '*quite loudly*'
 - iii) that immediately KC said those words, he (JL) saw MB react, turn towards KC and try to talk to KC
 - iv) that his reaction to hearing the words was one of '*complete shock*'

¹³ For example (1) '*Loud enough that I am surprised no one in the stands heard it – didn't hear it*' to emphasise the clarity with which he heard the words uttered by KC (2) '*I can remember this day like it was yesterday*' to emphasise the clarity of his recollection of the Incident.

- v) that while he may have spoken briefly with MB before the ball next went out of play, he could not recall exactly what was said
 - vi) that during the next stoppage in play he told the Match Referee *'the keeper's been racist'*
 - vii) that when play stopped for a second time a short while later, the Match Referee asked him what had happened, to which JL responded that KC had said something racist
 - viii) that the Match Referee had explained that he would deal with the matter after the match
 - ix) that in the tunnel after the match he had encountered KC and *'I recall him talking to me but I didn't really want to listen to what he had had to say. By this point I had calmed down quite a lot and was happy that we had won the game. I wasn't really taking in what KC had said and don't remember any specific words used. He seemed to waffle to me for a few seconds and I don't think I said anything back to him. I do remember that he offered his hand to me to shake, which I did, and it felt like this was kind of an apology but I didn't hear him actually say sorry'*
 - x) that after the match he had spoken to the Match Referee in the Officials' changing room. The Match Referee had asked him what had happened, he (JL) had *'confirmed the comment to him again'* and the Match Referee had written it down
 - xi) that after the match he had exchanged WhatsApp messages with TR:
 - (1) TR had asked whether KC had been racist towards JL
 - (2) JL had answered *'Yo'*
 - (3) In answer to the question *'Said what'*, JL had answered *'U fucking nigga'*
 - (4) In answer to the further question *'You sure fam'*, JL had answered *'Yh fam'*
 - (5) TR had responded *'He said he said whats your fucking name'*
- b) In his evidence in chief JL
- i) Confirmed that he was sure that he had heard KC utter the words *'You fucking nigger'*
 - ii) Explained that those words had caused him to *'[freeze] kind of'*, because he could not believe what he had heard; he *'did not know how to react'* when he heard the words
 - iii) Confirmed that he had looked to his left, which he described as *'back over [his] left shoulder'* in reaction to hearing KC utter the relevant words

- iv) Denied the suggestion that he had not heard KC utter anything, and had instead been told by MB what he (MB) thought he had heard KC say. Indeed, he denied speaking with MB at all after the Incident
 - v) Confirmed that on each occasion he spoke to the Match Referee on the pitch, he had told the Match Referee that KC had been racist
 - vi) Stated that he did now recall KC '*saying that he was sorry*' after the game; he gave that evidence as a correction to his witness statement
 - vii) Confirmed that when he spoke to the Match Referee after the match, he had told him that KC had been racist and what KC had said, and that the Match Referee had written it down
- c) JL stood by his evidence in cross-examination and in answer to questions from us:
- i) He remained adamant that he had heard the words '*You fucking nigger*' uttered loudly by KC towards him
 - ii) While he accepted that he had reacted differently to MB
 - (1) He maintained his position that the look to his left was a reaction to hearing whatever KC had said, not a reaction to seeing MB turn and confront KC
 - (2) He explained that his more subdued reaction than MB was simply because he was shocked at what he had heard, and had not known how to react; that was the first occasion on which he had ever heard anyone use the word '*nigger*'
 - (3) He acknowledged that he had also been thinking about the game, since the ball was still in play
 - iii) He maintained that he was telling the truth about KC having said sorry after the match. He explained
 - (1) That that was something that he had remembered since making his witness statement, and
 - (2) That had KC not apologised, the likelihood is that JL would not have shaken KC's hand
- d) JL was cross-examined about his exchanges, if any, with MB after the Incident – in particular, about the inconsistency between
- i) His witness statement, where he had stated that he may have spoken with MB, although could not recall exactly what had been said
 - ii) His evidence in chief, where he had stated that he had not spoken with MB

- iii) The FA footage, which appears to show a short verbal exchange between MB and him.

By the end of that passage of cross-examination JL accepted that it appeared that MB had said something to him, and had gesticulated to him, shortly after the Incident although he could not remember what had been said. He also accepted that it was possible that MB might have said to him that KC had made a racist comment, and that it was thus MB's words that had caused him to go to talk to the Match Referee. However, he remained firm that the first time that he and MB had spoken about the precise words that each had heard uttered by KC had been in the changing room after the match

- e) JL was also cross-examined about

- i) The words that he had used when reporting the Incident to the Match Referee on the pitch. It was suggested to him

(1) That he had simply said words to the effect of '*the goalkeeper has been racist*', and

(2) That he had not reported to the Match Referee the words said to have been uttered by KC.

JL accepted that the former might well have been the case. In response to that latter suggestion he answered '*I don't think I told him that*'

- ii) Who (out of JL and MB) had first uttered in the changing room after the match the words alleged to have been used by KC. JL was unable to recall, but accepted that it could have been MB

- iii) What he had said in his witness statement about confirming to the Match Referee '*again*' in the Officials' room after the match the words that he had heard used by KC:

(1) It was suggested that in fact that had been the first occasion on which JL had reported the actual words '*You fucking nigger*' to the Match Referee, so that the inclusion of the word '*again*' in his witness statement was a mistake

(2) JL accepted that.

- 76) In his closing submissions Mr Mill QC submitted that we should also treat JL's evidence with considerable care – in particular, that while JL may have heard KC say something, we should not accept JL's evidence that he had clearly heard KC say loudly '*You fucking*

nigger'. In support of that submission he identified a number of instances where he alleged that JL had unjustifiably attempted to entrench or bolster the quality of his evidence. Such instances included

- a) JL's evidence about the altercation prior to the Corner
- b) JL's *volte face* about whether or not KC had apologised to him after the match, as well as proffering his hand to shake
- c) The internal discrepancies in his evidence that we have set out above.

77) While we accept there were certain inconsistencies in aspects of JL's evidence, those related to relatively peripheral aspects of his evidence and did not in our view adversely impact on the quality of his evidence overall or on the central issue of what he believed he had heard.¹⁴ We found him to be a truthful and reliable witness whose evidence we could generally accept at face value. On the central question of whether JL genuinely believed immediately after the Corner that he had heard KC utter the words '*You fucking nigger*' we accept JL's evidence:

- a) JL reacted at the same time as MB. That would suggest that each was reacting to the same external trigger. We do not accept that JL was reacting only to MB's reaction; we find that JL turned his head as a reaction to something that he heard, not as a reaction to something that he saw
- b) While JL's reaction was very different to MB, nothing can be inferred from that. There is no 'right or wrong' way to react to language such as that which JL and MB each believed that they heard. The manner in which JL reacted was, in our view, entirely consistent
 - i) With what we were told about his personality, both by MB and by TR – a very laid back individual

¹⁴ As above, we by and large accepted JL's evidence in relation to the altercation. On the 'apology/handshake' issue however we felt that his evidence was insufficiently cogent for us to conclude with confidence that the word 'sorry' had actually been uttered to him by KC. Instead, we concluded (1) that KC had proffered his hand to JL when JL was walking towards the Officials room after the match (2) that KC had said something while doing so (as JL had stated in his witness statement and as KC accepted), and (3) that JL had – rightly or wrongly - interpreted whatever KC had said while proffering his hand as being an apology for what he (JL) had heard after the Corner, and that is why he shook it. That was also the impression formed by JJ – who witnessed the interaction of KC and JL in the tunnel after the match - of KC's action of proffering his hand to JL.

- ii) With the reaction of shock that JL described, particularly when his mind was at least in part still on the continuing match
 - iii) With how a young man hearing a racial insult for the first time in his life might react
 - iv) With the fact that the ball was still in play, the match was continuing and JL was caught up in the flow of play
 - v) With what we observed of JL when he gave his evidence
- c) JL made a report on the pitch to the Match Referee. He told us that that was the first time in his entire career that he had ever felt it necessary to take such a step. We do not believe that he would have taken that step unless he considered that there was reason for him to do so and that he (rather than someone else) should do so
- d) While the FA footage does show MB saying something to JL when the ball goes out of play, whatever he said was extremely brief, and we do not accept that in that very short exchange MB
- i) Could have informed JL, or did inform JL, that KC had made a racist comment to JL, let alone what that comment might have been, or
 - ii) Could have persuaded JL that he (JL) should report it to the Match Referee.
- In our view it is far more likely that MB said nothing more to JL than to ask whether he was OK, and gestured JL towards the Match Referee;
- e) Had the position been otherwise – for example, had JL in fact only learned at that moment for the first time from MB that he (MB) had allegedly heard KC make a racist remark, when JL had not himself clearly heard a similar remark – matters would in our view have unfolded differently:
- i) A longer exchange between them would have been necessary and would have been inevitable. JL would have asked ‘*what did he say ?*’ in response to any observation by MB that ‘*the keeper has been racist*’, and there is no reason to believe that MB would not have told him. There would have been discussion about telling the Match Referee, and who would/should do so
 - ii) The likelihood is that either JL would have told the Match Referee that MB had heard KC make a racist comment, or that MB would have told the Match Referee himself that he had heard a racist comment. There would have been no reason for JL to claim to the Match Referee – as he did on 3 separate occasions, twice in the

moments after the Incident and once immediately after the match - that he had himself heard a racist comment from KC.

78) There are 2 further pieces of evidence that are consistent with JL having genuinely believed that he had heard KC use the words ‘*You fucking nigger*’ following the Corner:

a) First, those were the words that someone reported to the Match Referee had been uttered by KC:

i) The Match Referee made 2 near-contemporaneous notes:

(1) On the back of his yellow card, during the match itself, he noted ‘*Leko Keeper Nigger*’:

(a) His evidence was that ‘*that was what I was told by [JL]*’. In cross-examination he confirmed that he was ‘*fairly sure*’ that JL had said that KC had ‘*called him a nigger*’

(b) He had no recollection of speaking to/being spoken to by MB about the Incident, although he could not rule out that possibility

(c) Had MB spoken to him about the Incident, he would not have noted that ‘*because [he] already had the same allegation noted from [JL]*’

(2) Of course, as we have set out above, neither JL nor MB recalled reporting to the Match Referee while still on the pitch the exact words that each believed they had heard KC use; indeed, each denied that he had not done so, and recalled that he had simply told the Match Referee that KC had made a racist comment

(3) One or other – or possibly both – must however have reported the word ‘*nigger*’ in order for the Match Referee to have made the note that he did

ii) On a sheet of lined paper in the Officials room after the match he noted that he had been told by JL

‘*J Leko Nigger keeper*

JL + Jonnie Jackson -> ass manager “nigger” – confirmed allegation on field of play. Bonne 17 heard too’ (our emphasis added)

iii) In our view the likelihood is that the source of what the Match Referee recorded in each of those notes was the reports made on the pitch and after the match by JL

b) Secondly, JL confirmed those words during his WhatsApp exchange with TR. JL and TR have known each other for many years. There would have been no reason for JL to

tell TR that he believed KC had used the words ‘*U fucking nigga*’ unless he (JL) genuinely believed he had done so.

79) Accordingly, we reject any suggestion

- a) That JL heard nothing, or
 - b) That JL heard KC say something, but did not hear those words as ‘*you fucking nigger*’.
- As with MB, we accept that JL genuinely believed at the time, and continues to genuinely believe, that he heard KC utter the words ‘*You fucking nigger*’ at him immediately after the Corner.

(H) The second part of the critical question:

Did MB and JL in fact hear KC use the words alleged, or were they mistaken in what they heard ? In other words, what did KC in fact say ?

80) As we have recorded above, by the end of the hearing

- a) The FA’s position was that JL and MB not only genuinely, but also correctly, believed that they had heard KC utter the words ‘*you fucking nigger*’ because KC had in fact uttered those words at an audible level after the Corner, while
- b) KC’s position was that
 - i) He had not uttered those words
 - ii) He had probably uttered something at an audible level after the Corner. Various suggestions were made as to what that might have been. Each suggestion was a variant of what a goalkeeper might shout at his defenders after a corner to encourage them to move up the pitch¹⁵
 - iii) JL and MB must have misheard whatever KC did in fact say after the Corner.

81) As a starting point it might be said

- a) That it would be inherently improbable that an individual might mishear innocent words as ‘*you fucking nigger*’, unless perhaps those innocent words were very similar to those offensive words, and

¹⁵ Such as ‘*Out*’, ‘*Get out*’, ‘*Fucking out*’, ‘*Fucking get out*’, ‘*Up*’ ‘*Fucking get up*’

- b) That it would be even more improbable that 2 individuals might mishear innocent words in that same way.

82) However, that in our view would be a wholly erroneous starting point:

- a) First, English is not KC's first language; while he speaks some words, his pronunciation is (by his own admission) far from perfect and (as we heard from various witnesses) such English as he does speak is accented. It would therefore be unfair on KC for us to 'test' the likelihood of words being misheard simply by comparing English pronunciations of innocent phrases that KC might have shouted at his defenders with English pronunciations of the words alleged to have been uttered
- b) Secondly, if one individual mishears innocent words and believes that he has heard something else, it is perhaps more, not less, likely that a second individual hearing the same innocent words will make the same mistake; the same words are, after all, being heard by both individuals
- c) We therefore started our analysis of this aspect of the evidence with no preconception that it was inherently unlikely that JL and MB might have misheard innocent words uttered by KC as '*you fucking nigger*'. We reached our Decision on the issue of what KC in fact said on the evidence that was presented before us.

i) Our starting point: did KC know the word 'nigger' ?

83) We are of course conscious that the burden of proving the Charge – and thus that KC uttered the words alleged – rests with the FA, and that KC does not bear any burden of proving or disproving anything. However, it is convenient to begin our consideration of this question by considering and determining a central plank of KC's defence, namely his assertion that at the time of the Incident

- a) He was unaware of the English word '*nigger*' – in KC's interview he explained on more than one occasion
 - i) that he '*didn't even know it existed*'. In answer to the question '*You hadn't even heard of the word before this incident*' he replied '*No*';
 - ii) that it was not a word that he had ever heard of at all

b) He *'didn't even know what it meant'* and *'didn't know ... what its connotations are, what it means'*. He did not know that *'nigger'* meant *'negro'* or how that Spanish word would be translated into English.

84) In his witness statement KC further clarified the position. He explained that he did not know what the word *'nigger'* meant *'until [KC's] interview'* i.e. until 24 October 2019, almost 1 month after the match. He repeated that position in answer to a question from the FA early in his cross-examination:

'Q: So at no other time in your life, in this country and in Spain, have you ever come across the word "nigger"'

A: No'.

85) The FA spent a considerable time in cross-examination attempting to undermine KC's evidence in that regard, both

a) Directly, by exploring the extent to which KC might have come across that word during his lifetime, for instance in music or film, and

b) Indirectly, by exploring KC's wider knowledge and use of English swear words.

KC's evidence remained that he had never, prior to 24 October 2019, encountered the word *'nigger'*.

86) Regrettably however we were driven to conclude

a) That we could not accept KC's evidence in that regard, and

b) That as at the date of the match KC was familiar with the word *'nigger'*, and well knew that it was a racial insult.

We did not reach that conclusion because of KC's demeanour or the manner in which he gave his evidence. Nor did we reach that conclusion because we considered it to be inherently improbable that an individual such as KC (i.e. of his age, background and professional footballing experience) would be unaware of that word; we are in no position to assess the inherent probability that a Spanish footballer who has played the vast majority of his football in Spain and who has very limited knowledge of English might or might not know a particular English word, regardless of how notorious that word might be to a native English speaker. Rather we reached that conclusion because in our view that is what the evidence before us, taken as a whole, clearly demonstrated.

- 87) We took as our starting point the first occasion on which (on KC's case) he became aware that an allegation of any sort was being made against him. That occurred after the match
- a) When he was told (while in the changing room) by MG that the Match Referee wished to speak to him. MG's evidence in that regard was
 - i) That when he told KC that the Match Referee wished to speak to him, he (KC) asked – as one might reasonably expect - 'Why ?', but
 - ii) That he (MG) was unable to give any further information to KC at that stage as he (MG) knew nothing other than that there had '*been an allegation*'
 - b) When he then went (with MG) to speak with the Match Referee in the Officials room.
- 88) We heard evidence from 3 sources as to what occurred when the Match Referee spoke with KC and MG after the match:
- a) First, from the Match Referee:
 - i) His witness statement records simply '*I informed [KC] of the allegation. KC stated that he had said 'No no, I said you are fucking shit and what is your name'*
 - ii) His contemporaneous handwritten note records (immediately after the words that we have set out at paragraph 78(a) above, which of course recorded that the word '*nigger*' had been used) '*(MG Team Manager) No No you are fucking shit what is your name*'
 - iii) His Extraordinary Incident Report Form (prepared the morning after the match) records '*I advised [KC] of the allegation by [CAFC] 14 and if he wished to clarify' He said 'no no, I said you are fucking shit and what is your name'*
 - iv) In examination in chief
 - (1) He was asked '*Would you be able to describe whether you told [KC] what the allegation was ?*'
 - (2) He replied '*So obviously the game is now five months ago, but I believe I relayed the allegation that '[JL] has said that you called him a nigger, do you have anything to say*'

When asked ‘*How confident are you that you would have said that to [KC] ?*’ he replied ‘*I am pretty confident that is what I would have said to be very precise. However, I can’t be 100 per cent sure sat here five months later*’

- v) That evidence was not challenged in cross-examination
- vi) The Match Referee’s evidence was also that he told KC (and MG) that he would be reporting the matter to the FA. He was not challenged on that evidence in cross-examination either

b) Secondly, from KC:

- i) In KC’s interview KC stated that he had been told by the Match Referee that it had been alleged ‘*that I insulted someone, that I’d said something racist*’. When asked whether he had been told specifically what ‘*the comment*’ had been

(1) His initial reply was ‘*The phrase ... I don’t remember what was said*’

(2) When asked again ‘*Even now to this point, to this day today, do you know specifically what the allegation is ?*’ he replied ‘*Not exactly but I can imagine what it is ... Something to do with negro ... I don’t know how you say that in English*’¹⁶

(3) When asked ‘*Okay, and how has that come to you ? How do you know about that ?*’ KC replied ‘*I don’t remember ... I don’t know exactly what it was but you can figure out that it would’ve been something like negro which yes, just to clarify, negro means black in Spanish but it can have those connotations to it ... I don’t know what it was but if it is something racist then it would have to be something to do with the colour of someone’s skin so it would be*’

- ii) In his witness statement KC

(1) Confirmed that prior to KC’s interview, he had not known of the specific words that he was alleged to have used, and

(2) Explained that he had ‘*guessed*’ that the allegation ‘*might relate to the word negro or something like that, because that is what you would call a black person in Spanish*’

¹⁶ The transcript needs to be read in light of Language Line’s 3 January 2020 email to the FA. That email clarifies that although the transcript in fact appears to attribute to KC the answer ‘*Something to do with negro **which maybe translates as ‘nigger’** I don’t know how you say that in English*’, the words that we have highlighted in bold are in fact spoken by the Translator, not by KC.

- iii) KC was cross-examined on that evidence – in particular, why he had ‘presumed’ in interview that the allegation, the specifics of which he claimed not to know, related to ‘black’ or ‘*negro*’, rather than to some other racial slur or behaviour
 - iv) It was also put to KC directly that ‘*when you saw the referee he told you that the allegation included the word “nigger”*’. KC’s immediate response to that question was ‘*I don’t remember*’ and later ‘*I don’t remember it being said*’ and ‘*I can’t rule it out*’ although he later qualified that by explaining that, had the word been used by the Match Referee, it would have ‘rung a bell’ when it came up in KC’s interview
 - v) KC also asserted in cross-examination that on the day of the match ‘*I didn’t think it was going to go further*’, and that he only learned that ‘*somebody wanted to make a complaint about me*’ on the Sunday after the match. That evidence was plainly at odds with the Match Referee’s unchallenged evidence that the matter would be reported to the FA
 - vi) KC also asserted in cross-examination that, while he ‘*knew that there was something when I went to speak to the referee*’, it was only the next day (i.e. the Sunday after the match) that ‘*I knew what was involved*’
- c) Thirdly, from MG:
- i) In his draft witness statement MG stated
 - (1) That ‘*once inside [the Officials’ room] we were informed that [CAFC] number 14 had alleged a racist remark by KC in the 71st minute of the match*’ and that he (the Match Referee) had an obligation to report it to the FA, and
 - (2) That he did not recall KC making any reply to the allegation
 - ii) In his witness statement MG clarified that KC had in fact replied to the allegation. He continued ‘*That is not surprising to me when I think about it because it is a very serious allegation and it was clear on the day (as it is now) that KC felt it was unjustified and untrue*’
 - iii) In his oral evidence MG
 - (1) Confirmed that he did not recall the precise words used by the Match Referee to KC after the match, but
 - (2) Explained that he did not believe that the Match Referee had explained that the allegation related to the use of the word ‘*nigger*’ because he (MG) had remained unaware that that was the nature of the allegation until either KC’s interview or (possibly) he learned of the same via social media.

- 89) We concluded that the Match Referee's evidence was credible and cogent. Although he fairly acknowledged that, given the passage of time, he could not be '*100% sure*'
- a) We considered that it was extremely likely that he would have specifically put to KC the precise words alleged to have been used. For him to have done otherwise – and in particular, for him simply to have said to KC that it had been alleged that a 'racist remark' had been made by KC – would have been peculiar given that he was seeking to ascertain and record KC's response to the allegation that had been made
 - b) That conclusion is consistent with the contemporaneous note made by the Match Referee of his conversations. The fact that KC's first words to the Match Referee, as recorded in that note, were '*No no*' is consistent with KC responding to an allegation that has been put to him. That note is far less consistent with the Match Referee having raised the allegation only in general terms and having asked '*What did you say ?*'
- 90) From that starting point we asked ourselves whether there was other evidence which either supported or undermined the Match Referee's evidence:
- a) We considered it to be wholly improbable that, if the Match Referee really had said only something to the effect that '*a racist remark*' had been alleged, KC would not have asked the Match Referee what that alleged remark was, unless of course it was already known:
 - i) It is almost inconceivable that someone accused of making a racist remark to a third party would not ask '*What does he say I said ?*'. That KC did not do so in our view corroborates the Match Referee's evidence that he informed KC of the words alleged to have been used
 - ii) While KC sought to justify the fact that he did not ask for details of the allegation because he '*didn't think it was going further*', we were unable to accept that:
 - (1) The Match Referee informed KC that he would be reporting the matter to the FA
 - (2) Even if KC had genuinely believed that the matter would go no further, we find it impossible to believe that he would not have sought details of an allegedly

unparticularised racist remark, particularly given that this was the first occasion in his career on which he was alleged to have acted in that way

b) We considered it to be even more inconceivable that MG would not have asked for clarification of the words alleged to have been used if the Match Referee really had said only something to the effect that ‘*a racist remark*’ had been alleged. Before us MG suggested that it was ‘not his job’ to ask such questions. We reject that. MG’s role was not simply to act as KC’s translator, as was demonstrated by the fact that immediately after leaving the Officials he telephoned

i) LUFC’s Head of Communications, and

ii) His line manager, the LUFC Director of Football

in order to report what he viewed as a ‘*very serious allegation*’ including, no doubt, the fact that a report was to be forwarded by the Match Referee to the FA. We find it frankly incredible for MG to suggest as he did that he did not anticipate that either of those individuals would say to him ‘*What is KC alleged to have said ?*’ or that he would not have asked the Match Referee for the information needed to be able to answer that inevitable question had the Match Referee simply said nothing more than that KC was alleged to have made a ‘*racist remark*’.

91) As regards MG more generally, we regrettably formed the clear impression that by his evidence he was not seeking to assist us to ascertain the truth of what had happened on and after the day of the match, but rather was giving such evidence as he felt would most assist KC (and LUFC) to defend this Charge. That was perhaps best illustrated by his repeated denials that he had been aware of the words alleged to have been used by KC until some considerable time after the match – and quite possibly not until the date of KC’s interview, almost 4 weeks later – despite a number of LUFC players who gave evidence before us stating

a) That it was from MG that they had learned that KC was alleged to have used the word ‘*nigger*’

b) That they had learned of the same within a matter of days after the match

c) That a number of them had had individual meetings with MG – predominantly on the Monday after the match - at which the Incident had been discussed. MG denied that any such meetings had taken place.

- 92) We also heard evidence from a number of LUFC players about when each of them first learned that KC was alleged to have used the word '*nigger*' during the Incident. Some explained that they had first learned of it on the coach trip back to Leeds after the match. Others explained that they had learned it in the days after the match. Each was generally asked from whom, or from what source, they had learned that KC was alleged to have used that word. While most offered an answer, the answers given
- a) Were rarely consistent with one another, and
 - b) Did not enable us to reach any confident conclusions about the route by which information spread within the squad to individual players.
- 93) By way of illustration, it can be said with confidence that TR was made aware via his WhatsApp exchange with JL during the course of the coach journey that KC was alleged to have said '*you fucking nigga*':
- a) TR's evidence was that he had then told EN, who was seated close to him, but probably not AF, KP, BW, LC or GB
 - b) EN said nothing about knowing the precise words alleged to have been used by KC
 - c) GB's evidence was that he had learned from AF during the coach journey that the allegation included the word '*nigger*'
 - d) AF however denied knowing that the allegation included the word '*nigger*' until the days following the match
 - e) KP admitted learning on the coach that the allegation included the word '*nigger*', and gave evidence that BW had also learned of that during the coach journey
 - f) BW denied that that he had learned during the coach journey that the allegation included the word '*nigger*'. His evidence was that he had probably heard of the substance of the allegation on the Monday after the match, and that he was unaware of any discussion having taken place amongst the LUFC players about the words said to have been used by KC.
- 94) The FA sought to establish in cross-examination of those players that, because they (or at least some of them) had known about the specific words forming the allegation within hours or days of the match, KC must similarly have done so (and so must have known of the word '*nigger*' before KC's interview). Aside from AF – who asked KC (via GB as translator) about the allegation in general terms - none of those players described speaking with KC about the allegation or about the words used, and we concluded that

we could not safely conclude that any discussion had in fact taken place about the Incident with KC beyond that described by AF, let alone (if it had) what had actually been said. The best that could be said is that, certainly within a few days of the match, it was common knowledge within the LUFC squad that KC was alleged to have used the word '*nigger*' during the match.

- 95) That left KC's denial and the evidence that he gave in support of that denial. In leaving his evidence until last we are in no way relegating the importance of KC's evidence to this issue. Rather, we left a consideration of it until last so that we could assess his evidence against the picture of all of the other evidence that we heard:
- a) As we have said above, we concluded that we could not accept at face value KC's evidence that he had been unaware of the word nigger, let alone its connotations, until KC's interview
 - b) As we have also said above, we prefer the evidence of the Match Referee to the evidence of KC and MG about what was said in in the Officials' room after the match. The word '*nigger*' was put to KC after the match. Had he genuinely not at that time known that word, or its meaning or connotation, he would have asked for an explanation or at the very least a translation. It was not suggested by anyone that he did so
 - c) As we have also said above, we find it inconceivable that, had the Match Referee not particularised the racist allegation that had been made, KC would not have asked for clarification. He is plainly an intelligent, articulate man. We reject any suggestion that he was so unconcerned at the allegation that he would have given no thought to asking for details of the extremely serious allegation that had been made against him
 - d) Even if we were to accept that KC had believed after the match that the allegation had been dealt with and was over, he had (on his own evidence) ceased holding that belief the next day when he met with MG and the LUFC Head of Communications and was made aware that '*a complaint*' had been made. It is wholly implausible to suggest
 - i) That KC would not by that stage have wanted to know what he was alleged to have said, or

- ii) That LUFC would not have wanted to know what KC was alleged to have said, and (just as importantly) would not have wanted to know KC's response to '*the complaint*'.

It is far-fetched to suggest that KC consciously chose to remain in the dark about the substance of the allegation until he was asked about it at KC's interview almost 1 month later

- e) We were not convinced by KC's explanation about why he had 'assumed' in KC's interview that the allegation related to the word '*negro*'. Had he genuinely been unaware of what racist remark had been made
 - i) We would have expected him simply to answer '*No*' when asked whether he knew specifically what the allegation was. We would not have expected him to answer '*not exactly*'
 - ii) We would not have expected him to speculate – and speculated correctly – about the allegation. We would have expected him to ask what it was.

96) We therefore concluded

- a) That KC was aware of the English word '*nigger*' prior to KC's interview
- b) That prior to KC's interview KC knew of the connotations attaching to that word
- c) That we could not accept KC's evidence to the contrary.

97) Of course, as Mr Mill QC emphasised in his closing submissions, the fact that we reject KC's evidence on that point does not of itself mean

- a) That KC's evidence on other matters should be rejected, or
- b) That KC in fact uttered the words '*you fucking nigger*' at JL.

However, we are entitled to ask ourselves why KC gave evidence that we have found to be incorrect on that important point. We concluded that the most likely reason that KC did so was that KC saw that as a way to create an unbreachable defence to the Charge; if he did not know of the existence of the word '*nigger*', how could he have used it? That he adopted such an approach did not reflect well on KC.

ii) Did KC use the words alleged?

98) Of course, even then the fact that KC sought to make out a defence that he knew was not in truth open to him does not mean that the Charge was proved. We still had to consider

whether, adopting the requisite approach to the standard of proof that we have set out above, we are satisfied on the balance of probabilities

- a) That KC in fact uttered the words '*you fucking nigger*', and
- b) That KC directed those words at JL.

99) Having done so, we were satisfied to the requisite standard on both matters i.e.

- a) That KC did utter the words '*you fucking nigger*' after the Corner, and
- b) That KC directed those words at JL.

100) As we have said above, we started from the position

- a) That it would have been out of character for KC to have used the words '*you fucking nigger*', and
- b) That it was inherently improbable that an individual such as KC would have used the words.

101) We also considered the submission that, pretty much regardless of the factual conclusions that we reached in relation to the altercation before the Corner, that altercation was so minor and insignificant that it could not reasonably have prompted anyone, let alone KC, to have reacted with the insult alleged. While we agreed that that was a factor to which weight had to be given, we accepted the FA's submission that on occasion, and for little or no apparent reason, a wholly inappropriate reaction can result from the most insignificant of triggers.¹⁷

102) However, despite such matters we were satisfied to the requisite standard – and in reality, to a degree well above the requisite standard –

- a) That KC had indeed uttered the words '*you fucking nigger*', and
- b) That JL and MB had not misheard those words, but had heard them correctly.

103) We have already said above that we found JL and MB to be impressive and straightforward witnesses. Although certain inconsistencies were highlighted during cross-examination (both as between them, and as between their own written and oral

¹⁷ The FA drew the decision of *The FA v Alan McCormack* 31/10/16) to our attention to illustrate that submission. While accepting that that decision does indeed provide such an illustration, we found that decision of little assistance beyond that; each case ultimately turns on its own facts.

evidence), those inconsistencies were moderate and their evidence on key matters was consistent, both internally and with each other, and persuasive. It was also consistent with such contemporaneous and near-contemporaneous evidence as was available. It was not suggested to either individual that he had colluded with the other in the evidence that they were to give.

104) The same could not be said about KC. Although we stress that we did not fall into the trap of rejecting the entirety of his evidence simply because we rejected his evidence that he had been unaware of the word ‘*nigger*’ and its connotations as at the date of the match, our conclusion in that regard did dent KC’s credibility and caused us to look with great care at his evidence¹⁸ on all issues, particularly where such evidence

- a) Was uncorroborated, or
- b) Was at odds with evidence given by others.

105) Having done so, we concluded that we could not reliably place any significant weight on his denials that he had not uttered the words alleged by JL and MB. We concluded that, contrary to his assertions, the altercation had resulted in JL ‘getting under his skin’. We concluded that, having successfully defended the Corner and punched the ball clear, he determined to direct one last utterance at JL. We concluded that he determined to direct it at JL’s skin colour – and so use the word ‘*nigger*’ - and to preface that word with the word ‘*fucking*’ for emphasis.

106) We carefully considered the possibility that KC had shouted words to the effect of ‘*Out out*’ or ‘*Fucking out*’ or ‘*Fucking get out*’, and that that was what had been heard (or misheard) by JL and MB. In that regard

- a) We reminded ourselves that in his witness statement EN had confirmed that he had heard KC say something after the Corner. He stated ‘*all I heard was fucking*’; he said that he could not hear whether anything else had been said by KC. Although EN also gave oral evidence before us, we were not assisted by that oral evidence

¹⁸ As we did with the evidence given by all witnesses.

- b) We noted that none of the other players who gave evidence before us recalled hearing KC utter anything after the Corner. However, once again that evidence was ultimately of little assistance to us, since
- i) It was of course accepted that KC had, on the balance of probabilities, said something
 - ii) JL and MB were closest to KC immediately after the Corner, albeit that other players were nearby
 - iii) While their evidence might be said to be consistent with KC having uttered something so anodyne that none of them had any reason to recall anything being said, few of the LUFC players in fact volunteered evidence to the effect that it was KC's invariable or even normal practice to shout or swear at them after corners in order to move them upfield. Two did, when pressed, accept that KC might do so. None materially corroborated KC's evidence to the fact that that was something he usually did
 - iv) The best that we could take from their evidence was thus that, whatever KC had said, it had not been heard by any of his own players
- c) We remained persuaded by the evidence given by JL and MB that the words that they had heard had been '*you fucking nigger*' and not '*fucking*' followed by some instruction by KC to his teammates. We concluded that there was no real, rather than merely fanciful, possibility that they had misheard anodyne words uttered loudly by KC as '*You fucking nigger*'.

107) One final piece of evidence to which we were encouraged to have regard was the direction in which KC was looking at the time of the Incident. Mr Mill QC invited us to conclude

- a) That KC had been looking at the ball, and not at JL, and
- b) That it was accordingly more likely that whatever KC uttered was a general 'shout' to his teammates to move upfield than an insult directed at JL.

108) We accept that, as a matter of fact, at the time of the Incident KC was facing in the general direction of the ball. He was also facing in the general direction of JL. Ignoring all other matters for a moment, the direction in which KC was facing would thus have been no more consistent with him uttering '*you fucking nigger*' at JL than it would have been

with him shouting ‘*fucking out*’ to his teammates generally. However, any uncertainty over the target of KC’s words falls away given the conclusion that we have reached about what KC uttered. Having concluded that he used the words ‘*you fucking nigger*’ we inevitably concluded that he had directed those words at JL. The fact that, when doing so, he was also facing in the direction in which he had punched the ball is simply a matter of coincidence. We do not accept that, as was suggested on behalf of KC in closing submissions, JL merely came fleetingly into KC’s field of vision as he (KC) followed the flight of the ball.

109) Before leaving this section of our Decision, we confirm that we gave careful consideration to what Mr Mill QC presented as KC’s secondary case, namely the suggestion that we should adopt an approach analogous to that taken by the Regulatory Commission in *The FA v Sampson* (16 January 2020) and should conclude

- a) That even if we were unable to reject the evidence of JL and MB outright, we ought to conclude that their evidence (or rather, the evidence and case presented by the FA as a whole) was insufficiently cogent or reliable to discharge the burden of proof resting on the FA to the requisite standard in a serious case such as this, and so
- b) That we ought to dismiss the Charge on that basis.

110) We rejected that alternative position. This was a case where we did find the evidence of MB and JL, and the evidence in the case as a whole, sufficiently cogent and compelling to allow us to conclude with the necessary confidence and to the requisite standard

- a) What had happened in the Incident, and so
- b) That KC had indeed uttered the words ‘*You fucking nigger*’ at JL.

(I) Our Decision

111) We concluded that the FA had proved the Charge to the required standard. We concluded

- a) That the words ‘*you fucking nigger*’ had been spoken in the Incident
- b) That those words had been spoken by KC
- c) That those words had been addressed or directed to/at JL.

112) Accordingly, we find

- a) That KC is guilty of Misconduct for a breach of FA Rule E3 as alleged, and

- b) That because the words constituting that breach made reference to race, colour and/or ethnic origin, the breach is an ‘Aggravated Breach’ as defined in FA Rule E3(2).

(J) Next steps

113) At the end of the hearing

- a) We discussed with the parties how we might deal with penalty in the event that we found the Charge to be proved, and so in the event that that matter needed to be addressed, and
- b) We gave certain directions in that regard.

114) Since we have found the Charge proven, and so since the issue of penalty does now need to be addressed, we confirm those directions as follows:

- a) By 4.00pm on Tuesday 25 February 2020 the FA shall serve on KC’s representatives and file with Michael O’Connor, the Regulatory Commissions & Appeals Officer, a copy of any written submissions that it wishes to make (and any other documents on which it might wish to rely)
 - i) On the approach to penalty that it contends should be adopted in this case,
 - ii) As to any aggravating features of which it contends we should take account when considering penalty, and
 - iii) As to any other matters that it considers appropriate
- b) By 4.00pm on Thursday 27 February 2020 KC shall serve on the FA and file with Michael O’Connor a copy of any written submissions that he wishes to make (and any other documents on which he might wish to rely)
 - i) In response to the FA’s written submissions,
 - ii) In mitigation of any penalty to be imposed on KC, and
 - iii) As to any other matters that he considers appropriate
- c) Insofar as either party considers a further personal hearing (or telephone or Webex hearing at which oral submissions can be made) is needed prior to us considering the penalty to be imposed on KC, that party shall notify the other and Michael O’Connor by email by 10.00am on Friday 28 February 2020, setting out the reasons said to justify a further personal, Webex or telephone hearing

- d) Insofar as the FA wishes to respond to KC's written submissions
 - i) It shall notify KC's representatives and Michael O'Connor by email by 10.00am on Friday 28 February 2020 of its wish to do so, and
 - ii) It shall provide such response by 4.00pm on Friday 28 February 2020
- e) In the event that either party wishes to vary the above directions, that party shall apply to the Chairman by notifying the other party and Michael O'Connor.

115) Unless

- a) Either party has indicated by 10.00am on Friday 28 February 2020 that a further personal, Webex or telephone hearing is needed, and
 - b) The Chairman then directs that such a further personal, Webex or telephone hearing should take place
- we will proceed to determine the issue of penalty on the basis of the written submissions received from the parties.

116) Also at the end of the hearing we directed that the hearing, the submissions made and evidence given at the hearing, and our Decision and Written Reasons, are to remain confidential until the conclusion of the determination of this Charge. For the avoidance of any doubt we confirm that that direction remains in place, and will remain in place until we have reached our Decision on Penalty and provided that Decision on Penalty to the parties.

117) This decision – which is the unanimous decision of this Regulatory Committee – is subject to the relevant Appeal Regulations, albeit that we direct that the time for any appeal shall not begin until we have provided our Decision on Penalty to the parties.

Graeme McPherson QC (Chairperson)

Marvin Robinson

Stuart Ripley

23 February 2020

APPENDIX 1
DECISION AND WRITTEN REASONS ON PENALTY

(A) Documents received since Decision and Written Reasons

- 1) Pursuant to the Directions that we gave at the end of the hearing we received
 - a) Submissions on Sanction from the FA, together with
 - i) A Personal Impact Statement from JL, and
 - ii) An article from the Yorkshire Evening Post dated 20 February 2020
 - b) A skeleton argument on behalf of KC on matters relating to penalty, together with
 - i) An extract from ‘*Sport: Law and Practice*’ (3rd ed), and
 - ii) 22 previous decisions of other Regulatory Commissions in which penalties had been imposed for Aggravated Breaches.

(B) Relevant provisions within the FA Rules

- 2) Paragraph 40 of the Disciplinary Regulations General Provisions (‘*General*’) empowers a Regulatory Commission to impose any one or more of the penalties listed therein.
- 3) In addition where (as here) a Participant has been found to have committed an Aggravated Breach, paragraphs 46 and 47¹⁹ of the Disciplinary Regulations General Provisions (‘*Aggravated Breaches (Rule E3(2))*’) provide
 - a) That (whether or not a suspension has been imposed by the Regulatory Commission in accordance with paragraphs 47 to 50 of the Disciplinary Regulations General Provisions) the Regulatory Commission
 - i) Must order the Participant to be subject to an education programme, the details of which will be provided to the Participant by the FA, and

¹⁹ Paragraph 47 is subject to paragraphs 48 and 49 of the Disciplinary Regulations General Provisions. However, they have no relevance for present purposes

- ii) May impose a financial penalty or any other sanction that it considers appropriate
 - b) That where a Participant commits an Aggravated Breach for the first time, a Regulatory Commission shall impose an immediate suspension of at least six Matches on that Participant, and may increase the suspension where additional aggravating factors are present.
- 4) As well as the provisions of the Disciplinary Regulations General Provisions, our attention was invited to numerous previous decisions of other Regulatory Commissions as regards penalties imposed for Aggravated Breaches. While acknowledging
- a) That there is no strict doctrine of precedent for cases such as these, and
 - b) That each case will turn on its own facts
- it was submitted on behalf of KC that we should have regard to previous decisions in order to achieve consistency of decision-making.
- 5) We carefully read each of the 22 previous Decisions identified by KC. In reaching our Decision on penalty we had appropriate regard to those Decisions.

(C) Aggravating Factors

- 6) The FA's position is
- a) That there are a number of aggravating factors present in this case, and
 - b) That a suspension significantly above the level identified in Regulation 47 of the Disciplinary Regulations General Provisions is therefore appropriate in this case; the FA suggests a suspension of 10 games.
- 7) We deal briefly with each factor in turn.

i) Gravity of the breach in light of the words used

- 8) The FA submits that the gravity of the breach in light of the words used (*'the highest category of seriousness of racial abuse'*) should be reflected by the imposition of a penalty well above the level of *'at least six Matches'* set out in paragraph 47 of the Disciplinary Regulations General Provisions.

- 9) In response, Mr Mill QC cautions against ‘double counting’. He makes the point that care needs to be taken to ensure that the very element of the breach that renders it an Aggravated Breach (and so triggers paragraph 47 of the Disciplinary Regulations General Provisions and the minimum length of suspension identified therein) is not then of itself treated as something that further aggravates the breach and/or justifies a longer suspension.
- 10) We accept the correctness of Mr Mill QC’s submission in the abstract. However, ‘*Aggravated Breaches*’ are not all the same. A Regulatory Commission is entitled to assess the gravity of the conduct that underlies the Aggravated Breach and, if it considers the particular conduct to be sufficiently grave or serious, to impose in an appropriate case a suspension above the ‘entry level’ of ‘*at least six Matches*’ in light of that factor alone.
- 11) We consider KC’s conduct in this case to fit that description. While we accept
- a) That KC is not a racist, and
 - b) That KC’s language was wholly out of character
- the language used was abhorrent, and was plainly a very grave and serious racial insult.
- 12) We therefore accept that the particular words used are an aggravating feature in this case. To reach that conclusion is not ‘double counting’ on the facts of this case.

ii) Consequences on JL

- 13) We accept that the evidence that has been provided to us as regards
- a) The impact that the words used had on JL, both during the match and afterwards, and
 - b) The impact that KC’s defence of the Charge and JL’s experience when giving evidence at the hearing have had on JL.
- 14) However, those are matters that are so intimately connected with the conduct of KC – and so with the nature and gravity of the breach in light of the words used – that to treat them as a separate aggravating factor would be ‘double counting’. We have therefore taken care to avoid doing so.
- 15) We have taken no account on how a ‘*moronic minority*’ might behave in the future towards JL, or how that might impact on JL. To do otherwise would be speculate unjustifiably.

16) Before we leave this section, we wish to express the view that JL is to be commended for reporting the words that he heard and for committing himself to the prosecution of the Charge as he did. He deserves real credit for the manner in which he has acted throughout the process. We would hope that others will pay heed to how he has acted and, in appropriate cases, have similar strength of character.

iii) The circumstances in which KC uttered the words

17) The FA identified a number of factors in this regard that, it submits, aggravates this breach:

- a) The fact that KC deployed the words intentionally, seeking to cause offence and/or harm to JL
- b) The fact that KC is a senior player, particularly in comparison to JL

18) In response Mr Mill QC

- a) Reminds us that we have already made findings as to the context in which the words were uttered by KC and that the FA's submission as to why KC used the words goes too far, and
- b) Submits that we should view KC as having been provoked prior to his uttering the words.

19) As regards the first of those submissions, it is correct that we have already made our findings on why KC acted as he did. This was not a case of KC attempting ill-judged banter. Nor however was it a case at the other extreme.

20) As regards the second of those submissions, we reject any submission that JL's conduct prior to the Incident impacts on penalty in this case. Any provocation that KC might have felt during and after the altercation was plainly no justification for him having acted as we have found he did.

iv) KC's 'language' defence

21) The FA suggests that the 'cynical' nature of KC's pretence that he did not know the existence of the English word alleged to have been used by him and his choice to hide behind an imaginary language barrier are aggravating features in this case

- a) The FA describes that conduct as a '*gravely ill-judged attempt at intentionally and dishonestly misleading the Commission ...*'

b) The FA relies on the acceptance by Mr Mill QC in his closing submissions that, in the event that we found that KC *had* uttered the words alleged, it inevitably follows that ‘*part of any [such] finding is that [KC] came here to deceive the Tribunal, and that makes it even more serious*’.

22) Despite the submission now made on KC’s behalf to the contrary, we accept that KC’s deployment of his ‘language defence’ is an aggravating feature in this case. We rejected KC’s evidence that he was unaware of the word, and we reached conclusions in our Written Reasons as to why we concluded he had pretended otherwise. KC’s conduct in that regard aggravates the gravity of case, as Mr Mill QC accepted in closing submissions.

v) KC’s use of character references

23) The FA also relies on what it describes as KC’s ‘*shameless ploy*’ in providing exhaustive character evidence from high-profile names within football who had experienced racism and discrimination, and with whom he had links, in an effort to demonstrate that he would never engage in such conduct.

24) That is not in our view an aggravating factor. KC was entitled to rely on evidence to demonstrate that – as the FA accepted and as we have found – he is not a racist. The character evidence provided by KC went in large part to demonstrating that.

vi) KC’s lack of apology

25) The FA suggests that the fact that KC has not apologised to JL for his words is an aggravating feature. Mr Mill QC suggests that – at least in JL’s mind – an apology was forthcoming after the match, when KC shook hands with JL.

26) Whatever one makes of the handshake, the fact that KC chose to consistently deny using the words that we have found he uttered does not sit easily with a submission that we should treat the handshake, at least in JL’s mind, as akin to an apology. However, the lack of an apology is in any event in our view not an aggravating feature; an apology might be a mitigating factor, but a lack of apology is akin to a neutral factor.

(D) Mitigation

27) The following mitigating factors were identified on behalf of KC:

- a) The fact that we found as we did at paragraph 32 of our Written Reasons. We agree that the fact that we have found KC's one-off use of these words to have been completely at odds with his character is a matter to which regard must be had when deciding penalty
- b) KC's previous exemplary disciplinary record:
 - i) In response the FA submits previous good character is not a 'true' mitigating factor – rather (1) a poor disciplinary record is an aggravating factor, and (2) a good disciplinary record should be viewed as 'non-aggravating', or neutral;
 - ii) We agree. KC is entitled to only very limited credit for a lack of any previous Misconduct – that should be a 'given' in a player
- c) The fall from grace that KC may well suffer after a long and distinguished career. While we gave consideration to the evidence before us as to KC's professional and personal, that is only of limited relevance in a case such as this
- d) KC's intention to focus on restoring his reputation by giving assistance to the football community's battle with discrimination and around the game. While that intention is admirable, and to be encouraged, the lack of any detail about what KC intends to do in that regard means that we are able only to give him very limited credit for that.

(E) Deterrence

28) The FA submits that any sanction should *'incorporate an element of deterrence to demonstrate the seriousness of this matter and to seek to prevent such misconduct arising at all levels of football in the future'*.

29) That is not something that we felt to be necessary in this case. The approach that we adopted was to identify what penalty was necessary and proportionate to reflect the nature and circumstances of the Aggravated Breach that we found to have been committed.

(F) Penalty: suspension

i) Length of suspension

30) Against that background we determine that the appropriate penalty to impose on KC is a suspension of eight (8) matches:

- a) A suspension of only 6 matches – the minimum described in Paragraph 47 of the Disciplinary Regulations General Provisions – would in our view be too lenient in a case such as this, and by quite some way
- b) The FA’s suggestion that a 10 match suspension is appropriate is too severe
- c) The aggravating and mitigating factors identified above in our view justify a suspension of 2 matches over and above the 6 match minimum for any Aggravated Breach i.e. a suspension of 8 Matches. While we are conscious that that is at the very upper end of the length of suspensions imposed in the other cases to which our attention was drawn, that length of suspension is merited in this case.

ii) Suspension from what ?

31) It is open to us to suspend KC from all footballing activities until the conclusion of the 8th match for which he is suspended. However, we agree with the submission made on his behalf that to do so in this case is neither necessary nor proportionate. The suspension is thus a suspension from domestic club football until such time as LUFC complete eight (8) first team competitive matches in approved competitions; it does not prevent KC from training with LUFC or engaging in other football-related activities.

iii) Should the implementation of the suspension be stayed ?

32) KC asks that we stay the implementation of the suspension until the expiry of the 7 day period during which he has a right of appeal against our Decision.

33) We refuse that request. KC has not stated that he intends to appeal our Decision. That is despite the fact that he has had our Decision and Written Reasons since 24 February 2019; although we made clear in that document that his time for actually appealing would not start to run until we provided our Decision and Written Reasons on penalty

- a) He has had ample time in which to form at least a provisional view on the likelihood of any appeal, yet
- b) His skeleton argument makes no reference to the likelihood or otherwise of an appeal being lodged.

34) It is of course open to KC to renew an application for a stay to the Appeal Board

- a) If he does in fact appeal our Decision, and
- b) If he wishes to do so.

(G) Penalty: other elements

35) Education Programme: In accordance with paragraph 46.1 of the Disciplinary Regulations General Provisions we direct that KC shall attend a face to face education programme, the details of which will be provided to him by the FA. That shall be done by no later than 31 May 2020.

36) Financial Penalty: we impose a financial penalty of £60,000 on KC. We consider both the fact of a financial penalty, and the amount of that financial penalty, to be appropriate in this case.

37) Warning as to Future Conduct: KC is warned as to his future conduct.

38) Costs: We conclude that KC

- a) Should pay the costs of the Regulatory Commission. The amount of those costs will be notified to him by the FA
- b) Should forfeit the hearing fee.

(H) Order

39) We order that Kiko Casilla

- a) Is suspended from all domestic club football until such time as LUFC complete eight (8) first team competitive matches in approved competitions
- b) Shall undergo and complete to the FA's satisfaction, by 31 May 2020, a face to face FA education programme, the details of which shall be provided to him by the FA. Failure to do so within the relevant time frame shall result in KC being immediately suspended from all football and football-related activity until such time as the course is satisfactorily completed
- c) Is warned as to its future conduct

d) Is fined the sum of £60,000

e) Shall pay the costs incurred by the Regulatory Commission in full in an amount to be notified to him by the FA

f) Forfeits the hearing fee.

40) This decision – which is the unanimous decision of this Regulatory Committee – is subject to the relevant Appeal Regulations.

Graeme McPherson QC (Chairperson)

Marvin Robinson

Stuart Ripley

28 February 2020