

IN THE MATTER OF AN APPEAL FROM
THE DECISION OF
A FOOTBALL ASSOCIATION REGULATORY COMMISSION

B E T W E E N :-

THE FOOTBALL ASSOCIATION

Appellant

And

JOSE MOURINHO

Respondent

WRITTEN DECISION AND REASONS
OF THE APPEAL BOARD

Appeal Board: Graeme McPherson QC (Chairperson)
Marvin Robinson
Simon Parry

Secretary to Appeal Board: Paddy McCormack (Judicial Services Manager)

Date of appeal: 14 November 2018

Venue: Wembley Stadium

Appearances: Appellant: Jonathan Laidlaw QC, Amina Graham,
Yousif Elagab
Respondent: Paul Gilroy QC, Matthew Bennett,
Patrick Stewart

(A) Introduction

- 1) On 6 October 2018 Manchester United FC (*'MUFC'*) played Newcastle United FC (*'NUFC'*) at Old Trafford (*'the fixture'*).
- 2) As Jose Mourinho (*'JM'*), the manager of MUFC, left the field of play at the end of the fixture he was followed by a broadcast camera along the touchline; indeed, broadcast cameras had been focussed on JM throughout the match. In JM's words, he had had *'no escape from the camera focused on him and in noticeably close proximity to him'*.
- 3) As JM walked along the touchline after the match he could be seen (1) gesturing using a clenched fist and making an inaudible comment, and (2) very shortly thereafter, making another inaudible comment. At the time of the first inaudible comment he was not looking at the broadcast camera. While making the second inaudible comment he briefly glanced at the camera lens.
- 4) On 16 October 2018 the Football Association (*'the FA'*) charged JM with Misconduct in breach of FA Rule E3 (*'the Charge'*). The FA alleged that language used by JM after the end of the fixture and captured by the broadcast camera had been *'abusive and/or insulting and/or improper'*.
- 5) The proceedings proceeded under the Fast Track Regulations set out in Part E of the Disciplinary Regulations.
- 6) JM denied the Charge. He did not request a personal hearing and requested that the Charge be dealt with on the papers only.
- 7) Following exchanges of submissions and factual and expert evidence – to which we return below – the Charge came to be considered by an FA Regulatory Commission (*'the Commission'*) comprising Ifeanyi Odogwu (Independent Legal Panel Member), Mick Kearns (Independent Football Panel Member) and Bradley Pritchard (Independent Football Panel Member) on 31 October 2018.
- 8) The Commission found that the Charge had not been proved by the FA. The Commission therefore dismissed the Charge.

- 9) The FA appealed the dismissal of the Charge to this Appeal Board (*'the Board'*). The FA's sole ground of appeal was that the Commission had come to a decision to which no reasonable such body could have come. Written submissions dated 7 November 2018 prepared by Jonathan Laidlaw QC were lodged by the FA in support of the appeal.
- 10) JM opposed the FA's appeal. A detailed response to the FA's appeal was set out in a written Response to Notice of Appeal dated 9 November 2018 prepared by Paul Gilroy QC and Centrefield LLP.
- 11) The appeal was heard at Wembley Stadium on 14 November 2018. At the conclusion of the hearing, after proper consideration of all of the relevant evidence, material and written and oral submissions
- a) The Board allowed the appeal and quashed the decision of the Commission to dismiss the Charge. We did so on the narrow ground
- i) That although the Commission had correctly identified the need to apply the 'reasonable bystander' test when considering whether JM's utterances breached FA Rule E3, and
- ii) That although the Commission had correctly identified the need to consider all relevant facts and circumstances relating to the utterances under scrutiny (i.e. to consider 'context') when applying the 'reasonable bystander' test, and
- iii) That although there was no justification for us to interfere with any findings of fact made by the Commission in that regard
- the Commission had incorrectly applied the 'reasonable bystander' test to those facts in this case; and
- b) The Board concluded that, subject to one important caveat (to which refer in paragraphs 13 and 14 below) any reasonable Regulatory Commission that correctly applied the 'reasonable bystander' test to the facts as found by the Commission would have found that the words used by JM had been abusive, insulting and/or improper. Subject to that caveat, the Board therefore found that any reasonable Regulatory Commission would have found the Charge to be proved. Given the caveat, that finding can properly be described as a provisional, qualified finding by the Board that JM's conduct and language amounted to Misconduct for a breach of FA Rule E3.

12) These are the Board's written Reasons for that Decision.

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

14) The Commission did not determine JM's Legitimate Expectation defence (because it considered it unnecessary to do so). After hearing argument, we concluded that it would be inappropriate for us to determine, effectively as a first instance tribunal, JM's Legitimate Expectation defence. We therefore directed that the determination of the Legitimate Expectation defence should be remitted to a fresh Regulatory Commission. Once the Legitimate Expectation defence has been determined, we anticipate that that fresh Regulatory Commission will (depending on how that issue is determined) either

- a) Dismiss the Charge (if JM's Legitimate Expectation defence succeeds), or
- b) Find that the Charge has been proved (if JM's Legitimate Expectation defence fails) and proceed to a determination of sanction.

We were asked to make clear – and we do make clear – that nothing in these Written Reasons should be taken by that fresh Regulatory Commission as trespassing on the task that will be before that fresh Regulatory Commission. The task of determining the Legitimate Expectation defence is for that fresh Regulatory Commission alone.

15) We also directed that our Decision and our Written Reasons should be embargoed until that fresh Regulatory Commission is able to determine the Legitimate Expectation defence (and any ancillary issues that might need to be determined) and produce Written Reasons for its Decision. That was to ensure that nothing that we have decided becomes 'public' until a final determination

- a) Of all of JM's defences to the Charge, and so
- b) Of whether the FA has in fact proved the Charge against JM has been made.

(B) Background

16) On 9 October 2018 the FA wrote to JM to request his written observations regarding his actions immediately following the conclusion of the fixture; specifically, the FA requested an explanation and clarification of the words used by JM and the hand gesture that he appeared to make.

17) JM's response was set out in a letter dated 11 October 2018 from Rebecca Britain, the MUFC Club Secretary. In that letter:

- a) The gesture was explained. Since the gesture forms no part of the Charge brought by the FA against JM, we say no more about that;
- b) Information was provided about the words used by JM. The relevant section of the letter
 - i) Began by providing '*observations regarding the context in which the Footage was captured*', and then
 - ii) Stated as follows:

'[JM] can clarify that the words he used were a Portuguese profanity for which there is no direct translation. He wishes to emphasise that they were spoken quietly and to himself i.e. they were not directed at the camera or at any person and were said under his breath. This is clearly show in the Footage, where the words used by him are not audible despite the very close proximity of the camera. The words [JM] used were a very brief release of the understandable emotion he felt in the immediate aftermath of the match during which he was being followed very closely by a TV camera. The words could not reasonably have been expected to be comprehensible to anyone watching the TV coverage given that they were inaudible, made with minimal lip movement and in a language unfamiliar to the vast majority of TV viewers. However, if anyone did understand the words and was offended by them, that was not his intention and [JM] is extremely sorry.'

18) We observe that JM did not in this letter actually set out the Portuguese words that he had used after the fixture; he simply referred to them as '*a Portuguese profanity*'.

19) By letter dated 16 October 2018 the FA charged JM with Misconduct under FA Rule E3. That Rule states:

'A Participant shall at all times act in the best interests of the game and shall not act in any manner which is improper or which brings the game into disrepute or use any

one, or a combination of, violent conduct, serious foul play, threatening, abusive or insulting words or behaviour’.

20) The Charge read as follows:

***‘Manchester United FC v Newcastle United FC
Premier League
6 October 2018***

...

It is alleged that your language after the end of the fixture, as captured by the broadcast camera, was abusive and/or insulting and/or improper’.

21) With the Charge the FA served (amongst other things) a report from Mr Pedro Xavier (*‘Mr Xavier’* and *‘the Xavier report’*). According to the front page of the Xavier report, Mr Xavier is an expert in the field of *‘Colloquial Portuguese Language (Translation and Interpretation of lip reading)’*.

22) The Xavier report addressed the following issues:

- a) Mr Xavier’s terms of reference;
- b) The meaning of the words used by JM *‘in general terms’*:
 - i) Mr Xavier concluded that the Portuguese words used by JM had been *‘Vós sois uns filhos da puta’*
 - ii) Mr Xavier translated each individual word in that phrase
 - iii) Mr Xavier then expressed his opinion of the translation/meaning of the phrase as a whole. According to him, the English translation is *‘You are sons of whores/bitches’*;
- c) Whether or not the words used by JM were offensive. Mr Xavier concluded *‘The phrase is highly offensive, especially if the people involved are not close. Among friends (normally men) it can occur as a joke or a teaser. In a professional capacity it is absolutely offensive ... The expression ... is normally regarded as offensive. Typical expression used when people are angry’.*

23) The conclusion of the Xavier report stated as follows:

‘Language is a very complex matter and it can be assessed in many ways and interpreted differently by different kinds of people. Every language has its own

common expressions and in the Portuguese language the words used by [JM] are common during a moment of anger or as a hit back for a problematic event, but in any event they are considered highly inappropriate and unprofessional’.

24) On 24 October 2018 JM served on the FA:

- a) His Reply Form. JM denied the Charge. He did not request an opportunity to attend before a Regulatory Commission for a personal hearing. As a result, the Charge fell to be dealt with at a paper hearing before a Regulatory Commission;
- b) A written response to the charge prepared by Patrick Stewart, General Counsel at MUFC. That well-drafted, detailed response
 - i) Set out a number of different substantive bases on which JM’s denied the Charge. Those bases included
 - (1) A denial that ‘*improper language*’ could form the basis of a charge under FA Rule E3. JM contended that only language which was threatening, abusive, indecent or insulting could give rise to a breach of FA Rule E3;
 - (2) A denial that (if he failed on (1)) the language that he had used had been ‘*improper*’. The response set out a number of reasons why, JM contended, his actions after the fixture had not been improper
 - (3) A denial that his language had been abusive or insulting; and
 - ii) Set out a further ‘Legitimate Expectation’ defence to the Charge. It was contended that, based on the past approach of the FA in other cases, JM (and Participants generally) had a legitimate expectation that the simple use of a profanity would not be deemed by the FA to be an act of misconduct contrary to Rule E3(1). As a result, it was contended, the interests of fairness, consistency and equality demanded that the Charge should be dismissed;
- c) A report from Dr Simão Valente (‘*Dr Valente*’ and ‘*the Valente report*’). Dr Valente had been asked to give his expert opinion on
 - i) What words had been used by JM as shown in the footage
 - ii) The meaning of those words
 - iii) Whether those words would or could be considered improper, insulting, abusive or offensive.

25) In the Valente report:

a) Dr Valente concluded that JM had said '*Vão levar no cu, filhos da puta*'. Those Portuguese words were similar to, but not identical to, the words that Mr Xavier had attributed to JM;

b) Dr Valente provided literal, idiomatic and contextual translations of those words. Before doing so, he stated

'the contextual translation is the one that matters most, as this would be what anyone viewing the video (and who would be able to comprehend the words) would actually take those words to mean, in comparison with an English language context';

c) Dr Valente gave the following translations:

i) Literal translation – '*Go take it in the arse, sons of the whore*'

ii) Idiomatic translation – '*Fuck off, you sons of bitches*' or '*Fuck off you arseholes*'.

Dr Valente immediately explained however '*This does not mean however that an idiomatic translation would be entirely adequate to describe what is happening there. Context is essential*' and went on to explain that, given the context which he attributed to the words, he did not consider the idiomatic translation to be '*entirely accurate*'. He also referenced a headline from a Portuguese football newspaper to corroborate his opinion

iii) Contextual translation – '*fuck yeah*' or '*hell yeah*', spoken in a celebratory manner.

That '*Translations*' section of the Valente report concluded with Dr Valente stating

'[The contextual translation] is the translation I find most accurate, even if diverging from the literal sense';

d) Dr Valente then went on to address the question '*Are the words abusive, insulting, improper or offensive ?*' In doing so he endeavoured to '*mediate between British perceptions of each of those terms and their Portuguese equivalent*'. He concluded

i) That the words '*cannot be considered abusive*'

ii) That '*no Portuguese person would feel insulted*' by the words. That was the case regardless of whether the words were directed at a specific individual or simply uttered to the world at large

iii) That when considering whether the words were ‘improper’

‘... Context is crucial. In Portuguese there are no words considered universally improper, it all depends on how, where and when they are said. The terms [JM] uses are swear words, but the use and perception of swear words in English is not like in English. I would describe those terms as rude, but not improper in the English sense. I would not expect them to occur in a business meeting with new clients (old ones, possibly) or at church. In those contexts they would be improper. They would not be improper in a football field.’

iv) That when considering whether the words were ‘offensive’

‘... the concept of ‘offensive’ does not fully translate into Portuguese in what concerns language. There are no words in Portuguese that would be described as offensive absent any context: no words referred to as ‘c-word’ or ‘f-word’. There are actual words for those concepts – cona, foder – but they can be written and spoken depending on the context. In certain parts of the county (the North) they are common, everyone says them, children and old ladies included ... Among friends they can be acceptable too. It is always context and use that can potentially make a word offensive in Portuguese, nothing intrinsic about the word itself. In the context shown in the video I do not consider that typical Portuguese speakers would consider the words to be offensive’;

e) Dr Valente concluded

‘[JM’s] words as shown in the video are inaudible, but with the benefit of repeated viewings and my own expertise I have been able to decipher them. [JM’s] words as depicted in the video would not in my opinion be considered abusive, insulting, improper or offensive by a typical Portuguese speaker who was able to decipher them’.

26) The FA submitted a lengthy response (with an Appendix comprising additional factual evidence) dated 29 October 2018 in which it addressed

a) Each of the substantive defences that had been raised in JM’s written response to the Charge, and

b) The Legitimate Expectation defence

The FA did not serve any further evidence from Mr Valente.

- 27) Although he had no right (under the Fast-Track Regulations) to do so, JM applied for (and was granted) permission to submit a reply to the FA's 29 October 2018 response. JM therefore submitted a reply dated 30 October 2018
- a) Addressing many of the points made in the FA's 29 October 2018 response, and
 - b) Re-emphasising many of the points already made in JM's 24 October 2018 response to the Charge.

(C) The Decision and Written Reasons of the Commission

- 28) The Commission considered the matter on the papers on 31 October 2018. Its Decision and Written Reasons were produced on 5 November 2018. It is necessary to consider those Written Reasons carefully, and we have done so, both with the assistance of the parties at the appeal hearing and subsequently.
- 29) The Commission began by setting out a summary of the background facts as they had found them to be. Although we have set our own summary of aspects of the background above, that has been done simply to make this Written Decision a more 'complete' document which can be understood without the need for repeated cross-reference to the Commission's Decision and Written Reasons. Nothing in what we have set out above should be taken as criticism by us of the contents or findings set out in the '*Background Facts*' section of the Commission's Written Reasons. We make that clear in light of an issue that occupied some time before us, namely
- a) Whether the FA was attempting on this appeal to undermine any factual findings made by the Commission, and if so
 - b) Whether we could or should interfere with any such factual findings.
- 30) While we return to this issue below, we make clear from the outset that we do not accept that the Commission
- a) Made any finding of fact that was without evidential foundation at all, or
 - b) Made any finding of fact that was wholly contrary to the weight of the evidence before it, or
 - c) Overlooked any material evidence when making findings of fact.¹

¹ There was debate before us as to whether the Commission had 'overlooked' the contents of the 11 October 2018 letter sent on JM's behalf by way of explanation and clarification of his conduct following the fixture. That debate had at its heart the question of whether the Commission had overlooked that JM's own position was that

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

31) Having set out the text of FA Rule E3 and dealt with a procedural matter, the Commission then

- a) Summarised the FA's case (paragraphs 13 to 16 of the Written Reasons),
- b) Summarised JM's case (paragraphs 17 to 20 of the Written Reasons), and
- c) Identified the principal issues that, in light of the cases of the respective parties, it considered that it had to determine (paragraphs 22 and 23 of the Written Reasons).

Neither party made any criticism of those parts of the Written Decision.

32) The issues identified by the Commission in paragraphs 22 and 23 of the Written Reasons read as follows:

'22. It was not in dispute between the parties that JM had been seen on broadcast footage using Portuguese profanity, including the words '... filhos da puta', repeated twice. It was agreed by both experts that the literal translation of 'filhos da puta' into English is '... sons of a whore'. The Commission noted that JM accepted the words ascribed to him by the FA's expert Mr Xavier ... We also noted that there were slight differences between the experts as to what words preceded 'filhos da puta'. We accept Mr Xavier's interpretation given his expertise and JM's concession, however we note from the idiomatic translation ... from Dr Valente that this does not differ materially from Mr Xavier's opinion as to the meaning of the words in general terms. It was also common ground that the charge related solely to the use of this language, and not any gestures made by JM.

23. In our assessment the relevant issues in dispute that were determinative of the charge were

(1) What is the appropriate test to determine whether JM breached Rule E3(1); the 'objective bystander test' or is it necessary for somebody to be actually insulted, abused or offended by the words JM used ?

he had uttered a 'Portuguese profanity'. We conclude that ultimately we do not need to decide whether or not the Commission had that letter in mind when it reached its Decision. That is because (at paragraph 31 of its Decision and Written Reasons) the Commission described the 'words mouthed' as a 'Portuguese ... profanity', albeit that the Commission qualified 'profanity' with the word 'colloquial' for the reasons that we set out below.

(2) What is the proper construction of FA Rule E3(1) insofar as it relates solely to language? Does 'improper words' fall within the scope of the Rule?

(3) What is the translation of JM's repetition of the words ...?

(4) Subject to our findings on the above issues, did JM's language constitute an abusive and/or insulting and/or improper act so that it was a breach of FA Rule E3?

(5) If JM's language was a breach of Rule FA E3, did he nevertheless have a legitimate expectation that the use of profanity will not be deemed by the FA to be an act of misconduct contrary to the Rule so as to be an available defence?

i) Issue 1 before the Commission: Appropriate test

33) The Commission

- a) Rejected JM's submission that for a breach of Rule E3 to be made out
 - i) there must be at least one recipient of abusive, threatening, indecent or insulting words, and
 - ii) it must be possible to identify somebody who was actually insulted, abused and/or offended by words used, and
- b) Concluded that the appropriate test
 - 'is an objective one, commonly known as the 'reasonable observer test'. In other words, we were to consider how the words used would be perceived by a reasonable observer. That is entirely consistent with how the test has previously been applied.'*

34) There is no cross-appeal against, or criticism of, that conclusion. The Commission's conclusions in that regard – and the manner in which it summarised the '*appropriate test*' – were plainly right.

35) In this Decision and Written Reasons we refer to that test as '*the reasonable bystander test*'. It is, as the Commission recorded, an objective test.

ii) Issue 2 before the Commission: Construction of FA Rule E3

36) The Commission rejected JM's argument

- a) That use of 'improper words' could not fall within the scope of FA Rule E(3), and

b) That a breach of FA Rule E3 arising from a use of language could only be found if the words or language used were *'threatening, abusive, indecent or insulting'*.

37) Once again, there is no cross-appeal against, or criticism of, that conclusion. We therefore proceed on the basis that the Commission was entitled to ask itself, when determining the Charge, not only whether the words used by JM were *'abusive and/or insulting'* but also whether the use of such words was *'improper'*.

iii) Issue 3 before the Commission: Translation of the words

38) Having repeated its conclusion that there was *'no meaningful dispute between the parties'* as to the Portuguese words had been used by JM and caught by the broadcast camera, the Commission recorded (at paragraph 26 of the Decision and Written Reasons, with emphasis added by us) that

'The crux of the case relates to the translation and interpretation of JM's language' before noting *'the competing submissions of the FA and JM were premised on their own expert evidence'*.

39) Before setting out its conclusions on Issue 3, the Commission dealt with what it described as a *'central contention'* to the issue of translation, namely the relevance of *'context'*. It summarised the position of the FA as follows:

'The FA argues that as the comments are prima facie objectively abusive and/or insulting, the context in which they are used are not relevant for the purpose of determining whether breach has occurred but only for mitigation.'

40) The Commission rejected that argument by the FA, concluding at paragraph 30 of its Decision and Written Reasons (with emphasis added)

'In our assessment it is necessary for the Commission to consider not just the words in a vacuum but to consider whether, viewing the matter in context and taking into account the specific facts and circumstances involved, the words as translated were insulting and/or abusive and/or improper.'

41) It gave (at paragraph 27 of the Decision and Written Decision) 2 principal reasons for doing so:

- a) First, because the evidence of the FA’s own expert – Mr Xavier - was that *‘language is a very complex matter and it can be assessed in any different ways and interpreted differently by different kinds of people’*. From that the Commission concluded that *‘given such complexities, the scope for different interpretation and the fact that we are being invited to interpret and make a finding on a foreign language, the context is pertinent to our consideration of the reasonable bystander test’*;
- b) Secondly, in light of the expert opinion before the Commission to the effect that *‘there are no Portuguese words considered universally or intrinsically improper or offensive in and of itself. Rather it all depends on how, where and when those are used. To this extent the use and perception of swear words in Portuguese is considerably different to English’*.

42) On this appeal the FA criticised the Commission’s conclusion on this Issue 3; its position was

- a) As it had been before the Commission, that if (as it contended was the case) the words used by JM were on the face of it objectively abusive and/or insulting and/or improper, it was entirely unnecessary to go on to consider context; the very use of the words of itself meant that a breach of FA Rule E3 had been committed, and
- b) That the Commission had erred in rejecting its submission that context was irrelevant.

43) We reject that argument. While we set out reasons more fully below, in our view context is something that should be considered by a Regulatory Commission when assessing whether conduct or language amounts to a breach of FA Rule E3, albeit that the extent of the consideration in fact needed is likely to differ from case to case. If context is not properly considered, a Regulatory Commission cannot properly apply the objective ‘reasonable bystander’ test which, as we have said above, is the test by which conduct and words will be judged in any case involving an alleged breach of FA Rule E3. We say that because the ‘reasonable bystander’ must be taken to be appraised of all relevant facts and circumstances relating to the conduct/utterance, including the context of the conduct/utterance, before any Regulatory Commission can consider how that reasonable bystander might perceive the relevant words or conduct.

44) Having concluded that it should consider ‘context’, the Commission then set out (at paragraphs 28 and 29 of its Decision and Written Reasons) its analysis of and conclusions as to ‘context’ in this case:

a) At paragraph 28 the Commission re-analysed the evidence given by Mr Xavier and Dr Valente about the various possible English translations of the Portuguese words used by JM;

b) At paragraph 29 the Commission concluded

'In the absence of competing expert evidence on the significance of context when translating 'Vós sois uns filhos da puta' or 'Vão levar no cu, filhos da puta', we accepted Dr Valente's considered opinion that the contextual translation of 'fuck yeah' or 'hell yeah' was the most accurate in these circumstances.'

45) We return to those paragraphs below.

iv) Issue 4 before the Commission: breach of FA Rule E3 ?

46) As we have already said above, the Commission

a) Correctly identified that it was to apply the 'reasonable bystander' test in order to determine whether the FA had proved the Charge against JM, and

b) Correctly identified that, in order to apply that test properly, it was necessary to consider not just '*the words in a vacuum*' but also their context.

The Commission's application of the 'reasonable bystander' test to the facts, circumstances and context as the Commission found them to be is set out in paragraphs 30 to 34 of its Decision and Written Reasons.

47) The Commission began by listing the attributes that it considered should be ascribed to a 'reasonable bystander'. It was said that a 'reasonable bystander' should, in this case, be considered

a) To be someone of '*reasonable fortitude*'

b) To have an appreciation of the prevalence of profanity in football

c) To have an appreciation of the dramatic conclusion of the fixture

d) To have an appreciation of the particular circumstances of the scrutiny surrounding JM in this fixture.

No criticism is made of the Commission for ascribing those qualities to the 'reasonable bystander', and none is justified.

48) The Commission then went on to identify further 'context' that it considered to be relevant – in particular

a) That JM had been celebrating victory

- b) That although JM had uttered the Portuguese words twice, those utterances had been inaudible (and had not been ‘*shouted*’, as stated in Mr Xavier’s report)
- c) That on the first occasion that he had uttered the words, JM had been looking away from the broadcaster’s camera
- d) That on the second occasion that he had uttered the words JM had briefly glanced at the lens of the broadcaster’s camera
- e) That JM had not aimed the Portuguese words at anyone in particular
- f) That the words used were a ‘*Portuguese colloquial profanity*’.

49) The Commission then went on to attempt to apply the objective ‘reasonable bystander’ test to the facts as it had found them to be. It noted

- a) That the reasonable bystander would have had to lip read JM’s mouth, and
- b) That the reasonable bystander would have had to interpret Portuguese colloquialisms to ‘*accurately decipher the comments*’

before concluding (at paragraphs 32 and 33 of the Decision and Written Reasons) as follows:

32. Even if the objective person was able to decipher the language JM used, which is ‘highly debatable, we accept Mr Valente’s evidence that a typical person fluent in Portuguese colloquialisms would not feel insulted or offended from what they saw or interpreted from the footage, rather would understand JM to be very happy about something good that had just happened to him against all odds ...

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

50) In light of those conclusions, the Commission concluded that JM’s language had not been abusive or insulting or improper act so as to make its use a breach of FA Rule E3. The Charge was accordingly dismissed.

51) As we set out below, criticism of the way in which the Commission applied the ‘reasonable bystander’ test to the facts of the case as the Commission had found them to be formed the principal plank of the FA’s appeal

v) Issue 5 before the Commission: the Legitimate Expectation defence

52) In light of its findings on Issue 4, the Commission found it unnecessary to consider or determine JM’s Legitimate Expectation defence.

(D) The Appeal: an area of common ground

53) Before we turn to consider

- a) The bases upon which the FA pursued the appeal, and
- b) JM’s responses to those bases

we acknowledge what, early in the hearing, became common ground, namely our role on this appeal.

54) JM set out (at paragraphs 6 to 11 of Mr Gilroy QC’s Response to Notice of Appeal) his submissions as to our role. The FA did not quarrel with the contents of those paragraphs, and we accept what is said in those paragraphs about our role. We therefore acknowledge and record that

- a) An appeal such as this proceeds by way of a review of the decision of the Commission; it is not a rehearing;
- b) It is not open to us to substitute our decision for that of the Commission simply because we might ourselves have reached a different decision. If the Commission has reached a decision which it was open to the Commission to reach, the fact that we (or a different Regulatory Commission) might have reached a different decision is irrelevant. To put it another way, it is not for us to ‘second guess’ the Commission;
- c) Evidential assessments and factual findings made by the Commission should only be disturbed if they are clearly wrong or if wrong principles were applied. It was common ground that ‘*clearly wrong*’ encompassed 2 scenarios in this regard:
 - i) When there was no evidential basis whatsoever for a finding of fact that had been made, and/or

- ii) Where the evidence was overwhelmingly contrary to the finding of fact that had been made;
- d) We are permitted to ‘intervene’ only when there has been an error or principle by the Commission. To put it another way, we are not permitted to interfere with the decision of the Commission unless we are satisfied that the Commission has gone ‘plainly wrong’. The parties agreed that when applying that test, we are entitled to examine both
 - i) The ultimate decision reached by the Commission, and
 - ii) The route by which the Commission reached its decision;
- e) The test for us to apply in determining whether the Commission acted ‘*irrationally*’ or ‘*perversely*’ or ‘*came to a decision to which no reasonable body could have come*’ is essentially the Wednesbury test applied in public law in cases of judicial review;
- f) Any appellant who pursues an appeal on the ground that a Regulatory Commission has come to a decision to which no reasonable such body could have come has a high hurdle to clear or a high threshold to pass;
- g) We should accord the Commission a ‘*significant margin of appreciation*’ when considering matters such as evidential assessments, factual findings and any exercise of discretion by the Commission.

(E) The appeal: a preliminary contentious issue

55) In Mr Gilroy QC’s Response to the Notice of Appeal JM asserted that, despite the fact that the appeal was to proceed by way of review not rehearing, the FA was nonetheless impermissibly seeking

- a) To ‘*re-characterise the evidence*’, and/or
- b) To invite us to make findings of fact that were contrary to, or at least not entirely in line with, findings of fact made by the Commission.

In an Annex to the Response to the Notice of Appeal JM identified 17 occasions on which, it was said, the FA’s Written Submissions contained such impermissible re-characterisations and invitations and/or amounted to submissions or arguments which were contrary to the evidence (or, in certain instances, entirely new arguments).

56) At the appeal hearing we were addressed on a limited number of those 17 instances. We have however for the purpose of preparing these Written Reasons considered all 17 instances. Having done so, we find it unnecessary to address individually; it is more appropriate for us to address the parties' substantive positions on the appeal by reference to the broad sub-grounds of appeal rather than by reference to individual extracts set out in the Annex to the Response to the Notice of Appeal. That is what we do below.

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

- a) Does not accord precisely with the wording in the Commission's Written Decisions, and
- b) Might be described as 'spin' on the wording used by the Commission.

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

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

(F) The Appeal: the FA's first and second arguments

59) It is convenient to deal with these arguments together:

- a) Both arguments have at their heart an assertion
 - i) that no reasonable Regulatory Commission could have reached any conclusion other than that the words used by JM were, applying the reasonable bystander test, abusive or insulting and/or that JM's conduct in using such words was improper, and so
 - ii) that by reaching a contrary conclusion, the Commission's decision was one to which no reasonable Regulatory Commission could have come;

- b) The FA’s first argument on appeal is that such a conclusion should have been reached by the Commission without any consideration of the context in which the words had been uttered; any reasonable Regulatory Commission, the FA contends,
 - i) would have concluded from the very use of the words in this case that JM had breached FA Rule E3 and was guilty of the Charge, and
 - ii) would not have found it necessary to consider ‘context’;

- c) The FA’s second argument on appeal is that, even if the Commission did not err in considering the context in which the words had been used by JM
 - i) It still erred in concluding that, even when considered ‘in context’, the words did not amount to a breach of FA Rule E3, and
 - ii) By reached a conclusion that the words used by JM did not, when considered in context, amount to a breach of FA Rule E3, the Commission reached a conclusion that no reasonable Regulatory Commission could have reached.

i) Context

60) We reject the suggestion that the Commission erred in considering the context in which the relevant words had been used by JM. The FA fell well short of satisfying us that, on the facts of this case, no reasonable Regulatory Commission could have considered the context in which the words had been used to be relevant.

61) On behalf of JM Mr Gilroy QC helpfully drew our attention to 2 previous decisions of Independent Regulatory Commissions of the FA, namely *The FA v Luis Suarez* (30 December 2011) and *The FA v Nicolas Anelka* (3 March 2014). While the facts of each of those cases were some considerable way from the present case, each contained statements as to the approach that the relevant Regulatory Commission considered to be appropriate when considering whether words or conduct breached FA Rule E3:

- a) In *The FA v Suarez* the Regulatory Commission stated (emphasis added)
 - i) (at paragraph 57) ‘... the test for breach of Rules E3(1) is objective. The question is simply whether the words or behaviour are abusive or insulting. **This is a matter for the Commission to decide having regard to all the relevant facts and circumstances of the case ...**’, and

ii) (at paragraph 71) ‘... *in applying the objective test and asking ourselves whether, in our assessment the words or behaviour are abusive or insulting, it is necessary to view the matter in context, taking account of all the relevant facts and circumstances*’;

b) In *The FA v Nicolas Anelka* the Regulatory Commission (at paragraphs 12 to 14) endorsed the approach set out in *The FA v Suarez*.

62) We also endorse the observations of the Regulatory Commission in *The FA v Suarez*. In our view

a) It was essential for the Commission to ‘*view the matter in context, taking account of all relevant facts and circumstances*’ when applying the ‘reasonable bystander’ test. That is the approach taken in other spheres when a ‘reasonable bystander’ test falls to be applied, and we see no reason for any different approach to be taken when that test is applied for the purpose of determining whether a breach of FA Rule E3 has been committed;

b) It certainly cannot be said that, by considering ‘context’, the Commission acted in a way in which no reasonable Regulatory Commission could have acted.

63) We spent a little time with both parties during oral submissions considering whether there could ever be an occasion when a Regulatory Commission would not have to consider ‘context’ when assessing whether conduct or language amounted to a breach of FA Rule E3. While we do not need to decide that question (and we should not be taken as doing so in these Written Reasons) in order to decide this appeal

a) We are doubtful whether there would ever be such an occasion where it would be appropriate to consider words or conduct in a vacuum, without a consideration of the surrounding facts, circumstances or context, and

b) Our view is that any Regulatory Commission tasked with considering a charge involving alleged Misconduct under FA Rule E3 would always be well advised to consider ‘context’. While the extent of the consideration needed will vary from case to case - in some cases context and its relevance to the words or conduct may be extremely obvious, while in other cases the relationship might be complex or less clear-cut - any Regulatory Commission is likely to need

- i) To ascertain (by considering the relevant facts and circumstances of the case) the context in which the relevant conduct occurred and/or in which the relevant words were uttered, and
- ii) To have in mind that context when addressing the question of how the conduct or words under scrutiny would be perceived by the reasonable bystander.

ii) Context in this case

64) We have set out above the context in which the Commission found JM had uttered the relevant Portuguese words. As we have already said, having considered

- a) The factual findings that make up that ‘context’, and
- b) The evidential bases for such factual findings

there is in our view no justification for us interfering with any such factual findings. While other Regulatory Commissions might have interpreted the evidence differently, and so made different factual findings about the context in which JM used the words that he did, that is of no consequence on this appeal.

iii) The key question for us

65) Having

- a) Rejected the FA’s contention that context should have been ignored by the Commission, and
- b) Concluded that the Commission’s factual findings as to ‘context’ are not ones with which we should interfere

the question for us on this part of the FA’s appeal becomes a relatively simple one – has the FA persuaded us that no reasonable Regulatory Commission, correctly applying the ‘reasonable bystander’ test, could have concluded (as the Commission did) that in the context in which they were used, the words used by JM were not abusive, insulting or improper ?

66) In order to answer that question it is necessary to consider whether, having correctly *described* the ‘reasonable bystander’ test to be applied (at paragraph 24 of its Decision and Written Reasons) the Commission in fact *applied* that test correctly. In our view, it did not.

67) Assessing how the ‘reasonable bystander’ would have perceived the words used by JM required/requires a consideration of 2 matters:

- a) Who is the ‘reasonable bystander’ in a case such as this ? What attributes and qualities does he have ?
- b) What would that ‘reasonable bystander’ have understood JM to have been saying in the context of this case ?

a) Who is the ‘reasonable bystander’ in the context of this case, and what characteristics does he have ?

68) As we have said above, the Commission identified a number of qualities that it attributed to the ‘reasonable bystander’ in paragraph 30 of the Decision and Written Reasons. We see no reason to interfere with any of the conclusions reached in that paragraph.

69) In addition, the Commission accepted that although the words used by JM

- a) Were inaudible, and
- b) Were in any event in a language that (in light of the nature and location of the fixture) would not be readily understood by a ‘typical’ viewer of the fixture using his own linguistic skills

the ‘reasonable bystander’ would nonetheless have had those words communicated to him in a form that he could understand. The Commission was plainly correct to accept that. Given (amongst other things) the global reach of the Premier League, the high-profile of JM and the particular circumstances of the scrutiny surrounding JM in the fixture it was inevitable – as the Commission implicitly accepted -

- i) That JM’s words would be ‘picked up’ by the broadcaster’s cameras,
- ii) That JM’s words would be scrutinised,
- iii) That JM’s words would be translated, both in the sense of being lip-read and in the sense of being converted into English, so that they could be appreciated by a ‘typical’ viewer,
- iv) That once converted in that way, JM’s words would be widely disseminated for public consideration, and
- v) That it would thus not be only those viewers able to lip-read and understand Portuguese that would learn or appreciate what JM had said, but it would be a far wider, more diverse audience.

70) As set out above, at paragraphs 28 and 29 of its Decision and Written Reasons the Commission

- a) Analysed the expert evidence contained in the Xavier and Valente reports as to the correct English ‘equivalent’ of the Portuguese words used by JM
- b) Concluded that only Dr Valente had provided a ‘contextual translation’, which was ‘*fuck yeah*’ or ‘*hell yeah*’
- c) Concluded that Mr Xavier had not addressed context ‘*meaningfully if at all*’ in the Xavier report
- d) Accepted that Dr Valente’s opinion that ‘*the contextual translation of ‘fuck yeah’ or ‘hell yeah’ was the most accurate in these circumstances*’.

71) Having reached that conclusion, the Commission went on (at paragraph 30 of its Decision and Written Reasons, having set out its findings about ‘context’) to say this

‘Even if the objective person was able to decipher the language JM used, which is highly debatable, we accept Dr Valente’s evidence that a typical person fluent in Portuguese colloquialisms would not feel insulted or offended from what they saw or interpreted from the footage ...’

Thus as well as crediting the hypothetical ‘reasonable bystander’ (1) with being of reasonable fortitude, (2) as having an appreciation of the prevalence of profanity in football (3) with being aware of the dramatic conclusion of the fixture, and (4) with being aware of the particular circumstances of the scrutiny surrounding JM in the fixture, the Commission also concluded that the ‘reasonable bystander’ in this case should be given the attributes of fluency in (or at least an ability to understand and appreciate) Portuguese colloquialisms and an ability to determine when a literal translation of Portuguese words might not properly convey the meaning and intent of the totality of the phrase used. While no criticism can be made of the Commission in respect of (1) to (4), we agree with the FA’s submission that to attribute those final characteristics to a ‘reasonable bystander’ in this case was incorrect.

72) The FA puts its case (at paragraph 18 of the written Submissions on Appeal) as follows:

‘These words were not spoken ... to an exclusively Portuguese speaking audience or to an individual ... ‘fluent in Portuguese colloquialisms’. These were words spoken or

mouthed to camera², to a world-wide audience, which [JM] must (or ought to) have known perfectly well would be lip-read and translated for broad public consideration ... The literal translation ... [is] how the words would be reported to the notional 'reasonable observer'.'

73) During the course of his oral submissions on this issue Mr Laidlaw QC drew our attention paragraph 389 of the Decision and Written Reasons of the Regulatory Commission in The FA v Suarez. That paragraph contains the following passages:

'We are concerned with whether the words or behaviour were abusive or insulting when used in a football match in England under the FA Rules ... We are not deciding whether the words or behaviour would have been abusive or insulting if used in a match in Uruguay. Nevertheless we have taken account of the fact that the words were said in Spanish by a Uruguayan player to a French player who speaks Spanish. We have also had regard to the Spanish language expert evidence about how particular uses of 'negro' and comments using 'negro' would or might be understood in Uruguay. However ultimately our task is to decide whether in our view the words or behaviour were abusive or insulting in the circumstances in which they took place in this match played in England under the FA Rules'.

74) We asked Mr Gilroy QC whether JM took issue with the words that we have underlined in the passage from The FA v Suarez above. He did not. In our view he was entirely correct not to take issue with such statements. They are an appropriate statement of the approach to be taken by a Regulatory Commission which is tasked with considering whether conduct which takes place, or words which are uttered, at a match played in England and governed by the FA Rules are abusive, insulting or improper. The question for such a Regulatory Commission is not whether (in a case such as this) words uttered in a foreign language would be considered abusive, insulting or improper to native speakers of that language; the question is whether such words, when translated in a permissible and foreseeable way into English, would be considered abusive, insulting or improper to the reasonable English-speaking bystander when considered in the context in which they had been uttered.

75) Mr Laidlaw QC submitted that Mr Gilroy QC's acceptance of those underlined words was akin to a concession that the appeal must succeed. That in our view went too far; that

² To be clear, we do not accept that they were spoken or mouthed 'to camera'; as above, we accept that the Commission was entitled to conclude, as it did, that as he was making the second inaudible comment, JM glanced briefly towards the camera lens.

was not the effect of Mr Gilroy QC's acceptance that those words represented an accurate summary of the approach to be taken by a Regulatory Commission.

76) So, was that the approach taken by the Commission in this case? In our view it was not. The Commission's conclusion was that the 'objective person' (to adopt its phrase) should be taken to be an individual

- a) Who (whether or not they could lip read) was sufficiently fluent in Portuguese colloquialisms that they would understand the words used by JM to be nothing more than a Portuguese equivalent of '*fuck yeah*' or '*hell yeah*', and
- b) Who was sufficiently 'Portuguese' that they would not find such words to be in any significant way abusive, insulting or improper.

To put it another way, the Commission concluded that, given the context in which the words had been uttered, the 'reasonable bystander' would not (and could not) have understood the words used to equate in English to any of the literal or idiomatic translations described by either Mr Xavier or Dr Valente.

77) There, in our view, the Commission fell into error. The Commission

- a) Attributed the 'reasonable bystander' with the same characteristics as Dr Valente – in particular, an ability to process the words used by JM in such a way so as to appreciate that, despite their (agreed) literal and idiomatic English translations, the 'correct' meaning of the words was something altogether different, and
- b) Concluded that the 'reasonable bystander' could only have understood the words in the (non-offensive) way that Dr Valente considered they would be understood by a typical Portuguese speaker.

78) In doing so the Commission incorrectly characterised the hypothetical 'reasonable bystander'. The Commission appears to have lost sight of the fact

- a) That the fixture was a domestic match, played in England between 2 English clubs;
- b) That not all of the viewing audience (to put it at its very lowest) would have been versed in Portuguese colloquialisms;
- c) That what JM had uttered would be lip read and translated (if thought worthy of being reported) for broad public consideration;
- d) That as well as the Portuguese words having a contextual English equivalent of '*fuck yeah*' or '*hell yeah*', those words had literal or idiomatic translations as

- i) ‘*You are sons of whores/bitches*’, or
- ii) ‘*Go take it in the arse, sons of the whore*’ or ‘*Fuck off you sons of bitches*’/‘*Fuck off you arseholes*’

depending on precisely what Portuguese words had been used by JM;

- e) That it was not (to paraphrase the words used in *The FA v Suarez*) deciding whether the words would have been abusive, insulting or improper if used in a match in Portugal in front of an exclusively ‘typical’ Portuguese crowd (where a ‘reasonable bystander’ might have very different characteristics), but rather whether they were abusive, insulting or improper when used after this fixture in England.

79) The ‘reasonable bystander’ in a case such as this is perhaps best described as a ‘typical’ follower of English Premier League football (if there is such a thing). Some such persons may have the qualities of Dr Valente and his ‘*typical Portuguese speaker*’, but the overwhelming majority will not. Most

- a) Will be wholly dependent on third parties to ‘translate’ into a form that is comprehensible to them
 - i) inaudible comments made by Participants that have been picked up on camera and/or
 - ii) audible comments made by Participants in a foreign language that have been picked up on audio, and thus
- b) Will become informed of what has been said by Participants from ‘translations’ provided via such third parties.

In our view, that is how the Commission ought to have characterised the ‘reasonable bystander’.

b) So, how would such a ‘reasonable bystander’ have understood the words used by JM ?

80) Our finding that the Commission mis-characterised the reasonable bystander is not an end to the matter; the FA’s appeal succeeds only if no reasonable Regulatory Commission would have concluded that a properly-characterised reasonable bystander would have concluded that the words used by JM were not abusive, offensive or improper.

81) We invited the parties to address us on whether, having found that the Commission had misapplied the ‘reasonable bystander’ test, and so having ‘route’ by which the Commission had reached its conclusion was flawed,

- a) We should remit to a fresh Regulatory Commission the question of how a properly-characterised reasonable bystander would have understood the Portuguese words uttered by JM, or
- b) We should consider that question ourselves, with a view to establishing
 - i) Whether a Regulatory Commission could still have concluded that such a properly-characterised reasonable bystander would not have perceived the Portuguese words uttered by JM to be abusive, insulting or improper when considered in context, or
 - ii) Whether any reasonable Regulatory Commission would have been compelled to conclude that such a properly-characterised reasonable bystander would have perceived JM's words to be abusive, insulting or improper when considered in context.

82) Having heard submissions from both parties, we concluded

- a) That we were entitled to adopt the latter course,
- b) That adopting the latter course was fair to JM, and
- c) That adopting the latter course was the proportionate and correct way forward in this case given that we were not interfering with any of the findings of 'context' made by the Commission.

83) In our view, the properly-characterised reasonable bystander (i.e. the 'reasonable bystander' that we have described above)

- a) Is most unlikely to have understood JM's words to be an utterance equivalent to '*fuck yeah*' or '*hell yeah*', and
- b) Is far more likely to have understood those words as being
 - i) '*You are sons of whores/bitches*', or
 - ii) '*Go take it in the arse, sons of the whore*' or '*Fuck off you sons of bitches*'/'*Fuck off you arseholes*'

depending on precisely what Portuguese words had been used by JM.

84) The reality is that

- a) If a reasonable bystander had asked the question '*What did he say ?*' after seeing JM utter inaudible words on television, and

b) If that question had been answered by an audible repetition in Portuguese of the words uttered by JM, and

c) If the reasonable bystander had then asked the question ‘*What does that mean ?*’

the overwhelming likelihood is that that question would have been answered by the giving of the literal/idiomatic translation – ‘*it means ‘go take it in the arse, sons of a whore’, or ‘you are sons of whores/bitches’ or ‘fuck off you sons of bitches’/‘fuck off you arseholes’* (depending on the actual Portuguese words used). The reasonable bystander simply would not have been told ‘*it means ‘hell yeah/fuck yeah’*’.

85) Thus the answer to the question posed in the heading of this sub-section of our Written Reasons is that the ‘reasonable bystander’

a) Would have understood the words used by JM to mean ‘*go take it in the arse, sons of a whore’, or ‘you are sons of whores/bitches’ or ‘fuck off you sons of bitches’/‘fuck off you arseholes’* (depending on the actual Portuguese words used), and

b) Would not have understood the words used by JM to be simply a Portuguese phrase equivalent to ‘*hell yeah*’ or ‘*fuck yeah*’.

86) We find support for that conclusion in the following:

a) Both experts agreed (in very broad terms) on the literal/idiomatic translation of the words. The only difference between them in such regard came from the fact that they did not wholly agree on the Portuguese words in fact used;

b) Dr Valente’s evidence was not (and was not found by the Commission to be) that the Portuguese words in fact translated to ‘*fuck yeah*’ or ‘*hell yeah*’. His evidence was that despite their literal/idiomatic translation, a ‘*typical Portuguese speaker*’ would take them to mean ‘*fuck yeah*’ or ‘*hell yeah*’. However, as we have said above, the ‘reasonable bystander’ is not to be equated with a ‘typical Portuguese speaker’;

c) JM’s own characterisation (in the 11 October 2018 letter) of the words that he had used as a ‘*Portuguese profanity*’. It is notable that in that letter JM (1) asserted that there was ‘*no direct translation*’, a position with which neither expert agreed, and (2) made no attempt to assert that the Portuguese words that he had used (a) had an inoffensive meaning akin to ‘*hell yeah*’ or ‘*fuck yeah*’, or (b) (to use Dr Valente’s

words) ‘*would not be considered abusive, insulting, improper or offensive by a typical Portuguese speaker who was able to decipher them*’. Rather, he apologised to anyone who had understood the ‘*Portuguese profanity*’ that he had uttered and who had been offended by those words;

- d) The way in which the words were in fact reported in the British press (or at least, in those articles which were in evidence before the Commission). Aside from a somewhat opaque headline in a Portuguese newspaper (referenced in the Valente report), none of the media coverage in evidence translated or reported JM’s words as having a meaning equivalent to ‘*fuck yeah*’ or ‘*hell yeah*’.

87) It is also our view that any ‘reasonable bystander’ who understood the words used by JM as we have set out at paragraph 85 above would consider those words to be abusive, insulting or improper, even given the context in which the Commission found they had been uttered by JM. The context as found by the Commission does not render those words ‘inoffensive’ to the ‘reasonable bystander’ in this case, even if they would have been considered inoffensive by a typical Portuguese speaker in such context. The fact that they were uttered as a celebration of victory or as an expression of vindication or success after a period of suffering might explain why JM used the words that he did, but does not render those words inoffensive.

88) While those are the conclusions that we have reached, we also have asked ourselves whether a different Regulatory Commission (or Appeal Board) could have reached different conclusions – in other words, whether the Commission’s conclusion that JM’s words were not abusive, insulting or improper (albeit a conclusion reached by an incorrect application of the ‘reasonable bystander’ test) was nonetheless a conclusion that could have been reached by a reasonable Regulatory Commission that correctly applied the ‘reasonable bystander’ test.³ In our view this is not such a case. Any reasonable body tasked with determining whether JM’s words would be perceived by a properly-characterised reasonable bystander as being abusive, insulting or improper would, in our view, conclude that they were.

³ As it was put succinctly in oral submissions by Mr Gilroy QC, even though we have concluded that the route by which the Commission reached its decision was flawed, we still have to ‘*look at the integrity of the decision as a whole*’ when asking ourselves whether the basis on which the FA has pursued this appeal – that the Commission came to a decision to which no reasonable such body could have come – has been made out.

iv) Conclusion on the key question

89) In summary

- a) The Commission correctly identified the need to apply the ‘reasonable bystander’ test to determine the Charge;
- b) The Commission correctly identified the need to consider context, so as to ensure that the ‘reasonable bystander’ was properly appraised of facts and circumstances relevant his hypothetical consideration of the words used;
- c) The Commission wrongly applied the ‘reasonable bystander’ test to the facts of this case. That is because the Commission mis-identified a key characteristic of the ‘reasonable bystander’ by finding that the ‘reasonable bystander’ would have understood the words used by JM to be the Portuguese equivalent of the phrase ‘*fuck yeah*’ or ‘*hell yeah*’;
- d) The Commission (and any reasonable Regulatory Commission) ought to have concluded that the reasonable bystander would have understood the words used by JM
 - i) To be a profanity, uttered in Portuguese, and
 - ii) To translate into English as ‘*go take it in the arse, sons of a whore*’ or ‘*you are sons of whores/bitches*’ or ‘*fuck off you sons of bitches*’/‘*fuck off you arseholes*’ (depending on the actual Portuguese words used by JM);
- e) The Commission (and any reasonable Regulatory Commission) ought to have concluded that a reasonable bystander, understanding those to be the words that had been used by JM and understanding the context as found by the Commission, would consider such words to be abusive, insulting and/or improper;
- f) The Commission (and any reasonable Regulatory Commission) ought to have found that, subject to the Legitimate Expectation defence, the Charge had been proved by the FA against JM.

90) Before leaving this section, we confirm that in reaching that the above conclusions

a) We have borne in mind the principles set out above which define our role as the Appeal Board, and

b) We have accorded the Commission's decision a wide margin of appreciation.

However, as we have said, we have concluded (1) that the Commission 'went wrong' when applying the reasonable bystander test, and (2) that had the 'reasonable bystander' test been correctly applied, no reasonable Regulatory Commission could have concluded anything other than, subject to the Legitimate Expectation defence, JM had used insulting and/or abusive language and/or had acted improperly by using such language.

(G) The FA's third ground of appeal

91) The third ground of appeal advanced by the FA was described thus:

'This decision - although this is not a reason itself the Appeal should allowed, but rather an example of the irrationality of the decision – sets a very dangerous precedent in respect of the FA's ability to regulate and control the behaviour of its Participants and thus to preserve the reputation of the game. Why should the position of [JM], speaking in Portuguese, be any different to that which brought Mr Rooney before a Commission for swearing in English into a camera in 2011 ?'

92) That is not a submission (or ground) which we found persuasive and is certainly not a basis on which we would have allowed the appeal had we rejected the FA's other arguments. Every case where conduct or language of an individual is under scrutiny will turn on its own facts. The Commission's Decision – had it stood – would not have set any dangerous precedent.

(H) The Legitimate Expectation defence

93) As set out above, the Commission dealt with all but one of JM's defences to the Charge. It did not however deal with JM's Legit Expectation defence.

94) We invited the parties to address us on whether we, effectively as a first instance tribunal, should resolve that Legitimate Expectation defence. Having heard submissions we concluded that it would not be appropriate for us to do so. We therefore decided to remit the Legitimate Expectation defence to a fresh Regulatory Commission for consideration and determination. We are satisfied that a fresh Regulatory Commission will be able to determine the Legitimate Expectation as a stand-alone issue. While JM's position in that regard altered a little during the hearing, we are of the view that Mr Gilroy QC's initial

position of the Legitimate Expectation defence being distinct from, and ‘boxed off’ from, the other issues determined by the Commission and considered by us in this appeal was correct.

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

(I) Conclusions

96) Having carefully analysed

- a) The materials before the Commission,
- b) The Commission’s Decision and Written Reasons, and
- c) The written and oral submissions advanced before us

we find that the FA’s appeal should be allowed. The Decision of the Commission to find that the FA had not proved that JM’s words were abusive, insulting or improper was not a conclusion any reasonable Regulatory Commission could have reached.

97) We also find that the only conclusion that could reasonably have been reached by a Regulatory Commission properly applying the correct ‘reasonable bystander’ test, on the facts and in the context and circumstances of this case as the Commission had found them to be, was that JM’s words were abusive, insulting or improper

98) Those conclusions are however subject to the important caveat that JM’s Legitimate Expectation defence has not yet been determined. Despite those conclusions it is therefore not appropriate for us to finally determine whether JM’s conduct did or did not constitute Misconduct under FA Rule E3. That is a task for a fresh Regulatory Commission, to whom we have remitted the determination of the Legitimate Expectation defence.

99) Until that Legitimate Expectation defence has been decided, and the fresh Regulatory Commission has produced its Decision and Written Reasons, this Decision and Written Reasons is embargoed.

(J) Costs

100) Pursuant to Regulation 17 of the Appeals - Fast Track Regulations costs fall to be determined in accordance with the provisions of paragraphs 54 and 55 of Part A: General Provisions.

101) Mr Gilroy QC submitted that it would be inappropriate for us to make any costs order now, and that we should reserve questions of costs until after the fresh Regulatory Commission has concluded its deliberations and reached a final determination on the Charge. Mr Laidlaw QC did not oppose us taking that approach. That is therefore what we do.

102) It may be that the parties are in time able to reach a consensus on what costs order we should make. If that is the case, we invite them to set out their joint position briefly in writing for us to consider. If that is not the case, we will receive brief written submissions from each party as to costs.

(K) Order

103) We accordingly declare and order and declare as follows:

- a) The FA's appeal is allowed and the Decision of the Commission to dismiss the Charge is quashed;
- b) The words used by Mr Mourinho after the end of the fixture, as captured by the broadcast camera, were abusive and/or insulting and/or Mr Mourinho's conduct in using those words was improper;
- c) Mr Mourinho's Legitimate Expectation defence is remitted to a fresh Regulatory Commission for determination;
- d) The costs of this appeal are reserved
- e) This Decision and Written Reasons are embargoed until the fresh Regulatory Commission
 - i) Has determined the Legitimate Expectation defence,
 - ii) Has finally determined the Charge, and
 - iii) Has produced its Decision and Written Reasons.

Graeme McPherson QC (Chairperson)

Marvin Robinson

Simon Parry

Signed by the Chairperson on behalf of the Appeal Board

18 November 2018