

**IN THE MATTER OF AN APPEAL**

**FROM THE DECISION OF A REGULATORY COMMISSION**

**OF THE FOOTBALL ASSOCIATION**

**BETWEEN:**

**THE FOOTBALL ASSOCIATION**

**Appellant**

**and**

**(1) MARCO DA SILVA**

**(2) ALEKSANDAR MITROVIĆ**

**Respondents**

Appeal Board: Paul Goulding KC (Chair) – Independent Specialist Panel Member  
Abdul Shaffaq Iqbal KC – Independent Legal Panel Member  
Stuart Ripley – Independent Football Panel Member

Secretary: Michael O’Connor – Lead Judicial Services Officer

Attendees: *For the Football Association*  
Kate Gallafent KC - Blackstone Chambers  
Celia Rooney - Blackstone Chambers  
Yousif Elagab – Senior Regulatory Advocate, the FA  
Charlie Kendrick – Paralegal, the FA

*For Mr Silva and Mr Mitrovic*  
Nick De Marco KC – Blackstone Chambers  
Peter Limbert – General Counsel, Fulham FC  
Rebecca Todd – Associate General Counsel, Fulham FC  
Nick Alford – Club Secretary, Fulham FC

Date of hearing: 21 April 2023

Venue: Video conference call

## WRITTEN REASONS OF THE APPEAL BOARD

### **Introduction**

1. On 19 March 2023, Fulham played Manchester United at Old Trafford in the FA Cup Quarter Final. In the 72<sup>nd</sup> minute, with Fulham leading 1-0, the Fulham player Willian Borges Da Silva (known more commonly as “Willian”) blocked a shot from the Manchester United player Jadon Sancho on the Fulham goal line. The referee initially gave a corner but was then advised by the Video Assistant Referee (**VAR**) to consult the pitch side monitor.
2. After the referee had signalled the VAR review, Marco da Silva, the Fulham manager, threw a water bottle in the direction of the assistant referee, protested to the fourth official and then continued to protest as he walked towards the referee who was consulting the monitor. The referee showed Mr Silva a red card. Mr Silva then protested again to the fourth official.
3. Having consulted the monitor, the referee returned to the pitch and signalled a penalty before showing Willian a red card for handball. At this point, Aleksandar Mitrovic, the Fulham striker, approached the referee, dug his elbow into the referee’s arm and protested at the decision. The referee showed Mr Mitrovic a red card. Mr Mitrovic continued to protest to the referee, and to the fourth official, until he was led away by others.
4. The Football Association (**FA**) charged both Mr Silva and Mr Mitrovic with breaching its rules. A hearing took place before a Regulatory Commission (**RC**) of the FA on 3 April 2023. The RC provided its decision with written reasons on 6 April 2023. Mr Silva admitted all save one of the charges (which was found proved) and received a 2-match suspension and a fine of £20,000. Mr Mitrovic denied a charge that the standard punishment (a 3-match suspension) otherwise applicable to his sending off was clearly insufficient (which was found proved) and admitted a charge relating to his conduct after the red card. He received a 3-match suspension for the former charge (in addition to an automatic 3-match suspension for the red card), and a 2-match suspension and a fine of £75,000 for his conduct after the red card. He, therefore, received a total suspension of 8 matches.

5. The FA appealed the 2-match suspension against Mr Silva and the 2-match suspension against Mr Mitrovic for his conduct after the red card. Under the FA rules, no appeal can be brought in respect of the additional 3-match suspension for Mr Mitrovic's conduct before the red card. In order to succeed on either appeal, the FA must show that the RC imposed a sanction that was "*so unduly lenient as to be unreasonable*" (as stated in Regulation 5.3 of the Fast Track 7: Appeals – Fast Track Regulations).
6. The Appeal Board heard the FA's appeal on 21 April 2023. The appeal hearing was conducted remotely using MS Teams. The parties were represented at the hearing by counsel, who provided clear and detailed written and oral submissions, for which we are grateful. Following the conclusion of the hearing, we informed the parties of our decision, which is to dismiss both appeals. These are our reasons for that decision.

#### **The FA rules and charges**

7. Mr Silva and Mr Mitrovic were charged with a breach of FA Rule E3.1, which is in the following terms:

*"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."*

8. Mr Silva was charged with four breaches of FA Rule E3.1 as follows:

*"1. It is alleged that your behaviour in throwing a water bottle in the direction of the Assistant Referee was improper; and*

*2. It is alleged that prior to your dismissal, you used abusive and/or insulting words towards the Fourth Official; and*

*3. It is alleged that you used abusive and/or insulting words and/or gestures and/or behaviour towards the Match Referee; and*

*4. It is alleged that following your dismissal, you used abusive and/or insulting words and/or gestures and/or behaviour towards the Fourth Official"*

9. Mr Mitrovic was charged with two breaches of FA Rule E3.1. The first concerned his conduct before the red card. Since this is not the subject of any appeal, we shall say little about it save in so far as it is relevant to the appeal. The second charge against Mr Mitrovic was in the following terms:

*“It is alleged that following the offence for which you were dismissed, your behaviour and/or language was improper and/or abusive and/or insulting and/or threatening.”*

10. The FA designated the case against Mr Silva and the second charge against Mr Mitrovic as a Non-Standard Case. This designation derives from the FA Disciplinary Regulations concerning Fast Track 2 cases. Both cases that are the subject of this appeal were Fast Track 2 cases which concern *“incidents on or around the field of play”* and *“incidents outside the jurisdiction of match officials”* (such as Mr Mitrovic’s conduct after his red card). Regulations concerning Fast Track 2 cases include the following provisions under the heading *“Standard Penalties”*:

*“8 The Association may in its absolute discretion designate a case as a “Standard Case”*

*9 In exercising that discretion, The Association shall not designate any case as a “Standard Case” where any one or more of the following exceptional circumstances applies:*

*9.1 where the particular facts of the alleged Misconduct are of a serious and/or unusual nature, as determined by The Association;*

*9.2 where the Participant Charged has been issued a Charge for a similar matter, as determined by The Association, which took place in the preceding 12 months, and that Charge was found proven; and/or*

*9.3 where the Charge is issued in relation to media comments made by the Participant.*

*10 Where a case is designated as a Standard Case:*

*10.1 Standard Penalty 1 shall be offered in the Charge and will come into effect where such a Charge is admitted and the Standard Penalty is accepted;*

*10.2 Standard Penalty 2 shall come into effect when the Charge is denied and is subsequently found proven by a Regulatory Commission.*

11 *In all cases Standard Penalty 1 shall be lower than Standard Penalty 2. In the ordinary course it shall be lower by approximately one third.*

12 *Where a case is not designated as a Standard Case (a “non-Standard Case”), a Standard Penalty will not be offered and, where such a Charge is admitted or found proven, the Regulatory Commission shall have a discretion to impose any such penalty as it considers appropriate.”*

11. The FA designated Mr Silva’s case as a Non-Standard Case “*due to the multiple incidents of misconduct*”. The FA designated Mr Mitrovic’s case concerning his conduct after the red card as a Non-Standard Case “*due to the incident occurring outside the jurisdiction of the Match Official and/or the aggressive nature of the reported behaviour*”.

12. We shall return below to the Non-Standard nature of the case against Mr Silva since this is relevant to the FA’s appeal in his case.

13. In FA v Jurgen Klopp, the Appeal Board provided the following guidance when the FA appeals on the ground that a sanction is so unduly lenient as to be unreasonable:

*“a) That this appeal is by way of a review of the decision of the [Regulatory Commission], not a rehearing;*

*b) That the burden rests with the Appellant – the FA – to establish that the [Regulatory Commission’s] decision was one to which no reasonable Regulatory Commission could have come. The hurdle for the FA to clear is thus a high one;*

*c) That when assessing whether the [Regulatory Commission’s] decision was one to which no reasonable Regulatory Commission could have come, an Appeal Board is entitled to examine both*

*i) The route by which the Regulatory Commission reached its decision, and*

*ii) The ultimate decision reached by the Regulatory Commission;*

*d) That when considering evidential assessments, factual findings and the exercise of a judicial discretion in the context of an appeal by way of a review, a Regulatory Commission made up of individuals with considerable sporting and dispute resolution experience (as the*

*[Regulatory Commission] was) should be accorded a generous and significant margin of appreciation by an Appeal Board;*

*e) That evidential assessments and factual findings made by a Regulatory Commission should only be disturbed by an Appeal Board if they are clearly wrong or wrong principles have been applied; it is not for an Appeal Board to substitute its own view simply because it might have reached a different decision;*

*f) That when assessing whether a sanction is unreasonable, the same generous and significant margin of appreciation applies. It is not for an Appeal Board to substitute its own opinion on sanction unless it finds that the Regulatory Commission's decision was unreasonable or one that it was not open to the Commission to have reached:*

*i) By analogy with the decision in Wilfred Zaha v The FA (supra) @ para 30 (where the issue was whether the sanction imposed by the Regulatory Commission had been 'excessive') it would be 'wrong for an Appeal Board to interfere with a sanction imposed by a Regulatory Commission simply because the Appeal Board would itself have imposed a slightly lower (sic) sanction'*

*ii) 'So unduly lenient as to be unreasonable' means more than merely 'lenient'; it means so unduly lenient as to be unreasonable in the sense that it was a sanction which no reasonable Regulatory Commission could have imposed."*

14. The weight to be given to different factors relevant to sanction is a matter for the RC to assess and evaluate. An Appeal Board should not interfere with the RC's assessment unless its approach is wrong in principle or one which no reasonable RC could adopt. The fact that an Appeal Board might have attached more (or less) weight to any particular factor than the RC did is not, of itself, a reason to interfere with the RC's assessment: FA v Klopp.

15. It is also well-recognised in football disciplinary cases, as in other fields of law, that an Appeal Board should not subject the language of the decision of a Regulatory Commission to excessive scrutiny. Decisions can frequently be better expressed and should not be overturned for what has been described as "*infelicitous drafting*". An Appeal Board should

read the decision of an RC as a whole, having regard (amongst other matters) to the time constraints under which a decision may have been produced.

16. The FA did not dispute the correctness of the approach outlined above to an appeal against sanction.

#### **The decision of the RC in this case**

17. When considering sanction for Mr Silva, the RC rejected what it described as the FA's approach of effectively seeking a separate sanction for each of the four breaches of FA Rule E3.1 which the FA submitted should result in a touchline ban of 4-6 matches. The RC continued:

*“80. However, we equally consider that Mr Silva’s misconduct was undoubtedly serious, with the aggravating features of it being at a time of the Match when the Match Referee was under great pressure and seeking to undertake a V.A.R. review, with repeated foul language being used to more than one Match Official. The Commission also found that the throwing of the water bottle, in the circumstances as we have found them, which was a charge that Mr Silva denied, did him no credit. The Commission also had regard, when considering the sanction, to the fact there were four breaches of Rule E3, three of which had been admitted as well as to a previous sanction imposed on Mr Silva in April 2022 for comments made to the Assistant Referee in a game at Bournemouth, which bore some similarities to some of the conduct we were considering and for which Mr Silva was fined £2000.*

*81. The Commission also considered the mitigating factors in Mr Silva’s favour, including his apology, to the Match referee, publicly via the Fulham website and to us as a Commission. We accept he was contrite about what had happened. In having regard to this mitigation the Commission considered that it removed any possibility of a 3 match touchline ban, which the Commission would otherwise have considered imposing.*

*82. In considering a fine, in addition to the touchline ban, the Commission took into account all the circumstances of what was a prolonged period of misconduct, as*

*well as Mr Silva's antecedents. The Commission considered that, in context, a substantial fine along with the 2 match touchline ban was proportionate and properly reflected the seriousness of the events, having regard to bans that were imposed in other cases cited to us which were often for a single incident, but which usually led to a single game ban."*

18. The RC imposed a touchline ban for 2 games and a fine of £20,000 on Mr Silva.

19. In Mr Mitrovic's case, having considered other cases of players failing to leave the field of play, the RC continued:

*"104. Ultimately, however, we were considering the actions of Mr Mitrovic. Having regard to all the circumstances of the events after the red card, namely 'out of the jurisdiction' we were completely satisfied that the appropriate and proportionate sanction was a ban for 3 games. The Commission considered that the 1 game suggested on behalf of Mr Mitrovic was plainly inadequate and carried with it an inherent failure to recognise the seriousness of what had occurred. The Commission also considered that, in all the circumstances, a suspension of 4-6 games as advocated by The FA was disproportionate. We must be careful to have regard to the totality of the events, but also avoid double counting and in considering this charge we are only considering the post red-card events. Those events warrant a 3 game ban.*

*105. The Commission also stood back and considered the totality of the 1 minute 32 seconds and asked itself the question of whether, before applying mitigation, a 9 game ban was proportionate. This the Commission undertook as a check and balancing exercise. Although sanctioning for separate charges, the Commission was of the view that it should also consider the totality of the events and the sanction imposed. Having undertaken this exercise the Commission was wholly satisfied that a 9-game ban was proportionate.*

*106. The Commission also considered mitigation on the out of jurisdiction charge. Mr Mitrovic, we were told, had apologised to the Match Referee, Mr Kavanagh. Mr*

*Mitrovic had also issued a public apology and although not giving evidence he attended before us to express his remorse and contrition for what had happened. The Commission accepted his apology and contrition as genuine. Whilst it was also suggested that Mr Mitrovic has volunteered for an internal club fine at Fulham, we did not consider this to have much mitigating effect in circumstances where we were told that the fine had not yet been applied.*

107. *In all the circumstances, including the fact Mr Mitrovic accepted the 'out of jurisdiction' charge at the earliest opportunity, the Commission determined that it was appropriate to reduce the ban by one match to have proper regard to the mitigation."*

20. In total, the RC imposed a ban of 2 matches on Mr Mitrovic for his conduct after the red card (reduced from 3 matches by 1 match for mitigation), as well as a further 3-match ban in addition to the automatic 3-match suspension for the red card offence, making a total ban of 8 matches, and a fine of £75,000.

#### **The FA's appeal in Mr Silva's case**

21. The FA appealed Mr Silva's 2-match ban on the ground that it is so unduly lenient as to be unreasonable. The FA sought a ban of 4-6 matches.

#### *The FA's submissions in Mr Silva's case*

22. The FA advanced two arguments in support of its appeal in Mr Silva's case.

23. First, the FA argued that the RC erred in not approaching the issue of sanction by reference to each separate and distinct breach, which error led to an unduly lenient sanction. The FA's position is that the proper approach in principle when considering the imposition of a sporting sanction for a Non-Standard breach of Rule E3 is as follows. First, the starting point should be that, in a standard case, the standard sporting sanction for an admitted breach involving abusive or insulting language is a 1-match touchline ban, although there is no standard sporting sanction if the charge excludes abusive or insulting language. Second, where a case has been designated as "Non-Standard" (and where the RC agrees with that

assessment) on the grounds that it is of a serious nature then, by definition (and prior to taking account of mitigation), a greater sanction than the standard sporting sanction should be imposed for a breach of Rule E3. Third, where a charge contains multiple alleged breaches, an RC should start by approaching the issue of sanction on the basis that such breaches should be considered separately, unless it would be unreasonable to regard them as being separate and distinct such that they should be considered to constitute a single incident or course of conduct. Fourth, an RC should consider whether the overall sanction based on adding together individual sanctions for each breach is, viewed in its totality, proportionate, and if it is not to reduce the overall sanction accordingly.

24. The FA criticised the RC's characterisation of Mr Silva's conduct as "*different facets of one course of Misconduct*" which, it argued, failed to have due regard to the distinct aspects of Mr Silva's conduct over the relevant period. As such, the RC wrongly conflated the four separate incidents alleged in the charge into a single incident. The FA argued that the RC was wrong to place any reliance on previous cases to which it referred (Tuchel; Klopp; Lowe; and Marsch), each of which was distinguishable from the present case.
25. Second, the FA argued that, even if the RC did not err in having treated the four separate incidents as a single course of misconduct, it nonetheless imposed a sanction that was unduly lenient. The FA contended that the RC offered no explanation as to why a 4-6 match ban was disproportionate nor why it mattered that the numerous admitted or proven breaches of Rule E3 were different facets of one course of misconduct. As the RC recognised, Mr Silva's conduct was undoubtedly serious and involved very many aggravating features. The RC was also wrong to attribute any significant weight to the fact that Mr Silva had offered an apology and that his contrition removed any possibility of a 3-match touchline ban which it would otherwise have considered imposing. Mr Silva's apology was given well after the FA had brought charges and was given "*presumably on legal advice as to its potential for mitigation purposes*".

*Mr Silva's submissions*

26. In response on behalf of Mr Silva, it was said, first, that the FA had not designated this as a Non Standard Case on the grounds that it is serious but rather due to the multiple reported incidents of misconduct. That cannot be a reason for increasing the sanction for each incident otherwise the FA would have it both ways: regard one course of conduct as 4 separate incidents, each attracting a standard penalty, then increase each standard penalty because there is more than one incident. Second, the RC was not required, in a case containing multiple alleged breaches, to approach the issue of sanction on the basis that each breach should be considered separately. There is no authority supporting this approach, which is unsurprising since the FA usually brings a single charge in respect of one course of conduct. It was reasonable for the RC to consider Mr Silva's conduct as a whole when sanctioning. In any event, the RC considered that a 3-match ban was proportionate (before considering mitigation), which is the position it would have reached if it had applied the standard penalty of a 1-match ban for each of the three charges involving abusive or insulting language.

27. As for the previous cases to which the RC referred, three of them involved a 1-match ban, including the case of Marsch which involved misconduct closest to the facts of, though more serious than, this case, whilst the case of Lowe which was more serious resulted in a 2-match ban. The RC was entitled to find that Mr Silva was contrite about what happened, which was not challenged on appeal, and the weight to be attached to this mitigating factor was a matter for the RC. Overall, even if a 4-match ban might have been in the range of proportionate sanctions to have imposed as a starting point, that did not mean that it is so unduly lenient to be unreasonable for the RC to have used a 3-match ban as a starting point.

*Decision on the FA's appeal in Mr Silva's case*

28. We begin by considering the proper approach for an RC when considering a case that the FA has designated as a Non-Standard Case due to the multiple reported incidents of misconduct. We do not accept the FA's argument that an RC is required to approach the issue of sanction on the basis that the multiple breaches should be considered separately, and the standard penalty applied to each breach as a starting point, unless it would be unreasonable to regard

them as being separate and distinct such that they should be considered to constitute a single incident or course of conduct.

29. There is nothing in the relevant FA rules that requires an RC to approach the issue of sanction in a multiple breach case in any particular way. On the contrary, the rules provide that in a Non-Standard Case, a Standard Penalty will not be offered, and where such a Charge is admitted or found proven, the RC shall have a discretion to impose any such penalty as it considers appropriate (Regulation 12). It is clear from the rules that an RC has a discretion in approaching the matter of sanction and there is no particular structure or framework that it is required to adopt when deciding on sanction. Indeed, it may be an artificial exercise, in any particular case, to have to decide whether to characterise the multiple instances of misconduct as separate acts of misconduct or as separate facets of one course of misconduct. There is no clear dividing line between the two approaches. If the FA's argument were correct, and an RC is required to start by applying standard penalties to each separate charge, that would mean that the starting point for sanctions would vary according to how many charges the FA unilaterally chose to bring in relation to the conduct in question. That cannot be right.
30. In our view, it is a matter for an RC to decide, in the exercise of its discretion, how to approach the issue of sanction in a Non-Standard multiple breach case. It is entitled (though it is not required) to have regard to the standard penalties, and to consider each breach separately or as part of a course of conduct. There is no set formula. In each case the RC should have regard to all the relevant circumstances and elements of the conduct in question.
31. It follows that we do not accept the FA's argument that the RC erred in not approaching the issue of sanction by reference to each separate and distinct alleged breach. The RC was entitled to approach the case in the way it described in paragraph 77 of its decision, namely on the basis that, for the sanction to be proportionate, the totality of the breaches needed to be considered as different facets of one course of misconduct. There is much to be said for that approach in this case. Mr Silva's conduct, which gave rise to the four charges, arose out the decision to carry out a VAR review of Willian's goal line clearance, and all took place within

a short space of time. The RC carefully considered the different aspects of Mr Silva's conduct, as paragraph 80 of its decision makes clear (set out above).

32. The FA's alternative argument in Mr Silva's case is that, even if the RC was entitled to approach the case on the basis of different facets of one course of conduct (as we have held that it was), nevertheless the sanction was still so unduly lenient as to be unreasonable.
33. As we have remarked, the RC considered the different aspects of Mr Silva's conduct, noting in paragraph 80 of its decision that it was undoubtedly serious with the aggravating features that (i) it involved repeated foul language, (ii) it was directed at three match officials (the referee, assistant referee and fourth official), (iii) it occurred when the referee was under great pressure and seeking to undertake a VAR review, (iv) Mr Silva threw a water bottle in the direction of the assistant referee, and (v) Mr Silva had in the previous season made comments to an assistant referee which bore similarities to some of the conduct in this case, for which he was fined.
34. Whilst no RC should slavishly seek to follow previous decided cases (as this RC reminded itself), the four previous cases to which it referred resulted in managers receiving 1 or 2-match touchline bans. As for Mr Silva's apology, the weight to be attached to this is a matter for the RC provided that its approach is not unreasonable in the sense of an approach that no reasonable Regulatory Commission could adopt. We do not accept that the assessment of the RC to reduce the starting point for the match ban by 1 match is unreasonable. Mr Silva gave evidence and apologised to the RC in person. The RC accepted that he was contrite about what had happened. The FA has not challenged that finding. The RC reduced the 3-match ban that it would otherwise have given by 1 match to reflect this mitigation. The RC was entitled to do so.
35. It was for the RC to decide what was a proportionate sanction having regard to all the relevant circumstances. Given the various matters to which it made careful reference, we do not accept the FA's argument that the RC was required to provide any further explanation as to why it considered a 4-6 match ban to be disproportionate.

36. Having reviewed the RC's detailed reasoning, the FA's criticisms of that reasoning, and having considered the sanction that the RC imposed on Mr Silva in the round, we are not persuaded that the sanction was so unduly lenient as to be unreasonable.

#### **The FA's appeal in Mr Mitrovic's case**

37. The FA appealed Mr Mitrovic's 2-match ban for his post-red card conduct on the ground that it is so unduly lenient as to be unreasonable. The FA sought a ban of 4-6 matches.

#### *The FA's submissions in Mr Mitrovic's case*

38. The FA pointed out that the RC found that Mr Mitrovic's conduct that led to his red card "*was the worst example of on-field behaviour toward a Match referee for a very long time*" (paragraph 91 of the RC's decision). The FA also referred to the RC's finding that "*if anything, Mr Mitrovic became more aggressive and threatening towards the Match Referee in the seconds after he had been red-carded. Although there was no physical contact at this point, if the Referee had not moved his head back, arched his back and then walked backwards, there is no doubt there would have been*" (paragraph 100 of the RC's decision). The FA argued that the logic of the RC's own decision is therefore that the post-red card charge is more serious than the pre-red card charge which it recognised as itself the worst example of on-field behaviour towards a match official in recent memory.

39. The FA also relied on the aggravating circumstances, including Mr Mitrovic's repeated foul and abusive language towards the referee when he was doing his job in very difficult circumstances and which led to him being surrounded on the field. The FA also argued that the RC was wrong to reduce the standard 3-match ban to 2 matches, where the only mitigation available to Mr Mitrovic was his (late, post-charge) apology. Further, the FA suggested that the RC was influenced by a misplaced concern about double-counting and failed to explain why a total 10-12 match ban would be disproportionate – as would have been imposed had the RC accepted the FA's invitation to impose a 4-6 match ban in respect of the post-red card charge. This was said to be especially the case having regard to all the circumstances, including the fact that the sanction did not take any account of the need to deter such (obviously unacceptable) conduct in the future.

### *Mr Mitrovic's submissions*

40. For Mitrovic, it was argued that the RC's view that Mr Mitrovic's post-red card conduct was so serious that it would have warranted a 3-match suspension must be seen as a strong conclusion on the facts. It was pointed out that whilst the RC found that Mr Mitrovic's conduct "*became more aggressive and threatening towards the Match Referee*" after the red card, it also found that "*there was no physical contact*" at this point. Reference was made to the case of Zaha, where the player's failure to leave the pitch promptly was aggravated by the time he took to leave the pitch and his sarcastic clapping of the referee. There the player was given a 1-match ban for the post-red card misconduct, whereas the RC's starting point here was that Mr Mitrovic's conduct warranted a 3-match ban (before considering mitigation). As to mitigation, the RC accepted Mr Mitrovic's apology and contrition as genuine and also took into account that Mr Mitrovic admitted the post-red card charge at the earliest opportunity. It was said that the RC was correct to be careful not to double count, and did not do so, having regard only to Mr Mitrovic's post-red card conduct. Finally, the RC's comments about deterrence were made when the RC was dealing with the pre-red card charge, and did not show an incorrect approach to deterrence.

### *Decision on the FA's appeal in Mr Mitrovic's case*

41. It is clear that the RC found that Mr Mitrovic became more aggressive and threatening towards the referee after he was shown the red card while pointing out that there was no physical contact at that point. However, we do not accept the FA's argument that the logic of the RC's own decision is that the post-red card charge is more serious than the pre-red card charge. This would be surprising given that Mr Mitrovic made physical contact with the referee before the red card but there was no physical contact after the red card, as the RC pointed out.

42. In paragraph 102 of its decision, the RC said:

*"Having been referred to the definition of violent conduct and noting that contact does not need to [be] made, the Commission is wholly satisfied that had the post red-card events*

*occurred in isolation, they would have warranted a red-card in and of themselves, which would have attracted a 3 game ban as a standard penalty.”*

43. The FA argued that this amounted in effect to a finding of violent conduct after the red card, which would have attracted a 3-match ban in itself, and that the RC was incorrect not to increase this to 4-6 matches having regard to its aggravating features. We do not accept this argument. In our view, what the RC meant in paragraph 102 was that Mr Mitrovic’s conduct as a whole after his sending off would have merited a red card if he had not already received one. This conduct included the matters to which the RC referred in the next paragraph, including (i) the physical aggression, (ii) the language (where he called the referee “*a fucking disgrace*”), (iii) the referee was doing his job in very difficult circumstances, (iv) the behaviour led to a surrounding of the referee on the field, and (v) Mr Mitrovic failed to leave the field of play. The RC had regard to all these circumstances in deciding that a 3-match ban for this post-red card charge, resulting in a 9-match ban overall, was proportionate, before taking mitigation into account.
44. So far as mitigation is concerned, the RC was entitled to take the approach that it did, as in the case of Mr Silva. Mr Mitrovic apologised to the referee, he made a public apology and attended before the RC to express his remorse and contrition for what had happened, which the RC accepted as genuine. There is no appeal against that finding. Mr Mitrovic also admitted this charge at the earliest opportunity. In our view, it was not unreasonable for the RC to reduce the 3-match ban, that it would otherwise have imposed, by 1 match on account of this mitigation.
45. As for deterrence, at paragraph 92 of its decision the RC referred to the Klopp case in which the Appeal Board stated the following:
- “(a) When considering sanction a Regulatory Commission is entitled to have regard to issues of deterrence as a legitimate sanctioning objective (along with other legitimate sanctioning objectives such as punishment of the offender and wider issues such as protecting/preventing harm to the integrity, reputation and image of the game) if it considers the same to be relevant.*

- (b) *While a Regulatory Commission is entitled to impose a sanction which has combined aims of punishing the offender, deterring him and others from offending and protecting/preventing harm to the integrity, reputation and image of the game, the sanction imposed must remain a proportionate response to the facts of the cases under consideration and the offending in question.*
- (c) *A Regulatory Commission is not entitled to include a ‘deterrent element’ in/add a ‘deterrent element’ to a sanction if by doing so the overall sanction imposed would become disproportionate to the offending under scrutiny in the particular case. Put simply a Regulatory Commission is not entitled to increase a sanction for the purpose of deterring others (or the respondent) from offending in the future if by doing so the nature or level of the sanction would increase to a level that was no longer proportionate to the facts of the case for which the sanction is being imposed.”*

46. The parties before us did not dissent from the above guidance. The RC went on in paragraph 93 to state:

*“The Commission were mindful of these comments when considering the appropriate sanction for Mr Mitrovic. However, the Commission wishes to emphasise that whilst addressed on the issue of deterrence, at no stage did it overtly consider deterrence as a part of the appropriate sanction that should apply to Mr Mitrovic. Rather, the Commission concentrated on the facts as it found them, as set out above.”*

47. The FA criticised the RC for its approach in this paragraph, arguing that the RC erred by failing to take account of the need to deter such conduct as displayed by Mr Mitrovic in the future. We do not accept this argument. First, the RC’s comments in paragraph 93 are to be found in that section of its decision dealing with the sanction for Mr Mitrovic’s pre-red card conduct, which suggests that the RC was intending to limit them to that charge. The RC made no reference to deterrence in the context of the sanction for Mr Mitrovic’s post-red card conduct, just as it made no reference to deterrence in relation to Mr Silva (which the FA did not suggest showed an error by the RC in Mr Silva’s case). Second, even if paragraph 93

reflected the RC's approach to sanction for Mr Mitrovic's post-red card conduct, we do not consider that it discloses an error by the RC. It is plain from paragraph 92 of its decision that the RC had in mind that it was entitled to have regard to deterrence as a legitimate sanctioning objective if it considered it relevant to do so. Therefore, it was a matter for the RC whether or not to take deterrence into account, and, if so, to what extent when deciding upon sanction in this case. It was not unreasonable for the RC not to add a deterrent element to Mr Mitrovic's sanction, if that indeed was its approach.

48. Having considered the RC's reasoning, and the FA's criticisms of it and of the sanction imposed, and looking at the matter in the round, we are not persuaded that the sanction of a 2-match ban for Mr Mitrovic's post-red card conduct, when considered against the background and totality of the fine and 6-match ban for his pre-red card conduct, was so unduly lenient as to be unreasonable.

### **Conclusion**

49. For these reasons we dismiss the FA's appeals. In doing so, we recognise that another Regulatory Commission might have imposed a greater sanction on Mr Silva and Mr Mitrovic. There is room for reasonable disagreement about what is an appropriate sanction. The issue before us is simply whether the sanction imposed by the RC is so unduly lenient as to be unreasonable. We are not persuaded that it is. However, nothing in this decision should detract from the RC's view, which we share, that the conduct of Mr Silva and Mr Mitrovic towards the match officials was undoubtedly serious and is to be met with strong disapproval and sanction.

**25 April 2023**