IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ICC ANTI-CORRUPTION CODE

Between:

THE INTERNATIONAL CRICKET COUNCIL ("ICC")

And

MR DILHARA LOKUHETTIGE ("Mr Lokuhettige")

DECISION ON SANCTIONS

Introduction

1. In their award dated 19 January 2021 ("the liability award") the Tribunal found Mr Lokuhettige guilty of the following breaches of the ICC anti-corruption code ("the Code"):

   Charge No.1 – Breach of Code Article 2.1.1, in that Mr Lokuhettige was a party to an effort to fix or contrive or otherwise influence improperly the result, progress, conduct, or other aspect(s) of an International Match.

   Charge No.2 – Breach of Code Article 2.1.4, in that Mr Lokuhettige directly solicited, induced, enticed or encouraged [Player A] to breach Code Article 2.1.1.

   Charge No.3 – Breach of Code Article 2.4.4, in that Mr Lokuhettige failed to disclose to the ACU (without unnecessary delay, or at all) full details of any approaches or invitations he received to engage in Corrupt Conduct under the Code.

2. In the liability award the Tribunal invited the parties to file submissions on sanctions. On 19th February 2021 the ICC and Mr Lokuhettige duly filed their submissions. The Tribunal is grateful for those submissions, both of which it has carefully read.

Article 6 of the Code

3. The Code sets out the approach to sanctions in Article 6, which provides, so far as material, as follows:

> **"6.1** *Where a breach of the Anti-Corruption Code is admitted by the Participant or upheld by the Anti-Corruption Tribunal, the Anti-Corruption Tribunal will be required to impose an appropriate sanction upon the Participant from the range of permissible sanctions described in Article 6.2. In order to determine the appropriate sanction that is to be imposed in each case, the Anti-Corruption Tribunal must first determine the relative seriousness of the offence, including identifying all relevant factors that it deems to:*
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> ***6.1.1*** *aggravate the nature of the offence, including (without limitation):*
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> ***6.1.1.1*** *a lack of remorse on the part of the Participant;*
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> ***6.1.1.2*** *the Participant's bad previous disciplinary record (including where the Participant has previously been found guilty of another offence under the Anti-Corruption Code and/or any predecessor regulations of the ICC and/or any anti-corruption rules of any National Cricket Federation);*
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> ***6.1.1.3*** *where the amount of any profits, winnings or other Reward directly or indirectly received by the Participant as a result of the offence(s) is substantial and/or where the sums of money otherwise involved in the offence(s) were substantial;*
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> ***6.1.1.4*** *where the offence substantially damaged (or had the potential to damage substantially) the commercial value and/or the public interest in the relevant International Match(es);*
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> ***6.1.1.5*** *where the offence affected (or had the potential to affect) the result of the relevant International Match(es);*
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> ***6.1.1.6*** *where the welfare of a Participant or any other person has been endangered as a result of the offence;*
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> ***6.1.1.7*** *where the offence involved more than one Participant; and/or*
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> ***6.1.1.8*** *any other aggravating factor(s) that the Anti-Corruption Tribunal considers relevant and appropriate.*

6.1.2 *mitigate the nature of the offence, including (without limitation):*

6.1.2.1 *any admission of guilt (the mitigating value of which may depend upon its timing);*

6.1.2.2 *the Participant's good previous disciplinary record;*

6.1.2.3 *the youth and/or lack of experience of the Participant;*

6.1.2.4 *where the Participant renounced the attempt or agreement prior to it being discovered by a third party not involved in the attempt or agreement.*

6.1.2.5 *where the Participant has cooperated with the ACU and any investigation or Demand carried out by it;*

6.1.2.6 *where the offence did not substantially damage (or have the potential to substantially damage) the commercial value, integrity of results and/or the public interest in the relevant International Match(es);*

6.1.2.7 *where the offence did not affect (or have the potential to affect) the result of the relevant International Match(es);*

6.1.2.8 *where the Participant provides Substantial Assistance to the ICC, any other National Cricket Federation, a criminal authority, or a professional disciplinary body;*

6.1.2.9 *where the Participant has already suffered penalties under other laws and/or regulations for the same offence; and/or*

6.1.2.10 *any other mitigating factor(s) that the Anti-Corruption Tribunal considers relevant and appropriate.*

6.2 *Having considered all of the factors described in Articles 6.1.1 and 6.1.2, the Anti-Corruption Tribunal shall then determine, in accordance with the following table, what the appropriate sanction(s) should be:*

ANTI-CORRUPTION CODE OFFENCE	*RANGE OF PERMISSIBLE PERIOD OF INELIGIBILITY*	*ADDITIONAL DISCRETION TO IMPOSE A FINE*
Article 2.1.1, 2.1.2, 2.1.3 or 2.1.4 (Corruption)	*A minimum of five (5) years and a maximum of a lifetime.*	*In all cases, in addition to any period of Ineligibility, the Anti-Corruption Tribunal shall have the discretion to impose a fine on the Participant of such amount as it deems appropriate.*
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	.	
Any of Articles 2.4.1 to 2.4.6, inclusive (General)	*A minimum of six (6) months and a maximum of five (5) years.*	

6.3 *For the avoidance of doubt:*

6.3.1 *.....;*

6.3.2 *where a Participant is found guilty of committing two offences under the Anti-Corruption Code in relation to the same incident or set of facts, then (save where ordered otherwise by the Anti-Corruption Tribunal for good cause shown) any multiple periods of Ineligibility imposed should run concurrently (and not cumulatively);*

6.3.3 *where a fine and/or costs award is imposed against a Participant, such fine and/or costs award must be paid: (a) by the Participant (and not, unless the ICC agrees, by any other third party, including a National Cricket Federation); (b) directly to the ICC no later (subject to Article 6.7) than one calendar month following receipt of the decision imposing the fine; and*

6.3.4 *.....*

6.4 *Any period of Ineligibility imposed on a Participant shall commence on the date that the decision imposing the period of Ineligibility is issued; provided that any period of Provisional Suspension served by the Participant shall be credited against the total period of Ineligibility to be served.*

Relative seriousness of the offending

4. Both parties agree that the starting point is the relative seriousness of the offending but take different positions on how serious Mr Lokuhettige's offending was.

5. The ICC submit that Mr Lokuhettige has been found to have committed the most serious offences under Code Article 2.1, going to the very core of its fundamental sporting imperatives[1] and that the Tribunal should weigh very heavily these – including in particular (i) deterring others from similar wrongdoing,[2] (ii) maintaining public confidence in the sport,[3] and (iii) preserving public confidence in the

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[1] See Code Articles 1.1.1 to 1.1.5: ('The ICC has adopted this Anti-Corruption Code in recognition of the following fundamental sporting imperatives: 1.1.1 All cricket matches are to be contested on a level playing-field, with the outcome to be determined solely by the respective merits of the competing teams and to remain uncertain until the cricket match is completed. This is the essential characteristic that gives sport its unique appeal. 1.1.2 Public confidence in the authenticity and integrity of the sporting contest is therefore vital. If that confidence is undermined, then the very essence of cricket will be shaken to the core. 1.1.3 Advancing technology and increasing popularity have led to a substantial increase in the amount, and the sophistication, of betting on cricket matches. The development of new betting products, including spread-betting and betting exchanges, as well as internet and phone accounts that allow people to place a bet at any time and from any place, even after a cricket match has started, have all increased the potential for the development of corrupt betting practices. That, in turn, increases the risk that attempts will be made to involve Participants in such practices. This can create a perception that the integrity of the sport is under threat. 1.1.4 Furthermore, it is of the nature of this type of misconduct that it is carried out under cover and in secret, thereby creating significant challenges for the ICC in the enforcement of rules of conduct. As a consequence, the ICC needs to be empowered to seek information from and share information with competent authorities and other relevant third parties, and to require Participants to cooperate fully with all investigations and requests for information. 1.1.5 The ICC is committed to taking every step in its power (a) to prevent corrupt practices undermining the integrity of the sport of cricket, including any efforts to influence improperly the outcome or any other aspect of any Match; and (b) to preserve public confidence in the readiness, willingness and ability of the ICC and its National Cricket Federations to protect the sport from such corrupt practices').

[2] See, e.g., ICC v Butt, Asif and Amir, Anti-Corruption Tribunal decision dated 5 February 2011, para 217, ('We must take account of the greater interests of cricket which the Code itself is designed to preserve and protect. There must, we consider, be a deterrent aspect to our sanction'); ICC v Ahmed, Ahmed and Amjad, Award dated 26 August 2019, para 7 ('the Tribunal accepts that in determining the appropriate sanction against each of the Respondents it should weigh very heavily these fundamental sporting imperatives, including, in particular, the need (i) to deter others from similar wrongdoing (i.e., preventing corrupt practices from undermining the sport), and (ii) to maintain public confidence in the sport'); ICC v Ikope, Award dated 5 March 2019, at para 8.20 ('[I]n light of the inherent seriousness of the offences, the ICC submits that the Tribunal should weigh heavily the fundamental sporting imperatives undermining (sic) the Code (Code Article 1.1) in determining the appropriate sanction – including in particular (i) deterring others from similar wrongdoing (i.e., preventing corrupt practices from undermining the sport, and (ii) maintaining public confidence in the sport)').

[3] See e.g., in relation to the point of principle, Bolton v Law Society [1993] EWCA Civ 32, at paragraph 15 'To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied readmission … A

willingness and ability of the ICC and its National Cricket Federations to protect the sport from corruption. The ICC support this submission with copious reference to jurisprudence.

6. The ICC, therefore, submit that sanctions at or towards the top end of the range of permissible sanctions are the appropriate starting point in Mr Lokuhettige's case. The ICC notes that the commission of these most serious Code Article 2.1 offences by a Participant will always attract a period of Ineligibility of at least five years and can, in appropriate cases, result in a ban up to and including a lifetime ban from the sport[4] – including where (as here) a participant has sought to corrupt others.[5]

7. Mr Lokuhettige submits in response, also citing jurisprudence in support, that Mr Lokuhettige's offences fall at the lower end on the scale of seriousness for four reasons:[6]

   (i) The case involved spot fixing, not the more serious match fixing for which the most severe sanctions should be reserved.

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profession's most valuable asset is its collective reputation and the confidence which that inspires'. Also, in the sporting context, Bradley v Jockey Club [2005] EWCA Civ 1056, at para 24, ('Where an individual takes up a profession or occupation that depends critically upon the observance of certain rules, and then deliberately breaks those rules, he cannot be heard to contend that he has a vested right to continue to earn his living in his chosen profession or occupation. But a penalty which deprives him of that right may well be the only appropriate response to his offending'). See also ICC v Ahmed, Ahmed and Amjad, Award dated 26 August 2019, para 7 and ICC v Ikope, Award dated 5 March 2019 (at para 8.20 (both as quoted in the footnote immediately above).

[4] See PTIOs v Lindhal CAS 2017/A/4956 (), paras 61-78, making clear (at paras 68-69) that '[A] severe sanction is required to punish and deter match-fixing and … permanent eligibility may be a proportionate sanction for players who are involved in such corruption offences … in order to be considered appropriate and proportionate, [permanent eligibility] must be based on the given circumstances in each case…'. (Lindhal is a tennis case concerning the Tennis Anti-Corruption Program, but the reasoning is applicable, *mutatis mutandis*, to the Code).

[5] See, e.g., ICC v Ahmed, Ahmed and Amjad, Award dated 26 August 2019, para 19, quoting para 8.33 of Savic v PTIOs CAS 2011/A/2621 (), a tennis case concerning the proportionality of a lifetime ban (which quotation itself refers to various other previous CAS cases). In Ahmed, Ahmed and Amjad, the Ahmed brothers both received lifetime bans (the only such bans imposed to date under the Code), as specifically sought by the ICC in that case, having engaged in a prolonged and sophisticated campaign of corrupt conduct. In Savic, the tennis player David Savic received a lifetime ban for an attempt to corrupt one other player.

[6] Though said in the response to be three.

(ii) An inchoate offence is significantly less serious than a completed offence[7] which will have far greater untoward consequences.

(iii) Mr Lokuhettige did not profit from his conduct.

(iv) Mr Lokuhettige's approach to [Player A] did not involve any features such as bribes, threats or repeated harassment.

Aggravating and mitigating factors

8. Both parties agree that it is further necessary to consider and apply any aggravating or mitigating factors though again they disagree as to the nature and weight of the factors in the present case.

Aggravating factors

9. The ICC identifies the following aggravating factors:

9.1 Mr Lokuhettige was an experienced ex-international cricketer, who had attended a number of anti-corruption education sessions prior to his offending.[8]

9.2 In respect of the (most serious) Code Article 2.1 offences specifically:

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[7] As per sentencing criminal cases in English law. For example, see Attorney General's Reference No 24 of 2002 (R v Everett) [2004] EWCA Crim 844, in which an application was made by the Crown for leave to refer as unduly lenient a sentence of 8 years' imprisonment for conspiracy to import between 6 and 10 tonnes of cannabis, with a value of £8-11m, into the UK. The maximum sentence was 14 years. Kay L.J. said (at para. 5) "… *despite the persistence of the conspirators, there was in fact no evidence at all of any successful importation. This resulted from a number of unforeseen events thwarting their plans...*" Having reviewed the aggravating and mitigating features of the case (at para. 41) the court observed that nowhere in the Attorney General's reference was any comment made on the fact that none of the drugs actually reached the UK. Nor did any of the sentencing authorities referred to deal with a situation where there was no successful importation at all. Kay L.J. said (at para. 42): "*It seems to us that is an important factor in a case of this kind. It is a clearly established principle that sentences for attempt are much less than sentences where the completed offence has been committed. This of course was a conspiracy, but it was not a successful conspiracy; it was an unsuccessful one, and it seems to us there is no reason why similar principles should not apply. That, it seems to us, was an important factor that ought to have been recognised, and, we anticipate, was recognised by the learned judge.*"

[8] See education sessions at HB tab 1, in relation to sessions delivered by the ICC and held on 8 August 2012 and 16 September 2013, and ICC Supp. tab 2 in relation to a separate 2013 session delivered by SLC, with Mr Lokuhettige attending in his capacity as a 'Provincial Contracted Player'.

9.2.1 His attempted corruption of [Player A] is the most serious aggravating factor, because it is the corruption of others that spreads the 'cancer' of corruption.[9]

9.2.2 Moreover, if [Player A] had acceded to Mr Lokuhettige's corrupt approach:

(a) Mr Lokuhettige would have corrupted a Participant playing at the very highest level of the sport); to its obvious potential detriment.

(b) Mr [Player A]'s career and reputation would have been destroyed.

(c) Irrespective of any distinction between the seriousness of spot-fixing and of match-fixing,[10] the fix suggested by Mr Lokuhettige,[11] had the obvious potential to affect a match's outcome.

9.3 The approach made to [Player A] was clearly pre-meditated.[12]

9.4 The approach must have put [Player A] in an extremely unsettling position.

9.5 As a necessary corollary of Mr Lokuhettige's denial of guilt in these proceedings,[13] he has shown no remorse for his conduct.

9.6 That lack of remorse has been compounded by the approach he has taken in these proceedings, especially the making of (or permitting his counsel to make) (a) very serious, highly improper and totally unsubstantiated allegations about the conduct of the ICC/ACU,[14] and (b) public comments outside of these proceedings, in breach of the Code's provisions relating to confidentiality.[15] In

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[9] See, e.g., Savic v PTIOs CAS 2011/A/2621.
[10] See WPBSA v Lee, a Disciplinary Panel decision (on sanction and costs) dated 24 September 2013 (a snooker case), para 6 ('The damage to the sporting integrity of a contest is clear if the end result is fixed. But there is also damage to the sporting integrity of a contest if even part of it is not played honestly without affecting the end result. Participants, spectators and television audiences are entitled to see the entire contest played out with both sides trying their best. Furthermore, it may often not be possible to engage in such "spotfixing" without at least the potential for the end result to be affected … [7] It is therefore essential that sanction is indeed sufficient to deter others from match-fixing and spot-fixing').
[11] Liability Award, paragraph 56; Appendix (p.43).
[12] Liability Award, paragraph 80.
[13] Mr Lokuhettige admitted at least the facts that supported the charge under Code Article 2.4.4 (see Liability Award, paragraph 81).
[14] See, e.g., Liability Award, paragraph 65 (the tampering argument), and paragraphs 70-73 (the conspiracy argument).
[15] Code Article 5.1.7 and Code Article 8. See the twitter account of 'Warne Consultancy' (https://twitter.com/WarneConsultan1), purporting to represent Mr Lokuhettige, which posted a

accurate anticipation of the possibility that Mr Lokuhettige's newly instructed counsel might now take "*a more sensible approach*", the ICC submit that such approach, while welcome, would be too little, too late.

10. By way of response Mr Lokuhettige submits that the only aggravating factor that can be said to apply in Mr Lokuhettige's offences is that of a lack of remorse under Article 6.1.1 but invites the Tribunal not to give this factor excessive weight because his then legal team was the driving force in his decision to contest the charges.

Mitigating factors

11. The ICC accept that Mr Lokuhettige has no relevant previous disciplinary record Article 6.1.2 (but submits that this might count for little when weighed against the seriousness of his offending[16]). Mr Lokuhettige emphasises this point adding that his offences, being committed as they were at the relatively late age of 37, are therefore out of character.

12. The ICC further submit that any credit that Mr Lokuhettige might have obtained by any cooperation with the ACU's investigation has been entirely wiped out by his

'press conference' of Mr Warnasuriya on 25 January 2021 (following the Tribunal's Award on 19 January 2021), and which on 28 and 29 November 2020 had previously posted the comment 'HOW'ZAT? Another former SL cricketer #DilharaLokuhettige cries foul over illegal action by the (supposed) watchdog, ICC!'. SLC's Anti-Corruption Manager has provided the following translation in respect of part of Mr Warnasuriya's press conference: 'A Judge belongs to ICC tells now what we have been trying to tell the world so far. One out of three judges of the panel says, ICC doesn't have power to take decisions on this Sri Lankan player. ICC is not the United Nations. Though we tried to tell this so far, no one did listened to it. Now, judge who is paid by ICC says ICC doesn't have judicial powers to take decisions. This is the first time that ICC appointed judge says that what ICC did was wrong. ICC may have executive powers on a player who is a contract player of SLC. That power should come through a contract where Dilhara should agree to give such powers to ICC. But the judge says, ICC doesn't have such powers on Dilhara once the contract period is over. This is said not by Dilhara's lawyers, but by the a judge who was brought by ICC on their account. **We have evidence on ICC ACU, it is a den of thieves. Do not let ICC which is a multi national company to harass Sri Lankan players**. They cannot question our players out of the contracts. I wish at least SLC will open their eyes now'. *The ICC has not obtained a formal translation but does not expect the translation provided by SLC to be contested as inaccurate (certainly in any material respect*).

[16] See ICC v Ansari, Award dated 20 February 2019, at paragraph 8.3 ('The Tribunal appreciates that this is the maximum sanction in terms of ineligibility vouched for by the Code but the seriousness of the offences enhanced by substantial aggravating factors against which there is but a single and minor mitigating factor to be set off, justify the conclusion that it is appropriate. The fact that it is possible to envisage offences against each Article of even greater gravity than Mr Ansari's does not of itself compel a reduction below the maximum in his case. Cricket would, in the Tribunal's view, be better off without Mr Ansari's participation for the period it has determined').

subsequent conduct. Anticipating again accurately that Mr Lokuhettige's newly instructed counsel might seek to advance mitigating factors as to Mr Lokuhettige's personal circumstances, submit that the wider interests of the sport must be the given priority (however unfortunate the consequences for Mr Lokuhettige).[17]

13. Mr Lokuhettige's response has various strands:

13.1 Mr Lokuhettige's offences did not affect the result of, or a single event within, any international match.

13.2 Even if the approach had been taken up and the form of underperforming spot fixing that was envisaged been successfully carried out in an international match, the potential for it to affect the result of that match was remote. Article 6.1.2.7.

13.3 The impact of these offences on Mr Lokuhettige's life, in other words the punishment he has already suffered and will continue to suffer, is considerable. Article 6.1.2.10**.**

13.4 Mr Lokuhettige's whole life has been devoted to cricket. Without a future in cricket, it is difficult to see where he can turn to earn a living for himself and his family. The supporting detail is set out in an Appendix.

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[17] Cf. Bolton v Law Society [1993] EWCA Civ 32 (), at paragraph 16 ('Because orders made by the Tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the Tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem bis reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely to be, so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price').

13.5 In addition to the loss of a life-long cricketing vocation and the devastating past and future financial impact of these offences is Mr Lokuhettige's fall from grace in the eyes of his family, friends and the public[18], which is a considerable punishment in its own right.

13.6 Mr Lokuhettige prays in aid (as did the ICC although to a different end) previous sanctions decisions in order to make comparisons favourable to his case with the sanctions imposed.

13.7 Mr Lokuhettige relies most heavily on a decision of a Tribunal in *ICC v Butt, Asif and Amir*, of 5 February 2011. The case, as is well known, concerned spot fixing in which the three no balls were delivered by the players ("the Lords Trio") in an England v Pakistan Lord's test match in 2010. The sanctions imposed were 10 years 5 suspended on the captain, Mr Butt[19], 7 years 2 suspended on Mr Asif, 5 years on Mr Amir.

13.8 Mr Lokuhettige further relies on what was said by the Court of Arbitration of Sport ("CAS")[20] in the case of Mr Butt[21] and Mr Asif [22].

13.9 On that basis Mr Lokuhettige invites, the Tribunal either to impose a period of ineligibility less the 5-year minimum or, at least, suspend some of that period for the following reasons:

13.9.1 Mr Lokuhettige's approach to engage in spot fixing was single, unsophisticated, unsuccessful;

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[18] There have already been a number of abusive messages about him and his family on social media, which the children are aware of, which has caused them to close all of their online accounts.

[19] Mr Butt was also found to have committed the offence of failing to disclose an approach by his agent that he should bat a maiden over in the England v Pakistan Oval test match played from 18-21 August 2010.

[20] It is therefore clear, both from Puerta and under English law, that a CAS panel only has authority to reduce a minimum sanction in exceptional circumstances (e.g., where that sanction would not be just or proportionate). See also CAS 2010/A/2268, paragraphs 132 et seq."

[21] CAS 2011/A/2364.

[22] CAS 2011/A/2632.

13.9.2 a sanctions distinction between completed and uncompleted fixing offences would create an incentive for potential offenders not to complete an improper course already embarked upon[23] referencing the dictum of Tribunal in *ICC v Butt, Asif and Amir*, at para 216; and

13.9.3 a restorative and rehabilitative process offers potential benefits not only to the offender but in its educational element to the wider game of cricket.

Application of Article 6.3.2

14. The ICC submit that as Mr Lokuhettige has been found by the Tribunal to have committed multiple offences under the Code, Article 6.3.2 must be considered.

15. In this context the ICC points out that previous Tribunals have noted that:

(i) Code Article 6.3.2 does not define the degree of proximity for the requisite relationship to subsist between the offence and the relevant incident or set of facts;

(ii) under English law, which is the governing law of the Code,[24] proximity is dictated by context,[25] and the relevant context here is of the exception to the general rule that would allow the Tribunal freedom to determine whether periods of Ineligibility should run cumulatively or concurrently; and

(iii) in principle therefore the phrase 'in relation to' should be construed narrowly rather than broadly in the context of Code Article 6.3.2.[26]

[23] "Public confidence in the fairness of the administration of cricket would be undermined rather than strengthened if it was felt that the Code was being applied in a way that appeared to be penalising relatively minor transgressors in an unduly vengeful way the more so just because it is difficult to catch the masterminds who ensnare them or indeed to identify the corrupt acts themselves."
[24] Code Article 11.5.
[25] See, for example, Svenska Petroleum Exploration AB v Lithuania [2006] EWCA Civ 1529, at para 137.
[26] See ICC v Ansari, Award dated 19 February 2019, at paragraph 7.6 *et seq.* ; ICC v Ahmed, Ahmed and Amjad, Award dated 26 August 2019, para 16.

16. The ICC therefore submit that, adopting a narrow construction, Code Article 6.3.2 does not apply to Mr Lokuhettige because each charge concerns a separate incident/set of facts[27].

17. However the ICC also accept that the application (or non-application) of Code Article 6.3.2 is ultimately a matter for the Tribunal.

18. Mr Lokuhettige does not expressly address Article 6.3.2 but the Tribunal takes his submission that Charge 3 adds little or nothing to Charge 1 to include a submission that any period of ineligibility for the two charges should be concurrent, not consecutive.

Sanctions proposed by the Parties

19. The ICC make no precise request for any particular sanction other than for the minimum period of 5 years ineligibility and for a fine and, in light of his conduct in these proceedings[28], a costs order against Mr Lokuhettige.[29]

20. Mr Lokuhettige submits his case does not deserve a sanction of greater than that minimum period of ineligibility of 5 years, with an appropriate part being suspended, and that in view of his strained financial position, no fine should be imposed nor any order for costs made against him.

Analysis

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[27] The Code Article 2.1.1 charge concerns his agreement with [Mr X] to make a corrupt approach to [Player A], the Code Article 2.1.4 charge concerns his making of that corrupt approach, and the Code Article 2.4.4 charge concerns his failure to report any of the corrupt approaches made to him by [Mr X].

[28] Code Article 5.2.4 provides that 'The Anti-Corruption Tribunal has the power to make a costs order against any party to the hearing in respect of the costs of convening the Anti-Corruption Tribunal and of staging the hearing and/or in respect of the costs (legal, expert, travel, accommodation, translation or otherwise) incurred by the parties in relation to the proceedings where it deems fit (for example, but without limitation, where it considers that such party has acted spuriously, frivolously or otherwise in bad faith). If it does not exercise that power, the ICC shall pay the costs of convening the Anti-Corruption Tribunal and of staging the hearing, and each party shall bear its own costs (legal, expert, travel, accommodation, translation or otherwise)' (emphasis added).

[29] In respect of the ICC's (i) costs in convening the Tribunal, (ii) costs in staging the hearing, and (iii) legal costs i.e. the costs incurred by Bird & Bird LLP.

21. The Tribunal's understanding of the proper application of the sanctions provisions of the Code is as follows:

(1) The Tribunal, having already decided, as a necessary precursor to any determination of an appropriate sanction, the classification of an offence under Article 2 must thereafter determine, as an exercise of judgment the "*relative seriousness of the offence*", taking into account any relevant aggravating and mitigating factors (Code Articles 6.1.1 and 6.1.2) (which include specified factors and, any other unspecified factors[30], that the Tribunal considers relevant and appropriate)[31] ("*all relevant factors*").

(2) The "*relative seriousness of the offence*" is not determined exclusively by taking into account "*all relevant factors*". The reference to "*all relevant factors*" is preceded by the word "*including*"[32] which suggests that other matters will affect the determination of the "*relative seriousness of the offence*". What such other matters are or may be is not, however, expressly identified and, given the amplitude of "*all relevant factors*" there seems little space for such other matters.

(3) Nonetheless, the Tribunal construes Article 6.1 itself to envisage some starting point of seriousness ("the starting point") which can be increased or decreased on application of the relevant factors so affecting the period of ineligibility to be imposed by way of sanction. It notes that the parties themselves in their submissions envisage the existence of a starting point.

(4) Article 6.1 does not itself give express guidance as to how to determine the starting point for any Article 2 offence including an Article 2.1 corruption offence, with which the Tribunal is presently concerned, other than that for a corruption offence it would logically have to be for more than 5 years because otherwise there would never be scope for decrease by way of mitigating factors.

(5) The range of Ineligibility for the corruption offences with which Mr Lokuhettige has been found guilty is prescribed by Code Article 6.2, i.e., 5 years minimum up

[30] Article 6.1.1 8 (aggravating) Article 6.1.2.10 (mitigating).
[31] See ICC v Ansari, Award dated 19 February 2019, at paragraph 7.14, and ICC v Ahmed, Ahmed and Amjad, Award dated 26 August 2019, para 5.
[32] A word which ordinarily enlarges rather than exhausts the meaning of words to which it is applied Taylor v ITCITT 1967 1 AC 1.

to lifetime maximum (additionally, for each offence, the Tribunal has the discretion to impose a fine of such amount as it deems appropriate).

(6) The approach of the English Sentencing Council, reflected in other common law jurisdictions is as follows "Most offences have Sentencing Guidelines produced by the Sentencing Council which assist Judges and Magistrates in calculating the correct sentence in a variety of circumstances. This enables them to identify the correct range of sentencing options available. Courts must follow sentencing guidelines unless they conclude that it would not be in the interests of justice to do so." [33] In particular as to bribery (the closest to the offence with which Mr Lokuhettige is charged for which Guidelines exist) the Guidelines state "The court should determine the offence category with reference to the tables below. In order to determine the category the court should assess culpability and harm. The level of culpability is determined by weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out". Those tables include specific starting points as well as ranges. Furthermore the tables are set out at the start so as to inform the exercise of the Court in weighing up all the factors of the case rather than as in the Code at the end.

(7) The Tribunal recognises that the modern approach in English law[34] to interpretation of an instrument such as the Code is to favour the purposive over the literal.[35] It will therefore, treating Article 6.1 and 6.2 as a whole rather than disjunctively construe the table, despite its location, as being intended to inform the Tribunal entire approach to sanction. It would respectfully recommend the

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[33] See too the discussion in Teerath Persaud v The Queen CCJ Appeal no BB CR 2017/001 at paras 43-48 especially para 48 33 C.A. 446 of 1999 (New Zealand) "*Fixing the starting point is not a mathematical exercise; it is rather an exercise aimed at seeking consistency in sentencing and avoidance of the imposition of arbitrary sentences. Arbitrary sentences undermine the integrity of the justice system. In striving for consistency, there is much merit in determining the starting point with reference to the particular offence which is under consideration, bearing in mind the comparison with other types of offending, taking into account the mitigating and aggravating factors that are relevant to the offence but excluding the mitigating and aggravating factors that relate to the offender. Instead of considering all possible aggravating and mitigating factors only those concerned with the objective seriousness and characteristics of the offence are factored into calculating the starting point. Once the starting point has been so identified the principle of individualized sentencing and proportionality as reflected in the Penal System Reform Act is upheld by taking into account the aggravating and mitigating circumstances particular (or peculiar) to the offender and the appropriate adjustment upwards or downwards can thus be made to the starting point.*"...

[34] Which governs the Code Article 11.5.

[35] Minera Las Bambas SA v Glencore Queensland Ltd [2019] EWCA Civ 972 per Leggatt LJ at para 20.

ICC to clarify the Code so as achieve its apparent objective, i.e., to allow the Tribunal to weigh up all the factors in any particular case, both those which tell in the participants favour and those which tell against him before alighting upon an appropriate sanction within the prescribed range consistent with the Code's objectives[36].

(8) In so determining the appropriate sanction in each case[37] the Tribunal must undertake a qualitative assessment of the weight to give to each element prescribed by the Code as well as bearing in mind that the purpose of any sanction is to deter and to maintain public confidence in the sport. These must be the primary drivers of any decision.

22. The Tribunal accept the ICC's submission that offences embraced in Charges 1 and 2 go the very core of the fundamental sporting imperatives that underpin the Code and that in appropriate cases the period could mean a lifetime ban from the sport[38].

23. However it notes that, the Code itself stipulates that even for such offences the five year minimum period of ineligibility could suffice. It therefore follows that whether it is sufficient or should be exceeded and, if so, by how much, is a fact specific matter. The Tribunal accepts that in appropriate cases the period could mean a lifetime ban from the sport[39] – such cases including where a Participant has sought to corrupt others.[40] It notes, however that Mr Lokuhettige's offences did not amount to actual

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[36] An alternative model is the World Anti-Doping Code provides in Article 10 a sanctions starting point in terms of specified periods of ineligibility for the more serious anti-doping rule violations and then allows for the possible reduction or elimination of such periods in circumstances also provided for.

[37] See ICC v Ahmed, Ahmed and Amjad, Award dated 26 August 2019, para 9.

[38] See PTIOs v Lindhal CAS 2017/A/4956 , paras 61-78, making clear (at paras 68-69) that '[A] severe sanction is required to punish and deter match-fixing and … permanent eligibility may be a proportionate sanction for players who are involved in such corruption offences … in order to be considered appropriate and proportionate, [permanent eligibility] must be based on the given circumstances in each case…'. (Lindhal is a tennis case concerning the Tennis Anti-Corruption Program, but the reasoning is, in the Tribunal's view, applicable, *mutatis mutandis*, to the Code).

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[40] See, e.g., ICC v Ahmed, Ahmed and Amjad, Award dated 26 August 2019 , para 19, quoting para 8.33 of Savic v PTIOs CAS 2011/A/2621), a tennis case concerning the proportionality of a lifetime

fixing; nor, in the Tribunal's view could his conduct be equated qualitatively to that which on a single occasion has attracted a lifetime ban under the Code[41].

24. The Tribunal accepts that, though Charge 3 adds little to Charge 1 it was properly brought for its precedential and deterrence value.

25. The Tribunal is grateful to both parties for drawing its attention to cases, mainly, but not exclusively in the cricketing context, but observes that each case axiomatically turns on its own facts even if the penal principles are constant. The purpose of the sanctions is to deter and to maintain public confidence in the sport. These must be the primary drivers of any decision.

26. In particular the Tribunal knows of no precedent for imposing a period of ineligibility less than the minimum (the minimum itself has the merit of certainty). The Tribunal in the case of the Lords Trio were highly sympathetic to Mr Amir but while it reserved its position on whether or not the 5 year minimum (which has the merit of certainty) could ever be disapplied on the grounds that it was disproportionate, declined to disapply it in his case as his offence was (like Mr Lokuhettige's) deliberate. The CAS statement relied on in the Butt appeal was clearly obiter, and there can be no read across from Puerta to Mr Lokuhettige's case.

27. The Tribunal refers to and relies on what its predecessor said in the Lords Trio case at para 208.[42]

Aggravating and mitigating factors

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ban (which quotation itself refers to various other previous CAS cases). In Ahmed, Ahmed and Amjad, the Ahmed brothers both received lifetime bans (the only such bans imposed to date under the Code), as specifically sought by the ICC in that case, having engaged in a prolonged and sophisticated campaign of corrupt conduct. In Savic, the tennis player David Savic received a lifetime ban for an attempt to corrupt one other player.

[41] i.e. ICC v Ahmed, Ahmed and Ahmed cit.sup.fn 14

[42] ''*Puerta for obvious reasons provide no compelling precedent for us, where the players' breach of the Code was not inadvertent but deliberate, and the need for an effective deterrent against conscious corrupt behaviour is as important as the need for such a deterrent against doping. We do not need accordingly to consider whether there might be wholly exceptional circumstances in which a full-frontal assault upon the minimum limit might succeed. Suffice to say that on any view this is not such a case*''.

28. In the Tribunal's view, the main aggravating factor, was Mr Lokuhettige's lack of remorse. As to the other factors prayed in aid by the ICC the Tribunal makes these observations. Mr Lokuhettige's experience and education in the Code denies him the benefit of the mitigation in Article 6.1.2.3 but is not itself an aggravating factor. His attempted corruption of [Player A] constitutes but does not aggravate the Article 2.1.4 offence. However it notes that potential, and not merely actual, damage to an international match resulting from the offence can engage Article 6.1.1.4 and does not accept that in Mr Lokuhettige's case the prospect of such damage was on the particular facts remote. Had [Player A] accepted and implemented Mr Lokuhettige's corrupt and specific proposal such damage might well have occurred.

29. The Tribunal must address the way Mr Lokuhettige's defence was advanced, which illustrated, even compounded his lack of remorse for the offences. While it takes note of the submission that the Counsel then instructed was the driver of the defence, (and doubtless exclusively so in respect of matters of law), the Tribunal would not willingly find Counsel guilty of unprofessional conduct without according him the chance to defend himself.[43] In any event Mr Lokuhettige embraced the defence, including its factual elements) for which he adduced no viable evidence whatsoever. In the case of the Lords Trio the Tribunal said at para 222 "*There can be no cavilling at their use to the full of their rights under the Code to present their defence as forcefully as they could*" and this Tribunal would not wish to depart from that position. This does not mean, however that a Participant has freedom to make any serious allegations he chooses without any evidential support. The Tribunal would draw a distinction between Mr Lokuhettige's assault of the reliability and motivation of [Player B]'s and [Player A]'s testimony (to which, inter alia, he juxtaposed his own testimony[44]) and his serious allegations about the conduct both of the ICC and the Sri Lanka cricketing authorities (i.e. tampering with evidence and conspiracy) for which he produced no real evidence whatsoever.

30. The Tribunal is persuaded that the key factors relied on by way of mitigation in Mr Lokuhettige's case are well founded. It accepts that attempts in principle under governing English law warrant lower penalties than completed acts, that Mr Lokuhettige did not in the end personally benefit from his offences, that his approach

[43]It notes that legal professional privilege may be engaged.

[44] No separate sanction will be imposed for Mr Lokuhettige's approach to [Player B] it is not the subject of any charge.

to [Player A] was relatively unsophisticated, and his general financial background and circumstances[45] as set out in the Appendix made him vulnerable to corrupt approaches.

31. Evaluating all the prescribed matters, including the relevant factors that bear upon the relative seriousness of his offence the Tribunal considers that a period of 8 years ineligibility is appropriate on Mr Lokuhettige's case.

32. As to whether the periods of ineligibility should run consecutively or concurrently- options envisaged by Article 6.3.2 where two of more offences **relate** *"to the same incident or set of facts"* the Tribunal prefaces its conclusion with these observations. Failure to report' is a gateway offence that serves as a deterrent. It was entirely conceivable that Mr Lokuhettige could have been convicted of that 'failure to report' offence and not of the 'fixing offence'. But as the ICC accept the Tribunal has an overriding discretion as to whether to order sentences for separate offences to run concurrently or consecutively, and considers that in this case, whether or not the offences strictly related to the same incident or set of facts the links between them are such that the sentences should run concurrently[46].

Suspension

33. The Tribunal accepts that it has power to suspend a period of ineligibility above the minimum period prescribed by the Code. It is not, however, minded to exercise that power in the circumstances set out above.

Fine

34. The Tribunal will not impose a fine. The ICC has not advanced any particular grounds to show that a fine is required in addition to a period of ineligibility. Mr Lokuhettige made no profit from his offences.

Costs

[45] There were not formally in evidence, but the Tribunal will accept them when advanced on instructions by experienced Queen's Counsel.
[46] There is a separate issue of prosecutorial discretion as to when to 'charge after' a participant for failure to report to which the Tribunal suggests that the ICC gives further consideration to ensure a fair and consistent approach, and to avoid even the impression of 'a deal' which would raise concomitant issues of reliability of evidence.

35. The Tribunal declines to make an order for costs not because in principle it is not appropriate but because the Tribunal considers that, given the facts as set out in the Appendix it would seem to serve no useful purpose. It repeats *mutatis mutandis* paragraph 35 above.

Dissenting opinion of Simon Copleston

36. This opinion is provided in the matter of proceedings brought under the ICC Anti-Corruption Code against Mr Dilhara Lokuhettige.

37. I have read the draft award on sanctions prepared by my fellow tribunal members. I am in agreement with their views on most points. But I disagree with their analysis in one respect, as set out below.

38. I disagree with the comments made in paragraph 30 of the draft award. I would make no negative inferences on Mr Lokuhettige because of the defence brought on his behalf. To me, the true meaning of liberty is "freedom from constraint". My colleagues, in their criticism of Mr Lokuhettige, a cricketer by nature and likely unused to dealing with legal proceedings or legal counsel, for not controlling his lawyers or accepting their advice, and in their implicit criticism of his counsel, have (a) placed an unfair burden on a cricketer such as Mr Lokuhettige to control the professionals that he engaged to help him, and (b) more concerningly, engaged (so far as others may wish to follow) in the recent deplorable progressive trend of "de-platforming". "De-platforming" represents a dangerous threat to freedom of speech, a cornerstone of civil liberty:

"Restriction of free thought and free speech is the most dangerous of all subversions" Supreme Court Justice William O. Douglas.

"What is freedom of expression? Without the freedom to offend, it ceases to exist." Salman Rushdie.

In my capacity as a Tribunal member I do not believe, based on the evidence before me, that Mr Richardson acted in anything other than a proper manner in investigating this case. Neither do I see any evidence of improper behaviour on the part of ICC or Sri Lanka Cricket. The evidence presented against them is thin at best. However, if any of

the parties involved or referred to do indeed feel unduly offended by matters raised, they should be aware that the counsel involved have professional and ethical obligations as part of their membership of Bar or other counsel associations or regulators; the proper channel for expression of any concerns or complaints is to those associations or regulators. Furthermore, neither I nor (I assume) the other Tribunal members, have any in depth knowledge of how legal arguments are routinely crafted and presented in Sri Lanka; there is no reason for us to apply Western standards, and to consider them superior, in this case or in any other cases. Furthermore, we have no knowledge as to whether Mr Lokuhettige's lawyers ever advised him that their advocated defence may end up aggravating the sanctions ultimately made against him (I suspect that this advice was not provided, and I am not sure that we should expect that it should have been provided).

39. This Tribunal's role is to make an objective decision based on the facts put before it, and not to comment further. My colleagues may also be confusing the nature of the ICC Tribunal as convened (on the basis of contractual relationships) with the separate and distinct roles of court appointed judiciary, who often hold developed powers to make such comments and to control the manner in which evidence is placed before them. In this case, and in my view, it would have been preferable if, before publishing their views (as set out in paragraph 30), the majority had properly tested their understanding of the meaning of liberty. As Justice Scalia said, "Closing debate closes minds."

40. There is a serious issue behind these points: The ICC Tribunal will, no doubt, continue to hear cases in which the defendants (a) often hail from the less affluent cricketing nations in emerging markets, and (b) lack means to hire top law firms to represent them. The Tribunal should not seek to create a precedent which prevents defendants from putting forward their arguments in defence; arguments will often be supported by limited or tenuous evidence – *this does not mean that those arguments are not correct, or that they should not be presented.* The majority decision in this case will create unnecessary doubt in defendants' minds over this issue. In circumstances where the career, reputation and livelihood of a defendant are at stake, he or she should have full rein to speak freely.

41. This issue may not have troubled me so deeply if it were not for the activities of the Tribunal in the run up to publication of my initial dissenting opinion in January. I hold a genuine and empirical belief that certain firm steps were taken to prevent the publication of that opinion (which is now the subject of an appeal to CAS), and that certain other steps were taken with the hope of either persuading me or others that my opinion would or should never "see the light of day". This was "de-platforming" in the same vein as above, and the two instances of it in this single case are deeply concerning. I have several other comments to make on the manner in which the Tribunal has operated, particularly the role of the chairman and the decision-making process, and the free flow of ideas and opinions, but these are less relevant in this context and I will make them direct to the chairman and ICC.

42. I shall leave the last words for Shakespeare (King Lear): "Speak what we feel, not what we ought to say".

CONCLUSION

43. For the foregoing reasons the Tribunal by a majority:

    (i) Imposes a period of 8 years ineligibility. In accordance with Code Article 6.4, Mr Lokuhettige's period of provisional suspension from 3 April 2019 will be credited against that period of ineligibility; so that his period of ineligibility will end on 3rd April 2027.

    (ii) Does not impose a fine.

    (iii) Makes no order as to costs.

Michael J Beloff QC Chair
Simon Copleston, Solicitor of the Supreme Court of England and Wales
The Honourable Justice Winston Anderson

7 April 2021

APPENDIX

1. Mr Lokuhettige was born on 3 July 1980. He is now 40 years old.

2. Mr Lokuhettige's father was a security officer for local government and mother was a housewife; he is the eldest of their three children. Theirs was a lower middle-class family, without any political, societal or cricketing connections that might have afforded them any advantages or assistance.

3. Mr Lokuhettige attended a small state school in Colombo. He remains the only person from that school, where cricket is not well supported, to play for the national team. He was captain of his school team from under 13s to under 19s and passed 8 O-levels.

4. Mr Lokuhettige's first-class cricket career was as follows:
   Upon leaving school, *Bloomfield Cricket and Athletic Club*. He was paid only a small match fee and was relied on financial support from his father.
   1999 - 2000, *Antonians Sports Club* in Wattala. He also joined the national fast bowling academy, but remained financially dependent on his father.
   2001 - 2002, *Galle Cricket Club*. The contract paid around £300 for the season and a modest fee per match.
   2003 - 2016, *Moors Sports Club*. The contract for the first season paid £500, increasing each year, plus a modest fee per match.

5. Between 30 July 2005 and 9 July 2013, Mr Lokuhettige represented Sri Lanka in nine one-day international matches and, on 10 and 12 October 2008, two T20 international matches.
   Mr Lokuhettige's modest international career spanned eight years because not long after it had begun, he suffered an injury in the form of a left side strain and was away from cricket for many months. He worked hard to win back his place but it took him many years to recover his fitness and form.

6. By the end of his first-class career on 18 February 2016, Mr Lokuhettige had taken over 350 wickets (only one fast bowling all-rounder in Sri Lanka, namely Chaminda Vaas, has more). He is the only player in that category to have scored a double hundred. Until

last year, Mr Lokuhettige held the record for the fastest double century in the Sri Lankan domestic game.

7. Mr Lokuhettige is married with three children: aged 12, 7 and 5.

8. In 2016, aged 35, Mr Lokuhettige emigrated to Australia in order to give his family to possibility of a better life.

9. Mr Lokuhettige's father passed away in 2018 and his mother now lives with his sister.

10. Since his suspension from cricket, Mr Lokuhettige has been unable to work. The family's main source of income is his wife's job in catering for a government geriatrics' hospital.

11. The family, which has no savings, is struggling to meet their day-to-day expenses. The children's schooling must be paid for and his wife has taken a second job to cover their extra-curricular tuition and activities, such as music, at which one of their daughters is particularly gifted. However, this means that Mr Lokuhettige's wife works 12 hours a day. The strain has caused a deal of mental stress for the couple and is causing problems in the family dynamic.