

**NATIONAL ANTI-DOPING PANEL**

*Before:*

David Casement QC (Chairman)  
Dr Kitrina Douglas (Specialist Member)  
Professor Peter Sever (Specialist Member)

**B E T W E E N:**

UK Anti-Doping

*National Anti-Doping Organisation*

- and -

Mr Sam Grammer

*Respondent*

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF  
THE SCOTTISH HIGHLAND GAMES ASSOCIATION**

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**FINAL DECISION OF THE ANTI-DOPING TRIBUNAL**

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1. **Introduction**

1.1 This is the final decision of the Anti-Doping Tribunal convened under Article 8.1 of the Anti-Doping Rules of the Scottish Highland Games Association ("SHGA") to determine a charge brought against Mr Sam Grammer ("the Athlete") for commission of an Anti-Doping Rule Violation in breach of Article 2.1 of the SHGA Anti-Doping Rules ("the Rules").

1.2 Article 2.1 of the Rules makes it an Anti-Doping Rule Violation for there to be

“The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample, unless the Athlete establishes that the presence is consistent with a TUE granted in accordance with Article 4.”

1.3 The Tribunal, made up of David Casement QC (Chairman), Dr Kitrina Douglas and Professor Peter Sever were appointed by the President of the National Anti-Doping Panel on 7 October 2011. No objection was raised to the appointments. The Tribunal held a final hearing in respect of the charge on 14 December 2011. The hearing was attended by the following people in addition to the members of the Tribunal:

1.3.1 on behalf of UK Anti-Doping (“UKAD”) Hannah McLean acting as advocate, Graham Arthur, Anna Shawyer and Amy Dyer;

1.3.2 Sam Grammer and his wife Katherine Grammer attending by video-link in Connecticut, United States;

1.3.3 on behalf of the National Anti-Doping Panel secretariat Richard Harry, Jenefer Lincoln and Kazuki Shishido.

1.4 This document constitutes the final reasoned decision of the Tribunal, reached after due consideration of the evidence heard and the submissions made by the parties attending at the hearing. Capitalised terms herein are defined terms within the Rules save where the context provides otherwise.

## 2. **Procedural History**

- 2.1 The Athlete was charged with an Anti-Doping Rule Violation by letter dated 25 August 2011. The letter informed the Athlete that the WADA-accredited Drug Control Centre at Kings College, London had analysed the urine sample that the Athlete gave at the Loch Lomond Highland Games on 16 July 2011 and found in that sample three substances namely human chorionic gonadotrophin (“HCG”), anastrozole and furosemide each of which is identified on the WADA 2011 Prohibited List under Class S2 (Peptide related hormones, growth factors and related substances), S4.1 (Aromatase Inhibitors) and S5 (Diuretics and other masking agents) respectively.
- 2.2 It was noted in the letter of 25 August 2011 that the Athlete was then in the process of applying for a Therapeutic Use Exemption (“TUE”) which, if granted, would have retrospective effect pursuant to Article 4.2.5 of the Rules. Such applications for retrospective TUEs, and for TUEs generally, are matters to be decided by the UK TUE Committee and not the Tribunal.
- 2.3 A telephone directions hearing took place on 19 October 2011 before David Casement QC as Chairman of the Tribunal and directions were given pursuant to Article 7.8 of the 2010 Procedural Rules of the National Anti-Doping Panel. The Athlete together with Ms McLean and Mr Arthur of UKAD attended that telephone directions hearing. The Athlete clarified his position in respect of the charge namely that he did not challenge the Adverse Analytical Finding, namely the presence of the three Prohibited Substances, and therefore, subject to the granting of a retrospective TUE, he accepted there was an Anti-Doing Rule Violation. It followed that if the retrospective TUE was granted for all three of the Prohibited Substances the charge would not proceed and that would be the end of the matter. However, if the retrospective TUE was not granted for any of the three Prohibited Substances the charge would proceed and the Tribunal would have to determine the Consequences of the admitted Anti-Doping Rule Violation. The directions order that was made

allowed, at the request of both the Athlete and UKAD, longer periods for steps to be taken including the serving of statements so as to provide the opportunity for the UK TUE Committee to determine the TUE application before the final hearing took place before the Tribunal.

2.4 In the event, the TUE Committee gave its ruling on 30 November 2011 rejecting the application for a retrospective TUE in respect of all three of the Prohibited Substances.

2.5 Pursuant to the directions order of 19 October 2011 the following steps were taken by the parties:

2.5.1 UKAD filed a preliminary case summary dated 9 November 2011 setting out the nature of the charge brought, the provisions under the Rules that were relevant to mitigation of the Consequences, the matters that Mr Grammer had to prove under those provisions and helpfully UKAD identified those matters it was satisfied with and in respect of which it did not require further proof from Mr Grammer;

2.5.2 On 29 November 2011 Mr Grammer filed a witness statement of his wife Katherine Grammer and also his own statement. In addition to these statements Mr Grammer was also able to rely upon the report of Dr Kharouba dated 16 September 2011 which he had filed in respect of his unsuccessful TUE application;

2.5.3 UKAD filed the witness statement of Hannah McLean dated 2 December 2011;

2.5.4 Skeleton arguments were filed by both Mr Grammer and UKAD on 7 December 2011.

### 3. **The Tribunal's Decision**

#### 3.1 **Determination of the Charge**

3.1.1 The Athlete was charged with an Anti-Doping Rule Violation under Article 2.1 of the Rules as set out above. UKAD carried the burden of establishing to the comfortable satisfaction of the Tribunal, bearing in mind the seriousness of the allegation made (see Article 8.3.1 of Rules), the presence of HCG, anastrozole and furosemide in the Athlete's sample;

3.1.2 Consistently with his application for a retrospective TUE the Athlete admitted at the directions hearing that the Prohibited Substances were present in his sample as a result of the medication that he had been prescribed. Subject to the granting of a retrospective TUE, for which his application was extant, the Athlete admitted the Anti-Doping Rule Violation.

3.1.3 In the event the TUE application was unsuccessful and the only matter in dispute before the Tribunal was the Consequences and in particular the period of Ineligibility.

#### 3.2 **Consequences**

##### A. **Ineligibility**

3.2.1 Under the Rules, where an Athlete is found to have committed an Anti-Doping Rule Violation under Article 2.1 of those Rules, and, as here, such offence is the Athlete's first Anti-Doping Rule Violation, the Tribunal must,

subject to a limited discretion, impose a period of Ineligibility of two years under Article 10.2 of the Rules. Whilst this is a case which involved multiple Prohibited Substances, UKAD made it clear in its case summary that it did not seek to assert under Article 10.6 of the Rules that there were aggravating circumstances, given its acceptance that the Prohibited Substances were ingested for therapeutic purposes. It was also conceded by UKAD, rightly in our view, that irrespective of the number of Prohibited Substances the present charge counts as the Athlete's first Anti-Doping Rule Violation. The reason for this is that under Article 10.7.4 of the Rules a second Anti-Doping Rule Violation may only be considered for the purposes of imposing a longer sanction if it occurred after the Athlete was notified of the first Anti-Doping Rule Violation.

3.2.2 The Tribunal is only given discretion to depart from that Consequence in three narrow circumstances:

- (a) Where the Athlete establishes No Fault or Negligence in accordance with Article 10.5.1 of the Rules, no period of Ineligibility will be imposed.
- (b) Where the Athlete establishes No Significant Fault or Negligence in accordance with Article 10.5.2 of the Rules, the period of Ineligibility may be reduced by no more than one half.
- (c) Where it is the Athlete's first doping offence, and the Athlete establishes that the Prohibited Substance in issue is a "Specified Substance" and that his use of it was not intended to enhance his performance, in accordance with Article 10.4 of the Rules, the Tribunal has discretion to impose a sanction ranging from a warning and no period of Ineligibility to a period of Ineligibility of up to two years.

3.2.3 In accordance with Article 8.3.2 of the Rules, if the Athlete seeks to rely on any of the foregoing pleas in mitigation, it is his burden to satisfy the Tribunal, on the balance of probabilities, of each of the requisite elements of the plea. The exception to this is where he seeks to rely upon Article 10.4 in respect of a Specified Substance in which case the burden of proof still remains with the Athlete but he must produce corroborating evidence and prove to the comfortable satisfaction of the Tribunal the absence of an intention to enhance the Athlete's performance.

3.2.4 In this case, UKAD accepted the following matters:

3.2.4.1 in respect of Articles 10.4, 10.5.1 and 10.5.2 of the Rules UKAD accepted that the "threshold showing" had been proved by the Athlete. UKAD therefore accepted the explanation and corroborating evidence from the Athlete that the Prohibited Substances each entered the Athlete's body by ingesting medication that had been prescribed by the Athlete's Doctor;

3.2.4.2 in respect of Article 10.4 it was accepted by UKAD that the Prohibited Substances were not ingested by the Athlete with the intention to enhance the Athlete's sporting performance or to mask the Use of a performance-enhancing substance.



**Article 10.5.1 and Article 10.5.2**

4. In the circumstances of the present case the only provisions that are possibly relevant to mitigation of the period of Ineligibility for HCG and Anastrozole (both non-specified substances) are Articles 10.5.1 and 10.5.2 of the Rules. For the Athlete to eliminate altogether the period of Ineligibility the burden was therefore upon him to establish on the balance of probabilities pursuant to Article 10.5.1 of the Rules that he had No Fault or Negligence for the Anti-Doping Rule Violation. For the Athlete to reduce the period of ineligibility by a maximum of one-half of the minimum period otherwise applicable (namely 2 years) the burden upon him under Article 10.5.2 is to establish on the balance of probabilities that he had No Significant Fault or Negligence in respect of the Anti-Doping Rule Violation.

5. The Athlete's evidence as to the ingestion of medication which contained Prohibited Substances was largely uncontroversial:

5.1 the Prohibited Substances were contained in medications that were prescribed to the Athlete by his Doctor [REDACTED];

5.2 the items of medication containing the Prohibited Substances were declared by the Athlete on the Doping Control Form completed on 16 July 2011.



5.3 the Athlete was and remains an amateur athlete who, although he had participated in Highland Games events organised in the United States, had never undertaken a Doping Test before and had received no education in respect of anti-doping rules;

5.4 prior to the doping test giving rise to the Anti-Doping Rule Violation in this case the Athlete and his wife had only recently got married and travelled to Scotland as part of their honeymoon. They both decided to enter the Loch Lomond Scottish Highland Games.

6. In his oral testimony, including answers to questions from the Tribunal as well as cross-examination by Ms McLean, the athlete gave the following testimony which is relevant to the issue of fault generally:

6.1 Prior to participating in the SHGA event at Loch Lomond the Athlete completed and signed a competitor registration form by which he registered as a member of that association. Included within the declaration was the following:

*"I, the undersigned, wish to register as a competitor with the SHGA for season 2010 and understand and accept that the SHGA forbids doping. I further agree that I shall abide by the Rules and regulations of the SHGA and consent to the random testing for prohibited substances which may take place at any time and to inform the SHGA prior to competition of any medicines I may be taking at that time..."*

The Athlete's attention was therefore specifically brought to the fact that random testing for Prohibited Substances would be taking place at the games and that the Athlete was bound by the Rules and regulations of the SHGA.

6.2 The Athlete's Doctor was aware that the Athlete participated in amateur sport at the time the medications were prescribed. According to the Athlete it was said by his Doctor that, given the medical conditions that had been diagnosed, the effect of those conditions was that the Athlete was underperforming in his sport. The Athlete was adamant that there was no discussion at all about the components of the medication and no discussion at all about Prohibited Substances. Nonetheless the Doctor, according to the Athlete, said that the effect of the medication would be to bring the Athlete back to the level of performance he would have been at had he not suffered from the medical conditions identified.

6.3 The Athlete had, over his years of involvement in sport in track and field as well as the Highland Games events in the United States, heard of doping tests and that some athletes had been found guilty of doping. He said the only drugs he was aware of were steroids. Importantly in his evidence he said he was aware that supplements available to athletes in the United States sometimes contained steroids and that it was necessary to check not only the brand name of a supplement but also the pharmacological ingredients to see if any of those ingredients were prohibited. The Athlete had heard stories about products having to be taken off shelves because they were later found to contain prohibited ingredients when such were not apparent from the brand name.

6.4 The Athlete confirmed that he did not discuss the ingredients of the medication with his Doctor or discuss the need to ensure that nothing within the medication was a Prohibited Substance under the World Anti-Doping Code. The Athlete did not seek and was not given any assurance whatsoever from his Doctor about his medications' compliance with the Code. The Athlete assumed that because the Doctor knew he was involved in sport the Doctor would alert him to any such issue.

6.5 The Athlete confirmed that he made no enquiries whatsoever, whether on the internet or otherwise, as to whether the components of the medication complied with the Rules i.e. whether they were on the Prohibited List. Whilst we accept his evidence in respect of this it did not sit at all well with his knowledge that supplements sometimes contained Prohibited Substances and that this would only be apparent from a consideration and investigation in respect of the components rather than the brand name.

7. The Athlete's submission was essentially that the Rules were too harsh if their effect was to make an amateur athlete such as him liable for a doping offence when all he was doing was taking medication that he had been prescribed by his Doctor. The Athlete was effectively inviting the tribunal not to apply the rules or at least to mitigate their effects to the fullest extent possible given the circumstances.

8. The Tribunal finds that the Athlete has failed to discharge his burden of proving on the balance of probabilities that he has No Fault or Negligence (for the purposes of Article 10.5.1) or no Significant Fault or Negligence (for the purposes of article 10.5.2). The reasons for this finding are as follows:

8.1 The Athlete was charged with Core Responsibilities under Article 1.3 of the Rules namely:

“1.3.1 It is the personal responsibility of each Athlete (which may not be delegated to any other Person):

- a. to acquaint him/herself, and to ensure that each Person (including medical personnel) from whom he/she takes advice is acquainted with all of the requirements of these Rules, including (without limitation) being aware of what constitutes an Anti-Doping Rule Violation and of what substances and methods are on the Prohibited List; and
- b. to comply with these Rules in all respects, including:
  - i. taking full responsibility for what he/she ingests and uses;
  - ii. ensuring that any medical treatment he/she receives does not infringe these Rules;
  - iii. making him/herself available for Testing at all times, whether In-Competition or Out-of-Competition;
  - iv. when included in a Registered Testing Pool, providing accurate and up-to-date whereabouts information for the purposes of Out-of-Competition Testing; and
  - v. co-operating fully with any investigation into a potential Anti-Doping Rule Violation under these Rules.”

It is clear from the Athlete’s own evidence that he made no enquiries whatsoever as to what his obligations were under the Rules notwithstanding the fact that he signed a registration form that

expressly drew his attention to the Rules and bound him to comply with the Rules. It is also clear that the Athlete made no enquiries whatsoever as to what substances were contained on the Prohibited List and on the face of his evidence he appears to have been unaware of the existence of the Prohibited List. It is therefore clear that at the foundation of the Athlete's plea to mitigate the minimum period of Ineligibility is ignorance of the Rules and the Prohibited List as a result of his failure to comply with the Core Responsibilities. We do not accept that ignorance of the Rules can properly amount to either a defence to an Anti-Doping Rule Violation or form the basis for mitigation.

- 8.2 The Athlete was not entitled to follow blindly the recommendation of his Doctor to take the medications especially in circumstances where he (a) had no discussion with the Doctor as to the ingredients of the medication and their compliance with the Code i.e. to ensure they were not on the Prohibited List and (b) he had not sought or received any assurance from his Doctor that the ingredients were not on the Prohibited List. The fact that the Doctor knew that the Athlete was involved in amateur sport does not alleviate the responsibility of the Athlete to make all reasonable enquiries of the Doctor in respect of the medication and its compliance with the Code. The Athlete was suggesting that he was entitled to rely upon the Doctor's recommendation in circumstances where he had not told the Doctor he would so rely or discussed the implications of that reliance. He did not even ask if the Doctor was familiar with the Code and the Prohibited List. This was entirely contrary to the Core Responsibilities. The Athlete was clearly at fault and was negligent and in our judgment the degree of fault and negligence was significant.

8.3 The Tribunal is fortified in this conclusion by the CAS decision in WADA v Frederico Turrini CAS 2008/A/1565:

*“66. In this case the Panel has considered the following circumstances. The Athlete is a professional swimmer. It is the professional duty of an athlete to consult the rules and to be well aware of all the duties an athlete has to fulfil, among others to ensure that no Prohibited Substance enters his body. As said in the Commentary to the WADC, the Athlete cannot rely on advice from his personal physician in these matters, especially when the doctor is no expert on sports medicine. It is rather easy to get information about the components of Keratyl. A simple search on the Internet exposes that the active ingredient in Keratyl is Nandrolone sodium sulphate. The Athlete in this case admits that he did nothing to ensure that the medication did not contain any forbidden substance. For example he did not even ask his doctor if Keratyl could be dangerous to use in this respect. He simply relied on his doctor to warn him if the medication did contain anything on the Prohibited List.*

*67. It is the Panel's view that an Athlete, in order to fulfil his or her duty according to Art. 2.1 of the WADC, has to be active to ensure that a medication that he or she uses does not contain any compound that is on the Prohibited List. In the present case, the Athlete has not done anything to ensure this. The Panel is of the view that the Athlete has not established that he bears No Significant Fault or Negligence. It is therefore no ground to reduce the sanction according to Art 10.5.1. or 10.5.2 of the WADC (for a similar case see P. v ITF (CAS 2008/A/1488 especially paragraphs 7.11 ff).”*

8.4 Furthermore the fact that the Athlete failed to even try to make any enquiries himself in respect of the medications to ascertain their components and then to cross-refer those components to the Prohibited List represented a complete failing to take reasonable steps to avoid committing the Anti-Doping Rule Violation. There was

no satisfactory explanation for this provided by the Athlete. We find this particularly odd in circumstances where, in respect of supplements, he was aware that there may be Prohibited Substances that could not be detected merely by a consideration of the brand name. Again this failing merely underlines the Significant Fault and Negligence with which the Athlete committed the Anti-Doping Rule Violation.

8.5 The Athlete's criticism of the harshness of the Rules in the present circumstances is not a matter that assists the Athlete in mitigating the Consequences of the Anti-Doping Rule Violation. The Tribunal's task is to apply the Rules and to do so in a manner that conforms with the precedents available to it so as to ensure a uniform application of the Rules and consistency in the application of the narrow discretion available under the Rules. On the present facts the Athlete did nothing at all to fulfil the Core Responsibilities and to avoid the commission of an Anti-Doping Rule Violation. If he was unaware of the contents of the Rules and the Prohibited List it is because he never made any effort whatsoever to familiarise himself with them.

8.6 To the extent that the Athlete has sought to engage some wider principle of proportionality whereby the Tribunal should go outside of the Rules to reduce the period of Ineligibility the Tribunal does not recognise any such principle. We refer to the case of Federation Internationale de Natation (FINA) v Cesar Filho and others CAS 2011/A/2495:



*“8.47 Despite Mr Jacobs’ submissions, the Panel does not believe it is entitled, by invocation of any principle of proportionality, to reduce Mr Waked’s sanction to one below the minimum specified by this Rule. In this respect, the Panel respectfully and expressly adopts the reasoning of a differently comprised CAS Panel in CAS 2009/A/1870 World Anti-Doping Agency v Jessica Hardy & Another at [138] where it was stated:-*

*“The Panel...does not find that the requirements of the fundamental principles of proportionality...allow (or even compel to) a deviation from the applicable anti-doping rule. In this respect, in fact the following is to be underlined:*

- *It is recognised that the measure of the sanctions contemplated by the WADC (and consequently of the FINA DC) is consistent with the principle of proportionality (compare Advisory Opinion of 21 April 2006, CAS 2005/C/976 and 986, FIFA and WADA at [139];*
- *This Panel agrees with the holding of another CAS Panel, where it is stressed that “the WADC [and therefore the FINA DC] contains some degree of flexibility to enable the Panel to satisfy the general legal principle of proportionality. However, the scope of flexibility is clearly defined and deliberately limited so as to avoid situations where a wide range of factors and circumstances, including those completely at odds with the very purpose of a uniformly and consistently applied anti-doping framework are taken into account’ (Award of 12 June 2006, CAS 2006/A/1025, Puerta v ITF [11.7.8]).”*

#### **Article 10.4**

9. Having found that Articles 10.5.1 and 10.5.2 are not available to the Athlete to mitigate the minimum period of Ineligibility it follows that in respect of HCG and Anastrozole the Tribunal will impose a period of Ineligibility for the minimum term, namely two years.
  
10. It is therefore strictly unnecessary to consider the position in respect of Furosemide which is a specified substance and to which Article 10.4 applies. However, it is the finding of the Tribunal that the Athlete's fault was so great that a reduction of the period of Ineligibility from two years would not have been available. The total failure of the Athlete to acquaint himself with the Rules and the Prohibited List coupled with the complete failure to make any proper enquiries of his Doctor or otherwise in respect of the components of the medication represented major fault on the Athlete's part.

#### **Period of Ineligibility**

11. Accordingly the period of Ineligibility in respect of the Anti-Doping Rule Violation with which the athlete is charged is that of two years for the reasons set out above.
  
12. In accordance with Article 10.9 of the Rules, the period of Ineligibility shall run from 9am (BST) 27 August 2011 being the time and date of the Athlete's provisional suspension and so shall end at 9am (BST) 27 August 2013. During the period of

Ineligibility, in accordance with Article 10.10 of the Rules, the Athlete shall not be permitted to participate in any capacity in a competition or other activity (other than authorised anti-doping education or rehabilitation programmes) organised, convened or authorised by (a) the SHGA or by any body that is a member of, or affiliated to, or licensed by the SHGA (b) any of the Signatories (c) any club or other body that is a member of, or affiliated to, or licensed by, a Signatory or a Signatory's member organisation or (d) any professional league or any international- or national-level Event organisation.

### **Costs**

13. In accordance with the discretion of the Tribunal under the 2010 Procedural Rules of the National Anti-Doping Panel Rule 11.2 each party shall bear their own costs of these proceedings.

### **14. Summary**

- 14.1 Accordingly, for the reasons given above, the Tribunal makes the following decision:

- (i) An Anti-Doping Rule Violation contrary to Article 2.1 has been established;
- (ii) The period of Ineligibility imposed upon the Athlete shall be a period of two years commencing 9am (BST) 27 August 2011 and ending at 9am (BST) 27 August 2013

### **15. Rights of Appeal**

- 15.1 In accordance with Article 13.4 of the Rules, the following parties shall have the right to appeal against this decision to the National Anti-Doping Appeal Tribunal: the Athlete, UKAD, SHGA and WADA.

15.2 Any party that wishes to exercise such rights must file a Notice of Appeal with the National Anti-Doping Panel Secretariat no later than 21 days from the date of receipt of this decision, in accordance with Article 13.7 of the Rules.

Signed by the Chairman on behalf of the Tribunal:

David Casement QC (Chairman)

Dr Kitrina Douglas (Specialist Member)

Professor Peter Sever (Specialist Member)

A handwritten signature in black ink, appearing to read 'David Casement', written in a cursive style.

Dated: 4 January 2012