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## A victory for Caster Semenya – but still no right to compete

On 11 July, the first major international sports law decision of 2023 was handed down by the European Court of Human Rights (ECtHR).<sup>1</sup> This latest instalment of the litigation between Caster Semenya and World Athletics (WA) was the first to analyse in detail the human rights implications of WA's 'Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)' (the DSD Regulations).<sup>2</sup> The DSD Regulations required that athletes with DSD must reduce their testosterone levels below 5nmol/l before they are eligible to compete in athletic events between 400m and one mile. Billed in the media as a test of the legality of WA's DSD regulations, the case was in reality a much more specific challenge to the conduct of the earlier hearings before the Court of Arbitration for Sport (CAS)<sup>3</sup> and the Swiss Federal Tribunal (SFT)<sup>4</sup> and whether they satisfied the requirements of the European Convention on Human Rights (ECHR).<sup>5</sup>

The ECtHR addressed three specific issues in its judgment. First, whether it had jurisdiction to hear the case brought by Semenya against WA. Secondly, whether the DSD Regulations acted in a discriminatory manner by interfering with her personal autonomy, in violation of Articles 8 and 14 ECHR. Thirdly, whether there was any effective remedy available to Semenya if violations of the ECHR were proven.

### Does the ECtHR have jurisdiction to hear Semenya's case?

In its most basic form, the dispute was between a South African national, Semenya, and a private organisation constituted under the law of Monaco, WA. The link to Switzerland, and from there to the ECHR, was made by the requirement that the dispute between Semenya and WA be made before the CAS, not through the national court structures of either South Africa or Monaco, and that from the CAS, there is a limited right of review before the SFT. Following the decision of the ECtHR in *Pechstein*,<sup>6</sup> it was reiterated that the ability to appeal from the CAS to the SFT creates the necessary nexus between the case and the state of Switzerland, bringing it within the jurisdiction of the ECtHR. The ECtHR considered that it was particularly important that it had jurisdiction over sports law cases as otherwise an entire category of people, professional athletes, would be prevented from accessing justice before the Court by the 'forced arbitration clauses' that require all disputes of this nature to be heard exclusively before the CAS.

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<sup>1</sup> *Semenya v Switzerland* app.no. 10934/21, documentation available at:

[https://hudoc.echr.coe.int/eng#{%22fulltext%22:\[%22semenya%22\]}](https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22semenya%22]}) (accessed 24/07/2023).

<sup>2</sup> Available at: <https://www.worldathletics.org/download/download?filename=fd2923ad-992f-4e43-9a70-78789d390113.pdf&urlslug=IAAF%20Eligibility%20Regulations%20for%20the%20Female%20Classification%20%5BAthletes%20with%20Differences> (accessed 24/07/2023).

<sup>3</sup> CAS/2018/O/5794 *Mokgadi Caster Semenya v International Association of Athletics Federations* available at: [https://www.tas-cas.org/fileadmin/user\\_upload/CAS\\_Award - redacted - Semenya ASA IAAF.pdf](https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_-_redacted_-_Semenya_ASA_IAAF.pdf).

<sup>4</sup> *Mokgadi Caster Semenya v International Association of Athletics Federations*, cases 4A\_248/2019 4A\_398/2019.

<sup>5</sup> For a selection of articles in this Journal on the Semenya cases and related issues see: Cooper, J. Protecting human rights in sport: is the Court of Arbitration for Sport up to the task? A review of the decision in *Semenya v IAAF*. *Int Sports Law J* (2023). <https://doi.org/10.1007/s40318-023-00239-4>, Chanda, S., Saha, K. An analytical study of the human rights concerns before the CAS with reference to Caster Semenya. *Int Sports Law J* 22, 314–331 (2022). <https://doi.org/10.1007/s40318-022-00214-5>, Shinohara, T. Which states parties should be held responsible for the implementation of positive obligations under the ECHR in sports-related disputes?. *Int Sports Law J* 22, 332–342 (2022). <https://doi.org/10.1007/s40318-021-00202-1>, and Duval, A. Lost in translation? The European Convention on Human Rights at the Court of Arbitration for Sport. *Int Sports Law J* 22, 132–151 (2022). <https://doi.org/10.1007/s40318-022-00221-6>.

<sup>6</sup> *Mutu & Pechstein v Switzerland*, App. nos. 40575/10 and 67474/10 [2018].

This finding is of particular importance for the sporting world as it means that the rules of all international sporting federations that require their disputes to be heard before, or appealed to, the CAS, must now be compatible with the rights protected by the ECHR. Thus, if raised by as an issue by either party, the ECHR must be addressed appropriately in the CAS awards and their review before the SFT.

### **Was Semenya treated in a discriminatory manner?**

By a majority of four-to-three, the judges of the ECtHR determined that there was a violation of Articles 14 and 8. Semenya was able to establish a credible claim of discrimination on the basis of sex and her sexual/genetic characteristics as she was treated differently from other athletes by being excluded from competing on the basis of her DSD. As a compulsory arbitration agreement required the case to be heard before the CAS, it was essential that a specific human rights analysis be undertaken both at the initial arbitral hearing, and at the subsequent appeal before the SFT. The failure to undertake this Convention-based analysis, coupled with Switzerland's failure to provide very weighty reasons for permitting discrimination of this kind, meant that Semenya's rights under the ECHR were violated. It does not, however, mean that the DSD Regulations themselves are automatically unlawful. The failure to afford Semenya the procedural safeguards provided for by the ECHR is the operative breach; the ECtHR was unable to determine whether the DSD Regulations as applied in Semenya's case were objective and proportionate to the aim pursued (the protection of the integrity of the female category of competition) as no human rights analysis had been undertaken by either the CAS or the SFT.

### **Was there an effective remedy available if a violation of the ECHR was established?**

Finally, and also by a majority of four-to-three, the ECtHR held that as there had been no Convention-based analysis of her discrimination claim before either the CAS or the SFT, Semenya had not been able to access any effective remedies for those violations. This constituted a violation of Article 13 ECHR.

### **To be continued?**

At the time of writing in July 2023, WA has refused to suspend the operation of the DSD Regulations.<sup>7</sup> As Human Rights Watch have stated, 'Caster Semenya won her case, but not the right to compete.'<sup>8</sup> Relying on the 'deeply divided Chamber' of the ECtHR, WA is currently liaising with the Swiss government over a potential appeal to the Grand Chamber; any appeal must be made by 11 October 2023. If an appeal is requested, a five-member panel will determine whether the case requires further examination by the Grand Chamber.

From a sports law perspective, perhaps the most important element of the ECtHR's decision is that it has confirmed its reasoning for why the substantive rights enshrined in the ECHR, not just those requiring due process in Article 6(1) ECHR, applies to hearings before the CAS and to appeals from the CAS to the SFT. In essence, this means that cases heard before the CAS, and those appealed to the SFT, are subject to the requirements of the ECHR. Where relevant to the case, an appropriate human rights analysis that takes into account the case law of the ECtHR must be undertaken and, where a violation of the ECHR is identified, an effective remedy must be made available to the athlete.

**International Sports Law Journal Annual Conference, 26-27 October 2023, The Asser Institute, The Hague**

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<sup>7</sup> World Athletics Press Release, available at: <https://worldathletics.org/news/press-releases/response-european-court-human-rights-decision-2023> (accessed 24/07/2023).

<sup>8</sup> Reid, G and Worden, M, 'Caster Semenya won her case, but not the right to compete' Human Rights Watch press release, 18 July 2023, available at: <https://www.hrw.org/news/2023/07/18/caster-semenya-won-her-case-not-right-compete>, (accessed 24/07/2023).

The Semenya decision and its implications for international sport will be amongst the issues discussed at the Journal's Annual Conference, to be held at the Asser Institute in The Hague on the 26-27 October 2023.<sup>9</sup> The keynote lectures will be given by Dr Silvia Camporesi (University of Vienna and King's College London), who will speak on the transnational regulation of gender by international sports governing bodies, and Prof Stephen Weatherill (University of Oxford), who will discuss the value of EU legislation on sports governance as a supplement to the application of competition law to sporting practices. Papers delivered from speakers from around the globe will cover sporting neutrality, human rights, the governance of football and the regulation of gender. We look forward to seeing as many of you as possible in The Hague!

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<sup>9</sup> More information and a registration link will be available at: <https://www.asser.nl/education-events/events/?id=4308>.