The long race of Caster Semenya: European Court for Human Rights chides Swiss Federal Supreme Court

A) Introduction

On July 11, 2023, the European Court of Human Rights narrowly found in favour of the two-time Olympic 800m champion Caster Semenya by a four to three majority in its ruling against a judgement of the Swiss Federal Supreme Court of August 2020. This latest judgment represents Semenya's most important success in her campaign against the implementation of testosterone level restrictions by World Athletics (formerly the International Association of Athletics Federations ("**IAAF**")) in 2018.

B) Background

Semenya, a South African middle-distance athlete, was legally identified as female at birth, but with a genetic difference in sex disorder (DSD) known as 46 XY DSD. As a result, her body naturally produces a much higher level of testosterone than women without the condition.

After winning the women's 800 metres at the 2009 Berlin World Championships, Semenya was informed by the IAAF that in order to continue to compete internationally she would be required to reduce and maintain her testosterone levels through medication to below 5 nmol/L. She agreed to the treatment and despite suffering "significant side-effects", quickly rose to fame following her gold-medal winning performances in the 800 metres at the Daegu World Championships in 2011, and the 2012 and 2016 Olympic Games.

Issues began after the IAAF temporarily suspended these hormone regulations following the July 2015 *Dutee Chand* case interim award by the Court for Arbitration for Sport ("**CAS**") in Lausanne, at which point Semenya stopped taking the hormone treatments[1].

The IAAF later announced plans for the new "IAAF Eligibility Regulations for Female Classification (Athletes with Differences of Sex Development)" ("**DSD Regulations**") to come into force in 2018. These regulations prohibited females with naturally high levels of testosterone who refused treatment to keep them below than 5 nmol/L from qualifying for international competitions in restricted "women's" events between 400 metres and 1 mile. Semenya refused to comply with the DSD Regulations due to poor understanding of the potential side-effects of the treatment. She appealed to the CAS, the private arbitration court competent to hear appeals against measures of the IAAF / World Athletics, in 2019, pleading to have the regulations declared invalid and void on the basis they were "*discriminatory,*

[1] *Dutee Chand v AFI & IAAF* [2015] CAS 2014/A/3759.

unnecessary, unreliable and disproportionate"[2]. The regulations apply only to "relevant athletes" who have 46 XY DSD, not females with naturally high testosterone and XX chromosomes.

C) Procedural history

1) CAS Award of April 2019

The CAS dismissed Semenya's appeal in its award of April 30, 2019, finding, inter alia, that while the IAAF's rules were discriminatory, "*on the basis of the evidence submitted by the parties, such discrimination is necessary, reasonable and proportionate means of achieving the IAAF's aim of preserving the integrity of female athletics in the restricted events*"[3].

The 165-page CAS award, despite dismissing Semenya's appeal, noted it "serious concerns" over the regulations in the context of their practical application and the consequences of accidental non-compliance, the lack of concrete evidence on the actual advantage provided by increased testosterone levels and potential side-effects from such hormonal treatments.

The CAS ruling meant that the regulations continued to apply to qualification requirements for the 2020 Tokyo Olympic Games and without the treatment Semenya was ineligible to compete and hence did not qualify.

2) Swiss Federal Supreme Court Decision of August 2020

In 2020, Semenya (together with the South African athletics association "Athletics South Africa" / "**ASA**") brought an appeal to the Swiss Federal Supreme Court ("**FSC**"). In an extensive decision, the FSC rejected both appeals on all counts raised. The apex court upheld the decision of the CAS on the basis that the lower instance had "*comprehensively examined the Caster Semenya case and consulted numerous experts. For its part, the Swiss Federal Supreme Court cannot subject the CAS decision to any free legal control. On the contrary, its examination of the content is limited by law to the question of whether the CAS decision violates fundamental and widely recognized principles of public order ("ordre public"). That is not the case.*"[4]

To better understand the limits within which the FSC reviewed the CAS award, it needs to be understood that Swiss law allows for only a very narrow appeal with regard to arbitral awards (such as the CAS ruling). Contrary to the common full review in fact and law that ordinary

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[2] CAS Media Release, *Caster Semenya & ASA v IAAF* [2019] (CAS/2018/O/5794).
[3] *Ibid.*
[4] FC Press Release, *Caster Semenya & ASA v IAAF* [2020] 4A_248/2019.

appellants would enjoy after a first instance state court judgment, international arbitration awards may only be subjected to judicial review by the FSC in five narrow instances (as provided for in art. 190 para. 2 Federal Act in International Private Law, "**PILA**").

In the case at hand, Semenya and ASA had invoked a breach of the requirement of a properly constituted arbitral tribunal (art. 190 para. 2 letter a PILA), a breach of the appellants' right to be heard (art. 190 para. 2 letter d PILA) and an incompatibility of the CAS award with Swiss (material) public policy (*ordre public*) (art. 190 para. 2 letter d PILA).

Owing to this curtailed legal review, the FSC was proscribed from performing a material evaluation of an arbitral award and was limited to examining issues of glaring procedural shortcomings of the underlying arbitration proceedings and appraising the final award under public policy aspects. The latter requires Swiss courts to refuse recognition (and/or enforce) awards which violate the fundamental principles of Swiss law to such an extent that they cannot be reconciled with the legal order and the system of decisive values prevailing in Switzerland (at least at the present). The FSC went on to explain that such incompatibility with Swiss values was more than just a finding of arbitrariness. According to the existing case law, the lower hurdle of an arbitrary decision was reached when a decision was manifestly untenable, seriously disregarded a clear and indisputable legal rule or principle, or offended in a shocking manner against the sense of justice and fairness. Arbitrariness was not present if another legal solution seems conceivable, or even preferable.

Against this background, it is clear that the test for incompatibility with public policy is even higher. Consequently, arbitral awards rendered by a Swiss based tribunal are considered very robust and resilient to legal challenge.

In its thus limited review of the CAS award, the FSC examined the arguments raised by the appellants and found as follows (in brief):

a) Improper restraint in its review by the CAS

The FSC found that the appellants' argument that the alleged improper restraint exercised by the CAS in its review of the DSD Regulations constituted an irregularity in the tribunal's constitution was to be considered flawed. Furthermore, it found that the CAS had in any event extensively reviewed the legality of the DSD Regulations, also under the aspect of its proportionality and even with regard to aspects that the appellants had not even challenged.

b) Violation of the right to be heard

The FSC then turned to the second of the appellants' arguments pursuant to which the issue of the inclusion of the 1,500 metres and mile disciplines in the list of "relevant events" under

the DSD Regulations but this time on the basis of the infringement of the right to be heard guaranteed by art. 190 para. 2 let. PILA. In their view, the CAS had restricted its power of review by not deciding whether these two disciplines had been rightfully included in the DSD Regulation.

The FSC dismissed this challenge because it was of the view that the appellants had not sufficiently identified the alleged infringement of their right to be heard and in which way such breach would have impacted the outcome of the proceedings. Moreover, the FSC found that the CAS had indeed dealt with the issue of the inclusion of these disciplines in the DSD Regulations, thus holding the challenge to be unfounded.

c) Award contrary to public policy

The last line of attack of the appellants was based on the argument that the CAS award was in its result contrary to material Swiss public policy. They had raised three distinct challenges under this heading: a) a violation of the rule of non-discrimination, b) a violation of Semenya's personality because of numerous violations of her basic right, and lastly c) a violation of her human dignity.

i) Non-discrimination rule

The FSC held firstly, that under Swiss law, the rule against discrimination was applicable to the relationship between citizens and the state, protecting the prior from undue sovereign actions. On the contrary, a horizontal effect of this right between two private parties was not recognized as a fundamental right in Switzerland. The court did recognize that the factual dependency of athletes vis-à-vis their governing sports body was akin to a state-citizen relationship. Nevertheless, the court held that despite such similar effects this was not sufficient to sway it that this principle was so fundamental as to be considered part of Swiss material public policy.

It further examined whether the DSD Regulations, despite their prima facia discriminatory effect, constituted a necessary, reasonable and proportionate measure to ensure fairness in sports competitions.

With regard to the necessity of such measures the court found that dividing sports contests into the categories men and women was legitimate. Given this undisputed point of departure, the court followed that it was thus also necessary to define the criteria pursuant to which competitors fell into either of these categories. However, in the view of the FSC, basing division solely on the criteria of the sex of an athlete fell short. Rather, it was legitimate to subject the right to participate in such categories to certain biological factors. The latter were

determinant whether a participant enjoyed the insurmountable advantage of male hormones such as testosterone ("*les traits physiques leur procurant cet avantage insurmountable*"). The court thus concluded that the DSD Regulations were not only necessary but also reasonable.

The FSC then did an extensive analysis of the findings of the CAS on the proportionality of the DSD Regulations finding that the tribunal had done a very wide and detailed assessment of the regulations. In summary, the FSC was of the view that the CAS had considered the fears raised by the appellants including the side-effects of the medication required to suppress testosterone levels. If concluded that – at present – the DSD Regulations needed to be considered to be proportionate, however that at a future date, based on more medical results, such a finding might well need to be revisited.

ii) Violation of personality

The appellants had claimed a violation of Semenya's personality rights based on infringements of her physical integrity, her identity, her protected sphere of intimacy and her economic freedom. After reviewing each of these arguments, the apex court decided that none of these claims could be considered to be so grave as to warrant recognition as a public policy violation.

iii) Violation of human dignity

On this final point the FSC was very succinct. The plea raised by the appellant that the award created gender stereotypes and thus disregarded her human dignity: Semenya's argument was that since only women with biological characteristics corresponding to the female stereotype would be allowed to compete freely in the disciplines at issue (i.e. as "real women"), this was a breach of her human dignity. The FSC noted in this regard that the CAS award in no way sought to call into question the female gender of intrasexual athletes or to determine whether they are sufficiently "female". The issue was not what constituted a woman or an intersex person. The court stressed that the only issue to be resolved was whether it was to be considered to be contrary to human dignity to create certain eligibility rules, for the purposes of sporting fairness and equal opportunities, applicable only to certain women who benefitted from an insurmountable advantage as a result of certain innate biological characteristics. The FSC held that in the case at hand, creating such eligibility rules was not contrary to the human dignity of the affected athletes.

In conclusion, the FSC dismissed all of the challenges raised by Semenya and ASA against the CAS award finding that it was not contrary to Swiss material public policy

3) European Court of Human Rights Decision of July 2023

After the FSC decision and as a final resort, Semenya lodged an application to the ECHR in February 2021.[5] Her complaints included a count of discriminatory treatment on account of her DSD in reliance of article 14 of the European Convention on Human Rights / "**ECHR"** (prohibition of discrimination) taken together with article 8 ECHR (right to respect for private and family life), as well as the FSC's limited power of review in reliance of article 13 ECHR (right to an effective remedy) taken with articles 3 (prohibition of torture), 8 and 14 of the convention.

The European Court did note that Switzerland had played no part in the adoption of DSD Regulations and that Semenya's case essentially challenged whether certain regulations issued by the IAAF (a private-law Monegasque association) and endorsed by the CAS were compatible with the ECHR. In light of this the European Court focused on the more procedural issue of whether reviews carried out by the CAS and FSC had satisfied the requirements of the ECHR.

The judgment, described by her barrister Schona Jolly KC as an "*important personal win for* [Semenya and] *… a wider victory for elite athletes around the world*", recognised a violation of article 14 with regard to discrimination on the basis of sex and gender, and a violation of article 13 for the right to an effective remedy.[6]

On the former, the European Court found in particular that Semenya had "*not been afforded sufficient institutional and procedural safeguards in Switzerland to allow her to have her complaints examined effectively, especially since her complaints concerned substantiated and credible claims of discrimination as a result of her increased testosterone level caused by differences of sex development (DSD)*".

Due to the high level of personal stakes involved for Semenya, the ability to compete internationally and practice her profession, "*Switzerland had overstepped the narrow margin of appreciation afforded to it in the present case, which concerned discrimination on grounds of sex and sexual characteristics requiring 'very weighty reasons' by way of justification*". This combination of high stakes for Semenya and narrow margin of appreciation should have led to a thorough institutional and procedural review, which she had not been able to obtain. As a result, "*the Court was unable to determine whether the DSD Regulations, as applied in the applicant's case, could be considered a measure that was objective and proportionate to the aim pursued*", constituting a violation of article 14 taken with article 8 of the ECHR.

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[5] ECHR Press Release, *Semenya v Switzerland* [2023] ECHR 219 (application no. 10934/21)

[6] Nakrani, S., *'European Court rules that Caster Semenya's human rights were violated'* (the Guardian, 11th July 2023).

The European Court's decision on the latter was based on "*essentially the same reasons*" that had led to finding a violation of article 14, in particular the "*lack of sufficient institutional and procedural safeguards in Switzerland*". The "*substantiated and credible*" complaints brought by Semenya before the CAS and FSC relied on the ECHR either directly or in substance. This should have given the FSC an opportunity to rule on these issues, but owing in particular to its "*very limited*" power of review the European Court found that neither the FSC nor the CAS had responded in an "*effective manner*". The European Court therefore concluded "*in its limited role as guardian of European public order, that in the particular circumstances of the present case the domestic remedies available to the applicant could not be considered effective within the meaning of Article 13 of the Convention*", constituting a violation of article 13 in relation to article 14 taken together with article 8.

Under Swiss law, a party that has received a final favourable judgment at the ECHR may bring a request for revision to the Swiss Federal Supreme Court. It will be interesting to see whether the ECHR judgment remains unchallenged and whether Caster Semenya will reapply at the Swiss Federal Supreme Court.

D) Conclusion

While this judgment was not made against World Athletics nor does it bring into question DSD regulations themselves, it represents a significant development in the complex debate surrounding sex and gender in professional sport. In the present absence of a satisfactory framework it must serve as a reminder that sporting professionals, regardless of regulatory uncertainties, are first and foremost humans who must be afforded the same universal standard of respect and protection. To allow objective management by governing bodies to be eclipsed by the inherently competitive and sometimes divisive nature of sport to justify implementing factually uncertain policies would be to lose sight of its core principles. The challenge of balancing fair competition standards on the one hand and equal opportunity regardless of sex and sexual characteristics on the other is no small task. With strong feelings and high personal stakes on both sides of the discussion, finding the optimal solution for all athletes will undoubtedly require a significant amount of patience, sensitivity and compromise.

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