



SEMENYA V SWITZERLAND: THE BEGINNING OF THE EUROPEAN COURT OF HUMAN RIGHTS' INFLUENCE ON GENDER DISCRIMINATION IN SPORTING MATTERS?

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Abstract-- This article discusses the recent decision of the European Court of Human Rights on Caster Semenya's discrimination claim. Semenya, a female athlete, possesses high levels of testosterone, for which she is required to lower as per the International Association of Athletics Federations' guidelines. Prior to reaching the European Court of Human Rights, the matter was considered by the Court of Arbitration for Sport and the Swiss Federal Court, both of whom rejected the discriminatory issues raised by Semenya as being proportionate in the context of fair competition. The European Court of Human Rights has now delivered its judgment that Semenya's convention rights as per Article 13 and 14, when taken with Article 8 had been violated.

Keywords: Sports Law, Human Rights Infringement, Discrimination, European Court of Human Rights

INTRODUCTION

Caster Semenya's case in the European Court of Human Rights (ECtHR) revolves around the issue of gender discrimination in sports. Semenya, a South African middle-distance runner, has naturally high levels of testosterone, which has sparked controversy and led to scrutiny of her eligibility to compete in certain women's events.

In April 2018, the International Association of Athletics Federation (IAAF) adopted the "Eligibility Regulations for the female Classification (athletes with Differences of Sex Development)" – the DSD regulations.

Semenya challenged the regulations set by the International Association of Athletics Federations (IAAF), which required certain female athletes with naturally high testosterone levels to lower their hormone levels through medication in order to compete in women's races. She argued that these regulations violated her rights to privacy, dignity, and non-discrimination under the European Convention on Human Rights.

In 2019, the Court of Arbitration for Sport (CAS) ruled in favour of the IAAF, upholding the regulations.¹ They cited that whilst they were discriminatory, they were necessary, reasonable and proportionate in order to achieve fair competition between athletes. She further appealed this decision to the Swiss Federal Court, citing discrimination on the grounds of sex, and a violation of her human dignity and personality rights had taken place. The Federal court went on to dismiss Semenya's claim, stating that the regulations were proportionate in furthering legitimate aims and fairness in sport. It also further commented on the fact that its role in reviewing arbitration was limited to the review of the award under appeal in relation to public policy. It concluded that it was not in contravention of public policy and complied with athlete personality and human dignity.²

However, Semenya appealed this decision to the ECtHR, seeking to have the regulations declared invalid, and lodged her claim in February 2021.³

The case centres on the question of whether the IAAF's regulations are a necessary and proportionate means to ensure fair competition in women's athletics. Semenya argues that the regulations unfairly target and stigmatize athletes with intersex variations, and that they are based on arbitrary and discriminatory assumptions about gender and athletic performance.

¹ CAS/2018/O/5794

² 4A_248_2019 & 4A_398_2019 Caster Semenya & ASAF v. IAAF

³ Application no. 10934/21



The ECtHR has now considered the appeal that was lodged by Semenya and have decided that the athlete was discriminated against by the IAAF's implementation of rules that forced her to lower her testosterone levels in order to compete.⁴ Accordingly, the ECtHR has ruled that Articles 13 and 14 of the European Convention on Human Rights (in conjunction with Article 8) had been violated. Accordingly, it was decided that a violation of the prohibition of discrimination has occurred, in conjunction with the right to respect for private life as well as a contravention of right to an effective remedy.

FINDING OF THE ECtHR

The first element of the matter focussed on whether the ECtHR had any jurisdiction over the matter. It is accepted that Sports Law in general possesses its own processes for resolving disputes, primarily through compulsory arbitration and with Court of Arbitration for Sport (CAS), via arbitration agreements. The agreements are based upon standard arbitration clauses and accepted by regulatory bodies and athletes.⁵ The advantages of such a system is its clear-cut nature, it provides clarity, consistency, and certainty by using the Court of Arbitration for Sport as the adjudicator for sporting disputes. However, the court noted that in finding that they were *not* to have jurisdiction, they would be potentially excluding professional athletes from accessing the court for similar matters, and such a stance would not be keeping within the purposes and spirit of the Convention. Further to this, given the compulsory nature of the arbitration agreements that are in place between professional athletes, governing bodies and the Court of Arbitration for Sport, no other remedy, or redress to any other court was open to the applicant, which was noted by the ECtHR.

The other matter in terms of jurisdiction was whether the rules and regulations issued by the IAAF were compatible with the Convention, given both the IAAF and the Court of Arbitration for Sport were non-state actors, and in essence, private bodies. While this element was true, the matter had also been adjudicated upon by the Swiss Federal Court as per an appeal in May 2019, which was looked at by the court in August 2020, where the applicant's appeal was dismissed.⁶ This would allow the court to decide they did have jurisdiction in light of its case-law, as by allowing the Swiss Federal court to review the findings of the Court of Arbitration for Sport, they had, in essence, allowed the applicant's case to fall within the jurisdiction of Switzerland, as per Article 1 of the Convention, which is an obligation to respect human rights.⁷ In essence, the Swiss Federal Court had a responsibility to not only implement, but to enforce the individual rights as guaranteed by the convention.

The decisions of the Court of Arbitration for Sport are subject to review by the Swiss Federal Court.⁸ In the event the Federal Court was to refuse to review decisions of the Court of Arbitration for Sport, especially under Article 6, then Switzerland, as a member of the ECHR Charter, would face sanctions.⁹ The ECtHR possesses the *ratione personae* to hear complaints of those who have been affected by the decisions of the Court of Arbitration for Sport if they have been validated by the Swiss Federal Courts.¹⁰

ARTICLES 14 AND 8 OF THE CONVENTION

Article 14 of the Convention provides the prohibition of discrimination. Namely:

⁴ ECHR 148 (2021) - 17.05.2021

⁵ See CAS' ordinary Arbitration Procedure at <https://www.tas-cas.org/en/arbitration/standard-clauses.html> accessed 11/07/2023.

⁶ Ibid, note ii

⁷ The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.

⁸ Articles 190 and 191 of the LDIP

⁹ There are a number of matters concerning review of CAS decisions by the SFT from a public policy perspective. See 4A_558/2011 Matuzalem, 27 March 2012, 4A_260/2017 Seraing, 20 February 2018, 4A_486/2019 Trabzonspor c. TFF, Fenerbahce et FIFA, 17 August 2020

¹⁰ see, mutatis mutandis, Nada c. Suisse [GC], no 10593/08, § 120-122, CEDH 2012, para 62-67



“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”¹¹

Article 8 of the Convention provides the protection of one’s right to respect for a private and family life. The first element states:

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

The second element provides:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The court observed that the applicant could assert at least one ground for discrimination under Article 14 and that she could assert that she was a victim of discrimination on the basis of her sex as well as her sexual characteristics (particularly genetic characteristics), which was a claim that fell under the ambit of Article 14. In doing so, it was clear that the applicant was in a similar situation to many other female athletes that had been treated differently and had been excluded due to the IAAF’s DSD regulations. In essence, the court had to decide whether the applicant had access to sufficient procedural safeguards and remedies, to which she could raise her complaints, and to which a reasoned decision would be made, using the Court’s already established case-law. It reaffirmed its previous stance that distinctions solely based on sex required “very weighty reasons,” “particularly serious reasons,” or, in another phrase, “particularly weighty and convincing reasons” as justification. Similar factors were taken into account if a person’s sexual preferences or intersex status were the basis for a treatment differential. Furthermore, the State’s discretion would be constrained in cases where a particularly significant aspect of a person’s life or identity was at risk.

Following this consideration, the court considered the Court of Arbitration for Sport’s and the Federal Court’s ability to conduct reviews; the lack of consensus among scientists about the DSD Regulations’ efficacy; the balancing of interests and consideration of the adverse effects of the required medication; the discrimination’s horizontal effects, as well as a connection to the predicament of transgender athletes.

The Court took note, among other things, of the fact that the applicant had filed a claim with both the Court of Arbitration for Sport and the Federal Court, and that both courts had upheld the case’s initial seriousness. It went on to state that the Court of Arbitration for Sport had raised serious concerns about the DSD Regulations in at least three ways. Firstly, it had acknowledged that the side effects of the hormone treatment were “significant”. Secondly, it had acknowledged that even if female athletes carefully followed the hormone treatment regimen, they might still not be able to comply with the DSD Regulations; and, thirdly, it had thought that the evidence that 46 XY DSD athletes had any advantages in the 1500m and 1-mile races as “sparse”. The court further added that unlike the decision in the Dutee Chand¹² case, where the regulations in issue had been suspended by the Court of Arbitration for Sport, the same outcome was not provided here. With regards to the Federal Court, it had not made an effort to address the concerns raised by the Court of Arbitration for Sport regarding the DSD Regulations’ practical applicability and scientific foundation. The Court on the other hand, pointed out that recent reports from human rights organisations, particularly the Parliamentary Assembly of the Council of Europe and the Office of the High Commissioner for Human Rights, had raised serious concerns about discrimination against women in sports, including intersex athletes, based on regulations like those at issue in the current matter.

Conclusively, for Articles 14 and 8, the notion of compulsory arbitration had deprived the applicant from and prohibited access to any other court, aside from a possible remedy from the Court of Arbitration for Sport, who did not apply the provisions of the Convention, notwithstanding its concerns of the DSD regulations and associated issues as outlined above. The review of the Court of Arbitration for Sport’s decision as carried out by the Federal Court was also very limited in scope, being merely a question surrounding the compatibility of the

¹¹ Article 14 of the European Convention on Human Rights

¹² CAS 2014/A/3759



arbitration award being in line with public policy. It had failed in its duty to respond to the concerns raised by the Court of Arbitration for Sport in compliance with the requirements of Article 14 of the Convention.

As a result, the ECtHR determined that the applicant did not receive adequate institutional and procedural protections in Switzerland to address her complaints effectively. This was particularly concerning because her complaints involved well-founded and credible allegations of discrimination based on her elevated testosterone levels caused by a DSD. Given the significant personal consequences for the applicant, such as her ability to compete in international athletic events and pursue her profession, Switzerland exceeded the limited discretion allowed to it in this case, which dealt with sex and sexual characteristic discrimination and required "very weighty reasons" for justification. The narrow margin of appreciation ought to have resulted in a thorough "institutional and procedural" review. Accordingly, the Court was unable to ascertain whether the DSD regulations could be deemed to be a measure that was both objective and proportionate to the aim pursued. Thusly, there was a clear violation of Articles 14 and 8 of the Convention.

ARTICLE 13 WITH ARTICLES 8 AND 14 OF THE CONVENTION

In addition to the above, the lack of sufficient institutional and procedural safeguards in Switzerland, the court also found there to be a violation of Article 13 with 8 for the same reasons as that of Articles 14 with 8.

Article 13 provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The sole object of Article 13 is to provide individuals with a means to a remedy and an opportunity to obtain relief at national level for infringements of rights.

The court noted that previous complaints lodged with the Court of Arbitration for Sport and the Swiss Federal Court had relied directly on the Convention. To this extent, the applicant had claimed of discrimination pertaining to the grounds of sex when compared to athletes with no DSD, and a breach of her right to dignity. Accordingly, the opportunity was there for the Court to make a decision on those complaints. This opportunity was not taken, as with the Court of Arbitration for Sport before, the limited power of review of the Swiss Federal Court resulted in a response that was ineffective when reviewed in conjunction with Article 13. Accordingly, the court decided that a violation of Article 13 had also occurred.

DISCUSSION

Interestingly, the judgment made in this case is not final.¹³ Within a period of 3 months, a party may request that the same be considered by the Grand Chamber. As such, there is still a level of uncertainty with regards to what World Athletics will do with regards to the aforementioned DSD regulations. In response to the judgment, World Athletics stated that their regulations were "...*necessary, reasonable and proportionate for means of protecting fair competition in the female category...*" It also alluded to the fact that they would encourage the Swiss State to make a request to the Grand Chamber to determine the matter with finality, and that the DSD regulations will remain in place for the time being.¹⁴ Further, World Athletics is bound by decisions of the Court of Arbitration for Sport, and unless the matter is reopened and overturned, they are entitled to continue with the controversial DSD rules in their current format. It should also be noted that there were dissenting views in the Chamber, and the majority was 4 votes to 3. The ruling of the ECtHR is not binding but could the decision itself be a beginning of ECtHR influences in matters of discrimination in sports law?

The issue of discrimination in sports and the rights of athletes is a prominent topic in discussions surrounding sports, law, and society. There is currently a significant conflict between the established rules, practices, and culture of sports and the increasing recognition of diverse and marginalized identities, as well as the urgent need for human rights and anti-discrimination standards in sports. The case of Caster Semenya exemplifies the

¹³ Matters can be referred to the Grand Chamber for final decisions within 3 months.

¹⁴ <https://worldathletics.org/news/press-releases/response-european-court-human-rights-decision-2023> - accessed 11/07/2023.



challenges faced in achieving inclusion and addressing exclusion in sports. It highlights the ongoing struggle to find a balance between the interests of marginalized athletes, sport's governing bodies as regulators, and participants in sports.

The decision of the ECtHR comes at a time of intense debate and disagreement regarding gender eligibility in sports. This issue has caused a divide between those who support the inclusion of gender diverse individuals and those who prioritize fair competition. While sports has moved away from policing female athletes, biological factors from previous regulations still heavily influence current rules. The scientific basis for eligibility criteria is used to exclude gender diverse athletes, but experts have differing opinions on the relationship between sex categories, the impact of testosterone, athletic performance, advantage, injury risk, and gender diversity. Progress is being made, but the discussion is still in its early stages, with ongoing research exploring the scientific, legal, and sociological aspects of gender identity and inclusion.

From the offset, little to no consideration was given to the possible conflict between gender rules and fundamental human rights. As the case progressed, there has been a growing discussion about the relationship between sports and human rights, and how these two realms can intersect. There has been increased debate on how international human rights provisions can be applied to private sports regulations and arbitration in order to ensure the protection of human rights for individuals involved in sports. While the sports community has made theoretical advancements in their commitment to human rights, they are facing pressure to fulfil their responsibilities in this regard. The decision of the ECtHR will serve as an indication of the link between sports and human rights and will contribute to our understanding of this complex legal issue.

A further issue to think about is the concept of how such a decision will impact upon sports law's very arbitral nature. One of the most extraordinary elements of sports law is the ability for international governing bodies to 'discriminate' in the name of sport, with the Court of Arbitration for Sport seen as a court of 'last instance.'¹⁵ Any awards made are usually only binding upon those parties concerned. Discriminatory violations is something that *was* (and continues to be) acceptable in sporting matters because it is deemed to be within the spirit of fair competition (World Athletics response to the judgment of the ECtHR substantiates this). It is the sole reason why male and female categories are separate in the majority of elite sports.¹⁶ It is submitted that this decision could also spark a possible reaction to current debates and issues in male to female transgender athletes in other areas of athletics.¹⁷ These athletes may be able to cite discrimination especially if they are prohibited from competing within their respective gender competitions.¹⁸

As the ECtHR has allowed itself to have jurisdiction in this matter – matters that have previously been resolved under the arbitrary regulations that connect athletes and private sports regulatory bodies with the Court of Arbitration for Sport - will we now see these matters more frequently in the ECtHR? While the ECtHR has reviewed the decision of the Swiss Federal Court, and their lack of providing an adequate remedy in the spirit of the Convention, it has also discussed the original ruling issued by the Court of Arbitration for Sport (a private court in its own right), especially their noting of the DSD regulations being discriminatory, and that the lack of access to any other court also being a violation of rights under Section 13 of the Convention. The Court of Arbitration for Sport, a private law foundation that derives its power from civil law, is not a state court. The objections brought before the ECtHR are particularly concerned with the legitimacy of the arbitral tribunal's composition and the procedures utilised by them. Will the route taken by Semenya now be followed by others?

¹⁵ There are a number of matters concerning Human Rights that have been reviewed by CAS. See: Erwin Bakker v. Switzerland, 26 September 2019, Ali Riza v. Switzerland, 13 July 2021, Platini v. Switzerland, 11 February 2020

¹⁶ Tennis (mixed doubles is permitted), Rugby, Football, Basketball, Cricket etc

¹⁷ Gender Recognition Act 2004

¹⁸ The UK's Sports Councils Guidance for Transgender Inclusion in Domestic Sport -

<https://equalityinsport.org/docs/300921/Guidance%20for%20Transgender%20Inclusion%20in%20Domestic%20Sport%202021.pdf> - accessed 11 July 2023



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