

# Annotatie

## Reflections on the ECtHR judgment in the Caster Semenya case

Daniela Heerdt\*

On 11 July 2023, the European Court of Human Rights (ECtHR) issued its Chamber judgment in the case of *Caster Semenya v. Switzerland* (application no. 10934/21). In short, the case is a result of the legal battle the professional South African Olympic Gold medallist Caster Semenya has been fighting against World Athletics, the international federation of the sport of athletics, for issuing eligibility rules that would have forced her to take medication to lower her testosterone levels to be allowed to compete in the 800m run. First the Court of Arbitration for Sport (CAS) decided in 2019 that while these rules are discriminatory, they are justified.<sup>1</sup> In 2020 the Swiss Federal Court (SFC) upheld the CAS award and did not find a violation of Swiss public policy.<sup>2</sup> Now, the ECtHR decided that Switzerland has failed to protect her rights to not be discriminated, to private and family life, and to effective remedy.

This case note discusses the possible implications of this judgment for the broader sport and human rights movement.<sup>3</sup> After a brief summary of the facts and the decision three potential consequences this judgment might have are examined: its impact on one of the most topical debates in sports, namely the inclusion of female athletes with differences of sex development (DSD) and

female transgender athletes (section 2), its meaning for rule- and decision-making by sport governing bodies (SGBs) (section 3), and its potential to strengthen the remedy landscape for sport-related human rights abuses (section 4).

### 1. Facts and decision of the case

After Caster Semenya won the World Championships in 800m running three times, plus gold at Summer Olympic Games in 2012 and 2016, World Athletics (formerly known as International Association of Athletics Federations – IAAF) issued new eligibility rules (DSD Regulations) that presented Semenya with a dilemma: ‘abandoning sport or getting a medical treatment’.<sup>4</sup> The rules required female athletes with DSD to have a certain testosterone level in order to be able to compete.<sup>5</sup> Semenya, who identified as DSD athlete, would have been required to undergo medical treatment in order to lower her testosterone and be able to compete. Based on her previous negative experience of such treatment, she refused to comply and instead decided to challenge the rules before the CAS, an arbitration body for the world of sport located in Switzerland.<sup>6</sup>

\* Dr. D. (Daniela) Heerdt is researcher at T.M.C. Asser Instituut in The Hague (NL) and consultant on sport and human rights based in Utrecht (NL).

1 CAS 30 April 2019, 2018/O/5794 (*Mokgadi Caster Semenya v. International Association of Athletics Federations*) & CAS 30 April 2019, 2018/O/5798 (*Athletics South Africa v. International Association of Athletics Federations*).

2 Schweizer Bundesgericht, 4A\_248/2019 & 4A\_398/2019, available at [http://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight\\_docid=aza%3A%2F%2Faza://25-08-2020-4A\\_248-2019&lang=de&zoom=&type=show\\_document](http://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://25-08-2020-4A_248-2019&lang=de&zoom=&type=show_document).

3 The analysis is based on unofficial translations of the original judgment in French, the official English summary and press release, and secondary sources that discuss the case.

4 Antoine Duval, Twitter thread, 11 July 2023, available at [twitter.com/Ant1Duval/status/1678777058690998277](https://twitter.com/Ant1Duval/status/1678777058690998277).

5 World Athletics, Eligibility Regulations for the Female Classification (Athletes with Differences in Sex Development), 1 November 2019.

6 Press release of ECtHR, Discrimination against international-level athlete who was not afforded sufficient procedural safeguards when challenging World Athletics regulations, 2023, available at [hudoc.echr.coe.int/eng#%7B%22display%22:%5B%5D,%22languageisocode%22:%5B%5D,%22appno%22:%5B%5D,%2210934/21%22,%22documentcollectionid%22:%5B%5D,%22CLIN%22%5D%7D](https://hudoc.echr.coe.int/eng#%7B%22display%22:%5B%5D,%22languageisocode%22:%5B%5D,%22appno%22:%5B%5D,%2210934/21%22,%22documentcollectionid%22:%5B%5D,%22CLIN%22%5D%7D).

In April 2019, the CAS dismissed Semenya's claims against the DSD Regulations on the basis that they were discriminatory but presented a necessary, reasonable, and proportionate measure of World Athletics to ensure fair competition in their sport. The panel admitted that 'it has not found the issues in this case easy to decide', but nevertheless decided that the rules can be upheld for 'achieving the aim of what is described as the integrity of female athletics and the upholding of the "protected class" of female athletes in certain events'.<sup>7</sup> Semenya appealed this decision at the Swiss Federal Court, which in 2020 rejected the appeal, finding that Semenya did not sufficiently show that the CAS award violates fundamental and widely recognized principles of public order.<sup>8</sup> In short, the Court agreed with CAS that '(f)airness in sport is a legitimate concern and forms a central principle of sporting competition', and concluded that 'the CAS decision is also compatible with the guarantee of human dignity'.<sup>9</sup>

The only possibility for Semenya and her legal team to challenge this decision was to go to the ECtHR and file an application arguing that Switzerland had breached its obligations under the European Convention of Human Rights (ECHR, the Convention). In February 2021, the application was filed, relying on article 14, the prohibition of discrimination, together with article 8, the right to respect for private life, as well as on article 13, the right to effective remedy taken together with articles 3, the prohibition of inhuman or degrading treatment, article 8 and article 14, and relying on article 3, article 6, the right to a fair hearing, and article 8 separately.

As Switzerland did not play a role in developing or issuing the DSD Regulations, the Court decided to focus on Switzerland's role in reviewing the regulations and whether it had violated the Convention in that respect. After establishing jurisdiction, which in and of itself is an interesting reasoning given that the applicant is from South Africa and the rules in question have been issued by a non-state actor based in Monaco,<sup>10</sup> the Court came to the conclusion that Switzerland had overstepped the narrow margin of appreciation applied in cases of discrimination based on sex and sexual characteristics, by not ensuring sufficient institutional and procedural safeguards to allow Semenya to have her complaints examined effectively. In other words, the Court argued that due to the specific circumstances of the discrimination, the margin of appreciation was different, and Switzerland failed to protect her rights by exceeding that margin. The Court therefore decided that there is a vio-

lation of article 14 taken together with article 8.<sup>11</sup> With a similar reasoning, the Court argued that the fact that both the CAS and the SFC had failed to respond in an effective manner to the complaints she raised, which were substantiated on the ECHR,<sup>12</sup> the remedies available to Semenya cannot be considered effective, and therefore found a violation of article 13 in relation to article 14 taken together with article 8. The complaint under article 3 was declared inadmissible for being manifestly ill-founded.<sup>13</sup>

## 2. How the judgment might impact debates on the inclusion of female DSD athletes

The ECtHR recognized the 'high personal stakes of the case for the applicant', which should have led to a thorough review by the CAS and the SFC.<sup>14</sup> Arguably, the stakes were high for the broader community of female athletes with DSD. Their inclusion in women elite sport is a highly debated topic in the sport world. Even though the International Olympic Committee (IOC) has recommendations in place in form of the 'IOC Framework on Fairness, Inclusion, and Non-discrimination on the Basis of Gender Identity and Sex Variations', international federations address this topic in very different ways. Many have recently changed their rules regarding DSD and transgender athletes, some with the result that transgender female athletes are entirely banned from participating, and others asking the athletes to reduce their testosterone levels. This includes World Aquatics, the international governing body of all aquatic sports, the Union Cycliste Internationale, as well as World Rugby, and most recently also the International Chess Federation.<sup>15</sup> In its judgment, the ECtHR stresses the serious concerns about discrimination against women in sport, including intersex athletes, on the basis of regulations such as the one issued by World Athletics.<sup>16</sup> The right to fair competition for non transgender female athletes and those without DSD is the most often used justification of such rules. While there is no explicit human right to fair competitions in sport, there is an explicit right to non-discrimination. The ECtHR concludes

7 See note 2, paras 469 & 626.

8 Lena Holzer, The Decision of the Swiss Federal Supreme Court in the Caster Semenya Case: A Human Rights and Gender Analysis, 2020, in: *Opinio Juris*, available at <https://opiniojuris.org/2020/09/30/the-decision-of-the-swiss-federal-supreme-court-in-the-caster-semenya-case-a-human-rights-and-gender-analysis/>.

9 Swiss Federal Tribunal, Press Release, Judgment of 25 August 2020 (4A\_248/2019, 4A\_398/2019), available at [www.bger.ch/files/live/sites/bger/files/pdf/en/4A\\_248\\_2019\\_yyyy\\_mm\\_dd\\_T\\_e\\_18\\_18\\_10.pdf](http://www.bger.ch/files/live/sites/bger/files/pdf/en/4A_248_2019_yyyy_mm_dd_T_e_18_18_10.pdf).

10 ECtHR, 11 July 2023, 10934/21 (*Semenya/Switzerland*) paras 100-113.

11 *Ibid.*, paras 200-202.

12 *Ibid.*, para 184 ff.

13 *Ibid.*, para 217.

14 Press release of ECtHR, 2023, 'Discrimination against international-level athlete who was not afforded sufficient procedural safeguards when challenging World Athletics regulations', available at <http://hudoc.echr.coe.int/eng#%7B%22display%22:%7B%220%22%7D%22languageisocode%22:%7B%22ENG%22%7D%22appno%22:%7B%2210934/21%22%7D%22documentcollectionid%22:%7B%22CLIN%22%7D%7D>.

15 See for example Reuters, Chess-World Chess federation bars transgender players from women's events, 2023, available at [www.reuters.com/sports/chess-world-chess-federation-bars-transgender-players-womens-events-2023-08-18/](http://www.reuters.com/sports/chess-world-chess-federation-bars-transgender-players-womens-events-2023-08-18/).

16 See note 11, para 183.

that the SFC should have done a better job in assessing the claims at stake in line with the way article 14 of the Convention has been tested in case law of the Court and not just in light of the concept of fairness of competition in sport.<sup>17</sup> The justification for imposing restrictions on female DSD and transgender athletes used by many is based on rather controversial science, some of it confirming an advantage due to higher testosterone alone, some of it questioning it, some cases confirming the negative side-effects of taking medication to lower it, and others showing that the medication does not have any effects.<sup>18</sup> In the concurrent opinion, Judge Pavli argues that it is not the Court's role to question the underlying science, nor to decide on a universal approach to fairness in sport.<sup>19</sup> Instead, it is the Court's task to assess the means that have been designed in response to the science and against the aim that has been set.<sup>20</sup>

Following from that and given the Court's careful consideration of facts, arguments, and submissions by others, and the lengthy dissenting opinion, it would be wrong to assume that with this judgment, all female athletes with DSD and female transgender athletes will be able to claim their right to non-discrimination under the Convention. Rather, a case-by-case approach can be expected for these types of cases should there be more in the future. It would also be wrong to assume that this decision now allows Semenya to return to the competitions she has been excluded from. World Athletics has issued a new set of rules in the meantime, with even stricter rules on eligibility of female athletes with DSD and female transgender athletes. However, if World Athletics wants to prevent these rules from being challenged successfully, and the same is true for other federations, they would have to carefully consider the prohibition of discrimination as defined under the ECHR and by the ECtHR. The following section goes into greater details on the implications of the judgment for sport governing bodies' rulemaking.

### 3. What the judgment means for rule- and decision-making of SGBs

While this judgment is directed against Switzerland's failure to protect the rights of a female athlete with DSD and does not directly consider the compliance of relevant sport bodies, namely World Athletics and the CAS, with the ECHR, it nevertheless has important indirect consequences for SGBs. Admittedly, it is not the first

time that the ECtHR deals with cases that found their way to the Court after having been dealt with by CAS and by the SFC. Other examples are *Mutu and Pechstein v. Switzerland*, *Platini v. Switzerland* or *Ali Riza and Others v. Switzerland*.<sup>21</sup> However, there is an important difference between these previous cases and the current case. Whereas previous cases, that is those that were declared admissible, challenged the right to fair trial enshrined in article 6 of the Convention in relation to CAS proceedings, the Semenya case was about more, namely legal questions on substantive rights such as the right to non-discrimination, the right to private life, and the right to remedy in relation to the decision of the CAS and the SFC concerning rules of sport bodies. As Krech argues, the 'ECtHR's decision offers the first judicial assessment of the rules' compliance with international human rights law, particularly as codified in the European Convention on Human Rights'.<sup>22</sup>

The fact that the ECtHR established jurisdiction in this case, means that no matter where the sport body is located, and irrespective of the fact whether or not it committed to human rights, the Court can have jurisdiction for cases that concern sport bodies' rules, as long as they have been challenged in one of its member states, such as Switzerland. In the words of Krech, '(t)his is, in fact, nothing else but acknowledging the human rights responsibilities of sports federations'.<sup>23</sup> The dissenting opinion clarifies and criticizes that by widening the scope of jurisdiction beyond article 6 of the Convention, it now covers 'l'ensemble du monde sportif' (the entire world of sport).<sup>24</sup> The Court widens the scope based on the argument that if it would not accept jurisdiction, it would deprive an entire group of people, namely professional sportswomen, from accessing the Court, which would be against the spirit, object and purpose of the convention.<sup>25</sup> As a result, not only will the CAS and the SFC need to consider the option of appeal to the ECtHR when rendering their judgments and awards but the CAS actually needs to apply the rules of the ECHR on non-discrimination in relevant cases, and the SFC needs to apply the ECHR more strictly in reviews of CAS awards.<sup>26</sup> Sports bodies, for their part, need to adopt eligibility rules in compliance with the ECHR's provision on non-discrimination.

Looking closely at the Court's reasoning and reflecting on its implications for sport bodies, in particular the way the court dealt with, or rather brushed over the concept of fairness in sport is remarkable. It shows that the concept of fairness of competition is not as strong as sport bodies might have thought when challenged under human rights. In the words of Duval, while CAS and

17 See note 11, para 174.

18 Ben Bloom, 'I know I can run as fast': Christine Mboma on the medical minefield of World Athletics' DSD ruling, *The Guardian*, August 17, 2023, available at [www.theguardian.com/sport/2023/aug/17/i-know-i-can-run-as-fast-christine-mboma-on-the-medical-minefield-of-world-athletics-dsd-ruling](http://www.theguardian.com/sport/2023/aug/17/i-know-i-can-run-as-fast-christine-mboma-on-the-medical-minefield-of-world-athletics-dsd-ruling).

19 Ibid.

20 See note 11, para 9 of concurrent opinion.

21 ECtHR, *Sport and the European Convention on Human Rights*, 2022, available at [www.echr.coe.int/documents/d/echr/FS\\_Sport\\_ENG](http://www.echr.coe.int/documents/d/echr/FS_Sport_ENG).

22 Michele Krech, *Who Is Responsible for Ensuring Human Rights in Global Sport? Takeaways From the ECtHR's Judgment in Semenya v. Switzerland*, *Völkerrechtsblog*, August 4, 2023, doi: 10.17176/20230804-224137-0.

23 Ibid.

24 See note 11, joint dissenting opinion.

25 See note 11, para 111.

26 Ibid., paras 194-195.

the SFC put great emphasis on it, it basically ‘collapses’ before the ECtHR.<sup>27</sup> In this particular case, it collapses against discrimination based on an individual’s sex characteristics and intersex status, which according to ECtHR case law can only be justified by very strong considerations, compelling reasons, or particular solid and convincing reasons.<sup>28</sup> The Court adds that when the individual’s existence or identity is at stake, which it recognized is the case for Semenya, the margin of appreciation left to States is restricted. Consequently, SGBs, but also the CAS, will need to re-think the central place they give to the concept of fairness when they restrict the athletes’ rights enshrined in the ECHR.

#### 4. Why the judgment strengthens the remedy landscape for sport and human rights cases

The fact that human rights abuses happen in the sporting context is undisputed. While the past decade has seen significant steps being taken by international sport governing bodies, like the FIFA, or the IOC, in terms of adopting human rights policies, integrating human rights standards into regulations, the question of remedies for sport-related human rights abuses remains to be one of the most challenging issues to address. In 2017, a multistakeholder initiative called ‘The Mega-Sporting Events Platform for Human Rights’ defined three gaps in relation to remedy for sport-related human rights harms: a lack of recourse to available mechanisms, a lack of sport-based mechanisms with adequate human rights expertise, and sport’s failure to recognize external mechanisms that can be relevant.<sup>29</sup> A recent publication by the World Players Association on access to effective remedy for players shows that not much has changed. The gaps identified here are lack of remedy mechanisms attached to human rights commitments by sport bodies, available mechanisms not being fully human rights compliant, neither mechanism nor commitment by sport bodies, and finally the lack of willingness of sport bodies to use their leverage over states to fulfil their human rights obligations.<sup>30</sup>

The decision of the ECtHR in the Semenya case does not fill these gaps. However, it can be argued that by broad-

ening the scope of jurisdiction to include violations of substantive rights in cases that challenge Switzerland’s obligation in connection with decisions by the CAS and the SFC, the Court creates possibilities to review sporting rules under human rights law and thereby strengthens the remedy landscape for sport-related human rights abuses. That landscape is currently at best a patchwork of mechanisms that either lack capacity or are not effective or not available to certain affected individuals and groups. Through expressing the expectations that both the CAS and SFC should apply relevant human rights standards in relevant cases and deciding that Switzerland failed to fulfil its obligations because both the CAS and SFC failed to do so, the Court holds a State responsible for ensuring access to effective remedies for sport-related human rights harms.

More precisely, the decision implies that for Switzerland not to have breached its obligations, the SFC should have exercised a more thorough review of the case, and adds explicitly that it should be more thorough than in commercial arbitration cases, due to the hierarchical structure of sports and relations between athletes and the organizations issuing sporting rules.<sup>31</sup> In effect, this means that Switzerland has to ensure that the SFC takes arguments grounded in the ECHR when reviewing CAS awards more seriously. This could for instance be done by increasing expertise and capacity on the ECHR at the SFC. More generally, this and other statements of the court are in general important clarifications by a human rights court that builds a precedent and case law in this field, which can be helpful for other affected people and their representatives when trying to access remedy for sport-related human rights abuses.

#### 5. Conclusion

While this case is certainly a win for the sport and human rights movement, we also need to be cautious and recognize that it is not over, as well as the lengthy and costly battle that is behind this win. Caster Semenya managed to have the means it took to win this battle, but that did not come without its consequences, and it is certainly not the case for all athletes that are affected by federation’s eligibility rules, or other affected groups and individuals that suffered different kinds of human rights abuses in the sporting context. There are numerous disputes in the sporting world, which touch on human rights standards. One relevant example is the debate on eligibility of athletes from Russia and Belarus and to what extent not letting them violates their human right to non-discrimination, or how letting them compete violates human rights of Ukrainian athletes.<sup>32</sup> In the world of football, another interesting case to

27 Antoine Duval, Twitter thread, 11 July 2023, available at [twitter.com/Ant1DUval/status/1678777058690998277](https://twitter.com/Ant1DUval/status/1678777058690998277).

28 See note 11, para 169.

29 Mega-Sporting Events Platform for Human Rights, *Remedy Mechanisms for Human Rights in the Sports Context*, Sporting Chance White Paper 2.4, Version 1, January 1, 2017, available at [www.ihrb.org/uploads/reports/MSE\\_Platform%2C\\_Remedies\\_Mechanisms\\_for\\_Human\\_Rights\\_in\\_the\\_Sports\\_Context%2C\\_Jan-2017.pdf](https://www.ihrb.org/uploads/reports/MSE_Platform%2C_Remedies_Mechanisms_for_Human_Rights_in_the_Sports_Context%2C_Jan-2017.pdf).

30 World Players Association, *Ensuring Access to Effective Remedy – The Players’ Strategic Pathway to Justice*, 2021, available at <https://uniglobalunion.org/wp-content/uploads/WPA-Ensuring-Access-to-Effective-Remedy-The-Players-Strategic-Pathway-to-Justice-2022.pdf>.

31 See note 11, para 177.

32 Patricia Wiater, *Peaceful and Neutral Games: The Human Rights Perspective on Banning Russian and Belarussian Athletes from International Sports Competitions*, VerfBlog, 23 March 2023, available at <https://verfassungsblog.de/peaceful-and-neutral-games/>.

mention is the one that unfolded in France in June this year: the French Conseil d'Etat, France's highest administrative court upheld the French Football Federation's decision to ban players who choose to wear the Islamic headscarf during matches.<sup>33</sup> Being as well a case arguable on the grounds of discrimination, it could follow a similar path as the Semenya case, and it would be interesting to see how (differently) the CAS, and perhaps the SFC, would deal with the case after ECtHR's decision in the Semenya case.

This case note has argued that the decision taken and the reasoning applied by the ECtHR in this case is a remarkable step towards increasing human rights protection in the world of sport. To what extent this will have a real impact on the world of sport also depends on whether and how the case will be examined by the Court's Grand Chamber in the future. Either way, it will not provide Caster Semenya with any actual or immediate relief, as World Athletics in the meantime adopted and applies new rules, which are said to be even stricter. For things to change for the better, these new rules need to be challenged, and the South African athlete would need to undergo the same legal battle again, which based on what we know now from the ECtHR's judgment might have a more successful outcome than this first one.

33 Conseil d'Etat 29 June 2023, Nos 458088, 459547, 463408.