



Discrimination against international-level athlete who was not afforded sufficient procedural safeguards when challenging World Athletics regulations

In today's Chamber judgment¹ in the case of [Semenya v. Switzerland](#) (application no. 10934/21) the European Court of Human Rights held, by a majority (4 votes to 3), that there had been:

a violation of Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private life) of the European Convention on Human Rights, and

a violation of Article 13 (right to an effective remedy) in relation to Article 14 taken together with Article 8 of the Convention.

The case concerned an international-level athlete, specialising in middle-distance races, who complained about certain regulations of the International Association of Athletics Federations (IAAF – now called World Athletics) requiring her to take hormone treatment to decrease her natural testosterone level in order to be able to take part in international competitions in the female category. Having refused to undergo the treatment, she was no longer able to take part in international competitions. Her legal actions challenging the regulations in question before the Court of Arbitration for Sport (CAS) and the Federal Court were rejected.

The Court found in particular that the applicant 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). It followed, particularly with regard to the high personal stakes involved for the applicant – namely, participating in athletics competitions at international level, and therefore practising her profession – that 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. The high stakes of the case for the applicant and the narrow margin of appreciation afforded to the respondent State should have led to a thorough institutional and procedural review, but the applicant had not been able to obtain such a review. The Court also found that the domestic remedies available to the applicant could not be considered effective in the circumstances of the present case.

A legal summary of this case will be available in the Court's database HUDOC ([link](#)).

Principal facts

The applicant, Mokgadi Caster Semenya, is a South African national who was born in 1991 and lives in Pretoria (South Africa). She is an international-level athlete, specialising in middle-distance races (800 to 3,000 m).

After her victory in the women's 800 m race at the World Championships in Berlin in 2009, the International Association of Athletics Federations (IAAF) informed the applicant that she would have

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

to decrease her testosterone level below a certain threshold if she wished to be eligible to compete in her preferred events in future international athletics competitions.

Despite suffering significant side-effects from the hormone treatment she then underwent, the applicant won the women's 800 m race at the World Championships in Daegu (2011) and the Olympic Games in London (2012).

Subsequently, after the interim award of 24 July 2015 delivered in the case of *Dutee Chand*, in which the Court of Arbitration for Sport (CAS) temporarily suspended the relevant IAAF regulations in force at the time, the applicant stopped taking her hormone treatment.

In April 2018 the IAAF adopted a new set of regulations entitled "Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)" – "the DSD Regulations".

The applicant, who did not dispute that she was a "Relevant Athlete" within the meaning of the DSD Regulations, refused to comply with them since, in her submission, they required her to submit to hormone treatment with poorly understood side-effects with the aim of lowering her natural testosterone level in order to be allowed to participate in the female category of an international competition.

In June 2018 the applicant challenged the validity of the DSD Regulations (CAS/2018/O/5794) before the CAS, which has its seat in Lausanne.

While the proceedings were ongoing, the IAAF amended the list of differences of sex development (DSD) covered by the DSD Regulations; from that point onwards, they applied only to "46 XY DSD" athletes, that is, to persons with XY chromosomes, not to those with XX chromosomes. In other words, athletes with XX chromosomes having an increased level of testosterone were no longer subject to these Regulations.

In April 2019 the CAS dismissed the applicant's request for arbitration; it found that while the DSD Regulations were discriminatory, they were a necessary, reasonable and proportionate means of achieving the aims of the IAAF, namely to ensure fair competition.

In May 2019 the applicant lodged a civil appeal with the Federal Court, arguing in particular that she had been discriminated against on grounds of sex as compared to male and female athletes with no DSD, and that her human dignity and personality rights had been breached.

In August 2020 the Federal Court dismissed the applicant's appeal, considering that the relevant regulations were an appropriate, necessary and proportionate means of achieving the legitimate aims of fairness in sport and of upholding the "protected class". It noted in that connection that its power of review in the area of international arbitration was limited to examining the question whether the award under appeal was incompatible with substantive public policy and concluded that it was not.

Complaints, procedure and composition of the Court

Relying on Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private life) of the European Convention on Human Rights, the applicant complained that she had been subjected to discriminatory treatment on account of her DSD, which resulted in her having a naturally higher level of testosterone.

Relying on Article 13 (right to an effective remedy) taken together with Articles 3, 8 and 14 of the Convention, the applicant complained of the Federal Court's limited power of review.

The applicant also relied on Articles 3 (prohibition of inhuman or degrading treatment), 6 (right to a fair hearing) and 8 (right to respect for private life) of the Convention.

The application was lodged with the European Court of Human Rights on 18 February 2021.

Several third parties, including World Athletics, were given leave to intervene in the written procedure by the Section President.

Judgment was given by a Chamber of seven judges, composed as follows:

Pere **Pastor Vilanova** (Andorra), *President*,
Yonko **Grozev** (Bulgaria),
Georgios A. **Serghides** (Cyprus),
Darian **Pavli** (Albania),
Peeter **Roosma** (Estonia),
Ioannis **Ktistakis** (Greece),
Andreas **Zünd** (Switzerland),

and also Milan **Blaško**, *Section Registrar*.

Decision of the Court

Subject matter of the case

The Court noted that, in essence, the applicant was challenging the compatibility with various provisions of the Convention of certain regulations that had been issued by the IAAF (a Monegasque private-law association) and subsequently endorsed by the CAS and the Swiss Federal Court. It further noted that Switzerland had played no part in the adoption of the DSD Regulations. The Court therefore decided to focus its examination on the issue whether the review carried out by the CAS and the Federal Court had, in the present case, satisfied the requirements of the Convention.

Whether the Court had jurisdiction

In the context of compulsory arbitration, which had deprived the applicant of the possibility of applying to the ordinary courts in her own country or elsewhere, the only remedy available to the applicant had been a request for arbitration to the CAS, followed by an appeal against the refusal of arbitration to the Federal Court. No other remedy, in particular an appeal to other Swiss courts or to the Monegasque courts, had been available to her.

The Court did not deny that a “centralised” system for handling disputes in the domain of sport had its advantages, in particular, in order to guarantee a certain coherence and consistency in the international case-law, through the CAS. The fact remained, nevertheless, that if the Court were to find that it did not have jurisdiction to examine this type of application, it would risk barring access to the Court to an entire category of individuals, that of professional sportspersons, which would not be in keeping with the spirit, object and purpose of the Convention.

The Court was aware that the applicant was complaining before it of the compatibility with the Convention of regulations issued by the IAAF and endorsed by the CAS, both of which were non-State actors. However, to the extent that the findings of the CAS had been reviewed by the Federal Court with regard to the applicant’s complaints, the Court concluded, in the light of its case-law, that the applicant’s case fell within the “jurisdiction” of Switzerland for the purposes of Article 1 (obligation to respect human rights) of the Convention. This was so even though the Swiss Federal Court had not explicitly referred to the provisions of the Convention and had only had a limited power of review, being limited to the question whether the award under appeal had been compatible with substantive public policy. It followed that the Court had jurisdiction to examine the present case.

Article 14 taken together with Article 8

The Court noted that the applicant could rely on at least one ground of discrimination under Article 14, and that she could claim to be a victim of discrimination on the ground of sex and also sexual characteristics (in particular, genetic characteristics), a notion which came within the ambit of Article 14.

The Court considered that the applicant was in a comparable situation to that of other female athletes and that she had been subjected to a difference in treatment in relation to those athletes as she had been excluded from taking part in competitions as a result of the DSD Regulations.

The Court's task was to ascertain whether the applicant had had sufficient institutional and procedural safeguards available to her, in the form of a system of courts to which she could submit her complaints, in particular those under Article 14, and whether those courts had delivered reasoned decisions which took account of the Court's case-law.

It reiterated that it had repeatedly held that differences based exclusively on sex required "very weighty reasons", "particularly serious reasons" or – in another formulation – "particularly weighty and convincing reasons" by way of justification. Similar considerations applied if a difference in treatment was based on the sexual characteristics of an individual or his or her status as an intersex person. Furthermore, where a particularly important facet of an individual's existence or identity was at stake, the State's discretion would be restricted.

The Court next took note of the following points: the power of review of the CAS and the Federal Court; the scientific uncertainty as to the justification for the DSD Regulations; the balancing of interests and the account taken of the side-effects caused by the compulsory medication; the horizontal effect of the discrimination; and the comparison with the situation of transgender athletes.

The Court noted, among other things, that the applicant had lodged before both the CAS and the Federal Court a complaint of which the prima facie serious and arguable nature had not been denied by those courts. It further noted that the CAS itself had expressed serious concerns about the DSD Regulations in at least three respects: it had acknowledged that the side-effects of the hormone treatment were "significant"; it had also acknowledged that, even if female athletes carefully followed the prescribed hormone treatment, they might still be unable to remain in compliance with the DSD Regulations; and, lastly, it had considered that the evidence that 46 XY DSD athletes had any actual significant athletic advantage in the 1,500 m and 1 mile races was "sparse". These serious concerns had not, however, led to the CAS suspending the regulations in issue, as they had done in the *Dutee Chand* case several years before. As to the Federal Court, it had not sought to address the doubts expressed by the CAS with respect to the practical application of and scientific basis for the DSD Regulations. On the other hand, the Court noted that recent reports of human rights bodies, in particular the Parliamentary Assembly of the Council of Europe and the Office of the High Commissioner for Human Rights, had mentioned serious concerns about discrimination against women in the sports domain, including intersex athletes, based on regulations such as those in issue in the present case.

In conclusion, the Court found that, in the context of compulsory arbitration, which had deprived the applicant of the possibility of applying to the ordinary courts, the only remedy available to her had been an application to the CAS which, despite providing very detailed reasoning, had not applied the provisions of the Convention and had left open serious questions as to the validity of the DSD Regulations, in particular as regards: the side-effects of the hormone treatment; the potential inability of athletes to remain in compliance with the DSD Regulations; and the lack of evidence of 46 XY DSD athletes having an actual significant athletic advantage in the 1,500 and 1 mile races. Furthermore, the review carried out by the Federal Court on an appeal against a CAS decision was very limited, being limited to the question whether the arbitration award was compatible with

substantive public policy, and had failed, in the present case, to respond to the serious concerns expressed by the CAS in a manner compatible with the requirements of Article 14 of the Convention.

Consequently, the Court found that the applicant 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 DSD. It followed, particularly with regard to the high personal stakes involved for the applicant – namely, participating in athletics competitions at international level, and therefore practising her profession – that 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. The high stakes of the case for the applicant and the narrow margin of appreciation afforded to the respondent State should have led to a thorough institutional and procedural review, but the applicant had not been able to obtain such a review in the present case. 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. **There had therefore been a violation of Article 14 taken together with Article 8 of the Convention.**

Article 13 taken together with Articles 8 and 14

The Court also found a violation of the right to an effective remedy within the meaning of Article 13 of the Convention for essentially the same reasons which had led it to find a violation of Article 14 taken together with Article 8, namely the lack of sufficient institutional and procedural safeguards in Switzerland.

It noted that the complaints that the applicant had lodged with the CAS and the Federal Court had been substantiated and had relied directly or in substance on the Convention. In her appeal before the Federal Court against the decision of 28 May 2019 refusing arbitration, the applicant had complained, in particular, of discrimination on grounds of sex as compared to male and female athletes with no DSD, and of a breach of her right to dignity and her personality rights. As such, she had given the Federal Court the opportunity to rule on those complaints. However, like the CAS before it, the Federal Court, owing in particular to its very limited power of review, had not responded in an effective manner to the applicant’s substantiated and credible complaints of, among other things, discrimination.

The Court 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. **There had therefore been a violation of Article 13 in relation to Article 14 taken together with Article 8 of the Convention.**

Other Articles

The Court held, by 6 votes to 1, that there was no need to give a separate ruling on the complaints under Article 8 taken alone or the complaint under Article 6 § 1 of the Convention.

It declared, by a majority, the complaint under Article 3 inadmissible as being manifestly ill-founded.

Just satisfaction (Article 41)

The applicant not having submitted claims in respect of pecuniary or non-pecuniary damage, the Court made no award under these heads. It held (by 4 votes to 3), however, that Switzerland was to pay the applicant 60,000 euros in respect of costs and expenses.

Separate opinions

Judge Pavli expressed a concurring opinion. Judge Serghides expressed a partly concurring, partly dissenting opinion. Judges Grozev, Roosma and Ktistakis expressed a joint dissenting opinion. These opinions are annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.