



Caster Semenya: Highest Swiss Court also backs World Athletics' DSD Regulations

Earlier this month, the Swiss Federal Tribunal upheld the 2019 CAS Award that World Athletics' "DSD Regulations", which use blood testosterone levels as a measure to govern eligibility to participate in certain "female" events, are a lawful way of determining which athletes may compete in those events.

This means that Caster Semenya, a woman with hyperandrogenism (naturally high testosterone levels) cannot compete in either the 800m or 1,500m female events at the highest level unless she takes medication to lower her testosterone levels.

This is a follow-on and update to our previous articles on this subject:

- ❖ **Banned from Being Yourself** which provides background to the DSD Regulations (available [here](#)); and
- ❖ **Classification of Sport – Lessons from Semenya** which sets out further detail of the 2019 CAS Award as well as considerations for international federations, governing bodies and regulators in setting their own rules and regulations for gender classification (available [here](#)).

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The Dispute to Date

By way of recap:

- ❖ Caster Semenya and Athletics South Africa (**ASA**) challenged World Athletics' (previously known as IAAF) DSD Regulations before the Court of Arbitration for Sport (CAS) in April 2019.
- ❖ The DSD Regulations set out blood testosterone levels that must be maintained in order for athletes to be eligible to compete in the female classification of certain restricted athletic events.
- ❖ The DSD Regulations were published by World Athletics on 23 April 2018 and were due to come into force on 1 November 2018.
- ❖ CAS had to determine whether the DSD Regulations were a legally enforceable means of determining which athletes may compete in seven restricted "female" events at the highest level.
- ❖ Remember that Semenya and ASA did not challenge the binary division between "male" and "female" events.
- ❖ On 30 April 2019 CAS awarded:
 - unanimously, that the DSD Regulations are **discriminatory**;
 - by majority, that such **discrimination is a necessary and reasonable means** of achieving World Athletics' aim of preserving the integrity of sporting competition; and
 - by majority, that the DSD Regulations were **proportionate** (for example, testosterone can be lowered by taking a pill, rather than any invasive treatment).
- ❖ CAS required World Athletics to amend the DSD Regulations to apply to a more limited set of five, rather than seven, "female" events. Their effect was then suspended by the SFT pending the outcome of the SFT trial.

Semenya's Appeal at the SFT

Semenya and ASA challenged the lawfulness of the CAS Award before the Swiss Federal Tribunal (SFT). A challenge against an arbitral award before the SFT can only be made on very narrow

grounds: the SFT will not conduct a new hearing on the facts and evidence.

The SFT's role was to ensure that CAS, in reaching its decision, did not violate any widely recognised principles of public policy, such as the right to a fair trial. These principles are set out in article 190 of the Swiss Private International Law Act (**PILA**).

On 25 August 2020 the SFT confirmed that the CAS decision is compatible with Swiss public policy. In doing so, the SFT upheld the DSD Regulations as a legitimate and proportionate means of classifying participation in the restricted female events. In reaching its decision, SFT considered that:

- ❖ CAS had consulted numerous experts to find that testosterone is the main factor for the difference in performance levels of sexes in athletics.
- ❖ In particular, those (including Semenya) with the "46 XY DSD" gene effectively have an advantage over those who do not in the five events now listed under the DSD Regulations.
- ❖ Fairness in sport and fairness of competition is fundamentally important and is also widely recognised by the European Court of Human Rights (**ECtHR**). Innate characteristics can distort the fairness of competition.
- ❖ World Athletics' DSD Regulations do not violate human dignity - athletes remain free to choose to take testosterone-lowering medication to participate in any of the "restricted" female events.

What next for Caster Semenya?

What Caster Semenya decides to do in relation to taking testosterone lowering medication and her sporting career, after having dominated the 800m event over the last decade, is a question only she can answer. She has reportedly been training in the 200m: if she wins medals in this event at the highest level, this switch would lead to an unprecedented dominance across female's sprint and middle-distance racing.

From a legal perspective, she could still appeal the SFT's decision to the European Court of Human Rights. This essentially means taking the Swiss state to court to challenge its application of human rights principles. However, such an

appeal could take several years and not be a practical solution to an athlete whose time at the elite level is limited, but she and her supporters may determine that the point of principle is worth the time and effort.

Lessons for international sport federations, governing bodies and regulators

World Athletics' DSD Regulations certainly open the door to a way of classifying athletes based on biological characteristics (to confirm who is eligible to compete in the binary division between "male" and "female" events) for the purposes of

fairness and equal opportunity. The SFT stated that *'it is above all up to the sports federations to determine to what extent a particular physical advantage is likely to distort competition and, if necessary, to introduce legally admissible eligibility rules to remedy this state of affairs.'*

However, in doing so, we recommend that governors and regulators of sport remind themselves of the considerations set out in our previous article **Classification of Sport – Lessons from Semenya** (available [here](#)).



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