



Gender Classification of Sport: Lessons from Semenya

By way of update from our note "Banned for Being Yourself", CAS has dismissed the legal challenge from Caster Semenya concerning IAAF's proposed DSD Regulations governing athletes' eligibility to participate in certain restricted "female" events.

Whilst the decision seemingly leaves it open for international federations, governing bodies and regulators to set their own rules and regulations for gender classification, key lessons from Semenya should be considered and kept under review. These are set out in full in our note but in summary include:

- ❖ Should participants be divided by gender or biological attributes and if so how?
- ❖ Is division required at all levels of the sport or just elite competition?
- ❖ Are the reasons "necessary, proportionate and legitimate"?
- ❖ What happens if an athlete cannot fulfil the governing criteria of their preferred event?
- ❖ What is the risk profile, including challenge on discriminatory and human rights grounds?

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CAS' decision

This case required CAS to consider complex arguments of ethics, science and law, framed by public debate over the interplay between biological sex, sexual identity and legal sex. It is easy to see why this case generated unprecedented media attention and the panel of three arbitrators could not reach unanimous agreement.

CAS' decision is limited in its scope. It does not answer the question of whether it is in principle fair or legal to divide athletics (or other sports) into "male" and "female" events. It was accepted by the parties that such binary division is required as there is a substantial difference at elite level between their athletic performance.

Rather, CAS was only required to determine the narrow question of whether the IAAF's DSD Regulations are a legally enforceable means of determining which athletes may compete in eight restricted "female" events (including the 800m and 1,500m) at the highest level¹.

Discrimination

Unanimously, the panel of arbitrators found the DSD Regulations are discriminatory both on the basis of legal sex (because they impose restrictions on a subset of the female/intersex athlete population but not on the male athlete population) and on the basis that they target individuals who have certain immutable biological characteristics (namely a 46 XY DSD² coupled with naturally raised testosterone levels³ and a material androgenising effect arising from that condition⁴).

Necessity

By majority, the panel found such discrimination is a necessary and reasonable means of achieving the IAAF's aim of preserving the integrity of sporting competition. In reaching this conclusion, the panel acknowledged that the binary division exists to protect athletes from competing against those who have physical traits that create a performance advantage. Whilst recognising the interplay between sexual identity, legal sex and biological sex, the panel

decided that sexual difference for the sake of the legitimate aim must be determined on the basis of biological factors alone.

Proportionality

By majority, the panel found that the DSD Regulations were proportionate to achieving the legitimate aim. The panel appeared to be partially persuaded by the fact that lowering testosterone levels in 46 XY DSD athletes, and thereby achieving the legitimate aim, can be achieved with a simple pill (i.e. no surgery or invasive procedure is required).

End of the story for the DSD Regulations?

The panel expressed a reluctance to be cast as regulator or policy-maker. It was also at pains to highlight the difficulty it had in reaching its decision, the limited scope and application of the decision. It is also worth mentioning that CAS praised Semenya for her grace and fortitude throughout the proceedings.

Whilst the IAAF has pressed on and implemented the DSD Regulations, the sporting world should be mindful of CAS' serious reservations about:

- ❖ the application of the DSD Regulations to 1500m and one mile events;
- ❖ the potential difficulty for an athlete in complying with the DSD Regulations, through no fault of their own;
- ❖ the actual future effects of the implementation of the DSD Regulations; and
- ❖ the implications of CAS' own decision, recommending continuous monitoring of the effects of enforcement of the DSD Regulations.

It seems that CAS has reserved the right to change its mind on the question of proportionality, pending future developments so this may not be the last we hear about this case.

Finally, it remains to be seen whether the CAS award will be appealed (this must be done by 30 May 2019 to the Swiss Federal Tribunal).

¹ The DSD Regulations apply to 400m, 400m hurdles, 800m, 1500m, one mile, and all other events between 400m and one mile whether run alone or as part of a relay event or combined event, in international competitions.

² A condition in which an individual with one X chromosome and one Y chromosome in each cell, the pattern normally found in males, have genitalia that is not clearly male or female.

³ Above 5 nmol/L

⁴ Meaning that the increased level of testosterone has a biological effect.

For information, CAS' 165-page award is currently confidential but its executive summary can be accessed [here](#).

Lessons from Semenya

In this case the panel was mindful of its judicial role and noted that it was not necessary or appropriate for it to "step into the shoes of the IAAF". In doing so, they left it very much open to other governing bodies and administrators to conceive of their own regulations concerning the commonly accepted binary "female" / "male" division in many sports. It also raises the question of how to classify competitions and participants more generally.

Following this case, we recommend international federations, governing bodies and regulators consider the following:

- ❖ Is it legitimate to separate athletes into groups based on physical advantage, in order to preserve sporting competition for those falling into each group?
 - ❖ Should division apply to all events or certain restricted events?
 - ❖ How should groups be defined: by legal status, sexual identity, biological sex or characteristics, or other determining factors that are not related to sex at all?
 - ❖ Should classification at elite level extend to the lower levels of the sport? Do the biological characteristics that create competitive advantage among adult professionals still have that effect at amateur, recreational or junior level?
 - ❖ How should the sport treat athletes that do not fit into the defined categories or who wish to compete in a different category than the one into which they naturally fall?
 - ❖ What is the risk of legal challenge? International federations and governing bodies are not usually public authorities to which human rights instruments apply but athletes may nevertheless seek to argue that policies are discriminatory/contrary to human rights based on the broader regulatory framework or underlying governing law.⁵
- ❖ Does the sport have access to or can it obtain requisite scientific evidence to demonstrate that decisions are necessary, proportionate and made legitimately?
 - ❖ Where the burden is on an individual to comply with a potentially discriminatory rule, what alternative methods of achieving compliance have been explored and tested? Can compliance be achieved with the minimum of medical intervention?
 - ❖ As always, public perception and reputational issues.

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⁵ Ms Semenya's lawyers apparently argued that the alleged unfair discrimination was in violation of the IAAF constitution, the Olympic

Charter and the laws of Monaco, as well as "universally recognised fundamental human rights."