Intervention: Semenya v Switzerland (European Court of Human Rights), No. 10934/21, July 11, 2023

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Introduction

The increased visibility in sport of trans women and those with sex variations[i], has challenged the binary, generalized idea of typical male and female upon which segregation in sport is based. It has left Sports Governing Bodies (SGBs) with a problem: how to deal with values of fair competition (and, for some, safety) on the one hand and inclusion on the other. The International Association of Athletics Federations (IAAF - now World Athletics)[ii] has been one of the most pro-active SGBs on this issue. Responding to concerns over athletes with sex variations having unfair athletic advantages, it introduced the Hyperandrogenism Regulations in 2011, and, following their rejection by the Court of Arbitration for Sport (CAS) in 2015,[iii] the Eligibility Regulations for the Female Classification (Athletes with Differences in Sex Development) 2019 (the Regulations). It has also introduced regulations restricting (and, since March 2023, preventing) trans women from participating in the female category.[iv]

In *Semenya v Switzerland* the European Court of Human Rights (ECtHR) considered, for the first time, whether sporting regulations restricting eligibility due to sex variations might violate rights established by the European Convention of Human Rights (the Convention). Also, a first in a sporting context, it was asked to consider violations of substantive rights (rather than procedural ones). As acknowledged by the ECtHR itself, the case also raised several issues of wider importance (para. 77,[v] Judge Serghides, para. 52) about the reach of the Convention into a private, horizontal relationship between parties who had no direct connection to Switzerland, the role of the Swiss Federal Supreme Court (SFSC) (and Switzerland) as a protector of human rights, the appropriateness of the sporting justice system as currently realised and the governmental autonomy of SGBs. As such it is something of a landmark case likely to cause ripples in the sporting world.

Background

In *Chand*, the CAS determined that, although blanket restrictions on female athletes with raised levels of endogenous testosterone might *seek* to achieve a legitimate aim of fair competition, it did so in a

disproportionate way. There was, in the panels' view, insufficient evidence that all legal females with endogenous testosterone levels above the designated threshold had an advantage comparable to typical men. Consequently, World Athletics took a more nuanced approach with the Regulations, focussing on fewer individuals (those with specific sex variations and higher levels of 'useable' testosterone) and fewer events where the evidence of performance advantage was greatest.[vi] Athletes caught by the Regulations were left with a choice between medical treatment to reduce testosterone levels to a prescribed level or choosing an event not covered by the Regulations.[vii]

Before the Regulations were introduced, Caster Semenya challenged their validity at the CAS on grounds of discrimination as to sex and birth traits, arguing that the DSD Regulations treated athletes with sex variations differently from other females (and males) and, in so doing, interfered with rights to privacy, dignity, freedom of expression and economic activity.[viii] It is important to recognise, as is common in the sporting context, Miss Semenya was subject to an exclusive arbitration clause, meaning there was no public law forum for her complaints; the CAS was her only option.[ix] Despite recognition that the Regulations were (like the Hyperandrogenism Regulations) *prima facie* discriminatory, the CAS upheld their validity as a justifiable means of achieving 'fair and meaningful competition within the female category' (World Athletics, 2019), albeit with some reservations concerning the practical application of the Regulations and the paucity of evidence relating to some of the events (*Semenya v IAAF*, CAS, 2019). The Regulations came into force in May 2019.

SFSC Appeal

Given the binding nature of the CAS decision, Miss Semenya's only avenue of appeal was to the SFSC on the ground that the CAS decision offended the 'public policy' of Switzerland (Art. 190 (2), Federal Act on Private International Law 1987).[x]

The difficulty for Miss Semenya's appeal, (based on human rights grievances), was that the SFSC's case law consistently recognises that the 'public policy' ground is extremely difficult to make out. To be successful, an arbitral decision must 'disregard the essential and widely recognised values which, according to the prevailing conceptions in Switzerland, should form the basis of any legal order' (Case 4A_248 / 2019 & Case 4A_398 / 2019, SFSC, para 9.1)[xi]. Given a lack of rationality in decision making is insufficient (SFSC, para. 9.1), and the SFSC expressed doubts that discrimination between purely private individuals was something (according to the prevailing view in Switzerland) widely recognised as essential to any legal order (SFSC, para 9.4), it is not surprising the result was a superficial consideration of the merits of Miss Semenya's grievances. In essence, the judgment rubber-stamped the decision of the CAS panel as being sufficiently thorough and justified but without any meaningful consideration of the severity of potential human rights violations, without questioning the aims of the

Regulations, the mechanism for achieving those aims or even the relevant Convention provisions or case law interpreting the scope of Convention rights.

The author has argued previously that the system of exclusive arbitration and the limited scope for a review by the SFSC leaves a lacuna in human rights protection for elite athletes,[xii] so it was equally unsurprising that Miss Semenya applied to the ECtHR alleging that Switzerland, as the state responsible for ensuring protection of human rights within its courts, had failed to do so.

Grounds of Appeal to the ECtHR

Miss Semenya lodged her application on 19th February 2021. In the context of her right to private life, she argued a violation of her right not to be discriminated against on the grounds of sex and birth traits/sexual characteristics (Art. 14, in conjunction with Art 8)[xiii], a violation of her right to private life (regardless of discrimination) (Art.8), a violation of her right not to be subjected to degrading treatment (Art. 3), her right to an effective remedy (Art. 13) and her right to a fair trial (Art. 6).

The Decision of the ECtHR

Before turning to the key issues in the judgment,[xiv] it is important to recognise that although the overall decision went in Miss Semenya's favour, it was by majority (4 to 3), including one partially concurring/partially dissenting judgment. As a result, there is a clear possibility of a further application to the Grand Chamber for a re-examination.

Initial question- jurisdiction

One of the Swiss government's (the Government) main arguments was that the ECtHR did not have jurisdiction within the meaning of Art. 1, a perspective supported by the dissenting judges (para. 13). Art. 1 requires signatory states to 'secure to *everyone within their jurisdiction* the rights and freedoms defined in…the Convention".[xv] The Government alleged that a combination of the SFSC's limited power of review over CAS decisions (para. 84) and the lack of direct territorial link with Switzerland (World Athletics being a non-Swiss private organisation domiciled in Monaco and Miss Semenya being a non-Swiss national (para. 85)), meant it had no responsibility for the Regulations that affected Miss Semenya.

It pointed out that the ECtHR had previously only accepted jurisdiction in relation to international arbitration where the complaint concerned rights to a fair trial, a context in which there was a more obvious link to the SFSC's limited role as supervisor of a due process, and not where substantive rights where in issue (para. 89). As such, this would be extending the reach of the ECtHR into private arbitration. It also argued that such an extension would require the Government to establish a

mechanism to review CAS awards in their entirety, something that would question the basis of the current sports justice system (para. 86).

Whilst the majority recognised the SFSC's limited power of review, they found it difficult to accept that the concept of 'public policy' should not include meaningful consideration of rights to non-discrimination, respect for human dignity and the right to free choice of profession, especially given previous SFSC case law and its own judgment in the *Semenya* case, which clearly engaged with these values (para. 108), if only at a superficial level.

Regarding the territorial link, the majority drew on *Markovic and others v Italy* ([GC], no 1398/03), which recognised a jurisdictional link exists 'from the moment a person brings an action before the civil courts' of a signatory state. Whilst the CAS is not a civil court, the ECtHR has previously confirmed the principle extends to arbitral panels, where, by accepting jurisdiction to hear appeals from the CAS, the SFSC provides *res judicata* effect to those awards (*Mutu and Pechstein v. Switzerland,* nos. 40575/10 and 67474/10, 2018). Even though those awards concerned Article 6 rights, once the basic jurisdictional link is made, the majority could not see any rational reason for making a distinction (para. 107).

Underpinning its reasoning, the majority were concerned that if jurisdiction was refused, the reality of forced arbitration would result in 'an entire category of persons' being ostracised from the protection of the Convention, something irreconcilable with its fundamental nature (para. 111). Whilst the majority referred to the ostracised category as 'professional sportswomen,' in fact it would seem to include any elite athlete subjected to a forced arbitration clause.

Article 14 in conjunction with Article 8

The right of non-discrimination is not a 'stand-alone' right (para. 119) since it requires difference in treatment as regards the enjoyment of other rights and freedoms guaranteed by the Convention. It is also a qualified right as difference in treatment can be justified if there are proportionate means used to achieve a legitimate aim.

Miss Semenya's primary argument was, as compared to other female athletes (and as compared to men), she was treated differently as regards rights to a private life (and rights to dignity) due to variations of sex and biological characteristics (para. 129). Furthermore, she argued such treatment was not objectively justifiable for a two key reasons. First, the Regulations result in 'a flagrant' (para. 130) violation of human dignity (since athletes are forced to undergo medical examinations and undertake ongoing treatment against their will) and confidentiality (given testing and treatment will play out in public there is no realistic way of keeping the identity of athletes confidential)). Whilst the

possibility of *some* impact on an athlete's human rights has been recognised by World Athletics, the CAS and the SFSC, the severity of violations has not been fully considered. Second, in pursuing the aim of fair competition, justification for the Regulations is grounded on assumptions about the size and significance of the performance advantage that athletes with relevant sex variations have (para. 133), as well as the effect of medical treatments that supress testosterone levels (para. 137). However, scientific evidence as to the magnitude of advantage is not universally accepted[xvi] and evidence concerning the effects of suppression on elite athletes is extremely limited. The fact that the SFSC, as the last mechanism of appeal, had failed to conduct a sufficiently intensive review that properly took these issues into consideration meant that Switzerland had failed in its obligations to protect the human rights of those within its jurisdiction.

By contrast, the Swiss Government stressed it (and, presumably, the SFSC, the CAS and World Athletics) enjoyed a margin of appreciation in determining whether any differences in treatment were justifiable. It pointed out that ensuring fair competition in female athletics *was* recognised as a legitimate objective, that segregation into male/female categories is also legitimate (para. 141), that the CAS had considered and accepted evidence that athletes with a relevant DSD enjoyed a significant competitive advantage (para. 142) and that the SFSC had 'carefully' weighed up the competing interests of fair competition in the female category against the harm caused to affected athletes (para. 144). Consequently, the SFSC's finding that the Regulations were a justifiable instance of different treatment was within a states' margin of appreciation.

In finding that the Miss Semenya *had* been discriminated against, the majority recognised her complaint of different treatment clearly fell 'within the ambit' of Article 8 (which was all that is necessary) and noted that the CAS and the SFSC had both implicitly accepted the relevant comparator for assessing difference in treatment was other female athletes who did not have variations of sexual characteristics (para. 161). Accordingly, as Miss Semenya *is* treated differently under the Regulations (in a way that touches on several aspects her private life as recognised by previous ECtHR case law), the Government had to show that the SFSC's approach to assessing the CAS decision and the justification for the discrimination was, in itself, objectively justified (para. 156). In the context of rights violations between private individuals, this required 'applying a normative framework that takes into account the various interests to be protected in a given context' (para. 164). In other words, courts must carry out a genuine balancing of competing interests and provide transparent and rational reasoning that considers ECtHR case law.

In terms of the relevant context, the majority picked out several factors. First, although limitations on Convention rights are acceptable when freely consented to, forced arbitration is not the result of free

consent (para. 167) and this reality must be considered when assessing the necessary safeguards. Furthermore, the context differed from typical commercial arbitration, where parties are usually in a more equal, horizontal relationship and consent to arbitration is more meaningful. In a sporting context, the hierarchical structure means the power dynamic is different and the relationship better resembles a vertical one (para. 177). Second, where difference in treatment is based on gender, sex or an individual's sexual characteristics, any justification must be based on 'particularly strong and convincing reasons,' meaning a state's margin of appreciation is restricted (para. 169), more so where an individual's self-understood identity is questioned. Third, the majority expressed concern over the certainty of scientific evidence, both in terms of the concrete performance advantage enjoyed by athletes with a relevant DSD and, especially, the effect of medical treatment (para. 181-183). Fourth, and, perhaps, most importantly, athletes affected by the Regulations do not have a real choice about medical treatment if they want to continue competing. Either an athlete protects their personal and physical integrity *or* their right to exercise a profession. Either choice involves a 'renunciation of rights guaranteed by the Convention' (para. 187), a situation that would seem to undermine the underpinning aims of the Convention. Finally, the majority made clear that 'national courts are required to guarantee *real and effective* protection against discrimination committed by [private] individuals'[xvii] (para. 194-195). Article 14 requires a court to weigh competing interests (here, a typical female's rights to fair competition against rights to dignity, reputation, physical integrity and private life of those athletes directly affected by the Regulations).[xviii] The superficial review of human rights concerns simply failed to adequately consider (or give appropriate weight to) these contextual issues, making the protection largely illusory. Accordingly, Switzerland had failed to provide appropriate 'institutional and procedural safeguards' and, therefore, failed in its positive obligations to prevent discrimination within its jurisdiction (para. 166).

Article 13 – access to remedy

Although states have a margin of appreciation as to the mechanism, Article 13 requires domestic laws that: (i) provide a forum for claims of Convention rights violations; (ii) ensures the substance of claims are considered; and (iii) provides redress. As the majority found that Switzerland failed to provide the necessary level of safeguards to ensure Miss Semenya's discrimination grievances were properly considered, it was unsurprising they also found that Switzerland failed to provide an effective remedy. Ultimately, the limited grounds of appeal to the SFSC and the superficial review that resulted meant the remedy provided by the sporting justice system was viewed as ineffective *in practice,* even if legally available. To be practically effective, the system needs to ensure a sufficient intensity of review so that decisions of arbitration panels (and SGBs) are more than minimally rational (para. 233). As to the

argument that Switzerland's special position as a seat for international arbitration is a legitimate aim justifying a limited right of access to a court (and a reduced level of scrutiny), the majority seemed to accept that this was not a proportionate means in the context of forced arbitration, at least where the claim concerned potential violations of Convention rights (para. 227).

Article 3 – degrading treatment

The ECtHR has described degrading treatment as actions 'likely to cause feelings of fear, anxiety and inferiority capable of humiliating, degrading and possibly breaking the moral resistance of the person subjected to it, or leading [them] to act against [their] will' (*Keenan v United Kingdom*, no. 27229/95, 68). Although the rights enshrined in Article 3 are absolute (so violations cannot be justified), it has been recognised that a minimum 'threshold' of severity is required for a violation. What conduct satisfies the threshold will depend on the facts of the case (para. 213).

Miss Semenya claimed she was a victim of degrading treatment due to the Regulations requiring her to submit to intimate physical examinations that questioned her self-understood identity, and, thereafter, forced her to take medication (or undergo surgery) to continue her chosen profession. Furthermore, she highlighted that the nature of elite sport meant such treatment took place under a spotlight of media attention and amidst speculation and stigmatisation from other athletes, which only amplified the severity.

In contrast, the Government (and World Athletics) argued that the treatment was not sufficiently severe to engage Article 3.

Despite finding that unnecessary, forced medical examinations and treatments 'constituted the very essence of an allegation of violation of dignity', the majority determined there was no violation on the facts, reasoning that Miss Semenya had not actually suffered the examinations or the treatment prescribed by the Regulations because she chose to give up the events in which she excelled (and any intimate examinations had been carried out before the Regulations were introduced) (para. 215). Essentially, the majority thought that the generalised threat of unnecessary medical examinations and treatment was not enough to cross the threshold, even though they had also recognised the only way to avoid treatment was to give up rights protected by Article 8.

As pointed out by Judge Serghides in a partially concurring judgment, once it is recognised that there is a forced choice between rights guaranteed by the Convention, it seems difficult to conclude that such ongoing 'ill-treatment' is not sufficiently severe. After all, it is the forced choice that is the root of the problem because it treats athletes affected as less worthy of human rights protection than

anyone else. Such a conclusion is not helped by some of the ECtHR case law, which has recognised one-off acts (such as a slap in the face) as being capable of passing the threshold of severity (para 43, *Bouyid v Belgium* [GC] no. 23380/09, 2015)

Article 6 and Article 8

As the majority had found a violation under Article 14/Article 8 and Article 13, the court did not find it necessary to make determinations on Article 6 or Article 8 separately.

Analysis

Miss Semenya's athletic career has been severely affected by the introduction of the Regulations and, from a career perspective, it remains to be seen whether this legal victory (5 years after bringing her case to the CAS) turns out to be a little hollow. However, her determination to take the case to its conclusion may well have profound implications for those that follow her, which is where the focus of this analysis will lie.

Implications for the Sporting Justice System

The sporting justice system as it currently exists is built on a foundation of exclusive arbitration clauses. It is suggested that the general acceptance of forced arbitration is largely due to a perception that athletes have a choice about whether to participate. The idea that sport is a voluntary activity and that participants can walk away if they do not like the rules, seems to be an underpinning justification for regulations restrictive of rights and freedoms. However, in the context of elite athletes, such a choice is largely illusory, since by the time athletes have invested sufficient time and effort to get to the pinnacle, the time to 'choose' has long gone.

Given the majority recognised this underpinning problem and, also, that Switzerland chooses to promote itself as a seat of international arbitration (even suggesting that the SFSC oversight provides counterweight in this context (para. 111)), it is not difficult to see why the majority felt Switzerland has an obligation to ensure athletes are protected from human rights violations. That this will mean the SFSC is forced to take on a role as protector of human rights in international sport can be seen as the price for Switzerland marketing itself as the place for international sports arbitration.

The Government has three months from the date of the decision to request a re-examination by the Grand Chamber (Article 43 (1)), but assuming the decision is upheld or goes unchallenged, there would appear to be some significant consequences for the SFSC and the CAS. First, as the government suggested, Switzerland will have to create a mechanism that ensures a much more thorough review of CAS decisions (para. 86), at least on human rights issues. Whether that might be achieved by the SFSC

simply adopting a wider interpretation of the concept of 'public policy', which allows for a genuine balancing of competing interests and considers ECtHR case law, or whether more extensive reform is required (such as specialised judges or a new sport specific division of the court), remains to be seen. Second, if its decisions on human rights issues are subjected to more intensive review by the SFSC, it seems inevitable that the CAS will *also* have to recognise its role as protector of human rights. Again, whether this can be implemented simply through better selection of panel members, or whether a more fundamental change is needed is likely to be the source of future debate.[xix]

Whether, as the Government suggested, the decision could lead to SGBs taking arbitration to non-signatory countries is an interesting question (para. 87). However, such a move would be ethically dubious and politically difficult, since it would fly in the face of stated commitments of most SGBs to good governance, the protection of human rights and safeguarding of athletes.

It seems that the concerns of the dissenting judges about the scope of the ECtHR's jurisdiction increasing beyond rights to a fair trial in arbitration cases will be a key aspect of any appeal that the Government makes (if it does). However, it is difficult to think that the Grand Chamber would be prepared to ignore the underpinning problem of forced choice when it results in a whole category of people having reduced protection; it seems contradictory to the fundamental aims of the Convention. As such, it is not stretching it too far to suggest that the impact of the decision on the autonomy of SGBs is in the same bracket as the decision of the European Court of Justice in the infamous *Bosman* ruling.

Implications for World Athletics and other SGBs on issues of eligibility

One key aspect of the majority's reasoning in relation to Article 14/Article 8 was that the SFSC (and the CAS) did not apply an appropriate normative framework, resulting in decisions that lacked sufficient rationality and transparency to properly conclude discrimination was justified. Assuming such a framework is implemented, an increased requirement for rationality and transparency (and a need to consider the severity of human rights violations more thoroughly) must, necessarily, transmit to SGBs. Given the majority's observations about the reduction in leeway that states have in respect of discrimination relating to sex, sexual characteristics and questions of personal identity, World Athletics' argument that they have a considerable margin of appreciation seems untenable. In *Semenya v IAAF,* the CAS accepted all World Athletics needed to do was demonstrate 'an honest and good faith view that had a reasonable basis' (*Semenya v IAAF* para. 303). This is no longer true; whether described as

a margin of appreciation or a level of rationality, the freedom of SGBs to justify eligibility regulations relating to sex variations seems to have been significantly reduced.

World Athletics has responded to the decision by reaffirming its belief that the Regulations are necessary and proportionate (World Athletics, 2023). However, the majority's criticism of the forced choice faced by athletes (between their profession or medical treatment) suggests that it will be difficult for the Regulations to survive a future challenge, at least as currently drafted. As the author has argued elsewhere,[xx] a more rational justification of the decision might require more precise evidence of disproportionate performance advantage, and certainly more thought on alternative mechanisms of compensation and, more fundamentally, a coherent articulation of what fair competition looks like. This approach would also seem to be one that resonates with the International Olympic Committee's Framework on Fairness, Inclusion and Non-discrimination ((International Olympic Committee, 2021)

One sliver of light for World Athletics was that Miss Semenya's complaint regarding Article 3 was found to be 'manifestly ill-founded'. As an absolute right, had there been a violation of Article 3, it would have amounted to an outright rejection of forced medical treatment as a mechanism of compensating for athletic advantage, whether in the interests of fair competition or safety. However, by suggesting that the issue of forced choice was better considered in the context of a violation of Article 14/Article 8, the majority took a more diplomatic path, leaving open the possibility that forced medical treatment could be rationally and objectively justified as a proportionate way of meeting a legitimate (sporting) aim. It will be interesting to discover whether the Grand Chamber agrees with this approach if asked.

In the context of trans women athletes, the majority accepted that different considerations will be relevant, indeed this was something stressed by Miss Semenya. However, it seems inevitable, in general terms, that an increased requirement for rationality and proportionality must also apply to regulations that affect eligibility of trans women. For example, whether such a requirement might require SGBs to think about other ways of accommodating trans women athletes (rather than outright bans or creating a separate category), might be an issue for a future legal case.

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[i] This term will be used in preference to differences in sex development or intersex.
[ii] The term World Athletics will be used throughout the rest of this article.
[iii] *Chand v IAAF*, CAS 2014/A/3759
[iv] World Athletics Eligibility Regulations for Transgender Athletes 2023
https://worldathletics.org/download/download?filename=c50f2178-3759-4d1c-8fbc-

370f6aef4370.pdf&urlslug=C3.5%20%E2%80%93%20Eligibility%20Regulations%20Transgender%20Athletes%20%E2%80%93%20effective%2031%20March%202023

[v] References to paragraph numbers of the judgment are to the majority decision unless otherwise stated.

[vi] Although it can be argued that there is some inconsistency in World Athletics evidence on this since some events that seemed to show higher levels of advantage for female athletes with higher testosterone (such as pole vault) were not covered (Bermon and Garnier, 2017) pp. 3,5)

[vii] The Regulations were amended in March 2023, so they now apply to all athletic events. The level of endogenous testosterone has also been reduced from 5 nmol/litre to 2.5 nmol/litre (Eligibility Regulations for The Female Category (Athletes with Differences in Sex Development), March 2023). https://www.worldathletics.org/download/download?filename=2ffb8b1a-59e3-4cea-bb0c-5af8b690d089.pdf&urlslug=C3.6A%20%E2%80%93%20Eligibility%20Regulations%20for%20the%20Female%20Classification%20%E2%80%93%20effective%2031%20March%202023

[viii] *Mokgadi Caster Semenya v IAAF* CAS 2018/O/5794

[ix] For a more detailed explanation of the problems inherent in the current sporting justice system when it comes to grievances regarding human rights, see Cooper, 2023

[x] English translation accessible at https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en

[xi] SFSC Case judgment accessible at <https://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>

[xii] A point argued by the author previously (Cooper, 2023)

[xiii] References to Articles are to the Convention unless indicated otherwise.

[xiv] It should be noted that the original judgment is in French, and the author has reviewed an English translation.

[xv] Italics added for emphasis by the author.

[xvi] For a more detailed consideration of the scientific evidence presented at the CAS, see Cooper, 2023.

[xvii] Words in square bracket added by the author.

[xviii] Whether an athlete's right to fair competition as against other athletes who have performance advantages due to genetic or biological pre-dispositions is even capable of coming within the ambit of Convention rights is another question not yet fully considered. See Cooper, 2023.

[xix] See for example, criticisms of Duval and Van Rompuy, 2015 and Lindholm, 2021.

[xx] Cooper, 2023

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