EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
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Violation of international athlete's right to a fair hearing on account of Federal Supreme Court's limited review of an arbitral award relating to a set of World Athletics regulations

The case of Semenya v. Switzerland (application no. 10934/21) concerned an international-level South African athlete who complained about a set of regulations issued by World Athletics ("the DSD Regulations"[1]) requiring her to decrease her natural testosterone level in order to be allowed to take part in international competitions in the female category, and about the rejection of her legal actions challenging those regulations before the Court of Arbitration for Sport (CAS) – which has its seat in Switzerland – and then the Swiss Federal Supreme Court.

In today's **Grand Chamber** judgment[2] in this case the European Court of Human Rights declared, by 13 to 4, **inadmissible the applicant's complaints under Articles 8 (right to respect for private life), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the Convention**. It found that Ms Semenya did not fall within Switzerland's jurisdiction in respect of those complaints.

By contrast, the Court:

– declared, unanimously, **the application admissible in respect of the complaint under Article 6 § 1 (right to a fair hearing)** of the European Convention on Human Rights, and

– held, by 15 votes to 2, that there had been **a violation of Article 6 § 1 (right to a fair hearing)** of the Convention.

The Court considered, first, that the appeal lodged by the applicant with the Federal Supreme Court to challenge the CAS award had created a jurisdictional link with Switzerland, entailing an obligation for that State to ensure respect for the rights protected by Article 6 of the Convention in the proceedings which took place before the Federal Supreme Court, which was responsible, under domestic law, for reviewing the compatibility of arbitral awards with substantive public policy.

After pointing out the structural imbalance which characterised the relationship between sportspersons and the sport governing bodies, the Court then held that respect for the applicant's right to a fair hearing had required a "particularly rigorous examination of ... her case" for the following three reasons: (1) the CAS's mandatory and exclusive jurisdiction had been imposed on her, not by law but by a sport governing body; (2) the dispute concerned one or more "civil" rights; and (3) those rights corresponded, in domestic law, to fundamental rights.

In the Court's view, the specific characteristics of the sports arbitration to which the applicant had been subject – entailing the CAS's mandatory and exclusive jurisdiction – had required a rigorous judicial review that was commensurate with the seriousness of the personal rights at issue, by the only domestic court with jurisdiction to carry out such a task.

The Court considered, however, that the Federal Supreme Court's review had fallen short of that requirement, on account, in particular, of its restrictive interpretation of the notion of public policy, within the meaning of the Federal Act on Private International Law. Accordingly, the Court found that Ms Semenya had not benefited from the safeguards provided for in Article 6 § 1 of the Convention,

[1] Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development).

[2] Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

given the Federal Supreme Court's failure to fulfil the requirement to carry out a particularly rigorous examination.

This press release is accompanied by a Q&A sheet (link).

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 South Africa.

Ms Semenya is an international-level athlete, specialising in middle-distance races. She complained that she was obliged to decrease her natural testosterone level in order to be allowed to take part in the female category of international competitions, as a result of the Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) issued in 2018 by the International Association of Athletics Federations (IAAF – now called World Athletics), a Monegasque private-law association, and that her legal actions challenging those regulations before the CAS and then the Federal Supreme Court had been rejected.

In 2018 Ms Semenya lodged a request for arbitration with the CAS, which has its seat in Lausanne, in which she challenged the DSD Regulations; her action was rejected.

In 2019 she lodged a civil-law appeal with the Federal Supreme Court, seeking to have the CAS award set aside under section 190(2)(e) of the Federal Act on Private International Law. With regard to international arbitration, that provision allowed for the possibility of challenging the decisions ("awards") made by arbitral tribunals which had their seat in Switzerland if those decisions were "incompatible with public policy".

In 2020 the Federal Supreme Court dismissed the applicant's appeal, holding that the award in question was not incompatible with substantive public policy.

Complaints

Relying on Article 6 (right to a fair hearing) and Article 13 of the Convention, Ms Semenya complained of a violation of her right of access to a court and of her right to an effective remedy, arguing that the review carried out by the Federal Supreme Court on the basis of section 190(2)(e) of the Federal Act on Private International Law had been excessively limited.

Relying on Article 8 (right to respect for private life), she argued that the DSD Regulations affected her bodily and psychological integrity and identity, her right to self-determination and her right to exercise her professional activity. Lastly, relying on Article 14 (prohibition of discrimination), taken together with Article 8, she also submitted that the DSD Regulations led to discriminatory treatment.

Procedure and composition of the Court

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

In its judgment of 11 July 2023, a Chamber of the Court held, by a majority, that there had been a violation of Article 14 of the Convention taken together with Article 8, and a violation of Article 13 in relation to Article 14 taken together with Article 8. The Chamber held, in particular, that the applicant had not been afforded sufficient institutional and procedural safeguards in Switzerland.

On 9 October 2023 the Government requested that the case be referred to the Grand Chamber under Article 43, and on 6 November 2023 a panel of the Grand Chamber accepted that request. A hearing took place on 15 May 2024.

Numerous third parties (including the United Kingdom Government, the United Nations High Commissioner for Human Rights, and World Athletics) were given leave to intervene in the written procedure.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Marko **Bošnjak** (Slovenia), *President*,
Síofra **O'Leary** (Ireland),
Arnfinn **Bårdsen** (Norway),
Gabriele **Kucsko-Stadlmayer** (Austria),
Mattias **Guyomar** (France),
Faris **Vehabović** (Bosnia and Herzegovina),
Mārtiņš **Mits** (Latvia),
Pauliine **Koskelo** (Finland),
Tim **Eicke** (the United Kingdom),
Jolien **Schukking** (the Netherlands),
Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),
Andreas **Zünd** (Switzerland),
Diana **Sârcu** (the Republic of Moldova),
Kateřina **Šimáčková** (the Czech Republic),
Davor **Derenčinović** (Croatia),
Sebastian **Răduleţu** (Romania),

and also Abel **Campos**, *Deputy Registrar.*

Decision of the Court

Switzerland's jurisdiction

Article 1 of the Convention provides that the State Parties undertake to "secure to everyone within their jurisdiction" the rights and freedoms defined in the Convention.

A State's jurisdiction under Article 1 is primarily territorial, that is, the facts complained of by an applicant must in principle have occurred on the territory of the respondent State. In the present case, the Court noted that there was no territorial link between Switzerland on the one hand, and the applicant, the adoption of the DSD Regulations and their effects on her personal situation on the other, except for the proceedings brought before the CAS and the Federal Supreme Court. It concluded that the applicant did not fall within Switzerland's territorial jurisdiction.

Exceptional circumstances might, however, lead the Court to conclude that a State had exercised its jurisdiction outside its national territory.

The Court noted the absence of such circumstances with respect to the complaints under Articles 8, 13 and 14 of the Convention. The applicant did not, therefore, fall under the jurisdiction of Switzerland in respect of those complaints.

On the other hand, it considered that, by way of exception to the above-mentioned principle, the applicant fell within Switzerland's jurisdiction as concerned her complaint under Article 6 § 1: Ms Semenya's appeal to the Federal Supreme Court, following on from the CAS award, had created a jurisdictional link with Switzerland, entailing an obligation for that State, under Article 1 of the Convention, to ensure respect for the rights protected by Article 6 of the Convention in the proceedings which were conducted before the Federal Supreme Court.

Article 6

The Court noted that, in matters of international disputes relating to sport, recourse to arbitration and referral to the CAS were generally imposed on sportspersons by the governing body which regulated their particular discipline.

The fact that arbitration was imposed by a private entity rather than by law was not sufficient to give rise to a violation of Article 6 § 1 of the Convention.

However, it had to be acknowledged that sports arbitration occurred in the context of the structural imbalance which characterised the relationship between sportspersons and the bodies which governed their respective sports. Sport governing bodies were in a position to dictate terms in their relationship with sportspersons, in that they regulated international sports competitions, were able to impose the CAS's mandatory and exclusive jurisdiction for the examination of disputes relating to that system of regulation, and exercised structural control over the international sports arbitration system.

Thus, even more than where arbitration was required by law, in a situation where the CAS's exclusive jurisdiction in a dispute between a sports organisation and a sportsperson had been imposed on that sportsperson, it was essential that he or she could benefit from the safeguards provided for in Article 6 § 1 of the Convention. This requirement was particularly important where the "civil" right or rights that were the subject of the dispute amounted, in domestic law, to fundamental rights.

Consequently, where the CAS's mandatory and exclusive jurisdiction was imposed on a sportsperson by a sport governing body, with the result that the Swiss Federal Supreme Court had jurisdiction to hear a civil-law appeal against the CAS award; where the dispute between them concerned one or more "civil" rights, within the meaning of Article 6 § 1, of that sportsperson; and where that or those "civil" rights corresponded, in domestic law, to fundamental rights, respect for that individual's right to a fair hearing required a particularly rigorous examination of his or her case.

In the Court's view, the specific characteristics of the sports arbitration to which the applicant had been subject – entailing the CAS's mandatory and exclusive jurisdiction – had required a rigorous judicial review that was commensurate with the seriousness of the personal rights at issue, by the only domestic court with jurisdiction to carry out such a task.

In the present case, however, the review of Ms Semenya's case by the Federal Supreme Court had not satisfied the requirement of particular rigour.

The Court noted, specifically, that the potential difficulty faced by the athletes concerned in maintaining their level of testosterone below the maximum level permitted by the contested regulations was not only at the heart of the applicant's detailed argument but also decisive for the outcome of the dispute brought by her. However, although the CAS had left this issue open, the Federal Supreme Court's review of the CAS award – examining whether it was "incompatible with public policy" within the meaning of the Federal Act on Private International Law – had been limited to assessing whether, on the basis of the findings as established by the CAS, the award's conclusion was "unjustified". In so doing, the Federal Supreme Court had merely noted that the CAS had not definitively endorsed the DSD Regulations but had instead expressly reserved the right to re-examine their proportionality as applied in a (different) particular case.

It therefore appeared that although the CAS had expressed very serious concerns, thereby rendering ambiguous its reasoning in relation to proportionality, the Federal Supreme Court had conducted only a limited review of this aspect of the CAS's decision.

It was thus apparent that the review by the Federal Supreme Court of this fundamental and detailed aspect of the applicant's dispute, within that court's competence to review whether the CAS award was compatible with substantive public policy, had not been subjected to the particularly rigorous examination called for by the circumstances of the case.

When examining whether the DSD Regulations were reasonable and proportionate, the CAS had left open other questions – one relating to the allegedly arbitrary decision to include the 1,500 m and 1 mile events in the list of events concerned by the DSD Regulations, and the other to the fact that the DSD Regulations could result in the status of female athletes with a difference of sex development being made public – about which it had, nevertheless, expressed concerns; the Federal Supreme Court had not, however, sufficiently acted on the doubts expressed.

In still other respects, the review carried out by the Federal Supreme Court had not reached the required level of rigour. In that connection, the Court observed, in particular, that that court had rejected, without thorough examination, the applicant's argument comparing the situation in her case with that in the *Francelino da Silva Matuzalem v. Fédération Internationale de Football Association* case, in which it had considered a CAS award to be incompatible with public policy.

In consequence, the review of the applicant's case by the Federal Supreme Court, not least owing to its very restrictive interpretation of the notion of public policy, had not satisfied the requirement of particular rigour called for in the circumstances of the case.

In consequence, the Court concluded that the applicant had not benefited from the safeguards provided for in Article 6 § 1 of the Convention, and found a violation of that provision.

Just satisfaction (Article 41)

The Court noted that the applicant had not submitted a claim for damages. It held that Switzerland was to pay her 80,000 euros in respect of costs and expenses.

Separate opinions

Judge Šimáčková expressed a partly concurring opinion. Judges Bošnjak, Zünd, Šimáčková and Derenčinović expressed a joint partly dissenting opinion. Judges Eicke and Kucsko-Stadlmayer expressed a joint partly dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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