

Caster Semenya & ASA vs the IAAF - What it Means for Women and Sport

Thursday, June 20, 2019

On 1 May 2019, the Court of Arbitration for Sport (“CAS”) delivered its [ruling](#) in the requests for arbitration by Caster Semenya and Athletics South Africa (“ASA”) against the International Association of Athletics Federation (the “IAAF”). CAS dismissed the requests, upholding the validity of the new IAAF *Eligibility Regulations for Female Classification (Athletes with Differences of Sex Development)* (the “Regulations”), which require 46 XY chromosome female athletes with differences in sex development (“DSD”) to reduce their testosterone levels in order to compete internationally in the female classification in certain track events.

The Swiss Federal Tribunal, to which Semenya has now appealed, has since ordered the IAAF to suspend the implementation of the Regulations and has given the IAAF until 25 June 2019 to respond.



Article By
[Sports & Entertainment - Squire Patton Boggs](#)
[Squire Patton Boggs \(US\) LLP](#)
[Sports Shorts](#) [Entertainment, Art & Sports](#)
[Global](#)
[All Federal](#)
[All International](#)

Background

Caster Semenya burst onto the athletics scene in the 2009 World Championships in Berlin, where she won gold in the women’s 800 metres at the age of 18. Following her victory, Semenya faced heavy scrutiny from the IAAF and allegations that she was not biologically female and it was announced that she had been subjected to testing in order to confirm her sex. Whilst the results of the tests have never been published, it is understood that Semenya is 46 XY female with DSD, meaning that whilst she is a woman, she has XY chromosomes and DSD, resulting in elevated testosterone levels. She has since gone on to win gold medals at the 2012 and 2016 Summer Olympics and at the 2017 World Championships.

The Regulations

In March 2018, the IAAF Council approved the Regulations. These were to come into effect on 1 November 2018 and replace the previously enacted *Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women’s Competition*, which were challenged before CAS by Indian 100m sprinter Dutee Chand in 2015 and suspended as a result.

The Regulations require any 46 XY DSD female athlete with 5 nanomoles of testosterone per litre of blood (nmol/L) or above to:

- be recognised at law either as female or as intersex;
- reduce her blood testosterone level to below 5 nmol/L for a continuous period of at least six months; and
- thereafter must maintain her blood testosterone level below 5 nmol/L continuously (i.e. whether she is in competition or out),

if she wishes to compete in the female classification in track events between 400 metres to 1 mile at the international level or set world records.

The Regulations do not prohibit a relevant female from competing in non-international competitions or other events internationally. Affected female athletes are also permitted to compete internationally in the male

classification or “any applicable intersex or similar classification that may be offered” (see Regulation 2.6(b) & (c), IAAF Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)). There are currently no international or national competitions that offer classifications outside the traditional binary categories.

The introduction of these Regulations are premised on the notion that “[high levels of endogenous testosterone circulating in athletes with certain DSDs can significantly enhance their sporting performance.](#)” The IAAF believes that these Regulations accordingly ensure “[fair and meaningful competition](#)” and that “[genetic difference is not outcome-determinative](#)”.

CAS Ruling

The two-time Olympic champion and ASA challenged the Regulations, and brought requests for arbitration to CAS, on the basis that they:

- unfairly discriminate against athletes on the basis of sex and/or gender because they only apply (i) to female athletes; and (ii) to female athletes having certain physiological traits;
- lack a sound scientific basis;
- are unnecessary to ensure fair competition within the female classification; and
- are likely to cause grave, unjustified and irreparable harm to affected females.

CAS found that the Regulations are discriminatory, as they target a specific subset of female athletes based on their inherent biological characteristics without imposing any restriction on their male counterparts, however it rejected the challenge on the grounds that, whilst discriminatory, the Regulations are a necessary, reasonable and proportionate [means of achieving the IAAF’s legitimate objective of ensuring fair competition in female athletics in certain events and protecting the “protected class” of female athletes in those events.](#) The Regulations thus came into force on 8 May 2019.

The CAS Panel did, however, express some serious concerns as to the future practical application of these Regulations and recognised that they were constrained by the “accepted, necessary, binary division of athletics into male events and female events, when there is no such binary division of athletes”, noting that this binary division is not the subject of the challenge.

Swiss Federal Tribunal Order

Following the decision by CAS, Semenya appealed to the Swiss Federal Supreme Court on the grounds that “[the IAAF’s requirements for compulsory drug interventions violate essential and widely recognised public policy values, including the prohibition against discrimination, the right to physical integrity, the right to economic freedom and respect for human dignity.](#)”

The court has issued a super-provisional order, temporarily suspending the application of the Regulations until a further hearing can take place. Semenya can, therefore, participate in the restricted events internationally without medically altering her testosterone levels until a further decision is made.

Comment

The Regulations have caused a great deal of controversy and have come under scrutiny from professional bodies. The World Medical Association issued a statement advising physicians around the world not to implement the Regulations and calling for their withdrawal on the basis that it has “[strong reservations about \[their\] ethical validity](#)”. A number of global organisations that promote women’s sport have also written to the IAAF stating that the Regulations enforce gender inequality given they do not apply equally to male athletes.

The Regulations call into debate the point at which natural genetic advantages become “unfair”. Over the decades, many of the sporting elite have bettered their competition thanks to rare physiology. It is arguable that elite sports would not exist at all without these genetic advantages that distinguish world class athletes from the everyday individual – Ian Thorpe’s size 17 feet, Usain Bolt’s fast-twitch long stride, Pete Reed’s 12-litre lung capacity, to name but a few. Indeed, Eero Mäntyranta, the Finnish cross-country skier, was diagnosed with familial and congenital primary polycythemia, a rare blood disorder that results in an increase in the production of red blood cells and thus an increase in oxygen carrying capacity by up to 50%, a notable advantage when competing in endurance events. He went on to win seven medals in three Winter Olympics and his genetic abnormality was celebrated rather than deemed unfair or contrary to fair competition. In the context of sport performance, what makes the natural advantages experienced by 46 XY DSD female athletes remarkable?

Semenya's challenge and the Regulations themselves create questions in relation to the binary distinction in the world of sport and the Swiss Federal Tribunal is now being tasked with trying to reconcile the existence of the binary male/female athletics system with the biological reality that sex/gender is not binary and instead exists on a spectrum. The current system and the Regulations that accompany it run a real risk, as demonstrated by Semenya's case, of alienating those individuals who do not conform to the conventional definitions of what it means to be male and female and thus do not fall neatly into either category.

Written by Harriet Gibson

© Copyright 2019 Squire Patton Boggs (US) LLP

Source URL: <https://www.natlawreview.com/article/caster-semenya-asa-vs-iaaf-what-it-means-women-and-sport>