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THE TIMELINE OF THE SEMENYA SAGA
WAITING FOR THE GRAND CHAMBER

STEFANO BASTIANON*

On 15 May 2024, the European Court of Human Rights (ECtHR) held a Grand Chamber hearing in the well-known case of *Semenya v. Switzerland* (https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7945781-11072795%22}). The relevance of the case at hand and, in particular, the fact that this case "*involves a collision of scientific, ethical and legal conundrums*" (https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_-_redacted_-_Semenya_ASA_IAAF.pdf) suggests, while awaiting the ruling of the Grand Chamber, to briefly review the human and judicial story of Caster Semenya.

Caster Semenya: she is a South African athlete (middle distance runner). She first won gold at the World Championships in 2009 and went on to win at the 2016 Olympics and the 2017 World Championships, where she also won a bronze medal in the 1500 metres. she was also awarded gold medals for the 2011 World Championships and the 2012 Olympics. According to the Court of Arbitration of Sport (CAS), Caster Semenya "*is a woman. At birth, it was determined that she was female, so she was born a woman. She has been raised as a woman. She has lived as a woman. She has run as a woman. She is – and always has been – recognised in law as a woman and has always identified as a woman*" (https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_-_redacted_-_Semenya_ASA_IAAF.pdf).

March 2018: the IAAF (now WA) Council approved the DSD Regulations "*to address the eligibility of athletes with differences of sex development to compete in the female category of competition in certain track events*". According to the DSD Regulations, in

* Professore Ordinario di Diritto dell'Unione europea, Università degli Studi di Bergamo

order to participate in the female classification, a 46XY DSD athlete (a) must be recognised at law either as female or as intersex (or equivalent); (b) must reduce her blood testosterone level to below five (5) nmol/L for a continuous period of at least six months (e.g., by use of hormonal contraceptives); and (c) thereafter she must maintain her blood testosterone level below five (5) nmol/L for so long as she wishes to maintain eligibility to compete in the female classification.
For the sake of clarity, a 46XY DSD athlete is an individual who, because of Differences of Sex Development (DSD), from a biological point of view shows a male genetic sex (i.e., 46XY) and a female gonadal sex (i.e., external genitalia developed along female lines).

18 June 2018: Caster Semenya and Athletics South Africa (ASA) challenged the DSD Regulations before the CAS arguing that the DSD Regulations are discriminatory, unnecessary and disproportionate. In particular, according to the athlete the DSD Regulations are discriminatory as (i) they discriminate on the basis of birth or natural, physical, genetic or biological traits and restrict the ability of some female athletes to compete based solely on a natural or genetic trait which they have possessed since birth and over which they have no control; (ii) they discriminate against female athletes on the basis of sex because they impose thresholds and burdens on female athletes, while no equivalent requirements are applied to male athletes; (iii) they discriminate on the basis of gender, as a social term, by classifying the athletes as intersex or as having a male "sport sex" regardless of how the athlete self-identifies and irrespective of how they were born and raised. The DSD Regulations are also not necessary to preserve fair competition within the female category, as success in elite sport is the product of both genetic and environmental factors and there is no qualitative difference between DSD and other genetic variations that make athletes particularly tall or strong, or which provide unusual haemoglobin concentration, unusually large skeletal muscles etc. Last, the DSD regulations are not proportionate as they provide for intrusive medical assessment that involve examination of female athletes' most intimate body parts and will result in athletes undergoing medical treatments with adverse health risks.

30 April 2019: the CAS rejected the requests for arbitration underlining that, although the DSD Regulations presented a discriminatory nature, it constituted a necessary, reasonable and proportionate tool with respect to the objective pursued, namely the fairness of sporting competitions. In reaching this conclusion, the CAS held that: (a) the vast majority of experts' view is that testosterone is the primary driver of the physical advantages and therefore, of the sex difference in sports performance, between male and female; (b) it is not disputed that a 46 XY DSD individual is a person with a male chromosomal sex (XY and not XX), male gonads (testes not ovaries) and levels of circulating testosterone in the male range which are significantly higher than the female range; (c) the preponderance of evidence submitted by the parties shows that female athletes with 46 XY DSD have high levels of circulating testosterone in the male range and that this does result in a significantly enhanced sport performance ability. Accordingly, although discriminatory, the DSD Regulations are necessary to maintain fair competition in female athletics by ensuring that female athletes who do not enjoy the

significant performance advantage caused by exposure to levels of circulating testosterone in the adult male range do not have to compete against female athletes who do enjoy that performance advantage.

28 May 2019: the athlete challenged the arbitration award before the Swiss Federal Tribunal (SFT) arguing that the DSD Regulation introduced a form of discrimination based on sex and sexual characteristics, undermined human dignity and personality rights and for these reasons were to be considered in conflict with public order.

25 August 2020: the SFT shared the analysis carried out by the CAS panel and, while deeming the DSD Regulations discriminatory, considered it a necessary, reasonable and proportionate tool with respect to the objective pursued, excluding any opposition of the award to the public order (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). In particular, the SFT observed that on the one hand, the CAS panel considered the interest in guaranteeing fairness in competitions within women's athletics and in defending the "protected class", with a view to allowing female athletes without DSD to be able to compete at the highest level. On the other hand, it considered the effects of oral contraceptives on the health of 46 XY DSD athletes, the damage associated with intrusive physical examinations aimed at assessing androgen sensitivity, problems relating to confidentiality and the possibility for 46 XY DSD athletes to successfully maintain their testosterone levels below the regulatory limit. In light of the above, the SFT underlined that (i) the concern to ensure, as far as possible, the fairness of competitions constitutes a perfectly legitimate interest, also recognized by the ECtHR; (ii) the pursuit of sports fairness is an important objective which may justify serious infringements of the rights of sportspersons; (iii) the objective pursued by the IAAF (namely, to guarantee the fairness of the competitions), is not the only one that comes into play. Indeed, as the CAS panel pointed out, the Semenya case is characterized by the fact that private interests are in conflict, since the interests of the 46 XY DSD athletes are opposed to those of the other female athletes who do not present DSD.

18 February 2021: the athlete challenged the ruling by the SFT before the ECtHR for violation of Artt. 3 (prohibition of torture and inhuman and degrading treatment), 6 (right to a fair trial), 8 (right to respect for private and family life), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the Convention.

11 July 2023: the ECtHR ascertained the violation by Switzerland of Art. 14 taken together with Art. 8 of the Convention as well as of Art. 13 in relation to Art. 14 taken together with Art. 8 of the Convention (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-226011%22]}). In its ruling the ECtHR focused on the following three main points:

(a) *jurisdiction*: while acknowledging that Switzerland had no role in the adoption of the contested DSD Regulations, issued by the IAAF, a Monegasque private law association, the ECtHR recalls that Art. 1 of the Convention states that "*The High Contracting Parties guarantee to all within their jurisdiction the rights and freedoms defined in Title I of the (...) Convention*". Furthermore, the ECtHR recalls that from the moment in which a person brings an action before the civil courts of a State, there is incontestably a "judicial link" between that person and the State, notwithstanding the possible extra-territoriality of the facts giving rise to the action. In the case of the South African athlete, therefore, the appeal against the arbitral award of the CAS filed with the SFT has, a priori, brought into play the jurisdiction of Switzerland pursuant to Art. 1 of the Convention;

(b) *the prohibition of discrimination (taken together with the right to private and family life) – Artt. 14 and 8 of the Convention*: the CAS panel, despite a very detailed award, addressed the issue of the necessary, reasonable and proportionate nature of the DSD Regulations without any reference to Art. 14 of the Convention and to the jurisprudence of the ECtHR. Moreover, the ECtHR considers that the very limited control exercised by the SFT can be justified in the field of commercial arbitration, where companies, on an equal footing, agree on a voluntary basis to devolve their disputes to an arbitration board. Conversely, the limited scope of the SFT's review may be more problematic in sports arbitration, where individuals are often confronted with very powerful sports organizations. Under Art. 14 of the Convention a difference in treatment is discriminatory if it is not based on an objective and reasonable justification, i.e. if it has no legitimate aim or if there is not a reasonable relationship proportionality between the means employed and the aim pursued. In other words, to satisfy the requirements of Art. 14 of the Convention, the SFT would have had to weigh the interests invoked by World Athletics, in particular that of fairness of competitions, with those invoked by the athlete, in particular those relating to her dignity and reputation, her physical integrity, her privacy, including her sexual characteristics, and her right to practice the profession. However, the SFT did not do so since, according to its jurisprudence, such an examination does not fall within the notion of public policy. Last, States are required to take measures to protect persons under their jurisdiction from discriminatory treatment, even if the discriminatory treatment is administered by private individuals. In other words, according to the ECtHR, national judges are required to guarantee real and effective protection also against discrimination committed by individuals. By contrast, in the case at hand, the SFT did not consider that the prohibition of discrimination issued by private law subjects fell within the scope of the notion of public order pursuant to Art. 190.2 e) PILA and, consequently, has not submitted the DSD Regulations issued by World Athletics, a non-state act, to the check of compliance with the Constitution or the Convention as requested by the athlete.

(c) *The right to an effective remedy – Art. 13 of the Convention in relation to Art. 14 taken together with Art. 8 of the Convention*: in the context of a compulsory arbitration, the athlete had had no other choice than to apply to the CAS to challenge the validity of the DSD Regulations. However, in holding that it was certainly discriminatory but nevertheless constituted a necessary, reasonable and proportionate means to achieve the

aims pursued by the IAAF, the CAS panel did not assess the validity of the regulation in question in the light of the requirements of the Convention and, in particular, did not analyse allegations of discrimination under Art. 14 of the Convention, despite the athlete's well-founded and credible complaints.

6 November 2023: the case was referred to the Grand Chamber under Art. 43 of the European Convention on Human Rights at the Swiss Government's request (https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7791665-10803581&filename=Grand%20Chamber%20Panel).

15 May 2024: as already stated, the ECtHR held a Grand Chamber hearing.

It is not the first time that the ECtHR is called to rule on the applicability of human rights in international sports arbitration. For example, in the well-known *Mutu and Pechstein* case (https://hudoc.echr.coe.int/eng?i=002-12113), the ECtHR held that in forced arbitration proceedings Art. 6.1 of the Convention (right to a public hearing) applies directly.
However, the Semenya case is likely to be even more relevant.
First, contrary to the *Mutu and Pechstein* case, in the Semenya case the ECtHR ruled that substantive (not procedural) human rights (i.e. non-discrimination) shall be directly applied by the CAS and SFT.
Second, the ECtHR held that it is entitled to examine the complaint of an athlete residing in South Africa, against Switzerland, in a case governed by regulations adopted in Monaco. Accordingly, if the Grand Chamber were to confirm this conclusion, the Semenya affair could be relevant for millions of athletes around the world. That said, it is not surprising that the minority dissenting argued that "*by accepting that the Court has full jurisdiction beyond the basic fair-trial guarantees under Art. 6 and by including in its jurisdiction also the prohibition of discrimination under Art. 14 in conjunction with Art. 8, the majority has dramatically expanded the reach of this Court to cover the whole world of sports*".
In light of the above it is not possible to predict the final decision of the Grand Chamber; however, it is highly likely that such a ruling will represent a fundamental watershed in the relationship between sport and human rights.