

## SEMENYA & SEX(UALITY): IS CAS RIGHT?

### *Introduction*

On the 30<sup>th</sup> April 2019, the Court of Arbitration for Sport (“CAS”) handed down its judgement in Caster Semenya’s landmark case deciding that the International Association of Athletics Federations (“IAAF”), new rules of restricting testosterone levels in female runners was lawful. Subsequently, Semenya’s appeal to Switzerland’s Federal Supreme Court was unsuccessful on the 8<sup>th</sup> September 2020. The international fallout from the change of rules and Semenya’s case has wide ranging implications for hundreds, if not thousands, of athletes around the world. This article seeks to look at the detail of the CAS panel’s judgment, the arguments raised at the hearing, some of the medical evidence challenging the IAAF experts and what more, if anything, could have been done to advance Miss Semenya’s case. **Yasin Patel**, looks at the regulations, the background to the matter, the case itself and the various arguments used by the parties in court.

### *The Background*

Caster Semenya is widely regarded as the best female middle-distance runner of her generation. Over 800m she is a double Olympic, three-time world and Commonwealth games champion. Over 1500m she is a World-bronze medallist and Commonwealth champion.

Throughout her career, Semenya has been under constant scrutiny over her gender and perceived physical advantages over competing athletes. Semenya has XY chromosomes and is defined 46 XY Karotype. This falls under the umbrella of conditions that are often described as “intersex”. These conditions provide men and women with specific genetic traits that would normally not be associated with their defined birth sex. In Semenya’s case, this meant her body produces more testosterone than normal as a result of internal testes.

There is a perceived benefit that more testosterone results in a bigger, stronger and faster athlete. In an attempt to make competition fair, the IAAF has produced regulations which competitors must adhere to in order to compete. The IAAF is the international body responsible for policing athletics worldwide and acts as a regulatory body for competitions. Registered in Monaco it is subject to the laws of Monaco.

## *Case History*

In 2015, Dutee Chand, an Indian athlete who competed in the same events as Semenya, was declared ineligible to participate under the IAAF's Eligibility of females with hyperandrogenism to compete in women's competition regulations ("the Hyperandrogenism Regulations").

Chand appealed against the regulations to the CAS who suspended the regulations for up to 2 years, as an interim remedy, to allow the IAAF to produce evidence and submissions to support the regulations.

In early March 2018, the IAAF repealed the Hyperandrogenism regulations and announced that new regulations would come into force on 1 November 2018. Semenya lodged enforcement proceedings with the CAS against the IAAF. Athletics South Africa ("ASA") joined Semenya in her attempts to have the regulations struck down.

## *The DSD Regulations*

The relevant part of the Regulations for the Female Classification (Athletes with Differences of Sex Development) ("the DSD Regulations") are stated in full below:

### 2.2

*For these purposes:*

*(a) A Relevant Athlete is an athlete who meets each of the following three criteria:*

*(i) she has one of the following DSDs:*

*(A) 5 $\alpha$ -reductase type 2 deficiency;*

*(B) partial androgen insensitivity syndrome (PAIS);*

*(C) 17 $\beta$ -hydroxysteroid dehydrogenase type 3 (17 $\beta$ -HSD3) deficiency;*

*(D) congenital adrenal hyperplasia;*

*(E) 3 $\beta$ -hydroxysteroid dehydrogenase deficiency;*

*(F) ovotesticular DSD; or*

*(G) any other genetic disorder involving disordered gonadal steroidogenesis; 4 and*

*(ii)*

*as a result, she has circulating testosterone levels in blood of five (5) nmol/L or above; and*

*(iii) she has sufficient androgen sensitivity for those levels of testosterone to have a material androgenising effect.*

*(b) Restricted Events are 400m races, 400m hurdles races, 800m races, 1500m races, one mile races, and all other Track Events over distances between 400m and one mile (inclusive) whether run alone or as part of a relay event or a Combined Event.*

### *2.3*

*To be eligible to compete in the female classification in a Restricted Event at an International Competition, or to set a World Record in a competition that is not an International Competition, a Relevant Athlete must meet each of the following conditions (the Eligibility Conditions);*

*(a) she must be recognised at law either as female or as intersex (or equivalent);*

*(b) she 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 continuously (i.e., whether she is in competition or out of competition) for so long as she wishes to maintain eligibility to compete in the female classification in Restricted Events at International Competitions (or to set a World Record in a Restricted Event at a competition that is not an International Competition).*

### *2.6*

*A Relevant Athlete who does not meet the Eligibility Conditions (and any athlete who is asked by the IAAF Medical Manager to submit to assessment under these Regulations and fails or refuses to do so) will not be eligible to compete in the female*

*classification in a Restricted Event at an International Competition (or to set a World Record in a Restricted Event at a competition that is not an International Competition. However, that athlete will be eligible to compete:*

*(a) in the female classification:*

- (i) at competitions that are not International Competitions: in all Track Events, Field Events, and Combined Events, including the Restricted Events; and*
- (ii) at International Competitions: in all Track Events, Field Events, and Combined Events, other than the Restricted Events; or*

*(b) in the male classification, at all competitions (whether International Competitions or otherwise), in all Track Events, Field Events, and Combined Events, including the Restricted Events; or,*

*(c) in any applicable intersex or similar classification that may be offered, at all competitions (whether International Competitions or otherwise), in all Track Events, Field Events and Combined Events, including the Restricted Events.*

### ***Original CAS Hearing***

The hearing at CAS lasted 4 days from 18 to 22 February 2019. Submissions and evidence was heard in proceedings from all three parties and can be summarised as follows:

#### **Miss Semenya's Submissions:**

- a) The Regulations are discriminatory as:
  - i. They discriminate on the basis of birth, or natural physical, genetic or biological traits – this restriction is based on uncontrollable traits;
  - ii. They discriminate on the basis of sex towards female athletes – there is no equivalent for men;
  - iii. They discriminate on the basis of gender as a social term by classifying relevant athletes as intersex regardless of self-identification and irrespective of how they were born or raised;

- iv. They discriminate on the basis of physical appearance;
  - v. They discriminate only (and specifically) against competitors in certain events;
- b) The Regulations are unnecessary as:
- i. They are not required for fair competition;
  - ii. The studies relied on to support the Regulations are flawed and unreliable;
  - iii. The studies, if accepted, do not establish necessity;
- c) The IAAF must prove the following to the contrary to show they are reasonable regulations;
- i. The limit of testosterone is not arbitrary nor confined to specific events for no apparent reasons;
  - ii. The assessment of the effect of testosterone is not subjective;

In summary, the regulations are arbitrary, unnecessary and discriminatory, causing athletes to be excluded from competition leading to intrusive medical procedures, psychological harm and treatments that lead to adverse health risks.

ASA's Submissions:

- a) The use of the samples was illegal and immoral. Samples used to test athletes was taken at events where it was not disclosed that the samples would be used to test for these measurements, and therefore their use to disqualify athletes on test results from these samples is illegal;
- b) There is no evidence to show the link between testosterone and increased performance;
- c) The methods used to reduce testosterone levels have unpleasant and, sometimes dangerous side effects which should not be forced upon any athlete to allow them to compete;
- d) The findings in the literature reviews relied on by the IAAF are inconsistent with the regulations in that the events which are targeted have no statistically significant increased advantage if an athlete has a condition covered by the regulations;

- e) The Regulations are inherently unfair as they prevent competition based on natural variances of genetic make-up;

These submissions attempted to add depth to the claim against the IAAF.

#### IAAF's Submissions

- a) The DSD Regulations are based on strong scientific, legal and ethical foundations;
- b) The Regulations are necessary, reasonable and proportionate to the legitimate aim and objective, that of fair competition;

These are clearly very brief overviews of the arguments put forward by the parties, but the essential questions the CAS panel had to ask themselves were:

1. Are the Regulations discriminatory in their nature?
2. Is so, are the Regulations necessary?
3. If they are necessary, are the Regulations, as they stand, proportionate and legitimate in order to achieve their desired goal.

If the answer to all three of these questions was “yes”, then the regulations would stand, and Semenya would be under an obligation to comply with them in order to compete. The judgment delivered by the panel had further breakdown of these questions but for the purposes of this article it is unnecessary to quote them word for word.

#### ***The Evidence***

The evidence in support of these submissions was vast. In a judgment of over 600 paragraphs, over half of the judgement is spent rehearsing the evidence put before the panel. This was split between medical, scientific and legal evidence.

The medical and scientific evidence focussed on the research into the conditions which were covered by the regulations and the perceived benefits that the specific athletes gained from their conditions. Much of Semenya's evidence was focussed on the flaws in the studies that the IAAF relied upon, such as incorrect conclusions or data being duplicated. In summary, the

evidence attempted to undermine the conclusion that the DSD Regulations were necessary, reasonable and proportionate to the aim of IAAF.

In contrast, the IAAF put forward evidence that had been commissioned as a direct result of the *Chand* case. The studies, and reviews, were said to all prove that the performance advantage enjoyed by DSD athletes is so much that it would be unfair to allow them to compete against other women.

The legal issues revolved around whether the discrimination, which the regulations perpetuated, was justified. The three limbs of necessity, reasonableness and proportionality all needed to be satisfied for the regulations to be lawful. In regard to necessity, the need to protect gender in sport was never an issue between the parties, and it was agreed that it was necessary to protect women in sporting competition.

In deciding reasonableness and proportionality, the test that had to be satisfied was taken from the *Chand* case:

*“The Degree of performance advantage that relevant athletes enjoy by virtue of elevated testosterone levels is so significant as to require the imposition of restriction of their eligibility to compete against other females who don’t enjoy that testosterone advantage.”*

Much of the evidence here revolved around the level of difference in performance between DSD and non-DSD athletes. The common accepted difference between men and women is between 10% and 12%, which justifies the exclusion of men from women’s races. This legal issue was therefore, is the performance advantage enjoyed by DSD athletes close to, or in, that range in order to justify the Regulations.

### ***The Decision***

There were three questions that the panel had to ask themselves when coming to a decision.

Firstly, were the regulations discriminatory? Unsurprisingly, the panel had little trouble concluding that the regulations were discriminatory on the basis of sex. They only applied to women or intersex athletes and they restricted the eligibility of those athletes. In coming to

this conclusion, the panel stated that Semenya and the ASA had satisfied the burden of proof which was required in order for the next two questions to be considered.

The second question for the panel to ask itself was were the regulations necessary. The legal test, taken from *Chand*, read as follows:

*“Is the degree of performance advantage that the relevant athlete enjoys by virtue of elevated testosterone levels so significant as to require the imposition of restriction on eligibility to compete against other females who don’t enjoy that advantage.”*

Considering the evidence provided by the IAAF, the panel concluded that the advantage gained by Semenya was significant and therefore satisfied the test for necessity. The need to ensure fairness in competition meant that regulations are required in order to prohibit unfair advantage.

The panel relied on the BG17 review and other scientific evidence put forward by the IAAF despite major concerns raised by the experts who had given evidence on behalf of Semenya and IAAF. Their conclusion was that the advantage was “so great,” the regulations were required.

The final issue to decide was whether the regulations were reasonable and proportionate in the circumstances. In doing so, the panel must consider “whether the restrictions imposed by the DSD regulations are rationally connected to their objective of ensuring fair competition for female athletes in elite athletes.” The panel was only considering this test in the context of an athlete having to take the contraceptive pill. The panel concluded that the regulations were proportionate for the same reasons that they were necessary, namely fair competition.

### ***Appeal to the Swiss Courts***

In June 2019, Semenya appealed to the Swiss Federal Tribunal (the Swiss Supreme Court) to rule the award as null and void. In a temporary reprieve, Semenya received an interim injunction that allowed her to compete without having to lower her natural testosterone levels. However, this was overturned by the Tribunal once it had heard further argument on the issue. The Swiss Federal Court stated that the CAS decision was final, and that a Swiss court would only intervene if there was a fundamental breach of Swiss law or human rights.

On the 8 September 2020, Semenya lost her appeal to Switzerland's Federal Supreme Court.

In summary, Semenya and the ASA have lost. The regulations are still in force at this moment of time and Semenya is required to lower her testosterone level in order to compete.

### ***Arguments, conclusions and observations***

Having briefly summarised the disputes between the parties involved in this case, it is important to highlight areas of medical evidence that are important in challenging the CAS judgment, areas that do not seem to have been explored at the hearing in Lausanne in February 2019 or in appeals subsequently and parts of the CAS decision which seem to have flawed assumptions or an ill-conceived basis.

### ***The Regulations were Racist***

There were hints throughout the arguments by Semenya's and ASA's legal teams that the reason why the regulations were discriminatory was because they seemed to target Semenya more so than other athletes. The tribunal's conclusion was that the regulations were discriminatory but justified in the circumstance.

What was never explicitly mentioned was that the regulations seemed to be racist in nature. There is no getting away from the fact that the vast majority of sufferers of DSD's are women from Africa and Asia, with the number of occurrences of DSD's in western women being drastically lower than from either of the other two continents.

It has to be said that there is some form of discrimination based on race occurring here. It may well have been inadvertent, but there is no getting away from the fact that Semenya is black, and Chand is Indian. Other leading female athletes suffering from DSD's are Margaret Wambui and Francine Niyonsaba (both black and African). There have been very few, if any, white athletes who have been or will be affected by the regulations, which places the IAAF in difficult territory.

A further reason that the discrimination argument gains further support is the fact that the ruling is over women competing at the distances Semenya, Wambui and Niyonsaba run and not across all track and field – leading to the suggestion that leading black athletes who are dominating the distances in question are being targeted.

This issue, and a possible reason why it was not advanced at trial, is that data and statistics on women with DSD's are non-existent. It is a very rare phenomenon and diagnosis is often missed in developing countries without the testing methods to detect such conditions. It cannot be said, without reference to the elite athletes who are affected by the regulations, there would be an evidential basis on which to base this submission on. Having said that, one must question whether the submission could have been made without the data.

### *The Missing Data*

The main literature review that was used in proceedings was known as BG17. This study reviewed the data and conclusions that had been collected and discussed in the wake of the Chand case. There were two issues that were raised: First, not all the data that was used in the review was disclosed to the scientists who were investigating the scientific rigour of the review. Secondly, the IAAF refused to disclose documents which proved that the sample collection had been agreed to in regard to the type of testing which would be done.

In regard to the first point, this meant that scientists were not able to recreate the statistical modelling to ensure the conclusions of studies were correct. As a result, there was no way to verify or call into question the data relied upon by the IAAF. The team for Semenya was limited to testing in one event, and even here errors were found: duplicated results, missed results or so called “phantom” results with no discernible source were all included. Without the remaining data being disclosed, who is to say what could have been shown to undermine the validity of BG17.

The second issue is perhaps even more disturbing. The ASA had repeatedly, and vociferously, requested the consent forms of athletes whose samples had been tested for the BG17 review. This is for the simple, but important reason, that the IAAF should not be testing or using samples which athletes have not consented to. To do so would mean the results were void or the evidence cannot be used in court. The IAAF response was to decline to disclose the forms.

Disclosure battles are commonplace in the courts, there is no surprise about this point of contention. What is most unsettling is the conclusion reached by the panel?

*“The Panel considers that it can therefore be inferred that no such forms exist, or that if they do exist, they do not assist the IAAF on the issue.”*

For those who work within the world of the adversarial system, this conclusion raises an eyebrow, even both. Coming to the conclusion that something does not exist because the holding party refuses to disclose it is an irrational and baseless conclusion. Litigants are often their own worst enemy when disclosure is mentioned, denying that there may be a document which hurts their case. There is no accusation on the part of the lawyer for the IAAF, but it would seem that the conclusion reached by the panel was not supported by evidence, other than the statement by the IAAF.

#### ***More Testosterone means athletic success?***

As a result of blood tests, Semenya has been found to have a testosterone level that is above what is usually seen in women. According to Professor Peter Sonksen, a retired professor of endocrinology (the study of hormones), the IAAF (incorrectly) attributes Semenya’s athletic success to the effects of her high testosterone. He states that it seems likely that Semenya has Androgen Insensitivity Syndrome (AIS) and as a result is severely insensitive to testosterone.

Sonksen submits that the gap that exists for testosterone between men and women in the general population does not exist among elite athletes.

Professor Malcolm Ferguson-Smith of the Cambridge Resource Centre for Comparative Genomics, tested 3,387 women athletes at the Atlanta Olympic Games and found eight with XY sex chromosomes, of whom seven had AIS. Their heights were in the normal male range. Six of them had already had their testes removed and were still able to reach Olympic standard. In other words, a virtually complete lack of testosterone did not appear to affect their athletic performance.

In a subsequent paper, Ferguson-Smith explained the high number of XY women with AIS and other DSD's in elite sport. Rather than testosterone levels, it is likely due to genes on the Y chromosome, especially those associated with height in the male range.

All athletes are selected largely on their physical attributes due to their genetic constitution. Favourable genes on many chromosomes are known to be involved and some may say that it is discriminatory to exclude those athletes who have favourable genes on the Y chromosome (like Semenya). These athletes with AIS are at no greater advantage than those who are selected because of favourable genes on other chromosomes.

Ferguson-Smith states that *“women with hyperandrogenism possess no physical attribute relevant to athletic performance that is neither attainable, nor present in other women.”*

As Sonksen further submits, *“women with AIS cannot respond to injected testosterone, and therefore it would be no use to them as a doping agent”*.

### ***Decision by majority***

Arbitration proceedings are inherently private; indeed, their very purpose is to decide the dispute out of the public eye, with awards rarely being published or publicised. CAS is distinctly different in that regard, where it often publishes the awards in full so that future appellants are able to rely on CAS jurisprudence when bringing cases to the tribunal.

Arbitration panels are governed by the rules which parties subscribe to. This may be a copy and paste of the civil procedure rules or a finely tuned, bespoke set of rules devised by the parties. Often rules will stipulate that the award will be given in the form of a judgement, with only the majority giving their reasons for their decision. Under R46 of the CAS procedural code, this is what applies to the cases before the CAS.

Whilst this means that decisions are faster and there is less room for appeals to arise, it means that the dissenting judge of the tribunal will be unable to make their reasons for dissent known. In the Semenya case, there are a number of occasions where the panel references *“the majority of the panel agreed ...”* with the question being left unanswered: who disagreed with the majority and why.

And yet the serious concerns that the CAS Panel has about the application of the rules were outlined in the judgment including,

- Worries that athletes might unintentionally break the strict testosterone levels set by the IAAF;
- Questions about the advantage higher testosterone gives athletes over 1500m and the mile;
- The practicalities for athletes of complying with the new rules.

The appellate courts of the UK have always provided differing views where judges have not agreed. Indeed, often the outcome is the same but the reasons for reaching that decision may differ massively. It brings into focus that issue of a differing opinion in the Semenya case. What were the reasons for a differing opinion, what was the conclusion of the opinion and could it have had any effect on the approach of the CAS in the future? Sadly, we will never know, but it is a point of contention which the Semenya and ASA camps would be keen to explore if this issue ever (and it is surely bound to), raise its head again.

### ***One event and not the other***

The final logical issue to consider is that there seems to be a lack of logic when concluding that only the prescribed events are affected by elevated testosterone. As stated above, the current accepted performance difference between men and women is 10-12%. This is not sport or event specific and was never argued as such.

The issue that arises is that if the IAAF never stated there was a difference in performance between events, then how can a tribunal conclude that regulations for specific events are justified? If there is a general performance advantage, then the regulations should be general, not specific and yet the CAS award states the regulations are fine in this regard.

### ***Immoral, Inhumane and Unnecessary***

For some, CAS's decision and the qualifications set by the IAAF are immoral, humiliating and not needed. Was Semenya born a woman? Yes. Has she taken any external medication to develop her XY Chromosomes? No. Have her extra testosterone levels been caused by anything other than natural growth and development? No. Can it be proved that Semenya has benefitted from XY chromosomes in her chosen event? No. Therefore, the conclusion on this point is that despite Semenya not having taken any substances or supplements, not had any genetic changes, not cheated or to be found to be taking any performance-enhancing drugs, she must undergo medication in order to lower her testosterone levels to the amount that women in general (whoever they may be) would have.

Kyle Knight, a researcher in the Lesbian, Gay, Bi-sexual and Transsexual rights programme at Human Rights Watch said that taking the proposed IAAF testosterone suppressants would be as *"humiliating as it is medically unnecessary"* for female athletes whose hormone levels are outside accepted boundaries. In other words, unless your testosterone levels are below five nanomoles per litre of blood, you are not representative of women generally and cannot compete with other women. Some may argue that the IAAF is now determining what are the determining factors to be recognised as a woman.

### ***Conclusion***

The decision of the IAAF has resulted in Semenya being unable to race without taking a contraceptive pill in order to lower her blood testosterone level. This has been deemed as proportionate, necessary and reasonable by the CAS. The Swiss Courts have been of little help to Semenya in her attempts to battle the regulations further.

The case is by no means the end of this issue. With the rise and gathering pace of the issue of transgender athletes in sport, the role of gender, sex and testosterone level will continue to be a major topic of discussion. More research is required, better understanding of human physiology and definitions of gender in sport will all play a major role in how this unfolds: how it unfolds is anyone's guess.

**Yasin Patel is a Barrister at Church Court Chambers specialising in all aspects of Sports Law and a Director of SLAM (Sports, Law and Media).**