Joint statement in support of South African athlete Caster Semenya

News, Legal Protection, European Court of Human Rights, Sex Characteristics, Sport, Strategic Litigation

> ILGA-Europe, The International Commission of Jurists and the organisation Intersex International Europe jointly file a third-party intervention before the Grand Chamber of the European Court of Human Rights in a case concerning the South African athlete Caster Semenya

In July 2023, in its judgment in the case of *Semenya v. Switzerland*, the Chamber of the third section of the European Court of Human Rights (ECtHR) had ruled in favour of Caster Semenya, a South African Olympic runner, finding that Switzerland had violated her right to freedom from discrimination, taken together with her rights to respect for private life and to an effective remedy had been violated.

The case had arisen from a complaint brought to the Strasbourg Court against witzerland by Caster Semenya, a South African international-level athlete specializing in middle-distance races (800 to 3000 metres). She had refused to comply with the "Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development – the DSD Regulations)" of the International Association of Athletics Federations (IAAF, now *World Athletics*), requiring her to reduce her natural testosterone level through hormone treatment in order to be allowed to participate in international competitions in the women's category, since the side-effects of such treatment were not well understood. Her failure to comply with the DSD Regulations resulted in her being barred from participation in international competitions.

Notwithstanding the July 2023 ECtHR judgment, Semenya and many other women athletes continue to be banned from competing in sports under World Athletics regulations. Later that year, the Swiss government filed a referral request to the Grand Chamber of the ECtHR for a final ruling on Semenya's case. A hearing in the case will take place in Strasbourg on 15 May 2024.

Kaajal Ramjathan-Keogh, Director of ICJ's Africa Programme, said, "The Grand Chamber of the ECtHR will have the opportunity to consider Semenya's complaint of human rights violations and the broader question of discrimination against athletes with hyperandrogenism, a condition characterized by higher than usual levels of testosterone, a hormone that increases muscle mass and strength. Under World Athletics regulations women like Semenya, who have naturally occurring higher testosterone levels associated with Differences of Sex Development (DSD), are barred from competing – unless they subject themselves to medically unnecessary interventions to reduce their testosterone levels and conform to an arbitrary and subjective standard of femininity."

Organisation Intersex International Europe (OII Europe), ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association) and the International Commission of Jurists (ICJ) filed a joint submission before the Grand Chamber of the European Court of Human Rights to assist the Grand Chamber in its determination of the case. The joint submission focuses on the place of intersex athletes in competitive sports and sporting fairness for all athletes. The submission analyses World Athletics' constantly evolving rules, which – due to their strict prerequisites – effectively limit and/or prevent the participation of intersex athletes in international sporting competitions. Even though new regulations were issued in 2021 and again in 2023, the submission deals in chief with the 2018 regulations as these are the ones being contested before the Court.

The submission focuses on the following issues:

- The DSD Regulations discriminate against intersex athletes on the grounds of sex within the meaning of Article 14 of the European Convention of Human Rights (ECHR), as well as on the grounds of sex characteristics – in particular, genetic characteristics – which, in turn, fall within the protective scope of the same provision. The joint interveners have provided the Grand Chamber with a comparison between the 10 December 2021 Regulations, 31 March 2023 Regulations, and the 2018 Regulations to show that World Athletics is continually restricting access to sport for intersex and other athletes without "particularly weighty and convincing reasons" by way of justification.

- The 2018 DSD Regulations were less restrictive than the subsequently issued rules as they only limited participation in the following races: 400m races; 400m hurdles races; 800m races; 1500m races; one-mile races; and all other Track Events over distances between 400m and one mile, whether run alone or as part of a relay event or a Combined Event. The 2018 Regulations were nevertheless discriminatory to intersex athletes.

- The submission expands on the wider detrimental effect of the DSD Regulations on the human rights of youth, children and intersex athletes.

- The submission makes brief remarks on the right of access to justice and the right to an effective remedy under international law and standards, including Articles 6 and 13 of the European Convention on Human Rights.

Dan Christian Ghattas, Executive Director of OII Europe, said, "The submission sets out that the 2018 DSD Regulations fall foul on sex characteristics as a ground for discrimination without 'particularly weighty and convincing reasons' by way of justification and, as a result, impermissibly discriminate against intersex athletes under Article 14 of the European Convention on Human Rights. In particular, the joint submission underscores the significance of the findings in the Chamber judgment establishing sex characteristics as a prohibited ground under Article 14 of the Convention."

According to **Katrin Hugendubel, Advocacy Director at ILGA-Europe**, "Despite claims from the World Athletics that the DSD Regulations will not prevent any women from competing in athletics, they have the effect of forcing some women with variations of sex characteristics to choose between undergoing medically unnecessary interventions to lower their testosterone levels or be precluded from participating in international sport. This is yet another example of discrimination faced by intersex athletes who are exposed to invasive medical examinations and interventions that have a dramatic impact on their ability to participate in competitions, and which may have life-long physical and psychological consequences."

Background to the case

The 2019 regulations are the ones that are in question in the case, despite regulations also being issued in 2021 and 2023. Sports governing bodies argued that the 2019 regulations broke from the past 50 years of sex testing women athletes, a practice that was humiliating, degrading and discriminatory. However, the revised 2019 regulations still subjected women athletes to sex eligibility criteria that retain these negative, rights-abusing consequences.

Semenya unsuccessfully challenged the 2018 regulations in the Court of Arbitration for Sport based in Lausanne in April 2019. She then appealed to Switzerland's highest court, the Federal Tribunal, which dismissed the case on grounds that sports regulations violating women's rights cannot be struck down as inconsistent with Swiss public policy. They added that the DSD regulations were an appropriate, necessary, and proportionate means of achieving the legitimate aims of fairness in sport.

In its July 2023 judgment, the third section of the ECtHR found that Semenya had not been afforded sufficient institutional and procedural safeguards in Switzerland to allow her to have her complaints examined effectively, especially since her complaints concerned substantiated and credible claims of discrimination as a result of her

increased testosterone level caused by differences of sex development (DSD). It followed, particularly with regard to the high personal stakes involved for Semenya – namely, participating in athletics competitions at the international level, and therefore practising her profession – that Switzerland had overstepped the narrow margin of appreciation afforded to it in the present case, which concerned discrimination on the grounds of sex and sexual characteristics requiring “very weighty reasons” by way of justification. The high stakes of the case for Semenya and the narrow margin of appreciation afforded to Switzerland should have led to a thorough institutional and procedural review, but Semenya had not been able to obtain such a review. The Court also found that the domestic remedies available to the applicant could not be considered effective in the circumstances of the case.

The 2018 DSD Regulations require a blood testosterone level below five nmol/L for a continuous period of at least six months. The 2023 DSD Regulations, in turn, impose an even lower threshold with respect to the concentration of testosterone in the serum of relevant athletes, namely, below two point five nmo/L. In comparison with the 2018 DSD Regulations, the 2023 DSD Regulations betray an even more misogynistic nature and are *a fortiori* discriminatory to athletes with variations of sex characteristics. Moreover, the 2023 DSD Regulations’ restricted testosterone level does not just affect intersex persons, but also endosex (i.e., non-intersex) women in general.

In November 2023, Switzerland successfully requested a referral of the case to the Grand Chamber of the ECtHR on the grounds *inter alia* that Switzerland lacked jurisdiction; that the case did not involve the application of Swiss law; that the Chamber’s ruling would require a fairly fundamental review of the system of judicial review of international arbitral awards requiring alignment with the judicial review of judgments handed down by national courts and this would run counter to the aims of international arbitration and would significantly reduce the attractiveness of this method of dispute resolution.

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