

Bundesgericht

Tribunal fédéral

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CH-1000 Lausanne 14

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Press Release of the Swiss Federal Supreme Court

Judgment of 25 August 2020 ([4A_248/2019](#), 4A_398/2019)

DSD Regulations: Caster Semenya's appeal against the decision of the Court of Arbitration for Sport dismissed

The Swiss Federal Supreme Court dismisses the appeals submitted by the South African athlete Caster Semenya and her athletics federation against the decision of the Court of Arbitration for Sport on the "Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)" (DSD Regulations). The Court of Arbitration for Sport had the right to uphold the conditions of participation issued for female athletes with the genetic variant "46 XY DSD" in order to guarantee fair competition for certain running disciplines in female athletics.

The International Association of Athletics Federation issued the new DSD Regulations in April 2018. These regulate the conditions that an implicated female athlete must meet in order to be able to participate in international running competitions in the "protected class women", over distances of 400m up to 1 mile. The regulations only apply to female athletes with the genetic variant "46 XY DSD". Persons with this gene variation have a testosterone level clearly within the normal reference range for men. The DSD Regulations require that the implicated female athletes lower their testosterone level to below a certain value (5 nmol/L) for six months before a competition and keep it below this value for as long as they wish to compete in equivalent international competitions in the "women" category.

In June 2018, the South African athlete Caster Semenya appealed against the DSD Regulations before the Court of Arbitration for Sport (CAS) in Lausanne. The South African Athletics Association ("Athletics South Africa", ASA) also took the case to the CAS. The CAS dismissed both arbitration claims in 2019. The main conclusion was that the admission conditions in accordance with the DSD Regulations would only cover implicated female athletes, but that the differentiation was necessary, reasonable and proportionate in order to preserve the integrity of female athletics ("protected class women") in the relevant running competitions as well as to guarantee fair competition.

Caster Semenya and ASA appealed to the Swiss Federal Supreme Court against the CAS decision. It rejects both appeals.

As an independent court of arbitration, the CAS has comprehensively examined the Caster Semenya case and consulted numerous experts. For its part, the Swiss Federal Supreme Court cannot subject the CAS decision to any free legal control. On the contrary, its examination of the content is limited by law to the question of whether the CAS decision violates fundamental and widely recognized principles of public order ("ordre public"). That is not the case.

Caster Semenya essentially alleges a violation of the prohibition of discrimination. For the Swiss Federal Supreme Court, the CAS has issued a binding decision based on the unanimous opinion of the experts who were consulted that testosterone is the main factor for the different performance levels of the sexes in athletics; according to the CAS, women with the "46 XY DSD" gene variant have a testosterone level comparable to men, which gives them an insurmountable competitive advantage and enables them to beat female athletes without the "46 XY DSD" variant. Based on these findings, the CAS decision cannot be challenged. Fairness in sport is a legitimate concern and forms a central principle of sporting competition. It is one of the pillars on which competition is based. The European Court of Human Rights also attaches particular importance to the aspect of fair competition. In addition to this significant public interest, the CAS rightly considered the other relevant interests, namely the private interests of the female athletes running in the "women" category.

Its decision is also compatible with public order from the point of view of Caster Semenya's alleged violation of her personality and human dignity. The medical clarifications and any necessary drug-related lowering of the testosterone level represent a considerable interference with physical integrity. However, the core area of this right is not affected. It should also be noted that the examinations are carried out by qualified doctors and under no circumstances against the will of any female athletes. Ultimately, the CAS decision is also compatible with the guarantee of human dignity. Implicated female athletes are free to refuse treatment to lower testosterone levels. The decision also does not aim to question in any way the female sex of implicated female athletes.

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NB: The press release is intended as an information to the public and the media. The terminology used may differ from the wording of the judgment. For legal purposes, only the wording used in the written decision is binding.

The decision will be available on www.bger.ch : *Rechtsprechung* > *Rechtsprechung (gratis)* / *Weitere Urteile ab 2000* > entering [4A_248/2019](#).