
LETTER TO THE EDITOR

Making Sense of *Semenya* before the European Court of Human Rights

Dear Editors,

In 2022, this Journal allowed us to contribute to the lively debate on the ethical concerns stemming from international rules applying to athletes with specific sex characteristics.¹ In that article, we discussed the case of *Caster Semenya v. IAAF* (Court of Arbitration for Sport, CAS). Caster Semenya, a top-level middle-distance runner and twice Olympic champion, had challenged the regulations of World Athletics (former International Association of Athletics Federations, IAAF) that imposed her and other athletes with differences of sex development (DSD) to undergo hormone-suppressing treatment to meet pre-established levels of testosterone as a precondition to compete in the female category. The article deconstructed four distinct narratives based on which the adjudicators had justified the exclusionary regime applying to athletes with DSD. Therefore, we questioned that: (1) deciding on eligibility is not deciding about sex/gender; (2) testosterone is an accurate predictor of athletic performance; (3) the required testosterone-suppressing treatment is safe and harmless; and (4) excluding Semenya from competition serves to protect women as a whole. We concluded that adjudicators had shown a limited understanding of gender and race and a myopic view of scientific and ethical concerns.

Thanks to the worldwide visibility given by the Journal, our article reached Strasburg and was quoted in the European Court of Human Rights' (ECtHR) judgment *Semenya v. Switzerland* on July 11, 2023.² After the CAS award, indeed, Caster Semenya applied to the Strasbourg Court alleging that Switzerland, as the CAS' country of seat, had violated many of her rights under the European Convention on Human Rights (ECHR): namely, the rights to be free from inhuman and degrading treatment (Article 3), to a fair trial (Article 6), to private and family life (Article 8), to an effective remedy (Article 13) and to be free from discrimination (Article 14). An all-male panel of the ECtHR held that there had been a violation of the prohibition of discrimination in conjunction with the right to respect for private life as well as a violation of the right to an effective remedy. By holding that

Semenya had not been guaranteed to have her human rights complaints examined effectively in Switzerland, the Court adopted a view that challenged narratives 2 and 3 above as we did in our article.

In particular, a key role in the judgment is played by medical ethics in the hormonal-suppressing treatment imposed on athletes with DSD and the consequent double bind that these athletes must face — either jeopardizing their physical and mental health or relinquishing their profession.³ At the roots of this dilemma is the respect for the right to self-autonomy of people with intersex traits, who are coerced to undergo treatment without any medical needs should they wish to continue to compete. The ECtHR has dealt with this aspect from the perspective of the right to identity and personal development through social relations under Article 8 of the ECHR. Moreover, the Court has criticized both the CAS and the Swiss Federal Supreme Court for having neglected the variety and severity of the side effects of the hormone-suppressing treatment. Finally, the Court has recognized that imposing medical treatment with no therapeutic functions and serious secondary effects to meet prefixed eligibility criteria, or for the simple sake of fairness in sports competition, collides with international standards of medical ethics.⁴

At the same time, however, the ECtHR denied the applicability of the prohibition of ill-treatment under Article 3, declaring Semenya's complaint in this regard inadmissible, because the applicant had *not* undergone any treatment. This outcome raises many ethical as well as legal questions. Interestingly, in his partially concurring opinion, Judge Serghides contended that Semenya's choice not to compete had been due to the feared consequences of the treatment and considered the imposition of the testosterone-suppressing treatment by the DSD regulations as a violation of Article 3 because of the stigmatizing and humiliating effects they produced.⁵

Semenya v. Switzerland is a victory for the rights of intersex people for at least two reasons. First, this is the first decision where the ECtHR recognizes that discrimination on the grounds of sex characteristics falls under discrimination on the grounds of sex under

Article 14 of the ECHR.⁶ The “I” of the globally renowned acronym “LGBTIQ” eventually found a place in a supranational court. Second, it has been expressly recognized that World Athletics as well as the CAS must now comply with international human rights law. Yet, whether sports practice will effectively abide by the judgment remains uncertain as Caster Semenya cannot return to compete until World Athletics repeals the DSD regulations. Moreover, the Swiss government has appealed the judgment to ECtHR’s Grand Chamber which will take several months, if not a couple of years, to rule the case again.

Despite these elements, the most important lesson we can draw from *Semenya v. Switzerland* lies in the established connection between human rights, medical ethics, and sports organizations. With this judgment, international human rights law ceases to be a blind spot in sports law, thereby becoming a requirement for both regulators and adjudicators. Importantly, medical ethics rise as an integral part of the conversation about human rights in sports organizations, with adjudicators (the CAS and the Swiss Supreme Federal Tribunal) now functioning as conscientious gatekeepers. Yet, to see whether post-*Semenya* sports competitions reflect this model, we have to

wait for the verdict of the Grand Chamber. Until then, there will be one race that Caster Semenya still cannot win: the race to be herself.⁷

Sincerely,

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References

1. M. Winkler and G. Gilleri, “Of Athletes, Bodies and Rules: Making Sense of Caster Semenya,” *Journal of Law, Medicine and Ethics* 49, no. 4 (2021): 644-660, DOI: 10.1017/jme.2021.89.
2. ECtHR, *Semenya c. Suisse*, 11 July 2023, n. 10934/21, p. 94, n. 1.
3. *Ibid.*, para. 124, 188.
4. *Semenya*, *supra* note 2, para. 189.
5. *Semenya c. Suisse*, Partially Concurring and Partially Dissenting Opinion of Judge Serghides, paras 14-18.
6. *Ibid.*, para. 158.
7. See C. Semenya, *The Race to Be Myself* (London: Merky Books, 2023).

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