



Mokgadi Caster Semenya and Athletics South Africa
v
International Association of Athletics Federations CAS
2018/O/5794 & CAS 2018/)/5798

Case Overview:

This case concerns the decision of the IAAF to introduce regulations policing the eligibility of some athletes with a 'Differences in Sexual Development' ('DSD') from competing in certain female athletic events. The regulations concerned being the Eligibility Regulations for the Female Classification [Athletes with Differences of Sex Development], also known as the DSD Regulations.

Athletics, like many other sports, separates competition categories by sex based on the observed athletic advantage that typical males have over typical females. The IAAF has always taken the view that in order to encourage and protect female participation in the sport, and to ensure meaningful competition, separate male and female competition categories are necessary.

The perceived necessity of the DSD Regulations derives from the IAAF's recognition that although athletic classifications are binary (male/female), the biological sex of individuals is not; that there is, in fact, a variety of presentations of biological sex. Accordingly it is possible that individuals with certain DSDs who are legally female and identify as female may have some of the natural, physiological and athletic advantages associated with typical males and, therefore, an unfair advantage over females without such a DSD. The purpose of the DSD Regulations is, therefore, to ensure fair and meaningful competition ***within the female sub-classification***.

As determining eligibility by reference only to purely legal status or individual identification would not solve the problem, the DSD Regulations instead rely on the growing scientific consensus that, from puberty onwards, higher testosterone levels in typical males plays a significant role in the development of the 'athletic advantage'. From this basis, the IAAF has determined that testosterone levels would provide the best, objective basis for determining eligibility to compete as a 'sporting' female.

In short, the DSD Regulations state that athletes with certain DSDs (where the difference in development is such that the individual has the male 'Y' chromosome) who have a circulating level of testosterone that is significantly higher than typical female athletes without a DSD must reduce and maintain their testosterone levels to within the normal female range (below



5nmol/L) if they wish to compete in certain Restricted Events (track events from 400m to one mile) at International Competition.

Caster Semenya and Athletics South Africa challenged the IAAFs decision to introduce the DSD regulations at the Court of Arbitration for Sport, primarily on the basis that they were discriminatory.

Arguments:

Caster Semenya

The case against the IAAF was brought by Mogkadi Caster Semenya. Ms Semenya is one of the most well-known female athletes competing with a DSD. Ms Semenya argued that the DSD Regulations are discriminatory, unnecessary, unreasonable and disproportionate. She challenged the basis on which the DSD Regulations were being introduced. She argued that the need for the DSD Regulations - to ensure fair competition - was not supported by any credible empirical data and that there is no evidence to show that Ms Semenya, or other athletes with relevant DSDs, benefited from a significant performance advantage over female athletes without a relevant DSD. Ms Semenya also argued that the selection of Restricted Events was arbitrary and appeared to only apply to the competitions in which Ms Semenya excelled.

Moreover, Relevant Athletes would be classified by subjective assessments informed by socially constructed views of femininity. Ms Semenya advanced strong objection to the IAAF's use of the term 'biologically male' to describe Ms Semenya who was born, raised and identifies as female.

Finally, Ms Semenya contended that the mental and physical effects of having to comply with the DSD Regulations were disproportionate.

The IAAF

The IAAF's position is that the DSD Regulations are necessary to 1) ensure a level playing field within the female classification in athletics and 2) to protect female sport. The IAAF stressed that they were not in any way making assertions as to Ms Semenya's legal sex or gender identity and, in essence, that 'sporting sex' is a separate question



They argued that the restrictions contained within the DSD Regulations are lawful and are necessary to achieve the legitimate objective of fair competition within the female classification. The IAAF argued that a female athlete with a DSD that results in higher circulating (and useable) levels of testosterone provides those athletes with a significant performance advantage over female athletes who do not have such a DSD. Further, that this advantage is such that typical female athletes could not hope to win and that this would therefore affect future participation in the sport. Thus, unless there were such restrictions, fair competition would be undermined and the interests of the sport affected.

It was also argued that the DSD Regulations should be considered progressive as they would allow athletes with female gender identities, but with a different biological sex i.e. male, to compete within the female classification.

The Panel

The key issues that the Panel had to consider were as follows:

1. *Whether the DSD Regulations were discriminatory*
2. Whether the restrictions introduced by the DSD Regulations are lawful, that is, are they necessary, reasonable and proportionate to achieve their aim?

The Panel held that the DSD Regulations were *prima facie* discriminatory for several reasons, including that they only affect a "*subset of the female/intersex athlete population*" and did not impact on male athletes. However, the Panel found by a majority that the restrictions within the Regulations were lawful to the achievement of the legitimate objective of fair competition within the female category.

In brief, and based on the evidence put before them, the Panel decided that the DSD Regulations were:

- Necessary – the performance advantage enjoyed by athletes with relevant DSDs **was** significant and, therefore, to ensure fair competition in certain events the regulations were necessary. If the regulations were not introduced female athletes without a relevant DSD would have compete against female athletes who enjoy the male performance advantage caused by higher levels of circulating testosterone, this undermining the 'level playing field'.



- Reasonable – the scope of Restricted Events was not arbitrary, it was informed by rational explanation, which was essentially the same as the reasons why the regulations are necessary, namely there was enough evidence to comfortably satisfy the majority of the Panel that 46 XY DSD athletes had a significant performance advantage in those events.
- Disproportionate – the side effects that could potentially be experienced by 46 XY DSD female athletes as a consequence of taking the hormonal treatment that would be required under the DSD Regulations is not different in *nature* to side effects experienced by millions of other XX women taking similar treatment.

The Panel did however express grave concerns about the practical application of the DSD Regulations. Ms Semenya raised the issue of unintentional spikes in testosterone levels even when taking hormonal medication and complying with the Regulations. Ms Semenya experienced these unintentional fluctuations when undergoing the hormonal treatment that was required under previous Regulations, which were later suspended by the Dutee Chand¹ decision. Those Regulations required Ms Semenya to keep her testosterone levels below 10nmol/L. The Panel recognized the potential difficulty of complying with the DSD Regulations and the burden that would be placed on athletes to monitor fluctuations and demonstrate that unintentional fluctuations did not impact an athlete's performance.

The Panel noted that the DSD Regulations would therefore have the potential to be disproportionate if their application cannot be implemented fairly by Relevant Athletes.

Discussion points:

- The importance of the legal concept of proportionality in decision making
- Balancing of rights: the rights of 'typical' female athletes to have a chance of winning vs right to have an individual's legal sex and gender identity respected.
- Individual Human rights vs the interest of sport
- Civil and Common Law systems grant sports bodies a margin of appreciation in determining necessity and proportionality regarding legitimate objective and significant freedom in creating regulations deemed in the interest of that sport

¹ CAS 2014/A/3759 *Dutee Chand v AFI & IAAF* – this decision partially upheld Chand's appeal against the AFI's declaration that she was ineligible to compete under the IAAF's Hyperandrogenism Regulations, and the Panel suspended the Hyperandrogenism Regulations for a period of up to two years.



- How do governing bodies use scientific information to implement/create sporting regulations
- The limitations faced by the CAS Panel – whilst recognizing the ethical, scientific and regulatory issues raised in the decision, the role of the Panel is a judicial one and limited to, and framed by, the need to come to a final determination of the disputed legal issues before them.

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