

---

# CASTER SEMENYA V. INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS

CANOC SPORTS LAW CONFERENCE 2019  
ST. VINCENT & THE GRENADINES



# GROUNDS OF DISCRIMINATION: SEX

- **CAS 2018/0/5794 Mokgadi Caster Semenya v. International Association of Athletics Federations**
  - IAAF enacted Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)
  - DSD Regulations restrict eligibility of:
    - Females with certain differences of sex development ("DSD") and levels of endogenous testosterone above 5 nmol/L
  - C suffers from DSD:
    - male chromosomal sex (XY and not XX);
    - male gonads (testes not ovaries); and
    - levels of circulating testosterone in the male range (7.7-29.4 nmol/L)
  - C/other females with DSD prevented from participating in "Restricted Events" at international athletics competitions - 400m, 800m and 1500m events, unless she reduces endogenous testosterone to below 5 nmol/L
    - C argued that Regulations are unfair, discriminatory, arbitrary and disproportionate
      - Regulations only apply (i) to female athletes; and (ii) to female athletes having certain physiological traits.
    - C alleged violation of IAAF Constitution, Olympic Charter, laws of Monaco, the laws of jurisdictions in which international athletics competitions are held, and international human rights instruments

# GROUNDS OF DISCRIMINATION: SEX

- **CAS 2018/0/5794 Mokgadi Caster Semenya v. International Association of Athletics Federations**

- *Semenya's arguments:*

- DSD Regulations are discriminatory because they:

- discriminate on the basis of birth or natural/physical/genetic/biological traits, over which she had no control
- discriminate against female athletes on the basis of sex –
  - they impose thresholds and burdens (e.g. screening for high testosterone, invasive medical examinations, and eligibility restrictions) on female athletes, while no equivalent requirements are applied to male athletes.
- discriminate on the basis of gender by classifying "Relevant Athletes" as "intersex" or as having a male "sport sex", regardless of how the athlete self-identifies and irrespective of how they were born and raised.
- deliberately seek out women with a stereotypically male phenotype, while not targeting women who possess a stereotypically female appearance
- discriminate against female athletes who compete in specific events (namely 400m to 1 mile), while female athletes who compete in shorter or longer events are not subjected to scrutiny under the Regulations
- are not necessary to preserve fair competition within the female category.
  - Success in elite competitive sport is the product of both genetic and environmental factors. DSD are a form of genetic difference that should be celebrated as other genetic differences

# GROUNDS OF DISCRIMINATION: SEX

- *Semenya's arguments:*
  - Studies failed to establish the degree of performance advantage that females with DSD have over females without DSD
  - Studies relied on by the IAAF in support of Regulations are flawed and unreliable.
    - studies were produced by individuals with conflicts of interest and bias (conscious or subconscious) against women who do not conform to a particular socio-cultural view of femininity.
    - studies are rudimentary and lack rigour i.e. significant errors in those data, which vitiate the reliability of data and the IAAF's analysis
- Athletes with DSD are likely to be excluded from competing altogether
  - IAAF's suggestion that they could compete as men is "an insult"
- Regulations provide for intrusive medical assessments that involve examination of female athletes' most intimate body parts (including measurement of the size of the clitoris).
  - This is likely to cause feelings of shame and will undermine the affected athletes' dignity and self-esteem.
- Athletes who are subjected to Regulations will suffer psychological harm caused by public scrutiny, judgement, commentary and social stigmatization.
- Regulations will result in Athletes with DSD undergoing medical treatments with adverse health risks including venous thromboembolism ("VTE"),
  - Medication leads to decreased bone mineral density, significant weight gain, hypotension, renal dysfunction, electrolyte abnormalities, cardiovascular disease and sterility, as well as adverse mental health effects

# GROUNDS OF DISCRIMINATION: SEX

## ■ Findings:

- 46 XY individuals generally have greater lean body mass, larger hearts, higher cardiac output, larger haemoglobin mass and larger VO<sub>2</sub> max than 46 XX individuals.
- **Can DHT have some effect on physical performance?**
  - there was no evidence that DHT had an effect on athletic performance separate to testosterone
    - *“endogenous DHT has either no effect on athletic performance or, at most, has a modest effect, of a different order of magnitude to the effect of endogenous testosterone.”*
- **Do women with 46 XY DSD (such as 5-ARD) have an athletic advantage over other female athletes? and, if so, whether the magnitude of that advantage is capable of subverting fair competition in certain athletic events?**
  - The effect of exogenous testosterone in enhancing athletic performance is not disputed
    - Testosterone binds to the androgen receptors in muscle, skin, bone and bone marrow tissues, thereby stimulating synthesis of muscle, bone and haemoglobin.
    - testosterone is the key determinant of muscle mass/lean body mass and strength in males.
- An androgen-sensitive individual with circulating testosterone between 5 and 10 nmol/L will have an ergogenic advantage both in terms of muscle mass and strength and in terms of levels of circulating haemoglobin over an individual with circulating testosterone below 5 nmol/L

# GROUNDS OF DISCRIMINATION: SEX

## ■ Findings:

- female athletes with 5-ARD and other 46 XY DSD have high levels of circulating testosterone in the male range and that this does result in a significantly enhanced sporting performance ability: it –
  - increases muscle mass and
  - Increases size and levels of circulating haemoglobin.

*“The majority of the Panel further concludes that that enhanced performance ability translates in practice to a significant performance advantage in certain athletics events covered by the DSD Regulations.*

*statistics provide compelling evidence that the physical characteristics associated with 5-ARD give female athletes with that condition a significant and frequently determinative performance advantage over other female athletes who do not have a 46 XY DSD.*

*In reaching this conclusion, the majority of the Panel does not purport to quantify precisely the exact percentage of the performance advantage that elite female athletes with 46 XY DSD have over other female athletes.”*

# GROUNDS OF DISCRIMINATION: SEX

## ■ Findings:

### ■ Do the DSD Regulations constitute discrimination?

- S discharged her onus of establishing prima facie differential treatment based on protected characteristics
  - Regulations only apply to athletes who are recognised at law either as female or intersex
  - Athletes with a male legal sex are therefore not affected by the DSD Regulations
  - within the class of individuals who are legally recognised as female or intersex, the DSD Regulations impose certain eligibility restrictions and conditions on a subset of individuals on the basis of certain biological characteristics
- Regulations are expressly intended to, and do in fact, impose conditions and restrictions on a particular group of individuals on the basis that those individuals:
  - are not legal males; and
  - all possess certain natural biological characteristics that other females and intersex individuals do not possess.
  - Regulations do not impose any conditions or restrictions on individuals who have a male legal sex, or who have a female or intersex legal sex and whose testosterone is above 5 nmol/l
- *“it follows that the DSD Regulations are prima facie discriminatory on grounds of innate biological characteristics.”*

# GROUNDS OF DISCRIMINATION: SEX

- **Are the DSD Regulations necessary?**
- **Legitimate objective**
  - ensuring fair competition in the female category of elite competitive athletics
- **Necessity**
- once it is recognised that it is legitimate to have separate categories of male and female competition, it inevitably follows that it is necessary to devise an objective, fair and effective means of determining which individuals may, and which may not, participate in those categories.

*“the purpose of the male-female divide in competitive athletics is not to protect athletes with a female legal sex from having to compete against athletes with a male legal sex. Nor is it to protect athletes with a female gender identity from having to compete against athletes with a male gender identity. Rather, it is to protect individuals whose bodies have developed in a certain way following puberty from having to compete against individuals who, by virtue of their bodies having developed in a different way following puberty, possess certain physical traits that create such a significant performance advantage that fair competition between the two groups is not possible. In most cases, the former group comprises individuals with a female legal sex and a female gender identity, while the latter group comprises individuals with a male legal sex and male gender identity. However, this is not true of all cases.”*

# GROUNDS OF DISCRIMINATION: SEX

## ■ Findings:

- the necessity criterion can only be established where the evidence establishes to the requisite degree of proof that the *biological factor which is the subject of the regulation confers a sufficiently significant performance advantage in each athletic discipline* that is covered by the regulation.
  - 46 XY 5-ARD athletes have levels of circulating testosterone at the level of the male 46 XY population and not at the level of the female 46 XX population;
  - This gives 46 XY 5-ARD athletes a significant sporting advantage over 46 XX female athletes.
- “*androgen-sensitive women with elevated testosterone levels enjoy a significant performance advantage over other female athletes.*”
  - those athletes consistently beat women who do not have 46 XY DSD.
  - it is not a performance advantage that could fairly be characterised as marginal or minimal.
- “*IAAF discharged its burden of establishing that regulations governing the ability of female athletes with 46XY DSD to participate in certain events are necessary to maintain fair competition in female athletics by ensuring that female athletes who do not enjoy the significant performance advantage caused by exposure to levels of circulating testosterone in the adult male range do not have to compete against female athletes who do enjoy that performance advantage.*”

# GROUNDS OF DISCRIMINATION: SEX

## ■ **Proportionality**

- a. *The effect of the DSD Regulations on society generally*
  - within the relevant segment of society governed by IAAF regulations, these DSD Regulations are necessary and reflect a rational resolution of conflicting human rights.
- b. *The effects of testosterone-suppressing medical treatment*
  - the DSD Regulations can be evaluated in the context of hormonal treatment using contraceptive pills
    - If oral contraceptives were not capable of achieving the result of maintaining the level of testosterone below 5 nmol/L thus requiring an athlete to turn to GnRH agonists or gonadectomy in order to compete a different analysis of proportionality would need to be undertaken.
- The use of oral contraceptives to reduce testosterone levels can cause a range of unwanted side effects
  - E.g. decreased bone density, significant weight gain, hypotension, renal dysfunction, electrolyte abnormalities and venous thromboembolism
- Effects have not been shown to be attributable simply and exclusively to the use of oral contraceptives
  - “requiring 46 XY DSD athletes to take oral contraceptives to lower testosterone in order to compete in the female category in Restricted Events at International Competitions is not, of itself, disproportionate.”
    - “the side effects that may be experienced by such athletes [...] as a result of taking an oral contraceptive do not outweigh the need to give effect to the DSD Regulations in order to attain the legitimate objective of protecting and facilitating fair competition in the female category.”

# GROUNDS OF DISCRIMINATION: SEX

- **c. The effect of requiring Relevant Athletes to undergo intimate medical examinations and assessments of virilisation**
- Examination for virilisation may be unwelcome and distressing even when conducted with due care and sensitivity.
  - *‘in assessing the proportionality of the DSD Regulations the Panel has regard both to the likelihood that Relevant Athletes will undergo undesired examinations and to the possibility that such examinations may in some cases yield the discovery of medical information that is capable of assisting athletes to reach informed decisions about possible necessary medical treatments and of exonerating them from any erroneous finding that they have taken exogenous testosterone.’*
    - Regulations provide that the benefit of any doubt will be resolved in favour of the athlete.
- **d. The risk that the confidentiality of Relevant Athletes will be compromised**
  - the exclusion of athletes from Restricted Events in International Competitions would be likely to render confidentiality meaningless in some cases.
- **e. The application of the DSD Regulations to only the Restricted Events**
- *“The Panel has some concern about the inclusion of two events within the category of Restricted Events on the basis (at least in part) of a speculative assumption that since female athletes who compete successfully in the 800m often also compete successfully in those longer events, it must follow that 46 XY DSD athletes are likely to enjoy a significant performance advantage over other female athletes in those two events.”*

# GROUNDS OF DISCRIMINATION: SEX

- **f. The rationale and effect of the 5 nmol/L threshold**
  - the decision to reduce the testosterone threshold from 10 nmol/L to 5 nmol/L was not arbitrary.
  - 5 nmol/L was rationally selected because it represents the highest level well above the normal female range
    - Testosterone above the 5 nmol/L threshold increases muscle mass, muscle strength, haemoglobin
- **g. The ability of the athlete to maintain a level of testosterone below 5 nmol/L**
  - Concern about unintentional fluctuations in the levels of endogenous testosterone
  - spikes could result in an athlete inadvertently breaching the 5 nmol/L maximum level under the DSD Regulations even if the treatment regime of oral contraceptives designed to reduce the level of testosterone sufficiently was followed diligently.
    - propensity of some women to forget to take the medication on a given day and the possibility of unintentional fluctuation for that reason
    - difficulty for an athlete to monitor their testosterone levels when the results of a test, which may record a fluctuation or uncontrolled spike, would not be available to them until some days later.
    - individual metabolism and other gastro-intestinal issues could affect testosterone levels

# GROUNDS OF DISCRIMINATION: SEX

- If a Relevant Athlete takes the medication as prescribed to lower testosterone and fully complies with that treatment and still has fluctuations over the maximum permitted level, that would, under the DSD Regulations in force at the time of the hearing, still disqualify her from competing in a Restricted Event. It would be an impossible burden for the athlete to demonstrate that such unintentional fluctuations did not impact her performance
- A delay between testing and notification of the results of that testing would mean that the athlete could not respond to any fluctuations that occur immediately before competitions.
  - There is therefore a real risk that an athlete may suffer disqualification - and all of the detrimental consequences this entails - despite using her best endeavours to comply conscientiously with the DSD Regulations.
- “there are the side effects of using medication to lower testosterone levels coupled with the risk of inadvertent fluctuations above the 5 nmol/L threshold and, potentially, the difficulty for an elite athlete in competition to keep their testosterone consistently below 5 nmol/L, to monitor that level adequately in real time and to pay for that monitoring.”
- “the Panel does have concerns as to the maximum level of 5 nmol/L and the practical ability of female athletes with 46 XY DSD to ensure that their levels of testosterone do not exceed that level. These matters will necessarily require oversight by the IAAF to ensure that this requirement is workable in practice.”

# GROUNDS OF DISCRIMINATION: SEX

## ■ Conclusion

- the DSD Regulations are prima facie discriminatory but necessary and reasonable

## ■ CAS's CONCERNS

- “the Panel has some grave concerns as to the future practical application of the DSD Regulations. While the evidence has not established that those concerns are justified, or that they negate the conclusion of ex facie proportionality, this may change in the future unless constant attention is paid to the fairness of how they are implemented.”
- “there are difficulties of implementation of the DSD Regulations and the significance of those difficulties in the context of a maximum permitted level of testosterone of 5 nmol/L rather than 10 nmol/L. The Panel notes the strict liability aspect of the DSD Regulations and repeats its concern as to an athlete's potential inability to remain in compliance with the DSD Regulations in periods of full compliance with treatment protocols, and, more specifically, the resulting consequences of unintentional and unavoidable non-compliance.”
- “the evidence of actual (in contrast to theoretical) significant athletic advantage by a sufficient number of 46 XY DSD athletes in the 1500m and 1 mile events could be described as sparse. The IAAF may consider deferring the application of the DSD Regulations to these events until more evidence is available..”
- “The Panel is precluded by reason of the lack of authorisation by the parties from making a decision ex aequo et bona. It nevertheless considers it appropriate to highlight its concerns with aspects of the DSD Regulations which arose from the submissions and evidence adduced by the parties in these proceedings. The Panel strongly encourages the IAAF to address the Panel's concerns in its implementation of the DSD Regulations.”
  - *“the majority of the Panel observes that it may be that, on implementation and with experience, certain factors, supported by evidence, may be shown to affect the overall proportionality of the DSD Regulations.”*

# THANK YOU!

Jason Haynes

LLB (Hons. UWI), LLM (Dist, UoN), PhD  
(Durham), PGCAP (Durham), LEC (NMLS)

Attorney-at-Law | Legal Consultant

Kingstown, St Vincent and the Grenadines

Bridgetown, Barbados

[hayneslaw@mail.com](mailto:hayneslaw@mail.com) | 1-246-261-5454

J. Tyrone Marcus

Sports Law Consultant | Mediator | Arbitrator

Adjunct Lecturer in Sports Law,

University of the West Indies,

St. Augustine, Trinidad.

[jtm.sportslegal@gmail.com](mailto:jtm.sportslegal@gmail.com) | 1-868-463-6831