



MEDIA RELEASE

ATHLETICS

CAS ARBITRATION: CASTER SEMENYA, ATHLETICS SOUTH AFRICA (ASA) AND INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF): DECISION

Lausanne, 1 May 2019 – The Court of Arbitration for Sport (CAS) has ruled on the requests for arbitration filed by the South African athlete Caster Semenya and Athletics South Africa (ASA) (“the Claimants”) against the International Association of Athletics Federations (IAAF) (collectively, the parties). The arbitration procedures concerned the “IAAF Eligibility Regulations for Female Classification (Athletes with Differences of Sex Development)” (DSD Regulations) that were due to come into effect on 1 November 2018 and which are currently suspended, pending the outcome of the CAS procedures. **The CAS has dismissed both requests for arbitration.**

Caster Semenya and ASA requested that the DSD Regulations be declared invalid and void with immediate effect. They consider them as being discriminatory, unnecessary, unreliable and disproportionate. The IAAF contended that the DSD Regulations do not infringe any athlete’s rights, including the right to equal treatment, but instead are a justified and proportionate means of ensuring consistent treatment, and preserving fair and meaningful competition within the female classification. There is no dispute that there should be a separate classification for female athletes – a binary divide between male and female.

In March/April 2018, the IAAF cancelled its “Hyperandrogenism Regulations”, which had been primarily challenged by the Indian athlete Dutee Chand, and replaced them with the DSD Regulations establishing new requirements governing the eligibility of women with DSD for the female classification in race events from 400m to 1 mile (the “Restricted Events”) at international athletics competitions. The DSD covered by the Regulations are limited to athletes with “46 XY DSD” – i.e. conditions where the affected individual has XY chromosomes. Accordingly, individuals with XX chromosomes are not subject to any restrictions or eligibility conditions under the DSD Regulations.

Athletes with 46 XY DSD have testosterone levels well into the male range (7.7 to 29.4 nmol/L; normal female range being below 2 nmol/L). The DSD Regulations require athletes with 46 XY DSD with a natural testosterone level over 5 nmol/L, and who experience a “material androgenizing effect” from that enhanced testosterone level, to reduce their natural testosterone level to below 5 nmol/L, and to maintain that reduced level for a continuous period of at least six months in order to be eligible to compete in a Restricted Event. Such reduction can be achieved, according to the IAAF evidence, by the use of normal oral contraceptives.

In June 2018, Caster Semenya and ASA filed their respective requests for arbitration at the CAS against the DSD Regulations adopted by the IAAF. The proceedings were conducted by the Hon. Dr. Annabelle Bennett (Australia), President, the Hon. Hugh L. Fraser (Canada) and Dr. Hans Nater



(Switzerland) who heard the parties, their witnesses and experts (specialising in gynaecology, andrology and the causes, diagnosis, effects and treatment of DSD; genetics, endocrinology and pharmacology; exercise physiology and sports performance; medical and research ethics; sports regulation and governance; and statistics) in Lausanne, Switzerland, from 18 to 22 February 2019. After the hearing, the parties filed additional submissions and materials and agreed to postpone the issuance of the CAS award until the end of April 2019.

By majority, the CAS Panel has dismissed the requests for arbitration considering that the Claimants were unable to establish that the DSD Regulations were “invalid”. The Panel found that the DSD Regulations are discriminatory but the majority of the Panel found that, on the basis of the evidence submitted by the parties, such discrimination is a necessary, reasonable and proportionate means of achieving the IAAF’s aim of preserving the integrity of female athletics in the Restricted Events.

However, in a 165-page award, the CAS Panel expressed some serious concerns as to the future practical application of these DSD Regulations. While the evidence available so far has not established that those concerns negate the conclusion of *prima facie* proportionality, this may change in the future unless constant attention is paid to the fairness of how the Regulations are implemented.

In this regard, reference has been made to the following main issues:

- 1) The difficulties of implementation of the DSD Regulations in the context of a maximum permitted level of testosterone. The Panel noted the strict liability aspect of the DSD Regulations and expressed 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 non-compliance.
- 2) The difficulty to rely on concrete 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. The CAS Panel suggested that the IAAF consider deferring the application of the DSD Regulations to these events until more evidence is available.
- 3) The side effects of hormonal treatment, experienced by individual athletes could, with further evidence, demonstrate the practical impossibility of compliance which could, in turn, lead to a different conclusion as to the proportionality of the DSD Regulations.

The CAS Panel was restrained in its task, due to the strict framework of the arbitration, to solely determine whether the DSD Regulations were invalid or not. It nevertheless considered it appropriate to highlight its concerns with aspects of the DSD Regulations which arose from the submissions and evidence adduced by the parties during the CAS proceedings. The CAS Panel strongly encouraged the IAAF to address these concerns when implementing the DSD Regulations, bearing in mind that the DSD Regulations are a “living document”, as asserted by the IAAF itself. Indeed, it may be that, on implementation and with experience, certain factors may be shown to affect the overall proportionality of the DSD Regulations, either by indicating that amendments are required in order to ensure that the Regulations are capable of being applied proportionately, or by providing further support for or against the inclusion of particular events within the category of Restricted Events.

The full award with reasons remains confidential for the moment but an executive summary will be published by the CAS shortly. The CAS award may be appealed at the Swiss Federal Tribunal within 30 days.