What Could the European Court's Ruling on the Rights of Intersex Athletes Mean for Trans Athletes?

article, sports and physical activity, intersex

In July 2023, the European Court of Human Rights (ECtHR) ruled in favour of Caster Semenya. This ruling confirmed that 'sex characteristics' is a protected ground against discrimination under Article 14 of the European Convention on Human Rights.

TGEU welcomes this important decision in *Caster Semenya v. Switzerland*, and its significance for intersex athletes. It is especially important, as it comes at a time when the participation of women and girls, including trans women, is a topic of intense debate.

While this case is not explicitly about trans people, some of the factors involved continue to affect trans athletes. We'll look at what this ruling brings to the debate, and how it might influence regulations of trans women's participation in sports.

What is the Caster Semenya v. Switzerland case?

Caster Semenya is an internationally renowned South African athlete and an Olympic gold medalist. Following her victory at the 2009 Athletics World Championships, Semenya was subjected to a gender verification test. This test was called for under the then existing regulations of the World Athletics, the governing body for international athletic competitions.

Following the test, she was asked to take hormonal medication to reduce her testosterone levels if she wanted to compete in future international competitions. She complied, and continued to compete at the international level.

However, in 2015, these regulations were suspended by the Court of Arbitration in Sport (CAS) because of a legal challenge initiated by Indian athlete, Dutee Chand. In 2018, World Athletics published revised guidelines, "Regulations Governing Qualifications in the Female Category (for athletes with differences in sex development)". This is widely referred to as the DSD Regulations. These regulations require athletes suspected of high testosterone levels to bring their testosterone down to 5 nmol/L.

Semenya refused to comply with the DSD Regulations. She argued that the side effects of reducing naturally occurring testosterone levels is unknown. She started arbitration proceedings before the CAS. This time, the CAS found that the DSD Regulations were a reasonable and necessary measure to ensure fair participation in women's athletics competitions.

Semenya challenged this decision again before the Swiss Federal Supreme Court. She claimed discrimination on the basis of sex, among other grounds. The Swiss Federal Court upheld CAS's decision and held that the regulations are valid.

Semenya then approached the ECtHR. She claimed a violation of her Convention rights under:

1. Article 3 – prohibition of torture
2. Article 6 – right to a fair trial

3. Article 8 – right to respect for private and family life
4. Article 13 – right to an effective remedy
5. Article 14 – prohibition of discrimination.

The ECtHR's decision: in favour of intersex athletes

The ECtHR found a violation of Semenya's:

- Right to non-discrimination based on sex and sex characteristics (Article 14)
- Right to private life (Article 8)
- Right to an effective remedy (Article 6 and 13).

It found that there was no violation of the right against torture, inhumane, and degrading treatment (Article 3).

The ECtHR held that:

1. Semenya was wrongly excluded from taking part in competitions in the female category because of the DSD Regulations.
2. The medical interventions to reduce naturally occurring testosterone levels had side-effects on her health.
3. There were insufficient procedural and institutional safeguards for her human rights. Her discrimination claim was not effectively examined by the Swiss Federal court.

Significantly, the ECtHR emphasised that athletes have human rights, and they should have access to processes to protect these rights.

It also noted the coercive nature of the choice presented to athletes under the DSD Regulations – comply or lose the ability to compete in sports and the source of livelihood.

What is the outcome of this case?

Semenya was awarded compensation by the ECtHR. However, the DSD Regulations remain valid and operational.

What does this decision mean for transgender athletes?

The decision acknowledged that Semenya's case is distinct from that of a trans athlete.

The ECtHR observed that the participation of trans athletes in international competitions was governed by different regulations – World Athletics' "Rules Governing the Eligibility of Transgender Athletes 2019". It imposes a similar requirement that athletes competing in international women's sports must maintain testosterone levels of less than 5 nmol/L for at least 12 continuous months before competing. They must maintain this testosterone level for as long as they wish to participate in international women's competitions.

The ECtHR clarified that this is the same requirement that the DSD Regulations impose. However, the reason for treating trans and intersex athletes the same is not self-evident because in the case of trans women, any sporting advantage is due to biological constitution because they were born as the male sex. To quote the court:

"Without wishing to prejudge any future cases before it, it simply observes at this stage that, in the case of transgender sportswomen, the advantage they enjoy is due to the inequality inherent in their birth as men (Perruchoud, op. cit., p. 225)…and, moreover, the treatment they are asked to undergo to lower their testosterone

levels corresponds to an adaptation of the treatment already prescribed to them."

The court is clear that its comments will not affect any future outcomes on this issue. However, the emphasis of this case, as well as cases against the inclusion of trans women in women's sports continues to be testosterone levels. This persists even though studies show there is no clear correlation between testosterone levels and physical abilities.

The concurring opinion of Judge Pavli, however, makes important observations on the role of the court in such cases. The opinion reiterates that athletes are entitled to fundamental rights. It continues that it is the court's responsibility to examine whether the solutions implemented to include (or exclude) athletes from certain categories respect their fundamental rights and freedoms. The opinion emphasises that it is within the court's remit to examine the measures taken by sporting bodies and how those means affect athletes' rights.

What are the current World Athletics regulations on trans athletes?

In 2023, World Athletics introduced new regulations governing all transgender athletes. These replaced the 2019 Regulations referred to by the ECtHR.

Under the new regulations, trans male athletes who wish to participate in the male category need to provide a written declaration that their gender identity is male. Once it's reviewed, they are permitted to participate through a written certification.

However, the regulations are much more strict for trans women. All trans women who have been through male puberty are excluded from female World Ranking competitions. Any trans woman who wants to participate in the female category must meet three conditions:

1. Provide a written and signed declaration that their gender identity is female.
2. Not have experienced male puberty beyond Tanner Stage 2 or 12 years of age, whichever is earlier.
3. Since puberty, they must have continuously maintained a testosterone concentration below 2.5 nmol/L.

In other words, testosterone levels continue to be the main basis for inclusion or exclusion of trans women in professional sports. This is the case even though the relationship between testosterone levels and sporting proficiency is not established.

The World Athletics also acknowledged that they have no athletics-specific evidence of any advantage of trans athletes that would impact the fairness of competitions. Regardless, they '*decided to prioritise fairness and integrity of the female competition before inclusion*'.

More resources

The court referred to the recent reports of the Parliamentary Assembly of the Council of Europe and the Office of the High Commissioner of Human Rights which have expressed concern about the exclusion of women in the sports domain based on similar regulations. These provide a good overview of the human rights concerns at stake.

Together with other LGBTI networks, TGEU wrote a report on LBTI women's experiences in sports. This provides a summary of the key concerns from the perspective of activists and civil society.