ENTERTAINMENT AND SPORTS LAW JOURNAL

Cooper, J. 2025. Intervention: Semenya v Switzerland (European Court of Human Rights, Grand Chamber), No. 10934/21, July 10, 2025. *Entertainment and Sports Law Journal*, 23(1): 7, pp. 1–6. DOI: https://doi.org/10.16997/eslj.1985

ARTICLE

Intervention: Semenya v Switzerland (European Court of Human Rights, Grand Chamber), No. 10934/21, July 10, 2025

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Caster Semenya began her legal claim against the International Association of Athletics Federations (IAAF) regarding the discriminatory effect of the the Female Eligibility Regulations in Athletics (the 'DSD Regulations') in June 2018. Since then seven years have passed, the IAAF has change its name to World Athletics and arguments have been made in front of a Court of Arbitration for Sport (CAS) arbitration panel, the Swiss Federal Supreme Court (SFSC) and twice before the European Court of Human Rights (ECtHR).

On July 10th 2025, a full two years after the first decision by the ECtHR had found Switzerland in breach of its positive obligations regarding the protection of Caster Semenya's human rights, the Grand Chamber handed down the final judgment in the lengthy legal saga. The interim has seen a proliferation in regulations restricting the ability of athletes with sexual variations and transgender athletes from competing. In upholding the finding that Switzerland had failed in its obligations to protect Caster Semenya's human rights, the Grand Chamber appears to have recognised that the *status quo* regarding how the sporting justice system deals with human rights claims has to change. Moroever, the decision seems to recognise that the peculiar context of sports governance and sports arbitration requires more careful scrutiny of the decisions of sports governing bodies. This intervention provides an initial analysis of the Grand Chamber decision and questions whether the majority judgment provides sufficient clarity to ensure that such change will happen.

Keywords: Human Rights; sex variations; sport; fair competition; inclusion; safeguards; sport; proportionality; inclusion; sex variations; intersex; fair competition; safeguards

Introduction

The participation of female athletes with variations in sexual characteristics (VSC) and trans female athletes in female sport is an issue that raises strong feelings and opinions. It seems to have become somewhat of a lens through which wider concerns and perspectives about the binary reality of sex are magnified and disputed. In such an environment, there seems to have been an increasing trend towards more restrictive regulation of participation of such athletes by sport's governing bodies (SGBs). For example, the recent reaction of some UK SGBs to the decision of the Supreme Court in *For Women Scotland Ltd v The Scottish Ministers* (Supreme Court, 2025) was to immediately prohibit trans female athletes from participating in female competition (The Football Association, 2025; The England Cricket Board, 2025). The increasingly restrictive approach to permitting access to sport for athletes with VSCs with little additional justification was also a point raised by one of the third-party intervenors in Grand Chamber hearing, which is the focus of this article (ECtHR, 2025, para. 183).

Yet it was only in July 2023 that the ECtHR recognised the need for Switzerland, as the seat of the Court of Arbitration for Sport (CAS), to ensure appropriate safeguards for the protection of the human rights of an athlete with a VSC who was faced with restrictions on their ability to compete (*Semenya v Switzerland*, ECtHR, 2023).[1] Moreover, in that judgment the majority made critical observations both about the lack of scrutiny that the Swiss Federal Supreme Court (SFSC) had undertaken in reviewing the decision of World Athletics (WA) to introduce the DSD Regulations, and, by extension the decision of WA itself (Cooper, 2023(b)). Given the case also raised important wider issues concerning the role of the SFSC and Switzerland as a protector of human rights in a sporting context, the suitability of the sporting justice system as currently realised as well the governmental autonomy of International Sporting Federation (ISFs) and SGBs more generally, it was not surprising that the Swiss government made an application to have the case reconsidered by the Grand Chamber. It seems likely that the wait for the final decision of the Grand Chamber has muted the influence and impact of the original judgment of the Third Section and, perhaps, contributed to the more restrictive

approaches of SGBs. In any event, a full two years later, the Grand Chamber has finally handed down its judgment, representing the end of Caster Semenya's legal journey and, possibly, some increased clarity about the requirements of substantive human rights norms when they clash with sporting regulation.

This article won't recite the background to the decision or the introduction of the DSD Regulations, since a great deal has been written on this (Holzer, 2020; Kakarzis et. al., 2018; Krech 2017 & 2019; Cooper, 2019). However, it is worth remembering that the DSD Regulations were introduced by the IAAF to ensure fair competition within the female category and that they ultimately required affected athletes to make a choice between undergoing permanent surgery or taking medication to reduce testosterone levels or stopping competing in the events covered by them. This was in the context of disputed evidence about what advantage those affected athletes actually enjoyed over 'typical' females and with very little evidence of the impact of medication on those with VSCs. Before turning to the Grand Chamber decision, it is worth highlighting the key aspects of the earlier decision of the Third Section.

The Judgment of the Third Section

One particularly significant aspect of the Third Section's majority judgment[2] was recognition that the positive obligations of Switzerland, as the seat of the Court of Arbitration for Sport, extended to the protection of substantive Convention rights of athletes (in the case, Article 8, Article 14 and Article 13), despite the fact that Switzerland had no direct control over the sporting regulations at issue and the applicant, Caster Semenya, had no particular connection to Switzerland. The DSD Regulations were created by the IAAF, a legal entity domiciled in Monaco, over which Switzerland had no direct influence. The athlete's only connection to Switzerland was that she had (and might again) compete there. This was, arguably, a significant extension of the court's principles recognising when the obligations of states arise outside of acts within their territory. This somewhat controversial extension was primarily justified by reference to the forced nature of sporting arbitration, the limited forums for accessing justice that result, and, ultimately, the possibility that failure to accept jurisdiction would result in 'an entire category of persons' being ostracised from the protection of the Convention, something irreconcilable with its fundamental nature (ECtHR, 2023, para. 111).

Regarding the merits of the case, the Third Section found that there had been a breach of Article 14 in conjunction with Article 8 (discrimination as to private life) and Article 13 (lack of remedy). Put simply, Switzerland had failed in its positive obligations to prevent discrimination within its jurisdiction because the 'institutional and procedural safeguards' represented by the SFSC oversight of CAS judgments lacked rigour (ECtHR, 2023, para. 166). Specifically, the SFSC had failed to sufficiently consider the extent and nature of the different interests at stake nor the contextual factors relevant to sports governance[3] and the sporting justice system.[4] As a result, it had failed to undertake a genuine balancing assessment that provided rational and transparent reasons and considered relevant ECtHR case law, and in so doing, had presumably failed to guide the CAS on the need to do so. The conclusion on access to remedy followed. In the eyes of the majority, the sports justice system as realised provided only a theoretical access to justice in human rights cases. This was insufficient and access needed to be real and practical (ECtHR, 2023, para. 194–195). The system needed to ensure a sufficient intensity of review so that decisions of CAS arbitration panels (and SGBs) are more than minimally rational (ECtHR, 2023, para. 233).

The Decision of the Grand Chamber

Jurisdiction

Although there were some dissenting opinions, the vast majority of the Grand Chamber[5] were unwilling to follow the Third Section's approach to jurisdiction on substantive rights issues. In their view, extending the ability of the ECtHR to consider substantive rights claims where the state party had no control over the acts complained of was a step too far (ECtHR, 2025, para. 145–147). The exceptional 'extra-territorial' jurisdiction recognised in previous case law related to Article 2 concerning the need to carry out effective investigations into unlawful killings and was irrelevant (ECtHR, 2025, para. 142). Extending the court's jurisdiction to cover *any* athlete simply because the CAS is based in Switzerland, and thereby disregarding where the facts leading to the complaint had occurred, had no basis in ECtHR case law (ECtHR, 2025, para. 150).

However, the whole court recognised that it did have jurisdiction to consider the applicant's complaint under Article 6 (right to a fair trial). It made clear that, where a purely procedural right like Article 6 is concerned, the obligations on states to safeguard those procedural rights will be triggered simply by the state court accepting jurisdiction to hear the case; provided it relates to a right under domestic law, is a genuine and serious claim and the result of the proceedings is decisive in determining rights and obligations. As the SFSC had recognised Caster Semenya's case *did* concern domestic civil rights recognised by the Swiss Civil Code, it was clear the claim raised serious legal issues and the SFSC's judgment was decisive, Article 6 protections were triggered (ECtHR, 2025, para. 158). In fact, this was not a contentious point, since the government conceded that there was a jurisdictional link to it for the purposes of Article 6 (ECtHR, 2025, para. 156).

Merits of the case and the protections of athletes under Article 6

Perhaps the most interesting and significant part of the judgment related to what the right to a fair trial encompassed in the context of forced arbitration in sport. The majority started its assessment by stating that its only obligation was "to examine whether specific procedural safeguards laid down in Article 6 have been met or that conduct of the proceedings as a whole did not guarantee the applicant a fair hearing" (ECtHR, 2025, para. 193).

Turning to what constituted a fair hearing, the majority noted that concept of a fair hearing includes the right to submit whatever arguments the applicant wishes and to have them "heard" (ECtHR, 2025, para. 194). This means not only must an applicant be allowed to put their perspective across, but that there must also be a "proper examination of the arguments and the evidence" and the court must respond to key arguments, providing reasons for their decisions (ECtHR, 2025, para. 194).

From this logical building block, the majority then recognised that where arbitration was voluntarily entered, as in a typical commercial context, Article 6 protections were largely irrelevant (ECtHR, 2025, para. 197). The voluntary acceptance of arbitration acts as a waiver of the protection afforded by Article 6. Seemingly, anyone is free to agree to have their legal rights and obligations determined by the toss of a coin if they wish or even by the arbitrary whim of a third party: but that choice must be freely made. However, where arbitration is forced (as it very often is in the sports justice system), and even if the forced nature has potential benefits,[6] the protections offered by Article 6 cannot be ignored (ECtHR, 2025, para. 198–199). More generally, it also pointed out that when the claimed 'civil' rights in dispute resonate with fundamental rights protected by the Convention, then the protections of Article 6 become yet more important (ECtHR, 2025, para. 206).

Moreover, the court went on to point out additional reasons why the protections of Article 6 are especially important in a sporting context (ECtHR, 2025, para. 205). First, although Article 6 is not infringed simply because forced arbitration in sport emanates from something other than 'law',[7] the lack of a national, democratic context for the creation of regulations was clearly viewed as important (ECtHR, 2025, para. 199). Second, it noted the pyramidic, hierarchical structure of sports governance models and the resulting structural imbalance between athletes at the bottom and ISFs at the top creates an environment that leaves athletes vulnerable (ECtHR, 2025, para. 200). Third, it recognised that despite not being public bodies, the monopolistic traits of SGBs result in them wielding *de facto* power to restrict fundamental rights and, thereby, exercising "powers close to that of a public body" (ECtHR, 2025, para. 202).

Accordingly, the majority came to the clear conclusion that where sports and human rights are concerned and where forced arbitration limits forums for accessing justice, "respect for an individual's right to a fair trial requires a **particularly rigorous examination** of [the applicant's] case" (ECtHR, 2025, para. 209).[8] In the court's later summing up, it described the requirement as an "in depth judicial review – commensurate with the seriousness of the personal rights at issue" (ECtHR, 2025, para. 238).

As recognised in the dissenting joint opinion of judges Eicke and Kucsko-Stadlmayer, what this seems to amount to is the introduction of a new understanding of what the right to a fair trial demands, all be it limited to the unique sports justice context; namely, the need for both the CAS and the SFSC to undertake "an in-depth proportionality analysis" (ECtHR, 2025, p. 119, para. 9) of the decisions of SGBs and ISFs that impact fundamental rights in a potentially significant way.

The compatibility of an in-depth proportionality analysis with the Swiss concept of 'offending public policy'

One consequence of demanding an in-depth proportionality analysis of the SFSC is that it clashes with the previously settled understanding of the role of the SFSC in overseeing international arbitration[9] and, therefore, would seem to interfere with the jurisdiction of domestic courts.[10] In this regard, the majority judgment was careful managing this apparent collision. It recognised that the SFSC's oversight is limited by the basis on which it can review the merits of international arbitration awards and is interminably linked to the concept of what offends Swiss 'public policy.'[11] It also accepted that this concept has previously been so narrowly construed that it requires something beyond arbitrariness in decision making for the SFSC to reject an arbitration panel's decision (ECtHR, 2025, para. 226). As evidence of how narrow a requirement this is to satisfy, the majority pointed to the fact that only one CAS judgment, *Francelino da Silva Matuzalem v Fédération Internationale de Football Association* (SFSC, 2012) has ever been held to offend public policy (ECtHR, 2025 paras. 227, 235 & 53–54).

However, notwithstanding such concerns, the majority clearly felt that 'offending public policy' had scope to accommodate a wider approach in the sporting arbitration context without unduly interfering with the settled understanding in other contexts (ECtHR, 2025 para. 238). Whilst the majority did not explicitly say so, the implication must be that, unlike voluntary arbitration where the possibility of arbitrariness in determining rights is permitted by the express consent of the parties, forced sporting arbitration requires a wider understanding of 'public policy' to ensure the protections of Article 6—one that does not tolerate arbitrariness.

Application to the Semenya *case*

With the requirement for 'particular rigour' established, the majority then went on to consider whether the SFSC satisfied that requirement in *Semenya v IAAF.*

They approached this question by highlighting aspects of the CAS decision that expressed reservations about the proportionality of the DSD Regulations,[12] or where it felt the CAS should have been more sceptical[13] and then asked why the SFSC had not conducted a more rigorous examination of the reasoning on those aspects. From the perspective of legal precedent, the judgment also noted the SFSC's rejection of Caster Semenya's key arguments without much apparent justification. In particular, the majority seemed to find it difficult to understand why the SFSC had rejected the argument that her case was similar to *Matuzalem* since it demonstrated some significant *prima facie* similarities.[14] Moreover, the majority criticised the SFSC for dismissing the inevitable consequence of redefining an individual's

self-understood identity that the DSD Regulations entailed. In this respect, the SFSC had seemed to simply accept such an interference with a person's dignity as an unfortunate and inevitable side effect of policing the female category and thus failed to evaluate carefully the actual human rights infringements and, presumably, whether they were necessary or proportionate.

In light of these failings, the majority concluded that there had been a breach of Article 6.

Analysis

The voluntary nature of arbitration is a major reason justifying exempting arbitral decisions from the need for close scrutiny by domestic courts. In essence, by agreeing to submit to a private mechanism for ascertaining legal rights and obligations, parties *choose* to waive their right to insist on a rational basis for decision making. It is suggested that this is what underpins such a traditionally narrow understanding of what 'offends the public policy' of Switzerland under PILA and the extremely narrow basis of the SFSC's resulting review. The traditional perspective in a sporting context seems to have been that an athlete's choice as to whether to participate in the sport at all is sufficient 'agreement' to have legal rights and duties resolved in this way; like any other sporting rule, athletes can simply walk away if they don't like it. However, as argued previously in the context of elite athletes, such a choice is largely illusory: by the time athletes have invested sufficient time and effort to get to the pinnacle,[15] the time to 'choose' has been and gone (Cooper 2023(a)). Not surprisingly, in the author's opinion, the Grand Chamber has followed the Third Section in recognising that such a justification does not have anywhere near the same force in a sporting context and is insufficient to warrant such a 'light touch' approach. Accordingly, it seems clear that for Switzerland to fulfil its Article 6 obligations in respect of arbitration involving sport and human rights in the future, the SFSC will have to embrace a wider understanding of what it means to 'offend the public policy' of Switzerland.

In commenting on the decision of the Third Section, this author suggested that a major focus of any reference to the Grand Chamber would be on concerns about increasing the scope of the ECtHR's jurisdiction beyond rights to a fair trial in arbitration cases. However, it was also suggested that it would be difficult for the Grand Chamber to ignore the underpinning problem of forced choice when it results in a whole category of people having reduced protection of fundamental rights (Cooper, 2023(b)). By recognising what appears to be new understanding of the meaning of a right to a fair trial specific to a sport and human rights context, the ECtHR appears to have grasped for a pragmatic solution that speaks to both concerns. The result is to demand a more intensive approach to the scrutiny of the decisions of SGBs and ISFs where they impact fundamental rights of athletes. In this respect, it closely resembles the outcome of the Third Chamber judgment, although reached by a different route and backed by a much larger majority of the court.[16] Given that most of the relevant convention rights are qualified, providing scope for infringement justification, it is suggested that this will involve a lot of 'heavy lifting' for the doctrine of proportionality.[17]

Whilst four judges in the Grand Chamber questioned the majority's refusal to consider Miss Semenya's substantive right claims (ECtHR, 2025, pp. 113–116), it is suggested that at the heart of such concerns is ensuring athletes complaints are taken seriously and are 'heard'. In this regard, what seems crucial is the future role of the SFSC in ensuring that a sufficiently intensive review of the proportionality of the original decision of the ISF or SGB has been conducted by the CAS panel. As the author has previously argued, perhaps prematurely in relation to the decision of the Third Section, the base line for rational explanation and justification of decision making would appear to have increased (Cooper, 2023 (b)), a point that seems to have now been reinforced by the Grand Chamber decision.

What is conspicuous by its absence from the Grand Chamber decision was any detailed or systematic guidance on how to assess the appropriate intensity of the proportionality analysis in a given case or what that assessment means for the analysis that follows. For example, regarding the first of those concerns, it does not seem totally clear from the judgment whether the majority was suggesting a particularly rigorous examination is now the default position in all forced sports arbitration or whether the particularly significant interferences with core human rights caused by the DSD Regulations was a special case and whether, in cases where rights infringements speak less clearly to the core values of the convention, a less intensive approach would be appropriate.

Regarding the second, other than to recognise the CAS applied broadly similar criteria to those used by the ECtHR in discrimination cases, there was little analysis of the SFSCs or the CAS panel's approach to the proportionality analysis. There was no systematic consideration of whether the SFSC had scrutinised CAS's reasons for accepting the aim of the regulations was legitimate, whether the regulations could achieve the aim, and whether the solution employed to achieve fair competition was necessary and, overall, proportionate. Instead, the judgment focussed on individual aspects of the CAS decision that the majority felt needed more careful thought by the SFSC with no real reference to the framework of the proportionality doctrine. Consequently, there was little in the way of a blueprint offered as to how to provide a coherent, systematic and transparent approach to the whole question of proportionality in a sport and human rights context more generally.

Moreover, there was some less than helpful, slightly contrary views expressed. For example, at the outset of its assessment the court seemed to be at pains to make clear that Article 6 cannot result in the ECtHR dictating to domestic courts how to assess evidence and what weight to give to different factors in a particular case, nor lay down rules about the burden (and presumably the standard) of proof (ECtHR, 2025, para. 193). If this is true, then there is a danger that a proportionality analysis might well amount to simply ensuring that relevant factors have been considered,

a situation that does not sit easily with a 'particularly rigorous examination'. In contrast, later in the judgment the majority seemed to suggest that although the SFSC and the CAS had considered the human rights consequences on the athlete, it had not accorded sufficient weight to the severity of the infringements from the athlete's perspective (ECtHR, 2025, para. 236).

It is argued that in highlighting the problematic specificities of the sports governance and justice environment which it did, the Grand Chamber was recognising the need for an approach that is especially protective of athletes as a potentially vulnerable group and, possibly, of athletes with VSC's as an even more vulnerable sub-group. Yet, its rather peripheral consideration of proportionality feels like a good deal of scope has been left for reinterpretation of what a 'particularly rigorous examination' entails in practice. The real danger is that it will take another athlete to stick their head above the parapet and a further seven years of legal wrangling to get further clarification. In the meantime, SGBs and ISFs may well move the goalposts by altering the regulations once again.

The end of Caster Semenya's lengthy legal battle has ultimately resulted in a victory, all be it one that provides little benefit for her directly. As evidenced by making no claim for damages, her perseverance has been in pursuit of better treatment for others at the hands of ISFs and the sports justice system and, ultimately, to allow others in her position to realise their potential, an opportunity she has been denied (ECtHR, 2025, para. 241). The key question, of course, is what influence the victory will have 'downstream' on the future approaches of the SFSC, the CAS and ultimately ISFs and SGBs. In addition to concerns over the meaning of a 'particularly rigorous examination', this will depend to a large degree on how complaint the SFSC and the CAS are in implementing more stringent scrutiny and whether they are competent to do so. In this respect, it should be noted that the court was asked to consider underlying concerns about the independence of the CAS, but unfortunately such concerns were largely brushed under the carpet by Grand Chamber.[18]

As indicated in the introduction, the effect of Third Section decision has been largely negligible. It will be interesting to see whether the Grand Chamber decision will have any more impact, or whether the distance between ISFs and the judgments of the ECtHR both in terms of time and legal accountability is enough for any downstream effects to remain rather muted.

Notes

[1] The specific regulations in question being The International Association of Athletic Federation (IAAF)'s 'Eligibility Regulations for the Female Classification (Athletes with Differences in Sexual Development)', better known as the DSD Regulations. As the IAAF is now known as World Athletics, reference will be made to World Athletics hereafter.

[2] The decision was a four to three majority.

[3] For example, it had not properly considered the monopolistic nature of the World Athletics' power and the inherent imbalance between it and affected athletes.

[4] The forced nature of arbitration and the important differences from 'purely' commercial arbitration.

[5] Thirteen votes to four (ECtHR, 2025, para. 245).

[6] such as speed, cost and certainty.

[7] In the sense that 'law' is seen as resulting from legitimate democratic machinations of a state.

[8] Emphasis and words in square brackets added.

[9] and, as argued by the UK, internationally understood norms in international arbitration (ECtHR, 2025, para. 175).

[10] This seemed to be the crux of the two dissenting opinions on this point.

[11] Briefly, the relevant Swiss legislative provisions (Sections 190–192 of the Federal Law on Private International Law – "PILA") only permit review of the substantive decisions of international arbitration panels on one ground: the applicant has to demonstrate that the decisions of the panel 'disregard the essential and widely recognised values which, according to the prevailing conceptions in Switzerland, should form the basis of any legal order' (SFSC, 2019, para 9.1).

[12] For example, there were clear reservations about whether an athlete would be able to maintain their testosterone levels effectively (ECtHR, 2025 para. 229–231) and concerns about the evidence for including certain events in the regulations ((ECtHR, 2025 para. 232–233).

[13] For, example, the fact that the CAS had recognised confidentiality about athletes' ineligibility was unrealistic and, therefore, the public questioning of their identity was an inevitable consequence of the regulations.

[14] As indicated above, this being the only case (of fourty applications) in which the SFSC has ever found a CAS decision to be incompatible with the substantive public policy of Switzerland (ECtHR, 2025 para. 32).

[15] Where sport becomes the vehicle for making a living and realising an individual's economic personality.

[16] Fifteen to two.

[17] Even where claims are made under rights that are considered absolute, such as a right to dignity, it seems that the preference of the ECtHR is to analyse the issues in such a way as to allow for the possibility of justification (see Cooper, 2023(c)).

[18] The issue of the independence of CAS was raised by a third party intervener (Antoine Duval, Cesare P. R. Romano & Faraz Shahlei (ECtHR, 2025, para. 184). Although it was largely ignored by the majority, the issue was picked up in the partly concurring opinion of Judge Simackova, (ECtHR, 2025, pp. 106–112). See also Duval, 2025.

Competing Interests

The author has no competing interests to declare.

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How to cite this article: Cooper, J. 2025. Intervention: Semenya v Switzerland (European Court of Human Rights, Grand Chamber), No. 10934/21, July 10, 2025. *Entertainment and Sports Law Journal*, 23(1): 7, pp. 1–6. DOI: https://doi.org/10.16997/eslj.1985

Submitted: 22 July 2025 **Accepted:** 24 July 2025 **Published:** 29 September 2025

Entertainment and Sports Law Journal is a peer-reviewed open access journal published by University of Westminster Press.

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