Around the World

Switzerland

CASTER SEMENYA UNSUCCESSFULLY FOUGHT THE CAS AWARD CONFIRMING THE IAAF ELIGIBILITY REGULATIONS

Federal Supreme Court decisions 4A_248/2019 and 4A_398/2019 of 25 August 2020

Discrimination; Eligibility; Gender; Human rights; Sportspersons; Women

Facts

Caster Semenya, a well-known and very successful South African athlete specialising in middle-distance running, is an intersex cisgender woman, assigned female at birth and legally recognised and socialised as a female, with XY chromosomes and naturally elevated testosterone levels (source of those descriptive elements that are not mentioned in the judgment: Wikipedia). Since 2009, the year of her appearance at international top level, there have been many discussions on whether she was eligible to participate in competitions in the female division and, if so, in principle whether she had to fulfil certain medical prerequisites to do so. The main issue was whether she had to artificially lower her testosterone levels, which was a temporary qualification prerequisite in the past decade. The details have been debated widely and are not repeated here.

In 2018, the International Association of Athletics Federation (IAAF) introduced new eligibility regulations for the female classification for athletes with differences of sex development (Eligibility Regulations). Pursuant to Section 1.1 of the Eligibility Regulations, they aim to "ensure fair and meaningful competition in the sport of athletics" by organising competition "within categories that create a level playing field and ensure that success is determined by talent, dedication, hard work, and the other values and characteristics that the sport embodies and celebrates" but "to place conditions on the participation of athletes with differences of sex development (DSD) only to the extent necessary to ensure fair and meaningful competition". As "[t]here is a broad medical and scientific consensus … that the high levels of endogenous testosterone circulating in athletes with certain DSDs can significantly enhance their sporting performance", the Eligibility Regulations define eligibility conditions to be met for such athletes to compete in the female classification in specified events. Namely, Section 2.3 of the Eligibility Rules state that an athlete with DSD wishing to compete in such events "must reduce her blood testosterone level to below five (5) nmol/L for a continuous period of at least six months" and thereafter "must maintain her blood testosterone level below five (5) nmol/L continuously (i.e., whether she is in competition or out of competition) for so long as she wishes to maintain eligibility to compete in the female classification" in such events.

Subsequently, Caster Semenya and Athletics South Africa (ASA) initiated arbitration proceedings with the Court of Arbitration for Sports (CAS) against IAAF, contesting the validity of the Eligibility Rules. After very intense arbitral proceedings, by award dated 30 April 2019 (Award), the CAS dismissed the requests filed, analysing and balancing all interests concerned and weighing the interests of all athletes to be exposed to a level playing field higher than the interests of athletes with DSD to be eligible to compete in the female division without having to artificially reduce their testosterone level. Much has been written about this decision (see e.g. ISLR 3/2019 pp.66 et seq. and ISLR 4/2019 pp.83 et seq., where counsel to both sides commented on the Award), and the authors will refrain from taking up a detailed discussion about the Award for this reason.

Caster Semenya and ASA both appealed the Award to the Federal Supreme Court (FSC) and requested that it be set aside. They argued mainly (i) that the CAS had incorrectly limited its powers as to the review of the Eligibility Regulations and therefore was to be regarded as improperly constituted and had breached the parties' right to be heard, and (ii) that the CAS had violated three aspects of public policy (*ordre public*), namely that it had passed its award in a discriminatory manner, that it had breached Caster Semenya's personality rights and that it had disregarded human dignity.

Held

Beginning with the formal issues, the FSC initially confirmed that not only Caster Semenya being an athlete directly concerned by the Eligibility Rules but, additionally, also ASA was legitimated to appeal the Award. As to ASA, the FSC motivated the legitimation based on the fact that the Eligibility Rules imposed certain collaboration and information duties onto the IAAF members such as ASA and that ASA was therefore directly concerned by the Eligibility Rules in a different way than Caster Semenya, which justified the admission of a separate appeal by ASA. Nevertheless, the proceedings were joined.

Further, the FSC analysed whether the parties had validly waived the possibility to appeal the Award. It referred to its leading case 133 III 235 (Case No.4P.172/2006) regarding the tennis player Cañas which the authors of this contribution discussed in ISLR 3/2007 pp.51 et seq. Based on the criteria developed in said judgment, it also qualified the potential appeal waiver—which was contained in the Eligibility Rules—as not having been accepted by free will by the appellants and therefore not valid.

As a last formal issue, the FSC again used the opportunity to stress that it qualified the CAS as an independent and impartial arbitral tribunal, and that this was confirmed by the European Court of Human Rights. [Remark by the authors: This qualification is important as it allows appeals of CAS awards to the FSC.]

Entering into the merits of the case, the FSC once more reminded the parties of the fact that the grounds for challenges of international arbitral awards were exhaustively listed by art.190 of the Swiss Private International Law Act (PILA) and consisted of five specific issues of public policy (*ordre public*) quality. Consequently, it stressed that it would not re-evaluate the substantial issues in an unlimited manner but that it would restrict its analysis to the compatibility of the Award with public policy, as far as this was disputed by the appellants. Namely, it would not review the fact-finding by the CAS or take evidence on its own.

As to the first ground for appeal, the FSC held that the CAS had not incorrectly limited its review powers but rather even gone beyond the minimum requirements by analysing elements that were not appealed by the parties. Therefore, the FSC held that the appeal would have to be dismissed as far as it was founded on this ground. Further, it stressed that, in any case, even if a self-limitation of powers had taken place by the CAS, this would not lead to its qualification as an improperly constituted arbitral tribunal.

Getting to the second ground for appeal, i.e. the criticism pursuant to with the CAS had allegedly violated public policy (*ordre public*), the FSC first recalled the high threshold to be met for such a violation. An arbitral award is incompatible with public policy if it disregards the essential and widely recognised values and fundamental principles which, according to the Swiss concept, should form the basis of any legal order. Public policy is violated only if the result of the award (and not just parts of the rationale) is incompatible with public policy. Whether or not a constitutional right is

breached does not matter in this context, and by far not every breach of a constitutional right reaches the relevant public policy threshold. Therefore, appeals based on this ground are rarely successful.

Applying these principles onto the case at hand, the FSC rejected the criticism pursuant to which the CAS had breached public policy by acting in a discriminatory manner, by breaching Caster Semenya's personality rights and by disregarding human dignity. The FSC described in detail how thoroughly the CAS had analysed the medical facts and how it had carefully weighed the interests of all contestants to be able to compete under fair circumstances and the interests of Caster Semenya and other athletes with DSD to be allowed to compete without having to undergo medical examinations and treatments beforehand. It stressed that the long-established differentiation between male and female divisions in athletics is aimed at minimising those differences between the athletes competing in one and the same division which are based on biological factors.

Thus, it found that the CAS did not act in a discriminatory manner by approving of regulations which, for the purpose mentioned, define divisions focused on biological criteria rather than on the legal gender allocation of these athletes. Further, the personality rights of athletes with DSD were protected as the measures taken to minimise biological differences between the contestants in the female division in some certain athletics events were necessary, reasonable and proportionate, as athletes with DSD were only forced to undergo examinations and treatments if they wanted to profit from being classified as a female for the sake of competition in those specific events, and as they could compete in any other events or another division without having to undergo such examinations and treatments. As to the alleged disregarding of human dignity, the FSC confirmed that human dignity was, without any doubt, part of public policy. However, it concluded that a differentiation based on biological criteria which were clearly decisive for specified events to ensure equal chances for all participants did not undermine human dignity. Rather, also in this context it held it to be admissible and legitimate that such biological factors could be weighed higher than the legal gender or the gender identity of a person.

Discussion

This judgment by the FSC is unusually long and detailed and was obviously carefully drafted. It reflected in large parts the factual findings of the CAS, which were binding for the FSC. This shows that the FSC was aware that this was not just an average case but rather that its decision would have an important impact in a delicate issue in which science and gender identity do not coincide. It did not lightly dismiss the arguments filed by the appellants but only did so after careful and comprehensive consideration of the rationale of the award. Again, it all came down to a weighing of interests—as this was the case already in the arbitral proceedings. Before the FSC, however, the threshold for the appellants to overcome was much higher as the appeal would only have been successful had the FSC found the result of the weighing of interests by the CAS had violated public policy.

Generally, this FSC decision may be viewed as a good source for the current view on many legal aspects of appeals against awards to the FSC, such as, e.g., the reaffirmation of the independence of the CAS, the cognition of the FSC in appeals against arbitral awards and the threshold to be met for public policy violation.

As to the latter, it is to be stressed that it is not impossible to successfully challenge an arbitral award for breach of public policy. However, statistically, chances to do so are extremely slim. Between 1989 and 2019, this has been tried 220 times. However, only two awards have been set aside under that ground, both in sports-related arbitration. In FSC decision 138 III 322 (*Matuzalém v FIFA*, discussed by the authors of this contribution in ISLR

1/2013 pp.31 et seq.) and in FSC decision 136 III 345 (*Club Atlético de Madrid SAD v Sport Lisboa E Benfica—Futebol SAD, and FIFA*) (for the statistics: see Dasser, in: ASA Bulletin 1/2021, p.19). In the *Matuzalém* case, the FSC set aside the award based on the breach of the principle pursuant to which no person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals. In the *Atlético v Benfica* case, the FSC did so based on the breach of the principle of *res judicata*. We all are left to wait for the third successful challenge yet to happen.

Eva Gut
STAIGER Attorneys at Law, Zurich

Christoph Gasser[*]
BianchiSchwald, Zurich

[*] *Eva Gut is a member of the major Swiss business law firm STAIGER Attorneys at Law and advises clients in various matters of litigation, bankruptcy and arbitration matters, contractual law and sports law. Since 2018, she has been a member of the supervisory body of the judicial bodies within the Swiss Ice Hockey Federation and was, before this, the secretary to the president of said body for 13 years. In addition, she was, between 2004 and 2011, a member of the working group on doping controls of the Swiss Federal Commission on Sports. Christoph Gasser is a member of the major Swiss business law firm BianchiSchwald and advises clients in various matters of intellectual property, litigation and arbitration matters, contractual law and sports law.*