

It's not clear where human rights fit in the legal ruling on athlete Caster Semenya

By [Annette Greenhow](#)

3 May 2019

On May 1 the Court of Arbitration for Sport ([CAS](#)) issued a highly anticipated ruling involving athlete Caster Semenya and Athletics South Africa as claimants, and the International Association of Athletics Federations ([IAAF](#)).



Caster Semenya. Image source: [Yann Caradec/Flickr](#)

The [ruling](#) upheld the IAAF's eligibility regulation that restricted female athletes, including Semenya, with "differences of sex development" – broadly taken to mean high levels of testosterone – from entering certain international athletic events.

It means Semenya [will have to take medication](#) to lower her testosterone levels if she wishes to continue competing internationally in running events.

This decision is within the sports law decision-making framework. But what about Semenya's human rights? [Recent publications](#) from the United Nations Human Rights Council ([UNHRC](#)) criticise the "discriminatory regulations" relating to lowering testosterone in female athletes.

Semenya's case shows the challenges in balancing a range of interests in maintaining fair competition. On the one hand, the IAAF's claim of a "legitimate, necessary and proportionate" method to ensure a level playing field in competitive sport. On the other, the rights of those with hyperandrogenism (a condition where the body produces relatively high levels of testosterone) in competing against females with so-called "normal" testosterone levels.

Who is Caster Semenya?

As an athlete competing in IAAF events, 28-year-old Semenya is well known for her athletic prowess in her chosen sport.

The public scrutiny [Semenya endured in 2009](#) when subject to gender testing increased public attention on her physical

attributes.

After being cleared to run again, Semenya's domination continued to raise [controversy](#) about perceived unfairness of being included in female classified events. Others described her physical advantage akin to an adult competing against a child in the [same competition](#).

The IAAF sets the rules

The IAAF is the legitimate rule-maker in the world of athletics. Athletes agree to be bound by the IAAF rules if they want to compete.

In April 2018 the "Eligibility Regulations for Female Classification (Athletes with Differences of Sex Development)" – known as the [DSD regulations](#) – were set out.

These established the criteria for women to compete in the female classification of the 400m, 800m and 1500m races and apply to athletes who are [female \(or have intersex characteristics\)](#) with naturally occurring testosterone levels of above 5 nanomole/L (a measure of concentration) and who experience a "material androgenising effect" (that is, the testosterone has a [biological effect](#)).

Affected female athletes are required to reduce natural testosterone levels to within the normal female range (i.e. to a level below 5 nanomole/L) by using medication, and maintain that reduced level for at least six months to remain eligible to compete.

The role of CAS

The CAS determines sports-related disputes and bases its rulings on the evidence presented to it and the submissions presented by the parties. The authority of the CAS operates via a series of interlocking arrangements that cascade down through the global governance of sport, and are binding on athletes.

In June 2018, Semenya and Athletics South Africa filed [arbitration proceedings](#) challenging the validity of the DSD Regulations as "[discriminatory, unnecessary, unreliable and disproportionate](#)". They claimed that the DSD regulations would cause "grave unjustified and irreparable harm" and questioned the scientific soundness, a concern raised by [others](#).

The IAAF disagreed and claimed the DSD regulations were necessary to pursue "the legitimate aim of safeguarding fair competition and protecting the ability of female athletes to [compete on a level playing field](#)". It claimed the DSD regulations were based on the "best available science" and did not discriminate.

On May 1 the CAS Panel upheld the validity of the DSD regulations and considered the DSD Regulations as a "necessary, reasonable and proportionate means of achieving the IAAF's aim of preserving the [integrity of female athletics](#)"

Semenya and Athletics South Africa have thirty days to appeal to the Swiss Federal Tribunal. The IAAF issued a [media release](#) advising the DSD Regulations effective on 8 May 2019, and calling on affected athletes to consult their medical teams and initiate suppressive treatment.

It's also about human rights

So what are the wider implications of the Semenya case?

In March 2019, the IAAF was criticised by the United Nations Human Rights Council ([UNHRC](#)) over [concerns that](#) their "discriminatory regulations [...] to medically reduce blood testosterone levels contravene international human rights [...] including the right to equality and non-discrimination...and full respect for the dignity, bodily integrity and bodily autonomy of the person".

With specific reference to the IAAF's DSD Regulations, the UNHRC [called upon states](#) to “ensure that sporting associations [...] refrain from developing and enforcing policies [...] that force, coerce or otherwise pressure [...] athletes into undergoing unnecessary, humiliating and harmful medical procedures”.

The UNHRC also requested the UN High Commissioner to [prepare a report](#) on the intersection of gender discrimination in sports and human rights to present to the Human Rights Council at its forty-fourth session (likely to be [held June 2020](#)).

Sport is a special domain, but it is not that special to be immune from the law and human rights. Indeed, Sport Australia [promotes inclusive sport](#) based on the principle that “every Australian [...] should be able to participate in sport [...] in a welcoming and inclusive way”.

So the questions remain whether states will take heed of the UNHRC call to action, and how to reconcile this with the IAAF's stand on gender characteristics falling outside the “normal” range.

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ABOUT THE AUTHOR

Annette Greenhow, assistant professor, Faculty of Law, Bond University

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