

Caster Semenya successful before European Court of Human Rights

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

Legal update: case report | Published on 13-Jul-2023 | Switzerland

In *Semenya v Switzerland, App No 10934/21 (ECtHR)*, the European Court of Human Rights issued a Chamber judgment in which it held, by a narrow majority, that Switzerland had failed to afford former Olympic champion, Caster Semenya, sufficient procedural safeguards when she unsuccessfully challenged an award of the Court of Arbitration for Sport before the Swiss Supreme Court.

Christopher Boog (Partner), Schellenberg Wittmer Ltd

By a narrow majority (4:3), the European Court of Human Rights (ECtHR) has held that Switzerland failed to afford former Olympic champion, Caster Semenya, sufficient procedural safeguards when she sought to challenge an award of the Court of Arbitration for Sport (CAS) before the Swiss Supreme Court. Before the CAS, Semenya had unsuccessfully challenged World Athletics' regulations requiring her to undergo hormone treatment to lower her natural hormone levels to allow her to participate in international female competitions. She then applied to set aside the CAS award, but the Swiss Supreme Court rejected her application (see *Decisions 4A_248/2019 and 4A_398/2019*, discussed in *Legal update CAS award in Caster Semenya case not contrary to substantive public policy (Swiss Supreme Court)*). Semenya then challenged that decision before the ECtHR alleging Switzerland had violated her rights under the European Convention on Human Rights (Convention).

The ECtHR held that Switzerland had violated the following articles of the Convention:

- Article 14 (prohibition of discrimination), taken together with Article 8 (right to respect for private life).
- Article 13 (right to an effective remedy) in relation to the violation of Article 14 (together with Article 8).

Semenya had not been afforded sufficient institutional and procedural safeguards in Switzerland to allow her to have her complaints examined effectively, especially since her complaints concerned substantiated and credible claims of discrimination as a result of her increased testosterone level caused by differences of sex development. According to the ECtHR, particular regard had to be paid to the high personal stakes involved for Semenya, namely, participating in athletics competitions at an international level and therefore practicing her profession. Switzerland had overstepped "the narrow margin of appreciation afforded to it in the present case". These factors should have led to a thorough institutional and procedural review in relation to the CAS award, but Semenya had not been able to obtain this before the Swiss Supreme Court. Consequently, the ECtHR found that the remedies available in Switzerland could not be considered effective.

Following judgments like *Pechstein* and *Mutu*, this is another case in which the ECtHR has sought to set boundaries to the current system of sports arbitration. Switzerland may request a referral of the case to the ECtHR's Grand Chamber and if accepted, the Grand Chamber will hear the case and deliver a final judgment. The world of sports is likely to now eagerly await if this will happen.

Case: *Semenya v Switzerland, App No 10934/21 (ECtHR) (11 July 2023)*.

END OF DOCUMENT