

EXECUTIVE SUMMARY

Introduction

1. On 30 April 2019, the Court of Arbitration for Sport (“CAS”) delivered an Award with respect to the challenges brought by Caster Semenya and Athletics South Africa (“ASA”) to the validity of the IAAF’s Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) (the “DSD Regulations”). By a majority, the CAS Panel dismissed the requests for arbitration considering that the Claimants could not establish that the DSD Regulation were “invalid”. The Panel found that the DSD Regulations are discriminatory but that, on the basis of the evidence submitted by the parties, such discrimination is a necessary, reasonable and proportionate means of achieving the legitimate objective of ensuring fair competition in female athletics in certain events and protecting the “protected class” of female athletes in those events. The Panel also expressed serious concerns about the future practical application of the DSD Regulations. While the evidence has not established that those concerns are justified, or that they negate the conclusion of prima facie proportionality, this may change in the future unless constant attention is paid to the fairness of how the Regulations are implemented.

The DSD Regulations

2. In 2014 the Indian athlete Dutee Chand brought proceedings before the CAS challenging the IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women’s Competition (the “Hyperandrogenism Regulations”). In July 2015, the CAS delivered an Interim Award partially upholding Ms. Chand’s challenge and suspending the Hyperandrogenism Regulations (CAS 2014/A/3759 *Dutee Chand v AFI & IAAF*).
3. In *Chand*, the CAS had determined that the hormone testosterone was the primary cause for the increase in lean body mass in males at puberty and that this provided athletic advantage to male athletes over female athletes. The Panel in that case was not satisfied as to the degree of that advantage and declined to validate the Hyperandrogenism Regulations. The IAAF was given the opportunity to provide further evidence to validate those regulations, which had set the maximum level of testosterone for an athlete in female competition to 10 nmol/L, this being well above the maximum level in the female population and slightly above the minimum level in the male population.
4. In March 2018, the IAAF informed the CAS that it intended to withdraw the Hyperandrogenism Regulations and to replace them with new Regulations.
5. In April 2018, the IAAF enacted the DSD Regulations. In summary, the DSD Regulations establish new requirements governing the eligibility of women with certain differences of sex development (“DSD”) to participate in the female classification in eight events (the “Restricted Events”) at international athletics competitions (“International Competitions”). The Restricted Events include the 400m, 800m and

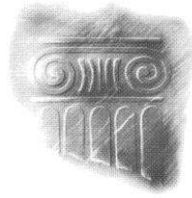


1500m races – events in which Ms. Semenya regularly participates at International Competitions.

6. During the course of the proceedings before the CAS, the IAAF explained that, following an amendment to the DSD Regulations, the DSD covered by the Regulations are limited to “46 XY DSD” – i.e. conditions where the affected individual has XY chromosomes. Accordingly, no individuals with XX chromosomes are subjected to any restrictions or eligibility conditions under the DSD Regulations.
7. Athletes with 46 XY DSD have testosterone levels well into the male range. The DSD Regulations require athletes with 46 XY DSD who have a natural testosterone level of above 5 nmol/L, and who experience a “*material androgenizing effect*” from that enhanced testosterone level, to reduce their natural testosterone level to within the normal female range (i.e. to a level below 5 nmol/L) and to maintain that reduced level for a continuous period of at least six months in order to be eligible to compete in a Restricted Event at an International Competition. There is no requirement for, or suggestion of, any surgical intervention to achieve this level.

The Claimants’ challenges to the validity of the DSD Regulations

8. The DSD Regulations came into force on 1 November 2018. Prior to that date, however, Ms. Semenya and ASA (collectively, the “Claimants”) commenced arbitration proceedings before the CAS challenging the validity of the DSD Regulations.
9. The Claimants contended *inter alia* that the DSD Regulations unfairly discriminate against athletes on the basis of sex and/or gender because they only apply (i) to female athletes; and (ii) to female athletes having certain physiological traits. They submitted that the DSD Regulations lack a sound scientific basis; are unnecessary to ensure fair competition within the female classification; and are likely to cause grave, unjustified and irreparable harm to affected female athletes. Accordingly, the Claimants sought an award from the CAS declaring the DSD Regulations unlawful and preventing them from being brought into force on the basis that the Regulations are unfairly discriminatory, arbitrary and disproportionate and therefore violate the IAAF Constitution, the Olympic Charter, the laws of Monaco, the laws of jurisdictions in which international athletics competitions are held, as well as universally recognised fundamental human rights.
10. In response, the IAAF submitted that the DSD Regulations are based on the best available science; do not discriminate on the basis of any protected characteristic; and are a necessary, reasonable and proportionate means of pursuing the legitimate aim of safeguarding fair competition and protecting the ability of female athletes to compete on a level playing field.
11. Between 18-22 February 2019, a hearing of the Claimants’ challenges was held before the CAS in Lausanne, Switzerland. The CAS Panel comprised the Hon. Dr. Annabelle Bennett AO SC (President); The Hon. Hugh L. Fraser (Arbitrator) and Dr. Hans Nater (Arbitrator). The Panel received detailed written and oral testimony from a large number of factual and expert witnesses. This included experts specialising in gynaecology,



andrology and the causes, diagnosis, effects and treatment of DSD; genetics, endocrinology and pharmacology; exercise physiology and sports performance; medical and research ethics; sports regulation and governance; and statistics.

The Award of the CAS Panel

12. After setting out the parties' evidence and submissions, the Panel begins its analysis of the merits by noting that this case involves a complex collision of scientific, ethical and legal conundrums. It also involves incompatible, competing rights. It is not possible to give effect to one set of rights without restricting the other set of rights. Put simply, on one hand is the right of every athlete to compete in sport, to have their legal sex and gender identity respected, and to be free from any form of discrimination. On the other hand, is the right of female athletes, who are relevantly biologically disadvantaged vis-à-vis male athletes, to be able to compete against other female athletes and to achieve the benefits of athletic success. The decision is also constrained by the accepted, necessary, binary division of athletics into male events and female events, when there is no such binary division of athletes. That binary division has not been challenged.
13. The Panel has not found the issues in this case easy to decide. It is clear from the range of expert evidence presented on behalf of the parties that there are many scientific, ethical and regulatory issues on which reasonable and informed minds may legitimately differ. The Panel is mindful that, in considering these issues, it is not acting as a policy maker or regulator. It is neither necessary nor appropriate for the Panel to step into the shoes of the IAAF by deciding how it would have approached issues had it been charged with making policies or enacting rules itself. Instead, its function is a purely judicial one. The Panel must adjudicate the disputed legal issues on the basis of the applicable legal tests and by reference to the arguments and admissible evidence on the record in these proceedings. While this inevitably requires consideration of arguments and evidence based on an array of policy and scientific matters, the Panel must be mindful of its judicial role and the limits of that role. It is also bound to make its decision based upon the evidence presented to it, taking account of the submissions made by the parties.

Discrimination

14. The Panel unanimously concludes that the DSD Regulations are prima facie discriminatory since they impose differential treatment based on protected characteristics. In particular, since the DSD Regulations establish restrictions that are targeted at a subset of the female/intersex athlete population, and do not impose any equivalent restrictions on male athletes, it follows that the Regulations are prima facie discriminatory on grounds of legal sex. Similarly, the DSD Regulations create restrictions that are targeted at a group of individuals who have certain immutable biological characteristics (namely a 46 XY DSD coupled with a material androgenising effect arising from that condition), and which do not apply to individuals who do not have those characteristics. It follows that the Regulations are also prima facie discriminatory on grounds of innate biological characteristics.



15. The conclusion that the DSD Regulations are prima facie discriminatory is merely the starting point of the Panel's legal analysis. In particular, it is common ground that a rule that imposes differential treatment on the basis of a particular protected characteristic is valid if it is a necessary, reasonable and proportionate means of attaining a legitimate objective.

Necessity

16. The majority of the Panel concludes that the IAAF has succeeded in establishing the necessity requirement.
17. The Panel begins its consideration of this question by observing that once it is recognised that it is legitimate to have separate categories of male and female competition, it inevitably follows that it is necessary to devise an objective, fair and effective means of determining which individuals may, and which may not, participate in those categories.
18. The Panel accepts the IAAF's submission that reference to a person's legal sex alone may not always constitute a fair and effective means of making that determination. This is because the reason for the separation between male and female categories in competitive athletics is ultimately founded on biology rather than legal status. The purpose of having separate categories is to protect a class of individuals who lack certain insuperable performance advantages from having to compete against individuals who possess those insuperable advantages. In this regard, the fact that a person is recognised in law as a woman and identifies as a woman does not necessarily mean that they lack those insuperable performance advantages associated with certain biological traits that predominate in individuals who are generally (but not always) recognised in law as males and self-identify as males. It is human biology, not legal status or gender identity, that ultimately determines which individuals possess the physical traits which give rise to that insuperable advantage and which do not.
19. Accordingly, the purpose of the male-female divide in competitive athletics is not to protect athletes with a female legal sex from having to compete against athletes with a male legal sex. Nor is it to protect athletes with a female gender identity from having to compete against athletes with a male gender identity. Rather, it is to protect individuals whose bodies have developed in a certain way following puberty from having to compete against individuals who, by virtue of their bodies having developed in a different way following puberty, possess certain physical traits that create such a significant performance advantage that fair competition between the two groups is not possible. In most cases, the former group comprises individuals with a female legal sex and a female gender identity, while the latter group comprises individuals with a male legal sex and male gender identity. However, this is not true of all cases. Natural human biology does not map perfectly onto legal status and gender identity. The imperfect alignment between nature, law and identity is what gives rise to the conundrum at the heart of this case.
20. The Panel considers that, once it is recognised that the reason for organising competitive athletics into separate male and female categories rests on the need to protect one group of individuals against having to compete against individuals who possess certain



insuperable performance advantages derived from biology rather than legal status, it follows that it may be legitimate to regulate the right to participate in the female category by reference to those biological factors rather than legal status alone.

21. It was common ground between the parties that there is a substantial difference in elite sports performance between males and females. It was also common ground that (a) the normal female range of serum testosterone, produced mainly in the ovaries and adrenal glands, is 0.06 to 1.68 nmol/L; and (b) the normal male range of serum testosterone concentration, produced mainly in the testes, is 7.7 to 29.4 nmol/L. On the basis of the scientific evidence presented by the parties, the Panel unanimously finds that endogenous testosterone is the primary driver of the sex difference in sports performance between males and females.
22. The IAAF submitted that all but one of the many different factors that contribute to sport performance - including training, coaching, nutrition and medical support, as well as many genetic variations - are equally available to men and women. The only factor that is available only to men is exposure to adult male testosterone levels. The IAAF submitted that if the purpose of the female category is to prevent athletes who lack that testosterone-derived advantage from having to compete against athletes who possess that testosterone-derived advantage, then it is necessarily “category defeating” to permit any individuals who possess that testosterone-derived advantage to compete in that category. The majority of the Panel accepts the logic of the IAAF’s submission.
23. Having carefully considered the expert evidence, the majority of the Panel concludes that androgen sensitive female athletes with 46 XY DSD enjoy a significant performance advantage over other female athletes without such DSD, and that this advantage is attributable to their exposure to levels of circulating testosterone in the normal adult male range, rather than the normal adult female range. The majority of the Panel observes that the evidence concerning the performances and statistical over-representation of female athletes with 46 XY DSD in certain Relevant Events demonstrates that the elevated testosterone levels that such athletes possess creates a significant and often determinative performance advantage over other female athletes who do not have a 46 XY DSD condition.
24. On this basis, the majority of the Panel accepts that the IAAF has discharged its burden of establishing that regulations governing the ability of female athletes with 46XY DSD to participate in certain events are necessary to maintain fair competition in female athletics by ensuring that female athletes who do not enjoy the significant performance advantage caused by exposure to levels of circulating testosterone in the adult male range do not have to compete against female athletes who do enjoy that performance advantage.

Proportionality

25. The majority of the Panel concludes that, on the evidence adduced, the DSD Regulations are on their face reasonable and proportionate. In reaching this conclusion, the majority notes, amongst other things, that the DSD Regulations do not require any athlete to undergo any surgical intervention, and envisage that affected athletes can control their



testosterone levels by using conventional oral contraceptives. The majority has also had regard to the possible side effects of such oral contraceptives, to the nature of the examinations that will be undertaken for the purpose of determining whether an athlete has experienced a “material androgenising effect” from their high testosterone levels, and the risk of individuals’ medical confidentiality being compromised.

26. While the majority concludes that the DSD Regulations are not disproportionate on their face, the Panel highlights its serious concerns about aspects of the practical application of the DSD Regulations when they are implemented. In particular, the Panel expresses its concerns about the potential difficulty for an athlete in complying with the requirements under the Regulations (including the possibility that affected athletes may inadvertently, and through no fault of their own, be unable consistently to maintain a natural testosterone level below 5 nmol/L). The Panel also notes the paucity of evidence to justify the inclusion of two events (the 1500m and one mile events) within the category of Restricted Events. The Panel strongly encourages the IAAF to address the Panel’s concerns in its implementation of the DSD Regulations. At the same time, the majority of the Panel observes that it may be that, on implementation and with experience, certain factors, supported by evidence, may be shown to affect the overall proportionality of the DSD Regulations, either by indicating that amendments are required in order to ensure that the Regulations are capable of being applied proportionately, or by providing further support for or against the inclusion of particular events within the category of Restricted Events.

The Panel’s expression of gratitude to Ms. Semenya

27. In its Award the Panel expressly pays tribute to Ms. Semenya’s grace and fortitude throughout this process. The Panel expresses its profound gratitude for her dignified personal participation and the exemplary manner in which she has conducted herself throughout the proceedings.
28. The Panel also stresses that while much of the argument in this proceeding has centred around the “fairness” of permitting Ms. Semenya to compete against other female athletes, there can be no suggestion that Ms. Semenya (or any other female athletes in the same position as Ms. Semenya) has done anything wrong. This is not a case about cheating or wrongdoing of any sort. Ms. Semenya is not accused of breaching any rule. Her participation and success in elite female athletics is entirely beyond reproach and she has done nothing whatsoever to warrant any personal criticism.