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## Press Release of the Swiss Federal Supreme Court

Interlocutory order of 29 July 2019 (4A\_248/2019)

### **The DSD Regulations are, for the time being, again applicable to Caster Semenya**

*For the time being, the "Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)" (DSD Regulations) are again applicable to Caster Semenya. The Swiss Federal Supreme Court revokes its Super-Provisional Order of 31 May 2019 after hearing the counterparty (IAAF) and dismisses Caster Semenya's request for the provisional suspension of the DSD Regulations, respectively for suspensive effect for her appeal against the decision of the Court of Arbitration for Sport. The Federal Supreme Court also rejects the request of Athletics South Africa, which had requested the suspension of the DSD Regulations for all female athletes. The Swiss Federal Supreme Court has, however, not yet reached a final decision on the appeal itself.*

The International Association of Athletics Federations (IAAF) had issued the new DSD Regulations in April 2018. They govern eight race events for women over distances of 400m to 1 mile and exclusively cover female athletes with "46 XY DSD", i.e. women with XY chromosomes. Persons with "46 XY DSD" have testosterone levels well into the male range. The DSD Regulations require that implicated female athletes with "46 XY DSD" maintain their testosterone level permanently below a specified level for as long as they wish to compete in a restricted event at an international competition.

In June 2018, the South African athlete Caster Semenya requested that the Court of Arbitration for Sport (CAS) in Lausanne declare the DSD Regulations invalid. Athletics

South Africa (ASA) also submitted such a request to the CAS. The CAS rejected both requests for arbitration on 30 April 2019. The CAS essentially came to the conclusion that while the admission conditions in accordance with the DSD Regulations only affected the implicated female athletes with the "46 XY DSD" characteristic, this differentiation was necessary, reasonable and proportionate to preserve the integrity of female athletics ("protected class women") in the restricted events as well as to ensure fair competition.

Caster Semenya appealed to the Swiss Federal Supreme Court against the CAS decision. She requested that the Court adopt (super)provisional measures and grant her appeal suspensive effect, in the sense that the DSD Regulations would not be applied to her during the course of the Swiss Federal Supreme Court proceedings. ASA requested the provisional suspension of the DSD Regulations for all female athletes. By Super-Provisional Order of 31 May 2019, the Swiss Federal Supreme Court initially suspended the application of the DSD Regulations to Caster Semenya in order to provisionally maintain the existing status until the hearing of the IAAF. A request for reconsideration by IAAF in this matter was dismissed by the Swiss Federal Supreme Court on 12 June 2019.

By Order of 29 July 2019, the Swiss Federal Supreme Court revokes its Super-Provisional Order of 31 May 2019 and rejects Caster Semenya's request to adopt provisional measures and grant suspensive effect. The Swiss Federal Supreme Court also rejects, in so far as it is admissible, ASA's request to provisionally suspend the application of the DSD Regulations to all female athletes.

The Swiss Federal Supreme Court first of all emphasizes its strict practice, which applies to the adoption of provisional measures or the granting of suspensive effect in the field of international arbitration. As a rule, such orders are only issued if it appears, after a summary examination of the case, that the appeal seems *with high probability to be well founded*.

The Swiss Federal Supreme Court further points out that its power of review in cases of international arbitration is very limited and, as a general rule, only involves examining whether the contested decision is compatible with fundamental principles of public order ("ordre public"). It stresses that this also applies in the field of sport and that the Swiss Federal Supreme Court is by no means a "Supreme Court for Sports", which could examine the matter freely.

On this basis, the Swiss Federal Supreme Court concludes, in a first summary examination, that Caster Semenya's appeal does *not appear with high probability to be well founded*. The CAS, after thoroughly evaluating the expert evidence, found that the "46 XY DSD" characteristic has a direct impact on performance in sport, which could never be achieved by other women. Thus, with the participation of a female athlete with "46 XY DSD" in the "protected class women", a basic principle of top-class sports, namely fair competition, is disregarded from the outset. The Swiss Federal Supreme Court is bound by this finding regarding the impact of "46 XY DSD" on performance. In the light of the arguments put forward by the CAS after extensive and thorough examination, namely the integrity of female athletics, neither the allegation of an

infringement of the principle of non-discrimination, nor the alleged violation of "ordre public" due to an infringement of their personality and human dignity appears *with high probability to be well founded*. For the same reasons, ASA's request must also be dismissed.

The Interlocutory Order is available on [www.bger.ch](http://www.bger.ch) : *Rechtsprechung > Rechtsprechung (gratis) / Weitere Urteile ab 2000 > entering 4A\_248/2019*.

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**NB:** The press release is intended as an information to the public and the media. The terminology used may differ from the wording of the judgment. For legal purposes, only the wording used in the written decision is binding.