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SEMENYA V. SWITZERLAND [GC]: GRAND CHAMBER JUDGMENT EXPANDS SWISS FEDERAL TRIBUNAL'S ROLE IN PROTECTING HUMAN RIGHTS IN SPORTS

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After two years of the Chamber judgment rendered by the European Court of Human Rights (ECtHR), the Grand Chamber of the ECtHR delivered its final judgment of *Semenya v. Switzerland* (App no. 10934/21) on 10 July 2025. The Chamber judgment found violations of procedural aspects of Article 14 in conjunction with Article 8, as well as Article 13 of the European Convention on Human Rights (ECHR). In contrast to the Chamber judgment, the Grand Chamber found a violation of Article 6(1) ECHR due to the lack of a fair hearing caused by the limited scope of judicial review exercised by the Swiss Federal Tribunal (SFT) under Article 190(2)(e) of the Swiss Private International Law Act (Swiss PILA). Furthermore, it declared the applicant's claims under Article 14 in conjunction with Article 8, as well as Article 13 ECHR, inadmissible. This landmark decision is expected to significantly impact the Swiss legal system, as it places a positive obligation on Switzerland to adopt a broader interpretation of Article 190(2)(e) Swiss PILA in order to ensure the protection of substantive human rights within the framework of sports arbitration and the Swiss legal system.

1 INTRODUCTION

After two years of the Chamber judgment rendered by the European Court of Human Rights (ECtHR), the Grand Chamber of the ECtHR delivered its final judgment of *Semenya v. Switzerland* (*Semenya*) (App no. 10934/21) on 10 July 2025. The author of this case note previously commented on the Chamber Judgment in the Strasbourg Observers on 27 September 2023 (Shinohara, 2023). Furthermore, numerous scholars and sports lawyers have already published case notes on both the Chamber judgment (Anthony, 2023; Krech, 2023; Shahlaei, 2023; Cooper, 2023; Holzer, 2023; Shahlaei, 2024; Thin, 2024; Duval, 2025) and the Grand Chamber judgment (Kennedy & Lavey, 2025a; Kennedy & Lavey, 2025b; Cooper, 2025; Duval, 2025b; Patel, 2025; Rietiker, 2025). Accordingly, this landmark case warrants careful analysis, as it is highly significant for the sports society in the context of sports and human rights.

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In light of the foregoing, this case note will be structured as follows: After this introduction, it will provide a brief overview of the case background, tracing developments from the Court of Arbitration for Sport (CAS) proceedings to the ECtHR Chamber judgment. It will then summarise the key findings of the Grand Chamber judgment. Finally, it will conclude with the author's comments on the Grand Chamber's judgment.

2 BACKGROUND OF THE CASE

Caster Semenya, a popular South African middle-distance runner and an Olympic champion in women's 800m, was born with differences of sex development (DSD) that include male sex characteristics and naturally elevated levels of endogenous testosterone within the male range. World Athletics (formerly the International Association of Athletics Federations (IAAF)) prohibited her from competing in women's events under the IAAF's 2018 Differences of Sex Development Regulations (hereinafter referred as the "DSD Regulations"), which required her to lower her testosterone levels by taking hormonal treatment, such as oral contraceptives, in order to compete in female category of athletics competitions (see paras. 12-22).

Against this decision, she initiated proceedings before the CAS, arguing that the DSD Regulations were discriminatory based on sex, gender and sex characteristics and they could not be justified to ensure fair competition in female category of athletics competitions. In the arbitral proceedings, the CAS held that the DSD Regulations were a *prima facie* discrimination, as they applied exclusively to women and, more specifically, to male-to-female transgender athletes and intersex female athletes (46 XY DSD) (para. 23). However, the CAS found that this discrimination could be justified on the basis of the physical competitive advantage derived from the sex characteristics. The CAS also concluded that requiring Semenya to reduce her testosterone levels—such as through the use of oral contraceptives—in order to comply with the DSD Regulations constituted

a reasonable and appropriate means. Accordingly, the CAS panel determined that although the DSD Regulations were a *prima facie* discrimination, they constituted a necessary, reasonable, and proportionate means of achieving the legitimate aim of ensuring fair competition and protecting other female athletes (see paras. 30-31).

Against this arbitral award, Semenya lodged an appeal before the SFT seeking to have the award set aside under Article 190(2) Swiss PILA. She argued that the award should be annulled on the grounds of: (1) an unjustified restriction on the CAS's adjudicative powers (Article 190(2)(a)); (2) a violation of her right to be heard (Article 190(2)(d)); and (3) a violation of substantive public policy (Article 190(2)(e)). The SFT rejected all three arguments, finding no breach of the Swiss PILA, and therefore upheld the CAS award (see paras. 32-42).

Following the proceedings before the CAS and the SFT, Semenya lodged an application with the ECtHR, alleging violations of her fundamental rights, in particular Articles 3, 6, 8 and 13 ECHR, as well as Article 8 read in conjunction with Article 14. The ECtHR held that there had been a violation of the procedural aspects of Article 8 in conjunction with Article 14, as well as a breach of Article 13 ECHR, on the basis that the institutional and procedural safeguards available to Semenya were insufficient to protect her against discrimination in sports arising from her sex and sex characteristics (see Shinohara, 2023).

3 A SUMMARY OF THE GRAND CHAMBER'S JUDGMENT

A *Switzerland's Jurisdictional Link with the Applicant under Article 1 ECHR*

Concerning the Switzerland's jurisdiction, the Court confirmed Switzerland had no personal link with the applicant, as she is a South African national residing in South Africa (para. 98). Moreover, Switzerland has no link to the DSD Regulations, since World Athletics is established under Monegasque law (para. 98). Nevertheless, the Court recognised a limited link between Switzerland and the case, based on two factors: (1) the CAS is seated in Lausanne; and (2) the SFT has jurisdiction to review CAS awards for potential violations of substantive public policy (para. 98).

In this context, the Court first examined whether the applicant fell within Switzerland's jurisdiction under Article 1 ECHR (para. 99). The Court reaffirmed that, as a general rule, a State's jurisdiction is territorial—meaning the alleged violation must occur within the State's territory (para. 119). However, it recognised that extraterritorial jurisdiction may exceptionally apply to acts or omissions attributable to the State that take place outside its territory, provided the State exercises effective control in that context (paras. 120-121).

Turning to the specific complaint under Article 6(1) ECHR, the Court concluded that jurisdiction is established when a person brings a civil action before the courts of a State, provided that domestic law permits such an action and that the right asserted *prima facie* falls within the scope of Article 6(1) ECHR (para. 123). In other words, once civil proceedings are initiated in a State's domestic courts, the State is bound under Article 1 ECHR to ensure respect for the rights guaranteed by Article 6(1) ECHR (para. 123).

Based on this understanding, the Court acknowledged that there was no territorial link between Switzerland and the applicant with regard to the adoption of the DSD Regulations or the CAS–SFT proceedings in the case (para. 127). Nevertheless, the Court observed that the applicant had lodged a civil-law appeal before the SFT seeking to set aside the CAS award on the grounds of incompatibility with Swiss public policy under Article 190(2)(e) Swiss PILA (paras. 128-131). This procedural step, in the Court's view, established a jurisdictional link with Switzerland under Article 6 ECHR (para. 133). Accordingly, the Court concluded that the applicant fell within Switzerland's jurisdiction for the purposes of Article 6(1) ECHR (para. 135 and 153).

B *No Jurisdictional Link with the Applicant under Article 8 ECHR, taken alone or in conjunction with Article 14 ECHR*

With respect to Article 8 ECHR, taken alone or in conjunction with Article 14 ECHR, the Grand Chamber held that it could not rely on *Platini v. Switzerland* (*Platini*) (App no. 526/18) in the present case. In *Platini* case, FIFA was headquartered in Switzerland and the dispute was governed by the Swiss Code of Civil Procedure as a matter of domestic arbitration (para. 141). By contrast, the Grand Chamber found that the mere fact that the SFT reviewed the civil-law appeal was insufficient to establish a jurisdictional link under Articles 8 and 14 ECHR in the present case (para. 145). Moreover, the Court explicitly rejected the reasoning of the Chamber judgment founding that “the only remedy available to the applicant had been the request to the CAS followed by an appeal to the [SFT]”, held that if the Court were to find that it did not have jurisdiction to examine this type of application, it would risk barring access to the Court for an entire category of individuals, namely professional female athletes, which would not be in keeping with the spirit, object and purpose of the Convention” (para. 150). In spite of this fact, the Grand Chamber considered that this fact does not sufficiently establish a jurisdictional link the present case to Switzerland (para. 150). On this basis, the Grand Chamber concluded that the facts did not suffice to establish a jurisdictional link between Switzerland and the applicant under Article 8 ECHR, either taken alone or in conjunction with Article 14 (para. 151), nor under Article 13 ECHR (paras. 152 and 154).

C *Violation of Article 6(1) ECHR and Article 13 ECHR*

On the merits of the proceedings, the Court first observed that, under Article 6 ECHR, its role is limited to assessing whether the domestic courts failed to observe the specific procedural safeguards guaranteed by that provision, or whether the overall conduct of the proceedings failed to ensure the applicant a fair hearing (para. 193). Moreover, the Court reiterated that Article 6 imposes a positive obligation on the State to ensure that domestic courts properly examine the submissions, arguments, and evidence presented by the parties (para. 194).

In the context of arbitration, the Court reaffirmed that no legal issue arises under Article 6 ECHR where the arbitration is entered into voluntarily (para. 197). It further clarified that parties are entitled to waive the rights guaranteed by the ECHR, provided such waiver is made freely, lawfully, and unequivocally, and is not incompatible with the object and purpose of the ECHR (para. 197). However, the Court emphasised that merely consenting to arbitration does not automatically imply a waiver of the procedural safeguards enshrined in Article 6 ECHR (para. 197). Accordingly, the Court considered that the ECtHR's case law does not preclude "the possibility that arbitration may be required by law, with the result that the parties have no option but to refer their dispute to an arbitral tribunal". In this situation, "the arbitral tribunal must afford the safeguards" under Article 6(1) ECHR (para. 198).

With regard to sports arbitration, the Court observed that it takes place within a context marked by a structural imbalance, which often characterises the relationship between sportspersons and the sports governing bodies (SGBs) (para. 200). This hierarchical nature of the sporting world, previously acknowledged by the SFT, distinguishes these relationships from typical horizontal relations between private parties (para. 200). Furthermore, the Court stated that "[SGBs] exercise powers in the field of international sports competition which are akin to regulation-making powers; in particular, they determine who can compete and under what conditions" (para. 201). In this context, the CAS's exclusive jurisdiction for sports-related disputes signified this exclusive power (para. 201). The Court further noted that "the inherent dominance enjoyed by [SGBs] in the system of international sports arbitration must also be taken into account" because, for instance, (1) the CAS was established by the IOC; (2) the International Council of Arbitration for Sport (ICAS) may adopt and amend the CAS Code as well as appoint the CAS arbitrators; and (3) ICAS is responsible for functioning and financing of the CAS (para. 203). As a result, SGBs are in a position to impose the mandatory and exclusive jurisdiction of the CAS for resolving sports-related disputes through their sporting regulations, thereby exercising structural control over the arbitration system (para. 204). In light of this, the Court held that the procedural rights of sportspersons under Article 6(1) ECHR must be effectively protected (para. 205). The Court considered that "this requirement is particularly important

where the “civil” right or rights which are the subject of the dispute correspond under domestic law to fundamental rights” (para. 206).

In light of the foregoing, the Court held that respect for the right to a fair hearing under Article 6(1) ECHR requires particularly rigorous examination in the following requirements: (1) where the mandatory and exclusive jurisdiction of the CAS is imposed on a sportsperson by SGBs, thereby granting the SFT jurisdiction to hear a civil-law appeal under Article 190(2) Swiss PILA; (2) where the dispute involves one or more civil rights as defined by Article 6(1) ECHR; and (3) where those civil rights correspond to fundamental rights under domestic law (para. 209). Therefore, the Court must assess whether the SFT’s examination of the case satisfied the requirement of particular rigour (para. 210).

In this case, the Grand Chamber observed that the applicant had no choice other than to accept the arbitration clause to compete in international competitions, as with the case of Mutu and Pechstein case (App nos. 40575/10 and 67474/10) (paras. 211-213). Therefore, it was clear that the arbitration was compulsory and imposed by sporting regulations established by the SGBs (para. 214) (Requirement (1)). Furthermore, the SFT examined the respect for personality rights and human dignity under Articles 27 et seq. of the Swiss Civil Code, which are recognised as “civil rights” within the meaning of Article 6(1) ECHR (para. 215) (Requirements (2) and (3)). Accordingly, the Court held that the SFT was required to conduct a particularly rigorous examination of the civil-law appeal brought by the applicant (para. 216). Therefore, the Court examined whether the SFT’s review met the standard of particular rigour required by the circumstances of the case, particularly given the mandatory and exclusive nature of sports arbitration, and considering the SFT’s competence to assess the compatibility of the award with substantive public policy (para. 218).

In this regard, the SFT merely noted that the CAS had not fully endorsed the DSD Regulations in relation to whether 46 XY DSD athletes could consistently maintain testosterone levels below the 5 nmol/L threshold (para. 228). Consequently, the Court found that, although the CAS had raised serious concerns on this matter, the SFT conducted only a limited review of this aspect of the CAS award (para. 229). As a result, the Court concluded that the SFT’s examination did not meet the standard of particularly rigorous examination required within its competence to assess the compatibility of the CAS award with substantive public policy (para. 230).

Secondly, the Court noted that the SFT failed to give serious consideration to whether the selection of the Restricted Events was arbitrary (para. 233). In this respect, the SFT should have conducted a particularly rigorous examination of whether the DSD Regulations were specifically designed to target the applicant, as this issue lay at the core of her case before the CAS (para. 233). The Grand Chamber emphasised that, although the SFT interpreted the concept of public

policy narrowly, its case law demonstrates that a CAS award could be set aside if it constituted a manifest and serious violation of personality rights, which renders it incompatible with public policy (para. 233).

Thirdly, the Court noted that the CAS acknowledged the DSD Regulations could result in the public disclosure of an athlete's DSD status, recognising this as a likely and unavoidable negative consequence (para. 234). While the CAS ultimately considered this acceptable in view of the legitimate aims pursued, the Grand Chamber found that the SFT had failed to adequately address this issue. Specifically, it did not sufficiently engage with the fact that the CAS had largely left this matter unresolved, despite its serious implications for the applicant—particularly concerning her ability to compete (para. 234).

In other points, the SFT's review of the CAS award for compliance with substantive public policy did not also meet the requisite level of rigour (para. 235). The Court first observed that the purpose of the DSD Regulations was not to "redefine" or challenge the sex or gender identity of the athletes concerned, nor did the CAS award seek to determine whether 46 XY DSD athletes were female or "female enough" (para. 236). Nonetheless, the Court found that the SFT had failed to undertake a sufficiently thorough analysis of whether the outcome of the arbitration was consistent with fundamental rights—an essential element of public policy in the context of this case (para. 236). The Court also highlighted that Chapter 12 Swiss PILA applies uniformly to all forms of international arbitration (para. 237). This includes international sports arbitration, even when it is mandatory and involves disputes over "civil" rights that intersect with fundamental rights (para. 237). Under Article 190(2)(e) Swiss PILA, the SFT's review in both sports and commercial arbitration contexts is confined to determining whether an arbitral award violates public policy (para. 237). Moreover, the SFT applies the same narrowly construed definition of public policy in its review of CAS awards as it does in international commercial arbitration cases (para. 237).

In light of the foregoing, the Grand Chamber held that the mandatory and exclusive nature of the CAS system necessitates an in-depth judicial review, particularly given the fundamental personal rights at stake (para. 238). However, the SFT's review in the present case failed to meet this standard due to its overly narrow interpretation of public policy in assessing CAS awards (para. 238). Consequently, the SFT did not meet the requirement of particular rigour applicable in such circumstances (para. 238).

Accordingly, the Court concluded that there had been a violation of Article 6(1) of the ECHR, as the applicant had not been afforded the procedural safeguards guaranteed by that provision (paras. 238–239).

4 CONCLUSION

The *Semenya* case can be recognised as a landmark and leading judgment in the emerging field of “sports and human rights”. It has significantly contributed to the development of both substantive and procedural human rights protections, following a series of ECtHR decisions concerning sports. Notably, the Grand Chamber held that the SFT is required to exercise broader and more in-depth judicial review over CAS awards, particularly regarding their compatibility with substantive public policy under Article 190(2)(e) Swiss PILA. This enhanced review obligation is instrumental in ensuring the effective protection of substantive human rights guaranteed by the provisions of the ECHR.

It is important to note that, in this case, the Court clarified the requirements under which a particularly rigorous examination is required for sports arbitration under Article 6(1) ECHR. These requirements are: (1) where a sportsperson is subject to the mandatory and exclusive jurisdiction of the CAS imposed by SGBs, thereby conferring jurisdiction upon the SFT to hear a civil-law appeal under Article 190(2) Swiss PILA; (2) where the dispute concerns one or more civil rights within the meaning of Article 6(1) ECHR; and (3) where those civil rights correspond to fundamental rights under domestic law. Upon examination, the Court concluded that the CAS–SFT sports dispute resolution mechanism satisfied these conditions. Accordingly, the SFT was required to apply a particularly rigorous review standard to examine the sports-related disputes.

In the author’s view, the Grand Chamber’s judgment will likely compel Switzerland to consider the following action:

- (a) Revising the existing provision, or introducing a new special provision, within the Swiss PILA to broaden the SFT’s review powers over the sports arbitration system; or
- (b) Expanding the interpretation of “substantive public policy” to encompass a review of substantive rights guaranteed under Article 6(1) ECHR.

However, the latter approach poses significant risks, as “public policy” is considered an exceptional legal concept and is invoked only where no other legal provisions or case law offer a solution. Within the framework of the Swiss legal system, the scope of “public policy” is interpreted narrowly and should not be expanded arbitrarily (see Cooper, 2025, p. 3). Therefore, according to this Grand Chamber judgment, Switzerland should pursue the first approach—namely, revising or introducing the relevant provisions of the Swiss PILA—in order to enhance the SFT’s review power over CAS awards and to fulfil its positive obligations under Article 6(1) ECHR.

In this context, however, it is worth noting that, on 28 August 2024, Switzerland formally announced that it clearly opposed to the ECtHR’s climate

change judgment delivered on 9 April 2024 (*Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, App no 53600/20) because Swiss national legislation had sufficiently implemented the obligation to take necessary measures to address climate change (Conseil fédéral, 2024). In light of this stance, Switzerland may also choose to oppose to the *Semenya* judgment to the extent that it requires expanding the SFT's review power over CAS awards. Nonetheless, as no official position of the Swiss government has yet been published regarding *Semenya* judgment, it remains possible that Switzerland will not comply with that judgment.

Furthermore, it should be noted that Semenya succeeded in her case against Switzerland, not against World Athletics, through this Grand Chamber judgment. As a result, World Athletics is not legally required to amend its internal regulations in light of the ruling (Shinohara, 2022; Kennedy & Lavey, 2025a). In this regard, Rietiker (2025) noted that “the Grand Chamber did not consider the alleged discriminatory nature of the DSD Regulations”. Consequently, this complex and difficult human rights issue concerning intersex female athletes remains unresolved, with the practical outcome that such athletes are effectively barred from competing in women's athletics events under the current regulatory framework. However, World Athletics has continued to update and revise the DSD Regulations in light of new scientific evidence (see Kennedy & Lavey, 2025b). It should therefore not be assumed that World Athletics has failed to address this complex issue; rather, it continues to grapple with it and to seek solutions.

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