

BEFORE THE GRAND CHAMBER

EUROPEAN COURT OF HUMAN RIGHTS

Semenya v. Switzerland

Application no. 10934/21

WRITTEN SUBMISSIONS ON BEHALF OF OII EUROPE (ORGANISATION INTERSEX INTERNATIONAL EUROPE), ILGA-EUROPE (THE EUROPEAN REGION OF INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION), AND THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

JOINT INTERVENERS

Pursuant to the Deputy Registrar's notifications dated 5 December 2023

8 January 2024

Introduction

1. These submissions are made jointly by OII Europe (Organisation Intersex International Europe), ILGA-Europe (the European Region of International Lesbian, Gay, Bisexual, Trans and Intersex Association), and the International Commission of Jurists (ICJ).

2. In April 2018, the International Association of Athletics Federations (IAAF – now called World Athletics) adopted the “Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)” – the 2018 DSD Regulations – requiring “relevant athletes” – as defined by the Regulations – to lower their testosterone level to below a certain value for six months before a competition and keep it continually below this threshold to be eligible to compete in international sporting events in the “protected class women”, that is, the “women” category. The 2018 DSD Regulations did not specify the means by which testosterone levels should be reduced but did suggest the use of hormonal contraceptives. In March 2023, World Athletics adopted the “Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)” – the 2023 DSD Regulations – further reducing the eligibility of athletes with variations of sex characteristics to global sports events. While the 2018 DSD Regulations are the ones in question, this submission also focuses on changes made in subsequent regulations, including the 2023 DSD Regulations, as these are the ones applicable at the current time.

3. The joint interveners’ submissions presented below focus on the place of intersex athletes in competitive sports and sporting fairness for all athletes. They analyse World Athletics’ constantly evolving rules, which – due to their strict prerequisites – effectively limit and/or prevent the participation of intersex athletes in international sporting competitions. In particular, the submissions presented below focus on the following issues:

- The DSD Regulations discriminate against intersex athletes on the grounds of sex within the meaning of Article 14 of the European Convention of Human Rights (ECHR), as well as on the grounds of sex characteristics – in particular, genetic characteristics – which, in turn, fall within the protective scope of the same provision. The joint interveners provide the Grand Chamber with a comparison between the 10 December 2021 Regulations (old rules), 31 March 2023 Regulations (new rules), and the 2018 Regulations to show that World Athletics is continually restricting access to sport for intersex and other athletes without “particularly weighty and convincing reasons” by way of justification.
- The 2018 DSD Regulations were less restrictive than the subsequently issued rules as they only limited participation in the following races: 400m races; 400m hurdles races; 800m races; 1500m races; one-mile races; and all other Track Events over distances between 400m and one mile, whether run alone or as part of a relay event or a Combined Event.

The 2018 Regulations were nevertheless discriminatory to intersex athletes.

- The wider detrimental effect of the DSD Regulations on the human rights of youth, children and intersex athletes.
- Brief remarks on the rights to access to justice and to a court and the right to an effective remedy under international law and standards, including Articles 6 and 13 of the Convention.

I. The DSD Regulations discriminate against intersex athletes

4. The interveners submit that the 2018 DSD Regulations fall foul on sex characteristics as a ground for discrimination without “particularly weighty and convincing reasons” by way of justification and, as a result, impermissibly discriminate against intersex athletes under Article 14 of the European Convention on Human Rights. With respect to this, the interveners urge the Grand Chamber to uphold the findings in the Chamber judgment establishing sex characteristics as a prohibited ground under Article 14 of the Convention.

5. The 2018 DSD Regulations require a blood testosterone level below five nmol/L for a continuous period of at least six months. As detailed further below, the 2023 DSD Regulations, in turn, impose an even lower threshold with respect to the concentration of testosterone in the serum of relevant athletes, namely, below two point five nmo/L. In comparison with the 2018 DSD Regulations, the 2023 DSD Regulations betray an even more misogynistic nature and are *a fortiori* discriminatory to athletes with variations of sex characteristics (or, as referred to in the aforementioned Regulations, differences of sex development). Moreover, the 2023 DSD Regulations’ restricted testosterone level does not just affect intersex persons, but also endosex (i.e., non-intersex) women in general.

6. The first major change introduced in the 2023 DSD Regulations deals with eligibility conditions. Whereas the preceding 10 December 2021 Regulations stipulated that athletes must be recognized at law (for example, in a birth certificate or passport) either as female or as intersex (or equivalent). There is no longer space for recognition of an equivalent status as in the previous regulations.

7. On a physical level, the 2021 Regulations stipulated that athletes must reduce their blood testosterone level to below five (5) nmol/L for a continuous period of at least six months (e.g., by use of hormonal contraceptives). This has also undergone a major revision. In light of the 2023 DSD Regulations athletes must now continuously maintain the concentration of testosterone in their serum below two point five (2.5) nmol/L for a period of at least 24 months at all times (i.e., whether they are in competition or out of competition) for so long as they wish to retain eligibility to compete in the female classification at World Rankings Competitions and/or to have recognized any World Record performance in

the female classification at a competition that is not a World Rankings Competition. There are no specific race categories for athletes with variations of sex characteristics and they must necessarily fall within existing categories. The rules make no provision for the participation of intersex athletes in the female category – as they are effectively coerced into adjusting their body to the norm for non-intersex female athletes at risk of their health – and as a result, discriminate against intersex female athletes on the grounds of their sex characteristics.

8. Despite claims from the World Athletics that the DSD Regulations will not prevent any women from competing in athletics, they have the effect of forcing some women with variations of sex characteristics to choose between undergoing medically unnecessary interventions to lower their testosterone levels or be precluded from participating in international sport. As a result, the interveners are concerned that the DSD Regulations will, in effect, coerce some women to undergo medically unnecessary procedures to alter their natural physiology, including their hormone levels.

9. In addition, the 2023 DSD Regulations include other major and far-reaching changes to further restrict participation in a greater number of sporting events, where the previous rules applied only to "Restricted Events", namely: 400m races; 400m hurdles races; 800m races; 1500m races; one-mile races; and all other Track Events over distances between 400m and one mile (inclusive), whether run alone or as part of a relay event or a Combined Event. For clarity, the term "Restricted Event", as used in the 2023 DSD Regulations, encompasses any Combined Event that includes one or more Restricted Events, so that an athlete who is eligible under the 2023 DSD Regulations to compete in Restricted Events is also eligible to compete in Combined Events that include Restricted Events; while an athlete who is ineligible to compete in Restricted Events is also ineligible to compete in Combined Events that include Restricted Events.

10. The interveners underscore that the issuance of discriminatory regulations by international sporting bodies necessarily engages the obligations of States under international human rights law, including the European Convention on Human Rights and, in particular, States' duty to protect against discrimination and ensure equal protection of the law. For example, as the Committee on the Elimination of Discrimination against Women has underscored in its General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, the obligation to protect women's right to non-discrimination and to the enjoyment of equality requires that States parties "ensure that women are protected against discrimination committed by public authorities, the judiciary,

organizations, enterprises or private individuals, in the public and private spheres.”¹

11. In addition, the constant case law of this Court has held that States are obliged to take effective measures to protect anyone within their jurisdiction against discriminatory treatment, including with respect to instances when such a treatment emanates from private individuals as opposed to State institutions.

12. In recent years, a clear trend is emerging towards adoption of legal protection from discrimination against intersex people. The protection is based on the ground of sex characteristics or other status, including sex or gender. In Europe, eleven Council of Europe (CoE) Member States provide for prohibition of discrimination against intersex people in national legislation, of which seven have established the protection on the grounds of sex characteristics, and four under “other” grounds. At the European level both Council of Europe and European Union institutions have established the need for recognition of sex characteristics as a discrimination ground and called upon Member States to guarantee protection from discrimination of intersex people. In a similar vein, at the international level, a number of United Nations bodies have highlighted the need for targeted inclusion of protection of intersex people in national anti-discrimination legislation. The UN High Commissioner’s Office on Human Rights has stressed that “discrimination against intersex people must be prohibited, preferably as a standalone attribute (of sex characteristics), or, at a minimum, through a progressive interpretation of sex”. The interveners draw the Grand Chamber’s attention to the concerns expressed by the UN Human Rights Council that regulations, rules and practices that require women and girl athletes with variations of sex characteristics androgen sensitivity and levels of testosterone to medically reduce their blood testosterone levels may contravene international human rights norms and standards, including the right to equality and non-discrimination, the right to the highest attainable standard of physical and mental health, the right to sexual and reproductive health, the right to work and to the enjoyment of just and favourable conditions of work, the right to privacy, the right to freedom from torture or other cruel, inhuman or degrading treatment or punishment, and full respect for the dignity, bodily integrity and bodily autonomy of the person².

13. The interveners are concerned that the DSD Regulations constitute an unnecessary and disproportionate interference with the right of female athletes with variations of sex characteristics to equal participation in

¹ Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para.17.

² Resolution adopted by the Human Rights Council on 21 March 2019 40/5. Elimination of discrimination against women and girls in sport, Human Rights Council Fortieth session
<https://digitallibrary.un.org/record/3806787?ln=en>

certain competitions. The interveners are also concerned that regulations amounting to sex testing of elite female athletes, such as those adopted and enforced by the World Athletics, have the potential to proliferate. Requiring athletes to submit to random testing at any time will impact the rights to privacy and dignity of these athletes in violation of ECHR Article 8.

II. The wider detrimental effect of the DSD Regulations on the human rights of youth, children and intersex athletes

14. This submission evaluates the impact of the DSD Regulations for intersex athletes of the major sports bodies on intersex persons as well as children outside elite sports events.

15. In general, the rules should not have any impact on anyone who has a variation of sex characteristics and wants to participate in sports at the grassroots level, including children. The rules are intended to target elite sports, where people compete for medals and records at the national and international levels according to the rules of major sports organizations, including youth events. This could lead to the mistaken belief that sports at lower levels are open to anyone and are safe for anyone to participate in, by implication meaning that such persons are not affected by the rules. Unfortunately, this is a fundamental misjudgement. This submission underscores the potential negative effect of the DSD Regulations on youth and children as well as the implications of the rules on grassroots sports in general.

16. Intersex youths in sports reportedly face various challenges, including social, psychological and physiological aspects. While it is important to note that intersex is a term that encompasses a range of variations in sex characteristics, and individuals may have different experiences depending on their variation, reports to OII Europe and ILGA-Europe show a wide range of challenges intersex youths encounter in the context of participation in sports. These include:

- Intersex youths may be at an increased risk of bullying, discrimination, or stigmatization in sports environments. This includes discrimination and stigmatization from teammates, opponents, coaches and spectators due to a lack of understanding about intersex variations.
- Misunderstandings about intersex variations may lead to perceptions that individuals with such characteristics have a competitive advantage or disadvantage in certain sports. Addressing these misconceptions is essential for fair treatment.
- Some intersex individuals may undergo medical interventions or hormone therapy to align their physical characteristics with societal norms. These interventions can have physiological and psychological effects that may impact sports performance.

- The disclosure of having a variation of sex characteristics must be a personal decision; intersex individuals may face pressure to disclose or conceal their having a variation of sex characteristics in sports settings leading to concerns about privacy and potential discrimination.
- Persons with a variation of sex characteristics may face challenges related to eligibility and inclusion. Rules that are based solely on binary gender classifications may not adequately address the diversity of sex characteristics.
- Most of the points relevant for youths and children also apply to any person with variations of sex characteristics wanting to participate in any grassroots or advanced sports.

17. Apart from the challenges listed, children and youths will be faced with the fact that they must meet the rules of the sports bodies if they want to proceed to reach an elite level. That means they will have to undergo medical treatment, including lowering their testosterone levels to acceptable limits. There is no reliable scientific evidence of what effect such a treatment would have on the health of those athletes in the long term, and they face considerable risks to their health and well-being in order to compete in global sports. This can either have the effect of discouraging intersex children and youth from participating in sports to safeguard their physical or mental health or lead to a violation of their rights before they are even at the point of their career that the current regulations address. This cannot be the goal of any sports body and does not conform to human rights standards. It is important for sports organizations, policymakers and the broader community to work towards creating inclusive and affirming environments for intersex youths, acknowledging their diversity, and ensuring that their rights and dignity are respected.

18. Creating inclusive and supportive sports cultures is crucial to fostering a positive experience for all athletes. Policies and rules (where necessary) that determine whether an athlete is eligible in the women's or men's category in any sport should take into account that not every athlete's sex fits into one of the two available categories. The Olympic Charter in Principle 4 states: "The practice of sport is a human right. Every individual must have access to the practice of sport, without discrimination of any kind in respect of internationally recognised human rights within the remit of the Olympic Movement. The Olympic spirit requires mutual understanding with a spirit of friendship, solidarity, and fair play."

III. Brief remarks on the rights to access to justice and to a court and the right to an effective remedy under international law and standards, including Articles 6 and 13 of the Convention

19. The interveners submit that access to justice is essential to safeguarding human rights and the Court must satisfy itself that the decision of a professional regulatory body has been subject to an effective judicial

review. Access to justice can be broadly defined as “[t]he ability of people to seek and obtain a remedy through formal or informal institutions of justice and in conformity with human rights standards.”³ Access to justice is a core principle of the rule of law that enables the redress of a wrong in law.⁴ It provides the avenue for enforcing and protecting rights, correcting wrongs putting a check on the exercise of administrative and executive power and ensuring that accused persons can defend themselves in criminal proceedings. Access to justice is both a means and an end and is essential for the enjoyment of any other substantive right. Access to justice has come to be seen as a key element of human rights protection and serves as a procedural means to safeguard the rule of law.⁵

20. Articles 2(3) and 14 of the ICCPR and Articles 8 and 10 of the Universal Declaration of Human Rights (UDHR) guarantee access to justice. Under the Convention, access to justice is provided for by Articles 6 and 13, which guarantee the right to a fair trial and to an effective remedy, as interpreted by the Court.

Right to Access to a Court

21. In interpreting Article 6 of the Convention, the European Court has held that the application of the provisions of the Article are autonomous and can be read independently of the status of the parties or the nature of the domestic law.⁶ Furthermore, Article 6 is applicable where there is a dispute present in respect of a right that is recognized by domestic law. The dispute in question must have the character of being serious and a resolution by the courts must be able to fully determine the civil rights.⁷

22. The right to access to a court is subject to implied limitations;⁸ however, such limitations must not restrict the exercise of the right in such a way or to such an extent that the very essence of the right is impaired. Limitation on the right to access a court must pursue a legitimate aim and there must be reasonable proportionality between the means employed and the aim sought to be achieved.⁹ Where courts of appeal or cassation exist within a Contracting Party, such courts must comply with the guarantees under Article 6.¹⁰ Accordingly, in an instance where a professional regulatory body

³ UNDP (2005), *Programming for Justice: Access for All*, A practitioner’s guide to a human rights-based approach to access to justice. p.5.

⁴ ECtHR, *Golder v. United Kingdom*, Application no. 4451/70, 21 February 1975.

⁵ United Nations (UN), Committee on Human Rights, General Comment No. 32 (2007).

⁶ ECtHR, *Georgiadis v. Greece*, Application no. 21522/93, 29 May 1997, § 34; *Bochan v. Ukraine* (no. 2) [GC], Application no. 22251/08, 5 February 2015, § 43.

⁷ ECtHR, *Denisov v. Ukraine* [GC], Application no. 76639/11, 25 September 2018, § 44; *Regner v. the Czech Republic* [GC], Application no. 35289/11, 19 September 2017, § 99; *Károly Nagy v. Hungary* [GC], Application no. 56665/09, 14 September 2017, § 60; *Nait-Liman v. Switzerland* [GC], Application no.51357/07, 15 March 2018, § 106.

⁸ *Deweert v Belgium* § 49; *Kart v Turkey* [GC] § 67.

⁹ *Guerin v France* [GC], § 37; *Omar v France* [GC], § 34.

¹⁰ *Maresti v Croatia*, § 3; *Reichman v France*, § 29.

has made an adjudication on a dispute, it is critical that either: (i) the professional regulatory body itself complies with the full requirements of Article 6(1), including being an “independent and impartial tribunal established by law” or (ii) the decision of the professional regulatory body is subject to the subsequent control of a judicial body that has full jurisdiction and that provides the guarantees of Article 6.¹¹

23. The right to a fair trial under Article 6 § 1 requires that a case be heard by an independent and impartial tribunal established by law. Articles 6 and 13 read together require that a Contracting Party provide access to justice and to courts, as well as the right to an effective remedy. These rights cannot be limited in ways that render them ineffective. Articles 6 and 13 read together require that a remedy provided by a Contracting Party, in order to be effective, must enable applicants to challenge a decision that restricts their rights under the Convention.¹² Taken together, the provisions of Articles 6 and 13 require that a domestic court examine the facts of a case, including the complaint of a violation of Convention rights, in order to provide an effective remedy. Where the judicial review has not examined such facts in full, then such a review cannot be said to have complied with Articles 6 and 13 of the Convention.

Access to a court and to an effective remedy can be justifiably limited by Contracting Parties or third parties but must still be effective under the Convention.

24. The Court has held that access to a court, under Article 6 of the Convention, is not an absolute right and may vary “in time and place according to the needs and resources of the community and of individuals”.¹³ However, limitations to Article 6 must not restrict or reduce the access left to the individual as to impair the essence of the right to access to court.¹⁴ Furthermore, any limitation of the right of access to court must pursue a legitimate aim, and must be proportionate to the aim pursued.¹⁵ Regardless of whatever limitations exist within the regulatory or domestic law process, the scope of the judicial review must be sufficient to guarantee an effective remedy under Article 13. As such, an insufficient exercise of the power of judicial review may constitute a violation of Article 13 and will not be considered an effective remedy.¹⁶ This will be the case

¹¹ ECtHR, *Albert and Le Compte v. Belgium*, Application no. 7299/75; 7496/76, 10 February 1983, §29.

¹² *Csullog v Hungary*, 2011, § 46.

¹³ ECtHR, *Golder v. United Kingdom*, App no. 4451/70, 21 February 1975.

¹⁴ ECtHR, *Philis v. Greece (no. 1)*, Application no. 12750/87; 13780/88; 14003/88, 27 August 1991, § 59; *De Geouffre de la Pradelle v. France*, Application no. 12964/87, 16 December 1992, § 28.

¹⁵ ECtHR, *Ashingdane v. the United Kingdom*, Application no. 8225/78, 28 May 1985, § 57; *Fayed v. the United Kingdom*, Application no. 17101/90 21 September 1990, § 65.

¹⁶ ECtHR, *Smith and Grady v. the United Kingdom*, Applications nos. 33985/96 and 33986/96, 27 September 1999 §§ 136-139; *Hatton and Others v. the United Kingdom* [GC], Application no. 36022/97, 8 July 2003 §§ 141-142.

where the judicial review does not consider all of the issues of law and fact, including the independence and impartiality of the adjudicatory process, raised before the professional regulatory body.

25. In light of the above, the interveners submit that, while Articles 6 and 13 are not absolute rights in their application, a judicial review must not be carried out in a way that nullifies the application of these Convention rights.
