

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME



ENG - 2018/1
Application Form

About this application form

This form is a formal legal document and may affect your rights and obligations. Please follow the instructions given in the "Notes for filling in the application form". Make sure you fill in all the fields applicable to your situation and provide all relevant documents.

Warning: If your application is incomplete, it will not be accepted (see Rule 47 of the Rules of Court). Please note in particular that Rule 47 § 2 (a) requires that a concise statement of facts, complaints and information about compliance with the admissibility criteria MUST be on the relevant parts of the application form itself. The completed form should enable the Court to determine the nature and scope of the application without recourse to any other submissions.

Barcode label

If you have already received a sheet of barcode labels from the European Court of Human Rights, please place one barcode label in the box below.

Reference number

If you already have a reference number from the Court in relation to these complaints, please indicate it in the box below.

A. The applicant

A.1. Individual

This section refers to applicants who are individual persons only. If the applicant is an organisation, please go to section A.2.

1. Surname

2. First name(s)

3. Date of birth

0	7	0	1	1	9	9	1
D	D	M	M	Y	Y	Y	Y

 e.g. 31/12/1960

4. Place of birth

5. Nationality

6. Address

7. Telephone (including international dialling code)

8. Email (if any)

9. Sex

male

female

A.2. Organisation

This section should only be filled in where the applicant is a company, NGO, association or other legal entity. In this case, please also fill in section D.1.

10. Name

11. Identification number (if any)

12. Date of registration or incorporation (if any)

D	D	M	M	Y	Y	Y	Y

 e.g. 27/09/2012

13. Activity

14. Registered address

15. Telephone (including international dialling code)

16. Email

B. State(s) against which the application is directed

17. Tick the name(s) of the State(s) against which the application is directed.

- | | |
|---|--|
| <input type="checkbox"/> ALB - Albania | <input type="checkbox"/> ITA - Italy |
| <input type="checkbox"/> AND - Andorra | <input type="checkbox"/> LIE - Liechtenstein |
| <input type="checkbox"/> ARM - Armenia | <input type="checkbox"/> LTU - Lithuania |
| <input type="checkbox"/> AUT - Austria | <input type="checkbox"/> LUX - Luxembourg |
| <input type="checkbox"/> AZE - Azerbaijan | <input type="checkbox"/> LVA - Latvia |
| <input type="checkbox"/> BEL - Belgium | <input type="checkbox"/> MCO - Monaco |
| <input type="checkbox"/> BGR - Bulgaria | <input type="checkbox"/> MDA - Republic of Moldova |
| <input type="checkbox"/> BIH - Bosnia and Herzegovina | <input type="checkbox"/> MKD - North Macedonia |
| <input checked="" type="checkbox"/> CHE - Switzerland | <input type="checkbox"/> MLT - Malta |
| <input type="checkbox"/> CYP - Cyprus | <input type="checkbox"/> MNE - Montenegro |
| <input type="checkbox"/> CZE - Czech Republic | <input type="checkbox"/> NLD - Netherlands |
| <input type="checkbox"/> DEU - Germany | <input type="checkbox"/> NOR - Norway |
| <input type="checkbox"/> DNK - Denmark | <input type="checkbox"/> POL - Poland |
| <input type="checkbox"/> ESP - Spain | <input type="checkbox"/> PRT - Portugal |
| <input type="checkbox"/> EST - Estonia | <input type="checkbox"/> ROU - Romania |
| <input type="checkbox"/> FIN - Finland | <input type="checkbox"/> RUS - Russian Federation |
| <input type="checkbox"/> FRA - France | <input type="checkbox"/> SMR - San Marino |
| <input type="checkbox"/> GBR - United Kingdom | <input type="checkbox"/> SRB - Serbia |
| <input type="checkbox"/> GEO - Georgia | <input type="checkbox"/> SVK - Slovak Republic |
| <input type="checkbox"/> GRC - Greece | <input type="checkbox"/> SVN - Slovenia |
| <input type="checkbox"/> HRV - Croatia | <input type="checkbox"/> SWE - Sweden |
| <input type="checkbox"/> HUN - Hungary | <input type="checkbox"/> TUR - Turkey |
| <input type="checkbox"/> IRL - Ireland | <input type="checkbox"/> UKR - Ukraine |
| <input type="checkbox"/> ISL - Iceland | |

C. Representative(s) of the individual applicant

An individual applicant does not have to be represented by a lawyer at this stage. If the applicant is not represented please go to section E.

Where the application is lodged on behalf of an individual applicant by a non-lawyer (e.g. a relative, friend or guardian), the non-lawyer must fill in section C.1; if it is lodged by a lawyer, the lawyer must fill in section C.2. In both situations section C.3 must be completed.

C.1. Non-lawyer

18. Capacity/relationship/function

NOT APPLICABLE.

19. Surname

NOT APPLICABLE.

20. First name(s)

NOT APPLICABLE.

21. Nationality

NOT APPLICABLE.

22. Address

NOT APPLICABLE.

23. Telephone (including international dialling code)

NOT APPLICABLE.

24. Fax

NOT APPLICABLE.

25. Email

NOT APPLICABLE.

C.2. Lawyer

26. Surname

SFOGGIA

27. First name(s)

SOLENE

28. Nationality

FRENCH

29. Address

NORTON ROSE FULBRIGHT
PARIS EIGHT
40 RUE DE COURCELLES
75008 PARIS
FRANCE

30. Telephone (including international dialling code)

+33 1 56 59 52 89

31. Fax

+33 1 56 59 50 01

32. Email

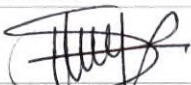
solene.sfoggia@nortonrosefulbright.com

C.3. Authority

The applicant must authorise any representative to act on his or her behalf by signing the first box below; the designated representative must indicate his or her acceptance by signing the second box below.

I hereby authorise the person indicated above to represent me in the proceedings before the European Court of Human Rights concerning my application lodged under Article 34 of the Convention.

33. Signature of applicant



34. Date

1	8	0	2	2	0	2	1
D	D	M	M	Y	Y	Y	Y

 e.g. 27/09/2015

I hereby agree to represent the applicant in the proceedings before the European Court of Human Rights concerning the application lodged under Article 34 of the Convention.

35. Signature of representative



36. Date

1	8	0	2	2	0	2	1
D	D	M	M	Y	Y	Y	Y

 e.g. 27/09/2015
Electronic communication between the representative and the Court

37. Email address for eComms account (if the representative already uses eComms, please provide the existing eComms account email address)

paris-ecomms@nortonrosefulbright.com

By completing this field you agree to using the eComms system.

D. Representative(s) of the applicant organisation

Where the applicant is an organisation, it must be represented before the Court by a person entitled to act on its behalf and in its name (e.g. a duly authorised director or official). The details of the representative must be set out in section D.1.

If the representative instructs a lawyer to plead on behalf of the organisation, both D.2 and D.3 must be completed.

D.1. Organisation official

38. Capacity/relationship/function (please provide proof)

Not applicable.

39. Surname

Not applicable.

40. First name(s)

Not applicable.

41. Nationality

Not applicable.

42. Address

Not applicable.

43. Telephone (including international dialling code)

Not applicable.

44. Fax

Not applicable.

45. Email

Not applicable.

D.2. Lawyer

46. Surname

Not applicable.

47. First name(s)

Not applicable.

48. Nationality

Not applicable.

49. Address

Not applicable.

50. Telephone (including international dialling code)

Not applicable.

51. Fax

Not applicable.

52. Email

Not applicable.

D.3. Authority

The representative of the applicant organisation must authorise any lawyer to act on its behalf by signing the first box below; the lawyer must indicate his or her acceptance by signing the second box below.

I hereby authorise the person indicated in section D.2 above to represent the organisation in the proceedings before the European Court of Human Rights concerning the application lodged under Article 34 of the Convention.

53. Signature of organisation official

Not applicable.

54. Date

Calendar grid for date entry with labels D, D, M, M, Y, Y, Y, Y.

e.g. 27/09/2015

I hereby agree to represent the organisation in the proceedings before the European Court of Human Rights concerning the application lodged under Article 34 of the Convention.

55. Signature of lawyer

NOT APPLICABLE.

56. Date

Calendar grid for date entry with labels D, D, M, M, Y, Y, Y, Y.

e.g. 27/09/2015

Electronic communication between the representative and the Court

57. Email address for eComms account (if the representative already uses eComms, please provide the existing eComms account email address)

NOT APPLICABLE.

By completing this field you agree to using the eComms system.

Subject matter of the application

All the information concerning the facts, complaints and compliance with the requirements of exhaustion of domestic remedies and the six-month time-limit laid down in Article 35 § 1 of the Convention must be set out in this part of the application form (sections E, F and G). It is not acceptable to leave these sections blank or simply to refer to attached sheets. See Rule 47 § 2 and the Practice Direction on the Institution of proceedings as well as the "Notes for filling in the application form".

E. Statement of the facts

58.

- a) Mokgadi Caster Semenya is a South African two-time Olympic gold medallist in the sport of athletics. Ms. Semenya is a woman. She was born a woman. She has been raised as a woman and lived as a woman her entire life. She has competed in sport as a woman. She is – and always has been – recognised in law as a woman.
- b) This Application concerns eligibility regulations implemented by World Athletics, the international governing body for the sport of athletics (formerly known as the International Association of Athletics Federations, or "IAAF"): the Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development). These regulations require Ms. Semenya (and other women athletes) to undergo intrusive and disturbing physical examinations and experimental and harmful medical interventions as a condition of competing in the female category in international athletics. This would include competitions in numerous States which are signatories to the Convention. This application has been lodged against Switzerland whose Federal Supreme Court ("FSC") issued a decision on 25 August 2020 refusing to intervene against World Athletics' serious infringements of Ms. Semenya's Convention rights.
- c) The impugned regulations are the latest development in a decade-long campaign of discrimination by World Athletics which has, through various iterations of sex-testing regulations, consistently prevented Ms. Semenya – as well as other women with differences in sex development ("DSDs") – from competing freely in international sport as the woman she is. Since the 1960s, the IAAF has sought to regulate eligibility for women's athletics through sex-verification processes. The Applicant will rely on the history of that sex-testing, including the institution in 1966 of "nude parades" whereby athletes were required to undergo a visual bodily (and genital) inspection by a panel of doctors; the implementation in 1968 of a new sex chromatin test (the "Barr test"); the 2006 "Policy on Gender Verification": the 2011 Hyperandrogenism Regulations; and on the Court of Arbitration for Sport ("CAS") decision: 2014/A/3759 in Dutee Chand v AFI & IAAF as important factual context to the harm created by the present set of DSD Regulations.

1989 - 2009

- d) Ms. Semenya was born in 1989 in a small village in the Limpopo Province of South Africa. She had a modest upbringing and enjoyed playing sport as a schoolgirl. In 2005, she began running competitively and she qualified for her first junior international competition in July 2008. (Semenya CAS Statement, paras. 9-14.)
- e) In August 2009, Ms. Semenya represented South Africa at the IAAF World Championships in Berlin. Prior to the competition and without Ms. Semenya's informed consent, IAAF-approved doctors conducted physical examinations of her body, including her genitals, and blood tests pursuant to the IAAF's sex-testing policy in effect at the time. Ms. Semenya went on to win gold in the women's 800 metres. Following her win, IAAF officials publicly commented on the tests conducted on her, including a statement by the IAAF's General Secretary that "It is clear that [Ms. Semenya] is a woman but maybe not 100 per cent." She was shocked, disturbed, and hurt by the widespread public discussion of her body and sex. (Semenya CAS Statement, paras. 20-27.)

2010 - 2015

- f) Upon her return home from Berlin, Ms. Semenya was told by the IAAF that, in order to compete in international competitions, she would have to reduce her natural testosterone levels to below 10 nmol/mL, which limit was formally enacted in 2011 by the IAAF's Hyperandrogenism Regulations. Ms. Semenya felt that she had no choice but to comply. She had devoted her life to running and it was her only way of earning a living. (Semenya CAS Statement para 30; IAAF Hyperandrogenism Regulations.)
- g) Dr Stéphane Bermon of the IAAF discussed the medical options for Ms. Semenya with her specialist physician, Professor Greta Dreyer, who objected to the suggestion that Ms. Semenya undergo surgical procedures due to extensive evidence of "dramatic physical and mental deterioration" caused by such procedures. Instead, Ms. Semenya was prescribed an oral contraceptive to reduce her testosterone levels. Ms. Semenya felt like she was "being used as a guinea pig or lab rat" because there was no available information on how the medication would work for this off-label use or the side effects it might cause (CAS Award, paras. 83, 101.)

Statement of the facts (continued)

59.

- h) The IAAF required Ms. Semenya to take oral contraceptives for more than five years. During this period, she felt sick all the time, gained weight, suffered from regular fevers, and had constant internal abdominal pain. The pills also adversely affected her mental health. Even though Ms. Semenya complied with the medical protocol established for her, her testosterone levels fluctuated significantly. During the time she was forced to take oral contraceptives, Ms. Semenya won a silver medal in the 800 meters at the 2012 London Olympic Games, which was later upgraded to gold after another athlete was disqualified for doping. (Semenya CAS Statement paras 37-42, 49; CAS Award, paras. 77-80, 100-102, 612.)
- i) In late-2014, Indian athlete Dutee Chand commenced an arbitration against the IAAF before the CAS seeking to set aside the IAAF's Hyperandrogenism Regulations. In its award dated 27 July 2015, the CAS held that the Regulations discriminated on the basis of sex (as they applied only to women and not men) and a natural physical characteristic (elevated natural testosterone levels). The CAS decided that the IAAF had not presented "sufficient scientific evidence about the quantitative relationship between enhanced testosterone levels and improved athletic performance in hyperandrogenic athletes", concluding that it had failed to prove that the Regulations were necessary and proportionate to preserve fairness in athletic competition and suspended the Regulations. (CAS 2014/A/3759, paras 532-534, 547.)
- j) This meant that there were no sex-testing restrictions on women during the 2016 Rio Olympic Games and 2017 IAAF World Championships in London. Ms. Semenya won gold in the women's 800 metres at both competitions. She was subjected to further offensive and hurtful comments from competitors about her body and sex. (Semenya CAS Statement, para. 27-28.)

2018 – New Eligibility Regulations

- k) In April 2018, the IAAF published the DSD Regulations to replace the suspended Hyperandrogenism Regulations.
- l) The DSD Regulations create a complicated eligibility regime for female athletes regulating the process from the IAAF Medical Manager's identification (based on any information derived from unspecified "reliable" sources) of a potential "Relevant Athlete" through to investigation, medical testing, medical assessment, eligibility decisions and up to and including disciplinary and exclusionary measures. A "Relevant Athlete" is a woman seeking to compete internationally and who meets the following conditions:
- (1) She has one of the DSDs listed in section 2.2(a)(i) – the listed DSDs only concern those with 46XY;
 - (2) She has circulating testosterone levels in her blood of at least 5nmol/L; and
 - (3) She has "sufficient androgen sensitivity" for her testosterone levels to have a "material androgenising effect" on her body (section 2.2(a)).
- m) Women with a 46 XX DSD and with endogenous testosterone levels above 5nmol/L do not come within the scope of the DSD Regulations; nor do women with polycystic ovary syndrome ("PCOS") nor with complete androgen insensitivity syndrome ("CAIS"), even if their endogenous testosterone levels are above 5nmol/L.
- n) The DSD Regulations apply only to running events over distances between 400 metres and one mile, the very distances in which Ms. Semenya specialises. Under the DSD Regulations, women who compete in such "Restricted Events" and who have one of various enumerated genetic conditions causing natural testosterone to be above 5 nmol/L are subjected to multiple rounds of physical examination and clinical assessment by IAAF-approved doctors. If the doctors determine that the athlete's natural testosterone results in a "material androgenizing effect" on her body, she has four options if she wishes to remain in competitive athletics: (i) undergo medical intervention (i.e., hormone suppressing drugs or surgical gonadectomy) to reduce and maintain her testosterone below 5 nmol/L in order to compete in Restricted Events in the female category; (ii) compete in Restricted Events in the male category; (iii) switch specialties to a non-Restricted Event; or (iv) compete only at the national level.

2019 – Court of Arbitration for Sport

- o) Ms. Semenya refused to accept the IAAF's renewed demand that she undergo harmful and experimental medical intervention to reduce her natural testosterone as a condition of eligibility. Instead, in June 2018 she commenced an arbitration against the IAAF in the CAS, which she was required to do pursuant to section 5 of the DSD Regulations. Her challenge sought to invalidate the DSD Regulations, arguing that they were discriminatory and neither necessary nor proportionate to preserve fair competition in women's athletics. (CAS Semenya Statement of Claim.)

Statement of the facts (continued)

60.

p) In an arbitral award dated 30 April 2019 (CAS 2018/O/5794; CAS 2018/O/5798, referred to herein as "CAS Award"), the CAS panel held unanimously that the DSD Regulations discriminate on the basis of legal sex and immutable biological characteristics, namely certain DSDs. However, by a two-to-one majority, the CAS upheld the DSD Regulations as a necessary, reasonable, and "ex facie proportionate" means of protecting the integrity of female athletics. On the issue of necessity, the majority of the CAS panel relied on certain "Highly Confidential Information" possessed by the IAAF in holding that women athletes with certain DSDs have "an insuperable advantage" over their competitors. On the issue of proportionality, the majority of the CAS panel recognised (i) the unwanted and distressing consequences of physical examinations conducted on women athletes targeted by the DSD Regulations (which measure, among other things, clitoral length, breast size, and body hair patterns); (ii) the unwanted adverse health effects of oral contraceptives and other hormone-reducing medications taken by women athletes to reduce and maintain their testosterone below 5 nmol/L, including for example risks of deep venous clots, pulmonary embolism, stroke, hypertension, liver dysfunction, and tumours; (iii) the inevitable inability to maintain confidentiality of cases under the DSD Regulations; (iv) the speculative basis upon which the IAAF deemed certain running disciplines as Restricted Events under the Regulations; and (v) concerns about the practical ability of women athletes to comply with the Regulations using oral contraceptives (as opposed to more harmful hormonal interventions or surgery, which the CAS expressly excluded from its assessment of proportionality). Nonetheless, the majority of the CAS panel deemed that the DSD Regulations were proportionate based on the available evidence but cautioned that further evidence on the implementation of the Regulations could lead to a different conclusion on proportionality. The reasons of the dissenting arbitrator were not published by the CAS. Costs were ordered against the Applicant despite this being a matter of general public importance. (CAS Award.)

q) In response to the CAS award, the World Medical Association ("WMA") issued a statement on 15 May 2019 opposing the DSD Regulations as "contrary to medical ethics." The WMA reaffirmed its previous statement calling on the IAAF to withdraw the DSD Regulations as they "constitute flagrant discrimination based on the genetic variation of female athletes" and calling on physicians not to perform tests or administer off-label medicines on athletes to artificially modify endogenous testosterone for mere compliance purposes. (WMA Statements April 2019 and May 2019.)

r) On 28 May 2019, Ms. Semenya filed an application in the Swiss FSC to set aside the CAS award. Ms. Semenya argued that the award infringed her fundamental rights protected under Swiss public policy, including her (i) right to be free from discrimination; (ii) right to physical and psychological integrity; (iii) right to privacy; (iv) right to economic freedom; and (v) human dignity. (Swiss FSC Submission.)

2020 – Swiss Federal Supreme Court Decisions and International Reports

s) On 3 June 2019, the FSC issued an ex parte superprovisional order suspending the DSD Regulations vis-à-vis Ms. Semenya. This order was overturned by the FSC on 29 July 2019, meaning the Regulations subsequently remained in full force against all athletes for eleven months while the proceedings were pending. (FSC Order, 3 June 2019; FSC Order, 29 July 2019.)

t) As a result, Ms. Semenya did not compete at the 2019 IAAF World Championships held in October 2019 in Doha.

u) In June 2020, the United Nations High Commissioner for Human Rights issued a report on the intersection of race and gender discrimination in sport calling on World Athletics to "review, revise and revoke" the DSD Regulations. The Commissioner's report expressed concerns that the Regulations "effectively legitimise the surveillance of all women athletes based on stereotypes of femininity" and "single out a group of women athletes, putting them at risk of repercussions far beyond the inability to compete." (UNHCHR Report.)

v) In a decision dated 25 August 2020, the FSC refused to set aside the CAS award, holding that the award did not violate Swiss public policy. The FSC made this determination despite acknowledging that the physical examinations and medical intervention required by the DSD Regulations "seriously infringe" Ms. Semenya's right to physical integrity, and that the Regulations also infringe her right to privacy and right to economic freedom. (Swiss FSC 4A_248/2019 and 4_A398/2019, sections 9, 10.)

w) On 4 December 2020, Human Rights Watch ("HRW") issued a scathing report on the gender-based harms caused by the DSD Regulations - and predecessor sex-testing regimes in sport - to women athletes (especially those from the Global South, who were disproportionately affected). HRW reported concerns of women athletes facing discrimination, invasions of privacy and surveillance, loss of dignity, coercion, social stigma, psychological harm, and loss of income. HRW called on World Athletics to rescind the DSD Regulations. (HRW Report.)

x) Ms. Semenya has filed this Application in the hope that she will one day be permitted to run the way she was born, free from the discrimination and other human rights violations perpetuated by the DSD Regulations and validated by Switzerland.

F. Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments

61. Article invoked Overview	<p>Explanation By:</p> <p>(i) affording a seat to the International Council of Arbitration for Sport (“ICAS”) and the CAS in Lausanne;</p> <p>(ii) the Applicant having no choice but to resort to the mandatory arbitration provisions of the DSD Regulations which required her to submit her dispute to CAS;</p> <p>(iii) providing the right to appeal against relevant CAS awards to the Swiss FSC, on the grounds that the award offends against Swiss public policy (which allows the provisions of the Convention to be taken into account) (FSC Judgment, §9.2); and</p> <p>(iv) the FSC validating the CAS award by dismissing the Applicant’s appeal, so giving it the force of law in the Swiss legal order:</p> <p>Switzerland, as a signatory to the Convention, triggered its positive obligations pursuant to Articles 14, 8, 3, 6 and 13 to ensure effective protection against any violations of the Applicant’s Convention rights within its jurisdiction. Switzerland has further breached its obligations by failing to provide the Applicant with effective access to a court (Article 6) and/or an effective remedy (Article 13) for the violation of her substantive Convention rights which the CAS failed to protect against because of its flawed approach to and analysis of the Applicant’s case against the IAAF which was then validated and given force of law in Switzerland by the FSC.</p>
<p>(Articles 14 and/or 8 and/or 3: Article 14 is applicable since the substantive matters plainly fall within the ambit of both Articles 8 and 3, which are engaged either individually or taken together with Article 14;</p> <p>and</p> <p>Articles 6 and 13 of the Convention)</p>	<p>Article 14:</p> <p>The DSD Regulations discriminate against the Applicant and other “Relevant Athletes” (as defined in the Regulations) on the basis of: (i) sex, because they impose eligibility conditions for international competitions on women athletes only (with no equivalent restrictions applied to men); and/or (ii) other status (namely, intersex and/or physical or biological characteristics and/or gender identity and/or these intersecting characteristics), because the Regulations continue a historical regime of sex-testing, aimed at verifying an athlete’s so-called “sport sex”, by seeking to differentiate and exclude certain women athletes from the women’s category on the basis that they are not sufficiently female, in so-doing perpetuating harmful gender stereotypes; and/or the Regulations target and screen for certain natural biological/genetic traits (naturally high testosterone) and not others.</p> <p>The prima facie discrimination on grounds of sex and physical/biological characteristics was found in the Applicant’s favour by the CAS and the FSC but the CAS concluded that this discrimination was reasonable, necessary and proportionate to the IAAF’s aim of protecting the fairness and integrity of competition in the female category (that is, a level playing field). The FSC accepted that conclusion, without assessing for itself – in accordance with appropriate and Convention-compliant standards – the necessary questions as to objective justification. Furthermore, the adverse impacts of the Regulations disproportionately affect women from the Global South, such that they cause indirect race discrimination which is relevant for assessing necessity and harm. The CAS’s conclusion was fatally flawed by its impermissible approach to both the evidence and legal analysis. The FSC adopted and validated the CAS conclusions without any proper or sufficient analysis of each the essential legal tests required by the Convention (including as to the burden of proof). Constrained by its limited powers to review the CAS Award, it failed properly to assess itself whether the aim relied on by the IAAF was even capable of justifying, (1) the “necessity” for the DSD Regulations (and whether they were rationally connected to their aims); and (2) the interferences with the Applicant’s Convention rights. In particular, the objective of the Regulations was neither legitimate nor sufficiently important having regard to their harmful impact; the Regulations were not rationally connected to their objective and there was no no proportionality as between any legitimate benefit and harms caused. It was a critical error to impose a burden on the Applicant to disprove the IAAF’s case on objective justification (including by requiring her to adduce evidence of actual harms). Accordingly, there was a significant failure to protect the Applicant from the serious violations of her right not to be discriminated against in the enjoyment of her substantive rights under Articles 8 and/or 3 of the Convention.</p>

Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments (continued)

62. Article invoked	Explanation
Article 8:	<p>The DSD Regulations – which mandate humiliating and intrusive examinations aimed at determining whether the Applicant is “biologically male” as well as pharmacological or even surgical interventions to reduce the levels of naturally-occurring testosterone in the bodies of affected female athletes – seriously interfere with the Applicant’s right to respect for private life, in particular her physical and psychological integrity and identity and right to self-determination, including the right to exercise her professional activity as an elite athlete without undue restriction; and to respect for human dignity. The FSC acknowledged the severe intrusion upon the Applicant’s “personality rights” (a concept within the Swiss public order which is akin to the right to respect for private life under Article 8(1) of the Convention); and that the Applicant’s consent to the regime imposed by the DSD Regulations was not freely given (FSC Judgment, §10.2). The FSC (as had the CAS) also acknowledged the likelihood of breaches of confidentiality caused by the regime (§10.4). Nevertheless, the FSC failed properly to assess and analyse these serious infringements by reference to Convention-compliant legal test and standards and, in particular, wholly failed to appreciate that:</p> <ul style="list-style-type: none"> (i) the DSD Regulations are not in accordance with the law because they are not delineated with sufficient clarity or precision to create foreseeability so as to afford the Applicant protection against arbitrariness; (ii) the objective of the Regulations (de facto “sex-testing”) did not pursue one of the aims enumerated in Article 8(2); (iii) the Regulations have no rational connection to their stated aims (of fairness and integrity in sport and inclusive participation in sport); (iv) the objective of the Regulations is not sufficiently weighty so as to be necessary in a democratic society and they do not meet a pressing social need, given that they seek to exclude women from their own (i.e. female) category; and (v) the serious interferences with the Applicant’s Article 8(1) rights was not proportionate to the aim pursued. <p>The FSC failed to engage with and have regard to the manifest flaws in the IAAF’s evidence which rendered it incapable of discharging the burden of justification.</p>
Article 3:	<p>The Applicant is a healthy woman; and does not need to be “treated” or “corrected”. However, the DSD Regulations cause harm (her body is subjected to assessment and interference, including examination of her genitalia) which is medically unnecessary; stigmatisation through public shaming and humiliation (marking her out as not female enough); psychological harm through coercion and the lack of valid consent to the assessment pathway and the medical interventions imposed on her to allow her to continue to compete; disproportionate impact on her as a woman from the Global South; and severe harm to her dignity and self-worth (whereby she is singled out simply by virtue of her existence). The FSC considered issues of harm, but the narrow jurisdiction under the PILA disabled it from appreciating their severity which, viewed individually and cumulatively, meet the threshold of inhuman and degrading treatment.</p>
Article 6 and/or 13	<p>The limited nature of the review against Swiss public policy under Article 190(2)(e) PILA is either incapable of affording both effective access and an effective remedy, or the Court failed to provide such access and/or remedy. The scope of review was excessively restrictive and the Court could not, or would not, examine the merits of each of the Convention complaints.</p>
Article 41 (just satisfaction)	<p>The Applicant seeks the following:</p> <ul style="list-style-type: none"> a) A finding that her rights under Articles 14, 8 and 3, taken independently and together, have been violated; b) A finding that her rights under Article 6 have been violated; c) A finding that her rights under Article 13, read together with her substantive rights under Articles 14, 8 and 3, have been violated; d) Just satisfaction under Article 41 to address the violation of her rights as set out above; e) The costs and expenses of the legal proceedings, both before the CAS, the FSC and this Court.

G. Compliance with admissibility criteria laid down in Article 35 § 1 of the Convention

For each complaint, please confirm that you have used the available effective remedies in the country concerned, including appeals, and also indicate the date when the final decision at domestic level was delivered and received, to show that you have complied with the six-month time-limit.

<p>63. Complaint All.</p>	<p>Information about remedies used and the date of the final decision</p> <p>a. The Applicant, who is a South African national, has raised her complaints and/or the substance of her complaints in all available domestic avenues and pursuant to Swiss law. Accordingly, she has complied with the obligation to exhaust domestic remedies. The Applicant was obliged to bring her complaints before the CAS, which has jurisdiction in respect of the IAAF's DSD Regulations, and whose seat is in Lausanne, Switzerland. The Applicant failed in her arbitration by decision of 30 April 2019 (CAS 2018/O/5794).</p> <p>b. By the Federal Law on Private International Law of 18 December 1987 (the "PILA"), Articles 176, 190-191, a limited right of appeal is provided to the Swiss FSC, which the Applicant pursued. That appeal was unsuccessful by decision of 25 August 2020 (4A_248/2019), notified 7 September 2020 (see stamp on the last page) and received on September 8. There is no further avenue of appeal (Article 191 PILA). The Applicant's complaint therefore complied with exhaustion of remedies, and this Application is served within the six-month time limit, as specified by Article 35.1 of the Convention.</p> <p>c. For the avoidance of doubt, the Court plainly has jurisdiction <i>ratione personae</i> to examine these complaints. Whilst the CAS is neither a domestic court, nor any other institution of Swiss public law, Swiss law confers jurisdiction on the FSC to examine the validity of CAS Awards (Articles 176, 190-191 PILA). The substance of Article 3, 8 and 14 of the Convention is engaged by the Swiss concept of public policy (the FSC noting at §9.2 that, whilst it is not possible to directly invoke Convention violations, the provisions of the Convention can be taken into account in the context of public order). The FSC made findings on the substantive claims relating to discrimination and personality rights. The acts or omissions complained of therefore engaged the respondent State's responsibility under the Convention. The FSC dismissed the Applicant's appeal, thereby giving the CAS award (and the attendant violations) force of law in the Swiss legal order. It follows that the Court has jurisdiction to hear complaints by applicants about the acts and omissions of the CAS as endorsed by the FSC (<i>Mutu and Pechstein v Switzerland</i> App. Nos. 40575/10 and 67474/10, §§62-7; <i>Platini v Switzerland</i> App. No. 526/18, §§36-8). Moreover, the Convention itself is a "constitutional instrument of European public order" (e.g. <i>Bosphorus v Ireland</i> App. No. 45036/98, §156). The impugned acts or omissions are therefore capable of and did engage the responsibility of the respondent State under the Convention.</p> <p>d. Further, the CAS proceeding was a mandatory arbitration, the Applicant being compelled to engage CAS jurisdiction pursuant to section 5.2 of the DSD Regulations, which were applicable to her as a condition of her participation in international athletics. The FSC itself noted that competitive sport is characterised by a hierarchical structure, and that the relations between the athletes and sporting governance bodies are distinguished from the horizontal relations established by the parties to a purely private contractual relationship. In this context, resort to arbitration was not voluntary and the Applicant was left with no alternative route to protect her fundamental rights (by analogy with <i>Tabbane v Switzerland</i> App. No. 41069/12, §§26-7; and <i>Ali Reza v Turkey</i> and others App. Nos. 30226/10). (See further <i>Pla and Puncernau v Andorra</i> App No. 69498/01, §59, in respect of the FSC position on the question of discrimination relating to horizontal rights). In those circumstances, the respondent State was obliged to ensure her fundamental rights were protected.</p> <p>e. Further, and in any event, the Applicant asserts that the respondent State has positive obligations to her pursuant to Articles 1, 3 and 8 of the Convention (Articles 3 and 8 taken individually or together with Article 14), and/or that the respondent State has failed to provide her with effective access to a court (pursuant to Article 6) and/or an effective remedy, pursuant to Article 13, for the violations of her substantive Convention rights.</p>
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64. Is or was there an appeal or remedy available to you which you have not used?

Yes

No

65. If you answered Yes above, please state which appeal or remedy you have not used and explain why not

Not applicable.

H. Information concerning other international proceedings (if any)

66. Have you raised any of these complaints in another procedure of international investigation or settlement?

Yes

No

67. If you answered Yes above, please give a concise summary of the procedure (complaints submitted, name of the international body and date and nature of any decisions given)

The Applicant has exhausted all domestic remedies. She has not pursued any further avenues of international complaint, whether to any United Nations mechanism, or to any other international arbitration body. Her application to this Court is the sole avenue of redress for which she has applied.

For clarity, and as set out in other parts of this application, the process of exhausting domestic remedies included the submission by the Applicant of her complaints in the first instance to the CAS, as she was required to do pursuant to applicable law. The CAS arbitration was heard by a panel of three CAS arbitrators on February 18 to 22, 2019 and an award was issued on April 30, 2019 (CAS Award). The details of the CAS arbitration are set out in other parts of this application form, the annex hereto, and the accompanying documents included in the application materials. The Applicant herself has not submitted any complaints to any United Nations body, although, owing to the importance of her case at a global level, the Applicant's CAS arbitration and related issues were considered – without input or request from the Applicant - at the forty-fourth (44th) session of the United Nations Human Rights Council held on June 15 to July 3, 2020, as reflected in the Report of the United Nations High Commissioner for Human Rights entitled "Intersection of race and gender discrimination in sport" (UNHCHR Report).

68. Do you (the applicant) currently have, or have you previously had, any other applications before the Court?

Yes

No

69. If you answered Yes above, please write the relevant application number(s) in the box below

Not applicable.

I. List of accompanying documents

You should enclose full and legible *copies* of all documents. No documents will be returned to you. It is thus in your interests to submit copies, not originals. You **MUST**:

- arrange the documents in order by date and by procedure;
- number the pages consecutively; and
- NOT staple, bind or tape the documents.

70. In the box below, please list the documents in chronological order with a concise description. Indicate the page number at which each document may be found

1.	IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition, 01 May 2011 ("Hyperandrogenism Regulations")	p.	1
2.	Report of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, February 2013	p.	30
3.	Dutee Chand v IAAF and AFI, CAS 2014/A/3759, 24 July 2015	p.	53
4.	IAAF Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development, published 23 April 2018 ("DSD Regulations"))	p.	214
5.	CAS Order – Confidentiality Order, 3 October 2018	p.	236
6.	CAS Evidence - Witness Statement of Mokgadi Caster Semenya, 14 November 2018	p.	241
7.	CAS Submission - Statement of Claim of Mokgadi Caster Semenya, 19 November 2018	p.	288
8.	CAS Award (redacted, publicly available version) - Mokgadi Caster Semenya and ASA v. IAAF, CAS 2018/O/5794 / CAS 2018/O/5798, 30 April 2019	p.	407
9.	World Medical Association Statements, 25 April and 15 May 2019	p.	570
10.	IAAF Revised DSD Regulations, 01 November 2019	p.	577
11.	Swiss FSC Submission – Recours en matière civile de Mokgadi Caster Semenya, 28 May 2019 (redacted to remove Highly Confidential Information)	p.	600
12.	Swiss FSC Order, 31 May 2019	p.	713
13.	Swiss FSC Order, 29 July 2019	p.	715
14.	Swiss FSC Judgment - Semenya and ASA v IAAF, 4A_248/2019 and 4_A398/2019, 25 August 2020 (notified to Applicant on 7 September 2020 as shown by stamp on last page)	p.	728
15.	Report of the United Nations High Commissioner for Human Rights: Intersection of race and gender discrimination in sport, June 2020 ("UNHCHR Report")	p.	799
16.	Human Rights Watch, "They're Chasing Us Away from Sport": Human Rights Violations in Sex Testing of Elite Women Athletes, 4 December 2020 ("HRW Report")	p.	814
17.	ECtHR Evidence – Statement of Mokgadi Caster Semenya, 2 February 2021	p.	941
18.	ECtHR Evidence - Emails between the Applicant's counsel and World Athletics counsel concerning CAS Highly Confidential Information, 8-12 February 2021 (redacted to remove Highly Confidential Information)	p.	946
19.		p.	
20.		p.	
21.		p.	
22.		p.	
23.		p.	
24.		p.	
25.		p.	

Any other comments

Do you have any other comments about your application?

71. Comments

The Applicant has attached an annex to the application form pursuant to Rule 47.2(b). The Applicant has also included in the application materials: (i) a Request for Confidentiality pursuant to Rule 33; and (ii) a Request for Priority pursuant to Rule 41. The Request for Confidentiality explains why the Applicant has filed with the Court the public (redacted) version of the CAS Award and why certain other documents containing Highly Confidential Information covered by a Confidentiality Order issued by the CAS Panel have not been provided or provided in redacted form at this point in time.

Declaration and signature

I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct.

72. Date

1 8 0 2 2 0 2 1 e.g. 27/09/2015
 D D M M Y Y Y Y

The applicant(s) or the applicant's representative(s) must sign in the box below.

73. Signature(s) Applicant(s) Representative(s) - tick as appropriate



SOLENE SFOGGIA

Confirmation of correspondent

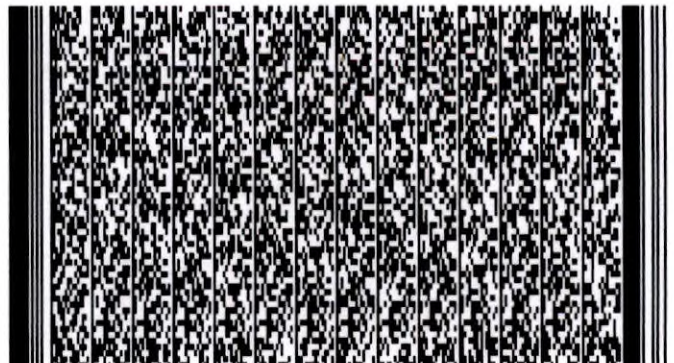
If there is more than one applicant or more than one representative, please give the name and address of the one person with whom the Court will correspond. Where the applicant is represented, the Court will correspond only with the representative (lawyer or non-lawyer).

74. Name and address of Applicant Representative - tick as appropriate

Solène Sfoggia
 Norton Rose Fulbright - ParisEight
 40 rue de Courcelles
 75008 Paris
 France

The completed application form should be signed and sent by post to:

The Registrar
 European Court of Human Rights
 Council of Europe
 67075 STRASBOURG CEDEX
 FRANCE



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