Arbitration, athletes and appeals: a human right to judicial review of awards?

The European Court of Human Rights judgment in Semenya v Switzerland

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In its judgment issued on 11 July 2023,[1] a chamber of the European Court of Human Rights (ECtHR) upheld complaints by the South African athlete Mokgadi Caster Semenya against the Swiss state. Notably the ECtHR found that the outcome of arbitral proceedings in the Court of Arbitration for Sport (CAS), coupled with the narrow scope of review by the Swiss Federal Court, violated her right against discrimination under article 14 of the European Convention of Human Rights

The case may be heading for the Grand Chamber. Meanwhile the judgment is the latest word on how decision-making in professional sport should address difficult gender-related questions in the context of women's competitions. Much of the legal interest, though, lies in its broader implications: the way the ECtHR defined the duties of arbitral tribunals dealing with Convention issues and, crucially, what the judgment means for the scope of review of arbitral awards by national courts.

The judgment in brief

Ms Semenya's ECtHR application followed a CAS award upholding a World Athletics regulation requiring certain athletes with the genetic condition DSD (differences of sex development) to take testosterone-inhibiting drugs as a condition for participating in women's competitions. The Swiss Federal Court declined to quash the award, finding that Ms Semenya had failed to establish any of the extremely limited grounds under Swiss law for interfering with the outcome of an arbitration – in particular, incompatibility with public policy.

World Athletics – formerly known as IAAF – is a private body established under the laws of Monaco. The dispute was adjudicated at first instance by CAS, also a private body.

Nonetheless, the ECtHR found the Convention applicable because the Swiss Federal Court had determined Ms Semenya's application to annul the award. The ECtHR followed its earlier decision in *Mutu and Pechstein v Switzerland*,[2] also a case stemming from CAS proceedings, in which the Federal Court's role in the review and recognition of CAS awards engaged the responsibility of the Swiss state. *Mutu and Pechstein* also affirmed that arbitration is compatible with the article 6 right of access to court, provided certain conditions relating to waiver of rights are satisfied.[3]

The ECtHR had no difficulty accepting that the case engaged Ms Semenya's article 8 rights, enabling it to consider whether article 14 had been violated in relation to those rights.[4] It noted that the CAS had not directly applied the Convention, or the ECtHR's jurisprudence, in ultimately deciding to uphold the regulation. This was so despite the tribunal making extensive factual findings (outlined in the press summary) pointing towards an unjustified discriminatory effect of the regulation. The extremely narrow scope of review by the Federal Court – confined to compatibility of the CAS award with substantive public policy (*l'ordre public matériel*), a very high threshold indeed – had "*not permitted it to respond to the serious concerns expressed by the CAS in a manner compatible with the requirements of article 14*". Switzerland had therefore failed to meet its positive obligation under article 14 to provide "*sufficient institutional and procedural safeguards*" for Ms Semenya's complaint of discrimination.[5]

1 Semenya v Switzerland, Application 10934/21; at the time of writing this is available in French only. An English press summary is also available. The judgment was by 4–3 majority.

2 Applications 40575/10 and 67474/10, Chamber judgment of 2 October 2018.

3 See further Gordon Nardell KC's case note at https://arbitrationblog.kluwerarbitration.com/2021/07/29/the-ecthr-judgment-in-beg-spa-v-italy-a-human-right-to-a-conflict-free-arbitrator-part-i/ discussing *Mutu and Pechstein* and the later *BEG SpA v Italy*. See also below for voluntary v mandatory arbitration.

4 Judgment paras [122]–[127].

5 See in particular judgment paras [165]–[166], [220]–[201].

The ECtHR also found a violation of article 13, due to the lack of an effective domestic remedy for Ms Semenya's article 8 and 14 complaints, for essentially the same reasons

Some observations on the ECtHR's reasoning

While there is a substantial body of case law on the relationship between arbitration and article 6, this is the first time that the ECtHR has adjudicated on the relationship between arbitration and article 14.

Article 14 cases usually involve the court asking itself whether a "difference in treatment" is a proportionate means of pursuing a legitimate aim – a substantive balancing exercise in which the state is afforded a certain margin of appreciation, though this margin is narrow where the state seeks to justify differential treatment on grounds such as gender, ethnicity or sexual orientation.

In *Semenya*, the ECtHR instead focused on the *procedural* guarantees afforded by the national system. The central question was "*whether the applicant enjoyed sufficient institutional and procedural guarantees, such as a system of courts or tribunals before which she could bring her complaints, in particular that based on article 14, and whether these have rendered properly reasoned decisions taking into account the court's jurisprudence*".[6] Given the paucity of reasoning from the national court, that approach sidestepped the need for the ECtHR to decide an exceptionally sensitive substantive issue, effectively as a court of first instance. That would have been an invidious burden for an international court whose review is meant to be subsidiary to that of the national authorities.

The upshot, then, of the judgment is article 14 includes a right to access courts and tribunals that explicitly determine complaints of discriminatory treatment against Convention standards. Hence the Convention does not prevent private law organisations, such as sporting bodies, from requiring members to submit complaints of discrimination – or other alleged violations of fundamental rights – to arbitration. But the arbitral tribunal must properly apply the Convention, asking itself the right question – is a difference in treatment proportionate? – and answering it by reference to the ECtHR's jurisprudence. The state must also ensure an adequate review of the award by the national court. That is perhaps the most interesting issue – and the aspect of the judgment most likely to alarm arbitration practitioners.

6 Judgment para [166].

Consequences for London-seated arbitrations: section 69 to the rescue?

Semenya invites the question: where Convention issues are in play, is the state required to provide full merits review of arbitral awards? The judgment does not go that far. What is necessary is a review sufficient to ensure that the tribunal has "*rendered a properly reasoned decision taking into account the court's jurisprudence*".[7] In other words, the national court must ensure that the tribunal, having found the facts, has reached its legal conclusions properly applying the protections afforded by the Convention.

That falls well short of a fresh examination of the merits. But it is undoubtedly wider than the restrictive grounds on which most of the Council of Europe's 46 member states permit judicial interference with arbitral awards. There is a parallel with a strand of ECtHR jurisprudence dealing with administrative decisions that determine "civil rights and obligations". Here, a failure by the decision-maker to meet the standards of article 6 can be compensated by a national court with "full jurisdiction" to review the outcome.[8] That condition is met where the court can review the *legality* of the decision;[9] a complete review of the merits is not necessary.

Would, say, the right of appeal to the High Court under s69 of the English Arbitration Act 1996 be sufficient? This is far from an academic question: arbitration in England is the agreed forum for (among others) disputes under the rules of the English Football League (EFL) and appeals from the Cricket Discipline Commission (CDC), both encompassing proceedings potentially involving complaints of racist or discriminatory conduct. Indeed, the CDC recently dealt with high-profile complaints by former player Azeem Rafiq alleging racist and discriminatory language in breach of the ECB Anti-Discrimination Code. In the wake of *Semenya*, the sufficiency of review under s69 may well become a live issue sooner rather than later.

In principle, review of an award for error of law ought to satisfy the *Semenya* requirement. But a s69 appeal requires permission which will only be granted if, among other cumulative conditions, "the question is one which the tribunal was asked to determine" (s69(3)(b)) and "the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of

7 Above, fn 6.

8 *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, ECtHR.

9 "*…full jurisdiction to deal with the case as the nature of the decision requires*": *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, Lord Hoffmann [87].

the tribunal is at least open to serious doubt" (s69(3)(c)). Suppose the tribunal has considered the issue of discrimination generally, but was not specifically asked to address article 14 (exactly the position in the CAS in *Semenya*). Would its failure to consider article 14 be enough to leave its decision "open to serious doubt"? Does a potential UK violation of the Convention, if permission were refused, itself raise a question of "general public importance"? In the wake of *Semenya* the answer must be at least an arguable 'yes', with the court if necessary deploying Human Rights Act 1998 s3 to read s69 compatibly with the Convention.

What happens if the relevant rules contain an opt-out from the right of appeal – as the EFL rules do?[10] The court would likely apply ECtHR case law on waiver of Convention rights.[11] If arbitration is found to be compulsory – which it may well be, where a professional athlete has no choice but to sign up to the relevant rules – waiver is unlikely to be permissible at all, effectively overriding the opt-out. If the agreement to arbitrate is regarded as voluntary, waiver must be "established in an unequivocal manner" and accompanied by "minimum safeguards commensurate with the importance of the right". The necessary "safeguards" could include recourse to the court under s69, once more overriding the opt-out.

The position may be more difficult where arbitration is seated in a jurisdiction where the court's intervention is limited to Model Law (essentially, compatibility with public policy) or similarly narrow grounds.[12] However, in relation to Switzerland, the ECtHR in *Semenya* hinted that the problem lay in the Federal Court's unduly restrictive jurisprudence on the scope of 'public policy', rather than in any inherent impossibility in treating that concept as extending to incompatibility with Convention rights.

Each member state will no doubt find its own jurisprudential solution to this conundrum. Ultimately, the limited expansion required in the scope of judicial intervention where Convention issues arise seems a modest price to pay for preserving the legitimacy of the arbitral system itself, as against the 'baby-with-bathwater' alternative of diverting all such cases to state courts.

10 Rules 104.1 and 104.2.1.

11 *Mutu and Pechstein*, above.

12 UNCITRAL Model Law article 34(2)(b) contemplates recourse against an award where "(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State." Examples include the Irish Arbitration Act 2010, which incorporates the Model Law, and the Danish Arbitration Act 2005 and Turkish International Arbitration Law 2001, which contain adaptations of article 34.

What happens next?

Switzerland has three months from the judgment to request reconsideration by the Grand Chamber. If the case is referred to the Grand Chamber, its eventual judgment will either affirm or overturn the divided chamber's conclusions.

Whatever the ultimate outcome, the chamber's reasoning is a reminder of the burgeoning relevance of the ECtHR's jurisprudence to arbitration generally. Sporting bodies and other private organisations whose rules include submission to arbitration might think it prudent to look carefully at how their processes accommodate Convention arguments, and to anticipate a growing willingness of national courts to intervene in arbitral decisions where Convention issues are in play.

Takeaways

- The *Semenya* chamber judgment affirms the growing relevance of the European Convention on Human Rights to arbitral proceedings involving sporting and other private organisations.
- The ECtHR recognised that where article 14 is in play, the state is positively obliged to provide "sufficient procedural and institutional safeguards" to protect individual athletes against discrimination. That includes ensuring that arbitral tribunals give properly reasoned decisions based expressly on the Convention and the ECtHR's jurisprudence, supervised by a national court with adequate power to set aside awards that fail to meet that standard.
- In English-seated arbitrations, an appeal on a point of law under Arbitration Act 1996 s69 should meet the supervisory requirement, subject to adopting a Convention-compatible reading of the permission provisions and applying the ECtHR's waiver principles to opt-out rules.
- Council of Europe member states whose law includes no equivalent of s69 will have to find other workarounds to ensure compatibility with the Convention, including potentially a more generous interpretation of 'public policy'.
- The case may be referred to the Grand Chamber. Meanwhile sporting bodies and other private organisation using arbitration should consider the Convention compatibility of their processes and anticipate a heightened risk of judicial intervention.

Meet the authors

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