Semenya v. IAAF: Targeted Discrimination or Necessary for Fair Competition?

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Law - Other (International Sport) virtual asynchronous
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In June 2018, Caster Semenya, a South African 800 meter runner, filed a class action complaint with the Court of Arbitration for Sport (CAS) challenging the International Association Athletics Federations (IAAF) Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development). The CAS arbitration panel issued their decision on April 30, 2019, finding the IAAF DSD regulations discriminatory, but that the discrimination is a “necessary, reasonable and proportionate means of achieving the legitimate objective of ensuring fair competition for female athletes”. Semenya has filed an appeal with the Swiss Federal Tribunal that the CAS decision violates her human rights and is therefore a violation of l’ordre public -- the sum of all moral and cultural values that form public policy in society. The decision of the Swiss Court is expected between January and March of 2020. The purpose of this legal research is to examine the IAAF policy changes concerning athletes with differences of sex development (DSD) and whether the legal decisions are justified.

Caster Semenya became a global track and field phenomenon in August 2009 after winning the women’s 800 meters at the IAAF world championships. Immediately, Semenya’s sex was questioned based on her physical appearance and she was temporarily suspended and subjected to gender verification testing. In 2011, the IAAF announced new eligibility rules requiring women with levels of natural testosterone above 10 nmol/L to take testosterone-reducing drugs. These rules were challenged in 2015 by sprinter Dutee Chand of India, with CAS suspending the rules until scientific evidence was provided. The IAAF then evaluated existing research and established new rules in 2018 which required women with a recognized DSD and circulating testosterone blood levels of 5 nmol/L or more competing in track events from 400m to the mile to take hormone suppressing drugs to lower blood testosterone levels below the 5 nmol/L threshold for at least 6 months to be eligible for competition in the restricted events.

The IAAF DSD rules appear to specifically target Semenya for differential treatment, as she competes internationally in events from 400m to 1500m. The scientific evidence does not fully support the IAAF’s claims that testosterone levels above 5 nmol/L provide a competitive advantage in the restricted events as experts debated for four days in the CAS hearings without resolution; therefore the IAAF failed to provide scientific evidence to justify the rule. The IAAF requirement that women take hormone-suppressing drugs to achieve arbitrary acceptable levels of blood testosterone is also contrary to medical ethics and standard doping rules, which generally prohibit doping.

The impending ruling by the Swiss Federal Tribunal will impact the future of DSD athletes in track and field. It also has the potential to impact society, as sport has historically been a conduit for social change. In this case, the decision will either promote acceptance of naturally occurring biological sex differences and making sport an inclusive space for women, or perpetuate sex stereotypes and facilitate fearmongering of DSD athletes eliminating opportunities for “real” women.