

REFLECTIVE REPORT – A critical evaluation of the case of Caster Semenya and the legality of the International Amateur Athletic Federation’s approach to the issues that it raised regarding gender

Introduction

This report reflects upon my own personal learning and interactions to have been derived from the completion of this coursework’s critical evaluation of the case of Caster Semenya and the legality of the International Amateur Athletic Federation’s (IAAF’s) approach to the issues that it raised regarding gender. Therefore, it is was necessary to draw upon my insights to have been gained from the facilitations and discussions undertaken when studying this subject, as well as the reading materials, when set against my pre-existing personal beliefs and experiences. This is because I was then able to not only effectively evaluate Semenya’s specific case, but also to consider the legality of the IAAF’s approach to the issues that it raised regarding gender to determine whether it was beneficial to the individual athletes and/or the sport as a whole. Additionally, the evaluation of the issues surrounding Semenya’s case and how they were dealt with by the IAAF were also informative for showing how sports governing bodies look/fail to deal with legal issues that impact upon individual athletes’ participation in sports to their detriment. Finally, this reflective report concludes with a summary of my key findings derived from this report’s analysis regarding what I learnt during my completion of this coursework related to the subject matter.

Main Body of Analysis

Prior to completing the coursework that this report is reflecting upon, as a fan of athletics, I was well aware of the continuing controversy surrounding the South African athlete, Caster Semenya's participation in her chosen sport as a 'female'. The controversy surrounding Semenya centred upon the fact that she is understood to be an intersex woman who was assigned female at birth due to having both X **AND** Y chromosomes present in her genetic make-up, along with levels of testosterone that were found to be naturally elevated (Olivesi, 2016). That Semenya's biology became such an issue for the IAAF is because she not only won the gold medal in the 800 metres at the athletics World Championships in 2009, but her times were improving so dramatically (8 seconds in the 800 metres and 25 seconds in the 1500 metres within 2 years) so as to potentially arouse suspicion of drug misuse (Olivesi, 2016). Therefore, allied to question marks being raised about her physical appearance, the IAAF wanted Semenya to undergo 'sex tests' to determine whether she was 'female' to compete fairly with women over her chosen distance and she was not allowed to compete again using hormonal medication until the tests were completed in July 2010 (Olivesi, 2016).

It was also interesting to note that, arguably largely due to what happened with Semenya's specific case and others like it, the IAAF's policy for dealing with such cases that had been established in 2011 in the form of the IAAF Hyperandrogenism Regulations of 2011 to regulate this aspect of athletic competition was suspended in 2015 (Patel, 2021). This is because the Court of Arbitration for Sport (CAS) decided in the case of CAS 2014/A/3759 *Dutee Chand v. Athletics Federation of India & The International Association of Athletics Federations* that there was actually insufficient evidence that the presence of testosterone in female athletes served to enhance their athletic performance. However, there was also a caveat to this decision since the IAAF was also informed that they had a deadline of two years to provide the evidence that testosterone's presence in female athletes did indeed

improve their athletic performance (CAS 2014/A/3759 *Dutee Chand v. Athletics Federation of India & The International Association of Athletics Federations*).

Reflecting back upon CAS's decision in the case of CAS 2014/A/3759 *Dutee Chand v. Athletics Federation of India & The International Association of Athletics Federations*, in the spring of 2018, new rules were announced by the IAAF that would appear to be somewhat bizarre. The IAAF's Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development (DSD)) of 2018 impacted upon both Semenya specifically and other athletes with certain sex development disorders that raise levels of testosterone above 5 nmol/L and sensitivity to androgen to take medication to compete as 'female' from May 2019, but only where they participate in the 400, 800 and/or 1,500 metres (Patel, 2021). Consequently, it could be argued that the IAAF's changes in the rules were specifically designed to discriminate against Semenya due to the limited pool of athletes this was likely to affect; although it was highly unlikely that she was the only person competing at the regulated distances who had a sex development disorder that meant that she could not compete as 'female' without medication.

That there remains some significant debate regarding cases like Semenya's and the IAAF's approach to their resolution is supported by the arguments to have been by those that were called upon to testify upon the respective parties in CAS 2018/O/5794 *Mokgadi Caster Semenya v. International Association of Athletics Federations* and CAS 2018/O/5798 *Athletics South Africa v. International Association of Athletics Federations*. This is because, despite the fact that she failed with her challenge to the IAAF's new rules due to the need for her to already take hormonal medication between 2010 and 2015 served to make her physically sick and caused her physical pain, the two sides of the argument surrounding the

issues were effectively summarised (CAS 2018/O/5794 *Mokgadi Caster Semenya v. International Association of Athletics Federations* and CAS 2018/O/5798 *Athletics South Africa v. International Association of Athletics Federations*). To illustrate, whilst Doriane Coleman argued that certain biological traits were required to participate in women's sport, Eric Vilain argued that it is hard to exclude those who have always lived their lives as women from being legally defined as women (CAS 2018/O/5794 *Mokgadi Caster Semenya v. International Association of Athletics Federations* and CAS 2018/O/5798 *Athletics South Africa v. International Association of Athletics Federations*).

Despite CAS's decision, it is also interesting to note that there are still further means of redress available to Semenya with a view to asserting her basic human rights as they are recognised under international law if an afflicted party has both the means and the wherewithal to continue proceedings. However, despite the seemingly arbitrary nature of the IAAF's current rules regarding who may be designated as 'female' to participate in particular athletic disciplines, Semenya's appeal to the Federal Supreme Court of Switzerland in *Mokgadi Caster Semenya v. International Association of Athletics Federation (IAAF)*, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_248/2020 was also rejected in September 2020. This is because the Court determined that not only did CAS have the right to uphold the IAAF's new rules "to guarantee fair competition for certain running disciplines in female athletics", but the Court could not "subject the CAS decision to any free legal control" (*Mokgadi Caster Semenya v. International Association of Athletics Federation (IAAF)*, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_248/2020 was also rejected in September 2020). The reason for this is that the Court's remit of "examination is limited by law to the question of whether the CAS decision violates fundamental and widely recognized principles of public order" which was not deemed to be

the case in this instance (*Mokgadi Caster Semenya v. International Association of Athletics Federation (IAAF)*), Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_248/2020 was also rejected in September 2020).

Nevertheless, the decision to have been reached by the Federal Supreme Court of Switzerland has not been the end of the matter: a further appeal was filed with the European Court of Human Rights by Semenya in the hope that she may finally get the recognition of her rights against the IAAF that she is seeking for herself (*Semenya v. Switzerland* (application no. 10934/21)). However, reflecting back upon the research and analysis to have been completed during the coursework that led to the completion of this report, one cannot help feeling that not only is the IAAF's current approach to cases like Semenya's deeply flawed when it comes to the basis of the policy itself and the recognition of her human rights and the legal process for attempting to redress the issue.

Looking at Semenya's experiences from a legal perspective, it would seem that she has been heavily discriminated against by the IAAF on the grounds of her gender and also having her rights to privacy and her physical and mental health contravened due to the sex tests that she had to partake in and the medication that she had to take to participate as female (Patel, 2021). Based upon the research and analysis to have been completed by the IAAF, it would seem that they justified the contravention of Semenya's rights simply because of the speed with which she improved in her chosen sporting discipline in such a short period of time and the way that she looked physically being linked to the presence of testosterone (Gillieri and Winkler, 2021). Consequently, it is my view that the IAAF's approach to cases like Semenya's not only appears to heavily discriminate against both her and her chosen pursuit but would also seem to be wholly inappropriate (Mahomed and Dhali, 2019). This is because

the current policy would appear to actually discourage sporting improvement and, as a consequence, achievement in a given discipline for those that do not fit within the arbitrary criteria to have been set for what it is to be 'female' (Mahomed and Dhali, 2019). Moreover, it would seem that the IAAF failed to safeguard Semenya's privacy because whilst the results of the initial sex tests that she was made to undertake were never officially published, some of the results were leaked within the media and soon became the subject of a significant amount of discussion and debate (Patel, 2021).

However, arguably one of the saddest things that I discovered during my research into Semenya's case and the legality of the IAAF's approach to it is not only the continuing prevalence and prominence of such cases, but also the fact that the approach that is taken is still so discriminatory and invasive when the medical science surrounding it is still so unclear (Hilton and Lundberg, 2021). Moreover, there are those like the Ugandan middle-distance runner, Annet Negesa who did not actively seek to assert their basic human rights and instead, actually attempted to comply with the current IAAF rules (Human Rights Watch, 2020). Negesa alleges that, based upon the advice of the IAAF medical team, she had a gonadectomy to remove her internal testes in 2012, but that both the nature and the purpose of the surgery were misrepresented to her (Human Rights Watch, 2020). Moreover, the inadequate medical aftercare and the resultant damage that Negesa suffered to her physical and mental health from the aforementioned surgery effectively forced her into early retirement since she was no longer able to participate effectively as an elite athlete (Human Rights Watch, 2020).

Conclusion

It is clear from the analysis to have been completed in this reflective report that there is a considerable amount of conflict between what is considered to be morally correct, the science of biology that is (or is not) involved and what is understood to be legal and fair for the purpose of competition under the auspices of the IAAF. One of the key things that I have learnt centres upon the fact that it would seem that there is significant scope for sports governing bodies, like the IAAF, to openly discriminate against those that would seek to participate under their auspices without sufficient means of redress being available to those that are seemingly discriminated against. Put simply, it would seem that there are notable limits upon the ability of those affected by this kind of discrimination to be able to assert and to have their human rights actively recognised in practice.

Such a view is supported by not only the decision in *CAS 2014/A/3759 Dutee Chand v. Athletics Federation of India & The International Association of Athletics Federations* where it was identified that there was still scope for the IAAF to justify their approach, but also the fact that whilst there are some means of redress available, there is a need to have both the means and the wherewithal to continue a given case in pursuit of justice. Therefore, it would seem that there is a clear need for the IAAF to seriously re-evaluate its approach to the kinds of issues that Caster Semenya's case raises based upon the apparent lack of a viable form of redress, without including the serious issues to have been experienced by those that have sought to comply with the rules, like Annet Negesa.

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