



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

THIRD SECTION

DECISION

Application no. 17670/21
ATHLETICS SOUTH AFRICA
against Switzerland

The European Court of Human Rights (Third Section), sitting on 5 October 2021 as a Committee composed of:

Dmitry Dedov, *President*,

Peeter Roosma,

Andreas Zünd, *judges*,

and Olga Chernishova, *Deputy Section Registrar*,

Having regard to the above application lodged on 8 March 2021,

Having deliberated, decides as follows:

THE FACTS

1. The applicant association, Athletics South Africa, is an association established under South African law and based in Johannesburg. It is represented before the Court by Mr D. Maharaj, a lawyer practising in Johannesburg.

The circumstances of the case

2. The facts of the case, as submitted by the applicant association, may be summarised as follows.

3. The applicant association is the regulatory authority of athletics in South Africa. Its application is closely linked to the case *Semenya v. Switzerland*, cited above, currently pending before the Court. Mokgadi Caster Semenya (“M.C. Semenya”), is a South African national. She is an international athlete, specialising in middle-distance races (800 to 3 000 metres). She has won several gold medals at Olympic Games and World Championships.

4. Having carried out a sex verification test after M.C. Semenya's victory in the women's 800 metre race at the 2009 World Championships in Berlin, the International Association of Athletics Federations (IAAF) informed her that she was henceforth required to reduce her testosterone levels to below a certain threshold if she wished to continue competing in her preferred events at international athletics competitions.

5. M.C. Semenya stopped taking hormonal treatment following an interim ruling issued in the *Dutee Chand* case on 24 July 2015,¹ in which the Court of Arbitration for Sport (the "CAS") temporarily suspended the IAAF regulation then in force.

6. In April 2018 the IAAF issued new regulations entitled "Eligibility Regulations for the Female Classifications (Athletes with differences of sex development)" (the so-called "DSD Regulations"). These regulate the conditions that an implicated female athlete must meet in order to be able to participate in international running competitions in the "protected class women", over distances of 400 metres up to 1 mile.

7. M.C. Semenya contested the validity of the regulations before the CAS, jointly with the applicant association. The CAS dismissed both arbitration claims in a ruling of 30 April 2019.

8. The applicant association and M.C. Semenya then submitted a civil-law appeal to the Swiss Federal Supreme Court, alleging, in particular, discrimination on the grounds of sex and of sexual characteristics against female athletes with DSD compared to female and male athletes who do not have DSD.

9. This appeal was dismissed on 25 August 2020. The Swiss Federal Tribunal recognized the applicant association's standing to appeal. It held, in this regard, that as a member federation of IAAF, it was not only bound by the DSD Regulations but also had to cooperate with and support IAAF in implementing these regulations. It also had the obligation to inform the IAAF Medical Manager if it was aware or believed that a sportswoman was a "relevant athlete". In these conditions, it was necessary to recognise that the association had an interest worthy of protection distinct from that of the athlete. On the merits, the tribunal held, *inter alia*, that fairness in sport was a legitimate concern and a central principle of sporting competitions. It was one of the pillars on which competitions were based.

COMPLAINTS

10. The applicant association argues that the DSD Regulations impose an unjustified and disproportionate interference with the core of the right to the physical, moral and psychological integrity of the athlete, protected under Article 8 of the Convention. In light of that provision, the applicant

¹ CAS 2014/A/3759, *Dutee Chand c. Athletics Federation of India (AFI) and IAAF*.

association also argues that M.C. Semenya suffers from an unjustified restriction on exercising her profession due to the DSD Regulations that preclude her from competing at an international level.

11. Invoking Article 14, combined with Article 8, the applicant association observes that the DSD Regulations only apply to elite athletes who are women with a DSD. Insofar as they do apply neither to male athletes nor to elite female athlete without a DSD, the targeted group was discriminated against.

12. The applicant association finally argues that the more medal-winning athletes it licenses, the more funding it will receive from IAAF to train and develop its teams. Under the DSD Regulations, however, it cannot licence a targeted athlete unless that athlete complies with the medical treatment required. For these reasons, there has been a violation of Article 1 of Protocol No. 1, taken alone as well as combined with Article 14.

THE LAW

13. Regarding the complaints under Article 8, taken alone and combined with Article 14 of the Convention, the Court reiterates that under Article 34 of the Convention it may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. For an applicant to be able to claim to be a victim of a violation, there must be a sufficiently direct link between the applicant and the alleged violation. The concept of “victim” must be interpreted autonomously and irrespective of rules of domestic law such as those concerning an interest or capacity to act (see, in particular, *Association de défense des intérêts du sport v. France* (dec.), no. 36178/03, 10 April 2007; and *Tunnel Report Limited v. France*, no. 27940/07, § 24, 18 November 2010).

14. Furthermore, according to the Court’s settled case-law, “victim” status may be granted to an association or trade union only if it is directly affected by the measure complained of (see *Winterstein and Others v. France*, no. 27013/07, § 108, 17 October 2013, and *Syndicat CFDT des services de santé et des services sociaux de Côtes d’Or and Others v. France* (dec.), no. 11052/06, 21 October 2008).

15. In the instant case the Court observes that, although the applicant association was recognised by the Federal Tribunal as having standing to challenge the DSD Regulations, this is not sufficient to be considered as victim for the purposes of Article 34 of the Convention. The applicant association, as a legal entity, is not a direct and personal victim of the alleged violations of Articles 8 and 14, combined with Article 8 of the Convention (see, *National Federation of Sportspersons’ Associations and Unions (FNASS) and Others v. France*, nos. 48151/11 and 77769/13, § 95,

18 January 2018). The mere fact that it was, as a member federation of IAAF, bound by the DSD Regulations and had certain duties with a view to implanting them, is not sufficient to confer such status on it.

16. Furthermore, and in so far as the applicants' complaints under Article 1 of Protocol No. 1 may be considered raising issues in respect of its own situations, the Court observes that Switzerland has not ratified Protocol No. 1. Therefore, the applicant association cannot rely on its Article 1. The same applies to the complaint under Article 14, combined with Article 1 of Protocol No. 1, considering that Article 14 has no independent existence and has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by the other substantive provisions of the Convention and the Protocols (see, among many others, *Sahin v. Germany* [GC], no. 30943/96, § 85, ECHR 2003-VIII, or *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 53, 24 January 2017).

17. Accordingly, the application is incompatible *ratione personae* with the provisions of the Convention and Protocols and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 4 November 2021.

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Olga Chernishova
Deputy Registrar

Dmitry Dedov
President