

THE PROTECTION OF INTERSEX AND TRANSGENDER ATHLETES FROM DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract: *After the hearing of the Court of Arbitration for Sport (CAS) and the Swiss Federal Tribunal (SFT), some athletes brought their complaints against their decisions before the European Court of Human Rights (ECtHR). In Mutu and Pechstein case, the ECtHR held that there was a violation of Article 6 (1) of the European Convention on Human Rights (ECHR) on the ground that the CAS held no public hearing. This judgment played a significant role in opening a door for athletes to have access to the ECtHR. However, the ECHR does not impose any legal obligations on sports governing bodies, but on states parties, because they are private entities established by national private law. In this context, it is worth noting that states parties must implement positive obligations under the ECHR to protect athletes from human rights violations caused by non-state actors under the ECtHR's jurisprudence. In other words, the ECHR may indirectly apply to the private relationship between non-state actors. In this situation, how can athletes argue a violation of their human rights due to discriminatory measures based on their gender identity and sex characteristics before the ECtHR? To answer this question, this article will consider whether sporting regulations applicable to intersex and transgender athletes are compatible with Article 14 of the ECHR. Through this research, it may serve to identify a possibility that the athletes may bring their complaints under Article 14 of the ECHR before the ECtHR.*

Keywords: *Article 14 of the ECHR, discrimination, gender identity, sex characteristics, human rights, positive obligations, intersex and transgender athletes*

Introduction

After the hearing of the Court of Arbitration for Sport (CAS) and the Swiss Federal Tribunal (SFT), some professional athletes brought their complaints before the European Court of Human Rights (ECtHR). In the context of sports and human rights, Caster Semenya, an intersex female professional athlete, brought a case before the ECtHR to argue a violation of her rights due to discriminatory measures based on her sex characteristics by the World Athletics (the former IAAF).¹

1. This case is still pending. See Press Release ECHR 148 (2021), 17 May 2021, available at <http://hudoc.echr.coe.int/eng-press?i=003-7021287-9471834>; David, S. (2021), "The Final Yards Of

Before the Caster Semenya case, the ECtHR had examined some sports-related disputes. In particular, in *Mutu and Pechstein* case, the ECtHR held that there was a violation of Article 6(1) of the European Convention on Human Rights (hereinafter, ECHR or Convention) on the ground that the CAS held no public hearing.² This judgment played a significant role in opening a door for athletes to have access to the ECtHR. However, the ECHR does not impose any legal obligations on sports governing bodies, but on states parties, because they are private entities established by national private law.³

In this context, it is worth noting that states parties must implement positive obligations under the ECHR to protect athletes from human rights violations caused by non-state actors under the ECtHR's jurisprudence. In other words, the ECHR may indirectly apply to the private relationship between non-state actors.⁴ In this sense, it would be considered that sports governing bodies also have an *indirect obligation* to take necessary measures to respect the athletes' rights under the positive obligations of the ECHR.⁵

In this situation, how can athletes argue a violation of their human rights due to discriminatory measures based on their gender identity and sex characteristics before the ECtHR? To answer this question, this article will consider whether

Caster Semenya's Human Rights Appeal: Background & Broader Implications", LawInSport, published 13 April 2021. https://www.lawinsport.com/topics/item/the-final-yards-of-caster-semenya-s-human-rights-appeal-background-broader-implications?utm_content=162265096&utm_medium=social&utm_source=linkedin&hss_channel=lcp-2670852.

2. *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, Judgment of 2 October 2018, ECtHR, para. 183.

3. Concerning the principle of private autonomy in Switzerland, see Baddeley, M. (2020), "The extraordinary autonomy of sports bodies under Swiss law: lessons to be drawn", *The International Sports Law Journal*, Volume 20, Issue 1-2, April 2020, pp. 1-17.

4. This effect has been understood as 'indirect horizontal effect' that the ECHR may indirectly affect non-state actors that may exercise their power to control over individuals in a specific community, such as family, company and association to implement positive obligations of the state parties to the ECHR. This issue will be examined in future research. See Lane, L. (2018), "The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies", *European Journal of Comparative Law and Governance*, Volume 5, Issue 1 (2018), pp. 26-29.

5. This issue should be examined under the United Nations Guiding Principles on Business and Human Rights (UNGPs) because this instrument served to clarify a normative duty (or responsibility) to respect human rights in the private relationship between non-state actors. OHCHR, *Guiding Principles on Business and Human Rights*, HR/PUB/11/04 (New York and Geneva, 2010), United Nations, available at https://www.ohchr.org/documents/publications/guiding-principlesbusinesshr_en.pdf; Pitts, C. (2016), "The United Nations 'Protect, Respect, Remedy' Framework and Guiding Principles", in B. P. Dorothée and N. Justine (eds.), *Business and Human Rights From Principles to Practice*, Routledge, 2016, pp. 51-63.

sporting regulations applicable to intersex and transgender athletes are compatible with Article 14 of the ECHR. However, it is important to note that Article 14 of the ECHR must be invoked in conjunction with other rights under the ECHR.⁶ Through this research, it may serve to identify a possibility that the athletes may bring their complaints under Article 14 of the ECHR before the ECtHR.

In light of the foregoing, it will be divided into the following sections: After this introduction, this article will skim through conditions of how the ECtHR determines whether there are discriminatory measures against athletes under Article 14 of the Convention. Furthermore, it will consider how to provide for intersex and transgender athletes human rights protection against discrimination based on their gender identity and sex characteristics in light of the ECHR. Finally, it will conclude with a provisional answer to the research question of this article that was mentioned above, before the ECtHR makes a judgment over the Caster Semenya case.

1. The conditions for determining whether there is discrimination under Article 14 of the ECHR

Article 14 of the ECHR may apply when there is a differential treatment for one person based on the prohibited grounds set forth in Article 14 of the ECHR without an objective and reasonable justification compared to another, in a similar situation to him or her, who is treated better.⁷ In this regard, the Court expressly observed in *Belgian Linguistic* case that:

“[T]he Court ... holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable

6. In this context, it is worth noting that *Michael Platini* case implicitly indicated a possibility that athletes might claim a violation of personality rights under Article 8 of the ECHR in conjunction with Article 14 of the ECHR. In this case, the Court accepted the applicability of Article 8 of the ECHR on the grounds that “the claimant is not explicitly referred to the Swiss Federal Tribunal under Article 8, but that he has invoked an infringement of his personal rights (Article 27 CC) and his economic freedom”. *Michel Platini c. Suisse* (déc.), requête n° 526/18, le 11 février 2020, CourEDH, para. 51.

7. Gerards, J. (2018), “Prohibition of discrimination”. In: Hoof, F. et al. (2018), *Theory and practice of the European Convention on Human Rights* (Fifth edition). Intersentia, pp. 1013-1018; Harris, D. J. et al. (2018), *Law of the European Convention on Human Rights*, 4th edition. Oxford University Press. Oxford, pp. 766-776; *Van der Mussele v. Belgium*, no. 8919/80, Judgment of 23 November 1983, ECtHR, paras. 42-46.

relationship of proportionality between the means employed and the aim sought to be realised.”⁸

Based on this landmark judgment of Article 14 of the ECHR, the ECtHR explained a definition of discrimination under Article 14 of the ECHR in *Zarb Adami v. Malta* describing that the person concerned was treated “differently, without an objective and reasonable justification, persons in relevantly similar situations”.⁹ The Court reaffirmed the judgment of the *Belgian Linguistic* case and reiterated it in its later judgments.¹⁰

In light of the ECtHR case-law, Jacobs et al. specified the following conditions in application and interpretation of Article 14 of the ECHR:

(1) “Does the complaint of discrimination fall within the scope of a protected right?;

(2) “Is the alleged reason for the discrimination one of the grounds listed in Article 14?;

(3) “Can the applicants properly compare themselves with another class of persons which is treated more favorably?;

(4) “Is the difference of treatment capable of objective and reasonable justification?”¹¹

The reason why the state concerned must show an objective and reasonable justification is that the differential treatment should be tolerated in a certain situation that, for instance, vulnerable persons (including children, women and persons with disabilities) should be treated differently to provide for them the special protection compared to non-vulnerable persons.¹² In this context, the ECtHR noted in *Sejdić and Finić v. Bosnia and Herzegovina* that:

8. Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. *Belgium (Merits)*, nos. 1474/62, 1677/62, 1691/62, 1769/63 and 2126/64, Judgment of 23 July 1968, ECtHR, section. I, para. B.10.

9. *Zarb Adami v. Malta*, no. 17209/02, Judgment of 20 June 2006, ECtHR, para. 71; According to W. A. Schabas, “[d]iscrimination means treating persons in analogous situations differently without an objective and reasonable justification”. See Schabas W. A. (2015), *The European Convention on Human Rights: A Commentary*. Oxford University Press. Oxford, p. 564.

10. *Zarb Adami v. Malta*, paras. 71-72.

11. It should be noted that these conditions vary from one commentator to another and are slightly different. This book has chosen to quote the conditions given by Jacob et al. Jacobs, F. G., et al. (2017), *The European Convention on Human Rights*, 7th edition, Oxford University Press, Oxford, p. 640; See also *Rasmussen v. Denmark*, no. 8777/79, Judgment of 28 November 1984, ECtHR, paras. 27-42; ECtHR (2021), *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of the Protocol No. 12 to the Convention: Prohibition of discrimination*, updated on 31 August 2021, Council of Europe/European Court of Human Rights, para. 51.

12. Harris et al. 2018, pp. 770-771; Schabas 2015, pp. 566-577.

“Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct “factual inequalities” between them. Indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article”.¹³

In this case, the Court held that the ineligibility to stand for election in Bosnia and Herzegovina could not be justified due to the lack of an objective and reasonable justification and, thus, there was a violation of Article 14 in conjunction with Article 3 of Protocol No. 1.¹⁴ The Court reaffirmed this position in another case-law.¹⁵

It is important to note, however, that the ECtHR shall take into account a certain margin of appreciation allowing the state parties to assess “whether and to what extent differences in otherwise similar situations justify a different treatment”.¹⁶ The ECtHR reaffirmed this understanding in *Zarb Adami v. Malta* that:

“The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. (...) The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background (...), but the final decision as to observance of the Convention’s requirements rests with the Court.”¹⁷

In this sense, Article 14 of the ECHR has not been applied consistently by judges and, thus, the question of whether Article 14 of the ECHR is infringed must be decided by the Court on a case-by-case basis.¹⁸

In the light of the foregoing, this section will precisely skim through the four

13. *Sejdić and Finić v. Bosnia and Herzegovina* [GC], no. 27996/06 and 34836/06, Judgment of 22 December 2009, ECtHR, para. 44.

14. *Sejdić and Finić v. Bosnia and Herzegovina* [GC], para. 50.

15. *Andrejeva v. Latvia*, paras. 82.

16. *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, Judgment of 12 April 2006, ECtHR, para. 51; Harris et al. 2018, p. 773; Schabas 2015, pp. 567-568; *D. H. and Others v. Czech Republic* [GC], no. 57325/00, Judgment of 13 November 2007, ECtHR, para. 175.

17. *Zarb Adami v. Malta*, paras. 74; See also *Stec and Others v. the United Kingdom* [GC], para. 52.

18. In this regard, Cartabia noted that “[n]ot only is the non-discrimination clause susceptible to being applied inconsistently by judges, but, in most cases, the very structure of the discrimination test as such is responsible for the unpredictable outcomes of the controversies”. Cartabia, M. (2011), “The European Court of Human Rights: judging non-discrimination”, *International Journal of Constitutional Law*, Volume 9, Issue 3-4, October 2011, p. 812.

criteria for determining whether there is a discriminatory measure against individuals under Article 14 of the ECHR.

1.1. Whether the alleged claim falls within the ambit of one of the substantive provisions of the ECHR in conjunction with Article 14

The Court firstly must examine whether the alleged claim falls within the ambit of one of the substantive provisions of the ECHR for the Article 14 claim (*ambit test*).¹⁹ This test has played a crucial role in making up a limitation of Article 14 of the ECHR as ‘accessory right’ because the state parties to the ECHR have no obligation if the alleged right falls outside the ambit of the Convention.²⁰

For instance, the Court observed in *E.B. v. France* that “the applicant who was a lesbian, sought to adopt a child, but French authority refused authorisation to adopt due to the lesbian relationship with her partner and the lack of a paternal referent.”²¹ She alleged that refusing the authorisation to adopt was a discriminatory measure based on her sexual orientation and, thus, there was a violation of Article 14 of the ECHR taken in conjunction with Article 8 due to the arbitrary interference with her right to respect for her private life.²² In this situation, the Court examined whether the alleged claim falls within the ambit of one of the substantive provisions of the ECHR for the purposes of the Article 14 claim. For this, it stated that “[t]he Court is not ... called upon to rule whether the right to adopt ... should or should not fall within the ambit of Article 8 of the Convention taken alone”²³ because Article 14 “has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded” by substantive provisions of the ECHR.²⁴ Thus, “[t]he application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention” and “[i]t is necessary but it is also sufficient for the facts of the case to fall “within the ambit” of one or more of the Articles of the Convention”.²⁵ In this case, the Court considered that the applicant’s allegation falls within the ambit of Article 8 of the Convention.²⁶ The Court may consider

19. Harris et al. 2018, pp.767-768; See also *Andrejeva v. Latvia*, no. 55707/00, Judgment of 18 February 2009, ECtHR, paras. 74-80.

20. Harris et al. 2018, p. 768.

21. *E.B. v. France* [GC], no. 43546/02, Judgment of 22 January 2008, ECtHR, paras. 7-31.

22. *E.B. v. France* [GC], para. 32.

23. *E.B. v. France* [GC], para. 46.

24. *E.B. v. France* [GC], para. 47.

25. *E.B. v. France* [GC], para. 47.

26. *E.B. v. France* [GC], para. 49; See also *Fretté v. France*, no. 36515/97, Judgment of 26 February 1998

the admissibility of the applicant's allegation in light of the *ambit test* on whether it falls within the ambit of one of the substantive provisions of the ECHR. If so, Court will declare it admissible and then enter into the merits.

Taking into account this judgment, can it be considered that discrimination based on gender identity and sex characteristics may fall within the ambit of Article 8 of the ECHR? These grounds would constitute a "private life" guaranteed by Article 8 of the ECHR because the ECtHR held that the term 'private life' should be considered as broad concept that encompasses the right to "personal development".²⁷ To be precise, it can be understood that this notion includes "elements such as names, gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8 (...)"²⁸ In this sense, from a theoretical perspective, it can be considered that the Court might consider that the fact that discrimination based on gender identity and sex characteristics falls within the scope of Article 8 of the ECHR and, thus, Article 14 of the ECHR may be invoked in this situation.

1.2. Whether there is a differential treatment for individuals by the state parties or non-state actors within its jurisdiction

Secondly, the ECtHR must identify whether there is a differential treatment for individuals by the state parties or non-state actors within its jurisdiction. In this connection, the Court reiterated that "Article 14 of the ECHR does not prohibit in treatment but only those based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another".²⁹

According to Gerards, the interpretation of 'personal characteristic' under Article 14 of the ECHR has not been coherent in light of the ECtHR's jurisprudence.³⁰ The ECtHR held that a differential treatment may be based on not only 'personal characteristic', including birth,³¹ race and

ruary 2002, ECtHR, paras. 27-33.

27. *E.B v. France*, para. 43.

28. *E.B v. France*, para. 43.

29. ECtHR 2021, para. 87; *Kjeldsen, Busk Madsen and Pedersen*, nos. 5095/71; 5920/72; 5926/72, Judgment of 7 December 1976, ECtHR, para. 56; *Molla Sali v. Greece* [GC], no. 20452/14, Judgment (Merits) of 19 December 2018, ECtHR, para. 134; *Kiyutin v. Russia*, no. 2700/10, Judgment of 10 March 2011, ECtHR, para. 56.

30. Gerards, J. (2013), "The Discrimination Grounds of Article 14 of the European Convention on Human Rights", *Human Rights Law Review*, Volume 13, Issue 1, March 2013, pp. 103-113

31. *Brauer v. Germany*, no. 3545/04, Judgment (merits) 28 May 2009, ECtHR, para. 30; *Mazurek v. France*, no. 34406/97, Judgment of 1 February 2000, ECtHR, para. 49; *Camp and Bou-rimi v. Netherlands*, no. 28369/95, Judgment of 3 October 2000, ECtHR, paras. 37-39.

ethnic origin,³² sex,³³ gender equality,³⁴ religion,³⁵ political opinion,³⁶ nationality,³⁷ and sexual orientation,³⁸ but also ‘impersonal characteristic’ that are not directly related to human beings, such as the geographical location³⁹ and the place of residence’,⁴⁰ within the meaning of Article 14 of the ECHR.⁴¹

32. *Sejdić and Finić v. Bosnia and Herzegovina* [GC], para. 43; *Šečić v. Croatia*, no. 40116/02, Judgment of 31 May 2007, ECtHR, para. 62 and 66; *Stoica v. Romania*, no. 42722/02, Judgment of 4 March 2008, ECtHR, paras. 117-133; *Abdu v. Bulgaria*, no. 26827/08, Judgment of 11 March 2014 (Extracts), ECtHR, paras. 40-55; *Sampani v. Greece*, no. 59608/09, Judgment of 11 December 2012, ECtHR, paras. 77-105; *D. H. and Others v. Czech Republic* [GC], paras. 175-181.

33. *Schuler-Zraggen v. Switzerland*, no. 14518/89, Judgment of 24 June 1993, ECtHR, paras. 61-67; *Burghartz v. Switzerland*, no. 16213/90, Judgment of 22 February 1994, ECtHR, para. 27; *Wessels-Bergervoet v. Netherlands*, no. 34462/97, Judgment of 4 June 2002, ECtHR, para. 47-55 at 49; *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, Judgment of 12 April 2006, ECtHR, paras. 50-66; *Emel Boyraz v. Turkey*, no. 61960/08, Judgment of 2 December 2014, ECtHR, para. 51.

34. *Konstantin Markin v. Russia* [GC], no. 30078/06, Judgment of 22 March 2012, ECtHR, para. 127.

35. *Vojnity v. Hungary*, no. 29617/07, Judgment of 12 February 2013, ECtHR, paras. 36-39.

36. *Virabyan v. Armenia*, no. 40094/05, Judgment of 2 October 2012, ECtHR, paras. 200-201.

37. *Andrejeva v. Latvia*, para. 87; *Luczak v. Poland*, no. 77782/01, Judgment of 27 November 2007, ECtHR, paras. 46-48 and para. 52; *Gaygusuz v. Austria*, no. 17371/90, Judgment of 16 September 2007, ECtHR, para. 42.

38. *E.B. v. France* [GC], paras. 91-93; *Fretté v. France*, paras. 26-43; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, Judgment of 21 December 1999, ECtHR, para. 23 and 28; *Santos Couto v. Portugal*, no. 31874/07, Judgment of 21 September 2010, ECtHR, para. 23 et paras. 37-45; *S.L. v. Austria*, no. 45330/99, Judgment of 9 January 2003, ECtHR, para. 37; *Kozak v. Poland*, no. 13102/02, Judgment of 2 June 2010, ECtHR, para. 83; *Dudgeon v. the United Kingdom*, no. 7525/76, Judgment of 22 October 1981, ECtHR, paras. 64-70; *L. and V. v. Austria*, nos. 39392/98, 39829/98, Judgment of 9 January 2003, ECtHR, para. 45; *Karner v. Austria*, no. 40016/98, Judgment of 24 July 2003, ECtHR, para. 37; *X and Others v. Austria*, no. 19010/07, Judgment of 19 February 2013, ECtHR, paras. 98-104; Danisi, C. (2011), “How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its nondiscrimination jurisprudence”, *International Journal of Constitutional Law, Volume 9, Issue 3-4, October 2011*, pp. 802-807.

39. *Magee v. the United Kingdom*, no. 28135/95, Judgment of 6 June 2000, ECtHR, para. 50 (considering that different criminal procedure depending on the geographical location of the applicant may be an aspect of personal characteristic under Article 14 of the ECHR read in conjunction with Article 6).

40. *Carson and others v. the United Kingdom* [GC], no. 42184/05, Judgment of 16 March 2010, ECtHR, paras. 70-71 (accepting that the place of residence constitutes an aspect of personal characteristic or status for the purpose of Article 14 of the ECHR in the event of the same pensions legislation depending on the residence and presence abroad of individuals).

41. Gerards 2013, pp. 103-113; Schabas 2015, pp. 573-574.

To be precise, the Court observed in *Carson and others v. the United Kingdom* [GC] that:

“[The Grand Chamber] has established in its case-law that only differences in treatment based on personal characteristic (or “status”) by which persons or groups of persons are distinguishable from each other are capable of amounting to discrimination within the meaning of Article 14 (...). However the list set out in Article 14 is illustrative and not exhaustive as shown by the words “any ground such as” (...). It further notes that the words “other status” ... have been given a wide meaning so as to include, in certain circumstances, a distinction drawn on the basis of a place of residence. Thus, in previous cases the Court has examined under Article 14 the legitimacy of alleged discrimination based, *inter alia*, on domicile abroad ... and registration as a resident (...).”⁴²

In other words, discrimination based on impersonal characteristics may also fall within the ambit of Article 14 of the Convention. Thus, Article 14 of the ECHR may apply to the cases of both personal and impersonal differences in treatment.⁴³

In light of the foregoing, how should the Court consider discrimination against intersex and transgender athletes based on their gender identity and sex characteristics? On the basis of the above discussion, the grounds of gender identity and sex characteristics might fall within the meaning of ‘other status’ as the prohibited grounds under Article 14 of the ECHR.⁴⁴ This is because the prohibited grounds under Article 14 of the ECHR are not exhaustive,⁴⁵ and the provisions of the ECHR should be recognised as a ‘*living instrument*’ “which must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today”.⁴⁶ On this basis, as an example of Caster Semenya case, the fact that intersex and transgender female athletes could not participate in the

42. *Carson and others v. the United Kingdom* [GC], para. 70.

43. Gerards 2013, pp. 112-113; Reid, K. (2015), *A Practitioner's Guide to the European Convention on Human Rights*, 5th Edition, Sweet & Maxwell, London, pp. 471-472.

44. Regarding the interpretation of the term ‘other status’, see ECtHR 2021, paras. 142-191.

45. Brunn, N. (2013), “Prohibition of Discrimination under Article 14 European Convention on Human Rights”, in Filip, E. et al. (2013), *The European Convention on Human Rights and the Employment Relation*, Hart Publishing, London, p. 370; Fredman, S. (2016), “Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights”, *Human Rights Law Review*, Volume 16, Issue 2, June 2016, p. 275; *Salgueiro da Silva Mouta v. Portugal*, para. 28; *Kiyutin v. Russia*, no. 2700/10, Judgment of 10 March 2011, ECtHR, para. 56.

46. *Tyrer v. The United Kingdom*, no. 5856/72 Judgment of 25 April 1978, ECtHR, para. 31; *Soring v. The United Kingdom*, no. 14038/88, Judgment of 7 July 1989, ECtHR, para. 102; *Bayatyan v. Armenia*, no. 23459/03, Judgment of 7 July 2011, ECtHR, para. 102; *Schwizgbel v. Switzerland*, no. 25762/07, Judgment of 10 June 2010, ECtHR, para. 81; Harris et al. 2018, pp.

female category of their sports competitions due to their gender identity and sex characteristics would be deemed to constitute a differential treatment for them in light of Article 14 of the ECHR.

1.3. Whether the person concerned is treated differently compared to others in a similar or analogous situation to him or her

Thirdly, if there is a differential treatment against individuals, the Court must examine whether the person concerned is treated differently compared to others in similar or analogous situations to him or her, based on the prohibited grounds set forth in Article 14 of the ECHR.⁴⁷

In *Zarb Adami v. Malta*, the applicant argued that a compulsory jury service in Malta constituted a discrimination against him because “he had been treated differently from women who ... were called on to fulfil jury service in a minimal manner when compared to men”.⁴⁸ It meant that “the burden of jury service was placed predominantly on men, while women were *de facto* exempted from this social duty”.⁴⁹ In this situation, the Court importantly noted that:

“[S]tatistic are not in themselves sufficient to disclose a practice which could be classified as discriminatory (...). At the same time, the Court considers that a discrimination potentially contrary to the Convention may result not only from a legislative measure (...), but also from a *de facto* situation”.⁵⁰

On this basis, it held that “there has been a difference in treatment between two groups – men and women – which, with respect to this duty, were in a similar situation” because “[the] figures show that the civic obligation of jury service has been placed predominantly on men”.⁵¹

In contrast to this, Brunn indicated, on the basis of the ECtHR judgment of *Thlimmenos v. Greece*,⁵² that “it is not only differential treatment of similarly situated people that may constitute discrimination, but also that similar treatment of persons in dissimilar situations might lead to discriminatory results”.⁵³ In this case, “the applicant was not appointed a chartered accountant as a result of his

47-49; Mowbray, A. (2005), “The Creativity of the European Court of Human Rights”, *Human Rights Law Review*, Volume 5, Issue 1, 2005, pp. 60-71.

47. Harris et al. 2018, pp. 769-770.

48. *Zarb Adami v. Malta*, para. 58.

49. *Zarb Adami v. Malta*, para. 59.

50. *Zarb Adami v. Malta*, para. 76.

51. *Zarb Adami v. Malta*, para. 78.

52. See *Thlimmenos v. Greece* [GC], no. 34369/97, Judgment of 6 April 2000, ECtHR, paras. 39-45.

53. Brunn 2013, pp. 372-373.

past conviction for insubordination consisting in his refusal to wear the military uniform” and, as a result, “he was ... treated differently from other persons who had applied for that post on the ground of his status as a convicted person”.⁵⁴ Taking into consideration this situation, the Court noted that “the question whether ... the imposition of ... sanctions on conscientious objectors to compulsory military service may in itself infringe the right to freedom of thought, conscience and religion guaranteed by Article 9 § 1”.⁵⁵ More importantly, the Court also pointed out that:

“The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”⁵⁶

In other words, similar treatment of differently situated people may also constitute discrimination under Article 14 of the ECHR. Accordingly, the Court held that Article 14 of the ECHR was applicable to this case in conjunction with Article 9 of the ECHR.⁵⁷

1.4, Whether there is an objective and reasonable justification

Finally, when the applicant successfully establishes the above two conditions, the burden of proof that the differential treatment is not discriminatory turns to the respondent state.⁵⁸ When examining the burden of proof, the ECtHR adopted the standard of “beyond reasonable doubt” in the case of *Nachova and Others v. Bulgaria*.⁵⁹ On the basis of this standard, the state concerned must show that the differential is objectively and reasonably justified.

In *Zarb Adami v. Malta*, the Court importantly observed that “Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the

54. *Thlimmenos v. Greece* [GC], para. 41.

55. *Thlimmenos v. Greece* [GC], para. 43.

56. *Thlimmenos v. Greece* [GC], para. 44.

57. *Thlimmenos v. Greece* [GC], para. 45.

58. According to *Molla Sali v. Greece*, the Court stated that “[a]s to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has demonstrated a difference in treatment, it is for the Government to show that the latter was justified”. See *Molla Sali v. Greece* [GC], no. 20452/14, Judgment (Merits) of 19 December 2018, ECtHR, para. 137.

59. *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98 Judgment of 7 July 2005, ECtHR, para. 147.

Convention”.⁶⁰ In order to justify such differential treatment, the respondent state must prove a legitimate aim for that treatment and a reasonable relationship of proportionality between the means employed and the aims sought to be realised.⁶¹

When the respondent state successfully showed the existence of the legitimate aim, the ECtHR must examine whether the means employed to achieve the legitimate aim is proportionate or not. To examine the proportionality, the ECtHR held in the *Belgian Linguistic* case that differential treatment must “strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention”.⁶² The determination of striking a fair balance by the Court must take into account public interests of state parties within the scope of the margin of appreciation in accordance with the principle of subsidiarity.⁶³ When it decided to afford a wide margin of appreciation to the state parties, the Court finds no violation of Article 14 of the ECHR in conjunction with other provisions.

To know how the Court examines the margin of appreciation, it stated in *Andrejeva v. Latvia* that:

“..., a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of this direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation” (...).”⁶⁴

In other words, when there is a very weighty reason for the discrimination that was described above, the Court should afford the state parties a narrow margin of appreciation in choosing measures that reflect the domestic society.⁶⁵ In such a case, the Court would find a violation of Article 14 due to manifestly without reasonable foundation.

On the basis of the margin of appreciation theory, the term “very weighty

60. *Zarb Adami v. Malta*, para. 73.

61. Gerards 2018, p. 1014; Schabas 2015, pp. 569-572; See also *Aktaş v. Turkey*, no. 24351/94, Judgment of 24 April 2003, ECtHR, para. 272.

62. *Belgian Linguistic* case, section II, para. A.7; *Hämäläinen v. Finland* [GC], no. 37359/09, Judgment of 16 July 2014, ECtHR, paras. 108-109.

63. The wide margin of appreciation may apply “in the context of sensitive moral and ethical issues” and the system of taxation. See Reid 2015, p. 475.

64. *Andrejeva v. Latvia*, para. 83; *Carson and others v. the United Kingdom* [GC], paras. 61-62; See also *Stummer v. Austria*, no. 37452/02, Judgment of 7 July 2011, ECtHR, para. 89.

65. *Kiyutin v. Russia*, no. 2700/10, Judgment of 10 March 2011, ECtHR, paras. 62-72.

reasons” should be examined because it may impose the state parties a heavy burden of proof to justify their differential treatment. In this regard, D. J. Harris et al. noted that “[t]he notion of proportionality implies that the more serious the difference of treatment is deemed to be then the greater the reasons required from the state to justified it must be”.⁶⁶ The ECtHR also considered that a differential treatment based on serious discriminatory grounds, such as race, religion, sex and gender, nationality, and sexual orientation,⁶⁷ should be considered ‘very weighty reasons’ and the state parties must owe a heavy burden to justify its differential treatment.⁶⁸ On that basis, it should be considered that gender identity and sex characteristics would be recognised as one of the ‘suspect category’ under Article 14 of the ECHR, including sex, sexual orientation, national and ethnic origin as examples, considering as ‘very weighty reasons’ to be examined in the proportionality test.⁶⁹ Thus, the state parties are held responsible for establishing the objective and reasonable justification for a differential treatment for intersex and transgender persons based on their gender identity and sex characteristics.

In the context of sports, a legitimate aim of the differential treatment for intersex and transgender athletes by sports governing bodies was to maintain a fair sporting competition for regular female athletes. This point was endorsed by the CAS and SFT and thus this issue is highly controversial from a human rights perspective.⁷⁰ In this sense, it would be considered that striking a balance between the interests of intersex and transgender athletes and those of female sports society might be an important issue in the case of intersex and transgender athletes in sports.

2. The protection of intersex and transgender athletes against discrimination based on their gender identity and sex characteristics in light of the ECHR

As had been seen above, Article 14 of the ECHR is an *accessory* provision so that it can be invoked in conjunction with another provision of the ECHR.⁷¹

66. Harris et al. 2018, p. 776.

67. The category of serious discriminatory reasons is called ‘suspect category’ under Article 14 of the ECHR. See Harris et al. 2018, p. 776.

68. Harris et al. 2018, p. 776.

69. See Schabas W. A. (2015), *The European Convention on Human Rights: A Commentary*. Oxford University Press. Oxford, pp. 574-575.

70. More importantly, Caster Semenya filed her application before the ECtHR. See Press Release ECHR 148 (2021), 17 May 2021, available at <http://hudoc.echr.coe.int/eng-press?i=003-7021287-9471834>.

71. In *Kafkaris v. Cyprus*, the ECtHR noted that “Article 14 of the Convention has no indepen-

In other words, it may apply when “the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols”⁷² and when there is no violation of the substantive right itself.⁷³ On this basis, this section will consider whether intersex and transgender athletes may enjoy the protection against discrimination based on their gender identity and sex characteristics in light of Article 14 of the ECHR taken in conjunction with Article 8 of the same instrument.⁷⁴

In this regard, in the Caster Semenya case, the CAS Panel decided that:

“[T]he DSD Regulations are discriminatory but that on the evidence currently before the Panel such discrimination is a necessary, reasonable and proportionate means of achieving the aim of what is described as the integrity of female athletics and the upholding of the “protected class” of female athletes in certain events”.⁷⁵

Thus, she could obtain no legal remedy even though the DSD Regulations are discriminatory. Due to such discriminatory regulations, there were two negative consequences on her: (1) her personality right was infringed because sensible personal information of intersex and transgender athletes was disclosed in public eyes by the IAAF; and (2) her living expenses and social reputation were damaged or deprived of because she could not participate in female competitions after the CAS awards.⁷⁶ Both situations would be considered as arbitrary interference with their personality rights guaranteed by Article 8 of the ECHR

dent existence, since it has effect solely in relation to the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols”. *Kafkaris v. Cyprus* [GC], no. 21906/04, Judgment of 12 February 2008, ECtHR, para. 159; See also ECtHR 2021, paras. 2-4.

72. *Kafkaris v. Cyprus* [GC], para. 159; See also Schabas 2015, pp. 562-563.

73. ECtHR 2021, para. 6.

74. Regarding the applicability of Article 8 of the ECHR to sports-related disputes, T. Shinohara has already discussed it in his research. Thus, this article will not examine the applicability of Article 8 of the ECHR in more detail. See Shinohara, T. (2021), “Physical and sexual abuse against young athletes in sport in light of Article 8 of the European Convention on Human Rights (ECHR)”, *International Sports Law Journal* (2021), pp. 1-11.

75. *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*, award of 30 April 2019 (hereinafter: *Caster Semenya and Athletics South Africa (ASA) v. IAAF*). para. 626.

76. See Duval Smith, A. and Maclean, S. (2009), “Fears for Caster Semenya over trauma of test results”, *The Guardian*, published on 13 September 2009. <https://www.theguardian.com/sport/2009/sep/13/caster-semenya-gender-test-results>; See also Saleem, R. (2010), “The Olympic Meddle: The International Olympic Committee's Intrusion of Athletes' Privacy Through the Discriminatory Practice of Gender Verification Testing”, *The John Marshall Journal of Information Technology & Privacy Law*, Volume 28, Issue 1, Fall 2010, pp. 68-71.

in conjunction with Article 14 of the ECHR due to discrimination based on the prohibited grounds of ‘other status’ including gender identity and sex characteristic.⁷⁷ In this situation, it would be said that her personality rights might be infringed by the state’s omission of taking necessary measures to protect their personal information from public eyes and to prevent a negative effect on their professional career, social reputation and cost of livings by sports governing bodies due to discriminatory sporting regulations on intersex and transgender athletes. Accordingly, intersex and transgender athletes would claim a violation of Article 14 of the ECHR in conjunction with Article 8.

However, it is important to note that, when they invoke Article 14 of the ECHR, intersex and transgender athletes shall establish such infringement of their personality right was caused by discrimination on their gender identity and sex characteristics within the meaning of the term ‘other status’ under Article 14 of the ECHR. In other words, they must show a causal link between a violation of their personality right and such discriminatory measures. If so, they would claim a violation of Article 14 of the ECHR in conjunction with Article 8.

It is further worth noting that the differential treatment for intersex and transgender athletes were conducted by non-state actors established by national private law. Thus, it is necessary to consider whether Article 14 of the ECHR imposes on the state parties positive obligations to protect intersex and transgender athletes against all forms of discriminatory measures by non-state actors based on their gender identity and sex characteristics. In this regard, the state parties “shall secure to everyone within their jurisdiction the rights and freedoms” guaranteed by the Convention.⁷⁸ In other words, they are held responsible for taking necessary measures to protect individuals against discrimination within the jurisdiction.⁷⁹ Harris et al. explained that:

“The obligation of the state to take action to protect against private acts of discrimination which affect the enjoyment of Convention rights could embrace matters like membership of private associations or the right to be freed from privately imposed discriminatory fetters, such as restrictive covenants on property rights.”⁸⁰

77. See *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, nos. 5095/71, 5920/72, and 5926/72, Judgment of 7 December 1976, ECtHR, para. 56.

78. Article 1 of the ECHR.

79. For instance, in *Opuz v. Turkey*, the Court observed that “the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction ... It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.” *Opuz v. Turkey*, no. 33401/02, Judgment of 9 June 2009, ECtHR, para. 128.

80. Harris et al. 2018, p. 800.

That is to say, the state parties are held responsible for implementing positive obligations to ensure the enjoyment of the right to non-discrimination within their jurisdiction based on the prohibited grounds under Article 14 of the ECHR conducted by non-state actors.⁸¹ According to the ECtHR's Guide, "the "horizontal effect" of Article 14 ... may apply in purely private situations".⁸² Accordingly, Article 14 of the ECHR may apply to the private relationship between sports governing bodies and athletes.

In conclusion, it might be said that state parties to the ECHR must implement positive obligations to take necessary measures to protect intersex and transgender athletes against discrimination based on their gender identity and sex characteristics by sports governing bodies under Article 14 of the ECHR and to prevent such discrimination against them. In this sense, intersex and transgender athletes may argue a violation of Article 14 in conjunction with Article 8 of the ECHR if they show a causal link between a violation of their rights and discriminatory measures. However, it is important to note that a question of whether the Court may find it admissible cannot be answered at this moment so that it is necessary to await the Court's decision in relation to this issue.

Conclusion

This article explained how the ECtHR examines the four conditions to identify a violation of Article 14 of the ECHR in light of the ECtHR jurisprudence. In the context of sports, sporting regulations on intersex and transgender athletes may be recognised as discriminatory measures against them. To justify such discriminatory measures, however, the ECtHR would examine a complex issue of striking a balance between the interests of intersex and transgender athletes and those of female sports society.

As had been mentioned above, the Convention cannot impose legal obligations on non-state actors, but it obliges state parties to implement positive obligations to protect individuals against human rights violations caused by non-state actors. Under the positive obligations of Article 14 of the ECHR, they are held responsible for protecting intersex and transgender athletes against discriminatory measures based on their gender identity and sex characteristics by sports governing bodies within the jurisdiction. In this sense, state parties to the ECHR must take necessary measures to protect athletes from such discriminatory measures.

In conclusion, intersex and transgender athletes would argue a violation of their rights caused by discriminatory measures based on their gender identity and sex characteristics by sports governing bodies under the positive obligations of

81. Harris et al. 2018, pp. 799-800.

82. ECtHR 2021, para. 15.

Article 14 of the ECHR in conjunction with Article 8 of the ECHR. However, it is worth noting that it is necessary to await the Court's decision over the Caster Semenya case that is still pending at the time of writing to know the Court's position on this issue.⁸³

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