

<b>Decision of the Appeals Board of 25 September 1992</b>
<b>Appeal No. 170/1992 – MULLER-RAPPARD (II) v. Secretary General</b>

The Appeals Board, composed of:

Mr Carlo RUSSO, Chairman,  
Sir Donald TEBBIT, member, and  
Mr Kåre HAUGE, substitute member,

assisted by:

Mr Michele de SALVIA, Secretary, and  
Ms Margaret KILLERBY, Deputy Secretary,

has delivered the following decision after due deliberation.

## **PROCEEDINGS**

1. The appellant lodged his appeal on 20 March 1992 and it was entered in the Board's register under file No. 170/1992 on the same day.
2. The Secretary General's observations were submitted to the Board on 12 May 1992.
3. The appellant's reply was sent to the Secretary General on 15 June 1992.
4. The public hearing took place in the Court Room of the European Court of Human Rights, Strasbourg, on 26 June 1992. The appellant, Mr E. MULLER-RAPPARD, presented his own case. The Secretary General was represented by Mr E. HARREMOES, Director of Legal Affairs, assisted by Mr P. DEWAGUET, Administrative Officer in the Directorate of Legal Affairs.

## **THE FACTS**

5. The appellant, a German national, entered the service of the Council of Europe in 1963. He is a permanent member of staff and since 1 November 1989 has occupied the post (grade A6) of Deputy Director of Social and Economic Affairs (DSEA).
6. When the post of Director of Economic and Social Affairs (grade A7) became vacant the appellant applied for the post following the appearance of Vacancy Notice No. 57/91 of 28 May 1991.
7. On 12 December 1991, during an interview with the Secretary General, the appellant

was informed that another applicant, a British national, had been appointed. As required by Article 25, paragraph 2 of the Regulations on Appointments, the Secretary General had informed the Committee of Ministers on 11 December 1991 of her intentions and the reasons for her choice.

This decision was confirmed in writing in a note from the Secretary General to the appellant on 10 January 1992.

8. On 13 January 1992, considering, in the first place, that the procedure for appointment to the above-mentioned post had been irregular and, secondly, that he had been the victim of discriminatory treatment, the appellant lodged an administrative complaint against the Secretary General's decision, requesting its annulment.

## **THE LAW**

9. The appeal is directed against the Secretary General's decision to appoint to the vacant post of Director of Social and Economic Affairs an external applicant, namely Mr R. GUTHRIE, a British national.

The appellant considers that this decision was unlawful, and has submitted two main arguments in that connection.

10. In the first place, he alleges that the decision at issue failed to comply with the provisions of Article 8, paragraph 1 of the Regulations on Appointments in that the successful candidate did not possess, at the time of his appointment, all the qualifications required by the Vacancy Notice. In particular the candidate in question did not have "a thorough knowledge of the problems of European international co-operation and of the requisite working methods" or "wide professional experience" in the field of the DSEA's activities.

Consequently, in the appellant's submission, the application of the Director chosen should have been rejected at the admissibility stage, since his previous career did not fully satisfy the requirements for the post in question.

In short, the Secretary General did not assess with the necessary objectivity and precision the extent to which the knowledge of the appointed candidate matched the requirements set out in the Vacancy Notice.

11. Secondly, the appellant asserts that he suffered discriminatory treatment contrary to Article 12, paragraph 2 of the Staff Regulations. He alleges in this connection that the impugned appointment was taken in the context of a new practice followed by the Secretary General consisting in the systematic appointment of external candidates to directors' posts (grade A7).

Although Article 12, paragraph 2 of the Staff Regulations refers to "the desirability of bringing in fresh talent from time to time", the first of the principles explicitly set forth in that provision is that when vacancies are being filled due allowance must be made for "the qualifications and experience of serving staff members".

Furthermore, the new appointments policy, as described above, indicated wilful disregard of the geographical distribution principle, since the nationality of the candidate chosen was more strongly represented in the establishment table than that of the appellant.

Consequently, the appellant was placed at a disadvantage, as, from the outset, his application, i.e. the application of a member of staff with a long period of service and, moreover, of a lawyer, did not have the same prospects of success as that of an external candidate.

12. The Secretary General maintains that the appeal is unfounded since the appellant failed to prove that he was victim of a breach of the Staff Regulations and therefore cannot validly claim to have suffered any pecuniary or non-pecuniary damages.

13. With regard to the argument relating to a breach of Article 8, paragraph 1 of the Regulations on Appointments, the Secretary General asserts that the Director chosen was the candidate whose experience and qualifications most closely matched both the duties and qualifications listed in the vacancy notice taken as a whole and the nature of the fields of activity handled by the DSEA.

The successful candidate had previously occupied posts of major responsibility in his own country. For example, he had headed a body responsible for overseeing the use made of their resources by numerous charitable associations and organisations. In addition, he had previously worked in various capacities in many fields of a social or economic nature and had been directly involved in a number of activities conducted by the Council of Europe.

Far from being vitiated by any error of assessment, the impugned appointment was consistent not only with the interests of the Council of Europe, but also with the Secretary General's duty to appoint "staff of the highest ability" (Article 12, paragraph 1 of the Staff Regulations).

14. With regard to the argument relating to a breach of Article 12, paragraph 2 of the Staff Regulations, and to alleged discriminatory treatment, the Secretary General considers that the decision to appoint a candidate of British nationality satisfies the geographical distribution criterion, supposing that criterion to be applicable to the case under consideration, as defined in the Order adopted by the Committee of Ministers in 1978.

Moreover, the above criterion is not decisive for appointments to vacant posts. The appointment must in principle be based on the merits, qualifications and experience of each candidate, and a comparative assessment of these elements in respect of the candidates taking part in a competition procedure.

With regard to the appellant's assertion that a practice of appointing external candidates to senior grades in the Council of Europe, particularly posts of directors, is systematically followed, the Secretary General points out that numerous appointments to A7 and A6 posts had recently concerned serving members of staff who had made their professional career at the Council of Europe.

The reason that, in the present case, an external candidate was chosen, was that he was

considered the person best qualified for the post of Director of Social and Economic Affairs.

15. The Board considers that, while the present dispute concerns the general issue of promotion, it also has special features relating both to the Secretary General's wide discretionary powers with regard to the appointment of senior officials and to the specific rules laid down in that area by the Regulations on Appointments.

16. The Board has pointed out on numerous occasions that the Secretary General, being vested with authority to make appointments (Article 36c of the Statute of the Council of Europe and Article 11 of the Staff Regulations), and holding primary responsibility for the organisation of the Secretariat, is best qualified to know and assess the needs of the Organisation and to achieve a proper balance between the different decisive factors. This principle applies particularly to the appointment of senior officials, such as the directors who are, under the Secretary General's authority, responsible for implementing the Organisation's policy in accordance with the guidelines laid down by the Committee of Ministers in the various sectors.

Taken into account that the duties of these senior officials are at the same time of an administrative and political nature, the Secretary General is entitled to have regard, when appointing them, to a number of criteria. Article 12, paragraph 2 of the Staff Regulations gives examples of such criteria, but does not contain an exhaustive list.

17. For that reason, leaving aside circumstances different from the present case (those covered by Article 26 of the Regulations on Appointments, for example), the rules applicable to the appointment of senior officials differ from those concerning other posts in the Organisation. Article 25 of the Regulations on Appointments lays down rules governing the procedure for appointment to A7 and A6 posts which override the ordinary regulations. In particular, paragraph 1 of that provision stipulates that "any vacancy at grade A6 or A7 shall be suitably notified to Permanent Delegations and published within the Secretariat...", which also emphasises the political importance of such appointments. With regard to the procedure as such, and unlike the procedure with regard to other posts, paragraph 2 stipulates that "the Secretary General shall make an appointment after an informal exchange of views with the Committee of Ministers, during which he shall make known his intentions and the reasons for his choice". Such a procedure confirms the Secretary General's particular responsibility for the appointment of directors under the regulations in force.

18. However, the special features described above cannot override the basic principles governing recruitment policy set forth in Article 12 of the Staff Regulations. This means, for example, that recruitment must satisfy the essential condition (paragraph 1) of "ensuring the employment of staff of the highest ability, efficiency and integrity".

19. In addition, under the criteria laid down by Article 12, paragraph 2 for appointment to vacant posts, the Secretary General is required to take into account in the first place "the qualifications and experience of serving staff members". This provision thus specifically recognises the latter's "right to a career".

The Board takes the view that this endorses the general principle that the first objective of promotion policy must be to give serving staff members a reasonable chance of promotion within the Organisation, even to the highest posts. This requirement is clearly deducible from

the very text of the provision in question, which reserves the possibility of bringing in “fresh talent” from time to time.

However, such a requirement cannot confer upon serving staff members a preeminent right to be promoted to senior posts (grades A6 and A7). Such a right is not recognised, explicitly or implicitly, either by the regulations in force at the Council of Europe or by administrative case-law.

20. With regard to the appeal before it, the Board notes that the appellant’s arguments are closely linked, since they both relate to the scope of the Secretary General’s discretionary powers and the way they were exercised in the present case. This applies both to the admissibility of the application complained of and to the merits of the impugned decision. It is therefore appropriate to examine them together.

21. The Board observes that the provisions of Article 8 of the Regulations on Appointments are also applicable to the procedure for the appointment of a director. Paragraph 1 of that provision, which makes no distinction between grades, expressly states that “applications shall be admissible only if they comply with the conditions set out in the vacancy notice”.

22. In the present case, some of the qualifications required by Vacancy Notice No. 57/91 undoubtedly constitute objective criteria in that they are capable of being reviewed on the basis of evidence. This applies to the requirement of a “university degree” and to the requirements concerning applicants’ knowledge of languages. There are other qualifications, however, which, by their nature, leave room for the assessing authority to exercise discretionary powers. Requirements such as “authority”, “initiative”, “highly developed sense of responsibility” and “management skills” belong to the latter category. The same applies to the requirement “wide professional experience” in the field of activities mentioned in the vacancy notice and “thorough knowledge of the problems of international co-operation”.

23. The Board, having considered all the evidence submitted by the parties, finds no indication that there has been a breach of Article 12, paragraph 2 of the Staff Regulations.

The appellant’s allegation of discriminatory treatment, which is based on the practices which he imputes to the Secretary General in the area of recruitment, amounts in fact to an allegation of prejudice.

The Board is of the opinion that the appellant would have had to present compelling evidence that the decision against him was based upon prejudice (cf., *mutatis mutandis*, ABCE 130/1985, Fuchs v. Secretary General, paragraph 55). However, no evidence has been submitted of any prejudice against the appellant, particularly no evidence of prejudice on the ground of his nationality.

24. In the light of these considerations, the Board finds that, in the present case, the Secretary General did not unreasonably or arbitrarily use the margin of appreciation which she enjoys in assessing that the previous career of the successful applicant and the experience he had acquired in performing the duties entrusted to him in his own country in particular, made him best suitable to take up the post of Director of Social and Economic Affairs.

25. Accordingly, the facts of the case do not disclose any appearance of unlawfulness.

For these reasons, the Appeals Board:

Declares the appeal unfounded;

Dismisses it; and

Orders that each party shall bear its own costs.

Delivered in Strasbourg on 25 September 1992, the French version of the decision being authentic.

The Secretary of the  
Appeals Board

M. de SALVIA

The Chairman of the  
Appeals Board

C. RUSSO