

CONSEIL DE L'EUROPE——— ———COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No 226/1996 (Daniel ZIMMERMANN v. Secretary General)

The Administrative Tribunal, composed of:

Mr Carlo RUSSO, Chair,
Mr Kåre HAUGE,
Mr José da CRUZ RODRIGUES, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar, and
Mrs Claudia WESTERDIEK, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr Daniel ZIMMERMANN lodged his appeal on 6 November 1996. On 12 November 1996, the appeal was registered under file No. 226/1996.
2. On 12 December 1996, the Secretary General submitted his observations on the appeal.
3. On 21 January 1997, the appellant's counsel, Mr G. ALEXANDRE, barrister, filed a reply to the Secretary General's observations.
4. The public hearing took place in the Human Rights Building, Strasbourg, on 18 March 1997. The appellant Mr D. ZIMMERMANN was represented by Mr G. ALEXANDRE. The Secretary General was represented by Mr R. LAMPONI, Head of the Legal Adviser's Department and Treaty Office, Directorate of Legal Affairs.

THE FACTS

5. On 8 February 1996, Vacancy Notice No. 5/96 was published to advertise the post of Executive Secretary (grade A5) of Eurimages, the European Support Fund for the Co-production

and Distribution of Creative Cinematographic and Audiovisual Works.

6. The purpose of Eurimages, established by Resolution (88) 15 adopted by the Committee of Ministers on 26 October 1988 at the 420th meeting of the Ministers' Deputies, is to encourage in any way decided by the Board of Management the co-production, distribution, broadcasting and screening of creative cinematographic and audiovisual works, particularly by helping to finance co-production, distribution, broadcasting and screening. The Fund is managed by a Board of Management to which each of the Fund's member states appoints a representative. The board takes decisions by a two-thirds majority of the votes cast, each of the Fund's member states having one vote; decisions thus taken are valid when the majority represents half of the Fund's paid-in capital. Procedural decisions are taken by a majority of the votes cast. The Secretary General of the Council of Europe acts as secretary of the Fund.

7. The decision to set up the Fund was taken in 1988 by the Committee of Ministers representatives of twelve Council of Europe member states, under Resolution (51) 62 of the Committee of Ministers concerning partial agreements and the Committee of Ministers decision authorising member states to pursue appropriate objectives by means of a partial agreement within the Council of Europe. Resolution (51) 62 provides that if the Committee of Ministers, by the unanimous vote of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee, decides that abstention from participation in any proposal before it is permitted, the proposal is put to the Committee; it is considered to have been adopted only by the representatives who then vote in favour of it, and its effects are limited accordingly. Any additional expenditure incurred by the Council of Europe is borne exclusively by the members of the relevant partial agreement. Another thirteen member states have since joined the Fund.

8. Vacancy Notice No. 5/96 referred to Article 7 of the Regulations on Appointments and stated that the post would be filled by external recruitment procedure also open to permanent staff members of the Organisation.

In the general information in the notice, it was stated that "the Executive Secretary [was] appointed by the Secretary General in consultation with the Board of Management of the Fund", that "under its equal opportunities policy, the Council of Europe [was] aiming to achieve parity in the number of women and men employed in each category and grade", and that "in the event of equal merit, preference [would] therefore be given to the applicant belonging to the under-represented sex (female candidates in the present case)".

In the post description (Post No. 118.11), it was stated: "Under the authority of the Secretary General, the successful candidate will be responsible for the running of the 'Eurimages' Fund, carrying out the instructions and decisions of the Board of Management and reporting to the Fund's President". The various duties involved were then set out, together with the academic qualifications, professional experience, knowledge, skills and language proficiency required.

9. A large number of applications were received.

10. On 3 June 1996, the Recruitment Panel, reinforced by two representatives of the Eurimages Board of Management, considered the qualifications of eleven pre-selected

candidates – including the appellant – and interviewed them. It then submitted a unanimous recommendation to the Secretary General, ranking Ms P.-L. and the appellant equally (15/20 points).

The panel also drew attention to Article 22 *bis* in the Regulations on Appointments, which states that in the event of equal merit between a woman and a man both of whom are candidates in an external recruitment or internal competition procedure, preference is to be given to the candidate of the sex which is under-represented in the grade and category to which the vacant post belongs.

11. On 5 June 1996, the Chair of the panel sent a memorandum to the Chair of the Eurimages Board of Management informing him of the panel's meeting of 3 June 1996. The memorandum stated that the panel had unanimously recommended two equal-ranking candidates for appointment as Executive Secretary and gave the names of Ms P.-L. and the appellant, specifying that they appeared "in alphabetical order".

12. On 24 June 1996, the Eurimages Board of Management, consulted by the Secretary General on the two applications, interviewed the candidates in Reykjavik. It then voted in favour of the appellant, in a final vote of thirteen (representing more than half the capital) to eleven with one abstention.

13. On 19 July 1996, the Secretary General appointed Ms P.-L. Executive Secretary of the Fund.

On the same day, in letters to the appellant and the members of the Board of Management, the Secretary General gave the reasons for his decision. After outlining the stages in the recruitment procedure, he explained that "the presence of two candidates generally recognised as excellent for the post, the tie in the reinforced jury, the close vote in the board and the absence of a valid recommendation from the latter body have led me to conclude that this is a typical case for the application of the above-mentioned rule, which is by no means an empty formality within an organisation that is still seriously skewed as far as the sexual balance in its management structure is concerned".

14. On 9 August 1996, the appellant filed an administrative complaint with the Secretary General against the decision of 19 July 1996. He contended that after the vote by the Board of Management, Ms P.-L. and he were no longer of equal merit and that the Secretary General could not, therefore, apply Article 22 *bis* of the Regulations on Appointments.

15. On 13 September 1996, the Deputy Director of Administration, on behalf of the Secretary General, rejected the administrative complaint on the grounds that it was inadmissible and, alternatively, unfounded. He said that the Secretary General had taken due account of all the relevant facts of the case and, under his discretionary powers and in line with the unanimous opinion of the Recruitment Panel, had decided that the appellant and Ms P.-L. were of equal merit. The Secretary General had then legitimately applied Article 22 *bis* of the Regulations on Appointments.

THE LAW

16. The appeal is directed against the decision of 13 September 1996 dismissing the administrative complaint against the Secretary General's decision of 19 July 1996 to appoint Ms P.-L. to the post of Executive Secretary of Eurimages, as advertised in Vacancy Notice No. 5/96.

A. The Secretary General's preliminary objection

17. The Secretary General submits that the appeal is inadmissible.

In his opinion, the admissibility of the appeal must be assessed in the light of Article 59 6 d of the Council of Europe Staff Regulations. Eurimages, like other partial agreements, was an integral part of the Council of Europe. Under Article 7 (1) of Resolution (88) 15, "the Secretary General of the Council of Europe [acted] as secretary of the Fund". The Staff Regulations and the appendices to them therefore applied directly to it; indeed, it was inconceivable that staff of a partial agreement have no regulations to govern and protect them.

The Secretary General asserted that Article 59, paragraph 6 d of the Staff Regulations specifically introduced a condition restricting external candidates' right of appeal. The reference to a "competitive recruitment examination" implied that this provision applied only to candidates sitting a "competitive examination" that included written papers, as specified in Article 15, paragraph 1, of the Regulations on Appointments. Since the selection procedure in which the appellant had taken part was based on qualifications, his complaint – and consequently the appeal – was inadmissible. Even if the stages of a selection process based on qualifications, as governed by Article 16, paragraph 1, of the Regulations on Appointments were held to constitute a "competitive recruitment examination" within the meaning of Article 59, paragraph 6 d of the Staff Regulations, the appeal was inadmissible because it challenged not the qualification-examination procedure or the conduct of the Recruitment Panel interview but the Secretary General's application of Article 22 *bis* of the Regulations on Appointments.

18. The appellant contested the applicability of Article 59, paragraph 6 d of the Staff Regulations. Firstly, the Eurimages Fund was a body separate from the Council of Europe and the procedure for appointing the Executive Secretary therefore did not come under Article 59.

Secondly, even if Article 59, paragraph 6 d of the Staff Regulations were applicable, it provided that, even if not on the Council staff, a candidate eliminated in a recruitment competition could challenge a decision not to appoint him or her to the staff post competed for. To interpret Article 59, paragraph 6 sub-paragraph d, as placing additional restrictions, namely that recruitment be on the basis of a written examination and that the complaint relate to an irregularity in the procedure, went beyond the text and conflicted with the spirit of Article 59, paragraph 6 d whose purpose was to restrict appeals by candidates who were not staff members to the matters which had adversely affected them. In the case of a candidate in a competition, any irregularities in the challenged appointment procedure could be disputed. Furthermore, the interpretation suggested by the Secretary General resulted in illegal discrimination between staff members and external candidates participating in a recruitment competition.

Alternatively, the appellant contended that the two candidates selected by the panel had undergone an “examination” when interviewed in Reykjavik by the Eurimages Board of Management.

Even if Article 59 of the Staff Regulations did indeed contain a number of restrictions, the Administrative Tribunal had jurisdiction, under Article 60 of the Staff Regulations, to determine any appeal entered after the explicit or implicit rejection of an administrative complaint.

19. The Administrative Tribunal dismisses at the outset the appellant’s argument that Article 59, paragraph 6 d, and the other provisions of the Staff Regulations of the Council of Europe and its appendices do not apply to disputes concerning the Eurimages Fund as a partial agreement. The Tribunal considers that, under Resolution (88) 15 of the Committee of Ministers on the Eurimages Fund and Resolution (51) 62 on partial agreements, the Fund is an activity conducted within the Council of Europe. The Secretary General of the Council of Europe is called on to act as secretary of the Fund, and he can only do so by applying the rules and procedures provided for in the Staff Regulations and the appendices to them. Moreover, Vacancy Notice No. 5/96 stated that the recruitment procedure would be governed by the general rules of the Council of Europe.

20. Article 59 of the Staff Regulations reads as follows:

“1. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them. The expression ‘administrative act’ shall mean any individual or general decision or measure taken by the Secretary General.

...

3. The Secretary General shall give a reasoned decision on the complaint as soon as possible and not later than thirty days from the date of its receipt and shall notify it to the complainant. If, despite this obligation, the Secretary General fails to reply to the complainant within that period, he or she shall be deemed to have given an implicit decision rejecting the complaint.

...

6. The complaints procedure set up by this article shall be open on the same conditions *mutatis mutandis*:

...

d. to candidates outside the Council who have been allowed to sit a competitive

”recruitment examination, provided the complaint relates to an irregularity in the examination procedure.

... ”

21. The Administrative Tribunal does not share the appellant’s opinion that, even if there is a breach of Article 59 of the Staff Regulations at the administrative-complaint stage, the Tribunal can hear any complaint brought before it provided only that the complaint has been dismissed and the time-limit laid down in Article 60, paragraph 3 of the Staff Regulations complied with. Under Article 60, paragraph 1, of the Staff Regulations, an appeal can only be made after the

administrative complaint in the dispute has been rejected. Hence the provisions of Part VII (“Disputes”) complement each other. Article 60, paragraph 1, requires not only that the complaint has been filed with the Secretary General but also that the heads of complaint submitted to the Tribunal have been raised in the manner prescribed in Article 59 (see, *mutatis mutandis*, ABCE, Padolecchia v. Secretary General, Decision of 14 October 1971, No. 3/1971, paragraphs 14-17; Lafuma v. Secretary General, Decision of 13 October 1972, No. 7/1970; see also European Court of Human Rights, Cardot v. France, Judgment of 19 March 1991, Series A Vol. 200, p. 18, paragraph 34; and Akdivar v. Turkey, Judgment of 16 September 1996, Reports of Judgments and Decisions 1996, paragraph 66).

22. In Article 59, paragraphs 1 and 6, of the Staff Regulations specifies those who may institute complaint proceedings. The main group is staff members of the Organisation who have a direct and existing interest in so doing (paragraph 1). Paragraph 6 extends this possibility, *mutatis mutandis*, to other categories which may be the victims of an “administrative act adversely affecting them”.

23. The Secretary General and the appellant disagree as to the interpretation of paragraph 6, sub-paragraph d, of Article 59 of the Staff Regulations and in particular the interpretation of the words “competitive recruitment examination” and the requirement that “the complaint [relate] to an irregularity in the examination procedure”.

24. The Tribunal takes the view that, even though internal administrative regulations of the Council of Europe are here at issue, it should be guided by Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969, which essentially set out generally accepted principles of international law, to which the European Court of Human Rights has referred in its case-law (see European Court of Human Rights, Golder v. United Kingdom, Judgment of 21 February 1975, Series A Vol. 18, p. 14, paragraph 29).

The “general rule of interpretation” given in Article 31, paragraph 1, of the Convention reads as follows:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

25. The words of Article 59, paragraph 6 d, of the Staff Regulations, read in their context, do not require the restrictive interpretation put forward by the Secretary General. The provision refers to “candidates outside the Council who have been allowed to sit a competitive recruitment examination” and to “irregularity in the examination procedure”. It therefore concerns examination to grade candidates with a view to filling a vacant post in the Organisation.

The Regulations on Appointments do indeed distinguish between the “competitive examination”, with which Article 15 is concerned, and “selection based on qualifications”, dealt with by Article 16. Article 15, paragraph 1, states that the competitive examination includes written papers and an interview, while selection based on qualifications, under Article 16, involves an examination of qualifications and, if necessary, an interview.

However, the words of Article 59, paragraph 6 d, of the Staff Regulations and of Article

15 of the Regulations on Appointments are not so similar as to imply that the former provision refers exclusively to the procedure governed by the latter. The order of words is reversed in the French text of Article 59, paragraph 6 d, of the Staff Regulations, and the English text refers to a “competitive recruitment procedure”, a broader term which covers all examination of candidates in a recruitment procedure for the purpose of grading them.

26. To determine its jurisdiction, the Tribunal must also take into account the object and purpose of the provisions on disputes contained in the Staff Regulations. The Tribunal points out in this connection that the first sentence of Article 59, paragraph 1, states: “Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them”. The Tribunal holds that in the matters governed by the Staff Regulations and the appendices to them, anyone who is not a member of the Council of Europe staff who is directly and adversely affected by an administrative act must have the right to refer the decision or measure in question first to the Secretary General and then, if necessary, to the Administrative Tribunal, except by *actio popularis*.

27. In the case of an external recruitment procedure, therefore, all candidates who sit the competitive examination(s) may have an interest in having a judicial body review the lawfulness of the procedure.

28. The Tribunal considers this the only interpretation compatible with the principle of the rule of law, to which the Statute of the Council of Europe refers twice: firstly, in the preamble, where the signatory governments proclaim their steadfast commitment to the principle and, secondly, in Article 3, which states: “Every member of the Council of Europe must accept the principles of the rule of law...”.

29. Against this background, the Tribunal draws attention to the case-law of the European Court of Human Rights concerning the interpretation of Article 6, paragraph 1, of the Convention. The court has held that “one can scarcely conceive of the rule of law without there being a possibility of having access to the courts” and that everyone has “the right to have any claim relating to his civil rights and obligations brought before a court or tribunal” (see *Golder Judgment*, p. 17, paragraph 34 and p. 18, paragraph 36; *Fayed v. United Kingdom*, Judgment of 21 September 1994, Series A Vol. 294-B, pp. 49-50, paragraph 65). While in the *Golder Judgment*, the Court observed that “the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognised’ fundamental principles of law” and that “the same is true of the principle of international law which forbids the denial of justice”, the “safeguard of some appeals procedure” is also recognised as a general principle of international civil service law (see *ILOAT*, Judgment No. 122 of 15 October 1968, *Chadsey v. W.P.U.*, p. 4). If an international organisation does not provide efficient protection of the individual, the immunity from jurisdiction enjoyed by international organisations in states’ domestic law could pose a problem with regard to Article 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms (see decisions of the European Commission of Human Rights of 24 February 1997 on the admissibility of Application No. 26083/94, *Waite and Kennedy v. Germany*, and Application No. 28934/95, *Beer and Regan v. Germany*).

30. In the present case, moreover, which concerns external recruitment procedure also open

to permanent staff members of the Organisation, this interpretation obviates the slightest discrimination between candidates.

31. Consequently, the Tribunal is competent *ratione personae* to consider the appeal.

32. The objection must therefore be dismissed.

B. The merits of the case

I. The decision of 19 July 1996

33. The appellant alleged that Article 22 bis of the Regulations on Appointments was not relevant to the case and that the Secretary General had made a mistake of law in applying it. The staff of Eurimages were not to be considered staff of the Council of Europe. The rules of procedure of the Eurimages Board of Management laid down independent procedures for appointing an Executive Secretary and contained no reference to the opinion of a panel or to the regulations that applied to Council of Europe staff. After consultation with the Board of Management, the Secretary General could therefore have taken a decision unfettered by Article 22 bis of the Regulations on Appointments.

34. Alternatively, the appellant disputed that the two prerequisites for applying Article 22 *bis* were met.

The Recruitment Panel and its Chair were not competent to decide equal merit; any decision that there was equality of merit required it to be based on the Board of Management's opinion, delivered after examining both candidates. Otherwise the Board of Management had been misled with regard to the application of Article 22 *bis*. The decision by the Board of Management had been very much in the appellant's favour. It had been taken by a majority of the votes cast, in compliance with Article 6, paragraph 3, of the Board of Management's Rules of Procedure, and the board had unanimously decided to communicate the result to the Secretary General. The alleged equality of merit thus did not exist.

Furthermore, the appellant maintained that there was no under-representation in the grade and category to which the vacant post belonged, as there was only one post of Executive Secretary in the Fund. He also pointed out that the Eurimages secretariat was composed mainly of women, so that the under-representation alleged did not exist within Eurimages.

35. The Secretary General replied that the Staff Regulations and the Regulations on Appointments did apply to the staff of partial agreements and consequently to applicants for posts in their secretariats. Moreover, the Vacancy Notice had stated that "in the event of equal merit, preference [would] therefore be given to the applicant belonging to the under-represented sex (female candidates in the present case)".

Further, under Article 9 of the Regulations on Appointments, the Appointments Board, which included the Recruitment Panel, was the only body competent to make recommendations to him about appointments. In this instance, the panel had made a recommendation giving Ms P.-L. and the appellant equal ranking. The opinion of the Eurimages Board of Management was only provided for by its Rules of Procedure, which were not binding on the Secretary General in

a matter (appointment of staff to the Organisation) and which it was for the Committee of Ministers to regulate. He had consulted the Board of Management before appointing the Executive Secretary, such a consultation not being incompatible with the Staff Regulations or the Regulations on Appointments. However, as the appellant recognised, a Board of Management opinion was not binding.

The Secretary General accordingly considered that he had not overstepped the latitude he was allowed in deciding that Ms P.-L. and the appellant were of equal merit and that Article 22 *bis* of the Regulations on Appointments should apply. The very small Board of Management majority in favour of the appellant was not sufficient to separate the two candidates, both of whom the panel had considered highly qualified and who had been awarded the same mark (15/20).

36. The present case concerns the appointment of the Executive Secretary of the Eurimages Fund after an external recruitment procedure also open to permanent staff of the Council of Europe. The appellant was not appointed to the post because the Secretary General, under Article 22 *bis* of the Regulations on Appointments, gave preference to Ms P.-L.

37. The Administrative Tribunal points out that in staff management matters the Secretary General, who holds the authority to make appointments (Article 36 c of the Statute of the Council of Europe and Article 11 of the Staff Regulations), has wide ranging discretionary powers under which he is qualified to ascertain and assess the Organization's operational needs and the staff's professional abilities. However those discretionary powers must always be lawfully exercised. Where a decision is challenged, an international court naturally cannot substitute its judgment for that of the Administration. However, it must ascertain whether the decision challenged was taken in compliance with the Organisation's regulations and the general principles of law, to which the legal systems of international organisations are subject. It must consider not only whether the decision was taken by a competent authority and whether it is legal in form, but also whether the correct procedure was followed and whether, from the standpoint of the Organisation's own rules, the administrative authority's decision took account of all the relevant facts, any conclusions were wrongly drawn from the evidence in the file, and there was any misuse of power (ABCE, No. 147-148/1986, Bartsch and Peukert v. Secretary General, Decision of 30 March 1987, paragraphs 51-53; No. 173/1994, Ferriozzi-Kleijssen v. Secretary General, Decision of 25 March 1994, paragraph 29; and ATCE, Nos. 216, 218 and 221/96, Palmieri III, IV and V v. Secretary General, Decision of 27 January 1997, paragraph 41).

38. With regard to the appellant's principal argument, the Tribunal reiterates that the Secretary General must comply with the Organisation's regulations concerning management of Council of Europe staff and must also comply with them when called on to act as secretary of a partial agreement established under the Council of Europe (see paragraph 19 above).

39. The Tribunal notes that the Secretary General appointed Ms P.-L. Executive Secretary of the Fund, stating that "the presence of two candidates generally recognised as excellent for the post, the tie in the reinforced jury, the close vote in the board and the absence of a valid recommendation from the latter body have led me to conclude that this is a typical case for the application of the ... rule [Article 22 *bis* of the Regulations on Appointments], which is by no means an empty formality within an organisation that is still seriously skewed as far as the

sexual balance in its management structure is concerned”.

40. Article 22 *bis* of the Regulations on Appointments reads as follows:

“1. In the event of equal merit between a woman and a man both of whom are candidates in an external recruitment or internal competition procedure, preference shall be given, notwithstanding the provisions of Article 22 paragraph 2, to the candidate of the sex which is under-represented in the grade and category to which the vacant post belongs.

2. A sex is under-represented in relation to the other when the proportion of staff of that sex in the grade and category to which the post belongs is below 40%.

3. The corrective measure set out above does not constitute discrimination contrary to Articles 3 and 13 of the Staff Regulations.”

The Tribunal points out that this provision was introduced by decision of 21 May 1992 (476th meeting of the Ministers’ Deputies) following the decision of the Appeals Board of the Council of Europe of 28 February 1992 (ABCE, No. 167/1991, *Parsons v. Secretary General*). The board there recognised “that progress towards the effective equality of the sexes is an important objective to attain in all fields of social life, and therefore also in the framework of work relations, and that it is legitimate, even meritorious, for an administrative authority such as that of the Council of Europe to aim at such an objective by adopting special measures” and that “belonging to one sex rather than another may well be of importance and even a determining factor in filling a post if such is the aim of a policy based on equality between men and women”, on condition that “the rules in force expressly authorise such differentiated treatment” (ABCE, No. 167/1991, paragraph 24 *et seq.*).

41. The Tribunal also notes that Vacancy Notice No. 5/96 informed the parties of this equal opportunities policy and stated that in the present case, women were under-represented.

42. The question here is whether the Secretary General’s decision to appoint Ms P.-L. Executive Secretary of the Eurimages Fund met the requirements of Article 22 *bis* and of Vacancy Notice No. 5/96.

43. The Tribunal has considered the reasons given in the Secretary General’s communications of 19 July 1996 (in this connection, see ATCE, No. 186/94, *Bouillon v. Secretary General*, Decision of 24 February 1995, paragraph 34 *et seq.*; and No. 194/94, *Fernandez-Galiano v. Secretary General*, Decision of 5 April 1995, paragraph 23 *et seq.*). It has also examined all the evidence and documents submitted by the parties, including the record of the Recruitment Panel’s meeting of 3 June 1996 produced by the Secretary General at the Tribunal’s request.

44. First of all, the Tribunal must consider whether the decision appealed against was based on equality of merit between Ms P.-L. and the appellant within the meaning of Article 22 *bis* of the Regulations on Appointments, and if the conclusion that there was equality of merit was justified.

45. In the Tribunal's view, although the wording of the Secretary General's communication of 19 July 1996 was vague, it is reasonably clear from it that, having taken into account the panel's recommendation and the opinion of the Eurimages Board of Management, he concluded that the two applicants were of equal merit.

46. With regard to the recommendation of the Recruitment Panel, which is competent to make recommendations under Article 12, paragraph 6, of the Regulations on Appointments, it is clear from the minutes of the Panel's meeting that when the Panel assessed and compared the applicants after their interview it thoroughly scrutinised their respective abilities in the light of the requirements in the Vacancy Notice and unanimously concluded that Ms P.-L. and the appellant were of equal merit. To avoid any misunderstanding, the Chair specifically stated in his memorandum of 5 June 1996 (see paragraph 11 above) that the two candidates were named in alphabetical order. Moreover, the appellant did not criticise this outcome as such.

47. The Tribunal notes that the Secretary General then consulted the Eurimages Board of Management, as provided for in its Rules of Procedure. The Board of Management, after considering the two applications, voted in favour of the appellant. However, the result was a close one – thirteen votes to eleven with one abstention (see paragraph 12 above).

48. The Tribunal takes the view that the Board of Management's opinion of the candidates for the Fund secretariat's most important post was a far from insignificant factor, but one that was non-binding and did not override the finding of the Recruitment Panel, the only body competent to make a recommendation to the Secretary General, that the two candidates were of equal merit.

49. The Secretary General's decision took due account of the Board of Management's opinion, which moreover did not state any of the members' reasons for voting as they did. On the basis of the various evidence at its disposal, the Tribunal cannot censure the Secretary General's conclusion that the two candidates were still of equal merit.

50. Secondly, the Tribunal must consider whether women were under-represented in the grade and category to which the vacant post belonged.

51. As stated in Vacancy Notice No. 5/96, the Council of Europe, under its equal opportunities policy, seeks to ensure parity in the number of women and men employed in each category and grade. (The Vacancy Notice stated that women were the under-represented sex in this instance).

The Tribunal notes that this referred to the under-representation of women in category A, grade 5, of the Council of Europe staff as a whole. The Tribunal, holding that any differentiation between the staff of the Council of Europe and the staff of partial agreements would be incompatible with this policy's important aim of gradually achieving proper equality of the sexes, finds that the Secretary General's approach was appropriate.

52. Consequently, his decision to appoint Ms P.-L. Executive Secretary of Eurimages was not unlawful. The Tribunal would point out that in this instance, regard being had to Article 22 *bis* of the Regulations on Appointments and Vacancy Notice No. 5/96, the Secretary General was obliged to give preference to Ms P.-L. and thus did not enjoy any discretionary power.

II. The Decision of 13 September 1996

55. The appellant challenges the decision of 13 September 1996 dismissing his administrative complaint. He alleged that the decision, signed by the Deputy Director of Administration, was therefore made by an authority empowered to make it in that the Deputy Director of Administration had not been delegated any authority to take a decision on the Secretary General's behalf. He also contested the lawfulness of delegating any such authority since it was the Secretary General in person who was empowered to appoint the Executive Secretary of Eurimages.

56. The Secretary General, relying on Article 2 of the Staff Regulations, asserted that the Deputy Director, by virtue of his duties, was competent to take staff-management decisions. He referred to the text of the letter of 13 September 1996 and confirmed that the Deputy Director of Administration had acted with his consent. In addition, referring to the Tribunal's case-law (ATCE, *Fender v. Secretary General*, Decision of 24 February 1995, No. 178/94, paragraph 29), he asserted that if the decision were to be declared null, the resulting situation would be comparable to tacit rejection of the complaint, which would have the same effects.

57. The Tribunal notes that the Deputy Director of Administration began as follows his letter rejecting the complaint: "The Secretary General has instructed me to reply as follows to the above administrative complaint" and signed it "on behalf of the Secretary General". Article 2 of the Staff Regulations provides that hierarchical superiors in the Secretariat exercise their authority in the name of the Secretary General. Assisting the Secretary General in his staff-management functions is one of the Deputy Director of Administration's duties, and in his observations to the Tribunal, the Secretary General confirmed that the Deputy Director of Administration had acted with his consent.

In addition, the Tribunal reiterates that "Article 59 of the Regulations cannot be interpreted in such a way as to infer from it, as the appellant does, that there was an irregularity which vitiated the whole procedure, including the previous part of it with which the administrative complaint was concerned, even though it is desirable that a decision on an administrative complaint be taken and signed by the Secretary General" and that "if the [refusal] were to be declared null, the resultant situation would be comparable to a tacit rejection, which would have the same effects" (ATCE, No. 178/94, cited above).

Consequently, this complaint by the appellant must also be dismissed.

58. In conclusion, the Tribunal cannot find any illegality.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Declares it unfounded;

Dismisses it; and

Orders that each party bear its own costs.

Delivered at Strasbourg on 24 April 1997, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C RUSSO