

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

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeal No. 250/1999 (Danielle SCHMITT 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. Ms Danielle SCHMITT lodged her appeal on 20 January 1999. On 21 January 1999, the appeal was registered as No. 250/1999.

2. On 18 February 1999, the appellant's representative, Mr J.-P. CUNY, filed a supplementary memorial. On 22 March 1999, the Secretary General submitted his observations on the appeal. The appellant's counsel filed observations in reply on 19 April 1999.

3. On 9 November 1998, in connection with the administrative complaint preceding this appeal, the appellant had applied to the Chair of the Administrative Tribunal for a stay of execution of the Secretary General's decision to reject her application for the post of Equality Administrator (grade A2/A3) in the Human Resources Division – Directorate of Administration (Vacancy Notice No. 50/98). In an order of 1 December 1998, the Chair rejected the application for a stay of execution.

On 3 December 1998, the appellant lodged a second application for a stay of execution. She argued that the procedure was at an advanced stage and she had reason to believe that the Secretary General was about to appoint another person to the post. After hearing the Secretary General's comments, on 18 December 1998 the Chair granted the stay of execution.

4. The public hearing took place in the Human Rights Building, Strasbourg, on 29 April 1999. The appellant was represented by Mr J.-P. CUNY and the Secretary General by Mr R. LAMPONI, Head of the Legal Adviser's Department, Directorate of Legal Affairs, assisted by Mr J. POLAKIEWICZ, Administrative Officer in the same directorate.

On the same day, the Secretary General lodged the summary report of the meeting of Recruitment Panel I concerning the selection of candidates.

## **THE FACTS**

5. The appellant, a permanent staff member on grade B5, entered the Council of Europe's service on 1 January 1978 in a temporary capacity. On 1 March 1981, she was given a permanent post as Administrative Assistant (grade B4) in the Personnel Division (now Human Resources Department), in which she has spent her entire career. On 1 January 1989, she was promoted to Principal Administrative Assistant (grade B5).

Under the authority of her Head of Service, Ms Schmitt is mainly responsible for managing appointments to permanent posts (managing postings, implementing the decisions of transfer and promotion panels, monitoring geographical quotas, and so on). She assists in the preparation of the budget and prepares data concerning human resources management for various bodies of the Co-ordinated Organisations, the Staff Committee and permanent delegations.

She formerly served in the French Ministry of Foreign Affairs, where she had particular responsibility for staff management in a large embassy. In addition, in 1996 she completed a specialist higher education diploma in human resources at the Robert Schumann University in Strasbourg. She is currently enrolled at the University of Management Sciences at Metz, where she has already presented a post-graduate dissertation on the purposes of appraisal systems and is currently preparing a doctoral thesis in management science on managing skills in a multicultural environment.

The appellant is also an active member of the European research network on the management of organisations, based at the University of Metz.

In September 1998, Ms Schmitt applied for the post of Equality Administrator (grade A2/A3) in the Directorate of Administration, Human Resources Division. The post was to be filled by external recruitment (Vacancy Notice No. 50/98).

Recruitment Panel I met on 23 September 1998 to draw up a list of candidates to be invited to sit the competitive examination. The appellant was among the names submitted to the panel (twenty-four out of a total of eighty-four applicants). Following discussion, the panel decided to invite a very restricted number of candidates (three).

In a letter of 13 October 1998, the appellant was informed that her application had been rejected, for the following reasons: "in accordance with the Regulations on Appointments, the recruitment panel has drawn up a list of candidates who satisfy the criteria in the vacancy notice. I regret to inform you that despite your qualifications, your application has not been accepted".

7. On 9 November 1998, the appellant lodged an administrative complaint against the rejection of her application and on 17 November an application for a stay of execution of the Secretary General's decision. In his observations in reply, the Secretary General challenged the admissibility of the request for a stay of execution on the grounds that the complaint to which it related was manifestly inadmissible.

On 1 December 1998, the Chair of the Administrative Tribunal decided not to grant the application for a stay of execution since it was concerned with the continuation of the recruitment procedure; this decision did not include the appointment of another person.

8. On 3 December 1998, the appellant presented a new application for a stay of execution. She argued that the procedure was now at an advanced stage and she had reason to believe that the Secretary General was about to appoint another person to the post in question. On 8 December, the Secretary General submitted his observations on the application in which he said that he would leave the matter to the Tribunal to decide, while stressing the urgent need to settle the dispute, so that this very important post could be filled.

On 18 December 1998, the Chair of the Administrative Tribunal delivered an order by which he granted the stay of execution in so far as it concerned the appointment procedure for the post in question.

9. Meanwhile, on 8 December 1998, the Secretary General had rejected the administrative complaint submitted by the appellant as being inadmissible and unfounded.

He had considered the complaint inadmissible because it was incompatible, both *ratione personae* and *ratione materiae*, with Article 59 of the Staff Regulations, according to which administrative complaints relating to external recruitment examinations are only admissible from applicants who have been allowed to sit the examination and provided the complaint relates to an irregularity in the examination procedure. This was not the purpose of the appellant's complaint, which related to the decision not to be allowed to sit the examination. The decision was thus outside the scope of Article 59.

The Secretary General had also considered the complaint unfounded because the appellant's application for the post did not satisfy either of two specific conditions required for it.

10. On 20 January 1999, Ms Schmitt lodged her appeal against the Secretary General's decision to reject her complaint.

## **THE LAW**

11. The appellant challenges the Secretary General's decision of 8 December 1998 to reject her application for the post of Equality Administrator (grade A2/A3) in the Human Resources Department, Directorate of Administration.

## **A. On the admissibility of the appeal**

12. The Secretary General maintains that the appeal is inadmissible because it is incompatible, *ratione personae* and *ratione materiae*, with Article 59 of the Staff Regulations. According to paragraph 6 of that article, only applicants who have been allowed to sit the examination are entitled to lodge an appeal and the administrative complaint must relate to an irregularity in the examination procedure. He argues that in an external recruitment examination, internal and external candidates take part on an equal footing. They must therefore have the same rights concerning disputes procedures. Allowing internal candidates who have not been allowed to sit an examination to appeal against the decision would give them an unfair advantage over external candidates and would thus constitute discrimination against the latter.

13. The appellant claims that the complaint and the appeal are admissible. She considers that maintaining that her complaint is inadmissible on grounds of incompatibility *ratione personae* and *ratione materiae* is unfounded. She relies on Article 59, paragraph 1, of the Staff Regulations to establish compatibility *ratione personae*, based on her status as a Council of Europe staff member. Regarding the incompatibility *ratione materiae*, she argues that the Secretary General's refusal to allow her to take part in the examination related to the exercise of a statutory right specifically provided for in Article 7, paragraph 2, of the Regulations on Appointments. She finds it paradoxical to claim that the limited right of appeal granted to external candidates under Article 59, paragraph 6, entails an unwritten restriction on permanent staff members' exercise of a statutory right. The purpose of Article 59, paragraph 6, is to grant candidates outside the Council a right of appeal, while subjecting it to certain conditions. Permanent staff and external candidates are treated differently in terms of their right to challenge a refusal to accept their candidature for a post open to external recruitment, on account of the contractual link between permanent staff and the Council of Europe.

In her memorial in reply, the appellant also states that there would not be discrimination between the candidates and that the difference of treatment would not affect the results of the examination because it only concerns the right to challenge a decision not to accept a candidature and not the conduct of the examination in itself.

14. The Tribunal notes that the case concerns an external recruitment procedure. However, Article 59, paragraph 6 d, of the Staff Regulations is concerned not with external recruitment procedures as such but rather with the participation of "candidates outside the Council". The appellant's status as a Council of Europe staff member cannot therefore be excluded from consideration. The appellant could invoke paragraph 1 of the same article and submit a complaint against the contested decision. The latter undoubtedly affects the appellant adversely since she clearly submitted her application quite legitimately in the interests of her career progression.

Since the appeal is not incompatible *ratione personae*, there can be no question in this case of any incompatibility *ratione materiae*, which applies to candidates outside the Council of Europe.

15. The Secretary General has argued that all the candidates – internal and external – must have the same rights concerning disputes procedures and that it would constitute discrimination if Council of Europe staff who took part in an external recruitment procedure could challenge

the decision not to allow them to sit the examination.

16. The Tribunal acknowledges this point. However, it notes that such discrimination cannot be eliminated by reducing staff members' statutory rights. The governing bodies of the Council of Europe must take whatever positive steps are necessary. Any persons who consider themselves the victims of decisions adversely affecting them are entitled to initiate legal proceedings. This is a general principle in force in the Council of Europe's member states, the importance of which has recently been emphasised by the European Court of Human Rights when it ruled that limitations on "the right of access to the courts" must not "restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired" (see European Court of Human Rights, Waite and Kennedy Judgment of 18 February 1999, paragraph 59, to appear in the Reports).

17. The objection to admissibility must therefore be rejected.

### **B. On the merits of the case**

18. The appellant challenges the Secretary General's decision of 8 December 1998 to reject the administrative complaint concerning the recruitment panel's decision to reject her application for the post in question. The appellant alleges a breach of the general principles of law and a failure to comply with the Staff Regulations. She maintains that the letter of 13 October 1998, informing her that her application had been rejected, not only failed to give any reasons but was also sufficiently ambiguous and unclear as to suggest the existence of improper grounds. She refers to internal memorandums, whose authors emphasise their preference for an external appointment, to argue that she has suffered from a misuse of power designed to ensure the recruitment of an outside candidate. Finally, she argues that the decision that her application was inadmissible was manifestly unfounded, since she satisfied all the requirements.

The appellant therefore asks the Administrative Tribunal to annul the decision of 8 December 1998 and to award her the sum of 20 000 French francs in costs and expenses.

19. The Secretary General does not deny the requirement to give reasons for a decision adversely affecting someone's interests but also notes that account must be taken of the particular nature of the recruitment process. In this case, the decision to reject the application came in the initial stage, whose purpose was to ensure that applicants satisfied the conditions set out in the notice of competition. At this stage of the proceedings, even a brief explanation is sufficient. Given the often large number of candidates for external recruitments, providing each applicant with detailed grounds for rejection could paralyse the Administration's activities. The Secretary General considers that this approach does not infringe staff members' rights since he can always expand on an initially brief explanation in his replies to requests for clarification or complaints from unsuccessful applicants.

Concerning the argument that he had misused his power, the Secretary General denies that he had decided to reserve the post for an outside candidate. The internal documents referred to by the appellant show that the vacancy notice was prepared conscientiously and that there was a commitment to consult all the departments concerned. Moreover, the choice of procedure in no way prejudices who will be the successful candidate. Internal candidates were able to

compete with outsiders on an equal footing. The recruitment panel considered all the applications impartially and with no prejudice against internal candidates.

Finally, regarding the argument that the decision not to accept the appellant's application was manifestly unfounded, the Secretary General states that the panel rejected it after duly assessing her previous experience. Her application in no way satisfied the criteria laid down in the vacancy notice.

Therefore the Secretary General asks the Tribunal to declare the appeal inadmissible or, in the alternative, to dismiss it.

20. In her observations in reply, the appellant maintains the arguments in her appeal. Regarding the alleged deficiencies in the reasons given, she says that staff members must be offered sufficient explanation when decisions affecting their rights are communicated to them. The Secretary General's argument that it is possible to obtain subsequent explanations through administrative complaints is fallacious, since the Staff Regulations do not require him to reject complaints in writing.

21. The Tribunal does not agree with the appellant that the letter of 13 October 1998 failed to offer any reasons. It agrees that the Secretary General's explanation was, to say the least, somewhat brief. However, given the stage of the proceedings and, as the Secretary General notes, the opportunity for the appellant to request further clarification before initiating the disputes procedure, the Tribunal concludes that the reasons given were nevertheless adequate.

22. Turning to the alleged misuse of power, after having received the summary report of the meeting of Recruitment Panel I, which had been asked to draw up a list of candidates to be invited to take part in the examination, the Tribunal notes that the Secretary General did not manifest any intention of recruiting someone from outside the Organisation, at the expense of an internal candidate. Besides, the appellant relies on statements in memorandums written prior to the recruitment procedure. Unlike the appellant, the Tribunal does not think that, in the absence of any explicit written statement or any other conclusive evidence, preliminary memorandums can be relied on to show that there has been a misuse of power.

23. The Tribunal notes that the alleged ambiguous nature of the letter of 13 October 1998, cited as a further indication of a misuse of power, does not constitute evidence of such misuse, in the form of a decision to exclude the appellant to facilitate the recruitment of an external candidate.

24. Finally, regarding the question of whether the decision was unfounded, the Tribunal notes firstly that, contrary to the appellant's claim, based on the wording of the letter of 13 October 1998 and of the letter rejecting her administrative complaint, her application was not declared "inadmissible". In fact, it emerges from the summary report of the meeting of Recruitment Panel I that her application was considered at the same time as a certain number of other applications and that it was only after it had done so that the panel decided that the appellant should not be invited to sit the examination (see paragraph 6 above).

25. Concerning the merits of the contested decision, the Tribunal has already considered the question of the Secretary General's discretionary power in recruitment matters (see ATCE, No.

226/1996, Zimmermann v. Secretary General, Decision of 24 April 1997). The Tribunal found that 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 (*ibidem.*, paragraph 37).

26. The Tribunal has examined all the evidence and documentation submitted by the parties, including the summary report of the meeting on 13 October 1998 of Recruitment Panel I, produced by the Secretary General at the Tribunal's request.

It emerges from this document that even though the Secretary General's letter of 13 October 1998 was vaguely worded, the panel examined the applicant's qualifications in the light of the post to be filled. It is also clear that in considering the applications, the panel both assessed and compared the applicants.

27. The Tribunal has found that "in assessing objective qualifications the competent authority naturally makes less use of discretionary power than in assessing subjective qualifications" (ATCE, Appeals Nos. 216/1996, 218/1996 and 221/1996, Palmieri II, IV and V v. Secretary General, Decision of 27 January 1997, paragraph 43). It added that "assessing each applicant's qualifications is a different matter from taking the final decision on which applicant to select. Moreover, the stage of considering the admissibility of each application, which is and must remain a preliminary one, by nature allows the Secretary General less latitude for discretion than the assessment of each staff member's qualifications and capabilities" (*ibidem.*).

There is nothing in the information at the Tribunal's disposal to suggest that in taking its decision, the panel made an arbitrary assessment of the applicant's qualifications.

28. The Tribunal does not agree with the Secretary General that the application in no way satisfies the criteria laid down (paragraph 19). Nor did Recruitment Panel I make such an assessment or reach the same conclusions about the appellant's qualifications as the Secretary General has in these proceedings. Nevertheless, in deciding not to invite the appellant to sit the examination, the Secretary General did not exceed his discretionary power at the contested stage of the proceedings or draw manifestly erroneous conclusions liable to be criticised by the Tribunal.

Since it is not for the Tribunal to substitute its own assessment for that of the Secretary General concerning the appellant's qualifications and suitability as an official on practically the highest rung of B grade for her sought-after promotion to A grade, it concludes that the Secretary General's decision does not appear to be arbitrary.

It follows that the appeal is unfounded and must be rejected.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Declares the appeal unfounded;

Dismisses it; and

Orders that each party bear its own costs ;

Delivered at Strasbourg on 9 June 1999, the French text being authentic.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

C. RUSSO



## **Appendix 1**

### **CHAIR'S ORDER OF 1 DECEMBER 1998 in the case of SCHMITT v. Secretary General**

#### **THE FACTS**

1. The complainant is a permanent staff member (grade B5) of the Council of Europe, assigned to the Human Resources Department.
2. On 21 September 1998, she applied for a post of Administrative Officer responsible for Equal Opportunities Policy (grade A2/A3) in the Directorate of Administration – Human Resources Department (Vacancy Notice No. 50/98).
3. On 13 October 1998, she was informed that, despite her qualifications, the Recruitment Panel had rejected her application.
4. On 9 November 1998, she submitted a complaint to the Secretary General under Article 59, paragraph 1, of the Staff Regulations, asking him to cancel the panel's decision.
5. She challenged the merits and the reasoning of that decision.
6. On the merits, she argued that her professional experience and educational qualifications were entirely consistent with the criteria set out in the vacancy notice.
7. As to the reasoning, she maintained that it was both concise in the extreme and unclear.

The concision was extreme in that the note informing her of the decision failed to state the reasons why her application had not been accepted, in particular which qualifications she lacked.

The decision was unclear as, in informing her that her application had been rejected despite her qualifications, the author of the note might have meant that she had not been selected although she had the required qualifications. The complainant therefore appeared to have been excluded for inappropriate reasons.

8. In a note dated 17 November 1998, the complainant applied to the Chair of the Administrative Tribunal for a stay of execution of the Secretary General's decision.
9. On 17 November 1998, the Chair of the Administrative Tribunal invited the Secretary General to submit any observations he wished to make on the request for a stay of execution.
10. The Secretary General submitted his observations by letter of 23 November 1998. A copy of these observations was sent to the complainant the same day. The complainant submitted her observations in reply on 26 November 1998.

## THE LAW

11. Under Article 59, paragraph 7, of the Staff Regulations, a request for a stay of execution of an administrative act may be made if such execution is likely to cause “grave prejudice difficult to redress”.

12. The reason given for the present application for a stay of execution is that execution of the challenged decision would cause the applicant serious prejudice “difficult to redress”.

Continuation of the recruitment procedure and appointment of a candidate to the post in question would, it alleged, make the redress the complainant sought impossible in view of the entitlement that candidate would acquire on being appointed.

13. The Secretary General points out that, under Article 59, paragraph 6 d, of the Staff Regulations, the complaints procedure is available “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”.

It follows, he maintains, that a complaint cannot be lodged against a preliminary decision by the Secretary General not to allow a candidate to sit a competitive examination.

He therefore submits that the request for a stay of execution of the decision to exclude the complainant from external competitive recruitment examination No. 50/98 is inadmissible.

14. The Secretary General also maintains that, although Article 59, paragraph 6 d, explicitly refers to outside candidates, it also applies to internal candidates wishing, like Ms Schmitt, to sit an external competitive recruitment examination.

His argument is that this obviates “the slightest discrimination between candidates”, an aim stated in the Administrative Tribunal’s case-law (Decision No. 226/1996, paragraph 30).

15. The Secretary General also notes that any stay of execution would delay filling the post of Administrative Officer responsible for Equal Opportunities Policy, whereas it is of undoubted priority for the Organisation that the duties attaching to the post continue to be performed.

16. The Secretary General disputes that the alleged prejudice is grave or difficult to redress, since, even if the complainant were allowed to sit the examination, there is nothing to suggest that she would be appointed to the vacant post.

17. In conclusion, the Secretary General asks that the request be refused as inadmissible. He also contends that the request is disproportionate to the prejudice that would be caused to the Organisation if it were obliged to delay the recruitment procedure.

18. In her observations in reply, the complainant maintains that an external recruitment procedure would establish rights and situations difficult to reverse.

19. She submits that the Secretary General’s argument of inadmissibility is clearly unfounded. In her contention, this argument is based on application to the case at issue of the

restriction laid down in Article 59, paragraph 6 d, of the Staff Regulations for candidates from outside the Council of Europe. She regards this as an attempt to institute an exception to staff members' right, as laid down in the Staff Regulations, to have the Administrative Tribunal review the lawfulness of administrative decisions adversely affecting them (Article 59, paragraph 1, of the Staff Regulations), an attempt, she contends, which clearly breaches the criteria for interpreting the Staff Regulations stated on many occasions by the Appeals Board and based on Article 31 on the Vienna Convention on the Law of Treaties.

20. Secondly, the complainant contends that the need, referred to by the Secretary General, to "obviate even the slightest discrimination between candidates" is irrelevant since a difference in treatment in this matter is justified by Article 7, paragraph 2, of the Regulations on Appointments, which entitles members of staff to participate in competitive examinations under the external recruitment procedure.

21. As to the Secretary General's argument that the prejudice is neither grave nor difficult to redress as, "even if Ms Schmitt were allowed to sit the examination, there is nothing to suggest that she would be deemed suitable for appointment", the complainant points out that the contested decision prevents her from even competing on an equal footing with outside candidates for the post to be filled by competitive examination.

22. Lastly, concerning the prejudice that would be caused to the Organisation by a delay in filling the post, the complainant notes that, pending an appointment, the Secretary General could entrust the most urgent tasks (in particular sitting on panels as an observer) to a competent administrative officer.

23. The Chair points out that there can be no question, at this stage, of analysing the parties' submissions relating to the merits of the Secretary General's objection of inadmissibility or the substance of the complaint, which it is inappropriate to discuss, far less examine, in the present proceedings, which only concern the taking of urgent action (see paragraph 10 of the Chair's Order of 28 January 1992 in the case of *Muller-Rappard v. Secretary General*).

24. The complainant contends that continuation of the recruitment procedure and the ensuing appointment would objectively make it very difficult, or even impossible, to afford the redress being sought, in view of the entitlement the appointee would acquire on being appointed.

25. The Chair points out that there have been requests to stay external recruitments which he has granted (Chair's Orders of 15 December 1994 in the case of *Ernould v. Governor of the Council of Europe Social Development Fund*, of 7 July 1994 in the cases of *Bouillon and Fernandez-Galiano v. Secretary General* and of 22 February 1988 in the case of *Jeannin v. Secretary General*). However, the facts behind those requests were different: the cases involved, respectively, a member of staff who was challenging a decision opening to competition a post from which he had been dismissed (*Ernould*), a complaint by a member of staff concerning the lawfulness of an external recruitment procedure to which she was party (*Jeannin*), refusal of a new application, after a post had been thrown open to external recruitment, by a member of staff whose application under the internal promotions procedure had been rejected (*Bouillon*), and throwing open to external recruitment a post for which a staff member had been turned down under the internal promotions procedure (*Fernandez-Galiano*). The first of these cases concerned the prejudice caused by the appointment of a third party to the complainant's post. In the others,

the issue was the prejudice arising from appointment of another person to a post for which the complainant was in competition. The complainants therefore relied on a prejudice relating to an existing right or to their participation in a competitive examination procedure still pending (Jeannin) or already completed (Bouillon and Fernandez-Galiano).

In the case under consideration here, the situation is somewhat different, in that the complainant is in essence asserting a right to participate in the procedure at issue.

26. The Chair reiterates that the exceptional power conferred on him under Article 59, paragraph 7, of the Staff Regulations calls for some self-restraint in its exercise (see Chair's Order of 31 July 1990 in the case of Zaegel v. Secretary General, paragraph 12 of the). Moreover, as already pointed out above, there can be no question, at this stage, of analysing the arguments relied on by the complainant in connection with her administrative complaint.

27. He also notes that, with regard to a request for a stay of execution in connection with an appointment to a senior post, he ruled that "Article 59, paragraph 7, of the Staff Regulations cannot be interpreted as conferring power to stay, as a matter of urgency, execution of a decision to appoint a senior official such as a director where there is no *prima-facie* evidence that 'grave prejudice' is likely to be caused to the candidates who were not chosen, since otherwise there would be serious risk not only to departmental functioning, but also to management of important parts of the Organisation, a possibility the drafters of the Staff Regulations clearly did not intend" (Chair's Order of 28 January 1992 in the case of Muller-Rappard v. Secretary General, paragraph 11). In view of the nature of the post at issue here and the duties attaching to it, the Chair holds that those findings should also be borne in mind in the present case.

28. He nonetheless notes that the letter which the Organisation sent the complainant to inform her that her application had been rejected contains some information revealing an apparent contradiction (see Chair's Order of 8 January 1992 in the case of Cannizzaro v. Secretary General, paragraph 19).

29. It is therefore necessary to take account not only of the Organisation's interests but also of the complainant's. Consequently, so as not to disrupt the fair balance that should exist between the Council of Europe and the complainant, the Chair finds that the request for a stay of execution must be refused in so far as it relates to continuation of the procedure, except in respect of appointing another candidate. This solution currently makes it possible to strike an acceptable balance between the parties in that if the complainant were to succeed with her complaint, her application for the post could always be taken into consideration later without the Organisation's suffering significant delay in holding the competitive examination.

30. It follows from the above findings that the request for a stay of execution is unfounded in so far as it relates to continuation of the competitive examination procedure. It is for the complainant, on being informed by the Organisation of subsequent developments in the procedure, to take steps to lodge a new request for urgent action if she so wishes.

For these reasons,

Exercising my jurisdiction to make interim orders under Article 59, paragraph 7, of the Staff Regulations, Article 8 of the Statute of the Administrative Tribunal and Article 21 of the Administrative Tribunal's Rules of Procedure.

Having regard to the urgency of the matter,

**I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL**

Decide

- that Ms Schmitt's request for a stay of execution is rejected in so far as it concerns continuation of the procedure, not including the appointment of another person.

Done and ordered in Savona on 1 December 1998

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

C. RUSSO

## **Appendix 2**

### **CHAIR'S ORDER OF 18 DECEMBER 1998 in the case of SCHMITT v. Secretary General**

#### **THE FACTS**

1. The complainant is a permanent staff member (grade B5) of the Council of Europe, assigned to the Human Resources Department. On 17 November 1998, she filed a first request for a stay of execution of the Secretary General's decision not to accept her application for a post of Administrative Officer responsible for Equal Opportunities Policy (grade A2/A3) in the Directorate of Administration – Human Resources Department (Vacancy Notice No. 50/98). Earlier, on 9 November 1998, she had lodged an administrative complaint under Article 59, paragraph 1, of the Staff Regulations, challenging the decision to reject her application.

2. On 1 December 1998, the Chair found that the request for a stay of execution must be refused "in so far as it concerns continuation of the procedure, not including the appointment of another person".

3. On 3 December 1998, the complainant filed a new request for a stay of execution on the following ground: "the procedure to recruit an Administrative Officer responsible for Equal Opportunities Policy (grade A2/A3) in the Directorate of Administration – Human Resources Department – is at a very advanced stage. The file seems virtually ready for the Secretary General to take an appointment decision in accordance with the Staff Regulations and the Regulations on Appointments".

4. On 3 December 1998, the Chair of the Administrative Tribunal invited the Secretary General to submit any observations he wished to make on the request for a stay of execution.

5. The Secretary General filed his observations by letter dated 8 December 1998, received at the Registry on 9 December. A copy of these observations was sent to the complainant the same day. The complainant submitted her observations in reply on 14 December 1998.

On 16 December 1998, the Secretary General submitted comments on the complainant's observations, to which she replied on 17 December 1998.

On 8 December 1998, the Secretary General dismissed the administrative complaint.

#### **THE LAW**

6. Under Article 59, paragraph 7, of the Staff Regulations a request for a stay of execution of an administrative act may be made if such execution is likely to cause "grave prejudice difficult to redress".

7. The reason given for the present application for a stay of execution is that execution of the challenged decision would cause the complainant serious prejudice "difficult to redress",

should a candidate be appointed following a competition in which she had not been allowed to participate.

8. The complainant states that, according to information unofficially in her possession, the recruitment procedure for the post of Administrative Officer responsible for Equal Opportunities Policy is at a very advanced stage. This constitutes a very serious impediment to assertion of her right to participate in the procedure in question as, if the Secretary General were to exercise his power of appointment under the Staff Regulations and Regulations on Appointments, the Organisation would be committed and this would engender situations difficult to reverse.

9. The complainant points out that she is entitled to participate in the procedure at issue under the Regulations on Appointments (Article 7, paragraph 2), and opines that she has been denied this right for reasons which have not been explained and which are also inexplicable.

10. In his observations on the request for a stay of execution, the Secretary General takes note of the Chair's Order of 1 December 1998, whereby "the request for a stay of execution is rejected in so far as it concerns continuation of the procedure, not including the appointment of another person".

Stressing the urgent need to settle the dispute so as to be able to fill a post that is very important for the Organisation, he goes on to state that he leaves the matter to the Chair's discretion.

11. The Chair draws attention to the Order of 1 December 1998, in which he refused a first request for a stay of execution lodged by the complainant "in so far as it concerns continuation of the procedure, not including the appointment of another person". In the same order, he pointed out that "it is for the complainant, on being informed by the Organisation of subsequent developments in the procedure, to take steps to lodge a new request for urgent action if she so wishes" (*ibidem*, paragraph 30).

12. The complainant bases the new request on the fact that "the file seems virtually ready for the Secretary General to take an appointment decision in accordance with the Staff Regulations and the Regulations on Appointments". The Secretary General himself has adduced no evidence that might contradict the complainant's assertion.

13. The Chair concludes from this that an appointment is likely in the near future, which gives relevance to the issue of the prejudice the complainant might suffer should the appeal she says she wishes to lodge prove founded.

14. The Chair notes that such an appointment is calculated to disrupt the desired balance between the Organisation's interests and those of the complainant (see Order of 1 December 1998, paragraph 29).

15. The Chair also points out that in the Order of 1 December 1998, he noted that, with regard to a request for a stay of execution in connection with an appointment to a senior post, he had ruled that "Article 59, paragraph 7, of the Staff Regulations cannot be interpreted as conferring power to stay, as a matter of urgency, execution of a decision to appoint a senior official such as a director where there is no *prima-facie* evidence that 'grave prejudice' is likely to be caused to the candidates who were not chosen, since otherwise

there would be serious risk not only to departmental functioning, but also to management of important parts of the Organisation, a possibility the drafters of the Staff Regulations clearly did not intend". He added that, "in view of the nature of the post at issue and the duties attaching to it ... those findings should also be borne in mind in the present case" (paragraph 27 of the Chair's Order of 1 December 1998 in the case of Schmitt v. Secretary General).

The Secretary General confirms that the post is important but does not provide any specific evidence allowing the Tribunal's case-law concerning requests for stays of execution affecting the management of important sectors of the Organisation to be applied.

The complainant argues that the Secretary General could temporarily entrust the functions in question to a member of staff already in post.

16. The Chair also points out that the present case differs from the Muller-Rappard appeal in that no appointment has yet been made (paragraphs 9 and 13 of the Order of 28 January 1992 in the Muller-Rappard case).

17. It follows from the above findings that the request for a stay of execution is founded in so far as it relates to a stay of the procedure for making an appointment to the post in question.

For these reasons,

Exercising my jurisdiction to make interim orders under Article 59, paragraph 7, of the Staff Regulations, Article 8 of the Statute of the Administrative Tribunal and Article 21 of the Administrative Tribunal's Rules of Procedure;

Having regard to the urgency of the matter,

#### **I, Chair OF THE ADMINISTRATIVE TRIBUNAL,**

- grant the requested stay of execution in so far as it relates to the procedure for appointing an Administrative Officer responsible for Equal Opportunities Policy (grade A2/A3) in the Directorate of Administration – Human Resources Department;

- decide that the stay of execution shall lapse if the applicant does not exercise her right of appeal before the Administrative Tribunal within the period laid down in Article 60 paragraph 3 of the Staff Regulations in the event that her complaint is dismissed.;

- decide that the stay of execution shall expire not later than the day on which the Administrative Tribunal delivers its decision.

Done and ordered at Savona on 18 December 1998.

The Registrar of the  
Administrative Tribunal

S. SANSOTTA

The Chair of the  
Administrative Tribunal

C. RUSSO