

# CONSEIL DE L'EUROPE— —COUNCIL OF EUROPE

## COMMISSION DE RECOURS APPEALS BOARD

**Appeal No. 115/1985 (Mr PEUKERT v. Secretary General)**  
**Appeal No. 116/1985 (Mr MULLER-RAPPARD v. Secretary General)**  
**Appeal No. 117/1985 (Mr BARTSCH v. Secretary General)**

The Appeals Board, composed of:

Mr Walter GANSHOF VAN DER MEERSCH, Chairman,  
Mr Raul VENTURA,  
Sir Donald TEBBIT, Members,

assisted by:

Mr Michele de SALVIA, Secretary  
Mrs Margaret KILLERBY, Deputy Secretary,

has delivered the following decision after due deliberation.

### PROCEEDINGS

1. Mr Muller-Rappard applied to the Chairman of the Appeals Board, on 13 September 1985, for a stay of execution of the decision to appoint Mr X to the post of Deputy to the Director of Human Rights.
2. In a note verbale of 17 September 1985, the Chairman of the Board asked the Secretary General to ensure that steps to implement the disputed decision were suspended until such time as a decision had been taken by the Chairman on the application in accordance with Article 59, paragraph 7, of the Staff Regulations.
3. Mr Peukert and Mr Muller-Rappard lodged appeals on 25 September 1985 against the abovementioned appointment. These appeals were registered the same day in the register of the Appeals Board under Nos. 115/1985 and 116/1985.
4. On 26 September 1985, the Chairman of the Board issued an order rejecting Mr Muller-Rappard's application for a stay of execution.
5. On 26 September 1985, the Secretary General was invited to submit his observations on the appeals by 28 October 1985.

6. Mr Bartsch lodged an appeal on 27 September 1985 with regard to the same matter as had been raised in the appeals of Mr Peukert and Mr Muller-Rappard. It was registered the same day in the register of the Appeals Board under No. 117/1985.

7. On 27 September 1985, the Secretary General was invited to submit his observations on this appeal by 28 October 1985.

8. On 2 October 1985, Mr X informed the Chairman of the Appeals Board of his wish to intervene in the proceedings, in accordance with Article 10 of the Statute of the Board.

9. By order of 10 October 1985, the Chairman of the Board decided, without prejudging the admissibility of Mr X's application for permission to intervene, that a copy of the appeals and of the Secretary General's written observations should be transmitted to him.

10. The Secretary General's observations on the cases were received on 28 October 1985 and transmitted to the appellants on 29 October 1985 for a reply, to be submitted by 29 November 1985.

11. On 29 October 1985, copies of these observations were transmitted to Mr X. The Chairman gave him 10 days in which to apply for permission to intervene, should he still wish to do so. An application to this effect was received from him on 4 November 1985.

12. On 7 November 1985, the parties were informed that the date fixed for the hearing was 18 December 1985.

13. By order of 16 November 1985, the Chairman of the Board declared Mr X's application for permission to intervene admissible.

14. The appellants submitted their observations in reply on 28 and 29 November 1985.

15. The public hearing took place on 18 December 1985. The appellants appeared in person. The Secretary General was represented by Mr M. Scheuer, Principal Administrative Officer in the Directorate of Legal Affairs, assisted by Mrs G. Tubach-Ortiz, Principal Administrative Officer in Establishment Division and Mr R. Lamponi, Administrative Officer in the Directorate of Legal Affairs.

16. The Appeals Board decided on 28 January 1986, in accordance with Rule 14 of its Rules of Procedure, to order the joinder of the three appeals, as they concerned the same question.

## **THE FACTS**

### **I. APPEAL No. 115/1985 (Mr PEUKERT)**

The facts put forward by the parties may be summarised as follows:

17. Mr Peukert, of German nationality, took up his duties at the Council of Europe on 1 July 1968. At the date of his appeal he was Principal Administrative Officer in the Secretariat of the European Commission of Human Rights (A4).

18. On 28 March 1985, the Secretary General issued Vacancy Notice No. 25/85 for the post of Deputy to the Director of Human Rights (Grade A5), for which the appellant and 10 other members of staff applied.

19. The Promotions Panel met on 2 May 1985 to examine these applications. Having done so, it decided to recommend that Mr X be appointed to the vacant post.

20. By Decision AP No. 3502 of 24 May 1985, the Secretary General appointed Mr X, a grade A4 member of staff who had served with the Council of Europe since 1 September 1976, to the post of Deputy to the Director of Human Rights (A5).

21. Mr Peukert submitted an administrative complaint to the Secretary General, on 31 May 1985, requesting that the appointment decision be annulled.

22. The Secretary General rejected the complaint on 29 July 1985.

23. On 25 September 1985 the appellant lodged his appeal.

## II. APPEAL No. 116/1985 (Mr MULLER-RAPPARD)

The facts put forward by the parties may be summarised as follows:

24. Mr Muller-Rappard, of German nationality, took up his duties at the Council of Europe in May 1963. At the date of his appeal he had been in the Council's service for 22 years and 4 months. He currently has a grade A5 post in the Directorate of Legal Affairs. In July 1980 the Secretary General had appointed the appellant to the post of Head of the Crime Problems Division in that Directorate.

In a memorandum to the Secretary General dated 2 July 1980, the appellant expressed his wish to be assigned to the Directorate of Human Rights.

He received no reply to this request.

25. On 28 March 1985, the Secretary General issued Vacancy Notice No. 25/85 for the post of Deputy to the Director of Human Rights (grade A5), for which the appellant and 10 other members of staff applied.

26. The Promotions Panel met on 2 May 1985 to examine these applications. Having done so, it decided to recommend that Mr X be appointed to the vacant post.

27. By Decision AP No. 3502 of 24 May 1985, the Secretary General appointed Mr X, a grade A4 member of staff, who had served with the Council of Europe since 1 September 1976, to the post of Deputy to the Director of Human Rights.

28. Mr Muller-Rappard submitted an administrative complaint to the Secretary General on 6 June 1985, requesting that the appointment of Mr X be annulled and that the appointment proceedings be re-opened.

29. The Secretary General rejected the complaint on 29 July 1985.

30. On 25 September 1985 the appellant lodged his appeal.

III. APPEAL No. 117/1985 (Mr BARTSCH)

The facts put forward by the parties may be summed up as follows:

31. Mr Bartsch, of German nationality, took up his duties at the Council of Europe on 15 April 1969 in the Directorate of Legal Affairs. At present, he is Principal Administrative Officer (A4) in that Directorate.

32. On 28 March 1985, the Secretary General issued Vacancy Notice No. 25/85 for the post of Deputy to the Director of Human Rights (grade A5), for which the appellant and 10 other members of staff applied.

33. The Promotions Panel met on 2 May 1985 to examine these applications. Having done so, it decided to recommend that Mr X be appointed to the vacant post.

34. By Decision AP No. 3502 of 24 May 1985, the Secretary General appointed Mr X, a grade A4 member of staff who had served with the Council of Europe since 1 September 1976, to the post of Deputy to the Director of Human Rights (A5).

35. Mr Bartsch submitted an administrative complaint to the Secretary General, on 2 July 1985, requesting that the decision appointing Mr X be annulled and that the appointment proceedings be re-opened.

36. The Secretary General rejected the complaint on 29 July 1985.

37. On 26 September 1985, the appellant lodged his appeal.

**SUBMISSIONS OF THE PARTIES**

I. APPEAL No. 115/1985 (Mr PEUKERT)

38. The appellant requested that the decision concerning the appointment to the post of Deputy to the Director of Human Rights be annulled.

The **appellant's** submissions may be summarised as follows:

**As to the arbitrary and discriminatory nature of the Secretary General's choice**

39. The appellant submitted that the Promotions Panel failed to take account of the length of service of the candidates, all of whom were equally qualified in the legal field. The appellant added that the only working language of the chosen candidate seemed to be French. The Secretary General's decision was therefore arbitrary and discriminatory.

The **Secretary General's** submissions may be summarised as follows:

**A. As to the jurisdiction of the Appeals Board**

40. While stating that he did not contest the jurisdiction of the Board, the Secretary General nevertheless pointed out that, pursuant to Article 60, paragraph 2, of the Staff Regulations and in accordance with its case-law (Decision 76/1981), the Board could not substitute its own judgment for that of the Administration in the event of an appeal against a decision in respect of which the Secretary General has discretionary power, as in the present case.

**B. As to the arbitrary and discriminatory nature of the Secretary General's decision**

41. The Secretary General pointed out that, in accordance with Article 19, paragraph 3, of the Rules of Procedure of the Appointments Board, the members of the Panel had at their disposal "documents testifying to the candidates' competence, performance or behaviour and included in their personal files" as well as their "assessment reports" and therefore took due account of the development of the career of Mr X as well as of the careers of the other candidates.

42. The Secretary General agreed that the candidates for post 20.12 had not taken a language test. This was quite normal in an internal promotion procedure in which the participating candidates had a number of years' seniority and for each of whom a personal administrative file was already available.

43. The Secretary General submitted that the complaint that Article 22, paragraph 2, of the Regulations on Appointments was not complied with was ill-founded, since this provision read as follows: "In cases of equal merit, preference shall be given to the applicant who has served longer in the grade and, as a subsidiary criterion, with the Council". Length of service was therefore only a subsidiary criterion, to be used to choose between applicants of equal merit. In the case in point, the Panel did not, after considering all the qualifications of each candidate, consider the appellant and Mr X were of equal merit.

44. The claim that the appointment decision was discriminatory was ill-founded, for the Panel based its recommendation on a set of adequately established facts (cf. para 41), and it was on the basis of this recommendation and with a full knowledge of the facts that the Secretary General took the decision at issue.

**II. APPEAL No. 116/1985 (Mr MULLER-RAPPARD)**

45. The appellant requested that the appointment decision concerning the post of Deputy to the Director of Human Rights be annulled and that the proceedings be re-opened.

The **appellant's** submissions may be summarised as follows:

**A. As to the breach of Article 5, paragraph 2, of the Regulations on Appointments**

46. This provision reads as follows: “Before filling a vacant post, the Secretary General shall first consider whether this should be done by way of transfer. If so, he shall approach the staff member considered for transfer in order to allow him to express his views”.

The appellant pointed out that, when by a transfer decision, he was required to work in a post in the Directorate of Legal Affairs in July 1980, he asked the Secretary General, in his memorandum dated 22 July 1980, to be transferred to the Directorate of Human Rights “at the earliest opportunity..., in particular when a competition [was] held [the following] autumn for the newly created A5 post in the Directorate of Human Rights”.

47. Believing that this request, to which he had still not received a reply, was still valid, he concluded that, in omitting to consider it before issuing Vacancy Notice No. 25/85, the Secretary General had failed to comply with the provision of the above-mentioned article.

48. He also pointed out that he had reiterated his request for a transfer to the Head of the Secretary General’s Private Office on 26 February 1985, i.e. a month before the vacancy notice was issued.

**B. As to misuse of powers**

49. The appellant pointed out that the qualification which appeared in the previous vacancy notice for the A5 post in the Directorate of Human Rights (Notice 1980 (37) of 11 August 1980), viz: “a thorough knowledge and wide experience of legal affairs, gained preferably from work in the civil service or in European or international co-operation”, had not been included in Notice No. 25/85 of 28 March 1985.

50. He submitted that it had been omitted deliberately in order to favour Mr X by relieving the Panel of the need to take account of an important factor: the professional experience of any other applicants.

51. He inferred that, in omitting this qualification, the Administration had been guilty of misuse of powers, as defined by the ILO Administrative Tribunal (ILOAT, Judgment No. 431, paragraph 6).

52. While not in any way contesting the fact that the Secretary General may adapt objective promotion criteria to the needs of the Organisation, the appellant, referring to the case-law of the ILO Administrative Tribunal, pointed out that differences in the treatment of candidates were allowed only where there were “administrative reasons” for them and where there was no breach of the principle of equality (ILOAT, Judgment No. 301, paragraph 7).

**C. As to the failure to hold the interview provided for in Article 19, paragraph 4, of the Rules of Procedure of the Appointments Board**

53. The appellant pointed out that his interview with the Director of Human Rights was not such as to satisfy the conditions to be fulfilled by the interview provided for in Article 19, paragraph 4, of the Rules of Procedure of the Appointments Board, which read as follows: “Before the meeting of the Panel the Director or Head of Department to which the

appointment is to be made shall interview the candidates. The interview will give candidates the opportunity to secure further information about the duties involved”.

54. He also pointed out that the said interview took place six days before the vacancy notice was issued.

55. The applicant further maintained that the said interview provided for in the above-mentioned Article 19, paragraph 4, was an essential formality and that failure to comply with it rendered the proceedings irregular.

**D. As to the breach of the principle that there should be no discrimination**

56. The appellant claimed that another candidate for post 20.12, Mr Bartsch, had been called for an interview after he had applied, even though he had already had an interview with Mr Leuprecht before applying. The appellant submitted that this constituted a breach of the principle of equal treatment, “which would be applicable even in the absence of a specific provision” and “is intended to ensure that persons who are in similar circumstances in fact and in law are put on the same legal footing” (ILOAT, Judgment No. 202, paragraph 3).

**E. As to the irregularities of the proceedings before the Promotions Panel**

57. The appellant stated that the Appeals Board was competent to check the regularity of the proceedings in question, in accordance with Rule 19, paragraph 1, of its Rules of Procedure.

**1. The Panel’s failure to check whether the applications were admissible**

58. The appellant maintained that the Panel had infringed Article 8, paragraph 1, of the Regulations on Appointments (which stated that “applications shall be admissible only if they comply with the conditions set out in the vacancy notice”) taken in conjunction with Article 14, paragraph 4, indent (1) of the Regulations (which stated: “The Promotions Panel shall be responsible for any competitive examination or selection based on qualifications that is conducted as part of the promotions procedure. The Panel shall scrutinise all applications”).

59. While not contesting the Secretary General’s right to determine the qualifications required for appointment to an advertised vacant post, the appellant maintained that, the Secretary General could not later, when making the appointment, ignore the objective qualifications set out in the vacancy notice.

60. The appellant believed that in the present case in point, the Panel, since it had not examined, with regard to admissibility, the criteria relating to linguistic qualifications, which were required for the post in question, had failed to take account of an essential competition requirement and that this breach of the law rendered the appointment proceedings irregular.

**2. The Panel’s failure to base its examination on objective considerations**

61. The appellant considered that, as the post in question was a particularly important one, the Panel should have applied Article 16, paragraph 3, of the Regulations on Appointments, which reads as follows: “When appointments are being made by promotion, the Promotions Panel shall normally examine the applicants’ qualifications. However, if it deems necessary,

in order to form a more complete opinion of the applicants, it may decide to conduct interviews or hold a competitive examination in accordance with Article 15, paragraph 4”.

62. He submitted, in this connection, that the files submitted to the Panel did not provide it with adequate information and that, since it did not conduct a more detailed examination on the objective basis of oral or written tests, the Panel had shown itself to be biased and had exercised its discretionary power improperly and arbitrarily.

3. The way in which the Panel assessed the merits of the applicants

63. The appellant maintained that the Panel failed to take into consideration, when examining that applications, Article 22, paragraph 2, of the Regulations on Appointments, which states that “in cases of equal merit, preference shall be given to the applicant who has served longer in the grade, and, as a subsidiary criterion, with the Council”. Mr X, whose length of service in Grade A4 was the shortest of the candidates, could not, in the situation envisaged in the above-mentioned article, have been selected.

64. The appellant submitted in addition that, even if the merits of Mr X were superior to those of all the other candidates, the Panel had, under paragraph 5 of Article 14, the duty to list the candidates in order of merit.

4. The exercise of discretionary powers by the Secretary General when making the appointment decision

65. The Regulations on Appointments required the Secretary General to exercise his discretionary powers effectively in the light of the Appointment Board’s recommendation and to take the appointment decision on his own responsibility.

66. The appellant maintained that, in the case in point, the Secretary General simply endorsed the disputed recommendation and did not therefore in reality exercise his discretion.

The *Secretary General’s* submissions may be summarised as follows:

**A. As to the jurisdiction of the Appeals Board**

67. While stating that he did not contest the jurisdiction of the Board, the Secretary General nevertheless pointed out that, pursuant to Article 60, paragraph 2, of the Staff Regulations and in accordance with its case-law (Decision 76/1981), the Board could not substitute its own judgment for that of the Administration in the event of an appeal against a decision in respect of which the Secretary General had discretionary powers, as in the present case.

**B. As to the breach of Article 5, paragraph 2, of the Regulations on Appointments**

68. The Secretary General maintained that this ground of appeal is ill-founded. Exercising his discretionary powers, he took the decision to hold a competition for post 20.12, although aware of the appellant’s request for a transfer. In doing so he was acting in keeping with international case-law (ILOAT, Gatmaytan case, Judgment No. 535, paragraph 3).



69. He pointed out, in this connection, that there were no particular requirements governing the choice of the most appropriate procedure for filling a vacant post and that, moreover, it was only if the Secretary General decided to fill a post by way of transfer that he must, under Article 5, paragraph 2, “approach the staff member considered”.

**C. As to the misuse of powers**

70. The submission that both the wording of the vacancy notice and the procedure whereby Mr X was appointed revealed a bias in the latter’s favour was ill-founded.

71. With reference to the omission from Vacancy Notice No. 25/85 of the qualification relating to “a thorough knowledge and wide experience of legal affairs, gained preferably from work in the civil service or in European or international co-operation” – which was included in the vacancy notice for the same post in 1980 – the Secretary General drew attention to a judgment of the Administrative Tribunal of the International Labour Organisation, which decided as follows: “It is for [the Secretary General] to adapt the promotion criteria to the [Organisation’s] requirements. Hence the criteria may change from year to year and, since they do so, different staff members are differently treated according to the dates on which they receive promotion. Where there are administrative reasons for such difference in treatment, it is no breach of the principle of equality. The complainant has not shown that in his case [the Secretary General] acted for any purpose but to serve [the Organisation’s] interests” (ILOAT, Schmitter case, Judgment No. 301, paragraph 5).

**D. As to the failure to hold the interview provided for in Article 19, paragraph 4, of the Rules of Procedure of the Appointments Board**

72. The Secretary General maintained that the interview that took place between the Director concerned and the appellant served the twofold purpose set forth in the above-mentioned article, that was providing the candidate with information about the duties pertaining to the post and enabling the Director to assess the candidate’s qualifications with more precision.

73. The fact that the interview took place before the appellant submitted his application had no effect on the deliberations of the Panel or on the Secretary General’s decision. It did not therefore constitute a material irregularity leading to the annulment of the appointment proceedings.

**E. As to the breach of the principle that there should be no discrimination**

74. The Secretary General did not consider the appellant’s situation to be comparable with that of Mr Bartsch: since the preliminary interview with Mr Bartsch had been brief and informal, and since the Director had never had occasion to work with him beforehand – as he had with the appellant – a second more detailed interview was called for so that information could be exchanged.

**F. As to the irregularities of the proceedings before the Promotions Panel**

1. The Panel's failure to check whether the applications were admissible

75. The Secretary General pointed out that the members of the Panel had at their disposal, in accordance with Article 19, paragraph 3, of the Rules of Procedure of the Appointments Board, "documents testifying to the candidates, competence, performance or behaviour and included in their personal administrative files" and their "assessment reports". They took account of the careers of Mr X and of the other candidates.

76. The Secretary General agreed that the candidates for post 20.12 did not take a language test. This was quite normal in an internal promotion procedure in which the participating candidates had a number of years' seniority and where an individual administrative file was already available for each of them.

Moreover, the linguistic knowledge of Mr X had been proved objectively by the assessment reports on him and the promotions received during his career.

2. The Panel's failure to base its examination on objective considerations

77. The Secretary General maintained that this ground of appeal was ill-founded since a language test was not justified in the case in point (see above, paragraph 76).

78. He further pointed out that recourse by the Panel to either an oral interview or a competitive examination (Article 16, paragraph 3, of the Regulations on Appointments) was a discretionary one.

3. The Panel's failure to assess the merits of the candidates solely on the basis of the qualifications officially required

79. The Secretary General pointed out that it was apparent from the minutes of the Panel's meeting that the discussion had covered all aspects of the applications: university education, professional experience and administrative ability.

80. The Secretary General stressed that the qualification concerning knowledge of languages was not specifically discussed by the Panel since there was evidence of the candidates' knowledge of languages in the detailed information in their personal files, which the members of the Panel had in their possession (cf. paragraph 75).

4. The Panel's failure to rank the candidates satisfying the requirements in order of merit

81. While acknowledging that the satisfactory candidates were ranked not by means of a list but "implicitly in the actual text in the minutes of the meeting", the Secretary General nevertheless maintained that such a procedure enabled him to form a detailed picture of the qualifications of the applicants, since he could refer to the report of the discussions and the outcome of the vote.

82. The submission that the appellant's name had not been included in the Panel's recommendation was ill-founded: his name was, the Secretary General maintained, included among the candidates whose names were put to the vote, and the appellant came second in the vote.

### III. APPEAL No. 117/1985 (Mr BARTSCH)

83. The appellant requested that the decision concerning the appointment to the post of Deputy to the Director of Human Rights be annulled and that the appointment proceedings be re-opened.

The **appellant's** submissions may be summarised as follows:

#### **A. As to the failure to take account of a required qualification, as set out in the vacancy notice**

84. The appellant maintained that the Promotions Panel did not take into account one of the objective requirements included in Vacancy Notice No. 25/85, viz a very good knowledge of the Organisation's second official language.

While not contesting the Secretary General's right to decide on the qualifications required for appointment to a particular post, he submitted that, when making the appointment, the Secretary General could not then fail to give proper weight to the objective qualifications set out as requirements in the vacancy notice.

85. The appellant pointed out in passing that inclusion of the qualification "excellent knowledge of one of the official languages" gave candidates whose mother tongue was English or French an unfair advantage.

#### **B. As to the arbitrary nature of the Secretary General's choice**

86. The appellant claimed that the Panel's recommendation and the Secretary General's decision were arbitrary, on the ground that the candidates' merits were not examined objectively. While acknowledging that a comparison of the respective "merits" of several candidates (Article 22, paragraph 2, of the Regulations on Appointments) gave the Secretary General certain scope for discretion, he submitted that, in the case in point, by appointing a candidate who was at an earlier stage in his career than other candidates, the Secretary General ignored the provisions of the above-mentioned Article 22, paragraph 2.

87. The appellant further submitted that, by simply endorsing the Panel's recommendation without considering for himself the merits of the candidates and, in particular in the absence of the list of names drawn up "in order of merit", in accordance with Article 14, paragraph 5, of the aforesaid Regulations, the Secretary General failed to exercise his discretionary powers, as he was required to do.

The **Secretary General's** submissions may be summarised as follows:

#### **A. As to the jurisdiction of the Appeals Board**

88. While stating that he did not contest the jurisdiction of the Board, the Secretary General nevertheless pointed out that, pursuant to Article 60, paragraph 2, of the Staff

Regulations and in accordance with its case-law (Decision 76/1981), the Board could not substitute its own judgment for that of the Administration in the event of an appeal against a decision in respect of which the Secretary General has discretionary powers, as in the case in point.

**B. As to the failure to take account of a required qualification, as set out in the vacancy notice**

89. The Secretary General pointed out that, in accordance with Article 19, paragraph 3, of the Rules of Procedure of the Appointments Board, the members of the Panel had at their disposal “documents testifying to the candidates’ competence, performance or behaviour and included in their personal files” and their “assessment reports”. They took account of the careers of Mr X and the other candidates.

90. The Secretary General agreed that the candidates for post 20.12 did not take a language test. This was quite normal in an international promotion procedure in which the candidates had a number of years’ seniority and for whom a personal administrative file was already available.

91. Referring to the claim that candidates of English or French mother tongue have an advantage, the Secretary General pointed out that the qualifications to be included in a vacancy notice were decided on in the interests of the Organisation.

**C. As to the arbitrary nature of the Secretary General’s decision**

92. The complaint that, because the applications were not examined objectively, the Panel’s recommendation and the Secretary General’s decision were arbitrary was ill-founded. The Secretary General submitted, in this connection, that the Promotions Panel based its recommendations on a set of adequately established facts (cf. paragraph 89-90) and that, in expressing a very marked preference for Mr X, it was not drawing false conclusions from these facts. It was on the basis of this recommendation and with a full knowledge of such facts that the Secretary General took the decision at issue.

93. The Secretary General dismissed as ill-founded the claim that Article 22, paragraph 2, of the Regulations on Appointments was not complied with, pointing out that it read as follows: “In cases of equal merit, preference shall be given to the applicant who has served longer in the grade and, as a subsidiary criterion, with the Council”. Length of service was therefore only a subsidiary criterion, on the basis of which to choose between candidates of equal merit. In the present case, the Panel did not, after considering all the qualifications of each candidate, consider that the appellant and Mr X were of equal merit.

**THE LAW**

94. Given the three appeals, all of which relate to the same proceedings and have the same purpose, i.e. the annulment of the contested decision, are closely related, the Appeals Board ordered the joinder of the cases under Rule 14 of its Rules of Procedure.

95. The appeals of the appellants were against the decision taken by the Secretary General on 24 May 1985 at the end of proceedings whereby the post of Deputy to the Director of Human Rights was filled.

They requested the annulment of this decision.

In addition, Mr Muller-Rappard and Mr Bartsch requested that the appointment proceedings should be reopened.

Mr Muller-Rappard also requested that the Secretary General should pay him one franc as damages.

96. The Secretary General maintained that the proceedings had not been illegal.

#### **With regard to the subject-matter of the appeals**

97. The Secretary General has a wide-ranging discretionary power in matters of staff management. In the exercise of this power, he is qualified to know and assess the operational needs of the Organisation.

The existence of the discretionary power of the authority is, borne out by the case-law of international administrative bodies. This case-law recognises that the authority has a wide measure of discretion to assess factual matters, in particular with regard to the needs of the Organisation (ILOAT, Tarrab case, Decision No. 132, and Silow case, Decision No. 151), as well as to assess professional ability (UNAT, Decision No. 52, ESROAB, Decisions No. 8 and 10, ILOAT, Decision No. 405).

98. This discretionary power is, however, subject to the rules in force in the Organisation. It is exercised “without prejudice to the rights which servants enjoy under their Staff Regulations” (ECCJ, Case 61/70, G. Vistosi v. Commission of the European Communities, 16 June 1971, (1971), ECR, p. 535s). This is an essential rule which safeguards the rights and interests of the persons who form the administrative staff of the Organisation.

99. While it is true that, in the event of a dispute, the international adjudicating body cannot substitute its own judgment for that of the Administration, it has the duty to ascertain whether the disputed decision was taken in accordance with the regulations and with general principles of law, to which the legal systems of international organisations are subject (ABCE 8/1972, G. Artzet v. Secretary General, Digest, p. 47). As has been noted by the ILO Administrative Tribunal, the discretionary authority of the Administration must always be exercised lawfully. This is why it is for the court hearing an appeal against a decision taken by virtue of the exercise of discretionary power to determine not only whether that decision has been taken by a competent authority and whether it is in regular form, but also whether the correct procedure has been followed. The court must also determine, with regard to the legality of the decision under the Organisation’s own rules, whether the Administration’s decision took account of all the essential facts, whether conclusions which are manifestly wrong have been drawn from the documents in the file, or finally, whether there has been a misuse of authority (ILOAT, Ballo case, Decision No. 191) (see also: ABCE 76/1981, Pagani v. Secretary General, Digest, p. 100; ABCE 100/1984; Van Lamoën v. Secretary General, Digest, p. 142;

ABCE 101-113/1985, Stevens and others v. Secretary General, Digest, p. 153; OECDAB, Decision No. 55).

100. Moreover the Administration must ensure, in the interests of proper staff management of the Organisation, that it complies with the regulations in force, in particular as it must comply with the principle whereby an authority is bound by the rules which it has laid down as long as it has not repealed or amended them (ILOAT, Poulain d'Andecy case, Decision No. 51).

### **As to the merits of the appeals**

101. The three appeals concern the decision taken by the Secretary General, after he had received the opinion of the promotions panel, following an internal competition procedure in which the applications of the candidates, amongst whom were the three appellants, were examined.

102. The Board cannot stress too strongly that panels which have the task of assisting the administration of the Organisation in the examination of candidates for promotion are required, in the interests of the Organisation, to take full account of the following criteria: the experience, the ability and the merits of the candidates.

The Board hopes that the minutes of panels' discussions will not be limited to summary formulae giving an overall view but will, on the contrary, be a precise and complete reflection of their detailed consideration. This is necessary not only for the purposes of taking measures which directly affect the careers of members of the staff or the Organisation but also to enable the Appeals Board itself to exercise its task of supervision.

103. It goes without saying that in the case of transfer procedures the Administration should take account of all the above criteria.

104. It is clear from the information given in the case that, by vacancy notice No. 25/85, the staff of the Council of Europe were informed that the post of Deputy to the Director of Human Rights (grade A5) was vacant and that it would be filled by means of a competitive internal procedure open only to permanent staff. The notice did not contain any information concerning the grade of potential candidates.

The appellants and eight other staff members applied for the post.

105. The Regulations on Appointments which govern this matter "set out the conditions under which permanent posts are filled by transfer, recruitment or promotion" (Article 1).

These regulations envisage three procedures for filling a permanent post: external recruitment, transfer and promotion, these last two being reserved for candidates who are staff members of the Organisation.

As the present case concerns a competition open solely to permanent staff, only these last two procedures apply.

106. A transfer is defined as being "the appointment of a staff member to another post carrying the same grade" (Article 2 of the above Regulations).

A promotion is defined as being “appointment of a staff member to a post carrying a higher grade” (Article 2 of the above Regulations).

107. The regulations in force provide that the transfer produce must necessarily take place before any promotion’s procedure. For this reason, the Board will first examine the situation of the appellant Mr Muller-Rappard.

108. Paragraph 1 of Article 5 the Regulations on Appointments refers to the case where a member of staff of the Organisation wishes to be assigned to a vacant post and makes a request to this effect. It provides that “Any staff member may inform the Secretary General that he wishes to be assigned to another post in the same grade. His request shall be considered when a vacancy arises or when an exchange is contemplated”.

Paragraph 2 of Article 5 also provides that “before filling a vacant post, the Secretary General shall first consider whether this should be done by way of transfer”. Finally, according to paragraph 1 of Article 6, “in the case of a vacant post which is not being filled by transfer... the Secretary General shall decide, having regard to the provisions of Article 12 of the Staff Regulations, whether the post in question should be ... thrown open to internal competition among existing staff”.

109. It follows from these regulations that any staff member has a right to make a request for a transfer and the Secretary General has a duty to examine this request. Consequently, it would seem wise henceforth to give notification of all vacant posts so that staff members may, if they wish, request their transfer.

110. Under the power of appointment granted to him by article 36c of the Statute of the Council of Europe and in compliance with the Regulations on Appointments, the Secretary General must take a decision whether or not to fill the post by way of transfer. This decision is an administrative act which could have an adverse effect, and which could therefore give rise to a complaints procedure and possibly an appeals procedure in accordance with Articles 59 and 60 of the Staff Regulations.

111. The promotions procedure may only take place if the Secretary General has decided not to fill the post by transfer.

112. In the present case, Mr Muller-Rappard, in July 1980, made a request for transfer to the Secretary General in which he pointed out that the request applied in particular “when a competition [was] held in [the following] autumn for the newly created A5 post in the Directorate of Human Rights” (cf. paragraph 46 above).

In addition, following vacancy notice No. 25/85, he applied again for the post, which was advertised as vacant.

113. It can be seen from the above that the request made by Mr Muller-Rappard (grade A5) could only be examined in the framework of a transfer procedure. The appellant was entitled to expect that the Secretary General should not only examine the request first but also take a decision on this request, which could, if necessary, be contested.

114. According to the declaration made by the representative of the Secretary General at the hearing of 18 December 1985, the latter considered that, although he did not reject the merits of Mr Muller-Rappard's application, "in the interests of the Human Rights Sector" it was "desirable to fill this post by competition so that he could make a more enlightened choice, by bringing into consideration a greater number of candidates".

115. The result of the procedure which was followed in this case was to place Mr Muller-Rappard in a promotion competition for a post in a grade which he had already reached and, furthermore, in competition with staff members of a grade lower than his own.

116. Moreover, under the regulations (paragraph 4 of Article 14 of the Regulations on Appointments), the promotions panel was only entitled to make a recommendation for the promotion of a staff member and was not competent to assess the professional qualifications of staff members for the purposes of a transfer.

117. In matters of staff management and, in particular, when a vacant post is to be filled, a procedure respecting the letter and spirit of the statutory provisions and regulations has the advantage of preventing any misuse of powers and is, moreover, of a nature to ensure the transparency which is necessary in such matters. The conditions and procedures laid down by the Staff Regulations are in fact designed to ensure the respect of the principle of certainty of the law which is inherent in the system of the Council of Europe and is therefore in the interests of the Organisation as well as in the interests of members of its staff.

118. It follows, for all these reasons that the contested decision infringed Article 5, paragraph 1, Article 6, paragraph 1 and Article 14, paragraph 4 of the Regulations on Appointments and that the decision is therefore illegal.

119. Consequently, the Board is not required to examine all the other grounds raised by Mr Muller-Rappard with regard to the contested decision.

120. Having established that the contested decision was illegal, the Commission does not consider it necessary to examine the grounds raised by Mr Peukert and Mr Bartsch with regard to the promotion proceedings.

121. Considering that the annulment of the contested appointment decision in itself amounts to a fair and adequate reparation,

122. With regard to the requests made by the appellants for the reopening of the proceedings, neither paragraph 2 of Article 60 of the Staff Regulations nor the Statute of the Appeals Board give the Board jurisdiction to order the reopening of the proceedings since the appointment procedure is governed by the Regulations on Appointments;

For these reasons, the Appeals Board:

1. Declares the appeals founded;

2. Annuls the decision whereby the Secretary General appointed Mr X to the post of Deputy to the Director of Human Rights;



3. Rejects the request for compensation made by Mr Muller-Rappard;
4. Rejects the requests for the reopening of the appointment proceedings;
5. Decides that each party shall bear its own costs,

Delivered at the public hearing in Strasbourg, on 14 February 1986, the French text of the decision being authentic.

The Secretary of the  
Appeals Board

M. de SALVIA

The Chairman of the  
Appeals Board

W.J. GANSHOF VAN DER MEERSCH