CONSEIL DE L'EUROPE———
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TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 460/2009 (Levent ERCAN v. Secretary General)

The Administrative Tribunal, composed of:

Mr Georg RESS, Deputy Chair,
Mr Angelo CLARIZIA,
Mr Hans G. KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Mr Levent Ercan, lodged his appeal on 12 June 2009. On 18 June 2009, the appeal was registered under No. 460/2009.

2. On 30 June 2009 the Tribunal received the appellant's observations.

3. On 31 July 2009 the Secretary General submitted his observations on the appeal. The appellant submitted observations in reply on 11 August 2009.

The Tribunal then fixed 12 November 2009 as the date for the commencement of oral proceedings (Rule 23 of the Rules of Procedure).

The appellant being unable to attend in person or to arrange for himself to be represented, and having asked the Court to appoint a "free lawyer", the Deputy Chair told him that the Tribunal did not have the authority to do that.

On 5 November 2009, the Secretary General, after being apprised of the appellant's position, said that he wished to waive the oral proceedings under Article 23 of the ATCE Rules of Procedure. He asked the Court to inform the appellant that the Secretary General did not feel it was appropriate, not least on the principle of equality of arms, to hold a hearing without both parties being present and to seek his agreement on this point.

On 10 November 2009 the appellant agreed to the Secretary General's proposal, saying that he had no choice but to accept.

On 12 November 2009 the Tribunal, after being apprised of the parties' position, decided that there was no reason to change the decision to hold a hearing that same day, pointing out that the appellant could reply in writing to the Secretary General's submissions and that the Secretary General could file a rejoinder.

4. The public hearing took place in Strasbourg on 12 November 2009. The Secretary General was represented by Ms Bridget O'Loughlin, Deputy Head of the Legal Advice Department, Directorate of Legal Advice and Public International Law, assisted by Ms Sania Ivedi from the same department.

5. Afterwards, the Tribunal sent the appellant some documents that had been submitted at the hearing while keeping others confidential, in response to a request from the Secretary General. Among these last was the record of the meeting of the Appointments Board.

6. At the same time, the Tribunal sent the appellant documents and information which the Secretary General had authorised, at the hearing, to be passed on to him. It explained that it was not releasing the documents that were considered confidential.

7. In reply, the appellant asked to see the documents which the Tribunal had decided to withhold.

8. By decision of 28 January 2010, the Tribunal established that this request should not be granted and that care would be taken to ensure that the appellant's rights were respected.

9. Meanwhile, in a letter dated 11 January 2010 and received on 19 January 2010, the appellant submitted his written observations on the Secretary General's submissions. On 25 January 2010 the Secretary General said that he had no further comments to make and that he referred to his earlier written submissions.

In a new request, received by the Registry on 22 February 2010, the appellant asked the Tribunal to amend the decision of 28 January 2010 so that he "could see all the documents in order to be able to respond and mount a defence".

By decision of 20 March 2010, adopted under Rule 42 of the Tribunal's Rules of Procedure, the Deputy Chair, after consulting the other judges, rejected this new request. Declaring the appellant's request to be inadmissible, he went on to say that even supposing the request were admissible, it would still have to be rejected. The Deputy Chair reiterated that the Tribunal was taking cognisance of the information in question while making sure that the appellant's rights were respected.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The appellant is a former Council of Europe staff member and a Turkish national. He had been employed on a fixed-term contract from July 2007 to June 2008 and assigned to a B3 post in the Registry of the European Court of Human Rights as a legal assistant.

11. The appellant applied to sit the competitive examination to recruit assistant lawyers – Turkey, grade B3 (vacancy notice no. e37/2008).

12. In a letter dated 6 August 2008, the Directorate of Human Resources ("DRH") invited the appellant to sit the written examination and informed him that the candidates who obtained the highest marks would be invited for interview.

13. After sitting the written examination, the appellant was invited to an interview which was held on 9 January 2009. According to the appellant, at that interview, he learned that the number of posts to be filled had been increased.

14. On 9 February 2009, the Directorate of Human Resources informed the appellant that his application had not been successful.

15. In a letter dated 25 February and received on 23 March 2009, the appellant lodged an administrative complaint under Article 59 of the Staff Regulations.

16. In a letter dated 21 April 2009 and received by the appellant at the beginning of May 2009, the Secretary General stated that the administrative complaint should be considered inadmissible and/or ill-founded and that it should be dismissed.

17. In a letter posted on 12 June 2009, the appellant lodged the present appeal.

18. At the same time, the appellant asked the Chair of the Tribunal to stay the execution of the impugned act (Article 59, paragraph 7, of the Staff Regulations). In an order of 1 July 2009, the Chair rejected the request.

II. APPLICABLE PROVISIONS

19. Articles 12 and 13 of the Staff Regulations read as follows:

> Article 12 – Recruitment policy
>
> 1. Recruitment should be aimed at ensuring the employment of staff of the highest ability, efficiency and integrity, with due regard to a fair geographical distribution of posts and positions, in accordance with relevant decisions of the Committee of Ministers. In addition, the Secretary General shall seek to ensure a fair distribution of appointments between the sexes.
>
> 2. When vacancies are being filled, due allowance shall be made for the qualifications and experience of serving staff members and the desirability of bringing in fresh talent from time to time.
>
> 3. In the context of the rules set out in the foregoing paragraphs and under the arrangements determined by the Regulations on Appointments, vacancies in category A representing the start of a career shall, unless otherwise provided for in those regulations, be filled by recruitment from outside the Council or by transfer and the

other vacancies in this category either by outside recruitment, transfer or by promotion. In particular, the Secretary General will seek to secure the services, for a limited period, of civil servants and specialists.

4. No post or position may be reserved for nationals of any specific member state.

5. Category C staff shall normally be recruited in the region in which their place of employment is located.

Article 13 – Non-discrimination between candidates

1. Subject to Article 14 of the Staff Regulations and Article 6 of the Regulations on Appointments (Appendix II to the Staff Regulations), recruitment shall be carried out without direct or indirect discrimination, in particular on grounds of racial, ethnic or social origin, colour, nationality, disability, age, marital or parental status, sex or sexual orientation, and political, philosophical or religious opinions.

2. Paragraph 1 does not prevent the Secretary General from setting certain conditions in terms of age and nationality in respect of specific posts/positions, provided that such limits have an objective and reasonable justification.

3. The Secretary General deciding not to recruit a person because s/he has expressed opinions that are incompatible with the fundamental principles enshrined in the Statute of the Organisation and the European Convention on Human Rights does not constitute discrimination under paragraph 1.

4. The Appointments Board shall consider applications in the first instance on the basis of qualifications, experience and competencies.

20. Articles 14 and 15 of Appendix II (Regulations on appointments) to the Staff Regulations read as follows:

Article 14 – Functions of the Board with regard to transfers and promotions

“1. The Board shall be responsible for any competitive examination or selection based on qualifications that is conducted as part of the internal competition procedure.

The Board shall:

- scrutinise all applications; it may draw up a short list of those applicants considered best qualified for the post or position to be filled on the basis of the criteria set out in the vacancy notice;

- decide whether shortlisted applicants will be invited to sit tests or examinations;

- assess the results of such tests and examinations;

- if necessary, interview those applicants who have been shortlisted; where written tests or examinations have been held, only those applicants who have obtained satisfactory results shall be interviewed.

2. At the end of the procedure, the Board shall submit a recommendation to the Secretary General on the basis of all the relevant information at its disposal. Where a number of applicants are included in the recommendation, they shall be listed in order of merit.

3. The Board shall supply the Secretary General with recommendations on cases of promotion provided for in Article 21, paragraphs 5 and 6, and in Article 24.

Article 15 – Competitive examination

1. Competitive examinations shall include written papers or tests, or both, and interviews conducted by the Board:

- the written papers shall be eliminatory, manuscripts must be anonymous, and must be marked by two examiners;

- examiners of written papers may not sit on the Board for the competition for which they marked the papers;

- tests may be eliminatory and shall be anonymous. In exceptional circumstances, where their nature so requires and upon decision of the Board, tests may be evaluated without anonymity. In such cases, applicants invited to compete will be informed accordingly.

2. A competitive examination shall be obligatory when posts in the starting grades of A, L and B are to be filled by recruitment to employment of indefinite duration.

3. When the number of applicants having passed a competitive examination conducted as part of the external recruitment procedure exceeds the number of vacant posts or positions open to competition, a reserve list shall be drawn up in order of merit and notified to the applicants concerned and to Permanent Representations of member states. A reserve list shall be valid for two years with the possibility of extending it – in justified circumstances – by one year which may be repeated twice. In the event of a vacancy not being filled by way of internal competition, the Secretary General may appoint a suitable candidate named in the reserve list.

4. When appointments are being made by internal competition, the Board shall decide whether written examinations should be held; in such cases the examinations shall be designed mainly to test professional ability.

5. The Chair of the Board may take the following decisions concerning the conduct of competitive examinations without consulting the Board members:

- approve question papers and tests for written examinations prepared in consultation with the department concerned; the questions must be selected in such a way that candidates are treated equally;

- select examiners drawn from a list approved by the Board;

- determine, having consulted the administrative entity to which the appointment is to be made, how many of the applicants who have obtained the highest marks in the tests and examinations should be interviewed by the Board.

THE LAW

21. The appellant asks the Tribunal to annul both the decision to reject his administrative complaint and the results of the “oral examination”. He further asks to be appointed to the post in question. Lastly, the appellant asks the Tribunal to award him the sum of €30,000 for pecuniary damage and €30,000 for non-pecuniary damage, as well as a “public apology” and “costs”.

22. The Secretary General, for his part, asks the Tribunal to declare the appeal inadmissible and/or ill—founded and to dismiss it.

I. SUBMISSIONS OF THE PARTIES

A. Admissibility of the appeal

23. The Secretary General argues that the administrative complaint is inadmissible because it is out of time, on two counts.

24. First the Secretary General points out that, concerning the merits of the appeal, the appellant contends that only the candidate (or candidates in the event of a tie) who obtained the highest mark in the written examination should be invited to an interview, in his view a mere formality, and be appointed. The appellant, therefore, should have contested this decision at the time when – on receiving the letter of 6 August 2008 (paragraph 12 above) – he “learned” that in point of fact, the candidates who obtained the highest marks would be interviewed. As it happens, however, he took no such action and, in the Secretary General’s view, can hardly claim now to have suffered damage on that account. For although he was in fact among the candidates who obtained the highest marks in the written examination, he did not know that at the time when he received the letter from DRH and raised no objections to the arrangement. He could equally well have been among those candidates who obtained not the highest but among the highest marks in the written examination and was therefore invited for interview, in which case he would have seen no reason to criticise the existing arrangements.

25. The appellant having failed to challenge in a timely manner the rule laid down in the letter inviting him to sit the competitive examination, the Secretary General submits that his administrative complaint and, consequently, his appeal are inadmissible because they were lodged too late.

26. Second, the Secretary General notes that the appellant was informed as far back as 10 February 2009 that he had been unsuccessful and, although his administrative complaint is dated 25 February 2009, DRH did not receive it until 23 March 2009. He further notes that the appellant was issued with an acknowledgement of receipt and that he never contested the date shown on it. In the Secretary General’s opinion, the appellant should have made sure that his complaint reached the Council of Europe as early as possible (and not almost 6 weeks after being informed that he had been unsuccessful), to ensure stability of legal situations. The Secretary General concludes from this that the appellant failed to act sufficiently quickly. On this point, the Secretary General refers to the case-law of the Tribunal (ATCE, Appeal No. 312/2003 – Schmidt v. Secretary General, decision of 5 December 2003, paragraph 33).

27. The appellant for his part maintains that the Secretary General's arguments amount to mere speculation about the appeal.

28. The appellant further maintains that he lodged his appeal within the time-limit specified in the regulations and that he is not to blame for the delays in the Turkish and French postal services.

In conclusion, the appellant asks the Tribunal to reject the Secretary General's pleas of inadmissibility.

B. Merits of the appeal

29. The appellant makes several points in support of his claim that there has been an infringement of Articles 12 and 13 of the Staff Regulations and of Articles 14 and 15 of Appendix II (Regulations on appointments) to the Staff Regulations.

30. With regard to the first ground, alleging infringement of Article 12 of the Staff Regulations (paragraph 19 above), the appellant draws attention to the fact that, under the precise terms of Article 12 of the Staff Regulations, recruitment must be aimed at ensuring the employment of officials "of the highest ability, efficiency and integrity". The appellant maintains that, given that he had already worked in the same post, he ought to have been the Board's first choice for that post.

31. Concerning the second ground, alleging infringement of Article 13 of the Staff Regulations (paragraph 19 above), the appellant argues that unless there are "extreme circumstances, the Board's first choice should be the person who obtained the highest mark, while at the same time taking account of experience". Since, in this particular case, the Board chose to employ individuals who had failed to obtain sufficient marks to be invited for interview, the candidates, maintains the appellant, cannot be said to have been treated equally. This was allegedly compounded by a further inequality, in that the individuals hired were all English-speaking. In the view of the appellant, these inequalities amount to discrimination under the said Article 13 of the Staff Regulations.

32. With regard to the third ground, alleging infringement of Article 14 of the Regulations on appointments (paragraph 20 above), the appellant argues that there has been a breach of procedure and law insofar as candidates who failed to obtain "sufficient marks" (10 out of 20) to be invited for interview were nevertheless interviewed and later hired. In his view, a score that is less than half the maximum number of marks cannot be considered satisfactory. The Board, therefore, had no right to interview and employ persons who had failed to perform satisfactorily in the written examination.

33. With regard to the fourth ground, alleging infringement of Article 15 of the Regulations on appointments (paragraph 20 above), the appellant notes that paragraph 3 of the said Article 15 states that "when the number of applicants having passed a competitive examination conducted as part of the external recruitment procedure exceeds the number of vacant posts or positions open to competition, a reserve list shall be drawn up in order of merit and notified to the applicants concerned and to Permanent Representations of member states". Since, in this particular case, the Organisation did not draw up a reserve list in order of merit, the appellant maintains that there has been an infringement of this provision.

34. The Secretary General for his part argues, in response to the first complaint, that the appellant is free to form his own opinions but that, even supposing they are correct, there is nothing in his assessment to show that, of all the candidates, he is the one who is of the highest ability, efficiency and integrity, or that he has the qualifications and experience called for in this particular case. In the Secretary General's opinion, it is clear, furthermore, from the assessment made by the Appointments Board, which in the only competent authority in such matters, that that is not the case. After all, the Board did not see fit to recommend that the appellant be appointed to the post in question.

35. With regard to the second complaint, the Secretary General notes from the record of the meeting of the Board of Appointments that the latter did in fact list the candidates in order of merit and made a recommendation to the Secretary General to this effect. There has been no infringement of this provision either, therefore.

36. As to the third argument, the Secretary General contends that Article 14 of the Regulations on appointments does not apply in this case, as it relates to transfers and promotions whereas what we are dealing with here is a recruitment procedure. Such procedures are governed by Article 15, paragraph 5, of the Regulations on appointments, which contains no provision to the effect that only candidates who obtained satisfactory marks in the written examination are to be invited for interview.

37. As to the fourth argument, the Secretary General states that six candidates passed the competitive examination in question. Since there were only five vacancies, a reserve list was in fact drawn up but as there was only one name on it, it was not possible to arrange it in order of merit.

The Secretary General further maintains that insofar as we are to understand that what the appellant is really complaining about is an infringement of Article 13, paragraph 2, of the Regulations, under which "At the end of the recruitment procedure, whether it be through competitive examination under Article 15 or selection based on qualifications under Article 16, the Board, after having listed the applicants in order of merit, shall submit a recommendation to the Secretary General", it is clear from the record of its meeting that the Board did in fact list the candidates in order of merit and made a recommendation to the Secretary General to this effect. No infringement of this provision may be said to have occurred either, therefore.

38. The Secretary General concludes from all the above considerations that he has not breached the Staff Regulations or any related texts and that the impugned decision is not vitiated by any irregularity.

II. THE TRIBUNAL'S ASSESSMENT

A) Admissibility

39. With regard to the merits of the first plea of inadmissibility on grounds of lateness, the Tribunal notes that, since in his administrative complaint, the appellant did complain about the conduct of the interview, this plea is unfounded. The Tribunal's case-law is consistent on this point, moreover.

40. It follows that the Secretary General's plea must be rejected.

41. Regarding the second plea of inadmissibility on grounds of lateness, the Tribunal notes that under Article 59, paragraph 2, of the Staff Regulations, complaints must be "lodged" with thirty days. It is clear that what is meant here is that the time-limit runs from the time the letter is dispatched and not from the time it is received, in cases where, as in this one, the said time can be established unequivocally. Consequently, the Secretary General's plea is unfounded.

42. It follows that the Secretary General's plea must be rejected.

B) Merits

43. Before considering the appellant's grounds, the Tribunal emphasises that it has read the record of the meeting of the Board of Appointments, although it has not disclosed it to the appellant. The Tribunal points out that it did so in response to a request from the Secretary General (paragraph 5 above) and in keeping with a long-standing practice of the Tribunal in order to respect the confidential nature of the proceedings.

44. The appellant did certainly ask the Tribunal for a copy of this document. The Tribunal, however, decided not to release it to him. Since, as a result, the appellant was unable to make claims or, during the proceedings before the Tribunal, comments in full knowledge of the facts, the Tribunal made a point of examining the contents of the document very carefully and of checking to see whether it was in any way damaging to the appellant.

45. The Tribunal notes that it has already drawn the Secretary General's attention to the amount of information that must be given to a candidate. In its decision in the Marchenkov case (ATCE, Appeal No. 294/2002, decision of 28 February 2003, paragraph 37), the Tribunal stated as follows:

> "As regards the requirement to give reasons, the Tribunal believes that the Secretary General should review how much information candidates in a competition could be given regarding the conduct of the competition and its results. It is of course for the Secretary General to decide how the administrative-law rule that reasons must be given for any adverse decision is to be implemented."

Since then, the Tribunal has decided, in other appeals, to give rulings without taking account of records submitted by the Secretary General *proprio motu* and kept confidential (ATCE, Appeals Nos. 408, 409, 413 and 415/2008, Pace Abu-Ghosh, Nikoghosyan, Verneau and Oreshkina, decisions of 31 March 2009).

The Tribunal wishes to point out that the decision taken in the present appeal, while in line with those made by the Tribunal in the past, does not set future case-law.

46. It appears from close inspection of the record of the Board of Appointments meeting that the arguments put forward by the appellant are unfounded and that no breach of the principles and rules in this area can be deemed to have occurred. In particular, the fact that the appellant was French-speaking played no role in the Board's decision. Likewise, no importance has been attached to the fact that the candidates were informed just before the interview that the number of vacancies had increased. Besides, the increase in the number of posts was of a reasonable nature and was not excessive, so it could not have had a

disproportionate influence on the conduct of the recruitment procedure. The Tribunal does not see how this increase in the number of posts could have been detrimental to the appellant.

47. As to the fact that the Council determines in each recruitment procedure the number of marks required in order to be invited for interview, the Tribunal notes that, even though this procedure is laid down in Article 15 of the Regulations on appointments, one has to wonder whether interviewing candidates who obtained less than half the maximum number of marks is in keeping with the general principles in this area. Be that as it may, it is clear that in this particular instance, the appellant did not suffer any damage, because the reason why he was not recruited was that his interview, irrespective of the other candidates' participation in the competition, was not considered satisfactory. And there is nothing to indicate that this assessment was arbitrary.

48. The Tribunal notes that it has already considered the issue of the Secretary General's discretionary power in recruitment matters (see ATCE, No. 250/1999, decision in Schmitt v. Secretary General, mentioned above, paragraphs 25-27). 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 discretionary powers under which he is qualified to ascertain and assess the Organisation's operational needs and the candidates' professional suitability for a vacant post.

49. The Tribunal further holds, however, that 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. The Tribunal subsequently found (*ibid.*, paragraph 25) that:

> "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."

50. The Tribunal also indicated that in assessing objective qualifications the competent authority naturally makes less use of discretionary power than in assessing subjective qualifications (cf. *a contrario* ATCE, Appeals Nos. 216/1996, 218/1996 and 221/1996, *Palmieri* (III, IV and V), decision of 27 January 1997, paragraph 43).

There is nothing in the facts laid before the Tribunal to indicate that the Appointments Board failed to act in accordance with the requirements of the vacancy notice and the principles laid down by the Tribunal or that its assessment was arbitrary. There is no evidence either that the Appointments Board drew conclusions that were patently incorrect or that its assessment of the appellant's qualifications was arbitrary or that it sought to favour this or that candidate to the detriment of the appellant, because of some "old boys network" or for linguistic reasons.

51. In deciding not to include the appellant in the list of candidates who had performed satisfactorily at interview and, by extension, not to offer him a contract, the Secretary General did not breach the law by which he was bound and did not draw conclusions which were

manifestly incorrect in relation to the vacancy notice or the rules of the Organisation, such as to incur the censure of the Tribunal.

52. In conclusion, the appeal is unfounded and must be dismissed.

For these reasons,

The Administrative Tribunal:

Rejects the Secretary General's pleas of inadmissibility;

Declares the appeal admissible;

Dismisses it;

Orders each party to bear its own costs.

Delivered at Strasbourg on 28 April 2010, the French text being authentic.

The Registrar of the Administrative Tribunal	The Deputy Chair of the Administrative Tribunal
S. SANSOTTA	G. RESS