CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeals Nos. 486-489/2011, 491/2011, 498-500/2011 and 502/2011
(Ümit KILINC and others v. Secretary General

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,
Mr Angelo CLARIZIA,
Mr Hans G.KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The Tribunal has received nine appeals, lodged by:

- Mr Ümit KILINC,	Appeal N° 486/2011, lodged on 4 July 2011 and registered the same day,
- Ms Natasha BAKIRCI,	Appeal N° 487/2011, lodged on 6 July 2011 and registered the same day,
- Mesut BEDIRHANOGLU,	Appeal N° 488/2011, lodged on 7 July 2011 and registered the same day,
- Ms Senem GUROL,	Appeal N° 489/2011, lodged on 7 July 2011 and registered the same day,
- Mr Sergey GUSEVSKIY,	Appeal N° 491/2011, lodged on 8 July 2011 and registered the same day,
- Ms Ekaterina PRIKHODKO,	Appeal N° 498/2011, lodged on 12 July 2011 and registered the same day,
- Ms Marina MAKAROVA,	Appeal N° 499/2011, lodged on 12 July 2011 and registered the same day,

- Mr Emanuele NICOSIA,	Appeal N° 500/2011, lodged on 15 July 2011 and registered the same day,
- Ms Ayşegül ALKIŞ	Appeal N° 502/2011, lodged on 2 August 2011 and registered the same day.

2. On 8 August 2011, the Secretary General sent a letter to the Tribunal concerning the admissibility of the Gurol and Alkiş appeals.

On 2 and 7 September, Ms Gurol and Ms Alkiş submitted their respective comments.

On 9 September, these replies were brought to the attention of the Secretary General.

3. Meanwhile, in the period between 8 August and 11 October 2011, Ms Nathalie Verneau, a member of the Organisation's staff and counsel for the appellants, filed further pleadings in these appeals.

4. On 17 October 2011, the Secretary General submitted his observations on the appeals.

5. On 21 November 2011, the appellants filed a memorial in reply.

6. On 15 November 2011, the appellants asked for documents concerning the work of the Appointments Board to be produced and communicated to them. The Secretary General agreed to the production of these documents but was against communicating them to the appellants.

7. On 6 December 2011, after consulting the other judges, the Chair decided that he would give a ruling on this request after the hearing.

8. The public hearing on these appeals was held in the Administrative Tribunal's hearing room in Strasbourg on 8 December 2011. The appellants were represented by Ms Nathalie Verneau and the Secretary General by Ms B. O'Loughlin, Deputy Head of the Legal Advice Department in the Directorate of Legal Advice, assisted by Ms Christina Olsen, from the same department.

9. After the hearing, the Tribunal decided that that there were no grounds for acceding to the appellants' request regarding the production of documents. On the other hand, the Tribunal asked the Secretary General to submit a copy of the proof of delivery of the registered letter notifying Ms Alkiş (Appeal N° 502/2011) of the decision to reject her administrative compliant. This document was received on 9 January 2012. Ms Alkiş submitted the original of this decision and the envelope to the Tribunal on 12 January 2012.

FACTS

10. The nine appellants are staff members who work or have worked for the Organisation on fixed-term contracts as assistant lawyers in the Registry of the European Court of Human Rights.

11. The relevant facts common to all the appellants may be summarised as follows.

12. The appellants were candidates in the competition for the recruitment of profile B lawyers (grade A1/A2) launched by means of vacancy notice n° e25/2010. The Organisation's aim in holding this competition was to recruit lawyers in the fields of public international law (profile A) and the European Convention on Human Rights (profile B). The vacancy notice specified that the recruitment procedure was in three stages: preliminary selection of candidates, a written examination and an interview with the members of the Appointments Board.

13. On 22 February 2011, the Head of the Recruitment and Appointments Division in the Directorate of Human Resources informed the appellants that, being among the 475 candidates preselected on the basis of their qualifications, they were invited to participate in the next stage of the selection procedure, which consisted of ability tests to be completed on-line.

14. In this message the Head of Division gave details of the three parts of the tests and specified that they would be eliminatory. She added that the candidates who obtained the best results would be invited in due course to sit a written examination.

15. On 12 April 2011, the Directorate of Human Resources sent the appellants an email informing them of their results in the three tests. None of them having obtained the required minimum mark of 50 in all three tests, the appellants were not admitted to the written examination which was due to take place on 23 May 2011.

16. Between 20 and 28 April 2011, the appellants lodged administrative complaints in accordance with Article 59, paragraph 2, of the Staff Regulations. They asked for annulment of the ability tests and to be allowed to sit the written examination. Since this examination was due to take place before the end of the statutory period of thirty days for replying to an administrative complaint, the appellants asked to be allowed, if necessary, to participate in the examination on a provisional basis pending the outcome of the administrative complaint.

17. Each appellant also applied to the Chair of the Tribunal for a stay of execution of the act complained of (Article 59, paragraph 9, of the Staff Regulations). All the appellants asked him to order the Secretary General to stay execution of the decision not to invite them to participate in the next stage of competition e25/2010, and consequently to allow them to participate in the written examination.

18. In orders adopted on 6 May 2011, the then Chair dismissed all these applications for a stay of execution.

19. The administrative complaints having been rejected by the Secretary General on 23 May 2011, each of the appellants lodged an appeal with the Tribunal under Article 60 of the Staff Regulations.

20. On 29 September 2011, the appellants lodged a joint application for a stay of execution of the act complained of, requesting a stay of execution on the holding of the interviews scheduled for 19, 20 and 21 October in the profile B section of competition e25/2010.

21. By order of 7 October 20011, the Chair granted the request for a stay of execution insofar as it concerned the procedure for profile B appointments.

Applicable provisions

22. The submission of administrative complaints is governed by Article 59 of the Staff Regulations (Part VII – Disputes).

23. The paragraphs relevant to the present case, following the amendments introduced by Resolution CM/Res(2010) 9 of 7 July 2010, read as follows:

Article 59 – Complaints procedure

"1. (…)

2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression "administrative act" shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General.

3. The complaint must be made in writing and lodged via the Director of Human Resources:

a. within thirty days from the date of publication of the act concerned, in the case of a general measure; or

b. within thirty days of the date of notification of the act to the person concerned, in the case of an individual measure; or

c. if the act has been neither published nor notified, within thirty days from the date on which the complainant learned thereof; or

d. within thirty days from the date of the implicit decision rejecting the request referred to in paragraph 1.

The Director of Human Resources shall acknowledge receipt of the complaint.

In exceptional cases and for duly justified reasons, the Secretary General may declare admissible a complaint lodged after the expiry of the periods laid down in this paragraph.

(…)

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

(…)

d. to staff members and 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.

(…)."

24. In the previous version, the same paragraphs (with the original numbering) read as follows:

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

(…)

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

(…)

d. to candidates outside the Council, who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure.

(…)."

25. As regards the time-limit for lodging an appeal with the Tribunal after the rejection of an administrative complaint, Articles 60, paragraph 3, and 61 of the Staff Regulations provide as follows:

Article 60 – Appeal procedure

"3. An appeal shall be lodged in writing within sixty days from the date of notification of the Secretary General's decision on the complaint or from the expiry of the time-limit referred to in Article 59, paragraph 3. Nevertheless, in exceptional cases and for duly justified reasons, the Administrative Tribunal may declare admissible an appeal lodged after the expiry of these periods."

Article 61 – Calculation of time-limits

"The time-limits in Articles 59 and 60 shall run from midnight of the first day of each time-limit as defined in the provision concerned. Saturdays, Sundays and official holidays shall count when calculating a time-limit. However, where the last day of a time-limit is a Saturday, Sunday or an official holiday, the time-limit shall be extended to include the first working day thereafter."

THE LAW

26. In lodging their appeals, the appellants asked the Tribunal to annul the ability test session which took place from 4 to 11 March 2011. They also asked the Tribunal to order the Secretary General to organise a second session for the other written papers, and to allow them to participate in it.

For his part, the Secretary General asks the Tribunal to declare the appeals inadmissible and/or ill-founded and to reject them. As a preliminary, he also asks that the appeal by Ms Alkiş (no 502/2011) be declared out of time and therefore inadmissible.

I. JOINDER OF THE APPEALS

27. Given the connection between the nine appeals, the Administrative Tribunal ordered their joinder pursuant to Rule 14 of its Rules of Procedure.

II. SUBMISSIONS OF THE PARTIES

A. Admissibility of Appeal N°502/2011 – Alkiş v. Secretary General

1. The Secretary General

28. The Secretary General argues that the appeal lodged by this appellant was out of time because she received the reply to her administrative complaint on 30 May 2011 but did not lodge her appeal until 2 August 2011, outside the 60-day period provided for in Article 60, paragraph 3, of the Staff Regulations. Furthermore, the reason given by the appellant does not justify the application of the last sentence of the paragraph in question, according to which "in exceptional cases and for duly justified reasons, the Administrative Tribunal may declare admissible an appeal lodged after the expiry of these periods."

2. The appellant

29. For her part, the appellant says she does not remember the exact date on which she received notification of the rejection of her administrative complaint. Should the appeal be out of time, she asks the Tribunal to declare it nevertheless admissible, pursuant to Article 60, paragraph 3, last sentence. She cites difficulties of co-ordination with the other applicants due to the summer holidays as a valid reason for declaring her appeal admissible.

B. Objections of inadmissibility in whole or in part of all the appeals: ratione personae and late submission

1. The Secretary General

30. The Secretary General contends that all the administrative complaints and the appeals that followed are inadmissible because they fail to satisfy the conditions of admissibility laid down in paragraphs 2 and 8 d. of Article 59 of the Staff Regulations (paragraph 23 above) and because the administrative appeals were out of time.

31. Firstly, the Secretary General argues that the appellants had no interest in bringing proceedings.

32. The Secretary General notes that the competition launched by vacancy notice n° e25/2010 was an external recruitment procedure and that the appellants' applications were governed by the rules for external candidates.

33. In his opinion, the appellants lack *locus standi* because, according to Article 59, paragraph 8 d., cited above:

> "[the complaints procedure] (…) is open (…) to staff members and 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".

34. Again in the opinion of the Secretary General, because the appellants were not allowed to take the written examination, it is clear that the complaints, and hence the appeals, are inadmissible for lack of interest in bringing proceedings. It should be noted in this connection that the ability tests form part of the preliminary selection stage and not the written examination proper. The latter took place, for the eligible candidates (ie those selected on the basis of their qualifications and their performance in the ability tests), on 23 May 2011.

35. Furthermore, not only do the Staff Regulations restrict this right to candidates allowed to sit the examination, but also complaints submitted by them must relate to "an irregularity in the examination procedure". However, because the appellants were not allowed to participate in the examination, their complaint and their appeal seeking the annulment of the ability tests do not relate to an irregularity in the examination procedure, in which they did not participate. In the light of these circumstances, the Secretary General considers that the appellants have no legal basis for lodging a complaint, and hence an appeal, against the decision not to invite them to participate in the written examination, and have no legal interest in relying on any irregularity in the examination procedure.

36. In the Secretary General's view, the case law of the European Union's Civil Service Tribunal cited by the appellants cannot be transposed to the procedure complained of because of the differences in how the procedure is organised.

37. The Secretary General also focuses on the appellants' argument that it would be sufficient for the Appointments Board to introduce one or more additional stages in the recruitment process, entitled "tests", and the fact that such "tests" are not regarded as written examinations would automatically deprive appellants of access to the Tribunal.

38. The Secretary General says that this argument might be attractive if the Appointments Board were to take such a decision (to introduce an additional stage and to consider it as not being part of the written examination) at some random time, and in any case after adopting its decision on the procedure for the examination. This was not the case. At the same time as they approved the lists of candidates satisfying the relevant criteria on the basis of their qualifications, the members of the Board approved the next stage in the procedure, namely the ability tests, decided that they would be eliminatory and that only the candidates with the best marks would be allowed to sit the written examination, then adopted the three written papers. The Board adopted these decisions more than six weeks before the candidates took the ability tests.

39. According to the Secretary General, it follows from this that the Appointments Board decided that the ability tests were part of the preliminary selection stage, and not the "written examination" stage, and did not add a new stage in the middle of the procedure, contrary to what the appellants assert.

40. As to the second objection (late submission of the administrative complaints), the Secretary General argues that the appellants are wrong to believe that they acquired the status of victim at the time when they were informed that they were not being allowed to sit the written examination. Indeed, their complaint concerns the very existence of these tests and the test procedure. In his view, if the appellants considered that the fact of taking these tests and/or the

test procedure caused them ant prejudice, they should have contested them within 30 days of receiving the email of 22 February (paragraph 13 above) from the Directorate of Human resources inviting them to take the ability tests, and not upon being informed that they had failed them.

Because the appellants did not do this, this part of their administrative complaint, and hence of their appeal, is inadmissible for being out of time.

41. In the opinion of the Secretary General, the appellants were fully informed about the existence of these tests and about the test procedure (in particular the nature of the tests, the fact that they were eliminatory, that they were to be done in English or French, that only the candidates with the best marks would be allowed to sit the written examination, that verify tests would be organised etc).

The Secretary General infers from this that the appellants should have complained about the tests before or at the time of taking them. Such a complaint coming after the news that they had failed them does not carry conviction.

2. The appellants

42. In the appellants' view, the Secretary General's line of argument is that ability tests are not part of the written examination, which, according to the terms of Article 59, paragraph 8 d., of the Staff Regulations, deprives them of any right to submit an administrative complaint and, hence, to lodge an appeal with the Tribunal challenging the test procedure in question.

43. Without going into arguments about the context which led the Organisation to limit staff members' right of appeal, which seems out of phase with the relevant case law of the European Court of Human Rights, the appellants consider that their appeals cannot be declared inadmissible on the ground that the ability tests complained of are not part of the written examination.

As their main submission, they rely on the *Vicente Carbajosa and Others v. Commission* judgment (n° F 9/09, 18 October 2010, paragraph 50) of the European Union's Civil Service Tribunal, which dealt with a similar issue. In the appellants' view, there is no doubt that the findings of this judgment are perfectly transposable to the case in point. They therefore ask the Tribunal to find that the content and nature of the ability tests place them firmly in the category of "written examinations" within the meaning of Article 15 of the Regulations on Appointments.

44. As a subsidiary consideration, the appellants refer to the email of 23 February 2011 sent by a staff member of the Directorate of Human Resources (and copied to the Head of the Recruitment and Appointments Division) to one of the candidates, in which he confirms that the ability tests are an "integral part of the written examination". The appellants consider that the Secretary General's argument that this message was sent "hurriedly, without prior verification" and is therefore not legally binding on him, does not hold up: as the staff member himself explained, it was purely for reasons of expediency that the Directorate of Human Rights decided to "split this [written examination] stage into two parts". The fact remains that it is clear from this

email that the tests were indeed regarded by the Directorate of Human Resources, and in particular by the person responsible for organising this competition, as forming part of the written examination.

45. With regard to the alleged late submission of the administrative complaint, which, according to the Secretary General, should have been submitted within thirty days of the date of the tests (ie by 11 April 2011 at the latest), the appellants observe that they did not acquire the status of victim until they were informed that they were not being allowed to take the other written papers, ie in the email sent to candidates by the Directorate of Human Resources on 12 April 2011. The "administrative act adversely affecting them", and marking the start of the proceedings, is indeed, therefore, this email of 12 April 2012, which invalidates the argument relating to late submission.

46. For these reasons, the appellants ask the Tribunal to declare their appeals admissible.

C. The merits of the nine appeals

1. The appellants

47. The appellants argue that the ability test procedure was vitiated by several irregularities.

After commenting on the limits to the Secretary General's discretionary power in this matter, the appellants express the view that, by changing the criteria for evaluation of the tests after the date on which the tests were held, the Secretary General violated the principles of foreseeability of legal rules and legal certainty. They further argue that the fact that they were informed of these tests shortly before they were held prevented them from preparing properly for them.

48. With regard to the test procedure, they point out first of all that the criteria for evaluating the tests were changed after the tests without any explanation. Secondly, the conditions were not the same during the practice phase and during the actual tests. Lastly, the way the results are calculated and the weighting system applied to the questions are totally unclear.

49. In this connection, the appellants refer, for reasons of contrast, to the practice adopted by the European Union for tests of this kind: in competitions organised by the European Union, the procedure for these tests and the criteria for marking them are explained clearly to candidates in the vacancy notice. The appellants are of course aware that, as the Secretary General says in his reply to their administrative complaints, "the Council of Europe has unfettered discretion in the running of its recruitment procedures and nothing compels it to follow those of the European Union". The fact remains, however, that the Secretary General's discretionary power in recruitment matters does not permit arbitrariness on his part. On the contrary, the appellants point out that the Secretary General is responsible for ensuring that the entire recruitment process is fair and objective and he must accordingly see to it that this process is consistent with the Organisation's regulations and the general principles of law as they are applied in the legal systems of international organisations. In the case in point, the appellants consider that the manner in which the ability tests were conducted was marked by arbitrariness, a lack of

information and a failure to give reasons and cannot therefore be regarded as satisfying the standards of transparency and objectivity by which the Secretary General and the Administration should have been guided in organising these tests.

50. The appellants add that another important principle, that of equal treatment of candidates, was violated owing to the fact that the Directorate of Human Resources organised these tests in such a way that candidates took them from home at any time convenient to them between 4 and 11 March 2011, and not all at the same time on the premises of the Organisation, which would have been the only way to ensure that candidates took them under the same conditions. The Directorate of Human Resources therefore has no way of ensuring that the candidates who passed the tests did not cheat, for example by enlisting the help of a third person familiar with this type of test. The appellants consider therefore that the Secretary General did not ensure the lawfulness of these tests, since they were taken at the time and from the place chosen by the candidates and without any supervision by the Administration.

51. The appellants also stress that several factors made for inequality between candidates in the actual conduct of the tests. As mentioned in the grounds of appeal, some candidates were placed in an advantageous position because they had the same questions in the practice phase as in the subsequent test.

52. The French-speaking appellants raise a further complaint specific to them, namely that they were placed at a disadvantage by the poor translation of the questions. Several French-speaking candidates, including some of the appellants, noticed inconsistencies or ambiguities in the wording of the questions in French, which proved to be a particular difficulty, and indeed a handicap, in the verbal reasoning test. The same inconsistencies and ambiguities were not to be found in the wording of the questions in English. The appellants infer from this that the French-speaking and English-speaking candidates did not enjoy equality of treatment.

53. In conclusion, the appellants consider that the ability tests complained of were unlawful for the reasons given.

They therefore consider that the test session which took place in March 2011 should simply be annulled. However, not wishing to make difficulties for the candidates who successfully completed the recruitment procedure and are currently on the competition reserve list, they modify the initial requests made at the time of lodging their appeals and now ask simply that a new series of written tests tailored to the recruitment of human rights lawyers be organised for them in conformity with the Staff Regulations and the general principles of law.

2. The Secretary General

54. For his part, the Secretary General disputes that the fact that the appellants were informed about the tests only shortly before they were actually held prevented them from preparing properly for them. He adds that, in any case, the appellants had the same time for preparation as all the other candidates and, consequently, there was no breach of equality or discrimination in relation to the other candidates.

55. Next, in response to the appellants' claim that the ability tests were not part of the preliminary selection stage, the Secretary General submits that preselection is not necessarily confined to consideration of the qualifications stated on the application form but may perfectly well include an additional stage, which, in the case in point, was success in the ability tests. In the Secretary General's view, ability tests are part of the preliminary selection stage – which is the first stage in the procedure – the second stage being the written examination. He points out that these tests were added because of the number of applications received and because applications had been invited from nationals of twenty-six member states.

56. In response to the appellants' argument that it was stated in a letter from a staff member of the Directorate of Human Resources that the tests were part of the written examination, the Secretary General contends that only official letters can be recognised as having the force of a decision.

57. The Secretary General then makes a series of points aimed at proving that the appellants must have known about the ability tests at an earlier date than that stated.

58. With regard to the criteria used for evaluating the test results, the Secretary General stresses that there was never any question of disclosing the criteria used for evaluating these or any other tests. This information must remain confidential and, furthermore, the Organisation was under no obligation to disclose the scales and criteria used for marking, neither before nor after the tests.

59. In response to the appellants' argument that the marks received are open to debate because "they do not correspond to the number of questions answered correctly", the Secretary General states that the results of ability tests are calculated according to the particular degree of difficulty (framework) and in comparison with the chosen reference population (general population). It was wrong to interpret the results by trying to assign a certain number of points per question. So, for example, a mark of 90 meant that the result was better than 90% of the candidates in that reference population at that particular degree of difficulty.

60. The Secretary General then puts forward a series of arguments to disprove the appellants' assertions concerning his decision to maintain the average at 50%, the fact that this decision was taken after the tests had been held, the lack of any supervision of the tests, and the claim that some candidates had been placed in an advantageous position in relation to others because, during the tests, they had the same questions as in the practice session, and because some questions were the same as those given as examples on the website of the company which designed the tests.

61. Lastly, in response to the complaint by the French-speaking appellants that the French-speaking participants had suffered a disadvantage because of bad translations, the Secretary General submits that this assessment is incorrect. The company which supplies the tests carries out verification procedures before approving a new language version. The French version had of course passed these checks designed to ensure fair treatment between groups of candidates who had chosen different languages. Moreover, the pass rates for French- and English-speaking

candidates in the tests for this competition were similar and did not corroborate the appellants' claims.

62. In conclusion, the Secretary General submits that there is no evidence of any breach of statutory provisions, regulations, general principles of law or legal practice, nor of any formal or procedural defect, that all relevant elements have been taken into account, that no faulty conclusions were drawn from the documents in the file and, lastly, that there has been no misuse of authority.

IV. THE TRIBUNAL'S ASSESSMENT

A. Late submission of Appeal N° 502/2011 – Alkiş v. Secretary General

63. The Tribunal notes from the documentation submitted to it by the parties after the hearing that this appellant personally took delivery of the registered letter informing her of the rejection of her administrative complaint on 30 May 2011 and lodged her appeal on 2 August 2011, ie after the statutory period of 60 days stipulated in Article 60, paragraph 3, of the Staff Regulations had expired. Her appeal must therefore be rejected for being out of time.

64. The appellant asks the Tribunal, however, to declare it nevertheless admissible on the basis of the last sentence of that provision. The Tribunal does not consider it necessary to apply this provision because the reasons advanced by the appellant are not duly justified reasons for making such a finding. The appellant says that there was no record on the envelope in her possession of the date on which the letter was delivered and she did not remember the exact date. Furthermore, because of the summer holidays she had had difficulty in conferring with the other persons who wished to lodge an appeal. In the view of the Tribunal, the appellant, as a well-informed lawyer, should have taken all the necessary steps to remedy this drawback in good time; in any case, these difficulties were not "duly justified reasons" for making such a finding. Indeed, they certainly did not constitute an exceptional case.

65. It follows that the appeal by Ms Alkiş must be declared out of time and therefore inadmissible.

B. The admissibility of the other eight appeals

66. The Tribunal must first of all consider the first objection of inadmissibility, namely the contention that the appellants had no interest in submitting an administrative complaint.

The Tribunal prefers to place this objection under the heading of inadmissibility *ratione personae*.

67. The Tribunal notes that the Secretary General bases his objection on the new wording of Article 59 of the Staff Regulations, as amended by the Committee of Ministers Resolution of 7 July 2010, regarding the persons entitled to submit an administrative complaint.

The Tribunal was recently confronted with this provision without being required to give a ruling (ATCE, Appeals Nos 474/2011 and 475/2011 - Françoise Prinz and Alfonso Zardi v.Secretary General, decision of 8 December 2011, paragraphs 70-72)

68. Here again, in the Tribunal's view, there is no need to consider the amendments introduced by the Resolution of 7 July 2010 because the Secretary General's objection must in any case be dismissed.

69. The parties were at pains to argue that the written tests were part of the written examination or to dispute that argument, as the case may be. Admittedly, Article 15 of the Regulations on Appointments states in paragraph 1 that "[c]ompetitive examinations shall include written papers or tests, or both, and interviews conducted by the Board", which suggests that tests are not part of the written procedure. However, the new wording of Article 59, paragraph 8 d., of the Staff Regulations says that the complaints procedure is open to staff and outside candidates who have been allowed to sit a "competitive recruitment examination provided the complaint relates to an irregularity in the examination procedure". The term "competitive recruitment examination" is undeniably wider in scope than "written papers", an expression frequently used by the Secretary General in the proceedings before the Tribunal in place of the correct wording of Article 59, paragraph 8 d., of the Staff Regulations.

70. It is therefore clear to the Tribunal that the wording of paragraph 8 d. of Article 59 of the Staff Regulations allows a candidate who has been admitted to a test session to submit an administrative complaint without its being necessary to decide whether the tests in question form part of the written examination or constitute a preliminary test. This is logical, moreover, because while a preliminary selection stage as it is conceived in the Organisation's recruitment procedure serves to assess applications without any active participation by the candidates, except for completing their application form, the holding of an ability test involves the candidates' active participation and can therefore only be considered as an examination within the meaning of Article 59, paragraph 8 d.

71. The Secretary General disputes that the administrative complaints – and the ensuing appeals – meet the other requirement of this provision, namely that they should relate to an "irregularity in the examination procedure".

72. Having studied the appellants' submissions, the Tribunal considers that the appeals do indeed relate to irregularities in the examination procedure. Consequently, there is no reason why the appeals should not be declared admissible.

73. In conclusion, this objection must be declared inadmissible.

74. Next, the Secretary General objects that the administrative complaints were out of time and that the ensuing appeals are therefore inadmissible.

75. The Tribunal notes that, according to its case law, the administrative act adversely affecting the appellants is indeed the decision, of which they were notified on 12 April 2011, that they had not passed the tests, and not that of 22 February 2011. It is of course arguable that the

appellants should have contested this first decision. But the fact that they did not does not prohibit them from contesting the second decision.

76. Consequently, this objection should also be dismissed and the Tribunal must now consider the merits of the appeals.

C. The merits of the eight appeals

77. The Tribunal considers that the first ground of appeal to be taken into consideration is that concerning the decision by the Appointments Board to make the candidates take ability tests.

78. In the opinion of the appellants, this decision, taken at the time of approving the lists of candidates satisfying the criteria, is consistent neither with the wording of Article 13 of the Regulations on Appointments (Appendix II to the Staff Regulations) nor with the vacancy notice.

79. The Tribunal notes that the provision governing the organisation of this procedure (Article 15 of the Regulations on Appointments) provides expressly that "[c]ompetitive examinations shall include written papers or tests, or both, and interviews conducted by the Board". In this case, however, the vacancy notice makes no mention whatsoever of the possibility that tests might be held: it merely states that "the recruitment procedure comprises three stages: preliminary selection, a written examination and an interview with the members of the Board".

80. Assuming that, as argued by the Secretary General, the tests were an integral part of the preliminary selection procedure, the Tribunal fails to see how the Appointments Board could have drawn up the list of preselected candidates before the actual holding of the ability tests, which it decided to hold at the same time as it adopted the list of preselected candidates. However that may be, the holding of these tests should have been mentioned in the vacancy notice, if only as a possibility, because it undoubtedly constitutes a fourth stage in the recruitment procedure. But this was not the case. Now, given that the vacancy notice determines the rules for the conduct of recruitment procedures, the failure to mention this stage in the selection of candidates constitutes an irregularity which vitiates the recruitment procedure. This irregularity is all the more blatant given the general move towards the introduction of ability tests in recruitment procedures.

81. In conclusion, this ground of appeal is well-founded and the acts complained of must be annulled.

82. Having reached this conclusion, the Tribunal has no need to consider the appellants' other grounds of appeal. It wishes however to draw the Organisation's attention to the misgivings it had regarding the organisation of these tests, which were held without any real supervision. The Secretary General did mention that candidates who pass the test have to take another series of tests conducted under supervision. However, leaving aside the fact that the addition of this new test session is not provided for in the vacancy notice either, the Tribunal notes that the "test group" principle in the evaluation of the first series of ability tests is likely to be distorted by candidates who cheat to the detriment of those who do not.

83. In their final submissions, the appellants say that the test session held in March 2011 should simply be annulled. However, not wishing to cause any difficulties for the candidates who have successfully completed the recruitment process and are now on the competition reserve list, they ask simply that a new series of written examinations tailored to the recruitment of human rights lawyers be organised for them in conformity with the Staff Regulations and general principles of law.

84. The Tribunal points out first of all that there can be no question here of annulling the recruitment procedure or the test session in its totality, or the ensuing decisions which affect only the appellants: the procedure must be annulled only insofar as the established irregularity is concerned.

85. In connection with the appellants' above-mentioned request, the Tribunal notes that, according to Article 60, paragraph 6, of the Staff Regulations, responsibility for executing its decisions lies with the Secretary General. It will be for him to execute this decision in due course by deciding at which stage and in what way the procedure is to be resumed. If the appellants consider that the manner in which the Secretary General executes this decision causes them prejudice, they will be able to avail themselves of the legal remedies available to them and challenge this manner of execution, as other appellants have done in other cases.

19. Since the appellants did not ask for reimbursement of the costs of these proceedings, the Tribunal considers that there is no reason to rule on this question.

For these reasons,

The Administrative Tribunal:

Orders the joinder of the appeals;

Accepts the objection of inadmissibility raised by the Secretary General as to Appeal No 502/2011 lodged by Ms Alkiş;

Declares this appeal out of time;

Dismisses the objections of inadmissibility raised by the Secretary General in Appeals Nos 486-489/2011, 491/2011 and 498-500/2011;

Declares Appeals Nos 486-489/2011, 491/2011 and 498-500/2011 well-founded and annuls the decisions complained of.

Adopted by the Tribunal in Strasbourg on 16 April 2012, and delivered in writing on 20 April 2012 pursuant to Rule 35, paragraph 1, of its Rules of Procedure, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	C. ROZAKIS