

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeals Nos. 555/2014 and 556/2014 (Geneviève MAYER and Fabrice KELLENS
v. Secretary General)**

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,
Mr Jean WALINE,
Mr Rocco Antonio CANGELOSI, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The two appellants, Ms Geneviève Mayer and Mr Fabrice Kellens, lodged their respective appeals on 17 September 2014. On the same day, the two appeals were registered as Nos. 555/2014 and 556/2014.
2. The appellants having requested anonymity when lodging their appeals, the Chair ruled on 30 September 2014 that there were no grounds for granting anonymity in this case.
3. On 3 November 2014, the appellants filed a joint supplementary memorial.
4. On 3 December 2014, the Secretary General submitted his observations on the two appeals.
5. On 9 February 2015, the appellants submitted joint pleadings in reply.
6. The public hearing on this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 17 March 2015. The appellants were represented by Ms Carine Cohen-Solal,

lawyer practising in Strasbourg, while the Secretary General was represented by Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law (Jurisconsult), assisted by Ms Maija Junker-Schreckenber and Ms Sania Ivedi, administrative officers in the same department.

7. Following the hearing, the Tribunal decided that the Secretary General would file three of the five documents whose disclosure had been requested by the appellants.

8. On 2 April 2015, the Secretary General filed two of the three requested items (regarding the third, he said that this document did not actually exist) and another document on his own initiative.

9. On 16 April 2015, the Chair, acting in accordance with Rule 42 of the Tribunal's Rules of Procedure, decided, after obtaining the agreement of the other judges, to send the appellants a copy of the Secretary General's reply and an expurgated version of the documents appended thereto.

On 17 April 2015, the appellants asked for information about the expurgated parts of the appended documents.

10. On 21 April 2015, the appellants submitted their comments on the expurgated documents which had been sent to them.

11. On 24 April 2015, the Secretary General said that he had no comments to make in reply.

THE FACTS

I. THE FACTS OF THE CASE (common to both appeals)

12. The appellants are both permanent members of the Council of Europe staff.

The female appellant holds grade A5 and, after working for several years in the Secretariat of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), is currently assigned to another department of the Directorate General of Human Rights and Rule of Law.

The male appellant holds grade A4 and is Deputy Executive Secretary of the CPT.

13. In 2013, the Organisation published vacancy notice No. e257/2013 for the purpose of filling, in accordance with the external recruitment procedure, the post of Executive Secretary of the CPT (grade A6) in the Directorate General of Human Rights and Rule of Law (DGI).

14. According to this vacancy notice, as far as the eligibility criteria were concerned, the following experience was required:

“professional experience, preferably of 12 years or more, in a relevant field of activities; direct experience of visiting or working in places where persons are deprived of their liberty by a public authority would be an asset”.

15. As far as competencies were concerned, the following professional and technical competencies were stipulated:

“profound knowledge of issues concerning deprivation of liberty, in the criminal justice, mental health and/or immigration contexts, with particular emphasis on means of protecting persons deprived of their liberty from ill-treatment; the ability to establish facts and make sound assessments in complex situations; extensive experience in managing human and financial resources at a senior level, preferably in an international context; conceptual thinking at a strategic level”.

16. The further information provided included a statement to the effect that, under its equal opportunities policy, the Council of Europe aims to achieve parity in the number of women and men employed in each category and grade and that, in the event of equal merit, preference would be given to the applicant belonging to the under-represented sex, without, however, specifying which sex this was.

17. The appellants both applied for the post.

18. According to the information supplied by the Secretary General, the Directorate of Human Resources initially drew up a shortlist of candidates meeting the criteria of the vacancy notice. This list was then submitted to the administrative entity concerned, namely DGI, for comment and approval. Lastly, the shortlist was submitted to the Secretary General, who drew up the final list of candidates selected for the next stage in the recruitment procedure, namely the assessment of competencies.

19. The appellants were both among the five candidates shortlisted to take part in the further stages of the procedure: an online assessment by an outside company, written and oral assessments by that same company, and an interview with an *ad hoc* panel appointed by the Secretary General, which consisted of three senior officials.

20. On 4 April 2014, the male appellant was informed that the Secretary General had decided not to select him for the next stage in the procedure, which was an interview with the Secretary General, assisted by the Director of his Private Office.

21. On the same day, however, the female appellant was informed that she had been selected for the next stage along with two other candidates, and was called to an interview with the Secretary General on 7 May 2014.

On 4 June 2014, the female appellant was informed that the Secretary General had chosen another candidate, whose appointment had also been announced on the Organisation’s intranet on 2 June 2014.

22. On 27 June 2014, the appellants submitted an administrative complaint to the Secretary General under Article 59, paragraph 2, of the Staff Regulations.

In their complaints, both appellants challenged the validity of the recruitment procedure and, hence, the appointment of another candidate on the grounds, inter alia, that he did not satisfy all the requirements of the vacancy notice in terms of eligibility (“experience”) and competencies (“professional and technical experience”).

The female appellant also disputed the validity of the procedure on the grounds that the Secretary General had respected neither his own equal opportunities policy nor the principle of equal treatment of candidates, given that two different assessment companies were used, nor even the principle of transparency inherent in recruitment procedures.

23. On 18 July 2014, the Secretary General dismissed the two administrative complaints as being unfounded.

24. On 17 September 2014, the appellants lodged their appeals.

II. THE RELEVANT PROVISIONS

25. Article 12, paragraph 1, of the Staff Regulations reads 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.”

26. Appendix II to the Staff Regulations constitutes the Regulations on Appointments.

27. Article 8 of these Regulations (as amended by Committee of Ministers Resolution (2013)59 of 11 December 2013, with effect from 1 January 2014) is worded as follows:

Article 8 – Applications

“Applications shall be admissible only if they comply with the conditions set out in the vacancy notice and all required information is provided.”

28. The procedure for recruiting high-ranking officials of the Organisation (grades A6 and A7) differs from the “ordinary” recruitment procedure. It is governed by Article 25 of the Regulations on Appointments, the relevant part of which reads as follows:

Article 25 – Procedure for appointment to grades A6 and A7

“1. Any vacancy at grade A6 or A7 shall be notified to Permanent Representations and published within the Secretariat unless, where particular circumstances so require, the Committee of Ministers shall decide otherwise on a proposal by the Secretary General.

2. The Secretary General shall make an appointment after an informal exchange of views with the Committee of Ministers, during which he or she shall make known his or her intentions and the reasons for his or her choice.

(...)”.

THE LAW

I. JOINDER OF THE APPEALS

29. In view of the close interconnection between appeals nos. 555/2014 and 556/2014, the Administrative Tribunal ordered their joinder pursuant to Rule 14 of its Rules of Procedure.

II. THE PARTIES’ SUBMISSIONS

30. The appellants ask the Tribunal to annul the recruitment procedure of vacancy notice No. e257/2013 and the Secretary General’s decision to appoint another candidate. They also ask the Tribunal to order that a new recruitment procedure be organised to fill the post opened to competition.

31. For his part, the Secretary General asks the Tribunal to declare appeal No. 555/2014 partially inadmissible and ill-founded and appeal no. 556/2014 ill-founded, and to dismiss both appeals.

A. The partial inadmissibility of appeal No. 555/2014

32. The Secretary General submits that the female appellant’s claim relating to the procedure for assessing the candidates’ competencies is inadmissible because it was submitted out of time. He considers that the period of thirty days for submitting the administrative complaint to him started to run when she received the email of 5 December 2013 inviting her to sit the competency assessment because, from that time on, she was fully informed of the procedure for this assessment exercise, and in particular of the fact that it would include an individual interview with an outside consultant. The Secretary General further submits that she had no interest in bringing proceedings.

33. However, in her pleadings in reply and at the hearing, the female appellant said that she did not wish to maintain the claim to which the Secretary General had raised an objection of inadmissibility. This question was therefore no longer applicable.

B. The merits of the appeals

34. As to the merits of the appeals, the appellants submit two identical grounds of appeal: non-compliance with the recruitment procedure (Article 8 of the Regulations on Appointments – paragraph 27 above) and non-compliance with recruitment policy (Article 12, paragraph 1 of the Staff Regulations – paragraph 25 above).

35. The female appellant also raised two grounds specific to her appeal: non-compliance with equal opportunities policy and lack of transparency of the recruitment procedure.

36. The parties' submissions may be summarised as follows:

1. Arguments common to both appeals

a) Non-compliance with the recruitment procedure (Article 8 of the Regulations on Appointments)

37. Both appellants state that, in the light of the procedure chosen for the purpose of filling the post, the rules on external recruitment are applicable in this case and must be fully complied with. While the Secretary General is fully entitled to decide which of all the candidates has, in his opinion, the profile best matching the post in question, that candidate must necessarily satisfy the eligibility and competency requirements specified in the vacancy notice.

38. After reiterating the terms of Article 8 of the Regulations on Appointments (paragraph 33 above), the appellants submit that the candidate appointed "possessed, on the day of his application and on the day of his appointment, neither the experience nor the competencies required by the vacancy notice". They add that the functions and responsibilities previously exercised by that candidate were irrelevant to the requirements stipulated in the vacancy notice. Consequently, he could not be shortlisted and, still less, appointed by the Secretary General.

39. The appellants subsequently dwell on the professional experience and competencies of the candidate appointed in relation to their own. However, the Tribunal considers that it is unnecessary to summarise the submissions relating to the appellants here, as the dispute is not about their competencies but about those of the candidate appointed. Moreover, the appellants are aware of the scope of that dispute.

40. In the appellants' view, this candidate did not have experience in a relevant field of activities (paragraph 14 above), "bearing in mind that 'relevant field of activities' necessarily refers to one of the fields of activity of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and not to human rights in general". They add that the prevention of torture is a quite specific human rights issue and, in the light of his CV, the candidate appointed did not possess the experience required by the vacancy notice.

41. As regards the required professional and technical competencies (paragraph 15 above), the appellants claim that the candidate appointed did not possess them, even though they concede that these competencies need not necessarily have been acquired in the CPT. Furthermore, the statement made by the Secretary General as proof that this requirement was satisfied, namely that the candidate appointed had an "extensive cross-the-board knowledge" of human rights, is insufficient in their view.

42. For his part, the Secretary General focuses first of all on the scope of his discretionary power relating to the appointment of senior officials, which applies both to the appointment decision and to his method of reaching that decision. He points out that the appointment procedure for these posts differs from the usual appointment procedures and is intentionally flexible. He adds that appointment to grade A6 and A7 posts corresponds to the highest level of

responsibility in the job hierarchy, and stresses the importance of such appointment decisions, particularly in political terms, since the future of a whole sector of activity depends on them.

43. He further submits that the nature of the functions and responsibilities exercised by the holders of these posts and their position in the hierarchy of the Council of Europe Secretariat justify the Secretary General's legitimate interest in requiring of these staff members a special bond of trust and loyalty and appointing the candidates who, in his view, best meet those requirements. For this reason, he is entitled to decide which of all the candidates has, in his view, the profile best matching the post in question.

44. The Secretary General then refers to the case law of the Administrative Tribunal, which on several occasions has set out the principles governing the Secretary General's powers relating to appointment and the wider discretion he enjoys in the appointment of senior officials of grades A6 and A7 as compared with posts at lower grades (ATCE (formerly CRCE), appeal No. 170/1992, Muller-Rappard v. Secretary General, decision of 25 September 1992, paragraphs 16-17).

45. The Secretary General lastly refers to the Tribunal's case law to the effect that the wide discretionary power vested in him must by no means be seen as an arbitrary power because it remains subject to the rules in force in the Organisation (ATCE, appeals Nos. 474 and 475/2011, Prinz and Zardi v. Secretary General, decision of 8 December 2011, paragraph 75).

46. The Secretary General looks next at the admissibility of the successful candidate's application in relation to the criteria set out in the vacancy notice.

47. He notes that this application, like those of the appellants, had been considered as being among those best matching all the criteria of the vacancy notice, which had led to this candidate being shortlisted. In his view, there is no doubt about the admissibility of his application. The appellants' allegations in this regard are totally untrue and unfounded.

48. Regarding the criteria for professional experience and professional and technical competencies, the Secretary General makes the following observations.

49. Where experience is concerned, the Secretary General submits that the candidate appointed has nearly 30 years' extensive across-the-board experience of human rights protection. Furthermore, although this is not an essential requirement given that it is mentioned as being an asset, the candidate appointed also has practical experience of visiting places of detention through his previous experience at the head of a non-governmental organisation for the defence of human rights.

The Secretary General adds that the vacancy notice does not make it obligatory for applicants to have direct experience of working in the CPT. In his view, the appellants' allegations regarding the irrelevance of the successful candidate's previous experience amount essentially to the observation that the latter has no direct experience of working in the CPT. The appellants are thus attempting to mislead the Tribunal by giving an interpretation of the vacancy notice which is contrary to its clear wording: it requires experience in a relevant field of activities and not previous experience of working in the CPT.

There is no doubt in the Secretary General's mind that the candidate appointed possesses professional experience in a relevant field of activities, that of human rights protection. He adds that an in-depth knowledge of deprivation of liberty issues, whether in the criminal justice, mental health or immigration field, can be acquired in areas of work and contexts other than those of the CPT.

50. The Secretary General considers that the candidate appointed also possesses the required professional and technical competencies. He details the duties he performed in his previous posts and states that he has an extensive across-the-board experience of human rights. He infers from this that, in all these respects, the candidate appointed indeed satisfies all the criteria of the vacancy notice and his application was perfectly admissible.

b) Non-compliance with recruitment policy (Article 12, paragraph 1, of the Staff Regulations)

51. After reiterating the terms of Article 12, paragraph 1, of the Staff Regulations, according to which "[r]ecruitment should be aimed at ensuring the employment of staff of the highest ability, efficiency and integrity", the appellants submit that the Secretary General had a duty to appoint the candidate possessing the best qualifications, professional experience, and professional and technical competencies. In their view, the impugned appointment is therefore vitiated by a manifest error of assessment since the candidate appointed did not possess qualities comparable to those of the other candidates, and particularly those of the appellants.

52. The appellants go on to consider the scope of the Secretary General's discretionary power in this field and submit that the Secretary General complied neither with the provisions of the Staff Regulations relating to appointment procedure nor with the requirements stated in the vacancy notice, which resulted in unequal treatment of candidates. They accordingly submit that he flouted all the applicable rules in order to appoint a candidate whose application was quite simply inadmissible. The appellants infer from this that there has been a breach of the principle of good faith. Lastly, they allege a misuse of power since a recruitment procedure must not be organised for the purpose of legitimising the appointment of a staff member earmarked for the post opened to competition. If that was the case, the choice of the "best candidate" would be a sham.

53. For his part, the Secretary General submits that there is no evidence that the impugned decision is flawed by any error of assessment. He maintains that he chose the best candidate in accordance with Article 12 of the Staff Regulations.

He adds that he exercised his power of decision in the light of all the information in his possession, namely the candidates' CVs, the results of the competency assessments, the interviews with the panel and his own interviews with the candidates.

The Secretary General states that, in exercising his power of discretion, he deviated from the recommendation of the *ad hoc* panel formed for the purposes of this appointment procedure. In this connection, he emphasises that the role of the panel is that of an *ad hoc* advisory body whose recommendation is not binding on the Secretary General. He retains his full power of

decision and discretion. The role of this panel was to prepare the ground for the Secretary General, to evaluate the applications in order to recommend to him the candidates with the best profile.

The Secretary General notes that the panel merely recommended a profile capable of ensuring the continuity of the CPT's work. This fell short of the ambition he had for the CPT, a body emblematic of the Council of Europe. He added that, following the interviews, he had been convinced by the successful candidate's excellent profile and, after the different stages of the recruitment procedure, in accordance with his discretionary power, had reached the conclusion that this candidate had the profile best matching the requirements of the post to be filled.

2. *Arguments specific to appeal No. 555/2014*

54. The female appellant also alleges a failure to comply with equal opportunities policy and with the principle of transparency in recruitment matters.

55. Regarding the first claim, she submits that, in view of her qualifications and experience, the post opened to competition should have been offered to her rather than to the candidate who was appointed. She considers herself to be much better qualified than the candidate who was appointed and says that the Secretary General was wrong in claiming that the successful candidate's application was better than hers. In her view, out of the three candidates interviewed by the Secretary General, she should have been chosen, if only to ensure compliance with equal opportunities policy.

56. She then alleges a lack of transparency because she does not know the content of the assessment centre's report on her, or the general opinion, the recommendations of the *ad hoc* panel and the reasons for the Secretary General's choice, as required by Article 25, paragraph 2 of the Regulations on Appointments (paragraph 28 above).

57. In response to the Secretary General's statement that the appellant could have asked the Directorate of Human Resources for feedback, she emphasises that the Secretary General had the opportunity to give her answers to her questions in his reply to the administrative complaint.

58. The appellant therefore asks that the Secretary General disclose five documents to the Tribunal and herself.

59. For his part, the Secretary General stresses that, under the Organisation's equal opportunities policy, preference can only be given to the under-represented sex in the event of equal merit.

60. With regard more specifically to the female appellant, the Secretary General emphasises that, despite her excellent knowledge of the functioning of the CPT, her application was not sufficiently convincing in several respects and did not match the direction he wished to give to this post.

61. Consequently, since the female appellant and the successful candidate were not of equal merit, there was no reason to give preference to former.

62. Regarding the alleged lack of transparency of the procedure, the Secretary General notes that the appellant complains that she does not know the content of the competency assessment report on her, the panel's recommendations and the reasons for the Secretary General's choice. He adds that, according to her, he could have answered her questions in his reply to her administrative complaint. He notes, however, that, in her administrative complaint, the appellant did not request this information, but merely alleged non-compliance with the principle of transparency. She did not raise any questions to which the Secretary General was called on to reply.

The Secretary General adds that, as he pointed out in his reply to the female appellant's administrative complaint, the DRH provides feedback to all candidates who so request and would have been ready to provide information to the female appellant on this occasion. It appears, however, that the female appellant did not ask for feedback on any of the stages in the recruitment procedure. Consequently, she cannot complain of any lack of transparency.

II. THE TRIBUNAL'S ASSESSMENT

A. Partial inadmissibility of appeal No. 555/2014

63. The Tribunal notes that the female appellant withdrew the claims to which the Secretary General had raised objections of partial inadmissibility. Consequently, there is no need to rule on those objections.

B. The merits of the appeals

64. The Tribunal must first observe that the parties disagree on the interpretation to be given to one of the eligibility criteria stated in the vacancy notice, with which everyone is required to comply, including the Secretary General.

65. The appellants consider that professional experience "in a relevant field of activities" (paragraph 14 above) must be taken to mean specific experience of the CPT's work; in the Secretary General's opinion, however, this refers to experience in the wider field of human rights protection, of which the CPT's work constitutes a specific branch.

66. The Tribunal accepts this second interpretation.

67. The terms used in the vacancy notice are sufficiently broad that the narrower interpretation proposed by the appellants can be rejected on the basis of the Latin maxim "*ubi lex voluit dixit*".

Furthermore, if interpreted in the manner proposed by the appellants, the first part of this paragraph would constitute at the very least an *obiter dictum*, if not actually a *contradictio in terminis* – given that it is described merely as an "asset" - with the second part of the paragraph concerning this eligibility criterion, which states that "direct experience of visiting or working in places where persons are deprived of their liberty by a public authority would be an asset". Indeed, even assuming that the CPT might conceivably not confine its activities to places in

which persons are deprived of their liberty, the fact remains that the CPT's supervisory activities are carried out exclusively in such places. Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provides as follows:

"(...). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment."

And Article 2 stipulates that:

"Each Party shall permit visits, in accordance with this Convention, to any place within its jurisdiction where persons are deprived of their liberty by a public authority."

68. Lastly, it should be noted that, according to the wording of this criterion, the required professional experience was to be in "a" relevant field of activities. In the Tribunal's opinion, if the intention had been to restrict competency to the CPT's specific area of work, the vacancy notice would have stipulated professional experience in "the" relevant field of activities.

69. The Tribunal must therefore bear in mind this interpretation of the disputed eligibility criterion in examining the appellants' grounds of appeal. However, it is not for the Tribunal to comment on the appropriateness of setting such a broad eligibility criterion given the narrower scope of the CPT's activities. Moreover, in their submissions to the Tribunal, the appellants do not allege that there is anything improper about such a broad eligibility criterion.

1. Arguments common to both appeals

70. With regard to the complaint of non-compliance with the recruitment procedure, and hence with Article 8 of the Regulations on Appointments, it appears, in the light of the Tribunal's above observations concerning the eligibility criterion, that the candidate appointed possessed the required competencies and, consequently, that his application was admissible.

The complaint is therefore unfounded. Furthermore, the appellants do not allege that the successful candidate did not possess the required competency as the Tribunal has just interpreted it.

71. With regard to the second ground of appeal common to both appellants, the Tribunal notes that the Secretary General clearly deviated from the recommendations made by the *ad hoc* panel.

72. As the Tribunal has already stated (ATCE, appeals nos. 474 and 475/2011, Prinz and Zardi v. Secretary General, decision of 8 December 2011, paragraph 75):

"75. The Tribunal accepts that, as it has stated several times in its earlier decisions, the Secretary General enjoys wide discretionary powers in the matter of appointments and the Tribunal cannot substitute its own assessment for that of the Secretary General. It also accepts that this margin of assessment is wider in the case of appointments to senior posts (grades A6 and A7) for which specific procedures have been laid down. However, the Tribunal observes that these posts are and remain Council of Europe staff posts, and that consequently the recruitment rules must as far as possible be in line with the fundamental recruitment criteria within the Organisation and there can

be no question of infringing the principles which must govern the matter. It is clear that observance of the recruitment conditions laid down in a vacancy notice manifestly come within this sphere, which admits of no exceptions.”

73. The Tribunal must accordingly ask itself two questions: was it permissible for the Secretary General to deviate from the *ad hoc* panel’s recommendation and, if so, did he exceed the margin of appreciation which he enjoys in this matter?

74. Where the first question is concerned, the Tribunal must observe that it is not stated anywhere that the Secretary General cannot deviate from the recommendations made to him by the *ad hoc* panel regarding either the merits of an application or the considerations which lead the panel to conclude that one candidate is better qualified than another to fill the post opened to competition. Consequently, if the Secretary General does deviate from them, it cannot be concluded that he failed to observe the rules laid down in Article 12 of the Staff Regulations.

75. The Tribunal also considers that there is no general principle of law requiring the Secretary General to abide by the opinion of a panel appointed by him to give him an opinion. It is true that the Secretary General said that there was no specific text laying down the panel’s terms of reference and omitted to produce evidence such as the notification to the panel members of his decision to have them participate in the procedure as members of this *ad hoc* panel or the message convening the panel. However, the terms of the panel’s conclusions are sufficiently clear for it to be concluded, on the one hand, that its task was to make a recommendation and, on the other, that even if its own view was that the female appellant stood out from the other candidates, at no time was the successful candidate clearly regarded as being unfit to perform the duties of the post opened to competition.

76. Where the second question is concerned, the Tribunal notes that the appellants not only discussed the question of the successful candidate’s competencies from the standpoint of the admissibility of the application, but also argued that the Secretary General was required to appoint the candidate possessing the best qualifications, professional experience and professional and technical competencies. In examining this second question, it must be borne in mind that a discretionary power, however broad it may be, must not be arbitrary.

77. However, nothing in the facts brought to the Tribunal’s knowledge indicates that, in assessing the candidates, the Secretary General departed from the principles laid down in Article 12, paragraph 1, of the Staff Regulations. The Secretary General reached the conclusion that the candidate appointed was the best even though the *ad hoc* panel had been of a completely different opinion. Even assuming that the conclusions reached by the Secretary General were erroneous, nothing proves that they were not, nevertheless, covered by the scope of his margin of appreciation.

78. The Tribunal notes that the appellants submitted that there was bias in that the Secretary General wished at all costs to appoint his chosen candidate. However, there has been no evidence in support of this assertion and the fact that the Secretary General deviated significantly from the assessments made before his final decision does not prove that this decision was the result of bias. The Tribunal further notes that, instead of asking the *ad hoc* panel to make a fresh recommendation including several applicants, which would have been in line with the

instructions he had just given for the future, the Secretary General himself drew up the list of the candidates he would be interviewing. However, this departure from the procedure he had just laid down for the future is not in itself proof of bias.

79. The Tribunal therefore comes to the conclusion that the Secretary General did not exceed the margin of appreciation conferred on him and, accordingly, this ground of appeal must also be rejected.

2. Arguments specific to appeal No. 555/2014

80. Regarding the alleged failure to comply with equal opportunities policy, the Tribunal notes that, according to the vacancy notice, preference was to be given to the under-represented sex.

81. The Tribunal first notes that the vacancy notice did not specify which sex was under-represented and that, for her part, the female appellant has not proved that women were to be regarded as the under-represented sex in this case.

82. However that may be, without needing to dwell on the inconsistency in the arguments put forward by the female appellant, who claims to be better qualified than the candidate appointed and subsequently requests the application of a principle which applies in the event of equal merit, the Tribunal finds that there has been no breach of the rules in the instant case. Indeed, the Secretary General considered that the successful candidate's application was better than that of the female appellant. The Tribunal therefore fails to see how this principle could be found to have been violated. The fact that the *ad hoc* panel had expressed the opinion that the female appellant's application was better than that of the candidate appointed does not justify the opposite conclusion.

83. Consequently, this ground of appeal must be rejected.

84. As far as the second ground of appeal is concerned, the Tribunal agrees with the Secretary General that the female appellant cannot allege a breach of the principle of transparency since she did not request any information during the administrative stage prior to the commencement of proceedings. The fact that the Secretary General did not provide her spontaneously with that information during the administrative complaint stage does not warrant a change of opinion on the Tribunal's part.

3. Concluding remarks

85. The Tribunal can only welcome the Secretary General's decision to appoint an *ad hoc* panel to give him an opinion on applications for posts of grade A6/A7 in the Organisation, a procedure which is not provided for in the regulations or governed by written rules laid down by the Secretary General himself.

86. The Tribunal nevertheless wishes to draw the Organisation's attention to the desirability of regulating the filling of these posts by means of rules laid down in advance with a sufficient

degree of certainty and clarity. The Tribunal is aware that these are senior management posts subject to specific rules in respect of which some definite latitude must be left to the Secretary General. The fact remains, however, that these are Council of Europe posts and, as such, must be filled in accordance with settled rules and procedures clearly laid down in advance in order to ensure sound management of the Organisation (see, *mutatis mutandis*, ATCE, appeals Nos. 258/2000 and 261/2000 - José-Maria Ballester v. Secretary General, decision of 31 January 2002, paragraph 50).

87. The Tribunal further notes that this case, like others brought before it in the past, raised the issue of access by the appellants to documents classified confidential by the Secretary General (although the legal source of this classification is not specified), where the appellants consider that a full knowledge of the content of these documents may be useful for the defence of their interests.

88. Without going into the question of whether the Secretary General's representative tasked with defending the interests of the Organisation had full access to these documents before the Tribunal ordered their disclosure, the Tribunal considers that it would be in the interests of the Organisation to regulate the matter of access to documents concerning decisions taken in recruitment and promotion competitions. In the absence of such rules (whose application would in any event be subject to the Tribunal's supervision), the Tribunal will be obliged to decide each case on its own merits, bearing in mind Article 6 of the European Convention on Human Rights, under which equality of arms is a key requirement of a fair hearing.

89. Lastly, the Tribunal believes it would also be useful to point out that, even supposing the expurgated documents had been fully disclosed to the appellants and they had been more critical in their submissions to it, this would not have altered its position as to the lawfulness of the Secretary General's decision. Indeed, the Tribunal asked itself the questions which the appellants would have been able to raise on the basis of the expurgated parts of the documents and, contrary to what happened in the first case resulting from the Prinz and Zardi appeals, it came to the conclusion that, in the instant case, the Secretary General did not exceed the limits of his margin of appreciation. At most, he may have come close to them, but he did not overstep them.

C. Conclusion

90. In conclusion, the appeals are unfounded and must be dismissed.

For these reasons, the Administrative Tribunal:

Orders the joinder of appeals nos. 555/2014 and 556/2014;

Decides that there is no need to rule on the objection of partial inadmissibility raised against appeal no. 555/2014;

Declares the appeals unfounded and dismisses them;

Orders each party to bear its own costs and expenses.

Adopted by the Tribunal in Strasbourg on 28 April 2015 and delivered in writing on 28 April 2015 pursuant to Rule 35, paragraph 1, of the Tribunal's Rules of Procedure, the French text being authentic.

The Registrar of the Administrative
Tribunal

The Chair of the Administrative
Tribunal

S. SANSOTTA

C. ROZAKIS