# CONSEIL DE L'EUROPE
# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF
## ADMINISTRATIVE TRIBUNAL

**Appeal No. 554/2014 (Viaceslav PETRASHENKO 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,

has delivered the following decision after due deliberation.

**PROCEEDINGS**

1. The appellant, Mr Viaceslav PETRASHENKO, lodged his appeal on 5 August 2014. The appeal was registered on 14 August 2014 as No. 554/2014.

2. On 15 September 2014, the Secretary General forwarded his observations on the appeal.

3. On 25 September 2014, the appellant filed pleadings in reply.

4. On 4 November 2014, the Secretary General filed a rejoinder.

5. On 7 November 2014, the appellant submitted observations in reply.

6. The parties having agreed to waive oral proceedings, the Tribunal decided on 5 December 2014 that there was no need to hold a hearing.

7. The appellant having expressed doubts regarding the fact that the Deputy Registrar was assisting the Tribunal in this appeal, since she had been a member of the

Appointments Board referred to in the case, the Registrar informed the appellant that the person in question had abstained from assisting the Tribunal from the time the appeal was lodged.

## THE FACTS

### I. THE FACTS OF THE CASE

8. The appellant is a Ukrainian national who participated in a procedure for the recruitment of a Ukrainian lawyer to the Registry of the European Court of Human Rights (vacancy notice e238/2013 for a position of grade A1/A2).

9. On 13 January 2014, the appellant took the written tests. On 15 May he took an online verbal reasoning test and was interviewed by the Appointments Board.

10. On 18 June 2014, the appellant was informed that, following the interview, and on the Appointments Board's recommendation, the Registrar of the European Court of Human Rights had decided to appoint another candidate. He was also informed that his name was not on the reserve list drawn up following the recruitment procedure.

11. On 2 July 2014, the appellant submitted an administrative complaint to the Secretary General under Article 59, paragraph 2, of the Staff Regulations. He claimed in particular that the decision complained of had infringed his rights under the Regulations.

12. Having not received a reply, the appellant submitted this appeal on 5 August 2014.

13. However, the Secretary General had rejected the administrative complaint on 30 July 2014 and a letter had been sent to the appellant.

14. In his observations in reply to those of the Secretary General (paragraph 4 above), the appellant, who lives in Kyiv (Ukraine), stated that he had not received the above-mentioned letter of 30 July. In the later stages of the proceedings, neither party raised this matter again.

15. However that may be, the Directorate of Human Rights sent a copy of this letter by email on 13 October 2014, and the appellant acknowledged receipt of it the same day.

### II. THE RELEVANT LAW

16. Article 59, paragraphs 2 and 4, of the Staff Regulations, which stipulates the procedure for submitting an administrative complaint – and, consequently, an appeal to the Administrative Tribunal – reads as follows:

> "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.
>
> (…)
>
> 4. The Secretary General shall give a reasoned decision on the complaint as soon as possible and not later than thirty days from the date of its receipt and shall notify it to the complainant. If, despite this obligation, the Secretary General fails to reply to the complainant within that period, he or she shall be deemed to have given an implicit decision rejecting the complaint.
>
> (…)."

17. Article 60, paragraphs 1 and 3, of the Staff Regulations, which governs the procedure for submitting an appeal to the Tribunal, reads as follows:

> "1. In the event of either explicit rejection, in whole or part, or implicit rejection of a complaint lodged under Article 59, the complainant may appeal to the Administrative Tribunal set up by the Committee of Ministers.
>
> (…).
>
> 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 4. Nevertheless, in exceptional cases and for duly justified reasons, the Administrative Tribunal may declare admissible an appeal lodged after the expiry of these periods.
>
> (….)."

## THE LAW

18. The appellant asks the Tribunal to annul the Secretary General's decision not to appoint him to the post opened to competition and not to place him on the reserve list.

19. The Secretary General asks the Tribunal to declare the appeal inadmissible and ill-founded and to dismiss it.

## I. THE PARTIES' SUBMISSIONS

20. The parties' submissions may be summarised as follows.

### A. Admissibility

1) *The Secretary General*

21. The Secretary General submits that the appeal is inadmissible because the appellant lodged his appeal without having acquainted himself with the content of the Secretary General's reply to his administrative complaint. Given that he adopted a

reasoned decision, which he notified to the appellant on 30 July 2014, he considers that the appellant cannot legitimately claim that his complaint was implicitly rejected. For this reason, he argues, the appellant failed to comply with the procedure provided for in Article 60, paragraph 3, of the Staff Regulations (paragraph 16 above) and his appeal should be declared inadmissible. He further submits that this conclusion is in keeping with the Tribunal's case law (ATCE, appeal No. 466/2010 – KRAVCHENKO v. Secretary General, decision of 27 January 2011, paragraph 93).

2) *The appellant*

22. For this part, the appellant stresses that he did not know that the Secretary General had sent him a reply and that he had not received it at the time of filing his observations in reply to those of the Secretary General. He emphasises that there is nothing in the Staff Regulations to suggest that, once the time available to the Secretary General for giving his decision has expired, a complainant must wait a few weeks before lodging his or her appeal.

23. Next, the appellant points out that he became aware of the existence of this rejection decision when reading the Secretary General's observations of 16 September 2014 and states that he is ready to lodge a fresh appeal within a period of sixty days from that date if the Tribunal considers that there has been a violation of the procedure on this point.

24. The appellant adds that, having acquainted himself with the reasons for the rejection of his administrative complaint, he has no changes to make to his appeal of 5 August 2014.

**B. Merits of the appeal**

*1) The appellant*

25. The appellant puts forward several arguments, which concern the composition of the reserve list, the interviews conducted by the Appointments Board and, lastly, the consideration given, in the final assessment, to the written tests, including the aptitude tests.

26. He submits that the procedure lacked transparency and objectivity. Furthermore, he alleges discrimination based on the criterion of employment or internship experience at the Council of Europe since preference was given to the candidate possessing such experience. For this reason, the appellant considers that, from the start, his chances of passing the interview for the post opened to competition were unrealistic and purely theoretical. Yet the criterion in question was not stated in the vacancy notice but added, and, he submits, this preference is not in line with the case law of the European Court of Human Rights, which prohibits all discrimination based on unobjective or unreasonable criteria. The appellant considers that the assessment of the candidates during the interview with the Appointments Board was not impartial and objective and that the Board misused its powers.

27. In conclusion, the appellant asks for the annulment of the decision not to appoint him to the post opened to competition and not to place him on the reserve list.

*2) The Secretary General*

28. The Secretary General does not deny that the candidate selected had experience of working in the Registry of the European Court of Human Rights, as did most of the candidates invited for interview with the Appointments Board. He adds that the Organisation aims to recruit the best candidates and that the procedure applied in this case was consistent both with the regulations governing recruitment and with the terms of the vacancy notice.

29. The Secretary General notes that it is not because a candidate passes the examination that the Appointments Board recommends his or her appointment or places him or her on the reserve list. He adds that it can be seen from the minutes drawn up by the Appointments Board after the interviews that the Board made a detailed assessment of the candidates' respective qualifications and aptitudes in relation to the requirements of the post to be filled. Following its assessment, the Board did not recommend the appellant's candidature and considered that his performance was not sufficiently convincing. The minutes show that the Appointments Board gave ample reasons for its decision not to recommend his candidature and based that decision on objective factors.

30. With regard to the appellant's allegation that the fact of having already been employed or having served an internship at the Council of Europe was a new eligibility criterion not mentioned in the vacancy notice, the Secretary General submits that the appellant's allegation as to the existence of unjustified discrimination of this kind against candidates who, like him, had never been employed or served an internship at the Council of Europe, would need to substantiated. However, the appellant cites no specific, verifiable facts in support of his argument, and fails even to present prima facie evidence.

31. In the Secretary General's view, due account was taken of the principle of equality of treatment between candidates in the selection procedure, which was conducted conscientiously and in accordance with the applicable regulations. Only the candidates' qualifications, experience and competences were taken into consideration. No requirement not stipulated in the vacancy notice was taken into account by the Appointments Board in its assessment of the different candidates, and there is no evidence of any favouritism. The appellant's candidature was examined in good faith and with due respect for the principles guaranteeing fair competition between candidates, and the assessment of his interview by the Appointments Board was not vitiated by any defect.

32. The Secretary General concludes that the recruitment procedure at issue was conducted in accordance with established practice, the applicable regulations and the general principles of law. Furthermore, there is no evidence to suggest that the competent authorities exceeded in any way the limits of their discretion or committed any manifest error by pursuing any aim other than that of fulfilling their duty.

## II. THE TRIBUNAL'S ASSESSMENT

### A. The Secretary General's objection of inadmissibility

33. The Tribunal notes that, according to the information in its possession, on the date when he filed his observations in reply to those of the Secretary General, i.e. a little over fifty days from the expiry of the time-limit for giving a decision on the administrative complaint, the appellant had still not received notification of the Secretary General's decision. The parties agree that this was not due to any negligence on the part of the Organisation or the appellant (see, *mutatis mutandis*, ATCE, appeal no. 416/2008, ŠVARCA v. Secretary General, decision of 24 June 2009, paragraphs 30-38).

34. The Tribunal has repeatedly emphasised the importance of compliance with deadlines and, of course, with the requirements linked to compliance with deadlines. However, it is clear from the terms of Article 60, paragraph 3, of the Staff Regulations that the Tribunal can declare admissible an appeal lodged out of time.

35. In the light of the particular circumstances of the case, the Tribunal considers that this rule can apply not only to cases where the time-limit is exceeded, but also to the instant case. These circumstances include the fact that the appellant was in Ukraine and also the fact that on 25 September 2014 – before the start of the period within which he would have been able to lodge a second appeal, i.e. when he finally received a new notification by email on 13 October 2014 – the appellant stated, without receiving a reply, that he could lodge a fresh appeal if the Tribunal deemed it necessary.

36. Accordingly, a declaration of inadmissibility of his existing appeal would penalise him unnecessarily because, ultimately, the circumstances of the case do not affect observance of the principle of legal certainty inherent in the Council of Europe system, in the interests of both the Organisation and its staff (*ibid*, paragraph 33). Moreover, the appellant does not base any arguments in this appeal on the content of the Secretary General's decision.

37. In conclusion, the Secretary General's objection of inadmissibility is unfounded and must be dismissed.

### B. The merits of the appeal

38. The Tribunal notes that the starting-point for examining the appeal is the fact that the appellant was not deemed suitable for recruitment: indeed, on 18 June 2014 he was informed not only that another candidate would be appointed following the recruitment procedure, but also – and the Tribunal attaches particular importance to this – that his name had not been put on the reserve list. The appellant does not argue that any error was made in assessing his competencies and his suitability for recruitment. He merely asserts, without providing any proof of this, that he was ruled out because of the preference given to candidates with experience of working at the Council of Europe.

39. While it is true that it is difficult for him to provide proof relating to discussions of which he has no knowledge, given the secrecy surrounding them, the fact remains that the appellant has not provided the Tribunal with any details concerning the tenor of the interview which might have made it possible to substantiate his claims. Neither does the appellant provide any evidence showing that he possessed the required competencies to be recruited and that the Organisation wrongly excluded him and gave undue preference to other candidates, so that it exceeded the limits of its discretionary power in matters of recruitment. The fact that the appellant passed the written paper and the aptitude tests and the fact that he attended relevant law courses do not constitute prima facie evidence.

40. The appellant having requested the Tribunal to obtain a copy of the minutes of the Board's discussions without disclosing it to the appellant himself, the Tribunal considers, in the light of the foregoing, that it is not required to order the production of this document.

41. Consequently, the appellant has provided no prima facie evidence of any irregularity in the procedure, despite the fact that the burden of proving his allegations rests with him.

III. CONCLUSION

42. The appeal is unfounded and must be dismissed.

For these reasons, the Administrative Tribunal:

Dismisses the objection of inadmissibility raised by the Secretary General;

Declares the appeal unfounded;

Orders each party to bear its own costs.

Adopted by the Tribunal in Strasbourg on 17 March 2015 and delivered in writing pursuant to Rule 35, paragraph 1, of the Tribunal's Rules of Procedure on 20 March 2015, the French text being authentic.

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