CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeal No. 457/2008 (Natasha PACE ABU-GHOSH (II) v. Secretary General)

The Administrative Tribunal, composed of:

Ms Elisabeth PALM, Chair,
Mr Hans G. KNITEL, Judge,
Mr José da CRUZ RODRIGUES, Substitute Judge,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Ms Natasha Pace Abu-Ghosh, lodged her appeal on 23 December 2008. It was registered the same day under No. 457/2008.

2. The appellant filed her grounds for appeal at the same time.

3. On 3 February 2009 the Secretary General submitted his observations on the appeal. The appellant filed a memorial in reply on 2 March 2009.

4. Since the parties had indicated their willingness to forego oral proceedings, the Tribunal decided that there was no need to hold a hearing.

5. During the proceedings the Tribunal received a copy of the Secretary General's reply to the appellant's administrative complaint.

THE FACTS

6. The appellant is a temporary member of the Council of Europe's staff and a UK national. She was recruited on the basis of a temporary contract and assigned to the registry of the European Court of Human Rights.

7. The appellant applied to sit the general external competitive examination for the recruitment of administrative officers (grade A1/A2), open to nationals of all the Council of Europe member states (vacancy notice e84/2007).

The appellant's participation in the competitive examination gave rise to two disputes with the Organisation which were dealt with in two different appeals: Appeal No. 408/2008 and the present appeal.

A. The first appeal (No. 408/2008)

8. Following the final decision not to admit her to this competitive examination the appellant instigated proceedings to challenge the decision and on 13 May 2008 lodged an appeal (No. 408/2008) against her exclusion from the competition.

9. The Tribunal subsequently ruled on Appeal No. 408/2008: in a decision delivered on 31 March 2009 the Tribunal declared the appeal to be well founded and annulled the decision not to admit the appellant to the written part of competitive examination 84/2007.

In paragraph 51 of its decision the Tribunal said:

> "51. The Tribunal is aware that, following the written tests, the appellant was not invited for interview because of her results in the written tests and that she has challenged this subsequent decision in a second appeal (No. 457/2008).
>
> The Tribunal notes that it is not for the Tribunal to rule today on the merits of that new appeal [No. 457/2008], since the present appeal [408/2008] is concerned solely with the appellant's entitlement to take part in the written tests."

B. The present appeal

10. In the meantime, while the first dispute was still ongoing, the appellant was invited to take part in the examination in question on a provisional basis and subject to the Tribunal's final ruling on the case.

11. On 15 September 2008 the appellant learned that she had not qualified for the interview stage of the competition.

12. On this occasion the Directorate of Human Resources told the appellant the marks she had obtained in the written papers: her overall average was below the 12/20 required by the Appointments Board and, consequently, she was not invited to participate in the interview stage of the examination. The appellant twice met with a staff member from the Directorate of Human

Resources and learned that she had scored 14.25/20 in the dissertation paper, 13.60/20 in the French language paper, 10/20 in the executive summary paper and 6.67/20 in the job simulation test.

13. On 13 October 2008 the appellant lodged an administrative complaint under Article 59 of the Staff Regulations. This read as follows (original English text):

> "On 15 September 2008 I received an email from Human Resources informing me that I had achieved an overall score of 11.82 in the above cited General A Competition. As a decision had been taken to only invite candidates with an overall mark of 12 to interview, my written examination had therefore been unsuccessful.
>
> I met with Ms. […] from Human Resources on two occasions, who kindly informed me that I had achieved one of the highest marks for the eliminatory dissertation paper, with a 14.25 score. My mark for the French language paper was also pretty high, with 13.6 (despite my being given a 0 for French in the last British Lawyers' Competition which took place in June 2007). My Executive Summary was given a 10, I was informed that although I had included all salient points and my summary was well-structured, it was slightly long.
>
> However, my performance in the *Mise en Situation/Job* Simulation test had played a decisively negative role, as I was given a significantly low 6.67 as a mark. Ms. […] kindly asked the external examiners how someone who had gained one of the highest marks for the dissertation could be rated so poorly for the job simulation test. The examiners replied with a medley of comments, I was told that I displayed energy, vitality, a good degree of authority and self confidence and that I was a real decision maker. Notwithstanding, I was informed that I lack empathy and am too direct.
>
> I would like to highlight that, by achieving an overall score of 11,82, it is 0.18 of a point which inhibits me from being invited to interview. As the breakdown of my results for this competitive examination show, it is the *mise en situation* test which has stood as a barrier to my progressing with my career. This is the case despite my having achieved one of the top marks across the board for my dissertation.
>
> Without wishing to contest the merits of the *mise en situation* test *per se*, I respectively submit that it is unjust to allow such a subjective evaluation of a candidate's psychological profile to have such a decisive and as is here the case, negative, effect on her career. It appears that my psychological make-up has been determined to the precision of two decimal points and it is two decimal points that stand between me and any advancement in my career. I was told that the external *mise en situation* examiners, when reminded that I had produced one of the highest ranking dissertations in the Competition, remarked that they were not surprised as they had discerned that I was someone who was exceptionally good at their job. How can someone who is exceptionally good at their job be evaluated so poorly and so exactly in such a subjective test? Moreover, I respectfully wish to comment that I find the external examiners remarks rather discrepant at times and also too general in nature, which makes them all the more

hard to challenge. Surely, fairness would dictate that one should be able to challenge observations made about her that she perceives to be ill-founded or unfair.

In sum, I submit that the *mise en situation* test's opaque and incoherent application was manifestly unfair in my case. The unhappy result is that two decimal points (0.18) in what is undisputedly a highly subjective test have barred me from progressing with my career at this venerable institution.

I respectfully request that my paper be reassessed in the light of my above comments."

14. In a reply dated 4 November 2008, the Secretary General deemed the administrative complaint unfounded and rejected it.

15. On 23 December 2008 the appellant lodged the present appeal.

THE LAW

16. The appellant asks to be called for the interview stage of competition e84/2007.

17. The Secretary General, for his part, asks the Tribunal to declare the appeal wholly or partially inadmissible and/or ill-founded and to dismiss it.

A. SUBMISSIONS OF THE PARTIES

1. Admissibility of the appeal

18. The Secretary General contends that the appellant did not, in her administrative complaint, ask to be invited to participate in the interview stage of the competitive examination. As a result he claims that this part of the appeal is inadmissible on the ground that internal remedies have not been exhausted.

Without prejudice to the above, the Secretary General makes the further point that, in any case, the principle of good administrative practice does not allow a candidate to be invited to participate in the interview stage of an examination when he or she has failed the written, eliminatory, papers; the appellant, having failed the written tests, cannot ask to be invited for interview.

The Secretary General thus considers the appeal to be partially inadmissible.

19. The appellant, for her part, stresses that the present appeal is wholly linked to her first appeal and that the stated aim of the latter was to secure an invitation for interview, assuming she was successful in the written part of competitive examination e84/2007. She adds that the aim of the present appeal is to challenge the final assessment of her test papers, because she obtained an average mark of 11.82/20, lower than the minimum average of 12/20 required to qualify for the interview stage.

In conclusion, the appellant disagrees with the Secretary General and maintains that this part of the appeal *is* admissible.

2. Merits of the appeal

20. The appellant refers to the arguments outlined in her administrative complaint (paragraph 13 above).

21. She maintains that the examiners or the Secretary General made unfair and improper use of their wide discretionary powers in allowing a shortfall of 0.18/20 to bar her from progressing in her career, on the basis of a highly subjective test which the Secretary General agrees was not fully explained to her.

22. In conclusion, the appellant asks that her appeal be accepted and that she be invited for interview.

23. The Secretary General, for his part, points out that international case-law is consistent in saying that competent authorities have wide discretion in determining how written tests in an examination are conducted and managed, but also how they are assessed. He adds that this discretion, which must be exercised on the basis of objective criteria, is not, however, exempt from judicial review, the purpose of which is to ascertain whether a manifest error or misuse of powers occurred in the exercise of the discretion or whether the limits of the discretion have been manifestly exceeded (cf. ATCE, No. 172/93, *Feriozzi-Kleijssen v. Secretary General*, decision of 25 March1994, paragraph 31; cf. also CJEC, case 40/86, *George Kolivas v. Commission* [1987], paragraph 11).

24. The Secretary General states that the Appointments Board found no irregularities in the way in which the test papers were marked.

The marking was impartial, anonymous and objective. The anonymised scripts were marked by two duly appointed examiners, in accordance with Article 15, paragraphs 1 and 5 of the Regulations on Appointments. The Secretary General adds that the examiners were all required to apply a number of criteria in marking all the candidates' scripts, including the appellant's. He points out that if two examiners had given significantly different marks, a third examiner would have been called in to mark the papers as well. That was not deemed necessary in this case because the examiners who marked her scripts were in agreement, both in the level of the marks they awarded and the comments they made.

In the Secretary General's view it is worth pointing out - since the appellant complains about the assessment criteria used by the examiners in the job simulation test - that this matter falls entirely within the examiners' exercise of their discretionary power. He argues that the assessment of the supervisory body cannot override that of the competent authorities unless there have been irregularities or manifest errors in the conduct of the procedure. Fairness is guaranteed by the fact that the same rules and criteria are applied to all, including candidates already employed by the Organisation. It should also be remembered that the importance attached to the job simulation test in the competitive examination announced by vacancy notice e84/2007 was approved by the Appointments Board.

The Secretary General maintains that the assessment criteria applied to written papers in an examination are an integral part of the examination and as such must remain confidential. All candidates are subject to the same marking scale and criteria, so they all benefit by having a single set of rules applied to them. He adds, drawing on international case-law, that he is not obliged to divulge the marking scale and criteria for an examination either before or after it is held. But when the appellant had a feedback interview on her results with the Directorate of Human Resources, she was told what the marking criteria were, as she herself admits in her administrative complaint.

Concerning the nature of the examiners' comments, the Secretary General states that the comments on the appellant's written papers which the Directorate of Human Resources passed on to her were only a synopsis of the comments made. Whilst it is understandably in candidates' interests to have a full account of all the comments made, and their precise content, the Appointments Board is free to divulge such parts as it sees fit to unsuccessful candidates and has no obligation to return their scripts or to give them all the comments made by the examiners. He quotes here Article 9, paragraph 1 of the Regulations on Appointments:

> "Its deliberations, reports, opinions and recommendations shall be confidential. The Board may indicate in its report which information may be communicated to unsuccessful candidates."

25. In view of the foregoing the Secretary General considers that no irregularity has been identified either in the preparation and conduct of the tests or in the way in which they were marked. Likewise there is nothing to suggest that the competent authorities in any way exceeded their discretionary power or committed a manifest error, in the pursuit of an objective other than that of doing their duty with regard to the competitive examination in question. The marking procedure was fully in order, and whilst one can understand the appellant's disappointment, nothing in her arguments points to any breach of that procedure.

II. THE TRIBUNAL'S ASSESSMENT

A) Admissibility

26. Regarding the merits of the plea that internal remedies have not been exhausted, the Tribunal notes that since, by the fact of her administrative complaint, the appellant was challenging the marking of her written tests – which, in the Tribunal's view includes her complaint at not being invited for interview – this plea is without merit.

27. The Tribunal points out in this context that under Article 60, paragraph 2 of the Staff Regulations the Tribunal only has the power to annul a decision, which means in this case that it can annul the Secretary General's decision not to invite the appellant for interview, but it cannot order the Secretary General to invite her to participate in the later stage of the procedure (cf., *mutatis mutandis*, ATCE, Appeal No. 413/2008, *Verneau v. Secretary General*, decision of 11 March 2009, paragraphs 54 and 55).

28. Consequently the Secretary General's plea must be rejected.

B) Merits

29. The Tribunal first points out that in its decision on Appeal No. 408/2008 it ruled only on the issue of whether the appellant's participation in the competitive examination should be made final. It did not address the matter of whether the appellant should be invited for interview.

30. The appellant first of all challenges the mark she was given in the job simulation test. But she provides no conclusive arguments, either in her administrative complaint or in her appeal, that the marking was unlawful. She reasons rather that it was inappropriate to exclude her because of a small shortfall in her marks compared with the minimum average required for progression to the interview stage. Moreover, in her administrative complaint the appellant expressly states that she does not contest the merits of the job simulation test *per se*, but argues rather that it is unjust to allow a subjective evaluation of a candidate's psychological profile to have a decisive – and, in her case, negative – effect on her career. The appellant did, admittedly, say that she thought the examiners' comments were "rather discrepant at times and also too general in nature, which makes them all the more hard to challenge. Surely, fairness would dictate that one should be able to challenge observations made about her that she perceives to be ill-founded or unfair". But the appellant offers no argument to prove her allegation that "the *mise en situation* test's opaque and incoherent application was manifestly unfair in my case."

31. As to the appellant's complaint that she was not given a full explanation and that the examiners or the Secretary General thus made unfair and improper use of their "discretionary power", the Tribunal observes that the appellant received an explanation from the Directorate of Human Resources of how her test had been marked, which the Tribunal regards as sufficient (cf. paragraph 12 above).

32. The Tribunal notes that it has previously had occasion to look at the matter of the Secretary General's discretionary power in respect of recruitment (see ATCE, Appeal No. 250/1999, aforementioned decision in *Schmitt v. Secretary General*, paragraphs 25-27). The Tribunal held that the Secretary General, who has the authority to make appointments (Article 36 c of the Statute of the Council of Europe and Article 11 of the Staff Regulations), holds a discretionary power. In matters of recruitment the scope of this power allows him to familiarise himself with and assess the requirements of the service and the professional aptitudes of candidates for a vacant post.

33. But the Tribunal further holds that this power must always be exercised lawfully. Undoubtedly, in the event of a challenge, the assessment of an international court cannot take precedence over that of the Administration. But it has a duty to check that the impugned decision was taken in accordance with the Organisation's rules and the general principles of law as laid down in the legal systems of international organisations. The Tribunal subsequently found (*ibid.*, paragraph 25) that:

> "It must consider not only whether the decision was taken by a competent authority and whether it is legal in form, but also whether the correct procedure was followed and whether, from the standpoint of the Organisation's own rules, the administrative

authority's decision took account of all the relevant facts, any conclusions were wrongly drawn from the evidence in the file, and there was any misuse of power".

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

There is nothing in the facts laid before the Tribunal to indicate that the Appointments Board failed to act in accordance with the requirements of the vacancy notice and the principles laid down by the Tribunal or that its assessment was arbitrary. There is no evidence either that the Appointments Board drew conclusions that were patently incorrect or that its assessment of the appellant's qualifications was arbitrary.

It is certainly unfortunate for the appellant to have failed by a margin of just 0.18/20. However, there is nothing to suggest that the administrative decision concerning her was unlawful and it is not for the Tribunal to impose its assessment of the matter over that of the Secretary General.

35. In deciding not to invite the appellant for interview, the Secretary General did not breach the law by which he was bound and did not draw conclusions which were manifestly incorrect in relation to the vacancy notice or the rules of the Organisation, such as to incur the censure of the Tribunal.

36. In conclusion, the appeal is ill-founded and must be dismissed.

For these reasons the Administrative Tribunal:

Rejects the Secretary General's plea of partial inadmissibility;

Declares the appeal admissible;

Dismisses it;

Orders each party to bear its own costs.

Delivered by the Tribunal in Strasbourg on 17 June 2009 and recorded as a written judgment, pursuant to Article 35, paragraph 1 of the Tribunal's Rules of Procedure, on 24 June 2009, the French text being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	E. PALM