

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeals Nos. 288/2001 and 296/2002 – Taner BEYGO (X) and (XI) v. Secretary General

The Administrative Tribunal, composed of:

Mr Kurt HERNDL, Chair,
Mr José da CRUZ RODRIGUES,
Mr Helmut KITSCHENBERG, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar, and
Ms Claudia WESTERDIEK, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. Mr Taner Beygo lodged two appeals, dated 19 November 2001 and 19 January 2002, which were posted on 19 November 1991 and 19 January 2002. These appeals were received on 22 November 2001 and 22 January 2002 and were registered on 27 November 2001 and 1 February 2002 as files nos 288/2001 and 296/2002 respectively.

2. On 21 January 2002, Ms Claire Beygo, the appellant's representative, lodged observations in Appeal No. 288/2001. On 1 March 2002, the Secretary General lodged his observations. The Secretary General was represented by Mr Jörg Polakiewicz, acting head of the Legal Advice Department, Directorate General I – Legal Affairs.

3. On 25 April 2002, the appellant lodged observations which were to be regarded both as a reply to the Secretary General's observations in Appeal No. 288/2001 and as supplementing Appeal No. 296/2002.

On 25 June 2002, the Secretary General lodged his observations in Appeal No. 296/2002. On 25 November 2002, the appellant lodged observations in reply.

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

At the Tribunal's request, the Secretary General provided various information in writing on the procedure relating to recognition of the appellant as unfit for service. The appellant subsequently submitted his comments.

THE FACTS

5. The appeals are connected with a dispute between the appellant and the Secretary General concerning the appellant's entitlement to an invalidity pension (Appeals Nos 227/1997, 229/1997 and 242/1998). That dispute itself forms part of a wider dispute which culminated in the appellant's removal from his post (Appeals Nos 211/1995, 213/1995, 220/1995 and 222/1997).

6. The Tribunal determined all of these appeals in a decision of 18 April 1999. It allowed Appeal No. 227/1997 "in so far as it [sought] to secure the continued examination of the [appellant's] application for recognition as an invalid" and declared it "inadmissible for the remainder" (operative part of the decision). The Tribunal dismissed Appeals Nos 229/1997 and 242/1998.

7. On 26 May 1999, the Secretary General informed the Administrative Tribunal of the measures taken to execute the decision. He stated that the procedure concerning examination of the appellant's invalidity application had been resumed at the stage at which it had been broken off on 31 January 1996.

For fuller details, the Tribunal refers to its decision of 18 April 1999.

A. Appeal No. 288/2001

8. On 10 December 1999 and 10 March 2001, the appellant wrote to the Secretary General concerning the results of the invalidity procedure. The Secretary General replied on 10 January and 5 April 2001.

That correspondence related to the Secretary General's request that the appellant undergo a further examination before the matter was referred to the Invalidity Board.

9. By letter of 1 June 2001, the appellant informed the Secretary General that he saw no need for a further examination and reiterated his request for payment of invalidity pension. However, he asked the Secretary General to keep him informed of the name of the expert, the date and place of the examination and the expert's remit "in the unlikely event of [his] continuing to insist on a further examination".

10. The Secretary General did not reply.

11. On 24 August 2001, the appellant lodged an administrative complaint against the Secretary General's failure to reply. His grounds of complaint were that the Secretary General had never convened the Invalidity Board or paid the outstanding invalidity pension. He asked the Secretary General to adopt the requested decision or measure as quickly as possible in strict compliance with the decision of the Administrative Tribunal of the Council of Europe of 28 April 1999.

12. On 20 September 2001, the Secretary General wrote to the appellant, through the Director General for Administration and Logistics, as follows (translation):

“Re: administrative complaint of 24 August 2001 ...

The Secretary General has instructed me to provide the following reply to the above administrative complaint.

In your complaint, you claim that the Secretary General never convened the Invalidity Board, thus blocking your application, and you seek payment of outstanding pension in respect of that application.

However, I should remind you that, following the decision of the Administrative Tribunal of 28 April 1999, which set aside the decision to discontinue the invalidity procedure, the Secretary General took the necessary steps to complete the procedure.

Please refer to the letter from the head of the Secretary General’s Private Office of 12 January 2000 summarising the position and requesting that you cooperate in the invalidity procedure and in particular undergo the requested medical examination (copy enclosed).

I note that, now, eighteen months later, you state that you are prepared to undergo that examination.

The Secretary General has instructed the Administration and the competent services to proceed with the medical examination. Dr B. ... has been asked to carry out the additional examination required by Professor Br. and will be in touch with you to tell you the date and place of the medical examination. He will be given his instructions by the Council of Europe’s medical adviser. The details are therefore protected by medical confidentiality and I am unable to inform you of them.”

13. On 10 November 2001 the appellant brought the present action.

B. Appeal No. 296/2002

14. The facts of this appeal are similar to those of Appeal No. 288/2001, to which the Tribunal refers (see paragraphs 8 to 10 above).

15. On 20 November 2001, the Director General for Administration and Logistics wrote to the appellant as follows (translation):

“Further to the above administrative complaint, the Secretary General has instructed me to reply to you as in my letter of 20 September 2001, a copy of which is enclosed.

In that letter, in which I summarised the position, I invited you to proceed with the next stage in the invalidity procedure and undergo the requested medical examination.

I also note that in your letter of 24 August 2001, you stated that you were prepared to undergo that examination. You nonetheless refused to attend for medical examination by Dr B. on 22 October 2001 after being given the appointment by registered letter of 21 September 2001.

Until such time as you agree to undergo such an examination, the Secretary General will be unable to take the necessary steps to complete the invalidity procedure.

I therefore inform you that the procedure is currently suspended.”

16. On 19 January 2002, the appellant brought the present action.

THE LAW

I. JOINDER OF THE APPEALS

17. The appellant requests that the two appeals be joined.

18. As the appeals are closely connected, the Administrative Tribunal hereby orders their joinder, in accordance with Rule 14 of its Rules of Procedure.

II. APPEAL No. 288/2001

A. Admissibility

1) Arguments of the parties

19. The Secretary General submits that the present appeal is inadmissible, for two reasons.

He submits that the appeal is inadmissible *ratione temporis* in so far as the appellant seeks a declaration that the request that he undergo a further examination by Dr B. is unlawful. The appellant had been aware of the Secretary General's decision to proceed with such an examination since September 1999, the month in which the head of the Human Resources Department had notified him by registered letter of an appointment with Dr B. However, his administrative complaint was lodged on 24 August 2001, almost two years later.

20. The Secretary General further submits that the appeal is premature in so far as the appellant claims an invalidity pension from the Council of Europe. In order to be granted an invalidity pension, the appellant must be recognised by the Invalidity Board as suffering from permanent invalidity rendering him wholly unfit to perform the duties of his post in the Organisation. The Secretary General notes that by refusing to undergo the requested examination, the appellant is preventing the Invalidity Board from reaching a decision. He argues that, in the absence of such a decision, the appellant is unable to rely on an administrative act adversely affecting him. The Secretary General concludes that the present appeal is devoid of purpose and that there is no need to adjudicate on its merits.

21. Last, the Secretary General requests the Tribunal to ascertain whether the appellant complied with the period of sixty days prescribed for bringing an appeal (Rule 60 (3) of the Staff Regulations).

22. The appellant has not submitted any comments on the objections of invalidity.

2) Decision of the Tribunal

23. As regards the last of these questions, the Tribunal observes that the appeal was posted on 19 November 2002 (see paragraph 1 above). It was therefore submitted in time.

24. On the objection that the appellant was late with his appeal against the Secretary General's decision that he should undergo a further examination before resumption of the invalidity procedure, the Tribunal agrees that the appellant can no longer challenge that decision. The Secretary General has shown that the appellant was aware of that decision at a date prior to 10 March 2000. The Secretary General's objection must therefore be upheld.

25. On the other hand, the Tribunal does not consider that the appeal is wholly premature. A distinction must be drawn between the application for payment of an invalidity pension and the appellant's request that examination of his recognition of unfitnes application resume. Although the first part of the appellant's complaint is devoid of purpose because neither the Invalidity Board of the Council of Europe nor the Tribunal, in its decision of 28 April 1999, has recognised that the appellant has such a right – and the decision of the French Social Affairs Tribunal has no legal effect in the Council of Europe legal system – the fact remains that the appellant is entitled to complain of delays in examination of the case for which he is not to blame. Consequently, the Secretary General's objection must be dismissed in so far as it seeks to have that part of the appeal declared premature too.

B. The merits of the appeal

1) Arguments of the parties

26. The appellant complains of a misuse of power and alleges infringement of Instruction 13/3 of the Pension Scheme Rules. In the part relating to the convocation and composition of the Invalidity Board, that provision is worded as follows:

“Convocation and composition of the Invalidity Board

iii) When the Invalidity Board is to be convened at the staff member's request, the request shall be addressed to the Head of Personnel responsible for him: it must include his formal application to be declared a permanent total invalid, and give the name of the medical practitioner who is to represent his interests on the Invalidity Board. The request may be accompanied by a medical file, under separate confidential cover, for the attention of the Organisation's medical adviser.

Upon receipt of this request, the Head of Personnel shall forward it to the Organisation's medical adviser with a request to contact the medical practitioner nominated by the staff member. The staff member must ask his medical practitioner to

forward to the Organisation's medical adviser all medical evidence in support of his application.

Within 30 calendar days following receipt of the staff member's request, the Head of Personnel shall inform the medical practitioner nominated by the staff member of the name of the medical practitioner who will represent the Organisation on the Invalidity Board.

iv) When the Invalidity Board is to be convened at the request of the Organisation, the Head of Personnel shall notify the staff member accordingly and ask him to make his observations, if any, and to nominate a medical practitioner to represent him on the Board, within 30 calendar days following receipt of the said notification.

This notification shall also state the name of the medical practitioner who will represent the Organisation on the Invalidity Board.

The Head of Personnel shall ask the staff member to forward all medical documents concerning him to the medical practitioner representing the Organisation.

v) If one of the parties has not nominated a medical practitioner to represent it on the Invalidity Board within the prescribed time-limit, the other party shall ask the Chairman of the Appeals Board / Administrative Tribunal of the Organisation to appoint such a medical practitioner as soon as possible. He may, for this purpose, consult a list drawn up by:

- a national judicial body, or

- the Medical Council, or

- failing this, another national body of the staff member's duty station or home country.

vi) The third medical practitioner shall be selected by the other two within 30 calendar days at the most following notification of their names to the parties; failing agreement on this nomination within the prescribed time, the Chairman of the Appeals Board/ Administrative Tribunal shall nominate, at the request of either party, this third medical practitioner in accordance with the procedure set out in the above subparagraph.

27. In the appellant's submission, the misuse of power is manifested in the refusal to convene the Invalidity Board, in the request for a further medical examination and in the refusal to apply a final judgment delivered by the French courts. The appellant also contends that the Administration's action impedes implementation of the Council of Europe Administrative Tribunal's decision of 28 April 1997 in Appeal No. 227/1997 and also of the judgment of the French Social Affairs Tribunal of 25 November 1998 (as to the latter decision, see the decision of 28 April 1997).

28. He maintains that the examination requested by the Director General for Administration is a delaying tactic intended to block the invalidity procedure. He takes the view that the examination is unlawful and he alleges harmful intent and harassment. Further, in his submission the examination is no longer necessary and no longer serves any purpose, since it cannot establish his state of health in November 1995. On that point, he refers to the

judgment of the French Social Affairs Tribunal of 25 November 1998, which he says established his state of health.

The appellant goes on to state that the request is unlawful since the Pension Scheme Rules provide that a medical examination may be ordered by the Secretary General only where the staff member is already receiving an invalidity pension.

29. Last, he claims that there has been a breach of the Pension Scheme Rules in so far as he nominated a medical practitioner whom the Organisation's medical adviser has never contacted.

30. The Secretary General, on the other hand, insists first of all that the further examination Dr B. was asked to carry out, which was merely intended to supplement the report of Professor Br.'s 1996 examination, which is still valid and will be examined by the Invalidity Board, was not devoid of purpose. The Secretary General bases his request on paragraph viii.b of Instruction 13/3, cited above, which is worded:

“Meeting of the Invalidity Board

viii) The Invalidity Board shall have at its disposal:

...

b) a medical file containing the report presented by the medical representative of the party - the Organisation or the staff member - that has asked for the Board to be convened, and, if appropriate, the medical report presented by the other party, as well as any reports or certificates from the staff member's medical practitioner or from practitioners whom the parties have consulted. This medical file shall also contain details of the length of absences of the staff member concerned which have provided grounds for the Board to be convened, as well as the nature of the disability on which the Board is asked to give a ruling.

All these reports, documents and certificates must be communicated to the three medical practitioners.”

31. Next, as regards the appellant's claim that the request for a medical examination is unlawful, the Secretary General contends that the appellant cannot claim entitlement to an invalidity pension without at the same time agreeing to his entitlement's being established according to the procedures applicable to Council of Europe staff.

32. Third, the Secretary General maintains that he has not broken the Pension Scheme Rules, since the head of the Human Resources Department asked the appellant in his letter of 10 June 1999 whether he was still in favour of the appointment of Dr S. He also notes that the delay did not cause any loss to the appellant and reiterates that the procedure in respect of the appellant's invalidity application could not resume because the appellant refused to undergo a further medical examination.

It follows, in the Secretary General's submission, that the appellant's allegations of harassment and misuse of power are unfounded.

33. The Secretary General invites the Tribunal to declare Appeal No. 288/2001 unfounded.

In his observations in reply, the appellant maintains all the arguments set out in his initial observations.

2) *Decision of the Tribunal*

34. The Tribunal considers that it must first of all determine the question on which it is to adjudicate. The real issue is not whether or not the appellant is still represented by a medical practitioner but whether or not he must undergo the further medical examination desired by the Secretary General before his application for recognition of unfitness is examined.

35. After finding that the present action is admissible, the Tribunal notes that it cannot resolve the question whether the Secretary General was entitled to order a further medical examination and to instruct Dr B. to perform it because the appellant did not challenge the relevant decision within the prescribed period.

36. Nor can the Tribunal adjudicate in the present action on the formal decision, taken by the Administration on 20 November 2001, to suspend the invalidity procedure. That decision was adopted after the appellant had brought the matter before the Tribunal and forms the subject matter of Appeal No. 296/2002, which is dealt with below.

37. The Tribunal is of the view that it must take into consideration the question whether the Secretary General's delay in referring the matter to the Invalidity Board, owing to his wish to have a further medical examination carried out, constitutes an administrative act which the appellant can challenge before the Tribunal and, if so, whether that delay adversely affected the appellant.

38. The Tribunal notes that by letter of 1 June 2001, in which he requested to be kept informed of various details concerning the medical examination "in the unlikely event" of the Secretary General's continuing to insist on such an examination, the appellant asked the Secretary General to resume the invalidity procedure. The Secretary General did not convene the Invalidity Board and did not provide the appellant with the information requested concerning the further medical examination.

39. In the Tribunal's view the letter constituted a request for an administrative act within the meaning of Article 59(1), third sentence, of the Staff Regulations and the Secretary General's failure to respond within sixty days was an implied rejection decision that the appellant can challenge before the Tribunal.

40. The fact that the Secretary General instructed the appellant to attend on 21 November 2001 and that the appellant did not comply cannot affect the present action.

41. As to whether the decision not to convene the Invalidity Board is capable of adversely affecting the appellant, it must be held that the appellant is entitled to have his request for invalidity examined by the Council of Europe Invalidity Board.

42. Under Instruction 13/3(viii)(b) of the Pension Scheme Rules, the further report requested by the Secretary General is not necessary for consideration of the matter by the Invalidation Board. That provision states that “any” medical report presented by the party other than the party that has asked for the Board to be convened is to be submitted to the Invalidation Board. To suspend the procedure in order to oblige the claimant to undergo a further examination therefore goes further than the rules allow.

43. It is, of course, for the Invalidation Board to establish, on the basis of the evidence before it, whether it is able to give a ruling on the application for recognition of unfitness and, if so, to give its decision. It may also ask the appellant to undergo an additional medical examination by a medical practitioner appointed by it (see Instruction 13/3(ix)). The claimant suffers the adverse consequences of any failure to cooperate.

44. In conclusion, the appellant’s appeal is well founded in so far as he claims that his invalidity application should be examined by the Invalidation Board.

III. APPEAL No. 296/2002

45. The Secretary General first disputes the admissibility of the appeal. He refers to his observations concerning the admissibility of Appeal No. 288/2001.

46. As regards the subject matter of the action, the Secretary General says that the appellant does not formulate any precise claim in his observations. He states that only a challenge to an administrative act, namely any individual or general decision or measure taken by the Secretary General, can be the subject matter of an administrative action.

He refers to the letter of 20 November 2001 from the Director General for Administration and Logistics, in which the Director General stated that the procedure was currently suspended. The letter, he maintains, did not constitute an individual decision taken against the appellant but was merely an observation concerning a factual situation: so long as the appellant did not agree to undergo the examination, the procedure could not go any further.

47. As regards the merits of the action, in his observations of 25 April 2002 the appellant sets out the same arguments as in his observations on Appeal No. 288/2001 and makes the same final submissions.

48. The Secretary General regrets the appellant’s systematically defamatory tone. As regards the allegation of misuse of power on the part of the Administration, he refers to his observations in Appeal No. 288/2001.

49. In conclusion, the Secretary General asks the Tribunal to declare Appeal No. 296/2002 inadmissible both in so far as it seeks a declaration that the request for a further examination by Dr B. was unlawful and in so far as it seeks payment of an invalidity pension by the Council of Europe. In the alternative, he requests the Tribunal to declare Appeal No. 296/2002 unfounded.

50. Before examining the parties' various arguments concerning the admissibility and merits of this action, the Tribunal considers that it must raise of its own motion the question whether the appellant was correct to bring the matter before the Tribunal.

51. Under Article 60 (1) of the Staff Regulations, a staff member may appeal to the Tribunal only after the express rejection, in whole or in part, or the implied rejection of the administrative complaint which he submitted to the Secretary General under Article 59 of the Staff Regulations.

52. The Tribunal finds that that is not the position in the present case.

53. The appellant objects to the letter of 20 November 2001 from the Director General for Administration and Logistics, which is certainly not the answer to an administrative complaint but an administrative act which should have been challenged by an administrative complaint.

The Tribunal also finds confirmation of its conclusion in the form which the appellant was required to complete in order to bring his appeal (Rule 16(3) of the Rules of Procedure of the Tribunal). In that form the appellant stated that the complaint was submitted on 24 August 2001, while the "contested act" was dated 20 November 2001. It is true that he also stated that the "complaint" was rejected on 20 September 2001 and that 20 November 2001 was the date of suspension of the procedure but he does not explain why he then needed to bring a new appeal and why the new appeal was not to be regarded as a duplication of Appeal No. 288/2001.

54. It follows that this appeal must be declared inadmissible.

IV. THE HARM SUSTAINED AND COSTS AND EXPENSES

55. In his memorial in reply to the observations of the Secretary General in Appeal No. 296/2002, the appellant claims two sums in respect of pecuniary and non-pecuniary harm and of all his costs and expenses.

56. As Appeal No. 296/2002 has been declared inadmissible, those claims cannot be taken into consideration in the context of Appeal No. 288/2001. Even though the document contains a reference to both appeals and requests that they be joined, it is a document relating to Appeal No. 296/2002.

57. Even on the assumption that those claims could be taken into account under Appeal No. 288/2001, the Tribunal notes that the appellant has not established the existence of pecuniary harm linked with the part of the appeal declared well founded. Nor has the appellant – who was represented by his wife – provided any evidence to support the claim for costs (see the decision of 28 April 1999 in the appellant's previous appeals, paragraph 116).

For those reasons, the Administrative Tribunal:

Joins the appeals;

As regards Appeal No. 288/2001:

Upholds the Secretary General's objection of inadmissibility *ratione temporis* in respect of the appellant's complaint regarding Secretary General's decision to request a further examination by Dr B.;

Upholds the Secretary General's objection of inadmissibility concerning the prematurity of the appeal in so far as the appellant requests payment of an invalidity pension;

Dismisses the objection of inadmissibility raised by the Secretary General concerning the prematurity of the appeal in so far as the appellant requests the convocation of the Invalidity Board;

Declares this action admissible in so far as the appellant requests the convocation of the Invalidity Board to examine his application for recognition of unfitness;

Declares it well founded;

Sets aside the implied decision of the Secretary General not to convene the Invalidity Board to examine the application;

As regards Appeal No. 296/2002, declares it inadmissible;

Dismisses it;

Orders that the parties bear their own costs.

Delivered at Strasbourg on 16 May 2003, the French text being authentic.

The Registrar of the
Administrative Tribunal

S. SANSOTTA

The Chair of the
Administrative Tribunal

K. HERNDL