

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

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

**Appeals Nos. 474/2011 and 475/2011 (Françoise PRINZ and Alfonso ZARDI
v. Secretary General)**

The Administrative Tribunal, composed of:

Mr Georg RESS, Deputy Chair,
Mr Angelo CLARIZIA,
Mr Hans G. KNITEL, judges,

assisted by:

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

has delivered the following decisions after due deliberation.

PROCEDURE

1. The first applicant, Ms Françoise PRINZ, lodged her appeal on 18 February 2011. It was registered on the same day under no. 474/2011.
2. The second applicant, Mr Alfonso ZARDI, lodged his appeal on 22 February 2011. It was registered on the same day under no. 475/2011.
3. Each of the applicants lodged a supplementary memorial on 21 March 2011.
4. On 26 April 2011 the Secretary General submitted his observations on both appeals; An appended document was communicated to the applicants in an expurgated version.
5. On 6 June 2011 the applicants submitted a memorial in reply.
6. The Chair having authorised the Staff Committee of the Council of Europe to take part in the procedure (Article 10 of the Statute of the Tribunal), the latter submitted written observations on 14 June 2011.

7. The public hearing on this appeal took place in the Administrative Tribunal's courtroom in Strasbourg on 23 June 2011. The applicants were represented by Me Carine Cohen-Solal, barrister at the Strasbourg bar, while the Secretary General was represented by Ms Bridget O'Laughlin, Deputy Head of the Legal Advice Department, assisted by Ms Maija Junker-Schreckenber and Ms Sania Ivedi, both from the same department.

8. Following the hearing, the Tribunal decided that the Secretary General would submit a number of documents including the Panel's minutes (paragraph 17 below) and that only an expurgated version of that document would be communicated to the applicants.

9. On 30 June 2011 the Secretary General submitted the required documentation. However, concerning the above-mentioned minutes, he submitted to the Tribunal a request for reconsideration of its decision to communicate an expurgated version of the Panel's minutes. That request was worded as follows:

“kindly decide not to divulge the minutes of the Panel, even in an ‘expurgated’ version. Should the Tribunal nonetheless envisage divulging those minutes to the applicants (or to their lawyer), the Secretary General considers that it would be necessary first to seek the opinion of the Data Protection Commissioner in order to comply, in particular, with Articles 2 and 3 of the Secretary General's Regulation of 17 April 1989 outlining a data protection system for personal data files in the Council of Europe”.

10. On 1 August 2011 the Tribunal requested the applicants, firstly to state their views on this request for reconsideration of the decision concerning the Panel's minutes, and secondly to submit their observations on the remaining documentation tabled. Their comments on the first point were received by the Tribunal on 12 August 2011 and those on the second point on 19 August 2011.

11. The Secretary General did not submit observations on the applicants' comments concerning the second point.

12. Concerning the first point, on 30 August the Chair, acting in accordance with Article 42 of the Tribunal's Rules of Procedure, decided, after receiving the agreement of the other judges, to dismiss the Secretary General's request for reconsideration and communicated an expurgated version of the Panel's minutes to the applicants.

13. On 14 September 2011 the applicants submitted their observations on the Panel's minutes.

14. On 20 September 2011 the Secretary General said that he had no observations to make in reply.

Mr Georg Ress, Deputy Chair, subsequently replaced the Chair, Mr Wildhaber, who was unable to act, for the examination of these appeals (Article 2 of the Statute of the Tribunal - Appendix XI to the Staff Regulations).

The Tribunal considered that there was no reason to recommence that part of the procedure which had taken place prior to that replacement (Article 33 of the Tribunal's Rules of Procedure).

THE FACTS

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

15. The applicants are both permanent officials of the Council of Europe. They are both of A5 grade. At the time of the disputed facts, the female applicant was assigned to the Directorate General of Administration and Logistics and the male applicant worked in the Directorate General of Democracy and Political Affairs.

16. In 2010 the Organisation published vacancy notice no. e46/2011 for the purpose of filling, in accordance with the external recruitment procedure, the post of Director of Programme, Finance and Language Services (grade A6) in the Directorate General of Administration and Logistics.

The holder of that post is responsible, under the responsibility of the Director General of Administration and Logistics, for questions relating to programme and finances throughout the organisation, and for overseeing the operation of the language services.

The text of the said vacancy notice stated, with regard to professional and technical qualifications, that the professional experience required was:

“at least 12 years’ relevant professional experience in one or more of the following fields: policy development, programme management, budgetary and financial management”.

The vacancy notice stated that there were two stages in the recruitment procedure: “preselection of candidates and interviews”. It stated that candidates might be asked to take tests but gave no indication as to the manner of preselection or the criteria which would be employed.

17. The applicants submitted applications and both were selected for oral interviews with the Panel.

18. That selection was made by “competent officials of the Directorate of Human Resources” who, as indicated by the Secretary General in his reply to the administrative complaints lodged by the applicants, verified “the objective criteria in the vacancy notice (and in particular the 12 years’ relevant professional experience [...])” and eliminated “those candidatures which did not satisfy the conditions laid down in the vacancy notice”.

19. The Panel consisted of the Director General of Administration, the Director of Human Resources and a female Director General.

20. Following that interview and after two candidates (other than the applicants) selected by the Panel had met the Secretary General, the latter decided to recruit a candidate other than the applicants.

21. On 15 November 2010 the applicants were duly informed.

22. On 28 November and 15 December 2010 the applicants lodged an administrative complaint in accordance with Article 59 § 2 of the Staff Regulations. In their complaints both applicants argued, *inter alia*, that the chosen candidate did not satisfy the conditions laid down in the vacancy notice for appointment to the post in question.

23. On 21 December 2010 and 11 January 2011 the Secretary General rejected both administrative complaints as unfounded.

24. On 18 and 22 February 2011 the applicants lodged their appeals.

II. THE RELEVANT PROVISIONS

25. Article 12 § 1 of the Staff Regulations is worded 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 7 of the Regulations on Appointments (Appendix II to the Staff Regulations) covers the question of advertising vacant posts or positions. Paragraph 4 thereof reads as follows:

Article 7 – Advertising of vacant posts or positions

“1. Except in the cases provided for in Articles 5 (paragraphs 1bis, 2 and 3), 15 (paragraph 3), 26 (paragraph 1) and 27 and subject to the provisions of Article 25 of these regulations, all vacancies shall be advertised in accordance with the provisions of this article.

(...)

4. The notice shall describe the duties attaching to the vacant post or position and state the conditions for eligibility, the qualifications required of candidates and the time-limit for submission of applications. The time-limit shall not be less than three weeks in the case of internal competition and not less than four weeks in the case of external recruitment.”

28. Article 8 of the said Regulations reads as follows:

Article 8 – Applications

“Applications shall be admissible only if they comply with the conditions set out in the vacancy notice.”

29. Article 9 of the same Regulations provides for the participation of the Appointments Board in recruitment procedures. However, paragraph 2 of that article states that the said Board is to be consulted in all cases except in the case of appointments to posts in grades A6 and A7, which are covered by the provisions of Article 25 (paragraph 31 below).

30. No information has been provided to the Tribunal about the texts or practice governing the activity of the Panel which acted in this case. Nor has it been made clear whether the activity of such a Panel is regular in nature or whether, in this particular case, the Secretary General gave instructions on the work to be carried out by the Directorate of Human Resources (which preselected the candidates) and by the Panel (which conducted the interviews).

31. The procedure for recruitment of grade A6 officials is covered by Article 25, which is worded 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.

3. In the case of a post in the Secretariat of the Parliamentary Assembly, the Secretary General shall also inform the Bureau of the Assembly of his or her intentions at an informal exchange of views.

4. The procedures provided for in paragraphs 2 and 3 above shall also apply to exchanges of staff members of the same grade.”

THE LAW

I. THE JOINDER OF THE APPEALS

32. In view of the related nature of appeals nos. 474/2011 and 475/2011, the Administrative Tribunal decided that they be joined in accordance with Article 14 of its Rules of Procedure.

II. THE ARGUMENTS OF THE PARTIES

33. The applicants refer first to the admissibility of their appeals and request the Tribunal to declare them admissible and decline to apply the provisions of Article 59 § 2 of the Staff Regulations which would wrongfully restrict their right of access to a court. That article provides that 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.”

34. As to the merits of the appeal, the applicants present three identical grounds of appeal. They request the Tribunal to annul the recruitment procedure and the Secretary General’s decision to appoint another candidate.

According to them, the recruitment procedure at issue is irregular in so far as the Secretary General ultimately chose a candidate whose candidature was inadmissible because it failed from the outset to satisfy the conditions laid down in the vacancy notice.

Further, after adducing factual elements in respect of their experience and that of the other candidate finally appointed, the applicants argue that there was a manifest error of assessment in so far as the said candidate did not possess qualities comparable to those of the other candidates and especially their own.

Lastly, according to the applicants, insufficient reasons were given for the decision of the Secretary General.

35. Each of the two applicants claims symbolic damages of one euro for the non-material injury suffered.

36. With regard to the costs arising from these proceedings, the applicants claim reimbursement of 5000 euros each.

37. For his part, the Secretary General requests the Tribunal to declare the appeals unfounded and dismiss them.

The arguments of the parties may be summarised as follows.

A. The applicants

1) Inadmissibility of the candidature chosen - infringement of Article 8 of the Regulations on Appointments

39. According to the applicants, the rules on recruitment procedures were applicable and should have been observed in this case. Referring to paragraph 4 of Article 7 of the Regulations on Appointments (paragraph 27 above), the applicants maintain that, according to the wording of the vacancy notice (paragraph 16 above), candidates had to have “at least 12 years’ relevant professional experience in one or more of the following fields: policy development, programme management, budgetary and financial management”.

40. The applicants add that according to Article 8 of the Regulations on Appointments - to which no exceptions are allowed - “Applications shall be admissible only if they comply with the conditions set out in the vacancy notice.” (paragraph 28 above). In their opinion, the recruitment procedure was irregular in so far as the Secretary General chose a candidate whose candidature was inadmissible because it failed from the outset to satisfy the conditions laid down in the vacancy notice.

41. In support of their appeals, the applicants give their views on the professional experience of the chosen candidate and come to the conclusion that the latter was able to claim at most eight years’ experience instead of the twelve years required by the vacancy notice.

2) Manifest error of assessment - infringement of Article 12 § 1 of the Staff Regulations

42. According to the applicants, the appointment of the chosen candidate is furthermore vitiated by a manifest error of assessment in so far as that candidate did not possess qualities comparable to those of the other candidates and especially their own.

After citing the wording of Article 12 of the Staff Regulations, the applicants state that it was therefore the duty of the Secretary General to choose the most competent candidate, which he manifestly failed to do in the instant case.

43. In his reply to the administrative complaint, the Secretary General gave no objective explanation for the choice he made. He merely asserted that the chosen candidate was the best one and that in any event he was free to choose whatever method suited him in making that choice.

44. However, according to the applicants, the Secretary General cannot hide behind his discretionary powers in order to appoint an official who was in no case able to accede to that post as

described in the vacancy notice. While the Secretary General does have wide powers of appointment, they cannot be arbitrary in any circumstances.

45. In their view, there is no doubt that the Secretary General failed to observe the provisions of the Staff Regulations on recruitment procedure and the conditions laid down in the vacancy notice, with the consequence that there was inequality of treatment between the candidates.

46. The applicants add that the Secretary General thereby ignored all the conditions and rules in arbitrarily appointing an official whose candidature was inadmissible under the terms of vacancy notice no. e46/2010 and of Article 8 of Appendix II to the Staff Regulations.

47. In order to complete the picture on this point and enlighten the Tribunal concerning the circumstances in which this appointment came about, the applicants state that it was not until the early months of the year 2010 that the chosen candidate was assigned to a post in which he had an opportunity to acquire relevant experience in one of the areas of competence required by the vacancy notice, namely the post of person responsible for planning and coordination of the intergovernmental programme of activities.

48. The applicants add that this appointment (formally notified on 1 March 2010) further appears to have been given practical effect in circumstances which, to say the least, were unusual (transfer, without posts being advertised, of three A5 officials including the former incumbent) and which the Staff Committee did not fail to contest.

3) *Insufficient reasons*

49. Thirdly, the applicants assert that insufficient reasons in law were given for the Secretary General's decision, which is therefore again open to challenge from this standpoint. In this connection they recall the case-law of the Tribunal, according to which "the requirement of giving adequate reasons for an administrative decision helps to ensure the necessary transparency in matters of staff management" (ATCE, appeal no. 231-238/1997 - Fuchs and others, decision of 29 January 1998).

4) *Conclusion*

50. Having regard to the foregoing, the applicants consider themselves justified in requesting the annulment of the recruitment procedure (vacancy notice no. e46/2010) and consequently of the decision of the Secretary General to appoint another candidate. According to them, a new recruitment procedure in conformity with vacancy notice no. e46/2010 should be set in motion.

51. Consequently, the applicants request the Tribunal to annul the recruitment procedure initiated by vacancy notice no. e46/2010 and the decision of the Secretary General to appoint another candidate. They also request the Tribunal to order that a new recruitment procedure in conformity with vacancy notice no. e46/2010 be set in motion.

B. The Secretary General

52. For his part, the Secretary General emphasises in reply to the arguments put forward by the applicants concerning the admissibility of the appeals (paragraph 33 above) that according to Article 59 § 8 (d) of the Staff Regulations, the administrative complaints procedure is open on the same conditions, *mutatis mutandis*, "to staff members and candidates outside the Council, who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an

irregularity in the examination procedure.” He adds that in his opinion the appeals are clearly admissible and that candidates admitted to a competitive examination who complain of irregularities in the examination procedure enjoy the right of access to a court within the meaning of Article 6 § 1 of the European Convention on Human Rights.

53. Concerning the merits of the appeals, the Secretary General begins with some preliminary remarks on his powers of appointment (Article 11 of the Staff Regulations) in general and, more specifically, on the procedure for filling grade A6 and A7 posts which is covered by Article 25 of the Regulations on Appointments (paragraph 31 above).

The Secretary General also considers the framework in which the authority of the Tribunal is exercised, in particular where it is asked to decide a question on which the Secretary General enjoys wide discretionary power such as, for example, cases of appointment of senior officials, an area where the Secretary General enjoys a wider margin of discretion than for other posts at a lower level. On this point the Secretary General recalls the Tribunal’s case-law (ATCE, appeal no. 170/1992 - Muller-Rappard v. Secretary General, decision of 25 September 1992, and appeal no. 461/2009 – Ramazanova v. Secretary General, decision of 18 June 2010 and the case-law cited therein).

54. Next, the Secretary General puts forward the following arguments.

1) Inadmissibility of the chosen candidature - infringement of Article 8 of the Regulations on Appointments

55. In reply to the complaint of the applicants, the Secretary General begins by stating that the applicants are content to rely on an alleged irregularity in the appointment of the present Director of Programme, Finance and Linguistic Services, without supporting their allegations with any objective evidence. According to him, the applicants merely set their own assessment of the professional experience of the person concerned against that of the Secretary General, claiming - without offering any “concrete and materially verifiable” facts, contrary to what they say - that it does not satisfy vacancy notice no. e46/2010. The Secretary General emphasises that the candidate chosen has been a grade A staff member since September 1994 and has had increasing levels of responsibility for policy development, programme management, and the management of human and financial resources.

56. The Secretary General adds that, where appointments are concerned, he enjoys wide discretionary powers accorded to him by the texts and by case-law. According to him, therefore, he is entitled to decide in all conscience and at every stage of the procedure that any particular candidate presents a better profile for the post in question. In the instant case, he considered that the profile of the chosen candidate best corresponded to the requirements of the vacancy notice.

57. On this point, the Secretary General recalls the case-law of the Tribunal (then known as the Appeals Board), which stated the following (ATCE, appeal no. 170/1992 - Muller-Rappard, decision of 25 September 1992, paragraph 22):

“22. In the present case, some of the qualifications required by Vacancy Notice no. 57/91 undoubtedly constitute objective criteria in that they are capable of being reviewed on the basis of evidence. This applies to the requirement of a “university degree” and to the requirements concerning applicants’ knowledge of languages. There are other qualifications, however, which, by their nature, leave room for the assessing authority to exercise discretionary powers. Requirements such as “authority”, “initiative”, “highly developed sense of responsibility” and “management skills” belong to

the latter category. The same applies to the requirement “wide professional experience” in the field of activities mentioned in the vacancy notice and “thorough knowledge of the problems of international co-operation”. (Secretary General’s underlining)

58. The Secretary General points out that he took his decision bearing in mind the recommendation of the Panel he had appointed to assess the numerous candidatures for this post.

59. The Secretary General points out that, in view of the *prima facie* quality of the applications received, which were selected on the basis of objective factors, he decided, as is often the case, to entrust the initial assessment of these various candidatures to a Panel consisting of senior managers in the Organisation fully acquainted with the functioning of the Council of Europe and its needs in the sector of activities concerned. He adds that he is free to choose whatever method suits him for making his choice where appointments to grades A6 and A7 are concerned. In this way he acted as a good manager for the purpose of taking the most enlightened decision possible.

The Secretary General emphasises that the Panel assessed the skills of each preselected candidate at an individual interview, in the light of all the requirements set out in vacancy notice no. e46/2010. Following those interviews, the Panel decided to recommend to the Secretary General two candidates who best satisfied the criteria of the vacancy notice for interview with him. In its minutes the Panel described the strengths and weaknesses of each candidate, plus the reasons why it was or was not recommending a candidature. The Secretary General states that he received those minutes together with the each candidate’s application file, and decided after examining them to follow the Panel’s recommendation that he interview the two designated candidates. The Secretary General observes that he thus had at his disposal, when interviewing the candidates in question and taking his decision, the assessments on all the candidates as communicated to him by the Panel.

The Secretary General points out that in his opinion the chosen candidate possesses an in-depth knowledge of the operational activities of the Council of Europe and of every sector of the Organisation - an essential element, particularly for establishing the Council of Europe’s programme of activities. The experience he has acquired, plus his detailed knowledge of the Council of Europe at the political, administrative and financial levels, determined his decision to appoint him Director of Programme, Finance and Linguistic Services.

For these reasons, the Secretary General considers that the chosen candidate was the one whose experience and qualifications best corresponded both to all the tasks and qualifications mentioned in the relevant vacancy notice and to the nature of the activity sectors within the Directorate of Programme, Finance and Linguistic Services.

2) *Manifest error of assessment - infringement of Article 12 § 1 of the Staff Regulations*

60. According to the Secretary General, there is no basis for claiming that the decision contested by the applicants is vitiated by any error of assessment. On the contrary, the decision in question is in keeping, first with the true interests of the Organisation, and secondly with the obligation on the Secretary General to appoint “staff of the highest ability, efficiency and integrity” (Article 12 § 1 of the Staff Regulations).

After stressing the context (a major process of reform) in which the appointment of the new Director of Programme, Finance and Linguistic Services took place, the Secretary General maintains that the merger of the programme and budget services made the post of Director of Finance and Linguistic Services - which became that of Director of Programme, Finance and Linguistic Services - a far more political one, consequently no longer essentially entailing a

financial expertise role. The Secretary General adds that he chose the candidate who corresponded best to this new orientation, which indicated the choice of an official possessing more than purely technical skills.

61. Concerning the assertion that there was inequality of treatment between the different candidates because the Secretary General had “ failed to observe the provisions of the Staff Regulations on recruitment procedure and the conditions laid down in the vacancy notice”, the Secretary General points out that the conditions laid down in the vacancy notice (and in particular the 12 years’ relevant professional experience cited by the applicants) were verified by competent staff of the Directorate of Human Resources, who examined the candidatures and proposed eliminating those which did not satisfy the conditions laid down in the vacancy notice. Their preselection was then reviewed and validated both by the Directorate General of Administration and Logistics and by the Private Office of the Secretary General. The curriculum vitae of the chosen candidate amply demonstrates that he did possess the 12 years’ professional experience required, as well as all the skills called for.

The Secretary General asserts again that the contested appointment was made, in accordance with the statutory and regulatory provisions in force, on the basis of the skills and qualifications of each candidate and the comparative assessment of those elements in respect of the candidates who took part in this competitive procedure.

62. With regard to the alleged inequality of treatment between candidates, the Secretary General stresses that this amounts to a charge of bias according to the case-law of the Administrative Tribunal. That case-law states that “Where such allegations are made in an appeal, it is for the appellant to present compelling evidence that the administrative decision relating to the selection of the person who was to occupy the post sought by him was based upon prejudice” (UNAT, judgment no. 312, *Roberts v. Secretary General of the United Nations*; ABCE, appeal no. 130/185, *Fuchs v. Secretary General*, decision of 10 November 1986, paragraph 55). However, it is apparent from the appeals that the applicants do not offer any evidence of bias against them.

63. From this the Secretary General infers that the complaints based on alleged inequality of treatment between candidates and of an infringement of Article 12 § 1 of the Staff Regulations are unfounded.

3) *Insufficient reasons*

64. According to the Secretary General, the applicants give no explanation whatever for their allegations, since they merely assert that “insufficient reasons in law were given for the Secretary General’s decision, which is therefore again open to challenge from this standpoint.” The Secretary General finds it hard to see which decision is being referred to by the applicants and in what way he has failed in his duty to give reasons.

The Secretary General points out that the applicants were informed of the name of the chosen candidate and subsequently, in his reply to their administrative complaint, he explained - within the limits of the confidential nature of this information - the reasons why he had chosen the candidate in question. On this point the Secretary General refers to his decisions on the administrative complaints, for which sufficient reasons in law are given.

65. In conclusion, the Secretary General notes that, where the reasons for a decision are concerned, the important thing to verify is that the reasons given, by whatever means they are communicated, were sufficient to enable the person concerned to challenge them and seek

rectification of the related administrative decision. The administrative complaint of the applicant and the arguments she put forward amply demonstrate that those reasons were sufficient.

4) *Conclusion*

66. From all the foregoing considerations it is clear to the Secretary General that he has infringed neither a regulation nor the practice or general principles of law. Nor was there a mistaken assessment of the relevant factors, or erroneous conclusions or abuse of powers.

67. In the light of all these elements, the Secretary General concludes by requesting the Tribunal to declare the two appeals unfounded and dismiss them.

II. THE MEMORIAL OF THE INTERVENING THIRD PARTY

68. In its memorial the Staff Committee, after recalling a number of circumstances, considers that the process followed in the instant case bears all the marks of an act of favoritism designed to place the chosen candidate in the office he now occupies, without any concern to ascertain whether there might have been a better candidate. According to the Staff Committee, the decision-making process is littered with decisions that are as arbitrary as they are surprising and not obviously rational, in which it is hard to discern the principles of equality and objectivity which underpin the Staff Regulations and which, just like the superior interest of the Organisation, ought to guide the Secretary General when it comes to making an appointment, especially a high-level one.

After stating that it is able to understand the doubts expressed by the applicants as to whether the chosen candidate did satisfy the conditions required in vacancy notice no. e46/2010, and in particular that of relevant experience, and after putting forward other considerations, the Staff Committee expresses its opinion that the disputed procedure bears all the marks of an act of favoritism designed to place the chosen candidate in the office he now occupies, without any concern to ascertain whether there might have been a better candidate.

69. The Staff Committee recalls that, according to the case-law of the Administrative Tribunal of the International Labour Organisation, every candidate for a post is entitled to have his candidature examined in good faith and in accordance with the principles of fair competition between candidates (see in particular judgment 1549 of the ILOAT, paragraph 9 *in fine*). It considers that this did not happen in the instant case. It therefore invites the Tribunal to accede to the applicants' requests and in particular to annul the procedure which led to the appointment of the chosen candidate to the post in question, and to order the Secretary General to organise a fresh recruitment procedure that is transparent and fair, such as to enable him to select objectively the best candidate for the post in the interests of the Organisation.

III. THE TRIBUNAL'S ASSESSMENT

A. **As to admissibility**

70. The Tribunal first finds that the Secretary General - who accepts that Article 6 of the European Convention of Human Rights applies to candidates who a) are admitted to a competitive examination and b) complain of irregularities in the examination procedure - does not challenge the admissibility of the present appeals because the applicants satisfy the two aforesaid conditions.

Consequently, the Tribunal need not examine the question of the admissibility of the appeals as requested by the applicants.

The Tribunal has even less need to decide the question whether the right of access to a court may be invoked - which the Secretary General appears to deny - by staff members who are candidates in an external competition procedure without the two restrictions (“allowed to sit a competitive recruitment examination” and “provided the complaint relates to an irregularity in the examination procedure”) cited by the Secretary General coming into play.

71. The Tribunal finds that these two restrictions were introduced into Article 59 by the Committee of Ministers of the Council of Europe in its Resolution CM/Res(2010)9 of 7 July 2010. According to the information given in document CM(2010)75 of 4 June 2010, the origin of that text was as follows:

“A clarification of the complaints procedure in general is also proposed by the Secretary General, as well as a modification of the Staff Regulations in relation to access to the Administrative Tribunal in the case of disputes concerning external recruitment procedures, with a view to removing a currently existing differential treatment of candidates who are already staff members and candidates who come from outside the Organisation.”

The Tribunal observes that this desire expressed by the Organisation to eliminate a difference of treatment between staff members and external candidates appears to be a response to the Tribunal’s earlier finding, when governed by the texts previously in force, that on the basis of the existing texts staff members were able to lodge an appeal in the context of a dispute over recruitment, whereas external candidates could do so only subject to the two above-mentioned restrictions. The Tribunal pointed out at the time that it was incumbent on the Organisation to take the requisite positive measures (ATCE, appeal no. 250/1999, Schmitt v. Secretary General, decision of 9 June 1999, paragraph 15-16). It expressed itself as follows:

15. The Secretary General has argued that all the candidates – internal and external – must have the same rights concerning disputes procedures and that it would constitute discrimination if Council of Europe staff who took part in an external recruitment procedure could challenge the decision not to allow them to sit the examination.

16. The Tribunal acknowledges this point. However, it notes that such discrimination cannot be eliminated by reducing staff members’ statutory rights. The governing bodies of the Council of Europe must take whatever positive steps are necessary. Any persons who consider themselves the victims of decisions adversely affecting them are entitled to initiate legal proceedings. This is a general principle in force in the Council of Europe’s member states, the importance of which has recently been emphasised by the European Court of Human Rights when it ruled that limitations on “the right of access to the courts” must not “restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired” (see European Court of Human Rights, Waite and Kennedy Judgment of 18 February 1999, paragraph 59, to appear in the Reports).

72. The Organisation having chosen, in Resolution CM/Res(2010)9 of 7 July 2010, to eliminate the discrimination in question by reducing the rights of staff members rather than broadening those of external candidates, the Tribunal’s acceptance of the Secretary General’s argument on the admissibility of the instant case cannot be interpreted as validating the statutory change introduced on 7 July 2010: the Tribunal will be able to rule on that change only when an appeal relating to this specific issue is lodged with the Tribunal itself.

B. As to the merits of the appeals

73. As regards the merits of the appeals, the Tribunal has the following comments to make on the first ground of appeal concerning an infringement of Article 8 of the Regulations on Appointments.

74. In that ground of appeal, the applicants contest the decision of the Secretary General to take into consideration the candidature of the candidate ultimately chosen to fill the post opened to competition.

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.

76. The Tribunal points out that, in the instant case, the applicants do not contest the assessments made by the Secretary General of the qualifications of the candidate ultimately appointed, nor of his suitability to fill the post opened to competition. Consequently, attention cannot be focussed on this aspect of the case but will be confined solely to the question whether the candidature of the chosen candidate was or was not admissible.

77. The Secretary General stated before the Tribunal that, according to him, the chosen candidate had 12 years' experience, and he was at pains to indicate the reasons which led him to that conclusion. The Secretary General did not say that in his opinion the chosen candidate did not have all the necessary experience and that he had employed the margin of assessment which he enjoys in recruitment matters. Consequently, the Tribunal has a duty to examine whether the conclusions reached by the Secretary General were in keeping with the rules and, if not, whether they were nevertheless covered by the scope of his margin of discretion.

78. The Tribunal recalls that the wording of the vacancy notice, drawn up by the Organisation itself, required the appointee to have "at least 12 years' relevant professional experience in one or more of the following fields: policy development, programme management, budgetary and financial management" (paragraph 16 above). By virtue of this text, the Secretary General requires the candidate for appointment to satisfy two indissociable conditions: length and relevance of experience.

79. Without needing at this point to dwell on a detailed appraisal of the candidature of the chosen candidate, the Tribunal finds on the basis of the information and documents supplied to it that the chosen candidate did not satisfy these two conditions. While it is true that the chosen candidate was able to claim sixteen and a half years' professional experience - calculated from the start of his first employment to the expiry of the time-limit for submission of his candidature - , the fact is that the period of relevant experience immediately appears shorter and is less than 12 years.

During the proceedings before the Tribunal, both the applicants and the Tribunal (at the hearing on 23 June 2011) laid emphasis on the need to clarify the method employed when forming the view that the chosen candidate was considered as having "at least 12 years' relevant

professional experience” in the requisite fields, that professional experience being one of the conditions laid down in the vacancy notice. In its memorial as intervening third party, the Staff Committee expressed understanding of the applicants’ doubts on this point.

The Tribunal is bound to note that in his written and oral comments the Secretary General was not however able - or willing - to supply details on this point. Consequently, the Tribunal can only find that the chosen candidate did not satisfy the conditions required by the vacancy notice.

80. The Tribunal notes that in the hearing before it the Secretary General, in reply to the applicants’ arguments, relied on his discretionary power under which he “considered that the profile of the chosen candidate best corresponded to the requirements of the vacancy notice.” He also stated that he had reached his decision taking account of the recommendation made by the Panel. Lastly, he added that he had considered that the chosen candidate possessed all the skills and qualifications required and was the best person to discharge the duties attaching to the post. However, at no time did he explain how he had calculated the twelve months necessary for the contested candidature to be selected. With regard to the experience of the chosen candidate, the Secretary General referred the Tribunal to the wording of the application and made the following comments (paragraphs 37-39 of the memorial - paragraph 4 above):

“37. It should be noted that the person concerned joined the Council of Europe as an administrative official in 1994 and worked in the intergovernmental field as secretary to key committees. He was later appointed Head of Protocol in 2008, then Head of the Programme Department at the start of 2010. His *curriculum vitae* shows that he does have the requisite 12 years’ professional experience.

38. In the opinion of the Secretary General, the person concerned has an in-depth knowledge of the operational activities of the Council of Europe and of every sector of the Organisation - which is an essential element, in particular for drawing up the activities programme of the Council of Europe. The experience he has acquired, together with his detailed knowledge of the work of the Council of Europe at the political, administrative and financial levels, was decisive in the Secretary General’s choice to appoint him Director of Programme, Finance and Linguistic Services.

39. It is apparent from the above considerations that the person concerned was the candidate whose experience and qualifications best corresponded, in the opinion of the Secretary General, both to all the tasks and qualifications mentioned in the relevant vacancy notice and to the nature of the activity sectors within the Directorate of Programme, Finance and Linguistic Services. Moreover, the reasons which guided the Secretary General’s choice were communicated by him to the Committee of Ministers, in accordance with Article 25 § 2 of the Regulations on Appointments. The Committee of Ministers made no criticism of that choice: quite the contrary.”

81. The hearing on 23 June 2011 (paragraph 7 above) and a reading of the documents subsequently lodged added nothing to these comments.

From an assessment of all these elements it does not appear that the chosen candidate possessed the experience required by the Secretary General himself at the time the vacancy notice was drawn up. Moreover, the Tribunal considers that the conditions - such as professional experience - which have implications for the admissibility of a candidature should be defined more precisely.

82. The fact that the Secretary General enjoys a wide margin of discretion did not exonerate him, when faced with a cluster of indications to the contrary, from proving that he had not exceeded the limits of the wide margin of discretion accorded to him in the recruitment of high-ranking officials. Furthermore, as stated above, the existence of discretionary power does not entitle him to disregard the admissibility conditions set down in the vacancy notice, the assessment of which is a quite different thing from the assessment of qualifications or of ability to fill a given post. If that were so, decisions of this kind could not be challenged via the disputes procedure provided for in Articles 59 and 60 of the Staff Regulations.

83. The Tribunal therefore arrives at the conclusion that the chosen candidate did not have the requisite qualifications and thus that his candidature was inadmissible under Article 8 of the Regulations on Appointments. For this reason his appointment must be set aside.

84. The applicants having requested annulment of “the recruitment procedure relating to vacancy notice no. e46/2010”, the Tribunal points out that it must be annulled only to the extent that it is affected by an established irregularity.

85. With regard to the applicants’ request that the Tribunal “order that a new recruitment procedure in conformity with vacancy notice no. e46/2010 be set in motion”, the Tribunal points out that under Article 60 of the Staff Regulations it is empowered only to set aside the act complained of. Consequently, it cannot instruct the Secretary General to set a new recruitment procedure in motion. On this point, the Tribunal recalls its case-law, which has precluded the possibility of having a judgment aimed at obtaining a finding (ATCE, formerly, appeal no. 179/1994, - Fuchs v. Secretary General, decision of 12 December 1994). In the opinion of the Tribunal the same must apply where it receives a request not seeking to establish a certain behaviour but to impose behaviour on the Secretary General.

86. According to Article 60 § 6 of the Staff Regulations, the task of enforcing the Tribunal’s decisions falls to the Secretary General. He will be free, in due course, to give effect to this decision by deciding on the stage in the procedure from which the recruitment procedure is to be resumed or recommenced and, as appropriate, with which candidates. If the applicants consider that the manner in which the Secretary General gives effect to this decision is prejudicial to them, they will be able to resort to the judicial means at their disposal and challenge that manner, as other applicants have done in other disputes.

87. Having reached this conclusion, the Tribunal need not examine the other two grounds of appeal alleging a manifest error of assessment and insufficient reasons.

C. As to the claim for damages and procedural costs

88. Each applicant requests the Tribunal to award him/her the sum of one symbolic euro by way of damages, and 5000 euros to cover all the costs occasioned by this appeal.

89. The Secretary General considers that the applicants have not suffered any non-material damage; as to costs, he invites the Tribunal to reject the claim on this point.

90. With regard to the claim for damages, the Tribunal considers that the decision to set aside the act complained of constitutes sufficient compensation. Thus there is no cause to award the symbolic euro claimed by each applicant.

91. With regard to procedural costs, the Tribunal observes that the applicants, who employed the services of the same counsel, submitted identical documents and furthermore the two cases were pleaded simultaneously. The Tribunal finds it reasonable for the Secretary General to refund the sum of 2500 euros to each applicant (Article 11 § 2 of the Staff Regulations).

D. Conclusion

92. In conclusion, the appeal is well founded and the decision complained of must be set aside. The Secretary General shall refund the sum of 2500 euros to each applicant.

For these reasons,

The Administrative Tribunal:

Orders the joinder of appeals nos. 464/2010 and 465/2010;

Declares the appeals well founded and sets aside the decision complained of;

Orders the Secretary General to refund to each applicant the sum of 2500 euros by way of costs and disbursements.

Adopted by the Tribunal in Strasbourg on 2 November 2011 and given in written form in accordance with Article 35 § 1 of the Tribunal's Rules of Procedure on 8 December 2011, the French text being authentic.

Registrar of the
Administrative Tribunal

Deputy Chair of the
Administrative Tribunal

S. SANSOTTA

G. RESS