

COUNCIL OF EUROPE

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ADMINISTRATIVE TRIBUNAL TRIBUNAL ADMINISTRATIF

Appeal No. 408/2008 (Natasha PACE ABU-GHOSH v. Secretary General)

The Administrative Tribunal, composed of:

Ms Elisabeth PALM, Chair,
Mr Hans G. KNITEL, Judge,
Mr José da CRUZ RODRIGUES, Deputy 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 13 May 2008. It was registered the same day as File No. 408/2008.
2. In these circumstances, the appellant filed the grounds for the appeal
3. On 13 June 2008, the Secretary General submitted his observations on the appeal. The appellant filed observations in reply on 15 July 2008.
4. As the parties had expressed 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 from the Secretary General, without having requested it, the report of the Appointments Board meeting at which the rejection of the appellant's application had been reconsidered. As this document was classified as confidential under Article 9, paragraph 1 of the Regulations on Appointments (Appendix II to the Staff Regulations), the Tribunal, in line with its customary practice, did not disclose it to the appellant. In any event, the Tribunal did not take account of this document.

6. The Tribunal asked to see, and duly examined, the appellant's application to take part in another external recruitment procedure (vacancy notice e5/2007 for recruitment of a British lawyer, grade A1/A2/A3), in which she had been allowed to sit the written tests.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The appellant is a temporary member of the Council of Europe's staff and an English national. She has been recruited on a temporary contract at the registry of the European Court of Human Rights.

8. 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).

9. A first decision to reject the appellant's application to take part in this competitive examination was reconsidered, but on 13 February 2008, the appellant was told by the Directorate of Human Resources that the Appointments Board had upheld its recommendation that her application should be rejected.

10. On 10 March 2008, the appellant lodged an administrative complaint with the Secretary General against the decision of 13 February 2008 rejecting her candidacy.

On the same date, the appellant requested the Chair of the Tribunal to stay execution of the impugned decision under Article 59, paragraph 7 of the Staff Regulations.

11. In a communication dated 17 March 2008, the appellant was told that her administrative complaint had been rejected.

12. On the same date, she was told that she had been invited to sit the competitive examination in question on a provisional basis. She subsequently learned that she had not qualified for the interview stage and challenged this decision in a second appeal (No. 457/2008).

13. In an order of 26 March 2008, the Chair of the Tribunal rejected the request for a stay of execution of the impugned decision.

14. On 13 May 2008, she lodged the present appeal.

II. APPLICABLE PROVISIONS

15. The power to lodge an administrative complaint is governed by Article 59 of the Staff Regulations. The relevant parts of it are as follows:

“1. 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. The expression ‘administrative act’ shall mean any individual or general decision or measure taken by the Secretary General.

If the Secretary General has not replied within sixty days to a request from a staff member inviting him

or her to take a decision or measure which he or she is required to take, such silence shall be deemed an implicit decision rejecting the request. The sixty-day period shall run from the date of receipt of the request by the Secretariat, which shall acknowledge receipt thereof.

2. The complaint must be made in writing and lodged via the Head of the Human Resources Division :

- a. within thirty days from the date of publication or notification of the act concerned; or
- b. if the act has not been published or notified, within thirty days from the date on which the person concerned learned thereof; or
- c. within thirty days from the date of the implicit decision rejecting the request as mentioned in paragraph 1.

The Head of the Human Resources Division shall acknowledge receipt of the complaint.

In exceptional cases and for duly justified reasons, the Secretary General may declare admissible a complaint lodged after the expiry of the periods laid down in this paragraph.

(...)

6. The complaints procedure set up by this article shall be open on the same conditions *mutatis mutandis*.

- a. to former staff members;
 - b. to persons claiming through staff members or former staff members, within two years from the date of the act complained of; in the event of individual notification, the normal time-limit of thirty days shall apply;
 - c. to the Staff Committee, where the complaint relates to an act of which it is subject or to an act directly affecting its powers under the Staff Regulations;
 - d. to 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.
- (...)"

THE LAW

16. The appellant asks to be invited to participate in the interview stage, assuming she is successful in the written part of competitive examination e84/2007 which she was allowed to sit on a provisional basis.

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.

I. SUBMISSIONS OF THE PARTIES

A. The Admissibility of the appeal

18. In the Secretary General's view it is important to ascertain whether the present appeal meets the admissibility criteria laid down by the Staff Regulations in Article 60, paragraph 1 and Article 59, paragraph 6 d).

19. He argues that because the competitive examination advertised in vacancy notice e84/2007 was an external recruitment procedure, the appellant's application was governed by the rules in place for external applications.

20. In view of the aforementioned provisions, then, since the appellant's application to take part in the competitive examination in question had been rejected, she was not entitled under the Staff Regulations to lodge a complaint against the decision to reject her candidature or, *a fortiori*, to appeal when her complaint was dismissed.

21. Indeed, not only do the Staff Regulations allow that right solely to candidates whose application to sit the examination has been accepted; any complaint or appeal by them must relate "to an irregularity in the examination procedure". But the appellant's application to sit the examination in question was not accepted. And her appeal, seeking recognition that she satisfied all the criteria set out in the vacancy notice, does not challenge any irregularity in the examination procedure.

22. Given these circumstances the Secretary General considers that the present appeal is inadmissible because the appellant is not entitled to bring her case before this Tribunal.

23. The Secretary General also considers that the appellant is wrong to claim that she is entitled to lodge the present appeal by virtue of her status as a Council of Europe staff member under Article 59, paragraph 1 of the Staff Regulations.

24. The concept of a staff member's direct and existing interest has been established by the case-law of the international administrative courts: this requires staff members to show that their legal position has been adversely affected. In the instant case, the appellant is not claiming any breach of the statutory provisions and regulations applicable to her as a staff member of the Organisation. The Secretary General points out here that the status of a member of staff does not, in itself, imply a right to apply, or even a legally protected interest in applying, to take part in an external recruitment procedure since eligibility to take part is governed exclusively by the criteria set out in the vacancy notice.

25. The Secretary General states that the competition advertised by vacancy notice e84/2007 did not treat candidates employed by the Council of Europe differently from those who were not so employed at the time of making their applications. The appointments procedure chosen was from this point of view an ordinary external recruitment procedure based on and governed by the Staff Regulations. Things would have been different if, for example, this had been an exceptional procedure aimed at making temporary Council staff into permanent staff.

26. Consequently, any attempt to base this appeal on Article 59, paragraph 1 of the Staff Regulations because the appellant is a staff member misunderstands the procedure followed and wrongly seeks treatment different from that given to candidates who are not employees of the Council of Europe, in breach of the principle of non-discrimination between candidates.

27. In the light of all these considerations the Secretary General argues that the present appeal is also inadmissible as regards Article 59, paragraph 1 of the Staff Regulations.

28. The appellant points out that although she took part in an external recruitment procedure, which was thus open to candidates from outside the Organisation, she has at all times retained her status as a member of the Organisation's staff. As a result, her case is

covered by Article 59, paragraph 1 of the Staff Regulations. She is a staff member complaining about an administrative act which has been prejudicial to her.

29. The appellant adds that the Secretary General's argument that there has been confusion over the principle of non-discrimination *vis à vis* candidates from outside is not convincing because she is, *de facto*, a member of staff and should be able to avail herself of all the staff rules applicable to her. Article 59, paragraph 6 d) of the Staff Regulations defines external candidates ("candidates outside the Council") and the fact that applications are invited from these candidates cannot obscure the fact that the appellant was at no time a "candidate outside the Council".

B. Merits of the appeal

30. Regarding the merits, the appellant claims above all that she possesses the required professional experience ("at least two years' appropriate professional experience"). She adds that she never received written notification of the reasons why her application was rejected but learned of the professional experience issue during a telephone conversation with a staff member of the Directorate of Human Resources. Moreover, at the time of an earlier recruitment procedure (vacancy notice e5/2007 for recruitment of a British lawyer, grade A1/A2/A3 – paragraph 6 above) the Organisation had recognised that she had at least two years' experience and had allowed her to sit the competitive examination. However, to justify his decision the Secretary General invoked the discretion allowed in deciding whether her experience was "appropriate". The appellant considers that it would be unfair to deny her the chance to take part in the competition solely because use had been made of a discretionary power which was designed to determine not the length but the quality of her professional experience.

31. In conclusion, the appellant asks that her appeal be declared well founded and that she be allowed to participate in the interview stage if she is successful in the written tests.

32. The Secretary General, for his part, replying to the appellant's submissions, notes that the appellant shows, from the very first lines of those submissions, that she is fully aware of the reasons behind the decision to reject her candidacy. It is thus somewhat surprising that she claims, as one of the grounds for her appeal, that she never received any written explanation of those reasons.

33. He adds that as far as the reasons substantiating these decisions are concerned, what needs to be verified is whether the reasons given, regardless of how they were given, were enough to enable the appellant to challenge them and ask for the relevant administrative decision to be annulled.

34. The Secretary General notes that international administrative case-law generally recognises the principle that the assessment of skills and aptitudes on which administrative decisions by international organisations are based necessitates the exercise of discretionary powers. And there is no doubt, when it came specifically to determining whether the appellant's professional experience could be deemed appropriate within the meaning of vacancy notice e84/2007, that this decision was a matter for the Appointments Board. The Secretary General adds that the Board twice considered the appellant's application and twice concluded that she did not meet the criterion of required professional experience.

35. The Secretary General adds that decisions deriving from the exercise of an international organisation's power of discretion are subject to only limited scrutiny: they can be overturned only if they were taken by a body not competent to take them, were formally or procedurally incorrect, were based on a factual or legal error, failed to consider material facts, entailed an abuse of power or drew conclusions from the case that were patently incorrect.

In the Secretary General's view, however, the appellant pleads no circumstances constituting grounds which might vitiate the decision to reject her candidacy. Regarding her reference to the circumstance that since making her application she has acquired "an additional year's worth of managerial work experience (...) having taken over a Rule 39 Project at the Research Division (for which I had two secretaries, a trainee and a fellow colleague under my supervision and for which I actively participated in the Committee of Working Methods at the Registry of the Court)", it is clear that all experience gained after the deadline for submitting applications is irrelevant when it comes to deciding whether a candidate's application is admissible.

36. Furthermore, on the matter of the appellant's admission to competitive examination e5/2007 for recruitment of a UK lawyer, grade A1/A2/A3 – something which the appellant claims proves that she met the requirements in vacancy notice e84/2007 – the Secretary General observes that the requirements of these two vacancy notices in terms of qualifications and skills were different, so they are not comparable. The fact that an application is admissible in one recruitment procedure does not mean that the same application is admissible in every recruitment procedure for posts of the same grade.

37. Lastly, the Secretary General notes that the appellant appears to be questioning whether it is actually possible for the Organisation to select candidates in a recruitment procedure not only on the basis of the length of their professional experience but also on the basis of the quality of that experience.

38. The Secretary General firstly points out here that at least two years' appropriate professional experience was a stated requirement in vacancy notice e84/2007 and that the Organisation thus had to apply that criterion in its procedure for selecting candidates. If the appellant thought that such a criterion was prejudicial to her she should have challenged it, but at no time did she do so. The Secretary General further argues that this requirement is fully consistent with the Organisation's practice and its Staff Regulations which state, in Article 8 of the Regulations on Appointments, that "applications shall be admissible only if they comply with the conditions set out in the vacancy notice", and in Article 13, paragraph 4 of the Staff Regulations, that "the Appointments Board shall consider applications in the first instance on the basis of qualifications, experience and competencies." The Regulations on Appointments contain numerous provisions on assessment of the quality and level of candidates' or staff members' experience, further proof that the exercise of discretion in guiding such assessment is not, by definition, an abuse.

39. In the light of the foregoing the Secretary General believes that the decision to reject the appellant's application on the ground that it did not satisfy the criteria of the vacancy notice is not vitiated by any irregularity. There is nothing to suggest, from the arguments outlined by the appellant, that the impugned decision constitutes a breach of the Appointment Board's power of discretion.

II. THE TRIBUNAL'S ASSESSMENT

A. Admissibility

40. 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.

41. As may be inferred from the *Schmitt* decision, this power also covers scrutiny of the competences required by the vacancy notice. 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".

42. The Tribunal indicated that "in assessing objective qualifications the competent authority naturally makes less use of discretionary power than in assessing subjective qualifications" (ATCE, Appeals Nos. 216/1996, 218/1996 and 221/1996, Palmieri (III, IV and V), decision of 27 January 1997, paragraph 43). It added that "assessing each applicant's qualifications is a different matter from taking the final decision on which applicant to select. Moreover, the stage of considering the admissibility of each application, which is and must remain a preliminary one, by nature allows the Secretary General less latitude for discretion than the assessment of each staff member's qualifications and capabilities" (*ibid.*).

The Tribunal notes that a period of nine years has elapsed without the Organisation's governing bodies taking the necessary measures. Had this not been the case, the governing bodies could have remedied this *de facto* discrimination created by the Staff Regulations and related texts.

43. For these reasons the plea of inadmissibility must be rejected.

B. Merits of the appeal

44. The appellant asks to be invited to participate in the interview stage, assuming she is successful in the written part of competitive examination e84/2007 which she was allowed to sit on a provisional basis. In the light of the appellant's submissions throughout the proceedings, the Tribunal points out that the appellant should, more correctly, be challenging the merits of the decision to exclude her from the written tests. Consequently, the Tribunal will consider the appeal on the premise that this is the *petitum*.

45. 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.

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48. The Tribunal notes that, with regard to the phase of the competitive examination which follows publication of the vacancy notice, the Secretary General is bound firstly by the law, that is to say the rules of the Organisation, and by the rules on the conduct of competitive examinations, notably those stipulating the criteria for candidates' eligibility to take part. Only after applications have been received does the Secretary General exercise a power which one may call discretionary, in assessing candidates' qualifications in relation to the requirements stipulated by the vacancy notice. If the Secretary General does not abide by these rules when exercising this power he is exceeding his discretionary power and his decision may be viewed as a breach of the law.

Having examined the facts available to it, the Tribunal concludes that the Appointments Board reached its decision on the basis of an arbitrary assessment of the appellant's qualifications. The Board did not take proper account of the fact that the appellant had been admitted to the written tests in competitive examination e5/2007. The Tribunal disagrees with the Secretary General's assessment of these two vacancy notices, finding that there are no admission criteria that would warrant a different decision. These were two competitive examinations for administrative officers of grade A1, and the posts to be filled were similar in terms of the qualifications required. Both of them, moreover, asked for at least two years' experience. In the Tribunal's view the professional and technical requirements of competitive

examination e5/2007 could even be regarded as more stringent than those of e84/2007. The vacancy notice for e5/2007 required:

“Professional knowledge and expertise:

- A qualification to practise as a solicitor or barrister in the United Kingdom and at least two years’ full-time practice;
or alternatively
a university degree in UK law, plus a total of four years’ full-time work experience in a relevant capacity (closely connected to UK law, human rights or in an international Organisation);”

Whereas vacancy notice e84/2007 required:

“professional experience: at least two years’ appropriate professional experience in one of the fields mentioned”.

Given this *de facto* situation, if the Appointments Board did not think the appellant had the requisite qualifications for the new competitive examination, it should have stated the reasons for this different conclusion and substantiated its decision more clearly.

49. The Tribunal also notes that the Secretary General has not argued that the appellant was admitted in error to competitive examination e5/2007, which would have meant that a different decision in the context of e84/2008 was justified. The present proceedings are, after all, in no way concerned with competitive examination e5/2007, but the Tribunal must take account of the Appointments Board’s decision in that competition and infer the necessary consequences for procedure e84/2007.

50. In deciding not to invite the appellant to sit the competitive examination, the Secretary General breached the law by which he was bound and drew conclusions which were manifestly incorrect regarding the vacancy notice, such as to incur the censure of the Tribunal.

Consequently, the appeal is well founded.

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, since the present appeal is concerned solely with the appellant’s entitlement to take part in the written tests.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Declares it well founded;

Annuls the decision to exclude the appellant from the written part of competitive examination 84/2007.

Adopted by the Tribunal in Strasbourg on 11 March 2009, and delivered in writing pursuant to Article 35, paragraph 1 of the Tribunal's Rules of Procedure on 31 March 2009, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

E. PALM