COUNCIL OF EUROPE———————
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ADMINISTRATIVE TRIBUNAL
TRIBUNAL ADMINISTRATIF

Appeal No. 409/2008 (Lilit NIKOGHOSYAN 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 Lillit Nikoghosyan, lodged her appeal on 2 June 2008. It was registered the same day under No. 409/2008.

2. The appellant filed a supplementary memorial on 14 August 2008.

3. On 3 September 2008, the Secretary General submitted his observations on the appeal. The appellant filed a memorial in reply on 1 October 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 documents.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The appellant is a permanent member of the Council of Europe's staff and an Armenian national. Appointed on 1 April 2003, she currently holds a grade B3 post and, as of 1 February 2007, is employed by the Congress of Local and Regional Authorities as co-secretary of the Institutional Committee of the Congress.

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. The appellant asked the Directorate of Human Resources to give her the reasons for this decision.

11. On 18 February 2008, the Directorate of Human Resources replied to her as follows (original English text):

> "When re-examining your file, the Appointments Board took into account all the various documents you had provided. They studied your experience up to the date of the vacancy notice – 19 September 2007. They noted that the request for your post in the [Directorate of Strategic Planning] to be upgraded to B4 had been refused by the Secretary General. They considered that the duties assigned to you as a B2 secretarial assistant and more recently as B3 could not be considered as being at the appropriate level for admission to this recruitment competition. They therefore decided to confirm their decision not to invite you to participate in the written tests".

12. On 26 February 2008, the appellant received a new message from the Directorate of Human Resources, again telling her that, on 30 January 2008, the Appointments Board had re-examined her application in the light of "all the documents [which the appellant] had transmitted together with the administrative complaint, including Mrs [C.]'s memorandum". This message stated that the Board had confirmed its decision not to allow the appellant to sit the written tests.

13. On 5 March 2008, the appellant addressed an administrative complaint to the Secretary General against the decision of 13 February 2008 rejecting her application.

14. In a communication of 4 April 2008, the appellant was told that her administrative complaint had been rejected.

15. On 2 July 2008, she lodged the present appeal.

II. APPLICABLE PROVISIONS

16. 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

17. The appellant asks the Tribunal to rule that the impugned decision was incorrect and to order the Secretary General to take a new decision consistent with the decision delivered by the Tribunal.

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

I. SUBMISSIONS OF THE PARTIES

A. Admissibility of the appeal

19. The Secretary General enters three pleas of inadmissibility.

Firstly, he argues that the appeal is inadmissible because the criteria of Article 59 of the Staff Regulations are not met. Secondly, the allegation that no reasons were given should be rejected on the ground that internal remedies have not been exhausted, since this allegation was not made at the administrative complaint stage. Lastly, the appellant does not have an interest in bringing proceedings because she has furnished no evidence to support a conclusion that annulling the impugned decision would have the effect of producing a decision different in substance from the decision annulled.

20. Regarding the first plea, the Secretary General argues that the appellant did not have an interest in bringing proceedings because, under Article 59, paragraph 6 d) of the Staff Regulations, the complaints procedure is open only

> "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."

21. The appellant had referred to the Tribunal's decision in Schmitt (ATCE, Appeal No. 250/1999, decision of 9 June 1999), and the Secretary General notes that the Tribunal, in its decision on this case, made a number of important observations (paragraphs 14-16 of the decision).

The Secretary General acknowledges that it might seem unfortunate that nine years had elapsed without anything being done here. But he thinks there may have been good reasons for not amending the Staff Regulations and, in any case, before any action is taken now, the question of candidates' interest in matters of external recruitment will need to be reconsidered in the light of the changed circumstances since the *Schmitt* decision. These changes were the scale of external competitive examinations and the increased number of Council of Europe member states. As a result, there was a real risk of the Tribunal becoming inflated, indeed paralysed, and an even greater risk of this happening to the Administration, if the Tribunal had to handle appeals from all those who thought their applications should not have been rejected or were unhappy with the outcome of an examination.

Lastly the Secretary General argues that if, as in the case of Ms Schmitt, the Tribunal allows appeals from staff members excluded from external competitive examinations but does not give the same treatment to candidates from outside the Organisation, that creates discrimination, as the Tribunal itself recognised in the *Schmitt* case. But the only basis for that discrimination – the advancement of staff members' careers – was not in his view a sufficient reason to give advantages to this category of candidates.

22. For this reason, the Secretary General asks the Tribunal not to highlight and, by so doing, worsen the inequality potentially created by the decision in the *Schmitt* case. He is convinced that the issue should not be dealt with on a case-by-case basis but should be the

subject of a careful review and full revision of Article 59 of the Staff Regulations. There are ways of improving things to make it easier to get deserving cases brought before the Tribunal. It goes without saying that those who wish to show that they have suffered as a result of a basic defect in the recruitment procedure (discrimination or malice, for example) must not be denied the opportunity to appeal. But there too, changes on such a scale require a meticulously prepared reform of the Staff Regulations.

Lastly, the Secretary General thinks it is it is perhaps unfortunate that the matter has been somewhat neglected. But there is now an opportunity to resolve it in line with the principles laid down by the Tribunal and the European Court of Human Rights (ECHR), taking account of the realities of the Council's situation regarding recruitment and above all the growing need to hold large-scale competitive examinations on a regular basis.

23. Regarding the second plea of inadmissibility, the Secretary General says that the appellant alleges in her further pleadings that the Appointments Board failed to give reasons for its decision communicated on 13 February 2008. It should be noted, however, that she did not put forward this argument in her administrative complaint of 5 March 2008. He accordingly argues that the appellant has not exhausted internal remedies and cannot submit this ground of complaint to the Tribunal.

24. Regarding the third plea, the Secretary General argues that the appellant has no interest in bringing proceedings since it is apparent from a study of the file that the appellant cannot prove that she possesses sufficient professional experience. That being so, the appellant would have no legitimate interest in getting the impugned decision annulled, given that she has furnished no evidence to support a conclusion that annulling the impugned decision would have the effect of producing a decision different in substance from the decision annulled (cf., *mutatis mutandis*, CJEC, Court of First Instance, judgement of 12 December 1996 in case T-99/95, Stott v. Commission [1996], paragraph 32).

25. The appellant, for her part, replying to the Secretary General's first plea, refers to the Tribunal's case-law as established in the *Schmitt* decision, which she says should apply to her case.

26. She argues that the Tribunal ought not to reverse this case-law, as the Secretary General is asking it to, because there is no justification for so doing. In particular, she claims, it is not proven that the present-day situation is different from in 1999 or that the Organisation's judicial system is on the brink of collapse. Nine years of inactivity ought not to be rewarded.

27. Regarding the second plea of inadmissibility concerning the appellant's claim that she was not given reasons for the rejection of her application, the appellant insists that, on 13 February 2008, she did not receive any explanation and that it was only on receiving a communication dated 4 April 2008 (rejecting her administrative complaint) that she was able to infer from reading certain passages that her professional experience had been deemed insufficient.

28. Regarding the Secretary General's third plea, the appellant refers to what she has said on several occasions concerning her experience.

B. Merits of the appeal

29. Concerning the merits, the appellant argues that the impugned decision did not respect the obligation to substantiate decisions. Moreover, the criterion applied in assessing her application was inappropriate and discriminatory so that it invalidated the assessment and its result. Lastly, even supposing that the criterion could be applied, the result was manifestly ill-founded and arbitrary.

30. Concerning the first ground, the appellant says that the decision rejecting her administrative complaint gave no reasons or explanation. As for the impugned decision, this does not state why her candidacy was not accepted. At most one can infer from certain passages that her experience had been deemed insufficient. In any event, it does not actually say that or give the factual or legal reasons behind the decision.

31. Concerning the second ground, the appellant presumes that her application was measured against the criteria set for the examination of applications from staff members. But these criteria, she says, are more stringent than those in the vacancy notice and if the Appointments Board had applied those, her candidacy would have been accepted. Even supposing the Board could set stricter criteria, these should not be based on arbitrary distinctions. Posts within the Organisation are not all graded correctly, and the job classification exercise has not yet been completed.

32. Concerning the third ground, the appellant states that her application met the requirements of the vacancy notice and she possessed the requisite experience. She bases this claim on a number of documents drawn up for her appraisal and on testimonials from her superiors.

33. In conclusion, the appellant asks the Tribunal to annul the decision to exclude her from participation in the competition in question and asks it to order the Secretary General to take another decision allowing her to participate in the recruitment procedure.

34. In reply to the appellant's first ground, the Secretary General states that one cannot but conclude, from reading the e-mails sent to the appellant, that she was properly informed of the reasons why her application had been rejected. For example, in a message to the appellant dated 18 February 2008, the Directorate of Human Resources detailed the reasons which had led the Appointments Board to conclude that her professional experience was not "appropriate" within the terms of the vacancy notice. Subsequently, at a meeting held on 5 March 2008, the appellant was given a fuller explanation of the reasons that had prompted the Appointments Board to take that decision.

35. The Secretary General notes that, in the matter of reasons to substantiate such decisions, it is important to check that the reasons given, whatever the means of communication used, were adequate to enable the appellant to challenge them and seek rectification of the administrative decision concerned (Administrative Tribunal of the Council of Europe (ATCE), Appeal No. 307/2002, Dimitri Souproun v. Secretary General, decision of 4 July 2003). The administrative complaint and the appellant's present appeal are ample proof that the reasons in question were adequate.

36. Concerning the second ground, the Secretary General contends that the argument that a "different and more stringent criterion" was introduced is irrelevant on two counts.

Firstly, it will be shown that the Appointments Board did not exceed its margin of discretion in interpreting the vacancy notice in the way it did. Secondly, and this applies in all cases, in-depth analysis of the criteria adopted by the Appointments Board would only be necessary and relevant if it were beyond doubt that adoption of those criteria had been prejudicial to the appellant. Such analysis is not necessary in this case because the appellant has not suffered prejudice. From a cursory examination of the appellant's submissions and the evidence of her professional experience it is clear that the appellant did not meet the selection criteria laid down in vacancy notice e84/2007.

37. For example, the vacancy notice stipulated that candidates had to have "at least two years' appropriate professional experience" in one of the fields of their choice, in this instance for the post of Programme Officer. Since the purpose of the competition was to fill A-grade posts, the Appointments Board naturally considered that candidates had to have acquired "appropriate" experience in a similar job. So, it is not surprising, in the case of in-house candidates, that the Appointments Board used the Organisation's own grading system as the point of reference for its assessments. It was decided that experience acquired in an A-grade or higher B-grade post (B4 and above) would count as "appropriate", but not experience gained in functions corresponding to grade B2 or B3 posts.

This decision would seem to be both reasonable and fair in view of the fact that the reclassification process is so recent (2007). Indeed, it was judicious on the part of the Appointments Board to rely on the opinion of experts who had looked at the nature of the duties performed in each post (including the appellant's) in the course of the reclassification process, rather than to carry out a case-by-case assessment. This made it possible to rule out any arbitrary judgement by the Appointments Board.

38. Concerning the third ground, the Secretary General looks at the appellant's submissions in support of this ground and concludes that there is nothing to suggest that the Appointments Board, which considered the appellant's candidacy in the light of the substantiating documents laid before it, in any way exceeded its discretionary powers or committed manifest errors in considering her application.

39. Regarding the allegation that the appellant's candidacy was considered in the light of "incorrect and/or irrelevant" information, the Secretary General states that the inaccuracies were minor and that the appellant's doubts cannot be confirmed.

40. The Secretary General concludes that the decision to reject the appellant's candidacy on the ground that it did not meet the criteria of the vacancy notice is in no way irregular. There is nothing to suggest that the Secretary General or the Appointments Board in any way exceeded their discretionary power in adopting the impugned decision or that they drew conclusions that were manifestly incorrect and open to criticism by the Tribunal.

II. THE TRIBUNAL'S ASSESSMENT

A. Admissibility of the appeal

41. Regarding the first plea, the Tribunal sees no reason to depart from the case-law established by the *Schmitt* decision.

42. In that decision the Tribunal clearly ruled that staff members taking part in an external recruitment procedure could lodge an administrative complaint against a decision not to admit them to the examination on the basis of an entitlement under paragraph 1 of Article 59, not paragraph 6 d) of that same article (aforementioned *Schmitt* decision, paragraph 14). At the time the Tribunal noted that a situation of discrimination existed between external and internal candidates. But it observed that this discrimination would not be removed by curtailing the statutory rights of staff members. The Tribunal also pointed out that "[t]he governing bodies of the Council of Europe must take whatever positive steps are necessary" (*ibid.*, paragraph 16) and, referring to the case-law of the European Court of Human Rights, it reiterated that "[a]ny persons who consider themselves the victims of decisions adversely affecting them are entitled to initiate legal proceedings" (*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.

Proper account could then have been taken of the fact referred to by the Secretary General (namely the increase in the number of potential appellants) and the Organisation's governing bodies could have remedied this *de facto* situation. The fact that no change has been decided on makes the Tribunal disinclined to curtail the rights of staff members in order to ensure equality of treatment with external candidates. Consequently, this argument of the Secretary General's is not sufficiently weighty to persuade the Tribunal to depart from its earlier rulings.

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

44. Regarding the second plea concerning the appellant's claim that she was not given reasons for the rejection of her application, the Tribunal accepts that, at the administrative complaint stage, the appellant did, at least in substance, put forward the arguments she later used in the appeal. Indeed, various passages in the administrative complaint show that she appeared to query the absence of any reasons. The appellant spoke of her "understanding" and said that "today when the breakdown by grade and status of selected internal candidates as well as the criteria of selection of internal applicants are in the public domain, the rejection of my case raises even more questions". These passages may be generic, but they allow the Tribunal to suppose that the appellant wished, already at the stage of her administrative complaint, to challenge the fact that she had not been given proper reasons. In any case, the allegation made in the administrative complaint was the same as that laid before the Tribunal.

45. Consequently, this plea too must be rejected.

46. Regarding the third plea, this is not a true plea of inadmissibility but raises issues which must be examined during a consideration of the merits of the appeal.

47. In conclusion, the three pleas must be rejected.

B. Merits of the appeal

48. The appellant alleges as her first ground that she was not given reasons for the impugned decision. The Tribunal considers that as of 12 March 2008, when she was told of

the selection criteria that had been set and applied, the appellant had been given an adequately substantiated decision.

49. Consequently, this ground is without merit.

50. Concerning the second ground, the Tribunal finds that the Appointments Board has not really introduced different and more stringent criteria but rather that it has adopted homogeneous guidelines for the assessment of in-house candidates' professional experience as members of the Organisation's staff.

51. Consequently, this ground is without merit.

52. Concerning the third plea, 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.

53. 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."

54. 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.*).

55. 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.

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

56. Consequently, this ground is without merit.

57. In conclusion, the appeal is unfounded and must be dismissed.

For these reasons, the Administrative Tribunal:

Declares the appeal admissible;

Dismisses it;

Orders each party to bear its own costs.

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