

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

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 580/2017  
(Sibel DEMIR SALDIRIM v. Secretary General of the Council of Europe)

The Administrative Tribunal, composed of:

Mr Christos ROZAKIS, Chair,  
Ms Mireille HEERS,  
Mr Ömer Faruk ATEŞ, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

### PROCEDURE

1. The appellant, Ms Sibel Demir Saldirim, lodged her appeal on 16 March 2017. On 30 March 2017, it was registered under No. 580/2017.
2. The grounds for the appeal were appended to the form of appeal.
3. On 2 May 2017, the Secretary General forwarded his observations on the appeal.
4. On 2 June 2017, the appellant submitted observations in reply.
5. The public hearing took place in the hearing room of the Administrative Tribunal in Strasbourg on 25 September 2017. The appellant conducted her own defence, while the Secretary General was represented by Ms Ekaterina Zakovryashina, Head of Division in the Legal Advice Department, Directorate of Legal Advice and Public International Law, assisted by Ms Sania Ivedi, Administrative Officer in the same department.

6. Appeal No. 579/2017 – Zeki Uysal v. Secretary General was examined at the same hearing.
7. Immediately after the hearing, the appellant submitted details of her costs. On 17 July 2017, the Secretary General submitted comments. On 20 July 2017, the appellant submitted her observations in reply.

## **THE FACTS**

### **I. CIRCUMSTANCES OF THE CASE**

8. The appellant is a judge of Turkish nationality.
9. On 28 October 2016, the Turkish authorities proposed that national lawyers be seconded to the Registry of the European Court of Human Rights and nominated the appellant, the appellant in appeal No. 579/2017 and ten other people. The Tribunal has not been informed of the terms of the letter or of the context in which the proposal, which seems to be part of a regular co-operation arrangement between the Court and Turkey, was made.
10. On 10 November 2016, the Registrar of the Court wrote to the Permanent Representative of Turkey as follows:

“Dear Ambassador,

Following your authorities’ proposal dated 28 October 2016, submitting twelve candidates for consideration for a secondment to the Registry of the European Court of Human Rights, we have now planned the usual selection procedure, which will include a written test and interviews with two Registry representatives in Ankara on 24 and 25 November 2016.

Two of the 12 candidates will not be asked to attend the selection procedure, for the following reasons:

- [X1] recently participated in a recruitment procedure that involved similar tests and was considered suitable to work at the Registry. We can confirm already at this stage that we agree to his secondment and would be grateful if arrangements could be made for him to take up his duties in Strasbourg on 2 January 2017.
- [X2] was interviewed for a possible secondment on 1 December 2015 and was not considered suitable. As a result, we do not take this proposal any further and will not invite him to the selection procedure in Ankara.

The remaining 10 candidates will be informed rapidly by e-mail, specifying time, place and modalities of the procedure. I will inform you of our conclusions as soon as possible during the week starting on 28 November 2016. It would be good if all new secondees could take up their duties in January 2017 which would enable them to attend the next induction programme for new Registry' lawyers.

Following the usual procedure, the agreement will be concluded by a Memorandum of Understanding set up separately for each secondment. The Council of Europe's Directorate of Human Resources will forward these Memoranda for your signature when the selection has been made.

I would like to thank the Turkish authorities once again for their support of the Court's activities."

11. On the same day, 10 November 2016, a member of staff in the Court's Registry sent an email to the appellant, on behalf of the head of the Administrative Division of the said Registry, inviting her to sit a written test and attend an interview on 24 and 25 November 2016.

12. In the event, only 10 people took part in the selection procedure: one who had not been invited at the beginning because he had not been considered "suitable" in a similar procedure in December 2015 was finally invited but he did not attend and the other because, in a procedure involving "similar tests", he had been found to be "suitable" (paragraph 10 above).

13. The tests were conducted under the supervision of two Registry officials.

14. On 1 December 2016, the Registrar of the Court wrote to the Permanent Representative of Turkey as follows:

"Dear Ambassador.

Following your authorities' proposal to second additional lawyers to the Registry, we have now carried out the selection procedure referred to in my letter of 10 November 2016.

As you may remember, we had already agreed to the secondment of [X1]. The administrative arrangements are being made to enable him to take up his duties at the Registry on 2 January 2017.

Ten of the remaining 11 candidates you had proposed sat the written test and were interviewed in Ankara, respectively on 24 and 25 November 2016. [X2] had also been invited but did not turn up to attend the procedure.

Seven candidates were found not to attain the required level of proficiency. Considering these results, I would be grateful if you would make the necessary arrangements for the following two judges to take up their duties at the Registry at the same time as [X1]:

[X3]

[X4]

We will ask the Council of Europe's Directorate of Human Resources to prepare, for your signature, the usual Memorandum of Understanding for both of these judges in order to formally conclude our agreement.

The remaining judge, [X5], was also considered suitable. However, his current duties involve the preparation of observations on cases pending before our Court, following our usual principles; national lawyers seconded to the Registry must not come from the Government Office dealing with pending cases.

I am looking forward to welcoming the three new secondees at the Registry and would like to take this opportunity to thank the Turkish authorities once again for their generous support of the Court and its activities."

15. In a letter received on 2 January 2017, the appellant lodged an administrative complaint with the Secretary General under Article 59, paragraph 2, of the Staff Regulations, contesting the decision not to select her and alleging, *inter alia*, irregularities in the way the evaluation procedure had been managed.

16. Accordingly, in a letter received by the Registry on 9 January 2017, the appellant applied to the Chair of the Administrative Tribunal for a stay of execution pursuant to Article 59, paragraph 9, of the Staff Regulations. She asked the Chair to stay execution of the decision concerning the appointments of Turkish judges seconded to the Registry of the European Court of Human Rights. On 24 January 2017, the Chair rejected the request for a stay of execution.

17. On 1 February 2017, the Secretary General rejected the administrative complaint, deeming it inadmissible and ill-founded.

18. On 16 March 2017, the appellant lodged the present appeal.

## II. APPLICABLE LAW

19. Article 59 of the Staff Regulations lays down the rules for lodging an administrative complaint and, insofar as relevant to the present case, reads as follows:

“(…)

2. 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. The expression “administrative act” shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General.

(…)

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

a. (...);

b. (...);

c. (...);

d. to staff members and candidates outside the Council of Europe, who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure.”

20. The subject of secondments is governed by Resolution CM/Res(2012)2 establishing Regulations for secondments to the Council of Europe adopted by the Committee of Ministers on 15 February 2012 at the 1134th meeting of the Ministers' Deputies.

21. The Preamble states:

“On the proposal of the Secretary General, the Staff Committee having been consulted in accordance with Article 6, paragraph 1, of the Regulations on Staff Participation (Appendix I to the Staff Regulations)”

22. Sections I of the Resolution deals with the general rules and reads as follows:

**“I. General rules**

1.a. The present Regulations lay down the conditions for the secondment of international, national, regional and local officials, as well as other persons sent by member States in accordance with their national legislation, to the Council of Europe (“seconded officials”).

(...)

c. The rules and regulations applicable to staff shall apply to seconded officials only as specified hereafter. These Regulations may not be interpreted as conferring the status of staff members on seconded officials.

2. Seconded officials shall remain in employment or be paid by the member state from which he/she is seconded throughout the period of secondment, and shall receive no salary from the Council of Europe.”

23. Section II of the Resolution deals with the implementation of secondment to the Organisation and reads as follows:

**“II. Implementation of secondment to the Organisation**

5. The Secretary General shall communicate to the Permanent Representatives of the member States or, as the case may be, to the Heads of international organisations, information as to the number and type of officials that the Council of Europe would like to have seconded to it, asking them if they wish to make detailed proposals in writing.

6. On the basis of the proposals received from the Permanent Representatives of the member States or, as the case may be, the Heads of international organisations and within the appropriations allocated under the annual budget, the Secretary General shall make the requisite appointments, which shall take account of the specific needs of the Council of Europe departments, the qualifications of the candidates and the need to ensure a gender balance, as well as a balanced geographical representation between the member States.

7.a. Secondment shall be effected by an agreement between the Secretary General and the Permanent Representative of the member State concerned or the Head of the international organisation. Upon a request of the Permanent Representative of the member State concerned, such an agreement may also be concluded with a person duly authorised under the national law of that State to represent the sending authority or institution. This agreement shall specify the following matters:

(...).”

24. Under the terms of paragraph 27 of this Resolution, the present Regulations may be completed by implementing rules issued by the Secretary General after consultation with the Staff Committee. In the proceedings before the Tribunal, the Secretary General has not mentioned adopting such rules and the Tribunal, for its part, is not aware of any.

25. As regards secondments within the European Court of Human Rights, the Court has a secondments programme involving mainly judges and prosecutors from certain Council of Europe member States.

26. In this context, on 18 September 2015, the Registrar of the European Court of Human Rights issued an Instruction which was approved by the President of the European Court of Human Rights pursuant to Rule 17, paragraph 4, of the Rules of Court.

27. Paragraphs 13-19 of this Instruction deal with the selection of seconded lawyers and read as follows:

#### Selection of Seconded Lawyers

“13. In order to guarantee both the appearance and the reality of independence and impartiality the final selection of the national lawyers to be seconded must be left to the Court. Member states should submit a sufficient choice from which the Registrar selects the most suitable lawyers. The choice proposed by governments should ideally include national judges or prosecutors.

14. In order to ensure that the national lawyers are suitable for the work at the Court, in particular with regard to their ability to draft and communicate in one of the official languages, they may be invited to sit written tests or attend interviews, or both.

15. The selection procedure normally consists of the following stages:

(a) Shortlisting: The national lawyers whom the Registrar considers to best meet the requirements from among those proposed by the member states are shortlisted and taken into consideration in the further selection procedure.

(b) Written tests may be administered as follows:

- Candidates are invited to sit written tests under the supervision of Council of Europe staff;
- Candidates receive tests electronically at an agreed time and must return their answers upon expiry of the time period allowed for the test.

In the latter case, candidates must sign a statement confirming that they followed the instructions provided to them and prepared the answers on their own without the help of any other person.

Papers are marked by a staff member of the Registry.

Candidates who obtain results that are considered sufficient will be interviewed by Registry staff.

(c) Interviews: Candidates are interviewed by representatives of the Registry, normally from Administration and the division(s) concerned. The national Judge may also attend the interviews if he or she so wishes.

16. Following the interviews and the consultation of the national Judge, the interviewers submit a recommendation to the Registrar for final decision.

17. Should the number of suitable candidates exceed the number of secondments proposed by the sending state, the Registrar may also approve a list of candidates to whom a secondment may be proposed at a later stage.

18. The selection procedure described above may be waived in those cases where the Registrar is satisfied that an open and transparent selection has been organised in the member state concerned.

19. Exceptions to the requirement for the member states to propose a choice of candidates may be made for smaller states where it is difficult to find several candidates meeting all the requirements set out in

paragraphs 9 to 12 above, but any candidate selected must meet these requirements. The Registrar may refuse proposals.”

## **THE LAW**

28. The appellant is filing the present appeal:

- a) in order to secure the annulment of the administrative act whereby the Registry of the Court found that in the written tests and interview conducted under the recruitment procedure on 24 and 25 November, she failed to reach the required level of proficiency;
- b) in order to secure the annulment of the decision to “recruit” four other candidates;
- c) in order to secure the annulment of the decision to exempt XI from the tests held on 24 and 25 November 2016;
- d) in order to secure the annulment of the “act” of not selecting her for secondment;
- e) in order, by way of an amicable solution, to be selected for secondment.

29. Lastly, the appellant claims reimbursement of her costs.

30. For his part, the Secretary General asks the Tribunal to declare the appeal inadmissible or, failing that, ill-founded and to dismiss it. He considers that the claim for reimbursement of costs should likewise be dismissed.

## **I. SUBMISSIONS OF THE PARTIES**

### **A. Admissibility of the appeal**

#### *1. The Secretary General*

31. The Secretary General argues that the appeal is inadmissible in two respects: incompatibility *ratione personae* and because the administrative act adversely affecting the appellant was in fact adopted by the Turkish authorities and not by himself or the Registrar of the Court.

32. As to the matter of incompatibility *ratione personae*, the Secretary General points out that, under Article 1c. of the Committee of Ministers Resolution (paragraph 21 above),

“c. The rules and regulations applicable to staff shall apply to seconded officials only as specified hereafter. These Regulations may not be interpreted as conferring the status of staff members on seconded officials.”

33. Since this paragraph makes no reference to Articles 59 and 60 of the Staff Regulations governing disputes, the Secretary General understands that these provisions do not apply to seconded officials, still less to candidates for secondment.

34. The Secretary General adds that Article 59, paragraph 2, of the Staff Regulations provides that only staff members and those mentioned in paragraph 8 of Article 59 (paragraph 19 above) may lodge administrative complaints and, subsequently, appeals before the Tribunal.

Since the appellant is a Turkish civil servant who was nominated by her national authorities for a secondment, she does not fall into either of these categories. In particular, the appellant's situation cannot be equated with that of "candidates outside the Council of Europe, who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure", as provided for in Article 59, paragraph 8, d., of the Staff Regulations.

35. As to the second objection, the Secretary General argues that the evaluation procedure and the final decision regarding the secondments were agreed with the Turkish authorities and that the latter had the final say on the decision to second officials to the Registry. He further contends that the role of the Registry of the Court was merely to ensure that the selected officials would be able to work at the Registry.

36. The contested decision is the responsibility of the Turkish authorities therefore and the administrative act adversely affecting the appellant was taken by them, and not by the Secretary General or the Registrar of the Court. That being the case, any complaint should be directed to the national authorities. The Administrative Tribunal of the Council of Europe is not the appropriate forum, therefore, for a complaint relating to that decision to be entertained.

## *2. The appellant*

37. The appellant contends that her complaint is admissible.

38. On the subject of the first objection, she asserts that her participation is covered by Article 59, paragraph 8, d., of the Staff Regulations, because she falls into the category of "candidates outside the Council of Europe, who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure".

39. The appellant arrives at this conclusion after conducting an analysis of this provision, of the definition of "secondment" provided in Article 2 of Appendix II (Regulations on appointments) to the Staff Regulations and of the fact that the Chair did not reject her application for a stay of execution on the merits on the ground that she was not qualified to request a stay of execution. She further notes that the Committee of Ministers resolution is silent on the matter of legal remedies in relation to such administrative acts or actions. In this connection, she refers to Article 13 of the European Convention on Human Rights which guarantees the right to an effective remedy.



40. She then points out that her administrative complaint related to irregularities in the examination procedure.

41. Lastly, she contends that Articles 1 and 2 of the Committee of Ministers Resolution cannot be construed as prohibiting her, as a candidate for secondment, from lodging an administrative complaint.

42. On this last point, the appellant cites the fact that this Resolution was adopted, drawing on the authority conferred by Article 6, paragraph 1, of Appendix I (Regulations on staff participation) on the Staff Regulations (paragraph 21 above), which reads as follows:

Article 6 – Regulations within the competence of the Committee of Ministers

“1. The Secretary General and the Staff Committee shall consult each other on any draft that either intends to submit to the Committee of Ministers on matters which come within the competence of the Committee of Ministers under Article 16 of the Statute of the Council of Europe and which relate to:

- alteration or amendment of the Staff Regulations,
- alteration, amendment or adoption of other regulations concerning the staff.”

43. The appellant submits that, as a result, the Resolution could not contain provisions that contradict the Staff Regulations in terms of who is entitled to lodge an administrative complaint and, subsequently, an appeal before the Tribunal. Only the relevant provisions of the Staff Regulations could be taken into account therefore.

44. As to the second plea of inadmissibility, the appellant points out that the role of the Turkish authorities consisted of putting forward the names of candidates who would sit the examination. Following which the Court alone decided who would be allowed to participate in the competition and which candidates had been successful. According to the letter sent on 1 December 2016 to the Permanent Representative of Turkey (paragraph 14 above), furthermore, the latter was merely informed of the names of the candidates who had been successful.

45. In conclusion, the appellant asks the Tribunal to declare the appeal admissible.

**B. The merits of the appeal**

46. The appellant submits four pleas in support of her appeal:

1. one candidate was exempted from the competitive tests and was considered suitable straightaway;
2. irregularity in the written test and in the interview;
3. incorrect assessment of her level of proficiency;
4. violation of the gender equality principle.

*1. Exemption of a candidate from the tests*

47. The appellant cites the fact that X1 (paragraph 10 above) was exempted from the tests because he had been successful in an earlier recruitment procedure for Assistant Lawyers (Grade B3).

48. “Assistant Lawyer” is a different job category, however, from that of persons seconded to the Organisation. Also, the tests which X1 sat were conducted by other Registry officials and related to different matters.

49. She goes on to make the point that this candidate was considered “successful” without undergoing the selection procedure because he had been successful in another competition which was different in nature. In her view, this was detrimental to the other candidates and led to an unjust outcome. The Secretary General, moreover, has furnished no legal basis for this decision nor made any reference to an earlier decision on a similar matter. The appellant further states that had she been informed that those who were successful in the B3 competition could be posted by secondment to the Court, she would have applied for that competition. In her view, therefore, there has also been a violation of the principle of disclosure.

### *2. Irregularity in the written examination and in the interview*

50. With regard to the written examination, the appellant states that five minutes before the end of this test, the duration of the examination – of which the candidates had been notified in advance – was extended by 15 minutes by Court staff, at the request of one of the candidates who, incidentally, was subsequently found to have been successful and who said he could not answer the questions within the prescribed time.

51. The appellant holds that this amounts to a violation of the principle of equality between those candidates who organised themselves so as to complete the paper within the prescribed time and the candidate who requested an extension, to the benefit of the latter and to the detriment of the former.

52. She further submits that this constitutes a violation of the principles of foreseeability and certainty.

53. The appellant further submits that the Registry staff failed to display an approach which was seen to be impartial.

54. On the subject of the interview, the appellant asserts that the Registry staff remained “in the shadow” and that the interview took place without reference to any objective criteria, the entire evaluation being reliant on the subjective opinions of the Registry staff. The fact that she had no knowledge of the manner in which the other candidates were interviewed leads her to conclude that the oral examination was not evaluated objectively.

### *3. Incorrect assessment of the appellant’s proficiency*

55. The appellant contends that the criteria aimed at establishing the merits of the candidates were not observed, and that this was to her disadvantage. She believes that she was not assessed correctly and that the selected candidates were rated too highly.

56. In order to prove that her level was satisfactory and “suitable”, the appellant requests that her paper be examined in comparison with the papers of all the other candidates and that an expert review be commissioned pursuant to Rule 13 of the Tribunal’s Rules of Procedure, which reads as follows:

“The Tribunal may designate one or more of its members to take, on its behalf, such action as the Tribunal considers expedient or necessary for the proper performance of its duties under its Statute, and in particular, hear witness or experts or examine documents.”

57. In the appellant’s view, all the candidates should also be re-interviewed under the supervision of this expert.

#### *4. Violation of the gender equality principle*

58. The appellant submits that the selection procedure failed to comply with the last sentence in paragraph 1 of Article 12 of the Staff Regulations which reads as follows:

“In addition, the Secretary General shall seek to ensure a fair distribution of appointments between the sexes.”

59. In this connection, she observes that six men and one woman had already been seconded and that following the procedure in question, three men and one woman were selected. She therefore considers that her expectations were violated given that she possessed greater merit than other candidates who were selected.

60. The Secretary General, for his part, makes submissions on the substance of the appellant’s complaints, in particular the allegations that the selection procedure was flawed due to various irregularities.

61. He contends that the selection of seconded lawyers to the Registry of the Court consists of an assessment of the candidates’ suitability for work as a case lawyer.

62. Unlike recruitment, this evaluation procedure is not, argues the Secretary General, of a competitive or comparative nature, where candidates compete directly with each other and only the best candidates are selected.

63. Instead, through written tests and interviews, the Registry of the Court conducts an objective and reasonable assessment of the candidates’ level of competency.

64. Should the number of suitable candidates – i.e. those meeting the required standard – exceed the number of secondments proposed, the Registrar of the Court may approve a list of candidates to whom a secondment may be proposed at a later stage.

65. There is, however, nothing to prevent the Registrar from concluding that a candidate proposed by the national authorities simply does not meet the standard required to be posted at the Registry. The Registrar made such a decision in the case of the appellant's candidacy. The Turkish authorities, on the basis of the conclusion of the Registrar, then chose to second four candidates selected by the Registry.

66. In the Secretary General's view, it should be stressed once again that seconded officials are not staff members and that the Staff Regulations do not apply to them *per se*.

67. He notes that the appellant refers to Article 5 (B) of the Regulations on appointments in order to argue that the Staff Regulations apply to seconded officials to the Council of Europe and to procedures set up for their selection. In the Secretary General's view, however, this interpretation is incorrect. Article 5 (B) of the Regulations on appointments applies solely to Council of Europe staff members that are seconded by the Council of Europe to work for another international organisation, or national, local or regional administration.

68. Pursuant to Article 1 of the Staff Regulations, however: "These Regulations shall apply to any person who has been appointed in accordance with the conditions laid down in them as a staff member [...] of the Council of Europe [...]."

69. Similarly, the evaluation procedure to which the appellant was invited cannot be considered as governed by the provisions of the Regulations on appointments (Appendix II to the Staff Regulations), "which set out the conditions under which staff members are recruited, transferred, seconded or promoted". More specifically, the evaluation procedure is not, in the Secretary General's view, a recruitment procedure within the meaning of Article 15 of the said Regulations on appointments.

70. Against this background, and since there is no competition between the candidates, it is not justified to state that the evaluation procedure concerned in this particular case should be subject to the same principles and strict rules as a competitive recruitment examination.

71. The Secretary General points out that the purpose of the procedure is simply to assess if the candidates proposed by national authorities for secondment meet the required standard. For this reason, the procedure provides for sufficient flexibility to allow an efficient assessment limited to what is actually necessary.

72. To this end, one of the candidates was exempted from the assessment by decision of the Registrar of the Court as explained above. This decision was justified and complied with the objectives of the evaluation procedure.

73. Concerning the appellant's complaints regarding the extension of the time limit at the end of the written test at the request of one of the candidates, the Secretary General stresses the fact that all of the candidates were asked by the representatives of the Registry whether they had any objection to that request, and all of the candidates, including the appellant, agreed to the requested extension. The appellant therefore accepted this change to the previously announced arrangements with full knowledge, and thereby waived any right to challenge it after the fact.

74. Concerning the appellant's claim that she should have been selected for a secondment, the Secretary General states that the representatives of the Registry considered that the appellant had obvious difficulties communicating in English, including difficulties in understanding simple questions, and that they therefore concluded that the appellant did not possess one of the essential skills required for the work.

75. As regards the allegation that there was gender discrimination, the Secretary General makes no comment.

76. Considering the above, the Secretary General concludes that the appellant's submissions regarding alleged irregularities in the procedure based on the provisions of the Staff Regulations and Regulations on appointments are unsubstantiated.

77. In the light of the foregoing, the Secretary General is of the opinion that the appeal is inadmissible and, in the alternative, ill-founded and should be rejected.

## **II. The Tribunal's assessment**

### **A. Admissibility of the appeal**

78. The Tribunal considers that it should examine the second plea of inadmissibility first, because if it were justified, there would be no need for the Tribunal to examine the other plea.

79. Like the appellant, it notes that her complaints relate only to acts carried out by the Registry of the European Court of Human Rights. As a result, there can be no basis for the Secretary General's assertion that the Registry of the Court merely endorsed the choice made by the Turkish authorities and that consequently, they are the ones whom the appellant should hold responsible. In effect, the terms of the letter sent on 1 December 2016 from the Registrar of the Court to the Turkish authorities (paragraph 14 above) show that this assertion by the Secretary General is untrue.

80. The Tribunal believes it is worth adding that, even supposing the Turkish authorities were responsible for a decision that was detrimental to the appellant, that would in no way alter the fact that the Registry of the Court took an autonomous decision which may be challenged through the Organisation's internal complaints procedure.

81. The Tribunal cannot see, therefore, how the appellant could sue the Turkish authorities through the Turkish courts as regards this aspect of the dispute.

82. It follows that the Secretary General's plea is unfounded and must be dismissed.

83. As to the other argument that the appeal is inadmissible *ratione personae*, the Tribunal notes firstly that the terms of Article 1, paragraph c, of Resolution CM/Res(2012)2 establishing Regulations for Secondments to the Council of Europe neither preclude nor prohibit the

application of Part VII (Disputes) of the Staff Regulations to persons seconded to the Organisation. The said provision merely specifies that:

“1.a. The present Regulations lay down the conditions for the secondment of international, national, regional and local officials, as well as other persons sent by member States in accordance with their national legislation, to the Council of Europe (“seconded officials”).

(...)

c. The rules and regulations applicable to staff shall apply to seconded officials only as specified hereafter. These Regulations may not be interpreted as conferring the status of staff members on seconded officials.”

84. To deduce from the phrase “The rules and regulations applicable to staff shall apply to seconded officials only as specified hereafter” that Part VII of the Staff Regulations is not applicable to secondees would go beyond the wording of the provision.

85. Furthermore, in the absence of a provision on the subject, and pursuant to the conclusions previously reached by the Tribunal in relation to this objection, the Secretary General’s interpretation of this phrase would cause the secondee to be deprived of the safeguards that are inherent in Part VII unless otherwise “specified hereafter” in the said Resolution.

86. Having reached this conclusion, the Tribunal must determine whether the appellant is among those entitled under Part VII (Disputes) of the Staff Regulations to lodge an administrative complaint (Article 59) and subsequently, if necessary, an appeal before the Tribunal (Article 60).

87. In this context, the Tribunal cannot conclude that the appellant’s right to such action would be covered by Article 5 B of Appendix II to the Staff Regulations because, as the Secretary General has pointed out, this provision, in accordance with the definition given in Article 2 of the same Appendix, applies solely to Council of Europe staff members who are seconded to another international organisation, or national, local or regional administration.

88. The appellant’s situation may, however, fall into the category mentioned in Article 59, paragraph 8, d., of the Staff Regulations for the following reasons.

89. The secondment procedure, as provided for in Resolution CM/Res(2012)2, does not include any mechanism for verifying candidates’ qualifications. In the Tribunal’s view, this is evident from the wording of paragraph 6 of the said Resolution (paragraph 23 above) which merely states, in a generic fashion, that the Secretary General shall make the requisite appointments, taking into account, *inter alia*, the qualifications of the candidates. The Secretary General, moreover, although duly authorised by the Committee of Ministers, has not adopted any implementing rules that might have supplemented the existing regulations in this area.

90. The Registry of the Court, on the other hand, has introduced rules governing secondments to the Registry, through an instruction issued by the Registrar.

91. It is clear to the Tribunal, however, that the system put in place replicates to a very large extent the evaluation procedure applicable when recruiting Council of Europe staff, as provided for in Article 15 of the Regulations on appointments (Appendix II to the Staff Regulations).

92. The Tribunal reaches this conclusion without there being any need to consider the issue of whether, even in the absence of implementing rules issued by the Secretary General, the chosen method of dealing with such matters was the most appropriate one for regulating relations, with persons outside the Registry, for the purpose of selecting them, without, however, taking into account any rights which those persons may claim with respect to the administrative decisions in question.

In this particular instance, indeed, the rules were laid down in an instruction issued by the Registrar of the Court, approved by the President of the Court pursuant to Article 17, paragraph 4 (“General instructions drawn up by the Registrar, and approved by the President of the Court, shall regulate the working of the Registry”), of the Rules of the European Court of Human Rights.

In point of fact, a Committee of Ministers resolution or a rule issued by the Secretary General, both adopted following consultation with the Council of Europe’s Staff Committee, might have paved the way for consultation with this representative staff body and would perhaps have been more appropriate given that, ultimately, the secondment agreement is signed by the Secretary General after taking into account the specific needs of the department.

93. In any event, the procedure put in place and applied in this particular instance goes further than the secondment procedure as provided for in Resolution CM/Res(2012)2 and is very similar to the one stipulated in Article 15 of Appendix II to the Staff Regulations.

94. The Tribunal recognises that there is a case to be made for having rules and regulations on the selection procedure for secondments when there is a systematic policy of using secondments as a way to alleviate a department’s workload. The case is less strong, of course, when secondments are used only sporadically. It is important, however, that such rules and regulations have regard to the interests of all the parties involved in this process.

95. Admittedly the purpose of the selection procedure for secondments is not to recruit candidates in order that they should become staff or, as Article 1 of the Staff Regulations makes clear, staff members of the Council of Europe, but it does employ the staff recruitment process.

96. Accordingly, the points made by the Secretary General and which aim to show that what we have here is not a selection procedure involving comparison between candidates – as is the case in the application of Article 15, mentioned above – but rather an individual assessment of candidates’ personal competences can have no bearing on the Tribunal’s analysis, even if the Tribunal has been given no indication of the number of people who were to be selected

97. In effect, the letter dated 28 October 2016 from the Turkish authorities to the Registrar of the Court (paragraph 10 above) has not been submitted to the Tribunal and no information has

been provided as to the number of people to be seconded and whether suitable candidates might be placed on a waiting list in preparation for subsequent secondments.

98. In these circumstances, the fact remains that, according to the exchanges between the Registry of the Court and the Turkish authorities, there were eleven candidates (of whom ten sat the written examination and attended the interview) of whom only three (and of whom two had sat the written examination and attended the interview) were chosen following a selection process based on tests, one was not selected after successfully completing the tests for reasons unrelated to proficiency and the rest (seven) were found not to have attained the required level of proficiency.

99. It would be unfair, therefore, to make a distinction between the appellant and a candidate who participates in a fully-fledged recruitment procedure under Article 15 mentioned above.

100. It would also appear that it was the Organisation which decided to depart from the “simplified” selection procedure provided for in Resolution CM/Res(2012)2 in favour of a more complex procedure. In keeping with the adage “*nemo auditur turpitudinem suam allegans*” (no one will be heard who pleads his own wrongdoing), the Tribunal does not consider it appropriate that the appellant should have to suffer the consequences of this choice.

101. The appellant, moreover, also complains of irregularities in the examination procedure.

102. In point of fact, the procedure followed is deficient insofar as it does not include any remedies against administrative acts involving selection that might be added on to the procedure laid down in the said Resolution, acts which, in a normal recruitment procedure, could undoubtedly be challenged before the Tribunal.

103. Given the choice to depart from the procedure prescribed in Resolution CM/Res (2012)2, it would be unfair, therefore, not to treat the appellant in the same way as external candidates in a recruitment competition and to deny her the enjoyment of the safeguards contained in Article 59, paragraph 8, d., of the Staff Regulations.

104. Consequently, this plea of inadmissibility is not founded either and must be dismissed.

## **B. The merits of the appeal**

### *1. Exemption of a candidate from the tests*

105. The Tribunal notes that the purpose of the procedure was to determine which of the candidates put forward were suitable for secondment to the Registry. At no stage was any information provided as to the number of people to be selected; indeed, in the only document that refers to this subject (letter of 1 December 2016, paragraph 14 above), the Registrar merely talks about “additional lawyers”. It is clear, however, that a selection was made from among the candidates. Moreover, the instruction issued by the Registrar expressly states that:

“Member states should submit a sufficient choice from which the Registrar selects the most suitable lawyers.” (Paragraph 27 above)



106. In these circumstances, it seems somewhat anomalous that the Registry should have decided to select a candidate without requiring him to undergo the same procedure as the others because of how he had performed in another competition. The Tribunal, moreover, has had occasion in the past to sanction, albeit in a different context, this practice of having recourse to previously attained results in selection procedures (ATCE, formerly the Appeals Board, decision of 27 September 1990 in appeal No. 160/1990 – Staff Committee. v. Secretary General, in particular, *mutatis mutandis*, paragraph 58).

107. In the opinion of the Tribunal, the process of comparing candidates in order to assess their suitability for work in the Registry should have taken place after requiring them to sit the same tests.

108. Furthermore, the candidate who had initially been excluded (letter of 10 November 2016 – paragraph 10 above) was ultimately invited to participate in the selection procedure (letter of 1 December 2016 – paragraph 14 above).

109. The fact that the Registry had actually decided to select the exempted candidate well before the tests were held (letter of 10 November 2016, paragraph 10 above) merely confirms that there was an infringement of the principle of equality – which was ultimately observed in the case of the candidate who had initially been excluded – to the detriment of the appellant.

110. Consequently, this ground of appeal is well-founded and must be accepted.

### *2. Irregularities in the written examination and in the interview*

111. With respect to the irregularities in the written examination, the Tribunal notes, on the subject of the extension of the duration of the written examination, that the appellant denies that she gave her consent to such extension. The Secretary General, furthermore, has provided no evidence to support his claim that all of the candidates agreed. Faced with the undisputed fact, therefore, that an extension was granted, the Tribunal can only conclude that there was an unwarranted departure from the rules laid down previously, which must be considered as constituting a procedural irregularity. This irregularity is all the more notable given that it occurred only 5 minutes before the end of the test and, what is more, at the request of one of the candidates.

112. The Tribunal must accept this part of the complaint, therefore.

113. As to the irregularities in the interview, the Tribunal notes that the evidence submitted by the appellant is not sufficient to show that the interview was irregular. Consequently, this part of the complaint must be dismissed.

### *3. Incorrect assessment of the appellant's proficiency*

114. The Tribunal notes that the appellant cited the application of Rule 13 of the Tribunal's Rules of Procedure (paragraph 56 above) for the purpose of securing an assessment of her

proficiency. Given the nature of the request, however, it would have been more appropriate to cite Rule 25 of the same Rules, which concerns the hearing of witnesses, experts and other persons.

115. In any event, the Tribunal does not consider it necessary to conduct such a hearing, as it is not required to establish whether the appellant possessed, at the time of the tests, the required level of proficiency, it being for the Organisation to perform such checks.

116. In effect, under Article 59, paragraph 8, d., the Tribunal can rule only on questions concerning irregularities in the procedure. It goes without saying that a manifestly erroneous assessment or, as the appellant suggests, a deliberately false assessment would fall within the scope of this provision.

117. It is for the appellant, however, to provide evidence of the existence of the irregularities which she alleges. As it happens, the evidence which she has provided does not support her contention that there was a manifest irregularity in assessing her proficiency.

118. This complaint must be declared unfounded, therefore.

#### *4. Violation of the gender equality principle*

119. Even supposing that Article 12, paragraph 1, of the Staff Regulations were aimed at ensuring gender equality, rather than “a fair distribution” as stated in the text, the fact remains that, unlike the candidates who were ultimately seconded, the appellant was not considered to possess the requisite competences for secondment. Her complaint cannot be accepted therefore.

120. It follows that this complaint must be declared unfounded.

### **C. Decision to be taken**

121. The Tribunal notes that the appellant has submitted a number of requests (paragraph 28 above).

122. In the light of the conclusions which the Tribunal has reached in respect of point a), the Tribunal considers that it must set aside the procedure insofar as it relates to the appellant. In the light of its conclusions concerning the merits of the third complaint about the appellant’s proficiency, the Tribunal must dismiss the claim made under point d).

123. As to point e), the Tribunal notes that, except in disputes of a pecuniary nature, it may only annul the act complained of (Article 60, paragraph 2, of the Staff Regulations). The Tribunal cannot rule on this point therefore, not even by way of an “amicable solution”.

124. As to points c) and d), the Tribunal notes that while it is true that it can agree to point c), the Tribunal considers that there is no reason to set aside the decision to exempt XI from the examination as it has not been shown that this decision was ultimately prejudicial to the

appellant. As regards point b), the final decision to “recruit four other candidates” is an entirely separate act from the procedure complained of, even though it originates from that procedure. In the Tribunal’s view, this is evidenced by the fact that, in the end, only three candidates were recruited (the fourth having been ruled out for the reasons stated in paragraph 14 above). Furthermore, secondment is not an administrative act but rather an agreement between the Organisation and the Turkish authorities. As such, it cannot be considered an administrative act within the meaning of Article 59, paragraph 2, of the Staff Regulations.

125. Consequently, the decision taken as a result of the procedure in question must be set aside insofar as it relates to the appellant.

#### **D. Costs**

126. The appellant, who conducted her own defence, asks the Tribunal to order the reimbursement of the costs paid by her. This sum corresponds to the costs entailed in sending documents and attending the hearing.

127. The Secretary General invites the Tribunal to dismiss this claim. He adds that he himself was willing to waive the requirement to hold a hearing and that the oral proceedings took place because the appellant requested them.

128. The Tribunal notes that the appellant was under no obligation to waive the hearing. Any such renunciation, moreover, would have required the approval of the Tribunal which alone has the power to decide whether oral proceedings may properly be dispensed with.

129. The appellant should not be obliged to bear the costs which she incurred in attending the hearing, therefore.

130. Consequently, the Tribunal considers it reasonable that the Secretary General should reimburse the requested sum (Article 11, paragraph 2, of Appendix XI to the Staff Regulations).

### **III. CONCLUSION**

131. The appellant’s appeal is partly well-founded and the disputed decision concerning the appellant must be set aside.

For these reasons, the Administrative Tribunal:

Dismisses the Secretary General’s pleas of inadmissibility;

Declares the appeal well-founded and annuls the contested decision within the limits indicated in paragraphs 121-125 above;

Orders the Organisation to reimburse the appellant in respect of the costs incurred and claimed by her.

Adopted by the Tribunal in Strasbourg, on 24 January 2018, and delivered in writing on 31 January 2018 pursuant to Rule 35, paragraph 1, of the Tribunal's Rules of Procedure, the French text being authentic.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS