

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

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

**Appeal No. 590/2018 (Edo KORLJAN
v. Secretary General of the Council of Europe)**

The Administrative Tribunal, composed of:

Ms Nina VAJIĆ, Chair,
Ms Françoise TULKENS,
Mr Christos VASSILOPOULOS, Judges,

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Mr Edo Korljan, lodged his appeal on 4 May 2018. It was registered the same day under No. 590/2018.
2. On 18 May 2018, the appellant submitted further pleadings.
3. On 25 June 2018, the Secretary General submitted his observations on the merits of the appeal.
4. On 9 July 2018, the appellant submitted observations in reply.
5. At the request of the Tribunal, on 18 September 2018 the Secretary General submitted information and documents. These were sent to the appellant who reserved the right to submit comments during the oral proceedings.
6. The public hearing took place in the hearing room of the Administrative Tribunal in Strasbourg on 25 September 2018. The appellant was represented by Mr Giovanni M. Palmieri,

legal adviser on international civil service law, while the Secretary General was represented by Mr Jörg Polakiewicz, Jurisconsult and Director of Legal Advice and Public International Law, assisted by Ms Sania Ivedi and Mr Kevin Brown, administrative officers in the Legal Advice Department.

7. On 8 October 2018, the appellant submitted a memorandum with attachments, disputing certain facts cited by the Secretary General at the hearing. This material was forwarded to the Secretary General who was invited to submit any comments.

8. On 10 October 2018, the Tribunal asked the Secretary General to answer a question and to submit a list in support of his reply.

9. On 18 October 2018, the Secretary General submitted his comments on the appellant's aforementioned memorandum together with his reply to the Tribunal's question.

10. On 22 October 2018, the appellant filed his observations on the Secretary General's reply to the Tribunal's question. On 23 October 2018, these observations were sent to the Secretary General.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The appellant has been a Council of Europe staff member on a contract of indefinite duration since 1 April 1998. He has dual citizenship – Croatian and Serbian – and was recruited by the Organisation as a Croatian national.

12. While on unpaid leave, the appellant, who held the grade A3 at the time, applied for the (A4) position of head of the Council of Europe office in Tirana (vacancy notice 114/2015).

13. As a result of this procedure, the appellant was assigned to the position of head of the Tirana office and promoted to grade A4. Article 1 of *ad personam* decision No. 6813 of 7 December 2015 read as follows:

“Vacancy notice 114/2015

...

[The appellant]
Grade A3/step 9 staff member,
in the Directorate General of Democracy,

as of 1 January 2016, is assigned to a Head of Office position, currently limited to 31 December 2017, in the Office of the Directorate General of Programmes, Tirana, and promoted to grade A4/step 6.

Unless otherwise decided, this appointment may be automatically extended for as long as the position exists.

Should this position be abolished, the appointee will return to his original post/position and be assigned to the step of Grade A3 that he would have reached if he had not been promoted to this position

The aforementioned step has been determined on the basis of the scales valid on the date of signature of this Decision. In case of further adjustment and retroactive scales, the step will be revised accordingly, if necessary.

Having regard to the staff member's length of service at his previous grade/step and subject to satisfactory performance, [the appellant] will progress to step 7 of Grade 4 on 1 October 2017."

14. As the Secretary General pointed out to the Tribunal, however, due to objections from the Albanian authorities to the appellant's taking office, he was unable to follow through with this appointment to the position of head of the Tirana office. The Secretary General does not specify the reason for the Albanian authorities' stance. He has, however, said that the position of head of office has a strong political component and requires close co-operation with the national authorities. In his view, a good relationship between the national authorities and the head of office is crucial if the latter is to be able to carry out his duties. He states that the Albanian authorities' opposition thus made it impossible for the appellant to be assigned to the position of head of office in Tirana, without there being any way for the Council of Europe to remedy this state of affairs.

15. The appellant states that the opposition was due to his Croatian nationality.

16. The Secretary General adds that, to avoid causing prejudice to the appellant, it was agreed to keep him on grade A4 for the period during which he was originally to have served as head of the Tirana office, i.e. until 31 December 2017.

In 2016, therefore, the appellant was deployed within the Directorate General of Programmes; in 2017, he was seconded for the first eight months to the Directorate of External Relations and served as acting head of the Council of Europe office in Geneva. As of 1 September 2017, the appellant was transferred to the Secretariat of the Representative of the Secretary General for Migration and Refugees.

In each instance, these changes were confirmed by administrative decisions that took into account the change in the position in which the appellant was to serve. The appellant thus moved from position No. 2818 (Tirana) to position 2815 (Geneva and Strasbourg).

17. On 22 December 2017, the Secretary General adopted the following *ad personam* decision No. 7292:

"From position n° 2815 (A4)
To position n° 3282 (A1/2/3)

...

Having regard to Article 10 of rule No 1355 laying down procedures for the implementation of Regulations for appointments;

...

[The appellant]
Grade A4 staff member
in the Directorate General of Programmes,

as of 1 January 2018, returns to his previous grade (A3) and is assigned to an A1/2/3 position, currently limited to 30 June 2018, in the Directorate General of Human Rights and Rule of Law - Department for the Execution of Judgments of the European Court of Human Rights.

Unless otherwise decided, this appointment may be automatically extended for as long as the position exists. Should this position be abolished, the appointee will return to his previous A1/A2/A3 post in the Directorate General of Democracy.

[The appellant] is assigned to the step 9 which corresponds to the step that he would have reached if he had not been promoted. If the appointee's performance is satisfactory, [the appellant] will progress to step 10 of grade A3 on 1 April 2019."

18. On 12 January 2018, the Directorate of Human Resources decided to second the appellant to the Secretariat of the Special Representative for Migration and Refugees for six months from 1 January 2018.

19. On 16 January 2018, the appellant was notified of the decisions of 22 December 2017 and 12 January 2018.

20. On 5 February 2018, the appellant submitted an administrative complaint to the Secretary General against the decision of 22 December 2017 (under Article 59, paragraph 2, of the Staff Regulations).

21. On 7 March 2018, the Secretary General dismissed the administrative complaint as ill-founded.

22. On 4 May 2018, the appellant lodged the present appeal.

II. RELEVANT LAW

23. Appointments to positions are governed by Secretary General Rule No. 1355 of 12 March 2014 laying down procedures for the implementation of the Regulations on Appointments. From the date on which it was adopted, this rule superseded Rule No. 1258 of 8 September 2006 on the same subject.

24. Article 11, paragraph 8, of Rule No. 1258 read as follows:

“Article 11 – Appointments to positions and posts

(...).

4. Staff members appointed for an indefinite duration may be transferred or promoted to positions, in accordance with the provisions of the Regulations on Appointments, for a period not exceeding the one for which the position has been set up. In such cases, appointments made on posts held by the staff members concerned immediately prior to their transfer or promotion to a position may only be made for a fixed term not exceeding the period for which the positions in question have been set up.

5. Such appointments by transfer or promotion may be extended for periods corresponding to the existence of the positions concerned, or confirmed for an indefinite duration if the positions are transformed into posts. The fixed-term contracts of the staff members appointed on the posts vacated by the indefinite-term staff member as described in paragraph 4 above may be extended accordingly or replaced by indefinite-term contracts.

(...)

8. Notwithstanding the provisions of paragraphs 4 and 7 above, staff members appointed for an indefinite duration who are promoted to positions in the external duty stations of the Council of Europe shall, subject to their satisfactory performance over two years following this promotion, remain at the grade they had reached by this promotion. The staff member's satisfactory performance should be confirmed in the appraisal reports drawn up in conformity with Article 22 of the Staff Regulations."

25. In his reply to a question of the Tribunal (see paragraphs 8-9 above), the Secretary General stated that:

"in view of the practical difficulty of reassigning the staff members concerned to A4 posts or positions in accordance with their right to be transferred back to the Organisation's seat after three consecutive years of service outside Strasbourg, it was decided to abolish this provision allowing them to retain the grade acquired on promotion to positions in external duty stations. Accordingly, Rule No. 1355, which repealed and replaced Rule No. 1258 on 12 March 2014, no longer provides for the grade obtained in the event of promotion to a position in a field office to be retained when the staff member returns to headquarters in Strasbourg."

26. Article 10 of Rule No. 1355 concerns appointments to positions and posts while Article 11 deals with transfers between the seat of the Organisation and external duty stations. They read as follows:

"Article 10 – Appointments to positions and posts

1. Staff members recruited pursuant to Article 15 of the Regulations on Appointments may apply for vacancies notified in accordance with Article 7, paragraph 3, thereof; they may also be transferred in accordance with Article 5 of the same Regulations.

2. Should staff members on a fixed-term contract be transferred or promoted to positions in accordance with the provisions of the Regulations on Appointments their contracts shall be replaced by a new fixed term contract corresponding to the period for which the position they have been transferred or promoted to has been set up. The new contract shall automatically replace the previous contract.

3. Staff members appointed for an indefinite duration may be transferred or promoted to positions, in accordance with the provisions of the Regulations on Appointments, for a period not exceeding the one for which the position has been set up. In such cases, appointments made on posts held by the staff members concerned immediately prior to their transfer or promotion to a position may only be made for a fixed term not exceeding the period for which the positions in question have been set up.

4. Such appointments by transfer or promotion may be extended for periods corresponding to the existence of the positions concerned.

5. Should positions be abolished, staff members assigned to them who hold indefinite term contracts, shall return to their previous posts. Staff members who were promoted to positions which are abolished, shall return to their previous grade and be assigned to the step which they would have reached, if they had not been promoted.

6. Notwithstanding Article 21, paragraph 4 bis, of the Regulations on Appointments, staff members appointed to a position of a duration of less than two years shall be eligible to apply for internal competitions for transfer.

Article 11 – Transfers between the headquarters of the Organisation and external duty stations

Staff members who following at least five years of service in the headquarters of the Organisation have been transferred or promoted to a post or position in an external duty station have a right of return to the Organisation's seat after three consecutive years of service outside Strasbourg. The return shall be effected within six months from the date it has been requested, unless the staff member concerned agrees on another time-limit."

27. As regards more specifically the rules governing the post in question, it should be noted that such posts, in their current form, only came into being in 2010 pursuant to a resolution adopted by the Committee of Ministers of the Council of Europe, CM/Res(2010)5 on the status of Council of Europe offices. There are currently only 11 posts of this kind in total.

THE LAW

28. The appellant asks that the Secretary General's decisions of 22 December 2017 and 7 March 2018 be set aside. He is also claiming costs in the amount of 7,000 euros.

29. The Secretary General invites the Tribunal to declare the appeal ill-founded and to dismiss it.

I. THE PARTIES' SUBMISSIONS

A. The appellant

30. The appellant maintains that the decision complained of, which he describes as a downgrading, is flawed because it amounts to an excess of power. He further alleges that the decision violates four general principles of law: legality, legal certainty, acquired rights and non-discrimination.

1. Excess of power

31. In support of his claim, the appellant relies on the five legal texts on which the Secretary General based his decision to dismiss the administrative complaint: Article 21 of the Staff Regulations, the Regulations on Appointments as a whole (Appendix II to the Staff Regulations), Article 10 of Rule No. 1355, Article 41 of the Staff Regulations and Appendix IV (Regulations governing staff salaries and allowances) to the Staff Regulations.

32. The appellant argues that Article 21 of the Staff Regulations and the Regulations on Appointments do not provide for the possibility of downgrading; Article 41 of the Staff Regulations is inoperative in this instance because of how the article itself is worded while the

reference to the Regulations governing staff salaries and allowances is a “misleading digression”, as it were, on the part of the Secretary General.

33. According to him, only the reference to Article 10 of Rule No. 1355 is relevant in the present case, and, unlike the other reference texts, could be deemed to constitute an outline statement of reasons.

34. At the same time, the appellant contends that this provision does not apply to him because the position to which he had been promoted has not been abolished, and it is his assignment to the position that has been terminated. “Downgrading”, however, is possible only in the instance provided for in paragraph 5 of the Article 10 in question (see paragraph 24 above).

35. As regards the reasons given by the Secretary General in his reply to the administrative complaint (see paragraph 20 above), the appellant considers that the Secretary General is essentially pleading force majeure yet the event in question, namely the fact that the Permanent Representative of Albania was displeased, does not meet the criteria that define force majeure. In this respect, the appellant refers to the definition provided by international case law and claims that the Secretary General could have overridden the objections. In the view of the appellant, under the terms of the “*Memorandum of Understanding between the Council of Ministers of the Republic of Albania and the Council of Europe concerning the Council of Europe Office in Tirana and its Legal Status*”, the Secretary General either merely provides information, or merely notifies the Albanian Ministry of Foreign Affairs (Articles 4 and 5 of the said Memorandum). Furthermore, the Albanian authorities’ attitude runs counter to Article 36, letters e) and f) of the Council of Europe Statute and also Article 3 of the Staff Regulations which prohibit any attempts by Council of Europe member states to influence the Secretary General in the discharge of his duties and discrimination between staff, respectively.

36. The Secretary General is wrong, therefore, to claim that the expression of displeasure by the Permanent Representative was an event that unavoidably prevented him from assigning the appellant to the position of head of the Tirana office.

37. Nor can this event even be considered “unforeseeable” as clearly, if the Secretary General decides to make assigning individuals to positions of this kind subject to the consent of the country concerned, contrary to the agreements concluded with the member states in this area, he has to expect at least the occasional expression of dissent.

38. According to the appellant, it would be also incorrect to take the view that his non-assignment stemmed from causes beyond the control of the Secretary General. Far from it, it was the Secretary General who agreed to bow to the wishes of the Permanent Representative of Albania when no applicable rule required him to do so. The appellant argues that the independence enjoyed by international civil servants in the discharge of their duties is recognised not only in the provisions of the Council of Europe Statute and the Staff Regulations, but also in another norm of a higher order than written rules, namely a general principle of law. In his view, had it not been for the undue interference on the part of the Permanent Representative, he could confidently have expected to have been assigned to the

position of head of the Tirana office and to have had that assignment extended, or to have been appointed to another similar position.

39. The appellant further considers that the assertion contained in the decision to dismiss the administrative complaint, to the effect that his “appointment” and “promotion” could simply be revoked, is based on two errors: firstly, the confusion between abolishing a position and discontinuing a particular person’s assignment to a position and, secondly, a spurious notion of force majeure.

40. In the appellant’s opinion, it is clear that the impugned decision is not based on any power expressly conferred on the Secretary General by the relevant texts and cannot be justified by pleading force majeure.

2. *General principles of law*

41. As regards the failure to comply with the general principles of law, the appellant recalls that the principle of legality places a permanent check on discretionary power and, in this instance, goes hand in hand with the principle “*legem patere quam ipse fecisti*”. Any “downgrading” must, therefore, be decided strictly in accordance with the Organisation’s internal rules, which was not the case here.

42. As regards the legal certainty, the appellant argues that there are two aspects of this principle: firstly, laws must be clear and intelligible and, secondly, “the basis in law of relations between organisation and staff must be stable” (see ILOAT, Judgment No. 567, Devisme and Iverus No. 2 (1983) *in fine*).

43. It is clear from both the letter and the spirit of the regulatory provisions that promotion is important in the context of a staff member’s career. Any decision to promote an individual confers rights which cannot be annulled through a decision by the Secretary General which disregards the conditions and limits laid down in the provisions which expressly state under what circumstances downgrading is possible.

44. The appellant acknowledges that, as pointed out by legal doctrine and case law, force majeure is liable to be incompatible with stability in legal situations and hence the principle of legal certainty. In his opinion, the Secretary General has, however, no grounds to plead force majeure. The appellant accordingly considers that there is no justification for the failure to afford him legal certainty.

45. As regards the principle of respect for acquired rights, the appellant contends that the decision of 7 December 2015 entitled him to be promoted to grade A4 and, in accordance with the second paragraph of this decision, to have this appointment extended as long as the position existed. The appellant acknowledges that such extensions are subject to the proviso “Unless otherwise decided” but maintains that any such decision must relate to cases provided for in the relevant texts and cannot be based on an unlimited discretionary power that would be incompatible with the rule of law.

As regards reassigning him to his original post/position on grade A3, as mentioned in the aforementioned decision in the event that the position should be abolished, any such reassignment is subject to the position of head of the Tirana office being abolished. Since this condition was not met, the appellant considers that the decision of 7 December 2015 was not adhered to, with adverse consequences for himself, and that, accordingly, the right to promotion which he had acquired was withdrawn from him unlawfully.

46. Lastly, as regards the principle which prohibits the discrimination suffered, the appellant argues that the impugned decision stemmed from the Secretary General's acceptance of a discriminatory stance adopted by the Permanent Representative of Albania on account of his nationality. Such treatment is prohibited under Article 14 of the European Convention on Human Rights.

47. Accordingly, the appellant requests that the decisions of 22 December 2017 and 7 March 2018 be set aside and asks for 7,000 euros to be paid to him in respect of the costs of the present proceedings.

B. The Secretary General

48. The Secretary General submits at the outset that, contrary to what the appellant alleges, he was not downgraded, a measure that applies only in the two instances provided for in Articles 22 *bis* (Underperformance) and 54 (Disciplinary measures) of the Staff Regulations.

49. In his view, the appellant's case was very different as it involved a promotion which was not able to take effect and, as a result, became null and void.

50. After noting the definition of nullity and the definition of promotion as found in Article 2 of the Regulations on Appointments (Appendix II to the Staff Regulations), the Secretary General states that the appellant's promotion to the position of head of the Tirana office on grade A4 from 1 January 2016 did not become effective as he never took up his duties. Since the requirement that the appellant take office was not met, the promotion, it is argued, became null and void and the *ad personam* decision of 22 December 2017 formally acknowledged this fact.

51. The Secretary General states that it was only out of consideration and concern for the welfare of the appellant that this decision was not made until after the period for which the appellant was originally to have been assigned to the Tirana office had ended. The appellant thus enjoyed the benefit of an A4 grade for two years. By the end of this period, however, the time had come to acknowledge that the appellant's promotion was null and void and to return him to his previous grade.

52. The Secretary General further states that, because of its unique and unprecedented nature, the situation in which the appellant found himself was not expressly provided for in the relevant regulatory texts. Such texts, indeed, cannot anticipate every single situation. There was, however, nothing to prevent the relevant legal principles from being applied and, in this case, the recognition that the promotion was null and void enabled the provisions of Article 10,

paragraphs 3 and 5, of Rule No. 1355 laying down procedures for the implementation of the Regulations on Appointments to be applied *mutatis mutandis* to the appellant's situation.

53. Under these provisions, it was accordingly decided that the appellant must return to his previous post, his situation being deemed equivalent to one in which a position is abolished.

54. The Secretary General points out that the inability to make the appellant's appointment as head of the Tirana office effective was due to external causes beyond his control, which unavoidably prevented the appellant from being assigned to this position. These circumstances amount to a case of force majeure, absolving the Council of Europe of any responsibility for the fact that the appellant's appointment was unable to take effect.

55. After noting the definitions of force majeure provided by legal doctrine, the International Law Commission and international courts, the Secretary General observes that all these definitions agree that the event in question must be unforeseeable, unavoidable and external in order for it to be considered force majeure. In his view, that was certainly the case in the present case.

56. As to whether the event was "unforeseeable", he notes that there was nothing to indicate that the Albanian authorities would object to the appellant's appointment as strenuously as they did. Nor had the Organisation ever encountered such vigorous opposition from national authorities to a head of office taking up his duties in the past.

57. The Secretary General insists that head of office appointments are not subject to the prior approval of the relevant national authorities and that the Organisation did not consult the member state concerned before making the appointment. He maintains that there was no question here of taking instructions from a member state regarding a staff member's appointment since the said appointment had already been decided before the Albanian authorities were notified of it, in keeping with the rule that the Organisation should remain independent from member states.

58. The impossibility of implementing the decision to appoint the appellant to the position in question was nevertheless a reality of which the Organisation was compelled to take note and to which it was necessary to find a solution.

59. As regards the "unavoidable" nature of the event, this flows from the fact that the position of head of office is highly specific and a close relationship between the head of office and the national authorities is vital. That is because the main function of a head of office is to establish good working relations with the national authorities of the state in which the office is based. In particular, the head of office provides advice, support and co-ordination with national authorities in planning, negotiation and implementation of Council of Europe co-operation activities. This function is crucial for the smooth delivery of the activities in question and simply cannot be performed without the co-operation and support of the national authorities. The fact is, however, that the latter opposed the appellant's appointment, despite all the efforts made by the Council of Europe to resolve the situation.

60. The force majeure referred to here, therefore, was characterised by an event which the Council of Europe could not avoid and which had an external cause, beyond its control. As a result, the Organisation should not be held responsible for the fact that the appellant's assignment to the position concerned and the corresponding promotion could not be made effective.

61. As regards the appellant's allegation that the Council of Europe disregarded the principles of the international civil service, including notably the principle of independence, and the accusation that it took instructions from a source outside the Council of Europe, in allowing a member state to veto the appointment of a head of office, the Secretary General submits that it was not a matter here of taking instructions from a member state. Rather it was a matter of acknowledging the fact that the appellant's appointment could not be made effective as, despite its efforts, the Council of Europe was unable to persuade the Albanian authorities to accept it. Head of office appointments require, at the very least, the implicit support of the national authorities and, in this instance, that basic requirement had not been met.

62. The Secretary General argues that the Council of Europe was compelled to heed the Albanian authorities' openly expressed opposition to appointing the appellant as head of the Tirana office insofar as this opposition prevented the appointment from becoming effective. It was a case of finding a way out of a deadlock which demanded that action be taken, based solely on the interests of the Organisation, so that the Council of Europe office in Tirana could function properly.

63. The Secretary General adds that it is incumbent upon him to look after the Organisation's interests alone, and that these interests required him, in the particular circumstances of the present case, to formally acknowledge the impossibility of making the appellant's appointment to the position of head of the Tirana office effective.

64. Accordingly, the *ad personam* decision of 22 December 2017 noting that the appellant's promotion was null and void is not unlawful.

II. THE TRIBUNAL'S ASSESSMENT

A. Preliminary remarks and proposal for witnesses to be heard

65. Before considering the appellant's submissions, the Tribunal considers it necessary to make the following observations.

66. Firstly, the Tribunal notes that the parties disagree on the legal classification of the measure complained of. According to the appellant, the measure was a downgrading whereas the Secretary General submits that downgrading is a very specific disciplinary and punitive measure, which was not adopted in the case of the appellant, and, in the instant case, it is the question of a promotion which could not take effect and, as a result, became null and void.

67. Secondly, the Tribunal accepts that, as the Secretary has underlined, the post to be filled is obviously somewhat special in this case as the position of head of field office by definition involves co-operating with the authorities in the country to which the staff member is to serve.

It is clear, therefore, that this role cannot be performed successfully if these authorities are not willing to co-operate despite the international nature of the position of head of a Council of Europe office. It is important to remember, indeed, that the head of office is detached from the exercise of the sovereign activity of the state of which he is a national and acts in order to enable the host state to benefit from the experience and achievements of the Organisation that appointed him.

68. In the instant case, the regulatory acts adopted by the Organisation both at Committee of Ministers level (paragraph 3 of the appendix to Resolution CM/Res(2010)5 and Appendix II (Regulations on Appointments) to the Staff Regulations) and at Secretary General level (Rule No. 1355 of 12 March 2014) take no account of these particular features and contain no provisions in this respect.

69. In particular, the above-mentioned Resolution, adopted in order to regulate the functioning of the field offices, is silent on the question raised by the present appeal and merely establishes in paragraph 5 that “the Secretariat is instructed to take all the necessary steps to set up the offices and to make all appropriate arrangements with the relevant authorities in the host countries and/or with the relevant international organisation(s) or institution(s)”.

In paragraph 3 of the Appendix to the Resolution, it is merely stated as regards staff that: “The Council of Europe Offices will be staffed on the basis of temporary positions created for periods not exceeding the duration of the offices’ terms of reference. These positions will be filled by deployment of Council of Europe permanent and temporary staff members, seconded officials and locally recruited staff.”

70. As for the *Memorandum of Understanding between the Council of Ministers of the Republic of Albania and the Council of Europe*, paragraph 5 of this text states that the Secretary General is to inform the Albanian Minister of Foreign Affairs in writing of the appointment of the head of office but no mention is made of any disagreement that might arise between the parties concerning the appointment of a particular person.

71. In its preamble, however, the Memorandum refers to the United Nations Convention on diplomatic relations of 1961 (Vienna Convention), Article 4 of which reads as follows:

“1. The sending State must make certain that the agrément of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.

2. The receiving State is not obliged to give reasons to the sending State for a refusal of agrément.”

In the instant case, the appointment of a head of office could be likened to the accreditation referred to in this Article 4.

72. Lastly, it appears from examining the administrative complaint that at this initial stage of the proceedings, the appellant was contesting the decision to “downgrade” him, and not the failure to take up his duties in Tirana two years earlier. In the appeal, however, two of the grounds relate to the “downgrading” while the third ground, namely discrimination on the basis of nationality, concerns the failure to take office.

73. The Tribunal must, therefore, take account of these facts in its decision.

74. Since the particular features of the post in question meant it was only appropriate that the Secretary General should ultimately have regard to the Albanian position, the fact remains that, when examining the present appeal, the internal rules of the Organisation must be taken into account, in addition to international law and the general principles of law.

75. The Secretary General has proposed that the Tribunal obtain written evidence on the content of the four staff members' conversations with the appellant concerning his situation and the return to his former grade, should the Tribunal have doubts and should it consider the issue crucial. The Tribunal, however, does not consider it necessary to order this investigative measure (Article 9, paragraph 5, of the Tribunal's Statute).

B. Excess of power

76. With regard to the first ground of appeal concerning excess of power, the Tribunal notes that, because of its unique and unprecedented nature in the practice of the Council of Europe, the specific situation in which the appellant found himself was not expressly provided for in the relevant regulatory texts. It accepts that, as the Secretary General has pointed out, those texts cannot anticipate every single situation. Consequently, the Tribunal must ascertain whether, because of this gap in the rules, the Secretary General had no option but to apply *mutatis mutandis* the provisions of Article 10, paragraphs 3 and 5, of Rule No. 1355 laying down procedures for the implementation of the Regulations on Appointments by analogy to the appellant's situation.

77. These provisions concern the situation provided for in Committee of Ministers Resolution CM/Res(2010)5, namely abolition of position, which is a different matter from removing the grade of the staff member assigned to that position. Indeed, promotion is a stage in the professional life of staff members which is governed by the Staff Regulations and the Appendices thereto, regulatory provisions of higher rank than Rule No. 1355, which is only a text adopted by the Secretary General pursuant to the Regulations.

78. Accordingly, given that a solution had to be found to the unexpected problem created by the Albanian authorities' opposition, the Tribunal accepts that the Secretary General was entitled to apply Article 10 of Rule No. 1355 by analogy in *ad personam* decision No. 7292 (paragraph 17 above).

79. Moreover, the Tribunal must consider whether the promotion in question could, in these circumstances, be deemed null and void in the absence of the appellant taking office in Tirana.

80. In the view of the Tribunal, the answer is in the affirmative, for several reasons.

81. Firstly, the decision of 7 December 2015 states that the appellant was, "as of 1 January 2016, assigned to the position of Head of Office, (...), and promoted to grade A4/step 6" (see paragraph 13 above). The two measures, therefore, are interlinked in a way which suggests that

non-implementation of the first has a bearing on the second. In this instance, therefore, taking office in Tirana must be considered a condition for the promotion to be effective.

82. Secondly, it is clear that, when faced with the failure to take office, the Organisation did not immediately return the appellant to his former grade but employed him on grade A4 in other positions both at the Organisation's headquarters and abroad. The Organisation justifies its action as an act of duty of care so as "not cause prejudice to the appellant".

Such circumstances are part of the considerations taken into account by the Organisation in relation to its duty of care, in the light of *ad personam* decision No. 6813, which provided that the position in question would be limited to a period of two years. Such a situation, therefore, cannot give rise to legitimate expectations and convictions on the part of the appellant to the effect that his promotion was final.

It is certainly true that the appellant was not assigned to Tirana; but for two years, and pursuant to *ad personam* decision No. 6813, he was assigned to other posts under several successive contracts and performed various grade A4 roles. This is apparent from all the decisions pursuant to which the Organisation offered him these successive contracts within the framework of *ad personam* decision No. 6813 for a period of two years. It appears, therefore, that the appellant's promotion and his assignments are intrinsically linked and must be considered jointly, in particular in the light of the two-year period provided for in *ad personam* decision No. 6813.

The Tribunal accordingly finds that the appellant was fully informed of the fact that his assignments subsequent to the adoption of *ad personam* decision No. 6813 were directly connected to that decision, which provided that "the position of head of office in Tirana was limited to 31 December 2017" – that is, for a period of two years from the appellant's appointment, which, in the event, did not materialise.

83. The appellant was accordingly employed in other roles during which time he held the A4 grade on a "provisional" basis, until the *ad personam* decision of 22 December 2017 (see paragraphs 17 and 79 above), when the Organisation concluded that there was no justification for extending the arrangement beyond the two years. There is, therefore, no reason not to conclude that the appointment lapsed after the two years during which the appellant was provisionally employed in other roles. The fact that the Organisation offered the appellant successive contracts for a period of two years while paying him a salary of A4 grade is not, in the Tribunal's view, a reason for the appellant to suppose that his promotion to A4 grade was final. The Secretary General, furthermore, states that this arrangement was agreed upon whereas the appellant is silent on this point.

84. In the view of the Tribunal, the arguments submitted by the appellant, contesting the existence of the conditions necessary for the appointment to be deemed null and void, cannot be regarded as compelling. Indeed, it cannot be denied that the event which prevented the appellant from taking office was "unforeseeable", "unavoidable" – except for jeopardising the proper performance of duties and the very existence of the position – and "external" to the Organisation.

85. Last but not least, it should be noted that the issue in the instant case was not a post within the organisational structure of the Council of Europe headquarters but rather a position in a field office, whose provisional nature is stipulated in the regulations.

86. Accordingly, the appellant's appointment never became effective, and the Tribunal cannot but note that in the present case, there has been no excess of power in the decision to return the appellant to his former grade.

C. General principles of law

87. As for the second ground of appeal concerning failure to comply with the general principles of law, the Tribunal notes that this ground is divided into four parts which invoke four general principles of law: legality, legal certainty, respect for acquired rights and, lastly, non-discrimination.

Insofar as it concerns the failure to comply with the first three general principles of law relied on (the first three parts of the ground), the Tribunal considers that this second ground raises the same issue as that raised in the first ground, under a different legal heading yet without adding any particular element which would distinguish it from the first ground alleging the excess of power and which would warrant specific, detailed consideration.

88. In these circumstances, the Tribunal can only reach the same conclusion.

89. Lastly, with regard more specifically to the part of the ground concerning discrimination based on nationality, the Tribunal notes that the appellant has dual Croatian and Serbian nationality (see paragraph 11 above). He claims that he was discriminated against on the grounds of his Croatian nationality because there was already a European Union official of the same nationality working in Tirana, in charge of relations between the European Union and Albania.

90. When asked at the hearing to provide further details, because the dispute on the decision of 22 December 2017 was not directed at the failure to take office in Tirana but rather at the "downgrading" two years later, the appellant argued that this ground was justified because the "downgrading" was a consequence of the failure to take office, which was itself a consequence of the discrimination he had suffered.

91. The Tribunal does not share this view.

92. Indeed, the failure to take office and the "downgrading" are in fact two separate acts, which occurred at different times and which should have been challenged through two separate administrative complaints within 30 days from the date of notification of the act in question (Article 59, paragraph 3 b, of the Staff Regulations).

93. Moreover, it cannot be claimed that the "downgrading" was unlawful using, as a ground of appeal, arguments which relate more to the failure to take office because that would

effectively amount to reopening the time allowed for challenging the legality of the first act, namely the failure to take office.

94. Accordingly, this ground of appeal must be dismissed as inadmissible as being out of time.

95. Nevertheless, the Tribunal considers it appropriate to point out that excluding a staff member from a post on the ground of his or her nationality, when no particular nationality is required for the post and no such requirement has been indicated, would amount to a breach of Article 3 of the Staff Regulations. Even if it were established, the Secretary General could not however, be held responsible for this failure because the ground was submitted too late.

III. CONCLUSION

96. In conclusion, the appeal is partly unfounded and partly inadmissible and must be dismissed.

For these reasons, the Administrative Tribunal:

Declares the appeal partly unfounded and partly inadmissible and dismisses it;

Orders that each party bear its own costs.

Adopted by the Tribunal in Strasbourg on 23 January 2019 and delivered in writing on 30 January 2019 pursuant to Rule 35, paragraph 1, of its Rules of Procedure, the French text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

N. VAJIĆ