

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

Appeal No. 592/2018 – Sibel DEMIR SALDIRIM (II)
v. Secretary General of the Council of Europe

The Administrative Tribunal, composed of:

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

assisted by:

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

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Ms Sibel Demir Saldirim, lodged her appeal on 21 August 2018. It was registered on 29 August 2018 under N° 592/2018.
2. On 5 October 2018 the Secretary General submitted his observations on the appellant's appeal. The appellant filed submissions in reply on 8 November 2018.
3. The public hearing took place in the Tribunal's hearing room in Strasbourg on 22 November 2018. The appellant conducted her own defence. The Secretary General was represented by Ms Sania Ivedi, legal officer in the Directorate of Legal Advice and Public International Law, assisted by Mr Kevin Brown, legal officer in the same Directorate.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

4. The appellant is a judge of Turkish nationality who was considered for secondment to the Registry of the European Court of Human Rights (hereinafter "the Court"). The selection procedure took place on 28 March 2018, following the Tribunal decision of 24 January 2018

(appeal No. 580/2017), whereby the previous selection procedure conducted on 24 and 25 November 2016, and in which the appellant had participated, was annulled *inter alia* in respect of the appellant. The date of the new selection procedure was brought to the attention of the Tribunal in a letter from the Secretary General dated 23 February 2018 (Article 60, paragraph 6, of the Staff Regulations).

5. The selection procedure consisted of a written job-related examination and an interview conducted by video-conference.

6. The appellant was invited to the new selection procedure by email of 7 March 2018, which clearly stated that she would both sit a written test and attend an oral interview, and that these examinations were to be administered on the same day. The email further stated that the oral interview would take the form of a video-conference with staff members in Strasbourg, during which the appellant would be present at the Council of Europe Programme Office in Ankara. The appellant replied on the same day and agreed unreservedly to participate in the selection procedure as described in the email invitation.

7. The report of each of the two examiners marking the written examination found that the candidate failed to adequately analyse the factual matrix of the case study and that her legal analysis was flawed. Moreover, the interviewers considered that the candidate struggled to respond spontaneously to questions and demonstrated a lack of thorough understanding of the Court's case-law. Accordingly, on 3 April 2018, the interviewers submitted a recommendation to the Registrar, advising against accepting the appellant's candidature. The Registrar duly rejected her candidature on the basis of the written recommendation and informed the Turkish authorities, in line with customary practice, in a letter dated 5 April 2018.

8. On 25 April 2018 the appellant was notified by the Turkish authorities of the decision not to select her candidature.

9. On 18 May 2018 she submitted an administrative complaint, requesting annulment of the procedure and the decision not to select her, together with an amicable solution consisting in her being selected as a seconded lawyer.

10. On 18 June 2018 the Secretary General rejected the appellant's administrative complaint as being manifestly unsubstantiated.

II. RELEVANT LAW

11. The secondment of national lawyers to the Court is governed by Resolution CM/Res(2012)2 adopted by the Committee of Ministers of the Council of Europe on 15 February 2012. Rules on secondments at the Court are governed by the Instruction of 18 September 2015, "Secondments at the European Court of Human Rights", issued by the Registrar, and approved by the President, under Rule 17, paragraph 4 of the Rules of Court (hereinafter "the Instruction").

12. The qualifications required of seconded lawyers are set out in Articles 9-12 of the Instruction, which provide, *inter alia*, that the seconded lawyers should be at a stage in their career equivalent to Registry lawyers at grades A2 or A3, and that they must possess a very good knowledge of English or French, including the ability to draft to a high standard in one of those languages.

13. The selection of seconded lawyers is described in Articles 13-19 as follows:

“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. ...

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:

...

(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.

...

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.

...”

14. Under Article 18, the selection procedure may be waived in cases where the Registrar is satisfied that an open and transparent selection has been organised in the member state concerned.

15. The implementation of secondments is described in paragraph 24 which provides as follows:

“The Registry informs the Directorate of Human Resources (DHR) of the national lawyer selected for secondment in accordance with the procedures described in Paragraphs 15 to 19 above. The DHR prepares a Memorandum of Understanding to be signed by the Permanent Representative of the member state concerned ... and the Director of Human Resources of the Council of Europe. The signed Memorandum concludes the agreement on the secondment and sets out, in particular, the period of secondment ...”

THE LAW

I. SUBMISSIONS OF THE PARTIES

1. *The appellant*

16. The appellant challenges the manner in which the Tribunal's decision in appeal No. 580/2017 was executed by the Secretary General who, in her view, has erred by failing to annul and rescind the secondments of the other Turkish lawyers who participated in the competition challenged in her previous appeal to the Tribunal.

17. The appellant complains that the Court's decision was not executed in a manner which fulfilled its purpose. She states that while the Court explicitly stated that the secondee examination is a competitive one, and although the Court's decision was delivered on 24 January 2018, the decision was executed after the expiry of the 30-day period. In the meantime, a new recruitment procedure got under way and the examination, in which the appellant should have been but was not included, took place on 28 February 2018.

18. Referring to Article 15 (c) of the Instruction on secondment, the appellant further argues that the interview should not have been conducted via video-conferencing. According to her, the interviews had hitherto been conducted face-to-face, so applying the video-conferencing method to her and her alone was incompatible with the principle of equality. She notes in this connection that during her interview, the screen froze and the connection was lost for some time due to technical problems.

19. With reference to Article 15 (b) of the Instruction, the appellant maintains that a candidate needs to be successful in the written examination in order to be admitted to the next stage, namely the interview. She therefore concludes that since she was allowed to participate in the oral examination, she must have been successful in the written tests. In this connection, the results of her performance in the written examination which was the subject of appeal No. 580/2017 should have been maintained.

20. The appellant further argues that the Registry erred in finding her unsuitable for secondment duties, in particular in relation to her knowledge of English and law. She states, *inter alia*, that she scored 6.5 in the internationally recognised IELTS examination and, having lived in the United Kingdom for one and a half years, is adept in every aspect of English. She also participated in the English Language Course for Lawyers in Turkey lasting one year which improved her linguistic skills. Therefore, based on the nationally and internationally valid certificates, it is proved that the appellant has better English than other judges who attended the same selection procedure as herself. Moreover, relying on her extensive judicial and academic career, the appellant argues that in comparison with *curricula vitae* of the secondees recruited from the same group as herself, there is no doubt that she was better than the others.

21. The appellant further states that her performance in the oral examination was outstanding, and that she provided a comprehensive assessment of the case concerning freedom of expression. In her written submissions, she noted that as the interview was conducted via the Internet, she was disadvantaged in comparison with other candidates who were interviewed face-to-face, and that she was the only candidate to whom a video-conference interview was applied. At the hearing before the Tribunal, she accepted, however,

that there was another candidate who had also been interviewed via video-conference. Furthermore, she complains that at one point, the Internet connection was lost due to technical problems. The appellant also questions the competence of the persons who administered the examination.

22. Referring to the Tribunal decision in her previous appeal which was examined on the merits, the appellant maintains that her appeal before the Tribunal significantly contributed to the Council of Europe in progressing more confidently towards the values of the rule of law, human rights and democracy. Considering that the appellant had made valuable contributions to the Organisation even before becoming a secondee, it could be definitely predicted how significant contributions she would make once she would be appointed as a secondee.

2. *The Secretary General*

23. The Secretary General maintains that the first selection procedure in which the appellant participated on 24 November 2016 was annulled by the Tribunal insofar as it related to the appellant. As a result, the Secretary General conducted a new procedure under the same conditions as the first, in order to determine anew whether the appellant was suitable for secondment to the Registry. In this connection, Article 14 of the Instruction provides for various possible methods for undertaking the selection process. More specifically, under Article 16 “following the interviews ... the interviewers submit a recommendation to the Registrar for final decision”. Accordingly, the Instruction presumes that a candidate will not be seconded without having attended an interview. Nonetheless, Article 18 states that “the selection procedure ... may be waived”. In addition, Article 15 lays down the procedure as it “normally” applies, and describes different stages including a) shortlisting, b) written tests and c) interviews.

24. The Secretary General admits that once the procedure has been determined, it must be followed correctly. In the present case, the Registry laid down the rules and relevant procedures in an email to the appellant on 7 March 2018, clearly stating that she was invited both to sit a written test and to attend an oral interview. These examinations were to be administered on the same day. It was further stated that the oral interview would be conducted via video-conference with staff members in Strasbourg, during which the appellant would be present at the Council of Europe Programme Office in Ankara. The appellant responded by email on the same day and agreed unreservedly to participate in the selection procedure as described in the invitation.

25. The Secretary General maintains, referring to Articles 9, 10, 12 and 14 of the Instruction, that all candidates in the selection procedure are assessed against the same criteria and must meet a minimum threshold of competence in order to be considered suitable to perform the duties of a seconded lawyer in the Registry.

26. The Secretary General rejects the appellant’s argument that she should have been included in the examination scheduled for 28 February 2018 and maintains that the examination which she undertook on 28 March 2018 was properly conducted according to the relevant rules and instructions and pursuant to the decision of the Tribunal. The procedure was fairly administered and afforded the appellant a genuine opportunity to demonstrate her capacity for secondment duties at the Registry. Furthermore, the appellant was not disadvantaged by the fact that she took the examination on a different date from the other candidates for secondment. All examinations for secondment are marked independently and

objectively, so the fact that the test was not administered the same day is not a valid ground of appeal, since all examinations are marked according to the same criteria.

27. The Secretary General considers that the examination was properly administered within the scope of the Instruction and according to the procedure laid down explicitly in the invitation letter to the appellant and in the letter to the Tribunal dated 23 February 2018. The same criteria of suitability were applied to the appellant as to all other candidates, both in previous selection procedures and in the one organised on 28 March 2018 which was also attended by the appellant.

28. In respect of the alleged irregularity of the oral examination, the Secretary General maintains that nothing in Article 15 (c), cited by the appellant, can be construed as preventing an interview from being conducted via video-conference. The fact of “inviting” or “attending” does not require in any way the physical presence of the parties in the same place. The Council of Europe has in recent years put in place methods for conducting interviews, meetings and even conferences via video-link. Both its head offices and several field offices, including Ankara, are equipped with video-conferencing hardware and it has become more common to hold meetings using this method. Indeed, video-conferences are more time efficient as well as much less costly, requiring less travel on the part of Council of Europe staff or third parties. The negative aspects are limited, provided the participants can see and hear one another and can assess the content of the interviewee’s statements, as well as, to a lesser extent, their body language. The fact of appearing via video-link does not in itself call into question the regularity of the interview.

29. With regard to the unfortunate interruptions caused by technical problems, the Secretary General argues that the interviewers took appropriate note of these issues during the interview, and in the report which each interviewer prepared. Contrary to what the candidate claims, the interruption was very brief. In addition, the candidate explicitly acknowledged during the interview that the interruption had not adversely affected her. The Secretary General affirms that due allowance was made for any negative effect and the appellant suffered no prejudice by virtue either of the fact that she was interviewed via video-link, or of the fact that the connection was interrupted. The interviewers’ reports rightly focus on the content of the appellant’s responses as well as her lack of spontaneity which, in their view, demonstrated a lack of thorough understanding of the relevant legal standards. In sum, neither the choice of video-conferencing as a legitimate means to administer the interview nor the technical problems which arose had any bearing on the appellant’s results in the selection procedure.

30. Furthermore, the Secretary General denies any accusation of impropriety or bias on the part of the staff involved. He notes that the markers are Registry staff, as provided for in Article 15 (b) of the Instruction, who have sufficient detailed knowledge of the relevant areas of law. Moreover, although all staff members of the Council of Europe are under the responsibility of the Secretary General according to the Staff Regulations, there is no hierarchical link between the staff of the Court’s Registry and the staff of the Directorate of Legal Advice and Public international Law who represent the Secretary General before the Tribunal. More precisely, the staff who marked the written examinations work for the Registry of the Court and do not have any hierarchical link with the staff in the Human Resources department who are responsible for organising the secondment selection procedure. In any event, the marks awarded are justified in the report sent to the Registrar

who makes his decision on the basis of all available information and there is no identifiable reason why he would be prejudiced or discriminate against the appellant.

31. The Secretary General also denies the appellant's argument regarding her success in the written examination based on the fact that Article 15 of the Instruction, which lays down the procedure "normally" to be followed, includes the provision that "Candidates who obtain results that are considered sufficient will be interviewed by Registry staff". He notes that the appellant actually scored 9 out of 20 in the written exercise whereas a score of 10 out of 20 is ordinarily considered to be a "pass". Article 15, furthermore, lays out the default procedure for selecting seconded lawyers. This module is not obligatory, however, and Article 14 provides that candidates for secondment "may be invited to sit written tests or attend interviews, or both". The Registry therefore has discretion to determine the most appropriate procedure. In the present case, the Registry decided that the Tribunal's decision would best be executed by inviting the appellant and another person to sit the written examination and attend an interview on the same day.

32. In respect of the appellant's complaint regarding the "invalidation of an earlier examination in which "she was successful", the Secretary General observes that by order of the Tribunal in appeal No. 580/2017, the results of the written examination were set aside along with the rest of the procedure insofar as it related to the appellant (see paragraph 122, Decision of the Tribunal of 24 January 2018, Appeal No. 580/2017), but not in relation to the other candidates. The Secretary General argues that this method of executing the decision struck the appropriate balance between the need to act fairly towards the appellants in appeals Nos. 579/2017 and 580/2017, and the need to protect the rights and interests of the other candidates who had accepted the offer of secondment in good faith.

33. As to the finding regarding the appellant's inadequacy and her purported contributions to the Council of Europe, the Secretary General observes that the Tribunal was clear in its decision in appeal No. 580/207 when stating that the appellant must prove the existence of relevant irregularities. In the present case, however, the appellant alleges similar irregularities, in particular as regards her knowledge of English and the law. When it comes to the question of proof, however, the appellant adduces as evidence of her abilities her certificate attesting to her knowledge of English, and the fact that she won her previous appeal. The Secretary General notes that it was found during the interview that she lacked spontaneity, which was also seen by the examiners as evidence of the appellant's lack of relevant legal knowledge and understanding. The errors discovered in her written response, moreover, pertained as much to structure, content, and attention to factual detail as to her ability to draft in English. With regard to her legal knowledge, it is neither relevant nor convincing that she won her previous appeal before the Tribunal.

34. With regard to the appellant's performance in the oral examination, the Secretary General observes that the reports of the two independent examiners are directly at odds with the appellant's own assessment of her performance. A review of the video is not possible as no recording was made, and would in any case be inappropriate for the same reasons acknowledged by the Tribunal in its previous judgment (paragraph 115). Lastly, whatever effect the appellant's actions may have had in terms of galvanising the Organisation, this has no evidential value regarding her suitability as a seconded lawyer and must be considered inadmissible in any selection procedure carried out according to the rules of the Organisation.

35. In the light of all these considerations, the Secretary General concludes that the present appeal is ill-founded.

II. THE TRIBUNAL'S ASSESSMENT

36. In the present appeal, the appellant seeks annulment of the written and oral examination of 28 March 2018 and of the subsequent decision not to select her as a secondee. Moreover, by way of an amicable solution, the appellant also asks to be selected as a secondee.

37. The Tribunal recalls that a recruitment procedure is, in general, aimed at identifying the best and most qualified candidates for a particular post or position in a timely and cost-effective manner within the Organisation. It is imperative that every recruitment procedure respect the principles of efficiency, transparency and equality. Moreover, written regulations on the recruitment and employment process must be clear, transparent and effectively enforced.

38. The Tribunal notes that the object of the present appeal does not concern the standard recruitment of staff members of the Organisation but rather the procedure for selecting lawyers to be seconded by member states to the Registry of the Court. Unlike staff members of the Organisation, secondees, during their appointment at the Registry, continue to be employed by the national administration. In other words, a seconded lawyer does not enter into an employment relationship with the Council of Europe on the basis of his or her secondment.

39. Nevertheless, despite those differences, the Tribunal considers that, as already indicated in its previous decision in appeals Nos. 579/2017 and 580/2017, the above-mentioned principles regarding the standard recruitment process must necessarily also be respected in the selection procedure for seconded lawyers. By the same token, once the selection procedure has been completed in full accordance with these principles and written rules, it is up to all the persons involved to respect the outcome of this selection procedure.

40. The selection procedure in the present case was conducted following the Tribunal decision in appeal No. 580/2017 whereby the written tests and interview under the recruitment procedure on 24 and 25 November 2016 were set aside in respect of the appellant (see paragraphs 4, 28, 122 and 131 of the decision of 31 January 2018). Therefore, in respect of the appellant's argument that the decision of the Tribunal was executed after the expiry of the thirty-day legal term, the Tribunal notes that its decision did not specify any date by which the selection procedure was to be carried out. In any event, the Secretary General, in a letter dated 23 February 2018 (see paragraph 4 above), informed the Tribunal that pursuant to its decision of 31 January 2018, the new selection procedure had been scheduled for 28 March 2018. The Tribunal considers that this timeframe is reasonable in the circumstances of the present case.

41. The new selection procedure was conducted pursuant to the Instruction issued by the Registrar on the basis of Resolution CM/Res(2012)2 of 15 February 2012 (see paragraphs 11-14 above). The appellant was invited to participate in it by email of 7 March 2018 which clearly described the content and form of the selection procedure, and which the appellant accepted without any reservations (see paragraph 6 above).

42. The Tribunal observes that Article 15 (c) of the Instruction states, without giving further details, that candidates are to be interviewed by representatives of the Registry. Noting that the traditional recruitment process requires the Organisation and its Directorate of Human Resources in particular to expend valuable time and resources, the Tribunal cannot but acknowledge that conducting the selection procedure using electronic devices greatly simplifies the whole process, and involves fewer financial, logistical and personnel resources. It therefore considers that conducting the interviews via video-conference in the present case was in keeping with Article 15 (c) of the Instruction and did not disadvantage the appellant despite some technical problems which arose during the interview (see paragraph 29 above). The Tribunal adds in this vein that the appellant was not the only candidate who was interviewed via video-conference (see paragraph 21 above).

43. The Tribunal further observes that Article 15 (b) of the Instruction, which describes the written test procedure, indicates that “Candidates who obtain results that are considered sufficient will be interviewed by Registry staff.” Admittedly, this sentence could be construed as indicating the chronological order of the individual stages of the selection procedure, i.e. that a candidate cannot be invited to interview unless he or she performed satisfactorily in a written test. The Tribunal considers, however, that the provisions of the Instruction need to be read in their entirety. It notes in this respect that it clearly follows from Article 14 of the Instruction that the number and forms of particular components of the selection procedure can vary: written tests, interviews or both (see paragraph 13 above) and that, therefore, the selection procedure defined in Article 15 of the Instruction represents a “standard” arrangement. This understanding is consistent with Article 18 of the Instruction which allows, under certain circumstances, selection procedures to be waived (see paragraph 14 above).

44. Against this statutory framework, the Tribunal notes that the appellant does not deny that she knew, from the email invitation sent three weeks before the date of the selection procedure, that she would have to both sit a written test and attend an interview on the same day at the Council of Europe Programme Office in Ankara, and that she agreed, unreservedly, to participate in the selection procedure arranged as indicated (see paragraph 6 above). Accordingly, the Tribunal finds that the appellant cannot successfully argue that the fact that she was invited to interview was conditional upon a satisfactory performance in the written examination.

45. Finally, in reply to the appellant’s assertions that the Registry erred in finding her unsuitable for secondment duties, in particular as regards her knowledge of English and law and that, in view of her contributions to the Council of Europe, she deserved to be seconded, the Tribunal recalls that under Article 59, paragraph 8 d., of the Staff Regulations, it can rule only on questions concerning irregularities in the procedure. It goes without saying that a manifestly erroneous or deliberately false assessment would fall within the scope of this provision (see Decision No. 580/2017, paragraph 116). The Tribunal underlines that it is for the appellant to support her allegations by adducing relevant evidence. There is nothing in the case file, however, which would substantiate any of her contentions that the decision of the Registry not to accept the appellant for secondment is based on a manifestly erroneous assessment of her competences, abilities and knowledge, as demonstrated during the written test and/or the interview.

46. In the light of all these considerations, the Tribunal finds that the appellant’s complaints are manifestly unfounded.

III. CONCLUSION

47. The appeal is unfounded and must be dismissed.

For these reasons, the Administrative Tribunal:

Declares appeal No. 592/2018 unfounded and dismisses it;

Decides that each party will 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 English text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

N. VAJIĆ