

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

Appeal No. 712/2022
(Fatih KIRBAS v. Secretary General of the Council of Europe)

The Administrative Tribunal, composed of:

Nina VAJIĆ, Chair,
Lenia SAMUEL,
Thomas LAKER, Judges,

assisted by:

Christina OLSEN, Registrar,
Dmytro TRETAKOV, Deputy Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The appellant, Fatih Kirbas, lodged his appeal on 9 May 2022. The appeal was registered the same day under No. 712/2022.
2. On 10 June 2022, the Secretary General forwarded her observations on the appeal.
3. On 18 June 2022, the appellant filed his submissions in reply.
4. The public hearing of this appeal was held in the Administrative Tribunal's hearing room in Strasbourg on 27 October 2022. The appellant conducted his own defence. The Secretary General was represented by Benno Kilian, Head of the Legal Advice and Litigation Department, assisted by Sania Ivedi and Nina Grange, both legal advisors for this Department.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

5. The appellant is a Turkish national who was a seconded official to the Council of Europe between 1 August 2020 and 31 July 2022.

6. The appellant applied to the external recruitment procedure No. e35/2021 organised for the recruitment of Turkish lawyers at the Registry of the European Court of Human Rights (Grade A1/A2).

7. By email dated 16 November 2021, the Directorate of Human Resources (DHR) informed the appellant that, as one of the shortlisted candidates on the basis of his qualifications, he had been invited to participate in the next stage of the selection procedure consisting of three online job-related tests.

8. The appellant passed the first online test (multiple choice questions) and was invited to the second and the third tests, which were respectively a legal analysis of a summary of facts and complaints in the light of the European Convention on Human Rights (Paper 2) and an essay on a general topic related to the European Court of Human Rights (Paper 3).

9. The appellant participated in the second and the third tests on 18 January 2022.

10. According to the appellant, when he started the second test in the morning of 18 January 2022, he noticed that certain functionalities in the Word document were non-operational, in particular he could not use the mouse for copy-pasting. Some one and a half hour later he asked the online exam invigilator whether there was a copy-paste function. Ten to twenty minutes later the invigilator returned to him explaining that the said function was in fact operational with the use of keyboard shortcuts. The appellant tried to use the shortcuts unsuccessfully, which he considered to be a result of him being under panic, as there was only about half an hour left until the end of the exam.

11. By email dated 14 March 2022, the DHR informed the appellant that his results in the papers did not qualify him to be invited to the next stage of the selection procedure. The email specified the marks that the appellant had obtained and indicated that his overall average was below the minimum final mark set by the DHR for candidates to be invited to an interview.

12. On 15 March 2022, the appellant raised his concerns with the DHR regarding the copy-paste function inherent to the electronic Word document used during the second online examination. He indicated that, if possible, he “would like to object to the results obtained in paper 2” and if not possible, he “would at least recommend (...) to provide the candidates in the following exams sufficient and clear instructions or guidelines before the exam”.

13. On 8 April 2022, the DHR replied to the appellant that his objection could not be taken into consideration since “as indicated in the Protocol for passing online tests through the TestReach platform, any technical issues during the exam must be reported to the DHR within 10 calendar days.” The DHR considered that it was unable to proceed further with the matter since the appellant sat the exam on 11 January but informed the DHR about the technical issues only on 15 March, after receiving his final results.

14. By email dated 10 April 2022, supplemented by additional information provided by e-mail dated 13 April 2022, the appellant introduced an administrative complaint against the DHR’s reply of 8 April 2022. He claimed that his complaint was not related to a technical issue but rather to the conditions in which the examination took place. He challenged the results of his examination on the grounds that he had been treated unfairly and that candidates had not been provided with sufficient and clear instructions on the modalities of the examination, thus raising an issue of lack of foreseeability and arbitrariness. On these grounds, the appellant

requested the Secretary General to disregard his mark for Paper 2 and to review his overall average mark on the basis of his results for Paper 3 only, or to give him another opportunity to sit the second test or to annul the examination procedure.

15. On 4 May 2022, the appellant applied to the Chair of the Administrative Tribunal for a stay of execution.

16. On 6 May 2022, the Secretary General dismissed the complaint in its entirety on the grounds that it was ill-founded.

17. On 9 May 2022, the appellant lodged the present appeal, in accordance with Article 60 of the Staff Regulations in force at the time.

18. On 17 May 2022, the Chair of the Administrative Tribunal rejected the appellant's application for a stay of execution.

II. THE RELEVANT LAW

19. The relevant provisions which applied to the submission of an administrative complaint at the time of the facts of the present case were set out in Article 59, paragraphs 2 and 8 of the Staff Regulations¹ and they read 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*: (...)

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. Article 60, paragraphs 1 and 2, of the Staff Regulations laid down the rules governing the appeal procedure before the Administrative Tribunal:

“1. In the event of explicit rejection, in whole or part, or implicit rejection of a complaint lodged under Article 59, the complainant may appeal to the Administrative Tribunal set up by the Committee of Ministers.

2. The Administrative Tribunal, after establishing the facts, shall decide as to the law. In disputes of a pecuniary nature, it shall have unlimited jurisdiction. In other disputes, it may annul the act complained of. It may also order the Council to pay to the appellant compensation for damage resulting from the act complained of.”

¹ The Staff Regulations which applied at the time of the facts of the present case are those which were adopted by [Resolution Res\(81\)20](#) of the Committee of Ministers of the Council of Europe on 25 September 1981. These 1981 Staff Regulations, with further amendments, were replaced on 1 January 2023 by the new Staff Regulations, adopted by [Resolution CM/Res\(2021\)6](#) of the Committee of Ministers of the Council of Europe on 22 September 2021. All references in the present judgment to the Staff Regulations are therefore to be understood as references to the 1981 Staff Regulations.

21. Article 12, paragraph 1, of the Staff Regulations defined the aim of the recruitment policy at the Council of Europe in the following terms:

“Recruitment should be aimed at ensuring the employment of staff of the highest ability, efficiency and integrity (...).”

22. The rule prohibiting discrimination between candidates which applied at the time of the facts of the case was Article 13 of the Staff Regulations. Its relevant provisions were worded as follows:

“1. Subject to Article 14 of the Staff Regulations and Article 6 of the Regulations on Appointments (Appendix II to the Staff Regulations), recruitment shall be carried out without direct or indirect discrimination, in particular on grounds of racial, ethnic or social origin, colour, nationality, disability, age, marital or parental status, sex or sexual orientation, and political, philosophical or religious opinions.

(...)

4. Applications shall be considered in the first instance on the basis of qualifications, experience and competencies.”

THE LAW

23. In his appeal, the appellant requests the Tribunal to annul the Secretary General’s rejection of his administrative complaint of 13 April 2022 and his exam results for Paper 2 to be disregarded. He further requests that his exam results be based solely on his results for Paper 3, resulting in his invitation to the interview, or alternatively to be provided with a second chance to sit either the second test only or a new written exam in full, or alternatively for the written exam procedure to be cancelled for all candidates and a new exam procedure be initiated.

24. For her part, the Secretary General asks the Tribunal to declare the appeal unfounded and to dismiss it in its entirety.

I. THE PARTIES’ SUBMISSIONS

A. The appellant

25. The appellant considers that the Administration failed to provide candidates with clear and necessary instructions regarding the online tests, in particular, as regards the Word functionalities used during the second test. The appellant submits that the lack of the copy-paste function through the click of the mouse, misled him into believing that this function was entirely unavailable. He argues that the absence of clear instructions placed an excessive burden on candidates to find alternative solutions. It was only later, when he sought assistance of the exam invigilator, that he realised there was an alternative way of using the copy-paste function through the keyboard shortcut. The appellant goes on to provide a detailed argumentation on the importance of the copy-paste function for his performance on Paper 2 in support of his claim that the lack of clear instructions adversely affected his performance in this test. This is further demonstrated, according to the appellant, by the higher mark he obtained in Paper 3 for which the copy-paste function was not necessary. Thus, the appellant concludes that the decision complained of is unsubstantiated, unfair, and arbitrary.

26. The appellant further submits that the challenged decision violates the principle of equality of treatment as some of the candidates knew about the possibility to use shortcuts either directly from their experience of sitting similar exams or indirectly through other persons who had such experience. He believes that such difference cannot be considered an “inherent inequality”, as contended by the Secretary General (see paragraph 29 below) and that he was in a disadvantageous position since he could not save time by using the copy-paste function. He maintains that the argument about “inherent inequality” amounts to saying that “exam authorities do not need to provide the candidates any information before the exam because the candidates shall learn everything about the functioning of the exams by participating in these exams”.

B. The Secretary General

27. The Secretary General observes that, under international case-law, the Administration has wide discretion in determining how written tests in an examination are conducted and managed, as well as how they are assessed. She adds that this discretion, which must be exercised on the basis of objective criteria, is subject to judicial review, the purpose of which is to ascertain whether a manifest error or misuse of powers occurred in the exercise of the discretion or whether the limits of the discretion have been manifestly exceeded.

28. Further, the Secretary General submits that finding solutions to difficulties such as the one faced by the appellant in the present case was an integral part of the selection procedure, which is of a competitive and comparative nature. She notes that usual keyboard shortcuts for copy-pasting were available during the exam and their use is widespread. Providing this information before or in the test instructions would have been an unnecessary overload of information for candidates who in any case were informed about the possibility to raise any questions they had with the invigilator at any time during the test. The fact that the appellant availed himself of this possibility only at an advanced stage of the exam was entirely his responsibility. The Secretary General underlines that in any event, the use of the copy-paste function was not essential to succeed in this type of online test consisting of a legal analysis requiring candidates to come up with their own drafting and reasoning. There was no difference in this regard between Paper 2 and Paper 3, the latter consisting of an essay. The Secretary General concludes on this point that the issues raised by the appellant had no bearing on the candidates' prospects of success and did not impact on the impugned decision.

29. The Secretary General refutes the appellant's plea that the decision complained of violated the principle of equality. All candidates were provided with the same exam papers and information. The principle of equality of treatment between candidates was not distorted in the selection procedure by the fact that some candidates knew beforehand how to use the copy-paste keyboard shortcuts. The fact that some candidates had the previous experience of sitting similar exams gave them a potential advantage which is inherent in their participation in previous competitions, but it did not amount to a breach of the principle of equal treatment between candidates. She refers to the concept of “inherent inequality” that was examined by the Tribunal in its decision of 30 October 2009 in [Appeal No. 455/2008](#) - Musialkowski v. Secretary General (paragraph 37).

30. The Secretary General concludes that in the present case, the Council of Europe did not commit any irregularity and the appellant's claims should be dismissed in their entirety as manifestly unfounded.

II. THE TRIBUNAL'S ASSESSMENT

31. The Tribunal recalls that with regard to competitions, international case law is consistent in saying that competent administrative authorities have wide discretion in determining how competitive examinations are conducted and managed, as well as how candidatures are assessed. This discretion must however be counterbalanced by scrupulous observance of the applicable rules and principles and is not exempt from judicial review, the purpose of which is to ascertain whether the challenged decision was taken without authority or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence (Appeals Board of the Council of Europe, [Appeal No. 172/1993](#) - Feriozzi-Kleijssen v. Secretary General, decision of 25 March 1994, paragraph 31; see also European Court of Justice (ECJ), [Case C-40/86](#), Judgment of the Court (First Chamber) of 16 June 1987, *George Kolivas v. Commission of the European Communities*, paragraph 11). It is not for the Tribunal to declare the test papers unlawful unless they exceed the limits set out in the notice of competition or conflict with the purpose of the tests or of the competition (Court of First Instance of the European Communities, [Case T-173/99](#), Judgment of 25 May 2000, *Gilbert Elkäim and Philippe Mazuel v. Commission of the European Communities*, paragraph 35).

32. In the present case, the DHR provided all candidates with the amount of information that it deemed necessary for participation in the impugned examination. It is indeed for the competent authorities to decide what information is indispensable and what information constitutes general knowledge which the ordinary person is expected to have when participating in the online examinations. It must not be overlooked that the obvious purpose of the examination at stake was to check the legal knowledge and drafting skills of the candidates rather than their mastering of electronic functionalities. Therefore, the candidates were not expected to show specific and complex computer skills. However, they were expected to have basic knowledge of commonly used tools. Therefore, the choice of the organisers not to provide more information on such tools was within their discretion. Indeed, the appellant himself has never claimed that he did not master the relevant keyboard shortcuts, he claimed that it was less common than the use of the mouse. Furthermore, the organisers provided all candidates with a possibility of raising questions of this type with the test invigilator and the appellant used that possibility. The situation that he found himself in, as described in paragraph 10, was indeed the result of his own presumptions and choices for which the Administration could not be responsible.

33. As to the appellant's argument about discriminatory treatment during the second part of the exam, the Tribunal reiterates that at all stages of the competitive examination, whether that of its organisation or conducting or marking of the papers, all candidates must be treated on an equal footing and completely impartially (cf. Appeals Board of the Council of Europe, [Appeal No. 172/1993](#) - Feriozzi-Kleijssen v. Secretary General, decision of 25 March 1994, paragraph 31).

34. In its case law, referred to by the Secretary General, (Administrative Tribunal of the Council of Europe, [Appeal No. 455/2008](#) - Musialkowski v. Secretary General, paragraph 37), the Tribunal admitted that there could be a *de facto* situation constituting an "inherent inequality" between candidates without this situation amounting to unequal treatment. In the aforementioned decision, such difference was in command of language between native speakers and non-native speakers. There could be equally other types of experiences that put one candidate in a more advantageous situation than the others. The appellant himself, having

worked for the Council of Europe for almost two years at the time, could be arguably considered in a more advantageous situation than those candidates who had not worked for the Organisation.

35. On the other hand, as the appellant suggested, it could be accepted that those who had previously sat similar exams could have a certain experience that other participants lacked. In this respect, the Tribunal reiterates its above findings that the information, which the appellant considered lacking, and knowledge of which allegedly gave an advantage to other candidates, was not specific to this type of examination and is widely used in the text formatting. Having said that, the Tribunal considers that even assuming that the appellant considered himself in a situation of “inherent inequality” as to the mastering of the computer skills, such alleged difference does not appear to be relevant to the purpose of the examination in question and simply presupposes, as mentioned above (see paragraph 32), certain basic knowledge of commonly used computer skills. The Tribunal considers in any case that the appellant was not adversely affected by this *de facto* situation.

For these reasons, the Administrative Tribunal:

Declares the appeal ill-founded and rejects it;

Decides that each party will bear its own costs.

Adopted by the Tribunal in Strasbourg on 25 January 2023 and delivered in writing in accordance with Rule 35, paragraph 1, of the Tribunal’s Rules of Procedure on 31 January 2023, the English text being authentic.

Registrar

Chair

Christina OLSEN

Nina VAJIĆ