

Appeal No. 759/2024

D. S.

v.

**Secretary General
of the Council of Europe**

JUDGMENT

30 January 2025

The Administrative Tribunal, composed of:

Paul LEMMENS, Chair,
Lenia SAMUEL,
Thomas LAKER, Judges,

assisted by:

Christina OLSEN, Registrar,
Dmytro TRETYAKOV, Deputy Registrar,

has delivered the following judgment after due deliberation.

PROCEEDINGS

1. The appellant, D. S., lodged his appeal on 27 June 2024. On the following day, 28 June 2024, the appeal was registered under number 759/2024. On 29 July 2024 the appellant filed supplementary pleadings with the Tribunal.
2. On 30 August 2024 the Secretary General forwarded observations on the appeal.
3. On 12 September 2024 the Chair of the Tribunal addressed to the Secretary General a request for additional information in pursuance of Rule 13 of the Tribunal's Rules of procedure.
4. On 26 September 2024 the Secretary General provided the additional information requested by the Tribunal.
5. On 9 October 2024 the appellant lodged his observations in reply.
6. On 21 October 2024 the Secretary General submitted a rejoinder.
7. The hearing on the appeal was held by videoconference on 19 November 2024. 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, head of the Litigation division, and Nina Grange, from the same division.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

8. The appellant was a job candidate who applied to take part in the external recruitment procedure No. 105/2023 for assistant lawyers at the Registry of the European Court of Human Rights (hereinafter "the Court").
9. By e-mail dated 18 December 2023 the appellant was informed that he had been shortlisted on the basis of his qualifications to participate in the next stage of the selection procedure, which would take the form of an online job-related test. The email provided the appellant with several explanations on the conduct of the examination. It specified that the job

candidates would be asked to summarise facts of a case submitted to the Court and to provide a legal analysis of admissibility and merits issues arising in the case, with reference to the case-law of the Court. It further indicated that:

“(…) tests will be conducted online from the place of your choice with remote invigilation provided by TestReach, an independent company specialised in delivering online assessments. Please find below the link to the Protocol Document setting out the conditions under which these tests will be held: (...). It also includes a candidate exam checklist.

(…)

The papers must be drafted in English or in French. You may use a dictionary (your mother tongue to English or French) and/or a monolingual dictionary (English, French or your mother tongue) - **electronic dictionaries and legal dictionaries are not allowed. You may use your own version (paper copy) of the Convention with no annotations or underlinings.** No other book will be allowed on your desk during the examination. (...)” (emphasis included in the e-mail).

10. The above-mentioned Protocol Document informed candidates that they would need to meet certain IT requirements, including having “[i]nternet connectivity with continuous internet speed of a minimum of 2.0 Mbps”.

11. The provisions of the aforementioned Protocol Document, in the section on data storage, indicated that “[a]ll video data is held on TestReach systems for a period of 6 weeks following the online assessment, after which it is deleted, unless particular needs require it be held for a longer period, for example, in the case of an appeal process”.

12. By email of 11 January 2024, replying to the appellant’s query, the Registry of the Court informed him that he could also use a dictionary from English to his mother tongue during the test.

13. On 19 January 2024 the appellant took part in the online written test. During the test, candidates were informed on the TestReach platform that “some pages [of the documents for the test that were] not relevant to the (...) examination, [had] been removed”. According to the appellant the system worked slowly, and some documents listed in the application form as attachments were unavailable.

14. In accordance with the Protocol Document, an invigilator was able to remotely control the candidate’s desktop / screen and monitor the candidate via a live audio and video feed on a webcam.

15. On the same day, after taking the test, the appellant sent two emails to the Registry of the Court. In his first email, the appellant complained about how slowly the IT system worked when he took the exam. The email was worded as follows:

“Today I had the exam on Testreach, the system worked very slowly, whenever I needed to scroll down to check the next pages, those next pages were invisible for seconds and sometimes for up to a minute and it was systematic. This took lots of time and can I appeal on this or is there anything I can do in this regard? (...)”.

In his second email, the appellant added:

“I would also like to mention the fact that in documents’ tab not all the materials were there, I mean the documents that the applicant [in the case that was the object of the test] has indicated that he had submitted, this is probably related to the content of the exam and was done on purpose as a part of exam

but as I mentioned in the previous letter, the system worked very slowly and that's why I'm a bit anxious whether it was really on purpose or I missed something. (...)"

16. On 26 March 2024 the appellant was informed by the Registry of the Court that his result in the written test did not qualify him to be invited to the final stage of the selection procedure. It was specified that he had obtained the mark 6/20 in the job-related test. He was also informed that, considering the results of all the candidates, it had been decided to set the minimum mark for candidates to be invited to an interview at 10/20.

17. By e-mails dated 27 and 28 March 2024, the appellant contested his result in the written test, which he considered to be unfair, and asked for an explanation of the mark he had received in the test. He blamed his performance on the fact that the IT system was working slowly on the day of the examination. He also claimed that the person in charge of supervising his online written test had not thoroughly checked the documents at his disposal.

18. In its reply to the appellant dated 4 April 2024, the Registry of the Court provided the following explanations:

"(...) please be reminded of the conditions mentioned in the Protocol which was sent to you together with the invitation letter and which states the following:

"If you consider that the issue was not resolved via this contact with your supervisor and that it compromised the test, you must inform the Council of Europe and TestReach by sending an email to (...) within ten calendar days after the exam in order to enable us to verify the circumstances you refer to. Please note that any complaint concerning technical issues lodged outside the ten calendar day time limit cannot be taken into account."

In your e-mail of 19 January you were complaining that some material might have been missing: however, there was no missing material in the examination and the fact that the system was working slowly was linked to connectivity issues on your side for which neither the Council of Europe nor TestReach can be held liable. I should also like to add that no issue whatsoever was raised during or after that examination, neither on the candidates' nor on TestReach's side.

I attach herewith the response you submitted. The correctors noted that the admissibility issues concerning the Article 6 complaint had not been identified and that other complaints had not been examined at all. The proposal to dismiss the case as abusive was not sufficiently motivated. A number of irrelevant facts were mentioned. A confusion has been made between Rule 47 and the inadmissibility criteria. On the whole the response was considered confusing at times and not sufficiently motivated.

(...)[t]he aim of this feedback is to help you better understand the assessment which was made of your Paper since this might be useful for you in case you wish to participate again in one of our competitions. Its aim is not to justify the decision or to enter into discussions on the marking, which was done by two independent correctors whose marks did not differ by more than two points out of 20. (...)"

19. On 9 April 2024 the appellant submitted a formal complaint against the decision not to invite him to the final stage of the selection procedure, challenging his result in the written test.

20. On 2 May 2024 the Secretary General replied to the appellant's formal complaint and rejected it in its entirety on the grounds that it was inadmissible and, in the alternative, ill-founded.

21. On 27 June 2024 the appellant lodged the present appeal.

II. THE RELEVANT LAW

22. The rules governing the grievance procedures are laid down in Article XIV of the Staff Regulations and the corresponding implementing provisions of the Staff Rules, as follows:

Article XIV of the Staff Regulations - Grievance procedures

(...)

14.3 Staff members who consider that an administrative decision is prejudicial to their interest and conflicts with their terms and conditions of appointment, or with any pertinent provisions of the Staff Regulations, Rules, Instructions or Policies, may initiate the process of management review, allowing for the correction of an improper decision or, where a decision was properly taken, its confirmation along with a reasoned explanation. The modalities of the review shall be set out in Staff Rules adopted by the Secretary General.

14.4 After pursuing management review, staff members who are not satisfied with the outcome thereof may lodge a formal complaint with the Secretary General against the contested administrative decision adversely affecting them, provided that they have a direct and existing interest in doing so. The modalities of the complaints procedure shall be set out in Staff Rules adopted by the Secretary General.

14.5 The Secretary General's decision on the complaint may be appealed to the Administrative Tribunal of the Council of Europe in accordance with the provisions of the Tribunal's Statute. (...)

14.10 In addition to staff members, the complaints and appeals procedure shall be open mutatis mutandis to:

(...)

14.10.3 job candidates, insofar as their complaint or appeal concerns irregularities of the selection process directly affecting them;

(...)

Staff Rule on grievance procedures

1420. DEFINITIONS

1420.1 An administrative decision is any decision, action or implicit decision, taken by an official with administrative powers or a staff member's manager, which affects a staff member's terms and conditions of employment or rights under the Staff Regulations or Rules or any applicable legal provisions.

(...)

1440. MANAGEMENT REVIEW

(...)

1440.2 A request for management review must be filed with the original decision-maker within 30 days from the date on which the contested administrative decision was notified to the staff member or, in the absence of notification, from the date on which the staff member became aware of the decision.

(...)

1440.5 The following administrative decisions are not subject to management review:

(...)

1440.5.4 A decision addressed to the persons referred to in Article 14.10 of the Staff Regulations.

1450. COMPLAINTS PROCEDURE

(...)

1450.2 The complaint must be lodged within 30 days from the date on which the outcome of the management review was notified or, in the absence of notification, within 30 days from the date on which the notification was due.

(...)

1460. APPEALS PROCEDURE

1460.1 The Secretary General's rejection, in whole or in part, of a formal complaint may be appealed to the Administrative Tribunal of the Council of Europe in accordance with the provisions of the Tribunal's Statute and Rules of Procedure.

23. The relevant provisions of the Staff Regulations and Rules regarding recruitment procedures read as follows:

ARTICLE IV of the Staff Regulations – Entry into service

4.1 The Secretary General shall have the power to appoint staff in conformity with Article 36 of the Statute of the Council of Europe. (...)

4.2 The paramount consideration in the appointment of staff members shall be the necessity of securing the highest standards of competence, professionalism and integrity. (...)

4.3 Selection shall be made on a competitive basis, without discrimination, in a manner that ensures the fairness and transparency of the process.

(...)

Staff Rule on entry into service

(...)

490. RECRUITMENT PROCEDURES

490.1 Candidates who meet the criteria set out in the Staff Regulations and Staff Rules and the vacancy notice and whose applications demonstrate the best profile in terms of qualifications, experience and motivation shall be shortlisted for the recruitment evaluation process. Where appropriate, the shortlisting process may involve staff members chosen by the Director of Human Resources who have substantive knowledge of the jobs falling within the ambit of the vacancy notice.

490.2 The evaluation process shall be appropriate to recruitment needs, shall be carried out on a competitive basis and may include consecutive eliminatory stages.

(...)

THE LAW

24. In his appeal, the appellant asks to be “put on the preselection list or at least to [be] give[n] [...] the right to retake the exam”.

25. For his part, the Secretary General asks the Tribunal to declare the appeal inadmissible and, in the alternative, unfounded and to dismiss it in its entirety. Having regard to the non-pecuniary nature of the dispute at hand, the Secretary General submits that the Tribunal’s jurisdiction in this case is limited to annulling the contested administrative decision. He argues therefore that the appellants’ requests go beyond the competence of the Tribunal and should, in any case, be rejected on this ground.

I. THE PARTIES’ SUBMISSIONS

A. Admissibility

1. The Secretary General

26. The Secretary General considers that the appeal is inadmissible with respect to all the complaints raised by the appellant. He observes that the present appeal mainly concerns the outcome of the appellant’s written examination based on the assessment of his paper by the correctors, which differs from his own evaluation of the accuracy and quality of his answers in the examination procedure at issue. The Secretary General notes in this respect that the appellant’s formal complaint and subsequent appeal do not contain any elements concerning an

irregularity of the selection process directly affecting him, contrary to the requirement made in Article 14.10.3 of the Staff Regulations.

2. The appellant

27. The appellant does not comment on the admissibility of his appeal.

B. Merits of the appeal

1. The appellant

a) On the regularity of the procedure related to the online test

28. The appellant calls into question the regularity of the examination procedure on several accounts.

(i) Technical issues and video recording of the test

29. First, the appellant submits that during the online test, he encountered technical problems due to the slowness of the system and the fact that some documents relating to the case, which was the subject of the test, were missing from the test platform. In his rejoinder, the appellant further submits that during his test, he received confirmation from the invigilator that the slowness of the system was not related to his connection or his laptop and that it was a problem that other candidates were facing as well. He adds that the missing documents were relevant to the task at hand and denies that he did not pay attention to the instructions given to the candidates which indicated that irrelevant documents had been removed from the test platform.

30. The appellant complains that, although he drew the attention of the Administration to these issues immediately after taking the test, i.e. on 19 January 2024, his warning went unheeded. By the time he was notified of the decision to exclude him further from the competition on 26 March 2024, the video recordings which could have corroborated his allegations had been destroyed. The appellant considers that his emails of 19 January 2024 (paragraph 15) and the issues he raised therein fully qualified as a complaint under the terms of the applicable Protocol Document. Having submitted his complaint within the required ten calendar days after the test, the appellant asserts that the video recordings of his online test should have been preserved in order to verify his allegations about the circumstances of the test.

31. In so far as the issues raised in his complaint could have had an impact on the outcome of his examination and were nevertheless not taken into account by the Administration, the appellant considers that the decision to exclude him from the further competition procedure is based on erroneous conclusions.

(ii) Checks carried out by the invigilator

32. Secondly, the appellant claims that the invigilator failed to check thoroughly, before the start of his written test, the documents located on his desk and did not verify the title of the dictionary he used. On that basis, the appellant claims that other candidates might have been able to use unauthorised materials during their written tests without this being detected.

(iii) Information on dictionaries to be used by candidates

33. Thirdly, the appellant claims that the information provided to candidates about the dictionaries they could use during the online test was incomplete. He refers to an email which he received from the Administration before taking the test, confirming that he could use an English-Georgian dictionary, provided that it was not a legal dictionary. He considers that this information was not covered by the information given to candidates in the letter inviting them to the test.

b) On the assessment of the appellant's paper

34. The appellant challenges the marking of his written test. He disputes the correctors' assessment of his paper and seeks to show that, contrary to their findings, the analysis of the Court's case which he provided during his examination is in accordance with the practice of the Court. In particular, he contests the view of the correctors that he failed to mention all the complaints raised by the applicant in the case examined. In the appellant's view, the evidence he provided to the contrary, based on extracts of his test paper, was completely overlooked by the Secretary General in the reply to his formal complaint.

2. The Secretary General

35. The Secretary General submits that the appellant's paper was correctly assessed and that the decision not to invite him to the final stage of the selection procedure was taken in full compliance with the applicable rules and principles.

a) On the regularity of the procedure related to the online test

(i) Technical issues and video recording of the test

36. The Secretary General rejects the appellant's argument that a technical issue occurred during his online test which would have justified the video recording of the test being examined and kept beyond the normal period of six weeks.

37. The Secretary General contends that neither the appellant's complaint that the system was slow nor his remarks about the fact that some documents might have been missing during the examination qualified as a technical issue justifying the review of the video recording. The Secretary General stresses that not all questions raised by candidates require a review of the video recording, such as in situations where they can be solved by resorting to available data and information, as was the case with the appellant.

38. As regards the appellant's allegations that the system was slow during his written test, the Secretary General indicates that the appellant's problem was related to his own internet connection and was therefore not the responsibility of either the Council of Europe or TestReach. In support of his position, the Secretary General mentions a post-exam report provided by TestReach which excludes any technical problems related to the online platform or to the situation of the appellant that could have slowed down the examination. Had the appellant requested assistance in relation to this issue, this would have been reflected in TestReach's post-exam report. The Secretary General mentions further that none of the candidates, apart from the appellant, had reported any particular slowing down of the system.

39. As regards the appellant's claim that some documents might have been missing from the materials provided to the candidates, the Secretary General refers to the instructions that had been given to candidates during the online test informing them that some documents, which were not considered relevant to the test, had been removed. There was therefore no need to review the appellant's video recording on this point either, since it was established that the documents had been deliberately removed from the exam file. The Secretary General infers from the appellant's arguments that he had not paid attention to this instruction.

(ii) Checks carried out by the invigilator

40. As regards the appellant's argument related to the invigilator's checks, the Secretary General notes that the appellant first raised this issue by email on 28 March 2024, i.e. more than two months after the date of his online written test. By that time, in accordance with the Protocol Document, the videos of the test had been destroyed. It was therefore not possible to review the video of his online test in order to check the veracity of his allegation that the invigilator had not acted in accordance with the Protocol Document. In the absence of any evidence that would establish that the online tests were not adequately supervised or that other candidates used unauthorised materials or documents, the Secretary General considers that the appellant's allegations in this regard are unsubstantiated.

(iii) Information on dictionaries to be used by candidates

41. The Secretary General rejects the appellant's allegation that the information given to the candidates concerning the dictionaries they could use during the online test was incomplete. He recalls that candidates were informed in their invitation letter that they could use dictionaries from their mother tongue into English or French. Since bilingual dictionaries usually contain translations into and from both languages, it was implied that dictionaries from English or French into the candidates' mother tongue were also allowed. The Secretary General therefore maintains that the e-mail sent by the Administration to the appellant confirming that he could use an English-Georgian dictionary did not contain any new information and no irregularity affected his written test in this respect.

b) On the assessment of the appellant's paper

42. The Secretary General contests the appellant's arguments concerning the marking of his examination papers, stressing the wide discretion enjoyed by the selection body and the inability of the appellant, as a candidate, to challenge the way in which his performance was assessed.

43. The Secretary General submits that the conditions for ensuring a fair and objective examination procedure were fully met in the appellant's case: his paper was marked by two different, independent and qualified correctors, selected by the Registry of the Court on the basis of their competencies; the correctors were supplied with specific and objective marking criteria which were applied to the assessment of all candidates' papers and all the papers were marked anonymously, impartially and objectively. The Secretary General emphasises the consistency of the assessment of the appellant's paper by each corrector. In the Secretary General's view, the appellant has not provided any evidence to substantiate his allegations that the correctors' marks are vitiated by any error of assessment.

44. The Secretary General concludes on this point that no irregularity can be found in the way in which the written examination was prepared and carried out nor in the way in which the appellant's paper was marked.

II. THE TRIBUNAL'S ASSESSMENT

A. Confidentiality of certain documents

45. Upon a request from the Tribunal, the Secretary General provided additional information requesting that some of the documents submitted be treated as confidential and not disclosed to the appellant (paragraph 4).

46. In view of the fact that the Tribunal does not rely on these documents to decide the present case, it is not necessary to take a decision on their confidentiality.

B. Admissibility

47. The Tribunal notes that the English version of Article 14.10.3 of the Staff Regulations provides that job candidates can bring proceedings before the Tribunal only “insofar as their complaint or appeal concerns irregularities *of* the selection process directly affecting them” (emphasis added). It notes that the French version of the same provision is apparently less restrictive since it allows for complaints relating to “des irrégularités *lors de la procédure de* selection qui les affectent directement” (emphasis added). The latter version corresponds to the text of Article 59, paragraph 8, d, of the former Staff Regulations (in force until 31 December 2022), which referred to “an irregularity in the examination procedure” (in French: “une irrégularité dans le déroulement des épreuves du concours”). The Tribunal has held that it went “without saying that a manifestly erroneous or deliberately false assessment would fall within the scope of this provision” (ATCE, appeal No. 580/2017, [decision of 24 January 2018](#), *Demir Saldirim (I) v. Secretary General of the Council of Europe*, § 116; ATCE, appeal No. 592/2018, [decision of 23 January 2019](#), *Demir Saldirim (II) v. Secretary General of the Council of Europe*, § 45).

48. In the light of the foregoing, the Tribunal considers that the objection of the Secretary General as to the admissibility of the appeal insofar as the appellant challenges the assessment of his paper is inextricably linked to the merits of this complaint. Therefore, the Tribunal will examine this objection together with the merits of the complaint.

49. As to the remainder of the appellant's appeal, the Tribunal reiterates that under Article 14.10.3 of the Staff Regulations, a job candidate can bring a complaint relating to the selection procedure. Therefore, this part of the appeal is admissible.

C. Merits

a) *Technical issues related to the online test*

50. Insofar as the appellant complains about the technical issues that took place during the online test, the Tribunal notes that the relevant information as to technical requirements, including that for internet connectivity, were provided to the candidates in advance. The candidates were also informed that some of the documents mentioned in the application form of the case submitted to the Court had been removed from the file put at the disposal of the candidates, for being considered not relevant for the test purposes (see paragraph 13 above).

51. The Tribunal reiterates that the burden of proof regarding alleged irregularities in the procedure lies with the appellant (see, e.g., ATCE, appeal No. 554/2014, [decision of 17 March 2015](#), *Petrashenko v. Secretary General of the Council of Europe*, § 41).

52. The Tribunal notes that the available evidence, in particular the TestReach's post-exam report, shows that TestReach had not received any alerts indicating a general problem with the platform and that no other candidate had complained about similar problems. It also takes note of the appellant's statement in his observations in reply that he had informed the invigilator during the exam that he thought the IT system was operating slowly, and that the invigilator had checked this and found that the delays in displaying the documents were normal and the same for all the other candidates.

53. In the present case, the Tribunal further notes that there is nothing in the file to show that the issues experienced by the appellant as regards the slowness of the system depended on the online testing platform. Even assuming that the video recordings could have corroborated the appellant's allegations in this respect, it is not certain that they would have revealed the underlying cause of the issues in question and thus, could have demonstrated that they were caused by the online test platform, rather than by the appellant's internet connection to the platform.

54. As regards the appellant's complaint concerning the missing documents on the platform, the Tribunal notes that there is no dispute between the parties that some documents were indeed not included in the file put at the disposal of the candidates. The Tribunal considers that the appellant's complaint in this respect relates rather to the choice made by the organisers of the test with respect to the relevance of the documents for the purposes of the test, with which the appellant does not agree.

55. Therefore, the Tribunal considers that the appellant's complaints relating to the alleged malfunctioning of the platform are unsubstantiated or without merits.

b) Organisational issues related to the online test

56. The Tribunal will now examine the appellant's complaints concerning the information provided by the organisers in respect of dictionaries that could be used during the test and about the fact that the invigilator did not check thoroughly enough that he had complied with the requirement to use only authorised materials during the test.

57. In this regard, the Tribunal notes that the appellant asked for clarification about the use of dictionaries and received the necessary explanations from the Administration well before the exam (see paragraph 12). He does not explain how the situation described could possibly have affected his performance during the test.

58. As regards the appellant's arguments that the performance of other candidates might have been affected for the lack of sufficient control by the invigilator, the Tribunal considers that these allegations are purely hypothetical and, in any event, without any possible bearing on the appellant's own performance during the test.

59. In the light of the above, the Tribunal finds that the complaints under this head are equally unsubstantiated and, in any event, incapable of affecting the lawfulness of the decision on the appellant's test.

c) *Assessment of the appellant's paper*

60. 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 candidates and their performance are assessed. This discretion is not exempt from judicial review, the purpose of which is to ascertain whether the challenged decision was taken by an incompetent authority, in breach of a procedural or substantive rule, or based on an arbitrary or manifestly unreasonable assessment of the examination (ATCE, appeal No. 736/2023, *A. A. v. Secretary General of the Council of Europe*, [judgment of 30 November 2023](#), § 26; Court of First Instance of the European Union, [judgment of 15 February 2005](#), *Norman Pyres v Commission of the European Communities*, T-256/01, points 36-37). However, it is not for the Tribunal to substitute its assessment for that of the examination authority.

61. With respect to the assessment of the appellant's paper, the Tribunal has no reason to doubt the independence and the qualifications of the correctors who were selected by the Registry of the Court. Their conclusions are corroborative (within the margin of two points) and not contradictory. The mere fact that the appellant disagrees with their assessment of his written test is not sufficient to claim that this assessment is arbitrary or manifestly unreasonable. As mentioned in the preceding paragraph, it is not for the Tribunal to make its own assessment of the appellant's test paper. In the absence of any evidence that the assessment could be characterised as manifestly erroneous or deliberately false, the Tribunal does not consider that it is its task to dwell on what appears to be mere disagreement of the job candidate with the marking of his paper by the correctors. It follows that this complaint is inadmissible.

For these reasons, the Administrative Tribunal:

Declares the appeal inadmissible insofar as it refers to the complaint relating to the assessment of the appellant's paper;

Declares the remainder of the appeal admissible but unfounded;

Decides that each party will bear its own costs.

Delivered by the Tribunal on 30 January 2025, the English text being authentic.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

Christina Olsen

Paul Lemmens