

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER OF 18 January 2018

In the case of Victor SOLOVEYCHIK v. Secretary General

THE FACTS

1. The complainant, Mr Victor Soloveytschik, has been a permanent staff member of the Council of Europe since 1994. He is assigned to the Registry of the European Court of Human Rights.
2. The complainant was on unpaid leave from the Organisation from 1 September 2012 to 31 August 2017. During this period, until 15 August 2017, he worked for the European Commission of the European Union, where he is also a permanent staff member.
3. As the situation currently stands, on 16 August 2017, the complainant was granted unpaid leave for personal reasons by the European Union, which will end on 5 August 2018 and which, according to EU rules, can be renewed for 12 years.
4. On 1 September 2017, the complainant resumed work at the Council of Europe and he is still assigned to the Registry of the European Court of Human Rights.
5. On 8 December 2018, the complainant made a request for administrative derogation to the Director General of Administration of the Council of Europe.
6. After indicating that it would be unreasonable for him to resign from the European Union now, he stated that he had been informed by the Organisation that he had six months from the date of his return to the Council of Europe (namely until 28 February 2018) to ask for a transfer of his pension contributions from the European Union to the Council of Europe. He added that he had been informed that this time-limit stemmed from Article 2 of the Agreement of 2 September 2008 between the European Union and the Council of Europe on the transfer of pension rights.
7. The complainant stated that he could only meet this time-limit if he resigned from the European Union in the coming two to three months, but that this was not desirable in view of the uncertainties faced by the Organisation's staff members. Therefore, the complainant asked for a derogation which would enable him to transfer his pension rights six months from the day when he resigned from the European Commission.

8. In a memorandum dated 20 December 2017, the Director of Human Resources replied to the complainant.

9. She informed him that she had consulted the Pensions Administrative Committee of the Co-ordinated Organisations and confirmed to him that the Agreement between the European Union and the Council of Europe did not expressly provide for the possibility of transferring pension rights acquired during a period of unpaid leave. She added, however, that the Committee had confirmed, by assimilation, the practice making it possible, in that case, to transfer the rights under arrangements identical to those provided for by the transfer agreements or, failing that, on the basis of the provisions of Article 12 of the Pension Scheme Rules.

10. The Director concluded that it was not possible to make an exception to the regulations in force, for reasons of the overall consistency of the pension scheme and of the transfer agreements in force. Therefore, any transfer of pension rights from the European Union to the Council of Europe made after 28 February 2018 would not be taken into account.

11. On 2 January 2017, the complainant lodged an administrative complaint with the Secretary General under Article 59, paragraph 2, of the Staff Regulations. From the outset, he specified that:

“The purpose of this complaint is to seek the annulment of the [disputed] decision and to obtain assurances that in the specific circumstances described [he is] entitled to initiate a pension rights transfer after 28 February 2018 and within a certain time-limit of [his] future resignation from the EU, if [he] decide[s] to resign.”

12. On 3 January 2018, the complainant made an application to the Chair of the Administrative Tribunal for a stay of execution of the measure complained of.

13. On 10 January 2018, the Secretary General submitted his observations concerning the application for a stay of execution.

14. On 12 January 2018, the complainant submitted his observations in reply.

THE LAW

15. Under Article 59, paragraph 9, of the Staff Regulations, an application for a stay of execution of an administrative act may be lodged if its execution is likely to result in a “grave prejudice difficult to redress”.

According to the same provision, the Secretary General must, save for duly justified reasons, stay the execution of the act until the Chair of the Administrative Tribunal has ruled on the application in accordance with the Tribunal’s Statute.

16. The complainant made his request for a stay of execution of the impugned decision so that the possibility of his transferring his pension be maintained for at least one month after the Secretary General’s decision, or in the event of subsequent proceedings before the Administrative Tribunal, one month after its decision.

17. In support of his application for a stay of execution, the complainant argues that:

“As it can be seen from the impugned decision and my complaint, on 28 February 2018 the said decision, if not annulled, will produce an irreversible effect: I will be deprived for good of a pension rights transfer or I will be forced to resign from the European Commission.

While it is true that a future annulment of the contested decision, by the Secretary General or by the Administrative Tribunal, if the case is submitted to its attention, may also contain a clause restoring my right to effect a pension transfer, this fact does not remove the irreversible nature of the consequences of the decision’s execution on 28 February 2018. That is so because, in case the decision is not annulled on or before that date or its execution is not stayed, I will be unable to take the risk of waiting for a future uncertain annulment and I will have no choice but to resign from the European Commission on that date at the latest and request a pension transfer. A lack of stay of execution would thus result in the irreversible consequence of me losing the possibility to return to work for the EU institutions, which may cause serious personal and pecuniary prejudice.

This serious prejudice for me would be the result of – as I maintain – the impugned unlawful and grossly disproportionate decision. Let me emphasise in this respect that it is precisely the impugned decision that imposes on me the time-limit of 28 February 2018: no legal text applicable to my situation contains such a time-limit.

I would therefore respectfully request a stay of execution of the contested decision to the effect that the possibility for me to initiate a pension transfer is preserved for at least until one month after the Secretary General’s decision or, in case of subsequent proceedings before the Administrative Tribunal, one month after its judgment.”

18. For his part, the Secretary General contends, firstly, that the complainant has not established the existence of an act which, if implemented, would likely cause grave prejudice difficult to redress. As is clear from the case law of the Administrative Tribunal, “it is for the person applying for the stay of execution to show that he or she is likely to suffer prejudice difficult to redress if the stay of execution is not granted, and not for the Secretary General to provide evidence to the contrary”.

19. The Secretary General then points out that, with his administrative complaint, the complainant is asking for the annulment of the decision applying to his situation the time-limit of six months applicable to the transfer of pension rights in the case of recruitment. However, this is precisely the decision with regard to which the complainant is seeking a stay of execution. The Secretary General adds that when an appeal is lodged with the Tribunal following the dismissal of a complaint, it has the power to annul the act complained of before it. In such a case, the Organisation must abide by the annulment decision taken by the Tribunal and implement it in good faith. The implementation of such an annulment decision would not raise feasibility concerns. Therefore, should the appeal be upheld, the annulment of the impugned decision would make it possible to provide appropriate compensation for any prejudice suffered by the complainant. Consequently, the grave nature of the alleged prejudice and the difficulty of redressing it have not been established.

20. Lastly, the Secretary General contends that there is no need to grant a stay of execution of the act complained of since the latter does not entail any execution measures by the Administration. The act complained of by the complainant simply consists in the expiry of a time-limit beyond which the possibility of transferring his pension rights will not be accepted by the Organisation.

21. Conversely, should the Tribunal dismiss the complainant’s appeal, this would mean that the legality of the Organisation’s decision to apply a time-limit of six months expiring on 28 February 2018 as of the date of the complainant’s return to the Organisation will have been recognised by the Tribunal.

22. The Secretary General points out that, as with the point made by the Chair in paragraph 32 of his Order of 24 November 2011 in the case of Yuksek and others v. Secretary General, the complainant relies on the grounds put forward in support of his administrative complaint without actually adding anything specific which might demonstrate the need for the requested stay. These points relate to the merits of the case, which cannot be addressed at the stage of the stay of execution.

23. The Secretary General then points out that, as the Tribunal has stressed on many occasions, “the exercise of [the Chair’s] exceptional power under Article 59, paragraph 9, of the Staff Regulations calls for some self-restraint” (see, among others, the Chair’s Order of 20 December 2016 in the case of Brannan and others v. Secretary General). The purpose of the urgent procedure is to ensure that the administrative proceedings are fully effective, so any application for a stay of execution must show that the requested measure is necessary to avoid grave prejudice difficult to redress. Were it otherwise, this would impair not only the proper running of the services but also the management of major sectors of the Organisation. For the reasons outlined above, the appellant cannot invoke a grave prejudice difficult to redress.

24. Lastly, the Secretary General also points out that there can be no question at this stage of assessing arguments pertaining to the validity of the grievances expressed by the complainant in his administrative complaint, as these issues do not have to be discussed, let alone examined, in the current proceedings, which are concerned only with urgent measures.

25. Given these circumstances and having regard to these considerations, the Secretary General asks the Chair to reject the applicant’s request for a stay of execution as ill-founded.

26. In his observations in reply, the complainant states the following:

“I respectfully submit that this is a most clear case for stay of execution. Without a stay of execution the very purpose of the administrative proceedings will be destroyed and I will be deprived of the right to judicial examination of the dispute.

The Secretary General also submits that there is no room for stay of execution because the impugned decision does not provide for any measures for its execution but imposes a time-limit beyond which the Organisation would not accept a transfer. However, there is no basis for such a narrow interpretation of the power of the President of the Administrative Tribunal under Article 59, paragraph 9, of the Staff regulations. First, contrary to what is stated in the observations, the impugned decision does imply an execution measure: an act of refusal, to be issued if I request a pension rights transfer after 28 February 2018. Second, it is obvious that an individual administrative act which unlawfully imposes a time-limit for the exercise of a right may destroy that right before the end of the administrative proceedings and prejudice its outcome, causing irreparable harm.

Moreover, no difficulty of any kind would arise for the administration of the Council of Europe as a result of preserving the possibility of my pension rights transfer pending the outcome of the administrative proceedings, including possible proceedings before the Tribunal (and for a short reasonable period after that, for example one month, so as to enable me to undertake a transfer in case of an unfavourable outcome). The Secretary General has not even claimed that such difficulty existed.

Finally, having regard to the fact that the merits of the dispute are not the subject matter of the procedure for stay of execution, I will refrain for the time being from commenting on the merits-related statements contained in the Secretary General’s observations.”

27. The Chair notes, firstly, that any transfer of the complainant’s pension rights from the European Union to the Council of Europe would be made on the basis of an agreement signed to that end. However, the Tribunal only has the power to rule on the Council of Europe’s

measures. With that proviso, the Chair notes, subject to any considerations which the Tribunal may make if an appeal is ultimately lodged, that in this case, the measure complained of is the Organisation's unilateral decision, set out in the memorandum from the Director of Human Resources of 20 December 2017, not to take into account any transfer of pension rights from the European Union to the Council of Europe after 28 February 2018.

28. Therefore, for the purposes of these proceedings for a stay of execution, there is indeed a measure by the Organisation which may be the subject of an application for a stay of execution.

29. Turning to the merits of the application, the Chair points out, firstly, that it is a necessary condition for granting a stay of execution order that the execution of the act complained of before a final decision on the dispute "is likely to cause ... grave prejudice difficult to redress" (Article 59, paragraph 9, of the Staff Regulations).

30. Regarding the present case, the Chair notes that, as the Secretary General has correctly asserted in his observations, if the complainant wins his case, the decision to annul the measure complained of would be binding and the Tribunal's decision could be implemented. However, the Chair notes that this argument is only valid if the complainant wins his case on the merits of the appeal and does not resign from the European Union. However, doubts remain as to the possibility of redressing the prejudice if, before winning his case, the complainant resigns from the European Union before he wanted to in order to comply with the time-limit imposed on him for transferring his pensions rights.

31. Equally, doubts may be expressed about the possibility of redressing the prejudice even if the complainant fails to win his case and he has not complied with the time-limit since, owing to the present proceedings, he has not resigned from the European Union because he wanted to be sure about the rules that apply to him. However, this situation would be irreversible because, faced with the complainant's legal challenge, the Organisation has not suspended the time-limit of its own volition pending a final decision.

32. However, granting a stay of execution is not linked to the expectation that the complainant will win his case or, simply, to the existence of serious doubts as to the legality of the impugned measure: according to the provision itself, the implementation of the measure before the final decision need only "cause grave prejudice difficult to redress". Therefore, only the condition of urgency is required for Article 59, paragraph 9, of the Staff Regulations to be applied. As a result, the Chair must also take into account any prejudice that a complainant may suffer even if he does not win the proceedings.

33. The Chair wishes to point out that there can be no question at this stage of entering into the arguments pertaining to the merits of the applicant's complaint, since these issues do not have to be discussed, let alone examined, in the current proceedings, which are concerned only with urgent measures (see the Chair's Order of 3 July 2003, paragraph 10, in the case of *Timmermans v. Secretary General*). Moreover, contrary to the Secretary General's assertions, the arguments submitted by the complainant in support of his request for a stay of execution are not related to the merits of the case, but to its consequences for him. The complainant did mention the arguments which prompted him to challenge the decision of 20 November 2017, but most of the present request for a stay of execution is based on the prejudice that he would suffer if the measure complained of were applied before the legal framework which applies to his case was determined.

34. The Chair also points out that the exercise of his exceptional power under Article 59, paragraph 9, of the Staff Regulations calls for some self-restraint (ABCE, paragraph 12 of the Chair's Order of 31 July 1990 in the case of Zaegel v. Secretary General; ATCE, paragraph 26 of the Chair's Order of 1 December 1998 in the case of Schmitt v. Secretary General; and paragraph 16 of the Chair's Order of 14 August 2002). The purpose of the urgent procedure is to ensure that the administrative proceedings are fully effective, so any application for a stay of execution must show that the requested measure is necessary to avoid grave prejudice difficult to redress. Were it otherwise, this would impair not only the proper running of the services but also the management of major sectors of the Organisation. As the necessity is shown here, the requested stay of execution should be granted. Furthermore, the Chair can see no reason why granting the stay of execution in the present case could disrupt the proper running of the services or the management of major sectors of the Organisation.

35. As the complainant has requested that a stay of execution be granted "for at least until one month after the Secretary General's decision or, in case of subsequent proceedings before the Administrative Tribunal, one month after its judgment", the Chair wishes to point out that normally a stay of execution expires on the day on which the Administrative Tribunal delivers its decision at the latest. However, when granting certain stays of execution, other dates have been set. Therefore, in the interest of sound administrative management of the transfer in question, the Chair considers it useful to grant the complainant's request.

For these reasons,

Making a provisional ruling in accordance with Article 59, paragraph 9, of the Staff Regulations, with Article 8 of the Statute of the Administrative Tribunal, and with Article 21 of the Rules of Procedure of the Administrative Tribunal,

Having regard to the urgency of the matter,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- grant the stay of execution requested;

- order that the stay of execution will expire one month after the day on which the Tribunal delivers its decision at the latest.

Done and ordered at Kifissia (Greece) on 18 January 2018.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS