

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER OF 19 August 2015 on an application to lift a stay of execution

in the case of **Costas SKOURAS (II) v. Secretary General**

THE FACTS

1. The appellant, Mr Costas Skouras, is a British national who is working for the Organisation as a staff member on a fixed-term contract. He is Director (grade A6) of the Directorate of Information Technology.
2. The appellant was recruited by the Organisation on 1 September 2010 on a fixed-term contract corresponding to the probation period; this contract was renewed via a 3-year contract due to expire on 31 August 2015.
3. On 30 April 2015, the appellant was informed at a meeting that the Secretary General was unable to offer him a new contract and that he would cease work on 31 August 2015.
4. On 15 May 2015, the appellant received a letter of notice informing him that his current contract as Director of Information Technology would end on 31 August 2015.
5. On 2 June 2015, the appellant lodged an administrative complaint in accordance with Article 59 of the Staff Regulations. He requested that the decision not to renew his contract be set aside.
6. On 2 July 2015, the Secretary General dismissed the administrative complaint.
7. In July, the Organisation published vacancy notice No. e82/2015 for the post of Director of Information Technology (grade A6), the deadline for applications being 10 August 2015.
8. In a letter posted on 27 July 2015 and sent in advance by email the same day, the appellant lodged an appeal (No. 567/2015) with the Tribunal under Article 60 of the Staff Regulations. The case is currently pending. The appellant has until 27 August 2015 to submit additional pleadings. Thereafter, once the Secretary General has submitted observations and the appellant observations in reply, there will be oral proceedings unless the parties waive them and the Tribunal deems them unnecessary. The hearing is currently due to be held in January 2016 at the latest.

9. On the same 27 July 2015, the appellant applied to the Chair of the Administrative Tribunal for a stay of execution of the impugned decision.

10. In an order issued on 11 August 2015, the Chair granted the requested stay of execution and ruled that it would expire on the date on which the Administrative Tribunal delivered its decision at the latest.

Paragraph 37 of the order reads as follows:

“It is of course for the Secretary General to provide at any stage of the proceedings safeguards sufficient to preclude the existence of grave prejudice difficult to redress, safeguards which are currently lacking, and to request that the stay of execution which the Chair has today decided to grant be lifted.”

11. On 12 August 2015, the Secretary General asked the Chair to order that the stay of execution which he had granted be lifted.

12. On 14 August 2015, the appellant submitted his comments.

13. On the same day, the Secretary General submitted his observations in reply.

THE LAW

14. 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 cause “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.

15. According to Article 60, paragraph 5, of the Staff Regulations:

“While an appeal is pending, the Secretary General shall avoid taking any further measure in respect of the appellant which, in the event of the appeal being upheld, would render unfeasible the redress sought.”

This last provision only applies when, as in the present case, an appeal has already been lodged with the Tribunal.

16. The Secretary General has applied for the stay of execution to be lifted. He justifies his request as follows:

“I refer to the Order made by the Chair of the Administrative Tribunal on 11 August 2015 in connection with the [appellant’s] application for a stay of execution submitted on 27 July 2015.

The Chair decided to grant [the appellant] the requested stay of execution, namely suspension of the decision not to renew his fixed-term contract when it expires on 31 August 2015.

The Chair of the Tribunal concluded that the stay of execution requested by [the appellant] should be granted after taking into account the fact that a recruitment procedure is currently pending in order to fill the post of Director of Information Technology. In the Chair’s view, “if the appellant does not remain in post, a problem could arise if the appellant wins his case but his post has been filled by a third party.”

Paragraph 37 of the Order states:

“It is of course for the Secretary General to provide at any stage of the proceedings safeguards sufficient to preclude the existence of grave prejudice difficult to redress, safeguards which are currently lacking, and to request that the stay of execution which the Chair has today decided to grant be lifted.”

Under these circumstances and in view of these considerations, the Secretary General is willing to provide the Tribunal with such safeguards. He undertakes to keep the post vacant and to refrain from appointing a new Director of Information Technology after the current recruitment procedure, pending the Tribunal’s decision on appeal No. 567/2015 lodged by [the appellant].

The Secretary General therefore asks the Chair of the Administrative Tribunal to order that the stay of execution granted to [the appellant] be lifted.

At the same time, given how this situation is affecting the proper functioning of the service and the management of human resources, the Secretary General also asks the Tribunal to order that this case be fast-tracked, as it did in Appeal No. 541/2013, Palmieri v. Secretary General (cf. Order of the Chair of 13 September 2013, paragraph 34).”

17. The appellant submits the following comments:

“According to the Secretary General, there is no risk for irreparable damage to my interests as he declares his intension not to fill the vacancy until the Administrative Tribunal reaches a decision. In so doing, the Secretary General abuses the procedural rights in two ways:

1. *In the present case, for his request to be accepted by the President of the Administrative Tribunal, the Secretary General declares that the order for stay of execution is not needed because no irreparable damage is possible as he promises not to continue the replacement procedure for the post of Director of Information Technologies until a decision by the Administrative Tribunal is reached.*
2. *Moreover, he asks the Administrative Tribunal to speed up procedures for the preparation of the case for “... the good of the service operations and the management of human resources...”.*

The Secretary General comes too late in both of his requests:

1. *In the first place, he indirectly insists in his position that I should not be guaranteed the full justice promised at all levels by the Council of Europe. As I have demonstrated in my pleadings up to now, it is clear that the Secretary General wants me removed from the service. For that reason he has delayed all action against me in order to impede the justly expected process and deprive me of the full protection by the justice system of the Council of Europe. He could clearly have taken action against me in time and through the appropriate avenues available to him. If this would have been the case, the Administrative Tribunal would not have the need to order a stay of execution. Moreover, he could have decided not to open the vacancy when he received my administrative complaint letter. Sadly, he did not. Finally, his late promise is abusive and it also proves that contrary to the benefit of the organisation, he prefers the Council of Europe not to have a Director of IT rather than to accept me in office for a small period of time. This sequence of undeniable actions by the Secretary General prove that the damage to me will be irreparable if I am not covered by a stay of execution.*
2. *Secondly, every element of the Secretary General behaviour in the present case demonstrates unfairness and abuse of procedure. Apart from ordering the non-renewal of my contract for arbitrary, capricious and unfair reasons and unlawfully hiding a disciplinary attitude and approach against me, his behaviour constitutes an abuse of procedure as he asks for quick and speedy process and resolution when he himself has refused to cooperate and agree to an early hearing of the case when asked and offered the option by the Tribunal. I am attaching herewith the correspondence between the Secretariat of the Administrative Tribunal with both parties involved. This correspondence clearly outlines and proves the true intensions of myself and the Secretary General. In summary and despite the fact that at the time the matter of the stay of execution decree (which I always felt that I deserve) was not resolved, I agreed to the question by the Administrative Tribunal for the case to be heard during the October session. The*

Secretary General refused and forced the Tribunal to assign the case to the January 2016 session. Now, once more, the Secretary General is acting against the general principle of law of "non venire contra factum proprium".

This attitude only proves in the best possible way that the Secretary General is acting unfairly, capriciously and abuses the procedure rights. Unfortunately this can only conclude to a total loss of trust. For all of the above reasons, I respectfully come to the conclusion that the stay of execution is absolutely necessary and needs to be maintained."

18. In his observations in reply, the Secretary General argues as follows:

"The Secretary General wishes to point out firstly that the appellant has failed to prove his allegation that the safeguards which the Secretary General has provided to the Administrative Tribunal are not sufficient to prevent the prejudice which the Chair's Order of 11 August 2015 seeks to avoid.

On the contrary, the Secretary General notes that he has furnished the Tribunal with all the necessary safeguards "to preclude the existence of grave prejudice difficult to redress" by undertaking to keep the post vacant and to refrain from appointing a new Director of Information Technology after the current recruitment procedure, pending the Administrative Tribunal's decision in appeal No. 567/2015 lodged by the appellant.

The appellant also criticises the Secretary General for asking that the procedure be dealt with speedily. Yet this is a reasonable request, prompted by the desire to minimise the negative impact that the current situation could have on the proper functioning of the service. The decision to fast-track a case has been shown to be effective in the past, furthermore, as in appeal No. 541/2013, Palmieri v. Secretary General."

In the Secretary General's opinion, a speedy procedure does not mean one that is over-hasty. That is precisely why he made it clear beforehand that he could not agree to produce his written submissions within a timeframe that would not allow him the opportunity to exercise his defence rights properly and in full. The Secretary General therefore asks the Tribunal to order that the case be fast-tracked, while at the same time preserving each party's right to present its case in an appropriate manner and in sufficient time, for example, by ordering a hearing to be held by the end of 2015."

19. The Chair wishes to make it clear firstly that he does not share the appellant's opinion that the Secretary General acted in an unfair and capricious manner, and committed an abuse of procedure. He is confident that the Organisation will stand by its undertaking if the Chair decides to lift the stay of execution. The Chair has been aware from the outset of the ins and outs of the present stay of execution proceedings and, without there being any need to examine them here, of the issues involved in the appeal proceedings. He will therefore make a decision without considering these claims and trusts that the remainder of the proceedings will be conducted in accordance with the principle of courtesy in the use of language.

20. Secondly, the Chair wishes to point out that, as in his order of 11 August 2015, there can be no question at this stage of any assessment of the arguments concerning the merits of the appellant's complaint. These matters are not for discussion, let alone examination, in the current proceedings, which are only concerned with urgent measures (see Order of the Chair of 3 July 2003, paragraph 10, Timmermans v. Secretary General).

21. With regard to the relevance of the Secretary General's arguments for lifting the stay of execution, the Chair notes that, since his order of 11 August 2015, a new balance in terms of procedural safeguards has emerged between the parties with the granting of the application to stay execution of the Secretary General's decision not to renew the appellant's fixed-term contract. When considering the Secretary General's request, due account must be taken of this new development.

22. While it is true that the Secretary General's undertaking is such as to preclude the existence of "grave prejudice difficult to redress" (Article 59, paragraph 9, of the Staff Regulations) as regards the possibility for the appellant to remain in post if he wins his case before the Tribunal, the fact remains that this declaration by the Secretary General is not sufficient to preclude the risk of the appellant suffering grave prejudice difficult to redress in another respect.

23. Presenting a mixture of facts and arguments, the appellant, in his application for a stay of execution, challenged the decision not to renew his contract, citing the move to fill his post as quickly as possible via a recruitment procedure.

24. From the moment the appellant's application for a stay of execution was granted, he became entitled to a number of benefits during the appeal proceedings which are not contingent on the outcome of the latter and which the appellant would lose if the stay of execution is lifted and he fails to win his case on the merits of the appeal.

25. To grant this application for a stay of execution, therefore, would effectively be to alter, to the detriment of the appellant, the status quo that arose following the order of 11 August 2015.

26. The Secretary General could, of course, object to this decision, on the ground that, by his order of 11 August, the Chair changed the existing status quo. The fact is, however, that the circumstances referred to in the case law on stays of execution concerning changes to a status quo relied upon by the Secretary General and cited in the order of 11 August 2015 were not the same as those of this appellant. For the complainant in the case referred to was complaining of the failure to renew her fixed-term contract in a context where her replacement was not imminent and no steps had yet been taken to fill the post whereas in the present case, not only has the procedure to fill the post commenced and the time-limit for applications already expired, but also the Secretary General has not denied what the appellant said about a speedy resolution. This distinction justified a change in the status quo in respect of the appellant.

27. Moreover, even though Article 60, paragraph 5, of the Staff Regulations, mentioned above, applies only to the Secretary General's actions in cases where an appeal is declared well-founded, it is clear that the Chair, in exercising his discretionary power, must take account of the spirit of this rule and avoid any new measure that would be detrimental to the appellant in the event that his appeal should not be declared well-founded.

28. In conclusion, the Chair must reject the application to lift the stay of execution.

29. The Parties having commented on the principle that the examination of the merits of the appeal should be conducted quickly, the Chair wishes to point out that such matters should be settled not in stay of execution proceedings but rather in the appeal proceedings, during which the parties are consulted about how the various stages are to be organised and the Chair takes the final decision.

30. The Chair points out that the exceptional power conferred on the Chair under Article 59, paragraph 9, of the Staff Regulations calls for some self-restraint in its exercise (cf. 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 and any application to lift a stay of execution must show that such risk no longer exists. Otherwise, it would jeopardise not only the smooth running of Council departments but also the management of significant sectors of the Organisation.

For these reasons,

WE, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- dismiss the Secretary General's application to lift the stay of execution.

Done and ordered at Kifissia (Greece) on 19 August 2015.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS