

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER of 31 March 2016

In the case of Ilknur YUKSEK (III) v. Secretary General

THE FACTS

1. The complainant, Ms Ilknur Yuksek, worked for the Organisation, on fixed-term contracts, from January 2004 to May 2014 both in the Registry of the European Court of Human Rights and in the Directorate General for Human Rights and Rule of Law. She was then employed from 10 November 2015 to 31 January 2016, on a temporary contract, in the Parliamentary Assembly of the Council of Europe.

2. The complainant applied to sit a competitive examination for the recruitment of a “lawyer – Turkey (Grade A1/A2) – Registry of the European Court of Human Rights”.

3. Vacancy notice No. e26/2015 indicates that this was a “fixed-term contract” and that:

“Following this competition, a reserve list of successful candidates, in order of merit, may be established. This list will be valid for two years with the possibility of extending it to a maximum of four years. It should be noted that placement on a reserve list does not give candidates the right to an appointment within the Council of Europe. The choice of candidates from a reserve list is not made solely according to the order of merit but also takes into account the requirements of the position to be filled and the qualifications of the candidates.

During the period of validity of the reserve list, candidates on the list may be offered employment on a fixed-term contract, which may be renewed one or several times. There is a statutory probationary period of two years.”

4. After the written tests, the complainant was invited to an interview with the Appointments Board which took place on 21 January 2016.

5. On 11 February 2016, the Directorate of Human Resources informed the complainant that, on the recommendation of the Appointments Board, the Registrar of the European Court of Human Rights had decided not to place her on the reserve list drawn up after the competition.

6. On 16 February 2016, the complainant had a meeting, at her request and for the purpose of obtaining feedback, with, according to her statement, the Chair of the Appointments Board (the Secretary General merely refers to a staff member from the Directorate of Human Resources). At this meeting, she was given detailed explanations as to why her application had

not been successful. In particular, it was pointed out that the Appointments Board had seen her most recent appraisal report which dated back to 2013. The complainant adds that she was also told that among other considerations, the Board members had noted the appraiser's comments, which, in her view, tended to work against her.

7. On 10 March 2016, the complainant submitted an administrative complaint to the Secretary General under Article 59, paragraph 2, of the Staff Regulations. She asked that the interview with the Appointments Board be declared null and void, on the ground that candidates who were already working or had already worked at the Council Europe had not been treated on an equal footing with external candidates.

8. In a complaint, posted on 16 March 2016 and which reached the Registry on 18 March, having been preceded by an email sent on 15 March, the complainant applied to the Chair of the Tribunal for a stay of execution of the recruitment procedure, under Article 59, paragraph 9, of the Staff Regulations.

9. On 21 March 2016, the Secretary General submitted his observations on the application for a stay of execution.

10. On 23 March 2016, the complainant submitted her observations in reply.

THE LAW

11. Under Article 59, paragraph 9, of the Staff Regulations, an application for a stay of execution of an act on the part of the Administration may be submitted 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.

12. The complainant lodged her application for a stay of execution so that the Chair could order the suspension of the recruitment procedure. In support of her application, she cited the failure to treat candidates who were already working or had already worked at the Council of Europe on an equal footing with external candidates. She has not, however, advanced any arguments to show that to proceed with the recruitment procedure would be likely to cause her "grave prejudice difficult to redress".

13. The Secretary General for his part states firstly that eight candidates were placed on the reserve list. Offers of employment were made and accepted by three candidates, who are to start work on 1 May 2016. According to the Secretary General, these recruitments created entitlements on the part of the candidates concerned and are binding on the Council of Europe. It is not possible, therefore, to suspend a recruitment procedure that has already been completed.

14. The Secretary General contends that the present application can under no circumstances be granted, as it has been rendered devoid of purpose by the fact set out above.

15. He further argues that the complainant's situation does not justify suspending the recruitment procedure.

16. Firstly, argues the Secretary General, there is nothing in the present application to support the complainant's claim that she is likely to suffer grave prejudice difficult to redress within the meaning of Article 59, paragraph 9, of the Staff Regulations, as she has presented no arguments to this effect. The Secretary General adds that, as observed by the Chair in his Order of 24 November 2011 in the case Yuksek and others v. Secretary General (paragraph 31), the complainant relies on the reasons given in support of her administrative complaint, without adding anything specific that might demonstrate the necessity of the requested stay. In the Secretary General's view, these points relate to the merits of the case which cannot be addressed at the stay of execution stage.

17. The Secretary General himself goes on to provide some details which relate to the merits of the case and which need not be repeated here.

18. Secondly, the Secretary General maintains that to proceed with the recruitment procedure would in no way be likely to cause the complainant any prejudice whatsoever.

19. In this respect, the Secretary General notes that, for the purpose of executing the decision of 30 October 2009 in Appeal No. 455/2008 (Musialkowski), he arranged for all the candidates to sit new tests, even though some successful candidates had already been recruited, and, after these tests, a new reserve list was drawn up and incorporated into the original one. The candidates on the second reserve list did not suffer any prejudice and were recruited in the usual fashion.

20. The Secretary General contends that there is currently no reason why he should not adopt the same approach in this case.

21. To conclude, in the Secretary General's view, it is clear from the foregoing that the present application is devoid of purpose as three candidates have already been recruited and cannot therefore be put on hold. He further contends that there is nothing in the complainant's situation that could be deemed to constitute "*grave prejudice difficult to redress*", without which no stay of execution may be granted. The fact is that the prejudice invoked by the complainant, if it did exist, would not be such as to justify suspending recruitments which have already been agreed between the Council of Europe, as the employer, and three candidates who have accepted job offers and are due to start work on 1 May 2016.

22. As the purpose of the proceedings concerning the request for urgent action is to ensure that the administrative disputes procedure is fully effective, the application for a stay of execution must demonstrate that the measure requested is necessary in order to avoid grave prejudice difficult to redress. Otherwise, not only the efficient operation of the various departments but also the management of sizeable sectors of the Organisation would be jeopardised. For the reasons outlined above, the complainant cannot invoke a grave prejudice that it is difficult to redress.

23. It is for that reason, in those circumstances and in the light of those elements, that the Secretary General requests the Chair to reject the application for a stay of execution on the ground that it is devoid of purpose and/or ill-founded.

24. In her observations in reply, the complainant notes, on the subject of grave prejudice difficult to redress, that the subject of her administrative complaint is related to an irregularity

in an external examination procedure. After achieving marks above the final pass mark required in order to be invited to an interview with the panel, she contends that she also succeeded in the interview part of the competition and was going to be placed on a reserve list.

25. That would have afforded her an opportunity for employment in the Registry of the European Court of Human Rights, as an A-grade lawyer. Hence her argument that the execution of the recruitment procedure, which was flawed on the grounds of unequal treatment between candidates and therefore in breach of the principle of fairness, will cause her grave prejudice difficult to redress.

26. After putting forward arguments concerning the legal basis for the practice followed in the recruitment procedure, the complainant asserts, with regard to the fact that offers had already been made to three candidates, that, in view of the 30-day time-limit laid down in Article 59 of the Staff Regulations for lodging an administrative complaint, the Administration should have acted with due diligence and waited until the end of this period before offering employment to the shortlisted candidates.

27. On the subject of continuation of service in an important sector such as the European Court of Human Rights, she expresses the view that such continuation cannot be achieved as a result of arbitrary and unfair procedures.

28. In conclusion, the complainant maintains her application for a stay of execution.

29. The Chair notes that the Secretary General argues firstly that the application for a stay of execution no longer serves any purpose and secondly that it is ill-founded.

30. As regards the first claim, the Chair notes that the fact that the Secretary General had already proceeded to recruit three candidates after the recruitment procedure is no reason to claim that the present application has become devoid of purpose. The complainant is not contesting the recruitments which took place after the recruitment procedure but rather the fact she was not included in the reserve list. This list is valid for two years, with the possibility of extending it to a maximum of four years, and the candidates on the list may be recruited, which could be detrimental to the complainant should she win her case in the present dispute. Since, given the status of the recruitment procedure at the time when the application for a stay of execution was lodged, it is clear that, through her request to suspend the procedure, the complainant is essentially seeking to block, as a precautionary measure, any possible recruitment at this stage, the application obviously cannot be declared devoid of purpose.

31. The Secretary General's request that the application for a stay of execution be declared devoid of purpose must be dismissed therefore.

32. With regard to the merits of the application, the Chair notes firstly that there can be no question at this stage of any assessment of the arguments relating to the merits of the grievances set out by the complainant in her administrative complaint. These matters are not for discussion, let alone examination, in the current proceedings, which are only concerned with urgent measures (cf. paragraph 10 of the Chair's Order of 3 July 2003, in the case *Timmermans v. Secretary General*).

33. The Chair notes that he has already ruled on other applications for a stay of execution in which the complainants had asked him to stay the procedure or suspend any recruitment,

as the case may be, and he granted this second request because of the prejudice which an applicant might suffer if he were interviewed after other candidates, invited earlier by the Appointments Board, were recruited. This problem arises not only when there is a competition for one or more predefined vacancies, but also where a list of eligible candidates is drawn up and individuals are recruited before the case in question has been settled.

34. The Chair notes that the arguments put forward by the complainant – which relate more to the merits of the case – are not such as to prove that she would suffer grave prejudice difficult to redress if the stay of execution were not granted. The Chair underlines that the onus is on the person applying for a stay of execution to show that he or she is likely to suffer prejudice difficult to redress if the stay is not granted. In the present case, however, the Chair notes that the complainant has not established the existence of any “grave prejudice difficult to redress” (Article 59, paragraph 9, of the Staff Regulations).

35. The Chair is compelled to note, however, that, particularly in the absence of a stay suspending the recruitment of those candidates who have already accepted job offers – something which, it should nevertheless be noted, has not been ordered in the past –, if the Secretary General continues to fill posts which become available by recruiting from the reserve list before this dispute is settled, the chances of the complainant being recruited should she win her case may be reduced and the prejudice suffered may even become difficult to redress if all the available posts are filled.

36. The Chair notes, however, that the Secretary General has stated that there is currently no reason why he should not adopt here the same approach as that used in Appeal No. 455/2008 (Musialkowski), and which involved incorporating the candidates on the new reserve list into the original reserve list and recruiting them in the usual manner. There is no need therefore to apply Article 8, paragraph 2, of the Tribunal Statute, under which the Chair may make his or her decision subject to certain conditions.

37. The Chair adds that the exceptional power conferred on him under Article 59, paragraph 9, of the Staff Regulations calls for some self-restraint in its exercise (cf. Order of 14 August 2002, paragraph 16, in the case of Schmitt v. Secretary General). Since the purpose of summary procedure is to ensure the full effectiveness of administrative litigation, the application for stay of execution must demonstrate that the requested measure is necessary to avert grave prejudice difficult to redress.

The Chair has reached this conclusion despite the fact that the Secretary General has not shown that, as he seems to claim, granting the stay of execution in this instance would impair the efficient operation of the various departments and the management of major sectors of the Organisation. For the Secretary General has not mentioned any positions which need to be filled from the reserve list and which are vital for the efficient operation of the departments.

On these grounds,

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,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- Order that the present application for a stay of execution be rejected.

Done and ordered in Strasbourg, on 31 March 2016.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS