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TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

DECISION OF THE ADMINISTRATIVE TRIBUNAL of 8 January 2021

Appeal No. 625/2019 (James BRANNAN (IV) v. Secretary General)

The Administrative Tribunal, composed of:

Ms Nina VAJIĆ, Chair,
Ms Françoise TULKENS,
Mr Christos VASSILOPOULOS, Judges,

assisted by:

Ms Christina OLSEN, Registrar,
Ms Eva HUBALKOVA, Deputy Registrar,

has delivered the following decision after due deliberation.

1. On 2 December 2020, Mr James Brannan (the appellant) received a communication from the Registry by way of which he was sent a copy of the decision delivered by the Tribunal on 30 November 2020 on his appeal No. 625/2019. The Tribunal points out that the aforementioned appeal concerned a dispute over the medical and social cover applicable to the appellant's dependent child.

2. On 3 December 2020, the appellant sent the Tribunal an email in which he challenged the validity of this decision on the ground of a lack of impartiality. In support of his challenge, the appellant states that he personally worked with two members of the Tribunal, namely its Chair, Nina Vajić, and Judge Françoise Tulkens, in the course of his duties at the European Court of Human Rights ("Court"). The appellant points out that he was not informed in advance of the composition of the Tribunal and that he was therefore unable to challenge the judges concerned in advance.

3. In her observations of 8 December 2020 on the appellant's objection of bias, the Secretary General firstly notes that although the appellant "contests the validity" of the Tribunal's decision, he does not explicitly request that it be reviewed.

4. As to procedure, the Secretary General points out that under Article 12 of the Statute of the Tribunal, no appeal lies from decisions and that neither the Statute of the Tribunal nor its Rules of Procedure make provision for a review procedure. The Secretary General adds that should it be possible to exercise a right of challenge under general principles of law – even in

the absence of an explicit stipulation to this effect in the applicable provisions – this right should be exercised during the proceedings and before the case is decided by the Tribunal, which did not happen in this case. In response to the appellant's allegation that he was unable to exercise his right of challenge because he had not been informed in advance of the Tribunal's composition, the Secretary General underlines that the rule on the Tribunal's composition is well known (Rule 9 of the Tribunal's Rules of Procedure), as are the identities of the members who sit on the Tribunal by virtue of their appointment by the Court or their election by the Committee of Ministers. In the light of the foreseeable likelihood that the two judges whose impartiality he calls into question would hear his case, the Secretary General states that the appellant ought to have raised objections in relation to their alleged bias well before the decision was taken.

5. Furthermore, the Secretary General observes that if a previous working relationship with a judge at the Court were sufficient for an appellant working in the Court's registry to raise an objection as to the impartiality of this judge sitting on the Administrative Tribunal, this would seriously compromise the operation of the Tribunal.

6. As to the substance of the appellant's challenge, the Secretary General notes that the appellant has provided no evidence casting any doubt on the subjective impartiality of the judges concerned. In addition, according to the Secretary General, the appellant's fears cannot be regarded as objectively justified because the fact that he has worked with the judges concerned as a translator in the Court's registry is not, in and of itself, sufficient to conclude that the requirements of impartiality were breached.

7. The Secretary General also notes that when Judge Tulkens heard the appellant's previous appeal No. 596/2018, the appellant did not raise any issues with regard to alleged bias of the Tribunal in that case.

8. The Secretary General concludes from this that the appellant's real aim is to call into question and discredit a decision that is unfavourable to him. She therefore considers that the appellant's objection of bias must be dismissed.

9. On 9 December 2020, by videoconference during its sixth session of 2020, the Tribunal considered the appellant's objection of bias in the light of Rule 42 of the Tribunal's Rules of Procedure in particular.

10. To the extent that the appellant's objection of bias can be regarded as the exercise of a right of challenge, the Tribunal acknowledges that such a right exists by virtue of general principles of law even in the absence of a stipulation to this effect in the applicable provisions.

11. However, the Tribunal considers that this right was exercised out of time in this case.

12. The Tribunal firstly notes that the appellant had information about the Tribunal's composition. In this regard, it makes reference to the rules that apply to its composition and the information in the public domain concerning the identities of the regular judges and the substitute judges. It considers that the appellant ought to have raised the objection in question before the decision taken on his appeal No. 625/2019 was served on him, as the information available to him made it reasonably possible for him to foresee the composition that the Tribunal would have when his case was heard.

13. The Tribunal secondly notes that the appellant also had information about the way in which the Tribunal operates. This information was sufficient to enable him to realise that one or even two former judges from the Court would very likely be called to hear his case.

14. According to relevant case-law, an application for withdrawal of a judge must be made without delay, and any delay in making it can be taken into account when deciding whether the application was made in good faith (United Nations Disputes Tribunal (UNDT), Order No. 1, 22 June 2012, Gehr v. Secretary-General of the United Nations, paragraph 23). According to this case-law, an application for withdrawal of a judge cannot be made in a case that has already been decided, as it is "physically impossible to grant it" (United Nations Dispute Tribunal (UNDT), Order No. 28, 4 March 2013, Belhachmi v. Secretary-General of the United Nations, paragraph 10). The appellant did not act in due time.

15. As to the merits, the Tribunal considers that the appellant has not submitted any evidence, or even any prima facie evidence, which could call into question the subjective impartiality of the judges concerned or which would indicate a breach of the requirements of objective impartiality. The Tribunal points out in this regard that the personal impartiality of a judge must be presumed until there is proof to the contrary (United Nations Dispute Tribunal (UNDT), Judgment No. UNDT/2009/005, 12 August 2009, Campos v. Secretary-General of the United Nations, paragraph 7.2.2.) and that the burden of proving the basis for disqualification rests with the party who requests it (United Nations Dispute Tribunal (UNDT), Order No. 1, 22 June 2012, Gehr v. Secretary-General of the United Nations, paragraph 20).

16. The only fact mentioned by the appellant in support of his objection is the fact that he worked with two members of the Tribunal over 10 years ago. This fact does not by itself prove that the judges challenged displayed any bias, or that it is objectively reasonable to fear any bias on their part. The Tribunal also points out that to determine whether bias exists, it is necessary to ascertain whether there is a conflict of interest in relation to the subject-matter of the dispute. Such a conflict may arise where, for example, the case concerns persons with whom the judge has personal or family ties, or where he/she has been called upon to participate in the case previously in any capacity. In the case at hand, the Tribunal observes that the appellant has not cited any facts that could demonstrate the existence of any conflict of interest in relation to the dispute on the part of the aforementioned members of the Tribunal. It also notes that in any event, the appellant did not raise an objection of bias in his appeal No. 596/2018 when former judges from the Court were among the Tribunal's members.

17. Furthermore, the Tribunal notes that if the fact of having had a working relationship were sufficient by itself to justify an objection of bias, this would call the Tribunal's operating arrangements into serious question given that its composition always includes at least one former judge from the Court. The Tribunal points out that in the absence of any objections from the parties, it had to judge the appellant's case in accordance with the rules applicable to it in order to avoid a miscarriage of justice.

18. Because he only raised the objection of bias after the decision taken on his appeal No. 625/2019 had been served on him, the course of action taken by the appellant amounts, *de facto*, to laying claim to a right of appeal against the decision. As the Tribunal's decisions are not open to appeal, the appellant cannot succeed in his aim and the Tribunal dismisses his request.

The appellant's request is therefore ill-founded.

For these reasons,

The Administrative Tribunal

Dismisses the request by way of which the appellant contests the validity of the Tribunal's decision of 30 November 2020 on his appeal No. 625/2019 and raises an objection of bias in respect of two of its members.

Done in Strasbourg on 8 January 2021. This decision has been served on Mr Brannan and the Secretary General.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
C. OLSEN	N. VAJIĆ