

CONSEIL DE L'EUROPE————— —————**COUNCIL OF EUROPE**

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR OF 1 July 2009

In the case of case Levent ERCAN v. Secretary General

THE FACTS

1. The appellant, Mr Levent Ercan, is a Turkish national who has already worked for the Organisation as a temporary member of staff (assistant lawyer) for slightly less than one year. At the present time, he is living in Ankara.
2. The appellant applied to take part in the competitive examination to recruit assistant lawyers – Turkey (grade B3) in the registry of the European Court of Human Rights, published in vacancy notice no. e37/2008.
3. After taking the written test, the appellant was invited to present himself for the oral test on 9 January 2009.
4. On 9 February 2009, the appellant learnt that his candidature had not been selected.
5. In a letter dated 25 February 2009, received by the Directorate of Human Resources on 25 March 2009, the appellant lodged an administrative complaint in accordance with Article 59 of the Staff Regulations. He requested that the results of the competitive examination be cancelled and that a stay of execution be granted.
6. On 21 April 2009, the Secretary General rejected the administrative complaint as being partially inadmissible and/or unfounded. In his reply, he observed that the appellant had not submitted a request for a stay of execution to the then Chair of the Administrative Tribunal. The appellant states that the rejection was communicated to him at the beginning of May.
7. In a letter dated 10 June 2009 and posted on 12 June, the appellant lodged an appeal to the Tribunal under Article 60 of the Staff Regulations. The appeal reached the registry on 18 June 2009 and was registered under no. 460/2009 on the same day.
8. In his appeal, the appellant also submitted to the Chair of the Administrative Tribunal a request for a stay of execution.
9. On 22 June 2009, the Secretary General submitted his observations on the request for a stay of execution.

10. On 25 June 2009, the appellant submitted his observations in reply.

THE LAW

11. Under Article 59 paragraph 7 of the Staff Regulations, a request may be submitted for a stay of execution of an act of the Administration if its execution is likely to cause “grave prejudice difficult to redress”.

12. The appellant lodged his request for a stay of execution but did not give reasons for it.

13. The Secretary General argues in the first place that the request for a stay of execution is inadmissible.

14. In his opinion, it follows from paragraphs 7 and 4 of Article 59 of the Staff Regulations that a request for a stay of execution of an act complained of should be submitted at the administrative complaint stage, or at least before the complainant becomes an appellant and in any event not at the same time as an appeal is lodged. If the stay of execution had been requested at the right time and had been granted by the Chair of the Tribunal, it could have been maintained during the appeal procedure. In the instant case, the appellant having lodged the said request at the same time as his appeal, his request is inadmissible.

15. The Secretary General is aware that the ground of inadmissibility raised here was recently dismissed in an Order of the Chair of the Administrative Tribunal dated 23 January 2009 in the Winter case. However, he wishes to stress that the wording of the provisions referred to appears not to permit of a “broad” interpretation of those provisions, in the sense that it is for the appellant to submit a request for a stay of execution of the act complained of, and that it is where such stay has been granted (ie. at the complaint stage) that the stay of execution is maintained throughout the appeal procedure.

16. Consequently, the Secretary General considers it useful to put this ground of inadmissibility again to the Chair of the Tribunal, particularly as in the afore-mentioned Winter case the recruitment procedure in which the appellant had taken part was still ongoing at the time when the request for a stay of execution was submitted and staying execution to enable her to participate in the end of the procedure made sense. In the instant case, there is no escaping the fact that the recruitment procedure in which the appellant took part is over.

17. As to the merits of the request, the Secretary General maintains that if the appellant considered that he might suffer prejudice as the result of a decision, then he ought to have submitted a request as soon as that decision was taken, in order to prevent its execution. However, the recruitment procedure took its course, reached its conclusion, and five of the successful candidates in the competitive examination have since been appointed. In the Secretary General’s opinion, it also follows from these facts that the request submitted by the appellant has become purposeless, the recruitment procedure in which the appellant applied having ended. The Secretary General adds that if the Chair of the Tribunal did desire to uphold the appellant’s request, he cannot see which decision he should defer, since the appointments have been made and the staff appointed must be shielded from any prejudice.

18. The Secretary General adds that the purpose of urgent procedure being to ensure that the administrative disputes procedure is wholly effective, the request for a stay of execution must demonstrate that the measure sought is necessary to prevent grave prejudice difficult to redress. Otherwise, this would compromise not only the proper functioning of departments but also the management of important sectors of the Organisation. The Secretary General holds that in the instant case the appellant cannot claim grave prejudice difficult to redress.

19. Having regard to these factors, the Secretary General requests the Chair of the Tribunal to reject the request for a stay of execution as being inadmissible and ill-founded.

20. In his observations in reply, the appellant argues that his request for a stay of execution is admissible under Articles 59, paragraph 7 and 60, paragraph 4 of the Staff Regulations.

21. With regard to the merits of his request, the appellant asserts that if the Secretary General had given a decision on his request for a stay of execution when his administrative complaint was submitted, the procedure would not have been concluded today. He goes on to develop a whole series of arguments which seek to show that the decision complained of was vitiated by substantive and procedural defects, misuse of power, conflict of interests, prejudice and bad faith.

22. In conclusion, the appellant requests the Chair to order the stay of execution.

23. In the first place the Chair must examine the ground of inadmissibility of the request for stay of execution put forward by the Secretary General.

24. He observes that it was standard practice for appellants to submit requests for stay of execution after lodging their appeals and the Secretary General has never challenged their admissibility (see the order for stay of execution in appeal no. 172/1993, Feriozzi-Kleijssen v. Secretary General and, lastly, the order for stay of execution in appeal no. 384/2006, Radziwill v. Secretary General).

25. The Chair observes that, the Secretary General having recently challenged their admissibility, the then Chair of the Tribunal did not see fit to depart from well-established practice whereby any request for a stay of execution submitted after lodging the appeal was ruled admissible (orders for stay of execution of 20 June 2008 in the case of Tomasi v. Secretary General and 23 January 2009 in the case of Winter v. Secretary General). In the Tomasi order, the Chair had noted that the very purpose of the request for stay of execution supported the conclusion that it was possible to submit a request for stay of execution in the course of the contentious proceedings (ibid, paragraph 21).

26. The Chair goes on to add that, in her order of 29 May 2008 in the Simonet (2) case, the then Chair also expressly mentioned the possibility of submitting a further request for stay of execution in the course of the contentious proceedings (ibid, paragraph 21) following a first request for stay of execution lodged at the administrative complaint stage. Again according to the Chair, an appellant is free to consider that only from the time when he lodges his appeal is he liable to suffer "grave prejudice difficult to redress" from the execution of the act complained of.

27. In the instant case, the Chair agrees with that precedent, from which there is no reason to depart.

28. It follows that the ground of inadmissibility put forward by the Secretary General must be rejected.

29. With regard to the merits of the request for stay of execution, the Chair points out that there can be no question of analysing at the present juncture the arguments relating to the merits of the complaint submitted by the appellant in the context of his appeal, since there is no cause for these questions to be discussed, still less examined, in the context of the present procedure which is aimed only at the adoption of emergency measures (cf. the Chair's order of 3 July 2003, paragraph 10, in the *Timmermans v. Secretary General* case). In the instant case, the Chair notes that the complainant has not established the existence of "grave prejudice (to himself) difficult to redress" (Article 59 § 7 of the Staff Regulations). The appellant's assertion that there were anomalies, defects and disturbing coincidences which influenced the recruitment procedure, in themselves constituting grave prejudice difficult to redress, is not an argument capable of proving the existence of such grave prejudice difficult to redress.

30. The Chair reiterates that the exceptional power conferred on him under Article 59, paragraph 7, of the Staff Regulations calls for some self-restraint in its exercise (see *ABCE*, Chair's Order of 31 July 1990, paragraph 12, in the case of *Zaegel v. Secretary General*; and *ATCE*, Chair's order of 1 December 1998, paragraph 26, in the case of *Schmitt v. Secretary General*, Chair's order of 14 August 2002, paragraph 16). The purpose of urgent procedure being to ensure that the administrative disputes procedure is wholly effective, the request for a stay of execution must demonstrate that the measure sought is necessary to prevent grave prejudice difficult to redress. Otherwise, this would compromise not only the proper functioning of departments but also the management of important sectors of the Organisation.

WE, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decide

- to reject the request for a stay of execution submitted by Mr Ercan.

Done at Oberwil (Switzerland) on 1 July 2009.

The Registrar of the
Administrative Tribunal

Sergio SANSOTTA

The Chair of the
Administrative Tribunal

Luzius WILDHABER