

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR OF 12 September 2013

In the case of KURT TORUN v. Secretary General

THE FACTS

1. The applicant, Ms Bilge Kurt Torun, has been employed by the Council of Europe since 1 October 1999 on a permanent contract as an administrative assistant. She is currently on grade B 4, step 7.

2. In March 2013, the Directorate of Human Resources (hereafter the DHR) organised a competitive examination, pursuant to Article 24 e) of the Regulations on Appointments (Appendix II of the Staff Regulations), which the applicant applied to take part in through the electronic system. On 4 April 2013, she received an acknowledgement of her application from the DHR. On 30 April 2013, she was told that she was one of the 217 candidates invited to the first test of the selection procedure, which would take place in Strasbourg. In an email of 28 May 2013, she was invited to take part in an examination scheduled for 7 June 2013. The examination took place on that date and comprised three tests. Candidates who passed this examination were invited to sit further tests

3. In an email of 3 July 2013, the DHR informed the applicant that she had not obtained the minimum required results and would not, therefore, be allowed to take part in the next stage of the special assessment procedure, the written tests scheduled for 17 September 2013.

4. On 12 July 2013, the applicant lodged an administrative complaint asking the Secretary General to annul the decision not to admit her to the written tests. The purpose of the administrative complaint was to challenge the violations that she considered had vitiated this competition. At the applicant's request, the case is currently before the Advisory Committee on Disputes.

5. On 27 August 2013, the DHR informed the applicant that the Secretary General would rule on her complaint within thirty days of the date he received the opinion of the Advisory Committee on Disputes, and that in the meantime he was unable to take any further action.

6. In an application lodged on 28 August 2013, the applicant asked the Chair of the Administrative Tribunal to order a stay of execution, under Article 59, paragraph 9 of the Staff Regulations, of the decision not to allow her to sit the written tests. She stated that she would suffer grave prejudice difficult to redress if the tests took place without her participation. Under

these circumstances, the applicant asked to be able to maintain her anonymity and confidentiality.

7. On 2 September 2013, the Secretary General submitted his observations in response to the application for a stay of execution.

8. On 4 September 2013, the applicant presented her observations in reply.

THE LAW

9. Under Article 59, paragraph 9 of the Staff Regulations, applications may be lodged for a stay of execution of an administrative act if that execution is likely to cause “grave prejudice difficult to redress”.

The same provision stipulates that the Secretary General, shall, 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.

10. In her application for a stay of execution, the applicant, who requests anonymity and confidentiality, asks the Chair to order the suspension of the DHR decision of 3 July 2013 not to allow her to sit the written tests scheduled for 17 September 2013. She argues that if the written tests of the competitive examination are conducted in her absence she could suffer “grave prejudice difficult to redress”.

She states that the Secretary General would be unable to rule on her administrative complaint before 17 September 2013, that the competitive examination in question was a general one and that the successful candidates could therefore be offered posts fairly rapidly. This meant that even if the Administrative Tribunal found in her favour, she would lose the opportunity to apply for the vacant posts.

11. Turning to the merits of her application, she alleges that the computer-based tests were not transparent and fair, that the candidates had not replied to the same number of questions of the same level, and that the questions did not have a previously determined score. She also criticises the lack of clarity of the assessment method and the unsuitability of the “reference group” used. She states that the content of the tests, other than the verbal one, was not relevant to the competences required and duties carried out in the Council of Europe. The applicant challenges the use of these tests as the sole criterion for eliminating candidates, particularly as these included persons who already worked in the Organisation.

12. The applicant also states that the tests in question result in *de facto* discrimination, since their complexity prevents candidates whose mother tongue is neither French nor English from passing them. Nor did the Administration offer candidates any training for this competition to prepare them to sit the tests, other than a link, provided by the DHR, to the site of the company organising them. She claims that these tests were chosen in order to eliminate artificially the maximum number of candidates.

13. The Secretary General states that the application for a stay of execution is ill-founded, since the applicant has not established the existence of “grave prejudice difficult to redress”. He disputes the applicant’s contention that the competition is a general one, and that the

successful candidates will be offered posts very rapidly. What distinguishes this particular recruitment procedure is the fact that it enables L and B grade permanent staff wishing to become eligible for appointment to category A posts and positions to take part in a formal assessment procedure and then, should they be successful, authorises them to participate in internal competitions for vacant category A posts or positions. There is no question, therefore, either of filling a specific vacant post or position, or of drawing up a reserve list. The Secretary General states that staff who have received a positive assessment following such a special procedure will not be offered vacant posts that might arise. Nor do B and L grade staff with a positive assessment following a special procedure have any right or entitlement to be appointed to an A grade post or position.

14. Given the particular nature of the special assessment procedure and the fact that it simply authorises those concerned to apply to take part in internal competitions, the applicant has not established that she would be caused grave prejudice difficult to redress if the special assessment procedure went ahead as normal. Moreover, if the Chair were to find in her favour the Secretary General would be bound by the Tribunal's decision and would have to execute it. There would be nothing to prevent the organisation of new written and, if appropriate, oral tests for the applicant.

15. The Secretary General adds that the alleged detriment to the applicant caused by the length of time between Appointments Board interviews and the so-called impossibility of comparing candidates is without foundation. He refers in this context to the order of the Chair of 7 October 2011 (appeals nos 486-489, 491, 498-500 and 502/2011 Kiliç and others v. Secretary General).

16. Finally, the Secretary General does not consider it appropriate at this stage of the proceedings to comment on the merits of the applicant's complaints.

17. In her observations in reply, the applicant states that lost opportunities "correspond to the prejudice suffered by a person as a result of the disappearance of the possibility that a favourable event will occur". In her case, this is a lost opportunity to obtain promotion and, more precisely, a lost opportunity to advance professionally, because of the genuine and certain disappearance of a probable outcome, namely the chance to secure a promotion that would entail a significant change in her employment status: from B grade to A grade. She considers, in the light of her CV and her last appraisal report, that this entails a genuine and serious loss of opportunity.

18. The applicant claims that execution of the decision not to let her sit the written tests is likely to cause her grave prejudice difficult to redress, as provided for in Article 59, paragraph 9 of the Staff Regulations. Staff who have been successful in the competition concerned are able to respond to all the mobility notices open to A grades, but if she is unable to take part in the written tests she will not have this opportunity. She adds that a written test organised just for her, as the Secretary General suggests, would not have the same effect as her participation in the tests of 17 September 2013, since it would not be the same test, which means that she would be deprived of the chance to take part in the competition under the same conditions as the other candidates. Whereas all the other candidates could be assessed on the basis of the same questions, and thus the same criteria, the applicant would be deprived of this opportunity since she would be assessed on the basis of different questions and thus different criteria. This distinction would be in breach of the equal opportunities principle. Moreover, if her candidature were assessed later, she would not be able to contribute to setting the level at which candidates

were deemed by the Appointments Board to have passed. She would be assessed according to this same standard, in the setting of which only candidates previously examined would be taken into account.

19. The Chair must first rule on the request for anonymity and confidentiality. He considers that the reasons relied on by the applicant, which it is unnecessary to detail here, are not such as to justify either the anonymity or the confidentiality requested and would be at variance with normal procedure.

The Chair also considers that there can be no question at this stage of assessing the arguments on the merits adduced by the applicant in support of her administrative complaint, which it is inappropriate to discuss, far less examine, in the present proceedings, which only concern the taking of urgent action (see paragraph 10 of the Chair's Order of 3 July 2003 in the case of *Timmermans v. Secretary General*).

20. The Chair notes that he has already ruled on other applications for stays of execution in which, depending on the circumstances, the applicants were asking him for a stay of execution either of the procedure or of the entire recruitment process. He acceded to the second application because of the prejudice an applicant may suffer if he or she has an interview after other candidates previously invited by the Appointments Board are recruited. This problem arises not only when there is a competition for one or more posts to be filled that have already been decided on but also when a list of eligible candidates is being drawn up and persons are recruited before the disputed issue has been settled.

21. However, the Chair wishes to emphasise that persons lodging applications for stays of execution must establish that they could suffer prejudice difficult to redress if the stay of execution is not granted.

22. In this case, the Chair finds that the applicant has not established the existence of a "grave prejudice difficult to redress" (Article 59, paragraph 9 of the Staff Regulations) if these tests take place in her absence. He is less than convinced by her arguments, which are equally concerned with her lost opportunities for professional career progression and which allege that if written tests were organised specifically for her, this would be in breach of the principle of fairness. The Chair fails to see how the time elapsed between the general written tests and a possible individual one for the applicant would prevent the Appointments Board from comparing the results of the two and drawing up a final list of candidates who have completed the examinations successfully.

23. The Chair also notes that the special procedure is still in its initial stage and that moreover it is not designed to recruit A grade staff but rather to enable existing B and L grades to take part in internal procedures to fill A grade posts for which they have the necessary competences. The applicant cannot therefore legitimately claim that she might suffer grave prejudice difficult to redress if the Administration continues with the disputed procedure without awaiting the Tribunal's decision on whether or not the applicant is entitled to take part in it (see, *a contrario*, the aforementioned *Kiliç* and others order, paragraph 36).

24. 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 (see Chairman's Order of 14 August 2002 in the case of *Schmitt v. Secretary General*, paragraph 16). Since the purpose of the urgent procedure is to ensure that administrative proceedings are fully effective,

applications for a stay of execution must establish that the measure requested is necessary to avoid causing grave prejudice difficult to redress.

He reaches this conclusion even though, despite the Secretary General's statement to the contrary, granting a stay of execution in this case would not undermine the smooth running of departments or the management of important sectors of the Organisation. Nevertheless, as the Secretary General has emphasised, the procedure in question is not designed to fill vacant posts rapidly but to enable B and L grade staff to take part in internal competitions for A grade posts. Suspension of the disputed procedure would have no impact on the normal conduct of internal competitions to fill A grade posts and positions since A grade staff could take part in them on a normal basis and the posts and positions concerned could be filled by existing A grade candidates.

For these reasons,

Exercising my jurisdiction to make interim orders under Article 59, paragraph 9 of the Staff Regulations, Article 8 of the Statute of the Administrative Tribunal and 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,

Decide to reject this application for a stay of execution

.

Done and ordered in Kifissia (Greece), 12 September 2013.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS