CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR of 14 May 2020

In the case of A (I)
v. Central Commission for the Navigation of the Rhine (CCNR)

THE FACTS

1. The appellant, A, lodged an appeal with the Tribunal on 13 December 2019. In view of the circumstances, she asked the Chair to grant her anonymity, which she has done. Accordingly, this order has been drawn up in such a way as to preserve this anonymity as much as possible.

2. In her appeal, the appellant requests that the decision by the President of the Central Commission for the Navigation of the Rhine (CCNR) to refuse to open an external inquiry into allegations of harassment which she made be set aside. She also requests the suspension of the implementation of the appointments which, in her view, were decided on with the goal and the effect of removing her from her post.

3. As things stand, preparations for the hearing have reached the stage where the respondent organisation is required to file written observations.

4. On 29 April 2020, the appellant filed the present application for a stay of execution.

5. Following exchanges with the registrar on the procedure for the examination of applications for stays of execution and the length of time granted to the respondent organisation, on 5 May 2020, the latter filed observations on the application for a stay of execution without using up all the time allowed.

6. The appellant replied on 8 May 2020.

7. The same day, a few hours after reading the reply, the representative of the respondent organisation made it known that he would have liked to have been given due time to reply to the opposing party's long reply but there was an imbalance in the proceedings between the parties, rendering them inequitable.

8. The appellant also made some comments on the respondent organisation's arguments.

9. On 11 May 2020, the respondent organisation asked for authorisation to file a rejoinder within 24 hours. The Chair acceded to this request and its observations in reply were received on 12 May 2020.

THE RELEVANT LAW

10. On 16 December 2014, the Council of Europe and the Central Commission for the Navigation of the Rhine entered into an agreement whereby the Administrative Tribunal of the Council of Europe has jurisdiction to rule on appeals lodged by CCNR officials under the conditions described in Article 60 of the Council of Europe Staff Regulations.

11. The last sentence of Article 3, paragraph 3, of this agreement states that "after lodging an appeal, an official may bring a request for stay of execution, even if he/she has not done so before the Secretary General of the Central Commission for the Navigation of the Rhine or the conciliator or if his/her application has been rejected".

12. Article 2 of the agreement clarifies that Articles 59, paragraph 9, and 60 of the Council of Europe Staff Regulations apply to such appeals and the references in these articles to the "Council of Europe" and the "Secretary General of the Council of Europe" should be understood to refer to the Central Commission for the Navigation of the Rhine and its Secretary General.

13. Under Article 59, paragraph 9, of the Staff Regulations, which applies in this case under the agreement reached between the Council of Europe and the Central Commission for the Navigation of the Rhine, an application for a stay of execution of the act complained of 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.

14. As this application was filed after the appeal was lodged with the Tribunal, it should also be pointed out that under Article 60, paragraph 5, of the Staff Regulations of the Council of Europe, "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".

15. The Chair notes from the outset that the parties have submitted a substantial amount of facts and legal arguments relating to the examination of the appeal. However, there can be no question at this stage of entering into the arguments pertaining to the admissibility and merits of the appellant's complaint, since these issues do not have to be discussed, let alone examined, in the current proceedings, which are concerned only with urgent measures (see Order of the Chair of 3 July 2003, paragraph 10, Timmermans v. Secretary General). Consequently, there is no reason to summarise these submissions and arguments at this stage.

16. As to the subject of the merits of the application for a stay of execution, the parties' arguments can be summed up as follows.

17. The purpose of the appellant's application for a stay of execution was to prompt the Chair to order the suspension of the decision by the President of the CCNR not to suspend the procedures relating to the appointment and taking up of his post of the official who, according to the appellant, has been appointed to prevent her contract from being renewed.

18. The appellant asserts that she was subjected to acts of psychological harassment, institutional harassment and outright mobbing. This was intended ultimately, she claims, to create the conditions that would be most conducive to her removal. The means used to achieve this result was to do everything possible for appointments to be made that would be likely to make it impossible for the appellant's contract to be renewed in the light of the CCNR's institutional practices.

19. Having described the circumstances of the appointment which she contests (the decision adopted in May 2019 for the post to be taken up in July 2000), the appellant points out that since 1 March 2020, the person in question has been on an ad hoc post of policy officer, created for him on 3 December 2019.

20. The appellant believes that if the person in question takes up his functions on 1 July 2020 such that his appointment becomes operational, her removal from the CCNR will be only a matter of a few months. The ultimate goal of the psychological and institutional harassment and the mobbing will thus have been achieved.

21. Even if the Tribunal acknowledged that the appellant is a victim of psychological harassment, *restitutio in integrum* would no longer be possible and she would be entitled only to compensation.

22. As a result, the appellant considers that only the suspension of the disputed appointment would be capable of sparing her a "prejudice difficult to redress" in accordance with Article 59, paragraph 7, of the Staff Regulations.

23. The appellant also cites the fact that in an exchange with the parties, the Chair reminded the respondent organisation of the terms of Article 60, paragraph 5, of the Staff Regulations of the Council of Europe cited above, which applies in the present case pursuant to Article 1 of the Agreement between the two international organisations. The purpose of this paragraph is to prevent any further measures being taken while an appeal is being examined which, in the event of the appeal being upheld, would render unfeasible the redress sought by the appellant.

24. The appellant says that she is aware of the consequences of her request for the appointment in question to be suspended and the fact that the Tribunal has always shown restraint with regard to high-grade posts. However, a past Chair of the Tribunal stated in a similar case that he would grant stays of execution if the applicants were able to provide "prima facie evidence" of the existence of "grave prejudice" difficult to redress (see, for example, the Chair's Order of 28 January 1992 in the case of Muller-Rappard v. the Secretary General of the Council of Europe). In addition, a Chair of the Tribunal at that time granted a stay of execution each time where not to have done so would have created "rights and situations that are difficult to reverse" (see Order of the Substitute Chair of 26 October 1993 in the case of Ferriozzi-Klejssen v. the Secretary General of the Council of Europe and Order of the Chair of 18 December 1998 in the case of Schmitt v. the Secretary General of the Council of Europe).

25. In conclusion, prima facia evidence of the prejudice arises from an examination of the facts and the causal link between the actual taking up of functions following the disputed appointment and the removal of the appellant in the short term.

26. According to the respondent organisation, the application for a stay of execution should be dismissed on three grounds, namely the Tribunal's lack of jurisdiction, the inadmissibility of the application and, lastly, the fact that it is ill-founded.

27. Firstly, while recognising that the Tribunal has jurisdiction to examine administrative decisions regardless of the authority which adopted them (Secretary General or President, even though the latter is not named explicitly in the agreement between the two organisations), the respondent organisation would point out that the Tribunal does not have jurisdiction to examine appeals against the CCNR which are not administrative but policy-related in nature. In its view, the appellant is contesting a policy-related decision, adopted by the Central Commission.

28. Secondly, the respondent organisation submits that the application for a stay of execution is inadmissible under Article 1 of the Agreement between the two Organisations and Article 59, paragraph 9, of the Council of Europe Staff Regulations.

29. In its opinion, the appellant does not have standing to contest the recruitment decision in question because this appointment was made for policy-related reasons unconnected with the appellant's situation. This decision does not have any impact on the current mandate of the appellant, which will continue as usual up to its end.

30. As to any future mandate, the appellant does not have any acquired right to a second renewal of her mandate. Nor does she demonstrate that if the recruitment in question had not taken place, this would have prompted the CCNR to proceed with this renewal.

31. In the respondent organisation's opinion, no direct and certain causal link has been reported by the appellant. Consequently, she has no standing to contest the appointment decision, as it does not adversely affect her.

32. Furthermore, it is not the contested act which is liable to cause her grave prejudice that it will be difficult to redress if it is carried out, but the decision by the Central Commission of 29 May 2019 to proceed with the disputed recruitment. Yet, the appellant does not contest this decision.

33. Moreover, the appellant has failed to state in her written submissions (administrative request and others) until what date the suspension of the disputed appointment would apply and hence should cease. Unless this essential clarification is made, there is reason to understand that the suspension would apply for an indeterminate period, which obviously cannot be the case.

34. Consequently, the application for a stay of execution should be considered inadmissible.

35. Lastly, the respondent organisation argues that the application for a stay of execution is ill founded because the appointment decisions contested by the appellant were taken by the Central Commission on the basis of policy-related considerations and its discretionary power. The President could not therefore suspend them on his own.

36. The main reason to dismiss the administrative complaint is the fact that the appointment decisions taken are entirely unconnected with the alleged acts of harassment which the appellant complains of and the alleged campaign against the renewal of her contract.

37. It should also be said that there is nothing to prove that such intrigues have taken place, since the appellant has not provided any objective, materially verifiable evidence of the supposed conspiracy of which she claims to be a victim. Likewise, and conversely, neither does the appellant show that if the disputed recruitment had not taken place, her contract would still have been renewed by the Central Commission.

38. The appellant does not provide any evidence either of a direct and certain causal link between the alleged psychological harassment and the non-renewal of her mandate.

39. In conclusion, the requirements for a stay of execution are not established. Accordingly, the respondent organisation requests the Chair to declare that she does not have jurisdiction to stay the execution of the contested decision, and to declare the application for a stay of execution inadmissible and ill-founded.

40. The appellant, for her part, maintains that the application for a stay of execution is admissible. She reiterates her arguments and abides by her conclusions.

41. In its rejoinder, the respondent organisation reiterates the arguments already expounded and asks the Chair to concur with its conclusions that the application should be dismissed.

42. Firstly, the Chair considers that she must dismiss the respondent organisation’s complaints of inequitable proceedings.

43. As to the time limit to rule on an application for a stay of execution, the Chair points out that the time limit of fifteen days is set by statutory and regulatory texts (Article 61 (Calculation of time-limits) of the Staff Regulations of the Council of Europe, Article 8 (Stay of execution) of the Statute of the Tribunal, and Rule 21 of the Rules of Procedure of the Tribunal).

44. On the subject of the procedure followed to prepare the examination of the application for a stay of execution and the apportionment of the time limits granted to the parties, the Chair would simply note that she was merely applying a decades-long practice whose equity had never been contested to date.

45. As to the merits of the application for a stay of execution, on the subject of the first objection to the application relating to the lack of jurisdiction of the Tribunal owing to the policy-related nature of the disputed decision, the Chair would point out that only the Tribunal itself may rule on objections relating to its jurisdiction. This exclusive power is established by Article 4 of the Statute of the Tribunal and acknowledged by Article 1 of the Agreement between the two Organisations. Moreover, the parties do not contest this exclusive power in the instant case. Accordingly, this objection by the respondent organisation must be dismissed.

46. As to the second argument that the application for a stay of execution is inadmissible, the Chair notes that in this respect as well, a distinction needs to be made between the jurisdiction of the Tribunal and that of its Chair. Only the Tribunal may rule on the merits of the appeal and the Chair must limit herself to ruling only on matters which may cause a prejudice that it is difficult to redress to the execution of the decision which the Tribunal must

deliver. Accordingly, the Chair may not rule on whether the contested decision is a policy-related one or not. Neither is it her role to decide whether, through her appeal, the appellant is contesting an act which adversely affects her.

47. As to the other arguments relating in turn to the maintenance and renewal of the appellant in her functions and to their continuation, the Chair notes that these arguments relate to the merits of the application for a stay of execution rather than its admissibility. The same applies to the fact that the appellant does not specify, in her administrative and litigious submissions, how long she wishes the suspension to last. Consequently, the Chair will take these matters into account below, when examining the arguments relating to the merits. It follows that the plea of inadmissibility of the application for a stay of execution must be dismissed.

48. On the subject of the merits of the application, having studied the arguments put forward by the appellant and the respondent organisation, the Chair is of the opinion that the application must be dismissed because the appellant fails to prove that she is liable to suffer "prejudice difficult to redress" if the stay is not granted.

49. The appellant bases her application solely on the fact that if the contested decision is not suspended and the Tribunal finds in her favour, there cannot be *restitutio in integrum*. Yet, according to the first sentence of Article 5 of the Agreement between the two Organisations, "[the] Central Commission for the Navigation of the Rhine undertakes to execute the judgments of the Administrative Tribunal and to inform it of the execution in accordance with the provisions of Article 60, paragraph 6 of the Council of Europe Staff Regulations".

50. In the Chair's view, the only fact which could currently amount to "prejudice difficult to redress" for the appellant would be that a procedure has been set up to replace her. There is no evidence that the respondent organisation is in the process of taking such steps and the Chair is confident that it will not do so before the Tribunal gives its decision.

51. In conclusion, the application for a stay of execution must be dismissed.

For these reasons,

THE CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- dismisses the application for a stay of execution submitted by A.

Done and ordered in Zagreb on 14 May 2020.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	N. VAJIĆ