

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR OF 17 May 2022

in the case of **Fatih KIRBAS v. Secretary General**

THE FACTS

1. The applicant is a national civil servant on secondment with the Council of Europe until 31 July 2022.
2. The applicant applied to the external recruitment procedure No. e35/2021 organised for the recruitment of Turkish lawyers at the Registry of the European Court of Human Rights (Grade A1/A2)
3. By email dated 16 November 2021, the Directorate of Human Resources (DHR) informed the applicant that, as one of the shortlisted candidates on the basis of his qualifications, he had been invited to participate in the next stage of the selection procedure consisting of three online job-related tests.
4. The invitation indicated that the paper scheduled on 11 January 2022 (“paper 1”) was eliminatory and that those candidates who obtained a minimum mark of 10/20 would be invited to sit the next two papers (“paper 2” and “paper 3”) on 18 January 2022. The invitation specified:

“The overall average mark will be calculated using the following weighting: Paper 2 - 60% of overall average mark, Paper 3 - 40% of overall average mark. Those candidates with the best marks will be invited to an interview at later dates. Please note that the overall average mark may be increased depending on the number of successful candidates.”
5. On 13 January 2022, the DHR informed the applicant that he had passed the first online examination with success and that he was admitted to the next exams (papers 2 and 3) which he sat on 18 January 2022.
6. By email dated 14 March 2022, the DRH informed the applicant that his results in the papers did not qualify him to be invited to the next stage of the selection procedure. The email specified that he had obtained the marks 6/20 in paper 2 and 11/20 in paper 3, with an overall average of 8/20, which fell short of the minimum final mark of 10/20 for candidates to be invited to an interview.

7. On 15 March 2022, the applicant raised his concerns with DHR regarding the copy-paste function inherent to the electronic Word document used during the second online examination. He indicated that, if possible, he “would like to object to the results obtained in paper 2” and if not possible, he “would at least recommend (...) to provide the candidates in the following exams sufficient and clear instructions or guidelines before the exam”.

8. On 8 April 2022, the DHR replied to the applicant that his objection could not be taken into consideration since “as indicated in the Protocol for passing online tests through the TestReach platform, any technical issues during the exam must be reported to DHR within 10 calendar days.” The DRH considered that it was unable to proceed further with the matter since the applicant had sat the exam on 11 January but had only informed the DRH about the technical issues on 15 March, after receiving his results in the papers.

9. By email dated 10 April 2022, supplemented by additional information provided by email dated 13 April 2022, the applicant introduced an administrative complaint against the DHR’s reply of 8 April 2022. He claimed that his complaint was not related to a technical issue but rather to the conditions in which the examination took place. He challenged the results of his examination on the grounds that he had been treated unfairly and that candidates had not been provided sufficient and clear instructions on the modalities of the examination, thus raising an issue of lack of foreseeability and arbitrariness. On these grounds, the applicant requested the Secretary General to disregard his mark in paper 2 and to review his overall mark on the basis his results in paper 3 only, or to provide him another opportunity to sit paper 2 or to annul the examination procedure.

10. On 4 May 2022, the applicant applied to the Chair of the Administrative Tribunal for a stay of execution.

11. On 6 May 2022, the Secretary General rejected the applicant’s administrative complaint.

12. On 9 May 2022, the applicant lodged an appeal against the rejection of his administrative complaint.

13. The Secretary General submitted her observations on the application for a stay of execution on 10 May 2022. They were forward to the applicant on 11 May 2022. The latter submitted his observations in reply on 13 May 2022.

THE LAW

14. Under Article 59, paragraph 9 of the Staff Regulations, an application for a stay of execution of an administrative act complained of may be submitted if its execution is likely to cause “grave prejudice difficult to redress”.

I. THE PARTIES’ SUBMISSIONS

15. After setting out arguments which relate rather to the merits of the administrative complaint and the appeal, the applicant asks the Chair of the Tribunal to order the stay of the exam proceedings held under the external vacancy notice No. e35/2021. As grounds for his application, he submits that the completion of the recruitment procedure before his case is settled by the Secretary General and/or the Administrative Tribunal would deprive him of any

possibility of redress and would render the appeals procedure “theoretical and illusory but not practical and effective”. He notes in this respect that the interviews held under the recruitment procedure were completed on 29 April 2022.

16. The Secretary General notes from the outset that the recruitment procedure of which the applicant requests the stay of execution is closed, given that on 5 May 2022, the Court Registrar decided to place on a reserve list the 7 candidates recommended by the Appointments Board and that this decision was notified on the same day to the selected candidates.

17. On the merits of the request, the Secretary General maintains that the applicant failed to establish the existence of a grave prejudice difficult to redress which would justify granting a stay of execution. She considers that the arguments put forward in support of the request (see paragraph 15) are not such as to prove that the applicant would suffer serious harm difficult to repair if the stay were not granted.

18. The Secretary General considers furthermore that future recruitments deriving from the competition at stake are in no way likely to cause any harm to the applicant, since, if the Tribunal were to rule in favour of his appeal, adequate redress could be provided by conducting new written exams and interviews and drawing up a new reserve list. The Secretary General refers in this connection to the case law of this Tribunal, in ATCE, [Chair’s order of 11 May 2021](#), Yuksek (V) v. Secretary General (paragraph 32) and ATCE, [Chair’s order of 10 June 2021](#), Botsi v. Secretary General (paragraph 32).

19. The Secretary General contends further that the prejudice alleged by the applicant, if it were to exist, would not be such as to justify the stay of execution of the recruitments resulting from the competition, given their importance for the proper functioning of the Registry of the Court and the handling of the backlog of Turkish cases pending before the European Court of Human Rights. She also mentions the need to consider the situation of candidates who have been successful in the competition and whose professional future would be put on hold.

20. For all the above considerations, the Secretary General concludes that the applicant’s request for a stay of execution is unfounded and should not be granted.

21. In his observations in reply, the applicant develops considerations pertaining to the merits of his appeal. He notes that none of the shortlisted candidates on the reserve list have been recruited so far, which goes to demonstrate that the recruitment procedure is not completed, contrary to the Secretary General’s claim (see paragraph 16 above), and that a decision on the stay of execution can still be taken. The applicant adds that the delays in the Administration’s handling of his objections and queries undermined his right to an effective remedy and delayed his application for a stay of execution.

22. The applicant challenges the notion that an adequate form of redress, should the Tribunal rule in his favour, would be to conduct new written exams and interviews and to draw up a new reserve list (see paragraph 18 above), since his chances of being recruited from the reserve list would be diminished by the end of the appeal procedure.

23. The applicant considers that he should not bear the burden of the Administration’s failings in conducting the competition and that therefore, the Administration is misguided to invoke the need to avoid the adverse consequences for the Organisation of a suspension of the competition (see paragraph 19 above).

24. Thus, the applicant stands firmly by the submissions made in his application for a stay of execution.

II. THE CHAIR'S ASSESSMENT

25. From the outset, the Chair recalls that, under the power conferred on her by Article 59, paragraph 9 of the Staff Regulations, she may order a stay of execution of an act which has been contested by way of an administrative complaint and/or appeal if such execution is likely to cause the complainant/appellant grave prejudice which would be difficult to redress.

26. In the present case, although the applicant requested the stay of execution of the recruitment procedure (see paragraph 15 above), the Chair considers that she can examine this request only to the extent that it concerns the contested decision, namely the decision not to invite the applicant to an interview in the context of the recruitment procedure in question. It is therefore subject to this limit that the Chair will rule on the present application.

27. Regarding the Secretary General's preliminary observation that the recruitment procedure was finalised with the decision to place the 7 recommended candidates on a reserve list (see paragraph 16), the Chair observes that this decision was taken on the same day on which the applicant's request for a stay was notified to the Secretary General. The Chair recalls that under the terms of Article 59, paragraph 9 of the Staff Regulations, 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.

28. The Chair further notes that the Secretary General herself acknowledges that the reserve list established during this procedure will continue to be used for future recruitments in the coming years, which could be to the detriment of the applicant if he is successful in his current litigation.

29. Therefore, the Chair finds that the Secretary General's remark on the closure of the recruitment procedure No. e35/2021 has no bearing on the present procedure.

30. Concerning the merits of the requests, the Chair specifies that there can be no question at this stage of assessing arguments attaching to the validity of the grievances expressed by the applicant in his administrative complaint and appeal: these issues should not be discussed, let alone analysed, in the context of the present procedure, whose sole purpose is the adoption of urgent measures (see Chair's order of 3 July 2003, paragraph 10, in the case *Timmermans v. Secretary General*). Thus, for the purposes of ruling on the present request for a stay of execution, the Chair shall not examine the applicant's arguments on the merits of his appeal, nor shall she rule on the applicant's requests relating to the production of information which might be relevant to the appeal proceedings, such as his request that the Secretary General provide the Tribunal information "on the number of the successful candidates who used the copy-paste tool (in order) to see whether the use of copy paste tool was decisive or not in the exam results".

31. The Chair observes that in the present case, the arguments put forward by the applicant relate rather to the merits of the case and are not such as to prove that he would suffer serious harm difficult to repair if the stay were not granted. Thus, the applicant failed to meet the requisite burden of proof as regards the existence of a "grave prejudice difficult to redress".

Indeed, the applicant's only ground for requesting the stay is the loss of any chance of being recruited under the recruitment procedure No. e35/2021 should this procedure be terminated before the Tribunal rules on his case.

32. The Chair reiterates that the exceptional power conferred on her under Article 59, paragraph 9, of the Staff Regulations calls for some self-restraint in its exercise (see ATCE, [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).

33. Since the condition of urgency is not met, the applicant's request for a stay of execution must be dismissed, without the need to examine the applicant's other arguments and requests such as his request that the Secretary General provide the Tribunal information "on the average duration of the conclusion of the reserve lists following the interviews, concerning the previous similar external recruitment proceedings" and "on the number of candidates who were subsequently recruited having their cases been granted on (their) merits by the Tribunal".

34. Having reached this conclusion, the Chair notes nevertheless that if the Secretary General continues to cover posts that become available by resorting to the reserve list before the end of the dispute pending before the Tribunal, the applicant's chances of being recruited if he is successful may be reduced and the prejudice incurred may become difficult to repair.

35. In that regard, the Chair takes note of the Secretary General's position that should the Tribunal rule in favor of the applicant, it would be possible to follow the precedent in the execution of the judgement delivered in appeal No. 455/2008, [Musialkowski v. Secretary General](#), consisting of establishing a new reserve list on the basis of new interviews and integrating this list into the reserve list established prior to the Tribunal's ruling on the appeal.

36. In view of the possible applicability of this precedent to the applicant's case, the Chair sees no need to subject to certain conditions her decision to reject his application, in pursuance of Article 8, paragraph 2, of the Statute of the Tribunal.

37. This finding cannot prejudice the Tribunal's decision on the merits and is without prejudice to the applicant's ability to state - during the contentious proceedings - the prejudice that he might suffer owing to the execution of the contested decision and, if successful, to claim compensation for damage resulting from the act complained of (Article 60 paragraph 2 *in fine* of the Staff Regulations).

For these reasons,

Ruling on the urgent application 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,

THE CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decides that:

the application for a stay of execution presented by Mr Fatih KIRBAS is rejected.

Done and ordered in Zagreb (Croatia), on 17 May 2022, the English text being authentic.

The Registrar of the
Administrative Tribunal

Christina OLSEN

The Chair of the
Administrative Tribunal

Nina VAJIĆ