

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

ORDER of the CHAIR of 22 March 2021

in the case of
A (II) v. Central Commission for the Navigation of the Rhine

FACTS

1. On 10 March 2021, the appellant, A, lodged an application for a stay of execution of the decision not to renew her contract, of which she had been notified by the President of the Central Commission for the Navigation of the Rhine (CCNR) on 19 January 2021. Prior to this, on 10 February 2021, she had lodged an administrative complaint under Article 59, paragraph 1, of the Staff Regulations of the Council of Europe to contest this decision, on grounds including violation of the general principles of law whereby reasons must be given for administrative decisions and prior notice must be given if a temporary contract is not to be renewed.

2. It is recalled that in its decision of 30 November 2020, ruling on Appeal No. 626/2020, the Tribunal set aside the decision by the President of the CCNR dismissing the administrative complaint made by A against the President's refusal to conduct an inquiry into the appellant's allegation that she was psychologically harassed with the goal of having her removed from the Organisation. The Tribunal concluded that the fact that the appellant was not heard following her complaint resulted in an infringement of Article 38 (c), paragraph 4, of the CCNR staff regulations.

3. It is also recalled that in connection with her appeal, the appellant requested anonymity, which the Chair granted her. Accordingly, this order has been drawn up in such a way as to preserve this anonymity as much as possible.

4. In the context of the appeal in question, the appellant also lodged an initial application for a stay of execution of procedures relating to the appointment and taking up of his functions of the official who, according to the appellant, has been appointed to prevent her contract from being renewed. This application was dismissed by the Chair in an Order of 14 May 2020.

5. With regard to the execution of the Tribunal's decision the President of the CCNR informed the Tribunal by letter of 16 December 2020 about the measures that had been taken pursuant to Article 5 of the Agreement on jurisdiction between the Council of Europe and the

CCNR and Article 60, paragraph 6, of the Council of Europe Staff Regulations. His letter read as follows:

“The decision was followed by an execution measure by the CCNR in the form of a letter from the President to the applicant dated 14 December 2020 (a copy of which is attached), inviting her to a hearing under Article 38 (c) of the CCNR staff regulations.

The setting aside of the impugned decision for a procedural defect means that the CCNR must carry out the proper procedure.

The appellant accepted the President’s invitation, while pointing out that, as the result of a period of sick leave, she would be available only from 6 January 2021 on.

Following this interview, the CCNR will be required to take a decision on the merits of the administrative complaint of 8 September 2019”.

6. The hearing of the appellant provided for as part of the execution of the decision of 3 November 2020 took place on 3 February 2021. In the meantime her functions within the CCNR had come to an end on 20 January 2021.

7. On 10 March 2021, the appellant sent a letter to the President of the CCNR asking for information on the arrangements and timetable for the inquiry. She stated in the letter that she interpreted the CCNR’s silence concerning her complaint which was the subject of the Tribunal’s decision requesting an inquiry into allegations of harassment as an implicit acceptance under Article 38 (c), paragraph 3, *in fine*, of the CCNR staff regulations.

8. On 16 March 2021, the respondent organisation submitted its observations to the Tribunal on the application for a stay of execution on 10 March 2021.

9. The appellant replied on 19 March 2021.

THE RELEVANT LAW

10. On 16 December 2014, the Council of Europe and the CCNR 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. 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 CCNR and its Secretary General.

12. Under Article 59, paragraph 9, of the Staff Regulations, which therefore applies in this case, an application for a stay of execution of an 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.

The parties' arguments

13. The parties' arguments concerning the application for a stay of execution can be summed up as follows.

14. When lodging the application for a stay of execution the appellant asked the Chair of the Tribunal to order the suspension of the CCNR President's decision not to renew the appellant's contract on the ground that following the current or imminent procedure to recruit a successor to the appellant, the appointment would create rights for the person recruited that would be difficult to reverse and hence constitute a grave prejudice difficult to redress.

15. Incidentally, the appellant observes that if it is ultimately found, following the inquiry to be carried out by the CCNR, that there was psychological harassment, the question of redress will inevitably arise. If the stay is granted, she can hope to be reinstated and this, in her view, is the only possible means of *restitutio in integrum*.

16. Having described again under what circumstances her contract was not renewed, the appellant states that this non-renewal will inevitably lead to the opening of a procedure to recruit a replacement on her post and that it is the opening of this procedure which is likely to cause her a grave prejudice difficult to redress.

17. The appellant asserts that the Tribunal's case law argues in favour of the recognition of this prejudice as it considers that an external recruitment procedure is "likely to create rights and situations that would be difficult to reverse and might therefore cause the applicant grave prejudice difficult to redress within the meaning of Article 59 para. 7 of the Staff Regulations" (see *inter alia* paragraph 20 of the Chair's Order of 15 December 1994 in the case of Ernould (III) v. Governor of the Social Development Fund of the Council of Europe).

18. According to the respondent organisation, the application for a stay of execution is unfounded and should be rejected because there is no grave prejudice difficult to redress and if a stay was granted, this would cause excessive and unjustified harm to the Organisation.

19. The respondent organisation bases the first ground relating to the absence of grave prejudice on two arguments: (i) the lack of any decision on the part of the Organisation to begin the recruitment procedure for the post formerly occupied by the appellant and (ii) the absence of any right to have her fixed-term contract renewed.

20. Firstly, the respondent organisation points out that to date, it has taken no decision on filling the post which the appellant occupied. It also notes that the administrative complaint made prior to this application related only to the decision not to renew the appellant's contract and not to a decision to appoint a new member of staff to replace her, as such a decision had not been adopted at this stage.

21. For this reason the case law referred to by the appellant in support of her application is irrelevant in the respondent organisation's view because in the Ernould (III) case cited above, the external recruitment procedure had already begun and the administrative complaint by the staff member in question was directed specifically against the decision to start such a procedure.

22. Secondly, the respondent organisation contests the appellant's argument that reinstatement in her former post is the only possible means of *restitutio in integrum* on the ground that the appellant is not entitled to have her contract renewed.

23. The respondent organisation would point out in this respect that the appellant's contract has already been renewed twice – from 2013 to 2017 and then from 2017 to 2021 – and that under the relevant provision of the CCNR staff regulations, a third renewal is only possible in exceptional circumstances. The respondent organisation also points to the discretion enjoyed by the CCNR where it comes to the appointment and renewal of the post previously occupied by the appellant. As this is a senior position in the CCNR, this type of decision is a policy-related one and is always taken for a limited duration of a few years so as to ensure balanced representation of the member states. In addition, the appellant's fixed-term contract did not entitle her to expect an extension, or appointment to a different post. In view of these circumstances, the respondent organisation submits that the appellant has no well-founded ground to request the suspension of the procedure to appoint her successor, which is part of the normal functioning of an international organisation.

24. The expiry of the appellant's contract also means that the situation cannot be compared to that of the appellant in the Ernould (III) case, which she cites nonetheless in support of her application despite the fact that the appellant in this case had been dismissed following a disciplinary procedure.

25. The respondent organisation also repudiates the appellant's argument based on paragraph 50 of the Chair's Order of 14 May 2020 (referred to above in paragraph 4), which reads as follows:

“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”,

pointing out that when this order was issued, the appellant was still in post, whereas now her contract has been over since 20 January 2021, following its expiry. It claims therefore that paragraph 50 is not relevant in the instant case.

26. The respondent organisation also points out that if the decision not to renew the appellant's contract were set aside, the execution of the decision to set aside would not immediately entail her reinstatement and might result in other forms of redress, such as payment of compensation.

27. The respondent organisation also mentions the fact that the appellant has found a new job outside the CCNR since February 2021, which distinguishes her case from that of the appellant in the Ernould (III) referred to above, for whom the prospect of finding another job outside the respondent Organisation was practically non-existent owing to his age.

28. As to the second ground relied on to demonstrate that the application is unfounded, the respondent organisation argues that a decision to suspend the process of appointment to the executive post formerly occupied by the appellant would cause unjustified and disproportionate harm to the CCNR, which it illustrates through a whole range of submissions relating to its functioning and the projects it is currently running. In support of this argument it refers to paragraph 11 of the Chair's Order of 28 January 1982 in the case of Muller-Rappard v. the

Secretary General. For this reason, the respondent organisation asserts that it would be extremely hazardous and even harmful for the absence of the holder of the post previously occupied by the appellant to be extended further, beyond the time strictly necessary to make a new appointment.

29. In conclusion the respondent organisation asks the Chair to declare the application for a stay of execution unfounded and to dismiss the application to suspend the decision not to renew the appellant's contract, thus enabling the Organisation to proceed with the appointment of her successor.

30. In its rejoinder, the respondent organisation completes the description of the facts related in its initial submissions by referring to the letter of the President of the CCNR of 10 March 2021 informing it of his decision to open an external inquiry into the appellant's allegations of harassment.

31. The appellant reiterates her intention to ask the Chair of the Tribunal to suspend the procedure to appoint the successor to her former post, which she understands, on the basis of a whole series of signs, to be imminent. In support of her position she cites an Order of the Chair of the Tribunal which granted a stay of execution in a case where an appointment had not yet been announced but was considered to be impending (Chair's Order of 18 December 1998 in the case of Schmitt).

32. The appellant then goes into more detail about the grounds supporting her complaint against the decision not to renew her contract, focusing in particular on the breach of the obligation to state reasons – which is recognised by international case law to apply even when a fixed-term contract expires by operation of law. She points out that she complains of a breach of the general principles of international civil service law, which occupies a higher place in the ranking of standards than statutory and regulatory provisions. She states that the illegality of the decision not to renew is liable to have an impact on the legality of the decision to appoint her successor and reiterates that this appointment would prevent full reparation for the damage suffered.

33. As to grave prejudice difficult to redress, the appellant insists that the current procedure must attempt to uphold full reparation of the prejudice by means of *restitutio in integrum*. In the appellant's view this is the only form of reparation capable, unlike certain forms of financial reparation, of erasing as far as possible the consequences of the unlawful decision by reinstating the situation which would probably have existed had it been decided to renew. She states that considerations linked to her current employment should not be taken into account when assessing the damage that she would incur were her rights infringed.

34. The appellant then makes a series of submissions intended to refute the respondent organisation's allegation that it would suffer harm if the stay of execution were granted. She considers that the Organisation is wrong to cite the case of Muller-Rappard to attempt to prove that no stay of execution is possible with regard to the appointment of a high-ranking civil servant as this order allows stays of execution to be granted in cases like those of the appellant where grave prejudice is immediately apparent.

The Chair's conclusions

35. The Chair notes firstly that the first part of this appeal requests a stay of execution of the decision not to renew the appellant's contract. In her complaint of 10 February 2021 against this decision, the appellant states that the decision itself was not communicated to her – which she complains about – but she was able to infer its existence from the letter of the President of the CCNR sent to her by electronic means on 19 January 2021 and by post on 2 February 2021, with the heading “Thanks on expiry of your term of office”.

36. In fact, the appellant's contract ended on 20 January 2021, which is the date on which it expired in accordance with the relevant provision of the CCNR staff regulations. While it is true that the aforementioned letter which the appellant disputes only reached her by electronic means on the day before her contract expired, the Chair notes that the appellant let a month pass after submitting her administrative complaint before filing the present application for a stay of execution.

37. The first part of Article 59, paragraph 9, of the Staff Regulations of the Council of Europe, which applies in this case, provides as follows:

“A complaint shall not have a suspensive effect. However, the complainant may apply to the Chair of the Administrative Tribunal, with copy to the Secretary General, for a stay of execution of the act complained of if its execution is likely to cause him or her grave prejudice difficult to redress”.

38. It is clear from this provision that an application for a stay of execution may only be granted if the impugned decision has not yet been executed. As the relevant international case law states, a Tribunal “may only order suspension of action if the implementation of the contested decision is still possible and at stake” (see, in particular, United Nations Dispute Tribunal, Case No. UNDT/GVA/2010/005, *Abdalla v. Secretary General of the United Nations*, [Order No. 4 \(GVA/2010\)](#), 26 January 2010). In the instant case, the decision has already been executed and its suspension can no longer be ordered.

39. In addition, the Chair notes that under the aforementioned provision of Article 59 of the Staff Regulations, it only has the power to suspend an administrative decision and in no respect to impose other types of provisional measures or to amend the disputed decision in any way. It should also be pointed out that a stay of execution is intended only to preserve the appellant's rights. Under no circumstances can it be used to prejudge the merits of the case.

40. The second part of this appeal requests a stay of execution of the decision to proceed with the recruitment of a replacement to the post formerly occupied by the appellant.

41. The Chair considers that in view of the wording of Article 59 of the Staff Regulations, as cited above, and in accordance with the relevant international case law (see, in particular, United Nations Dispute Tribunal, Case No. UNDT/GVA/2010/063, *Aswad v. Secretary General of the United Nations*, [Order No.5 \(GVA/2010\)](#), 29 January 2010), a stay of execution “may only be sought with respect to a decision which deploys legal effects vis-à-vis the concerned staff member”. Furthermore, it can be inferred from this wording that a stay of execution is only possible in respect of a decision against which an administrative complaint has been filed.

42. In the instant case, the Chair notes that the appellant neither asserts nor provides any evidence that for the time being, any decision has been taken to appoint her successor, although she alleges that this is imminent. The Chair also notes that the administrative complaint of 10

February 2021 did not complain of any such decision. Consequently, a stay of execution of this decision cannot be granted.

43. In conclusion, the application for a stay of execution can be dismissed without any need to examine the parties' other arguments.

For these reasons,

THE CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

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

Done and ordered in Supetar, Croatia, on 22 March 2021.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

C. OLSEN

N. VAJIĆ