

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR OF 25 March 2011

In the case of Alfonso ZARDI (I) v. Secretary General

THE FACTS

1. The applicant, Mr Alfonso Zardi, works for the Organisation as a permanent staff member. At present, he occupies an A5 grade post in the Directorate of Democratic Institutions in the Directorate General of Democracy and Political Affairs.

On 5 July 2010, the applicant applied for the post of Directorate of Programme, Finance and Linguistic Services (grade A6) in accordance with vacancy notice no. e46/2010.

2. The applicant was informed by email on 15 November 2010 that the Secretary General had decided to appoint another candidate to this post. The person in question was Mr B., then an A5 grade official performing the duties of Head of the Programme and Budget Service in the same Directorate of Programme, Finance and Linguistic Services.

3. On 14 January 2011, the Secretary General rejected the administrative complaint lodged by the applicant on 15 December 2010 under Article 59, paragraph 2 of the Staff Regulations. He considered that the administrative complaint was unfounded.

4. On 22 February 2011, the applicant lodged an appeal against the decision complained of (appeal No. 274/2011).

5. On 4 March 2011, the Organisation initiated an internal competition procedure by way of a vacancy notice (no. 62/2011), open only to permanent staff members, in order to fill the post of Head of the Programme and Budget Service (grade A5). The Organisation had earlier advertised this post in a mobility notice.

6. In a letter dated 10 March 2011, which was received by the Registry by email on that same day and in the original on 16 March 2011, the applicant submitted to the Chair of the Administrative Tribunal an application for stay of execution. He stated that this application was being submitted “against the decision to make the appointment to the A6 post of Directorate of Programme, Finance and Linguistic Services following vacancy notice no. e46/2010.” Referring to Article 59, paragraph 9 of the Staff Regulations, the applicant requested the Chair to order a “stay of execution of the recruitment procedure initiated by vacancy notice no. 62/2011”.

7. On 15 March 2011, the Secretary General submitted his observations on the application for stay of execution.

8. On 18 March 2011, the applicant submitted his observations in reply.

THE LAW

9. Under Article 59, paragraph 9 of the Staff Regulations, a complainant may apply “for a stay of execution of the act complained of if its execution is likely to cause ...grave prejudice difficult to redress.”

The same rule provides 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.

Under Article 8 of the Statute of the Administrative Tribunal, “The Chair may make his or her decision subject to certain conditions.”

The applicant having already lodged an appeal with the Tribunal, it is appropriate to recall that Article 60, paragraph 5 of the Staff Regulations states that during the examination of the appeal 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.”

10. In his appeal, the applicant requests the Chair to order a stay of execution of the internal competition procedure open only to permanent staff, to fill the post of Head of the Programme and Budget Service (grade A5) in accordance with vacancy notice no. 62/2011. That post is the former post of the present Director of Programme, Finance and Linguistic Services, whose appointment following recruitment procedure no. e46/2010 he challenges in his appeal.

11. The applicant begins with a series of arguments intended to prove the existence of serious doubts such as to lead to the annulment of recruitment procedure no. e46/2010, and consequently of the decision to appoint the present Director of Programme, Finance and Linguistic Services.

12. The applicant then seeks to demonstrate the existence of grave prejudice difficult to redress.

13. He observes that if the Tribunal were to uphold his appeal, the annulment of the recruitment procedure would lead consequentially to the annulment of the appointment of the present Director of Programme, Finance and Linguistic Services. The latter would be obliged to return to his former post, i.e., that of Head of the Programme and Budget Service (grade A5).

Consequently, in the framework of the present application the applicant seeks a stay of execution of the recruitment procedure initiated by vacancy notice no. 62/2011 in order to permit the present Director of Programme, Finance and Linguistic Services to return to his post if appropriate. According to the applicant, only if the recruitment procedure were stayed could the Tribunal’s pending decision be properly enforced.

14. The applicant adds that if the recruitment procedure initiated by vacancy notice no. 62/2011 were to continue, the post of Head of the Programme and Budget Service would be awarded to a candidate, consequently making it impossible for the present Director of Programme, Finance and Linguistic Services to return to his former post.

15. The applicant asserts that such a situation would deprive his appeal of all interest and effect, since the present Director of Programme, Finance and Linguistic Services would be maintained in the post of Director of Programme, Finance and Linguistic Services even though the recruitment procedure had been found irregular.

16. In view of all these factors and in the interests of the proper administrative of justice, according to the applicant the recruitment procedure initiated by vacancy notice no. 62/2011 should be suspended until the Tribunal has decided on the merits of the dispute.

17. For his part, the Secretary General begins by observing that the applicant fails to demonstrate “grave prejudice difficult to redress” under Article 59, paragraph 9 of the Staff Regulations.

18. First, it must be noted that the internal competition organised to fill the post of Head of the Programme and Budget Service for which the applicant requests a stay of execution is unrelated to the subject of the appeal lodged by him with the Tribunal concerning the procedure to fill the post of Director of Programme, Finance and Linguistic Services.

19. As the Secretary General sees it, this is not a procedure injurious to the applicant because he is not himself a candidate in the internal competition in question, which therefore cannot be prejudicial to him. He adds that the applicant was a candidate in response to the mobility notice to fill that post, prior to the internal competition, and so it is hard to understand why (a) he applied for a post the filling of which he claims would be prejudicial to him and (b) he now requests a stay of execution of the procedure designed to fill that post through promotion.

20. Furthermore, if the applicant considered that he suffered grave prejudice difficult to redress as a result of the filling of the post of Head of the Programme and Budget Service, he ought to have taken urgent action as soon as he knew about the publication of the mobility notice under which he himself applied, and to have lodged an administrative complaint against that decision while at the same time seeking suspension of the procedure as soon as the mobility notice was issued on 28 January 2011. However, the applicant did not lodge the complaint and waited over a month before lodging his appeal, which renders it a late appeal. According to the Secretary General, in order to prove the existence of a link between his appeal and the subject of his application for stay of execution, the applicant claims that filling the post of Head of the Programme and Budget Service would prevent the proper execution of the decision of the Administrative Tribunal in the event that the Tribunal upheld his appeal. He adds that, according to him, if the recruitment procedure for the post of Director of Programme, Finance and Linguistic Services were to be annulled, the present Director “would be obliged to return to his former post, i.e., that of Head of the Programme and Budget Service (grade A5)”. Such a conclusion strikes the Secretary General as erroneous. According to the consistent case-law of international administrative tribunals, when an appointment procedure is annulled, the organisation must keep the appointed candidate shielded from any loss which may arise from the setting aside of his appointment. Thus, in the opinion of the Secretary General, there is no ground for concluding that the Director of Programme, Finance and Linguistic Services would

necessarily have to be returned to his former post. On the contrary, it is the responsibility of the Council of Europe to protect him from any loss. The Secretary General also believes it is helpful to recall that a decision produces its effects only with respect to the parties concerned. It is for the Secretary General to accept the consequences of the setting aside of a decision and to find the best way of executing a decision of the Administrative Tribunal, taking account of the imperatives of the situation.

21. The Secretary General adds that, in any event, the situation of the applicant is lacking in all the elements which would constitute “grave prejudice difficult to redress”, the requisite condition for granting a stay of execution. The fact is that the prejudice referred to by the applicant, if it exists, is very indirect and not such as to justify the granting of a stay of execution in the framework of an internal competition procedure unconnected with the subject of his appeal.

22. The Secretary General goes on to point out that, since the purpose of the urgent application is to guarantee the full efficacy of the administrative dispute’s procedure, the application for grant of a stay of execution must show that the measure sought is necessary in order to prevent grave prejudice difficult to redress. Otherwise, it would jeopardise not only the proper functioning of services but also the management of important sectors of the Organisation. The Secretary General stresses in this connection that if the post of Head of the Programme and Budget Service were not filled rapidly at a time when the new draft two-year programme-budget was being prepared, the team in charge of the programme and budget would be very seriously weakened, which would jeopardise the attainment of one of the prime objectives of the second phase of reform as approved by the Committee of Ministers on 16 February 2011.

23. Lastly, the Secretary General wishes to point out that there can be no question at this juncture of analysing the arguments on the merits of the complaints raised by the applicant in the framework of his appeal, this question not having been discussed, still less examined, in the framework of this procedure, which is concerned only with the adoption of emergency measures.

24. In these circumstances and having regard to these elements, the Secretary General requests the Chair to reject the application for stay of execution as being inadmissible and/or unfounded.

25. In his observations in reply, the applicant again asserts that if the recruitment procedure initiated by vacancy notice no. 62/2011 were to continue and the post of Head of the Programme and Budget Service were awarded to a candidate, that would make it impossible for the present Director of Programme, Finance and Linguistic Services to return to his former post. Such a situation would deprive his appeal of all interest and effect, since the Director would be maintained in the post of Director of Programme, Finance and Linguistic Services even though the recruitment procedure had been found irregular.

26. The applicant therefore repeats that his interest in taking proceedings is manifest. He emphasises that the procedures set in motion through vacancy notices no. e46/2010 and no. 62/2011 were closely linked because the internal competition initiated by vacancy notice no. 62/2011 had its origin in the appointment of the holder of the post opened to competition to the post of Director of Programme, Finance and Linguistic Services in accordance with vacancy notice no. e46/2010.

27. Having referred to the statements made by the Secretary General about the execution of the pending decision, the applicant points out that his urgent application is intended only to preserve his rights and make it possible for the pending decision to be properly implemented. In his opinion, the position taken by the Secretary General on the execution of the pending decision is certainly in keeping with his own wishes. That being so, he is bound to be reassured by the Secretary General's undertaking not to oppose the appointment of a candidate to the post of Head of the Programme and Budget Service in accordance with vacancy notice no. 62/2011 as being an obstacle to the proper execution of the pending decision.

28. The applicant states that his fears are legitimate in so far as, following the decision handed down by the Administrative Tribunal in appeals Nos. 254/1999 and 257/1999 (*Léon Hornecker v. Secretary General*), the Secretary General had relied on serious staff management problems within the meaning of Article 60, paragraph 7 of the Staff Regulations in order to avoid implementing the decision of the Tribunal, which had ordered the setting aside of an appointment decision.

29. In conclusion, the applicant requests that this appeal be declared admissible. He then requests, as his principal claim, that the Chair order the suspension of the procedure for recruitment to the post of Head of the Programme and Budget Service at grade A5 in accordance with vacancy notice no. 62/2011 and, as subsidiary claim, that official note be taken of the Secretary General's undertaking to fully implement the pending decision if the Administrative Tribunal were to set aside the recruitment procedure under vacancy notice no. e46/2010 and consequently the decision to appoint the present Director of Programme, Finance and Linguistic Services.

30. The Chair begins by noting that, in his conclusions, the Secretary General asks for the application for stay of execution to be rejected as "inadmissible and/or unfounded".

31. With regard to the objection on the ground of inadmissibility, the Chair notes that the Secretary General argues that the request is inadmissible because the application for stay of execution is unrelated to the subject of the appeal. He adds that the procedure set in motion by vacancy notice no. 62/2011 is not a procedure injurious to the applicant because he is not himself a candidate in the internal competition in question, which therefore cannot be prejudicial to him.

32. The Chair considers that this objection must be dismissed in so far as it is clear that Article 59, paragraph 9 of the Staff Regulations aims to prevent grave prejudice difficult to redress from arising during the dispute phase. While it is true that the applicant did not apply under the competition procedure initiated by vacancy notice no. 62/2011, the fact remains that he can validly argue that he might suffer prejudice. It is not necessary at this juncture to clarify the details of what that prejudice might be and whether it is real and well founded, since for the purposes of examining the inadmissibility objection at issue it is sufficient to mention its existence.

33. Consequently, the inadmissibility objection of the Secretary General must be rejected.

34. With regard to the merits of the application for stay of execution, the Chair recalls that there can be no question at this juncture of analysing the arguments on the merits of the complaints raised by the applicant in the framework of his appeal, these questions not having

been discussed, still less examined, in the framework of this procedure, which is concerned only with the adoption of emergency measures (see Chairman's Order of 3 July 2003, paragraph 10, in the case of *Timmermans v. Secretary General*).

35. The Chair also notes that there can likewise be no question of examining the execution procedure – and in particular the various execution possibilities – that will follow if the Tribunal, which is already seized of an appeal by the applicant, were to conclude that the contested decision, namely the appointment of the Director of Programme, Finance and Linguistic Services, must be set aside.

36. However, in view of certain statements by the Secretary General – that “it is for the Secretary General to accept the consequences of the setting aside of a decision and to find the best way of executing a decision of the Administrative Tribunal, taking account of the imperatives of the situation” (paragraph 21 above) – and without prejudging the position of the Tribunal on the question, the Chair does not consider it irrelevant to recall at this point that the manner of execution of a Tribunal decision is governed by paragraphs 6 and 7 of Article 60 of the Staff Regulations, which read as follows:

“6. Decisions of the Administrative Tribunal shall be binding on the parties as soon as they are delivered. The Secretary General shall inform the Tribunal of the execution of its decisions within thirty days from the date on which they were delivered.

7. If the Secretary General considers that the execution of an annulment decision is likely to create serious internal difficulties for the Council, he or her shall inform the Tribunal to that effect in a reasoned opinion. If the Tribunal considers the reasons given by the Secretary General to be valid, it shall then fix the sum to be paid to the appellant by way of compensation.”

It is clear from these provisions that the execution of a decision is not controlled by the Secretary General alone but is overseen by the Tribunal itself, and Article 60, paragraph 7 cited above can be applied only if the Secretary General's request meets with the Tribunal's approval.

37. As regards the merits of the application for stay of execution, the Chair recalls that his predecessors have already had occasion to rule on applications with similar content.

38. In appeals nos. 202-207/1995 (*Palmieri, Grayson and others v. Secretary General*), the Chairman had to decide on the applications for stay of execution lodged by the applicants. Consequently, he ruled *inter alia* on the arguments of the applicant Palmieri concerning the potential consequences for the applicant of filling the post left vacant by the person whose appointment was being challenged. The Chairman expressed himself as follows (Chairman's Order of 1 February 1995 in the case of *Palmieri, Grayson and others*, paragraph 16):

“16. The Secretary General has stated that the filling of the post left vacant by Mr A. is not liable to create rights and situations that cannot be easily reversed. The applicants dispute this assertion.

As Mr Palmieri has noted, in an earlier application for a stay of execution the Secretary General decided to postpone, temporarily, the advertising of the vacated post (order of 17 July 1986 para 9, in the case *Bartsch v. Secretary General*). However, the Chairman notes that the Secretary General has wide discretionary power in matters of staff management and in exercising this power he is qualified to know and assess the operational need of the Organisation. If the Secretary General does not consider such a decision appropriate in the present cases, the consequences will have to be taken into account if he is required to implement a decision to annul the contested appointment, since his action cannot be allowed to delay or impede the implementation of the Tribunal's decision.”

39. The Chair notes that the applicant cannot legitimately claim at this stage of the procedure that he risks suffering grave prejudice difficult to redress if the post, the opening of which to competition is contested by the applicant in contentious proceedings, is filled before the Tribunal decides whether his appeal is well founded. On this point, the Chair observes that this application differs from other applications for stay of execution which concerned procedures intended to fill the post which was the subject of the appeal concerning them. Furthermore, the reasons which led to the application of Article 60, paragraph 7 of the Staff Regulations in the Hornecker appeals (paragraph 29 above) were different from those pertaining to this present case.

40. In the past, the Secretary General has adopted a different position (see paragraph 39 above). Since he is now aware that, following the decision to be handed down by the Tribunal, problems might possibly arise in executing a decision favourable to the applicant, these being problems which the wording of Article 60, paragraph 5 of the Staff Regulations seeks to obviate (paragraph 9, last sub-paragraph above), it will be for the Tribunal if appropriate to appreciate the consequences of this for the execution of its decision and thus dictate the action of the Secretary General if application of Article 60, paragraph 7 of the Staff Regulations were to be requested.

41. The Chair recalls that a certain restraint is necessary in exercising the exceptional powers conferred on him by Article 59, paragraph 9 of the Staff Regulations (see ABCE, Chairman's Order of 31 July 1990, paragraph 12 in the case of Zaegel v. Secretary General; and ATCE, Chairman's Order of 1 December 1998, paragraph 26 in the case of Schmitt v. Secretary General; Chairman's Order of 14 August 2002, paragraph 16). The purpose of the urgent application procedure being to guarantee the full efficacy of the administrative disputes' procedure, the application for grant of a stay of execution must show that the measure sought is necessary in order to prevent grave prejudice difficult to redress. Otherwise, it would jeopardise not only the proper functioning of services but also the management of important sectors of the Organisation. Since that is not so in the instant case, there is no reason to grant the stay of execution sought. Nor is there cause to give formal notice to the Secretary General, in the terms referred to by the applicant, of the undertaking to execute the pending decision (paragraph 29 above) because that is not the role of the Chair in the present stay of execution procedure.

For these reasons,

Making an interim order in accordance with 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,

WE, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decide

- the application for stay of execution lodged by Mr Zardi is dismissed.

Done and ordered at Oberwil (Switzerland) on 25 March 2011.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

Sergio SANSOTTA

Luzius WILDHABER