

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR OF 26 February 2009

In the case of Sergey GOLUBOK (II) v. Secretary General

THE FACTS

1. The appellant, Mr Sergey Golubok, is a Russian national who already works for the Organisation on a fixed-term contract in the Registry of the European Court of Human Rights.
2. The appellant applied to sit a competitive examination for the external recruitment of a Russian lawyer (grade A1/A2/A3) to be employed on a fixed-term contract in the Registry of the European Court of Human Rights (Vacancy Notice e 42/2008).
3. On 16 September 2008, the appellant was informed that his application had been rejected.
4. That day, he asked the Directorate of Human Resources why his application had been rejected and received a reply.
5. On 17 September 2008, the appellant lodged an administrative complaint under Article 59 of the Staff Regulations. He asked for the decision to reject his application to be set aside and to be invited to take part in the written examinations of the competition, but without success.
6. On 28 September 2008, the Chair rejected an application for a stay of execution of the impugned decision which the appellant had applied for under Article 59, paragraph 7, of the Staff Regulations. In her order, the Chair observed as follows:

“21. The Chair would point out that on 10 May 1994, when executing the Tribunal’s decision on appeal no. 172/1993 (Feriozzi-Kleijssen v. Secretary General), the Secretary General informed the Tribunal that, pursuant to its decision, he would be holding fresh examinations for the appellant and he would not make any job offers before the individual proceedings concerning Ms Feriozzi-Kleijssen had been completed.

22. The Chair notes that as things stand there is no reason why the Secretary General should not adopt this approach in this case even if he did not mention the possibility before the Tribunal. Furthermore, the appellant – who must be kept informed of how the competition is proceeding – is always at liberty to lodge a fresh application for a stay of execution if the Secretary General proceeds with recruitment before the dispute concerning the appellant is finally decided (see the Chair’s Order of 29 May 2008 in the case of Simonet (2) v. Secretary General cited above and the Chair’s Order of 20 June 2008 in the case of Tomasi v. Secretary General).”

7. His complaint having been rejected, on 21 October 2008, the appellant lodged an appeal with the Tribunal under Article 60 of the Staff Regulations. This appeal is currently pending before the Tribunal.

8. In an application lodged on 12 February 2009, the appellant asked the Chair of the Administrative Tribunal to grant a stay of execution. After noting that the interview in the competition in question was due to take place on 27 February 2009, the appellant asked the Chair for a stay of execution to prevent the Secretary General from recruiting anyone to the position in question or, alternatively, to allow him to attend the said interview.

9. On 17 February 2009, the Secretary General submitted his observations on the application for a stay of execution.

10. On 19 February 2009, the appellant submitted a memorial in reply.

THE LAW

11. Under Article 59, paragraph 7, of the Staff Regulations, an application for a stay of execution of an administrative act may be lodged if its execution is likely to cause “grave prejudice difficult to redress”.

The appellant lodged his application for a stay of execution in order that the Chair should order the Secretary General to refrain from proceeding with recruitment after the competition in question pending the outcome of his appeal, which is currently before the Tribunal. Alternatively, he asks to be allowed to take part in the oral interview due to be held on 27 February 2009 for candidates who passed the written tests.

12. To justify his request for a stay of execution, the appellant argues that “*if the competition e42/2008 is allowed to proceed and indeed to conclude in his absence, and the successful candidate(s) is(are) appointed, it will inevitably cause him grave prejudice not only difficult but impossible to redress, since he will be deprived of any chance to compete on equal and fair basis for the position sought, namely that of the Russian lawyer at the Registry of the European Court of Human Rights.*”

13. The Secretary General notes from the outset that he still subscribes to the view that, despite the terms of the order of 28 September 2009 in the appellant’s initial application for a stay of execution on this point, having regard to the relevant provisions of the Staff Regulations, the appeal in question and, consequently, the related application for a stay of execution, are inadmissible for lack of standing as the appellant has not been permitted to sit the competitive examination. As noted in his observations on the appeal in question, the Secretary General points out that not only do the Staff Regulations restrict the right to lodge such an appeal to candidates who have been allowed to sit the tests in the said competition but also the appeal must relate to “*an irregularity in the examination procedure*”. In this case, the appellant has been refused permission to take part in the examination and his complaint, in which he asks for it to be recognised that he satisfies all the requirements of the vacancy notice, does not relate to an irregularity in the examination procedure.

14. The Secretary General goes on to state that it is clear from Article 59, paragraph 7, and Article 60, paragraph 4, of the Staff Regulations that an application must be lodged and the stay of execution of an impugned act granted at the administrative complaint stage and not at the appeal stage, and that if it had been granted by the Chair at the appropriate time, the stay could remain in place during the appeal proceedings. The Secretary General notes that in the instant case, although the appellant did in fact make an initial application for a stay of execution at the time of lodging his administrative complaint, this application was rejected on 28 September 2008. Consequently, the present application, which was lodged at the appeal stage, should be declared inadmissible.

15. It should further be observed that the current situation does not warrant granting a stay of execution any more than the situation which obtained at the time when the initial application was lodged. For the oral tests in a competition are an extension of the recruitment procedure, and form the second phase of that procedure, after the written tests. In the absence of any new facts that would justify adopting a new solution in the context of the present application, and as the Administrative Tribunal itself considered in its order of 28 September 2008, the appellant “has not established the existence of any ‘grave prejudice difficult to redress’” and the “requested measure is not necessary”. Nor can the appellant be invited to attend the oral interviews as he has not been permitted to sit the written tests.

16. The purpose of the urgent procedure is to ensure that the administrative proceedings are fully effective so any application for a stay of execution must show that the requested measure is necessary to avoid grave prejudice that is difficult to redress. Otherwise, it would jeopardise not only the smooth running of Council departments but also the management of significant sectors of the Organisation. For the reasons outlined above, the appellant cannot invoke a grave prejudice that is difficult to redress.

17. The Secretary General would also like to refer to the Chair’s Order of 29 May 2008 in the case of *Simonet (2) v. the Secretary General*. The Chair had begun by pointing out (paragraph 19 of the Order) that the appellant had not established the existence of any “grave prejudice difficult to redress” as his argument that it would be difficult to organise new examinations had no probative value. She also pointed out (in paragraph 20) that, when executing the Tribunal’s decision on appeal No. 172/1993 (*Feriozzi-Kleijssen*), the Secretary General had informed the Tribunal that he would be holding fresh examinations for the appellant, and he would not make any job offers before the individual proceedings concerning the appellant had been completed. In paragraph 21 of the Order, she noted: “*as things stand there is no reason why the Secretary General should not adopt this approach in this case even if he did not mention the possibility before the Tribunal*”. On the basis of this argument, she rejected Mr Simonet’s request for a stay of execution.

18. The Secretary General notes that the facts in the current case are similar, and accordingly, under these circumstances and in view of these considerations, he asks the Chair to dismiss the appellant’s request for a stay of execution as being inadmissible and ill-founded.

19. In his observations in reply, the appellant contends that his appeal is admissible and observes that the issue of its admissibility should not be examined at this stage. He refers here to the first order that was made in his case. He further notes that in this order, the Chair stated that he “is always at liberty to lodge a fresh application for a stay of execution if the Secretary General proceeds with recruitment before the dispute concerning the appellant is finally decided” (*ibid.*, paragraph 22).

20. As to the merits of his request for a stay of execution, the appellant reiterates that he would suffer grave prejudice difficult to redress if the stay of execution is not granted. He notes that, unlike the application for a stay of execution in *Simonet (2)*, what he is asking for now is that the Secretary General be prevented from proceeding with recruitment until his appeal has been heard. He adds that if a candidate is appointed, there would be no reason for him to participate at a later stage in the procedure and it would make no sense to employ the “solution” adopted in *Ms Feriozzi-Kleijssen’s* case. The appellant notes that such was the conclusion reached by the Chair of the Administrative Tribunal on 18 December 1998 when ruling on *Ms Schmitt’s* application.

21. In conclusion, the appellant reiterates his request that the Secretary General be prevented from appointing anyone pending the outcome of his appeal.

22. The Chair would point out that there can be no question at this stage of any assessment of the arguments concerning the admissibility and/or the merits of the appellant’s complaint. These matters are not for discussion, let alone examination, in the current proceedings, which are only concerned with urgent measures (see the Chair’s Order of 3 July 2003, paragraph 10, *Timmermans v. Secretary General*).

23. The Chair then notes that there is no need to take into consideration the appellant’s alternative request concerning his provisional participation in the oral interview because, as the Secretary General correctly points out, there can be no question of allowing someone – even provisionally – to attend an oral interview if he or she has not passed the written tests first. The appellant, however, has not sat any written tests. The Chair need therefore only consider the application for a stay of execution insofar as it seeks to prevent anyone from being recruited before the appellant’s appeal, currently before the Tribunal, has been heard.

24. The Chair notes here that the parties refer to two different Tribunal decisions: the *Schmitt* order of 18 December 1998 and the *Simonet (2)* order of 29 May 2008. As the appellant has correctly observed, the former concerned suspension of recruitment following a recruitment procedure whereas the latter was more about arranging for the participation, at a later date and without prejudice, of a candidate who had not been admitted by the Organisation and who was challenging that decision.

25. The Chair notes that the situation which prompted the appellant to lodge this fresh application for a stay of execution is different from the one which prompted the first application and that, as matters stand, the appellant can legitimately claim that he is likely to suffer grave prejudice difficult to redress if the Secretary General proceeds with the recruitment planned under the impugned procedure before the Tribunal establishes whether or not he was entitled to take part in it and to know how he performed in the tests. The Chair refers here to the arguments put forward in the order of 28 January 1992 in the *Muller-Rappard* case which hinged precisely on the limits to the scope of a decision to stay execution where steps had already been taken to employ someone following a recruitment procedure that was being challenged before the Tribunal.

26. The Chair further notes that the Secretary General has adduced no evidence that would lead the Chair to conclude that the appellant would not suffer serious prejudice difficult to redress if the procedure were to continue. The arguments that he has submitted, namely that he could organise fresh tests for the appellant if the Tribunal granted his appeal, do not amount in

this instance to a means likely to prevent the damage which the appellant fears would occur should another candidate be appointed in the meantime.

27. The Chair notes therefore that the appellant could suffer grave prejudice difficult to redress and that he should be granted the requested stay of execution.

28. The Chair points out that the exercise of her exceptional power under Article 59, paragraph 7, of the Staff Regulations calls for some self-restraint (ABCE, paragraph 12 of the Chair's Order of 31 July 1990 in the case of Zaegel v. Secretary General; ATCE, paragraph 26 of the Chair's Order of 1 December 1998 in the case of Schmitt v. Secretary General; and paragraph 16 of the Chair's Order of 14 August 2002). The purpose of the urgent procedure is to ensure that the administrative proceedings are fully effective so any application for a stay of execution must show that the requested measure is necessary to avoid grave prejudice that is difficult to redress. Otherwise, it would jeopardise not only the smooth running of Council departments but also the management of significant sectors of the Organisation. As that is the case here, the requested stay of execution should be granted.

29. It is of course for the Secretary General to provide at any stage of the proceedings safeguards sufficient to preclude the existence of grave prejudice difficult to redress, safeguards which are currently lacking, and to request that the stay of execution which the Chair has today decided to grant be lifted.

For these reasons,

Making a provisional ruling in accordance with Article 59, paragraph 9 of the Staff Regulations, with Article 8 of the Statute of the Administrative Tribunal, and with Rule 21 of the Rules of Procedure of the Administrative Tribunal,

Having regard to the urgency of the matter,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- grant the request for a stay of execution insofar as it concerns the procedure for appointment to the position to be filled by means of the disputed procedure (vacancy notice e42/2008);

- order that the stay of execution will expire on the day on which the Tribunal delivers its decision at the latest.

Done and ordered in Göteborg, on 26 February 2009.

The Registrar of the
Administrative Tribunal

Sergio SANSOTTA

The Chair of the
Administrative Tribunal

Elisabeth PALM