

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR of 6 May 2011

In the case of Ümit KILINÇ (I) and others v Secretary General

Other complainants:

Dejan GEORGIEVSKI, Ayşe Gül ALKIŞ, Senem GUROL, Ekaterina PRIKHODKO, Işık BATMAZ, Sergey GUSEVSKIY, Mesut BEDIRHANOGU, Natasha BAKIRCI, Emanuele NICOSIA, Laura TOMASI, Lubomir MAJERCIK, Tomasz KODRZYCKI, Kornelis KASPER, Christina BAGLAI, Marina MAKAROVA, Yulia GENDLINA, Idil OZKOCAK-SEKERd

THE FACTS

1. The complainant, Mr Ümit Kiliñ, already works for the Organisation as an assistant lawyer in the registry of the European Court of Human Rights.
2. The complainant applied to sit a competitive examination for the recruitment of grade A1/A2 lawyers (Vacancy Notice No. e25/2010). The vacancy notice stated that the recruitment procedure was in three stages: shortlisting of applicants, a written examination and an interview with the members of the Appointments Commission.
3. On 22 February 2011, the Human Resources Directorate informed the complainant that, as one of the 475 candidates shortlisted on the basis of their qualifications, he was invited to the next stage of the recruitment procedure consisting of aptitude tests to be completed online.
4. In this notification, the Human Resources Directorate stated that the aptitude tests would be eliminatory. It added that the candidates who obtained the best results would then be invited to sit written examinations.
5. In an e-mail of 12 April 2011, the Human Resources Directorate informed the complainant of his results in the three tests. Since not all the three marks obtained by the complainant reached the required minimum (50 in each test), he was not admitted to participate in the written examinations.
6. The written examinations will take place on 23 May 2011.

7. On 21 April 2011, the Human Resources Directorate received the administrative complaint that the complainant had lodged under Article 59, paragraph 9, of the Staff Regulations. He requested the annulment of the aptitude tests and to be allowed to sit the written examinations. As they would take place before the end of the statutory period for a reply to the administrative complaint, the complainant asked to be allowed, if necessary, to participate in them on a provisional basis pending the outcome of the administrative complaint.

The complainant stated that, in view of the urgency of the issue and the serious prejudice he would suffer if he was unable to take part in the competition, he was also obliged to lodge an application for a stay of execution of the decision not to invite him to the next stage of the competitive examination.

8. In an application dated 20 April 2011 received by the registry on 21 April 2011, the complainant lodged an application for a stay of execution with the Chair of the Administrative Court. He asked him to order the Secretary General to stay execution of the decision not to invite him to the next stage of competition e25/2010 and consequently to allow him to participate in the written examinations.

9. On 27 April 2011, the Secretary General submitted his observations on the application for a stay of execution.

10. On 29 April 2011, the complainant submitted a memorial in reply.

THE LAW

11. Under Article 59, paragraph 9, of the Staff Regulations, an application for a stay of execution of a disputed act may be lodged if its execution is likely to cause him or her “grave prejudice difficult to redress”.

12. The complainant lodged his application for a stay of execution so that the Chair would order the Secretary General to stay execution of the decision not to invite him to the next stage in competitive competition e25/2010 and therefore to allow him to participate in the written examinations.

13. As grounds for his application for a stay of execution, the complainant refers to the grounds set out in his administrative complaint and the documents that accompany it. In his administrative complaint, the complainant, after setting out the five grounds on which he disputes the regularity of the aptitude tests, states that he would suffer grave prejudice if he were not able to take part in the competition and mentions the lodging of the present application for a stay of execution (paragraph 7 above).

14. The Secretary General begins by observing that Article 59, paragraph 2, of the Staff Regulations excludes any issue concerning an external recruitment procedure – as in the present case – from acts against which staff members can lodge an administrative complaint.

15. The Secretary General adds that, in view of Article 59, paragraph 8, of the Staff Regulations, which sets out the categories of persons/bodies to which the complaints procedure is open on the same conditions – *mutatis mutandis* – applicable to staff members, the complainant does not have capacity to take part in proceeding before the Tribunal. Article 59, paragraph 8(d), states that “[the complaints procedure] (...) is open (...) to staff members and

candidates outside the Council who have been allowed to sit a competitive recruitment examination, provided the complaint relates to an irregularity in the examination procedure.”

16. The Secretary General argues that, since the candidate has not been admitted to participate in the written examinations of the competition, the complaint in question and the application for a stay of execution that supplements it, are inadmissible as the complainant does not have *locus standi*. He notes in this regard that the aptitude tests are part of the procedure for shortlisting candidates and not written examinations properly so-called. Such written examinations will take place for the candidates admitted to participate (that is, those who have been selected on the basis of their success in the aptitude tests) on 23 May 2011.

17. The Secretary General adds that, not only do the Staff Regulations restrict this right to candidates admitted to participate in the examinations, but, if such persons lodge complaints, the complaint must relate to “to an irregularity in the examination procedure”. Since the complainant had not been admitted to participate in the competition examinations, his complaint requesting cancellation of the aptitude tests does not concern an irregularity in the examination procedure because the examinations have yet to take place.

18. In view of these circumstances, the Secretary General argues that the complainant has no legal grounds on which to lodge a complaint against the disputed act nor to obtain a stay of execution of the decision not to invite him to participate in the written examinations and has no *locus standi* on which to base any irregularity in the examination procedure.

19. With regard to the merits of the application for a stay of execution, the Secretary General emphasises that, in the unlikely event of the Tribunal finding in favour of the complainant at the end of the proceedings, he would be bound by the Tribunal’s decision and execute it in accordance with Article 60, paragraph 6, of the Staff Regulations.

20. Consequently, according to the Secretary General, the situation of the complainant does not constitute a “grave prejudice difficult to redress”, the condition required for granting a stay of execution. Therefore the prejudice invoked by the complainant, if it existed, would not be such as to justify a stay of execution in the context of an external competitive procedure for which the selected candidates were invited to the written examinations on 23 May 2011.

21. Referring to the many candidates awaiting the next stage of the recruitment procedure and the risk of swelling the number of requests for a stay of execution by persons who believe they should be admitted to participate in the written examinations, the Secretary General asks the Chair to reject the application for a stay of execution as inadmissible and unfounded.

22. In his memorial in reply, the complainant notes that, in his observations, the Secretary General bases his invitation to the Chair to reject his application for a stay of execution on two main arguments: the complaint is inadmissible as he has no *locus standi* since the aptitude tests disputed in the administrative claim were part of the shortlisting process and not written examinations of the competition, and the application for a stay of execution is manifestly unfounded in the absence of a grave prejudice difficult to redress.

23. Regarding the first argument, the complainant maintains that the tests are not part of the shortlisting phase. He cites as evidence Articles 8 and 15, paragraph 1, of the Regulations on appointments (Appendix 2 of the Staff Regulations). He also bases his arguments on a correspondence concerning these tests and on the case law of the European Union Civil Service

Tribunal (judgment in European Commission / Vicente Carbajosa e.a., case F-9/09, 28 October 2010, § 50).

24. Regarding the second argument, the complainant states that it is for the Secretary General to prove absence of a grave prejudice difficult to redress.

25. He goes on to note that, in view of the time periods, if there were no response or a negative response to his administrative complaint, he would suffer a grave prejudice difficult to redress as he would be unable to participate in the written examinations. In view of the urgency of the question, he asks to be permitted to participate on a provisional basis pending the outcome of his administrative complaint and the appeal he intends to lodge to the Tribunal in the event of a negative response by the Secretary General. Contrary to the assertion of the Secretary General, such an authorisation would be prejudicial neither to the other candidates who have been admitted to take part in the written examinations nor to the Organisation.

26. The complainant then notes that, in several similar cases, the Secretary General has accepted that there was a risk of grave prejudice difficult to redress for candidates who had not been admitted to sit the written examinations. He therefore invited the persons concerned to take part in the written examinations of the competition on a provisional basis in order to avoid causing such prejudice.

27. According to the complainant, in his case it is obvious that only a stay of execution of the decision not to admit him to the written examinations will make it possible to avoid a grave prejudice difficult to redress, a risk that the Secretary General has judged should be avoided in the aforementioned similar cases.

28. The complainant ends by stating that, contrary to the assertion of the Secretary General, no risk of uncertainty and prejudice would ensue for the Organisation or the other candidates as a result of the Tribunal granting his application for a stay of execution. The candidates admitted would take the written examinations on 23 May 2011 and the Organisation would continue with the recruitment procedure under Vacancy Notice e25/2010. His request was to take part in these written examinations in order to avoid any grave prejudice difficult to redress.

29. Consequently, the complainant maintains his submissions and asks the Chair to order the Secretary General to place a stay of execution on his decision not to invite him to the written examinations of competition e25/2010, and therefore to allow him to participate in these tests on a provisional basis.

30. The Chair must first decide upon the objection to admissibility of the application for a stay of execution raised by the Secretary General.

31. He notes that the arguments put before him relate to the merits of the case rather than to the examination of the admissibility of the application for a stay of execution and that there is no evidence on which to conclude that the application for a stay of execution is inadmissible.

32. It follows that the objection to admissibility raised by the Secretary General must be rejected.

33. With regard to the merits of the application for a stay of execution, 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 complainant'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*).

34. The Chair notes that, contrary to the complainant's assertion, it is for the person who lodges the application for a stay of execution to prove that he or she is likely to suffer grave prejudice difficult to redress if the stay of execution is not granted and not for the Secretary General to prove the contrary.

35. The Chair notes that the complainant has not established the existence of a "grave prejudice difficult to redress" (Article 59, paragraph 7, of the Staff Regulations). Indeed, the arguments he submits are without foundation.

36. The Chair notes that, in this case, as in others the Chair has heard concerning the same competition e25/2010 and other previous appeals, and unlike what had previously occurred in other cases, the Secretary General has not admitted, on a provisional basis and subject to the outcome of the recruitment process, a candidate who had contested the non-admission decision.

37. 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.

38. 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 this possibility in his observations regarding the complainant and he limited himself to indicate his obligation to execute the decisions of the Tribunal in accordance with Article 60, paragraph 6 of the Staff Regulations. Furthermore, the complainant – 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 complainant 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*).

39. In the present case, this is all the more justified since the competition procedure is not at an advanced stage and consequently differs from the procedure that gave rise to the decision taken in the order of 26 February 2009 in the application for a stay of execution in *Golubok (2)*. This fact has to be taken into consideration although the complainant disputes the regularity of the decision to hold aptitude tests, tests which were not mentioned in the vacancy notice. Indeed, if the complainant's claim were well-founded, the decision concerning it could lead to annulment of the complainant's exclusion and, indirectly, cast doubt upon the regularity of the conduct of the competition.

40. The Chair points out that the exercise of his 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). As the purpose of the urgent procedure

is to ensure that the administrative proceedings are fully effective, 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 these reasons,

Exercising my jurisdiction to make interim orders under Article 59, paragraph 9, of the Staff Regulations, Article 8 of the Statute of the Administrative Tribunal and Rule 21 of the Rules of Procedure,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decide

To reject Mr Kilinç's application for a stay of execution.

Oberwil (Switzerland), 6 May 2011.

The Registrar of the
Administrative Tribunal

Sergio SANSOTTA

The Chair of the
Administrative Tribunal

Luzius WILDHABER