

# CONSEIL DE L'EUROPE

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# COUNCIL OF EUROPE

## TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

ORDER OF THE CHAIR of 7 October 2011

In the case of Ümit KILINÇ (II) and Others v. Secretary General

Other complainants:

Natasha BAKIRCI, Mesut BEDIRHANOGLU, Senem GUROL, Sergey GUSEVSKIY, Ekaterina PRIKHODKO, Marina MAKAROVA, Emanuele NICOSIA, Ayşe Gül ALKIŞ

### THE FACTS

1. The nine appellants, Mr Ümit KILINÇ, Ms Natasha BAKIRCI, Mr Mesut BEDIRHANOGLU, Ms Senem GUROL, Mr Sergey GUSEVSKIY, Ms Ekaterina PRIKHODKO, Ms Marina MAKAROVA, Mr Emanuele NICOSIA, Ms Ayşe Gül ALKIŞ, work or have already worked for the Organisation as assistant lawyers in the registry of the European Court of Human Rights.
2. The appellants were candidates in the competition for the recruitment of profile B lawyers (grade A1/A2) launched by means of vacancy notice No. e25/2010. The vacancy notice specified that the recruitment procedure was in three stages: shortlisting of applicants, a written examination and an interview with the members of the Appointments Board.
3. On 22 February 2011, the Human Resources Directorate informed the appellants that, as they were among the 475 candidates shortlisted on the basis of their qualifications, they were 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 appellants of their results in the three tests. Since not all the three marks obtained by each appellant reached the required minimum (50 in each test), they were not admitted to participate in the written examinations, which would take place on 23 May 2011.

6. Each appellant lodged an administrative complaint under Article 59, paragraph 2, of the Staff Regulations. They requested the annulment of the aptitude tests and to be allowed to sit the written examinations of the competition. As these were to take place before the end of the statutory period of 30 days for a reply to an administrative complaint, the appellants asked to be allowed, if necessary, to participate in them on a provisional basis pending the outcome of the administrative complaint.

7. Each appellant also lodged an application to the Chair of the Administrative Tribunal for a stay of execution of the disputed act (Article 59, paragraph 9, of the Staff Regulations). All the appellants asked him to order the Secretary General to stay execution of the decision not to invite them to the next stage of competition e25/2010 and consequently to allow them to participate in the written examinations.

8. In orders adopted on 6 May 2011, the then Chair dismissed all these applications for a stay of execution.

9. As the administrative complaints had been rejected by the Secretary General, the appellants lodged appeals to the Tribunal under Article 60 of the Staff Regulations. Examination of these appeals is currently at the written procedure stage.

10. On 29 September 2011, the appellants lodged a joint application for a stay of execution of the act complained, requesting a stay of execution on the holding of the interviews scheduled for 19, 20 and 21 October in the profile B section of competition e25/2010.

11. On 30 September 2011, the Secretary General submitted his observations on the request for a stay of execution.

12. On 3 October, the appellants submitted their memorials in response.

13. On 4 October 2011, the Secretary General sent the Chair comments on certain points in these memorials, which had been communicated to him for information; the same day, the appellants stated that they did not consider it necessary to extend this exchange of letters.

14. On 6 October 2011, the Chair decided to accept this exchange although he had not authorised it in advance.

## **THE LAW**

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

The appellants lodged the application for a stay of execution requesting that the Chair order the Secretary General to defer the organisation of interviews scheduled for 19, 20 and 21 October in the profile B section of competition e25/2010 and, in any case, to defer all recruitment in the profile B section of this competition until the Tribunal had ruled on the merits of the present appeals.

16. The appellants consider that, were the interviews under the competition at issue to go ahead, they would run the risk of causing grave prejudice difficult to redress within the meaning of Article 59, paragraph 9, of the Staff Regulations on three grounds.

First, it is certain that, because of the time taken by the proceedings to examine the merits of their appeals, the Tribunal cannot rule on the merits of the appeals before the interviews, if these are conducted on the dates scheduled.

Second, the purpose of competition e25/2010 is not to fill a particular post but to recruit lawyers in all sectors of the Organisation. That implies that the candidates selected at the end of the competition could be offered posts very rapidly, depending on the needs of the various departments. If the disputed interviews take place on the dates indicated, the Secretary General could immediately draw from the list of selected candidates to fill any vacant posts. In this scenario, the current appeals would lose much of their substance since the appellants must in any case await the outcome of the proceedings before the Tribunal and then, if the Tribunal finds in their favour, sit the written examinations before possibly being called for interview by the Appointments Board. They could not therefore apply for any vacant positions that may be offered in the coming weeks to candidates from the e25/2010 competition, which would cause them grave prejudice difficult to redress since they would suffer an indisputable loss of opportunity compared with the other competition candidates.

Third, the appellants state that the purpose of the present appeals is, in particular, to enable the candidates to take part in the rest of the written examinations of the profile B e25/2010 competition and, if successful, the interviews with the Appointments Board. If an initial series of interviews took place as scheduled from 19 to 21 October 2011, and if the Tribunal found in favour of the appellants, the Appointments Board would have to meet again to interview possible new candidates, certainly several weeks, even several months, after seeing the first wave of candidates. In view of the lapse of time that might separate the two interview sessions, the appellants state that it would be very difficult, even impossible, for the Appointments Board to compare the respective merits of the candidates with a view to drawing up the final list of candidates (who must be listed in order of merit, as posts must then be offered in that order).

17. In view of the above considerations and the conclusions of the Chair of the Administrative Tribunal in the orders of 6 May 2011, the appellants call for a decision to order the Secretary General to defer the organisation of interviews scheduled for 19, 20 and 21 October in the profile B section of competition e25/2010 and, in any case, to defer all recruitment in the profile B section of this competition until the Tribunal has decided upon the merits of the present appeals.

18. The Secretary General states at the outset that he continues to maintain that, despite the terms of the orders of 6 May 2011 on this point, in view of the relevant provisions of the Staff Regulations, the appeals in question and consequently the related applications for stay of execution, are inadmissible for want of *locus standi* since the appeals concern an external recruitment procedure. As he noted in his reply to the appellants' administrative complaints, the Secretary General emphasises that the Staff Regulations exclude any question concerning an external recruitment procedure from the acts against which staff members may lodge complaints. The Staff Regulations limit to candidates "admitted" to participate in examinations the right to lodge complaints that relate "to an irregularity in the examination procedure". Since the appellants have not been admitted to participate in the said examination, their appeals requesting annulment of the aptitude tests that were part of the shortlisting procedure, do not relate to an irregularity in the examination procedure.

19. The Secretary General adds that, in his opinion, the current situation no more justifies granting a stay of execution than that at the time when the initial applications for a stay of

execution were lodged. The appellants still do not establish in their arguments in the present applications the existence of a “grave prejudice difficult to redress”. As the Chair himself considered in his orders of 6 May 2011, “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”. The normal holding of the profile B oral examinations of the e25/2010 competition scheduled for 19, 20 and 21 October next are in no way such as to cause any prejudice to the appellants.

20. In this regard, the Secretary General observes that in the execution of the decision of 30 October 2009 in Appeal No. 455/2008 (*Musialkowski v. Secretary General*), the Secretary General had informed the Tribunal that he would organise new written examinations for all the candidates who had not passed the written examinations in the profile C – Programme Officer (project management) – section of the general competition for the recruitment of administrative staff (Vacancy Notice e84/2007). The written and oral examinations had already taken place and a reserve list had already been drawn up for the profile C section of this competition. Indeed, some successful candidates had already been recruited. Following the new written and oral examinations that took place in execution of this decision, a new reserve list was drawn up and was combined with the initial reserve list. Consequently, the candidates on the second reserve list suffered no prejudice and could be recruited in the normal way.

21. According to the Secretary General, there is nothing to prevent his adopting this solution in the present cases, if necessary. Consequently, the appellants’ situation does not constitute a “grave prejudice difficult to redress”, the condition required for granting a stay of execution. It is clear that the prejudice invoked by the appellants, if it exists, is not such as to justify granting a stay of execution in an external competition procedure in progress for which the selected candidates have been invited for interview on 19, 20 and 21 October next.

22. After putting forward arguments concerning the situation of the candidates invited for interview and the budgetary difficulties that the postponement of those interviews would cause for the Organisation, the Secretary General states that the appellants could not claim a grave prejudice difficult to redress.

23. The Secretary General adds that, if, despite all this, the Tribunal wishes there to be no recruitment for profile B of this competition before it has ruled on the appeals, it could be decided to “freeze” the reserve list drawn up for this profile after the interviews on 19, 20 and 21 October next until the date of the Tribunal’s decisions on the appeals at issue. Such a solution would allow the profile B interviews to take place as planned and accordingly reduce the prejudice suffered both by the invited candidates and the Council of Europe.

24. The Secretary General ends by stating that there can be no question at this stage of any assessment of the arguments concerning the merits of the appellants’ complaints. These matters are not for discussion, let alone examination, in the current proceedings, which are concerned only with urgent measures.

25. For these reasons, in these conditions and in view of this evidence, the Secretary General asks the Chair of the Administrative Tribunal to reject the application for a stay of execution lodged by the appellants as inadmissible and without foundation.

26. In their memorials in reply, the appellants dispute that deferring the interviews would cause difficulties, in particular financial difficulties, for the Council of Europe and

organisational problems for the candidates, some of whom have already made arrangements to come to Strasbourg.

As for the solution suggested by the Secretary General of “freezing” the reserve list for profile B until the end of the appeal proceedings, the appellants reiterate the argument they put forward in their request concerning the difficulty, or indeed the impossibility, there would be in that case of ensuring equality among the candidates as a result of the time that would elapse between the different interview sessions.

Furthermore, they invite the Tribunal to examine the arguments set out in their application, which sufficiently prove that continuing the competition would cause them grave prejudice difficult to redress within the meaning of Article 59, paragraph 9, of the Staff Regulations.

27. The Tribunal notes first that, to save work, there is good reason to issue a single order, although the appellants have, in accordance with the procedure in force, lodged separate appeals. Indeed, the facts and the arguments put forward by all the appellants are identical and this complies, moreover, with the practice followed in applications for a stay of execution lodged at the time of the administrative complaint (see Order in Couardes and others of 19 November 1994).

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

29. As was the case in the orders issued following the first series of requests for a stay of execution lodged by the appellants, he notes that the arguments put before him relate to the merits of the case rather than to 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.

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

31. Regarding the merits of the application for a stay of execution, the Chair observes, as was already pointed out in the aforementioned orders of 6 May 2011, that there can be no question at this stage of any assessment of the arguments concerning the admissibility and/or the merits of the appellants’ complaints. These matters are not for discussion, let alone examination, in the current proceedings, which are concerned only with urgent measures (see the Chair’s Order of 3 July 2003, paragraph 10, *Timmermans v. Secretary General*).

32. The Chair notes at the outset that the appellants ask for two alternative measures: a stay of execution on the interview procedure of 19-21 October 2011 or, in any case, a deferral of any recruitment in the profile B section of this competition until the Tribunal has decided upon the merits of these appeals.

33. The Chair emphasises that it is for the person who lodges an 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.

34. Regarding the appellants' first request, the Chair notes that they have not established in their arguments the existence of a "grave prejudice difficult to redress" (Article 59, paragraph 9, of the Staff Regulations) if the interview process of 19-21 October is not suspended. The arguments they put forward based on the lapse of time between interviews if the substance of the appeals is accepted are without foundation. The Chair does not accept that, because of the lapse of time between the interview sessions, the Appointments Board would be unable "to compare the respective merits of the candidates with a view to drawing up the final list of candidates".

35. On the other hand, with regard to the second request, the Chair notes that a stay on recruitment pending the outcome of a dispute before the Tribunal has already been ordered with the consequence of suspending any recruitment until the case was decided (see ATCE, appeal No. 456/2008, Golubok v. Secretary General, Order of 26 February 2009, quoted in paragraph 17 of the decision of 13 May 2009).

36. In the Chair's opinion, it is clear that, in view of the advanced stage of the recruitment procedure, the appellants may legitimately claim that they risk a grave prejudice difficult to redress if the planned recruitment takes place under the procedure at issue before the Tribunal has established whether or not they had the right to take part and be informed of the results (see aforementioned Golubok Order (2), paragraph 25). Moreover, the Secretary General is aware of this fact and accepts the hypothesis of a freeze on recruitment pending the outcome of this dispute (paragraph 23 above). Furthermore, this solution appears more appropriate than the other, also considered by the Secretary General, based on the execution of the Tribunal's judgment in the Musialkowski appeal quoted in paragraph 20 in which, it is worth recalling, the appellant had not requested a stay of execution of the contested act. In this case, the appellants do not merely dispute a decision based on an assessment of their participation in the recruitment procedure, but dispute the very regularity of the whole procedure at issue and, as the Chair observed in the order of 6 May 2011 when deciding upon the first application for a stay of execution by the appellants, "if the claim [of the appellants] were well-founded, the decision concerning it could lead to annulment of the [appellants'] exclusion and, indirectly, cast doubt upon the regularity of the conduct of the competition" (paragraph 37 of these orders).

37. 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). 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 the Council's 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,

In view of the urgency,

**I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,**

- grant the stay of execution requested insofar as it concerns the contested profile B appointments procedure (Vacancy Notice e25/2010);
- decide that the stay of execution shall cease at the latest on the day the Administrative Tribunal's judgment is handed down.

Done and ordered at Kifissia (Greece), 7 October 2011.

The Registrar of the  
Administrative Tribunal

The Chair of the  
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS