

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER OF 17 January 2013

In the case of Emmanuel MENARD v. Secretary General

THE FACTS

1. The complainant, Mr Emmanuel Menard, is a French national, who is already working for the Council of Europe as a permanent staff member. He holds the grade B 5 and works in the General Directorate of Administration.
2. The complainant applied to sit an external competition for recruitment as a financial specialist (Grade A1/A2). This is a position in the General Directorate of Administration, Directorate of Programme, Finance and Linguistic Services, to be filled on a fixed term contract (Vacancy notice No. e 220/2012).
3. On 3 December 2012, the complainant was informed that a list had been drawn up of the candidates whose qualifications best corresponded to the requirements set out in the vacancy notice and that his application had not been accepted.
4. The complainant then contacted the Directorate of Human Resources and asked about the reasons for this decision. The Directorate of Human Resources received the candidate on two occasions and gave him detailed reasons as to why his application had not been selected.
5. The written examinations took place on 18 December 2012. The results of these exams are not known – or at least the candidates who took part in the exams have not yet been informed – and interviews have neither been organised nor taken place.
6. On 2 January 2013, the complainant lodged an administrative complaint under Article 59, paragraph 2, of the Staff Regulations. He asked that the decision of 3 December 2012 be declared null and void and that his name be included among those shortlisted so that he could be called for interview.
7. In a complaint submitted the same day, the complainant made an application to the Chair of the Administrative Tribunal for a stay of execution of this decision pursuant to Article 59, paragraph 9, of the Staff Regulations. He asked the Chair to order the stay of execution of the decision taken on 3 December 2012 and the suspension of the recruitment procedure until the date on which the Tribunal handed down its judgment, at the latest.

8. On 7 January 2012, the Secretary General submitted his observations concerning the application for a stay of execution.

9. On 10 January 2012, the complainant submitted his observations in reply.

THE LAW

10. Under Article 59, paragraph 9, of the Staff Regulations, an application for a stay of execution of an administrative act may be lodged only if its execution is likely to cause the complainant “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.

11. The complainant lodged his application for a stay of execution so that the Chair could order the suspension of the Directorate of Human Resources' decision of 3 December 2012 to set aside his application. He also asked the Chair to order the suspension of the recruitment procedure until the date on which the Tribunal ruled on the matter, at the latest.

12. To justify his application for stay of execution, the complainant put forward arguments concerning serious legal grounds that should lead to the annulment of the decision taken on 3 December 2012 and the existence of “grave prejudice difficult to redress”.

His first argument was that his application fully met the requirements set out in the vacancy notice. He also claimed that the decision had been taken without consulting the department seeking to recruit a financial specialist, whereas, according to the Tribunal's case-law, the Directorate of Human Resources did not have authority to set aside an application for recruitment on its own initiative.

As regards his second argument, the complainant claimed that if the disputed decision was not suspended, his application to sit the competition would definitively be set aside whereas he had lodged an administrative complaint within the required time-limit and that the disputed decision had been taken in complete breach of the rules in force and of the Tribunal's case-law.

He added that he was sure that he would, as a result, suffer “grave prejudice difficult to redress” if the position for which the competition had been held was filled before the Tribunal had the opportunity to establish whether or not he had the right to be short-listed for the position.

The complainant understood that the stay of execution of the disputed decision and of the recruitment procedure was essential to guarantee the full effectiveness of the administrative complaint and the applicant's rights as to the appropriateness of his administrative complaint.

13. The Secretary General for his part first argued that the administrative complaint and the corresponding application for stay of execution were inadmissible for lack of standing. He then argued that the application for stay of execution was unfounded.

With regard to former, the Secretary General, pointed out that Article 59, paragraph 2, of the Staff regulations excludes an external recruitment procedure from the administrative acts

against which staff members may lodge an administrative complaint. Paragraph 8 of the same article stipulates the categories of persons/entities entitled, under the same conditions - *mutatis mutandis* – as those applicable to staff members, to initiate a complaint procedure; this provision stipulates that the complaint procedure “shall be 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”.

The Secretary General understood that, given that the complainant had not been allowed to take part in the written examinations of the competition, his administrative complaint and the corresponding application for stay of execution were inadmissible for lack of standing.

Moreover, under the said paragraph 8, a complaint should relate “to an irregularity in the examination procedure”, whereas the complaint concerned the annulment of a decision not to accept the application and did not therefore relate to an irregularity in the examination procedure.

In view of these circumstances, the Secretary General understands that the complainant has no legal grounds for lodging a complaint against the disputed decision nor for obtaining a stay of execution of the decision not to invite him to take part in the examination and that he has no legal interest in alleging an irregularity in the examination procedure.

With regard to the merits of the application for a stay of execution, the Secretary General says that, as he is bound by the ruling of the Tribunal, he will have to execute its decision, in accordance with Article 60, paragraph 6 of the Staff Regulations.

It follows that the complainant’s situation does not present any of the elements that could be considered to result in a “grave prejudice difficult to redress”, a condition which is required for the granting of a stay of execution. It is worth noting that the prejudice invoked by the complainant, if it did exist, would not be such as to justify granting a stay of execution in the context of a procedure involving an external competition which had already been set in motion and for which the selected candidates had already been invited to written examinations, which took place on 18 December 2012.

In the Secretary General’s opinion, it is also necessary to take account of the situation of the candidates who have sat the written exams and of the difficult situation of the recruiting department, which relied to a great extent on the competition to be able to recruit a financial specialist as soon as possible. If the recruitment procedure were to be suspended for several months, that would impede the proper functioning of a vital department of the Council of Europe, all the more so given that recruitment to the position in question was limited to 31 December 2013. There was no way in which the recruiting department could mitigate the impossibility of recruiting a financial specialist in 2013.

Finally, with regard to the complainant’s allegation that the candidates were shortlisted solely by the Human Resources Department, without consulting the department concerned, the Secretary General argues that such a claim is totally unfounded and incorrect, as the recruiting department was actively involved in selecting the candidatures, as provided for under Article 16 of the Regulations on Appointments.

The Secretary General was of the opinion that the arguments put forward by the Chair in his Order of 24 November 2011 in the case *Yuksekk and others v. Secretary General* (paragraph 33) should also be taken into account in the instant case.

In these circumstances and in the light of these elements, the Secretary General asks the Chair of the Administrative Tribunal to reject the application for a stay of execution submitted by the complainant as inadmissible and/or ill-founded.

14. In his observations in reply, the complainant strongly disputes the Secretary General's position with regard to the admissibility of the administrative complaint and of the application for a stay of execution, a position which he claims is, at all events, neither compatible with international case-law, nor even with the Tribunal's recent case-law on this point.

15. He also argues that the restriction set out in the Staff Regulations does indeed make any objection or appeal in the case of an external recruitment procedure impossible and that this is completely discriminatory and incompatible with the general principles of law and in particular with Article 6 § 1 of the European Human Rights Convention.

He claims that the recruitment procedure starts from the very moment a candidate submits his or her application and that the decision informing a candidate that he has not been selected to follow the recruitment procedure is clearly a decision giving rise to a complaint and that it was taken after an irregular "shortlisting procedure" and that, at this stage in the recruitment procedure, his application should have been forwarded to the department concerned for consideration among the other candidatures on list A.

He claims that the selection of the candidates admitted to continue the recruitment procedure must be conducted in accordance with the admissibility conditions set out in the vacancy notice, in accordance with specific rules. Denying him the right to challenge the Directorate of Human Resources' decision not to include him in the recruitment procedure is tantamount to removing all control over the procedure for shortlisting candidates. It was precisely because this procedure was not respected that he had a reason for challenging the decision taken by the Directorate of Human Resources on 3 December 2012.

He claims that the provisions set out in Article 59 paragraph 2 of the Staff Regulations necessarily breach the principle of right of access to a court, within the meaning of the provisions set out in Article 6 § 1 of the European Human Rights Convention.

It is also incompatible with the case-law of the Tribunal (Application No. 250/1999 *Danielle Schmitt v. Secretary General*, paragraphs 14-17) of the Administrative Tribunal of the International Labour Organisation (ILOAT, Judgment No. 122 of 15 October 1968) and of the European Court of Human Rights (ECHR 18 February 1999, *Waite and Kennedy v. Germany*, §59).

In the light of all these elements, Mr Menard has grounds to assert that both his administrative complaint and his application for a stay of execution are admissible.

After putting forward arguments concerning the serious grounds for his complaint and also aimed at showing that he met the conditions set out in the vacancy notice, he reasserted that he would suffer grave prejudice difficult to redress if the position in respect of which the competition had been held were filled by means of the disputed procedure before the Tribunal

could establish whether or not he was entitled to take part in that procedure. He also claimed that suspension of the procedure would not cause any problems to the department. The recruiting department was at no point penalised for, since then, a mobility notice has already been published to fill a similar position, so recruitment was continuing in the same department.

At the very minimum, if the Tribunal were to consider it appropriate, Mr MENARD should provisionally be allowed to take part in the examinations in respect of recruitment procedure e220/2012, i.e. in the instant case to sit a written exam comparable to the one held on 18 December 2012.

16. According to the Chair there is absolutely no question at this stage of analysing the arguments concerning the admissibility and/or the validity of the grievance set out by the complainant in the context of his complaint, as there is no need to consider these issues and *a fortiori* to examine them in the context of the instant procedure, which only concerned the taking of emergency measures (see. paragraph 10 of the Chair's Order of 3 July 2003, in the case *Timmermans v. Secretary General*). As a result, he does not need to recall the Tribunal's case-law concerning the possibility for a candidate (irrespective of whether or not he or she is already a member of staff) to challenge a decision to exclude them from a recruitment procedure or to reiterate the comments that were made concerning the changes made to the statutory texts on 7 July 2010, following the Tribunal's rulings on this subject.

17. With regard to the plea of inadmissibility on the grounds that the complainant had no standing, the Chair notes that this question is inseparable from that of the admissibility of the complaint and that it cannot therefore be dealt with at this stage either, because there is no reason to pre-empt at this stage a question based on a detailed examination of a possible appeal. It therefore follows that the Secretary General's plea of inadmissibility must be rejected.

18. With regard to the merits of the application, the Chair then notes that there was no need to take into consideration the complainant's alternative request – submitted in his observations in reply of 10 January 2012 – concerning his provisional participation in the written examination. Indeed, irrespective of the fact that this request was not submitted along with the application – and that therefore, as a result, the Secretary General did not have the opportunity to submit his observations –, it nevertheless transpired during the examination of the instant application for a stay of execution, that the written examinations had already begun and that nothing justified organising a written examination comparable to the one held on 18 December 2012 solely for the complainant at that stage, rather than after a decision had been taken – a reply from the Secretary General concerning his administrative complaint or a ruling by the Tribunal – in his favour.

19. The Chair need therefore only consider the application for a stay of execution insofar as it concerns the suspension of the decision taken on 3 December 2012 by the Directorate of Human Resources not to accept his candidature and the suspension of the recruitment procedure according to vacancy notice e220/2012.

20. The Chair notes that the different arguments put forward by the complainant are not such as to prove that execution of the disputed decision was likely to cause him grave prejudice difficult to redress. Indeed, as regards his participation in the recruitment procedure, nothing proves that it would not be possible to organise written tests for the complainant if he won his case. That had already happened in the past in cases in which the Secretary General had not considered it possible, contrary to what had happened in other administrative complaints, and

subject to the outcome of the appeal, to admit the complainant, who challenged his exclusion from the competition.

21. The same arguments must apply with regard to the request to suspend the recruitment procedure. It must be considered from two standpoints: the conduct of the recruitment procedure and the final act, i.e. the recruitment of the candidate selected to fill the position in question. Admittedly, in his conclusions, the complainant expressly requests only the suspension of the procedure; however, it is clear that filling the position is an integral aspect of the recruitment procedure even if it is the final act.

22. In this respect, the Chair points out that, in the past, decisions were taken to grant the requested stay of execution in similar cases and more recently such a stay of execution was refused (Order of the Chair of 24 November 2011, in the cases *Yukse* and others v. the Secretary General, referred to by the Secretary General).

23. In the instant case, the issues mentioned by the Secretary General and to be taken into consideration are undeniably less important than those mentioned in the above-mentioned *Yukse* and others Order. However, that does not mean that the Chair should depart from this case-law even if the arguments put forward by the Secretary General are not such as to prove the importance of the consequences that a possible decision to stay execution might have for the Council of Europe. The need to avoid these consequences means that in balancing the interests of the Council of Europe and the interests of the complainant, the former must have precedence over the latter. In the instant case, even if it does not seem that the latter override the former, it appears that the complainant does not risk suffering grave prejudice difficult to redress.

24. Indeed, the Secretary General has clearly stipulated that if the complainant wins his case before the Tribunal, he will be obliged to execute the corresponding judgment pursuant to Article 60, paragraph 6, of the Staff Regulations. Moreover, if the Secretary General does not voluntarily wish to allow the complainant to provisionally take part in the recruitment procedure and the latter wins on the substance of the dispute, the Secretary General will have to accept the consequences and the complainant will be able to demand compensation for the damage suffered as a result of having forfeited his chance of being recruited to the position in question.

25. The Chair recalls that some restraint is imperative in exercising the exceptional power conferred on him by Article 59, paragraph 7 of the Staff Regulations (cf. ABCE, Order of the Chair of 31 July 1990, paragraph 12, in the *Zaegel v. Secretary General* case; and ATCE, Order of the Chair of 1 December 1998, paragraph 26, in the *Schmitt v. Secretary General* case, Order of the Chair of 14 August 2002, paragraph 16). Since the purpose of summary procedure is to ensure the full effectiveness of administrative litigation, the application for stay of execution must demonstrate that the requested measure is necessary to avert grave prejudice difficult to redress. Were it otherwise, this would impair not only the proper running of the services but also the management of major sectors of the Organisation. As this is not so in the instant case, there is no reason to grant the requested stay of execution.

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 Article 21 of the Rules of Procedure of the Administrative Tribunal,

WE, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decide that

- the application for stay of execution brought by Mr Menard is rejected.

Done and ordered at Kifissia (Greece) on 17 January 2013.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS