CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER of 27 April 2012

In the case of Françoise PRINZ (II) v. Secretary General

THE FACTS

1. The complainant, Ms Françoise Prinz, works for the Organisation as a permanent staff member. She currently occupies an A5 post in the Directorate of Democratic Institutions in the Directorate General of Administration and Logistics.

2. The complainant took part in an external recruitment procedure for the (A6) post of Director of Programme, Finance and Linguistic Services (grade A6), as advertised in vacancy notice no. e46/2010. Following this procedure, she lodged an appeal with the Tribunal against the decision to appoint another candidate (appeal No. 475/2011).

3. In a decision delivered on 8 December 2011, the Tribunal, after joining this appeal to another one on the same subject (Appeal No. 474/2011), set aside the impugned decision (ATCE, appeals nos. 474/2011 and 475/2011 – Prinz and Zardi v. Secretary General, decision of 8 April 2011).

4. Following this decision, the Secretary General decided to recommence the recruitment procedure and published a new vacancy notice (No. e86/2012) to fill the post in question. The closing date for applications was 26 April 2012.

5. On 13 April 2012, the complainant submitted an administrative complaint to the Secretary General under Article 59, paragraph 2, of the Staff Regulations. In it, she contested the Secretary General's decision to publish a new vacancy notice (with less stringent admissibility conditions than the previous one). She pointed out that, in her view, vacancy notice no. e86/2012 clearly showed that the Secretary General did not intend to implement the decision of 8 December 2011 in good faith. She therefore asked that this vacancy notice be withdrawn and replaced by vacancy notice no. e46/2010, or that the earlier procedure be resumed from the stage the Secretary General considered most appropriate.

6. On 16 April 2012, the complainant lodged an application for a stay of execution with the Chair of the Tribunal (Article 59, paragraph 9, of the Staff Regulations). She asked the Chair to suspend the recruitment procedure relating to vacancy notice no. e/862012 with immediate effect, and in any event by 26 April 2012, the closing date for applications.

7. On 20 April 2012, the Secretary General submitted his observations concerning the application for a stay of execution.

8. On 23 April 2012, the complainant submitted observations in reply.

RELEVANT LAW

9. Under the terms of Article 59, paragraph 9, of the Staff Regulations, an application for a stay of execution of the act complained of may be lodged "if its execution is likely to cause (…) 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.

Under Article 8 of the Tribunal's Statute, the Chair may "make his or her decision subject to certain conditions".

10. In her application, the complainant, after noting the facts and putting forward arguments relating to the merits of the case, states that allowing vacancy notice no. e86/2012 to remain in effect until 26 April 2012 (the closing date for applications) is liable to cause her grave prejudice difficult to redress.

11. The complainant contends that the prejudice can be broken down as follows.

Firstly, the Secretary General can no longer be relied upon to ensure that all the applications, starting with the complainant's own application, will be examined in an objective and impartial manner, signs of favouritism having been detected and condemned, albeit not explicitly, by the Staff Committee itself in an announcement that appeared on the Council of Europe portal on 4 April 2012. This condemnation is in itself sufficient to cast serious doubt on the regularity of the procedure.

Secondly, the discretion which the Secretary General enjoys in the exercise of his power to make appointments to A6 posts is very wide but, as has been pointed out by the Tribunal (paragraph 75 of the decision of 8 December 2012), not unlimited. At the very least, it is constrained by the need to respect the admissibility conditions set out in the vacancy notice. In the present case, the Tribunal went so far as to observe that "the conditions – such as professional experience – which have implications for the admissibility of a candidature should be defined more precisely" (paragraph 81). The Secretary General, however, has done exactly the opposite, in making the eligibility requirements in terms of competence and qualifications too lax.

Lastly, the complainant contends that relaxing the admissibility conditions too much is likely to result in an incalculable yet potentially very large number of applicants, with qualifications significantly inferior to those of the complainant. Quite apart from the costs for the Organisation, dealing with such a large volume of applications is liable to put the complainant, whose high qualifications could well go unnoticed and unappreciated amid the general lowering of the standard of competence required, at an unfair disadvantage while at the same time unduly benefiting the staff member who is currently acting as director, assured as

he is, according to the information provided by the Secretary General in connection with the execution of the decision of 8 December 2011, of being able to stay on in this post pending the outcome of the proceedings and so acquire extra months of experience in the job.

12. According to the complainant, the damage that would result from allowing vacancy notice no. e86/2012 to remain in effect would be not merely "difficult" to redress but downright "irreparable" in terms of the complainant's professional standing, insofar as her qualifications and experience would be downgraded to those of a junior administrative officer. As to the disregard for the principle of *res judicata* and the consequent undermining of the Tribunal's authority, which are evident from the wording of vacancy notice no. e86/2012, these could not be remedied by any challenge that might be mounted against the Secretary General's ultimate decision concerning the appointment and which may or may not succeed. The only option is to prevent the prejudice from occurring in the first place, by suspending the recruitment procedure set in motion with vacancy notice no. e86/2012 before 26 April 2012.

13. The complainant therefore asks the Chair to kindly suspend the recruitment procedure relating to vacancy notice no. e86/2012 with immediate effect, and in any event by 26 April 2012, the closing date for applications.

14. The Secretary General, for his part, begins by observing that the complainant has adduced no evidence of "grave prejudice difficult to redress" within the meaning of Article 59, paragraph 9, of the Staff Regulations.

15. The first point to note is that it is for the Secretary General to draw the implications from the annulment of a decision and to find the best way of executing the Tribunal's decision, as the situation requires. According to the Tribunal's decision of 8 December 2011, moreover, it is for the Secretary General to "give effect to this decision by deciding on the stage in the procedure from which the recruitment procedure is to be resumed or recommenced and, as appropriate, with which candidates". Contrary to what the complainant claims, the Tribunal has thus left it to the Secretary General to decide whether to resume the original recruitment procedure, or to recommence the recruitment procedure from the publication-of-vacancy-notice stage. The Secretary General chose the second option and in so doing acted in a manner wholly in keeping with the terms of the above-mentioned decision.

16. In any event, 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. The fact is that the prejudice invoked by the complainant, if any, would not be such as to justify granting a stay of execution in the context of this recruitment procedure which is at the call-for-applications stage. In effect, the complainant, like all the other applicants, is at liberty to participate in the recruitment procedure which began with vacancy notice no. e86/2012. Needless to say, her application will be dealt with no less objectively than those of the other candidates.

17. The Secretary General makes the point here that failing to fill the post of Director of Programme, Finance and Linguistic Services quickly is liable to compromise the smooth running and management of a key Directorate in the Organisation.

18. Under these circumstances and in view of these considerations, the Secretary General asks the Chair to dismiss the request for a stay of execution as being ill-founded.

19. In her observations in reply, the complainant, after making some points about the Secretary General's powers with regard to the execution of Tribunal decisions and about the Tribunal's supervisory power, says that she is not aware of any new facts or needs that would justify a general lowering of the eligibility requirements in terms of seniority and professional experience, as set out in the new vacancy notice.

20. As to "serious and irreparable prejudice", the fact that the complainant, like all the other applicants, is at liberty to participate in the recruitment procedure which began with vacancy notice e86/2012 cannot be deemed to constitute proof that there is no likelihood of prejudice. For in the complainant's opinion, even supposing that the current procedure were allowed to run its course and led to a candidate being appointed, there would be no means to challenge the Secretary General's choice: the objective admissibility criteria, being unusually wide, are easily satisfied while the subjective assessment is protected by the margin of discretion which the Secretary General enjoys in the exercise of his power to make appointments to A6 and A7 posts. It was precisely such extreme cases of denial of justice that the Tribunal sought to prevent when it wrote (paragraph 82 *in fine* of the decision of 8 December 2011): "the existence of discretionary power does not entitle him to disregard the admissibility conditions set down in the vacancy notice, the assessment of which is a quite different thing from the assessment of qualifications or of ability to fill a given post. If that were so, decisions of this kind could not be challenged via the disputes procedure provided for in Articles 59 and 60 of the Staff Regulations". Except, notes the complainant, that the Tribunal calls for conditions, such as professional experience "which have implications for the admissibility of a candidature" to be "defined more precisely" (*ibid*., paragraph 81).

21. By refusing to define the admissibility criteria more precisely and, on the contrary, widening them, the Secretary General is creating conditions for the procedure to become effectively immune to legal challenge. The Tribunal, however, was also careful to make the point (paragraph 86) that "if the applicants consider that the manner in which the Secretary General gives effect to this decision is prejudicial to them, they will be able to resort to the judicial means at their disposal and challenge that manner". In the circumstances newly created by the Secretary General by publishing vacancy notice no. e86/2012, the only way to accomplish this is to challenge the vacancy notice itself and suspend its execution before the time-limit for submitting applications expires.

22. In conclusion, the complainant maintains that the measure sought is necessary to avert the grave and irreparable prejudice arising from the failure to comply with the decision of 8 December 2011, as evidenced by vacancy notice e86/2012.

23. The Chair notes firstly that there can be no question at this stage of assessing arguments concerning the validity of the grievance set out by the complainant in the context of her administrative complaint. These matters are not for discussion, let alone examination, in the current proceedings, which are only concerned with urgent measures (see Order of the Chair of 3 July 2003, paragraph 10, Timmermans v. Secretary General).

24. The Chair further notes that nor can there be any question of considering the manner in which the Secretary General gave effect to the decision of 8 December 2011 and, in particular, the various ways in which execution could be achieved, as this issue can only be addressed in the context of an appeal against such execution.

25. In the light of certain statements made by the Secretary General, however, to the effect that it is for the Secretary General "to draw the implications from the annulment of a decision and to find the best way of executing the Tribunal's decision, as the situation requires" – and without prejudice to the Tribunal's position in this matter -, the Chair wishes to point out – as indeed has been done before in the decision of 8 December 2011 – that the subject of executing decisions handed down by the Tribunal 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 she 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 decisions is not guided solely by the Secretary General but is also subject to scrutiny by the Tribunal itself and that Article 60, paragraph 7, mentioned above can only be implemented if the Secretary General's request meets with the Tribunal's approval.

26. As to the merits of the application for a stay of execution, the Chair notes that he has been called upon in the past to rule on applications submitted at a non-advanced stage of the recruitment procedure and where the complainants challenged the manner in which the procedure was conducted. In some cases, he dismissed the applications because, at the current stage of the procedure, he did not believe that executing the impugned act was liable to cause the complainants grave prejudice difficult to redress. There was, however, nothing to prevent the complainants from re-applying for a stay of execution if the status of the recruitment procedure subsequently gave them reason to suspect that they were once again at risk of suffering grave prejudice difficult to redress.

27. The Chair notes that the complainant cannot legitimately claim at this stage of the procedure that she is liable to suffer grave prejudice difficult to redress if the recruitment procedure is allowed to continue, even though the present application, unlike the application for a stay of execution submitted in connection with the first dispute, relates to the procedure designed to fill the post referred to in her administrative complaint of 13 April 2012.

28. The Chair observes firstly that, when considering the appeal that is to be lodged by the complainant if the Secretary General dismisses her administrative complaint, the Tribunal may set aside – as indeed it did after examining appeals nos. 474/2011 and 475/2011 – the appointment if the procedure which preceded it was irregular, and that any application of Article 60, paragraph 7, of the Staff Regulations would require the approval of the Tribunal.

In this respect, the Chair points out that, in appeals nos. 202-207/1995 (Palmieri, Grayson and others v. Secretary General), the Chair, when called upon to rule on the applications for stays of execution submitted by the complainants, gave the following opinion on the arguments put forward by the complainant Palmieri concerning the consequences which filling the post vacated by the person whose appointment was being contested could have on the complainant (Chair'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 ranging 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 Organization. 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."

Admittedly, in this instance, the Secretary General has made no such statement. That cannot be allowed to act as a limitation on the decisions to be taken by the Tribunal, however.

29. Secondly and most importantly, the fact remains that the arguments put forward by the complainant are not such as to prove that execution of the disputed decision is likely to cause her grave prejudice difficult to redress.

30. The Chair notes that there is, at present, no evidence to indicate that the applications, including the complainant's, will not be examined in an objective and impartial manner. Secondly, any overstepping of the margin of discretion accorded to the Secretary General in the exercise of his power to make appointments to A6 posts is a factor that bears on the merits of the dispute rather than in the adoption of a measure under summary procedure. The same applies to what the complainant considers the excessive relaxation of the admissibility conditions and the undue advantage for the staff member who is currently performing the duties attached to the post in question on an *ad interim* basis and who is none other than the person whose appointment was set aside by the Tribunal in its decision of 8 December 2011. On this last point, it is obviously for the complainant to raise, if she considers it expedient and in whatever manner is most appropriate, the issue of how this experience should be evaluated.

31. The Chair points out that the exercise of his exceptional power under Article 59, paragraph 9, 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). Since the purpose of summary procedure is to ensure the full effectiveness of administrative litigation, the application for a 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.

32. There is, of course, nothing to prevent the Secretary General, even after the Tribunal has ruled on this application for a stay of execution, from himself considering the advisability of continuing with the recruitment procedure which began with vacancy notice no. e86/2012 while the dispute over the execution of the decision of 8 December 2011 is still ongoing.

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,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

Decide

- that the application for a stay of execution submitted by Ms Prinz is dismissed.

Done and ordered at Kifissia (Greece), on 27 April 2012.

The Deputy Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
Eva HUBALKOVA	Christos ROZAKIS