

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER OF 24 November 2011

in the case of Ilknur YUKSEK (II) and Others v. Secretary General

THE FACTS

1. The five complainants, Ms Ilknur Yuksek, Mr Lado Lalici, Ms Sophio Gelashvili, Ms Milica Vesovic and Mr Mahir Mushteidzada, work for the Organisation as project managers in various Directorates of Directorate General I – Human Rights and Legal Affairs.

2. The complainants applied to sit the competitive examination for the external recruitment of project managers which began with vacancy notice No. e104/2011. The procedure was organised in accordance with Article 16 of the Regulations on Appointments (Appendix II to the Staff Regulations). According to the vacancy notice, the total length of employment under fixed-term contracts is limited to five years.

3. The vacancy notice stated that the job mission would be:

“To design, implement and evaluate projects financed by extra-budgetary resources (Joint Programmes with the European Union, voluntary contributions or other sources), in co-operation with donors, partners and other stakeholders, in accordance with Council of Europe procedures, guidelines and priorities, and partner/donor requirements and with a concern for quality, efficiency and accuracy.

The projects cover support in the three main pillars of the Council of Europe: human rights, rule of law and democracy. The current geographical focus is mostly on Southern and Eastern areas of Europe, the South Caucasus and the Council of Europe neighbourhood.”

4. According to additional information in the vacancy notice, the recruitment procedure would consist of several stages: “preliminary selection, if necessary, job related tests, and an interview”.

5. On 15 September 2011, the Directorate of Human Resources notified the complainants that, being among the 147 candidates who had been shortlisted on the basis of their qualifications, they were invited to participate in the next stage of the selection procedure, which consisted of ability tests to be completed online.

6. In the same email, the Directorate of Human Resources explained that the ability tests would be eliminatory.

7. In an email sent on 7 October 2011, the Directorate of Human Resources informed the complainants about how they had performed in the two tests. None of them having obtained the pass mark, the complainants were not admitted to the next round of the competition, namely an interview to be held between 2 and 9 November 2011.

8. On 8 November 2011, the complainants lodged administrative complaints in accordance with Article 59, paragraph 2, of the Staff Regulations. They asked the Secretary General to reconsider his decision to exclude them based on the results and to re-open the competition for those who had been eliminated on the basis of the impugned tests.

9. On 9 November 2011, the complainants each lodged an application for a stay of execution of the impugned act, requesting that the recruitment procedure be suspended.

10. On 16 November 2011, the Secretary General submitted his observations on the applications for a stay of execution.

11. On 21 November 2011, the complainants submitted their observations in reply.

THE LAW

12. Under Article 59, paragraph 9, 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". 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".

The complainants lodged their applications for a stay of execution, requesting that the Chair order the Secretary General to suspend the recruitment procedure pending the outcome of their administrative complaints. They refer to the grounds relied upon in their administrative complaints and point out that if they are unable to participate in the next stage of the procedure (the interviews), they will suffer prejudice difficult to redress.

13. In their administrative complaints, the complainants challenge the impugned decision on three grounds. Firstly, they refer to the fact that they were informed about the ability tests at extremely short notice, namely three days before the tests were actually held. Secondly, they argue that the tests in question were of no relevance to the tasks which, as project managers, they would be required to perform. Thirdly, they complain of a lack of supervision in the execution of the tests, because of the manner in which they were conducted.

The complainants stated in their administrative complaints that, because of the urgent nature of the matter and the grave prejudice which they would suffer if they did not participate in the next stage of the recruitment procedure, they were obliged to seek a stay of execution of the impugned act.

14. The Secretary General asserts that the complainants have not established, in connection with the present applications, the existence of any "grave prejudice difficult to redress". He notes that, according to the case-law of the Administrative Tribunal, it is for the person applying for the stay of execution to show that he or she is likely to suffer prejudice difficult to redress if the stay of execution is not granted, and not for the Secretary General to provide evidence to

the contrary. The complainants, however, have provided no evidence to support their claim that they would be likely to suffer some prejudice or other.

15. The Secretary General notes that the oral tests for applicants who had passed the ability tests took place between 2 and 9 November 2011. The notice announcing that the interviews in this competition would take place on these dates was clearly posted on the competitions-in-progress page of the Council of Europe website, which was swiftly updated after emails were sent on 7 October 2011, announcing the results of the ability tests. The recruitment procedure is therefore now closed, all the interviews having already taken place. The Secretary General further contends that if the complainants genuinely believed that to proceed with the oral tests in competition e104/2011 in the usual manner was likely to cause them some prejudice or other, logically, they should have applied for a stay of execution at the earliest possible stage, and in any case well before 9 November, the last day of the interviews, especially as they had been aware of their failure to pass the ability tests since 7 October 2011. By waiting for over a month before applying for a stay of execution, the complainants have shown that the execution of the impugned decision is not likely to cause them grave prejudice difficult to redress and, consequently, that their situation does not justifying granting an urgent measure.

16. In this context, the Secretary General notes that for the purpose of executing the decision of 30 October 2009 in Appeal No. 455/2008 (*Musialkowski v. Secretary General*), the Secretary General informed the Tribunal that he was going to organise new written tests for all the candidates who had not passed the written tests for profile C – Programme officer (project management) – in the general competition to recruit administrative officers (vacancy notice e84/2007). The written and oral tests had already take place and a reserve list had already been drawn up for the profile C section of the competition. Indeed, a number of successful candidates had already been recruited. After the new written and oral tests which were held pursuant to this decision, a new reserve list was drawn up and incorporated into the original one. The candidates on the second reserve list thus suffered no prejudice and were able to be recruited in the usual fashion.

17. In the Secretary General's view, there is currently no reason why he should not adopt this approach in the present cases, where appropriate. It follows that the complainants' 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 complainants, 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 has already concluded.

18. After putting forward arguments concerning the situation of the candidates invited to the oral tests, the Secretary General also, and above all, emphasises the difficult position in which the various departments of the Council of Europe would find themselves.

19. On this last subject, the Secretary General stresses that these departments are counting heavily on this competition in order to be able to recruit, in the very near future, project managers capable of carrying out major co-operation projects funded through extra-budgetary resources (European Union, voluntary contributions, etc.) and which are being implemented by the Council of Europe. Many of the Council of Europe's operational activities on the ground fall into this category. The Secretary General further states that, whenever it obtains external funding of this kind, the Council of Europe makes a number of commitments, notably in terms of the expected outcomes, the resources that will be allocated to achieve the goals set and the

duration of the project. Once the funding has been secured and the project started, it has to be able to be carried out under the supervision of a project manager. Should one or more projects have to be suspended or delayed because the Council of Europe is unable to recruit project managers, that would not only compromise the project and the activity itself but also greatly affect the reliability and reputation of the Council of Europe, which would then lose the trust of its partners. It would also seriously jeopardise future agreements and partnerships in these areas.

20. The Secretary General infers from this that the complainants cannot invoke a grave prejudice that is difficult to redress.

21. Lastly, the Secretary General notes that, at this stage, there can be no question of analysing the submissions of the parties, relating as they do to the validity of the grievances expressed by the applicants in their applications, which it is inappropriate to discuss, still less examine, in the present proceedings, which concern only the taking of urgent action.

22. It is for that reason, in those circumstances and in the light of those elements, that the Secretary General requests the Chair to reject the complainants' applications for a stay of execution on the ground that they are ill-founded.

23. In their observations in reply, the complainants dispute the Secretary General's assertions casting doubt on their good faith because of the delay in lodging their administrative complaints, assertions which, in their view, are inappropriate and contrary to the Staff Regulations. Furthermore, the Organisation planned the subsequent stages of the procedure, knowing the length of the timeframe for lodging a complaint.

24. The complainants accept the Organisation's fiscal and moral obligations towards its donors. They take the view, however, that these obligations should be performed with adequate human resources who can bring their knowledge and experience to the work. For that reason they question the relevance of the ability tests which were conducted merely for the purpose of eliminating as many candidates as possible and bear no relation to the tasks listed in the vacancy notice or to the tasks involved in the job of project manager. No link has been provided between any of the competencies listed in the vacancy notice that could have been considered "performable" or "non-performable" on the basis of the results of these tests.

25. The complainants further state that, if it is not possible to suspend the recruitment procedure because it has been terminated, they request the application of the procedure followed in the Musialkowski case, mentioned above. The guiding principle would be to rectify any deficiencies in the recruitment procedure and in particular the prejudice sustained by the complainants. They therefore request that adequate steps be taken to make up for the actual and serious prejudice which they have suffered as a result of not being able to participate in the next round of the recruitment procedure.

26. For these reasons, the complainants invite the Chair to consider their arguments to the effect that continuing the recruitment procedure would cause them serious prejudice difficult to redress, as defined in Article 59, paragraph 9, of the Staff Regulations.

27. The Chair notes firstly that, to save time and effort, the matter should be settled by a single order, even though the complainants, in accordance with the current rules, lodged separate applications for a stay of execution. The facts and the arguments advanced by the

claimants are identical in every case and this procedure is also consistent with the practice followed with respect to applications for a stay of execution lodged at the administrative complaint stage (cf. Orders issued in *Couardes and others* on 19 November 1994 and in *Kilinc and others* on 7 October 2011).

28. Then, the Chair notes that at this stage, there can be absolutely no question of analysing the submissions of the parties, relating as they do to the validity of the grievances expressed by the applicants in their administrative complaints, which it is inappropriate to discuss, still less examine, in the present proceedings, which concern only the taking of urgent action (see paragraph 10 of the Chair's Order of 3 July 2003, in the case *Timmermans v. Secretary General*).

29. The Chair further notes that he has ruled before on other applications for a stay of execution in which the complainants had asked him to stay the procedure or suspend any recruitment, as the case may be, and he granted this second request because of the prejudice which an applicant might suffer if he were interviewed after other candidates, invited earlier by the Appointments Board, were recruited. Such problems arise not only when there is a competition for one or more predefined vacancies, but also where a list of eligible candidates is drawn up and individuals are recruited before the case in question has been settled.

30. The Chair likewise notes that, as regards the precedent concerning the *Musialkowski* case cited by the Secretary General, the applicant in question had not sought a stay of execution of the impugned act. The Chair further observes that he has already had occasion to rule on the expediency of adopting such an approach (see ATCE, Chair's Order of 7 October 2011 in the case *Kilinc and others v. Secretary General*, paragraph 36).

31. In any case, the Chair underlines that the onus is on the person applying for a stay of execution to show that he or she is likely to suffer prejudice difficult to redress if the stay is not granted.

32. In this instance, however, to substantiate their claims that the condition concerning grave prejudice difficult to redress has been met, as required under Article 59, paragraph 9, of the Staff Regulations, the complainants rely on the grounds put forward in support of their administrative complaints, without adding anything specific that might demonstrate the necessity of the requested stay. All these points, however, relate to the merits of the case which, as indicated above, cannot be addressed at this stage of the proceedings.

33. The Chair further notes that, in the instant case, the issues mentioned by the Secretary General and to be taken into consideration are different from the ones taken into account in the past insofar as the posts in question here are specific posts for developing co-operation activities with planners outside the Organisation or posts funded by them. The Chair adds that the arguments put forward by the complainants in their observations in reply to the Secretary General's comments are not such as to prove that such prejudice could not be established but are more relevant to the examination of the merits of the grounds of their complaint on this point.

34. The Chair does not underestimate the importance of the consequences that a possible decision to stay execution might have for the Organisation's external contacts. The need to avoid these consequences means that in balancing the interests of the Council of Europe and the interests of the complainants, the former must have precedence over the latter and that,

consequently, the Chair will not be bound in the instant case by previous rulings granting a stay of execution in similar cases. If, moreover, the complainants win their case on the merits of the dispute, they will be able to claim compensation for the damage suffered as a result of not having been recruited on fix-term contracts for a maximum period of five years or having lost the chance to be recruited to posts which were filled before they were given their rightful place on the list of eligible candidates.

35. The Chair notes that the exceptional power conferred on him under Article 59, paragraph 9, of the Staff Regulations calls for some self-restraint in its exercise (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. Otherwise, not only the efficient operation of the various departments but also the management of sizeable sectors of the Organisation would be jeopardised.

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,

- Order that the applications for a stay of execution submitted by the five complainants be rejected.

Done and ordered at Kifissia (Greece) on 24 November 2011.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS