

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF

ADMINISTRATIVE TRIBUNAL

CHAIR'S ORDER OF 14 October 2011

in the case of Ksenia ROCHÉ (CHEKOLAEVA)

THE FACTS

1. The complainant, Ms Ksenia Roché (Chekolaeva), was a candidate in the competition for the recruitment of profile A (public international law) lawyers (grade A1/A2) launched by means of vacancy notice No. e25/2010.
2. Having passed the aptitude tests held for the purpose of selecting candidates who would then be invited to participate in the competition, the complainant was allowed to sit the written examinations which took place on 23 May 2011.
3. On 22 September 2011, the Directorate of Human Resources sent the complainant an email informing her of her results in the written tests. Since the overall average mark obtained by the complainant was less than the minimum required, she was not invited to an interview with the Appointments Board.
4. Following an exchange of emails with the Directorate of Human Resources about the mark awarded in a test, the complainant lodged an administrative complaint under Article 59, paragraph 2, of the Staff Regulations, which reached the Directorate of Human Resources on 4 October 2011. She requested, *inter alia*, that her paper be re-marked, that it be acknowledged that DHR had made a manifest error regarding the mark in question and that she be allowed to attend an interview with the Appointments Board. While this application for a stay of execution was being examined, the Secretary General, after making inquiries with the Directorate of Human Resources, told the Chair that the mark awarded by each of the two correctors was in fact the one notified to the complainant.
5. On 10 October 2011, the complainant applied to the Chair of the Tribunal for a stay of execution of the act complained of (Article 59, paragraph 9, of the Staff Regulations). She asked him to order that she be allowed to attend an interview with the Appointments Board, at least provisionally, or, failing that, to suspend the other candidates' interviews with the Appointments Board pending the final decision in her case.
6. On 11 October 2011, the Secretary General submitted his observations on the application for a stay of execution.

7. On 14 October 2011, the complainant submitted observations in reply.

THE LAW

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

The complainant lodged her application for a stay of execution so that the Chair would order the Secretary General either to allow her to attend an interview with the Appointments Board, at least provisionally, or to suspend the interviews with the other candidates pending the final decision in the case in question.

9. After indicating that the interviews with the Appointments Board for profile A candidates who passed the written examinations have been scheduled for 17 October 2011, the complainant states that these interviews “will give rise to a decision by the Appointments Board which, from 17 October, will name the candidate or candidates to be appointed to a vacant post/position or to vacant posts/positions open to competition and, in the event that the number of candidates should exceed the number of posts/positions, a reserve list will be drawn up (Article 15, paragraph 3, of the Staff Regulations, Appendix II: Regulations on appointments)”.

10. The complainant adds that, in these circumstances, insofar as the failures of which she was the victim have been established, she faces a real and imminent risk of being unjustly deprived of the opportunity to be interviewed on the same terms as the other candidates and, consequently, of being selected for the post/position open to competition.

11. She accordingly submits that the gravity of the prejudice suffered in this event would be obvious. Such prejudice, moreover, would be difficult to redress in the instant case because, from as early as 17 October 2011, the candidate(s) for the post(s)/position(s) are to be selected and a reserve list drawn up if necessary. After the procedure and in the event that the contested decision should be set aside and her paper re-marked, it would be difficult to set aside the decisions already taken and to re-interview all the candidates who passed the written tests.

12. The complainant makes the further point that, having regard to the provisions of Article 59, paragraph 4, of the Staff Regulations, the Secretary General’s decision on the administrative complaint is liable to be taken after 17 October 2011, the date set for the interviews. She notes that, interestingly, even if her complaint had been lodged the very day on which the contested decision was received, i.e. 22 September 2011, the Secretary General would still have been entitled to rule on the administrative complaint after 17 October 2011, the date of the interviews.

13. In the light of these considerations, the complainant believes that it is entirely conceivable that the decision taken on the complaint might not suffice to prevent her from suffering grave prejudice difficult to redress.

14. For these reasons and given the excessively short time remaining before the date set for the interviews, the complainant asks to be granted the benefit of the provisions of Article 59, paragraph 9, of the Staff Regulations and requests that the Chair either order that she be allowed to attend the interview, at least provisionally, or suspend the interviews.

15. The Secretary General begins by making the point that there can be no question of inviting the complainant to attend an interview as she did not pass the written tests.

16. Secondly, he observes that the complainant's situation does not justify suspending the interviews which are due to take place on 17 October next in the case of profile A lawyers participating in the e25/2010 competition. In effect, the complainant has not established, in the present application, the existence of any "grave prejudice difficult to redress". As is clear from the Tribunal's case-law, "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". Yet proceeding as planned with the oral tests for profile A lawyers in the e25/2010 competition, which are scheduled for 17 October next, is in no way likely to cause the complainant any prejudice.

17. In this context, the Secretary General wishes to point out that in pursuance of the Tribunal's decision of 30 October 2009 on appeal No. 455/2008 (*Musialkowski v. Secretary General*), the Secretary General had informed the Tribunal that he would be holding fresh written examinations for all the candidates who had not passed the written tests in the profile C – Programme Officer (project management) - section of the general competition to recruit 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 tests 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.

18. According to the Secretary General, as things stand there is no reason why he should not adopt this approach in the instant case. 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", which is a precondition for a stay of execution. It is clear that the prejudice invoked by the complainant, if it exists, is not such as to justify granting a stay of execution in an external competition procedure which has already been set in motion and for which the selected candidates have already been called for interview on 17 October 2011. All the more so as there has been no response yet to the administrative complaint and the complainant has yet to receive the "feedback" which she requested. The Secretary General adds that it is entirely possible that once the complainant is in possession of this information, she will decide not to lodge an appeal.

19. After putting forward arguments concerning the situation of the candidates called for interview and the budgetary difficulties that suspending those interviews could cause for the Organisation, the Secretary General states that the complainant cannot invoke grave prejudice difficult to redress.

20. Next, the Secretary General considers it important to refer to the Chair's order of 7 October 2011 (appeals Nos. 486-489, 491, 498-500 and 502/2011, *Kiliç* and others) on applications for a stay of execution in respect of the interviews due to be held on 19, 20 and 21 October 2011 in the profile B section of same e25/2010 competition.

21. After citing an excerpt (paragraphs 34-36) from the said order, the Secretary General considers that, if need be, the same conclusion could apply in this instance, namely that the reserve list drawn up for this profile after the interviews on 17 October should be "frozen", in order to prevent any recruitments in the event that the complainant should lodge an appeal in

the present case. Such a solution would allow the profile A interviews to proceed as planned, thus reducing the prejudice suffered both by the candidates called for interview and by the Council of Europe.

22. 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 complainant's administrative complaint. These matters are not for discussion, let alone examination, in the current proceedings, which are concerned only with urgent measures.

23. For these reasons, in these conditions and in view of this evidence, the Secretary General asks the Chair to dismiss the complainant's application for a stay of execution as ill-founded.

24. In her observations in reply, the complainant puts forward a series of arguments concerning the severity of the damage and the fact that it would be difficult to redress if the solution adopted in appeal No. 455/2008 (Musiałkowski) were to be adopted, concerning the interests of the shortlisted candidates and of the Organisation and, lastly, concerning the solution involving suspension of the recruitment procedure pending the outcome of the dispute, as mentioned by the Secretary General.

In conclusion, the complainant asks the Chair to grant one of her original requests and, failing that, to order that any recruitment of profile A candidates who participated in the e25/2010 competition be suspended, pending the outcome of the present case.

25. The Chair notes that, as has already been pointed out on several occasions (see, most recently, the Kiliç order, mentioned above) there can be no question at this stage of any assessment of the arguments concerning the merits of the complainant's administrative complaint. These matters are not for discussion, let alone examination, in the current proceedings, which are concerned only with urgent measures.

26. The Chair notes firstly that the complainant asks for two alternative measures: order that she be allowed to attend the interview with the Appointments Board, at least provisionally, or suspend the other candidates' interviews with the Appointments Board pending the outcome of the present dispute. It is only in her observations in reply that she comments on the question of a limited stay of execution that would apply only to recruitment.

27. 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 prejudice difficult to redress if the stay of execution is not granted.

28. With regard to the first request, the Chair notes that it is true that, as pointed out by the Secretary General, the complainant cannot currently be deemed to have passed the written tests; he also notes, however, that there would be nothing to prevent the Chair from deciding to allow the complainant, at this stage, to attend the interview with the Appointments Board on a provisional basis and subject to the outcome of the present dispute. Indeed, there have been cases in the past where the Secretary General has himself allowed candidates to sit written tests on a provisional basis and subject to the outcome of proceedings challenging the decision to exclude the person from the competition.

The Chair does not consider it necessary to adopt such a decision, however, as the complainant has adduced no evidence that she would suffer grave prejudice difficult to redress

if the Chair were to decide otherwise. This request on the part of the complainant must be dismissed, therefore.

29. As to the second request, the Chair notes that, even though she is asking for the interviews to be suspended, the complainant's submissions relate more to the damage that would result from the subsequent recruitment of the candidates considered suitable than to the actual conduct of the interviews on the prescribed date (17 October 2011).

30. The Chair further notes that the complainant has not established that she would suffer "grave prejudice difficult to redress" (Article 59, paragraph 7, of the Staff Regulations) if the interviews on 17 were not suspended. Her arguments, which are based on the short amount of time remaining before the interviews compared with the time available to the Secretary General for ruling on his administrative complaint, are without foundation. In effect, 17 October will be spent interviewing the candidates and drawing up a list of suitable ones and it is highly unlikely that the Secretary General will make any actual recruitment decisions until later.

31. As regards the complainant's main concern, however, namely the decision to recruit other candidates, it is clear to the Chair that, in view of the advanced stage of the recruitment procedure, the complainant may legitimately claim that she is liable to suffer grave prejudice difficult to redress if the planned recruitments take place under the procedure at issue before the Tribunal has established whether or not she had the right to be called for interview.

32. The Chair notes that suspension of a recruitment procedure pending the outcome of the case before the Tribunal has been ordered in the past, with the result that all recruitment was suspended pending the outcome of the dispute (cf. ATCE, appeal No. 456/2008, Goulobok v. Secretary General, Order of 26 February 2009 cited in paragraph 17 of the decision of 13 May 2009). Furthermore, the Chair adopted a similar decision concerning the same e25/2010 competition with regard to the recruitment of candidates who participated in the profile B section (Kiliñç order, mentioned above) and he preferred this solution to the one employed in the Musiałkowski appeal mentioned in paragraph 17 above.

33. The Chair considers that the same decision should be taken in this case. Also, the Secretary General is amenable to the idea of a freeze on recruitment pending the outcome of the present dispute (paragraph 21 above).

34. Such a solution appears more appropriate, moreover, as the applicants who participated in the profile B section of this same competition and who lodged appeals with the Tribunal, upon which the aforementioned Kiliñç order and the orders of 6 May 2011 in the same cases were based, 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 said orders of 6 May 2011 when deciding upon the appellants' first application for a stay of execution, "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" (see paragraph 37 of the orders). In the view of the Chair, however, it is not possible to prejudge, at this stage, whether any decision in favour of these appellants would or would not cast – again indirectly – similar doubts on the profile B section of the same competition.

35. 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; and paragraph 16 of the Chair's Order of 14 August 2002). 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.

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,

Having regard to the urgency of the matter,

I, CHAIR OF THE ADMINISTRATIVE TRIBUNAL,

- grant the stay of execution requested insofar as it concerns the contested profile A appointments procedure (vacancy notice e25/2010);

- decide that the stay of execution shall be rendered null and void if the complainant does not exercise her right of appeal before the Tribunal within the time-limit prescribed in Article 60, paragraph 3, of the Staff Regulations against any dismissal of her complaint;

- decide that the stay of execution shall cease on the day on which the Administrative Tribunal delivers its decision.

Done and ordered at Kifissia (Greece), on 14 October 2011.

The Registrar of the
Administrative Tribunal

The Chair of the
Administrative Tribunal

S. SANSOTTA

C. ROZAKIS