

**JUDGMENT No 1/2012 of the APPEALS BOARD OF THE  
EUROPEAN UNIVERSITY INSTITUTE**

**CONCERNING APPEALS BY**

“IB”, appearing in person and without legal representation, appellant and respondent in the cross-appeal

v

THE EUROPEAN UNIVERSITY INSTITUTE, via dei Roccettini 9, 50014 San Domenico di Fiesole, Italy, represented by the Principal of European University Institute, assisted by Mme Aude Bouveresse, docteur en droit et Maître de conférences at the University of Strasbourg, France, respondent in the appeal by IB and appellant in the cross-appeal

against Judgment No 1/2011 of the Organ of First Instance of the European University Institute dated 29 April 2011

**THE APPEALS BOARD**

Sir David Edward, President, Professor Evgenia Prevedourou and Ms Marta Ayllón Martín,

Secretary of the Appeals Board Mrs Silvia Salvadori

Having regard to the written procedure and further to the hearing on 20 April 2012

Renders the following

**JUDGMENT**

**FACTS AND CIRCUMSTANCES**

1. On 29 April 2011 the Organ of First Instance (hereafter the “OFI”) gave judgment in an appeal introduced under Article 2, paragraph 3 of the Common Provisions in which the present appellant and respondent in the cross-appeal (hereafter “Mr IB”) appealed against a decision of the Principal of the European University Institute (hereafter the “EUI”) of 3

May 2010 rejecting a complaint by Mr IB concerning Open Competitions IUE/5/2009 and IUE/6/2009 for which Mr IB was a candidate.

2. The facts giving rise to the proceedings before the OFI, the procedure followed and the forms of order sought before that tribunal are fully set out in paragraphs 1 to 26 of that Judgment, and are not repeated here.
3. By its Judgment the OFI readmitted Mr IB to open competitions IUE/5/2009 and IUE/6/2009 and ordered each party to bear its own costs.
4. In a document dated 28 June 2011 addressed to the Appeals Board (hereafter the "Board"), Mr IB submitted what was stated to be "a formal appeal to the Judgment No 1/2011 of the Organ of First Instance". That document does not, however, specify any grounds on which that Judgment is vitiated by error of law, nor does it contain any plea to the effect that that Judgment should be annulled in whole or in part.
5. By letter dated 30 June 2011 the EUI submitted a *Requête Pourvoi* (hereafter the "cross-appeal") seeking annulment of the Judgment of the OFI in three respects and for an order as to costs.
6. By letter dated 15 September 2011 the EUI submitted its observations on the appeal by Mr IB. The EUI seeks an order dismissing that appeal as manifestly inadmissible and/or ill-founded.
7. By letter dated 13 October 2011 Mr IB submitted his observations on the cross-appeal.
8. An oral hearing took place at the EUI on 20 April 2012 at which Mr IB appeared in person and the EUI was assisted by Mme Aude Bouveresse.

#### THE APPEAL BY MR IB

9. As mentioned above, the appeal document lodged by Mr IB does not specify any grounds on which the Judgment of the OFI is vitiated by error of law, nor does it contain any plea to the effect that that Judgment should be annulled in whole or in part.
10. The appeal document contains a numbers of complaints and criticisms of the way in which the EUI has given effect to the Judgment of the OFI.
11. At the hearing Mr IB contended that the Judgment of the OFI was incomplete and lacked two essential elements. First, the OFI should have required disclosure to him of the documents referred to in paragraph 65 of the Judgment. Second, the OFI should have spelled out the conditions under which he, Mr IB, would be readmitted to the Competitions in order to ensure that his qualifications were assessed in exactly the same way as had previously been applied to the other candidates.

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12. In terms of Article 4(1) of *Decision No 8/06 of the High Council of 8 December 2008 establishing an Organ of First Instance within the Appeals Board of the European University Institute*, an appeal may be brought before the Board against "final decisions of the OFI". In terms of Article 5(1) "An appeal to the Appeals Board shall be limited to points of law".
13. It is apparent from the terms of that Decision of the High Council that the jurisdiction of the Board in an appeal is limited to review of the Judgment of the OFI on points of law.
14. As regards the contention of Mr IB that the OFI should have required disclosure to him of the documents referred to in paragraph 65 of the Judgment, the issue of confidentiality is considered below at paragraphs 18 to 28. In the context of the appeal by Mr IB, the Appeals Board considers that the OFI was entitled in law to refuse disclosure of the documents to him on grounds, *inter alia*, of data protection – see the judgment of the Court of Justice in Case C-104/10 *Kelly*, dated 21 July 2011, at paragraph 55.
15. As regards the contention that the OFI should have spelled out the conditions on which Mr IB would be readmitted to the Competitions, the Appeals Board finds that there was no legal obligation upon the OFI to do so. Accordingly, the OFI committed no error of law in this respect.
16. Since the document submitted by Mr IB does not identify any point of law in respect of the Judgment of the OFI is vitiated and on grounds of which it should be annulled ("quashed"), it is apparent that, in so far as that document can be considered to constitute an "appeal" within the meaning of the Decision of the High Council, that appeal is manifestly inadmissible and must be dismissed.

#### THE CROSS-APPEAL BY THE EUI

17. In its cross-appeal, the EUI seeks annulment of the Judgment of the OFI on three grounds. It is appropriate to consider first the ground relating to the lifting of confidentiality.

#### *Confidentiality*

18. The EUI seeks annulment of the Judgment in so far as the OFI allowed a partial lifting of confidentiality in relation to the documents concerning the proceedings of the Selection Board on condition of anonymity.
19. The argument of the EUI is confined to one paragraph in the following terms:

*"Au vu de l'argumentation qui a été précédemment développée, il apparaît, qu'en l'absence de violation évidente des règles qui président aux travaux du jury et afin de respecter le secret inherent à leurs travaux tel que consacré par l'article 6 de l'annexe III du statut, il ne peut être admis, sauf à exposer les jurys à des ingérences*

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*et de pressions extérieures de nature à lier leur pouvoir d'appréciation que de tels documents ne soient pas couverts par la confidentialité."*

20. At the hearing, the EUI made clear the nature and effect of its contention. Amongst the documents produced to the OFI there are Reports submitted by the Selection Board in each of the two Competitions. In each case, the Report states the number of applications received (162 in Competition IUE/5/2009 and 139 in Competition IUE/6/2009) and states that one candidate was eliminated as ineligible, being a non-EU citizen.

21. After stating the names of the members of the Selection Board and the Assessors, the Report in each case proceeds in paragraph 4 as follows:

"The Selection Board met on (17 September 2009 in Competition IUE/5/2009 and 24 September 2009 in Competition IUE/6/2009) and confirmed the requirements indicated in the competition notice, on the basis of which the candidates should be evaluated.

"In accordance with the provisions of the Staff Regulations, the Selection Board decided that the following candidates be admitted to the tests and interview:"

There follow 15 names in the Report on Competition IUE/5/2009 and 11 names in the Report on Competition IUE/6/2009.

22. At the hearing, the EUI stated that the OFI was bound to accept the terms of those Reports and was not entitled to enquire further into the manner in which the Selection Boards had proceeded in their assessment of the candidates. Any such enquiry would place at risk the secrecy of the work of the Selection Board and expose future Selection Boards to improper interference or pressures.

23. In the opinion of the Appeals Board, this contention is manifestly ill-founded. The purpose of the system of judicial control established by the High Council by analogy with the procedures relative to the civil service of the European Union is, as regards procedures of recruitment, to ensure that such procedures are transparent and conducted objectively in accordance with the criteria set out in the Vacancy Notice.

24. If the tribunal exercising judicial control were bound to accept at face value statements such as those quoted in paragraph 21 above, it would not be possible for the tribunal to verify the transparency and objectivity of the proceedings of the Selection Board.

25. Given the lack of clarity and apparent contradictions in the documents and explanations provided by the EUI to the OFI, the Appeals Board considers that the OFI was not only entitled in law, but was bound in the proper exercise of its function, to lift the confidentiality of certain

documents of the Selection Boards in order to verify the procedure followed by each of the Boards.

26. Accordingly, the Appeal Board rejects the EUI's ground of appeal.
27. On the other hand, the Appeals Board considers that the decision of the OFI not to disclose to Mr IB the documents referred to in paragraph 65 of the Judgment was correct in law.
28. Accordingly, the Appeals Board rejects Mr IB's ground of appeal also.

*The Role of the Assessors*

29. The EUI seeks annulment of the Judgment in so far as the OFI held (at paragraph 81) that the regularity of the role played by the assessors in the procedure relative to competitions IUE/5/2009 and IUE/6/2009 had not been established.
30. As explained in paragraph 4 of the Judgment, the Selection Board in each Competition consisted of a Chairperson and 4 members, assisted by Assessors, 3 for the short-listing process and 3 for the interview process.
31. As explained in paragraph 5 of the Judgment, the procedure followed consisted, first, of a short-listing process, by which the candidates were identified who would proceed to the second stage of tests and interviews.
32. As explained in paragraphs 14 and 15 of the Judgment, Mr IB was not placed on the short list in either Competition.
33. The issue that arises on this aspect of the cross-appeal concerns the role played by the Assessors and members of the Selection Board respectively in the short-listing process. It is well established that, while the Selection Board may be assisted by Assessors, it is the Board alone that must take the decision as to the selection of candidates.
34. In the present case, for the reasons fully explained in paragraphs 70 to 77 of the Judgment, the OFI considered that, upon an examination of the documents and the *attestations sur l'honneur* of the President, it was uncertain whether the decisions taken in each Competition as to the candidates to be admitted to the short list had been taken by the Selection Board alone or by the Selection Board together with the Assessors, no difference being made between the weight given to the votes of each.
35. Having referred in paragraph 78 to the judgment of the Court of Justice in Case 122/77 *Agneessens* (1978) ECR 2085, the OFI held at paragraph 79 that it had not been shown that the test set out in the *Agneessens* had been met in this case.
36. At paragraph 80, the OFI added further that:

“At the hearing, Counsel for the EUI was unable to identify the point at which the assessors ceased assisting the Selection Board and at which the members of the Selection Board took exclusive control of the process. She stated that no record was kept in this regard. She also confirmed that the Assessors were present at the final meetings of the Selection Boards when the decisions establishing the short-lists were taken but did not know if they took the floor.”

37. The OFI therefore concluded at paragraph 81 as follows:

“In the light of all the preceding considerations, the Organ of First Instance considers that it has not been demonstrated in a sufficiently convincing manner, so as to rebut the appellant’s allegations, that Article 3 of Annex III of the Staff Regulations was respected. Accordingly the appellant’s argument must be upheld.”

38. In its cross-appeal, the EUI contends that, in proceeding in this manner, the OFI has reversed the burden of proof, in requiring the EUI to establish that the requirements of the Staff Regulations had been complied with, whereas, according to well-established case-law, the burden of proof of non-compliance rests upon the appellant.

39. In the opinion of the Appeals Board the EUI does not correctly represent the process of reasoning by which the OFI reached its conclusion.

40. Article 3 of Annex III of the Staff Regulations provides that “*le jury peut faire appel à un ou plusieurs assesseur(s) ayant voix consultative*”. The contention of the appellant before the OFI was that in this case the role of the Assessors had not been limited to a purely consultative role and that they had taken part, on an equal footing with the members of the Selection Board, in determining which candidates should be admitted to the short list.

41. The OFI, after examining in some detail all the available facts (of which, under the procedure established by the High Council, it is the sole judge), found a number of *indicia* that the Assessors had played more than a purely consultative role suggesting that the requirements of Article 3 had not been complied with.

42. The Appeals Board considers that, in such circumstances, the OFI was entitled, as sole judge of fact, to consider that it was incumbent on the EUI to show the contrary. The Appeals Board entirely accepts that the burden of proof in an appeal to the OFI rests in law upon the appellant. But where the available facts are such as to suggest *prima facie* (*à première vue*) that the allegations of the appellant are justified, the OFI is entitled, in the absence of contrary evidence, to conclude that the appellant has discharged the burden of proof incumbent on him/her. The Appeals

Board does not consider that this constitutes a reversal of the legal burden of proof, but rather an instance of the manner in which the judge of fact is entitled to assess the probative value of the available evidence.

43. Accordingly, the Appeals Board rejects this ground of appeal.

*The Evaluation Criteria*

44. The EUI seeks annulment of the Judgment in so far as the OFI held (at paragraph 103) that "By failing to provide adequate explanations concerning the weight attached to the various qualifications, or the evaluation criteria concerning them, the EUI has not been able to rebut the appellant's arguments that the Qualifications in the Vacancy Notice and evaluation criteria concerning them were not applied appropriately by the Selection Boards in relation to the qualifications of the candidates".
45. The EUI contends that the OFI has unlawfully entered into the domain reserved exclusively to the province of the Selection Board in seeking to establish how the Selection Board proceeded to evaluation of the criteria in relation to the qualifications of the candidates.
46. The Appeals Board considers that, here again, the EUI does not correctly represent the reasoning of the OFI.
47. It is well established in the law relating to the civil service in the European Union that a Vacancy Notice must state which qualifications are essential, which will be given weight without being essential, and which will be considered an advantage other things being equal. In some cases the Vacancy Notice will specify what specific weighting will be given to each of the criteria specified in the notice. It is also well established that the Selection Board must proceed to evaluate the qualifications of each candidate by reference only to the criteria specified in the Vacancy Notice.
48. Having proceeded to such evaluation, the Selection Board is then in a position to rank the candidates and to determine which of them will be admitted to the next stage of the competition.
49. In the present case, although the appellant was given certain explanations as to why he was not admitted to the short list, the OFI found (at paragraph 102) that neither the documents nor the explanations provided by the EUI showed how the Selection Board went about the task of ranking the candidates for the purpose of determining which of them should be admitted to the short list and admitted to the next stage. On the contrary, it appears that, after elimination of some candidates for reasons that were not recorded, the members of the Selection Board (with the exception of the Chairman) together with the Assessors proceeded to a "global assessment" of the qualifications of the candidates placing them in three categories of first, second and third preferences.

50. In these circumstances, the Appeals Board considers that the OFI was fully entitled, as sole judge of fact, to hold that the appellant had established a *prima facie* case which the EUI had not been able to rebut.

51. Accordingly, the Board rejects this ground of appeal.

#### DECISION

52. For the foregoing reasons, the Appeals by Mr IB and the EUI are dismissed.

#### DECISION ON COSTS

53. In these circumstances it is appropriate that each party should bear its own costs.

#### OPERATIVE PART

On these grounds

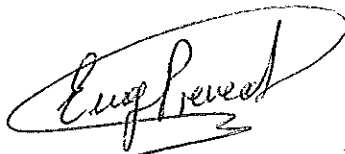
#### THE APPEALS BOARD

1. Dismisses the appeal by Mr I B against the Judgment of the Organ of First Instance dated 29 April 2011.
2. Dismisses the cross-appeal by the President of the European University Institute against the same Judgment.
3. Makes no order as to costs, each party to bear its own costs.

Signed



DAVID EDWARD

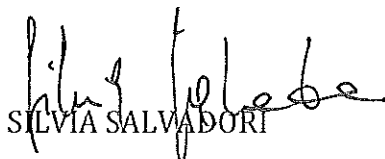


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MARTA AYLLÓN MARTIN

President and Members of the Appeals Board



SILVIA SALVADORI

Secretary of the Appeals Board

Dated 20 April 2012.