



Original: **English**

No.: **ICC-RoC72-03/18**
Date: **15 November 2018**

THE PRESIDENCY

Before: **Judge Chile Eboe-Osuji, President**
 Judge Robert Fremr, First Vice-President
 Judge Marc Perrin de Brichambaut, Second Vice-President

Public Redacted

Public redacted version of “Decision on the request to review the decision of the Registrar denying the inclusion of an applicant in the list of counsel”

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court*

to:

Applicant
[REDACTED]

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section
Mr Esteban Peralta Losilla

The Presidency of the International Criminal Court (the ‘Court’) has before it the request of [REDACTED] (the ‘Applicant’) dated 10 October 2018 (the ‘Request’), in relation to a request for judicial review of a decision of the Registrar, dated 3 May 2018, denying her inclusion in the list of counsel maintained by the Registrar pursuant to rule 21(2) of the Rules of Procedure and Evidence (the ‘Rules’).¹

The Request is denied.

I. BACKGROUND

1. The Applicant had applied for inclusion in the list of counsel by completing a ‘Candidate application form list of counsel’.² On 25 January 2018, the Applicant was requested by the Registry to provide additional information, namely submitting a table of cases by way of overview of the criminal cases she had worked on, which she duly submitted (the ‘Additional Information’).³
2. On 23 May 2018, by way of email, the Registry informed the Applicant that it was not in a position to respond favourably to her application for inclusion in the list of counsel (the ‘Impugned Decision’).⁴

¹ ‘Application to the List of Counsel/Review of Decision’, ICC-RoC72-03/18-1-Conf-Anx. Although dated 10 October 2018, the Request was received by the Registry from the Applicant on 19 October 2018 and filed before the Presidency by the Registry on 24 October 2018: ‘Registry’s Transmission of a Request for Review of the Registry’s Decision denying the Inclusion of [REDACTED] to the List of Counsel of the International Criminal Court’, ICC-RoC72-03/18-1-Conf.

² The Presidency has been unable to discern the date on which this application was originally made, although a precise date is immaterial for present purposes. The Request states that the application was made on 26 October 2016, although required documentation was provided later (see ICC-RoC72-03/18-1-Conf-Anx, p. 4). The application form which has been provided to the Presidency bears the date of 1 February 2017 at the signature line (ICC-RoC72-03/18-2-Conf-Anx1, p. 12), but it bears a statement indicating its receipt by the Counsel Support Section of the Court on 1 May 2017 (ICC-RoC72-03/18-2-Conf-Anx1, p. 1).

³ The Applicant indicates that this table of information was requested from her via email on 25 January 2018 (see ICC-RoC72-03/18-1-Conf-Anx, p. 4), although a complete copy of the email has not been provided and the Presidency is unable to verify its date. The Presidency does not know on what date the Applicant provided the requested table to the Registry. The table in question has been provided to the Presidency by the Registry, attached to a document which bears a date stamp indicating that it was received by the Counsel Support Section 1 May 2017 (see ICC-RoC72-03/18-2-Conf-Anx5), yet it appears that the table was not actually received on 1 May 2017 but was provided at a later date. The Presidency will assume that the table was provided some time after 25 January 2018.

⁴ ICC-RoC72-03/18-2-Conf-Anx3. The Impugned Decision itself is dated 3 May 2018. In ICC-RoC72-03/18-1-Conf, the Registry indicates that the Applicant was informed of the Impugned Decision, by email, on 23 May 2018, whereas in ICC-RoC72-03/18-2-Conf, the Registry states that the Applicant was notified by e-mail of the Impugned Decision on 3 May 2018, which was then resent on 29 May 2018. The Applicant states that ‘I received an e-mail on 23 May 2018 dated 3 May 2018’ (ICC-RoC72-03/18-1-Conf-Anx, p. 4). Given that the Registry itself presents an inconsistent account of the date on which the Impugned Decision was transmitted to the Applicant, the Presidency accepts the information provided by the Applicant, namely that she received the Impugned Decision on 23 May 2018.

3. On 29 May 2018, by way of e-mail sent to the Registry's email address 'judoc@icc-cpi.int',⁵ the Applicant sought from the Presidency judicial review of the Impugned Decision.
4. On 26 September 2018, the Registry requested that the Applicant submit her request for review using the standard ICC template to facilitate the filing of the application. On 5 October 2018, the Applicant re-submitted her application. On the same day, the Registry requested the Applicant to correct the application to remedy some errors related to the format of the application. On 19 October 2018, the Registry received a corrected version of the application, dated 10 October 2018.
5. On 24 October 2018, the Registry transmitted the re-formatted Request to the Presidency.⁶
6. On 26 October 2018, upon the Presidency's instruction, the Registrar filed, on a confidential basis, the documents which formed part of the Applicant's application for inclusion in the List of Counsel.⁷

II. MERITS

A. Impugned Decision

7. The Impugned Decision rejects the Applicant's request for inclusion in the list of counsel. The Impugned Decision notes that while the requirements of 'competence' (rule 22(1)), 'knowledge of languages' (rule 22(1)) and 'absence of criminal and/or disciplinary sanctions' (regulation 67(2) of the Regulations of the Court (the 'Regulations')) are fulfilled, the requirement of 'ten years of experience in criminal proceedings' (rule 22(1) and regulation 67(1)) is not met.
8. With respect to the latter requirement, the Impugned Decision notes as follows:

In your Application Form as well as in your *Curriculum Vitae* you state that you have 11 years of experience in criminal proceedings. However, in the overview of the cases that you submitted you only list 30 cases that you worked on, on national level. Accordingly, you note on your *Curriculum Vitae* that you have been [REDACTED] in the Ministry of Justice of [REDACTED] since

⁵ ICC-RoC72-03/18-2-Conf-Anx4. The Presidency was only made aware of the existence of this email on 24 October 2018, by virtue of the Request.

⁶ ICC-RoC72-03/18-1-Conf-Anx.

⁷ 'Registry's transmission of supporting material concerning the application of [REDACTED] to the List of Counsel of the International Criminal Court', 26 October 2018, ICC-RoC72-03/18-2-Conf.

[REDACTED], which certainly demonstrates competence in criminal law. Nonetheless, the fact that you only listed 30 cases that you treated throughout these years unfortunately does not substantiate that you possess the necessary 10 years of experience in criminal proceedings.⁸

B. Submissions

9. The Applicant seeks judicial review of the Impugned Decision on two grounds: (i) erroneous assessment of her experience in criminal proceedings in her application for inclusion in the list of counsel; and (ii) failure to assess her application ‘holistically’.
10. With respect to the first ground, the Applicant submits the Impugned Decision’s use of the number of cases listed in her Additional Information⁹ to reach a conclusion as to her number of years of necessary relevant experience as a judge, prosecutor, advocate or similar is ‘unfairly justified’.¹⁰ The Applicant contends the she was never asked to indicate all the cases she had handled nor was asked to provide a ‘minimum or maximum number of cases’.¹¹ The Applicant further contends that that ‘[t]here is nowhere in the provisions cited that specifically required number of cases handled as criteria to be fulfilled’.¹² The Applicant also draws attention to the fact that nowhere in her application does she indicate that she has only handled 30 cases throughout her experience in criminal proceedings.
11. Under the second ground, the Applicant submits that the Registrar did not look at her application holistically as she was informed of the possibility of applying to be included on the List of Assistants in the Impugned Decision, despite her indication in her application that she had been included on the List of Assistants since 4 July 2011.

C. Determination of the Presidency

1. Applicable law

12. Pursuant to rule 21(2) of the Rules, the Registrar shall create and maintain a list of counsel who satisfy certain criteria. The requirements for inclusion in such list are

⁸ ICC-RoC72-03/18-2-Conf-Anx3, p.2.

⁹ See ICC-RoC72-03/18-2-Conf-Anx5.

¹⁰ Request p. 4.

¹¹ Request p. 4.

¹² Request p. 5.

enumerated in rule 22 of the Rules and regulation 67 of the Regulations, which provide, in relevant part:

Rule 22

Appointment and qualifications of Counsel for the defence

1. A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. [...]

Regulation 67

Criteria to be met by counsel

1. Subject to regulation 78, sub-regulation 2, the necessary relevant experience for counsel as described in rule 22 shall be at least ten years for lead counsel and at least eight years for associate counsel.

2. Counsel should not have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court.

13. The Presidency recalls that the judicial review of decisions of the Registrar, including decisions on the inclusion in the list of counsel, concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.¹³

2. Preliminary matters

14. The Presidency recalls that regulation 72(2) of the Regulations requires applications for review of decisions of the Registrar to be made to the Presidency within 15 days of notification of the decision of the Registrar. The inconsistencies regarding the date the Applicant was notified of the Impugned Decision are outlined in footnote 4 above. In light of the lack of clarity, the Presidency will treat the Impugned Decision as having been notified to the Application on 23 May 2018, thus making the Applicant's attempt to seek judicial review on 29 May 2018 well within the prescribed time limit.

¹³ See 'Reasons for the "Decision on the "Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2nd January not to Admit Prof. Dr. Sluiter to the List of Counsel"', 10 July 2008, ICC-RoC72-01/08-10, para. 20.

15. The Presidency notes the unexplained lapse of time of nearly four months between the Applicant's email of 29 May 2018 seeking review and 26 September 2018, the date on which the Registry approached the Applicant concerning the appropriate format for her review request. Noting that such delay cannot be attributable to the Applicant, the Presidency will treat the Request as having been placed before it in a timely manner.

3. Analysis

16. The Presidency notes that the reasoning of the Impugned Decision may be unclear. The Impugned Decision indicates that 'you state that you have 11 years of experience in criminal proceedings. However, in the overview of the cases that you submitted you only list 30 cases that you worked on, on national level'. It later states that 'the fact that you only *listed* 30 cases that you treated throughout the years unfortunately *does not substantiate* that you possess the necessary 10 years of experience in criminal proceedings' (emphasis added).¹⁴

17. It is evident from the Request that the Applicant understood the Impugned Decision to reject her application because she had *only* handled 30 cases throughout her 11 years of necessary relevant experience. The Applicant's understanding could arise by implication from the first extract quoted above. Nonetheless, the Presidency considers that, when the Impugned Decision is carefully examined as a whole, in particular those aspects emphasised above, the Impugned Decision rejects the application on the basis that the information provided as to the Applicant's criminal caseload fails to adequately substantiate the details of her work performed in the role of [REDACTED] since 2005. The reason underlying the Impugned Decision is one of a failure to substantiate and not one in which there has been the imposition of a requirement to have conducted a certain number of cases.

18. The Presidency understands that although the Applicant indicated that she had 11 years' experience as [REDACTED] (at the time of her application), the Registrar may, of course, seek further detail from any candidate in order to fully understand the nature of the legal work performed by a candidate in a given professional role. The Court must assess applications from individuals with experience in diverse legal systems all around the world, with it not being possible to assume that a given role or title necessarily correlates with a particular type of work. The Presidency notes that the

¹⁴ ICC-RoC72-03/18-2-Conf-Anx3.

Additional Information provided by the Applicant does not appear to adequately provide the information requested on 25 January 2018. The Applicant's table does not indicate when the cases occurred, does not clearly delineate the Applicant's role¹⁵ and only identifies the specific subject-matter of the crimes for 12 out of the 30 cases listed. In view of this failure to provide further detail as to her workload in criminal proceedings, the Presidency sees no reason to interfere with the finding of the Impugned Decision that the information provided by the Applicant¹⁶ is insufficient to allow a positive determination that the nature of her professional experience since 2005 meets the requirement of at least 10 years of necessary relevant experience in criminal proceedings. The Presidency further notes that the present Decision is without prejudice to the possibility that the Applicant may wish to make a new application for inclusion in the list of counsel, in which she substantiates, in detail, the nature of her necessary relevant experience in criminal proceedings.

19. The Presidency notes that there is an underlying issue related to the ongoing inadequacies of the standard application form for inclusion in the list of counsel. While it is incumbent on a candidate for inclusion in the list of counsel to demonstrate his or her qualifications for inclusion in the list of counsel, including the details of the relevant necessary experience in criminal proceedings,¹⁷ the standard application form is not well-suited for such purpose. The standard application form simply asks the candidate to insert their number of years of experience in criminal proceedings, without communicating that further detail may be necessary. The Presidency observes that it has previously made similar observations as to the inadequacies of a similar form for its purpose.¹⁸ It is incumbent on the Registrar to ensure that the standard application form clearly communicates to potential candidates the level of detail at which they are expected to substantiate their experience and/or knowledge. In the absence of the availability of such clear form, the onus shall be on the Registrar to seek further clarification where necessary. In the present circumstances, the Registrar did

¹⁵ Indicating merely that for all cases she has been 'lead counsel/participated'.

¹⁶ ICC-RoC72-03/18-2-Conf-Anx1; ICC-RoC72-03/18-2-Conf-Anx2; ICC-RoC72-03/18-2-Conf-Anx5.

¹⁷ See 'Decision on the request to review the decision of the Registrar denying the inclusion of Ms Ana Cristina Rodriguez Pineda in the list of counsel', 20 April 2018, ICC-RoC72-01/18-6, para. 25.

¹⁸ See 'Public redacted version of "Decision on the 'Request for Review of Decision to Deny the Applicant admission to the List of Counsel Pursuant to Regulation 125(4) of the Regulations of the Registry"', 4 September 2016, ICC-RoR125-01/15-5-Conf-Exp,' 1 October 2015, ICC-RoR125-01/15-5-Red, paras. 41-44.

seek such further clarification, by way of requesting an overview of the Applicant's criminal caseload.¹⁹

20. With respect to the Applicant's contention that the Registrar failed to assess the Applicant's application holistically, although the Impugned Decision includes a paragraph advising the Applicant of the possibility of admission to the List of Assistants, which is not applicable to her circumstances as she is already so admitted, such administrative oversight is not necessarily indicative that the entirety of the application has not been properly assessed.

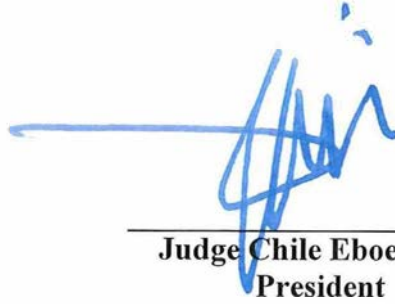
III. CLASSIFICATION

21. In view of the confidential classification of the documents transmitted to the Presidency, the present decision is classified as confidential. The Presidency takes the view, however, that this decision could be of relevance more broadly to future candidates for inclusion in the list of counsel. The Presidency hereby indicates its intention to file a public redacted version of the present decision, with the name of the Applicant and potentially identifying personal details redacted. If there is any other information requiring redaction prior to publication, the Applicant may inform the Presidency thereof no later than two weeks from notification of the present decision, by way of a filing communicated through the Court Management Section (judoc@icc-cpi.int).

The Request is denied.

¹⁹ Although the purpose of the request for additional information could have been communicated more clearly to the Applicant, namely, that its purpose was to enable the Court substantiate the necessary relevant experience in criminal proceedings listed in her application form and *curriculum vitae*.

Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
President

Dated this 15 November 2018
At The Hague, The Netherlands