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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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Before: Judge Navanethem Pillay, President

Original: English

Registrar: Mr. Adama Dieng

Date: 9 April 2003

**THE PROSECUTOR
V
PAULINE NYIRAMASUHUKO
&
ARSÈNE SHALOM NTAHOBALI**

CASE NO. : ICTR-97-21-T

JUDICIAL RECORDS/ARCHIVES
ICTR
2003 APR -9 | A II: 19 |

THE PRESIDENT'S DECISION ON AN APPLICATION BY PAULINE NYIRAMASUHUKO FOR REVIEW OF THE REGISTRAR'S DECISION DECLINING THE REAPPOINTMENT OF HER TWO INVESTIGATORS

Defence Counsel:

- Ms. Nicole Bergevin
- Mr. Guy Poupart

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("The Tribunal")

SITTING AS Judge Navanethem Pillay, President;

HAVING RECEIVED:

- On 24 March 2003, the English translation of an Application dated 21 January 2003 from Pauline Nyiramasuhuko, for a review of the Registrar's Decision of 3 October 2002 (the "Application");
- On 7 March 2003, the Registrar's Response to the Application, dated 6 March 2003 (the "Response");
- On 8 April 2003, the English translation of the Applicant's Reply to the Response, dated 10 March 2003 (the "Reply");

HEREBY CONSIDERS the Application, the Response and the Reply;

NOTES that:

- (i) Article 16 of the Statute¹ provides that the Registry shall be responsible for the administration and servicing of the Tribunal;
- (ii) Article 20(d) of the Statute *inter alia* guarantees legal assistance to an indigent accused where the interests of justice so require;
- (iii) Rule 19 of the Rules² states that the President shall preside at all plenary meetings of the Tribunal, coordinate the work of the Chambers and supervise the activities of the Registry, as well as exercise all other functions conferred on her by the Statute and Rules;
- (iv) Rule 33(A) of the Rules states that the Registrar shall assist the Chambers, the Plenary Meetings of the Tribunal, the Judges and the Prosecutor in the

¹ S/RES/995 (1994) (the "Statute").

² The Rules of Procedure and Evidence (the "Rules").



performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication;

(v) Articles 10 and 12 of the Directive.³

AFTER HAVING DELIBERATED,

The Facts On Which The Application Is Based

1. A detailed factual account of the events that culminated in the Application is set out in the first thirty-four paragraphs of this Application. The Registrar concurs with this factual account, but disputes the conclusion reached by Pauline Nyaramusuhuko (the "Applicant").
2. In the main, the issue appears to be that the Registrar has declined to reappoint two investigators, Mr. Damasse Birekeraho and Mr. Daniel Tuyizere, because they are related to the Applicant, although the Registrar was aware of this fact when he initially appointed them as investigators on 18 August 1999 and when he periodically reappointed them.
3. On 13 June 2001, the Registrar adopted a series of measures "to prevent the abuse of the legal aid system and to protect the integrity of the Tribunal's judicial process"⁴, which *inter alia* included requiring "Personal history forms to be filled by individuals who are hired by defence counsel as defence investigators, requiring more detailed information about the backgrounds of such individuals to ensure, among other [things], that that they are not related to accused persons detained by the Tribunal."⁵
4. On 3 October 2002, the Registrar informed the Applicant in writing that:⁶

³ The Directive on Assignment of Defence Counsel (the "Directive").

⁴ Statement By The Registrar, Mr. Adama Dieng, On Some Issues Relating To The Defence Of Accused Persons, Dated 13 June 2001 (the "Statement of 13 June 2001"), page 1.

⁵ *Ibid* page 2.

After consideration of the circumstances of the case, we are hereby putting you on notice that we are renewing for three months the contracts of the two investigators who are related to the accused person. At the end of the three months, we will not renew the contract of one of the investigators. You must start looking for a replacement. At the end of the next three months, it is hoped that the remaining investigator will have settled in the new investigator. His contract will also not be renewed.

On The Admissibility Of The Application

5. Article 12 of the Directive states that an accused may seek the President's review of the Registrar's decision where his request for assignment of counsel has been denied. There are no provisions in the Rules or Directive that allow for review of the Registrar's decision where requests for assignment or reappointment of investigators, have been denied.
6. In its decision⁷ on a motion by co-accused Arsene Shalome Ntahobali for the reinstatement of his suspended investigator, Trial Chamber II stated:⁸

...in view of the administrative powers and responsibilities of the Registry in organizing and appointing defence investigators, the Chamber finds that the issue of re-instatement of a suspended investigator is an administrative matter resting with the Registrar.

I concur with this reasoning.

7. Modern systems of Administrative Law have built in review procedures to ensure fairness when individual rights and protected interests are in issue, or to preserve the interests of justice. In the context of the Tribunal, Rules 19 and 33(A) of the Rules ensure that such review is available in appropriate cases. While the Registrar has the responsibility of ensuring that all decisions are procedurally and substantially fair, not every decision by the Registrar can be the subject of review by the President. The Registrar must be free to conduct the business of the Registry without undue interference by Presidential review.

⁶ Letter of 3 October 2002 to Ms. Nicole Bergevin from Didier Preira, Deputy Chief of The Defence Counsel Management Section (the "letter of 3 October 2002").

⁷ The Prosecutor v Pauline Nyiramasuhuko & Arsene Shalom Ntahobali; Case no. : ICTR-97-21-T; Decision on Ntahobali's extremely urgent motion for the re-instatement of suspended investigator, Mr. Thaddee Kwitonda, dated 14 December 2001.

⁸ *Ibid*, page 4, paragraph 17.




8. In all systems of administrative law, a threshold condition must be satisfied before an administrative decision may be impugned by supervisory review. There are various formulations of this threshold condition in national jurisdictions, but a common theme is that the decision sought to be challenged, must involve a substantive right that should be protected as a matter of human rights jurisprudence or public policy. An application for review of the Registrar's decision by the President on the basis that it is unfair procedurally or substantively, is admissible under Rules 19 and 33(A) of the Rules, if the accused has a protective right or interest, or if it is otherwise in the interests of justice.⁹
9. In this case, the assistance of investigators has a bearing on the Applicant's ability to prepare her defence. I find that the Applicant does have a protective interest in this case, and the Application is therefore admissible.

On The Reappointment Of The Investigators

10. The responsibility of managing the Tribunal's Legal Aid Programme lies with the Registrar, who is obliged to ensure that there is no abuse of legal aid funds. The Registrar is entitled to implement measures in order to safe guard the Legal Aid Programme from abuse.
11. The Office of Internal Oversight (OIOS), in its report of 26 January 2001, found evidence of abuse of the Legal Aid Programme. The OIOS observed *inter alia* that some defence teams were hiring friends and relatives of indigent accused as defence investigators. According to the Registrar, all counsel had been made aware of these findings through the Statement of 13 June 2001. This Statement also informed all concerned of the measures undertaken by the Registrar to prevent further abuse of the Legal Aid Programme. These measures include requiring lead counsel to complete a personal history form when requesting the appointment of an investigator.

⁹ The Prosecutor v. Joseph Nzirorera (Case no. ICTR-98-44-T), The President's Decision on review of the decision of the Registrar withdrawing Mr. Andrew McCartan as lead counsel of the accused Joseph Nzirorera, 13 May 2002, page 3, paragraph xi.

12. After the issuance of the Statement of 13 June 2001, the Registrar continued to periodically reappoint the two investigators concerned and on 3 October 2002, took the decision to limit the reappointment of these investigators to 9 February 2003 and 9 April 2003, respectively, by virtue of their "family links" with the Applicant.
13. The Statement of 13 June 2001, does not categorically exclude the appointment of relatives as investigators. It sets out measures, one of which requires disclosure of the relationship, if any, of the proposed investigator to the indigent accused. Presumably, the Registrar will then consider the information and act on the matter. In the present case, information of the existing relationship between the Applicant and her investigators was made known to the Registrar prior to, and subsequent to the Statement of 13 June 2001. The Registrar, in full possession of this information, took the decision to reappoint the two investigators and continued to do so for a period of fifteen months after the release of the Statement of 13 June 2001. It was only on 3 October 2002, that he communicated his intention not to reappoint the investigators beyond 9 February 2003 and 9 April 2003, respectively.
14. The reasons for the impugned decision as set out in the Letter of 3 October 2002 are that:
 - (i) "[The] position changed in 2001 and members of the family of an indigent accused can no longer be appointed in his defence team. The Rule against engagement of members in the defence team that are related to the accused person is now a reality."
 - (ii) "...the work of [the Applicant's] investigators at this time of the proceedings is almost complete or should be completed."
15. The Registrar's assessment that the investigations in the Applicant's case is complete or almost complete, is disputed by the Applicant, who submits that un-redacted prosecution witness statements were only disclosed to her in January 2002 and investigations are ongoing. In any event, this could not have been the basis for the impugned decision as the Registrar communicates his willingness to appoint new investigators to replace the current persons.
16. It is therefore clear, that the reason for the impugned decision is the retroactive implementation of the measures mentioned in the Statement of 13 June 2001, and not



the discovery of any abuse of the Legal Aid Programme on the part of the Applicant's investigators.

17. In my view, the periodic reappointment of the investigators over a long period of time, gave rise to a well-founded expectation on the part of the Applicant that, absent any other circumstances warranting dismissal, the investigators will be retained.

18. Taking into consideration the advanced stage of the Applicant's trial, the fact that the investigators have worked on the Applicant's case since 18 August 1999 and that the impugned decision was made more than fifteen months after the "family links" criteria had been introduced and after the commencement of the Applicant's trial, I find the impugned decision to be unfair and potentially prejudicial to the Applicant.

FOR THE AFOREGOING REASONS, I hereby:

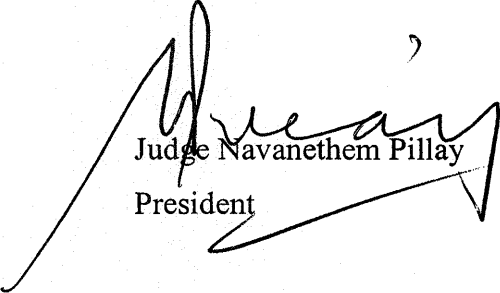
FIND the Application admissible;

GRANT the Application;

REVERSE the Registrar's Decision of 3 October 2002;

ORDER the reappointment of Mr. Damasse Birekeraho and Mr. Daniel Tuyizere as investigators to the Applicant's Defence Team.

Arusha, 9 April 2003


Judge Navanethem Pillay
President

(Seal of the Tribunal)

