



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

ICTR-98-44-T 44824
11-2-2009
(44824-44821) 2009

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 11 February 2009

JUDICIAL RECORDS/ARCHIVE
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J. K. Nziro

THE PROSECUTION

v.

**Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA
Case No. ICTR-98-44-T**

**DECISION ON JOSEPH NZIRORERA'S MOTION FOR DISCLOSURE OF
LETTER OF RECOMMENDATION**

Office of the Prosecution:

Don Webster
Iain Morley
Saidou N'Dow
Gerda Visser
Sunkarie Ballah-Conteh
Takeh Sendze

Defence Counsel for Édouard Karemera
Dior Diagne Mbaye and Félix Sow

Defence Counsel for Mathieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

Defence Counsel for Joseph Nziroera
Peter Robinson and Patrick Nimy Mayidika Ngimbi

88

INTRODUCTION

1. On 1 December 2008, Joseph Nzirorera filed a motion requesting that the Presiding Judge of this Trial Chamber disclose a "letter of recommendation" he had written in support of the application of one member of the Prosecution Team, Ian Morley, to become Queen's Counsel in the United Kingdom.¹
2. The Prosecution opposes the motion.²

DELIBERATION

3. Joseph Nzirorera requests the Presiding Judge of the Trial Chamber to disclose to him a copy of the said letter so he can determine whether or not any actual bias or the appearance of bias may exist on the part of the President, as such would provide grounds for a motion for disqualification pursuant to Rule 15 of the Rules of Procedure and Evidence ("Rules").³ Joseph Nzirorera also submits that since the beginning of the trial, he has repeatedly complained about a double standard maintained by the Chamber in "forgiving [the Prosecution's] misconduct while frequently sanctioning defence counsel, and in maintaining *ex parte* communication with the prosecution while disclosing *ex parte* filings of the defence."⁴
4. The Prosecution acknowledges that one of its staff members was given an assessment by the Presiding Judge in this case.⁵ The Prosecution submits that "[a]n application to become Queen's Counsel does not call for a "letter of recommendation", but for a formal professional assessment of an advocate's competence both in court and in written pleadings."⁶ The Prosecution adds that this exercise is a professional duty for the seniors to report to the authorities of the juniors, so the profession may advance.⁷ The Prosecution also submits that Judge Byron had the occasion to observe Ian Morley in two cases before the ICTR and was therefore well placed to make a professional assessment.⁸ The Prosecution

¹ Joseph Nzirorera's Motion for Disclosure of Letter of Recommendation, filed on 1 December 2008 ("Motion"); Reply Brief: Joseph Nzirorera's Motion for Disclosure of Letter of Recommendation, filed on 10 December 2008 (dated 8 December 2008).

² Prosecutor's Response to Nzirorera's Application for Disclosure of a Letter of Recommendation, filed on 3 December 2008 ("Response").

³ Motion, paras. 1-2.

⁴ Motion para. 4.

⁵ Response, para. 2.

⁶ Response, para. 3.

⁷ Response, para. 7.

⁸ Response, para. 4.

further submits that Joseph Nzirorera has known from the outset of the application and that *inter alia* the Presiding Judge of this Chamber would be approached for a formal assessment. The Prosecution adds that counsel for Nzirorera was also approached but declined to offer an assessment.⁹ Finally, the Prosecution submits that neither the Prosecution nor Ian Morley have personally seen the assessment offered by the Presiding Judge of this Chamber as such assessments are confidential.¹⁰

5. Assessors do not write "letters of recommendation" for Queen's Counsel applicants. Indeed, Queen's Counsel Applicants are asked to list "judges or arbitrators, practitioners and professional clients who will have seen them recently in cases of substance, complexity, or particular difficulty or sensitivity. The applicant 'nominates' certain of these people whom the Panel undertakes to approach."¹¹ The assessments are not available to the applicants.

6. The Appeals Chamber in the *Furundžija* case held that "[t]here is is an unacceptable appearance of bias if: i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."¹² The Appeals Chamber added that a "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."¹³ The Presiding Judge's assessment of a Queen's Counsel applicant does not demonstrate any bias or appearance of bias. The exercise of assessment is different from that of writing a letter of recommendation, to someone particularly since no one except the members of the selection panel of Queen's Counsel will have access to the content of the assessment of the competencies of the applicant by the assessor.

7. The Presiding Judge of this Chamber was approached to give such an assessment which he performed as part of his judicial activities. The Chamber finds that Joseph Nzirorera misrepresented the reality of the exercise of assessment of a Queen's Counsel applicant. This conduct is clearly vexatious and shows disrespect for the Chamber and its Judges. The

⁹ Response, para. 5.

¹⁰ Response, para. 6.

¹¹ See Guidance for Assessors, Queen's Counsel Competition for England and Wales 2008.

¹² *Prosecutor v. Anto Furundžija*, Judgement (AC), para. 189 (footnote omitted).

¹³ *Ibid.*, para. 190 (footnote omitted).

Chamber considers that the mere accusation that a judge may be biased because he performs a judicial function shows a clear lack of respect for the Chamber.

8. Contrary to Joseph Nziroera's submissions, the Chamber does not maintain double standard between the Prosecution and the Defence Parties. Without entering into too many details to address such a frivolous and vexatious assertion, the Chamber will just recall that all Parties have a right, pursuant to the Rules, to file *ex parte* motions when justified and that both the Prosecution and the Defence have been sanctioned when the Chamber deemed it to be necessary.¹⁴

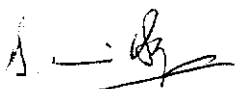
9. The Chamber finally considers that counsel for Joseph Nziroera should be denied the payment of any fee in relation to this motion.


FOR THESE REASONS, THE CHAMBER

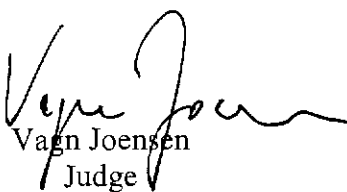
DENIES Joseph Nziroera's Motion in its entirety; and

DIRECTS the Registry to deny the payment of any fees to counsel for Joseph Nziroera in relation to this Motion and its reply brief.

Arush, 11 February 2009, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge

[Seal of the Tribunal]



¹⁴ See *inter alia* remedies offered to the Defence for Prosecution violations of Disclosure or sanction of Defence Counsel for continuous disregard of Chamber's orders.