



UNITED NATIONS
NATIONS UNIES

ICTR-98-44-T
27-02-2009
(45249-45247)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 27 February 2009

THE PROSECUTION

v.

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

2009 FEB 27 11:09
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**DECISION ON JOSEPH NZIRORERA'S APPLICATION FOR CERTIFICATION
TO APPEAL: DISCLOSURE OF LETTER OF RECOMMENDATION**

Rule 73(B) of the Rules of Procedure and Evidence

Office of the Prosecution:

Don Webster
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Dior Diagne Mbaye and Félix Sow

Defence Counsel for Matthieu Ngirumpatse
Chantal Hounkpatin and Frédéric Weyl

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

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INTRODUCTION

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1. On 11 February 2009, the Chamber denied Joseph Nzirorera's request for disclosure of a letter of assessment written by the Presiding Judge of this Chamber in relation to an application of a member of the Prosecution team to become Queen's Counsel in the United Kingdom.¹

2. On 13 February 2009, Joseph Nzirorera filed a request for certification of the Impugned Decision, alleging that disclosure of the assessment is necessary to determine whether its contents contain evidence of bias or the appearance of bias that would warrant filing a motion for disqualification.² The Prosecution opposes the Motion in its entirety.³

DELIBERATIONS

3. Rule 73(B) of the Rules of Procedure and Evidence provides that certification to appeal may only be granted if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Appeals Chamber recognizes the discretionary powers of the Trial Chamber over Rule 73(B) procedures and regularly emphasizes that requests for certification to appeal are only warranted under exceptional circumstances.⁴

4. The Prosecution submits that the decision not to disclose the Presiding Judge's professional assessment of Prosecution counsel's suitability to serve as Queen's Counsel cannot plausibly have a significant impact on the outcome of a trial.⁵ The Prosecution also argues that disclosure of the assessment will not materially affect the advancement of Joseph Nzirorera's case.⁶ Joseph Nzirorera, however, submits that the question is ultimately one of bias and therefore of trial fairness. Nzirorera argues that he should be permitted to review the assessment as it may reveal bias or the appearance of bias, and in turn warrant a motion for

¹ *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44-T ("Karemera et al."), Decision on Joseph Nzirorera's Motion for Disclosure of Letter of Recommendation, 11 February 2009 ("Impugned Decision").

² Joseph Nzirorera's Application for Certification to Appeal: Disclosure of Letter of Recommendation, filed 13 February 2009 ("Motion"), para. 6.

³ Prosecutor's Response to Joseph Nzirorera's Application for Certification to Appeal: Decision on Motion for Disclosure of Letter of Recommendation, filed 18 February 2009 ("Response").

⁴ *Karemera et al.*, Decision on Mathieu Ngirumpatse's Request for Certification to Appeal the Order of 17 April 2008 on the Presentation of the Defence Case, 14 May 2008, para. 4.

⁵ Response, para. 4.

⁶ Response, para. 5.

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disqualification.⁷ He submits that allowing the issue of bias to be fully considered while the trial is ongoing would avoid the possibility of a new trial at a later stage.⁸

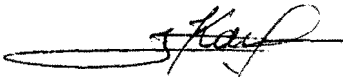
5. The Chamber finds that while the question of disclosing the assessment may not in and of itself have a significant impact on the outcome of the trial, the possibility of a later motion for disqualification undoubtedly will. The question of whether there is a reasonable apprehension of bias is one of fundamental fairness; leaving this matter to be raised in a later appeal creates a risk that a contrary decision will undermine the entirety of the proceedings. Consequently, a decision by the Appeals Chamber would materially advance the proceedings. In these circumstances, the Chamber finds it appropriate to grant certification to appeal the Impugned Decision.

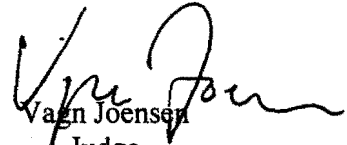
FOR THESE REASONS, THE CHAMBER

GRANTS Joseph Nzirorera's Motion in its entirety.

Arusha, 27 February 2009, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge



⁷ Motion, para. 6.

⁸ Motion, para. 8.