ICTR-98-44-AR75.15
05th May 2009
{2758/H – 2750/H}

UNITED NATIONS
NATIONS UNIES

Tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Fausto Pocar
Judge Theodor Meron
Judge Carmel Agius
Judge Iain Bonomy

Registrar: Mr. Adama Dieng

Decision of: 5 May 2009

ÉDOUARD KAREMERA
MATTHIEU NGIRUMPATSE
JOSEPH NZIRORERA

v.

THE PROSECUTOR

Case No. ICTR-98-44-AR73.15

DECISION ON JOSEPH NZIRORERA'S APPEAL AGAINST A DECISION OF TRIAL CHAMBER III DENYING THE DISCLOSURE OF A COPY OF THE PRESIDING JUDGE'S WRITTEN ASSESSMENT OF A MEMBER OF THE PROSECUTION TEAM

Counsel for the Appellant:
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for Joseph Nzirorera

Counsel for the Co-Accused
Ms. Dior Diagne Mbaye and Mr. Félix Sow for Édouard Karemera
Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Matthieu Ngirumpatse

The Office of the Prosecutor:
Mr. Hassan Bubacar Jallow
Mr. Alex Obote-Odora
Ms. Inneke Onsea
Mr. David Morris

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of an appeal, filed by Mr. Joseph Nzirorera on 4 March 2009,[1] against a decision of Trial Chamber III denying the disclosure of a copy of an assessment of a member of the Prosecution team written by the Presiding Judge.[2] The Prosecution responded on 17 March 2009[3] and Mr. Nzirorera replied on 18 March 2009.[4]

INTRODUCTION

2. In April 2008, Mr. Iain Morley, a member of the Prosecution team in the *Karemera et al.* trial, applied to the committee responsible for nominating members of the Bar of England and Wales for admission to the rank of Queen's Counsel.[5] In the course of this application process, he requested Judge Byron, the Presiding Judge of the Trial Chamber in this case, as well as Mr. Peter Robinson, Counsel for Mr. Nzirorera, if he could nominate them as assessors in connection with his application.[6] An assessor provides a confidential assessment of the applicant's competencies to the nominating committee.[7] Mr. Robinson declined to be nominated as an assessor.[8] Judge Byron agreed and ultimately provided a written assessment when requested to do so by the nominating committee.[9] It appears that Mr. Nzirorera has known from the outset that Mr. Morley would approach the Presiding Judge to be an assessor.[10]

3. On 1 December 2008, Mr. Nzirorera requested the Trial Chamber to disclose a copy of the "letter of recommendation" for Mr. Morley so that he could determine whether its contents might reveal actual bias or the appearance of bias on the part of the Presiding Judge.[11] The Trial Chamber denied the motion on 11 February 2009, holding that the Presiding Judge's assessment of Mr.

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[1] Joseph Nzirorera's Appeal of Refusal to Disclose Letter of Recommendation, 4 March 2009 ("Appeal").
[2] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Disclosure of Letter of Recommendation, 11 February 2009 ("Impugned Decision").
[3] Prosecutor's Response to Nzirorera's Appeal of Refusal to Disclose "Letter of Recommendation", 16 March 2009 ("Response").
[4] Reply Brief: Joseph Nzirorera's Appeal of Refusal to Disclose Letter of Recommendation, 18 March 2009 ("Reply").
[5] Response, para. 5.
Response, paras. 6, 7.
Impugned Decision, para. 5; Response, para. 18.
Response, para. 7.
[9] Response, paras. 7, 8.
[10] Impugned Decision, para. 4 ("The Prosecution further submits that Joseph Nzirorera has known from the outset of the application and [*sic*] that *inter alia* the Presiding Judge of this Chamber would be approached for a formal assessment."). Mr. Nzirorera has not disputed this.
[11] Impugned Decision, para. 3.

Morley did not demonstrate any bias or appearance of bias.[12] It reasoned that the confidential "assessment", accessible only to members of the Queen's Counsel selection panel, was different from a "letter of recommendation".[13] In its view, Mr. Nzirorera misrepresented the nature of the activity as a "recommendation".[14] The Trial Chamber further noted that the Presiding Judge gave the assessment as part of his judicial activities and considered 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."[15] Consequently, the Trial Chamber denied the motion and the payment of fees related to it.[16] On 27 February 2009, the Trial Chamber granted certification to appeal.[17]

4. Mr. Nzirorera submits that the Trial Chamber abused its discretion in failing to disclose Judge Byron's assessment of Mr. Morley and then in denying fees associated with the underlying motion.[18] In particular, he argues that the Trial Chamber erred in law in holding that the assessment was not subject to disclosure because it resulted from a judicial act.[19] In any event, he also questions whether providing an assessment of a trial counsel's competence to a domestic jurisdiction is in fact a judicial act.[20]

5. Mr. Nzirorera further contends that the Trial Chamber failed to consider whether there was any possibility that the assessment could reveal actual bias or the appearance of bias.[21] He argues that the Trial Chamber should have applied the same standard as exists for the Prosecution under Rule 68 of the Tribunal's Rules of Procedure and Evidence ("Rules").[22] In Mr. Nzirorera's view, it is clear that the possibility of bias exists since Mr. Morley's application for Queen's Counsel was successful, suggesting that the assessment was favorable.[23] Mr. Nzirorera notes that the day after he filed his request for disclosure, the Trial Chamber ordered the conduct of his Lead Counsel to be negatively reported to his bar association for seeking reconsideration of a decision concerning his witness list.[24] He alleges that the Trial Chamber maintains "widely disparate" standards of treatment for the parties in matters of sanctioning misconduct, *ex parte* communications, and the

[12] Impugned Decision, para. 6.
[13] Impugned Decision, para. 6.
[14] Impugned Decision, para. 7.
[15] Impugned Decision, para. 7.
[16] Impugned Decision, para. 9.
[17] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Application for Certification to Appeal: Disclosure of Letter of Recommendation, 27 February 2009, para. 5 ("*Karemera et al.* Certification Decision").
[18] Appeal, paras. 1, 11, 13, 47.
[19] Appeal, paras. 14-28; Reply, paras. 3-14.
[20] Appeal, para. 22.
[21] Appeal, paras. 29-45; Reply, paras. 15-24.
[22] Appeal, paras. 30-33.
[23] Appeal, paras. 34, 35.
[24] Appeal, paras. 3, 35.

allotment of time for the presentation of evidence.[25] He further points to the "fervor with which the Presiding Judge and Trial Chamber denied the motion, labeling it 'vexatious'", which in his view lends credence to the possibility of bias.[26]

6. Finally, Mr. Nzirorera submits that the Trial Chamber erred in denying his counsel fees associated with the motion.[27] He argues that such sanctions must be imposed cautiously.[28] Mr. Nzirorera acknowledges that there is no appeal as of right against a decision denying fees, but notes that the Trial Chamber granted certification of the entire decision, which necessarily includes the denial of fees.[29] In the event that his appeal is successful, he asks that the sanctions be reversed.[30]

7. The Prosecution responds that the Trial Chamber did not abuse its discretion in denying disclosure of the assessment of Mr. Morley.[31] It argues that the Trial Chamber, after describing the purpose of an assessment in connection with an application for Queen's Counsel, correctly determined that the process could not give rise to a claim of bias or an appearance of bias and thus denied the motion.[32] The Prosecution further argues that Rule 68 of the Rules has no applicability as nothing in the assessment would suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.[33] The Prosecution also contends that a denial of fees is not subject to appeal.[34]

DISCUSSION

8. This appeal raises two principal questions concerning whether the Trial Chamber erred in refusing to disclose the assessment and in denying fees to Mr. Nzirorera's counsel. The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[35]

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[25] Appeal, para. 36.
[26] Appeal, para. 37.
[27] Appeal, paras. 46-48; Reply, paras. 26-28.
[28] Appeal, para. 46.
[29] Appeal, para. 48; Reply, para. 27.
[30] Appeal, paras. 47, 48.
[31] Response, paras. 4, 25-48.
[32] Response, paras. 25-31.
[33] Response, paras. 32-48.
[34] Response, paras. 4, 24, 49-54.
[35] *See, e.g.*, Decision on Mathieu Ngirumpatse's Appeal from the Trial Chamber Decision of 17 September 2008, 30 January 2009, para. 18; Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, para. 3.

A. Alleged Error in Refusing to Disclose the Assessment

9. The Statute and Rules guarantee an accused's right to be tried by impartial Judges.[36] Rule 15(A) of the Rules specifically provides that "[a] Judge may not sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality." In particular, a Judge must withdraw from a case if it is shown that actual bias exists or if the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[37]

10. Rule 15(B) of the Rules prescribes a two-stage process for making a request to disqualify a Judge which consists of (i) an application to the Presiding Judge of the Trial Chamber seized with the proceedings, and (ii) a *de novo* determination by the Bureau.[38] The Appeals Chamber's consideration of matters relating to disqualification is limited to an appeal on the merits of the case or, as here, where the issue properly arises in an interlocutory appeal certified by the Trial Chamber.[39]

11. Mr. Nzirorera has not filed a request to disqualify Judge Byron in accordance with Rule 15(B) of the Rules. Rather, he sought disclosure of material directly from the concerned Trial Chamber in order to assess the merits of making such a claim.[40] While the Statute and Rules do not explicitly provide for the disclosure of material from a Judge in connection with a request for disqualification, they also do not prevent a party from requesting disclosure of information in this regard. The Appeals Chamber recalls that a presumption of impartiality, which cannot be easily rebutted, attaches to the Judges of the Tribunal.[41] Bearing this in mind, a request for disclosure must specifically identify the material or information in the possession of the Judge and make a *prima facie* showing that it would demonstrate actual bias or the appearance of bias.

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[36] *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 47 ("*Nahimana et al.* Appeal Judgement").
[37] *Nahimana et al.* Appeal Judgement, para. 49, quoting *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 203 ("That there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute: A. A Judge is not impartial if it is shown that actual bias exists. B. There 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.").
[38] *The Prosecutor v. Athanase Seromba*, ICTR-01-66-AR, Decision on Interlocutory Appeal of a Bureau Decision, 22 May 2006, para. 5 ("*Seromba* Appeal Decision").
[39] *Seromba* Appeal Decision, para. 4.
[40] Impugned Decision, para. 3.
[41] *Nahimana et al.* Appeal Judgement, para. 48.

12. There is no dispute that Mr. Nzirorera has sufficiently identified the requested material. The main question therefore is whether he has shown that it is capable of demonstrating bias or the appearance of bias. Mr. Nzirorera claims that the Trial Chamber erred in law in holding that the contents of the assessment could not be disclosed because giving the assessment amounted to a judicial act. As previously noted in this case, the fact that a Judge performs an act in a judicial capacity provides no shield from a claim of bias or appearance of bias.[42] In any event, even though the assessment was presumably based on the Presiding Judge's observations of Mr. Morley's competence in court, the Appeals Chamber is not convinced that it constituted a judicial act of the Tribunal.

13. Nevertheless, the Appeals Chamber does not agree with Mr. Nzirorera that the Trial Chamber denied disclosure only because it considered the assessment to be a judicial act. In refusing to disclose the assessment, the Trial Chamber reviewed the nature and purpose of the exercise and concluded that it did not demonstrate any bias or an appearance of bias.[43] Only then, did the Trial Chamber go on to observe that the assessment was a judicial function. This reference was made to highlight what the Trial Chamber viewed as Mr. Nzirorera's "lack of respect for the Chamber" and does not appear to be the basis of the decision.[44]

14. The Appeals Chamber is also not persuaded that the Trial Chamber failed to properly consider whether the assessment demonstrates bias or an appearance of bias. In this respect, the Trial Chamber referred to the nature of the exercise, which was to provide a confidential assessment available only to the Queen's Counsel nominating committee about the applicant's competencies in cases of substance, complexity, or particular difficulty.[45] The Trial Chamber also considered this exercise against the backdrop of a Judge's duty to remain impartial.[46]

15. The Appeals Chamber agrees that there is nothing *per se* improper about a Judge providing an assessment of a counsel's professional competence – whether ultimately positive or negative or characterized as a letter of recommendation – in connection with an application for a distinction or rank conferred by a domestic jurisdiction. Consequently, it can identify no error on the part of the Trial Chamber in refusing to disclose the assessment.

16. In support of Mr. Nzirorera's contention that a Judge should not provide a letter of recommendation for a person appearing in a pending case before him or her, he points to a

[42] *See* Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004, para. 68.
[43] Impugned Decision, paras. 5, 6
[44] Impugned Decision, para. 7.
[45] Impugned Decision, paras. 5, 6.
[46] Impugned Decision, para. 6.

jurisdiction in the United States which allows Judges to write letters of recommendation, but prohibits them from doing so on behalf of persons who have or will likely have cases before them.[47] Mr. Nzirorera does not refer to any other jurisdiction containing a similar prohibition or which applies to counsel, as opposed to litigants.[48] Thus, this rule, if applicable to the present situation, does not appear to reflect a majority position, even within the United States.[49]

17. As the Bureau of the International Criminal Tribunal for the former Yugoslavia (ICTY) has noted, "[i]t is quite common in most jurisdictions for Judges to form professional relationships with counsel and for Judges and counsel to show signs of mutual respect."[50] Bearing this in mind, the ICTY Bureau held that a Trial Chamber's previous expression of appreciation for the professional conduct of counsel did not prevent it from bringing an unbiased mind to the assessment of that counsel's evidence when he appeared as a witness in a contempt proceeding arising out of the case in which he appeared.[51] In this same vein, the Appeals Chamber considers that, by agreeing to provide an assessment, Judge Byron simply showed a sign of professional respect, and it does not mean that he, given the responsibilities of his office and the presumption of impartiality that attaches to him, is unable to bring an unbiased mind to the assessment of matters at issue in the case, including matters which might bear on Mr. Morley's integrity.

18. Mr. Nzirorera points to several other circumstances in his case which suggest that the contents of the assessment might show a lack of impartiality on the part of Judge Byron. In particular, he highlights the sanction of his counsel in a separate matter the day after filing his motion, allegedly disparate treatment of the parties in such matters as *ex parte* filings, time allotted

[47] Appeal, para. 42, referring to Wisconsin Code of Judicial Conduct, Supreme Court Rule 60.03(2) (comment) ("Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. Such a letter should not be written if the person who is the subject of the letter is or is likely to be a litigant engaged in a contested proceeding before the court.").

[48] Mr. Nzirorera also points to an ethics advisory opinion from the State of Arizona in the United States which prohibits Judges from soliciting a letter of recommendation from a lawyer with a pending case before the Judge. *See* Appeal, para. 43, citing Arizona Supreme Court Judicial Ethics Advisory Committee, Advisory Opinion 99-01 (6 April 1999). The Appeals Chamber notes that this presents a significantly different scenario where the Judge would receive a benefit from the recommendation and thus a reasonable person might perceive any subsequent favourable decisions for the party providing the recommendation as a *quid pro quo*.

[49] Notably, the American Bar Association's Model Code of Judicial Conduct does not proscribe this conduct. *See* American Bar Association, Model Code of Judicial Conduct, Rule 1.3 (Comment 2) ("A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.").

[50] *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-R77, Decision on Application for Disqualification, 11 June 2004, para. 17 ("*Brđanin* Bureau Decision").

[51] *Brđanin* Bureau Decision, para. 17.

for the presentation of evidence, and the "fervor" with which the Trial Chamber denied his request.[52]

19. The Appeals Chamber notes that Mr. Nzirorera's counsel was sanctioned by the Trial Chamber in an unrelated matter regarding his repeated failure to comply with the Trial Chamber's orders concerning his list of witnesses.[53] Mr. Nzirorera makes no submissions challenging the correctness of this decision, which has a lengthy procedural history, including prior warning to counsel, pre-dating his request for disclosure. His allegation of disparate treatment between the Prosecution and Defence relates to matters that fall squarely within a Trial Chamber's discretion to manage the proceedings. Mr. Nzirorera has also not specifically shown any error in the decisions taken by the Trial Chamber or that the alleged different treatment was not warranted by the surrounding circumstances. Finally, in view of the nature of the assessment exercise, the Appeals Chamber is not convinced that the language used in the Impugned Decision makes it more likely that the contents of the assessment would reveal a lack of impartiality.

20. Accordingly, the Appeals Chamber finds that the Trial Chamber did not make a discernible error in denying Mr. Nzirorera's request for disclosure.

B. Alleged Error in Denying Fees

21. The Trial Chamber characterized Mr. Nzirorera's motion as "vexatious" and "frivolous" and noted that it showed disrespect for the Trial Chamber.[54] It then denied fees in addition to dismissing the motion.[55] The Appeals Chamber has held that the power to impose sanctions on counsel should be imposed cautiously.[56] It is most appropriate where a motion is frivolous or an abuse of process. The Appeals Chamber has previously held that there is no appeal from a decision to impose sanctions under Rule 73(F) of the Rules.[57] However, the specific situation in this instance is

[52] Appeal, paras. 35-37.
[53] *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motions for Reconsideration of 24 October 2008 Order, for Extension of Time, Subpoenas and Video-Link and on Prosecution's Motion for an Order to Nzirorera to Reduce His Witness List, 2 December 2008, paras. 2, 23.
[54] Impugned Decision, paras. 7, 8.
[55] Impugned Decision, para. 9, p. 4.
[56] *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Decision on the Appellant's Request to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence, 28 October 2008, para. 14; *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on Request to Admit Additional Evidence of 1 August 2008, 1 September 2008, para. 12.
[57] Decision on Interlocutory Appeals Regarding Participation of Ad Litem Judges, 11 June 2004, p. 2 ("[A] decision to impose monetary sanctions on counsel for frivolous motions or abuse of process pursuant to Rule 73(F) of the Rules is not subject to appeal under the Statute of the International Tribunal or the Rules"); Decision on Counsel's Appeals From Rule 73(F) Decisions, 9 June 2004, p. 3 ("[N]either the Statute nor Rules provide for a right of appeal from sanctions imposed pursuant to Rule 73(F) of the Rules").

different. Since Judge Byron was both the Judge and subject of the underlying disclosure dispute, the Appeals Chamber considers that the decision is subject to independent review.[58]

22. A review of the pleadings underlying the Impugned Decision does not reflect that counsel for Mr. Nzirorera submitted a disrespectful or frivolous application.[59] As the Appeals Chamber held above, the Statute and Rules do not foreclose a party from seeking limited disclosure from a Judge on matters related to disqualification. In his submissions at trial and on appeal, Mr. Nzirorera pointed to one jurisdiction where providing an assessment could require a Judge to withdraw. Additionally, the Tribunal has not had the occasion to consider this issue previously. Therefore, it cannot be said that there was no good faith legal basis for making the request for disclosure. Furthermore, the Appeals Chamber has rejected the Trial Chamber's characterization of the assessment as constituting judicial function, which was one of the reasons for describing the motion as disrespectful. In view of the foregoing, the Appeals Chamber considers that the decision to deny fees associated with the motion was unreasonable. Thus, the Trial Chamber made a discernible error in this respect.

23. Accordingly, the Appeals Chamber reverses the Trial Chamber's decision to deny the payment of fees in association with the motion and reply brief underlying the Impugned Decision.

DISPOSITION

24. For the foregoing reasons, the Appeals Chamber AFFIRMS the Trial Chamber's denial of the disclosure of the assessment and REVERSES the order denying fees associated with the underlying motion and reply.

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

Done this 5th day of May 2009,
At The Hague,
The Netherlands.

Judge Liu Daqun
Presiding

[Seal of the Tribunal]

[58] *Cf. Nahimana et al.* Appeal Judgement, paras. 73, 74.
[59] *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Joseph Nzirorera's Motion for Disclosure of Letter of Recommendation, 1 December 2008; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Reply Brief: Joseph Nzirorera's Motion for Disclosure of Letter of Recommendation, 8 December 2008.

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		Case No / *no. de l'affaire*:	**ICTR-98-44-A**

To: *A:*	**Appeals Chamber Support Unit, The Hague:** - **Mr. Koffi Afande** - **Ms. Rosette Muzigo-Morrison** - **Mr. Ramadhani T. Juma**	☐ **Judge / Juge, Liu Daqun, Presiding** ☐ **Judge / Juge Faustor Pocar** ☐ **Judge / Juge Theodor Meron** ☐ **Judge / Juge Carmel Agius** ☐ **Judge / Juge Iain Bonomy**
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