

ICTR-98-41-A
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED
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UNIES

OR: ENG

OFFICE OF THE PRESIDENT

Before: Judge Dennis C.M. Byron, *President*

Date: 28 March 2011

Aloys NTABAKUZE
v.
THE PROSECUTOR
Case No. ICTR-98-41-A

**REVIEW OF THE REGISTRAR'S DECISION DENYING THE REQUEST FOR
WITHDRAWAL OF CO-COUNSEL**

Defence of Aloys Ntabakuze:
Peter Erlinder
André Tremblay

INTRODUCTION

1. This is an application¹ made by Counsel Peter Erlinder to the President to review the decision of the Registrar² denying his application for the withdrawal his Co-Counsel, André Tremblay, from the case of Aloys Ntabakuze. The application challenges the Decision grounds that the Registrar was wrong to reject 1) Co-Counsel's professional judgement that he is acting under conflict of interest and, 2) the Applicant's assertion of Co-Counsel's medical condition on the ground of absence of supporting evidence.³

DELIBERATION

2. Article 19 (A) (ii) of the Directive on the Assignment of Defence Counsel ("Directive") provides that the Registrar may, in exceptional circumstances, withdraw the assignment at the request of Lead Counsel. According to Article 19 (E) of the Directive, where a request for withdrawal made pursuant to Article 19 (A) of the Directive, has been denied, the person making the request may seek a review of the Registrar's decision from the President. Noting that the initial request made by Peter Erlinder and rejected by the Registrar was made pursuant to Article 19 (A) (ii) of the Directive, the President consequently has jurisdiction to review it according to Article 19 (E). The scope of this review is an assessment of the fairness and reasonableness of the Registrar's decision.⁴

3. This application for review has a specific context. The appeal hearing for Aloys Ntabakuze has been set down for hearing on the 30 March, 31 March and 1 April 2011.⁵ Counsel had made various applications before the Appeals Chamber for indefinite postponement of the appeals hearing and for leave to appear via video-conference. All the applications have been denied.⁶ When the application for withdrawal was made before the Registrar on 7 February 2011, the main ground was that Co-Counsel Tremblay had concluded that his fear of the risk of arrest by Rwandan authorities for genocide denial constituted a conflict of interest with his client's right to be properly represented. The other ground was that Co-Counsel had health issues, which were not specified in the application nor supported by any independent medical evidence. After the

¹ Confidential & Ex Parte with Confidential Ex Parte Annexes A through I, Annex E, and Public Annexes J & K. Request for Review, Pursuant to Article 19 (E) of the Directive on Assignment of Counsel, of the Public Administrative Decision of the Registrar to the Ex Parte confidential Request of Lead Counsel for Appellant Ntabakuze for the Withdrawal of Co-Counsel, filed on 11 March 2011 ("Motion").

² Théoneste Bagosora, Aloys Ntabakuze and Anatole Ngeyuhumva v. the Prosecutor, Case No. ICTR-98-41-A ("Bagosora et al"), Registrar's Decision on the Motion for Withdrawal of Andre G. Tremblay, Co-Counsel for Aloys Ntabakuze, 23 February 2011 ("Registrar's Decision").

³ Confidential & Ex Parte with Confidential Ex Parte Annexes A through I, Annex E, and Public Annexes J & K. Request for Review, Pursuant to Article 19 (E) of the Directive on Assignment of Counsel, of the Public Administrative Decision of the Registrar to the Ex Parte confidential Request of Lead Counsel for Appellant Ntabakuze for the Withdrawal of Co-Counsel, filed on 11 March 2011 ("Motion").

⁴ Jean-Bosco Harayagwiza v. the Prosecutor, Case No. ICTR-99-52-A, Review of the Registrar's Decision Denying Request for Withdrawal of Co-Counsel (President), 29 August 2006, para. 5.

⁵ Bagosora et al, Scheduling Order, 27 January 2011.

⁶ Bagosora et al, Decision on Aloys Ntabakuze's Motion for Stay of Proceedings, 27 January 2011, Decision on Aloys Ntabakuze's Motions for Video-conference Participation of Lead Counsel in the Appeals Hearing and for Withdrawal of Registrar's Public Decision, 15 March 2011.

Erlinder

application had been filed, the Co-Counsel engaged the Registry in correspondence to the effect that he had suffered severe injuries in a traffic accident in Thailand on the 13 February 2011.⁷ In the context, it was not surprising that the Registry wrote him requiring medical evidence,⁸ but Co-Counsel failed to submit any medical certificates and relied on sending the name and address of a doctor with an invitation to the Registry to contact him, which the Registry did not do.⁹ The Registrar in his decision delivered on 23 February 2011, specified that he could not act on the allegation of ill health without supporting evidence. Subsequent to the Registrar's Decision, and as annexes to the application for review, medical certificates relating to the traffic accident have been presented to me. Further certificates were presented as late as 22 March 2011.¹⁰

4. Peter Erlinder submits that André Tremblay formed a professional assessment that he is acting under a conflict of interest *vis-à-vis* his professional duties to his client and that the jurisprudence of several common law jurisdictions¹¹ does not permit the Registrar to question Co-Counsel's judgement in this regard.¹² I note that the two cases attached in support of the Motion relate to the relationship between a counsel and his client with regards to a client's conduct which created professional embarrassment for counsel or a request to act in an unethical manner. In both instances, the courts recognised that there were no reasons for them to ignore the self-assessment of counsels in those circumstances.¹³ Indeed, in the situations described, to require more details from counsel may have resulted in breaching confidential communication with the client and created a prejudice to him. Nevertheless, I observe that the Applicant, by citing jurisprudence from only three legal systems of common law, does not demonstrate that the principle he is basing his reasoning on, is globally accepted by the major legal systems of the world. In any event, the situation in the present case is different as the issues raised do not relate to situations where a client's conduct created professional embarrassment for Co-Counsel or the client requested him to act in an unethical manner. The Applicant has not demonstrated that the Registrar was not entitled not rely on Co-Counsel's appraisal and to assess the situation of Co-Counsel in order to estimate whether the request to withdraw his assignment was warranted.

5. Counsel submits that the Registrar's Decision on this issue was wrong given that a conflict of interest is a serious breach of the Code of Conduct warranting withdrawal under Article 19 (A) (iii) of the Directive.¹⁴ I note that the details of the conflict as spelt out in Lead Counsel's motion before the Registrar, is that Rwandan authorities threaten Mr. Tremblay's security and liberty, and that this conflicts with his ability to

⁷ See Annexes to the Motion.

⁸ See Annexes G and I to the Motion, e-mail correspondence from DCDMS representative to Co-Counsel dated 15 February 2011.

⁹ See Annexes F and I to the Motion.

¹⁰ Confidential Medical certificates concerning Mr. Tremblay, received on 22 March 2011 by Fax addressed to the President.

¹¹ Lead Counsel cites case law from various jurisdiction in the Motion at paras. 16-20 and attaches case law in the annexes to the Motion.

¹² Motion, para. 13.

¹³ See Annex I, *R. v. Uday and another* [2007] EWCA Crim 2379; Annex K, *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331.

¹⁴ Motion, para. 22.

represent Aloys Ntabakuze effectively.¹⁵ But this issue has already been the subject of rulings by the Appeals Chamber, in two decisions dated 6 October 2010¹⁶ and 15 March 2011.¹⁷ The decisions clearly assert that there is no objective basis for the fears asserted by Counsel. In his Decision, the Registrar not only referred to these decisions which would be binding on him but he also observed that Co-Counsel is not expected to 'travel to Rwanda for the rest of the case, thus rendering pointless any fear'.¹⁸ I consider that the Registrar did not make any error in considering that the alleged fear of Co-Counsel is not justified and that there is consequently no conflict of interest for Co-Counsel *vis-à-vis* his client. In my view the Registrar was entitled to make an objective assessment of whether there were any exceptional circumstances, and was not obliged to rely on the subjective position of Counsel when satisfied that it was unjustified. I therefore reject the submissions on this ground and find that the Registrar's conclusions were fair and reasonable.

6. In his submissions before me, Counsel used rather disrespectful language in describing the Registrar's decision as being based on deliberate falsehood. He contended that the Registrar had medical evidence before him when he ruled that no evidence was adduced to substantiate the health reasons invoked.¹⁹

7. In the first place, my review of the material indicates that there was no detail or evidence submitted at any time of any medical condition prior to the traffic accident. The traffic accident occurred after the application had been filed. On a purely technical note, no application for amending the motion was filed, and the applicant seemed to assume that any issues concerning Co-Counsel's traffic accident was properly brought before the Registrar by the email communications he had with officers in the Registry. On the substantive issue, however, it seems to be incontrovertible that no evidence was adduced to support the health conditions alleged in the motion.

8. I take note of the annexes attached to the Motion and the documents submitted by Mr. Tremblay on 22 March 2011 to my Office. Most of the documents submitted are e-mail exchanges between Co-Counsel and Aloys Ntabakuze as well as between Co-Counsel, Lead Counsel and the Registry. Four medical certificates are to be found in Annex C and six in the documents submitted on 22 March 2011. Out of the six medical statements submitted on 22 March 2011, four are identical to the one attached at Annex C. I also observe that the first certificates are dated 22 February 2011. Two others are dated 27 February 2011 and the last two are dated 10 and 21 March 2011 respectively. The allegations that the Registrar had access to these certificates before he signed the decision on 23 February are therefore not believable. There is no indication

¹⁵ Confidential Ex Parte Request to the Registrar: For the Replacement of Co-Counsel, ME, André Tremblay, Pursuant to Exceptional Circumstances under Article 19, Consistent with Notice Provided to the Chamber in the December 17, 2010 Motion for Permanent Stay of Proceedings, dated 7 February 2011 but filed on 14 February 2011 ("Original Motion").

¹⁶ *Bagasora et al.*, Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder (Appeals Chamber), 6 October 2010.

¹⁷ *Bagasora et al.*, Decision on Aloys Ntabakuze's Motions for Video-conference Participation of Lead Counsel in the Appeal Hearing and for the Withdrawal of Registrar's Public Decision (Appeals Chamber), 15 March 2011.

¹⁸ Registrar's Decision, para. 5.

¹⁹ Motion, paras. 7-12.

K

that Counsel made any submission requesting the Registrar to reconsider his decision in light of the medical certificates that he obtained after the decision was issued.

9. I consider that the Registrar applied the correct standard when he refused to consider Co-Counsel's own assessment of his medical condition and indicated that he would only act upon medical evidence supporting the alleged ill-health. In any view that conclusion is neither unfair nor unreasonable.

10. In coming to his decision the Registrar had gone on to state that the appeal hearing had been fixed for the 30 March, 31 March and 1 April 2011 and that all relevant documents had already been filed.²⁰ The matter was therefore ready for hearing. He expressed the conclusion that acceding to counsel's request would create unnecessary delay and disruption of the proceedings. Bearing in mind the right of the Accused to a hearing without undue delay, that view of the Registrar is neither unfair nor unreasonable. In these circumstances I do not consider that there is any basis for concluding that even if the medical evidence had been before the Registrar his decision would have been different. Consequently, I do not think that I should refer the matter to Registrar for any further review of his decision.

11. In my considered decision the Applicant has not shown that the decision of the Registrar denying his application to withdraw Co-Counsel is unfair or unreasonable and I dismiss the application for review in its entirety.

12. Finally, although the Motion was filed *ex parte*, I consider that this decision shall be filed as a public document as it contains no sensitive or damaging information.

FOR THESE REASONS, I

DENY the Motion (i) in its entirety

Arusha, 28 March 2011, done in English.


Dennis C.M. Byron
President

[Seal of the Tribunal]

Registrar's Decision, para. 7.