

IT-95-13/1-PT
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UNITED
NATIONS



**International Tribunal for the
Prosecution of Persons Responsible
for Serious Violations of International
Humanitarian Law Committed in the
Territory of the Former Yugoslavia
Since 1991**

**Case: IT-95-13/1-PT
Date: 20 August 2003
Original: English**

THE PRESIDENT OF THE TRIBUNAL

**Before: Judge Theodor Meron, President
Registrar: Mr Hans Holthuis
Decision of: 20 August 2003**

THE PROSECUTOR

v.

Veselin ŠLJIVANČANIN

DECISION ON ASSIGNMENT OF DEFENCE COUNSEL

1. Veselin Šljivančanin has appealed against a 9 July 2003 decision by the Registrar refusing to assign two attorneys, Goran Petronijević and Momčilo Bulatović, to be his Tribunal-paid defence counsel. For the reasons given below, I find that the appeal is properly directed to the President. I also find that the decision with respect to both attorneys must be quashed and the matter remanded to the Registrar for reconsideration in light of this decision.

Background

2. Veselin Šljivančanin was transferred into the custody of the Tribunal on Tuesday, 1 July 2003. His initial appearance was originally scheduled to take place before Judge Agius on Thursday, 3 July 2003. The initial appearance was postponed because Mr. Šljivančanin's preferred lawyers had not been approved by the Registrar.¹ On 7 July 2003, Mr. Šljivančanin filed a declaration of means, the initial form necessary to establish indigence for the purpose of having counsel paid by the Tribunal. On 9 July 2003, the Registrar informed Mr. Šljivančanin that Mr. Petronijević and Mr. Bulatović would not be assigned to defend him.² On 10 July, Mr. Šljivančanin had his initial appearance, assisted by temporary counsel Stephen Solley.

3. In his letter decision of 9 July 2003 rejecting assignment of Mr. Šljivančanin's preferred counsel, the Registrar indicated that both proposed counsel failed to meet Rule 44(A)'s requirement that counsel speak at least one of the Tribunal's working languages. The Registrar noted that even counsel who do not fulfil the language requirement may be appointed, pursuant to Rule 44(B), "on an exceptional basis, where the interests of justice so demand." The Registrar declined to appoint Mr. Petronijević under the Rule 44(B) exception because his "history raises questions about his suitability for assignment as counsel, at Tribunal expense." The Registrar went on to state, "It appears that Mr. Petronijević acquired some international notoriety for his handling of the criminal case against ethnic Albanians Muhedin Zeka et al., while a district judge in Serbia in 2000. Given the press coverage of that case, which reflected negatively on the fame and character of Mr. Petronijević in matters of justice and human rights, his appointment now could endanger the repute of this Tribunal, which must at all times be seen to do justice." Thus, according to the Registrar, "the 'interests of justice' strongly dictate against his appointment."

¹ See *The Prosecutor v. Veselin Šljivančanin*, IT-95-13/1-PT, Tr. 3 July 2003, pp. 95, 99-100, 104-106, 108-109. The Registry received a faxed power of attorney for Mr. Petronijević and Mr. Bulatović, signed by Mr. Šljivančanin, on 24 June 2003.

² The Registrar's letter decision is dated 9 July 2003. Mr. Šljivančanin acknowledged at the 10 July initial appearance that he had been informed of the Registrar's decision orally on 9 July 2003 and that he had received the Registrar's letter

4. The Registrar did not explain why Mr. Bulatović was not suitable for appointment under the Rule 44(B) exception, but he stated that “[t]he accused’s right to choose his own counsel is limited” and that neither Mr. Bulatović nor Mr. Petronijević had “come forward with any other reasons why the interests of justice require their assignment.”

5. On 14 July 2003, Mr. Šljivančanin filed an appeal of the Registrar’s decision.³ He claims that the Registrar’s decision violates the right, enshrined in Article 21 of the Statute, to have counsel of his own choosing. He states that he “do[es] not know what kind of judge Mr. Petronijević was or whom he judged, but I am convinced that he will work successfully on my case.” He also states that Mr. Petronijević and Mr. Bulatović “will conduct themselves extremely correctly and will adhere to all the rules and regulations of the International Tribunal.” He contends that Mr. Petronijević and Mr. Bulatović will be better able to contact defence witnesses and the military authorities in Belgrade for assistance in preparing his defence than will “an attorney from elsewhere.” He avers that he has asked Mr. Petronijević and Mr. Bulatović to find an attorney from an English-speaking country with whom they can work, but “when the trial is under way and the conditions are right.” Finally, he asks that, if it is not possible for both of his preferred attorneys to be appointed, at least one of them be allowed to assist him in the preparation of his defence.⁴

6. On 8 August 2003, the Registrar filed a “Submission of the Registrar Pursuant to Rule 33(B),” which I have interpreted as a response to Mr. Šljivančanin’s appeal brief.⁵ He argues that

decision in English. He stated that he had yet to receive a B/C/S translation of the letter decision. *The Prosecutor v. Veselin Šljivančanin*, IT-95-13/1-PT, Tr. 10 July 2003, p. 119.

³ On 11 July 2003, Mr. Petronijević and Mr. Bulatović had addressed a letter to me stating, among other things, that they did not make any statements to two B/C/S-language newspapers published in Frankfurt. I have not considered this letter in reaching my decision. I would note, however, that the Registrar did not rely on any articles from those publications in reaching his decision.

⁴ On 22 July 2003, Mr. Petronijević filed a document styled “Appeal of Mr. Goran Petronijević on the Registry’s Decision Declining Assignment of Defence Counsels to the Accused.” Mr. Petronijević claimed to be filing the document pursuant to Article 14(D) of the Directive on Assignment of Defence Counsel. That Article addresses decisions by the Registrar to refuse assignment of counsel based on the initiation of contempt or disciplinary proceedings against counsel. The Registrar’s decision reviewed here was not made pursuant to Article 14 of the Directive (as should have been clear to Mr. Petronijević), and thus Mr. Petronijević’s filing is not relevant to the case at hand. Moreover, as the Registrar points out, it is the suspect or the accused, not the affected counsel, who has a right to appeal against decisions concerning assignment of defence counsel made pursuant to Article 13 of the Directive or Rule 44(B) of the Rules of Procedure and Evidence. See Submission of the Registrar Pursuant to Rule 33(B) (“Registrar’s Response”), para 2. While the Judge or Chamber hearing an appeal may decide to permit filings by persons with an interest in a case other than the parties themselves, I have not done so here.

⁵ Rule 33(B) provides:

(B) The Registrar, in the execution of his or her functions, may make oral and written representations to the President or Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary.

the language competence requirement is consistent with Article 21 of the Statute, and he provides some useful information on the origins of the “interests of justice” exception. He now gives as a reason for refusing assignment to Mr. Petronijević and Mr. Bulatović a ground not clearly stated in his 9 July 2003 letter decision, namely, that “neither counsel submitted any information with respect to their relationship to the accused that would give the Registry grounds to believe that there was a special relationship between them and the accused.”⁶ More generally, with respect to his application of the “interests of justice” exception in this case, he states:

The Registry is aware that the language requirement has been waived in other cases in circumstances that might not necessarily meet the requirements of “exceptional circumstances.” Nonetheless, the Registry does not consider that the existence of past precedent should in itself constitute a valid justification to compel a waiver to the language requirement in this case. Indeed, it has been the experience of the Registry that the assignment of counsel who does not speak the working language of the Tribunal has in some occasions resulted in significant delays and adjournments. The fact that the Registry may have granted exceptions more freely in the past should not, as a matter of principle, fetter the Registrar’s discretion in the future, or otherwise compel him to perpetuate the problems encountered. The exception, indeed, should not be allowed to swallow the Rule. Accordingly, the onus should be on the accused and the counsel in question to demonstrate to the Registrar that exceptional circumstances exist that warrant the granting of an exception.⁷

Discussion

A. Relevant Provisions of Law

7. Article 21 of the Statute provides, in relevant part, that “[i]n the determination of any charge against the accused . . . the accused shall be entitled to the following minimum guarantees, in full equality: . . . (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; . . . (d) . . . to defend himself in person

Although the relevant portions of neither the Directive on Assignment of Defence Counsel nor the Rules of Procedure and Evidence provide for the filing of a response by the Registrar in appeals against his decisions concerning assignment of defence counsel, I believe the Registrar would be entitled to file such a response even in the absence of Rule 33(B). Whether a responsive filing by the Registrar in cases such as this one is properly understood as a submission pursuant to Rule 33 or not, though, it must be made in a timely fashion. Neither Rule 33, nor Rule 44, nor Article 13 of the Directive sets a deadline for the filing of a response. Article 13(B) gives an accused two weeks to file an appeal. Rule 126 *bis* of the Rules provides a default deadline of two weeks for the filing of responses to motions. In the circumstances, the Registrar could not have reasonably imagined that he would be allowed more than two weeks to file a response to Mr. Šljivančanin’s appeal. I therefore consider his filing to have been done out of time. Because of the uncertainty concerning the relevant deadlines, though, I will excuse the late filing in this instance. I trust the Registrar will act more expeditiously in similar appeals in the future.

⁶ Registrar’s Response, para. 15.

⁷ *Id.*, para. 10. Having weighed the various interests involved, I have made my decision without waiting to see whether Mr. Šljivančanin would seek to file a reply.

or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

8. Rule 44 of the Rules of Procedure and Evidence, according to its title, governs the “[a]ppointment, [q]ualifications, and [d]uties” of counsel. Paragraphs (A)-(C) of Rule 44 provide:

(A) Counsel engaged by a suspect or an accused shall file a power of attorney with the Registrar at the earliest opportunity. Subject to any determination by a Chamber pursuant to Rule 46 or 77, a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that the counsel is admitted to the practice of law in a State, or is a University professor of law, speaks one of the two working languages of the Tribunal and is a member of an association of counsel practising at the Tribunal recognised by the Registrar.

(B) At the request of the suspect or accused and where the interests of justice so demand, the Registrar may admit a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused. The Registrar may impose such conditions as deemed appropriate. A suspect or accused may appeal a decision of the Registrar to the President.

(C) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Professional Conduct for Defence Counsel and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel set out by the Registrar and approved by the permanent Judges.

9. Rule 45, according to its title, governs the “[a]ssignment of [c]ounsel.” Paragraphs (A)-(D) of Rule 45 provide:

(A) Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in a Directive set out by the Registrar and approved by the permanent Judges.

(B) A list of counsel who, in addition to fulfilling the requirements of Rule 44, have shown that they possess reasonable experience in criminal and/or international law and have indicated their willingness to be assigned by the Tribunal to any person detained under the authority of the Tribunal lacking the means to remunerate counsel, shall be kept by the Registrar.

(C) In particular circumstances, upon the request of a person lacking the means to remunerate counsel, the Registrar may assign counsel whose name does not appear on the list but who otherwise fulfils the requirements of Rule 44.

(D) If a request is refused, a further request may be made by a suspect or an accused to the Registrar.

10. The Directive on Assignment of Defence Counsel (IT/73/Rev. 9, 12 July 2002) sets out the process by which the Registrar determines whether an accused is entitled to have his counsel paid for by the Tribunal. Article 14 of the Directive sets out the standards for counsel to qualify to be placed on the Registrar's list of legal aid lawyers. It recapitulates the requirements for a counsel to qualify for assignment contained in Rule 45(B) and, by incorporation, Rule 44 of the Rules of Procedure and Evidence. It also contains one additional requirement, the second in the list contained in Article 14(A):

- (i) he is admitted to the practice of law in a State, or is a university professor of law;
- (ii) he has not been found guilty in relevant disciplinary proceedings against him where he is admitted to the practice of law or a university professor, and has not been found guilty in relevant criminal proceedings against him;
- (iii) he speaks one of the two working languages of the Tribunal, except if the interests of justice do not require this;
- (iv) he possesses reasonable experience in criminal and/or international law;
- (v) he agrees to be assigned as counsel by the Tribunal to represent any indigent suspect or accused;
- (vi) he is or is about to become a member of an association of counsel practising at the Tribunal.

11. Article 13 of the Directive authorizes the President to review at least some decisions by the Registrar denying assignment of counsel to *suspects*; it authorizes the Trial Chamber seised of a case to review those same decisions by the Registrar when they concern counsel for an *accused*:

(A) The suspect whose request for assignment of counsel has been denied may, within fifteen days of the date of notification to him, seek the President's review of the decision of the Registrar. The President may either confirm the Registrar's decision or decide that a counsel should be assigned.

(B) The accused whose request for assignment of counsel has been denied, may, within two weeks of the date of notification to him, make a motion to the Chamber before which he is due to appear for immediate review of the Registrar's decision. The Chamber may

- (i) confirm the Registrar's decision; or
- (ii) rule that the suspect or accused has means to partially remunerate counsel, in which case it shall refer the matter again to the Registrar for determination of which parts shall be borne by the Tribunal; or
- (iii) rule that a counsel should be assigned.

B. Who Reviews the Registrar's Decision?

12. Mr. Šljivančanin sent his appeal to me. The Registrar's decision suggested that the review should be undertaken by the Trial Chamber hearing Mr. Šljivančanin's case. While the question is not free from doubt, I believe the appeal is properly directed to the President.⁸

13. Rule 44 establishes the standards for qualification of any defence counsel, whether paid for by the accused or by the Tribunal. It provides, in paragraph (B), that "[a] suspect or accused may appeal a decision of the Registrar to the President." The text of the Rule leaves unclear the exact referent of "a decision of the Registrar," but it would seem to include at least decisions by the Registrar under paragraph (B) of Rule 44 itself, that is, decisions either i) not to permit appointment of counsel under the "interests of justice" exception to the working languages requirement or ii) to impose conditions on such an appointment.

14. Rule 45 governs assignment of defence counsel, that is, qualification of defence counsel who will be paid by the Tribunal. It does not provide directly for review of decisions of the Registrar. In paragraph (A), it provides generally that "assignments shall be treated in accordance with the procedure established in the Directive" on Assignment of Defence Counsel. With respect to the particular decision to assign counsel whose name does not appear on the Registrar's list of legal aid lawyers, it simply provides, in paragraph (D), that "[i]f a request is refused, a further request may be made by a suspect or an accused to the Registrar."

15. It is Article 13 of the Directive on Assignment of Defence Counsel that defines the avenues for review of at least some decisions by the Registrar concerning assignment of defence counsel who are to be paid by the Tribunal. As noted above, for suspects, that is, individuals who have not had an indictment against them confirmed, review is by the President. For accused persons, review is by the Trial Chamber. Because an indictment against Mr. Šljivančanin was confirmed on 7 November 1995, he is an accused, not a suspect.⁹

16. While the Registrar's 9 July letter decision indicated that it was subject to review under Article 13 – and thus should go to the Trial Chamber for review – the structure of the Directive and the wording of Article 13 suggest that the right of review established by Article 13 concerns

⁸ In his letter decision of 9 July 2003, the Registrar relied on Rules 44(A) and 44(B) for his decision and informed Mr. Šljivančanin that "[y]ou are entitled to appeal this decision in accordance with Article 13(B)." That would have meant appeal to the Trial Chamber. At the initial appearance on 10 July 2003, David Pimentel, Chief of Court Management, reaffirmed this view (though he misspoke by referring to Article 13(A), concerning suspects, rather than Article 13(B), which concerns accused persons). See *The Prosecutor v. Veselin Šljivančanin*, IT-95-13/1-I, Tr. 10 July 2003, p. 120. Judge Agius informed Mr. Šljivančanin that he could appeal the Registrar's decision to the President. *Id.*

⁹ See *The Prosecutor v. Mrkšić et al.*, IT-95-13-I, Confirmation of the Indictment, 7 November 1995. The indictment was amended in 1996 and 1997. Trial Chamber II is presently considering a prosecution motion for a further amendment of the indictment. See *The Prosecutor v. Mrkšić et al.*, Prosecution's Motion for Leave to File a Consolidated Amended Indictment, filed 21 July 2003.

only Registrar's decisions as to whether a suspect or an accused meets the criteria for indigence, not Registrar's decisions concerning the qualifications of particular counsel. Article 13 constitutes chapter four of part III of the Directive. Chapter four is captioned, "Remedy." Chapter three, which includes Articles 11 and 12, is titled "The decision." The decision described in those rules is the decision "how far the suspect or accused lacks means to remunerate counsel."¹⁰ Article 11 assumes that the counsel selected will be from the list of qualified counsel maintained by the Registrar. The alternative forms of decision on appeal envisioned in Rule 13 – confirmation of the Registrar's denial, a ruling that "a counsel" (not *the* counsel) should be assigned, or, in the case of Article 13(B), that the accused has means partially to remunerate counsel – all suggest that the decision under review is simply the one concerning the suspect's or the accused's indigence. Similarly, Article 18 of the Directive, which incorporates the procedures established in Article 13, concerns withdrawal of legal aid based on circumstances coming to light that lead the suspect or accused no longer to qualify as indigent.¹¹

17. The Registrar's action in this case appears to have been taken under Rule 45, paragraph (C), which provides that "[i]n particular circumstances, upon the request of a person lacking the means to remunerate counsel, the Registrar may assign counsel whose name does not appear on the list but who otherwise fulfils the requirements of Rule 44." There seems to be no dispute that Mr. Šljivančanin appears to lack the means to remunerate counsel and that his preferred attorneys are not on the list. As noted above, the Rule does not provide a right of appeal from such decisions. It simply states, in paragraph (D), that "[i]f a request is refused, a further request may be made by a suspect or an accused to the Registrar."

18. Because unless they expressly provide to the contrary, the Rules should normally be read as affording some avenue for judicial review of administrative decisions, Rule 45(C)'s incorporation of the standards of Rule 44 may be read as incorporating the provision for Presidential review of decisions under Rule 44(B) concerning the "interests of justice" exception to the language competence requirement.¹² For that reason, Mr. Šljivančanin's appeal may properly be directed to the President.

¹⁰ Article 11(A).

¹¹ Cf. *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, paras. 1-2 (describing Article 13 and Article 18 as providing a right of review of Registrar's decisions to "refuse[] legal aid" or "withdraw legal aid") (*Kvočka Decision*).

¹² Rule 45(C) does not define the "particular circumstances" (beyond counsel's compliance with the requirements of Rule 44) in which the Registrar should accede to an indigent suspect or accused person's request for assignment of counsel not on the Registrar's list. Nor does it explain why counsel assigned in this way apparently needs only to meet the requirements of Rule 44, while those assigned from the list must meet the additional requirements set out in Rule 45(B).

C. The Merits

1. The Right to Counsel of One's Own Choosing

19. Mr. Šljivančanin claims that the Registrar's refusal to assign his preferred attorneys violates Mr. Šljivančanin's right to counsel of his own choice, guaranteed by Article 21, paragraph 4 of the Statute. The claim may quickly be rejected.

20. This case concerns assignment of counsel to be paid for by the Tribunal. Whatever may be the scope of the right to counsel of one's own choosing when a defendant hires his own counsel, the right to publicly paid counsel of one's own choice is limited. The ICTR Appeals Chamber and several ICTY Trial Chambers have repeatedly held that, while the Registrar should normally take a defendant's preferences into account, a defendant must accept any duly qualified counsel appointed from the list maintained by the Registrar.¹³ I fully concur in that view. To the extent Mr. Šljivančanin challenges the reasonableness of the language competence requirement itself, that challenge must certainly fail. As far as I am aware, every court requires attorneys practicing before it, and especially those paid by it, to be able to function in the court's working language. The reasonableness of that requirement is made all the plainer by the availability of the "interests of justice" exception to it.

2. Standard of Review of the Registrar's Decision

21. It must still be determined whether the Registrar's application of the language competence requirement and the "interests of justice" exception in this case was reasonable.

22. The Registrar's decision to permit or deny assignment of counsel based on the "interests of justice" exception involves questions both of fact and of law. The Registrar must first make certain factual determinations, either about the circumstances of the defendant's case or, as in this case, about the counsel in question's past conduct, or about both. Then, given the facts as he finds them, he must determine what the "interests of justice" require. The first part of the Registrar's task involves, as has been said of his determination to withdraw legal aid, "an

¹³ See, e.g., *Kambanda v. The Prosecutor*, ICTR-97-23-A, Appeals Chamber Judgement, 19 October 2000, para. 33; *The Prosecutor v. Akayesu*, ICTR-96-4-A, Appeals Chamber Judgement, 1 June 2001, paras. 61-62; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-counsel, 3 July 2003, paras. 74-75; *Prosecutor v. Knezević et al.*, IT-95-4-PT, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002, p. 3; cf., e.g., *Lagerblom v. Sweden*, European Court of Human Rights, Judgment of 14 January 2003, para. 54; *Croissant v. Germany*, European Court of Human Rights, Judgment of 28 August 1992, para. 29.

administrative fact-finding procedure.”¹⁴ His findings need only be established as more probable than not. Judicial review of those findings should be somewhat deferential in light of the assignment to the Registrar of principal responsibility for overseeing the assignment of defence counsel. As the Appeals Chamber has said in reference to judicial review of the Registrar’s decision to withdraw legal aid,

Judicial review of an administrative decision by the Registrar . . . is concerned initially with the propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it. The administrative decision will be quashed if the Registrar has failed to comply with the legal requirements of the Directive. . . . The administrative decision will also be quashed if the Registrar has failed . . . to act with procedural fairness towards the person affected by the decision, or if he has taken into account irrelevant material or failed to take into account relevant material, or if he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached. . . . there can be no interference with the margin of appreciation of the facts or the merits of that case to which the maker of such an administrative decision is entitled.¹⁵

Whether the Registrar’s determination of what the “interests of justice” require is entitled to an equal degree of deference is less clear.

3. Mr. Petronijević and Mr. Bulatović

23. In determining that Mr. Petronijević and Mr. Bulatović should not be allowed to serve as assigned counsel under the “interests of justice” exception to the language competence requirement, the Registrar relied on a number of newspaper and magazine articles, judicial documents, and reports by inter-governmental or non-governmental organizations. According to Registry staff, however, the Registrar did not afford Mr. Šljivančanin an opportunity to respond to the (non-confidential) evidence against his preferred attorneys, or at least to a summary of that evidence. The Registrar’s failure to do so represented “a fail[ure] to act with procedural fairness.”¹⁶ For this reason, the Registrar’s decision must be quashed and the matter remanded to him for reconsideration. The Registrar, of course, cannot be required to conduct a mini-trial each time a defendant seeks assignment of a particular lawyer. He need not hold a hearing of any kind. But the Registrar must provide the accused with at least a summary of the evidence upon which the Registrar intends to rely, and he must take into account whatever materials the accused (in consultation with his preferred attorney) wishes to submit within some very short period to be

¹⁴ *Kvočka* Decision, para. 12.

¹⁵ *Id.*

determined by the Registrar so as to avoid undue delay. It is important to emphasize that the requirement to give the affected accused an opportunity to respond to at least a summary of the evidence upon which the Registrar intends to rely does not in any way relieve the accused of the burden of establishing that the interests of justice demand the assignment of the preferred attorney. Nor does it restrict the discretion of the Registrar in defining the bounds of the “interests of justice” exception.¹⁷

24. While the Registrar possesses the authority and the responsibility to define the “interests of justice” exception in the first instance, he must apply the definition consistently across cases. In at least two recent cases, the Registrar has indicated that, in the absence of other considerations, the interests of justice exception would be satisfied if the accused were to demonstrate that i) his preferred attorney had represented him previously before a national court in relation to the charges now being brought before the ICTY or related charges¹⁸; ii) the accused (and his preferred attorney) have identified an individual willing to serve as co-counsel who speaks one of the working languages as well as the language of the accused well; iii) the proposed co-counsel has sufficient experience as a criminal defence attorney that he could take over the case if the lead counsel were to withdraw for any reason; and iv) all expenses for interpretation and translation beyond those usually provided by the Tribunal would be borne by the accused or the lead counsel.¹⁹

25. As noted earlier, the Registrar asserts in his Response that he must be able to change his interpretation of the “interests of justice” exception in light of experience and that therefore he cannot be bound to apply the same interpretation in every case.²⁰ The Registrar is certainly correct that he has the authority to change the criteria he uses in giving meaning to the “interests of justice” exception. For example, if the Registrar determines that allowing assigned counsel who do not speak at least one of the working languages has led to enormous delays and that therefore he should restrict the circumstances in which he will grant assignment pursuant to the

¹⁶ *Id.*

¹⁷ It should also be emphasized that the accused (and thus his preferred attorney) need not be given an opportunity to respond to all the materials collected by the Registrar, only to those upon which the Registrar intends actually to rely in making his decision.

¹⁸ I understand this to include representation of the accused in the extradition proceedings leading to the accused’s transfer to the Tribunal.

¹⁹ *The Prosecutor v. Stanisić*, IT-03-69-PT, Decision of the Registrar, 18 July 2003, p. 2; Letter from the Registrar to Mr. Željko Olujić, 25 June 2003. The letter to Mr. Olujić concerns *The Prosecutor v. Ivica Rajić*, IT-95-12-PT. The letter to Mr. Olujić is not a formal decision, but a proposal setting out the criteria upon which the Registrar “may favourably consider” the request for assignment in that case.

²⁰ See *supra* para. 6; Registrar’s Response, para. 10.

“interests of justice” exception, he is free to do so. In doing so, however, he must observe the following procedural regularities. Those regularities are intended to ensure fairness to affected parties, to improve the accuracy of the Registrar’s decisions, and to establish a basis for effective judicial review of the Registrar’s decisions. First, the Registrar must explain that he is changing the meaning of the “interests of justice” exception and why he is doing so. Second, he should do so in a way that does not leave a particular applicant facing new standards of which he could not reasonably be aware. He may seek an amendment of the Directive. He may make a general statement to the Association of Defence Counsel and ask them to publicize it, *e.g.*, by posting it on the Association’s website. He may also announce a new interpretation in the course of ruling on a particular request for assignment of counsel, so long as he makes clear to the affected parties the standards upon which the request for assignment will be judged.

26. In this case, neither the Registrar’s 9 July letter decision nor his Response suggests that he was applying a novel interpretation of the “interests of justice” exception. The fact that the Registrar handed down his decision in this case just two weeks after one of the decisions in which he relied on the four criteria mentioned above and just nine days before the other decision in which he relied on those criteria makes it hard to imagine that those were not the criteria upon which the Registrar was acting when he handed down the decision in this case. It is therefore with those criteria in mind that I have reviewed the record upon which the Registrar made his decision.

27. The materials concerning Mr. Petronijević do not show whether the four criteria noted in the previous paragraph are satisfied in his case. They do suggest that, even if those four criteria were satisfied, a countervailing consideration may exist that might justify denying assignment under the “interests of justice” exception. The materials indicate that Mr. Petronijević may have acted improperly when he served as a trial judge in Serbia. In particular, they suggest that in one trial involving 143 ethnic Albanian defendants from the area of Djakovica in which he served as presiding judge he may have violated the defendants’ fundamental rights and convicted many of them in the absence of any evidence of individual guilt. The Registrar understandably found those claims troubling. If Mr. Petronijević were the only attorney whose assignment Mr. Šljivančanin had sought, it would be necessary to determine whether those claims of judicial impropriety, if found by the Registrar to be more likely than not true, would suffice by themselves to justify refusing to assign Mr. Petronijević. Because Mr. Šljivančanin has indicated that he would be happy to have either Mr. Petronijević or Mr. Bulatović assigned, and because, as

noted below, the record concerning Mr. Bulatović does not raise the possibility of any disqualifying consideration of this sort, it is not necessary to reach that question. It is sufficient to hold that, if the Registrar finds the claims of Mr. Petronijević's past judicial impropriety more likely than not true, and he finds Mr. Bulatović to be otherwise qualified for assignment, he should assign Mr. Bulatović rather than Mr. Petronijević as lead counsel.

28. The evidence concerning Mr. Bulatović appears to support the propriety of his appointment as defence counsel. It shows him to be an experienced defence lawyer, and one who has represented a controversial Bosnian Muslim client. It does suggest that, as a political figure, he favors less cooperation with the Tribunal than does the party in power in Serbia-Montenegro or Serbia, but that hardly makes him unfit to represent a defendant in a criminal proceeding here. Those materials do not reveal any countervailing consideration of the sort identified by the Registrar in Mr. Petronijević's case.

29. In his Response, the Registrar asserts that both Mr. Petronijević and Mr. Bulatović failed to satisfy the first criterion described in paragraph 24, that is, having developed a relationship of trust with Mr. Šljivančanin in the course of representing him before national courts in relation to the charges he faces before this Tribunal or related charges.²¹ If so, that would supply a sufficient basis for refusing to invoke the "interests of justice" exception and thus for refusing to assign either of them as defence counsel for Mr. Šljivančanin. The Registrar's 9 July letter decision, though, certainly suggests that the Registrar's refusal to assign Mr. Petronijević was based on another ground, namely, his conduct when serving as a judge in 2000. The letter decision is less clear when it comes to Mr. Bulatović, though it does refer in general terms to both attorneys' "fail[ure] to come forward with any other reasons why the interests of justice require their assignment." The party seeking assignment of counsel bears the burden of convincing the Registrar that his preferred attorney meets the relevant criteria. The Registrar bears the responsibility to make clear the basis for his decisions. On remand, the Registrar should give Mr. Šljivančanin a brief opportunity to establish that Mr. Petronijević and Mr. Bulatović satisfy the four criteria noted above. If they fail to do so, the Registrar should refuse them assignment. If they both satisfy those criteria or if Mr. Bulatović does, the Registrar should assign Mr. Bulatović as lead counsel.

Disposition

²¹ See Registrar's Response, para. 15

30. The Registrar's decision is quashed and the matter is remanded to him for reconsideration in light of this decision.

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

Dated this 20th day of August 2003,
At The Hague,
The Netherlands.



Judge Theodor Meron
President

[Seal of the Tribunal]