



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

Case No. IT-04-74-PT
Date: 21 September 2005
Original: English

BEFORE THE TRIAL CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Amin El Mahdi
Judge Alphons Orié

Registrar: Mr. Hans Holthuis

Decision of: 21 September 2005

PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ČORIĆ
BERISLAV PUŠIĆ**

PUBLIC REDACTED VERSION

**DECISION ON (REDACTED) REQUEST FOR REVIEW OF
THE DEPUTY REGISTRAR'S DECISION DATED
(REDACTED) 2005 REGARDING THE ACCUSED'S REQUEST
FOR ASSIGNMENT OF COUNSEL**

Counsel for the Accused:

(REDACTED)

The Deputy Registrar

1. Procedural History

1. This Chamber is seized of the (REDACTED), wherein (REDACTED) (“the Accused”) requests that a hearing be scheduled “to allow the parties to fully present their position and/or provide additional facts or argument”¹, or in the alternative, “to rule that [the Accused] has means to partially remunerate counsel and refer the matter again to the Registrar for determination of which parts [of the costs of his defence] shall be borne by the Tribunal”.²
2. On (REDACTED), the Accused applied for the assignment of Tribunal-paid counsel on the basis that he did not have sufficient means to remunerate counsel. On that date the Registry of the 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 (“the Tribunal”) began its inquiries into the Accused’s financial status for the purpose of determining his eligibility for assignment of counsel. Various correspondence ensued.³
3. On 5 May 2005, the Accused requested the Registry to assign him counsel on an interim basis pursuant to Article 11(B) of the Directive on Assignment of Defence Counsel (“the Directive”).
4. On 27 May 2005, the Accused filed a motion before the Trial Chamber requesting an order directing the Registry to expedite its consideration of the Accused’s request for assignment of counsel. The Registry asserted that they did not yet have a complete picture of the Accused’s financial status because he had refused to provide information that the Registry needed in order to complete its inquiries.⁴
5. On (REDACTED), the Deputy Registrar filed a decision denying the Accused’s request for the assignment of counsel (“Deputy Registrar’s Decision”). The

¹ Request for Review paragraph 38

² Ibid para 39

³ See Annexes to Registry Submission Regarding (REDACTED) 5th July 2005 Request for Review of the Deputy Registrar’s Decision Denying Assignment of Counsel (“Registry Submission”), filed 22nd July 2005.

Deputy Registrar denied the Accused's request on the basis that the Accused had not provided the information that the Registry needed to complete its inquiries into the Accused's financial status. However, the Registry did state that the 'request for assignment of counsel will be re-examined if and when [the Accused] provides the Registry with the information that the Registry requires to conclude its inquiries into his ability to remunerate counsel'.⁵

6. On (REDACTED), the Registry filed a Motion for Extension of Time in which to present its comments on the Request for Review. On 22 July 2005, the Registry filed a Submission Regarding (REDACTED) 5 July 2005 Request for Review of the Deputy Registrar's Decision Denying Assignment of Counsel ('Registry Submission'). The Registry submits that :

[The Deputy Registrar's Decision] was not a decision *in meritis*. It did not examine the Accused's eligibility for assignment of counsel with reference to his financial status. Rather, it denied the Accused's request for assignment of counsel on the basis that the Accused had failed to comply with his obligations under the Directive and had failed to meet his burden of proof. The Registry submits that it is the propriety of *this* decision, rather than a detailed examination of the financial status of the Accused, that should be considered by the Chamber in these review proceedings'. (Emphasis in original).

7. On behalf of the Chamber it was indicated to the Defence that the request for a hearing might not be granted, and that the Accused was therefore invited by e-mail dated 1 September 2005 to respond to the Registry Submission, if he wished to do so. On 7 September the Accused filed (REDACTED) ("Accused's Response"). The Accused states in the Response that 'the issue is simple; in this particular case the burden of proof lies on the Registry',⁶ and submits that 'the Trial Chamber should primarily decide, or at least offer some guidelines, on the focal disagreement between the Registry and the Accused, namely the issues of the relevance of the information and related issue of burden of proof'.⁷ On 20 September the Defence filed (REDACTED) ("Supplemental Submission"), along

⁴ Ibid, para 5.

⁵ Deputy Registrar's Decision, final paragraph.

⁶ Accused's Response para 11.

⁷ Ibid para 13.

with material which has previously been submitted to the Registry.⁸ All these documents have been available to the Registry prior to reaching the Registry Decision which is now being reviewed by the Chamber.

2. Applicable Provisions

8. Assignment of Counsel:

The details concerning the provision of legal aid are to be found in Rule 45(A) of the Rules of Procedure and Evidence ('the Rules'), and also the associated Directive on Assignment of Defence Counsel.⁹

9. Burden of Proof and Declaration of Means:

In order to be granted legal aid, the Accused should establish that he or she cannot remunerate counsel, as per Article 8 of the Directive. Article 7 requires a suspect or Accused requesting the Assignment of Counsel to make a declaration of means on the form provided by the Registry. Thus the burden of proof is on the Accused to show that he is wholly or partially indigent. Article 8 also indicates what interests and / or assets can be taken into account by the Registrar in order to assess the Accused's request for legal aid:

Article 8

- A. A suspect or accused who requests the assignment of counsel must produce evidence that he is unable to remunerate counsel.

- B. In order to determine whether the suspect or accused is unable to remunerate counsel, there shall be taken into account means of all kinds of which he has direct or indirect enjoyment or freely disposes, including but not limited to direct income, bank accounts, real or personal property, pensions, and stocks, bonds, or other assets held, but excluding any family or social benefits to which he may be entitled. In assessing such means, account shall also be taken of the means of the spouse of a suspect or Accused, as well as those of persons with whom he habitually resides, provided that it is reasonable to take such means into account.

⁸ as Annexes to the Accused's declaration of means or with other correspondences, as confirmed in an email from the Registry to Chambers on 20 September 2005.

⁹ Article 6 of the Directive explains the condition for the entitlement to counsel fully paid for by the Tribunal.

- C. Account may also be taken of the apparent lifestyle of a suspect or accused, and of his enjoyment of any property, movable or immovable, and whether or not he derives income from it.

10. Article 8 (A) of the Directive clearly and unambiguously states that “A suspect or accused who requests the assignment of counsel *must produce evidence* that he is unable to remunerate counsel” (emphasis added). Furthermore, both the Trial and Appeals Chambers have considered the issue of the burden of proof within the context of investigating the indigency of an Accused, and it has been decided unequivocally that the onus lies on the Accused to establish that he lacks the means to remunerate counsel.¹⁰

11. Relevant Information:

Article 10 of the Directive allows the Registrar to inquire into the means of an Accused, requesting any relevant information pertinent to the investigation:

Article 10

- a. For the purposes of establishing whether the suspect or Accused satisfies the requisite conditions for assignment of counsel, the Registrar may inquire into his means, request the gathering of information, hear the suspect or Accused, consider any representation, or request the production of any documents likely to verify the request.
- b. In executing this stipulation and even after counsel has been assigned, the Registrar shall be authorised to request any relevant information at any time from any person who appears to be able to supply relevant information.

3. Accused's Financial Circumstances

12. The Registry has denied the assignment of counsel to the Accused on the basis that he did not discharge his burden of proof in showing that he does not have the means to remunerate counsel. The Registry asserts that the Accused was not

¹⁰ *Prosecutor v Momčilo Krajišnik*, Decision on the Defence's Motion for an Order Setting Aside the Registrar's Decision Declaring Momčilo Krajišnik Partially Indigent for Legal Aid Purposes, 20th January 2004 para 18, and *Prosecutor v Miroslav Kvočka et al* Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003, para 12, where it states “The burden of the Accused in the first instance to establish that he lacks the means to remunerate counsel..’.

altogether frank in his declaration of means, in that preliminary enquiries by the Registry indicated that the Accused has, or had significant interests in several large assets, namely (REDACTED). These were not declared by the Accused in the declaration of means to the Registry.¹¹ The Accused has failed to provide most of the information the Registry requested on more than one occasion subsequent to the Declaration of Means being submitted.¹²

13. Past Assets

The Registry recognises that ‘It cannot reasonably include items in the Accused’s asset base which were previously, but no longer available to him to finance the costs of his defence’.¹³ However, if there is reason to believe that an Accused has not really disposed of his assets and/or his interests in those assets, then this may affect his right to have counsel assigned to him. The Registry has good reason to investigate such matters if it is put on notice that the movement of such assets took place when the Accused knew or had reason to know that in the near future he would need counsel to represent him. It is too narrow an interpretation of the Directive to exclude the relevance in some instances of what happened in the recent past.

14. The Registry requested the Accused to provide more information regarding such assets, bearing in mind Article 8 of the Directive, which places the onus on the Accused to provide such information.¹⁴ The Registry is specifically concerned about whether the Accused has any interest in the (REDACTED), and states in its Submission that it “considered it reasonable and necessary to make a diligent inquiry into whether the Accused enjoyed an ownership interest in [them] and if so, whether those interests could be used to pay for the costs of [the Accused’s defence] before the Tribunal”.¹⁵

15. The Accused replied by stating, *inter alia*, that

- i. he was previously (REDACTED) but no longer performs this function;

¹¹ Registry Submission para. 18.

¹² Ibid

¹³ Registry Submission para 30.

¹⁴ Letters from the Registry to the Accused (REDACTED).

¹⁵ Registry Submission para 19.

- ii. he is not presently a shareholder , or owner, or company manager, or in any way associated with the (REDACTED);
- iii. that he is presently neither owner, nor a shareholder, a company manager or in any way associated with the (REDACTED);
- iv. the address of the (REDACTED). Furthermore, the Accused asserted he does not own the (REDACTED), but it is in fact owned by (REDACTED). The property is, however, (REDACTED);¹⁶
- v. the (REDACTED) has no status of joint marital property.¹⁷

The Accused also provided the Registry with documentation to show that he is not the current registered owner of any of the above assets.¹⁸ The Accused has not contested any of the claims by the Registry in respect of previous ownership or the positions he held in relation to these assets.

16. The Registry argues in its Submission¹⁹ that the following factors put them on notice that the Accused may have an ownership interest, other than legal / registered ownership in some or all of (REDACTED), as well as the (REDACTED):

- i. The Accused had previously been the legal owner of (REDACTED),²⁰
- ii. Although the (REDACTED) were, and are valued in the (REDACTED) dollars, it appeared that the Accused had transferred his legal ownership interests therein for no consideration before the date of his application,²¹
- iii. The Accused had transferred his legal ownership interests to close family members, suggesting that those transfers were not made 'at arm's length',²²
- iv. Those family members appeared to have no link to (REDACTED) other than being now their registered owners. In contrast, the

¹⁶ Letter from the Accused to the Registry, (REDACTED).

¹⁷ Defence Request for Review para 13

¹⁸ See Annexes to Registry Submission.

¹⁹ Registry Submission paragraph 21.

²⁰ See Annexes XII, XIII and XVII to Registry Submission.

²¹ See the Deputy Registrar's Decision, Confidential *Ex Parte* Appendix I at paragraph 20. See also Annexes XII through XIV which contain documents supporting the values attributed to the Companies in the Deputy Registrar's Decision.

²² Ibid.

Accused continued (REDACTED) and had ongoing relations with (REDACTED) which were consistent with his retaining an ownership interest therein.²³

The Registry does not address the ownership of (REDACTED) in its Submission. This, however will not affect the decision of the Chamber when considering the issues involved in this case.

4. Legal Issues

17. The issue to be determined by this Chamber is whether the Registry was reasonable in its initial decision to deny the Accused assignment of counsel due to the fact that it has insufficient evidence before it at this stage to determine whether the Accused is partially or wholly indigent. In this Tribunal, a “Judicial review of [the Registry’s decision] is not a rehearing. Nor is it an appeal”.²⁴ The Appeals Chamber elaborated on the standard of judicial review of an administrative decision made by the Registrar. The administrative decision will be quashed if the Registrar has:

- i. failed to comply with the legal requirements of the Directive,
- ii. failed to observe procedural fairness towards the Accused,
- iii. taken into account irrelevant material or failed to take into account relevant material, and
- iv. If he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the “unreasonable” test).²⁵

18. Irrelevant and Relevant Material

The Chamber first turns to whether the Registry, whilst seeking information, incorrectly considered the information it asked for to be relevant. It appears that the Registrar is of the opinion that, in order to assess the present financial

²³ See Footnote 19 in the Registry Submission, where it states that the Accused’s brother, the current registered owner of the (REDACTED) property, works as (REDACTED) and appears to have no role in the company, whereas the Accused appears to have retained title to and dominion over a (REDACTED).

²⁴ *Prosecutor v Kvočka et al*, “Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić”, 7 February 2003, para 13.

²⁵ *Ibid.*

situation of the Accused, not only the documentation regarding the Accused's present situation is relevant, but also evidence regarding recent events which may have had a non-negligible impact on the Accused's present financial situation. The enquiries by the Registrar have produced sufficient indicia to create a reasonable suspicion that the Accused disposed of his assets in such a way that the non-registration of this ownership may not reflect the economic interests he still holds.

19. This Chamber further considers that what is 'relevant' is a matter for the Registry, not the Accused to decide. The process of the Registry investigating whether the Accused should be assigned legal aid or not is an administrative process, performed in order to ensure the right of the Accused to defence counsel but also, to ensure that the funds of the court are not misspent. The process the Registry adopted in this case was, and correctly so, an administrative one, not comparable with a trial procedure, where the prosecution has to prove its case. The Chamber does not concur with the allegation by the Accused that the Registry turned this administrative process into a guessing game or a 'fishing expedition, trolling for irrelevant information'.²⁶ The Accused in the present circumstances incorrectly asserts that it is the 'duty' of the Registrar to investigate the 'relevant' facts. The duty of the Registrar, apart from being instrumental in guaranteeing the fundamental procedural right of counsel in this instance, is to administer Tribunal funds in order that they are not misappropriated, and in order to do this he has correctly followed the guidelines in the Directive.

20. The Chamber specifically pays attention to the issue of the reasonable suspicion of the disposal of legal ownership of assets worth (REDACTED) for no known consideration. Under the circumstances known to the Registry, including the information given by the Accused, in an attempt to "pierce the veil",²⁷ the Registry could consider the material in relation to those transactions 'relevant' for the purposes of assessing the indigency of the Accused. If this information was not sought by the Registry, a situation could result whereby public funds would be misspent, due to a defendant attempting to cunningly shift the burden of proof, and therefore possibly the financial burden of his defence away from himself and onto the Registry. By insisting that the Accused provides the information

²⁶ Accused's Request for Review para 37

requested, the Registry did not seek access to irrelevant material. The Chamber rejects the Accused's argument in paragraph 25 of the Request for Review, insofar as the Accused implies that the burden of proof shifts from himself to the Registrar to provide or find the information needed to make a finding on whether or not the Accused is indigent.

21. Fairness and Legal Requirements of the Directive

In view of the foregoing, and in light of the submissions by the Registry and the Accused, the Chamber finds no unfairness in the procedure. Neither does the Chamber find that the Registry has failed to comply with the legal requirement of Article 21 of the Statute, or Rule 45. A declaration of means was filled out by the Accused, and there was correspondence between the Accused and the Registry, in which the Registry confronted the Accused with information regarding recent ownership of assets and asked for specific information from him.²⁸ The Registry wrote to the Accused stating that 'Where (REDACTED) held financial interests in (REDACTED) and claims to have disposed of those interests he should provide statements which address how his interests were disposed of, when, to whom, and for what consideration. Documentation in support of those statements should also be provided. When this information is received [the Registry] will determine whether it is necessary to re-approach (REDACTED) for further information'.²⁹ The Registry has further indicated that it would be willing to reopen and investigate matters, if they are provided with the information they asked for.³⁰

22. Reasonableness

The Chamber considers that the conclusion the Registry reached is not one no reasonable person could have reached. Given that the Accused has persistently refused to provide the said information, the decision of the Registry is reasonable. There are no clear limits set out in Articles 8 and 10 of the Directive

²⁷ Registry Submission para 23, 24.

²⁸ See Annexes in Registry Submission

²⁹ Letter from the Registry to the Accused dated (REDACTED), and (REDACTED). Some matters also seem unclear. For example, the Accused asserts that 'the seat of (REDACTED) is at (REDACTED), not (REDACTED) as the Registry claims' (Request for Review para 31), thus indicating there is some distance between him and this company, yet in a letter from the Accused to the Registry (REDACTED), the Accused states that 'The street address (REDACTED)', and then goes on to say that 'Mr. and Mrs. (REDACTED) are residing in the same household in a house at the said address. This is the principal place of residence of the Accused and only his spouse and himself habitually reside in that house'

³⁰ Registry Decision last paragraph, Registry Submission para 10.

which would prohibit the Registry from conducting enquiries of a broader nature. The Registry used its powers not at will, but in a reasonable manner.

23. The Trial Chamber finds that the arguments and supporting materials submitted by the parties are sufficient for the Trial Chamber to decide on this issue without a hearing.

For all of the above reasons,

Disposition

This Chamber denies the Accused's request for an oral hearing, and rejects the Accused's Request for Review of the Deputy Registrar's Decision.

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

Dated this 21st day of September 2005
At The Hague, The Netherlands

[Seal of the Tribunal]

Judge Liu Daqun
Presiding Judge, Trial Chamber 1