



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-04-79-PT  
Date: 24 April 2007  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Christine Van Den Wyngaert  
Judge Krister Thelin

**Registrar:** Mr. Hans Holthuis

**Order of:** 24 April 2007

**PROSECUTOR**

**v.**

**MİĆO STANIŠIĆ**

**DECISION ON REVIEW OF REGISTRAR'S DECISION RE  
CO-COUNSEL FOR MİĆO STANIŠIĆ**

**The Office of the Prosecutor:**

Mr Alan Tieger  
Ms Anna Richterova

**Counsel for the Accused:**

Mr Stevo Bezbradica

## 1. Background

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seized of "Defence Counsel's Motion for Review of the Registrar's Refusal to Assign Mr Slobodan Cvijetić as Co-Counsel" ("Motion") filed on 18 August 2006 by Stevo Bezbradica, Counsel for the Accused Mićo Stanišić ("Accused").

2. In a letter of 30 June 2006 to the Office of Legal Aid and Detention Matters ("OLAD") of the Registry of the Tribunal ("June 2006 letter"), Counsel for the Accused requested the assignment of Mr. Cvijetić as legal consultant and co-counsel.<sup>1</sup> On 12 July 2006 the Deputy Head of OLAD granted the request for the assignment of Mr. Cvijetić as legal consultant.<sup>2</sup> Subsequently in a communication of 6 August 2006 Counsel for the Accused confirmed the request for the assignment of Mr. Cvijetić as co-counsel.<sup>3</sup> In a letter of 11 August 2006 the Head of OLAD denied this request ("Impugned Decision"). The Head of OLAD stated that since the Registry understood that Mr. Cvijetić does not speak either of the Tribunal's two working languages, the question whether he can be assigned as co-counsel is governed by Article 16(D) of the Directive on the Assignment of Defence Counsel ("Directive"). The Head of OLAD concluded that the Registry was not satisfied that it would be justified to waive the language requirement pursuant to Article 16(D) of the Directive.<sup>4</sup> In the Motion the Accused submits that the Impugned Decision should be quashed on the grounds that the Registrar failed to comply with the legal requirements of the Directive, and procedural fairness has not been considered for the benefit of the Accused.<sup>5</sup> The Accused also submitted that the interests of justice test has not been applied in a proper way by the Registry and that Mr. Cvijetić should be assigned as co-counsel, because he can provide suitable assistance for the Accused's lead counsel.<sup>6</sup> On 24 August 2006 Counsel for the Accused filed the "Supplement to Defence Counsel's Motion for Review of the Registrar's Refusal to Assign Mr. Slobodan Cvijetić as Co-Counsel", which enclosed a letter from the Accused dated 16 August 2006 in which he strongly supported the assignment of Mr. Cvijetić as co-counsel. On 5 September 2006, the Registry filed its "Registry Rule 33(B) Submission on the Defence Motion for Review of the Registry Decision on the Assignment of Co-Counsel" ("Registry Submission") asserting that the Impugned Decision was reasonable and justified and therefore should be upheld. In its Submission,

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<sup>1</sup> Motion, Annex 1.

<sup>2</sup> Motion, Annex 2.

<sup>3</sup> Motion, Annex 3.

<sup>4</sup> Motion, Annex 4.

<sup>5</sup> Motion, para. 7.

<sup>6</sup> Motion, para. 8.

the Registry submitted that it had complied with the standard for proper administrative decision-making in denying the request for the assignment of Mr Cvijetić as co-counsel.<sup>7</sup>

## 2. Assignment of counsel

3. By Article 21(4)(d) of the Statute of the Tribunal (“Statute”) an Accused has the right to “defend himself in person or through legal assistance of his own choosing”. Necessarily, the right of an Accused to choose his or her counsel is limited to counsel qualified to appear before the Tribunal. Rule 44 of the Rules of Procedure and Evidence (“Rules”) sets out the required qualifications. They are extensive and deal in particular with the legal qualification, good standing and professional conduct of the counsel. There is a specific requirement that counsel has written and oral proficiency in one of the two working languages of the Tribunal, although it is also provided that, where the Registrar deems it to be in the interests of justice to waive this requirement, he may do so. In such an exceptional case, however, by Rule 44(D) the Registrar may impose conditions, *inter alia* regarding the costs of translation and interpretation, and requiring an undertaking from counsel not to seek any extension of time by virtue of his lack of proficiency in one of the working languages of the Tribunal.

4. The present is not such a case, however, as the Accused does not have the means to remunerate counsel of his choice. Instead, he sought the assignment of a counsel by the Registrar pursuant to the legal aid scheme of the Tribunal. This is administered pursuant to Rule 45 and the Directive on Assignment of Defence Counsel (“Directive”): see Rules 44(C) and 45(A). For this purpose the Registrar maintains a list of counsel, who possess additional specific competence related to the jurisdiction of the Tribunal, have at least 7 years relevant experience, and have indicated their availability and willingness to be assigned to represent persons as counsel or co-counsel. Pursuant to Rule 45(A) and Article 16(C) of the Directive, a co-counsel may also be assigned at the request of lead counsel and where this is in the interests of justice.

## 3. Legal Basis for Review

5. By Rule 44(B) an Accused may seek a review by the President of a Decision of the Registrar to refuse to admit counsel of an accused’s choice who has been retained by the Accused, but who does not meet the language requirement. In the case of the assignment of counsel to an Accused under the legal aid scheme (Rule 45), however, there is no provision for such a review by the President.

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<sup>7</sup> Submission, para. 13.

6. As the jurisprudence of the Tribunal has recognised, however, it does not follow that the Registrar's decision to refuse a requested assignment of co-counsel is altogether final. In a number of decisions in this Tribunal it has been recognised that it is inherent in the judicial function of the Tribunal that a decision of the Registrar which affects, or is likely to affect, the right of an Accused to a fair and expeditious trial or the integrity of the proceedings, may as a jurisdictional matter be reviewed by the Trial Chamber before which the trial is to be held, or is being held.<sup>8</sup>

7. It has been made clear, that this jurisdiction is limited to cases which meet those jurisdictional conditions. Even then, it is not the role of the Trial Chamber to intervene in every complaint, recognising that the Registrar has, by his administrative decision-making, the primary responsibility in the matter of the assignment of counsel and co-counsel.<sup>9</sup> Indeed in the *Knežević* case, it was observed that a Chamber should only exercise its power relating to the assignment of counsel "in exceptional cases".<sup>10</sup>

8. In a case where a jurisdictional basis exists for a Trial Chamber to entertain a motion to review the refusal of the Registrar to assign a requested co-counsel, guidance as to the approach to a review of the merits by the Trial Chamber and the standard to be applied in determining whether to interfere with a decision of the Registrar may be found in the Appeals Chamber's decision in *Kvočka et al* where it was said:

"The administrative decision will be quashed if the Registrar has failed to comply with the legal requirements of the Directive. This issue may in the particular case involve a consideration of the proper interpretation of the Directive. The administrative decision will also be quashed if the Registrar has failed to observe any basic rules of natural justice or 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 (the "unreasonableness" test). These issues may in the particular case involve, at least in part, a consideration of the sufficiency of the material before the Registrar, but (in the absence of unreasonableness) there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled."<sup>11</sup>

9. It is of relevance to the scope of the Chamber's judicial review that the Accused's preference as to co-counsel is to be taken into consideration. In this case, as has been indicated, the Accused has not the financial means to retain his own counsel. Even so, the counsel he has selected to conduct his defence as lead counsel under the legal aid scheme at the Tribunal has been assigned

<sup>8</sup> *Prosecutor v. Mile Mrkšić et al.*, Case No.: IT-95-13/1-PT, Decision on Appointment of Co-Counsel for Mile Mrkšić, 7 October 2005 ("Mrkšić Decision"), para. 7; *Prosecutor v. Enver Hadžihasanović et al.*, Case No.: IT-01-47-PT, Decision on Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002 ("*Hadžihasanović* Decision"), paras 23-24. Note also Article 13(B) of the Directive which appears, however, to be directed to the case of a refusal to assign any counsel.

<sup>9</sup> *Mrkšić* Decision, para. 8; *Prosecutor v. Milan Martić*, Case No.: IT-95-11-PT, Decision on Appeal against Decision of Registry, 2 August 2002, p. 6; *Hadžihasanović* Decision, paras 23-24.

<sup>10</sup> *Mrkšić* Decision para. 8; *Prosecutor v. Duško Knežević*, Case No.: IT-95-4-PT and IT-95-8/1-PT, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002, p. 4.

to him. In this respect, the Registrar took into account and, indeed, has fully respected, the expressed preference of the Accused by assigning Mr Bezbradica as counsel.<sup>12</sup>

10. In the *Šljivančanin* decision it was said by the President of the Tribunal:

“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 be quickly rejected.

20. This case concerns the 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. I fully concur in that view.”<sup>13</sup>

Thus, while it is not a matter of legal right, well founded notions of fairness are reflected in the view expressed in the *Šljivančanin* decision, and also in the earlier *Martić* Trial Chamber decision.<sup>14</sup> It is to be noted that this concern for fairness appears to be in general keeping with the approach of the European Court of Human Rights, in respect of Article 6(3)(c) of the European Convention of Human Rights, as expressed in *Croissant v Germany*, where it was said

“It is true that Article 6(3)(c) entitles ‘everyone charged with a criminal offence’ to be defended by counsel of his own choosing. Nevertheless, and notwithstanding the importance of a relationship of confidence between the lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the Accused be defended by counsel appointed by them. When appointing defence counsel the National Courts must certainly have regard to the defendant’s wishes; indeed, German Law contemplates such course. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice”.<sup>15</sup>

11. It is to be emphasised, however, that the issue in this review of the Registrar’s decision concerns the assignment of co-counsel. Under the terms of Article 16 of the Directive, it is the counsel, rather than the Accused, who seeks the appointment and assignment of a co-counsel. There is a different emphasis in the case of the assignment of co-counsel. The primary focus is on the needs of the Accused’s lead counsel for suitable assistance by counsel chosen by the lead counsel, rather than on the preferences of the Accused. Indeed, it has been held by the Appeals Chamber in *Blagojević* that lead counsel may seek the appointment of a nominated co-counsel without the Accused’s agreement to the choice of co-counsel. It was said by the Appeals Chamber:

<sup>11</sup> *Prosecutor v Miroslav Kvočka et al*, Case No.: IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 (“*Kvočka* Decision”), para. 13.

<sup>12</sup> *Prosecutor v. Mićo Stanišić*, Case No.: IT-04-79-PT, Decision of the Deputy Registrar, 5 May 2006. Cf. *Mrkšić* Decision, para. 10.

<sup>13</sup> *Prosecutor v Veselin Šljivančanin*, Case No.: IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003, paras 19-20 (footnotes omitted).

<sup>14</sup> *Prosecutor v Milan Martić*, Case No.: IT-95-11-PT, Decision on Appeal against Decision of Registry, 2 August 2002, pp 5-6.

<sup>15</sup> *Croissant v Germany*, EUR.CT.H.R. Judgement, 25 September 1992, Series A No. 237-B, para. 29.

“As already stated, the appointment of co-counsel is a decision to be made by Counsel pursuant to Article 16 of the Directive. In this respect, provided the Registrar is satisfied that the nominated person meets the requirements of Article 14 of the Directive, the propriety of Counsel seeking the appointment of a particular person does not turn upon the awareness of an Accused of the likelihood of such an appointment or upon the agreement of an Accused to that appointment.”

It was further said

“Further, while the selection of Co-counsel is a matter which falls to lead Counsel under Article 16 of the Directive, the selection of lead Counsel is a matter which falls to the Registrar under Article 14 of the Directive. The Registrar may take into account an Accused’s preferences, as he did in the appointment of lead counsel in this case, but it is within the Registrar’s discretion to override that preference if he considers that it is in the interests of justice to do so.”<sup>16</sup>

12. The apparent effect of these decisions is to confirm that the assignment of co-counsel is not a matter primarily involving the legal right of the Accused to be represented by counsel of his own choosing. Nevertheless, as they also indicate, considerations of fairness emphasise the desirability of the Registrar also taking into account any preference expressed by the Accused as to the co-counsel to be assigned. In a case such as the present, in which it appears that the lead counsel and the Accused each favour the assignment of Mr Cvijetić, the Registrar would normally be expected to take into account the Accused’s preference and would no doubt give effect to it unless, in the view of the Registrar, there was good reason for not doing so. This statement of the position is subject, however, to a further material consideration in a case in which, as in this case, the preferred co-counsel is not qualified to act as counsel before the Tribunal.<sup>17</sup>

#### 4. Language qualification

13. In the present case, the assignment of co-counsel requested by Mr Bezbradica and supported by the Accused is also most materially affected by the language qualification requirement of Rule 44(B) which is incorporated into the legal aid scheme by Rule 45(B). This is also reflected in Article 16(D) of the Directive. It is open to the Registrar under Rule 44(B) to admit a counsel who does not speak either of the two working languages of the Tribunal, but who speaks the native language of the Accused *and* where the interests of justice so *demand* (emphases added). Necessarily, the interests of justice must be viewed in light of the particular case.<sup>18</sup>

14. In this case, Mr Cvijetić is not proficient in either of the working languages of the Tribunal. He is proficient in the Accused’s native language, as also is the assigned counsel, Mr Bezbradica. Thus, this is not a case in which, as at times has been the case, the assignment of a co-counsel who

<sup>16</sup> *Prosecutor v Vidoje Blagojević*, Case No.: IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, paras 21 and 22. This decision was made before the July 2004 amendments to Rules 44 and 45 but those amendments do not appear to affect these observations of the Appeals Chamber.

<sup>17</sup> *Mrkšić* Decision, para. 15.

<sup>18</sup> *Mrkšić* Decision, para. 16.

speaks the native language of the Accused has the desirable advantage of facilitating adequate communication between the Accused and lead counsel.<sup>19</sup>

## 5. Discussion of merits

15. In support of the Motion, the Accused submits that Mr. Cvijetić has previous experience before the Tribunal, he is familiar with cases connected with the instant case and he has excellent advocacy skills and a detailed knowledge of the Statute and the Rules.<sup>20</sup> In the Impugned Decision the Head of OLAD states that the Registry does not consider that Mr. Cvijetić's advocacy skills constitute unique expertise and skills that are of significant importance to the Defence case,<sup>21</sup> and that the relevance of Mr. Cvijetić's prior experience at the Tribunal is reduced by his lack of trial experience.<sup>22</sup> In addition, the Registry submits that Mr. Cvijetić's knowledge of the Statute and the Rules is of less value than would be the case if the Accused were represented by a less experienced lead counsel.<sup>23</sup> The Chamber is aware that Mr. Cvijetić worked in *Prosecutor v. Miroslav Deronjić* as lead counsel.<sup>24</sup> Although the experience of Mr. Cvijetić in a sentencing case could be of some general use to the Defence of the Accused, it does not give him any specific advantage with respect to trial proceedings in this Tribunal for which he lacks experience. Also, the Chamber is persuaded that the Accused has not shown why Mr. Cvijetić's advocacy skills are of significant importance to the Defence case. Although the present case has certain broadly defined factual similarities with the *Deronjić* case,<sup>25</sup> the Trial Chamber does not accept that the considerations of the Accused in this respect are of major importance and it considers that it was well open to the Registry to conclude that these considerations do not justify an exception to the language qualification requirement.

16. The Accused submits that a further reason for the assignment of Mr. Cvijetić to the Accused is the expressed wish of the Accused that Mr. Cvijetić should be assigned on the grounds that there is a relationship of trust and confidence between the two of them,<sup>26</sup> and that the expressed wish of the Accused was not considered by the Registry in the Impugned Decision.<sup>27</sup> In the Registry Submission, the Registry states that it is not in a position to assess whether the relationship of trust and confidence exists or what weight should be given to it and that to the extent that the Accused has a preference for the assignment of Mr. Cvijetić, that preference cannot alone justify his

<sup>19</sup> See *Mrkšić* Decision, para. 17.

<sup>20</sup> June 2006 letter; Motion, para. 9.

<sup>21</sup> Cf. Registry Submission, para. 25.

<sup>22</sup> Cf. Registry Submission, para. 24.

<sup>23</sup> Cf. Registry Submission, para. 24.

<sup>24</sup> Motion, Annex 1.

<sup>25</sup> Both concern events in Republika Srpska in 1992. See *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Judgement, para. 2.

<sup>26</sup> Motion, para. 11.

<sup>27</sup> Motion, para. 11.

assignment because the Accused does not have a legal right to the choice of co-counsel.<sup>28</sup> The Trial Chamber concurs with the Registrar. For the reasons given in paragraph 11 above, lead counsel may seek the appointment of a nominated co-counsel even without the Accused's agreement to the choice of co-counsel. A relationship of trust and confidence is to be expected between every accused and his or her co-counsel. Therefore the existence of such a relationship already between the Accused and Mr. Cvijetić should be accorded little weight. The Trial Chamber is therefore of the view that neither the relationship of trust and confidence between them nor the expressed wish of the Accused are sufficient to justify a waiver of the language qualification requirement.

17. The Accused submits that the involvement of Mr. Cvijetić in the case is a further factor which counts in favour of his assignment as co-counsel. Specifically, Mr. Cvijetić is already involved in the case as a defence legal consultant; he has communicated with the Accused almost every day and he has participated in the preparation of his defence; and he is aware of all prospective defence and prosecution witnesses and would therefore be of great assistance to Counsel.<sup>29</sup> The Registry on the other hand submits that acceptance of the presence of Mr. Cvijetić on the Defence Team as a justification for his assignment as co-counsel would promote abuse of the exception set forth in Article 16(D) of the Directive. The Registry also observes that because Mr. Cvijetić will continue to act as a legal consultant on the Defence Team, Counsel for the Accused will not be deprived of the knowledge that Mr. Cvijetić has gained through that assignment.<sup>30</sup> The Trial Chamber accepts, for the reasons given by the Registry, that the consultant role of Mr. Cvijetić in the case should not be regarded as determinative in deciding whether his assignment as co-counsel is justified under Article 16(D) of the Directive. Clearly, if involvement in some capacity such as a consultant in a Defence Team were to be regarded as a significant consideration justifying assignment as a co-counsel under Article 16(D), the exceptional nature of the waiver of the language qualification requirement would be undermined. Moreover, no significant weight should be given to the existing contribution of Mr. Cvijetić to the defence of the Accused, since this contribution may continue if he is not assigned as co-counsel. Accordingly, in the view of the Chamber, it was reasonably open to the Registrar to conclude that the involvement of Mr. Cvijetić as a consultant in the case does not justify an exception being made to the language qualification requirement.

18. On this reasoning the Trial Chamber concludes that the Registrar has not failed to comply with the legal requirements of the Directive, nor has he failed to observe basic rules of natural justice or to act with procedural fairness towards the Accused. Further, in the Chamber's view, the

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<sup>28</sup> Registry Submission, para. 27.

<sup>29</sup> Motion, para. 10.

<sup>30</sup> Registry Submission, para. 26.



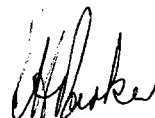
Registrar, in reaching his decision, has not taken into account irrelevant material or failed to take into account relevant material, nor has he reached a conclusion which is unreasonable, i.e. the application of the test set forth in the *Kvočka* Decision.<sup>31</sup> Thus, Mr. Stanišić has not established any basis on which the Chamber would be justified in finding that the Impugned Decision should be quashed.

6. Disposition

19. For these reasons the Chamber dismisses the Motion.

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

Dated this 24th day of April 2007,  
At The Hague,  
The Netherlands



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**Kevin Parker**  
**Presiding Judge**

[Seal of the Tribunal]

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<sup>31</sup> *Kvočka* Decision, para. 13.