



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 No.: IT-05-88/2-PT

Date: 20 July 2007

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost, Pre-Trial Judge

Registrar: Mr. Hans Holthuis

Decision of: 20 July 2007

PROSECUTOR
v.
ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON MOTION BY THE ACCUSED FOR REVIEW OF THE
REGISTRAR'S DECISION OF 29 JUNE 2007**

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

I. INTRODUCTION

1. This Trial Chamber 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 (“Tribunal”) is seised of the “Submission by the Accused for Assistance of the Trial Chamber on Appointment of Permanent Counsel” filed by Zdravko Tolimir (“Accused”) on 13 July 2007 and dated 6 July 2007 (“Motion”).
2. The Accused was transferred into the custody of the Tribunal on 1 June 2007. On 14 June 2007, the Accused requested legal aid and the assignment of Mr. Nebojša Mrkić (“Mr. Mrkić”) as Lead Counsel.
3. The Registry denied the request for the assignment of Mr. Mrkić as Lead Counsel in a letter dated 28 July 2007 (“Registry Decision”), on the grounds that Mr. Mrkić did not fulfil the requirements set out in Rule 45 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) and consequently did not qualify for assignment as Lead Counsel. Specifically, Mr. Mrkić had not satisfied the Registry that he is proficient in one of the two working languages of the Tribunal, English or French. In addition, the Registry expressed its concerns that a conflict of interest could arise.

II. SUBMISSIONS BY THE PARTIES

4. In the Motion, the Accused requests the Trial Chamber to review the Registry Decision, denying the assignment of Mr. Mrkić as Lead Counsel for the Accused, arguing that it would be in “the interest of justice in keeping with the Rules of Procedure and Evidence, Rule 44(b)” to have Mr. Mrkić assigned.
5. On 18 July 2007, the “Prosecution’s Response to Submission by the Accused for Assistance of the Trial Chamber on Appointment of Permanent Counsel” (“Response”) was filed by the Prosecution. The Prosecution submits that it “does not dispute that Tolimir should be able to choose Counsel to represent him, within the guidelines set forth by OLAD; however, his proposed choice of Mr. Nebojša Mrkić as his Lead Counsel creates a potential conflict of interest and is not in the interests of justice.”¹ The Prosecution argues that since Mr. Mrkić served as Assistant Counsel for Accused Beara in the case of *Popović et al.*² until 13 June 2007, numerous potential conflicts of interests would arise from an assignment of Mr. Mrkić as Lead Counsel for the Accused.³ The

¹ Response, para. 1.

² IT-05-88-T.

³ Response, para. 3.

Prosecution further refers the Trial Chamber to two recent decision by the Appeals Chamber in the *Gotovina* case, in which it was held that an Accused's consent does not conclusively remove a conflict of interest.⁴

6. On 18 July 2007, the "Registry Submission Pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding the Accused Tolimir's 13 July 2007 Submission on Appointment of Permanent Counsel" was filed by the Registry ("Registry Submission"), with confidential and *ex parte* annexes I to III and confidential annex IV. The Registry submits that the Motion should be denied on the grounds that it has complied with the legal requirements of the Directive on Assignment of Counsel ("Directive") and relevant provisions of the Rules⁵, it has observed the basic rules of natural justice and acted with procedural fairness towards the Accused and Mr. Mrkić⁶ and it has considered only relevant material before rendering the Registry Decision.⁷

III. APPLICABLE LAW

7. While the Registrar has the primary responsibility in determining matters concerning the assignment of counsel, a Registrar's decision to refuse a requested assignment is not exempt from judicial scrutiny by the Chamber.

8. While neither the Rules nor the Directive explicitly provide for a Chamber's competence to do so, the jurisprudence of the Tribunal has nevertheless consistently held that it is inherent in the judicial function of the Tribunal that a decision 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 be reviewed by the Trial Chamber before which the trial is to be held, or is being held.⁸ In the *Hadžihasanović* Decision it was held that the basis for intervention by the Trial Chamber in decisions of the Registry "rests with its power and duty to guarantee a fair trial and the proper administration of justice, as set forth in the Statute of the International Tribunal."⁹ In the same Decision the Trial Chamber also held that "once a Chamber is seized of a case, any measure or request that may impact on the conduct of the

⁴ Response, para. 4, referring to *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal Against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct, 4 May 2007, and *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR73.2, Decision on Ivan Čermak's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 29 June 2007.

⁵ Registry Submission, paras. 24–30.

⁶ Registry Submission, para. 31.

⁷ Registry Submission, para. 32.

⁸ *Prosecutor v. Hadžihasanović and Kubura*, 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, paras. 23–24 ("*Hadžihasanović* Decision").

⁹ *Ibid.*, para. 14.

case is within its power of regulation and control”¹⁰ and that “the issue of qualification, appointment and assignment of counsel, when raised as a matter of procedural fairness and proper administration of justice, is open to judicial scrutiny.”¹¹

9. Because the Registry maintains the primary responsibility over matters dealing with the assignment of counsel and co-counsel, a Chamber will only intervene to conduct “[j]udicial review of an administrative decision made by the Registrar in relation to legal aid [which] 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.”¹²

10. Henceforth, the Appeals Chamber in the *Žigić* Decision held that an impediment to the fairness of trial has come to include situations where 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 established 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. These standards for judicial review of administrative decisions rest on general principles of law derived from the principal legal systems.¹³

11. An accused person before the Tribunal bears the burden of proving to the Chamber conducting the review that an error of the nature described above has occurred, and that such error has significantly affected the Registrar’s decision to his detriment. In such instances, the Registrar’s decision may be quashed and the Chamber may, where appropriate, rule on the matter or refer the matter back to the Registrar for reconsideration.¹⁴ “It is clear [...] that the power of the Chamber to substitute its own decision for that of the Registrar is limited.”¹⁵

¹⁰ *Ibid.*, para. 17.

¹¹ *Ibid.*, para. 21.

¹² *Prosecutor v. 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 (“*Žigić* Decision”), para. 13; referred to in *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, Decision on Defence Request for Review of the Registrar’s Decision on Partial Indigence of Mile Mrkšić, 9 March 2004, p. 3; *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, Decision on Defence Request for Review of the Registrar’s Decision on the Level of the Case, 3 March 2005, p. 3; *see also Prosecutor v. 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, where it was noted that the Trial Chamber should only exercise its power relating to the assignment of counsel “in exceptional cases”.

¹³ *Žigić* Decision., para. 13.

¹⁴ *Ibid.*, para. 14.

¹⁵ *Ibid.*

12. The Trial Chamber considers that in the present case the issue of qualification and assignment of Lead Counsel is open to this Chamber's scrutiny as to (1) the compliance with the legal requirements of the Directive on Assignment of Counsel; (2) observance of basic rules of natural justice and procedural fairness; (3) consideration of relevant material and non-consideration of irrelevant material; and (4) reasonableness of the conclusions reached.

IV. DISCUSSION

13. The right of an accused to "defend himself in person or through legal assistance of his own choosing" is enshrined in Article 21(4)(d) of the Statute of the Tribunal ("Statute"). However, this right is necessarily subject to a number of limitations, especially when an accused is provided with legal aid and the Tribunal pays for his or her defence.¹⁶ The assignment of defence counsel under the legal aid system is governed both by the Rules and the Directive. Counsel who "fulfil all the requirements of Rule 44, although the language requirement of Rule 44(A)(ii) may be waived by the Registrar as provided for in the Directive"¹⁷ as well as a number of Rule 44(B) criteria specific to counsel assigned under the legal aid scheme,¹⁸ are included on a list, maintained by the Registrar, of counsel qualified to represent accused persons who lack the means to remunerate counsel ("Rule 45 List").

14. With regard to the language requirement for counsel under the legal aid scheme, Article 14(A)(ii) of the Directive further codifies the procedure for assignment and provides that

[a]ny person may be assigned as counsel to a suspect or accused if the Registrar is satisfied that he is admitted to the list of counsel envisaged in Rule 45(B) of the Rules. A person is eligible for admission to the list if he has written and oral proficiency in one of the two working languages of the Tribunal[.]

Article 14(C) nonetheless provides that

[a] person who does not have written and oral proficiency in either of the two working languages of the Tribunal but who speaks a language spoken in the territory over which the Tribunal has jurisdiction, and who fulfils all other requirements set out in Article 14(A), may be admitted to the

¹⁶ Cf. *Prosecutor v. Šljivančanin*, Case No. IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003, paras. 19–20; *Prosecutor v. Blagojević and Jokić*, 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, para. 22.

¹⁷ Rule 44(A) sets forth a number of requirements which any counsel, whether engaged by a suspect or an accused or assigned by the Registrar under the legal aid scheme, is required to meet to represent any suspect or accused before the Tribunal. These requirements include, *inter alia*, that the counsel is admitted to the practice of law in a State, or is a university professor of law, is a member in good standing of an association of counsel practicing at the Tribunal recognised by the Registrar and has not been found guilty in relevant criminal proceedings.

¹⁸ Under Rule 45(B), counsel must also "possess established competence in criminal law and/or international criminal law/international humanitarian law/international human rights law; possess at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings; and have indicated their availability and willingness to be assigned by the Tribunal to any person detained under the authority of the Tribunal lacking the means to remunerate counsel, under the terms set out in the Directive."

list envisaged in Rule 45(B) of the Rules, if the Registrar deems it justified. *Such person can be assigned only as co-counsel in accordance with Article 16(D).* (emphasis added)

15. Rule 45(B)(i) read in conjunction with Article 14(A) and 14(C) of the Directive allow the Registrar, at the request of lead counsel and where interests of justice require, to assign a co-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. These rules do not allow the Registry to apply this exception with regard to the assignment of Lead Counsel.

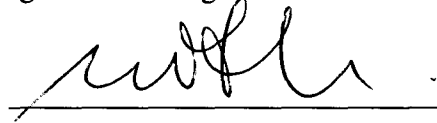
16. In light of the foregoing the Registry has complied with the Directive and the relevant Rules in denying the request for the assignment of Mr. Mrkić as Lead Counsel on the grounds that he does not meet the requirements set forth in Rule 45 in that he has not satisfied the Registry that he is proficient in either of the two working languages of the Tribunal. Moreover Article 14(C) of the Directive only permits an exception to the requirements of Rule 45(B)(i) in the case of co-counsel and therefore this exception does not apply to the request for the assignment of Mr. Mrkić as Lead Counsel.

17. The Trial Chamber finds that the Accused has failed to demonstrated any error on the part of the Registry in reaching a decision on the request, and therefore sees no reason to intervene.

V. DISPOSITION

For the forgoing reasons the Trial Chamber, **DENIES** the Motion.

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



Carmel Agius
Presiding

Dated this twentieth day of July 2007
At The Hague
The Netherlands

[SEAL OF THE TRIBUNAL]