

SCSL - 2003 - 06 - PT
(1489-1494)



SPECIAL COURT FOR SIERRA LEONE

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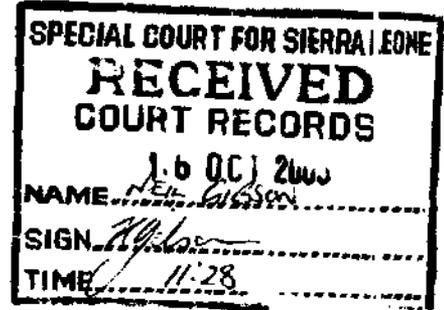
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THE TRIAL CHAMBER

Before: Judge Bankole Thompson (Presiding Judge)
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Robin Vincent

Date: 15th day of October 2003



The Prosecutor against

Alex Tamba Brima
(Case No.SCSL-2003-06-PT)

**DECISION ON THE APPLICATION FOR EXTENSION OF TIME FOR LEAVE TO
BE GRANTED TO FILE DEFENCE MOTION TO APPEAL AGAINST THE
DECISION REFUSING AN APPLICATION FOR THE ISSUE OF THE WRIT OF
HABEAS CORPUS**

Office of the Prosecutor:
Luc Côté, Chief of Prosecutions
Robert Petit, Senior Trial Counsel
Paul Flynn, Trial Counsel

Defence Counsel:
Terence Michael Terry

THE SPECIAL COURT FOR SIERRA LEONE (“the Special Court”),

SITTING as the Trial Chamber (hereinafter “the Chamber”), composed of Judge Bankole Thompson, Presiding Judge, Judge Pierre Boutet and Judge Benjamin Mutanga Itoe;

CONSIDERING the Ruling on the Application for the issue of a Writ of *Habeas Corpus* filed by the Applicant, rendered on the 22nd day of July 2003 (“the Ruling”), and served on the parties on the 4th day of September 2003;

CONSIDERING that a request by the Defence for leave to appeal this decision was due within three days of service, pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (“the Rules”), namely on the 8th day of September 2003;

BEING SEIZED of the Defence Application for Extension of Time for Leave to be Granted to the Accused the Applicant herein Tamba Alex Brima to File Defence Motion to Appeal Against the Decision and Consequential Orders of the Rt Honourable Judge Benjamin Mutanga Itoe dated 22nd July 2003 Refusing an Application for the Issue of the Writ of *Habeas Corpus*, (“the Defence Request”), filed on the 16th day of September 2003;

CONSIDERING the Prosecution Response thereto filed on the 24th day of September 2003, the Prosecution Corrigendum thereto, filed on the 26th day of September 2003, and the Applicant’s Reply thereto, filed on the 26th day of September 2003;

CONSIDERING ALSO the referral of “the Defence Request” By Judge King as Pre-Hearing Judge of the Appeals Chamber on the 1st day of October 2003 to the Trial Chamber for consideration pursuant to Rule 73(B) of “the Rules”;

NOTING THE SUBMISSIONS OF THE PARTIES***The Defence Request***

1. Counsel for the Accused submits that he was unwell during the period of the 4th day of September to the 8th of September when the request seeking leave to appeal “the Ruling” was due, and therefore that he was unable to submit the application.
2. Defence Counsel relies upon three attachments to show that he was unwell. First, a letter from Dr Walter Renner of 8th Pultney Street, Freetown, dated 15th September 2003, stating that he has been informed that the treatment will be prolonged for a few weeks. Secondly an affidavit from Ayo Max-Dixon, Managing Clerk in the office of the defence counsel, dated 16th September 2003, stating that Mr. Terry was abroad undergoing medical treatment on 4th September. Third, a letter from Dr Roland Doumith of the American Hospital in Paris, undated, stating that he examined Mr Terry in early September and on

15th September. Based upon this, defence counsel is seeking an extension of time for leave to appeal "the Ruling".

3. Furthermore the Accused submits that he has good grounds for appeal of "the Ruling" which he intends to submit in the event that extension of time for leave to appeal is granted.

The Prosecution Response

4. The Prosecution submits that the Accused has failed to show "good cause" for an extension of time. It contends that the ill health argument is not adequately supported by the contents of the letters attached to "the Defence Request", for there is no evidence to indicate that counsel could not work during the period in question.

5. It is submitted that Defence Counsel was present at the hearing of the Trial Chamber when "the Ruling" was delivered orally, and that Counsel was therefore given adequate time to prepare a draft of grounds for appeal.

6. The Prosecution presumes that Defence Counsel has a capable and qualified associate Counsel or junior Counsel who could have prepared a draft application for leave to appeal which lead Counsel could have approved and submitted. If no such person were available then Defence Counsel should have availed himself of the services of the Defence Office. If no such junior Counsel could assist and ill health stopped lead Counsel from fulfilling his mandate, the Prosecution suggest that Defence Counsel should withdraw from the case.

7. Further, it is noted that Defence Counsel have failed to comply with deadlines on other occasions, again on grounds of illness.

8. The Prosecution alleges that all the medical documents establish is that Defence Counsel could be unwell indefinitely. In this way the Prosecution suggest that Counsel for the Accused is indirectly requesting a suspension of proceedings, for proceedings may be left open until the Doctor sees fit to allow Counsel to resume his duties. This would conflict with the terms of the Order for Legal Assistance of the 9th day of March 2003 by failing to comply with Rule 45(C) of "the Rules" requiring Counsel to be available on a full time basis for the conduct of the case. Counsel for the Prosecution submits that the integrity of "the Rules" and the interest in timely continuance of proceedings demand that "the Rules" be complied with, and that in filing this "Request" Counsel acknowledges that he is unfit to fulfil his duties, as laid out in "the Rules", to his client.

The Defence Reply

9. Defence Counsel replies that the formal notice of service of "the Ruling" given on the 4th day of September 2003 was only served at his Chambers and not personally on himself in his absence.

10. Observing that Counsel for the Prosecution is not competent to discuss medical matters, Defence Counsel avers that his colleague lacks appreciation of a fundamental principle of practice at the Bar not to look behind a medical certificate without evidence of good cause, which is not demonstrated in the instant case. Counsel for the Accused asserts that the certificates do indeed demonstrate Counsel's state of health, but that the relative weight accorded to these certificates should be a matter left for the Judges to decide.

11. Counsel for the Accused objects that it is misplaced of the Prosecution to suggest that the medical certificates establish that he could be unfit indefinitely. The allegation that Counsel is "chronically ill" is contested as insupportable medically. Counsel for the Accused challenges the Prosecution's suggestion that in granting the application "the Special Court" would leave proceedings open ended and that the application was itself an indirect request for a suspension of proceedings, on the grounds that the Defence is not making such a request.

12. The Defence submits that it is irrelevant whether or not Counsel was present at the oral decision of the 22nd day of July 2003.

13. On the matter of the other requests for extension of time previously filed by the Defence in the course of the proceedings, the Defence proposes that this will be addressed on the proper occasion before the Appeals Chamber, but that the issue does not arise for the purposes of this application.

14. As regards the appointment of Co-Counsel, the Defence observes that the relevant contract with the Defence Office of "the Special Court" has still to be concluded, as there is some question as to the appropriate funds to be allocated for the position of Co-Counsel.

15. Lastly, Counsel for the Accused remarks that it is not the place of Counsel for the Prosecution to advise Counsel as to whether or when he should withdraw from the case, and that this is a matter for Defence Counsel himself to consider.

AFTER HAVING DELIBERATED AS FOLLOWS:

16. "The Rules" do not specify a test that should be applied when considering the granting of extensions of time. Nevertheless, jurisprudence from the Special Court has



already indicated guidance on this matter. In *Prosecutor against Kallon*, SCSL-2003-07¹, the Trial Chamber noted that extensions of time should only be granted upon the showing of “exceptional circumstances or good cause.” Although the present case involves an extension of time for leave to appeal rather than extension of time to file reply, the test seems to offer appropriate and helpful guidance. The Chamber will use this test in order to rule on the current “Request”.

17. The Chamber notes that in the above case, the Trial Chamber held that “exceptional circumstances may exist when the circumstances rest outside of the parties’ power or control”. This gives helpful direction on the way in which the test should be interpreted, and will be considered in assessing whether or not “the Request” fulfils the test.

18. Upon careful consideration of Defence Counsel’s access to communication of the written decision of the 4th day of September 2003, the Chamber notes that Counsel for the Accused was located in Paris and it seems that there were adequate means of communication for him to file this present leave for extension of time on the 16th day of September 2003. Thus Counsel should have been able, by some means, to receive formal notice of the written decision on the 4th day of September 2003 when issued.

19. Indeed, on the question of the date upon which Counsel received notice of the written decision, the Chamber observes that Defence Counsel submits in his Reply that formal notice “was only served at my Chambers and not personally on me in my absence when I was undergoing medical check-up in Europe”. The Chamber recalls that once a document is served upon Counsel’s Chambers this is the point at which Counsel is given to have personally received it. The Chamber recollects earlier jurisprudence from the case of *Prosecutor against Gbao*, SCSL-2003-09², Judge Thompson made it clear in this Order that the Court Management Proof of Service is adequate to signify that Counsel is served. The same applies to the instant case. Moreover the Chamber observes that Counsel for the Accused laid out in “the Request” a definition of the term “Defence” as meaning and including “the Accused, the Defence Counsel and their respective Legal Assistants and Staff”. Thus under the definition offered by Counsel for the Accused, serving notice on the staff of his Chambers should constitute serving notice upon Defence Counsel himself.

20. The Chamber observes moreover that Defence Counsel was present at the oral reading of “the Ruling”, and notes that the delay in giving written notice of that decision was due to an internal procedural issue within the Court Management Section. This delay provided Counsel for the Accused with an unusually long period in which to consider and prepare an application for leave to appeal that decision if he intended to file one. In the

¹ ‘Order on the Defence Application for Extension of Time to file Reply to Prosecution Response to Preliminary Motions’, of the 24th day of June 2003

² ‘Order on the Urgent Request for Direction on the Time to Respond to and/ or an Extension of Time for the filing of a Response to the Prosecution Motions and the Suspension of any Ruling on the issue of Protective Measures Pending’, rendered on the 16th day of May 2003

Chamber's opinion it seems inexplicable and unacceptable that Defence counsel, given the importance which he currently attaches to the application for leave, did not so consider or prepare.

21. Counsel for the Accused contends in the Reply that although he has submitted other applications for extension of time in the past, this should have no bearing upon the current "Request", and that it is a question to be decided before the Appeals Chamber on another occasion. In the Chamber's opinion this is not the case. The Chamber considers that it is indeed relevant that Counsel for the Defence has requested extensions of time before and that it is a pertinent factor for the Chamber to take into consideration at the present time.

22. As regards the sufficiency of the medical certificates submitted by Counsel for the Accused, the Chamber considers that a more detailed account by the Doctors would be appropriate in the circumstances. The certificates as filed do not show enough about counsel's state of health to indicate to the Chamber that he was unable to work during the period in question. Given the importance of the matter at hand, and with due regard to Counsel's right to privacy and the proper respect to be accorded to certificates by medical practitioners, the Chamber considers that Counsel should have filed further details of his medical condition. Such documents could have been filed confidentially.

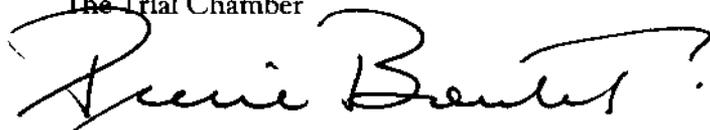
23. Bearing in mind all of the aforementioned, the Chamber deems that Defence Counsel has not provided evidence sufficient to persuade the Chamber that there are either exceptional circumstances or good cause to warrant extension of time.

AND THEREFORE, BASED ON THE ABOVE REASONING

DENIES "the Request".

Done at Freetown, Sierra Leone, this 15th day of October 2003.

The Trial Chamber



Judge Pierre Boutet

