

I, JUSTICE GEORGE GELAGA KING, Single Judge of the Appeals Chamber appointed pursuant to Rule 65(E) of the Rules of Procedure and Evidence ("Rules");

SEIZED of the Application to Show Good Cause to Allow an Appeal of the Decision on Application of Issa Sesay for Provisional Release filed on 19 April 2004 ("Application");

NOTING the Prosecution Response to Application to Show Good Cause to Allow an Appeal of the Decision on Application of Issa Sesay for Provisional Release filed on 30 April 2004 ("Prosecution Response");

NOTING that no Reply has been filed by Issa Hassan Sesay;

NOTING the Decision on Application of Issa Sesay for Provisional Release of 31 March 2004 by Judge Pierre Boutet of the Trial Chamber, dismissing the Application ("Provisional Release Decision").

I. SUBMISSIONS OF THE PARTIES

A. Defence Application

1. The Accused Issa Hassan Sesay seeks leave to appeal the Provisional Release Decision of Judge Boutet denying his application for bail.

2. The Defence argues that good cause is demonstrated by the following, relating to paragraphs 48 and 51 of the Provisional Release Decision:

- a) The judge should have been satisfied that prior to Sesay's arrest, he was informed and aware of the extreme seriousness of the crimes falling within the jurisdiction of the Court and failed to provide adequate reasons for why he was not so satisfied. Moreover, the Indictment was confidential, so Sesay could not have been expected to demonstrate that had he been aware of it he would have surrendered. Thus, the Defence demonstrated that Sesay had the opportunity to flee and did not avail himself of that opportunity notwithstanding sufficient notice of the existence and nature of the Special Court.
- b) The judge misinterpreted the evidence relating to Sesay's role in the peace process. Sesay was instrumental in bringing the RUF to the peace table and worked hard to play a part

in bringing the conflict to an end, placing himself under the authority of the UN to end the war. The Defence placed great weight on this evidence and submits that it should not have been dismissed in a single sentence without further explanation.

3. Therefore, the Defence argues that the judge erred in law and fact.

B. Prosecution Response

4. The Prosecution submits that the reasons advanced by the Defence do not amount to “good cause”. According to the Prosecution, in order to show good cause the Defence must show that the Trial Chamber may have erred by not applying the law correctly or failing to take into account and assess all the decisive facts of a case. The Prosecution submits that the Defence has failed to demonstrate any error in law or fact.
5. In relation to paragraph 48 of the Provisional Release Decision, the Prosecution argues:
 - a) The test being one of reasonableness, the judge did not arrive at a conclusion that no reasonable person could have reached.
 - b) Paragraph 48 must be seen in its context where a number of other factors were taken into consideration, such as “the inability of the Special Court to directly perform any arrest on the territory of Sierra Leone; the current diminished capability of the national authorities to promptly and efficiently provide any police supervision or intervention in the case of flight of the Accused; the fact the report relied on by the Defence mentions that the potential exists for an extremist reaction to the Special Court and the seriousness of the crimes brought against the Accused.”¹
6. In relation to paragraph 51 of the Provisional Release Decision, the Prosecution argues:
 - a) This paragraph must also be read in its context where other factors were considered.
 - b) The judge took into account the Accused’s role in peace negotiations and provided comprehensive reasons to support his entire decision. It was not an error to say this aspect was more relevant as a mitigating factor.
7. The Prosecution notes that the Defence emphasises two paragraphs out of a Decision containing 57 paragraphs.

¹ Prosecution Response, para. 12.

III. DISCUSSION

7307

A. The Principal Question for Determination

9. As stated in my Decision on Application for Leave to Appeal against Refusal of Bail in the *Kallon* case², the principal question in this application is whether the applicant has shown good cause as required by Rule 65(E) of the Rules. The Rule provides:

65(E) Any decision rendered under this Rule shall be subject to appeal in cases where leave is granted by a Single Judge of the Appeals Chamber, upon good cause being shown. Applications for leave to appeal shall be filed within seven days of the impugned decision.

B. What is "Good Cause"?

10. The Appeals Chamber in other international jurisdictions has held that in order to show "good cause" the Defence must show that the Trial Chamber may have erred in making the impugned decision.³ If the answer is in the affirmative then according to these decisions, "good cause" is shown.
11. I take cognisance of the fact that "the Judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda."⁴ This provision, however, does not deter the newly constituted Special Court for Sierra Leone from developing its own jurisprudence and case law, being guided, of course, by the relevant decisions of the two international tribunals.
12. As already stated in the *Kallon* Decision, it seems to me that that test, while useful and helpful is too restrictive. It gives only one instance of "good cause", i.e. where the Defence makes out a *prima facie* case that an error of law and/or fact has been made by the Trial Chamber or a single Judge of that Chamber, as the case may be. Indeed, a bench of the ICTY Appeals Chamber in *Prosecutor v Šainović and Ojdanić* considered that "in special cases, 'good cause'

² *Prosecutor v Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, SCSL04-15-PT, *Kallon* - Decision on Application for Leave to Appeal against Refusal of Bail, 31 March 2004 ("*Kallon* Decision").

³ *Prosecutor v. Brđjanin and Talić*, Case No. IT-99-36/1, "Decision on Application for Leave to Appeal", 7 September 2000; *Sagahutu v. The Prosecutor*, Case No. ICTR-00-56-1, "Decision on Leave to Appeal Against the Refusal to Grant Provisional Release", 26 March 2003, para. 26; *Ndayambaje v. The Prosecutor*, Case No. ICTR-96-A-8, "Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002", 10 January 2003, para. 29; and *Prosecutor v. Simić et al.*, Case No. IT-95-9, "Decision on Application for Leave to Appeal", 19 April 2000, para. 11.

⁴ Article 20(3) of the Special Court Statute.

pursuant to Rule 65(D) may include situations where it is felt that there is a need for a full bench of the Appeals Chamber to give an opinion as to issues relating to provisional release which arise in [the] particular case.”⁵

- 13. In my judgement the concept of “good cause” ought to be extended to include those instances where the question in relation to which leave to appeal is sought, is one of general principle to be decided for the first time, or a question of public importance upon which further argument and a decision of the Appeals Chamber would be in the interest of justice paying particular regard to the fact that ordinarily the “accused may only make one application for bail to the Judge or Trial Chamber.”⁶

C. Has Good Cause been shown in this Application?

- 14. As acknowledged by the Prosecution, the Defence arguments that have been made regarding paragraphs 48 and 51 of the Provisional Release Decision cannot be read in isolation but must be considered in the context of the whole rubric: “Will the Accused, Issa Hassan Sesay, Appear for Trial if Granted Bail”.
- 15. The balance between an assessment of the circumstances which are not under the control of the accused but which emanate out of the general situation in this country, and which could apply to all accused before the Special Court for Sierra Leone, and the specific submissions of any particular accused, is a crucial one. It is therefore my considered opinion that apart from the question whether errors were made by the learned Judge, good cause exists for granting leave to appeal, as it seems to me that the question of this balance in applications regarding provisional release is of such importance as to merit further argument. Apart from the precise grounds as characterised and raised by the Defence in its Motion, the broader question whether provisional release can ever be granted to an accused before the Special Court for Sierra Leone and if so, in what circumstances, is one of fundamental importance and a decision of the Appeals Chamber would be in the interests of justice.

IV. DISPOSITION

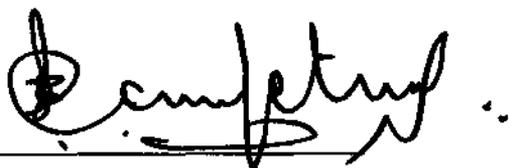
- 16. I, therefore, grant the Defence leave to appeal against the decision of Judge Boutet refusing bail to the Accused.

⁵ *Prosecutor v Šainović and Ojdanić*, Case No. IT-99-37-AR65, Decision Granting Leave to Appeal, 16 July 2002, p. 2.

⁶ Rule 65(c)

17. In accordance with Rule 108(C) of the Rules, any notice and grounds of appeal must be filed within 7 days of the receipt of this Decision.

Done at Freetown this 28th day of July 2004



Justice George Gelaga-King

