



THE APPEALS CHAMBER

Case No.: STL-11-01/PT/AC/AR126.2

Before: Judge David Baragwanath, Presiding
Judge Ralph Riachy
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko
Judge Kjell Erik Björnberg

Registrar: Mr Herman von Hebel

Date: 13 November 2012

Original language: English

Classification: Public

THE PROSECUTOR

v.

**SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

DECISION ON APPEAL AGAINST PRE-TRIAL JUDGE'S DECISION ON MOTION BY COUNSEL FOR MR BADREDDINE ALLEGING THE ABSENCE OF AUTHORITY OF THE PROSECUTOR

Prosecutor:
Mr Norman Farrell

Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan
Mr Emile Aoun

Legal Representatives of Victims:
Mr Peter Haynes
Mr Mohammad F. Mattar
Ms Nada Abdelsater-Abusamra

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz
Mr John Jones

Head of Defence Office:
Mr François Roux

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse
Mr Yasser Hassan

Counsel for Mr Assad Hassan Sabra:
Mr David Young
Mr Guénaél Mettraux





INTRODUCTION

1. We are seized of an Appeal by counsel for Mr Badreddine¹ against a decision of the Pre-Trial Judge,² in which the Pre-Trial Judge dismissed counsel's request to find that the mandate of then Prosecutor Mr Bellemare had expired on 14 November 2010, and to declare the Indictment, which was submitted at a later date, as well as all other related filings "null and void".³ Counsel for Mr Oneissi sought to join this appeal.⁴ The Prosecutor responded with a request to dismiss both the Appeal and the Joinder.⁵
2. In their Appeal, counsel for Mr Badreddine claim that the Pre-Trial Judge erred in finding that Prosecutor Bellemare's three-year term of office had begun on 1 March 2009 when the Tribunal commenced its work.⁶ They request the Appeals Chamber to set this decision aside and rule that the "validity of the Indictment and subsequent acts is therefore radically vitiated."⁷ The Prosecutor requests dismissal of the Appeal.⁸
3. We find the Appeal without any merit. Counsel have not demonstrated any error in the Pre-Trial Judge's finding that Prosecutor Bellemare's term of office began on 1 March 2009 and ended on 29 February 2012. We consequently dismiss the Appeal.

¹ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/AR126.2, Appellate Brief by the Badreddine Defence against the Decision Dismissing its Motion for the Indictment to be Annulled on the Grounds of Absence of Authority, 27 September 2012 ("Appeal"). All further references to filings and decisions relate to this case number unless otherwise stated.

² STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Motion by the Defence for Mr Mustafa Badreddine to Have the Indictment of 10 June 2011, Confirmed on 28 June 2011, Annulled on the Grounds of Absence of Authority, 29 August 2012 ("Impugned Decision").

³ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Request by the Badreddine Defence to Annul the Indictment of 10 June 2011, confirmed on 28 June 2011, for Absence of Authority, 25 June 2012, para. 22.

⁴ Joining of the Oneissi Defence with the Appellate Brief of the Badreddine Defence Against the Decision Denying its Application to Annul the Indictment for Absence of Authority, 27 September 2012 ("Joinder"), para. 1.

⁵ Prosecution Response to the Badreddine Defence Appeal from the Pre-Trial Judge's Decision of 29 August 2012, 16 October 2012 ("Prosecutor's Response"), para. 10. We permitted counsel for Mr Badreddine to file a reply with respect to one new issue arising from the Prosecutor's Response, see Order on Defence Request for Leave to File a Reply, 29 October 2012 ("Order on Reply"); Observations of the Badreddine Defence on whether Certification to Appeal is a Discretionary Decision, 2 November 2012 ("Reply").

⁶ Appeal, para. 21.

⁷ Appeal, para. 28.

⁸ Prosecutor's Response, para. 10.



STANDARD OF REVIEW ON APPEAL

4. Under Article 26 of our Statute and Rule 176 of the Rules of Procedure and Evidence, an appeal may be lodged on the grounds of “an error on a question of law invalidating the decision” or “an error of fact that has occasioned a miscarriage of justice”. In the Impugned Decision, the Pre-Trial Judge found that the mandate of Prosecutor Bellemare began on 1 March 2009 and expired on 29 February 2012. This was a finding of fact, which counsel for Mr Badreddine argue was made in error.⁹

5. Other international courts and tribunals have persuasively and succinctly set out the applicable principles of appellate review for alleged errors of fact.¹⁰ We agree with the following standard adopted by the ICTY Appeals Chamber:

When considering alleged errors of fact, the Appeals Chamber will apply the standard of reasonableness. As a general principle, in reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision. In determining whether or not a Trial Chamber’s finding was one that no reasonable trier of fact could have reached, the Appeals Chamber “will not lightly disturb findings of fact by a Trial Chamber”. Further, only an error of fact that has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.¹¹

6. We add that at this Tribunal the standard is applicable for decisions of both the Trial Chamber and the Pre-Trial Judge.

⁹ Appeal, paras 9, 28

¹⁰ The Statutes of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”), respectively, contain the same grounds for appeal as the Statute of the Special Tribunal for Lebanon, *see* Art. 25 ICTY St., Art. 24 ICTR St. The Statutes of the International Criminal Court (“ICC”) and the Special Court for Sierra Leone (“SCSL”) have similar grounds of appeal

¹¹ ICTY, *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2009, para. 15 (with further references to the case-law of the ICTY Appeals Chamber) (footnotes omitted); *see also* ICTR, *Gatete v. Prosecutor*, Case No. ICTR-00-61-A, Judgement, 9 October 2012, para. 10 (with further references to the case-law of the ICTR Appeals Chamber) (footnotes omitted); SCSL, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-A, Judgment, 26 October 2009, para. 32.



DISCUSSION

I. Preliminary Issues

A. *The “joinder” of counsel for Mr Oneissi*

7. Counsel for Mr Oneissi seek to join the appeal of counsel for Mr Badreddine.¹² However, as we have noted previously, they did not seek or obtain certification of the Impugned Decision as required by Rule 126(C).¹³ Consequently, they cannot join the appeal and their request is dismissed.

B. *The request for an oral hearing*

8. Counsel request to hold an oral hearing in the appeal “in view of the importance of the subject.”¹⁴ However, they have not further substantiated this request. We have held that interlocutory appeals at this Tribunal will as a general rule be decided on the basis of the written briefs of the parties and that it is up to the party requesting a hearing to demonstrate why the issues on appeal cannot be effectively addressed through those briefs.¹⁵ Counsel for Mr Badreddine have failed to advance any arguments in this regard. We consequently reject their request.

C. *Whether certification is discretionary*

9. In his response, the Prosecutor requests us “to affirm that first instance chambers may and should exercise [...] discretion when considering requests for certification under Rule 126(C).”¹⁶ For this he relies on case-law of the ad-hoc tribunals. In reply, counsel for Mr Badreddine argue that this case-law does not assist in the interpretation of Rule 126(C) in the light of the difference between this Rule and the provisions applicable at the ad-hoc tribunals.¹⁷ They contend that the decision whether to certify a decision for appeal or not “does not encompass [...] discretionary power.”¹⁸

¹² Joinder, para. 1.

¹³ Order on Reply, para. 3.

¹⁴ Appeal, para. 27.

¹⁵ STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/AC/AR126.1, *Corrected Version of Decision on Defence Appeals Against Trial Chamber’s Decision on Reconsideration of the Trial In Absentia Decision*, 1 November 2012 (“*In Absentia Appeal Decision*”), para. 7 (with further references to the case-law of the ICTR and the ICC); see also ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-AR73.1, *Decision on Request for Oral Argument*, 16 March 2011, pp. 1-2 (with further references to the case-law of the ICTY).

¹⁶ Prosecutor’s Response, para. 9.

¹⁷ Reply, para. 2.

¹⁸ Reply, para. 3.



10. We note that we are not seized of this issue, which has no bearing on the admissibility of the present appeal.¹⁹ However, the Prosecutor has raised the matter in responding to the Appeal because it was not addressed by the Pre-Trial Judge,²⁰ and we consider it important to clarify the proper interpretation of the certification requirements under Rule 126(C).²¹

11. Rule 126(C) provides that

Decisions on all motions under this rule are without interlocutory appeal save with certification, if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

We have previously held that this is a high threshold and that consequently certification must be an exception.²²

12. The Prosecutor essentially argues that even when the two cumulative requirements of Rule 126(C) are met, a Chamber retains discretion whether to grant certification or not. We disagree with this assertion. Once the Chamber is satisfied that the issue in question is both a significant issue and one that warrants immediate resolution by the Appeals Chamber, it must certify the decision for appeal with respect to that issue. The Prosecutor cannot rely on the case-law of the ICTY and ICTR with regard to an *additional* discretionary element because the procedural rules of these courts explicitly allow for the exercise of discretion even after a Chamber is satisfied that the two requirements are fulfilled.²³ In contrast, our Rule 126(C) does not provide for such power.

13. However, we stress a Chamber's obligation to establish the two cumulative requirements of Rule 126(C). In particular, the Chamber must first ascertain the existence of the precise issue²⁴ that *would significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Even though arguments relating to the correctness of the decision for which certification is

¹⁹ The Pre-Trial Judge granted certification of the Impugned Decision, see STL, *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/PT/PTJ, Decision on the Badreddine Defence Motion for Certification to Appeal the Decision of 29 August 2012, 18 September 2012, para. 9.

²⁰ Prosecutor's Response, para. 9.

²¹ The same standard is applicable to Rule 90(B)(ii).

²² *In Absentia* Appeal Decision, para. 8.

²³ See Rule 73(B) ICTY RPE (providing that the Trial Chamber "*may* grant such certification" if the two requirements are met [emphasis added]); Rule 73(B) ICTR RPE (containing the same language).

²⁴ See *In Absentia* Appeal Decision, para. 11.



sought are not relevant to the process of certification,²⁵ the Chamber must decide whether the issue or issues in question have the significance required under Rule 126(C). In our view, frivolous or absurd requests for certification or requests that in the view of the Chamber are wholly without merit should therefore not be granted.

14. Similar considerations apply to the second requirement of Rule 126(C), which concerns the matter of urgency. Only those issues are certifiable for which an *immediate* resolution by the Appeals Chamber through an interlocutory appeal may advance the proceedings. There is no general right to an interlocutory appeal. Most issues, even when significant, may be resolved at the end of the case. Indeed, as we have held before, it would be against the interests of judicial economy for the Appeals Chamber to “address issues that might better be decided during an appeal against the Trial Chamber’s final judgment or—depending on the outcome of the case—might not need to be decided at all”.²⁶

15. In summary, decisions on certification are not discretionary and a Chamber must certify an issue for appeal once it is satisfied that the two requirements of Rule 126(C) are met. However, these requirements are strict and a Chamber must take great care in assessing them.

II. The Merits of the Appeal

16. Counsel contend that the Pre-Trial Judge erred in finding that Prosecutor Bellemare’s term had begun on 1 March 2009. Their central argument is that the Pre-Trial Judge failed to distinguish between the appointment of the Prosecutor on 14 November 2007 and the commencement of his duties on 1 March 2009.²⁷ They argue that the Pre-Trial Judge should have found that Prosecutor Bellemare’s term had expired on 13 November 2010, and that he therefore had no authority to file an Indictment.²⁸ The Prosecutor responds that counsel have failed to show any error in the Pre-Trial

²⁵ See ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Decision on Prosecution Motion for Certification of Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its Rule 65 *ter* Witness and Exhibit Lists and Admit Evidence Pursuant to Rule 92 *ter*, 15 March 2012, para. 9 (with further references to ICTY case-law); ICTR, *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Decision on Defence Motion for Certification to Appeal the Decision on the Scheduling of Closing Arguments, 18 June 2012, para. 19 (with further references to ICTR case-law).

²⁶ *In Absentia* Appeal Decision, para. 11.

²⁷ Appeal, paras 19-25.

²⁸ Appeal, paras 1, 26.



Judge's assessment of the facts of the case and that the Appeal is based on a misreading of the relevant legal provisions.²⁹

17. We find the Appeal wholly without merit. Counsel has shown no error in the Pre-Trial Judge's analysis.

18. Article 11(3) of the Statute and Article 3(1) of the Annex to Security Council Resolution 1757 establishing the Tribunal ("Annex")³⁰ set out that the United Nations Secretary-General appoints the Prosecutor of the Tribunal for a three-year term. Article 19(2) of the Annex provides that the Tribunal "shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government [of Lebanon], taking into account the progress of the work of the International Independent Investigation Commission ['Commission']".

19. In a letter dated 12 November 2007, the Secretary-General informed the members of the Security Council of his "intention to appoint Daniel Bellemare, of Canada, as the next Commissioner [of the Commission]" following the expiration of the previous Commissioner's mandate on 31 December 2007. At the same time, he notified the members that:

[U]nder my authority pursuant to article 3 of the annex to Security Council resolution 1757 (2007) on the establishment of the Special Tribunal for Lebanon ("annex"), and upon the recommendation of the selection panel established for this purpose, I will appoint Mr. Bellemare as the Prosecutor of the Special Tribunal. He will, however, commence his official duties as the Prosecutor at a later date in keeping with the provisions of this annex.³¹

20. In a letter to the Prosecutor dated 3 July 2012, the Principal Legal Officer in charge of the Office of the Legal Counsel confirmed that "in accordance with the Secretary-General's decision of 14 November 2007, and his letter to Mr. Bellemare of 12 February 2009, Mr. Bellemare assumed his functions on 1 March 2009, from which date his term of office commenced."³²

21. It was the only reasonable conclusion for the Pre-Trial Judge to find on this basis that "Mr Bellemare's term of office as Prosecutor did not begin on 14 November 2007 and that it could

²⁹ Prosecutor's Response, paras 3-6.

³⁰ This Annex is entitled "Agreement between the United Nations and the Lebanese Republic on the establishment of Special Tribunal for Lebanon", see SC Res 1757, UN Doc. S/RES/1757 (30 May 2007).

³¹ Letter dated 12 November 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/669 (14 November 2007).

³² STL, *Prosecutor v Ayyash et al*, Case No. STL-11-01/PT/PTJ, Prosecution Response to the Joint Defence Request to Annul the Indictment for Absence of Authority, 6 July 2012, Annex A, Letter of 3 July 2012 from the United Nations Office of Legal Counsel.



not run simultaneously with his term of office as Commissioner.”³³ We also note with approval the Pre-Trial Judge’s reasoning that “as an organ of the Tribunal, the Prosecutor would not be able to commence his duties before the court to which he had been appointed to exercise his duties had begun its work.”³⁴ Indeed, counsel fail to explain why or how Mr Bellemare would have been both Commissioner of the International Independent Investigation Commission and the Prosecutor of a not-yet functioning Tribunal. We note that the Tribunal commenced its operations on the day after the Commission completed its mandate and ceased to exist.³⁵ Consequently, Mr. Bellemare became Prosecutor on that day for a three-year term. Counsel’s attempt to artificially distinguish between the Prosecutor’s term of office and the taking up of his functions is entirely unfounded.

22. We are puzzled that counsel would expend their resources on such a matter. We remind counsel that under Rule 126(G) payment of fees will be withheld for the production of filings that are frivolous or an abuse of process. While we find that counsel’s Appeal has not yet reached that threshold, we warn them that we will not tolerate the filing of appeals that lack any serious legal or factual basis.

23. We also record that given the lack of merit in the application on behalf of Mr Badreddine, in terms of the certification standard we have set out, the Pre-Trial Judge should not have certified the Impugned Decision for appeal.

³³ Impugned Decision, para. 19.

³⁴ Impugned Decision, para 20.

³⁵ See SC Res. 1852, UN Doc. S/RES/1852 (17 December 2008), p. 1 (taking note “of the Secretary-General’s announcement that the Special Tribunal for Lebanon (The Tribunal) is fully on track to commence functioning on 1 March 2009” and “of the Commission’s request to extend its mandate up to 28 February 2009, so that it can continue its investigation without interruption and gradually transfer operations, staff and assets to the The Hague with a view to completing the transition by the time the Tribunal starts functioning”).



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

DISMISSES the Joinder;

AND DISMISSES the Appeal.

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

Dated 13 November 2012,

Leidschendam, the Netherlands

Judge David Baragwanath

Presiding

