



THE APPEALS CHAMBER

Case No.: CH/AC/2012/02

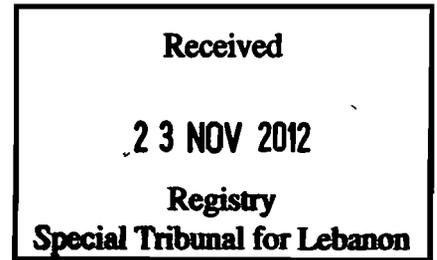
Before: Judge David Baragwanath, Presiding
Judge Ralph Riachy
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko
Judge Kjell Erik Björnberg

Registrar: Mr Herman von Hebel

Date: 23 November 2012

Original language: English

Classification: Public



IN THE MATTER OF EL SAYED

**DECISION ON PARTIAL APPEAL BY MR EL SAYED AGAINST PRE-TRIAL
JUDGE'S DECISION OF 8 OCTOBER 2012**

Counsel for Mr El Sayed:
Mr Akram Azoury

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Mr François Roux





HEADNOTE¹

In proceedings by Mr El Sayed for disclosure of documents in the Prosecutor's custody, the Pre-Trial Judge ordered on 8 October 2012 that documents relating to nine persons would if disclosed expose them to "high" or "very high" risks and ordered they be withheld from disclosure to Mr El Sayed. This decision was based upon risk assessments performed by the Office of the Prosecutor and the Victims and Witnesses Unit ("VWU"). The Pre-Trial Judge further ordered that the risk assessments for these nine persons be repeated every six months. Mr El Sayed appealed to the Appeals Chamber against this decision ("Impugned Decision").

Mr El Sayed claims that (i) the Impugned Decision violates his rights under the International Covenant on Civil and Political Rights; and that (ii) the ex parte nature of the risk assessments violates the adversarial principle. The Appeals Chamber first reiterates that, although Mr El Sayed has a general right of access to certain documents in the possession of the Prosecutor, such right is subject to exceptions. The Tribunal is obliged to ensure the safety of the individuals to whom the documents in issue relate. Mr El Sayed's interest in seeking access to these documents cannot prevail over their protection.

The Appeals Chamber further holds that ex parte proceedings are justified for exceptional reasons which may include the protection of victims and witnesses. The sensitive nature of the risk assessments, and the importance of keeping confidential the required information to perform such assessments, made it appropriate for the Pre-Trial Judge to conduct this part of the proceedings ex parte Mr El Sayed.

However, considering that the Tribunal's Statute requires that it complies with the highest standards of international criminal procedure, the ex parte nature of the proceedings does not immunize the process from appellate oversight. The Appeals Chamber holds that in reviewing the risk assessments performed by the Prosecutor and approved by the VWU, the Pre-Trial Judge erred by endorsing the VWU's determinations without further examination of the methodology employed in arriving at these determinations. It is incumbent on the Judge or Chamber, without second-guessing the VWU's determination as to individual risk assessments, to review the employed methodology and to ensure that it is appropriate and follows a consistent path in its application to all individuals who are assessed for risk.

In the interests of justice and judicial economy, the Appeals Chamber determines that there is no need to remand the issue to the Pre-Trial Judge for further consideration and decides to assess the methodology itself. Having examined the documents submitted to the Pre-Trial Judge, the Appeals Chamber finds that the methodology employed by the VWU provides clear and logical guidelines for assessments of risk and is sound. It was also applied consistently to all individual risk assessments. The risk assessments of "high" or "very high" risk, and the need to withhold the disclosure of the documents related to witnesses under these assessments, are reasonable. The appeal is dismissed.

¹ This Headnote does not constitute part of the decision of the Appeals Chamber. It has been prepared for the convenience of the reader, who may find it useful to have an overview of the decision. Only the text of the decision itself is authoritative.



INTRODUCTION

1. In the context of proceedings concerning a request by Mr El Sayed for disclosure of documents in the Prosecutor's custody, we are seized of a partial appeal by Mr Jamil El Sayed² against the Pre-Trial Judge's decision of 8 October 2012.³ In that decision, following risk assessments performed by the Office of the Prosecutor and the Victims and Witnesses Unit ("VWU"), the Pre-Trial Judge ordered that documents relating to nine persons exposed to "high" and "very high" risks be withheld from disclosure to Mr El Sayed.⁴ We uphold the Pre-Trial Judge's decision and dismiss the appeal.

SUBMISSIONS OF THE PARTIES

2. Mr El Sayed argues that the Pre-Trial Judge's decision to withhold the documents in question violates his rights under the International Covenant on Civil and Political Rights.⁵ He also contends that the *ex parte* nature of the risk assessments made by the Pre-Trial Judge violated the adversarial principle.⁶ He claims that the Impugned Decision gave "*de facto* immunity" to the nine individuals whose identities are withheld,⁷ which in turn results in a threat against him and his family.⁸

3. The Prosecutor responds that contrary to Mr El Sayed's assertions, he has complied fully with the Pre-Trial Judge's disclosure requirements.⁹ He argues that the only issue on appeal is whether the

² STL, *In the matter of El Sayed*, Case No. CH/PTJ/2012/05, Partial Appeal of the Pre-Trial Judge's Decision of 8 October 2012 "Setting a Deadline for the Prosecutor to Disclose to Mr El Sayed the Documents Mentioned in the Pre-Trial Judge's Order of 12 May 2011", 11 October 2012 ("Appeal").

³ STL, *In the matter of El Sayed*, Case No. CH/PTJ/2012/04, Decision Setting a Deadline for the Prosecutor to Disclose to Mr El Sayed the Documents Mentioned in the Pre-Trial Judge's Order of 12 May 2011, 8 October 2012 ("Impugned Decision"). The title of the Impugned Decision initially contained an error, which was later on corrected. See STL, *In the matter of El Sayed*, Case No. CH/PTJ/2012/05, Corrigendum to the "Decision Setting a Deadline for the Prosecutor to Disclose to Mr El Sayed the Documents Mentioned in the Pre-Trial Judge's Order of 21 May 2011", 11 October 2012.

⁴ Impugned Decision, paras 13-14, Disposition.

⁵ Appeal, paras 15-22.

⁶ *Id.*, para. 23.

⁷ *Id.*, para. 24.

⁸ *Id.*, para. 25.

⁹ STL, *In the matter of El Sayed*, Case No. OTP/AC/2012/01, Prosecution Response to Jamil El Sayed's Partial Appeal of the Pre-Trial Judge's Decision of 8 October 2012 "Setting a Deadline for the Prosecutor to Disclose to Mr El Sayed the Documents Mentioned in the Pre-Trial Judge's Order of 12 May 2011", 1 November 2012 ("Response"), paras 6-8. Mr El Sayed filed a request for leave to reply to the Prosecutor's Response. We rejected his request. See STL, *In the matter of El Sayed*, Case No. OTP/AC/2012/01, Request for Authorisation to File a Reply to "Prosecution Response to Jamil El Sayed's Partial Appeal of the Pre-Trial Judge's Decision of 8 October 2012 'Setting a Deadline for the Prosecutor to Disclose to Mr El Sayed the Documents Mentioned in the Pre-Trial Judge's Order of 12 May 2011'" of 1 November 2012, 5 November 2012; STL, *In the matter of El Sayed*, Case No. CH/AC/2012/01, Order on Request by Mr El Sayed for Leave to File a Reply, 7 November 2012.



Pre-Trial Judge made a proper assessment regarding the non-disclosure of certain documents.¹⁰ He states that the temporary non-disclosure of documents relating to witnesses who face a “high” or “very high” risk, should they be identified, is a balanced approach of the competing interests, i.e. the right of the Appellant to access the documents he seeks and the right of the nine witnesses to protection via anonymity.¹¹

ADMISSIBILITY OF THE APPEAL

4. Arguing that his Appeal is admissible without having obtained certification from the Pre-Trial Judge, Mr El Sayed has filed the Appeal directly before the Appeals Chamber.¹² At the same time he is seeking certification to appeal the Impugned Decision from the Pre-Trial Judge.¹³ This request is still pending. The Prosecutor has made no submissions on this point.¹⁴

5. We have previously held that an appeal in this case can be brought before our Chamber without certification if it “potentially deals finally” with Mr El Sayed’s application for disclosure of documents. Otherwise, certification is required.¹⁵ We must therefore determine whether the Impugned Decision can be classified as final or merely interlocutory.

6. In the Impugned Decision, the Pre-Trial Judge ordered that documents relating to nine individuals who may be at “high” or “very high” risk be withheld from Mr El Sayed.¹⁶ While he also ordered that the risk assessment should be reviewed on a regular basis, at least every six months,¹⁷ that does not detract from the reality that—whatever may happen in the future—Mr El Sayed’s request has been declined, conceivably finally. Perhaps the individual assessments made for each person may be temporary and may vary according to changing circumstances. However, these assessments are

¹⁰ Response, para. 9.

¹¹ *Id.*, paras 10-16.

¹² Appeal, para. 13.

¹³ *Id.*, para. 13 (arguing that if the Appeals Chamber were to find that certification is required, his appeal “should be considered as submitted on a precautionary basis”).

¹⁴ We note that in a submission before the Pre-Trial Judge on the question of certification, the Prosecutor considered that the Impugned Decision is deemed to be final with respect to the matter on appeal and therefore is appealable as of right, see STL, *In the matter of El Sayed*, Case No. OTP/PTJ/2012/09, Prosecution Response to Jamil El Sayed’s Demande de Certification de l’Appel Partiel de la Décision du Juge de la Mise en État Datée du 8 Octobre 2012 « Relative à la Fixation d’un Délai au Procureur pour la Remise À M. El Sayed des Documents Visés par l’Ordonnance du Juge de la Mise en État du 12 mai 2011 », 1 November 2012, paras 2, 7.

¹⁵ See STL, *In the matter of El Sayed*, Case No. CH/AC/2012/03, Decision on the Prosecutor’s Partial Appeal of the Pre-Trial Judge’s Order of 20 February 2012, 18 April 2012, para. 15 (with further references to our previous decisions).

¹⁶ Impugned Decision, paras 13-14, Disposition.

¹⁷ *Id.*, para. 15.



underpinned by the general finding that an assessment of “high” or “very high” risk always requires non-disclosure of documents relating to that person. Therefore, the mere possibility of future review cannot alter the present status of the Impugned Decision which must be classed as final. It follows that the Impugned Decision may be appealed without certification, even if the assessment of risk may change with respect to certain individuals. This conclusion is underscored by the fact that any prejudice suffered by Mr El Sayed because of delay in accessing the documents in question may not be cured by such a potential future change in circumstances. The Appeal is therefore admissible.

DISCUSSION

I. Whether non-disclosure of documents is an appropriate measure

7. In the Impugned Decision, the Pre-Trial Judge decided that non-disclosure of documents related to individuals subject to “high” or “very high” risk was necessary to protect them.¹⁸ Mr El Sayed claims that this decision violates his rights to compensation and to a fair hearing under the International Covenant on Civil and Political Rights.¹⁹ The Prosecutor responds that no such violation was demonstrated.²⁰

8. In our previous decisions we stressed that, while Mr El Sayed has a general right to access certain documents in the possession of the Prosecutor, this right is by no means absolute.²¹ In particular, we held that “any claim Mr. El Sayed has to information held by this Tribunal must be properly weighed against well-founded contrary interests that may be asserted by the Prosecution on behalf of the larger community.”²² We also clarified that although not directly applicable to Mr El Sayed’s case, we are guided in this regard by our Rules of Procedure and Evidence, including the provisions on disclosure.²³

9. Indeed, the stringent disclosure obligations under our Rules are subject to certain exceptions, which include situations where non-disclosure is required for the protection of victims and

¹⁸ Impugned Decision, para. 14.

¹⁹ Appeal, para. 15. International Covenant on Civil and Political Rights, Adopted 16 December 1966, 999 U.N.T.S. 171 and 1057 U.N.T.S. 407.

²⁰ Response, para. 12.

²¹ STL, *In the matter of El Sayed*, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010 (“Jurisdiction and Standing Decision”), para. 69; STL, *In the matter of El Sayed*, Case No. CH/AC/2011/01, Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge’s Decision of 12 May 2011, 19 July 2011 (“19 July 2011 Decision”), para. 50.

²² 19 July 2011 Decision, para. 51.

²³ *Id.*, para. 30.



witnesses.²⁴ For instance, the Rules permit the withholding of documents that reveal the identity of witnesses or provide their statements as a proper counterbalancing measure to minimize any risk to them.²⁵

10. Consequently, while Mr El Sayed's interest in securing access to documents in the possession of the Prosecutor is an important one, the Tribunal has nonetheless an obligation to ensure the safety of the individuals to whom these documents relate. If their life is put at risk by disclosing their identities and other information to Mr El Sayed, then his interest in seeking judicial redress cannot prevail; he cannot be accorded any absolute right to access. As we have held before, "[o]ur obligation is to ensure due process: both disclosure to Mr El Sayed of his entitlement and protection of individuals where that is justified."²⁶ Mr El Sayed's arguments for an unfettered right in this regard are rejected.

II. Whether the assessment of risk was properly conducted and reviewed

11. Mr El Sayed claims that the adversarial principle was violated by the *ex parte* nature of the proceedings that took place to assess the risks threatening the nine individuals whose statements he is seeking. He contends that he was not given the possibility to discuss the alleged risks.²⁷ The Prosecutor responds that this was a necessary aspect of protecting witnesses.²⁸

A. *The ex parte nature of the proceedings*

12. Our Statute and Rules require the proceedings before the Tribunal to be held in public, unless otherwise decided by a chamber.²⁹ We have previously held that any departure from this principle

²⁴ See Rules 115 and 116 STL RPE. Rule 115(A) allows the Prosecutor to "apply to the Pre-Trial Judge or Trial Chamber to order interim non-disclosure of the identity of a victim or witness who may be in danger or at risk until appropriate protective measures have been implemented." Likewise, Rule 116 provides that the Prosecutor may apply to be relieved of an obligation to disclose material if such disclosure "(i) [...] ii) may cause grave risk to the security of a witness or his family, or iii) [...]" These provisions are a reflection of legislation and case-law, both national and international, considering that access to a criminal file is not an absolute right because it is subject to the need not to compromise an ongoing investigation, or the physical well-being of persons, or affect national or international security. See STL, *In the matter of El Sayed*, Case No. CH/PTJ/2010/05, Order relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed Dated 17 March 2010 And Whether Mr El Sayed has Standing Before the Tribunal, 17 September 2010, para. 53.

²⁵ Rules 115, 116 and 133 STL RPE.

²⁶ STL, *In the matter of El Sayed*, Case No. CH/AC/2011/02, Order Allowing in Part and Dismissing in Part the Appeal by the Prosecutor Against the Pre-Trial Judge's Decision of 2 September 2011 and Ordering the Disclosure of Documents, 7 October 2011 ("Disclosure Decision"), para. 34.

²⁷ Appeal, para. 23.

²⁸ Response, para. 15.

²⁹ Art. 20 STL St., Rules 96, 136 STL RPE.



“[...] can only be justified for exceptional reasons, which may include the protection of victims and witnesses [...]”³⁰ In the light of the sensitive nature of risk assessments, and the importance of keeping confidential the required information to perform such assessments, we find that it was appropriate for the Pre-Trial Judge to conduct this part of the proceedings *ex parte* Mr El Sayed. Indeed, Mr El Sayed’s participation in this process would have defeated the whole purpose of the risk assessment, which was designed to establish whether permitting access to certain information relevant to that assessment would constitute a significant risk to the safety of the individuals to which it related. We consequently reject Mr El Sayed’s arguments in this regard.

B. The assessment by the Pre-Trial Judge

13. Given the *ex parte* nature of the risk assessments in relation to the nine individuals, Mr El Sayed was prevented from raising any arguments in relation to how this assessment was conducted. The Prosecutor contends that the propriety of the risk assessments is not at issue before the Appeals Chamber.³¹ We disagree. Our Statute requires that we comply with the highest standards of international criminal procedure.³² Just because the risk assessments were performed *ex parte* does not mean that this process is immune from appellate oversight.

14. In the proceedings before the Pre-Trial Judge, the Prosecutor provided his methodology and an application of it (individual risk assessment) to the VWU for review.³³ The VWU provided feedback on the methodology³⁴ and conducted its own risk assessment for each person.³⁵ The Pre-Trial Judge based his decision to withhold documents relating to the nine individuals on a final document prepared by the Prosecutor and reviewed and updated by the VWU.³⁶ However, it appears from the Impugned Decision, as well as previous decisions, that the Pre-Trial Judge simply endorsed the

³⁰ STL, *Prosecutor v Ayyash et al.*, Case No. STL-11-01/PT/AC, *Corrected Version of Decision on the Pre-Trial Judge’s Request Pursuant to Rule 68(G)*, 29 March 2012, para. 12.

³¹ Response, para. 9.

³² Art. 28 STL St.

³³ STL, *In the matter of El Sayed*, Case No. CH/PTJ/2011/18, Prosecution’s Submission in Compliance with the Pre-Trial Judge’s Scheduling Order of 21 October 2011, Confidential and *Ex parte*, 30 December 2011.

³⁴ STL, *In the matter of El Sayed*, Case No. CH/PTJ/2011/18, Annex A: VWU’s Internal Memorandum Dated 21 November 2011, Confidential and *Ex parte*, 30 December 2011.

³⁵ STL, *In the matter of El Sayed*, Case No. REG/PTJ/2012/04, Annex A: Results of VWU’s Individual Risk Assessment for Witnesses Mentioned in the Pre-Trial Judge’s Order of 21 May 2012, Confidential and *Ex Parte*, 17 September 2012.

³⁶ STL, *In the matter of El Sayed*, Case No. OTP/PTJ/2012/05, Annex A to Prosecution’s Submission in Response to Mr El Sayed’s “Urgent Request”, Confidential and *Ex parte*, 24 September 2012.



VWU's determinations without any further review of the methodology employed in arriving at these determinations.³⁷ This was an error.

15. In a previous decision, we noted that the VWU can speak authoritatively about the risk faced by witnesses.³⁸ A judge does not generally possess the expertise required to perform such a task. The VWU is the competent body to conduct risk assessments and weight must be given to its expertise. However, the VWU's expertise does not justify rubber-stamping its assessments; that it can speak authoritatively does not absolve a Chamber from consideration of whether it has erred.

16. Consequently, to comply with the highest standards of international criminal procedure, it is incumbent on the Judge or Chamber relying on a risk assessment performed by the VWU to review the VWU's submissions and identify the relevant procedures and standards. This includes the methodology employed by the VWU when assessing the risk to individuals. It is not the role of a Judge or Chamber to second-guess in relation to specific individuals the determinations of the VWU whose expertise they cannot claim. But they can and must evaluate the VWU's methodology to assess whether it is appropriate and follows a consistent path in its application to all individuals who are assessed for risk.³⁹

17. Moreover, while the sensitive nature of the assessments will require that details of the methodology and its application be kept confidential,⁴⁰ to the extent that reasons can be given concerning their appropriateness without disclosing any confidential aspects, that must be done.

³⁷ STL, *In the matter of El Sayed*, Case No. CH/PTJ/2012/02, Order Relating to the Prosecution Submissions Filed on 27 March 2012, 21 May 2012, para. 10:

[...] Therefore it is for the VWU, and not the Pre-Trial Judge, to determine whether, in the context of conducting individual "risk assessments" that are incumbent upon it and in order to fully discharge that task, it should examine the threat assessment produced by the Prosecutor and, if appropriate, the methodology it should use, bearing in mind the fact that the risk assessment conducted by the latter is necessarily based on its own assessment of the threats.

See also Impugned Decision, para. 13:

The Pre-Trial Judge notes that the VWU approved, on the one hand, the Prosecution's risk assessment process by way of an independent risk assessment for the witnesses mentioned in the Order of 21 May 2012 and, on the other hand, the general principles for the redaction of information, in accordance with the Order of the Appeals Chamber of 7 October 2011. As a consequence, the Pre-Trial Judge considers that the documents mentioned in the Order of 21 May 2012 [...] must be disclosed to the Applicant without delay pursuant to the principles of protection and disclosure validated by the VWU, with the exception of those relating to the nine witnesses exposed to "high" and "very high" risks. (emphasis added)

³⁸ Disclosure Decision, para. 28.

³⁹ *Id* at paras 23 (referring to the assessment made by the Pre-Trial Judge with respect to the risk for certain individuals), 33 (noting that the Pre-Trial Judge must be in a position to evaluate the relevant risks); Disposition (directing the Pre-Trial Judge to issue comprehensive and reasoned decisions with respect to disclosure).

⁴⁰ *Cf* Rule 166(A) STL RPE.



18. The Pre-Trial Judge's failure to review the methodology employed by the VWU in arriving at its finding that the risk relating to nine witnesses is assessed as either "high" or "very high" could justify remanding the issue back to him for further consideration. However, we have decided that in the interests of justice and judicial economy we should ourselves conduct the assessment of whether the methodology adopted was appropriate and was applied consistently. Having done so we conclude that this was duly performed.

19. The documents submitted to the Pre-Trial Judge show that the VWU's methodology sets out two distinct phases: the first is the threat assessment phase whereby the intention of a subject to cause harm to a witness is assessed on the basis of "desire, expectance, resources and knowledge."⁴¹ The second is the risk assessment phase, whereby the likelihood of a threat occurring combined with the consequence, i.e. the potential harm that might result should the threat occur, is assessed. Each assessment is described in a matrix. The threat rating and the risk rating are then combined to provide an overall threat/risk level. In the present case, this methodology translated into (i) a situational assessment of the witnesses' environment; (ii) the identification of threat groups with their threat intent and capability; and (iii) the individual risk assessment of each witness.

20. We have examined the procedure adopted by the VWU in each of the challenged cases. It is plain from this examination that the selected methodology provided clear and logical guidelines for assessments of risk. In each individual case there was a detailed examination and explanation in the manner described above. We are satisfied that in each case the methodology adopted to reach the assessments was sound.

21. Our examination of the documents submitted to the Pre-Trial Judge also satisfied us that the methodology was applied by the VWU consistently to all individual risk assessments. We are further satisfied that the risk assessments of "high" or "very high" risk, and of the consequential need to withhold the disclosure of the documents related to witnesses under these assessments, are reasonable at least until the risk levels are lowered following reassessment.

22. Mr El Sayed's remaining arguments are dismissed.

⁴¹ See above fn 34, para. 11.



DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

FINDS the appeal admissible;

DISMISSES the appeal.

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

Dated 23 November 2012,

Leidschendam, the Netherlands

Judge David Baragwanath

Presiding

