



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS CHAMBER

Case No: STL-11-01/T/AC/AR126.6

Before: Judge David Baragwanath, Presiding
Judge Ralph Riachy
Judge Afif Chamseddine
Judge Daniel David Ntanda Nsereko
Judge Ivana Hrdličková, Judge Rapporteur

Registrar: Mr Daryl Mundis

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Classification: Public

THE PROSECUTOR

v.

SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

**DECISION ON APPEAL BY COUNSEL FOR MR ONEISSI AGAINST PRE-TRIAL
JUDGE'S "DECISION ON THE ONEISSI DEFENCE'S REQUEST FOR DISCLOSURE
REGARDING A COMPUTER"**

Prosecutor:
Mr Norman Farrell

Head of Defence Office:
Mr François Roux

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

Counsel for Mr Salim Jamil Ayyash:
Mr Eugene O'Sullivan, Mr Emile Aoun &
Mr Thomas Hannis

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz, Mr John Jones &
Mr Iain Edwards

Counsel for Mr Hassan Habib Merhi:
Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Khalil

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Mr Philippe Laroche

Counsel for Mr Assad Hassan Sabra:
Mr David Young, Mr Guénaél Mettraux &
Mr Geoffrey Roberts



INTRODUCTION

1. Counsel for Mr Oneissi have appealed against a decision of the Pre-Trial Judge.¹ In that decision, the Pre-Trial Judge denied counsel's request to order the disclosure of certain documents and information relating to the computer of a Mr. Abu Adass. After careful review of the appeal, the Pre-Trial Judge's decision and that of the Trial Chamber in certifying this matter for appeal, we conclude that the certified issue does not arise from the decision of the Pre-Trial Judge. We therefore dismiss the appeal.

BACKGROUND

2. In a motion before the Pre-Trial Judge, counsel for Mr Oneissi requested an order for the disclosure by the Prosecution of various documents and information relating to a computer belonging to Mr Abu Adass ("Abu Adass Computer").² This was opposed by the Prosecution.³ In a decision dated 24 October 2013, the Pre-Trial Judge dismissed the motion.⁴

3. The next day the Pre-Trial Judge issued his Rule 95(A) Report and, together with the relevant material, formally transferred the *Ayyash et al.* case file to the Trial Chamber.⁵ On 31 October 2013, the Trial Chamber issued an order which confirmed that it had been seized of the *Ayyash et al.* case since 25 October 2013.⁶

¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.6, F0001, Appeal of the Pre-Trial Judge's Decision of 24 October 2013 on Disclosure of Documents Relating to the Computer of ABOU ADASS, 7 April 2014 ("Oneissi Appeal").

² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F1033, Oneissi Defence Request for Disclosure of Documents relating to the Computer of Abou Adass and to Reduce the Time-limits provided for under the Rules (Rules 8 (A), 9 (A), 110 (B) and 113 of the Rules), Confidential, 6 August 2013.

³ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F1072, Prosecution Response to "*Requête de la Défense de Mr. Oneissi en communication de documents relatifs à l'ordinateur d'Abou Adass et aux fins de raccourcir les délais prescrits par le Règlement (Articles 8(A), 9(A), 110(B) et 113 du Règlement)*", Confidential, 22 August 2013.

⁴ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F1175, Decision on the Oneissi Defence's Request for Disclosure Regarding a Computer, Confidential, 24 October 2013 ("Impugned Decision") (but ordering the Prosecutor to re-disclose an investigator's note pursuant to different provisions of the Rules). This decision was subsequently made public on 16 January 2014 (see STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/PTJ, F1327, Decision on the Request by Counsel for Mr. Oneissi for Reconsideration or Certification of the "Decision on the Oneissi Defence's Request for Disclosure Regarding a Computer", 16 January 2014).

⁵ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F1182, The Pre-Trial Judge's Report Prepared Pursuant to Rule 95 (A) of the Rules of Procedure and Evidence, Confidential, 25 October 2013 (a correction was filed on 12 December 2013; a public redacted version was filed on 13 December 2013).

⁶ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, F1191, Orders for Trial Preparation Following the Pre-Trial Conference of 29 October 2013, 31 October 2013.

4. In the interim, on 30 October 2013, counsel for Mr Oneissi filed before the Pre-Trial Judge a motion requesting that he reconsider part of the Impugned Decision and certify another part of that same decision for appeal.⁷ The Prosecution opposed both requests.⁸ Since the case file had been transferred to the Trial Chamber, the Pre-Trial Judge determined that he had no jurisdiction to consider the motion, and dismissed it.⁹

5. As a result, counsel for Mr Oneissi filed a fresh motion before the Trial Chamber requesting that the Presiding Judge grant leave for the Trial Chamber to reconsider in part, and certify in part, the Impugned Decision.¹⁰ As previously, the Prosecution opposed the motion.¹¹

6. The Presiding Judge of the Trial Chamber dismissed the request for leave for the Trial Chamber to reconsider part of the Impugned Decision on the basis that the Trial Chamber did not have power to reconsider the decisions of another chamber.¹² In a separate decision, the full Trial Chamber considered the certification aspect of the motion. After noting that no certifiable issue had been identified, the Trial Chamber proceeded to identify *proprio motu* the issue that is now before us (“Certified Issue”), namely:

Did the Pre-Trial Judge err by misconstruing a disclosure request by Defence counsel in circumstances involving an alleged breach of the Prosecutor’s disclosure obligations under Rules 111 and 113 of the Rules of Procedure and Evidence, by finding that ‘it

⁷ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F1188, *Demande de réexamen et de certification aux fins d’appel de la «Decision on the Oneissi Defence’s Request for disclosure Regarding a Computer»*, 30 October 2013. A confidential addendum to this motion was subsequently filed: STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F1201, *Addendum à la Demande de réexamen et de certification aux fins d’appel de la «Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer»*, 4 November 2013.

⁸ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F1216, Prosecution Response to “*Demande de réexamen et de certification aux fins d’appel de la «Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer»*”, 14 November 2013.

⁹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/PTJ, F1327, Decision on the Request by Counsel for Mr. Oneissi for Reconsideration or Certification of the “Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer”, 16 January 2014.

¹⁰ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1340, Request for Reconsideration and Certification to Appeal the “Decision on the Oneissi Defence’s Request for Disclosure regarding a Computer, 24 January 2014 (“Reconsideration/Certification Request”).

¹¹ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1398, Prosecution Response to “*Demande de réexamen et de certification aux fins d’appel de la «Decision on the Oneissi Defence’s Request for Disclosure Regarding a Computer»*”, 10 February 2014.

¹² STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1446, Decision Denying Leave to Reconsider a Decision of the Pre-Trial Judge Re Disclosure Regarding a Computer, 11 March 2014 (“Reconsideration Decision”).

appears that the Prosecution had adhered to the requirements of the Working Plan, and that judicial determination is not required?¹³

7. Following the filing of the appeal by Counsel for Mr Oneissi on 7 April 2014, the Prosecutor filed his response on 22 April 2014.¹⁴

DISCUSSION

I. Confidentiality

8. The parties in this appeal have filed their respective written submissions on a confidential basis without providing any reason(s) as to why they did so. This is contrary to the relevant Practice Direction.¹⁵ The Tribunal, in service of the Lebanese people, operates on the fundamental principle of open and transparent justice. Hence, we have stressed on a number of occasions the importance of the public nature of the Tribunal's proceedings.¹⁶ Confidentiality in judicial proceedings before the STL is the exception, not the norm.

9. After reviewing the filings in this appeal, we see no reason why the broad matters to which they relate should continue to be confidential. We therefore order the parties to file redacted versions of their briefs in this appeal within 14 days.¹⁷

¹³ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1469, Decision Granting Certification of a Decision of the Pre-Trial Judge on the Oneissi Defence's Request for Disclosure Regarding a Computer, 31 March 2014 ("Certification Decision"), para 14.

¹⁴ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.6, F0002, Prosecution Response to Oneissi Defence Appeal of the Pre-Trial Judge's Decision of 24 October 2013 on Disclosure of Documents Relating to the Computer of Abou Adass, 22 April 2014 ("Prosecutor's Response").

¹⁵ Practice Direction on Filing of Documents before the Special Tribunal for Lebanon, STL/PD/2010/01/Rev.2, 14 June 2013 (Article 6 (2): "Where a Participant files a document as Confidential, Confidential and *Ex Parte* or Under Seal and *Ex Parte* with Limited Distribution, he/she shall indicate, in the document, the factual and legal basis for the chosen classification.")

¹⁶ See, e.g., STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.4, F0004, Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records", 2 October 2013, para. 5; STL, *In the matter of El Sayed*, CH/AC/2013/01, Public Redacted Version of Decision on Appeal by the Prosecutor Against Pre-Trial Judge's Decision of 11 January 2013, Dated 28 March 2013, 28 March 2013, para. 9 (with further references).

¹⁷ To avoid further litigation we encourage the parties to verify their redactions with the respective other party before filing their redacted briefs (see *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.4, F0005, Order on Issuing Public Redacted Version of 19 September 2013 Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records", 2 October 2013, para. 2).

II. Preliminary matter - the Certified Issue

10. Counsel for Mr Oneissi allege a number of errors in the Impugned Decision, including a failure by the Pre-Trial Judge to rule on the questions of disclosure submitted by the Defence and an erroneous application of the relevant Rules on disclosure to the material being sought.¹⁸ The Prosecutor responds by arguing, *inter alia*, that none of these issues fall within the scope of the issue certified by the Trial Chamber, and that the Trial Chamber in fact certified an issue that does not arise from the Impugned Decision.¹⁹

11. We recall that our jurisdiction to entertain an interlocutory appeal where certification has been granted by the Trial Chamber is limited to those issues that were in fact certified.²⁰ Moreover, we have clarified that we only decide issues that actually arise from the Impugned Decision.²¹ We must therefore first ascertain which issues, if any, are properly before us. In this regard, we are aided by the language of the Impugned Decision as well as the Certification Decision.

A. Impugned Decision

12. The present dispute concerns the Pre-Trial Judge's decision concerning two distinct sets of material broadly relating to the Abu Adass Computer sought by counsel for Mr Oneissi from the Prosecution.²² The Pre-Trial Judge ultimately denied counsel for Mr Oneissi's request for both sets.²³

13. The Pre-Trial Judge's decision with respect to each set was based on distinct grounds. Regarding the first set of material ("First Set of Material")—requested by counsel for Mr Oneissi under Rules 110 (B) and 113 and for which the Prosecution did not assert Rule 111 protection

¹⁸ Oneissi Appeal, paras 29-58.

¹⁹ Prosecution Response, paras 10-18.

²⁰ See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, F0009, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013, para. 22; see also STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR.126.5, F0003, Decision on Appeal by Counsel for Mr Sabra Against Pre-Trial Judge's "Decision on Sabra's Tenth and Eleventh Motions for Disclosure", 6 November 2013 ("Disclosure Appeal Decision"), paras 7-8; see also ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.14, Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 25 February 2009, para. 17 ("[T]here is no jurisdiction for the Appeals Chamber to decide on matters that the Trial Chamber explicitly declined to certify for appeal.").

²¹ Disclosure Appeal Decision, paras 6-7.

²² Impugned Decision, paras 27-39.

²³ *Id.* at paras 30, 39, Disposition.

against disclosure—the Pre-Trial Judge held that “it appears that the Prosecution has adhered to the requirements of the Working Plan, and that judicial determination is not required.”²⁴ This was because the Prosecution had found only one document within this category that matched the Defence’s request, which he had already disclosed.²⁵

14. Regarding the second set of material (“Second Set of Material”)—requested under Rules 110 (B) and 113 and for which the Prosecution did assert Rule 111 protection against disclosure—the Pre-Trial Judge held that “the position is nuanced.”²⁶ After reviewing the scope of Rule 111,²⁷ he held that “the [Oneissi] Defence has not established that the Prosecution has abused its discretion and is not acting in good faith. [...] [H]aving failed to show that the Prosecution has abused its discretion and is not acting in good faith, the Pre-Trial Judge will not intervene in the Prosecution’s exercise of its discretion [...]”²⁸

15. Thus, while the Pre-Trial Judge held that a judicial determination was not required for the First Set of Material, he did not do the same with respect to the Second Set of Material. Indeed, he did make a judicial determination that the Prosecutor was not required to disclose this material.

B. Certification Decision

16. In their Reconsideration/Certification Request to the Trial Chamber, the Defence did not challenge the Pre-Trial Judge’s distinction between the two sets of material. Rather, the Defence requested, on the one hand, *reconsideration* of paragraphs 27-30²⁹ (relating to the Pre-Trial Judge’s decision on documents for which the Prosecution did not rely on Rule 111) and, on the other, *certification for appeal* of paragraphs 31-38³⁰ (relating to the Pre-Trial Judge’s decision on the documents for which the Prosecution did rely on Rule 111 in order to withhold them).

²⁴ *Id.* at para. 30.

²⁵ *Id.* at paras. 27-30.

²⁶ *Id.* at para. 31.

²⁷ *Id.* at paras 32-33, 36.

²⁸ *Id.* at para. 39.

²⁹ Reconsideration/Certification Request, paras 18-24.

³⁰ *Id.* at paras 25-38.

17. The Presiding Judge subsequently denied the reconsideration request.³¹ The full Trial Chamber, in the Certification Decision—after admonishing counsel for Mr Oneissi for failing to state a specific certifiable issue in their motion (by only requesting blanket certification of paragraphs 31-38 of the Impugned Decision)³²—proceeded *proprio motu* and identified a “certifiable issue” within these same paragraphs. Those paragraphs only contain the Pre-Trial Judge’s reasoning as to the Second Set of Material outlined above.

18. Nevertheless, the Trial Chamber stated that the Pre-Trial Judge’s basis with respect to the Second Set of Materials “appears to be paragraph 30 [of the Impugned Decision],”³³ namely, the Pre-Trial Judge’s finding that “it appears that the Prosecution has adhered to the requirements of the Working Plan, and that judicial determination is not required.”³⁴ This understanding of the Impugned Decision led the Trial Chamber to identify the Certified Issue.³⁵

C. Whether the Certified Issue arises from the Impugned Decision

19. The Appeals Chamber finds that the Certified Issue as outlined in the Certification Decision was based on a misapprehension of the Impugned Decision.

20. As outlined above, the phrase “it appears that the Prosecution has adhered to the requirements of the Working Plan, and that judicial determination is not required”³⁶—which forms an integral part of the Certified Issue—did not in any way form the basis of the Pre-Trial Judge’s reasoning concerning the Second Set of Material (contained in paragraphs 31-38 of the Impugned Decision). Rather, this phrase summarized the Pre-Trial Judge’s reasoning in relation to the First Set of Material only (contained in paragraphs 27-30 of the Impugned Decision). Yet the certification request filed by counsel for Mr Oneissi related to the Second Set of Material—where the Prosecution asserted Rule 111 protection against disclosure—not the First Set of Material.³⁷

³¹ Reconsideration Decision, para. 18.

³² Certification Decision, para. 10.

³³ *Id.* at para. 13.

³⁴ *Id.* at para. 13 (quoting from Impugned Decision, para. 30).

³⁵ See above para. 6.

³⁶ Impugned Decision, para. 30.

³⁷ Oneissi Appeal, paras 29-58.

21. The Certification Decision thus conflated the Pre-Trial Judge's basis for denying counsel for Mr Oneissi's request for an order requiring disclosure of the First Set of Material with his altogether different basis for denying their request with respect to the Second Set of Material. Therefore, although the original certification motion before the Trial Chamber identified only paragraphs 31-38 of the Impugned Decision³⁸ and the Trial Chamber claims to have identified a certifiable issue within these same paragraphs,³⁹ the Certified Issue before us is entirely unrelated to these paragraphs and instead relates to the First Set of Material.

22. We note that the Certified Issue was formulated *proprio motu* by the Trial Chamber after it correctly noted counsel for Mr Oneissi's failure to adequately present an issue for certification in their original motion. As indicated in the Certification Decision, the request for certification did not "meet the minimum standard required in a Party seeking to certify a decision for an interlocutory appeal"⁴⁰ and the Trial Chamber was entirely within its discretion to "dismiss the motion on that basis alone."⁴¹ The Trial Chamber's provision to counsel for Mr Oneissi of an opportunity to seek redress, albeit on an incorrect interpretation of the Impugned Decision, therefore gave them a certificate to which they were not entitled.

23. In sum, the Certified Issue does not arise from the Impugned Decision. We dismiss the appeal on this basis.

³⁸ Certification Decision, para. 10.

³⁹ *Id.* at para. 11: "[W]ithin these eight identified paragraphs, the Trial Chamber has identified an issue [for certification]."

⁴⁰ *Id.* at para. 10 (quoting from Reconsideration Decision, para. 19).

⁴¹ *Ibid.*

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

DISMISSES the Oneissi Appeal in its entirety; and

ORDERS the parties to file public redacted versions of their submissions on appeal within fourteen days of this decision.

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

Dated 12 May 2014

Leidschendam, The Netherlands



Judge David Baragwanath
Presiding

