



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE PRESIDENT

Case No.: STL-14-05/PT/PRES

Before: Judge David Baragwanath, President

Registrar: Mr Daryl Mundis

Date: 13 November 2014

Original language: English

Classification: Public

**IN THE CASE AGAINST
AL JADEED [CO.] S.A.L. / NEW T.V. S.A.L. (N.T.V.)
KARMA MOHAMED TAHSIN AL KHAYAT**

**DECISION ON “DEFENCE REQUEST TO THE PRESIDENT FOR DISCLOSURE
RELATED TO THE MATTER OF THE
PERSONAL JURISDICTION OF THE TRIBUNAL”**

***Amicus Curiae* Prosecutor**
Mr Kenneth Scott

Counsel for Al Jadeed S.A.L.:
Mr Karim A.A. Khan
Mr Rodney Dixon
Ms Shyamala Alagendra
Ms Maya Habli

Counsel for Ms Karma Khayat:
Mr Karim A.A. Khan
Mr Rodney Dixon
Ms Shyamala Alagendra
Ms Maya Habli



INTRODUCTION

1. I am seized of a request filed by the Defence for *Al Jadeed S.A.L.* and Ms Karma Mohamed Tahsin al Khayat (“Defence”) pursuant to Rule 32 (B) of the Rules of Procedure and Evidence (“Rules”) of the Special Tribunal for Lebanon (“Tribunal”), seeking disclosure to the Defence of “(i) all information and documentation about any trainings, seminars or meetings that were held in the Chambers of the Tribunal on the subject of whether the Tribunal may exercise jurisdiction over legal entities, including on whether the Rules could be amended; and (ii) any papers or other documentation circulated within the Chambers on this topic.”¹ The *Amicus* Prosecutor opposes this Request.²

2. The Request is predicated on a recent decision of the Appeals Panel which held, by majority, that the Tribunal has jurisdiction to hold contempt proceedings against legal persons.³ The Appeals Panel ruling overturned the earlier decision of the Contempt Judge that the Tribunal does not possess such jurisdiction.⁴

3. For reasons that follow I decline the request.

SUBMISSIONS OF THE PARTIES

4. On 16 October 2014, the Defence in this case requested disclosure of “all information and documentation pertaining to any internal trainings, seminars or meetings organised in the Chambers of the Tribunal for the Judges under the current Presidency or the past Presidency of the late President, Judge Antonio Cassesse [*sic*], on the subject of whether the Tribunal may exercise jurisdiction over legal persons, including whether the Rules should be amended to include such jurisdiction”⁵, outside the ordinary deliberations of the Appeals Panel. The Defence asserts that disclosure of such material is necessary given the significance of the

¹ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PR/PRES, F0067, Defence Request to the President for Disclosure Related to the Matter of the Personal Jurisdiction of the Tribunal, 16 October 2014 (“Request”), para. 19.

² STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PR/PRES, F0077, Response to “Defence Request to the President for Disclosure Related to the Matter of the Personal Jurisdiction of the Tribunal”, 30 October 2014 (“Response”).

³ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/AP/AR126.1, F0012, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, 2 October 2014 (“Appeals Panel Decision”).

⁴ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/CJ, F0054, Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, 24 July 2014.

⁵ Request, para. 1.

Appeals Panel Decision which, it argues, has made new law regarding the criminal liability of companies.⁶

5. Noting that the grounds upon which the impartiality of a judge may be challenged under Rule 25 (A) of the Rules are broad, the Defence claims that the judges' attendance at "trainings", discussions and/or the circulation of materials could cast doubt over the impartiality and the appearance of impartiality of the proceedings before the Appeals Panel.⁷ The Defence also argues that the judges of the Appeals Panel were restricted to ruling on the submissions made by the parties to the case.⁸ It expresses concern that the Appeals Panel Decision was founded on authorities and arguments not raised by the *Amicus* Prosecutor, and to which the Defence had no opportunity to respond.⁹ The Defence further contends that disclosure of the requested material is necessary to promote confidence in the fairness and transparency of the Tribunal's proceedings.¹⁰

6. The *Amicus* Prosecutor opposes the Request in its entirety. He contends that the Defence has not submitted any legal basis for its application for disclosure, and that the breadth of the Request makes it tantamount to a fishing expedition.¹¹ The *Amicus* Prosecutor states that even if the Defence had specified the material to be disclosed, any such documentation is internal and comprises work product and/or "judicial mental impressions".¹²

7. The *Amicus* Prosecutor challenges the Defence's suggestion of judicial partiality on the part of the Appeals Panel, arguing that "[t]he presumption that research or attending training programs or seminars leads to bias is entirely unfounded."¹³ In the *Amicus* Prosecutor's view, the Request is essentially an attempt to re-litigate the Appeals Panel Decision.¹⁴

8. The *Amicus* Prosecutor also contests the Defence's claim that judges must only consider the submissions of parties when deciding on the merits of a case. The *Amicus* Prosecutor maintains that judges are instead required to apply the relevant law, whether or

⁶ Request, para. 2.

⁷ *Id.* at paras 3, 9.

⁸ *Id.* at para. 11.

⁹ *Id.* at para. 18.

¹⁰ *Id.* at para. 4.

¹¹ Response, paras 3, 5.

¹² *Id.* at para. 6.

¹³ *Id.* at para. 9.

¹⁴ *Id.* at paras 13, 15.

not it has been provided or relied upon by the parties.¹⁵ In his concluding submissions, the *Amicus* Prosecutor expresses concern with the Defence's approach and refers to the Contempt Judge's previous warning that motions "should concern live issues and not hypothetical musings or petitions".¹⁶

DISCUSSION

9. I first note that the Defence raises a number of arguments calling into question the impartiality of the Judges on the Appeals Panel which decided the interlocutory appeal on the jurisdiction of the Tribunal over legal persons. The proper procedure for challenging a Judge of this Tribunal in this regard is by way of formal application to be judicially considered by a panel of three Judges as provided by Rule 25 of the Rules. Here, the Defence has not applied for the disqualification of any of the Judges sitting on the Appeals Panel and any arguments in this regard are not properly before me under Rule 32 (B). As Article 10 (1) of the Statute on which that Rule is based makes plain, the functions referred to in Rule 32 (B) are not themselves judicial functions but rather are "in addition to [the President's] judicial functions". On the issue of disqualification reliance on the President's *administrative* role is not a legitimate alternative to using the Rule 25 application for *judicial* relief. The same reasoning applies to the Defence's criticism of the Appeals Panel's legal holdings. A challenge founded on natural justice/*audi alteram partem* grounds can be made only to a *judicial* entity. Hence, the right of the Defence to seek reconsideration of the Appeals Panel Decision pursuant to Rule 140 of the Rules.

10. The issue before me is thus a narrow one: does the Defence have a right to obtain from me as the President of the Tribunal in my administrative capacity information relating to the internal workings of the Chambers? The Defence has not cited any provision of the Tribunal's Statute or Rules in support of its application. Nor has it referred to any relevant international or domestic law or practice in this regard. Rather, the Defence invokes my general responsibility under Rule 32 (B) of the Rules "for the effective functioning of the Tribunal and the good administration of justice" as the basis for its Request. It asserts that disclosure of information concerning any trainings, seminars and meetings that took place in the Tribunal's Chambers on the issue of whether the Tribunal might exercise jurisdiction over

¹⁵ Response, para. 17.

¹⁶ *Id.* at para. 19.

legal entities is justified given the magnitude and novelty of the Appeals Panel Decision and its implications.

11. Section 7 of the Tribunal's Rules sets out a detailed regime governing disclosure in cases before the Tribunal. Section 7 comprises 14 separate Rules,¹⁷ which clarify the material to be disclosed by the Prosecutor, the Defence and Victims Participating in the Proceedings and the manner of such disclosure (including specific restrictions). The Rules are silent on the point of disclosure by the Chambers. As the Rules do not contemplate the possibility of disclosure by the Chambers to a party, such disclosure could only take place in strictly limited circumstances, as an exception to the overarching principle of the secrecy of judicial deliberations. This principle is referenced in Rule 43: "The deliberations of the Chamber shall take place in private and remain secret." It is a principle that exists in all international courts and tribunals and in domestic law.¹⁸ It safeguards the independence and impartiality of the judiciary, including its staff, by shielding it from external pressures and from unjustifiable demands on its time that might otherwise exist. Each judge must be able to work in an environment in which he or she can be sure that confidentiality is respected. This in turn enables a free exchange of opinions.

12. The principle also in my opinion covers the legal research that judges undertake. It is unclear in this respect what "trainings" are in contemplation by the Defence in this matter. Judges may take part in seminars on judgment writing or on specific topics. But unless the case falls within some exception, such as those noted below,¹⁹ the principle of confidentiality applies.

13. The present issue is not related to fact-finding. The Appeals Panel ruled on a *legal* issue, namely, whether the Tribunal has jurisdiction over contempt with respect to legal persons. The Defence's submission of a judge's alleged improper "acquisition of facts not provided by the parties" is therefore not relevant here.²⁰ On the contrary, judges must be or become familiar with the legal provisions they apply. For that purpose, they can—and indeed should—be closely interested in legal developments that might be relevant to their work. Taking the Defence arguments to their logical conclusion, judges would have to disclose

¹⁷ Rules 110 – 122 STL RPE.

¹⁸ *See, e.g.*, Art. 74 (4) ICC St., Rule 142 (1) ICC RPE; Rule 29 ICTY RPE; Rule 29 MICT RPE; Art. 528 of the Lebanese Code of Civil Procedure; Sections 43, 45 of the German Judiciary Act; Art. 6 (1) of the French *Ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature*, *see also* Section 8(1) of the English Contempt of Court Act of 1981 (with respect to jury deliberations).

¹⁹ *See below*, para. 16.

²⁰ *See Request*, para. 10.

every book they have consulted, every law journal they have read and any conference they have attended, just because this could provide a clue to their thought processes. This would result in the exposure of judges to external pressures that must be avoided, especially given the implications for the judges' independence and impartiality.

14. I am not persuaded that in this case different principles should apply. Just because judges rule in a way that does not find the agreement of the party losing an argument of law does not entitle that party to information on how the judges arrived at their legal conclusions. Here, I find particularly unpersuasive the complaint by the Defence that the Appeals Panel's Judges relied on legal sources not referenced by the *Amicus* Prosecutor in his pleading. Indeed, the Defence must be aware of the *jura novit curia* principle: "no party has a 'burden' in relation to establishing or interpreting legal norms; rather it is for the Chamber to set out and interpret the law".²¹ In other words, while a Chamber may be assisted by a party's legal submissions, it is neither bound by them, nor barred from relying on other sources of law.

15. The reality is that each judge draws upon the "extensive judicial experience" which by Article 9 (1) of the Statute is a condition of appointment. Such experience evolves over time with exposure to the myriad factors of education, discussion and living that contribute to it, including personal study in preparation for the case.

16. I do not discount the duty in some circumstances for judges to make disclosure. Since a judge's first obligation is to avoid bias, any factors that could reasonably be construed as disqualifying must be disclosed unless the judge elects to disqualify him or herself. Furthermore, if a judge receives information otherwise than in the courtroom as to relevant facts, in the absence of any privilege from production they too must be disclosed.

17. I add that, where there is no disadvantage in such course, a court will strive to keep parties and the public aware of any factors that may be of interest. But here there would be serious disadvantage. Were I to accede to the present request it could serve as a precedent for

²¹ ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, Decision on Boškoski Defence Motion for Admission of Exhibits from the Bar Table - "Armed Conflict" and Related Requirements Under Article 3 of the Statute, 27 February 2008, para. 7; see also ICTR, *Kambanda v. Prosecutor*, ICTR 97-23-A, Judgement, 19 October 2000, para. 98 ("[I]n the case of errors of law, the arguments of the parties do not exhaust the subject. It is open to the Appeals Chamber, as the final arbiter of the law of the Tribunal, to find in favour of an Appellant on grounds other than those advanced: *jura novit curia*. Since the Appeals Chamber is not wholly dependent on the arguments of the parties, it must be open to the Chamber in proper cases to consider an issue raised on appeal even in the absence of substantial argument. The principle that an appealing party should advance arguments in support of his or her claim is therefore not absolute: it cannot be said that a claim *automatically* fails if no supporting arguments are presented.") (Emphasis in the original).

an expensive and time-wasting general fishing exercise in other cases. The Defence argument is that the Appeals Panel Decision regarding the criminal liability of companies has made new law. But here, from the outset of the appeal, as both parties well knew, whether a company could be liable under Rule 60 *bis* was the major question for decision. It is counsel's task to research and draw to the Tribunal's attention the authorities on the issue on which they rely. If in preparation of their decision the judges were to come across some wholly new point on which a decision will turn they would of course invite submissions upon it. But there is no impediment to their relying upon some uncited case that does no more than apply a principle that has been debated in submissions.

18. Finally, with respect to the request for information on proposals to amend the Rules, I note that such proposals are made confidentially. In compliance with Rule 5 of the Rules, the President makes public a summary of accepted Rules proposals and may do so, in consultation with the Judges, with respect to rejected Rules proposals. I have adhered to such practice in the past.

19. In sum, the Defence has not demonstrated any right to the material it seeks. Nor has it shown the existence of any exceptional circumstances which militate in favour of disclosure.

DISPOSITION

FOR THESE REASONS;

PURSUANT to Rule 32 (B) of the Rules;

I DISMISS the Request.

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

Dated 13 November 2014

Leidschendam, the Netherlands



Judge David Baragwanath

President