

THE CONTEMPT JUDGE

Case No.: STL-14-06/PT/CJ
Before: Judge Nicola Lettieri, Contempt Judge
Registrar: Mr Daryl Mundis, Registrar
Date: 17 February 2015
Original language: English
Classification: Public

IN THE CASE AGAINST

AKHBAR BEIRUT S.A.L.
IBRAHIM MOHAMED ALI AL AMIN

**DECISION ON REQUEST SEEKING LEAVE TO FILE A REQUEST FOR
RECONSIDERATION OF THE DECISION OF 14 AUGUST 2014**

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

**Counsel for *Akhbar Beirut* S.A.L. and
Mr Ibrahim Mohamed Ali Al Amin:**
Mr Antonios Abou Kasm



INTRODUCTION

1. Counsel assigned to the two Accused has seized me with a confidential and *ex parte* request for leave to seek reconsideration of a previous decision.¹ In that decision I denied counsel's request to order the *Amicus Curiae* Prosecutor ("*Amicus*") to make disclosure in this case not just to counsel but also to the Accused directly.² Having conducted the required *prima facie* examination of the merits of counsel's Leave Request, I conclude that counsel's arguments for reconsideration are manifestly unfounded and for this reason dismiss the Leave Request. I also reject counsel's request to keep his submissions from the *Amicus* and the public.

BACKGROUND

2. The Accused are both represented by counsel assigned to them by the Head of Defence Office upon my order. In a previous decision I have provided a procedural history on this subject.³

3. Following his assignment, counsel sought an order from me compelling the *Amicus* to disclose all relevant materials not just to counsel, but, separately, to the Accused.⁴ I dismissed this request, noting in particular that:

[O]nce counsel is assigned to represent an accused, like in this case, counsel carries all responsibilities related to the accused's defence. This includes receiving relevant disclosure. It is then for counsel to share this information with the accused. To require parallel disclosure to both an accused and counsel would defeat the purpose of legal representation.⁵

¹ STL, *In the case against Al Akhbar S.A.L. and Al Amin*, STL-14-06/PT/CJ, F0075, Request Seeking Leave to File a Request for Reconsideration of the Decision of 14 August 2014 Relating to the Urgent Defence Submissions Regarding Disclosure of Evidence by the *Amicus Curiae* Prosecutor and Preliminary Motions, Confidential and *Ex Parte*, 3 February 2015 ("Leave Request"). All further references to filings and decisions refer to this case number unless otherwise stated. See also F0075/A01, Annex – Request for Reconsideration of the Decision of 14 August 2014 Relating to the Urgent Defence Submissions Regarding Disclosure of Evidence by the *Amicus Curiae* Prosecutor and Preliminary Motions, Confidential and *Ex Parte*, 3 February 2015; F0075/ADD, Annex *Bis* – Addendum to the Request for Reconsideration of the Decision of 14 August 2014 Relating to the Urgent Defence Submissions Regarding Disclosure of Evidence by the *Amicus Curiae* Prosecutor and Preliminary Motions, Confidential and *Ex Parte*, 5 February 2015 ("Addendum").

² F0053, Decision on Urgent Defence Submissions Regarding Disclosure by *Amicus Curiae* Prosecutor and Preliminary Motions, 14 August 2014 ("Decision of 14 August 2014").

³ F0059, Decision on Defence Request for Reconsideration of Decision on Certification, 1 September 2014 ("Certification Reconsideration Decision"), paras 2-4.

⁴ F0039, Urgent Request from Assigned Counsel for Disclosure to the Accused of All the Evidence Disclosed by the *Amicus Curiae* Prosecutor Pursuant to Rule 110 (A) of the Rules of Procedure and Evidence, 22 July 2014.

⁵ Decision of 14 August 2014, para. 9.

4. Counsel now requests leave to seek reconsideration of this decision.⁶ He contends that, since my decision, new circumstances have arisen. Counsel submits that he was unable to provide the Accused with the materials disclosed by the *Amicus* because the Accused have broken off all contact with him.⁷ He argues that, under the fair trial rights as guaranteed by Article 16 of the Tribunal's Statute, the Accused have a right to examine all incriminating evidence produced during the proceedings.⁸ Because the Accused have not received this material, their rights are being violated, leading to prejudice.⁹ Counsel further argues that the lack of contact between him and the Accused should not deprive the Accused of their right to see the case file. He suggests that I request either the Registrar or the Head of Defence Office to disclose to the Accused directly all evidence in the case file. Alternatively, he seeks permission for the Accused to consult the material at the Tribunal's Beirut Office.¹⁰

APPLICABLE LAW

5. Rule 140 of the Rules of Procedure and Evidence ("Rules") provides the following:

A Chamber may, *proprio motu* or at the request of a Party with leave of the Presiding Judge, reconsider a decision, other than a Judgement or sentence, if necessary to avoid injustice.

Pursuant to Rule 60 *bis* (H), Rule 140 is applicable, *mutatis mutandis*, in contempt proceedings.¹¹

6. Rule 140 establishes a bifurcated procedure. The party requesting reconsideration must first obtain leave of the Presiding Judge of the Chamber to file a reconsideration request. If such request is filed before a single Judge, previous practice has been to require that leave must be granted by that Judge.¹² The step of first seeking leave serves as a filter to prevent the filing of unwarranted requests for reconsideration.¹³ Any request for leave must therefore undergo a

⁶ Leave Request, para. 15, p. 5.

⁷ *Id.* at para. 12.

⁸ *Id.* at para. 13.

⁹ *Id.* at para. 14.

¹⁰ *Id.* at para. 15.

¹¹ Certification Reconsideration Decision, paras 6-8; STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/CJ, F0088, Public Redacted Decision on *Amicus Curiae* Prosecutor's Request for Reconsideration of Decision of 14 November 2014, 28 August 2014, paras 5-7.

¹² See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, F0172, Decision on the Prosecution's Request for Partial Reconsideration of the Pre-Trial Judge's Order of 8 February 2012, 29 March 2012, para. 30, fn. 33.

¹³ See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, F1214, Decision on Request by Defence for Messrs Badreddine and Oneissi for Authorization to Seek Reconsideration of the Appeals Chamber's Decision of 25 October 2013, 13 November 2013, para. 4; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, F1603, Decision

prima facie examination of the merits of the sought reconsideration and will be dismissed if it is manifestly unfounded.¹⁴

7. In this regard, I recall the applicable standards for reconsideration. In particular, the Appeals Chamber has held that:

[R]econsideration is an exceptional measure and subject to strict requirements. A party seeking the remedy must demonstrate that reconsideration is necessary to avoid an injustice. What constitutes an injustice is case-dependent, but “[a]t a minimum, it involves prejudice.” The party must allege prejudice on specific grounds, which may include that a decision is “erroneous or [. . .] constituted an abuse of power on the part of the Chamber” or that “new facts or a material change in circumstances” have arisen after the decision is made. We recall that “the presence of these grounds is not sufficient per se. The party seeking reconsideration must also show that they resulted in prejudice”.¹⁵

DISCUSSION

I. Preliminary issue – the classification of the request and this decision

8. Counsel has requested that I maintain the confidential and *ex parte* nature of his submissions “so as to protect the confidentiality of communications between Counsel and the Accused”.¹⁶ He relies on Rule 163 and Article 10 of the Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims appearing before the Special Tribunal for Lebanon (“Code”).¹⁷ For the following reasons, I deny this request.

9. Rule 163 states that, “[c]ommunications made in the context of the professional relationship between a person and his legal counsel shall be regarded as privileged and consequently not subject to disclosure at trial”. Article 10 (A) of the Code relatedly provides that, “[c]ounsel shall at all times preserve the confidentiality of the Client’s affairs and shall not reveal to any other person [...] the content, existence or scope of any communications made in the context of the professional relationship with his Client”. These provisions generally protect certain communications between legal counsel and client. In his submissions, however, counsel

on Leave to Reconsider Two Decisions on Challenges to the Form of the Indictment (Merhi Defence), 30 June 2014, paras. 4-5.

¹⁴ *Ibid.* In some systems, this would be spelled out as an examination as to the *fumus boni juris* of the request (assessment of the possibility of success) and the *periculum in mora* (possible prejudice).

¹⁵ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC, Decision on Request by Counsel for Messrs Badreddine and Oneissi for Reconsideration of the Appeals Chamber’s Decision of 25 October 2013, 10 December 2013, para. 10 (footnotes referring to other case-law omitted).

¹⁶ Leave Request, paras 16-18.

¹⁷ *Id.* at para. 17.

discloses neither the content nor even the existence of any communications between him, or his team, and the Accused, except for quoting a recent statement Mr Al Amin himself made publicly on television describing one exchange.¹⁸ Indeed, counsel's submissions concern the absence of communications, which he supports by reference to an article published in a newspaper and Mr Al Amin's statement on television, both of which are not subject to attorney-client privilege.¹⁹ The fact that the Accused have refused to communicate with counsel is already in the public realm, and, at least with respect to the television interview, has been confirmed by Mr Al Amin himself.²⁰ There is thus no basis for withholding the submissions from the *Amicus* or the public and I am ordering the Registrar to change the status of the submissions from confidential and *ex parte* to public. This decision will also be issued publicly.

10. I note that because of the *ex parte* nature of the Leave Request, the *Amicus* had no opportunity to respond. Ordinarily, the *audi alteram partem* principle requires me to hear from him in this matter.²¹ However, I have concluded that in the circumstances at hand I exceptionally can decide the matter in the absence of a response. This is because I was fully briefed by both Parties on the issue underlying this request—decided in the Decision of 14 August 2014—namely, whether disclosure should be effected other than through counsel. Furthermore, given the outcome of this decision, the *Amicus* suffers no prejudice.

II. Whether leave should be granted to request reconsideration of my decision that disclosure to the Accused must be effected through counsel

11. In the Decision of 14 August 2014, I explained that, under the applicable legal provisions, it is the responsibility of assigned counsel to effect disclosure to the Accused.²² Indeed, it follows from the independence of the legal profession that the conduct of the defence is essentially a matter between the accused and counsel, whether counsel be appointed under a legal aid scheme or be privately financed. A court must intervene only if the failure of counsel to

¹⁸ Addendum, para. 2.

¹⁹ Leave Request, para. 12; Addendum, para. 2.

²⁰ Addendum, para. 2.

²¹ See 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. 6.

²² Decision of 14 August 2014, paras 7-9.

provide effective representation is manifest or sufficiently brought to the court's attention in some other way.²³

12. While I appreciate the difficulties faced by counsel, who apparently has had no contact with the Accused, this does not change the fact that as assigned counsel he represents the Accused and is responsible for all aspects of their defence.²⁴ This includes receiving any disclosed material, ensuring that the Accused have the opportunity to meaningfully examine this material and supervising compliance with protective measures. This responsibility cannot be delegated to others, be it the Head of Defence Office or the Registrar. Nor can the Court make an order to that effect.

13. However, counsel's responsibility reaches its limits where an accused refuses to cooperate with him. I stress that the Accused in these proceedings have a right to receive the material disclosed by the *Amicus*. But if the Accused decline to receive such material from counsel, or even be in contact with counsel, it is not up to the Court to dictate to them whether and how to exercise their right. This is the Accused's choice alone.

14. Moreover, deviating from the principle that counsel is responsible for all aspects of the defence would in essence enable the Accused to circumvent my decision to assign counsel to them in the first place. I recall that I ordered such assignment because of the Accused's stated refusal to participate in the proceedings and to safeguard their rights.²⁵

15. The same considerations apply to counsel's alternative requested relief; that is, to permit the Accused to consult the relevant material at the Tribunal's Beirut Office. It is not the Court's role to prescribe the arrangements under which an Accused can access such material. On the contrary, it is for the Accused and their counsel to agree on the appropriate arrangements in this regard.

16. In light of the foregoing, I conclude that the request for leave to seek reconsideration of the Decision of 14 August 2014 is manifestly unfounded and I dismiss it in its entirety.

²³ See ECtHR, *Kamasinski v. Austria*, 9783/82, Judgment, 19 December 1989, para. 65; see also ICTY, *Prosecutor v. Blagojević et al.*, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 96.

²⁴ Decision of 14 August 2014, para. 9.

²⁵ See F0018, Reasons for Decision on Assignment of Counsel, 5 June 2014.

17. I note however that counsel may of course seek the assistance of the Head of Defence Office in establishing contact with the Accused and in setting up appropriate arrangements that allow the Accused to exercise their right to examine the disclosed material under the framework set out above. I recall in this regard that one of the Head of Defence Office's functions is to "provide support and assistance to defence counsel".²⁶ This includes all assistance as required to facilitate the work of assigned counsel in this case.

²⁶ Art. 13 (2) STL St.; Rule 57 (E) (i) STL RPE.

DISPOSITION

FOR THESE REASONS;

PURSUANT to Rule 140 of the Rules,

I

DISMISS the Leave Request; and

ORDER the Registrar to change the classification of the Leave Request (F0075), the Annex (F0075/A01) and the Addendum (F0075/Add) to public.

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

Dated 17 February 2015

Leidschendam, the Netherlands



Judge Nicola Lettieri
Contempt Judge

