

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**THE CONTEMPT JUDGE**

**Case No.:** STL-14-05/T/CJ  
**Before:** Judge Nicola Lettieri, Contempt Judge  
**Registrar:** Mr Daryl Mundis, Registrar  
**Date:** 11 May 2015  
**Original language:** English  
**Classification:** Confidential

**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 *AMICUS CURIAE* PROSECUTOR'S SUBMISSIONS ON DEFENCE  
WITNESS DT02**

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

**Counsel for *Al Jadeed* [CO.] S.A.L./  
NEW T.V. S.A.L. (N.T.V.) and  
Ms Karma Khayat:**  
Mr Karim A.A. Khan  
Mr Rodney Dixon  
Ms Shyamala Alagendra



## **INTRODUCTION**

1. On 12 May 2014, Ms Maya Habli was appointed co-counsel for the Accused in this case.<sup>1</sup>
2. On 13 October 2014, following the Appeals Panel's decision on jurisdiction, the *Amicus Curiae* Prosecutor ("*Amicus*") filed his Amended Pre-Trial Brief.<sup>2</sup>
3. On 8 December 2014, the Defence notified the *Amicus* that Ms Habli might be called as a witness during the Defence case, if any. The Defence attested that, on account of this possibility, Ms Habli's access to the Tribunal's legal work flow system had not been renewed and she had been unable to access new *Amicus* disclosure or confidential filings since at least 20 October 2014. The Defence sought an indication from the *Amicus* whether he objected to Ms Habli remaining as co-counsel, given the possibility she might appear as a witness.<sup>3</sup>
4. On 11 December 2014, the *Amicus* communicated to the Defence that he currently expressed no view on the propriety of Ms Habli as a Defence witness or on whether the measures taken by the Defence cured any potential issues in this respect. He added that the Defence's measures did not correct Ms Habli's exposure to prior disclosure and confidential filings. He also presumed that attorney-client privileges and work product protections would be waived as to any matter on which Ms Habli might be called to testify, and that such waiver would apply to *Al Jadeed S.A.L.* and her representation of persons associated with *Al Jadeed S.A.L.*<sup>4</sup>
5. On 15 January 2015, Ms Habli requested the Tribunal's Head of Defence Office to terminate her representation appointment in this case on the basis of Article 7 of the Code of Professional Conduct for Defence Counsel and Legal Representatives of Victims Appearing Before the Special Tribunal for Lebanon ("Code of Professional Conduct").<sup>5</sup> Ms Habli's appointment was terminated on 27 January 2015.<sup>6</sup>

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<sup>1</sup> STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/I/CJ, F0011, Appointment of Co-Counsel Pursuant to Rules 57 (D) (vii) and 58 of the Rules of Procedure and Evidence, 12 May 2014. All further references to filings and decisions refer to this case number unless otherwise stated.

<sup>2</sup> F0066, Amended Prosecution Pre-Trial Brief, Confidential, 13 October 2014.

<sup>3</sup> F0146, Defence Response to "Submissions on Defence Witness DT02", Confidential Annex A, 6 May 2015.

<sup>4</sup> F0142, Submissions on Defence Witness DT02, Annex A, Confidential, 4 May 2015.

<sup>5</sup> F0146, Defence Response to "Submissions on Defence Witness DT02", Confidential Annex B, 6 May 2015.

<sup>6</sup> F0095, Révocation de la nomination du co-conseil Me Maya Habli en vertu de l'article 34 A) de la Directive relative à la nomination et à la commission d'office des conseils de la defense, 27 January 2015.

6. On 29 April 2015, the Defence filed its witness list, which included Ms Habli as a fact witness.<sup>7</sup>

7. On 4 May 2015, the *Amicus* requested that I preclude Ms Habli from testifying.<sup>8</sup> The Defence opposed the Request.<sup>9</sup>

8. Having considered the Parties' submissions, I deny the Request. As explained below, I will issue a reasoned decision as soon as practicable.

### **APPLICABLE LAW**

9. Rule 149 (C)-(D) of the Tribunal's Rules of Procedure and Evidence ("Rules") provides that a Chamber may admit any relevant evidence which it deems to have probative value; but the Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. In particular, the Chamber may exclude evidence gathered in violation of the rights of the suspect/accused as set out in the Statute and the Rules.

10. Rule 162 (A) states that no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of proceedings. Rule 162 (B) explains that, in particular, evidence shall be excluded if it has been obtained in violation international standards on human rights.

11. Article 7 (C) (iii) of the Code of Professional Conduct instructs counsel to refuse a representation agreement where counsel believes that she or a member of her office will be called to appear as a witness during these proceedings.<sup>10</sup>

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<sup>7</sup> F0136/A01, Submission of Defence List of Witnesses and List of Evidence, Confidential Annex A, 29 April 2015.

<sup>8</sup> F0142, Submissions on Defence Witness DT02, Confidential, 4 May 2015 ("Request").

<sup>9</sup> F0146, Defence Response to "Submissions on Defence Witness DT02", Confidential with Confidential Annexes, 6 May 2015 ("Response").

<sup>10</sup> Article 7 (C) (iii) of the Code of Professional Conduct also provides the following as exceptions: (a) the testimony relates to the nature and value of legal services rendered in the case or (b) the testimony relates to an issue which counsel honestly and reasonably believes will not be contested by either party.

## **DISCUSSION**

### ***A. The position of the Amicus***

12. The *Amicus* submits that Ms Maya Habli cannot be allowed to act or to have acted as both counsel and witness in this case.<sup>11</sup> Permitting Ms Habli to appear would go against the need to ensure a fair trial.<sup>12</sup>

13. The *Amicus* asserts that it is inappropriate for Ms Habli to give evidence because of the nature of her long representation of *Al Jadeed* S.A.L., particularly her role in the events connected to this case and in the Defence preparation.<sup>13</sup> From at least 13 May 2014 to 27 January 2015, Ms Habli played an active and substantial part as counsel-of-record. Accordingly, she had access to information most witnesses would not and should not have had, including material related to protected and confidential *Amicus* witnesses, confidential filings and other confidential matters.<sup>14</sup> The *Amicus* further emphasises that Ms Habli wrote *Al Jadeed* S.A.L.'s response to the Registrar's notice of cease and desist and simultaneously represented the company, Ms Khayat and several other suspects during the investigation. Ms Habli acted for the suspects in their suspect interviews and assisted Ms Mariam Al-Bassam in a forgery lawsuit related to the events in this case. Moreover, in these circumstances Ms Habli's testimony could raise conflicts of interest, since the evidence of one or more of the suspect interviewees might be contrary to the interests of the Accused.<sup>15</sup>

14. The *Amicus* contends that all the issues he raises were foreseeable given, *inter alia*, Ms Habli's role in the investigation, that I raised possible conflicts of issue in May 2014 and that Ms Habli herself gave witness statements in these proceedings in June 2014. He asserts that Article 7 of the Code of Conduct required Ms Habli to refuse to act as co-counsel in this case.<sup>16</sup>

15. The *Amicus* also claims that Ms Habli would improperly be a "[s]tand-in [h]earsay witness" for Ms Al-Bassam.<sup>17</sup> He avers that Ms Al-Bassam's involvement in the events

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<sup>11</sup> Request, para. 19.

<sup>12</sup> *Id.* at para. 6.

<sup>13</sup> *Id.* at para. 7.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Id.* at paras 10-11.

<sup>16</sup> *Id.* at paras 11-14.

<sup>17</sup> *Id.* at para. 17.

connected to this case has long been known and she is available to appear. Calling Ms Habli is a tactical decision to avoid Ms Al-Bassam's appearance.<sup>18</sup>

16. If Ms Habli is allowed to testify, the *Amicus* argues that "she and her clients waive and extinguish all attorney-client and/or work-product privileges or immunities which relate to her evidence, either directly or indirectly".<sup>19</sup> He seeks disclosure prior to her testimony of any relevant communications between Ms Habli, her agents or her assistants and the Accused, Ms Al-Bassam and the suspects she represented in the interviews.<sup>20</sup>

***B. The position of the Accused***

17. The Defence responds that Ms Habli's appointment and eventual termination were proper and there is no basis for excluding her testimony.<sup>21</sup>

18. The Defence asserts that Ms Habli and the Defence complied with the Code of Professional Conduct. The reasonable prospect of Ms Habli being called as a witness arose only after the Appeals Panel reinstated *Al Jadeed S.A.L.* as an accused and the *Amicus* filed his Amended Prosecution Pre-Trial Brief. From that time, the Defence proceeded on a good faith basis in ensuring compliance with the spirit of the Code of Professional Conduct. The Defence cut off Ms Habli's access to new disclosure or confidential filings and, after appropriate consultations, Ms Habli requested that her appointment be terminated.<sup>22</sup>

19. The Defence further argues that permitting Ms Habli to testify is proper under Rule 149 (C)-(D). The circumstances of Ms Habli's representation and withdrawal as co-counsel do not "raise the spectre of fair trial infringement required to trigger application of Rule 149(D)".<sup>23</sup> Rather, the appropriate remedy is for the *Amicus* to challenge Ms Habli's credibility and the reliability of her evidence.<sup>24</sup> Moreover, the *Amicus*'s concerns regarding the danger of Ms Habli's testimony are "*de minimus* at best".<sup>25</sup> The record of Ms Habli's representations cited by the *Amicus* indeed lessens the danger of any conflicts of interest or the impact of exposure to

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<sup>18</sup> Request, para. 17.

<sup>19</sup> *Id.* at para. 18.

<sup>20</sup> *Ibid.*

<sup>21</sup> Response, para. 11.

<sup>22</sup> *Id.* at paras 12-14.

<sup>23</sup> *Id.* at para. 16.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Id.* at para. 17.

disclosure and intra-Defence discussions because her “words and actions are set in stone”.<sup>26</sup> Lastly, the *Amicus*’s claim that Ms Habli’s testimony will involve hearsay evidence about Ms Al-Bassam as a tactical decision is speculative and unsupported.<sup>27</sup>

20. With respect to attorney-client or work-product privileges, the Defence submits that none will apply during Ms Habli’s testimony “in relation to any communications sent and advice given by [her] in relation to the subject matter of this case vis-à-vis Al Jadeed TV, Ms. Mariam al-Bassam, Ms. Karma Khayat and the three other persons who she represented in the suspect interviews, prior to Ms. Habli’s appointment as counsel in Case STL 14-05”.<sup>28</sup> The Defence further notes that it has asked Ms Habli to examine her records for relevant material covered by the *Amicus*’s disclosure request prior to Ms Habli’s appointment as co-counsel, if they exist. At the time of filing, Ms Habli had not provided a substantive response.<sup>29</sup>

### ***C. Discussion***

21. Given that I was not fully briefed on this matter until Thursday, 7 May 2015, that Ms Habli is scheduled to testify on 13 May 2015 and that it is therefore imperative to make a prompt determination as to whether she can testify, I am issuing this Decision with a reasoned decision to follow as soon as practicable.

22. Having considered the Parties’ submissions, I reject the Request. Ms Habli may testify as a fact witness. If Ms Habli testifies, she waives attorney-client and work-product privileges, vis-à-vis the Accused, Ms Mariam al-Bassam and the other persons Ms Habli represented in the suspect interviews, in relation to her testimony.

23. With respect to the *Amicus*’s request for disclosure, I remind the Defence of its obligations under Rule 112 (A) (i).

### ***D. Confidentiality***

24. Certain submissions in this matter were filed confidentially. Though there is indeed information in the filings that should remain confidential, they should be made public with appropriate redactions. I therefore order the Parties to file, as appropriate, public redacted

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<sup>26</sup> Response, para. 17.

<sup>27</sup> *Id.* at para. 18.

<sup>28</sup> *Id.* at para. 21.

<sup>29</sup> *Ibid.*

versions of their submissions. I encourage the Parties to verify their redactions with one another before filing their redacted submissions. A public redacted version of this Decision will also be issued.

## **DISPOSITION**

**FOR THESE REASONS;**

**PURSUANT** to Rule 149 of the Rules;

**I**

**DENY** the Request;

**ORDER** that, if Ms Habli testifies, she waives attorney-client and work-product privileges, vis-à-vis the Accused, Ms Mariam al-Bassam and the other persons Ms Habli represented in the suspect interviews, in relation to her testimony;

**INFORM** the Parties that I will issue a reasoned decision as soon as practicable; and

**ORDER** the Parties to file public redacted versions of the submissions related to this Decision.

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

Dated 11 May 2015

Leidschendam, the Netherlands



Judge Nicola Lettieri  
Contempt Judge

