

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

BEFORE THE TRIAL CHAMBER**SPECIAL TRIBUNAL FOR LEBANON**

Case No: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr Daryl Mundis

Date: 9 June 2016

Original language: English

Classification: Public

PROSECUTOR

v.

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

**CERTIFICATION FOR INTERLOCUTORY APPEAL OF ‘INTERIM DECISION ON
THE DEATH OF MR MUSTAFA AMINE BADREDDINE AND POSSIBLE
TERMINATION OF PROCEEDINGS’**

Office of the Prosecutor:
Mr Norman Farrell

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

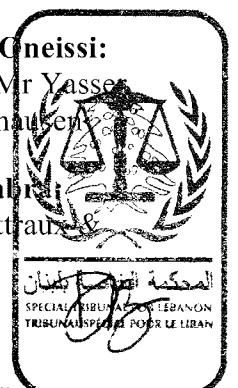
Counsel for Mr Salim Jamil Ayyash:
Mr Emile Aoun & Mr Thomas Hannis

Counsel for Mr Mustafa Amine Badreddine:
Mr Antoine Korkmaz, Mr Iain Edwards &
Ms Mylène Dimitri

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

Counsel for Mr Hussein Hassan Oneissi:
Mr Vincent Courcelle-Labrousse, Mr Yasser
Hassan & Ms Natalie von Wistinghausen

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



INTRODUCTION AND BACKGROUND

1. In a hearing on 31 May and 1 June 2016, the Trial Chamber heard evidence and legal submissions regarding the reported death of the Accused, Mr Mustafa Amine Badreddine, in the week of 8 May 2016, and the possible termination of the proceedings against him. The Trial Chamber, by majority, on 1 June 2016, delivered an interim decision in court deciding that ‘it did not believe that sufficient evidence has yet been presented to convince it that the death of Mustafa Amine Badreddine had been proved to the requisite standard’. Judge Braidy delivered a short oral dissenting opinion.¹

2. The same day, in court, counsel for Mr Badreddine sought immediate certification of the interim decision.² The Presiding Judge, however, explained that the time for seeking certification ran from the filing of the written reasoned decision.³ Later that day, counsel filed a written request seeking the same order, and additionally seeking a stay of proceedings.⁴ On 2 June 2016, the Trial Chamber heard some further legal submissions.⁵

3. The Trial Chamber ordered the Defence of Mr Badreddine to file any application for certification to appeal the interim decision within 24 hours of the filing of the Trial Chamber’s written reasons and for the Prosecution and Legal Representative of Victims to file any submissions and observations, respectively, within 24 hours of that filing.⁶ On 7 June 2016 the Trial Chamber published the written reasons for its interim decision.⁷ Counsel for Mr Badreddine filed their application for certification to appeal the decision on 8 June 2016, joined by the Defence of the four other Accused and the Head of the Defence Office.⁸ Judge

¹ Transcript of 1 June 2016, pp 56-57.

² Transcript of 1 June 2016, pp 61-62.

³ Transcript of 1 June 2016, p. 62.

⁴ STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F2609, Badreddine Defence Request for Certification to Appeal the Oral Decision of 1 June 2016, and for Stay of Proceedings, 1 June 2006.

⁵ See transcript of 2 June 2016, pp 34-57, on the requisite standard for finding that an accused person was deceased.

⁶ Transcript of 2 June 2016, p. 57.

⁷ F2612, Reasons for interim decision on the death of Mr Mustafa Amine Badreddine and possible termination of proceedings, 7 June 2016.

⁸ F2613, Badreddine Defence Perfected Request for Certification to Appeal the Interim Decision of 1 June 2016, 8 June 2016; F2614, Defence joinder to “Badreddine Defence perfected request for certification to appeal the interim decision of 1 June 2016”, 8 June 2016; F2617, Observation du Chef du Bureau de la Défense au soutien de la requête de la Défense de M. Badreddine datée du 8 juin 2016 et certification d’appel de la décision du 1er juin 2016, 8 juin 2016.

Braidy filed her written reasoned dissent the same day.⁹ The Prosecution responded on 8 June 2016 and the Legal Representative of Victims filed his response and observations on 9 June 2016.¹⁰

ISSUE FOR CERTIFICATION AND SUBMISSIONS

4. Rule 126 (C), ‘Motions Requiring Certification,’ of the Special Tribunal’s Rules of Procedure and Evidence requires the Trial Chamber to certify a decision for interlocutory appeal:

if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

5. The Trial Chamber must be satisfied that an issue meets these strict requirements to certify an interlocutory appeal.¹¹ Its analysis includes deciding whether the challenged decision involves a precise issue with an adequate legal or factual basis, but is not concerned with whether a decision was correctly reasoned.¹²

6. The issue posed for certification for interlocutory appeal is: ‘Did the majority of the Trial Chamber err in deciding that insufficient evidence had yet been presented to convince it that the death of Mustafa Amine Badreddine had been proved to the requisite standard?’

7. In support of the argument, counsel for Mr Badreddine relied upon the submissions in their application filed on 1 June 2016 at paragraphs 6 to 11. Counsel argue that if the Trial Chamber erred, and sufficient evidence exists to establish Mr Badreddine’s death to the requisite standard, it would be unlawful and unfair for it to continue proceedings in circumstances where it no longer has *ratione personae* (personal) jurisdiction. Continuing the proceedings would also violate the presumption of innocence. The final resolution of the matter cannot await post-trial proceedings and must be resolved without delay.

⁹ F2616, Dissenting opinion of Judge Micheline Braidy on the Trial Chamber’s interim decision regarding the death of Mr Mustafa Amine Badreddine and possible termination of proceedings, 8 June 2016.

¹⁰ F2615, Prosecution Response to the Badreddine Defence Perfected Request for Certification to Appeal the Interim Decision of 1 June 2016, 8 June 2016; F2618, Observations of the Legal Representative of Victims to the Badreddine Defence Perfected Request for Certification to Appeal the Interim Decision of 1 June 2016, 9 June 2016.

¹¹ STL-11-01/PT/AC/AR90.2, F0007, Decision on Defence Appeals against Trial Chamber’s “Decision on Alleged Defects in the Form of the Amended Indictment”, 5 August 2013, para. 7.

¹² STL-11-01/PT/AC/AR126.2, F0008, Decision on Appeal against Pre-Trial Judge’s Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, para. 11. Also, see generally, STL-11-01/TC, F2461, Decision certifying for appeal the Trial Chamber’s decision of 23 October 2015 regarding the conditions of assignment of Omar Nashabe, 19 February 2016, para. 10.

8. The Prosecution did not oppose certifying for interlocutory appeal the issue posed in the Defence application of 8 June 2016. It argued, however, against certifying any issue relating to the presumption of innocence or whether the Trial Chamber may continue to receive evidence relating to Mr Badreddine after any judicial determination to terminate the proceedings against him; these issues formed no part of the Trial Chamber's decision.¹³

9. The Legal Representative of Victims opposed the *current* application for certification, arguing that it did not fall within Rule 126 (C), would cause 'unhelpful parallel litigation' in the Appeals Chamber, would cause unnecessary delay and promote the possibility of a 'jurisprudential conundrum'. It is an interim decision based on a current state of evidence which could shortly change and is therefore not appropriate for interlocutory appellate review. There are three possibilities; first, receiving further information confirming to the 'requisite standard' that Mr Badreddine is dead, second, and if not, the Trial Chamber reconsidering its interim decision, or, third, that evidence could emerge that Mr Badreddine is not dead.¹⁴

DISCUSSION

10. As the Legal Representative of Victims has observed, the Trial Chamber's decision is an interim one.¹⁵ The Trial Chamber explained at paragraph 6 of its decision that the Prosecution had sent requests for assistance to the Government of Lebanon seeking further information relating to Mr Badreddine's reported death—including an official death certificate—and that it was awaiting the response. The Trial Chamber held, at paragraphs 33, 35 and 40:

Having reviewed the material presented by the Prosecution and the Defence of Mr Badreddine, at this stage the Trial Chamber (by majority) is not yet satisfied that it has received evidence from which it could safely conclude that the Accused has died. The Trial Chamber is not yet convinced that the circumstantial evidence it has received—in the form of media reports, statements from Hezbollah, and from senior religious figures—satisfies this high standard.

Not all avenues are yet exhausted to obtain official proof from the Lebanese or any other State authorities certifying the death of Mr Badreddine.

¹³ Prosecution response, paras 3-4.

¹⁴ Legal Representative of Victims observations, paras 3-7.

¹⁵ Transcript of 2 June 2016, p. 27, Presiding Judge, 'The decision of the Chamber rendered yesterday was an interim one, interlocutory one. It's not a final decision on whether Mr Badreddine is dead or not. We will make a decision when we've had a chance to receive further information or not to determine whether we are satisfied that it's been proved to the requisite standard'.

The Trial Chamber will review any additional material regarding the issue of Mr Badreddine's death and, if necessary, re-evaluate the material already submitted into evidence. It stresses that this decision is an interim one.

11. Thus, on one view—as expressed by the Legal Representative of Victims—because the Trial Chamber decided that it does not yet have the information needed to make a more final determination, this interim decision may not be capable of certification for interlocutory appeal under the test in Rule 126 (C).

12. Defence counsel, however, have submitted¹⁶ that continuing the trial without a final legal determination of the issue of Mr Badreddine's death could result in unfairness.¹⁷ This is because the Trial Chamber may lack *ratione personae* jurisdiction.

13. In these circumstances, the Trial Chamber is satisfied of an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Trial Chamber will therefore certify the issue for interlocutory appeal.

14. The Trial Chamber has slightly altered the wording of the issue posed for certification for interlocutory appeal to delete the words 'majority of the' (referring to the Trial Chamber), to reflect that the decision under appeal is that of the Trial Chamber itself rather than a portion of it.¹⁸

15. The Trial Chamber urges expedition in resolving this matter at the appellate level.

¹⁶ Defence application of 1 June 2016, paras 7-8; Defence application of 8 June 2016, para. 3; *see also* transcript of 1 June 2016, pp 17-23 and 30-31, where the same arguments are implicitly made.

¹⁷ It is noted, however, that Mr. G. Mettraux, co-counsel for Mr Assad Hassan Sabra stated in court on 1 June 2016, transcript p. 58, in relation to his ability to continue with the proceedings: 'As indicated, we'll be prepared to recommence our cross-examination of Mr MacLeod tomorrow, if ordered to do so. We believe, however, that there will be areas of cross-examination that we will have to postpone until a later time. I don't think it's going to be much of a problem since we've been informed by the Prosecution that Mr MacLeod would be available only until we believe, midday, on Friday, so that will give us a day and a half of cross-examination; tomorrow, Thursday, and Friday, the two morning sessions we're given to understand'.

¹⁸ *See* F1532, Reasons for decision denying Merhi Defence an extension of time to file an application for certification to appeal, 19 May 2014, paras 21-22, and the case-law of the International Criminal Tribunal for the Former Yugoslavia cited at paras 18-19, namely, *Prosecutor v. Prlić*, IT-04-74-AR73.13, Decision on Jadranko Prlić's Consolidated Interlocutory Appeal Against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009, para. 27. *See also* *Prosecutor v. Gotovina et al.*, IT-06-90-PT, Decision on Urgent Application Concerning the Partially Issued Impugned Decision and Proper Rime Limit for Application for Certification for Appeal, 12 April 2007, p. 2.

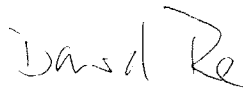
DISPOSITION

FOR THESE REASONS, the Trial Chamber certifies the following issue for interlocutory appeal under Rule 126 (C):

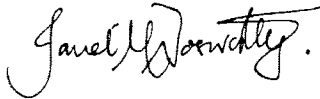
Whether the Trial Chamber erred in determining that it did not believe that sufficient evidence has yet been presented to convince it that the death of Mr Mustafa Amine Badreddine had been proved to the requisite standard.

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

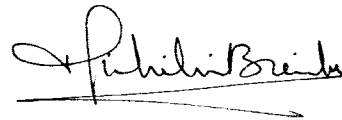
Leidschendam,
The Netherlands
9 June 2016



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

