

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: 28 February 2017

Original language: English

Classification: Public

The PROSECUTOR

v.

**SALIM JAMIL AYYASH
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA**

**DECISION ADMITTING WITNESS PRH437'S STATEMENTS UNDER RULE 158
AND GRANTING PROTECTIVE MEASURES**

Office of the Prosecutor:
Mr Norman Farrell & Mr Alexander Milne

**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 & Chad Mair

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 Geoffrey Roberts



INTRODUCTION

1. Witness PRH437 provides evidence relating to the Accused, Mr Salim Jamil Ayyash. The witness worked with Mr Ayyash at a Civil Defence Station that Mr Ayyash headed. He provides evidence about: shift patterns, and working and reporting procedures; Mr Ayyash's working hours and attendance, responsibilities, attitude towards his work and assertions about why he held his position; a Regional Civil Defence Centre's two telephone numbers; and that Mr Ayyash could be contacted on one of two mobile telephone numbers and changed numbers several times.¹

2. The witness, however, suffers from an advanced serious medical condition. The Prosecution therefore seeks, under Rule 158 of the Special Tribunal's Rules of Procedure and Evidence, the admission into evidence of his two witness statements as those of an 'unavailable' witness. It also seeks protective measures. Counsel for Mr Ayyash oppose the statements' admission into evidence, but take no position on the protective measures.² At the Trial Chamber's request, the Prosecution replied to the Ayyash Defence response.³

THE WITNESS STATEMENTS' ADMISSIBILITY UNDER RULE 158

Submissions

Prosecution's submissions

3. Under Rule 158, a Chamber may receive into evidence the statement of an 'unavailable' witness. The Prosecution submits that Witness 437 is 'unavailable', and has provided a 2016 medical report explaining that the witness suffers from an advanced stage of a serious medical condition which, due to the timing of his treatment, prevents him from testifying before the Special Tribunal.⁴

¹ ERN 60313713-60313722; ERN 60313706-60313712. Although tendered in its motion as attachments to the earlier of the two statements, the Prosecution does not seek to rely on two documents; *see* STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2951, Prosecution Motion to Admit the Statement of Unavailable Witness PRH437 pursuant to Rule 158 and Request for Protective Measures pursuant to Rule 133, 23 January 2017 (confidential with confidential annex A), para. 9; ERN 60313723-60313730.

² F2979, Ayyash Defence Response to "Prosecution Motion to Admit the Statement of Unavailable Witness PRH437 pursuant to Rule 158 and Request for Protective Measures", 6 February 2017 (confidential).

³ F2984, Prosecution Reply to Ayyash Defence Response to Prosecution Motion to Admit the Statement of Unavailable Witness PRH437 Pursuant to Rule 158 and Request for Protective Measures pursuant to Rule 133, 10 February 2017 (confidential).

⁴ ERN 60317823.

4. The Prosecution also relies on an investigator's statement, Witness PRH539's, documenting observations of Witness 437's apparent exhaustion, fatigue and dizziness, including his difficulty in signing a receipt, not wanting to attend the Beirut Office again due to the impact of the journey on his physical condition, and saying that his condition had worsened in 2016.⁵ It is thus highly unlikely that the witness could attend a court hearing and answer questions and testify coherently; consequently, he is 'for good reason otherwise unavailable' under Rule 158.⁶

5. The statements have the necessary indicia of reliability as they were taken by Prosecution investigators with the assistance of a Registry approved interpreter, read back to the witness in a language he understood, and signed by the witness, who acknowledged the truth of their contents and the fact that he could be liable for prosecution for knowingly and willingly making a false statement.⁷

6. The statements are also relevant and probative of Mr Ayyash's work attendance, the attribution of four mobile telephone numbers to him, and the Regional Civil Defence Centre's telephone number, which was in contact with two telephone numbers attributable to Mr Ayyash. Further, the statements corroborate previously admitted evidence, are internally consistent, and do not go to the acts and conduct of Mr Ayyash as charged in the amended consolidated indictment.⁸

Ayyash Defence's response

7. Counsel for Mr Ayyash submit that a 'health condition does not automatically disqualify a witness from testifying' unless it affects his 'competency to testify', meaning having 'a basic capacity to understand the questions put to him and give rational and truthful answers to those questions'. Witness 437's medical condition does not necessarily affect his competency to testify. While he suffers from physical impairment and has difficulty travelling, he does some work. He may not wish to testify, but he has no difficulties in comprehension or in expressing himself orally. The Trial Chamber should therefore make an

⁵ ERN 60317818-60317822.

⁶ Prosecution motion, paras 3-7; ERN 60317818-60317822; ERN 60317823.

⁷ Prosecution motion, para. 10.

⁸ Prosecution motion, paras 8, 11-12.

objective assessment, bearing in mind a witness' general duty to testify and an accused's right to confront the evidence against him.⁹

8. Moreover, the statement is inadmissible under Rule 149 (D) as its probative value is substantially outweighed by the need to ensure a fair trial. The Trial Chamber must consider the prejudicial effect of admitting the evidence of unavailable witnesses going to the heart of the Prosecution's case against Mr Ayyash. In addition, Witness 437 is the only witness giving evidence about working with Mr Ayyash, and the witness has had no further contact with Mr Ayyash since then. Mr Ayyash's alleged telephone usage in relation to the alleged conspiracy amounts to his acts and conduct, making the statement inadmissible under Rule 158. Moreover, Witness 437 is the only witness who states that Mr Ayyash changed mobile numbers, which is inconsistent with the evidence of at least five other Prosecution witnesses, and he would not be cross-examined on this.¹⁰

Prosecution's reply

9. The Prosecution submits that every medical case must be judged individually. It is not that the witness cannot communicate or comprehend questions; rather, the probable impact of a lengthy journey and the stress of testimony on someone with his medical condition would render his attendance impossible. To insist on his attendance in these circumstances 'would be inhumane'. There is no basis for supposing that the medical report, prepared 'in recent months', does not provide an accurate assessment of his condition.¹¹

Discussion

10. Under Rule 158 (A), the Trial Chamber may admit into evidence the written statement of a person who is for good reason unavailable to testify, if it is satisfied of their unavailability and finds that the statement is reliable, taking into account how it was made and maintained. The evidence must be relevant and have probative value, and the Trial Chamber must consider whether its probative value is substantially outweighed by the need to ensure a fair trial.¹² Moreover, under Rule 158 (B), in considering the application of Rule 149 (D), the Trial Chamber must take into account whether the evidence in question goes to proof of the acts and conduct of the Accused as charged in the indictment.

⁹ Ayyash response, paras 5-13.

¹⁰ Ayyash response, paras 14-21.

¹¹ Prosecution reply, paras 3-4.

¹² See also e.g. ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-T, Decision on Prosecution's Motion to Admit the Evidence of Witness No. 39 pursuant to Rule 92 *quater*, 7 September 2011 ('*Tolimir* Decision'), para. 19.

11. There is no contest as to the relevance of the evidence; the issues are whether the witness is ‘unavailable’ and, if so, whether his evidence should nonetheless be excluded under Rule 149 (D).

‘Unavailable’ under Rule 158

12. Rule 158 does not define the phrase ‘for good reason otherwise unavailable to testify’. Although Rule 158 (A) is broader than the wording of the International Criminal Tribunal for the Former Yugoslavia’s (ICTY) Rule 92 *quater*, its case law may offer guidance. ICTY Chambers have applied a test of ‘objective unavailability’ when witnesses’ physical or mental conditions may have impacted on their ability to testify orally.¹³ Even when this test was not explicitly applied, in practice Chambers considered how the witnesses’ condition actually affected their ability to testify orally, including travelling to testify.¹⁴ The Trial Chamber agrees with this approach.

13. The uncontested medical evidence is that Witness 437 suffers from an advanced stage of a serious disease. The witness has also expressed reluctance, due to this condition, to travel to testify via video-conference link from Beirut. A Prosecution investigator, although not medically qualified, has provided evidence of his observations of the effect that a trip to the Special Tribunal’s Beirut Office, for a logistical meeting, had on the witness. A meeting with an investigator for logistical reasons is objectively far less stressful to a witness than testifying and answering questions, especially in cross-examination.

14. In these circumstances, the Trial Chamber is satisfied that Witness 437 is ‘objectively unavailable’ to testify under Rule 158. The witness’ physical impairments and the timing of his treatment make it so difficult for him to travel to the Special Tribunal’s Beirut Office to testify via video-conference link as to satisfy the requirements of Rule 158. The Trial Chamber has considered that the witness is able to perform some work but, in its view, this is

¹³ ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on the Admission of Statements of Four Witnesses pursuant to Rule 92 *quater*, 24 July 2008 (‘*Gotovina* 24 July 2008 Decision’), para. 16; ICTY, *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Omnibus Motion for Admission of Evidence pursuant to Rule 92 *quater* and Prosecution Motion for the Admission of the Evidence of GH-083 pursuant to Rule 92 *quater*, 9 May 2013 (‘*Hadžić* Decision’), paras 23, 29, 41, 55, 59, 95, 99, 101, 104; *Tolimir* Decision, para. 30. See also ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, para. 48.

¹⁴ *Gotovina* 24 July 2008 Decision, para. 9; ICTY, *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on the Admission of Statements of Two Witnesses and Associated Documents pursuant to Rule 92 *quater*, 16 January 2009, paras 8, 10; ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits pursuant to Rule 92 *quater*, 30 November 2009, para. 5.

very different to travelling a longer distance (to Beirut) to testify, as testifying is inherently stressful. In these circumstances, the Trial Chamber does not require the Prosecution to obtain an updated medical report.

Admissibility under Rules 149 and 158 (B)

15. The Trial Chamber has carefully reviewed Witness 437's statements. Their relevance is unchallenged, and no explicit challenge is made to their reliability. The Trial Chamber is satisfied that the statements are relevant to the Prosecution's case. It is also satisfied that the statements are *prima facie* reliable, as the circumstances under which they were taken cast no doubt on their reliability.¹⁵ The inconsistencies between this witness' evidence and that of others—highlighted by counsel for Mr Ayyash—do not deprive the statements of probative value; rather, they go to the weight that the Trial Chamber may give to them. The Trial Chamber is thus satisfied that the statements are probative of the matters referred to in paragraph 1 above.

16. In relation to the argument for exclusion under Rule 149 (D), counsel for Mr Ayyash argue that the statements are inadmissible because: (i) the evidence regarding Mr Ayyash's telephone usage goes to his acts and conduct; (ii) the evidence regarding Mr Ayyash's work attendance and telephone usage is critical to the Prosecution's case; and (iii) they will not be able to cross-examine the witness.

17. The Trial Chamber will not exclude Witness 437's evidence. With regard to the evidence of Mr Ayyash's use of multiple mobile telephones, the Trial Chamber has held that evidence relating to the attribution of telephone numbers does not, of itself, go to the acts and conduct of the Accused.¹⁶ But even if it did, the wording of Rule 158 (B) makes it clear that this does not bar admitting the statements under this rule. Moreover, the mere fact that Witness 437's evidence may be important to the Prosecution's case is also no bar to its admission under Rule 158. Rather, these are factors to be considered when determining

¹⁵ See F1890, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH402 and PRH636, 27 March 2015, para. 16.

¹⁶ F2644, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH024, PRH069, PRH106 and PRH051 pursuant to Rule 155, 12 July 2016 ('Decision of 12 July 2016'), paras 32-34; F2062, Decision on 'Prosecution Motion for the Admission of Locations Related Evidence', 9 July 2015, para. 39. See also F2304, Decision on Prosecution Motion to Admit the Statements of PRH081, PRG071, PRH050, PRH086, PRH312 and PRH539, and to Admit 37 Documents Related to the Insurance Policies of Salim Ayyash, 4 November 2015, para. 15; F2297, Decision on Prosecution Motion for the Admission of Witness Statements pursuant to Rule 155 and Documents pursuant to Rule 154, 2 November 2015, para. 21; F2292, Decision on Prosecution Motion for the Admission into Evidence under Rule 155 of the Statements of Witnesses PRH078, PRH550 (Toby Smith) and PRH678, 29 October 2015, disposition.

whether the lack of cross-examination prejudices the Accused's right to a fair trial,¹⁷ and whether this outweighs the statements' probative value.

18. The Trial Chamber is satisfied that Witness 437's evidence is not so critical to the Prosecution's case that admitting his statements without cross-examination would be unduly prejudicial to the Ayyash Defence.¹⁸ Thus, any prejudice to the Accused's right to a fair trial does not outweigh the statements' probative value. The Trial Chamber will of course carefully assess the weight that it can give these statements in light of the fact that counsel for Mr Ayyash have not had the chance to cross-examine the witness and that they have opposed the statements' admission into evidence.

19. Finally, the Ayyash Defence challenges inferences that the Prosecution seeks to draw from the statements. At the admissibility stage, the Trial Chamber is not making a determination on any such inferences, and the Defence may challenge these at the appropriate time. These arguments are therefore dismissed. The Trial Chamber will thus admit the two statements into evidence.

PROTECTIVE MEASURES

20. The Prosecution seeks protective measures for Witness 437, under Rule 133, due to his privacy and security concerns. It submits that: the 'tense political, territorial and security situation prevailing in Lebanon' is inherent in the witness' security concerns and some people in Lebanon have sought to obstruct the Special Tribunal's work; publicly disclosing the witness' identity will violate his privacy by revealing his medical condition; in light of the area in which the witness resides, publicly disclosing his involvement with the Special Tribunal could raise security risks for him and his family, or at least the possibility of intimidation; and granting him protective measures does not prejudice the Accused's rights.¹⁹ The Ayyash Defence takes no position on the request for protective measures.²⁰

21. The Trial Chamber is satisfied that, for the reasons outlined by the Prosecution, the requested protective measures are necessary to protect Witness 437's privacy and security, and grants the requested measures.

¹⁷ Decision of 12 July 2016, para. 32.

¹⁸ *Hadžić* Decision, para. 27.

¹⁹ Prosecution motion, paras 13-18.

²⁰ Ayyash response, paras 2, 22.

CONFIDENTIALITY

22. The Prosecution requests that its motion and annex remain confidential until the Trial Chamber decides otherwise, after being heard on the issue. It will file a public redacted version of the motion and a public summary of Witness 437's statement may be read in court. The Ayyash Defence submits that its response was filed confidentially as it may identify the witness and a public redacted version will be filed. To maintain the public nature of the trial, the Trial Chamber orders the Parties to file public redacted versions of their submissions.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DECLARES admissible, under Rule 158, Witness PRH437's two statements;

DECIDES that it will, at a suitable stage in the proceedings, formally admit the statements into evidence and assign exhibit numbers to them;

GRANTS the protective measures requested for Witness PRH437;

ORDERS that:

- Witness PRH437's identity shall remain confidential;
- Witness PRH437 shall continue to be referred to by his pseudonym in all public hearings and public documents;
- any documents that are disclosed to the public shall be redacted to protect Witness PRH437's identity and any information which may identify him as a witness at trial; and
- no person, including members of the media and third parties who become aware of the identity of Witness PRH437 or of information which may identify him, may disclose information protected by these orders;

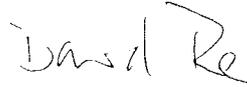
REAFFIRMS that a knowing violation of this order may result in prosecution under Rule 60 *bis*;²¹ and

ORDERS the Parties to file public redacted versions of their submissions.

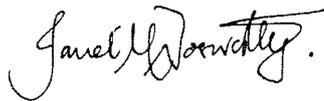
²¹ Punishable by a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both.

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

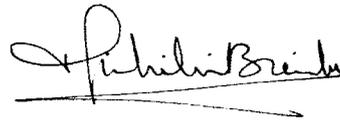
Leidschendam,
The Netherlands
28 February 2017



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy

