

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

**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:** 20 October 2017

**Original language:** English

**Classification:** Public

**THE PROSECUTOR**

v.

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

**DECISION DENYING SABRA DEFENCE APPLICATION FOR  
CERTIFICATION TO APPEAL DECISION ADMITTING STATEMENTS  
OF WITNESS PRH103 UNDER RULE 158**

**Office of the Prosecutor:**Mr Norman Farrell & Mr Alexander Hugh  
Milne**Counsel for Mr Salim Jamil Ayyash:**Mr Emile Aoun, Mr Thomas Hannis &  
Mr Chad Mair**Legal Representatives of  
Participating Victims:**Mr Peter Haynes, Mr Mohammad F. Mattar  
& Ms Nada Abdelsater-Abusamra**Counsel for Mr Hassan Habib Merhi:**Mr Mohamed Aouini, Ms Dorothee Le Fraper  
du Hellen & Mr Jad Youssef 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 &  
Ms Sarah Bafadhel

1. The Trial Chamber found that Mr Ziad Ramadan (Witness PRH103) was for good reason unavailable to testify, and declared admissible on the applications of the Prosecution and counsel for the Accused, Mr Assad Hassan Sabra, the witness' statements made to Lebanese and Syrian judicial and investigating authorities and to the United Nations International Independent Investigation Commission, under Rule 158 of the Special Tribunal's Rules of Procedure and Evidence.<sup>1</sup> The Prosecution exhibits were admitted into evidence while the Defence exhibits are still awaiting admission.<sup>2</sup>

2. Counsel for Mr Sabra now seek certification for interlocutory appeal, under Rule 126 (C), of the following issues:

i. Whether the Trial Chamber erred in interpreting the ambit of Rule 158 - an exception to the general principle of orality - as being "broad in compass" (Issue 1);

ii. Whether the Trial Chamber erred in ruling a witness who is traceable and unwilling to testify is 'unavailable' for the purposes of Rule 158 (Issue 2);

iii. Whether the Trial Chamber abused its discretion by concluding that a witness who alleges to have suffered mistreatment is unavailable for purposes of Rule 158 without first considering whether special measures would have facilitated his attendance (Issue 3);

iv. Whether the Trial Chamber acted with the requisite diligence and within the scope of its discretion in accepting the claim that PRH103 might have been mistreated (Issue 4);

v. Whether the Trial Chamber abused its discretion by: (a) recognising that PRH103 provided hearsay information about one of the accused's acts and conduct; (b) noting that the witness does not know Mr. Oneissi's name, but acknowledging that the witness described the conduct of someone named Mohamed; (c) recognising that the Prosecution alleges that Mohamed is Mr. Oneissi; (d) erroneously concluding that the statement did not go to any accused's acts and conduct, thus misapplying the necessary weight to be given to this factor when declaring PRH103's statement admissible under Rule 158 (Issue 5); and

vi. Whether the Trial Chamber abused its discretion by failing to give adequate weight to the need to ensure an adversarial trial and guarantee the defendants' right to confront the case against them (Issue 6).<sup>3</sup>

3. Counsel for Mr Sabra submit that the witness' evidence is 'central' to the Prosecution's case against Mr Sabra. Moreover, it is the Defence's case that the witness might have been involved, with associates other than Mr Sabra, in the disappearance of Mr

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<sup>1</sup> STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F2901, Decision Admitting Statements of Witness PRH103 under Rule 158, 12 December 2016 (confidential). Rule 158 permits a Chamber to admit into evidence the statement of a person 'who can no longer with reasonable diligence be traced, or who is for good reason otherwise unavailable to testify orally', if it finds that the statement is reliable. The Chamber must also consider whether the statement goes to the acts and conduct of the accused as charged in the indictment.

<sup>2</sup> Mr Ramadan's statements and interview transcript tendered by the Prosecution are exhibits P1774, P1775 and P1776.

<sup>3</sup> F2921, Sabra Request for Certification to Appeal "Decision Admitting Statements of Witness PRH103 under Rule 158", 20 December 2016 (confidential) ('Application'), para. 2. See Application, paras 3, 15.

Ahmed Abu Adass.<sup>4</sup> The Defence's inability to cross-examine the witness and directly test his evidence therefore significantly affects the fairness of the proceedings. It also affects the number of documents and witnesses which the Defence may seek to use in its case, and—as a result—the expeditious conduct of the proceedings. The potential links which could be made with the witness' evidence could significantly affect the outcome of the trial. An immediate resolution by the Appeals Chamber would materially advance the proceedings because it may resolve the issues of whether Mr Sabra has a case to answer in these proceedings, the Defence needs to present any evidence or the Chamber needs to write a judgment in respect of Mr Sabra. It may also ensure that further questions regarding the admissibility of written witness statements are correctly resolved.<sup>5</sup>

4. The Prosecution objects to the application, noting that the issues raised do not meet the Rule 126 (C) standard. Instead, the application focuses on the alleged incorrectness of the Trial Chamber's decision and concerns evidentiary issues that go to the future determination of the weight of the witness' evidence. Defence counsel's submissions directly address only one of the issues for which they seek certification to appeal.<sup>6</sup>

5. Rule 126 (C) permits the Trial Chamber to certify a decision for interlocutory appeal if: (1) the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (2) for which an immediate resolution by the Appeals Chamber may materially advance the proceedings. The Trial Chamber has previously acknowledged the legal principles and rules of international criminal law governing the certification of decisions for interlocutory appeal.<sup>7</sup> These are applicable here.

6. The Trial Chamber is not convinced by the Defence's arguments under the first limb of the test in Rule 126 (C). The Trial Chamber will consider the Defence's inability to cross-examine the witness when ultimately deciding on the weight to give to his evidence.<sup>8</sup> The legal safeguards in place ensure that there is no issue that would significantly affect the fair

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<sup>4</sup> See, for example, F2720, Amended Consolidated Indictment, 12 July 2016, paras 27-29.

<sup>5</sup> Application, paras 7-14.

<sup>6</sup> F2930, Prosecution Consolidated Response to Defence Requests for Certification to Appeal the Trial Chamber's Decision Admitting Statements of Witness PRH103, 4 January 2017 (confidential), paras 1, 3, 5-6, 8-10.

<sup>7</sup> See e.g. F2874, Decision Denying Certification to Appeal 'Decision on the Admission of Call Sequence Tables related to the Movements of Mr Rafik Hariri and Related Events, and Four Witness Statements', 6 December 2016, paras 5-6; F1798, Decision on Application for Certification of Decision regarding the Scope of Marwan Hamade's Evidence, 18 December 2014 ('Decision of 18 December 2014'), paras 12-14.

<sup>8</sup> Decision, paras 47-48.

conduct of the proceedings.<sup>9</sup> Nor does the *possibility* of a longer Defence case suffice to identify an issue that *would* significantly affect the expeditious conduct of the proceedings. The speculative argument that potential links made with the witness' evidence *could* significantly affect the outcome of the trial similarly fails to identify any issue that *would* significantly affect the outcome of the trial, considering that the Trial Chamber has yet to determine the weight to be attached to Mr Ramadan's evidence and to examine it in light of the totality of the evidence on the record. The Trial Chamber therefore finds that the application fails to meet the requirements of the first limb of the test in Rule 126 (C).

7. In any event, the application would also fail in relation to the second limb of the test in Rule 126 (C). The Defence argument concerning whether the Trial Chamber needs to write a judgement in respect of Mr Sabra is misconstrued, as the Trial Chamber must in all circumstances write a reasoned judgement in this respect, either one of acquittal under Rules 167 or 168, or one of conviction under Rule 168.<sup>10</sup> Moreover, the Trial Chamber's determination as to whether the second limb of the test is met cannot depend on the Defence's future choice as to whether or not to present a case. Nor will the Trial Chamber prejudge whether or not Mr Sabra has a case to answer. The Trial Chamber is also not convinced by the argument that an immediate resolution by the Appeals Chamber would materially advance the proceedings because it may ensure that further questions regarding the admissibility of written witness statements are correctly resolved. The Trial Chamber has previously held that certification of an appeal has to be the absolute exception when deciding on the admissibility of evidence because it is first and foremost the responsibility of the Trial Chamber, as the trier of fact, to determine which evidence to admit; it is not for the Appeals Chamber to assume this responsibility.<sup>11</sup> It is therefore primarily for the Trial Chamber to interpret the Rules to decide on the admission of evidence. Finally, the Trial Chamber has settled the question of the

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<sup>9</sup> See F3107, *Corrected Version of "Decision on 'Prosecution Motion to Admit the Statement of PRH024 under Rule 158' – with Partially Dissenting Opinion of Judge David Re" dated 28 April 2017*, 1 May 2017, para. 42, referring to 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. 53.

<sup>10</sup> See F3328, Decision Denying 'Sabra Request for Certification to Appeal Decision Admitting Statement of PRH024 under Rule 158', 15 September 2017, para. 39.

<sup>11</sup> Decision of 18 December 2014, para. 14 and reference therein; F3175, Decision Denying Certification to Appeal 'Decision Admitting 10 Call Sequence Tables Related to Mr Salim Ayyash and Mr Hassan Habib Merhi under Rule 154 and Two Related Witness Statements under Rule 155', 8 June 2017, para. 18.

conditions for accepting into evidence witness statements tendered by the Defence during the Prosecution's case.<sup>12</sup>

8. The decision was filed confidentially to allow the Prosecution to file an application for protective measures for Mr Ramadan. Since then, the Trial Chamber has denied the Prosecution request for protective measures for the witness and ordered that the decision be reclassified as public.<sup>13</sup> The Sabra Defence did not specifically explain why the application was filed confidentially. Now that the decision is public, there is no apparent reason why the application should remain confidential. It should therefore be reclassified. There is however an annex A attached to the application, which contains *inter partes* correspondence. The Trial Chamber finds that in order to facilitate the public nature of these proceedings, the Sabra Defence should file a public redacted version of the annex, after having first consulted with the Prosecution.

**FOR THESE REASONS**, the Trial Chamber:

**DISMISSES** the Sabra Defence application for certification for interlocutory appeal;

**ORDERS** this application to be reclassified as public (excluding annex A); and

**ORDERS** the Sabra Defence to file a public redacted version of annex A to its application.

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

Leidschendam,  
The Netherlands  
20 October 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy



<sup>12</sup> See F3337, Decision Granting, in Part, Sabra Defence Motion for the Admission of Documents Relating to Mr Ahmed Abu Adass – Character, Religious Beliefs and Associates, 25 September 2017, paras 79-93, 97-106.

<sup>13</sup> See F3366, Decision Denying Prosecution Motion for Protective Measures for Witness PRH103, 20 October 2017.