

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 ONEISSI 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

Defence Office:

Mr François Roux

Counsel for Mr Hassan Habib Merhi:

Mr Mohamed Aouini, Ms Dorothée Le Fraper
du Hellen & Mr Jad Youssef Khalil

Legal Representatives of

Participating Victims:

Mr Peter Haynes, Mr Mohammad F. Mattar
& Ms Nada Abdelsater-Abusamra

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



INTRODUCTION

1. The Trial Chamber found that Mr Ziad Ramadan (Witness PRH103) was for good reason unavailable to testify, and decided to admit his statements into evidence under Rule 158 of the Special Tribunal's Rules of Procedure and Evidence.¹ The statements are relevant to a claim of responsibility for the assassination of the former Lebanese Prime Minister, Mr Rafik Hariri, in Beirut on 14 February 2005, in a video featuring Mr Ahmed Abu Adass, broadcast shortly after the attack, as pleaded in the amended consolidated indictment.²

SUBMISSIONS

Defence submissions

2. Counsel for the Accused, Mr Hussein Hassan Oneissi, opposed the admission into evidence of Mr Ramadan's statements, and now seek certification for interlocutory appeal, under Rule 126 (C), of the following issues:

- a. Whether the Trial Chamber erred in considering that PRH103[s] evidence was corroborative of evidence the Trial Chamber has already heard concerning a meeting between Mohammed and Ahmad Abu Adass in the university Mosque;
- b. Whether the Trial Chamber erred in considering that the witness's statements do not go directly to the acts and conducts of an accused person as charged in the amended consolidated indictment; and
- c. Whether the Trial Chamber erred in ruling that Rule 158 was necessarily broad in compass when assessing whether there were good reasons to establish that the witness was unavailable to testify.³

3. Counsel argue that the Trial Chamber made unsupported factual findings and prejudged elements of the case against Mr Oneissi when it wrongly concluded that the witness' evidence is largely corroborated by evidence the Trial Chamber has heard. This

¹ 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.

² 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) ('Decision'). For the pleaded facts *see*, for example, F2720, Amended Consolidated Indictment, 12 July 2016, paras 23, 27-29 and 44. Mr Ramadan's statements and interview transcript tendered by the Prosecution are exhibits P1774, P1775 and P1776.

³ F2922, Defence for Hussein Hassan Oneissi Request for Certification to Appeal the "Decision Admitting Statements of Witness PRH103 under Rule 158", Dated 12 December 2016, 20 December 2016 (confidential) ('Application'), paras 2, 23 (internal references omitted).

raises grave concerns regarding the respect of the fundamental principle of the presumption of innocence and constitutes an appealable error. Should the Appeals Chamber concur with the Defence's argument that the Trial Chamber's findings lack evidentiary support, it inevitably would affect the outcome of the trial. An immediate resolution by the Appeals Chamber is necessary to determine if the Trial Chamber is right that there is corroborative evidence, in which case the Defence must be informed about it to understand the charges against Mr Oneissi and to prepare accordingly, or if it is wrong, in which case the decision contains unsupported factual findings and must be reversed immediately.⁴

4. Counsel further submit that the Trial Chamber erred in fact when it found that the witness' evidence does not go to the acts and conduct of the Accused, considering that Mr Ramadan's evidence concerns the acts and conduct of a person named 'Mohammed' whom the Prosecution alleges to be Mr Oneissi. The misinterpretation of the evidence has a significant impact on the fairness and expeditiousness of the proceedings because the Defence cannot cross-examine the witness and challenges the only adduced evidence concerning Mr Oneissi's alleged meeting with and recruitment of Mr Abu Adass. If the Appeals Chamber reverses the Trial Chamber's decision and the witness' evidence is withdrawn from the proceedings it would have a significant impact on the evidentiary basis of the case and the outcome of the trial. Only an immediate resolution by the Appeals Chamber can clarify which evidence is relevant to the acts and conduct of the accused and ensure that the proceedings follow the right course.⁵

5. Regarding the third issue, counsel submit that the Trial Chamber's unduly broad interpretation of the witness' unavailability violates the Accused's fair trial right to examine the witness against him and therefore significantly affects the fair conduct of the proceedings. If allowed to stand, this interpretation would open the floodgates for the Prosecution to tender evidence under Rule 158 which, under a correct reading of this rule, it could not have tendered, thereby significantly affecting the expeditious conduct of the proceedings. Finally, the issue significantly affects the outcome of the proceedings because the only other person whose evidence would support the alleged meeting between 'Mohammed' and Mr Abu Adass, Witness PRH056, is unlikely to testify. Since this alleged meeting is fundamental to the Prosecution's case against Mr Oneissi, the admissibility of Mr Ramadan's evidence will have a direct bearing on the Trial Chamber's eventual decision to convict or acquit him. An

⁴ Application, paras 4-8.

⁵ Application, paras 9-14.

immediate resolution by the Appeals Chamber would prevent the admission of further evidence under the erroneous interpretation of Rule 158 from tainting the fairness of the proceedings and marring the evidentiary record with evidence that should not have been admitted.⁶

Prosecution submissions

6. The Prosecution opposes the application as it identifies issues which 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 weight of the witness' evidence. Contrary to the Defence submissions, the Trial Chamber did not make factual findings on allegations against Mr Oneissi pleaded in the amended consolidated indictment. Rather, it addressed factors relevant to the admissibility of the witness' evidence.⁷

DISCUSSION

7. Rule 126 (C) provides that a decision may only be subject to interlocutory appeal 'with certification, 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'. In previous decisions, the Trial Chamber has acknowledged the legal principles and standards governing the certification of decisions for interlocutory appeal.⁸ These are equally applicable here.

8. The first issue raised in the application stems from a misinterpretation of the decision. The Trial Chamber has not made factual findings against Mr Oneissi. The Trial Chamber's determination that the evidence is corroborative in nature results from its assessment of factors favouring or impeding the admissibility of the evidence, rather than a prejudicial evaluation of the evidence. The Trial Chamber reiterates that it has received evidence that

⁶ Application, paras 15-22.

⁷ 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) ('Prosecution Consolidated Response'), paras 1, 3, 5-8, 10.

⁸ See e.g. F2987, Written Reasons for Decision Denying Certification to Appeal the "Decision Clarifying Mr Gary Platt's Area of Expertise" dated 25 January 2017, 14 February 2017 ('Decision of 14 February 2017'), paras 5-6; 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 ('Decision of 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.

corroborates Mr Ramadan's statements.⁹ The first issue does not have an adequate factual basis in the decision. It therefore does not meet the strict requirements of Rule 126 (C).¹⁰

9. The second issue also does not meet the Rule 126 (C) test. The Trial Chamber held that, on balance, Mr Ramadan's evidence does not go directly to the acts and conduct of an accused person as charged in the amended consolidated indictment. Even if it did go to Mr Oneissi's acts and conduct, its corroborative nature favoured its admission. The Trial Chamber also considered the Defence's inability to cross-examine the witness and held that this has to be carefully assessed when giving weight to his evidence at a later stage of the proceedings.¹¹ Counsel for Mr Oneissi misrepresent the Trial Chamber's reasoning as well as the evidentiary record. They have therefore failed to identify an issue that meets the requirements of the first limb of the test in Rule 126 (C). Even if they had succeeded, the issue would fail under the second limb of the test. Indeed, considering the existence of corroborating evidence, there is no immediate need to clarify the definition under Rule 158 (B) of evidence going to proof of acts and conduct of the accused as defined in the amended consolidated indictment.

10. With regard to the third issue, counsel for Mr Oneissi again omit mentioning that the Trial Chamber recognised the need to consider the Defence's inability to cross-examine the witness when ultimately deciding on the weight to give to his evidence.¹² As such, they have not shown that the issue would significantly affect the fair conduct of the proceedings. It is unclear why the Trial Chamber's determination that Mr Ramadan's specific circumstances allowed for his statements to be admitted under Rule 158¹³ would open the 'floodgates' of Prosecution evidence. At the present late stage of the Prosecution's case no such floodgates have been opened.¹⁴ The issue therefore does not significantly affect the expeditious conduct

⁹ Decision, para. 47. *See* F2269, Decision on Prosecution Motion for Protective Measures [...], 15 October 2015 (confidential).

¹⁰ Decision of 14 February 2017, para. 6; Decision of 6 December 2016, para. 6; Decision of 18 December 2014, para. 13.

¹¹ Decision, paras 47-48.

¹² Decision, para. 48.

¹³ Decision, paras 34-36.

¹⁴ The Trial Chamber has issued seven decisions on Prosecution motions for admission of evidence pursuant to Rule 158. In addition to the Decision, *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 ('Decision of 1 May 2017'); F3017, Decision Admitting Witness PRH437's Statements under Rule 158 and Granting Protective Measures, 28 February 2017 ('Decision of 28 February 2017'); F2100, Decision on Prosecution Motion to Admit the Statements of Deceased Witness PRH045, 24 July 2015; F1953, Decision on Prosecution Motion to Admit the Statements of Deceased Witnesses PRH249 and PRH093, 18 May 2015; F1890, Decision on Prosecution Motion to Admit the Statements of Witnesses PRH402 and PRH636, 27 March 2015; transcript of 9 January 2014, pp. 14-15. There are currently two such motions

of the proceedings. The Trial Chamber also rejects the argument concerning the outcome of the trial as it is based on the incorrect assumption that there is no other evidence corroborating the alleged meeting between ‘Mohammed’ and Mr Abu Adass. The Trial Chamber therefore finds that the application fails to meet the first limb of the test in Rule 126 (C).

11. Moreover, even if the Trial Chamber were to find that the issue meets the requirements of the first limb of the certification test, it is not convinced that an immediate resolution by the Appeals Chamber could materially advance the proceedings. 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.¹⁵ It is therefore primarily for the Trial Chamber to interpret the Rules to decide on the admission of evidence. In any event, this particular contested interpretation of Rule 158 has not surfaced in any litigation since the decision was issued.¹⁶

OBLIGATIONS UNDER THE CODE OF PROFESSIONAL CONDUCT

12. In its decision, the Trial Chamber directed counsel for Mr Oneissi to withdraw the offending statement in their response to the Prosecution’s further submissions regarding its Rule 158 application that ‘everything leads to believe that the Prosecution seeks to take advantage of the witness’ obvious bad faith to excuse his appearance in person before the Tribunal and his cross-examination by the Defence’.¹⁷ To date, counsel have not done this and are again directed to do so.

pending before the Trial Chamber. *See* F3214, Prosecution Rule 158 Motion for Admission of Written Statement of Unavailable Person PRH680 (confidential); F3124, Prosecution Motion to Admit the Statement of PRH028 under Rule 158 and for Provisional Protective Measures for PRH028, 5 May 2017 (confidential with confidential annex A).

¹⁵ 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; Decision of 18 December 2014, para. 14 and reference therein.

¹⁶ Decision, paras 34-36. *See* F3309, Decision Admitting into Evidence 18 Witness Statements under Rules 155 and 158, and Reasons for Admitting Two Witness Statements of Participating Victims, 5 September 2017, paras 20-21; Decision of 1 May 2017, paras 34-40, Partially Dissenting Opinion of Judge David Re; Decision of 28 February 2017, paras 12-14.

¹⁷ Decision, para. 56, referring to F2773, Defence for Hussein Hassan Oneissi Response to the “Prosecution Further Submissions pursuant to the Order of 28 June 2016”, Dated 27 September 2016, 12 October 2016 (confidential), para. 12. *See* Decision, para. 57, disposition.

CONFIDENTIALITY

13. 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.¹⁸ The Oneissi 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. The same reasoning applies to the Prosecution Consolidated Response, which should also be reclassified.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the Oneissi Defence application for certification for interlocutory appeal;

ORDERS this application as well as the Prosecution Consolidated Response to be reclassified as public; and

ORDERS counsel for Mr Hussein Hassan Oneissi to withdraw without delay their offending statement from the trial record.

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



¹⁸ See F3366, Decision Denying Prosecution Motion for Protective Measures for Witness PRH103, 20 October 2017.