



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: 6 December 2017

Original language: English

Classification: Public

THE PROSECUTOR

v.

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

**DECISION DENYING ‘SABRA REQUEST FOR CERTIFICATION TO APPEAL
THE “SUMMARY DISMISSAL OF SABRA DEFENCE APPLICATION FOR THE
ADMISSION OF 224 DOCUMENTS”’**

Office of the Prosecutor:

Mr Norman Farrell & Mr Alexander Hugh
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 &
Mr Chad Mair

Counsel for Mr Hassan Habib Merhi:

Mr Mohamed Aouini, Ms Dorothée 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 Robinson
Ms Sarah Bafadhel



BACKGROUND AND ISSUES FOR INTERLOCUTORY APPEAL

1. In responding to a motion filed by the Prosecution tendering statements of a witness into evidence under Rule 158 of the Special Tribunal's Rules of Procedure and Evidence,¹ counsel for the Accused, Mr Assad Hassan Sabra, sought the admission into evidence of 234 documents, including nine statements and a letter of the same witness.² The documents were listed in two annexes to the response.

2. The Trial Chamber held that although procedurally the witness's nine statements and letter should have been tendered in a separate Defence motion, it would deal with them in the decision determining the Prosecution's Rule 158 application.³ The Trial Chamber, however, summarily dismissed the Defence application with respect to 224 documents tendered in annex B, finding at paragraphs 6 to 10 of the decision,

Four of the 224 items in annex B are already in evidence—as exhibits P806, 4D137 and 5D129. On 25 September 2017, the Trial Chamber decided on the admissibility of another 75 items listed in annex B, and decided to admit one into evidence, meaning that it rejected receiving the other 74 into evidence. Despite this—and on 13 November 2017—the Sabra Defence retendered them. But on what basis is unstated.

Counsel for Mr Sabra have not sought reconsideration of the decision not to admit the 74 documents. In the absence of any application to reconsider the decision under Rule 140 or any reason to do so, the Trial Chamber will not. Defence counsel should not have filed a response containing an annex seeking the admission into evidence of any of these 79 documents. It was a sloppy and careless exercise which is wasteful of the Trial Chamber's and the Parties' time.

It also appears that the Sabra Defence has already tendered into evidence 131 of the 224 items in the revised annex B and are awaiting a Trial Chamber decision. The Trial Chamber, however, has wasted a considerable amount of time in attempting to divine this, including carefully examining the revised annex B, previous Sabra Defence motions and a reply. The Trial Chamber will determine the admissibility of these documents when deciding on the

¹ STL-11-01/T/TC, *Prosecutor v. Ayyash, Merhi, Oneissi and Sabra*, F3389, Prosecution Renewal of Application under Rule 158 in Respect of [a witness], 27 October 2017 (confidential with confidential annex). Rule 158 regulates the admissibility of evidence of 'unavailable persons', that is, persons who have 'died, who can no longer with reasonable diligence be traced, or who [are] for good reason otherwise unavailable to testify orally'.

² F3411, Sabra Defence Response to "Prosecution Renewal of Application under Rule 158 in Respect of [a witness]", 13 November 2017 (confidential with confidential annexes).

³ F3418, Summary Dismissal of Sabra Defence Application for the Admission of 224 Documents, 21 November 2017 ('Summary Dismissal'), para. 1.

respective Defence motions. They should not have been listed in an annex to a response to a different Prosecution motion.

That leaves a ‘mere’ 14 documents that appear—and this is, at best, a qualified statement or an educated guess by the Trial Chamber—not to have been previously submitted for tender into evidence.

The Sabra Defence, however, has provided insufficient information on their relevance, *prima facie* [sic] reliability and hence probative value to admit them into evidence. The argument on its own that the Defence would have tendered these documents during the cross-examination of the witness is insufficient to warrant their admission. The Trial Chamber has held that where a Party ‘wishes to tender documents and records into evidence during the testimony of a witness, the Trial Chamber, generally, will hear any submissions from the Parties about the admissibility at the end of the testimony.’⁴

3. Counsel for Mr Sabra now request certification under Rule 126 (C) to appeal the decision.⁵ The Prosecution has not yet responded. The Sabra Defence seeks to have four issues certified for interlocutory appeal, namely,

- i. Whether the Trial Chamber erred in summarily dismissing the alternative relief, before addressing the primary relief in the Defence Response;
- ii. Whether the Trial Chamber abused its discretion in refusing to admit any of the 14 documents it actually considered potentially admissible on the basis that they do not show a direct link with the credibility of the witness;
- iii. Whether the Trial Chamber erred in summarily dismissing of 74 out of the 224 documents that had been previous rejected by the Chamber but which were tendered for admission under a different legal basis and for a different purpose and not tendered for the truth of their contents, without seeking reconsideration of the initial decision to reject them; and,
- iv. Whether the Trial Chamber erred in summarily dismissing the 131 out of 224 documents on the basis that these documents had been tendered in other motions for admission of evidence by the Defence for which a decision was pending.

⁴ Summary Dismissal, paras 6-10 (emphasis and footnotes in the original omitted), specifically referring to 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.

⁵ F3437, Sabra Request for Certification to Appeal the “Summary Dismissal of Sabra Defence Application for the Admission of 224 Documents”, 29 November 2017 (public with confidential annex).

LEGAL REQUIREMENTS UNDER RULE 126 (C)

4. Rule 126 (C) provides that a decision is 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’. The Trial Chamber has set out the principles applicable to the certification of issues for interlocutory appeal.⁶

5. Decisions on the admission of evidence are discretionary and the Trial Chamber (again) reiterates its finding that, ‘certification to appeal is the absolute exception when deciding on the admissibility of evidence. A question for certification relating to admitting something into evidence will therefore rarely meet the standard in Rule 126 (C).’⁷

DISCUSSION

6. The essence of the decision was to reject the admission into evidence of 14 documents for which the Sabra Defence had provided insufficient information on their relevance and probative value, as Rule 149 (C) requires for their admission.⁸ The remaining 210 documents were (a) under consideration for admission into evidence in other Defence motions, or (b) already admitted into evidence, or (c) already rejected for admission into evidence (but without any accompanying Defence application to reconsider the decision rejecting their admission).⁹

7. The Sabra Defence did not adequately explain how the 14 documents were relevant and probative, and the Trial Chamber had difficulty in determining this itself. Hence the application was summarily dismissed. But in any event, nothing prevents the Sabra Defence from re-rendering these 14 documents in accordance with the Rules and the Trial Chamber’s

⁶ 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, 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, paras 5-6; STL-11-01/T/TC, *Prosecutor v. Ayyash, Badreddine, Merhi, Oneissi and Sabra*, F1798, Decision on Application for Certification of Decision regarding the Scope of Marwan Hamade’s Evidence, 18 December 2014, paras 12-14.

⁷ F1841, Decision on ‘The Defence for Hussein Hassan Oneissi Request for Certification of the “Decision on Prosecution’s Motion for Admission into Evidence of 485 Documents, Photographs and Witness Statements Relevant to Rafik Hariri’s Movements and to Political Events” of 30 December 2014’, 3 February 2015, para. 11.

⁸ Rule 149 (C) specifies that a Chamber ‘may admit any relevant evidence which it deems to have probative value’.

⁹ Summary Dismissal, paras 6-10.

directions that motions for the admission of documents and witness statements must comply with the Rules. In this respect the Trial Chamber also held, at paragraph 5, of the decision, that it,

has exercised extreme patience with the Sabra Defence's filing of lengthy annexes containing incorrect, duplicated and non-cross-referenced material, thus transferring to the Trial Chamber the burden of attempting to decipher what is intended for submission into evidence and on what basis. This is yet another example.¹⁰

8. In these circumstances—namely, of the Trial Chamber having insufficient information to determine whether evidence is relevant with some probative value—this discretionary decision not to receive these remaining 14 documents into evidence cannot *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The application for certification to appeal is without merit and is dismissed. The Trial Chamber has therefore issued the decision without awaiting a response from the Prosecution.

DISPOSITION

FOR THESE REASONS, the Trial Chamber:

DISMISSES the application for certification to appeal.

¹⁰ Footnote 9 to paragraph 5 of the Summary Dismissal refers to STL-11-01/PT/TC, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, F1268, Corrected Version of “Orders relating to Five Defence Motions for Orders to Lebanon on State Cooperation” of 16 December 2013, 24 December 2013, paras 5, 22; F1244, Further Order to Counsel for Assad Hassan Sabra in relation to Requests for State Cooperation, 29 November 2013, paras 3-4; STL-11 01/T/TC, *Prosecutor v Ayyash, Merhi, Oneissi and Sabra*, F3015, Order on Sabra Defence Motion for the Admission of Documents relating to Ahmed Abu Adass, 27 February 2017; Decision of 25 September 2017, para. 4.

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

Leidschendam,
The Netherlands
6 December 2017

David Re

Judge David Re, Presiding

Janet Nosworthy

Judge Janet Nosworthy

Micheline Braidy

Judge Micheline Braidy

