

IT-03-69-A
4603-4 4605
20 August 2014

4603
9/23

UNITED
NATIONS



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-03-69-A
Date: 20 August 2014
Original: English

THE PRESIDENT OF THE TRIBUNAL

Before: Judge Theodor Meron, President
Registrar: Mr. John Hocking
Decision: 20 August 2014

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

CONFIDENTIAL

**DECISION ON REQUEST FOR REVIEW OF OLAD DECISION
ON REMUNERATION FOR THE APPEAL PHASE**

The Office of the Prosecutor:

Mr. Peter Kremer

Counsel for Mr. Jovica Stanišić

Mr. Wayne Jordash

Mr. Scott Martin

Counsel for Mr. Franko Simatović

Mr. Mihajlo Bakrač

Mr. Vladimir Petrović

1. **I, THEODOR MERON**, President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal” or “ICTY”), am seised of the confidential “Request for Review of OLAD Decision on the Remuneration for the Appeal Phase”, filed by defence counsel for Mr. Franko Simatović (“Simatović Defence”) on 2 April 2014 (“Request”). The Registry of the Tribunal (“Registry”) filed a confidential response on 16 April 2014.¹

I. BACKGROUND

2. On 30 May 2013, Trial Chamber I fully acquitted Franko Simatović (“Simatović”).² On 28 June 2013, the Office of the Prosecutor (“Prosecution”) filed a notice of appeal.³

3. On 15 July 2013, the Registry informed the Simatović Defence that it had provisionally ranked the appeal at Complexity Level 1,⁴ pursuant to paragraph 12 of the ICTY Defence Counsel-Appeals Legal Aid Policy.⁵ On 4 October 2013, the Registry confirmed that it ranked the Simatović appeal at Complexity Level 1, and that accordingly the Simatović Defence was entitled to 1,050 counsel hours pursuant to paragraph 5 of the Legal Aid Policy (“Paragraph 5”).⁶

4. On 30 January 2014, the Registry informed the Simatović Defence that the latest group of invoices it had submitted, for the period from August to December 2013, considered together with invoices previously submitted and processed, exceeded its 1,050 counsel hour allotment.⁷ In response to queries by the Simatović Defence, the Registry explained that it had mistakenly reimbursed invoices from June 2013 submitted pursuant to paragraph 7 of the Legal Aid Policy (“Paragraph 7”) without informing the Simatović Defence at that time that the Registry disagreed with its interpretation of Paragraph 7.⁸ The Registry stated that despite this “internal oversight”⁹ it

¹ Registrar’s Submission Regarding the Defence’s Request for Review of OLAD Decision on Remuneration for the Appeal Phase, 16 April 2014 (confidential) (“Response”).

² *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Judgment, 30 May 2013 (“Judgement”).

³ Prosecution’s Notice of Appeal, 28 June 2013 (“Notice of Appeal”).

⁴ See Letter from Susan Stuart, Acting Head of Office of Legal Aid and Defence Matters (“OLAD”), to Mihajlo Bakrač, Lead Counsel for Franko Simatović, Re: Funding for the Appeal Phase, 15 July 2013 (confidential) (“Initial Complexity Ranking Decision”), p. 1.

⁵ ICTY Defence Counsel-Appeals Legal Aid Policy, 18 April 2013 (“Legal Aid Policy”).

⁶ See Letter from Susan Stuart, Acting Head of OLAD, to Mihajlo Bakrač, Lead Counsel for Franko Simatović, Re: Complexity Level Determination of *Simatović* Appeal, 4 October 2013 (confidential), p. 6.

⁷ See Email from Fiana Reinhardt, OLAD, to Mihajlo Bakrač, Lead Counsel for Franko Simatović, Subject: Your Appeals invoices, 30 January 2014 (confidential).

⁸ See Email from Fiana Reinhardt, OLAD, to Mihajlo Bakrač, Lead Counsel for Franko Simatović, Subject: Fw: Simatovic Invoices, 19 March 2014 (confidential) (“19 March 2014 Email”).

⁹ 19 March 2014 Email.

would still count these 50 reimbursed counsel hours as part of the 1,050 counsel hours granted under Paragraph 5, rather than as an additional entitlement pursuant to Paragraph 7.¹⁰

5. On 2 April 2014, the Simatović Defence filed a request for review of the Registry's refusal to reimburse 50 counsel hours under Paragraph 7.¹¹

II. STANDARD OF REVIEW

6. The following standard has been set for the review of administrative decisions made by the Registrar:

A judicial review of [...] an administrative decision is not a rehearing. Nor is it an appeal, or in any way similar to the review which a Chamber may undertake of its own judgment [*sic*] in accordance with Rule 119 of the Rules of Procedure and Evidence. A judicial review of an administrative decision made by the Registrar [...] is concerned initially with the propriety of the procedure by which [the] Registrar reached the particular decision and the manner in which he reached it.¹²

Accordingly, an administrative decision may be quashed if the Registrar:

- (a) failed to comply with [...] legal requirements [...], or
- (b) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or
- (c) took into account irrelevant material or failed to take into account relevant material, or
- (d) reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test).¹³

7. Unless unreasonableness has been established, "there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled."¹⁴ The party challenging the administrative decision bears the burden of demonstrating that "(1) an error of the nature enumerated above has occurred, and (2) [...] such an error has significantly affected the administrative decision to his detriment".¹⁵

III. APPLICABLE LAW

8. Paragraph 7 provides that:

¹⁰ See 19 March 2014 Email.

¹¹ Request.

¹² *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 ("Žigić Decision"), para. 13. See also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Review of Decision on Defence Team Funding, 31 January 2012 ("Karadžić Decision"), para. 6.

¹³ *Karadžić Decision*, para. 6. See also *Žigić Decision*, para. 13.

¹⁴ *Žigić Decision*, para. 13. See also *Karadžić Decision*, para. 7.

¹⁵ *Karadžić Decision*, para. 7. See also *Žigić Decision*, para. 14.

In the absence of the filing of a Notice of Appeal by either Counsel or Prosecution, a maximum of 50 counsel hours shall be allotted, to cover work such as reviewing the judgement to analyse possible grounds of appeal or cross-appeal, and consulting with and advising the accused.

IV. SUBMISSIONS

9. The Simatović Defence submits, *inter alia*, that under Paragraph 7, where any party fails to file a notice of appeal, defence counsel are allotted a maximum of 50 counsel hours to cover work “such as reviewing the judgement to analyze possible grounds of appeal or cross-appeal” and advising clients about the meaning of judgements during the pre-appeal phase of a case. Accordingly, noting that it did not file a notice of appeal, the Simatović Defence contends that it is entitled to be compensated for 50 counsel hours under Paragraph 7.¹⁶

10. The Simatović Defence further submits that it was reimbursed for invoices submitted pursuant to Paragraph 7, and subsequently relied on the fact that work had been reimbursed under Paragraph 7 in planning subsequent activities.¹⁷

11. The Registry responds, *inter alia*, that Paragraph 7 only provides for 50 counsel hours if no appeal proceedings are launched. Noting that the Prosecution filed such a notice of appeal, the Registry maintains that the Simatović Defence is accordingly not entitled to counsel hours under paragraph 7.¹⁸ The Registry contends that the Simatović Defence “ignores the rationale for” the allotment provided by Paragraph 7, “which is intended to fund a convicted person’s consideration of whether or not to appeal”,¹⁹ and indicates that such consideration was unnecessary because “Simatović could not appeal his acquittal”.²⁰ The Registry submits that the Simatović Defence did not need to “second-guess whether or on what grounds the Prosecution w[ould] appeal” as he would be informed of these issues by a notice of appeal.²¹ The Registry relatedly specifies that “work of an acquitted person in responding to a Prosecution appeal is remunerated” separately under the Legal Aid Policy.²²

12. The Registry underscores that its allocation of funds to Simatović was “generous”,²³ and similar to allocations provided to defence teams which, contrary to the Simatović Defence, are not

¹⁶ See Request, para. 9 (emphases omitted). See also Request, paras 7-8, 10-11.

¹⁷ Request, para. 13.

¹⁸ See Response, paras 17-18. See also Response, para. 17 n. 13.

¹⁹ Response, para. 20.

²⁰ Response, para. 18.

²¹ Response, para. 19.

²² See Response, para. 20.

²³ Response, para. 21.

only responding to appeals by the Prosecution but also engaging in substantive appeals of judgements themselves.²⁴

V. DISCUSSION

13. As an initial matter, I note that the language of Paragraph 7 is ambiguous with regards to what circumstances entitle a defence team to reimbursement of 50 counsel hours after a judgement is rendered, but before notices of appeal are filed. Its specification that “[i]n the absence of the filing of a Notice of Appeal by either Counsel or Prosecution, a maximum of 50 counsel hours shall be allotted”²⁵ could either mean that these 50 counsel hours are allotted if any party fails to file a notice of appeal, or that these hours are allotted only if all parties fail to file a notice of appeal. The remainder of Paragraph 7 does not clearly support one of these two readings; it specifies that these counsel hours are for analysis of possible grounds of appeal and cross-appeal following judgement delivery or consultations with a convicted person,²⁶ however such activities could take place whether or not notices of appeal are filed.

14. The Registry is unconvincing in suggesting that the Simatović Defence’s more generous reading of Paragraph 7 would require support for excessively speculative types of legal analysis.²⁷ It is true that Simatović had no need to analyze potential grounds of appeal, as he had been acquitted.²⁸ However the Registry does not demonstrate that it was unreasonable for the Simatović Defence to analyze the Judgement for potential grounds of cross-appeal before any relevant notice of appeal was filed.²⁹ Such analysis is arguably both prudent and referenced in Paragraph 7, which explicitly provides for consideration of potential grounds of cross-appeal prior to the filing of any notice of appeal. In these circumstances, initial analysis of the Judgement was not so unreasonable an activity as to render the Simatović Defence’s interpretation of Paragraph 7 untenable.

15. Given the ambiguity of the language of Paragraph 7, I am not convinced by the Registry’s submission that the only possible rationale for the 50 counsel hour allotment is “to fund a convicted person’s consideration of whether or not to appeal.”³⁰ The fact that a response to the Notice of Appeal was separately provided for in the Legal Aid Policy, does not automatically mean that work prior to this notice of appeal could not be reimbursed.³¹ Indeed, the Legal Aid

²⁴ See Response, para. 21.

²⁵ Legal Aid Policy, para. 7.

²⁶ See Legal Aid Policy, para. 7.

²⁷ See Response, para. 19.

²⁸ Response, para. 18.

²⁹ Cf. Response, para. 19.

³⁰ Response, para. 20.

³¹ Cf. Response, para. 20.

Policy provides separately for various stages of an appeal; for example, it separates out preparation of a notice of appeal, and subsequent appeal work.³²

16. In view of the foregoing, I consider that the Registry's communications with the Simatović Defence provided the latter grounds to rely on their expansive interpretation of Paragraph 7. While the Registry explicitly excluded reimbursement for preparation of a notice of appeal under paragraph 6 of the Legal Aid Policy ("Paragraph 6") in initial communications with the Simatović Defence, it did not explicitly exclude reimbursement under Paragraph 7.³³ In addition, the Registry acknowledged to the Simatović Defence that it initially reimbursed invoices submitted pursuant to Paragraph 7 some time before communicating its view that the Simatović Defence was not entitled to the 50 counsel hours provided for by Paragraph 7.³⁴

17. In this context I do not consider that the Registry acted with procedural fairness in denying reimbursement under Paragraph 7. The language of Paragraph 7 was sufficiently ambiguous that the Simatović Defence was not unreasonable in considering itself entitled to 50 counsel hours for work performed prior to filing of a notice of appeal. The Registry's initial actions, i.e. failing to exclude claims under Paragraph 7 while explicitly excluding claims under Paragraph 6, and reimbursing receipts submitted pursuant to Paragraph 7, could be reasonably interpreted by the Simatović Defence as confirming its interpretation of Paragraph 7, and would have encouraged the latter to plan work accordingly. Subsequently altering the reimbursement terms, under which the Simatović Defence reasonably believed it was operating, was procedurally unfair.

18. The Registry asserts that the Simatović Defence benefited from a "generous" allocation of defence funds in comparison to other teams.³⁵ This is irrelevant to the issue at hand. It may well be that the Registry granted comparatively generous funds to the Simatović Defence, and indeed that the Simatović Defence's reading of Paragraph 7 reimbursements privileges defence teams in particular procedural postures. However, even if these points are valid, they do not detract from the procedural unfairness of the Registry's actions in this case.

VI. DISPOSITION

19. In view of the foregoing, I hereby **GRANT** the Request and order the Registry to provide an additional 50 counsel hours of reimbursement to the Simatović Defence pursuant to Paragraph 7.

³² See Legal Aid Policy, paras 4-12.

³³ See Initial Complexity Ranking Decision, p. 1.

³⁴ See 19 March 2014 Email.

³⁵ Response, para. 21.

was

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

Done this 20th day of August 2014,
At The Hague,
The Netherlands.



Judge Theodor Meron
President

[Seal of the Tribunal]