Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-RoR56-01/09**
Date: **6 August 2009**

THE PRESIDENCY

Before: **Judge Sang-Hyun Song, President**
Judge Fatoumata Dembele Diarra, First Vice-President
Judge Hans-Peter Kaul, Second Vice-President

Confidential

Decision on the application to review the decision of the Registrar denying the admission of Ms Magdalena Ayoade to the list of experts

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

REGISTRY

Registrar	**Other**
Ms Silvana Arbia	Ms Magdalena Ayoade, Applicant
Deputy Registrar	
Mr Didier Preira	

The Presidency of the International Criminal Court (hereinafter "Court") has before it the application of Ms Magdalena Ayoade for judicial review of the decision of the Registrar refusing to admit her to the list of experts.

The decision of the Registrar is quashed and the matter is remitted to the Registrar to provide a new decision for the reasons set out below.

I. PROCEDURAL HISTORY

1. On 10 March 2008, Ms Magdalena Ayoade (hereinafter "applicant") applied to the Registrar for inclusion in the list of experts, which is created and maintained by the latter pursuant to regulation 44 of the Regulations of the Court.[1]
2. On 7 January 2009, the Registrar rejected that application for inclusion in the list of experts (hereinafter "Impugned Decision").[2] The applicant received the Impugned Decision on 16 January 2009.[3]
3. On 20 January 2009, the applicant sought from the Presidency judicial review of the Impugned Decision pursuant to regulation 56(2) of the Regulations of the Registry (hereinafter "Application").[4] The Registrar received the Application on 6 February 2009.[5]
4. On 17 February 2009, the Registrar transmitted to the Presidency a "report", to which the Application and the applicant's case file were attached.[6]

II. PRELIMINARY PROCEDURAL ISSUE

5. As a preliminary consideration, the Presidency notes that the "report" submitted by the Registrar contains her submissions in response to the Application. The Registrar is expressly entitled, in accordance with regulation 56(3) of the Regulations of the

[1] Application to the Registrar to be included in the list of experts, ICC-RoR56-01/09-1-Conf-Anx1.
[2] ICC-RoR56-01/09-1-Conf-Anx2.
[3] ICC-RoR56-01/09-1-Conf-Anx3.
[4] ICC-RoR56-01/09-1-Conf-Anx3.
[5] Request for review of the decision of the Registrar pursuant to regulation 56 of the Regulations of the Registry, ICC-RoR56-01/09-1-Conf, page 3.
[6] ICC-RoR56-01/09-1-Conf and annexes, cited in full at footnote 5 above.

Registry, to file a response to an application seeking judicial review of a decision refusing to include a person in the list of experts. According to that regulation, a response is to be filed within 15 calendar days of notification of the application for review. The Presidency notes that the "report" of the Registrar was filed within the prescribed time limit. The Presidency therefore admits the report as a response to the Application (hereinafter "Response"), pursuant to regulation 56(3) of the Regulations of the Registry.

III. MERITS

A. Relevant part of the Impugned Decision

6. Given the brevity of the Impugned Decision, it is quoted in full:

> "Dear Ms. Ayoade,
>
> We thank you for your interest in the work of the International Criminal Court and for applying to the List of Experts.
>
> While your credentials are noteworthy, we regret to inform you that at this moment your field of expertise does not meet the needs of the Court. However, should you have no objection, we would like to keep your file on record for future requirements should the need for your expertise arise.
>
> Kindly note that you may apply to the Presidency for a review of this decision within 15 days of notification, as provided for under regulation 56(2) of the Regulations of the Registry."

B. The submissions of the parties

1. *The arguments of the applicant*

7. The applicant seeks to have the Impugned Decision reversed on the grounds that she is qualified to be included in the list of experts. The applicant argues that she has

worked as "the expert in the Polish National Court for some years," that she has a "very good reference from the Presidency of the Polish Court" and that she is sure that her experience "could be very useful in the expertise" of the Court.[7]

2. *The arguments of the Registrar*

8. The Registrar requests the Presidency to confirm the Impugned Decision. The reasoning of the Registrar contained in the Impugned Decision is further explained in her Response. She submits that an assessment of the applicant was carried out by an external consultant tasked with "verify[ing] the human resources background of [the applicant]", who concluded that:

> "the [applicant] has serviced [*sic*] for 3 years and a half as an expert in a national Court in Poland in the field of finance, management and organization. With a total of 5 years of relevant experience, the [applicant] does not meet the criteria to be registered as an expert of the Court".[8]

9. In order to be classified as an expert, the Registrar submits that an applicant must be able to demonstrate the same level of experience as a P4 level employee of the Court.[9] That is, an applicant must possess a minimum of 7 years of experience in conjunction with an advanced university degree, or a minimum of 9 years of experience without an advanced university degree.[10]

10. The Registrar argues that, in addition, "finance" as a field of expertise "is to be understood in the context of financial investigations and the freezing of goods and assets."[11] In the submission of the Registrar, "[t]he applicant's field of expertise was not deemed to meet the needs of the Court as it mainly focuses on business activities at the national level (Poland)".[12]

[7] Application.
[8] Response, paragraph 2.
[9] Response, paragraph 3.
[10] Response, paragraph 3.
[11] Response, paragraph 4.
[12] Response, paragraph 4.

C. Determination of the Presidency

11. It is recalled that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.[13]

12. The creation of, and addition to, the list of experts is governed by regulation 44 of the Regulations of the Court and regulation 56 of the Regulations of the Registry.

Regulation 44(1) of the Regulations of the Court provides:

> The Registrar shall create and maintain a list of experts accessible at all times to all organs of the Court and to all participants. Experts shall be included on such a list following an appropriate indication of expertise in the relevant field. A person may seek review by the Presidency of a negative decision of the Registrar.

Regulation 56 of the Regulations of the Registry provides, in relevant part:

> (1) For the purpose of regulation 44 of the Regulations of the Court, a person seeking to be included in the list of experts shall provide the Registry with the following documentation:
>
> ...
>
> (c) An appropriate indication of his or her expertise in the relevant field;
>
> ...
>
> (2) The decision as to whether a person shall be included in the list of experts shall be notified to that person. If the application is refused, the Registrar shall provide reasons and shall inform the person on how to apply to the Presidency for review of that decision...

[13] The standard of judicial review was defined by the Presidency in its Decision of 20 December 2005, ICC-Pres-RoC72-02-5, paragraph 16, and supplemented in its Decision of 27 November 2006, ICC-01/04-01/06-731-Conf, paragraph 24. See also the Decision of the Presidency of 10 July 2008, ICC-Pres-RoC72-01-8-10, paragraph 20.

13. The Presidency considers that the reasoning in the Impugned Decision is not sufficiently clear. The Presidency recalls its Decision of 20 December 2005,[14] which considered the duty upon the Registrar to provide reasons for declining to include a person in the list of counsel pursuant to regulation 70(2) of the Regulations of the Court. The Presidency notes that the wording of that provision is, to all intents and purposes, the same as regulation 56(2) of the Regulations of the Registry on the list of experts. In the Decision of 20 December 2005, the Presidency stated:

> "The purpose of providing ... reasons is twofold: they should inform the applicant why his or her application has been unsuccessful; and they should enable the applicant appropriately to assess whether he or she has any ground to apply for review of the adverse decision.
>
> ... It follows from the above that the reasons for the decision should always be clear. They need not be elaborate. In many instances it may be possible to express them briefly. The level of detail required will necessarily depend upon the facts of the individual case. What is paramount is that the applicant should be able clearly to understand the factual and legal basis upon which the decision has been taken".[15]

1. *Field of Expertise*

14. Turning to the Impugned Decision, the reasoning of the Registrar for rejecting the Application based on the applicant's field of expertise is unclear. Given that "finance" is specifically listed on the website of the Court as a field in which the Court is seeking experts,[16] it was not sufficient for the Registrar to reason, without more, that the applicant's field of expertise (finance) did not meet the needs of the Court. This could lead to the erroneous presumption that financial experts generally are not relevant to proceedings before the Court.

15. In her Response, the Registrar appears to explain her position with two qualifications, neither of which is contained in the reasons given in the Impugned Decision. First,

[14] ICC-Pres-RoC72-02-5.
[15] ICC-Pres-RoC72-02-5, paragraphs 18-19.
[16] http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry/Experts/, last accessed 9 June 2009.

that "finance", for the purposes of the Court, relates to financial investigations and freezing of assets[17]; and, second, that the applicant's expertise does not meet the needs of the Court as it primarily focuses on business activities at the national level in Poland.

16. In relation to the first qualification that "finance" be "understood in the context of financial investigations and freezing of goods and assets," the Presidency notes the applicant's appointment, since August 2004, as a financial expert at the District Court in Warsaw, in the field of "organisation and management of an enterprise."[18] In her *curriculum vitae*, the applicant explained her expertise as pertaining to, *inter alia*, the possible "incorrect" activities of companies and natural persons, checking the illegal aspects of activities, and considering possible transgressions of legal regulations, in the financial field.[19] The Presidency considers that this experience could, at first sight, appear to be relevant to "financial investigations" and it is unclear from the Impugned Decision whether the Registrar considered the experience to be relevant and, if not, why not. This is particularly so in light of the finding of the external consultant, which the Registrar cited in her Response, that the applicant had "serviced [*sic*] for 3 years and a half as an expert in a national Court in Poland in the field of finance, management and organization" and *possessed "a total of 5 years of relevant experience"*.[20]

17. Regarding the second qualification that the applicant's field of expertise does not meet the needs of the Court as it primarily focuses on business activities at the national level as opposed to the international level, again no explanation concerning this qualification appears in the Impugned Decision; it is mentioned for the first time in the Response. In this regard, the Presidency recalls its Decision of 20 December 2005, in which it held that "essential reasoning must be stated in the body of the decision itself ... it should not be introduced, for the first time, in response to an application for review."[21] The Presidency notes that the call for experts at the Court makes no reference to having expertise at the international as opposed to the national level. If, as it appears from the Response, the Registrar relied on the applicant's lack

[17] This is also explained in a footnote to the call for experts at the Court as currently displayed on the website of the Court. See http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry/Experts/, last accessed 9 June 2009.
[18] See translation of the decision of the President of the District Court of Warsaw, reappointing the applicant as a court expert, 10 December 2007, ICC-RoR56-01/09-1-Conf-Anx1, pages 23-24.
[19] *Curriculum vitae* of the applicant, ICC-RoR56-01/09-1-Conf-Anx1, page 11.
[20] Response, paragraph 2. Emphasis added.
[21] ICC-Pres-RoC72-02-5, paragraph 25.

of international expertise as a reason for denying the latter's inclusion in the list, it should have been expressly stated and explained in the Impugned Decision

2. *Relevant years of experience*

18. Notwithstanding the above regarding the applicant's field of expertise, there is one reason provided by the Registrar for denying the applicant's inclusion in the list which is clear: that the applicant does not possess the requisite number of years of experience. The Registrar stated in her Response that a person seeking admission to the list of experts must possess at least 7 years of experience with an advanced university degree or 9 years of experience without such a degree.[22] This requirement also appears in the call for experts at the Court.[23] The applicant herself stated in her original application to be included in the list of experts that she had only 5 years of relevant experience,[24] therefore falling short of this requirement. The Registrar did not, however, cite in the Impugned Decision the applicant's insufficient years of experience as a reason not to include her in the list of experts; it is again introduced for the first time in the Response.[25] The Presidency reiterates that essential reasoning must be set out in the original decision; if the applicant's lack of necessary experience was in fact a significant reason for refusing her admission to the list of experts, it should have been expressly stated in the Impugned Decision.

19. In light of the foregoing reasons, the Presidency is not satisfied that the Registrar has adequately discharged the obligation upon her to provide clear reasoning pursuant to regulation 56(2) of the Regulations of the Registry, or the general obligation upon her to act with procedural fairness in providing reasons for decisions. The Impugned Decision is therefore quashed and the matter remitted to the Registrar to provide the applicant with a new decision.

[22] Response, paragraph 3.
[23] http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Registry/Experts/, last accessed 9 June 2009.
[24] Application to the Registrar to be included in the list of experts, ICC-RoR56-01/09-1-Conf-Anx1, page 6.
[25] Response, paragraphs 2-3.

IV. CLASSIFICATION

20. The Presidency notes that the Response of the Registrar, to which the Application and case file were annexed, was filed with a confidential classification. In the view of the Presidency, nothing said in this decision *prima facie* qualifies it as confidential. However, if there is any factual or legal basis for retaining the confidential classification of the instant decision or if there is any information requiring redaction prior to publication, the applicant may inform the Presidency thereof by 4pm on 21 August 2009. The Registrar may file any response thereto or provide any additional reasons as to why the instant decision should retain its confidential classification or indicate whether there is any additional information requiring redaction prior to publication by 4pm on 4 September 2009. The Presidency will thereafter rule on whether the classification should be maintained and the need for any redactions.

The Impugned Decision is quashed.

The matter is remitted to the Registrar to provide the applicant with a new decision under regulation 56(2) of the Regulations of the Registry.

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

Sang Hyun Song

Judge Sang-Hyun Song

President

Dated this 6 August 2009

At The Hague, The Netherlands