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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF THE PROSECUTOR

v.

***FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND
MOHAMMED HUSSEIN ALI***

Public

**Prosecution's Application for Leave to Appeal the "Decision with Respect to the
Question of Invalidating the Appointment of Counsel to the Defence" (ICC-01/09-
02/11-185)**

Source: Office of the Prosecutor

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

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Other

Introduction

1. The Chamber decided that Mr Essa Faal's recent affiliation as Senior Trial Lawyer with the Office of the Prosecutor (OTP) is not an impediment to his appointment as defence counsel of Mr Kirimi Muthaura ("Decision").¹ In addition, although the Prosecution established that Mr Faal had access to confidential information related to this case during the time of his employment for the OTP, the Single Judge concluded that the information, though confidential, was *de minimis*.
2. The Prosecution seeks leave to appeal the following two Issues from the Decision:
 - Whether as a matter of law, prosecution lawyers may join a defence team in a case that was open at the time when the person worked for the prosecution ("First Issue");
 - Whether the correct test to determine that a person is "privy to confidential information" under Article 12(1)(b) [of the Code of Professional Conduct] is whether that person has become aware of more than *de minimis* confidential information related to the relevant case ("Second Issue").
3. Given the potentially irreparable impact of the decision on the fairness and integrity of the proceedings, and its serious consequences for the organization of the OTP, the Prosecution submits that the issue should be sent to the Appeals Chamber for its immediate authoritative determination. Further, Trial Chamber IV has recently granted leave to appeal in another prosecutor-turned-defence counsel matter, involving a more junior OTP lawyer who joined the defence in the *Banda and Jerbo* case.²

¹ "Decision on the Question of Invalidating the Appointment of Counsel to the Defence" - ICC-01/09-02/11-185.

² ICC-02/05-03/09-179.

Background

4. Mr Essa Faal (“Mr Faal”) started to work as Investigations Team Leader in the Office of the Prosecutor (“Prosecution”) on 17 January 2006. He was appointed as Team Leader of the Darfur Team, a position which he held until 1 November 2007 when he was appointed as Senior Trial Lawyer in charge of the Darfur case. He worked in this position until 31 March 2011.
5. On 22 April 2011, three weeks later, he telephoned the Deputy Prosecutor from Kenya to inform her that he had joined the Muthaura Defence Team. Despite the Prosecution’s objections, CSS appointed him on 26 May 2011.
6. On 1 July 2011, the Prosecution filed the “Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence Team” (“Request”).³ The Prosecution submitted that Mr Faal was privy to confidential information related to the *Muthaura case* and annexed in its Request supporting documentation.⁴ In particular the Prosecution attached a declaration of a Trial Lawyer concerning a discussion on the “case hypothesis” of the *Muthaura case* and its weaknesses. The attorney indicated that the case hypothesis practically remained unchanged.⁵ The Prosecution further objected to the principle that a lawyer may leave the Office of the Prosecutor and immediately join the Defence team in a case that was active when the lawyer was employed there. In these scenarios there will always be the risk that lawyers consciously or unconsciously bring to their new clients knowledge or understanding of the case or of prosecutorial strategies that they could only acquire as attorneys in the Prosecution.⁶
7. On 6 July 2011, the defence of Kirimi Muthaura (“the Defence”) filed a response to the Request, arguing that the Request should be dismissed.⁷ On 8 July Muthaura’s Defence re-submitted its Reponse (“Response”).⁸

³ ICC-01/09-02/11-150-Conf.

⁴ Request, paras.2, 15-25. See attached annexes.

⁵ Annex A to the Prosecution’s Request.

⁶ Request, paras.5, 26. The Prosecution listed some domestic regulations that provide for certain safeguards in instances as the current one. See paras.27-34.

⁷ ICC-01/09-02/11-159-Conf-Exp and its annexes.

⁸ ICC-01/09-02/11-163-Conf-Exp.

8. On 14 July 2011, and after the Chamber granted leave, the Prosecution submitted its Reply to the Defence Response.⁹ The Prosecution also attached the following relevant annexes to its Reply: an email from a trial lawyer in the *Ruto case* requesting Mr Faal's advice on a confidential legal issue; an email forwarded to Mr Faal with the outline of a police structure report in the Kenya cases; and an document indicating that Mr Faal had accessed a Confidential Weekly Report containing a summary of two confidential, ex parte filings in the Kenya situation.¹⁰
9. On 20 July 2011, the Single Judge Pre-Trial Chamber II issued its "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence" ("Decision").¹¹ It ruled that "the Prosecutor has failed to satisfy the required standard of proof that Mr Faal was aware of more than the *de minimis* confidential information." According to the Chamber this is supported by (i) the Registry's report indicating that Mr Faal had never accessed any confidential document in the Muthaura case, although he was in the notification list; (ii) "the unequivocal assertions of Mr Faal in that he does not know or has no knowledge of any confidential investigative or prosecutorial policies pertaining to the present case".¹²
10. The Single Judge also noted that the Chamber would keep the issue decided under review and would invalidate Mr Faal's appointment if it identifies new fact that indicate that Mr Faal was privy of confidential information.¹³
11. The Prosecution hereby seeks leave to appeal two issues arising from the Decision pursuant to Article 82(1)(d).

⁹ ICC-01/09-02/11-172-Conf-Exp and its annexes.

¹⁰ Annexes 5,4 and 3 of the Prosecution's Reply, respectively.

¹¹ ICC-02/05-03/09-168.

¹² Decision, para.29.

¹³ Decision, para.30.

Summary of Issues

12. The Prosecution seeks leave to appeal the following two Issues from the Decision:

- Whether as a matter of law, a prosecution lawyer may join a defence team in a case that was open at the time when the person worked for the prosecution Prosecution lawyer who, shortly after leaving the OTP, joins a defence team in a case that was open at the time when the person worked for the Prosecution should be deemed as being privy to confidential information related to that case under Article 12(1)(b) of the Code of Professional Conduct (“First Issue”);
- Whether the correct test to determine that a person is “privy to confidential information” under Article 12(1)(b) is whether that person has become aware of more than *de minimis* confidential information related to the relevant case (“Second Issue”).

13. Both issues concern the legal test to be applied by the Chamber to determine impediments to representation and conflict of interest by counsel under Article 12(1)(b) of the Code of Professional Conduct. That provision requires disqualification: “counsel *shall not* represent a client in a case in which counsel was [...] privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear”. The First Issue refers to the automatic existence of an impediment to appoint a former OTP lawyer as defence counsel in a case that was open when that person worked for the Prosecution. The Prosecution will submit that in light of the particularities of the OTP and the cases before the Court, any lawyer working in the OTP was privy to confidential information. The Second Issue is more confined, and relates to the legal test to be applied by the Chamber to determine whether a person proven to have received specific confidential information, thus establishing the impediment addressed in

Article 12(1)(b), can be authorized to participate on the ground that the Chamber determines the confidential information to be “de minimis”.

14. These two Issues arise from the Decision and constitute appealable issues pursuant to Article 82(1)(d). They further meet all the criteria for leave to appeal.

Submissions

15. As established by the jurisprudence of the Court, the correctness of a decision is irrelevant to an application for leave to appeal under Article 82(1)(d). The sole question is whether the issues involved in the Decision meet the criteria set out in that provision.¹⁴ Reference to any errors contained in the Decision will only be made when necessary to demonstrate the appellability of the Decision.

(i) *The two Issues arise from the Decision*

16. The First Issue arises from the Decision. The Prosecution submitted that “[it] objects to the principle that a lawyer may leave the OTP and immediately join the Defence team in a case that was active within the OTP while the lawyer was employed there”¹⁵ and “there should be the [...] presumption that lawyers in PD are privy to inside information about the other cases [...]”.¹⁶ Such presumption would lead to an automatic disqualification of staff formerly employed at the Office of the Prosecutor who join the defence of a case that was open when they worked at the Office. The standard is based in an objective premise: because of the size and the operational methods of the Office of the Prosecution (and in particular the Prosecution Division), any lawyer working there will be unavoidably exposed to information of a privileged nature in all ongoing cases,

¹⁴ ICC-02/04-01/05-20-US-Exp, para. 22.

¹⁵ Request, para.5.

¹⁶ Request, para.34.

including facts, strategy issues, internal concerns, and legal issue. Hence, the lawyer will necessarily be privy to confidential information related to the relevant case under Article 12(1)(b).¹⁷ The standard proposed by the Prosecution does not require documented proof of actual access to confidential or privilege information. It is based on the operational reality within the OTP and also on the national legal systems' recognition that there should be objective distance between a lawyer's service as a prosecutor and his ability to appear against the same prosecution office as a defence counsel.

17. The Single Judge rejected the Prosecution standard and applied Article 12(1)(b) of the Code of Professional Conduct as *lex specialis* in this case.¹⁸ The Single Judge noted that the Court's statutory documents do not prohibit a former Prosecution staff from joining the Defence and that the Chamber cannot act as a legislative body setting a time bar that is not envisaged in the Court's statutory provisions.¹⁹

18. The Second Issue also arises out of the Decision: in its Request, the Prosecution provided concrete information that Mr Faal had gained access to confidential information relevant to the *Muthaura* case.²⁰ As noted above, the Single Judge applied Article 12(1)(b) to assess whether Mr Faal was "privy to confidential information as a staff member of the Court relating to the case of Mr Muthuara".²¹ The Single Judge indicated that the Court's statutory provisions, including the Code of Professional Conduct, do not define the scope of the expression "privy to confidential information". However, she noted that Trial Chambers III and IV had developed a standard in similar situations, requiring that the former staff member became aware of more than *de minimis* confidential information concerning the relevant case for the impediment to apply.²² The Single Judge endorsed this standard and, applying it to the facts of the case, found that although Mr Faal had gained access to confidential information concerning the *Muthuara* case, the

¹⁷ Request, paras.32-34.

¹⁸ Decision, para.16.

¹⁹ Decision, para.27.

²⁰ See Anexes attached to Request and Reply.

²¹ Decision, para.16.

²² Decision, para.17.

qualitative threshold required by this standard had not been met. In the Single Judge's view, Mr Faal had not become aware of more than *de minimis* confidential information.²³

(ii) *The two Issues constitute appealable issues pursuant to Article 82(1)(d)*

19. Both Issues constitute "identifiable subject[s] or topic[s] requiring a decision for [their] resolution."²⁴ Their resolution is "essential for the determination of matters arising under the judicial cause under examination,"²⁵ namely the question of whether Mr Faal's appointment to the defence team case gives rise to a conflict of interest in light of his previous employment with the Prosecution.

20. Both issues concern questions of law surrounding the applicable legal standard for a determination of an "Impediment to Representation" under Article 12 involving a former Prosecution lawyer. The resolution of both issues is essential to the entire approach taken by the Chamber to the issue of conflict of interest, since the relevant information has to be assessed against those standards.

(iii) *The two Issues affect the fair conduct of the proceedings*

21. The determination of both Issues contributes to the outcome of the determination of a conflict of interest involving Mr Faal. Trial Chamber IV has already found that these issues affect the fairness of the proceedings when it stated that if "the assignment of [a former OTP lawyer] to the defence team creates a conflict of interest is one that may significantly affect the fairness of the proceedings".²⁶ The

²³ Decision, paras.18-22.

²⁴ ICC-01/04-168 OA3, para. 9.

²⁵ ICC-01/04-168 OA3, para. 9.

²⁶ ICC-02/05-03/09-179, para.17.

Chamber acknowledged its duty under Articles 64(2) and 64(3)(a) of the Statute to apply these provisions to prevent any “unfairness in the proceedings”.²⁷

22. Provisions on conflict of interest and their application are by definition intended to safeguard the fairness of the proceedings. The Single Judge noted in the Decision that the proceedings concerning the possible invalidation of Mr Faal’s appointment had been triggered by the Chamber *proprio motu* and were “driven by the fact that the Chamber is keen to preserve the integrity of the proceedings to the effect that they are conducted in a fair and transparent manner, respecting the rights of both parties involved”.²⁸

23. Further, if confidential information concerning the investigation and prosecution in the Muthuara case, including but not limited to information on its case hypothesis and its prosecutorial strategy, is possessed by a member of the Defence team, this will necessarily affect the fairness of the proceedings. At a minimum, it will give the Defence insight into the Prosecutor’s strategy and its perception of the strengths and weaknesses of the case. This, the Prosecution submits, will affect its right to a fair trial and provide the Defence with an undue and unfair advantage over the Prosecution.

(iv) *The two Issues affect the expeditious conduct of the proceedings*

24. The Prosecution submits that the Issues in this Decision also affect the expeditious conduct of the proceedings.²⁹ Again, Trial Chamber IV acknowledged this impact

²⁷ ICC-02/05-03/09-168, para.12

²⁸ Decision, para.11.

²⁹ Chambers of this Court have taken different approaches to whether a party is also required to show that an issue affects the expeditious conduct of proceedings once it has been demonstrated that the issue affects the fairness of those proceedings. The Prosecution concurs with Trial Chamber II, which has granted leave to appeal after finding that an issue “may significantly affect” or “clearly has a bearing on” the fairness of the proceedings and therefore, without requiring additional affect on expeditiousness, concluding that “the first requirement of Article 82(1)(d) of the Statute is met” (ICC-01/04-01/07-2032, para. 28; ICC-01/04-01/07-1859, para. 18. Trial Chamber III has also granted leave to appeal finding that the issue affects the fairness of the proceedings – without making any independent finding on expeditiousness. See ICC-01/05-01/08-1169, para.35). Hence, once a party has demonstrated that an issue affects the fair conduct of the proceedings, then any further showing that the issue also affects the expeditious conduct of the proceedings is superfluous for the purposes of obtaining leave to appeal under Article 82(1)(d). This reflects the consistent position of the Prosecution: see in particular

in an almost identical case and found that the Prosecution's concerns that a former OTP lawyer had access to sensitive information has a "real potential for delay to the trial" as the Prosecution may be forced to adjust its strategy in the case and its selection of evidence in order to neutralize or mitigate the prejudice to its case.³⁰

25. Moreover, if it becomes clear at trial that the Defence strategy is indeed informed by Mr. Faal's access to confidential or privileged information, this could derail the trial and require disqualification of the Defence team in its entirety and recommencement of the proceedings with new counsel. The Single Judge expressly noted in the Decision that the Chamber would keep reviewing whether Mr Faal's was privy to confidential information and that would invalidate his appointment should this fact become apparent.³¹ However, there are no guarantees that the Chamber will be effectively in a position to timely identify such a situation. A belated decision would not be able to redress the Decision's impact on the conduct of the proceedings as Mr Faal would already have acted as defence counsel. Moreover, the mechanism of ongoing review contemplated by the Decision will in and of itself affect the expeditious conduct of the proceedings, since it requires that the Chamber remain seized of the issue and will most likely lead to further litigation.³²

26. Finally, the Prosecution notes that the Issues, if not resolved now, could lead to a reversal of the result of the trial in a final appeal and a possible re-trial. In any of these scenarios, the result will be an avoidable delay to the overall determination

ICC-01/04-141, paras. 49-52; ICC-01/04-103, footnote 5; ICC-01/04-01/06-125, footnote 30. The Prosecution considers that this requirement mirrors the obligation to ensure that proceedings are fair and expeditious (see e.g. Article 64(2)). In the same manner that once proceedings are no longer fair or no longer expeditious, they are no longer "fair and expeditious"; so once an issue affects the fair conduct of the proceedings, or affects the expeditious conduct of the proceedings, it affects the "fair and expeditious conduct of the proceedings". The jurisprudence of the ICTY and ICTR, adjudicating on the same text as is found in Article 82(1)(d), supports this proposition (see authorities set out in ICC-01/04-141, paras. 49-52).

³⁰ ICC-02/05-03/09-179, para.19; see also ICC-01/04-01/07-116, p. 6.

³¹ Decision, para.30.

³² Decision, para.30.

of the responsibility of Muthaura, and potentially of Kenyatta and Ali,³³ and compromise of the efficient conduct of the proceedings.³⁴

(v) *The immediate resolution of the two issues will materially advance the proceedings*

27. As stated by the Appeals Chamber, this requirement means that “prompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “‘move forward’ by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”³⁵ Otherwise, a wrong decision on an issue in the context of Article 82(1)(d), unless remedied on appeal, will entail a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.³⁶

28. The appointment of a member of the Defence team is a sensitive matter of significant importance for the fairness and integrity of the proceedings. Trial Chamber IV has properly found that an immediate determination by the Appeals Chamber of this same issue “would ensure that the proceedings continue on the right course”.³⁷ Indeed, if tainted by a conflict of interest, Mr Faal’s appointment could invalidate the entire proceedings. Timely intervention by the Appeals Chamber now will materially advance the proceedings in the sense that it will prevent taint to the entirety of the trial proceedings from Mr Faal’s appointment.

29. Moreover, the very point of this Court is to protect the rule of law and end both the perception and the reality of impunity due to power or special status. If a

³³ Delay and promptness of proceedings must be judged in the context of the situations that the Court has jurisdiction over, the complexity of the issues and the circumstances in which investigations take place.

³⁴ The prompt determination of responsibility is not just an interest of the defence, but also of the prosecution, victims, and the international community as a whole. See e.g. Norman Decision on Application for Stay, para. 8; and Terrier, Powers of the Trial Chamber in Cassese, Gaeta and Jones (ed) (2002) 1259 at 1264-65.

³⁵ ICC-01/04-168, paras. 14-15, 18.

³⁶ ICC-01/04-168 OA3, para. 16.

³⁷ ICC-02/05-03/09-179, para.22.

perception of insider advantage permeates the case it can damage the public perception of the legitimacy of these proceedings and the public acceptance of the validity of the outcome. This impact will affect other cases before the Court. In that regard the appellate determination of the rules in this case and applicable to all future cases before this Court will materially advance the proceedings by avoiding reversible error and also increasing the acceptability of the institution through greater confidence in the transparency of its proceedings and the fairness of its process.

30. The Prosecution also notes that if Mr Faal or any other member of the Defence team were to intentionally or inadvertently use any confidential information that he obtained for the purposes of the defence of his client, this would influence the strategy and investigation of the Defence as well as its litigation. By necessary implication, this would also affect the proceedings. An immediate resolution by the Appeals Chamber of the two Issues is therefore required to prevent such an outcome.

31. Finally, the very same issues that the Prosecution now seeks leave to appeal are currently before the Appeals Chamber in a different case. Should the Appeals Chamber grant the Prosecution's appeal, the Prosecution would be forced to request this Chamber to reconsider the facts in light of the new standard.³⁸ Basic considerations of judicial economy also militate in favour of certifying the issues for appeal.³⁹

³⁸ The Prosecution notes that it was granted leave to appeal a similar decision in the Banda and Jerbo case (ICC-02/05-03/09-179). The appeal brief has been filed on 25 July 2011 (ICC-02/05-03/09-184OA)

³⁹ There is an additional and singular fairness issue as well: while the same defence counsel appears in both this case and the *Banda and Jerbo* case, Mr Faal cannot participate in the Defence litigation in the pending appeal, since he was the Senior Trial Lawyer in that case. Consequently, the Appeals Chamber may decide the underlying issue in the *Banda and Jerbo* case, which will affect Mr Faal, without the ability to consider Mr Faal's views.

Relief sought

32. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the three Issues pursuant to Article 82(1)(d).



Luis Moreno-Ocampo
Prosecutor

Dated this 26th day of July 2011
At The Hague, The Netherlands