

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/05-01/08 OA 10

Date: 5 March 2012

THE APPEALS CHAMBER

Before:

Judge Anita Ušacka, Presiding Judge

Judge Sang-Hyun Song

Judge Akua Kuenyehia

Judge Erkki Kourula

Judge Daniel David Ntanda Nsereko

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public redacted version

Judgment

on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled “Decision on the defence’s 28 December 2011 ‘Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’”

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence

Mr Aimé Kilolo-Musamba

REGISTRY

Registrar

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled “Decision on the defence’s 28 December 2011 ‘Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’” of 6 January 2012 (ICC-01/05-01/08-2034-Conf),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The “Decision on the defence’s 28 December 2011 ‘Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo’” is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. In reviewing a “ruling on release or detention” under article 60 (3) of the Statute, the Pre-Trial or Trial Chamber needs to consider whether there are “changed circumstances”. If there are changed circumstances, the Pre-Trial or Trial Chamber will need to consider their impact on the factors that formed the basis for the decision to keep the person in detention. If, however, the Pre-Trial or Trial Chamber finds that there are no changed circumstances, that Chamber is not required to further review the ruling on release or detention.

II. PROCEDURAL HISTORY

A. Background and proceedings before the Trial Chamber

2. In December 2011, Mr Bemba filed two separate and consecutive requests to Trial Chamber III (hereinafter: “Trial Chamber”) for his interim release to the [REDACTED] (hereinafter: “[REDACTED]”) during judicial recesses, weekends,

and any period during which the Chamber will not sit for at least three consecutive days. Both requests were based on letters by [REDACTED] relevant to [REDACTED]'s guarantees and ability to ensure that Mr Bemba would not abscond while in [REDACTED] and would return to The Netherlands at the end of each period of release. The first two letters are dated 5 December 2011¹ (hereinafter: "Letters of 5 December 2011"), while a third letter was faxed on 27 December 2011² (hereinafter: "Letter of 27 December 2011").

3. Mr Bemba's first request for interim release,³ registered on 12 December 2011, was rejected by the Trial Chamber on 19 December 2011⁴ (hereinafter: "Decision of 19 December 2011"). Mr Bemba did not appeal that decision.

4. Mr Bemba's second request for interim release⁵ (hereinafter: "Request for Interim Release") was filed on 28 December 2011. The Trial Chamber rejected the Request for Interim Release in its "Decision on the defence's 28 December 2011 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo'"⁶ of 6 January 2012 (hereinafter: "Impugned Decision"). As in the Decision of 19 December 2011, the Trial Chamber found that Mr Bemba's detention continues to be necessary to ensure his appearance at trial.⁷ The Trial Chamber dealt with both proceedings expeditiously.⁸

¹ Annex A to "Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo", 9 December 2011, ICC-01/05-01/08-2000-Conf-AnxA-tENG.

² Annex A to "Request for Provisional Release of Mr Jean-Pierre Bemba Gombo", 28 December 2011, ICC-01/05-01/08-2029-Conf-AnxA-tENG.

³ "Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo", 9 December 2011, ICC-01/05-01/08-2000-Conf. A public redacted version in French was filed on 20 January 2012 as ICC-01/05-01/08-2000-Red. An English translation dated 9 December 2011 and registered on 12 December 2011 was filed as ICC-01/05-01/08-2000-Conf-Anx1. All references herein are to the English translation.

⁴ "Decision on the «Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo», ICC-01/05-01/08-2022-Conf. A public redacted version was filed on 3 January 2012 as ICC-01/05-01/08-2022-Red. All references herein are to the public redacted version.

⁵ "Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo", ICC-01/05-01/08-2029-Conf. A public redacted version in French was filed on 30 January 2012 as ICC-01/05-01/08-2029-Red. An English translation was filed on 28 December 2011 as ICC-01/05-01/08-2029-Conf-Anx1. All references herein are to the English translation.

⁶ ICC-01/05-01/08-2034-Conf. A public redacted version was filed on 19 January 2012 as ICC-01/05-01/08-2034-Red. All references herein are to the public redacted version.

⁷ Decision of 19 December 2011, para. 13; Impugned Decision, para. 10.

⁸ See "Decision shortening time for observations on the «Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo», 12 December 2011, ICC-01/05-01/08-2003; see also "Order granting leave to reply", 15 December 2011, ICC-01/05-01/08-2014; "Decision shortening time for observations



B. Proceedings before the Appeals Chamber

5. On 9 January 2012, Mr Bemba appealed the Impugned Decision.⁹ On 10 January 2012, he filed the “Addendum à l’Acte d’Appel de la Défense contre la décision de la Chambre de Première Instance III du 6 Janvier 2012 intitulée ‘*Decision on the Defence’s 28 December 2011 “Requête de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo”*’”¹⁰ (hereinafter: “Defence Request for Abridging the Time”), which consists of a separate request to the Appeals Chamber to abridge time limits for submissions and to decide the appeal before 19 January 2012.

6. On 10 January 2012, Mr Bemba filed the “Document à l’appui de l’Acte d’Appel de la Défense contre la décision de la Chambre de Première Instance III du 6 Janvier 2012 intitulée ‘*Decision on the Defence’s 28 December 2011 “Requête de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo”*’”¹¹ (hereinafter: “Document in Support of the Appeal”).

7. On 17 January 2012, the Prosecutor filed the “Prosecution’s Response to the ‘Defence Appeal Brief against the Trial Chamber III’s decision of 6 January 2012 entitled “Decision on the Defence’s 28 December 2011 *Requête de mise en liberté provisoire de M Jean-Pierre Bemba Gombo*”’”¹² (hereinafter: “Response to the Document in Support of the Appeal”).

8. On 20 January 2012, victims filed the “Application of Legal Representative of Victims Mr Zarambaud Assingambi for leave to participate in the appeals proceedings following the Defence appeal of 9 January 2012 and addendum of 10 January 2012”¹³ (hereinafter: “Victims’ Application”). In accordance with the Appeals Chamber’s order,¹⁴ the Prosecutor and Mr Bemba filed their responses to the Victims’

on the «Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo», 28 December 2011, ICC-01/05-01/08-2030.

⁹ “Acte d’Appel de la Défense contre la décision de la Chambre de Première Instance III du 6 Janvier 2012 intitulée ‘*Decision on the Defence’s 28 December 2011 “Requête de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo”*’”, ICC-01/05-01/08-2037 (OA 10).

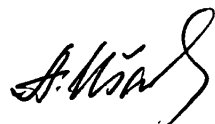
¹⁰ ICC-01/05-01/08-2039-Conf (OA 10).

¹¹ ICC-01/05-01/08-2041-Conf (OA 10), dated 10 January 2012 and registered on 11 January 2012. An English translation dated 10 January 2012 and registered on 11 January 2012 was filed as ICC-01/05-01/08-2041-Conf-Anx1. All references herein are to the English translation.

¹² ICC-01/05-01/08-2047-Conf (OA 10).

¹³ ICC-01/05-01/08-2054-Conf-tENG (OA 10).

¹⁴ “Order on the filing of a response by Mr Jean-Pierre Bemba Gombo and the Prosecutor to ‘Demande du Représentant légal de victimes, Maître Zarambaud Assingambi à participer a la procédure d’appel



Application.¹⁵ On 1 February 2012, the Appeals Chamber rejected the Victims' Application.¹⁶

III. PROCEDURAL MATTERS

9. Mr Bemba asked the Appeals Chamber to abridge the time for submitting the response to the Document in Support of the Appeal and requested the Appeals Chamber to issue the judgment in this appeal before 19 January 2012.¹⁷ The reason he gave for this request was that the Trial Chamber suspended the trial for a number of days not exceeding two weeks. On those days, Mr Bemba wished to be released to [REDACTED]. The Appeals Chamber notes that, in the recent past, it has rejected similar requests of Mr Bemba in previous appeal proceedings.¹⁸

10. Mr Bemba does not show good cause for abridging the time limits as required by regulation 35 of the Regulations of the Court. The expiry of only one of the periods for which Mr Bemba seeks interim release does not render the appeal moot. Even if the Appeals Chamber rejects the Defence Request for Abridging the Time, Mr Bemba would, if successful with his appeal, still benefit.

11. The Appeals Chamber notes further that, even if Mr Bemba's appeal was upheld before 19 January 2012, and if the Court had ordered Mr Bemba's interim release, it still would have taken time to make the necessary arrangements for his release. Therefore, the Appeals Chamber cannot discern the urgency in Mr Bemba's requests.

suite à l'acte d'appel de la Défense du 9 janvier 2012 et à l'addendum du 10 janvier 2012", 23 January 2012, ICC-01/05-01/08-2059 (OA 10).

¹⁵ "Prosecution's Response to 'Demande du Représentant légal de victimes, Maître Zarambaud Assingambi à participer à la procédure d'appel suite à l'acte d'appel de la Défense du 9 janvier 2012 et à l'addendum du 10 janvier 2012' (ICC-01/05-01/08-2054-Conf)", 25 January 2012, ICC-01/05-01/08-2064-Conf (OA 10); "Réponse de la Défense à la 'demande du Représentant légal de victimes, Maître Zarambaud Assingambi à participer à la procédure d'appel suite à l'acte d'appel de la Défense du 9 Janvier 2012 et à l'addendum du 10 Janvier 2012'", 25 January 2012, ICC-01/05-01/08-2065-Conf (OA 10).

¹⁶ "Decision on 'Application of Legal Representative of Victims Mr Zarambaud Assingambi for leave to participate in the appeals proceedings following the Defence appeal of 9 January 2012 and addendum of 10 January 2012", ICC-01/05-01/08-2098-Conf (OA 10).

¹⁷ Defence Request for Abridging the Time; Document in Support of the Appeal, para. 35.

¹⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 27 June 2011 entitled 'Decision on Applications for Provisional Release'", 19 August 2011, ICC-01/05-01/08-1626-Red (OA 7) (hereinafter: "*Bemba OA 7 Judgment*"), para. 21; "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 26 September 2011 entitled 'Decision on the accused's application for provisional release in light of the Appeals Chamber's judgment of 19 August 2011'", 23 November 2011, ICC-01/05-01/08-1937-Red2 (OA 9) (hereinafter: "*Bemba OA 9 Judgment*"), para. 20.

IV. MERITS

A. First ground of appeal

12. As his first ground of appeal, Mr Bemba asserts that the Trial Chamber manifestly erred in assessing the new guarantee given by [REDACTED] in the Letter of 27 December 2011 because the Trial Chamber did not take into account a significant new element bearing directly on Mr Bemba's flight risk.¹⁹

1. Relevant part of the Impugned Decision

13. The Trial Chamber stated in the Impugned Decision that the issue for determination was "whether the 27 December Letter alters the above factual findings to such a degree that a modification of the December 2011 Decision is warranted".²⁰ In so deciding, the Trial Chamber considered the jurisprudence of the Appeals Chamber relevant to the definition of "changed circumstances".²¹ The Trial Chamber then held that:

[i]n the Chamber's view, the 27 December Letter has no bearing on whether the accused continues to pose a flight risk and does not alter the four factors upon which the Chamber has based its previous detention decisions. Instead, the 27 December Letter merely reiterates undertakings that [REDACTED] made in its earlier letters, which the Chamber has previously determined to be insufficient to warrant the accused's release. Indeed, the text of the 27 December Letter is largely a *verbatim* repetition of that contained in [REDACTED]'s letters of 28 July and 5 December 2011. In sum, the 27 December Letter contains no new factual information bearing on the accused's risk of flight and cannot be seen as a "changed circumstance" warranting a modification of the December 2011 Decision, much less "a significant change", as the defence argues.²² [Footnotes omitted.]

2. Mr Bemba's submissions before the Appeals Chamber

14. Mr Bemba disagrees with the Trial Chamber's finding in the Impugned Decision that the Letter of 27 December 2011 did not constitute a changed circumstance. He states that "in the second part of [the Letter of 27 December 2011], [REDACTED] introduces a new element which eliminates the risk of flight foreseen under Article 58 of the Statute and found to exist in the previous decision on detention

¹⁹ Document in Support of the Appeal, p. 4.

²⁰ Impugned Decision, para. 9.

²¹ Impugned Decision, para. 7.

²² Impugned Decision, para. 9.



of 19 December 2011”.²³ He avers that the Letter of 27 December 2011 includes information that [REDACTED] did not previously convey, which relates to [REDACTED]’s ability to prevent Mr Bemba from fleeing.²⁴ Mr Bemba also addresses the effect of this letter and states that “[t]his letter [...] represents the first time that [REDACTED] has specifically pronounced on its ability to prevent any risk of flight, thus precluding the possibility [that] Mr. Jean-Pierre Bemba will flee”.²⁵ He argues that there is no risk that he would abscond “because the police or gendarmes authorized will have the means to prevent any [such] attempt”.²⁶

3. Prosecutor’s submissions before the Appeals Chamber

15. The Prosecutor requests that the Appeals Chamber dismiss the first ground of appeal.²⁷ He argues that a plain reading of the Letter of 27 December 2012 confirms the Trial Chamber’s conclusion that this letter is a *verbatim* repetition of the Letters of 5 December 2011.²⁸ He avers that [REDACTED] merely expressed the view that the measures already proposed would indeed prevent Mr Bemba from absconding.²⁹ He argues that [REDACTED]’s expression of a view on the usefulness of measures already considered by the Trial Chamber in prior proceedings “does not constitute a ‘changed circumstance’ that would materially change the prior circumstances and warrant a revision of the prior decision on detention.”³⁰ The Prosecutor concludes by pointing out that it is the Trial Chamber’s task to evaluate the flight risk and the underlying facts, not that of the State that agrees to host a person while on interim release.³¹

4. Determination by the Appeals Chamber

16. Mr Bemba argues that [REDACTED]’s statement that ten police officers “will be sufficient to prevent Mr Bemba from absconding from [REDACTED]”³²

²³ Document in Support of the Appeal, para. 9.

²⁴ Document in Support of the Appeal, para. 9.

²⁵ Document in Support of the Appeal, para. 16.

²⁶ Document in Support of the Appeal, para. 17.

²⁷ Response to the Document in Support of the Appeal, para. 28.

²⁸ Response to the Document in Support of the Appeal, para. 25.

²⁹ Response to the Document in Support of the Appeal, para. 26.

³⁰ Response to the Document in Support of the Appeal, para. 26.

³¹ Response to the Document in Support of the Appeal, para. 27.

³² Letter of 27 December 2011.



constitutes a change in circumstances.³³ This argument may be construed as raising an error of fact. The Appeals Chamber has held that a Pre-Trial or Trial Chamber commits such an error if it misappreciates facts, disregards relevant facts or takes into account facts extraneous to the *sub judice* issues.³⁴ In this regard, the Appeals Chamber has underlined that the appraisal of evidence lies, in the first place, with the relevant Chamber.³⁵ In determining whether the Trial Chamber has misappreciated facts in a decision on interim release, the Appeals Chamber will “defer or accord a margin of appreciation both to the inferences [the Trial Chamber] drew from the available evidence and to the weight it accorded to the different factors militating for or against detention”.³⁶ Therefore, the Appeals Chamber “will interfere only in the case of a clear error, namely where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it.”³⁷

17. The Appeals Chamber finds that the Trial Chamber did not commit an error of fact. The Trial Chamber had to evaluate the alleged new facts in order to determine whether there were “changed circumstances” in terms of article 60 (3) of the Statute. The Trial Chamber concluded that the Letter of 27 December 2011 is, in large part, a *verbatim* repetition of the Letters of 5 December 2011 and contained no new factual information bearing on Mr Bemba’s risk of flight. Indeed, [REDACTED] stated in the Letters of 5 December 2011 and in the Letter of 27 December 2011 that ten policemen were available to monitor Mr Bemba while in [REDACTED]. The only difference between the Letters of 5 December 2011 and the Letter of 27 December 2011 is that, in the latter, [REDACTED] added the phrase that these ten police officers “will be sufficient to prevent Mr Bemba from absconding from

³³ Document in Support of the Appeal, paras 10-17.

³⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”, 9 June 2008, ICC-01/04-01/07-572 (OA 4) (hereinafter: *Katanga OA 4 Judgment*), para. 25.

³⁵ *Bemba OA 9 Judgment*, para. 48; *Katanga OA 4 Judgment*, para. 25.

³⁶ *Prosecutor v. Callixte Mbarushimana*, “Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the “Defence Request for Interim Release”’”, 14 July 2011, ICC-01/04-01/10-283 (OA), para. 17 (hereinafter: *Mbarushimana OA Judgment*”).

³⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, 2 December 2009, ICC-01/05-01/08-631-Red (OA 2) (hereinafter: *Bemba OA 2 Judgment*”), para. 61; *Mbarushimana OA Judgment*, para. 17.

[REDACTED]”. This phrase addresses in clear terms the purpose of providing ten police officers, i.e. that they will prevent Mr Bemba from absconding. This purpose has not changed but was only more clearly spelt out in the Letter of 27 December 2011. The Trial Chamber’s conclusion therefore cannot be faulted. The first ground of appeal is dismissed.

B. Second Ground of Appeal

18. As his second ground of appeal, Mr Bemba submits that the Trial Chamber made an error of law in the Impugned Decision when it misapplied “the legal concept of ‘risk of flight’ by failing to examine the predisposition or intention of Mr. Jean-Pierre Bemba to flee”.³⁸

1. Background and relevant part of the Impugned Decision

19. The Trial Chamber reviewed Mr Bemba’s detention on a number of occasions pursuant to article 60 (3) of the Statute. His detention was primarily based on the Trial Chamber’s assessment that there is a risk of flight should Mr Bemba be released. On 17 December 2010, the Trial Chamber carried out a review of Mr Bemba’s detention in its “Decision on the review of detention of Mr Jean-Pierre Bemba Gombo pursuant to the Appeals Judgment of 19 November 2010”³⁹ (hereinafter: “Decision of 17 December 2010”).

20. On 26 September 2011, the Trial Chamber rendered the “Decision on the accused’s application for provisional release in light of the Appeals Chamber’s judgment of 19 August 2011”⁴⁰ (hereinafter: “Decision of 26 September 2011”). The Trial Chamber’s finding (which was not reversed on appeal) relevant to the risk of flight reads as follows:

In the Chamber’s view, the above four factors remain unchanged as of today’s date. As was the case in December 2010, the accused’s trial is ongoing, which creates an obligation for him to attend the hearings regularly. The gravity of the charges against the accused has not changed. Nor has the related possibility of a substantial sentence if convicted. Finally, there is no suggestion that the accused’s access to financial and material support has

³⁸ Document in Support of the Appeal, p. 7.

³⁹ ICC-01/05-01/08-1088.

⁴⁰ ICC-01/05-01/08-1789-Conf. A public redacted version was filed on 27 September 2011 as ICC-01/05-01/08-1789-Red. All references herein are to the public redacted version.



lessened. On the contrary, on at least three occasions since the December 2010 Decision, the defence has represented to the Chamber that the costs of charter flights, security and monitoring would be borne by the accused's "family members and friends" if provisional release were granted. If the accused can summon sufficient funds for those purposes, it is a proper inference that he can also muster the funds he would need to abscond.⁴¹ [Footnotes omitted.]

21. Mr Bemba requested his interim release again in December 2011, as referred to in paragraph 3 above. The Decision of 19 December 2011 reviewed the Decision of 26 September 2011 but was, however, not appealed by Mr Bemba.

22. In the Impugned Decision, the Trial Chamber recalled the Decision of 19 December 2011:

The Chamber's most recent detention ruling is the December 2011 Decision, which found the accused's continued detention to be necessary under Article 58(1)(b)(i) of the Statute to ensure his appearance at trial. This conclusion was based upon the Chamber's determination that there was no change in the four factors upon which the Chamber based its previous findings that the accused constituted a flight risk: (i) the final dismissal of the defence's challenge to the admissibility of the case and the commencement of the trial; (ii) the gravity of the charges confirmed against the accused; (iii) the potential substantial sentence in case of conviction; and (iv) the financial and material support from which the accused benefits.⁴² [Footnotes omitted.]

23. In the Impugned Decision, the Trial Chamber stated that the submissions of the Defence did not alter the four factors upon which the Chamber based its former decisions.⁴³ It also found that "there [did] not appear to have been any other changes in circumstances in the brief period since the December 2011 Decision that bear on the accused's risk of flight".⁴⁴ It concluded therefore "that the accused's detention continues to be necessary to ensure his appearance at trial and is therefore warranted under Article 58(1)(b)(i) of the Statute".⁴⁵

2. Mr Bemba's submissions before the Appeals Chamber

24. Mr Bemba argues that, in assessing whether there is a risk of flight pursuant to article 58 (1) (b) (i) of the Statute, it is necessary to determine whether the detained

⁴¹ Decision of 26 September 2011, para. 23.

⁴² Impugned Decision, para. 8.

⁴³ Impugned Decision, para. 9.

⁴⁴ Impugned Decision, para. 10.

⁴⁵ Impugned Decision, para. 10.

person has a “predisposition to flee, warranting his continued detention”.⁴⁶ Mr Bemba alleges that the Impugned Decision should have addressed this matter and that evidence should have been adduced that shows that Mr Bemba has such a predisposition.⁴⁷ He concludes by stating that “[i]t is unacceptable in this regard that the Trial Chamber imputes an intention to Mr. Jean-Pierre Bemba, without indicating concrete factual circumstances of his alleged intention or predisposition to flee, beyond those general factors which apply to all persons appearing before the Court”.⁴⁸

3. The Prosecutor’s submissions before the Appeals Chamber

25. The Prosecutor avers that Mr Bemba’s arguments as to the appropriate test find no basis in the legal texts or the jurisprudence of the Court.⁴⁹ Further, he argues, based on the jurisprudence of the Appeals Chamber, that: a) it is sufficient that there is a possibility that a person would escape and that there is no need to establish that escape is inevitable and b) the Chamber needs to “make a prediction as to the likelihood of future events”.⁵⁰ He avers that it is sufficient that a person has the intention or the resources to escape, rather than requiring proof of both elements, in order to determine that there is a risk of absconding.⁵¹

26. The Prosecutor also argues that the Trial Chamber is not required to make a *de novo* factual and legal review but must determine whether the circumstances that justified detention still exist or whether there has been a change.⁵² The Prosecutor recalls that Mr Bemba already challenged the Trial Chamber’s findings relevant to his resources and the risk of absconding in earlier appeals. He asks the Appeals Chamber to dismiss the submissions because they are repetitive.⁵³ As a final note, the Prosecutor argues that Mr Bemba’s personal circumstances have been “considered and reviewed, extensively and repeatedly”, by all Chambers of the Court dealing with his case.⁵⁴

⁴⁶ Document in Support of the Appeal, para. 21.

⁴⁷ Document in Support of the Appeal, paras 23-24.

⁴⁸ Document in Support of the Appeal, para. 25.

⁴⁹ Response to the Document in Support of the Appeal, para. 30.

⁵⁰ Response to the Document in Support of the Appeal, para. 32.

⁵¹ Response to the Document in Support of the Appeal, para. 33.

⁵² Response to the Document in Support of the Appeal, para. 36.

⁵³ Response to the Document in Support of the Appeal, para. 37.

⁵⁴ Response to the Document in Support of the Appeal, para. 38.

4. Determination by the Appeals Chamber

27. Mr Bemba avers that the Trial Chamber erred in assessing the ‘risk of flight’ because it did not examine his predisposition or intention to flee.

28. The preliminary question arising is whether Mr Bemba may raise this ground of appeal, as the risk of absconding was not re-assessed by the Trial Chamber in the Impugned Decision. The Trial Chamber only reiterated the four factors that were the basis for the assessment that there was such a risk if released. The assessment, however, had been made in prior decisions of the Trial Chamber.

29. The Appeals Chamber’s powers in interlocutory appeals are limited according to rule 158 (1) of the Rules of Procedure and Evidence to confirming, reversing or amending the “decision appealed”. In this context, the Appeals Chamber has consistently held that, in exercising its powers under rule 158 of the Rules of Procedure and Evidence, it would only consider specific grounds of appeal that allege legal, factual or procedural errors that materially affect the impugned decision.⁵⁵ With respect to the present proceedings, the Appeals Chamber finds that the risk of flight was only assessed in previous decisions of the Trial Chamber, in which also the predisposition of Mr Bemba to flee was at issue.⁵⁶ Mr Bemba therefore cannot raise errors in assessments made in those previous decisions as a ground of appeal in challenging the Impugned Decision.

30. The second ground of appeal could also be read as purporting that the Trial Chamber should have re-assessed Mr Bemba’s risk of flight by taking into account his predisposition to flee. Therefore, the question arises whether the Trial Chamber erred by not re-assessing the risk of flight.

⁵⁵ With respect to the standard of review applied by the Appeals Chamber, see *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’”, 13 October 2006, ICC-01/04-01/06-568 (OA 3) (hereinafter: “*Lubanga OA 3 Judgment*”), para. 19; *Lubanga OA 3 Judgment*, Dissenting Opinion of Judge Pikis, para. 14; *Mbarushimana OA Judgment*, para. 15; *Bemba OA 2 Judgment*, para. 62; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation’”, 17 February 2012, ICC-02/05-03/09-295 (OA 2), para. 20.

⁵⁶ See Decision of 26 September 2011, para. 24; Decision of 17 December 2010, para. 37.

31. In the *Bemba OA 4 Judgment*,⁵⁷ the Appeals Chamber laid out the following procedure for reviewing decisions on detention or release under article 60 (3) of the Statute. First, the Pre-Trial or Trial Chamber must identify the “ruling on release or detention” that needs to be reviewed, i.e. the initial decision made under article 60 (2) of the Statute as well as any potential subsequent modifications made to that decision under article 60 (3) of the Statute.⁵⁸ Second, the Pre-Trial or Trial Chamber needs to consider whether there are “changed circumstances”, i.e. whether there is a “change in some or all of the facts underlying a previous decision on detention, or a new fact satisfying a Chamber that a modification of its prior ruling is necessary”.⁵⁹ If there are changed circumstances, the Pre-Trial or Trial Chamber will need to consider their impact on the factors that form the basis for the decision to keep the person in detention. If, however, the Pre-Trial or Trial Chamber finds that there are no changed circumstances, that Chamber is not required to further review the ruling on release or detention.⁶⁰

32. Applying this jurisprudence to the present proceedings, the Appeals Chamber concludes that the Trial Chamber was not required to further review the ruling on detention, i.e. to re-assess Mr Bemba’s risk of flight. In any event, the Appeals Chamber notes that Mr Bemba had not even referred to his predisposition to flee in his submissions before the Trial Chamber in the present proceedings.

33. The Trial Chamber did not re-assess Mr Bemba’s risk of flight and was also not required to do so. Mr Bemba therefore cannot raise the second ground of appeal before the Appeals Chamber in the present proceedings because it alleges an error in previous decisions in which the Trial Chamber carried out a review under article 60 (3) of the Statute.

34. In conclusion, the second ground of appeal is dismissed.

⁵⁷ “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’”, 19 November 2010, ICC-01/05-01/08-1019 (OA 4).

⁵⁸ *Bemba OA 4 Judgment*, para. 46.

⁵⁹ *Bemba OA 4 Judgment*, paras 51-52.

⁶⁰ *See Bemba OA 4 Judgment*, para. 53.

C. Third Ground of Appeal

35. As a third ground of appeal, Mr Bemba avers that the Impugned Decision infringes his individual liberty, the principle of the presumption of innocence and the right to a fair trial.⁶¹

1. Relevant part of the Impugned Decision

36. The Trial Chamber recalled in paragraph 8 of the Impugned Decision that:

The Chamber's most recent detention ruling is the December 2011 Decision, which found the accused's continued detention to be necessary under Article 58(1)(b)(i) of the Statute to ensure his appearance at trial. This conclusion was based upon the Chamber's determination that there was no change in the four factors upon which the Chamber based its previous findings that the accused constituted a flight risk: (i) the final dismissal of the defence's challenge to the admissibility of the case and the commencement of the trial; (ii) the gravity of the charges confirmed against the accused; (iii) the potential substantial sentence in case of conviction; and (iv) the financial and material support from which the accused benefits. [Footnotes omitted.]

2. Mr Bemba's submissions before the Appeals Chamber

37. Mr Bemba alleges that all four factors applied by the Trial Chamber to assess whether there is a risk of absconding if released violate his human rights. His main concern appears to be that the assessment of whether there is such a risk "appl[ies] indiscriminately to all accused on trial before the Court, and as such this results in a principle of detention, with release being the exception".⁶² His arguments then culminate in the sentence:

Ultimately, these four factors relied upon by the Trial Chamber constitute a standard formula which, if consistently applied, would systematically deprive every accused before the ICC of any chance of provisional release, in contravention of the principles of release, the right to a fair trial, and the presumption of innocence.⁶³

3. The Prosecutor's submissions before the Appeals Chamber

38. The Prosecutor rebuts Mr Bemba's arguments. He contends that, while it is true that persons investigated and prosecuted by the Court might often be detained, the

⁶¹ Document in Support of the Appeal, p. 8.

⁶² Document in Support of the Appeal, para. 28.

⁶³ Document in Support of the Appeal, para. 34.

Chambers decide whether to keep a person in detention on a case-by-case basis, taking into account each person's individual circumstances and "making predictive determinations of intent based on a balanced assessment of each person's particular circumstances".⁶⁴ He avers that the Court does not apply a "standard formula".⁶⁵ In so arguing, the Prosecutor shows that all Chambers dealing with Mr Bemba's detention carefully analysed and considered the submissions and all available information before making any determinations, pointing out that the Appeals Chamber reviewed most of those decisions.⁶⁶ He then adds that the Appeals Chamber has already made pronouncements on most of the factors challenged by this ground of appeal.⁶⁷ The Prosecutor also recalls that, in submissions in prior proceedings relevant to his interim release, Mr Bemba has shown that he has access to financial and material support through friends and family. This indicates according to the Prosecutor that the fourth factor is "relevant because it addresses [Mr Bemba's] particular ability to escape even if conditions were imposed on his release".⁶⁸

4. Determination by the Appeals Chamber

39. The third ground of appeal fails for the same reasons as those provided under the second ground of appeal. The Trial Chamber did not re-assess in the Impugned Decision whether there is a risk of absconding and was also not obliged to do so. Mr Bemba therefore cannot succeed with a ground of appeal that alleges errors in previous decisions in which the Trial Chamber carried out a review under article 60 (3) of the Statute.

40. The Appeals Chamber, nevertheless, refers to its previous jurisprudence wherein it has held that the detention regime of article 60 (3) of the Statute is a "procedural safeguard against detention that is not in accord with the Statute and internationally recognised human rights" and that it must be considered in the context of "the detained person's right to be presumed innocent".⁶⁹

⁶⁴ Response to the Document in Support of the Appeal, para. 40.

⁶⁵ Response to the Document in Support of the Appeal, para. 44.

⁶⁶ Response to the Document in Support of the Appeal, para. 42.

⁶⁷ Response to the Document in Support of the Appeal, para. 43.

⁶⁸ Response to the Document in Support of the Appeal, para. 41.

⁶⁹ *Bemba OA 4 Judgment*, para. 49.

41. Further, the Appeals Chamber recalls that in interlocutory appeals an appellant must allege that there are specific legal, factual or procedural errors that materially affect the impugned decision.⁷⁰ Therefore an appellant cannot simply claim that an impugned decision violated the overall fairness or led to a violation of his or her human rights without specifying and substantiating such claim. Any such general arguments would require the Appeals Chamber to review the correctness of the entire impugned decision in the absence of allegations of any specific error by the parties.

42. And finally, as pointed out by the Prosecutor,⁷¹ the Appeals Chamber already pronounced on the four factors which form the basis for the Trial Chamber's previous assessment that there is a risk of Mr Bemba absconding if released.⁷²

43. The Appeals Chamber therefore dismisses the third ground of appeal.

V. APPROPRIATE RELIEF

44. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case it is appropriate to confirm the Impugned Decision as Mr Bemba did not establish errors in the Trial Chamber's finding that his continued detention was necessary under article 58 (1) (b) (i) of the Statute to ensure his appearance at trial. Consequently, the appeal is dismissed.

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



Judge Anita Ušacka
Presiding Judge

Dated this 5th day of March 2012

At The Hague, The Netherlands

⁷⁰ With respect to the standard of review, *see supra* footnote 55.

⁷¹ Response to the Document in Support of the Appeal, para. 43.

⁷² *See Bemba OA 2 Judgment*, paras 67-70, 74.