

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

No.: ICC-Pres-RoC72-01-8

Date: 29 January 2008

THE PRESIDENCY

Before: Judge Philippe Kirsch, President
Judge Akua Kuenyehia, First Vice-President
Judge René Blattmann, Second Vice-President

Registrar: Mr Bruno Cathala

Public

Registrar's Response Pursuant to Regulation 72(3) of the *Regulations of the Court* to the "Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr Sluiter to the List of Counsel" filed on 16 January 2008

Mr Göran Sluiter

On 16 January 2008, Mr Göran Kimo Sluiter ("the Applicant") filed with the Presidency an "Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel" ("the Application").

As a preliminary matter, the Applicant states that he agrees with the assessment of his application by the Division of Victims and Counsel, which concluded that he only fulfilled three out of the four criteria to be included in the list of counsel ("the List"). He similarly states that he agrees that his five years and three months of experience as a criminal judge falls short of the requirement of at least ten years of experience imposed by regulation 67(1) of the *Regulations of the Court* ("the Regulations"). Lastly, he states that the purpose of his Application for review is to challenge the ten years of experience requirement imposed by the Regulations.

Pursuant to regulation 72(3) of the Regulations, the Registrar submits this response to the Application.

The legal basis of the Application

1. The Registrar notes that the Applicant submitted his Application to the Presidency on the basis of rule 21(3) of the *Rules of Procedure and Evidence*. It is worth recalling that the decision of 2 January 2008, which is the subject of the Application, is an administrative decision rejecting the Applicant's application for inclusion in the List, and that that decision determines solely the issue of whether the Applicant satisfies the conditions required by the texts to be included in the said List.

2. The Registrar submits that applications for review of a decision not to include an individual on the List, such as the application for review of the decision of 2 January 2008, can only be made under regulation 72(1)(a) of the *Regulations of the Court*, as provided for in the said regulation and recalled for the Applicant's benefit

in the impugned decision in which the legal basis for the decision and the appropriate procedure for reviewing the decision were expressly indicated to him.

3. Furthermore, the Registrar notes that the wording of rule 21(3) of the *Rules of Procedure and Evidence* – which the Applicant relies on as the legal basis of his Application – is unambiguous, especially if read in the context of its heading (“Assignment of legal assistance”) and its provisions. Contrary to what has been done in this instance, rule 21(3) of the *Rules of Procedure and Evidence* is not the proper legal basis for an application to the Presidency for review of a decision by the Registrar not to include the Applicant on the List. Accordingly, the Applicant was wrong to base his application to the Presidency on rule 21(3) of the *Rules of Procedure and Evidence*, which only applies to the review of a decision of the Registrar to refuse a request for assignment of counsel.

4. The Registrar further notes that the Applicant clearly states that he is not challenging the factual and legal assessment¹ as well as the findings contained in the decision of 2 January 2008 and that the sole purpose of his Application is to challenge the requirement of at least ten years of experience imposed by regulation 67(1) of the Regulations. Accordingly, the Application seeks, both in fact and in law, to challenge a specific provision of the Regulations adopted in accordance with article 52 of the Statute. Regulation 6 of the Regulations clearly sets out the procedure for the amendment to the said Regulations, and the Application is not included in the mechanisms provided for the amendment of a provision of the Regulations.

5. Accordingly, the Registrar submits that, to the extent that the Application is based solely on rule 21(3) of the *Rules of Procedure and Evidence*, it must be ruled inadmissible.

6. The Registrar nevertheless makes the following submissions for the sole purpose of enabling the Presidency to make a determination should the Presidency

¹ See also the e-mail from Mr Sluiter dated 2 January 2008 (Annex 1-Conf.).

decide to rule the Application admissible and to consider it pursuant to regulation 72(3) of the *Regulations of the Court*.

Compliance of the decision of 2 January 2008 with the texts of the Court

7. The Registrar notes that he is responsible for managing the List of counsel authorised to act before the Court in accordance with the relevant texts² and that the impugned decision was rendered in the performance of this responsibility. It should be noted that in discharging his responsibilities, even when considering applications for inclusion in the List, the Registrar is bound to the strict adherence to the relevant texts of the Court and, accordingly, issues his decisions based on the requirements set by the applicable provisions, as contained in these texts. Therefore, in all cases, before including the name of any applicant in the List, the Registrar must be satisfied that the applicant meets all the criteria stipulated in the texts of the Court in force.

8. The Registrar recalls that an in-depth assessment of the Application submitted by the Applicant to the Registry for the purpose of being included in the List was undertaken to determine, on the basis of the information provided in support of the Application, whether the Applicant met the cumulative criteria imposed by rule 22(1) of the *Rules of Procedure and Evidence* and regulation 67 of the Regulations, that is: (1) established competence in international or criminal law and procedure, (2) excellent knowledge of and fluency in at least one of the working languages of the Court (English or French), (3) at least ten years of experience in criminal proceedings, and (4) must never have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court.

9. With respect to the position that the criteria imposed by rule 22(1) of the *Rules of Procedure and Evidence* and regulation 67 of the Regulations on any applicant

² See, for example, rule 21(2) of the *Rules of Procedure and Evidence* and regulation 70 of the *Regulations of the Court*. See also regulations 69 and 71 of the *Regulations of the Court* and regulation 122 of the *Regulations of the Registry*.

seeking to be included in the List must be applied cumulatively, the Registrar points out that in its decision dated 21 February 2007, the Appeals Chamber stated that: “[t]he qualifications that a person must possess in order to gain registration as counsel with authority to act before the Court are established by rule 22 [of the *Rules of Procedure and Evidence*]³ and supplemented by regulation 67 of the *Regulations of the Court*”.⁴ That court decision confirms the propriety of applying the cumulative criteria stipulated for inclusion in the List in the decision of 2 January 2008.

10. Furthermore, the Registrar notes that the Applicant appeals the aforementioned decision to the Presidency without showing how it would be inconsistent with the relevant Court texts, viz rule 22 of the *Rules of Procedure and Evidence* and regulation 67 of the Regulations, nor does he provide evidence to establish, in particular, that he fulfils the criterion of having at least ten years of experience in criminal proceedings.⁵ The Applicant is therefore wrong to invite the Presidency to order the Registrar to review *de novo* his application for inclusion in the List by disregarding regulation 67 of the Regulations or by applying it flexibly.

11. The Registrar considers that such applications are inconsistent with the texts and jurisprudence of the Court and must therefore be denied. It should be noted that the criterion of at least 10 years of experience is expressly imposed by regulation 67 of the Regulations and was so intended by the drafters of the said Regulations, particularly to ensure that persons involved in proceedings before the Court receive quality legal representation, which safeguards the rights of persons requiring legal

³ Emphasis added.

⁴ See *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo*, “Reasons for the ‘Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007’ issued on 16 February 2007”, dated 21 February 2007 (ICC-01/04-01/06-834), para. 14.

⁵ The Registrar points out that a minimum of 10 years of experience in criminal proceedings is also required of those wishing to act as counsel before the International Criminal Tribunal for Rwanda (ICTR), pursuant to article 13(i) of the *Directive on the Assignment of Counsel*, or before the Extraordinary Chambers in the Courts of Cambodia (see Rule 11(4), p. 11 of the *Internal Rules*, 12 June 2007: http://www.eccc.gov.kh/english/cabinet/files/irs/ECCC_IRs_English_2007_06_12.pdf).

assistance in proceedings and is consistent with the proper administration and interests of justice.

12. The Registrar is of the opinion that to allow or accept such applications would lead not only to a challenge of the legal regime governing the criteria for inclusion in the List established by the texts of the Court, but also to a violation of those same texts. In this respect, the Registrar repeats his observations set out in paragraph 4 above.

Clarification with respect to the Applicant's allegations concerning the management of the List

13. The Registrar notes the Applicant's statements in which he alleges that the Registry applies a policy of widespread and systematic exclusion⁶ from the list of counsel qualified to act before the Court.

14. In the interests of transparency and in order to provide accurate information about the management of the List, including in relation to the applications submitted to the Registry by persons seeking to be included in the said List, the Registrar points out that, to date, the Registry has received a total of 376 applications for inclusion in the List from candidates from almost all regions of the world. Of those applications, 235 applicants were considered to have fulfilled the criteria imposed by the texts and were therefore included in the List, while 27 applicants had their application for inclusion denied for not having fulfilled the criteria imposed by the texts. The 114 remaining applications include those which are currently incomplete and those under review. Accordingly, the Applicant's statement on this point must be tempered by the above figures.

15. In view of the above, the Registrar is of the opinion that the impugned decision is consistent with the texts of the Court and the interests of justice, falls

⁶ See page 5 of the Application.

within his jurisdiction, takes account of fairness and is based solely on the relevant factors.⁷

Clarification with respect to freedom of choice in the appointment of counsel

16. The Registrar notes that the decision of 2 January 2008 relates only to the application submitted by the Applicant for the purpose of being included in the List and that at no point does it pertain to or decide issues other than that of determining whether the applicant meets the criteria imposed by the texts for inclusion in the List. In this respect, the Registrar is of the opinion that, in his Application to the Presidency, the Applicant is wrong to invoke issues connected with the case of *The Prosecutor v. Germain Katanga*⁸ and to raise issues which have no relevant connection either with the application which resulted in the decision under review, or with the assessment of the application under the relevant provisions of the Court which set out the criteria to be met for inclusion in the List.

17. Without going into the submissions put forward by the Applicant in this regard, the Registrar submits, on the one hand, that the exercise of the right to freedom of choice in the appointment of counsel as enshrined in the texts of the Court, in particular article 67 of the Statute and rule 21(2) of the *Rules of Procedure and Evidence*, is restricted to counsel fulfilling the criteria set forth in the above-mentioned rule 21(2) and regulation 67 of the Regulations – such counsel either being on the List or agreeing to be included therein – and, on the other hand, that this right

⁷ See the Presidency's *Decision on the Application to Review the Registrar's Decision Denying the Admission of Mr Ernest Midagu Bahati to the List of Counsel*, of 20 December 2005, para. 16 (ICC-Pres-RoC72-02-05), in which the Presidency of the Court defines the test applicable to the "judicial review" of administrative decisions of the Registry as follows "[...] the review of the administrative decision of the Registrar [...] is concerned with the propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it. The review involves a consideration of whether the Registrar has acted without jurisdiction, has committed an error of law, has failed to act with procedural fairness, has taken into account irrelevant factors or failed to take into account relevant factors, or has reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached." See also *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić & Dragoljub Prcać*, IT-98-30/1-A, *Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić*, 7 February 2003.

⁸ ICC-01/04-01/07.

applies solely to the appointment of counsel, which implies that it does not extend to the appointment of associate counsel or other team members acting before the Court. The appointment of the latter is the responsibility of counsel who is in charge of the defence team and who, where necessary, may consult his or her client on this matter. This position is also consistent with the practice of the ad hoc tribunals in the appointment of team members other than counsel.

18. The Registrar respectfully submits that the Court's practice is entirely in line with international jurisprudence on the subject and that it offers the person seeking legal assistance considerably more freedom than is available before the ad hoc tribunals or domestic legal systems⁹ since it allows a person either to choose counsel from the List or to choose a counsel who meets the criteria set forth in the texts and is willing to be included in the List.

⁹ It must be emphasised that jurisprudence acknowledges that the right of an accused to freely choose his or her counsel is not absolute and that this right is indisputably restricted when representation of the person concerned is covered by a legal assistance scheme. See, e.g. *Prosecutor v. Hadžihasanović et al.*, *supra*, note 24. See also *Prosecutor v. Knezevic*, Case No. IT-95-4-PT/IT-95-8/1-PT, 6 September 2002, which was issued several months after the *Hadžihasanović et al.* decision, *supra*, and in which the Chamber simply reiterated the precedent set in *Hadžihasanović et al.* In *Prosecutor v. Knezevic*, the Chamber had to consider a decision of the Registrar in which an application to appoint a specific counsel was rejected because of a conflict of interests and another counsel was appointed by the Registrar. The accused asserted that the decision violated his right to freely choose counsel under article 21.4.0 of the Statute of the Tribunal. The Chamber issued a decision which upheld the Registrar's decision, stating that: "(...) the right of the indigent accused to counsel of his own choosing is not without limits; that the decision for the assignment of counsel rests with the Registrar having to take into consideration the wishes of the accused, unless the Registrar has reasonable and valid grounds not to grant the request." This decision in *Prosecutor v. Knezevic* was heavily based on similar grounds given by the European Court of Human Rights in *Croissant v. Germany*, No. 62/1991/314/385 (28 August 2003), and the jurisprudence of the International Criminal Tribunal for Rwanda in *The Prosecutor v. Gérard Ntakirutimana*, Case No. ICTR-96-10, *Decision on the Motions of the Accused for Replacement of Assigned Counsel*, 11 June 1997, p. 2. See also *Prosecutor v. Delic*, Case No. IT-04-83-PT, "Decision of the Trial Chamber on Motion Seeking Review of the Registry Decision Stating that Mr Stephane Bourgon cannot be assigned to represent Rasim Delic, 10 May 2005". *Kambanda v. The Prosecutor*, ICTR-97-23 A, 19 September 2000; *Aston Little v. Jamaica*, communication No. 283/1988; *Wright & Harvey v. Jamaica*, communication No. 459/1991 UN Doc. CCPR/C/55/D/459/1991 (1995); *Kenneth Teesdale v. Trinidad and Tobago*, 677/1996; *F. v. Swiss Confederation* (Decision of 9 May 1989, Application No. 12152/86); *Faretta v. California*, 422 U.S. 806(1975), No 73-5772, FN 8 "An indigent criminal defendant has no right to appointed counsel of his choice".

19. In the same vein, it must be noted that the national legislation of several States such as the United Kingdom, Greece or Colombia, restricts access to the highest courts in their domestic systems (Supreme Courts for example) to all but a few counsel.

FOR THESE REASONS,

The Registrar respectfully requests the Presidency,

I. AS HIS MAIN SUBMISSION,

TO RULE the Application inadmissible in that it is based on rule 21(3) of the *Rules of Procedure and Evidence*;

II. IN THE ALTERNATIVE,

TO DENY the Application in its entirety as being wrong in fact and in law.

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

[signed]
The Registrar

Dated this 29 January 2008

At The Hague