

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-RoC72-01/11

Date: 9 September 2011

THE PRESIDENCY

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

Public

Decision on the “Requête urgente portant recours contre la Décision du Greffier sur la radiation d’un conseil et sollicitant une suspension immédiate des effets de cette décision”

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

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Mr Esteban Peralta Losilla

Deputy Registrar

Mr Didier Preira

Other

Mr Hervé Diakiese

Trial Chamber I

Pre-Trial Chamber I

The Presidency of the International Criminal Court (hereinafter “Court”) has before it the application of Mr Hervé Diakiese for judicial review of the decision of the Registrar of 19 August 2011 removing him from the list of counsel authorised to act before the Court.

The majority of the Presidency denies the application for the reasons set out below, with Judge Fatoumata Dembele Diarra, First Vice-President, dissenting.

I. PROCEDURAL HISTORY

1. In March 2009, Mr Hervé Diakiese, counsel admitted to the list of counsel authorised to act before the Court (hereinafter “applicant”), was contacted by the Registrar in relation to his suspension for 12 months for discourtesy and lack of deference by the Bar Council of Matadi, which was upheld on appeal by the National Bar Council of the Democratic Republic of the Congo (hereinafter “National Bar”).
2. On 28 April 2009, the Registrar wrote to the applicant expressing the view that although the suspension against him was sufficiently serious to violate the requirement of regulation 67(2) of the Regulations of the Court (hereinafter all references to regulations are to the Regulations of the Court, unless otherwise provided), he would not be removed from the Court’s list of counsel since he had subsequently been in good standing with the relevant bar authorities in the Democratic Republic of the Congo (hereinafter “DRC”). The Registrar noted, however, that another disciplinary action had commenced in the DRC against him for unlawful exercise of the profession of advocate and indicated that she may reconsider her decision following the outcome of this new disciplinary proceeding.¹
3. On 19 August 2011, at 11.03, the Registrar contacted the applicant via email, informing him that she had received information that he had been struck off by the National Bar as a disciplinary sanction. The Registrar invited the applicant to communicate his observations on this matter by 14.00 that same date, which the applicant duly did.²
4. That same day, following the receipt of the applicant’s observations, the Registrar removed the applicant from the list of counsel, considering that he no longer met the criteria for inclusion in the list of counsel prescribed in regulation 67(2), by virtue of having been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court (hereinafter “Impugned Decision”).³

¹ ICC-RoC72-01/11-1-Conf-Anx6; ICC-RoC72-01/11-1-Conf-Anx7; ICC-RoC72-01/11-1-Conf-Anx8; ICC-RoC72-01/11-1-Conf-Anx9.

² ICC-RoC72-01/11-1-Conf-Anx2; ICC-RoC72-01/11-3-Conf-AnxB.

³ ICC-RoC72-01/11-1-Conf-Anx11; ICC-RoC72-01/11-1-Conf-Anx12; ICC-RoC72-01/11-1-Conf-Anx13; ICC-RoC72-01/11-1-Conf-Anx14.

5. On 23 August 2011, the applicant sought from the Presidency judicial review of the Impugned Decision, requesting also its immediate suspension (hereinafter “Application”).⁴
6. On 26 August 2011, the Presidency issued an interim decision, deciding, with reasons to follow, to suspend the Impugned Decision and ordering the Registrar to respond to the Application, pursuant to regulation 72(3) (hereinafter “Interim Decision”).⁵
7. On 6 September 2009, the Registrar responded to the Application, in accordance with the Interim Decision (hereinafter “Response”).⁶

II. PRELIMINARY PROCEDURAL ISSUES

A. Suspension

8. By its Interim Decision, the Presidency suspended the Impugned Decision. The applicant argued that the Impugned Decision was issued very rapidly, noting also that by its operation he would suffer irreparable harm to his mandate to represent victims in ongoing proceedings before the Court, thereby submitting that its urgent suspension was warranted.⁷ Following receipt of the Application, the Presidency, after having made an initial assessment, considered that, *prima facie*, the applicant may have had legitimate grounds justifying review of the Impugned Decision. Considering, therefore, that there may have been irremediable prejudice caused to the applicant if the Impugned Decision was to continue in force, the Presidency acceded to the request.

III. MERITS

A. Relevant parts of the Impugned Decision

9. By the Impugned Decision, the Registrar noted that, by a decision dated 10 March 2011, the National Bar struck the applicant off, on the grounds that the applicant had

⁴ REQUETE URGENTE PORTANT RECOURS CONTRE LA DECISION DU GREFFIER SUR LA RADIATION D'UN CONSEIL ET SOLLICITANT UNE SUSPENSION IMMEDIATE DES EFFETS DE CETTE DECISION. (REQUETE PUBLIQUE AVEC 15 ANNEXES CONFIDENTIELLES), ICC-RoC72-01/11-1.

⁵ Interim decision concerning the “REQUETE URGENTE PORTANT RECOURS CONTRE LA DECISION DU GREFFIER SUR LA RADIATION D'UN CONSEIL ET SOLLICITANT UNE SUSPENSION IMMEDIATE DES EFFETS DE CETTE DECISION. (REQUETE PUBLIQUE AVEC 15 ANNEXES CONFIDENTIELLES)”, ICC-RoC72-01/11-2.

⁶ Response of the Registrar on the “Requête urgente portant recours contre la Décision du Greffier sur la radiation d'un conseil et sollicitant une suspension immédiate des effets de cette décision” dated 23 August 2011, ICC-RoC72-01/11-3.

⁷ Application, paragraphs 10-20.

violated article 101 of the Legislative Ordinance of 28 September 1979,⁸ which obliged a lawyer struck off or suspended to refrain from exercising any professional duties.

10. By the Impugned Decision, the Registrar emphasised the importance of counsel before the Court complying with a very high standard of ethical and professional conduct. The Registrar emphasised that striking off is the most serious disciplinary measure which may be imposed upon a lawyer. She then considered that “la radiation est prononcée en tenant nécessairement compte de la gravité intrinsèque et extrême dudit manquement, que l’appréciation de cette gravité relève de la compétence de l’organe ou de l’instance qui a pris la mesure, laquelle doit toutefois, pour être crédible et justifiée, être vue par toute personne sensée examinant la question comme il se doit comme basée au moins sur des faits concrets, dépourvue de vices ou d’erreurs manifestes et rendue suivant des dispositions juridiques généralement acceptées dans les sociétés démocratiques ou dans un système de droit consacrant des garanties minimales de respect des principes du procès équitable tels qu’ils ressortent par exemple des instruments juridiques internationaux ou régionaux en la matière”.
11. The Registrar then considered that the applicant no longer satisfied the criteria contained in regulation 67(2) that counsel should not have been convicted of a serious disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court, thereby, pursuant to regulation 71(1)(a), the Registrar removed the applicant from the list of counsel on the basis that he no longer met the criteria for inclusion in the list.

B. Arguments of the Applicant

12. The applicant prays that the Presidency set aside the Impugned Decision, on the basis that it breaches the Rome Statute, the Regulations and the Code of Professional Conduct for counsel (hereinafter “Code”).⁹
13. The applicant argues that his right to procedural fairness has been violated, drawing attention to the fact that the Registrar allowed him a period of less than three hours to comment on the information that he had been removed from the National Bar, submitting that there was no acute urgency justifying such limited opportunity to respond.¹⁰
14. The applicant submits that the Impugned Decision does not properly interpret the requirements of regulation 67(2). He argues that regulation 67(2) requires the

⁸ “En l’occurrence, l’article 101 de l’Ordonnance-loi du 28 septembre 1979 dispose que l’Avocat interdit ou suspendu doit s’abstenir de tout acte professionnel et notamment de revêtir le costume de la profession, de recevoir la clientèle, de donner des consultations, d’assister ou représenter les parties devant les juridictions”, Journal officiel de la République Démocratique du Congo, 1 July 2011, Première partie – no. 13, page 111.

⁹ Application, page 13.

¹⁰ Application, paragraphs 10-26.

Registrar to make an assessment of the gravity of the disciplinary offence in question,¹¹ whereas the Impugned Decision is based essentially on the gravity of the sanction that has been imposed against him.¹² The applicant submits also that the Impugned Decision does not examine whether the procedure leading to the National Bar sanction against him was consistent with principles of procedural fairness generally accepted by democratic societies.¹³

15. The applicant further submits that the disciplinary offence of which he was accused by the National Bar consists only of performing the duties entrusted to him by the Court, with the authorisation of the Registrar. The applicant submits that the Registrar had previously noted that he had been suspended by the National Bar and that there were ongoing disciplinary proceedings against him in the DRC for unlawful practice, but, by her letter dated 28 April 2009, she allowed him to continue to act as counsel before the Court.¹⁴ The applicant then notes that the disciplinary sanction of striking off is not based on any new alleged violation or acts by him, but is based only on the fact that during his aforementioned period of suspension, the applicant continued to perform his duties as a representative of victims before the Court.¹⁵ The applicant further submits that the Registrar has, in effect, sought to sanction him twice over the same events, since there is no new element or fresh complaint brought against him in respect of the National Bar decision resulting in his striking off.¹⁶ The applicant further submits that even if he had refrained from fulfilling his mandate to victims, which the Registrar had authorised him to perform, he would have seriously breached his obligations to his clients pursuant to articles 17 and 18 of the Code, noting that article 4 of that Code establishes the primacy of the Code over any other code of ethics or professional responsibility which counsel are bound to honour.¹⁷
16. The applicant submits that he was unaware of the striking off until it was brought to his attention on 18 August 2011 by Trial Chamber I, submitting that it was a procedure by default, issued without his knowledge and which is now under appeal and subject to a request for immediate suspension in the DRC.¹⁸
17. Finally, the applicant submits that the Registrar is in violation of article 21(3) of the Rome Statute, which requires the application of the law without any adverse distinction based on national origin, arguing that the Impugned Decision is discriminatory in that lawyers sanctioned by a national bar association without respect for fundamental rights or procedural guarantees will be treated differently in respect of the same acts compared to those lawyers subject to a bar association which

¹¹ Application, paragraph 32.

¹² Application, paragraphs 29-34.

¹³ Application, paragraph 29.

¹⁴ Application, paragraphs 36, 40-41.

¹⁵ Application, paragraphs 36, 39, 46-47.

¹⁶ Application, paragraph 37.

¹⁷ Application, paragraphs 44-45.

¹⁸ Application, paragraphs 49-50.

complies with such due process.¹⁹ The applicant further submits that the Registrar failed to assess the fact that the applicant is now a member of the Paris Bar Association, with the Impugned Decision failing to consider whether the disciplinary offence in question would have resulted in a sanction of such gravity before the Paris Bar.²⁰

C. Arguments of the Registrar

18. The Registrar submits that the Impugned Decision was reasonable and well founded, with full respect for procedural fairness and in conformity with the applicable legal texts in view of the relevant facts.²¹
19. The Registrar submits that in her assessment of regulation 67(2), she “must be satisfied that there is *de facto* a conviction, and that the latter is for a ‘serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court’”.²² The Registrar submits that striking off is the most serious disciplinary sanction which can be imposed upon counsel and is not imposed lightly.²³ She argues, by reference to domestic jurisprudence, that conduct such as practicing while suspended is considered a serious disciplinary offence.²⁴ The Registrar notes that the applicant failed to adhere to the suspension imposed against him by the National Bar and, in view of his repeat violations, the latter ultimately struck him off. Given these facts and the serious nature of the sanction, the Registrar submits that she is satisfied that the prohibition contained in regulation 67(2) was breached and, therefore, the applicant no longer met the requirement for inclusion in the list of counsel, pursuant to regulation 71(1)(a).²⁵
20. The Registrar submits that the applicant has not been punished twice for the same facts, but that there is a clear demarcation between two different sets of disciplinary proceedings, each with a separate legal basis and for essentially different conduct.²⁶ The Registrar explains that a first set of proceedings against the applicant occurred in relation to his suspension for 12 months by the Bar Council of Matadi and, later, the National Bar, for a lack of deference and discourtesy, which later resulted in disciplinary proceedings being launched before the Court’s Disciplinary Board in relation to the applicant having failed to report the imposition of the suspension to the Registrar. The Impugned Decision relates to separate proceedings before the National Bar for continuing his professional activities before the Court during his period of

¹⁹ Application, paragraphs 51-52.

²⁰ Application, paragraph 53.

²¹ Response, paragraph 1.

²² Response, paragraph 6.

²³ Response, paragraph 8.

²⁴ Response, paragraph 9.

²⁵ Response, paragraphs 10, 18-19.

²⁶ Response, paragraphs 12-13.

suspension.²⁷ The Registrar submits that the former disciplinary proceedings “derive from a wholly separate matter and are based on separate facts and legal basis ... and are not to be mixed or confused” with the latter disciplinary proceedings.²⁸ The Registrar further submits that she is not responsible for advising or ordering the applicant to abide by the obligations placed upon him by national professional rules and decisions, with the applicant himself being obliged to respect such rules and decisions by refusing representation agreements or terminating existing representation agreements during his period of suspension.²⁹

21. The Registrar submits that in conducting her assessment within the framework of regulation 67(2), the independence and professional integrity of national bar associations, including their disciplinary regimes, should be strictly respected and given due deference. She submits that it is not her role to substitute her determination for that of a national bar, although noting that she may exercise extra caution where there is clear and substantiated evidence that national proceedings manifest bad faith.³⁰
22. In response to the request in the Interim Decision that the Registrar respond to the applicant’s submissions regarding his membership of the Paris Bar, the Registrar submits that the applicant’s standing with the Paris Bar is irrelevant, emphasising, by reference to rule 22 of the Rules of Procedure and Evidence, that admission or active membership of a national bar is not a mandatory requirement for admission to the list of counsel.³¹
23. The Registrar submits that she acted in accordance with the due process rights of the applicant, indicating that she gave him an opportunity to be heard prior to taking the Impugned Decision and that the arguments made by the applicant at that time were unpersuasive.³²
24. Finally, the Registrar submits that the relevant decision by the National Bar is enforceable and, in any event, cannot be subject to further appeal.³³

D. Determination of the Presidency

25. 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,

²⁷ Response, paragraphs 14, 16.

²⁸ Response, paragraph 15.

²⁹ Response, paragraphs 20-23.

³⁰ Response, paragraphs 25-29.

³¹ Response, paragraphs 30-38.

³² Response, paragraphs 39-45.

³³ Response, paragraphs 47-51.

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.³⁴

1. *Procedural fairness*

26. The applicant argues that his right to a fair defence was violated, as he had less than three hours on 19 August 2011 to respond to the Registrar on the matter of his removal from the list of counsel, considering that he should have been able to defend himself in a period of time which is consistent with his right to a fair defence.³⁵ The Registrar submits that the applicant was afforded the opportunity to provide observations prior to the taking of the Impugned Decision.³⁶
27. The Presidency considers that the Registrar is not required to notify counsel prior to any removal or suspension from the list of counsel, with regulation 71(3) requiring only that the Registrar provides notification of her decision which includes reasons and information on how to apply for review. In these circumstances, the Registrar exercised her discretion by providing the applicant with a short period within which to make any observations, although she was not required to do so. It is the current review procedure before the Presidency, pursuant to regulation 72, which guarantees that decisions relating to removal and suspension from the list of counsel before the Court comply with appropriate standards of procedural fairness.
28. The Impugned Decision, therefore, does not err in respect of the requirements of procedural fairness.

2. *Regulation 67(2)*

29. By the Impugned Decision, the Registrar refers to the seriousness of the sanction of striking off, as imposed by the National Bar, to demonstrate that regulation 67(2) is no longer satisfied in respect of the applicant. By her Response, the Registrar confirms that her decision that the threshold of gravity, namely incompatibility with the nature of the office of counsel before the Court, was motivated by the seriousness of the sanction of striking off, referring also to the seriousness of the offence of practicing while suspended.³⁷ The Registrar submits that in conducting her assessment pursuant to regulation 67(2), she cannot, ordinarily, substitute her own determination for that of a national bar association.³⁸ The Registrar also argues that it was the applicant who

³⁴ 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.

³⁵ Application, paragraphs 21-26.

³⁶ Response, paragraphs 39-45.

³⁷ Response, paragraphs 6-7, 9-10, 18-19.

³⁸ Response, paragraphs 25-26.

had the onus to ensure that he complied with the suspension imposed upon him by the National Bar.³⁹

30. The Presidency accepts the position of the Registrar that in determining the existence of an offence sufficient to violate the requirements of regulation 67(2), it is likely that she will be guided by the gravity of the sanction imposed by the relevant organ or bar and that, absent any obvious errors, she is entitled to act with deference to the relevant body.
31. In addition, the Registrar has relied not only on the sanction imposed by the National Bar but she has also independently reached the view that the applicant's conduct of having continued to practice whilst subject to a suspension order was conduct inconsistent with the high standards of professional and ethical conduct required of counsel before the Court and thereby satisfied the criteria of incompatibility.
32. The Presidency discerns no error in the above approach and considers that the Registrar has made a reasonable determination that the requirements of regulation 67(2) are no longer satisfied by the applicant.
33. The applicant's argument that the conduct at the basis of his disciplinary offence was simply performing his functions before the Court as he had been permitted to do by the Registrar is misleading. By her letter of 28 April 2009, the Registrar did not purport to authorise the applicant to continue representing clients, but simply determined that he was not to be removed from the list of counsel. The applicant, from the date of 27 September 2008, could not have been unaware of his suspension,⁴⁰ thus for a period of more than six months prior to the letter of the Registrar of 28 April 2009, the applicant independently decided to continue representing his clients before the Court. The applicant, therefore, could not have relied on the Registrar's letter as permitting him to continue representing clients. The Presidency also accepts the Registrar's submission that in respect of whether the applicant should have continued to act for clients, it was not up to her to advise or order the applicant, but for him to independently ensure that he was acting at all times in accordance with the professional and ethical obligations incumbent upon him by virtue of his membership of the relevant bar in the DRC. In respect of the applicant's submission that he was unable to stop representing his clients without violating articles 17 and 18 of the Code, although the applicant's circumstances would not have fitted squarely within the examples of termination of representation referred to in article 18 of the Code, the Presidency is confident that the applicant could still have approached the Chamber for leave to withdraw from the case, citing his conflicting ethical obligations in the form of his suspension.

³⁹ Response, paragraphs 20-21.

⁴⁰ Case of *The Registrar v. Mr Hervé Diakiese*, Decision of the Disciplinary Board, DO-01-2010, 9 July 2010, paragraphs 39-40.

34. Further, the Presidency cannot accept the argument of the applicant that he has been assessed and punished twice in respect of the same conduct, accepting the Registrar's submission that the proceedings giving rise to the sanction of suspension and the proceedings giving rise to the striking off, although connected, are distinct.

3. *Legal status of the National Bar decision*

35. The applicant argues that the decision of the National Bar striking him off was a default proceeding in which he had not been notified or participated and which is now subject to both appeal and a request for immediate suspension in the DRC.⁴¹ The Registrar argues that the National Bar decision was enforceable and, in any event, cannot be the subject of an appeal in the DRC.⁴²
36. The Presidency considers that the Registrar was entitled to rely, as she did, on a decision gazetted in the "Journal officiel de la République Démocratique du Congo" which reflected a conviction for a disciplinary offence against the applicant, without further considering whether such decision had been taken by default or was subject to appeal, with such information unlikely to be readily available to the Registrar. Moreover, in the event of a successful appeal, suspension or other modification of a criminal or disciplinary conviction, counsel may readily re-apply for inclusion in the list of counsel.

4. *Paris Bar*

37. The Presidency accepts the submission of the Registrar that, in the absence of a requirement in the legal texts that counsel be a member of a national bar association, the applicant's membership of the Paris Bar is irrelevant to the current determination.

The Application is denied.

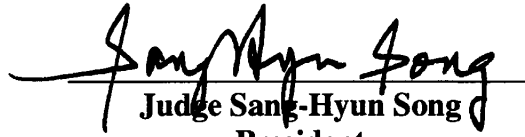
The Registrar is ordered to notify this decision to all parties and participants in the case of *the Prosecutor v. Thomas Lubanga Dyilo* and the case of *the Prosecutor v. Callixte Mbarushimana*.

A dissenting opinion of Judge Fatoumata Dembele Diarra, First Vice-President, shall follow.

⁴¹ Application, paragraphs 49-50.

⁴² Response, paragraphs 47-49.

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


Judge Sang-Hyun Song
President

Dated this 9 September 2011

At The Hague, The Netherlands