

SEPARATE OPINION OF JUDGE EBOE-OSUJI

1. I note that appellant's counsel alleged 'errors of fact' on the part of the Pre-Trial Chamber.
2. That complaint thus gives a specific purpose to the standard of appellate review that the Appeals Chamber restated for purposes of this appeal, in paragraph 13, in the following words:

Regarding an alleged error of fact, the Appeals Chamber has held in the context of an appeal against a decision concerning interim release that, 'its review is corrective and not *de novo*. It has explained that "[i]t will therefore not interfere unless it is shown that the Pre-Trial or Trial Chamber committed a clear error, namely: misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts". As regards the "misappreciation of facts" the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it. The Appeals Chamber applies a standard of reasonableness in assessing an alleged error of fact in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Trial Chamber's findings.'¹

3. That standard of appellate review, in my view, adequately takes into account the fact that while article 81 of the Rome Statute gives an appellant a right to appeal 'errors of fact,' article 82 is silent as to that right. The current appeal is brought under article 82(1)(b), concerning grant or denial of judicial interim release.
4. But, this is not to say that the Appeals Chamber may not consider complaints of erroneous factual findings in any appeal brought under article 82. Previous jurisprudence of the Appeals Chamber accepts the possibility of such complaints.²

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5. Notably, the force of the rationale for appellate deference to the Pre-Trial Chamber's or the Trial Chamber's factual findings during interlocutory appeals is more compelling for an article 82(1)(d) appeal, which concerns a 'decision that involves an issue that would significantly affect the fair and expeditious conduct of

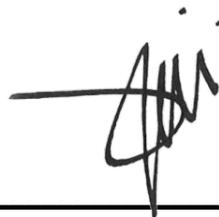
¹ [Footnote 19 in the original] [Gbagbo OA10 Judgment](#), para. 16 (footnotes omitted).

² See e.g. *Situation in the Democratic Republic of Congo*, [Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"](#), 13 July 2006, ICC-01/04-169 (OA), paras 32-34.

the proceedings or the outcome of the trial, *and for which, in the opinion of the Pre-Trial or Trial Chamber*, an immediate resolution by the Appeals Chamber may materially advance the proceedings.’ [Emphasis added.] Thus, article 82(1)(d) appeals concern classic interlocutory appeals launched in the middle of an ongoing proceeding, in order that an issue may be resolved which would – in the opinion of the Chamber below – materially advance the proceeding. There is thus greater scope for deference to the factual findings of the Chamber below, without inevitable risk of injustice. For, if the proceeding in question is materially advanced by an interlocutory appellate resolution of a stumbling issue, an unsatisfied appellant may pursue an enduring concern in a final appeal in which the appellant may then (also) engage an erroneous factual finding of the Chamber below.

6. But, there is a different consideration for article 82(1)(b) appeals, which concern individual liberty, when judicial interim release is wrongly denied. It is important to keep in mind that such appeals flow from article 58, which contain powers that must be exercised reasonably and not capriciously. It may be an erroneous factual finding that makes the impugned decision unreasonable or capricious. For that, the necessary standard of reasonableness is sufficiently expressed in the formulation of paragraph 13 of the Appeals Chamber’s decision.

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



Judge Chile Eboe-Osuji

Dated this 5th day of February 2021

At The Hague, The Netherlands