

1 International Criminal Court
2 Appeals Chamber
3 Situation: Darfur, Sudan
4 In the case of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (Ali
5 Kushayb) - ICC 02/05-01/20
6 Presiding Judge Piotr Hofmański
7 Appeals Judgment - Courtroom 1/Webex
8 Friday, 27 August 2021
9 (The hearing starts in open session at 4.50 p.m.)
10 THE COURT USHER: [16:50:58] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE HOFMAŃSKI: [16:51:26] Good afternoon.
14 Would the court officer please call the case.
15 THE COURT OFFICER: [16:51:35] Good afternoon, your Honour.
16 This is the situation in Darfur, Sudan, in the case of The Prosecutor versus Ali
17 Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), case number ICC-02/05-01/20.
18 And for the record, we're in open session.
19 PRESIDING JUDGE HOFMAŃSKI: [16:51:53] Thank you very much.
20 I'm Judge Piotr Hofmański, presiding in this appeal arising from the case
21 the Prosecutor against Ali Muhammad Ali Abd-Al-Rahman. My fellow judges in
22 this appeal are Judge Luz del Carmen Ibáñez Carranza, Judge Perrin de Brichambaut,
23 Judge Solomy Balungi Bossa and Judge Gocha Lordkipanidze.
24 May I ask the parties to introduce themselves for the record, please, starting with
25 the Defence.

1 Mr Laucci.

2 MR LAUCCI: [16:52:34](Interpretation) Thank you, Mr President. Good afternoon

3 to you. For the Defence of Mr Abd-Al-Rahman this afternoon we have

4 Mr Ahmad Issa; Nina Guilloux and Camille Divet, in charge of evidence analysis.

5 Mr Mohamed Manaa, linguistic assistant. And myself Mr Cyril Laucci, lead counsel.

6 PRESIDING JUDGE HOFMAŃSKI: [16:53:16] Thank you, Mr Laucci.

7 For the Office of the Prosecutor, please.

8 MS BRADY: [16:53:24] Good afternoon, your Honour. My name is Helen Brady.

9 I'm appearing on behalf of the Prosecution and I'm here today with Mr Matteo Costi,
10 appeals counsel. Thank you.

11 PRESIDING JUDGE HOFMAŃSKI: [16:53:35] Thank you very much.

12 The Legal Representative for Victims.

13 MS MASSIDDA: [16:53:50] Good afternoon, your Honour. I am Paolina Massidda,

14 principal counsel of the Office of Public Counsel for Victims. I am appearing today

15 on behalf of victims represented by the office.

16 PRESIDING JUDGE HOFMAŃSKI: [16:54:03] Okay, thank you very much,

17 Ms Massidda.

18 Well, thank you very much. For the record, I note that Mr Abd-Al-Rahman

19 participates from the remote location.

20 Today, the Appeals Chamber will deliver its judgment in the appeal of

21 Mr Abd-Al-Rahman against the decision of Pre-Trial Chamber II entitled "Decision on

22 the review of the detention" of 5 July 2021.

23 This is a non-authoritative summary of the Appeals Chamber's written judgment in

24 the appeal. The latter will be notified after this hearing.

25 I will now briefly explain the context of this appeal.

1 On 12 April 2021, the Pre-Trial Chamber reviewed Mr Abd-Al-Rahman's detention
2 and rejected the Defence's request for Mr Abd-Al-Rahman's interim release.

3 The Defence appealed this decision, which I will refer to as the OA7 interlocutory
4 appeal.

5 On 5 May 2021, the Pre-Trial Chamber issued an order setting a schedule for an oral
6 hearing on the review of detention. The Pre-Trial Chamber explained that
7 the one-year period referred to in Rule 118(3) of the Rules of Procedure and Evidence
8 would expire on 15 June, and it set the oral submissions for 27 May.

9 The Defence requested that the Pre-Trial Chamber postpone the annual hearing on
10 detention on the basis that the Appeals Chamber had not yet ruled on the Defence's
11 appeal in the OA7 interlocutory appeal.

12 In an oral decision delivered on 26 May 2021, the Pre-Trial Chamber rejected
13 the Defence's request to reschedule the hearing. One of the reasons for rejecting
14 the request was that the main purpose of the annual hearing is to ascertain
15 the conditions of detention.

16 During the annual hearing, held the next day, the Pre-Trial Chamber explained that
17 the main purpose of the hearing was for the Chamber to ascertain

18 Mr Abd-Al-Rahman's conditions of detention, as is mandated by Rule 118(3) of
19 the Rules. It clarified that it was not a hearing about whether the pretrial detention
20 should continue or not, which would take place in due course.

21 On 11 June 2021, written submissions on the review of Mr Abd-Al-Rahman's
22 detention were filed by the Prosecutor and participating victims, and then
23 the Defence submitted its written response.

24 On 5 July 2021, the Pre-Trial Chamber issued a decision on the review of
25 Mr Abd-Al-Rahman's detention, which I will refer to as the impugned decision.

1 The Pre-Trial Chamber did not hold another hearing after the annual hearing and
2 prior to the impugned decision.

3 The Defence appeals the impugned decision on three grounds. First, the Defence
4 alleges that the Pre-Trial Chamber erred in law in finding that the purpose of the
5 hearing under Rule 118(3) is to ascertain the conditions of detention, and not to
6 address the interim release.

7 Second, the Defence alleges that the Pre-Trial Chamber erred in fact and in law in
8 presuming that the Defence would refuse to present submissions on interim release
9 during the annual hearing had it been invited to do so.

10 And third, the Defence alleges that the Pre-Trial Chamber erred in law in finding that
11 the written submissions of the Defence could replace the oral submissions made on
12 the subject of interim release during a hearing.

13 I will now address the admissibility of the Defence's appeal.

14 The Prosecutor challenge's the admissibility of the Defence's appeal, submitting that
15 the question of whether the Pre-Trial Chamber erred in limiting the annual hearing to
16 a discussion of the conditions of Mr Abd-Al-Rahman's detention is one that arose
17 from the oral decision of 26 May and not from the impugned decision. In essence, he
18 submits that the Defence has appealed the wrong decision.

19 However, the Appeals Chamber's recalls that it has in the past heard appeals alleging
20 procedural errors leading to the decision being appealed when the issues on appeal
21 were relevant to the legal correctness or procedural fairness of the decision being
22 appealed.

23 Here, the Appeals Chamber notes that the Defence does not purport to challenge
24 the oral decision of 26 May 2021 per se but, rather, the procedure employed by
25 the Pre-Trial Chamber leading to the impugned decision. This includes the decision

1 of the Pre-Trial Chamber not to hold a hearing on interim release following
2 the judgment in the OA7 interlocutory appeal and prior to the one-year anniversary
3 of Mr Abd-Al-Rahman's initial appearance.

4 In this respect, the instant appeal relates directly to the Pre-Trial Chamber's decision
5 not to hold an additional hearing after the annual hearing - a decision that could only
6 be challenged after the issuance of the impugned decision itself.

7 Furthermore, the Appeals Chamber observes that there was ambiguity as to whether
8 the Pre-Trial Chamber intended to hold a hearing on interim release prior to the
9 impugned decision.

10 Therefore, the Appeals Chamber rejects the Prosecutor's argument that the appeal is
11 inadmissible because it is an appeal of the wrong decision.

12 As the appeal is admissible, I will turn to the merits of the appeal.

13 In today's judgment, the Appeals Chamber has addressed the Defence's first and third
14 grounds of appeal together, as they are related to one another.

15 In this regard, the Appeals Chamber has analysed the language of Rule 118(3). It has
16 also analysed the context of that paragraph within Rule 118 and of that rule within
17 Section IV of the Rules, entitled "Procedures in respect of restriction and deprivation
18 of liberty". Upon analysis, the Appeals Chamber considers that the hearing under
19 Rule 118(3) is intended to be a hearing on the circumstances justifying detention listed
20 in Article 58(1) of the Statute.

21 As argued by the Defence, this interpretation is consistent with the practice of the
22 chambers of this Court.

23 The Appeals Chamber also finds that this interpretation of the text actualises
24 the intention of the drafters in designating an annual hearing in order to strike
25 a compromise about the scope of the right to a hearing on interim release.

1 Therefore, for these reasons and those more fully explained in today's written
2 judgment, the Appeals Chamber finds that the Pre-Trial Chamber erred in finding
3 that the hearing under Rule 118(3) of the Rules may concern only the conditions in
4 the detention centre and the well-being of the detained person.

5 However, in order to interfere with the impugned decision, the Appeals Chamber
6 must be satisfied not only that the Pre-Trial Chamber erred, but that the error
7 materially affected the impugned decision. It is the Defence's responsibility, as
8 the appellant, to substantiate the alleged error as well as its materiality. In this
9 appeal, the outcome of the impugned decision was, ultimately, the continued
10 detention of Mr Abd-Al-Rahman pending trial. Therefore, the Appeals Chamber
11 must assess whether the outcome may have been different but for
12 the Pre-Trial Chamber's error regarding the interpretation of Rule 118 of the Rules.

13 In this regard, the Appeals Chamber is not persuaded that any of the Defence's
14 arguments under its first and third grounds of appeal demonstrate the impact of the
15 Pre-Trial Chamber's failure to hold a hearing on interim release within one year of the
16 initial appearance.

17 In particular, the Defence has not presented examples of any arguments that it could
18 have made orally but that were not appropriate for written submissions, which it did
19 have the opportunity to file. Nor has the Defence indicated that it would have
20 presented viva voce evidence and that this evidence would have had an effect on
21 the decision to detain.

22 Therefore, the Appeals Chamber finds that the Defence has not demonstrated that
23 the impugned decision would have been materially different had it come after
24 a public hearing instead of the course of written submissions ordered by
25 the Pre-Trial Chamber.

1 For these reasons, and those more fully explained in the written judgment,
2 the Appeals Chamber rejects the Defence's first and third grounds of appeal.
3 Turning finally to the Defence's second ground of appeal, the Appeals Chamber finds
4 that the Defence does not challenge a finding of the Pre-Trial Chamber. Rather,
5 the Defence appears to take issue with language that amounts to *obiter dicta*, which
6 does not form part of the substantive reasons given in the impugned decision.
7 Therefore, the Defence's second ground of appeal is dismissed *in limine*.
8 For these reasons - and for the reasons stated more fully in the written
9 judgment - the Appeals Chamber rejects the appeal and confirms the impugned
10 decision.
11 And this brings us to the end of the summary of the Appeals Chamber's judgment.
12 I would like to thank the court reporters, interpreters and other Registry staff for their
13 valuable assistance today in holding this hearing.
14 The hearing is adjourned.
15 THE COURT USHER: [17:07:16] All rise.
16 (The hearing ends in open session at 5.07 p.m.)