Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No. ICC-01/09-02/11 OA 3
Date: 10 November 2011

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA and MOHAMMED HUSSEIN ALI

Public document

Judgment
on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II dated 20 July 2011 entitled "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence"

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 Karim A. A. Khan
Mr Kennedy Ogetto
Mr Essa Faal

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence" dated 20 July 2011 and registered on 21 July 2011 (ICC-01/09-02/11-185),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1) The "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence" is reversed.

2) The Pre-Trial Chamber is directed to decide anew on the question of whether to invalidate the appointment of Mr Faal as counsel in this case in light of the present judgment.

REASONS

I. KEY FINDINGS

1. For an impediment to representation to arise based upon the fact that counsel was "privy to confidential information" as a staff member of the Court within the meaning of article 12 (1) (b) of the Code of Professional Conduct for counsel, counsel must have had knowledge of any confidential information relating to the case in which counsel seeks to appear. Counsel may not represent a client in such circumstances unless the impediment to representation is first lifted by the relevant Chamber.

2. The impediment to representation that arises if counsel was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear may be lifted by the relevant Chamber if deemed justified in the interests of justice. What constitutes "the interests of justice" must be determined in the light of

all relevant factors and circumstances of a particular case. Such factors may include, but are not limited to, whether the confidential information was of a "*de minimis*" nature.

II. PROCEDURAL HISTORY

A. Proceedings before the Pre-Trial Chamber

3. While a number of the documents before the Pre-Trial Chamber in this case were classified as either confidential or confidential *ex parte*, the Appeals Chamber finds it necessary to refer in this judgment only to matters that are already in the public domain, either because they have already been filed in redacted form or because reference has already been made to those matters or documents in another public document. Where a document has two different classifications, references in this judgment are to the public redacted version.

4. Mr Essa Faal joined the Office of the Prosecutor (hereinafter: "OTP") on 17 January 2006.[1] He worked on cases in the situation in Darfur, Sudan, becoming the Senior Trial Lawyer in relation to those cases on 1 November 2007.[2] He resigned from that position with effect from 31 March 2011.[3]

5. On 22 April 2011, Mr Faal informed the Deputy Prosecutor that he had joined the defence team in the present case (hereinafter: "Defence").[4]

6. On 28 June 2011, following Mr Faal's official appointment as co-counsel, the Pre-Trial Chamber, acting *proprio motu*, ordered submissions from the parties and the Registrar on whether there was an impediment to his appointment.[5]

7. On 1 July 2011, further to the Pre-Trial Chamber's order, the Registrar filed the "Report of the Registrar on the Access to the Case Record"[6] (hereinafter: "Registrar's

---

[1] *See* "Prosecution's Appeal against the 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)'", 1 September 2011, ICC-01/09-02/11-271-Red, para. 6.
[2] *Ibid.*
[3] *Ibid.*, para. 1.
[4] *Ibid.*
[5] "Order to the Prosecutor and the Registrar to Submit Observations Regarding a Potential Impediment to Defence Representation", 28 June 2011, ICC-01/09-02/11-138-Conf, p. 4; *see* also "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence", 20 July 2011, ICC-01/09-02/11-185, paras 3, 11.
[6] ICC-01/09-02/11-149-Conf-Exp with annex 1.

Report"). On the same day, the Prosecutor filed the "Prosecution's Request to Invalidate the Appointment of Counsel to the Defence Team"[7] (hereinafter: "Prosecutor's Request"), in which he argued that the appointment of Mr Faal should be invalidated as a result of a conflict of interest.[8]

8. On 6 July 2011, the Defence filed the "Defence Response to the 'Prosecution's Request to Invalidate the Appointment of Counsel to the Defence Team'",[9] which was re-submitted on 8 July 2011[10] (hereinafter: "Defence Response"), in which the Defence argued that the Pre-Trial Chamber should dismiss the Prosecutor's objections to the appointment.[11]

9. On 14 July 2011, the Prosecutor filed the "Prosecution's Reply to the 'Defence Response to the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence team'"[12] (hereinafter: "Prosecutor's Reply"), maintaining that the appointment of Mr Faal should be invalidated.[13]

10. On 20 July 2011, the Pre-Trial Chamber rendered the "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence"[14] (hereinafter: "Impugned Decision"), in which it decided that Mr Faal could continue to represent Mr Muthaura in the present case.

11. Upon application of the Prosecutor,[15] the Pre-Trial Chamber granted leave to appeal the Impugned Decision,[16] on the following two grounds:

---

[7] ICC-01/09-02/11-150-Conf with annexes A-H.
[8] *See* "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence", 20 July 2011, ICC-01/09-02/11-185, para. 4.
[9] ICC-01/09-02/11-159-Conf-Exp with annexes A-H and a separately filed annex 1.
[10] ICC-01/09-02/11-163-Conf-Exp.
[11] *See* "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence", 20 July 2011, ICC-01/09-02/11-185, para. 7.
[12] ICC-01/09-02/11-172-Conf-Exp with six annexes.
[13] *See* "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence", 20 July 2011, ICC-01/09-02/11-185, para. 9.
[14] ICC-01/09-02/11-185.
[15] "Prosecution's Application for Leave to Appeal the 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence' (ICC-01/09-02/11-185)", 26 July 2011, ICC-01/09-02/11-195; *see* also "Defence Response to 'Prosecution's Application for Leave to Appeal the "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence" (ICC-01/09-02/11-185)'", 1 August 2011, ICC-01/09-02/11-207.
[16] "Decision on the 'Prosecution's Application for Leave to Appeal the "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence" (ICC-01/09-02/11-185)'", 18 August 2011, ICC-01/09-02/11-253 (hereinafter: "Decision on Application for Leave to Appeal").

1. Whether, as a matter of law, prosecution lawyers may join a defence team in a case that was open at the time when the person worked for the prosecution [or whether the person] should be deemed as being privy to confidential information related to the case under Article 12(1)(b) of the Code of Professional Conduct; and

2. Whether the correct test to determine that a person is 'privy to confidential information' under Article 12(1)(b) is whether that person has become aware of more than *de minimis* confidential information related to the relevant case.[17]

B. Proceedings before the Appeals Chamber

12. On 29 August 2011, the Prosecutor filed the "Prosecution's Appeal against the 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)'"[18] (hereinafter: "Document in Support of the Appeal").

13. On 9 September 2011, the Defence filed the "Defence Response to Prosecution's Appeal against the 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)'"[19] (hereinafter: "Response to the Document in Support of the Appeal").

III. MERITS

A. Relevant procedural context and summary of Impugned Decision

14. In the Impugned Decision, the Pre-Trial Chamber recalled that it had initiated the proceedings in relation to this issue *proprio motu* as it was "keen to preserve the integrity of the proceedings to the effect that they are conducted in a fair and transparent manner, respecting the rights of both parties involved" and that the issue would be determined on the basis of such an approach.[20]

15. The Pre-Trial Chamber considered article 12 (1) (b) of the Court's Code of Professional Conduct for counsel (hereinafter: "Code") to be "*lex specialis* in this

---

[17] "Prosecution's Appeal against the 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)'", 1 September 2011, ICC-01/09-02/11-271-Red, para. 15, referring to the Decision on Application for Leave to Appeal, para. 11.
[18] ICC-01/09-02/11-271-Conf-Exp; a public redacted version of the Document in Support of the Appeal was filed on 1 September 2011 as ICC-01/09-02/11-271-Red; all references to the Document in Support of the Appeal will be to the public redacted version.
[19] ICC-01/09-02/11-311 with annexes A-C.
[20] Impugned Decision, para. 11.

case" and determined that on the basis of this provision, the core issue was not whether there was an "appearance of conflict of interest", as the Prosecutor had argued, but "whether Mr. Faal was 'privy to confidential information as a staff member of the Court relating to the case' of Mr. Muthaura".[21] If he were, he would not be able to continue to represent Mr Muthaura as "there would certainly be a potential or even an actual conflict of interest within the meaning of articles 7(4), 16(1) and 24(1) of the Code of Conduct".[22]

16. Having found that the Court's legal texts, including the Code, were silent on the scope of the expression "privy to confidential information", the Pre-Trial Chamber, relying on the previous jurisprudence of Trial Chambers III and IV,[23] adopted the standard of "'*de minimis* confidential information', which requires a [sic] proof that the person concerned 'became aware of more than' the 'minimal' confidential information relevant to the case under consideration".[24] Having defined "*de minimis*" information to be that which is "so insignificant that a court may overlook it in deciding an issue", the Pre-Trial Chamber explained that to show that a person had become aware of more than *de minimis* confidential information, "the facts presented should reveal that at least he/she was aware of confidential information of some significance to the case *sub judice,* which prompts the Chamber to invalidate the person's continuous involvement with the opposite party (Defence)".[25] The Pre-Trial Chamber stated that it would endorse the aforementioned standard used by Trial Chambers III and IV, "as developed by the Single Judge in this paragraph".[26]

17. In applying this standard to the totality of the submissions and evidence presented by the Prosecutor, the Pre-Trial Chamber made an initial overall finding that "there is a lack of proof that Mr. Faal actually was aware of confidential

---

[21] Impugned Decision, paras 14-16.
[22] Impugned Decision, para. 16.
[23] *See* Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the 'Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team'", 7 May 2010, ICC-01/05-01/08-769, para. 42; Trial Chamber IV, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence", 30 June 2011, ICC-02/05-03/09-168, para. 16.
[24] Impugned Decision, para. 17.
[25] Impugned Decision, para. 17.
[26] Impugned Decision, para. 17.

information concerning the case of the *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, let alone *de minimis* information".[27]

18. The Pre-Trial Chamber proceeded to find that the Prosecutor's Request and nine annexes did not reveal that Mr Faal "was privy to confidential information of the *case* within the meaning of article 12(1)(b) of the Code of Conduct".[28] The Pre-Trial Chamber found annexes A, F and H appended to the Prosecutor's Request to be of some relevance. In relation to Annex A, a declaration of an OTP trial lawyer in the present case concerning a discussion between the lawyer and Mr Faal about the 'case hypothesis' and its weaknesses, the Pre-Trial Chamber held that the information provided therein was "too general in nature and unsupported by concrete facts which could reveal that Mr. Faal was privy to confidential information related to this case".[29] The Pre-Trial Chamber found that a "'case hypothesis' is a developing document and is subject to change and that at this stage of the proceedings the information related thereto is probably known to the Defence".[30] The Pre-Trial Chamber continued that "[t]he same holds true" of Annexes F and H.[31] In relation to Annex F, two email notifications informing OTP staff that Mr Faal was to be in charge of the Prosecution Division *in lieu* of the Deputy Prosecutor for a number of days in October 2008 and in November 2010, the Pre-Trial Chamber found that it "does not in itself sufficiently prove that [Mr Faal] was privy to confidential information related to the *case* against Mr. Muthaura within the meaning of article 12(1)(b) of the Code of Conduct".[32] Annex H, reflecting minutes of a meeting of the Prosecution Division held in April 2010 at which the situation of the Republic of Kenya was discussed, was found by the Pre-Trial Chamber to be unpersuasive given that Mr Faal was not present at that meeting.[33]

19. The Pre-Trial Chamber also examined the six annexes appended to the Prosecutor's Reply, in relation to which it found that "the Prosecutor has also failed to prove that Mr Faal became aware of more than the *de minimis* confidential

---

[27] Impugned Decision, second para. 17. A typographical error in the Impugned Decision has resulted in two paragraphs numbered 17.
[28] Impugned Decision, para. 19.
[29] Impugned Decision, para. 20.
[30] Impugned Decision, para. 20.
[31] Impugned Decision, para. 20.
[32] Impugned Decision, para. 20.
[33] Impugned Decision, para. 20.

information".[34] The Prosecutor was said to rely primarily on two annexes containing e-mails from OTP staff members requesting Mr Faal's advice.[35] One e-mail was held merely to refer to a question of a legal nature in the other case in the Kenya situation, to which Mr Faal had not responded.[36]

20. In relation to the other e-mail, the Pre-Trial Chamber observed that the "Prosecutor himself acknowledges that the 'confidential information contained in [it][...] is plainly not critical'".[37] The Pre-Trial Chamber continued that, "[m]oreover", the Prosecutor argued that "despite the insignificance of the email's content" it demonstrates that because of Mr Faal's position and his relationship with his colleagues, "'he was inevitably exposed to, and consulted on, confidential information in the Kenya case'".[38] The Pre-Trial Chamber found that this "assertion rests on a speculation rather than on an [sic] actual proof of being aware of confidential information concerning the case against Mr. Muthaura".[39]

21. In relation to another annex, an example of an OTP weekly report to which Mr Faal had access and which included a summary of two confidential *ex parte* filings, the Pre-Trial Chamber found that the "summary is confined to the proceedings, which relates to issues triggered by the suspects of the companion case. Even then, the information provided in this report is very general in nature and provides a limited summary of the interpretation and development of the law by Pre-Trial Chamber II in two of its public decisions".[40]

22. With respect to the Prosecutor's legal argument that, as a matter of principle, a lawyer leaving the OTP should be subject to a time-bar before joining the Defence, the Pre-Trial Chamber held that the "Court's statutory documents do not prohibit a staff member from the Office of the Prosecutor to join the Defence. Nor do they set a time bar for such an involvement".[41] Thus the Chamber found that "in the absence of any prohibitive rule to that effect, the person is free to do so subject to the limitations

---

[34] Impugned Decision, para. 21.
[35] Impugned Decision, para. 21.
[36] Impugned Decision, para. 22.
[37] Impugned Decision, para. 23.
[38] Impugned Decision, para. 23.
[39] Impugned Decision, para. 23.
[40] Impugned Decision, para. 24.
[41] Impugned Decision, para. 27.

dictated by the existing statutory provisions including those referred to in the Code of Conduct".[42] Furthermore, the Chamber opined that even if there were a lacuna in the statutory framework of the Court, "a general principle of law cannot be extracted on the basis of examining only five national jurisdictions, the practice of which is even inconsistent".[43]

23. In conclusion, the Pre-Trial Chamber stated that the "Prosecutor has failed to satisfy the required standard of proof that Mr. Faal was aware of more than the *de minimis* confidential information",[44] a conclusion which in the Chamber's view was supported by the Registrar's Report which demonstrated that Mr Faal had never accessed a confidential document concerning the present case. The Pre-Trial Chamber also relied on Mr Faal's "unequivocal assertions" that he had no knowledge of any confidential investigative or prosecutorial policies pertaining to the present case and as such the Chamber held that "[i]n the absence of any reasons 'doubting [Mr. Faal's] integrity', the Single Judge is entitled 'to rely on his clear undertakings'".[45] The Pre-Trial Chamber decided that Mr Faal could continue to represent Mr Muthaura in the present case.[46]

24. The Pre-Trial Chamber concluded that it would keep its decision under review; and that if it identified that any significant facts were not available at the time of the decision that revealed that Mr Faal was privy to confidential information, it would not hesitate to invalidate his appointment.[47]

B. The Prosecutor's submissions before the Appeals Chamber

25. In relation to the first issue on appeal, the Prosecutor submits that "[t]he Trial Chamber erred by failing to disqualify Mr. Faal based on an objective, not subjective, standard under Article 12 of the Code of Conduct and its obligations under Article 64 of the Rome Statute".[48]

---

[42] Impugned Decision, para. 27.
[43] Impugned Decision, para. 27.
[44] Impugned Decision, para. 29.
[45] Impugned Decision, para. 29.
[46] Impugned Decision, p. 13.
[47] Impugned Decision, para. 30.
[48] Document in Support of the Appeal, p. 8.

26. The Prosecutor submits that the Pre-Trial Chamber erred in (i) failing to consider its authority to act under article 64 (2) of the Statute to take steps to preserve the fairness of the trial, instead basing its decision solely on the Code;[49] and (ii) in construing article 12 (1) (b) of the Code to require the Prosecutor to prove that a former OTP staff member had actual knowledge of, and recalled, significant confidential information,[50] which put an impossible burden on the Prosecutor.[51]

27. The Prosecutor submits that the Pre-Trial Chamber failed to analyse correctly the issue before it as one involving the fairness of the trial, and not simply the oversight of attorney ethics, and failed to apply an "objective standard".[52] The Prosecutor argues that the test applied by the Pre-Trial Chamber provides inadequate protection for the fairness of the proceedings and the perception thereof[53] and "prejudices the OTP's interests".[54]

28. The Prosecutor raises arguments under four heads. First, he submits that the characteristics and working methods of the OTP result in an OTP prosecutor having access – and therefore being privy – to confidential information in relation to cases that were open at the time that prosecutor worked at the OTP.[55] In addition to his initial assertion that OTP employment contracts require a staff member to accept that everything that occurs within the OTP is confidential,[56] the Prosecutor also refers to rule 101.4 (d) of the Staff Rules, which expressly provides that the obligation of confidentiality continues after separation from service.[57] Second, the Prosecutor argues that, based upon the facts that the Pre-Trial Chamber had accepted, it should, when interpreting and applying article 12 (1) (b) of the Code, have adopted "a presumption that a Senior Trial Lawyer has knowledge of more than *de minimis* confidential information in cases open at the time when [...] he or she served at the OTP".[58] Third, the Prosecutor argues that the Code "regulates ethical behaviour of

---

[49] Document in Support of the Appeal, paras 16, 26-30.
[50] Document in Support of the Appeal, para. 16.
[51] Document in Support of the Appeal, para. 19.
[52] Document in Support of the Appeal, para. 17.
[53] Document in Support of the Appeal, para. 19.
[54] Document in Support of the Appeal, para. 20.
[55] Document in Support of the Appeal, paras 18, 21-23.
[56] Document in Support of the Appeal, para. 5.
[57] Document in Support of the Appeal, para. 23.
[58] Document in Support of the Appeal, para. 25.

lawyers, but is not a guide to fairness at trial"[59] and that, even if reliance on the Code were appropriate, it had not been properly interpreted.[60] Fourth, the Prosecutor submits that the Pre-Trial Chamber failed to take into account the need to protect the proceedings against the appearance of impropriety.[61] By reference to case-law from the International Criminal Tribunal for the former Yugoslavia[62] (hereinafter: "ICTY") and the United States,[63] the Prosecutor contends that cases such as this one give rise to an "appearance of 'impediments to representation' and damage the public perception of this Court"[64] and that there was a "need for an objective standard to promote public confidence in the legal system".[65]

29. In relation to the second issue on appeal, the Prosecutor submits that "[t]he Trial Chamber erred by failing to find that Mr. Faal's access to confidential information impedes his representation of the Defence under Article 12(1)(b) of the Code of Conduct".[66]

30. The Prosecutor argues that the Pre-Trial Chamber made two errors. First, the Prosecutor alleges that it "erred by adding to the requirement that counsel be 'privy to confidential information' a condition not found in the Code, that he or she be subjectively aware of being in possession of the information".[67] Second, the Prosecutor avers that the Pre-Trial Chamber erred "by requiring that the confidential information be sufficiently 'important'".[68] The Prosecutor submits that neither requirement is to be found in the Code.[69] In relation to subjective awareness, the

---

[59] Document in Support of the Appeal, para. 27.
[60] Document in Support of the Appeal, paras 27, 29-30.
[61] Document in Support of the Appeal, paras 31-33.
[62] ICTY, Trial Chamber, *Prosecutor v. Hadžihasanović and others*, "Decision on Prosecution's Motion for Review of the Decision of the Registrar to assign Mr Rodney Dixon as Co-Counsel to the Accused Kubura", 26 March 2002, IT-01-47-PT.
[63] Court of Criminal Appeals of Tennessee, *State v. Tate*, 20 December 1995, 925 S.W.2d 548; Court of Appeals Tennessee, *Watson v. Ameredes*, 10 December 1997, No. 03-A-01-9704-CV-00129, 1997 Tenn. App. LEXIS 884; Court of Appeals for the 3rd Circuit, *United States v. Miller*, 26 June 1980, 624 F.2d 1198; Supreme Court of North Dakota, *Heringer v. Haskell*, 29 August 1995, 536 N.W.2d 362; District Court for the Western District of Tennessee, Western Division, *Lee v. Todd*, 23 December 1982, 555 F. Supp. 628; District Court for the Eastern District of New York, *Blue Cross and Blue Shield of New Jersey v. Philip Morris, Inc.*, 18 June 1999, 53 F. Supp. 2d 338.
[64] Document in Support of the Appeal, para. 32.
[65] Document in Support of the Appeal, para. 33.
[66] Document in Support of the Appeal, p. 15.
[67] Document in Support of the Appeal, para. 35.
[68] Document in Support of the Appeal, para. 35.
[69] Document in Support of the Appeal, para. 36.

Prosecutor argues, by reference to a decision of the ICTY[70] and case-law from the United States,[71] that a "possibility" test should apply with respect to whether a person had confidential information.[72] In relation to "importance", the Prosecutor argues that such a requirement was excluded from article 12 (1) (b) of the Code and established an unrealistic evidentiary burden on the Prosecutor.[73]

31. The Prosecutor submits that the test that should be applied in these circumstances is whether the former prosecutor had been in a position where he or she had "the possibility to become aware of the relevant confidential information".[74] If so, the Prosecutor argues that he or she should be disqualified from acting as counsel in the same case, without anything further needing to be demonstrated.[75] He asserts that the approach of the Pre-Trial Chamber in the present case was "legally unsupported, and simply fails to offer the necessary degree of protection".[76]

C. The Defence's submissions before the Appeals Chamber

32. The Defence submits that the Impugned Decision contained no errors[77] and that the Prosecutor's proposed "objective test" is unfounded in law.[78]

33. In relation to the first issue on appeal, the Defence points out that the Pre-Trial Chamber itself initiated the proceedings "'to preserve the integrity of the proceedings' and to ensure 'that they are conducted in a fair and transparent manner'",[79] and introduced the important safeguard of keeping the matter under review.[80] The Defence argues that the Pre-Trial Chamber was correct, pursuant to article 21 of the Statute, to

---

[70] ICTY, Trial Chamber, *Prosecutor v. Hadžihasanović and others*, "Decision on Prosecution's Motion for Review of the Decision of the Registrar to assign Mr Rodney Dixon as Co-Counsel to the Accused Kubura", 26 March 2002, IT-01-47-PT.
[71] Court of Appeals for the 3rd Circuit, *United States v. Miller*, 26 June 1980, 624 F.2d 1198; District Court for the Southern District of New York, *Frontline Communications International, Inc. v. Sprint Communications Company L.P.*, 21 November 2002, 232 F. Supp. 2d 281; Court of Appeals for the 2nd Circuit, *Government of India v. Cook Industries, Inc.*, 13 January 1978, 569 F.2d 737; District Court for the District of Connecticut, *Colorpix Systems of America v. Broan Mfg. Co., Inc.*, 7 February 2001, 131 F. Supp. 2d 331.
[72] Document in Support of the Appeal, paras 38-39.
[73] Document in Support of the Appeal, paras 35-36.
[74] Document in Support of the Appeal, para. 41.
[75] Document in Support of the Appeal, para. 41.
[76] Document in Support of the Appeal, para. 41.
[77] Response to the Document in Support of the Appeal, para. 2.
[78] Response to the Document in Support of the Appeal, paras 3-4, 8, 10, 26.
[79] Response to the Document in Support of the Appeal, para. 6.
[80] Response to the Document in Support of the Appeal, para. 7.

apply article 12 (1) (b) of the Code.[81] The Defence also submits that the Pre-Trial Chamber interpreted the provision correctly as requiring the Prosecutor to prove that counsel "was aware of confidential information of some significance to the case".[82] In the view of the Defence, this approach is supported by jurisprudence from the ICTY and the International Criminal Tribunal for Rwanda.[83]

34. In respect of the Prosecutor's arguments about the working methods of the OTP, the Defence submits that they should not be considered because they relate to the facts of the case, which are not before the Appeals Chamber.[84] The Defence submits that the legal standard applied merely required "the party challenging an appointment to substantiate its claim and properly identify the confidential information to which it alleges a person has been made privy".[85] The Defence contends that this standard was not unreasonable, and that the Prosecutor failed to discharge it in the instant case.[86] The Defence further submits that the Prosecutor's arguments about Mr Faal's exposure to confidential information were irrelevant and could not give rise to any presumption of knowledge of more than *de minimis* confidential information as Mr Faal had not been found to be privy to any confidential information.[87]

35. In respect of the Prosecutor's arguments about protection from an appearance of impropriety, the Defence argues that a plain reading of article 12 (1) (b) of the Code does not require such a factor to be taken into account; and that there can be no appearance of impropriety where there is no evidence that counsel has been privy to any confidential information.[88] The Defence further argues that the Prosecutor fails to cite a single case where a former prosecutor of an international court was barred from appearing as defence counsel on the basis of impropriety[89] and avers that the cases

---

[81] Response to the Document in Support of the Appeal, paras 9, 11, 15.
[82] Response to the Document in Support of the Appeal, paras 15-17.
[83] Response to the Document in Support of the Appeal, paras 19-20, citing, respectively, ICTY, Trial Chamber, *Prosecutor v. Hadžihasanović and others*, "Decision on Prosecution's Motion for Review of the Decision of the Registrar to assign Mr Rodney Dixon as Co-Counsel to the Accused Kubura", 26 March 2002, IT-01-47-PT, and International Criminal Tribunal for Rwanda, Trial Chamber, *Prosecutor v. Édouard Karemera et Matthieu Ngirumpatse*, Décision sur la Requête Urgente pour Matthieu Ngirumpatse aux Fins d'Annulation de la Poursuite et aux Fins de Mise en Liberté Immédiate, 11 April 2011, ICTR-98-44-T.
[84] Response to the Document in Support of the Appeal, paras 22-23, 25.
[85] Response to the Document in Support of the Appeal, para. 23.
[86] Response to the Document in Support of the Appeal, para. 24.
[87] Response to the Document in Support of the Appeal, para. 28.
[88] Response to the Document in Support of the Appeal, para. 30.
[89] Response to the Document in Support of the Appeal, para. 32.

from the one domestic jurisdiction to which the Prosecutor refers – the United States – are either so different factually from the current case as to be irrelevant or do not demonstrate any coherent position in relation to appearances.[90]

36. In relation to the second issue on appeal, the Defence submits that the Prosecutor's arguments deprive the Court's judges of their fact-finding function.[91] The Defence argues that the Prosecutor's mere "possibility" standard is incorrect, because article 12 (1) (b) of the Code does not say anything about possibilities.[92] The Defence submits that as "privy to" in article 12 (1) (b) of the Code is not defined, "it must bear its ordinary meaning: 'sharing in the secret of'".[93] Further, the Defence submits that the Pre-Trial Chamber's adoption of the *de minimis* standard was correct and "reflects the reality that in all areas of law, there are some factors that are so insignificant that any court ought not to consider them" and that therefore this finding cannot be improper.[94] The Defence further submits that the second sentence of article 12 (1) (b) of the Code illustrates that the provision requires the Chamber to balance the "accused's right to be represented by counsel of their choosing against the risk that the OTP would be disadvantaged by the Defence having access to confidential information".[95]

37. The Defence also submits that the imposition of a "restraint of trade", as allegedly urged for by the Prosecutor in arguing that former OTP lawyers should not be able to join defence teams for a period of time regardless of whether a conflict of interest exists, is contrary to general principles of employment law. It is averred that the employment contracts of OTP lawyers do not provide for such a restriction.[96]

38. The Defence further states that, should any error of law be found, it reserves the right to request the Chamber to exercise its discretion under article 12 (1) (b) of the Code to lift any impediment to Mr. Faal's appointment in the interests of justice.[97]

---

[90] Response to the Document in Support of the Appeal, para. 33.
[91] Response to the Document in Support of the Appeal, para. 35.
[92] Response to the Document in Support of the Appeal, paras 36-37.
[93] Response to the Document in Support of the Appeal, para. 37.
[94] Response to the Document in Support of the Appeal, para. 40.
[95] Response to the Document in Support of the Appeal, para. 41.
[96] Response to the Document in Support of the Appeal, para. 43.
[97] Response to the Document in Support of the Appeal, para. 44.

D. The determination of the Appeals Chamber

1. The Appeals Chamber's understanding of the Impugned Decision

39. As set out above, the Pre-Trial Chamber made an initial finding that it had not been proved that Mr. Faal actually was aware of confidential information in the present case, "let alone *de minimis* information".[98] This finding suggests that, in the Pre-Trial Chamber's view, Mr Faal was not aware of any confidential information, not even *de minimis* confidential information. This is also the meaning of the Impugned Decision for which the Defence contends.[99]

40. However, in the paragraphs of the Impugned Decision that follow, the Pre-Trial Chamber proceeds to make further findings on the submissions of the Prosecutor, which suggest that the Pre-Trial Chamber's ultimate conclusion was that Mr Faal was aware of some confidential information but that this information was not more than *de minimis*.

41. The Appeals Chamber notes that, from paragraph 17 of the Impugned Decision onwards, the Pre-Trial Chamber does not simply refer to Mr Faal not being aware of *any* confidential information. Instead, having extensively defined the expression "privy to confidential information" to mean being "aware of confidential information of some significance to the case *sub judice*",[100] the Pre-Trial Chamber held in relation to the Prosecutor's Request and the nine annexes thereto, that they did not reveal that "Mr. Faal was privy to confidential information of the *case* within the meaning of article 12(1)(b) of the Code" (underlining added).[101] Furthermore, the Pre-Trial Chamber found with respect to the Prosecutor's Reply and the six annexes appended thereto, that the Prosecutor "has also failed to prove that Mr. Faal became aware of more than the *de minimis* confidential information".[102] Having assessed the submissions of the Prosecutor and the Defence as a whole, the Pre-Trial Chamber reiterated its conclusion that "the Prosecutor has failed to satisfy the required standard

---

[98] Impugned Decision, second para. 17.
[99] *See* Response to the Document in Support of the Appeal, para. 39.
[100] Impugned Decision, para. 17.
[101] Impugned Decision, para. 19.
[102] Impugned Decision, para. 21.

of proof that Mr. Faal was aware of more than the *de minimis* confidential information".[103] The Impugned Decision on this aspect of the case is thus equivocal.

42. In light of the above, the Appeals Chamber will proceed on the basis that the Pre-Trial Chamber concluded that, while Mr Faal was aware of some confidential information, that information was no more than *de minimis*.

2. The issues on appeal and their scope

43. The Appeals Chamber recalls that the issues on appeal are:

> 1. Whether, as a matter of law, prosecution lawyers may join a defence team in a case that was open at the time when the person worked for the prosecution [or whether the person] should be deemed as being privy to confidential information related to the case under Article 12(1)(b) of the Code of Professional Conduct; and
>
> 2. Whether the correct test to determine that a person is 'privy to confidential information' under Article 12(1)(b) is whether that person has become aware of more than *de minimis* confidential information related to the relevant case.[104]

44. Both issues require the Appeals Chamber to examine whether the Pre-Trial Chamber applied the correct legal standard to the facts in determining whether Mr Faal may represent Mr Muthaura in the present case, namely whether Mr Faal "was aware of confidential information of some significance to the case *sub judice*, which prompts the Chamber to invalidate the person's continuous involvement with the opposite party (Defence)".[105] As such, the Appeals Chamber will proceed to consider the two issues together.

3. The legal basis for the Pre-Trial Chamber to rule on a request to invalidate the appointment of counsel

45. The Pre-Trial Chamber initiated the proceedings in relation to this issue *proprio motu* as it was "keen to preserve the integrity of the proceedings to the effect that they are conducted in a fair and transparent manner, respecting the rights of both parties involved".[106] It determined that the appropriateness of Mr Faal appearing for the

---

[103] Impugned Decision, para. 29.
[104] Document in Support of the Appeal, para. 15, referring to Decision on Application for Leave to Appeal, para. 11.
[105] Impugned Decision, para. 17.
[106] Impugned Decision, para. 11.

Defence in the instant case would be decided on the basis of such an approach,[107] and rightly so.

46. The Appeals Chamber considers that protecting the integrity of the proceedings – in particular their fairness and expedition in the specific context under consideration – is a matter that is necessarily within the jurisdiction of the Pre-Trial Chamber and that its approach was therefore appropriate. The Pre-Trial Chamber did not expressly mention article 64 of the Statute in coming to its decision. That is likely to be because, on its face, that provision does not expressly apply to the Pre-Trial Chamber. However, the essence of its relevant underlying principles – ensuring "that a trial is fair and expeditious and is conducted with full respect for the rights of the accused"[108] and adopting "such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings"[109] – were clearly behind the Pre-Trial Chamber's approach to this issue. Insofar as the Prosecutor appears to suggest that the Pre-Trial Chamber failed correctly to analyse the issue before it "as one involving the fairness of the trial, and not simply the oversight of attorney ethics",[110] this is contrary to the express basis upon which the Pre-Trial Chamber was acting.

4. The relevance of the Code to the issue at hand

47. Although the Pre-Trial Chamber was thus acting to protect the fairness and integrity of the proceedings, the Appeals Chamber considers that the Pre-Trial Chamber, in deciding this issue, was equally correct to have regard to the Code, and, in particular, the standard laid down in its article 12.

48. The Code is a part of the Court's applicable law under article 21 (1) (a) of the Statute, which requires the Court to apply, in the first place, its Statute, Elements of Crimes and Rules of Procedure and Evidence. Rule 8 of the Rules of Procedure and Evidence mandates the drawing up of a Code of Professional Conduct for counsel. Pursuant to that rule, the Code was adopted by the Court's legislative body, the Assembly of States Parties, by consensus, on 2 December 2005.[111] Although Mr Faal is not the lead counsel of Mr Muthaura, in this case, he is practising before the Court

---

[107] Impugned Decision, para. 11.
[108] Article 64 (2) of the Statute.
[109] Article 64 (3) (a) of the Statute.
[110] Document in Support of the Appeal, para. 17.
[111] Resolution ICC-ASP/4/Res.1.

as counsel within the meaning of article 1 of the Code, and he is therefore bound by its provisions.

49. Article 12 (1) (b) of the Code specifically regulates impediments to representation as a result of having been privy to confidential information as a staff member of the Court relating to the case in which they seek to appear. It provides:

> 1. Counsel shall not represent a client in a case:
>
> [...]
>
> (b) In which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified in the interests of justice. Counsel shall still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court.[112]

50. Given that the Code directly regulates the situation under consideration in the current appeal, the Appeals Chamber determines that it was therefore appropriate for the Pre-Trial Chamber to draw upon its provisions in adopting a standard to ensure that the proceedings were fair and that their integrity was protected.

51. Insofar as the Prosecutor appears to regard the Code to regulate attorney ethics, but not to be an appropriate guide to fairness at trial in the current context,[113] the Appeals Chamber disagrees. Article 12 (1) (b) of the Code prohibits counsel from appearing in a case in which he or she was involved or privy to confidential information as a staff member of the Court – the OTP being an organ of the Court.[114] Preventing counsel from appearing in such circumstances, but permitting impediments to representation on this basis to be lifted if deemed to be justified in the interests of justice, is consistent with ensuring that a trial is fair and protecting the integrity of the proceedings. Indeed, ensuring that a person is suitable to act as counsel, preventing conflicts of interest, protecting the confidentiality of information and ensuring that one party does not have an unfair advantage arising therefrom and

---

[112] Pursuant to article 12 (4) of the Code, article 12 is "without prejudice to article 16" of the Code, which mandates counsel to "exercise all care to ensure that no conflict of interest arises" (article 16 (1) of the Code).
[113] Document in Support of the Appeal, para. 27.
[114] Article 34 (c) of the Statute.

respecting the rights of the accused are features of a fair trial and also reflect the purposes underpinning article 12 (1) (b) of the Code.

(a) The requirement of knowledge

52. In interpreting and applying article 12 (1) (b) of the Code, having regard to its ordinary meaning, its context as well as its object and purpose, the Appeals Chamber holds that the provision requires that counsel had knowledge of confidential information relating to the case.

53. The wording of the provision is clear. The standard imposed by article 12 (1) (b) of the Code is that counsel "was privy to" confidential information. The Shorter Oxford English Dictionary (5th ed.) defines "privy to" as meaning "[s]haring in the knowledge of something secret or private",[115] i.e. that a person has knowledge of something secret or private that has been shared with him or her. Contrary to the arguments of the Prosecutor, the wording of article 12 (1) (b) refers to a case in which counsel "was privy to confidential information", not whether counsel "was or could have been" privy to that information or had "the possibility to become aware of the relevant confidential information".[116] The provision, which must be interpreted in light of the Statute, to which it is subject, reflects a fair balance, in the context of impediments to representation and a fair trial, between the interests of the OTP, the right to legal assistance of the accused's choosing (albeit this is not an absolute right[117]) and not unduly restricting the future professional practice of a former staff member of the Court.

54. The requirement that counsel has knowledge of confidential information relating to the case makes it clear to counsel when he or she is able to represent a client. It is, in the first instance, counsel's responsibility to ensure that an impediment to representation and/or a conflict of interest does not arise, in accordance with his or her professional obligations under the Code.[118] First and foremost, counsel must not take on a case in relation to which he or she was privy to *any* confidential information as a member of the OTP (subject to any application to lift the impediment that

---

[115] *Shorter Oxford English Dictionary, Volume 2 N-Z*, (Oxford University Press, 5th ed., 2002), p. 2351.
[116] Document in Support of the Appeal, para. 41.
[117] ECtHR, *Croissant v. Germany*, "Judgment", 25 September 1992, application no. 13611/88; ECtHR, *Rozhkov v. Russia*, "Decision" , 5 February 2007, application no. 64140/00.
[118] *See* articles 12 and 16 of the Code.

ordinarily arises in the interests of justice, which will be addressed further below). The threshold imposed by article 12 (1) (b) of the Code for preventing counsel from representing a client is therefore not a high one. It contrasts, for example, with the higher standard imposed by article 14 (C) of the ICTY Code of Professional Conduct, which prevents counsel from representing a client "in connection with a matter in which counsel participated personally and substantially as an official or staff member of the Tribunal" unless the Registrar of that Tribunal determines that no real possibility of a conflict of interest arises.[119] No such personal and substantial involvement in the case is required before counsel is prevented from representing a client at this Court as a result of having been privy to confidential information relating to that case – and counsel will therefore need to consider the situation with particular care prior to accepting a case.

55. This is particularly the case given that the potential consequences of not applying the relevant provisions correctly are (i) being disqualified from the case; (ii) the institution of disciplinary proceedings pursuant to the Code, with the ultimate potential sanction being a permanent ban on practising before the Court and being struck off the list of counsel (article 42 (1) (e) of the Code); and (iii) an enduring tarnish on counsel's professional reputation (honesty and/or judgment). Given both the nature of the obligation and those potential consequences, the Appeals Chamber would expect counsel to err on the side of caution and either not agree to represent a client at all or, certainly, immediately bring the matter before the relevant Chamber pursuant to article 12 (1) (b) of the Code prior to agreeing to represent a client if in any doubt at all about the application of the provisions to him or her.

56. The Appeals Chamber further finds that if the Prosecutor wishes to challenge the assignment of a particular person as counsel, it is not unreasonable for him to have to demonstrate knowledge of confidential information relating to the case. Contrary to the Prosecutor's submissions, this does not need to be information which counsel presently "recalls"[120] – all that is required is to prove that counsel once had knowledge of the particular information.

---

[119] ICTY, Code of Professional Conduct for Counsel Appearing before the International Tribunal, adopted on 12 June 1997 and last amended on 22 July 2009, IT/125 REV. 3.
[120] Document in Support of the Appeal, para. 16.

57. The Appeals Chamber also does not accept that the standard imposed by article 12 (1) (b) of the Code places upon the Prosecutor an impossible evidentiary burden. There are various methods by which the Prosecutor could prove relevant knowledge of one of his staff members in these circumstances, whether by use of methods attempted in the present case (evidence from other staff members, electronic records of materials accessed, records of meetings or e-mail distribution lists) or, indeed, by any other appropriate means by which the Prosecutor can substantiate his allegations.

58. Having made the above determinations, it follows that the Appeals Chamber rejects the argument of the Prosecutor that a so-called "objective standard" should apply to the matters under consideration, resulting in all members of the OTP being deemed to be privy to confidential information relating to any case that was open at the time of their employment at the OTP (see the first issue on appeal). There is nothing in the wording of article 12 of the Code, nor indeed in any other provision of the Court's governing texts, that indicates that there should be a general bar – whether limited by reference to cases that were open at the time of their employment or otherwise – on former staff members of the OTP representing the defence. On the contrary, as set out above, article 12 of the Code specifically envisages former staff members of the Court appearing as counsel and regulates the considerations that should apply when they do so. In other words, prior association with the OTP does not, *per se*, disqualify a former OTP staff member from working for the defence. The fact that a case was already open by the time that counsel left the employ of the OTP would not, without more, disqualify counsel from acting for the defence in that case. A conflict of interest must be established.

59. The Appeals Chamber notes, furthermore, that the arguments that the Prosecutor makes in relation to the working methods of the OTP were clearly not sufficient to have established to the satisfaction of the Pre-Trial Chamber that Mr Faal had been privy to more than *de minimis* confidential information in the circumstances of the present case; nor that any such presumption should arise resulting from those matters that the Prosecutor had put before that Chamber.

60. Moreover, in relation to the arguments that the Prosecutor makes about appearances, the Appeals Chamber does not regard there to be a risk of an appearance of impropriety in circumstances in which counsel has unequivocally concluded that he

or she was neither involved in nor was privy to any confidential information relating to the case, nor that any conflict of interest arises; nor has it been established by the Prosecutor that counsel did have any such impediment to representation. In other words, without more, it cannot be said that there is an appearance of impropriety arising out of the mere fact of having previously worked for the OTP regardless of the circumstances.

61. It is also of note that neither is the standard contended for by the Prosecutor to be found in international practice, nor is there any suggestion or evidence of any such standard equating to a principle or rule of international law (see article 21 (1) (b) of the Statute). Even in the *Hadžihasanović* case on which the Prosecutor relies, it was expressly stated that "prior association alone does not justify disqualification of a former employee of the Prosecution from becoming a defence counsel".[121]

62. This Court has its own legal framework governing the issues that arise in this appeal, as set out above. This cannot be replaced by the practice of other courts and tribunals in the present circumstances. In this context, the Appeals Chamber notes that the Prosecutor does not explain his reliance upon case-law from just one domestic jurisdiction (the United States). It is not argued that article 21 (1) (c) of the Statute is applicable in the current circumstances, nor that the case-law presented should be interpreted as founding a general principle of law "derived by the Court from national laws of legal systems of the world" within the meaning of that article. The Appeals Chamber therefore does not find that case-law to be of assistance in resolving the issues before it in the present appeal.

63. The Appeals Chamber notes the argument of the Prosecutor that the employment contracts of his staff and the Staff Rules oblige members of the OTP to recognise that everything is confidential within the OTP and to maintain that confidentiality.[122] Yet that argument does not assist the Prosecutor in the current context, which concerns whether counsel was privy to confidential information "relating to the case in which counsel seeks to appear", not confidential information more generally. The third sentence of article 12 (1) (b) of the Code makes clear that

---

[121] ICTY, Trial Chamber, *Prosecutor v. Hadžihasanović and others,* "Decision on Prosecution's Motion for Review of the Decision of the Registrar to assign Mr Rodney Dixon as Co-Counsel to the Accused Kubura", 26 March 2002, IT-01-47-PT, para. 53.
[122] Document in Support of the Appeal, paras 5, 23.

counsel shall "still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court", even if the impediment to representation is lifted by the Court.

64. The Appeals Chamber therefore concludes, in relation to this aspect of the appeal, that for an impediment to representation to arise based upon the fact that counsel was "privy to confidential information" as a staff member of the Court within the meaning of article 12 (1) (b) of the Code, counsel has to have had knowledge of confidential information relating to the case in which counsel seeks to appear.

(b) The "*de minimis*" standard

65. The Appeals Chamber recalls that the Pre-Trial Chamber added a further qualification to the requirement of being "privy to confidential information", namely that the confidential information needed to be "of some significance".[123] The Appeals Chamber cannot agree with this interpretation. The phrase "privy to confidential information" is clear and unambiguous. It need not and should not be qualified in any way. To require that the shared information be "more than *de minimis*" or "of some significance" alters the plain meaning of the phrase.

66. Once it had been determined that counsel was privy to any confidential information relating to the case in which he sought to appear, that was an impediment justifying counsel's disqualification pursuant to article 12 (1) (b) of the Code, unless any such impediment was lifted under the second sentence of the article. The Pre-Trial Chamber erred in failing to follow such an approach. In other words, without putting a gloss upon the words "confidential information", the Pre-Trial Chamber should have adopted a legal standard that addressed (i) whether counsel was aware of any confidential information relating to the case and (ii) if so, whether it was nevertheless in the interests of justice for counsel to be permitted to represent the accused.

67. Such an approach also has the advantage of requiring counsel to come before the Chamber to request the lifting of the impediment in relation to any confidential information that he or she has come across in his or her previous employment, rather than having to make his or her own assessment of whether the information was in fact

---

[123] Impugned Decision, para. 17.

"*de minimis*" and then unilaterally to decide whether or not to bring it to the attention of the Chamber. It is emphasised that counsel should err on the side of caution in bringing any information that related to the case to the Chamber's attention that might be seen as being confidential. Without it being appropriate in the context of this appeal to give an exhaustive definition of what constitutes "confidential information", counsel should be aware that the phrase extends in principle to internal assessments about the strengths and weaknesses of a particular case. The Appeals Chamber notes in this context rule 81 of the Rules of Procedure and Evidence, which provides that, "[r]eports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure".

68. The Appeals Chamber considers that, ordinarily, a conflict of interest will be presumed once knowledge of confidential information has been established, as one would usually follow from the other. A duty of confidentiality to a former employer when contrasted with the requirement to represent a present client is likely to lead to a conflict of interest. However, there are circumstances in which there may not be any real conflict of interest or other impediment to representation. The second sentence of article 12 (1) (b) of the Code expressly provides for this possibility in providing that the lifting of the impediment to representation under that article may be ordered by the Court "at counsel's request" and "if deemed justified in the interests of justice".

69. This broad discretion afforded to the Chamber under article 12 (1) (b) of the Code is again consistent with its primary duty to ensure that the proceedings as a whole are fair. It is not possible, in the abstract, to define exhaustively what might be "in the interests of justice": this will depend upon all relevant factors and circumstances of a particular case. However, the Appeals Chamber notes that one of the factors that may be considered is likely to be the nature of the confidential information itself. If it is of a "*de minimis*" nature – in the sense of Black's Law Dictionary definition of being "so insignificant that a court may overlook it in deciding an issue or case"[124] – this might well be a factor that convinces the Chamber that it is in the interests of justice to permit this particular counsel to represent the accused.

---

[124] B. G. Gardner (ed.), *Black's Law Dictionary*, (West Group, 8th ed., 2004), p. 464.

70. Yet a consideration of whether the information was of a "*de minimis*" nature is potentially only one factor that a Chamber may wish to consider in ruling upon whether it is in the interests of justice for this particular counsel to represent the accused in all the circumstances of the particular case. Other factors that might be considered under this head could include the rights of the accused, counsel's position within the defence team, and concerns about the overall fairness or the appearance of impropriety in relation to the proceedings arising, in the specific circumstances, out of the fact that counsel possessed confidential information relating to the case.

IV. APPROPRIATE RELIEF

71. 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). Given that the Appeals Chamber has determined that the Pre-Trial Chamber applied the incorrect legal standard in addressing the facts of this case, the Appeals Chamber holds that it is appropriate for the Impugned Decision to be reversed in the specific circumstances of the case.

72. The Appeals Chamber recalls the ambiguity of the Impugned Decision as to whether or not Mr Faal had knowledge of any confidential information.[125] In these circumstances, the Pre-Trial Chamber is directed to decide anew on the question of whether to invalidate the appointment of Mr Faal in light of the present judgment. The Pre-Trial Chamber will first need to clarify whether there was any confidential information of which Mr Faal was aware. In case of an affirmative answer, it will need to determine whether it is nevertheless in the interests of justice that Mr Faal should be part of the Defence. In this context, the Appeals Chamber notes paragraph 44 of the Defence Response to the Document in Support of the Appeal, in which it is stated that, in the event that the Appeals Chamber finds an error of law, "the Defence advise that it reserves the right to request that the discretion provided for in Article 12(1)(b) of the Code of Conduct be exercised in the interests of justice to lift any impediment to Mr. Faal's appointment".[126]

---

[125] *See* above, paras 39-40.
[126] Response to the Document in Support of the Appeal, para. 44.

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

Judge Akua Kuenyehia
Presiding Judge

Dated this 10th day of November 2011

At The Hague, The Netherlands