

MICT-13-33
01-07-2016
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THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

CASE No. MICT-13-33

THE SINGLE JUDGE

Before: Judge Aminatta Lois Runent N'Gum

Registrar: Mr. John Hocking

Date Filed: 1 July 2016

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

Public

REQUEST FOR CERTIFICATION TO APPEAL DECISION ON MOTION TO
RESCIND PROTECTIVE MEASURES FOR DEFENCE WITNESS ALM

Office of the Prosecutor:
Mr. Serge Brammertz

Jean de dieu Kamuhanda:
Mr. Peter Robinson, Counsel

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1. Jean de dieu Kamuhanda respectfully requests, pursuant to Rule 80(C), certification to appeal the Single Judge's *Decision on Motion to Rescind Protective Measures for Defence Witness ALM* (29 March 2016)(the "Impugned Decision")

2. Rule 80(C) provides in pertinent part:

Requests for certification shall be filed within seven days of the filing of the impugned decision.

3. The Single Judge has kindly granted an extension of time for certification to appeal until seven days after the disclosure of a redacted version of two confidential decisions relied upon in the Impugned Decision.¹ The redacted version of the *Stanisic & Zupljanin* decision was issued on 29 June 2016.² Therefore, this request is timely.

4. Rule 80(B) provides:

Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

5. Mr. Kamuhanda seeks to appeal the Single Judge's decision that his motion did not demonstrate a compelling showing of exigent circumstances that would justify the rescission of the protective measures.³

6. As a ground of appeal, Mr. Kamuhanda would contend that the Single Judge erred in failing to consider the consent of family members to the rescission of protective measures for the deceased witness when determining whether exigent circumstances existed. It is contended that instead of denying the motion outright, the Single Judge should have ordered the WISP to contact the family members of Witness ALM and determine their position on this matter, including any effect of rescission of Witness ALM's protective measures on them.

7. Mr. Kamuhanda would contend that the decision of the Single Judge makes it more difficult to rescind protective measures for deceased witnesses, when in fact they are in least need of protective measures. As such, it frustrates an important goal of the

¹ *Decision on Motion for Extension of Time* (5 April 2016)

² *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-R75H.3, *Decision on Motion for Redacted Version of Decision* (29 June 2016)

³ *Impugned Decision*, p. 3

Mechanism to make the records of ICTY and ICTR proceedings available for future generations with as much transparency as possible.

8. If granted leave to appeal, Mr. Kamuhanda would contend that the decision of the Single Judge is contrary to the *Milosevic* decision that she cited in support of her decision.⁴ In that case, the Chamber found that exigent circumstances existed to vary the protective measures of a deceased witness, in part because the witness' family did not object.⁵ The Single Judge failed to give the position of family members any consideration whatsoever.

9. Mr. Kamuhanda would also contend that the Single Judge's decision was contrary to other precedent, such as in the *Seselj* and *Stanisic & Simatovic* cases at the ICTY, and the *Zigiranyirazo* case at the ICTR, where the protective measures of a deceased witness were rescinded when he was single with no immediate family.⁶ There is no significant difference between a deceased witness with no immediate family and a deceased witness whose immediate family is in favor of rescinding the protective measures.

10. While the correctness, or lack thereof, of the Impugned Decision is not a consideration for certification to appeal, the issue presented by the proposed appeal is one which would significantly affect the fair conduct of the proceedings in this case, and an immediate resolution by the Appeals Chamber would materially advance the proceedings.

11. With respect to the first prong, Mr. Kamuhanda intends to file a motion for review of his wrongful conviction. That motion will include references to his alibi presented at trial. Witness ALM was one of his alibi witnesses. Mr. Kamuhanda's right to a public trial, and by extension his right to a public review of his conviction, will be substantially affected if he is unable to refer to Witness ALM by his true name, in light of

⁴ *Impugned Decision* at fn. 6.

⁵ *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Application of the Prosecutor of the Tribunal for Variation of Protective Measures* (27 January 2010) at para. 21

⁶ *Prosecutor v. Seselj*, No. IT-03-67-T, *Decision on Prosecution's Motion for Admission of Evidence of Stevan Todorovic (VS-1008) pursuant to Rule 92 quater of the Rules of Procedure and Evidence* (17 February 2010); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution Motion for Admission of Evidence of Stevan Todorovic pursuant to Rule 92 quater* (29 October 2010) at para. 33; *Prosecutor v Zigiranyirazo*, No. ICTR-01-73, *Decision Rescinding the Protective Measures of Witness ATM* (26 September 2011)

the willingness of Witness ALM's family to rescind the protective measures.⁷

12. In addition, the rescission of the protective measures for Witness ALM may encourage other witnesses to come forward and agree to testify at a review hearing without protective measures. This would allow for greater accountability for their version of events and for a means for members of the public to come forward if the account of the witness is untrue. In that way, Mr. Kamuhanda's right to a fair hearing will be significantly enhanced.

13. An immediate resolution by the Appeals Chamber would materially advance the proceedings in that it would allow for the issue to be decided before the motion for review is filed and if granted, would allow Mr. Kamuhanda to refer to Witness ALM, and any other witnesses to follow, by their true names in his motion and at any review hearing.

14. In the *Bagosora et al* case, the Trial Chamber granted certification to appeal a decision concerning protective measures for defence witnesses where the decision would have an impact on other defence witnesses in the case.⁸ This is also the situation here.

15. Certification to appeal in the context of review proceedings does not fit neatly into the test set forth in Rule 80(B). However, an issue such as the rescission of protective measures for witnesses who no longer need them is one that is likely to recur in this and other cases. Therefore, given the Impugned Decision's departure from previous decisions, it is also in the interests of justice that the Appeals Chamber be provided with the opportunity to provide definitive guidance on the issue of rescission of protective measures for deceased witnesses.

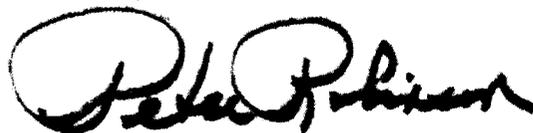
16. For any and all of the above reasons, certification to appeal the Impugned Decision should be granted.

⁷ Other defence witnesses have already agreed to rescission of their protective measures as Mr. Kamuhanda prepares for his review proceedings: *Decision on an Application Pursuant to Rule 86(H)* (12 January 2016) (Witness NTD); *Decision on an Application Pursuant to Rule 86* (23 March 2016) (Witness ALB); *Decision on an Application Pursuant to Rule 86* (19 April 2016) (Witness VPG)

⁸ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses* (21 July 2005) at paras. 9,11

Word count: 1248

Respectfully submitted.

A handwritten signature in black ink, appearing to read "Peter Robinson". The signature is written in a cursive style with large, rounded letters.

PETER ROBINSON
Counsel for Jean de dieu Kamuhanda



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