



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-95-5/18-
AR73.3
Date: 4 June 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision of: 4 June 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON INTERLOCUTORY APPEAL OF THE TRIAL
CHAMBER'S DECISION ON PROSECUTION MOTION
SEEKING DETERMINATION THAT THE ACCUSED
UNDERSTANDS ENGLISH**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

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1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the “Appeal of Trial Chamber’s Decision on Languages” (“Appeal”), filed by Radovan Karadžić (“Appellant”) on 29 April 2009 appealing the “Decision on Prosecution’s Motion Seeking Determination that the Accused Understands English for the Purposes of the Statute and the Rules of Procedure and Evidence”, rendered by the Trial Chamber in this case on 26 March 2009 (“Impugned Decision”).¹

A. Procedural Background

2. The Appellant has chosen to represent himself and is assisted by four legal associates, an investigator and two case managers assigned by the Registry of the Tribunal,² as well as a number of *pro bono* advisers and interns.³ During the initial pre-trial phase, although the Trial Chamber had not made a determination of the Appellant’s ability to understand English, it proceeded on the basis that the Appellant’s native language, Serbian (with Bosnian and Croatian, referred to collectively by the Tribunal as “B/C/S”), was the appropriate language in which the Appellant should receive documents required under the Statute of the Tribunal (“Statute”) and the Rules of Procedure and Evidence (“Rules”).⁴ Accordingly, it ordered that any transcripts disclosed pursuant to Rule 66(A) of the Rules should be transcribed in B/C/S rather than provided to him in audio format.⁵

3. On 17 February 2009, the Prosecution filed a motion requesting a determination by the Trial Chamber that English is a language which the Appellant understands for the purposes of the Statute and the Rules.⁶ In the event that the Trial Chamber was unable to reach such a conclusion, the Prosecution requested a determination that providing B/C/S audio files to him, accompanied by English language transcripts, is a form of disclosure that satisfies the requirements of Rule 66(A)(ii) of the Rules.⁷ The Trial Chamber rendered the Impugned Decision on 26 March 2009, concluding that the Appellant understands English for the purposes of the Rules and the Statute. As a result, it

¹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Prosecution Motion Seeking Determination that the Accused Understands English for the Purposes of the Statute and the Rules of Procedure and Evidence, 26 March 2009.

² Current level of Registry-assigned assistance as confirmed by the *Pro Se* Legal Liaison Officer of the Registry.

³ Impugned Decision, para. 1.

⁴ See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on the Accused’s Request that All Materials, Including Transcripts, Be Disclosed to Him in Serbian and Cyrillic Script, 25 September 2008 (“Decision of 25 September 2008”), para. 10; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on the Accused Motion for Full Disclosure of Supporting Material, 25 November 2008 (“Decision of 25 November 2008”), paras 23, 29

⁵ Decision of 25 September 2008, para. 11; Decision of 25 November 2008, para. 23.

⁶ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution Motion Seeking Determination that the Accused Understands English for the Purposes of the Statute and the Rules of Procedure and Evidence, 17 February 2009 (“Motion”), para. 1.

held that the requirements of disclosure under Rule 66(A)(ii) of the Rules would be satisfied by the Prosecution providing the Appellant with the relevant materials in the form of audio-format tapes, accompanied by English transcripts.⁸

4. The Appellant's application for certification to appeal the Impugned Decision⁹ was granted on 22 April 2009.¹⁰ Accordingly, the Appellant filed his appeal on 29 April 2009. The Prosecution filed its response on 11 May 2009¹¹ and the Appellant replied on 15 May 2009.¹²

B. Standard of Review

5. The Appeals Chamber recalls that decisions relating to the management of pre-trial and trial proceedings are matters that fall within the discretion of the Trial Chamber.¹³ In order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber committed a "discernible error" resulting in prejudice to that party.¹⁴ The Appeals Chamber will only overturn a Trial Chamber's discretionary decision where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹⁵

C. Submissions

6. The Appellant requests that the Impugned Decision be quashed.¹⁶ First, he submits that the Trial Chamber's decision was based upon an incorrect interpretation of the law governing the right to self-representation.¹⁷ In support of this, the Appellant underlines that self-representation is recognised as an "indispensable cornerstone of justice"¹⁸ and contends that the Trial Chamber's

⁷ Motion, paras 2, 23.

⁸ Impugned Decision, para. 23.

⁹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Application for Certification to Appeal Decision on Languages, 6 April 2009.

¹⁰ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's Application for Certification to Appeal Decision on Languages, 22 April 2009.

¹¹ Prosecution Response to Karadžić's Appeal of Trial Chamber's Decision on Languages, 11 May 2009 ("Response").

¹² Reply to Prosecution's Response to Accused's Appeal of Trial Chamber Decision on Languages, 15 May 2009 ("Reply").

¹³ *Sec. inter alia, Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009, para. 11; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.1, Decision on Appellant Radovan Karadžić's Appeal Concerning Holbrooke Agreement Disclosure, 6 April 2009, para. 14; *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-AR73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 26 January 2009, para. 5.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Appeal, para. 62.

¹⁷ Appeal, para. 22.

¹⁸ Appeal, para. 25, quoting *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 11. See also Appeal, paras 23-38, 59

decision “betray[s] an inappropriate disposition towards the self-represented accused himself and operate[s] to make the right of self-representation almost impossible to exercise.”¹⁹ Second, the Appellant submits that the Trial Chamber failed to articulate the correct legal threshold for determining an accused’s ability to understand English for the purposes of the Rules and the Statute.²⁰ In particular, the Appellant submits that the Trial Chamber should have taken into consideration the *Tolimir* Appeal Decision as well as Articles 67(1)(a) and (f) of the Rome Statute of the International Criminal Court (“Rome Statute” and “ICC”, respectively) in determining the appropriate legal standard.²¹ Third, he argues that the Trial Chamber erred in its consideration of the evidence as to his ability to understand English.²² Finally, he posits that as a result of these errors an unfair disposition was reached.²³

7. The Prosecution responds that the Trial Chamber applied the correct legal standard when it found that the Appellant understands English “for the purposes of the Rules and the Statute”.²⁴ In this respect, it submits that the finding in the *Tolimir* Appeal Decision, that an accused must understand the language of the proceedings “sufficiently in order to allow for the effective exercise of the right to conduct his defence,” is consistent with the standard applied by the Trial Chamber.²⁵ The Prosecution rejects the Appellant’s reliance on the Rome Statute on the basis that the ICC standard is not applicable before the Tribunal.²⁶ Further, it points to the *Katanga* Appeal Decision on languages at the ICC in which, it submits, the ICC Appeals Chamber acknowledged the differences between the relevant statutory provisions of the ICC and the Tribunal.²⁷ It also submits that the Trial Chamber’s findings of fact regarding the Appellant’s ability to understand English were reasonable and the Appellant has failed to demonstrate that no reasonable trier of fact could have reached the same conclusion.²⁸ Finally, the Prosecution submits that, contrary to the Appellant’s arguments, the Impugned Decision does not prejudice the Appellant’s right to self-representation.²⁹

¹⁹ Appeal, para. 27. See also paras 52-58, 61.

²⁰ Appeal, paras 42-48.

²¹ Appeal, paras 45-46, citing *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-AR73.1, Decision on Interlocutory Appeal Against Oral Decision of the Pre-Trial Judge of 11 December 2007, 28 March 2008 (“*Tolimir* Appeal Decision”), para. 6.

²² Appeal, paras 49-51, 60.

²³ Appeal, paras 52-58, 61.

²⁴ Response, para. 4, citing Impugned Decision, para. 23.

²⁵ Response, para. 4, citing *Tolimir* Appeal Decision, para. 15. See also Response, paras 5-13.

²⁶ Response, para. 14.

²⁷ Response, para. 14, citing *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07 OA3, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, 27 May 2008 (“*Katanga* Appeal Decision”), paras 48-49.

²⁸ Response, paras 15-18.

²⁹ Response, paras 19-22.

8. The Appellant replies that the Prosecution's reliance on the *Katanga* Appeal Decision to argue that the ICC standard is not applicable to the Tribunal is "potentially misleading".³⁰ He argues that the Tribunal has always maintained that it applies the "highest standards of international justice" and therefore it is problematic to interpret the ICC Appeals Chamber as identifying two standards: a higher one for the ICC and a lower one applicable to the Tribunal.³¹ He argues that the *Katanga* Appeal Decision sets out what is necessary for the realisation of the fair trial rights of the accused.³² He further posits that the *Katanga* Appeal Decision does not in fact purport to use a higher standard than that of the Tribunal but rather that the ICC Appeals Chamber was "engaged in the elaboration of what it means to understand a language in the relevant sense" and took an approach which is consistent with the *Tolimir* Appeal Decision's approach.³³

D. Discussion

9. The Appeals Chamber considers that the substance of the Appellant's arguments regarding the notion of the right to self-representation³⁴ and whether the Trial Chamber's alleged lack of respect for the Appellant's exercise of that right resulted in an unfair disposition address overlapping issues.³⁵ These arguments will be addressed after the Appeal Chamber's analysis of the Appellant's arguments challenging the Trial Chamber's finding that he understands English for the purposes of the Rules and the Statute.³⁶

1. Legal standard for the determination of an accused's language ability

10. The Appellant submits that the Trial Chamber failed to articulate the applicable law on "the legal threshold differentiating an accused who does not understand English for the purposes of the Tribunal's Statute and Rules, from one who does" and as such failed to correctly distinguish the legal standard applicable to an accused represented by counsel and a self-represented accused.³⁷ In this respect, he submits that the appropriate standard is the one set out in the *Tolimir* Appeal Decision that an accused must understand a language "sufficiently in order to allow for the effective exercise of his right to conduct his defence."³⁸ He further submits that the Rome Statute of the ICC

³⁰ Reply, para. 3.

³¹ Reply, para. 6.

³² Reply, para. 8(i).

³³ Reply, para. 8 (emphasis omitted).

³⁴ Appeal, paras 22-38.

³⁵ Appeal, paras 52-58, 61.

³⁶ Appeal, paras 39-58, 60.

³⁷ Appeal, para. 42.

³⁸ Appeal, para. 45, quoting *Tolimir* Appeal Decision, para. 15 (The Appellant cites paragraph 6, however, the quote is actually located in paragraph 15.).

which sets out that the language to be used is one which the accused “fully understands and speaks”,³⁹ “provide[s] the best evidence of the applicable legal threshold in international law.”⁴⁰

11. With respect to the Appellant’s reliance on the Rome Statute, the Appeals Chamber recalls that it is not bound by the Rome Statute or Rules of Procedure and Evidence of the ICC, although it may seek guidance from them when appropriate.⁴¹ In the present case, the Appeals Chamber notes that the *Tolimir* Appeal Decision has already set out the Appeals Chamber’s interpretation of “a language which [the accused] understands” in Article 21(4)(a) of the Statute⁴² and that the Appellant does not contest this standard.⁴³ Furthermore, the Appeals Chamber notes that the Tribunal’s standard on language ability is consistent with other international human rights instruments setting out fair trial rights.⁴⁴ In light of this, the Appeals Chamber does not consider it necessary to engage in an analysis of the ICC’s standard regarding the level of language ability required of an accused.

12. As in the current case, the issue in the *Tolimir* Appeal Decision was the scope and meaning of the right to receive materials in a language that the accused understands in the context of a case with a self-represented accused.⁴⁵ The Appeals Chamber in *Tolimir* considered the meaning of Article 21(4)(a) of the Statute and Rule 66(A) of the Rules and found that the issue “hinges on understanding and not preference.”⁴⁶ It continued:

These provisions, when read with the other minimum guarantees provided in Article 21(4) of the Statute, create an obligation to provide relevant material in a language which the accused understands sufficiently in order to allow for the effective exercise of his right to conduct his defence.⁴⁷

The determination of whether an accused possesses a sufficient level of understanding is a factual question and must be made on a case-by-case basis.⁴⁸

³⁹ Rome Statute, Article 67(1).

⁴⁰ Appeal, para. 46.

⁴¹ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Public Version of the Confidential Decision on the Prosecution’s Motion to Grant Specific Protection Pursuant to Rule 70, 25 July 2002, para. 17, citing *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 (“*Furundžija* Trial Judgement”), para. 227; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, para. 223. See also *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić*, Case No. IT-95-9-T, Judgement, 17 October 2003, fn. 212.

⁴² *Tolimir* Appeal Decision, para. 15.

⁴³ Appeal, para. 45; Reply, para. 8(iii).

⁴⁴ See International Covenant on Civil and Political Rights, Article 14(3); European Convention on Human Rights, Article 6(3); American Convention on Human Rights, Article 8(2). See also Statutes of the International Criminal Tribunal for Rwanda, Article 20(4) and the Special Court for Sierra Leone, Article 17(4).

⁴⁵ *Tolimir* Appeal Decision, para. 14.

⁴⁶ *Tolimir* Appeal Decision, para. 15.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*



13. While the Impugned Decision did not expressly refer to the *Tolimir* Appeal Decision, the Trial Chamber considered the same provisions in the Statute and the Rules and applied an equivalent standard. After noting Rule 3(A) of the Rules, which provides that the “working languages of the Tribunal shall be English and French”, the Trial Chamber recalled that this rule must be consistent with the right of an accused to a fair trial.⁴⁹ In this respect, it quoted from Article 21(4) of the Statute which provides, *inter alia*, that:

[i]n the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; [...]⁵⁰

More particularly, it recalled that the materials disclosed to an accused pursuant to Rule 66(A) of the Rules must be “in a language which the accused understands”.⁵¹ It proceeded to consider the materials submitted to it by the Prosecution as evidence of the Appellant’s understanding of the English language⁵² before concluding that the Appellant understands English “for the purposes of the Rules and the Statute”.⁵³ In considering whether the Appellant understands English “for the purposes of the Rules and the Statute” with reference to Article 21(4) of the Statute and Rule 66(A) of the Rules, the Trial Chamber was in effect inquiring as to whether the Appellant “understands sufficiently in order to allow for the effective exercise of his right to conduct his defence.”⁵⁴ This is demonstrated by the fact that the Trial Chamber considered not merely the Appellant’s general English language abilities but specifically his ability to undertake tasks required “in the context of a complex criminal trial”⁵⁵ such as his ability to converse with his English speaking legal advisers,⁵⁶ to respond to questions regarding war crimes allegations⁵⁷ and exhibits placed before him,⁵⁸ and to draft or approve motions and other submissions filed by him.⁵⁹ This shows that although the Trial Chamber did not explicitly refer to the *Tolimir* Appeal Decision, it applied the same standard. Accordingly, the Appeals Chamber finds no error in the legal standard applied by the Trial Chamber.

⁴⁹ Impugned Decision, para. 11.

⁵⁰ *Ibid.*

⁵¹ Impugned Decision, paras 12-13, quoting Rule 66(A) of the Rules.

⁵² Impugned Decision, paras 17-21.

⁵³ Impugned Decision, para. 23.

⁵⁴ See *Tolimir* Appeal Decision, para. 15.

⁵⁵ Impugned Decision, para. 20. See also Impugned Decision, paras 18-21.

⁵⁶ Impugned Decision, paras 19, 20.

⁵⁷ Impugned Decision, para. 18.

⁵⁸ Impugned Decision, para. 19.

⁵⁹ Impugned Decision, para. 20.

2. Trial Chamber's factual findings

14. The Appellant argues that the Trial Chamber erred in its factual assessment of his competence in English. In particular, he submits that the Trial Chamber “relied overwhelmingly on assessments of his knowledge of the language going back to 1995 or earlier” and gave no weight to the fact that he withdrew from public life in 1995 and has been speaking almost nothing but Serbian since.⁶⁰ Further, he submits that the Trial Chamber “gave undue weight to evidence [as to his] capacity to converse in English about general matters unrelated to the legal case against him”.⁶¹ Similarly, he argues that the Trial Chamber failed to give proper weight to the immensity of the documentation being provided pursuant to Rule 66(A) of the Rules and to consider the impracticability of him having to check English transcripts against B/C/S audio-recordings.⁶²

15. With regard to the Appellant's submission that the evidence relating to his language abilities relied on by the Trial Chamber was outdated, the Appeals Chamber notes that while evidence from many years ago may not be conclusive of present language abilities, it is relevant. In this case, however, while the Trial Chamber took into consideration evidence from 14 to 17 years ago, it also considered more recent evidence. The latter evidence included an account of his meeting with his *pro bono* legal adviser, Kevin Jon Heller, his ability to read and comment on English exhibits during his testimony in the *Krajišnik* appeal hearing,⁶³ his ability to communicate with his English speaking legal associates and to draft or approve of the English submissions filed on his behalf in his case,⁶⁴ and to spot errors in English translations.⁶⁵ Accordingly, the Appellant fails to show that the Trial Chamber gave undue weight to outdated evidence.

16. Turning to whether the Trial Chamber properly considered the Appellant's ability to understand English for the purpose of conducting his defence, the Appeals Chamber notes that the Trial Chamber's consideration was focussed on whether he understood English “for the purposes of the Rules and the Statute”.⁶⁶ In this respect, the Trial Chamber considered the Appellant's language abilities from the functional perspective of his ability to effectively exercise his right to conduct his defence. As noted above, it considered his ability to converse with his English speaking legal associates,⁶⁷ to respond to questions regarding war crimes allegations⁶⁸ and exhibits placed before

⁶⁰ Appeal, para. 50.

⁶¹ Appeal, para. 60.

⁶² *Ibid.*

⁶³ Impugned Decision, para. 19.

⁶⁴ Impugned Decision, para. 20.

⁶⁵ Impugned Decision, para. 21.

⁶⁶ Impugned Decision, para. 23.

⁶⁷ Impugned Decision, paras 19, 20.

⁶⁸ Impugned Decision, para. 18.

him,⁶⁹ and to draft or approve motions and other submissions filed by him.⁷⁰ The Appeals Chamber notes that the Appellant has not challenged any of these specific findings of the Trial Chamber.

17. The Appeals Chamber considers that while the Trial Chamber did not consider the large volume of documentation being disclosed pursuant to Rule 66(A) of the Rules or the difficulty of checking English transcripts against B/C/S audio-recordings, these are not factors which go to the determination of whether the Appellant understands English for the purposes of the Statute and the Rules. The Appeals Chamber recalls that in recognition of the large volume of materials involved in this case, the Appellant has been granted provision of funding for up to eight legal associates and other support staff and an increase of the maximum allotment of hours if necessary.⁷¹ As a result, the Appellant fails to show that the Trial Chamber made a patently incorrect finding of fact in concluding that the Appellant has sufficient understanding of English to conduct his defence.

3. Effect of the Trial Chamber's decision on the Appellant's right to self-representation

18. The Appellant submits that the Trial Chamber's decision "betray[s] an inappropriate disposition towards the self-represented accused himself and operate[s] to make the right of self-representation almost impossible to exercise."⁷² While the Appellant refers to extensive case-law on the importance of the right to self-representation,⁷³ he generally fails to point to specific findings in the Impugned Decision which demonstrate either the Trial Chamber's "inappropriate disposition" toward the accused or its disregard of his right to self-representation. The one finding which he does specifically challenge in this regard⁷⁴ is the following:

The Chamber is cognisant of the Accused's argument that he is unfamiliar with English legal terms, whereas he has a far better understanding of those terms in Serbian. This may simply be one example of the difficulties that go with self-representation, which the Tribunal's Scheme for providing assistance, including legal support and language assistance, to self-represented can solve.⁷⁵

The Appellant argues that this excerpt shows that the Trial Chamber considered that "a self-represented accused must bear the disadvantages flowing from his lack of knowledge of an official Tribunal language".⁷⁶ However, the Appeals Chamber considers that the Appellant misunderstands the Trial Chamber. It did not say that he must bear the disadvantage of his choice to be self-

⁶⁹ Impugned Decision, para. 19.

⁷⁰ Impugned Decision, para. 20.

⁷¹ Letter from the Registrar to Radovan Karadžić regarding your request for reconsideration, 14 November 2008 (reproduced in *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion for Adequate Facilities and Equality of Arms: Legal Associates, 25 November 2008, Annex E).

⁷² Appeal, para. 27. See also paras 52-58, 61.

⁷³ Appeal, paras 22-38.

⁷⁴ Appeal, paras 52-58.

⁷⁵ Impugned Decision, para. 22.

⁷⁶ Appeal, para. 56.

represented but rather acknowledged the potential disadvantage and identified the Tribunal's scheme for providing assistance, including legal support and language assistance, as a remedy for this disadvantage. The Appeals Chamber considers that the Trial Chamber was aware of the law relating to the effective realisation of the Appellant's right to a fair defence⁷⁷ and it carefully considered the evidence adduced in light of that law.⁷⁸ Accordingly, the Appellant fails to show that the Impugned Decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.

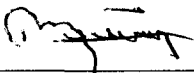
E. Disposition

For the foregoing reasons, the Appeals Chamber

DISMISSES the Appeal in its entirety.

Done in English and French, the English text being authoritative.

Dated this fourth day of June 2009
At The Hague
The Netherlands



Judge Mehmet Güney
Presiding

[Seal of the Tribunal]

⁷⁷ Impugned Decision, paras 11-13.

⁷⁸ Impugned Decision, paras 17-23.