

**UNITED
NATIONS**



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-PT
Date: 27 March 2009
Original: English

IN TRIAL CHAMBER III

Before: Judge Iain Bonomy, Pre-Trial Judge
Judge Christoph Flügge
Judge Michèle Picard

Acting Registrar: Mr. John Hocking

Submission date: 27 March 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**REGISTRY SUBMISSION REGARDING THE DENIAL OF
ASSIGNMENT OF MARKO SLADOJEVIĆ**

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Mark B. Harmon
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

A. INTRODUCTION

1. Pursuant to Rule 33(B) of the Rules of Procedure and Evidence (“Rules”) of the International Criminal Tribunal for the former Yugoslavia (“Tribunal”), the Registrar respectfully offers his comments on the “Request for Judicial Review of the Registry Decision on the Assignment of Mr. Marko Sladojević as Legal Associate” filed by Mr. Radovan Karadžić (“Accused”) on 24 March 2009 (“Request”).

B. PROCEDURAL HISTORY

2. On 14 January 2009, the Accused requested the Registrar to assign Mr. Marko Sladojević as a legal associate to his defence team (“Request for Assignment”).
3. By letter of 14 January 2009, the Registry provided Mr. Sladojević an opportunity to comment on possible conflicting loyalties in case of a dual assignment to the Accused and Mr. Krajišnik’s defence. By letter of the same date, the Registry requested the Accused and Mr. Krajišnik’s written consent to a possible dual assignment of Mr. Sladojević and explained to each the potential consequences of such assignment.
4. By letters of 15 January 2009, the Accused and Mr. Krajišnik provided their written consent to the dual assignment. By letter of the same date, Mr. Sladojević provided his comments on possible conflicting loyalties in case of his assignment.
5. On 4 February 2009, the Registry sent the Accused a letter denying the assignment of Mr. Sladojević (“Decision”).
6. On 6 February 2009, the Accused submitted to the Acting Registrar a request for reconsideration of the Decision (“Request for Reconsideration”). By letter of the same date, Mr. Krajišnik once again wrote to the Registry asking it to reconsider the Decision. Further, Mr. Sladojević provided additional comments and information to the Registry regarding the assessment of the Request for Reconsideration by correspondence of 11 February 2009.
7. By letter of 3 March 2009, the Acting Registrar confirmed the Decision and denied the Request for Reconsideration (“Impugned Decision”).
8. On 24 March 2009, the Accused filed his Request before the Trial Chamber, seeking judicial review of the Registrar’s Decision on the assignment of Mr. Sladojević.

9. On 26 March 2009, the Trial Chamber issued its “Order Setting a Deadline for Registry Submission on Accused’s Request for Judicial Review”, inviting the Registrar to file his submission no later than 27 March 2009.

C. LAW ON JUDICIAL REVIEW

1. The Registrar respectfully submits that the Trial Chamber’s review of this matter be guided by the standard for proper administrative decision-making as outlined by the Appeals Chamber in the *Prosecutor v. Kvočka et al.* case.¹
2. The Appeals Chamber’s statement in *Kvočka et al.* envisions a four-part test for proper administrative decision-making and judicial review of such decisions: (1) compliance with the legal requirements of the Directive on the Assignment of Defence Counsel;² (2) observance of basic rules of natural justice and procedural fairness; (3) consideration of relevant material and non-consideration of irrelevant material; and (4) reasonableness of the conclusion reached.³
3. The Registrar submits that in denying the Accused’s Request, he complied with the standard for proper administrative decision-making.

¹ “A judicial review of [...] an administrative decision is not a rehearing. Nor is it an appeal. [...] A judicial review of an administrative decision made by the Registrar in relation to legal aid is concerned initially with the propriety of the procedure by which the Registrar reached the particular decision and the manner in which he reached it.” *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić (“Žigić Decision”), 7 February 2003 at para. 13. Subsequently cited in the *Prosecutor v. Šljivančanin*, Case No. IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003 at para. 22; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, “Decision on the Defence’s Motion for an Order Setting Aside the Registrar’s Decision Declaring Momčilo Krajišnik Partially Indigent for Legal Aid Purposes”, 20 January 2004 at para. 16; *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-PT, Decision on Defence Request for Review of the Registrar’s Decision on Partial Indigence of Mile Mrkšić, 9 March 2004 at page 3; and *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, Decision on Appointment of Co-Counsel for Mrkšić, 7 October 2005 at para. 9.

² Directive No. 1/94, IT/73/REV.11.

³ Paragraph 13 of the Žigić Decision provides: “[t]he administrative decision will be quashed if the Registrar has failed to comply with the legal requirements of the Directive. This issue may in the particular case involve a consideration of the proper interpretation of the Directive. The administrative decision will also be quashed if the Registrar has failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or if he has taken into account irrelevant material or failed to take into account relevant material, or if he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the “unreasonableness” test). These issues may in the particular case involve, at least in part, a consideration of the sufficiency of the material before the Registrar, but (in the absence of

D. DISCUSSION

1. Arguments of the Accused

4. The Accused avers that by denying the assignment of Mr. Sladojević, the Registrar failed to comply with the relevant legal authorities, did not take into account relevant material, including letters from Messrs. Krajišnik and Sladojević in his Impugned Decision⁴ and reached an unreasonable conclusion.⁵ With the issuance of the Appeals Judgement in the Krajišnik case on 17 March 2009, the Accused asserts that there can be no prejudice to Mr. Krajišnik⁶ and that Mr. Sladojević no longer has conflicting loyalties.⁷ The Accused contends that the denial of Mr. Sladojević's assignment would slow down his pre-trial preparations and require the postponement of the trial. He argues that any alternative candidate would require more time to familiarise himself with the issues relevant to the Accused's case, resulting in an additional burden to the management of public funds. In his view, the Registrar reached an unreasonable conclusion by applying to Mr. Sladojević a stricter conflict-of-interest test in relation to support staff than to counsel and disregarded the differences between counsel and a legal associate to a self-representing accused.⁸

2. Registrar's submission

5. The Registrar respectfully submits that, as demonstrated below, he has complied with the standard for administrative decision-making in reaching the Impugned Decision.
6. It is undisputed between the Registry and the Accused that there is a certain overlap of facts between the *Karadžić* case and the *Krajišnik* case. It is further undisputed that Mr. Sladojević may have been privy to confidential information that the Accused could not have been aware of and which could potentially be: 1) advantageous to the Accused were he aware of it; and 2) harmful to Mr. Krajišnik if the Accused were aware of it.⁹ Additionally, the Accused appeared as a witness in the case of Mr. Krajišnik and Mr.

established unreasonableness) there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled."

⁴ Request, para. 14.

⁵ Request, para. 11.

⁶ Request, para. 15.

⁷ Request, para. 15.

⁸ Request, para. 23 f.

⁹ The Registry wrote to Mr. Sladojević and informed him of its concerns with regard to the potential consequences of this dual assignment and invited him to address the specific steps he envisaged to take, in order to ensure that Mr. Krajišnik's and the Accused's rights are protected, should he be assigned to the Accused's defence team as a legal associate. In his response of 15 January 2009, Mr. Sladojević stated that he may have been privy to confidential information in the *Krajišnik* case.

Sladojević participated in the preparation of his testimony as a witness to Mr. Krajišnik, including proofing sessions.

7. In his Request, the Accused acknowledges the involvement of Mr. Sladojević in the *Krajišnik* case and the similarity of the two cases, but does not agree with the Registrar's assessment and conclusion of the potential consequences of assigning him to the Accused's case. He emphasises the professionalism with which Mr. Sladojević has acted in previous cases, the recommendation for his assignment by Mr. Krajišnik, his knowledge of the facts of the case and the importance of his role in his defence team as important considerations to warrant his assignment.
8. The Registrar's concerns are different from those raised by the Accused and centre on the probability that Mr. Sladojević could face conflicting loyalties between Mr. Krajišnik and the Accused in case of an assignment to the Accused's defence team. Mr. Sladojević has been privy to confidential information in the *Krajišnik* case, a matter he acknowledges. He may therefore find himself unable to effectively undertake the coordination and legal consultation required of a legal associate, as there may be confidential information in the *Krajišnik* case of which he may be aware, that may be advantageous to the Accused and harmful to Mr. Krajišnik if the Accused were aware of this information.
9. The Registrar disagrees with the Accused's assertion that a more stringent conflict-of-interest-test has been applied by the Registrar in considering the assignment of Mr. Sladojević, than in the case of counsel.¹⁰ The Registrar respectfully submits that the standards of a conflict-of-interest test applicable to counsel pursuant to Article 14 of the Code of Professional Conduct for Counsel Appearing before the International Tribunal¹¹ cannot be applied *mutatis mutandis* to a legal associate as the role of the latter is limited to coordination and legal consultation, thereby performing tasks typical of a support staff member. Counsel, on the contrary, decides on the main defence strategy issues for the accused.
10. However, with regard to a request for the assignment of a support staff member who has worked on another case, and where the facts of the case overlap with the case in which his assignment is requested, the Registry is under an obligation to assess any conflict of

¹⁰ Request, para. 23.

¹¹ Code of Professional Conduct for Counsel Appearing before the International Tribunal, IT/125 REV.2 of 11 July 2006 ("Code of Conduct").

loyalties that may arise in accordance with the Registry's duty to preserve and protect the rights of the accused at all times.¹²

11. In the case of a represented accused before the Tribunal, lead counsel would take responsibility for ensuring that strict confidentiality parameters are respected, and is required to provide the Registry with an undertaking outlining measures to be put in place to ensure that the rights of the other accused person are protected. In addition, in the event of inadvertent disclosure, lead counsel undertakes not to use this information in the defence case.
12. Whilst the Registrar undertakes the same conflict assessment with respect to legal associates to self-represented accused, there is no regulatory mechanism through accountability of counsel, as the Accused is his own counsel. The Registrar is therefore not in a position to assign a legal associate who has been previously assigned to a conflicting defence case, as one of the accused would be vulnerable to the possibility of a violation of his rights, particularly with respect to confidentiality issues.
13. The Registrar notes that after the Registrar had issued the Impugned Decision, the *Krajišnik* case terminated with the issuance of the Appeals Judgement on 17 March 2009. However, it is the Registrar's submission that the end of a case does not relieve the legal associate from all responsibilities regarding confidentiality issues and general loyalty vis-à-vis the case in which he was previously assigned as a support staff member or legal associate. Further, the *Krajišnik* case could potentially be reopened in future review proceedings. Thus, it cannot be ruled out that the Accused's interests and Mr. Krajišnik's interests still are, or may become potentially materially adverse.
14. The procedural history as outlined above shows that the Registrar acted in good faith and treated the Accused fairly in his assessment of the Impugned Decision. The Registrar provided Mr. Sladojević an opportunity to comment on his concerns that his potential assignment could result in conflicting loyalties. The Registrar further provided independent legal advice to both the Accused and Mr. Krajišnik, and informed them of the potential consequences of the assignment of Mr. Sladojević to the Accused.
15. In his final assessment, the Registrar took into consideration the personal statement of Mr. Sladojević and his additional correspondence, as well as correspondence on the

¹² Thus, the Registry assesses the possibility of conflicting loyalties of legal assistants to represented accused in case the assistant moves from one defence team to another or in case of a dual assignment, as it has previously done on various cases before this Tribunal.


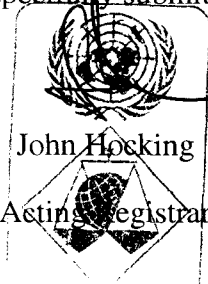
matter received from the Accused and Mr. Krajišnik, both of whom consented to the assignment. The Registrar was however not persuaded that adequate measures could be put in place to ensure the protection of Mr. Krajišnik's rights, were Mr. Sladojević to be assigned as a legal associate to the Accused.

16. It is therefore respectfully submitted that the Registrar observed basic principles of natural justice and treated the Accused with procedural fairness in issuing the Impugned Decision. By considering all the communication from the Accused, Mr. Krajišnik and Mr. Sladojević, the Registrar considered all relevant information in making the Impugned Decision.
17. In light of the considerations and circumstances described above, the Registrar respectfully submits that the administration of justice could be compromised were Mr. Sladojević to join the Accused's defence team and that the Impugned Decision was reasonable.

E. CONCLUSION

18. The Registrar acknowledges that this is the first case in which conflicting loyalties of a legal associate to a self-representing accused have been evaluated by the Registrar. In making the above assessment, the Registrar is mindful of the fact that there are no control mechanisms to guarantee that the rights of both the Accused and Mr. Krajišnik are preserved as provided for in cases of represented accused through the accountability of counsel. In its appreciation of the matter, the Registrar was guided by the imperative to protect the interests of the Accused.

Respectfully submitted,


 John Hocking
 Acting Registrar
 

Dated this 27th day of March 2009

At The Hague,

The Netherlands.