

**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-04-74-A
Date: 26 April 2016
Original: English

THE PRESIDENT OF THE TRIBUNAL

Before: Judge Alphons Orie, Acting President

Registrar: Mr John Hocking

Decision of: 26 April 2016

PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
BERISLAV PUŠIĆ**

CONFIDENTIAL

**DECISION ON PRLIĆ'S REQUEST FOR REVIEW OF THE
REGISTRAR'S DECISION ON REMUNERATION FOR
ADDITIONAL FUNDS IN APPEAL PHASE**

Office of the Prosecutor

Mr Douglas Stringer
Mr Mathias Marcussen

Counsel for the Accused

Mr Michael G. Karnavas and Ms Suzana Tomanović for Mr Jadranko Prlić
Ms Senka Nožica and Mr Karim A. A. Khan for Mr Bruno Stojić
Ms Nika Pinter and Ms Nataša Fauveau-Ivanović for Mr Slobodan Praljak
Ms Vesna Alaburić and Mr Davor Lazić for Mr Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Mr Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Mr Berislav Pušić

I. PROCEDURAL HISTORY

1. On 9 October 2014, the Registrar of the Tribunal (“Registrar”) ranked the Prlić *et al.* case at Complexity Level 3 (extremely difficult/leadership) for the duration of the Appeals Phase pursuant to paragraphs 10-12 of the ICTY Defence Counsel-Appeals Legal Aid Policy (“Appeals Legal Aid Policy”).¹ The Prlić Defence was entitled to a maximum of 300 counsel hours and 300 support staff hours for the preparation and filing of the Notice of Appeal and, based on the complexity assessment, entitled to a maximum of 2,100 counsel hours and 900 support staff hours, plus all counsel hearing hours, for the remainder of the Appeal Phase.² The Notice of Appeal was filed by the Prlić Defence on 5 August 2014.³

2. On 8 June 2015, lead counsel, Mr Michael G. Karnavas, for Jadranko Prlić (“counsel for Prlić”) requested funding from the Registrar for an additional allotment of 500 hours for work already performed (comprising ‘less than 100 hours’) and anticipated to be performed on the Prlić appeal (“Request for Additional Hours”).⁴

3. On 16 July 2015, the Registrar sent a confidential and *ex parte* memorandum to the Appeals Chamber to seek the Appeals Chamber's input in relation to the Request for Additional Hours, pursuant to paragraph 15 of the Appeals Legal Aid Policy.⁵ On 10 September 2015, the Appeals Chamber provided the Registrar with its input on the matter.⁶ On 30 September 2015, the Registrar informed counsel for Prlić that the Request for Additional Hours was rejected on the basis that at that moment: the complexity and size of the case; preparing and correcting (self-made) errors to the Notice of Appeal; assessing new disclosures comprising 147 documents (totalling 2,500 pages); and preparing for oral arguments, were not unforeseen circumstances beyond the control of counsel for Prlić (“Impugned Decision”).⁷

4. On 6 October 2015, counsel for Prlić sent a letter to the Registrar, indicating that he would seek review of the Impugned Decision and requesting additional information upon which the

¹ See Letter from Head of Office for Legal Aid and Defence Matters (“OLAD”) to Counsel for Mr. Jadranko Prlić, 9 October 2014 (confidential) (“Complexity Decision”); ICTY Defence Counsel-Appeals Legal Aid Policy, 18 April 2013.

² Appeals Legal Aid Policy, para. 5.

³ Jadranko Prlić’s Notice of Appeal, 5 August 2014 (“Notice of Appeal”).

⁴ Request, Annex 1, Letter from Counsel for Mr. Jadranko Prlić to Head of OLAD, 8 June 2015, p. 1 (requesting ‘an additional 500 hours, inclusive of which are the hours already spent beyond the allotted time, for newly discovered evidence and for the preparation of oral arguments’).

⁵ Response, Annex 2 (confidential and *ex parte*), Internal Memorandum from Kate Mackintosh, Deputy Registrar to Appeals Chamber, Regarding Prlić Request for Additional Hours, 16 July 2015.

⁶ Response, Annex 3 (confidential and *ex parte*), Internal Memorandum from Appeals Chamber to Kate Mackintosh, Deputy Registrar, Regarding Prlić’s and Praljak’s Request for Additional Hours, 10 September 2015.

⁷ Request, Annex 2, Letter from Head of OLAD to Counsel for Mr. Jadranko Prlić, 30 September 2015.

Impugned Decision was based (“6 October 2015 Letter”).⁸ On 21 October 2015, without waiting for a response to the 6 October 2015 Letter, counsel for Prlić filed a confidential request for ‘judicial review’ of the Impugned Decision before the President (“Request”).⁹ On 2 November 2015, the Registrar filed a confidential response with confidential and *ex parte* annexes (“Response”) to the Request.¹⁰ On 18 February 2016, the President assigned the Request to me.¹¹

II. SUBMISSIONS OF THE PARTIES

5. Counsel for Prlić requests that the Impugned Decision be quashed and that the Registrar be ordered to allocate an additional 500 hours to Prlić’s defence during the Appeal Phase of the case.¹² In support of his request, counsel for Prlić argues that, in reaching the Impugned Decision, the Registrar erroneously found that none of the reasons presented in the Request for Additional Hours were ‘unforeseeable circumstances beyond the control of the Defence’.¹³ In failing to consider or meaningfully analyse any of the reasons presented, the Registrar failed to meet the standards of administrative decision-making.¹⁴

6. Counsel for Prlić submits that the Registrar failed to observe any basic rules of natural justice or act with procedural fairness by consulting and obtaining information from the Appeals Chamber *ex parte* which put Prlić at a disadvantage by not furnishing him with details of that consultation.¹⁵ Counsel contends that the Registrar took into account irrelevant material and failed to take into account relevant material on the basis that the Registrar: (i) could not have seriously analysed any of the submissions made in the Request for Additional Hours;¹⁶ (ii) was extending an analysis of complexity and length of the case made in August 2014 (following the filing of the Notice of Appeal) to a consideration of whether at the current moment additional hours ought to be granted;¹⁷ (iii) failed to consider the active involvement of Prlić in the defence of his case;¹⁸ (iv) failed to consider the high standard required in challenging ‘virtually all of the legal and factual findings in the Trial Judgment’ and the work required in a case of this magnitude and complexity;¹⁹

⁸ Request, Annex 3, Letter from Counsel for Mr. Jadranko Prlić to Head of OLAD, 6 October 2015.

⁹ Request by the Defence of Dr. Jadranko Prlić for Judicial Review of the Registrar’s Decision on Additional Funds, 21 October 2015 (confidential with confidential annexes).

¹⁰ Deputy Registrar’s Submission on the Prlić Defence Request for Review of the Registrar’s Decision on Additional Funds, 2 November 2015 (confidential with confidential and *ex parte* annexes).

¹¹ Order Assigning a Request to a Judge, 18 February 2016 (confidential).

¹² Request, para. 21.

¹³ Request, para. 8.

¹⁴ Request, para. 8.

¹⁵ Request, paras 9-11.

¹⁶ Request, paras 12-13.

¹⁷ Request, para. 14.

¹⁸ Request, para. 15.

¹⁹ Request, para. 16.

and (v) failed to assess the size and scope of the trial record and evidence base which necessitated a thorough check of submissions and required counsel for Prlić to amend errors made in the Notice of Appeal though the filing of a corrigendum.²⁰

7. Counsel for Prlić further asserts that the Registrar reached a conclusion which no sensible person who has properly applied his/her mind to the issue could have reached.²¹ In this respect, in particular, counsel for Prlić takes issue with the expectation that new disclosures ought to fall within work which was foreseeable.²² Counsel for Prlić argues that the Registrar provided no authority or criteria in support of the view that ‘the disclosure in question (147 documents totalling around 2,500 pages) does not surpass the amount of material that counsel could reasonably expect to be disclosed in a case of this size’.²³ Counsel for Prlić also considers that the Registrar did not properly consider the complications and challenges that could have arisen in preparation of the remaining phases of the appeal. Accordingly, he challenges the Registrar’s position that ‘the preparation for oral arguments is well within the scope of ordinary appellate tasks and foreseeable to counsel’.²⁴

8. The Registrar observes that by filing the Request before the President, counsel for Prlić failed to follow the procedure prescribed for requesting review under Article 31(C) of the Directive.²⁵ The Registrar accordingly seeks a dismissal of the Request *in limine*.²⁶

9. In the alternative, the Registrar maintains that the Impugned Decision complied with the standard for proper administrative decision-making and should be upheld.²⁷ The Registrar states that, in reaching the Impugned Decision, he considered whether the factors identified by counsel for Prlić in the Request for Additional Funding constituted factors that could qualify as ‘unforeseen circumstances beyond the control of the Defence’.²⁸ In this respect, the Registrar explains that he determined in consultation, where relevant, with the Appeals Chamber that: (i) the size, scope, and complexity of the case was well-known to the parties given the Level 3 upgrade in complexity ranking for the duration of the Appeal Phase and, as such, the argument that work stemming from the complexity and size of the case was unforeseeable is unpersuasive;²⁹ (ii) preparation for oral arguments was well within the scope of ordinary and foreseeable appellate tasks for any defence

²⁰ Request, para. 17.

²¹ Request, para. 18.

²² Ibid.

²³ Request, paras 18-19.

²⁴ Request, para. 20.

²⁵ Response, para. 10.

²⁶ Response, para. 11.

²⁷ Response, paras 2, 26-27.

²⁸ Response, paras. 13, 18-22.

²⁹ Response, para. 18.

team,³⁰ (iii) Prlić's instructions to counsel and active involvement in the Appeal Phase were certainly not unforeseeable;³¹ (iv) new disclosures are not, in and of themselves, unforeseeable events and the particular disclosure in question (147 documents totalling around 2,500 pages) did not surpass the amount of material that counsel could reasonably be expected to have disclosed in a case of this size;³² and (v) the need to correct one's own errors, in respect of the corrigendum to the Notice of Appeal, could not justify the allocation of additional funds.³³ The Registrar argues that he correctly applied the relevant legal provisions of the Appeals Legal Aid Policy.³⁴ The Registrar submits that the Impugned Decision complied with the applicable law, mandated by the Directive and Appeals Legal Aid Policy, underscored by the fact that he applied procedural fairness, considered relevant material, did not consider irrelevant material, and reached a reasonable conclusion.³⁵

III. APPLICABLE LAW

10. The following standard applies to the review of administrative decisions by the Registrar:

A judicial review of [...] an administrative decision is not a rehearing. Nor is it an appeal, or in any way similar to the review which a Chamber may undertake of its own judgement in accordance with Rule 119 of the Rules of Procedure and Evidence. A judicial review of an administrative decision made by the Registrar [...] 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.³⁶

11. Accordingly, an administrative decision may be quashed if the Registrar:

- a) failed to comply with [...] legal requirements [...], or
- b) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or
- c) took into account irrelevant material or failed to take into account relevant material, or
- d) reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test).³⁷

³⁰ Response, para. 19.

³¹ Response, para. 20.

³² Response, para. 21.

³³ Response, para. 22.

³⁴ Response, paras 2, 13-17, 23-25.

³⁵ Response, paras 2, 13-17.

³⁶ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 ("Žigić Decision"), para. 13. *See, e.g., Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Request for Review of Registrar Decision Regarding Visit of Defence Team Members, 10 August 2011 ("Šešelj Decision"), para. 12. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Review of Decision on Defence Team Funding, 31 January 2012 ("Karadžić Decision"), para. 6.

³⁷ Žigić Decision, para. 13. *See also Karadžić Decision*, para. 6.

12. Unless unreasonableness has been established, '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'.³⁸ The party challenging the administrative decision bears the burden of demonstrating that (1) an error of the nature enumerated above has occurred, and (2) that such an error has significantly affected the administrative decision to his detriment.³⁹

13. Article 23(A) of the Directive on the Assignment of Defence Counsel ("Directive") provides that:⁴⁰

Where counsel has been assigned, the costs of legal representation of the suspect or accused necessarily and reasonably incurred shall be met by the Tribunal in accordance with the Statute [of the Tribunal], the Rules [of Procedure and Evidence], this Directive and related policies and subject to the budgetary provisions, rules, regulations, and practice set by the United Nations. All costs are subject to prior authorisation by the Registrar. If authorisation was not obtained, the Registrar may refuse to meet the costs.

14. Article 24(C) of the Directive governs the remuneration of defence teams during appellate proceedings, and provides that:

During appellate proceedings, assigned counsel and assigned members of the defence team shall be remunerated on the basis of a maximum allotment of working hours paid at a fixed hourly rate as established in Annex I to this Directive, for the work reasonable and necessary to the preparation and presentation of the defence case.

15. Paragraphs 14-16 of the Appeals Legal Aid Policy provide in relevant part that:

14. If, during the Appeal Phase, Lead Counsel demonstrates the occurrence of unforeseeable circumstances beyond the control of the Defence which substantially impact the preparation reasonably required, the Registrar may allocate additional hours, while maintaining the complexity ranking of the case.

15. In deciding upon a request for additional hours, the Registrar may consult with the Appeals Chamber and also give consideration to the efficient use of resources by the Defence throughout the duration of the Appeal Phase.

16. Any additional allocation of hours must be requested and approved prior to work being performed. If authorisation was not obtained before the work was performed, the Registrar may refuse to approve payment in whole or in part. The exhaustion of resources, without more, shall not constitute a basis for a request for additional hours.

16. Paragraph 26 of the Appeals Legal Aid Policy provides that any disputes arising from the application of the policy shall be settled in accordance with Article 31 of the Directive. Article 31(C) of the Directive provides that:

Where the dispute involves a sum greater than €4,999, an aggrieved party may file a request for review with the Registrar [of the Tribunal], who shall refer the matter to the President [of the Tribunal] for his determination. Before making a determination the President shall request

³⁸ Žigić Decision, para. 13. See also Karadžić Decision, para. 7.

³⁹ Žigić Decision, para. 14. See also Karadžić Decision, para. 7.

⁴⁰ Directive on Assignment of Defence Counsel No. 1/94, IT/73/REV.11, 11 July 2016.

submissions from the aggrieved party and the respondent. The President's determination shall be final and binding upon the parties.

IV. DISCUSSION

17. At the outset, I note that the Registrar correctly observes that, by filing the Request before the President instead of the Registrar, counsel for Prlić did not follow the procedure outlined in Article 31(C) of the Directive. No reasons were provided for this departure from formal procedure in the Request. In light, however, of the fact that the Registrar has a passive procedural role in referring a request for review to the President, without any further input, and in light of the need for judicial economy, I will consider the Request as validly filed before me.

18. The Registrar in reaching the Impugned Decision consulted and obtained further information from the Appeals Chamber pursuant to paragraph 15 of the Appeals Legal Aid Policy.⁴¹ I note that there is no requirement, under the applicable regulations, to have *inter partes* consultations. Nor is there a requirement, under the applicable regulations, to furnish upon a party the outcome of the Registrar's consultations with the Appeals Chamber. The Registrar in order to come to a reasoned decision may be compelled, by necessity, to defer to the Appeals Chamber in areas that fall squarely within its knowledge and expertise, for instance, when making an assessment of the workload of the parties. I reject, therefore, counsel for Prlić's objection to the Registrar's *ex parte* consultations with the Appeals Chamber.

19. Counsel for Prlić takes particular issue with the Registrar's apparent expectation that new Prosecution disclosures ought to be considered as a foreseeable event and that the disclosures in question (147 documents totalling around 2,500 pages) did not surpass the amount of material that counsel could reasonably expect to receive in disclosure in a case of this size.⁴² I note that it is reasonable to expect some disclosure from the Prosecution during the Appeals Phase given the ongoing obligation to disclose exculpatory and other relevant material under Rule 68 of the Rules of Procedure and Evidence. Furthermore, I consider that the question of foreseeability relates not only to the fact of disclosure itself but also to the scope, volume, and nature of the disclosures. In this respect, the burden to demonstrate that the new disclosures, both in substance and volume, were unforeseeable, such that they substantially impacted the work reasonably required, lies with counsel for Prlić. Counsel for Prlić relied on an argument solely based on quantity of documents and failed to specify, precisely, what was unforeseen about these disclosures that entailed additional work and, therefore, warranted an allocation of additional funding. The Registrar, in responding to Counsel for Prlić's arguments and informed through consultation with the Appeals Chamber, assessed that

⁴¹ Impugned Decision, p. 1.

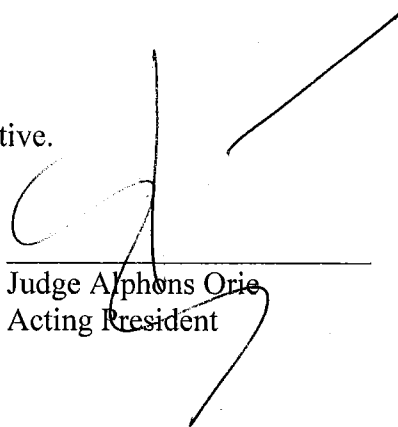
reviewing these documents was not unforeseeable on the basis that they represented a tiny fraction of the trial record.⁴³ Accordingly, given the submissions of counsel for Prlić relating to the disclosures, there is no reasonable basis to depart from the decision of the Registrar who reasonably exercised his discretion in denying the Request. Counsel for Prlić is free to make submissions demonstrating precisely why the new disclosures were of a type requiring substantial additional work which was unforeseen, and, therefore, warrant the allocation of additional hours.

20. Under paragraph 14 of the Appeals Legal Aid Policy, the Registrar is to consider a request for additional hours given the pre-determined complexity ranking at which the case was assessed. Counsel for Prlić bears the burden of establishing that circumstances were unforeseen which substantially impacted work reasonably required over-and-above the already established complexity ranking. I find that Counsel for Prlić has not met the requisite burden and, specifically, has not demonstrated unreasonableness in relation to the Registrar's findings that the following matters were foreseeable: reviewing and responding to the judgement of the Trial Chamber; liaising with Mr Jadranko Prlić with whom lead counsel has worked through the duration of the trial and appeal phases; rectifying self-made errors to the Notice of Appeal, and preparation for oral hearings.⁴⁴ In these circumstances, the Registrar, in reaching the Impugned Decision, reasonably exercised his discretion in denying the Request for Additional Hours.

V. DISPOSITION

21. For the foregoing reasons, I **DISMISS** the Request.

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



Judge Alphons Orie
Acting President

Dated this twenty-sixth day of April 2016
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴² Request, paras 18-19.

⁴³ Impugned Decision, p. 2; Complexity Decision, p. 3.

⁴⁴ See, e.g., *Prosecutor v. Milan Lukić et al.*, Case No. IT-98-32/1-A, Decision on Request for Review of OLAD Decision Denying Additional Funding, 22 November 2011 (confidential and *ex parte*), paras 9-10; *Prosecutor v. Nikola Sainović et al.*, Case No. IT-05-87-A, Decision on Request for Review of OLAD Decisions on Appeal Phase Remuneration, 25 May 2010 (confidential), para. 27.