

ICTR-98-44-T
13-2-2009
(45093-45079)

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 13 February 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL NOTICE
RECEIVED

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JOSEPH NZIRORERA'S APPLICATION FOR CERTIFICATION TO APPEAL:
DISCLOSURE OF LETTER OF RECOMMENDATION

The Office of the Prosecutor:

Mr. Don Webster
Mr. Iain Morley
Ms. Gerda Visser
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ndirumpatse

1. Joseph Nzirorera respectfully applies, pursuant to Rule 73(B), for certification to appeal the Trial Chamber's *Decision on Joseph Nzirorera's Motion for Disclosure of Letter of Recommendation* (11 February 2009).

2. Rule 73(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.”

3. Mr. Nzirorera respectfully contends that the issue at stake in the Impugned Decision—the alleged bias or appearance of bias of the Trial Chamber hearing his case—is one which would significantly affect the fair conduct of the proceedings and the outcome of the trial. He further contends that an immediate resolution of the issue by the Appeals Chamber will materially advance the proceedings.

4. In the Impugned Decision, the Trial Chamber refused to disclose an “assessment” made by the Presiding Judge, at the express request of Office of the Prosecutor Trial Attorney Iain Morley, of Mr. Morley's competence and integrity. This assessment was for the purpose of supporting Mr. Morley's application to be a Queen's Counsel in the United Kingdom.¹

5. The Trial Chamber reasoned that the Presiding Judge's voluntary assessment of Mr. Morley, solicited by Mr. Morley himself, was a judicial function, and could not,

¹ A copy of the assessment form is attached as Annex “A”.

under any circumstances, contain evidence of bias or the appearance of bias. The Trial Chamber found the request for disclosure of the “assessment” vexatious and frivolous.²

6. Mr. Nzirorera contends that disclosure of the “assessment” is necessary to determine whether its contents contain evidence of bias or the appearance of bias that would warrant his filing a motion for disqualification. He notes that the “assessment” calls for direct comment on the integrity of Mr. Morley, an issue that has been squarely raised in several motions which were decided on the merits by the Trial Chamber concerning allegations that Mr. Morley and the prosecution have concealed exculpatory evidence and otherwise violated their professional obligations relating to disclosure and representations made in open court.

7. The issue therefore goes directly to the fairness of the trial. The very concept of disqualification for bias or appearance of bias presumes that a trial is not fair if presided over by a judge who is biased or where his impartiality may reasonably be questioned. In addition, the concept of disqualification for bias or appearance of bias also presumes that the outcome of a trial presided over by a biased judge will be affected. Therefore, the first requirement of Rule 73(B) is satisfied in this case.

8. The prospect of continuing a trial until final judgement with a judge who may be biased or have the appearance of bias demonstrates that an immediate decision by the Appeals Chamber would materially advance the proceedings. If the Appeals Chamber rules that the “assessment” must be disclosed, it will allow the issue of bias to be fully considered while the trial is ongoing and therefore avoid the possibility of a new trial for this long running case.

9. Therefore, the second requirement of Rule 73(B) is satisfied in this case.

² Impugned Decision at paras. 7 and 8

10. This Trial Chamber has already recognized that an issue concerning the authority of judges to act in a case met the standard for certification to appeal. It granted certification on the issue of whether the remaining judges had the power under Rule 15 *bis* to decide pending substantive motions.³

11. At the ICTY, certification was granted on an issue of the validity of the appointment of an *ad litem* judge, thus finding that the authority of a judge to continue to sit in a trial met the criteria under Rule 73(B).⁴

12. At the Special Court for Sierra Leone, leave to appeal was granted for an issue of the bias of a judge who was sitting in an ongoing trial—the same issue that underlies the present application for certification to appeal.⁵

13. Mr. Nzirorera recognizes that at the ICTR, a decision on disqualification by the Bureau cannot be appealed.⁶ However, such a decision is made by three independent judges, thus being the functional equivalent of an appeal. The Impugned Decision in this case was made by the three Judges who are directly involved in the matter, thereby warranting review by the independent judges of the Appeals Chamber.

14. Mr. Nzirorera fails to see what harm would be created by disclosure of the “assessment”. The Trial Chamber’s visceral reaction to Mr. Nzirorera’s simple request for disclosure demonstrates that the decision should be reviewed by the Appeals Chamber

³ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK* (4 April 2007)

⁴ *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Application for Certification to Appeal Against Trial Chamber’s Decision of 16 June 2006* (23 June 2006)


⁵ *Prosecutor v Sesay*, No. SCSL-2004-15-T, *Decision on Leave to Appeal Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case* (6 December 2007)

⁶ *Prosecutor v Seromba*, No. ICTR-01-66-AR, *Decision on Interlocutory Appeal of a Bureau Decision* (22 May 2006)

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so that questions of the fairness of the trial and possible bias of the judges can be settled as soon as possible.

15. Therefore, it is respectfully requested that the application for certification to appeal be granted.

Respectfully submitted,

PETER ROBINSON
Lead Counsel for Joseph Nzirorera

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ANNEX "A"

PART 1: PERSONAL DETAILS

The applicant's details

Surname

Forename(s)

Name by which the applicant is usually known:

Applicant ID:

Your details

Title

Surname

Forename(s):

Assessor ID: Assessment Code:

PART 2: YOUR KNOWLEDGE OF THE APPLICANT

1. Have you drawn on others' views in preparing this assessment? If so, whose?

2. During the last three years how often and on what occasions have you had professional contact with the applicant, in addition to the occasions mentioned by the applicant? Please give dates.

3. Is there any further information about your professional contact with the applicant which may assist the Selection Panel: e.g., how long or how well you have known the applicant?

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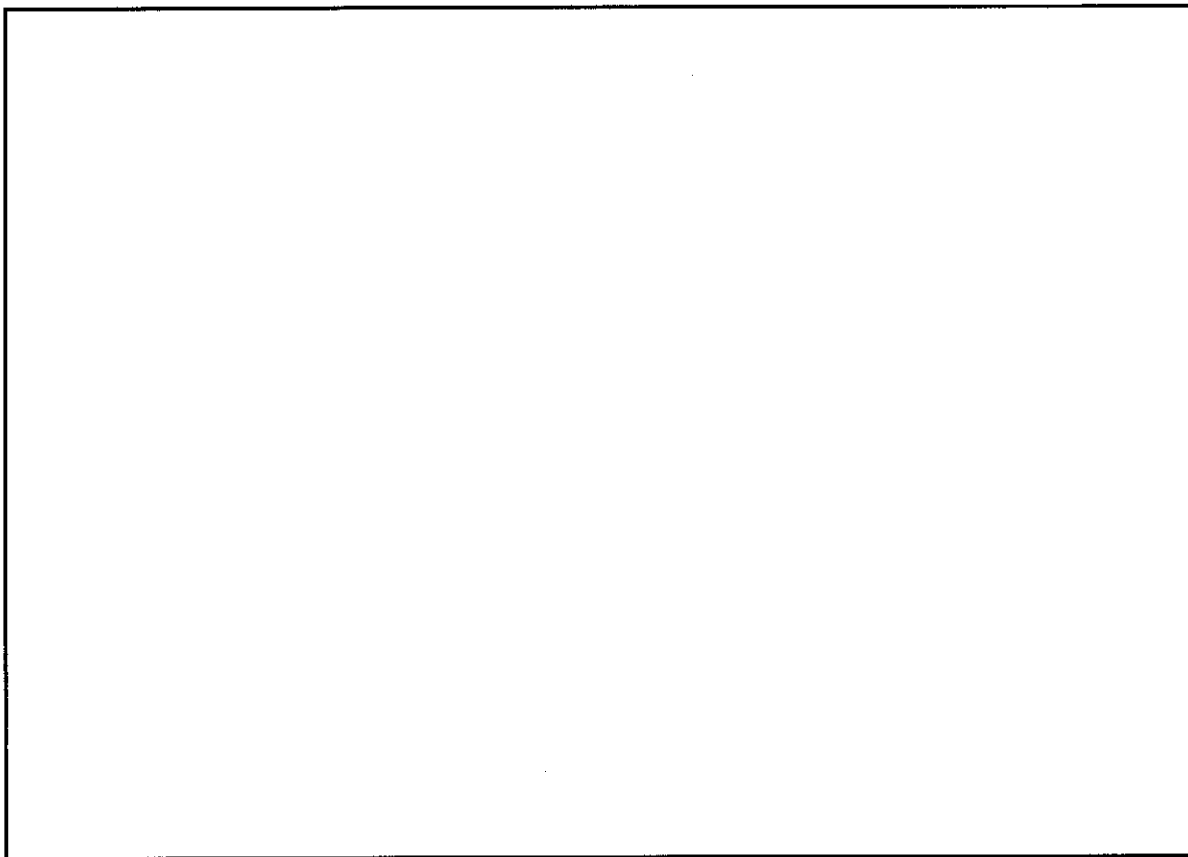
PART 2: YOUR KNOWLEDGE OF THE APPLICANT (CONTINUED)

4. Please confirm, with brief reasons, whether or not in your view each of the occasions mentioned by you or the applicant was a case of substance, complexity or particular difficulty or sensitivity. Please indicate any that had unusual or challenging features.

PART 3: EVIDENCE OF THE COMPETENCIES

A. Understanding and using the law

Has expert, up-to-date legal knowledge and uses it accurately and relevantly, and becomes familiar with new areas of law quickly and reliably.

**PART 3: EVIDENCE OF THE COMPETENCIES – CONTINUED****B. Oral and written advocacy**

Develops and advances client's case to secure the best outcome for the client by gaining a rapid, incisive overview of complex material, identifying the best course of action, communicating the case persuasively, and rapidly assimilating the implications of new evidence and argument and responding appropriately.

Preparation:

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Court and/or Resolution:

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C: Working with others

Establishes productive working relationships with all, including professional and lay clients, the judge and other parties; representatives and members of own team; is involved in the preparation of the case and leads the team

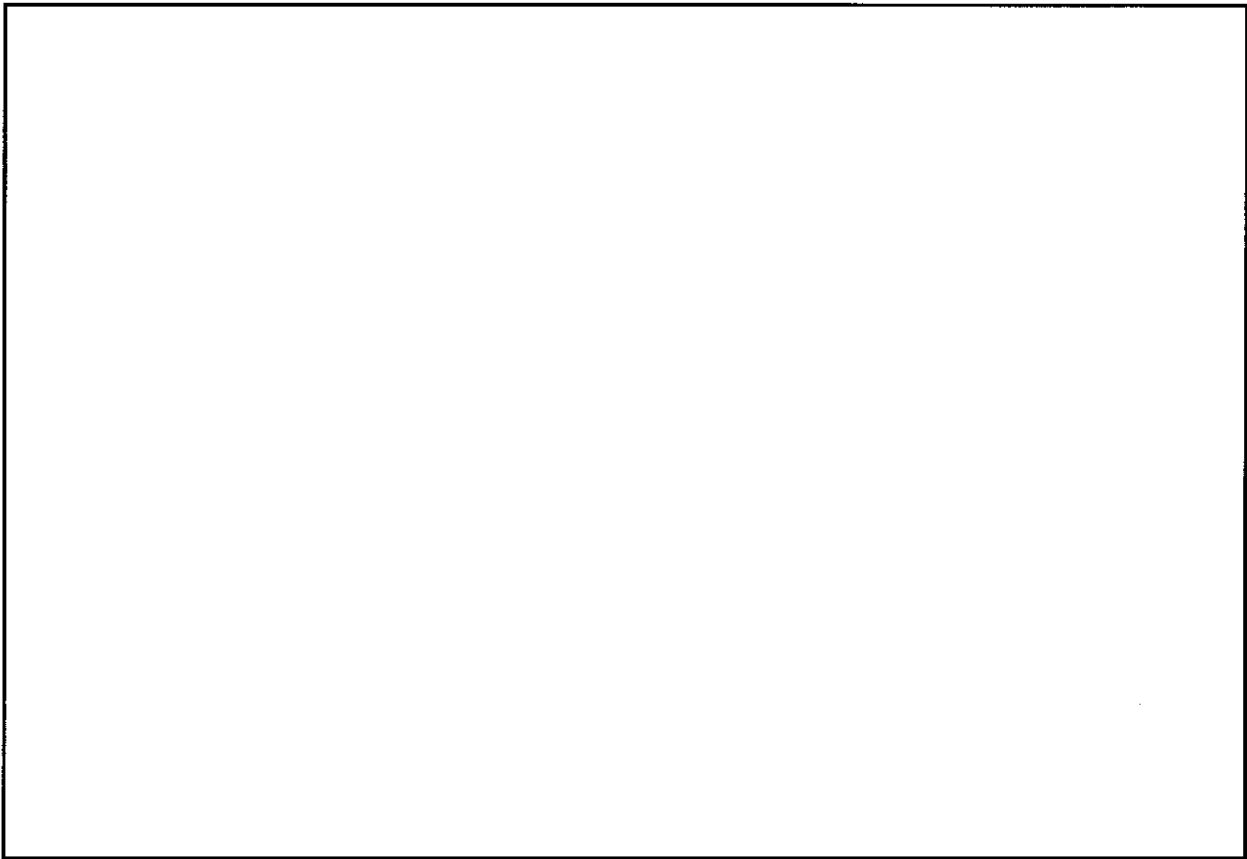
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before the court or other tribunal

PART 3: EVIDENCE OF THE COMPETENCIES - CONTINUED

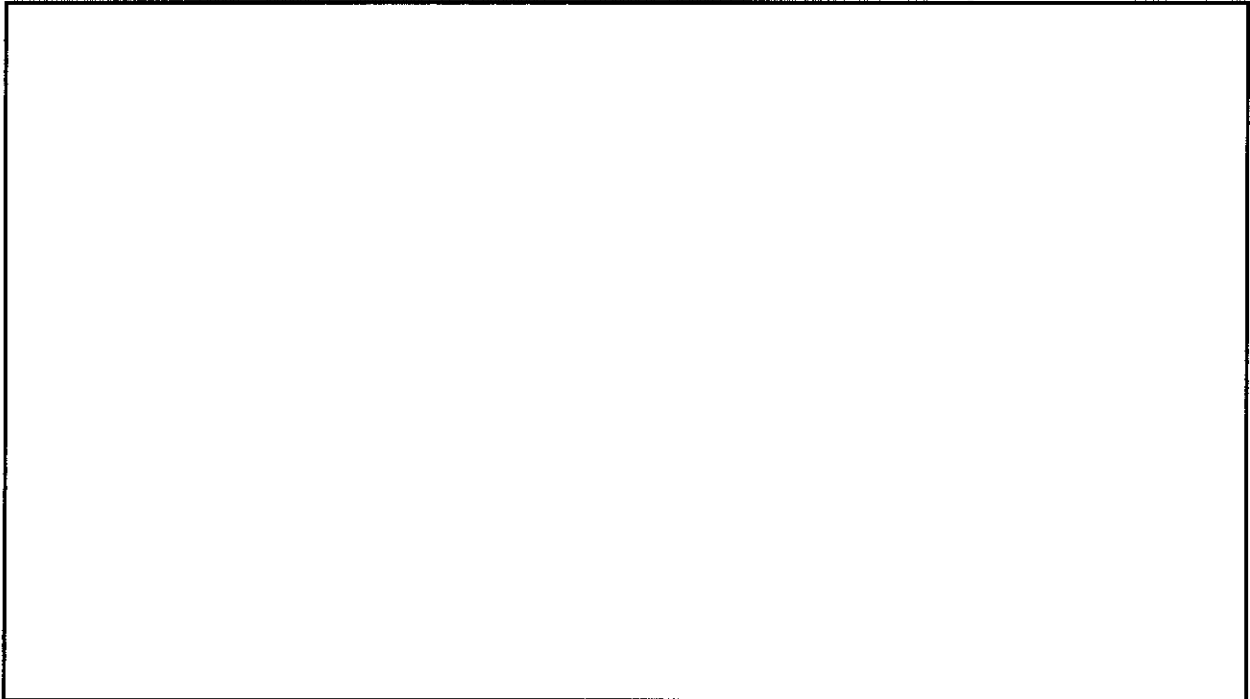
D: Diversity

Demonstrates an understanding of diversity and cultural issues, and is proactive in addressing the needs of people from all backgrounds and promoting diversity and equality of opportunity



E: Integrity

Is honest and straightforward in professional dealings, including with the court and all parties



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PART 4: ADDITIONAL INFORMATION

Please use this section to give brief justification of your overall rating in Part 5. You may also use this section of the form to give any additional information that will assist the Selection Panel.

[Empty box for providing additional information]