



UNAKRT

United Nations Assistance to the Khmer Rouge Trials

UNITED NATIONS ADMINISTRATIVE JUDGE

Case File: 004/07-09-2009-ECCC/OCIJ
Before: Judge Agnieszka KLONOWIECKA-MILART
Greffier: Sheila PAYLAN
Date: 2 May 2014
Language: English
Classification: PUBLIC

**DECISION ON REFUSAL TO APPOINT MS. [REDACTED] AS THE CASE
MANAGER FOR THE [REDACTED] DEFENCE TEAM
*CORRECTED AND PUBLIC REDACTED VERSION***

Co-Lawyers for [REDACTED]

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1. **I, Agnieszka KLONOWIECKA-MILART**, Judge of the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“ECCC”), nominated on 25 March 2014 by the Coordinator of the United Nations Assistance to the Khmer Rouge Trials (“UNAKRT Coordinator”) as the United Nations Administrative Judge (“UNAJ”) pursuant to a request by the Co-Lawyers for [REDACTED], a Suspect in Case 004 (“Co-Lawyers” and “Suspect”, respectively) regarding a dispute with the Chief of the Defence Support Section (“DSS”),¹ am seized of the “Application Requesting Ms. [REDACTED] as the Case Manager for the [REDACTED] Defence Team” submitted on 25 March 2014 (“Application”).

BACKGROUND

2. On 13 December 2013, one of the Co-Lawyers, Mr. SO Mosseny, requested the Chief of DSS to appoint Ms. [REDACTED] as the case manager for the Defence of the Suspect (“Request”).² On 18 December 2013, the Request was denied on the basis that, because Ms. [REDACTED] is the daughter of [REDACTED], a co-lawyer for a named suspect in Case 003, her appointment would contravene Section 10.4 of the DSS Administrative Regulations.³ After a series of exchanges on the matter,⁴ the Chief of DSS reiterated on 7 January 2014 that Ms. [REDACTED]’s recruitment as a case manager was unable to proceed at the same time as her father’s assignment as a co-lawyer on a defence team, “even if it is a different team”.⁵

3. On 20 February 2014, the Suspect provided a statement to DSS in which he asserted that he trusts Ms. [REDACTED] and thereby requested reconsideration of the decision not to appoint her as his case manager “because it is extremely important for me to have in my defence team people I trust, especially since I am still a suspect and the confidentiality is my main concern”.⁶ On 27 February 2014, the Co-Lawyers reiterated the Suspect’s request for reconsideration, providing further submissions in this respect (“Request for

¹ Letter from the UNAKRT Coordinator to Judge KLONOWIECKA-MILART, dated 25 March 2014; Letter from the Co-Lawyers to the UNAKRT Coordinator entitled “Re: Application to the United Nations Administrative Judge [...]”, dated 19 March 2013.

² Letter from Mr. SO Mosseny to the Chief of DSS entitled “Request to Recruit Mr. [REDACTED] as Legal Consultant and Ms. [REDACTED] as Case Manager”, dated 13 December 2013.

³ Electronic mail from the Chief of DSS to Mr. SO Mosseny entitled “Re: Request for recruitment of Mr. [REDACTED] and Ms. [REDACTED]”, sent on 18 December 2013 at 8:45AM (“18 December 2013 Email”).

⁴ Electronic mail from Mr. SO Mosseny to the Chief of DSS entitled “Re: Request for the Recruitment of Mr. [REDACTED] and Ms. [REDACTED]”, sent on 19 December 2013 at 1:10AM; Electronic mail from the Chief of DSS to Mr. SO Mosseny entitled “Re: Request for the Recruitment of Mr. [REDACTED] and Ms. [REDACTED]”, sent on 19 December 2013 at 8:52AM; Letter from Mr. SO Mosseny to the Chief of the Human Resources Management Section and the Chief of DSS entitled “Refusal of assignment of Ms. [REDACTED] as Case Manager for Case 004 [REDACTED] Defence Team”, dated 20 December 2013; Electronic mail from the Chief of DSS to Mr. SO Mosseny entitled “Re: Letter from Case 004 Defence concerning Refusal Appointment of Ms. [REDACTED]”, sent on 20 December 2013 at 6:54PM; Letter from Mr. SO Mosseny to the Chief of DSS entitled “Request for Reasoned Decision Concerning Refusal of Assignment of Ms. [REDACTED] as Case Manager for Case 004 [REDACTED] Defence Team”, dated 23 December 2013.

⁵ Letter from the Chief of DSS to Mr. SO Mosseny entitled “Re: Request for the Recruitment of Ms. [REDACTED] as a Case Manager”, dated 7 January 2014 (“7 January 2014 Letter”), para. 2.

⁶ Statement of [Suspect] on Recruitment of Ms. [REDACTED] as Case Manager, 20 February 2014 (“Statement”).

Reconsideration”).⁷ On 4 March 2014, the Chief of DSS denied the Request for Reconsideration.⁸ The Co-Lawyers consequently submitted the present Application, to which the Chief of DSS declined to respond.⁹

ADMISSIBILITY

4. The Co-Lawyers bring the present dispute pursuant to Article 11.1 of the ECCC Legal Services Contract (“LSC”),¹⁰ which reads:

Non-Fees Disputes. Except for disputes relating to the payment of fees claimed under Paragraph 9 of this Contract, any dispute, controversy or claim between the Parties relating to the terms and conditions of this Contract shall be resolved amicably between the Contracting Co-Lawyer and the Head of the DSS. In the event that the Parties are unable to settle such dispute, controversy or claim amicably within 60 days, each Party may refer such dispute, controversy or claim to the international judge nominated by the Coordinator of UNAKRT as the UN Administrative Judge.¹¹

5. A review of this provision shows that, as a preliminary matter, the dispute between the Co-Lawyers and the Chief of DSS (“Parties”) regarding Ms. [REDACTED]’s eligibility for appointment to the Suspect’s defence team must relate to the terms and conditions of the LSC. In this respect, the Co-Lawyers submit that the refusal to appoint Ms. [REDACTED] obstructs their obligation under Article 6.1 of the LSC to “provide effective legal advice and representation” to the Suspect.¹² In particular, the Co-Lawyers, recalling the Suspect’s statement that he trusts Ms. [REDACTED], contend that appointing someone whom the Suspect does not trust will impact on his ability to assist in his own defence and on the Co-Lawyers’ ability to provide effective legal representation.¹³

6. Without making a determination on the merits of such a contention, it is my view that a dispute about the recruitment of a potential member of defence team is one that could be properly brought before a UNAJ. Part of the Co-Lawyers’ obligation under Article 6.1 of the LSC implicitly involves the creation and maintenance of a harmonious and competent defence team, while respecting organisational rules and administrative regulations. Should the Chief of DSS take unreasonable and/or unfair decisions hindering

⁷ Letter from Co-Lawyers to Chief of DSS entitled “Request for Reconsideration of Refusal to Assign Ms. [REDACTED] as Case Manager for Case 004 [REDACTED] Defence Team”, dated 27 February 2014.

⁸ Letter from Chief of DSS to Co-Lawyers entitled “Re: Your Request for Reconsideration of the Decision on the Recruitment of Ms. [REDACTED]”, dated 4 March 2014 (“4 March 2014 Letter”).

⁹ Electronic mail from the Chief of DSS to Sheila PAYLAN, Legal Officer and Greffier of the Supreme Court Chamber, entitled “Re: Letter to Judge Milart on Appointment of UNAJ”, sent on 1 April 2014 at 10:52AM.

¹⁰ Application, paras. 17, 20.

¹¹ Emphasis in original.

¹² Application, paras. 16, 18. Article 6.1 of the LSC reads: “**Primary obligation.** The Contracting Co-Lawyer shall provide effective legal advice and representation to the Accused as his or her defence lawyer with respect to the proceedings before the ECCC” (emphasis in original). It bears emphasizing that [REDACTED] is not accused of any crimes at this stage, but remains a suspect. Article 1.1 of the LSC, however, defines the term “Accused” to apply equally throughout the LSC to “an indigent or partially indigent [s]uspect, [c]harged [p]erson or [a]ccused before the [ECCC]”.

¹³ Application, para. 18, *referring to* Statement.

the Co-Lawyers' ability to effectively advise and represent the Suspect, such decisions should certainly be subject to appellate administrative scrutiny.

7. The procedural history demonstrates that the Parties have been unable to settle the dispute, which commenced on 18 December 2013, the first time that Ms. [REDACTED]'s appointment was denied.¹⁴ The dispute was referred to me after more than 60 days had passed without resolution.¹⁵ The dispute is therefore properly before me.

8. The Application is accordingly admissible.

MERITS

9. The Co-Lawyers submit that the Chief of DSS erroneously applied and interpreted Section 10.4 of the DSS Administrative Regulations in the present case.¹⁶ In particular, the Co-Lawyers contend that, contrary to the Chief of DSS's determination, Ms. [REDACTED]'s appointment is not that of a member of the family of a co-lawyer,¹⁷ and it is in the interests of justice to appoint her.¹⁸ The Co-Lawyers contend that, in refusing to appoint Ms. [REDACTED], the Chief of DSS is obstructing their ability to provide effective legal advice and representation to the Suspect.¹⁹ The Co-Lawyers accordingly request that I find that Ms. [REDACTED]'s appointment as a case manager to the Suspect's defence team is in accordance with Section 10.4 of the DSS Administrative Regulations.²⁰

10. Section 10.4 of the DSS Administrative Regulations reads as follows:

Members of the family or close friends of suspects, charged persons, accused or Co-Lawyers are not eligible for appointment as members of a defence team unless it is in the interests of justice to do so.

11. In his previous exchanges with the Co-Lawyers rejecting Ms. [REDACTED]'s appointment to the Suspect's defence team, the Chief of DSS explained:

[A]fter an initial assessment, DSS sought and obtained the opinion of the Human Resources Management Section on the interpretation of this provision and both sections agree that a family member of a Co-Lawyer cannot be appointed to a defence team, even if it is a different team from the one on which the Co-Lawyer is working. I believe part of the rationale for this regulation is to give to as many different Cambodian families as possible the opportunity to be part of the ECCC process.²¹

12. The Co-Lawyers contest the broad interpretation of this provision to apply to the appointment of family members or close friends of suspects, charged persons, or co-

¹⁴ See *supra*, para. 2.

¹⁵ See *supra*, fn. 1.

¹⁶ Application, paras. 1, 21-38.

¹⁷ Application, paras. 22-25.

¹⁸ Application, paras. 26-38.

¹⁹ Application, para. 1.

²⁰ Application, p. 19.

²¹ See 18 December 2013 Email. See also 7 January 2014 Letter and 4 March 2014 Letter.

lawyers to *any* defence team, rather than to the *same* defence team.²² They assert that Ms. [REDACTED] is not seeking to join the defence team of her father, who is a co-lawyer for a named suspect in Case 003, that she is not related to any member of the Suspect's defence team, and that there is no issue of nepotism as well as no evidence that she would engage in fee-splitting.²³

13. In Section 10.4 of the DSS Administrative Regulations, the term "defence team" is preceded by the indefinite article "a", which is ordinarily used to denote something general as opposed to particular, and counts among its synonyms the words "any" and "every", therefore lending itself to the broader interpretation espoused by the Chief of DSS. It follows that if the drafters of the DSS Administrative Regulations intended to prohibit appointments of relatives or close friends to the *same* defence team, rather than to *any* defence team, they would have used language to clearly reflect as much. To verify this hypothesis, it is instructive to look at regulations that have similar functions and compare the norms that they express and language used for this purpose. To this end, similar general provisions can be found in the staff rules of the International Criminal Court ("ICC Staff Rules") and of the United Nations ("UN Staff Rules"), and, more concretely addressing the issue of defence teams, the International Criminal Tribunal for the former Yugoslavia's Directive on the Assignment of Defence Counsel ("ICTY Directive"), as well as the Special Tribunal for Lebanon's Directive on the Appointment and Assignment of Defence Counsel ("STL Directive"), each outlining within the rule any possible exceptions:

Rule 104.12 of the ICC Staff Rules (Family relationships)

- (a) No employment contract may be concluded with the father, mother, son, daughter, brother or sister of a staff member.
- (b) A staff member:
 - i. Shall not be assigned to serve in a post which is superior or subordinate in the of authority to his or her spouse;
 - ii. Shall disqualify himself or herself from participating in the process of reaching or reviewing an administrative decision affecting the status or entitlements of his or her spouse.

Rule 4.7 of the UN Staff Rules (Family relationships)

- (a) An appointment shall not be granted to a person who is the father, mother, son, daughter, brother or sister of a staff member, unless another person equally well qualified cannot be recruited.
- (b) The spouse of a staff member may be appointed provided that he or she is fully qualified for the post for which he or she is being considered and that the spouse is not given any preference by virtue of the relationship to the staff member.
- (c) A staff member who bears to another staff member any of the relationships specified in paragraphs (a) and (b) above:
 - i. Shall not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member to whom he or she is related;

²² Application, paras. 22-25.

²³ Application, paras. 22, 24.

- ii. Shall not participate in the process of reaching or reviewing an administrative decision affecting the status or entitlements of the staff member to whom he or she is related.

Article 16(F) of the ICTY Directive

Members of the family or close friends of suspects, accused and counsel are not eligible for assignment under the Directive as counsel, expert, legal assistant, investigator, translator or interpreter, unless the Registrar determines that the assignment is in the interests of justice.

Article 18(D) of the STL Directive

Members of the immediate family or close friends of suspects and accused and members of the immediate family of defence counsel can only be eligible for appointment or assignment under this Directive as members of the defence team if the lead counsel specifically requests the appointment or assignment of such persons where he provides justification for such appointment or assignment for the adequate preparation of the case for the Defence and where the Head of Defence Office, with a view to the fairness of the proceedings, has no objection to the appointment or assignment.

14. The above provisions show varying levels of comprehensiveness, with Article 18(D) of the STL Directive containing relatively more relaxed conditions for approval of the exception, but nevertheless expressed using more prohibitive than permissive language.²⁴ This review allows a conclusion that Section 10.4 of the DSS Administrative Regulations reflects a general policy throughout the United Nations, and the ICC alike, which is to grant access to opportunities within their systems to the widest possible group of candidates, and to prevent nepotism in particular; consequentially, as a principle, consanguineal appointments are prohibited. This policy in the context of the DSS Administrative Regulations is served when Section 10.4 is given a broad acceptance consistent with the language used, to the effect of barring engagement of relatives in any ECCC defence team. Adhering to this policy is of particular importance in the context of ECCC which in the past was tainted with allegations of corrupt practices of salary-splitting; therefore, avoiding even the *appearance* of nepotism is crucial. As such, I find no legal grounds to either refuse the application of Section 10.4 of the DSS Administrative Regulations or apply it beyond the confines of its plain language.

15. The Co-Lawyers submit that the Registrar of the ICTY has stated that the purpose of Article 16(F) of the ICTY Directive, analogous to Section 10.4 of the DSS Administrative Regulations, is “to protect the Tribunal’s legal aid system from fee-splitting and nepotism”, and argue that there is no issue of nepotism in the present case because Ms. [REDACTED] would be hired to a different defence team than that of her father; moreover, there is no evidence of fee-splitting.²⁵ However, it should be noted that the rule expressed

²⁴ Section 10.4 of the DSS Administrative Regulations requires that the appointment be “in the interests of justice” whereas Article 18(D) of the STL Directive requires only that lead counsel provide “justification for such appointment” and that “the Head of Defence Office, *with a view to* the fairness of the proceedings, has no objection” (emphasis added).

²⁵ Application, para. 23, *referring to Prosecutor v. Balaj*, IT-04-84-PT, Decision, 9 February 2007, p. 2. *See also* Application, para. 38.

by Section 10.4 is abstract, and its purpose – as explained above – is preventive. Thus, its applicability does not depend on the actual occurrence of nepotism or other irregularities, such as fee-splitting. It should also be noted that in his Statement, the Suspect specified that his preference to employ Ms. [REDACTED] is based on the relationship that he has with her father.²⁶ This is precisely the kind of advantage that the rule seeks to eliminate from bearing upon the hiring process. This submission is therefore flawed.

16. As such, the determination that Ms. [REDACTED]’s appointment would be that of a co-lawyer’s family member is correct and the issue at hand falls under the ambit of the disposition of Section 10.4 of the DSS Administrative Regulations.

17. With respect to whether it is in the interests of justice to appoint Ms. [REDACTED] to the Suspect’s defence team, the Co-Lawyers submit that a test formulated and applied by the Registrar of the ICTY in respect of Article 16(F) of the ICTY Directive comprising the following four questions (“ICTY Test”) is the appropriate test to apply in the present case on the fact that both the ICTY and the ECCC are administered by the UN, and administrative rules should therefore be applied uniformly “in similar circumstances”, whereas the test was erroneously applied in the present case by the Chief of DSS.²⁷

- 1) Does the person in question possess specific qualifications and/or experience which place him/her into a unique position in comparison to other possible candidates for the position the assignment is requested for?
- 2) Have counsel and the person in question previously worked together in the same field and the same capacities as those for which the assignment is sought?
- 3) Does the person in question have experience before the Tribunal?
- 4) Would the assignment contribute to speeding up the proceedings and ensuring the most efficient use of public funds?

18. In my opinion, two consequences follow from the normative construct of the general rule *versus* exception in Section 10.4. First, exceptions need to be interpreted strictly in order to give effect to the rule. Second, the person invoking the exception has the burden of showing that conditions predicate for the exception are present. Considering the intrinsically broad notion of “the interests of justice”, the test boils down to the showing of (1) an exceptional advantage for the legitimate interests of the defence, or for the court proceedings in general, resulting from an appointment or employment of a relative or close friend of a suspect, charged person, accused or co-lawyer to a defence team; and/or, (2) a concrete detriment to any of these interests if such appointment is not effected. In accordance with the strict interpretation of “the interests of justice”, it is therefore necessary that the advantage or detriment go beyond a mere convenience or inconvenience. The criteria that may demonstrate advantage or detriment concern mainly the *sensu largo* qualifications or availability of the person, and may, for example, include:

- 1) unique qualities or skills relevant to the position, such as expert knowledge in a narrow or rare discipline;

²⁶ See Statement, para. 2 (“I initially chose Mr. [REDACTED] as my co-lawyer because of my confidence and trust in Mr. [REDACTED]’s ability and capacity, and that I have decided to request for appointment of [*sic*] Mr. So Mosseny and Suzana Tomanović to be appointed as my co-lawyers based on Mr. [REDACTED]’s recommendation”) and para. 3 (“I trust Ms. [REDACTED] because of my trust in Mr. [REDACTED] and Mr. So Mosseny”).

²⁷ Application, paras. 26-37.

- 2) significant prior experience in performing work similar to that required for the position;
- 3) immediate availability in view to particular time constraints or pressure that would not be met unless appointing the person in question;
- 4) another circumstance, due to which the appointment of the person in question would significantly expedite proceedings, such as knowledge of the case or knowledge of languages of the proceedings;
- 5) significant costs that could be saved only by appointing the person in question

19. The Co-Lawyers submit that the most unique quality possessed by Ms. [REDACTED] is that she holds the Suspect's trust, and that no other case manager on the DSS Case Manager List possesses his trust.²⁸ They further contend that Ms. [REDACTED]'s previous experience at the ECCC as an intern for the IENG Sary Defence Team puts her in a unique position in comparison to other former ECCC interns, because: (1) the IENG Sary Defence Team considered her work to be exceptional in comparison to others;²⁹ (2) Ms. [REDACTED] has experience with the ECCC court proceedings, Zylab, CaseMap, the filing and documentation practices of the defence teams, potential legal issues in Case 004, and background and factual matters specific to the Suspect;³⁰ (3) at the time of her internship with the IENG Sary Defence Team, she was supervised by both Co-Lawyers, one of whom was the team's case manager at the time,³¹ and, (4) her assignment would contribute to speeding up the proceedings and ensuring the most efficient use of ECCC funds because she can start immediately, she requires less training than other candidates, she works efficiently, and the Suspect trusts her.³² In addition, the Co-Lawyers assert that the Suspect is entitled to be represented by lawyers of his choice in accordance with Rule 21(1)(d) of the Internal Rules.³³

20. Rule 21(1)(d) of the Internal Rules guarantees “[e]very person suspected or prosecuted [...] to be defended by a lawyer of his/her choice”. Without pronouncing on whether this rule is applicable to case managers in addition to lead counsel, it is sufficient to note that according to an established fair trial standard, notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute and is necessarily subject to certain limitations where free legal aid is concerned.³⁴ At the ECCC, an accused or suspect who lacks the means to remunerate counsel has the right to have counsel assigned to him by the Chief of DSS from the list drawn up in accordance with Rule 11(6) of the Internal Rules. While in practice, the Chief of DSS will take account of an accused's or suspect's preferences in assigning counsel, where his or her defence is being paid for pursuant to the ECCC's legal aid programme, his or her right to legal counsel of his or her own choosing from the list is not absolute, and the Chief of DSS may override that preference if it is in the interests of justice.³⁵ Likewise, choices of an accused or a suspect as to defence support staff funded through legal aid

²⁸ Application, para. 28.

²⁹ Application, para. 29.

³⁰ Application, paras. 29, 31.

³¹ Application, para. 31.

³² Application, para. 37.

³³ Application, p. 1, para. 19.

³⁴ See, e.g., European Court of Human Rights, *Croissant v. Germany*, Application no. 13611/88, Judgment, 25 September 1992, para. 29; *Lagerblom v. Sweden*, Application no. 26891/95, Judgment, 14 April 2003, para. 54.

³⁵ See *Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-2007-91-A, Judgment, 15 May 2010, para. 35, and references cited therein.

programme may be subject to limitations, such as in Section 10.4 of the DSS Administrative Regulations.

21. As to the qualifying factors indicated by the Co-Lawyers, it is my opinion that while they do establish a reasonable basis for preferring Ms. [REDACTED]'s candidacy over that of others, they are insufficient to constitute the necessary "interests of justice" capable of overriding the general rule at Section 10.4 of the DSS Administrative Regulations. Skills attributed to Ms. [REDACTED] are not unique or difficult to attain. It appears from the uncontested submissions that there are a number of qualified candidates on the DSS Case Manager List who, in the absence of any time constraints or pressure in the present case, could easily be better trained to suit the Suspect's team's needs, and equally gain his trust. There is no indication that the Suspect could not possibly trust another candidate, an indication which would in any event be presumably unreasonable. As such, in the absence of any advantage or detriment going beyond a mere convenience or inconvenience to hire any other qualified candidate other than Ms. [REDACTED], I am inclined to agree with the Chief of DSS's evaluation that it is not, in the present case, in the interests of justice to appoint her as the Suspect's case manager.

22. In light of the foregoing, I hereby **DENY** the Application in its entirety.

Phnom Penh, 2 May 2014
United Nations Administrative Judge



Judge Agnieszka KLONOWIECKA-MILART