SPECIAL COURT FOR SIERRA LEONE
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Before: Justice Robertson, President

Registrar: Robin Vincent

Date: 26th day of November 2003

The Prosecutor Against:

Sam Hinga Norman
(Case No. SCSL-2003-08-PT)

DECISION ON MOTION FOR MODIFICATION OF THE CONDITIONS OF DETENTION

Office of the Prosecutor:
Luc Côté, Chief of Prosecution
Jim Johnson, Senior Trial Counsel

Defence Office:
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THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court")

NOTING THE SUBMISSIONS OF THE PARTIES
HEREBY DECIDES AS FOLLOWS:

1. This Motion[1] is brought under Rule 64 (Detention on Remand) of the Rules of Procedure and Evidence ("Rules") on behalf of Chief Sam Hinga Norman, an indictee who has been detained, since his arrest on 10 March 2003, in Special Court detention facilities, initially at Bonthe Detention Facility (where he was incarcerated when the motion was filed on 23 July 2003) but now in the detention unit of the Special Court complex in Freetown, adjacent to the Court itself. It is described as a "motion for modification of the conditions of detention" although it is in fact (and this is frankly acknowledged in the Motion) a request for his release from detention so that he can be placed under what is ambiguously described as "house arrest", under conditions (e.g. to reside at the house at all times, surrender his passport, and to have no contact with witnesses or the media) which are normally associated with a grant of bail. The Prosecution responded very fully, over more than 100 pages, on 31 July 2003[2] and a reply was expeditiously filed on 4 August 2003.[3] The papers were not, however, put before me until 30 October 2003. The Motion struck me immediately as one which is, in effect and in principle, an application for conditional bail, which should have been brought under Rule 65, and I therefore invited counsel for the Applicant and the Prosecutor to address me initially on this issue, which they did at a hearing convened in the Special Court law library on 5 November 2003. I am grateful to them for their assistance.

2. My first anxiety, however, was to understand why the delay occurred. The Motion seems to have been a casualty first of the fact that the Court was in recess during the month of August. Subsequently, there seems to have been confusion (understandably, as will appear) in the Registry as to whether this was a bail application under Rule 65 or a matter for the President's discretionary jurisdiction over the detention facility which was provided by Rule 64, although there had been a change made to Rule 64 on 1 August 2003 at the second London plenary of the judges. (Power to order "special measures of detention" was allocated to the Registrar, subject to

[1] Motion for Modification of the Conditions of Detention, 23 July 2003.
[2] Prosecution Response to Defence "Motion for Modification of the Conditions of Detention", 31 July 2003.
[3] Reply – Motion for Modification of the Conditions of Detention, 4 August 2003.

an appeal within two days to a judge). In these circumstances I can see how the delay occurred and expedition does not appear to have been urged on behalf of the detainee - perhaps because he was over this period moved from Bonthe to a more satisfactory environment. Although no-one is to blame, I do apologise to Chief Hinga Norman and his lawyers for the delay that has occurred in dealing with their Motion. Although I conclude that it should not have been filed in the first place under Rule 64, either as it stood at the time or as amended, this was not clear at the time of filing and no criticism can be attached to the detainee's lawyers for bringing what they described as an "innovative" application.

The Detention Regime

3. All indictees arrested in Sierra Leone or transferred there after arrest abroad must initially be detained in the facilities run by the Special Court administration. Rule 64, inherited from the International Criminal Tribunal for Rwanda ("ICTR") under Article 14 of the Statute, originally provided;

> Upon his transfer to the Special Court, the accused shall be detained in the facilities of the Special Court, or facilities otherwise made available pursuant to Article 22 of the Statute. The President may, on the application of a party or the Registrar, order special measures of detention of an accused.

This was the rule as it existed when the application was made on 23 July this year. It gave the President the power to order "special measures of detention", i.e. special ways of treating a particular prisoner who was detained within the facility. The prisoner himself, for example, might seek an order for solitary confinement or special medical treatment while the Registrar might make a request for CCTV surveillance of a cell for a "suicide watch" or where there was suspicion of a plan of escape. It was, in my view, a rule which envisaged the ordering of a special regime for a prisoner confined within the detention facility or else (e.g. if being treated in a hospital) being guarded by and remaining in the custody of the Special Court. It did not empower the President to order bail, which is a measure of provisional liberty to be dealt with under Rule 65.

4. A distinction, upon which this application will turn, should be simple to understand and apply, once the ambiguity of the phrase "house arrest" is recognised and removed. Some "house arrests"

involve round-the-clock guards from the detaining power, albeit in the more comfortable surrounds of a private house rather than a prison cell. The other form of "house arrest", for example that served in Britain by General Pinochet, requires residence in a private house outside the control of any prison authority, but subject to conditions such as the surrender of passport and reporting to police. It is this second, Pinochet-style form of "house arrest" that the applicant seeks and it is of course (as in Pinochet's case) a form of conditional bail rather than a "special measure of detention". The essential distinction between "house arrest" and conditional bail involving a form of house arrest is the presence or absence of the detaining authority as the power controlling the movements of the detainee. The applicants have not put before me any approval to their desired course from the Head of Detention. His ability to operate a control regime would be essential before I could consider any application under old Rule 64 for a variation in the place and conditions of detention.

5. The actual administration of the conditions of detention must comply with the Rules of Detention,[4] which are designed to provide for a regime of humane treatment for unconvicted prisoners, subject to restrictions and discipline necessary for security, good order, and for the fairness of ongoing trials. They should conform with the provisions of the 1949 Geneva Conventions, suitably updated (the right to smoke cigarettes, for example, regarded as virtually inalienable in 1949, may be qualified because of more recent health concerns about fellow detainees).[5] The Detention Rules give necessary powers to the Head of Detention, subject to direction by the Registrar. Judges have no part in administering or ordering these rules, although in three difficult or urgent situations the President does have a role to order a report into the death in custody of an indictee (Rule 24(c)); to approve any order by the Registrar for cell video surveillance which order lasts longer than 14 days (Rule 26); and to hear appeals by a detainee from any decision to deny him contact with any person (Rule 48). These are serious situations where it is right that the President, as head of the Special Court, should oversee the Registrar. Otherwise, judges are not involved in administrative detention matters unless they impact significantly upon the right under Article 17(4)(b) of the Statute to adequate preparation of the defence, when they may be raised by motion before the Trial Chamber judges who are best placed to make such a determination.

[4] Rules governing the detention of persons awaiting trial or appeal before the Special Court for Sierra Leone or otherwise detained on the authority of the Special Court for Sierra Leone, 7 March 2003, as amended 25 September 2003.
[5] See Article 26 of Convention (III) relative to the treatment of prisoners of war, Geneva, 12 August 1949.

6. At the second plenary, Rule 64 was amended so that it would best serve a court where the President, who is an Appeals Chamber judge, would not be in full-time office until after the first trial had ended. Except in these very serious matters for which the Rules of Detention provide for Presidential involvement, "special measures" could be approved by any judge - normally by one of the three full-time and resident Trial Chamber judges. Moreover, in keeping with the policy that detention is a matter for administrative rather than judicial decision, any order for such exceptional measures should be made by the Registrar. In order to protect the detainee, if subjected to them without consent, the Registrar is required to seek judicial endorsement within 48 hours of imposing the measure. Rule 64 (Detention on Remand) now reads:

> Upon his transfer to the Special Court, the accused shall be detained in the facilities of the Special Court, or facilities otherwise made available pursuant to Article 22 of the Statute. The Registrar, in a case where he considers it necessary, may order special measures of detention of an accused. Such special measures shall be put before a judge for endorsement within 48 hours.

Bail - Release from Detention

7. The prisoner remains in detention under Rule 64 and the Rules of Detention when transferred to holding areas prior to entry into court or outside the prison for medical treatment (even if placed for a lengthy period in hospital) and in the courtroom itself while being tried. The alternative situation, where the prisoner can be said to enjoy a state of liberty, however restricted, can only be achieved (other than by his acquittal) through an application for bail which must be made pursuant to Rule 65. This rule provides:

A. Once detained, an accused shall not be granted bail except upon an order of a Judge or Trial Chamber.

B. Bail may be ordered by a Judge or a Trial Chamber after hearing the State to which the accused seeks to be released and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

C. An accused may only make one application for bail to the judge or Trial Chamber unless there has been a material change in circumstances.

D. The Judge or Trial Chamber may impose such conditions upon the granting of bail to the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused at trial and the protection of others.

E. Any decision rendered under this rule shall be subject to appeal in cases where leave is granted by a single Judge of the Appeals Chamber, upon good cause being shown. Applications for leave to appeal should be filed within 7 days of the impugned decision.

F. If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been granted bail or is for any other reason at large. The provisions of Section 2 of Part V shall apply.

G. The Prosecutor may appeal the decision to grant bail. In the event of such an appeal, the accused shall remain in custody until the appeal is heard and determined.

H. Appeals from bail decision shall be heard by a bench of at least three Appeals Chamber judges.

8. Although the paragraphs of Rule 65 are somewhat jumbled, the procedure is tolerably clear. There is no presumption in favour of bail, which is understandable given the very serious nature of the crimes charged. It may be applied for to a single judge (generally, prior to trial) or to the Trial Chamber once the trial has started and may only be appealed by leave of the pre-hearing judge of the Appeals Chamber, upon good cause being shown. Under Rule 65D any judge or chamber minded to grant liberty has a wide discretion to impose conditions and restrictions. In my judgement, as will appear, this "application for special measures of detention" is in reality an application for conditional bail which should have been made under Rule 65D.

The Application

9. The Defence has found a "safe house" outside the Court and seeks an order (in effect inviting bail conditions) that he should reside at that address at all times; that he should surrender his passport; not interfere with witnesses; conduct no media interviews but admit "occasional unannounced visits" by a designate of the Registrar - presumably to check that he is still there.

There would be no permanent (or even occasional) presence in the house of prison officers, as there is in the first kind of "house arrest" discussed in paragraph 4 above. The proposal is for the accused to be at liberty, and together with his family, subject only to conditions which are commonly regarded as conditions of bail.

10. My classification of this application as one for bail relieves me of any need to detail, let alone determine, the grounds upon which it has been made: most relate to conditions in Bonthe, which are now water under the bridge. I am sorry to hear that the accused still suffers some pain from a condition that has required surgery in the past; if it threatens his preparation for trial then of course, under the Rules of Detention, he is entitled to have medical examination and treatment, but his doctor's letter (undated) gives no cause at this stage for alarm. There is a letter from the Secretary of the President of Sierra Leone, but that was in respect of an approach by the applicant's lawyers who sought an indication of the position of the State in respect to a potential Rule 65 application where paragraph B requires such an indication from the State of proposed residence. This approach to the President envisaged an application under Rule 65 and not Rule 64.

11. The Prosecution opposes the application by way of affidavits from its senior investigator and the Inspector General of Police: these will be for the Trial Chamber to consider in the event that a bail application is made. The Prosecution response invites me at length to dismiss the Motion on its merits. Surprisingly, it does not take the point that it is in reality an application for bail. Had it been made after the amendment to Rule 64, of course, the position would I hope have been much clearer.

The *Blaskic* Case

12. The applicant justified his "innovative" use of the old Rule 64 on the basis of a decision of Judge Cassese, when President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), to use his powers under that Rule to order that General Blaskic be permitted to reside outside the Court and to spend some nights with his wife and children.[6] Having examined the *Blaskic* case, I do not think that it assists. It is briefly reported, and does not fully describe the

[6] *Prosecutor v Tihomir Blaskic*, Case No. IT-95-14-T, Decision of the President on the Defence Motion filed pursuant to Rule 64, 3 April 1996.

regime which is being approved. I am told that it proved impractical in any event. There was some background - the President said that the General's "voluntary surrender deserved some recognition" and that "house arrest is a form of detention"[7] - but as I have pointed out in paragraph 4 above this depends on what is meant by the ambiguous phrase "house arrest". The Pinochet style of house arrest is emphatically not a form of detention; it is a form of conditional bail. The issue turns on whether the indictee remains under the control of the detention unit and that fact is not clear from the *Blaskic* decision. There was a subsequent decision dealing with security arrangements, from which it may be inferred that the accused was in fact to be guarded whilst at home. This fact would eliminate the case as a precedent for this application which as I have indicated is one for bail with a condition (amongst others) of residence at a particular address. That comparable applications have always been made and dealt with as applications for bail (or for "provisional release" as bail is there described) is apparent from many other ICTY and ICTR cases.[8]

13. In my judgement, this is right both as a matter of rule construction and in principle. It will henceforth be right under amended Rule 64 where the Registrar's power to order "special measures" cannot be interpreted as a power to order conditional release or any measure which places a detainee outside the 24 hour control of the Head of Detention. Applications for conditional freedom must proceed under Rule 65, where they will receive the attention of the Chamber that is actually trying the accused, or of a resident Trial Chamber judge. In its original ICTY incarnation, Rule 65 limited bail to "exceptional circumstances".[9] Now, and in this Court, all circumstances must be taken into account: obviously there would need to be convincing guarantees that the accused will not abscond or tamper with witnesses or victims or pose a threat to others. A Rule 65 application also has the right of an appeal, should leave be granted.

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[7] Ibid, para. 3(d).

[8] See e.g. *Prosecutor v Bagosora*, Case No. ICTR-98-41-T, Decision on Defence Motion for Release, 12 July 2002; *Prosecutor v Brdanin*, Case No. IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000; *Prosecutor v Mrda*, IT-02-59-PT, Decision on Darko Mrda's Request for Provisional Release, 15 April 2002; *Prosecutor v Ademi*, Case No. IT-01-46-PT, Order on Motion for Provisional Release, 20 February 2002; *Prosecutor v Jokic*, Case No. IT-01-42-PT, Order on Miodrag Jokic's Motion for Provisional Release, 20 February 2002; *Prosecutor v Brdanin and Talic*, Case No. IT-99-36-PT, Decision on Motion by Momir Talic for Provisional Release, 28 March 2001.

[9] See Rule 65(B) of the ICTY Rules of Procedure and Evidence adopted on 14 March 1994 (as amended 8 January 1996), UN Doc. IT/32/Rev.7 (1996), "Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person."

14. In ICTY and ICTR practice, bail has not often been granted. In Sierra Leone, when crimes of murder and treason are charged, the terms of Section 79(1) of the Criminal Procedure Act of 1965 (as amended) require any grant of bail to be made by a judge and not a magistrate. The harshness of a bail refusal is tempered where the Court can provide a relatively speedy trial at which the "presumption of innocence" operates to require the Prosecution to prove its case beyond reasonable doubt. I recognise that continued incarceration is particularly burdensome to this accused who was a minister in the Government both at the time of his arrest and at the time of his alleged crimes. The Prosecution accepts that its charges against him arise out of his leadership of forces which acted in defence of the democratically elected government, sometimes at its request, and that it would fail if it could not prove that the degree of force used was unreasonable in all the circumstances. His counsel refer, rightly and repeatedly, to his right to a fair and speedy trial.

15. The importance of this right in the Special Court has already been emphasized by the Appeals Chamber.[10] That prospective delay is a relevant circumstance to be taken into account in bail applications has been confirmed by ICTY and ICTR jurisprudence which rightly warns prosecutors against reliance on early and aberrant decisions of the European Commission of Human Rights excusing very lengthy pre-trial detentions.[11] The very act of bringing an indictment implies that the Prosecution has a case that is almost ready for trial and can be made ready within 6 to 9 months of the date of arrest, a time that is probably the minimum necessary to allow defence preparation. Arguments that concern delay in trial fixtures considerably beyond that time period will be carefully scrutinised to ensure that both parties are genuinely working towards trial at the earliest practicable time.

Conclusion

16. This application cannot be entertained under Rule 64. It must be made anew and under Rule 65 should the applicant wish to pursue it as an application for conditional bail. I make no comment on the evidence filed by either side, which in any event would need to be updated since it deals

[10] *Prosecutor v Norman*, Case No. SCSL-2003-08, *Prosecutor v Kallon*, Case No. SCSL-2003-07, *Prosecutor v Gbao*, Case No. SCSL-2003-09, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003.

[11] See *Prosecutor v Brdanin*, Decision on Motion by Brdanin for Provisional Release, in particular at paras 24-28. Note also footnote 62 in which the aberrant European Commission case of *Ventura v Italy* is discussed. Other such cases are distinguished on the basis that they are applications of the "margin of appreciation" doctrine.

with the position in July and to a large extent the conditions in Bonthe. Of paramount importance in the applicant's case is the need for the Court to effectuate his right to an early trial fixture and to consider any further application he may make in the context of his preparation for that trial and as the trial progresses.

Done at Freetown

This twenty-sixth day of November 2003

Justice Robertson

President

[Seal of the Special Court]