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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

IN THE TRIAL CHAMBER

Before: Justice Raga Fernando

Registrar: Mr. Robin Vincent

Date filed: 8 September 2004

THE PROSECUTOR

Against

SAM HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

CASE NO. SCSL-2004-14-AR65

PROSECUTION RESPONSE TO MOININA FOFANA APPLICATION FOR LEAVE TO APPEAL AGAINST REFUSAL OF BAIL

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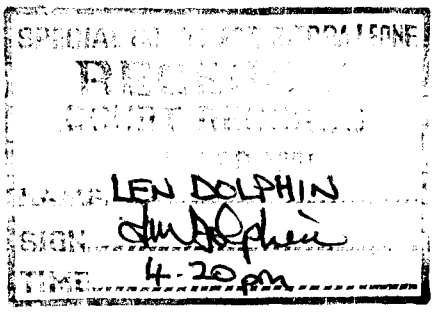

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I. INTRODUCTION

1. The Prosecution files this Response to the Moinina Fofana Application for Leave to Appeal against Refusal of Bail ("**the Fofana Application**") filed on 27 August 2004.

2. In the Application, the Defence seeks leave to appeal the "Fofana – Decision on Application for Bail Pursuant to Rule 65" rendered by Judge Itoe on 5 August 2004 ("**the Fofana Decision**"). The Defence argues that the Judge committed both factual and legal errors in denying the bail application made by the Accused, Fofana. Specifically, the Defence argues the following grounds:

    a. The Judge erred on the facts when he failed to give proper consideration to the specific guarantees given by the accused, which guarantees should have been sufficient to satisfy the Judge that the accused would appear for

trial and, if released, would not pose any danger to victims, witnesses or other persons.[1]

b. The Judge erred in law in his interpretation of Rule 89(C) by which the unsigned statement of the Defence was excluded. Further, the Judge was wrong in relying on the "best evidence rule" in deciding on the admissibility of the declaration submitted by the Defence.[2]

c. The Judge erred in law in admitting into evidence the statement of the Chief Investigator for the Prosecutor who was not an impartial witness.[3]

d. The Judge erred in law when he held that in matters relating to bail, the burden of establishing the conditions set out in Rule 65(B) of the Rules rests on the accused.[4]

e. Finally, the Fofana Application merits consideration by the Appeals Chamber by virtue of the questions of public importance raised by the application.[5]

3. The Prosecution submits that no errors of law or fact committed by the Judge in the exercise of his discretion have been identified by the Defence. On that basis the application should be dismissed. As to the broader question of the circumstances under which provisional release may be ordered by the Special Court, the Prosecution submits that as decided by Judge Gelaga King in the *Kallon*[6] and *Sesay*[7] decisions, a final determination of the issue may be warranted from the Appeals Chamber, only if it is in the interests of justice to do so. The Prosecution submits that it is not.

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[1] Fofana Application, para. 12.
[2] Id., paras. 13 & 14.
[3] Id., para. 16.
[4] Id., para. 17.
[5] Id., para. 20.
[6] Prosecutor v. Kallon,
[7] Prosecutor v. Sesay,

II. ARGUMENTS

A. Good Cause

4. Under Rule 65(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." The Appeals Chamber of the SCSL has held that "good cause" is shown not only when the Trial Chamber "may have erred" in making the impugned decision but also where the issue raised in the appeal is one to be decided for the first time, or a question of public importance upon which further argument and a decision of the Appeals Chamber would be in the interests of justice.[8]

5. The Prosecution submits that the Fofana Application raises no error of law or fact on the part of Judge Itoe. The Prosecution further submits that, given the decisions in the *Kallon* and *Sesay* matters, the Fofana Application does not raise a matter of general principle for the first time. It is the Prosecution's submission that only if the Fofana Application establishes that a decision of the Appeals Chamber in the instant case would be in the interests of justice paying particular regard to the fact that ordinarily the accused may only make one application for the bail to the Judge or Trial Chamber, would "good cause" have been demonstrated.

B. Alleged Factual Error

6. The Defence asserts in its Application that the Learned Judge erred on the facts when he "gave limited response to, in (sic) any, to the specific guarantees raised by Mr. Fofana". The Defence concludes that the "guarantees should have been sufficient to satisfy Judge Itoe that he [the accused] would appear for trial and, if released, would not pose any danger to victims, witnesses or other persons."[9]

7. The Prosecution submits that the Learned Judge duly considered all the material facts presented to him, including the specific guarantees furnished by the accused, and appropriately dismissed the guarantees offered as being insufficient evidence that he would appear to stand trial. The Learned Judge stated in his decision as follows: *"I*

[8] *Prosecutor v. Issa Hassan Sesay et al.*, Kallon – Decision on Application for Leave to Appeal Against Refusal of Bail, 23 June 2004, para. 9. *Prosecutor v. Issa Hassan Sesay et al.*, Sesay – Decision on Application for Leave to Appeal Against Refusal of Bail, 28 July 2004, para. 15.
[9] Fofana Application, para. 12..

have taken cognisance of the guarantees he has offered in Counsel's submissions to back his application but these, to my mind, do not rise up to the expectation that would convince me to exercise the discretion in his favour".[10] Judge Itoe balanced the guarantees given by the Accused against factors such as the gravity of the offence and the severity of sentence;[11] the limited means of the Special Court and the Sierra Leone Police to execute a warrant of arrest against an indictee who absconds;[12] the danger posed by the Accused to victims and witnesses;[13] and public order concerns relating to the release of the Accused.[14] The Trial Judge concluded that he was *"not convinced by the sincerity of the Applicant in providing such glowing guarantees as an unequivocal assurance that he would, if released on bail, appear for his trial."*

8. The Prosecution further submits that Rule 65(B) gives the Trial Chamber discretion as to whether to grant bail; this notwithstanding the furnishing of legal, moral and material guarantees by the Accused.[15] Thus, the Learned Judge was not compelled to accept what the Defence considers to be "sufficient" and "substantial" guarantees as meeting the conditions stipulated under the Rule. Moreover, Rule 65(B) does not purport to list all the factors that may be taken into account in such an application.[16]

C. Alleged Errors of Law

1. The Judge Did not Err in His Admission of Presented Evidence

9. The Defence asserts that the Learned Judge erred in the admission of presented evidence and thus in the interpretation of Rule 89(C).

10. The Defence argues, first, that the Learned Judge erred in applying the best evidence rule to the admissibility rather than the evaluation of the evidence. The Prosecution submits that Judge Itoe correctly exercised his discretion in applying the "best evidence rule" to the admissibility of evidence. Although as a matter of common law, the "best evidence rule" goes to weight and not admissibility, the "best evidence rule" as applied by the

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[10] Fofana Decision, para, 68.
[11] Id., at paras. 72-75.
[12] Id., at paras. 76-77.
[13] Id., at paras. 78-81.
[14] Id., paras. 82-84.
[15] *Brdanin & Momir Talic*, IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000, para. 22.
[16] *Prosecutor v. Ademi*, Order on Motion for Provisional Release, IT-01-46-PT, 20 February 2002, para. 22.

Learned Judge is supported by the jurisprudence and practice of the ICTY.[17] The rule was adopted by the Tribunal in order to ensure fairness in proceedings by applying the best rules possible.[18] More importantly, Rule 89(A) of the SCSL Rules provides that the Court is not bound by national rules of evidence. Also, Rule 89(B) authorises the Court, in cases not provided for in the rules, to apply rules of evidence which will best favour a fair determination of the matter before it and are in consonance with the spirit of the Statute and the general principles of law. Thus, the application of the "best evidence rule" in this instance was in the interests of justice given that the principle of a fair trial applies equally to the Defence and the Prosecution.

11. In addition, the fact that the "best evidence rule" goes to weight and not to admissibility does not mean that the rule allows for blanket admissibility of evidence irrespective of its or the overall circumstances. Furthermore, assuming that the learned Judge was wrong in his application of the "best evidence rule" in this case, the error was not fatal to the conclusions reached by the Judge.

12. Secondly, in the absence of any detailed legal analysis as to the scope of Rule 89(C), the Defence argues that the unsigned declaration "should have been admitted as evidence" and that "an unsigned document is not by definition irrelevant." The Defence assumes, contrary to the weight of established jurisprudence, that all relevant evidence is admissible under Rule 89(C). At the outset, the Prosecution points out that the Learned Judge has discretion under Rule 89(C) as to whether or not to admit relevant evidence.[19] Also, at no stage did the Judge opine that the unsigned declaration was irrelevant. In fact, the Learned Judge held that "*The contents of both the unsigned submission of the Government of Sierra and the unsigned Defence Declaration are* ***relevant*** *but what is to be determined is whether they are, in the circumstances, admissible under Rule 89(C).*"[20] [Emphasis added]

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[17] *Prosecutor v. Delalic*, Decision on the Tendering of Prosecution Exhibits 104-108, 9 February 1998, para. 14 & 15.
[18] Id., para. 14.
[19] Rule 89(c) reads uses the word "may" and not "shall".
[20] Fofana Decision, para. 51.

13. As to the interpretation of Rule 89(C), the Learned Judge held that for evidence to be admissible under the rule it must be relevant and have probative value.[21] The Learned Judge further held that the Court must be satisfied that it is reliable.[22] This interpretation of Rule 89(C) by Judge Itoe is in conformity with the ICTY and ICTR jurisprudence which is based on comparable provisions.[23] The ad hoc tribunals have consistently held, in spite of the principle of extensive admissibility, that relevant evidence may be excluded if found to be unreliable.[24] In fact, in the case of *Prosecutor v. Blagojevic & Jokic*, the Trial Chamber of the ICTY held that unreliable evidence cannot be relevant. It concluded: "The Trial Chamber is of the opinion that, when determining whether to admit evidence, it will have to consider the reliability of the evidence because *if evidence is not reliable it cannot have either probative value or be relevant to the case.*"[25] The Appeals Chamber in *Celebici*[26] held that at the stage of admission of evidence, the implicit requirement of reliability means no more than that there must be sufficient indicia of reliability to make out a prima facie case. Relying also on the principle that evidence which tends to bring the administration of justice into disrepute is inadmissible, the Judge held that the unsigned Defence Declaration was prima facie inadmissible and prejudicial to the interests of justice.[27] After examining the applicable principles, the learned Judge found that given the overall circumstances of the case, and particularly the *purpose* for

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[21] Id., para. 50.
[22] Id., para. 52.
[23] Rule 89(C) of both the ICTR and ICTY provide that "a Chamber may admit any relevant evidence which it deems to have probative value."
[24] *Delalic et al*, Decision on Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample, 19 January 1998, para. 32. This decision was affirmed by the Appeal Chamber in Delalic et al, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 19-20. At para. 20, the Appeal Chamber stated that "[T]he implicit requirement that a piece of evidence be prima facie credible – that it have sufficient indicia of reliability – is a factor in the assessment of its relevance and probative value."
[25] *Prosecutor v. Blagojevic & Jokic*, Decision on the Admission into Evidence of Intercept-Related Materials, 18 December 2003, para. 15. The Trial Chamber further held that in determining reliability it would take into account factors such as the truthfulness and trustworthiness of the evidence, the circumstances under which it was obtained and the content of the evidence.
[26] *Prosecutor v. Delalic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 17.
[27] Fofana Decision, para. 57 & 58. This is supported by Rule 95 of the SCSL Rules.

which the Declaration was sought to be tendered, namely to secure bail, the unsigned declaration was unreliable and therefore inadmissible.[28]

14. Based on the foregoing, the Prosecution submits that the Defence has failed to show any discernible errors of law committed by the Learned Judge in his interpretation of the pertinent principles and their application to the facts of the case.

2. The Judge Did Not Err When He Admitted the Declaration of the Chief of Investigations

15. The Defence alleges that the Learned Judge erred in admitting the Declaration of the Chief Investigator for the Prosecution into evidence since the latter was not an impartial witness.[29] The Defence concludes that, not being an impartial witness, the probative value of the Chief Investigator's statement was questionable and of no relevance to the issues before the Learned Judge. However, the admissibility of a statement is not dependent upon the "impartiality" of the witness. Therefore, a statement from a witness does not lack relevance, probative value or reliability merely because the witness is associated with a party to the proceedings. In addition, the question of the weight to be given to admitted evidence is one for the Judge alone to make.

16. The Defence assertion that the Declaration of the Chief of Investigations is based on hearsay[30] has no merit. Even if true, hearsay evidence is not per se inadmissible under international criminal law, and again, the question of weight is for to the Judge alone to make.[31]

17. The Prosecution submits that the Learned Judge applied the correct principles of law in finding that the signed Declaration of the Chief of Investigations was relevant, reliable and of value. Thus, he did not err in the exercise of his discretion when he admitted it into evidence and assigned to it the appropriate weight.[32]

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[28] Fofana Decision, para. 58.
[29] Fofana Application, para. 16.
[30] Id.
[31] *Prosecutor v. Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 15. Available at www.icty.org
[32] Fofana Decision, para. 59.

3. The Burden of Proof under Rule 65(B) Rests with the Applicant

18. The Defence submits that Judge Itoe erred when he considered that in matters relating to bail, the burden of establishing the conditions set out in Rule 65(B) rests on the accused. According to the Defence this concession cannot be reconciled with the "customary law principle which consecrates liberty as the rule and detention as the exception". The Prosecution submits that the Judge's decision that the onus of establishing the conditions under Rule 65(B) rests on the person seeking to benefit from the exercise of the Court's discretion is in accordance with current jurisprudence in international criminal law.[33]

19. The Learned Judge's decision regarding the burden of proof under Rule 65(B) is consistent with customary principles of law. In the majority decision of *Prosecutor v. Krajisnik*, the ICTY Trial Chamber held that *"...there is nothing in customary international law to prevent the placing of such a burden in circumstances where an accused is charged with very serious crimes, where an International Tribunal has no power to execute its own arrest warrants, and where the release of an accused carries with it the potential for putting the lives of victims and witnesses at risk. These factors lend further weight to placing the burden of proof upon the accused."*[34]

20. Further, contrary to the view expressed by Judge Itoe and adopted by the Defence,[35] under international criminal law detention is neither the rule nor the exception. Each case of provisional release is decided on its own facts.[36]

D. General Principles and Questions of Public Importance

21. The Prosecution agrees that by virtue of the decisions of Justice Gelaga King in *Kallon* and *Sesay* granting leave to appeal against refusal of bail, that issues of public importance

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[33] *Prosecutor v. Ademi*, IT-01-46-PT, Order on Motion for Provisional Release, 20 February 2002, para. 19. The ICTY held that even after the amendment "(A)s to the question of the burden of proof in satisfying they Trial Chamber that provisional release should be ordered, it is the case that in an application under Rule 65, this rests on the accused." See also, *Prosecutor v. Issa Hassan Sesay*, SCSL-04-15-PT, Decision on Application of Issa Sesay for Provisional Release, 31 March 2004; *Prosecutor v. Brdanin et al.*, Case No. IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000 ("Brdanin"), para. 22.

[34] IT-0039 & 40 PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 October 2001, para. 13. Even in the dissenting opinion, Judge Patrick Robinson noted that it was not impermissible to impose a burden on an Accused person awaiting trial to justify his release. Para. 7.

[35] Fofana Decision, para. 95-97; Fofana Application, para. 17.

[36] *Ademi*, supra, para. 6. This view was followed in *Prosecutor v. Sam Hinga Norman*, SCSL-2003-08-PT, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003, para. 8. See also, *Prosecutor v. Brdanin & Talic*, supra, para. 12.

or interests of justice may arise in applications for leave to appeal against refusal of bail. However, the Prosecution submits no such issues or interests arise in the instant case.

22. First, given the *Kallon* and *Sesay* decisions, the Fofana Application does not raise a question of general principle to be decided for the first time. Second, general questions of public importance upon which further argument and a decision of the Appeals Chamber would be the interests of justice will be answered by the decisions of that Chamber in *Kallon* and *Sesay*. Finally, the Fofana Application identifies no error of fact or law on the part of Judge Itoe. As a result, the interests of justice do not warrant examination of the issue by the Appeals Chamber notwithstanding the fact that ordinarily the accused may only make one application for bail to the Judge or Trial Chamber.

III. CONCLUSION

23. It is an established principle that in the absence of discernible error, the exercise of discretion by a primary judge should not be disturbed on appeal.[37] No such discernible error on the facts or the law has been shown in this particular case by the Defence. For the reasons outlined, the Fofana Application does not raise a novel question of general principle nor questions of public importance meriting consideration by the Appeals Chamber in the interests of justice. For these reasons, the Prosecution submits that the Fofana Application for Leave to Appeal should be dismissed.

Freetown, 8 September 2004.

For the Prosecution,

Luc Côté
Chief of Prosecution

James C. Johnson
Senior Trial Attorney

[37] *Aleksovski*, Appeal Judgement, 24 March 2000, para. 74. The Appeals Chamber held that unless there is good reason to believe that the Trial Chamber has drawn unreasonable inferences from the evidence, it is not open to the Appeals Chamber to disturb the factual conclusions of the Trial Chamber. *Bizimungu et al*, Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence, ICTR-99-50-AR73.2, 25 June 2004, paras. 17 & 20.

Prosecution Index of Authorities

1. Prosecutor v. Limaj et al, IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003.

2. Prosecutor v. Brdanin & Momir Talic, IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000.

3. Prosecutor v. Ademi, Order on Motion for Provisional Release, IT-01-46-PT, 20 February 2002.

4. Prosecutor v. Delalic, Decision on the Tendering of Prosecution Exhibits 104-108, 9 February 1998.

5. Prosecutor v. Delalic, Decision on Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample, 19 January 1998.

6. Prosecutor v. Blagojevic & Jokic, Decision on the Admission into Evidence of Intercept-Related Materials, IT-02-60-T, 18 December 2003.

7. Prosecutor v. Delalic, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of 19 January 1998 for the Admissibility of Evidence, 4 March 1998.

8. Prosecutor v. Aleksovski, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999.

9. Prosecutor v. Krajisnik, IT-0039 & 40 PT, Decision on Momcilio Krajisnik's Notice of Motion for Provisional Release, 8 October 2001.

10. Prosecutor v. Aleksovski, Appeal Judgement, 24 March 2000.

11. Prosecutor v. Bizimungu et al, Decision on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence, ICTR-99-50-AR73.2, 25 June 2004.