373) SCSL-04-15-T (11857- 11862) 11857

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Hon. Justice Benjamin Itoe, Presiding Judge
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: **Mr. Robin Vincent**

Date filed: **10th May 2005**

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 04 – 15 – T

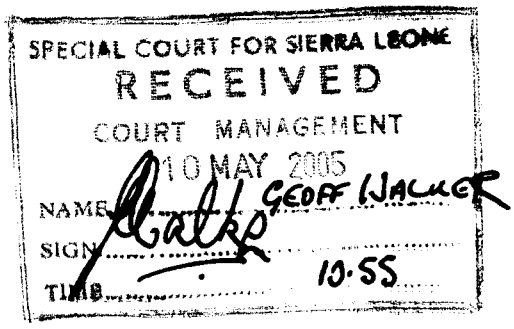
APPLICATION FOR LEAVE TO APPEAL – RULING (2nd May 2005) ON MOTION SEEKING DISCLOSURE OF THE RELATIONSHIP BETWEEN GOVERNMENTAL AGENCIES OF THE UNITED STATES OF AMERICA AND THE OFFICE OF THE PROSECUTOR

Office of the Prosecutor

Lesley Taylor
Peter Harrison

Defence

Wayne Jordash
Sareta Ashraph



1. It is the submission of the Sesay Defence Team ("the Defence") that Majority Decision in the 2nd May 2005 Decision of the above Application[1] (in which it was decided that "there is no legal basis for a disclosure order to be directed to the Prosecution to disclose any information relating to assistance given by the Prosecution or its agents to General Tarnue in respect of his asylum claim or relocation[2]") is an error of law.

2. The Defence submit that the reasoning of Judge Boutet in the "Partially Dissenting Opinion of Justice Pierre Boutet on the Decision on Sesay – Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor"[3] is the correct application of law and the proper interpretation of the meaning of "prima facie case" when the term is applied in relation to Rule 68 and the Prosecution's duty to disclose therein.

3. The Defence refer in totality to the reasoning contained in the Partially Dissenting Opinion. The Defence opine that Justice Boutet's Opinion is a strong dissent which relates directly to the criteria of exceptionality which governs the grant of leave to appeal pursuant to Rule 73(B).

a. <u>Exceptional Circumstances</u>

4. It is submitted (irrespective of whether a strong dissent relates to the exceptionality criteria pursuant to Rule 73(B)) that the current application satisfies the criteria of "exceptional circumstances and irreparable prejudice" in order to satisfy the grant of leave to appeal test, as outlined in the recent decision by the Trial Chamber on the 28th April 2005[4].

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[1] Decision on Sesay- Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2nd May 2005 ("the Majority Decision")
[2] Para 66(ix) of the Majority Decision
[3] Dated 2nd May 2005, ("the Partially Dissenting Opinion")
[4] "Decision on Defence Application for Leave to Appeal ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1 – 141", dated 29th April 2004.

5. In particular the Defence submit that the interpretation of a "prima facie case" implicit in the Majority Decision places the threshold for proof pursuant to Rule 68 unreasonably high and effectively requires the Defence to always prove mala fides on the part of the Prosecution before the Trial Chamber would be minded to intervene. The issue at stake therefore relates to the entire disclosure regime pursuant to Rule 68 and is therefore of significance to public international law (upon which further argument or decision at the appellate level would be conducive to the interests of justice) and is also one which raises serious issues of fundamental importance to the Special Court for Sierra Leone. The Appeals Chamber ought to be permitted to give guidance as to the level of proof which the Defence have to demonstrate before satisfying the "prima facie" test pursuant to Rule 68.

6. It is important to note that there is a clear dispute between the Majority Decision and Justice Boutet's Partially Dissenting Opinion in the view taken of whether the Defence have shown a prima facie case of exculpatory material.

7. On the one hand the Learned Majority considered that the Defence have failed to identify the "specific... material evidence"[5] and yet the Learned Justice Boutet was able to identify (i) the material sought (the assistance given to General Tarnue in his relocation and asylum[6]) and to such a degree of particularity that the material could be compared with other material accepted by the Prosecution and Trial Chamber to be Rule 68 material[7] and (ii) that the material could affect the credibility of a[8] witness[9]. Moreover that the evidence identified (which formed the basis of these decisions) would constitute a prima facie case which, in the words of the Trial Chamber of the International Tribunal for the former Yugoslavia in the Blaskic case, "would make probable

[5] Para. 64 of the Majority Decision
[6] Para. 6 of the Partially Dissenting Opinion
[7] Para. 4 of the Partially Dissenting Opinion
[8] The Defence note the applicability therefore of this finding (and thereby potential dispute) to all witnesses who will appear in the ongoing trial.
[9] Para. 6 of the Partially Dissenting Opinion

the exculpatory nature of the material sought"[10] (or as also expressed in the Partially Dissenting Opinion, "might affect the credibility of the witness"[11]).

8. Exceptionally thus these issues ought to be considered by the Appeals Chamber as they relate to the definition of exculpatory material and define both the burden placed upon the Defence to demonstrate a prima facie case pursuant to Rule 68 and thereafter the ongoing fundamental obligation of the Prosecution to disclose material which could affect the assessment of all prosecution evidence.

b. <u>Irreparable prejudice</u>

9. It is submitted that an error of law which leads to the non – disclosure of material which could affect the issue of credibility of all Prosecution evidence could lead to irreparable prejudice. In the event that the Learned Majority are wrong, this material may either be lost, destroyed or simply be unavailable due to the passage of time (and the fading of memories) at the point of a final appeal against judgement. It may well be too late therefore at the point of appeal (and any re – trial) for the Defence to rely upon this material. This issue ought therefore to be considered by the Appeals Chamber forthwith to prevent the "loss" of the material and the consequential irreparable prejudice.

Extension of Time to apply for Leave

10. The Defence seek permission to apply for leave to appeal out of time. The Majority Decision and Partially Dissenting Opinion were served electronically on the 3rd May 2005. It was not received by the team until the 8th May 2005 for the reasons outlined below.

11. On the 29th April 2005 the Learned Trial Chamber informed the Defence that Trial Chamber I was adjourned until 10th May 2005. All the active members of the Defence presently reside in England. It was neither feasible nor desirable

[10] Para 49 of Decision on the Production of Discovery Materials, Prosecutor v. Blaskic IT-95-14, 27th January 1997
[11] Para. 6 of the Partially Dissenting Opinion

for the team to travel to England in this period. We therefore travelled to Kono and Kailahun to conduct site visits and investigations in this period of enforced court leave. We were not contactable in Kailahun due to a lack of telephone coverage and did not have access to e-mail throughout our time away from Freetown. In short, due to taking advantage of the period out of Court to continue case preparations and due to communication difficulties (which were not within our control), we were not cognisant of the Majority Decision and the Partially Dissenting Opinion.

12. The present Application has therefore been drafted as soon as was practicable, bearing in mind the circumstances. The lateness of the present application can not be attributed to our lack of due diligence but to a combination of factors (not within our control) which ought not to be decisive of whether we should be permitted to apply for leave to appeal.

13. The Defence hereby applies for leave to appeal the Majority Decision of the 2nd May 2005 (to the extent and as outlined above).

Dated this 10th day of May 2005

Wayne Jordash
Sareta Ashraph

BOOK OF AUTHORITIES

1. Decision on Sesay- Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2nd May 2005. (available on SCSL website)

2. Partially Dissenting Opinion of Justice Pierre Boutet on the Decision on Sesay – Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2nd May 2005. (available on SCSL website)

3. Decision on Defence Application for Leave to Appeal ruling of the 3rd February 2005 on the Exclusion of Statements of Witness TF1 – 141", 29th April 2004. (available on SCSL website)

4. Decision on the Production of Discovery Materials, Prosecutor v. Blaskic IT-95-14, 27th January 1997. (available on ICTY website)