



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-95-5/18-PT

Date: 30 September 2009

Original: English

BEFORE THE INTERNATIONAL TRIBUNAL

Before: Judge Mehmet Güney
Registrar: Mr. John Hocking
Decision of: 30 September 2009

THE PROSECUTOR
v.
RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON RADOVAN KARADŽIĆ'S MOTION TO RECUSE JUDGE
MELVILLE BAIRD**

The Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Radovan Karadžić

1. On 22 September 2009, the self-represented accused Radovan Karadžić (“Karadžić”) filed before Trial Chamber III of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) a “Motion to Recuse Judge Melville Baird” (“Motion”). The Prosecution responded on 24 September 2009.¹

I. BACKGROUND

2. On 25 September 2009, the Presiding Judge in the *Karadžić* case issued the “Report by Presiding Judge to President on Motion to Recuse Judge Baird” (“Report”), finding no merit to Karadžić’s Motion.² By an “Order Assigning a Motion to a Judge” of 25 September 2009 (“Order”), the President withdrew from considering the Motion, owing to a conflict of interest arising from his prior role as Presiding Judge on the Pre-Trial Bench in the present case.³ The Order further acknowledges that Vice-President Judge O-Gon Kwon’s current role as Presiding and Pre-trial Judge in the present case⁴ likewise gives rise to a conflict of interest and that, therefore, he also withdraws from considering the Motion.⁵ Consequently, and pursuant to Rule 22(A) of the Rules of Procedure and Evidence (“Rules”), I was assigned to entertain the Motion in the President’s and the Vice President’s place.⁶

3. On 28 September 2009, Karadžić submitted his “Request for Appointment of Three Judge Panel” (“Request”).

II. SUBMISSIONS

A. Submissions of the Parties

4. Karadžić argues that “by virtue of his age, Judge Baird does not meet the qualifications of an *ad litem* Judge pursuant to Article 13 of the Statute [of the Tribunal], and therefore cannot sit as a judge on his case.”⁷ Karadžić contends that pursuant to Article 13 of the Statute, in order to qualify for appointment as an *ad litem* Judge at the Tribunal, an applicant has to possess the qualifications required for the highest judicial office in his or her respective country. In Judge

¹ Prosecution Expedited Response to Karadžić’s Motion to Recuse Judge Melville Baird, 24 September 2009.

² Report by Presiding Judge to President on Motion to Recuse Judge Baird, 25 September 2009, para. 9.

³ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-I, Order on Composition of Pre-Trial Bench, 22 August 2008; Order Replacing a Judge in a Case Before a Trial Chamber, 18 November 2008.

⁴ Order Regarding Composition of a Bench of the Trial Chamber, 4 September 2009, p. 2.

⁵ Order Assigning a Motion to a Judge, 25 September 2009, p. 2.

⁶ *Ibid.*

⁷ Motion, para. 1.

Baird's case, this would be, as Karadžić submits, the Court of Appeal, for which the mandatory retirement age of 65 years is stipulated in Section 136(1) of Trinidad and Tobago's Constitution.⁸

5. As at the time of his election as an *ad litem* Judge by the UN General Assembly on 25 August 2005, Judge Baird was already over 65 years old, Karadžić concludes that Judge Baird does not meet the qualifications for an *ad litem* Judge before the Tribunal.⁹

6. Regarding the procedural handling of his Motion, Karadžić reiterates his request that the Motion be dealt with pursuant to Rule 15 of the Rules.¹⁰ He argues that Rule 15(B)(ii) of the Rules requires that a panel of three Judges be appointed to decide the Motion.¹¹ He contends that he has not yet had an opportunity to reply to the Prosecution Response and wishes to file submissions before the three judge panel in order to achieve a "full briefing on the issue".¹²

7. The Prosecution contends that by focusing on Judge Baird's age, Karadžić "fails to challenge Judge Baird's essential qualifications to serve as a judge at the Tribunal".¹³ It asserts that pursuant to the Tribunal's jurisprudence, essential qualifications pursuant to Article 13 of the Statute do not include national age eligibility requirements for judges.¹⁴

8. The Prosecution further purports that this interpretation of Article 13 of the Statute is shared by the United Nations Security Council ("UNSC"), which is apparent from the nomination of Judge Sir Ninian Stephen 1993 as a Judge before the Tribunal at the age of 70 and Judge Baird's nomination in 2005 as well as the extension of his term of office before and after his assignment to a case by the President of the Tribunal.¹⁵

B. Report by Presiding Judge

9. In his Report, the Presiding Judge states that Judge Baird "possesses the *qualifications* for judicial office at the highest level in Trinidad and Tobago", as he has served for many years as a judge at the High Court in that country.¹⁶ The Presiding Judge considers the qualification to hold such office to be a separate matter from whether Judge Baird would be *eligible* to hold judicial office in Trinidad and Tobago due to the provision of the Constitution concerning retirement of judges at the age of 65. According to the Report, nothing in Article 13 of the Statute suggests that

⁸ Motion, paras 2-4.

⁹ Motion, paras 5-6.

¹⁰ Request, para. 1, referring to the Motion, footnote 1.

¹¹ Request, para. 6.

¹² Request, paras 7-8.

¹³ Prosecution Expedited Response to Karadžić's Motion to Recuse Judge Melville Baird, 24 September 2009 ("Response"), paras 1, 5.

¹⁴ Response, para. 2.

¹⁵ Response, paras 3-4.

¹⁶ Report, para. 7.

the mere fact that an applicant has surpassed the retirement age for judicial offices in the respective country of origin could make this applicant ineligible for appointment as a judge of this Tribunal.¹⁷ The Report cites a finding of the Appeals Chamber in the *Čelebići* case in support of its assessment.¹⁸

III. DISCUSSION

A. Applicable law

10. As noted in the Report, the Motion is not filed pursuant to Rule 15 of the Tribunal's Rules concerning the disqualification of judges from sitting on particular cases, as it does not allege any personal interest or association on the part of Judge Baird that might affect his impartiality. Rather, the Motion is premised on Article 13 of the Statute, entitled "Qualifications of Judges", which provides in relevant part as follows:

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.

11. It follows that the procedure set out in Rule 15 of the Rules for the determination of motions for disqualification does not directly apply in the present case. Neither the Statute nor the Rules foresee a specific procedure for dealing with motions for recusal based on Article 13 of the Statute. I also note the fact that the Motion is filed in a more general context, seeking the disqualification of Judge Baird not only from the *Karadžić* case but rather his disqualification in general terms as a Judge at the Tribunal.¹⁹ However, considering that Rule 15 of the Rules regulates a similar legal situation, I find that the procedure as set out in Rule 15(B) of the Rules is appropriate for the determination of the present Motion.

12. Rule 15(B)(ii) of the Rules stipulates in relevant part that

[f]ollowing the report of the Presiding Judge, the President shall, if necessary, appoint a panel of three Judges drawn from other Chambers to report to him its decision on the merits of the application.

13. Karadžić claims that Rule 15(B)(ii) of the Rules requires that a panel of three Judges be appointed to decide the Motion.²⁰ However, I note that Rule 15(B)(ii) accords a margin of

¹⁷ *Ibid.*

¹⁸ *Id.*, para. 8.

¹⁹ See Motion, para. 6: "He thus does not meet the qualifications for an *ad litem* judge at the ICTY."

²⁰ Request, para. 6.

discretion to the President when deciding whether it is necessary to appoint a panel of three Judges to decide on the merits.²¹

B. Analysis

14. I note that Judge Baird was a judge of the High Court of Trinidad and Tobago, one of the branches of the Supreme Court, from 1993 to March 2005, when he retired. I also note that in Trinidad and Tobago, judges of the Supreme Court must retire at the age of 65, and that Judge Baird is now past that age.

15. I further note that Karadžić does not contend that Judge Baird otherwise does not meet the qualification requirements for appointment as a Judge of the Tribunal. It is undisputed that Judge Baird possesses the professional qualification for judicial office at the highest level in Trinidad and Tobago, and that he served for more than 11 years as a judge at the High Court in that country. I concur with the Presiding Judge's view in the Report that Judge Baird's professional qualification is a matter different from the question whether he would be eligible to hold judicial office in his country of provenance due to the provision of the Constitution concerning retirement of judges at the age of 65.²²

16. This understanding finds support in the Tribunal's legislation and jurisprudence. Nothing in Article 13 of the Statute suggests that a judge who possesses the necessary material qualifications to become a judge before the Tribunal but who has retired from judicial office in his or her own country due to the laws in force in that country is ineligible for appointment before the Tribunal.

17. Further, the Appeals Chamber in the *Čelebići* case found that the purpose of Article 13 of the Statute is to "ensure, so far as possible, that the *essential* qualifications [of the Tribunal's judges] do not differ from judge to judge."²³ According to the Appeals Chamber, those essential qualifications are "character [...], legal qualifications (as required for appointment to the highest judicial office) and experience [...]. Article 13 was *not* intended to include every local qualification for the highest judicial office such as nationality by birth or religion, or disqualification for such high judicial office *such as age*."²⁴

²¹ See Rule 15(B)(ii) of the Rules: "[...] the President shall, *if necessary*, appoint a panel of three Judges [...]"; see also *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 16 February 2007, paras 2, 27.

²² Report, para. 7.

²³ *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeals Judgement"), para. 659.

²⁴ *Ibid* (second emphasis added).

18. The Appeals Chamber further noted that the UNSC seems to be interpreting Article 13 of the Statute in a similar fashion. It finds that it may safely be assumed that the UNSC would not closely consider a candidate who does not satisfy the requirements of Article 13 of the Statute.²⁵

19. This understanding of Article 13 by the UNSC and the General Assembly also became apparent when Judge Baird was nominated and elected as an *ad litem* Judge on 24 August 2005. On 15 December 2008, Judge Baird was sworn into office at the Tribunal, to serve as a judge on the *Đorđević* trial.²⁶ At all stages of this process, Judge Baird was above the mandatory age for retirement as a judge of the Supreme Court of Trinidad and Tobago.

20. In light of the foregoing, I am not persuaded that there is any merit in Karadžić's Motion.

21. However, I also note the Appeals Chamber's "Decision on Appeal from Decision on Motion to Disqualify Judge Picard" in this case of 26 June 2009, finding that

under the current Rule 15(B) of the Rules, where the President (or, as in the instant case, the Vice-President) has determined that it is not necessary to refer the matter to a panel of judges and decided the matter himself, and that decision is challenged, it becomes "necessary" to refer the matter to a panel of three judges. Accordingly, the Appeals Chamber finds that it is not properly seised of this matter as it should be referred to a panel of three judges.²⁷

In light of Karadžić's Request and in order to expedite proceedings both with a view to an expeditious and fair trial for Karadžić and the scheduled imminent commencement of trial in this case, I nevertheless consider it necessary to appoint a panel of three Judges to consider the merits of the Motion and to report its decision on those merits to me.

²⁵ *Čelebići* Appeals Judgement, para. 660.

²⁶ *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-PT, Order Replacing Judge on the Trial Bench, 16 December 2008. On 4 September 2009, Judge Baird was assigned to Trial Chamber III for the *Karadžić* trial, and on the same day the Vice President issued an order composing the Bench for the trial, including Judge Baird.

²⁷ Decision on Appeal from Decision on Motion to Disqualify Judge Picard, 26 June 2009, para. 8.

IV. DISPOSITION

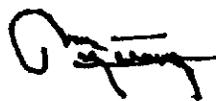
For the above reasons, pursuant to Rule 22(A) of the Rules and Article 13 of the Statute, I hereby **GRANT** the Request and **APPOINT** a panel of three Judges to consider the merits of the Motion, composed as follows:

Judge Carmel Agius, Presiding;

Judge Burton Hall; and

Judge Guy Delvoie.

Done in English and French, the English text being authoritative.



Judge Mehmet Güney

Dated this 30th day of September 2009
At The Hague,
The Netherlands

[Seal of the Tribunal]