



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: 20 October 2009

Original: English

BEFORE THE INTERNATIONAL TRIBUNAL

Before: Judge Carmel Agius, Presiding
Judge Burton Hall
Judge Guy Delvoie

Registrar: Mr. John Hocking

Decision of: 20 October 2009

THE PROSECUTOR
v.
RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON MOTION TO RECUSE JUDGE BAIRD AND REPORT TO
JUDGE GÜNEY**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

1. **THIS BENCH** 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”) is seised of a “Motion to Recuse Judge Melville Baird”, filed by the self-represented accused Radovan Karadžić (“Karadžić”) on 22 September 2009 (“Motion”). The Prosecution responded on 25 September 2009.¹

BACKGROUND

2. On 25 September 2009, the Presiding Judge in the *Karadžić* case issued a report to the President of the Tribunal, finding that although the Motion was not filed pursuant to Rule 15 of the Rules of Procedure and Evidence (“Rules”), but rather pursuant to Article 13 of the Statute of the Tribunal (“Statute”), the procedure set out in Rule 15(B) was appropriate for the determination of the Motion.² The Report concluded that there was no merit to the Motion.³

3. That same day, the President issued an order withdrawing from consideration of the Motion pursuant to Rule 15(A), also noting that Vice-President Judge Kwon was likewise withdrawing pursuant to Rule 15(A). The President therefore assigned Judge Güney to consider the merits of the Motion pursuant to Rule 22(A).⁴

4. Following a request by Karadžić for a panel of three judges to report on the merits of the Motion pursuant to Rule 15(B)(ii),⁵ Judge Güney issued a decision on the Motion, noting that although he was not persuaded that there was any merit to the Motion, it was necessary to appoint a panel of three Judges to consider it.⁶

5. Following a decision issued by this Bench,⁷ Karadžić filed a reply to the Prosecution Response on 14 October 2009.⁸

SUBMISSIONS

6. Karadžić submits that, by virtue of his age, Judge Baird does not meet the qualifications of an *ad litem* Judge required by Article 13, which provides that a Judge must possess the

¹ Prosecution Expedited Response to Karadžić’s Motion to Recuse Judge Melville Baird, filed 25 September 2009 (“Prosecution Response”).

² *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT (“*Karadžić*”), Report by Presiding Judge to President on Motion to Recuse Judge Baird, 25 September 2009 (“Report”), paras 2-3.

³ Report, para. 9.

⁴ *Karadžić*, Order Assigning a Motion to a Judge, 25 September 2009, p. 2.

⁵ Request for Appointment of Three Judge Panel, filed 28 September 2009.

⁶ *Karadžić*, Decision on Radovan Karadžić’s Motion to Recuse Judge Melville Baird, 30 September 2009, paras 20-21.

⁷ *Karadžić*, Decision on Motion for Leave to File a Reply, 9 October 2009.

⁸ Reply Brief: Motion to Recuse Judge Baird, filed 14 October 2009 (“Reply”).

qualifications required in his or her respective country for appointment to the highest judicial office. Karadžić argues that since the Constitution of Trinidad and Tobago provides for a mandatory retirement age of 65 for Judges of the Court of Appeal, its highest judicial office, Judge Baird did not meet the requirements of Article 13 when he was elected as an *ad litem* Judge by the UN General Assembly in August 2005, as he was already beyond that age.⁹

7. The Prosecution responds that Karadžić has failed to challenge Judge Baird's *essential* qualifications under Article 13. Relying on the *Čelebići* Appeal Judgement, the Prosecution argues that Article 13 refers to essential qualifications for judicial office, such as character, legal qualifications and experience; essential qualifications do not include age eligibility requirements in judges' home countries.¹⁰ The Prosecution also notes that during the nomination and election of Judge Baird, at no time did the UN Security Council, General Assembly or any member state assert that Judge Baird's age prevented him from serving as an *ad litem* judge.¹¹

8. Karadžić replies that Article 13 should be interpreted according to its plain meaning, a reading which does not support the interpretation given to it by the Prosecution, Judge Güney in the Decision, or the Appeals Chamber in *Čelebići*.¹² Further, the Prosecution's reliance on the *Čelebići* Appeal Judgement is misplaced because the Appeals Chamber's interpretation of Article 13 was *dicta*, based upon an outdated version of the Statute, and factually distinguishable from the present case.¹³ Finally, Karadžić submits that there is no evidence that the General Assembly or any other UN body considered the issue of Judge Baird's age and that it is therefore evident that the General Assembly simply made a mistake in appointing Judge Baird.¹⁴

DISCUSSION

9. Article 13 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.

10. 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. There is no dispute that in Trinidad

⁹ Motion, paras. 1-6.

¹⁰ Response, paras 1-2; referring to *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case No. It-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

¹¹ Prosecution Reponse, para. 4.

¹² Reply, paras 3-11, 21-22.

¹³ Reply, paras 16-19.

¹⁴ Reply, para. 20.

and Tobago, judges of the Supreme Court must retire at the age of 65, and that Judge Baird was beyond this age when elected as an *ad litem* Judge of the Tribunal in August 2005.¹⁵

11. As noted in both the Report and the Decision, Karadžić does not contend that Judge Baird fails to otherwise meet the qualifications for appointment as a judge of the Tribunal; the only issue is whether Judge Baird's age renders him ineligible to serve as a Judge pursuant to Article 13.¹⁶

12. The Bench notes that in the *Čelebići* Appeal Judgement, the Appeals Chamber interpreted Article 13 as follows:

[t]he intention of Article 13 must...be to ensure, so far as possible, that the *essential* qualifications do not differ from judge to judge. Those *essential* qualifications are character (encompassing impartiality and integrity), *legal* qualifications (as required for appointment to the highest judicial office) and experience (in criminal law, international law, including international humanitarian law and human rights law). 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. Nor was Article 13 intended to include constitutional disqualifications peculiar to any particular country for reasons unrelated to those essential qualifications.¹⁷

13. Both the Report and the Decision relied, at least in part, on such an interpretation of Article 13 in concluding that the Motion was without merit.¹⁸ Karadžić, however, seeks to distinguish the *Čelebići* Appeal Judgement from the present case on a number of grounds.

14. First, Karadžić argues that the above-noted language is *dicta*. He notes that the Appeals Chamber's concern was whether Judge Odio Benito of Costa Rica was qualified pursuant to Article 13 notwithstanding election as Vice President of her country. Karadžić submits that the Appeals Chamber reviewed Costa Rican law and determined that Judge Benito was not disqualified from appointment to the highest judicial office in that country and, consequently, her continued service at the Tribunal did not contravene Article 13.¹⁹

15. The *Čelebići* Appeals Chamber's analysis of the intent behind the Article 13 qualification requirements can hardly be characterised as *dicta*. Rather, it was a statement of legal principle necessary to adjudication of the central issue in that case. The distinction drawn between essential and local qualifications was key to the Appeals Chamber's reasoning, and is directly applicable to

¹⁵ Motion, para. 5; Prosecution Response, para. 4; Reply, para. 2; Report, para. 6; Decision, para. 19.

¹⁶ Report, para. 4; Decision, para. 15.

¹⁷ *Čelebići* Appeal Judgement, para. 659 (emphasis in original).

¹⁸ Report, para. 8; Decision, para. 17.

¹⁹ Reply, para. 12.

the facts of this case notwithstanding the underlying factual substitution of age for acceptance of a political position.

16. Second, Karadžić argues that the *Čelebići* Appeal Judgement is based on an earlier version of the Statute which has since been amended. There, the Appeals Chamber noted that the provisions of Article 12 stated that no two Judges may be nationals of the same State which, as Karadžić points out, has been amended to allow *ad litem* judges to be from the same state as a permanent judge. Thus, Karadžić concludes, the rationale for the loosening of the term qualifications by the Appeals Chamber no longer exists.²⁰

17. The Bench finds no merit in this argument. The Appeals Chamber held that Article 13 must be interpreted in light of the restriction contained in Article 12 that no two judges may be nationals of the same state and noted that, therefore, “[t]he Statute envisages that judges from a wide variety of legal systems would be elected to the Tribunal, and that the qualifications for appointment to the highest judicial offices in those systems would similarly be varied.”²¹ Consequently, the intention of Article 13 must be to ensure that the essential qualifications do not differ from judge to judge, rather than to include every local qualification.²²

18. The Bench finds that this reasoning remains persuasive, despite the amendment to Article 12. Simply by permitting permanent and *ad litem* judges to be nationals of the same state does not fundamentally alter the intention of the Statute to include Judges from a wide variety of legal systems, nor does it undermine the conclusion that, consequently, Article 13 could not have intended to include local, technical, requirements for office.

19. Third, Karadžić argues that the facts underlying the *Čelebići* Appeal Judgement are distinguishable from the present case, since the Judges discussed in the *Čelebići* Appeal Judgement, Judge Benito and Judge Stephen, met the qualifications for appointment to their respective highest judicial offices at the time of their appointment, whereas Judge Baird did not.

20. The Bench notes, however, that the Appeals Chamber held that “a judge must *remain* qualified within the meaning of Article 13 throughout his or her term of office.”²³ The Bench shares this view and rejects Karadžić’s implicit assertion that a Judge’s qualification at the time of appointment is relevant to a determination of a Judge’s current qualification under Article 13. In

²⁰ Reply, paras 16-17.

²¹ *Čelebići* Appeal Judgement, para. 659.

²² *Čelebići* Appeal Judgement, para. 659

²³ *Čelebići* Appeal Judgement, para. 655 (emphasis in original).

other words, the factual difference that Karadžić highlights between the *Čelebići* Appeal Judgement and the present case is irrelevant.

REPORT TO JUDGE GÜNEY

21. It is plain that the Statue does not limit the ability of Judges to serve at the Tribunal by virtue of age, nor does the Bench find any reason to read such a requirement into Article 13. Indeed, a clear distinction must be drawn between the qualifications referred to in Article 13 and technical requirements for judicial office. In particular, the qualities a person must possess to be trusted with the highest judicial offices in his or her country is a separate matter from the restrictions local legislation may impose with respect to the age until which a person may hold such office. Accordingly, the Bench finds the Motion to be without merit.

DISPOSITION

For these reasons, the Bench **DENIES** the Motion.

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



Carmel Agius
Presiding

Dated this twentieth day of October 2009
At The Hague
The Netherlands

[Seal of the Tribunal]