



File number: SA-07-HJ

Before: Higher Judge for Staff Appeals
Judge Charles L. Smith III

Date: 28 August 2019 (confidential version issued 5 August 2019)

Language: English

Classification: Public

Decision on the Admissibility of the Appeal

Appellant:

[REDACTED]

Respondent:

The Registrar, Fidelma Donlon

THE HIGHER JUDGE FOR STAFF APPEALS of the Specialist Chambers, acting pursuant to Staff Rule 84(h) of the Staff Rules of the Specialist Chambers and Specialist Prosecutor's Office ("Staff Rules")¹ and Rules 20(5), 21, 22(1)-(4) and 29(3) of the Rules of Procedure for Staff Appeals ("Staff Appeals Procedure"),² issues this decision on the admissibility of the appeal of Ms [REDACTED] ("Appellant").³

I. PROCEDURAL BACKGROUND

1. On 13 May 2019, the Appellant filed a confidential appeal⁴ against the decision of the Registrar dated 24 April 2019 ("Registrar's Decision"),⁵ regarding the status of the Appellant's employment with the Kosovo Specialist Chambers ("First Appeal").
2. On 5 July 2019, the Judge for Staff Appeals, Judge Thomas Laker, issued a confidential version of the decision on the First Appeal, in which he "found the Appeal inadmissible", and accordingly, rejected the "relief sought therein" ("Impugned Decision").⁶
3. On 19 July 2019, the Appellant filed an appeal against the Impugned Decision ("Second Appeal"),⁷ which was communicated to the President on the same day.
4. On 22 July 2019, the President issued the "Decision on a Request and Assigning a Higher Judge for Staff Appeals",⁸ in which, *inter alia*, she assigned "Judge Charles L.

¹ KSC-RI-01-v.1.1, 7 February 2018.

² KSC-RI-02-v1.0, 11 September 2017.

³ SA-07-HJ/F001, Appeal Before the Higher Judge for Staff Appeals, 19 July 2019 (confidential) and its confidential annexes (A01-A06).

⁴ SA-07-HJ/F001/A03, Appeal of Ms [REDACTED] Against the Decision of the Registrar Dated 24 April 2019, 13 May 2019 (confidential).

⁵ F001/A03, Registrar's Review of an Administrative Decision, 24 April 2019 (confidential).

⁶ F001/A05, pp. 12-13. A public redacted version of this decision was issued on 8 July 2019.

⁷ F001 together with confidential annexes (A01 – A06).

⁸ F002.

Smith III to serve as the Higher Judge for Staff Appeals in File No. SA-07-HJ".⁹

II. APPLICABLE LAW

5. Rule 84(h) and (i) of the Staff Rules reads:

(h) Decisions made by a Staff Appeal Judge shall become final unless they are appealed within fourteen days to the Higher Judge for Staff Appeals. Such appeals shall be limited to a manifest error of law causing a miscarriage of justice.

(i) Decisions of Higher Judge for staff Appeals [...] shall be binding on the Specialist Chambers and the Specialist Prosecutor's Office.

6. Rule 20(5) of the Staff Appeals Procedure stipulates: "[t]he Decision on the Appeal shall become final, unless it is appealed within fourteen (14) days to the Higher Judge for Staff Appeals in accordance with Chapter 3".

7. Rule 21 of the Staff Appeals Procedure stipulates:

(1) An Appealing Party may appeal a Decision on the Appeal rendered pursuant to Rule 20.

(2) The Second Appeal shall be in writing and shall include:

(i) where applicable, the name and contact details of the Appellant and his or her present or former status with the Specialist Chambers or the Specialist Prosecutor's Office;

(ii) where applicable, the initial Decision of the Registrar and the request for review filed in this respect by the Appellant in accordance with Staff Rule 84(a);

(iii) the Decision of the Registrar or the Disciplinary Decision contested before the Judge for Staff Appeals, as applicable;

(iv) the submissions and material filed by the Parties before the Judge for Staff Appeals;

(v) the contested Decision on the Appeal;

(vi) the arguments of the Appealing Party regarding the alleged manifest error of law causing a miscarriage of justice, as specified in Rule 22(3);

(vii) the relief sought; and

(viii) where applicable, the name and contact details of any person representing the Appellant, if any, in accordance with Rule 9.

8. Rule 22(1)-(4) of the Staff Appeals Procedure stipulates:

(1) The Second Appeal shall be filed within fourteen (14) days of notification of the Decision on the Appeal.

(2) Second Appeals submitted after the prescribed time limits shall not be admissible unless the Appealing Party demonstrates exceptional and compelling circumstances warranting an extension of time.

⁹ F002, p. 5.

(3) The Decision on the Appeal may be appealed only on the grounds of a manifest error of law causing a miscarriage of justice.

(4) If the Higher Judge for Staff Appeals considers that the Appealing Party does not identify the alleged manifest error of law causing a miscarriage of justice, he or she shall summarily dismiss the Second Appeal within fourteen (14) days of his or her assignment pursuant to Rule 23(1). The Appealing Party shall be notified of the summary dismissal forthwith, including the reasons thereof.

III. APPELLANT'S SUBMISSION

9. For the sake of judicial economy, this section will be confined to a summary of the Appellant's arguments in the Second Appeal. The Higher Judge for Staff Appeals shall refer to other submissions and annexes only to the extent necessary for judicial reasoning.

10. The Appellant premises her Second Appeal on two main lines of arguments. The first relates to the applicable law and the approach to its interpretation, while the second focuses on alleged violations of her rights to a fair hearing before the Judge for Staff Appeals.

11. In substantiating the first part of her Second Appeal, the Appellant refers to Rule 84(h) of the Staff Rules and Rule 22(3) of the Staff Appeals Procedure as the applicable law in this case.¹⁰ Yet, the Appellant "protest[s] that the applicable test sets an excessively high, narrowly categorised and deficient basis for an appeal to be brought forward, and that any doubt as to the applicable standard and interpretation of the law to which the Appellant must establish their appeal should be exercised in their favour".¹¹

12. According to the Appellant, the applicable standard of "manifest error of law causing a miscarriage of justice" is also "inconsistent with the general due process

¹⁰ F001, para. 7.

¹¹ F001, para. 8.

principles and international administrative law of other comparable institutions”.¹² The narrow scope of this standard and its confinement to “errors of law”, “does not, at least on the face of it, allow for any appeal at all should the first instance judge make an error of fact”, the Appellant adds.¹³ This is so even if such a factual error is deemed manifest and causing an miscarriage of justice, the Appellant further argues.¹⁴ Referring to the competence requirements for an appeal as reflected in the statutes of the United Nations Appeals Tribunal as well as the International Labour Organisation Administrative Tribunal, the Appellant argues that none of these judicial organs set the bar as high as “under the KSC [Kosovo Specialist Chambers] system”.¹⁵

13. In developing the second part of the Second Appeal, the Appellant advances a number of arguments most of which revolve around the manner in which the Judge for Staff Appeals addressed the First Appeal and in particular its admissibility including the examination of the time limits.¹⁶ Quoting paragraph 37-40 of the Impugned Decision on the basis of which the First Appeal was decided inadmissible for failing to meet the prescribed time limits, the Appellant claims lack of judicial reasoning and shortage in considering the material presented.¹⁷

14. Furthermore, in justifying her non-compliance with the time limits as reflected in the Impugned Decision, the Appellant argues that by the time of filing her First Appeal she was “an unrepresented litigant in person”.¹⁸ The Appellant also claims that she refrained from filing evidence as to compliance with any time limits “since she quite reasonably did not consider it to be an issue in the case”.¹⁹

¹² F001, para. 9.

¹³ F001, para. 9.

¹⁴ F001, para. 9.

¹⁵ F001, paras 10-11.

¹⁶ F001, paras 14-23.

¹⁷ Impugned Decision, paras 37-40; F001, paras 13-14.

¹⁸ F001, para. 15.

¹⁹ F001, para. 15.

15. The Appellant nevertheless acknowledges that she did not include the “evidence of actual ‘receipt’ of the decision on review as an essential part of her appeal”.²⁰ However, the Appellant argues that since the issue of time limits was at stake between the parties, she expected that the Judge for Staff Appeals in exercising his “duty of fairness [...] [should have] enquire[d] further of the parties into the matter [...]”.²¹ Consequently, “Judge Laker manifestly erred in law”, particularly that he did not “make any enquiries that could and would have restored the applicants case so that the merits could and should have been considered”.²² According to the Appellant, the Judge for Staff Appeals manifestly erred in law as he also failed to “observe”, and “exercise his powers, discretions and duties to issue any orders or directions to the parties” in this regard.²³

16. The Appellant also alleges a manifest error of law based on paragraph 38 of the Impugned Decision, which speaks of 24 April 2019 as the “relevant date for the start of the time limit”.²⁴ According to the Appellant, Rule 16(1) of the Staff Appeals Procedure requires that the appeal is filed “within fourteen days of receipt of the Registrar’s answer” as opposed to the date of “communication”, as reflected in paragraph 38 of the Impugned Decision.²⁵ In addition, referring to paragraph 39 of the Impugned Decision, the Appellant claims that the Judge for Staff Appeals purportedly refrained from giving any direction or indication that “it would be in her interests” to demonstrate the existence of “exceptional circumstances warranting an extension of time”, as Rule 16(4) of the Staff Appeals Procedure dictates.²⁶

²⁰ F001, para. 17.

²¹ F001, para. 17.

²² F001, para. 18.

²³ F001, para. 18.

²⁴ F001, para. 19.

²⁵ Impugned Decision, para. 38; F001, para. 19.

²⁶ F001, para. 20.

17. Finally, the Appellant alleges a further error in determining the admissibility of the appeal as the Judge for Staff Appeals “did not act to the standard required by Rule 84(g) and decide[d] the appeal in accordance with the highest standards of administrative practice in comparable fields”.²⁷

18. Having set out the foregoing arguments, the Appellant seeks the following relief:

24. [...] [A] decision that she had filed her Appeal in time and the decision of Judge Laker be rescinded.

25. [...] [T]he remittal of her case to be fully and properly considered on the merits in a just and fair manner by a new first instance Judge drawn from the Second staff Appeals Roster. This preserves the Appellants [sic] right to appeal against the new Judge’s Decision which would be lost under paragraph 26 below.

26. In the absence of the remedy at paragraph 25, the Appellant invites the Higher Judge to modify the decision of Judge Laker and rule upon the merits of her case.

27. [...] [R]equests moral damages and legal costs for the harm caused by the unlawful decision-making process.²⁸

IV. ADMISSIBILITY OF THE APPEAL

19. At the outset, the Higher Judge for Staff Appeals wishes to point out that for the sake of grating the relief sought by the Appellant, the Second Appeal must first pass the admissibility test set out in Rule 84(h) of the Staff Rules and Rule 22(3) and (4) of the Staff Appeals Procedure. This is a *conditio sine qua non*.

20. According to Rule 84(h) of the Staff Rules, “[d]ecisions made by a Staff Appeal Judge shall become final unless they are appealed within fourteen days to the Higher Judge for Staff Appeals. Such appeals shall be limited to a *manifest error of law causing a miscarriage of justice*” (emphasis added). Similarly, Rule 22(3) of the Staff Appeals Procedure reads: “[t]he Decision on the Appeal may be appealed only on the grounds of a *manifest error of law causing a miscarriage of justice*” (emphasis added). Paragraph 4 of the same provision stipulates: “[i]f the Higher Judge for Staff Appeals considers

²⁷ F001, paras 21-22.

²⁸ F001, paras 24-27.

that the Appealing Party does not identify the alleged manifest error of law *causing a miscarriage of justice*, he or she shall summarily dismiss the Second Appeal [...]" (emphasis added).

21. Thus, for this Second Appeal to be admissible, the Appellant must identify one or more manifest error(s) of law causing a miscarriage of justice. The legal test is cumulative in the sense that the mere identification of an error of law is not sufficient. Rather, the Appellant is called upon to identify a *manifest* error of law, which causes a *miscarriage of justice*. The alleged errors must be sufficiently substantiated by the Appellant.

22. The KSC statutory documents neither define "manifest error" nor "miscarriage of justice". However, a plain meaning of "manifest" suggests that the alleged error identified should be "clear, obvious [or] unquestionable".²⁹ As to "miscarriage of justice", the term is broad and used depending on the context in which it is applied.³⁰ However, in a recent decision issued by the International Criminal Court in the context of passing a ruling regarding compensation, Trial Chamber II, after having conducted a comparative domestic and international analysis concerning the notion, it concluded that "miscarriage of justice" denotes "a clear violation of the applicant's fundamental rights and must have caused serious harm [...]. [T]herefore not every error committed in the course of the proceedings is automatically considered a 'grave and manifest' miscarriage of justice".³¹ This is equally valid for the interpretation of

²⁹ J. Law (ed.), *A Dictionary of Law*, 9th ed., (Oxford, Oxford University Press), 2018, p. 802.

³⁰ See, *inter alia*, ICTR, *Protais Zigiranyirazo v. The Prosecutor*, "Decision on Protais Zigiranyirazo's Motion for Damages", 18 June 2012, ICTR-2001-01-073, para. 21; ECtHR, Chamber, *Granger v. The United Kingdom*, 28 March 1990, Application No. 11932/86, para. 26; Grand Chamber, *Allen v. The United Kingdom*, 12 July 2013, Application No. 25424/09, paras 118,129-133.

³¹ ICC, Trial Chamber II, *Prosecutor v. Mathieu Ngudjolo*, "Decision on the 'Requête en indemnisation en application des dispositions de l'article 85(1) et (3) du Statut de Rome'", 16 December 2015, ICC-01/04-02/12-301-tENG, paras 37-45.

the notion of “miscarriage of justice” within the meaning of Rule 84(h) of the Staff Rules and Rule 22(3) and (4) of the Staff Appeals Procedure.

23. In this regard, the Higher Judge for Staff Appeals recalls that the Appellant disputes the mere existence and application of this admissibility standard, suggesting that errors of fact should be captured by errors of law in accordance with the applicable standard set out in Rule 84(h) of the Staff Rules and Rule 22(3) and (4) of the Staff Appeals Procedure.³²

24. This argument put forward by the Appellant is unsustainable. There must be a distinction between *lex lata* (the law as it exists or currently in force) and *de lege ferenda* (what the law should be). This means that the Higher Judge for Staff Appeals is duty bound to apply the existing legal framework regulating the operation of the KSC, in this case the legal standard reflected in Rule 84(h) of the Staff Rules and Rule 22(3) and (4) of the Staff Appeals Procedure.

25. The Appellant correctly observes that identifying a manifest error of law causing miscarriage of justice imposes a higher burden of proof on her part. Satisfying this standard requires examination of whether the alleged error claimed by the Appellant first, qualifies as manifest error of law, and if the answer is in the affirmative, whether such manifest legal error causes a miscarriage of justice.

26. Upon review of the Appellant’s submission as detailed in section III above, it is clear that the bulk of the errors alleged by the Appellant may be classified at most as factual errors related to the manner in which the Judge for Staff Appeals assessed the evidence and the weight he gave to the evidence relied upon in the circumstances. This is clear from the Appellant’s submission, which clearly disputes time lines related to receipt of the Registrar’s Decision, chain of email exchanges between the Registrar’s staff and the Appellant regarding the start and end of the time limit, and lack of

³² F001, para. 9.

consideration of certain material (although the latter is more close to an alleged procedural error).

27. In fact, the Appellant disputes the scope of the standard applicable for admissibility determinations and its confinement to errors of law as opposed to errors of fact then “submit[ing] that judicial failures on issues of fact should be interpreted as encompassing failures of law”.³³ This also suggests that the Appellant is aware that the Second Appeal mainly rests on alleged errors of fact as mentioned above.

28. On the other hand, the Appellant’s claims regarding the Judge for Staff Appeals’ alleged failure to act with the highest standards of administrative practice or secure a fair hearing by way of providing directions to the Appellant regarding the time limits and the exceptional circumstances provided in the law together with the arguments provided in support, cannot qualify as legal errors, let alone manifest legal errors causing miscarriage of justice. These allegations pertain to the exercise of discretion provided to judges, and in the case of an abuse of discretion, may amount to a procedural error.³⁴

29. In addition, the Appellant’s argument that she was not legally represented during the First Appeal, cannot be blamed on the Judge for Staff Appeals, and it clearly does not amount to any error in this regard. In conclusion, the fact that the Appellant failed

³³ F001, paras 8-9.

³⁴ See, albeit in a different context, ICC, Appeals Chamber, *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”, 7 April 2015, ICC-01/04-02/12-271-Corr, para. 21; Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo et al*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red, para. 100; Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, 8 June 2018, ICC-01/05-01/08-3636-Red, para. 48. Although the jurisprudence relied upon is extracted from the judgments of an international criminal court as opposed to an administrative tribunal, the classification of the different types of errors remains similar before the different tribunals and equally applicable.

to file all the necessary evidence in her First Appeal is not the fault of the Judge for Staff Appeals. The burden lies on the Appellant, and consequently, this should not be invoked in the Second Appeal.

30. There remains, however, one argument advanced by the Appellant which may qualify as a legal error namely the findings in paragraphs 37 and 38 of the Impugned Decision and reflected in paragraph 19 of the Second Appeal. In paragraph 37 of the Impugned Decision, the Judge for Staff Appeals recalled Rule 84(b) of the Staff Rules, which provides that “an appeal shall be submitted within 14 days from the date of the receipt of the Registrar’s decision on the request for review”.³⁵ In paragraph 38, the Judge for Staff Appeals concluded that “[i]n the present case, the Review Decision was communicated to the Appellant on 24 April 2019. The Appellant filed the Appeal, including the documentation required pursuant to Rule 15(2) of the Staff Appeals Procedure, on 13 [May] 2019, which is clearly past the 14-day time limit”.³⁶ According to the Appellant, this finding constitutes an error of law. The Judge for Staff Appeals considered “the relevant date for the start of the time limit is the date ‘the Review Decision was *communicated* to the Appellant on 24 April 2019’ when the requirement under Rule 16(1) is that an appeal shall be filed ‘within fourteen days of *receipt* of the Registrar’s answer [...]’”.³⁷ Indeed, this finding on its face, may amount to an error of law.

31. Although the Impugned Decision used the term “communicated” instead of “receipt” as per Rule 16(1) of the Staff Appeals Procedure, this error is neither manifest nor causes a miscarriage of justice. This is so because paragraph 37 of the Impugned Decision referred to the correct standard, while paragraph 38 of the Impugned Decision in essence is not incorrect in substance, as the Judge for Staff Appeals correctly applied the law. The apparent difference in terminology between the words

³⁵ Impugned Decision, para. 37.

³⁶ Impugned Decision, para. 38.

³⁷ F001, para. 19.

“receipt” and “communicated”, does not make a difference in the context of email exchanges, given that the moment of communication by way of sending an email generally corresponds to the receipt of the message by the receiver, in this case the Appellant.

32. In view of the foregoing, the Appellant failed to identify a manifest error of law causing a miscarriage of justice. The Higher Judge for Staff Appeals cannot but render the Second Appeal inadmissible, requiring its summary dismissal. It follows that the alternative requests in the relief sought can no longer be addressed.

33. Finally, according to Rule 29(3) of the Staff Appeals Procedure, “[f]inal Decisions shall, to the extent possible, be public and may only be redacted where this is deemed necessary by the Judge, *proprio motu* or upon request by the Appellant for the purpose of the protection of his or her identity, or by the Registrar [...]. A public redacted version of any Final Decision shall be available to the Specialist Chambers and the Specialist Prosecutor’s Office Staff [...]”. Considering the significance of the principle of publicity of the proceedings, the Higher Judge for Staff Appeals deems it necessary that a public redacted version of the present decision is available to the “Specialist Chambers and the Specialist Prosecutor’s Office Staff”. Since the present decision refers to confidential information from the relevant filings, the Higher Judge for Staff Appeals considers it necessary to receive redaction proposals, if any, from the Appellant and the Registrar before issuing a public redacted version of the present decision.

FOR THESE REASONS, THE HIGHER JUDGE FOR STAFF APPEALS

- a) **decides** that the Second Appeal is inadmissible;
- b) **summarily** dismisses the Second Appeal in its entirety; and
- c) **orders** the Appellant and the Registrar to submit redaction proposals to the present decision, if any, no later than Monday, 19 August 2019.



**Judge Charles L. Smith III,
Higher Judge for Staff Appeals**

Dated this Wednesday, 28 August 2019
At The Hague, The Netherlands