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RSCSL-03-01-ES
(12782 - 12798)

12782



RESIDUAL SPECIAL COURT FOR SIERRA LEONE

Before: President Justice Jon Kamanda
Justice Teresa Doherty, Designated Duty Judge

Registrar: Ms. Binta Mansaray

Date: 23 July 2020

In the matter of

THE APPLICATION OF CHARLES GHANKAY TAYLOR

Case No. RSCSL-03-01-ES

**STATEMENT AND DECISION ON PRINCIPAL DEFENDER'S REQUEST FOR
RECUSAL OF JUSTICE T. DOHERTY
PUBLIC**

**PRINCIPAL DEFENDER'S REQUEST FOR THE WITHDRAWAL AND/OR
RECUSAL OF HON. JUSTICE TERESA DOHERTY OF THE UNITED
KINGDOM (UK) AS THE DUTY JUDGE ON THE APPLICATION OF
CHARLES G. TAYLOR TO BE TEMPORARILY TRANSFERRED TO A SAFE
THIRD COUNTRY TO CONTINUE HIS IMPRISONMENT DUE TO THE
MASSAIVE (sic) OUTBREAK OF COVID 19 IN THE UK**

Office of the Prosecutor:
Mr. James C Johnson

Defence Office
Mr. Ibrahim Yillah

RESIDUAL SPECIAL COURT FOR SIERRA LEONE	
RECEIVED	
COURT MANAGEMENT THE HAGUE	
23 JUL 2020	
NAME	Francis Nisaboh-Smet
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TIME	12:37

SEIZED of “Principal Defender's Request For The Withdrawal and/or Recusal of Hon. Justice Teresa Doherty of The United Kingdom (UK) as the Duty Judge on The Application Of Charles G. Taylor To Be Temporarily Transferred To A Safe Third Country To Continue His Imprisonment Due To The Massaive (Sic) Outbreak Of Covid 19 In The UK” Dated 1 July 2020 addressed to President Kamanda and to Justice Doherty;

COGNISANT of the provisions of Article 11(2) of the Statute of the Residual Special Court for Sierra Leone and Rules 15 and 15bis (C) of the Rules of Procedure and Evidence (“Rules”);

NOTING the Order of the President of 29 June 2020 appointing me as Designated Duty Judge;

NOTING that the Current Motion is stated to be a Request by the Principal Defender¹ and not by Mr. Taylor or by Mr. Taylor’s Counsel;

NOTING Prosecutor's Response To Principal Defender's Request For The Withdrawal And/Or Recusal Of Hon. Justice Teresa Doherty Of The United Kingdom (UK) As The Duty Judge On The Application Of Charles G. Taylor To Be Temporarily Transferred To A Safe Third Country To Continue His Imprisonment Due To Massive Outbreak Of Covid-19 In The UK;

NOTING Principal Defender’s Reply to Prosecutor's Response To Principal Defender's Request For The Withdrawal And/Or Recusal Of Hon. Justice Teresa Doherty Of The United Kingdom (UK) As The Duty Judge On The Application Of Charles G. Taylor To Be Temporarily Transferred To A Safe Third Country To Continue His Imprisonment Due To Massive Outbreak Of Covid-19 In The UK filed on 14 July 2020;

HEREBY DECIDES AS FOLLOWS;

PRELIMINARY MATTERS

1. There is an ambiguity in the title of this motion which is stated to be a request by the Principal Defender and is not signed or submitted by Counsel. Notwithstanding this ambiguity, I treat this as an application made upon and in accordance with Mr. Taylor’s instructions. This

¹ RSCSL-03-01-ES 1449 , cover sheet and para. 5 of the Motion.

is now confirmed in the Reply.² However because of the ambiguity I will refer to the moving party as ‘Applicant’.

2. In the current motion the Applicant makes three applications, conjunctively and in the alternative. As the cover sheet shows the applications are addressed to President Kamanda and to Justice Doherty. Two requests are submitted to President Kamanda viz to withdraw Justice Doherty’s designation as Duty Judge, and to replace her with another Justice and a third application that Justice Doherty recuse herself.

3. The Applicant does not state under which provision of the Rules he makes this application but, given the reference to ‘impartiality’ and other wording,³ I consider it is an application pursuant to Rule 15 (B), that is an application for disqualification of a judge, which entitles me to present my comments on the matter under Rule 15 (C).

4. For elimination of doubt I, Justice Doherty, will herein exercise my entitlement to present my comments on the matter⁴ and deal with the application to recuse myself which has been made to me⁵. The Applicant has stated that “the Impugned Designated Judge has not issued a statement or an affidavit on oath contradicting the factual allegations contained in the Principal Defender’s request.”⁶ Clearly I could not have made such a statement until the Parties had completed their submissions and the nature of the request had been clarified.

SUBMISSIONS

APPLICANT’S SUBMISSIONS

5. The Applicant sets out the chronology of the pleadings in ‘Mr. Taylor’s Motion For Temporary Transfer To A Safe Third Country To Continue His Imprisonment Due To Massive Outbreak Of Covid-19 In The UK’⁷ noting that the President appointed me as Designated Duty Judge “to hear and determine all matters arising from the Motion”⁸ and states that “[i]t is in

² RSCSL-03-01-ES 1456, para 1.

³ RSCSL-03-01-ES 1456, paras. 7, 15.

⁴ Rule 15 (C).

⁵ RSCSL-03-01-ES 1449, cover sheet and para. 16

⁶ RSCSL-03-01-ES 1456, para. 7.

⁷ RSCSL-03-01-ES 1442.

⁸ RSCSL-03-01-ES 1449, para. 4.

response to the President’s Order that the Principal Defender files [his] request seeking the orderly withdrawal of the Hon. Justice Teresa Doherty of the UK as a duty Judge on the Taylor Motion”⁹ because “her lady is from the UK and the scope and extent of the litigation to be undertaken in this application may well encompass submissions from the UK Home Office or other officials responsible for UK Prison System response to covid 19”¹⁰ and “[t]he duty Judge would undoubtedly be faced with a situation of passing some form of judgment/assessment of her country’s response to covid 19.”¹¹

6. The Applicant states “[t]o be clear, Mr. Taylor is questioning neither the integrity nor the impartiality of the learned Justice [but whilst] respecting the learned Justice’s integrity,”¹² she is a “UK National who ha[s] served as a judge in that country and [was] nominated by that country to serve as a Judge in the RSCSL”¹³ and “the issues to be considered in the Taylor Motion touch and concern the UK’s response to covid-19 within its prison system, in particular the specific prison where Mr. Taylor is currently serving his imprisonment.”¹⁴

7. He submits that “[i]n order to properly consider such a motion, submissions would be required to be obtained from UK Officials with responsibility of implementing public health measures in the UK Prison in question and more broadly from the UK”¹⁵ and this “will require some judgment/assessment to be passed on the country that nominated the learned Justice to serve on this court which would place [...] the learned Justice in a difficult and even conflicting position.”¹⁶ He submits that “[t]his scenario by itself without more creates an appearance of ‘bias’ akin to a person being a judge in his/her own cause.”¹⁷ This arises as there is “appearance of bias should a UK Judge be designated to serve as a duty Judge to determine matters relating to covid-19 in the UK wherein UK officials may be required to file

⁹ RSCSL-03-01-ES 1449, para. 5.

¹⁰ RSCSL-03-01-ES 1449, para. 5.

¹¹ RSCSL-03-01-ES 1449, para. 5.

¹² RSCSL-03-01-ES 1449, para. 7.

¹³ RSCSL-03-01-ES 1449, para. 8.

¹⁴ RSCSL-03-01-ES 1449, para. 7.

¹⁵ RSCSL-03-01-ES 1449, para. 7.

¹⁶ RSCSL-03-01-ES 1449, para. 7.

¹⁷ RSCSL-03-01-ES 1449, para. 8.

submissions and a judgment made on that country's response to covid-19 within one of its prisons.”¹⁸

PROSECUTOR'S RESPONSE

8. On 8 July 2020, the Prosecutor sought leave to respond to Applicant's motion stating that the “Request for Recusal raises a novel issue relating to recusal/disqualification of a judge from a matter for apparent bias based on his/her nationality. If considered favourably, the decision will impact on the settled principles on this subject in the jurisprudence of international courts and tribunals and as well, those of the most advanced legal systems of the world.”¹⁹ Leave to respond was granted²⁰ and the Prosecutor's Response filed on 8 July 2020.

9. The Prosecutor submits that the Applicant's request should be denied for lack of merit, being premised on the incorrect assertion that the Designated Duty Judge is a UK national and is without any valid legal basis.²¹

10. He points out that the Designated Duty Judge is “in fact Irish” and sets out the terms of the Belfast Agreement which gives Northern Ireland persons a “birthright to hold British or Irish citizenship.”²² The Prosecutor refers to the records of the SCSL and RSCSL which “consistently listed” the Designated Duty Judge as Irish.²³ The Prosecutor also notes that she is an appointee Election Monitoring Register of the Irish Department of Foreign Affairs.²⁴

11. The Prosecutor refers to the “complicated relationship” of Northern Ireland to the U.K. and to Ireland which dates back to the colonisation, known as the Plantation of Ulster in the 17th Century, and the “personally emotive” impact this “troubled political history of the Irish people can have.”²⁵ The Prosecutor exhibits a treatise by T.J. White and another reference to submit that the history of colonialism in Ireland, and N. Ireland in particular, may impact on the attitudes towards British institutions.

¹⁸ RSCSL-03-01-ES 1449, para. 11.

¹⁹ RSCSL-03-01-ES 1453, para. 3.

²⁰ RSCSL-03-01-ES 1454.

²¹ RSCSL-03-01-ES 1455, para. 2.

²² RSCSL-03-01-ES 1455, para. 5.

²³ RSCSL-03-01-ES 1455, para. 6.

²⁴ RSCSL-03-01-ES 1455, para. 6.

²⁵ RSCSL-03-01-ES 1455, para. 8.

12. Hence the Prosecutor submits “thus, to the extent that the Request for Recusal is predicated exclusively on this factually incorrect assertion that Hon. Justice Teresa Doherty, the Designated Duty Judge is a UK national and seeks her recusal solely on this basis”, “it raises a non-issue and should be rejected for being frivolous and a waste of the court’s time and resources.”²⁶

13. The Prosecutor further submits that there is presumption of impartiality attached to judges and that a party seeking the disqualification of a judge must adduce sufficient evidence to demonstrate a lack of impartiality or that there is a reasonable apprehension of bias.²⁷ He states that according to the tests set forth in the *Furundzija Appeal Judgement*,²⁸ a judge is not impartial if it is shown that actual bias exists or there is an unacceptable appearance of bias if: i) a judge is a party to the case, or has financial or proprietary interest in the outcome of a case, or if the judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties; or ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.²⁹

14. The Prosecutor submits that the Appeals Chamber has held that the applicable test for determining applications made under Rule 15 (B) is whether an independent bystander or reasonable person will have a legitimate reason to fear that the judge in question lacks impartiality, “in other words, whether one can apprehend bias.”³⁰ He avers that “even fear based on an appearance of bias should for what it is worth be supported by some fact(s), which itself must be ascertainable or reasonable.”³¹ He asserts that there is a high threshold to reach in order to rebut the presumption of impartiality, and that a reasonable apprehension of bias must be firmly established.³²

²⁶ RSCSL-03-01-ES 1455, para. 9.

²⁷ RSCSL-03-01-ES 1455, paras. 4 and 12.

²⁸ Prosecutor v. Furundzija, Judgment, Case No. IT-95-17/1-A, Appeals Chamber, 21 July 2000 (“Furundzija Appeal Judgement”), paras. 164-215, especially paras. 177-215.

²⁹ RSCSL-03-01-ES 1455, para. 13.

³⁰ RSCSL-03-01-ES 1455, para. 21 *citing* SCSL-2004-14, Decision on the Motion to Recuse Judge Winter from the Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers, 28 May 2004, para. 22 (“Judge Winter Recusal Decision”), *citing* SCSL-2004-15-PT-058, “Decision on Motion Seeking Disqualification of Justice Robertson from the Appeals Chamber”, 13 March 2004, para. 15 (“Sesay Decision”).

³¹ RSCSL-03-01-ES 1455, para. 22.

³² RSCSL-03-01-ES 1455, para. 12.

15. He further submits that the Applicant does not meet this threshold as the request fails all the tests for impartiality.³³ In this regard, he first submits that the Applicant acknowledges the integrity and distinction of the Duty Judge and claims to have no issues with her integrity to dispense justice.³⁴ Second, the Prosecutor asserts that the Applicant does not demonstrate that actual bias exists since “it is not suggested anywhere in the Request that Justice Doherty made statements or has acted in any way that will be interpreted as displaying actual bias in relation to Prisoner Taylor’s Request for Temporary Transfer, which is the subject of this challenge.”³⁵ Third, he claims that it cannot “be said that Justice Doherty is a party to the matter before her, or that she has a financial or proprietary interest in the matter before her, or indeed that her decision will lead to the promotion of a cause with which she is involved together with other parties.”³⁶

16. Finally, the Prosecutor submits that the appearance of bias claimed by the Applicant is based exclusively on the incorrect premise of the Judge’s alleged UK nationality. He submits that, even disregarding this factual inaccuracy, the Applicant is seeking to establish a novel precedent which creates a false presumption of bias against judges simply on the basis of their nationality; a proposition that is deeply flawed, troubling and unsupported by any existing legal authority.³⁷ He asserts that similar claims have been rejected swiftly and outright by other international criminal tribunals and recites several Court decisions.³⁸

17. The Prosecutor submits that the principle of presumption of impartiality irrespective of nationality thus remains a viable principle that should be safeguarded and recalls that when Prisoner Moinina Fofana broke a condition of his release in Sierra Leone, the President designated a Sierra Leonean judge to sit on the complaint.³⁹ He avers that her bearing the same nationality as Prisoner Fofana was inconsequential to the considerations about her designation and she delivered a fair and just decision.⁴⁰ Moreover, on that occasion, the designated judge, who was also a member of the Supreme Court for Sierra Leone, was critical of the Monitoring

³³ RSCSL-03-01-ES 1455, para. 15.

³⁴ RSCSL-03-01-ES 1455, para. 15.

³⁵ RSCSL-03-01-ES 1455, para. 16.

³⁶ RSCSL-03-01-ES 1455, para. 17.

³⁷ RSCSL-03-01-ES 1455, paras. 3, 23.

³⁸ RSCSL-03-01-ES 1455, paras. 23-26.

³⁹ RSCSL-03-01-ES 1455, para. 27.

⁴⁰ RSCSL-03-01-ES 1455, para. 27.

Authority in Sierra Leone, the Sierra Leone Police, for its extreme laxity and inefficiency in carrying out its appointed role as a Monitoring Authority.⁴¹

APPLICANT'S REPLY

18. The Applicant filed his Reply⁴² addressed, in part, to the President only; the remaining part is an “introduction.” Notwithstanding the Direction that the title of these proceedings be amended to “The Application of Charles Ghankay Taylor for Temporary Transfer to a Safe Third Country to Continue His Imprisonment Due to Massive Outbreak of Covid-19 in the UK”⁴³, he persists in titling his pleading as “The Prosecutor Against Charles Ghankay Taylor.” The Reply is not signed nor submitted by Counsel for Mr. Taylor.

19. In his “Introduction”, the Applicant states that he, the Principal Defendant, is acting on instructions of Charles Ghankay Taylor and refers to the motion seeking removal or recusal of the Designated Duty Judge “because among other things her lady shall be presiding over an application which will warrant presiding over her country’s response to covid-19 within one of its prisons where Mr. Taylor is currently serving imprisonment.” In his submissions, the Principal Defender noted that such an application “may warrant a scheduling order requiring a response from UK Authorities and such a situation would place her lady in a difficult situation no matter the professional balance she may seek to apply and in any case would leave the reasonable observer to question the impartiality of not only the designation process but the possible outcome of the application given the multitude of judges from other jurisdictions available on the Court’s register.”⁴⁴

20. The Applicant “questions the authority of the Impugned Designated Duty Judge to issue the decision granting the Prosecutor leave to respond to the Principal Defender’s request because by doing so, the Impugned Designated Judge has effectively ruled on the Principal Defender’s request” and “this procedure amounts to the Impugned Designated Duty Judge acting as a judge in her own cause.”⁴⁵ He further submits that “[g]ranting Leave to the

⁴¹ RSCSL-03-01-ES 1455, para. 28.

⁴² RSCSL-03-01-ES 1456.

⁴³ RSCSL-03-01-ES 1448, dated 30 June 2020.

⁴⁴ RSCSL-03-01-ES 1456, para. 1.

⁴⁵ RSCSL-03-01-ES 1456, para. 3.

Prosecutor to respond to the disqualification/recusal motion” “amounts to her lady effectively granting a ruling on the main application by conduct.”⁴⁶

21. The Applicant sets out what would have been “the appropriate course of action” and reiterates that by “allowing the Impugned Designated Judge to continue sitting on applications arising from the Principal Defender’s main request, the President has effectively ruled on the Principal Defender’s main request by conduct and this state of affairs has the potential for Mr. Taylor to lose confidence in the Court’s ability to render him impartial justice especially considering his upcoming application for review of his judgment.”⁴⁷

22. The Applicant criticises the Prosecutor for being “a spokesperson for the Impugned Judge” and offering “second hand hearsay evidence” on “factual information on the Impugned Designated Judge in relation to her work and her election of Irish citizenship as a result of the Belfast agreement” which “far exceed(ed) what the Principal Defender could obtain from open source searches on the Judge from the world wide web.”⁴⁸ The “Principal Defender considers [these to be] personal statements on behalf of the Impugned Judge in a manner which leaves a reasonable observer with the impression that the Prosecutor has provided more than a legal resume.”⁴⁹ These statements, he submits should be disregarded.⁵⁰

23. The Applicant also submits that “central to the determination of the issues raised in [his] request is the fact that the Impugned Judge has consistently sat on almost all applications filed by Mr. Taylor. It is in the public domain that the Impugned Designated Judge sat on the Trial Chamber that convicted Mr. Taylor and also sat on the panel post Mr. Taylor’s appeal which rejected [his] application to be transferred from UK to continue his imprisonment in Rwanda.”⁵¹ He submits that “Mr. Taylor’s instructions are that the consistent empanelling of the Impugned Designated Judge on [the] applications that [Mr. Taylor] has filed with this court

⁴⁶ RSCSL-03-01-ES 1456, para. 4.

⁴⁷ RSCSL-03-01-ES 1456, para. 5.

⁴⁸ RSCSL-03-01-ES 1456, para. 7.

⁴⁹ RSCSL-03-01-ES 1456, para. 7.

⁵⁰ RSCSL-03-01-ES 1456, paras. 7-8.

⁵¹ RSCSL-03-01-ES 1456, para. 9.

post his appeal [...] leave him to wonder whether there is any particular reason for the exercise of this discretion by the President.”⁵²

24. The Applicant directs the remaining submissions of his Reply only “to the President and not the Impugned Judge [...] because to do otherwise would amount to the Principal Defender submitting to the jurisdiction of the Impugned Designated Judge who the Principal Defender had requested be removed from sitting on his application.”⁵³

25. The ensuing paragraphs addressed to the President refer to the Prosecutor’s factual and legal submissions. The Applicant states, inter alia, “the main contention in [his] request is not solely NATIONALITY as the Prosecutor contends in his response but is rather hinged on a second limb namely; that the process and procedure which this Court may undertake to resolve the expert/scientific/global issues”⁵⁴ and “[i]t boggles the mind to observe how the Prosecutor strenuously submits that her lady changed her nationality to Irish and yet contradictorily submits that nationality should not be considered as a factor in determining subjective or objective bias in determining requests relating to disqualification/recusal.”⁵⁵ Furthermore, he submits that it is in the public domain that the Impugned Judge is from Northern Ireland and Northern Ireland is part of the UK.⁵⁶

26. The Applicant also claims that the cases cited by the Prosecutor relating to Judge Orié and Justice Solomon differ from the present situation because in this case “independent international organizations such as the World Health Organization (WHO) may be asked to file submissions on UK’s response to covid-19 within its Prison systems generally and within the specific prison where Mr. Taylor is serving imprisonment in particular for the court to appreciate the scope and details of Mr. Taylor’s request. This may in turn generate response from UK national authorities and experience has shown that there is every possibility of tension arising from the different submissions as the UK Government may seek to protect its response purely as a matter of political expediency.”⁵⁷

⁵² RSCSL-03-01-ES 1456, para. 9.

⁵³ RSCSL-03-01-ES 1456, para. 10.

⁵⁴ RSCSL-03-01-ES 1456, para. 11.

⁵⁵ RSCSL-03-01-ES 1456, para. 12.

⁵⁶ RSCSL-03-01-ES 1456, para. 13.

⁵⁷ RSCSL-03-01-ES 1456, para. 14.

27. He avers that Prosecutor’s “response falls apart because his focus has been solely to respond to the issue of NATIONALITY and not the process which will be followed by the Designated Judge in the scheduling order which may invite responses from the UK, WHO, AI and HRW and which process will be instigated by Defence applications.”⁵⁸ He submits that the request for recusal or disqualification “is not based on traditional underpinnings of subjective/objective impartiality but based on an issue which may put the sentencing enforcement country, the UK on trial on a single issue, namely; assessing its response to covid-19 within its prison system and this calls for independent assessment which will be better carried out by a Judge detached from the country, whose response system to COVID-19 is under review in the application.”⁵⁹ He also puts the court on notice that “the Defence shall be requesting amicus submissions of independent entities to file submissions on UK’s response to covid-19 within its prison system.”⁶⁰ The Applicant also applies to the President to have the Decision Granting Leave to the Prosecutor to file a Response “disregarded” as it is “tainted” since it was issued by the Impugned Designated Judge, whom he requests be disqualified from sitting on Mr. Taylor’s application.⁶¹

APPLICABLE LAW

28. Article 11(2) of the Statute of the Residual Special Court for Sierra Leone provides that:

The 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. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

29. Rule 15 provides that:

(A) A Judge may not sit at a trial or appeal in any case in which his or her impartiality might reasonably be doubted on any substantial ground.

(B) Any party may apply to the Chamber of which the Judge is a member for the disqualification of the said Judge on the above ground.

⁵⁸ RSCSL-03-01-ES 1456, para. 17.

⁵⁹ RSCSL-03-01-ES 1456, para. 16.

⁶⁰ RSCSL-03-01-ES 1456, para. 17.

⁶¹ RSCSL-03-01-ES 1456, para. 18.

(C) If an application is made under Sub-Rule (B), the challenged Judge shall be entitled to present his or her comments on the matter.

30. The Appeals Chamber of the Special Court for Sierra Leone has held, in the case of *The Prosecutor v. Charles Ghankay Taylor* that “to determine whether surrounding circumstances objectively give rise to an appearance of bias, the applicable test ... is whether an independent bystander or reasonable person will have a legitimate reason to fear that the judge in question lacks impartiality, in other words whether one can apprehend bias. The standpoint of the accused is not decisive. Rather, it must be demonstrated that there is a legitimate reason to fear that the Judge in question lacks impartiality which can be objectively justified. Where some indicia of bias is found the logical and reasonable conclusion must be that a Judge is disqualified.”⁶²

31. The Appeals Chamber further held that “the reasonable man is an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that judges must swear to uphold. This hypothetical fair minded observer has sufficient knowledge of the actual circumstances to make a reasonable judgment. The fair-minded observer is also aware that a Judge is trained to put out of their minds evidence other than that presented at trial. Therefore, a Judge’s prior judicial contact with the facts of a case (or indeed with the accused) alone would generally not be sufficient to find an unacceptable appearance of bias. A fair-minded observer would know that a Judge’s role can differ from one judicial context to another.”⁶³

32. “In determining whether a Judge’s prior association with another case gives rise to a legitimate fear that the Judge may be biased or may have prejudged the instant matter, the Appeals Chamber endorses and adopts the holding that what matters is that he or she has not taken any stand or expressed any view that may reasonably be perceived as prejudging his or her position on the guilt or innocence of the accused in the proceedings at bar.”⁶⁴

⁶² SCSL-03-01-A-1323, para. 16 (internal references omitted).

⁶³ SCSL-03-01-A-1323, para. 17 (internal references omitted).

⁶⁴ SCSL-03-01-A-1323, para. 18 (internal references omitted).

33. In addition, “[a] party seeking disqualification of a Judge at the Special Court bears a heavy burden of displacing the presumption of judicial impartiality. A party seeking disqualification must also support any application with ascertainable facts and firm evidence of judicial bias. Evidence that is remote, irrelevant, capable of being disabused in the mind of Judges or speculative is not sufficient.”⁶⁵

DECISION ON REQUEST FOR RECUSAL

34. On these foregoing submissions I consider that the Applicant’s objections to me in his Motion are based on bias or perceptions of bias on the grounds that I am a national of the United Kingdom and I hold or have held positions in the UK. The Applicant’s Reply raises further issues viz. the “Impugned Judge has consistently sat on almost all applications filed by Mr. Taylor”⁶⁶ AND that the main contention in the Principal Defender’s request “is not solely NATIONALITY [...] but is rather hinged on a second limb namely; that the process and procedure which this Court may undertake to resolve the expert/scientific/global issues raised in Mr. Taylor’s application on covid-19 may necessitate some judgment/assessment to be passed on the UK and it may not bode well for such to emanate from a judicial officer nominated by that country especially given the fact that the Impugned Designated Judge was nominated by the UK to sit on this fact.”⁶⁷

35. This “second limb” submission of the Applicant, if taken to its logical conclusion would suggest that any national of any country or jurisdiction will be biased and/or perceived to be biased by virtue of being appointed to judicial office by that country or jurisdiction. Such a conclusion is not borne out by any facts submitted by the Applicant. As noted by the Prosecutor “it would be as much a potential threat to the interest of impartial and fair administration of justice if judges were to disqualify themselves on the basis of an unfounded and unsupported allegations of apparent bias.”⁶⁸

36. If the factual basis for alleging bias and/or the appearance of bias is that I am a national of the United Kingdom and nominated by the UK to my present position then it is

⁶⁵ SCSL-03-01-A-1323, para. 19 (internal references omitted).

⁶⁶ RSCSL-03-01-ES 1456, para. 9.

⁶⁷ RSCSL-03-01-ES 1456, para. 11.

⁶⁸ RSCSL-03-01-ES 1455, para. 12.

factually incorrect. I come from Northern Ireland which is a province of the United Kingdom and, in common, with all citizens of that province, I have dual citizenship viz Irish and British.⁶⁹ The Applicant's statements that I have "changed [my] nationality to Irish" and made an "election of Irish citizenship as a result of the Belfast agreement" are also incorrect.⁷⁰ With respect, the Applicant appears confused when he states that it is "not clear whether the Prosecutor meant Republic of Ireland or Northern Ireland nationality."⁷¹ There is not a distinct "Northern Irish nationality."

37. I am by birth an Irish citizen and have travelled on an Irish passport for decades both before and after the Belfast Agreement 1998.

38. I have never served as a judge in the United Kingdom. I served as a Principal Magistrate and as a Judge of the National and Supreme Courts of Papua New Guinea and of the High Court and Court of Appeal of Sierra Leone. I served as a Parole Commissioner in Northern Ireland; this appointment was made by the Minister of Justice of Northern Ireland (not the UK Government) as criminal justice and prisons are devolved matters under the provisions of the Northern Ireland Act 1998.

39. I was not nominated as a judge of the Residual Special Court for Sierra Leone by the United Kingdom, my nomination was made by the Republic of Ireland. My nomination to the Special Court for Sierra Leone in 2004 was made by the United Kingdom to United Nations. Both appointments were made by the United Nations. I am noted in the records of both Special Court for Sierra Leone and Residual Special Court for Sierra Leone as a member of the court from Ireland. I would add, as further emphasis, that I am registered in such international bodies as the International Association of Women Judges as Irish. As noted by the Prosecutor I am on the Irish Department of Foreign Affairs Election Monitoring Register.⁷²

⁶⁹ Art. 2 - Bunreacht na hEireann, Constitution of Ireland ; Anglo Irish Treaty 1921; Belfast Agreement 1998.

⁷⁰ RSCSL-03-01-ES 1456, paras. 7, 12.

⁷¹ RSCSL-03-01-ES 1456, para. 13.

⁷² I have been a member of the Election Monitoring team sent by Ireland to Indonesia, Serbia and, more recently, North Macedonia. The United Kingdom also sent its own teams'

Other examples of public reference to my nationality as 'Irish' include: In 2006 the Irish Government agreed that part of the Irish Army Contingent in UNMIL then in Liberia would be used as SCSL Rapid Reaction Unit. (Snippit from This Day (Nigeria), 3 April 2006) When seeking approval from the Dail (Irish Parliament) the then Minister included in his submission that 'we have an Irish judge in the court'.

40. I, therefore refute the suggestion that by reason of nationality or because I am beholden to the United Kingdom government for any position I hold or have held that I am biased in favour of any actions a department of that country may take. For the same reason I will not be put in any invidious position because of actions of any department or organisation of the UK Government. I consider that the proposition that a reasonable observer, properly informed, would apprehend bias is not and cannot be supported by the Applicant’s allegations.

41. The Applicant seeks to support his allegations of bias by stating that I “may have to seek submissions” from “UK Officials with responsibility of implementing public health measures in the UK Prison in question and more broadly from the UK” and that this “will require some judgment/assessment to be passed on the country that nominated the learned Justice to serve on this court which would place [me] in a difficult and even conflicting position.”⁷³ He claims that this is an issue that may put the United Kingdom on trial.⁷⁴

42. In fact such information had already been sought by the Registrar and submitted to the Court prior to the President designating me as Duty Judge. That information includes the general provisions made by the prison authorities in relation to all prisons in England and Wales and specific information relating to Mr. Taylor’s regime. The Registrar’s submission also makes clear that general information concerning actions taken within the prison systems against covid 19 are in public arena.

43. Moreover, the submission that deciding Mr. Taylor’s request for a transfer would require putting the UK on trial for its response to the pandemic is mistaken. Pursuant to the Enforcement Agreement, the conditions of imprisonment are governed by the law of the United Kingdom subject to the supervision of this Court.⁷⁵

44. In his Reply the Applicant submitted that “central to the determination of the issues raised in the Principal Defender’s request is the fact that the Impugned Judge has consistently

The authors of *Can Might Make Rights* stated at page 237 “..International Judges have also made enormously positive contributions to domestic justice systems. Judge Teresa Doherty is a case in point. An Irish national who spent years.....”

At The Pontifical Academy of Sciences Summit on Human Trafficking and Organized Crime held in the Vatican in November 2017 I made Ireland’s presentation. A judge from England made the UK presentation.

⁷³ RSCSL-03-01-ES 1449, para. 7. *See also* RSCSL-03-01-ES 1456, para. 14.

⁷⁴ RSCSL-03-01-ES 1456, para. 16.

⁷⁵ Art. 3(2) Agreement Between the Special Court for Sierra Leone and the Government of the United Kingdom of Great Britain and Northern Ireland on the Enforcement of Sentences of the Special Court for Sierra Leone 2002

sat on almost all applications filed by Mr. Taylor.”⁷⁶ “Mr. Taylor’s instructions are that the consistent empanelling of the Impugned Designated Judge on his applications that he has filed with this court post his appeal and leave him to wonder whether there is any particular reason for the exercise of this discretion by the President.”⁷⁷ It is not clear if this is a ground for recusal or is an observation. The jurisprudence of the SCSL has clearly held “[i]n determining whether a Judge’s prior association with another case gives rise to a legitimate fear that the Judge may be biased or may have prejudged the instant matter, the Appeals Chamber endorse[d] and adopt[ed] the holding that what matters is that he or she has not taken any stand or expressed any view that may reasonably be perceived as prejudging his or her position [...]”⁷⁸

45. Further, the Appeals Chamber held that “[a] fair-minded observer would know that a Judge’s role can differ from one judicial context to another.”⁷⁹ The present proceedings and the other litigation alluded to by the Applicant are different. Mr. Taylor’s current request is for a temporary transfer but previous proceedings in which I was empanelled were Mr. Taylor’s trial of his criminal responsibility for crimes against humanity and war crimes and his first request for a transfer based, inter alia, on alleged violations of his right to family life. In addition, the empanelling of the courts were independent decisions by the different Presidents of the day, the previous chambers were of three judges and the decisions were unanimous.

46. The Applicant submits that in Sesay Decision⁸⁰ the “Appeals Chamber disqualified [Justice] Robertson on grounds of appearance of bias even before any matter on that case had come up before the Appeals Chamber where the impugned Justice sat as a Justice” and that “there is no compelling reason(s) why the principle enunciated in the Sesay [Decision] should not be applied to the instant application.”⁸¹ I distinguish that precedent on the factual grounds that the learned Justice Robertson had actually published a public document in which he made statements showing his views about the RUF and did so prior to the hearing.

⁷⁶ RSCSL-03-01-ES 1456, para. 9.

⁷⁷ RSCSL-03-01-ES 1456, para. 9.

⁷⁸ SCSL-03-01-A-1323, para. 18 (internal references omitted).

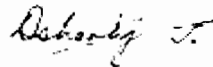
⁷⁹ SCSL-03-01-A-1323, para. 17 (internal references omitted).

⁸⁰ See *supra*, fn. 30.

⁸¹ RSCSL-03-01-ES 1449, para. 15.

47. I dispute the Applicant's submission that this is a "noncontentious matter" and herewith I present my comments on the application and for the foregoing factual and legal reasons I inform the President, Hon. Justice Kamanda and the parties that I decline to withdraw from this case.

Done this 23rd day July 2020



Justice Teresa Doherty

