

Uncertainty Over Seselj Case After Judge's Removal

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Now that trial judge has been disqualified, tribunal must decide what needs to happen in case against Serbian politician.

A Danish judge at the Hague tribunal has been disqualified after a panel of his peers found that an email which he sent out to personal contacts and later appeared in the press “demonstrated bias”.

Because Judge Frederik Harhoff sat on the bench in the long-running war crimes trial of Serbian nationalist politician Vojislav Seselj, the most immediate impact of his disqualification will be on that process. With the trial concluded, judgement is scheduled for October 30, but that date and indeed the whole case are now in flux.

The tribunal’s vice-president, Judge Carmel Agius, will have to decide how to proceed in light of Judge Harhoff’s disqualification. Legal experts say the options include assigning a replacement judge, ordering a new trial, or throwing out the case entirely on the grounds that the process was flawed.

“This is a nightmare scenario on so many levels,” said Luka Miletic, a defence lawyer who represented Croatian general Ante Gotovina at the tribunal.

The trouble began in June, when Judge Harhoff’s now infamous email was leaked to the Danish media. In it, he criticises the controversial acquittals of Gotovina and his co-accused Mladen Markac, former Yugoslav army chief Momcilo Perisic, and Serbian intelligence officials Jovica Stanisic and Franko Simatovic.

The letter, emailed to 56 contacts, also alleges that the Hague tribunal’s president, American judge Theodor Meron, applied “tenacious pressure” to colleagues in a way that “makes you think he was determined to achieve an acquittal” for Gotovina and Perisic.

“The latest judgements here have brought me before a deep professional and moral dilemma not previously faced,” the email said. “The worst of it is the suspicion that some of my colleagues have been behind a short-sighted political pressure that completely changes the premises of my work in my service to wisdom and the law.”

(For initial reactions to the email, see [Hague Tribunal Won't Comment on Leaked Letter](#).)

Shortly after the letter became public, Seselj – who represents himself – filed a request for Judge Harhoff to be disqualified from continuing with his case.

A three-judge panel was specially appointed to consider Seselj’s application, and on August 28, the majority of found that Judge Harhoff had “demonstrated a bias in favour of conviction such that a reasonable observer, properly informed, would reasonably apprehend bias”, and that the “presumption of impartiality has been rebutted”.

Judge Meron excused himself from dealing with the matter, so it is tribunal vice-president Judge Agius who must decide how to proceed in the Seselj case.

The limited options available are compounded by the fact that Seselj has already been in custody for ten years.

He was tried for nine counts of war crimes and crimes against humanity, for atrocities carried out in an effort to expel non-Serbs from parts of Croatia and Bosnia between August 1991 and September 1993.

His trial was supposed to start in 2006, but was postponed for nearly a year after he went on hunger strike. When proceedings finally got under way in November 2007, they were delayed for long periods at a time. Simultaneously, Seselj has been tried and convicted of contempt of court three times for revealing personal details of protected witnesses.

According to lawyer Miletic, Judge Harhoff’s removal from the case means that Seselj “does now have a legitimate claim to violation of his right to a speedy trial”.

“Before, you could say it was his own delay tactics. Now he can say, ‘You gave me a judge that was biased and you can’t hold me another 18 months or two years because of the mistake that you all made,’” Miletic said.

Dov Jacobs, assistant professor of international law at Leiden University in The Netherlands, says it is likely that Seselj will file a motion claiming “abuse of process” in order to have the case thrown out entirely.

“The logic would be that the trial is over and Seselj goes free. Any reasonable standard of fair trial and due process would mean that if a trial breaks down after ten years, it would be completely unfair to start over,” Jacobs said.

In addition to questions of fairness, Misetić said, the prospect of holding a brand-new trial would be “horrible”.

“Trying to explain that to the [United Nations] Security Council is almost inconceivable. His right to a speedy trial would certainly be violated,” the lawyer said. “They can’t in any way, shape or form have a case that’s going to last 15 years. To me that’s not a possibility. They are either going to name a new judge or dismiss the charges. I don’t see a third option at this point.”

Tribunal rules state that a judge can be replaced if he or she is found to be biased. But a situation where a judge is disqualified two months before judgement is due is unprecedented. Naming a new judge would almost certainly delay proceedings once again, possibly for a long time.

“Even if tomorrow you appoint a new judge, that judge is going to have to claim to have at least read every transcript of the trial or watched every video of the proceedings. So extrapolate out how much longer that will take. It would probably take a judge at least a year to do that,” Misetić said.

The conclusion that Harhoff demonstrated bias may also have serious implications for other cases.

Lawyers for former Bosnian Serb police official Mico Stanišić – who was sentenced to 22 years in prison this March by a panel that included Judge Harhoff – have already asked to enter the letter as new evidence during the appeals process.

In June, lawyers for the widow and children of deceased Bosnian army commander Rasim Delić requested that his conviction be “revised” on the grounds that Judge Harhoff was one of the judges on the bench.

Delić had appealed against the three-year sentence he received in 2008 for failing to prevent or punish the cruel treatment of Serb prisoners, as commander of wartime Bosnian government forces. A hearing was held in January 2010, but Delić died in April that year before judgement could be rendered. The appeals process was then terminated completely, despite objections from his lawyers.

In their June submission, lawyers argued that Judge Harhoff’s “lack of impartiality and integrity” was a new fact “which could have been a decisive factor in reaching the decision to convict Delić”.

“The publication of Judge Harhoff’s letter has unilaterally brought the reputation of the tribunal into significant disrepute and risks losing public confidence in the tribunal’s work,” the lawyers wrote. “It is therefore the responsibility of the appeal’s chamber to rectify the fallout committed as a result of Judge Harhoff’s appearance of bias. The only way to rectify this situation would be to issue the appeals judgement in this case, or to quash the trial judgement.”

The motion is now with the appeals chamber.

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