



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-04-84-A
Date: 2 September 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision: 2 September 2009

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON LAHI BRAHIMAJ'S APPLICATION TO VARY
CONDITIONS OF PROVISIONAL RELEASE**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Accused:

Mr. Ben Emmerson QC and Mr. Rodney Dixon for Mr. Ramush Haradinaj
Mr. Gregor Guy-Smith and Ms. Colleen Rohan for Mr. Idriz Balaj
Mr. Richard Harvey and Mr. Paul Troop for Mr. Lahi Brahimaj

1. The Appeals Chamber 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 (“Appeals Chamber” and “Tribunal”, respectively) is seized of the “Application on Behalf of Lahi Brahimaj to Vary Conditions of Provisional Release” filed by Lahi Brahimaj (“Brahimaj”) on 31 July 2009 (“Application”). The Office of the Prosecutor (“Prosecution”) filed its Response on 10 August 2009.¹ Brahimaj filed his Reply on 17 August 2009.²

I. BACKGROUND

2. On 3 April 2008, Trial Chamber I (“Trial Chamber”) convicted Brahimaj for torture and cruel treatment as violations of the laws or customs of war, pursuant to Article 3 of the Tribunal’s Statute,³ and sentenced him to six years’ imprisonment. The Appeals Chamber is currently seized of appeals against the Trial Judgement filed by Brahimaj and the Prosecution.⁴

3. On 18 March 2009, Brahimaj filed a motion for provisional release⁵ to which the Prosecution responded on 25 March 2009.⁶ On 25 May 2009, the Appeal Chamber granted Brahimaj provisional release pursuant to Rule 65(I) of the Rules of Procedure and Evidence of the Tribunal (“Rules”).⁷ Among the terms and conditions for provisional release established in the Decision Granting Provisional Release, the Appeals Chamber ordered Brahimaj to provide an address at which he would stay in Kosovo/Kosova to the authorities of the EULEX-Kosovo Mission and the Registrar of the Tribunal before leaving the United Nation Detention Unit in The Hague.⁸ It further required that Brahimaj must “remain within the confines of the municipality of his residence” during the time of provisional release.⁹ On 27 May 2009, Brahimaj filed a confidential notice identifying the address at which he would stay during the time of his provisional release.¹⁰ Brahimaj was provisionally released on 28 May 2009.¹¹ Since then, the

¹ Prosecution’s Response to Application on Behalf of Lahi Brahimaj to Vary Conditions of Provisional Release, 10 August 2009 (“Response”).

² Reply on Behalf of Lahi Brahimaj in Relation to Application [*sic*] to Vary Conditions of Provisional Release, 17 August 2009 (“Reply”).

³ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgement, 3 April 2008 (“Trial Judgement”), para. 504.

⁴ Notice of Appeal on Behalf of Third Defendant Lahi Brahimaj, 5 May 2008; Prosecution’s Notice of Appeal, 1 May 2008.

⁵ Application for Provisional Release Filed by the Accused Lahi Brahimaj, 18 March 2009 (“Motion for Provisional Release”).

⁶ Prosecution’s Response to Lahi Brahimaj’s Application for Provisional Release, 25 March 2009 (“Response to Motion for Provisional Release”).

⁷ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Decision on Lahi Brahimaj’s Application for Provisional Release, 25 May 2009 (“Decision Granting Provisional Release”) para. 18.

⁸ Decision Granting Provisional Release, para. 18(d).

⁹ Decision Granting Provisional Release, para. 18(e)(i).

¹⁰ Motion Providing Mr Brahimaj’s Address for Provisional Release Following Appeal Chamber Order [*sic*] of the 25 May 2009, 27 May 2009.

¹¹ Application, para. 12.

Appeals Chamber has received weekly reports from the EULEX-Kosovo Mission confirming that Brahimaj has complied with the conditions of provisional release.

II. APPLICABLE LAW

4. Pursuant to Rule 65(I) of the Rules, a convicted person may bring an application seeking provisional release for a fixed period. By virtue of Rule 107 of the Rules, the whole of Rule 65 applies *mutatis mutandis* to applications brought before the Appeals Chamber under this provision.¹² Rule 65(I) of the Rules thus provides that the Appeals Chamber may grant provisional release if it is satisfied that: (i) the convicted person, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be; (ii) the convicted person, if released, will not pose a danger to any victim, witness, or other person; and (iii) special circumstances exist warranting such release. These requirements must be considered cumulatively.¹³ The Appeals Chamber recalls that “whether an applicant satisfies these requirements is to be determined on a balance of probabilities, and the fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities”.¹⁴ Finally, the discretionary assessments of the requirements under Rule 65 of the Rules are made on a case-by-case basis.¹⁵

III. DISCUSSION

A. Arguments of the Parties

5. Brahimaj seeks to vary the conditions of provisional release to be permitted to travel to the municipalities of Gjakove and Decan at least one day per week, in consultation with the EULEX-Kosovo Mission, in order to visit his wife and four children in Jablanica, Gjakove municipality, his sister in Gillogjan, Decan municipality, and his brother in Gjakove, Gjakove municipality.¹⁶ Brahimaj asserts that in granting the provisional release, the Appeals Chamber was satisfied that he did not pose a flight risk and would not endanger victims, witnesses, or other persons, in

¹² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević’s Motion for Temporary Provisional Release on the Grounds of Compassion, 2 April 2009 (confidential) (“*Lazarević Decision*”), para. 4; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski’s Motion for Provisional Release, 18 December 2008 (confidential) (“*Tarčulovski Decision*”), para. 3.

¹³ *Lazarević Decision*, para. 4; *Tarčulovski Decision*, para. 3; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Application for Provisional Release Pursuant to Rule 65(I), 29 April 2008 (confidential) (“*Milošević Decision*”), para. 3.

¹⁴ *Lazarević Decision*, para. 4; *Tarčulovski Decision*, para. 3; *Milošević Decision*, para. 3.

¹⁵ *Lazarević Decision*, para. 4; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion, 2 April 2008, Public Redacted Version (“*Strugar Decision of 2 April 2008*”), para. 11, referring to *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution’s Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008, para. 7.

¹⁶ Application, paras 1, 15, 17.

compliance with Rule 65(I)(i) and (ii) of the Rules.¹⁷ Brahimaj argues that, in light of this finding, he should be allowed to travel outside the municipality where he resides during provisional release. In particular, Brahimaj argues that the principle of proportionality must be applied in deciding on his Application, balancing any remaining risk posed by him with a suitable accommodation for his right to a private and family life.¹⁸

6. The Prosecution opposes the Application on the ground that Brahimaj fails to show any need for amending the conditions of provisional release imposed by the Appeals Chamber.¹⁹ The Prosecution recounts that the Appeals Chamber, in its Decision Granting Provisional Release, did not grant Brahimaj's request to be released "within the territory of Kosovo", but rather imposed that Brahimaj "remain within the confines of the municipality of his residence" based on the Prosecution's concerns about attendance and witness intimidation.²⁰ The Prosecution reasserts such concerns in its Response, underscoring that it requested a re-trial for Brahimaj²¹ and that witness intimidation in the trial "is at the heart of the Prosecution appeal" and remains a potential risk in this case.²² Finally, the Prosecution submits that Brahimaj offers no persuasive justification in support of his request, as he fails to explain why the family members listed in his Application are unable to visit him in his chosen municipality or why he initially chose to reside in a municipality which differs from that of his wife and children.²³

7. Brahimaj replies that the Prosecution misinterprets the Decision Granting Provisional Release. In Brahimaj's view, the Appeals Chamber did not consider that he is a flight risk or a risk to witnesses and victims, and identified the terms and conditions for provisional release on the basis of those imposed when he was previously provisionally released during trial.²⁴ Brahimaj further claims that the Prosecution's stance that his visits to his immediate family members once a week would constitute a flight risk is "baseless".²⁵ In particular, Brahimaj observes that he was permitted by the Appeals Chamber to reside in any municipality of his choice in Kosovo/Kosova, that he is not actively monitored during his provisional release, and that he meets with EULEX-Kosovo Mission's representatives each week at his residence.²⁶ Brahimaj claims that the Prosecution has not explained how, in these circumstances, visiting close family members once a

¹⁷ Application, paras 9.1-9.2.

¹⁸ Application, para. 16; *see also* para. 14, referring to *Prosecutor v. Limaj et al*, Case No. IT-03-66-AR65, Decision On Fatmir Limaj's Request For Provisional Release, 31 October 2003, para. 13.

¹⁹ Response, para. 1.

²⁰ Response, para. 2 (internal quotations omitted).

²¹ Response, para. 3.

²² Response, para. 3; *see also* Response to Motion for Provisional Release, paras 3, 5.

²³ Response, para. 4.

²⁴ Reply, paras 4, 7.

²⁵ Reply, paras 1, 8.

²⁶ Reply, para. 8.

week would create any flight risk or interference with witnesses.²⁷ Brahimaj claims that it is difficult for his family to visit him, because of the very young age of his four children and the traditional aspects of Albanian culture which frown upon women travelling unaccompanied.²⁸ He submits that he should not be forced to choose between either living with his wife and children in a “tiny rural village” or “attempt[ing] to re-establish his life in Pristina [*sic*] but be prevented from visiting his family”.²⁹

B. Analysis

8. As recalled above,³⁰ whether an applicant satisfies the requirements of Rule 65(I) of the Rules is to be determined on a balance of probabilities, and the discretionary assessments of these requirements are made on a case-by-case basis.³¹ The Appeals Chamber’s evaluation whether an accused, if provisionally released, will not flee and will not endanger victims, witnesses, or other persons, as required by Rule 65(I)(i) and (ii) of the Rules,³² is not detached from the identification and consideration of the terms and conditions of provisional release to be imposed in a particular case. Rather, the conclusion that Rule 65(I)(i) and (ii) requirements are satisfied is necessarily related to the conditions required by a decision granting provisional release. Thus, for example, concerns relating to the fact that an accused may represent a flight risk may be overcome in certain instances by imposing strict surveillance over the accused.³³ The identification of whether the terms and conditions of provisional release are sufficient to assure that the requirements provided in Rule 65(I)(i) and (ii) of the Rules are satisfied depends upon the specific circumstances of any given case and is remitted to the discretionary assessment of the Appeals Chamber.

9. The Appeals Chamber recalls that, in its Decision Granting Provisional Release, it denied Brahimaj’s request relating to the conditions of his provisional release.³⁴ In particular, the Appeals Chamber considered that the two conditions suggested by Brahimaj, namely that he would remain within the territory of Kosovo/Kosova and would report once per month to local authorities, were insufficient to address the attendance and witness intimidation concerns raised by the Prosecution.³⁵ In order to address such concerns, the Appeals Chamber imposed, *inter alia*, the requirements that Brahimaj remain within the confines of the municipality of his residence during

²⁷ *Ibid.*

²⁸ Reply, para. 9.

²⁹ Reply, para. 10.

³⁰ *Supra*, para. 4.

³¹ *Lazarević* Decision, para. 4; *Strugar* Decision of 2 April 2008, para. 11.

³² Decision Granting Provisional Release, para. 14.

³³ See, e.g., *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Milan Lukić’s Motion for Provisional Release, 28 August 2009, p. 5, note 32; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Public Redacted Version of the “Decision on Vladimir Lazarević’s Second Motion for Temporary Provisional Release on the Grounds of Compassion” Issued on 21 May 2009, 22 May 2009, paras 14-15, 17(5)(c).

³⁴ Decision Granting Provisional Release, para. 17.

³⁵ Motion for Provisional Release, para. 17; Decision Granting Provisional Release, para. 17

the period of his provisional release.³⁶ The Appeals Chamber rejects Brahimaj’s argument that allowing him to travel in Kosovo/Kosova would have no impact on the assessment of the first two requirements for granting provisional release provided by Rule 65(I)(i) and (ii) of the Rules, as the restriction on movement represents a safeguard against the risk that an accused may flee or pose danger to victims and witnesses.

10. Furthermore, the Appeals Chamber considers that Brahimaj has not shown any persuasive justification as to why his family is unable to visit him in his chosen municipality of residence. Neither the fact that Brahimaj alleges that Albanian culture looks unfavourably on women travelling alone, nor the young age of Brahimaj’s children³⁷ can be considered as a sufficient justification to permit a change in the conditions of Brahimaj’s provisional release and allow him unrestricted mobility. In addition, Brahimaj has not alleged any reason why his brother or sister would be unable to travel to visit him.

11. The Appeals Chamber recalls that Brahimaj was given the opportunity to choose the municipality in which he would reside for provisional release.³⁸ The reasons why Brahimaj elected to reside in Priština rather than with his family members during the period of provisional release are outside the purview of the Appeals Chamber. Nevertheless, in light of the information provided in the Application, the Appeals Chamber considers it appropriate to allow Brahimaj to provide a new and different address, to which he would relocate in Kosovo/Kosova, to the authorities of the EULEX-Kosovo Mission and the Registrar of the Tribunal within three days from the issuance of the present Decision. Should Brahimaj elect a new place of residence, he shall travel there, accompanied by a representative of the EULEX-Kosovo Mission, within fourteen days from the issuance of the present Decision, and remain in his new place of residence until the termination of his provisional release. All the remaining terms and conditions identified in the Decision Granting Provisional Release shall remain unchanged.

IV. DISPOSITION

12. For the foregoing reasons, pursuant to Rule 65(I) of the Rules, the Appeals Chamber:

DENIES the Application;

ORDERS that Brahimaj, should he wish to relocate within Kosovo/Kosova, shall provide a new address in Kosovo/Kosova to the authorities of the EULEX-Kosovo Mission and the Registrar of the Tribunal within three days from the issuance of the present Decision;

³⁶ Decision Granting Provisional Release, para. 18 (e)(i).
³⁷ Reply, para. 9.

REQUESTS, should Brahimaj choose to relocate, that the EULEX-Kosovo Mission:

- i. accompany Brahimaj to his new place of residence within fourteen days from the issuance of the present Decision; and
- ii. send a report on the transfer of Brahimaj to his new place of residence to the Appeals Chamber within two days of the date of the transfer;

ORDERS that all terms and conditions of Brahimaj's provisional release as identified in the Decision Granting Provisional Release be maintained.

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



Judge Patrick Robinson
Presiding

Dated this second day of September 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁸ Decision Granting Provisional Release, para. 18(d)(e).