

UNITED
NATIONS



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-05-87-A
Date: 17 May 2010
Original: English

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrézia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision: 17 May 2010

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC REDACTED VERSION

**DECISION ON VLADIMIR LAZAREVIĆ'S MOTION FOR
TEMPORARY PROVISIONAL RELEASE ON
COMPASSIONATE GROUNDS**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Defence:

Mr. Toma Fila and Mr. Vladimir Petrović for Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksander Aleksić for Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Sreten Lukić

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 seised of “Vladimir Lazarevic [*sic*] Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annexes” filed confidentially by Counsel for Vladimir Lazarević (“Lazarević”) on 19 April 2010 (“Motion”). The Prosecution filed its response on 20 April 2010 opposing the Motion.¹ Lazarević filed his reply on 23 April 2010.²

I. BACKGROUND

2. On 21 May 2009, the Appeals Chamber granted Lazarević’s request for provisional release and ordered that he be released to Serbia for a period of one month in order to receive the required medical treatment, including subsequent recovery therapy.³ Lazarević was released on 25 May 2009 and was due to return to the United Nations Detention Unit in The Hague (“UNDU”) on 25 June 2009.⁴ On 24 June 2009, following Lazarević’s request, the Appeals Chamber extended the period of provisional release until 15 July 2009.⁵ On 14 July 2009, following another urgent request from Lazarević, the Appeals Chamber further extended the period of provisional release until 5 August 2009 and instructed the Registry of the Tribunal to appoint an independent medical expert to examine Lazarević in the Military Hospital in Niš, Serbia, (“Niš Hospital”) and submit a report,⁶ which was done on 31 July 2009.⁷ On 4 August 2009, the Appeals Chamber dismissed Lazarević’s third motion for prolongation of his provisional release,⁸ and ordered that he return to the UNDU no later than 5 August 2009,⁹ which he did.

¹ Prosecution’s Response to Vladimir Lazarević’s Confidential Motion for Temporary Provisional Release, 20 April 2010 (confidential) (“Response”).

² Lazarevic [*sic*] Defence Reply to Prosecution Response to Vladimir Lazarevic’s [*sic*] Confidential Motion for Provisional Release, 23 April 2010 (confidential) (“Reply”).

³ *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 (“Lazarević Decision of 21 May 2009”), paras 11, 17.

⁴ *Ibid.*, para. 17; Correspondence from the Embassy of the Republic of Serbia, 22 May 2009, No. 515/2009 (confidential); Correspondence from the Embassy of the Republic of Serbia, Re: Return of Vladimir Lazarević, 19 June 2009, No. 665-1/2009 (confidential).

⁵ Decision on Urgent Defence Motion Requesting Prolongation of Provisional Release of Vladimir Lazarević, 24 June 2009 (confidential; public redacted version filed the same day), para. 16.

⁶ Decision on Second Urgent Defence Motion Requesting Prolongation of Provisional Release of Vladimir Lazarević, 14 July 2009 (confidential; public redacted version filed the same day) (“Lazarević Decision of 14 July 2009”), paras 13, 15.

⁷ Registry Submission Pursuant to Rule 33(B) Regarding the Accused Lazarević’s Health Status, 31 July 2009 (confidential and *ex parte*) (“Medical Report of 31 July 2009”).

⁸ Third Urgent Defence Motion Requesting Prolongation of Provisional Release of General Vladimir Lazarevic [*sic*] with Confidential Annexes, 3 August 2009 (confidential).

⁹ Decision on the Third Urgent Defence Motion Requesting Prolongation of Provisional Release of Vladimir Lazarević, 4 August 2009 (confidential; public redacted version filed on the same date) (“Lazarević Decision of 4 August 2009”), para. 14.

3. On 13 January 2010, the Appeals Chamber dismissed a further motion for provisional release,¹⁰ on the basis that Lazarević had failed to establish the existence of special circumstances required by Rule 65(I)(iii) of the Rules of Procedure and Evidence (“Rules”).¹¹ Another similar motion¹² was dismissed by the Appeals Chamber on the same grounds on 1 March 2010.¹³
4. On 19 March 2010, the Appeals Chamber received the “Registry Submission Pursuant to Rule 33(B) Concerning Medical Treatment” (“Medical Report of 17 March 2010”) communicating, with Lazarević’s consent, the most recent report compiled by the UNDU Medical Officer.¹⁴
5. The Netherlands, in its capacity as host country, has no objections to Lazarević’s provisional release as requested by the Motion.¹⁵
6. On 6 May 2010, the Deputy Registrar of the Tribunal provided some clarifications with respect to Lazarević’s claims presented in the Motion.¹⁶

II. APPLICABLE LAW

7. 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.¹⁷ 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

¹⁰ Vladimir Lazarevic [sic] Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annexes, 16 December 2009 (confidential).

¹¹ Decision on Vladimir Lazarević’s Motion for Temporary Provisional Release on the Grounds of Compassion, 13 January 2010 (confidential) (“Lazarević Decision of 13 January 2010”).

¹² Vladimir Lazarevic [sic] Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annexes, 19 February 2010 (confidential).

¹³ Public Redacted Version of the Decision on Vladimir Lazarević’s Motion for Temporary Provisional Release Rendered on 1 March 2010, 10 March 2010.

¹⁴ Registry Submission Pursuant to Rule 33(B) Concerning Medical Treatment, 19 March 2010 (confidential and *ex parte*).

¹⁵ Letter from the Deputy Director of Protocol for the Minister of Foreign Affairs titled “Provisional Release Mr Vladimir Lazarević”, 21 April 2010 (confidential).

¹⁶ Registry Submission Pursuant to Rule 33(B) Concerning the Health of the Appellant, Mr. Lazarević, 6 May 2010 (confidential) (“Submissions of 6 May 2010”). The Appeals Chamber also notes the Registry Submission Pursuant to Rule 33(B) Regarding the Accused Lazarević’s Request Dated 6 May 2010, 10 May 2010 (confidential and *ex parte*) (“Submissions of 10 May 2010”), whereby the Registry brought to the Appeals Chamber’s attention the written request made by Lazarević to the Registrar, UNDU administration and the President of the Appeals Chamber regarding the urgency of the required surgery.

¹⁷ Lazarević Decision of 13 January 2010, para. 5 and references cited therein.

considered cumulatively.¹⁸ 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”.¹⁹ Finally, the discretionary assessments of the requirements under Rule 65 are made on a case-by-case basis.

III. DISCUSSION

A. Submissions

8. Lazarević requests to be provisionally released for a period of thirty days to undergo an operation on his thrombotic vein in the Niš Hospital.²⁰ In support of his request, he refers to the assessment of the Dutch vascular surgeon dated 5 March 2010 (“Report of 5 March 2010”) which states that Lazarević “developed thrombophlebitis of the right leg, below the knee due to possible insufficiency of the great saphenous vein” and recommends “[s]urgical treatment by stripping of the great saphenous vein on the right side.”²¹ Lazarević reiterates that doctors in the Niš Hospital recommended this surgical procedure in August 2009.²²

9. Lazarević contends that despite the “support stocking and antibiotic treatment” prescribed to him in the UNDU pursuant to the Medical Report of 31 July 2009, he has constant pain in his leg when walking and requires “emergency treatment” which the Niš Hospital is able to administer.²³

[REDACTED]

10. [REDACTED]

11. Finally, Lazarević asserts that the guarantees previously issued by the Government of the Republic of Serbia for his provisional release are still valid.²⁴ He reiterates his personal undertaking not to pose any risk of flight or a danger to any victim, witness or other person.²⁵

12. In its Response, the Prosecution objects to the Motion arguing that Lazarević has failed to demonstrate the existence of special circumstances required by Rule 65(I)(iii) of the Rules to justify

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Motion, paras 1, 13.

²¹ *Ibid.*, Annex A. See also *ibid.*, para. 3.

²² *Ibid.*, para. 4.

²³ *Ibid.*, paras 3, 7-8. See also Annex B (“Niš Hospital Report”).

²⁴ *Ibid.*, para. 11. See Supplement to Vladimir Lazarevic [*sic*] Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annexes, 29 April 2010 (confidential), Annex confirming the validity of the guarantees issued on 24 December 2009.

²⁵ Motion, para. 12.

his request for provisional release.²⁶ It argues that Lazarević has failed to demonstrate why he cannot obtain the surgery necessary to remove a thrombotic vein in The Netherlands or why such treatment would be inappropriate for him.²⁷ Furthermore, the Prosecution contends that the Niš Hospital Report does not demonstrate that the Niš Hospital offers “a unique and necessary medical procedure that is unavailable in The Netherlands.”²⁸

13. The Prosecution argues that even though Lazarević has requested “emergency treatment”, it is questionable whether his condition can be considered acute, given the delay between the Report of 5 March 2010 and his filing of the Motion.²⁹ It further suggests that the UNDU Medical Officer submit a further report on Lazarević’s current state of health indicating whether the surgery is still necessary and whether it can be performed in The Netherlands.³⁰ Additionally, the Prosecution notes that the Motion fails to identify the means by which Lazarević would be transported back to Serbia and asserts that “[t]his is important because, as the Defence has argued before, someone suffering from thrombosis may not be able to travel safely by airplane [*sic*].”³¹

14. [REDACTED]

15. In his Reply, Lazarević submits that he has not received adequate treatment in The Netherlands despite his repeated complaints since August 2009.³² He contends that it would be “much better” to receive the necessary treatment in the Niš Hospital which is ready to operate on him immediately, since treatment in The Netherlands is “highly uncertain” in view of the fact that he has waited eight months for an examination.³³ He emphasizes the urgent need for treatment and suggests that his condition is in danger of becoming fatal.³⁴

16. Lazarević further responds that he is able to fly to Serbia “if a compression bandage with short stretch bandages is applied to both his lower extremities”.³⁵ [REDACTED]

17. In his Submissions of 6 May 2010, the Deputy Registrar submits that Lazarević’s health care needs can be safely and effectively met in The Hague.³⁶ He clarifies that the necessary vascular surgery could be undertaken within four to five weeks from the date it is scheduled but is contingent

²⁶ Response, paras 1-2.

²⁷ *Ibid.*, paras 2-4.

²⁸ *Ibid.*, para. 4.

²⁹ *Ibid.*, para. 6.

³⁰ *Ibid.*, para. 5.

³¹ *Ibid.*, para. 6, referring to Second Urgent Defence Motion Requesting Prolongation of Provisional Release of General Vladimir Lazarević with Confidential Annex, 13 July 2009 (confidential), Annex.

³² Reply, para. 3.

³³ *Ibid.*, para. 4.

³⁴ *Ibid.*, para. 5.

³⁵ *Ibid.*, para. 6, referring to the Medical Report of 31 July 2009.

upon Lazarević's consent to be treated in The Hague.³⁷ The Deputy Registrar further notes that the administration of this treatment has been complicated by matters brought confidentially by Lazarević before the President of the Tribunal which have impacted on his treatment plan.³⁸ He emphasizes that should Lazarević consent to the necessary treatment in The Netherlands, the Registry will be able to "move forward with proactively tending to his health."³⁹

B. Analysis

1. Special circumstances under Rule 65(I) of the Rules

18. The Appeals Chamber recalls that the specificity of provisional release at the post-trial stage is reflected by Rule 65(I)(iii) of the Rules, which provides for an additional criterion, *i.e.* that "special circumstances exist warranting such release".⁴⁰ In such situations, the Appeals Chamber has concluded that special circumstances related to humane and compassionate considerations exist where there is an acute justification, such as the applicant's medical need or a memorial service for a close family member.⁴¹ The Appeals Chamber has also granted provisional release for a visit to a close family member in "extremely poor health and whose death is believed to be imminent".⁴² Because "the notion of acute justification [is] inextricably linked to the scope of special circumstances which could justify provisional release on compassionate grounds at the appellate stage", justifications such as wanting to spend time with family have explicitly not been recognized as special circumstances under Rule 65(I)(iii) of the Rules.⁴³

19. The Appeals Chamber considers that Lazarević has shown, based on medical evidence submitted, the need for surgical treatment. In so doing, the Appeals Chamber notes that Lazarević's

³⁶ Submissions of 6 May 2010, para. 6.

³⁷ *Ibid.*, paras 7-8, 10-11. See also Submissions of 10 May 2010, para. 5, stating that the indicated schedule is an expedited timeline, compatible with the condition itself and the need for surgery.

³⁸ *Ibid.*, para. 9.

³⁹ *Ibid.*, para. 8. The Deputy Registrar further notes that Lazarević has been advised to take preventative and restorative steps such as exercise which he has not undertaken. See *ibid.*, para. 10.

⁴⁰ *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 of 2 April 2009"), para. 8, referring to *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on the Renewed Defence Request Seeking Provisional Release on Compassionate Grounds, 15 April 2008 (public redacted version) ("*Strugar* Decision of 15 April 2008"), para. 10.

⁴¹ *Lazarević* Decision of 2 April 2009, para. 8, referring to *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. 12. See also, *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić for Provisional Release for a Fixed Period to Attend Memorial Services for his Mother, 5 May 2006, p. 3, referring to *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father, 21 October 2004, para. 14.

⁴² *Lazarević* Decision of 2 April 2009, para. 8; *Strugar* Decision of 15 April 2008, para. 10.

⁴³ *Lazarević* Decision of 2 April 2009, para. 8; *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) para. 8; *Strugar* Decision of 2 April 2008, para. 12.

condition has essentially remained unchanged since the receipt of the Medical Report of 31 July 2009 confirming that Lazarević has “thrombophlebitis of the side branch of the V. saphena magna of the right lower limb”.⁴⁴ Furthermore, the Appeals Chamber observes that the present recommendation for surgery follows Lazarević’s complaint that the treatment has not improved his condition and that he has had continuous pain in his right leg when walking.⁴⁵

20. However, the Appeals Chamber considers that Lazarević has failed to demonstrate why the required treatment can only be administered in Serbia.⁴⁶ While this is not a requirement explicitly provided for in Rule 65(I) of the Rules, the Appeals Chamber reiterates that it is a relevant factor in establishing whether “special circumstances” exist based on a case-by-case assessment reflecting the totality of relevant considerations.⁴⁷ In the present situation, Lazarević fails to substantiate any valid reason as to why the required treatment cannot be successfully performed in The Netherlands or would otherwise be inappropriate for him if administered there.⁴⁸ On the contrary, according to the Registry’s Submissions of 6 May 2010, the recommended vascular surgery is available in The Hague but is contingent on Lazarević’s consent to the necessary treatment.⁴⁹

21. Furthermore, the Appeals Chamber considers that [REDACTED] does not amount to an “acute justification” warranting provisional release, even when considered in combination with his present need for surgery. [REDACTED]

22. Consequently, the Appeals Chamber is not satisfied that Lazarević has shown the existence of special circumstances required by Rule 65(I)(iii) of the Rules. Considering that the requirements under Rule 65(I) of the Rules are cumulative, there is no need to consider whether the requirements of Rules 65(I)(i) or 65(I)(ii) are met in the present case.⁵⁰

23. Finally, as regards Lazarević’s allegations concerning [REDACTED], the Appeals Chamber notes that his relevant submissions in this regard have been or are being addressed through the

⁴⁴ Medical Report of 31 July 2009, p. 4 (Discharge Summary). See also *Lazarević* Decision of 4 August 2009, para. 11. The Appeals Chamber further observes that the Report of 5 March 2010 identifies the same condition, namely “[i]nsufficiency of the great saphenous vein”. See Report of 5 March 2010.

⁴⁵ Report of 5 March 2010; Motion, para. 3.

⁴⁶ Cf. *Lazarević* Decision of 2 April 2009, para. 10; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on “Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions”, 8 December 2005, p. 4.

⁴⁷ *Lazarević* Decision of 21 May 2009, para. 11.

⁴⁸ Cf., *a contrario*, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lazarević Motion for Temporary Provisional Release, 9 February 2009 (confidential and *ex parte*), Annex, para. 25. See also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.8, Decision on Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release, 20 July 2009 (public redacted version), para. 13, reiterating that “an applicant for provisional release on medical grounds bears the burden of establishing that any treatment in the Netherlands is not appropriate in his particular circumstances”.

⁴⁹ Submissions of 6 May 2010, paras 7-8, 10-11.

⁵⁰ Cf. *Lazarević* Decision 13 January 2010, para. 13.

appropriate complaint procedures.⁵¹ At this stage, the Appeals Chamber has no jurisdiction to intervene in these matters.⁵² The Appeals Chamber takes note of the Registry's continuous efforts to address Lazarević's medical concerns and has no reason to believe that this would not be ensured in the future.

IV. DISPOSITION

24. For the foregoing reasons, the Appeals Chamber hereby **DISMISSES** the Motion.

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

Done this 17th of May 2010,
At The Hague, The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]

⁵¹ Motion, paras 5-6; Submissions of 6 May 2010, para. 9.

⁵² See, e.g., Decision on Vladimir Lazarević's Request for Medical Examination, 18 September 2009 (confidential and *ex parte*), p. 3.