



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-04-82-AR65.4
Date: 27 July 2007
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision of: 27 July 2007

PROSECUTOR

v.

Ljube BOŠKOSKI and Johan TARČULOVSKI

Public

**DECISION ON JOHAN TARČULOVSKI'S INTERLOCUTORY APPEAL ON
PROVISIONAL RELEASE**

Office of the Prosecutor:

Mr. Dan Saxon
Ms. Joanne Motoike
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Ms. Meritxell Regue

Counsel for the Accused:

Ms. Edina Rešidović and Mr. Guénaél Mettraux for Ljube Boškosi
Mr. Antonio Apostolski and Ms. Jasmina Živković for Johan Tarčulovski

1. The Appeals Chamber of the International Criminal 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 “International Tribunal”, respectively) is seized of the interlocutory appeal confidentially filed by Johan Tarčulovski (“Appellant”) on 20 July 2007 (“Appeal”)¹ against the decision of Trial Chamber II (“Trial Chamber”) denying his request for provisional release for the period between 1 and 20 August 2007 (“Impugned Decision”).² The Prosecution filed its confidential response to the Appeal on 24 July 2007.³ The Appellant has not filed a reply.⁴

Background

2. On 14 March 2005, the Appellant was arrested by authorities of the Former Yugoslav Republic of Macedonia (“fYROM”)⁵ and subsequently transferred to the United Nations Detention Unit in The Hague. The operative Indictment, confirmed on 2 November 2005, charges the Appellant jointly with Ljube Boškoski for murder, wanton destruction and cruel treatment allegedly committed in the course of an attack on the village of Ljuboten in the fYROM between 10 and 12 August 2001.⁶

3. The first Appellant’s application for provisional release was denied by the Trial Chamber on 18 July 2005 (“First Trial Chamber Decision”) on the basis of serious concerns whether the Appellant would appear for trial and would not pose a danger to any victim, witness or other person, if provisionally released.⁷ The appeal by the Appellant against this decision was dismissed

¹ *Prosecutor v. Boškoski and Tarčulovski*, Case No.: IT-04-82-AR65.4, Confidential Appeal on the Decision on Johan Tarčulovski Motion for Provisional Release on Humanitarian Grounds, 20 July 2007.

² *Prosecutor v. Boškoski and Tarčulovski*, Case No.: IT-04-82-T, Confidential Decision on Johan Tarčulovski’s Motion for Provisional Release on Humanitarian Grounds, 19 July 2007. *See also Prosecutor v. Boškoski and Tarčulovski*, Case No.: IT-04-82-T, Johan Tarčulovski Motion for Provisional Release on Humanitarian Grounds, 7 June 2007.

³ *Prosecutor v. Boškoski and Tarčulovski*, Case No.: IT-04-82-AR65.4, Confidential Prosecution’s Response to Tarčulovski Appeal [sic] on the Decision on Johan Tarčulovski Motion for Provisional Release on Humanitarian Grounds, 24 July 2007 (“Response”). The Appeals Chamber finds no basis for the confidential nature of the Appeal and the Response and notes that neither the Appellant nor the Prosecution have an objection to the lifting of their confidentiality. The Appeals Chamber recalls that under Rules 78 and 107 of the Rules of Procedure and Evidence (“Rules”), all proceedings before an Appeals Chamber shall be public unless there are exceptional reasons for keeping them confidential. *See Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No.: IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber’s Decision on Sredoje Lukić’s Motion for Provisional Release, 16 April 2007, fn. 2.

⁴ Counsel for the Appellant informed the Appeals Chamber on 23 July 2007 that he would not file a reply.

⁵ The International Tribunal recognises that by Resolution A/RES/47/225 of 8 April 1993, the General Assembly decided to admit as a Member of the United Nations the State being provisionally referred to for all purposes within the United Nations as “The former Yugoslav Republic of Macedonia” pending settlement of the difference that had arisen over its name.

⁶ *Prosecutor v. Boškoski and Tarčulovski*, Case No.: IT-04-82-PT, Amended Indictment, 2 November 2005, paras 4-44.

⁷ *Prosecutor v. Boškoski and Tarčulovski*, Case No.: IT-04-82-T, Decision on Johan Tarčulovski’s Motion for Provisional Release, 18 July 2005, para. 33.

by the Appeals Chamber on 4 October 2005.⁸ His second application for provisional release was denied by the Trial Chamber on 17 January 2007 (“Second Trial Chamber Decision”), finding that the Appellant had failed to demonstrate a material change in circumstances since the First Trial Chamber Decision.⁹ In the Impugned Decision, the Trial Chamber denied the Appellant’s request for provisional release on the basis that the Appellant “has failed to demonstrate that there has been a ‘material change in circumstances’ since the date of the [Second Trial Chamber Decision] which would justify granting the Motion”.¹⁰ As a consequence, the Trial Chamber was not satisfied that the Appellant would appear for trial, if provisionally released.¹¹

Standard of Review

4. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber’s decision.¹² The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.¹³ Accordingly, the relevant inquiry is not whether or not the Appeals Chamber agrees with that discretionary decision, but rather “whether the Trial Chamber has correctly exercised its discretion in reaching that decision.”¹⁴ In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a “discernible error”.¹⁵ The Appeals Chamber will only overturn a Trial Chamber’s decision on provisional release where it is found to be “(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.”¹⁶

Applicable Law

5. Pursuant to Rule 65(A) of the Rules, once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B) of the Rules, a Chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will

⁸ *Prosecutor v. Boškoski and Tarčulovski*, Case No.: IT-04-82-AR65.1, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 4 October 2005.

⁹ *Prosecutor v. Boškoski and Tarčulovski*, Case No.: IT-04-82-T, Decision Concerning Renewed Motion for Provisional Release of Johan Tarčulovski, 17 January 2007, para. 22.

¹⁰ Impugned Decision, para. 17.

¹¹ *Ibid.*

¹² *Prosecutor v. Prlić et al.*, IT-04-74-AR65.4, Confidential Decision on the Prosecution Appeal of the Trial Chamber’s “*Décision relative à la demande de mise en liberté provisoire de l’accusé Pusić*”, 20 July 2007, para. 6 (with further references).

¹³ *Ibid.* (with further references).

¹⁴ *Ibid.*

¹⁵ *Ibid.*, para. 7.

¹⁶ *Ibid.*

not pose a danger to any victim, witness or other person; and after having given the host country and the State to which the accused seeks to be released, the opportunity to be heard.¹⁷

6. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.¹⁸ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁹ This is because decisions on motions for provisional release are fact intensive and cases are considered on an individual basis in light of the particular circumstances of the individual accused.²⁰ The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the International Tribunal.²¹

Analysis

7. The Appellant alleges that the Trial Chamber erred by failing to consider a material change in circumstances since the denial of his last application for provisional release. In particular, the Appellant argues that the Trial Chamber erred (i) when concluding that the guarantees of the Government of the fYROM do not constitute a material change in circumstances; (ii) when failing to consider the personal circumstances of the Appellant; (iii) when failing to take into consideration that there has not been a single case of harm to any witness or victim in this case; and (iv) by not considering the humanitarian grounds in this case, namely the birth of his second child and the assistance to be given to his wife who is alone to take care of two babies.²² The Prosecution responds that the Appellant fails to demonstrate that the Trial Chamber committed any error of law or fact in reaching the Impugned Decision and that the Appeal should be dismissed.²³

Guarantees of the Government of the fYROM

8. The Appellant argues that the Trial Chamber erred by concluding that the guarantees of the Government of the fYROM of 29 May 2007²⁴ did not constitute a material change in circumstances, in spite of the following new assurances: (i) the Appellant will return to trial within

¹⁷ *Ibid.*, para. 8.

¹⁸ *Ibid.*, para. 9.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² Appeal, paras 17-28.

²³ Response, para. 24.

²⁴ Appeal, Annex 1.

12 hours of notification (previous guarantee: within 48 hours of notification) and he will be under police surveillance for 24 hours a day;²⁵ (ii) he will report once a day to the local police in Skopje (previous guarantee: once a week); and (iii) an official will be sent to further explain the guarantees to the Trial Chamber. In addition, the Appellant submits that weight should have been put on the gained candidate status of the fYROM in the EU and NATO and the support of the President of the United States of America and the Italian Prime Minister, which reaffirms the ability of the fYROM to comply with its obligations and constitutes a material change in circumstances.²⁶ The Prosecution responds that the Trial Chamber did not err when concluding that the guarantees given by the Government of the fYROM on 29 May 2007 did not materially differ from those already considered in the Second Trial Chamber Decision.²⁷

9. The Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber erred when finding that the new assurances in relation to the time period within which the Appellant, upon notification, would be returned to trial, and the daily reporting to the local police in Skopje, “do not materially differ from those already made before this Chamber”.²⁸ Furthermore, the pledge of the fYROM to send an official to The Hague to give further details on the guarantees had already been considered in the Second Trial Chamber Decision, since the Prime Minister of the fYROM had stated that he would be present at an oral hearing to further explain the guarantees.²⁹ Hence, it does not constitute a material change in circumstances. Furthermore, the Appellant refers to a decision from the *Milutinović et al.* case, granting provisional release after an oral hearing which was scheduled although the guarantees provided were identical to those that had been previously before that Chamber.³⁰ The Appeals Chamber considers that each case before the International Tribunal is unique and that Trial Chambers can reasonably come to different conclusions even though the facts might appear similar. Indeed, the Appeals Chamber notes that in the *Milutinović et al.* case, the Trial Chamber noted “that the level of cooperation of the Serbian authorities with the Tribunal has increased in recent months.”³¹ The Appellant has not demonstrated that such circumstances existed in the present case. In addition, the Appeals Chamber is not satisfied that the Trial Chamber erred by attaching no weight to the candidate status of the fYROM in relation to the EU and NATO. This issue had already been considered in the Second Trial

²⁵ The Appeals Chamber notes that already the previous guarantees of the Government of the fYROM provided for a 24 hour surveillance of the Appellant, see *Prosecutor v. Boškoski and Tarčulovski*, Case No.: IT-04-82-T, Johan Tarčulovski’s Second Motion for Provisional Release, 1 December 2006, Annex 1.

²⁶ Appeal, paras 17-19.

²⁷ Response, para. 8.

²⁸ Impugned Decision, para. 10.

²⁹ *Prosecutor v. Boškoski and Tarčulovski*, Case No.: IT-04-82-T, Confidential Johan Tarčulovski Second Motion for Provisional Release, 1 December 2006, para. 11.

³⁰ Appeal, para. 18.

³¹ *Prosecutor v. Nikola Šainović*, Case No. IT-99-37-PT, Decision on Third Defence Request for Provisional Release, 14 April 2005, para. 27.

Chamber Decision,³² and the Appellant does not demonstrate that there has been a material change in circumstances justifying reconsideration of the Second Trial Chamber Decision, and that the Trial Chamber erred in this respect.

Personal Circumstances of the Appellant

10. The Appellant argues that the Trial Chamber erred by not considering his personal circumstances, namely (i) his position as a low level escort police inspector at the time when the alleged crimes took place; (ii) the fact that he lacks financial means to escape; (iii) his newly established family; (iv) his belief that he has good chances to be acquitted and that he would not try to escape; (v) the fact that the FYROM is a very small country where there is no place to hide; and (vi) the “capacity of the Macedonian authorities”, as proven in the cooperation with the Prosecution, which tends to decrease the risk of escape.³³ The Prosecution responds that the Trial Chamber did not err in fact or law when considering the personal circumstances of the Appellant.³⁴

11. The Appeals Chamber notes the fact that the Trial Chamber took into account the seriousness of the charges in the Second Trial Chamber Decision when it denied the Appellant’s request for provisional release,³⁵ and the Appellant does not show that the Trial Chamber erred when considering this factor. In addition, the Appeals Chamber is not satisfied that the Trial Chamber erred in fact or law when it did not consider the Appellant’s financial situation, his belief in his acquittal and the geographical size of the FYROM. The Appeals Chamber recalls that while a Trial Chamber is under an obligation to render a reasoned opinion, it “is not obliged to deal with all possible factors which a Trial Chamber can take into account when deciding whether it is satisfied that, if released, an accused will appear for trial.”³⁶ In light of this finding, the Appellant has not demonstrated that the above mentioned factors constituted relevant considerations that the Trial Chamber had to take into account. Furthermore, in relation to the capacity of the authorities of the FYROM to decrease the risk of escape, the Appeals Chamber notes that the Trial Chamber had already carefully considered submissions by the parties as to whether the competent FYROM authorities are ready to implement the guarantees, due to the return to power of the political party to which the Appellant belongs.³⁷ Thus, the Appeals Chamber is satisfied that the Appellant does not demonstrate the existence of a material change in circumstances in this respect. The fact that the Appellant’s wife has recently given birth to their second child will be discussed below.

³² Second Trial Chamber Decision, para. 14.

³³ Appeal, para. 20.

³⁴ Response, para. 16.

³⁵ Second Trial Chamber Decision, para. 8.

³⁶ *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, Case No.: IT-99-37-AR.65, Decision on Provisional Release, 30 October 2002, para. 6.

³⁷ Impugned Decision, para. 14, with reference to Second Trial Chamber Decision, para. 15.

The Danger posed by the Appellant to Victims, Witnesses or other Persons

12. The Appellant argues that the Trial Chamber erred by not taking into account that since the First Trial Chamber Decision denying provisional release, there has not been a single case of improper conduct in relation to witnesses or victims.³⁸ The Appeals Chamber considers, however, that the Trial Chamber did not find in the Impugned Decision that the Appellant, if released, would pose a danger to any victim, witness or other person. Instead, the Trial Chamber denied the Appellant's request for provisional release on the basis that it was not satisfied that he will appear for trial, if released.³⁹ Hence, the Appellant does not show how an alleged error of the Trial Chamber in assessing the danger to any victim, witness or other person could have invalidated the Impugned Decision or occasioned a miscarriage of justice.

Humanitarian Grounds

13. The Appellant argues that the Trial Chamber erred by not considering that the birth of his second child and the assistance to his wife who is alone to take care of two babies constitute humanitarian grounds for provisional release.⁴⁰ He submits that the Trial Chamber erred by not considering the International Tribunal's jurisprudence regarding provisional release on humanitarian grounds.⁴¹ The Prosecution responds that the Trial Chamber did not err in this respect.⁴²

14. The Appeals Chamber recalls that a Trial Chamber may grant provisional release only if it is satisfied that the accused will return for trial and that he will not pose a danger to any victim, witness or other person. It is in this context that any humanitarian grounds have to be assessed. The Appeals Chamber is satisfied that the Trial Chamber's consideration of the humanitarian dimension of the Appellant's family situation was reasonable in the circumstances of this case. The Trial Chamber considered the birth of his second child in the Impugned Decision and found that "the arrival of a baby is not of strong weight in the assessment of the likelihood of the Accused's future attendance at the trial or of the interests of justice in this case."⁴³ Therefore, the Appeals Chamber finds that the Appellant has not established that the Trial Chamber erred in denying the Appellant's request for provisional release despite his family situation, since in light of other relevant factors it was not satisfied that the Appellant would appear for trial, if provisionally released.

³⁸ Appeal, paras 21-22.

³⁹ Impugned Decision, para. 17.

⁴⁰ Appeal, paras 25-26.

⁴¹ Appeal, para. 25.

⁴² Response, paras 18-23.

⁴³ Impugned Decision, para. 16.

Other Submissions by the Appellant

15. In addition to the submissions set out above, the Appellant argues that (i) the gravity of the charges cannot by itself serve to justify long periods of detention; that (ii) the Macedonian Criminal Procedure Law does not allow the pre-trial detention to exceed more than two years; and that (iii) a material change in circumstances is constituted by the Appellant's pledge to accept all conditions the Trial Chamber might impose on his provisional release.⁴⁴

16. The Appeals Chamber takes note of the fact that while the Trial Chamber referred to the gravity of the offences with which the Appellant is charged, it considered a number of other factors when denying his request for provisional release, such as the guarantees given by the Government of the FYROM and its co-operation with the International Tribunal. Hence, the Appellant does not show that the Trial Chamber erred in relying merely on the gravity of the charges to deny his provisional release. In relation to the submission on the national criminal procedural law applicable in the FYROM, the Appeals Chamber recalls that the International Tribunal is not bound by any national rules of criminal procedure and that Article 15 of the Statute provides for the adoption of the International Tribunal's "rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals". Finally, the Appeals Chamber notes that, contrary to the allegation of the Appellant, the Trial Chamber indeed considered his pledge to fully comply with all conditions ordered by the Trial Chamber, if provisionally released.⁴⁵ The Appeals Chamber is not satisfied that the Appellant has established that the Trial Chamber erred in the consideration of this factor.

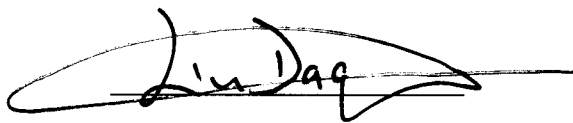
Disposition

17. The Appeals Chamber **DISMISSES** the Appeal for the foregoing reasons and **ORDERS** the Registry to lift the confidentiality of the Appeal and the Response.

⁴⁴ Appeal, paras 27-28.

⁴⁵ Impugned Decision, para. 15.

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

A handwritten signature in black ink, appearing to read 'Liu Daqun', written over a horizontal line.

Judge Liu Daqun
Presiding

Dated this twenty-seventh day of July 2007
At The Hague,
The Netherlands

[Seal of the International Tribunal]