



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-A
Date: 22 July 2009
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision of: 22 July 2009

PROSECUTOR

v.

**LJUBE BOŠKOSKI
JOHAN TARČULOVSKI**

PUBLIC

**DECISION ON TARČULOVSKI MOTION FOR PROVISIONAL
RELEASE ON COMPASSIONATE GROUNDS**

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for Ljube Boškosi:

Ms. Edina Rešidović
Mr. Guénaél Mettraux

Counsel for Johan Tarčulovski:

Mr. Alan M. Dershowitz
Mr. Nathan Z. Dershowitz
Mr. Antonio Apostolski
Mr. Jordan Apostolski

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 “Tarčulovski Motion for Provisional Release on Compassionate Grounds with Confidential Annexes A and B”, filed confidentially on 10 July 2009 (“Motion”) by Johan Tarčulovski (“Tarčulovski”). On 14 July 2009, the Prosecution confidentially filed its response, opposing the Motion.¹ On 15 July 2009, Tarčulovski confidentially filed his reply.²

2. On 10 July 2008, Trial Chamber II convicted Tarčulovski, pursuant to Article 7(1) of the Statute of the Tribunal (“Statute”), of murder, wanton destruction, and cruel treatment, as violations of the laws or customs of war under Article 3 of the Statute, and sentenced him to a single sentence of 12 years of imprisonment.³ The Appeals Chamber is currently seized of two appeals against the Trial Judgement filed by Tarčulovski⁴ and the Prosecution.⁵ Tarčulovski has served approximately a third of the sentence.⁶

A. Submissions of the parties

3. In his Motion, Tarčulovski seeks provisional release from 25 to 31 July 2009 in order to attend the ten-year commemoration of his father’s death.⁷ Tarčulovski submits that the following circumstances demonstrate good cause for granting the provisional release:⁸

- (i) Such commemoration is significant in Macedonian culture and “leads to gathering of the whole family with high spiritual value”;⁹

¹ Prosecution Response to “Tarčulovski Motion for Provisional Release on Compassionate Grounds with Confidential Annexes A and B”, 14 July 2009 (“Response”).

² Reply to the Prosecution Response to Tarčulovski Motion for Provisional Release on Compassionate Grounds with Confidential Annexes A and B, 15 July 2009 (“Reply”). The Kingdom of The Netherlands informed the Tribunal that it did not have any objections to the requested provisional release in the Motion. Correspondence from the Deputy Director of Protocol for the Ministry of Foreign Affairs of The Netherlands to the Chief of the Court Management and Support Section of the Tribunal, 20 July 2009.

³ *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-T, Judgement, 10 July 2008 (“Trial Judgement”), paras 607-608.

⁴ Brief of Johan Tarčulovski, 12 January 2009 (signed 9 January 2009).

⁵ The Prosecution has appealed the acquittal of Tarčulovski’s co-accused, Ljube Boškosi. Prosecution’s Appeal Brief, 20 October 2008.

⁶ Tarčulovski was arrested on 14 March 2005 and transferred to the United Nations Detention Unit in The Hague (“UNDU”) on 16 March 2005. Trial Judgement, paras 608-609. He has continuously been detained since, and his previous motions for provisional release have been denied. See *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski’s Motion for Provisional Release, 18 December 2008 (“Tarčulovski Decision”); Trial Judgement, para. 619; see also *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 27 July 2007; *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-AR-65.1, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 4 October 2005.

⁷ Motion, paras 10-11.

⁸ Motion, para. 17.

- (ii) It will allow Tarčulovski to spend some time with his five-year-old daughter and two-year-old son, both of whom he has never seen at his own home;¹⁰
- (iii) The Government of Macedonia confirms its preparedness to arrest Tarčulovski if necessary and bring him into custody of the Tribunal on request within 12 hours; it further guarantees that he will be placed under house arrest for the duration of the provisional release if the Tribunal so orders;¹¹
- (iv) Tarčulovski has demonstrated respect for the proceedings at the Tribunal and has posed no danger to any victim, witness or other person;¹²
- (v) He has no incentive to flee since he strongly believes that he is innocent and will be acquitted by the Appeals Chamber, and there is a possibility of an early release because of his proper behaviour in the UNDU.¹³

4. The Prosecution opposes the Motion on the ground that Tarčulovski fails to meet the conditions of Rule 65(I) of the Rules of Procedure and Evidence (“Rules”).¹⁴ The Prosecution submits that “special circumstances” related to humane and compassionate considerations under Rule 65(I)(iii) exist only when there is an acute justification.¹⁵ It avers that Tarčulovski’s desire to attend the ten-year commemoration of his father’s death and “to be alone with” his children lacks any temporal urgency or immediate justification, and therefore does not constitute “special circumstances” within the meaning of Rule 65(I)(iii).¹⁶ The Prosecution further contends that the fact that some accused have been granted provisional release for comparable reasons pending their trial cannot be automatically applied by analogy to persons who have already been convicted by a Trial Chamber, and that the mourning of the death of one’s father ten years after his passing is but one of the many important and meaningful family events that convicted persons will miss as a consequence of their crimes.¹⁷

5. In addition, the Prosecution asserts that Tarčulovski fails to substantiate his claim that he would not pose a danger to victims, witnesses or other persons,¹⁸ and that the fact that he has

⁹ Motion, para. 11; Reply, para. 4.

¹⁰ Motion, para. 12; Reply, para. 5.

¹¹ Motion, paras 13-14, pp 8-13 (Annex A to the Motion: Guarantee of the Government of the Republic of Macedonia, 6 July 2009); Reply, para. 6.

¹² Motion, paras 13-14, 16.

¹³ Motion, para. 15; Reply, para. 7.

¹⁴ Response, para. 1.

¹⁵ Response, para. 4.

¹⁶ Response, paras 3-5, 7.

¹⁷ Response, paras 6-7.

¹⁸ Response, para. 9.

already been sentenced increases the risk of his failure to return.¹⁹ The Prosecution also points out that Tarčulovski does not produce any evidence to substantiate (a) the date of the death of his father, (b) the time, date and duration of the alleged memorial event, or (c) the need for six days of release to attend this event.²⁰ It submits that should the Motion be granted, the provisional release should be limited to three days.²¹

B. Applicable Law

6. Pursuant to Rule 65(I) of the Rules, the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period if it is satisfied that: (i) the appellant, 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 appellant, if released, will not pose a danger to any victim, witness or other person; and (iii) special circumstances exist warranting such release.²² These requirements must be considered cumulatively.²³ 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”.²⁴ Finally, the discretionary assessments of the requirements under Rule 65 of the Rules are made on a case-by-case basis.²⁵

C. Preliminary issue

7. The Appeals Chamber notes that Tarčulovski’s Motion and Reply and the Prosecution’s Response were filed confidentially. However, the parties failed to justify the confidential designation of their filings. The Appeals Chamber publicly issues this Decision in which there is no information that needs to be withheld from the public.

¹⁹ Response, para. 10.

²⁰ Response, para. 8.

²¹ Response, para. 12.

²² *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on Motion of Rasim Delić for Provisional Release, 11 May 2009 (“*Delić Decision*”) para. 5, and references cited therein; *Tarčulovski Decision*, para. 3, and references cited therein. By virtue of Rule 107 of the Rules, the whole of Rule 65 of the Rules applies *mutatis mutandis* to applications brought before the Appeals Chamber. *Delić Decision*, para. 5, and references cited therein; *Tarčulovski Decision*, para. 3, and references cited therein.

²³ *Delić Decision*, para. 5, and references cited therein; *Tarčulovski Decision*, para. 3, and references cited therein.

²⁴ *Delić Decision*, para. 5, and references cited therein; *Tarčulovski Decision*, para. 3, and references cited therein.

²⁵ *Delić Decision*, para. 5, and references cited therein.

D. Discussion

8. When assessing a motion for provisional release, the Appeals Chamber recalls the “specificity of the appeal stage” reflected in Rule 65(I)(iii) of the Rules, which provides for an additional criterion that “special circumstances exist warranting such release.”²⁶ In cases where a convicted person seeks provisional release pending the appellate proceedings, the Appeals Chamber has found that special circumstances related to humane and compassionate considerations exist where there is an acute justification, such as the applicant’s medical need, extremely poor health of a close family member whose death is believed to be imminent, or a memorial service for a close family member immediately after his or her death.²⁷ Where a convicted person simply wishes to spend time with his family or seeks to visit a close relative in poor health, the Appeals Chamber has refused such an application.²⁸ The Appeals Chamber considers these cases in relation to the Motion, keeping in mind that motions for provisional release must be assessed on a case-by-case basis and that Tarčulovski’s Motion must therefore be considered on its own terms.

9. In the present case, Tarčulovski wishes to attend an event commemorating his father who passed away ten years ago. His father’s death dates back years before Tarčulovski was arrested and detained in the UNDU.²⁹ In the view of the Appeals Chamber, this does not constitute an acute justification. Furthermore, Tarčulovski neither indicates the exact date of his father’s death nor provides any proof thereof. Likewise, he does not substantiate his submission as to the

²⁶ *Tarčulovski* Decision, para. 8; *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 (“*Strugar* Decision of 15 April 2008”), para. 10; *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 (“*Strugar* Decision of 2 April 2008”), para. 11; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Radoslav Brđanin’s Motion for Provisional Release, 23 February 2007 (“*Brđanin* Decision”), para. 6.

²⁷ *Tarčulovski* Decision, para. 8; *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Decision on Application for Provisional Release Pursuant to Rule 65(I), 29 April 2008 (“*Milošević* Decision”), para. 7; *Strugar* Decision of 15 April 2008, para. 10; *Strugar* Decision of 2 April 2008, para. 12; *Brđanin* Decision, para. 6 requiring an “acute crisis” when the poor health of a family member is purported as a special circumstance. The jurisprudence of the Appeals Chamber concerning provisional release at the appeal stage cited by Tarčulovski (Motion, para. 9) deals with memorial services held within 40 days of the deaths of the applicants’ close family members. See *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to Attend His Brother’s Memorial Service and to Observe the Traditional Period of Mourning, 1 September 2006; *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; *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to Attend His Daughter’s Memorial Service, 21 April 2006; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005; *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 (“*Simić* Decision”).

²⁸ *Tarčulovski* Decision, para. 8; *Milošević* Decision, para. 7; *Strugar* Decision of 2 April 2008, para. 12; *Brđanin* Decision, para. 6; *Simić* Decision, para. 21.

²⁹ See fn. 6 *supra*.

alleged significance of such commemoration in Macedonian culture. The lack of evidence or explanation supporting his claim of the significance of a ten-year commemoration of a family member's death indicates that the desire to spend time with his family, notably his children, is Tarčulovski's primary motivation for his request for provisional release.³⁰ As the jurisprudence of the Tribunal indicates, such a justification does not constitute a special circumstance within the meaning of Rule 65(I)(iii).

10. Accordingly, the Appeals Chamber concludes that Tarčulovski fails to show the existence of special circumstances under Rule 65(I)(iii) of the Rules.

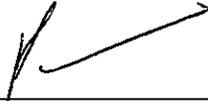
11. In light of the above and the cumulative nature of the requirements under Rule 65(I) of the Rules, the Appeals Chamber need not consider whether the requirements of Rules 65(I)(i) or (ii) are met in the present case.

E. Disposition

12. For the foregoing reasons, the Appeals Chamber **DENIES** the Motion and **ORDERS** the parties to, within seven days of the date of this Decision, (a) justify the confidential nature of the filings and file public redacted versions thereof, or (b) re-file the Motion, Response, and Reply publicly.

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

Dated this twenty-second day of July 2009
At The Hague,
The Netherlands



Judge Patrick Robinson
Presiding

[Seal of the Tribunal]

³⁰ See Motion, para. 12; Reply, para. 5.