

IT-04-82-A
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05 May 2010

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**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-04-82-A
Date: 5 May 2010
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

Order of: 5 May 2010

PROSECUTOR

v.

**LJUBE BOŠKOSKI
JOHAN TARČULOVSKI**

PUBLIC

**ORDER ISSUING A PUBLIC REDACTED VERSION OF
THE "DECISION ON JOHAN TARČULOVSKI'S MOTION
FOR PROVISIONAL RELEASE"**

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

I, MEHMET GÜNEY, Judge 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 (“Tribunal”);

NOTING the “Decision on Johan Tarčulovski’s Motion for Provisional Release” issued confidentially by the Appeals Chamber on 18 December 2008 (“Decision”) and signed by Judge Liu in his capacity as then acting Presiding Judge;

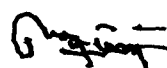
NOTING that at the time I presided over the instant case;

CONSIDERING that some of the information contained in the Decision is to remain confidential;

HEREBY ISSUE a public redacted version of the Decision.

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

Dated this fifth day of May 2010,
At The Hague,
The Netherlands.



Judge Mehmet Güney

[Seal of the Tribunal]

**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-04-82-A
Date: 18 December
2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Mohamed Shahabuddeen
Judge Andréia Vaz
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 18 December 2008

PROSECUTOR

v.

**LJUBE BOŠKOSKI
JOHAN TARČULOVSKI*****PUBLIC REDACTED VERSION***

**DECISION ON JOHAN TARČULOVSKI'S MOTION FOR PROVISIONAL
RELEASE**

Office of the Prosecutor

Mr. Paul Rogers

Counsel for Ljube Boškosi

Ms. Edina Rešidović and Mr. Guénaél Mettraux

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Mr. Alan M. Dershowitz, Mr. Nathan Z. Dershowitz, Mr. Antonio Apostolski and 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 “Motion of Johan Tarčulovski for Provisional Release with Annexes A through B”, filed confidentially by Johan Tarčulovski (“Tarčulovski”) on 11 December 2008 (“Motion”). The Office of the Prosecutor (“Prosecution”) responded on 15 December 2008, opposing the Motion.¹ Tarčulovski replied on 17 December 2008.²

2. On 10 July 2008, Trial Chamber II convicted Tarčulovski pursuant to Article 7(1) of the Tribunal’s Statute (“Statute”) for the crimes of murder, wanton destructions and cruel treatment, as violations of the laws and customs of war under Article 3 of the Statute.³ It sentenced Tarčulovski to a single sentence of twelve years’ imprisonment.⁴ The Appeals Chamber is currently seized of the appeals against the Trial Judgement filed by Tarčulovski⁵ and the Prosecution.⁶ Tarčulovski has served almost a third of the sentence imposed by Trial Chamber II.⁷

I. APPLICABLE LAW

3. Pursuant to Rule 65(I) of the Rules of Procedure and Evidence of the Tribunal (“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.⁸ Rule 65(I) of the Rules thus provides that the

¹ Prosecution Response to Motion of Johan Tarčulovski for Provisional Release with Annexes A through B, filed confidentially on 15 December 2008 (“Response”).

² Reply of Johan Tarčulovski to Response of Prosecution to Tarčulovski’s Motion for Provisional Release, filed confidentially on 17 December 2008 (“Reply”).

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

⁴ Trial Judgement, para. 608.

⁵ Tarčulovski Notice of Appeal, 8 August 2008. Upon Tarčulovski’s second request for extension of time to file his appellant’s brief (Tarčulovski Motion for Extension of Time to File the Appellant Brief, 1 October 2008), the Appeals Chamber ordered, on 22 October 2008, that the deadline for filing his appellant’s brief be postponed to 12 January 2009 (Decision on Johan Tarčulovski’s Second motion for Extension of Time to File Appeal Brief, 22 October 2008, p. 3).

⁶ The Prosecution has appealed the acquittal of Tarčulovski’s co-accused, Ljube Boškosi: Prosecution’s Notice of Appeal, 6 August 2008; Prosecution’s Appeal Brief, filed confidentially on 20 October 2008; Notice of Filing of Public Redacted Version of Prosecution’s Appeal Brief, 3 November 2008; Notice of Filing of Corrected Public Redacted Version of Prosecution’s Appeal Brief, 4 November 2008; Boškosi Defence Respondent Brief, 1 December 2008; Prosecution’s Reply Brief, filed confidentially on 16 December 2008.

⁷ Tarčulovski was arrested on 14 March 2005 and transferred to 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 Trial Judgement, para. 619; see also *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; *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).

⁸ *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 (“First Strugar Decision”), para. 3; *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 (“Second Strugar Decision”), para. 5.

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.⁹ 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.”¹⁰

II. DISCUSSION

A. Arguments of the Parties

4. Tarčulovski seeks provisional release for a period of time covering Christmas and New Year from 21 December 2008 to 12 January 2009¹¹ in order to “spend time” with his wife and two young children in the former Yugoslav Republic of Macedonia (“FYROM”).¹² Referring to a [REDACTED] Report¹³ and a [REDACTED] Report¹⁴ (collectively “Reports”) annexed to the Motion, Tarčulovski submits that his [REDACTED] daughter “[REDACTED]”, and that Tarčulovski’s absence has “created [REDACTED]”.¹⁵ He contends that [REDACTED] his [REDACTED] son “[REDACTED] manifests elements of [REDACTED]”.¹⁶ Relying again on the Reports, he adds that the negative effects of his prolonged absence can be “substantially alleviated” by his presence at home, and that it would be a “great benefit” to his children if he was with them during the “Christmas and New Year’s holidays”.¹⁷ He submits that these family circumstances constitute special circumstances under Rule 65(I)(iii) of the Rules.¹⁸

⁹ First *Strugar* Decision, para. 3; Second *Strugar* Decision, para. 5.

¹⁰ First *Strugar* Decision, para. 3; Second *Strugar* Decision, para. 5; *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release, 14 February 2008, para. 5; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005 (“*Galić* Decision”), para. 3; *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 of 21 October 2004”), para. 14.

¹¹ Motion, p. 2, paras 8 and 13. The Appeals Chamber notes that the Motion refers inconsistently to either 22 December 2008 (Motion, p. 2) or 21 December 2008 (Motion, paras 8 and 13; *see also* Reply, para. 9) as the starting date of the requested provisional release.

¹² Motion, p. 2, para. 6.

¹³ Motion, Annex B, [REDACTED].

¹⁴ Motion, Annex B, [REDACTED].

¹⁵ Motion, para. 6.

¹⁶ Motion, para. 6.

¹⁷ Motion, para. 7.

¹⁸ Motion, para. 6.

5. Tarčulovski also submits that the other two conditions under Rule 65(I) are met. He avers that he has shown respect for the Tribunal, and that the government of FYROM has fully cooperated with the Tribunal.¹⁹ In this respect, he provides guarantees from the government of FYROM that, if provisionally released, he will, *inter alia*, be kept under house-arrest and under 24-hour police surveillance,²⁰ be arrested in case of breach of the conditions of his provisional release and be returned to the Tribunal within 12 hours upon request of the Prosecution or the Tribunal.²¹ Tarčulovski further contends that, if released, he will not pose a danger to any victim, witness or other person.²² He finally submits that the circumstances under which his previous requests for provisional release have been rejected are “substantially different”, since the trial proceedings are now closed and that it is the first time in the present case that the Appeals Chamber will rule on such request pursuant to Rule 65(I) of the Rules.²³

6. The Prosecution responds that the conditions of Rule 65(I) of the Rules are not met.²⁴ It submits in particular that Tarčulovski’s submission that his children [REDACTED] does not amount to special circumstances in the sense of Rule 65(I)(iii) of the Rules, and that the Motion should be dismissed on this sole basis.²⁵ While the Prosecution acknowledges that Tarčulovski’s children are “[REDACTED]”, it argues that there is no suggestion in the Reports²⁶ that they are in any different position than any other young child forcibly separated from one of his parents,²⁷ and that their situation, far from showing an acute crisis, is the ordinary situation when a convicted person is a parent.²⁸ It further contends that while children benefit from having an understanding of both their parents, this could “never suffice as a special circumstance justifying provisional release post-conviction at the appellate stage.”²⁹ The Prosecution additionally submits that Tarčulovski has failed to substantiate his allegation that he will pose no danger to victims, witnesses or other

¹⁹ Motion, para. 5.

²⁰ The Appeals Chamber notes that Tarčulovski does not indicate the address where he would reside, if released. The guarantees provided by the government of FYROM specify, in this respect, that it would report to the Registrar of the Tribunal immediately and within three days at the latest the address of Tarčulovski’s residence during the provisional release, and any change of address within three days of the change of the address (Motion, Annex A).

²¹ Motion, paras 4-5, Annex A.

²² Motion, para. 9.

²³ Motion, para. 12.

²⁴ Response, para. 1.

²⁵ Response, paras 2, 5, 6, 8.

²⁶ The Prosecution also observes that there is no indication proving the specialist qualifications of the authors of the Reports to compile [REDACTED] assessments (Response, para. 7).

²⁷ Response, para. 5, citing the [REDACTED] Report, and para. 6.

²⁸ Response, para. 6.

²⁹ Response, para. 6.

persons.³⁰ Finally, it avers that the sentence imposed upon Tarčulovski by the Trial Chamber, a factor not considered in previous decisions on provisional release, increases the risk of flight.³¹

7. Tarčulovski replies that the Prosecution has opposed the Motion generally without articulating “any concern significant enough to militate against [its] denial”.³² With respect to the risk of flight, he reiterates that he will return to The Hague at the expiration of the provisional release, and argues that while at the time of his previous requests for provisional release he was facing a possible sentence of life imprisonment, the fact that he has been sentenced to “only 12 years, and is already serving [his sentence], must permit a more favorable inference on this condition.”³³ He further submits that the Prosecution has failed to “identify any single individual” to whom he would pose a threat, and that any danger is anyway alleviated since he would be in home confinement.³⁴ He reiterates his arguments regarding the adverse impact of his prolonged absence on his children, arguing that the “fact that the absence of a convicted parent can be said to have a common impact on families [...] does not preclude a grant of provisional release” on the finding that his situation constitutes special circumstances.³⁵ In this respect, he also alleges that the “[REDACTED] health of a small child” qualifies as a special circumstance within the Tribunal’s jurisprudence which “permits provisional release for detainees to visit sick and ailing relatives”.³⁶

B. Analysis

8. As recalled above, “[t]he specificity of the appeal 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’”.³⁷ In situations where an application for provisional release is made pending the appellate proceedings, 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.³⁸ The Appeals Chamber

³⁰ Response, para. 9.

³¹ Response, para. 10.

³² Reply, para. 1.

³³ Reply, para. 2.

³⁴ Reply, para. 3.

³⁵ Reply, para. 5. He also provides the *curriculum vitae* of both authors of the Reports (Reply, para. 6, Annex A).

³⁶ Reply, para. 8. In this respect, he also alleges that provisional release is not “rarely granted” (Reply, para. 8). In addition, he refers to positive elements of his personality considered by the Trial Chamber in mitigation of his sentence (Reply, para. 7, citing Trial Judgement, para. 600).

³⁷ First *Strugar* Decision, para. 11, and Second *Strugar* Decision, para. 10, both referring to *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Radoslav Brđanin’s Motion for Provisional Release, 23 February 2007 (“*Brđanin* Decision”), citing *Simić* Decision of 21 October 2004.

³⁸ First *Strugar* Decision, para. 12; Second *Strugar* Decision, para. 10; *Brđanin* Decision, para. 6; *Prosecutor v. 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 (“*Limaj et al.* Decision of 1 September 2006”), p. 1; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić for Provisional

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.³⁹ While there is no finite list of situations which may qualify as special circumstances for the purposes of Rule 65(I)(iii) of the Rules, the Appeals Chamber considers the notion of acute justification to be inextricably linked to the scope of special circumstances which could justify provisional release on compassionate grounds at the appellate stage of the proceedings before the Tribunal.⁴⁰ It is precisely for that reason that justifications such as wanting to spend time with family⁴¹ or to visit a close relative in poor health condition⁴² have explicitly not been recognized as special circumstances under Rule 65(I)(iii) of the Rules.

9. Tarčulovski argues that special circumstances justifying his provisional release at this stage of the proceedings exist because of the beneficial effect his presence during three weeks over Christmas and New Year could have on his two young children [REDACTED].⁴³ The Appeals Chamber notes that the Reports indeed indicate that Tarčulovski's children [REDACTED] and that his presence would be beneficial to them.⁴⁴ However, the Reports also point out to the "[REDACTED], which exist more or less in this kind of cases".⁴⁵ While the Appeals Chamber is sympathetic of the situation of Tarčulovski's children, it finds that it does not amount to an acute justification for granting provisional release at the appellate stage. Therefore, the Appeals Chamber concludes that Tarčulovski has not shown the existence of special circumstances within the meaning of Rule 65(I)(iii) of the Rules.

Release for a Fixed Period to Attend Memorial Services of his Mother, 5 May 2006 ("*Simić* Decision of 5 May 2006"), p. 3; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to Attend his Daughter's Memorial Service, 20 April 2006 ("*Limaj et al.* Decision of 20 April 2006"), p. 2; *Galić* Decision, para. 15; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on "Defense Motion: Defense Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro", 16 December 2005, p. 2; *Simić* Decision of 21 October 2004, para. 20.

³⁹ *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Decision on Application for Provisional Release, 12 December 2002, pp. 2, 3 (terminal illness); Second *Strugar* Decision, para. 11, where the Appeals Chamber found that Pavle Strugar's sister's health was "drastically deteriorating", and that "the specific diagnoses and symptoms [...] combined with the advanced age of Strugar's sister, qualify as acute justification for the purposes of determining whether the special circumstances envisaged by Rule 65(I)(iii) of the Rules exist"; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Dario Kordić's Request for Provisional Release, 19 April 2004, paras 5, 11, 12, where the provisional release was refused for lack of certainty that the applicant would return in the Tribunal's custody, subject however to the fact that in "case of exceptional circumstances such as e.g. a substantial deterioration of the health conditions of Dario Kordić's mother the Defence may submit a detailed request for a temporary controlled visit to his mother".

⁴⁰ First *Strugar* Decision, para. 12.

⁴¹ *Simić* Decision of 21 October 2004, para. 21.

⁴² First *Strugar* Decision, paras 12-13; See also *Brđanin* Decision, para. 6, referring to *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Order of the Appeals Chamber on the Motion for Provisional Release by Miroslav Kvočka, 11 September 2002, p. 4.

⁴³ Motion, paras 6-7; See also [REDACTED] Report, which states: [REDACTED]; and [REDACTED] Report, which reads: [REDACTED].

⁴⁴ Motion, Annex B.

⁴⁵ [REDACTED] Report, which states also: "There is no need of pointing out the need of two parents for establishment of [REDACTED] in childhood, especially from the age after the first year of life." See also [REDACTED] Report, which reads: "The family is functioning specifically as a family with one parent."

10. In light of the above and because the requirements under Rule 65(I) of the Rules are cumulative,⁴⁶ the Appeals Chamber need not consider whether the requirements of Rules 65(I)(i) or 65(I)(ii) are met in the present case.⁴⁷

III. DISPOSITION

11. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion.

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

Done this 18th day of December 2008
At The Hague, The Netherlands.

Judge Liu Daqun,
Acting Presiding Judge

[Seal of the Tribunal]

⁴⁶ See *supra* para. 3.

⁴⁷ See First *Strugar* Decision, para. 14; *Kordić and Čerkez* Decision, para. 10.