



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: 3 September 2010
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Decision: 3 September 2010

PROSECUTOR

v.

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

PUBLIC

**DECISION ON SRETEN LUKIĆ'S THIRD MOTION FOR
PROVISIONAL RELEASE ON COMPASSIONATE GROUNDS**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Government of the Kingdom of The Netherlands

Government of the Republic of Serbia

Government of the Republika Srpska

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 the “Urgent Motion for Provisional Release on Compassionate Grounds for a Fixed Period to Permit Attendance at Memorial Ceremony” filed confidentially by Counsel for Sreten Lukić (“Lukić”) on 23 August 2010 (“Motion”). The Office of the Prosecutor (“Prosecution”) filed its confidential response on 25 August 2010.¹ Lukić did not file a reply. On 1 September 2010, Lukić filed an amendment to his Motion.²

I. BACKGROUND

2. On 26 February 2009, Trial Chamber III (“Trial Chamber”) convicted Lukić of deportation, other inhumane acts (forcible transfer), murder and persecutions as crimes against humanity and murder as a violation of the laws or customs of war pursuant to Articles 5(d), 5(i), 5(a), 5(h), 3 and 7(1) of the Tribunal’s Statute and sentenced him to 22 years of imprisonment.³

3. In accordance with Rules 108 and 111 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), Lukić filed his Notice of Appeal and his Appeal Brief on 27 May 2009⁴ and 23 September 2009,⁵ respectively. He is currently detained in the United Nations Detention Unit (“UNDU”) pending the resolution of the appeals lodged against the Trial Judgement.

4. On 22 February 2010, the Appeals Chamber dismissed Lukić’s motion seeking temporary provisional release to assist his injured father in Serbia⁶ on the ground that Lukić failed to demonstrate the existence of an acute justification that would amount to special circumstances

¹ Prosecution Response to Sreten Lukić’s Third Urgent Motion for Provisional Release on Compassionate Grounds, 25 August 2010 (confidential) (“Response”).

² Amendment [*sic*] to Urgent Motion for Provisional Release on Compassionate Grounds for a Fixed Period to Permit Attendance at Memorial Ceremony, 1 September 2010 (confidential) (“Amendment to the Motion”).

³ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), vol. 3, para. 1212.

⁴ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Sreten Lukic’s [*sic*] Notice of Appeal from Judgment [*sic*] and Request for Leave to Exceed the Page Limit, 27 May 2009.

⁵ Defense [*sic*] Appellant’s [*sic*] Brief, 23 September 2009 (public with confidential Annexes). In accordance with the Pre-Appeal Judge’s decision of 29 September 2009, Lukić re-filed his appellant’s brief on 7 October 2009. See Decision on the Prosecution’s Motion for an Order Requiring Sreten Lukić to File his Appellant’s Brief in Accordance with the Appeals Chamber Decisions, 29 September 2009; Defense [*sic*] Appellant’s [*sic*] Brief Refiled [*sic*], 7 October 2009 (public with confidential Annexes).

⁶ Sreten Lukic’s [*sic*] Urgent Motion for Provisional Release on Compassionate Grounds with Annex A, 11 February 2010 (confidential).

under Rule 65(I)(iii) of the Rules.⁷ On 14 July 2010, the Appeals Chamber granted Lukić's motion requesting provisional release⁸ and allowed him to visit his terminally ill father in Belgrade.⁹

II. APPLICABLE LAW

5. 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.¹⁰ Therefore, 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.¹¹ 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".¹² Finally, the discretionary assessments of the requirements under Rule 65 are made on a case-by-case basis.¹³

III. DISCUSSION

A. Arguments of the parties

6. Lukić seeks "temporary provisional release on compassionate grounds as soon as possible to permit him to attend and participate in the 40 day memorial services" for his father who succumbed to a terminal illness on 31 July 2010.¹⁴

7. Lukić submits that it was impractical to request provisional release in time for the funeral which was held on 3 August 2010, and therefore wishes to attend his memorial service to pay his last respects.¹⁵ He contends that attendance of such memorial services, held 40 days after the death

⁷ Decision on Sreten Lukić's Motion for Provisional Release on Compassionate Grounds, 22 February 2010 (confidential), paras 15, 17.

⁸ Sreten Lukic's [*sic*] Urgent Motion for Provisional Release on Compassionate Grounds, 6 July 2010 (confidential).

⁹ Public Redacted Version of the Decision on Sreten Lukić's Second Motion for Provisional Release on Compassionate Grounds, 14 July 2010 ("Decision of 14 July 2010"), para. 21.

¹⁰ *Ibid.*, para. 5 and references cited therein.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Motion, paras 1-4, 9-10 and Annex A, thereto.

¹⁵ *Ibid.*, paras 3, 10-11 (p. 3).

of a close relative, has been found to constitute “compelling humanitarian circumstances and has served as the grounds for permitting provisional release of other accused.”¹⁶

8. As for the details of the requested provisional release, Lukić seeks to be provisionally released for a period of seven days, from 6 September 2010 until 13 September 2010, to enable him to attend the memorial services in Belgrade on 8 September 2010 and in Ruijste (Višegrad region) on 9 September 2010.¹⁷ He proposes staying at his family residence with his wife and son in Belgrade, where all the religious ceremonies, except for the graveside service in Ruijste, will be held.¹⁸ Lukić further indicates that, while in Belgrade, he intends to initiate inheritance procedures with his surviving family members.¹⁹

9. Lukić recalls his conduct while previously on provisional release and emphasizes that he will abide by any conditions the Appeals Chamber decides to impose.²⁰ Finally, he avers that he poses neither a flight risk nor a danger to witnesses.²¹ In support of these arguments, Lukić refers to the guarantees issued on 2 September 2010 by the Governments of the Republic of Serbia (“Serbia”)²² and the Republika Srpska.²³

10. The Prosecution does not oppose the Motion, provided that the appropriate conditions are imposed to ensure that Lukić will surrender into detention at the conclusion of the period of provisional release.²⁴

B. Analysis

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

11. 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

¹⁶ *Ibid.*, para. 8, referring to *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; Decision on Urgent Motion Requesting Provisional Release of Nebojša Pavković on Compassionate Grounds, 17 September 2009; Decision on Dragoljub Ojdanić’s Motion for Temporary Provisional Release on Compassionate Grounds, 9 August 2010 (“Decision of 9 August 2010”).

¹⁷ Motion, paras 2, 4-5, 9, 17, p. 7.

¹⁸ *Ibid.*, para. 14. See also Amendment to the Motion, para. 4 (p. 2).

¹⁹ *Ibid.*, para. 17. Lukić indicates that he also intends to meet his father’s doctors, purchase candles and a mourning suit for the memorial service and, following the memorial service, spend time resting at the familial home (see *ibid.*).

²⁰ *Ibid.*, paras 11 (p. 4), 16. See also *ibid.*, paras 12, 15. Lukić further provides a detailed itinerary indicating that the authorities of Republika Srpska would provide armed police surveillance for the duration of his stay there, including his visit of the cemetery (see *ibid.*, para. 15).

²¹ *Ibid.*, para. 11 (p. 4).

²² Guarantee of Government of Republic of Serbia, Conf. 05 number 00-297/2010, 2 September 2010 (confidential) (“Serbia’s State Guarantees”).

²³ Guarantee of the Government of Republic of Serpska [*sic*], No. 04/1-012-2-1734/10, 2 September 2010 (confidential) (“Republika Srpska’s State Guarantees”).

²⁴ Response, paras 1, 3-5.

warranting such release”.²⁵ 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.²⁶ 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 not been recognized as special circumstances under Rule 65(I)(iii) of the Rules.²⁷

12. In the present case, the Appeals Chamber is satisfied that the memorial service for Lukić’s father constitutes a special circumstance within the meaning of Rule 65(I)(iii) of the Rules.²⁸

2. Other Rule 65(I) requirements

13. The Appeals Chamber takes note of the Republika Srpska’s and Serbia’s State Guarantees. It also recalls that during his most recent provisional release, Lukić was ordered, *inter alia*, to remain under 24-hour armed surveillance throughout his presence in Serbia.²⁹ The Appeals Chamber further notes that Lukić fully complied with all the conditions imposed on this previous occasion³⁰ and considers that the conditions of Lukić’s provisional release should be as strict in the present instance. In light of the above and considering the circumstances at stake, the Appeals Chamber is satisfied that, if released, Lukić will surrender into detention at the conclusion of the fixed period for which he is provisionally released.

14. Likewise, the Appeals Chamber is satisfied that Lukić will not pose a danger to any victim, witness, or other person, thus satisfying the requirement of Rule 65(I)(ii) of the Rules.

15. Finally The Netherlands, in its capacity of the host State, filed its submissions indicating that it was not opposed to Lukić’s provisional release.³¹

3. Lukić’s residence and duration of the provisional release

16. As regards Lukić’s residence while on provisional release, the Appeals Chamber considers that provided that all the conditions stipulated below are complied with,³² Lukić may stay at the

²⁵ Decision of 14 July 2010, para. 11 and references cited therein.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Cf. Decision of 9 August 2010, para. 12 and references cited therein.

²⁹ Decision of 14 July 2010, paras 16, 21.

³⁰ Report from the State Secretary, Ministry of Justice, Republic of Serbia, No. 700-00-106/2004-20, 9 August 2010 (confidential).

³¹ Correspondence from the Head Host Nation Division for the Minister of Foreign Affairs, “Re Provisional release Mr Sreten Lukic [*sic*]”, 27 August 2010 (confidential).

³² See *infra*, paras 18 *et seq.*

residential address in Belgrade mentioned in paragraph 4 on page 2 of the Amendment to the Motion and travel to the village of Ruijste (Višegrad region), Republika Srpska, on 9 September 2010 for the graveside ceremony returning to Belgrade later the same day.

17. As for the requested term of the provisional release, the Appeals Chamber finds that Lukić should be released for a period of up to five days, including two days of travel time, starting on 7 September 2010 or as soon thereafter as is practicable. Considering the circumstances, the Appeals Chamber finds that this duration is reasonable³³ and will not disrupt the appellate proceedings given that the briefing of the appeals is completed and no date for the appeals hearing has yet been set.³⁴

IV. DISPOSITION

18. For the foregoing reasons, the Appeals Chamber hereby **GRANTS** the Motion and **ORDERS** as follows:

1. Lukić shall be transported to Schiphol airport in The Netherlands by the Dutch authorities on 7 September 2010, or as soon thereafter as is practicable;
2. At Schiphol airport, Lukić shall be provisionally delivered into the custody of a representative of Serbia's Government, pursuant to paragraph (a) of Serbia's State Guarantees, who shall accompany Lukić for the remainder of his travel to and from the address in Belgrade detailed in paragraph 4 on page 2 of the Amendment to the Motion;
3. The period of the provisional release shall commence when Lukić is delivered into the custody of the authorised representative of Serbia's Government and shall terminate upon his return to the Dutch authorities, which shall be no later than five days from the date of his release and in any event no later than 13 September 2010;
4. On his return flight, Lukić shall be accompanied by the authorised representatives of Serbia who shall deliver Lukić into the custody of the Dutch authorities at Schiphol airport; the Dutch authorities shall then transport Lukić back to the UNDU in The Hague; and

³³ Cf. Decision of 14 July 2010, para. 20. In this regard, the Appeals Chamber notes that the special circumstances warranting this provisional release concern the attendance of the memorial services for Lukić's late father. The reasonableness of the provisional release duration is assessed accordingly, and does not include time that Lukić would like to spend "resting at the familial home" or any other activities going beyond the strict purpose of the provisional release.

³⁴ A status conference is scheduled to be held on 14 September 2010 (Scheduling Order, 23 August 2010), but Lukić is to return to the UNDU before that date (see *infra*, paras 18.3, 18.5.i).

5. During the period of his provisional release, Lukić shall abide by the following conditions, and the authorities of Serbia and Republika Srpska shall ensure compliance, where applicable, with such conditions:
 - a. before leaving the UNDU, Lukić shall provide details of his itinerary to the Ministry of Justice of The Netherlands and to the Registrar of the Tribunal;
 - b. Lukić shall stay at the address in Belgrade indicated in paragraph 4 on page 2 of the Amendment to the Motion;
 - c. Lukić shall remain under armed 24-hour surveillance throughout his presence in Serbia and Republika Srpska;
 - d. Lukić shall surrender his passport to the Ministry of Justice of Serbia for the entire duration of his provisional release;
 - e. Lukić shall not have any contact whatsoever or in any way interfere with victims or (potential) witnesses or otherwise interfere in any way with the proceedings or the administration of justice;
 - f. Lukić shall not discuss his case with anyone, including the media, other than his counsel;
 - g. Lukić shall comply strictly with any requirements of the authorities of Serbia and Republika Srpska necessary to enable them to comply with their obligations under the present decision;
 - h. Lukić shall comply with any order of the Appeals Chamber varying the terms of or terminating his provisional release; and
 - i. Lukić shall return to the UNDU no later than five days from the date of his release and in any event no later than 13 September 2010.

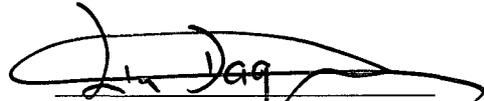
19. The Appeals Chamber further **REQUIRES** the Government of Serbia to assume responsibility for:
 1. Designation of the official into whose custody Lukić shall be provisionally released and who shall accompany Lukić from Schiphol airport in The Netherlands to the locations in Belgrade as detailed in paragraphs 15 and 17 of the Motion, and paragraph 4 on page 2 of the Amendment to the Motion, and notification, as soon as practicable, to the Appeals Chamber and the Registrar of the Tribunal of the name of the designated official;
 2. Ensuring Lukić's personal security and safety while on provisional release in Serbia;

3. Providing 24-hour armed surveillance of Lukić throughout his stay in Serbia, including the transfer from Belgrade Airport to Belgrade and back; and, on 9 September 2010, to the border of Bosnia and Herzegovina at the point of handover to the authorities of Republika Srpska, and back;
 4. All expenses in connection with the transport from Schiphol airport to Belgrade and back, as well as the transport to Ruijste (Višegrad region) and back;
 5. Facilitating, at the request of the Appeals Chamber or of the parties, all means of co-operation and communication between the parties and ensuring the confidentiality of any such communication;
 6. Reporting immediately to the Registrar of the Tribunal as to the substance of any threats to Lukić's security, including full reports of investigations related to such threats;
 7. Detaining Lukić immediately should he attempt to escape from the territory of Serbia, or should he in any other way breach the terms and conditions of his provisional release as set out in the present decision and reporting immediately any such breach to the Registry of the Tribunal and the Appeals Chamber;
 8. Respecting the primacy of the Tribunal in relation to any existing or future proceedings in Serbia concerning Lukić; and
 9. Submitting a written report to the Appeals Chamber, upon Lukić's return to the UNDU, as to Lukić's compliance with the terms of the present decision.
20. The Appeals Chamber further **REQUIRES** the authorities of Republika Srpska to assume responsibility for:
1. Designation of the official into whose custody Lukić shall be provisionally released and who shall accompany Lukić from the handover point at the border of Bosnia and Herzegovina to the cemetery in the village of Ruijste as detailed in paragraphs 15 and 17 of the Motion, and notification, as soon as practicable, to the Appeals Chamber and the Registrar of the Tribunal of the name of the designated official;
 2. Ensuring Lukić's personal security and safety while on provisional release in Republika Srpska;
 3. Providing 24-hour armed surveillance of Lukić throughout his stay in Republika Srpska, including the transfer from the handover point at the border of Bosnia and Herzegovina to the village of Ruijste and back;

4. Facilitating, at the request of the Appeals Chamber or of the parties, all means of co-operation and communication between the parties and ensuring the confidentiality of any such communication;
 5. Reporting immediately to the Registrar of the Tribunal as to the substance of any threats to Lukić's security, including full reports of investigations related to such threats;
 6. Detaining Lukić immediately should he attempt to escape from the territory of Republika Srpska, or should he in any other way breach the terms and conditions of his provisional release as set out in the present decision and reporting immediately any such breach to the Registry of the Tribunal and the Appeals Chamber;
 7. Respecting the primacy of the Tribunal in relation to any existing or future proceedings in Republika Srpska concerning Lukić; and
 8. Submitting a written report to the Appeals Chamber, upon Lukić's return to the UNDU, as to Lukić's compliance with the terms of the present decision.
21. Finally, the Appeals Chamber **INSTRUCTS** the Registrar of the Tribunal to:
1. Consult with the Dutch authorities, the authorities of Serbia and the authorities of Republika Srpska as to the practical arrangements for Lukić's provisional release;
 2. Request the authorities of the State(s) through whose territory Lukić may travel to:
 - a. hold him in custody for any time he will spend in transit at the airport of the State(s) in question; and
 - b. arrest and detain Lukić pending his return to the UNDU should he attempt to escape during travel;
 3. Continue to detain Lukić at the UNDU in The Hague until such time as the Appeals Chamber and the Registrar of the Tribunal have been notified of the name of the designated officials of the Government of Serbia and the Government of Republika Srpska into whose custody Lukić is to be provisionally released.

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

Dated this third day of September 2010,
At The Hague, The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]