



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-T

Date: 22 May 2007

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 22 May 2007

PROSECUTOR

v.

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

PUBLIC

DECISION ON PAVKOVIĆ MOTION FOR PROVISIONAL RELEASE

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

THIS TRIAL 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 (“Tribunal”) is seised of “Pavković Motion for Provisional Release During the Upcoming Court Recess”, filed on 15 March 2007 (“Motion”), and hereby renders its decision thereon.

BACKGROUND

1. On 30 October 2006, Pavković (“Applicant”) and his co-accused filed a “Joint Motion for Provisional Release During the Winter Recess.” In its decision of 5 December 2006, the Trial Chamber denied that motion, reasoning that the circumstances of the case had changed materially since the Applicant and his co-accused had last been granted provisional release.¹ The Trial Chamber found that, at that advanced stage in the Prosecution’s case, the risk of the Applicant not returning for the remainder of the trial was significantly greater than had been the case when he had previously been granted provisional release.² The Applicant and his co-accused appealed that decision, and in its Decision of 14 December 2006, the Appeals Chamber dismissed the appeal and affirmed the decision of the Trial Chamber.³

SUBMISSIONS

2. In the Motion, the Applicant requests that he be granted provisional release for the period from the end of the Prosecution case until a date to be determined by the Trial Chamber on the same conditions as those imposed *inter alia* in the Provisional Release Decision.⁴ In particular, the Applicant raises the following as factors for consideration:

- His full compliance with conditions when previously on provisional release;⁵
- His family situation, including his desire to visit his young daughter and ailing father;⁶
- His need to consult with Belgrade-based physicians in relation to previous medical care;⁷
- The relocation of the Applicant’s defence team to Belgrade for the duration of the recess in order to prepare his defence;⁸

¹ Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006 (“Provisional Release Decision”), para. 2. The Applicant was granted provisional release in the Decision on Joint Motion for Provisional Release During Summer Recess, 1 June 2006.

² Provisional Release Decision, para. 10.

³ Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006 (“Provisional Release Appeal Decision”).

⁴ Motion, paras 2, 10.

⁵ Motion, para. 3.

⁶ Motion, para. 4. The Trial Chamber notes that the Applicant’s daughter was born during the course of these proceedings.

⁷ Motion, para. 5.

⁸ Motion, para. 6.

- The standing guarantees from the Government of the Republic of Serbia;⁹
- The Applicant's personal undertakings;¹⁰ and
- The presumption of innocence.¹¹

3. The Prosecution filed its response to the Motion on 29 March 2007, opposing the Motion.¹² The Prosecution submits that there is a substantially increased risk of the Applicant not returning for trial should he be granted provisional release, since the quantum of evidence of the crimes for which the Applicant is charged has increased since the Provisional Release Decision.¹³ The Prosecution's Response does not address whether the Applicant will not pose a danger to any victim, witness, or other person if granted provisional release.

APPLICABILITY OF RULE 65

4. The Trial Chamber notes that it is now settled law that Rule 65, which governs provisional release, applies during the course of the trial, as well as during pre-trial and pre-appeal proceedings.¹⁴ Rule 65(B) provides as follows:

Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

Where one of the conditions required by Rule 65(B) has not been met, a Trial Chamber must deny provisional release and need not consider the other conditions.¹⁵

DISCUSSION

5. In deciding a request for provisional release, a Trial Chamber must determine whether the applicant has satisfied the burden of showing that, if released provisionally, he or she will (a) return for the continuation of the trial and (b) not pose a danger to any victim, witness, or other person.¹⁶ Where an accused applies for provisional release following the denial of a previous application, "it

⁹ Motion, para. 7.

¹⁰ Motion, para. 8.

¹¹ Motion, para. 9.

¹² Prosecution Response to Pavković Motion for Provisional Release During the Upcoming Court Recess, 29 March 2007 ("Response").

¹³ Response, paras 4, 5.

¹⁴ Provisional Release Appeal Decision, paras 8–10.

¹⁵ *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber's Decision on Sredoje Lukic's Motion for Provisional Release, 16 April 2007 ("*Lukić and Lukić* Decision"), paras 6, 23; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007 ("*Popović* Decision"), para. 6.

is incumbent on that accused to satisfy the Trial Chamber that there has been a change in circumstances that materially affects the approach taken in earlier provisional release decisions regarding the same accused.”¹⁷

6. In making its determination, the Trial Chamber must provide a reasoned opinion indicating its view on the relevant factors¹⁸ which a reasonable Trial Chamber would be expected to consider before making a decision.¹⁹ This does not mean that the Trial Chamber is obliged to deal with “all possible factors”, but it must at a minimum provide reasons to support its findings.²⁰ Neither is the satisfaction of these two conditions an automatic trigger for provisional release; they are instead minimum requirements, and the Trial Chamber retains discretion to grant or deny provisional release in light of all the circumstances of the case.²¹

7. In the course of the following discussion in which the relevant requirements of Rule 65(B) are considered, the Chamber will address each of the relevant factors raised by the Applicant in his Motion.

8. The Tribunal is in receipt of a letter from the Ministry of Foreign Affairs of The Netherlands, in which The Netherlands – in its capacity as host country – represents that it has no objection to the Applicant’s provisional release, should it be granted.²² The Tribunal is furthermore in receipt of the confidential Conclusion of the Government of the Republic of Serbia dated 22 March 2007, confirming that it will respect all orders made by this Trial Chamber in respect of the provisional release of the Applicant, should it be granted. The host country and the receiving State having been heard, it remains for the Trial Chamber to consider whether it is satisfied that the Applicant, if released, will appear for trial. If it is so satisfied, the Trial Chamber will then consider whether it is satisfied that the Applicant, if released, will not pose a danger to any victim, witness, or other person.

¹⁶ Rule 65(B); *Popović* Decision, para. 12.

¹⁷ *Popović* Decision, para. 12.

¹⁸ *Prosecutor v. Halilović*, Case No. IT-01-48-T, Confidential Decision on Renewed Motion for Provisional Release, 22 July 2005; Provisional Release Decision, para. 6.

¹⁹ *Popović* Decision, para. 7.

²⁰ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj’s Interlocutory Appeal Against the Trial Chamber’s Decision Denying his Provisional Release, 9 March 2006.

²¹ *Popović* Decision, para. 5.

²² Letter from Mr. J.H.P.A.M. de Roy, Deputy Director of Protocol for the Minister of Foreign Affairs, to Chief CMSS, dated 20 March 2007.

9. The Trial Chamber notes the standing guarantee furnished by the Government of the Republic of Serbia.²³ The Trial assumes for present purposes that Serbia would do its best to honour this guarantee. However, the Trial Chamber is not satisfied that there has been a change in circumstances that materially affects the approach taken in the decision denying provisional release of 5 December 2006, in which this factor was considered.²⁴ In any event, a Trial Chamber is not obliged to rely on guarantees provided by a government with the power to arrest the Applicant; it is instead required to evaluate government guarantees in light of the circumstances surrounding each individual applicant.²⁵

10. The Trial Chamber notes the Applicant's prior personal undertakings, and his claim to good prior conduct and full compliance with conditions when previously on provisional release. The Trial Chamber considers that the Applicant's prior conduct alone does not justify classifying him as a non-flight risk at this time.

11. The Applicant expresses his desire to visit his new-born daughter and ailing father. The Trial Chamber is not persuaded that provisional release for the duration requested should be granted on this basis in this case. As discussed above, Rule 65(B) requires the Trial Chamber to determine whether the Applicant has satisfied the burden of showing that if released provisionally he or she will return for the continuation of the trial. The Applicant's family situation may be a factor for consideration when determining his risk of flight,²⁶ but it can only be considered as a factor to the extent that the Applicant substantiates the alleged impact of this factor on the determination the Trial Chamber is required to make.²⁷ The Applicant has not shown how his family circumstances suggest that he will return for the continuation of the trial if released provisionally; rather, this is an appeal to compassionate considerations.

²³ Motion, para. 7.

²⁴ Provisional Release Decision, para. 10.

²⁵ *Popović* Decision, para. 16. See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popović's Application for Provisional Release, 28 October 2005, para. 10.

²⁶ The Appeals Chamber has recently considered and rejected the situation where an applicant's desire to visit an ailing sibling as a basis for provisional release, albeit pursuant to Rule 65(I)(iii). See *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Radoslav Brđanin's Motion for Provisional Release, 23 February 2007, para. 6, p. 3.

²⁷ *Prosecutor v. Mrksić*, Case No. IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002 (*Mrksić* Decision), paras 23–24. The Trial Chamber notes that, while Rule 65(B) is the applicable rule in this case and requires the consideration of "relevant factors", Rule 65(I)(iii) – which applies only to convicted persons pending an appeal – requires the consideration of "Special circumstances". The Appeals Chamber has recognised health/medical issues as pertinent to the latter issue. See *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on "Defence Motion: Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro", 16 December 2005 (*Strugar* Decision).

12. The Applicant submits that his medical history requires a consultation with physicians in Belgrade, and that dental treatment he requires can be done more easily and efficiently in Belgrade.²⁸ While the Trial Chamber remains concerned about the well-being of all detainees, it is not persuaded that provisional release should be granted on this basis in this case. As discussed above, Rule 65(B) requires the Trial Chamber to determine whether the Applicant has satisfied the burden of showing that if released provisionally he or she will return for the continuation of the trial. The Applicant's medical and dental preferences can only be considered factors to the extent that the Applicant substantiates their alleged impact on the determination the Trial Chamber is required to make.²⁹ The Applicant has provided no material to suggest that his medical and dental concerns are such that they are incompatible with his continued detention where such services are provided, and how these matters suggest that he will return for the continuation of the trial if released provisionally.

13. The Applicant has not demonstrated to the Trial Chamber how the circumstances which led to the denial of his application for provisional release in December 2006 have changed so as to materially affect the approach taken in the provisional release decision in December 2006, when he was denied provisional release.³⁰ At that time, the Trial Chamber determined that the Applicant's awareness of the case against him had been deepened, with the consequential finding that the risk that he would not return for the remainder of his trial was significantly greater than it had been previously.³¹ The further evidence that has been led since December 2006 serves only to strengthen the position taken by the Trial Chamber at that time, which was affirmed on appeal.³²

14. The remaining factor to which the Applicant refers in his Motion does not impact on an assessment of whether, if released, he will appear for trial. The Applicant's stated desire to be proximate to his defence team in Belgrade as they prepare his defence is a logistical issue and not a factor that assists in the assessment of the likelihood that he will return for trial. Since the foregoing analysis provides an independent basis for the denial of the Applicant's motion for provisional release pursuant to Rule 65(B), the Trial Chamber declines to consider whether the Applicant, if released, will not pose a danger to any victim, witness, or other person.³³

²⁸ Motion, para. 5.

²⁹ See *Mrksić* Decision, paras 23–24; *Strugar* Decision.

³⁰ *Popović* Decision, para. 12.

³¹ Provisional Release Decision, para. 10.

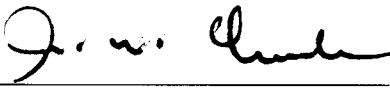
³² Provisional Release Appeal Decision.

³³ *Lukić and Lukić* Decision, paras 6, 23.

DISPOSITION

15. For the foregoing reasons, and pursuant to Articles 20 and 21 of the Statute and Rules 54 and 65 of the Rules, the Trial Chamber hereby **DENIES** the Motion without prejudice to any future motion for provisional release of a more limited duration on compassionate grounds.

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



Judge Ali Nawaz Chowhan

Dated this twenty-second day of May 2007
At The Hague
The Netherlands

[Seal of the Tribunal]