



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: 7 December 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: 7 December 2007

PROSECUTOR

v.

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

PUBLIC WITH CONFIDENTIAL ANNEX

DECISION ON ŠAINOVIĆ MOTION FOR TEMPORARY PROVISIONAL RELEASE

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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 a “Defence Motion Requesting Temporary Provisional Release During the Upcoming Court Recess or Requesting Temporary Provisional Release on the Grounds of Compassion,” filed confidentially by the Defence of Accused Nikola Šainović (“Accused”) on 26 November 2007 (“Motion”), and hereby renders its decision thereon.

Brief procedural background

1. On 28 June 2006, shortly before the commencement of the trial, the Trial Chamber varied the conditions of the Accused’s provisional release so that he could visit his mother, and so that he could accompany his mother to his father’s grave during a requiem.¹
2. The Accused was granted provisional release after the commencement of the trial and during the summer recess from 15 to 31 July 2006.²
3. On 5 December 2006, the Chamber denied the six Accused’s joint application for provisional release over the winter recess.³ The Appeals Chamber affirmed this decision.⁴
4. On 22 May 2007, the Chamber denied the application of the Accused for provisional release over the summer recess, holding, *inter alia*, that he had not demonstrated how the circumstances that led to the denial of his application in December 2006 had changed so as to materially affect the approach taken by the Chamber at that time. The Chamber left open the possibility that the Accused could apply for temporary provisional release on compassionate or humanitarian grounds.⁵
5. Following this denial, the Accused applied on 23 May 2007 for temporary provisional release arguing that his mother and sole surviving parent was 93 years of age, in a frail condition, and suffering from serious ill health; her prognosis was highly uncertain; his mother’s serious ill health prevented her from travelling to The Hague to visit him; and granting him temporary

¹ Decision on Šainović’s Request for Variation of Conditions of Provisional Release, 28 June 2006, paras. 1, 3; *see also* confidential Decision on Request of Nikola Šainović for Variation of Conditions of Provisional Release, 12 May 2006.

² Decision on Joint Motion for Temporary Provisional Release During Summer Recess, 1 June 2006.

³ Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2007.

⁴ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During Winter Recess, 14 December 2007.

⁵ Decision on Šainović Motion for Provisional Release, 22 May 2007, paras. 12, 14.

provisional release would offer him an opportunity to see his mother before her passing.⁶ On 7 June 2007, the Chamber granted this motion.⁷

6. It is against this procedural backdrop that the Chamber entertains the Accused's third motion for temporary provisional release on grounds related to visiting his mother.

Submissions

7. In the Motion, the Accused requests provisional release for the four-week court recess and sets forth various arguments in support thereof.⁸ In the alternative, the Accused requests temporary provisional release for seven days so that he can visit his mother and describes her current state of health.⁹ The Trial Chamber is in receipt of guarantees from the Republic of Serbia confirming that it will respect all orders made by the Chamber in respect of the provisional release of the Accused.¹⁰ The Netherlands, in its capacity as host country, represents that it has no objection to the Accused's provisional release.¹¹

8. On 3 December 2007, the Prosecution responded to the Motion, expressing its opposition to the provisional release of the Accused on the same grounds it advanced in connection with the last winter recess and summer recesses. Moreover, the Prosecution submits that granting provisional release at this advanced stage of the proceedings is not in the interests of justice and could disrupt the trial and prevent it from being brought to a fair and expeditious conclusion. According to the Prosecution, "[t]he rights of the Accused to (provisional) freedom and the particular humanitarian considerations for this Accused and his family member's health should be carefully balanced against the legitimate interest of the international community in the proper administration of justice which can only be achieved by completing this trial."¹²

9. In respect of the alternate request for temporary provisional release, the Prosecution takes the position that this is a matter best left to the discretion of the Chamber. Should the Motion be

⁶ Confidential Defence Motion Requesting Provisional Release on the Grounds of Compassion with Confidential Annex, 23 May 2007, paras. 4–7, 9, Annex 9.

⁷ Decision on Šainović Motion for Temporary Provisional Release, 7 June 2007 (public with confidential annex).

⁸ Motion, paras. 3–8.

⁹ Motion, paras. 9–13.

¹⁰ Motion, Annex I.

¹¹ Letter from Deputy Director of Protocol for the Dutch Minister of Foreign Affairs, dated 29 November 2007.

¹² Confidential Prosecution Response to Nikola Šainović's Defence Motion Requesting Provisional Release During the Upcoming Court Recess, 3 December 2007 ("Response"), paras. 2–4.

granted in this respect, the Prosecution requests the Chamber to order that the Accused return to the United Nations Detention Unit no later than five days prior to the resumption of the trial.¹³

Discussion

10 The Chamber has carefully considered all the submissions of the parties in relation to this matter and has taken all relevant factors bearing upon the issue of provisional release into account.

11 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. Where an accused applies for provisional release following the denial of a previous application, “it 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.”¹⁴

12 The Accused points to a number of factors in support of his request for relief: the presumption of innocence, his purported voluntary surrender, his respect for previous orders for provisional release, the guarantees from the Republic of Serbia (“Serbia”), and his respectful behavior towards the Tribunal. Moreover, the Accused argues that his lack of political and social life in Serbia, his lack of anonymity in Serbia, and the fact that the Prosecution, he, and other Accused have finished adducing their evidence in the trial, all belie the notion that he will pose a danger to any victim, witness, or other person.¹⁵ The Chamber, however, considers that the Accused has not demonstrated how any of these factors lead to the conclusion that the circumstances that led to the denial of his application in December 2006 have changed so as to materially affect the approach taken by the Chamber at that time.

13 The Chamber now turns to the Accused’s alternative request, *i.e.*, for temporary provisional release on compassionate or humanitarian grounds. While it is now settled law that Rule 65 of the Rules of Procedure and Evidence of the Tribunal governs provisional release generally,¹⁶ motions for temporary provisional release on compassionate or humanitarian grounds are governed by a distinct set of principles. Rule 65(B), which governs provisional release during trial, makes no

¹³ Response, paras. 5–6.

¹⁴ *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. 12.

¹⁵ Motion, paras. 5–8.

¹⁶ Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, paras. 8–10.

mention of compassionate or humanitarian grounds. However, the jurisprudence of the Tribunal has recognised that Chambers enjoy a measure of discretion when considering motions pursuant to Rule 65, and that, notwithstanding a finding that an accused does not meet the formal requirements for provisional release pursuant to Rule 65, compassionate or humanitarian concerns may nevertheless permit a more limited provisional release.¹⁷

14. [See confidential annex.]

15. Although the Chamber has granted the Accused permission to travel to Belgrade two times before in order to visit his ailing mother, it cannot discern a compelling reason to do so a third time. The Chamber has expressly granted the Accused permission to visit his mother – once immediately before the trial (July 2006) and once during his trial (June 2007). Moreover, the Accused was on provisional release during the pre-trial phase of the proceedings and was released during the summer recess last year (July 2006), during which time he could attend to his mother.

16. The Accused has therefore had opportunities to tend personally to his mother's health needs. The Chamber's previous decisions to grant temporary provisional release, far from being a reason to grant a third visit, reinforce the notion that the Accused has been granted an adequate opportunity to minister to his mother and therefore does not require a third visit. His fears of never seeing his mother alive again have now been averted. Finally, the Accused does not contend that he is the only member of his family who can look after his mother; there may be others who can fulfil this role so that there is no unduly adverse impact upon his overall familial situation.

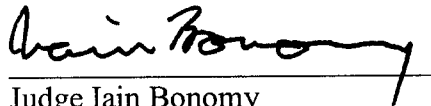
17. The Chamber notes, as a final matter, that no other pressing personal issues, such as the one raised on the confidential and *ex parte* annex 2 to the Accused's 4 May 2007 motion, are relied

¹⁷ See Decision on Šainović Motion for Temporary Provisional Release, 7 June 2007, paras. 7–11; see also *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, para. 5; *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, p. 1; *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, 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, p. 2; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005, para. 15; *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 Service for His Father, 21 October 2004, para. 20; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision on Dario Kordić's Request for Provisional Release, 19 April 2004, paras. 5–12; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Decision on Application for Provisional Release, 12 December 2002, para. 10.

upon as the basis for his request for temporary provisional release on compassionate or humanitarian grounds.¹⁸

18. For the foregoing reasons and pursuant to Rules 54 and 65, the Trial Chamber hereby DENIES the Motion.

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


Judge Iain Bonomy
Presiding

Dated this seventh day of December 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁸ Confidential Defence Motion Requesting Provisional Release During the Upcoming Court Recess with Confidential Annexes 1 and 3 and Confidential and *Ex Parte* Annex 2, 4 May 2007, Annex 2 (confidential and *ex parte*).