



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-AR65.4
Date: 18 December 2007
Original: English

Before: Judge Wolfgang Schomburg, Duty Judge
Registrar: Mr. Hans Holthuis
Decision of: 18 December 2007

PROSECUTOR

v.

MILAN MILUTINović
NIKOLA ŠAINović
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

PUBLIC

**DECISION ON "SRETEN LUKIĆ'S APPEAL PURSUANT TO
RULE 116 *BIS* AGAINST THE TRIAL CHAMBER'S DENIAL
OF TEMPORARY PROVISIONAL RELEASE"**

The 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 Alekšić 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

I, WOLFGANG SCHOMBURG, 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”), acting in my current capacity as Duty Judge;

NOTING the Trial Chamber’s “Decision on Lukić Motion for Temporary Provisional Release” (“First Decision”) filed on 7 December 2007,¹ in which the Trial Chamber denied Sreten Lukić’s (“Appellant”) motion for provisional release;

NOTING the Trial Chamber’s “Decision on Lukić Motion to Reconsider Denial of Motion for Temporary Provisional Release” (“Second Decision”) filed on 12 December 2007,² in which the Trial Chamber denied the Appellant’s motion for reconsideration of the First Decision;

NOTING “Sreten Lukić’s Appeal Pursuant to Rule 116 *bis* Against the Trial Chamber’s Denial of Temporary Provisional Release” (“Appeal”) filed confidentially by the Appellant on 14 December 2007;

NOTING the “Prosecution’s Response to Sreten Lukić’s Appeal Pursuant to Rule 116 *bis* Against the Trial Chamber’s Denial of Temporary Provisional Release” (“Response”) filed confidentially on 17 December 2007;

NOTING “Sreten Lukić’s Reply in Support of Appeal Pursuant to Rule 116 *bis* Against the Trial Chamber’s Denial of Temporary Provisional Release” (“Reply”) filed confidentially on 18 December 2007;

NOTING that the Appeal is directed against both the First and the Second Decision and requests that the Appellant be provisionally released on “compassionate grounds” during the Tribunal’s winter recess;³

CONSIDERING that I must as a matter of urgency conduct a review of the impugned First and Second Decision to give full effect to the right to appeal granted in Rule 65(D) of the Rules;⁴

CONSIDERING however that this review is subject to reconsideration by a full bench of the Appeals Chamber after the end of court recess if the Appellant so requests;

¹ The Trial Chamber on that date also filed a Confidential Annex to the Decision.

² The Trial Chamber on that date also filed a Confidential Annex to the Decision.

³ See Appeal, p. 4.

⁴ *Prosecutor v. Milan Milutinovic et al.*, Case No. IT-05-87-AR65.3, Decision On “Pavković Appeal Pursuant To Rule 116 *bis* Against The Decision On Pavković Motion For Temporary Provisional Release, Dated 12 December 2007,” p. 3.

RECALLING that an interlocutory appeal is not a *de novo* review of a Trial Chamber's decision, which under Rule 65 of the Rules is a discretionary one, and that accordingly the relevant inquiry is not whether I agree with that discretionary decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision;⁵

RECALLING that in order to successfully challenging a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a discernible error;⁶

FURTHER RECALLING that a Trial Chamber's decision on provisional release can only be overturned where it is found to be (1) based on an incorrect interpretation of the governing law, (2) based on a patently incorrect conclusion of fact, or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion;⁷

NOTING that in the Appeal the Appellant claims that the Trial Chamber's decisions were "erroneous insofar as they constitute an abuse of discretion by denying (without any justifiable or discernable reasoning or cause) Sreten Lukić a limited, controlled provisional release" to tend to personal matters,⁸ especially given that the Trial Chamber in his view exercised its discretion differently with regard to the Appellant than with regard to his co-accused;⁹

NOTING that in the Response the Prosecution submits that the Trial Chamber made no discernible error nor abused its discretion in denying the Appellant's provisional release and that accordingly the Appeal should be dismissed;¹⁰

NOTING that in the Reply the Appellant stresses that the Trial Chamber did not reach a finding that the Appellant poses a flight risk¹¹ and maintains that the Trial Chamber's exercise of its discretion was improper given that the Trial Chamber did not fully consider the new situation in the family of the Appellant,¹² and that the Trial Chamber erred when it treated the Appellant differently from his co-Accused;¹³

NOTING that the Trial Chamber in the First Decision stated that it had "carefully considered all the submissions of the parties in relation to this matter and has taken all relevant factors bearing

⁵ See *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release ("*Bošković & Tarčulovski Decision*"), 27 July 2007, para. 4 with further references.

⁶ *Id.*

⁷ *Id.*

⁸ Appeal, para. 8.

⁹ Appeal, para. 7.

¹⁰ Response, para. 10.

¹¹ Reply, paras 8, 9.

¹² Reply, paras 11-13.

upon the issue of provisional release into account” but that given that the Appellant had been on provisional release during the pre-trial phase of the proceedings and was released during the summer court recess in 2006 he had “therefore had adequate opportunities to tend personally to pressing personal matters” and that “circumstances [had not] materially changed so as to justify a temporary provisional release on compassionate or humanitarian grounds at this point in time”;¹⁴

NOTING that the Trial Chamber in the Second Decision reiterated that it “indeed consider[ed] the change in circumstances cited by the Accused, but nevertheless found they did not warrant a temporary provisional release”¹⁵ and that it did “not consider that the other provisional releases of the Accused have a bearing upon its determination of the Accused’s motion for temporary provisional release”;¹⁶

NOTING that the Trial Chamber in both impugned decisions¹⁷ explicitly referred to its decision of December 2006 (in which it had ruled that the progression of trial proceedings increased the flight risk of the accused);¹⁸

CONSIDERING that motions for provisional release are fact-intensive and cases are considered on an individual basis, that the weight attached to humanitarian reasons as justification for provisional release will have to be balanced against the specific temporal and factual circumstances of a particular case and that comparisons with previous provisional release decisions solely on this issue are not helpful;¹⁹

CONSIDERING FURTHER that a Trial Chamber may grant provisional release only if it is satisfied that the accused will return for trial and that he will not pose a danger to any victim, witness or other person, and that it is in this context that any humanitarian grounds have to be assessed;²⁰

¹³ Reply, paras 14.

¹⁴ First Decision, paras 7, 8.

¹⁵ Second Decision, para. 4.

¹⁶ Second Decision, para 12.

¹⁷ First Decision, para. 1; Second Decision, para. 2. I note in this context that the Appellant has not challenged this assessment by the Trial Chamber in his Appeal.

¹⁸ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87, Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006. This decision was upheld on appeal, *see Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, paras 14-16.

¹⁹ *See Prosecutor v. Vujadin Popović et al.*, Decision on Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, Case No. IT-05-88-AR65.3, 1 March 2007, para. 20.

²⁰ *Boškoski & Tarčulovski* Decision, para. 14.

FINDING that the Appellant has not shown how the Trial Chamber abused its discretion when it decided not grant provisional release for compassionate reasons and subsequently rejected the Appellant’s motion for reconsideration;

FINDING that the Trial Chamber reasonably considered that a provisional release on compassionate grounds was not warranted “at this point in time”,²¹ *i.e.* taking into account the progress of the trial, which includes a temporaneous assessment of flight risk;

FINDING that the Appellant has not shown how the Trial Chamber erred when it held that it “disagreed that the Accused is being treated unequally” and that “[h]is motion was considered upon its own merits”;²²


RECALLING that it is not for the appellate body to lightly overturn the decision by the trier of fact, which is best placed to permanently assess *de novo* whether provisional release is warranted or not;

FOR THE FOREGOING REASONS

DISMISS the Appeal in all aspects.

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

Done this 18th day of December 2007,
At The Hague,
The Netherlands.


Judge Wolfgang Schomburg
Duty Judge

[Seal of the Tribunal]

²¹ First Decision, para. 8; *see also* Second Decision, para. 19.

²² Second Decision, para. 12.