



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-04-81-AR65.1
Date: 29 July 2011
Original: English

BEFORE THE DUTY JUDGE

Before: Judge Árpád Prandler

Registrar: Mr. John Hocking

Decision of: 29 July 2011

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON MR. PERIŠIĆ'S APPEAL AGAINST THE
DECISION ON MR. PERIŠIĆ'S MOTION FOR
PROVISIONAL RELEASE**

The Office of the Prosecutor

Mr. Norman Farrell

Counsel for the Accused

Mr. Novak Lukić and Mr. Gregor Guy-Smith

1. I, **Árpád Prandler**, acting in my capacity as Duty 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"), am seised of the "Mr. Perišić's appeal against the decision on Mr. Perišić's motion for provisional release" filed confidentially on 18 July 2011 ("Appeal"), whereby the Accused seeks to impugn the decision of the Trial Chamber, issued by majority, Judge Moloto dissenting, on 14 July 2011 ("Impugned Decision").¹ The Prosecution filed its response confidentially on 22 July 2011 ("Response").²

2. Although the Appeal and the Response were both filed prior to the commencement of the court recess, the briefing could only be considered complete once the deadlines for filing a reply had passed.³ Considering that the briefing is now complete, the Appeal shall be decided by me as the Duty Judge pursuant to Rule 28(D) and (F) of the Rules of Procedure and Evidence of the Tribunal ("Rules").

I. BACKGROUND

3. On 20 June 2011, the Accused filed a motion requesting provisional release from 23 July 2011 to 15 August 2001, or for such period as specified by the Trial Chamber, on the same terms and conditions under which he was previously released or under such conditions as the Trial Chamber deems appropriate to impose pursuant to Rule 65(C) of the Rules.⁴

4. In support of his request, the Accused submitted, *inter alia*, that the deteriorating health of his wife and his wish to attend the fourth annual memorial service of his late brother scheduled for 11 August 2011 amounted to sufficiently compelling humanitarian grounds meriting his provisional release for a discreet period of time.⁵

5. On 14 July 2011, the Trial Chamber, Judge Moloto dissenting, denied the request by the Accused for provisional release during the court recess, holding that deterioration in the health of the wife of the Accused and his wish to attend the memorial service of his late brother did not "as a whole" amount to sufficiently compelling humanitarian grounds justifying provisional release.⁶

¹ Decision on Mr. Perišić's motion for provisional release, 14 July 2011.

² Response to Perišić appeal against decision on provisional release, 21 July 2011.

³ The deadline for filing a reply expired on 26 July 2011 pursuant to the Practice Direction on procedure for the filing of written submissions in appeal proceedings before the International Tribunal, IT/155/Rev. 3, 16 September 2005, paras 14, 16.

⁴ Impugned Decision, para. 1.

⁵ Impugned Decision, para. 3.

⁶ Appeal, para. 5; Impugned Decision, paras 12-14.

II. STANDARD OF APPEAL

6. An interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.⁷ A decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.⁸ Accordingly, the relevant inquiry is not whether I, as Duty Judge, agree with that discretionary decision but whether the Trial Chamber has correctly exercised its discretion in reaching that decision.⁹

7. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a "discernible error".¹⁰ A Trial Chamber's decision on provisional release will only be overturned where it is found to be (1) based on an incorrect interpretation of 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.¹¹ It will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.¹²

III. APPLICABLE LAW

8. Pursuant to Rule 65(A) of the Rules, once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B) of the Rules, a Chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness, or other person, and after having given the host country and the State to which the accused seeks to be released the opportunity to be heard.

9. In deciding whether the requirements of Rule 65(B) of the Rules are met, a Trial Chamber must consider all relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on these relevant factors.¹³ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁴ This is because decisions on motions for provisional release are fact-intensive, and cases are considered on an

⁷ See for e.g., *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.25, Decision on Slobodan Praljak's appeal against decision on his motion for provisional release, 10 June 2011, para. 3.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Id.*, para. 4.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Id.*, para. 6.

¹⁴ *Ibid.*

individual basis in light of the particular circumstances of the individual accused.¹⁵ The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision but also, as much as can be foreseen, at the time the accused is expected to return to the Tribunal.¹⁶

10. Finally, an application for provisional release brought at a late stage of the proceedings, and in particular after the close of the Prosecution case, should only be granted when serious and sufficiently compelling humanitarian grounds exist.¹⁷ The duration of provisional release, if granted on humanitarian grounds, should be proportional to the period of time necessary to carry out the humanitarian purpose of the release.

IV. SUBMISSIONS

11. The Accused submits that the Trial Chamber erred when it found that it was “even more” bound by the jurisprudence of the Appeals Chambers, requiring sufficiently compelling humanitarian grounds, given that the trial proceedings are at a “very late stage”.¹⁸ He submits that the standard only comes into effect at late stages of proceedings, but does not mandate that the more advanced the stage of proceedings, the more compelling the humanitarian grounds need to be.¹⁹ Accordingly, the Trial Chamber erred by applying a higher standard than that which is mandated by the jurisprudence on sufficiently compelling humanitarian grounds, despite finding that the Accused met all the other requirements of Rule 65(B) even in the stages of judgement drafting.²⁰

12. The Accused also submits that the Trial Chamber erred in fact by concluding that the condition suffered by the wife of the Accused is not “serious” and adds that the Trial Chamber abused its discretion when considering the sufficiency of the humanitarian grounds submitted by failing to give any or sufficient weight to established facts concerning his circumstances.²¹ The Accused acknowledges that, while his wife suffers from a “particularly painful condition” which is incrementally degenerative and has her confined to bed rest, it is not “critical” in the sense of being life-threatening. Mr. Perišić, however, points out that her condition is most certainly “serious”

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.9, Decision on “Prosecution’s Appeal from *Décision relative à la Demande de mise en liberté provisoire de l’Accusé Stojić* Dated 8 April 2008”, 29 April 2008 (“*Stojić Decision*”), para. 14; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on “Prosecution’s Appeal from *Décision relative à la demande de mise en liberté provisoire de l’Accusé Petković* dated 31 March 2008”, 21 April 2008 (“*Petković Decision*”), para. 16.

¹⁸ Appeal, para. 10.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Appeal, para. 6.

enough for a reasonable Trial Chamber to conclude that it warrants his provisional release “for a discreet period of time to attend to, and spend time with, her in Belgrade.”²²

13. Finally, the Accused submits that the Trial Chamber abused its discretion by considering that both the humanitarian grounds advanced, assessed in light of his circumstances as a whole, do not collectively constitute sufficiently compelling grounds for him to be provisionally released.²³ Recalling that the Trial Chamber has consistently found he satisfies the requirements of Rule 65(B), the Accused submits that the Trial Chamber failed to give appropriate weight to the humanitarian grounds extended in light of all the relevant circumstances of his specific case amounts to an abuse of its discretion.²⁴

14. The Prosecution responds that the Accused failed to demonstrate that the Trial Chamber committed any error in interpreting the governing law, its assessment of the facts or in the exercise of its discretion under Rule 65(B) of the Rules and his Appeal should be dismissed.²⁵

15. The Prosecution submits that, contrary to what the Accused contends, the Trial Chamber’s determination of being “even more so bound” by the standard set by the Appeals Chamber jurisprudence does not suggest a higher standard than applicable.²⁶ Rather, it is merely an affirmation by the Trial Chamber of its obligation to apply the sufficiently compelling humanitarian grounds standard at the “very late stage of the proceedings”.²⁷

16. Further, the Prosecution submits that the Trial Chamber did not err in the exercise of its discretion in concluding that the condition of Mr. Perišić’s wife did not constitute sufficiently compelling humanitarian reasons justifying his provisional release.²⁸ The Trial Chamber’s conclusion on her condition not being “serious” or “critical” was reasonable based on the medical records before it and the Accused failed to demonstrate a discernible error in the assessment.²⁹

17. Finally, the Prosecution submits that the Accused has not shown any error in the Trial Chamber’s exercise of its discretion since it gave due weight to the humanitarian grounds advanced, in light of all the relevant circumstances, when determining that they did not meet the

²² Appeal, para. 11.

²³ Appeal, para. 12.

²⁴ *Ibid.*

²⁵ Response, para. 1.

²⁶ Response, para. 3.

²⁷ *Ibid.*

²⁸ Response, para. 4.

²⁹ Response, paras 5-6.

jurisprudential standard both individually and cumulatively.³⁰ The Prosecution states that the Trial Chamber properly exercised its discretion taking into account all relevant circumstances.

V. DISCUSSION

18. Having perused the context within which the Trial Chamber set out and applied the Appeals Chamber jurisprudence on the sufficiently compelling humanitarian grounds standard applicable to requests for provisional release at late stages of the proceedings, I find no merit in the submission that the Impugned Decision applied a standard higher than that which it is required to apply nor did the reasoning imply that the humanitarian grounds advanced need to be increasingly compelling as the case progresses.

19. In this light, I note that the Trial Chamber considered identical submissions in its earlier decision of 12 July 2010, when the Defence was in the midst of presenting its case, and found that the deteriorating health of Mr. Perišić's wife and then the third anniversary memorial service of his late brother did not individually amount to sufficiently compelling humanitarian grounds.³¹ Similarly, in its decision of 15 December 2010, when the Defence case was near completion, the Trial Chamber had once again found that the medical condition of Mrs. Perišić was not serious enough so as to, by itself, warrant the provisional release of the Accused.³²

20. In concluding that the health of Mr. Perišić's wife was not serious enough to warrant provisional release, the Trial Chamber relied upon comparable Appeals Chamber jurisprudence.³³ Recalling that the standard of review entails that the appellant demonstrate that the conclusion of the Trial Chamber was so unfair or unreasonable as to constitute an abuse of its discretion, I find that the Accused has failed to do so.

21. Further, the Trial Chamber fully considered all the relevant circumstances surrounding the request of the Accused, including the cumulative effect of the two humanitarian grounds advanced, in rejecting the request for provisional release. Accordingly, I find that the Trial Chamber did not err in denying Mr. Perišić's request for provisional release.

³⁰ Response, para. 10.

³¹ Decision on Mr. Perišić's motion for provisional release during the summer recess, 12 July 2010, para. 14.

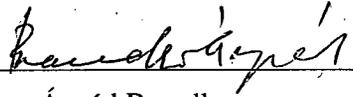
³² Decision on Mr. Perišić's motion for provisional release during the summer recess, 15 December 2010, paras 14, 18.

³³ Impugned Decision, para. 12.

VI. DISPOSITION

22. For the foregoing reasons, I hereby **DISMISS** the Appeal in its entirety and **AFFIRM** the Impugned Decision.

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



Judge Árpád Prandler

Dated this twenty-ninth day of July 2011.

At The Hague

The Netherlands

[Seal of the Tribunal]