



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-04-74-AR65.11
Date: 16 December 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Mr Hans Holthuis

Decision of: 16 December 2008

PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
and BERISLAV PUŠIĆ**

PUBLIC

**DECISION ON PRALJAK'S APPEAL OF THE TRIAL CHAMBER'S
2 DECEMBER 2008 DECISION ON PROVISIONAL RELEASE**

Office of the Prosecutor

Mr Kenneth Scott
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Counsel for the Accused

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Karim Khan for Bruno Stojić
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić and Mr Nicolas Stewart for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

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 seized of "Slobodan Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Slobodan Praljak's Request for Provisional Release" ("Appeal") filed by Counsel for Slobodan Praljak ("Praljak") on 9 December 2008 against the "*Décision relative à la demande de mise en liberté provisoire de l'accusé Praljak*" ("Impugned Decision"), issued by Trial Chamber III on 2 December 2008 and denying provisional release for Slobodan Praljak. The Prosecution responded on 16 December 2008.¹ Praljak notified the Appeals Chamber that he would not file a reply.

I. BACKGROUND

2. On 28 October 2008, Praljak filed a motion requesting provisional release for part of the winter judicial recess.² On 14 November 2008, the Office of the Prosecutor ("Prosecution") filed a consolidated response opposing the Request and applying for a stay of the decision in case the Trial Chamber granted the Request.³ Praljak did not file a Reply.

3. On 2 December 2008, the Trial Chamber issued its Impugned Decision rejecting the Request and declaring moot the application for a stay. The Trial Chamber found, *inter alia*, that Praljak respected the conditions of provisional release in the past⁴ and that he would not be a danger to victims, witnesses or others.⁵ However, the Trial Chamber did not consider the alleged humanitarian requirement stemming from his health problems, coupled with the stress due to the length of the detention and the impossibility of seeing his grandchildren,⁶ to be sufficient according to the jurisprudence of the Tribunal.⁷

II. STANDARD OF REVIEW

4. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.⁸ The Appeals Chamber has previously held that a decision on provisional

¹ Prosecution's Response to Slobodan Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Slobodan Praljak's Request for Provisional Release, 15 December 2008 ("Response").

² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, *Demande de mise en liberté provisoire présentée par Slobodan Praljak (vacances judiciaires d'hiver 2008-2009)*, 28 October 2008 ("Request").

³ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Prosecution Consolidated Response to Prlić, Stojić, Petković, Praljak and Ćorić Applications for Provisional Release During the Winter Recess 2008-2009, paras 1, 37-38 and 60-61.

⁴ Impugned Decision, para. 21.

⁵ Impugned Decision, para. 22.

⁶ Impugned Decision, paras 23-24.

⁷ Impugned Decision, paras 29-31.

⁸ See e.g., *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 ("*Brahimaj* Decision"), para. 5; *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo

release by the Trial Chamber under Rule 65 of the Rules of Procedure and Evidence (“Rules”) is a discretionary one.⁹ Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.¹⁰

5. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a “discernible error”.¹¹ The Appeals Chamber will only overturn a Trial Chamber’s decision on provisional release where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.¹²

III. APPLICABLE LAW

6. 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.¹³

7. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all of those relevant factors which 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 those relevant factors.¹⁴ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁵ This is because decisions on motions for provisional release are fact intensive and cases are considered on an individual basis in light of the particular circumstances of the individual accused.¹⁶ The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches

Stanišić’s Provisional Release, 17 October 2005 (“*Stanišić Decision*”), para. 6; *Prosecutor v. Boškoški & Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoški’s Interlocutory Appeal on Provisional Release, 28 September 2005, para. 5.

⁹ See e.g., *Prosecutor v. 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, para. 3; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006, para. 5.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Brahimaj Decision*, para. 6.

¹⁴ *Ibid.*, para. 10.

¹⁵ *Stanišić Decision*, para. 8.

its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the International Tribunal.¹⁷ Moreover, an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, should only be granted when serious and sufficiently compelling humanitarian reasons exist.¹⁸

IV. DISCUSSION

8. Under his first ground of appeal, Praljak alleges that the Trial Chamber erred in law in finding that he had not provided documentation showing “exceptional humanitarian circumstances”, while the Request did in fact incorporate by reference all previously provided facts relevant to his release.¹⁹ The Prosecution responds that the Trial Chamber actually considered all relevant information and that Praljak does not point to any new piece of information.²⁰

9. The Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber addressed the requirement that all pertinent facts before it must be considered.²¹ It simply found that Praljak had not indicated material supporting the allegations of compelling humanitarian reasons and was therefore not satisfied that his health conditions, as well as the condition of his relatives, did warrant such a finding.²² This finding was open to the Trial Chamber. The Appeals Chamber therefore finds that Praljak has not shown any legal error.

10. Under his second ground of appeal, Praljak challenges that the Trial Chamber required further documentation to prove the stress and sorrow caused by prolonged separation as well as his specific conditions—which are in any event known to the Trial Chamber. He claims that the requirement of documents is against the right to human dignity and a basic understanding of the human condition.²³ The Prosecution responds that objective medical documentation is clearly required by Tribunal’s jurisprudence to support compelling humanitarian reasons.²⁴

11. The Appeals Chamber finds that, in order to consider “those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a

¹⁶ *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Decision Denying Johan Tarčulovski’s Motion for Provisional Release, 4 October 2005, para. 7.

¹⁷ *Stanišić* Decision, para. 8.

¹⁸ *Prosecutor v. Jadranko 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 (“*Prlić* Decision of 21 April 2008”), paras 15 and 17.

¹⁹ Appeal, paras 23-27.

²⁰ Response, paras 10-14.

²¹ Impugned Decision, paras 6 and 20.

²² Impugned Decision, paras 25-26.

²³ Appeal, paras 28-34.

²⁴ Response, paras 15-16.

decision”,²⁵ a Trial Chamber is entitled to require the necessary documentation from the parties. While, under certain circumstances, written expert reports on health and other relevant personal conditions might not necessarily be required, Praljak has not shown that, under the present circumstances, the Trial Chamber abused its discretion in requesting such documentation.

12. Under his third ground of appeal, Praljak alleges that the humanitarian reasons pleaded as a basis for provisional release are sufficient and are not limited to physical illness and death.²⁶ He requests the Appeals Chamber to re-assess whether the jurisprudence on post-Rule 98bis provisional release “finds appropriate application with respect to individuals deprived of their liberty” for more than one year in light of the entirety of all of the relevant facts and analysis.²⁷ The Prosecution points out that detention during trial cannot *per se* be sufficient to give rise to humanitarian reasons justifying release.²⁸

13. Considering that an interlocutory appeal is not a *de novo* review of the Trial Chamber’s decision,²⁹ and lacking any specific argument showing an error under the present ground of appeal, the Appeals Chamber defers, as it must, to the evaluation made by the Trial Chamber of the humanitarian reasons alleged by Praljak and of his overall condition.

14. Under his fourth ground of appeal, Praljak alleges that the requirement that a Trial Chamber finds, after having concluded that no risk of flight and no risk to others exist, exceptional humanitarian circumstances in order to grant provisional release violates his human rights. Humanitarian circumstances, in his view, should only constitute a basis to resolve a doubt when such risks are still possible. In the present case, Praljak continues, the Trial Chamber indicated that he does not pose any such risk, so humanitarian circumstances should not be determinative of the matter.³⁰ Praljak further argues that no concern should be given to public relations or outreach concerns in provisional release decisions.³¹ He finally contends that, without a reasoned rationale refusing a limited period of provisional release, such a refusal must be considered punishment in violation of the presumption of innocence and that case-law infringing the rights of the accused can and should be reversed in light of the principle “*in dubio pro libertate*”.³² Praljak essentially requests the Appeals Chamber to depart from precedent, which can be done on the basis of “cogent

²⁵ See *supra*, para. 8.

²⁶ Appeal, paras 35-36 and 38.

²⁷ Appeal, paras 37 and 39.

²⁸ Response, paras 17-19.

²⁹ See *supra*, para. 5.

³⁰ Appeal, paras 40-43.

³¹ Appeal, paras 43-45.

³² Appeal, paras 46-50 and 51-55.

reasons in the interests of justice”.³³ The Prosecution responds that the jurisprudence of the Tribunal in this matter strikes a necessary balance between human rights guarantees, on the one hand, and its “specific mandate and work situation” on the other.³⁴ It emphasizes the peculiar situation of an accused in detention after a Rule 98 *bis* ruling, including his position *vis-à-vis* witnesses, victims and their families.³⁵

15. The Appeals Chamber recalls that a Trial 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. Among all of the factors to be taken into account in such an evaluation, a Chamber must consider the stage reached by the proceedings.³⁶ In circumstances where the trial proceedings are considerably advanced, in particular past the closure of the Prosecution case, the Appeals Chamber ruled that sufficiently compelling humanitarian reasons are required to be demonstrated to “tip the balance” in favour of provisional release. The Appeals Chamber finds no error in this approach and declines to exercise its authority to depart from precedent.

V. DISPOSITION

19. On the basis of the foregoing, the Appeals Chamber, Judge Güney partly dissenting, **DISMISSES** the Appeal.

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



Judge Fausto Pocar
Presiding Judge

The partially dissenting opinion of Judge Güney will be filed as soon as practicable.

Done this 16th day of December 2008,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

³³ *Kordić and Čerkez* Appeal Judgement, para. 1040; *Prosecutor v. Zoran Žigić*, Case No. ICTY-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement Delivered on 28 February 2005", 26 June 2006, para. 9.

³⁴ Response, para. 21.

³⁵ Response, paras 22-29.

³⁶ *Prić* Decision of 21 April 2008, para. 17.