

IT-03-69-AR65.6
A43-A34
30 July 2010

43
SMS



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-03-69-AR65.6
Date: 30 July 2010
Original: English

BEFORE THE DUTY JUDGE

Before: Judge Uldis Ķinis, Duty Judge
Registrar: Mr John Hocking
Decision of: 30 July 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON THE URGENT STANIŠIĆ DEFENCE REQUEST TO APPEAL THE
TRIAL CHAMBER'S 22 JULY 2010 "DECISION ON URGENT STANIŠIĆ
DEFENCE MOTION FOR PROVISIONAL RELEASE"**

Office of the Prosecutor

Mr Dermot Groome

Counsel for Jovica Stanišić

Mr Geert-Jan Alexander Knoops
Mr Wayne Jordash

Counsel for Franko Simatović

Mr Mihajlo Bakrač
Ms Vladimir Petrović

1. **I, Uldis KINIS**, 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 in accordance with Rule 28 of the Rules of Procedure and Evidence (“Rules”), am seised of the “Urgent Stanišić Defence Request to Appeal the Trial Chamber’s 22 July 2010 ‘Decision on Urgent Stanišić Defence Motion for Provisional Release’” (“Appeal”), filed on 26 July 2010, whereby Stanišić (“Appellant”), through his Counsel, appealed the “Decision on Urgent Stanišić Defence Motion for Provisional Release” (“Impugned Decision”), issued by Trial Chamber I on 22 July 2010, which denied him provisional release. The Prosecution responded on 28 July 2010, requesting that the Appeal be dismissed.¹ The Appellant filed a courtesy copy of the Reply² on 29 July 2010 at 5:46 p.m., outside of the shortened deadline which was informally communicated to the parties by the Duty Legal Officer on 27 July 2010.³ The Appellant submits that the reason for the delay was that counsel was outside the jurisdiction. In the absence of any detail of how this circumstance prevented counsel to file the Reply in a timely fashion, I am not satisfied that the Defence has shown good cause for the delay and I will not consider the Reply.

I. BACKGROUND

2. On 6 July 2010 the Appellant filed a motion seeking provisional release during the summer recess or any time deemed appropriate by the Trial Chamber (“Motion”).⁴ On 9 July 2010 the Prosecution responded, requesting the Trial Chamber deny the Motion or, in the alternative, require the Appellant to return from provisional release well before the resumption of the proceedings or, if his health should deteriorate, to return immediately.⁵ On 9 July 2010 the Tribunal’s host state filed a letter stating that it did not oppose the Motion.⁶

¹ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-AR65.6, Prosecution Response to Appeal of the Trial Chamber’s Denial of Provisional Release, 28 July 2010 (“Response”). On 26 July 2010, the Duty Legal Officer informed the parties that the Duty Judge had decided to set 28 July 2010 as the deadline to respond to the Appeal.

² *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-AR65.6, Urgent Stanišić Defence Reply to Prosecution Response to Appeal of the Trial Chamber’s 22 July 2010 “Decision on Urgent Stanišić Defence Motion for Provisional Release”, 29 July 2010 (“Reply”).

³ Upon my instruction, the Duty Legal Officer informed the parties by email at 11:29 a.m. on 27 July 2010.

⁴ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Urgent Stanišić Defence Motion for Provisional Release, 6 July 2010.

⁵ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Prosecution Response to Urgent Stanišić Defence Motion for Provisional Release, 9 July 2010.

⁶ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Letter of the Ministry of Foreign Affairs of the Kingdom of the Netherlands on Provisional Release for Mr Jovica Stanišić, 9 July 2010.

On 20 July 2010 the Appellant filed an Addendum to the Motion, with a waiver attached, whereby the Appellant waived his right to be present at trial in the event that any illness would prevent him from returning to The Hague.⁷

3. On 22 July 2010 the Trial Chamber issued the Impugned Decision. The Trial Chamber was satisfied that the Appellant, if provisionally released, would appear for trial and would not pose a danger to any victim, witness or other person.⁸ Based on the Appellant's medical history, and a number of medical reports compiled by the United Nations Detention Unit's ("UNDU") Reporting Medical Officer ("RMO"), the Trial Chamber found that "the medical condition of the [Appellant] continues to bear an unpredictable risk of deterioration".⁹ The Trial Chamber considered that a sudden deterioration of the Appellant's health outside the UNDU could affect his ability to return to The Hague for an extended period of time and therefore could result in a serious disruption of the trial proceedings, a factor strongly militating against granting provisional release.¹⁰ The Trial Chamber also considered that an anticipatory waiver of the right to be present at trial could be legally unsatisfactory in a situation where an accused is "objectively at risk of being unable to attend trial for a significant period of time."¹¹ The Trial Chamber considered that during such a period the Appellant would be in Belgrade with only a limited ability to effectively participate to the proceedings or instruct counsel which over time could call into question the voluntary nature of the Appellant's waiver.¹² Because of the possible impact that granting the Motion may have had on the future of the trial, the Trial Chamber denied provisional release to the Appellant.¹³

II. STANDARD OF REVIEW

4. An interlocutory appeal is not a *de novo* review of a Trial Chamber's decision.¹⁴ The Appeals Chamber has previously held that a decision on provisional release by the Trial

⁷ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Addendum to Urgent Stanišić Defence Motion for Provisional Release filed on 6 July 2010, 20 July 2010.

⁸ Impugned Decision, paras 6-7.

⁹ Impugned Decision, para. 8.

¹⁰ Impugned Decision, para. 9.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Impugned Decision, paras 11-12.

¹⁴ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Provisional release, 17 December 2008 (*Praljak Appeal Decision*), para. 4; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.7, Decision on Vujadin Popović's Interlocutory Appeal

Chamber under Rule 65 of the Rules is a discretionary one.¹⁵ Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision, but whether the Trial Chamber has correctly exercised its discretion in reaching that decision.¹⁶

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.¹⁷ The Appeals Chamber will only overturn a Trial Chamber decision on provisional release where it has found it to be (a) based on an incorrect interpretation of the governing law; (b) based on a patently incorrect conclusion of fact; or (c) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹⁸ The Appeals Chamber 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.¹⁹

III. APPLICABLE LAW

6. Under Rule 65 (B) of the Rules, a Trial Chamber may grant provisional release if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witnesses, 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.²⁰

7. In deciding whether the requirements of Rule 65(B) of the Rules have been 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 those relevant factors.²¹ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.²² 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

Against the Decision on Popović's Motion for Provisional Release, 1 July 2008 ("*Popović Appeal Decision*"), para. 5.

¹⁵ *Popović Appeal Decision*, para. 5; *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.

¹⁶ *Praljak Appeal Decision*, para. 4; *Popović Appeal Decision*, para. 5.

¹⁷ *Popović Appeal Decision*, para. 6.

¹⁸ *Praljak Appeal Decision*, para. 5; *Popović Appeal Decision*, para. 6.

¹⁹ *Popović Appeal Decision*, para. 6.

²⁰ *Praljak Appeal Decision*, para. 6; *Popović Appeal Decision*, para. 7.

²¹ *Popović Appeal Decision*, para. 8.

²² *Ibid.*

individual accused.²³ The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the Tribunal.²⁴

IV. SUBMISSIONS

a. The Appeal

8. The Appellant requests the Duty Judge²⁵ to reverse the Impugned Decision and order provisional release.²⁶ The Appeal is based on two grounds: (1) The Trial Chamber failed to properly consider the medical evidence and (2) the Trial Chamber failed to give sufficient weight to the Appellant's waiver of his right to be present at trial.

9. As to the first ground of appeal, the Appellant claims that no reasonable decision maker placing appropriate weight on the medical evidence could have concluded that the Appellant's medical condition continues to bear an unpredictable risk of deterioration capable of causing a serious disruption of the trial proceedings, and that this risk strongly militates against the granting of provisional release.²⁷ The Appellant avers that the medical evidence shows that any deterioration of his health would be limited to a few days of illness, and in light of the waiver, not affect the trial schedule.²⁸ He further submits that, to date, his health has not created any meaningful disruption.²⁹ According to the Appellant, it was not sufficient for the Trial Chamber to find a deterioration of his medical condition to be likely, but rather, on the basis of evidence, that this deterioration would also lead to a serious disruption of the trial.³⁰ Furthermore, the Appellant claims that the Trial Chamber disregarded the potential health benefits of provisional release as well as his right to liberty.³¹ Based on the above, the Appellant submits that the Impugned Decision is so unreasonable as to constitute an abuse of

²³ *Ibid.*

²⁴ *Ibid.*; *Prosecutor v Gotovina et al.*, Case No. IT-06-90-AR65.1, Decision on Ante Gotovina's Appeal Against Denial of Provisional Release, 17 January 2008, para. 8.

²⁵ Both the Appellant and the Prosecution addressed their submissions to the Appeals Chamber. However, during the recess period, it is the Duty Judge, pursuant to Rule 28 of the Rules, who is competent to decide appeals on provisional release and, therefore, the submissions of the parties will be treated as if they were addressed to the Duty Judge.

²⁶ Appeal, para. 20.

²⁷ Appeal, para. 13.

²⁸ *Ibid.*

²⁹ Appeal, para. 14.

³⁰ *Ibid.*

³¹ Appeal, para. 15.

discretion.³² In addition, the Appellant argues the Trial Chamber abused its discretion in denying him provisional release while granting it to Simatović, Co-Accused in the same case, absent a cogent objective basis justifying the different treatments.³³

10. The Appellant's second ground of appeal is that the Trial Chamber failed to give sufficient weight to his waiver of the right to be present at trial.³⁴ In the Appellant's submission, the Trial Chamber's approach was based on the wrong and medically unsupported premise that "any deterioration [in the Appellant's health] was likely to be of such length and severity that it would remove the [Appellant's] ability to instruct counsel or (otherwise) call into question the voluntary nature of the waiver".³⁵ The Appellant concludes that the Trial Chamber's effective dismissal of the waiver based on the premise that it might lead to lengthy delay and/or inability to instruct counsel was "inappropriate, speculative and ultimately led the Decision astray."³⁶

b. The Response

11. Regarding the first ground of appeal, the Prosecution responds that it was not unreasonable for the Trial Chamber to find that the Appellant's medical condition continues to bear an unpredictable risk of deterioration and that the Trial Chamber properly weighed this risk in denying provisional release.³⁷ It submits that the Trial Chamber is best placed to evaluate the ongoing health condition of the appellant and determine whether provisional release is appropriate.³⁸ In support of this submission, the Prosecution points out that the Trial Chamber is privy to a large volume of medical and psychiatric documentation from different experts, and lists the effort made by the Trial Chamber since the beginning of the trial to monitor the Appellant's physical and psychological condition, including appointing experts and receiving monthly, weekly and daily medical reports.³⁹

12. The Prosecution further responds that, since the re-commencement of trial on 9 June 2009 the Trial Chamber has denied all four requests for provisional release filed by the Appellant, and that in doing so, it has considered "the risks of deterioration on the possible

³² Appeal, para. 15.

³³ Appeal, para. 16.

³⁴ Appeal, paras. 17-18.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Response, para. 9.

³⁸ Response, paras 6, 10, 24.

³⁹ Response, paras 11-21.

disruption of trial proceedings and the continuity of the existing system of treatment and regular reporting by independent, court-appointed, non-treating doctors is of the essence to ensure a fair and expeditious conduct of the proceedings”.⁴⁰ It further points out that the Appellant did not impugn the last decision denying him provisional release issued on 31 March 2010,⁴¹ including the findings that the Appellant’s medical condition constantly bears an unpredictable risk of deterioration despite ongoing improvements and that a deterioration occurring outside the UNDU could result in a serious disruption of the trial proceedings.⁴² The Prosecution submits that, in denying provisional release, the Trial Chamber fully examined, and properly weighed, the totality of the circumstances, including the beneficial effects that provisional release could have on the mental state of the Appellant.⁴³

13. The Prosecution further responds that the Trial Chamber did not abuse his discretion by denying provisional release to the Appellant while granting it to his Co-Accused, but it appropriately considered the different circumstances for each Accused, which are highly distinguishable due to the logistics involved in maintaining the current reporting regime and medical treatment for the Appellant.⁴⁴

14. In relation to the second ground of appeal, the Prosecution first observes that the mere fact that a waiver was offered indicates that the Appellant contemplated the possible deterioration in his medical condition.⁴⁵ It adds that, although the waiver extends for the entire period of possible absence of the Appellant, “it is premised on the submission that any illness would be for a matter of days”, which it characterizes as illusory, “because it fails to distinguish between the occurrence of any deterioration in The Hague and the consequence of a sudden deterioration in Belgrade.”⁴⁶ In the Prosecution’s submission, the waiver does not resolve the objective risk of a significant delay in the proceedings if the Appellant is unable to return from Belgrade.⁴⁷ Lastly, the Prosecution submits that it was reasonable for the Trial Chamber to consider “the long term impact of whether the voluntary nature of the waiver

⁴⁰ Response, para. 22.

⁴¹ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Urgent Stanišić Defence Motion for Provisional Release, 31 March 2010.

⁴² Response, para. 23.

⁴³ Response, paras 25-30.

⁴⁴ Response, para. 31.

⁴⁵ Response, para. 33.

⁴⁶ Response, paras. 35, 37.

⁴⁷ Response, para. 35.

could be called into question if the [Appellant] was limited in his ability to participate in the proceedings or communicate with counsel.”⁴⁸

15. Based on the reasons set forth in the Response, the Prosecution requests the Duty Judge to dismiss the Appeal and affirm the Impugned Decision.⁴⁹

V. DISCUSSION

16. I first recall that, even if a Trial Chamber is satisfied that the Accused does not pose a flight risk or a danger to victims, witnesses or other persons, any decision to grant provisional release pursuant to Rule 65 (B) is a discretionary one. Accordingly, the first issue in this appeal is whether the Trial Chamber abused its discretion or committed a discernible error in finding that a deterioration of the Appellant’s health while on provisional release in Belgrade might prevent him from returning to The Hague for an extended period of time, thus resulting in a serious disruption of the trial proceedings. The second question is whether the Trial Chamber, in denying provisional release, failed to give sufficient weight the Appellant’s waiver of his right to be present during trial.

17. Decisions on provisional release are fact intensive, and the Trial Chamber is best placed to evaluate the Appellant’s health and determine whether provisional release is appropriate.

18. In reaching the Impugned Decision, the Trial Chamber took into account several medical reports filed by the RMO since 31 March 2010, including a report filed on 2 July 2010 that was requested by the Appellant.⁵⁰ The Trial Chamber also considered a number of additional factors both in favour and against the granting of provisional release. In favour of provisional release, the Trial Chamber considered the improvements in the Appellant’s health, the RMO’s opinion that provisional release (including travelling to Belgrade) would not increase the risk of deterioration of the Appellant’s health, and that in recent months the Appellant has made successful efforts to attend court proceedings.⁵¹ On the other hand, the Trial Chamber considered that the Appellant has experienced two episodes of problems with kidney stones since 31 March 2010, which according to the RMO “will certainly recur at

⁴⁸ Response, para. 38.

⁴⁹ Response, para. 39.

⁵⁰ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, T. 5961-5962; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, RMO Report Concerning the Health Condition of Mr Jovica Stanišić, 2 July 2010 (“2 July 2010 RMO Report”).

unpredictable moments in the future as treatment is limited by his other ailments.”⁵² The Trial Chamber also considered that in the same period the Appellant suffered an allergic reaction to one of his medicines, which was subsequently discontinued, thus resulting in the slow increase of colitis symptoms. It further considered the fact that the Appellant was unable to attend court during the week of 7 June 2010 and again on 5 July 2010.⁵³ Because the Trial Chamber took factors both for and against the granting of provisional release into consideration, I do not agree with the Appellant that the Trial Chamber failed to take the medical evidence into account, nor do I find that, in weighing such evidence, the Trial Chamber abused its discretion or committed a discernible error.

19. Regarding the second ground of appeal, I disagree with the Appellant that the Trial Chamber failed to give the Appellant’s waiver sufficient weight. In his brief, the Appellant states that he waived his right to be present at trial based on the fact that “he *might* be absent for only a handful of days”.⁵⁴ What the Appellant does not do is address the Trial Chamber’s concern about the continuing validity of a waiver should the Appellant be unable to return from Belgrade for a longer period of time due to his health. Under these circumstances, especially considering that the Trial Chamber found that the Appellant’s ability to participate in the proceedings and instruct counsel would be limited from Belgrade, it was not unreasonable to conclude that an *a priori* waiver was insufficient to resolve problems which could stem from the Appellant’s potentially prolonged absence from The Hague.

20. Lastly, the Appellant has failed to show that the Trial Chamber abused its discretion in denying him provisional release while granting it to his Co-Accused. The Appellant’s medical condition, in fact, constitutes a reasonable basis for the different treatments.

⁵¹ *Ibid.*

⁵² 2 July 2010 RMO Report, para. 5.

⁵³ *Ibid.*

⁵⁴ Appeal, para. 18.

VI. DISPOSITION

19. For the foregoing reasons, I **DISMISS** the Appeal.

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



Judge Uldis Kiris
Duty Judge

Dated this Thirtieth day of July 2010
At The Hague
The Netherlands

[Seal of the Tribunal]