



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-96-23/2-ES
Date: 21 February 2008
Original: English

THE APPEALS CHAMBER OF THE TRIBUNAL

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 21 February 2008

PROSECUTOR

v.

DRAGAN ZELENOVIĆ

DECISION ON MOTION FOR PROVISIONAL RELEASE

PUBLIC

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Julia Thibord

Counsel for Dragan Zelenović:

Mr. Zoran Jovanović

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 the “Defence Motion for Temporary Provisional Release With Annexes A and B” filed by Dragan Zelenović (“Zelenović”) on 30 January 2008 (“Motion”). The Office of the Prosecutor (“Prosecution”) filed its Response on 7 February 2008.¹ Zelenović submitted a reply on 15 February 2008.²

I. BACKGROUND

2. The Appeals Chamber rendered its Judgement on Sentencing Appeal against Zelenović on 31 October 2007, upholding the sentence of the Trial Chamber of 15 years imprisonment. Zelenović remains in the custody of the Tribunal pursuant to Rule 103(C) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), pending his transfer to the State in which he will serve his sentence. The President seized the Appeals Chamber of the Motion by Order of 11 February 2008.³

II. APPLICABLE LAW

3. By virtue of Rule 107 of the Rules, Rule 65 applies *mutatis mutandis* to applications for provisional release of a convicted accused. Rule 65(A) of the Rules provides that, once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(I) of the Rules, the Appeals Chamber may grant provisional release to a convicted person if it is satisfied that: “(i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be; (ii) the appellant, if released, will not pose a danger to any victim, witness or other person; and (iii) special circumstances exist warranting such release.” These requirements must be considered cumulatively.⁴ “Whether an applicant satisfies these requirements is to be determined on a balance of probabilities, and the fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities.”⁵

¹ Prosecution’s Response to Defence Motion for Temporary Provisional Release, 7 February 2008 (“Response”).

² Defence Motion for Filed Reply and Reply to “Prosecution’s Response to Defence Motion for Temporary Provisional Release”, 14 February 2008 (“Defence Request to File a Reply” and “Reply”).

³ Order Assigning Judges to a Case Before the Appeals Chamber, 11 February 2008.

⁴ *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Decision on Radoslav Brdanin’s Motion for Provisional Release, 23 February 2007 (“*Brdanin Decision*”), para. 5; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-A, Decision on Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007 (“*Hadžihasanović Decision*”), para. 8.

⁵ *Brdanin Decision*, quoting *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Second Defence Request for Provisional Release of Stanislav Galić, 31 October 2005, para. 3; *Hadžihasanović Decision*, para. 8.

III. DISCUSSION

4. Zelenović requests that he be granted temporary release for five days to allow him an opportunity to visit the graves of his parents.⁶ In support of his Motion, Zelenović submits that he has not had an opportunity to visit the graves of his parents and to attend memorial services for them since their deaths. His father died on 13 January 2001, his mother on 25 June 2002 and his father-in-law on 31 March 2003. At the time of their deaths, Zelenović was living in Russia and remained there until he was arrested on 22 August 2005.⁷ Following his arrest, he was transferred to Bosnia and Herzegovina on 8 June 2006 and two days later to the United Nations Detention Unit.⁸

5. Zelenović claims that it is very difficult for him to accept that his parents have died and he has been unable to visit their graves. As a religious person, he respects Orthodox rites and in accordance with his religious convictions expressed remorse for his acts and pled guilty before the Tribunal.⁹ He further makes reference to his limited financial resources, which has made it difficult for his family to visit him during his detention.¹⁰ He notes that Trial Chambers and the Appeals Chamber have granted other accused and convicted accused provisional release on compassionate grounds pursuant to Rule 65(I) of the Rules and requests that his temporary release be granted on this basis.¹¹

6. Finally, Zelenović provides a guarantee in Annex B to his Motion from the Government of Republika Srpska, “that it will organise and undertake all necessary measures during Mr. Dragan Zelenović’s stay in Foča” and ensure his return to The Hague at the expiration of his provisional release.¹²

7. In Response, the Prosecution opposes the application. It argues that Rule 65(I) of the Rules requires Zelenović to satisfy the Appeals Chamber that, if released (i) he will surrender into detention at the conclusion of the fixed period; (ii) he will not pose a danger to any victim, witness or other person; and (iii) that special circumstances exist that warrant release.¹³ It further states that, where a convicted person seeks provisional release pending appeal, the Tribunal’s jurisprudence recognises that special circumstances exist only when “there is acute justification, such as a medical need or a memorial service for a near family member”.¹⁴ It argues that no different test should be

⁶ Motion, paras. 10, 11.

⁷ *Ibid.*, para. 9; Reply, para. 4.

⁸ Motion, para. 8; Reply, para. 5.

⁹ Motion, para. 11.

¹⁰ *Ibid.*, paras 12-13.

¹¹ *Ibid.*, para. 14; see also Reply, para. 8.

¹² Motion, para. 15; see also Reply, paras 6-7, 9.

¹³ Response, para. 3.

¹⁴ *Ibid.*, citing *Brdanin* Decision, para. 6.

applied where a convicted person seeks release following the conclusion of his or her appeal proceedings.¹⁵

8. The Prosecution also avers that Zelenović has failed to demonstrate “acute justification” for his temporary release. It points out that he expresses his desire to visit the graves prior to the enforcement of his 15-year sentence, but there is no planned religious commemoration that he seeks to attend.¹⁶ Further, he was unable to attend the funerals or the memorial services of these family members because at the time of these events “he was a fugitive from justice, living under an [*sic*] false name in Russia after fleeing Foča in 2000 or 2001 to avoid detection and arrest for the crimes to which he has now pleaded guilty and been convicted for”.¹⁷ The Prosecution points out that “Zelenović was neither sufficiently grief-stricken nor driven by religious conviction to return to Foča to attend the memorial services or visit the graves of these family members during the period between his absconding from justice and his arrest and transfer to the Tribunal in 2006.”¹⁸

9. The Prosecution further claims that Zelenović represents a significant flight risk. The appeal process having been exhausted, he is awaiting transfer for the enforcement of his 15-year sentence. He had previously spent 5 years evading arrest and now seeks to return to Foča, without providing any specific details of the terms of his provisional release. The Prosecution notes the guarantees provided by the government of Republika Srpska, but refers to the escape of Radovan Stanković from custody while imprisoned in Foča. It argues that the risk of flight by Zelenović militates strongly against allowing his temporary provisional release.¹⁹

10. The Prosecution further emphasises that Zelenović was convicted for personally committing nine rapes, eight of which qualified as torture, and for participating as a co-perpetrator in two other instances of rape. These acts were committed against victims that remain in the Foča area, and his temporary release may exacerbate the suffering of these victims and their families. It may also undermine public confidence in the administration of international justice. The Prosecution argues that these matters should be taken into account by the Appeals Chamber in determining whether provisional release is appropriate.²⁰

11. Having considered the Motion, the Response, and the Reply, the Appeals Chamber is not persuaded that Zelenović has satisfied any of the requirements of Rule 65(I) of the Rules. First, the Appeals Chamber is not satisfied that Zelenović will surrender into detention on the expiration of

¹⁵ Response, para. 3.

¹⁶ *Ibid.*, para. 4.

¹⁷ *Ibid.*, para. 5.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, para. 7.

²⁰ *Ibid.*, para. 8.

the grant of temporary release sought. While he does provide guarantees from Republika Srpska, the Appeals Chamber notes the close proximity of Foča to the border of Serbia as well as the inability of the authorities of Republika Srpska to take any effective enforcement action should Zelenović manage to cross that border, due to the lack of extradition agreements between Serbia and Bosnia and Herzegovina. The Appeals Chamber further observes that there is an increased incentive to abscond once proceedings have been completed and the convicted person is awaiting transfer to a State in which his sentence will be served.

12. The Appeals Chamber is also not convinced that, if released, Zelenović will not pose a danger to any victims or witnesses. As the Prosecution points out, Zelenović was convicted for personal commission of particularly heinous crimes and his victims remain in the area of Foča. Indeed, Zelenović has provided nothing in his Motion or his Reply to satisfy the Appeals Chamber that his provisional release would not be to their detriment.

13. Finally, the Appeals Chamber finds that Zelenović has demonstrably failed to establish that special circumstances, or “acute justification”, exist to warrant this grant of provisional release. The fact that Zelenović has not previously visited the graves of these family members is partly to be imputed to the circumstance that he was a fugitive from justice residing in another country, under a false name. Zelenović committed heinous crimes and sought for a number of years to evade international justice. His eventual surrender to the Tribunal was a result of his arrest by the authorities of the state in which he was temporarily residing and not an exercise of free will. While the Appeals Chamber acknowledges that he pleaded guilty and cooperated with the Prosecution, this factor alone is also insufficient to establish special circumstances.

IV. DISPOSITION


14. In light of the foregoing, the Appeals Chamber

GRANTS the Defence Request to File a Reply;

DISMISSES the Motion.

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

Dated this 21st day of February 2008
At The Hague,
The Netherlands.



Fausto Pocar, Presiding Judge

[Seal of the Tribunal]