



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-96-21-AR72.2

Date: 15 October 1996

Original: English and French

**BEFORE A BENCH OF THE APPEALS CHAMBER**

**Before:** Judge Antonio Cassese, Presiding  
Judge Haopei Li  
Judge Jules Deschênes

**Registrar:** Mrs. Dorothee de Sampayo Garrido-Nijgh

**Decision of:** 15 October 1996

**PROSECUTOR**

v.

**ZEJNIL DELALIĆ  
ZDRAVKO MUCIĆ also known as "PAVO"  
HAZIM DELIĆ  
ESAD LANDŽO**

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**DECISION ON APPLICATION FOR LEAVE  
TO APPEAL (PROVISIONAL RELEASE)**

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**The Office of the Prosecutor**

**Mr. Eric Ostberg  
Ms. Teresa McHenry**

**Counsel for the Accused**

**Ms. Edina Rešidović for Zejnil Delalić**

## I

**APPLICATION FOR LEAVE TO APPEAL**

1. In an application for leave to appeal dated 8 October 1996, and filed in the Registry on the same day, the accused Zejnil Delalić seeks redress from the Decision on the Motion for Provisional Release filed by the Accused Zejnil Delalić rendered by Trial Chamber II on 25 September 1996.

2. The application for leave to appeal is made pursuant to Rule 72 B(ii) of the Rules of Procedure and Evidence, which reads:

(B) The Trial Chamber shall dispose of preliminary motions in *limine litis* and without interlocutory appeal, save

[...]

(ii) in other cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon serious cause being shown, within seven days following the impugned decision.

3. On the basis of the above, the Applicant seeks to challenge the Decision of 25 September 1996, on the following grounds:

- i) Error in fact; and
- ii) Error in law.

4. With respect to the challenge of error in fact, the Applicant argues that the Trial Chamber did not accurately evaluate the reasons presented in both written and oral pleadings with respect to the notion of "exceptional circumstances" which would allow for provisional release as set out in Rule 65(B) of the Rules of Procedure and Evidence. Rule 65 (B) reads:

(B) Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will

appear for trial and, if released, will not pose a danger to any victim, witness or other person.

5. With respect to “exceptional circumstances”, the Applicant asserts that he has unambiguously demonstrated that he had neither authority over the Čelebići camp nor did he hold any “superior” function in the position of coordinator. Further, the Applicant contends that the Trial Chamber did not take into consideration various statements which would demonstrate that he did not retain superior authority. This the Applicant considers as “exceptional circumstances” which would allow for provisional release.

6. To bolster his argument, the Applicant asserts that detention is legal only as long as there exists “reasonable suspicion”, and that in this case, in light of the statements which have been presented by the Defence, no such suspicion exists.

7. The Applicant then addresses the issue of “risk of flight”. In this regard he contends that the Trial Chamber erred in concluding that he would not appear again before the Tribunal if released provisionally. The Applicant goes on to explain the reasons why he had maintained false personal identification documents.

8. Furthermore, the Applicant claims that, if released, he would pose no danger to either victims, witnesses or other persons.

9. Finally, as a second challenge, that of error in law, the Applicant avers that the Trial Chamber erroneously applied the law concerning the conditions of detention. In this regard, the Applicant mentions: the right not to be detained as a general rule; the right that detention be limited to the shortest time possible; and the right to be considered for release in cases where the death penalty is not at issue.

## II

**PROSECUTION RESPONSE**

10. In her Response, dated 11 October 1996, the Prosecutor contends that “serious cause” has not been shown by the Applicant and hence that the application for leave to appeal should be refused. The Prosecutor submits that “pre-trial detention is an issue that must be confined to the discretion of the Trial Chamber, and may not be reviewed absent a showing of abuse of that discretion or misapplication of a legal principle”, and that such has not been demonstrated by the Applicant. The Prosecutor points out that the application raises factual issues which are for the most part immaterial to the issue of provisional release under Rule 65 of the Rules of Procedure and Evidence but which bear on the very issue of guilt or innocence which it is the purpose of a trial to determine.

## III

**SCOPE OF RULE 72(B)(ii)**

11. This Rule has now been applied in the present case in the Decision of this Bench of 14 October 1996 refusing to grant leave to appeal from the Decision of the Trial Chamber denying the Accused’s motion for a separate trial. As this Bench noted, a three-fold test of cumulative conditions is to be applied whenever an application for leave to appeal under Rule 72(B)(ii) is concerned:

- (1) Does the application relate to one of the issues covered by Rule 73 (A)(ii),(iii),(iv), (v).?

(2) Is the application frivolous, vexatious, manifestly ill-founded, an abuse of the process of court or so vague and imprecise as to be unsusceptible of any serious consideration?

(3) Does the application show a serious cause, namely does it either show a grave error in the decision which would cause substantial prejudice to the accused or is detrimental to the interests of justice or raise issues which are not only of general importance but are also directly relevant to the future development of trial proceedings, in that the decision by the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber?

#### IV

### **DISCUSSION**

12. Applying the first of these tests, it is readily apparent that the application of Delalic praying for his provisional release under Rule 65 of the Rules of Procedure and Evidence of the Tribunal, does not relate to any one of the issues covered by Rule 73 (A)(ii),(iii),(iv),(v), and is therefore not by any stretch of the imagination within the Appeals Chamber's interlocutory jurisdiction.

13. True, it so happens that this application was made at the same time as two others which do qualify as preliminary under Rules 72 and 73: a motion for separate trial and a motion raising defects in the form of the indictment. But that coincidence does not make of the application for provisional release a motion under Rules 72 and 73. It is true that it has been propounded at the outset of the case, but that does not make it a "preliminary motion" within the economy of the Rules. Indeed it could be made at any moment during the course of the proceedings. But it does not come within the ambit of Rules 72 and 73 and does not carry with it a built-in right of appeal.

14. As stated in the aforementioned Decision of 14 October 1996, the three conditions which must be met for leave to appeal to be granted under Rule 72(B)(ii) are cumulative. Since this application does not fulfil the first condition, it must be refused. It is not, however, without interest to find that, had it been necessary to reach the third test, the Decision would again have gone against the Accused. The reasons advanced by the Accused in support of his application for leave to appeal are essentially the same as those he had put forward in support of his motion for provisional release and fall to be determined by the Trial Chamber. No serious new ground has been propounded of such a nature as would undermine the Decision of the Trial Chamber and could qualify as "serious cause" herein.

15. Therefore, the matter is not one in respect of which the Appeals Chamber may entertain an interlocutory appeal.

## V

**DISPOSITION**

The Bench of the Appeals Chamber,

Ruling unanimously,

For the above reasons,

Pursuant to Rule 72(B)(ii) of the Rules of Procedure and Evidence,

REJECTS the application of Accused Delalic for leave to appeal the Decision of 25 September 1996 denying his motion for provisional release.

DONE in English and French, both versions being authoritative.



Antonio Cassese  
President

Dated this 15th day of October 1996

At The Hague

The Netherlands