

**UNITED
NATIONS**

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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-AR72.4

Date: 22 November 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: 22 November 1996

PROSECUTOR

v.

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

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

The Office of the Prosecutor

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

Counsel for the Accused

Mr. Salih Karabdić for Hazim Delić

I

APPLICATION FOR LEAVE TO APPEAL

1. In an application filed with the Registry on 5 November 1996, the accused, Hazim Delić, seeks leave to appeal from the "Decision on Motion for Provisional Release filed by the accused Hazim Delić" ("*Decision*"), rendered by Trial Chamber II on 24 October 1996 in the case of *the Prosecutor v. Zejnil Delalić, Zdravko Mucić, also known as "Pavo", Hazim Delić and Esad Landžo* (IT-96-21-T). In the *Decision*, the Chamber denied the accused's motion for provisional release under Rule 65 of the Rules of Procedure and Evidence ("the Rules").

2. The application for leave to appeal is made pursuant to Rule 72 B(ii) of the Rules, 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. In his application, the Applicant argues that, under international law, there exists a fundamental right to liberty, and that this right must be guaranteed by judicial procedures which ensure that effective remedies exist to protect that right. It is argued that one such judicial remedy is the right to appeal which is available to an accused when his right not to be deprived of his liberty is violated.

4. The Applicant states that the Tribunal, being governed by international law, should provide for the right to appeal on decisions regarding detention. The Applicant asserts that the appellate proceedings as set out in Article 25 of the Statute of the Tribunal are meant to include not only the right to appeal upon conviction but also the right to appeal upon detention.

5. Thus concluding that there is a right to appeal upon detention, the Applicant challenges the procedure of the Tribunal pursuant to Rule 72 B(ii) of the Rules whereby an applicant, in order to appeal a Decision regarding provisional release, must first obtain leave to appeal from a Bench of three Judges, and may not appeal as a right before the full Appeals Chamber. The Applicant contends that the Statute of the Tribunal does not provide for the establishment of such a Bench and that the Judges of the Tribunal, having constituted such a Bench through the Rules of Procedure and Evidence, have acted *ultra vires*. The Applicant contends that the power to constitute such a Bench lies solely with the United Nations Security Council by way of amending the Statute of the Tribunal.

6. The Applicant further avers that leave to appeal under Rule 72(B)(ii) should not be limited to those matters specifically enumerated in Rule 73(A). He submits that the word "include" in Rule 73(A) demonstrates that the list of preliminary motions enumerated under 73(A) is not exhaustive.

7. The Applicant thus argues that the Rules of Procedure and Evidence contravene various international instruments by not allowing for the right to appeal upon detention as of right and that "serious cause", as per Rule 72 B(ii) of the Rules of Procedure and Evidence, has been shown, justifying the granting of leave to appeal.

II

PROSECUTION RESPONSE

8. The Prosecutor filed her reply to the Application on 11 November 1996. In the "Prosecution Response to Delić's Application for Leave to Appeal the Decision of the Trial Chamber denying Motion for Provisional Release" ("*Prosecution Response*"), the Prosecutor notes, first of all, that the accused's Application does not fulfil the first condition of the three-fold test of cumulative conditions adopted by the Bench of the Judges of the Appeals Chamber in their Decision in the *Delalić* case of 14 October 1996, and, therefore, applying that test, the Application must fail.

9. Addressing, nonetheless, the substantive arguments raised in the Application, the Prosecutor submits, as a general principle, that “absent an erroneous application of law or an abuse of discretion, the decision of the Trial Chamber must be respected”. She avers that no such misapplication of the law or abuse of discretion in the Trial Chamber’s Decision has been demonstrated by the Applicant, and hence that no “serious cause” justifying the granting of leave to appeal has been shown.

10. The Prosecutor rebuts the Applicant’s claim that international human rights law entitles the Applicant to appeal the Trial Chamber’s Decision on Provisional Release by arguing that the guarantees contained in the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms are incorporated in the Statute and Rules of the Tribunal, and that the Trial Chamber’s review of detention under Rule 65 of the Rules of Procedure and Evidence satisfies the requirement of those human rights instruments that there be “an initial expeditious review, by a detached and objective judicial officer, of the deprivation of liberty and the necessity of continuing confinement”. *Prosecution Response* at p.3. The Prosecution argues that, “No other ‘generally proclaimed right of appeal’ against a decision on deprivation of liberty can be found in international law”. *Id.* at p.3.

11. Finally, the Prosecutor, responding indirectly, it would seem, to the Applicant’s claim that leave to appeal under Rule 72(B)(ii) should not have been limited by the Bench of the Appeals Chamber to those matters specifically enumerated in Rule 73(A), argues that, since the accused “has no further rights under international law”, the Tribunal “is free to shape its appellate jurisdiction as it sees fit”. *Id.* at p.3.

III

SCOPE OF RULE 72(B)(ii)

12. Rule 72(B)(ii) was first applied in the “Decision on Application for Leave to Appeal (Separate Trials)” of this Bench on 14 October 1996 regarding the accused Zejnil Delalić. 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

13. Applying the first of these tests, it is apparent that the application of Hazim Delić requesting provisional release, pursuant to Rule 65, does not relate to any one of the issues covered by Rule 73 (A)(ii),(iii),(iv),(v), and is therefore not within the interlocutory jurisdiction of Appeals Chamber.

14. Nevertheless, since the Applicant raises a number of fundamental issues, notably the right to liberty under international law and the legality of the Rules of Procedure and Evidence adopted by the Judges of the Tribunal, the Bench considers it proper to respond to the arguments raised in the Application.

15. The issues raised by the Applicant shall be dealt with under the following headings: (1) the right under international law to an effective remedy for a violation of a fundamental human right; (2) the scope of any "right to appeal" under international law; (3) the legality of

Rule 72(B)(ii) and its establishment of a Bench of Judges to entertain applications for leave to appeal; and (4) the interpretation of Rule 72(B)(ii).

(1) the right under international law to an effective remedy for a violation of a fundamental human right

16. The right to liberty is without question a fundamental human right. The Applicant has cited a number of international human rights instruments in this connection, but the proposition is axiomatic. The right also entails the right to an effective remedy for deprivation or violation of that right.

17. The mistake which the Applicant makes, however, is to consider that the Trial Chamber, by denying the motion for provisional release, has violated the Applicant's right to liberty and that the Applicant is therefore entitled to an effective judicial remedy for that violation. The correct analysis is that the Trial Chamber *is the effective judicial remedy* for any alleged violation of the right to liberty. By applying to the Trial Chamber, the Applicant exercises his right to challenge the lawfulness of his detention and deprivation of liberty. The word "effective" does not mean that the Application has to *succeed*; this would be a nonsense. It is enough that the competent judicial authority reviews the position in accordance with the appropriate norms and human rights standards, which the Trial Chamber has done quite properly.

(2) the scope of any "right to appeal" under international law

18. It follows from this that, to the extent that the Applicant bases his right to appeal on a right to an effective judicial remedy, the argument is ill-founded. The Applicant has, however, also referred to a substantive right to review which is to be found in Article 14(5) of the International Covenant on Civil and Political Rights ("ICCPR"), which reads:

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

19. It is clear, however, from the plain words of this Article, that the right to review in question applies only to *conviction and sentence*, not to provisional release or other

interlocutory matters. This substantive provision is, in any case, reproduced in the Tribunal's Statute which also provides for the right to appeal from conviction (Article 25). Although the Statute is silent on the question of appeal from sentence, the Judges sitting in plenary considered that such a right to appeal was to be implied and so Rule 108(A) explicitly provides for appeal from "judgement or sentence". Hence the substantive guarantees contained in Article 14(5) of the ICCPR are also guaranteed in the Tribunal's proceedings.

(3) the legality of Rule 72(B)(ii) and its establishment of a Bench of Judges to entertain applications for leave to appeal

20. Paradoxically, while applying for leave to appeal from the Bench, the Applicant also challenges the legality of establishing such a Bench in the first place. The Applicant considers that the Appeals Chamber can only sit as a Chamber of five judges and there is no authority for a three-member panel.

21. The Applicant's assertion that the appellate proceedings as set out in Article 25 of the Statute of the Tribunal are meant to include also the right to appeal upon detention cannot be sustained by the express provisions of that Article. As the Appeals Chamber has noted (See "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" in the *Tadić* case (IT-94-1-AR72), paras 4 -5)), Rule 72 has *broadened* the right to appeal from the very limited right to appeal provided for in the Statute. Rule 72 has thus enhanced and strengthened the judicial rights of the accused (and, consequently, those of the Prosecutor, on account of the principle of "equality of arms"). Since they introduced *ex novo* interlocutory appeal, the Judges had the authority to lay down conditions for its use, notably by providing the "filter mechanism" of Rule 72(B)(ii) for appeals other than those concerning jurisdiction. This "filter mechanism" was set up in the interest of good and expeditious administration of justice, namely for the purpose of promptly rejecting abusive interlocutory appeals while promptly admitting admissible interlocutory appeals. The Judges also had the authority to lay down in their jurisprudence the test to be applied for granting leave to appeal under Rule 72(B)(ii), which brings us to the next point.

(4) the interpretation of Rule 72(B)(ii).

22. Without explicitly mentioning the Bench's Decision in the *Delalić* case ("Application for leave to appeal (Separate Trials)"), where the Bench laid down a three-fold test for the granting of leave to appeal, the Applicant nevertheless indirectly challenges the first limb of that test when he argues that: "The interlocutory appeal according to Rule 72(B)(ii) cannot be limited only to objection mentioned in the Rule 73(A)(ii),(iii),(iv) and (v)". He bases his argument on the word, "include" in Rule 73(A), which "shows that the list of preliminary motions enumerated in that sub-Rule does not exclude the possibility of some other preliminary motions". The Applicant is quite right to consider that Rule 73(A) does not preclude the accused from bringing motions other than those specifically mentioned in Rule 73(A). What is significant about the motions mentioned in Rule 73(A), however, is that they must, according to Rule 73(B), be brought within sixty days after the accused's initial appearance, and, in any case, before the hearing on the merits, indicating that they are important preliminary matters which must be brought at an early stage. It was for this reason that the Bench considered that only those motions should be subject to possible interlocutory appeal under Rule 72(B)(ii). Provisional release, on the other hand, is not by its nature an application which must be brought prior to trial and a matter which is therefore essentially preliminary. As the Bench remarked in the *Delalić* (provisional release) application for leave to appeal, an application for provisional release can indeed be brought at any time.

23. For good measure, it should be added that, in considering whether leave to appeal should be granted, the Bench should not lose sight of the Decision itself which is challenged. Its objective merits should weigh heavily in the balance and should not be interfered with light-heartedly.

24. In the instant case, Trial Chamber II has quite fairly set out and analysed the various arguments advanced by Delić and has disposed of them convincingly. The Applicant has failed to show any serious ground of complaint against either the discussion or the disposition of his motion for provisional release.

25. Indeed the Applicant has not even alleged, still less established, either that the Trial Chamber misdirected itself on the law or misapprehended the factual underpinnings of his motion for release.

26. For these reasons, the Bench considers that the Applicant has not demonstrated "serious cause" within the meaning of Rule 72(B)(ii) of the Rules of Procedure and Evidence and leave to appeal must therefore be refused.

V

DISPOSITION

The Bench of the Appeals Chamber,

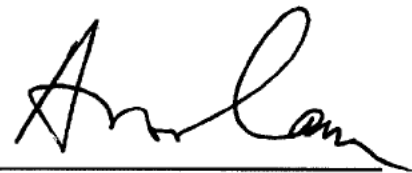
Ruling unanimously,

For the above reasons,

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

REJECTS the application of Accused Hazim Delić for leave to appeal the Decision of 24 October 1996 denying his motion for provisional release.

DONE in English and French, both versions being authoritative.



Antonio Cassese
President

Dated this 22nd day of November 1996
At The Hague
The Netherlands