IT-02-53-AR65
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UNITED
NATIONS

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: IT-02-53-AR65

Date: 18 April 2002

Original: English

BEFORE A BENCH OF THE APPEALS CHAMBER

Before: Judge David Hunt, Presiding
Judge Mehmet Güney
Judge Asoka de Zoysa Gunawardana

Registrar: Mr Hans Holthuis

Decision of: 18 April 2002

PROSECUTOR

v

Vidoje BLAGOJEVIĆ
Dragan OBRENOVIĆ
Dragan JOKIĆ

DECISION ON APPLICATION BY DRAGAN JOKIĆ FOR LEAVE TO APPEAL

Counsel for the Prosecutor:

Mr Norman Farrell
Mr Peter McCloskey

Counsel for the Applicant:

Mr Miodrag Stojanović and Ms Cynthia Sinatra for Dragan Jokić

1. On 28 March 2002, an application for provisional release made by Dragan Jokić (the "Applicant") was refused by Trial Chamber II ("Trial Chamber").[1] He has now sought leave to appeal from that refusal.[2]

2. Rule 65(D) of the Rules of Procedure and Evidence ("Rules") requires applications for leave to appeal from a decision to grant or refuse provisional release to be filed within seven days of the impugned decision being filed. That time expired on 4 April 2002. The date of filing is the date upon which the document is placed in the custody of the Tribunal's Registry,[3] which is open to receive documents until 5.30 pm.[4] The Application was sent to the Registry by the Applicant's co-counsel (who practises in Texas, USA) by fax at 1419 local time on 4 April, according to the time imprint in its header. However, at that particular time, Texas was eight hours behind The Hague, and the fax was received at The Hague after the Registry had closed on 4 April. In accordance with the usual practice for documents received by fax after the Registry is closed, the Application was not filed until the following day, 5 April, one day out of time. Although co-counsel should have been aware of the time difference and made allowance for it, the situation is one in which it would be appropriate for the Appeals Chamber to recognise the application as having been validly filed on 5 April.[5]

3. Rule 65(D) provides that leave to appeal may be granted by a Bench of three Judges of the Appeals Chamber "upon good cause being shown". Good cause will have been shown if the applicant for leave satisfies the Bench that the Trial Chamber "may have erred" in making the impugned decision.[6]

4. The Trial Chamber dismissed the application for provisional release upon the basis that it was "not satisfied with the guarantees provided", without considering what it described as the "other prerequisites of Rule 65".[7] The Applicant has argued that, insofar as it was necessary to provide guarantees, he had provided such a guarantee from the Government of Republika Srpska.[8] There are therefore two issues raised in the leave application:

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1 Decision on Request for Provisional Release of Accused Jokić, 28 Mar 2002 ("Trial Chamber Decision").
2 Dragan Jokić's Application for Leave of Court to Appeal Denial of Provisional Release, 3 April 2002 ("Application").
3 Directive for the Registry – Judicial Department – Court Management and Support Services, 1 Mar 1997 (IT/121), Article 25.3.
4 *Ibid*, Article 27.1.
5 Rule 127(A)(ii).
6 *Prosecutor v. Brđanin and Talić*, IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 Sept 2000 ("*Brđanin* Appeal Decision"), p 3.
7 Trial Chamber Decision, par 32.
8 Application, pars 9-13.

(i) Is it a prerequisite to obtain provisional release for an applicant to provide a guarantee from a governmental body that he will appear for trial?

(ii) If so, is a guarantee from the Government of Republika Srpska valid for that purpose?

5. The prosecution did not file a response to the application for leave to appeal. It had informed the Trial Chamber that the Applicant, when interviewed as a suspect, had offered to surrender should an indictment be issued, that he had voluntarily surrendered to the authorities immediately upon request, that it did not believe that he presented a serious flight risk and that it did not have any reason to believe that he presented a danger to any victim, witness or other person.[9]

6. In a reserved decision, the Trial Chamber held that "guarantees have to be provided '*by the State to which the accused seeks to be released*'".[10] No further explanation was given for this ruling, which assumed that such a guarantee was a "prerequisite" of Rule 65. The words in italics appear in Rule 65(B) in this context:

> Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard 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.

The words quoted by the Trial Chamber were inserted in that Rule in December 2001. Previously, the Trial Chamber only had the obligation to hear the host country (The Netherlands). The words were inserted in order to reflect the emerging practice of Trial Chambers to hear evidence from the governmental body in the area to which the applicant would be released if successful in his application.

7. Rule 65(B), however, requires an applicant for provisional release to satisfy the Chamber to which he has applied of only two matters: (i) that he will appear for trial, and (2) that, if released, he will not pose a danger to any victim, witness or other person.[11] The obligation is placed upon the Trial Chamber to give both the host country and the State to which the accused seeks to be released "the opportunity to be heard". There is no reference in Rule 65(B), or elsewhere in Rule 65, to an obligation upon the accused, as a prerequisite to

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[9] Prosecution Response to Request for Provisional Release for Accused Jokić, 20 Mar 2002, p 2; Oral hearing of application for provisional release, 21 Mar 2002, Transcript, p 67.

[10] Trial Chamber Decision, par 24. The italics and the underlining appear in the Trial Chamber Decision.

[11] *Brđanin* Appeal Decision, pp 2-3; *Prosecutor v Krajišnik*, IT-00-38&40-AR73.2, Decision on Interlocutory Appeal by Momčilo Krajišnik, 26 Feb 2002, par 21 (footnote 38).

obtaining provisional release, to provide guarantees from that State, or from anyone else, that he will appear for trial.

8. It is nevertheless usual, and it is certainly advisable, for an applicant for provisional release to provide such a guarantee from such a governmental body, in order to satisfy the Trial Chamber that he will appear for trial. That is because the Tribunal has no power to execute its own arrest warrant upon an applicant who is in the territory of the former Yugoslavia in the event that he does not appear for trial, and it needs to rely upon local authorities within that territory or upon international bodies to effect arrests on its behalf. Account must be taken of those circumstances in applying internationally recognised standards relating to the release of persons awaiting trial in the Tribunal.[12] Rule 65(C) permits the Chamber to impose conditions upon the release of an accused "to ensure the presence of the accused for trial", and frequently the production of a guarantee from the relevant governmental body is imposed as such a condition. But it is not a prerequisite.

9. The Trial Chamber ruled that the reference to "State" in the words quoted from Rule 65(B) did not include Republika Srpska, as it had "to be regarded only as an entity within the State of Bosnia and Herzegovina".[13] The Trial Chamber justified this assertion by references to the Constitution of Bosnia and Herzegovina and a decision of the Constitutional Court of that State.[14] It did not refer to Rule 2, which defines the word "State" when used in the Rules as:

> A State Member or non-Member of the United Nations or a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not.

The Constitution of Bosnia and Herzegovina to which the Trial Chamber referred states that the entities (including Republika Srpska) have the responsibility to maintain civilian law enforcement agencies in order to provide a safe and secure environment for all persons in their respective jurisdictions.[15] The Bench is able to take judicial notice of evidence given in numerous cases before the Tribunal that the entity of Republika Srpska does indeed exercise governmental functions within its territory, including the police powers of arrest.[16] The Trial Chamber in the present case had before it a letter from the Minister Counsellor – Liaison Officer for Republika Srpska to the Tribunal in The Hague, in which it was made clear that

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[12] *Brđanin* Appeal Decision, p 3.
[13] Trial Chamber Decision, par 25.
[14] *Ibid*, pars 26-27.
[15] Annex 4 to the Dayton Peace Accords, Article III.2(c), Responsibilities of the Entities.
[16] See, for example, *Prosecutor v Brđanin & Talic*, Decision on Motion by Momir Talić for Provisional Release, 28 Mar 2001, pars 9-14.

the State of Bosnia and Herzegovina did *not* exercise such powers in the territory of Republika Srpska and that the government of Republika Srpska *was* the appropriate authority to give a guarantee.[17] The letter referred the Trial Chamber to three cases in which other Trial Chambers had accepted guarantees from Republika Srpska and granted provisional release. The Trial Chamber did refer to the "practical difficulties arising from the gap between constitutional and factual situations",[18] but it declined (without explanation) to follow those previous decisions.

10. In both respects, the Bench is satisfied that the Trial Chamber "may have erred" in refusing the application for provisional release upon the basis that a guarantee was a prerequisite to obtaining such relief and that a guarantee from Republika Srpska was not valid for that purpose. Accordingly, good cause has been established for the grant of leave to appeal from the Trial Chamber's refusal. Whether any guarantee should be required as a condition of granting provisional release in the particular circumstances of the present case, and (if it is) whether a guarantee from Republika Srpska should be accepted as sufficient (rather than merely valid) are matters for argument at a later stage. Leave to appeal will be granted.

Disposition

11. For these reasons –

(i) The application for leave to appeal is recognised as having been validly filed on 5 April 2002.

(ii) Leave to appeal from the Trial Chamber's Decision refusing provisional release is granted.

The parties are required to comply with the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, pars 7-9.[19]

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

Dated this 18th day of April 2002,
At The Hague,
The Netherlands.

David Hunt

Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

[17] Trial Chamber Decision, par 8; the full text of the letter is Exhibit "A" to the Application.
[18] Trial Chamber Decision, par 28.
[19] 7 Mar 2002 (IT/155 Rev 1).