



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-95-14/2-A
Date: 19 April 2004
Original: English

IN THE APPEALS CHAMBER

Before: Judge Wolfgang Schomburg, Presiding
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision of: 19 April 2004

PROSECUTOR

v.

Dario KORDIĆ & Mario ČERKEZ

DECISION ON DARIO KORDIĆ'S REQUEST FOR PROVISIONAL RELEASE

Counsel for the Prosecutor:

Mr. Norman Farrell
Ms. Helen Brady

Counsel for the Defence:

Mr. Mitko Naumovski, Mr. Turner T. Smith and Mr. Stephen M. Sayers for Dario Kordić
Mr. Božidar Kovačić and Mr. Goran Mikulić for Mario Čerkez

I. Background

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991 ("International Tribunal") is seized of "Dario Kordić's Motion for Provisional Release on Compassionate Grounds" filed by counsel for Dario Kordić ("Defence") on 2 April 2004 ("Request"), pursuant to Rule 65(I) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). Following an oral granting of an extension of time¹, the Prosecution responded on 16 April 2004.² The Defence replied on 19 April 2004.³

2. The question before the Appeals Chamber is whether the Request meets the requirements set out in Rule 65(I) of the Rules for granting provisional release.

3. On 26 February 2001, Dario Kordić was sentenced to 25 years imprisonment by Trial Chamber III. The Appeals Chamber is currently seized of the Defence and Prosecution appeals against the Trial Chamber's judgment.

II. Applicable Law

4. Rule 65 (I) provides that:
 - (I) Without prejudice to the provisions of Rule 107, the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period 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.

The provisions of paragraphs (C) and (H) shall apply *mutatis mutandis*.

The aforementioned Rules 65(C) and (H) provide, respectively, as follows:

¹ See *Prosecutor v. Dario Kordić & Mario Čerkez*, "Prosecution's Motion for Extension of Time to Respond to Dario Kordić's Motion for Provisional Release", 7 April 2004, and, in the same case, "Dario Kordić's Response to Prosecution's 7 April 2004 Motion for Extension of Time", 8 April 2004.

² *Prosecutor v. Dario Kordić & Mario Čerkez*, "Prosecution's Response to Dario Kordić's Motion for Provisional Release", 16 April 2004 (filed confidentially).

³ *Prosecutor v. Dario Kordić & Mario Čerkez*, "Dario Kordić's Reply to 16 April 2004 Response to his Motion for Provisional Release on Compassionate Grounds", 19 April 2004 (filed confidentially).

- (C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others. [...]

III. Submission of the Parties and Discussion

5. In the Request, the Defence asks the Appeals Chamber to grant Dario Kordić a five-day provisional release from custody on compassionate grounds in order to allow him to visit his mother who is in extremely poor health and whose death he believes is imminent. For this purpose, the Defence submits medical reports from three specialists, confirming, *inter alia*, that Dario Kordić's mother has suffered three serious cerebral strokes since 1994.

6. The Defence recalls that Dario Kordić has been in the custody of the International Tribunal for the last six and a half years and that his behavior throughout the duration of his imprisonment has been exemplary. It points out that any provisional or temporary release shall be subject to strict guarantees undertaken by the Republic of Croatia and to any other conditions deemed necessary by the Appeals Chamber. For this purpose, the Defence has submitted an undertaking by the Croatian Minister of Justice, indicating that the Republic of Croatia is prepared to make the necessary arrangements to guarantee that during his release, Dario Kordić will be supervised at all times, that he will not pose any danger to any victim, witness, or other person, and that he will be returned immediately to the custody of the International Tribunal following his compassionate visit.

7. The Prosecution objects to the Request, *inter alia*, on the ground that there is a risk of flight because Dario Kordić has been convicted of extremely serious offences and that he was the senior political figure in Central Bosnia. The Prosecution further adds that after the hearing of the appeal, the Appeals Chamber will be in a better position to assess the strength of both appeals, and could receive further information as to the condition of his mother, particularly insofar as it has substantially worsened since 1994.

8. In accordance with the criteria set out in Rule 65(I) for granting of provisional release, the Appeals Chamber will first determine whether it is satisfied that, if released, Dario Kordić will not flee. The Appeals Chamber notes that Dario Kordić has been sentenced to 25 years imprisonment. This factor, notwithstanding the guarantees offered by the Republic of Croatia, creates a strong incentive to flee because, although he has already been in detention for more than six years, the remainder of his sentence would still be considerable if the sentence would be confirmed in whole

or in part. The Appeals Chamber notes that the sentence could be reduced as result of Dario Kordić's appeal, however, it is equally true that the sentence could be increased as a result of the Prosecution's appeal. The outcome of the case is unforeseeable. As submitted by the Defence, Mario Čerkez was temporarily released on one occasion. The underlying reasons, however, cannot be compared with the case at hand.⁴ Notably, a recent request by Mario Čerkez to be provisionally released was denied by the Appeals Chamber. In doing so, the Appeals Chamber took into account, *inter alia*, that he had been sentenced at first instance to 15 years imprisonment, notwithstanding that he also has been in detention for more than six years.⁵ In these circumstances, especially considering the length of the sentence imposed by the Trial Chamber, the Appeals Chamber is not satisfied that, if released, Dario Kordić will not try to flee, even if under strict control of guards.

9. Furthermore, the Appeals Chamber notes that, despite the fact that matters beyond the International Tribunal's control have extended the proceedings in this case to a considerable length,⁶ Dario Kordić's detention remains proportionate.⁷ Continued detention is necessary because of the seriousness of the crimes for which he has been convicted; the continued deprivation of liberty is also proportionate in the narrow sense. It serves the target, in accordance with Rule 65(I), of avoiding the possibility that, if released, Dario Kordić would not return into the custody of the International Tribunal and thereby either cause further delay in the appeal proceedings or fail to be in detention in the event his conviction is upheld in whole or in part, pursuant to Rule 118(B). No more lenient measure would suffice.

10. In light of the above, the Appeals Chamber finds that the Request does not meet the requirement set out in Rule 65(I)(i). Because the requirements mentioned in this Rule are cumulative, if the first requirement under Rule 65(I) is not satisfied, it is not necessary for the Appeals Chamber to discuss any further arguments made by the parties.

⁴ See *Prosecutor v. Dario Kordić & Mario Čerkez*, "Order on Joint Defence Motion Requesting Provisional Release", 14 September 1999.

⁵ *Prosecutor v. Dario Kordić & Mario Čerkez*, "Decision on Mario Čerkez's Request for Provisional Release", 12 December 2003, para 8.

⁶ On the right to be tried without undue delay, see *Bottazzi v. Italy*, Application n. 7975/77, European Commission of Human Rights, Decision of 13 December 1978 and, in the same case, the Judgement of 28 July 1999 by the European Court of Human Rights.

⁷ In *Limaj*, a Bench of the Appeals Chamber stated that: "...A measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure than mandatory detention, it must be applied". See e.g. *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, IT-03-66-AR65, "Decision on Fatmir Limaj's Request for Provisional Release", IT-03-66-AR65, 31 October 2003, para. 13, *Prosecutor v. Darko Mrđa*, Case No.: IT-02-59-PT, "Decision on Darko Mrđa on Request for Provisional Release", 15 April 2002, paras 41-43, and *Prosecutor v. Enver Hadžihasonović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-PT, "Decision Granting Provisional Release to Enver Hadžihasonović", 19 December 2001.⁷

IV. Disposition

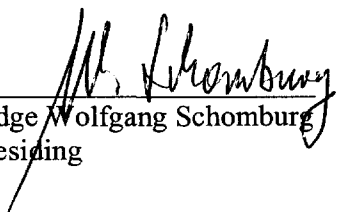
11. For the foregoing reasons and pursuant to Rule 65(I) of the Rules, the Request is, therefore, **dismissed**.

V. Additional Remark

12. The Appeals Chamber wishes to note that in case of exceptional circumstances such as e.g. a substantial deterioration of the health conditions of Dario Kordić's mother, the Defence may submit a detailed request for a temporarily controlled visit to his mother. The costs of such a controlled visit have to be borne by Dario Kordić.

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

Dated this 19th day of April 2004,
At The Hague
The Netherlands.



Judge Wolfgang Schomburg
Presiding