



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-02-65-AR65.2
Date: 16 December 2005
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision: 16 December 2005

PROSECUTOR

v.

Željko MEJAKIĆ
Momčilo GRUBAN
Dušan FUŠTAR
Duško KNEŽEVIĆ

**DECISION ON DUŠAN FUŠTAR'S REQUEST FOR
INTERLOCUTORY AND EXPEDITED APPEAL**

The Office of the Prosecutor:

Ms. Carla Del Ponte
Ms. Ann Sutherland

Counsel for the Accused:

Mr. Jovan Simić and Mr. Zoran Živanović for Željko Mejakić
Mr. Branko Lukić for Momčilo Gruban
Mr. Theodore Scudder and Mr. Dragan Ivetić for Dušan Fuštar
Ms. Slobodonka Nedić for Duško Knežević

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 "Dušan Fuštar's Request for Interlocutory and Expedited Appeal" ("Request"), filed in the Appeals Chamber on 15 December 2005 by Counsel for Dušan Fuštar ("Defence" and "Appellant", respectively).

2. On 30 November 2005, the Defence filed "Defendant, Dušan Fuštar's Petition Seeking a Temporary Provisional Release to Attend the 40-day Memorial of his Mother-in-law's Death" ("Petition").

3. On 6 December 2005, the Trial Chamber rendered its "Decision on Defendant Dušan Fuštar's Petition Seeking a Temporary Provisional Release", deferring the Appellant's request until such time as the Trial Chamber received guarantees from Republika Srpska that he would return for trial.

4. The guarantees were received from Republika Srpska on 8 December 2005, and on 12 December 2005, the Trial Chamber rendered its "Decision on Defendant Dušan Fuštar's Motion to Reconsider" ("Decision"). It denied the Appellant's request for four reasons:

- (i) the Appellant had resisted the referral of his trial to the domestic courts of Bosnia and Herzegovina;
- (ii) the Appellant had provided no personal assurance that he would return to the Tribunal to face trial;
- (iii) the pending appeal of his referral increased the risk that he would not return for trial; and
- (iv) the guarantees provided by Republika Srpska did not sufficiently assure the Trial Chamber that he would return for trial.¹

5. On 15 December 2005, the Defence filed its Request, asking the Appeals Chamber to reverse the Decision and grant the Appellant temporary provisional release.

6. A Trial Chamber may grant provisional release only if it is satisfied that the Appellant will appear for trial and not pose any danger to victims or witnesses.² The Trial Chamber's decision on

¹ Decision, p. 4.

provisional release is discretionary, and the Appeals Chamber on review determines only whether the Trial Chamber “correctly exercised its discretion in reaching that opinion”.³

7. The party challenging a provisional release decision bears the burden of showing that the Trial Chamber committed a “discernible error”.⁴ In order to do so, it must show either that the Trial Chamber (1) “misdirected itself [...] as to the principle to be applied”; (2) misdirected itself “as to the law which is relevant to the exercise of discretion”; (3) “gave weight to extraneous or irrelevant considerations”; (4) “failed to give weight or sufficient weight to relevant considerations”; (5) “made an error as to the facts upon which it has exercised its discretion”; or (6) rendered a decision “so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly”.⁵

8. In its Request, the Defence alleges a number of errors. First, it claims the Trial Chamber erred in holding “that Provisional Release cannot be granted where the Appellant is subject to a pending request for referral under Rule 11bis”.⁶ Further, because the Appellant requested provisional release to go to the same state to which he would potentially be transferred (Bosnia and Herzegovina), the Defence contends it was erroneous to conclude that the pending Rule 11bis appeal prevented his provisional release.⁷

9. The Appeals Chamber considers that the Trial Chamber did not hold that provisional release can never be granted when an accused is also involved in Rule 11bis proceedings; rather, the Trial Chamber considered that under the circumstances, the existence of such proceedings and the fact that the Appellant opposed the Rule 11bis transfer gave him a greater incentive not to return for trial. This is a reasonable conclusion and well within the Trial Chamber’s discretion. Further, the Appeals Chamber considers that the Appellant’s desire to be released to the same state to which he would be referred need not compel the conclusion that opposition to the Rule 11bis referral is of little significance. Therefore, this argument is dismissed.

² Rule 65(B) of the Rules of Procedure and Evidence.

³ *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, 17 October 2005 (“*Stanišić* Rule 65 Decision”), para. 6.

⁴ *Ibid.*

⁵ *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber’s Decisions Granting Provisional Release, 19 October 2005, para. 4.

⁶ Request, para. 3.

⁷ *Ibid.*, para. 7.

10. Second, the Defence claims the Trial Chamber erred in failing to ask the Government of Republika Srpska whether the reference to “Serbian Authorities” in the guarantee was a typographical error.⁸

11. The Appeals Chamber does not consider that the Trial Chamber erred in this regard. There is no showing or evidence that the existence or lack thereof of a typographical error influenced the Trial Chamber’s decision, despite the fact that in the Decision, the Trial Chamber described the guarantees in detail.⁹ Therefore, this argument is dismissed.

12. Third, the Defence submits the Trial Chamber erred in concluding that the Appellant did not give personal assurances that he would return for trial.¹⁰ It claims that the Appellant, in his earlier motions, “ma[d]e a clear personal assurance in this regard, promising to abide by all orders of the trial chamber and the authorities of Republika Srpska, and citing that he would act as he had when he was provisionally released in 2003 to attend the [memorial service] of his father, and when he returned to the ICTY upon the expiration of the period of provisional release”.¹¹

13. The Appeals Chamber considers that it is unclear from the pleadings whether the Appellant gave personal assurances. Though the Petition mentions his 2003 provisional release, it does not, contrary to what the Appellant claims, contain a promise that he will act now as he did then.¹² However, it does say, “[i]t is expected that all the restrictions and requirements typically imposed by the Trial Chamber under circumstance [*sic*] of temporary provisional release will be adhered to and followed.”¹³ That implies that the Appellant will return, but is not an explicit assurance. The Appeals Chamber considers that the Trial Chamber did not abuse its discretion in finding that the Appellant gave no personal assurance. Therefore, this argument is dismissed.

14. Fourth, the Defence claims the Trial Chamber erred in finding Republika Srpska’s guarantees insufficient because Republika Srpska is “an equal partner” in the State Court of Bosnia and Herzegovina.¹⁴

15. The Appeals Chamber considers that the mere receipt of government guarantees does not oblige the Trial Chamber to grant provisional release, although it is one factor for the Trial Chamber to consider. The Trial Chamber must satisfy itself in light of the guarantees as well as the other facts before it that the Appellant will return for trial. Under the circumstances, the Trial

⁸ *Ibid.*, para. 5.

⁹ Decision, pp. 2-3.

¹⁰ Request, para. 6.

¹¹ *Ibid.*

¹² See Petition, para. 4.

¹³ *Ibid.*, para. 28.

Chamber's conclusion that the government guarantees were not sufficient to ensure his return was within its discretion. Nor does the fact that Republika Srpska participates in the State Court of Bosnia and Herzegovina compel a Trial Chamber to trust its guarantees. Therefore, this argument is dismissed.

16. Fifth, the Defence claims the Trial Chamber erred by not treating the Appellant the same way as it treats Muslim indictees, some of whom have received provisional release.¹⁵

17. The Appeals Chamber considers that each case must be assessed on its own merits and according to its own particular facts and circumstances.¹⁶ The Appeals Chamber strictly rejects the Appellant's outrageous allegations that any ethnic or religious bias affected the Trial Chamber's decision in his case.

18. In sum, all of the Appellant's contentions of error are dismissed.

19. For the foregoing reasons, the Appeals Chamber DENIES the Defence's request to reverse the Trial Chamber and grant the Appellant temporary provisional release

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

Dated this 16th day of December 2005,

At The Hague, The Netherlands.



Fausto Pocar

Presiding Judge

¹⁴ Request, para. 8.

¹⁵ *Ibid.*, paras 9-10.

¹⁶ *Stanišić* Rule 65 Decision, para. 8.