



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-05-88-AR65.3
Date: 1 March 2007
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 1 March 2007

PROSECUTOR

v.

**Vujadin POPOVIĆ
Ljubiša BEARA
Drago NIKOLIĆ
Ljubomir BOROVIČANIN
Radivoje MILETIĆ
Milan GVERO
Vinko PANDUREVIĆ**

**DECISION ON INTERLOCUTORY APPEAL OF TRIAL
CHAMBER'S DECISION DENYING LJUBOMIR
BOROVIČANIN PROVISIONAL RELEASE**

Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Appellant:

Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin

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 “International Tribunal”, respectively) is seized of the confidential and *ex parte* “Defence Interlocutory Appeal Against the Trial Chamber’s ‘Decision on Defence Motion for Provisional Release of Ljubomir Borovčanin’ Dated 15 December 2006”, filed on 21 December 2006 (“Appeal”).

I. PROCEDURAL BACKGROUND

2. On 30 June 2006, the Appeals Chamber, in its Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release (“Decision of 30 June 2006”), upheld Trial Chamber II’s (“Trial Chamber”) decision of 10 May 2006¹, whereby the Trial Chamber denied the Accused Ljubomir Borovčanin’s (“Appellant”) request, pursuant to Rule 65 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), for provisional release during the pre-trial stage pending the commencement of his trial.

3. On 15 December 2006, the Trial Chamber issued its confidential and *ex parte* Decision on Defence Motion for Provisional Release of Ljubomir Borovčanin denying a further motion² filed by the Appellant pursuant to Rule 65 of the Rules requesting provisional release to the municipality of Bijeljina, Republika Srpska, for a short fixed period of seven to ten days based on humanitarian grounds (“Impugned Decision”).

4. On 21 December 2006, the Appellant filed the Appeal at issue under Rule 65(D) of the Rules requesting that the Appeals Chamber overturn the Impugned Decision and order that he be provisionally released to the Municipality of Bijeljina, Republika Srpska, for a short fixed period of time of seven to ten days as soon as possible, and/or for any other short fixed period of time as the Appeals Chamber may deem appropriate.³ The Appellant submits that, in order not to cause any undue delay of the trial, he is prepared to waive his right to be present in the courtroom for the duration of any provisional release granted.⁴ On 22 December 2006, the Prosecution filed its confidential and *ex parte* “Prosecution Response to Defence Interlocutory Appeal against the Trial

¹ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-PT, Decision on Defence Application for Provisional Release of the Accused Ljubomir Borovčanin, 10 May 2006 (“Provisional Release Decision of 10 May 2006”).

² *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Defence Application for Provisional Release of the Accused Ljubomir Borovčanin for a Short Fixed Period Based on Humanitarian Grounds, with Annexes I to IV, filed confidentially and *ex parte* on 1 December 2006 (“Motion of 1 December 2006”).

³ Appeal, p. 7.

⁴ *Id.*, para. 17.

Chamber's 'Decision on Defence Motion for Provisional Release of Ljubomir Borovčanin' Dated 15 December 2006" ("Response") opposing the Appeal. The Appellant has not filed a reply.

II. STANDARD OF REVIEW

5. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.⁵ The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.⁶ Accordingly, the Appeals Chamber is not concerned with whether or not it agrees with that discretionary decision. Rather, the relevant inquiry is "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."⁷ The party challenging a decision on provisional release must demonstrate that the Trial Chamber has committed a "discernible error."⁸ The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."⁹

III. APPLICABLE LAW

6. Pursuant to Rule 65(A), an accused, once detained, cannot be provisionally released except upon an order of a Chamber. Under Rule 65(B), a Trial Chamber can order release only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard. Further, the Trial Chamber must be satisfied that the accused will appear for trial and that, if released, he or she will not pose a danger to any victim, witness or other person. Where the Trial Chamber finds that one of these conditions has not been met, it need not consider the other and must deny provisional release.¹⁰

7. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those factors. What the relevant factors are, as well as the weight to

⁵ Decision of 30 June 2006, para. 5 & fn. 5.

⁶ *Id.*, para. 5 & fn. 6.

⁷ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006 ("*Milutinović et al.* Decision"), para. 3 (internal citations omitted).

⁸ *Id.*

⁹ *Id.*

be accorded to them, depends upon the particular circumstances of each case. The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the International Tribunal.¹¹

IV. DISCUSSION

8. In this Appeal, the Appellant raises three discernible errors allegedly committed by the Trial Chamber in the Impugned Decision amounting to incorrect conclusions of fact and an abuse of discretion when denying his application for provisional release.¹² In its Response, the Prosecution argues that the Appellant simply repeats his arguments from his application before the Trial Chamber and has failed to identify any discernible error on the part of the Chamber in the Impugned Decision.¹³ Because the first two alleged errors are interrelated, the Appeals Chamber turns to consider them together.

9. The Appellant first argues that the Trial Chamber erred in finding that there has been no material change in circumstances in this case since the time of its Provisional Release Decision of 10 May 2006 thereby necessitating its reconsideration of the findings of that Decision.¹⁴ The Appellant notes that the proceedings in his case have moved from the pre-trial to the trial stage, and he is no longer applying for an open-ended provisional release but for a short fixed period of several days based on humanitarian grounds.¹⁵ Furthermore, the Appellant argues that a new Government was elected in Republika Srpska in November 2006 and has issued new government guarantees in support of the Appellant's short provisional release request. The Appellant submits that the new government guarantees and recent official government statements undoubtedly prove the readiness and willingness of authorities in Republika Srpska to fully cooperate with the International Tribunal.¹⁶

10. Second, the Appellant submits that the Trial Chamber erred by concluding that it remained unsatisfied that the Appellant, if temporarily released, would return for the resumption of the trial. The Appellant contends that the Trial Chamber fails to reveal any basis for its finding and "there is no evidence put forward by the Prosecution or any other proof or suggestion based on which" the

¹⁰ Decision of 30 June 2006, para. 7.

¹¹ *Id.*, para. 8.

¹² Appeal, paras. 7-18.

¹³ Response, para. 8.

¹⁴ Appeal, para. 7.

¹⁵ *Id.*, para. 9.

Trial Chamber could have reached this conclusion.¹⁷ The Appellant points out that he has demonstrated good behaviour during his past 20 months in the United Nations Detention Unit (“UNDU”), and that he has signed an exhaustive personal guarantee showing good faith and agreeing to any conditions the Trial Chamber may impose upon his provisional release. The Appellant again argues that the Government of Republika Srpska has provided appropriate guarantees in support of his provisional release application and that the Republika Srpska authorities have never failed to adhere to the guarantees and assurances provided in previous provisional release cases.¹⁸

11. The Appeals Chamber notes that in the Impugned Decision, the Trial Chamber considered that the jurisprudence of the International Tribunal requires that where a previous request for provisional release was denied with respect to an accused and that accused files a new application for provisional release, the accused must satisfy the Trial Chamber “that there has been a material change in circumstances since the last application justifying reconsideration of the previous decision.”¹⁹ The Trial Chamber recalled that in its Provisional Release Decision of 10 May 2006 as affirmed by the Appeals Chamber, it had not been satisfied that the Appellant, if provisionally released, would appear for trial in light of the seriousness of the crimes charged, the circumstances of the Appellant’s transfer to The Hague, his cooperation with the Prosecution, the government guarantees and the personal guarantees. Upon consideration of the parties’ submissions, the Trial Chamber found that it was not satisfied that the circumstances which existed at the time of its Provisional Release Decision of 10 May 2006 had materially changed. It thus concluded that it remained unsatisfied that the Appellant would return to stand trial if provisionally released.²⁰

12. The Appeals Chamber agrees that where an accused applies for provisional release after having been previously denied, it is incumbent upon that accused to satisfy the Trial Chamber that there has been a change in circumstances that materially affects the approach taken in earlier provisional release decisions regarding the same accused.²¹ Furthermore, the Appeals Chamber recalls that under Rule 65(B), in order to grant provisional release, a Trial Chamber *must* be satisfied that an accused will appear for trial if released. Contrary to the Appellant’s argument, an

¹⁶ *Id.*, para. 10.

¹⁷ *Id.*, paras. 11-12.

¹⁸ *Id.*, para. 13.

¹⁹ Impugned Decision, p. 5, citing to *Prosecutor v. Nikola Šainović*, Case No. IT-99-37-PT, Decision on Third Defence Request for Provisional Release, 14 April 2005, para. 5.

²⁰ *Id.*, p. 6.

²¹ See *Milutinović et al.* Decision, para. 15

accused, not the Prosecution, has the burden of demonstrating that he or she will return to stand trial if released.²²

13. Turning to the alleged discernible errors raised by the Appellant, as a preliminary matter, the Appeals Chamber notes that in the Impugned Decision, the Trial Chamber failed to provide the reasons for its conclusion that the Appellant failed to demonstrate a material change in circumstances necessitating a reconsideration of its Provisional Release Decision of 10 May 2006. Rather, the Trial Chamber noted the submissions of the parties and summarily concluded that it remained unsatisfied that provisional release was warranted. The Appeals Chamber reminds the Chamber that not only must it consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision on provisional release, but it must then provide a *reasoned* opinion indicating its view on those relevant factors.²³ However, the Appeals Chamber considers that the Trial Chamber's failure to do so in this case does not amount to a discernible error capable of overturning the Impugned Decision. Recalling that "decisions on motions for provisional release are fact intensive and cases are considered on an individual basis" in light of all of the circumstances of a particular case,²⁴ the Appeals Chamber finds that, for the reasons that follow, the Trial Chamber reasonably concluded that the changed circumstances alleged by the Appellant do not sufficiently impact upon its previous decision denying him provisional release.

14. First, although the Appellant's case is now in the trial stage rather than the pre-trial stage, and he is only seeking a short-term rather than an open-ended release, this does not automatically lead to the conclusion that he will be more likely to return to the International Tribunal to stand trial. The Appeals Chamber recalls that over the course of the pre-trial and trial proceedings, "the incentives to flee might decrease over time; in other cases, these incentives might stay the same; and in still other cases these incentives might not shift enough to affect materially the approach taken in earlier provisional release decisions regarding the same accused."²⁵ In each individual case, "[t]hese matters are best assessed by the Trial Chamber that is hearing the case, and the Appeals Chamber will not reverse the Trial Chamber's considered judgement or decision" absent a showing of a discernible error.²⁶

²² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.1, Decision on Interlocutory Appeal from the Trial Chamber Decision Granting Nebojša Pavković's Provisional Release, 1 November 2005, para. 3.

²³ *See supra* para. 7.

²⁴ Decision of 30 June 2006, para. 8.

²⁵ *Milutinović et al.* Decision, para. 15.

²⁶ *Id.*

15. In this case, the Appellant fails to substantiate how the fact that his case is now in the trial phase automatically leads to the conclusion that any incentive for him to flee has decreased or that the short duration of his requested release makes it less likely that he will fail to return to the Tribunal to stand trial if released. Indeed, it is just as likely that a shift to the trial phase may actually lead to increased incentive to flee on the part of the Appellant as he hears first-hand evidence brought against him. Likewise, simply because the Appellant is requesting a short-term release of fixed duration rather than open-ended release does not necessarily lead to the conclusion that he will be less likely or able to flee. Thus, in light of all of the circumstances of the Appellant's case, including the seriousness of the crimes charged and the circumstances of his surrender and transfer to The Hague, it was reasonable for the Trial Chamber to conclude that these factors did not materially affect its previous decision that the Appellant should be denied provisional release.

16. Second, with respect to the new government guarantees and official statements made by the Government of Republika Srpska with regard to cooperating with the International Tribunal since the Trial Chamber's Provisional Release Decision of 10 May 2006, the Appeals Chamber recalls that a government guarantee, if deemed credible, may carry considerable weight in support of a request for provisional release.²⁷ Furthermore, the extent of cooperation by the government authorities at issue with the International Tribunal is relevant to the assessment of the weight to be given to the guarantee of the government concerned.²⁸ However, the reliability of such a guarantee must always be determined in relation to the circumstances of an individual accused in each case.²⁹

17. The Appellant fails to demonstrate how the new government guarantees materially impact upon the Trial Chamber's finding that there was doubt under the particular circumstances of the Appellant's case as to the Government of Republika Srpska's ability and willingness to arrest him if he failed to return to the International Tribunal for trial. The Appeals Chamber recalls that in the Provisional Release Decision of 10 May 2006, the Trial Chamber considered that: (1) the Appellant failed to surrender to the International Tribunal in 2002 despite agreeing to do so and remained in hiding in and around his family home in Bijeljina, Republika Srpska, for two and a half years; (2) the circumstances surrounding his decision to eventually surrender to the International Tribunal were unclear; and (3) the Appellant held positions of power in Republika Srpska sufficient to potentially impact upon the willingness of the relevant authorities to arrest him should he fail to

²⁷ Decision of 30 June 2006, para. 36.

²⁸ See, e.g., *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Appeal of Mićo Stanišić's Provisional Release, 17 October 2005, paras. 21-22.

²⁹ Decision of 30 June 2006, para. 36.

comply with the conditions of provisional release.³⁰ The Trial Chamber reasonably found such circumstances to be relevant vis-à-vis the weight to be accorded the government guarantees in spite of the fact that the government authorities had changed several times and that he held senior positions in Republika Srpska over a decade ago.³¹ Here, the Appellant fails to show how the new government guarantees materially dispel doubt as to the Republika Srpska's willingness and ability to apprehend him in light of the above circumstances and in the context of all of the factors the Trial Chamber took into consideration including the seriousness of the crimes charged against him.

18. Third, as for the Appellant's personal guarantee in conjunction with his good behaviour in the UNDU over the course of 20 months as evidence of his willingness, in good faith, to comply with any of the terms and conditions placed upon his provisional release, again, the Appeals Chamber finds that the Trial Chamber did not err in concluding in the Impugned Decision that these factors do not materially impact upon its Decision of 10 May 2006 denying provisional release. While such factors may be taken into account by a Trial Chamber and given weight in favour of an accused's application for provisional release, it was reasonable not to accord them much weight in light of all of the circumstances of the Appellant's case, including his failure to surrender in 2002, despite the promise that he would do so, and the fact that he remained at large for two and a half years.

19. As a final matter, the Appellant alleges that the Trial Chamber erred in finding his provisional release was not warranted in relation to his personal circumstances.³² According to the Appellant, the relatively precarious state of health of his elderly father justifies his application for a short provisional release on humanitarian grounds.³³ The Appellant argues that the International Tribunal has previously granted provisional release in analogous circumstances, even in less compelling cases, and that the Trial Chamber's decision is therefore unfair and prejudicial to him.³⁴

20. The Appeals Chamber does not agree that the Trial Chamber made a discernible error in this regard capable of overturning the Impugned Decision even though the Trial Chamber again failed to provide sufficient reasoning for its conclusion reached.³⁵ As noted previously, decisions on

³⁰ *Id.*, paras. 22, 38.

³¹ *Id.*, paras. 33, 38.

³² Appeal, para. 14.

³³ *Id.*, para. 15.

³⁴ *Id.*, para. 16.

³⁵ See *supra* para. 13.

motions for provisional release are fact-intensive and cases are considered on an individual basis.³⁶ The weight attached to humanitarian reasons as justification for provisional release will differ from one defendant to another depending upon all of the circumstances of a particular case. Therefore, comparisons with previous provisional release decisions solely on this issue are not helpful.³⁷ In this case, the Appeals Chamber does not find that the Appellant has sufficiently demonstrated that the Trial Chamber was unreasonable in concluding that provisional release should not be granted to him, even in the short-term for humanitarian reasons, in light of all of the circumstances of the Appellant's case including the seriousness of the charges against him and the circumstances of his arrest and transfer to the International Tribunal. It was reasonable for the Trial Chamber not to accord much weight to the personal circumstances of the Appellant upon remaining unsatisfied that he did not pose a serious flight risk if released.

V. DISPOSITION

21. On the basis of the foregoing, this Appeal is **DISMISSED**.³⁸

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

Done this 1st day of March 2007,
At the Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

³⁶ *Id.*

³⁷ *Cf.* Decision of 30 June 2006, paras. 15, 38.

³⁸ The Appeals Chamber notes that the Appellant requests that the Appeals Chamber render its Decision confidentially and *ex parte* if the Appeals Chamber grants his Appeal and further requests that such Decision be kept confidential and *ex parte* until the Appellant is returned to the UNDU. *See* Appeal, p. 7. However, because the Appeals Chamber has dismissed this Appeal, and this Decision does not reveal the personal and sensitive information detailed in the Appellant's provisional release Motion of 1 December 2006 filed before the Trial Chamber, it has decided to render the Decision publicly. The Appeals Chamber recalls that under Rule 78 and 107 of the Rules, all proceedings before an Appeals Chamber, including the Chamber's orders and decisions, shall be public unless there are exceptional reasons for keeping them confidential. *See Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Order Withdrawing Confidential Status of Pre-Review Orders and Decisions, 5 December 2005, p. 2, citing *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Vinko Martinović's Withdrawal of Confidential Status of Appeal Brief, 4 May 2005, p. 3.