



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-01-47-A
Date: 20 June 2007
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Hans Holthius

Decision: 20 June 2007

PROSECUTOR

v.

**ENVER HADŽIHASANOVIĆ
AMIR KUBURA**

Public

**DECISION ON MOTION ON BEHALF OF ENVER
HADŽIHASANOVIĆ FOR PROVISIONAL RELEASE**

The Office of the Prosecutor:

Mr. Peter Kremer, QC
Ms. Helen Brady

Counsel for the Appellants:

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Mr. Hadžihasanović
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Mr. Kubura

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 (“Appeals Chamber” and “International Tribunal”, respectively) is seized of the “Motion on Behalf of Enver Hadžihasanović for Provisional Release” (“Motion”), filed partly confidentially by Enver Hadžihasanović (“Hadžihasanović”) on 16 April 2007.¹

I. BACKGROUND

2. In the Motion, Hadžihasanović seeks provisional release “for the remainder of the duration of the appeal proceedings in this case”.² On 20 April 2007, the Prosecution filed “The Prosecution’s Response to Motion on Behalf of Enver Hadžihasanović for Provisional Release” (“Response”), in which it opposes the Motion. Hadžihasanović replied to the Response on 23 April 2007.³

3. Hadžihasanović was transferred to the custody of the International Tribunal to stand trial on 4 August 2001.⁴ Trial Chamber II (“Trial Chamber”) subsequently convicted him for two murders and six incidents of cruel treatment committed by his subordinates against Bosnian Croat and Bosnian Serb civilians and prisoners of war in various places of detention during the armed conflict between the Croatian Defence Council and the Army of Bosnia and Herzegovina (“ABiH”) in Central Bosnia in 1993.⁵ These acts were found to be in violation of the laws or customs of war punishable under Article 3 of the Statute of the International Tribunal (“Statute”). Specifically, Hadžihasanović was found responsible under Article 7(3) of the Statute as commander of the ABiH for failing to take necessary and reasonable measures to prevent or punish these murders and incidents of cruel treatment.⁶ The Trial Chamber acquitted Hadžihasanović on other charges of murder, cruel treatment, wanton destruction, plundering, and destruction of or wilful damage to institutions dedicated to religion committed during the conflict.⁷

4. As a result, the Trial Chamber sentenced Hadžihasanović to a term of imprisonment of five years, subject to credit for time already spent in detention in the United Nations Detention Unit (“UNDU”) pursuant to Rule 101(C) of the Rules of Procedure and Evidence (“Rules”), which the Trial Chamber calculated to be 828 days as of the date of its Judgement.⁸ This calculation took into

¹ The Motion was filed publicly while its enclosures were filed confidentially.

² Motion, para. 1.

³ Reply to Prosecution’s Response to Motion on Behalf of Enver Hadžihasanović for Provisional Release, 23 April 2007 (“Reply”).

⁴ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Judgement, 15 March 2006 (“Trial Judgement”), para. 2086.

⁵ *Ibid.*, pp 325-355, 398-436, 461-474, 484-501, 504-517, 621-623.

⁶ *Ibid.*, pp 621-623.

⁷ *Ibid.*, pp 620-625.

⁸ *Ibid.*, paras 2085-2086, & p. 625.

account several periods of provisional release.⁹ On 18 April 2006, Hadžihasanović and the Prosecution filed their notices of appeal against the Trial Judgement.¹⁰

5. Hadžihasanović submits that special circumstances exist warranting his provisional release in that, as of 7 April 2007, he has served two-thirds of his sentence, or 1217 of 1826 days.¹¹ He asserts that if it were not for the pending appeals, he would be eligible for early release as of this date.¹² Hadžihasanović also notes that the proceedings against him have entered their sixth year and that it is likely that the appeal proceedings may extend until at least the end of 2007.¹³ In addition, he asserts that at all times during his detention in the UNDU, he has demonstrated exemplary behaviour.¹⁴ Hadžihasanović “expressly undertakes to comply with any and all conditions which could be imposed by the Appeals Chamber and to be present for the hearing of the appeal and/or when the Appeals Chamber will render its Judgement”.¹⁵ He further submits that he will not pose a danger to any victim, witness or other person if granted provisional release on appeal.¹⁶ Finally, in the event that his motion for provisional release is granted, Hadžihasanović requests the Appeals Chamber to relax several of the conditions imposed by the Trial Chamber when granting his earlier requests for provisional release during the trial proceedings.¹⁷

6. Hadžihasanović has confidentially filed a guarantee of the Federation of Bosnia and Herzegovina (“BiH”), undertaking, among other things, to ensure that Hadžihasanović will return to the custody of the International Tribunal at the date set by the Appeals Chamber.¹⁸ The Appeals Chamber has also received a statement from the Dutch Ministry of Foreign Affairs that the Kingdom of the Netherlands, as host country, does not have any objections to Hadžihasanović’s provisional release.¹⁹

7. The Prosecution does not contest Hadžihasanović’s undertaking to appear at the hearing and rendition of judgement on appeal, or his assertion that he will pose no danger to any victim, witness

⁹ See Trial Judgement, paras 2086, 2123, 2128, 2129.

¹⁰ Notice of Appeal from Judgement on Behalf of Enver Hadžihasanović and Request for Leave to Exceed the Page Limit, 18 April 2006; Prosecution’s Notice of Appeal, 18 April 2006. Hadžihasanović’s co-accused, Amir Kubura, also appealed against the Trial Judgement. See Notice of Appeal on Behalf of Amir Kubura Pursuant to Rule 108, 13 April 2006.

¹¹ Motion, paras 25, 27; Reply, para. 10.

¹² Motion, para. 26; Reply, para. 10.

¹³ Motion, para. 28; Reply, para. 16.

¹⁴ Motion, para. 29; see also Confidential Enclosure 4 to the Motion (“Behaviour Report” from the Chief of Detention of the UNDU).

¹⁵ Motion, para. 19; see also Confidential Enclosure 1 to the Motion (Statement of Enver Hadžihasanović).

¹⁶ Motion, para. 22; see also Motion, paras 23-24.

¹⁷ Motion, paras 30-34.

¹⁸ See *ibid.*, para. 20; see also Confidential Enclosure 3 (Guarantees provided by the Federation of Bosnia and Herzegovina).

¹⁹ Correspondence of Host Country re: Provisional Release of Mr. Enver Hadžihasanović, signed 20 April 2007 and filed 26 April 2007.

or other person.²⁰ However, it opposes the Motion on the ground that Hadžihasanović has not demonstrated the existence of special circumstances warranting the granting of provisional release.²¹ It submits that time served is not a special circumstance for the purpose of an application for provisional release.²² Alternatively, it submits that if the Appeals Chamber considers that time served may constitute a special circumstance, the period should not be as low as two-thirds of the sentence, which is the minimum requirement for applying for early release.²³ The Prosecution further asserts that the remaining factors cited by Hadžihasanović in support of his application for provisional release do not constitute special circumstances.²⁴

II. DISCUSSION

8. Under Rule 65(I) of the Rules, the Appeals Chamber may grant provisional release to a convicted person 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.” These requirements must be considered cumulatively.²⁵ “Whether an applicant satisfies these requirements is to be determined on a balance of probabilities, and the fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities.”²⁶

9. The Appeals Chamber notes that the Prosecution does not contest Hadžihasanović’s undertaking to appear at the hearing or his assertion that he will pose no danger to any victim, witness or other person if released.²⁷ However, this concession is not dispositive, as Hadžihasanović submits in his Reply.²⁸ Rule 65(I) of the Rules provides that the Appeals Chamber may grant provisional release to a convicted person only if it is itself satisfied that the requirements of that Rule have been met.

10. With regard to the first requirement, the Appeals Chamber notes that Hadžihasanović has been convicted of serious crimes and sentenced to a term of five years imprisonment. The chance to avoid serving this sentence provides an incentive for Hadžihasanović to flee. Nonetheless, the

²⁰ Response, para. 7.

²¹ *Ibid.*, paras 1, 8, 13.

²² *Ibid.*, paras 9-13.

²³ *Ibid.*, paras 12-13.

²⁴ *Ibid.*, paras 8, 13.

²⁵ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Radoslav Brđanin’s Motion for Provisional Release, 23 February 2007 (“*Brđanin Decision*”), para. 5.

²⁶ *Ibid.*, quoting *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Second Defence Request for Provisional Release of Stanislav Galić, 31 October 2005, para. 3.

²⁷ Response, para. 7.

²⁸ Reply, paras 2-3.

Appeals Chamber considers that this incentive is mitigated by the fact that Hadžihasanović has already served approximately two-thirds of the sentence imposed by the Trial Chamber.²⁹ The Appeals Chamber also agrees with Hadžihasanović that his record of returning to custody after provisional release and complying with the other conditions set out by the Trial Chamber for that release, suggests that he will appear for the hearing of the appeal if granted provisional release. In addition, the BiH has undertaken to ensure that Hadžihasanović will return to the custody of the International Tribunal at the date set out by the Appeals Chamber.³⁰ In all the circumstances, the Appeals Chamber finds that Hadžihasanović has established that he does not pose a flight risk and therefore meets the requirements of Rule 65(I)(i) of the Rules.

11. As to the issue of danger to victims, witnesses, and others, the Appeals Chamber is satisfied that Hadžihasanović's past periods of provisional release without incident and good behaviour throughout the proceedings in this case illustrate that he does not pose a danger to victims, witnesses or other persons, as required by Rule 65(I)(ii) of the Rules.

12. However, before provisional release may be granted, the Appeals Chamber must also be satisfied that special circumstances exist warranting such release within the meaning of Rule 65(I)(iii). Hadžihasanović argues that special circumstances exist in his case because he has been detained for a period of more than two-thirds of the sentence of imprisonment imposed by the Trial Chamber and thus "would be eligible for early release in the absence of any appeal pending".³¹ A convicted person who has been detained for a period of time amounting to two-thirds of a sentence of imprisonment may but would not necessarily be eligible for early release from imprisonment if there were no appeal.³²

13. At the same time, the Appeals Chamber has previously considered that detention for a substantial period of time may amount to a special circumstance within the meaning of Rule 65(I)(iii) of the Rules. In *Kvočka*,³³ the Appeals Chamber held that "the fact that the appellant ha[d] already served around 80% of the sentence imposed by the Trial Chamber amount[ed] to a special

²⁹ Cf. Motion, para. 17.

³⁰ See Motion, para. 20; see also Confidential Enclosure 3 (Guarantees provided by the Federation of Bosnia and Herzegovina).

³¹ Reply, para. 10; see also Motion, para. 6; Reply para. 15.

³² The Appeals Chamber notes that while it has been a consistent practice of this Tribunal to apply this standard when determining the eligibility of persons imprisoned at the UNDU for pardon or commutation of sentence (see *Prosecutor v. Miroslav Tadić*, Case No. IT-95-9, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, 24 June 2004, para. 4), regard must be paid to other relevant criteria. See Rule 125 of the Rules and Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal, IT/146/Rev.1, 15 August 2006, para. 7.

³³ *Prosecutor v. Miroslav Kvočka*, Case No. IT-98-30/1-A.

circumstance warranting his release”.³⁴ The issue in this case is whether a lower percentage of a sentence of imprisonment served in detention – approximately two-thirds – considered together with other specific facts of the case, may likewise amount to a “special circumstance”. This determination has to be made on a case-by-case basis. On the facts of this case, including the fact that proceedings against Hadžihasanović have now entered their sixth year and may extend until the end of 2007 or longer, as well as the fact that his past periods of provisional release have not given rise to any concern, the Appeals Chamber is satisfied that detention amounting to approximately two-thirds of a term of imprisonment is sufficiently substantial to constitute a special circumstance warranting Hadžihasanović’s provisional release.³⁵

14. Finally, the Appeals Chamber notes that Hadžihasanović requests that, in the event he is granted provisional release on appeal, the conditions previously imposed by the Trial Chamber during his earlier periods of provisional release be relaxed.³⁶ Specifically, he requests to be authorized to stay at his place of residence and remain within the boundaries of the territory of BiH rather than being confined to Sarajevo, and to be required to report to the local police no more than once a month rather than once a week.³⁷ In light of the circumstances of this case and the similar conditions imposed on Kvočka when he was granted provisional release on appeal,³⁸ the Appeals Chamber considers that the less stringent conditions requested by Hadžihasanović are warranted.

III. DISPOSITION

15. For the foregoing reasons and pursuant to Rules 65(I) of the Rules, the Appeals Chamber **GRANTS** the Motion and **ORDERS** that the Appellant be provisionally released pending the hearing of his appeal under the following terms and conditions:

1. Hadžihasanović shall be transported to Schiphol airport in The Netherlands by the Dutch authorities as soon as possible.

³⁴ *Prosecutor v. Miroslav Kvočka*, Case No. IT-98-30/1-A, Decision on Kvočka’s Request for Provisional Release, 17 December 2003 (“*Kvočka* Decision of 17 December 2003”).

³⁵ The Appeals Chamber has previously suggested that detention amounting to two-thirds of a term of imprisonment coupled with other specific circumstances may, at least in some cases, constitute a special circumstance. In an earlier decision in *Kvočka*, rendered on 24 November 2003, the Appeals Chamber took note of the fact that Miroslav Kvočka (“*Kvočka*”) had by then served two-thirds of his sentence. While the Appeals Chamber did not immediately grant such release, due to Kvočka’s failure to address all the requirements of Rule 65(I) of the Rules, it found that in light of the “special circumstances of the case”, Kvočka was entitled to supplement his request. *Prosecutor v. Miroslav Kvočka*, Case No. IT-98-30/1-A, Decision on Request for Separation of Miroslav Kvočka’s Appeal Procedure and Kvočka’s Request for Provisional Release Pending Hearing of the Appeal, 24 November 2003, pp 4-5. After Kvočka did so, the Appeals Chamber granted provisional release, finding that service of 80% of the sentence imposed by the Trial Chamber constituted a special circumstance. *Kvočka* Decision of 17 December 2003.

³⁶ Motion, paras 31-34.

³⁷ Motion, paras 31, 34.

³⁸ *Kvočka* Decision of 17 December 2003, pp 3-4.

2. At Schiphol airport, he shall be provisionally released into the custody of the designated officials of the Government of BiH (whose names shall be provided in advance to the Appeals Chamber and the Registry) who shall accompany Hadžihasanović for the remainder of his travel to BiH and to his place of residence.
3. On his return flight, Hadžihasanović shall be accompanied by a designated official of BiH (or by such other designated officials as the Appeals Chamber may order or accept) who shall deliver Hadžihasanović into the custody of the Dutch authorities at Schiphol airport at a date and time to be determined by the Appeals Chamber; the Dutch authorities shall then transport him back to the United Nations Detention Unit;
4. During the period of his provisional release, Hadžihasanović shall abide by the following conditions, and the authorities of BiH shall ensure compliance with such conditions:
 - a) Within three days of his arrival, to report the address where he will be staying to the Registrar of the International Tribunal and to indicate any change of address to the Registrar within three days of such change;
 - b) To surrender his passport to the police station of his residence;
 - c) To remain within the boundaries of the territory of BiH;
 - d) To report every month to his local police station and that the local police station will maintain a log and file a written report with the International Tribunal confirming his presence each time;
 - e) Not to have any direct contacts or in any way interfere with victims or potential witnesses or otherwise interfere in any way with the proceedings or the administration of justice;
 - f) Not to discuss his case with anyone, including the media, other than his Counsel and immediate members of his family;
 - g) To comply with any order of the Appeals Chamber varying the terms of, or terminating, his provisional release;
 - h) To comply strictly with any requirements of the authorities of BiH necessary to enable them to comply with their obligations under the present decision for provisional release;

- i) To return to the International Tribunal at such time and on such date as the Appeals Chamber may order;

REQUIRES the Government of BiH to assume responsibility for:

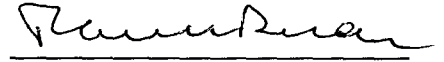
1. The personal security and safety of Hadžihasanović while on provisional release;
2. All expenses in connection with the transport of Hadžihasanović from Schiphol airport to his place of residence and back;
3. Reporting immediately to the Registrar of the International Tribunal the substance of any threats to the security of Hadžihasanović, including full reports of investigations related to such threats;
4. Facilitating, at the request of the Appeals Chamber or of the parties, all means of co-operation and communication between the parties and ensuring the confidentiality of any such communication;
5. Immediately detaining Hadžihasanović should he breach any of the terms and conditions of his provisional release and reporting immediately any such breach to the Registry and the Appeals Chamber;
6. Respecting the primacy of the International Tribunal in relation to any existing or future proceedings in BiH concerning Hadžihasanović;

INSTRUCTS the Registrar of the Tribunal to:

1. Consult with the Dutch authorities and the authorities of BiH as to the practical arrangements for the provisional release of Hadžihasanović;
2. Request the authorities of the State(s) through whose territory Hadžihasanović may travel to:
 - a) Hold him in custody for any time he will spend in transit at the airport of the State(s) in question; and
 - b) Arrest and detain Hadžihasanović pending his return to the UNDU should he attempt to escape during travel.

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

20 June 2007,
The Hague,
The Netherlands.



Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]