



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-05-87-AR65.3
Date: 18 December 2007
Original: English

Before: Judge Wolfgang Schomburg, Duty Judge

Registrar: Mr. Hans Holthuis

Decision of: 18 December 2007

PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

PUBLIC

**DECISION ON "PAVKOVIĆ APPEAL PURSUANT TO RULE
116 *BIS* AGAINST THE DECISION ON PAVKOVIĆ MOTION
FOR TEMPORARY PROVISIONAL RELEASE, DATED 12
DECEMBER 2007"**

The Office of the Prosecutor:

Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused:

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

I, WOLFGANG SCHOMBURG, Judge 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 (“Tribunal”), acting in my current capacity as Duty Judge;

NOTING the Trial Chamber’s “Decision on Pavković Motion for Temporary Provisional Release” (“First Decision”) filed on 7 December 2007, in which the Trial Chamber denied Nebojša Pavković’s (“Appellant”) motion for provisional release;

NOTING the Trial Chamber’s “Decision on Pavković Motion for Temporary Provisional Release” (“Second Decision”) filed on 12 December 2007,¹ in which the Trial Chamber denied the Appellant’s motion for provisional release which this time was sought on compassionate grounds;²

NOTING “Pavković Appeal Pursuant to Rule 116 *bis* against the Decision on Pavković Motion for Temporary Provisional Release, dated 12 December 2007” (“Appeal”) filed by the Appellant on 13 December 2007;

NOTING the “Prosecution’s Response to Pavković Appeal Pursuant to Rule 116 *bis* Against the Decision on Pavković’s Motion for Temporary Provisional Release, Dated 12 December 2007” (“Response”) filed on 17 December 2007;

NOTING that Counsel for the Appellant has informed me that he does not intend to file a reply;

NOTING the “Order” by the President of the Tribunal filed on 14 December 2007, which considered that “no bench of the Appeals Chamber can be constituted to consider the Appeal before the beginning of the Tribunal’s recess” and which requested “the Registry to transmit the Appeal to the Duty Judge, in order for him to consider whether the matter falls under his prerogatives”;³

CONSIDERING that pursuant to Rule 65(D) of the Rules of Procedure and Evidence (“Rules”) any decision denying or granting provisional release pursuant to Rule 65 of the Rules is subject to appeal as of right;

¹ The Trial Chamber on that date also filed a Confidential Annex to the Decision.

² See Pavković Motion for Temporary Provisional Release on Compassionate Grounds, With Annexes A & B” (Confidential), 10 December 2007, paras 2, 5.

³ Order, p. 2.

NOTING that the Appeal is directed against the Second Decision taking into account however the First Decision and requests that the Appellant be provisionally released on “compassionate grounds” during the Tribunal’s winter recess;⁴

CONSIDERING that pursuant to Rules 28(C) of the Rules “[a]ll applications in a case not otherwise assigned to a Chamber ... shall be transmitted to the duty Judge”;

CONSIDERING that pursuant to Rule 28(F) of the Rules the provisions of Rule 28(C) “shall apply *mutatis mutandis* to applications before the Appeals Chamber”;

CONSIDERING that if the Appellant had to wait until after the court recess for the Appeals Chamber to dispose of his appeal he could not effectively exercise his right to an appeal pursuant to Rule 65(D) of the Rules;

DECIDING therefore that in line with the spirit of the Rules, in the interest of justice and with a view to the fundamental rights of the accused concerned, I must conduct a review of the impugned Second Decision to give full effect to the right to appeal granted in Rule 65(D) of the Rules;

CONSIDERING however that this review is subject to reconsideration by a full bench of the Appeals Chamber after the end of court recess if the Appellant so requests;

RECALLING that an interlocutory appeal is not a *de novo* review of a Trial Chamber’s decision, which under Rule 65 of the Rules is a discretionary one, and that accordingly the relevant inquiry is not whether I agree with that discretionary decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision;⁵

RECALLING that in order to successfully challenging a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a discernible error;⁶

FURTHER RECALLING that a Trial Chamber’s decision on provisional release can only be overturned where it is found to be (1) based on an incorrect interpretation of the 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;⁷

⁴ See Appeal, p. 7 referring to Pavković Motion for Temporary Provisional Release on Compassionate Grounds, With Annexes A & B (Confidential), 10 December 2007, para. 8.

⁵ See *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release (“*Bošković & Tarčulovski* Decision”), 27 July 2007, para. 4 with further references.

⁶ *Id.*

⁷ *Id.*

NOTING that in the Appeal the Appellant claims that the Trial Chamber abused its discretion when it (1) deemed him a flight risk,⁸ (2) found that the Appellant if provisionally released will pose a danger to any victim, witness or other person⁹ and (3) held that, although it had permitted the Appellant to travel to Belgrade for reasons similar to the one advanced in his motion on a previous occasion, it could not discern a compelling reason to do so again;¹⁰

NOTING that the Prosecution responds that the Trial Chamber made no discernible error and that accordingly the Appeal should be dismissed;¹¹

NOTING that the Trial Chamber in the Second Decision referred to the First Decision which stated that “[t]here has been no change in circumstances to persuade the Chamber that the Accused is no longer a flight risk,” that the “Accused’s return from a strictly controlled, temporary provisional release on humanitarian grounds does not alter the situation,” and that “[f]or the Chamber to agree with the Accused’s point about the purported weakening of the Prosecution case, it would have to weigh the evidence adduced by the Prosecution against that of the Accused, and this is a task reserved for the Chamber’s final assessment of all the evidence at the conclusion of the trial, not at this stage”;¹²

CONSIDERING that the Trial Chamber is the body best positioned to assess whether circumstances at trial have materially affected the possibility that [an] accused will not return from provisional release;¹³

FINDING that the Appellant has not demonstrated a discernible error in the assessment by the Trial Chamber as regards his potential flight risk, in particular when considering that the Trial Chamber explicitly explained that in its view the circumstances since its decision of December 2006 on the matter¹⁴ (in which it had ruled that the progression of trial proceedings increased the flight risk of the accused) had not changed;¹⁵

FINDING FURTHER that since the Trial Chamber’s reasonable assessment of flight risk provides an independent basis for the denial of provisional release under the terms of Rule 65(B) it is not

⁸ Appeal, para. 6.

⁹ Appeal, para. 9.

¹⁰ Appeal, para. 11.

¹¹ Response, paras 3, 4.

¹² Second Decision, para. 2.

¹³ This is the settled jurisprudence of the Appeals Chamber. *See inter alia 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 (“Milutinović Decision”), 14 December 2006, para. 15.

¹⁴ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87, Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006. This decision was upheld on appeal, *see Milutinović Decision*, paras 14-16.

¹⁵ Second Decision, para 2, referring to First Decision, para. 9.

necessary to consider the Trial Chamber's separate conclusion that it was not satisfied that the Appellant, if released, would not pose a threat to any victim, witness or other person;¹⁶

NOTING that the Trial Chamber further explained that "the circumstances that have arisen since the Accused's last temporary provisional release [on compassionate grounds] do not rise to the level so as to warrant release at this stage of the proceedings";¹⁷

CONSIDERING that motions for provisional release are fact-intensive and cases are considered on an individual basis, that the weight attached to humanitarian reasons as justification for provisional release will have to be balanced against the specific temporal and factual circumstances of a particular case and that comparisons with previous provisional release decisions solely on this issue are not helpful;¹⁸

CONSIDERING FURTHER that a Trial Chamber may grant provisional release only if it is satisfied that the accused will return for trial and that he will not pose a danger to any victim, witness or other person, and that it is in this context that any humanitarian grounds have to be assessed;¹⁹

FINDING that the Appellant has not shown how the Trial Chamber abused its discretion when it held that it could not discern a compelling reason to provisionally release the Appellant on compassionate grounds again;

FINDING that the Trial Chamber reasonably considered that a provisional release on compassionate grounds was not warranted "at this stage of the proceedings",²⁰ *i.e.* taking into account the progress of the trial, which includes a temporary assessment of flight risk;

RECALLING AGAIN that it is not for the appellate body to lightly overturn the decision by the trier of fact, which is best placed to permanently assess *de novo* whether provisional release is warranted or not;

FOR THE FOREGOING REASONS

DISMISS the Appeal in all aspects.

¹⁶ See *Milutinović* Decision, para. 16.

¹⁷ Second Decision, para. 7.

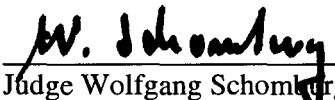
¹⁸ See *Prosecutor v. Vujadin Popović et al.*, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, Case No. IT-05-88-AR65.3, 1 March 2007, para. 20.

¹⁹ *Bošković & Tarčulovski* Decision, para. 14.

²⁰ Second Decision, para. 7.

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

Done this 18th day of December 2007,
At The Hague,
The Netherlands.



Judge Wolfgang Schomburg
Duty Judge

[Seal of the Tribunal]