

**UNITED
NATIONS**



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-04-74-AR65.7

Date: 21 April 2008

Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 21 April 2008

PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ČORIĆ
and BERISLAV PUŠIĆ**

PUBLIC

**DECISION ON “PROSECUTION’S APPEAL FROM *DÉCISION RELATIVE
À LA DEMANDE DE MISE EN LIBERTÉ PROVISOIRE DE L’ACCUSÉ
PETKOVIĆ DATED 31 MARCH 2008*”**

Office of the Prosecutor

Mr. Kenneth Scott
Mr. Douglas Stringer

Counsel for the Accused

Mr. Michael Karnavas and Ms. Suzana Tomanović for Jadranko Prlić
Ms. Senka Nožica and Mr. Karim Khan for Bruno Stojić
Mr. Božidar Kovačić and Ms. Nika Pinter for Slobodan Praljak
Ms. Vesna Alaburić and Mr. Nicolas Stewart for Milivoj Petković
Ms. Dijana Tomašegović-Tomić and Mr. Dražen Plavec for Valentin Čorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

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 (“Tribunal”) is seized of an appeal by the Office of the Prosecutor (“Prosecution”)¹ against a decision rendered by Trial Chamber III (“Trial Chamber”) on 31 March 2008, granting provisional release to the Accused Milivoj Petković (“Accused”).²

I. BACKGROUND

2. On 30 January 2008, Counsel for Milivoj Petković (“Defence”) filed a motion requesting the provisional release of the Accused during the period between the close of the Prosecution’s case and the beginning of the Defence case.³ On 19 February 2008, the Trial Chamber granted provisional release to the Accused.⁴ On 21 February 2008, the Prosecution appealed the 19 February 2008 Decision and related decisions granting provisional release to other co-Accused in the present case.⁵ On 11 March 2008, the Appeals Chamber granted the Prosecution’s Consolidated Appeal and overturned the Trial Chamber’s prior grant of provisional release to all of the Accused.⁶ The Appeals Chamber found, in particular, that the Trial Chamber had committed discernible errors in failing to explicitly discuss the impact of its 98bis Ruling⁷ when granting provisional release⁸ and in considering that the arguments put forth by the Accused might be regarded as humanitarian grounds capable of justifying the granting of provisional release.⁹

3. On 17 March 2008, the Defence filed the “Motion of Milivoj Petković for Provisional Release During the Remainder of the Period Between the Close of Prosecution Case and Beginning of Defence Case” (“Motion for Provisional Release”),¹⁰ whereby, *inter alia*, it reiterated that the

¹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Prosecution’s Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Petković* Dated 31 March 2008, 1 April 2008 (“Appeal”).

² *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Petković*, with a Confidential Annex, 31 March 2008, (“Impugned Decision”).

³ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Motion of Milivoj Petković for Provisional Release During Forthcoming Period Between Close of Prosecution Case and Beginning of Defence Case, Confidential, 30 January 2008 (“30 January 2008 Motion”).

⁴ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Petković*, Confidential, 19 February 2008 (“19 February 2008 Decision”).

⁵ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.5, Prosecution’s Consolidated Appeal from Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić Prior to the Defence Case (“Consolidated Appeal”).

⁶ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution’s Consolidated Appeal against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008 (“Appeals Chamber Decision”).

⁷ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Oral Decision Delivered Under Rule 98bis, T. 27200-27238, 20 February 2008 (“98bis Ruling”).

⁸ Appeals Chamber Decision, paras 19-20.

⁹ Appeals Chamber Decision, para. 21.

¹⁰ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Motion of Milivoj Petković for Provisional Release During the Remainder of the Period Between the Close of Prosecution Case and Beginning of Defence Case, 17 March 2008, Confidential, (“Motion for Provisional Release”).

98bis Ruling did not constitute a heightened risk of flight for the Accused.¹¹ It also provided additional information on the humanitarian grounds supporting its Motion for Provisional Release, in particular, the depression suffered by the Accused's wife.¹² In its Response,¹³ the Prosecution submitted that the Motion for Provisional Release did not provide any additional information to support the provisional release of the Accused, since all of the Defence's arguments had already been considered and dismissed in the Appeals Chamber Decision.¹⁴ On 21 March 2008, the Defence filed additional documents in support of the Motion for Provisional Release ("Addendum"),¹⁵ including medical certificates on the health conditions of both the Accused's mother and wife.

4. On 31 March 2008, the Trial Chamber issued the Impugned Decision, granting provisional release to the Accused which it ordered to be stayed in accordance with Rule 65(F) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), following the Prosecution's submission that, should provisional release be granted, it intended to Appeal that decision before the Appeals Chamber.¹⁶ On 1 April 2008, the Prosecution filed this Appeal. The Defence responded on 3 April 2008 ("Response").¹⁷ The Prosecution replied on 7 April 2008 ("Reply").¹⁸

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.¹⁹ 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.²⁰

¹¹ Motion for Provisional Release, paras 7-8.

¹² Motion for Provisional Release, paras 31 to 34.

¹³ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Prosecution Consolidated Response to 1) Slobodan Praljak's Motion for Provisional Release; 2) the Motion of Milivoj Petković for provisional release During the Remainder of the Period Between Close of the Prosecution Case and Beginning of Defence Case; and 3) the Supplemental Material in Support of Jadranko Prlić's Motion for Renewed & Explicit Consideration of his Previously Release, 20 March 2008 ("Prosecution Response to the Motion for Provisional Release").

¹⁴ Prosecution Response to the Motion for Provisional Release, paras 31-32.

¹⁵ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Confidential Addendum to the Annex of the Motion of Milivoj Petković for Provisional Release During the Remainder of The Period Between the Close of Prosecution Case and Beginning of Defence Case, 21 March 2008 ("Addendum").

¹⁶ Impugned Decision, p. 6 and p. 5, referring to Prosecution Response to the Motion for Provisional Release, para. 39.

¹⁷ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Milivoj Petković Response to Prosecution's Appeal from Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Petković Dated 31 March 2008, 3 April 2008.

¹⁸ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Prosecution Reply to Petković Reponse to Prosecution's Appeal from Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Petković Dated 31 March 2008, 7 April 2008 ("Prosecution Reply").

¹⁹ See e.g., *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006 ("Brahimaj Decision"), para. 5; *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 Decision"), para. 6; *Prosecutor v. Bošković & Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Bošković's Interlocutory Appeal on Provisional Release, 28 September 2005 ("Bošković Decision of 28 September 2005"), para. 5.

²⁰ See e.g., *Prosecutor v. 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 Decision"), para. 3; *Prosecutor v.*

Accordingly, the relevant inquiry is not whether or not the Appeals Chamber agrees with that discretionary decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.²¹

6. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a “discernible error”.²² 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.²³ The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.²⁴

III. APPLICABLE LAW

7. Pursuant to Rule 65(A) of the Rules, once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B) of the Rules, a Chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness or other person; and after having given the host country and the State to which the accused seeks to be released the opportunity to be heard.²⁵

8. 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 relevant factors.²⁶ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.²⁷ This is

Popović et al., Case No. IT-05-88-AR65.2, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006 (*Borovčanin* Decision of 30 June 2006), para. 5.

²¹ *Ibid.* (internal citations omitted).

²² *Ibid.*

²³ *Ibid.*

²⁴ See e.g., *Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5; *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004, para. 10; *Stanišić* Decision, para. 6, fn. 10; *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; *Brahimaj* Decision, para. 5; *Prosecutor v. Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić’s Interlocutory Appeal Against Trial Chamber’s Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008, para. 6.

²⁵ *Brahimaj* Decision, para. 6.

²⁶ *Ibid.*, para. 8.

²⁷ *Stanišić* Decision, para. 8.

because decisions on motions for provisional release are fact intensive and cases are considered on an individual basis in light of the particular circumstances of the individual accused.²⁸ 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.²⁹

IV. SUBMISSIONS OF THE PARTIES

9. The Prosecution raises two errors allegedly committed by the Trial Chamber, both of which would amount to an abuse of discretion in granting provisional release.³⁰ It contends that the Trial Chamber erred (i) in concluding that the circumstances justify granting provisional release on humanitarian grounds, and (ii) in taking into account its own 98*bis* Ruling in this case.³¹ On these grounds, the Prosecution requests the Appeals Chamber to overturn the Impugned Decision.³² In its Response, the Defence argues that the Prosecution has failed to identify any discernible error on the part of the Trial Chamber in the Impugned Decision, and seeks the dismissal of the Appeal.³³

10. With respect to the alleged errors in the exercise of the discretion identified above, the Prosecution argues that the Trial Chamber abused its discretion in finding that the circumstances concerning the health situation of the Accused's spouse, as well as the inability of the Accused's mother to travel to The Hague, justify provisional release on humanitarian grounds.³⁴ The Prosecution submits, in particular, that these circumstances were already addressed by the Trial Chamber in its 19 February 2008 Decision, and that the Appeals Chamber already concluded that the Trial Chamber committed a discernible error in considering such justifications as humanitarian grounds capable of justifying the granting of provisional release.³⁵ The Prosecution submits that, in light of the ruling provided in the Appeals Chamber Decision, and despite the updated information submitted by the Accused in his Motion for Provisional Release, there are no sufficient reasons to justify his provisional release on humanitarian grounds.³⁶

²⁸ *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Decision Denying Johan Tarčulovski's Motion for Provisional Release, 4 October 2005 ("*Tarčulovski* Decision"), para. 7.

²⁹ *Stanišić* Decision, para. 8.

³⁰ Appeal, paras 2 and 27.

³¹ Appeal, para. 2.

³² Appeal, para. 3 and p. 9.

³³ Defence Response, paras 31-32.

³⁴ Appeal, paras 15-18.

³⁵ Appeal, paras 16 and 17, referring to Appeals Chamber Decision, para. 21.

³⁶ Appeal, para. 8.

11. In response, the Defence claims that the additional humanitarian grounds identified in the Motion for Provisional Release and corresponding Addendum substantially differ from those previously addressed in the 30 January 2008 Motion.³⁷ The Defence notes that the Trial Chamber emphasized that additional and substantial humanitarian considerations were put forth by the Defence in its Motion for Provisional Release. The Defence claims that it is only following the examination of previously unknown information included in the Motion for Provisional Release and the medical certifications of both the Accused's mother and wife, that the Trial Chamber concluded that there were humanitarian reasons justifying the grant of provisional release.³⁸

12. The Prosecution further submits that the Trial Chamber erred in law by failing to "explicitly address the impact of its 98bis Ruling when granting provisional release, despite the express instruction of the Appeals Chamber to do so".³⁹ The Prosecution argues that, in light of the 98bis Ruling, there is a significantly greater risk of flight on the part of the Accused.⁴⁰ The Prosecution concedes that the Trial Chamber, in the Impugned Decision, elected to add a supplemental condition of provisional release, namely that the Accused remain at his personal residence under surveillance of the Croatian authorities. However, the Prosecution claims that this condition "does not sufficiently address the changed circumstance of the Trial Chamber's Rule 98bis [Ruling]".⁴¹

13. In its Response, the Defence submits that the Trial Chamber meticulously reviewed the impact of the 98bis Ruling before granting provisional release to the Accused.⁴² The Defence argues, in particular, that the Trial Chamber's conclusion on whether the Accused is a flight risk in the wake of the 98bis Ruling was reached after carefully considering all of the evidence presented by the Accused concerning his particular personal circumstances. The Trial Chamber further required additional guarantees on issues pertaining to surveillance and security in order to mitigate the risk of flight.⁴³ The Defence recalls that the flight risk can not be assessed *in abstracto*, but must be considered in the particular circumstances of the individual accused concerned, as provided by both the Tribunal's jurisprudence and the jurisprudence of the European Court of Human Rights ("ECtHR").⁴⁴ The Defence contends that the Prosecution, in its Appeal, erroneously addressed *in abstracto* the generic increased inclination of "all of the accused" to flee after a Rule 98bis decision.⁴⁵ The Defence contends that the Trial Chamber correctly considered the personal

³⁷ Defence Response, para. 14 and para. 26, fn. 18.

³⁸ Defence Response, paras 15-16, referring to the Impugned Decision, pp. 5-6.

³⁹ Appeal, para. 19.

⁴⁰ Appeal, paras 23-24.

⁴¹ Appeal, para. 25.

⁴² Defence Response, para. 26.

⁴³ Defence Response, paras 26-29.

⁴⁴ Defence Response, paras 19-20.

⁴⁵ Defence Response, para. 22.

circumstances of the Accused, and on that basis, reached the conclusion that, if provisionally released, the Accused would appear for trial.⁴⁶

14. In its Reply, the Prosecution contends that the ECtHR jurisprudence does not support the Defence position.⁴⁷ It further argues that the Tribunal's jurisprudence establishes that the denial of provisional release at this stage of the trial is consistent with human rights law.⁴⁸

V. DISCUSSION

15. The Appeals Chamber notes that the Trial Chamber did explicitly address the impact of its *98bis* Ruling in granting the Accused provisional release. The Trial Chamber recalled the holding of the Appeals Chamber Decision that the *98bis* Ruling constituted a significant change in circumstances, which warranted a renewed and thorough evaluation of the risk of flight of each of the co-Accused in this case. The Trial Chamber expressly considered that, in order to satisfy itself that the Accused still met the requirements of Rule 65, that if released they would appear for trial and not intervene with any victims and witnesses, it was required to consider whether the Accused had offered sufficient guarantees to offset that risk of flight. In such circumstances, even if the Trial Chamber was satisfied that sufficient guarantees were offered, it should not exercise its discretion in favour of a grant of provisional release unless compelling humanitarian grounds were present which caused to tip the balance in favour of allowing provisional release.⁴⁹

16. In the Impugned Decision, the Trial Chamber specifically recalled that the guarantees put forward to satisfy the burden of establishing that the Accused would return for trial if released in its 19 February 2008 Decision were considered by the Appeals Chamber to be insufficient in light of the *98bis* Ruling.⁵⁰ Consistent with the finding of the Appeals Chamber Decision, the Trial Chamber imposed additional conditions to the provisional release of the Accused, which it considered served to offset the risk of flight identified by the Appeals Chamber. Namely, the Trial Chamber determined that provisional release would be granted to the Accused on the condition that he be confined to his home under the surveillance of the local police.⁵¹ The Appeals Chamber considers that the Prosecution has failed to show any discernible error by the Trial Chamber in its consideration of the impact of the *98bis* Ruling on the risk of flight and in its determination to

⁴⁶ Defence Response, paras 21-23.

⁴⁷ Prosecution Reply, paras 2-3 and 6-10.

⁴⁸ Prosecution Reply, paras 2, 4 and 13.

⁴⁹ Impugned Decision, p. 5.

⁵⁰ Impugned Decision, p. 6.

⁵¹ Impugned Decision, p. 6. See also the Confidential Annex to the Impugned Decision.

remove any such risk by the conditions it imposed on the provisional release of the Accused. Indeed, the Appeals Chamber notes that the Trial Chamber considered this question with great care.

17. Concerning the humanitarian reasons sufficient to justify provisional release, the Appeals Chamber notes that the development of the Tribunal's jurisprudence implies that an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, will only be granted when serious and sufficiently compelling humanitarian reasons exist.⁵² Before granting provisional release, a Trial Chamber should take into consideration the position of victims and witnesses living in the same region where the accused, when released, will return. The perception that persons accused of international crimes are released, for a prolonged period of time, after a decision that a reasonable trier of fact could make a finding beyond any reasonable doubt that the accused is guilty (this being the meaning of a decision dismissing a Rule 98bis motion), could have a prejudicial effect on victims and witnesses. Therefore, provisional release should only be granted at a late stage of the proceedings when sufficiently compelling humanitarian reasons exist to justify the release. Furthermore, even when provisional release is found to be justified in light of the nature of the circumstances, the length of the release should nonetheless be proportional to these circumstances⁵³—for example, the need to visit a seriously ill family member in the hospital would justify provisional release of a sufficient time to visit the family member. The Appeals Chamber finds that there is no reason to establish a precedent pursuant to which accused are granted provisional release for the period between the Prosecution and Defence case, absent sufficiently compelling humanitarian reasons. The Appeals

⁵² Appeals Chamber Decision, para. 21. See also, *inter alia*, *Prosecutor v. Ademi*, Order on Motion for Provisional Release, 20 February 2002, which considered that the proximity of a prospective judgment may weigh against a decision to release, para. 22; *Prosecutor v. Halilović*, Case No IT-01-48-T, Decision on Motion for Provisional Release, 21 April 2005, whereby Trial Chamber I denied provisional release to the Accused considering “that the facts submitted by the Defence in support of the Motion do not amount to exceptional circumstances”, and “the advanced stage of the Prosecution case where most of the evidence in support of the Prosecution case has been presented and further Prosecution witnesses are still to be heard”, pp. 3-4; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on Defence Motion on Behalf of Ramush Haradinaj for Urgent Provisional Release, Confidential, 3 October 2007 (“*Haradinaj Decision*”), p. 3; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Prljajak*, with a Confidential Annex, 1 April 2008, pp. 6-8; *Prosecutor v. Milutinović et al.*, Case No IT-07-85-T, Decision on Šainović Motion for Temporary Provisional Release, 4 April 2008, paras 7-9; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Čorić*, with a Confidential Annex, 8 April 2008, pp. 6-7; *Prosecutor v. Milutinović et al.*, Case No IT-07-85-T, Decision on Lazarević Motion for Temporary Provisional Release, 15 April 2008 (“*Lazarević Decision*”).

⁵³ See, for example, *Prosecutor v. Hadžihasanović and Kubura*, Case No IT-01-47-T, Decision on Motions by Enver Hadžihasanović and Amir Kubura for Provisional Release, 19 July 2005, rendered between the close of the Defence case and the delivery of the judgment, whereby Trial Chamber II considered that “at this stage of the trial there is an increased risk of flight, particularly after the Prosecution requested a finding of guilt on all charges”; “the Prosecution’s final arguments and the sentences requested therein [...] may exert considerable psychological pressure on the Accused”; “other Chambers of the Tribunal held that the proximity of a prospective judgment date may weigh against a decision to release”; “the Chamber shares this view and holds that release for the entire period preceding the entry of judgment would be inappropriate and would create too great a risk of flight”; “a period of 12 days for each of the Accused significantly reduces the risk of flight as opposed to a longer period”; pp. 7-9. See also, *Lazarević Decision*, whereby Trial Chamber II considered that “based upon the compelling humanitarian considerations set forth in the Motion [...] it would be appropriate for the Accused to be provisionally released for a limited duration”, specifically, seven days, paras 16 and 18. See, further, *Haradinaj Decision*, p. 3.

Chamber recalls that the existence of compelling humanitarian reasons will only become relevant if the accused has met the prerequisite requirements of Rule 65(B), which must be satisfied for the Trial Chamber to have the discretion to consider granting that provisional release.⁵⁴

18. Turning to the humanitarian grounds alleged by the Defence for justifying the Trial Chamber's exercise of discretion in favour of granting provisional release to the Accused, the Trial Chamber explicitly noted that such circumstances had already been relied upon by the Defence in the 30 January Motion.⁵⁵ As correctly observed by the Trial Chamber, the Appeals Chamber already considered these circumstances in its Appeals Chamber Decision and concluded that these did not represent sufficient humanitarian reasons for granting provisional release to the Accused.⁵⁶ However, the Trial Chamber further emphasised that, in granting provisional release to the Accused, it also took into consideration new relevant information concerning the medical situation of both the Accused's mother and wife.⁵⁷ The Trial Chamber noted, in particular, that a medical certification dated 18 March 2008 attested that the health conditions of the Accused's wife had deteriorated in the past several months, partly due to the separation from her husband, and that she suffered from psychomotor inhibitions, anxiety, insomnia, and was under psychiatric treatment.⁵⁸ Neither the Trial Chamber nor the Appeals Chamber were previously aware of the depressive state of the Accused's spouse and this circumstance was therefore not taken into account in the 19 February 2008 Decision or in the Appeals Chamber Decision.⁵⁹ The Trial Chamber further noted that a new medical certificate on the health of the Accused's mother established that she suffers from a disease which prevents her from travelling and that this condition is accompanied by periods of anxiety and depression for which she is treated.⁶⁰ These circumstances are not merely repetitive of the information already addressed in both the 19 February 2008 Decision and the Appeals Chamber Decision but constitute evidence of additional humanitarian reasons in support of the application for provisional release.

⁵⁴ See, for example, *Prosecutor v. Boškoški and Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 27 July 2007 ("*Tarčulovski* Decision"), para. 14, whereby the Appeals Chamber recalled 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. It is in this context that any humanitarian grounds have to be assessed". In applying the above principle of law, the Appeals Chamber proceeded in considering that "[t]he Trial Chamber considered the birth of his second child in the Impugned Decision and found that 'the arrival of a baby is not a strong weight in the assessment of the likelihood of the Accused's future attendance at the trial or of the interests of justice in this case'. Therefore, the Appeals Chamber finds that the Appellant has not established that the Trial Chamber erred in denying the Appellant's request for provisional release despite his family situation, since in light of other relevant factors it was not satisfied that the Appellant would appear for trial, if provisional released".

⁵⁵ Impugned Decision, p. 5.

⁵⁶ Impugned Decision, p. 5.

⁵⁷ Impugned Decision, p. 5.

⁵⁸ Impugned Decision, pp. 5-6, referring to Annex 2 of the Addendum.

⁵⁹ Impugned Decision, p. 5.

⁶⁰ Impugned Decision, p. 6.

19. The Appeals Chamber notes nevertheless that the issue before the Trial Chamber was not simply to verify whether the circumstances put forth by the Defence in its Motion for Provisional Release represented new and additional information, but rather to evaluate whether such additional information would amount to a sufficiently compelling humanitarian reason justifying the provisional release of the Accused. The Trial Chamber assessed that the additional circumstance of the Accused's wife suffering a depressive state and evidence of the mother of the Accused being unable to travel to The Hague represented serious humanitarian reasons justifying the Accused's provisional release.

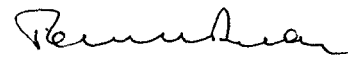
20. However, the Trial Chamber failed to explain why the humanitarian reasons advanced by the Accused were sufficient to justify the exercise of its discretion in favour of granting provisional release. Indeed, the Appeals Chamber Decision clearly considered analogous humanitarian grounds to be insufficient, all other circumstances considered, for granting provisional release.⁶¹ In properly exercising its discretion, the Trial Chamber should give explicit consideration to whether the additional humanitarian reasons are of a sufficiently different nature, present a higher degree of gravity or evince a more acute level of urgency than the humanitarian grounds which the Appeals Chamber already deemed insufficient. Whether the allegedly new humanitarian grounds are significantly different in any relevant respect is a determination that only the Trial Chamber can make in the first instance.

⁶¹ Appeals Chamber Decision, para. 21.

V. DISPOSITION

On the basis of the foregoing, the Appeals Chamber, Judge Güney partly dissenting, **GRANTS IN PART** the Prosecution Appeal and **REMANDS** the Impugned Decision to the Trial Chamber for a *de novo* adjudication of whether, in the light of the standards set out above, the humanitarian reasons advanced by the Accused are sufficiently compelling to justify, all other circumstances considered, his provisional release, even if for a short period of time.

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



Judge Fausto Pocar
Presiding Judge

Judge Güney appends a Partly Dissenting Opinion.

Done this 21st day of April 2008,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

PARTLY DISSENTING OPINION OF JUDGE GÜNEY

1. The majority rules that, after a Rule 98*bis* decision, “even if the Trial Chamber was satisfied that sufficient guarantees were offered, it should not exercise its discretion in favour of a grant of provisional release unless compelling humanitarian grounds were present which caused to tip the balance in favour of allowing provisional release”.¹ Because the majority decision imposes an additional requirement of “sufficiently compelling humanitarian reasons” to the two criteria listed in Rule 65(B) of the Rules, contrary to both the Rules and the continuing presumption of innocence, and effectively suspends the grant of discretion to the Trial Chamber by the Rules, I respectfully dissent.

2. Pursuant to Rule 65(B) of the Rules, 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”.² When satisfied that these two requirements are met, a Trial Chamber may exercise its discretion to grant provisional release. In doing so, it must consider all relevant factors.³ The existence of humanitarian reasons can be a salient and relevant factor in assessing whether to exercise discretion to grant provisional release. These humanitarian grounds will “have to be assessed” in the “context” of the two requirements of Rule 65(B),⁴ and the “weight attached to [them] as justification for provisional release will differ from one defendant to another depending upon all of the circumstances of a particular case”.⁵

3. The majority reads the Appeals Chamber Decision of 11 March 2008⁶ as setting up a higher standard for a Trial Chamber to meet when exercising its discretion in favour of granting provisional release to an accused after a Rule 98*bis* decision. According to the majority, even when the two requirements of Rule 65(B) of the Rules are met, after a Rule 98*bis* decision, the Trial Chamber must still identify the existence of compelling or sufficiently compelling humanitarian grounds before being able to exercise its discretion in favour of provisional release.⁷

4. However, nowhere does Rule 65(B) require humanitarian justifications for the provisional release of a person who has not been convicted. Unlike for convicted persons, there is no

¹ Majority Decision, para. 15; See also, paras 17, 19-20, and Disposition.

² *Prosecutor v. Ljube Boškoški and Johan Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 27 July 2007 (“*Tarčulovski* Decision”), para. 14.

³ See Majority Decision, para. 8.

⁴ *Tarčulovski* Decision, para. 14.

⁵ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007, para. 20.

⁶ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution’s Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008 (Decision of 11 March 2008), para. 21. I wish to specify that I was not part of the Bench that ruled on this decision.

⁷ Majority Decision, paras 15, 17.




requirement of additional “special circumstances”⁸ because the burden borne by a duly convicted person after full evaluation and adjudication is necessarily distinct from the burden borne by those who are still presumed innocent. Therefore, by imposing a new higher standard of compelling or sufficiently compelling humanitarian reasons following a Rule 98bis decision, the Majority Decision imposes in fact a form of the “special circumstances” requirement applicable to convicted persons upon individuals who have not been found guilty following the full process and evaluation of trial. It amounts to reinstating, for post Rule 98bis proceedings, the criterion of “exceptional circumstances” which used to be required by the Rules for the provisional release of an accused pending trial, and which was abrogated by amendment of 17 November 1999.⁹ Such a new hurdle overrides the important distinctions in burdens and liberty interests between convicted persons and persons who still enjoy the presumption of innocence under Article 21(3) of the Statute, and I cannot subscribe to it.

5. Because there is no requirement for humanitarian reasons, much less sufficiently compelling humanitarian reasons, under Rule 65(B) of the Rules, there is, in my humble opinion, only one acceptable reading of the Decision of 11 March 2008.¹⁰ If, after having considered all the circumstances of the case and the impact of the significant change of circumstances constituted by the Rule 98bis decision, a Trial Chamber cannot exclude the existence of flight risk or danger, then sufficiently compelling humanitarian reasons, coupled with necessary and sufficient measures to alleviate any flight risk or danger, can be a basis for resolving uncertainty and doubt in favour of provisional release. This would be the case, for example, of a Trial Chamber finding, subsequent to a Rule 98bis decision, a persistent risk of flight or danger, but deciding nonetheless to grant a limited period of provisional release in order for an accused to attend the funeral of his child, considering that the humanitarian reasons are so compelling that coupled with strict measures, the risk of flight or danger can be alleviated. In such a situation, I agree with the majority that the “length of the release should [...] be proportional to [the] circumstances”.¹¹

⁸ Rules 65(I)(iii) of the Rules. See also *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion, 2 April 2008 (Public Redacted Version), paras 11-12, in which the Appeals Chamber stated that “[t]he specificity of the appeal stage is reflected by Rule 65(I)(iii) of the Rules, which provide for an additional criterion, i.e. that ‘special circumstances exist warranting such release’” and that “the notion of acute justification [is] inextricably linked to the scope of special circumstances for the purposes of Rule 65(I)(iii) of the Rules”.

⁹ IT/32/REV.17. Before this amendment of the Rules, Rule 65(B) stated (IT/32/REV.16, 2 July 1999 (emphasis added)):

(B) Release may be ordered by a Trial Chamber **only in exceptional circumstances**, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

¹⁰ Decision of 11 March 2008, para. 21.

¹¹ Majority Decision, para. 17 (footnote omitted).

6. Indeed, in the Decision of 11 March 2008, the Appeals Chamber, in my opinion, required the existence of sufficiently compelling humanitarian reasons because the Trial Chamber did not evaluate the impact of its Rule 98*bis* decision pursuant to the two requirements of Rule 65(B) of the Rules, thus amounting to a lack of clarity as to the existence of a flight risk or danger. Only then did the Appeals Chamber, faced with a situation in which such a risk or danger could not be excluded, require sufficiently compelling humanitarian reasons.

7. Superfluously, I wish to underline that most of the references quoted in support of the majority finding “that the development of the Tribunal’s jurisprudence implies that an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, will only be granted when serious and sufficiently compelling humanitarian reasons exist”¹² are to decisions based on the Decision of 11 March 2008.¹³ The other decisions cited are no more than consideration by a Trial Chamber of the two requirements of Rule 65(B) of the Rules and the usual exercise of its broad margin of discretion.¹⁴

8. In the present instance, the Trial Chamber considered that the criteria of Rule 65(B) of the Rules were met.¹⁵ The Trial Chamber was thus not in the situation where it had to be satisfied of the existence of compelling humanitarian grounds to exercise its discretion in favour of provisional release. It had only to discretionally consider all the circumstances of the case and determine whether there were factors in favour of provisional release. In this respect, it considered the new circumstances constituted by “the extremely delicate state of health” of both Petković’s wife and mother.¹⁶ Coupling what amounted to “serious humanitarian circumstances” with other factors, including the additional guarantees to appear at trial, it ordered provisional release for a limited period of time.¹⁷ Given the broad margin of discretion afforded to Trial Chambers in assessing

¹² Majority Decision, para. 17, fns 52, 53.

¹³ Decision of 11 March 2008, para. 21; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Prljajak*, with a Confidential Annex, 1 April 2008, pp. 6-8; *Prosecutor v. Milutinović et al.*, Case No IT-07-85-T, Decision on Šainović Motion for Temporary Provisional Release, 4 April 2008, paras 7-9; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Čorić*, with a Confidential Annex, 8 April 2008, pp. 6-7; *Prosecutor v. Milutinović et al.*, Case No IT-07-85-T, Decision on Lazarević Motion for Temporary Provisional Release, 15 April 2008.

¹⁴ *Prosecutor v. Ademi*, Order on Motion for Provisional Release, 20 February 2002, para. 22; *Prosecutor v. Halilović*, Case No. IT-01-48-T, Decision on Motion for Provisional Release, 21 April 2005, pp. 3-4; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on Defence Motion on Behalf of Ramush Haradinaj for Urgent Provisional Release, Confidential, 3 October 2007, p. 3; *Prosecutor v. Hadžihasanović and Kubura*, Case No IT-01-47-T, Decision on Motions by Enver Hadžihasanović and Amir Kubura for Provisional Release, 19 July 2005, pp. 7-9. I note that with respect to this latter decision, the Trial Chamber, assessing the criteria of Rule 65(B) of the Rules, held that “release for the entire period preceding the entry of judgement and would create too great risk of flight” (p. 8).

¹⁵ Impugned Decision, pp. 7-8.

¹⁶ Impugned Decision, p. 7. The majority finds that “[t]hese circumstances are not merely repetitive of the information already addressed in both the 19 February 2008 Decision and the Appeals Chamber Decision [of 11 March 2008] but constitute evidence of additional humanitarian reasons in support of the application for provisional release.” (Majority Decision, para. 18).

¹⁷ Impugned Decision, pp. 7-8 and Confidential Annex.

factors in favour of provisional release,¹⁸ I cannot see any discernable error by the Trial Chamber in its balance of the factors before it. While another trial chamber could very well have reached a different conclusion about whether to exercise discretion to grant provisional release, this does not imply an abuse of discretion in the Impugned Decision.

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

Dated this 21st day of April 2008,
At The Hague, The Netherlands.



Mehmet Güney

Judge

[Seal of the International Tribunal]

¹⁸ “Deference is afforded to the Trial Chamber’s discretion in [...] decisions [of provisional release] because they ‘draw[] on the Trial Chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and require[] a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings.’” (*Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal against Decision on Joinder of Accused, 27 January 2006, para. 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 November 2004, para. 9.)

