



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 Nos.: IT-05-88-AR65.7

Date: 1 July 2008

Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision of: 1 July 2008

PROSECUTOR

v.

VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC

**DECISION ON VUJADIN POPOVIĆ'S INTERLOCUTORY APPEAL
AGAINST THE DECISION ON POPOVIĆ'S MOTION FOR PROVISIONAL
RELEASE**

Office of the Prosecutor

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Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin

Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić

Mr. Dragan Krgović and Mr. David Josse for Milan Gvero

Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

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 an appeal by Vujadin Popović (“Appellant”)¹ against a decision rendered by Trial Chamber II filed on 28 May 2008 (“Impugned Decision”)² in which the Trial Chamber denied the Appellant’s request for provisional release.

I. BACKGROUND

2. On 22 June 2005, Popović filed a motion requesting provisional release,³ which was rejected by Trial Chamber II on 22 July 2005.⁴ That decision was upheld by the Appeals Chamber.⁵

3. On 25 April 2008, the Appellant again requested provisional release, based on humanitarian grounds, in order to visit his ailing mother.⁶ In the Impugned Decision, the Trial Chamber denied the motion on the grounds that it was not convinced that the humanitarian reason advanced by the Appellant was sufficiently compelling to justify provisional release in light of the extremely high risk of flight posed by the Appellant.⁷

4. On 4 June 2008, the Appellant filed the Appeal. The Prosecution Response was filed on 16 June (“Response”).⁸ On 23 June 2008, the Appellant filed his Reply (“Reply”).⁹

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.¹⁰ The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules of Procedure and Evidence

¹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.7, Vujadin Popović’s Interlocutory Appeal Against the Decision on Popović’s Motion for Provisional Release, 4 June 2008 (“Appeal”).

² *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Popović’s Motion for Provisional Release, 28 May 2008. This decision was filed both confidentially and in a public redacted version.

³ *Prosecutor v. Popović et al.*, Case No. IT-02-57-PT, Vujadin Popović’s Motion for Provisional Release, 22 June 2005.

⁴ *Prosecutor v. Popović et al.*, Case No. IT-02-57-PT, Decision on Motion for Provisional Release, 22 July 2005.

⁵ *Prosecutor v. Popović et al.*, Case No. IT-02-57-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popović’s Application for Provisional Release, 28 October 2005 (“Popović Appeal Decision of 28 October 2005”).

⁶ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, The Accused Vujadin Popović’s Motion for Provisional Release, in the Form of a Custodian Visit Based on Humanitarian Grounds, 25 April 2008.

⁷ Impugned Decision, para. 26.

⁸ Prosecution Response to Accused Popović’s Interlocutory Appeal Concerning his Provisional Release, 16 June 2008.

⁹ Reply to the Prosecution Response to Accused Popović’s Interlocutory Appeal Concerning his Provisional Release, 23 June 2008.

¹⁰ 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. Boškovski and Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškovski’s Interlocutory Appeal on Provisional Release, 28 September 2005, para. 5.

("Rules") is a discretionary one.¹¹ Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision but whether the Trial Chamber has correctly exercised its discretion in reaching that decision.¹²

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".¹³ 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.¹⁴ 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.¹⁵

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.¹⁶

8. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all relevant factors that 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.¹⁷ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁸ This is because

¹¹ 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, para. 3; *Prosecutor v. 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*"), para. 5.

¹² *Borovčanin Decision*, para. 5.

¹³ *Borovčanin Decision*, para. 6.

¹⁴ *Borovčanin Decision*, para. 6.

¹⁵ 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.

¹⁶ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on "Prosecution's Appeal from *Décision relative à la Demande de mise en liberté provisoire de l'Accusé Petković* Dated 31 March 2008", 21 April 2008, para. 7.

¹⁷ *Ibid.*, para. 10.

¹⁸ *Stanišić Decision*, para. 8.

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.¹⁹ 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 Tribunal.²⁰

IV. DISCUSSION

9. As detailed below, the Appellant submits that the Trial Chamber committed discernable errors in the Impugned Decision because: (i) it erred in finding that the risk of flight posed by the Appellant is extremely high,²¹ and (ii) it provided insufficient reasons for its decision.²² The Appellant thus requests that the Appeals Chamber reverse the Impugned Decision or remand the Impugned Decision to the Trial Chamber with an order for the Trial Chamber to provide sufficient reasons for its decision.

10. In response, the Prosecution submits that the Appellant failed to demonstrate a discernable error resulting in prejudice and that, as a result, the Appeal should be dismissed.²³

A. Risk of Flight

11. The Appellant argues that the Trial Chamber erred in taking into account, when considering the relevant factors, both the seriousness of the charges against him and his whereabouts before his surrender to the Tribunal as relevant factors in assessing whether he posed a flight risk. Since the Appellant's co-Accused, charged with the same crimes, were granted provisional release by the Trial Chamber, the Appellant submits that the seriousness of the charges against him could not serve as a valid basis for the Trial Chamber to deny him provisional release.²⁴

12. The Appellant also argues that his whereabouts before surrender to the Tribunal have no bearing on whether he currently poses a flight risk. First, he contends, there is no cause and effect relationship between his whereabouts prior to surrender and his current risk of flight; no weight should therefore have been given to this aspect.²⁵ Second, in the Appellant's view, the Trial Chamber erred in fact by failing to explain how, in light of the stringent security measures discussed below, the Appellant would be able to evade custody, regardless of his desire to do so or

¹⁹ *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7.

²⁰ *Stanišić* Decision, para. 8.

²¹ Appeal, para. 10.

²² Appeal, para. 23.

²³ Response, para. 13.

²⁴ Appeal, para. 16. See also Reply, paras 1-2.

the resources available to him.²⁶ Third, the Appellant continues, the Trial Chamber failed to explain why security measures that were found sufficient to grant provisional release in the case of a co-accused who also posed a flight risk were found insufficient in the case of the Appellant.²⁷

13. The Prosecution responds that the Trial Chamber had abundant evidence before it to base a conclusion that the Appellant posed an extremely high risk of flight. In particular, it submits that the Trial Chamber considered: (i) the Appellant's failure to explain his whereabouts before, and the circumstances of, his surrender to the Tribunal; (ii) his failure to rebut the Prosecution's evidence that, prior to his apprehension, he fled using forged documents; and (iii) the nature of the case against him.²⁸ Contrary to the Appellant's assertion, the Prosecution claims that the Trial Chamber gave due consideration to the guarantees provided by Republika Srpska.²⁹

14. The Appeals Chamber observes that, at the outset of its decision, the Trial Chamber reviewed the law applicable to requests for provisional release, and specifically noted that it must address all factors relevant to such a decision.³⁰ In particular, the Trial Chamber found that it must examine the circumstances particular to the individual accused and observed that the weight attributed to the relevant factors vary from case to case.³¹

15. Consequently, the Appellant's first argument alleging inconsistency of treatment with respect to his co-Accused is without merit. The Trial Chamber considered the nature of the case against the Appellant and his past behaviour, namely his whereabouts prior to, and the circumstances of, his surrender to the Tribunal.³² It properly took into account the individual circumstances of the Appellant, rather than those of his co-accused, and in doing so acted in accordance with the jurisprudence of this Tribunal.³³ In addition, the Trial Chamber acknowledged both the humanitarian ground in support of the Appellant's request for provisional release and the guarantees provided by Republika Srpska in support of his request.³⁴

16. On the basis of these factors, the Trial Chamber's conclusion that the Appellant posed an extremely high risk of flight was not unreasonable. Contrary to the Appellant's assertion, it was open to the Trial Chamber to consider the nature of the charges against him as well as his situation prior to surrender in assessing his risk of flight. As the Appeals Chamber has held in the past, an

²⁵ Appeal, paras 17 and 22.

²⁶ Appeal, paras 17-19 and 22. See also Reply, paras 3-6 and 8.

²⁷ Appeal, paras 20 and 24. See also Reply, paras 9 and 11.

²⁸ Response, para. 4.

²⁹ Response, para. 6.

³⁰ Impugned Decision, paras 17-18.

³¹ Impugned Decision, para. 22.

³² Impugned Decision, para. 24.

³³ Cf. *Popović* Appeal Decision of 28 October 2005, para. 7.

³⁴ Impugned Decision, para. 23.

accused's "decision to remain a fugitive and his whereabouts prior to surrender can shed significant light" on a request for provisional release.³⁵

17. Furthermore, it was not incumbent upon the Trial Chamber, in coming to its conclusion, to explain how the Appellant might in fact evade custody. In requesting provisional release once an order on detention has been issued, the onus is on the accused to demonstrate entitlement under Rule 65 of the Rules.³⁶ The Appellant was required to show to the Trial Chamber that sufficient security measures were in place to counter any risk of flight, and it was reasonable for the Trial Chamber to conclude this burden had not been met, especially given the failure of the Appellant to rebut the Prosecution's evidence concerning his evasion of custody before surrender.³⁷

18. Indeed, considering the advanced stage of the proceedings, the Trial Chamber correctly stated that "[t]he humanitarian grounds raised by an accused as a basis for provisional release must be assessed in the context of the two requirements of Rule 65(B) [of the Rules], and the Trial Chamber must be satisfied that the conditions of provisional release are sufficient to address any concerns in relation to the requirements of Rule 65(B) [of the Rules]."³⁸ The Trial Chamber further stated that "exceptionally compelling" humanitarian reasons might offset the "extremely high" risk of flight present in this case.³⁹ In the present case, however, the Appellant did not satisfy the Trial Chamber of the two requirements under Rule 65(B) of the Rules, and the Trial Chamber therefore had no discretion to consider provisional release under the circumstances considered.

19. In light of the above, the Appeals Chamber finds that the Appellant failed to demonstrate any discernible error with respect to the Trial Chamber's analysis of his risk of flight.

B. Sufficiency of Reasons

20. With respect to his second ground of appeal, the Appellant argues that the security measures which will be imposed if he is provisionally released make the possibility of his escape so remote as to require better explanation from the Trial Chamber regarding how he could escape custody.

21. In particular, the Appellant contends that the Trial Chamber failed to place sufficient weight on the more stringent security measures than those considered in his first request for provisional release, which was denied. The measures include the guarantees given by the Government of Republika Srpska and the Ministry of Interior of Republika Srpska that the Appellant would be escorted at all times during his journey, under around-the-clock armed guards, and spend his

³⁵ *Popović* Appeal Decision of 28 October 2005, para. 6.

³⁶ *Popović* Appeal Decision of 28 October 2005, para. 9.

³⁷ Impugned Decision, para. 24.

³⁸ Impugned Decision, para. 19 (internal footnotes omitted).

³⁹ Impugned Decision, para. 25; see also para. 26.

evenings under guard at his mother's house, or at the local police station. The Appellant submits that these security measures are so strict as to amount to a "substantial state of detention".⁴⁰

22. Additionally, the Appellant submits that the Trial Chamber committed an error in law by failing to refer to the Appellant's undertaking to comply with any order of the Trial Chamber, as well as to his exemplary behaviour during his detention.⁴¹ Consequently, the Trial Chamber was obliged to provide a fuller explanation regarding its finding that the Appellant posed a flight risk. The Appellant argues that the failure to do so has undermined his substantive right of appeal.⁴²

23. In response, the Prosecution accepts that a Trial Chamber must provide a reasoned opinion that indicates its views on all relevant factors, but submits that the Trial Chamber did meet this standard in the Impugned Decision.⁴³ It argues that not only did the Trial Chamber clearly identify each of the factors in support of its decision, but also correctly applied the jurisprudence governing provisional release proceedings.⁴⁴ In particular, it was open to the Trial Chamber to conclude that the Appellant posed an extremely high risk of flight, without providing an explanation regarding how he might in fact escape custody while on provisional release.⁴⁵

24. The Appeals Chamber observes that the right to a reasoned opinion is an aspect of the fair trial requirement, but the content of this right varies with the nature of the decision and the circumstances of the case.⁴⁶ With respect to a decision under Rule 65 of the Rules, a Trial Chamber must examine those factors that a reasonable tribunal would take into account but is not obliged to "deal with all possible factors".⁴⁷ Rather, a Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision.⁴⁸

25. The Trial Chamber's analysis of the pertinent factors, albeit "laconic",⁴⁹ meets this requirement. Contrary to the Appellant's suggestion, the Trial Chamber did in fact take note of the Appellant's arguments concerning the security measures that would be in place during his provisional release, the fact that these measures were more stringent than those submitted at his first request for provisional release, the guarantees provided by the Republika Sprska, as well as the

⁴⁰ Appeal, para. 14. See also Reply, para. 6.

⁴¹ Appeal, para. 28. See also Reply, para. 7.

⁴² Appeal, para. 29. See also Reply, para. 10.

⁴³ Response, para. 8.

⁴⁴ Response, paras 10 and 11.

⁴⁵ Response, para. 12.

⁴⁶ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment, 21 July 2000, para. 69.

⁴⁷ *Brahimaj* Decision, para. 10; *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 6. See also *Prosecutor v. Dragoljub Kunarac et al.*, Case No.: IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 42.

⁴⁸ *Brahimaj* Decision, para. 10.

⁴⁹ Appeal, para. 30.

Appellant's good behaviour during his detention period.⁵⁰ Consequently, the Appellant has not established that the Trial Chamber failed to consider a factor relevant to his request, or that its conclusion was without foundation.

26. Furthermore, the Appeals Chamber rejects the contention that the Trial Chamber's reasons were so deficient as to undermine his substantive right of appeal. The Trial Chamber took into account the submissions but reached the conclusion that the specific circumstances of the case, and in particular the case against him⁵¹ and the uncertainties about the period during which the Appellant was a fugitive,⁵² did not warrant a finding that he would meet the requirements under Rule 65(B) of the Rules.

27. In light of the above, the Appeals Chamber finds that the Appellant failed to demonstrate any discernable error with respect to the adequacy of the Trial Chamber's reasons.

V. DISPOSITION

28. On the basis of the foregoing, the Appeal is **DISMISSED**.

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

Done this 1st day of July 2008,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

⁵⁰ Impugned Decision, paras 5-6 and 13.

⁵¹ Impugned Decision, para. 24.

⁵² Impugned Decision, paras 21 and 24.