



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-05-88-T
Date: 21 July 2008
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 21 July 2008

PROSECUTOR

v.

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

PUBLIC REDACTED VERSION

**DECISION ON PANDUREVIĆ'S MOTION FOR PROVISIONAL
RELEASE**

Office of the Prosecutor
Mr. Peter McCloskey

Government of Republika Srpska

Government of The Netherlands

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
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

THIS TRIAL 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 seised of the “Motion on Behalf of Vinko Pandurević for Variation of the Terms of his Detention in Custody Such as to Permit him a Short Visit to his Mother on Compassionate Grounds”, filed confidentially on 7 July 2008 (“Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. Pandurević has been denied provisional release on two occasions in the past.¹ Pandurević was granted provisional release under custodial conditions in December 2007 to attend a memorial service for his late father.²

2. In the Motion, Pandurević requests provisional release on compassionate grounds during the forthcoming recess in the proceedings.³ On 11 July 2008, the Prosecution filed confidentially the “Prosecution’s Consolidated Response to Accused Gvero, Miletić, Nikolić and Pandurević’s Motions for Provisional Release” (“Response”). On 17 July 2008, Pandurević filed confidentially the “Application by the Accused Pandurević for Leave to Reply and Reply to the Prosecution’s Response to the Motion for Variation on the Terms of his Detention in Custody such as to Permit him a Short Visit to his Mother on Compassionate Grounds” (“Reply”).

II. SUBMISSIONS OF THE PARTIES

A. Motion

3. Pandurević requests provisional release under custodial conditions for a period of not less than 10 days between 2 and 19 August 2008 in order to visit his ailing mother.⁴ Pandurević’s mother is 77 years of age, and suffers from a variety of illnesses.⁵ Her treating doctor describes her health as “terminal” and “very critical”.⁶ Pandurević stresses that his mother cannot undertake long

¹ *Prosecutor v. Pandurević and Trbić*, Case No IT-05-86-PT, Decision on Vinko Pandurević’s Motion for Provisional Release, 18 July 2005 (“Decision of 18 July 2005”), para. 24. This decision was upheld on appeal. See *Prosecutor v. Pandurević and Trbić*, Case No IT-05-86-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurević’s Application for Provisional Release, 3 October 2005 (“Appeals Chamber Decision of 3 October 2005”); Decision on Pandurević’s Renewed Motion for Provisional Release, 6 June 2006 (“Decision of 6 June 2006”).

² Decision on Pandurević’s Request for Provisional Release on Compassionate Grounds, 11 December 2007 (“Decision of 11 December 2007”).

³ Motion, p. 1.

⁴ *Ibid.*, pp. 1, 4, 7, paras. 4, 6.

⁵ *Ibid.*, p. 4, paras. 1–2. See also Strictly Confidential Annex 1 and Confidential 2.

⁶ *Ibid.*, Strictly Confidential Annex 1.

distance travel.⁷ He submits that the state of his mother's health is "rapidly declining"⁸ and this may be the last opportunity that he has to see her.⁹

4. Pandurević points to his compliance with the conditions of his previous period of provisional release in order to appease any concerns regarding his risk of flight.¹⁰ He also invites the Trial Chamber to impose various custodial conditions upon any grant of provisional release, including that Pandurević not leave the Sokolac municipality, be kept under armed guard at all times, spend every night in detention, sign a daily record of his presence, and not have any contact with his co-accused, any victim or witness.¹¹ In this regard, Pandurević produced guarantees from the Government of Republika Srpska as well as the Republika Srpska Ministry of Internal Affairs ("MUP").¹² Pandurević also provides a personal undertaking to comply with certain proposed custodial conditions listed in the Motion.¹³

5. Furthermore, Pandurević argues that because Sokolac is some distance from Zvornik and Bratunac, and there has never been any suggestion that he has attempted to interfere with persons involved in the proceedings, there is a very low risk that he would interfere with the witnesses or victims if granted provisional release. Pandurević argues that any risk in this regard can be set off by the proposed custodial conditions outlined in the Motion.¹⁴

B. Response

6. The Prosecution argues that the Trial Chamber should reject the Motion on two grounds. First, Pandurević's flight risk is too high, and second, the humanitarian reasons offered by Pandurević are insufficient.

7. In its Response, the Prosecution maintains that Pandurević "remains an extremely high flight risk".¹⁵ The Prosecution highlights the Appeals Chamber's observations regarding Pandurević in 2005 that notwithstanding his surrender, the serious nature of the charges against him as well as the fact that he remained at large for three years after learning of the charges against him, increase

⁷ *Ibid.*, p. 4, para. 3.

⁸ *Ibid.*, p. 4, para. 2.

⁹ *Ibid.*, pp. 1, 4, para. 4. *See also*, Strictly Confidential Annex 1 and Strictly Confidential Annex 6 (including two photographs of Mrs. Pandurević in December 2007).

¹⁰ *Ibid.*, p. 5, paras. 7–8.

¹¹ *Ibid.*, p. 5–6, para. 7.

¹² *Ibid.*, p. 6, para. 10. *See also*, Confidential Annexes 3, 4.

¹³ *Ibid.* *See also*, Confidential Annex 5.

¹⁴ *Ibid.*, p. 6, paras. 11–12.

¹⁵ Response, para. 14.

the risk that Pandurević might attempt to flee if released.¹⁶ The Prosecution also notes that the jurisprudence of the Tribunal requires a new assessment of the flight risk posed by Pandurević in light of the Trial Chamber's decision on the accused's submissions pursuant to Rule 98 *bis* ("Rule 98 *bis* Decision").¹⁷ The Prosecution contends that as Pandurević's motion for acquittal was dismissed by the Trial Chamber, Pandurević's poses an even greater risk of flight now than he did in 2005.¹⁸

8. The Prosecution also contends that the humanitarian reasons put forward in the Motion are insufficient. The Prosecution infers from the information tendered in the Motion that Pandurević was able to see his mother at his father's memorial service in December 2007, and for several other days during that period.¹⁹ The Prosecution also notes an absence of evidence that Pandurević's mother's health condition has deteriorated suddenly, and emphasises the general nature of her ailments.²⁰

9. The Prosecution contends that if provisional release were to be granted, a period of no more than one day would be necessary to fulfil the humanitarian purpose (*i.e.* for Pandurević to see his mother), and the visit should be under strict custodial conditions, including a "no contact" provision.²¹

10. Furthermore, should the Motion be granted in any form, the Prosecution requests a stay pending the filing of an appeal pursuant to Rule 65(E).²²

C. Reply

11. Pandurević first requests leave to file a reply.²³ In the Reply, Pandurević emphasises that he seeks provisional release on the same grounds and under the same custodial conditions as he did in December 2007, to which the Prosecution did not oppose.²⁴ Pandurević further submits that because he declined to make submissions pursuant to Rule 98 *bis*, which would have secured his acquittal

¹⁶ *Ibid.*, paras. 14, 16 (*quoting* Appeals Chamber Decision of 3 October 2005, paras. 4–5, 7).

¹⁷ *Ibid.*, para. 15.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, para. 18.

²⁰ *Ibid.*, para. 19.

²¹ *Ibid.*, para. 20. The Prosecution refers expressly to the form of custodial visit, with conditions and restrictions imposed on Borovčanin on 9 April 2008 to be applied in this instance. *Ibid.*

²² *Ibid.*, paras. 1, 18.

²³ Reply, para. 1.

²⁴ *Ibid.*, paras. 5–6.

for genocide, the most serious charge on the Indictment, the Trial Chamber's determination on this matter is a "wholly artificial event" and this would allegedly not increase his risk of flight.²⁵

12 Pandurević stressed again that the health conditions of his mother do amount to compelling humanitarian reasons justifying the granting of the Motion.²⁶

13 Pandurević also submits that the period of provisional release should be longer than the one day suggested by the Prosecution, referring to the purpose of the visit and the absence of any reason to the contrary in support of the period of the visit being for a "few days".²⁷

III. APPLICABLE LAW

14 Pursuant to Rule 65(A), once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B), a Trial Chamber may order the provisional release of an accused 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 giving the host country and the state to which the accused seeks to be released the opportunity to be heard.²⁸ Rule 65(C) provides that "[t]he Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others".

15 A decision on a request for provisional release must address all relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision and include a reasoned opinion indicating its view on those relevant factors.²⁹ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case,³⁰ since "decisions on motions for provisional release are fact intensive,

²⁵ *Ibid.*, para. 7.

²⁶ Reply, paras. 8–12.

²⁷ *Ibid.*, paras. 13–14.

²⁸ *See, inter alia*, *Prosecutor v. Popović et al.*, Case Nos. IT-05-88-AR65.4, IT-05-88-AR65.5 and IT-05-88-AR65.6, Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletić's Motions for Provisional Release During the Break in the Proceedings, 15 May 2008 ("Appeals Chamber Decision of 15 May 2008"), para. 5; Appeals Chamber Decision of 15 May 2008, para. 6; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.7, Decision on Vujadin Popović's Interlocutory Appeal against the Decision on Popović's Motion for Provisional Release, 1 July 2008 ("Appeals Chamber Decision of 1 July 2008"), para. 7.

²⁹ *See, inter alia*, Appeals Chamber Decision of 15 May 2008, para. 6; Appeals Chamber Decision of 1 July 2008, para. 8.

³⁰ *See, inter alia*, Appeals Chamber Decision of 15 May 2008, para. 6; Appeals Chamber Decision of 1 July 2008, para. 8.

and cases are considered on an individual basis in light of the particular circumstances of the individual accused.”³¹

16. Furthermore the Appeals Chamber held that a Rule 98 *bis* decision declining to enter a judgement of acquittal after the close of the Prosecution case is “a significant enough change in circumstance to warrant the renewed and explicit consideration by the Trial Chamber of the risk of flight by the Accused.”³² It further held that “when considering a provisional release motion at the post-98 *bis* stage of the proceedings, even when a Trial Chamber is satisfied that sufficient guarantees exist to offset the flight risk of an accused, it should not exercise its discretion to grant provisional release unless sufficiently compelling humanitarian reasons tip the balance in favour of allowing provisional release.”³³ The 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),³⁴ 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).³⁵

17. The Appeals Chamber has also held that where provisional release is found to be justified on humanitarian grounds, the duration of provisional release should be proportional to the period of time necessary to carry out the humanitarian purpose of the release.³⁶ Accordingly, “a Trial Chamber must address the proportionality between the nature and weight of the circumstances of a particular case and the duration of provisional release requested”.³⁷

IV. DISCUSSION

18. The Trial Chamber notes that Pandurević had filed two requests for provisional release, one during the pre-trial stage and one during trial proceedings, which were both denied.³⁸ A subsequent application by Pandurević for provisional release was based on humanitarian grounds and was granted under custodial conditions.³⁹ The Trial Chamber notes that on that occasion Pandurević

³¹ Appeals Chamber Decision of 15 May 2008, para. 6 (referring to *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7).

³² See, *inter alia*, *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 (“*Prlić* Appeals Chamber Decision of 11 March 2008”), paras. 19–20.

³³ See, for example, Appeals Chamber Decision of 15 May 2008, para. 24.

³⁴ *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal On Provisional Release, 27 July 2007, para. 14.

³⁵ See, for example, Decision on Borovčanin’s Motion for Custodial Visit, 9 April 2008, para. 24.

³⁶ Appeals Chamber Decision of 15 May 2008, paras. 18, 32.

³⁷ Appeals Chamber Decision of 15 May 2008, para. 18.

³⁸ Decision of 18 July 2005; Appeals Chamber Decision of 3 October 2005; Decision of 6 June 2006.

³⁹ Decision of 11 December 2007. In this application, Pandurević initially requested to be provisionally released for a limited period of days in order to visit his ailing father. However, while this application was under consideration,

complied with all custodial conditions imposed upon him and returned to custody in the United Nations Detention Unit (“UNDU”), at The Hague, as scheduled.

19. Further, since Pandurević last applied for provisional release, the Trial Chamber has orally rendered its Rule 98 *bis* Decision, in which it declined to enter a judgement of acquittal with reference to any of the accused after the conclusion of the Prosecution case.⁴⁰ The effect of the Rule 98 *bis* Decision must therefore be considered with reference to the particular circumstances of Pandurević as regards risk of flight. The Trial Chamber notes that Pandurević, who is indicted for genocide, conspiracy to commit genocide, crimes against humanity and war crimes in relation to allegations of murder, extermination, persecution, forcible transfer and deportation,⁴¹ requested, in the Rule 98 *bis* submissions, an acquittal on Count 2 (conspiracy to commit genocide), Count 7 (forcible transfer) and Count 8 (deportation).⁴² The Trial Chamber rejected Pandurević’s submissions and held that the counts against him passed the Rule 98 *bis* test.⁴³ However, the standard applied by the Trial Chamber in its Rule 98 *bis* Decision is very different to that under which Pandurević will be ultimately judged, and neither the credibility, nor the weight to be attributed to that evidence was assessed in the Rule 98 *bis* Decision.⁴⁴ As well, the Trial Chamber did not make any findings as to the strength of the case against Pandurević in the Rule 98 *bis* Decision.

20. The Trial Chamber further notes that Pandurević voluntary surrendered to the Tribunal, albeit after three years at large, and, when he was provisionally released, he abided by all conditions imposed and has returned as and when ordered by the Trial Chamber to do so.

21. Despite his surrender and compliance with the previous conditions of release, in all of the circumstances, the Trial Chamber continues to have concerns about the risk of flight with reference to Pandurevic.

22. However, Pandurević raises a very compelling humanitarian ground in support of the Motion for provisional release, namely his wish to visit his elderly and ill mother. Pandurević’s mother is of advanced age, and has been ill for an extended period of time, and, according to the

Pandurević’s father died. Consequently, Pandurević revised his request and asked to be provisionally released in order to attend the memorial service of his father in the Municipality of Sokolac, Republika Srpska. See Decision of 11 December 2007.

⁴⁰ T. 21460-21473 (3 March 2008).

⁴¹ Indictment, counts 1–8.

⁴² T. 21372–21381 (15 February 2008).

⁴³ T. 21473 (3 March 2008).

⁴⁴ T. 21461 (3 March 2008).

Specialist Report attached to the Motion, her state of health is terminal.⁴⁵ The Trial Chamber notes that Pandurević's mother is in a very critical condition and, as stated by Pandurević, this may be his final opportunity to see her alive, an opportunity not afforded to him prior to his father's passing.⁴⁶ Despite what the Prosecution seems to suggest, being able to see one's mother alive, possibly for the last time, is a humanitarian reason as compelling as attending a parent's funeral. The Trial Chamber is therefore of the opinion that the humanitarian ground advanced by the Accused, is sufficiently compelling so as to justify some form of provisional release provided concerns about the risk of flight can be addressed.

23. The Trial Chamber is satisfied with the Guarantees provided by the Government of Republika Srpska and the Republika Srpska MUP,⁴⁷ particularly in light of the undertakings given and carried out, to the full satisfaction of the Trial Chamber, on Pandurević's previous provisional release under custodial conditions. The Trial Chamber also acknowledges Pandurević's personal undertaking attached to the Motion,⁴⁸ and further notes that he had voluntarily surrendered to this Tribunal, albeit after over three years at large. The Trial Chamber also received the correspondence from The Netherlands, affirming that it has no objection to the sought provisional release.⁴⁹

24. The Trial Chamber is therefore satisfied that the compelling humanitarian reason offered by Pandurević, when combined with the strict custodial conditions, as detailed below (such as being kept under 24 hour guard by armed members of the Republika Srpska MUP, spending every night at the local detention facility and remaining at all times within the confines of the municipality of Sokolac), outweigh any risk of flight and justify provisional release for a limited time which is shorter than the one requested by him. It is further satisfied that Pandurević will not pose a threat to witnesses, victims or any other person in this case.

V. DISPOSITION

25. For these reasons, pursuant to Article 29 of the Statute and Rules 54 and 65 of the Rules, the Trial Chamber hereby:

- (a) **GRANTS** leave to Pandurević to file the Reply;
- (b) **GRANTS** in part Pandurević's request for provisional release, on the condition that any affected state has provided its agreement to the Registry, and decides as follows:

⁴⁵ [Redacted] Motion, Confidential Annex I.

⁴⁶ See Motion, para. 4.

⁴⁷ See Confidential Annexes 3, 4.

⁴⁸ See Motion p. 6, para. 10. See also Confidential Annex 5.

- (i) the agreement from any affected state should be submitted to the Registry prior to the transfer of Pandurević failing which no transfer will occur;
- (ii) Pandurević shall be provisionally released for a period of three days (excluding travel time); the exact dates of his provisional release shall be determined in consultations between the UNDU, the Registrar and a representative of the Trial Chamber;
- (iii) Pandurević shall be transported to Schiphol airport in The Netherlands by the Dutch authorities as soon as practicable;
- (iv) at Schiphol airport, Pandurević shall be transferred into the custody of a designated official of the Republika Srpska, who shall accompany Pandurević on the airplane;
- (v) the authorities of all states through whose territory Pandurević may travel will hold Pandurević in custody for any time he will spend in transit at the airport and arrest and detain Pandurević pending his return to the UNDU, should he attempt to escape;
- (vi) during the period of Pandurević's stay in Republika Srpska, he shall abide by the following conditions, and the authorities of the Republika Srpska shall ensure compliance with such conditions:
 - 1. Pandurević shall be in custody at all times, *i.e.* have armed members of the RS MUP guarding him 24 hours per day, while being allowed to see his mother, as requested in his Motion,
 - 2. Pandurević shall remain within the confines of the municipality of Sokolac, Republika Srpska, Bosnia and Herzegovina, apart from his travel to and from the Airport,
 - 3. Pandurević's travel documents shall be given to the European Union Police Mission ("EUPM") in Sarajevo or to the Office of the Prosecutor in Sarajevo, or to the Public Security Station in Sokolac,
 - 4. Pandurević shall spend every night in the local detention facility, which is part of the Sokolac Public Security Centre;
 - 5. a written report shall be filed with the Tribunal confirming the presence of Pandurević each day,

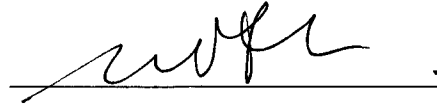
⁴⁹ Correspondence from Host Country Regarding the Provisional Release Request, 10 July 2008.

6. Pandurević shall not discuss his case with anyone other than his counsel,
 7. Pandurević shall not have any contact with the co-accused in the case,
 8. Pandurević shall not have any contact whatsoever or in any way interfere with any victim or potential witness or otherwise interfere in any way with the proceedings or the administration of justice,
 9. Pandurević shall comply strictly with any requirement of the authorities of the Republika Srpska necessary to enable them to comply with their obligations under this decision and their guarantees;
 10. Pandurević shall return to the UNDU in The Hague four days, at the latest, after his departure from the UNDU;
 11. on his return Pandurević shall be accompanied on the airplane by the designated officials of Republika Srpska, who shall deliver him into the custody of the Dutch authorities at Schiphol airport, the Dutch authorities shall then transport him back to the UNDU;
- (c) **REQUIRES** the Republika Srpska to assume responsibility as set out above, to cover all expenses concerning transport of Pandurević from Schiphol airport to Republika Srpska and back as well as concerning accommodation and security of Pandurević while on custodial visit, to arrest Pandurević immediately if he should breach any of the conditions of this decision, and to report immediately to the Trial Chamber any breach of the conditions set out above;
- (d) **REQUESTS** the Registry to obtain confirmation of the agreement of any state affected by the transfer, prior to arranging for the transfer of Pandurević to Republika Srpska, and to assist in obtaining the views of any state affected by the transfer, and to distribute this decision to the relevant states and organisations; and
- (e) **GRANTS** the Prosecution request and **ORDERS** a stay of the decision pending an appeal.

26 The Motion is denied in all other respects.

22/06/08

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



Carmel Agius
Presiding

Dated this twenty-first day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]