

**UNITED
NATIONS**

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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-03-67-R77.1-
AR65.1
Date: 25 July 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron
Registrar: Mr. Hans Holthuis
Decision of: 25 July 2008

**IN THE MATTER OF
LJUBIŠA PETKOVIĆ**

PUBLIC

**DECISION ON DEFENCE APPEAL AGAINST THE TRIAL
CHAMBER'S DECISION ON PROVISIONAL RELEASE**

Counsel for the Accused:

Ms. Branislava Isailović

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 the “*Appel contre la Décision relative à la Requête de la Défense aux fins de permettre la liberté provisoire de l’accusé comportant les conclusions d’appel*” filed on 15 July 2008 (“Appeal”) by Counsel for Ljubiša Petković (“Petković”) against the “Decision Regarding *Requête de la Défense aux fins de permettre la liberté provisoire de l’Accusé*”, issued on 10 July 2008 (“Impugned Decision”) by Trial Chamber III (“Trial Chamber”).

I. BACKGROUND

2. On 13 May 2008, the Trial Chamber initiated contempt proceedings against Petković for failure to comply with an order to appear as a witness in Case No. IT-03-67-T, *Prosecutor v. Vojislav Šešelj*,¹ and issued an Arrest Warrant ordering the authorities of the Republic of Serbia to *inter alia*, execute the arrest warrant as soon as possible.² Petković was transferred to the seat of the International Tribunal on 28 May 2008 and appeared before the Trial Chamber on 29 May 2008.³

3. On 8 July 2008, Petković requested to be provisionally released.⁴

II. STANDARD OF REVIEW

4. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber’s decision.⁵ 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 of the International Tribunal (“Rules”) is a discretionary one.⁶ Accordingly, the relevant inquiry is not

¹ *Prosecutor v. Šešelj*, Case No. IT-03-67-T, *Confidential Order in Lieu of an Indictment for Contempt Against Ljubiša Petković*, 13 May 2008 (“Order in Lieu of Indictment”), p. 4.

² *Prosecutor v. Šešelj*, Case No. IT-03-67-T, *Confidential Warrant to Arrest and Transfer Ljubiša Petković*, 13 May 2008 (“Arrest Warrant”), p. 2.

³ *In the Matter of Ljubiša Petković*, Case No. IT-03-67-R77.1, Scheduling Order for Initial Appearance, 28 May 2008, p. 2.

⁴ *In the Matter of Ljubiša Petković*, Case No. IT-03-67-R77.1, *Requête aux fins de mise en liberté provisoire avec les confidentiels* [sic] *annexes 1 à 6*, 8 July 2008 (“Request for Provisional Release”), para. 2.

⁵ See, e.g., *Prosecutor v. Haradinaj et al.*, 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. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski’s Interlocutory Appeal on Provisional Release, 28 September 2005 (“*Boškoski & Tarčulovski Decision*”), para. 5.

⁶ 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. 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.

whether the Appeals Chamber agrees with that discretionary decision but whether the Trial Chamber has correctly exercised its discretion in reaching that decision.⁷

5. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a “discernible error”.⁸ 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.⁹ 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.¹⁰

III. APPLICABLE LAW

6. 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.¹¹

7. 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.¹² What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹³ This is 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.¹⁴ The Trial

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ See, e.g., *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 (“*Tolimir* Decision”), para. 4.

¹¹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.8, 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 (“*Petković* Decision”), para. 7.

¹² *Ibid.*, para. 10.

¹³ *Stanišić* Decision, para. 8.

¹⁴ *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.

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.¹⁵

III. DISCUSSION

8. In his Appeal, Petković argues that the Trial Chamber erred in finding that it could not be satisfied that, if released, he would return for trial and in particular erred in placing insufficient weight on the guarantees provided by the Serbian authorities to transfer him for trial upon order of the Trial Chamber.¹⁶ He also submits that the Trial Chamber failed to determine whether the second requirement of Rule 65(B) of the Rules was met.¹⁷ Finally, he argues that he should be granted provisional release since the presumption of innocence he enjoys implies that detention should remain the exception.¹⁸ On this basis, Petković asks the Appeals Chamber to quash the Impugned Decision, grant him provisional release and impose any condition it deems appropriate to ensure his presence for trial and the protection of others.¹⁹

9. In support of his Appeal, Petković argues that the Trial Chamber erred in finding that the circumstances of his transfer to the International Tribunal, in particular, the difficulties experienced by the Serbian authorities in locating him, were such that it could not be satisfied that Petković would appear for his trial if provisionally released.²⁰ Petković submits that the circumstances of his transfer to the seat of the International Tribunal and those that would exist if provisionally released are completely different,²¹ given that his provisional release would obviously be subject to strict conditions, namely, home confinement and close surveillance.²² He claims that this was a relevant factor that the Trial Chamber failed to consider in reaching the Impugned Decision.

10. Petković also claims that in assessing whether the first requirement of Rule 65(B) of the Rules was met, the Trial Chamber failed to place sufficient weight on the fact that the Government of Serbia has provided guarantees that if he were provisionally released, it would fully comply with any conditions imposed by the International Tribunal and that it would take full responsibility for

¹⁵ *Stanišić* Decision, para. 8.

¹⁶ Appeal, paras 9-13.

¹⁷ Appeal, para. 8.

¹⁸ Appeal, para. 17.

¹⁹ Appeal, p. 5.

²⁰ Appeal, para. 9.

²¹ Appeal, para. 10.

²² Appeal, para. 11.

Petković from the time of his boarding the plane for Serbia until his return back to the Netherlands.²³

11. In support of his argument, Petković relies upon the dissenting opinion of Judge Antonetti, who considered that since Petković had surrendered himself to the authorities, it was unlikely that he would change his mind and decide not to appear before the International Tribunal at the end of his provisional release, and expose himself to additional contempt proceedings and that, additionally, any risk of flight could be offset by keeping Petković under close surveillance 24 hours a day.²⁴ Petković further argues that the Trial Chamber failed to consider as a relevant factor that he shall be presumed innocent and therefore detention shall always be an exception to the right of individual freedom.²⁵

12. Finally, Petković claims that the Trial Chamber failed to determine whether the second requirement provided for in Article 65(B) of the Rules was met.²⁶ He claims that he made a solemn declaration that he would abstain from contacting victims, witnesses and the media or from asking to directly consult documents and archives and that this declaration was a relevant consideration for the Trial Chamber to have taken into account.²⁷

13. With respect to Petković's argument that the Trial Chamber erred in finding that the circumstances of his initial transfer to the International Tribunal were relevant to the determination of whether, if released, Petković would return for trial, the Appeals Chamber is not satisfied that Petković has demonstrated an error on the part of the Trial Chamber. The circumstances surrounding an accused's initial transfer to the International Tribunal are "relevant to the Trial Chamber's determination as to the degree of cooperation that may be expected by the accused when the time comes for him or her to appear for trial if provisionally released".²⁸ However, this is not the only relevant factor that the Trial Chamber was required to consider. As stated previously, a Trial Chamber must also assess the circumstances existing at the time the application for provisional release is made and as far as foreseeable the time when he will be expected to return for

²³ Appeal, para. 12; *see also* para. 2, detailing the guarantees provided by the Government of Serbia; Request for Provisional Release, Annex 2, 4.

²⁴ Appeal, para. 13; *see also* Dissenting Opinion of Judge Antonetti, Impugned Decision, p. 4.

²⁵ Appeal, paras 16-17.

²⁶ Appeal, para. 8.

²⁷ Appeal, paras 14, 18.

²⁸ *See, e.g. 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, para. 16; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popović's Application for Provisional Release, 28 October 2005, para. 6; *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić, 17 October 2005, para. 12; *Prosecutor v.*

trial.²⁹ In its Impugned Decision, the Trial Chamber denied provisional release finding that Petković's previous repeated failure to comply with a summons issued by the Trial Chamber,³⁰ which led to the initiation of contempt proceedings and the issuing of the Arrest Warrant,³¹ was indicative of the level of cooperation it could expect of him in the future. It also found that it was not satisfied that Petković's flight risk at the time of the request for provisional release was sufficiently offset by the guarantees offered by the Republic of Serbia, given the difficulties and delays that occurred prior to Petković's transfer to the International Tribunal.³² The Appeals Chamber thus rejects Petković's claim that the Trial Chamber erred by failing to find that the circumstances prior to his transfer to the International Tribunal were entirely different from present circumstances. Having considered all of the information before it, in particular, Petković's prior behaviour together with the inability of the Serbian authorities to locate Petković for several weeks after the issuing of the Arrest Warrant, the Trial Chamber reasonably found that the difficulties surrounding his initial appearance at the International Tribunal continued to impact on the likelihood of his return in the future.

14. Turning to Petković's arguments based on the presumption of innocence, the Appeals Chamber observes that the Trial Chamber considered that Petković is charged with a relatively minor crime, in comparison with other accused before the International Tribunal. However, it also noted that contempt carries a relatively heavy sentence pursuant to Rule 77(G) of the Rules.³³ The Appeals Chamber recalls that, pursuant to Rule 65 of the Rules, the burden is upon the accused to demonstrate that, if released, he will appear for trial and will not interfere with victims and witnesses. It has also previously held that "the presumption of innocence is not 'determinative' since otherwise [...] 'no accused would ever be detained, as all are presumed innocent.' [...] This Tribunal's consistent jurisprudence does not treat the presumption of innocence as determinative in assessing whether provisional release should be granted. Rather to the extent that this Tribunal has identified determinative factors, it has pointed to those specified in Rule 65(B)".³⁴ The Appeals Chamber is not satisfied that Petković demonstrated any error in this respect.

15. Further, the Appeals Chamber notes that the Trial Chamber indicated that it would ensure that the period of pre-trial detention would be as brief as possible, and would start the trial within

Mrkšić, Case No. IT-04-79-AR65.1, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002, (*Mrkšić* Decision"), para. 9.

²⁹ *See supra*, para. 7.

³⁰ Impugned Decision, p. 3; *See* Order in Lieu of Indictment, p. 2.

³¹ Impugned Decision, p. 3.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Milutinović* Decision, para. 12.

the shortest time so as to avoid prolonging Petković's detention beyond what would be strictly necessary for the preparation of Petković's defence.³⁵ In so doing, the Appeals Chamber finds that the Trial Chamber gave due consideration to the specific situation of Petković so as to limit as far as possible restrictions on his liberty.

16. Given that the Appeals Chamber finds that the Trial Chamber's determination that Petković had not sufficiently demonstrated that he would appear for trial is reasonable, the Appeals Chamber is satisfied that the Trial Chamber was not required to address the second prong of Rule 65(B) of the Rules. Accordingly, Petković's claim that the Trial Chamber erred by failing to consider this factor is dismissed.³⁶

IV. DISPOSITION

17. In light of the foregoing, the Appeals Chamber **DISMISSES** the Appeal.

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

Dated this 25th day of July 2008,
At The Hague, the Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

³⁵ Impugned Decision, p. 4. The Appeals Chamber notes that Petković's trial is scheduled to start on 3 September 2008, see *In the Matter of Ljubiša Petković*, Case No. IT-03-67-AR77.1-PT, Ordonnance portant calendrier, 22 July 2008.

³⁶ Impugned Decision, p. 4; see, e.g., *Bošković & Tarčulovski* Decision, para. 24.