



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

Case No.: IT-05-87-T
Date: 10 December 2008
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 10 December 2008

PROSECUTOR

v.

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

PUBLIC WITH CONFIDENTIAL ANNEX

DECISION ON LAZAREVIĆ MOTION FOR TEMPORARY PROVISIONAL RELEASE

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Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 a confidential “Vladimir Lazarevic Motion for Temporary Provisional Release on the Grounds of Compassion,” filed on 6 November 2008 (“Motion”), and hereby renders its decision thereon.

Brief procedural background

1. On 5 December 2006, the Chamber denied the six Accused’s joint application for provisional release over the winter recess.¹ The Appeals Chamber affirmed this decision.²
2. On 22 May 2007, the Chamber denied the application of Vladimir Lazarević (“Accused”) for provisional release over the summer recess, holding, *inter alia*, that he had not demonstrated how the circumstances that led to the denial of his application in December 2006 had changed so as to materially affect the approach taken by the Chamber at that time. The Chamber left open the possibility that the Accused could apply for temporary provisional release on compassionate or humanitarian grounds.³ Following this denial, the Accused applied on 29 May 2007 for temporary provisional release on humanitarian grounds;⁴ and, on 18 June 2007, the Chamber granted this motion.⁵
3. On 7 December 2007, the Chamber denied a motion for temporary provisional release.⁶ The Chamber then denied a motion for reconsideration of this decision,⁷ and the Appeals Chamber affirmed.⁸
4. On 15 April 2008, the Chamber granted a temporary provisional release of the Accused based upon humanitarian and/or compassionate grounds.⁹

¹ Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006.

² *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During Winter Recess, 14 December 2006.

³ Decision on Lazarević Motion for Provisional Release, 22 May 2007, paras. 13, 15.

⁴ Confidential Vladimir Lazarević’s Motion Requesting Provisional Release on the Grounds of Compassion with Confidential Annex, 29 May 2007.

⁵ Decision on Lazarević Motion for Temporary Provisional Release, 18 June 2007 (public with confidential annex).

⁶ Decision on Lazarević Motion for Temporary Provisional Release, 7 December 2007, para. 11 (public with confidential annex).

⁷ Decision on Lazarević Motion to Reconsider Denial of Motion for Temporary Provisional Release, 13 December 2007 (public with confidential annex).

⁸ Decision on “Lazarević Defence Appeal Pursuant to Rule 116 *bis* Against the Trial Chamber’s Denial of Temporary Provisional Release”, 18 December 2007.

⁹ Decision on Lazarević Motion for Temporary Provisional Release, 15 April 2008 (public with confidential annex).

5. On 9 September 2008, the Chamber dismissed a motion made by the Accused upon humanitarian and/or compassionate grounds, without prejudice to a further application in the light of changed circumstances.¹⁰

6. On 26 September 2008, the Chamber granted the Accused temporary provisional release upon humanitarian/compassionate grounds.¹¹ The Prosecution appealed this decision, which the Appeals Chamber reversed because the Chamber had committed discernable error by misinterpreting a medical report of the Medical Officer of the United Nations Detention Unit: whereas the Medical Officer had reported that a period of convalescence in his home surroundings “could” ameliorate the Accused’s medical condition, the Chamber derived from this information that the recovery period “would” assist the Accused in his recovery.¹² The Appeals Chamber also held that the Chamber failed to properly exercise its discretion by not giving sufficient weight to other information in the medical report.¹³

Applicable law

7. 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 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, after having given the host country and the state to which the accused seeks to be released the opportunity to be heard.¹⁴ Where one of the criteria required by Rule 65(B) has not been met, a Chamber must deny provisional release and need not consider the other conditions.¹⁵

8. In deciding whether the requirements of Rule 65(B) have been met, a Chamber must consider all of those relevant factors that a reasonable Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its

¹⁰ Decision on Lazarević Motion for Temporary Provisional Release, 9 September 2008.

¹¹ Decision on Lazarević Motion for Temporary Provisional Release, 26 September 2008.

¹² Decision on “Prosecution’s Appeal from Decision on Lazarević Motion for Temporary Provisional Release Dated 26 September 2008”, 23 October 2008, paras. 12–13.

¹³ Decision on “Prosecution’s Appeal from Decision on Lazarević Motion for Temporary Provisional Release Dated 26 September 2008”, 23 October 2008, para. 14.

¹⁴ *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, para. 6.

¹⁵ *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber’s Decision on Sredoje Lukic’s Motion for Provisional Release, 16 April 2007, paras. 6, 23; *Prosecutor v. 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 (“*Popović* Decision”), para. 6.

view on those relevant factors.¹⁶ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁷ 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.¹⁸ The 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.¹⁹

9. Rule 65(B), which governs provisional release during trial, makes no mention of compassionate or humanitarian grounds. However, the jurisprudence of the Tribunal has recognised that Chambers enjoy a measure of discretion when considering motions pursuant to Rule 65 where compassionate or humanitarian concerns may permit a more limited provisional release.²⁰

10. The Appeals Chamber's recently overturned a decision in the *Prlić et al.* case, in which the Trial Chamber granted provisional release to five of the accused in those proceedings. The Appeals Chamber held that the *Prlić et al.* Chamber erred by not offering an indication of how much weight it ascribed to the justifications for temporary provisional release on humanitarian grounds. The Appeals Chamber also held that these various justifications were not sufficiently compelling, particularly in light of the Rule 98 *bis* ruling, to warrant the exercise of the Trial Chamber's discretion in favour of granting the accused provisional release without offering any indication of how much weight it ascribed thereto. This Chamber does not interpret the *Prlić et al.* decision as a *per se* legal ruling that provisional release must always be denied after a Rule 98 *bis* ruling,

¹⁶ *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. 8.

¹⁷ *Ibid.*

¹⁸ *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, para. 7.

¹⁹ *Stanišić Decision*, para. 8.

²⁰ See Decision on Šainović Motion for Temporary Provisional Release, 7 June 2007, paras. 7–11; see also *Prosecutor v. 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. 5 ("*Popović Decision*"); *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to Attend His Brother's Memorial Service and to Observe the Traditional Period of Mourning, 1 September 2006, p. 1; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić for Provisional Release for a Fixed Period to Attend Memorial Services for His Mother, 5 May 2006, p. 3; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to Attend His Daughter's Memorial Service, 20 April 2006, p. 2; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005, para. 15; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Service for His Father, 21 October 2004, para. 20; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision on Dario Kordić's Request for Provisional Release, 19 April 2004, paras. 8–12.

provided that the Chamber discusses and weighs all the factors relevant to the provisional release motion.²¹

11. Even more recently, the Appeals Chamber, again in *Prlić et al.*, has set the test for provisional release at a late stage of trial proceedings as follows:

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*. . . . 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 circumstances²²

12. The Chamber has carefully considered and applied all of the above jurisprudence of the Appeals Chamber when assessing the circumstances of the Accused.

Discussion

13. The Chamber has carefully considered all the submissions in relation to this matter and has taken all relevant factors bearing upon the issue of provisional release into account.²³

14. In the Motion, the Accused requests a temporary provisional release for three weeks based upon a medical condition.²⁴

15. The Trial Chamber is in receipt of guarantees from Serbia confirming that it will respect all orders made by the Chamber in respect of the provisional release of the Accused.²⁵ The Netherlands, in its capacity as host country, has stated that it has no objection to the Accused's provisional release.²⁶

²¹ *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, paras. 19–21.

²² *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. 17 (footnote omitted) (emphasis added); *but see Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution's Urgent Appeal Against "*Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Pušić*" Issued on 14 April 2008, 23 April 2008, para. 15.

²³ Motion, paras. 6–17.

²⁴ Motion, para. 5.

²⁵ Confidential Supplement to Vladimir Lazarevic Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annex, 21 August 2008.

²⁶ Letter from Dutch Ministry of Foreign Affairs, 11 November 2008.

16. The Prosecution opposes the Motion, articulating its general opposition to provisional release of any of the six Accused at this most advanced stage of the proceedings. The Prosecution submits that there is precedent for limited, strictly controlled provisional releases in cases of a compelling showing of unusual or special circumstances on compassionate grounds. However, in the view of the Prosecution, the assertions in the Motion, although showing the existence of medical issues, do not warrant the requested relief without more specific documentation. Should the Motion be granted, the Prosecution requests the Chamber to require 24-hour security of the Accused and to order a stay of the decision.²⁷

17. [See confidential annex.]

18. [See confidential annex.]

19. The Chamber recalls that the Appeals Chamber reversed the Chamber's decision on the Accused's last motion for temporary provisional release on compassionate and/or humanitarian grounds on two bases: (a) the Chamber committed discernable error by misinterpreting a medical report of the Medical Officer of the United Nations Detention Unit;²⁸ and (b) the Chamber failed to properly exercise its discretion by not giving sufficient weight to other information in the medical report.²⁹

20. In respect of the first ground, the Chamber notes that the Medical Officer has stated that "further rehabilitation surrounded by his close family *would* have a positive influence on his overall wellbeing" (emphasis added). The Appeals Chamber's prior holding that the Chamber committed discernable error by misinterpreting a medical report—deriving a "would" from a "could"—therefore does not prevent the Chamber from treating this factor favourably in relation to the Accused's motion for temporary provisional release. Moreover, the Chamber remains of the view that the Accused would indeed benefit from a period of convalescence in familiar home surroundings.

21. In respect to the second ground, the Appeals Chamber found that the Chamber failed to properly exercise its discretion by not giving sufficient weight to other information in two medical reports, even though the Chamber considered (and cited) this information in its previous decision. This information was the fact that the Medical Officer opined that the Accused was fit to attend

²⁷ Confidential Prosecution Response to Vladimir Lazarević Motion for Temporary Provisional Release on Grounds of Compassion, 13 November 2008, paras. 4–9.

²⁸ Decision on "Prosecution's Appeal from Decision on Lazarević Motion for Temporary Provisional Release Dated 26 September 2008", 23 October 2008, paras. 12–13.


²⁹ Decision on "Prosecution's Appeal from Decision on Lazarević Motion for Temporary Provisional Release Dated 26 September 2008", 23 October 2008, para. 14.

court, to travel, and to perform his daily routine³⁰ and the fact that the Locum Medical Officer stated that the Accused's recovery is "within the normal period of recuperation".³¹ The Chamber has reviewed the circumstances relevant to the Accused's motion for provisional release, including the fact that both the Medical Officer and the Chamber are of the view that further rehabilitation surrounded by his close family *would* have a positive influence on the Accused's overall well being, and now considers, in light of the guidance given by the Appeals Chamber in its Decision, that these circumstances do not constitute sufficiently compelling compassionate and/or humanitarian grounds to warrant a temporary provisional release.

Disposition

22. For the foregoing reasons and pursuant to Article 29 of the Statute of the Tribunal and Rules 54 and 65 of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby DENIES the Motion.

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


Judge Iain Bonomy
Presiding

Dated this tenth day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁰ Confidential and *ex parte* Registry Submission Pursuant to Rule 33(B) on the State of Health of the Accused, Mr. Vladimir Lazarević, 19 September 2008.

³¹ Confidential and *ex parte* Registry Submission Pursuant to Rule 33(B) Regarding the Accused Lazarević's Current Health Status, 26 August 2008.