



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: 12 December 2008
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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: 12 December 2008

PROSECUTOR

v.

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

PUBLIC

DECISION ON LUKIĆ 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 “Sreten Lukic’s Renewed Motion for Provisional Release”, filed confidentially on 3 December 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 the Accused Sreten Lukić (“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, arguing, *inter alia*, that the poor health conditions of members of his family justified his request for relief.⁴ On 25 June 2007, the Chamber denied this motion, reasoning that the Accused had not demonstrated that the health conditions of those members of his family precluded their travel to the Hague and that it was therefore unnecessary for the Accused to travel to Belgrade in order to visit with them.⁵ On 4 July 2007, the Chamber denied the Accused’s motion for reconsideration on this matter.⁶
3. On 4 December 2007, the Accused filed a motion for temporary provisional release on compassionate or humanitarian grounds.⁷ In its decision of 7 December 2007, the Chamber denied that motion, noting that the Accused was on provisional release during the pre-trial phase of the proceedings and was released during the summer recess in July 2006 and that, therefore, he had had adequate opportunities to tend personally to pressing personal matters. The Chamber also reasoned

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 Lukić Motion for Provisional Release, 22 May 2007, paras. 13, 15.

⁴ Confidential Sreten Lukić’s Renewed Motion for Provisional Release, 29 May 2007.

⁵ Decision on Lukić Motion for Temporary Provisional Release, 25 June 2007, para. 6.

⁶ Decision on Lukić Motion for Reconsideration of Decision on Provisional Release, 4 July 2007, para. 6.

⁷ Confidential Sreten Lukić’s Motion for Provisional Release During Winter Recess on Grounds of Compassion, 4 December 2007.

that it did not consider that circumstances had materially changed so as to justify a temporary provisional release on compassionate or humanitarian grounds at that point in time.⁸ On 12 December 2007, the Chamber denied the Accused's motion for reconsideration on this matter.⁹ This decision was affirmed on appeal.¹⁰

4. On 13 June 2008, the Chamber denied the Accused's motion for provisional release due to the fact that it was based upon inaccurate information presented to the Chamber.¹¹

5. On 26 September 2008, the Chamber denied the Accused's motion for temporary provisional release made on grounds of compassion. The Chamber found that the Accused had not adequately explained why he could not consult with his family in Serbia regarding arrangements for an ailing family member, and why his family in Serbia was not in a position to attend to the matters that formed the basis for the motion. As a consequence, the Chamber was not satisfied that the circumstances were serious and sufficiently compelling enough to warrant provisional release.¹²

6. On 31 October 2008, the Chamber denied a motion by the Accused for provisional release based upon compassionate and/or humanitarian grounds, being of the view that the Accused had not adequately supported his claim that a medical condition required the course of treatment described in the Motion. The Chamber also stated that it did not have enough information before it to find that a locally available medical alternative could not adequately address the Accused's purported health concerns.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

⁸ Decision on Lukić Motion for Temporary Provisional Release, 7 December 2007 (public with confidential annex), para. 8.

⁹ Decision on Lukić Motion to Reconsider Denial of Motion for Temporary Provisional Release, 12 December 2007 (public with confidential annex).

¹⁰ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.4, Decision on "Sreten Lukić's Appeal Pursuant to Rule 116 bis Against the Trial Chamber's Denial of Temporary Provisional Release", 18 December 2007.

¹¹ Decision on Lukić Motion for Provisional Release, 13 June 2008.

¹² Decision on Lukić Motion for Temporary Provisional Release, 26 September 2008.

¹³ Decision on Lukić Motion for Temporary Provisional Release, 31 October 2008, para. 21.

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.

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 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

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.

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. Bošković 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.

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, 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 provisional release for a period of at least 14 days to Belgrade, Republic of Serbia ("Serbia"), in order to receive medical check-up treatment for a procedure he underwent back in 2004 before his transfer to the Tribunal. The Accused avers that

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. 10–12.

this treatment needs to be done at the facility where he underwent the original procedure.²⁴ In addition, the Accused states that he has complied with all orders of the Chamber during his prior provisional releases.²⁵ The Accused also avers that, the evidence in the case having closed, the Chamber's concern that the Accused will endanger victims, witnesses, or other persons is no longer operative.²⁶ The Accused argues that Serbia has renewed its guarantees as regards a potential provisional release of the Accused.²⁷ 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.²⁸ The Netherlands, in its capacity as host country, has stated that it has no objection to the Accused's provisional release.²⁹

15. The Prosecution opposes the Motion, arguing that the accused has not met his burden of showing that he will return for judgment. It further avers that at this late stage of the proceedings the Accused is a substantial flight risk, and that he has not addressed such risk in his motion. The Prosecution also contends that the Accused has not made an adequate showing of compelling circumstances that would support the grant of provisional release on grounds of compassion. It points out that the Accused has not provided adequate documentation to demonstrate why the condition cannot be treated in The Hague. Moreover, the Prosecution observes that the grounds for the request for relief must have been known to the Accused for months, if not years, and should have been raised previously. Finally, should the Motion be granted, the Prosecution requests the Chamber to order a stay of the decision.³⁰

16. On 10 December 2008, the Medical Officer of the United Nations Detention Unit ("UNDU") filed a medical report on the health of the Accused, in response to a request from the Chamber.³¹ In this report, the Medical Officer answers five questions put to him by the Chamber, regarding matters raised by the Accused in the Motion. The terms of the report make it clear that the Accused is receiving adequate care at the UNDU and that his claims for the need for treatment in Belgrade are without foundation.³² The Chamber therefore is not satisfied that the circumstances

²⁴ Motion, paras. 2–9.

²⁵ Motion, para. 11.

²⁶ Motion, para. 10.

²⁷ Motion, para. 11.

²⁸ Confidential Sreten Lukic's Motion for Provisional Release, 16 October 2008, Exhibit B. These guarantees were from the last motion for provisional release.

²⁹ Letter from Dutch Ministry of Foreign Affairs, 9 December 2008.

³⁰ Prosecution Response to Sreten Lukic's Motion for Provisional Release, 5 December 2008, paras. 2–5.

³¹ Order Pursuant to Rule 74 *bis*, 5 December 2008.

³² Confidential and *ex parte* Registry Submission Pursuant to Rule 33(B) Regarding the Accused Sreten Lukic's Health, 10 December 2008.

set forth in the Motion are serious and sufficiently compelling enough to warrant a provisional release at this time.

17. In light of the foregoing finding, it is not necessary for the Chamber to address the Accused's submissions relating to the criteria that must be satisfied under Rule 65(B).


18. In the Accused's confidential "Supplement to Renewed Motion for Provisional Release: Provision of Medical Authorization", filed 10 December 2008, the Accused requests that copies of specific medical records be sent to him and the Chamber. The Chamber considers that it has adequate information before it, with the receipt of the medical report of the Medical Officer of the UNDU, in order to decide the Motion. However, the Chamber does consider that it is appropriate to request the Registry to facilitate the transfer of this information to the Accused.

Disposition

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

20. The Registry is hereby REQUESTED to facilitate the transfer to the Accused of copies of the specific medical records listed in the Accused's confidential "Supplement to Renewed Motion for Provisional Release: Provision of Medical Authorization", filed 10 December 2008.

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



Judge Iain Bonomy
Presiding

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

[Seal of the Tribunal]