



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-AR65.8

Date: 20 July 2009

Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision of: 20 July 2009

PROSECUTOR

v.

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

PUBLIC REDACTED VERSION

**DECISION ON PROSECUTION'S APPEAL AGAINST DECISION ON
GVERO'S MOTION FOR PROVISIONAL RELEASE**

Office of the Prosecutor

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Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Mr. Ljubomir Borovčanin
Ms. Natacha Fauveau-Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Mr. Milan Gvero
Mr. Peter Haynes QC and Mr. Simon Davis for Mr. 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 “Tribunal”, respectively) is seised of the “Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release”, filed confidentially on 16 June 2009 by the Prosecution (“Appeal”)¹ against the “Decision on Gvero’s Motion for Provisional Release”, issued confidentially on 15 June 2009 by Trial Chamber II (“Impugned Decision”), which granted provisional release to Milan Gvero (“Gvero”). Gvero responded on 25 June 2009.² The Prosecution did not file a reply.

I. BACKGROUND

2. On 1 May 2009, Milan Gvero filed a confidential and partially *ex parte* motion requesting provisional release to travel to Belgrade to receive a second opinion on treatment for [REDACTED].³ On 15 June 2009, the Trial Chamber granted the Motion, finding that Gvero did not pose a flight risk or a threat to any victim, witness, or person associated with this case⁴ and that it was “crucial that Gvero seeks a second opinion on [REDACTED]”.⁵ It further found that, “[i]n order to make an informed decision, Gvero will undoubtedly benefit from receiving such second opinion from a doctor who speaks his language and from doing the associated testing in Belgrade, a familiar environment.”⁶ The Trial Chamber also granted the Prosecution’s request for a stay of the execution of the Impugned Decision pending appeal.⁷

II. STANDARD OF REVIEW

3. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of a Trial Chamber’s decision.⁸ The Appeals Chamber has previously held that a decision on provisional

¹ See also Corrigendum to Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release, filed confidentially on 23 June 2009.

² Defence Response to Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release, filed confidentially on 25 June 2009 (“Response”).

³ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Motion Seeking the Provisional Release of Milan Gvero for Humanitarian Reasons During the Period Allowed for the Preparation of Final Briefs and Closing Arguments, filed confidentially and partially *ex parte* on 1 May 2009 (“Motion”), paras 13–17.

⁴ Impugned Decision, para. 16.

⁵ Impugned Decision, para. 18.

⁶ Impugned Decision, para. 18.

⁷ Impugned Decision, para. 23(g).

⁸ See, e.g., *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Praljak’s Appeal of the Trial Chamber’s 2 December 2008 Decision on Provisional Release, 17 December 2008, para. 4 (“*Praljak Decision*”) (citing *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

release by the Trial Chamber under Rule 65 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) is a discretionary one. Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.⁹

4. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a discernible error. The Appeals Chamber will only overturn a Trial Chamber’s decision on provisional release where it is found to be (a) based on an incorrect interpretation of governing law; (b) based on a patently incorrect conclusion of fact; or (c) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.¹⁰ 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.¹¹

III. APPLICABLE LAW

5. 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.¹²

6. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision.¹³ It must then provide a reasoned opinion indicating its view on those relevant factors.¹⁴ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁵ This is because decisions on motions for provisional release are fact intensive and cases are considered

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, para. 5).

⁹ See, e.g., *Praljak* Decision, para. 4; *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, para. 5.

¹⁰ *Praljak* Decision, para. 5.

¹¹ *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. 6.

¹² *Praljak* Decision, para. 6; *Brahimaj* Decision, para. 6.

¹³ *Praljak* Decision, para. 6; *Brahimaj* Decision, para. 6.

¹⁴ *Praljak* Decision, para. 7; see also *Brahimaj* Decision, para. 10.

¹⁵ *Praljak* Decision, para. 7; *Stanišić* Decision, para. 8.

on an individual basis in light of the particular circumstances of the individual accused.¹⁶ 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.¹⁷ If the Trial Chamber is satisfied that the requirements of Rule 65(B) have been met, it has a discretion as to whether or not to grant provisional release to an accused. An application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, should only be granted when sufficiently compelling humanitarian reasons exist.¹⁸

IV. SUBMISSIONS

7. The Prosecution appeals the Impugned Decision on the ground that “the Trial Chamber committed a discernible error by failing to correctly apply the governing law in respect of Gvero’s alleged need to obtain medical treatment in Serbia”.¹⁹ Specifically,

The Trial Chamber did not expressly find – as required – that the appropriate medical treatment sought by Gvero is not available to him in the Netherlands. Consequently, it failed to properly exercise its discretion when assessing whether there were sufficiently compelling humanitarian circumstances allowing Gvero’s provisional release at this late stage in the proceedings against him.²⁰

Regarding Gvero’s [REDACTED], the Prosecution contends that Gvero has not shown—and the Trial Chamber did not find—that it cannot be attended to in the Netherlands; moreover, the Prosecution argues that the treatment is not urgent, that extensive testing has already been conducted in the Netherlands, and that the Trial Chamber failed to consider the possibility of Gvero’s Serbian physicians travelling here to discuss with Gvero further treatment that could be conducted in the Netherlands.²¹ Regarding Gvero’s [REDACTED], the Prosecution advances similar arguments.²² According to the Prosecution, the Trial Chamber’s finding that it would be “beneficial” for Gvero to receive the treatment in Serbia, without having made a finding as to the treatment’s unavailability in the Netherlands, was an improper exercise of the Trial Chamber’s

¹⁶ *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.

¹⁷ *Praljak* Decision, para. 7; *Stanišić* Decision, para. 8.

¹⁸ *See Praljak* Decision, para. 15.

¹⁹ Appeal, para. 2.

²⁰ Appeal, paras 2, 7, 11, 16, 20.

²¹ Appeal, paras 11–15.

²² Appeal, paras 16–20.

discretion. The Prosecution therefore requests that the Appeals Chamber reverse the Impugned Decision and deny Gvero's provisional release.²³

8. Gvero responds by pointing out that the Trial Chamber, which has been seised of the case for almost three years, made its decision about the most appropriate place for him to receive his treatment based upon his age, ailments, and deteriorating health, as well as "various developments over time with respect to each factor".²⁴ Gvero argues that the Trial Chamber found that it was "crucial" for him to receive a second opinion for [REDACTED] and the need for [REDACTED] and that, due to the lapse of time, the need for such an opinion was urgent. Gvero then avers that the Trial Chamber did in fact explain why the particular treatment was not available in the Netherlands when it stated that "Gvero will undoubtedly benefit from receiving such second opinion from a doctor who speaks his language and from doing associated testing in Belgrade, a familiar environment".²⁵ In response to the Prosecution's argument that Gvero's Serbian doctors could travel to the Netherlands, Gvero states that this is "totally unrealistic and impractical" based upon the extensive nature of the treatment required, as documented in Annex C of the Motion.²⁶ Finally, Gvero disagrees with the Prosecution's assessment of his [REDACTED] situation as non-urgent; he provides details of his [REDACTED] situation—for example, [REDACTED], as documented in Annex D of the Motion. He further points out that the treatment is an on-going one that commenced in Belgrade and that the Trial Chamber gave clear and cogent reasons why the [REDACTED] should be carried out as soon as possible and at the same venue and time as the second [REDACTED] opinion.²⁷ Gvero therefore asks that the Prosecution's appeal be dismissed.²⁸

V. DISCUSSION

9. The core of the Prosecutor's appeal is that the Trial Chamber failed to properly assess whether there were sufficiently compelling humanitarian reasons justifying Gvero's provisional release at such an advanced stage of the proceedings against him. It states that, in concluding that the medical grounds advanced by Gvero in support of his release justified the exercise of its

²³ Appeal, paras 1, 14–15, 22.

²⁴ Response, para. 9 (referring to Impugned Decision, para. 17 and in particular note 42).

²⁵ Response, para. 10.

²⁶ Response, para. 11.

²⁷ Response, para. 12.

²⁸ Response, para. 13.

discretion in his favour, the Trial Chamber failed to consider whether the proposed treatment was available in the Netherlands, as it was required to do.²⁹

10. The Appeals Chamber has recently held in the *Milutinović et al.* case the following, in regards to an application from Vladimir Lazarević, whose case is currently on appeal:

Regarding the Prosecution's objection, the Appeals Chamber notes that, indeed, the medical evidence does not show that the required medical treatment cannot be performed in The Netherlands. While this is not a requirement explicitly provided for in Rule 65(I) of the Rules, the Appeals Chamber agrees with the Prosecution that it is a relevant factor in establishing whether "special circumstances" exist. Nonetheless, the Appeals Chamber emphasizes that the assessment of such circumstances must be made on a case-by-case basis and reflect the totality of relevant considerations.³⁰

The Appeals Chamber then went on to hold that, based upon the past medical history of Lazarević and the current circumstances he faced, there were "sufficient grounds to conclude that the required treatment and subsequent therapy have greater chances to succeed if performed in [Serbia]" and therefore that "special circumstances exist warranting provisional release".³¹

11. The Appeals Chamber considers that the *Lazarević* decision was one taken under Rule 65(I) in relation to a person who has already been convicted by the Trial Chamber and whose case is now on appeal, whereas Gvero is an accused on trial who still benefits from the presumption of innocence and whose provisional release is governed by Rule 65(B) and the relevant jurisprudence. Nevertheless, the Appeals Chamber does consider that the availability of medical care in the Netherlands, in the context of an accused applying for provisional release on medical grounds after a Rule 98 *bis* ruling, is a relevant factor in establishing whether sufficiently compelling humanitarian grounds exist for the release, which a Chamber must take into account.

12. Examining the Impugned Decision, it can be seen that the Trial Chamber first noted its previous findings about the medical condition of Gvero, including its deterioration throughout the proceedings.³² The Trial Chamber then considered Gvero's medical condition, finding that he would "undoubtedly benefit" from the assessment in Serbia regarding his [REDACTED] and that there were "advantages" to this assessment being carried out simultaneously with his [REDACTED] treatment at the same facility in Belgrade.³³ These findings were based upon two

²⁹ Appeal, para. 7.

³⁰ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Public Redacted Version of the "Decision on Vladimir Lazarević's Second Motion for Temporary Provisional Release on the Grounds of Compassion" Issued on 21 May 2009, 22 May 2009, para. 11.

³¹ *Ibid.*

³² Impugned Decision, para. 17.

³³ Impugned Decision, paras 18–19.

medical reports from the [REDACTED], detailing the coordinated treatment that Gvero would receive in Belgrade.³⁴ Finally, the Trial Chamber accepted Gvero's statement in the Motion that the Medical Officer of the UNDU supported the proposed consultation in Belgrade and considered that Gvero would derive some benefit from it, without requiring a report to this effect from the Medical Officer.³⁵

13. However, although written expert reports on health and other relevant personal conditions might not always necessarily be required³⁶ and although the Trial Chamber found that the proposed medical treatment in Belgrade would benefit Gvero, the Trial Chamber, in the particular circumstances of the present case, should have obtained medical documentation identifying the sufficient [REDACTED] reasons for medical treatment to take place outside the Netherlands. In this regard, the Appeals Chamber recalls that an applicant for provisional release on medical grounds bears the burden of establishing that any treatment in the Netherlands is not appropriate in his particular circumstances.³⁷ The Trial Chamber therefore neglected to address a relevant factor in its assessment of whether sufficiently compelling humanitarian reasons existed that warranted Gvero's release, namely whether Gvero could receive the treatment in the Netherlands, and in doing so committed a discernible error.

³⁴ Motion, Annexes B, C, and D.

³⁵ Impugned Decision, para. 18.

³⁶ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Provisional Release, 17 December 2008, para. 11.

³⁷ See *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, issued confidentially on 26 June 2008, para. 68 (citing *Prosecutor v. Strugar*, Case No. IT-01-42-A, Decision on "Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions", 8 December 2005, p. 4 (page citation corrected)).

VI. DISPOSITION

14. For the foregoing reasons, the Appeals Chamber **GRANTS** the Appeal and **REVERSES** the Impugned Decision.

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



Judge Patrick Robinson
Presiding

Judge Mehmet Güney appends a dissenting opinion.

Dated this twentieth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

OPINION DISSIDENTE DU JUGE GÜNEY

1. Dans plusieurs décisions antérieures³⁸, j'ai eu l'occasion d'exprimer mon désaccord avec l'interprétation de la Décision dans l'affaire *Le Procureur c/ Prlić et consorts* du 11 mars 2008³⁹ dernier faite par la majorité dans la décision *Petković* qui impose une condition supplémentaire, soit « des raisons humanitaires suffisamment impérieuses », ⁴⁰ à celles énoncées à l'article 65 (B) du Règlement de Procédure et Preuve («Règlement») ⁴¹ dans le cadre d'une demande de mise en liberté provisoire suite à une décision prise au titre de l'article 98 *bis* du Règlement.

2. Pour les raisons élaborées dans mes opinions dissidentes antérieures, j'éprouve des difficultés à partager l'opinion majoritaire des Juges dans la présente décision requérant la condition supplémentaire d'un rapport médical pour évaluer s'il y a des « raisons suffisantes sociales et psychologiques » justifiant un traitement médical en dehors des Pays-Bas.

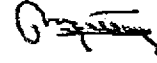
³⁸ *Le Procureur c/ Prlić et consorts*, affaire n° IT-04-74-AR65.14, Decision on Jadranko Prlić's Appeal Against the *Décision relative à la demande de mise en liberté provisoire de l'Accusé Prlić*, 9 April 2009, 5 juin 2009, Opinion Partiellement Dissidente du Juge Güney; *Le Procureur c/ Prlić et consorts*, affaire n° IT-04-74-AR65.7, *Décision concernant l'appel interjetée par l'Accusation contre la Décision relative à la demande de mise en liberté provisoire de l'Accusé Petković* rendue le 31 mars 2008, 21 avril 2008, Opinion Partiellement Dissidente du Juge Güney; *Le Procureur c/ Prlić et consorts*, affaire n° IT-04-74-AR65.8, *Décision relative à l'appel interjeté par l'Accusation contre la Décision relative à la demande de mise en liberté provisoire de l'Accusé Prlić* rendue le 7 avril 2008, 25 avril 2008, Opinion Partiellement Dissidente du Juge Güney; *Le Procureur c/ Prlić et consorts*, affaire n° IT-04-74-AR65.6, *Motifs de la Décision du 14 avril 2008 concernant l'appel urgent interjeté par l'Accusation contre la Décision relative à la demande de mise en liberté provisoire de l'Accusé Pušić*, 23 avril 2008; *Le Procureur c/ Popović et consorts*, affaire n° IT-05-88-AR65.4, *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 mai 2008, Opinion Partiellement Dissidente des Juges Liu et Güney.

³⁹ *Le Procureur c/ Prlić et consorts*, affaire n° IT-04-74-AR65.5, *Décision relative à l'appel unique interjeté par l'Accusation contre les décisions ordonnant la mise en liberté provisoire des Accusés Prlić, Stojić, Praľjak, Petković et Ćorić*, 11 mars 2008.

⁴⁰ *Le Procureur c/ Prlić*, Affaire n° IT-04-74-AR65.5, *Decision on Prosecutor's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praľjak, Petković and Ćorić*, 11 mars 2008. J'aimerais préciser que je ne faisais pas parti du Collège de Juges qui a rendu cette décision.

⁴¹ Règlement de Procédure et de Preuve, tel qu'amendé le 4 novembre 2008.

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



Judge Mehmet Güney

Dated this twentieth day of July 2009
At The Hague,
The Netherlands

[Seal of the Tribunal]