

**UNITED
NATIONS**



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-A
Date: 4 August 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision: 4 August 2009

PROSECUTOR

v.

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

PUBLIC REDACTED VERSION

**DECISION ON THE THIRD URGENT DEFENCE MOTION
REQUESTING PROLONGATION OF PROVISIONAL
RELEASE OF VLADIMIR LAZAREVIĆ**

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for the Appellants:

Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 seized of the "Third Urgent Defence Motion Requesting Prolongation of Provisional Release of General Vladimir Lazarevic [sic] with Confidential Annexes" filed confidentially by Counsel for Vladimir Lazarević ("Lazarević") on 3 August 2009 ("Motion"). The Office of the Prosecutor ("Prosecution") filed its response on the same day objecting to the Motion.¹ Lazarević has not yet filed a reply.²

I. BACKGROUND

2. On 21 May 2009, the Appeals Chamber granted Lazarević's request for provisional release and ordered that he be released to Serbia for a period of one month in order to receive the required medical treatment, including subsequent recovery therapy.³ Lazarević was released on 25 May 2009 and was due to return to the United Nations Detention Unit in The Hague ("UNDU") on 25 June 2009.⁴ On 24 June 2009, following Lazarević's request, the Appeals Chamber extended the period of provisional release until 15 July 2009.⁵ On 14 July 2009, following another urgent request from Lazarević, the Appeals Chamber further extended the period of provisional release until 5 August 2009.⁶

3. On 31 July 2009, the Registry submitted a report prepared by the medical expert appointed pursuant to the Decision of 14 July 2009⁷ with respect to Lazarević's health situation.⁸

¹ Prosecution's Response to Vladimir Lazarević Motion for Temporary Provisional Release on the Grounds of Compassion, 3 August 2009 (confidential) ("Response").

² The Appeals Chamber notes that the dead-line for filing a reply expires on 7 August 2009 (Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, It/155/Rev.3, 16 September 2005, para. 14. The Appeals Chamber has reminded Lazarević's Counsel of the urgency of the situation and invited them to file a reply, if any, by noon on 4 August 2009 (internal e-mail communication). No reply was submitted by then. Considering that Lazarević is scheduled to return from provisional release on 5 August 2009, the Appeals Chamber finds it to be in the interests of justice to render this decision without any delay and prior to the expiration of the said dead-line. The Appeals Chamber finds that Lazarević would not be prejudiced by this procedure given that the Response does not raise any issues that are not already addressed in the Motion.

³ *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 ("Decision of 21 May 2009"), paras 11, 17.

⁴ Correspondence from the Embassy of the Republic of Serbia, 22 May 2009, No. 515/2009 (confidential); Correspondence from the Embassy of the Republic of Serbia, Re: Return of Vladimir Lazarević, 19 June 2009, No. 665-1/2009 (confidential).

⁵ Decision on Urgent Defence Motion Requesting Prolongation of Provisional Release of Vladimir Lazarević, 24 June 2009 (confidential) ("Decision of 24 June 2009"), para. 16. The public redacted version was filed the same day.

⁶ Decision on Second Urgent Defence Motion Requesting Prolongation of Provisional Release of Vladimir Lazarević, 14 July 2009 (confidential) ("Decision of 14 July 2009"), para. 13. The public redacted version was filed the same day. See also, Correspondence from the Embassy of the Republic of Serbia, 3 August 2009, No. 875/2009 (confidential).

⁷ Decision of 14 July 2009, paras 10, 15.

II. APPLICABLE LAW

4. Pursuant to Rule 65(I) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), a convicted person may bring an application seeking provisional release for a fixed period. By virtue of Rule 107 of the Rules, the whole of Rule 65 applies *mutatis mutandis* to applications brought before the Appeals Chamber under this provision.⁹ Rule 65(I) of the Rules thus provides that the Appeals Chamber may grant provisional release if it is satisfied that (i) the convicted person, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be; (ii) the convicted person, if released, will not pose a danger to any victim, witness or other person, and; (iii) special circumstances exist warranting such release. These requirements must be considered cumulatively.¹⁰ The Appeals Chamber recalls that "whether an applicant satisfies these requirements is to be determined on a balance of probabilities, and the fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities."¹¹ Finally, the discretionary assessments of the requirements under Rule 65 are made on a case-by-case basis.¹²

5. The Appeals Chamber recalls that the same legal principles apply *mutatis mutandis* to a motion for extension of provisional release.¹³

III. DISCUSSION

A. Arguments of the parties

6. Lazarević requests that the period of his provisional release ordered by the Decision of 14 July 2009, be extended for another three weeks, *i.e.* until 26 August 2009, considering "the new development related to [Lazarević's] state of health".¹⁴

7. Lazarević submits that [REDACTED]. He further argues that he was advised to have surgical treatment in relation to this condition after the current inflammatory stage has passed, which had been expected to be two weeks after [REDACTED], and thus is not recommended at this moment.¹⁵ He is therefore suggesting that his provisional release be extended by three weeks,

⁸ Registry's Submission Pursuant to Rule 33(B) Regarding the Accused Lazarević's Health Status, 31 July 2009 (confidential and *ex parte*) ("Medical Report").

⁹ Decision of 21 May 2009, para. 4, and references cited therein.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Decision of 24 June 2009, para. 4.

¹⁴ Motion, paras 4, 15.

¹⁵ *Ibid.*, para. 7, referring to Annex 1 to the Motion.

including the 15 days required before the operation and 5 days of postoperative treatment.¹⁶ Lazarević alleges that his submissions are corroborated by the Medical Report. Finally, Lazarević emphasises that the doctors in the Military Hospital in Niš (“Niš Hospital”) are available to perform the required treatment as soon as possible, whereas, in his submission, “it would not be possible for such operation to be organized in the Netherlands within the necessary time-limit, this especially during [the] period of summer recess”.¹⁷

8. Annex 2 to the Motion contains a letter from the President of Serbia’s National Council for the Cooperation with the International Criminal Tribunal for the former Yugoslavia dated 31 July 2009, stating that the guarantees issued by the Government of the Republic of Serbia on 7 May 2009 for Lazarević’s provisional release are “valid and in effect for the prolongation of Provisional Release of the Accused Mr. Lazarević in accordance with new Decision of the Appeals Chambers [sic]”.¹⁸

9. The Prosecution objects to the Motion on the grounds that no acute justification exists for Lazarević’s continued treatment outside of the Netherlands and that available medical evidence shows that he is fit to travel with appropriate precautions.¹⁹ In particular, the Prosecution points to the conclusion of the Medical Report that [...].²⁰ Moreover, the Prosecution submits that neither the medical evidence underlying the Decision of 14 July 2009, nor the Medical Report contains any references to a required surgery in connection with Lazarević’s condition, and that in any case, the present Motion itself admits that the operation cannot be performed at this stage.²¹

B. Analysis

10. The Appeals Chamber recalls that, in its Decision of 14 July 2009, it found that “the special circumstances required under Rule 65(I)(iii) exist[ed], particularly given the acute phase of Lazarević’s condition and the fact that it is not recommended that he travels by plane in his current state”.²² In light of the fact that Lazarević’s submissions and the medical evidence underlying the Decision of 14 July 2009 suggested that his “treatment would require a *minimal* period of three weeks [from 12 July 2009 when [REDACTED] was diagnosed] with a recommended *further assessment* of his condition after the expiration of such period”, the Appeals Chamber instructed the

¹⁶ *Ibid.*, paras 8, 11.

¹⁷ *Ibid.*, paras 11-13.

¹⁸ Annex 2 to the Motion, p. 1. The Appeals Chamber also takes note of the “Letter of President of the National Council for Cooperation with the ICTY to Mr Daqun Liu, Presiding Judge of the ICTY Appeals Chamber in case against defendant Vladimir Lazarević, dated 03 August 2009”.

¹⁹ Response, paras 1, 5.

²⁰ Response, para. 3.

²¹ Response, para. 4.

Registry to appoint an independent medical expert to examine Lazarević in the Niš Hospital and submit a report, which was done on 31 July 2009.²³

11. The Appeals Chamber notes that the Medical Report confirms that Lazarević has [REDACTED]. The Medical Report concludes that Lazarević “can be fully mobile and capable of flying [REDACTED]”.²⁴

12. On the basis of the entirety of the medical evidence before it, the Appeals Chamber finds that Lazarević has failed to demonstrate the existence of special circumstances under Rule 65(I)(iii) of the Rules given that there is no acute justification from the medical point of view for him to remain in Serbia. The acute phase of his condition has passed and he is considered to be fit for travel with the necessary precautions. Furthermore, Lazarević has not shown that any surgical treatment is required in the immediate future.²⁵ Finally and importantly, Lazarević failed to demonstrate why any further treatment related to his current condition, including possible surgery, cannot be performed in the Netherlands. In this regard, the Appeals Chamber finds Lazarević’s reference to the Tribunal’s judicial recess to be irrelevant to any medical arrangements in the Netherlands which he may require upon his return to the UNDU.

13. The Appeals Chamber has not yet received any submissions from the host country but considering the urgency of the matter and the outcome of the present decision, the Appeals Chamber finds it to be in the interests of justice to issue its decision without any delay.

IV. DISPOSITION

14. For the foregoing reasons, the Appeals Chamber hereby **DISMISSES** the Motion and **ORDERS** that Lazarević return to the UNDU no later than 5 August 2009, as provided for by its Decision of 14 July 2009, namely:

1. Lazarević shall remain on provisional release as ordered by the Decision of 21 May 2009 until 05 August 2009;

²² Decision of 14 July 2009, para. 10.

²³ *Id.*

²⁴ *Id.*

²⁵ The Appeals Chamber notes that Annex 1 to the Motion is a report from Dr. Vojislav Andjelković, [REDACTED], stating that “patient Valdimir Lazarevic [sic] was advised to have a surgical treatment after the inflammation is healed, which was expected to happen in two weeks after the occurrence of [REDACTED]”; that such surgery is not indicated at the moment; and that the assessment of the necessity of the surgery can only be performed after the treatment is completed.

2. During the remaining period of his provisional release, Lazarević shall continue to abide by the following conditions, and the government authorities of the Republic of Serbia shall continue to ensure compliance with such conditions:

- a. Lazarević shall be staying at the location specified in the Decision of 21 May 2009;²⁶
- b. the Republic of Serbia shall provide 24-hour surveillance of Lazarević throughout his presence in Serbia;
- c. Lazarević's passport shall remain with the Ministry of Justice of Serbia for the entire duration of his provisional release;
- d. Lazarević shall not have any contact whatsoever or in any way interfere with victims or (potential) witnesses or otherwise interfere in any way with the proceedings or the administration of justice;
- e. Lazarević shall not discuss his case with anyone, including the media, other than his counsel;
- f. Lazarević shall comply strictly with any requirements of the authorities of the Republic of Serbia necessary to enable them to comply with their obligations under the present decision;
- g. Lazarević shall comply with any order of the Appeals Chamber varying the terms of or terminating his provisional release; and
- h. Lazarević shall return to the UNDU no later than 05 August 2009.

3. On his return flight, Lazarević shall be accompanied by the authorised representatives of the Government of the Republic of Serbia who shall deliver Lazarević into the custody of the Dutch authorities at Schiphol airport; the Dutch authorities shall then transport Lazarević back to the UNDU in The Hague.

15. The Appeals Chamber further **REQUIRES** the Government of the Republic of Serbia to assume responsibility for:

1. Ensuring Lazarević's personal security and safety while on provisional release;
2. Providing 24-hour surveillance of Lazarević throughout his stay in Serbia;
3. All expenses in connection with the transport from Niš to Schiphol airport;
4. Ensuring that Lazarević travels in compliance with the recommendations of the Medical Report;²⁷

5. Facilitating, at the request of the Appeals Chamber or of the parties, all means of co-operation and communication between the parties and ensuring the confidentiality of any such communication;
 6. Reporting immediately to the Registrar of the Tribunal as to the substance of any threats to Lazarević's security, including full reports of investigations related to such threats;
 7. Detaining Lazarević immediately should he attempt to escape from the territory of the Republic of Serbia, or should he in any other way breach the terms and conditions of his provisional release as set out in the present decision and reporting immediately any such breach to the Registry of the Tribunal and the Appeals Chamber;
 8. Respecting the primacy of the Tribunal in relation to any existing or future proceedings in the Republic of Serbia concerning Lazarević; and
 9. Submitting a written report to the Appeals Chamber, upon Lazarević's return to the UNDU, as to Lazarević's compliance with the terms of the present decision.
16. Finally, the Appeals Chamber **INSTRUCTS** the Registrar of the Tribunal to:
1. Consult with the Dutch authorities and the authorities of the Republic of Serbia, as to the practical arrangements for the termination of Lazarević's provisional release;
 2. Request the authorities of the State(s) through whose territory Lazarević may travel to:
 - a. hold him in custody for any time he will spend in transit at the airport of the State(s) in question; and
 - b. arrest and detain Lazarević pending his return to the UNDU should he attempt to escape during travel.

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

Done this fourth day of August 2009,

At The Hague, The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]

²⁶ Decision of 21 May 2009, para. 17.5.b.

²⁷ Medical Report, p. 4 (Discharge Summary).