

**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-98-32/1-A
Date: 28 August 2009
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. John Hocking

Decision of: 28 August 2009

PROSECUTOR
v.
MILAN LUKIĆ
SREDOJE LUKIĆ
PUBLIC

**DECISION ON MILAN LUKIĆ'S MOTION FOR
PROVISIONAL RELEASE**

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for Milan Lukić:

Mr. Jason Alarid
Mr. Dragan Ivetić

Counsel for Sredoje Lukić:

Mr. Đuro J. Čepić
Mr. Jens Dieckmann

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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 “Milan Lukić’s Motion for Provisional Release on Humanitarian Grounds”, filed publicly on 21 July 2009 (“Motion”) by Counsel for Milan Lukić (“Lukić”).¹ On 24 July 2009, the Prosecution confidentially filed its response, opposing the Motion.² Lukić did not file a reply.

I. BACKGROUND

2. On 20 July 2009, Trial Chamber III (“Trial Chamber”) found Lukić responsible, pursuant to Article 7(1) of the Statute of the Tribunal (“Statute”), for murder and cruel treatment as violations of the laws or customs of war under Article 3 of the Statute and for murder, persecutions, extermination and inhumane acts as crimes against humanity under Article 5 of the Statute. The Trial Chamber sentenced him to a term of imprisonment for the remainder of his life.³ Lukić filed his notice of appeal in accordance with Rule 108 of the Rules of Procedure and Evidence (“Rules”) on 19 August 2009.⁴

II. APPLICABLE LAW

3. Pursuant to Rule 65(I) of the Rules, a convicted person may bring an application seeking provisional release for a fixed period. By virtue of Rule 107 of the Rules, Rule 65 applies *mutatis mutandis* to applications brought before the Appeals Chamber under this provision.⁵ Rule 65(I) of the Rules thus provides that the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period 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

¹ A confidential “Annex A” was appended to the Motion (“Confidential Annex”).

² Prosecution Response to Milan Lukić’s Motion for Provisional Release, 24 July 2009 (“Response”) (confidential).

³ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Judgement, 20 July 2009 (“Trial Judgement”), paras 1099-1101.

⁴ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Notice of Appeal from Trial Judgement (with confidential Annex A), 19 August 2009. The Prosecution and counsel for Sredoje Lukić filed their Notices of Appeal on the same date.

⁵ *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Tarčulovski Motion for Provisional Release on Compassionate Grounds, 22 July 2009 (“Tarčulovski Decision”), fn. 22; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Decision on Lahi Brahimaj’s Application for Provisional Release, 27 May 2009 (“Brahimaj Decision”), para. 3 and references cited therein; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on Motion of Rasim Delić for Provisional Release, 11 May 2009 (“Delić Decision”), para. 5 and references cited therein.

exist warranting such release.⁶ These requirements must be considered cumulatively.⁷ 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”.⁸ Finally, the discretionary assessments of the requirements under Rule 65 of the Rules are made on a case-by-case basis.⁹

III. DISCUSSION

A. Submissions of the parties

4. In his Motion, Lukić seeks provisional release for a period of up to five days in order to spend some time with his ailing and elderly parents who reside alone in Belgrade, both of whom he has not seen since approximately 1998. He submits that his ailing mother recently suffered serious injuries and is undergoing medical rehabilitation and treatment.¹⁰ Lukić further submits that provisional release for several days on compassionate grounds, including the health of close family members, was previously granted in other cases before the Tribunal.¹¹ In particular, he refers to the *Krajišnik* Decision¹² and argues that he “should be entitled, at a minimum, to the same compassion” as that granted to other accused.¹³

⁶ *Tarčulovski* Decision, para. 6 and references cited therein; *Delić* Decision, para. 5 and references cited therein.

⁷ *Tarčulovski* Decision, para. 6 and references cited therein; *Brahimaj* Decision, para. 3 and references cited therein; *Prosecutor v. Sainović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević’s Second Motion for Temporary Provisional Release on the Grounds of Compassion 21 May 2009 (public redacted version filed on 22 May 2009) (“*Lazarević* Decision”), para. 4 and references cited therein.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Motion, paras 3, 6. Further information on his mother’s health status is provided in the Confidential Annex.

¹¹ Motion, para. 4. *See Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on Defense [sic] Motion on Behalf of Ramush Haradinaj for Urgent Provisional Release, 3 October 2007 (granting provisional release to attend the funeral and post-funeral ceremonies of his nephew); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Temporary Provisional Release, 4 July 2007 (granting provisional release to visit his paralysed, bedridden sister, who was in a state of deteriorating health and was unable to travel to The Hague); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lazarević Motion for Temporary Provisional Release, 18 June 2007 (granting provisional release to visit his wife, whose health was deteriorating and ability to travel was restricted); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Pavković Motion for Temporary Provisional Release, 18 June 2007 (granting provisional release to visit his ailing father who was 85 years old); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Šainović Motion for Temporary Provisional Release, 7 June 2007 (granting provisional release to visit his 93 year-old mother, whose ill health prevented her from travelling to The Hague); *Prosecutor v. Simić et al.*, 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; *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, 21 April 2006.

¹² *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-ES, Decision on Krajišnik’s Application for Custodial Visit, 17 June 2009 (“*Krajišnik* Decision”). Lukić argues that Krajišnik was granted provisional release, after his sentence became final, on humanitarian grounds to visit his elderly and gravely ill mother most probably for the last time,

5. Lukić claims that the fact that he did not surrender to the Tribunal does not preclude his provisional release on humanitarian grounds.¹⁴ He further submits that there is no risk of flight given that he would agree to be subject to any restrictions or conditions that were imposed in other proceedings and that guarantees from Serbia are being sought.¹⁵ Finally, he argues that there is no possibility of interference with witnesses or victims as the trial has been completed and that, in any event, such contact would not be feasible given the anticipated surveillance and restrictions on his movements.¹⁶

6. The Prosecution opposes the Motion on the ground that Lukić fails to meet any of the conditions of Rule 65(I) of the Rules.¹⁷ The Prosecution submits that the Appeals Chamber cannot be satisfied that he will surrender following provisional release and recalls: (i) Lukić actively evaded a 1998 Tribunal arrest warrant for seven years before his arrest in Argentina in 2005;¹⁸ (ii) he previously had access to money and a false passport and “the ability to use sophisticated methods to conceal his identity”;¹⁹ and (iii) being sentenced to life imprisonment and facing uncertain prospects on appeal, Lukić has little to lose and much to gain by reactivating his former support network and fleeing from justice again.²⁰ The Prosecution further submits that, following a conviction *in absentia* for abducting, torturing and murdering Muslims in 1992, Lukić faces a 20-year prison sentence in Serbia.²¹ According to the Prosecution, the fact that Serbia “is presumably obligated to detain a man who has been sentenced by its own courts” could present legal difficulties for Lukić’s return to the custody of the Tribunal.²²

7. The Prosecution further asserts that the proceedings are not over and that Lukić fails to show that he will not interfere with witnesses, recalling that Lukić has a history of contacting witnesses directly from the United Nations Detention Unit in The Hague.²³ It claims that, in any event, the completion of proceedings is not relevant in deciding whether Lukić would pose a danger to other people. The Prosecution submits that he has been convicted of 19 counts, including murder, extermination and cruel treatment and sentenced to life imprisonment and,

even though he had been convicted and was awaiting transfer to a host state to serve his sentence. He further argues that, unlike Krajišnik, he still has a remedy available on appeal. *See* Motion, paras 5, 8.

¹³ Motion, paras 4-5, 8 (citing Article 21(1) of the Statute which provides: “All persons shall be equal before the International Tribunal”).

¹⁴ Motion, para. 7 (mentioning that the same was also true for Krajišnik who was then granted provisional release).

¹⁵ Motion, paras 3, 9-11.

¹⁶ Motion, para. 12.

¹⁷ Response, para. 12.

¹⁸ Response, paras 1, 5.

¹⁹ Response, para. 5.

²⁰ Response, paras 1, 4, 6.

²¹ Response, para. 6.

²² Response, para. 6.

²³ Response, paras 2, 8, 12 (citing T. 3465 (open session) and T. 4317 (private session)).

therefore, “has little to lose by retaliating against those whose testimony placed him in this position”.²⁴

8. The Prosecution further responds that “special circumstances” related to humane and compassionate considerations under Rule 65(I)(iii) of the Rules exist only when there is an acute justification, such as the extremely poor health of a close family member whose death is believed to be imminent.²⁵ It avers that the state of health of Lukić’s mother does not constitute such “special circumstances”.²⁶

B. Analysis

9. When assessing a motion for provisional release, the Appeals Chamber must be satisfied that if released the appellant “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”.²⁷

10. In the present case, the Appeals Chamber notes that Lukić did not surrender voluntarily to the Tribunal and actively evaded arrest for a significant period of time. Furthermore, while evading arrest, Lukić travelled extensively across international borders using forged personal documents and assumed at least one false identity.²⁸ There is also some indication that during this period as a fugitive from justice, Lukić had ready access to a substantial sum of money to facilitate his flight.²⁹

11. The Appeals Chamber is not satisfied therefore that, if released, Lukić would surrender into detention at the conclusion of the proposed period of provisional release. Not only has Lukić failed to surrender voluntarily to the Tribunal in the past and proven his ability and determination to evade arrest but, more recently, he has also been sentenced to life imprisonment by this Tribunal for crimes that “exemplify the worst acts of inhumanity that one person may inflict upon others.”³⁰

²⁴ Response, para. 9.

²⁵ Response, para. 10 (referring to *Tarčulovski* Decision, para. 8).

²⁶ Response, paras 3, 11-12 (referring to Confidential Annex, pp 3, 6).

²⁷ Rule 65(I)(i) of the Rules.

²⁸ Response, para. 5 and fn. 9.

²⁹ Response, para. 5 and fn. 10.

³⁰ Trial Judgement, para. 1061.

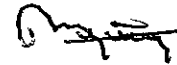
12. Because the requirements under Rule 65(I) of the Rules are cumulative,³¹ the Appeals Chamber does not need to elaborate on whether the remaining requirements set out in Rule 65(I) are met in the present case.³²

IV. DISPOSITION

13. For the foregoing reasons, the Appeals Chamber **DENIES** the Motion and **ORDERS** the Prosecution to, within fourteen days of the date of this Decision, file a public redacted version of the Response.

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

Dated this twenty-eighth day of August 2009
At The Hague,
The Netherlands



Judge Mehmet Güney
Presiding

[Seal of the Tribunal]

³¹ See *supra* para. 3.

³² See, e.g., *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski's Motion for Provisional Release on Compassionate Grounds, 22 July 2009 ("*Tarčulovski* Decision"), para. 11. In cases presenting exceptional circumstances, the Appeals Chamber has previously held that where the applicant poses an unacceptable flight risk, the Appeals Chamber may consider the possibility of imposing stringent measures that would eliminate such a risk, and grant provisional release on that basis. See *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Dario Kordić's Request for Provisional Release, 19 April 2004, para. 12; *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release, 14 February 2008, para. 10. The "special circumstances" that Lukić advances in this case do not, however, justify such an approach. See *Tarčulovski* Decision, paras 8, 9; *Lazarević* Decision, paras 4, 9, with further references.