



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-04-84bis-PT

Date: 10 September 2010

Original: English

IN TRIAL CHAMBER II

Before: Judge Bakone Justice Moloto, Presiding
Judge Burton Hall
Judge Guy Delvoie

Registrar: Mr. John Hocking

Decision: 10 September 2010

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON LAHI BRAHIMAJ'S MOTION FOR PROVISIONAL
RELEASE**

Office of the Prosecutor

Mr. Paul Rogers

Counsel for the Defence:

Mr. Ben Emmerson QC and Mr. Rodney Dixon for Ramush Haradinaj

Mr. Gregor Guy-Smith and Ms. Colleen Rohan for Idriz Balaj

Mr. Richard Harvey and Mr. Paul Troop for Lahi Brahimaj

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 the “Application for Provisional Release filed by the Accused Lahi Brahimaj” filed on 28 July 2010 (“Motion”);

A. PROCEDURAL BACKGROUND

1. On 21 July 2010 the Appeals Chamber quashed the Trial Chamber’s decisions to acquit Lahi Brahimaj (“Accused”), Ramush Haradinaj and Idriz Balaj on certain counts of the Indictment and ordered that they be retried on these counts.¹ The Appeals Chamber also ordered the detention on remand of the Accused, Ramush Haradinaj and Idriz Balaj and enjoined the Commanding Officer of the United Nations Detention Unit in The Hague to detain them until further order.²

2. On 28 July 2010 the Defence for Mr Lahi Brahimaj (the Defence) filed the “Application for Provisional Release Filed by the Accused Lahi Brahimaj” (“Motion”). The Prosecution filed the “Prosecution Response to Lahi Brahimaj’s Motion for Provisional Release” on 2 August 2010 (“Response”). On 9 August 2010 the Defence filed the “Supplemental Addendum and Reply to Prosecution Response to Lahi Brahimaj’s Motion for Provisional Release” (“Reply”). On 11 August a letter from the Dutch Ministry of Foreign Affairs was filed confidentially. On 18 August 2010 the Registry requested that EULEX state whether it would be willing to assume the obligations and responsibilities proposed in the Motion and suggest any additional conditions that it deems necessary (“Request”); and on 24 August 2010 EULEX filed a letter in reply.

B. SUBMISSIONS

1. Motion

3. The Defence requests that the Accused be granted provisional release under the conditions specified in the Motion or under such conditions as may be ordered by the Trial Chamber.³

¹ Appeals Judgement, para. 377. The Appeals Chamber ordered that both the Accused and Idriz Balaj be retried on counts 24, 26, 28, 30, 32 and 34 of the Indictment. The Appeals Chamber also ordered that Lahi Brahimaj be retried on counts 24, 26, 30 and 34 of the Indictment

² Appeals Judgement, para. 377.

³ Motion, para. 27.

4. The Defence asks the Trial Chamber to accept the Accused's past conduct as evidence of his willingness to submit to the Trial Chamber when ordered to do so⁴, as well as his support for the rule of law.⁵

5. The Accused argues that the Appeals Chamber found his former provisional release to have never posed any danger to victims or witnesses and that there is no evidence that witnesses have been endangered by his provisional release.⁶ The Accused further submits that there is no basis for suggesting that the situation would change if he were provisionally released pending his partial retrial.⁷ The Accused asserts that the Appeals Chamber ordered his provisional release having noted that "each of the potential witnesses" lives outside Kosovo and having found expressly that the Prosecution had given no substantiated indication that he would seek to intimidate witnesses.⁸

6. The Accused asks the Trial Chamber to consider his record of more than a year's compliance with provisional release conditions; stating that the Prosecution cannot stipulate an instance where he has posed a danger or threat to any witness, victim or other person.⁹

7. The Accused now applies for provisional release on the same conditions as those granted by the Appeals Chamber on 25 May 2009.¹⁰

2. Response

8. The Prosecution opposes the Accused's application for provisional release because of the "direct danger" that his provisional release would pose to witnesses and the integrity of the retrial.¹¹

9. The Prosecution submits that the trial was "marred by an unprecedented atmosphere of widespread and serious witness intimidation", causing "significant difficulties in securing the testimony of a large number of witnesses".¹²

10. The Prosecution argues that the atmosphere has not changed and that allegations of witness interference by the Accused along with publicity of his provisional release risk magnifying witness intimidation.¹³

⁴ *Ibid.*, para. 17

⁵ *Ibid.*, para. 18.

⁶ *Ibid.*, para. 20.

⁷ *Ibid.*, para. 21.

⁸ *Ibid.*, para. 21 (citing Decision on Lahi Brahimaj's Application for Provisional Release, 27 May 2009, para. 14).

⁹ *Ibid.*, para. 22.

¹⁰ *Ibid.*, para. 23.

11. The Prosecution states that the Trial Chamber refused the Accused's application for provisional release prior to the trial because the totality of the evidence raised a substantial doubt that the Accused would conduct himself in a way so as not to pose a threat to victims and potential witnesses in this case,¹⁴ adding that the considerations which led the Trial Chamber to provisionally release the Accused no longer apply,¹⁵ and the residence of Shefqet Kabashi and another key witness outside of Kosovo is not a valid consideration in favour of provisional release.¹⁶

12. The Prosecution submits that in the event of a finding that Rule 65(B) is satisfied, the Trial Chamber should exercise its discretion to refuse provisional release to preserve the integrity of the re-trial.¹⁷

13. The Prosecution requests that any grant of provisional release be stayed on the basis that it intends to appeal against such decision.¹⁸

3. Reply

14. On 9 August 2010 the Accused replied to the Prosecution's response, requesting leave to reply¹⁹ and to file a letter from Professor Dr. Qemal Buçinca.²⁰

15. The Accused dismissed the Prosecution's assertions as "entirely erroneous"²¹ and ignoring substantial changes in circumstances, including Kosovo being a more stable society than in 2006.²²

16. The Accused claims that the Prosecution has not indicated which witnesses, if any, it intends to call for the partial retrial or tendered evidence that any such witnesses would not testify if the Accused were provisionally released.²³

17. The Accused alleges that the Prosecution relies on 4 year-old concerns regarding unsubstantiated witness interference allegations, raised by the Prosecution and based on tenuous, uncorroborated evidence.²⁴

¹¹ Response, para. 1.

¹² *Ibid.*, para. 1.

¹³ *Ibid.*, para. 1.

¹⁴ *Ibid.*, para 2; See also Further Decision on Lahi Brahimaj's Motion for Provisional Release, 3 May 2006, para. 41.

¹⁵ Response, para. 3.

¹⁶ *Ibid.*, para. 4.

¹⁷ *Ibid.*, para. 5.

¹⁸ *Ibid.*, para. 12.

¹⁹ Reply, para. 1.

²⁰ *Ibid.*, para. 3.

²¹ *Ibid.*, para. 3.

²² *Ibid.*, para 5.

²³ *Ibid.*, para. 6.

18. The Accused submits that EULEX has monitored him during two periods of provisional release without any negative incident.²⁵

19. The Accused submits that Shefqet Kabashi testified that threats against him were made by agents of the Prosecution.²⁶

20. The Accused submits that the Prosecution has only submitted mere speculation in favour of denying provisional release, rather than the tangible evidence required by Rule 65(B).²⁷

21. The Defence claims that publicity is not a proper basis for refusing provisional release,²⁸ stating that media reporting will continue regardless of whether the Accused is provisionally released, and that there is no evidence that such media coverage will impact on any witnesses' willingness to testify.²⁹

22. The Accused submits that he has not sought to make any public statements during his previous periods of provisional release, and that he is not involved in any political activities.³⁰ He suggests that his previous provisional release was partly contingent on him not making such statements, and undertakes to continue complying with that requirement if the Motion is granted.³¹

23. The Accused submits that he has never participated, directly or indirectly in any act of intimidation.³²

C. APPLICABLE LAW

24. Rule 65 of the Tribunal's Rules of Procedure and Evidence ("Rule 65") sets out the basis upon which a Trial Chamber may order the provisional release of an accused. Rule 65 applies during pre-trial, as well as during the course of trial. Rule 65 reads, in relevant parts:

(A) Once detained, an accused may not be released except upon an order of a Chamber.

(B) Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

²⁴ *Ibid.*, para. 7.

²⁵ *Ibid.*, para. 7.

²⁶ *Ibid.*, para. 8.

²⁷ *Ibid.*, para. 10.

²⁸ *Ibid.*, para. 11.

²⁹ *Ibid.*, para. 11.

³⁰ *Ibid.*, para. 11.

³¹ *Ibid.*, para. 11.

³² *Ibid.*, para. 12.

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.

25. Rule 65(E) further states that the Prosecutor may apply for a stay of a decision by the Trial Chamber to release an accused on the basis that the Prosecutor intends to appeal it and shall make such an application at the time of filing his or her response to the initial application for provisional release by the accused.

D. DISCUSSION

1. Whether the Accused will appear for trial

26. The Trial Chamber notes that the Accused has been convicted of serious crimes and sentenced to 6 years' imprisonment but considers that a number of factors militate against any perceived incentive to flee. Firstly, the Accused has already served two thirds of his sentence.³³ Secondly, the Accused surrendered to the Trial Chamber as soon as he was aware of the Indictment against him.³⁴ Thirdly, the Accused has a record of complying with the conditions of his provisional release, including returning to custody when ordered.³⁵

27. The Appeals Chamber ordered the Accused's provisional release on 27 May 2009, pending hearing and determination of the outstanding appeal, and the Trial Chamber notes that neither party's submissions suggest that the Accused is any less likely to surrender for trial than when he was last provisionally released.

28. In determining whether it is satisfied that the Accused would appear for the partial retrial, the Trial Chamber notes that the EULEX has confirmed that it is willing and able to assume the responsibilities proposed in the Motion.³⁶

29. In light of the foregoing, the Trial Chamber is satisfied that the Accused will surrender to the Tribunal when ordered.

³³ Decision on Lahi Brahimaj's Application for Provisional Release, 25 May 2009 ("Decision of May 2009"), para. 10.

³⁴ Decision of May 2009, para. 10.

³⁵ *Ibid.*, para. 10.

³⁶ Submission by EULEX Kosovo to the Trial Chamber, 24 August 2010.

2. Whether the Accused, if released, will pose a danger to any victim, witness or other person

30. The jurisprudence of the Tribunal has established that an assessment of whether the accused would pose a danger to victims, witnesses or other persons “cannot be made in abstract”, and that “a concrete danger needs to be identified”.³⁷

31. The Prosecution submits that the Accused poses a direct danger to witnesses and the integrity of the trial. This claim is based, chiefly, on allegations that the Accused has interfered with witnesses.³⁸ These allegations were considered by the Trial Chamber in November 2005³⁹ and again in May 2006.⁴⁰ The Trial Chamber examined confidential evidence from UNMIK, regarding the Accused’s conduct and found that:

“[T]he totality of the evidence, as opposed to each of these incidents considered in isolation, raises a substantial doubt that the Accused, were he granted provisional release, would conduct himself in a way so as not to pose a threat to victims and potential witnesses in his case.”⁴¹

On the basis of this evidence the Trial Chamber denied the Accused’s Motion, holding that he had failed to satisfy the requirements of Rule 65(B).

32. The Accused was subsequently provisionally released in December 2007 and in May 2009.

33. In December 2007 the Trial Chamber considered the danger that the Accused posed to future witnesses, and held that the risk was considerably diminished because the trial had entered a new stage in which the Prosecution’s case was closed and no Defence case would be presented.⁴² The Trial Chamber was satisfied that the Accused would not pose a danger to victims, witnesses or other persons;⁴³ and the Accused was granted provisional release for a period of two weeks.⁴⁴

34. The Appeals Chamber granted the Accused provisional release in May 2009 after he had served two-thirds of his sentence of imprisonment.⁴⁵ It found that a number of factors tipped the scales in favour of finding that, if released, he would not pose a danger to any victim, witness or

³⁷ Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, 20 July 2007, para. 17; *Prosecutor v. Hadžihasanović et al.*, Decision Granting Provisional Release to Enver Hadžihasanović, Trial Chamber, 19 December 2001, para. 11; Decision on Ramush Haradinaj’s Motion for Provisional Release, 6 June 2005, para. 22; *Prosecutor v. Stanišić*, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, Appeals Chamber, 17 October 2005, para. 27.

³⁸ Response, paras. 1, 2.

³⁹ Decision on Lahi Brahimaj’s Motion for Provisional Release, 3 November, 2005.

⁴⁰ Further Decision on Lahi Brahimaj’s Motion for Provisional Release, 3 May 2006 (“Further Decision”).

⁴¹ Response, para. 2. See also, Further Decision, para. 41.

⁴² Decision on Motion on Behalf of Lahi Brahimaj for Provisional Release, 14 December 2007 (“Decision of December 2007”), para. 17.

⁴³ Decision of December 2007, para. 19.

⁴⁴ *Ibid.*, para. 25(1).

⁴⁵ Decision of May 2009, paras. 13–16.

other person.⁴⁶ The Appeals Chamber noted that while a retrial could be ordered as a result of the Prosecution appeal, the Accused could be acquitted or his sentence could be decreased as a result of the appeal. It considered it unlikely that the Accused would pose a danger to potential witnesses at that particular stage of the proceedings because the outcome was unforeseeable and a retrial was only one of the possible outcomes.⁴⁷ With the delivery of the Appeal Judgement, this state of affairs has changed: a partial retrial has been ordered in which witnesses are to be heard. In its Decision of May 2009 the Appeals Chamber also noted that the Prosecution had not challenged the assertion of the Accused that each of the potential witnesses lived outside Kosovo.⁴⁸ Again, the present situation is different: the Prosecution points to evidence of witness intimidation in the trial extending beyond Kosovo and submits that other witnesses may be called during the partial retrial.⁴⁹

35. The Trial Chamber follows the Appeals Chamber in taking into account the particular circumstances of the case in determining whether the Accused, if released, will pose a danger to any victim, witness or other person.⁵⁰ It was held in the Appeal Judgement that the failure of the Trial Chamber to take sufficient steps to counter the witness intimidation that permeated the trial and, in particular, to facilitate the Prosecution's requests to secure the testimony of Kabashi and another witness, both of whom were reluctant to testify, resulted in a miscarriage of justice and on the basis of this ordered the partial retrial.⁵¹ The position of witnesses in the partial retrial will be highly sensitive. Given this context, the allegations which cumulatively raise a substantial doubt as to the conduct of the Accused with regard to victims and potential witnesses are of even greater concern.

36. The Trial Chamber also attaches importance to the length of provisional release requested. What is at issue here is an as yet undetermined period of provisional release pending the commencement of the partial retrial. The Trial Chamber considers that the length of provisional release increases the possible risk to victims, witnesses or others.

37. In light of the foregoing, the Trial Chamber is not satisfied that the Accused, if released, will not pose a danger to any victim, witness or other person. Accordingly the Trial Chamber finds that the requirements of Rule 65(B) are not met.

⁴⁶ Decision of May 2009, para. 14.

⁴⁷ *Ibid.*, para. 14.

⁴⁸ *Ibid.*, para. 14.

⁴⁹ Response, para. 4.

⁵⁰ Decision of May 2009, para. 13.

⁵¹ Appeal Judgement, paras. 37, 49–50.

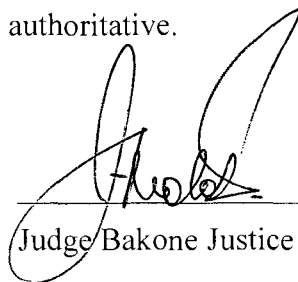
E. DISPOSITION

For the foregoing reasons and pursuant to Rules 65 and 126*bis* the Trial Chamber:

GRANTS leave to reply and to file the letter from Professor Qemal Buçinca; and

DENIES the Motion.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this tenth day of September 2010
At The Hague
The Netherlands

[Seal of the Tribunal]