

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-04-84bis-AR65.1

Date: 16 December 2010

Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision: 16 December 2010

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON PROSECUTION APPEAL OF THE TRIAL
CHAMBER'S DECISION ON RAMUSH HARADINAJ'S
MOTION FOR PROVISIONAL RELEASE**

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for the Accused:

Mr. Ben Emmerson 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

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 Appeal of the Trial Chamber’s Decision on Ramush Haradinaj’s Motion for Provisional Release”, filed by the Office of the Prosecutor (“Prosecution”) on 9 December 2010 (“Appeal”), against the “Decision on Ramush Haradinaj’s Motion for Provisional Release” issued by Trial Chamber II (“Trial Chamber”) on 8 December 2010, which granted Ramush Haradinaj (“Haradinaj”) provisional release.¹ Haradinaj filed his response on 13 December 2010.²

I. BACKGROUND

2. On 19 July 2010, the Appeals Chamber, Judge Robinson dissenting, reversed the Trial Chamber’s acquittal of Haradinaj, Idriz Balaj (“Balaj”), and Lahi Brahimaj (“Brahimaj”) on certain counts of the Indictment and ordered a retrial on these counts.³ The Appeals Chamber ordered the detention on remand of Haradinaj, Balaj, and Brahimaj and enjoined the Commanding Officer of the United Nations Detention Unit in The Hague to detain them until further order.⁴

3. On 10 September 2010, the Trial Chamber denied a motion by Haradinaj for provisional release.⁵ On 8 December 2010, in its Impugned Decision, the Trial Chamber granted Haradinaj’s provisional release. It was satisfied that Haradinaj would appear for trial⁶ and that, if released, Haradinaj would not pose a danger to any victim, witness, or other person.⁷ The Trial Chamber also found, after weighing the relevant factors, that it should not exercise its discretion to deny the requested provisional release.⁸ The Trial Chamber also granted the Prosecution’s request for a stay of the execution of the Impugned Decision pending appeal.⁹

¹ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Decision on Ramush Haradinaj’s Motion for Provisional Release, 8 December 2010 (“Impugned Decision”).

² Response on Behalf of Ramush Haradinaj to Prosecution Appeal of the Trial Chamber’s Decision on Ramush Haradinaj’s Motion for Provisional Release, 13 December 2010 (“Response”). In light of the urgency of the matter and considering that the Prosecution will not be prejudiced by the outcome of this decision, the Appeals Chamber finds it in the interests of justice to render this decision prior to the expiration of the deadline for filing a reply to the Response.

³ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Judgement, 19 July 2010 (“*Haradinaj et al.* Appeal Judgement”), para. 377.

⁴ *Ibid.*

⁵ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-PT, Decision on Ramush Haradinaj’s Motion for Provisional Release, 10 September 2010 (“10 September 2010 Decision”), p. 9.

⁶ Impugned Decision, para. 18.

⁷ *Ibid.*, para. 19.

⁸ *Ibid.*, para. 26.

⁹ *Ibid.*, p. 10.

II. STANDARD OF REVIEW

4. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of a Trial Chamber's decision.¹⁰ The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules of Procedure and Evidence of the Tribunal ("Rules") is a discretionary one.¹¹ 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 the decision.¹²

5. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a discernible error.¹³ 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.¹⁴ 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.¹⁵

III. APPLICABLE LAW

6. Pursuant to Rule 65(A) of the Rules, once detained, an accused may not be provisionally released except upon an order of a Chamber. 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

¹⁰ 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 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).

¹¹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Accused Praljak's Motion for Provisional Release, 25 July 2008 (public with confidential annex), para. 6. The decision was filed originally in French on 17 July 2008.

¹² 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.

¹³ *Praljak* Decision, para. 5 (internal citation omitted).

¹⁴ *Ibid.*

¹⁵ *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.

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.¹⁶

7. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision.¹⁷ It must then provide a reasoned opinion indicating its view on those relevant factors.¹⁸ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁹ 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.²⁰ 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.²¹ If the Trial Chamber is satisfied that the requirements of Rule 65(B) have been met, it has the discretion as to whether or not to grant provisional release to an accused.

IV. SUBMISSIONS

8. The Prosecution contends that the Impugned Decision is so unreasonable as to constitute an abuse of the Trial Chamber's discretion.²² It avers that the Trial Chamber erred in finding that Haradinaj's release would not pose any threat to witnesses.²³ The Prosecution notes that, in its 10 September 2010 Decision denying Haradinaj's provisional release, the Trial Chamber observed that witness intimidation remained prevalent in Kosovo and had the potential to affect witnesses beyond Kosovo.²⁴ The Prosecution also cites the Trial Chamber's acknowledgement in the Impugned Decision that the problem of witness intimidation had not improved since it had denied Haradinaj's provisional release in September 2010.²⁵ Based upon the foregoing, the Prosecution claims that the Trial Chamber erred in finding that the timing and duration of the release meant that the risk to the integrity of the proceedings would not be substantial.²⁶ As a result, the Prosecution contends that the Trial Chamber abused its discretion in granting Haradinaj provisional release and

¹⁶ *Praljak* Decision, para. 6; *Brahimaj* Decision, para. 6.

¹⁷ *Praljak* Decision, para. 7; *Brahimaj* Decision, para. 10.

¹⁸ *Praljak* Decision, para. 7; *see also* *Brahimaj* Decision, para. 10.

¹⁹ *Praljak* Decision, para. 7; *Stanišić* Decision, para. 8.

²⁰ *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.

²¹ *Praljak* Decision, para. 7; *Stanišić* Decision, para. 8.

²² Appeal, paras 1, 9.

²³ *Ibid.*, paras 2-3, 5-6.

²⁴ *Ibid.*, para. 5, referring to 10 September 2010 Decision, paras 35, 39.

²⁵ *Ibid.*, para. 5, referring to Impugned Decision, para. 21.

requests the Appeals Chamber to reverse the Impugned Decision and deny Haradinaj's application for provisional release.²⁷

9. In response, Haradinaj argues that the Trial Chamber considered all the relevant factors in exercising its discretion to grant him provisional release.²⁸ Specifically, Haradinaj contends that the Trial Chamber considered each relevant factor, including the duration of the release, the timing of the release, the length of time he had been in detention, his personal circumstances, the current state of the pre-trial proceedings, and when the trial was likely to commence.²⁹ Finally, Haradinaj submits that the Prosecution has not demonstrated any discernible error that would justify the intervention of the Appeals Chamber and that the Appeal should be dismissed.³⁰

V. DISCUSSION

10. In the Impugned Decision, the Trial Chamber considered that the two criteria under Rule 65(B) of the Rules had been met.³¹ The Trial Chamber then proceeded to consider a number of factors in determining whether to exercise its discretion not to grant provisional release.³² Specifically, it observed that there "is no reason to believe that the position with respect to witness intimidation [had] improved since the [10] September 2010 Decision".³³ It further acknowledged that witness intimidation remained prevalent in Kosovo and that there was evidence that witnesses have felt intimidated since the retrial was ordered.³⁴ Moreover, the Trial Chamber considered that the provisional release of Haradinaj would add to the threatening atmosphere for witnesses and might encourage his supporters to engage in acts of intimidation.³⁵ In spite of these findings, the Trial Chamber concluded that "the potential effect of the requested provisional release of [Haradinaj] on the integrity of the proceedings would not be substantial".³⁶

11. The Appeals Chamber considers that this conclusion amounts to an abuse of the Trial Chamber's discretion. Having noted significant factors which strongly militate against the grant of provisional release, the Appeals Chamber considers that it was incumbent upon the Trial Chamber to exercise its discretion accordingly. The Appeals Chamber notes that the Trial Chamber

²⁶ *Ibid.*, para. 6. The Prosecution also argues that the Trial Chamber erred by failing to give sufficient weight to the heightened political context—a national election—into which Haradinaj was due to be released. *Ibid.*, para. 7.

²⁷ *Ibid.*, para. 9.

²⁸ Response, para. 4.

²⁹ *Ibid.*, paras 8-9, 12-15. Haradinaj also contends that the submissions made by the Prosecution regarding the 12 December 2010 election in Kosovo are "misplaced". *Ibid.*, para. 16.

³⁰ Response, para. 17.

³¹ Impugned Decision, paras 18-19.

³² *Ibid.*, paras 20-25.

³³ *Ibid.*, para. 21.

³⁴ *Ibid.*

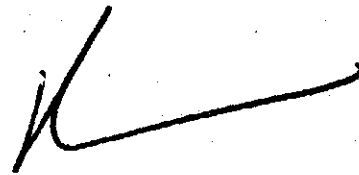
³⁵ *Ibid.*

considered, in support of the grant of provisional release, the relatively short duration of the requested provisional release, the uncertainty with respect to the date of the commencement of the trial and the length of time that Haradinaj has been in detention on remand.³⁷ However, in the circumstances of this particular case, the Appeals Chamber considers that these factors are insufficient to obviate the Trial Chamber's acknowledged concerns regarding the potential for witness intimidation or the inherent risk to the integrity of proceedings. Accordingly, the Appeals Chamber is of the view that the Trial Chamber's decision to grant Haradinaj provisional release was so unreasonable as to constitute an abuse of its discretion.

VI. DISPOSITION

12. For the foregoing reasons, the Appeals Chamber hereby **GRANTS** the Appeal and **QUASHES** the Impugned Decision.

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



Judge Patrick Robinson
Presiding

Dated this sixteenth day of December 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁶ *Ibid.*, para. 22.

³⁷ *Ibid.*, paras 22, 25.