



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-04-74-AR65.24
Date: 8 June 2011
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IN THE APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. John Hocking

Decision of: 8 June 2011

PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
BERISLAV PUŠIĆ**

PUBLIC

**DECISION ON JADRANKO PRLIĆ'S APPEAL AGAINST THE
TRIAL CHAMBER DECISION ON HIS MOTION FOR
PROVISIONAL RELEASE**

The Office of the Prosecutor:

Mr. Kenneth Scott
Mr. Douglas Stringer

Counsel for the Accused:

Mr. Michael G. Karnavas and Ms. Suzana Tomanović for Jadranko Prlić
Ms. Senka Nožica and Mr. Karim A.A. Khan for Bruno Stojić
Ms. Nika Pinter and Ms. Nataša Fauveau-Ivanović for Slobodan Praljak
Ms. Vesna Alaburić and Mr. Zoran Ivanišević for Milivoj Petković
Ms. Dijana Tomanović-Tomić and Mr. Dražen Plavec for Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

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 “Jadranko Prlić’s Appeal Against the Trial Chamber’s *Décision portant sur la demande de mise en liberté provisoire de Jadranko Prlić*”, filed by Jadranko Prlić (“Prlić”) on 2 May 2011 (“Appeal”), against a decision rendered by Trial Chamber III of the Tribunal (“Trial Chamber”) on 21 April 2011, which denied Prlić’s application for provisional release.¹ The Office of the Prosecutor (“Prosecution”) filed its response on 11 May 2011.² Prlić did not file a reply.

I. BACKGROUND

2. On 31 March 2011, Prlić filed a confidential motion requesting that the Trial Chamber grant him provisional release in Croatia until the delivery of the trial judgement in this case.³ On 21 April 2011, the Trial Chamber denied Prlić’s Motion.⁴ The Trial Chamber was satisfied that the accused, if released, would thereafter return to detention and that he would not endanger any victims, witnesses or other persons.⁵ However, it noted that, pursuant to the Appeals Chamber’s jurisprudence, the existence of compelling humanitarian grounds must be established before provisional release may be granted in the late stages of a trial.⁶ It found that the reasons presented by Prlić – the length of his provisional detention, past and future, and its deleterious effects on his wellbeing⁷ – did not amount, in the absence of supporting documentation regarding such impact, to sufficiently compelling humanitarian reasons, especially considering the extended period of release requested in Prlić’s Motion.⁸

¹ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, *Décision portant sur la demande de mise en liberté provisoire de Jadranko Prlić*, 21 April 2011 (“Impugned Decision”), para. 42, Disposition. The English translation was filed on 23 May 2011. On 27 April 2011, the Duty Judge partially granted Prlić’s request for an extension of time for the filing of his Appeal against the Impugned Decision. See Decision on Jadranko Prlić’s Urgent Motion for an Extension of Time for his Defence to File an Appeal Against the Trial Chamber’s *Décision portant sur la demande de mise en liberté provisoire de Jadranko Prlić*, 27 April 2011 (confidential).

² Prosecution’s Response to Appeal Against the Decision Denying Jadranko Prlić’s Provisional Release, 11 May 2011 (“Response”).

³ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić’s Motion for Provisional Release, 31 March 2011 (confidential with confidential Annexes 1 and 2) (“Motion”), pp. 1, 8. Prlić estimated that the trial judgement will not be rendered before February 2012. See Motion, para. 21.

⁴ Impugned Decision, para. 42, Disposition.

⁵ Impugned Decision, paras 19-20. See also Impugned Decision, para. 22.

⁶ Impugned Decision, para. 39.

⁷ See Motion, para. 22.

⁸ Impugned Decision, paras 40-42.

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.⁹ The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Tribunal's Rules of Procedure and Evidence ("Rules") is a discretionary one.¹⁰ 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.¹¹

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".¹² The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹³ 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.¹⁴

III. APPLICABLE LAW

5. Under Rule 65(B) of the Rules, a Trial 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 both the host country and the State to which the accused seeks to be released the opportunity to be heard.¹⁵

6. 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. It must then provide a reasoned opinion

⁹ See, e.g., *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.10, Decision on Radivoje Miletić's Appeal Against Decision on Miletić's Motion for Provisional Release, 19 November 2009 (public redacted version) ("*Miletić Decision*"), para. 4; *Prosecutor v. Jadranko Prlić et al.*, Case No. 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 June 2009 ("*Prlić Decision*"), para. 5.

¹⁰ See, e.g., *Miletić Decision*, para. 4; *Prlić Decision*, para. 5.

¹¹ See, e.g., *Miletić Decision*, para. 4; *Prlić Decision*, para. 5.

¹² See, e.g., *Miletić Decision*, para. 5; *Prlić Decision*, para. 6.

¹³ See, e.g., *Miletić Decision*, para. 5; *Prlić Decision*, para. 6.

¹⁴ See, e.g., *Miletić Decision*, para. 5; *Prosecutor v. Vujadin 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.

¹⁵ See, e.g., *Miletić Decision*, para. 6; *Prlić Decision*, para. 7.

indicating its view on those relevant factors.¹⁶ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁷ 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.¹⁸ 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.¹⁹ Finally, an application for provisional release brought at a late stage of the proceedings, and in particular after the close of the Prosecution case, should only be granted when sufficiently compelling humanitarian grounds exist.²⁰

IV. SUBMISSIONS OF THE PARTIES

7. Prlić contends that the Trial Chamber erred in denying his provisional release application.²¹ He argues that the Trial Chamber committed a discernible error by considering itself bound by the Appeals Chamber's jurisprudence on the "compelling humanitarian reasons" requirement for provisional release at the late stages of trial, given that the Trial Chamber: a) found that all the criteria for provisional release set out in Rule 65(B) of the Rules were met; and b) considered that such a requirement did not need to be established given the stage of the proceedings and the length of Prlić's past and foreseeable provisional detention.²² Prlić further asserts that the Trial Chamber was under no obligation to apply the "compelling humanitarian reasons" requirement, as it is neither grounded in the Rules or the Tribunal's Statute, nor supported by international law.²³ He alternatively contends that, even if the Trial Chamber were bound by the Appeals Chamber's jurisprudence on the "compelling humanitarian reasons" requirement, cogent reasons in the interests of justice require that the Appeals Chamber depart from such case law.²⁴ In particular, Prlić asserts that the Trial Chamber provided its own cogent reasons why the requirement was not necessary here, noting that the close of arguments constituted a significant change of circumstances and justified reconsideration of the relevance of this criterion.²⁵ He also argues, with reference to the Trial Chamber's reasoning, that imposing the compelling humanitarian reasons requirement at

¹⁶ See, e.g., *Miletić* Decision, para. 7; *Prlić* Decision, para. 8.

¹⁷ See, e.g., *Miletić* Decision, para. 7; *Prlić* Decision, para. 8.

¹⁸ See, e.g., *Miletić* Decision, para. 7; *Prlić* Decision, para. 8.

¹⁹ See, e.g., *Miletić* Decision, para. 7; *Prlić* Decision, para. 8.

²⁰ See, e.g., *Miletić* Decision, para. 7; *Prlić* Decision, para. 8.

²¹ Appeal, p. 1.

²² Appeal, pp. 1, 2, paras 16-17, referring to Impugned Decision, para. 38. The Appeals Chamber notes that the paragraph numbers have been duplicated on page 5. The Appeals Chamber refers to the second paragraph "16".

²³ Appeal, para. 20. See also Appeal, paras 17, 29-30.

²⁴ Appeal, pp. 1-2, paras 21-32.

²⁵ Appeal, paras 23, 25.

this stage is inconsistent with the principle of the presumption of innocence.²⁶ In the alternative, Prlić contends that the Trial Chamber erred by finding that the length of his provisional detention, and its impact on his wellbeing, did not constitute sufficiently compelling humanitarian reasons for provisional release.²⁷

8. The Prosecution responds that the Trial Chamber correctly considered itself bound by the jurisprudence requiring a showing of compelling humanitarian reasons for provisional release at an advanced stage of a trial.²⁸ It further asserts that there are no cogent reasons why the Appeals Chamber should depart from its previous jurisprudence on the matter.²⁹ The Prosecution contends that the “compelling humanitarian reasons” requirement is well-established in the Tribunal’s jurisprudence and is consistent with international law regarding the presumption of innocence.³⁰ It also recalls one of the concerns underlying the Appeals Chamber’s jurisprudence on the “compelling humanitarian reasons” requirement, namely that granting provisional release to an accused following a Rule 98 *bis* ruling may have a detrimental effect upon victims and witnesses living in the same region where the accused seeks to be released.³¹ Finally, the Prosecution argues that the mere assertion that continuing detention may affect the physical or psychological health of an accused, unsupported by concrete evidence, does not amount to a compelling humanitarian reason justifying provisional release.³²

V. DISCUSSION

9. The Appeals Chamber recalls its well-established jurisprudence requiring that an application for provisional release brought at a late stage of the proceedings, and in particular after the close of the Prosecution case, should only be granted when sufficiently compelling humanitarian grounds exist.³³ The Appeals Chamber has held that the existence of compelling humanitarian reasons only

²⁶ Appeal, para. 25, referring to Impugned Decision, para. 38.

²⁷ Appeal, p. 2, paras 33-36. Prlić argues that, after seven years of provisional detention, a prolonged detention of approximately another year - pending the issuance of the Trial Chamber’s judgement – “will take a serious physical and psychological toll” and therefore constitutes a sufficiently compelling humanitarian reason warranting his provisional release. See Appeal, para. 36.

²⁸ Response, paras 8-11. The Prosecution notes that Prlić did not file a Rule 98 *bis* motion. See Response, para. 4.

²⁹ Response, para. 19.

³⁰ Response, paras 13, 19. The Prosecution notes the Appeals Chamber’s holding that “the presumption of innocence does not play a determinative role in determining provisional release, since, if the presumption of innocence alone warranted release, no accused could ever be detained.” See Response, para. 13, referring to *Prosecutor v. Milan 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, paras 11-12.

³¹ Response, para. 15(d).

³² Response, paras 20-22. The Prosecution notes that Prlić has been provisionally detained for approximately five and a half years, and not, as he has claimed, for more than seven years. See Response, para. 3. See also Impugned Decision, para. 36.

³³ See, e.g., *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.7, Decision on Franko Simatović’s Appeal Against the Decision Denying his Urgent Request for Provisional Release, 23 May 2011, p. 1; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.11, Decision on Prosecution’s Appeal Against Decision

become relevant if the accused has met the prerequisite requirements of Rule 65(B) of the Rules.³⁴ The Trial Chamber therefore correctly applied this principle and examined whether humanitarian reasons were established after determining that the requirements of Rule 65(B) of the Rules had been met. The Appeals Chamber recalls the well-established principle that the *ratio decidendi* of the Appeals Chamber's decisions is binding on trial chambers, and that this principle is dictated, *inter alia*, by the need for certainty and predictability in the application of the law.³⁵ In light of the foregoing, the Appeals Chamber finds that the Trial Chamber did not commit any discernible error in considering itself bound by the Appeals Chamber's jurisprudence. The Appeals Chamber further finds, Judge Güney dissenting, no cogent reason to depart from this jurisprudence. The Appeals Chamber recalls that an accused's provisional release after a decision pursuant to Rule 98 *bis* of the Rules could have a prejudicial effect on victims and witnesses, a concern that is equally pertinent with respect to Prlić's present request.³⁶

10. With regard to Prlić's challenge to the Trial Chamber's findings that he had not presented sufficiently compelling humanitarian reasons, the Appeals Chamber recalls that the possible future impact of the length of detention on an accused's health is not a sufficiently compelling humanitarian reason for provisional release.³⁷ It further recalls that a trial chamber may not reasonably find that an accused's health has been affected by the length of his provisional detention "in the absence of any precise medical information or evidence provided with respect to [the Accused's] state of health".³⁸ The Appeals Chamber therefore finds that the Trial Chamber did not err in holding that the length of provisional detention and its potential negative impact on Prlić's wellbeing, in the absence of specific and up-to-date medical information, were not sufficiently compelling humanitarian reasons to warrant provisional release.

on Gvero's Further Motion for Provisional Release, 25 January 2010 (confidential), para. 7; *Miletić* Decision, para. 7; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.17, Decision on Prosecution's Appeal Against Decision on Prlić's Motion for Provisional Release, 23 July 2009 (public redacted version), para. 6; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.16, Decision on Prosecution's Appeal Against Decision on Pušić's Motion for Provisional Release, 20 July 2009 (public redacted version), para. 6; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.8, Decision on Prosecution's Appeal Against Decision on Gvero's Motion for Provisional Release, 20 July 2009 (public redacted version), para. 6; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.15, Decision on Prosecution's Appeal Against the Trial Chamber's Decision on Slobodan Praljak's Motion for Provisional Release, 8 July 2009, para. 7; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on "Prosecution's Appeal from *Décision relative à la demande de mise en liberté provisoire de l'accusé Petković* Dated 31 March 2008", 21 April 2008 ("*Petković* Decision"), para. 17. See also *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR65, Decision on Matthieu Ndirumpatse's Appeal Against Decision on Remand on Provisional Release, 8 December 2009, para. 7.

³⁴ *Petković* Decision, para. 17.

³⁵ *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 113.

³⁶ *Prlić* Decision, para. 15; *Petković* Decision, para. 17.

³⁷ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.10, Decision on Prosecution's Appeal of the Trial Chamber's Decision to Provisionally Release the Accused Praljak During the 2008 Summer Recess, 28 July 2008 (confidential), para. 16.

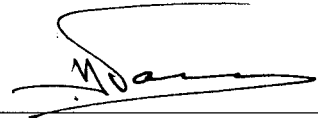
³⁸ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.15, Decision on Prosecution's Appeal Against the Trial Chamber's Decision on Slobodan Praljak's Motion for Provisional Release, 8 July 2009, para. 20.

VI. DISPOSITION

11. For the foregoing reasons, the Appeals Chamber, Judge Güney partially dissenting, **DISMISSES** the Appeal in its entirety.

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

Judge Mehmet Güney appends a partially dissenting opinion.



Judge Andréia Vaz
Presiding

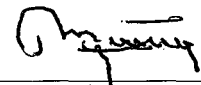
Dated this eighth day of June 2011
at The Hague,
The Netherlands.

[Seal of the Tribunal]

I. PARTIALLY DISSENTING OPINION OF JUDGE GÜNEY

1. I agree with the Majority that the prospective possible impact of the lengthy detention might not be sufficient in and of itself to provide a basis for provisional release. It would be one consideration among others to be weighed by the Trial Chamber in their analysis to decide whether provisional release is, in the specific circumstances of the case, warranted or not. However, as expressed several times in past provisional release decisions, I cannot agree with the requirement of the “compelling humanitarian reasons” criterion.¹ Also, as I recently articulated in the *Simatović* Decision, I believe that the current status of this jurisprudence on this issue is controversial, not only in light of the legislative history of Rule 65 (B) of the Rules of Procedure and Evidence but also taking into account that the reinstatement of this criterion via jurisprudence is opposed by several other judges.²

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



Judge Mehmet Güney

Dated this eighth day of June 2011
at The Hague,
The Netherlands.

[Seal of the Tribunal]

¹ *Prosecutor v. Stanisić & Simatović*, Case No. IT-03-69-AR65.7, 23 May 2011, Dissenting Opinion of Judge Güney (“*Simatović* Decision”); *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.11, Decision on Prosecution’s Appeal Against Decision on Gvero’s Further Motion for Provisional Release, 25 January 2010 (confidential, “*Gvero* Decision of 25 January 2010”), Joint Dissenting Opinion of Judges Güney and Liu; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.19, Decision on Prosecution’s Appeal of the Trial Chamber’s Decision to Provisionally Release Accused Praljak, 17 December 2009 (confidential), Partly Dissenting Opinion of Judge Güney; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.10, Decision on Radivoje Miletić’s Appeal Against Decision on Miletić’s Motion for Provisional Release, 19 November 2009 (confidential, “*Miletić* Decision of 19 November 2009”), Joint Dissenting Opinion of Judges Güney and Liu; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR65.3, Decision on Ivan Čermak’s Appeal Against Decision on his Motion for Provisional Release, 3 August 2009 (confidential, “*Čermak* Decision of 3 August 2009”), Partly Dissenting Opinion of Judges Güney and Liu; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.16, Decision on Prosecution’s Appeal Against Decision on Pušić’s Motion for Provisional Release, 20 July 2009 (confidential), Opinion Dissidente du Juge Güney.

² *Simatović* Decision, Dissenting Opinion of Judge Güney, para. 3.