



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-AR65.25

Date: 10 June 2011

Original: English

IN THE APPEALS CHAMBER

Before:

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

Registrar:

Mr. John Hocking

Decision of:

10 June 2011

PROSECUTOR

v.

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

PUBLIC

**DECISION ON SLOBODAN PRALJAK'S APPEAL AGAINST
DECISION ON HIS MOTION FOR PROVISIONAL RELEASE**

The Office of the Prosecutor:

Mr. Kenneth Scott
Mr. Douglas Stringer

Counsel for the Accused:

Mr. Michael Karnavas and Ms. Suzana Tomanović for Jadranko Prlić
Ms. Senka Nožica and Mr. Karim 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 Ćović
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 an appeal filed by Counsel for the Accused Slobodan Praljak ("Praljak") on 6 May 2011¹ against a decision rendered by Trial Chamber III ("Trial Chamber") on 21 April 2011, which denied provisional release to Praljak.² The Office of the Prosecutor ("Prosecution") responded on 9 May 2011,³ and Praljak replied on 13 May 2011.⁴

I. BACKGROUND

2. On 7 April 2011, Praljak filed a motion before the Trial Chamber seeking provisional release in Croatia until the delivery of the trial judgement in this case, noting that said trial judgement would likely not be rendered before February 2012.⁵ On 21 April 2011, the Trial Chamber issued the Impugned Decision, in which it denied the Motion.⁶ The Trial Chamber was persuaded that the Accused was not a threat to witnesses, victims, or any other person associated with the case, and was also certain that Praljak would return to detention should he be provisionally released.⁷ However, it found that the humanitarian reasons advanced by Praljak - namely, the excessive length of his detention and its effects on his and his family's wellbeing⁸ - were not sufficiently compelling, particularly for a period of release as long as that requested by Praljak.⁹

II. STANDARD OF REVIEW

3. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the 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 Tribunal's Rules of Procedure and Evidence ("Rules") is a discretionary one.¹¹ Accordingly, the relevant inquiry is not whether the

¹ Appeal Against Decision on Slobodan Praljak's Motion for Provisional Release, 6 May 2011 ("Appeal").

² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, *Décision relative à la demande de mise en liberté provisoire déposée par l'accusé Praljak*, 21 April 2011 ("Impugned Decision"), para. 42, Disposition. The English Translation was filed on 24 May 2011 ("Decision on Slobodan Praljak's Motion for Provisional Release").

³ Prosecution Response to Appeal Against the Decision Denying Slobodan Praljak Provisional Release, 9 May 2011 ("Response").

⁴ Slobodan Praljak's Reply to Prosecution's Response to Appeal Against the Decision Denying Provisional Release, 13 May 2011 ("Reply").

⁵ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Slobodan Praljak's Motion for Provisional Release, 7 April 2011 (confidential with confidential Annex A) ("Motion"), paras 2, 17, 37.

⁶ Impugned Decision, para. 42.

⁷ Impugned Decision, paras 16-19, 37.

⁸ See Motion, paras 22-29.

⁹ Impugned Decision, paras 38-41.

¹⁰ 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.

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

Appeals Chamber agrees with that discretionary decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.¹²

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”.¹³ 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.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

5. 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 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.¹⁶

6. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.¹⁷ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁸ 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.¹⁹ 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.²⁰ Finally, an application for provisional release brought at a late

¹² See, e.g., *Miletić* Decision, para. 4; *Prlić* Decision, para. 5.

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

¹⁴ See, e.g., *Miletić* Decision, para. 5; *Prlić* Decision, para. 6.

¹⁵ 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.

¹⁶ See, e.g., *Miletić* Decision, para. 6; *Prlić* Decision, para. 7.

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.

stage of the proceedings, and in particular after the closing of the Prosecution case, should only be granted when serious and sufficiently compelling humanitarian reasons exist.²¹

IV. ARGUMENTS OF THE PARTIES

7. Praljak contends that Trial Chambers have discretion to reach a decision regarding provisional release based on all circumstances of the case before them, and argues that the Trial Chamber committed a discernible error by failing to exercise its discretion to grant him provisional release in this case, given that the Trial Chamber: a) found that he met all of the criteria under Rule 65(B) of the Rules; and, b) expressed its disagreement with the Appeals Chamber's jurisprudence requiring that compelling humanitarian grounds be established before provisional release may be granted in the late stages of a trial.²² Praljak further submits that the compelling humanitarian reasons requirement violates the presumption of innocence under international "human rights principles" and the Tribunal's own statute,²³ and asserts that there are cogent reasons for the Appeals Chamber to depart from its previous case law and discard the requirement.²⁴ Alternatively, he argues that the length of his detention constitutes a violation of "fundamental norms"²⁵ and makes his case "exceptional and unique".²⁶

8. The Prosecution responds that the Trial Chamber does not have absolute discretion to make decisions regarding provisional release, but is constrained by law and the Tribunal's jurisprudence.²⁷ It argues that there are no cogent reasons for departing from the compelling humanitarian reasons requirement, which is consistent with international law regarding the presumption of innocence.²⁸ It further submits that prior Appeals Chamber decisions have held that and its potential impact of the length of detention does not in itself constitute a compelling humanitarian reason for granting provisional release.²⁹ It therefore urges the Appeals Chamber to dismiss the Appeal.³⁰

V. DISCUSSION

9. The Appeals Chamber recalls that since the *Petković* Decision of 21 April 2008, it has repeatedly affirmed by majority the "compelling humanitarian reasons" requirement for granting

²¹ See, e.g., *Miletić* Decision, para. 7; *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) ("*Gotovina* Decision"), para. 6.

²² Appeal, paras 17-20; Reply, paras 4-5.

²³ Appeal, paras 6-9. See also Appeal para. 16.

²⁴ Appeal, para. 20; Reply, paras 18-19.

²⁵ Appeal, para. 20.

²⁶ Reply, para. 20.

²⁷ Response, para. 14.

²⁸ Response, paras 12-19.

²⁹ Response, paras 20-22.

provisional release at a late stage of trial proceedings.³¹ It finds no cogent reason to depart from this analysis, Judge Güney dissenting.

10. The Appeals Chamber further recalls its holding that the possible future impact of detention on an accused's health does not constitute a "compelling humanitarian reason" in the context of provisional release,³² and that a Trial Chamber may not reasonably find that an accused's health has *already* been affected by his detention "in the absence of any precise medical information or evidence provided with respect to [the Accused's] state of health".³³ The Appeals Chamber therefore finds that the Trial Chamber did not err in concluding that Praljak's assertion that his detention had negatively impacted his and his family's wellbeing was not a sufficiently compelling humanitarian reason, given the absence of specific and current medical information. Accordingly, the Appeals Chamber finds, Judge Güney dissenting, that the Trial Chamber did not err in denying Praljak's motion for provisional release.

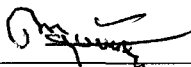
VI. DISPOSITION

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

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

Judge Güney appends a dissenting opinion

Dated this tenth day of June 2011,
At The Hague
The Netherlands


Judge Mehmet Güney
Presiding

[Seal of the Tribunal]

³⁰ Response, paras 1, 23.

³¹ *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 of 21 April 2008"), para. 17, fn. 52 and references cited therein. See, also e.g., *Miletić* Decision, para. 7; *Gotovina* Decision, para. 6.

³² *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.

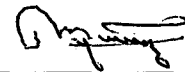
³³ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.15, Decision on Prosecution's Appeal Against the Trial Chamber's Decision on Slobodan Praljak's Motion for Provisional Release, 8 July 2009, para. 20.

I. DISSENTING OPINION OF JUDGE GÜNEY

1. As per my previous dissenting opinions appended to recent provisional release decisions, I still cannot agree with the addition of the “compelling humanitarian reasons” requirement for granting provisional release at a late stage of trial proceedings.¹ Also, 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

2. Consequently, I believe that the Appeals Chamber should have found that the Trial Chamber erred in finding that Praljak was required to present “compelling humanitarian grounds justifying provisional release”. Accordingly, I believe that the Appeals Chamber should have referred the matter back to the Trial Chamber to apply the correct legal standard and to determine, in the exercise of its discretion, whether the provisional release of Praljak was warranted.

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



Judge Mehmet Güney

On this 10 day of June 2011,

At The Hague, the Netherlands.

[Seal of the Tribunal]

¹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.24, Decision on Jadranko Prlić’s Appeal Against the Trial Chamber Decision on his Motion for Provisional Release, 8 June 2011, Partially Dissenting Opinion of Judge Güney; *Prosecutor v. Stanisic & 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.