

**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-03-69-AR65.9
Date: 4 August 2011
Original: English

BEFORE THE DUTY JUDGE

Before: Judge O-Gon Kwon

Registrar: Mr. John Hocking

Order of: 4 August 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON APPEAL AGAINST THE DECISION DENYING
FRANKO SIMATOVIĆ'S URGENT REQUEST FOR
PROVISIONAL RELEASE**

The Office of the Prosecutor:

Mr. Dermot Groome

Counsel for the Accused

Mr. Wayne Jordash and Mr. Scott Martin for Jovica Stanišić
Mr. Mihajlo Bakrač and Mr. Vladimir Petrović for Franko Simatović

I, O-Gon Kwon, Judge 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”), acting in my current capacity as duty Judge in accordance with Rule 28 of the Rules of Procedure and Evidence (“Rules”), am seised of the “Appeal Against the Decision Denying Franko Simatović’s Urgent Request For Provisional Release”, filed publicly on 27 July 2011 (“Appeal”) against the confidential “Decision on Simatović Defence Request for Provisional Release during Summer Recess”, rendered by Trial Chamber I of the Tribunal (“Trial Chamber”) on 20 July 2011 (“Impugned Decision”). The Office of the Prosecutor (“Prosecution”) publicly filed the “Prosecution Response to Appeal Against the Decision Denying Franko Simatović’s Urgent Request For Provisional Release” on 29 July 2011 (“Response”).

I. Background

1. On 7 July 2011, Mr. Franko Simatović (“the Accused”) filed a confidential motion before the Trial Chamber seeking provisional release for the period of the summer recess, or for a lesser period deemed appropriate by the Trial Chamber (“Motion”).¹ The Trial Chamber denied the Motion pursuant to Rules 54 and 65 of the Rules.² The Trial Chamber took into account that the proceedings had reached the post-Rule 98*bis* stage but concluded that this change did not “give rise to a reasonable fear that the Accused will attempt to abscond” and that given the guarantees provided by Serbia, that it remained satisfied that the Accused would appear for trial if granted provisional release.³ It also found that it had not received any new information to change its conclusion that the Accused “would not pose a danger to any victim, witness or other person if released”.⁴ However, the Trial Chamber noted that given the post-Rule 98*bis* stage of the proceedings it should not grant provisional release unless compelling humanitarian grounds were present and that in this case it was not convinced that there were such compelling humanitarian grounds.⁵

II. Submissions

2. The Accused challenges the Impugned Decision on the basis that the Trial Chamber committed an error in law in requiring “compelling humanitarian grounds” before granting provisional release.⁶ He observes that the “compelling humanitarian grounds” standard was not “foreseen as a condition for provisional release” under Rule 65(B) of the Rules and that once the

¹ Urgent Simatović Request for Provisional Release During the Summer Judicial Recess, 7 July 2011, paras. 1-2.

² Impugned Decision, para. 13.

³ Impugned Decision, para. 9.

⁴ Impugned Decision, para. 10.

⁵ Impugned Decision, paras. 11-13.

⁶ Appeal, para. 4.

Trial Chamber found that the stipulated conditions under Rule 65(B) had been met it “had every reason to exercise its discretion in favour of provisional release”.⁷ The Accused stresses that he enjoys the presumption of innocence even after the conclusion of the Rule 98*bis* procedure and that the differing standard applied after this phase of the proceedings does not accord with the “sense and spirit of Rule 65”.⁸

3. The Prosecution submits that the Appeal should be dismissed on the basis that the Appeals Chamber “recently denied a previous appeal by Simatović with an identical ground of appeal and nearly verbatim argumentation” and the Accused had not presented any reasons why the Appeals Chamber should reach a different result.⁹ According to the Prosecution the Trial Chamber was bound to follow Appeals Chamber jurisprudence and that the Accused failed to present any argument why the Trial Chamber erred in following the “compelling humanitarian grounds” standard which had been recently affirmed by the Appeals Chamber.¹⁰¹¹

III. Applicable Law and Standard of Review

4. Pursuant to Rule 28(C) of the Rules, all “applications in a case not otherwise assigned to a Chamber, other than the review of indictments, shall be transmitted to the duty Judge” and the duty Judge is required to act pursuant to Rule 54 in dealing with such an application. Rule 28(D) provides that the provisions of Rule 28 apply *mutatis mutandis* to applications before the Appeals Chamber. No Chamber had been assigned for the purpose of this Appeal prior to the commencement of the Tribunal’s summer recess and therefore the Appeal shall be decided by me as duty Judge pursuant to Rules 28(C) and 28(F).

5. An interlocutory appeal is not a *de novo* review of the Trial Chamber’s decision.¹² A decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one and therefore, the relevant question is not whether I, as duty Judge, agree with that discretionary decision but whether the Trial Chamber has correctly exercised its discretion in reaching that decision.¹³ The Appeals Chamber has held that in order to successfully challenge a

⁷ Appeal, para. 5.

⁸ Appeal, paras. 6-7.

⁹ Response, para. 1.

¹⁰ Response, paras. 4, 15-20.

¹¹ Response, paras. 29-32.

¹² *Prosecutor v. Momčilo Perišić.*, IT-04-81-AR65.1, Decision on Mr. Perišić’s Appeal Against the Decision on Mr. Perišić’s Motion for Provisional Release, 29 July 2011 (duty Judge) (“Decision on Perišić Appeal”), para. 6, citing *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.25, Decision on Slobodan Praljak’s Appeal against Decision on his Motion for Provisional Release, 10 June 2011 (“Decision on Praljak Appeal”), para. 3.

¹³ Decision on Perišić Appeal, para. 6; Decision on Praljak Appeal, paras. 3-4; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.23, Decision on Valentin Corić’s Appeal Against the Trial Chamber’s *Décision Relative à la Demande de*

discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a “discernable error” and that a Trial Chamber’s decision will only be overturned where it is found to be “(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion”.¹⁴ It 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

6. The applicable law governing provisional release and provisional release procedures is set out in the Trial Chamber’s previous decisions in this case.¹⁶

III. Discussion

7. The jurisprudence of the Appeals Chamber, albeit by majority, has established an interpretation of Rule 65(B) which *requires* sufficiently compelling humanitarian reasons before an Accused person, at a late stage in proceedings, will be granted provisional release.¹⁷ The Appeals Chamber has held that “an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, will only be granted when serious and sufficiently compelling humanitarian reasons exist”.¹⁸

8. I personally do not agree with this formulation of the Appeals Chamber, which places an additional hurdle at a later stage in the proceedings, a hurdle not provided for by the Rules. A majority decision of the Appeals Chamber itself concluded that “Rule 65(B) of the Rules does not mandate humanitarian justification for provisional release”.¹⁹ In addition other dissenting voices in

Mise en Liberté Provisoire de L’Accusé Valentin Ćorić, 24 December 2009 (duty Judge) (confidential decision) (“*Ćorić Decision*”), para. 6.

¹⁴ Decision on Perišić Appeal, para. 7; Decision on Praljak Appeal, para. 4; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution’s Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić, 11 March 2008 (“*Prlić 2008 Decision*”), para. 5.

¹⁵ Decision on Perišić Appeal, para. 7; Decision on Praljak Appeal, para. 4;

¹⁶ Impugned Decision, para. 8 citing Decision on Defence Request Requesting Provisional Release During the Winter Recess, 10 December 2010, para. 4; Decision on Defence Request Requesting Provisional Release During the Winter Court Recess, 15 December 2009, paras. 11-12; Decision on Defence Request Requesting Provisional Release, 15 October 2009, paras. 10-12.

¹⁷ *Prlić 2008 Decision*, para. 21; *Prosecutor v. 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; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.8, Decision on “Prosecution’s Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de L’Accusé Prlić* dated 7 April 2008”, 25 April 2008, para. 16; *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-AR-65.7, Decision on Franko Simatović’s Appeal Against the Decision Denying his Urgent Request for Provisional Release, 23 May 2011 (“*Simatović Decision*”), p. 1.

¹⁸ *Petković Decision*, para. 17; Decision on Praljak Appeal, para. 9; *Simatović Decision*, p. 1.

¹⁹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution’s Urgent Appeal Against “*Décision Relative à la Demande de Mise en Liberté Provisoire de L’Accusé Pušić*” Issued on 14 April 2008, 23 April 2008, paras. 14-15, citing *Prlić 2008 Decision*, para. 21.

Appeals and Trial Chamber decisions have consistently questioned the Appeals Chamber's interpretation.²⁰ There are at least three underlying issues which I observe are problematic with respect to the current interpretation of the Appeals Chamber.

9. Firstly, the artificial distinction between the standard applied in considering provisional release requests made before and after the Rule 98*bis* stage of proceedings is inconsistent with the presumption of innocence which an accused person continues to enjoy in the post-Rule 98 *bis* phase of the case. Article 21(3) of the Statute of the Tribunal guarantees that the accused "shall be presumed innocent until proved guilty", a presumption which is in no way affected when a case reaches the post-Rule 98*bis* phase.

10. Secondly, the current version of Rule 65(B) makes no reference to the "sufficiently compelling humanitarian reasons" standard. The interpretation adopted by the majority of the Appeals Chamber effectively re-introduces an additional requirement which is comparable to the "exceptional circumstances" language which was specifically removed from the wording of the rule in November 1999.²¹

11. Thirdly, Rule 65(I)(iii) requires the Appeals Chamber to be satisfied that "special circumstances exist warranting such release" before a convicted person is granted provisional release. It is irrational and unreasonable that before being granted provisional release an accused person, who still enjoys the presumption of innocence even after the Rule 98*bis* stage of the proceedings should be held to the ostensibly more stringent "sufficiently compelling humanitarian reasons" standard when a convicted person is held to the "special circumstances" standard.²²

12. However, it is apparent that the majority of the Appeals Chamber does not agree with my observations and I do not think that it is appropriate that the responsibility for the reversal, confirmation or development of this standard should be left to a single duty Judge. Having reached

²⁰ For example see: Decision on Praljak Appeal, Dissenting Opinion of Judge Güney; *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 ("Prlić 2011 Decision"), Partially Dissenting Opinion of Judge Güney; Simatović Decision, Dissenting Opinion of Judge Güney; *Prosecutor v. Stanišić & Župljanin*, Case No. IT-08-91-AR65.1, Decision on Mićo Stanišić's Appeal Against Decision on his Motion for Provisional Release, 11 May 2011 ("Mićo Stanišić Decision"), Separate Opinion of Judge Patrick Robinson; *Corić Decision*, paras. 15-17; *Prosecutor v. 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 decision), Joint Dissenting Opinion of Judges Güney and Liu; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Miletić's Motion for Provisional Release, 15 October 2009 (confidential decision), ("Miletić Decision"), Judge Prost's Dissenting Opinion; *Prosecutor v. 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, Partly Dissenting Opinion of Judges Güney and Liu.

²¹ Decision on Praljak Appeal, Dissenting Opinion of Judge Güney; Mićo Stanišić Decision, Separate Opinion of Judge Patrick Robinson, paras. 4-6; Miletić Decision, Judge Prost's Dissenting Opinion, paras. 4-6; Petković Decision, Partly Dissenting Opinion of Judge Güney, paras. 3-4.

the conclusion that it is for the Appeals Chamber and not for a single duty Judge to reverse the “sufficiently compelling humanitarian reasons” standard, I do not find that the Trial Chamber based its decision on an incorrect interpretation of governing law or that there was any discernable error in its conclusion that this standard was not met in the circumstances of the Accused. The Trial Chamber was simply applying the standard governing provisional release applications which had been developed by and affirmed by the jurisprudence of the Appeals Chamber. In addition, I find that the Trial Chamber did not base its decision on a “patently incorrect conclusion of fact” and that its decision was not “so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion”.

IV. Disposition

For the foregoing reasons, pursuant to Rules 54 and 65 of the Rules, I hereby **DISMISS** the Appeal in its entirety and **AFFIRM** the Impugned Decision.

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



Judge O-Gon Kwon
Duty Judge

Dated this fourth day of August 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

²² Mico Stanišić Decision, Separate Opinion of Judge Patrick Robinson, paras. 19-20; Miletić Decision, Judge Prost’s Dissenting Opinion, paras. 10-12; Petković Decision, Partly Dissenting Opinion of Judge Güneý, paras. 3-4.