

**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-05-88-A
Date: 11 January 2012
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrésia Vaz

Registrar: Mr. John Hocking

Decision of: 11 January 2012

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON VINKO PANDUREVIĆ'S URGENT MOTION
FOR PROVISIONAL RELEASE ON COMPASSIONATE
GROUNDS**

The Office of the Prosecutor:
Mr. Peter Kremer QC

Government of Republika Srpska

Government of the Kingdom of The Netherlands

Counsel for the Defence:

Mr. Zoran Živanović and Ms. Mira Tapušković for Mr. Vujadin Popović
Mr. John Ostojić and Mr. Predrag Nikolić for Mr. Ljubiša Beara
Ms. Jelenda Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Mr. Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Mr. Vinko Pandurević

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 “Urgent Motion on Behalf of Vinko Pandurević for Provisional Release Such as to Permit Him to Attend the Mourning and Memorial for His Mother” filed confidentially on 21 December 2011 (“Motion”) by Counsel for Vinko Pandurević (“Pandurević”). The Office of the Prosecutor (“Prosecution”) filed its response to the Motion on 22 December 2011.¹ On 28 December 2011, The Netherlands in its capacity as the Host State, filed its submission indicating that it was not opposed to Pandurević’s provisional release.² On 11 January 2012, Pandurević filed an addendum to the Motion containing the guarantees issued by the Government of the Republika Srpska, dated 21 and 29 December 2011.³

I. BACKGROUND

2. In the pre-trial stage, Pandurević filed two requests for provisional release, both of which were denied by Trial Chamber II (“Trial Chamber”).⁴ During the trial proceedings, Pandurević filed two further requests for provisional release which were granted on compassionate grounds. On the first occasion, in December 2007, the Trial Chamber provisionally released Pandurević to allow him to attend a memorial service for his deceased father.⁵ On the second occasion, in July 2008, the Trial Chamber provisionally released Pandurević to enable him to visit his ailing mother.⁶

3. On 10 June 2010, the Trial Chamber convicted Pandurević, pursuant to Articles 3, 5(a), 5(h), 5(i) and 7(1) of the Tribunal’s Statute (“Statute”), of aiding and abetting: murder, as a violation of the laws or customs of war; murder, as a crime against humanity; persecution, a crime against humanity; and inhumane acts (forcible transfer), a crime against humanity. The Trial

¹ Prosecution Response to Vinko Pandurević’s Urgent Motion for Provisional Release, 22 December 2011 (confidential) (“Response”).

² Correspondence from the Head Host Nation Division, on behalf of the Minister of Foreign Affairs of the Netherlands, “Re Provisional release Mr Vinko Pandurević”, 28 December 2011 (confidential).

³ Addendum to the Urgent Motion on Behalf of Vinko Pandurević for Provisional Release Such as to Permit Him to Attend the Mourning and Memorial for His Mother, 11 January 2012 (confidential) (“Addendum”); Addendum, Annex A (Guarantee of the Government of Republika Srpska, No. 04/1-012-2-2988/11, 29 December 2011); Addendum, Annex B (Guarantee of Republika Srpska Ministry of Internal Affairs Banja Luka, No. C/M-40/11/prov., 21 December 2011) (“Guarantee of the Ministry of Internal Affairs of Republika Srpska”) (collectively “Guarantees of Republika Srpska”).

⁴ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-PT, Decision on Pandurević’s Renewed Motion for Provisional Release, 6 June 2006; *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-PT, Decision on Vinko Pandurević’s Application for Provisional Release, 18 July 2005. See also *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurević’s Application for Provisional Release, 3 October 2005.

⁵ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Pandurević’s Request for Provisional Release on Compassionate Grounds, 11 December 2007 (“11 December 2007 Decision”).

⁶ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Pandurević’s Motion for Provisional Release, 21 July 2008 (public redacted version).

Chamber also convicted Pandurević, pursuant to Articles 3, 5(a) and 7(3) of the Statute, of murder, as a violation of the laws or customs of war; and murder, as a crime against humanity.⁷ He was sentenced to 13 years of imprisonment.⁸

4. On 22 February 2011, the Appeals Chamber granted Pandurević's request for provisional release on compassionate grounds to allow him to visit his ailing mother.⁹

II. APPLICABLE LAW

5. Rule 65(I) of the Rules provides that the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period, if it is satisfied that: (i) the convicted person, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be; (ii) the convicted person, if released, will not pose a danger to any victim, witness or other person; and (iii) special circumstances exist warranting such release.¹⁰ These requirements must be considered cumulatively.¹¹ The Appeals Chamber recalls that "whether an applicant satisfies these requirements is to be determined on a balance of probabilities, and the fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities".¹² The discretionary assessments of the requirements under Rule 65 are made on a case-by-case basis.¹³

III. DISCUSSION

A. Arguments of the Parties

6. Pandurević requests provisional release in order to attend the memorial service and the post-funeral mourning period for his mother, who passed away on 12 December 2011.¹⁴ He argues that in accordance with Serbian Orthodox Christian custom, a memorial service must be held no later than 40 days after death and is currently scheduled for 15 January 2012.¹⁵ Pandurević also submits that the 40th day, in this case 21 January 2012, is customarily a significant day of mourning.¹⁶ He

⁷ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version), Vol. II, pp. 831-832.

⁸ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version), Vol. II, para. 2110, pp. 831-832.

⁹ Decision on Vinko Pandurević's Urgent Motion for Provisional Release on Compassionate Grounds, 22 February 2011 (confidential) ("22 February 2011 Decision").

¹⁰ 22 February 2011 Decision, para. 5 with references cited therein.

¹¹ 22 February 2011 Decision, para. 5 with references cited therein.

¹² 22 February 2011 Decision, para. 5 with references cited therein.

¹³ 22 February 2011 Decision, para. 5 with references cited therein.

¹⁴ Motion, paras 1, 17-18; Annex A (Death certificate).

¹⁵ Motion, paras 17-18.

¹⁶ Motion, para. 17.

seeks permission to stay in the municipality of Sokolac during both these days, further arguing that the period of provisional release should not be shorter than 10 days – the period granted to him in similar circumstances by the 11 December 2007 Decision.¹⁷

7. Pandurević submits that he poses neither a flight risk nor a threat to any victim, witness or other person.¹⁸ He points to his good behaviour as a detainee and observance of the conditions of his prior provisional releases.¹⁹ Pandurević also argues that the fact that he has already served approximately 6 years and 8 months of his 13-year sentence mitigates the risk of flight.²⁰ Moreover, he asserts that there has never been any suggestion that he has attempted to interfere with witnesses.²¹ In support of his Motion, Pandurević further submits that, if granted provisional release, he is prepared to: (i) remain under armed guard 24 hours a day; (ii) remain within the Municipality of Sokolac at all times, with the exception of transfer to and from the airport; (iii) surrender any travel documents as directed; (iv) sign a daily record of his presence in Sokolac for daily transmission to the Tribunal; (v) refrain from discussing the facts of the case with anyone, with the exception of his Counsel; (vi) refrain from having contact with the co-accused in the case; (vii) refrain from in any way interfering with any victim or witness, or with the administration of justice; and (viii) comply with any further conditions as may be imposed by the Government of Republika Srpska in fulfilment of its obligations to the Tribunal.²² Pandurević also refers to the Guarantees of Republika Srpska.²³

8. Finally, Pandurević seeks the revision of the conditions imposed on him by the 22 February 2011 Decision by being permitted to spend his nights, under armed guard, at his family home in the village of Jasik rather than being removed every evening to a detention facility.²⁴ He argues that imposition of a latter condition in the present circumstances would frustrate one of the principal justifications for the release namely that he be permitted to associate with members of his family, many of whom can only return to Jasik during the evening, due to their work commitments.²⁵

¹⁷ Motion, para. 18.

¹⁸ Motion, paras 11-16.

¹⁹ Motion, para. 11.

²⁰ Motion, para. 12.

²¹ Motion, para. 16.

²² Motion, para. 13(c); Annex B (Personal undertaking).

²³ Motion, para. 14; Addendum, Annexes A and B (Guarantees of Republika Srpska).

²⁴ Motion, para. 19.

²⁵ Motion, para. 19.

9. The Prosecution does not oppose the Motion provided that the appropriate conditions are imposed and the relevant guarantees are obtained from the Government of Republika Srpska.²⁶

B. Analysis

1. Special circumstances under Rule 65(I) of the Rules

10. The Appeals Chamber recalls that the Rule 65(I)(iii) of the Rules imposes an additional prerequisite for provisional release at the post-trial stage, specifically, the requirement that “special circumstances exist warranting such release”.²⁷ The Appeals Chamber has concluded that special circumstances related to humane and compassionate considerations exist where there is an acute justification, such as the applicant’s medical need or a memorial service for a close family member.²⁸

11. In the present case, the Appeals Chamber is satisfied that the memorial service for Pandurević’s deceased mother constitutes a special circumstance within the meaning of Rule 65 (I)(iii) of the Rules. The Appeals Chamber also finds that, although not constituting such special circumstance in and of itself, the presence with the family during the 40th day of mourning may be a factor to be considered in determining the practical length of the provisional release that has been granted on another basis.

2. Other Rule 65(I) Requirements

12. The Appeals Chamber is aware that, in principle, there is a greater flight risk associated with granting a request for provisional release at the present stage, specifically, after the Trial Chamber sentenced Pandurević to 13 years of imprisonment, than there was during the trial phase when some of his previous requests for provisional release were granted.²⁹ However the Appeals Chamber finds, in light of the discussion below, that the requirement under Rule 65(I)(i) of the Rules is satisfied.

13. The Appeals Chamber is not aware of any instance of Pandurević’s non-compliance with the conditions imposed on him during his previous periods of provisional release.³⁰ The Appeals

²⁶ Response, para. 2.

²⁷ See *supra*, para. 5; 22 February 2011 Decision, para. 9 and reference cited therein.

²⁸ 22 February 2011 Decision, para. 9 and reference cited therein.

²⁹ See 22 February 2011 Decision, para. 13 and reference cited therein.

³⁰ See *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Report on Compliance with the Conditions of the Decision of Trial Chamber II of 21 July 2008 Regarding Pandurević’s Request for Provisional Release and Visit to Republika Srpska, Number 23/02-773-54/08, 14 August 2008 (confidential); *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Submission on Compliance with Trial Chamber II Decision of 11 December 2007 on Pandurević’s Request for Provisional Release on Compassionate Grounds, Number 23/02-773-98-1/07, 5 February 2008 (confidential).

Chamber also considers his personal undertaking³¹ and the Guarantees of Republika Srpska, which include an undertaking to ensure 24-hour surveillance of Pandurević for the time that he will be staying in the territory of Republika Srpska.³² If any of the conditions stipulated below (e.g., 24-hour *armed* surveillance) are not, or might not be complied with, the provisional release cannot be executed.³³ In light of the above and considering the circumstances at stake, the Appeals Chamber is satisfied that if released, Pandurević will surrender into detention at the conclusion of the fixed period for which he is provisionally released.

14. Further, the Appeals Chamber is not aware of any information suggesting that Pandurević has attempted to interfere with, or endanger, witnesses or victims during his previous periods of provisional release. In this context, the Appeals Chamber again notes Pandurević's personal undertaking³⁴ and the Guarantees of Republika Srpska.³⁵ It is therefore satisfied that if released, Pandurević will not pose a danger to any victim, witness or other person, thus satisfying the requirement of Rule 65(I)(ii) of the Rules.

3. Pandurević's Residence in Republika Srpska and Duration of the Provisional Release

15. With regard to Pandurević's residence while on provisional release, the Appeals Chamber considers that he should stay within the confines of the Municipality of Sokolac, Republika Srpska, Bosnia and Herzegovina.

16. At the same time, the Appeals Chamber recalls the provisional release regime imposed by the 22 February 2011 Decision.³⁶ It is not persuaded by Pandurević's submission that the purpose of the provisional release would be frustrated by the imposition of the requirement that Pandurević should spend nights in the Public Security Centre in the Municipality of Sokolac. However, the Appeals Chamber urges the appropriate authorities of Republika Srpska to ensure that Pandurević is given sufficient time to spend with his family in mourning by not returning him to detention before 21.00 hours.

17. With regard to the duration of the provisional release, the Appeals Chamber considers that the period between 13 and 23 January 2012, similar in length to the period granted in comparable circumstances by the Trial Chamber in its 11 December 2007 Decision,³⁷ is reasonable and appropriate to ensure that Pandurević can attend both the memorial service scheduled for

³¹ Motion, Annex B (Personal undertaking).

³² Addendum, Annex B (Guarantee of the Ministry of Internal Affairs of Republika Srpska), para. 1.

³³ See *infra*, para. 19.

³⁴ Motion, Annex B (Personal undertaking), paras 6-8.

³⁵ Addendum, Annexes A and B (Guarantees of Republika Srpska).

³⁶ 22 February 2011 Decision, paras 17, 19.

³⁷ 11 December 2007 Decision, para. 18.

15 January 2012 and observe the 40th day of mourning (21 January 2012) with consideration given to two days of travel time.

18. Finally, the Appeals Chamber notes that although all the related filings were confidential, the present decision does not contain any information to warrant giving it a confidential status.

IV. DISPOSITION

19. For the foregoing reasons, the Appeals Chamber hereby **GRANTS** the Motion and **ORDERS** as follows:

1. Pandurević shall be transported to Schiphol airport in The Netherlands by the Dutch authorities on 13 January 2012, or as soon as practicable thereafter;
2. At Schiphol airport, Pandurević shall be provisionally delivered into the custody of a representative of the Government of Republika Srpska, pursuant to paragraph 4 of the Guarantee of the Ministry of Internal Affairs of Republika Srpska,³⁸ who shall accompany Pandurević for the remainder of his travel to and from the Municipality of Sokolac, Republika Srpska, Bosnia and Herzegovina;
3. The period of the provisional release shall commence when Pandurević is delivered into the custody of the authorized representative of the Government of Republika Srpska and shall terminate upon his return to the Dutch authorities, which shall be no later than 23 January 2012;
4. On his return flight, Pandurević shall be accompanied by the authorized representatives of Republika Srpska who shall deliver Pandurević into the custody of the Dutch authorities at Schiphol airport, and the Dutch authorities shall then transport Pandurević back to the United Nations Detention Unit (“UNDU”) in The Hague; and
5. During the period of his provisional release, Pandurević shall abide by the following conditions:
 - a. before leaving the UNDU, Pandurević shall provide details of his itinerary to the Ministry of Justice of The Netherlands and to the Registrar of the Tribunal;

³⁸ Addendum, Annex B.

- b. Pandurević shall remain within the confines of the Municipality of Sokolac, Republika Srpska, Bosnia and Herzegovina, apart from his travel to and from the airport;
- c. between 23.00 hours each night and 07.00 hours the next day, Pandurević shall be confined to the local detention facility, which is part of the Sokolac Public Security Centre in the Municipality of Sokolac, Republika Srpska, Bosnia and Herzegovina;
- d. Pandurević shall remain under 24-hour armed surveillance throughout his presence in Republika Srpska, Bosnia and Herzegovina;
- e. Pandurević shall surrender all his travel documents to the European Union Police Mission (EUPM) in Sarajevo, or the Office of the Prosecutor in Sarajevo, or the Public Security Station in the Municipality of Sokolac for the entire duration of his provisional release;
- f. Pandurević shall have no contact whatsoever or in any way interfere with victims or (potential) witnesses or otherwise interfere in any way with the proceedings of the Tribunal or the administration of justice;
- g. Pandurević shall not discuss his case with anyone, including the media, other than his Counsel;
- h. Pandurević shall strictly comply with any requirements of the authorities of Republika Srpska necessary to enable them to comply with their obligations under the present decision;
- i. Pandurević shall comply with any order of the Appeals Chamber varying the terms of or terminating his provisional release; and
- j. Pandurević shall return to the UNDU no later than 23 January 2012.

20. The Appeals Chamber **REQUIRES** the Government of Republika Srpska to assume responsibility for:

- 1. Designation of the official into whose custody Pandurević shall be provisionally released and who shall accompany Pandurević from Schiphol airport in The Netherlands to the local detention facility, which is part of the Sokolac Public Security Centre in the Municipality of Sokolac Republika Srpska, Bosnia and

Herzegovina, and notification, as soon as practicable, to the Appeals Chamber and the Registrar of the Tribunal of the name of this designated official;

2. Ensuring Pandurević's personal security and safety while on provisional release in Republika Srpska;
 3. Providing 24-hour armed surveillance of Pandurević throughout his stay in Republika Srpska, including the transfer from the airport in Bosnia and Herzegovina to the Municipality of Sokolac and back;
 4. All expenses in connection with the transport from Schiphol airport to the Municipality of Sokolac, Bosnia and Herzegovina and back;
 5. Facilitating, at the request of the Appeals Chamber or of the parties, all means of co-operation and communication between the parties and ensuring the confidentiality of any such communication;
 6. Reporting immediately to the Registrar of the Tribunal as to the substance of any threats to Pandurević's security, including full reports of investigations related to such threats;
 7. Detaining Pandurević immediately should he attempt to escape from the territory of Republika Srpska, or should he in any other way breach the terms and conditions of his provisional release as set out in the present decision and immediately reporting any such breach to the Registry of the Tribunal and the Appeals Chamber;
 8. Respecting the primacy of the Tribunal in relation to any existing or future proceedings in Republika Srpska concerning Pandurević; and
 9. Submitting a written report to the Appeals Chamber, upon Pandurević's return to the UNDU, as to Pandurević's compliance with the terms of the present decision.
21. Finally, the Appeals Chamber **INSTRUCTS** the Registrar of the Tribunal to:
1. Consult with the Dutch authorities and the authorities of Republika Srpska, as to the practical arrangements for Pandurević's provisional release;
 2. Request the authorities of the State(s) through whose territory Pandurević may travel to:

- a. hold him in custody for any time he will spend in transit at the airport of the State(s) in question; and
 - b. arrest and detain Pandurević pending his return to the UNDU should he attempt to escape during travel;
3. Continue to detain Pandurević at the UNDU in The Hague until such time as the Appeals Chamber and the Registrar of the Tribunal have been notified of the name of the designated official of the Government of Republika Srpska into whose custody Pandurević is to be provisionally released.

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

Judge Patrick Robinson

Presiding



Dated this eleventh day of January 2012,
At The Hague,
The Netherlands

[Seal of the Tribunal]