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**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: 17 January 2012
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 17 January 2012

PROSECUTOR

v.

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

CONFIDENTIAL

**DECISION ON PROSECUTION MOTION FOR
RECONSIDERATION OF FILING STATUS OF THE APPEALS
CHAMBER'S DECISION ON VINKO PANDUREVIĆ'S
PROVISIONAL RELEASE OF 11 JANUARY 2012**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Defence:

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Mr. Vujadin Popović
Mr. John Ostojić and Mr. Theodor Scudder for Mr. Ljubiša Beara
Ms. Jelena 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

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);

NOTING the "Decision on Vinko Pandurević's Urgent Motion for Provisional Release on Compassionate Grounds" filed publicly on 11 January 2012 ("Impugned Decision") and granting Vinko Pandurević ("Pandurević") provisional release between 13 January and 23 January 2012;¹

BEING SEISED OF the "Prosecution Motion for Reconsideration of Filing Status of the Appeals Chamber's Decision on Vinko Pandurević's Provisional Release of 11 January 2012" filed confidentially on 12 January 2012 ("Motion");

NOTING the Prosecution's submission that the Impugned Decision contains a clear error of reasoning in paragraph 18 stating that it "does not contain any information to warrant giving it a confidential status" and that the Appeals Chamber should reconsider the Impugned Decision and change its status from public to confidential;²

NOTING that the Prosecution argues that the publication of the information contained in the Impugned Decision – notably the timing of the provisional release, details of Pandurević's whereabouts (including his attendance at events) and the modalities of his movements – "raises great concerns for the safety and security of Pandurević and the persons escorting him; potentially undermines the willingness and ability of The Netherlands and the Republika Srpska [*sic*] [...] authorities to guarantee the conditions of Pandurević's provisional release; and increases Pandurević's flight risk";³

NOTING the Prosecution's assertion that previous decisions issued in this case granting provisional release have kept such information confidential and that "[k]eeping plans of prisoner movements confidential has [...] been Tribunal practice in relation to provisional release of accused and convicted persons in other cases";⁴

NOTING the "Response of the Defence of Vinko Pandurevic [*sic*] to the Prosecution Motion for Reconsideration of Filing Status of the Appeals Chamber Decision on Vinko Pandurevic's [*sic*]

¹ Impugned Decision, paras 19(1), 19(3), 19(5)(j).

² Motion, paras 1, 4, 9.

³ Motion, para. 2.

⁴ Motion, para. 5.

Provisional Release of 11th January 2012", filed confidentially on 12 January 2012 ("Response"), whereby Pandurević endorses the Motion;⁵

CONSIDERING that the Appeals Chamber may only reconsider its own non-final decisions pursuant to its inherent discretionary power if a clear error of reasoning has been shown by the appellant, or particular circumstances merit reconsideration in order to prevent an injustice;⁶

RECALLING Pandurević's submission in support of his provisional release that he does not constitute a flight risk, and that the Prosecution did not contest this assertion;⁷

CONSIDERING that it is incumbent on the Prosecution to raise any concerns pertaining to the potential flight risk of a convicted person seeking provisional release within the context of Rule 65(I)(i) of the Tribunal's Rules of Procedure and Evidence, so that such concerns may be considered by the Appeals Chamber when determining whether provisional release should be granted;

EMPHASIZING that where there is a real risk that a convicted person may abscond, this factor will impact the Appeals Chamber's decision to grant provisional release;

CONSIDERING that in its Motion, the Prosecution fails to substantiate or in any way support its general assertion that there is a risk that Pandurević may abscond as a result of the public status of the Impugned Decision;

CONSIDERING that the Appeals Chamber has issued numerous public decisions granting convicted persons provisional release which contain similar information to that found in the Impugned Decision;⁸

⁵ See Response, paras 2-3, referring to Motion, para. 4.

⁶ See, e.g., *Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41A-A, Decision on Peter Erlinder's Motion to Reconsider Order Imposing Sanctions, 1 September 2011, p. 3. See also *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on Motion on Behalf of Veselin Šljivančanin Seeking Reconsideration of the Appeals Chamber's Decision of 8 December 2009, 22 January 2010, p. 2.

⁷ Urgent Motion on Behalf of Vinko Pandurević for Provisional Release Such as to Permit Him to Attend the Mourning and Memorial for His Mother, 21 December 2011 (confidential), paras 11-14; Prosecution Response to Vinko Pandurević's Urgent Motion for Provisional Release, 22 December 2011 (confidential), para. 2.

⁸ See, e.g., *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić's Third Motion for Provisional Release on Compassionate Grounds, 3 September 2010; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Dragoljub Ojdanić's Motion for Temporary Provisional Release on Compassionate Grounds, 9 August 2010; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Urgent Motion Requesting Provisional Release of Nebojša Pavković on Compassionate Grounds, 17 September 2009; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić for Provisional Release for a Fixed Period to Attend Memorial Services for his Mother, 5 May 2006; *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to attend his Daughter's Memorial Service, 21 April 2006; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić,

CONSIDERING that the confidential status of the Appeals Chamber's Decision of 22 February 2011 was due to the inclusion of information concerning the medical conditions of Pandurević's mother;⁹

NOTING FURTHER that the Trial Chamber's Decision of 11 December 2007, issued in very similar circumstances and containing very similar information to the Impugned Decision, was rendered publicly,¹⁰ and that the only redaction to the Trial Chamber's Decision of 21 July 2008 concerned the medical condition of Pandurević's mother;¹¹

FINDING that the Prosecution has failed to demonstrate that issuing the Impugned Decision publicly would jeopardize the security of Pandurević and his escort during the provisional release and increase the risk of flight;

FINDING THEREFORE that the Prosecution has not shown any error of reasoning in the Impugned Decision or that reconsideration is necessary to prevent injustice;

HEREBY DISMISSES the Motion in its entirety.

Judge Robinson appends a dissenting opinion to this decision.

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



Judge Patrick Robinson
Presiding

Dated this seventeenth day of January 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

23 March 2005; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for His Father, 21 October 2004.

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

¹⁰ *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 ("Decision of 11 December 2007").

¹¹ *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) ("Decision of 21 July 2008"), fn. 45.

DISSENTING OPINION OF JUDGE PATRICK ROBINSON

1. The Appeals Chamber has consistently identified two bases upon which its power of reconsideration may be exercised. The first requires that an applicant demonstrate a "clear error of reasoning".¹ The second requires a showing of particular circumstances which merit reconsideration in order "to prevent an injustice".² While the Majority have focused on the first basis, no doubt because it is relied upon by the parties,³ it is, of course, open to the Appeals Chamber to consider the application on the second basis. This is so because the Appeals Chamber is the final arbiter of the law of the Tribunal, and has the obligation to determine and apply the law in a given case. The circumstances under which the second basis for reconsideration is applicable are not exhaustively enumerated, but they have been held to include "new facts and new arguments".⁴ It is the application of this second basis to the arguments set forth in the submissions which I, respectfully, find persuasive.

2. None of the safety, security and flight risk considerations argued in the Motion were raised in the pleadings for the Impugned Decision. This is not surprising since the pleadings were submitted by the parties confidentially without any dispute as to their classification, and most likely without expectation that the Appeals Chamber might *proprio motu* find confidentiality unwarranted. In this regard, I note the inconsistent practice within the Appeals Chamber on the classification of its decisions granting provisional release, and indeed with respect to Pandurević himself. A survey of the Appeals Chamber's decisions on provisional release over the past ten years reveals that nine decisions granting provisional release with rather detailed information concerning the itinerary of the applicant were issued publicly;⁵ another eight decisions granting provisional

¹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution Request for Reconsideration of Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 25 November 2009, ("Karadžić Decision") para. 7.

² *Karadžić* Decision, para. 7. See also, *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-AR73.1, Decision on Zdravko Tolimir's Request for Reconsideration of Appeals Chamber's Decision of 28 March 2008, 18 June 2008, para. 8; *Prosecutor v. Jovića Stanišić*, Case No. IT-03-69-AR73.4, Decision on Motion on Behalf of Jovića Stanišić Appeal of Decision on Stanišić's Defence Request for Reconsideration of the Pre-Trial Chamber Decision of 16 March 2007, 23 September 2011, para. 13. See also, *Prosecutor v. Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on Motion on Behalf of Veselin Šljivančanin Seeking Reconsideration of the Appeals Chamber's Decision of 8 December 2009, 22 January 2010, p. 2, , *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze*, Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005, p. 2, *Prosecutor v. Juvénal Kalijeli*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 203, *Prosecutor v. Slobodan Milošević*, IT-02-54-AR108bis 3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006, para. 24, fn. 40.

³ Motion, para. 5; Response, para. 3.

⁴ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2. *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Decision on Defence Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses, 9 May 2002, para. 8: "In deciding whether to exercise its discretion in a given case, the Chamber may consider, *inter alia*, any new facts or legal arguments brought to the attention of the Chamber, and the possibility and gravity of prejudice to a party".

⁵ *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić's Third Motion for Provisional Release on Compassionate Grounds, 3 September 2010; *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Decision on Dragoljub Ojdanić's Motion for Temporary Provisional Release on Compassionate Grounds, 9 August 2010 (before the

release with only general information about the itinerary of the applicant were issued publicly;⁶ and another seven decisions with detailed information concerning the itinerary of the applicant granting provisional release were issued confidentially, thus preventing access by the public to any information with respect to the itinerary of the applicant while on provisional release.⁷ With respect to Pandurević, he has been provisionally released on three previous occasions: once in December 2007 in accordance with a public decision rendered by a trial chamber;⁸ again, in July 2008, pursuant to a confidential decision rendered by a trial chamber, followed, however, on the same day by the public redacted version with only minor redactions concerning the medical data;⁹ and most recently, in February 2011, when the Appeals Chamber granted provisional release in a confidential decision.¹⁰ Even though some of these decisions contained medical information that would ordinarily warrant confidentiality, they nonetheless remain examples of decisions with detailed information about the itinerary of the applicant that were issued confidentially. Moreover there is

Duty Judge); *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on Motion of Rasim Delić for Provisional Release, 11 May 2009; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić for Provisional Release for a Fixed Period to Attend Memorial Service for his Mother, 5 May 2006; *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to attend his Daughter's Memorial Service, 21 April 2006; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on "Defence Motion: Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro", 16 December 2005; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Service for His Father, 21 October 2004; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Decision on Application for Provisional Release, 12 December 2002.

⁶ *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Decision on Urgent Motion Requesting Provisional Release of Nebojša Pavković on Compassionate Grounds, 17 September 2009; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Decision on Lahi Brahimaj's Application for Provisional Release, 27 May 2009; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, Decision on Motion of Astrit Haraqija for Provisional Release, 8 April 2009; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, Decision on Motion of Bajrush Morina for Provisional Release, 9 February 2009; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on the Motion of Veselin Šljivančanin for Provisional Release, 11 December 2007; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision on Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007; *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, 2 December 2004; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on the Request for Provisional Release of Miroslav Kvočka, 17 December 2003.

⁷ *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić's Second Motion for Provisional Release on Compassionate Grounds, 14 July 2010 (confidential); *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); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević's Second Motion for Temporary Provisional Release on the Grounds of Compassion, 21 May 2009 (confidential); *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on the Renewed Defence Request Seeking Provisional Release on Compassionate Grounds, 15 April 2008 (confidential); *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to Attend his Brother's Memorial Service and to Observe the Traditional Period of Mourning, 1 September 2006 (confidential); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Dragan Jokić Motion for Provisional Release, 28 October 2005 (confidential); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Jokić Motion for Provisional Release, 3 October 2005 (confidential).

⁸ *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.

⁹ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Pandurević's Motion for Provisional Release, 21 July 2008 (confidential and public redacted versions).

¹⁰ Decision on Vinko Pandurević's Urgent Motion for Provisional Release on Compassionate Grounds, 22 February 2011 (confidential).

one decision with detailed information about the itinerary of the applicant that was issued confidentially for the sole purpose of maintaining the confidentiality of that detailed information.¹¹

3. In any event, the circumstances set forth in the Motion are unquestionably "new arguments" for the purposes of analyzing whether reconsideration is warranted. They are new arguments because the Appeals Chamber did not have the benefit of them when it was deciding the motion for provisional release. It is hearing these arguments for the first time. Specifically the Prosecution submits that "the publication of specific sensitive information...jeopardizes the security of the provisional release" and directs the Appeals Chamber to information in the Impugned Decision such as (i) the length of Pandurević's provisional release, including his departure and arrival dates; (ii) the date of his mother's memorial service that Pandurević wishes to attend; and (iii) Pandurević's precise location during his provisional release, location of his family home, the place of the detention facility he is required to spend the nights in, as well as the time he has to report back to that detention facility.¹² The Prosecution further argues that "making these details public knowledge raises serious safety, security and flight risk implications."¹³

4. With respect to whether the averred circumstances indeed merit reconsideration in order to prevent an injustice, I find most persuasive the nature of the circumstances, predominantly the safety and security of Pandurević and those escorting him while on provisional release. Two powerful arguments are raised in this regard.

5. First, it is argued that the publication of the Impugned Decision would compromise the safety and security of Pandurević, as well as those escorting him.¹⁴ Specifically, it is submitted that the publication of his precise whereabouts would put him and his escorts in danger.¹⁵ I am bound to say that I find this argument, which the Appeals Chamber is hearing for the first time, to be well-founded and cogent. In arriving at this decision, I am fortified by the fact that this aspect of the Prosecution request is supported by the Pandurević Defence which by its Response agrees with the Prosecution that publicizing the sensitive information would jeopardize the security of the provisional release.¹⁶

¹¹ *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to Attend his Brother's Memorial Service and to Observe the Traditional Period of Mourning, 1 September 2006 (public redacted version), pp 1, 2.

¹² Motion, para. 4.

¹³ Motion, para. 5.

¹⁴ Motion, para. 6.

¹⁵ Motion, para. 6.

¹⁶ Response, paras. 2-3.

6. The second argument raised in the motion, again supported by the defence, is that the publication of the Impugned Decision, including Pandurević's precise whereabouts, would undermine the ability of the authorities of The Netherlands and Republika Srpska to guarantee the conditions of his provisional release.¹⁷ In my view, an injustice would arise if the publication of the Impugned Decision resulted in some injury, or worse yet, death to Pandurević. If retaining the public status would have that result, then that is an outcome which should be prevented. Moreover, if the ability of the authorities of The Netherlands and Republika Srpska to guarantee the conditions of his provisional release is undermined by public release of the Impugned Decision, then that also clearly is a consequential injustice which should be prevented since the Impugned Decision itself is predicated in part on those guarantees.

7. Although the reconsideration decision is being determined on the basis of the specific Tribunal case law on that subject – the two criteria set out in paragraph one – it must be appreciated that this determination takes place against the backdrop of wider competing interests. First, Article 20(1) of the Statute, expressing a standard equally applicable to trial and appellate proceedings, mandates a trial chamber to ensure that "a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses".¹⁸ This provision establishes a hierarchy of interests in the conduct of a trial, with the rights of the accused being at the very apex. In the particular matter at issue, there are no victims or witnesses involved. The determination of this application must be made with "full respect for the rights of the accused", which on the basis of the analysis above would be seriously jeopardised if the Impugned Decision were made public.

8. The second competing interest involved is the right to a public trial, which is addressed by Article 20(4) as follows:

The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

This provision then takes us to Rule 79(A) of the Rules, which empowers a trial chamber to:

[...] order that the press and public be excluded from all or part of the proceedings for reasons of: (i) public order and morality; (ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or (iii) the protection of the interests of justice.

The relevant provision here is that which empowers a trial chamber to close the proceedings in the interests of justice, "proceedings" in this context having a wide connotation sufficient to cover the instant case of decisions determining provisional release. In this matter the competing interests are

¹⁷ Motion, para. 7.

¹⁸ ICTY Statute, Article 20(1).

resolved by re-classifying the Impugned Decision. Reconsideration is warranted to prevent an injustice, and an order to classify the Impugned Decision as confidential is warranted in the interests of justice.

9. In light of the foregoing, I would find that the Impugned Decision merits reconsideration, and I would order that the Impugned Decision be re-classified as a confidential filing and that a public redacted version be filed.

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



Judge Patrick Robinson

Dated this seventeenth day of January 2012
At The Hague
The Netherlands

[Seal of the Tribunal]