



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-AR65.31

Date: 23 April 2012

Original: English

IN THE APPEALS CHAMBER

Before: Judge Arlette Ramaroson, Presiding
Judge Patrick Robinson
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz

Registrar: Mr. John Hocking

Decision of: 23 April 2012

PROSECUTOR

v.

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

PUBLIC

**DECISION ON THE PROSECUTION'S APPEAL OF THE
DECISION ON FURTHER EXTENSION OF JADRANKO
PRLIĆ'S PROVISIONAL RELEASE**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for the Accused:

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

R

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 seized of an appeal filed by the Office of the Prosecutor (“Prosecution”) on 7 March 2012¹ against a decision issued confidentially by Trial Chamber III of the Tribunal (“Trial Chamber”) on 29 February 2012 (“Impugned Decision”), which extends the provisional release of Jadranko Prlić (“Prlić”) until 18 June 2012.² Prlić responded on 12 March 2012.³ The Prosecution did not file a reply.

I. BACKGROUND

2. On 24 November 2011, the Trial Chamber found that the criteria of Rule 65(B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”) were satisfied and exercised its discretion to grant Prlić provisional release for three months.⁴ The Trial Chamber also decided that, before the expiry of the three-month period, Prlić could apply for an extension of his provisional release and established the procedure to be followed in this respect.⁵ On 15 December 2011, the Appeals Chamber dismissed an appeal lodged by the Prosecution against the Decision Granting Provisional Release.⁶ On 29 February 2012, the Trial Chamber extended Prlić’s provisional release until 18 June 2012.⁷

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.⁸ The Appeals Chamber has previously held that a decision on provisional

¹ Prosecution Appeal of Decision on Further Extension of Jadranko Prlić’s Provisional Release, 7 March 2012 (“Appeal”).

² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Order on Jadranko Prlić’s Motion to Extend His Provisional Release, 29 February 2012 (confidential; public redacted version filed on 1 March 2012) (the English translations of the French originals were filed on 9 March 2012).

³ Jadranko Prlić’s Response to Prosecution Appeal of Decision on Further Extension of Jadranko Prlić’s Provisional Release, 12 March 2012 (“Response”).

⁴ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Jadranko Prlić’s Motion for Provisional Release, 24 November 2011 (public with public and confidential annexes) (the English translation of the French original was filed on 1 December 2011) (“Decision Granting Provisional Release”), paras 41-42, p. 13.

⁵ Decision Granting Provisional Release, paras 42-43, Annex 2.

⁶ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.26, Decision on Prosecution Appeal of Decision on Provisional Release of Jadranko Prlić, 15 December 2011 (“Decision of 15 December 2011”), para. 18.

⁷ Impugned Decision, p. 6. Although the date until which the provisional release of Prlić has been extended was confidential, the Appeals Chamber notes that Prlić, in his Response, discloses publicly this date. See Response, para. 8. The Appeals Chamber does not find that this information warrants giving the present decision confidential status. Cf. *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Vinko Pandurević’s Urgent Motion for Provisional Release on Compassionate Grounds, 11 January 2012, para. 18; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, 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, 17 January 2012, pp. 2-3.

⁸ See, e.g., Decision of 15 December 2011, para. 3 and references cited therein.

release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.⁹ 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 that decision.¹⁰

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”.¹¹ 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.¹² 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.¹³

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.¹⁴ Provisional release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement, and a Trial Chamber in granting such a release, may consider the existence of sufficiently compelling humanitarian grounds.¹⁵

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.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

⁹ See, e.g., Decision of 15 December 2011, para. 3 and references cited therein.

¹⁰ See, e.g., Decision of 15 December 2011, para. 3 and references cited therein.

¹¹ See, e.g., Decision of 15 December 2011, para. 4 and references cited therein.

¹² See, e.g., Decision of 15 December 2011, para. 4 and references cited therein.

¹³ See, e.g., Decision of 15 December 2011, para. 4 and references cited therein.

¹⁴ See, e.g., Decision of 15 December 2011, para. 5 and references cited therein.

¹⁵ Rule 65(B) of the Rules. See also Decision of 15 December 2011, para. 5.

¹⁶ See, e.g., Decision of 15 December 2011, para. 6 and references cited therein.

¹⁷ See, e.g., Decision of 15 December 2011, para. 6 and references cited therein.

R

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

IV. DISCUSSION

7. The Prosecution submits that the Impugned Decision should be reversed.²⁰ It argues that, when granting the extension of the provisional release of Prlić, the Trial Chamber committed a discernible error by failing to properly exercise its discretion by: i) ignoring “the principle of detention”; ii) failing to consider other important factors such as the gravity of the crimes charged; iii) failing to consider the impact of further provisional release on the international public’s confidence in the proper administration of justice; and iv) failing to address the Prosecution’s arguments on the insufficiency of Prlić’s request for provisional release.²¹ Prlić responds that the Prosecution fails to demonstrate that the Trial Chamber committed a discernible error in the exercise of its discretion and that, accordingly, the Appeal should be dismissed.²²

A. Alleged abuse of discretion by ignoring the “principle of detention”

8. The Prosecution submits that the Trial Chamber failed to exercise its discretion by not considering Rules 64 and 65(A) of the Rules and the Tribunal’s unique jurisdiction, which favours “detention as the rule and not the exception”.²³

9. Prlić responds that the Trial Chamber was not required to consider Rules 64 or 65(A) of the Rules as Rule 65(B) of the Rules is a self-contained procedural regime governing provisional release.²⁴ He argues that the Trial Chamber properly considered the requirements of Rule 65(B) of the Rules and found that they were met.²⁵ Prlić further responds that this argument is raised for the first time on appeal and, therefore, is an argument of “last resort”.²⁶

10. As a preliminary remark, the Appeals Chamber notes that the Prosecution did not advance this argument in its Response to Prlić’s Original Motion and raised this argument for the first time on appeal.²⁷ The Appeals Chamber recalls that a trial chamber “is generally not required to deal with matters which the parties have not raised before it, unless it considers those matters to be vital

¹⁸ See, e.g., Decision of 15 December 2011, para. 6 and references cited therein.
¹⁹ See, e.g., Decision of 15 December 2011, para. 6 and references cited therein.
²⁰ Appeal, paras 1, 15.
²¹ Appeal, paras 1-14.
²² Response, pp. 1, 10.
²³ Appeal, para. 4. See also Appeal, paras 1-2, 5.
²⁴ Response, para. 9.
²⁵ Response, paras 9-11.
²⁶ Response, para. 22.

to the issues it has to decide upon” and that “the appeal’s process is not meant to offer the parties a remedy to their previous failings at trial.”²⁸ Nonetheless, the Appeals Chamber finds that this argument merits consideration.

11. The Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred by ignoring the basic premise of the rule-based framework of detention, favouring detention as the rule and not the exception. In this context, the Appeals Chamber recalls that Rules 64 and 65(A) of the Rules provide that an accused, upon being transferred to the seat of the Tribunal, shall be detained and that he may not be released except upon an order of a Chamber. Rule 65(B) of the Rules sets out the cumulative requirements to be met for a trial chamber to grant provisional release.²⁹ Contrary to the Prosecution’s argument, the Trial Chamber was not required to consider Rules 64 and 65(A) of the Rules but needed only to determine whether the requirements of Rule 65(B) of the Rules were met. The Trial Chamber was satisfied that Prlić met the requirements of Rule 65(B) of the Rules before ordering the extension of his provisional release.³⁰ Thus, the Prosecution has failed to demonstrate that the Trial Chamber abused its discretion in this regard.

B. Alleged abuse of discretion by failing to consider other important factors, such as the gravity and scale of the crimes charged

12. The Prosecution submits that the Trial Chamber erred in failing to consider other important factors such as the gravity and scale of the crimes charged, Prlić’s involvement in those crimes, and the advanced stage of the proceedings.³¹ With respect to the latter factor, the Prosecution argues that it has been acknowledged as relevant by the Appeals Chamber and should be taken into account when assessing Prlić’s flight risk.³² Moreover, the Prosecution submits that the Trial Chamber’s focus on the presumption of innocence ignores the jurisprudence of the Tribunal that such factor is not determinative.³³

²⁷ See *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Prosecution Response to Jadranko Prlić’s Motion to Extend His Provisional Release, 24 February 2012 (“Response to Prlić’s Original Motion”).

²⁸ See, e.g., *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber’s Decisions Granting Provisional Release, 19 October 2005 (“Decision of 19 October 2005”), para. 32 and references cited therein.

²⁹ See, e.g., *Prosecutor v. Jadranko Prlić et al.*, Case No. 04-74-AR65.13, Decision on Prosecution’s Appeal of the Trial Chamber’s 10 December 2008 Decision on Prlić Provisional Release During Winter Recess, 18 December 2008 (confidential), para. 7. See also *supra*, para. 5.

³⁰ Impugned Decision, p. 4.

³¹ Appeal, paras 1-2, 6-9.

³² Appeal, paras 8-9.

³³ Appeal, para. 2, 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 Winter Recess, 14 December 2006, para. 12.

13. Prlić responds that, after six years of trial proceedings and one year of deliberations, the Trial Chamber was mindful of the scale and gravity of the crimes charged but correctly concluded that these factors do not outweigh his presumption of innocence.³⁴ He further argues that, in its Decision of 15 December 2011, the Appeals Chamber rejected a similar argument raised by the Prosecution in respect to the advanced stage of the proceedings.³⁵

14. The Appeals Chamber notes that the Prosecution did not advance the gravity and scale of the crimes charged nor Prlić's involvement in those crimes in its Response to Prlić's Original Motion and raised this argument for the first time on appeal.³⁶ The Appeals Chamber recalls its finding above that an interlocutory appeal is not meant to offer the parties a remedy to their previous failings at trial.³⁷ Nonetheless, the Appeals Chamber finds that this argument merits consideration.

15. While the Trial Chamber did not dwell upon the seriousness and the scale of the crimes charged and Prlić's role in them, it was not required to do so.³⁸ The Trial Chamber's concern was to ensure that, if granted an extension of his provisional release, Prlić would return to the United Nations Detention Unit ("UNDU") and would not pose a danger to any victim, witness or other person. In so doing, the Trial Chamber considered that Prlić respected the conditions of his provisional release and that the Government of the Republic of Croatia provided further guarantees for Prlić's extension of provisional release.³⁹ Moreover, the Trial Chamber recalled it was sensitive to the possible negative effect on victims and witnesses and, therefore, decided that the strict security measures of provisional release should apply *mutatis mutandis* to the extension of the provisional release.⁴⁰ On this basis, the Trial Chamber concluded that Prlić met the requirements of Rule 65(B) of the Rules.⁴¹ In these circumstances, the Appeals Chamber dismisses this argument.

16. The Appeals Chamber further dismisses the Prosecution's argument that the Trial Chamber's focus on the presumption of innocence ignores the jurisprudence of the Tribunal that such factor is not determinative. While the presumption of innocence was one of the factors that the Trial Chamber considered, it did not find that this factor was a determinative one in assessing

³⁴ Response, paras 12, 14-15. Prlić further responds that this argument is raised for the first time on appeal and, therefore, is an argument of "last resort". See Response, paras 22-23.

³⁵ Response, paras 16-17, referring to Decision of 15 December 2011, para. 10.

³⁶ See Response to Prlić's Original Motion.

³⁷ See *supra*, para. 10.

³⁸ *Prosecutor v. Jadranko Prlić et al.*, Case Nos. IT-04-74-AR65.1, IT-04-74-AR65.2 & IT-04-74-AR65.3, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004 ("Decision of 8 September 2004"), para. 31. The Appeals Chamber notes that, in the Decision Granting Provisional Release, the Trial Chamber mentioned the potential effect that the release of a person accused of serious crimes could have on the victims of those crimes. See Decision Granting Provisional Release, para. 39.

³⁹ Impugned Decision, p. 4.

⁴⁰ Impugned Decision, pp. 5-6.

whether Prlić satisfied the requirements of Rule 65(B) of the Rules.⁴² The Appeals Chamber therefore dismisses this argument.

17. Accordingly, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber abused its discretion.

C. Alleged abuse of discretion by failing to consider the impact of further provisional release on the international public's confidence in the proper administration of justice

18. The Prosecution submits that the Trial Chamber erred in failing to consider the “obvious” negative impact of Prlić’s continued provisional release “on the international public’s confidence in the proper administration of justice”, as recognised by domestic courts.⁴³ In addition, the Prosecution argues that the Trial Chamber erred in not considering the Prosecution’s argument in this regard and abused its discretion by limiting its discussion on this point to the fact that “Prlić is subjected to 24-hour surveillance”.⁴⁴

19. Prlić responds that the Trial Chamber was not required to address the impact of further provisional release on the international public’s confidence in the administration of justice because the Trial Chamber already considered that the guarantees provided by the Government of the Republic of Croatia and the 24-hour surveillance imposed on him diminish any possible negative effect on victims and witnesses.⁴⁵ Prlić further responds that the Trial Chamber considered whether an extended period of provisional release would have a negative effect on the goal of the Tribunal to contribute to the stability of the former Yugoslavia and that its decision was in accordance with the Statute, the Rules, and the jurisprudence of the Tribunal, which guarantee the fairness of the trial.⁴⁶

20. The Appeals Chamber notes that the Trial Chamber explicitly considered whether the extension of Prlić’s provisional release would have a negative impact on the Tribunal’s goal of promoting stability in the former Yugoslavia.⁴⁷ In this regard, the Trial Chamber found that “the Tribunal contributes to this goal by trying those accused of having committed the most serious crimes in the region and by delivering justice to the victims of these crimes through just and fair trials.”⁴⁸ The Appeals Chamber finds that the Prosecution has failed to articulate a concrete basis

⁴¹ Impugned Decision, p. 4.

⁴² Impugned Decision, p. 4.

⁴³ Appeal, paras 1-2, 10-12.

⁴⁴ Appeal, para. 13, referring to Impugned Decision, p. 5.

⁴⁵ Response, paras 18-19.

⁴⁶ Response, paras 18-19.

⁴⁷ Impugned Decision, p. 4, referring to Response to Prlić’s Original Motion, para. 5.

⁴⁸ Impugned Decision, p. 4.

R

tied to the circumstances of the extension of Prlić's provisional release to substantiate its argument that Prlić's extension of provisional release would negatively impact the international public's confidence in the proper administration of justice.⁴⁹ In the view of the Appeals Chamber, it is irrelevant that some domestic jurisdictions – such as the Supreme Court of Canada – recognise such negative effects on the community as a whole when releasing individuals charged with serious crimes.⁵⁰ Accordingly, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber abused its discretion in this regard.

D. Alleged abuse of discretion by failing to address the insufficiency of Prlić's request for extending his provisional release

21. The Prosecution argues that Prlić's arguments for extending his provisional release were unsubstantiated and that the Trial Chamber's failure to address the Prosecution's arguments in this respect is an abuse of discretion.⁵¹

22. Prlić responds that the Trial Chamber expressly considered the submissions of the Prosecution on this issue and found that Prlić's arguments were sufficient.⁵²

23. When granting provisional release to Prlić on 24 November 2011, the Trial Chamber decided to fix the period of provisional release to three months and further decided that this period could be extended if it was satisfied that the requirements set forth in Rule 65(B) of the Rules continued to be fulfilled.⁵³ The Appeals Chamber recalls that the same legal principles applicable to a motion for provisional release apply *mutatis mutandis* to a motion for extension of provisional release.⁵⁴ In extending Prlić's provisional release, the Trial Chamber considered the Prosecution's arguments but nonetheless found that Prlić respected the conditions of his provisional release and that the Government of the Republic of Croatia provided further guarantees for Prlić's extension of provisional release.⁵⁵ In addition, the Trial Chamber found that, should the provisional release be extended, Prlić would return to the UNDU and would not pose a danger to any victim, witness or other person, thus satisfying the requirements of Rule 65(B) of the Rules.⁵⁶ In these circumstances,

⁴⁹ See Decision of 15 December 2011, para. 11. In the view of the Appeals Chamber, the Prosecution seems to concede that it did not substantiate its argument in this respect as it stated that it "is not required to produce evidence of this impact" because it is "obvious". See Appeal, para. 11.

⁵⁰ Cf. Decision of 8 September 2004, para. 31.

⁵¹ Appeal, paras 3, 14.

⁵² Response, paras 20-21, referring to Impugned Decision, p. 3.

⁵³ Decision Granting Provisional Release, para. 42.

⁵⁴ See *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on the Third Urgent Defence Motion Requesting Prolongation of Provisional Release of Vladimir Lazarević, 4 August 2009 (public redacted version), para. 5 and reference cited therein.

⁵⁵ Impugned Decision, pp. 3-4.

⁵⁶ Impugned Decision, p. 4.

the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber abused its discretion in this regard.

V. DISPOSITION

24. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal.

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

Done this 23rd day of April 2012,
At The Hague,
The Netherlands.



Judge Arlette Ramaroson
Presiding

[Seal of the Tribunal]