



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-05-87-A
Date: 25 August 2010
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision: 25 August 2010

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC REDACTED VERSION

**DECISION ON NIKOLA ŠAINOVIĆ'S SECOND MOTION FOR
TEMPORARY PROVISIONAL RELEASE ON
COMPASSIONATE GROUNDS**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Defence:

Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 “Defence Motion Requesting Provisional Release on the Grounds of Compassion” filed confidentially by Counsel for Nikola Šainović (“Šainović”) on 20 July 2010 (“Motion”). The Office of the Prosecutor (“Prosecution”) filed its confidential response on 23 July 2010 opposing the Motion.¹ Šainović filed his confidential reply on 27 July 2010.² On the same day, the Registrar of the Tribunal (“Registrar”) filed a confidential and *ex parte* report by the Reporting Medical Officer of the United Nations Detention Unit (“UNDU”), Dr. Eekhof, dated 19 July 2010 pursuant to Rule 33(B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”).³ The Netherlands, in its capacity as host State, has no objections to Šainović’s provisional release as requested by the Motion.⁴

I. BACKGROUND

2. Throughout the trial proceedings in this case, Šainović made a series of requests for provisional release, some of which were granted on humanitarian and/or compassionate grounds.⁵ On 26 February 2009, Trial Chamber III convicted Šainović of deportation, other inhumane acts (forcible transfer), murder and persecutions as crimes against humanity and murder as a violation of the laws or customs of war pursuant to Articles 5(d), 5(i), 5(a), 5(h), 3 and 7(1) of the Tribunal’s Statute and sentenced him to 22 years of imprisonment.⁶

¹ Confidential Prosecution’s Response to Šainović’s Motion for Provisional Release, 23 July 2010 (confidential) (“Response”).

² Defence Reply to Prosecution Response to Šainović’s [sic] Motion for Provisional Release, 27 July 2010 (confidential) (“Reply”).

³ Registry Submission Pursuant to Rule 33(B) Concerning Medical Report on Nikola Šainović, 27 July 2010 (confidential and *ex parte*) (“Report of 19 July 2010”).

⁴ Correspondence from the Deputy Director of Protocol for the Minister of Foreign Affairs “Re Provisional release Nikola Šainović”, 22 July 2010 (confidential).

⁵ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Šainović Motion for Temporary Provisional Release, 9 February 2009 (public with confidential and *ex parte* Annex); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Šainović Motion for Temporary Provisional Release, 26 September 2008 (public with confidential Annex); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Šainović Motion for Temporary Provisional Release, 5 September 2008 (public with confidential Annex); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Šainović Motion for Temporary Provisional Release, 4 April 2008 (public with confidential Annex); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Šainović Motion for Temporary Provisional Release, 7 December 2007 (public with confidential Annex); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Šainović Motion for Temporary Provisional Release, 7 June 2007 (public with confidential Annex); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Šainović Motion for Provisional Release, 22 May 2007.

⁶ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), vol. 3, para. 1208.

3. In accordance with Rules 108 and 111 of the Rules, Šainović filed his Notice of Appeal and his Appeal Brief on 27 May 2009⁷ and 23 September 2009,⁸ respectively. He is currently detained in the UNDU pending the resolution of the appeals lodged against the Trial Judgement.

4. On 28 January 2010, the Appeals Chamber dismissed Šainović's motion seeking temporary provisional release to receive dental treatment in the Republic of Serbia ("Serbia")⁹ on the grounds that Šainović failed to demonstrate the existence of special circumstances under Rule 65(I)(iii) of the Rules.¹⁰

II. APPLICABLE LAW

5. Pursuant to Rule 65(I) of the Rules, a convicted person may bring an application seeking provisional release for a fixed period. By virtue of Rule 107 of the Rules, the whole of Rule 65 applies *mutatis mutandis* to applications brought before the Appeals Chamber under this provision.¹¹ Rule 65(I) of the Rules thus provides that the Appeals Chamber may grant provisional release 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. These requirements must be considered cumulatively.¹² 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".¹³ Finally, the discretionary assessments of the requirements under Rule 65 are made on a case-by-case basis.¹⁴

⁷ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Defence Submission: Notice of Appeal, 27 May 2009.

⁸ Defence Appeal Brief, 23 September 2009.

⁹ Defence Request Seeking Temporary Provisional Release on the Grounds of Compassion, 30 December 2009 (confidential) ("Motion of 30 December 2009").

¹⁰ Decision on Nikola Šainović's Request for Temporary Provisional Release on Compassionate Grounds, 28 January 2010 (confidential) ("Decision of 28 January 2010"), paras 15, 17.

¹¹ Public Redacted Version of the Decision on Sreten Lukić's Second Motion for Provisional Release on Compassionate Grounds, 14 July 2010 ("Lukić Decision of 14 July 2010"), para. 5 and references cited therein.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

III. DISCUSSION

A. Arguments of the parties

6. Šainović seeks provisional release for two phases of dental treatment, each lasting 25 days with a two month interval [REDACTED].¹⁵ In support of this request, Šainović reiterates the arguments he raised in his Motion of 30 December 2009,¹⁶ emphasizes his undisputed need for dental treatment¹⁷ and relies on the dental report of Dr. Dabić¹⁸ which was originally annexed to the said motion.¹⁹

7. Although the “pertinent treatment” recommended by Dr. Dabić can be administered in The Netherlands, Šainović submits that it is unclear who would bear the costs of such dental care,²⁰ particularly in light of a recent memorandum from the UNDU Reporting Medical Officer, Dr. Eekhof, to the Registrar.²¹ Šainović avers that as an indigent person, he does not have the means to pay 1,700 euros for the necessary treatment and claims that if the treatment were to be performed in Belgrade, the costs would be covered by his health insurance in Serbia.²² He argues that in this context “special circumstances” exist,²³ since “temporary provisional release is the only solution to solve this predicament” and claims that any further delay would prolong his suffering and additionally burden his stay in the UNDU to a significant degree.²⁴

8. Finally, he states that he has applied for the guarantees of the Government of Serbia and will submit them as soon as practicable.²⁵ To date, no such guarantees have been filed before the Tribunal.

9. In its Response, the Prosecution objects to the Motion, arguing that Šainović has failed to demonstrate the existence of special circumstances as required by Rule 65(I)(iii) of the Rules to justify his request for provisional release.²⁶ It argues that, given Šainović’s willingness to be treated

¹⁵ Motion, para. 5; see also *ibid.*, paras 17-18.

¹⁶ *Ibid.*, paras 3-4.

¹⁷ *Ibid.*, paras 7, 15.

¹⁸ *Ibid.*, Annex 2 thereto (confidential).

¹⁹ Motion of 30 December 2009, Annex 2 thereto (confidential). In support of his current request for dental treatment, Šainović also refers to the dental report of Dr. Tan, the Dutch dentist (see Motion, para. 15, fn. 13). This report was appended to both the present Motion and the Motion of 30 December 2009 (see Motion, Annex 3 thereto (confidential); Motion of 30 December 2009, Annex 1 thereto (confidential)).

²⁰ Motion, paras 9-12, 15.

²¹ *Ibid.*, Annex 1 thereto (confidential) (“Report of 18 June 2010”), para. 5.

²² *Ibid.*, paras 9, 12.

²³ According to Šainović, “the non-existence of a legal basis for the bearing of the costs of an expensive, and for [him], unbearable, dental treatment, does in fact represent special circumstances” (see *ibid.*, para. 14).

²⁴ *Ibid.*, para. 15.

²⁵ *Ibid.*, para. 16.

²⁶ Response, paras 1, 4, 11.

in The Netherlands, the “real issue” at stake is whether the Tribunal should bear the cost of his preferred dental treatment.²⁷ In light of the Appeals Chamber’s Decision of 28 January 2010, the Prosecution contends that “the uncertainty surrounding who will bear the cost of Šainović’s treatment in The Netherlands cannot serve as an acute justification for granting provisional release in these circumstances”²⁸ and invites the Appeals Chamber to dismiss Šainović’s Motion on that basis.²⁹

10. The Prosecution argues that Šainović has failed to demonstrate why the dental treatment suggested by Dr. Dabić is necessary,³⁰ given Dr. Tan’s recommendation of alternative treatment which may be administered in the UNDU and would pose no logistical problems.³¹ Finally, the Prosecution submits that Šainović has failed to demonstrate that he will surrender into detention at the conclusion of his provisional release.³²

11. In reply, Šainović refers to the Report of 19 July 2010, which suggests two solutions for his dental problems. The first treatment plan is recommended by the Dutch dentist, Dr. Tan, and involves a [REDACTED].³³ An alternative procedure, suggested by a Dutch implantologist, differs from that suggested by Dr. Dabić, and proposes [REDACTED].³⁴ [REDACTED]

B. Analysis

12. The specificity of provisional release at the post-trial stage is reflected by Rule 65(I)(iii) of the Rules, which provides for an additional criterion, *i.e.* that “special circumstances exist warranting such release”.³⁵ In such situations, 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.³⁶

²⁷ *Ibid.*, paras 2, 5, 9, referring, *inter alia*, to Report of 18 June 2010, para. 4.

²⁸ *Ibid.*, para. 6.

²⁹ *Ibid.*, paras 2; 4-6, 9, 11. The Prosecution further suggests that the Appeals Chamber direct the Registry to determine whether Šainović’s dental treatment is covered by the SFA/Medical Services Agreement or if Šainović has funds to pay for it in The Hague. In the event that neither Šainović nor the SFA/Medical Services Agreement are in the position to cover the costs of the dental treatment, the Prosecution suggests that the Appeals Chamber consider whether the Tribunal should bear such costs (see *ibid.*, para 3, 10).

³⁰ The Prosecution also asserts that Šainović has failed to demonstrate why the dental treatment recommended by Dr. Dabić requires two lengthy periods of provisional release (see *ibid.*, para. 7).

³¹ *Ibid.*, paras 7, 9 referring, *inter alia*, to Report of 18 June 2010, para. 6.

³² *Ibid.*, para. 8.

³³ Reply, para. 5, referring to Report of 19 July 2010, para. 3.

³⁴ *Ibid.*, referring to Report of 19 July 2010, para. 4. [REDACTED]

³⁵ Decision of 28 January 2010, para. 14 and references cited therein.

³⁶ *Ibid.*

13. Šainović's need for dental treatment is undisputed.³⁷ However, an applicant for provisional release on medical grounds bears the burden of demonstrating that the appropriate treatment is unavailable in The Netherlands.³⁸ While this is not a requirement explicitly provided for in Rule 65(I) of the Rules, the Appeals Chamber has considered it to be "a relevant factor in establishing whether 'special circumstances' exist based on a case-by-case assessment reflecting the totality of relevant considerations".³⁹ Moreover, the Appeals Chamber recalls that "[a]t issue is not simply the availability of treatment, but of appropriate treatment".⁴⁰

14. In the present case, Dr. Tan opines that [REDACTED]⁴¹ and proposes a treatment plan which would be free of charge for Šainović and "could be effectuated within a few weeks in the Netherlands" subject to Šainović's agreement.⁴² This is a professional opinion of a qualified dentist and Šainović has failed to substantiate, apart from expressing his personal preferences for a treatment in Belgrade and [REDACTED], that Dr. Tan recommends unreasonable or otherwise inappropriate treatment.⁴³ Furthermore, the Appeals Chamber notes that an alternative treatment plan was proposed by the Dutch implantologist as a possible "option" and is available in the UNDU, provided Šainović contributes financially thereto.⁴⁴ In this context, the Appeals Chamber recalls that "the cost of dental treatment is not a relevant consideration in determining whether an acute justification for granting provisional release has been demonstrated".⁴⁵ As such, this is not a judicial matter to be resolved in the context of the application for provisional release, but rather an administrative issue that falls within the procedure applicable to receiving medical treatment for persons detained in the UNDU.

³⁷ *Ibid.*, para. 15. See also Decision on Nikola Šainović's Motion for Medical Examination Pursuant to Rule 74bis, 17 May 2010 (confidential), p. 3.

³⁸ Cf. *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on "Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions", 8 December 2005, p. 4. See also *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008 (confidential), para. 68.

³⁹ Decision on Nebojša Pavković's Motion for Temporary Provisional Release on Compassionate Grounds, 22 September 2009 (confidential), para. 14. See also *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.19, Public Redacted Version of the "Decision on Prosecution's Appeal of the Trial Chamber's Decision to Provisionally Release Accused Praljak" Issued on 17 December 2009, 11 February 2010 ("Prlić et al. Decision of 17 December 2009"), para. 14; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.8, Decision on Prosecution's Appeal Against Decision on Gvero's Motion for Provisional Release, 20 July 2009, para. 11.

⁴⁰ Prlić et al. Decision of 17 December 2009, para. 14 and references cited therein.

⁴¹ Report of 19 July 2010, para. 3.

⁴² *Ibid.*, para. 6.

⁴³ Furthermore, the Appeals Chamber considers that Šainović's strong preference for treatment in Belgrade "based on his experiences in the past and the fact that communicating with Dr. Dabic [*sic*] in his own language excludes language and cultural misunderstandings" (see *ibid.*, para. 5), does not suffice to tip the balance in favour of granting provisional release in the present case (cf. Decision on Nebojša Pavković's Motion for Temporary Provisional Release on Compassionate Grounds, 22 September 2009 (confidential), para. 14).

⁴⁴ Report of 19 July 2010, paras 5-6.

⁴⁵ Decision of 28 January 2010, para. 15.

15. Consequently and bearing in mind the applicable burden of proof,⁴⁶ the Appeals Chamber considers that Šainović has failed to demonstrate that appropriate treatment is unavailable in The Netherlands and has therefore failed to show that special circumstances pursuant to Rule 65(I)(iii) of the Rules exist in this case. Considering that the requirements under Rule 65(I) of the Rules are cumulative, the Appeals Chamber need not consider whether the requirements of Rules 65(I)(i) or 65(I)(ii) are met in the present case.⁴⁷

IV. DISPOSITION

16. For the foregoing reasons, the Appeals Chamber hereby **DISMISSES** the Motion.

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

Dated this twenty-fifth day of August 2010,
At The Hague, The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]

⁴⁶ See *supra*, para. 13.

⁴⁷ Cf. Decision of 28 January 2010, para. 16.