

**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-04-84-A
Date: 25 May 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision: 25 May 2009

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON LAHI BRAHIMAJ'S APPLICATION FOR
PROVISIONAL RELEASE**

The Office of the Prosecutor:

Mr. Peter Kremer QC

Counsel for the Accused:

Mr. Ben Emmerson QC and Mr. Rodney Dixon for Ramush Haradinaj
Mr. Gregor Guy-Smith and Ms. Colleen Rohan for Idriz Balaj
Mr. Richard Harvey and Mr. Paul Troop for Lahi Brahimaj

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 the “Application for Provisional Release filed by the Accused Lahi Brahimaj”, filed by Counsel for Lahi Brahimaj (“Brahimaj”) on 18 March 2009 (“Application”). The Office of the Prosecutor (“Prosecution”) filed its response on 23 March 2009, opposing the Application.¹ Brahimaj did not file a reply.

I. BACKGROUND

2. On 3 April 2008, Trial Chamber I (“Trial Chamber”) convicted Brahimaj for torture and cruel treatment as violations of the laws or customs of war, pursuant to Article 3 of the Tribunal’s Statute.² Brahimaj was sentenced to a term of six years’ imprisonment, subject to credit for time already spent in detention in accordance with Rule 101(C) of the Rules of Procedure and Evidence of the Tribunal (“Rules”).³ He has since served approximately two-thirds of his sentence.⁴ The Appeals Chamber is currently seized of appeals against the Trial Judgement filed by Brahimaj⁵ and the Prosecution.⁶ On 23 March 2009, the Appeals Chamber received a statement from the Dutch Ministry of Foreign Affairs that the Kingdom of the Netherlands does not have any objection to Brahimaj’s provisional release.⁷

II. APPLICABLE LAW

3. 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.⁸ Rule 65(I) of the Rules thus provides that the Appeals Chamber may grant provisional

¹ Prosecution’s Response to Lahi Brahimaj’s Application for Provisional Release, 25 March 2009 (confidential) (“Response”).

² *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgement, 3 April 2008 (“Trial Judgement”), para. 504.

³ *Ibid.*, para. 505.

⁴ Lahi Brahimaj surrendered and was transferred to the United Nations Detention Unit (“UNDU”) on 9 March 2005. He has been continuously detained since, except for a period of provisional release from 21 December 2007 through 4 January 2008 (Trial Judgement, para. 500).

⁵ Notice of Appeal on behalf of Third Defendant Lahi Brahimaj, 5 May 2008.

⁶ Prosecution’s Notice of Appeal, 1 May 2008.

⁷ Correspondence from Host Country Re: Lahi Brahimaj Provisional Release, 19 March 2009.

⁸ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević’s Motion for Temporary Provisional Release on the Grounds of Compassion, 2 April 2009, (confidential) (“Lazarević Decision”), para. 4; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski’s Motion for Provisional Release, 18 December 2008, (confidential) (“Tarčulovski Decision”), para. 3; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Application for Provisional Release Pursuant to Rule 65(I), 29 April 2008, (confidential) (“Milošević Decision”), para. 3.

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.⁹ 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”.¹⁰ Finally, the discretionary assessments of the requirements under Rule 65 of the Rules are made on a case-by-case basis.¹¹

III. DISCUSSION

A. Preliminary Matters

4. The Appeals Chamber notes that on 19 March 2009, Brahimaj gave notice of the change of the filing status of the Application from *Public* to *Confidential*.¹² Brahimaj argued that he requested that his Application be made confidential “out of an abundance of caution” so that the “matter may be adjudicated upon by the Appeals Chamber at the earliest opportunity”.¹³ The Prosecution’s Response was also filed confidentially.

5. The Appeals Chamber recalls that all submissions filed before the Tribunal shall be public unless there are exceptional reasons for keeping them confidential,¹⁴ and that parties shall file public redacted versions of all confidential briefs filed on appeal.¹⁵ The Appeals Chamber notes that the public or confidential status of a filing has no effect on the adjudication schedule of the Appeals Chamber and that this does not constitute an “exceptional reason” to maintain a confidential filing. The Appeals Chamber considers that Brahimaj has provided no reasons justifying the confidential filing in his Confidentiality Notice, nor does the Prosecution in its

⁹ *Lazarević* Decision, para. 4; *Tarčulovski* Decision, para. 3; *Milošević* Decision, para. 3.

¹⁰ *Lazarević* Decision, para. 4; *Tarčulovski* Decision, para. 3; *Milošević* Decision, para. 3.

¹¹ *Lazarević* Decision, para. 4; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion, 2 April 2008, Public Redacted Version (“*Strugar* Decision of 2 April 2008”), para. 11, referring to *Prosecutor v. Jadranko 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 Čorić, 11 March 2008, para. 7.

¹² Notice of Change of Filing Status for Application for Provisional Release filed by the Accused Lahi Brahimaj, 19 March 2009 (“Confidentiality Notice”).

¹³ Confidentiality Notice, paras 1-2.

¹⁴ Cf. Rules 69 and 78 (applicable by virtue of Rule 107) of the Rules. See also *Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-A, Decision on the Prosecution Motion on the Filing of the Defence Notice of Appeal, 30 March 2009, p. 2; *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-99-52-A, Order to Appellant Hassan Ngeze to File Public Versions of His Notice of Appeal and Appellant’s Brief, 30 August 2007 (“*Nahimana et al.* Order of 30 August 2007”), p. 2.

¹⁵ *Nahimana et al.* Order of 30 August 2007, p. 2

Response. In light of the foregoing, the Appeals Chamber finds that there is no justification to maintain the confidential status of the Application and the Response.

B. Arguments of the Parties

6. Brahimaj seeks provisional release “pending the hearing and determination of the Appeal”.¹⁶ In respect of the first requirement under Rule 65(I) of the Rules, Brahimaj avers that he has always shown respect for the Tribunal and, in the past, has surrendered to the Tribunal in circumstances where the consequences were “arguably more serious than at the current stage of proceedings”.¹⁷ In respect of the second requirement under Rule 65(I) of the Rules, Brahimaj submits that he will not pose a danger to any victim, witness or protected person and asserts that neither of the two witnesses, whose testimony the Prosecution would seek to adduce during the requested retrial, reside in Kosovo, where he seeks permission to be provisionally released.¹⁸

7. In addition, Brahimaj submits that a number of factors together amount to a special circumstance within the meaning of Rule 65(I)(iii) of the Rules. Specifically he points to his detention for two thirds of his sentence and the absence of a date for an appeal hearing, as well as “the likelihood of appeal proceedings lasting a further significant period and his previous exemplary behaviour”.¹⁹ He emphasises that, having served two-thirds of his sentence, he would be eligible for early release if an appeal were not pending.²⁰ He refers to the *Hadžihasanović* Decision²¹ in support of the proposition “that detention for a substantial period of time may amount to special circumstances within the meaning of Rule 65(I)(iii)” of the Rules.²²

8. The Prosecution opposes the Application on the grounds that: (i) since it seeks a re-trial, Brahimaj may be less willing to return to the Tribunal to attend the appeal hearing;²³ and (ii) the fact of witness intimidation in the trial “is at the heart of the Prosecution appeal” and remains a potential risk in this case.²⁴ It further posits that “serving two-thirds of a sentence does not necessarily establish the existence of special circumstances within the meaning of Rule 65(I)(iii)” of the Rules.²⁵ Alternatively, the Prosecution submits that, should the Appeals Chamber grant

¹⁶ Application, p. 1, para. 1.

¹⁷ Application, para. 9.

¹⁸ Application, paras 11-12.

¹⁹ Application, para. 16. *See also* Application, Appendix A (Behaviour Report Whilst in Custody, 27 February 2009).

²⁰ Application, p. 3, para. 4.

²¹ *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 (“*Hadžihasanović* Decision”).

²² Application, para. 13.

²³ Response, para. 4.

²⁴ Response, paras 3, 5.

²⁵ Response, para. 2.

provisional release, it “should impose sufficient terms and conditions to address the attendance and witness intimidation concerns”.²⁶

C. Analysis

9. As previously noted, the requirements under Rule 65(I) of the Rules are cumulative. Accordingly, the Appeals Chamber will address them in turn.

1. The appellant, 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

10. The Appeals Chamber recalls that Brahimaj has been convicted of serious crimes and sentenced to a term of six years’ imprisonment.²⁷ It further considers that, given that the pending Prosecution’s appeal could result in a retrial, this might give Brahimaj an incentive to flee.²⁸ Nonetheless, the Appeals Chamber considers that three facts militate against this possibility. First, Brahimaj has already served approximately two-thirds of the sentence imposed by the Trial Chamber.²⁹ Second, he voluntarily surrendered to the Tribunal as soon as he was made aware of the Indictment against him.³⁰ Third, he has a record of returning to custody after provisional release and his compliance with the conditions of that release.³¹

11. In the present case, the Appeals Chamber inquired with both the United Nations Interim Administration in Kosovo (“UNMIK”) and the European Union Rule of Law Mission in Kosovo (“EULEX-Kosovo Mission”) as to whether they would be prepared to provide guarantees for Brahimaj and to honour any directions provided by the Appeals Chamber in the event of provisional release.³² Confidential responses from UNMIK and the EULEX-Kosovo Mission were filed on 11 May 2009 and 12 May 2009, respectively.³³ Pursuant to these responses, the Appeals Chamber understands that the EULEX-Kosovo Mission is best placed to provide the guarantees of compliance with the conditions of provisional release requested by the Appeals Chamber, and that it is prepared to assume responsibilities in this respect.

²⁶ Response, para. 6.

²⁷ Trial Judgement, para. 505.

²⁸ Response, para. 4; Prosecution Appeal Brief, “Ground I: Breach of Prosecution’s Fair Trial Right under Article 20(1) of the Statute”, para. 43; *see also* paras 3-42.

²⁹ At the date of the delivery of the Trial Judgement (3 April 2008), Brahimaj had already spent 1,109 days in detention. Trial Judgement, para. 501. He has since been detained for another 418 days, for a total of 1,527 days. Hence, he has already served more than two-thirds of the six years’ imprisonment sentence imposed by the Trial Chamber.

³⁰ Trial Judgement, p. 281, para. 3.

³¹ Trial Judgement, p. 284, para. 16.

³² Request to UNMIK and EULEX, 27 April 2009 (confidential).

³³ Response from UNMIK, 11 May 2009 (confidential); Response from EULEX, 12 May 2009 (confidential).

12. In light of the foregoing, the Appeals Chamber is satisfied that Brahimaj does not pose a flight risk and therefore meets the requirements of Rule 65(I)(i) of the Rules.

2. The appellant will not pose a danger to any victim, witness or other person

13. In assessing whether the appellant will pose a danger to any victim, witness or other person if released, the Appeals Chamber acknowledges that the Trial Chamber described in the Trial Judgement the particular circumstances of this case, including that “[t]he difficulty in obtaining evidence was a prominent feature of this trial and a few witnesses who were expected to give evidence on central aspects of the case were never heard”.³⁴ It further considers that, in its appeal, the Prosecution requests a retrial for Brahimaj and his two co-accused, and seeks to adduce the evidence of certain witnesses.³⁵ The Appeals Chamber also notes that the Prosecution opposes Brahimaj’s provisional release because the “potential risk” of witness intimidation³⁶ “remains a continuing concern in light of the relief being sought”.³⁷

14. Nonetheless, the Appeals Chamber considers that a number of circumstances tip the balance in favour of meeting the second requirement of Rule 65(I) of the Rules. First, the Appeals Chamber notes that, while a retrial could be ordered as a result of the Prosecution appeal, it is also the case that Brahimaj could be acquitted or his sentence could be decreased as a result of his appeal.³⁸ The Appeals Chamber considers that it is not likely that Brahimaj will pose a danger to potential witnesses at this stage of proceedings as the outcome of the case is unforeseeable and a retrial is only *one* of the possible outcomes. Second, the Appeals Chamber notes that Brahimaj points out that each of the potential Prosecution witnesses lives outside Kosovo (where he seeks permission to be provisionally released),³⁹ and that the Prosecution does not challenge this allegation.⁴⁰ Third, the Appeals Chamber considers that an assessment of danger posed to victims, witnesses or others cannot be made in the abstract and that there is no substantiated indication from the Prosecution that Brahimaj will seek to intimidate witnesses.⁴¹ The Appeals Chamber is further satisfied that Brahimaj’s past period of provisional release was without incident.⁴² In view of these

³⁴ Trial Judgement, para. 281; *see also* paras 22-27.

³⁵ *See* Prosecution Appeal Brief, “Ground I: Breach of Prosecution’s Fair Trial Right under Article 20(1) of the Statute”, para. 43; *see also* paras 3-42.

³⁶ Response, para. 2.

³⁷ Response, para. 5.

³⁸ *See Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Dario Kordić’s Request for Provisional Release, 19 April 2004, para. 8.

³⁹ Application, para. 11; *see also* Prosecution Appeal Brief, 16 July 2008, para. 14.

⁴⁰ In its Response, the Prosecution makes no express response to the claim in the Application that neither of its potential witnesses resides in Kosovo.

⁴¹ *See 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 (“*Šljivančanin* Decision”), p. 2.

⁴² Trial Judgement, p. 284, para. 16.

factors, the Appeals Chamber finds that Brahimaj, if provisionally released, would not endanger victims, witnesses or other persons, as required by Rule 65(I)(ii) of the Rules.

3. Special circumstances exist warranting such release

15. At the outset, the Appeals Chamber notes that “[a] convicted person who has been detained for a period of time amounting to two-thirds of a sentence of imprisonment may but would not necessarily be eligible for early release from a sentence of imprisonment if there were no appeal”.⁴³

16. At the same time, the Appeals Chamber recalls that detention for a substantial period of time may amount to a special circumstance within the meaning of Rule 65(I)(iii) of the Rules.⁴⁴ A determination must, however, be made on a case-by-case basis.⁴⁵ In the context of this case, taking into account that a date for hearing the appeal has not yet been set, as well as the good behaviour shown by Brahimaj whilst in detention, the fact that Brahimaj’s past period of provisional release did not give rise to any concerns and the fact that he has served two-thirds of his sentence, the Appeals Chamber finds that special circumstances warranting Brahimaj’s provisional release have been established.⁴⁶

IV. CONDITIONS OF PROVISIONAL RELEASE

17. In light of the foregoing, the Appeals Chamber finds that Brahimaj has satisfied all the conditions necessary for the granting of provisional release under Rule 65(I) of the Rules. The Appeals Chamber notes the Prosecution’s request that, in the event that provisional release is granted, terms and conditions sufficient to “address the attendance and witness intimidation concerns” should be imposed.⁴⁷ Keeping these concerns in mind, the Appeals Chamber considers that the two conditions of release suggested by Brahimaj⁴⁸ are insufficient. Thus, the Appeals Chamber denies Brahimaj’s requests relating to his conditions of provisional release. Instead, the

⁴³ *Hadžihasanović* Decision, para. 12 and fn. 32.

⁴⁴ *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-88-R77.4-A, Decision on Motion of Astrit Haraqija for Provisional Release, 8 April 2009, para. 12; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-88-R77.4-A, Decision on Motion of Bajrush Morina for Provisional Release, 9 February 2009 (“*Morina* Decision”), para. 10; *Hadžihasanović* Decision, para. 13 (noting that the Appeals Chamber was “satisfied that detention amounting to approximately two-thirds of a term of imprisonment is sufficiently substantial to constitute a special circumstance”); *Šljivančanin* Decision, p. 3 (noting that the fact that Šljivančanin had served 90 percent of his sentence imposed by the Trial Chamber constituted a special circumstance); *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Kvočka’s Request for Provisional Release, 17 December 2003, pp. 3-4 (noting that the fact that Kvočka had served around 80 percent of the sentence imposed by the Trial Chamber amounted to a special circumstance).

⁴⁵ *Hadžihasanović* Decision, para. 13.

⁴⁶ *See Morina* Decision, para. 10; *Hadžihasanović* Decision, para. 13.

⁴⁷ Response, para. 6.

⁴⁸ Brahimaj suggests as conditions of release that he remain within Kosovo and report to a local police station on a monthly basis. Application, para. 17.

Appeals Chamber considers it appropriate to impose on Brahimaj conditions of provisional release analogous to those in force when he was provisionally released during the trial.⁴⁹

V. DISPOSITION

18. For the foregoing reasons, and pursuant to Rule 65(I) of the Rules, the Appeals Chamber:

GRANTS the Application in part, and

ORDERS that Brahimaj be provisionally released pending the hearing of this appeal under the following terms and conditions:

- a. As soon as practicable, Brahimaj shall be transported to Schiphol airport in the Netherlands by the Dutch authorities;
- b. At Schiphol airport, Brahimaj shall be provisionally released into the custody of the security officer designated by the Registrar of the Tribunal who shall accompany Brahimaj for the remainder of his travel to Kosovo/Kosova;
- c. At Priština airport, Brahimaj shall be delivered into the custody of representatives of the EULEX-Kosovo Mission, who shall accompany him to his place of residence;
- d. Brahimaj shall provide the address at which he will be staying in Kosovo/Kosova to the authorities of the EULEX-Kosovo Mission and the Registrar of the Tribunal before leaving the United Nations Detention Unit ("UNDU") in The Hague;
- e. The authorities of the EULEX-Kosovo Mission shall instruct Brahimaj that, during the period of his provisional release, he shall abide by the following conditions:
 - i. to remain within the confines of the municipality of his residence;
 - ii. not to have any contact whatsoever, or in any way interfere with any victim or potential witness, or otherwise interfere in any way with the proceedings or the administration of justice;
 - iii. not to discuss his case with anyone, including the media, other than with his Counsel;
 - iv. to have no engagement in political activity and to make no public statements during his provisional release;
 - v. to comply strictly with any instructions of the authorities of the EULEX-Kosovo Mission necessary to enable them to comply with their obligations under this Decision and their guarantees;

⁴⁹ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Decision on Motion on Behalf of Lahi Brahimaj for Provisional Release, 14 December 2007, para. 25.

- vi. to continue to cooperate with the Tribunal and to comply strictly with any further Order of the Appeals Chamber varying the terms of, or terminating, his provisional release.
- f. The authorities of the EULEX-Kosovo Mission shall ensure that:
- i. Brahimaj surrenders his passport to the EULEX-Kosovo Mission authorities upon arrival in Kosovo/Kosova;
 - ii. Brahimaj reports weekly to the EULEX-Kosovo Mission authorities in the place of his residence;
 - iii. a report on the provisional release of Brahimaj is sent to the Appeals Chamber on a weekly basis.
- g. Brahimaj shall return to the UNDU in The Hague at the time to be determined by the Appeals Chamber. He shall be accompanied from the place of his residence in Kosovo/Kosova by an official of the EULEX-Kosovo Mission, who shall deliver Brahimaj at Priština airport to the custody of the security officer designated by the Registrar of the Tribunal. Upon arrival at Schiphol airport, Brahimaj shall be delivered to the custody of the Dutch authorities. The Dutch authorities shall then transport Brahimaj back to the UNDU in The Hague.

REQUIRES the EULEX-Kosovo Mission to assume responsibility as follows:

- a. by designating an official of the EULEX-Kosovo Mission who shall accompany Brahimaj from Priština airport to his place of residence, and notifying, as soon as practicable, the Appeals Chamber and the Registrar of the Tribunal of the name of the designated official;
- b. for all expenses concerning the transportation of Brahimaj from Priština airport to his residence and back;
- c. at the request of the Appeals Chamber or the parties, to facilitate all means of cooperation and communication between the parties and to ensure the confidentiality of any such communication;
- d. to report immediately to the Appeals Chamber any breach of the conditions set out above.

INSTRUCTS the Registrar of the Tribunal to consult with the Dutch Ministry of Justice as to the practical arrangements for the release of Brahimaj; to designate the official who shall accompany Brahimaj from Schiphol airport to Priština airport and back; and to continue to detain Brahimaj at the UNDU in The Hague until such time as Brahimaj has provided the address at which he will be staying in Kosovo/Kosova and until the Appeals Chamber and the Registrar have been notified of

the name of the designated official of the EULEX-Kosovo Mission who is to accompany Brahimaj from Priština airport to Brahimaj's place of residence.

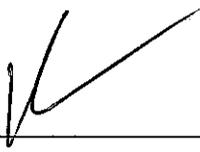
REQUESTS the authorities of all States through whose territory Brahimaj will travel,

- a. to hold Brahimaj in custody for any time that he will spend in transit at the airport; and
- b. to arrest and detain Brahimaj pending his return to the UNDU in The Hague, should he attempt to escape.

REQUESTS the Head of the EULEX-Kosovo Mission, in the event Brahimaj breaches any of the foregoing terms and conditions of his provisional release, to engage all resources at his disposal to ensure that Brahimaj is immediately apprehended and detained.

ORDERS that the Registry lift the confidential status of the Application and the Response.

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



Judge Patrick Robinson
Presiding

Dated this 25th day of May 2009
At The Hague
The Netherlands

[Seal of the Tribunal]