



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-T
Date: 22 May 2007
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 22 May 2007

PROSECUTOR

v.

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

PUBLIC

DECISION ON ŠAINOVIĆ MOTION FOR PROVISIONAL RELEASE

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Mr. Tomislav Višnjić and Mr. Norman Sepenuk 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

THIS TRIAL 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 (“Tribunal”) is seised of “Defence Motion Requesting provisional Release During the Upcoming Court Recess with Confidential Annexes 1 and 3 & Confidential and *Ex Parte* Annex 2”, filed confidentially on 4 May 2007 (“Motion”) by the Šainović Defence, and hereby renders its decision thereon.

BACKGROUND

1. On 30 October 2006, Šainović (“Applicant”) and his co-accused filed a “Joint Motion for Provisional Release During the Winter Recess.” In its decision of 5 December 2006, the Trial Chamber denied that motion, reasoning that the circumstances of the case had changed materially since the Applicant and his co-accused had last been granted provisional release.¹ The Trial Chamber found that, at that advanced stage in the Prosecution’s case, the risk of the Applicant not returning from provisional release for the remainder of the trial was significantly greater than had been the case when he had previously been granted provisional release in the pre-trial phase of the proceedings.² The Applicant and his co-accused appealed that decision and, in its Decision of 14 December 2006, the Appeals Chamber dismissed the appeal and affirmed the decision of the Trial Chamber.³

SUBMISSIONS

2. In the Motion, the Applicant requests that he be granted provisional release for the period from the end of the Prosecution case to the beginning of the Defence case on the same terms and conditions on which he has previously been granted provisional release.⁴ In particular, the Applicant raises the following as factors supporting provisional release:

- The Applicant’s voluntary surrender to the Tribunal on 2 May 2002;⁵
- The Applicant’s full compliance with conditions when previously on provisional release;⁶

¹ Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006 (“Provisional Release Decision”), para. 2. The Applicant had previously been granted provisional release in the Decision on Joint Motion for Provisional Release During Summer Recess, 1 June 2006.

² Provisional Release Decision, para. 10.

³ Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006 (“Provisional Release Appeal Decision”).

⁴ Motion, para. 3. The Trial Chamber notes that, notwithstanding the Applicant’s use of the term, the upcoming period is not a court recess, but rather an interval between the close of the Prosecution case and the opening of the Defence case.

⁵ Motion, para. 7.

⁶ Motion, para. 7.

- Standing guarantees from the Government of the Republic of Serbia;⁷
- The Applicant's submission that seven years have passed since he occupied a position of authority in Serbia and he no longer has any influence there;⁸
- The unlikelihood of the Applicant interfering with the Prosecution's witnesses or interests after the closure of the Prosecution's case-in-chief;⁹
- The relocation of the Applicant's defence team to Belgrade for the duration of the "pending recess" in order to prepare his defence, his preference that he be proximate in order to assist with that preparation, and the concomitant judicial economy that would result;¹⁰
- The advanced age and rapidly deteriorating health of the Applicant's mother;¹¹
- The health problems faced by a member of the Applicant's family;¹² and
- The recent graduation of the Applicant's son from a tertiary institution.¹³

3. The Prosecution filed its response to the Motion on 14 May 2007, opposing the Motion.¹⁴ The Prosecution submits that there is an increased risk of the Applicant not returning for trial should he be granted provisional release, since the quantum of evidence of the crimes for which the Applicant is charged has increased even further since the Provisional Release Decision.¹⁵ The Prosecution's Response does not address whether the Applicant will pose a danger to any victim, witness, or other person if granted provisional release.

APPLICABILITY OF RULE 65

4. The Trial Chamber notes that it is now settled law that Rule 65, which governs provisional release, applies during the course of the trial, as well as during pre-trial and pre-appeal proceedings.¹⁶ Rule 65(B) provides as follows:

Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

⁷ Motion, para. 8.

⁸ Motion, para. 9.

⁹ Motion, para. 9.

¹⁰ Motion, para. 10.

¹¹ Motion, para. 12 (confidential Annex 1).

¹² Motion, para. 13 (confidential and *ex parte* Annex 2).

¹³ Motion, para. 14 (Annex 3).

¹⁴ Prosecution Response to Nikola Šainović's Defence Motion Requesting Provisional Release During the Upcoming Court Recess, 14 May 2007 ("Response").

¹⁵ Response, paras 4–6.

¹⁶ Provisional Release Appeal Decision, paras 8–10.

Where one of the conditions required by Rule 65(B) has not been met, a Trial Chamber must deny provisional release and need not consider the other conditions.¹⁷

DISCUSSION

5. In deciding a request for provisional release, a Trial Chamber must determine whether the applicant has satisfied the burden of showing that, if released provisionally, he or she will (a) return for the continuation of the trial and (b) not pose a danger to any victim, witness, or other person.¹⁸ Where an accused applies for provisional release following the denial of a previous application, “it is incumbent on that accused to satisfy the Trial Chamber that there has been a change in circumstances that materially affects the approach taken in earlier provisional release decisions regarding the same accused.”¹⁹

6. In making its determination, the Trial Chamber must provide a reasoned opinion indicating its view of the relevant factors²⁰ which a reasonable Trial Chamber would be expected to consider before making a decision.²¹ This does not mean that the Trial Chamber is obliged to deal with “all possible factors”, but it must at a minimum provide reasons to support its findings.²² Neither is the satisfaction of these two conditions an automatic trigger for provisional release; they are instead minimum requirements, and the Trial Chamber retains discretion to grant or deny provisional release in light of all the circumstances of the case.²³

7. In the course of the following discussion in which the relevant requirements of Rule 65(B) are considered, the Chamber will address each of the relevant factors raised by the Applicant in his Motion.

8. The Tribunal is in receipt of a letter from the Ministry of Foreign Affairs of The Netherlands, in which The Netherlands – in its capacity as host country – represents that it has no

¹⁷ *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber’s Decision on Sredoje Lukic’s Motion for Provisional Release, 16 April 2007 (“*Lukić and Lukić Decision*”), paras 6, 23; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007 (“*Popović Decision*”), para. 6.

¹⁸ Rule 65(B); *Popović Decision*, para. 12.

¹⁹ *Popović Decision*, para. 12.

²⁰ *Prosecutor v. Halilović*, Case No. IT-01-48-T, Confidential Decision on Renewed Motion for Provisional Release, 22 July 2005; Provisional Release Decision, para. 6.

²¹ *Popović Decision*, para. 7.

²² *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj’s Interlocutory Appeal Against the Trial Chamber’s Decision Denying his Provisional Release, 9 March 2006.

²³ *Popović Decision*, para. 5.

objection to the Applicant's provisional release, should it be granted.²⁴ The Tribunal is furthermore in receipt of the confidential Conclusion of the Government of the Republic of Serbia dated 22 March 2007, confirming that it will respect all orders made by this Trial Chamber in respect of the provisional release of the Applicant, should it be granted. The host country and the receiving State having been heard, it remains for the Trial Chamber to consider whether it is satisfied that the Applicant, if released, will appear for trial. If it is so satisfied, the Trial Chamber will then consider whether it is satisfied that the Applicant, if released, will not pose a danger to any victim, witness, or other person.

9. The Trial Chamber notes the standing guarantee furnished by the Government of the Republic of Serbia.²⁵ The Trial Chamber assumes for present purposes that Serbia would do its best to honour this guarantee. However, the Trial Chamber is not satisfied that there has been a change in circumstances that materially affects the approach taken in the decision denying provisional release of 5 December 2006, in which this factor was considered.²⁶ In any event, a Trial Chamber is not obliged to rely on guarantees provided by a government with the power to arrest the Applicant; it is instead required to evaluate government guarantees in light of the circumstances surrounding each individual applicant.²⁷ The Trial Chamber now turns to the circumstances of the Applicant's surrender to the Tribunal.

10. The Applicant submits he surrendered to the Tribunal voluntarily on 2 May 2002. The Appeals Chamber has found to the contrary that the Applicant did not surrender voluntarily.²⁸ While the voluntariness of an accused's surrender is relevant to the determination of whether that accused will appear for trial if provisionally released,²⁹ the Trial Chamber is not satisfied that the circumstances of the Applicant's surrender support the determination that, if released, the Applicant will appear for trial.

11. The Trial Chamber notes the Applicant's claim to full compliance with conditions when previously on provisional release. However, the Trial Chamber considers that the Applicant's prior

²⁴ Letter from Mr. J.H.P.A.M. de Roy, Deputy Director of Protocol for the Minister of Foreign Affairs, to Chief CMSS, dated 9 May 2007.

²⁵ Motion, para. 8.

²⁶ Provisional Release Decision, para. 10.

²⁷ *Popović* Decision, para. 16. See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popović's Application for Provisional Release, 28 October 2005, para. 10.

²⁸ See *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, p. 6. See also *Prosecutor v. Nikola Šainović*, Decision on Third Defence Request for Provisional Release, 14 April 2005, para. 29.

²⁹ *Lukić and Lukić* Decision, para. 16.

compliance with previous conditions alone does not justify classifying him as a non-flight risk at this time.

12. The Applicant has not demonstrated to the Trial Chamber how the circumstances which led to the denial of his application for provisional release in December 2006 have changed so as to materially affect the approach taken in the Provisional Release Decision, when he was denied provisional release.³⁰ At that time, the Trial Chamber determined that the Applicant's awareness of the case against him had been deepened, with the consequential finding that the risk that he would not return for the remainder of his trial was significantly greater than it had been previously.³¹ The further evidence that has been led since December 2006 serves only to strengthen the position taken by the Trial Chamber at that time, which was affirmed on appeal.³²

13. The remaining factors to which the Applicant refers in his Motion do not impact on an assessment of whether, if released, he will appear for trial. The Applicant's stated desire to be proximate to his defence team in Belgrade as they prepare his defence is a logistical issue and not a factor that assists in the assessment of the likelihood that he will return for trial. Other factors concern the assessment of whether the Applicant, if released, will not pose a danger to any victim, witness, or other person.³³ Since the foregoing analysis provides an independent basis for the denial of the Applicant's motion for provisional release for the duration sought pursuant to Rule 65(B), the Trial Chamber declines to consider whether the Applicant, if released, will not pose a danger to any victim, witness, or other person.³⁴ Still other factors are raised by the Applicant on compassionate grounds,³⁵ on the basis of which provisional release is typically requested for a shorter period.³⁶ These factors are pertinent to a determination to be made on compassionate grounds, and the Applicant is entitled to file a motion on that basis should he choose to do so.

³⁰ *Popović* Decision, para. 12.

³¹ Provisional Release Decision, para. 10.

³² Provisional Release Appeal Decision.

³³ Those factors are the argument that seven years have passed since the Applicant occupied a position of authority in Serbia and he no longer has any influence; the unlikelihood of his influencing Prosecution witnesses at this stage of the case (Motion, paras 9–10).

³⁴ *Lukić and Lukić* Decision, paras 6, 23.

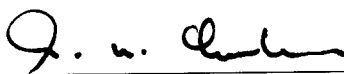
³⁵ Those factors are his mother's advanced age and rapidly deteriorating health, the confidential problems faced by a family member, and his son's recent graduation.

³⁶ See Decision on Šainović Request for Variation of Conditions of Provisional Release, 28 June 2006.

DISPOSITION

14. For the foregoing reasons, and pursuant to Articles 20 and 21 of the Statute and Rules 54 and 65 of the Rules, the Trial Chamber hereby **DENIES** the Motion without prejudice to the Applicant's entitlement to move the Chamber for provisional release of a more limited duration on compassionate grounds.

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



Judge Ali Nawaz Chowhan

Dated this twenty-second day of May 2007
At The Hague
The Netherlands

[Seal of the Tribunal]