



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-AR65.12
Date: 1 March 2011
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 1 March 2011

PROSECUTOR

v.

LJUBOMIR BOROVIČANIN

PUBLIC

**DECISION ON APPEAL FROM DECISION ON LJUBOMIR BOROVIČANIN'S
REQUEST FOR PROVISIONAL RELEASE**

The Office of the Prosecutor

Mr. Peter Kremer

Counsel for Ljubomir Borovčanin

Mr. Christopher Gosnell and Ms. Tatjana Čmerić

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 an “Appeal from Decision on Borovčanin’s [*sic*] Request for Custodial Visit” filed on 14 October 2010 by Counsel for Ljubomir Borovčanin (“Appeal” and “Borovčanin”, respectively) against the “Decision on Borovčanin’s Request for Custodial Visit” rendered by Trial Chamber II of the Tribunal (“Trial Chamber”) on 7 October 2010, denying provisional release to Borovčanin (“Impugned Decision”).¹ The Office of the Prosecutor (“Prosecution”) filed its confidential response on 26 October 2010.² Borovčanin filed his reply on 1 November 2010.³

I. BACKGROUND

2. On 10 June 2010, the Trial Chamber convicted Borovčanin, pursuant to Article 7(1) of the Statute of the Tribunal (“Statute”), of aiding and abetting extermination as a crime against humanity (count 3); murder as a violation of the laws or customs of war (count 5); persecutions as a crime against humanity (count 6); and inhumane acts (forcible transfer) as a crime against humanity (count 7). The Trial Chamber also convicted Borovčanin, pursuant to Article 7(3) of the Statute, of murder as a crime against humanity (count 4) and murder as a violation of the laws or customs of war (count 5) and sentenced Borovčanin to 17 years of imprisonment.⁴ Neither Borovčanin nor the Prosecution filed an appeal against his convictions and sentence.

3. Borovčanin remains in the custody of the Tribunal pursuant to Rule 103(C) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), pending the finalisation of arrangements for his transfer to the State where he will serve his sentence.

4. On 20 September 2010, the President of the Tribunal assigned Borovčanin’s request for a ten-day provisional release to visit his father to the Trial Chamber.⁵ On 7 October 2010, the

¹ *Prosecutor v. Ljubomir Borovčanin*, Case No. IT-05-88-ES.1, Decision on Borovčanin’s Request for Custodial Visit, 7 October 2010.

² Prosecution Response to Borovčanin’s Appeal from Denial of Provisional Release, 26 October 2010 (confidential). *See also* Public Redacted Version Prosecution Response to Borovčanin’s Appeal from Denial of Provisional Release, 27 October 2010 (“Response”); Corrigendum to Prosecution Response Brief, 2 November 2010.

³ Reply to Prosecution Response Concerning Borovčanin [*sic*] Appeal from Decision on Request for Custodial Visit, 1 November 2010 (“Reply”). The Appeals Chamber notes that Borovčanin seeks leave to file the Reply (*see* Reply, para. 1), but that it is not necessary to do so. *See* Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev. 3, 16 September 2005, para. 3.

⁴ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version) (“Trial Judgement”), vol. II, p. 829.

⁵ *Prosecutor v. Ljubomir Borovčanin*, Case No. IT-05-88-ES.1, Order Assigning Application to Trial Chamber, 20 September 2010 (confidential).

Trial Chamber issued its Impugned Decision, denying Borovčanin's request for provisional release.

II. SUBMISIONS OF THE PARTIES

5. Borovčanin argues that the Trial Chamber erred in law when it held that "the assessment of special circumstances in an application for custodial release while a convicted person is awaiting transfer to an enforcement State must be conducted more strictly in light of the fact that a convicted person is serving his sentence and is no longer presumed innocent."⁶ Borovčanin argues that this "elevated threshold" is already incorporated into the "special circumstances" requirement of Rule 65(I)(iii) of the Rules.⁷ Accordingly, the "draconian standard" articulated by the Trial Chamber in the Impugned Decision is not supported by jurisprudence of the Tribunal.⁸ Borovčanin therefore requests that the Impugned Decision be quashed.⁹

6. The Prosecution responds that the Trial Chamber did not subject Borovčanin to a higher burden, but rather applied the criteria of Rule 65(I) of the Rules and correctly found that he had failed to demonstrate that his father's health was critical.¹⁰ The Prosecution argues that the Trial Chamber's reference to conducting the assessment of a convicted person's application "more strictly" must be read in context and it explains that the Trial Chamber made this statement when it rejected Borovčanin's argument that the threshold should be lower for persons whose judgements have become final.¹¹ The Prosecution also argues that the Trial Chamber was correct not to speculate as to when Borovčanin's father might pass away and applied the correct legal standard, which requires that there be a present and acute health crisis before a Chamber can authorise such a custodial visit.¹²

⁶ Appeal, para. 6, *citing* Impugned Decision, para. 30. *See also* Appeal, para. 10.

⁷ Appeal, para. 7.

⁸ Appeal, paras 8–9, *referring to* *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-ES, Decision on Krajišnik's Application for Custodial Visit, 17 June 2009, paras 11, 17-19; *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release, 14 February 2008 ("*Bala* Decision"), paras 9-10, 12; *Prosecutor v. Blagoje Simić*, Case No. IT-00-39-ES, 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, para. 14. *See also* Reply, paras 24–26.

⁹ Appeal, paras 10, 31.

¹⁰ Response, para. 14, *referring to* Impugned Decision, para. 30.

¹¹ Response, para. 15, *referring to* Impugned Decision, para. 30.

¹² Response, paras 16–18.

7. In his Reply, Borovčanin argues that the Trial Chamber erred by assessing his request for a custodial visit in terms of the immediate time-frame, rather than the time during which he will be serving his sentence in an enforcement state.¹³

III. ADMISSIBILITY

8. The Appeals Chamber considers that the legal regime to be applied in this matter is that which relates to convicted persons on appeal, rather than that related to an accused at trial. The Appeals Chamber considers that the Appeal is not properly before it. However, on an exceptional basis and because Borovčanin should not be prejudiced by a procedural oversight, the Appeals Chamber will consider the matter before it and will apply, by analogy, the provisions of Rule 65(I) of the Rules.

IV. APPLICABLE LAW

9. A convicted person who seeks provisional release for a fixed period may bring an application pursuant to Rule 65(I) of the Rules.¹⁴ In the case of a convicted person awaiting transfer to the State in which the sentence will be served, he or she may be granted provisional release if the following conditions are satisfied: (i) the convicted person, if released, will surrender into detention at the conclusion of the fixed period; (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.¹⁵ These requirements must be considered cumulatively.¹⁶ The Appeals Chamber considers that “[w]hether 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.”¹⁷ Finally, the discretionary assessments of the requirements under Rule 65 of the Rules are made on a case-by-case basis.¹⁸

V. DISCUSSION

10. As previously held by the Appeals Chamber, special circumstances warranting provisional release on humanitarian or compassionate grounds require an acute justification, such as a medical need, a visit to a close family member in extremely poor health and whose

¹³ Reply, para. 27. *See also* Reply, paras 4, 8, 18–23.

¹⁴ *Bala* Decision, para. 4.

¹⁵ *Bala* Decision, para. 5.

¹⁶ *Bala* Decision, para. 5; *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 (“*Sreten Lukić* Decision”), para. 5 and references cited therein.

¹⁷ *Bala* Decision, para. 5; *Sreten Lukić* Decision, para. 5 and references cited therein.

death is believed to be imminent, or a memorial service for a near family member.¹⁹ By Borovčanin's own admission, his father's health is poor but stable.²⁰ The Appeals Chamber therefore finds that there is currently no acute justification for releasing Borovčanin and that he has not succeeded in demonstrating that special circumstances under Rule 65(I)(iii) of the Rules exist in this case.

11. Borovčanin also argues that the Trial Chamber (i) erred when it failed to take into account that no legal mechanism exists to grant him provisional release once he has been transferred to a State;²¹ (ii) erred in its assessment as to whether he posed a flight risk;²² and (iii) should have taken into account the fact that he chose not to appeal his conviction and sentence.²³ The Appeals Chamber considers that, having found that the Appeal is not properly before it, it is not necessary to determine these arguments. Moreover, considering that the requirements under Rule 65(I) of the Rules are cumulative, the Appeals Chamber need not consider whether the requirements of Rule 65(I)(i) or 65(I)(ii) of the Rules are met in the present case.²⁴

¹⁸ *Sreten Lukić* Decision, para. 5 and references cited therein.

¹⁹ See *Bala* Decision, para. 10; *Sreten Lukić* Decision, para. 11; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Public Redacted Version of the Decision on Sreten Lukić's Second Motion for Provisional Release on Compassionate Grounds, 14 July 2010, para. 11.

²⁰ Appeal, para. 12.

²¹ Appeal, paras 11–19; see also Response, paras 19–22; Reply, paras 10–15.

²² Appeal, paras 20–27.

²³ Appeal, paras 28–30.

²⁴ *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Nikola Šainović's Second Motion for Temporary Provisional Release on Compassionate Grounds, 25 August 2010 (public redacted version), para. 15.

VI. DISPOSITION

12. For the foregoing reasons, the Appeals Chamber hereby **DISMISSES** the Appeal.

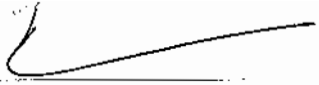
Done in English and French, the English text being authoritative.

Judge Patrick Robinson appends a separate opinion dissenting in part and concurring in result.

Judge Liu Daqun appends a separate opinion.

Judge Andréia Vaz appends a separate opinion.

Dated this first day of March 2011
At The Hague
The Netherlands



Judge Patrick Robinson
Presiding

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE PATRICK ROBINSON
DISSENTING IN PART AND CONCURRING IN RESULT

1. Although I concur with the outcome of the Appeal—that Borovčanin should not be released—I respectfully dissent from the holding of the majority that the Appeal is not properly before it.

2. Rule 65(I) provides as follows:

(I) Without prejudice to the provisions of Rule 107, the Appeals Chamber may grant provisional release *to convicted persons pending an appeal* or for a fixed period if it is satisfied that [emphasis added]:

(i) *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 [emphasis added];

(ii) *the appellant*, if released, will not pose a danger to any victim, witness or other person, and [emphasis added]

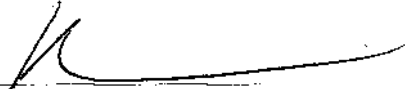
(iii) special circumstances exist warranting such release.

The provisions of paragraphs (C) and (H) shall apply *mutatis mutandis*.

3. Based upon the plain text of the Rule, there is ambiguity regarding whether the procedural situation in the present matter falls within the provisions of Rule 65(I) of the Rules: there is no appeal pending in relation to Borovčanin, and he is not an appellant. In finding that the Appeal is not properly before it, the Appeals Chamber implicitly expresses its view that the President abused his discretion by assigning Borovčanin's application for release to a Trial Chamber in the first instance. However, I am of the view that, pursuant to Rule 19(A) of the Rules—which requires the President to co-ordinate the work of Chambers—and in light of the fact that the present procedural situation does not fall squarely within Rule 65(I) of the Rules, it was a reasonable exercise of the President's discretion to assign Borovčanin's application to a Trial Chamber in the first instance.

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

Dated this first day of March 2011
At The Hague
The Netherlands



Judge Patrick Robinson

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE LIU DAQUN

1. In this decision, the Majority finds that “the legal regime to be applied in this matter is that which relates to convicted persons on appeal, rather than that related to an accused at trial.”¹ While I agree with this assessment and its outcome, I write separately to elaborate upon my reasons for doing so and to respond to the legitimate concerns that have been raised with respect to the apparent lacuna in the Tribunal’s Rules.

2. Although Rule 65(I) of the Rules contemplates the provisional release of “convicted persons”, there is no distinct provision that allows for the provisional release of “convicted persons” *pending transfer to an enforcement State*.² However, the Appeals Chamber has explicitly held that: “[i]n the case of a convicted person awaiting transfer to the State in which the sentence will be served, Rule 65(I) of the Rules provides that the Appeals Chamber may grant provisional release” if it is satisfied that the three conditions specified therein are met.³

3. Rule 65(I) of the Rules explicitly and exclusively empowers the Appeals Chamber to grant provisional release to convicted persons. In this respect, the Rule is unequivocal. Thus, any request for provisional release, considered in the context of this Rule, albeit by analogy, should, in my view, be directly assigned to the Appeals Chamber.⁴

4. Moreover, confining such cases to the Appeals Chamber prevents any undue discrimination between convicted persons pending an appeal and convicted persons pending transfer to an enforcement State. A convicted person awaiting transfer to serve his sentence should not be able to appeal a Trial Chamber’s decision on provisional release and thus avail himself of a potential remedy that is not available to an appellant filing similar motions for provisional release before the Appeals Chamber. Otherwise, convicted persons awaiting transfer to an enforcement State would be placed at a distinct advantage over appellants whose convictions may yet be quashed on appeal. Such disparate treatment would, in my view, be unwarranted and unfair.

¹ Decision on Appeal from Decision on Ljubomir Borovčanin’s Request for Provisional Release, 1 March 2011, para. 8.

² Rule 65(I) provides the possibility of provisional release for “*convicted persons pending an appeal or for a fixed period*” (emphasis added). However, as it has been observed, the Rule then proceeds to refer to the potential applicant as the “appellant”. This ambiguity undoubtedly warrants clarification by way of amendment to the Rules.

³ *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release, 14 February 2008, para. 5.

⁴ *See ibid.*

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

Dated this first day of March 2011
At The Hague
The Netherlands



Judge Liu Daqun

[Seal of the Tribunal]

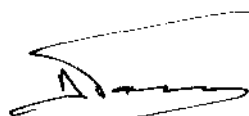
SEPARATE OPINION OF JUDGE ANDRÉSIA VAZ

1. I concur with President Robinson that the present Appeal can be regarded as being properly before the Appeals Chamber. I am persuaded that the present procedural situation is not expressly contemplated by Rule 65(I) of the Rules, which literally refers only to convicted persons pending their appeal. The holding, in the decision, that Rule 65(I) of the Rules applies here by analogy confirms the existence of such *vacuum legis*. While, in my view, the requirements provided by Rule 65(I) of the Rules may apply by analogy to decide on Borovčanin's request for provisional release, I am convinced that in the circumstances of the case it was within the President's discretion to assign this matter, in the first instance, to a trial chamber.

2. In reaching this conclusion, I observe that the Appeals Chamber was never seized of Borovčanin's case because neither he nor the Prosecution filed an appeal against his convictions and sentence. Therefore, the Trial Judgement rendered by Trial Chamber II of the Tribunal is final with regard to Borovčanin. As Rule 65(I) of the Rules does not squarely cover the present procedural situation, in my opinion Rule 65(D) of the Rules, which provides for a right of appeal against any decision rendered by a trial chamber under Rule 65, can be regarded as applicable here. While my view on this matter diverges from that of the majority, I concur with the outcome of the decision that Borovčanin should not be released.

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

Dated this first day of March 2011
At The Hague
The Netherlands



Judge Andréia Vaz

[Seal of the Tribunal]