



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-AR65.17

Date: 23 July 2009

Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. John Hocking

Decision of: 23 July 2009

PROSECUTOR

v.

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

PUBLIC REDACTED VERSION

**DECISION ON PROSECUTION'S APPEAL AGAINST DECISION ON PRLIĆ'S MOTION
FOR PROVISIONAL RELEASE**

Office of the Prosecutor

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Mr. Douglas Stringer

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Ms. Senka Nožica and Mr. Karim Khan for Mr. Bruno Stojić
Mr. Božidar Kovačić and Ms. Nika Pinter for Mr. Slobodan Praljak
Ms. Vesna Alaburić and Mr. Nicolas Stewart 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

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 a “Prosecution Appeal of the Trial Chamber’s Decision of 29 June 2009 Granting the Accused Prlić Provisional Release”, filed confidentially on 30 June 2009 (“Appeal”) against the “*Décision relative à la Demande de mise en liberté provisoire de l’Accusé Prlić*”, issued confidentially on 29 June 2009 (“Impugned Decision”), granting provisional release to Jadranko Prlić (“Prlić”).

I. BACKGROUND

2. On 12 June 2009, Prlić filed confidentially a motion requesting provisional release for the 2009 summer judicial recess.¹ On 29 June 2009, the Trial Chamber issued the Impugned Decision, finding that Prlić, if released, would not pose a flight risk and would not endanger victims, witnesses, or other persons.² The Trial Chamber also found that the humanitarian grounds put forward by Prlić were sufficiently compelling to justify the provisional release.³ The Chamber therefore partially granted Prlić’s request, ordered him released for seven days, and ordered a stay of the Impugned Decision, following the Prosecution’s indication that it intended to appeal should provisional release be granted.⁴ On 30 June 2009, the Prosecution filed this Appeal. Prlić filed a response on 9 July 2009.⁵ The Prosecution filed a reply on 13 July 2009.⁶

II. STANDARD OF REVIEW

3. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of a Trial Chamber’s decision.⁷ The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules of Procedure and Evidence of the Tribunal

¹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić’s Motion for Provisional Release for Humanitarian Reasons During the 2009 Summer Recess Period, filed confidentially on 12 June 2009, p.1.
² Impugned Decision, paras 24, 26.
³ Impugned Decision, para. 34.
⁴ Impugned Decision, paras 34, 37.
⁵ Jadranko Prlić’s Response to the *Prosecution Appeal of the Trial Chamber’s Decision of 19 June 2009 Granting the Accused Prlić Provisional Release*, filed confidentially on 9 July 2009 (“Response”).
⁶ Prosecution’s Reply to Jadranko Prlić’s Response to the Prosecution Appeal of the Trial Chamber’s 29 June 2009 Decision to Provisionally Release Accused Prlić, filed confidentially on 13 July 2009 (“Reply”).
⁷ *See, e.g., Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Praljak’s Appeal of the Trial Chamber’s 2 December 2008 Decision on Provisional Release, 17 December 2008, para. 4 (“*Praljak Decision*”) (citing *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 (“*Brahimaj Decision*”), para. 5; *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, 17 October 2005 (“*Stanišić Decision*”), para. 6; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski’s Interlocutory Appeal on Provisional Release, 28 September 2005, para. 5).

(“Rules”) is a discretionary one.⁸ 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.⁹

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.¹⁰ The Appeals Chamber will only overturn a Trial Chamber’s decision on provisional release where it is found to be (a) based on an incorrect interpretation of governing law; (b) based on a patently incorrect conclusion of fact; or (c) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.¹¹ 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.¹²

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 the host country and the State to which the accused seeks to be released, the opportunity to be heard.¹³

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.¹⁴ It must then provide a reasoned opinion indicating its view on those relevant factors.¹⁵ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁶ This is because decisions on motions for provisional release are fact-intensive and cases are considered

⁸ *Prosecutor v. Prlić*, Case No. IT-04-74, Decision on the Accused Praljak’s Motion for Provisional Release, 25 July 2008, para. 6.

⁹ See, e.g., *Praljak* Decision, para. 4; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, para. 3; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006, para. 5.

¹⁰ *Praljak* Decision, para. 5 (internal citation omitted).

¹¹ *Praljak* Decision, para. 5.

¹² *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.7, Decision on Vujadin Popović’s Interlocutory Appeal Against the Decision on Popović’s Motion for Provisional Release, 1 July 2008, para. 6.

¹³ *Praljak* Decision, para. 6; *Brahimaj* Decision, para. 6.

¹⁴ *Praljak* Decision, para. 7; *Brahimaj* Decision, para. 10.

¹⁵ *Praljak* Decision, para. 7; see also *Brahimaj* Decision, para. 10.

¹⁶ *Praljak* Decision, para. 7; *Stanišić* Decision, para. 8.

on an individual basis in light of the particular circumstances of the individual accused.¹⁷ The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches 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.¹⁸ If the Trial Chamber is satisfied that the requirements of Rule 65(B) have been met, it has a discretion as to whether or not to grant provisional release to an accused. An application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, should only be granted when sufficiently compelling humanitarian reasons exist.¹⁹

IV. DISCUSSION

7. The Prosecution argues that the Trial Chamber committed a discernible error of fact, law, and discretion in the Impugned Decision when it granted provisional release to Prlić.²⁰ The Prosecution contends that the Trial Chamber has misconstrued and misapplied the legal standard for provisional release after a Rule 98 *bis* ruling and therefore committed an error of law when it found that Prlić had demonstrated sufficiently compelling humanitarian reasons, that the Trial Chamber has committed an error of fact because Prlić has not established sufficiently compelling humanitarian reasons for provisional release, and that the Trial Chamber incorrectly exercised its discretion when it granted Prlić provisional release.²¹

8. As stated by the Prosecution, “There is no such thing at the ICTY as summer holiday or recess release.”²² The Prosecution first points out that Prlić was recently released in order to attend his father’s funeral and [REDACTED] and that this application was unopposed by the Prosecution.²³ The Prosecution further observes that on 11 March 2008 the Appeals Chamber rejected as grounds for release circumstances similar to those now submitted, such as [REDACTED].²⁴ In light of this, the Prosecution argues that Prlić has the burden of showing adequately supported grounds that are more compelling than those that the Appeals Chamber previously rejected as insufficient, which he has not done.²⁵

¹⁷ *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7.

¹⁸ *Praljak* Decision, para. 7; *Stanišić* Decision, para. 8.

¹⁹ See *Praljak* Decision, para. 15.

²⁰ Appeal, para. 2.

²¹ Appeal, para. 2.

²² Appeal, para. 3.

²³ Appeal, para. 5.

²⁴ Appeal, para. 6.

²⁵ Appeal, para. 6.

9. The Prosecution also argues that the Trial Chamber's decision to grant Prlić's request for more time for his family to grieve the loss of his father together is neither proportionate to any compelling humanitarian reasons that may exist, nor consistent with past Tribunal jurisprudence, including that of the Trial Chamber.²⁶ As concluded by the Prosecution, "Mr. Prlić's entire application comes down to [REDACTED]. Under the strict jurisprudence of the Tribunal and in the circumstances [REDACTED], these are not compelling humanitarian reasons."²⁷ Accordingly, the Prosecution argues that the Trial Chamber committed a discernible error when it granted him provisional release.²⁸

10. Prlić responds that the Trial Chamber conducted a thorough assessment of all the circumstances relevant to his request for provisional release and did not simply extend his previous release to attend his father's funeral and grieve with his family members.²⁹ Prlić also points out that the Trial Chamber specifically noted the analogous humanitarian grounds that had been found to be insufficient in the past, but considered that [REDACTED] amounted to humanitarian reasons additional to and more serious than those previously rejected.³⁰ Prlić argues that the Trial Chamber did not commit a discernible error because the duration of the release was proportionate to all the circumstances, as is evidenced by the fact that he requested four weeks but was only granted one week and by the stringent conditions placed upon his release.³¹

11. The Appeals Chamber considers that, in analysing the humanitarian reasons set forth by Prlić underlying his request for provisional release, the Trial Chamber in the Impugned Decision noted that (a) Prlić submitted that the distress caused by his father's death, [REDACTED], justified his request to spend time with his loved ones; (b) [REDACTED]; and (c) [REDACTED].³² The Trial Chamber also took into account [REDACTED].³³ The Trial Chamber therefore considered that

[REDACTED].³⁴

Finally, the Trial Chamber, in assessing the duration of the release, found that four weeks was disproportionate to the nature and weight of the circumstances justifying provisional release, and

²⁶ Appeal, para. 7.

²⁷ Appeal, para. 8.

²⁸ Appeal, para. 9.

²⁹ Response, para. 1.

³⁰ Response, para. 2.

³¹ Response, para. 3.

³² Impugned Decision, para. 29.

³³ Impugned Decision, paras 29, 31.

³⁴ Impugned Decision, para. 31.

found it necessary to limit the period so that it was proportionate to the time necessary for Prlić to [REDACTED], *i.e.*, a single week.³⁵

12. The Appeals Chamber considers that the Trial Chamber, in granting provisional release to Prlić, took into consideration new relevant information concerning [REDACTED]. [REDACTED]. The Appeals Chamber, having considered the new evidence before the Trial Chamber, finds that the Trial Chamber did not commit a discernible error or abuse its discretion in considering that [REDACTED] justify the provisional release of Prlić for a short period of time. Moreover, the Trial Chamber carefully evaluated the duration of the provisional release to ensure that its length was no longer than necessary for Prlić to [REDACTED]. The Appeals Chamber therefore finds that the period of the release is proportionate to the humanitarian reasons set forth therefor and that the Trial Chamber did not commit a discernible error or abuse its discretion in this regard.

³⁵ Impugned Decision, paras 32–33.

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V. DISPOSITION

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

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



Judge Patrick Robinson
Presiding

Judge Mehmet Güney appends a partly dissenting opinion.

Dated this twenty-third day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

PARTLY DISSENTING OPINION OF JUDGE GÜNEY

1. In a number of previous decisions³⁶ I expressed my disagreement with the majority of the Judges' interpretation of Rule 65(B) of the Rules of Procedure and Evidence ("Rules")³⁷ adopted in the 11 March 2008 Decision in the case of *Prosecutor v. Prlić et al.* ("Petković Decision").³⁸ When assessing a motion for provisional release after trial proceedings have passed the stage of a Rule 98bis decision, the interpretation of the majority imposes an additional requirement of "sufficiently compelling humanitarian reasons" to the enumerated criteria of Rule 65(B) of the Rules.³⁹

2. For the same reasons as mentioned in my previous dissenting opinions, I face difficulties to follow the Judges' majority opinion in the instant case, which requires the Accused Jadranko Prlić to demonstrate "sufficiently compelling humanitarian reasons" for his motion for provisional release to be considered.


³⁶ *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.16, Decision on Prosecution's Appeal Against Decision on Pušić's Motion for Provisional Release, 20 July 2009; *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; *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.14, Decision on Jadranko Prlić's Appeal Against the *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Prlić*, 9 April 2009, 5 June 2009, Partly Dissenting Opinion of Judge Güney; *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.7, Decision on "Prosecution's Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Petković Dated 31 March 2008*", 21 April 2008, Partly Dissenting Opinion of Judge Güney; *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.8, Decision on "Prosecution's Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Prlić Dated 7 April 2008*", 25 April 2008, Partly Dissenting Opinion of Judge Güney; *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.6, Reasons for Decision on "*Prosecution's Urgent Appeal Against Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Pušić Issued on 14 April 2008*", 23 April 2008; *Prosecutor v. Vujadin Popović et al.*, Case No IT-05-88-AR65.4, Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletić's Motions for Provisional Release During the Break in the Proceedings, 15 May 2008, Partly Dissenting Opinion of Judges Liu et Güney.

³⁷ Rules of Procedure and Evidence, as amended on 4th November 2008.

³⁸ *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 et Ćorić, 11 March 2008.

³⁹ *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 Ćorić, 11 March 2008. I would like to point out that I was not member of the Bench that rendered this decision.

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


Judge Mehmet Güney

Dated this twenty-third day of July 2009
At The Hague,
The Netherlands

[Seal of the Tribunal]