



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-99-37-AR65.2

Date: 26 June 2003

Original: English

BEFORE A BENCH OF THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney

Registrar: Mr Hans Holthuis

Decision of: 26 June 2003

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ**

DECISION REFUSING LEAVE TO APPEAL

Counsel for the Prosecutor
Mr Geoffrey Nice

Counsel for the Accused
Mr Toma Fila and Mr Zoran Jovanović for Nikola Šainović

THIS BENCH of 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,

NOTING Trial Chamber III's "Decision on Application of Nikola Šainović and Dragoljub Ojdanić for Provisional Release" of 26 June 2002 ("Trial Chamber's decision"), whereby the Trial Chamber granted provisional release to co-accused Nikola Šainović and Dragoljub Ojdanić ("Šainović" and "Ojdanić");¹

NOTING the "Decision on Provisional Release" rendered by the Appeals Chamber on 30 October 2002 ("Appeals Chamber's Decision on Provisional Release"), whereby it allowed the Prosecution's appeal against the Trial Chamber's decision, quashed it and revised it by denying the provisional releases of Šainović and Ojdanić;²

NOTING the "Decision on Motion for Modification of Decision on Provisional Release and Motion to Admit Additional Evidence", dated 12 December 2002, whereby the Appeals Chamber denied a motion by Ojdanić for a modification of its "Decision on Provisional Release" and a motion to admit additional evidence;

NOTING the second application by Šainović for provisional release filed by him on 10 February 2003;³

NOTING the "Decision on Second Applications for Provisional Release", dated 29 May 2003 ("Impugned Decision"), whereby Trial Chamber III denied Šainović's motion for provisional release as it had not been satisfied that, if released, he would appear for trial and that he would pose no danger to any victim, witness or other person;

BEING SEIZED OF the "Defence Application for Leave to file an Interlocutory Appeal", filed confidentially on 5 June 2003 ("Motion"), in which Šainović seeks leave to appeal the Impugned Decision;

¹ Prosecution's Appeal Against the Trial Chamber's Decision to Grant Provisional Release, 26 July 2002 ("Appellant's Brief").

² The procedural history of that decision is laid down in some detail in the text of the decision itself.

NOTING the “Prosecution’s Response to Nikola Šainović’s ‘Defence Application for Leave to file an Interlocutory Appeal’”, filed on 16 June 2003;

NOTING the “Defence Reply to ‘Prosecution’s Response to Nikola Šainović’s ‘Defence Application for Leave to file an Interlocutory Appeal’”, dated 20 June 2003;

CONSIDERING that “good cause” will be shown for the purpose of Rule 65 of the Rules of Procedure and Evidence (“Rules”) if the applicant for leave satisfies the Bench that the Trial Chamber “may have erred” in making the impugned decision;⁴

NOTING Šainović’s submissions that leave to appeal should be granted for the following reasons:

1. The Trial Chamber erred in concluding that the new material put before it by the Defence in support of its second motion was not sufficient “to render a decision other than the one issued by the Appeals Chamber”;⁵
2. The Trial Chamber erred when it determined the existence of statements made by Šainović which were relevant to his personal position in respect to both the indictment against him and his surrender to the Tribunal;⁶
3. The Trial Chamber erred in finding that Šainović’s position as Deputy prime minister could adversely influence the weight to be given to governmental guarantees;⁷
4. The Trial Chamber erred in not taking into account the directions of the Appeals Chamber in relation to provisional release, in particular, it failed to consider “the degree of co-operation given by the authorities of the FRY and Serbia; the fact that the government of the FRY and the government of the Republic of Serbia gave guarantees that they would ensure the presence of the accused for trial and guaranteed the observance of the conditions set by the Trial Chamber upon their provisional release”;⁸
5. The Trial Chamber wrongfully determined that Šainović could pose a danger to any victim, witness or other person;⁹

³ Second Defence Request for Provisional Release. Co-accused Ojdanić filed a similar motion on 7 February (“General Ojdanić Second Application for Provisional Release”).

⁴ See, *inter alia*, *Prosecutor v Blagojević et al*, IT-02-60-AR65.3 & IT-02-60-AR65.4, Decision on Application by Blagojević and Obrenović for Leave to Appeal, 16 January 2003, par 8 (“Blagojević Leave Decision”); *Prosecutor v Brđanin and Talić*, IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 September 2000, p 3; and *Prosecutor v Jokić*, IT-02-53-AR65, Decision on Application for Leave to Appeal, 18 April 2002, par 3.

⁵ Motion, par 6.

⁶ Motion, par 7.

⁷ Motion, par 8.

⁸ Motion, par 11, citing from the Appeals Chamber’s Decision on Provisional Release, par 6.

⁹ Motion, par 12.

6. The Trial Chamber erred in the exercise of its discretion, when deciding whether the conditions for provisional release had been met.¹⁰

CONSIDERING that, as to Šainović's first submission, the Trial Chamber held that it was not satisfied that any new material was such as to persuade it not to follow the Appeals Chamber's Decision that the surrender of Šainović was not voluntary;

CONSIDERING that Šainović has failed to establish any reason why the Trial Chamber may have erred in reaching that conclusion;

CONSIDERING that, as to Šainović's second submission, what the Trial Chamber said was that "public statements of accused are factors which must be taken into account in assessing whether the surrender were voluntary";¹¹

CONSIDERING that the Appeals Chamber took Šainović's statements into account when reaching its decision;¹²

CONSIDERING that, as to Šainović's third submission, the senior position of an accused person is, as pointed out by the Trial Chamber, relevant to the weight to be given to governmental guarantees;¹³

CONSIDERING that, as to Šainović's fourth submission, there is no indication that the Trial Chamber failed to take into account the directions given by the Appeals Chamber or any factors relevant to the present application for provisional release;

NOTING that, as to Šainović's fifth submission, in its Decision on Provisional Release, the Appeals Chamber has laid down a non-exhaustive list of factors which a Trial Chamber must take into account before granting provisional release;

CONSIDERING that all these factors need to be considered when the Trial Chamber decides to grant provisional release, not when it decides to refuse it;

¹⁰ Motion, pars 14-16.

¹¹ Impugned Decision, p 6.

¹² Appeals Chamber's Decision on Provisional Release, par 10.

¹³ Impugned Decision, p 6. See also Appeals Chamber's Decision on Provisional Release, par 9.

CONSIDERING in particular that all factors need not to be reviewed by a Trial Chamber if, for instance, the consideration of one of them is sufficient to satisfy the Chamber that, if released, the accused would not appear for trial;

CONSIDERING that, having determined that Šainović would not appear for trial if released, the Trial Chamber was not required to determine whether he posed a danger to any victim, witness or other person and that therefore the correctness of any determination by the Trial Chamber of this point is not relevant to a finding as to whether there is good cause for granting leave to appeal in this case;

CONSIDERING that Rule 65 of the Rules requires that the Trial Chamber be satisfied both that the applicant (i) will appear for trial and (ii) that, if released, he will not pose a danger to any victim, witness or other person;

CONSIDERING that, since the Trial Chamber was satisfied that the first requirement had not been met, it was not required to determine whether the second requirement was also met;¹⁴

CONSIDERING that, contrary to Šainović's sixth submission, the Trial Chamber having determined that the requirements of Rule 65 had not been met in his case, it did not need to exercise its discretion to decide whether or not to grant provisional release;

CONSIDERING therefore that Šainović has not shown good cause within the meaning of Rule 65(D) of the Rules;

HEREBY DENIES leave to appeal the Impugned Decision.

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



Judge Pocar
Presiding Judge

Dated 26 June 2003
At The Hague,
The Netherlands.

[Seal of the Tribunal]

¹⁴ See *Blagojević* Leave Decision, par 14.