



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: 27 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: 27 June 2003

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ**

DECISION REFUSING OJDANIĆ LEAVE TO APPEAL

Counsel for the Prosecutor
Mr Geoffrey Nice

Counsel for the Accused
Mr Tomislav Višnjić, Mr Vojislav Seležan and Mr Peter Robinson for Dragoljub Ojdanić

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, 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 Ojdanić 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 Ojdanić'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 SEISED OF "General Ojdanić's Application for Leave to Appeal: *Decision on Second Applications for Provisional Release*", filed on 5 June 2003 ("Motion"), in which Ojdanić 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.

³ General Ojdanić Second Application for Provisional Release. Co-accused Šainović filed a similar motion on 10 February ("Second Defence Request for Provisional Release").

NOTING the “Prosecution’s Response to ‘General Ojdanić’s Application for Leave to Appeal: Decision on Second Applications for Provisional Release’”, filed on 16 June 2003;

NOTING the “Reply Brief: General Ojdanić’s Application for Leave to Appeal: Decision on Second Applications for Provisional Release’”, 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 Ojdanić’s submissions that leave to appeal should be granted for the following reasons:⁵

1. The Trial Chamber failed to render a reasoned opinion;
2. The Trial Chamber failed to accord him due process of law by refusing to hear his testimony, and then deciding that his assertion that his surrender had been voluntary was not credible;
3. The Trial Chamber erred in finding that he would pose a danger to victims, witnesses or other persons, when its original decision to the contrary had not been appealed, nor the subject of new material.

CONSIDERING that, as to Ojdanić’s first submission, a Trial Chamber is not obliged to deal with all possible factors which a Trial Chamber can take into account when deciding whether it is satisfied that, if released, an accused will appear for trial;⁶

CONSIDERING, however, that it must render a reasoned opinion as part of the fair trial guarantees due to the accused;⁷

CONSIDERING that this requirement obliges the Trial Chamber to indicate all those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision;⁸

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 5.

⁶ Appeals Chamber’s Decision on Provisional Release, par 6.

⁷ *Prosecutor v Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, par 69

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

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 when, as in the present case, an applicant for provisional release did not raise any new *issue* which had not been discussed in his earlier application to the same effect, the Trial Chamber need not give its reasons anew in relation to the issues raised in the new application, if the new material before it does not impact upon its original decision;

CONSIDERING that Ojdanić has failed to establish any reason why the Trial Chamber should have expanded upon its reasons to refuse provisional release in light of the new material which, the Trial Chamber said, was not such as to persuade it not to follow the Appeals Chamber's Decision that his surrender was not voluntary;

CONSIDERING that there is no indication that the Trial Chamber failed to consider any of the factors relevant to the present application for provisional release;

CONSIDERING that, as to Ojdanić's second submission, the right of an accused to be heard is not similar to what the accused regards as his right to be heard personally;

CONSIDERING that the "right" of an accused, who is represented, to be heard personally is not unfettered and is subject to the discretion of the Chamber before which the accused is appearing;

CONSIDERING that Ojdanić has not put forth any cogent reason why he should have been heard personally in the present case, nor has he shown that the Trial Chamber abused its discretion when refusing to hear him personally;

⁸ Appeals Chamber's Decision on Provisional Release, par 6.

CONSIDERING that, as to Ojdanić's third submission, having determined that Ojdanić 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;⁹

CONSIDERING therefore that Ojdanić 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 27 June 2003,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

⁹ See *Blagojević* Leave Decision, par 14.