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**UNITED
NATIONS**



**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-03-69-AR73
Date: 29 September 2004
Original: English**

IN THE APPEALS CHAMBER

**Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Florence Mumba
Judge Mehmet Güney
Judge Inés Weinberg de Roca**

Registrar: Mr. Hans Holthuis

Decision of: 29 September 2004

**PROSECUTOR
v.
JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

**DECISION ON INTERLOCUTORY APPEALS FROM DECISION OF TRIAL CHAMBER
TO STAY PROVISIONAL RELEASE**

Counsel for the Prosecution

Mr. Dermot Groome
Mr. David Re

Counsel for the Accused:

Mr. Zoran Jovanović for Franko Simatović
Mr. Gert-Jan Alexander Knoops and Mr. Wayne Jordash for Jovica Stanišić

1. On 29 July 2004, Trial Chamber III granted the Prosecution's application for a stay of its decisions on the provisional release of the accused Jovica Stanišić ("Stanišić") and Franko Simatović ("Simatović").¹ On 4 August 2004, the accused Stanišić filed a motion before the duty judge for certification of the decision of the Trial Chamber for interlocutory appeal pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("Rules").² On 5 August, the accused Simatović filed a motion before the duty judge making the same request ("Defence Motions").³ On 20 August, the duty judge issued a decision remitting the Defence Motions to the Trial Chamber on the ground that they were not sufficiently urgent to warrant her resolution of them.⁴
2. On 2 September 2004, the Trial Chamber issued a decision on the Defence Motions granting the request for certification of its Impugned Decision.⁵ Following that certification, Stanišić and Simatović each filed an appeal before the Appeals Chamber.⁶ As both appeals raise the same issue, the Appeals Chamber will deal with them in this one decision.

Background

3. Rule 65(E) provides that the Prosecution should make an application for a stay of an order granting provisional release at the time of filing its response to the application for provisional release if the Prosecution intends to appeal an order made in favour of the applicant. In this case, the Prosecution did not make an application for a stay at the time of its response to Simatović's or Stanišić's applications for provisional release, but made its application following the grant of those provisional release applications by the Trial Chamber.⁷ The Trial Chamber granted the Prosecution's application for a stay making reference to Rule 127(A)(ii) of the Rules, which permits a Trial Chamber "on good cause being shown by motion" to "recognize as validly done any act done after the expiration of a time so prescribed on such terms, if any, as is thought just and whether or not that time has already expired".

¹ Order Granting Stay of Decisions on Provisional Release, 29 July 2004 ("Impugned Decision").

² Defense Request for Leave to Appeal From the Trial Chamber "Order Granting Stay of Decision on Provisional Release of July 29, 2004, 4 August 2004."

³ Defence Appeal for Confirmation of Interlocutory Appeal Against Trial Chamber's Order Granting Stay of Decisions on Provisional Release, 5 August 2004.

⁴ Decision on Defence Applications for Certification of Interlocutory Appeal, 20 August 2004.

⁵ Order on Defence Motions Seeking Certification for Appeal Against Trial Chamber's Orders Granting Stay of Provisional Release and on Defence Motion for Review, 2 September 2004.

⁶ Defence Interlocutory Appeal on Trial Chamber's Order Granting Stay of Decisions on Provisional Release, 6 September 2004 ("Simatović Appeal"); Defence Appeal From the Trial Chamber "Order Granting Stay of Decisions on Provisional Release" of July 29, 2004, 6 September 2004 ("Stanišić Appeal").

⁷ Prosecution's Motion to Stay "Decisions on Provisional Release" Pursuant to Rule 65 and Rule 127, 28 July 2004.

Appeal of Simatović

4. On appeal, Simatović argues that the Trial Chamber erred in granting the Prosecution's motion to stay its order on provisional release. He says that Rule 65(E) clearly sets out the procedure which the Prosecution should follow and that the Prosecution's oversight to act in accordance with the Rules cannot be treated as a reason that would allow the application of Rule 127. He argues that the Trial Chamber provided no reasons in its decision as to why it considered that the Prosecution had established "good cause" to warrant the application of Rule 127 and that the use of Rule 127 in this way creates legal uncertainty.⁸

Appeal of Stanišić

5. In his appeal, Stanišić argues that Rule 65(E) of the Rules imposes a mandatory obligation on the Prosecutor to make an application for a stay at the time of the filing of its response.⁹ He argues that the rationale of this mandatory requirement is legal certainty, and that the fundamental principle that "the accused must be informed in a timely manner [...] of the Prosecution's intentions" should, "on an issue as important as the accused's liberty,"¹⁰ preclude an interpretation of the Rule in favour of the Prosecution. Stanišić claims that, in the event that the Prosecution fails to comply with this mandatory provision, as a matter of law, it should be "interpreted in good faith with due regard to its object and purpose of which legal certainty is primary".¹¹

6. Stanišić further claims that the Prosecution had ample time in which to redress its failure to comply with the mandatory requirement of Rule 65(E). The Prosecution's response to his provisional release application was filed on 7 April 2004; the Trial Chamber's decision was not rendered until 28 July 2004. This gave the Prosecution nearly four months in which to address its omission.¹² Stanišić argues that the continuation of this oversight for over a three month period caused serious prejudice to him and makes this case novel and distinguishable from the *Simić* case in which the Prosecution's oversight was a matter of only days.¹³

7. Stanišić also claims that the Trial Chamber erred in finding that Rule 65(E) only provides one way in which the Prosecution may seek a stay pending appeal and in granting the application for a stay on the basis of the Prosecution's oversight.¹⁴ He submits that Rule 65(E) cannot be qualified and does not allow for that interpretation, and that an oversight should not be allowed to

⁸ *Simatović Appeal*, pars 7-13.

⁹ *Stanišić Appeal*, pars 7-8.

¹⁰ *Stanišić Appeal*, par 8.

¹¹ *Ibid.*

¹² *Stanišić Appeal*, par 10.

¹³ *Stanišić Appeal*, par 11; referring to *Prosecutor v Simić*, Case No. IT-95-9-PT, Decision on Milan Simić's Application for Provisional Release, 29 May 2000.

operate to the detriment of the accused. He says that the subjective intentions of the Prosecution to appeal has no relevance to the interpretation of Rule 65(E), particularly given the mandatory nature of that Rule.¹⁵

8. Stanišić also claims that it was improper for the Prosecution to rely on arguments regarding the danger to victims and witnesses in justification of its application because those arguments had already been extensively considered by the Trial Chamber.¹⁶

9. Stanišić further argues that the Trial Chamber failed to consider that he had a legitimate expectation that, as the Prosecution had not made application for a stay in accordance with the mandatory requirements of Rule 65(E), he would be released following the Trial Chamber's decision granting his application, and that this legitimate expectation was of particular importance due to his health condition.¹⁷

10. Stanišić submits that the Trial Chamber erred in its interpretation and application of Rule 127(A) (ii) to Rule 65(E). He argues that Rule 127(A) (ii) requires the Prosecution to show "good cause" and that the Impugned Decision does not address this requirement.¹⁸ Stanišić also argues that the only arguments made by the Prosecution were those dismissed by the Trial Chamber in the provisional release decision and therefore the request should have been denied.¹⁹ He argues that the Trial Chamber's apparent reliance on the arguments of the Prosecution made in its motion for the stay "seriously undermines the purpose and nature of the system for a stay of decisions as envisioned by both Rules 65(E) and 127(A) (ii), read in conjunction with each other".²⁰ Further, "good cause" is not shown by the argument that the Prosecution oversaw the obligation of Rule 65(E).²¹

11. As a separate ground of appeal, Stanišić argues that the Impugned Decision infringes his fundamental rights enshrined in Article 6(1) of the European Convention on Human Rights and Article 14(1) of the International Covenant on Civil and Political Rights to a fair and impartial hearing. He argues that the decision of the Trial Chamber violated the principle of *audi alterem partem* as the Trial Chamber granted the stay application without allowing him the opportunity to

¹⁴ Stanišić Appeal, par 14.

¹⁵ Stanišić Appeal, par 14(ii).

¹⁶ Stanišić Appeal, pars 15-16.

¹⁷ Stanišić Appeal, pars 17-20.

¹⁸ Stanišić Appeal, pars 21-24.

¹⁹ Stanišić Appeal, par 24.

²⁰ Stanišić Appeal, pars 25-26.

²¹ Stanišić Appeal, par 27-28.

be heard,²² and that the principle of equality of arms has been violated as the defence was put in a detrimental position *vis-à-vis* the Prosecution.²³

12. As a further ground of appeal, Stanišić claims that the Trial Chamber erred in granting the stay as the Prosecution did not offer any new legal or factual basis in support of its application. He argues that in the absence of any new legal arguments, the Impugned Decision infringes the principle of legal certainty.²⁴

13. As a final ground of appeal, Stanišić argues that there is no “concrete motivation” for the Trial Chamber’s grant of the stay and that an order for a stay of a decision to release can only be “administered in the event of a clear and thorough motivation why the judge who earlier decided to release an accused finds that reasons exist for a stay of this release”.²⁵

Prosecution Response

14. In response to both appellants, the Prosecution says that the appeal is incompetent under Rule 73(B) because the appellants seek appellate review of a stay order made pursuant to Rule 65(E). The Appeals Chamber is currently seised of the application for leave to appeal and the accused may only be released prior to that hearing pursuant to Rule 65(G). The Prosecution argues, therefore, that Rule 73(B) is not available as a remedy for appellate review.

15. The Prosecution disputes the argument of the appellants that Rule 65 (E) cannot be varied by the application of Rule 127. It argues that the specific exclusion from Rule 127 of Rule 40*bis* and Rule 90*bis* supports its argument that Rule 127 can be applied to all of the other Rules. The Prosecution also refers to the decision of the Appeals Chamber in *Prlić*²⁶ arguing that Rule 65(E) did not prevent the Prosecution from making a stay application at a later time by reference to Rule 127(A) (ii) in that case.²⁷

16. The Prosecution says that the only issue therefore is whether it showed good cause. It says that the consequences of its oversight, the provisional release of the accused pending its appeal, must amount to good cause pursuant to Rule 127.²⁸

²² *Stanišić Appeal*, par 30, 33.

²³ *Stanišić Appeal*, par 32.

²⁴ *Stanišić Appeal*, pars 36-39.

²⁵ *Stanišić Appeal*, pars 40-41.

²⁶ Prosecution Response to “Defence Interlocutory Appeal On Trial Chamber’s Order Granting Stay of Decisions On Provisional Release” (Franko Simatović), 13 September 2004 (“*Simatović Response*”) pars 4-6; Prosecution Response to “Defence Appeal From the Trial Chamber “Order Granting Stay of Decisions On Provisional Release” of July 29, (Jovica Stanišić), 13 September 2004, (“*Stanišić Response*”), pars 4-6.

²⁷ *Simatović Response*, pars 7-9; *Stanišić Response* pars 7-9.

²⁸ *Simatović Response*, pars 9-10; *Stanišić Response* pars 9-10.

17. The Prosecution further argues that no prejudice accrued to the appellants. Had it included its application for a stay in its response to the appellants' applications for provisional release pursuant to Rule 65(E), the order would have been automatically stayed for one day to allow the Prosecution to file an appeal under Rule 65(G), and that the appellants had an immediate right to a remedy under Rule 65(G) (iv) by seeking provisional release from the Appeals Chamber pending determination of the Prosecution's application for leave to appeal.²⁹

18. With respect to the argument of Stanišić that the Impugned Decision violates his right to be heard, the Prosecution asserts that at the time it filed its motion for a stay, it advised Counsel for Stanišić by email of its intention and attached a copy of its intended filing.³⁰ The Prosecution takes no issue with the complaint of Stanišić that the Trial Chamber filed the Impugned Decision without giving him the opportunity to respond³¹ but says that Stanišić had an alternative remedy to seek relief before the Appeals Chamber under Rule 65(G)(iv) upon the Prosecution filing its application for leave to appeal.³²

Reply of Simatović

19. In reply, Simatović argues that as Rule 65 does not exclude appeal following certification by a Trial Chamber, the Prosecution's arguments to the contrary are unfounded,³³ and he refutes the Prosecution's argument that it did show good cause for the application of Rule 127(A).

Reply of Stanišić

20. In his reply, Stanišić also argues that Rule 65 does not exclude appeal following certification and that the Prosecution arguments to the contrary are unfounded.³⁴ Stanišić also refutes the Prosecution's claim that it established a substantive showing of good cause within the meaning of Rule 127 for its failure to meet the timing requirements under Rule 65 for applying for a stay of the Trial Chamber's decision to grant provisional release. He argues that the Prosecution response, that the consequences of its "oversight (namely the provisional release of two Accused

²⁹ *Simatović* Response, pars 12-13; *Stanišić* Response pars 12-13.

³⁰ *Stanišić* Response, par 16.

³¹ *Stanišić* Response, par 17.

³² *Stanišić* Response, par 18.

³³ Defence Reply to "Prosecution's Response To Defence Interlocutory Appeal Against Trial Chamber's Order Granting Stay of Decisions on Provisional Release, 17 September 2004, pars 4-8.

³⁴ Defence Reply to "Prosecution Response to "Defence Appeal From the Trial Chamber Order Granting Stay of Decisions on Provisional Release of July 29, 2004 (Jovica Stanišić), 15 September 2004.

charged with the gravest of crimes against humanity) pending determination of its application for leave to appeal”, can hardly be interpreted as fulfilling the criteria of good cause”.³⁵

21. Stanišić further claims that the Prosecution cannot rely upon the decision of the Appeals Chamber in *Prlić* as support for its arguments. He argues that that decision clearly stated that Rule 127 cannot be used by the Prosecution to circumvent proper procedure.³⁶ That, he argues, is exactly what the Prosecution has done in this case by waiting over three months after the time at which Rule 65(E) should have been invoked to seek a stay relying upon Rule 127.³⁷

22. Stanišić further refutes the Prosecution’s argument that the availability of an avenue to petition the Appeals Chamber for release pursuant to Rule 65(G) (iv) remedies any prejudice that may have accrued to him by the Trial Chamber’s failure to accord him an opportunity to be heard before rendering the Impugned Decision.³⁸

Analysis

23. The Appeals Chamber rejects the Prosecution’s argument that the appeal was incompetently certified by the Trial Chamber pursuant to Rule 73(B). The challenge made by Simatović and Stanišić is to the Trial Chamber’s grant of a stay in circumstances where the Prosecution failed to comply with the proper procedure of Rule 65(E). The main issue was whether the Trial Chamber erred in using Rule 127 to rectify the oversight of the Prosecution. In this circumstance, the Appeals Chamber does not accept the argument of the Prosecution that Rule 65 provides the only avenue of recourse to Simatović and Stanišić. While Rule 65(G) (iv) does provide an avenue for Simatović and Stanišić to seek release where a Trial Chamber has issued a stay of its decision ordering release, it does not operate to prevent an appeal of a stay decision issued by a Trial Chamber where the circumstances are such that the Trial Chamber determines that certification pursuant to Rule 73(B) is appropriate.

24. As indicated above, Rule 65(E) establishes the procedure by which the Prosecution should indicate its intention to seek a stay of a decision of a Trial Chamber granting an accused’s provisional release application. However, while the Appeals Chamber is of the view that Rule 127 should not be relied upon by the Prosecution as a means of circumventing the correct procedure set out in the Rules, the Appeals Chamber is also not persuaded that the Trial Chamber erred in applying that Rule to receive the Prosecution’s application for a stay as validly filed. The sole

³⁵ *Stanišić* Reply, par 9.

³⁶ *Stanišić* Appeal, pars 11-12.

³⁷ *Stanišić* Appeal, pars 13-15.

³⁸ *Stanišić* Appeal, pars 19-20.

purpose of Rule 127(A)(ii) is to allow for exception to a strict application of the Rules where “good cause” exists for allowing that exception.

25. In the Impugned Decision, the Trial Chamber did not provide clear reasons for its finding that “good cause” existed for the application of Rule 127(A)(ii) to the requirements of Rule 65(E), but it was clearly within the Trial Chamber’s discretion to do so. In its stay application, the Prosecution made clear its intention to appeal the Impugned Decision. The “good cause”, as recently recognised by the Appeals Chamber in *Prlić* when it granted the Prosecution’s application for a stay of provisional release orders of a Trial Chamber, is the preservation of the object of the Prosecution’s appeal against the provisional release of the accused.³⁹ Preservation of the object of the appeal was the “concrete motivation” of the Judges of the Trial Chamber in granting the Prosecution’s stay application.

26. The Trial Chamber issued the Impugned Decision without giving the defence an opportunity to respond to the Prosecution’s application. The Appeals Chamber is sympathetic to the arguments of Stanišić that he was denied an opportunity to be heard by the Trial Chamber. It is not persuaded, however, that this denial caused such prejudice to him as to warrant overturning the Impugned Decision. The Appeals Chamber is not persuaded by any of the arguments he has presented on this appeal that the Trial Chamber erred in issuing the Impugned Decision.

27. The Appeals Chamber is also not convinced that the Trial Chamber erred in granting the Prosecution’s application for a stay based upon a repetition of arguments presented by the Prosecution in opposition to Stanišić’s application for provisional release. The argument of the Prosecution in its application for a stay was that the Trial Chamber erred in its consideration of the Prosecution’s arguments when granting provisional release to Stanišić, and that the Prosecution intended to seek leave to appeal those alleged errors to the Appeals Chamber. The Appeals Chamber is satisfied that the intention to seek leave to appeal constitutes sufficient grounds for the Trial Chamber’s grant of the stay application.

28. The Appeals Chamber does not accept the argument of Stanišić that he had a legitimate expectation that the Prosecution would not request a stay due to its failure to indicate its intention to do so in its original response to the applications for provisional release. The Prosecution’s opposition to his provisional release was made clear to him by its response to his application, and he could have expected the Prosecution to seek, by any means necessary, to prevent his provisional release once the Trial Chamber had determined that his application should be granted.

³⁹ *Prosecutor v Jadranko Prlić et al*, Case IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.3, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004.

Disposition

29. For the above reasons, the appeals of Simatović and Stanišić against the Impugned Decision are dismissed.

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

Done this 29th day of September 2004,
At The Hague,
The Netherlands.



Judge Meron
Presiding Judge

Seal of the Tribunal