



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-AR65.26

Date: 15 December 2011

Original: English

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Patrick Robinson
Judge Fausto Pocar
Judge Arlette Ramaroson
Judge Andrézia Vaz

Registrar: Mr. John Hocking

Decision: 15 December 2011

PROSECUTOR

v.

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

PUBLIC

**DECISION ON PROSECUTION APPEAL OF DECISION ON
PROVISIONAL RELEASE OF JADRANKO PRLIĆ**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for the Accused:

Mr. Michael G. Karnavas and Ms. Suzana Tomanović for Mr. Jadranko Prlić
Ms. Senka Nožica and Mr. Karim A. A. Khan for Mr. Bruno Stojić
Ms. Nika Pinter and Ms. Nataša Fauveau-Ivanović for Mr. Slobodan Praljak
Ms. Vesna Alaburić and Mr. Zoran Ivanišević for Mr. Milivoj Petković
Ms. Dijana Tomašević-Tomić and Mr. Dražen Plavec for Mr. Valentin Čorić
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 an appeal filed by the Office of the Prosecutor (“Prosecution”) on 25 November 2011¹ against a decision rendered by Trial Chamber III (“Trial Chamber”) on 24 November 2011 (“Impugned Decision”), which granted provisional release to Jadranko Prlić (“Prlić”).² Counsel for Prlić responded on 30 November 2011,³ and the Prosecution replied on 5 December 2011.⁴

I. BACKGROUND

2. On 31 October 2011, Prlić filed a motion seeking provisional release until the final judgement is rendered in the present case (“First Motion”).⁵ On 15 November 2011, Prlić confidentially filed, in the alternative, a second motion seeking provisional release for the period from 15 December 2011 to 15 January 2012 (“Second Motion”).⁶ On 24 November 2011, the Trial Chamber issued the Impugned Decision, in which it found that the Second Motion had become moot and partially granted the First Motion.⁷ In doing so, the Trial Chamber found that the criteria of Rule 65(B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”) had been satisfied and exercised its discretion to grant Prlić provisional release for three months.⁸ The Trial Chamber also decided that, before the expiry of the three-month period, Prlić could apply for an extension of his provisional release.⁹

II. STANDARD OF REVIEW

3. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber’s decision.¹⁰ The Appeals Chamber has previously held that a decision on

¹ Prosecution Appeal of Decision on Jadranko Prlić’s Provisional Release, 25 November 2011 (“Appeal”).

² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, *Décision relative à la demande de mise en liberté provisoire de l’accusé Jadranko Prlić*, (public with confidential annexes), 24 November 2011 (“Impugned Decision”). The English translation was filed on 1 December 2011.

³ Jadranko Prlić’s Response to Prosecution Appeal of Decision on Jadranko Prlić’s Provisional Release, 30 November 2011 (“Response”).

⁴ Prosecution Reply to Jadranko Prlić’s Response to Prosecution Appeal of Decision Granting Provisional Release, 5 December 2011 (“Reply”).

⁵ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić’s Motion for Provisional Release, (public with confidential annex), 31 October 2011, pp. 1, 7.

⁶ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić’s Motion for Provisional Release for Humanitarian Reasons During the 2011/2012 Winter Recess Period (confidential), 15 November 2011, pp. 1-2, 6.

⁷ Impugned Decision, p. 13.

⁸ Impugned Decision, paras 41-42, 46.

⁹ Impugned Decision, paras 42-43.

¹⁰ See, e.g., *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.25, Decision on Slobodan Praljak’s Appeal Against Decision on His Motion for Provisional Release, 10 June 2011 (“*Praljak* Decision”), para. 3; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.10, Decision on Radivoje Miletić’s Appeal Against Decision on Miletić’s Motion for Provisional Release, 19 November 2009 (“*Miletić* Decision”), para. 4; *Prosecutor v. Jadranko*

provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.¹¹ 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.¹²

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”.¹³ The Appeals Chamber will only overturn a Trial Chamber’s decision on provisional release where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.¹⁴ 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.¹⁵

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 both the host country and the State to which the accused seeks to be released the opportunity to be heard.¹⁶ Provisional release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement, and a Trial Chamber, in granting such a release, may consider the existence of sufficiently compelling humanitarian grounds.¹⁷

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. It must then provide a reasoned opinion indicating its view on those relevant factors.¹⁸ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁹ This is

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 (“*Prlić Decision*”), para. 5.

¹¹ See, e.g., *Praljak Decision*, para. 3; *Miletić Decision*, para. 4; *Prlić Decision*, para. 5.

¹² See, e.g., *Praljak Decision*, para. 3; *Miletić Decision*, para. 4; *Prlić Decision*, para. 5.

¹³ See, e.g., *Praljak Decision*, para. 4; *Miletić Decision*, para. 5; *Prlić Decision*, para. 6.

¹⁴ See, e.g., *Praljak Decision*, para. 4; *Miletić Decision*, para. 5; *Prlić Decision*, para. 6.

¹⁵ See, e.g., *Praljak Decision*, para. 4; *Miletić Decision*, para. 5; *Prosecutor v. Vujadin 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.

¹⁶ See, e.g., *Praljak Decision*, para. 5; *Miletić Decision*, para. 6; *Prlić Decision*, para. 7.

¹⁷ Rule 65(B) of the Rules.

¹⁸ See, e.g., *Praljak Decision*, para. 6; *Miletić Decision*, para. 7; *Prlić Decision*, para. 8.

¹⁹ See, e.g., *Praljak Decision*, para. 6; *Miletić Decision*, para. 7; *Prlić Decision*, para. 8.

because decisions on motions for provisional release are fact-intensive and cases are considered on an individual basis in light of the particular circumstances of the individual accused.²⁰ 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.²¹

IV. DISCUSSION

A. Alleged abuse of discretion by granting Prlić release for a three-month period

7. The Prosecution argues that, in granting Prlić provisional release for a three-month period, “the Trial Chamber abused its discretion by failing to consider or to give sufficient weight to relevant considerations”, namely: (i) the impact of the advanced stage of the proceedings on the victims and witnesses; (ii) the impact of Prlić’s release on the region; and (iii) the absence of sufficiently compelling humanitarian circumstances justifying provisional release. The Prosecution avers that, in view of the above factors, the three-month period of release granted by the Trial Chamber was disproportionate and requests the Appeals Chamber to reverse the Impugned Decision.²²

8. Prlić responds that the Trial Chamber comprehensively analysed the requirements of Rule 65(B) of the Rules, giving sufficient weight to the relevant considerations. According to Prlić, the Trial Chamber found that he was not a flight risk and would not be a danger to victims or witnesses and considered the current stage of the proceedings, his conduct during the past periods of provisional release, and the sufficiency of the measures of protection put into place by the Tribunal and Croatia.²³ Prlić states that the Prosecution has provided no evidence to counter the findings of the Trial Chamber²⁴ and that the Prosecution’s assertion that he will endanger victims and witnesses is speculation without any evidence to substantiate it.²⁵ In addition, Prlić argues that the Prosecution’s assertion that the Trial Chamber should have considered sufficiently compelling humanitarian grounds, given the advanced stage of the proceedings, is erroneous because the Trial Chamber’s assessment of sufficiently compelling humanitarian reasons is discretionary, rather than

²⁰ See, e.g., *Praljak* Decision, para. 6; *Miletić* Decision, para. 7; *Prlić* Decision, para. 8.

²¹ See, e.g., *Praljak* Decision, para. 6; *Miletić* Decision, para. 7; *Prlić* Decision, para. 8.

²² Appeal, paras 1-2, 10-15, 19.

²³ Response, para. 3.

²⁴ Response, paras 3-5.

²⁵ Response, paras 5-6.

obligatory. Prlić is therefore of the view that the Prosecution provides no evidence to demonstrate that the Trial Chamber abused its discretion.²⁶

9. The Prosecution replies that Prlić confuses two separate issues: the danger to victims and witnesses with that of the prejudice to victims and witnesses. It contends that the absence of danger to victims and witnesses is a requirement under Rule 65(B) of the Rules, while the risk of prejudice to victims and witnesses living in the region “is one of the considerations which a Trial Chamber should take into account in the exercise of its discretion to grant release.”²⁷ It further contends that the risk of prejudice to victims and witnesses in the region as a result of an accused’s provisional release at an advanced stage of the proceedings has been acknowledged as a pertinent concern by the Appeals Chamber.²⁸ Finally, it argues that the implication of proceedings going beyond a Rule 98bis decision is that the accused has a case to answer, and that the impact of having a case to answer continues after the closing of the trial hearing.²⁹

10. The Appeals Chamber notes that the Trial Chamber was convinced that, if released, Prlić would return to the United Nations Detention Unit.³⁰ The Trial Chamber was also of the opinion that, if released, Prlić would not pose a danger to victims, witnesses, or other persons.³¹ However, the Appeals Chamber recalls that the advanced stage of proceedings could have a prejudicial effect on victims and witnesses.³² To this end, the Trial Chamber considered the potential effect that the release of a person accused of such serious crimes could have on victims, stating that “this is one of the reasons why it always ensured that provisional releases of the accused were accompanied by very strict security measures, such as close and clearly defined 24-hour police escort, confinement of the accused to the town where [he] resided during [his] release, and a requirement for the Croatian authorities to provide the Chamber with regular reports on whether the conditions of the provisional release were being respected.”³³ The security measures imposed are a significant restriction upon Prlić’s freedom and show that he “remains under the authority of the Tribunal”.³⁴ Such measures, in the opinion of the Trial Chamber, “should contribute to reducing the potential effect that the release of [Prlić] in the Republic of Croatia could have on victims and witnesses.”³⁵

²⁶ Response, paras 7-10.

²⁷ Reply, para. 1, referring to *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 (“*Petković* Decision”), para. 17.

²⁸ Reply, para. 1, referring to *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.24, Decision on Jadranko Prlić’s Appeal Against the Trial Chamber Decision on his Motion for Provisional Release, 8 June 2011, para. 9.

²⁹ Reply, para. 2.

³⁰ Impugned Decision, paras 27-31, 34, 41.

³¹ Impugned Decision, paras 27-32, 34, 41.

³² *Petković* Decision, para. 17.

³³ Impugned Decision, para. 39.

³⁴ Impugned Decision, para. 39.

³⁵ Impugned Decision, para. 39.

In the view of the Appeals Chamber, the security measures imposed on the accused should rather “aim at eliminating any potential negative effect” on victims and witnesses. However, the Appeals Chamber cannot find in the present case that the Trial Chamber abused its discretion.

11. With regards to the impact of the provisional release of Prlić on the region, the Appeals Chamber finds that the Prosecution fails to substantiate its argument that the credibility of the Tribunal would be undermined by the provisional release of Prlić in the present circumstances. When arguing that the measures imposed on Prlić “underestimates” the impact on victims and witnesses, it does not elaborate on how this consideration was not properly addressed by the Trial Chamber in the exercise of its discretion. The Prosecution seems to suggest that the measures imposed by the Trial Chamber do not adequately address the gravity of any potential effect on the victims and witnesses and therefore that the Trial Chamber failed to properly balance these factors. However, the Prosecution fails to articulate a concrete basis tied to the circumstances of Prlić’s provisional release to substantiate its argument. Its submissions are therefore dismissed.

12. The Appeals Chamber notes that the newly amended Rule 65(B) of the Rules provides that a Trial Chamber, in deciding whether to grant provisional release, *may* consider the existence of sufficiently compelling humanitarian grounds. There is therefore no absolute requirement for a Trial Chamber to take into account the existence of such grounds before ordering a release and accordingly the Prosecution has failed to demonstrate that the Trial Chamber abused its discretion.

B. Alleged abuse of discretion by effectively providing for Prlić’s indefinite release

13. The Prosecution states that the Trial Chamber, after having agreed with the Prosecution that indefinite release until the judgement would be disproportionate, established a procedure whereby, prior to the expiry of the three-month release period, Prlić would be invited to apply to the Trial Chamber for that release to be prolonged.³⁶ The Prosecution argues that this procedure, in effect, amounts to indefinite provisional release.³⁷ According to the Prosecution, by “effectively providing for an indefinite period of provisional release, the Trial Chamber failed to apply the principle of proportionality and thereby abused its discretion.”³⁸ The Prosecution therefore requests that the Impugned Decision be reversed.³⁹

14. Prlić responds that the Trial Chamber found that granting him release until the final judgement is rendered would be disproportionate and therefore granted a more limited period of

³⁶ Appeal, paras 1, 16-17.

³⁷ Appeal, para. 17.

³⁸ Appeal, para. 18.

³⁹ Appeal, paras 2, 19.

release based upon the following considerations: (i) Prlić's presence was not required in court or to assist his counsel; (ii) "he has been in detention for more than five years, with limited periods of provisional release, after which he had always returned to the United Nations Detention Unit"; and (iii) "the criteria of Rule 65(B) of the Rules had been met."⁴⁰ Prlić also argues that the procedure for a possible extension of the release involves a *de novo* evaluation of the Rule 65(B) criteria by the Trial Chamber and thus is not automatic.⁴¹ According to Prlić, the Impugned Decision grants the opposite of an indefinite period of release, because his release is only for a defined period, with a possibility for him to request another definite period of release.⁴²

15. The Appeals Chamber observes that the Trial Chamber, "agree[d] with the Prosecution's argument that if it were to grant provisional release to [Prlić] for an indefinite period, the [Trial] Chamber would not be able to determine the flight risk" and stated that, as a result, it was necessary to limit the length of the provisional release.⁴³ The Trial Chamber further stated that it would be disproportionate to leave the length of the release undefined or until the judgement is rendered because it was its responsibility to "keep control of the progress of the provisional release". The Trial Chamber therefore decided to fix the period of release for a three-month period, which could be extended if it remained satisfied that the requirements set forth in Rule 65(B) of the Rules continued to be fulfilled.⁴⁴

16. The Appeals Chamber fails to discern how the procedure set up by the Trial Chamber can be considered an indefinite release of Prlić, who is required to submit a new motion for provisional release in the event that he wishes to extend his release beyond the three-month period.⁴⁵ As stated in the Impugned Decision, the Trial Chamber, on the basis of any such new motion, will assess once more, depending upon the documentation presented by Prlić and the arguments of the Prosecution, whether the criteria of Rule 65(B) of the Rules have been fulfilled and whether provisional release should be extended for Prlić and on what conditions.⁴⁶

17. The Appeals Chamber therefore finds that the Trial Chamber did not, in effect, grant Prlić indefinite provisional release. The Prosecution has thus not shown that the Trial Chamber failed to apply the principle of proportionality and thereby abused its discretion.

⁴⁰ Response, paras 11-12.

⁴¹ Response, para. 13.

⁴² Response, paras 14-15.

⁴³ Impugned Decision, para. 40.

⁴⁴ See Impugned Decision, para. 42.

⁴⁵ Impugned Decision, para. 43.

⁴⁶ Impugned Decision, para. 43.

V. DISPOSITION

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

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



Judge Mehmet Güney
Presiding

Dated this 15th day of December 2011,
at The Hague,
The Netherlands.

[Seal of the Tribunal]