

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

Dr. 00-39&40-AR73.2  
411-1/60 765  
26 February 2002

11/60 865  
JK

Case: IT-00-39&40-AR73.2

Date: 26 February 2002

Original: French

**BEFORE THE APPEALS CHAMBER**

**Before:** Judge Claude Jorda, Presiding  
Judge David Hunt  
Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Theodor Meron

**Registrar:** Mr Hans Holthuis

**Decision of:** 26 February 2002

**PROSECUTOR**

v

**Momčilo KRAJIŠNIK & Biljana PLAVŠIĆ**

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**DECISION ON INTERLOCUTORY APPEAL BY MOMČILO KRAJIŠNIK**

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**Counsel for the Prosecutor:**

**Mr Mark B Harmon, Senior Trial Attorney**

**Counsel for the Defence:**

**Mr Deyan Ranko Brashich and Mr Goran Nešković for Momčilo Krajišnik**

**Mr Robert J Pavich and Mr Eugene O'Sullivan for Biljana Plavšić**

1. Pursuant to leave granted by a Bench of the Appeals Chamber,<sup>1</sup> Momčilo Krajišnik (“Appellant”) has appealed against the decision of Judge Vohrah, when acting as the duty Judge, dismissing his application for provisional release.<sup>2</sup>

2. The Appellant’s application for provisional release was dated 4 August 2001 (a Saturday), and it was received by facsimile the same day – that is, out of normal Registry hours.<sup>3</sup> It was filed on Monday, 6 August. The Motion,<sup>4</sup> which says on its face that it was “being filed on an emergency basis”, states that the Appellant’s father died the same day (Saturday, 4 August) and that notice of his hospitalisation and [ill] health had previously been given to the Office of the Prosecutor on 1 August. The funeral was to be held on Tuesday, 7 August. A guarantee by the Government of Republika Srpska (dated 1 November 2000 and adopted on 30 January 2001), was annexed to an Addendum to the Motion received and filed on the same dates.<sup>5</sup>

3. The Motion came before the duty Judge pursuant to Rule 28 of the Rules of Procedure and Evidence (“Rules”), which at that time provided, so far as it may be relevant to this appeal:<sup>6</sup>

(B) The President, in consultation with the Judges, shall maintain a roster designating one permanent Judge as duty Judge for the assigned period of seven days. The duty Judge shall be available at all times, including out of normal Registry hours, for dealing with applications pursuant to paragraphs (C) and (D) but may refuse to deal with any application out of normal Registry hours if not satisfied as to its urgency. The roster of duty Judges shall be published by the Registrar.

(C) All applications in a case not otherwise assigned to a Chamber, other than the review of indictments, shall be transmitted to the duty Judge. Where accused are jointly indicted, a submission relating only to an accused who is not in the custody of the Tribunal shall be transmitted to the duty Judge, notwithstanding that the case has already been assigned to a Chamber in respect of some or all of the co-accused of that accused. The duty Judge shall act pursuant to Rule 54 in dealing with applications under this Rule.

<sup>1</sup> Decision on Notice of Motion for Leave to Appeal, 10 Aug 2001 (“Leave Decision”).

<sup>2</sup> [Decision on] Motion Before the Duty Judge for Provisional Release, 6 Aug 2001 (“Impugned Decision”).

<sup>3</sup> Directive for the Registry – Judicial Department – Court Management and Support Services (IT/121), Article 27. A purported amendment to the normal Registry hours is discussed in *Prosecutor v Galić*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 Dec 2001, par 2(2)(b)-(c), but it does not affect the issue here.

<sup>4</sup> Motion for Provisional Release to Allow the Accused Krajišnik to Attend Father’s Funeral, 4 Aug 2001 (“Motion”).

<sup>5</sup> Addendum to the Motion for Provisional Release to Allow the Accused Krajišnik to Attend Father’s Funeral, 4 Aug 2001.

<sup>6</sup> Rule 28, particularly par (D), was substantially amended on 21 Dec 2001 (IT/199), but the appeal is concerned only with the Rule in the form it was during August 2001.

- (D) The duty Judge may, in his or her discretion, if satisfied as to the urgency of the matter, deal with an application in a case already assigned to a Chamber out of normal Registry hours as an emergency application. In such case, the Registry shall also serve copies of the application and of any order or decision issued by the duty Judge in connection therewith on the Chamber to which the matter is assigned.
- (E) During periods of court recess, regardless of the Chamber to which he or she is assigned, the duty Judge may:
  - (i) take decisions on provisional detention pursuant to Rule 40bis;
  - (ii) conduct the initial appearance of an accused pursuant to Rule 62.
 The Registry shall serve a copy of all orders or decisions issued by the duty Judge in connection therewith on the Chamber to which the matter is assigned.

The Appellant's case had been assigned to Trial Chamber III but, as the Motion was received on the weekend leading to the Tribunal's Summer court recess (which commenced on Monday, 6 August), Trial Chamber III was unavailable to deal with it. On Monday, 6 August, the duty Judge denied (that is, dismissed) the application upon the basis that the Appellant had failed to satisfy him as to the urgency of the matter.<sup>7</sup>

4. When seeking leave to appeal from this dismissal, the Appellant made it clear that he wished to appeal not in order to obtain provisional release to attend his father's funeral (it was already too late for that), but in order to establish, as a matter of general importance to proceedings before the Tribunal,<sup>8</sup> that the proper exercise by the duty Judge of the discretion afforded by Rule 28 would have been to make a finding of emergency and then to decide upon the merits of the case.<sup>9</sup> The arguments submitted by the Appellant in the appeal, however, have proceeded somewhat beyond that simple issue.

5. The Appellant now argues that, once a finding of fact is made by a duty Judge that there is no urgency in a motion filed out of normal Registry hours or during a court recess, that Judge becomes obliged to defer dealing with the motion and to refer it to the Trial Chamber seized of the case to deal with it; in those circumstances, the Appellant says, the duty Judge has no power to deal with the motion by refusing the relief sought.<sup>10</sup> As the duty Judge in the present case purported to deal with the Motion on the Monday, during the normal Registry hours, it is submitted that he was at that time ousted of jurisdiction, which (it

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<sup>7</sup> Impugned Decision, p 2.  
<sup>8</sup> Rule 73(D)(ii).  
<sup>9</sup> Notice of Motion for Leave to Appeal, 6 Aug 2001, sixth and seventh unnumbered pages.  
<sup>10</sup> Appellant's Brief on Appeal, 14 Aug 2001 ("Appellant's Brief"), par 14.

is said) exists only where the duty Judge has found urgency *and* where he is acting out of normal Registry hours.<sup>11</sup>

6. The Appellant also argues that the duty Judge's finding that urgency had not been established was so erroneous as to amount to an error in the exercise of his discretion under Rule 28,<sup>12</sup> and that, in any event, as the prosecution had not contested the application, it was an abuse of that discretion to deny the application on uncontested facts.<sup>13</sup> Finally, the Appellant seeks orders that the duty Judge's order be reversed and that the matter be remanded to the Trial Chamber "with directions that the application be granted forthwith and that the Appellant be afforded leave for provisional release to pay his last respects to his late father and to venerate at [sic] his father's grave".<sup>14</sup>

7. The prosecution has responded to the Appellant's submissions by repeating its argument in opposition to the grant of leave to appeal – that, as the date of his father's funeral had passed, the proceedings were "moot".<sup>15</sup> It has not responded to the Appellant's submissions concerning the power of the duty Judge to deal with the Motion during the normal Registry hours or his finding that urgency had not been established, the very issues upon which leave to appeal was granted.<sup>16</sup> The prosecution has argued that it would be inappropriate to grant the fresh relief sought because (a) it was not an issue before the duty Judge, and (b) in any event, no decision had been made in accordance with Rule 65(B) at that time as to whether the Appellant, if released, would appear for trial and would not pose a danger to any victim, witness or other person.<sup>17</sup> The prosecution points out, moreover, that it would be inappropriate for the Appeals Chamber to grant such fresh relief because the

<sup>11</sup> Appellant's Brief, pars 16-17. No issue has been raised in this appeal as to whether the provisions of Rule 28(E) limit the jurisdiction of the duty Judge to deal with an application for provisional release during a court recess. It is nevertheless appropriate to point out that neither of the two matters enumerated in Rule 28(E) is, strictly, an "application". To interpret Rule 28(E) as limiting the nature of the applications with which the duty Judge may deal pursuant to Rule 28(B) during the court recess (but not during weekends, for example), would almost entirely destroy the whole purpose for which duty Judges are designated.

<sup>12</sup> Appellant's Brief, pars 12.1, 20; p 11.

<sup>13</sup> *Ibid*, pars 5, 7, 31-32.

<sup>14</sup> *Ibid*, p 11.

<sup>15</sup> Prosecution Response to Interlocutory Appeal by Krajišnik, 16 Aug 2001 ("Respondent's Brief"), par 9, repeating Prosecution Response to Motion for Leave to Appeal, 8 Aug 2001, par 2.

<sup>16</sup> Leave Decision, p 3.

<sup>17</sup> Respondent's Brief, pars 10, 11.

Appellant had already filed two separate applications for provisional release before the Trial Chamber, which at that time had not been determined.<sup>18</sup>

### **Powers of the duty Judge**

8. The relevant terms of Rule 28 have been quoted above. The present case had already been assigned to a Trial Chamber, so that Rule 28(D) is the most immediately relevant provision. It refers expressly only to the powers of the duty Judge to deal with an application in such a case “out of normal Registry hours as an emergency application”, and then only if the Judge is satisfied as to the urgency of the matter and as a matter of discretion. It is the absence of any *express* reference in Rule 28(D) to the circumstances in which the duty Judge may deal with an application in such a case during normal Registry hours which appears to have led to the submission that the duty Judge has no jurisdiction to deal with the matter during those hours.

9. Such an interpretation overlooks the requirement in Rule 28(B) that the duty Judge is to be “available at all times, including out of normal Registry hours, for dealing with applications pursuant to paragraphs (C) and (D)”. Rule 28 thus necessarily contemplates that the duty Judge *will* have power during normal Registry hours to deal with applications in cases which have already been assigned to a Trial Chamber. Rule 28(D) must be interpreted in a way which will correspond with what is clearly intended by Rule 28(B). It is therefore necessarily implicit in Rule 28(D) that the Judge *will* deal during normal Registry hours with applications which have already been assigned to a Trial Chamber. Rule 28(B) gives to the judge the discretion to refuse to do so where the application is not urgent. The exercise of that discretion will depend upon whether the application is of such a nature that it is appropriate that it be dealt with by the duty Judge rather than by the Trial Chamber to which the case has been assigned. This situation would usually arise during the official court recesses, but it would also arise where the Trial Chamber is, for reasons other than a court recess, not available to deal with the application.

10. The obvious example of where it would be appropriate – indeed, necessary – for the duty Judge to exercise the powers of the Trial Chamber (whether or not the relief sought should be granted) is where the application is an urgent one which cannot await for its

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<sup>18</sup> *Ibid*, par 12.

resolution the return of the Trial Chamber to which the case is assigned. Another obvious example of where it would be at least appropriate for the duty Judge to exercise the power to deal with the application (again, whether or not the relief sought should be granted) is where it is an application pursuant to Rule 127 to enlarge the time prescribed by the Rules for the doing of an act, and where the time for doing that act expires during the unavailability of the Trial Chamber by reason of the court recess or other reason, or very shortly thereafter. In considering whether it is appropriate for the duty Judge to deal with any particular matter, it is important to keep in mind that the Trial Chamber will usually be in a better position to deal with a matter which requires detailed knowledge of the case.

11. The duty Judge in the present case therefore had the jurisdiction on the Monday, during the normal Registry hours, to deal with the Appellant's application for provisional release to attend the funeral of his father. The Appellant's submission to the contrary is rejected.

12. Before turning to the decision of the duty Judge that the Appellant had failed to satisfy him as to the urgency of the matter, it is necessary to point out that, as the Motion was received by the Registry during the weekend,<sup>19</sup> and as it was expressly endorsed with a statement that it was "being filed on an emergency basis" (a direct reference to Rule 28(D) as it then stood), it should have been referred by the Registry to the duty Judge as soon as it was reasonably possible to do so, without waiting until the Monday.<sup>20</sup> It is not apparent from the record whether this was done; all that is apparent from the record is that the duty Judge gave his decision on the Monday.

<sup>19</sup> According to the Tribunal's imprint on the facsimile, the Motion was received at 3.31 p.m. on Saturday, 4 August.

<sup>20</sup> The Appellant has brought to the attention of the Tribunal the difficulty which his counsel experienced in reaching the duty Judge over the weekend. Counsel says that he was unable to contact either the Registry or Chambers, and that it was only by information obtained from a colleague who had also acted as Defence counsel before the Tribunal that he was able to contact a Registry officer working in the Office of Legal Aid and Detention Matters through that officer's mobile telephone: Appellant's Brief, pars 41-43.

The normal method by which Defence counsel send documents to the Registry is by facsimile. Where, however, a document is being filed out of normal Registry hours on an emergency basis because relief is sought urgently, it will be necessary to speak to the Registry officer on duty at the time, who can then contact the duty Judge. The only persons who are on duty at the Tribunal 24 hours a day and seven days a week are the security officers. They have access to the Registry officer on duty, and it is to the security office that contact should be made. The relevant telephone number is 31 70 512 5200.

### Decision of the duty Judge

13. The duty Judge's decision as to whether to deal with an application out of normal Registry hours is a discretionary one once the Judge is satisfied as to its urgency.<sup>21</sup> Contrary to the Appellant's submission,<sup>22</sup> the finding of fact as to whether the matter is or is not urgent is, however, the same as any other finding of fact. The finding by the duty Judge that there was no urgency in the Appellant's application cannot be reversed on appeal unless it is one which no reasonable tribunal of fact could have reached.<sup>23</sup> This is so whether the finding related to the application being dealt with out of, or during, normal Registry hours.

14. Where a case has already been assigned to a Trial Chamber, urgency would usually be established where the subject matter of the application is of such a nature that the relief sought can only be granted if the application is determined at a time before that Trial Chamber is available to determine it, and where the applicant would suffer significant prejudice if the application is not determined within that time. The circumstances which could constitute urgency in any particular case cannot be precisely defined in advance. The circumstances before the duty Judge in the present case were that the Applicant's father had died on the Saturday and his funeral (which the Appellant sought leave to attend on provisional release) was to take place on the Tuesday. In most cultures (religious or otherwise), the death of a parent or other immediate family member is recognised as a severely emotional event for the survivors, for whom different rituals are designed to provide some relief.<sup>24</sup>

15. Given the significant nature of the specific circumstances of the present case, the Appellant's application for provisional release was one which had of necessity to be dealt with, so far as was reasonably possible, before the funeral was expected to take place – indeed, in time for the Appellant to attend the funeral if provisional release were appropriate. The application was made on the weekend leading to the Tribunal's three week Summer

<sup>21</sup> Rule 28(B) states: "The duty Judge [...] may refuse to deal with any application out of normal Registry hours if not satisfied as to its urgency" (emphasis added). Rule 28(D) states: "The duty Judge may, in his or her discretion, if satisfied as to the urgency of the matter, deal with an application in a case already assigned to a Chamber out of normal Registry hours as an emergency application."

<sup>22</sup> Appellant's Brief, pars 12.1, 20; p 11.

<sup>23</sup> *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999, par 64; *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgment, 24 Mar 2000, par 63; *Prosecutor v Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000 ("Furundžija Appeal"), par 37; *Prosecutor v Delalić*, IT-96-21-A, Judgment, 20 Feb 2001, pars 434-435, 459, 491, 595; *Prosecutor v Kupreškić*, IT-95-16-A, Appeal Judgment, 23 Oct 2001, par 30.

<sup>24</sup> Appellant's Brief, pars 37-38.

recess, and it was dealt with by the duty Judge either during that weekend or on the first day of the court recess. It was obviously impossible for the Trial Chamber to which the case had been assigned to deal with the application within the time available to enable the Appellant to attend his father's funeral if provisional release were appropriate. It was therefore necessarily an urgent application to be determined by the duty Judge. The Appeals Chamber is satisfied that the decision of the duty Judge in the present case that the Appellant had failed to satisfy him as to the urgency of the matter was one which no reasonable tribunal of fact could have reached.

16. The Appellant has also argued that the duty Judge abused the discretion given to him by Rule 65(B) to grant provisional release when dismissing the application,<sup>25</sup> in that the facts before the Judge were uncontested and the application was not opposed by the prosecution.<sup>26</sup> However, the Motion was filed only on 6 August, and it was dismissed by the duty Judge on the same day without waiting for any response from the prosecution. No weight can therefore be afforded to the silence of the prosecution in determining whether it was appropriate to grant provisional release. Rule 65(B) requires the Trial Chamber (here the duty Judge) – even if satisfied that the detainee in question, if released, would appear for trial and would not pose a danger to any victim, witness or other person – to exercise a discretion to grant or not grant provisional release.<sup>27</sup> The lack of opposition by the prosecution does not necessarily dictate the exercise of that discretion in favour of the applicant. It is, however, clear in the present case that, having determined that there was no urgency, the duty Judge never reached the stage where it became necessary for him to exercise that discretion. The appellant's argument that the duty Judge abused his discretion is rejected.

17. Before turning to the consequences of this Chamber's determination that the duty Judge's decision was erroneous, it is necessary to point out that, even if his decision that urgency had not been established had been correct, the order which the Judge made dismissing the Motion was also erroneous. Where an application is made in a case assigned

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<sup>25</sup> Rule 65(B) states: "Release *may* be ordered by a Trial Chamber [...] only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person" (emphasis added).

<sup>26</sup> Appellant's Brief, pars 5, 7, 31-32.

<sup>27</sup> Rule 65(B) is relevantly quoted in footnote 25, *supra*. See *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, par 22.



to a Trial Chamber, but the Trial Chamber is not available to deal with it so that it comes before the duty Judge, and where that Judge correctly refuses to deal with that application because he or she has not been satisfied that it was urgent, the only ruling which should or could be made by that Judge is to refuse to deal with that application as the duty Judge. It would then be left to the Trial Chamber to deal with the application when the Trial Chamber is available to do so. This would appear to be so whether the application is addressed to the Trial Chamber or to the duty Judge directly. If the application is dismissed by the duty Judge, the Trial Chamber would necessarily be prevented from dealing with it in the ordinary course. That is not the intention of Rule 28.

### **Consequences of this Chamber's determination**

18. The Appeals Chamber has power to reverse an erroneous finding of fact only where that error has occasioned a miscarriage of justice.<sup>28</sup> A miscarriage of justice will be demonstrated where the erroneous decision leads to a grossly unfair outcome in the particular judicial proceedings.<sup>29</sup> The erroneous finding that the Appellant's application for provisional release to attend his father's funeral was *not urgent* was without doubt grossly unfair, but whether the dismissal of the application of provisional release for that purpose was *in the result* grossly unfair depends upon whether the duty Judge, had he not made the erroneous finding in relation to urgency, would have proceeded to grant the Appellant's application for provisional release.

19. The Appellant did not seek to have the Appeals Chamber determine for itself whether the application should have been granted. Clearly such an issue, as the prosecution has submitted, is now moot.<sup>30</sup> What the Appellant has sought to have the Appeals Chamber do instead is to reverse the order dismissing the application for provisional release and to remand the matter to the Trial Chamber with directions that such provisional release be granted to enable him to visit his father's grave.<sup>31</sup> That purpose is different to that which was put before the duty Judge. Without a finding that the requirements of Rule 65(B) have been satisfied, no such direction could properly be given to the Trial Chamber, even if the purpose for which provisional release was sought were the same on both occasions.

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<sup>28</sup> Tribunal's Statute, Article 25.

<sup>29</sup> *Furundžija* Appeal, pars 37, 40.

<sup>30</sup> Respondent's Brief, par 9.

<sup>31</sup> Appellant's Brief, p 11.

20. The issue which the Appeals Chamber must now determine is whether the duty judge, had he not made the erroneous finding in relation to urgency, would have proceeded to grant the application for provisional release. If the application would have been dismissed in any event, there can be no miscarriage of justice because it had been dismissed upon a wrong basis. If a Trial Chamber acquits an accused upon a wrong basis (even a grossly unfair basis), but should have done so on another basis, there has been no miscarriage of justice, and the acquittal would not be reversed.<sup>32</sup> In determining this issue, the Appeals Chamber is entitled to have regard to the events which have occurred following the duty Judge's decision.

21. The Trial Chamber has since determined the two separate applications made by the Appellant for provisional release referred to earlier.<sup>33</sup> The purpose for which the appellant first sought release was to attend a memorial service for his father.<sup>34</sup> The Trial Chamber (by majority) dismissed the application upon the basis that the majority was not satisfied that the Appellant would return and appear for trial if he were released.<sup>35</sup> The second application was for provisional release generally until the trial.<sup>36</sup> The Trial Chamber (again by majority) dismissed the application upon the basis that the majority was not satisfied that the Appellant, if released, would appear for trial and, moreover, that he would not pose a danger to any victim, witness or other person.<sup>37</sup> The Appeals Chamber refused leave to appeal from that second decision.<sup>38</sup> A yet further application for release, based upon a change in the

<sup>32</sup> Statute of the Tribunal, Article 25.1(b).

<sup>33</sup> Paragraph 7, *supra*.

<sup>34</sup> Notice of Motion for Provisional Release [to] Attend Memorial Service and Thereafter Return to Detention, 14 Aug 2001.

<sup>35</sup> Trial Chamber Transcript, 28 Aug 2001, pp 105-107.

<sup>36</sup> Notice of Motion for Provisional Release Filed by the Defence, 9 Aug 2001. Two addenda to the motion were filed on 20 Sept 2001.

<sup>37</sup> Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 Oct 2001, par 23. Judge Robinson dissented upon the basis of his view that, since the removal from Rule 65(B) in November 1999 of the requirement of exceptional circumstances for the grant of provisional release, the onus of proof lies upon the prosecution to establish that the remaining requirements of Rule 65(B) have not been met: Dissenting Opinion of Judge Patrick Robinson, par 16.

<sup>38</sup> Decision on Application for Leave to Appeal, 14 Dec 2001, p 4, referring to its earlier determination in *Prosecutor v Brđanin & Talić*, IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 Sept 2000 "Brđanin Provisional Release Appeal Decision", p 3: "CONSIDERING that under sub-Rule 65(B) of the Rules, the burden of proof is on an applicant to satisfy a Trial Chamber that provisional release should be ordered".

membership of the Trial Chamber,<sup>39</sup> has also been dismissed.<sup>40</sup> In none of those cases was reliance placed upon the dismissal of the Motion by the duty Judge.

22. The necessary inference from these facts is that, *had* the duty judge proceeded to consider the requirements of Rule 65(B), he would have rejected the application on the basis that the Appellant was unable to establish that he would return and appear for trial if he were released. There was nothing of a sufficiently exceptional nature in the material available to have warranted the exercise of the discretion given by Rule 65(B) to grant provisional release to the Appellant to attend his father’s funeral despite the fact that he had not established that he would return.<sup>41</sup> Accordingly, in the circumstances of this case, the Appeals Chamber is not satisfied that the erroneous finding of fact by the duty Judge as to the urgency of the Motion for provisional release to attend his father’s funeral occasioned a miscarriage of justice. The appeal must therefore be dismissed.

**Disposition**

23. The appeal is dismissed.

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

Dated this 26<sup>th</sup> day of February 2002,  
At The Hague,  
The Netherlands.

(signed)

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Judge Claude Jorda  
Presiding

**[Seal of the Tribunal]**

<sup>39</sup> Renewed Motion for Provisional Release, 29 Dec 2001.

<sup>40</sup> Decision on Motion for Provisional Release, 24 Jan 2002, p 2.

<sup>41</sup> In *Prosecutor v Djukić*, IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 Apr 1996, at p 4, the Trial Chamber granted to the accused provisional release solely upon humanitarian grounds in the light of the extreme gravity of the accused’s medical condition, in that he was suffering from an incurable illness in its terminal phase. In general, however, the discretion would not be exercised in favour of an applicant who has failed to establish one or other of the requirements of Rule 65(B): *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000; leave to appeal refused by the Appeals Chamber: *Brđanin* Provisional Release Appeal Decision, p 3: “FINDING that the Applicant had failed to demonstrate that the Trial Chamber may have erred in its application of Rule 65 in holding that the Applicant failed to discharge the burden [of proof] in this case [...]”.