



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-AR65.13
Date: 20 January 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Bakone Justice Moloto

Acting Registrar: Mr John Hocking

Decision of: 20 January 2009

PROSECUTOR

v.

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

PUBLIC

**REASONS FOR DECISION ON PROSECUTION'S APPEAL OF THE TRIAL
CHAMBER'S 10 DECEMBER 2008 DECISION ON PRLIĆ PROVISIONAL RELEASE
DURING WINTER RECESS AND CORRIGENDUM**

Office of the Prosecutor

Mr Kenneth Scott
Mr Douglas Stringer

Counsel for the Accused

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Karim Khan for Bruno Stojić
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić and Mr Nicolas Stewart for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Čorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for 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 seized of the “Prosecution’s Appeal of the Trial Chamber’s 10 December 2008 Decision to Provisionally Release Accused Prlić During the Winter Recess 2008-2009” (“Appeal”), filed confidentially on 11 December 2008 against the “*Décision relative à la demande de mise en liberté provisoire de l’Accusé Prlić*” (“Impugned Decision”), issued confidentially by Trial Chamber III (“Trial Chamber”) on 10 December 2008 which granted provisional release to Jadranko Prlić (“Prlić”) between 22 and 28 December 2008 under certain specified conditions in Zagreb, Croatia.¹ Prlić responded confidentially on 14 December 2008.² The Prosecution replied on 17 December 2008.³

2. On 18 December 2008, the Appeals Chamber issued a decision granting the Appeal by majority and overturning the Impugned Decision, advising that detailed reasons would follow (“Appeal Decision”).⁴ The procedural background, the standard of review and the applicable law were set out in the Appeal Decision.⁵

I. ARGUMENTS OF THE PARTIES

3. The Prosecution appeals the Impugned Decision on two grounds. First, it posits that the Trial Chamber committed a discernible error in finding that the medical conditions of Prlić’s father and brother provide sufficient compelling humanitarian grounds to justify provisional release.⁶ Second, the Prosecution submits that the Trial Chamber committed a discernible error in finding that Prlić’s unauthorised meeting with Witness Neven Tomić (“Tomić”) while on provisional release in the summer of 2008 was coincidental and that Prlić’s previous meeting with this witness did not violate the applicable terms of provisional release.⁷ It avers that based on these findings, the Trial Chamber erroneously concluded that Prlić does not pose a flight risk and that the level of monitoring and surveillance provided by the Croatian authorities is sufficient to offset that risk.⁸

4. In support of its first ground, the Prosecution submits that Prlić’s medical documentation attached in support of his request for provisional release does not demonstrate that compelling

¹ Impugned Decision, Confidential Annex, p. 18.

² Jadranko Prlić’s Response to Prosecution’s Appeal of the Trial Chamber’s 10 December 2008 Decision to Provisionally Release Accused Prlić During the Winter Recess 2008-2009, confidentially filed on 15 December 2008 (“Response”).

³ Prosecution Reply to Jadranko Prlić Response to Prosecution’s Appeal of the Trial Chamber’s 10 December 2008 Decision to Provisionally Release Accused Prlić During the Winter Recess 2008-2009, 17 December 2008 (“Reply”).

⁴ Decision on Prosecution’s Appeal of the Trial Chamber’s 10 December 2008 Decision on Prlić Provisional Release During Winter Recess, 18 December 2008.

⁵ Appeal Decision, paras 2-4, 5-6, and 7-9, respectively.

⁶ Appeal, paras 2(a), 12-28.

⁷ Appeal, paras 2(b), 29-39.

⁸ Appeal, paras 2(c), 40-48.

humanitarian reasons justify such release.⁹ The Prosecution argues that in its 11 March 2008 Decision the Appeals Chamber rejected a previous request based on very similar grounds and supported by very similar medical documentation, and that a new application was later granted, for the summer 2008 recess, on the basis of new evidence.¹⁰ In short, the Prosecution argues that the Trial Chamber committed a discernible error in finding that compelling humanitarian reasons justify Prlić's provisional release based on grounds and documentation which were previously found to be insufficient by the Appeals Chamber.¹¹

5. In response, Prlić argues that the Appeal should be dismissed because the Prosecution fails to substantiate its claim that the Trial Chamber erred in its consideration of the evidence before it in finding sufficient humanitarian grounds to support its discretionary decision to grant provisional release. He recalls that his most recent provisional release (during the summer recess 2008) was granted by the Trial Chamber based on "similar" medical records, a decision which the Prosecution did not appeal.¹² The Prosecution replies to this argument, remarking that the instant medical records present a situation more akin to the one considered insufficient by the Appeals Chamber in March 2008, rather than the one warranting provisional release in the summer of that year.¹³

6. In relation to the second ground of appeal, the Prosecution first recalls that in granting provisional release on all previous occasions, the Trial Chamber has ordered him, *inter alia*, not to have any contact with potential witnesses.¹⁴ Despite these orders, the Prosecution continues, Tomić testified before the Tribunal that he met Prlić at least eight times while the latter was on provisional release, including during the summer of 2008.¹⁵ In the Prosecution's view, since the witness list of Prlić was filed on 31 March 2008, this amounts to a breach of the conditions of provisional release.¹⁶ It argues that the Trial Chamber's finding that the meeting in summer 2008 could have happened by chance is implausible.¹⁷ Moreover, on the basis of the facts that Tomić and Prlić were close associates during the war and that Counsel for Prlić had met on several occasions with this potential witness, the Prosecution adds that, even before March 2008, Prlić must have considered Tomić a potential witness.¹⁸ The Prosecution therefore considers the Trial Chamber's finding in this

⁹ Appeal, paras 17, 19, 28, referring to *Prosecutor v. Prlić et al.*, Case No IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008 ("11 March 2008 Decision") and *Prosecutor v. Prlić et al.*, Case No IT-04-74-AR65.8, Decision on "Prosecution's Appeal from *Décision relative à la demande de mise en liberté provisoire de l'Accusé Prlić* Dated 7 April 2008", 25 April 2008.

¹⁰ Appeal, paras 14-19, 27-28.

¹¹ Appeal, paras 2(a), 14-19, 27-28. See also Reply, para. 6.

¹² Response, paras 1(A), 2-4.

¹³ Reply, paras 3-4.

¹⁴ Appeal, para. 29.

¹⁵ Appeal, para. 30.

¹⁶ Appeal, paras 31-32.

¹⁷ Appeal, paras 37-38.

¹⁸ Appeal, paras 33 and 35-36.

respect as a “patently incorrect conclusion of fact”,¹⁹ which in turn impinges on the assessment of the flight risk.²⁰ Due to the circumstances that (i) Prlić showed disregard for the conditions of provisional release imposed as well as ability to hide such a breach; and (ii) Croatian authorities were not able to prevent this breach from occurring, and did not even report the situation, the Prosecution contends that the present monitoring is insufficient to offset the increased risk of flight as the trial approaches its conclusion.²¹

7. Prlić argues that the Prosecution has not shown that the finding on the meeting in summer 2008 was clearly erroneous. He argues that the Trial Chamber meticulously analyzed the evidence, held an *ex parte* hearing, and seriously dealt with the issue.²² He further avers that the suggestion that he knew that Tomić was a potential witness is not based on any evidence.²³ Thus, he concludes, the Trial Chamber’s conclusion that no flight risk exists was correct.²⁴ The Prosecution replies to these arguments that “evidence” gathered at the *ex parte* hearing may not be used against the Prosecution, since the hearing took place in its absence.²⁵

II. DISCUSSION

8. The Appeals Chamber first notes the fact that Prlić met with Tomić while on provisional release despite the clear conditions imposed by the Trial Chamber not to meet with any *potential* witness.²⁶ As mentioned above, the Impugned Decision discusses the issue of the meetings between Prlić and Tomić at length.²⁷ It concludes that, as regards the meetings which took place before 31 March 2008 (*i.e.*, the date Counsel submitted the list of witnesses), Prlić could not have known that Tomić would be a witness; therefore, no breach of the provisional release conditions ensued.²⁸ It further concluded that the “accidental” meeting in the summer of 2008, after the list of witnesses had been submitted with Tomić on it, warranted sanctions but did not have a bearing on the flight risk of Prlić.²⁹

9. While the Appeals Chamber considers it extremely serious that Prlić met with, and engaged in conversation with, Tomić during his provisional release in the summer of 2008³⁰ as well as failed

¹⁹ Appeal, para. 36.

²⁰ Appeal, paras 40-44.

²¹ Appeal, paras 45-48.

²² Response, para. 8.

²³ Response, paras 9-10.

²⁴ Response, paras 11-16.

²⁵ Reply, para. 8.

²⁶ Appeal, paras 29-33; Response, para. 8.

²⁷ See, in particular, Impugned Decision, paras 32-34 and 48-50.

²⁸ Impugned Decision, para. 32.

²⁹ Impugned Decision, paras 34 and 48-50.

³⁰ Impugned Decision, para. 33.

to notify Counsel and the Trial Chamber about what had taken place,³¹ it will defer to the Trial Chamber's findings in this respect.

10. The Appeals Chamber nonetheless finds that, considering the circumstances, including the positions of the two individuals during the indictment period³² and their long-time acquaintance,³³ no reasonable trier of fact could have concluded that Prlić, even before 31 March 2008, was not aware that Tomić would be at least a *potential* witness, be it for the Prosecution, the Defence or as a Chamber witness. It is clear that, due to their respective positions and their relations since the time relevant to this case – even leaving aside the unopposed contention that Tomić had met with Counsel on several occasions before he was actually formally put on the list of witnesses³⁴ – Prlić must have contemplated that Tomić would be considered capable of providing evidence with probative value specifically relevant to his case. The breach of the order puts into doubt the reliability of Prlić in abiding by the conditions of provisional release.

11. In addition to any bearing on the question of the risk of flight, the possibility that potential witnesses are unduly influenced in such circumstances – a possibility clearly envisaged by the Trial Chamber in its orders that Prlić should avoid meeting with them – is one of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision under Rule 65(B) of the Rules.

12. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber committed a discernible error in assessing the breach of the conditions of provisional release imposed upon Prlić and its consequences on the requirements of Rule 65(B) of the Rules. On this basis alone, the Impugned Decision is overturned and the Appeal granted. There is therefore no need to consider the arguments of the parties in relation to the issue of “humanitarian circumstances”.

³¹ Impugned Decision, Separate Opinion of Judge Antonetti, at p. 21.

³² Compare the testimony of Tomić (for example, T. 34082-34087, 34093-34098) with *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-I, Amended Indictment, 16 November 2005, paras 2-3 and 15.

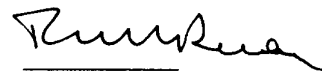
³³ Appeal, para. 35 and Response, para. 9.

³⁴ Appeal, para. 35.

III. DISPOSITION

13. The Appeals Chamber **DECLARES** that the Appeal was granted for the above-mentioned reasons and that the disposition of the Appeal Decision should read: “The Appeals Chamber **GRANTS** the Appeal and overturns the Impugned Decision. Reasons will follow in due course.”

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



Judge Fausto Pocar
Presiding Judge

Done this 20th day of January 2009,
At The Hague,
The Netherlands.

[Seal of the Tribunal]