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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-95-13/1-AR65

Date: 8 October 2002

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Shahabuddeen, Presiding**
Judge Hunt
Judge Güney
Judge Pocar
Judge Meron

Registrar: **Mr. Hans Holthuis**

Decision of: **8 October 2002**

PROSECUTOR

v.

MILE MRKŠIĆ

DECISION ON APPEAL AGAINST REFUSAL TO GRANT PROVISIONAL RELEASE

Counsel for the Prosecutor:
Mr. Jan Wubben
Mr. Mark J. McKeon

Counsel for the Defence:
Mr. Miroslav Vasić

1. Pursuant to leave granted by a Bench of the Appeals Chamber,[1] Mile Mrkšić ("Appellant") appealed against Trial Chamber II's "Decision on Mile Mrkšić's Application for Provisional Release", rendered on 24 July 2002 ("Appeal").[2] On 6 September 2002 the Prosecution filed the "Prosecution's Response to Accused Mrkšić's Appeal of the Trial Chamber's Decision to Deny Provisional Release", and on 12 September 2002 the Appellant filed the "Defence Reply to 'Prosecution's Response to Accused Mrkšić's Appeal on the Trial Chamber's Decision to Deny Provisional Release'".

First ground of appeal

2. The Appellant submits that the Decision of the Trial Chamber is out of line with other decisions on provisional release.

3. Rule 65 of the Rules of Procedure and Evidence ("Rules") provides, in relevant part, as follows:

> A) Once detained, an accused may not be released except upon an order of a Chamber.
>
> B) Release may be ordered by a Trial Chamber only after giving the host country and the State the opportunity to be heard, and 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.

4. The Trial Chamber stated in its Decision that it was not satisfied that, if released, the Appellant would appear for trial. It considered three factors in particular with regard to the likelihood of his appearance. First of all, it examined the Appellant's surrender to the Tribunal, which, coming as it did six years after the indictment was made known to him, the Trial Chamber found to have "only limited impact" upon its Decision. Secondly, the Trial Chamber considered guarantees offered by the Federal Republic of Yugoslavia ("FRY") and the Republic of Serbia designed to ensure co-operation with the terms of any provisional release, including the promise to re-arrest the Appellant if he tried to escape: these the Trial Chamber treated "with much caution" due to the fact that the governments concerned had arrested neither the other two co-accused in the case nor "other high-ranking individuals indicted by the Tribunal". Thirdly, the Trial Chamber declared itself not satisfied with the Appellant's own personal undertakings that he would return for trial since he had rejected the authority of the Tribunal during the six years when he knew of the indictment against him and yet failed to surrender for trial.

[1] "Decision on Application for Leave to Appeal", 26 August 2002.

5. The Appellant submits that the Trial Chamber erred in the weight it attached to these factors in reaching its Decision. He compares his case with others in which provisional release was granted,[3] and claims that these same factors weighed differently, and in favour, of the applicants in those other cases. He submits that the Tribunal is applying "double standards for identical issues".

6. The Prosecution makes the general point that comparison with other cases is of limited value as the various factors which the Chambers take into account will weigh differently in relation to different accused. So with regard to the Appellant's arguments on the issue of surrender, it submits that "[n]o single factor can be given controlling weight in deciding a provisional release motion".[4] In relation to the weight to be attached to the guarantees from the FRY and the Republic of Serbia, the Prosecution points again to the specificity of each case, and submits that the "question remains whether *in this case* the presence of guarantees issued by the FRY and the Republic of Serbia significantly softened the risks inherent in the fact that the Tribunal lacks the ability to re-arrest Mrkšić once he is released".[5]

7. The Appellant's allegations of double standards are developed in some detail, in particular with regard to the guarantees provided by the FRY and the Republic of Serbia. According to the Appellant, these were recognised by the Trial Chambers in the other decisions mentioned but were not accepted as "valid" in his own case.[6] A reading of the Trial Chamber's Decision in the present case demonstrates that it did not refuse to accept the guarantees of those two governments because they were not "valid". Indeed, the Trial Chamber held that the content of those guarantees "largely complies with that which the Trial Chamber would generally require for the purposes of provisional release".[7] What the Trial Chamber decided was that, despite the guarantees provided by those two governments, it was

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[2] "Defence Brief on Appeal against Trial Chamber's Decision to Deny Provisional Release", 30 August 2002.
[3] *Prosecutor v. Krajišnik & Plavšić* IT-00-39 & 40-PT, "Decision on Biljana Plavšić's application for provisional release", 5 September 2001; *Prosecutor v. Blagojević, Obrenović & Jokić* IT-02-53-AR65, "Decision on application by Dragan Jokić for Provisional Release", 28 May 2002; *Prosecutor v. Šainovic & Ojdanić* IT-99-37-PT, "Decision on Applications of Nikola Šainović and Dragoljub Ojdanić for Provisional Release", 26 June 2002 ("Šainović Decision"); *Prosecutor v. Gruban* IT-95-4-PT, "Decision on request for pre-trial provisional release", 17 July 2002.
[4] "Prosecution's Response to Accused Mrkšić's Appeal of the Trial Chamber's Decision to Deny Provisional Release", 6 September 2002, §28.
[5] *Ibid.*, §36.
[6] Appeal, § 10.
[7] Decision on Mile Mrkšić's Application for Provisional Release, 24 July 2002 ("Trial Chamber Decision"), § 44.

not satisfied that the accused would appear for trial.[8] It did so, as mentioned above, because it felt unable to ignore the fact that, to date, neither government has arrested two co-accused in this present case, nor "other high-ranking individuals indicted by the Tribunal".

8. This fact was relevant in this case, where the Trial Chamber had expressed doubts as to whether Mrkšić could be treated as having voluntarily surrendered. Whether he had voluntarily surrendered is relevant to the degree of cooperation which could be expected of Mrkšić when the time came for him to appear for trial. The Trial Chamber's finding concerning that degree of cooperation therefore necessarily placed some importance upon the reliability of the guarantees which had been provided by the two governments. But the suggestion by Mrkšić that the Trial Chamber was applying double standards by not being satisfied that he would appear for trial despite the provision of those guarantees demonstrates a misapprehension as to how Trial Chambers are required to approach the reliability of such guarantees.

9. The reliability of a guarantee given by the relevant authority must be determined in relation to the circumstances which arise in the particular case. The issue in each particular case is what would occur if the relevant authority were obliged under its guarantee to arrest the accused person seeking provisional release in that case. A Trial Chamber may accept such a guarantee as reliable in relation to Accused A, whereas the same or another Trial Chamber may decline to accept that the same authority's guarantee as reliable in relation to Accused B, without there being any inconsistency (or "double standards") involved in those two decisions. To give two easy examples: Accused A may have surrendered voluntarily as soon as he learnt that he had been indicted and may have cooperated with the Office of the Prosecutor in a way which demonstrated his *bona fide* intention to appear for trial. The reliability of the guarantee provided by the relevant authority is of less importance in such a case, and may more easily be accepted as sufficiently reliable in relation to this particular accused person. On the other hand, Accused B may have been a high level government official at the time he is alleged to have committed the crimes charged, and he may have since then lost political influence but yet possess very valuable information which he could disclose to the Tribunal if minded to cooperate should he be kept in custody. There would be a substantial disincentive for that authority to enforce its guarantee to arrest that particular accused if he did not comply with the conditions of his provisional release. A finding that the

[8] The Appeals Chamber here adopts the words of Rule 65(B), rather than the words used by the Trial Chamber, which may themselves be open to misinterpretation.

guarantee is not sufficiently reliable in the case of Accused B would be completely reasonable, despite the finding that it was reliable in relation to Accused A.

10. Academic and opinion writers and the interested public may, of course, nevertheless wrongly perceive an inconsistency in those two cases in relation to the same authority, and criticise the Tribunal for what has been wrongly perceived. Trial Chambers should take care to explain their decisions in a way to avoid such criticisms, but they cannot be expected to change their view of the facts in a particular case in order to avoid unfounded criticism. Nor should the Appeals Chamber interfere with either such case simply because of the possibility of such criticism.

11. There are many factors which are relevant to a Trial Chamber's determination of the reliability of the guarantee provided by the authority in question. Such reliability must be determined not by reference to any assessment of the level of cooperation by that authority with the Tribunal generally, but in relation to what would happen if that authority were obliged under its guarantee to arrest the particular accused in question. What would happen in the circumstances of that particular accused in question is a fact in issue to be decided when determining whether that accused will appear for trial. The general level of cooperation by the authority with the Tribunal does have some relevance in determining whether it would arrest the particular accused in question, but it is not itself a fact in issue. It is therefore both unnecessary and unwise to include in the Trial Chamber's decision a separate finding concerning that general level of cooperation – unnecessary because any such finding can only be applicable to a particular point in time, and unwise because it could easily be misunderstood by the parties in relation to subsequent applications for provisional release.

12. The reliability of guarantees by any particular authority necessarily depends to some extent upon the vagaries of politics and of personal power alliances within the relevant authority as well as upon the impact of any international pressure (including financial pressure) upon the authority at any time, and indeed even the likelihood in the future of a change of government in any particular case. A difference in cooperation as a result of a change of government is a fact of life (even though a political one) which must be taken into account in determining whether a guarantee will be enforced by an authority in relation to the accused person in question.

13. Once this approach is understood, and provided that the Trial Chambers make such an approach clear in their decisions, no suggestion of inconsistency (or, more gravely, of double standards) can fairly be made.

14. Under Article 25 of the Statute of the Tribunal, the Appeals Chamber has jurisdiction to deal with errors of fact which have occasioned a miscarriage of justice, or errors on a question of law invalidating the decision. The finding of the Trial Chamber that it was not satisfied that the Appellant would appear for trial is a finding of fact. Such a finding of fact will be reversed only if the party challenging it demonstrates that it was one which no reasonable tribunal of fact could have reached, or that the finding was invalidated by an error of law, or that the evaluation of the evidence was wholly erroneous.

15. The Appeals Chamber is unable to characterise the Trial Chamber's Decision in this case in this way. The fact that other Trial Chambers have reached different conclusions in different cases, having taken similar factors into account, does not mean that this Trial Chamber has reached a conclusion which no reasonable tribunal of fact could have reached. The Trial Chamber evaluated the circumstances which it thought to be relevant and reached a conclusion which was open to it.

16. This ground of appeal therefore fails.

Second ground of appeal

17. The Appellant further alleges an error of law in the Trial Chamber's assessment of the length of his pre-trial detention. The Trial Chamber considered the relevant period to be length of time that the Appellant had spent in detention until the delivery of its Decision on his application for provisional release (the actual period). The Appellant claims that the relevant period is rather until the probable start of trial (the probable period). The Prosecution responds that the only thing the Trial Chamber could look at was the actual period, as it would have been "rank speculation" for it to do otherwise.

18. It is true that the length of pre-trial detention raised by the Appellant in his motion before the Trial Chamber was the probable period of detention until the start of the trial.[9] The

[9] "Defence Motion for Provisional Release", 23 May 2002, §23; transcript of motion hearing 19 July 2002 p.17 lines 8-12.

Trial Chamber appeared to acknowledge this in its initial consideration of the matter, as it held that:

> The Chamber must, in this context, consider the Defence submission that it should take into account the likelihood that the Accused might face a slightly longer pre-trial procedure in the light of the pending amendment to the indictment and the Schedule of this Trial Chamber.[10]

However, the Chamber did not in fact consider the probable period, but rather went on to assess whether the actual period the Appellant had spent in pre-trial detention breached his right to trial within a reasonable time or to release, as reflected in article 9 of the International Covenant on Civil and Political Rights and article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

19. It is of course open to the Trial Chamber to take the actual period of pre-trial detention into account in considering an application for provisional release, in particular in relation to any breach of the above-mentioned right. However, this was not the argument put forward by the Appellant. The Appellant did not submit that the Trial Chamber was obliged to release him because his right to trial within a reasonable time had been breached by the actual period he had spent in detention, but rather that the Trial Chamber should take into account the probable period he would spend in pre-trial detention.

20. The Appeals Chamber understands the Appellant's submission to have been directed to the exercise of the Trial Chamber's discretion to release him. As the Appellant submits, some other decisions of this Tribunal on provisional release have taken the probable length of pre-trial detention into account in the exercise of this discretion.[11] However, even if the Trial Chamber had considered the correct period, it was far too early for it to determine whether that period was excessive in the circumstances.

21. This ground of appeal therefore fails.

Third ground of appeal

22. The last ground of appeal put forward relates to the health of the Appellant, who has a heart condition. He claims that the Trial Chamber's assessment of his medical condition was erroneous.

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[10] "Decision on Mile Mrkšić's Application for Provisional Release", 24 July 2002, §48.
[11] See Šainović Decision, §17; IT-00-39 & 40-PT *Prosecutor v Krajišnik* "Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release", 8 October 2001, §22.

23. The Trial Chamber held, on the basis of medical reports, that the Appellant's condition did not warrant his release, and that nothing in the record indicated that the treatment he would receive in detention was inferior to the treatment he could receive in Belgrade. The Appellant submits that the stress of being detained and the diet he receives in the Detention Unit contribute to his high blood pressure and hinder his recovery from a recent heart operation. The Prosecution concedes that, although health is not listed as an issue in Rule 65, the Tribunal has previously considered the question of whether an applicant's state of health is "incompatible with any form of detention" (see paragraph 21, *supra*). It goes on to assert that the treatment the Appellant requires can be obtained in the Netherlands, and that his contention that detention is causing or aggravating his condition is unsupported by the medical reports.

24. The Appeals Chamber notes that the medical reports do find that the Appellant's condition may be partly attributable to his detention. In particular, Dr. van Dijkman's report states that:

> Naturally, recent detention has resulted in considerable stress. Possibly as a result also high blood pressure.[12]

However, this report goes on to summarise the patient's situation as "currently good" and to prescribe medication for the high blood pressure. The Trial Chamber's conclusions from the reports that the Appellant can receive adequate treatment in the UN Detention Unit are not of such nature that no reasonable tribunal of fact could have reached them.

25. This ground of appeal thus also fails.

[12] 12 July 2002, p.1.

FOR THE FOREGOING REASONS,

THE APPEALS CHAMBER

DISMISSES the Appeal.

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

Mohamed Shahabuddeen
Presiding Judge

Dated this eighth day of October 2002
At The Hague,
The Netherlands.

[Seal of the Tribunal]