



Original: **English**

No.: **ICC-RoR220-04/22**

Date: **18 April 2023**

Date of original: **1 March 2023**

THE PRESIDENCY

Before: Judge Piotr Hofmański, President
 Judge Luz del Carmen Ibáñez Carranza, First Vice-President
 Judge Antoine Kesia-Mbe Mindua, Second Vice-President

SITUATION IN DARFUR, SUDAN

IN THE CASE OF
THE PROSECUTOR v. ALI MUHAMMAD ALI ABD-AL-RAHMAN ('ALI KUSHAYB')

Public

Public redacted version of “Decision on the ‘New Motion for Judicial Review of Registrar’s Second Decision’, dated 12 January 2023 (ICC-RoR220-04/22-5-Conf)” dated 1 March 2023 (ICC-RoR220-04/22-6-Conf-Exp)

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Mr Cyril Laucci

Mr Iain Edwards

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Pieter Vanaverbeke

Victims and Witnesses Unit

Detention Section

Mr Harry Tjonk

**Victims Participation and Reparations
Section**

Other

Mr Marc Dubuisson

Mr Christian Mahr

The Presidency of the International Criminal Court (the ‘Court’) has before it the application filed by Mr Ali Muhammad Ali Abd-Al-Rahman (‘Mr Abd-Al-Rahman’) dated 12 January 2023, seeking judicial review pursuant to regulation 220 of the Regulations of the Registry (the ‘Regulations’) of a decision of the Registrar issued on 5 January 2023 (the ‘Application’).¹

I. PROCEDURAL HISTORY

1. On 13 December 2022, Mr Abd-Al-Rahman sent a letter to the Registrar, requesting urgent action with regard to [REDACTED] of his children who had been prevented from boarding a flight in [REDACTED] to The Netherlands, for the purpose of a family visit funded by the Trust Fund for Family Visits, given the lack of a document from persons with [REDACTED].²
2. On 14 December 2022, the Registrar, by way of letter, informed Mr Abd-Al-Rahman, *inter alia*, that the Registry had followed established procedures and assisted with booking the travel arrangements and the visa requirements, and that although the visit of the [REDACTED] children was cancelled, they remain able to request a funded family visit for the future (the ‘Registrar’s Decision of 14 December 2022’).³
3. On 15 December 2022, Mr Abd-Al-Rahman filed an application for judicial review, requesting the Presidency to quash the Registrar’s Decision of 14 December 2022.⁴ On 15 December 2022, the Presidency, by majority, rejected this application *in limine* as being not properly before it in accordance with Regulation 220 of the Regulations (the ‘Decision of 15 December 2022’).⁵ On 16 December 2022, Mr Abd-Al-Rahman requested the Presidency to reconsider the Decision of 15 December 2022.⁶ On 19

¹ Defence for Mr Abd-Al-Rahman, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), New Motion for Judicial Review of Registrar’s Second Decision, 12 January 2023, ICC-RoR220-04/22-5-Conf.

² Defence for Mr Abd-Al-Rahman, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Annex B, 15 December 2022, ICC-RoR220-04/22-1-Conf-Exp-AnxB, p. 2, *annexed to* Defence for Mr Abd-Al-Rahman, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Urgent Motion for Judicial Review of Registrar’s Decision, 15 December 2022, ICC-RoR220-04/22-1-Conf-Exp (the ‘Motion of 15 December 2022’).

³ Defence for Mr Abd-Al-Rahman, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Annex A, 15 December 2022, ICC-RoR220-04/22-1-Conf-Exp-AnxA, pp. 2-3, *annexed to* Motion of 15 December 2022.

⁴ Motion of 15 December 2022.

⁵ Presidency, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Decision on the ‘Urgent Motion for Judicial Review of Registrar’s Decision’, dated 15 December 2022 (ICC-RoR220-04/22-1-Conf-Exp), 15 December 2022, ICC-RoR220-04-22-2-Conf-Exp, para. 5, p. 5.

⁶ Defence for Mr Abd-Al-Rahman, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Urgent Request for Reconsideration of the Presidency’s [sic] Decision, 16 December 2022, ICC-RoR220-04/22-3-Conf-Exp, p. 5.

December 2022, the Presidency, by majority, dismissed this request, but noted that it was open to Mr Abd-Al-Rahman to address a complaint for review to the Registrar under Regulation 218(1) of the Regulations, which he had, thus far, failed to do (the ‘Decision of 19 December 2022’).⁷

4. On 21 December 2022, Mr Abd-Al-Rahman made a complaint to the Registrar pursuant to regulation 218(1) of the Regulations, seeking review of the Registrar’s Decision of 14 December 2022 (the ‘Complaint’).⁸
5. On 5 January 2023, the Registrar issued a decision dismissing the Complaint as inadmissible and, in any event, unsubstantiated (the ‘Impugned Decision’).⁹
6. On 12 January 2023, Mr Abd-Al-Rahman filed the present Application for judicial review of the Impugned Decision pursuant to regulations 218(6) and 220(1) of the Regulations.¹⁰ The Registrar did not submit any observations pursuant to regulation 220(4) of the Regulations.

II. THE IMPUGNED DECISION

7. In the Impugned Decision, the Registrar rejects Mr Abd-Al-Rahman’s Complaint as inadmissible, on the basis that: (i) regulation 217(1) of the Regulations¹¹ provides that a detained person may make a complaint against ‘any matter concerning his or her detention’, which may cover ‘any litigation as to the *granting or refusal* of a funded family visit’, which is not the issue at stake in the present case since the family visit was

⁷ Presidency, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Decision on the ‘Urgent Request for Reconsideration of the Presidency’s Decision’, dated 16 December 2022 (ICC-RoR220-04/22-3-Conf-Exp), 19 December 2022, ICC-RoR220-04/22-4-Conf-Exp, para. 4, p. 5.

⁸ Defence for Mr Abd-Al-Rahman, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Annex A, 12 January 2023, ICC-RoR220-04/22-5-Conf-AnxA, p. 6, *annexed to* Application, ICC-RoR220-04/22-5-Conf.

⁹ Defence for Mr Abd-Al-Rahman, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (‘Ali Kushayb’), Annex B, 12 January 2023, ICC-RoR220-04/22-5-Conf-AnxB, paras 3, 21, *annexed to* Application, ICC-RoR220-04/22-5-Conf.

¹⁰ Application, ICC-RoR220-04/22-5-Conf.

¹¹ Although the Registrar refers to regulation 218(1) of the Regulations at paragraph 13 of the Impugned Decision, the Presidency understands that the Registrar refers, rather, to regulation 217(1) of the Regulations. *See* Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 13.

granted;¹² and (ii) Mr Abd-Al-Rahman fails to identify which provisions of the Court's legal framework relating to his detention have been violated.¹³

8. Turning to the merits of the Complaint, the Registrar recalls that paragraph 50(h) of the *Detention Centre Policy on Family Visits pursuant to Regulation 179(1) of the Regulations of the Registry* (the 'Family Visits Policy') allows for discretionary exception to paragraph 50(a), which provides that the Court 'shall bear the cost of the visas for the family members, if required'.¹⁴ The Registrar argues that since visas were granted to the family members participating in the family visit, at the expenses of the Court,¹⁵ he had no obligation, based on paragraph 50(h) of the Family Visits Policy, to re-organise a new family visit for the children with an accompanying adult out of the funds of the Trust Fund for Family Visits.¹⁶
9. The Registrar further submits that Mr Abd-Al-Rahman could not rely on paragraph 31 of the Family Visits Policy, which provides that '[t]he ICC may assist with the visa application, if required', to conclude that the Registrar had an obligation to grant the Complaint.¹⁷
10. The Registrar considers that 'by granting and facilitating the funded visit, the Registry fully discharged its obligations under the Court's legal framework, including the Family Visits Policy' and that once the 'visit had been granted and facilitated – as it was the case –, the Court in general and the Registrar in particular, had no further obligation towards [Mr Abd-Al-Rahman] and his [REDACTED] minor children for the purpose of implementing the said visit'.¹⁸ As a result, once the visit was interrupted in [REDACTED] due to the lack of [REDACTED], 'the said visit [...] was rightly cancelled'.¹⁹
11. The Registrar also rejects Mr Abd-Al-Rahman's arguments pertaining to an alleged violation of article [REDACTED] of the Agreement on Cooperation between the International Criminal Court and [REDACTED] (the 'Cooperation Agreement with

¹² Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 13.

¹³ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 13.

¹⁴ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 14.

¹⁵ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, paras 15-16.

¹⁶ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 15.

¹⁷ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 16.

¹⁸ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 17.

¹⁹ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 17.

[REDACTED]’).²⁰ In the Registrar’s view, since family members of a detained person do not fall within the categories of persons referred to in articles [REDACTED] of the Cooperation Agreement with [REDACTED], these arguments are without merits.²¹

12. With regard to the remedies sought by Mr Abd-Al-Rahman, the Registrar holds, with regard to Mr Abd-Al-Rahman’s request that a new family visit for the [REDACTED] children and at least one accompanying adult be organized without delay at the cost of the Court, that a new request for such family visit should be placed before the Acting Chief Custody Officer.²² With regards to the reimbursement of costs advanced by the Defence to the family that hosted Mr Abd-Al-Rahman’s children in [REDACTED], the Registrar finds that this request is legally unfounded and, in any event, unsubstantiated.²³

III. THE APPLICATION

13. Mr Abd-Al-Rahman requests the Presidency to quash the Impugned Decision and order that: (i) a new family visit for the [REDACTED] minor children and at least one accompanying adult be organised immediately at the cost of the Court; and (ii) [REDACTED] euro, sent to [REDACTED] by the Defence for the subsistence of the children pending their return to their place of residence, be reimbursed to the Defence.²⁴
14. With regard to the admissibility of the Complaint, Mr Abd-Al-Rahman submits that the Registrar erred in law by failing to consider the Complaint under paragraphs 50(b), 50(e) and 52 of the Family Visits Policy and holding Mr Abd-Al-Rahman had failed to identify a proper legal basis in support of his claims.²⁵ He further contends that the Registrar erred in law by considering that only decisions pertaining to ‘the granting or denial of a family visit’ can be challenged under regulation 217(1) of the Regulations,²⁶ as this assertion is

²⁰ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 18.

²¹ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 18.

²² Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 19.

²³ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 20.

²⁴ Application, ICC-RoR220-04/22-5-Conf, para. 37.

²⁵ Application, ICC-RoR220-04/22-5-Conf, para. 16.

²⁶ Application, ICC-RoR220-04/22-5-Conf, paras 22-23. Although Mr Abd-Al-Rahman refers to regulation 218(1) of the Regulations at paragraph 23 of the Application, the Presidency understands the correct reference as being regulation 217(1) of the Regulations.

not supported by any authority and is in contradiction with the Decision of 15 December 2022 and the Decision of 19 December 2022 of the Presidency.²⁷

15. Mr Abd-Al-Rahman further argues that the Registrar erred in law by finding that the Family Visits Policy did not support the use of funds for providing financial assistance to the [REDACTED] children during their stay in [REDACTED].²⁸ He contends that paragraphs 50(b), (c), (e) and (g) and 52 of the Family Visits Policy allowed the Registrar to provide financial assistance to the children while in [REDACTED] and that '[w]hensoever an incident occurs' in relation to a family visit, it falls within the mandate of the Trust Fund for Family Visits to cover for additional and unexpected expenses caused by this contingency.²⁹ Mr Abd-Al-Rahman also argues, alternatively, that the Registrar had discretion, under paragraph 50(h) of the Family Visits Policy, to take reasonable measures to resolve the situation.³⁰

16. Mr Abd-Al-Rahman asserts that his family fully complied with all the requirements in preparation of the family visit³¹ and that the Registrar: (i) erred in law by failing to draw the legal consequences from paragraphs 30 and 31 of the Family Visits Policy and mention the need to provide additional information or documents for the travel of the [REDACTED] children;³² (ii) erred in law when it refused to remind [REDACTED] of its obligations under article [REDACTED] of the Cooperation Agreement with [REDACTED];³³ and (iii) erred in fact when finding, in the Registrar's Decision of 14 December 2022, that the travel documents provided by the family members and the Defence were not up-to-date.³⁴

17. Finally, Mr Abd-Al-Rahman posits that the Registrar misused his authority by: (i) cancelling the family visit of the [REDACTED] children and deciding that, as a consequence, the Court was released from its obligation to provide for the children's accommodation and subsistence allowance after their family visit was interrupted in [REDACTED];³⁵ (ii) declining to intervene vis-à-vis the [REDACTED] authorities to

²⁷ Application, ICC-RoR220-04/22-5-Conf, paras 22-25.

²⁸ Application, ICC-RoR220-04/22-5-Conf, para. 13.

²⁹ Application, ICC-RoR220-04/22-5-Conf, paras 13-14.

³⁰ Application, ICC-RoR220-04/22-5-Conf, paras 13, 15-16.

³¹ Application, ICC-RoR220-04/22-5-Conf, para. 17.

³² Application, ICC-RoR220-04/22-5-Conf, paras 17, 21.

³³ Application, ICC-RoR220-04/22-5-Conf, paras 17-21.

³⁴ Application, ICC-RoR220-04/22-5-Conf, paras 26-27.

³⁵ Application, ICC-RoR220-04/22-5-Conf, paras 29-30.

resolve the situation;³⁶ and (iii) failing to give primary consideration to the best interests of the children in accordance with internationally recognised human rights instruments.³⁷

IV. DETERMINATION OF THE PRESIDENCY

A. Admissibility

18. The Presidency recalls that prior to the judicial review of a decision of the Registrar, it must be satisfied that the Application is properly before it.³⁸
19. Pursuant to regulation 217(1) of the Regulations, a detained person is entitled to ‘make a complaint against any matter concerning his or her detention’ at any time. The Presidency’s power of judicial review under regulation 220 of the Regulations, on which the Application relies, is limited to decisions of the Registrar on such complaints.
20. The Presidency must therefore determine whether the Registrar’s declining to organise a new family visit for the [REDACTED] children and at least one accompanying adult, without delay and at the cost of the Court, and reimburse [REDACTED] euro spent by the Defence for the subsistence of the children pending their return to their place of residence, is a ‘matter concerning [Mr Abd-Al-Rahman’s] detention’ under regulation 217(1) of the Regulations.
21. The Presidency has previously found that regulation 217(1) of the Regulations must be interpreted broadly, and that matters concerning a detained person’s detention include, at a minimum, those explicitly provided for in Chapter 6 of the Regulations of the Court and Chapter 5 of the Regulations of the Registry.³⁹ Among them is the right of a detained person to receive visits. Specifically, regulation 100(1) of the Regulations of the Court provides that ‘[a] detained person shall be entitled to receive visits’. The particular importance of the right to family visits is emphasised by regulation 179(1) of the Regulations of the Registry, which provides, in relevant part, that ‘[t]he Registrar shall

³⁶ Application, ICC-RoR220-04/22-5-Conf, paras 31-32.

³⁷ Application, ICC-RoR220-04/22-5-Conf, paras 33-36.

³⁸ See e.g. Presidency, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the Application for Judicial Review of the Registry Decision issued on 27 September 2021](#), dated 5 October 2021 (ICC-RoR220-06/21-1), 31 March 2022, ICC-RoR220-06/21-3 (the ‘Yekatom and Ngaïssona Decision of 31 March 2022’), para. 16.

³⁹ See e.g. [Yekatom and Ngaïssona Decision of 31 March 2022](#), ICC-RoR220-06/21-3, para. 19.

give specific attention to visits by family of the detained persons with a view to maintaining such links’.

22. While the Presidency acknowledges that there is no provision specifically addressing funding for family visits,⁴⁰ it has consistently recognised that, in the unique circumstances of the Court, where an indigent person is detained in The Hague far from his or her family pursuant to the execution of a decision of the Court, funded family visits are the only mechanism by which the effective exercise of such right is rendered meaningful.⁴¹ The Presidency has thus found that, in these circumstances, there is a positive obligation of the Court to fund family visits of indigent detained persons but clarified that such obligation cannot create an entitlement to unlimited funded family visits and that the extent of this obligation will inevitably be restricted by resource constraints.⁴²
23. In view of the above, the Presidency considers that the subject matter of the Complaint, which relates to a family visit funded by the Court, constitutes a matter concerning Mr Abd-Al-Rahman’s detention.
24. The Presidency observes that the Registrar, when submitting that matters against which a detained person may make a complaint pursuant to regulation 217(1) of the Regulations cover ‘any litigation as to the *granting or refusal* of a funded family visit’,⁴³ refers to no authorities other than regulation 217(1) of the Regulations. With regard to the Registrar’s assertion that Mr Abd-Al-Rahman failed to identify which provisions of the Court’s legal framework relating to his detention have been violated, the Presidency finds that, although this is the case, it is clear, in view of the arguments contained in the Complaint, that it purports to a violation of regulation 100(1) of the Regulations of the Court and regulation 179(1) of the Regulations.
25. The Presidency, therefore, finds the Application to be admissible. This is also in line with the Presidency’s Decision of 19 December 2022, in which the Presidency noted that it

⁴⁰ See e.g. Yekatom and Ngaïssona Decision of 31 March 2022, ICC-RoR220-06/21-3, para. 21.

⁴¹ See e.g. Presidency, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the ‘Defence Application for Judicial Review of Registrar’s Decision of 12 August 2021, dated 16 August 2021 \(ICC-RoR220-03/21-3-Conf\)](#), 31 March 2022, ICC-RoR220-03/21-5 (the ‘Al Hassan Decision of 31 March 2022’), para. 21; Presidency, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on “Mr Mathieu Ngudjolo’s Complaint Under Regulation 221\(1\) of the Regulations of the Registry Against the Registrar’s Decision of 18 November 2008”](#), 10 March 2009, ICC-RoR217-02/08-8 (the ‘Decision of 10 March 2009’), paras 31, 37.

⁴² [Al Hassan Decision of 31 March 2022](#), ICC-RoR220-03/21-5, para. 21 and references cited therein.

⁴³ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 13.

was open to Mr Abd-Al-Rahman to address a complaint for review to the Registrar under regulation 218(1) of the Regulations and signalled, thus, that it considered the subject matter of Mr Abd-Al-Rahman's Complaint as falling within the ambit of regulations 217(1) and 218(1) of the Regulations.⁴⁴

26. It follows from this finding that the Presidency considers that the Registrar erred in rejecting the Complaint as inadmissible. Notwithstanding, the Presidency notes that although the Registrar considered the Complaint to be inadmissible, the Impugned Decision still addresses the merits of the Complaint.⁴⁵ The Presidency, therefore, finds that the Registrar's error with regard to the admissibility of the Complaint is of limited practical consequence and rejects Mr Abd-Al-Rahman argument that the Impugned Decision should be overturned on this basis.

B. Standard of review and applicable law

27. The Presidency recalls that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no reasonable person who has properly applied his or her mind to the issue could have reached.⁴⁶
28. In respect of the applicable law, the Presidency recalls that detained persons have the right to receive visits, including family visits, in accordance with regulations 100(1) of the Regulations of the Court and 179(1) of the Regulations.

⁴⁴ Decision of 19 December 2022, ICC-RoR220-04/22-4-Conf-Exp, para. 4.

⁴⁵ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, paras 11, 14-21.

⁴⁶ The standard of judicial review was defined by the Presidency in its [Decision on the Application to Review the Registrar's Decision Denying the Admission of Mr Ernest Midagu Bahati to the list of Counsel](#), 20 December 2005, ICC-RoC72-02/05, para. 16; and supplemented in its Decision on the application to review the decision of the Registrar denying [REDACTED] privileged visits with Mr Lubanga Dyilo, under regulation 221 of the Regulations of the Registry, 27 November 2006, ICC-01/04-01/06-731-Conf, para. 24. *See also* Presidency, [Reasons for the 'Decision on the "Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel"'](#), 10 July 2008, ICC-RoC72-01/08-10, para. 20; Presidency, [Decision on the application to review the decision of the Registrar denying the admission of Ms Magdalena Ayoade to the list of experts](#), 6 August 2009, ICC-RoR56-01/09-2, para. 11.

C. Merits

29. Turning to the merits of the Application, the Presidency considers, in the following order, Mr Abd-Al-Rahman's arguments on: (i) the Registrar's alleged errors in interpreting the Family Visits Policy;⁴⁷ (ii) the Registrar's alleged errors for failing to mention the need to provide additional information or documents, failing to remind [REDACTED] of its obligations, and finding that the travel documents provided by the family members and the Defence were not up-to-date;⁴⁸ and (iii) the Registrar's alleged failure to give primary consideration to the best interests of the children.⁴⁹

1. Use of the Family Visits Policy

30. Mr Abd-Al-Rahman submits that whenever an incident occurs in relation to a family visit, any additional and unexpected costs arising from such contingency should be covered by the Trust Fund for Family Visits, in accordance with the Family Visits Policy.⁵⁰ He submits that the Registrar erred in law by failing to consider the Complaint under paragraphs 50(b), 50(e) and 52 of the Family Visits Policy, and by not exercising his discretion under paragraph 50(h), which gives the Registrar 'full authority and discretion' to authorise, on a case-by-case basis, the providing of additional costs incurred by a family visit.⁵¹ Mr Abd-Al-Rahman contends that these provisions supported the requests contained in his letter of 13 December 2022 to the Registrar to cover the costs of accommodation and subsistence allowance for the children until their reunification with their family and the purchase of new flights tickets to The Netherlands, with an accompanying adult if required.⁵² The Defence notes that it sent [REDACTED] euro to [REDACTED] 'for the purpose of supporting the children's stay until the return of the rest of the family' and their return to their place of residence.⁵³ In addition, Mr Abd-Al-Rahman submits that the Registrar misused his authority by cancelling the family visit of the children and deciding that, as a consequence, the Court was released from its

⁴⁷ Application, ICC-RoR220-04/22-5-Conf, paras 13-16, 29-30.

⁴⁸ Application, ICC-RoR220-04/22-5-Conf, paras 17-21, 26-27, 31-32.

⁴⁹ Application, ICC-RoR220-04/22-5-Conf, paras 29-30, 33-36.

⁵⁰ Application, ICC-RoR220-04/22-5-Conf, paras 13-15.

⁵¹ Application, ICC-RoR220-04/22-5-Conf, paras 13-16.

⁵² Application, ICC-RoR220-04/22-5-Conf, para. 13.

⁵³ Application, ICC-RoR220-04/22-5-Conf, para. 30. The Presidency notes that the Defence has not submitted proof of these expenses before the Presidency.

obligation to provide for the children's accommodation and subsistence allowance after their family visit was interrupted in [REDACTED].⁵⁴

31. In the Impugned Decision, the Registrar explains that he had no obligation, based on paragraph 50(h) of the Family Visits Policy, to re-organise a new funded family visit for the children with an accompanying adult,⁵⁵ and that 'by granting and facilitating the funded visit, the Registry fully discharged its obligations under the Court's legal framework, including the Family Visits Policy'.⁵⁶ With regards to Mr Abd-Al-Rahman's argument that the Registrar failed to consider the Complaint under paragraphs 50(b), 50(e) and 52 of the Policy, the Presidency observes that these provisions are not specifically referred to by the Registrar in the Impugned Decision. Nonetheless, the Presidency understands that the Impugned Decision took an all-encompassing approach that by granting and facilitating the funded visit, the Registry fully discharged its obligations under the Court's legal framework, including the Family Visits Policy, and had no further obligation towards Mr Abd-Al-Rahman and his [REDACTED] children after the visit was interrupted due to the lack of [REDACTED].⁵⁷ The Presidency understands this as a rejection, by the Registrar, of all of Mr Abd-Al-Rahman's arguments based on the provisions of the Family Visits Policy.

32. The relevant sections of the Family Visits Policy provide as follows:

50. In case of proved Family Financial Incapability, the ICC shall determine on the basis of available funds the extent to which one family visit can be funded. In funding the visit, the ICC shall identify those expenses that may be covered by the detained person or his/her family:

- a. The ICC shall bear the cost of the visas for the family members, if required;
- b. The ICC shall arrange and pay for economy return tickets to the Netherlands;
- c. The ICC may assist in the transportation of the family to and from the airport in the country of residence, if required;
- d. The ICC may assist in the transportation of the family to and from the airport in Netherlands, if required;
- e. The ICC shall arrange and pay for the accommodation of the family for a period not exceeding 10 days, if required;
- f. The ICC shall provide for travel and medical insurance for the sake of the visit to the family members;

⁵⁴ Application, ICC-RoR220-04/22-5-Conf, paras 29-30.

⁵⁵ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 15.

⁵⁶ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 17.

⁵⁷ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 17.

g. The ICC shall provide for a daily allowance of:

1. 24 Euros per day per adult
2. 12 Euros per day per child
3. The amount of the daily allowance may be adjusted, if required.

h. Any deviation from the above mentioned requisites, under a., will be subject to the approval of the Registrar on a case-by-case basis;

[...]

52. In the case where the family visitor is unable to travel alone due to age or medical reasons, the ICC may consider financing the visit of an escort, if he/ she has proved to be financially incapable, subject to the regulations of the Supported Family Visits. The relevant medical documents shall be attached to the Visitor's Application Form;

33. The Presidency, acting by majority consisting of Judge Ibáñez Carranza and Judge Mindua, notes that although the Family Visits Policy does not expressly address how interruptions to family visits should be addressed nor does it expressly vest a general discretion in the Registrar in this regard, with the discretion referred to in paragraph 50(h) being limited to visa costs, it must be understood that the Registrar nonetheless enjoys a certain discretion as to issues arising in the course of family visits. Any other understanding of paragraph 50 would be unduly narrow and could lead to absurd results – for example if family members have their journey disrupted due to flight cancellations or rerouting. The majority of the Presidency notes that the inability for the visit of the [REDACTED] children to take place due to the requirement to provide a document, the need for which was evidently not obvious to a family with no experience at international travel, was not foreseeable by either the Registry or the Defence. In such circumstances, paragraph 50 of the Family Visits Policy must be read with sufficient flexibility to address situations in which unexpected issues, which cannot be reasonably attributed to be the fault of the traveller, arise in the course of the execution of a family visit. The Presidency, acting by majority consisting of Judge Ibáñez Carranza and Judge Mindua, considers that paragraph 50 does not preclude the Registrar from covering the costs of additional replacement airfares, emergency accommodation or financial support in [REDACTED] for the children. In the same way the Registrar, when facilitating a family visit, has discretion to determine which measures to take in order to assist in the preparation and conduct of the family visit, the Registrar also had discretion to provide assistance to Mr Abd-Al-Rahman's children after their travel was interrupted when they were refused boarding the plane in [REDACTED].

34. Given that paragraph 50 of the Family Visits Policy inherently permits the Registrar some discretion to address unforeseen circumstances interrupting a family visit, the issue before the Presidency becomes whether it was legally erroneous for the Registrar to have failed to use such discretion. The Presidency, acting by majority consisting of Judge Ibáñez Carranza and Judge Mindua, considers that, in the present circumstances, the exercise of a discretion should clearly have taken place with an emphasis on the best interests of the children. The Registrar noted, in the Impugned Decision, the fact that the children, after they were refused boarding on the plane, ‘were nevertheless at all times with another trusted adult who hosted them in [REDACTED] and until such time [REDACTED] children could return to their place of origin’.⁵⁸ The majority of the Presidency considers that this falls short of demonstrating that the Registrar made a determination as to how to apply the Family Visits Policy with the best interests of the children as primary consideration. The Impugned Decision contains no element indicating that the Registrar took the best interests of the children into account at all. Accordingly, the Presidency, acting by majority consisting of Judge Ibáñez Carranza and Judge Mindua, finds that the Registrar failed to exercise his discretion reasonably, by refusing to consider the provision of forms of assistance (airfares for the resumption of travel or financial and accommodation support) which were available to the Registrar under paragraph 50 of the Family Visits Policy. It follows from the above that the Registrar similarly misused his authority by unilaterally cancelling the visit, without any consideration of the ordinary means available to him under paragraph 50 to have sought its resumption.
35. In sum, the Presidency, acting by majority consisting of Judge Ibáñez Carranza and Judge Mindua, considers that the Registrar has misunderstood the inherent discretion to react flexibly under paragraph 50 of the Family Visits Policy in the event of an unforeseen disruption to a family visit, having further failed to apply that policy through the lens of the best interests of the child. Accordingly, the majority of the Presidency considers that the Impugned Decision is legally erroneous in this regard.
36. Finally, the majority of the Presidency also notes in passing that it has been given no information from the Registrar about whether travel insurance was provided for the [REDACTED] children denied boarding, as is required under paragraph 50(f) of the

⁵⁸ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 10.

Family Visits Policy, and whether any such insurance could have been of relevance in covering any of the additional expenses incurred.

37. Judge Hofmański discerns no legal error or unreasonableness in the Registrar's finding that he did not have any legal obligation to provide further assistance to the children once their family visit was interrupted due to the lack of [REDACTED], whether in the form of financial assistance to cover expenses when family members decided that the children would remain behind in [REDACTED] after being denied boarding, or financial assistance to rebook a further flight for the children. Judge Hofmański considers that the Registrar fully discharged relevant obligations in paragraph 50 of the Family Visits Policy, including arranging visas, providing economy return tickets and assisting with transportation to and from the airport. He further considers that it is a natural reading of paragraph 50 that further obligations to provide accommodation and provide a daily allowance clearly relate to situations where the family visit is taking place and do not create obligations in situations where the family visit cannot be completed due to circumstances outside of the control of the Registrar. In view of the above, Judge Hofmański considers that the Registrar did not abuse his discretion nor misuse his authority by cancelling the visit, which, logically, could no longer take place once it was interrupted.

2. Other alleged legal and factual errors

i. Alleged failure to mention the need to provide additional information or documents

38. Mr Abd-Al-Rahman submits that the Registrar erred by failing to inform his family members of the need to provide additional information or documents, an obligation which he considers can be inferred from paragraphs 30 and 31 of the Family Visits Policy.⁵⁹ The Registrar submits that by granting and facilitating the visit, he fully discharged his obligations.⁶⁰

⁵⁹ Application, ICC-RoR220-04/22-5-Conf, paras 17, 21.

⁶⁰ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, paras 16-17.

39. Paragraph 30 of the Family Visits Policy provides that '[v]isa application and passport procedures shall be carried out by the prospective visitor' and paragraph 31 states that '[t]he ICC may assist with the visa application, if required'. The Presidency notes that, in the present case, the Court did assist the family members with their visa applications.⁶¹
40. The Presidency, acting by majority consisting of Judge Ibáñez Carranza and Judge Mindua, notes Mr Abd-Al-Rahman's submissions that the 'Court was in touch with the Defence about filling out of all necessary forms and the completion of all necessary steps', and that the family members had never travelled outside [REDACTED], followed all the instructions received by the Court and 'were totally in the hands of the Court'.⁶² In view of these circumstances, noting that the family members were being guided, by the Registry, through all the preparations in view of the family visit, the majority of the Presidency finds reasonable for the family to have had the expectation of having met all the necessary requirements for the family visit to take place, and considers that the Registrar ought to have been aware of this expectation. Consequently, the Presidency, acting by majority consisting of Judge Ibáñez Carranza and Judge Mindua, finds that the Registrar failed to inform the family members of the need to provide a document attesting of the [REDACTED] for Mr Abd-Al-Rahman's [REDACTED].
41. Judge Hofmański notes that Mr Abd-Al-Rahman seems to contend that based on paragraphs 30 and 31 of the Family Visits Policy, the Registrar should have mentioned to the family members 'the need to fill or provide additional information or documents',⁶³ namely a document [REDACTED]. Judge Hofmański considers that it does not follow that because the Court assisted family members in obtaining visas, it was also under an obligation to mention the need for a document [REDACTED]. Further, paragraph 30 of the Family Visits Policy makes clear that the responsibility for the completion of necessary procedural documents in respect of a visit rests with the visitor. Judge Hofmański can therefore find no legal error in the Registrar's interpretation of his obligations pursuant to paragraphs 30 and 31 of the Family Visits Policy.

⁶¹ Application, ICC-RoR220-04/22-5-Conf, para. 17.

⁶² Application, ICC-RoR220-04/22-5-Conf, para. 17.

⁶³ Application, ICC-RoR220-04/22-5-Conf, paras 17, 21.

ii. Alleged failure to remind [REDACTED] of its obligations

42. Mr Abd-Al-Rahman contends that the Registrar erred by refusing to remind [REDACTED] of its obligations under article [REDACTED] of the Cooperation Agreement with [REDACTED],⁶⁴ and misused his authority by declining to intervene with the [REDACTED] authorities.⁶⁵ The Presidency considers that although these arguments are addressed under two different sections in the Application, their similarity warrants that they be addressed together.
43. The Presidency notes that article [REDACTED] of the Cooperation Agreement with [REDACTED] provides, in relevant parts, that [REDACTED]. The Registrar argues that Mr Abd-Al-Rahman's arguments based on that article are without merits, since family members of a detained person [REDACTED].⁶⁶ While Mr Abd-Al-Rahman agrees that this is the case,⁶⁷ he argues that article [REDACTED] should have been interpreted as [REDACTED].⁶⁸ He also asserts that the Registry services 'bear full responsibility' for this alleged lacuna in the Cooperation Agreement, since it drafted and negotiated the Agreement.⁶⁹ With regard to this last argument, the Presidency notes that Mr Abd-Al-Rahman had not raised this argument in his Complaint but, rather, raises it for the first time in his Application before the Presidency. Considering that the Registrar was not given the opportunity to consider this argument in the Impugned Decision, nor could he have anticipated it, the Presidency finds that it is not properly before it and for this reason, will not address this argument in the present decision.
44. Notwithstanding the fact that family members participating in a family visit to a detained person in The Hague [REDACTED], the Presidency, acting by majority consisting of Judge Ibáñez Carranza and Judge Mindua, considers that the Registrar could have, nonetheless, intervened with the relevant authorities in [REDACTED] in the attempt to resolve the situation when the children were prevented to board the flight in [REDACTED]. The Registrar facilitated the family visit,⁷⁰ and in doing so, had discretion

⁶⁴ Application, ICC-RoR220-04/22-5-Conf, paras 17-21.

⁶⁵ Application, ICC-RoR220-04/22-5-Conf, paras 31-32.

⁶⁶ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 18.

⁶⁷ Application, ICC-RoR220-04/22-5-Conf, paras 18, 20.

⁶⁸ Application, ICC-RoR220-04/22-5-Conf, paras 18, 20.

⁶⁹ Application, ICC-RoR220-04/22-5-Conf, para. 20.

⁷⁰ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 17.

as to which measures were taken in order to assist in the preparation of the family visit. These included liaising with the [REDACTED] authorities.

45. When informed that the children were not allowed to board the plane, the majority of the Presidency opines that the Registrar had the possibility to enter into communication with the [REDACTED] authorities to see if the latter could have been of any assistance in resolving the matter. While this was obviously a matter within the discretion of the Registrar, such discretion should have been exercised at all times in the best interests of the children. In the present circumstances, the majority of the Presidency considers that it has not seen any evidence that the Registrar gave proper consideration to the issue of whether to seek assistance from [REDACTED].
46. Judge Hofmański considers that article [REDACTED] of the Cooperation Agreement with [REDACTED] is unambiguous as to [REDACTED]. Mr Abd-Al-Rahman's submissions fall short of demonstrating any error or unreasonableness in the Registrar's interpretation of that article. Judge Hofmański discerns no error in the Impugned Decision for having concluded that Mr Abd-Al-Rahman's submissions pertaining to an alleged violation of the Cooperation Agreement with [REDACTED] were without merits. Given that the Registrar had no reason to believe that there were any kind of failure or obstruction taking place on the part of the government of [REDACTED], there was evidently no failure of any kind in the Registrar not choosing to seek government intervention on the issue.

iii. Alleged error in finding that the documents provided by the family member and the Defence were not up-to-date

47. As for Mr Abd-Al-Rahman's contention that the Registrar erred in fact when finding, in the Registrar's Decision of 14 December 2022, that the travel documents provided by the family members and the Defence were not up-to-date,⁷¹ the Presidency observes the following. First, Mr Abd-Al-Rahman's contention reveals a mischaracterization of the Registrar's Decision of 14 December 2022, as the Registrar did not find, in that decision, that the documents were not up-to-date but, rather, stated that '[i]t is the responsibility of the family member with the assistance of the Defence teams to ensure that the travel

⁷¹ Application, ICC-RoR220-04/22-5-Conf, paras 26-27.

documents are up-to-date’.⁷² Second, even if this alleged error was to be accepted as demonstrated by the Presidency, it would have no effect on the Presidency’s determination of the Application. Mr Abd-Al-Rahman’s arguments are dismissed.

3. Whether the Registrar failed to give primary consideration to the best interests of the children

48. Mr Abd-Al-Rahman submits that the Registrar misused his authority by failing to give primary consideration to the best interests of the children, in accordance with internationally recognised human rights instruments, and refusing to resolve the situation of the [REDACTED] children and cover for additional costs incurred as a result of the interruption of their family visit.⁷³
49. As is evident from paragraphs 34, 35 and 45 above, the Presidency, acting by majority consisting of Judge Ibáñez Carranza and Judge Mindua, finds some merits in Mr Abd-Al-Rahman’s arguments that the Registrar failed to take into account the best interests of the children. The Court, when applying and interpreting the law, must do so consistently with internationally recognised human rights, in accordance with article 21(3) of the Rome Statute. The majority of the Presidency notes, notably, article 3(1) of the Convention on the Rights of the Child, which provides that ‘[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.⁷⁴ Further, both Mr Abd-Al-Rahman and his children benefit from the right to family life. In this regard, regulation 179(1) of the Regulations expressly refers to the need to maintain links with family, a provision which reflects generally accepted rules, such as that contained at rule 106 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) that ‘[s]pecial attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both’.⁷⁵

⁷² Registrar’s Decision of 14 December 2022, ICC-RoR220-04/22-1-Conf-Exp-AnxA, p. 3.

⁷³ Application, ICC-RoR220-04/22-5-Conf, paras 33-36.

⁷⁴ United Nations, General Assembly, article 3 of the Convention on the Rights of the Child, 20 November 1989, 1577 United Nations Treaty Series 27531.

⁷⁵ United Nations, General Assembly, rule 106 of the [United Nations Standard Minimum Rules for the Treatment of Prisoners](#) (the Nelson Mandela Rules), 17 December 2015, A/RES/70/175.

50. The Presidency, acting by majority consisting of Judge Ibáñez Carranza and Judge Mindua, recalls its above findings that the Registrar, in the present case, should have clearly exercised his discretion with an emphasis on the best interests of the children.⁷⁶ Although the Registrar knew that the children were with a trusted adult who hosted them in [REDACTED] and until such time [REDACTED] children could return to their place of origin, many uncertainties prevailed with regard to the children, for example with regard to their security, their well-being and their capacity to return to their place of origin safely. In light of the above, the majority of the Presidency finds that the Registrar failed to take into account the best interests of the children in the Impugned Decision.
51. By contrast, Judge Hofmański observes that in the Impugned Decision, the Registrar recalled that after the [REDACTED] children were unable to board the plane in [REDACTED], they were ‘nevertheless at all times with another trusted adult who hosted them in [REDACTED] and until such time [REDACTED] children could return to their place of origin’.⁷⁷ Judge Hofmański understands that the decision to entrust the children into the care of this person was made by the adults taking part in the family visit.⁷⁸ In view of the foregoing, Judge Hofmański considers that Mr Abd-Al-Rahman failed to demonstrate how the Registrar failed to give primary consideration to the best interests of the children and discerns no error or unreasonableness in the Registrar’s actions.

D. Request for a new family visit

52. The Presidency refers to Mr Abd-Al-Rahman’s request that a new family visit for the [REDACTED] minor children and at least one accompanying adult be organised immediately at the cost of the Court.⁷⁹ The Presidency observes that once the family visit of the [REDACTED] children was interrupted in [REDACTED], the Registrar cancelled the visit and in the Impugned Decision, indicated that a new request for family visit should be placed before the Acting Chief Custody Officer.⁸⁰
53. The majority of the Presidency, composed of Judge Ibáñez Carranza and Judge Mindua, considers that applying for a new family visit would give no certainty that Mr Abd-Al-

⁷⁶ *Supra*, paras 34-35, 46.

⁷⁷ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 10.

⁷⁸ Registrar’s Decision of 14 December 2022, ICC-RoR220-04/22-1-Conf-Exp-AnxA, p. 2.

⁷⁹ Application, ICC-RoR220-04/22-5-Conf, para. 37.

⁸⁰ Impugned Decision, ICC-RoR220-04/22-5-Conf-AnxB, para. 19.

Rahman's children would be granted such family visit and, if granted, when such visit would take place. The majority of the Presidency recalls again the importance of the right to family visits, as emphasised by regulation 179(1) of the Regulations. In view of this and given the clear findings above that the decision-making process of the Registrar contained clear legal errors, the Presidency, acting by majority consisting of Judge Ibáñez Carranza and Judge Mindua, therefore decides that it is appropriate, in the circumstances of the present case, that a new funded family visit be facilitated by the Registry as soon as feasible for the [REDACTED] of Mr Abd-Al-Rahman's children whose family visit was cancelled on 13 December 2022, together with an accompanying adult pursuant to paragraph 52 of the Family Visits Policy.

V. CLASSIFICATION

54. In light of the classification of the Application, the present decision is classified as confidential. The Presidency takes the view, however, that it would be beneficial to make this decision publicly available, in a redacted version, including for the benefit of other detained persons. As such the Presidency hereby indicates its intention to issue a public redacted version of the present decision. Mr Abd-Al-Rahman and/or the Registrar may inform the Presidency no later than by 1600 on 16 March 2023 of which information requires redaction prior to publication, as well as sharing any factual or legal basis for retaining the confidential classification of this decision.

In view of the above, the Presidency, by majority consisting of Judge Ibáñez Carranza and Judge Mindua, hereby:

- (i) **GRANTS** the Application, in part;
- (ii) **INSTRUCTS** the Registry to facilitate a family visit, funded by the Court, for Mr Abd-Al-Rahman's children whose family visit was cancelled on 13 December 2022 and an accompanying adult, as soon as feasible;
- (iii) **ORDERS** the Defence of Mr Abd-Al-Rahman to provide the Registrar with proof of funds sent for the subsistence of the children pending their return to their place of residence after their family visit was cancelled;

- (iv) **ORDERS** the Registrar to reimburse the Defence of Mr Abd-Al-Rahman the funds sent for the subsistence of the children pending their return to their place of residence, upon receipt of proof of these expenses by the Defence; and
- (v) **REJECTS** the remainder of the Application.

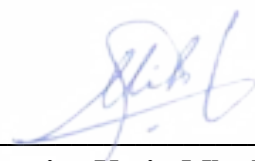
Done in both English and French, the English version being authoritative.



Judge Piotr Hofmański
President



Judge Luz del Carmen Ibáñez Carranza
First Vice-President



Judge Antoine Kesia-Mbe Mindua
Second Vice-President

Dated this 1 March 2023

At The Hague, The Netherlands