



Original: English

No.: ICC-RoR220-01/10

Date: 16 December 2010

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Fatoumata Dembele Diarra, First Vice-President
Judge Hans-Peter Kaul, Second Vice-President

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI**

Public redacted

Decision on the “Defence Appeal to the Presidency Challenging the *Décision du Greffier sur la ‘Defence Request for Review of Registrar’s Decision to Deny Mr. Katanga the Right to Communicate with Four Family Members and Friends’*”

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

**Counsel for the Defence for Mr Germain
Katanga**
Mr David Hooper
Mr Andreas O'Shea

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Detention Section

Mr Anders Backman

Other

Trial Chamber II

The Presidency of the International Criminal Court (hereinafter “Court”) has before it the application of Mr Germain Katanga for the judicial review of a decision of the Registrar denying the inclusion of four persons in his telephone contact list.

The application is granted.

I. PROCEDURAL HISTORY

1. On 7 May 2010, the Registrar informed Mr Germain Katanga (hereinafter “applicant”) that, in respect of four persons, the Registrar had rejected their inclusion in his list of telephone contacts (hereinafter “Impugned Decision”).¹
2. On 31 May 2010, the applicant, correctly acting pursuant to the procedure for complaints against decisions taken directly by the Registrar as prescribed by the Presidency in its “Decision of 17 September 2009”,² requested the Registrar to reconsider her Impugned Decision.³ On 14 June 2010, the Registrar confirmed the Impugned Decision, informing the applicant that he had 48 hours to seek judicial review by the Presidency.⁴ On 16 June 2010, the applicant sought such review (hereinafter “Application”).⁵

II. PRELIMINARY PROCEDURAL ISSUES

A. 48 hour time limit

3. The applicant raises concern with the 48 hour time limit to address the Presidency, requesting the establishment of a more reasonable time limit for future applications.⁶
4. The Presidency considers that the time limits established in section 5 of the Regulations of the Registry may not have been appropriate in practice thus far, given the complexity of the matters which have arisen for judicial review. To this end, the Presidency intends to conduct a review of the time limits in this section after seeking the views of the Registrar and defence teams. Until such time, the Regulations continue in force, however, in relation to applications to the Presidency, a detained person may utilise the procedure

¹ [REDACTED]

² Decision on the Application of Mr Germain Katanga in respect of the new policy in the detention centre on the registration of telephone contacts, ICC-RoR221-02/09-6-Corr, paragraphs 14-16.

³ Defence Request for Review of Registrar’s Decision to Deny Mr. Katanga the Right to Communicate with Four Family Members and Friends, ICC-RoR220-01/10-1-Conf-Exp.

⁴ Décision du Greffier sur la « Defence Request for Review of Registrar’s Decision to Deny Mr. Katanga the Right to Communicate with Four Family Members and Friends », ICC-RoR220-01/10-2-Conf-Exp.

⁵ Defence Appeal to the Presidency Challenging the *Décision du Greffier sur la “Defence Request for Review of Registrar’s Decision to Deny Mr. Katanga the Right to Communicate with Four Family Members and Friends”*, ICC-RoR220-01/10-3-Conf-Exp.

⁶ Application, paragraphs 5-7.

described in regulation 35 of the Regulations of the Court in order to seek the variation of a time limit in a particular matter.

III. MERITS

A. Relevant part of the Impugned Decision

5. By her Impugned Decision, the Registrar notes that she has approved the inclusion of 18 people on the applicant's telephone contact list and that she has not approved the inclusion of four people in such list.⁷
6. The Registrar considers that her power to refuse inclusion of a person in a telephone contact list can be derived from regulation 90 of the Regulations of the Court, utilising the criteria established by regulations 174-175 of the Regulations of the Registry.⁸ She further relies upon the Decision of 17 September 2009 to support the existence of this power,⁹ noting, in particular, the following passages from that Decision: "[t]he Registrar has the authority to make all decisions relating to the detention centre ... The Registrar and the Chief Custody Officer have the power to control the communications of detained persons, which must include the imposition of restrictions upon communication with specific individuals where justified, for example in order to prevent the detained persons from engaging in the activities outlined in regulation 175(1) of the Regulation of the Registry ... Those institutions [ICTY, ICTR, SCSL], like the Court, allow the Registrar and/or the Commanding Officer/Chief of Detention of their detention centres to prohibit, regulate or set conditions on contact between persons in their custody and other persons in particular circumstances".¹⁰
7. The Registrar refuses the inclusion of [REDACTED], on the grounds that he has been aware of [REDACTED]. Accordingly, he is a concern for the good administration of justice.
8. The Registrar refuses the inclusion of [REDACTED], on the grounds that she has been solicited by the applicant [REDACTED]. In addition, there is a doubt as to this person's identity [REDACTED]. Accordingly, she or he is a concern for the good administration of justice.
9. The Registrar refuses the inclusion of [REDACTED], on the grounds that she maintains links with the spouse of a former member of the FPRI and who seems to maintain close links with militia active in the Ituri region. Accordingly, inclusion is refused in order to mitigate the risk to the administration of justice.

⁷ Impugned Decision, paragraph 6.

⁸ Décision du Greffier sur la « Defence Request for Review of Registrar's Decision to Deny Mr. Katanga the Right to Communicate with Four Family Members and Friends », ICC-RoR220-01/10-2-Conf-Exp, pages 6-7.

⁹ Décision du Greffier sur la « Defence Request for Review of Registrar's Decision to Deny Mr. Katanga the Right to Communicate with Four Family Members and Friends », ICC-RoR220-01/10-2-Conf-Exp, page 6.

¹⁰ Decision of 17 September 2009, paragraph 46.

10. Finally, the Registrar refuses the inclusion of [REDACTED] and thereby is a concern for the good administration of justice.

B. Relief sought

11. The applicant requests that the Presidency overturn the Registrar's decision to deny him the right to communicate with four family members and friends by refusing to place them in his list of authorised telephone contacts.¹¹

C. Determination by the Presidency

12. It is recalled 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 sensible person who has properly applied his or her mind to the issue could have reached.¹²

1. *Ultra vires*

13. The applicant argues that there is no legal basis for the Registrar to disallow him from communicating with any person.¹³
14. In its Decision of 17 September 2009, the Presidency found, based on the Registrar's responsibility for the overall management of the Detention Centre pursuant to regulation 90 of the Regulations of the Court and the Registry's role in overseeing telephone communications pursuant to regulation 173(1) of the Regulations of the Registry, that the Registrar is empowered to maintain telephone contact lists for each detained person, which includes the power to restrict communications with specific individuals where justified, for example in order to prevent the activities outlined in regulation 175(1) of the Regulation of the Registry.¹⁴
15. Numerous provisions of the Regulations of the Registry empower restrictions to be placed on various forms of communications where there are reasonable grounds to believe that a detained person may be attempting to undertake a number of prohibited activities.¹⁵ The Presidency considers that it would be anomalous if the Registrar were empowered to stop

¹¹ Application, paragraph 43.

¹² The standard of judicial review was defined by the Presidency in its decision of 20 December 2005, ICC-Pres-RoC72-02-5, paragraph 16, and supplemented in its Decision of 27 November 2006, ICC-01/04-01/06-731-Conf, paragraph 24.

¹³ Application, paragraphs 19-32.

¹⁴ Decision of 17 September 2009, paragraphs 46-47.

¹⁵ Regulations of the Registry, regulation 169(3), 175(1), 180(1), 184(1).

the delivery of correspondence, to deny permission to visit and to halt an ongoing telephone call, but could not refuse to include a person in a telephone contact list if she has reasonable grounds to believe that a detained person may be attempting to undertake a prohibited activity in a manner which involved the aforementioned contact. Thus, noting her commensurate powers in regulations 169, 175 and 180, the Presidency's Decision of 17 September 2009 must be understood to allow the Registrar to refuse a person's inclusion in a telephone contact list if she has reasonable grounds to believe that the contact in question may be involved in assisting the detained person to undertake prohibited activities, namely: arranging an escape; interfering with or intimidating a witness; interfering with the administration of justice; otherwise disturbing the maintenance of the security and good order of the detention centre; jeopardising the interests of public safety or the rights or freedom of any person; or breaching an order for non-disclosure made by a Chamber.

16. The Presidency understands the purpose of regulation 101 of the Regulations of the Court to be to provide a mechanism for the Prosecutor to request restrictions on contact, rather than to provide an exclusive mechanism for the imposition of such restrictions.
17. For the reasons outlined above, the Registrar's decision to exclude four persons from the telephone contact list of the applicant had a proper legal basis.

2. *The test: reasonable grounds to believe*

18. The Presidency turns now to consider whether the Registrar properly applied the relevant legal standard. The Presidency notes that it has elsewhere set out in detail its understanding of the standard of reasonable grounds to believe, indicating that "[w]hether its conditions are satisfied in any particular case is essentially a question of fact depending on all the circumstances".¹⁶
19. In respect of all four persons, [REDACTED] the Presidency notes that the Registrar has provided only minimal factual information as to why these persons are each "un souci de bonne administration of justice". The Registrar asserts that these persons have variously had: awareness of witnesses; involvement in identifying and communicating with witnesses; communication with the applicant concerning witnesses; and closeness to the wife of a person allegedly involved in militia activity in Ituri.¹⁷ The Registrar's decision does not contain sufficient factual information to support these assertions, thus the Presidency is unable to make an assessment as to whether the Registrar had reasonable grounds to believe that these individuals may be assisting the applicant to interfere with the administration of justice. The Presidency therefore grants the Application. The Presidency notes that this does not preclude the possibility that the Registrar may take a

¹⁶ Decision of 5 December 2008, paragraph 28; See also [REDACTED].

¹⁷ Impugned Decision, paragraph 6.

decision anew, setting out sufficient information as to the factual background informing the beliefs asserted in paragraph 6 of her Impugned Decision.

20. In respect of one of the four persons, [REDACTED], the Registrar indicates that one of the reasons for non-inclusion in the applicant's telephone contact list is uncertainty as to his or her identity, noting that "un doute pèse sur sa propre identité [REDACTED]".¹⁸ The applicant has also acknowledged that there may be some confusion as to the identity of this person when he states that "[e]ven if, according to the Registrar, they are one and the same person, it appears that Mr Katanga only asked him or her [REDACTED] and not on a regular basis".¹⁹ The applicant appears to assert that the person in question is his [REDACTED].²⁰
21. Given that the Presidency has already acknowledged the necessity of the provision of information such as the identity of and the relationship to the applicant in its Decision of 17 September 2009,²¹ uncertainty as to these matters may constitute a reasonable basis for refusal to include such person in the telephone contact list. Noting, however, that the Registrar asserts that there is uncertainty whereas the applicant claims that [REDACTED], the Presidency does not currently have sufficient information to enable it to assess whether there is indeed uncertainty as to the identity of [REDACTED] and his or her relationship with the applicant.

The Impugned Decision is overturned.

If the Registrar wishes to exclude [REDACTED] from the telephone contact list of the applicant she must take a new decision to this effect.

If the Registrar wishes to exclude [REDACTED] from the telephone contact list of the applicant on the basis that his or her identity and relationship to the applicant is unclear, she must give the applicant the opportunity to clarify these matters.

Apart from the names of the relevant telephone contacts, which shall be redacted in any publication, the Registrar and the applicant are ordered to indicate and provide reasons for what information, if any, in this Decision, and in any other documents already filed in relation thereto, should remain confidential by 4pm on 31 January 2011.

¹⁸ Impugned Decision, paragraph 6; Décision du Greffier sur la « Defence Request for Review of Registrar's Decision to Deny Mr. Katanga the Right to Communicate with Four Family Members and Friends », ICC-RoR220-01/10-2-Conf-Exp, 14 June 2010, page 4.

¹⁹ Defence Request for Review of Registrar's Decision to Deny Mr. Katanga the Right to Communicate with Four Family Members and Friends, ICC-RoR220-01/10-1-Conf-Exp, 31 May 2010, paragraph 7.

²⁰ Defence Request for Review of Registrar's Decision to Deny Mr. Katanga the Right to Communicate with Four Family Members and Friends, ICC-RoR220-01/10-1-Conf-Exp, 31 May 2010, paragraph 5; Application, paragraph 9.

²¹ Decision of 17 September 2009, paragraphs 55-56, 59.

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


Judge Sang-Hyun Song
President

Dated this 16 December 2010

At The Hague, The Netherlands