

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-RoR221-06/12

Date: 19 February 2013

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Cuno Tarfusser, Second Vice-President

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

Confidential *ex parte*

Decision on Mr Germain Katanga's Application for judicial review of 7 November 2012

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

Detainee

Mr Germain Katanga

Legal representative

Mr David Hooper QC

Mr Andreas O'Shea

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Detention Section

Mr Patrick Craig

The Presidency of the International Criminal Court (hereinafter “Court”) has before it the application of Mr Germain Katanga for judicial review of the decision of the Registrar, which confirmed the decision of the Chief Custody Officer regarding an alleged unlawful cell search.

The application is dismissed.

I. PROCEDURAL HISTORY

1. On 26 September 2012, Mr Germain Katanga (hereinafter “the detainee”) filed a complaint with the Chief Custody Officer of the detention centre, pursuant to regulation 217(1) of the Regulations of the Registry¹ (hereinafter all references to regulations are to those of the Regulations of the Registry unless otherwise provided). In his complaint, the detainee argued that a search of his cell was carried out in his absence in violation of regulation 195(3).² During the incident, two of the detainee’s three laundry bags were removed from his cell whilst he was taking fresh air. The detainee further indicated that the guard carrying out the alleged unlawful search touched his underwear during the incident.³
2. On 8 October 2012, the said complaint was dismissed by the Chief Custody Officer (hereinafter “Decision of the Chief Custody Officer”), on the ground that the removal of the two laundry bags served the good order and safety of the cell as provided in the *Politique d’Adaptation*,⁴ an internal policy memorandum dated 18 September 2012 which had been distributed to all detainees and which provided for certain adjustments in the management of the cells.⁵ Furthermore, the Chief Custody Officer rejected the detainee’s allegation that the guard had touched his underwear.⁶ Based on those findings, the Chief Custody Officer found no violation of regulation 195(3).⁷

¹ Page 1 of Annex I (ICC-RoR221-06/12-2-Conf-Exp-Annx1) to the *Transmission de documents concernant l’appel de Germain Katanga en date du 6 novembre 2012*, ICC-RoR221-06/12-2-Conf-Exp, 13 November 2012 (hereinafter “Complaint to the Chief Custody Officer”).

² Complaint to the Chief Custody Officer, page 1.

³ *Ibid.*

⁴ Page 2 of Annex I (ICC-RoR221-06/12-2-Conf-Exp-Annx1) to the *Transmission de documents concernant l’appel de Germain Katanga en date du 6 novembre 2012*, ICC-RoR221-06/12-2-Conf-Exp, 13 November 2012 (hereinafter “Decision of the Chief Custody Officer”).

⁵ DS/2012/151/PC (18 September 2012). All references to the *Politique d’Adaptation* are to the French version.

⁶ Complaint to the Chief Custody Officer, page 3.

⁷ Decision of the Chief Custody Officer, pages 2-3.

3. On 15 October 2012, the detainee sought review by the Registrar of the Decision of the Chief Custody Officer, in accordance with regulation 220(1).⁸ By decision of 29 October 2012, the Registrar upheld the Decision of the Chief Custody Officer (hereinafter “Impugned Decision”).⁹
4. On 6 November 2012, the detainee sought judicial review of the Impugned Decision before the Presidency pursuant to regulation 221(1) (hereinafter “Application”).¹⁰ A corrigendum to the Application was filed on 7 November 2012 (hereinafter all references to the Application are to the corrigendum).¹¹ Judicial review was sought on the grounds that the entry into the detainee’s cell in his absence amounted to a “search” in violation of regulation 195¹² and that the search and removal of his belongings also amounted to a violation of his right to privacy and dignity.¹³
5. The Presidency is requested to find that the entry into the detainee’s cell in his absence and the removal of his laundry bags were unlawful.¹⁴

II. THE MERITS

A. Relevant part of the Impugned Decision

6. With respect to the allegation that a search of the detainee’s cell was carried out in his absence, the Registrar confirmed the Decision of the Chief Custody Officer that the incident did not constitute a “search” but an “inspection” carried out in accordance with the *Politique d’Adaptation* and with *Standard Operational Procedure No. 5:2, Security Checks and Searches of Cells* (hereinafter “*Standard Operational Procedure*”).¹⁵
7. Noting points V, VI and VIII of the *Politique d’Adaptation*, providing that every detainee has the right to “un sac à linge” [emphasis added] and that cells have to be

⁸ Page 1 of Annex II (ICC-RoR221-06/12-2-Conf-Exp-Annx2) to the *Transmission de documents concernant l’appel de Germain Katanga en date du 6 novembre 2012*, ICC-RoR221-06/12-2-Conf-Exp, 13 November 2012 (hereinafter “Impugned Decision”).

⁹ Impugned Decision, page 1.

¹⁰ ICC-RoR221-06/12-1-Conf-Exp, Germain Katanga’s Appeal of the *Décision du Greffier relative à la demande d’examen introduite par M. Germain Katanga suite une plainte concernant l’enlèvement d’un sac de la cellule en son absence – plainte #12-0036*.

¹¹ ICC-RoR221-06/12-1-Conf-Exp-Corr, Corrigendum to Germain Katanga’s Appeal of the *Décision du Greffier relative à la demande d’examen introduite par M. Germain Katanga suite une plainte concernant l’enlèvement d’un sac de la cellule en son absence – plainte #12-0036* (hereinafter “Application”).

¹² Application, paragraphs 1 and 9.

¹³ Application, paragraphs 1 and 21.

¹⁴ Application, page 9.

¹⁵ Impugned Decision, paragraph 4.

organised and tidy to preserve security and good order and prevent the risk of fire, the Registrar concluded that the detainee knew that he was not permitted to keep three laundry bags in his cell.¹⁶ The Registrar underlined that guards have the responsibility of carrying out daily inspections of the cells based on the *Standard Operational Procedure* and of ensuring compliance with the *Politique d'Adaptation*,¹⁷ with a view to checking whether detainees are maintaining good order and hygiene in their cells.¹⁸

8. The Registrar found that the incident was not a “search” because it neither entailed a thorough examination for prohibited items nor did it require the presence of more than one guard and the detained person.¹⁹ It was held that inspections of cells may take place either in a detainee’s presence or absence.²⁰
9. Finally, the Registrar rejected the detainee’s allegation that there had been a violation of his right to privacy, asserting that when detainees are outside their cells for external activities, the cells are nonetheless accessible by guards for the purpose of the functioning of the detention centre.²¹

B. The arguments of the detainee

10. In his appeal, the detainee submitted that the entry of his cell in his absence and the removal of his belongings amounted to a search in violation of regulation 195(3) (providing that a detainee should “be present at all times when his or her cell is being searched”)²² and to a violation of his right to privacy under Article 8 of the European Convention on Human Rights and his right to dignity under regulation 91(1) of the Regulations of the Court.²³
11. Noting that in their respective decisions, the Chief Custody Officer and the Registrar referred to the incident as an “inspection”, the detainee submitted first, that the term “inspection” has the same meaning as “search”²⁴ and second, that neither the Regulations of the Registry nor the Regulations of the Court create a

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Impugned Decision, paragraph 6.

¹⁹ *Ibid.*

²⁰ Impugned Decision, paragraph 7.

²¹ *Ibid.*

²² Application, paragraph 9.

²³ Application, paragraph 21.

²⁴ Application, paragraph 12.

power of “inspection” of a cell.²⁵ It was argued that any entry of his cell amounts to a “search” within the meaning of regulation 195(3) – irrespective of whether the guard saw the laundry bags immediately upon entering the cell or whether he searched through the detainee’s belongings.²⁶ It was argued that the procedural safeguards in regulation 195 cannot be derogated from by reference to an internal policy memorandum on the good order of the detention centre.²⁷

12. Furthermore, pursuant to regulation 195, the detainee argued that he has a reasonable expectation of privacy that his cell would not be entered, nor his property removed, in his absence or without his prior consent.²⁸ Invoking jurisprudence of the European Court of Human Rights, the detainee argued that any measure in violation of the right to privacy must comply with certain procedural safeguards and that the grounds on which authorities may take measures in violation of his privacy must be clearly set out²⁹ whereas the *Politique d’Adaptation* did not give any explicit or implicit authorisation for guards to enter detainees’ cells in their absence.³⁰

13. Finally, it is contested that the *Politique d’Adaptation* actually prohibits the detainee from having more than one laundry bag in his cell, given that it is written in recommendatory language and the fact that he routinely possessed more than one laundry bag in his cell prior to the incident. The detainee furthermore disputes that the possession of more than one laundry bag could lead to a security or hygienic problem.³¹

14. In relief, the detainee seeks a declaration by the Presidency that the entry of his cell in his absence and the removal of his laundry bags were unlawful.³²

²⁵ Application, paragraph 12.

²⁶ Application, paragraph 9.

²⁷ Application, paragraph 14.

²⁸ Application, paragraph 16.

²⁹ Application, paragraph 20.

³⁰ Application, paragraph 22.

³¹ Application, paragraph 23.

³² Application, page 9.

C. Determination of the Presidency

15. 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.³³
16. The issue is whether the facts amount to a “search” within the meaning of regulation 195, as submitted by the detainee, or whether they amount to an “inspection”, as held by the Registrar.
17. The detainee challenges the existence of a power to inspect that is distinct from the power to conduct a cell search under regulation 195. As to whether a distinct power of routine cell inspection exists, it is noted that the Registrar differentiated an inspection from a search on the ground that, whereas a search entails a thorough cell examination for prohibited items for the preservation of security and necessitates the presence of the detainee, an inspection does not, entailing rather a verification of the state of the cells. Another distinction was given in the case of *District of Columbia v. Little* before the United States Court of Appeals: “[i]nspect’ means to look at, and ‘search’ means to look for” [emphasis added],³⁴ demonstrating that a “search” and an “inspection” are two separate concepts, differing in their purpose and thereby in their execution.
18. The power to conduct a cell search is laid down in regulation 195 entitled “Search of cells”. It establishes the power to conduct “routine” cell searches (sub-regulation 1) and “special” cell searches where the Chief Custody Officer “has reason to believe that the cell contains an item which constitutes a threat to the health and safety of the detained person or any person in the detention centre, or to the security and good order of the detention centre” (sub-regulation 2). The presence of the detained person is required during both of these searches (sub-regulation 3). It

³³ 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.

³⁴ *District of Columbia v. Little*, 85 U.S.App.D.C. 242, 178 F.2d 13, 13 A.L.R.2d 954, paragraph 19, available at https://bulk.resource.org/courts.gov/c/F2/178/178.F2d.13.10092_1.html.

- further establishes a power to confiscate any “non-authorised items” discovered (sub-regulation 4).
19. The *Standard Operational Procedure*, which contains instructions on how an inspection is to be carried out, provides at paragraph 1 that “[i]t is the duty of the Officer in charge to ensure that a daily inspection and examination of all cells, bars, locks, doors, windows, ventilators etc takes place and to report it in the logbook”.³⁵ It is axiomatic that staff of the detention centre routinely ensure that the cells are secure and in good order. The Presidency finds that such inspections are imperative for the Chief Custody Officer to execute his mandate under regulation 187(1), namely to ensure the “secure custody of all detained persons, for their safe and humane treatment, for the safeguarding of their rights as determined by the Court and for the maintenance of discipline and good order within the detention centre”.
20. When an inspection is carried out, this may warrant the removal of items in accordance with regulation 166(2), where those items “constitute a threat to the security or good order of the detention centre, or to the health and safety of detained persons or any person in the detention centre”. Pursuant to regulation 192, the detained person is informed of such removal and further action. With respect to the presence or otherwise of the detained person during such inspections, the Presidency accepts the Registrar’s finding that whilst the detained person is entitled to be present, this cannot preclude general access to a cell by detention centre staff in the absence of the detained person.
21. As to whether the present facts constitute a “search” or an “inspection”, the Presidency accepts the Registrar’s finding that the aim of entry into the detainee’s cell in the instant case was to check the state of the cell as opposed to conducting a thorough search for prohibited items. The Presidency hereby finds that the incident fell within the category of an inspection rather than a search.
22. In view of the above, the Presidency will move to determine whether the power of inspection was properly exercised in the present case. The removal of the two laundry bags was justified by the Registrar on the basis of points V, VI and VIII of the *Politique d’Adaptation*, which entitle a detained person to “un sac à linge” and recommend that cells are organised and tidy in order to preserve good order and security and to prevent the risk of fire. The relevant section of the *Politique d’Adaptation*, point VIII, which limited the detained persons to “un sac a linge” came into force on 19 September 2012 and was thus in force at the time of the

³⁵ *Standard Operational Procedure*, page 25.

incident on 26 September 2012. The aims pursued by the Registrar – i.e. the preservation of good order and security – are legitimate aims and the Presidency sees no reason to interfere with the Registrar's finding that the two extra laundry bags presented a threat to the good order of the cell; deferring, in the instant case, in matters of security and order, to the expertise of the Registrar who is charged with the management of the detention centre in accordance with regulation 90 of the Regulations of the Court.

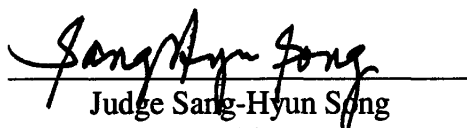
23. It follows that the removal of the two laundry bags from the detainee's cell was in accordance with the *Politique d'Adaptation*. In these circumstances, the Presidency sees no need to consider the arguments alleging a breach of privacy and dignity.

III. CLASSIFICATION

24. The Presidency notes that all documents in the instant Application have been filed confidentially and *ex parte*. The Presidency considers that, prima facie, there is no reason to retain the confidential *ex parte* classification of this decision and the related documents in the file, subject to ensuring the redaction of any information which may identify the detainee.
25. If there is any factual and/or legal basis for retaining the confidential *ex parte* classification of this decision or that of any of its related documents, or if there is any specific information requiring redaction before publication, the detainee and the Registrar are each ordered to inform the Presidency thereof by 4pm on 18 March 2013. The Presidency will thereafter rule on whether the classification should be maintained and, if necessary, on the need for any redactions.

For the above reasons, the Application is dismissed.

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


Judge Sang-Hyun Song
President

Dated this 19 February 2013

At The Hague, The Netherlands