

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-RoR221-04/12

Date: 22 February 2013

THE PRESIDENCY

Before:

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

Public Redacted

Decision on the application for judicial review dated 5 November 2012

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

Detainee
[REDACTED]

Legal representative
Mr Ghislain Mabanga

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 [REDACTED] for judicial review of the decision of the Registrar rejecting his request for a family visit funded by the Court.

The application is denied for the reasons set forth below.

I. PRODECURAL HISTORY

1. On 27 March 2011, pursuant to article 93(7) of the Rome Statute, [REDACTED] (hereinafter “detained witness”) arrived in the detention centre of the Court, where he remains to date, having been transferred from detaining authorities in the Democratic Republic of the Congo to participate in proceedings before the Court (hereinafter all references to articles are to those of the Rome Statute). He concluded his testimony before the Court on [REDACTED]. On 12 May 2011, he claimed asylum in The Netherlands before Dutch authorities. That process is ongoing.
2. On 30 July 2011, the detained witness applied to the Registrar for a funded family visit to enable his wife to visit him in the detention centre of the Court (hereinafter all references to regulations are those of the Regulations of the Registry unless otherwise provided).¹
3. On 12 August 2011, that application was denied by the Registrar on the grounds that persons detained pursuant to article 93(7) were not entitled to funded family visits and that she did not have jurisdiction to grant his request.²
4. On 29 August 2011, the detained witness filed a complaint before the Registrar, contesting that decision.³
5. On 7 September 2011, the Registrar rejected that complaint on the ground that it was filed after the relevant time limit.⁴
6. On 27 August 2012, the detained witness made a second application to the Registrar for a funded family visit to enable his nuclear family [REDACTED] to visit him in the detention centre of the Court.⁵

¹ Annex 7, ICC-RoR-221-04/12-1-Conf-Exp-Anx7.

² Pages 3 and 4 of Annex 6, ICC-RoR-221-04/12-1-Conf-Exp-Anx6, Décision relative à la demande de visite du témoin détenu [REDACTED].

³ Annex 5, ICC-RoR-221-04/12-1- Conf-Exp-Anx5.

⁴ Page 3 of Annex 4, ICC-RoR-221-04/12-1-Conf-Exp-Anx4, Décision concernant la demande de réexamen de la décision du 12 août relative à la demande de visite du témoin détenu [REDACTED].

⁵ Annex 3, ICC-RoR-221-04/12-1-Conf-Exp-Anx3.

7. On 30 August 2012, the Registrar rejected that application on the ground that it did not contain any new elements in comparison to the first application of 30 July 2011 which had been rejected.⁶
8. On 1 September 2012, the detained witness applied to the Presidency for judicial review of that decision on the ground that persons detained under article 93(7) were entitled to funded family visits and that regulation 180 had been breached by the Registrar.⁷
9. On 24 September 2012, the Presidency ordered the Registrar to examine that application, considering that, contrary to the complaints procedure, the detained witness had not requested the Registrar to review her decision of 30 August 2012, whereas such review might be beneficial to the detained witness, the Registrar and the Presidency alike and considering further that time might be saved by the Registrar reviewing the submission by the detained witness to the Presidency on 1 September 2012.⁸
10. On 26 October 2012, in response to the Presidency's order, the Registrar reviewed the application and rejected it on its merits (hereinafter "Impugned Decision").⁹
11. On 5 November 2012, the detained witness filed an application for judicial review of the Impugned Decision before the Presidency (hereinafter "Application").¹⁰ The Presidency is requested to find that the detained witness is entitled to a family visit funded by the Court.¹¹

II. MERITS

A. Relevant parts of the Impugned Decision

12. The Registrar subsequently found that detained persons are those detained not only pursuant to article 58 but also those detained pursuant to article 93(7). As such, the Registrar held that *prima facie* the detained witness has the right to receive family visits in the same way as other detainees as he was transferred to the Court pursuant to

⁶ Page 2 and 3 of Annex 2, ICC-RoR-221-04/12-1-Conf-Exp-Anx2.

⁷ Annex 1, ICC-RoR-221-04/12-1-Conf-Exp-Anx1.

⁸ ICC-RoR-221-04/12-2-Conf-exp, 24 September 2012.

⁹ Annex 2, ICC-RoR-221-04/12-3-Conf-Exp-Anx2, Décision relative à la demande de visite familiale du témoin détenu [REDACTED]– plainte #12033 (ICC-RoR-221-04/12-1- Conf-Exp-Anx5), (hereinafter "Impugned Decision").

¹⁰ Annex 1, ICC-RoR-221-04/12-3-Conf-Exp-Anx1, (hereinafter Application").

¹¹ Application, page 7.

article 93(7). The right to receive visits then depends upon the particular circumstances of each detained person.¹²

13. The Registrar further found that an indigent detained person who has been transferred to the Court in order to testify pursuant to article 93(7) would be entitled to funded family visits in cases of prolonged participation in Court proceedings.¹³
14. In determining whether to fund visits, the Registrar, taking into consideration the entitlement of the detained witness to legal assistance paid by the Court, the revenues received by him, his monthly allowance and noting the cost of his family traveling to The Hague, found that the detained witness was an indigent person for whom a family visit funded by the Court would be justified.¹⁴
15. However, the Registrar held that even though the detained witness was transferred to the detention centre pursuant to article 93(7), his detention had been prolonged due to his asylum seeking procedure before the Dutch authorities¹⁵ and was not the subject of proceedings before the Court.¹⁶ The Registrar concluded that the Court had no obligation to provide funding for the indigent detained witness in the particular case.¹⁷
16. Furthermore, the Registrar took into consideration other elements relating to the cooperation and assistance of the Congolese and Dutch authorities including the fact that the former would have to deliver passports and other necessary administrative documents, whilst the latter would have to deliver visas to each family member.¹⁸ In that respect, the Registrar held that a request for visas could be interpreted as a way of circumventing national laws and encouraging a *de facto* family reunification and further that the Court could not invest its resources without the certainty that such an endeavor would be successful.¹⁹
17. The Registrar stated that the detained witness was authorised to reach his family by telephone (prior to the current temporary restrictions put in place by the Custody Officer in relation to an outstanding telephone bill) and had been able to contact them by videoconference twice.²⁰ It was further stated that regulation 180(1) sets out the criteria for denying a request to receive family visits and does not govern the funding

¹² Impugned Decision, page 5.

¹³ Impugned Decision, page 7.

¹⁴ Impugned Decision, pages 4 and 5.

¹⁵ Impugned Decision, page 6.

¹⁶ Impugned Decision, page 8.

¹⁷ Impugned Decision, page 6.

¹⁸ Impugned Decision, pages 7 and 8.

¹⁹ Impugned Decision, page 8.

²⁰ Impugned Decision, page 6.

of authorised family visits by the Court, and as such, was inapplicable to the present case.²¹

18. The Registrar thus rejected the request for a family visit funded by the Court and, given the indigence of the detained witness, also rejected the request for a family visit.²²

B. Arguments of the detained witness

19. The detained witness submits that the right to family visits can only be rejected pursuant to regulation 180(1).²³ He argues that regulation 180(1) has been breached, as the criteria for rejecting a visit set out in that provision was not met by the Registrar, when she decided to reject his request to receive a family visit (i.e. it had not been demonstrated that the detained witness was arranging an escape or interfering with witnesses, the administration of justice or the security of the detention centre etc).²⁴ The detained witness also submits that the Registrar's finding referring to the cooperation of States should be rejected on the ground that it is not a criterion encompassed in regulation 180(1).²⁵
20. He further submitted that the Registrar did not correctly interpret the Decision of the Presidency of 10 March 2009.²⁶ The detained witness argues that the relevant decision did not hold that videoconferences replaced family visits but established that the right to receive family visits could not be replaced by technical means of communication.²⁷
21. In relation to the circumstances of his detention, the detained witness submits that the Registrar erred in holding that the entitlement to funded family visits extends to detained witnesses who are still taking part in proceedings, but not to those who have concluded their testimonies.²⁸ The detained witness further argues that this interpretation has the effect of discriminating between witnesses and, further, is in breach of internationally recognised human rights that the Court must apply pursuant to article 21(3).²⁹ The detained witness argues that he is entitled to all the rights

²¹ Impugned Decision, page 4.

²² Impugned Decision, page 8.

²³ Impugned Decision, page 4.

²⁴ Application, page 3.

²⁵ Application, page 6.

²⁶ Application, page 4 referring to ICC-RoR-217-02/08, paragraph 36.

²⁷ Application, page 4.

²⁸ Application, page 5.

²⁹ Application, page 5.

afforded to detained persons pursuant to articles 93(7) and 58, including the right to receive funded family visits.³⁰

22. In relief, the detained witness requests the Presidency to quash the Impugned Decision and grant his request for a family visit funded by the Court.³¹

C. Determination of the Presidency

23. 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.³²
24. The instant Application pertains to whether the detained witness is entitled to receive a family visit funded by the Court.
25. First, it is noted that the Court has jurisdiction to entertain requests made by any person in its custody pursuant to articles 58 or 93(7) or any other way consistent with the Court's obligations. The Presidency thus rejects the Registrar's initial decision of 12 August 2011, in so far as she denied jurisdiction over the request of the detained witness for funding from the Court for a family visit on the ground that his request should have been directed to the Dutch authorities, following his claim for asylum in The Netherlands.³³
26. The right of detained persons to receive visits is guaranteed by regulation 100(1) of the Regulations of the Court. The particular importance of the right to family visits is emphasised by regulation 179(1).
27. In examining the right to receive funded family visits, it is noted that while persons detained pursuant to article 58 are those in relation to whom "[t]here are reasonable grounds to believe that [they have] committed a crime within the jurisdiction of the Court",³⁴ persons detained pursuant to article 93(7) are those temporarily transferred

³⁰ Application, pages 6 and 7.

³¹ Application, page 7.

³² 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. See also the decision of the Presidency of 10 July 2008, ICC-Pres-RoC72-01-8-10, paragraph 20.

³³ Page 4 of Annex 6, ICC-RoR-221-04/12-Conf-Exp-Anx6.

³⁴ Article 58(1)(a) of the Statute.

from custody elsewhere for the “purposes of identification or for obtaining testimony or other assistance”. As the latter would ordinarily be required for only a part of the proceedings, it follows that the duration of their detention would be shorter than that of the former. As such, the question of the entitlement of a detained witness to funded family visits would not normally arise, given the expected short duration of their detention and the limited availability of the Court’s resources.

28. In cases of prolonged detention, an indigent detained witness may, however, be entitled to family visits, as the Registrar correctly found.³⁵ Given the exceptional nature of the extended detention of the detained witness in the instant case, the Presidency will proceed to examine the merits of his Application for a funded family visit.
29. The Decision of the Presidency of 2009, found that in the case of an indigent detained person, the right to receive family visits could only be rendered effective if the costs of such visits were borne by the Court.³⁶ Noting that the Registrar has found the detained witness to be an indigent person for whom a family visit funded by the Court would be justified,³⁷ the indigence of the detained person is not in issue in the present case.
30. In view of the length of the detention of the detained witness (approximately 1 year and 9 months), the Presidency considers that he would *prima facie* be entitled to receive funded family visits. However, in this particular case, the purpose for which the detained witness was transferred to the Court has been fulfilled as he concluded his testimony within approximately [REDACTED] of his arrival in the detention centre.³⁸ The Court’s custody over him has been extended and his transfer to the previous detaining Congolese authorities suspended due to his ongoing asylum claim in The Netherlands. The Presidency finds that since the extension of the custody of the detained witness is not for the purpose of Court proceedings, it does not result in a corresponding extension of the obligation of the Court to fund his family visit. The Registrar had a reasonable justification for differentiating between the detained persons for the purpose of establishing eligibility for funding for family visits.³⁹

³⁵ Impugned Decision, page 7.

³⁶ See ICC-RoR-217-02/08, paragraph 31.

³⁷ Impugned Decision, page 4.

³⁸ Pursuant to article 93 (7) (b), the person being transferred to the Court shall remain under its custody and when the purpose of the transfer has been fulfilled the Court must return the person to the requested State.

³⁹ See *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV, “The Court reiterates that Article 14 of the Convention affords protection against discrimination, that is treating differently, without an objective and reasonable justification, persons in relevantly similar situations”

31. Notwithstanding the above, the Presidency recognizes the importance of maintaining family ties for the well-being of the detained person and that the lack thereof may cause a degree of emotional hardship to the detained person and affect his morale.⁴⁰ It is noted that the detained witness is able to reach his family by telephone, subject to the temporary restrictions in place, and has been able to contact his family twice by video conference. The Registrar is encouraged to enable the detained witnesses to contact their families by video conferencing as frequently as is feasible.
32. Given the particular circumstances surrounding the detention of the detained witness, the Presidency confirms the Registrar's finding that the Court has no obligation to fund a family visit in the instant case.⁴¹ As such, no assessment pursuant to regulation 180 need have been made.

[REDACTED]

The Application is dismissed.

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


 Judge Sang-Hyun Song
 President

Dated this 22 February 2013

At The Hague, The Netherlands

⁴⁰ ICC-RoR-217-02/08, paragraph 35.

⁴¹ Impugned Decision, page 6.