

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-RoR221-01/13

Date: 10 June 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 25 March 2013

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
Mr. Herman von Hebel

Deputy Registrar
Mr. Didier Preira

Detention Section
Mr. Harry Tjonk

The Presidency of the International Criminal Court (“Court”) has before it the application of [REDACTED] for judicial review of the decision of the Registrar rejecting his request for an urgent appointment with an ophthalmologist.

The application is dismissed for the reasons set forth below.

I. PRODECURAL HISTORY

1. On 6 March 2013, [REDACTED] (“detainee”) made a complaint to the Chief Custody Officer stating that he had been suffering from problems with his eyes and glasses for two months, and claimed that despite his complaints to the medical service of the detention centre, he had received no reaction.¹
2. On 7 March 2013, that complaint was determined to be unjustified by the Chief Custody Officer, who noted that on 12 February 2013, the detainee had spoken to the nurse about the problems with his eyes. Following an ophthalmological examination, it was determined that the detainee’s current glasses were of insufficient effectiveness, and a report was made to the detention centre’s physician, who on 27 February 2013 made a referral to a specialist. An appointment with the specialist was scheduled for 11 March 2013. Since the detainee’s complaint would likely be resolved by the upcoming visit to the specialist, the Chief Custody Officer found it to be unfounded, as a request for an update on the situation would have yielded the same result that the detainee was seeking – namely, an appointment with a specialist.²
3. On 8 March 2013, the detainee filed a complaint before the Registrar, contesting the decision of the Chief Custody Officer,³ and expressing his feeling that he had been ignored by the medical service at the detention centre (“Medical Service”). He noted that he was only told of the appointment with the specialist after making his complaint to the Chief Custody Officer. Finally, he asked the Registrar not to delay his treatment any longer, for fear that it would worsen.
4. On 25 March 2013, the Registrar rejected the complaint on the ground that she could not review the decision of the detention centre’s doctor (“Doctor”) who had determined that the detainee’s eye condition was not urgent, since such decision was

¹ ICC-RoR-221-01-13-Conf-Exp-Anx4.

² Pages 2 and 3 of ICC-RoR-221-01-13-Conf-Exp-Anx4.

³ ICC-RoR-221-01-13-Conf-Exp-Anx3.

solely within the doctor's medical expertise ("Impugned Decision").⁴ However, the Registrar ordered the Chief Custody Officer to direct the Doctor to, in the future, inform all detained persons of the dates of their medical appointments as soon as possible.⁵

5. On 25 March 2013, the detainee made the instant application for judicial review of the decision of the Registrar to the Presidency, pursuant to Regulation 221 of the Regulations of the Registry ("Application"),⁶ therein requesting the Presidency to arrange "soin appropri  " for his vision.⁷
6. On 8 April, 2013, the Registrar filed submissions in response to the Application ("Response").⁸
7. The same day the detainee made further submissions by letter to the Presidency ("Supplementary Submissions"),⁹ which letter was filed on 11 April 2013.

II. MERITS

A. Relevant parts of the Impugned Decision

8. In rejecting the detainee's request to be seen by an ophthalmologist forthwith, the Registrar stated that the issue was solely for the Doctor to determine, in accordance with his medical expertise, having regard to the state of health of a detained person under his or her care and the urgency of such person's medical needs.
9. The Registrar stated that she had sought supplementary information from the Medical Service regarding the detainee's eye problems and had been informed that they first became apparent after he complained to a nurse on 12 February 2013. Prior to that date, the detainee had a consultation in November 2011 when his vision was measured.
10. The Registrar noted that the Doctor had found the detainee's condition not to be of such urgency as to warrant an immediate appointment with a specialist, and had instead, on 27 February 2013, scheduled an appointment for 11 March 2013, during the next regular visit of the specialist to the detention centre. Having found the

⁴ ICC-RoR-221-01-13-Conf-Exp-Anx2.

⁵ Page 4 of ICC-RoR-221-01-13-Conf-Exp-Anx2.

⁶ ICC-RoR-221-01-13-Conf-Exp-Anx1.

⁷ Application, page 5.

⁸ ICC-RoR-221-01-13-2-Conf-Exp.

⁹ ICC-RoR-221-01/13-3-Conf-Exp-Anx.

decision on medical necessity to be within the medical expertise of the Doctor, the Registrar declined to review the decision.

11. The Registrar also reiterated the statement of the Chief Custody Officer that the detainee ought to have made a simple query regarding his medical appointment, rather than utilizing the formal complaints procedure. Finally, the Registrar also noted that a formal procedure now allows detainees to leave requests in a box only accessible to medical staff, and this procedure would likely solve such communication problems.
12. The Registrar thus rejected the request for an immediate appointment with an optician. However, the Registrar found that it would help allay the fears of detained persons if they were informed of the dates of their medical appointments and ordered the CCO to direct the Doctor as such.¹⁰

B. Arguments of the detainee

13. First, the detainee states that he complained of decreased vision in writing several times, but it was only after a visit from the nurse for another issue, to whom he complained about his vision, that any steps were taken in response. The detainee states that the Doctor never consulted him directly regarding his decreased vision.
14. Second, the Applicant states that he could not recall having a single medical appointment related to his vision in November 2011, contrary to what was asserted in the Registrar's Decision, and that the Registrar must have been misled by the Medical Service of the detention centre.
15. Third, he states that his scepticism about the appointment date of 11 March 2013, proved justified, as the appointment did not take place as scheduled, and at the time of making this complaint to the Presidency on 25 March 2013, he had not had any information about a new medical appointment having been scheduled.
16. Fourth, the detainee points out that the Registrar agreed with the Doctor's characterisation of the urgency of the situation by scheduling an appointment so soon after the 27 February 2013 referral to the ophthalmologist. However, he argues that this contradicts her later expressing approval of the Doctor's statement that his health does not justify any emergency measures.
17. The detainee finally wishes to remind the Court that he continues to suffer from declining vision and asserts that he is in need of an "examen minutieux et approfondi"

¹⁰ Impugned Decision, page 8.

of his eyes. He states that “le fait que cela soit fait délibérément constitue une faute grave dans la mesure où c’est la vie humaine qui est exposée.”¹¹

18. In relief, the detained witness requests the Presidency to quash the Registrar’s Decision and schedule an ophthalmological appointment forthwith.
19. In his Supplemental Submissions, a copy of which was sent by the detainee to the International Committee of the Red Cross (“ICRC”) the detainee reiterates his arguments made in the Application, but additionally, requests to be treated for his condition by the ICRC.¹²

C. Response of the Registrar

20. In response to the first point raised by the Applicant, the Registrar indicates that during 14 medical consultations that the detainee attended between October 2012 and 19 January 2013, there is no record of the detainee making any mention of any problems with his glasses or vision. The Registrar also recalls that a special box was created where detainees could place written grievances or requests to the medical service that would be accessible to the nurses. It is submitted that the fact that the detainee was able to address his concern to the nurse is not a grounds for criticism, but rather shows that the lines of communication between the parties were in proper working order. Further, the Registrar notes that the established procedure is that nurses perform some measure of “triage”, having regard to the absence, presence, and urgency of patients’ symptoms. The Registrar emphasizes that consultations between nurses and patients are always discussed with the detention centre’s doctor afterward.¹³
21. With respect to the second point raised by the Applicant, the Registrar underlined that, contrary to what was asserted by the Applicant, she had no reason to doubt the integrity of the Doctor when he stated that there had been a consultation in November 2011. She confirmed that in November 2011, the detainee had asked for a new pair of glasses. He saw an optician and a new pair was purchased for him. The Registrar indicates that there is documentary evidence proving this set of facts. Although this does not directly bear on the question to be decided on this judicial review, the

¹¹ Application, page 4.

¹² Pages 3-4, ICC-RoR-221-01/13-3-Conf-Exp-Anx.

¹³ Response, pages 3-4.

Registrar submits that it demonstrates the fact that periodic visits with an optician take place in the detention centre, and calls into question the credibility of the Applicant.¹⁴

22. With respect to the third point raised by the Applicant, namely, the cancellation of the 11 March 2013 appointment, the Registrar has provided an explanation. Apparently, an appointment with the optician had been scheduled for that date; but unfortunately, the optometric device broke. The medical service indicated to the Registrar that it was in the process of finding a replacement, and if such could not be obtained by 12 April 2013, an external appointment would be arranged.¹⁵
23. In regard to the final two points made by the Applicant, the Registrar echoes what was stated by the Doctor, and observes that specialist medical services are not simply available on demand; rather, the scheduling of visits or consultations is done by the particular specialist in question and is determined by that specialist's schedule. The Registrar indicates that this explains the time between the decision to refer the detainee to a specialist by the Doctor, and the scheduling of the appointment for 11 March 2013.¹⁶
24. The Registrar also noted that even outside the detention centre, it is not unusual for specialist appointments such as dentists, ophthalmologists, physiotherapists, etc., to be scheduled weeks or months in the future due to the busy schedules of such specialists.
25. The Registrar does not question the expertise of the Doctor, who stated that the detainee will not suffer any adverse medical repercussions in his vision due to the delay in seeing an optician. The Registrar notes that it is the responsibility of the Doctor to determine the appropriate care required as a matter of medical expertise. Although the Doctor's position on this issue seems to be contrary to that of the detainee's, who states that the delay [translation, emphasis added by Registrar] "could lead to a deterioration of my vision", the Registrar states that the opinion of the Doctor, and his medical expertise in the matter, should be preferred.¹⁷

D. Determination of the Presidency

26. 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:

¹⁴ Response, page 4.

¹⁵ Response, page 5.

¹⁶ Response, page 5.

¹⁷ Response, pages 5-6.

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.¹⁸

27. The instant Application pertains to a request to review the medical treatment that is currently being arranged by the Medical Service in respect of the detainee's vision, the issue being whether the decision of the Registrar to rely on the Doctor's determination of the urgency of the situation was sound.
28. The right to receive medical treatment for persons detained by the Court is guaranteed by regulation 103 of the Regulations of the Court. The particular importance of the right to medical treatment is emphasised by regulation 103(3). Regulations 154-159 of the Regulations of the Registry provide further detailed requirements for the medical treatment of detained persons. Notably, regulation 155(2) stipulates that "the medical officer shall inform the Chief Custody Officer in writing whenever he or she considers that the physical...health of a detained person...will be adversely affected by any condition of or treatment in detention" and regulation 155(3) provides that "the Chief Custody Officer shall in turn inform the Registrar without delay." Further, the latter "shall take all action considered necessary and subsequently inform the Presidency and the Chamber in writing."
29. In the submissions in the Application, a number of facts were disputed between the detainee and the Registrar. The Presidency will delve into such issues only to the extent to which it is necessary to review the Impugned Decision.
30. The parties appear to be in agreement on a number of key facts. First, there is a problem with the detainee's eyes that is causing him some manner of distress, a problem that was made known to the Doctor in one way or another in February 2013, and for which the Doctor referred the detainee to a specialist – an ophthalmologist. It is also agreed that no appointment with the specialist took place on 11 March 2013, the date that was originally planned. The parties differ as to the reason for this; the detainee claims that no appointment was scheduled at all, whereas the Registrar states that an appointment was scheduled but had to be cancelled due to faulty equipment.
31. The Presidency accepts the explanation of the Registrar that the appointment was duly scheduled but did not take place due to faulty equipment. It is noted that the facts have

¹⁸ 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.

now evolved since the decision was made. Through further internal communications with the Registrar, the Presidency has been informed that the optometric device was not replaced or repaired by 12 April 2013, and the Registry assures the Presidency that steps are now being taken to secure an appointment with an external specialist as soon as possible.

32. The Presidency detects no error in the decision of the Registrar to give deference to the medical opinion of the Doctor that the detainee's problems with his vision were not in danger of worsening if he was unable to see a specialist immediately.
33. For decisions of the Chief Custody Officer or Registrar that concern medical opinions or decisions, due deference should be shown to the medical decision-maker by the reviewing body. Absent any indication that the medical decision or opinion was patently unreasonable, or any conflicting medical evidence, it was reasonable and proper for the Registrar to rely on the Doctor's opinion. The Presidency, in turn, will show an equal level of deference to the Doctor's opinion on medical urgency, and will not interfere with the decision of the Registrar in the instant case.
34. Nevertheless, the Presidency is mindful of the fundamental general principle of medical care in prisons, as expressed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment based on a review of the prison conditions of many countries, namely, that prisoners are entitled to an equivalent level of medical care as persons living in the community at large.¹⁹
35. Although the medical opinion of the Doctor is that physically, the detainee's vision will not be adversely affected by the further delay in treatment, it is evident from the detainee's own statements that his comfort is adversely affected by his untreated poor vision, and, as stated above, he is entitled to an equivalent level of care to citizens outside the detention centre. Thus, although the request by the detainee for the immediate treatment of his vision is dismissed, in accordance with the Registrar's assurances, the Registrar shall arrange for the detainee to visit a suitable specialist outside the detention centre at the earliest available opportunity.
36. Finally, with respect to the Supplemental Submissions that were made by the detainee, the Presidency first notes that such submissions were not made at the request of, or with prior leave of, the Presidency. Additionally, the bulk of those reiterate or elaborate on points that were made by the detainee in his Application. The Presidency thus takes this opportunity to reiterate that a party must first obtain leave before

¹⁹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Third General Report on the CPT's activities covering the period 1 January to 31 December 1992, CPT/Inf (93)12 [EN], paragraph 31.

making a reply in accordance with the principle established in regulation 24(5) of the Regulations of the Court.²⁰

37. Notwithstanding the foregoing procedural irregularities, with respect to the new request of the detainee in the Supplemental Submissions to “bien vouloir autoriser le service du Comité International de la Croix Rouge à s’occuper de ma santé”, the Presidency has determined that such request requires no further action on its part.
38. The Presidency notes that in accordance with Article 2(1) of the “Agreement between the International Criminal Court and the International Committee of the Red Cross on Visits to Persons deprived of Liberty Pursuant to the Jurisdiction of the International Criminal Court” (“ICRC Agreement”),²¹ the ICRC is authorized to visit all detainees held by the ICC for the duration of their detention. Article 4 of the ICRC Agreement further provides that, *inter alia*, the ICRC will have “unlimited access to all Detainees” during such visits, will be able to speak in private with any detainee, and can conduct such visits as often as the ICRC deems necessary. Article 3(2) sets out that during such visits, the ICRC “shall examine...the physical and psychological conditions and treatment of the Detainees.”
39. Thus, there is no need for the Presidency to give the authorization requested by the detainee, as the ICRC already enjoys a standing authorization of a more general nature that encompasses the specific authorization requested by the detainee.

III. CLASSIFICATION

40. 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 or his family members.
41. 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 1 June 2013. The Presidency will thereafter rule on whether the classification should be maintained and, if necessary, the need for any redactions.

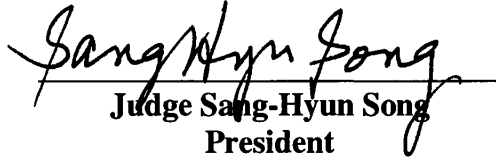
²⁰ Decision on the request for judicial review dated 8 February 2012, ICC-RoR221-01/12.

²¹ ICC-PRES/02-01-06.

The Application is dismissed.

The Registrar is ordered to arrange for the detainee to visit a suitable specialist outside the detention centre at the earliest available opportunity.

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


Judge Sang-Hyun Song
President

Dated this 10 June 2013

At The Hague, The Netherlands