

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-RoR221-02/13**

Date: **16 August 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 21 July 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] (“detainee”) for judicial review of the decision of the Registrar rejecting his request to be allowed to take his prescribed medication without the presence of a custody officer.

The application is dismissed for the reasons set forth below.

I. PRODECURAL HISTORY

1. On 6 March 2012, the procedure for administering medication in the detention centre was changed so that detained persons no longer needed to take their medication in the presence of a custody officer.¹
2. On 16 April 2012, a custody officer reported that during a routine pat-down search earlier that day, he found seven tablets of hydrochlorothiazide in the possession of the detainee (“April 2012 Incident”).²
3. On 20 April 2012, by memorandum, the Chief Custody Officer (“CCO”) ordered that, in the case of the detainee, all detention centre staff were to follow the previous procedure of administering medication; namely (in relevant part), (i) all medication would be handed to the detainee who would take the medication in the presence of the custody officer, and (ii) if the detainee refused to take the medication, the custody officer would ensure the medication was returned to the dosage box and would inform the Medical Officer and the CCO or Deputy CCO without delay.³
4. On 18 June 2013, an incident occurred during which certain custody officers stood in the presence of the detainee while he took prescribed vitamin D tablets (“June 2013 Incident”).
5. On 28 June 2013 the detainee made a complaint to the CCO stating simply: “Je me plains contre la decision de prise de medicaments par force. Je ne suis pas un animal au zoo auquel on doit administrer des médicaments par force. Ceci est une torture et me traumatise et va à l’encontre de norme 206.”⁴
6. On 1 July 2013, that complaint was determined to be unjustified by the CCO, who noted in particular that in no way was the detainee being forced to take his medication

¹ ICC-RoR-221-02/13-1-Conf-Exp-Anx3, page 3.

² ICC-RoR-221-02/13-1-Conf-Exp-Anx5.

³ ICC-RoR-221-02/13-1-Conf-Exp-Anx4.

⁴ ICC-RoR-221-02/13-1-Conf-Exp-Anx3, page 1.

– if the detainee wished to eschew his medications he was free to do so, but each refused dose would need to be returned to the custody officer and not kept by the detainee.⁵ The CCO also noted the serious danger to the health and safety of all detainees that would result from the stockpiling of medications.⁶

7. On 2 July 2013, the detainee filed a complaint before the Registrar, contesting the decision of the CCO.⁷ In that complaint, the detainee recounted the June 2013 Incident. He alleged that the custody officers involved had pressured him to swallow the tablets “par force sous leurs yeux”, contrary to the practice of previous custody officers.⁸
8. On 16 July 2013, the Registrar rejected this second complaint of the detainee (“Impugned Decision”).⁹ The Registrar noted that after the April 2012 Incident the detainee was informed in a meeting with the Deputy CCO (in the presence of an interpreter) of the fact that the detainee would henceforth be required to take his medication in the presence of a custody officer. He observed that there were no further incidents related to this issue from April 2012 until June 2013. The Registrar rejected the detainee’s allegation that he was physically forced to take his medication, and noted that the requirement that a custody officer be present during the administration of medication did not constitute forced medication. Rather, the detainee was allowed to choose not to take his medication if he did not wish to.¹⁰ If medication was not taken by the detainee, it had to be returned to the custody officer.¹¹
9. On 21 July 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”),¹² wherein he requested the Presidency to “lui permettre de prendre les médicaments comme toutes les personnes détenues du quartier Pénitentiaire de la Cour Pénale Internationale”.¹³
10. On 29 July 2013, the detainee made further submissions by letter to the Presidency (“Supplementary Submissions”).¹⁴ Such submissions consisted of the detainee’s observations on Annex 4 (the memorandum of the CCO to all detention centre staff

⁵ ICC-RoR-221-02/13-1-Conf-Exp-Anx3, page 3.

⁶ ICC-RoR-221-02/13-1-Conf-Exp-Anx3, page 3.

⁷ ICC-RoR-221-02/13-1-Conf-Exp-Anx2, paragraph 3.

⁸ ICC-RoR-221-02/13-1-Conf-Exp-Anx2, paragraph 3.

⁹ ICC-RoR-221-02/13-1-Conf-Exp-Anx2.

¹⁰ ICC-RoR-221-02/13-1-Conf-Exp-Anx2, paragraphs 9-10.

¹¹ ICC-RoR-221-02/13-1-Conf-Exp-Anx2, paragraph 9.

¹² ICC-RoR-221-02/13-1-Conf-Exp-Anx1.

¹³ ICC-RoR-221-02/13-1-Conf-Exp-Anx1, page 7.

¹⁴ ICC-RoR-221-02/13-2-Conf-Exp-Anx.

regarding the requirements for administering medication to the detainee) and Annex 5 (the report on the April 2012 Incident) of the Registry's transmission of this matter to the Presidency.

11. On 12 August 2013, the Registrar transmitted to the Presidency supplementary information pursuant to regulation 24 *bis* of the Regulations of the Court.¹⁵ This supplementary information consisted of a copy of the minutes taken by the CCO on 20 April 2012 regarding a meeting with the detainee in relation to the April 2012 Incident.¹⁶ The Registrar also informed the Presidency that in the period between the April 2012 Incident and the June 2013 Incident, the detainee only took medication from 14–21 January 2013, and such medication was administered under the supervision of custody officers. The Registrar further informed the Presidency that the first time the detainee indicated that he would not take medication under such supervision was the June 2013 Incident.

II. MERITS

A. Relevant parts of the Impugned Decision

12. In rejecting the detainee's complaint, the Registrar noted that the requirement that medication be taken in the presence of a custody officer does not constitute the administration of medication by force.¹⁷ The fact that certain custody officers did not scrupulously apply the CCO's order of 16 April 2012 was insufficient to relieve the detainee of his obligation to cooperate with the CCO order, despite the significant time lapse between that order and the June 2013 Incident.¹⁸ The Registrar recalled that failure to obey an order or instruction constitutes a disciplinary offence under regulation 217, although no such offence was found to exist on the facts of the case.¹⁹
13. The Registrar noted that there was no indication that incidents regarding the administration of medication occurred between April 2012 and June 2013.²⁰ However, the CCO held two meetings with the detainee on 24 and 26 June 2013 to recall the

¹⁵ ICC-RoR-221-02/13-3-Conf-Exp.

¹⁶ ICC-RoR-221-02/13-3-Conf-Exp-Anx.

¹⁷ ICC-RoR221002/13-1-Conf-Exp-Anx2, paragraph 10.

¹⁸ ICC-RoR221002/13-1-Conf-Exp-Anx2, paragraph 10.

¹⁹ ICC-RoR221002/13-1-Conf-Exp-Anx2, paragraph 10.

²⁰ ICC-RoR221002/13-1-Conf-Exp-Anx2, paragraph 6.

order of 20 April 2012 and to reiterate the instructions given to custody officers at that time.²¹

14. The Registrar confirmed that the practice followed in the detention centre is that when a detained person decides not to take his or her medication, the detainee must return that medication to the custody officer present.²² The Registrar further observed that before the change in procedure in March 2012, custody officers were present for the administration of medication. At that time, no particular complaint was raised against this policy by the detainee.²³
15. The Registrar addressed the detainee's allegation that the administration of medication was "forced", noting that the term gave the impression of physical force exercised by the custody officers.²⁴ However, the procedure for the administration of medication only required the physical presence of a custody officer.²⁵ If a detained person refused to take the medication, it had to be returned to the custody officer present, to avoid a situation in which the detained person could stockpile medications in their cell.²⁶ The Registrar recalled that the CCO has the obligation to take, in consultation with the Medical Officer, measures necessary to maintain the well-being of detained persons and to ensure order and discipline in the detention centre.²⁷ The stockpiling of unconsumed medication poses a risk to public and personal health which the CCO is obliged to prevent.²⁸

B. Arguments of the detainee

16. The detainee challenged the Impugned Decision and requested that the Presidency permit him to take his medications in the same manner as all other detained persons within the detention centre.²⁹
17. First, the detainee noted that contrary to the finding of the Registrar, it is not required that medication be taken in the presence of custody officers, and that the detainee was never previously required to follow such a procedure.³⁰ While the custody officers

²¹ ICC-RoR221002/13-1-Conf-Exp-Anx2, paragraphs 7, 10.

²² ICC-RoR221002/13-1-Conf-Exp-Anx2, paragraph 7.

²³ ICC-RoR221002/13-1-Conf-Exp-Anx2, paragraph 8.

²⁴ ICC-RoR221002/13-1-Conf-Exp-Anx2, paragraph 9.

²⁵ ICC-RoR221002/13-1-Conf-Exp-Anx2, paragraph 9.

²⁶ ICC-RoR221002/13-1-Conf-Exp-Anx2, paragraph 9.

²⁷ ICC-RoR221002/13-1-Conf-Exp-Anx2, paragraph 9.

²⁸ ICC-RoR221002/13-1-Conf-Exp-Anx2, paragraph 9.

²⁹ ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 7.

³⁰ ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 2.

were notified of the 20 April 2012 order, the detainee was not informed of this change in procedure.³¹

18. Second, the detainee observed that in June 2013, no pharmaceutical products were found in his possession, and he took medication in the same manner as all other detained persons.³² The detainee submitted this as proof that the custody officers' actions during the June 2013 Incident were directed against the detainee personally with a certain discriminatory intent.³³
19. Third, the detainee recalled that the Registrar accepted that two meetings on the 24 and 26 of June 2013 were convened to reiterate orally the instructions given to custody officers the previous year, regarding the supervision of the detainee during the administration of medication. Given that the detainee took his medication in the normal manner, the detainee questioned the purpose of the measure, particularly in light of the fact that he had committed no disciplinary offence.³⁴ The detainee further challenged the Registrar's conclusion that the procedure adopted was necessary to avoid a situation in which detained persons disposed of their stocks of medication in their cells. The detainee submitted that detained persons do not take medication in the presence of custody officers, and further, that they do not conserve such medications, nor are medications found in their possession.³⁵
20. Fourth, the detainee noted that the Impugned Decision incorrectly refers to a disciplinary offence under regulation 217. The detainee recalled that the regulation which addresses disciplinary offences is regulation 207, not regulation 217.³⁶
21. Fifth, the detainee submitted that the Registrar determined that the detainee was found to have violated regulation 207 on 20 April 2012. Accordingly under regulation 208, the CCO should have charged the detainee with a disciplinary matter no later than 48 hours after the commission or discovery of the offending conduct.³⁷ The detainee recalled that under regulations 210-211, the CCO must conduct an investigation into an alleged breach of discipline before imposing any punishment on the detained person.³⁸ However, no such investigation was conducted. The detainee further noted that the delay of a year in this case was clearly contrary to the 48 hour grace period

³¹ ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 2.

³² ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 3.

³³ ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 3.

³⁴ ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 3.

³⁵ ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 4.

³⁶ ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 5.

³⁷ ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 5.

³⁸ ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 5.

afforded by regulation 208.³⁹ The detainee therefore submitted that no decision could be taken against him without violating the Regulations of the Registry. The detainee affirmed that no new facts had emerged which would alter this analysis.⁴⁰ The detainee submitted that the Registrar and the CCO could not rely on the order of 20 April 2012 as a basis for their respective decisions, as regulation 206 prohibits the imposition of disciplinary measures without due process.⁴¹

22. In a further submission dated 24 July 2013 and transmitted by the Registry to the Presidency on 29 July 2013, the detainee reiterated that the order of 20 April 2012 was provided to staff, and that he was not personally informed of this measure.⁴² The detainee further noted that the measure was taken four days after the alleged commission of the offence and was not subjected to evaluation, in violation of regulations 208, 210, 211 and 214.⁴³ The detainee additionally referred to the Officer's Report of 16 April 2012, noting that the CCO had not checked any box regarding action to be taken against the person concerned.⁴⁴

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.⁴⁵
24. The present request for judicial review concerns the issue of whether the CCO may determine that a custody officer must be present during the taking of medication by a particular detainee, despite the fact that this procedure is not applied to other detainees.

³⁹ ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 6.

⁴⁰ ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 6.

⁴¹ ICC-RoR221-02/13-1-Conf-Exp-Anx1, page 6.

⁴² ICC-RoR221-02/13-2-Conf-Exp-Anx, page 1.

⁴³ ICC-RoR221-02/13-2-Conf-Exp-Anx, page 2.

⁴⁴ ICC-RoR221-02/13-2-Conf-Exp-Anx, page 2.

⁴⁵ 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.

25. In addressing this question, the Presidency recalls that there is nothing in the legal texts that bars a custody officer from administering medication to a detainee directly.⁴⁶ In its decision of 28 March 2012, the Presidency determined that “if the Medical Officer sees fit to allow custodial staff to administer medicines based on his or her instructions, the Presidency sees no reason to interfere with such expert medical assessment of the appropriate procedure.”⁴⁷ The question of whether the CCO has the discretion to order that in the case of a particular detainee, a procedure be adopted according to which medication is handed to the detainee in the presence of a custody officer, and, if the detainee refuses to take that medication, the medication is returned to the custody officer, nonetheless raises distinct issues.
26. In addressing this question, the Presidency notes that regulation 187(1) provides that the CCO shall be responsible for 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. While the Medical Officer has responsibility for the care of physical and mental health of detained persons, in accordance with regulation 155(1), the Presidency considers that the introduction of measures to promote the safe and humane treatment of detainees and to maintain discipline and good order that relate to the health of detained persons falls within the rubric of the CCO’s responsibilities as set out in regulation 187(1).
27. The Presidency agrees with the conclusion of the Registrar in the Impugned Decision that “la conservation de produits médicamenteux non consommés pose en effet un risque de santé publique qu’un CQP bien avisé devrait et doit prévenir.”⁴⁸ In the present case, the discovery of unused medication in the possession of the detainee in April 2012 raised a question of the safe and humane treatment of the detained person and of discipline and good order within the detention centre, which the CCO was required to address in accordance with his duties under regulation 187.
28. The Presidency considers that the measures taken by the CCO in response to the April 2012 Incident were adopted under the CCO’s general powers and duties under regulation 187. The Presidency further notes that the record of the CCO of 20 April 2012 demonstrates that the detainee was informed of these measures and that he raised no objection at that time. The Presidency accepts the finding of the Registrar

⁴⁶ Decision of 28 March 2012, ICC-RoR221-01/12-6-Red, paragraph 18.

⁴⁷ Decision of 28 March 2012, ICC-RoR221-01/12-6-Red, paragraph 49.

⁴⁸ ICC-RoR-221-02/13-1-Conf-Exp-Anx2, at paragraph 9.

that the detainee was reminded of these measures in two meetings on 24 and 26 June 2013.

29. The Presidency takes note of the detainee's submission to the effect that the requirement that he takes medication in the presence of custody officers contained a certain discriminatory intent. The Presidency considers that in light of the circumstances, the measures adopted by the CCO were not taken in a discriminatory manner contrary to regulation 91(2) of the Regulations of the Court, in that there was no discrimination on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.
30. The Presidency agrees with the conclusion of the Registrar that the measures adopted in the case of the detainee did not amount to a 'forced' administration of medication. If the detainee did not consent to taking medication in the presence of a custody officer, he remained free to return that medication to the custody officer.
31. The Presidency considers that the long gap between the April 2012 Incident and the June 2013 Incident is explained in part by the fact that the detainee was not taking medication regularly in the interim period. According to the information that was disclosed by the Registrar on 12 August 2013, during that interim period the detainee only took medication from 14-21 January, during which time the detainee was supervised by custody officers.
32. The Presidency emphasises that the decision of the CCO to impose the previous rule on the detainee regarding the taking of medication in the presence of a custody officer was not a disciplinary measure taken under Regulation 211 in response to any alleged disciplinary offence under Regulation 207. This is clear from the CCO's record of the meeting of 20 April 2012, in which the CCO stated that he was not going to address the April 2012 Incident as a disciplinary matter.⁴⁹ Since the detainee was never accused of any disciplinary offence, the arguments of the detainee⁵⁰ with respect to certain alleged failures by the CCO to follow the procedures related to disciplinary offences set out in Regulations 207, 208, 210, and 211 are inapplicable.
33. In accordance with this finding, the Presidency concludes that contrary to the detainee's submissions in his complaint to the CCO dated 28 June 2013, regulation 206 has no application to the measures adopted in this case. Regulation 206 provides that "[n]o disciplinary measures shall be imposed on a detained person without due

⁴⁹ ICC-RoR221-02/13-3-Conf-Exp-Anx.

⁵⁰ ICC-RoR-221-02/13-1-Conf-Exp-Anx1, paragraph 9.

process in accordance with these Regulations. No detained person shall be subjected to a disciplinary measure twice for the same act.”

34. The fact that the measures in question are administrative rather than punitive does not however entail that they may be imposed arbitrarily in the absence of general due process protections. The Presidency recalls in this regard that decisions of the Court must be consistent with internationally recognized human rights pursuant to article 21(3) of the Rome Statute of the International Criminal Court.
35. The Presidency sees no error in the Registrar’s determination on the basis of the facts in the present case. The Presidency recalls the invitation of the Registrar to the CCO to evaluate the situation and, when the cooperation of the detainee is deemed sufficient in the judgment of the CCO, to put an end to the procedure of requiring the detainee to take medication in the presence of a custody officer, and to the detainee to cooperate in the implementation of the CCO’s instructions.⁵¹
36. Finally, the Presidency notes that the further submissions of the detainee, transmitted by the Registry on 29 July 2013, were not made at the request of, or with prior leave of, the Presidency. The Presidency thus takes this opportunity to reiterate that a party must first obtain leave before making a reply in accordance with the principle established in regulation 24(5) of the Regulations of the Court.⁵²

III. CLASSIFICATION

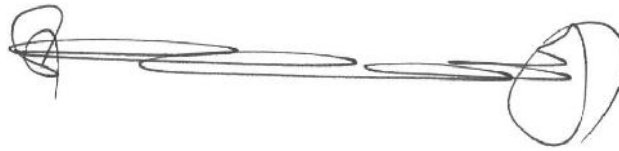
37. The Presidency notes that all documents in the instant Application have been filed confidentially and *ex parte*. The Presidency considers that, *prima facie*, there is no reason to retain the confidential *ex parte* classification of this decision and the related documents in the file, subject to ensuring the redaction of any information which may identify the detainee or his family members.
38. 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 6 September 2013. The Presidency will thereafter rule on whether the classification should be maintained and, if necessary, the need for any redactions.

⁵¹ ICC-RoR221-02/13-1-Conf-Exp-Anx2, page 6.

⁵² Decision on the request for judicial review dated 8 February 2012, ICC-RoR221-01/12; Decision on the application for judicial review dated 25 March 2013, ICC-RoR221-01/13.

For the above reasons, the Application is dismissed.

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

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, followed by a circular flourish on the right.

Judge Sanji Mmasenono Monageng
First Vice-President

Dated this **16 August 2013**

At The Hague, The Netherlands