

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-RoR220-03/21**

Date: **22 July 2021**

Date of submission:
21 July 2021

THE PRESIDENCY

Before: Judge Piotr Hofmański, President
Judge Luz del Carmen Ibáñez Carranza, First Vice-President
Judge Antoine Kesia-Mbe Mindua, Second Vice-President

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD

PUBLIC

**With Confidential, *ex parte*, Annexes A-O and Q [Defence and Registry only] and
Confidential Annex P**

Public redacted version of
‘Defence Application for Judicial Review of Registrar’s Decision of 13 July 2021’
(ICC-RoR220-03/21-1-Conf)

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

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

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I. Introduction

1. Pursuant to Regulation 220(1) of the Regulations of the Registry ('RoR'), the Defence for Mr Al Hassan ('Defence') seeks judicial review of the decision of the Registrar ('Impugned Decision') to overturn and deny Mr Al Hassan's previously approved family visit and limit a future visit to a maximum of two people. The Impugned Decision is impacted by the reversible errors explicated herein.
2. The first is the way by which the Registry has applied its 'equality' criterion that leads to an arbitrary and procedurally unfair outcome. Equal treatment in Mr Al Hassan's case required that the Registry to take steps to ensure that Mr Al Hassan could avail himself of entitlements that had accrued in 2019 and 2020, in the same manner that other indigent detainees had done so, in these years. Mr Al Hassan's legitimate and reasonable expectations of such visits derive from previously provided assurances by the Registry. The principle of equal treatment is offended in circumstances where persons in dissimilar circumstances are treated in the same manner. The Registrar approved a fully funded visit for five members of Mr Al Hassan's family in 2019. This visit was not implemented in 2019 due to a lack of funds. It was then postponed in 2020 due to Covid restrictions. His situation is not the same as detainees who were able to enjoy funded family visits in 2019 and 2020, or those who were arrested and detained at a later point in time.
3. The second reversible error arises from the Registrar's failure to take into account four relevant considerations related to Mr Al Hassan's personal circumstances. The result of this is an outcome that disproportionately impacts upon Mr Al Hassan's internationally recognised right to family life and the rights of his children.
4. These relevant factors stem from the cultural and religious background of Mr Al Hassan's family, the death of Mr Al Hassan's daughter in December 2020, the fact that Mr Al Hassan has never met his son, and the overall length of his separation from his family members. The failure to take into account these considerations vitiates the outcome of the Decision: no reasonable decision-maker would have confined the number of visitors to two persons if they had appropriately considered and weighed these circumstances.

II. Confidentiality

5. The Defence files the present request confidentially pursuant to Regulation 220(2) of the RoR. The basis pursuant to 23*bis*(1) of the Regulations of the Court is the private nature of the subject matter. A public redacted version is filed contemporaneously.

III. Time Limits

6. In view of the impending summer judicial recess and the extremely tight time-frame remaining to organise and complete a family visit ahead of the recommencement of the rigorous trial schedule on 23 August 2021, the Defence respectfully requests that the applicable schedule under RoR 220 be expedited.

IV. Procedural History and Facts

7. On 24 July 2019, the Defence for Mr Al Hassan requested a funded family visit ('Request') for Mr Al Hassan's wife, [REDACTED], three of his children ([REDACTED], [REDACTED] and [REDACTED], whom he has never met), and his mother, [REDACTED], to assist and act as guardian.¹ Therein, the Defence explained that for religious and cultural reasons the family would not be able to travel without a guardian, and, further, the assistance of [REDACTED] is essential due to her literacy and ability to speak French, both for the family to be able to make the journey through foreign airports and as liaison between the family and the Defence and the family and the Detention Centre.
8. On 10 September 2019, the Chief Custody Officer ('CCO') rejected the Defence Request on the basis of (i) the absence of funds in the Trust Fund for Family Visits ('TFFV') and (ii) the lack of sufficient time elapsed between the previous family visit and the Request.²
9. On 01 October 2019, the Defence filed a complaint pursuant to Regulation 218 of the RoR against the CCO's rejection of a funded family visit, arguing, *inter alia*, that the right of a detained person to receive a family visit should not be extinguished by the financial situation of the TFFV, Mr Al Hassan's family's total indigence and thus

¹ Annexes B, pp. 10-11, and D, pp. 5-6.

² Annex B, p. 9.

financial reliance on the Court, and his particular personal and cultural circumstances.³

10. On 15 October 2019, the CCO issued his decision on the complaint ('the CCO's Decision') in which he agreed that Mr Al Hassan would benefit from a family visit, but noted that due to the depletion of the TFFV, 'the question of whether or not other means are possible in funding a family visit' was a matter requiring elevation to the Registrar.
11. On 22 October 2019, the Defence addressed the Registrar for review of the CCO's Decision pursuant to Regulation 219 of the RoR.⁴ Therein, the Defence argued, *inter alia*, that in acknowledging Mr Al Hassan's rights to a funded family visit, the CCO was obliged to give this effect in practical terms and in line with international law, the rights of Mr Al Hassan's wife, mother and children, and the Registrar's duty of care to Mr Al Hassan and responsibility to maintain his family ties. The Defence also noted the positive obligation upon the Registrar to fund family visits, and to supplement the TFFV from alternative sources when depleted.⁵
12. On 6 November 2019, the Registrar issued his decision on CCO's Decision ('the First Decision'), in which he:⁶
 - a. reversed the CCO's Decision to deny the requested family visit pursuant to Regulation 219(3) of the RoR;
 - b. indicated that the Registry would explore whether there are alternative feasible means to support family visits of indigent detainees pending the provision of the TFFV;
 - c. promised to increase the Registry's efforts to seek donations to the TFFV; and
 - d. granted funds for Mr Al Hassan's family to obtain passports and identity cards for his family members, including the covering of the related associated costs.
13. On 12 November 2019, the CCO communicated to the Defence that the Registry had approved procuring the documents for Mr Al Hassan's wife and three children with funds from the Trust Fund for Family Visits.⁷ In response to Defence arguments that

³ Annex B, pp. 1-2.

⁴ Annex C.

⁵ Annex C, pp. 6-8.

⁶ Annex A, paras 7, 16-20.

⁷ Annex D, p. 4.

the visit, as requested by the Defence and approved by the Registrar, included Mr Al Hassan's mother as a guardian,⁸ the Registry approved funding for travel documents for all five persons.⁹

14. On 27 February 2020, [REDACTED]'s father passed away.

15. On 12 March 2020, following an exchange with the Division of External Operations in which the Defence was advised to 'liaise with the Detention Centre to discuss on the potential date of the family visit to discuss on the potential date of the family visit', the Defence requested that the family visit be scheduled from 06 to 16 April 2020.¹⁰ Lock down measures were implanted the next week.

16. On 23 March 2020, the Defence made an urgent request for interim release.¹¹

17. On 30 March 2020, the Registry stated:

[T]he Registry has focused its efforts on facilitating the family visits. As soon as the suspension of inbound and outbound flights in Mali is lifted, the Registry will assist Mr Al Hassan's family members in obtaining passports and Dutch visas. *The funds out of the TFFV are available and already earmarked for Mr Al Hassan's next family visit.*¹²

18. In its decision on interim release dating from 5 May 2020, the Trial Chamber relied upon the 30 March 2020 response of the Registry in stating:

The Chamber notes, in addition, that Mr Al Hassan has received a first family visit in 2019 and that the Registry informs that *there will be a second one scheduled as soon as possible once travel restrictions are lifted.*¹³

19. On 8 June 2020, the Registry indicated that it would assist the Defence in obtaining passports for Mr Al Hassan's family 'as soon as the MINUSMA in-country flights are

⁸ Annex D, p. 2, email dated 13 November 2021: *In accordance with the majority of scholars in Islam, one of the conditions for a woman to be allowed to travel without a [REDACTED] (male guardian) is if she is accompanied by one or more trustworthy female companion(s). See attachment for detailed explanation of this principle. Therefore, Mr Al Hassan's wife will not be allowed to travel if she is not accompanied by an elderly, trustworthy female companion. This is her religious belief and it is one of the principles of Islam. As you can see from the attached emails (see email sent on 23/01/2019 at 16:48, responded on 25/01/2019 at 17:09) , the presence of Mr Al Hassan's father was granted during the first family visit for this very reason.*

Moreover, the original family request included [REDACTED] as a visitor. The Registrar's decision reversed the CCO's Decision pursuant to regulation 219(3) of the RoR therefore granting the family visit for Mr Al Hassan, as requested on 24 July 2019. This request included [REDACTED] as an integral part of the family visit. Also the budget requested for the issuing of passports and ID cards included the cost of requesting these documents for [REDACTED].

⁹ Annexes D, E and F.

¹⁰ Annex F, pp. 2-3.

¹¹ ICC-01/12-01/18-680-Conf-Exp.

¹² ICC-01/12-01/18-698-Conf-Exp-Red, para. 13 (emphasis added).

¹³ ICC-01/12-01/18-786-Conf, para. 40 (emphasis added).

operational again and the date of the next family visit is agreed to by the Detention Centre.’¹⁴

20. On 3 September 2020, the Registry stated that:

all detained persons and their counsel were informed that visits to the DC are currently suspended due to COVID19 measures. [...] Mr Al Hassan’s family visit is treated the same as the visits for all other detained persons - which is that all family visits are all *temporarily suspended* until family visits resume at the DC. [...] Mr Al Hassan’s family visit is therefore *temporarily postponed* until further notice.¹⁵

21. On 14 December 2020, Mr Al Hassan and [REDACTED]’s daughter Fatma died from malaria at just six years old.

22. On 8 June 2021, the Registrar responded to a 3 May 2021 letter from lead Defence Counsel for those detained. The Registrar indicated that ‘I am now in a position to confirm that it is expected that visits by counsel, family and friends will resume on 15 July 2021.’¹⁶

23. On 21 June 2021, the Defence met the Director of DJSS and members of the Registry to discuss issues concerning family visits.

24. On 23 June 2021, the Defence wrote to the Director of DJSS pursuing logistical arrangements for the approved family visit.¹⁷ Therein, the Defence emphasised that it was seeking to plan the already approved family visit and not making a new request.

25. On 1 July 2021, the Defence wrote to the Registrar thanking him for the work already undertaken by the Registry in assisting Mr Al Hassan’s family members in obtaining passports, and emphasising again the limited time to organise a family visit given the strict time-constraints of Mr Al Hassan’s ongoing trial proceedings.¹⁸

¹⁴ Annex G, p. 3.

¹⁵ Annex G (emphases added), p. 1.

¹⁶ Annex H, p. 1.

¹⁷ Annex I.

¹⁸ Annex J.

26. On 5 July 2021, the Defence wrote to the DJSS expressing concerns following a meeting concerning family visits. This letter included information that is relevant to issues that the DJSS raised in a 2 July 2021 meeting.¹⁹

27. On 12 July 2021, the Defence received the Registry memorandum ('12 July Memorandum') that set out a decision allocating funding to detainees for family visits and the criteria that the Registry would apply. In this memorandum, the DDJS:

- a. noted that 'all detained persons have not been able to receive a family visit during the time of COVID, and are therefore all similarly situated';
- b. decided that 'all detained persons entitled to benefit from TFFV funded family visit have equal entitlement to the remaining funds of the TFFV';
- c. promised to 'ensure equal access to funded family visits for all entitled detained persons';
- d. decided that 'the maximum will remain at two persons';
- e. informed the Defence that 'the host State policy requires a minimum of three weeks to organise and request visas from the host State'; and
- f. stated that 'detained persons who are currently in trial and thus on strict trial schedules will be considered as the priority during the summer recess, so that the family visit does not impact the Defence case'.²⁰

28. On 12 July 2021, the Defence sought the Registry's confirmation that, in addition to the two-person visit, the previously approved family visit would be scheduled as soon as sufficient funding becomes available.²¹

29. On 13 July 2021, the Registry replied by email to the 5 July and 12 July Defence letters.

[O]n behalf of the Registry, your letters of 5 July and 12 July and their contents were received and noted. Following the memo sent to all Counsel this week, please note the Registry decision is to fund two persons. This decision applies equally to Mr Al Hassan, for the reasons indicated in the memo.

The Registry stands ready to facilitate the funded visit for the two persons designated by Mr Al Hassan. When designated, please kindly provide the two names to DS to start the scheduling and visa processes.²²

¹⁹ Annex K, p. 1.

²⁰ Annex L.

²¹ Annex M.

²² Annex N, p. 1.

30. On 15 July 2021, the Registrar responded to the Defence correspondence of 1 July 2021. In this letter (the Impugned Decision) the Registrar confirmed that:

[A]t this time the Registry decision is to fund family visits for detained persons entitled to visits funded from the TFFV at a maximum of two persons per visit, and that this decision applies equally to Mr Al Hassan.²³

V. Standing

31. The ‘complaint’ for the purposes of Regulations 218 and 219 was the 22 October 2019 Complaint.²⁴ The Impugned Decision constitutes a new decision overriding the First Decision on the 22 October 2019 Complaint, thus triggering this application to the Presidency for judicial review pursuant to Regulation 220(1) of the RoR.

32. Itself a decision of the Registrar, the Impugned Decision overrides a previous decision of the Registrar. The Registrar has been provided with Defence arguments and consistently informed regarding the Defence’s position and efforts in organising the agreed family visit. Having been afforded multiple opportunities to explicate his position, the Registrar has confirmed his position as well as that of the Director of the DJSS. The Defence thus submits that the Impugned Decision properly falls within the scope of Regulation 219. Reinitiating the previously litigated complaint procedure would be artificial and time-consuming, as well as indubitably futile, since the Registrar already issued a determination on the 2019 complaint and confirmed that the 2021 policy now overrides and replaces that determination. The Presidency has indicated that the purpose of the complaint procedure is to afford the Registrar with an opportunity to consider the arguments of the detained person.²⁵ The arguments of the detained person were set out in the 2019 complaint and further supplemented in detailed correspondence both preceding and post-dating the 2021 policy, which led to the Registrar’s decision to confirm that the policy overrode the previous 2019 decision. After this decision was issued, the Defence sought confirmation that this determination replaced the 2019 decision and, highlighting the applicable deadline for seeking review before the Presidency, requested the Registrar to respond prior to the expiration of this deadline. The Registrar then reconfirmed his position that the 2021 visit would be restricted to two persons only. The objectives of the complaint

²³ Annex O, p. 2.

²⁴ Annex C.

²⁵ [ICC-RoR220-04/19-3](#), para. 13.

procedure are thus fully met. In the same manner that it would be futile to initiate a complaint before the CCO in relation to a determination by the Registrar,²⁶ it would be futile and contrary to the obligation to ensure expeditious proceedings, to require the Defence to re-initiate the 2019 complaint in circumstances where the Registrar has issued an unequivocal determination on the present arguments.

VI. The Standard and Grounds of Review

33. Judicial review of a decision of the Registrar ‘concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision.’²⁷

The Presidency has recognised several separate sub-grounds of review. These require:

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 reasonable person who has properly applied his or her mind to the issue could have reached.²⁸

34. As detailed below, the Defence has identified several separate, related grounds, each of which merits the Presidency’s review of the Impugned Decision.

VII. Submissions

The Registrar failed to act with procedural fairness

35. The Registrar failed to act with procedural fairness in reaching the Impugned Decision. The Impugned Decision purports to distribute funds on an equal basis. The way in which the Registry has applied its ‘equality’ criterion leads to an unequal and procedurally unfair outcome. This impacts the legality of the discretion exercised by the Registrar. If equal treatment had prevailed, Mr Al Hassan would be entitled to a family visit that would address both his 2021 entitlement, and his accrued 2019 entitlement, which was suspended due to COVID.

36. Whether a procedure is fair and fairly executed is a multifaceted question. The Presidency has recognised that procedural fairness requires that:

²⁶ [ICC-RoR220-04/19-3](#), para. 12.

²⁷ *Ntaganda*, [ICC-RoR220-01/19-2-Red](#), para. 17.

²⁸ *Ntaganda*, [ICC-RoR220-01/19-2-Red](#), para. 17 citing [ICC-Pres-RoC72-02-05](#), para. 21; *Kony*, [ICC-02/04-01/05-378](#), para 29.

- a. the decision-maker must state the factors essential for the decision in the decision itself;²⁹ and
- b. it must be possible to discern from the face of the decision which requirements were in mind when arriving at the decision.³⁰

37. The Impugned Decision is based on the premise that Mr Al Hassan's visit must be restricted to two persons in order to ensure that all other indigent detainees can also receive a visit from two persons in 2021. The underlying assumption concerning the duty to ensure equal treatment is that the entitlement for each detainee is the same. This assumption fails to take into consideration the distinction between detainees who are still waiting to enjoy 2019 family visits, which were postponed due to Covid, as compared to detainees who were able to enjoy a funded family visit in 2020 (i.e. before Covid measures were implemented) or, were arrested in 2020 and thus have no pending entitlement to a 2019 visit. In essence, whereas the allotment of two persons represents the 2021 entitlement for some detainees, for Mr Al Hassan, it represents the entitlement accrued during 2019, 2020, and 2021. The *effect* of the Registry's decision is thus to discriminate in practice between detainees who were able to schedule family visits in 2020 before the pandemic measures were implemented, and those who were not. The Defence notes that the case law in regards to discrimination is helpful in illustrating the point that a failure to respond in a different manner to persons whose circumstances are distinct may cause as much harm as a failure to treat similarly situated persons in an equal manner.³¹

38. The Assembly of States Parties decided that indigent detainees are entitled to funding for family visits and equal treatment of detainees.³² 'Treatment' refers to the effect of measures, rather than equality of measures themselves. The same measure may be generous to one detainee while punitive to another. A procedurally fair allocation of funds must include equal treatment of all detainees. Equal treatment in this case requires that the Registry fulfil its commitment to provide Mr Al Hassan with the funds to implement the postponed 2020 visit, as per the terms of the First Decision.

²⁹ [ICC-Pres-RoC72-02-05](#), para 25.

³⁰ [ICC-Pres-RoC72-02-05](#), para. 25.

³¹ ECtHR, *Abdu v. Bulgaria*, [26827/08](#), para. 44; *Eweida and Others v. the United Kingdom*, [48420/10](#), [59842/10](#), [51671/10](#) and [36516/10](#), para 87; *Thlimmenos v. Greece*, [34369/97](#), para 44.

³² [ICC-ASP/8/Res.4](#), para. 5.

39. Mr Al Hassan had a legitimate expectation of a family visit in 2019. In the First Decision, the Registrar overturned a decision of the CCO rejecting a family visit ‘before the end of the calendar year’ (that is, 2019) and explained that he was ‘currently exploring possible alternative means to support family visits and increasing efforts to seek donations to the TFFV.’³³ While the Registrar noted ‘I wish to specify that guaranteeing that the visit will indeed take place before the end of the current calendar year as requested by the Complainant is beyond my control,’³⁴ the Registry’s actions to obtain passports in November 2019 demonstrate that both the Registry and Mr Al Hassan operated on the expectation of a family visit occurring promptly around the turn of 2019/2020. This is consistent with the fact that Mr Al Hassan had benefited from only one family visit since his transfer to the Court in March 2018.

40. In March 2020, the Defence wrote to the Registry to schedule a visit in April 2020.³⁵ On 30 March 2020, the Registry assured Mr Al Hassan and Trial Chamber X in response to a request for interim release that funds ‘are available and already earmarked for Mr Al Hassan’s next family visit.’³⁶ This statement provides no latitude for misunderstanding and, crucially, the Trial Chamber relied upon it in its decision refusing interim release.³⁷ That notwithstanding, the Registry confirmed six months later when it indicated to the Defence by email on 3 September 2020 that ‘Mr Al Hassan’s family visit is therefore temporarily postponed until further notice.’³⁸

41. In its letter of 12 July 2021, the Defence reminded the Registry that:³⁹

We recall that during the meeting convened on 02 July 2020, the Registry explained that the limited visit of a maximum of two persons would not replace Mr Al Hassan’s previously-approved family visit.

42. However, the Impugned Decision apparently precisely seeks to do just that, i.e. to replace the previously-approved family visit of two adults and three children with a visit of a maximum of two persons.

43. It is procedurally unfair for the Registrar to reverse the First Decision and re-introduce the criteria of available funding when:

³³ Annex A, paras 8 and 19.

³⁴ Annex A, para. 18.

³⁵ Annex F, pp. 1-2.

³⁶ ICC-01/12-01/18-698-Conf-Exp-Red, para. 13.

³⁷ ICC-01/12-01/18-786-Conf, para. 40.

³⁸ Annex G, p. 1.

³⁹ Annex M, p. 1.

- a. he had previously held that the insufficiency of actual funds in the TFFV did not exempt him from his duty to take positive steps to secure the funding necessary to satisfy the humanitarian objectives of a fully funded family visit;⁴⁰
- b. he informed Trial Chamber X that funding had been found and earmarked, and Trial Chamber X relied on this in denying a request for interim release;⁴¹ and
- c. the equal treatment of detainees requires that the Registry has to take into consideration pending or anticipated requests from indigent detainees⁴² and the Impugned Decision fails to consider the First Decision.

44. The Defence is acutely aware of the funding pressures faced by the Registry in connection with family visits. The rationale for dividing the current level of funds between the different detainees nonetheless assumes that the current level of funds for family visits will not be supplemented in the remaining 6 months. This assumption is incompatible with the Registry's positive duty to take steps to secure funding for Mr Al Hassan's family visit, and to schedule the family visits of detainees in such a way as to ensure that additional funding efforts can supplement the funds. The arbitrary nature of the fixed allotment is further underscored by the Registrar's refusal to consider concrete proposals from the Defence that would allow for expenses to be reduced. The introduction of a fixed allowance of two persons was thus an unnecessary and disproportionate response.

45. The outcomes of the Impugned Decision highlight the impropriety of the decision-making procedure. The 2019 decision accepted a family visit of five individuals on 'humanitarian grounds'. The Registrar should not treat as trivial such a conclusion two years later. The passage of time only increases the humanitarian need for the full family visit. This is amplified rather than diminished by the extraordinary isolation and uncertainty arising from the ongoing pandemic. If permitting a visit by five family members was mandated on humanitarian grounds in 2019, then the reduction to two members two years later runs counter to the previous humanitarian intention. This is particularly grave since the Registry's previous assurance formed part of Trial Chamber X's reasons in disposing of a Defence request for interim release.⁴³ In such

⁴⁰ Annex A, para. 16 referring to *Ntaganda*, [ICC-RoR220-01/19-2-Red](#), para. 29.

⁴¹ ICC-01/12-01/18-698-Conf-Exp-Red, para. 13.

⁴² [ICC-RoR221-02/16-3-Red](#), para. 40.

⁴³ ICC-01/12-01/18-786-Conf, para. 40, fn. 104.

circumstances, the outcome of the proposed measure is acutely cruel for both Mr Al Hassan and his family.

46. In light of the above, procedural unfairness impacted the Decision and this merits review by the Presidency.

The Impugned Decision failed to take into account relevant factors

47. In reaching the Impugned Decision the Registry failed to take into account four relevant factors:

- a. the cultural and religious background of Mr Al Hassan's wife;
- b. the death of Mr Al Hassan's daughter;
- c. that Mr Al Hassan has never met his son; and
- d. The length of time which has elapsed since Mr Al Hassan has seen members of his family.

48. Relevant factors are those matters that the decision-maker must take into account when taking a decision. To reach a correct decision, the decision maker must take into account factors and considerations that are within the specific legal provisions, or which the subject matter, scope, or purpose of the power logically implies. If the decision maker does not take these considerations into account then this renders the decision legally flawed. The standard of review concerns 'the propriety of the procedure by which the [Registrar] reached a particular decision and the outcome of that decision.'⁴⁴ Where the flaws in the procedure lead to unsound outcomes, judicial review is merited.

49. The Presidency has previously found, in the regime predating the TFFV structure, that a consideration as to the allocation of funds for family visits requires that the considerations include the personal circumstances of the detainee and the case at hand. The Presidency noted a number of matters which are part of this consideration. These are: 'any special needs of the family, the existence of any key moments in the life of the family or the detainee and the status of family relationships',⁴⁵ '[t]he duration of family separation prior to transfer to The Hague', and the frequency of visits.⁴⁶ The Presidency has also previously stated that '[a] particularly protracted

⁴⁴ Ntaganda, [ICC-RoR220-01/19-2-Red](#), para. 17.

⁴⁵ Ngudjolo, [ICC-RoR217-02/08-8](#), para. 47.

⁴⁶ Ngudjolo, [ICC-RoR217-02/08-8](#), para. 48.

period of separation might provide a basis for increasing the size, frequency or duration of initial family visits.’⁴⁷

50. The Impugned Decision failed to take into account any individual factors at all.

51. The Impugned Decision indicated that the ‘decision is to fund two persons’ ‘for the reasons indicated in the memo’. Meanwhile, the 12 July Memorandum states ‘[a]s regards specific circumstances or concerns that you have transmitted individually to the Registry on behalf of your clients, your communications will be responded to individually in the coming days. However the maximum will remain at two persons.’ The Registrar’s Decision is thus circular in its reasoning and fails to address the personal circumstances of Mr Al Hassan.

The failure to consider the cultural and religious background of Mr Al Hassan’s wife

52. The failure of the Impugned Decision to address the specific cultural and religious background of Mr Al Hassan and his wife is an error in the propriety of the procedure by which the Registry reached the Decision and its impacts upon the propriety of its outcome by causing a disproportionate impact upon Mr Al Hassan.

53. This failure merits judicial review given the impact of this failure upon the outcome. The flawed decision-making process has at least the following effects on the outcomes of the Decision:

- a. it potentially leads to an irrational, ill-conceived, or potentially cruel outcome for Mr Al Hassan’s wife;
- b. it denies Mr Al Hassan the opportunity to meet his son whom he has never met in person; and
- c. it effectively extinguishes Mr Al Hassan and his children’s right to family life and impacts upon internationally protected rights of the child.⁴⁸

54. The personal circumstances of the detainee include consideration of both Mr Al Hassan’s cultural and religious background. These personal circumstances also include those of his family.⁴⁹ As has been explained at more length previously,⁵⁰ due

⁴⁷ *Ibid.*

⁴⁸ [Convention on the Rights of the Child](#) (‘CRC’), Article 9.

⁴⁹ *Ngudjolo*, [ICC-RoR217-02/08-8](#), para. 52.

⁵⁰ *See* Annex D, p. 4.

to cultural and religious beliefs, [REDACTED] will not accept to travel to The Hague unless she is accompanied by a culturally appropriate guardian.

55. The obligation to consider Mr Al Hassan's circumstances is one that the Registrar must consider independently of Defence communications. That said, the Defence has raised considerations that flow from the cultural and religious background of Mr Al Hassan's wife on several occasions since 24 July 2019.⁵¹ In addition to such factors, the difficulty entailed in travelling unaccompanied is further heightened by the fact that Mr Al Hassan's wife ([REDACTED]) speaks Tamasheq, and cannot communicate in Arabic, French, English or Dutch, whereas the proposed guardian (Mr Al Hassan's mother) speaks French. Apart from the fact that she has not seen her husband since April 2017, [REDACTED] also lost both her daughter and her father in 2020. The hardship she has experienced should not be exacerbated further.

56. The Registry has implicitly previously recognised the relevance of these personal, cultural and religious considerations through the Registrar's decision on the October 2019 complaint and subsequent provision of assistance to obtain passports. The Defence previously requested the family visit include two adults and three children to allow for a guardian to accompany [REDACTED]. Following the Registrar's reversal of the CCO's rejection of the family visit, the Defence re-requested the visit to include the same five individuals.⁵² The CCO then confirmed this visit constellation, referring to the Registrar's First Decision.⁵³ Prior to the issuance of the Impugned Decision, the Defence further emphasised the need for funding for a guardian.⁵⁴ These arguments were then reiterated, in order to underscore the prejudice stemming from the two person quota.⁵⁵ The Registrar nonetheless declined to adjust his determination in order to address this concrete impediment.⁵⁶

57. The failure to consider the cultural and religious background of Mr Al Hassan's wife leads to a result where there can be no effective family life for his children and extremely curtailed family life for Mr Al Hassan. Given their young age, Mr Al Hassan's children cannot visit him without a parent but Mr Al Hassan's wife cannot

⁵¹ See Annex D, p. 4; Annex M.

⁵² See Annex D, p. 5.

⁵³ See Annex D, p. 4.

⁵⁴ Annex B, pp. 1-2, and Annex D, pp. 2-5.

⁵⁵ Annex K, p. 1.

⁵⁶ Impugned Decision.

visit him without a guardian. The two person allotment thus excludes the possibility for Mr Al Hassan to see his children. In this way, the two person restriction extinguishes the very purpose underpinning the right to funded family visits, which is to allow the detainee to maintain meaningful links with his children.

58. According to the European Court of Human Rights, the limitations or conditions applied to an individual must not be applied in such a way or to such an extent that the very essence of the right is impaired:

However, the right of access to a court secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation of the right of access to a court will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.⁵⁷

59. As noted below, Mr Al Hassan's children also benefit from the right to family life, rights under the Convention on the Rights of the Child, and other international legal protections. The Registrar was obliged to take these factors into account in reaching the Impugned Decision, but did not.

The failure to consider the death of Mr Al Hassan's daughter

60. Mr Al Hassan has experienced individual hardship beyond that of other detainees during COVID. He has lost his daughter. The death of Mr Al Hassan's daughter on 14 December 2020 has created a special need for Mr Al Hassan's family to be together, and to grieve as a family unit. This heightens the importance of allowing Mr Al Hassan to maintain meaningful contacts with his children through in person visits. The Registrar thus erred by failing appropriately to weigh the heightened right to family life during bereavement, in particular, through the lens of Mr Al Hassan's

⁵⁷ ECtHR, *Cudak v Lithuania*, [15869/02](#), para. 55 citing *Waite and Kennedy v. Germany* [GC], no. [26083/94](#), para. 59, ECHR 1999-I; *T.P. and K.M. v. the United Kingdom* [GC], no. [28945/95](#), para. 98, 10 May 2001; and *Fogarty v. the United Kingdom* [GC], no. [37112/97](#), para. 33, 21 November 2001.

family, who are ‘rights holders with specific needs that must be known and considered’ by the Court.⁵⁸

61. The Appeals Chamber noted the ‘special circumstances’ of this loss in its decision of 22 February 2021:

The Appeals Chamber expresses its sympathy for Mr Al Hassan. It also encourages the Registry to further explore alternative possibilities to facilitate communication between Mr Al Hassan and his family, in these special circumstances.⁵⁹

62. Although the Registry was aware of the circumstances of Fatma’s death and Mr Al Hassan’s inability to travel to Mali to participate in any form of grieving or memorial processes,⁶⁰ there is no indication that the Registrar considered Mr Al Hassan’s particular needs as a bereaved parent in the Impugned Decision. The Registrar’s omission on this point is thus not compatible with the obligation, arising under internationally human rights law, to take steps to ensure that detainees can enjoy effective and meaningful contacts with their family after the loss of a family member.⁶¹

63. This decision-making impropriety will cause further acute hardship for Mr Al Hassan and his family in addition to that already being experienced as a result of their separation and Mr Al Hassan’s serious and diagnosed mental health issues. This hardship impacts upon their right to family life. The loss of his daughter necessitates an opportunity for Mr Al Hassan to connect with his wife and children. This is required in order to be able to experience and overcome the grief within the solidarity of his close family. Only a visit including his wife and children will make it possible for Mr Al Hassan to maintain and strengthen the ties to his family. The Presidency has acknowledged this as one of the primary aims of family visits. It has also noted its importance to eventual re-integration and rehabilitation.⁶²

⁵⁸ [COVID-19: FOCUS ON PERSONS DEPRIVED OF THEIR LIBERTY](#), March 2020 OHCHR and WHO, p. 5: *State agencies who care for persons deprived of their liberty should be reminded that families and children of those persons are right holders with specific needs that must be known and considered. Families, especially women and children, are both protected and impacted by necessary prevention measures.*

⁵⁹ ICC-01/12-01/18-1311-Conf OA2, para. 106.

⁶⁰ Annex Q, p. 1.

⁶¹ [Lind v. Russia](#), 25664/05, paras 92 and 98.

⁶² *Ntaganda*, [ICC-RoR220-01/19-2-Red](#), para. 19.

The failure to consider that Mr Al Hassan and his son have never met

64. Mr Al Hassan son's early upbringing in the absence of his father creates a further special need for the family that the Impugned Decision failed to take into account. The birth of a child depicts a key moment in every family's life. The protracted separation endured by all places a particularly acute strain on the fundamental rights of both Mr Al Hassan and, importantly, his young son. Mr Al Hassan's son's right to know his father is enshrined in fundamental instruments of international human rights law, and places a burden upon the Court to ensure that these rights are upheld.⁶³
65. These all constitute personal circumstances of the detainee and his family that the Registrar was obliged to take into account when reaching the Impugned Decision. The failure to consider the religious and cultural circumstances of Mr Al Hassan and his wife are related to the failure to consider that Mr Al Hassan has never met his son.
66. Mr Al Hassan has been in detention for the entirety of his youngest son's life and has never met him in person. The fact that this key moment and his early life happened in the absence of Mr Al Hassan emphasises the need for a family visit in order to build and maintain Mr Al Hassan's ties to his family. Moreover, the earliest years of a child's life are critically important to enable a child to form a bond with a parent. The pain of the continued denial of even a fleeting opportunity to bond with his youngest child is a particularly heavy burden for Mr Al Hassan and his family to bear.
67. These circumstances were raised by the Defence in the initial Complaint,⁶⁴ and reiterated in its letter of 5 July 2021:

As you know, Mr Al Hassan has a son he has yet to meet, and one of his daughters died suddenly in December. He has not seen their mother since he was arrested by Barkhane in 2017.

It is imperative that the family visit occur during the upcoming summer judicial recess due to: (i) the length of time since Mr Al Hassan's last family visit; (ii) the bereavement that he and his family suffered in December 2020; (iii) the fact that travelling during the winter months will not be suitable for Mr Al Hassan's family; and (iv) the extraordinary psychological impact of delaying this visit until at least next summer, which would mean that Mr Al Hassan was afforded just one visit in five years and was deprived of the solace of seeing his family for the entirety of the Prosecution case.⁶⁵

⁶³ ICCPR, Articles 17 and 23, and CRC, Articles 9 and 10.

⁶⁴ Annexes B and C.

⁶⁵ Annex K.

68. There is no indication that the Registrar considered the abovementioned relevant facts and/or sufficiently weighed these facts in the Impugned Decision.
69. The impact of this failure demonstrates the impropriety of the Registrar's decision making. The impact of the error in the Impugned Decision implicates the rights to family life of Mr Al Hassan and his son and rights of his son under the Convention on the Rights of the Child.⁶⁶ A mosaic of international legal rights offers protection to Mr Al Hassan's son. These include the right to know and be cared for by his parents,⁶⁷ to have his interests taken into account by courts of law,⁶⁸ and the right to maintain personal relations and direct contact with both parents if separated from them.⁶⁹
70. The Impugned Decision also impacts or implicates rights conferred by regional human rights regimes. The African Commission has decided that the rights enshrined in Article 18(1) of the African Charter on Human and Peoples' Rights⁷⁰ include persons in detention.⁷¹ Article 24(3) of the Charter of Fundamental Rights of the European Union states that '[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'
71. International human rights jurisprudence also recognises that verbal communications are not an adequate substitute for meaningful face-to-face or physical contacts.⁷² This applies first and foremost to family visits. For this reason, the ICC Presidency has confirmed that the right to family life entails a right to regular, in person contacts;⁷³ telephone or video contacts are not an adequate substitute,⁷⁴ particularly as 'conversations via video calls may not be appropriate for very young children—the

⁶⁶ ICCPR, Articles 10(1), 17 and 23 and CRC, Articles 9 and 10.

⁶⁷ CRC, Article 7.

⁶⁸ CRC, Article 3(1).

⁶⁹ CRC, Article 9(3).

⁷⁰ The African Charter on Human and Peoples' Rights recognises that "family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."

⁷¹ [Communication 274/03 and 282/03](#) – *Interights, ASADHO and Madam O. Disu v. Democratic Republic of Congo*, Adopted at the 54th Ordinary Session of the African Commission on Human and Peoples' Rights, held from 22 October to 5 November 2013 in Banjul, The Gambia.

⁷² *Cantoral-Benavides v. Peru*, Series C, No. 69, (2000), p. 24, citing the fact that although the prisoner was allowed to see his family once a month, he "could have no physical contact with them". See also '[Guidance Document on the Nelson Mandela Rules](#)', August 2018, p. 122, concerning the position that "other forms of remote communication are not substitutes for in-person visits."

⁷³ [ICC-RoR217-02/08-8](#), paras. 31-36; [ICC-RoR220-01/19-2-Red](#), paras. 19-21.

⁷⁴ [ICC-RoR217-02/08-8](#), para. 36.

artificial nature of such interactions may make it difficult for younger children to bond or interact with adults virtually.’⁷⁵

72. In Mr Al Hassan and his son’s present circumstances, the effect of the Impugned Decision is to render building family ties and rapport impossible. Viewed against the failure by the Registrar to consider relevant considerations, this outcome of the Impugned Decision merits judicial review by the Presidency.

The failure to consider the overall length of time that has elapsed since Mr Al Hassan’s last in person contact with members of his family

73. Although the ‘[t]he duration of family separation prior to transfer to The Hague’⁷⁶ is a relevant consideration, the Registrar failed to give any weight to this factor, when deciding to limit funding to two persons.

74. Mr Al Hassan was arrested by Operation Barkhane in April 2017. He was then transferred to the DGSE, where he was held until his transfer to the ICC in March 2018. He had no contacts with his family for this entire period. Since that point, he has had one family visit in total, with only some members of his family: he has not seen his wife ([REDACTED]) nor his children [REDACTED] and [REDACTED] in over four years, and has still never met his youngest child, [REDACTED]. The Impugned Decision also affords no clarity as to if and when Mr Al Hassan will be able to see these family members. The prolonged nature of this separation, coupled with the uncertainty as to if and when Mr Al Hassan will be granted any future visits that would allow for the travel of children, has given rise to an intense degree of stress and hardship.

75. The Defence has raised Mr Al Hassan’s mental health issues elsewhere with the Registry⁷⁷ and has disclosed to the Registry a number of other documents which evidence the particular impact that trauma has on his conditions of confinement.⁷⁸ The

⁷⁵ [‘The effects of digital contact on children’s well-being: evidence from public and private law contexts’](#), Nuffield Family Justice Observatory, p. 2.

⁷⁶ Ngudjolo, [ICC-RoR217-02/08-8](#), para. 48.

⁷⁷ See e.g. Annex C, p. 9, para 19: *As a victim of torture, he suffers from PTSD and remains isolated whilst detained. These circumstances impact on Mr. Al Hassan’s well-being on a daily basis and therefore fall squarely within the CCO and Registrar’s non-discretionary duty of care and positive obligation to ensure that sufficient funds are made available for all warranted family visits.*

⁷⁸ MLI-D28-0002-0500; MLI-D28-0002-0535; MLI-D28-0003-1801; MLI-D28-0003-1806; MLI-D28-0003-1809; MLI-D28-0003-1811. See also ICC-01/12-01/18-1316-Red, para. 25 (including MLI-D28-0003-2272, para. 32 relating to the impact of the death of Mr Al Hassan’s daughter).

Registrar has been apprised of the findings of the independent Panel of Experts appointed by the Trial Chamber, which underscored the importance of facilitating direct contacts between Mr Al Hassan and his family, as soon as possible,⁷⁹ and further noted the importance of adopting culturally appropriate responses.⁸⁰ Following receipt of these findings, the Trial Chamber instructed the Registry to take note of these recommendations, and further expressed its understanding that the Registry would take the necessary steps to ensure that the family visit would occur as soon as possible.⁸¹

76. Notwithstanding the fact that the Registry was explicitly instructed to take into consideration the Panel of Expert's recommendations, the Impugned Decision contains no consideration as to whether the proposed modalities (two persons only) would address the specific concerns identified by the Panel of Experts. This error is further aggravated by the failure to acknowledge or address the practical consequences of this quota, which the Defence brought to the Registrar's attention (namely, that the quota and/or refusal to fund the travel of a guardian would prevent Mr Al Hassan from seeing his children).

VIII. Relief sought

77. In light of the above, the Defence respectfully requests that the Presidency review and **QUASH** the Impugned Decision pursuant to Regulation 220 of the Regulations of the Court and confirm that Mr Al Hassan is urgently entitled to a funded family visit that satisfies his right to effective and meaningful contacts with his wife and children.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 21st Day of July 2021
At The Hague, The Netherlands

⁷⁹ ICC-01/12-01/18-1197-Conf-Anx, para. 326.

⁸⁰ ICC-01/12-01/18-1197-Conf-Anx, para. 311.

⁸¹ ICC-01/12-01/18-1467, para. 85 and fn. 166.