

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **31 March 2022**

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**

**Confidential *ex parte*,
available only to the Defence of Mr Al Hassan and the Registry**

**Decision on the ‘Defence Application for Judicial Review of Registrar’s Decision of
12 August 2021’, dated 16 August 2021 (ICC-RoR220-03/21-3-Conf)**

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor****Counsel for Mr Al Hassan Ag Abdoul Aziz
Ag Mohamed Ag Mahmoud**
Ms Melinda Taylor
Ms Kirsty Sutherland**Legal Representatives of the Victims****Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims****The Office of Public Counsel for the
Defence****States' Representatives****Amicus Curiae****REGISTRY**

Registrar

Mr Peter Lewis

Counsel Support Section**Victims and Witnesses Unit****Detention Section**

Mr Harry Tjonk

**Victims Participation and Reparations
Section****Other**

The Presidency of the International Criminal Court (the 'Court') has before it the application filed by Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud ('Mr Al Hassan') on 16 August 2021, seeking judicial review pursuant to regulation 220 of the Regulations of the Registry (the 'Regulations') of a decision of the Registrar issued on 12 August 2021, requesting the Presidency to quash the decision and to confirm that Mr Al Hassan is immediately entitled to a funded family visit that satisfies his right to effective and meaningful contacts with his wife and children (the 'Application').¹

I. PROCEDURAL HISTORY

1. On 10 September 2019, the Chief Custody Officer (the 'CCO') rejected Mr Al Hassan's request for a funded family visit from his wife, three children and his mother, who was supposed to accompany the family as guardian (the 'CCO's Decision of 10 September 2019').² On 15 October 2019, the CCO rejected a complaint (the 'CCO's Decision of 15 October 2019'),³ which Mr Al Hassan had submitted in response to the CCO's Decision of 10 September 2019.⁴
2. On 6 November 2019, in response to Mr Al Hassan's complaint of 22 October 2019⁵ pursuant to regulation 219 of the Regulations, the Registrar, *inter alia*, reversed the CCO's Decision of 15 October 2019, stated his intention to explore alternative means to support family visits and granted funds for Mr Al Hassan's family to obtain required travel documents (the 'Registrar's Decision of 6 November 2019').⁶
3. On 30 March 2020, the Registrar informed Trial Chamber X, that '[a]s 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' and further that

¹ Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Defence Application for Judicial Review of Registrar's Decision of 12 August 2021, 16 August 2021, ICC-RoR220-03/21-3-Conf, para. 54.

² CCO's Decision of 10 September 2019, ICC-RoR220-03/21-1-Conf-Exp-AnxB, p. 10, *annexed to* the Application of 21 July 2021.

³ CCO's Decision of 15 October 2019, ICC-RoR220-03/21-1-Conf-Exp-AnxB, pp. 4-8, *annexed to* the Application of 21 July 2021.

⁴ Mr Al Hassan's Complaint of 1 October 2019, ICC-RoR220-03/21-1-Conf-Exp-AnxB, pp. 2-3, *annexed to* the Application of 21 July 2021.

⁵ Mr Al Hassan's Complaint of 22 October 2019, ICC-RoR220-03/21-1-Conf-Exp-AnxC, *annexed to* the Application of 21 July 2021.

⁶ Registrar's Decision of 6 November 2019, ICC-RoR220-03/21-1-Conf-Exp-AnxA, p. 7, *annexed to* the Application of 21 July 2021.

the 'funds of the TFFV [Trust Fund for Family Visits] are available and already earmarked for Mr Al Hassan's next family visit'.⁷

4. On 8 June 2021, after visits to the Detention Centre were suspended due to the COVID-19 pandemic, the Registry informed the detained persons that family visits would resume as of 15 July 2021.⁸
5. In a memorandum issued on 12 July 2021,⁹ the Registry informed all detained persons of his decision allocating funding for family visits to each detained person, emphasising that each of them shall have equal access to funded visits and that each visit is therefore limited to a maximum of two visitors per detained person.¹⁰
6. On 12 July 2021, Mr Al Hassan sought the Registry's confirmation that the family visit he considered to have been previously approved pursuant to the Registrar's Decision of 6 November 2019 would not be replaced by a visit limited to two persons,¹¹ to which the Registry responded on 13 July 2021 via email that the decision to fund a visit with two persons only, is equally applicable to Mr Al Hassan.¹²
7. On 15 July 2021, by way of letter, the Registrar confirmed again that the funded family visit of Mr Al Hassan would be limited to a maximum of two persons (the 'Letter of 15 July 2021').¹³ The Letter of 15 July 2021 emphasised that, while being committed to

⁷ Registrar, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Confidential Redacted Version of the Registry's Observations on the "Urgent Defence Request for Interim Release" (ICC-01/12-01/18-680-Conf-Exp), 30 March 2020, ICC-01/12-01/18-698-Conf-Exp-Red, para. 13.

⁸ Letter from Registrar to counsel of all detained persons, dated 8 June 2021, ICC-RoR220-03/21-1-Conf-Exp-AnxH, p. 1, *annexed to* Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Defence Application for Judicial Review of the Registrar's Decision of 13 July 2021, 21 July 2021, ICC-RoR220-03/21-1-Conf (the 'Application of 21 July 2021'). A public redacted version of the Application of 21 July 2021 is available at [ICC-RoR220-03/21-1-Red](#).

⁹ Registry Memorandum, ICC-RoR220-03/21-1-Conf-Exp-AnxL, *annexed to* Application of 21 July 2021, ICC-RoR220-03/21-1-Conf. The memorandum is dated 9 July 2021 but was communicated to counsel on 12 July 2021. See Impugned Decision, dated 12 August 2021, ICC-RoR220-03/21-4-Conf-Exp-Anx, para. 3, *annexed to* Registrar, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Transmission pursuant to Regulation 220(3) of the Regulations of the Registry, 18 August 2021, ICC-RoR220-03/21-4-Conf-Exp (the 'Registry Transmission'); ICC-RoR220-03/21-1-Conf-Exp-AnxM, *annexed to* Application of 21 July 2021, ICC-RoR220-03/21-1-Conf.

¹⁰ Internal Memorandum of the Registry, dated 9 July 2021, ICC-RoR220-03/21-1-Conf-Exp-AnxL, p. 1, *annexed to* the Application of 21 July 2021, ICC-RoR220-03/21-1-Conf.

¹¹ Letter of Mr Al Hassan's Defence to the Director of DJS, dated 12 July 2021, ICC-RoR220-03/21-1-Conf-Exp-AnxM, *annexed to* the Application of 21 July 2021, ICC-RoR220-03/21-1-Conf.

¹² Email from Registry, dated 13 July 2021, ICC-RoR220-03/21-1-Conf-Exp-AnxN, *annexed to* the Application of 21 July 2021, ICC-RoR220-03/21-1-Conf.

¹³ Letter of 15 July 2021, ICC-RoR220-03/21-1-Conf-Exp-AnxO, p. 2, *annexed to* the Application of 21 July 2021, ICC-RoR220-03/21-1-Conf.

organising a funded family visit for Mr Al Hassan,¹⁴ the Registrar also needs to take into account the requests for funded family visits of other detained persons and the current level of funding available at the Trust Fund for Family Visits (the 'TFFV').¹⁵ The Letter of 15 July 2021 further explained that in light of the COVID-19 pandemic none of the detained persons at the Detention Centre had received a family visit for over 18 months and that also other detained persons had faced judicial or personal developments, which would result in concurrent priorities and obligations towards several detained persons.¹⁶

8. On 21 July 2021, Mr Al Hassan filed an application, seeking judicial review of the Letter of 15 July 2021.¹⁷ On 27 July 2021, the Presidency dismissed this application *in limine*, considering that the Letter of 15 July 2021 constituted a new decision of the Registrar which, in accordance with the established procedure, must be first subject to detailed review by the Registrar himself, in accordance with regulation 218(1) of the Regulations, before it may be subject to judicial review by the Presidency, pursuant to regulation 220 of the Regulations.¹⁸
9. On 28 July 2021, Mr Al Hassan filed a complaint before the Registrar pursuant to regulation 218(1) of the Regulations, seeking review of the Registrar's decision 'concerning family visits', positing 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 by allowing for the travel of his wife and a guardian (his mother) and at least one child (to allow him to meet his youngest son)' and requesting an expedited determination (the 'Complaint').¹⁹ On 29 July 2021, the Registrar informed Mr Al Hassan that since the matter required careful review, he was not in a position to expedite his decision but would respond within the prescribed 14 calendar days.²⁰

¹⁴ Letter of 15 July 2021, ICC-RoR220-03/21-1-Conf-Exp-AnxO, p. 1, *annexed to the Application of 21 July 2021*, ICC-RoR220-03/21-1-Conf.

¹⁵ Letter of 15 July 2021, ICC-RoR220-03/21-1-Conf-Exp-AnxO, p. 1, *annexed to the Application of 21 July 2021*, ICC-RoR220-03/21-1-Conf.

¹⁶ Letter of 15 July 2021, ICC-RoR220-03/21-1-Conf-Exp-AnxO, pp. 1-2, *annexed to the Application of 21 July 2021*, ICC-RoR220-03/21-1-Conf.

¹⁷ [Application of 21 July 2021](#), ICC-RoR220-03/21-1-Red, para. 77.

¹⁸ Presidency, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the 'Defence Application for Judicial Review of Registrar's Decision of 13 July 2021', dated 21 July 2021 \(ICC-RoR220-03/21-1-Conf\)](#), 27 July 2021, ICC-RoR220-03/21-2, para. 10.

¹⁹ Complaint, dated 28 July 2021, ICC-RoR220-03/21-3-Conf-Exp-AnxA, pp. 2-3, 5, *annexed to Application*, ICC-RoR220-03/21-3-Conf.

²⁰ Email of the Registrar, dated 29 July 2021, ICC-RoR220-03/21-3-Conf-Exp-AnxC, p. 2, *annexed to Application*, ICC-RoR220-03/21-3-Conf.

10. On 12 August 2021, the Registrar issued a decision pursuant to regulation 218(5) of the Regulations, confirming the decision taken in his Letter of 15 July 2021 that the funded family visit of Mr Al Hassan would be limited to a maximum of two persons (the ‘Impugned Decision’).²¹ The Registrar emphasised that the two-person policy applies to Mr Al Hassan, and that should he wish for his wife to travel with a chaperone, that chaperone shall count as one of the two persons permitted pursuant to the two-person policy.²²
11. On 16 August 2021, Mr Al Hassan filed the present Application for review of the Impugned Decision by the Presidency.²³ On 18 August 2021, the Registrar transmitted the supporting documents to the Presidency, in accordance with regulation 220(3) of the Regulations.²⁴ The Registrar did not submit any observations pursuant to regulation 220(4) of the Regulations.

II. IMPUGNED DECISION

12. In the Impugned Decision, the Registrar rejects Mr Al Hassan’s assertions of unfair and discriminatory treatment, emphasising that he has always acted with procedural fairness.²⁵ He notes that to support his Complaint, Mr Al Hassan refers to discussions that took place prior to the COVID-19 outbreak but disregards a set of elements that led to a significant change in circumstances, such as major judicial developments which required the Registry to address concurrent priorities and meet concurrent obligations.²⁶ This concerns in particular the arrival of two new indigent detainees at the Detention Centre and changes with regard to the locations of families.²⁷ Considering that the currently available funds in the TFFV are limited, the Registrar explains that he was compelled to adopt the two-persons policy to ensure usage of these funds for the well-being and benefit of all eligible detained persons.²⁸

²¹ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, para. 8, p. 8.

²² Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, p. 8.

²³ Application, ICC-RoR220-03/21-3-Conf.

²⁴ Registry Transmission, ICC-RoR220-03/21-4-Conf-Exp, para. 2.

²⁵ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, para. 11.

²⁶ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, paras 12-13.

²⁷ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, para. 13.

²⁸ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, paras 11, 14.

13. The Impugned Decision indicates that, in light of the Registrar's obligation to ensure equal treatment of all detained persons, a five-person visit is no longer a viable option from a financial perspective and thus arrangements made prior to the adoption of the two-persons policy of 12 July 2021, are considered null and void.²⁹ It further emphasises that while family visits are a right guaranteed to all detained persons, under the terms and within the limits established in regulation 180(1) of the Regulations, the Court's legal framework does not provide for a right to *funded* family visits³⁰ and recalls that an earlier Presidency Decision provided as a guiding principle that the Registrar needs to strike a fair balance between safeguarding resources and ensuring that family links are maintained.³¹ In addition, the Impugned Decision notes that the TFFV has been set up by the Assembly of States Parties to be financed exclusively through voluntary contributions and that the Financial Regulations and Rules of the Court, do not allow the Registrar to make any advances to such trust funds or special accounts.³² Although efforts are currently underway to raise funds for family visits, at present the available resources do not allow to accommodate more than two persons per visit per indigent detainee.³³

14. Finally, with respect to Mr Al Hassan's alleged unique circumstances, the Registrar observes that, while he empathises with his situation, several other persons currently detained at the Detention Centre have never met some of their children.³⁴ Concerning the reference to religious and cultural reasons, the Impugned Decision notes that if the Registrar were to allow a 'chaperone' as an additional person due to religious reasons, it would effectively be creating positive discrimination for detained persons professing a specific religion, to the detriment of other detainees who may have other equally valid religious or cultural requirements.³⁵ The Registrar concludes that having examined all relevant factors, that is Mr Al Hassan's circumstances, surrounding circumstances related to the COVID-19 pandemic, the judicial developments and the current financial status of the TFFV, as well as the relevant legal framework and the obligation to address the

²⁹ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, para. 15.

³⁰ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, para. 16.

³¹ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, para. 15, *referring to* Presidency, *The Prosecutor v. Germain Katanga and Ma Thieu Ngudjolo Chui*, [Decision on "Mr Mathieu Ngudjolo's Complaint Under Regulation 221\(1\) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008"](#), 10 March 2009, ICC-RoR217-02/08-8 (the 'Presidency Decision of 10 March 2009'), para. 51.

³² Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, para. 17.

³³ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, para. 18.

³⁴ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, paras 24-25.

³⁵ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, para. 20.

interests of all indigent detained persons equally, the fundamentals of the two-persons policy remain valid.³⁶

III. APPLICATION

15. The Application seeks review of the Impugned Decision, arguing that the Registrar erred in rejecting Mr Al Hassan's request for a funded family visit of three persons.³⁷ He submits, first, that the Registrar erred in law and abused his discretion in relation to the interpretation and application of the notion of equality, conflating 'same treatment' with 'equal treatment'.³⁸ Highlighting that the principle of equal treatment is offended in circumstances where persons in dissimilar circumstances are treated in the same manner, Mr Al Hassan considers that 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 at a later point in time.³⁹ In adopting a one-size-fits-all approach, the Registrar not only failed to take into account critical differences between indigent detained persons⁴⁰ but also failed to engage in the required 'positive discrimination' to ensure that detained persons in different circumstances can enjoy the right to effective family life, in equal measure.⁴¹ Mr Al Hassan submits that the Registrar's application of the 'equality' criterion has led to an arbitrary and procedurally unfair outcome,⁴² arguing that in the absence of a special exemption, Mr Al Hassan's right to enjoy regular and effective contact with his family will be rendered illusory.⁴³ His wife can neither be expected to travel without a chaperon, i.e. in a manner that violates her religious faith, nor, in light of his young age, without her youngest son.⁴⁴

³⁶ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, para. 26.

³⁷ Application, ICC-RoR220-03/21-3-Conf, para. 1.

³⁸ Application, ICC-RoR220-03/21-3-Conf, paras 21-27.

³⁹ Application, ICC-RoR220-03/21-3-Conf, para. 2.

⁴⁰ Application, ICC-RoR220-03/21-3-Conf, paras 21, 23.

⁴¹ Application, ICC-RoR220-03/21-3-Conf, paras 21-22, 24-25. In this respect, Mr Al Hassan submits that applying some measure of positive discrimination is consistent with regulation 91(2) of the Regulations of the Court, which recognises that '[m]easures applied under these Regulations and the Regulations of the Registry to protect the rights and special status of particular categories of detained persons shall not be deemed to be discriminatory', and the Registry policy on family visits which recognises that special exemptions and funding may be required in case a particular family member cannot travel without assistance or a chaperone. Application, ICC-RoR220-03/21-3-Conf, paras 24-25, *referring to* Annex B, ICC-RoR220-03/21-3-Conf-Exp-AnxB, section XII, paras 3-5, *annexed to* Application, ICC-RoR220-03/21-3-Conf.

⁴² Application, ICC-RoR220-03/21-3-Conf, para. 2.

⁴³ Application, ICC-RoR220-03/21-3-Conf, para. 26.

⁴⁴ Application, ICC-RoR220-03/21-3-Conf, para. 26. In this regard, Mr Al Hassan submits that: (i) a visit without children would be contrary to the internationally recognised duty to take positive steps to ensure the rights of the

16. Second, he submits that the Registrar erred by failing to consider or afford appropriate weight to five relevant factors related to Mr Al Hassan's personal circumstances,⁴⁵ namely: (i) the cultural and religious background of Mr Al Hassan's family;⁴⁶ (ii) the death of Mr Al Hassan's daughter in December 2020;⁴⁷ (iii) the fact that Mr Al Hassan has never met his son;⁴⁸ (iv) the overall length of his separation from his family members;⁴⁹ and (v) the Registrar's prior commitment to implement the postponed visit.⁵⁰ In this respect, Mr Al Hassan relies on a prior Presidency decision which held that, while resource considerations are a relevant factor, the Registrar's decisions on funding for family visits must strike a 'fair balance between safeguarding resources and ensuring that family links are maintained', to argue that this balancing exercise requires the Registrar to consider the personal circumstances of the detainee and the case at hand.⁵¹
17. Third, Mr Al Hassan avers that the Registrar's decision to apply a fixed quota of two persons to all indigent detained persons constitutes an unreasonable exercise of discretion and that to the extent that the Registrar justified his policy by claiming that there was no entitlement to funded family visits, he erred in law.⁵² The Registrar's position that there is no positive obligation to fund family visits was rejected by the Presidency in past litigation, and thus reliance on this factor was legally erroneous and vitiates the Impugned Decision.⁵³ Further, given the size of detained persons' families, the two-person quota means that indigent detained persons will be deprived of the right to have regular, meaningful contact with a substantial component of their families and may be unable to see certain children over the course of a trial.⁵⁴ Mr Al Hassan argues that this outcome is contrary to the rights of the impacted children and fails to adhere to the principles

child; and (ii) the Registrar's argument that 'were the Registry to allow a chaperone as an additional person to accompany the Complainant's wife due to religious reasons, it would effectively be creating positive discrimination for the detainees professing a specific religion', is inconsistent with the Registry's duties under internationally recognised human rights law. Application, ICC-RoR220-03/21-3-Conf, paras 22, 26.

⁴⁵ Application, ICC-RoR220-03/21-3-Conf, paras 3, 28-50.

⁴⁶ Application, ICC-RoR220-03/21-3-Conf, paras 30-33.

⁴⁷ Application, ICC-RoR220-03/21-3-Conf, paras 34-37.

⁴⁸ Application, ICC-RoR220-03/21-3-Conf, paras 38-42.

⁴⁹ Application, ICC-RoR220-03/21-3-Conf, paras 43-47.

⁵⁰ Application, ICC-RoR220-03/21-3-Conf, paras 48-50.

⁵¹ Application, ICC-RoR220-03/21-3-Conf, para. 28, referring to [Presidency Decision of 10 March 2009](#), ICC-RoR217-02/08-8, para. 51.

⁵² Application, ICC-RoR220-03/21-3-Conf, paras 4, 51-53.

⁵³ Application, ICC-RoR220-03/21-3-Conf, para. 51, referring to [Presidency Decision of 10 March 2009](#), ICC-RoR217-02/08-8, para. 37.

⁵⁴ Application, ICC-RoR220-03/21-3-Conf, para. 52.

established by the Presidency in past litigation.⁵⁵ In addition, he avers that there is no indication that the Registry has acted with the diligence required to ensure that persons detained by the Court have the means to enjoy regular visits with their families.⁵⁶ Finally, Mr Al Hassan submits that, having agreed to fund two adults, it was plainly disproportionate and unreasonable to refuse to consider whether steps could be taken to secure the limited additional funds required for a child.⁵⁷

IV. DETERMINATION OF THE PRESIDENCY

A. Standard for judicial review and applicable law

18. The Presidency recalls 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 reasonable person who has properly applied his or her mind to the issue could have reached.⁵⁸

19. In respect of applicable law, the Presidency recalls that detained persons have the right to receive visits, including family visits, in accordance with regulations 100(1) of the Regulations of the Court and 179(1) of the Regulations.⁵⁹

B. Merits

20. In examining the merits of the Application, the Presidency will first address the alleged errors pertaining to the application of a two-person quota for funded family visits. Mr Al Hassan submits that to apply a fixed quota of two persons to all indigent detainees

⁵⁵ Application, ICC-RoR220-03/21-3-Conf, para. 52, referring to [Presidency Decision of 10 March 2009](#), ICC-RoR217-02/08-8, para. 52.

⁵⁶ Application, ICC-RoR220-03/21-3-Conf, para. 53.

⁵⁷ Application, ICC-RoR220-03/21-3-Conf, para. 53.

⁵⁸ The standard of judicial review was defined by the Presidency in its [Decision on the Application to Review the Registrar's Decision Denying the Admission of Mr Ernest Midagu Bahati to the list of Counsel](#), 20 December 2005, ICC-RoC72-02/05, para. 16; and supplemented in its Decision on the application to review the decision of the Registrar denying [REDACTED] privileged visits with Mr Lubanga Dyilo, under regulation 221 of the Regulations of the Registry, 27 November 2006, ICC-01/04-01/06-731-Conf, para. 24. See also Presidency, [Reasons for the 'Decision on the "Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel"'](#), 10 July 2008, ICC-RoC72-01/08-10, para. 20; Presidency, [Decision on the application to review the decision of the Registrar denying the admission of Ms Magdalena Ayoade to the list of experts](#), 6 August 2009, ICC-RoR56-01/09-2, para. 11.

⁵⁹ [Presidency Decision of 10 March 2009](#), ICC-RoR217-02/08-8, para. 26.

constitutes an unreasonable exercise of discretion and, to the extent that the Registrar justified his policy by claiming that there was no entitlement to funded family visits, he erred in law.⁶⁰ Second, he submits that the Registrar erred in law and abused his discretion in relation to the interpretation and application of the notion of equality and that procedural unfairness impacted the Impugned Decision.⁶¹ Third, the Presidency will address the allegation that the Registrar erred by failing to consider or afford appropriate weight to relevant factors related to Mr Al Hassan's personal circumstances.⁶²

1. Alleged error of law regarding the existence of an entitlement to funded family visits

21. The Presidency recalls that detained persons are entitled to receive visits under regulation 100(1) of the Regulations of the Court and regulation 179(1) of the Regulations which provides, in relevant parts, that 'the Registrar shall give specific attention to visits by family of the detained persons with a view to maintain such links'. As previously recognised by the Presidency, a detained person's right to receive family visits is clearly acknowledged by international human rights law.⁶³ Further, as consistently recognised by the Presidency, in the unique circumstances of the Court, where an indigent person is detained in The Hague far from his or her family pursuant to the execution of a decision of the Court, funded family visits are the only mechanism by which the effective exercise of such right is rendered meaningful.⁶⁴ The Presidency thus found that, in these circumstances, there exists a positive obligation to fund family visits to indigent detained persons but clarified that such obligation cannot create an entitlement to unlimited funded family visits and that the extent of this obligation will inevitably be restricted by resource

⁶⁰ Application, ICC-RoR220-03/21-3-Conf, para. 60. *See also* Application, ICC-RoR220-03/21-3-Conf, paras 51-53.

⁶¹ Application, ICC-RoR220-03/21-3-Conf, paras 21, 27. *See also* Application, ICC-RoR220-03/21-3-Conf, paras 2, 22-26.

⁶² Application, ICC-RoR220-03/21-3-Conf, paras 3, 28-50.

⁶³ Presidency, *The Prosecutor v. Dominic Ongwen*, Decision on the 'Defence Request for Review Pursuant to Regulation 220 of the Regulations of the Registry' dated 13 April 2021 (ICC-RoR220-01/21-1-Conf-Exp), 15 July 2021, ICC-RoR220-01/21-6-Conf-Exp, para. 26; Presidency, *The Prosecutor v. Bosco Ntaganda*, [Public redacted version of "Decision on Defence 'Request for review of the Registrar's decision of 21 June 2019' dated 5 July 2019 \(ICC-RoR220-01/19-1-Conf-Exp\)"](#), 10 December 2019, ICC-RoR220-01/19-2-Red (the 'Presidency Decision of 10 December 2019'), para. 19.

⁶⁴ [Presidency Decision of 10 December 2019](#), ICC-RoR220-01/19-2-Red, para. 21; [Presidency Decision of 10 March 2009](#), ICC-RoR217-02/08-8, paras 31, 37; Presidency, [Decision on the application for judicial review dated 5 November 2012](#), 22 February 2013, ICC-RoR221-04/12-4-Red, para. 29; Presidency, [Public redacted version of "Decision on the 'Application to review the 'Decision on Complaint to the Registrar by \[REDACTED\] concerning Supported Family Visit' dated \[REDACTED\] 2016"](#), 11 August 2016, ICC-RoR221-02/16-3-Red (the 'Presidency Decision of 11 August 2016'), para. 42.

constraints.⁶⁵ It follows that in determining the appropriate visiting conditions, the Registrar must essentially strike a fair balance between safeguarding resources and ensuring that family links are maintained.⁶⁶ The Presidency has further previously found that the depletion of funds cannot justify, as a matter of law, a suspension of the Court's obligation to ensure the effectiveness of the right for indigent detainees to receive family visits.⁶⁷

22. The assertion in the Impugned Decision that the Court's legal framework does not provide for a right to *funded* family visits,⁶⁸ is thus misleading in that it fails to properly take into account the prior legal findings of the Presidency, based on a review of pertinent human rights jurisprudence, that under certain circumstances, the Court is obliged to fund family visits to indigent detained persons.

23. Nonetheless, any error in this regard has not tainted the outcome of the Impugned Decision as a practical matter, given that Mr Al Hassan *has* been granted a supported family visit. For this reason, the Presidency rejects the argument that the Impugned Decision may be overturned on this basis. What is at issue in the present matter is whether the conditions of the visit granted, adequately satisfy Mr Al Hassan's right to maintain family ties.

2. *Alleged error in relation to the interpretation and application of the notion of equality*

24. Mr Al Hassan criticises the adoption of a 'one-size-fits-all approach' by the Registrar,⁶⁹ arguing that Mr Al Hassan's circumstances are different from those of other indigent detained persons.⁷⁰ The question before the Presidency is whether the adoption of a two-person policy for funded visits to indigent detained persons amounts to an unreasonable exercise of discretion and whether the Registrar erred in law in his interpretation and application of the notion of equality.

25. Turning first to the notion of equality, the Presidency observes that the Impugned Decision is based, amongst other factors, on the obligation to ensure equal treatment of

⁶⁵ [Presidency Decision of 10 March 2009](#), ICC-RoR217-02/08-8, paras 37, 42. See also [Presidency Decision of 10 March 2009](#), ICC-RoR217-02/08-8, paras 43, 46, 49, 53.

⁶⁶ [Presidency Decision of 10 March 2009](#), ICC-RoR217-02/08-8, para. 51.

⁶⁷ [Presidency Decision of 10 December 2019](#), ICC-RoR220-01/19-2-Red, para. 26.

⁶⁸ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, para. 16.

⁶⁹ Application, ICC-RoR220-03/21-3-Conf, para. 21.

⁷⁰ Application, ICC-RoR220-03/21-3-Conf, para. 2. See also Application, ICC-RoR220-03/21-3-Conf, paras 28-50.

all detained persons and to address the interests of all indigent detained persons equally, as well as the contention that the Registrar was compelled to adopt a two-persons policy to ensure usage of the limited available funds to the well-being and benefit of all eligible detained persons.⁷¹

26. The Presidency recognises, at the outset, the inherent difficulties faced by the Registrar in allocating the limited resources available in the TFFV, in light of the exceptional circumstances created by the COVID-19 pandemic with prolonged restriction of in-person contacts and the resulting hardship for all detained persons, as well as judicial developments which have increased the number of indigent detained persons at the Detention Centre. The adoption of a two-person policy for funded family visits is an attempt to strike a fair balance between competing interests. The Presidency has previously recognised that, in order to preserve the rights of all detained persons in an equal manner, the Registry has to take into consideration other pending or anticipated requests from other indigent detainees and that a ‘first come, first-served’ approach would run counter to the spirit underlying the principle of equal treatment of detained persons.⁷²

27. The notion of equality before the law is of a fundamental nature and often coupled with the prohibition of discrimination.⁷³ While national and international legislation and interpretation of the notion of equality may vary in some aspects, it is generally

⁷¹ Impugned Decision, ICC-RoR220-03/21-4-Conf-Exp-Anx, paras 11, 14.

⁷² [Presidency Decision of 11 August 2016](#), ICC-RoR221-02/16-3-Red, para. 40.

⁷³ See e.g. Organisation of African Unity, article 3 of the African Charter on Human and Peoples’ Rights (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); Organization of American States, article 24 of the American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series 17955; United Nations General Assembly, article 26 of the International Covenant on Civil and Political Rights, 16 December 1966, United Nations Treaty Series, vol. 999, p. 171; Council of Europe, article 14 of the European Convention on Human Rights, 4 November 1950, ETS 5; United Nations General Assembly, article 7 of the Universal Declaration on Human Rights, 10 December 1948, 217 A (III). See also regulation 91 of the Regulations of the Court; United Nations General Assembly, rule 2 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 8 January 2016, A/RES/70/175; Council of Europe: Committee of Ministers, paragraphs 13 of the Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, 11 January 2006, Rec(2006)2.

recognised that the principle requires, primarily, to preclude different treatment of persons in similar situations without any objective and reasonable justification.⁷⁴

28. The Presidency is not convinced that Mr Al Hassan's situation is fundamentally different from that of other indigent detained persons and thus finds no legal error, in principle, in applying the same conditions for funded family visits to all indigent detained persons. All of them have faced the prolonged absence from their respective families, as well as other individual challenges. The Presidency, acting by majority, Judge Mindua dissenting, emphasises, however, that equal treatment should not be interpreted as identical treatment without due regard to reasonably relevant personal circumstances. Moreover, the mere equal distribution of available resources for funded family visits does not guarantee that the right to family life is being adequately respected in the context of supported family visits. The Presidency, acting by majority, Judge Mindua dissenting, considers that the key issue in the present circumstances is not whether or not there has been equal treatment, but whether the Impugned Decision has rendered Mr Al Hassan's right to family visits meaningful. In approaching Mr Al Hassan's family visit purely from the perspective of a numerically equal division of resources, without giving due consideration to whether Mr Al Hassan's right to family life is being rendered meaningful, the Impugned Decision erred in law.

3. *Whether the Registrar erred by failing to consider or afford appropriate weight to relevant factors related to Mr Al Hassan's personal circumstances*

29. Mr Al Hassan further submits that the Registrar erred by failing to consider or afford appropriate weight to relevant factors related to Mr Al Hassan's personal circumstances. In this respect, the Presidency recalls that it has held previously, in the context of funded family visits to indigent detained persons, that, in determining visiting conditions which

⁷⁴ See e.g. European Court of Human Rights (the 'ECHR') (Grand Chamber), *Molla Sali v. Greece*, Judgment, 19 December 2018, Application no. 20452/14, para. 135 ('Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations'); Inter-American Court of Human Rights, Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, Advisory Opinion OC 24/17, 24 November 2017, para. 66 ('the Court recalls that not every difference in treatment will be considered discriminatory, rather only differences based on criteria that cannot realistically be considered objective and reasonable'); ECHR, *Gaciu v. Romania*, Judgment, 23 June 2013, Application no. 39633/10, para. 47; ECHR, *Varnas v. Lithuania*, Judgment, 9 July 2013, Application no. 42615/06, paras 106, 112; United Nations Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), para. 13 ('the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant').

satisfy the need to maintain family links, family circumstances are a relevant criterion.⁷⁵ It further recalls that this is a flexible and broad criterion, potentially encompassing a range of relevant factors, *inter alia* the ability of family members to travel, the size of the family, 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.⁷⁶ The duration of family separation prior to transfer to The Hague may also be relevant and a particularly protracted period of separation might provide a basis for increasing the size, frequency or duration of initial family visits.⁷⁷ The Presidency has also held that the availability of resources is a relevant consideration in determining visiting conditions and that there may be other relevant constraints of a practical nature.⁷⁸

30. Turning to Mr Al Hassan's argument that for religious and cultural reasons his wife can only travel if accompanied by a chaperone, the Presidency notes that the difficulty which arises in the current circumstances is ultimately not linked to whether or not Mr Al Hassan's wife is permitted to travel with a chaperone, considering that the Registrar has not denied permission in this regard, but whether the overall limitations on the number of persons to visit renders Mr Al Hassan's entitlement to maintain family life meaningful. The majority of the Presidency, Judge Mindua dissenting, is receptive to the argument that, if Mr Al Hassan's wife is not able to travel without a chaperone because of religious or cultural practices, the application of a two-person policy may impact on the ability of Mr Al Hassan's children to ever see their father, given their inability to travel without their mother. In this respect, the majority of the Presidency urges the Registry to give due consideration to this aspect and the rights generally accorded to children. This means in particular to examine carefully the actual financial implications of having a young child travel with its mother, which may be rather minimal. The majority of the Presidency reiterates in this regard that while equality may be a valid starting point in implementing a consistent and fair policy, when it comes to family visits, individual circumstances may vary greatly and there needs to be some flexibility to allow for such circumstances to be adequately taken into account. In the present circumstances, considerations related to the rights of Mr Al Hassan's child should be given appropriate weight.

⁷⁵ [Presidency Decision of 10 March 2009](#), ICC-RoR217-02/08-8, para. 47.

⁷⁶ [Presidency Decision of 10 March 2009](#), ICC-RoR217-02/08-8, para. 47.

⁷⁷ [Presidency Decision of 10 March 2009](#), ICC-RoR217-02/08-8, para. 48.

⁷⁸ [Presidency Decision of 10 March 2009](#), ICC-RoR217-02/08-8, paras 49-50.

31. Furthermore, as regards the death of Mr Al Hassan's daughter, the Impugned Decision does not make any reference at all to this personal circumstance. As outlined above, key moments in the life of the family are to be taken into account as relevant family circumstances in determining visiting conditions. Regarding the fact that Mr Al Hassan never met his son, the majority of the Presidency considers questionable the Impugned Decision's underlying approach of weighing the ability of one detained person to exercise their capacity to have a funded family visit against that of another detained person. The correct approach is that all detained persons should have equal ability to exercise their right to maintain their family ties in a way which is meaningful in view of their circumstances. In considering the question in terms of comparative hardship, suggesting that the non-unique nature of a personal circumstance renders it irrelevant, the majority of the Presidency, Judge Mindua dissenting, considers that the Impugned Decision fails to give proper consideration as to whether the right to family life is being made meaningful for Mr Al Hassan.

32. In light of the above, the majority of the Presidency, Judge Mindua dissenting, finds that the Impugned Decision failed to consider all relevant personal circumstances in reaching a decision on Mr Al Hassan's request for a funded family visit of more than two persons.

4. Conclusion

33. The Presidency, acting by majority, Judge Mindua dissenting, considers that the Impugned Decision has erroneously approached Mr Al Hassan's family visit from the perspective of a numerically equal division of resources without giving due consideration to whether Mr Al Hassan's right to family life is being rendered meaningful, including with respect to his children. The Impugned Decision failed to give any consideration to the actual costs of the inclusion of one additional child, even though Mr Al Hassan's request for a visit, which indicated a willingness to accept the visit as including only one of his children is rather measured and modest in nature. Further, the Impugned Decision failed to give any mention to the compelling humanitarian factor of the death of his daughter and dismissed the factor of him never having met his son on the basis that this factor is not unique. The Impugned Decision proceeds from the basis that a numerically equal division of resources amongst all detained persons eligible for supported family visits satisfies the Court's obligations in this regard and fails to properly consider whether

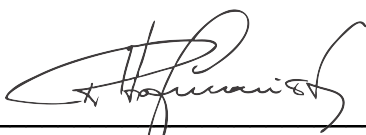
the resultant outcome allows Mr Al Hassan to exercise his right to family life in a meaningful manner. The majority of the Presidency finds this approach erroneous.

V. CLASSIFICATION

34. Considering the confidential classification of the Application and the private nature of the personal information contained in the Application and this decision, the Presidency, acting by majority, does not intend to issue a public version of the present decision.

In light of the above, the majority of the Presidency, Judge Mindua dissenting, hereby **GRANTS** the Application, in part, **REVERSES** the Impugned Decision, and **REMITTS** the matter to the Registrar for reconsideration in accordance with the present Decision.

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



Judge Piotr Hofmański
President

Judge Luz del Carmen Ibáñez Carranza
First Vice-President

Judge Antoine Kesia-Mbe Mindua
Second Vice-President

Dated this 31 March 2022

At The Hague, The Netherlands