

Public Annex



Original: **English**

No.: **ICC-RoR221-02/16**

Date: **11 August 2016**

THE PRESIDENCY

Before: Judge Silvia Fernández de Gurmendi, President
Judge Joyce Aluoch, First Vice-President
Judge Kuniko Ozaki, Second Vice-President

Public

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”

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

Applicant

Defence
[REDACTED]

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. Herman von Hebel

Detention Section

Division of Court Services

The Presidency of the International Criminal Court (“Court”) has before it the application of [REDACTED] (“Applicant”) dated [REDACTED] 2016 for the review of a decision of the Registrar dated [REDACTED] 2016, pursuant to regulation 221 of the Regulations of the Registry (hereinafter all references to regulations are to the Regulations of the Registry unless otherwise indicated).¹

The Application is granted, in part, for the following reasons.

I. BACKGROUND

1. On [REDACTED] 2016, the Applicant requested the Director of Judicial Services to fund a family visit for his wife and their [REDACTED] children to take place from 5 to 15 [REDACTED] 2016. The Applicant further requested that the flight tickets for his wife and their [REDACTED] children be issued for the period from 5 [REDACTED] to 1 [REDACTED] 2016, with the accommodation for the additional 15 days to be at the expense of family friends (“Request”).² In support of the Request, the Applicant explains that [REDACTED] is the most suitable month, as the trial is adjourned during this period and his children will be on school vacation. He further adds that he has not seen his wife and children for almost [REDACTED]. The Applicant appended to the Request the “*Formulaire de demande de visite d’une personne détenue*”,³ the “*Formulaire de situation financière familiale*” (“Family Financial Status Form”)⁴ as well as photocopies of the visitors’ passports.⁵
2. On [REDACTED] 2016, the Chief Custody Officer (“CCO”), on behalf of the Director of Judicial Services, declined to approve the Request. In his decision, the CCO reasons that “*la Cour ne dispose pas pour le moment de fonds nécessaires pour pouvoir répondre favorablement à votre demande de visite*” (“Decision of the CCO”).⁶

¹ Application to review the “Decision on Complaint to the Registrar by [REDACTED] concerning Supported Family Visit”, [REDACTED] 2016, ICC-RoR221-02/16-1-Conf-Exp (“Application”).

² “*Demande de financement d’une visite familiale*”, [REDACTED] 2016, ICC-RoR221-02/16-2-Conf-Exp-AnxA, p.2.

³ ICC-RoR221-02/16-2-Conf-Exp-AnxA, pp. 3-4. The “*Formulaire de demande de visite d’une personne détenue*” is Annex 1 to the “Detention Centre Policy on Family Visits pursuant to Regulation 179(1) of the Regulations of the Registry”, as amended on 1 September 2014 (“Family Visits Policy”). The Family Visits Policy is appended as Annex F to the “Registry transmission of information pursuant to regulation 221(2) of the Regulations of the Registry”, 4 August 2016, ICC-RoR221-02/16-2-Conf-Exp.

⁴ ICC-RoR221-02/16-2-Conf-Exp-AnxA, pp. 5-7. The Family Financial Status Form is Annex 2 to the Family Visits Policy.

⁵ ICC-RoR221-02/16-2-Conf-Exp-AnxA, pp. 8-10.

⁶ Document referenced DS/2016/040/PC/em, [REDACTED] 2016, ICC-RoR221-02/16-2-Conf-Exp-AnxB.

3. On [REDACTED] 2016, the Applicant transmitted to the Registrar a complaint against the Decision of the CCO (“Complaint”).⁷
4. As a preliminary matter, the Applicant expresses his understanding that “[t]he decision rendered by the CCO, on behalf of the Registrar’s office, denies [the] visit on the basis of unavailability of funds at the moment.”⁸ The Applicant further states that he is cognizant that the Court funding family visits is on condition of the availability of funds.⁹ Nonetheless, the Applicant requests the Registrar to review the Decision of the CCO on the basis of regulation 179(1), which provides in relevant part that “[t]he Registrar shall give specific attention to visits by family of the detained persons with a view to maintaining such links”. The Applicant highlights, in particular: (i) the distance between the country of residence of his family and The Hague; (ii) the fact that his family only sees him once a year; and (iii) their financial incapacity as established by the Registry.¹⁰
5. In parallel, the Applicant undertook to raise money among his family friends to fund the entirety of the visit. The Applicant did so in the belief that the Registry had no money to fund the requested family visit. The Applicant could find a friend who was willing, on an exceptional basis, to support his family’s flight and accommodation in The Hague.¹¹
6. The Applicant also requested the CCO diplomatic assistance in obtaining visas for his wife and their [REDACTED] children.
7. On [REDACTED] 2016, Counsel for the Applicant followed-up with the CCO on the Applicant’s request for diplomatic assistance.¹² In his electronic correspondence, Counsel for the Applicant indicates having taken note of the CCO’s position that a request for diplomatic assistance pre-requires a statement as to whether or not the visit is funded by the Court; and if not, to provide documentary proof of the sufficiency of means. Counsel for the Applicant explains that a family friend offered, on an exceptional basis, to fund the family visit of his wife and her [REDACTED] children, because: (i) as per the Decision of the CCO, the Court does not have sufficient means to fund the Applicant’s requested family visit at the moment; (ii) [REDACTED] 2016

⁷ “Detained Person’s Complaint to the Registrar”, [REDACTED] 2016, ICC-RoR221-02/16-2-Conf-Exp-AnxC.

⁸ Complaint, para. 9.

⁹ Complaint, para. 9.

¹⁰ Complaint, para. 10.

¹¹ Application, para. 21.

¹² “Email correspondences on [REDACTED] 2016”, ICC-RoR221-02/16-2-Conf-Exp-AnxE, p. 3. *See also*, Application, para. 22.

is the most convenient time for such a family visit; and (iii) the Applicant does not know when the Court will have sufficient funds to be able to fund the trip. Counsel for the Applicant provides copies of flight reservations, hotel reservations and insurance purchased by the family friend as well as other proof of sufficient means.

8. On the same day, the Applicant was informed that his request for diplomatic assistance would be treated as soon as the Registrar had issued his decision on the Complaint.¹³
9. On [REDACTED] 2016, in light of the above, Counsel for the Applicant requested that the Registrar render his decision on the Complaint on an expedited basis. Counsel for the Applicant clarified to the Registrar that “[i]n case the Registry does not grant the request of [the Applicant] to have a funded family visit this year, he would be forced to find a solution, which now presents itself in the form of a family friend’s willingness to fund the trip. The said trip is to be from 5 [REDACTED] to 1 [REDACTED] 2016. In order to be in time for this trip, the visa process has to be commenced as soon as possible.”¹⁴
10. On [REDACTED] 2016, the Registrar rendered his decision on the Complaint, vacating the Decision of the CCO, but denying the Request (“Impugned Decision”).¹⁵
11. On [REDACTED] 2016, the Applicant submitted his Application, requesting the Presidency to: (i) take note of the ‘incorrect presentation’ made on behalf of the Registrar regarding the availability of funds to support the requested family visit; (ii) quash the Impugned Decision; (iii) hold that the Registrar has the positive obligation, on the basis of available funds, to fund his family visits to the extent that he is indigent; and (iv) accord the Request.¹⁶
12. On 4 August 2016, upon request of the Presidency, the Registrar transmitted to the Presidency, on an *ex parte* basis –available only to the Registry and the Applicant, the relevant documents of the present proceedings.¹⁷

¹³ Application, para. 23.

¹⁴ “Email correspondences on [REDACTED] 2016”, ICC-RoR221-02/16-2-Conf-Exp-AnxE, p. 2. *See also*, Application, para. 23.

¹⁵ “Decision on Complaint to the Registrar by [REDACTED] concerning Supported Family Visit”, [REDACTED] 2016, ICC-RoR221-02/16-2-Conf-Exp-AnxD.

¹⁶ Application, para. 39.

¹⁷ “Registry transmission of information pursuant to regulation 221(2) of the Regulations of the Registry”, 4 August 2016, ICC-RoR221-02/16-2-Conf-Exp.

II. MERITS

A. Impugned Decision

13. In the Impugned Decision, the Registrar vacates the Decision of the CCO, but denies the Request.¹⁸
14. With regards to the Decision of the CCO, the Registrar observes that the Request was denied exclusively on the basis of unavailability of funds. However, the Registrar notes that the current balance of the Trust Fund for Family Visits (“TFFV”) is €9,372,55. Considering that the premise underlying the Decision of the CCO is incorrect, the Registrar decides to vacate it.¹⁹
15. Proceeding to consider the merits of the Request, the Registrar notes, in the first place, that the issue of family relation to the Applicant is not in dispute.²⁰
16. Turning to the indigence criterion, the Registrar notes the information provided by the Applicant in the Family Financial Status Form.²¹ The Registrar observes that: (i) the Applicant stated in the Request that the expenses for the family from 15 to 30 [REDACTED] 2016 would be paid by friends; and (ii) Counsel for the Applicant informed the Registry that if the Request were to be rejected, the Applicant “would be forced to find a solution, which now presents itself in the form of a family friend’s willingness to fund the trip.”²² On this basis, the Registrar finds that there are funds other than the TFFV to finance a stay of the Applicant’s family in The Hague for at least 15 days and that there “may well be” such other funds to finance the entire family visit, including “presumably” the travel.²³ Hence, the Registrar finds that the Applicant has failed to discharge the “burden of proof” relating to family financial incapability, “that is, he did not prove that his family is financially unable to pay for the visit.”²⁴
17. Having found that the test in relation to indigence has not been met, the Registrar does not examine the principle of equal treatment of detainees.²⁵

¹⁸ Impugned Decision, para. 26.

¹⁹ Impugned Decision, para. 17.

²⁰ Impugned Decision, para. 18.

²¹ Impugned Decision, paras. 19-20.

²² Impugned Decision, paras. 21-22.

²³ Impugned Decision, para. 23.

²⁴ Impugned Decision, para. 24.

²⁵ Impugned Decision, para. 25.

B. Application

18. The Applicant seeks review of the Impugned Decision on the grounds that: (i) the Registrar failed to act with procedural fairness by producing a new argument which was not part of the Decision of the CCO, and therefore denying the Applicant the opportunity to respond;²⁶ and (ii) the Registrar took into account an irrelevant factor by relying on the fact that a friend was willing to finance the family visit to find that the Applicant had failed to discharge the burden of proof relating to family financial capability.²⁷
19. As part of his Application, the Applicant also expresses concerns regarding: (i) the procedure followed to decide on his Request, whereby the decision was rendered by the CCO and not the Registrar;²⁸ and (ii) the ‘incorrect presentation’ made on behalf of the Registrar that the Court did not have sufficient means to fund the requested family visit.²⁹
20. For these reasons, the Applicant requests the Presidency to: (i) take note of the ‘incorrect presentation’ made on behalf of the Registrar; (ii) quash the Impugned Decision; (iii) hold that the Registrar has the positive obligation, on the basis of available funds, to fund his family visits to the extent that he is indigent; and (iv) accord the Request.³⁰

C. Determination of the Presidency

21. The Presidency has had previous occasion to lay down the standard applicable to the judicial review of administrative decisions of the Registrar. It is concerned with the propriety of the procedure by which the Registrar reached a particular decision and the outcome of the Registrar's decision. The review involves a consideration of whether the Registrar has acted without jurisdiction, has committed an error of law, has failed to act with procedural fairness, has acted in a disproportionate manner, has taken into account irrelevant factors or failed to take into account relevant factors, or has reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.³¹

²⁶ Application, para. 2. *See also*, paras. 25, 30-33.

²⁷ Application, para. 2. *See also*, paras. 34-38.

²⁸ Application, para. 26.

²⁹ Application, paras. 27-29.

³⁰ Application, para. 39.

³¹ *See* reasons for the “Decision on the ‘Application for Review of Decision of the Registrar’s Division of Victims and Counsel dated 2nd January not to Admit Prof. Dr. Sluiter to the List of Counsel’”, 10 July 2008, ICC-RoC72-01/08-10, para. 20.

1. Relevant law

22. Section II of the Family Visits Policy includes the following definitions of relevant terms:

Indigent refers to a detained person whose status has been determined by the Registrar that he/ she does not have sufficient means to pay for his/ her legal assistance and hence the court assigns him/ her legal assistance without payment. This includes detained persons who are temporarily regarded as indigent, pending the determination of the Registrar.

...

Family Financial Incapability refers to the family of a detained person, which -upon submitting the Family Financial Status Form- has been accepted by the ICC Registrar as being financially unable of paying for a visit to the detained person.

Supported Family Visit refers to a Family Visit, financially paid for by the ICC, to tire family of a detained person, whose Family Financial Incapability has been determined by the ICC Registrar.

23. Section XII of the Family Visits Policy, entitled “Supported Family Visits”, provides in relevant parts:

49. Nuclear family members and/ or the partner of an indigent detained person, wishing to be considered for a Supported Family Visit shall submit the two application forms and the requested documents to the Registrar no later than two months and a half prior to the day of commencement of the intended visit: ...

50. In case of proved Family Financial Incapability, the ICC shall determine on the basis of available funds the extent to which one family visit can be funded. In funding the visit, the ICC shall identify those expenses that may be covered by the detained person or his/her family:

...

e. The ICC shall arrange and pay for the accommodation of the family for a period not exceeding 10 days, if required;

...

2. Determination

(i) Preliminary matters

24. The Presidency notes that the Applicant expresses concerns regarding the procedure followed to consider the Request in the first place. The Applicant submits, in essence, that it did not fall within the jurisdiction of the CCO to render a decision on the

Request, as the latter was addressed to the Registrar.³²

25. Contrary to what represents the Applicant, the Request was communicated to the Director of Judicial Services, not to the Registrar himself. Moreover, the CCO rendered his decision *on behalf* of the Director of Judicial Services, to whom the Request had been transmitted. That being said, the Presidency notes that the decision-making process on requests for supported family visits is not clearly set out in the Family Visits Policy, in particular as regards the respective roles of the Registrar and the CCO in relation to the funding of family visits,³³ and that the practice seems to vary in this regard. It is the view of the Presidency that such decision-making process should be clearly delineated in order to avoid any uncertainty for indigent detainees applying for supported family visits.
26. Likewise, the Presidency notes that more than 30 days elapsed between the submission of the Request and the Decision of the CCO.
27. The Presidency is not convinced that the 14-day time limit of regulation 219 equally applies to a request for a supported family visit, as contended by the Applicant.³⁴ The Presidency notes that regulation 219(1) refers to ‘complaint’, the nature of which is different from a request submitted under the Family Visits Policy. However, the situation in which the Applicant has found himself and which gives rise to the present application for review – *i.e.* seeking funding from the Court while at the same time securing external funds – directly results from the fact that the Decision of the CCO was issued only a short time before the expected visit of his family and could have been avoided by a more expeditious consideration of the Request.

(ii) Merits

1. Whether the Registrar failed to act with procedural fairness by producing a new argument which was not part of the Decision of the CCO, and therefore denying the Applicant the opportunity to respond

28. The Presidency recalls that the Registrar decided to vacate the Decision of the CCO having found that the premise underlying the Decision – *i.e.* the unavailability of funds – was incorrect. The Registrar then proceeded to consider anew the Request in light of the applicable criteria and on the basis of the information available to him.

³² Application, para. 26.

³³ While paragraph 49 of the Family Visits Policy provides that the application forms and accompanying documents shall be submitted “to the Registrar”, paragraph 50 states that it is the “ICC” that shall determine the extent to which one family visit can be funded in case of proved family financial incapability.

³⁴ Application, para. 26.

29. The Presidency does not consider that the Registrar lacked procedural fairness in considering information not raised in the Decision of the CCO without providing the Applicant an opportunity to respond. The Presidency observes in this regard that Counsel for the Applicant not only informed the Registry and the Registrar of his client's decision to seek funding from a friend, but also provided the reasons for the said decision.³⁵ The Application advances no new arguments that have not already been communicated to the Registrar prior to the Impugned Decision.³⁶

30. The first ground for review is accordingly rejected.

2. Whether the Registrar took into account an irrelevant factor in finding that the Applicant had failed to discharge the burden of proof relating to "Family Financial Incapability"

31. In 2009, the Assembly of States Parties ("ASP") decided that the Court could, pending the establishment of a mechanism to this effect, subsidize family visits for indigent detainees from the Court's budget. In its resolution allowing for such a possibility, the ASP decided that requests for supported family visits had to be assessed against three cumulative criteria, namely:

- a. Family relation to the detainee;
- b. Full or partial indigence as determined by the procedure established by the Court to ascertain the status of indigence; and
- c. Equal treatment of detainees.³⁷

32. In 2010, the ASP established a special fund within the Registry for the purpose of funding family visits for indigent detainees.³⁸ The ASP clarified that this fund would operate "entirely through voluntary donations".³⁹ The resolution did not state, however, the criteria applicable to requests for supported family visits under the newly constituted fund.

33. The Presidency concurs with the Registrar that the three criteria set out by the Assembly of States Parties in 2009 continue to apply to requests submitted under the TFFV. The first two criteria – family relation and indigence – are explicitly referred to

³⁵ "Email correspondences on [REDACTED] 2016", ICC-RoR221-02/16-2-Conf-Exp-AnxE.

³⁶ Compare Application, para. 32 with "Email correspondences on [REDACTED] 2016", ICC-RoR221-02/16-2-Conf-Exp-AnxE.

³⁷ ICC-ASP/8/Res.4, para. 5.

³⁸ ICC-ASP/9/Res.4, Section X.

³⁹ ICC-ASP/9/Res.4, Section X, para. 1.

in the Family Visits Policy,⁴⁰ while the third criterion – equal treatment of detainees – can be inferred from the fact that the TFFV is intended to support family visits for all indigent detainees in the custody of the Court and that it is not financed from a recurrent budget.

34. Turning to the Impugned Decision, by relying on the availability of funds from *friends*, the Registrar has imposed on the Applicant the burden to establish, in addition to the indigence of his family, the absence of external sources of funding beyond his family. There is no such requirement in the Family Visits Policy. Paragraph 14 of the Family Visits Policy defines “Family Financial Incapability” as a situation where the *family* of a detained person is accepted by the Registrar as being financially unable of paying for a visit to the detained person. To the extent that the financial indigence of the Applicant’s family is not in dispute, the Request could not be denied on the basis of the second criterion.
35. The Applicant’s decision to seek financial support from a friend does not evidence a general financial capability on his part or on the part of his family. The circumstances which prompted the Applicant to secure funding for the entire family visit from an external source are exceptional and should have been considered in their context. The Presidency is satisfied that the Applicant turned to a friend because he was under the sincere belief that there were no funds available, as indicated by the CCO in his Decision, and given the imminence of [REDACTED], the only suitable month for a family visit in the case of the Applicant’s family.⁴¹
36. Moreover, the Presidency finds that it could not be held against the Applicant the fact that certain of his friends have volunteered to cater for accommodation of the Applicant’s family for 15 extra days. The offer made by the Applicant’s friends is solely aimed at enabling the Applicant’s family to spend a longer time in The Hague beyond the 10 days funded by the Court.⁴² The Presidency takes note of the Applicant’s submission that the family visit of [REDACTED] 2015 was conducted in the same manner.⁴³
37. The second ground for review is granted and the Impugned Decision is vacated accordingly.

⁴⁰ Paragraph 49 refers to “[n]uclear family members and/or the partner of an indigent detained person”, while paragraph 50 sets the “Family Financial Incapability” (as defined in paragraph 14) as the threshold for a family visit to be funded by the Court.

⁴¹ *See supra*, para. 1.

⁴² *See* Family Visits Policy, para. 50-e (quoted above at para. 23).

⁴³ Application, para. 20.

3. Whether the Request meets the criterion of equal treatment of detainees

38. As he considered that the criterion related to indigence had not been met, the Registrar did not examine the third criterion, namely equal treatment of detainees.⁴⁴
39. Having found that the Registrar made an error in his application of the indigence criterion, the Presidency will now determine whether the Request can be granted in light of the principle of equal treatment between detainees. The Presidency notes that the Applicant submitted in this regard that “[t]he third criterion, on equal treatment of detainees, does not arise in this case”,⁴⁵ without providing any substantiation.
40. The Presidency considers that the availability of funds in the TFFV does not entitle *per se* the Applicant to have the expenses related to his requested family visit borne by the Court. The Presidency notes that in addition to the Applicant, there are other indigent detainees in the custody of the Court, with family members living abroad, and who could, as such, seek family visits funded by the Court. The necessity to give due regard to the principle of equal treatment of detainees in this case is compounded by the limited amount of funds currently available in the TFFV, which would just allow for the funding of one family visit among all indigent detainees.⁴⁶ In order to preserve the rights of all detainees in an equal manner, the Registry has to take into consideration other pending or anticipated requests from other indigent detainees. A “first come, first served” approach would run counter to the spirit underlying the principle of equal treatment of detainees.
41. Considering that the TFFV is administered by the Registry,⁴⁷ which has at its disposal all relevant information and is best placed to balance the respective situations of the indigent detainees in the custody of the Court, the Presidency finds it appropriate to remit the matter to the Registrar to consider whether the Request should be granted, in whole or in part, in light of the principle of equal treatment of detainees.
42. On a related note, the Presidency is concerned by the fact that the availability of funds in the TFFV has reached a critically low level. The Presidency recalls its previous holding that there is a positive obligation upon the Court to render the right to family visits effective by funding such visits.⁴⁸ The Presidency notes that the ASP has opted

⁴⁴ Impugned Decision, para. 25.

⁴⁵ Application, para. 35.

⁴⁶ The Presidency notes that the visit of the Applicant’s family in [REDACTED] 2015 cost €9,615.

⁴⁷ Cf. ICC-ASP/9/Res.4, Section X, para. 1.

⁴⁸ “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, paras. 30-42.

for a mechanism operating “entirely through voluntary donations”.⁴⁹ In order to preserve the effectiveness of the system for all indigent detainees, the Presidency considers it important to actively seek donations for the TFFV from States Parties, other States, non-governmental organizations, civil society, individuals and other entities.⁵⁰

III. CLASSIFICATION

43. The Presidency notes that the present matter has proceeded on a confidential *ex parte* basis as it relates to the personal and private life of the Applicant. The Presidency acknowledges that details of the Applicant’s private life are entitled to confidentiality. The Presidency also takes the view, however, that a number of matters discussed in this present decision could be of relevance more broadly. The Presidency hereby indicates its intention to file a public version of the present decision. The Presidency directs the Applicant and the Registry to indicate, by way of submissions filed no later than 26 August 2016, what information, if any, ought to be redacted to the public. The Presidency will proceed to issue a public version of its decision upon receipt of the Applicant’s and Registry’s views.

THE PRESIDENCY HEREBY

VACATES the Impugned Decision;

REMITTS the matter to the Registrar to consider the Request in light of the principle of equal treatment of detainees;

REJECTS all other requests;

RECOMMENDS the Registrar to clarify the decision-making process on requests for supported family visits under the Family Visits Policy, as referred to in paragraph 25 above;

URGES the Registrar to actively seek donations for the TFFV; and

DIRECTS the Applicant and the Registry to indicate, by way of submissions filed no later than 26 August 2016, what information in the present decision, if any, ought to be redacted to the public.

⁴⁹ ICC-ASP/9/Res.4, Section X, para. 1.

⁵⁰ *Cf.* ICC-ASP/9/Res.4, Section X, para. 1.

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

A handwritten signature in black ink, appearing to read 'S. Fernández de Gurmendi', written in a cursive style.

Judge Silvia Fernández de Gurmendi
President

Dated this 11 August 2016

At The Hague, The Netherlands