



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ
Case File/Dossier No. 002/19-09-2007/ECCC/TC

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): 26 / 04 / 2013
ម៉ោង (Time/Heure): 16 : 20
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SAM ONN RANA

Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge YOU Ottara

Date: 26 April 2013
Original language(s): Khmer/English/French
Classification: PUBLIC

DECISION ON KHIEU SAMPHAN'S APPLICATION FOR IMMEDIATE RELEASE

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Accused
KHIEU Samphan

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

Lawyers for the Defence
KONG Sam Onn
Arthur VERCKEN
Jacques VERGÈS
Anta GUISSÉ

1. INTRODUCTION

1. The Trial Chamber is seized of KHIEU Samphan's application for immediate release on bail of 29 March 2013.¹ Upon receipt of the application, the Chamber scheduled a hearing for 5 April 2013 and directed the Co-Prosecutors to respond orally to the application at this hearing. Upon indication by the KHIEU Samphan Defence of its unavailability on 5 April 2013, the Chamber rescheduled this hearing for 11 April 2013. Having considered the written application of the Defence and the oral submissions of the Co-Prosecutors and all parties on 11 April 2013, the Chamber issues its present decision.

2. PROCEDURAL BACKGROUND

2. On 19 November 2007, the Accused KHIEU Samphan was detained by order of the Co-Investigating Judges and transferred to the ECCC detention facility.² The Co-Investigating Judges periodically renewed the Accused's detention orders, which were subsequently upheld by the Pre-Trial Chamber.³

3. On 15 September 2010, the Co-Investigating Judges issued their Closing Order in Case 002 and ordered the continued provisional detention of the Accused until he was brought before the Trial Chamber, stating that the conditions in Internal Rule 63(3) justifying detention were satisfied.⁴ The Accused appealed the detention order contained in the Closing Order.⁵

4. On 13 January 2011, the Pre-Trial Chamber filed its decision on the Accused's Appeal of the Closing Order, declaring the Accused's appeal inadmissible and ordering continuation of the Accused's provisional detention until he is brought before the Trial Chamber.⁶

¹ *Demande de mise en liberté immédiate avec placement sous contrôle judiciaire de M. KHIEU Samphan*, E275, 29 March 2013 ("Application for Immediate Release").

² Detention Order of KHIEU Samphan, C27, 19 November 2007.

³ See e.g. Decision on KHIEU Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, C26/5/26, 3 July 2009 ("PTC Decision on Appeal of Request for Release"), paras 53-58, 63; Decision on KHIEU Samphan's Appeal Against Order on Extension of Provisional Detention, C26/9/12, 30 April 2010 ("Second PTC Decision on Appeal of Request for Release"), paras 34, 35, 38, 39.

⁴ Closing Order, D427, 15 September 2010, "Part Six: Maintenance in Detention", para. 1622.

⁵ *Déclaration d'Appel (KHIEU Samphan)*, D427/4, 22 September 2010; *Mémoire en appel contre l'ordonnance de cloture (KHIEU Samphan)*, D427/4/3, 21 October 2010.

⁶ Decision on KHIEU Samphan's Appeal against the Closing Order, D427/4/14, 13 January 2011; see also Decision on KHIEU Samphan's Appeals against the Closing Order, D427/4/15, 21 January 2011.

5. The Trial Chamber was seized of Case 002 on 13 January 2011. On 18 January 2011, the Accused filed a request for provisional release, and on 16 February 2011, the Trial Chamber issued its decision rejecting this request.⁷ In this decision, the Chamber found that the potentially severe penalty faced by KHIEU Samphan if convicted created an incentive to abscond and that continued detention was necessary to ensure his presence at trial.⁸ On 6 June 2011, the Supreme Court Chamber (“SCC”) upheld the continued detention of the Accused due to the risk that the Accused might otherwise become unavailable for trial.⁹

6. On 20 February 2013, during the hearing following the SCC Decision of 8 February 2013 regarding the severance of Case 002, the KHIEU Samphan Defence announced that they would soon submit a request for the release of the Accused.¹⁰ This announcement was followed by the filing of the Application for Immediate Release on 29 March 2013.

3. SUBMISSIONS

7. The KHIEU Samphan Defence submits that the continued provisional detention of the Accused is excessive and violates the Accused’s fundamental rights. The risks that initially justified the provisional detention of KHIEU Samphan are presently low or non-existent and can be mitigated by releasing the Accused on bail pursuant to Internal Rule 65.¹¹ The Defence therefore requests the immediate release of the Accused subject to judicial supervision.¹²

8. The Defence submits that the unlikelihood that the Trial Chamber will render its verdict soon results in an excessively long period of detention, in breach of the Accused’s fundamental right to a fair and expeditious trial.¹³ It notes that since the creation of the ECCC in 2004, the Accused KHIEU Samphan has never sought to flee and has always attended proceedings, when required.¹⁴ The Defence contends that it is also unlikely that KHIEU Samphan will be prevented from attending hearings due to ill-health.¹⁵ It submits that there is

⁷ *Demande de mise en liberté en vertu de la règle 82(3) du règlement*, E18, 18 January 2011.

⁸ Decision on the Urgent Applications for Immediate Release of NUON Chea, KHIEU Samphan and IENG Thirith, E50, 16 February 2011, paras. 40.

⁹ Decision on Immediate Appeal by KHIEU Samphan on Application for Release, E50/3/1/4, 6 June 2011, para. 54 (“Decision on Immediate Appeal”).

¹⁰ T., 20 February 2013, p. 76; Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision concerning the Scope of Case 002/01 (E163/5/1/13), 8 February 2013.

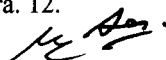
¹¹ The Chamber notes that « *demande de mise en liberté immédiate avec placement sous contrôle judiciaire* » is equivalent to release on bail in English (*cf.* Internal Rule 65 (French)).

¹² Application for Immediate Release, paras 64, 65; T., 11 April 2013, p. 90.

¹³ Application for Immediate Release, para. 20; T., 11 April 2013, pp. 80-82, 90.

¹⁴ Application for Immediate Release, para. 28; T., 11 April 2013, pp. 80, 84, 119.

¹⁵ Application for Immediate Release, para. 12.



no or negligible risk to public order should the Accused be provisionally released: a conclusion confirmed by the SCC in a recent decision in relation to a Co-Accused.¹⁶ The Defence further emphasizes that the advanced age of the Accused favours his release and that at no stage during the course of proceedings has he encountered any threat to his safety.¹⁷

9. In support of their request for provisional release of the Accused subject to appropriate and proportionate conditions, the KHIEU Samphan Defence proposes, in an Annex to its Application, that the Accused live with family members upon his release.¹⁸ These relatives attest that they have the means and willingness to take care of the Accused.¹⁹ Finally, the Defence suggests that if the request for the immediate release of the Accused KHIEU Samphan is granted, the Chamber's decision to this effect should be issued publicly.²⁰

10. The Co-Prosecutors oppose the Accused's application for immediate release and submit that all prior justifications for his continued detention remain valid.²¹ They further submit that the Defence submissions in relation to the excessive length of the current proceedings are not entitled to any weight.²² In this regard, the Co-Prosecutors contend that the Trial Chamber should instead assess whether the length of the Accused's detention is proportionate to the circumstances of the case.²³ They submit that in view of the scale of Case 002, the passage of time since the alleged crimes, the volume of evidence, the complexity of legal submissions, and the number of objections and legal arguments filed by all parties, there has been no undue delay in the conduct of proceedings.²⁴

11. The Co-Prosecutors also submit that material on the Case File demonstrates that KHIEU Samphan's release may create a material risk that pressure may be exerted on witnesses or victims, of collusion with accomplices or alleged accomplices, and that evidence

¹⁶ Application for Immediate Release, paras 32-35; T., 11 April 2013, pp. 85-87; *see also* Decision on Immediate Appeal Against the Trial Chamber's Order to Unconditionally Release the Accused IENG Thirith, E138/1/10/1/5/7, 14 December 2012, para. 75 ("[I]t is noted that there appears to be no particular threat to the Accused's safety.")

¹⁷ Application for Immediate Release, paras 26, 40; T., 11 April 2013, pp. 81, 87-88.

¹⁸ Application for Immediate Release, para. 50; T., 11 April 2013, p. 88.

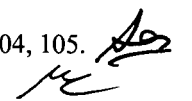
¹⁹ *Lettre de* [redacted], E275.2, 27 March 2013; *Attestation de* [redacted], E275.3, 17 February 2013; *Garantie de representation*, E275.4, 29 March 2013; *Acte translatif de propriété*, [redacted], E275.7, 29 March 2013; *Livret de famille de* [redacted], E275.8, 29 March 2013; *see also* Application for Immediate Release, para. 61; T., 11 April 2013, pp. 89, 92-93, 94-95, 96 (submitting that rendering this decision as a public filing may assist in ensuring public order).

²⁰ Application for Immediate Release, para. 63.

²¹ T., 11 April 2013, pp. 97-98.

²² T., 11 April 2013, pp. 98, 101.

²³ T., 11 April 2013, p. 100.

²⁴ T., 11 April 2013, pp. 102, 103-104, 105. 

may be endangered.²⁵ The Co-Prosecutors further submit that there are well-founded reasons to believe that the Accused may have committed the crime or crimes alleged against him – a factor listed in Internal Rule 63(3)(a) as justifying provisional detention – and which the Application makes no attempt to counter.²⁶

12. The Co-Prosecutors submit that measures to protect the security of the Accused – a factor identified in Internal Rule 63(3)(b)(iv) and considered by the Pre-Trial Chamber to justify provisional detention in 2009 and 2010 – remain necessary.²⁷ Allowing the Accused's release from detention at this stage of the proceedings may create an unacceptable risk to the Accused's safety, as well as jeopardizing his presence at trial and thus its orderly conclusion.²⁸ The Accused has made a number of prior statements that indicate that he is unwilling to participate in proceedings and has also questioned their legitimacy.²⁹ Finally, they submit that the Accused's release may risk disruption to public order.³⁰

4. FINDINGS

4.1. Applicable Law

13. Pursuant to Internal Rule 63(3), provisional detention is permissible at the pre-trial stage only when there is a well-founded reason to believe the person may have committed the crimes specified and that provisional detention is a measure necessary to satisfy at least one of the requirements below:

- i) prevent the Charged Person from exerting pressure on any witnesses or victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;
- ii) preserve evidence or prevent the destruction of any evidence;
- iii) ensure the presence of the Charged Person during the proceedings;
- iv) protect the security of the Charged Person; or
- v) preserve public order.³¹

14. Internal Rule 82(1) further provides that where the Accused is in detention at the time of his initial appearance before the Chamber, he shall remain in detention until the judgment is handed down. The Accused, however, may request the Chamber to release him based on a

²⁵ T., 11 April 2013, pp. 107-108, 111 (*citing* Internal Rules 63(3)(b)(i) and (2)).

²⁶ T., 11 April 2013, p. 106.

²⁷ T., 11 April 2013, p. 111.

²⁸ T., 11 April 2013, pp. 113-114.

²⁹ T., 11 April 2013, p. 114.

³⁰ T., 11 April 2013, p. 116.

³¹ Decision on Immediate Appeal, para. 39.

change in circumstances.³² The SCC has held that when a case is forwarded to the Trial Chamber, there is a presumption that the conditions considered by the Co-Investigating Judges to justify provisional detention continue to apply.³³ Although this presumption may be rebutted, “the onus is on an Accused to challenge the persistence of the grounds of his or her detention in a request to the Trial Chamber.”³⁴

15. When detention is continued at trial, jurisprudence requires the Court to ensure that detention remains proportionate to the circumstances of that case including its complexity and the prospective sentence. The rationale for continued detention of an Accused must be balanced against the risk of an unreasonably long or indefinite deprivation of liberty.³⁵ The reasonableness of continued detention is assessed in the light of the circumstances of each case and can be justified only if there are indications of a genuine public interest in continued detention that outweigh the obligation to respect individual liberty.³⁶ The Chamber must also consider whether the relevant judicial organs have displayed diligence in the conduct of the proceedings.³⁷

4.2. Re-examination of the Rationale for Continued Detention

16. The first condition in Internal Rule 63(3)(a) – the requirement for a well-founded reason to believe the person may have committed the crime – has not been disputed by any party. This conclusion is based on a Closing Order that has been upheld on appeal by the Pre-Trial Chamber, and the Trial Chamber finds that the presumption that this requirement is fulfilled continues to apply.

³² Internal Rule 82(4)

³³ Decision on Immediate Appeal, para. 49.

³⁴ Decision on Immediate Appeal, para. 48.

³⁵ Decision on Reassessment of Accused IENG Thirith’s Fitness to Stand Trial following Supreme Court Chamber Decision of 13 December 2011, E138/1/10, 13 September 2012, para. 22, footnote 56.

³⁶ *W. v. Switzerland*, Judgment, ECtHR (no. 14379/88), 26 January 1993, para. 30; *Muradkhanyan v. Armenia*, Judgment, ECtHR (no. 12895/06), 5 June 2012, para. 80 (also noting the presumption of innocence).

³⁷ *W. v. Switzerland*; *Muradkhanyan v. Armenia*; see also PTC Decision on Appeal of Request for Release, para. 70, citing *Prosecutor v. Lubanga*, ICC Pre-Trial Chamber (Case No. ICC-01/04-01/06), Decision on the Application for the interim release of Thomas Lubanga Dyilo, 18 October 2006, p. 6; *Prosecutor v. Mrksic et al.*, ICTY Trial Chamber (Case No. IT-95-13/1-PT), Decision on Defence Motion for Provisional Release, 9 March 2005, para. 25; see also Second PTC Decision on Appeal of Request for Release, para. 44.

17. Throughout the investigation phase, the Co-Investigating Judges and Pre-Trial Chamber found KHIEU Samphan's detention to be necessary in order to protect his safety, preserve public order, and ensure his presence at trial.³⁸

18. In February 2011, the Trial Chamber reassessed the reasons in support of continued detention of the Accused pursuant to Internal Rule 82, and found that continuation of detention remained necessary to ensure the presence of the Accused during trial proceedings, but rejected all other proposed reasons in support of continued detention.³⁹

19. The SCC has since held that the Trial Chamber is obliged also to consider whether the criteria justifying the Accused's detention listed in Internal Rule 63(3)(b) are satisfied.⁴⁰ It also noted that some of these grounds listed in that sub-rule and which justify continued detention – namely protection of the Accused's security and preservation of public order – were well-established in previous decisions of the Pre-Trial Chamber.⁴¹ The Trial Chamber will therefore consider the factors listed in Internal Rule 63(3), in addition to determining whether the length of the Accused's detention is proportionate in all the circumstances.

4.2.1. Prevention of Pressure on Witnesses or Victims, Collusion with Accomplices and the Destruction of Evidence (Internal Rule 63(3)(b)(i) and (ii))

20. The Co-Prosecutors' request is based exclusively on some evidence that in 2010, during the investigative phase of Case 002, a member of KHIEU Samphan's family contacted a witness when prohibited from doing so, although it is unclear whether the Accused arranged, or was aware of the approach. During the trial proceedings, there has been no indication that KHIEU Samphan or those acting on his behalf have tried to tamper with evidence. The Chamber is not satisfied that this episode gives reason to believe that KHIEU Samphan might attempt to pressure witnesses if he were released on bail.

³⁸ Decision on KHIEU Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, C26/5/26, 3 July 2009 ("PTC Decision on Appeal of Request for Release"), paras 49, 58, 63; Decision on KHIEU Samphan's appeal against Order on extension of his provisional detention, C26/9/12, 30 April 2010, paras. 34, 35, 38, 39; Decision on KHIEU Samphan's Appeal against the Closing Order, D427/4/14, 13 January 2011; *see also* Decision on KHIEU Samphan's Appeals against the Closing Order, D427/4/15, 21 January 2011.

³⁹ Decision on the Urgent Application for Immediate Release of NUON Chea, KHIEU Samphan and IENG Thirith, E50, 16 February 2011, para. 40.

⁴⁰ Decision on Immediate Appeal, para. 52.

⁴¹ Decision on Immediate Appeal, paras 16, 54.

4.2.2. Measures to Ensure the Presence of the Accused (Internal Rule 63(3)(b)(iii))

21. The Chamber's primary consideration is the risk of the Accused's flight. The Accused undertakes to be present during his trial and to respect any conditions that may be imposed should he be granted provisional release.⁴² His family states that it will provide him with lodgings, transport and assist him in fulfilling any release conditions, including appearing for trial.⁴³ The Chamber notes that Case 002/01 is entering its final stages and that non-appearance of the Accused (whether intentionally or otherwise) risks delay to the expeditious completion of Case 002/01 and further trials of what is in its totality "[...] an enormous organisational and logistical undertaking involving four [now two] Accused, most of whom have health problems, and numerous Civil Parties and multi-person legal teams."⁴⁴ The Chamber does not consider the assurances of the Accused and his family members sufficient to outweigh these concerns, or the risk that the Accused may abscond at this late stage of the trial. The Chamber notes also that at this advanced stage of the trial, the Accused may consider flight to be a real option when faced with the prospect of a lengthy sentence of imprisonment, should he be convicted.⁴⁵ The Chamber therefore considers all these considerations remain valid as reasons to continue the provisional detention of the Accused.

4.2.3. Protection of the Security of the Charged Person and Preservation of Public Order (Internal Rule 63(3)(b)(iv) and (v))

22. During the 11 April 2013 hearing, the Co-Prosecutors made reference to a survey of 1000 individuals, 40 per cent of whom allegedly indicated they continue to harbour feelings of revenge towards the former Khmer Rouge leadership.⁴⁶ They also noted an assault of KHIEU Samphan by a mob in 1991. The Chamber considers that although there may have been an earlier security risk to the Accused KHIEU Samphan, there is no evidence that this still persists. The Chamber has no basis to conclude that the Accused's continued detention is justified on grounds of possible danger to himself or that his release threatens public order.

23. Nor does the Chamber consider that KHIEU Samphan's continued detention is disproportionate in all the circumstances of the case. In cases of comparable complexity to

⁴² Attestation of Accused KHIEU Samphan, E275.4, 29 March 2013; T., 11 April 2013, p. 96.

⁴³ *Lettre de* [redacted], E275.2, 27 March 2013; *Attestation de* [redacted], E275.3, 17 February 2013.

⁴⁴ Decision on Immediate Appeal, para. 54.

⁴⁵ Decision on the Urgent Application for Immediate Release of NUON Chea, KHIEU Samphan and IENG Thirith, E50, 16 February 2011, paras 40, 41.

⁴⁶ T., 11 April 2013, p. 112; *The Survivors' Voices: Attitudes on the ECCC, the Former Khmer Rouge and Experiences with Civil Party Participation*, E50/3/1/1.1.4, December 2010.

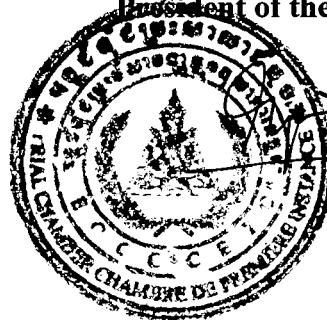
Case 002, provisional detention of five years or more has been viewed as justified in all the circumstances.⁴⁷ When all the relevant circumstances are considered, including the finding that it is “an enormous organisational and logistical undertaking”, the trial in Case 002 has proceeded as quickly as possible. In any event, as Case 002/01 approaches its concluding phases, the Chamber does not accept the KHIEU Samphan Defence submission that the Accused cannot predict or be certain of the likely duration of this trial. Nor does the Chamber consider that the Accused’s advanced age renders his detention inappropriate. The factors that justify his continued detention outweigh these personal issues when the Chamber takes into account the standard of care provided to the Accused and the respect for his rights afforded by the ECCC Detention Facility. Finally, Internal Rule 82(4) allows an Accused to file a further application for release where his circumstances have changed since his last application was finally rejected. The SCC upheld the Trial Chamber’s decision refusing to release KHIEU Samphan in February 2011. The Chamber has not found any change in the Accused’s circumstances since that date that would allow it to grant his application now.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

REJECTS the KHIEU Samphan Application for Immediate Release;

ORDERS the continued detention of the Accused pursuant to Internal Rule 63(3)(b)(iii). *pc*
pc

Phnom Penh, 26 April 2013
President of the Trial Chamber



pc
Nil Nonn

⁴⁷ *W. v. Switzerland*, Judgment, ECtHR (no. 14379/88), 26 January 1993, para. 42; *see also* Detention of Accused before the ICTY and ICTR: 5-10 years, E138/1/9.1, 7 September 2012 (*citing* 82 cases at the ICTR and ICTY in which pre-trial detention exceeded 5 years). Pursuant to the ECtHR case-law, pre-trial detention runs from the moment when an individual is remanded in custody until a first-instance court’s judgment is adopted (*see e.g. Punzelt v. the Czech Republic*, Judgement, ECtHR (no. 31315/96), 25 April 2000, para. 70); Decision on Immediate Appeal, para. 54.