



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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Before:

Judge NIL Nonn, President

Judge Jean-Marc LAVERGNE

Judge YA Sokhan

Judge Claudia FENZ

Judge YOU Ottara

Date:

18 February 2015

Original language(s):

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SECOND DECISION ON FITNESS OF THE ACCUSED KHIEU SAMPHAN TO STAND TRIAL

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1. PROCEDURAL HISTORY

1. Pursuant to Internal Rule 32, the Trial Chamber, on its own motion, assigned two experts, Dr. CHAN Kin Ming and Dr. HOUT Lina (“Experts”), to examine the Accused and to report on their present fitness to stand trial.¹ The Experts, after examining the Accused in accordance with this Chamber’s orders, filed their reports on 21 January 2015.² On 22 January 2015, upon request of the Chamber, the Experts provided additional opinions on the appropriate length of a court day for the Accused and addressed the effect of specific, recent health episodes experienced by KHIEU Samphan during the proceedings.³ The judges and parties had the opportunity to examine the Experts on their reports and opinions at a public hearing on 23 January 2015.

2. At the 23 January 2015 hearing, the Experts confirmed their findings and recommendations. Additionally, the Trial Chamber asked the experts to confirm their conclusion in the First Expert E-mail that a four-day court week is appropriate for both Accused. The Experts also discussed the results of tests performed on KHIEU Samphan by the Medical Unit on 8 January 2015, 21 January 2015, and 22 January 2015 after the Chamber adjourned the proceedings early due to KHIEU Samphan feeling ill. The International Co-Prosecutor, KHIEU Samphan Defence, NUON Chea Defence, and Lead Co-Lawyers for the Civil Parties also examined the experts at the hearing.

3. The Trial Chamber has previously found that KHIEU Samphan is fit to stand trial.⁴ To determine whether he is still fit to stand trial, the Trial Chamber ordered the Experts to report

¹ Order Assigning Experts to Assess the Accused’s Fitness to Stand Trial (“Order”), E329, 18 December 2015.

² Expert Medical Report: KHIEU Samphan (KHIEU Samphan Report”), E329/5, 21 January 2015; Expert Medical Report: NUON Chea, E329/4, 21 January 2015.

³ First Email from WESU to the Trial Chamber in Response to E329/6 (“First Expert E-mail”), E329/6/1, 22 January 2015; Second Email from WESU to the Trial Chamber in Response to E329/6 (“Second Expert E-mail”), E329/6/2, 22 January 2015. The Chamber is seized of a request by the KHIEU Samphan Defence for the First Expert E-mail to be reclassified from confidential to strictly confidential and the for Second Expert E-mail to remain classified as strictly confidential. The KHIEU Samphan Defence submitted that the public hearing on KHIEU Samphan’s health provides extensive and sufficient information on KHIEU Samphan’s health. T. 23 January 2015, pp. 59-60. Considering that the Experts discussed the information contained in both E-mails publicly during the fitness hearing of 23 January 2015, the Trial Chamber finds that classifying the First Expert E-mail and the Second Expert E-mail as strictly confidential would not serve the public interest. Accordingly, the Chamber will reclassify the First Expert E-mail and the Second Expert E-mail as public.

⁴ Decision on Fitness of the Accused KHIEU Samphan to Stand Trial (“First KHIEU Samphan Decision”), E301/12, 25 April 2014.

information which would enable the Chamber to determine the Accused's fitness according to the criteria outlined in the *Strugar* Appeal Judgement.⁵

2. THE EXPERT EXAMINATION

4. Since the Chamber issued the First KHIEU Samphan Decision, KHIEU Samphan was hospitalized three times: on 3 May 2014 for a chest infection, on 16 September 2014 for acute bronchitis, and on 12 January 2015 for bronchitis, hypertension, and heart-related issues.⁶ The Experts examined KHIEU Samphan on 19, 20 and 22 January 2015, reviewed weekly medical reports prepared by physicians at the ECCC detention facility and the Khmer-Soviet Friendship Hospital in Phnom Penh, and interviewed KHIEU Samphan's treating doctors at the Detention Facility.⁷ The Experts concluded that KHIEU Samphan appeared to be in good health despite several medical conditions and that none of his physical conditions would affect his ability to stand trial.⁸ They also concluded that he has recovered from his May 2014 chest infection and the bronchitis he suffered in September 2014.⁹ The Experts noted that KHIEU Samphan could get up from bed to sitting position more quickly, follow instructions, exercise by walking with a frame, read profusely, and prepare documents on his computer.¹⁰

5. The Experts concluded that no additional physical accommodations are necessary in the courtroom to ensure KHIEU Samphan's effective participation at trial.¹¹ It is also the Experts' opinion that KHIEU Samphan currently has no mental or cognitive problems that would affect his ability to participate in his trial according to the *Strugar* criteria.¹² Instead, the Experts' opinion is that KHIEU Samphan's short-term memory, concentration, and attention were excellent for a man of his age.¹³ The Experts specifically found that KHIEU Samphan had the necessary capacities outlined in *Strugar*.¹⁴

6. Given that KHIEU Samphan's memory and cognitive function will likely gradually deteriorate with age, the Experts recommend regular reviews of his cognitive function,

⁵ Order, para. 7, citing *Prosecutor v. Strugar*, ICTY Appeals Chamber, IT-01-42-A, Judgement, 17 July 2008 ("*Strugar*"), para. 55.

⁶ KHIEU Samphan Report, para. 7; T. 23 January 2015, p. 24.

⁷ KHIEU Samphan Report, para. 3; T. 23 January 2015, p. 9, 24.

⁸ KHIEU Samphan Report, para. 39; T. 23 January 2015, pp. 13-15.

⁹ KHIEU Samphan Report, para. 8; T. 23 January 2015, pp. 14-15.

¹⁰ KHIEU Samphan Report, para. 9; T. 23 January 2015, p. 14.

¹¹ KHIEU Samphan Report, para. 42.

¹² KHIEU Samphan Report, para. 44, T. 23 January 2015, p. 13.

¹³ KHIEU Samphan Report, para. 28, T. 23 January 2015, p. 13.

¹⁴ KHIEU Samphan Report, paras 30-37, T. 23 January 2015, p. 13.

particularly with a noticeable decline in his memory or cognition.¹⁵ The Experts found no evidence suggesting that KHIEU Samphan has Alzheimer's disease or other forms of dementia associated with a faster decline in cognitive function.¹⁶ At the 23 January 2015 hearing, the Experts recommended that both Accused, due to their advanced age, should undergo regular testing of their mental faculties.¹⁷ The Experts recommend a mental health assessment and report to be completed by a specialist monthly or quarterly.¹⁸ The Experts also recommend that, due to a stroke several years ago, KHIEU Samphan's blood pressure be closely monitored but that this should not affect his ability to stand trial.¹⁹

7. Addressing the health episodes that prompted KHIEU Samphan to leave the courtroom on 8 January 2015, the Experts concluded that KHIEU Samphan was actually unwell before the proceedings began.²⁰ The episodes of 21 January 2015 and 22 January 2015 were more likely due to physical fatigue.²¹ KHIEU Samphan told the Experts that he would have enough time to rest if the Chamber ended the morning court session at 11:30 a.m. and started the afternoon session at 1:30 p.m., giving him a two-hour break.²² The Experts opined that this was not an unreasonable accommodation.²³ The Experts stated that KHIEU Samphan could attend court hearings four days a week²⁴ and that a four-day court week with a two-hour lunch break should adequately address KHIEU Samphan's level of fatigue.²⁵

8. None of the parties contested the Experts' evidence at the hearing.

3. APPLICABLE LAW

9. In order to be considered fit to stand trial, the Accused must be capable of meaningful participation which allows him to exercise his fair trial rights to such a degree that he is able to participate effectively in his trial and has an understanding of the essentials of the proceedings.²⁶

¹⁵ KHIEU Samphan Report, para. 45; T. 23 January 2015, pp. 43-48.

¹⁶ KHIEU Samphan Report, para. 45.

¹⁷ T. 23 January 2015, pp. 43-48.

¹⁸ T. 23 January 2015, pp. 21-22.

¹⁹ KHIEU Samphan Report, para. 18; T. 23 January 2015, pp. 14-15.

²⁰ Second Expert E-mail, pp. 1-2; T. 23 January 2015, p. 27.

²¹ Second Expert E-mail, p. 2; T. 23 January 2015, pp. 26-28.

²² Second Expert E-mail, p. 2.

²³ Second Expert E-mail, p. 2.

²⁴ First Expert E-mail, p. 2.

²⁵ Second Expert E-mail, p. 2; T. 23 January 2015, pp. 34-36.

²⁶ *Strugar*, para. 55.

4. **FINDINGS**

10. To assess whether the Accused remains fit to stand trial, the Chamber considers all pertinent factors, including expert evidence, its own observations, the impact of the Accused's medical conditions, the availability of practical measures to mitigate the effects of any impairment, and that the Accused is represented and advised by competent legal counsel.

11. Having reviewed the KHIEU Samphan Report and the evidence given by the Experts at the 23 January 2015 hearing, the Trial Chamber is satisfied that KHIEU Samphan remains fit to stand trial and does not currently suffer from any mental or physical impairment which would prohibit his participation in the proceedings for Case 002/02. At the hearing, KHIEU Samphan's international defence counsel stated that she did not object to the conclusion that KHIEU Samphan is fit to stand trial.²⁷

12. In accordance with the Experts' recommendations, this Chamber revises its sitting schedule to include a two-hour recess at lunchtime to provide a longer midday rest period for KHIEU Samphan. As announced in the Chamber's oral ruling on 27 January 2015, the Trial Chamber will now sit daily from 9:00 a.m. to 11:30 a.m., and again from 1:30 p.m. to 4:00 p.m., generally from Monday through Thursday.²⁸

13. The Chamber will continue to take other practical measures – such as allowing the Accused to participate in proceedings via audio-visual link from his holding cell, pursuant to Internal Rule 81(5) – when necessary. The Chamber finds that such measures will adequately mitigate any impairment based on KHIEU Samphan's medical condition. The Chamber will also, as appropriate, issue future orders implementing the Experts' recommendations for increased monitoring of KHIEU Samphan's blood pressure, regular testing of his cognitive function, and accommodations to assist his ability to read in the courtroom after determining the most feasible methods for doing so.

²⁷ T., 23 January 2015, p. 59.

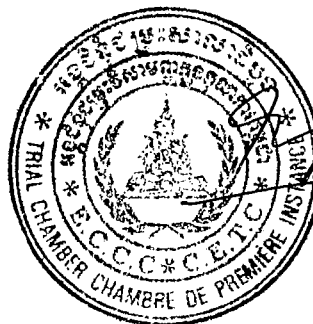
²⁸ T., 27 January 2015, pp. 25-26.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

AFFIRMS that the Accused KHIEU Samphan is fit to stand trial.

Phnom Penh, 18 February 2015

President of the Trial Chamber



Nil Nonn