



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: ០០២/១៩-០៩-២០០៧/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 réception):
.....06...../.....09...../.....2016.....
ម៉ោង (Time/Heure) :.....15:40.....
មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier:.....SANN.....BADA.....

Before: Judge YA Sokhan, for the President
Judge Jean-Marc LAVERGNE
Judge YOU Ottara
Judge Claudia FENZ
Judge THOU Mony

Date: 6 September 2016
Original language(s): Khmer/English/French
Classification: PUBLIC

THIRD DECISION ON FITNESS OF THE ACCUSED KHIEU SAMPHAN TO STAND TRIAL AND ORDER FOR QUARTERLY COGNITIVE TESTING

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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. HUOT 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 27 July 2016.² On 27 July 2016, the Trial Chamber enquired whether the Parties intended to examine the Experts on their reports and opinions during the hearing of 29 July 2016.³ On 27 and 28 July 2016, the Parties responded via email that they had no questions to put to the Experts. Accordingly, there was no hearing on the Accused’s fitness to stand trial.

2. The Trial Chamber has previously ruled on two separate occasions that KHIEU Samphan is fit to stand trial.⁴ For the purposes of the current decision, the Trial Chamber ordered the Experts to report 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

3. The Experts examined KHIEU Samphan on 25 July 2016 and reviewed weekly medical reports prepared by physicians at the ECCC detention facility and the Khmer-Soviet Friendship Hospital in Phnom Penh.⁶ In the KHIEU Samphan Report, the Experts state that KHIEU Samphan has a history of several chronic ailments and repeated episodes of hospitalization, but note that he has fully recovered from the most recent episodes and has not been admitted to hospital in 2016.⁷ The Experts find that his blood pressure, heart sounds, pallor, breathing, and muscle tones were all normal.⁸

¹ Order Assigning Experts to Assess the Accused’s Fitness to Stand Trial (“Order”), E389, 7 March 2016.

² Expert Medical Report: NUON Chea, E389/3, 27 July 2016; Expert Medical Report: KHIEU Samphan, E389/4, 27 July 2016 (“KHIEU Samphan Report”). Both Reports were filed as strictly confidential due to privacy reasons.

³ Email from Trial Chamber to the Parties dated 27 July 2016.

⁴ Decision on Fitness of the Accused KHIEU Samphan to Stand Trial, E301/12, 25 April 2014; Second Decision on Fitness of the Accused KHIEU Samphan to Stand Trial, E329/8, 18 February 2015 (“Second Decision on Fitness”).

⁵ Order, para. 6, citing *Prosecutor v. Strugar*, ICTY Appeals Chamber, IT-01-42-A, Judgement, 17 July 2008 (“*Strugar*”), para. 55.

⁶ KHIEU Samphan Report, paras 3, 5.

⁷ KHIEU Samphan Report, paras 6-9.

⁸ KHIEU Samphan Report, para. 14.

4. During his interview with the Experts, KHIEU Samphan spoke loudly in continuous sentences and listened to questions without much difficulty.⁹ He was able to walk pushing a wheelchair for support and to read using a magnifying glass.¹⁰ He recognised the Experts, although he could not remember their names.¹¹

5. The Experts report that KHIEU Samphan's treating doctors at Khmer-Soviet Friendship Hospital noted that his health is more stable now and did not notice any specific health issues.¹² The treating doctors added that KHIEU Samphan still exercises in the evening, can walk with support, and can read and prepare documents on his computer.¹³ The treating doctors reported no evidence of any problems with KHIEU Samphan's memory, concentration or mood.¹⁴

6. The Experts find that KHIEU Samphan was able to fully concentrate for the duration of their 60-minute interview, appeared alert and responded clearly to all the questions posed.¹⁵ The Experts found clear evidence of KHIEU Samphan's long-term memory preservation and he scored within the range considered as normal on the mental examination they administered.¹⁶ The Experts' opinion is that KHIEU Samphan's mental state is normal and that his short term memory, concentration and attention are all excellent for his age.¹⁷ The Experts note that regular mental tests in the form of Abbreviated Mental Tests (AMTs) were performed on KHIEU Samphan every three months and that in all tests the results indicated no cognitive impairment.¹⁸ The Experts also specifically find that KHIEU Samphan has the necessary capacities outlined in *Strugar*.¹⁹

7. The Experts conclude that there are currently no physical health problems that would affect KHIEU Samphan's ability to stand trial. However, they recommend that he is spoken to loudly, clearly and slowly and provided with adequate lighting and a magnifying glass if required to read documents.²⁰ They find that the current daily trial schedule of morning and afternoon sessions of two and a half hours separated by a two-hour break is suitable for

⁹ KHIEU Samphan Report, paras 12-13.

¹⁰ KHIEU Samphan Report, paras 11, 13.

¹¹ KHIEU Samphan Report, para. 11.

¹² KHIEU Samphan Report, paras 9-10, 16.

¹³ KHIEU Samphan Report, para. 9.

¹⁴ KHIEU Samphan Report, paras 22-23.

¹⁵ KHIEU Samphan Report, para. 24.

¹⁶ KHIEU Samphan Report, paras 25, 27.

¹⁷ KHIEU Samphan Report, paras 28-29.

¹⁸ KHIEU Samphan Report, para. 22.

¹⁹ KHIEU Samphan Report, paras 30-41.

²⁰ KHIEU Samphan Report, para. 5 of Conclusions section.

KHIEU Samphan.²¹ 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.²²

8. The Experts observe that KHIEU Samphan's memory and cognitive function will likely gradually deteriorate with age and recommend regular reviews of his cognitive function, particularly if there is a noticeable decline in his memory or cognition.²³ They also recommend that KHIEU Samphan's blood pressure and weight be closely monitored but that this should not affect his ability to stand trial.²⁴

3. APPLICABLE LAW

9. To be 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.²⁵

4. FINDINGS

10. In making this assessment, 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, 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.

12. The Chamber will continue with its revised sitting schedule that includes a two-hour recess at lunchtime to provide a longer mid-day rest period and will sit 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.²⁶ The Chamber will also continue to take practical measures – such as allowing the

²¹ KHIEU Samphan Report, para. 4 of Conclusions section.

²² KHIEU Samphan Report, para. 7 of Conclusions section.

²³ KHIEU Samphan Report, para. 42.

²⁴ KHIEU Samphan Report, para. 19.

²⁵ *Strugar*, para. 55.

²⁶ See Second Decision on Fitness, para. 12, citing T. 27 January 2015, pp. 25-26.

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.

13. In light of the recommendation of the Experts to have regular reviews of KHIEU Samphan’s cognitive function, the Chamber orders the continuation of his quarterly cognitive testing. The Chamber considers that these tests should continue to be devised by the Experts, changed as necessary in order to avoid results tainted by familiarity with the test, and administered by medical professionals contracted to provide services to the ECCC Detention Unit (“Medical Unit”).²⁷ The Chamber will also, as appropriate, issue future orders implementing the Experts’ recommendations for increased monitoring of KHIEU Samphan’s weight, blood pressure, and accommodations to assist his ability to read in the courtroom after determining the most feasible methods for doing so.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

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


ORDERS that the Accused KHIEU Samphan’s cognitive function continue to be tested at least once every quarter;

APPOINTS the Experts to prepare tests to assess the Accused KHIEU Samphan’s cognitive function and to work with qualified ECCC Medical Unit staff to administer these tests and report the results to the Trial Chamber; and

DIRECTS WESU to coordinate and schedule these tests, to begin no later than 22 September 2016.

Phnom Penh, 6 September 2016

For the President of the Trial Chamber



WS

YA Sokhan

²⁷ See Order for the Quarterly Cognitive Testing of NUON Chea and KHIEU Samphan, E329/9, 9 June 2015; Order for the Quarterly Cognitive Testing of NUON Chea and KHIEU Samphan – CLARIFICATION, E329/9.1, 24 June 2015; Order Scheduling Cognitive Testing of the Accused, E329/11, 26 August 2015.