



**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

**អង្គជំនុំជម្រះតុលាការកំពូល**

Supreme Court Chamber  
Chambre de la Cour suprême

<b>ឯកសារដើម</b>
<b>ORIGINAL/ORIGINAL</b>
ថ្ងៃ ខែ ឆ្នាំ (Date): 26-Nov-2012, 14:24
CMS/CFO: Sann Rada

សំណុំរឿងលេខ: ០០២/១៩-០៩-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(១៧)  
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(17)

**Before:** Judge KONG Srim, President  
Judge Chandra Nihal JAYASINGHE  
Judge SOM Sereyvuth  
Judge Agnieszka KLONOWIECKA-MILART  
Judge MONG Monichariya  
Judge Florence Ndepele Mwachande MUMBA  
Judge YA Narin

**Date:** 26 November 2012  
**Language(s):** Khmer/English  
**Classification:** PUBLIC

**DECISION ON NUON CHEA’S “APPEAL AGAINST CONSTRUCTIVE DISMISSAL OF APPLICATION FOR IMMEDIATE ACTION PURSUANT TO RULE 35”**

**Co-Prosecutors**  
CHEA Leang  
Andrew CAYLEY

**Accused**  
NUON Chea

**Civil Party Lead Co-Lawyers**  
PICH Ang  
Elisabeth SIMMONEAU-FORT

**Co-Lawyers for NUON Chea**  
SON Arun  
Victor KOPPE  
Michiel PESTMAN

1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 (“Supreme Court Chamber” and “ECCC”, respectively) is seized of the “Appeal Against Constructive Dismissal of Application for Immediate Action Pursuant to Rule 35” filed by the Defence for NUON Chea (“Defence”) on 10 October 2012 (“Appeal”).<sup>1</sup>

2. On 25 April 2012, the Defence filed an “Application for Immediate Action Pursuant to Rule 35” before the Trial Chamber (“Application”).<sup>2</sup> The Application was submitted in response to the resignation of Reserve International Co-Investigating Judge Laurent KASPER-ANSERMET, which the Defence argued is “conclusive proof that no Cambodian member of the ECCC is able to act against the [Royal Government of Cambodia’s] judicial agenda.”<sup>3</sup> The Defence accordingly requested an acknowledgment of the injurious impact of Judge KASPER-ANSERMET’s resignation letter, a full investigation into the effects of the Cambodian government’s interference on the fairness of Case 002, and a stay of the proceedings pending the outcome of such inquiry.<sup>4</sup> The Co-Prosecutors opposed the Application in its entirety.<sup>5</sup>

3. After waiting for a decision for nearly six months, the Defence filed the present Appeal pursuant to Rule 104(4)(d) of the Internal Rules,<sup>6</sup> arguing that the Trial Chamber’s failure to resolve the Application in a reasonable amount of time has amounted to a constructive dismissal thereof.<sup>7</sup> The Defence further asserts that such constructive dismissal without reasons constitutes both an error of law and an abuse of discretion under Rule 104(1) of the Internal Rules.<sup>8</sup> The Defence accordingly requests the Supreme Court Chamber to “assert jurisdiction over this Appeal in order to ensure that the allegations in the Application are promptly addressed”.<sup>9</sup>

4. In response, the Co-Prosecutors profess no objection to the Appeal’s admissibility but maintain their initial opposition to the Application.<sup>10</sup> The Co-Prosecutors further submit that the

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<sup>1</sup> E189/2/1.

<sup>2</sup> E189.

<sup>3</sup> Application, para. 19. *See also* Application, paras. 1, 6-11, 20.

<sup>4</sup> Application, para. 28. *See also* Application, paras. 16-18, 21-27.

<sup>5</sup> Co-Prosecutors’ Response to NUON Chea Application for Immediate Action Pursuant to Rule 35, E189/1, 3 May 2012.

<sup>6</sup> Internal Rules of the ECCC, Revision 8, 3 August 2011 (“Internal Rules”). Rule 104(4)(d) of the Internal Rules provides that “decisions [of the Trial Chamber] on interference with the administration of justice under Rule 35(6) [are subject to immediate appeal].”

<sup>7</sup> Appeal, paras. 1-4, 6.

<sup>8</sup> Appeal, para. 6.

<sup>9</sup> Appeal, para. 5. *See also* Appeal, para. 7.

<sup>10</sup> Co-Prosecutors’ Response to NUON Chea’s “Appeal Against Constructive Dismissal of Application for Immediate Action Pursuant to Rule 35”, E189/2/2, 1 November 2012 (“Response”), paras. 3, 13.

concept of constructive dismissal is novel before the Supreme Court Chamber, and accordingly offer their observations on the issue.<sup>11</sup>

5. On 23 November 2012, the Trial Chamber issued its written and reasoned decision on the Application, rejecting it in its entirety.<sup>12</sup> The question of whether the Application has been *constructively* denied is thereby rendered moot. Although mindful of the difficulties recently expressed by the Trial Chamber in its ability to meet its workload demands,<sup>13</sup> the Supreme Court Chamber nevertheless notes with concern the Trial Chamber's seven-month delay in rendering its definitive ruling on the Application, and considers that there is some merit in the Defence's complaint in this regard.

6. For the foregoing reasons, the Supreme Court Chamber **DISMISSES** the Appeal as moot, without prejudice to the Defence filing a renewed appeal pursuant to Rule 104(4)(d) of the Internal Rules on the basis of the Trial Chamber's written reasons for rejecting the Application.

**Phnom Penh, 26 November 2012**

**President of the Supreme Court Chamber**



**KONG Srim**

<sup>11</sup> Response, paras. 3-12.

<sup>12</sup> Decision on Application for Immediate Action Pursuant to Rule 35, E189/3, dated 22 November 2012 and filed 23 November 2012.

<sup>13</sup> See T. (EN), 23 October 2012, E1/137.1, pp. 49-50 (“The Trial Chamber has been informed by the [United Nations Assistance to the Khmer Rouge Trials (“UNAKRT”)] Administration that due to financial constraints the Trial Chamber is unable to replace a significant number of key international legal and other staff. The shortfall reduces the number of staff to approximately half that foreseen in the staffing table. The Chamber, over the last three months, has repeatedly advised the relevant UN bodies and the UNAKRT Administration of the difficulties it is experiencing as a consequence. In response, assurances have been given that staffing issues will be resolved, but to date no finality has been achieved. Consequently, the Trial Chamber indicated recently to those authorities that while there is insufficient staff to support the work of the Trial Chamber it cannot continue to sit for four days each week, and that regrettably this will lead inevitably to an extension of the time needed to conclude Case 002/01. Although this advice was communicated by the Trial Chamber approximately two weeks ago, there has been no confirmation that the staffing issues will be resolved. For that reason, and in order to give the parties and the public as much notice as possible, the Chamber will sit from Monday to Wednesday only, beginning from the week commencing the 5<sup>th</sup> of November 2012.”)