



Accused Khieu Samphan Denied Bail and a Separate Trial

Anne Heindel, Legal Advisor – Documentation Center of Cambodia

May 21, 2013

The Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) has rejected accused Khieu Samphan's requests to be granted bail and to be tried separately from his Case 002 co-accused in the interests of a speedy judgment on all charges.

Due to trial management issues including the fragile health of the accused, a strike by unpaid national staff in the Court's interpretation unit, and the obligation to reconsider the severance of the indictment into consecutive mini-trials, the Trial Chamber has heard less than 25 days of oral testimony since the beginning of 2013. All three of the octogenerian former Khmer Rouge leaders on trial were hospitalized in 2013, and accused Ieng Sary died in March. Of the two remaining co-accused, Nuon Chea's health is reportedly precarious, and he has yet to participate in trial proceedings from the courtroom since a month-long hospitalization earlier in the year.

The health of accused Khieu Samphan, who was hospitalized with bronchitis for 10 days in January, has nevertheless been generally good, and he is the only accused to have personally attended full days of almost all hearings. In contrast, the health issues of his co-accused have resulted either in postponements or in them participating from outside the courtroom. Khieu Samphan argued that his right to a fair and expeditious trial has been violated by these delays and sought to be tried separately from Nuon Chea on all charges in the Case 002 indictment, as well as for provisional release pending judgment.

Request for a Separate Trial

During hearings on the appropriateness of severing the Case 002 indictment by topic, the Defense emphasized that Khieu Samphan is fit for trial and is seeking acquittal on all charges in the Case 002 indictment — not only those at issue in the Case 002/01 mini trial. For that reason, he wants to be tried on all charges in one separate trial: “[T]he sooner he is ... tried, the quicker will he be acquitted, and therefore the sooner can he go back to his wife and children to live the remainder of his life with them in peace.”¹

In its second decision on severance, the Trial Chamber stated that “considerations of efficiency and fairness lend support to the general principle that charges concerning similar events against several Accused should preferably be tried in joint proceedings.” Noting that the ECCC has only one Trial Chamber, it decided, “[C]ontinuation of Case 002/01 as a single multi-Accused trial ... is likely to facilitate the Trial Chamber's search for truth” and avoid delay. Moreover, “the physical frailty of the Accused NUON Chea, and the time required to conclude the hearing of evidence and arrive at a partial verdict in Case 002, are significant factors in the Trial Chamber's determination of the scope of Case 002/01”² — i.e., the Chamber's decision to reach judgment on

¹ Trial Transcript—Case 002, at 61, 75-76 (Feb. 20, 2013).

² Decision on Severance of Case 002 Following Supreme Court Chamber Decision of 8 February 2013, ¶¶ 92, 93 (Apr. 26, 2013) (emphasis in original).

a section of the indictment as quickly as possible.

Request for Bail

The ECCC Internal Rules allow provisional detention when “[t]here is well founded reason to believe that the person may have committed the crime or crimes specified” and it is a necessary measure to:

- 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.³

If an accused is already in detention at the time of his initial appearance before the Trial Chamber, he “shall remain in detention until the Chamber’s judgment is handed down” unless there is a change in circumstances⁴: “[T]here is a presumption that the conditions considered ... to justify provisional detention continue to apply. 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.’” Nevertheless, the Trial Chamber must ensure that detention continues to be “proportionate to the circumstances of that case including its complexity and prospective sentence.”⁵

In requesting bail, the Khieu Samphan Defense team emphasized that the accused, who will soon turn 82, “has been deprived of his freedom for five years and four months. At the moment, he neither knows when he will be tried nor under what modalities. Consequently, keeping him in provisional detention violates not only his most fundamental rights but also his human dignity.”⁶ In their view, due to the slow pace of trial — caused to a large degree by inept management by the Trial Chamber— combined with uncertainty about if and when all charges in the indictment will be tried, make the prospect of a timely final judgment uncertain:

One way or another, we're not out of this for the next three or four years before we have a final verdict [after appeal], and it seems to us entirely reasonable ... that an 82 year old should not wait eight or nine years for his trial [verdict].⁷

The team argued that at Khieu Samphan’s advanced age, he has no intention of trying to flee, has no passport or assets, and merely wants to live with his family. Moreover, there is no evidence that his release would disturb public order or pose a risk to his physical security, as passions have cooled since the first tribunal verdict, most Cambodians don’t know who he is, and there have been no serious threats against him for many years. The Defense says that Khieu Samphan does

³ Internal Rules, r. 63(3).

⁴ *Id.* r. 82(1),(2).

⁵ Decision on Khieu Samphan's Application for Immediate Release, ¶¶ 14-15 (Apr. 26, 2013).

⁶ Application for Mr Khieu Samphan's Immediate Release on Bail, ¶ 27 (March 29, 2013).

⁷ Trial Transcript—Case 002, at 76 (Feb. 20, 2013).

not suffer from any chronic health issues and can receive proper medical attention outside of the tribunal detention facility; moreover, the objectives of ensuring his attendance at trial can be achieved by granting him bail with conditions. Such conditions could include requiring him to live at a specific address; submit his identity card to the Court; submit to regular checks by authorities; not speak to the media, witnesses, experts, or civil parties; undergo regular medical checks; and receive official transportation to hearings.⁸

In its decision, the Trial Chamber noted that the Khieu Samphan team had not disputed the first requirement for detention — a “well-founded reason to believe that the person may have committed the crime[.]”⁹ With regard to the other criteria, the Chamber agreed with the Defense that there was no indication that the accused would attempt to pressure witnesses or victims, or that there was sufficient evidence of a security risk or a danger to public order should he be released.¹⁰

The Chamber’s primary concern was Khieu Samphan’s availability for trial: “The Chamber notes that Case 002/01 is entering its final stages and that nonappearance of the Accused (whether intentionally or otherwise) risks delay to the expeditious completion of Case 002/01 and further trials.” The family’s assurances that it would assist the accused in appearing for trial did not outweigh these concerns, especially as his desire to abscond may increase when the prospect of conviction and a lengthy prison sentence become imminent.¹¹

Overall, the Chamber found that the accused’s continued detention was not disproportionate, considering the complexity of the case, and that “the trial in Case 002 has proceeded as quickly as possible.” Moreover, the duration of trial is not uncertain, as trial hearings on the re-severed portion of the indictment at issue in Case 002/01 — the subject of a new appeal to the Supreme Court Chamber¹² — approach their “concluding phases.”¹³

⁸ Application for Immediate Release, *supra* note 6, ¶¶ 28-58.

⁹ Decision Application for Release, *supra* note 5, ¶ 16.

¹⁰ *Id.* ¶¶ 16, 20, 22.

¹¹ *Id.* ¶ 21.

¹² See Co-Prosecutors’ Immediate Appeal of Second Decision on Severance of Case 002 (May 10, 2012), Expert Commentary on Legal Filings, *Co-Prosecutors Appeal Trial Chamber Severance Decision, Again* (May 17, 2013), at <http://www.cambodiatribunal.org/commentary/expert-commentary-legal-filings>.

¹³ Decision Application for Release, *supra* note 5, ¶ 23.