**BEFORE THE SUPREME COURT CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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# KHIEU Samphân's Application for Review of Decision on Requests for Extensions of Time and Page Limits on Notices of Appeal

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Before:

**The Supreme Court Chamber**
Judge KONG Srim
Judge Chandra Nihal JAYASINGHE
Judge SOM Sereyvuth
Judge Florence Ndepele MWACHANDE-MUMBA
Judge MONG Monichariya
Judge Phillip RAPOZA
Judge YA Narin

**The Co-Prosecutors**
CHEA Leang
Nicholas KOUMJIAN

**All Civil Party Lawyers**

**NUON Chea's Defence**

**MAY IT PLEASE THE SUPREME COURT CHAMBER**

1. On 26 April 2019, the Supreme Court Chamber (the "Supreme Court") issued its "Decision on NUON Chea and KHIEU Samphân's Requests for Extensions of Time and Page Limits on Notices of Appeal" (the "Decision").[1] NUON Chea requested 6 months and 100 pages for his notice of appeal.[2] KHIEU Samphân asked for 8 months and 100 pages for his notice of appeal.[3] The Supreme Court granted 3 months and 60 pages to all parties.[4]

2. The KHIEU Samphân Defence (the "Defence") hereby requests the Supreme Court to review its Decision.

3. The chambers have the inherent power to review their own decisions, not only because of changing circumstances, but also when it appears that the decision was wrong or caused an injustice. Changing circumstances may include new facts or arguments. This inherent power is particularly important for a judicial body acting as a last resort. The party requesting a review of a decision must show that the reasoning for the contested decision contains a manifest error or that the review is necessary to prevent an injustice.[5]

4. In this case, the Decision is clearly erroneous (I) and its review is necessary to prevent an injustice (II).

## I. THE REASONING FOR THE DECISION IS CLEARLY ERRONEOUS

5. First, a reading of the summary of the parties' submissions in the Decision shows that the Supreme Court did not take into account all of KHIEU Samphân's submissions. While it

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[1] **F43** Decision on NUON Chea and KHIEU Samphân's Requests for Extensions of Time and Page Limits on Notices of Appeal, 26 April 2019, (the "Decision").
[2] Decision, para. 3.
[3] Decision, para. 3; KHIEU Samphân's Request for Extension of Time and Page Limits on Notice of Appeal, 3 April 2019, **E39/1.1** (the "Request"), paras. 42 and 44.
[4] Decision, paras. 11 and 13.
[5] **C22/I/68** Decision on Application for Reconsideration of Civil Party's Application to Address the Pre-Trial Chamber in Person, 28 August 2008, para. 25 and references to ICTY case law cited (particularly the *Galić* Decision issued on16 July 2004 by Honourable Judge Florence Ndepele MWACHANDE-MUMBA). For an example of recent case law, *See Prosecutor v. Mladić*, MICT-13-56-A, Public Redacted Version of the "Decision on a Motion for Reconsideration and Certification to Appeal Decision on a Request for Provisional Release", 16 July 2018, p. 4.

obviously read his initial request in a piecemeal manner,[6] it mostly neglected his Reply/Response to the Prosecution.[7] Indeed, the Supreme Court carefully added a paragraph on KHIEU Samphân's reply to the Civil Parties, filed the day before the Decision,[8] but no paragraph is devoted to the summary of the Reply/Response to the Prosecution, although it was filed 2 days earlier, i.e. 3 days before the Decision.

6. Secondly, the very lapidary "reasoning" for the Supreme Court's Decision is contrary to its own case law, noted *inter alia* in KHIEU Samphân's Reply/Response to the Prosecution. Indeed, after having listed numerous reasons justifying considerable extensions,[9] the Supreme Court rules in one sentence on the "excessive",[10] requests by the defence teams, **without explaining why**. It considers that a "general" increase of 2 months and 30 pages is sufficient "for all parties",[11] **again without explaining why all parties should have the same time and space when they do not have the same needs**. All this is all the more incomprehensible in view of the principle noted by the Supreme Court in Case 002/01 that extensions must be **proportional** to the scope of appeals.[12] According to this principle, the extensions to be granted to defence teams must be **considerably larger in Case 002/02 than in Case 002/01** and also **considerably larger than those of the Prosecution**.[13]

7. Moreover, the part of the Decision where the Supreme Court is most vocal, regarding the translation into Khmer,[14] is incorrect. The assertion that there is an established practice at the ECCC that voluminous documents are forwarded for translation as they become available is unfounded and incorrect. Indeed, this is not the case for the many voluminous documents in the

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[6] Decision, para. 3: in summing up the arguments advanced by NUON Chea and KHIEU Samphân, the Supreme Court fails to list the latter's argument on the preparation of a motion for recusal (Request, para. 35), which is not addressed anywhere in the Decision. Moreover, it attributes to NUON Chea alone arguments (interlocutory decisions and novel legal questions) that KHIEU Samphân nevertheless also advanced (Request, para. 18).

[7] KHIEU Samphân's Reply and Response to the Prosecution on Extension of Time and Page Limits to Notices of Appeal, 23 April 2019, **F41/1** ("Reply and Response to the Prosecution"), notified on 24 April 2019. None of the arguments raised therein are addressed anywhere in the Decision.

[8] Decision, para. 6, in which it is noted further that KHIEU Samphân mostly repeats "the original submissions which the Chamber has already assessed". Here it is only about considering the submissions in the initial Request, without considering the arguments put forward in the Reply and Response to the Prosecution.

[9] Decision, paras. 8 and 9.

[10] Decision, para. 10.

[11] Decision, para. 11.

[12] Reply and Response to the Prosecution, para. 21 and references cited in footnotes ("fn.") 31 and 32.

[13] Reply and Response to the Prosecution, paras. 20-22.

[14] Decision, para. 10.

cases under investigation.[15] This was not the case for the closing briefs in Case 002/01 and Case 002/02[16] nor for the appeal submissions in Case 002/01.[17]

8. Finally, while the Supreme Court does not take into account, as it did in Case 002/01, this unique circumstance of translation before the ECCC to grant more time than before the international criminal tribunals ("ICT"),[18] it says absolutely nothing about another unique circumstance according to which it is not possible for the ECCC to amend the grounds of appeal once the notice of appeal has been filed.[19]

9. Despite this, it grants even less time to NUON Chea and KHIEU Samphân than to ICT accused with a judgment of comparable length, who were granted 4 months "in the interests of justice" to prepare notices of appeal "worthy of the name".[20] And it grants exactly the same time to the Prosecution, the scope of whose appeal is minimal compared to that of NUON Chea and KHIEU Samphân. Thus, the Decision is not only wrong but also profoundly unjust and unfair.

## II. THE REVIEW OF THE DECISION IS NECESSARY TO PREVENT INJUSTICE

[15] Final submissions, responses to final submissions, closing orders, appeals against the closing orders, responses and replies to these appeals. *See* the Completion Plan, where it is understood that documents are first filed in one language and then translated. For example: revision 17 of 30 June 2018, para. 19 and fn. 7, para. 20 a) and c); revision 20 of 31 March 2019, para. 10 a) and b), para. 26 a) and b).

[16] **E449/1** Closing Briefs and Closing Statements in Case 002/02, 16 December 2016, para. 10: "As in Case 002/01, the Closing Briefs shall be filed in one language."

[17] Both the notices of appeal and appeal briefs of the defence teams were initially filed in only one language.

[18] Request, para. 18 and references cited in fn. 26.

[19] Request, paras. 7-9, 18. Furthermore, the Supreme Court also fails to refer, as it did in 002/01, to Interlocutory Decisions, which constitute another major procedural difference at the ECCC: Request, para. 18; Reply/Response, para. 10.

[20] *Prosecutor v. Ratko Mladić*, MICT-13-56-A, Decision on Motion for Extension of Time to File Notice of Appeal, 21 December 2017 (*See* in particular p. 2: "Considering the need to weigh carefully the interests in safeguarding expeditious proceedings before the Mechanism and allowing sufficient time for the parties to prepare their respective cases"); *Prosecutor v. Radovan Karadžić*, MICT-13-55-A, Decision on a Motion for a Further Extension of Time to File a Notice of Appeal, 15 June 2016 (*See* in particular p. 4: "Considering that the preparation of the notice of appeal determines the framework in which any appeal will be considered and that it is in the interests of justice to ensure that Karadzic has sufficient time to prepare his notice in full conformity with the applicable provisions." The *Mladić* trial judgment had 2,541 pages, including annexes. The *Karadžić* trial judgment had 2,607 pages, including annexes. While the reasons for the Case 002/02 judgment covered 2,828 pages in French (2,387 pages in English), including annexes, for two co-accused, it should be noted that a very small number of pages are devoted solely to each accused. Indeed, 91 pages in French (78 in English) are devoted to the roles and responsibilities of NUON Chea, while 137 pages in French (92 in English) are devoted to the roles and responsibilities of KHIEU Samphân.

10. As a result of the Decision, the rights of the Defence have been seriously undermined, in favour of the Prosecution. Considering that a general increase of 2 months and 30 pages is sufficient to allow all parties to "properly read the Trial Judgment", "understand the Trial Chamber's findings" and "briefly outline the alleged errors of law",[21] the Supreme Court grants the Prosecution more time and space than it needs,[22] while not allowing the Defence to properly carry out its work, particularly in **identifying** the errors.

11. The right of appeal of a person convicted of an offence, guaranteed by Article 14 (5) of the International Covenant on Civil and Political Rights, imposes on States parties "a duty substantially to review conviction and sentence, **both as to sufficiency of the evidence and of the law**".[23]

12. While just over a month after notification of the reasons for the judgment, neither KHIEU Samphân nor his Defence were able to complete a first reading of these reasons, the 2-months extension of the time limit (less than half of the time requested by the defence teams),[24] will not allow the Defence to, *inter alia*, study and verify the legal and factual sources underpinning the findings of his 78 convictions listed in 14,446 footnotes with multiple references. The Chamber recently filed a corrigendum to the reasons for its judgment, aimed at correcting errors in some of these references,[25] which does not bode well. Moreover, while the Defence has been able to identify at this stage some discrepancies between the language versions of the reasons on major issues, it will no longer have time to do so.

13. The Defence will necessarily miss grounds of appeal **it will no longer be able to raise subsequently**. Nor will it be able to effectively present the grounds it would have been able to identify in a document that would serve as a roadmap for its brief. No one is expected to do the impossible.

14. The Decision has the effect of seriously infringing KHIEU Samphân's rights to the time and facilities necessary for the preparation of his defence and to a real and effective right of appeal. It

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[21] Decision, para. 11.
[22] Decision, para. 4 (the Prosecution requested a 45-day extension without increasing the number of pages).
[23] *Bandajevsky v. Bélarus*, Communication No. 1100/2002, Views adopted by the Human Rights Committee on 28 March 2006, para. 10.13 (emphasis added).
[24] That is only 30 days more than in Case 002/01 (filing of the notice of appeal within 53 days in French and 60 days in Khmer).
[25] **E465/Corr-1** Request for correction on document E465, 23 April 2019, notified on 25 April 2019.

has also seriously violated his right to equality of arms, according to which he must be given a reasonable opportunity to present his case in conditions that do not place him at a disadvantage compared to his opponent.[26] The Supreme Court must review it to avert a serious injustice and irreparable harm.

15. **FOR THESE REASONS**, the Defence requests the Supreme Court to REVIEW its Decision taking into account the arguments raised in all of KHIEU Samphân's submissions and to GRANT his request for extensions.

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[26] *See* for example, ECHR, *Bulut v. Austria* (Application No. 17358/90), Judgment, 22 February 1996, para. 47: "The Court recalls that under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice." (references omitted).