



**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

**អង្គបុរេជំនុំជម្រះ**  
Pre-Trial Chamber  
Chambre Préliminaire

Doc. No.: 4

*In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*

Case File No.: 14-06-2016-ECCC/PTC  
Before: Judge PRAK Kimsan, President  
Judge Olivier BEAUVALLET  
Judge NEY Thol  
Judge Kang Jin BAIK  
Judge HUOT Vuthy

Date: 4 August 2016

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PUBLIC REDACTED

**DECISION ON [REDACTED] APPEAL AGAINST THE DEFENCE SUPPORT SECTION'S FAILURE TO CONSIDER HIS APPLICATION TO BE PLACED ON THE LIST OF FOREIGN LAWYERS**

The Appellant

[REDACTED]

The Head of Defence Support Section

[REDACTED]



**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (the “ECCC”) is seised of [REDACTED] Appeal against the Defence Support Section’s failure to consider his Application to be placed on List of Foreign Lawyers, filed on 14 June 2016 (the “Appeal”).<sup>1</sup>

### I. Procedural Background

1. On 2 February 2015, [REDACTED] (the “Appellant”) filed an application to be placed on the Defence Support Section’s (the “DSS”) List of Lawyers eligible to defend indigent persons before the ECCC (the “February 2015 Application”).<sup>2</sup> On 11 February 2015, the DSS rejected [REDACTED] February 2015 Application on the ground that he did not possess the requisite level of professional experience under Regulation 2.2 of the DSS Administrative Regulations (the “February 2015 Decision”). In particular, it determined that [REDACTED] did not satisfy the Internal Rules’ requirement of having at least 10 years of experience working as a lawyer, judge or prosecutor, or in some other similar capacity.<sup>3</sup> The DSS found that the Appellant had only eight years and four months of relevant experience.<sup>4</sup>
2. On 17 February 2015, the Appellant appealed the February 2015 Decision requesting the Pre-Trial Chamber to quash it and to place his name on the List of Lawyers (the “February 2015 Appeal”).<sup>5</sup> On 17 June 2015, the Pre-Trial Chamber dismissed the February 2015 Appeal, finding that the Appellant had “not demonstrated that the [DSS] committed any error in its definition of the eligibility requirements to represent indigent suspects, charged persons or accused before the ECCC or in its assessment of his working experience.”<sup>6</sup>

<sup>1</sup> [REDACTED] Appeal Against the Defence Support Section’s Failure to Consider his Application to be Placed on the List of Foreign Lawyers, 14 June 2016, Doc. No. 1 (the “Appeal”).

<sup>2</sup> Application Form – Foreign Co-Lawyers, 2 February 2015, Case No. 17-02-2015-ECCC/PTC Doc. No. 1.1.5.

<sup>3</sup> Letter from the Head of the Defence Support Section to [REDACTED] entitled, “Decision on Your Application to be Placed on the Defence Support Section List of Foreign Lawyers”, 11 February 2015, Case No. 17-02-2015-ECCC/PTC, Doc. No. 1.1.4, para. 5.

<sup>4</sup> *Ibid.*, para. 9.

<sup>5</sup> [REDACTED] Appeal Against the Decision to Reject his Application to be Placed on the Defence Support Section’s List of Foreign Lawyers, 17 February 2015, Case No. 17-02-2015-ECCC/PTC, Doc. No. 1 (the “February 2015 Appeal”).

<sup>6</sup> Decision on [REDACTED] Appeal Against the Defence Support Section’s Decision on his Application to be Placed on the List of Foreign Lawyers, 17 June 2015, Case No. 17-02-2015-ECCC/PTC, Doc. No. 2, disposition and para. 25.

*Decision on [REDACTED] Appeal against the Defence Support Section’s Failure to Consider his Application to be Placed on the List of Foreign Lawyers*



3. On 14 April 2016, the Appellant filed another application to be placed on the List of Lawyers (the “April 2016 Application”).<sup>7</sup> On 18 April 2016, the Appellant received an email confirming receipt of the Application by the DSS,<sup>8</sup> and the Appellant emailed the DSS back stating that he “had accepted the findings of the DSS and the Pre-Trial Chamber” and also attaching a table with information “in order to assist the DSS to determine whether [he had] ten years of relevant experience”, which table, the Appellant explained, counted “experience which was not previously considered”.<sup>9</sup>
4. On 6 May 2016, the DSS emailed the Appellant, stating that it “has considered [the Appellant’s] request” and responding by noting that the February 2015 Decision, which was upheld by the Pre-Trial Chamber, rejected his application on the basis that he “only had **eight years and four months** of relevant experience instead of the required ten years” (the “DSS email of 6 May 2016”).<sup>10</sup> The DSS then expressed the view that it “cannot keep considering and reconsidering [the Appellant’s] application”,<sup>11</sup> and advised the Appellant to “wait for at least **one year and eight months from 11 February 2015** before resubmitting [his] application”.<sup>12</sup>
5. On 8 May 2016, the Appellant emailed back,<sup>13</sup> submitting that it appeared to him that the DSS email of 6 May 2016 was a summary dismissal made without assessing the merits of the April 2016 Application, but rather based on his February 2015 Application which practice, the Appellant stated, is not in accordance with Regulation 1.5 of the DSS Administrative Regulations. The Appellant stated that the April 2016 Application contained new facts, not included in the February 2015 Application, demonstrating that he has the requisite 10 years

<sup>7</sup> Application Form – Foreign Co-Lawyers, Neville Sorab, dated 14 April 2016, Doc. No. 1.1.6.

<sup>8</sup> Email, dated 18 April 2016, from ██████████ to ██████████, entitled “Your application to DSS”, Doc. No. 1.1.10.

<sup>9</sup> Email, dated 18 April 2016, from ██████████ to ██████████ and ██████████, entitled ‘Re: Your application to DSS’, Doc. No. 1.1.10.

<sup>10</sup> Email, dated 6 May 2016, from ██████████ to ██████████, entitled ‘Re: Your application to DSS’, Doc. No. 1.1.10 (emphasis in original).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid* (emphasis in original).

<sup>13</sup> Email, dated 8 May 2016, from ██████████ to DSS, entitled ‘RE: Your application to DSS’, Doc. No. 1.1.10.



of relevant experience.<sup>14</sup> Should the DSS wish to consider the April 2016 Application as an application for reconsideration, while not claiming that the February 2015 Decision was erroneous or caused injustice, the Appellant submitted that the new facts contained in the April 2016 Application consist in a “change in circumstances” falling within the ambit of the standard applied for reconsideration of decisions. On 12 May 2016, the DSS responded to the Appellant,<sup>15</sup> stating that its position expressed in the email of 6 May 2016 was final, and reiterating that the Appellant is advised to wait at least one year and eight months from 11 February 2015 before resubmitting his application.

6. On 14 June 2016, the Appellant filed the Appeal. The DSS responded to the Appeal on 27 June 2016, requesting the Pre-Trial Chamber to reject it because: i) the Appellant had missed the legal deadline, without providing justification for the delay; ii) the DSS has complied with all relevant regulations in its consideration of the Appellant’s applications and requests; and regardless, iii) the April 2016 Application cannot alter the previous determination made by the DSS, which was confirmed by the Pre-Trial Chamber (the “DSS Response”).<sup>16</sup>
7. On 4 July 2016, the Appellant filed a Request for leave to reply and a Reply to the DSS Response (the “Reply”).<sup>17</sup>

## II. Admissibility of the Appeal

8. The Pre-Trial Chamber firstly notes the points of contention with regards to the timeliness of the Appeal. The Appellant submits that he filed the Application on 14 April 2016<sup>18</sup> and that the DSS confirmed receipt on 18 April 2016.<sup>19</sup> According to the Appellant, the DSS *did not*

<sup>14</sup> *Ibid.*

<sup>15</sup> Email, dated 12 May 2016, from ██████████ to ██████████, entitled ‘RE: Your application to DSS’, Doc. No. 1.1.10.

<sup>16</sup> DSS Response to ██████████ Appeal Against the Defence Support Section’s Failure to Consider his Application to be Placed on the List of Foreign Lawyers, 27 June 2016, Doc. 2 (the “DSS Response”).

<sup>17</sup> ██████████ Leave to reply and Reply to the Defence Support Section’s Response to his Appeal against the DSS’s failure to consider his Application to be placed on the List of Foreign Lawyers, 4 July 2016, Doc. No. 3 (the “Reply”). The Pre-Trial Chamber accepted this filing in order to be fully informed on the matter.

<sup>18</sup> Appeal, para. 7.

<sup>19</sup> Appeal, para 12.

*Decision on ██████████ Appeal against the Defence Support Section’s Failure to Consider his Application to be Placed on the List of Foreign Lawyers*



*examine* the Application within the thirty day period.<sup>20</sup> The Appellant further submits that the Appeal is admissible because “[t]hirty days [have] now passed since the DSS received the April 2016 Application”,<sup>21</sup> and “Rule 11(5) does not provide a temporal limit for appeals against applications which have not been examined.”<sup>22</sup> The DSS submits that the Appellant *did* receive a *decision* on his April 2016 Application, given that on 6 May 2016, after considering his request, the DSS notified the Appellant of its decision that he must wait at least one year and eight months from 11 February 2015 before resubmitting an application.<sup>23</sup> Further, the DSS notes that, on 12 May 2016, replying to the Appellant’s request to examine the Application on its merit, the DSS stated that the position expressed in its 6 May 2016 email was final.<sup>24</sup> As such, the DSS submits, the Appellant has filed the present Appeal against a DSS “decision” on the Application, as opposed to against a “lack of examination” by the DSS of the Application. Consequently, the DSS suggests, the Appellant was required to file the Appeal within fifteen days of notification of the DSS decision of 6 May 2016, or of the 12 May 2016 one.<sup>25</sup> Alternatively, the DSS submits, the Appellant has failed to also file the Appeal within the legal deadline for appeals against DSS’ failure to examine applications which, according to the DSS’ reading of Rule 11(5), is either 30 or 45 days.<sup>26</sup> Furthermore, the DSS states, the Appellant did not even supply reasons justifying the lateness of the Appeal.<sup>27</sup> Accordingly, the DSS requests, the Appeal should be dismissed as untimely.<sup>28</sup>

9. The Pre-Trial Chamber notes that the Appeal is filed under Internal Rule 11(5),<sup>29</sup> which reads:

<sup>20</sup> Appeal, para 12: “indeed, on 6 May 2016 the Chief of the DSS stated, ‘[t]he DSS view at the present time is that we cannot keep considering and reconsidering your application’. Further, on 12 May 2016, the Chief of the DSS explicitly stated, ‘DSS is not going to consider any new or renewed application from you at this time’.” *See also* Reply, para. 3.

<sup>21</sup> *Ibid.*

<sup>22</sup> Reply, para. 4.

<sup>23</sup> DSS Response, para. 4.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> DSS Response, para. 5.

<sup>27</sup> DSS Response, para. 6 *referring* to Article 9 of ECCC’s Practice Direction on Filings.

<sup>28</sup> *Ibid.*

<sup>29</sup> Appeal, p. 1.

*Decision on [REDACTED] Appeal against the Defence Support Section’s Failure to Consider his Application to be Placed on the List of Foreign Lawyers*

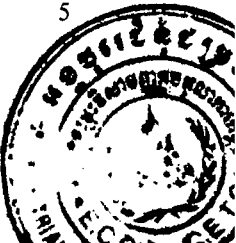


“Any lawyer or assistant whose request to be placed on the lists of lawyers for indigent persons referred to in sub-rules 2(d) and 2(i) above is refused or has not been examined within 30 (thirty) days of receipt by the Defence Support Section, or who is excluded from the list, may appeal to the Pre-Trial Chamber within 15 (fifteen) days of receiving notification of the decision of the Head of the Defence Support Section or the end of the 30 (thirty) day period, as appropriate.” The decision of the Pre-Trial Chamber shall not be subject to appeal. If the required majority is not attained, the default decision of the Pre-Trial Chamber shall be that the decision of the head of the Defence Support Section shall stand. However, in cases where the application was not examined within the 30 (thirty) day time period, the default decision shall be that inclusion in the list shall be deemed to have been granted.”<sup>30</sup>

10. The Appellant contends that, according to Rule 11(5), in a scenario of non-examination of applications, once thirty days have passed since the DSS received an application, there is no deadline to appeal. The DSS suggests that, to put applicants in both situations - of a decision or a non-examination – on an equal footing, Rule 11(5) must be read so that “in case of an application not examined by the DSS within thirty days of receipt, the applicant will have fifteen days to appeal to the Pre-Trial Chamber.” The Pre-Trial Chamber considers that any reasonable reader would conceive that Rule 11(5) does set deadlines for *all* appeals. For the purposes of examining admissibility of appeals under Rule 11(5), the first point of time to be determined is that when the DSS “receives an Application”. It is, then, clear from Rule 11(5) that once it has received an application, the DSS has thirty days to decide on it. If the DSS examines and application and decides to refuse it, it is clear that the appeal deadline starts running from the moment an applicant receives notice of that decision<sup>31</sup> and ends “within 15

<sup>30</sup> Rule 11 (5) provides identically in its Khmer and French versions, which are reproduced here as follows: “មេធាវី ឬ ជំនួយការរបស់ខ្លួនដែលពាក្យសុំចុះឈ្មោះរបស់ពួកគេសម្រាប់ការការពារជនក្រីក្រ ដូចមានចែងនៅក្នុងអនុវិធាន ២ចំណុច (ឃ)និង(ឈ)ខាងលើ ត្រូវបាន បដិសេធ ឬមិនត្រូវបានពិនិត្យក្នុងរយៈពេល ៣០(សាមសិប)ថ្ងៃ គិតចាប់ពីថ្ងៃទទួលបានពាក្យដោយអង្គការការពារកាតព្វកិច្ច ឬត្រូវបានលុបឈ្មោះចេញពីបញ្ជី អាច រៀនទូរណ៍ទៅអង្គបុរេជំនុំជម្រះក្នុងរយៈពេល ១៥(ដប់ប្រាំ)ថ្ងៃ បន្ទាប់ពីថ្ងៃទទួលបានសេចក្តីជូនដំណឹងពីសេចក្តីសម្រេចរបស់ប្រធានអង្គការការពារកាតព្វកិច្ច ឬ ក្រោយរយៈពេល ៣០(សាមសិប)ថ្ងៃកន្លងផុត តាមករណីសមស្រប ។ សេចក្តីសម្រេចរបស់អង្គបុរេជំនុំជម្រះបិទផ្លូវតវ៉ា ប្រសិនបើអង្គបុរេជំនុំជម្រះមិនអាចក សម្រេចគាំទ្រភាគច្រើនតាមកាលកំណត់បានទេ នោះសេចក្តីសម្រេចរបស់ប្រធានអង្គការការពារកាតព្វកិច្ច ត្រូវគម្កល់ទុកជាបានការ ហើយនៅក្នុងករណីដែល ពាក្យសុំនោះ មិនត្រូវបានពិនិត្យក្នុងរយៈពេល ៣០(សាមសិប)ថ្ងៃ ត្រូវចាត់ទុកជាបានសម្រេចចុះឈ្មោះក្នុងបញ្ជី។” and “[t]out avocat ou assistant dont la demande d’inscription sur les listes des avocats des personnes indigentes, mentionnées aux sous-Règles 2 d) et i) ci-dessus a été rejetée, ou n’a pas été examinée dans les 30 (trente) jours suivant sa réception par la Section d’appui à la défense, ou qui a été exclu de cette liste, peut faire appel devant la Chambre préliminaire au plus tard 15 (quinze) jours après notification de la décision du Directeur de la Section d’appui à la défense ou à l’expiration de la période de 30 (trente) jours, selon le cas. La décision de la Chambre préliminaire n’est pas susceptible d’appel. Lorsque la majorité requise n’est pas atteinte, la Chambre préliminaire est présumée avoir confirmé la décision du Directeur de la Section d’appui à la défense. Cependant, lorsque la candidature n’a pas été examinée dans le délai de 30 (trente) jours susmentionné, l’inscription sur la liste est considérée comme accordée.”

<sup>31</sup> It is noted that the term “refusal” is reproduced in the term “decision” later in the first sentence of Rule 11(5).



(fifteen) days”. If the DSS does not examine an application within the required thirty day period, the remedy provided by Rule 11(5) to expectant applicants is that they, similarly to those applicants who receive a decision, can file appeals to the Pre-Trial Chamber “within 15 (fifteen) days”, but in this instance - since there is no decision - “of [...] the end of the 30 (thirty) day period”, within which the DSS had to decide. In cases of non-examination, Applicants can appeal within 45 (forty five) days from the day when the DSS receives an Application. As also suggested by the DSS, the Pre-Trial Chamber considers that this reading, of Rule 11(5) appeal deadlines, is also in full compliance with the principle of equality of persons before the law.

11. In the case at hand, having looked at the documents in the case file, it is clear to the Pre-Trial Chamber that, the DSS received the Application on 18 April 2016 and that the Appellant received notice of DSS’ rejection of the Application on 8 May 2016.<sup>32</sup> Furthermore, it is noted that the DSS email of 6 May 2016, has all the indicia of a “decision” issued by the DSS rejecting the Application, since it was: i) issued by the Head of the DSS; ii) it noted that the DSS had “*considered* [the Appellant’s] request”; and iii) reiterated the insufficiency of experience on the part of the Appellant as reason for rejecting the Application, “at [that] time”.<sup>33</sup> It is also noted that, when it issued this Decision, the DSS was already in possession of the Appellant’s table that contained experience, “which was not previously considered” back in 2015.<sup>34</sup>
12. Therefore, the Pre-Trial Chamber finds, that DSS’s rejection of the Appellant’s Application represents a decision falling within the ambit of the term “decision” as prescribed under Rule 11(5), and that the Appellant’s deadline to appeal it expired on 24 May 2016, which is 15 (fifteen) days from receipt, on 8 May 2016, of the DSS email of 6 May 2016. Even if the 12<sup>th</sup> of May 2016 was determined as the day when the Appellant received a DSS decision,<sup>35</sup> the

<sup>32</sup> D1.1.10.

<sup>33</sup> *Ibid.*, see DSS email of 6 May 2016: “wait for at least one year and eight months from 11 February 2015 before resubmitting your application.”

<sup>34</sup> D1.1.10, see Email from ██████████ to ██████████, dated 18/04/2016 with subject: “Re: Your application to DSS.”

<sup>35</sup> The Chamber notes that the Defence also has no contention on this point. See DSS Response, para. 4.



Appellant filed the Appeal on 14 June 2016 and, therefore, late and, as also noted in the DSS Response, without providing any reasons for the delay, as required by Rule 39 and Article 9 of the Practice Direction on Filing. Lastly, even if the Appellant were right, in that he was faced with a non-examination of the Application by the DSS - the deadline to appeal also expired on 3 June 2016 which is forty five days from the 18<sup>th</sup> of April 2016, when the DSS received the Application.

13. Therefore, the Pre-Trial Chamber does not find any reasons for late filing of the Appeal to be convincing.

#### V. DISPOSITION

**THE PRE-TRIAL CHAMBER HEREBY, UNANIMOUSLY:**

Dismisses the Appeal as inadmissible.


Pursuant to Internal Rule 77(13), this Decision is not subject to appeal.


Phnom Penh, 4 August 2016


The President

the Pre-Trial Chamber

  
  
**PRAK Kimsan** **Olivier BEAUVALLET**

  
**NEY Thol**

  
**Kang Jin BAIK**

  
**HUOT Vuthy**