

**BEFORE THE PRE-TRIAL CHAMBER
OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

Filing details

Case File No.: 002/19-09-2007-ECCC-OCIJ (PTC36)

Party filing: The Co-Lawyers for the Defence of Mr KHIEU Samphan

Filed to: The Pre-Trial Chamber

Original language: FRENCH

Date of document: 17 December 2009

ឯកសារទទួល	
DOCUMENT RECEIVED/DOCUMENT REÇU	
ថ្ងៃ ខែ ឆ្នាំ (Date of receipt/date de reception):	22 / 12 / 2009
មេរៀន (Time/Heure) :	14:00
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier:	C.A. Fay

Classification

Classification suggested by the filing party: PUBLIC

Classification by the Pre-Trial Chamber: សាធារណៈ / Public

Classification status:

Review of interim classification:

Records Officer's name:

Signature:

**APPEAL AGAINST THE ORDER ON EXTENSION OF PROVISIONAL
DETENTION**

Filed by:

The Lawyers for Mr KHIEU Samphan:

SA Sovan

Jacques VERGÈS

Assisted by:

SENG Socheata

Charlotte MOREAU

Uldis KRASTINS

Coralie COLSON

Before:

The Pre-Trial Chamber:

Judge PRAK Kimsan

Judge NEY Thol

Judge HUOT Vuthy

Judge Katinka LAHUIS

Judge Rowan DOWNES

The Co-Prosecutors:

CHEA Leang

Robert PETIT

**Civil Party Lawyers and Unrepresented
Civil Parties**

ឯកសារត្រឹមត្រូវតាមច្បាប់ខ្មែរ	
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME	
ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date /Date de certification):	23 / 12 / 2009
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier:	C.A. Fay

MAY IT PLEASE THE PRE-TRIAL CHAMBER**I. Introduction**

1. By Notice dated 6 November 2009, and pursuant to Rule 63(7), the Co-Investigating Judges notified “the Charged Person and his lawyers that the term of Provisional Detention set down in [their] Provisional Detention Order dated 18 November 2008 [was due to] expire on 19 November 2009 and that [they] were considering whether to extend that provisional detention”.¹

2. In response to this legal Notice and in compliance with the time limits prescribed, on 10 October 2009, the Co-Lawyers for the Defence filed their “Objections to the Extension of the Provisional Detention of Mr KHIEU Samphan”.² The Co-Lawyers have incorporated herein all the arguments raised in their Objections.

3. On 18 October, the Office of the Co-Investigating Judges ordered the extension of Mr KHIEU Samphan’s detention for a maximum period of one year.³ In the Order, the Co-Investigating Judges provided no evidence to justify the extension of the detention and did not address any of the arguments raised in the Objections of the Co-Lawyers for the Defence.

4. The Co-Lawyers for the Defence hereby request the Pre-Trial Chamber to order Mr KHIEU Samphan’s immediate release.

II. Applicable law

5. As the Co-Investigating Judges recalled in their Order of 18 November 2009, “*provisional detention is an exception to the general rule that a Charged Person should remain at liberty during the judicial investigation phase. Therefore, a Charged Person may only be kept in provisional detention where it is established that the conditions set out in Rule 63(3) of the*

¹ Notice (Rule 63(7), 5 October 2009, C26/6.

² Objections to the Extension of the Provisional Detention of Mr KHIEU Samphan, 20 October 2009, C26/7 (“Objections”).

³ Order on Extension of Provisional Detention, 18 November 2009, C26/8. (“Order”).

[Original French: 00416889-00416898]

Appeal against the Order extending the provisional detention of Mr KHIEU Samphan

Internal Rules are still met”.⁴ This analysis was confirmed by the Pre-Trial Chamber.⁵

6. Moreover, Rule 63(3) of the Internal Rules provides that:

The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:

- a) there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and*
- b) The Co-Investigating Judges consider Provisional Detention to be 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.*

III. Grounds of appeal

1) The Co-Investigating Judges' Order?

7. As a preliminary matter, it must be emphasized that the Co-Investigating Judges' interpretation of Rule 63(7) was erroneous. Indeed, Rule 63(7) casts the burden of proof on the Co-Investigating Judges. They must render a decision in writing and [setting] out the reasons for extending the provisional detention. However, in their Order, the Co-Investigating Judges simply note that “[they] have not found any change in the circumstances”⁶ and seem to be content with recalling the Pre-Trial Chamber decision of 3 July 2009.

8. As stated in the preceding paragraphs, provisional detention is an exceptional measure and depriving a person of his or her natural liberty may not be ordered without undertaking a complete and thorough examination of the circumstances of the case. Simply noting that there has been no change in the circumstances and ordering an extension of detention based thereupon for no valid reason amounts to a serious breach of the principle of the presumption of innocence.

⁴ *Ibid.* para. 13.

⁵ *Decision on KHIEU Samphan's Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order*, 3 July 2009, C/26/5/26, para. 90. (“Decision”).

⁶ *Order on Extension of Provisional Detention*, paras. 24 and 27.

[Original French: 00416889-00416898]

Appeal against the Order extending the provisional detention of Mr KHIEU Samphan

9. The Pre-Trial Chamber held that under Rules 64(1) and 64(2) of the Internal Rules, a Charged Person must be released “*where the requirements of Provisional Detention set out in Rule 63 [...] are no longer satisfied*”.⁷ While this may be justified where the Co-Lawyers request release and may cast the burden of proving a change in circumstances on them, it does not apply with respect to an order extending provisional detention. The burden is on the Co-Investigating Judges to prove that there are well-founded reasons to believe that the person has committed the crime or crimes specified in the Introductory or Supplementary Submissions and that detention is necessary having regard to the requirements set out in Rule 63(3)(b). They must do this by means of a reasoned decision and must therefore provide evidence of the circumstances in question. This goes to the application of the principle of the presumption of innocence, which would be seriously undermined if the defence were required to justify his own liberty.

2) Application of Rule 63(3)(a) of the Internal Rules

10. The first requirement of the rule governing provisional detention is whether there are well-founded reasons to believe that the Charged Person committed the crime or crimes specified in the Introductory or Supplementary Submissions. The standard followed by the Pre-Trial Chamber is whether “*the satisfaction of an objective observer that the Charged Person may have been responsible for or committed the alleged crimes specified in the Introductory Submission*”.⁸

11. The Pre-Trial Chamber held in its *Decision on Appeals against Order refusing Request for release and Order on Extension of Provisional Detention* of 3 July 2009 that it “[had] not identified any evidence of exculpatory nature placed in the Case File after the making of the Extension Order, leading it to conclude that the condition set out in Internal Rule 63(3) continue[d] to be met”.⁹ Yet, the Co-Investigating Judges themselves emphasised in their Order that “[s]ome of the evidence collected during this period may appear to be exculpatory either as regards KHIEU Samphan’s level of power within the CPK, the extent of

⁷ Decision, 3 July 2009, para. 21.

⁸ *Decision on Appeal against Order on Extension of Provisional Detention of NUN Chea*, 4 May 2009, C9/4/6, para. 24.

⁹ Decision, para. 137.

[Original French: 00416889-00416898]

Appeal against the Order extending the provisional detention of Mr KHIEU Samphan

*his work and travel within Cambodia, or his knowledge of security centres or hospitals”.*¹⁰

12. On reading these two statements, it seems difficult to believe that an objective observer may conclude that there are well-founded reasons to believe that the Charged Person may have committed the crimes specified in the Introductory Submission; the Co-Lawyers submit that the condition set out in Rule 63(3)(a) is not met in this case.

13. In any event, and according to settled international jurisprudence, while the persistence of well-founded reasons to believe that the person arrested committed an offence is a condition *sine qua non* for the lawfulness of continued detention, but after a certain amount of time, it no longer suffices. In such cases, the Judges must establish whether the other grounds given by the judicial authorities continue to justify the deprivation of liberty.¹¹

3) Application of the standards set out in Rule 63(3)(b)

➤ The release of Mr KHIEU Samphan poses no risk to the ongoing judicial proceedings (Rules 63(3)(b)(i), (ii) and (iii))

14. As a preliminary matter, it is necessary to recall the conclusions of the Pre-Trial Chamber in its Decision of 3 July 2009, according to which there is no “concrete risk that the Charged Person may exercise pressure on Victims or witnesses (...) [or that] he might use [his] influence to interfere with witnesses and Victims or that he would destroy evidence” and it is also understood that there is no risk that he would flee if released.¹²

15. The Co-Investigating Judges did not identify any new facts as could call these conclusions into question and neither did they raise any new arguments as could challenge the fact that detention is no longer necessary based on those three grounds.

➤ The release of Mr KHIEU Samphan poses no risk to him (Rule 63(3)(b)(iv))

16. In their Order of 18 November, the Co-Investigating Judges merely point out that there

¹⁰ Order, para. 19.

¹¹ See, *inter alia*, ECHR, *Belchev v. Bulgaria* Judgement, 8 April 2004, Application No. 39270/98 (para. 74) or ECHR, *Labita v. Italy*, Judgment, 6 April 2000, Application No. 26772/95 (para. 153).

¹² Decision, para. 48.

[Original French: 00416889-00416898]

Appeal against the Order extending the provisional detention of Mr KHIEU Samphan

had not been “*any change in the circumstances since the Pre-Trial Chamber decision that could lead them to a different conclusion*”.¹³

17. To begin with, the Co-Lawyers recall the arguments raised in their Objections of 20 October 2009,¹⁴ which show that the events cited by the Pre-Trial Chamber do not sustain the conclusion that there is a concrete and present risk to Mr KHIEU Samphan’s safety, as he himself has no concerns about his safety.

18. The Co-Lawyers further submit that it is for the Co-Investigating Judges to provide proof of any circumstances that may threaten Mr KHIEU Samphan’s safety, and to justify provisional detention. The Co-Investigating Judges merely mentioned some events dating back to 1991, 2000 and 2008, all of which pre-date the original provisional detention order, but provided no information that reflects current circumstances. But, as stated earlier, an order extending provisional detention requires a fresh examination of circumstances contemporaneous to the order and not a mere recall of past events.

19. Therefore, there is no evidence to support the conclusion that Mr KHIEU Samphan’s safety would not be ensured if he were released. Lastly, it is necessary to recall that it would be easy to arrange the release of Mr KHIEU Samphan in such a way as to ensure his safety.

➤ **There is no risk that Mr KHIEU Samphan’s release would disrupt public order (Rule 63(3)(b)(v))**

20. Here again, the Co-Investigating Judges merely point out that there had not been “*any change in the circumstances since the Pre-Trial Chamber decision that could lead them to a different conclusion*”.¹⁵

21. The Co-Investigating Judges aver that “*the trials of the Khmer Rouge leadership are still a matter of great concern for the Cambodian population today*”.¹⁶

22. The reality of this concern is not the aim of this appeal, but it is certain that it is not

¹³ Order, para. 24.

¹⁴ Objections, paras 12 to 15.

¹⁵ Order, para. 27.

¹⁶ Order, para. 26.

[Original French: 00416889-00416898]

Appeal against the Order extending the provisional detention of Mr KHIEU Samphan

intrinsically linked to the person of Mr KHIEU Samphan, but rather to the ongoing judicial process and the Cambodian context itself. When the ECCC were established, detention was clearly considered an exception to the principle of freedom for charged persons. At the time when the statute was drafted, the Cambodian context and the trauma of the population were well-known, and it is inconceivable that the impact that the commencement of proceedings could have on the Cambodian population was not taken into account when establishing this rule. The ECCC are in line with international courts, including the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY was established at a time when the situation in the region was particularly difficult, but this did not prevent the judges from ordering the provisional release of a large majority of the accused, and their returning to their countries of origin without causing any notable disruption of public order such as to warrant a reversal of the measure.

23. In this regard, the Defence notes that the fragility of Cambodian society is far from established and that while it is true that the manifestations of distress are an indication of the persistence of trauma among the victims, it cannot however be said that the release of Mr KHIEU Samphan would actually and necessarily cause a disruption of public order. These two notions are different from each other and must not be confused.¹⁷

24. Finally, it would be contradictory, to say the least, for the Pre-Trial Chamber to conclude that the Charged Person presents no risk for the witnesses or the victims, but threatens the psychological well-being of persons who are, a priori, not directly affected by the judicial process.

25. Therefore, one cannot conclude that the extension of Mr KHIEU Samphan's detention

¹⁷ In this regard, a decision by the *Chambre d'accusation de Douai*, in which, quite clearly, the seriousness of the crimes and the persistent disruption of public order were confused, helps explain the difference between these two notions. In the case in question, there was no question that the prejudice caused to the victims was enormous, nonetheless, it was the persistent disruption of public order, and not the persistence of the distress caused to the victim that was to be proved. The criminal chamber found that "[TRANSLATION] it cannot (...) be said that, in 1997, the crime(s) caused 'exceptional and persistent' disruption of public order, as the topicality of the victim's suffering cannot imply that the disruption of public order arising from the crimes in this case – assuming that such disruption was "exceptional" – persisted for more than 17 years such that provisional detention of X was the only means of ending it". Therefore, the distress currently felt by the victims cannot be considered a 'persistent disruption of public order'. CHAMBON (P.), GUERY (C.), *Droit et Pratique de L'Instruction Préparatoire*, *Dalloz Action 2007/2008*, para. 142.43.

[Original French: 00416889-00416898]

Appeal against the Order extending the provisional detention of Mr KHIEU Samphan

is necessary to preserve public order.

4) In the light of the overall circumstances of the case, release is the only justifiable measure

26. As the Co-Lawyers for the Defence pointed out in their Objections, “*the nexus between the length of time a defendant spends in detention and the diligence displayed in the conduct of the investigations is a relevant factor, when considering the extension of detention or release*”.¹⁸ The Co-Investigating Judges accepted this analysis and attempted to provide evidence of the work accomplished in a bid to demonstrate that they had been diligent in the conduct of their investigations.

27. At paragraph 31 of the Order, the Co-Investigating Judges aver that they “*have personally conducted interviews and placed the written records of interviews of several witnesses and Civil Parties on the case file*”.¹⁹ A quick calculation based on the information provided by the Co-Investigating Judges reveals that they have interviewed around thirty witnesses and/or victims since 27 February 2009, or about three witnesses per month. It seems difficult, in view of this information, to conclude that the Co-Investigating Judges conducted their investigations with such reasonable diligence as to warrant the extension of Mr KHIEU Samphan’s detention.

28. A corollary of the presumption of innocence, the right to a fair trial, in particular that of being tried by an impartial and independent court, is a fundamental pillar of any judicial system that meets international standards.

29. On 3 July 2009, the Pre-Trial Chamber held that “*the duration of the Charged Person’s provisional detention [was] reasonable in light of the crimes that are being investigated and the actions the Co-Investigating Judges [had] undertaken*”.²⁰

¹⁸ Objections, para. 8, quoting the *Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order*, 3 July 2009, para. 68.

¹⁹ Order, para. 31.

²⁰ *Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order*, 3 July 2009, C26/5/26, para. 75.

[Original French: 00416889-00416898]

Appeal against the Order extending the provisional detention of Mr KHIEU Samphan

30. Beyond the very purpose of the judicial investigation, the issue is therefore to determine whether the judicial authorities have displayed due diligence in ensuring that continued detention is not perceived as an arbitrary convenience, but rather as being conducive to accomplishing a legitimate and lawful aim of the judicial system.

31. Nowhere in their decision do the Co-Investigating Judges address the Defence's arguments concerning the systematic violation of the presumption of innocence and Mr KHIEU Samphan's rights, in disregard of the findings of the Pre-Trial Chamber which recommends, in particular, that "*the conduct of the entire procedure*"²¹ be examined when considering whether the length of provisional detention is reasonable. These arguments were simply ignored.

32. In fact, this failure confirms the Defence's sentiment of being subjected to patently systematic bias. Such bias must be denounced and sanctioned. In a comparable case, the French Court of Cassation considered that the judgment it was seised of should be vacated, considering that the reasoning of the appellate court was so specious that the defendants could objectively doubt its impartiality.²² This is, without a doubt, clearly the case in this instance.

33. As emphasized in their Objections, the Co-Lawyers consider that release is the only appropriate measure in view of the overall circumstances of the conduct of the proceedings. In fact, two years into the judicial investigation, Mr KHIEU Samphan's international Co-Lawyer is still without effective access to the evidence contained in the judicial investigation case file or to the parties' submissions and requests, which are considered essential for the conduct of a fair trial,²³ allegations of corruption cast a cloud over the proceedings, the judicial investigation is not conducted with the requisite transparency,²⁴ the Co-Lawyers have raised the issues of lack of diligence in the conduct of the investigation many times²⁵ and there are

²¹ Decision, para. 69.

²² Court of Cassation, Social Division, Public Hearing of Tuesday 21 October 2008, Appeal No. 07-40312.

²³ Objections, paras. 24 and 25.

²⁴ *Ibid.*, para. 26.

²⁵ *Ibid.*, para. 27.

serious doubts regarding the impartiality of the judicial investigation organs.²⁶

IV. FOR THESE REASONS

34. The Co-Lawyers for the Defence of Mr KHIEU Samphan REQUEST THE RELEASE of Mr KHIEU Samphan.

**WITHOUT PREJUDICE,
AND IT WILL BE JUSTICE**

	SA Sovan	Phnom Penh	
	Jacques VERGÈS	Paris	
Date	Name	Place	Signature

²⁶ *Ibid.*, para. 28.

[Original French: 00416889-00416898]

Appeal against the Order extending the provisional detention of Mr KHIEU Samphan