



**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ
Case File/Dossier No. 002/19-09-2007/ECCC/TC

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 Judge Claudia FENZ
 Judge YA Sokhan
 Judge Jean-Marc LAVERGNE
 Judge YOU Ottara

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DECISION ON APPLICATION FOR DISQUALIFICATION OF JUDGE SILVIA CARTWRIGHT

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1. INTRODUCTION

1. The Trial Chamber is seised of NUON Chea's Application of 14 February 2012 seeking the immediate and permanent disqualification of Judge Silvia Cartwright from any further proceedings against NUON Chea and requesting the Chamber to urge Judge Cartwright to step down pending resolution of the matter ("Application"), to which the Co-Prosecutors responded on 24 February 2012.¹ Judge Cartwright opted not to exercise her right to present written submissions to the Chamber in respect of the Application.²

2. SUBMISSIONS

2. NUON Chea seeks the immediate and permanent disqualification of Judge Cartwright on grounds of actual or apparent bias. In support of this Application, he cites the following extract from a report in the New Zealand press ("Press Report"):

[...] Mrs Cartwright is one of two international judges who sit with three Cambodian judges in the Trial Chamber, which in 2010 found Duch guilty.

She has lived in Phnom Penh, a hot, humid and chaotic city, since 2008, and says her experience at the court has been "fascinating, if incredibly frustrating".

As the most senior-appointed official by the UN, Mrs Cartwright sees it as her responsibility to not only make sure the trials are held efficiently, but that the court is also managed in an honest and professional way.

But it is not without its challenges, or controversy.

Defence lawyers publicly criticised her last year for meeting with the prosecution team, something she admits to doing, but says she had little choice.

The Defence Counsel "put more emphasis on disruption than representing their clients," she says.

"It's a very common strategy by Defence Counsel. There's been an application to accuse [sic] me twice, once as a member of the entire tribunal and once personally and there have been other applications to accuse the president, who is Cambodian, and other Cambodian judges."

She was asked by the UN two years ago to hold regular meetings with various parties to discuss "governance" issues. "I resisted for some time but realised it was essential so we meet to discuss such crucial issues as the budget for the court, staff issues, problems with IT, those sorts of things. Largely management issues that affect the conduct of the trial."³

¹ Third Application for Disqualification of Judge CARTWRIGHT, E171, 14 February 2012 ("Application"); Co-Prosecutors' Response to NUON Chea's Third Application for Disqualification of Judge CARTWRIGHT, E171/1, 24 February 2012 ("Response").

² See Internal Rule 37(7).

³ Application, para. 2 and footnote 2, citing "Michelle Cooke, "Cambodia still reeling from Khmer Rouge", Fairfax NZ News, 4 February 2012" (emphasis added).



3. The Application also makes reference to the following in-court statements made by Judge Cartwright during Trial Chamber proceedings on 30 January 2012:

MR. PRESIDENT: Counsel, you are just informed that Case 003 and 004 are separate cases from Case 002. Besides, for Case 002, the Chamber has set the scope for the first trial that we are having now. I think you are well aware of this. And you are reminded to stay within the limit that concerns the facts of Case 002/1, according to the sequential segments.

MR. PESTMAN: Excuse me – excuse me, Mr. President, my microphone – my headphones are not working. I didn't hear the second half.

JUDGE CARTWRIGHT: I'll tell you in English, then, with the President's permission, while you're looking for new headphones. The President has ruled twice now that you are to remain within the confines of Trial 2, and the first trial in Trial 2. Is that clear enough now, Counsel?

MR. PESTMAN: My questions are within the scope of the first –

JUDGE CARTWRIGHT: Please don't argue. You have been asked to move on to your next question. Thank you.

MR. PESTMAN: I'd like to note to the record that I disagree with the decision. And I'm here to establish the Government interference in Case Number 2 and, for that purpose, I'm asking these questions, and I think they are well within the scope of this case, certainly, Case Number 2. But I will continue with my questions.

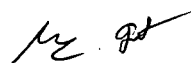
JUDGE CARTWRIGHT: I had understood that your role here was to represent and defend your client. Please move on with your questions in relation to this trial. Thank you.⁴

4. NUON Chea contends that the Press Report is evidence of Judge Cartwright's actual bias sufficient to rebut any presumption of impartiality to which she may be entitled.⁵ He argues that, according to the jurisprudence of the European Court of Human Rights ("ECtHR"), the Press Report demonstrates bias because it indicates "hostility or ill will" toward "counsel's approach to the case", reveals Judge Cartwright's "'personal conviction' to be firmly at odds with the manner in which the [NUON Chea] Defence has thus far conducted itself" and shows that Judge Cartwright has "publicly criticized 'the attitude of the defence before the court'", giving NUON Chea reason to believe that Judge Cartwright lacks impartiality.⁶

⁴ T., 30 January 2012, pp. 75-76.

⁵ Application, para. 18.

⁶ Application, para. 18 (citing *Kyprianou v. Cyprus*, Judgement, ECtHR (7397/01), 15 December 2005, para. 119 ("*Kyprianou*"); *Olujić v. Croatia*, Judgement, ECtHR (no. 22330/05), 5 May 2009, para. 11 ("*Olujić*"); *Lavents v. Latvia*, Judgement, ECtHR (58442/00), 28 February 2003, para. 119 ("*Lavents*").



5. NUON Chea also submits that the two paragraphs of the Press Report highlighted above are, individually or together, sufficient to establish a finding of bias against Judge Cartwright, as they indicate that she has already formed an unfavourable view of NUON Chea's case.⁷

6. In addition, NUON Chea argues that the Press Report, read in conjunction with her in-court statements made during trial on 30 January 2012, establishes that Judge Cartwright "takes the position that: (i) [...] Defence challenges [to the independence of the tribunal] are legally baseless and/or futile; (ii) there is no government interference at the ECCC which has unduly impacted Case 002; and/or (iii) all of the judges of the Trial Chamber are immune from external political pressure."⁸ By taking one or more of these positions, Judge Cartwright is alleged to have pre-empted further consideration of these issues and demonstrated bias.

7. In the alternative, NUON Chea contends that all of the purported evidence of bias identified in the Application would lead a reasonable observer, properly informed, to reasonably apprehend a lack of impartiality on the part of Judge Cartwright.⁹

8. NUON Chea adds that Judge Cartwright should have refrained from "making use of the press", or from expressing publicly "positions that do not accord with 'the higher demands of justice and the elevated nature of [...] judicial office'", and that, having done so, Judge Cartwright "must now be recused."¹⁰ NUON Chea further submits that Judge Cartwright is obligated by Article 559 of the Cambodian Code of Criminal Procedure to step down pending the determination of the Application, or, alternatively, that she should step down pursuant to Internal Rule 34(5).¹¹

9. In response, the Co-Prosecutors submit that press statements made by sitting judges or statements made during trial proceedings do not rebut the presumption of impartiality to which judges are entitled unless they are "specifically and personally directed against the Accused", "particularly inflammatory or insulting" or "amount to a prejudgment of issues

⁷ Application, para. 19 (citing *Buscemi v. Italy*, Judgement, ECtHR (no. 29569/95), 16 September 1999, para. 68 ("*Buscemi*")).

⁸ Application, para. 20.

⁹ Application, para. 22.

¹⁰ Application, para. 23 (citing *Buscemi*, para. 67).

¹¹ Application, para. 17.



central to [the] culpability of the Accused or the outcome of the case.”¹² The assessment of actual bias through such remarks is “context-specific and stringent.”¹³

10. The Co-Prosecutors further contend that the comments attributed to Judge Cartwright in the Press Report were general observations neither directed against NUON Chea or the NUON Chea Defence nor amounting to a prejudgment of the outcome of any pending or future legal issue or disqualification request.¹⁴ Even if the comments imply an unfavourable view of NUON Chea’s case, this is insufficient to give rise to a finding of actual bias.¹⁵ The material adduced by NUON Chea in support of the Application does not disclose any basis for a reasonable observer to apprehend that Judge Cartwright had formed an unfavourable view of issues central to his case.¹⁶ Consequently, they request the Chamber to dismiss the Application.¹⁷

3. FINDINGS

3.1. Legal framework

11. Internal Rule 34 governs applications for the disqualification of judges. Rule 34(2) states:

Any party may file an application for disqualification of a judge in any case in which the Judge has a personal or financial interest or concerning which the Judge has, or has had, any association which objectively might affect his or her impartiality, or objectively give rise to the appearance of bias.

12. An appearance of bias is established if “a judge is a party to the case or has a financial or proprietary interest in the outcome of the case, or if the judge’s decision will lead to the promotion of a cause in which he or she is involved; or the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.”¹⁸ As the Trial Chamber has consistently noted, a reasonable observer in this regard is “an informed person, with knowledge of all of the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality

¹² Response, paras 6-11 (citing *Olujić, Lavents and Kyprianou*).

¹³ Response, para. 11.

¹⁴ Response, para. 13.

¹⁵ Response, para. 14.

¹⁶ Response, para. 22.

¹⁷ Response, para. 23.

¹⁸ Decision on Motions for Disqualification of Judge Silvia CARTWRIGHT, E137/5, 2 December 2011, para. 13 (citing *Prosecutor v. Furundžija*, Judgement, ICTY Appeals Chamber (IT-95-17/1-A), 21 July 2000 (“*Furundžija* Appeal Judgement”), para. 189).

is one of the duties that Judges swear to uphold.”¹⁹ The starting point for any determination of an allegation of partiality is therefore a presumption of impartiality, which attaches to the ECCC Judges based on their oath of office and the qualifications for their appointment.²⁰ The moving party bears the burden of displacing that presumption, which imposes a high threshold.²¹

13. Internal Rule 34(3) requires that a party “shall clearly indicate the grounds and shall provide supporting evidence” for an application to disqualify a judge. An application that is speculative or based on a “mere feeling or suspicion of bias” by an accused is insufficient.²²

14. The ECtHR has found that remarks made by a judge to the press which imply that he has already formed an unfavourable view of an applicant’s case or has taken a real position on the outcome of an applicant’s case violate the applicant’s right to a fair hearing under Article 6 of the European Convention on Human Rights (“ECHR”).²³ However, judicial remarks reported in the press do not otherwise establish a lack of impartiality or give rise to a breach of an applicant’s fair trial rights, even if the high level of discretion required of judges should “dissuade them from making use of the press”.²⁴

15. Contrary to the submissions of the NUON Chea Defence, the Internal Rules consolidate the procedures applicable to ECCC proceedings before the ECCC and are therefore *lex specialis*.²⁵ The current proceedings are therefore governed by the Internal Rules rather than any corresponding provisions of the Cambodian Code of Criminal Procedure. Internal Rule 34(6) protects the fair trial rights of the applicant by requiring the judge who is the subject of the application for disqualification to be replaced by a reserve judge “for the purposes of the

¹⁹ E137/5, para. 14 (citing *Furundžija* Appeal Judgement, para. 190).

²⁰ Decision on IENG Thirith, NUON Chea and IENG Sary’s Applications for Disqualification of Judges NIL Nonn, Silvia CARTWRIGHT, YA Sokhan, Jean-Marc LAVERGNE and THOU Mony, E55/4, 23 March 2011, para. 12; E137/5, para. 14; Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge NEY Thol pending the Appeal against the Provisional Detention Order in the Case of NUON Chea, C11/29, 4 February 2008, paras 15-17 (citing *Furundžija* Appeal Judgement, para. 196).

²¹ E137/5, para. 14; *see also Furundžija* Appeal Judgement, para. 197 (noting that professional judges are able to “disabuse their minds of any irrelevant personal beliefs or predispositions”).

²² E137/5, para. 14 (citing *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera’s Motion for Disqualification of Judge Byron and Stay of Proceedings, ICTR Trial Chamber (ICTR-98-44-T), 20 February 2009, para. 5).

²³ *Buscemi*, para. 68; *Olujić*, para. 65; *Lavents*, para. 119. Remarks that have given rise to a breach of Article 6 include comments on the substance or outcome of the applicant’s case (*Buscemi*, para. 40; *Olujić*, paras 21 and 64; *Lavents*, para. 119), revelation of a specific conflict of interest (*Olujić*, paras 62-63) and insults or attacks on the applicant’s character (*Olujić*, paras 22 and 66); *see also Previti v. Italy*, Decision on Admissibility, ECtHR (45291/06), 8 December 2009, para. 265.

²⁴ *Buscemi*, para. 67.

²⁵ Decision on NUON Chea’s Preliminary Objection Alleging the Unconstitutional Character of the ECCC Internal Rules, E51/14, 8 August 2011.

application only”. Internal Rule 34(5) further provides that a judge in respect of whom an application for disqualification is made “may continue to participate in the judicial proceedings pending a decision” or, alternatively, “may decide to step down voluntarily”. Judge Cartwright has, as is her right pursuant to this sub-rule, opted to continue to participate in judicial proceedings.²⁶

3.2. Analysis

16. The Chamber has examined the content of the Press Report and in-court statements to determine whether this material satisfies the high threshold required to rebut the presumption of impartiality enjoyed by Judge Cartwright.

17. The Chamber concurs with the Co-Prosecutors that the Press Report makes no reference whatsoever to NUON Chea or the NUON Chea Defence.²⁷ The NUON Chea Defence merely asserts that “[i]t must be assumed that, on their face, Judge Cartwright’s assertions were directed at the NUON Chea Defence Team”.²⁸ These remarks instead refer to broad strategies typically employed by counsel, rather than to the case of any of the Accused, and still less to the outcome of the trial. Nor do any of the remarks quoted in the Press Report suggest that Judge Cartwright has formed an unfavourable view of NUON Chea, or made a negative assessment of his case, or that of any other Accused.

18. In relation to Judge Cartwright’s in-court statements, the Chamber notes that these were comments rebuking the NUON Chea Defence for repeated disregard of earlier directions from the President.²⁹ The Chamber finds these statements to be an appropriate exercise of a Trial Chamber judge’s discretion to ensure the proper conduct of proceedings. As not even adverse rulings by a judge in relation to a party by themselves suggest actual bias or create a basis on which a reasonable observer, properly informed, could reasonably apprehend bias,³⁰ still less does the proper exercise of a judge’s discretion to control proceedings indicate partiality. Where oral rulings are objected to by counsel, the appropriate remedy is appeal rather than

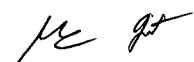
²⁶ See Decision on IENG Sary’s Request for Appropriate Measures Concerning Certain Statements by Prime Minister Hun Sen Challenging the Independence of Pre-Trial Judges Katinka LAHUIS and Rowan DOWNING, 002/20-10-2009-ECCC/OIJ (PTC-03), Doc No. 5, 30 November 2009, paras 3 and 15.

²⁷ Response, para. 12.

²⁸ Application, para. 2.

²⁹ T., 30 January 2012, pp. 74-75.

³⁰ Decision on KHIEU Samphan’s Application to Disqualify Co-Investigating Judge Marcel LEMONDE, 002/13-10-2009-ECCC/PTC (02), Doc No. 7, 14 December 2009, para. 35.



disqualification, on the grounds that all judges would otherwise risk being subject to disqualification whenever they make adverse rulings against a party.

19. Contrary to the submissions of the NUON Chea Defence, neither the oral ruling nor the Press Report, considered separately or together, substantiates any allegation of bias. As none of Judge Cartwright's statements demonstrate partiality, the suggestion that she has expressed "public positions that do not accord with 'the higher demands of justice and the elevated nature of [...] judicial office'" is baseless.³¹


20. Having examined the totality of the material referenced in the Application, the Chamber concludes that it is inadequate to displace the presumption of Judge Cartwright's impartiality. The Application is therefore rejected as being devoid of merit.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DENIES NUON Chea's application for the immediate and permanent disqualification of Judge Cartwright.

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Phnom Penh, 9 March 2012
President of the Trial Chamber



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Nil Nonn

³¹ Application, para. 23.