

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

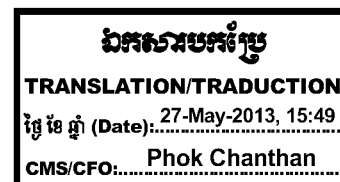
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**Appeal against the Decision on Mr KHIEU Samphân's Application
for Immediate Release on Bail**

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Before:

The Trial Chamber
Judge NIL Nonn
Judge Silvia CARTWRIGHT
Judge YOU Ottara
Judge Jean-Marc LAVERGNE
Judge YA Sokhan

Co-Prosecutors

CHEA Leang
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All Civil Party Lawyers

All Defence Teams

MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 16 February 2011, the Trial Chamber (“the Chamber”) rejected Mr KHIEU Samphân’s first application for release.¹
2. On 6 June 2011, the Supreme Court Chamber (“SCC”) admonished the Chamber for failure to provide reasons for its decision to reject the Application, but upheld it.²
3. On 8 February 2013, the SCC annulled the severance order concerning Case 002 and highlighted the many prejudices caused to the parties.³
4. On 18, 20 and 21 February 2013, the Chamber held a hearing on the consequences of the SCC decision.⁴ At the hearing, the Defence for Mr KHIEU Samphân announced that it was due to file an application for immediate release on bail.⁵
5. On 29 March 2013, it filed the application.⁶
6. On 10 April 2013, it requested that the relevant extracts of the book authored by Investigating Judge Marcel LEMONDE be considered by the Chamber in any hearings on his application for release.⁷
7. On 11 April 2013, at a hearing on Mr KHIEU Samphân’s application for release, the Chamber stated that it did not have the time to consider the request for admission of the

¹ Decision on the Urgent Application for Immediate Release of NUON Chea, KHIEU Samphân and IENG Thirith, Trial Chamber, 16 February 2011, **E50** (“Trial Chamber’s 2011 Decision”).

² Decision on Immediate Appeal by KHIEU Samphân on Application for Release, Supreme Court Chamber, 6 June 2011, **E50/3/1/4** (“SCC Decision Concerning KHIEU Samphân”).

³ Decision on the Co-Prosecutors’ Appeal of the Trial Chamber’s Decision Concerning the Scope of Case instance 002/01, Supreme Court Chamber, 8 February 2013, **E163/5/1/13** (“SCC Decision on Severance”).

⁴ Transcript of Trial Proceedings (“T.”), 18 February 2013, **E1/171.1**; T., 20 February 2013, **E1/172.1**; T., 21 February 2013, **E1/173.1**.

⁵ T. 20 February 2013, **E1/172.1**, p. 76.

⁶ Application for Mr KHIEU Samphân’s Release on Bail, 29 March 2013, **E275** (“Application for Release”).

⁷ Initial Request to Place Before the Chamber Extracts of the Book Authored by Judge Marcel LEMONDE, 10 April 2013, **E280**.

extracts, adding that the request should follow its normal course and that the parties would have an opportunity to make comments.⁸

8. However, on 19 April 2013, an email from the Greffier to the Co-Prosecutors informed the parties that the Chamber had rejected the request.⁹
9. On 26 April 2013, the Chamber issued its New Severance Order,¹⁰ as well as its decision on Mr KHIEU Samphân's Application for Release.¹¹
10. Today, Mr KHIEU Samphân's Defence is appealing the decision denying his Application for Immediate Release on Bail ("the Impugned Decision").¹²
11. In the Impugned Decision, the Chamber indicates that it does not consider Mr KHIEU Samphân's five years in provisional detention excessive. According to the Chamber, there has been no change in the Accused's circumstances since the rejection of his last application in 2011.
12. The present submission will demonstrate that the Chamber has committed numerous errors which warrant invalidating the decision.

I. JUSTIFICATION FOR CONTINUED PROVISIONAL DETENTION

13. At paragraph 21 of the Impugned Decision, the Chamber asserts that Mr KHIEU Samphân's non-appearance and/or delays to the proceedings justify his continued detention. It considers the assurances given by the Accused and his family members insufficient "*to outweigh the concerns*" or the risk that the Accused may abscond.

⁸ T., 11 April 2013, **E1/180.1**, p. 79, L. 5-13.

⁹ Email from Mr Roger PHILLIPS: "Re: Forms of Response to Khieu Samphan's Rule 87(4) Application", sent on 19 April 2013, at 3.15 p.m., **E280/1**.

¹⁰ Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, Trial Chamber, 26 April 2013, **E284** ("New Decision on Severance").

¹¹ Decision on KHIEU Samphân's Application for Immediate Release, Trial Chamber, 26 April 2013, **E275/1** ("Impugned Decision").

¹² Internal Rule 104(4)(b).

14. The Chamber thus erred in fact and in law, in that it did not provide sufficient reasons for its decision and omitted to take account of the concrete facts underpinning the Defence's supporting arguments. The Chamber attached undue significance to the flight risk and the organizational challenges. It did not afford sufficient weight to the assurances given or even take account of the proposed bail conditions.

A. Flight risk

1. A risk only in theory

15. Since 2007 and throughout the judicial investigation, the assurances regarding Mr KHIEU Samphân's presence during the proceedings have not been a factor in his provisional detention or continuation thereof.¹³

16. Yet, in 2011, the Chamber cited this criterion alone as justification for Mr KHIEU Samphân's continued detention. At that time, the Chamber "*found that the potentially severe penalty faced by KHIEU Samphan if convicted create[d]] an incentive to abscond*".¹⁴ On Appeal, the Supreme Court concurred with the Accused that the Chamber's decision was not sufficiently reasoned.¹⁵

17. In 2013, despite the SCC's guidelines, the Chamber committed the same error. Yet, the SCC had admonished the Chamber earlier for affording undue weight to this criterion¹⁶ and pointed out that the expectation of a lengthy sentence *in abstracto* cannot be held against the accused as a sole factor determining the outcome of an application for release.¹⁷ After

¹³ See, *inter alia*, the following Pre-Trial Chamber decisions: Decision on KHIEU Samphân's Appeals against the Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, **C26/5/26**, para. 39; Decision on KHIEU Samphân's Appeal against Order on Extension of Provisional Detention, 30 April 2010, **C26/9/12**, para. 30. This condition appears for the first in the Closing Order, but stereotypically and with no other reasoning except to say that the reasoning adopted in earlier decisions retains its full force: Closing Order, 15 September 2010, **D427**, paras. 1623-1624.

¹⁴ Trial Chamber's 2011 Decision, para. 40.

¹⁵ SCC Decision Concerning KHIEU Samphân, paras. 40-42, 50, 54.

¹⁶ *Ibid.*, para. 41.

¹⁷ *Ibid.*, para. 40.

recalling the court's duty "to address any concrete facts" set out in the Accused's submissions,¹⁸ the SCC went on to add:

*"Courts assessing the lawfulness of provisional detention must accordingly evaluate all reasons warranting detention, and weigh them against the basic right to personal liberty. As the European Court of Human Rights has held, continued detention can be justified only as long as there are "specific indications of a genuine public interest" which outweighs the presumption of liberty. In doing so, to adduce a general risk of flight, absconding, or obstructing proceedings does not suffice unless it is grounded upon specific circumstances of the given case (...)"*¹⁹

18. Even so, the Chamber again listed the incentive to abscond as its "primary consideration". According to the Chamber, "at this advanced stage of the trial, the Accused may consider flight to be a real option when faced with the prospect of a lengthy sentence of imprisonment, should he be convicted" (this segment does not appear in its entirety in the French translation of the Decision). However, it did not elaborate further, but merely adverted to a footnote in a decision dating back to 2011.
19. So both at present as in 2011, the Chamber simply refers to a hypothetical risk, a generality. Both at present as in 2011, the Chamber has not taken account of the unique character of the instant case and the concrete facts underpinning the Accused's arguments.

2. Concrete facts underpinning the Accused's arguments

20. The ICTY Appeals Chamber has logically observed that "[i]n some cases, the incentives to flee might decrease over time; in other cases, these incentives might stay the same; and in still other cases these incentives might not shift enough to affect materially the approach taken in earlier provisional release decisions regarding the same accused."²⁰

¹⁸ *Ibid.*, para. 57.

¹⁹ *Ibid.*, para. 56.

²⁰ *Prosecutor v. Milutinovic et al.*, IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, para. 15; *Prosecutor v. Popovic et al.*, IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovcanin Provisional Release, 1 March 2007, para. 14.

21. Generally speaking, the jurisprudence established at the international level leans in favour of taking account of the personal circumstances, personal situation and conduct of the person applying for release.²¹
22. The Chamber ignored those guidelines.
23. As such, at no point did it take account of the fact that Mr KHIEU Samphân does not have what it takes to abscond.
24. Yet, the Defence had clearly stated that Mr KHIEU Samphân has no passport or foreign residency permit, that he lacks the financial means to abscond; moreover, being 82, he lacks the physical ability to do so.²²
25. The Chamber totally ignored those arguments and did not even summarise them in its decision, under parties' submissions.²³ Needless to say, it did not address them thereafter.
26. The Chamber simply posited that anyone facing a lengthy sentence will abscond. It did not check its presumption against the information it had on record concerning Mr KHIEU Samphân.
27. So in its initial application, while Mr KHIEU Samphân was still at liberty and the ECCC had not yet been established, and while he knew that he was wanted by the ECCC, he stated publicly that he was prepared to answer the accusations against him.²⁴ Moreover, the Defence had clearly stated that he is very close to his family.²⁵
28. Mr KHIEU Samphân's demeanour at the relevant time is much more convincing and persuasive than the presumption that anyone facing charges will abscond. Mr KHIEU Samphân has always been prepared to answer any accusations against him in a

²¹ Application for Release, paras. 24-26.

²² Application for Release, para. 29; T. 11 April 2013, **E1/180.1**, p. 89 L. 10-23, p. 90 L. 11-14, p. 97 L. 1-4.

²³ Impugned Decision, see, *inter alia*, paras. 7-8.

²⁴ Application for Release, paras. 28, 60; T. 11 April 2013, **E1/180.1**, p. 96 L. 10-16, p. 134 L. 4-16.

²⁵ Application for Release, para. 29.

court of law. His demeanour (as exemplified by his public statements, interviews, the book he authored, and his regular presence at hearings despite his age) shows that he respects justice and the rule of law, and that he is keen to listen and to explain.

29. By not taking account of the above personal circumstances, the Chamber fell short of its duty to conduct meaningful review of the case before it.

3. The assurances given

30. At paragraph 21 of the Impugned Decision, the Chamber states that it does not consider “*the assurances of the Accused and his family members sufficient*”.

31. This assertion is totally mistaken.

32. Mr KHIEU Samphân’s family members had provided the Chamber with ample information regarding the residence where he was to stay and its location. They also provided perfectly valid and admissible attestations guaranteeing that they are prepared to put him up.²⁶

33. Further, in an annex to his Application for release, Mr KHIEU Samphân made the solemn pledge to attend any ECCC proceedings and to abide by any conditions for his release.²⁷ He repeated this pledge orally at the public hearing on his Application for release.²⁸ As a matter of fact, his pledge received press coverage.

34. According to the ICTY Appeals Chamber, the fact that the accused is prepared to accept any conditions for release supports his good faith. The ICTY also attaches weight to the Accused’s exemplary behaviour throughout the proceedings.²⁹

35. Of course, since release requires believing in the applicant’s good faith, detention is the easier option. This is precisely why the Chamber ought to have tried to figure out the

²⁶ Application for Release, Annexes E275.1, E275.2, E275.3, E275.5, E275.6, E275.7, E275.8.

²⁷ Application for Release, Annex E275.4.

²⁸ T. 11 April 2013, E1/180.1, p. 97, L. 22-24; p. 98 L 1-2.

²⁹ *Prosecutor v. Galic*, IT-98-29-A, Decision of Defence Request for Provisional Release of Stanislav Galic, 23 March 2005, para. 16.

underlying reasons for not believing in Mr KHIEU Samphân's good faith. As the Chamber could not come up with any good reasons, it resorted to positing a simplistic presumption ("anyone facing charges is predisposed to flee"), and in so doing omitted to take account of the overall conduct of the Accused; it then went on to ignore the truthfulness and sincerity of the assurances given.

36. The Chamber should have examined these elements both individually and collectively, but omitted to do so.

4. Proposed bail conditions

37. In 2011, the SCC declared:

*"While noting that the Trial Chamber could have investigated in a deeper fashion alternative measures other than detention which could have equally ensured the presence of the Accused at trial, its Decision is not invalid as the Accused's written and oral submissions did not provide any details as to the means of securing such presence."*³⁰

38. In the Impugned Decision, the Chamber gave no consideration to this possibility even though the Defence had made sure to provide all the necessary details regarding the means of securing Mr KHIEU Samphân's presence at the proceedings.³¹

39. For these reasons, the SCC should have followed the example of the French *Cour de Cassation*³² and declared the decision for continued provisional detention unlawful on the ground that it does not give reasons why the assurances on the conditions for release are deemed insufficient.

40. The Chamber erred in law by omitting to give reasons for its decision on this point, but also a reasonable trier of fact would have found sufficient the assurances that were given to

³⁰ SCC Decision Concerning KHIEU Samphân, para. 58.

³¹ Application for Release, paras. 50-53, 57, 58, 62; T. 11 April 2013, E1/180.1, p. 89 L. 3-25, p. 90 L. 1-14, p. 91 L. 25, p. 92 L. 1-5.

³² *Cour de Cassation, Chambre criminelle, 26 février 2008, affaire n°07-88.336, publié au Bulletin.*

secure the Accused's presence even with a hypothetical flight risk or the alleged organizational challenges.

B. Organisational challenges

41. At paragraph 21 of the Impugned Decision, the Chamber raises the issue of delays to the proceedings that could result from the unintended non-appearance of the Accused. It does not explain what it means by unintended non-appearance or its possible causes, or why such a hypothetical, ill-explained risk can be remedied by continued detention whereas it would be greater if bail were granted.
42. So in the present appeal, the Defence can only surmise.
43. If illness is the issue, the accused are not the only ones it concerns. It is important to bear in mind that the proceedings in Case 002 are not immune to possible delays in the event of a lawyer being taken ill, as has happened in the past. To give just one example, the testimony of Expert David CHANDLER was delayed for two days when a Prosecution lawyer was taken ill.³³ There is therefore no conceivable justification to deprive someone of his liberty for relying on such nebulous grounds whereas he is presumed innocent.
44. In any event, the Chamber did not even address the concrete assurances given by the Defence. Yet, those assurances were aimed at, as much as practicable, averting the risk of unintended non-appearance and were similar the assurances given in the event of imprisonment.³⁴
45. In the final analysis, the Chamber not only omitted to apply the established legal standards, but also it did not take account of the concrete, relevant information it was provided, but instead chose to focus on a risk which only exists in theory.
46. Its decision should be set aside, and Mr KHIEU Samphân should be released on bail.

³³ Email from Ms Susan LAMB to the parties: "Re: Co-Prosecutors Short Adjournment Request Regarding David Chandler", sent on 12 July 2012, at 12.48p.m., annexed hereto.

³⁴ Application for Release, paras. 51, 57, 58, 61.

II. LENGTH OF PROVISIONAL DETENTION

47. At paragraph 23 of the Impugned Decision, the Chamber states that it does not consider Mr KHIEU Samphân's continued detention "*disproportionate in all circumstances of the case*".

A. The proceedings in Case 002

48. According to the Chamber, the trial has proceeded as quickly as possible, and it is possible to predict or be certain of the likely duration of the trial as a whole.³⁵

1. Delays

49. At paragraph 23 of the Impugned Decision, the Chamber considers that "[i]n cases of comparable complexity", "when all the relevant circumstances are considered", "(...) the trial in Case 002 has proceeded as quickly as possible".

50. **First**, the Chamber erred in law by considering this case alone.

51. According to the established legal standards, the length of provisional detention also includes the pre-trial period and starts to run upon issuance of the detention order.³⁶ The Chamber thus omitted to include the judicial investigation phase among the "*relevant circumstances*" in its assessment of possible delays to the proceedings.

52. Further, the Chamber omitted to take account of the Defence's submissions or to give any reasons for its decision thereupon. Yet, the Defence reported delays and lack of diligence during the investigative phase³⁷ and, filed submissions with relevant proof of those defects.³⁸

³⁵ Impugned Decision, para. 23.

³⁶ See for example: *Soria Valderrama v. France*, Application No. 29101/09, ECHR Judgement, 26 January 2012, paras. 22-23.

³⁷ T. 11 April 2013, **E1/180.1**, p. 83 L. 20-23, p. 84 L.1-18.

³⁸ Initial Request to Place Before the Chamber Extracts of the Book Authored by Judge Marcel LEMONDE, 10 April 2013, **E280**, para. 5-17.

However, the Chamber did not take those submissions into account, despite being bound to do so and having the necessary time and facilities to that effect.

53. On 11 April 2013, the parties received the Request for admission of evidence. On 19 April, the Chamber rejected it, even though the Prosecutors had until 22 April to respond to it and the Chamber had until 2 May 2013 to render its decision on Mr KHIEU Samphân's Application for Immediate Release. This shows that in its deliberations, the Chamber could easily have taken all the filings into account.
54. The Chamber erred in the exercise of its discretion, and thereby caused the Accused serious prejudice. The evidence contained in that submission is highly relevant and probative, insofar as it originates from a judge who had conducted the judicial investigation. According to that evidence, the nearly one-year that Mr KHIEU Samphân spent in provisional detention was entirely unjustifiable.
55. By taking account of both the delays to the judicial investigation and the trial,³⁹ a reasonable trier of fact would have found that those were undue delays.
56. **Secondly**, the Chamber erred by comparing what cannot be compared. The comparison between the instant case and "*cases of comparable complexity*", namely common law proceedings before international criminal tribunals, is ill-chosen and beside the point.
57. Conducted without prior judicial investigation and judicial interview of witnesses at the pre-trial stage, adversarial proceedings before the ICTY, the ICTR and the ICC necessarily last much longer than proceedings which are preceded by judicial investigations, [even] lasting several years. It is just plain bad faith to liken the duration of the two types of trials in a bid to justify the duration of the instant trial.

2. Predictability and certainty

58. At paragraph 23 of the Impugned Decision, the Chamber indicates that:

³⁹ Application for Release, paras. 13-18.

“In any event, as Case 002/01 approaches its concluding phases, the Chamber does not accept Mr Khieu Samphan’s Defence submission that the Accused cannot predict or be certain of the likely duration of this trial.”

59. The Defence recalls that by the time it filed its Application for release, the new decision had not been issued as yet. Moreover, the Defence pleaded its Application without knowing the reasoning adopted in the reconsidered decision. The Defence finds that objectionable.⁴⁰
60. The Chamber has rendered both its New Decision on Severance and its Decision on Mr KHIEU Samphân’s Application for Immediate Release. Yet, although the New Decision on Severance is lengthy, it leaves many questions unanswered. Judicial predictability and certainty, two key factors in provisional detention, are yet to be ensured. This means therefore that the argument of Mr KHIEU Samphân’s Defence still stands, despite the reasons given in the New Decision on Severance.⁴¹ For the Defence, the only certainty is that the Chamber is patently inconsistent.
61. Firstly, the Chamber asserts in the Impugned Decision that now that Case 002/01 is drawing to a close, the Accused ought to be able to predict the likely duration of his trial. However, in its New Decision on Severance, the Chamber asserts that despite splitting the Closing Order into a series of smaller trials, no factual allegations or charges are dismissed.⁴² This means therefore that Mr KHIEU Samphân’s trial is not limited to Case 002/01. Moreover, the Chamber admits that it cannot predict the duration of the trial as a whole, encompassing all the charges set out in the Indictment.⁴³ This only goes to show that the Chamber itself is not in a position to indicate how much longer Mr KHIEU Samphân’s trial is expected to last.
62. Secondly, in the New Decision Severance Decision, the Chamber explained its decision not to extend the scope of Case 992 to include S-21, as follows:

⁴⁰ T. 8 April 2013, E1/177.1, p.2, L. 3-14.

⁴¹ Application for Release, para. 14-27.

⁴² New Decision on Severance, para. 155.

⁴³ *Ibid.*, para. 155: “(...) should the Accused remain fit to be tried and donor funds be found in support of these future trials”; Annex, footnotes 270 and 272: “(...) circumstances permitting and unless directed to the contrary (...)”, “All projections are indicative only”.

*“However, even if accepting the Co-Prosecutors’ projections, the Trial Chamber notes that the time required to conclude 15 days of testimony under conditions prevailing in Case 002/01 is highly variable and uncertain, due to the impact of a variety of factors, including the health of the Accused, witness availability, and the appeal process”.*⁴⁴

63. The Chamber raises the issues of the “*large number of contingencies, many of which are unknown*”,⁴⁵ and the uncertainty about the continuity of financial support for the ECCC.⁴⁶

*“A further factor considered relevant by the Trial Chamber is the uncertainty regarding the duration and continuity of financial support to the ECCC (...) No confirmation of the continuity of funding for 2013 and early 2014 has been received (...). The Chamber therefore infers that the ECCC’s persistent financial malaise, which is a matter of public knowledge, is likely to continue (...)”.*⁴⁷

64. This clearly shows that the Chamber itself cannot offer any certainties about the continuity of the trial or its duration.

65. It is also noteworthy that to this day, the parties are in the dark as to the identity and number of witnesses the Chamber is due to call before the substantive hearings in the instant trial come to a close. In its New Decision on Severance, the Chamber announced that it was about to conclude decisions on this issue.⁴⁸

66. Further, whereas the Chamber asserts that the trial is drawing to a close, it does not give the parties a clearer idea as to how much longer the trial will last:

*“In accordance with the principles outlined in this decision, Case 002/02 shall commence, circumstances permitting and unless directed to the contrary, after the conclusion of Case 002/01. Projections drawn from Case 001 suggest that a first-instance verdict in this case may follow approximately 8 months after the conclusion of the hearing of evidence in Case 002/01 (namely, during the first quarter of 2014), and a verdict on any eventual appeal 18 months thereafter (namely, late 2015). All projections are indicative only”.*⁴⁹

⁴⁴ *Ibid.*, para. 140.

⁴⁵ *Ibid.*, para. 142.

⁴⁶ *Ibid.*, para. 125-5.

⁴⁷ *Ibid.*, paras. 145-146, 155.

⁴⁸ *Ibid.*, para. 144.

⁴⁹ *Ibid.*, Annex p. 71, footnote 270.

67. Not only are these projections vague and indicative, but they also differ from the ones provides by the Chamber during the hearing on the consequences of the SCC decision on severance. At the that hearing, Judge FENZ recalled that it took the Chamber eight months to reach a judgement in Case 001, and after that, around 18 months for the Supreme Court Chamber to issue its judgement on appeal. However, Judge FENZ pointed out, whereas Case 001 involved only one accused and only one crime site, Case 002 involved several accused, “*more evidentiary and legal challenges*” and several sites. She was keen to ensure that the parties “*take [...] into consideration*”⁵⁰ the fact that Case 002 is expected to last longer than Case 001.
68. Thirdly, the New Severance Order reveals that the Chamber still has no answers to a number of key questions, and has thereby left the parties stranded in utter judicial unpredictability and uncertainty. The SCC had earlier admonished the Chamber for leaving questions unanswered whereas they were “[TRANSLATION] *could compromise bringing the subsequent proceedings to a conclusion within a reasonable time*”, a situation it considered “*likely to cause prejudice*”.⁵¹ For the SCC, the primary concern was “*to safeguard those fundamental rights for all interested parties*”.⁵²
69. It is a matter of great concern that the Chamber is yet to answer those questions and is merely proposing to hold a trial management meeting in due course.⁵³
70. This situation is likely to cause prejudice owing to the judicial unpredictability and uncertainty, hence the need to take the Accused’s advanced age into account.

B. The Accused’s advanced age

71. According to paragraph 23 of the Impugned Decision:

⁵⁰ T. 18 February 2013, **E1/171.1**, p. 36, L. 25 and p. 37 L. 1-16.

⁵¹ SCC decision annulling the Severance Decision, para. 47.

⁵² Decision on Request by the Defence for KHIEU Samphân for Trilingual Notification of the Supreme Court Chamber’s Decisions, 30 April 2013, **E163/5/1/15**, para. 7.

⁵³ New Decision on Severance, paras. 154-155.

“Nor does the Chamber consider that the Accused’s advanced age renders his detention inappropriate. The factors that justify his continued detention outweigh these personal issues when the Chamber takes into account the standard of care provided to the Accused and the respect for his rights afforded by the ECCC Detention Facility.”

72. In this regard, it is important to emphasize that it was not the Defence’s submission that Mr KHIEU Samphân’s advanced age alone was an impediment. Rather, the Defence’s submission was that his age is a key consideration in regard to provisional detention, i.e. where the right to be presumed innocent still applies and the Accused is uncertain as to when his trial is expected to end (see *supra*).

73. It is circumstances such as delays, judicial unpredictability and uncertainty, as well as Mr KHIEU Samphân’s age which, together, make the length of his provisional detention excessive.

74. By following the applicable legal standards and taking all the relevant factors into account, a reasonable trier of fact would have arrived at the same conclusion.

III. CHANGE OF CIRCUMSTANCES SINCE THE LAST DECISION

75. At paragraph 23 of the Impugned Decision, the Chamber cites Internal Rule 82(4) pursuant to which an accused may file a further application for release only if there has been a change in his circumstances since the last decision on the matter. The Chamber adds:

“The SCC upheld the Trial Chamber’s decision refusing to release KHIEU Samphan in February 2011. The Chamber has not found any change in the Accused’s circumstances since that date that would allow it to grant his application now”.

76. In addition to citing the wrong date – in that the SCC decision was issued in June 2011 and not in February 2011 – the Chamber also erred in law since Internal Rule 82(4) does not apply in this instance.

77. In 2011, in order to remedy its omission to give the parties adequate time and facilities to prepare for the hearing, the Chamber announced that Internal Rule 82(4) would not apply if

a fresh application for release was filed.⁵⁴ On appeal, the SCC considered this appropriate “remedy”.⁵⁵

78. Wherefore, the Chamber committed yet another error of law in relying upon Internal Rule 82(4) in rejecting Mr KHIEU Samphân’s new Application for Immediate Release.

⁵⁴ Chamber’s 2011 Decision, para. 42.

⁵⁵ SCC Decision Concerning KHIEU Samphân, paras. 51 and 55.

FOR THESE REASONS

79. The Defence for Mr KHIEU Samphân requests the Supreme Court Chamber to:

- HOLD a public hearing,
- ANNUL the Decision on Mr KHIEU Samphân's Application for immediate release,
- ORDER Mr KHIEU Samphân's immediate release,
- ISSUE any bail orders, as necessary.

	KONG Sam Onn	Phnom Penh	
	Anta GUISSÉ	Paris	
	Arthur VERCKEN	Paris	
	Jacques VERGÈS	Paris	
Date	Name	Place	Signature