



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

Request for Correction

Case : 002/19-09-2007-ECCC/TC

| To Document No(s): | ERN(s): | Request Date: | Correction Type: |
|--------------------|-------------------|---------------|---|
| E138/1/10 | 00846915-00846933 | 19/09/2012 | <input checked="" type="checkbox"/> Change to Original <input type="checkbox"/> Change to Translation <input type="checkbox"/> Reclassification |

Reason for changes:
 Typographical errors.

Details:
 Para. 22: moved second half of FN 58 to FN 56.
 Para. 25: change "women" to "woman"; FN 62 changed word.
 disposition: change "desist" to "refrain" consistent with para. 38.

Filing Party: Trial Chamber

Signature:

Approved by Greffier (for originals): Trial Chamber

Signature:

Approved by ITU (for translations):

Signature:

| |
|---|
| ឯកសារដើម |
| ORIGINAL DOCUMENT/DOCUMENT ORIGINAL |
| ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):19/09/2012..... |
| ម៉ោង (Time/Heure) :.....16:22..... |
| មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier:.....LCH A.Ton..... |

Federal Court of Australia evaluated the lawfulness of the detention of a defendant who had no real possibility of ever becoming fit to stand trial. It specifically rejected a detention order with six-monthly reviews, holding:

any suggestion that a person could be held in custody for many years, without trial or any possibility of trial, simply because a charge has been laid against him which he will never be well enough to answer, is so repugnant to our legal system's protection of the right to freedom that it would require clear evidence of legislative intention before it could be accepted.⁵¹

22. As the SCC has noted, the Cambodian legal system is also protective of the right to liberty and contains a presumption in favour of release of an Accused pending trial.⁵² A fundamental requirement of international human rights norms is also that any deprivation of liberty must be supported by well-founded reasons established by law.⁵³ In this regard, the European Court of Human Rights ("ECtHR") has held that the reasons for pre-trial confinement may become attenuated over time and that in such circumstances the person concerned should be released.⁵⁴ It has held that the gravity of the charges, the public reaction to them, and the severity of a possible sentence can be taken into account in determining to detain an Accused, but these reasons cannot by themselves justify long periods of detention.⁵⁵ Furthermore, the rationale for continued detention must be balanced against the risk of an unreasonably long or indefinite deprivation of liberty.⁵⁶

Comment [RLP1]: The second part of footnote 58 was moved to footnote 56.

the Accused's interests); Mental Health Act 1983, ss. 36(1), 37 (United Kingdom) (permitting remand of an Accused to hospital for treatment for up to twelve weeks where an accused is suffering from a mental disorder which makes detention in a hospital for medical treatment appropriate, and appropriate medical treatment is actually available).

⁵¹ *R v. Jabbari*, 50 ALR 147 at 151-52 (citing with approval *Jackson v. Indiana*).

⁵² SCC Decision on Immediate Appeal, para. 39; *see also* Internal Rule 63(3), 82(1) and Cambodian Code of Criminal Procedure, Articles 205, 306.

⁵³ European Convention on Human Rights, Article 5; *see also* International Covenant on Civil and Political Rights, Article 9; American Convention on Human Rights, Article 7 and African Charter on Human and People's Rights, Article 6.

⁵⁴ *Letellier v. France*, Judgement, ECtHR (no. 12369/86), 26 June 1991, para. 39.

⁵⁵ *Khudoyorov v. Russia*, Judgement, ECtHR (no. 6847/02), 8 November 2005, para. 180; *Letellier v. France*, Judgement, ECtHR (no. 12369/86), 26 June 1991, para. 51.

⁵⁶ SCC Decision on Immediate Appeal, para. 24. International human rights courts have uniformly held that unreasonably long pre-trial detention violates an Accused's fundamental rights, including in cases concerning very serious or particularly complex crimes; *see e.g. Labita v. Italy*, Judgement, ECtHR Grand Chamber (no. 26772/95), 6 April 2000, paras 154, 161, 164 (holding pre-trial detention of two years and seven months in a case concerning 46 alleged members of a Mafia type organization unreasonably long); *Soria Valderrama v. France*, Judgment, ECtHR (no. 29101/09), 26 January 2012, para. 30 (finding detention of four years and eight months to be *prima facie* unreasonable and needing to be justified by especially compelling reasons); *Piechowicz v. Poland*, Judgment, ECtHR (no. 20071/07), 17 April 2012, paras 188, 197; *Todorov v. Ukraine*, Judgment, ECtHR (no. 16717/05), 12 January 2012, paras 61-64; *Case of Suárez-Rosero v. Ecuador*, Judgment, I/A Court H.R., November 12, 1997, (Merits), para. 73 (holding four-year long preventive detention "far exceeds the reasonable time contemplated in the American Convention"); *Anthony Briggs Trinidad and Tobago*, Inter-American Commission on Human Rights, Report 44/99 (Case 11.815), 15 April 1999, para. 55; *Although*

23. As the above jurisprudence shows, the continued detention of an Accused who is unfit to stand trial can only be justified where there is a substantial likelihood that he or she may become fit to stand trial in the foreseeable future (and thus, where there is a reasonable prospect of that individual being tried without undue delay).

6. FINDINGS

6.1. Findings on the Accused's fitness to stand trial following the experts' reassessment

24. The Trial Chamber is in receipt of consistent and unanimous findings by multiple experts that the Accused suffers from a progressive, dementing illness (most likely Alzheimer's disease) and that she is unlikely to improve either spontaneously or with further treatment. On the basis of the experts' findings, the Trial Chamber reaffirms its prior conclusion that IENG Thirith's long-term and short-term memory loss ensures that she would be unable to understand sufficiently the course of proceedings to enable her to adequately instruct counsel and to effectively participate in her own defence. Following the most recent expert assessment, it appears that the Accused would further be unlikely to be able to testify at trial.⁵⁷ All available measures presently capable of improving IENG Thirith's cognitive function have been tried. As the Accused, despite the exhaustion of these measures, remains unable to meaningfully exercise her fundamental fair trial rights, the Chamber reaffirms its earlier finding that the Accused is unfit to stand trial. There further appears to be no reasonable prospect that IENG Thirith's cognitive impairment can be reversed.

25. Although noting the contrary conclusions of Dr. CHAK Thida, the Chamber notes that on 31 August 2012 and in their report, the experts outlined a number of specific methodological, factual and analytical shortcomings in Dr. CHAK Thida's reports and subsequent testimony.⁵⁸ For example, and while noticing some loss of memory, Dr. CHAK

periods of pre-trial detention before the *ad hoc* tribunals have frequently been lengthy, in all cases cited by the Co-Prosecutors, trial of the Accused was on-going or has in fact occurred. No example cited concerned an Accused retained in detention despite no prospect of trial in the foreseeable and not too distant future (see Table of Cases where detention of the accused before ICTY and ICTR has lasted 5-10 years, E138/1/9.1, 10 September 2012).

⁵⁷ Medical Experts' Reassessment, para. 62.

⁵⁸ Medical Experts' Reassessment, para. 40; T., 31 August 2012, pp. 77.⁵ ~~Although periods of pre-trial detention before the *ad hoc* tribunals have frequently been lengthy, in all cases cited by the Co-Prosecutors, trial of the Accused was on-going or has in fact occurred. See Table of Cases where detention of the accused before ICTY and ICTR has lasted 5-10 years, E138/1/9.1, 10 September 2012. No example cited concerned an Accused retained in detention despite no prospect of trial in the foreseeable and not too distant future.~~

Thida concluded that the Accused exhibited no sign of mental illness.⁵⁹ Dr. CHAK also denied that IENG Thirith suffered from urinary incontinence and hallucinations, even though this was independently verified by those responsible for her daily care.⁶⁰ Although Dr. CHAK recorded an MMSE score of 24 out of 30 for IENG Thirith in July 2012, the experts noted that this was inconsistent with eight other MMSE scores from 2011 and 2012.⁶¹ The experts further noted that Dr. CHAK administered the MMSE incorrectly by substituting a number of standardized questions for others which were less demanding.⁶² This test is standardized, based on internationally-accepted guidelines, and change to it was both unnecessary and served to invalidate the results obtained.⁶³ Dr. CHAK also appeared to misapply the test designed to assess orientation in time and failed to gather informant histories.⁶⁴ Although alleging that her evaluation was more likely to be correct because of a superior rapport with IENG Thirith as a woman and a Khmer speaker, there was no indication of a lack of rapport between the experts and the Accused, or indeed that the Accused responded more favourably to persons of her own gender and culture.⁶⁵ Dr. CHAK in any case agreed that there had been no improvement of IENG Thirith's cognitive function over the past few months.⁶⁶ For these reasons, the Chamber does not consider Dr. CHAK's report or subsequent testimony to cast doubt on the experts' conclusions.⁶⁷

⁵⁹ T., 30 August 2012, pp. 24, 26-27, 29, 31 and 36.

⁶⁰ Medical Experts' Reassessment, paras 43-44 (noting reports by the Chief of Detention Facility, female guards and physiotherapist that IENG Thirith suffers from incontinence and apparent hallucinations). Although Dr. CHAK Thida claimed that Professor Campbell did not properly describe Accused's ability to recognize a pen, later consultation with notes suggested that this assertion was incorrect (T., 31 August 2012, p. 8). In addition, she failed to take informant histories (Medical Experts' Reassessment, para. 40).

⁶¹ Medical Experts' Reassessment, para. 40.

⁶² Medical Experts' Reassessment, para. 40 (indicating that if correctly rescored, IENG Thirith would have scored a maximum of 15 out of 30 on the MMSE administered by Dr. CHAK); T., 31 August 2012, pp. 4-5, 77-78.

⁶³ T., 31 August 2012, p. 69. Further, Dr. CHAK appeared to contradict herself by indicating that as the Accused is highly intelligent and educated, there was no need to adjust the test to take account of her educational level and thus no barrier to applying the standardized version of the test (T., 30 August 2012, pp. 45).

⁶⁴ Medical Experts' Reassessment, para. 40.

⁶⁵ T., 30 August 2012, pp. 32-33, 80; T., 31 August 2012, pp. 3, 6, 65-66 (indicating that the experts developed a good rapport with the Accused, and that the Accused behaved with intermittent hostility toward the Cambodian female staff of the Detention Facility). Further, the Cambodian psychiatrist, Dr. HOUT Lina, concurred with the findings of the other international experts (T., 31 August 2011, pp. 11, 56).

⁶⁶ Medical Experts' Reassessment, para. 40.

⁶⁷ T., 30 August 2012, pp. 49-50. Although stating that she has experience with Alzheimer's disease, Dr. CHAK Thida was unable to specify the nature and depth of this experience. By contrast, each of the experts possess decades of training and experience in the practice of forensic psychiatry, geriatric medicine and psychiatry respectively (T., 31 August 2012, pp. 15-21); *see also* Curriculum Vitae of Seena FAZEL, E111.4; Curriculum Vitae of Dr. HUOT Lina, E111.2 and Summary of Expert Witness Qualifications, Professor Campbell, E62.1, 9 March 2011.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

REAFFIRMS the findings of the Trial Chamber that the Accused IENG Thirith is unfit to stand trial;

CONFIRMS the severance of the charges against the Accused from the indictment in Case 002 pursuant to Internal Rule 89*ter*;

CONTINUES its previous stay of proceedings against the Accused IENG Thirith in Case 002 indefinitely;

CONSEQUENTLY ORDERS the immediate release of the Accused IENG Thirith from the ECCC Detention Facility;

REMINDS the Accused of her obligation pursuant to Internal Rule 35 to refrain from interference with the administration of justice, and in particular, interference with witnesses, experts or victims before the ECCC (including Accused other than her husband IENG Sary), and further requests the Accused to desist ~~refrain~~ from communicating with the media in relation to proceedings before the ECCC;

Comment [RLP2]: Consistent with para. 38 of decision.

REQUESTS that the Accused remain within the territory of the Kingdom of Cambodia and that she or her guardian inform the ECCC Office of Administration prior to any change of address;

NOTES that the Trial Chamber possesses no jurisdiction pursuant to the Cambodian Civil Code to appoint a guardian or curator in respect of the Accused, which is instead within the exclusive competence of the Cambodian domestic courts;

UNDERTAKES to consult with the experts annually, commencing in March 2013 and continuing for the duration of the ECCC's existence, to ascertain whether new treatment options or therapy for progressive, dementing illnesses (in particular Alzheimer's disease) have been discovered which in their professional opinion are likely to restore the Accused's cognitive capacity such that she may become fit to stand trial;

REJECTS all other measures sought by the Co-Prosecutors;

DENIES the request of the Lead Co-Lawyers to appoint a new panel of experts; and

NOTES that this decision is appealable in accordance with the ECCC Internal Rules and applicable law.

Phnom Penh, 13 September 2012
President of the Trial Chamber