



UNAKRT

United Nations Assistance to the Khmer Rouge Trials

UNITED NATIONS ADMINISTRATIVE JUDGE

Case No.: UNAKRT/UNAJ/SCC/2019/1
Before: Judge Phillip RAPOZA
Greffier/Legal Officer: Peace MALLEN
Date: 30 December 2019
Language: English
Classification: PUBLIC

**DECISION ON URGENT APPEAL BY CO-LAWYERS FOR KHIEU SAMPHÂN OF
DEFENCE SUPPORT SECTION'S DECISION REFUSING THE RECRUITMENT
OF AN INTERNATIONAL LEGAL CONSULTANT (LEVEL 3)
EFFECTIVE 1 OCTOBER 2019**

Co- Lawyers for Khieu Samphân

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1. **Judge Phillip RAPOZA**, Reserve Judge of the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), was nominated on 15 October 2019 by Knut ROSANDHAUG, Coordinator of the United Nations Assistance to the Khmer Rouge Trials (“UNAKRT”) and Deputy Director of the Office of the Administration, to serve as the United Nations Administrative Judge (“Administrative Judge”) in Case No. UNAKRT/UNAJ/SCC/2019/1.¹
2. This case involves an appeal by Anta GUISSÉ and KONG Sam Onn, Co-Lawyers for KHIEU Samphân (“Co-Lawyers,” “Defence,” or “Appellants,” as appropriate), brought pursuant to Article 11.1 of the ECCC Legal Services Contract (“Legal Services Contract”), regarding a recruitment dispute with Mario HEMMERLING, Chief of the Defence Support Section (“DSS Chief” or “Respondent,” as appropriate).
3. The dispute between the Appellants and the Respondent arises in relation to an administrative decision of the Respondent dated 23 September 2019 (“Impugned Decision”).² The Impugned Decision denied the Appellants’ request for the recruitment of ██████████ as an international legal consultant (level 3) for the appeal of KHIEU Samphân (“Accused”) before the Supreme Court Chamber in Case 002/02. At the time of the request, ██████████ was already working for the Defence as an international associate legal consultant (level 2).
4. Accordingly, the Administrative Judge is seised of the “Urgent Appeal of DSS’s Decision to Refuse Review of its Decision to Oppose the Recruitment of an

¹ Letter of Knut ROSANDHAUG, Coordinator, UNAKRT, to Judge Phillip RAPOZA, Reserve Judge, Supreme Court Chamber, ECCC, dated 15 October 2019, with copies to the Appellants and the Respondent.

² Email from DSS to Co-Lawyers with attached letter dated 23 September 2019 captioned “Subject: Request for review of DSS decision,” (“Impugned Decision” or “Attachment 1 to the Urgent Appeal,” as appropriate).

International Legal Consultant (Level 3) effective 1 October 2019,”³ submitted on 2 October 2019 (“Urgent Appeal”), to which the DSS Chief submitted a response on 30 October 2019 (“Response”).⁴

I. PROCEDURAL BACKGROUND

5. Following the conclusion of trial proceedings in Case 002/02, both the budget of the Defence team and the number of its legal consultants were significantly reduced.⁵ The Defence was allowed, however, to return to its normal budget on 15 November 2018.⁶ On that date the Defence recruited an international associate legal consultant (level 2) and an international junior legal consultant (level 1).⁷
6. On the following day, 16 November 2018, the Trial Chamber announced its verdict in Case 002/02, convicting both NUON Chea and KHIEU Samphân of crimes against humanity, grave breaches of the Geneva Conventions and genocide and sentenced them to life imprisonment.⁸ The Trial Chamber provided a summary of the reasons for its verdict and indicated that the time limit for filing notices of appeal would begin following the notification of the “fully reasoned written Judgement.”⁹
7. On 1 December 2018, the Defence recruited [REDACTED] as an international associate legal consultant (level 2).¹⁰
8. On 28 March 2019, the Trial Chamber issued a “fully reasoned written judgement” (“Trial Judgement”) in Case 002/02 with respect to both of the

³ Urgent Appeal of DSS’s Decision to Refuse Review of its Decision to Oppose the Recruitment [REDACTED] as Legal Consultant (Level 3) effective 1 October 2019, dated 2 October 2019, (“Urgent Appeal”).

⁴ The DSS Chief’s response was in the form of a letter to the Administrative Judge dated 30 October 2019, with copies to the Co-Lawyers (“Response”).

⁵ Urgent Request for an Increase in the Khieu Samphân Defence Team’s Consultancy Budget and Clarification for 2020-2021, dated 23 July 2019 (“Urgent Request” or “Attachment 3 to the Urgent Appeal” as appropriate), para. 2.

⁶ Attachment 3 to the Urgent Appeal, para. 15.

⁷ Attachment 3 to the Urgent Appeal, para. 16.

⁸ Summary of Judgement, Case 002/02, 16 November 2018, paras 72-76.

⁹ Summary of Judgement, Case 002/02, 16 November 2018, para. 79.

¹⁰ The Appellants contend that, although recruited as a level 2 associate legal consultant in order “to comply with the budget limit...based on her level of experience, she should have been recruited at level 3.” Urgent Request, para. 17.

Accused.¹¹ On 3 April 2019, the Co-Lawyers for KHIEU Samphân requested that the Supreme Court Chamber (“SCC”) grant an extension of time to file the Defence notice of appeal as well as an increase in the number of pages to be submitted.¹² On 26 April 2019, the SCC granted the Defence request in part, allowing a total of three (3) months to file a notice of appeal of not more than sixty (60) pages.¹³

9. The Co-Prosecutors filed their Notice of Appeal on 21 June 2019, and the Defence filed its Notice of Appeal on 1 July 2019.¹⁴ On 10 July 2019, the Co-Lawyers filed a request seeking an extension of time to file their appeal brief as well as to respond to the Co-Prosecutor’s brief.¹⁵ They requested that the SCC, *inter alia*, “[grant leave] to the Defence to file a 950 page appeal brief in French within 10.5 months of filing of its Notice of Appeal initially in one language, with translation into Khmer to follow as soon as possible”.¹⁶
10. On 23 July 2019, the Co-Lawyers for KHIEU Samphân submitted to the DSS Chief an “Urgent Request for an Increase in the KHIEU Samphân Defence Team’s Consultancy Budget and Clarification for 2020-2021”.¹⁷ In the “Urgent Request,” the Co-Lawyers asserted that “the current consultancy budget is insufficient in view of the current and future workload” of the Defence with respect to the pending appeal in Case 002/02.¹⁸
11. In support of their request for additional staff beyond what could be supported by the budget already allocated to it, the Co-Lawyers noted the differences between Case 002/01 and Case 002/02 both as to their complexity and the volume of evidence

¹¹ Case 002/02 Judgement, 16 November 2018, E465 (“Trial Judgement”). The judgement consisted of 2,387 pages in English, 2,828 pages in French and 4,101 pages in Khmer and included 14,446 footnotes.

¹² KHIEU Samphân Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 3 April 2019, F39/1.1 (“Request for Notice of Appeal Extension”).

¹³ Decision on NUON Chea and KHIEU Samphân’s Requests for Extensions of Time and Page Limits on Notices of Appeal, 26 April 2019, F43, para. 13 (“SCC Decision on Notice of Appeal Extension”).

¹⁴ Co-Prosecutors’ Notice of Appeal of the Trial Judgement in Case 002/02, 21 June 2019, E465/2/1, (“Co-Prosecutor’s Notice of Appeal”); (“Khieu Samphân’s Notice of Appeal”) (002/02), 1 July 2019, E465/4/1, (“Defence Notice of Appeal”). In its notice of appeal, the Defence cited 1,824 alleged errors of law and/or fact by the Trial Chamber and identified 355 interlocutory Trial Chamber decisions for possible appeal.

¹⁵ KHIEU Samphân’s Request for an Extension of Time and Page Limits for Filing his Appeal Brief, 10 July 2019, F45, (“Request for Appeal Brief Extension”).

¹⁶ Request for Appeal Brief Extension, para. 41.

¹⁷ Attachment 3 to the Urgent Appeal.

¹⁸ Attachment 3 to the Urgent Appeal, para. 14.

involved. Comparing the latter case to the former, they asserted that Case 002/02 involves a trial judgement that is 3.5 times longer; includes 4.4 times more footnotes; considers approximately 4 times more series of facts; and pronounces 6 times more convictions against the Accused. They similarly pointed out that the amount of time required by the Trial Chamber to issue the final judgement in Case 002/02 was significantly longer than in Case 002/01.¹⁹

12. The Co-Lawyers went on to assert that, considering those factors, the time they had been allowed to prepare the notice of appeal was inadequate, rendering the task of preparing their appellate brief more onerous.²⁰ They also noted that beyond the preparation of the appeal brief, they were required to undertake other work relating to the appeal, such as an application to disqualify SCC judges.²¹ Moreover, they stated that their responsibilities to the Accused were not limited to preparing an appeal brief, but included the filing of motions, and responding to the filings of other parties. In this respect they also alluded to the daily management of tasks relating to KHIEU Samphân's family visits, his health and his fitness to stand trial.²²
13. Accordingly, the Co-Lawyers emphasized that "[t]he *current team* therefore *needs to be strengthened* to cope with this heavy workload on appeal in this unusually large case."²³ (emphasis added). Indeed, they stated that "the *Defence team must...be brought up to its full staffing level* at least until the appeal hearings,"²⁴ (emphasis added) stating that "it is imperative for the Defence to be able to *maintain a full team*."²⁵ (emphasis added). Considering their insistence on the need for bringing the Defence team up to its full staffing level, a level that they stated it was imperative to maintain, they also mentioned the difficulties in recruiting and retaining staff as the work of the ECCC reaches its conclusion.²⁶

¹⁹ Attachment 3 to the Urgent Appeal, paras 22-27.

²⁰ Attachment 3 to the Urgent Appeal, paras 28-35.

²¹ Attachment 3 to the Urgent Appeal, paras 36-41.

²² Attachment 3 to the Urgent Appeal, paras 36-41.

²³ Attachment 3 to the Urgent Appeal, para. 42. *See also*, para. 20: "[T]he Defence team must be strengthened..."; *See also*, para. 21, referring to "[t]he need to strengthen the team."

²⁴ Attachment 3 to the Urgent Appeal, para. 20.

²⁵ Attachment 3 to the Urgent Appeal, para. 47.

²⁶ Attachment 3 to the Urgent Appeal, paras 43-46.

14. Although the Co-Lawyers went on to make several different requests, as relates to the present Urgent Appeal, they asked that the annual consultancy budget of the Defence be maintained at the level of USD 243,000.²⁷ They went on, however, to request an additional USD 12,250 monthly supplement, to start immediately.²⁸ That sum was described as being “meant to enable [the Defence] to recruit as quickly as possible” three positions, being one senior international legal consultant (USD 6,750); two additional associate national legal consultants (level 2) (USD 2000 each, for USD 4000 total); and ██████████ “at her actual level of experience, i.e. as an associate international legal consultant at level 3 instead of level 2 (+ USD 1,500).”²⁹
15. On 21 August 2019, before making a recommendation to the Office of Administration, the DSS Chief sought clarification from the Co-Lawyers regarding their “Urgent Request” of 23 July 2019.³⁰ Specifically, he asked: (1) Whether the Defence request to the SCC for an extension of time to file its appeal brief was due to “the heavy workload and the current level of staffing” and, if so, whether the SCC had already ruled on that request; (2) How would the “promotion” of ██████████, an existing consultant, rather than the recruitment of additional consultants, alleviate the workload;³¹ and (3) What type of work would be carried out by the Defence, including the filing of motions and other submissions, during the period between the SCC appeal hearing and the issuance of the final judgement that would justify the request for additional funds.³²
16. On 23 August 2019, the SCC rendered its decision on the Defence request for both an extension of time to file its appeal brief and an increase in the number of pages to be submitted. The SCC allowed the request in part, granting the Defence an

²⁷ Attachment 3 to the Urgent Appeal, para. 69 (1)(a).

²⁸ Attachment 3 to the Urgent Appeal, para. 69 (1)(b).

²⁹ Attachment 3 to the Urgent Appeal, para. 70.

³⁰ Email from the DSS Chief to Co-Lawyers apparently captioned “Your urgent request for budget increase” contained as paragraphs 1-3 (in bold) in the email from the International Co-Lawyer to DSS captioned “Re: Your urgent request for budget increase,” dated 28 August 2019 (Attachment 7 to the Urgent Appeal).

³¹ The term “promotion” originates with the DSS Chief.

³² The DSS Chief’s requests for clarification are repeated in the document containing DSS’s email response dated 28 August 2019 with the subject line “Your urgent request for budget increase,” being Attachment 7 to the Urgent Appeal. The DSS Chief’s requests appear in the email as paras 1-3 (in bold).

extension until 27 February 2020 to file its appeal brief and setting a page limit of 750 pages.³³

17. On 28 August 2019, the International Co-Lawyer responded to the threefold request of the DSS Chief for clarification.³⁴

(a) With respect to the inquiry about the basis for the Defence extension request regarding its appeal brief and whether the SCC had rendered a decision: The Co-Lawyer confirmed that the SCC had ruled on the Defence request for an extension of time to file its appeal brief and to increase the number of pages to be submitted, although in both instances what the SCC granted fell short of what the Defence had requested. The Co-Lawyer explained that to the extent the Defence had “stated our problems of staffing in our request, it was far from being the main reason [for] the deadline extension request nor the reason for granting of the extension.”³⁵ The Co-Lawyer went on to describe the factors brought to the attention of the SCC that contributed to the heavy workload of the Defence team, including the length of the Trial Judgement and the complexity of the legal issues under discussion,³⁶ stating that “[t]hese are the main reasons why our deadline was granted.”³⁷ Further responding to the DSS Chief’s request for clarification,

³³ Decision on KHIEU Samphân’s Request for Extension of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, **F49**, para. 36 (“SCC Decision on Request for Appeal Brief Extension”).

³⁴ Attachment 7 to the Urgent Appeal, paras 1-3 (in bold).

³⁵ Although the Defence did not describe its staffing issues in detail in KHIEU Samphân’s Request for Appeal Brief Extension, it did so in KHIEU Samphân Defence Request for Extension of Time and Number of Pages to File Notice of Appeal, 17 April 2019, **F39/1.1**, paras 28-34 (“KHIEU Samphân’s Request for Notice of Appeal Extension”), to which the SCC made reference in its Decision on KHIEU Samphân’s Request for Extension of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, **F49**, (“SCC Decision on Request for Appeal Brief Extension”), stating at para. 33 that “the declared resource constraints of KHIEU Samphân’s defense team have duly been taken into consideration in determining an appropriate extension.” The SCC went on, however, to decline further consideration of the matter, stating that “[s]hort of circumstances which demonstrably jeopardize (or have the potential to jeopardize) an accused’s right to fair proceedings or an effective defense, the Chamber is not empowered to adjudicate the appropriateness of resources allocated to defense teams. This falls within the administrative ambit of the Defense Support Section which, under Internal Rule 11, is bestowed with autonomy as concerns substantive defense matters.”

³⁶ Request for Appeal Brief Extension, in which the Defence stated that “the size and complexity of the trial in Case 002/02 and of the written Judgement are significantly more extensive than in Case 002/01. Logically, it is apparent from KHIEU Samphân’s notice of appeal in Case 002/02 that his appeal would be considerably more extensive than in Case 002/01.” para. 15.

³⁷ Attachment 7 to the Urgent Appeal, para. 1 (in bold); *See also*, SCC Decision on Request for Appeal Brief Extension, para. 8, where the SCC states that the Accused “requests that an extension in the present case be granted in consideration of the size and complexity of the Trial Judgement. He argues that resource constraints

the Co-Lawyer referred back to their “Urgent Request” of 23 July 2019, in which the Defence had previously described work to be undertaken in addition to the preparation of the appeal brief, including the filing of various motions and the need to respond to the filings of other Parties.³⁸

(b) With respect to the inquiry as to how the “promotion” of an already recruited consultant, as compared to the recruitment of additional consultants, would alleviate the workload of the Defence: The Co-Lawyer described the rationale behind the request to recruit ██████████ as a legal consultant (level 3) from her then existing position as an associate legal consultant (level 2). The Co-Lawyer stated that ██████████ had “agreed to start in our team below the level of her competences because we were in a difficult situation and needed someone right away.”³⁹ Consequently, “[w]e have *promised her* that we would *do anything in our power* for her to obtain the salary that she is *entitled* to have according to her experience and we specifically told her about all the increase of budget we had done before her hiring.”⁴⁰ (emphasis added). The Co-Lawyer expressed concern that “we won’t be able to give attractive reasons to stay if she has ... better offers before the end of the case” and opined that “the chance of being able to recruit someone new at her level at this stage of the proceedings is *proche (sic)* to zero.” The Co-Lawyer went on to describe the request with respect to ██████████ as a “managerial move to avoid ... a crisis when she has an offer corresponding to her level.”⁴¹

(c) With respect to the inquiry about the type of work to be carried out by the Defence during the period between the SCC appeal hearing and the issuance of the final judgement: The Co-Lawyer stated that the “main work” of the Defence will relate to several issues, including reclassification of documents and motions

compelled him to identify errors cursorily in his notice of appeal, and he accordingly requires more time and space to adequately review the legal and factual authorities supporting the Trial Chamber’s conclusions.” Although concluding that the Defence request was “unduly excessive,” the SCC noted the voluminous trial record and related factors that led it to find that “exceptional circumstances exist which warrant extensions of time and page limits.” paras 14-15.

³⁸ Urgent Request, paras 36-37.

³⁹ Attachment 7 to the Urgent Appeal, para. 2 (in bold).

⁴⁰ Attachment 7 to Urgent Appeal, para. 2 (in bold).

⁴¹ Attachment 7 to the Urgent Appeal, para. 2 (in bold).

(from confidential to public); ongoing considerations with respect to KHIEU Samphân's fitness and detention conditions; monitoring family visits; preparing archives; and "administrative and legal issues." The Co-Lawyer also alluded to preparing for a proceeding apparently described in a "strictly confidential part of our memo" involving a request for reconsideration and revision of the appeal judgement in Case 002/01.⁴²

18. On 10 September 2019, the DSS Chief informed the Co-Lawyers that the consultancy funds for the KHIEU Samphân Defence team would be increased by an additional monthly amount of USD 4,500 from 1 October to 31 December 2019. The decision specified that the stated amount would allow for the recruitment of one (1) additional junior international legal consultant (level 1) and one (1) additional associate national legal consultant (level 2).⁴³ In explaining the basis for his determination, the DSS Chief acknowledged that the trial record in Case 002/02 is "voluminous, which requires significant work from the Defence team."⁴⁴ He went on to state: "Considering the full scope of the lengthy and allegedly erroneous trial judgement, DSS agrees insofar with the Co-Lawyers that drafting a well-reasoned appeal brief demands more resources beyond the current support staff at the disposal of the Co-Lawyers."⁴⁵ On the other hand, the DSS Chief also made clear that he was "not of the view that increasing monthly fees for an already recruited legal consultant ("promotion") would effectively help them cope with the team's workload related to drafting and filing Mr. KHIEU Samphân's appeal brief."⁴⁶

19. On 16 September 2019, the Co-Lawyers submitted a memorandum to the DSS Chief entitled "Urgent – Recruitment of 3 Legal consultants starting 1st October 2019" that responded to his memorandum of 10 September.⁴⁷ In their memorandum the Co-Lawyers referenced the monthly increase of USD 4,500 in consultancy funds for the

⁴² Attachment 7 to the Urgent Appeal, para. 3 (in bold).

⁴³ DSS Memorandum dated 10 September 2019, para. 14 ("Attachment 2 to the Urgent Appeal").

⁴⁴ Attachment 2 to the Urgent Appeal, paras 12-13.

⁴⁵ Attachment 2 to the Urgent Appeal, para. 13.

⁴⁶ Attachment 2 to the Urgent Appeal, para. 12.

⁴⁷ Urgent – Recruitment of 3 Legal Consultants starting 1st October 2019, Memorandum from Co-Lawyers to the DSS Chief dated 16 September 2019 ("Attachment 4 to the Urgent Appeal").

KHIEU Samphân's Defence team, but did not acknowledge the DSS Chief's explanation in his 10 September communication that the purpose of those funds was to "allow for the recruitment of one (1) additional junior international and one (1) additional associate national legal consultant."⁴⁸ Similarly, they did not acknowledge the DSS Chief's indication that the additional funds were not being provided to increase monthly fees for an "already recruited legal consultant" because doing so would not "effectively help them cope with the team's workload related to drafting and filing KHIEU Samphân's appeal brief."⁴⁹ Rather, the Co-Lawyers explained that they would use the additional monthly USD 4,500 to recruit ██████████ (the existing level 2 international associate legal consultant) as a level 3 international legal consultant and two other persons as national associate legal consultants (level 2), one on a full time and one on a half-time basis.⁵⁰ Accordingly, they requested the recruitment of ██████████ and the two other individuals as legal consultants at the stated levels.⁵¹ Moreover, they stated for the first time that ██████████ was willing "to undertake more responsibilities (in order, amongst other things, to alleviate part of the workload of the international senior consultant, needed more on the substance than ever)."⁵²

20. On 17 September 2019, the DSS Chief responded by email to the Co-Lawyers' memorandum of the previous day.⁵³ He granted the Defence request in part by allowing the recruitment of both national associate legal consultants (level 2) on a full-time basis for the period 1 October to 31 December 2019. Regarding the request of the Co-Lawyers to proceed with the recruitment of ██████████ as an international legal consultant (level 3), the DSS Chief referred the Defence to his memorandum of 10 September 2019, in which he effectively refused to provide funds to "promote" an international associate legal consultant (level 2) to the position of international legal consultant (level 3).⁵⁴

⁴⁸ Attachment 2 to the Urgent Appeal, para. 14.

⁴⁹ Attachment 2 to the Urgent Appeal, para. 12.

⁵⁰ Attachment 4 to the Urgent Appeal, paras 11-13.

⁵¹ Attachment 4 to the Urgent Appeal, para. 15.

⁵² Attachment 4 to the Urgent Appeal, para. 6. See also, Urgent Appeal, para.41.

⁵³ Email from the DSS Chief to Co-Lawyers captioned "Memo re: recruitments Oct 2019," dated 17 September 2019, ("Attachment 5 to the Urgent Appeal").

⁵⁴ Attachment 2 to the Urgent Appeal, para. 12.

21. On 17 September 2019, the Defence requested that the DSS Chief review his 10 September decision to refuse the recruitment of ██████████ as an international legal consultant (level 3).⁵⁵ In their “Request for review,” the Co-Lawyers asserted that “DSS has refused to allow the co-lawyers to manage the budget allocated to them in the way that they consider best for the performance of their work.”⁵⁶ In that regard, they cited the ECCC Legal Assistance Scheme as standing for the proposition that, while the number of support staff (including legal consultants) shall be subject to a cost cap, it is for the Co-Lawyers to decide how many and which levels of legal consultants to recruit based on the amount budgeted for support staff salaries.⁵⁷ Stating that the DSS Chief had “agreed with the co-lawyers of KHIEU Samphân that a budget increase [was] necessary and stated [he] would increase the funds by [an] additional 4500 USD/month,” the Co-Lawyers questioned the basis for the DSS Chief’s opposition to the recruitment of ██████████ as legal consultant (level 3).⁵⁸ They also compared the terms of reference for levels 2 and 3, stating that a legal consultant at the higher level had management responsibilities that were beyond the scope of a level 2 legal consultant.⁵⁹ Accordingly, they asserted that if ██████████ were recruited to a level 3 position with additional management responsibilities, the arrangement would free up time for the senior consultant to work on the drafting of the appeal brief.⁶⁰

22. On 23 September 2019, the DSS Chief responded to the 17 September 2019 request of the Co-Lawyers that he review his decision to refuse the recruitment of

⁵⁵ Request for review of refusal to recruit ██████████ as a legal consultant (Level 3), Letter from Co-Lawyers to DSS dated 17 September 2019 (“Request for review” or “Attachment 6 to the Urgent Appeal,” as appropriate).

⁵⁶ Attachment 6 to the Urgent Appeal, para. 2.

⁵⁷ ECCC Legal Assistance Scheme (Amended December 2014), D. DEFENCE TEAMS, Par. 1: “Where required for the effective representation of the suspect, charged person, accused, or appellant, the Co-Lawyers may request the DSS to provide one Case Manager and a number of Legal Consultants and or Evidence Analysts. The number of such support staff shall be subject to a cost cap; it will therefore be for the Co-Lawyers to decide how many and which levels of Legal Consultants to recruit based on the amount budgeted for support staff salaries and other costs.”

⁵⁸ Attachment 6 to the Urgent Appeal, para. 8. The Co-Lawyers go on to state that it did not appear that “your decision of refusal to recruit would be related to ██████████ experience and training since she obviously meets all the criteria corresponding to the Level 3 legal consultant.” para. 16. They also point out that she is knowledgeable about the case and is both available and onsite. para. 5.

⁵⁹ Attachment 6 to the Urgent Appeal, para. 17.

⁶⁰ Attachment 6 to the Urgent Appeal, para. 18.

██████████ as an international legal consultant (level 3).⁶¹ In what amounted to a further review of his previous decision, the DSS Chief once again refused the recruitment in question. (“Impugned Decision”).⁶²

23. In his response of 23 September, the DSS Chief contested the Co-Lawyers’ characterization of his decision not to approve the requested recruitment as a refusal “to allow the Co-Lawyers to manage the budget allocated to them in the way that they consider best for the performance of their work.”⁶³ He further recalled that for 2018/2019, USD 242,040 was allocated to the Defence for consultancy services and that “[the Defence] decided how to spend that money.”⁶⁴ He went on to state that he had reviewed the Defence request for additional funds to engage more legal consultants, including the recruitment of an existing international associate legal consultant (level 2) to a level 3 position. The DSS Chief also pointed out that he had allowed for the engagement of two additional national legal consultants “from funds beyond your regular budget for 2018/2019.”⁶⁵

24. With respect to the request concerning the existing international legal consultant (level 2), the DSS Chief referred back to his memorandum dated 10 September 2019, in which he stated he was “not of the view that increasing monthly fees for an already recruited legal consultant (“promotion”) would effectively help them cope with the team’s workload related to drafting and filing Mr. KHIEU Samphân’s appeal brief.”⁶⁶ The response also pointed out that in his communications of 10 September and 17 September 2019, the DSS Chief had stated that “additional funds requested for the purpose of supporting you to cope with the increased workload

⁶¹ Attachment 1 to the Urgent Appeal, para. 1. In keeping with his prior references, the DSS Chief referred to the requested review as relating to “its decision regarding the *promotion* of ██████████ to a legal consultant at Level 3.” (emphasis supplied).

⁶² See above, para. 3.

⁶³ Attachment 1 to the Urgent Appeal, para. 2.

⁶⁴ Attachment 1 to the Urgent Appeal, para. 2. The DSS Chief went on to state that in 2019 he also granted the Defence request to recruit an additional international junior legal consultant for the 1 October to 31 December 2019 time period

⁶⁵ Attachment 1 to the Urgent Appeal, para. 3.

⁶⁶ Attachment 2 to the Urgent Appeal, para. 12.

during the extended deadline for filing your client’s appeal brief cannot be used for promotion.” (emphasis in original).⁶⁷

25. On 2 October 2019, the Co-Lawyers for Khieu Samphân filed an “Urgent Appeal of DSS’s Decision to Refuse Review of its Decision to Oppose the Recruitment of [REDACTED] as Legal Consultant (Level 3) effective 1 October 2019.”⁶⁸ They requested, *inter alia*, the nomination of a UN administrative judge “to hear the appeal against the DSS decision of 23 September 2019 on the request for review thereof.”⁶⁹
26. On 15 October 2019, Knut ROSANDHAUG, Coordinator of the United Nations Assistance to the Khmer Rouge Trials and Deputy Director of the Office of the Administration, nominated Judge Phillip RAPOZA, Reserve Judge of the Supreme Court Chamber, as the UN Administrative Judge in the present matter to “look into the admissibility and, if appropriate, the merits of the representations, and advise me of the propriety of the 23 September decision.”⁷⁰
27. On 22 October 2019 the Legal Officer for the Administrative Judge emailed the Parties to determine if the DSS Chief wished to file a response to the Urgent Appeal by 31 October 2019. On 30 October 2019, the DSS Chief submitted a response (“Response”).⁷¹

II. ADMISSIBILITY

28. The Appellants refer the present dispute to the Administrative Judge pursuant to Article 11.1 of the Legal Services contract, which reads as follows:

⁶⁷ Attachment 1 to the Urgent Appeal, para. 4.

⁶⁸ Urgent Appeal of DSS’s Decision to Refuse Review of its Decision to Oppose the Recruitment of [REDACTED] as Legal Consultant (Level 3) effective 1 October 2019, dated 2 October 2019, (“Urgent Appeal” or “Urgent Appeal,” as applicable).

⁶⁹ Urgent Appeal, para. 3.

⁷⁰ Letter of Knut ROSANDHAUG, Coordinator, UNAKRT, to Judge Phillip RAPOZA, Reserve Judge, Supreme Court Chamber, ECCC, dated 15 October 2019, with copies to the Appellants and the Respondent.

⁷¹ The DSS response was in the form of a letter to the Administrative Judge dated 30 October 2019, with copies to the Co-Lawyers.

Non-Fees Disputes: Except for the disputes relating to the payment of fees claimed under Paragraph 9 of this contract, any disputes, controversy or claim between the Parties relating to the terms and conditions of this contract shall be resolved amicably between the Contracting Co-Lawyers and the Head of the DSS. In the event that the Parties are unable to settle such disputes, controversy or claim amicably within 60 days, each party may refer such dispute, controversy or claim to the international Judge nominated by the Co-coordinator of UNAKRT as the UN Administrative Judge.

29. Upon review of this provision, and as a preliminary matter, the Administrative Judge finds that the dispute between the Appellants and the Respondent constitutes a “dispute, controversy or claim” within the meaning of Article 11.1. Furthermore, the Administrative Judge finds that, despite the efforts of both the Co-Lawyers and the DSS Chief to resolve the matter amicably within the requisite time period, they were unable to do so, leaving the Impugned Decision as the Respondent’s final determination in the matter. Accordingly, the dispute is properly before the Administrative Judge and the Urgent Appeal is therefore admissible.

III. MERITS

30. The Appellants contend that the Impugned Decision should be overturned on several grounds: (1) The DSS Chief is not authorized to determine how funds allocated to the Defence are apportioned and, thus, acted *ultra vires* when the recruitment request was denied; (2) The decision of the DSS Chief to deny the recruitment request was arbitrary and an abuse of discretion, considering the resource needs of the Defence; (3) The decision of the DSS Chief to deny the recruitment request was an abuse of power that amounted to discrimination against [REDACTED] and (4) The decision of the DSS Chief to deny the recruitment request infringed on KHIEU Samphân’s right to effective legal representation.⁷²

⁷² The Appellants set out the four grounds of their appeal in a slightly different order. *See*, Urgent Appeal of DSS’s Decision to Refuse Review of its Decision to Oppose the Recruitment of [REDACTED] as Legal Consultant (Level 3) effective 1 October 2019, dated 2 October 2019, (“Urgent Appeal”) paras 2 and 18.

A. Whether the DSS Chief acted outside his authority and, thus, *ultra vires*

Contentions of the parties

31. The Appellants contend that the DSS Chief is not authorized to determine how funds allocated to the Defence are apportioned and, thus, acted *ultra vires* when the recruitment request in question was denied. Specifically, they argue that he violated Section D.1 of the Legal Assistance Scheme (LAS), which provides that, “[w]here required for the effective representation of the suspect, charged person, accused or appellant,” the Co-Lawyers may request DSS to provide, *inter alia*, “legal consultants.”⁷³ They point out that Section D.1 goes on to state that “the number of support staff shall be subject to a cost cap; it will therefore be for the Co-Lawyers to decide how many and which levels of Legal Consultants to recruit based on the amount budgeted for support staff salaries and other costs.”⁷⁴ Moreover, they assert that the cited provision applies not only to recruitments arising under their annual budget, but also to those that arise when additional funds are allocated to the Defence.⁷⁵
32. The Appellants further maintain that their interpretation of Section D.1 is consistent with their contention that the Co-Lawyers are best qualified “to decide which team composition is best suited to their work needs.”⁷⁶ The Appellants also assert that their position with respect to the recruitment that was refused is supported by past practice, citing a previous case in which additional funds were provided to the Defence outside its annual budget.⁷⁷
33. The Respondent, in turn, references the “obligations [of DSS] under the ECCC’s institutional framework to ensure that a proper balance is struck between ensuring that the rights of an indigent accused, including effective representation, are

⁷³ ECCC Legal Assistance Scheme (Amended December 2014) (“LAS” or “Attachment 9 to the Urgent Appeal,” as appropriate).

⁷⁴ Attachment 9 to the Urgent Appeal, para. D.1.

⁷⁵ Urgent Appeal, paras 29-31.

⁷⁶ Urgent Appeal, para. 37.

⁷⁷ Interoffice Memorandum of DSS entitled “Re: Joint Request for a Temporary Budget Increase,” 13 November 2015 (Attachment 10 to the Urgent Appeal).

maintained at every stage of proceedings, and the responsible and transparent administration of public funds pursuant to the Legal Assistance Scheme.”⁷⁸ The Respondent further cites the DSS Administrative Regulations (Regulations), by which the DSS administers the LAS, which determines how resources are allocated to the Defence.⁷⁹

34. The Respondent points out that Article 10.1 of the Regulations provides that: “The Co-Lawyers shall make a request for the appointment of a defence team to the Defence Support Section explaining the nature of the tasks to be undertaken and the duration of the appointment.”⁸⁰ He notes in particular that Article 10.2 goes on to state: “If it is agreed [by the DSS] that such appointments are necessary, the Co-Lawyers may select a legal Consultant... from the list, who shall be appointed by the Defence Support Section...”⁸¹

35. The Respondent emphasizes that when the Co-Lawyers made their request for an additional USD 12,250 and, *inter alia*, the recruitment of [REDACTED] as an international legal consultant (level 3), “DSS had not yet agreed that the appointment of further legal consultants was necessary within the meaning of Article 10.2.”⁸² He notes, however, that at a later point he communicated to the Co-Lawyers his agreement “that it would be necessary to engage further consultants to assist with the workload.”⁸³

36. The Respondent also points out that, although as DSS Chief he agreed both in principle and in fact to the recruitment of additional consultants to assist with the workload of the Defence, he did not agree to what he characterizes as the “promotion”

⁷⁸ DSS Response of 30 October 2019, para. 2.

⁷⁹ DSS Administrative Regulations (2007), C. Selection and Engagement/Assignment, Regulation 10 Selection and appointment of Defence Team. (“DSS Administrative Regulations”).

⁸⁰ DSS Administrative Regulations, Article 10.1.

⁸¹ DSS Administrative Regulations, Article 10.2.

⁸² DSS Response of 30 October 2019, para. 7.

⁸³ DSS Response of 30 October 2019, para. 7, fn. 3. The agreement of the DSS Chief to additional consultants was indicated in DSS Memorandum dated 10 September 2019 (“Attachment 2 to the Urgent Appeal”) in which it was stated that “it cannot be overlooked that the trial record in Case 002/02 is voluminous, which requires significant work from the Defence team. Considering the full scope of the lengthy and allegedly erroneous trial judgement, DSS agrees insofar with the Co-Lawyers that drafting a well-reasoned appeal brief demands more resources beyond the current support staff at the disposal of the Co-Lawyers.” Attachment 2 to the Urgent Appeal, para. 13. In light of those considerations, he stated that an additional USD 4,500 in consultancy funds would be provided, allowing for the recruitment of one (1) additional international junior legal consultant and one (1) additional national associate legal consultant. Attachment 2 to the Urgent Appeal, para. 14.

of [REDACTED] Referring to the “declared objective” of the Defence as “obtaining more human resources to cope with an increased workload in the case 002/02 appeal,” the Respondent asserts that “engaging an existent (sic) consultant at a higher grade” does not align with that objective.⁸⁴

Discussion

37. The three documents that serve as the foundation of the ECCC are (1) the Agreement between the United Nations and the Royal Government of Cambodia;⁸⁵ (2) the Law on the Establishment of the ECCC;⁸⁶ and (3) the Internal Rules of the ECCC.⁸⁷ Each of these documents refers to the fundamental rights of the defence, which are to be respected throughout the trial process.⁸⁸

38. Recognizing that those fundamental rights are not self-executing, the Internal Rules provide the institutional framework needed to ensure that those rights are recognized not only on paper, but also in practice. Thus, Rule 11 establishes the Defence Support Section (DSS) under the Office of Administration and states that it shall be “autonomous with regard to the substantive defence matters set out in this Rule.”⁸⁹ The autonomy afforded to the DSS by the Internal Rules includes the right to

⁸⁴ DSS Response of 30 October 2019, para. 3b.

⁸⁵ Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (ECCC Agreement), 6 June 2003 at <https://www.eccc.gov.kh/en/documents/legal/agreement-between-united-nations-and-royal-government-cambodia-concerning-prosecution>

⁸⁶ 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 with inclusion of amendments as promulgated on 27 October 2004 (ECCC Law) at https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf

⁸⁷ Internal Rules (Rev.9) (as revised on 16 January 2015) at https://www.eccc.gov.kh/sites/default/files/legal-documents/Internal_Rules_Rev_9_Eng.pdf.

⁸⁸ The ECCC Agreement incorporates in Article 13 (“Rights of the accused”) the “fair trial rights” enshrined in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) and provides that they “shall be respected throughout the trial process.” (Article 13, para. 1). The Agreement also provides that the UN shall be responsible for remuneration of defence counsel. (Article 17, para. C). The ECCC Law similarly recognizes the right of the accused to certain minimum guarantees in accordance with Article 14 of the ICCPR (Article 35 new), as well as the right of defence counsel to receive fees for mounting a defence, (Article 44 new, para. 3). The Internal Rules (IR) also acknowledge certain “fundamental principles,” that are basic to the right of an effective defence, including the right to be represented by counsel. Internal Rule 21 (1).

⁸⁹ Internal Rule 11(1). That provision also states that “The Defence Support Section shall be directed by the Head of the Defence Support Section...” It is noted that, in practice, the leadership position is variably described as “Head” or “Chief” of the DSS.

develop its own administrative regulations.⁹⁰ Indeed, the scope of DSS autonomy has been recognized by the Supreme Court Chamber, which has observed that determining “the appropriateness of resources allocated to defence teams...falls within the administrative ambit of the Defence Support Section which, under Internal Rule 11, is bestowed with autonomy as concerns substantive defence matters.”⁹¹

39. Internal Rule 11 makes clear in other ways as well that the DSS plays an important role in ensuring that effective legal representation is provided to indigent persons who require such assistance. By way of example, the rule provides that the DSS shall maintain a list of both national and foreign lawyers eligible to represent indigent persons before the ECCC.⁹² The rule further states that the DSS shall “[p]rovide lawyers with a list of national and foreign personnel eligible to assist defence teams for indigent persons.”⁹³ The rule also stipulates that the DSS shall adopt administrative regulations setting out “the criteria and procedures for the inclusion of lawyers and other personnel” on such lists.⁹⁴

40. The oversight role of DSS in ensuring that effective representation is provided is also recognized in the LAS. By way of example, Section A of the LAS states that “Each month the Co-Lawyers are required to prepare an Action Plan stating the tasks they will undertake, taking into account the other members of the team. *This Action plan must be approved by the DSS in advance of the work being done.*”⁹⁵ (emphasis added). Similarly, Section E of the LAS recites that the Co-Lawyers “are required to submit on a monthly basis an Action Plan outlining the tasks that they intend to complete in the following month and indicating how many hours will be spent on each

⁹⁰ “After these [Internal Rules] come into force...the Defence Support Section...shall develop [its] own ... administrative regulations.” Internal Rule 4 (references to other units of the ECCC omitted); *See also*, Internal Rule 11(2)(a).

⁹¹ Decision on KHIEU Samphân’s Request for Extension of Time and Page Limits for Filing his Appeal Brief, 23 August 2019, F49, para. 33. (“SCC Decision on Request for Appeal Brief Extension”).

⁹² Internal Rule 11(2)(d).

⁹³ Internal Rule 11(2)(i).

⁹⁴ Internal Rule 11(2)(a)(i). *See also*, DS7.07S Administrative Regulations-RS-9.07, A1.1 The list of lawyers and other legal professionals: “Pursuant to Rule 11 of the Internal Rules of the ECCC, there shall be a list of lawyers approved to defend cases before the ECCC and other legal professionals approved to be members of the defence teams”

⁹⁵ ECCC Legal Assistance Scheme (Amended December 2014) A. Overview, “Action Plans” (Fourth bullet point thereunder. The provision goes on to note that “during active trial, the submission of Action Plans will not be required.”

task. This plan is then reviewed by DSS. *Only tasks that the DSS approves as necessary and reasonable for the effective defence of the client can be paid for.*⁹⁶ (emphasis added).

41. The important role of the DSS in ensuring that indigent persons receive effective representation is also evident in Article 10.1 of the DSS Regulations, which provides that Co-Lawyers for the Defence “shall make a request for the appointment of a defence team to the Defence Support Section explaining the nature of the tasks to be undertaken and the duration of the appointment.”⁹⁷ Article 10.2, in turn, states that “*If it is agreed [by DSS] that such appointments are necessary, the Co-Lawyers may select a Legal Consultant...from the list, who shall be appointed by the Defence Support Section on the basis of a periodically renewable contract.*”⁹⁸ (emphasis added). Virtually the same terminology is included in the UN contract with the Co-Lawyers, in which it is stated “*If the DSS agrees that such appointments are necessary, the Co-Lawyers shall select a Legal Consultant...from the list of Legal Consultants...who shall be appointed by the DSS.*”⁹⁹
42. The provisions cited above make clear that the DSS has a considerable degree of autonomy in exercising its mandate to ensure effective legal representation. Moreover, those same provisions demonstrate that the DSS has a significant amount of discretion in exercising its authority. Especially pertinent here is the fact that the DSS must first agree to the need for legal consultants to be engaged before qualified persons can be recruited for such positions.
43. The prior agreement of DSS to the appointment of additional legal consultants is thus a necessary predicate to the selection of candidates by the Co-Lawyers. In the present case, the DSS Chief did not initially provide the necessary agreement but did

⁹⁶ ECCC Legal Assistance Scheme (Amended December 2014) E. Action Plans, para. 1. Stating that such plans are required “[e]xcept during the trial.”

⁹⁷ DSS Administrative Regulations, Art. 10.1.

⁹⁸ DSS Administrative Regulations, Art. 10.2.

⁹⁹ Attachment 8 to the Urgent Appeal, para. 10.2. “The Co-Lawyers shall make a joint request to the DSS for a Legal Consultant...to be appointed explaining the nature of the tasks to be undertaken and the duration of any appointments. *If the DSS agrees that such appointments are necessary*, the Co-Lawyers shall select a Legal Consultant...from the list of Legal Consultants... who shall be appointed by the DSS on the basis of periodically renewable contracts and assigned to the case on a full time basis.” (emphasis added).

so eventually in a memorandum dated 10 September 2019.¹⁰⁰ In that document, he stated that although the Supreme Court Chamber had granted the Defence additional time to file their submissions, “drafting a well-reasoned appeal brief demands more resources beyond the current support staff at the disposal of the Co-Lawyers.”¹⁰¹ Accordingly, in order to provide for the recruitment of one (1) additional international junior legal consultant and one (1) additional national associate legal consultant to assist with the workload, he approved an increase in Defence consultancy funds for a three-month period in the amount of USD 4,500 per month.¹⁰²

44. The DSS Chief made it clear, however, that in the exercise of his discretion he had approved supplemental funding to allow for the recruitment of additional legal consultants, not to raise an existing legal consultant (level 2) to a higher level (level 3). He advised that he was “not of the view that increasing the monthly fees for an already recruited legal consultant (“promotion”) would effectively help [the Defence] cope with the team’s workload related to drafting and filing KHIEU Samphân’s appeal brief.”¹⁰³ In sum, the additional funds were provided to increase the number of legal consultants on the Defence team, not to increase the amount of remuneration paid to existing personnel.

45. The position taken by the DSS Chief is not contrary to Section D.1 of the Legal Assistance Scheme, as is asserted by the Appellants. That section calls for providing legal consultants “[w]here required for the effective representation of the suspect, charged person, accused, or appellant.”¹⁰⁴ The meaning of that phrase must be

¹⁰⁰ Attachment 2 to the Urgent Appeal.

¹⁰¹ Attachment 2 to the Urgent Appeal, para. 13.

¹⁰² Attachment 2 to the Urgent Appeal, para. 14. When the Co-Lawyers approached DSS with their Urgent Request on 23 July 2019, the gravamen of their request was that, with a decrease in the Defence budget, the number of legal consultants on their team had been significantly reduced. (Attachment 3 to the Urgent Appeal, para. 2). They went on to state that “[s]ince the issuance of the reasons for judgement, the Defence has been overwhelmed and can only reassert now, but more strongly, what it has been saying since May 2018, namely that *the Defence team must be strengthened and the it must be brought up to its full staffing level* at least until the appeal hearings. (Attachment 3 to the Urgent Appeal, para. 20). (emphasis added).

¹⁰³ Attachment 2 to the Urgent Appeal, para. 12.

¹⁰⁴ ECCC Legal Assistance Scheme (Amended December 2014), D. DEFENCE TEAMS, Par. 1: “Where required for the effective representation of the suspect, charged person, accused, or appellant, the Co-Lawyers may request the DSS to provide one Case Manager and a number of Legal Consultants and or Evidence Analysts. The number of such support staff shall be subject to a cost cap; it will therefore be for the Co-Lawyers to decide how many and which levels of Legal Consultants to recruit based on the amount budgeted for support staff salaries and other costs.”

considered in the context of the legal framework that applies to the DSS, including Article 10.2 of the DSS Regulations. That provision states that the DSS must first agree that the appointment of legal consultants is “necessary” before a particular candidate can be selected from the list maintained by the DSS. Similarly, the UN contract with the Co-Lawyers states that the Co-Lawyers shall select a legal consultant from the list “[i]f the DSS agrees that such appointments are necessary.” Accordingly, to the extent that Section D.1 applies to the present case, that provision must be read in a manner consistent with homologous provisions relating to the DSS that indicate that the prior agreement of DSS is a necessary predicate to the appointment of additional legal consultants.

46. In circumstances where, as here, the DSS agrees that additional legal consultants are necessary to ensure “effective representation,” Section D.1 also provides that “[t]he number of such support staff shall be subject to a cost cap; it will therefore be for the Co-Lawyers to decide how many and which levels of Legal Consultants to recruit based on the amount budgeted for support staff salaries and other costs.” At issue here is whether the proposed appointment of ██████████ as a legal consultant (level 3) amounts to the recruitment of an additional consultant that DSS must put into effect within the meaning of Section D.1 or is simply the further engagement of an existing legal consultant to allow her to be compensated at a higher level of remuneration.

47. To determine whether the proposed appointment of ██████████ would constitute a recruitment within the meaning of Section D.1, it is appropriate to consider the evolving nature of the Defence’s rationale for her appointment. In their initial “Urgent Request” of 23 July 2019, the Co-Lawyers emphasized the need to strengthen the Defence team and to bring it “up to its full staffing level,” considering its significant workload.¹⁰⁵ They also referenced the fact that when she was originally recruited, ██████████ “could not even be hired at her level of experience (which is not very motivating to stay till the end).”¹⁰⁶

¹⁰⁵ Attachment 3 to the Urgent Appeal, para. 20.

¹⁰⁶ Attachment 3 to the Urgent Appeal, para. 45.

48. When the DSS Chief then asked the Co-Lawyers how appointing their existing legal consultant (level 2) to a legal consultant (level 3) position would alleviate the workload of the Defence as compared to recruiting additional legal consultants, the International Co-Lawyer expressed her concerns with respect to [REDACTED]

[REDACTED] has agreed to start in our team below the level of her competences because we were in a difficult situation and needed someone right away. *We have promised her that we would do anything in our power for her to obtain the salary that she is entitled to have according to her experience* and we specifically told her about all the increase of budget we had done before her hiring. (emphasis added)

She is dedicated to the team but considering the volume of work and her background, we won't be able to give attractive reasons to stay if she has a better offer [] before the end of the case. And as stated in the above paragraphs of our memo, the chance of being able to recruit someone new at her level and at this stage of the proceedings is *proche (sic)* to zero. The purpose of recruiting her at the level she deserves [is] a managerial move to avoid to face [a] crisis when she has an offer corresponding to her level.¹⁰⁷

49. With that information in hand, on 10 September 2019 the DSS Chief communicated to the Co-Lawyers that a monthly amount of USD 4,500 from 1 October to 31 December 2019 would be added to the consultancy funds for the Defence team to allow for the recruitment of additional legal consultants, being one (1) additional junior international legal consultant (level 1) and one (1) additional associate national legal consultant (level 2).¹⁰⁸ He also made clear, however, that he was “not of the view that increasing monthly fees for an already recruited legal consultant (“promotion”) would effectively help them cope with the team’s workload related to drafting and filing Mr. KHIEU Samphân’s appeal brief.”¹⁰⁹

¹⁰⁷ Attachment 7 to the Urgent Appeal, para. 2 (in bold).

¹⁰⁸ Attachment 2 to the Urgent Appeal, para. 14.

¹⁰⁹ Attachment 2 to the Urgent Appeal, para. 12.

50. Referencing the additional consultancy funds provided by DSS, on 16 September 2019, the Co-Lawyers called for not only the recruitment of two (2) additional associate national legal consultants, but also the recruitment of ██████████ as a legal consultant (level 3). It was at that point that they stated, for the first time, that she was willing “to undertake more responsibilities (in order, amongst other things, to alleviate part of the workload of the international senior consultant, needed more on the substance than ever).”¹¹⁰ The DSS Chief replied to the Co-Lawyers by email on 17 September and approved the recruitment of the two (2) associate national legal consultants (both on a full-time basis) but did not approve the requested appointment of the existing international legal consultant at a higher level, referring to his previous communication of 10 September.¹¹¹

51. Later on 17 September, the Co-Lawyers asked the DSS Chief to review his decision with respect ██████████ as expressed in his 10 September decision and reiterated in his subsequent email. In doing so, they restated their suggestion of the previous day that the requested appointment would allow a senior legal consultant to spend more time working on the appeal brief.¹¹² On 23 September, the DSS Chief denied the request of the Co-Lawyers for relief.¹¹³

52. In the present case, virtually from the outset it was clear that the DSS Chief was authorizing additional funds specifically for the purpose of recruiting additional legal consultants for the Defence in light of its significant workload. Moreover, he took that action in response to the concern originally expressed by the Defence that their existing team needed to be “strengthened” and “brought up to its full staffing level.”¹¹⁴

¹¹⁰ Attachment 4 to the Urgent Appeal, para. 6. See also, Urgent Appeal, para. 41.

¹¹¹ Attachment 5 to the Urgent Appeal.

¹¹² Attachment 6 to the Urgent Appeal, para. 18, noting that a level 3 position includes several management functions, the performance of which by ██████████ “would free up time for the senior consultant (much more familiar with the case) while making considerable progress in progress in purely legal work. The purpose of the division of tasks is obviously to have a better work on the substance of the case and therefore the drafting of the appeal brief.” Although the Appellants allege that ██████████ performance of some managerial functions would free up a more senior legal consultant to work on the appeal brief, they do not address the fact that, while performing those managerial functions, ██████████ would not be able to work on the appeal brief herself, which was the very reason for recruiting additional legal consultants.

¹¹³ Impugned Decision, Attachment 1 to the Urgent Appeal.

¹¹⁴ Attachment 3 to the Urgent Appeal, paras 20 and 42.

53. It is instructive, however, that the initial rationale of the Co-Lawyers in support of ██████ appointment at a higher level did not refer to increasing the number of legal consultants on the Defence team. Rather, it amounted to an expression of concern that ██████ originally had been recruited below her level of experience, which if left uncorrected, could lead to her departure if a better offer should arise elsewhere.¹¹⁵ Consistent with that explanation, on 28 August the International Co-Lawyer told the DSS Chief that “[w]e have *promised her* that we would *do anything in our power* for her to obtain the salary that she is *entitled* to have according to her experience” and expressed the concern that without an increase in her level of remuneration “*we won’t be able to give attractive reasons to stay* if she has a better offer [] before the end of the case.”¹¹⁶ (emphasis added).
54. It is appropriate to consider those representations when determining what weight to give the Defence’s subsequent characterization of ██████ engagement at a higher level as a means to “free up” a senior consultant to work on the appeal brief. This is not to suggest that the later reasoning of the Defence constituted a pretextual justification for her appointment at a higher level. The earlier explanations of the Co-Lawyers, however, do supply an insight into the fundamental concern with which they were dealing and the true nature of their request to engage ██████ at a higher level.
55. The proposed engagement of ██████ at a higher level did not add to the number of personnel on the Defence team, but in fact was designed to discourage her departure if she were to contemplate such a move in the indefinite future. In that sense, her proposed engagement was for the purpose of increasing her rate of pay and not for the purpose of adding personnel to the Defence team, thereby bringing it up to its “full staffing level” until the appeal hearings. The Defence was thus not proposing that the additional funds be used for their intended purpose, which was the recruitment of *additional* legal consultants.

¹¹⁵ Attachment 3 to the Urgent Appeal, para. 45.

¹¹⁶ Attachment 7 to the Urgent Appeal, para. 2 (in bold).

56. To the extent that the Defence relies on LAS Section D.1, which states in part that it is for “the Co-Lawyers to decide how many and which levels of Legal Consultants to recruit,” that language does not authorize the Co-Lawyers to ignore the specific purpose of the additional funds provided by the DSS. Here, the intended purpose of the provided funds was the recruitment of *additional* legal consultants. Consequently, it is only in the context of recruiting *additional* legal consultants that the provisions of Section D.1 regarding the number and level of legal consultants come into play. Whatever flexibility is allowed to the Co-Lawyers under Section D.1, it does not override the authority of the DSS to allocate additional funds for a specified purpose.

57. Considering that the proposed appointment of ██████████ did not involve the recruitment of an additional legal consultant, the Appellants cannot successfully cite Section D.1 as allowing the Defence to insist that she be engaged at a higher level. In sum, the proposed appointment of ██████████ as a legal consultant (level 3) did not amount to a recruitment to which DSS was required to give effect within the meaning of Section D.1.¹¹⁷

58. To the extent that the Appellants go on to assert that the actions of the DSS Chief violate past DSS practice, they cite a 2015 case in which the then Chief of DSS allocated an additional sum of USD 40,500 to the Defence for a three month period.¹¹⁸ A review of the memorandum of decision in that case, however, actually supports the position of the DSS Chief in the present matter.

¹¹⁷ To the extent that the proposed engagement of ██████████ at a higher level does not involve the recruitment of an additional legal consultant, the Respondent has consistently referred to the requested action as a “promotion.” The Appellant, on the other hand, has asserted that “[i]t is not a ‘promotion’ but rather a recruitment to a different post.” Urgent Appeal, para. 51. Regardless of the terminology used, however, it is clear that the proposed engagement of ██████████ as a level 3 consultant (and the corresponding elimination of a level 2 consultant from the Defence team) would not provide an additional legal consultant to the Defence team. See, Attachment 4 to the Urgent Appeal, para. 6, in which the Co-Lawyers confirm that “if recruited at level 3, she agreed to resign from her level 2 position.” In any case, there is no talismanic value to the use of the term “recruitment,” considering the circumstances presented here.

¹¹⁸ Urgent Appeal, para. 32, citing DSS Interoffice Memorandum entitled “Joint Request for a Temporary Budget Increase,” 13 November 2015 (Attachment 10 to the Urgent Appeal).

59. In the previous case, as here, there was an acknowledgement that the Defence was experiencing an increased workload that required “additional resources to be granted.”¹¹⁹ As funding requests had been made not only to the DSS but also through the Office of Administration, the DSS Chief cautioned that “the Administration is not of the view that increasing the monthly fees and salaries of the Co-Lawyers and their existing support staff would solve the problems,” noting that “the Administration believes that it would be more beneficial to grant your defence teams *temporary additional human resources*.”¹²⁰ (emphasis in original).
60. In turn, the DSS Chief advised that additional funds would be provided but pointed out that “these funds[,] *earmarked for the recruitment of the additional consultants[,] will be very carefully monitored to ensure that they are not used for any other purpose* such as extending the contracts or *increasing the pay rates of other support staff*.”¹²¹ (emphasis added). Put another way, the additional funds provided by the DSS in that case were specifically “earmarked” for a particular purpose, which was to recruit additional consultants and not to increase the pay rates of existing support personnel.¹²² That is the position taken by the DSS Chief in this case.

Conclusion

61. For the foregoing reasons and in the circumstances of this case, the Administrative Judge concludes that the DSS Chief had the authority to refuse the proposed recruitment of [REDACTED] an existing international legal consultant

¹¹⁹ Attachment 10 to the Urgent Appeal, para. 2.

¹²⁰ Attachment 10 to the Urgent Appeal, para. 5.

¹²¹ Attachment 10 to the Urgent Appeal, para. 7.

¹²² In citing the 2015 matter, the Appellants state that although the original funding was to compensate the equivalent of two additional international senior legal consultants (level 4) for a three month period, the Defence was instead able to recruit two additional legal consultants at different levels for over 12 months. Urgent Appeal, para. 32, fn. 29. A similar arrangement occurred in the present matter, where the DSS Chief proposed an additional USD 4,500 for one international junior legal consultant and one national associate legal counsel, and the Defence countered with a request for two national associate legal counsel positions, which was approved. What did not take place in either case, however, was the use of the additional funds to increase the level of remuneration of other Defence personnel. In both cases, to use the language of the 13 November 2015 memo cited by the Appellants, the additional funds were “earmarked for the recruitment of the additional consultants.” Attachment 10 to the Urgent Appeal, para. 7.

(level 2), as an international legal consultant (level 3) and his action in doing so was not *ultra vires*.

B. Whether the decision of the DSS Chief was arbitrary and an abuse of discretion, considering the resource needs of the Defence

Contentions of the parties

62. The Appellants contend that the decision of the DSS Chief to refuse the recruitment of ██████████ as an international legal consultant (level 3) was arbitrary and an abuse of his discretion considering the resource needs of the Defence. They explain that the resources available to the Defence are limited and they cite the terms of reference for both level 2 and level 3 consultants, asserting the utility of the additional management and administrative responsibilities of the latter. Specifically, they claim that the Defence would benefit from the performance of those functions by ██████████ as they would “free up time for the senior consultant (much more familiar with the case)” to work on the pending appeal.¹²³

63. The Respondent, in turn, states that from the outset the Co-Lawyers have stressed the need to bring the Defence team “up to its full staffing level, at least until the appeal hearings.”¹²⁴ To that end, he authorized an increase in funding and the engagement of additional consultants, which he describes as “reasonable and necessary in the circumstances.”¹²⁵ He explains that the request to engage ██████████ at a higher level, however, was not consistent with the objective of increasing the size of the Defence team. Moreover, he asserts that the Appellants have not demonstrated how the additional management and administrative responsibilities of a level 3 legal consultant would achieve the “declared objective of coping with the heavy workload in case 002/02.”¹²⁶

¹²³ Urgent Appeal, para. 41.

¹²⁴ Attachment 3 to the Urgent Appeal, para. 20.

¹²⁵ DSS Response of 30 October 2019, para. 13.

¹²⁶ DSS Response of 30 October 2019, para. 22.

Discussion

64. Having concluded that the DSS Chief had the authority to refuse the proposed recruitment of ██████████¹²⁷ it remains to be determined whether he exercised that authority in an arbitrary manner and thereby abused his discretion.
65. The Appellants claim that the DSS Chief's refusal to put into effect the proposed recruitment, which they assert would "qualitatively enhance" the resources of the Defence, rose to the level of arbitrariness.¹²⁸ Specifically, they emphasize that, unlike a level 2 legal consultant, a level 3 legal consultant has management and administrative responsibilities. They argue that if ██████████ were to be engaged as a level 3 legal consultant, she could perform those functions and "free up" a senior legal consultant to work on the appeal brief.
66. As previously noted, in response to the Defence assertion that their existing team needed to be "strengthened" and "brought up to full staffing level," the DSS Chief approved an increase in funding specifically for the purpose of recruiting additional legal consultants.¹²⁹ Moreover, he authorized the requested recruitment of specific additional legal consultants and observed that doing so "was reasonable and necessary in the circumstances."¹³⁰
67. He did not, however, authorize the recruitment of ██████████ at a higher level, considering that the supplementary funds were for the purpose of providing additional legal consultants for the Defence.¹³¹ To the extent that her proposed recruitment did not increase the number of legal consultants on the Defence team, the refusal of the

¹²⁷ See above, para. 61.

¹²⁸ Urgent Appeal, paras 2, 38-39.

¹²⁹ See above, para. 52. It bears repeating that the DSS Chief stated: "Considering the full scope of the lengthy and allegedly erroneous trial judgement, DSS agrees insofar with the Co-Lawyers that drafting a well-reasoned appeal brief demands more resources beyond the current support staff at the disposal of the Co-Lawyers." Attachment 2 to the Urgent Appeal, para. 13.

¹³⁰ DSS Response of 30 October 2019, para. 13.

¹³¹ See above, para. 55.

DSS Chief to allow her recruitment was thus consistent with the rationale for the additional funds. Accordingly, the decision of the DSS Chief was not arbitrary, as it was aligned with the previously expressed needs of the Defence in a manner that was reasonably designed to ensure that additional funding would only be spent to increase the team's staffing level.

68. The Appellants argue, however, that [REDACTED] recruitment to a higher level 3 position would be of significant assistance to the Defence because it would “free up” a senior legal consultant to work on substantive matters such as the appeal brief.¹³² Although they support that claim with the assertion that the “duties and obligations” of level 2 and level 3 legal consultancies “vary substantially,”¹³³ a review of the terms of reference for the two positions suggests otherwise. It is true that a level 3 consultant can manage interns and provide other forms of administrative assistance, but the duties of that position relative to legal drafting and research are virtually the same as those of a level 2 consultant.¹³⁴ Consequently, engaging [REDACTED] at a higher level would not, in and of itself, directly enhance her contribution to the legal work on the appeal.¹³⁵
69. It should also be noted that, with respect to the possibility of [REDACTED] providing management and administrative assistance as a level 3 legal consultant, the Appellants provide no indication regarding the extent to which the performance of those responsibilities currently impedes the legal work of the international senior consultant. Consequently, there is no indication regarding the scope of the benefit, if any, that might be realized were [REDACTED] to perform those functions. Nor do the Appellants discuss the fact that, for whatever unstated portion of her time would be spent on such matters, [REDACTED] would be unavailable to work on the appeal brief, even though to date she has “proved herself to be a great value for the team.”¹³⁶

¹³² Urgent Appeal, paras 38-41.

¹³³ Urgent Appeal, para. 39.

¹³⁴ Attachment 11 to the Urgent Appeal, “Terms of Reference for Legal Consultants in the Defence.”

¹³⁵ “[T]he elevation of [REDACTED] to a higher consultancy grade would not and could not achieve the Co-Lawyers’ declared objective of coping with the heavy workload in case 002/02.” DSS Response of 30 October 2019, para. 22.

¹³⁶ Attachment 4 to the Urgent Appeal, para. 6. Indeed, the Respondent describes [REDACTED] as “a longstanding consultant with immense institutional knowledge of the ECCC.” DSS Response of 30 October 2019, para. 16. *See also above*, fn. 112.

Considering these various circumstances, it is not unreasonable for the Respondent to assert that the Appellants have failed to demonstrate how shifting management tasks to ██████████ would contribute in any meaningful way to strengthening the Defence team.¹³⁷

70. The Respondent also asserts that it was appropriate for the DSS Chief to consider several other factors bearing on the request to engage ██████████ as a level 3 legal consultant. These included: the “misgivings” of the Co-Lawyers with respect to her initial engagement as a level 2 consultant; their assertions that they “*promised her that we would do anything in our power for her to obtain the salary that she is entitled to have*” (emphasis added); and indications that the purpose of requesting her engagement at a higher level “was to secure her presence rather than to mobilise her services to the case 002/02 workload at hand.”¹³⁸ Having taken into consideration those factors, among others, “DSS could not conclude that the Co-Lawyers’ submissions demonstrated, on balance, that ██████████ engagement at a higher level was for an operationally legitimate purpose (namely, coping with an increased workload in case 002/02).”¹³⁹

71. The Respondent states that the Appellants have failed to articulate an adequate nexus between the proposed recruitment of ██████████ at a higher level position and the Defence team’s ability to cope with its significant workload regarding KHIEU Samphân’s pending appeal.¹⁴⁰ In the circumstances presented, the Administrative Judge considers that assertion to be warranted, further supporting the conclusion that the DSS Chief did not exercise his authority in an arbitrary manner.

¹³⁷ DSS Response of 30 October 2019, para.16.

¹³⁸ DSS Response of 30 October 2019, para. 15(d), 15(e), and 15(f), respectively. *See above*, paras 53-55.

¹³⁹ DSS Response of 30 October 2019, para. 16.

¹⁴⁰ DSS Response of 30 October 2019, para. 24.

Conclusion

72. For the foregoing reasons and in the circumstances of this case, including the consideration given to the resource needs of the Defence, the Administrative Judge concludes that the decision of the DSS Chief to deny the proposed recruitment of ██████████ was not arbitrary and thus did not constitute an abuse of his discretion.

C. Whether the decision of the DSS Chief constituted an abuse of power that amounted to discrimination

Contentions of the parties

73. The Appellants contend that the decision of the DSS Chief to refuse the engagement of ██████████ as a legal consultant (level 3) constituted an abuse of power that amounted to discrimination. In that regard they cite the Secretary-General's bulletin prohibiting, *inter alia*, both discrimination and the abuse of power.¹⁴¹ In addition to reasserting their previous claim that the DSS Chief acted outside his authority and, thus, *ultra vires*, they state that his action "amount[ed] to excluding, and hence, discriminating against the candidate in question from a process of recruitment to a different vacancy."¹⁴² They conclude by stating that the actions of the DSS Chief were not supported by "any valid reasoning."¹⁴³
74. The Respondent does not directly reply to the allegation concerning discrimination, but in his Response, he contests the points raised by the Appellants, which in their view support that charge. Although not disputing the qualifications of ██████████, he asserts that he had a reasonable basis for refusing her recruitment where the proposal to engage an existing consultant at a higher level was inconsistent with the

¹⁴¹ Urgent Appeal, para. 44, citing ST/SGB/2008/5, Secretary-General's bulletin, Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, 11 February 2008, sub-paras 1.1 and 1.4.

¹⁴² Urgent Appeal, para. 52.

¹⁴³ Urgent Appeal, para. 53.

declared objective of the Defence, which was to obtain additional human resources to cope with its increased workload.¹⁴⁴ The fault if any, he suggests, is not with his decision but with the failure of the Appellants to demonstrate that their request was sufficiently justified.¹⁴⁵

Discussion

75. The Appellants allege that the DSS Chief abused his power in a manner that was discriminatory toward ██████████. That charge is grounded in the assertion that the DSS Chief acted outside his authority and, thus, *ultra vires*. Essentially, the Appellants claim that where additional funds were allocated to the Defence, the manner in which they are to be used is outside the authority of the DSS. Accordingly, they argue that the Defence should have been allowed to recruit ██████████ to a level 3 legal consultant position as they had requested.

76. This issue has been discussed above (*see*, paras. 52-61) and the conclusions reached there are applicable here: “Whatever flexibility is allowed to the Co-Lawyers...it does not override the authority of the DSS to allocate additional funds for a specified purpose.”¹⁴⁶ “In the present case, virtually from the outset it was clear that the DSS Chief was authorizing additional funds specifically for the purpose of recruiting additional legal consultants for the Defence in light of its significant workload. Moreover, he took that action in response to the concern originally expressed by the Defence that their existing team needed to be ‘strengthened’ and ‘brought up to its full staffing level.’”¹⁴⁷ Consequently, where the proposed recruitment failed to conform to the intended use of the funds that were allocated, the DSS Chief had the authority to refuse the recruitment of ██████████¹⁴⁸

¹⁴⁴ DSS Response of 30 October 2019, para. 3.

¹⁴⁵ DSS Response of 30 October 2019, para. 24.

¹⁴⁶ *See above*, para. 56.

¹⁴⁷ *See above*, para. 52.

¹⁴⁸ *See above*, para. 61.

77. The Appellants assert, however, that the manner in which the DSS Chief refused the recruitment involved an abuse of his authority. Specifically, they argue that the DSS Chief's use of the term "promotion" to describe the proposed engagement of ██████████ at a higher level "recharacterize[s], in an erroneous manner and a manner which constitutes an abuse of power, the recruitment request of the Defence."¹⁴⁹ They further assert that the DSS Chief, in using such terminology, unfairly excluded ██████████ from consideration for a higher level position, thereby discriminating against her.¹⁵⁰

78. As previously noted, "[r]egardless of the terminology used . . . it is clear that the engagement of ██████████ as a level 3 consultant (and the corresponding elimination of a level 2 consultant from the Defence team) would not provide an additional legal consultant to the Defence team."¹⁵¹ It was on that basis that the DSS Chief refused ██████████ recruitment, to wit: that it did not conform to the purpose of the supplemental funding, which was to provide additional members for the Defence team. In the circumstances presented, the rationale of the DSS Chief for refusing her recruitment was thus reasonable and supplied a sufficient justification for his decision.

79. To the extent that the Appellants also cite the Secretary-General's bulletin, it is appropriate to consider its possible application to the present matter. The bulletin describes "abuse of authority" as "the improper use of a position of influence, power or authority against another person."¹⁵² The action of the DSS Chief to ensure that the funds provided to the Defence were used for their intended purpose, being the recruitment of additional consultants, cannot reasonably be described as an "improper

¹⁴⁹ Urgent Appeal, para. 51.

¹⁵⁰ Urgent Appeal, para. 52. To the extent that Defence personnel are engaged by UNAKRT pursuant to ST/AI/2013/4 (Annex B to DSS Response of 30 October 2019), it is noted that sub-para 5.4 states that consultants and individual contractors are not considered to be staff members. This is a point worth noting as consultants and contractors are bound by the terms of their individual contracts, which do not provide any rightful expectation of future advancement. To the extent that the Co-Lawyers encouraged any form of promissory expectation on the part of ██████████ such representations did not bind the DSS in any way.

¹⁵¹ See above, fn 117.

¹⁵² ST/SGB/2008/5, Secretary-General's bulletin, Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, 11 February 2008, sub-para. 1.4. The preamble to the bulletin states that its purpose is to ensure that "*all staff members* of the Secretariat [have] a workplace free of any form of discrimination, harassment, including sexual harassment, and abuse of authority." (emphasis added). Although consultants and contractors are not staff members, for purposes of this decision the provisions of the Secretary-General's bulletin are treated as applicable to the members of the Defence team.

use” of either power or authority against another person within the meaning of the bulletin. Similarly, to the extent that the bulletin describes “discrimination” as “any unfair treatment or arbitrary distinction based on a person’s...status,”¹⁵³ it cannot reasonably be said that, in the circumstances presented, the refusal of ██████████ recruitment to a higher level position amounted to an action that was either “unfair” or “arbitrary” as those terms are used in the bulletin.

80. In sum, the DSS Chief reasonably considered the needs of the Defence, allocated increased funds for the recruitment of more legal consultants, and approved the recruitment of specific additional consultants. He did not, however, approve the recruitment of ██████████ as it did not serve the purpose of the additional funds that had been provided, which was to increase the number of legal consultants on the Defence team.¹⁵⁴

Conclusion

81. For the foregoing reasons and in the circumstances of this case, the Administrative Judge concludes that the decision of the DSS Chief to refuse the proposed recruitment of ██████████ did not constitute an abuse of power, nor did it amount to an act constituting discrimination.

¹⁵³ ST/SGB/2008/5, Secretary-General’s bulletin, Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority, 11 February 2008, sub-para. 1.1. The sub-paragraph refers to distinctions based on “a person’s race, sex, religion, nationality, ethnic origin, sexual orientation, disability, age, language, social origin or other status.” In its Urgent Request, the Co-Lawyers add emphasis to the term “other status,” being ██████████ status as a pre-existing member of the Defence team.

¹⁵⁴ It should be noted that the DSS Chief did not preclude future consideration of the recruitment here in issue. As he stated: “DSS is...open to reassessing consultant engagement according to a reasoned justification for additional or other resources from the defence teams.” DSS Response of 30 October 2019, para. 10. Moreover, he previously remarked that “DSS does not oppose the promotion of legal consultants within the regular budget allocated to defence teams with the caveat that the promotion is in line with the requirements set out in the Legal Assistance Scheme.” Attachment 1 to the Urgent Appeal, para. 4. It should also be pointed out that the refusal to approve the recruitment of ██████████ did not constitute an adverse judgement as to her qualifications. Indeed, the Respondent does not contest her professional skills and acknowledges that her service has benefited the Defence, especially considering that she is a “longstanding consultant with immense institutional knowledge of the ECCC” and is someone who could assist the Co-Lawyers “to a very high degree.” DSS Response of 30 October 2019, para. 16.

D. Whether the decision of the DSS Chief infringed on KHIEU Samphân’s right to effective legal representation

Contentions of the parties

82. The Appellants argue briefly that in refusing to engage ██████████ as a level 3 international consultant, the DSS Chief infringed upon KHIEU Samphân’s right to effective legal representation.¹⁵⁵ They claim that his decision not only failed to comply with Internal Rule 21 (“Fundamental Principles”), which guarantees certain fair trial rights, but also negatively impacted the right of the Accused to have “adequate ... facilities for the preparation of his defence.”¹⁵⁶
83. The Respondent does not directly reply to this allegation, although he does assert that the requested engagement of an existing legal consultant at a higher level “would not and could not achieve the Co-Lawyers’ declared objective of coping with the heavy workload in case 002/02.”¹⁵⁷ Moreover, he points out that he did, in fact, approve additional funds for the Defence as well as the recruitment of additional legal consultants, even though he did not agree to the proposed recruitment of ██████████ at a higher level.¹⁵⁸

Discussion

84. The Administrative Judge has previously concluded that the DSS Chief acted within his authority when he refused the proposed recruitment of ██████████ and that his decision in that regard was neither arbitrary nor an abuse of his discretion, nor was it an abuse of power constituting discrimination. The remaining issue to be considered is whether the decision of the DSS Chief infringed on KHIEU Samphân’s right to effective legal representation.

¹⁵⁵ The Appellants’ argument in support of this assertion consists of two short paragraphs.

¹⁵⁶ Internal Rule 21(1) and International Covenant on Civil and Political Rights, Article 14(3)(b).

¹⁵⁷ DSS Response of 30 October 2019, para. 22.

¹⁵⁸ DSS Response of 30 October 2019, paras 13 and 18.

85. At the outset it should be noted that the Respondent acknowledges the responsibility of DSS to ensure effective legal representation: “DSS’s dispensation of public monies under the Legal Assistance Scheme must at all times be directed at ensuring the effective representation of a suspect, charged person, accused or appellant (as the case may be) before the ECCC.”¹⁵⁹ This assertion is consistent with the fact that the legal framework of DSS relating to fair trial rights is designed “to ensure that those rights are recognized not only on paper, but also in practice.”¹⁶⁰

86. The Respondent also recognizes that the responsibility of DSS to ensure effective legal representation is ongoing in nature, stating that “the provision of consultancies and their respective levels is demand driven. DSS is therefore open to reassessing consultant engagement according to a reasoned justification for additional or other resources from the defence teams.”¹⁶¹ Similarly, the Respondent points out that the grant of additional funding in the present case “was made without prejudice to other justified requests by the Co-Lawyers.”¹⁶²

87. As previously noted, in response to the Defence assertion that their existing team needed to be “strengthened” and “brought up to full staffing level,” the DSS Chief approved supplemental funding specifically for the purpose of recruiting additional legal consultants.¹⁶³ Moreover, he authorized the requested recruitment of additional legal consultants and noted that:

“it cannot be overlooked that the trial record in Case 002/02 is voluminous, which requires significant work from the Defence team. Considering the full scope of the lengthy and allegedly erroneous trial judgement, DSS agrees insofar with the Co-Lawyers that drafting a well-reasoned appeal brief demands more resources beyond the current support staff at the disposal of the Co-Lawyers.”¹⁶⁴

¹⁵⁹ DSS Response of 30 October 2019, para. 23.

¹⁶⁰ *See above*, para. 38. *See also*, paras 37 and 39-46.

¹⁶¹ DSS Response of 30 October 2019, para. 10.

¹⁶² DSS Response of 30 October 2019, para. 14.

¹⁶³ Attachment 2 to the Urgent Appeal, para. 13.

¹⁶⁴ DSS Response of 30 October 2019, para. 13.

88. The DSS Chief, however, refused the recruitment of [REDACTED] at a higher level as the purpose of the supplemental funding was to ensure effective legal representation for KHIEU Samphân by providing *additional* legal consultants for his Defence team. Moreover, considering that the legal drafting and research responsibilities of level 2 and level 3 legal consultants are virtually the same, “engaging [REDACTED] at a higher level would not, in and of itself, directly enhance her contribution to the legal work on the appeal.”¹⁶⁵
89. To the extent that the Appellants claim that her recruitment would be of significant assistance because it would “free up” a senior legal consultant, as stated in the previous section, it is not unreasonable for the Respondent to assert that the Appellants have failed to demonstrate how shifting management tasks to [REDACTED] would contribute in any meaningful way to strengthening the Defence team.¹⁶⁶
90. The Administrative Judge thus concurs with the Respondent’s assertion that the Appellants have failed to articulate a nexus between [REDACTED] proposed recruitment at a higher consultancy grade and a “workload which will tangibly ensure the effective representation of [KHIEU Samphân].”¹⁶⁷

Conclusion

91. For the foregoing reasons and in the circumstances of this case, the Administrative Judge concludes that the decision of the DSS Chief to refuse the proposed recruitment of [REDACTED] did not infringe on KHIEU Samphân’s right to effective legal representation.

¹⁶⁵ See above, para. 68.

¹⁶⁶ See above, para. 69.

¹⁶⁷ DSS Response of 30 October 2019, para. 24. See above, paras 70-71.

IV. DISPOSITION

92. For the foregoing reasons, the Administrative Judge:

DECLARES the Urgent Appeal admissible; and

DENIES the Urgent Appeal on the merits.


Judge Phillip RAPOZA,

United Nations Administrative Judge

30 December 2019