

Summary of Constitutional Court Ruling

No. 1/2562 (2019)

Dated 13th February B.E. 2562 (2019)*

Re: Whether or not section 98/1 of the Organic Act on Anti-Corruption B.E. 2542 (1999) was contrary to or inconsistent with section 26, section 27 paragraph one and paragraph five of the Constitution.

1. Summary of background and facts

The Court of Appeals Corruption and Misconduct Cases Division referred an objection of the first defendant and others, a total of 3 persons, to the Constitutional Court for a ruling under section 212 of the Constitution. The facts stated in the letter referring the objections of all three defendants and supporting documents may be summarised as follows.

The state attorney, Office of State Attorney for Special Litigation 2, as prosecutor, prosecuted Mr. Pakit Kirawanich, first defendant, Mr. Siritan Pairojboriboon, second defendant, and Mrs. Yuwaree Inna, third defendant, in the Criminal Court on charges of conspiracy to exercise official functions dishonestly, conspiracy to wrongly perform or omit a duty in order to cause detriment to the Department of Pollution Control, Ministry of Natural Resources and Environment, as well as the public, to dishonestly perform or omit the performance of duties under section 151 and section 157 in conjunction with section 83 of the Penal Code. The Criminal Court convicted all three defendants of offences under section 151 and section 157 in conjunction with section 83 of the Penal Code. The defendants were each sentenced to 20 years imprisonment. The three defendants appealed and filed an objection pertaining to section 98/1 of the Organic Act on Anti-Corruption B.E. 2542 (1999) and Rules of the General Assembly of the Supreme Court on Inquiry Proceedings on State Officials Who are Not Political Office Holders under section 275 of the Constitution of the Kingdom of Thailand B.E. 2556 (2013). Article 13 of the said Rules provided that the competent court should rely on the report and case files of the National Anti-Corruption Commission (NACC) as the basis for deliberation. As a consequence, the defendants argued that they had lost the ability to fully contest the case and lost the right of due process, as well as the opportunity to object and cross-examine such witnesses presented during the investigations of the NACC and during trial in the Criminal Court, thus effectively being an ex parte hearing and witness examination. The proceedings were also contrary to the checks and balances under the democratic form of

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government by compelling the court to rely on the inquiry report of the NACC, an independent agency performing executive functions, as the basis for trying a case involving a state official who was not a political office holder alleged of committing a misconduct in the performance of official functions. This was inconsistent with the democratic form of government with the King as Head of State and an unjust discrimination. Hence, it was asserted that section 98/1 of the Organic Act on Anti-Corruption B.E. 2542 (1999) was contrary to or inconsistent with the Constitution of the Kingdom of Thailand B.E. 2540 (1997) and section 29 paragraph one, section 30, section 31 and section 40(2), (3) and (7) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Court of Appeals Corruption and Misconduct Cases Division found that the objections of all three defendants were in accordance with section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), section 211 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) and section 212 of the Constitution of the Kingdom of Thailand B.E. 2560 (2017), and therefore referred the objections to the Constitutional Court for a ruling under section 212 of the Constitution.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court could accept the objections for a ruling under the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

After deliberations, the Constitutional Court held as follows. These objections presented cases where all three defendants objected that section 98/1 of the Organic Act on Anti-Corruption B.E. 2542 (1999) was contrary to or inconsistent with the Constitution of the Kingdom of Thailand B.E. 2540 (197) and section 29 paragraph one, section 30, section 31 and section 40(2), (3) and (7) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Upon drawing an analogy with the Constitution of the Kingdom of Thailand B.E. 2560 (2017), similar principles could be found in section 25, section 26 and section 27 paragraph one and paragraph five. Therefore, the Constitutional Court could admit these objections for a ruling under the Constitution of the Kingdom of Thailand B.E. 2560 (2017). The next issue considered was whether or not the Constitutional Court had the competence to accept these objections for a ruling under section 212 of the Constitution. It was held that section 98/1 of the Organic Act on Anti-Corruption B.E. 2542 (1999) was a provision of law which empowered the court to try and adjudicate a case by relying on reports and case files of the NACC as the basis for deliberations. Further inquiries for finding facts and evidence could be carried out as deemed appropriate. The court followed a process which applied the inquisitorial procedure pursuant to the Rules of the General

Assembly of the Supreme Court. These provisions of law were to be applied by the Court of Appeals Corruption and Misconduct Cases Division to the case, and there had been no prior ruling of the Constitutional Court in relation to such provisions of law. The case was therefore in accordance with the rules under section 212 paragraph one of the Constitution. Hence the Constitutional Court accepted the cases for consideration. For the benefit of this trial, the Office of the Judiciary was directed to send a copy of the Criminal Court judgments in such cases to the Constitutional Court.

Pending consideration of this case in the Constitutional Court, the Organic Act on Anti-Corruption B.E. 2561 (2018) was promulgated. A transitory provision in section 192 paragraph four stated that “for the benefit of trial and adjudication of a court for cases already prosecuted or motioned in court prior to the coming into force of this Organic Act, it shall be deemed that the Organic Act on Anti-Corruption B.E. 2542 (1999), as amended, shall continue to apply until the case becomes final.” Thus, section 98/1 of the Organic Act on Anti-Corruption B.E. 2542 (1999) remained provisions of law which the Court of Appeals Corruption and Misconduct Cases Division had to apply to the case. Hence, the Constitutional Court could continue to rule on the objections

3. The issues considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 98/1 of the Organic Act on Anti-Corruption B.E. 2542 (1999) was contrary to or inconsistent with section 26 and section 27 paragraph one and paragraph five of the Constitution.

After deliberation, the Constitutional Court held as follows. Section 26 and section 27 of the Constitution were provisions in Chapter 3 Rights and Liberties of the Thai People. The provisions stated conditions for enacting laws which restrict rights and liberties of persons, under which the enactment of a law having the effect of restricting a right or liberty of a person must be in accordance with conditions provided under the Constitution. In the case where the Constitution did not provide conditions, such a law should not be inconsistent with the rule of law, not disproportionately increase a burden or restrict a right or liberty of a person, and not prejudice a person’s human dignity. The law should also specify the necessity for such restriction of right and liberty. Moreover, such a law should have a general application and not be directed to any particular case or person. Section 27 paragraph one was a provision which recognised the equality of persons, and paragraph five provided recognition that military personnel, police officers, government officials, other state officials and employees or workers of state agencies enjoyed the same rights and liberties as other

persons generally, except otherwise provided by law pertaining specifically to politics, competencies, discipline or ethics.

Upon consideration of section 98/1 paragraph one and paragraph two of the Organic Act on Anti-Corruption B.E. 2542 (1999) in conjunction with the Rules of the General Assembly of the Supreme Court on Inquiry Proceedings on State Officials Who are Not Political Office Holders under Section 275 of the Constitution of the Kingdom of Thailand B.E. 2556 (2013), the Constitutional Court found as follows. A defendant or alleged person had the right to fully defend a case and be tried in a court charged with the duty of finding facts and applying the relevant laws. Section 98/1 paragraph one merely provided that a competent court should rely on the report and case files of the NACC as a basis for proceedings. The competent court was not required to reach a finding based on only the facts or evidence stated in the report and case files of the NACC. Proceedings in the NACC were conducted merely for fact finding preliminary facts and evidence prior to prosecution in the Criminal Court. The court still exercised discretionary weighing of evidence pursuant to section 227 and section 227/1 of the Criminal Procedure Code and had the power to subpoena investigation files of the state attorney to be included in the records pursuant to section 175 of the Criminal Procedure Code. The prosecution had the burden of proving the defendant's actions and intent in accordance with the elements of the offence as with the case of general criminal wrongdoings. Also, a defendant retained the right to defend the case by presenting evidence, as well as to object and rebut evidence of the other party. Thus, section 98/1 paragraph one and paragraph two of the Organic Act on Anti-Corruption B.E. 2542 (1999) did not restrict a defendant's right to defend a case. The provision did not stipulate a legal presumption of the defendant's guilt. Each party still bore the burden of proof. There was no shift in the burden of proving innocence on the defendant. On the contrary, this provision was consistent with a defendant's right under section 172 paragraph one of the Criminal Procedure Code to an open trial in the defendant's presence. There was no presumption of criminal guilt. Hence, such provision of law was not inconsistent with the rule of law since trial was undertaken by an organ exercising judicial powers and there was no disproportionate increase of burden or restriction of rights or liberties under section 26 of the Constitution.

As for the three defendants' objection that section 98/1 paragraph one and paragraph two of the organic Act on Anti-Corruption B.E. 2542 (1999) was a provision of law which resulted in an unfair discrimination on the grounds of differences in statuses of persons who were state officials, the Constitutional Court found as follows. In Thailand, criminal proceedings against state officials for corrupt practices had gradually developed to ensure efficiency in the elimination of corrupt practices of state officials. It was therefore necessary to enact an organic law on anti-corruption to

stipulate measures and methods for preventing and combating corruption, which as a serious threat to the common benefit. The NACC was established to perform such duties to ensure efficient and effective enforcement of the law. Later, section 250(3) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) empowered the NACC to conduct inquiries and rule that a state official has committed an office of dishonest performance of duties or malfeasance of official functions. Section 98/1 was therefore a provision which applied only to state officials who were not political office holders under section 275 of the Constitution, in accordance with the intent of the Constitution and the law. A state official held a different status from the general public, thus calling for different criminal proceedings. Nonetheless, in court proceedings, a defendant or alleged person who is a state official still enjoyed the right to defend proceedings in a fair court trial. The court acted as an organ which exercised checks and balances on the functioning of the NACC as with general criminal cases. Hence, even though court proceedings under section 98/1 paragraph one and paragraph two of the Organic Act on Anti-Corruption B.E. 2542 (1999) showed some disparities from criminal proceedings on persons generally, those differences were necessary in order to combat corruption in official functions relating to the common benefit. Such provision of law did not constitute an unfair discrimination on the grounds of differences in statuses of persons who were state officials. Such provision of law was therefore neither contrary to nor inconsistent with section 27 paragraph one and paragraph two of the Constitution.

As for the provisions of section 98/1 paragraph three of the Organic Act on Anti-Corruption B.E. 2542 (1999), which provided that paragraph one and paragraph two applied to proceedings in the Military Court, such provisions were not applied by the Court of Appeals Corruption and Misconduct Cases Division to these cases and were not relevant to the objections filed by the three defendants. A ruling was therefore not needed.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 98/1 paragraph one and paragraph two of the Organic Act on Anti-Corruption B.E. 2542 (1999) were neither contrary to nor inconsistent with section 26 and section 27 paragraph one and paragraph five of the Constitution.
