

# Summary of the Constitutional Court Ruling No. 36/2542

Dated 15<sup>th</sup> June B.E. 2542 (1999) \*

**Re: The President of the House of Representatives requested for a Constitutional Court ruling on the status of Ministers under section 216 (4) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).**

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## 1. Background and summarized facts

The President of the House of Representatives referred the application dated 7<sup>th</sup> May B.E. 2542 (1999) of 125 members of the House of Representatives, which was not less than one-tenth of the number of existing members of the House of Representatives, who lodged a complaint with the President of the House of Representative pursuant to section 96 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) requesting that the application be referred to the Constitutional Court for a ruling on whether or not the ministership of Mr. Newin Chidchorb, Deputy Minister of Agriculture and Cooperatives had terminated under section 216 (4) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The facts in the application were stated as follows. Buri Ram Provincial Court passed a judgment on 19<sup>th</sup> June B.E. 2541 (1998) ruling that Mr. Newin Chidchorb, the defendant, committed an offence under section 328 of the Criminal Code and was liable to an imprisonment term of 6 months and a fine of Baht 50,000. It did not appear that the defendant had previously served an imprisonment sentence. The imprisonment sentence was therefore suspended for one year under section 56 of the Criminal Code and the defendant was instructed to advertise the judgment in a newspaper for 7 consecutive days. However, Mr. Newin Chidchorb submitted an appeal against the judgment to the Court of Appeal. Hence, the case was pending judgment in the Court of Appeal. An issue was raised as to whether or not the ministership of Mr. Newin Chidchorb had terminated under section 216 (4) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) despite the Court of First Instance's judgment not being final yet. There were no rules which could be taken as the norm of consistency with the provisions of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and the provisions for such a case in the B.E. 2517 (1974), B.E. 2521 (1978) and B.E. 2534 (1991) Constitutions were the same as the provisions in the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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\* Published in the Government Gazette, Vol. 116, Part 91a, dated 4<sup>th</sup> October B.E. 2542 (1999)

An issue from such a case which deserved a ruling of the Constitutional Court under section 216 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) in conjunction with section 96 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) on whether or not the ministership of Mr. Newin Chidchorb had terminated under section 216 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

## **2. The issues considered by the Constitutional Court**

The Constitutional Court considered the facts in the applicant's application documents and the respondent's statement and held that the following issues had to be considered.

On the first issue, Mr. Newin Chidchorb was charged with defamation. The commission of acts which constituted the cause of action occurred prior to the promulgation of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) and prior to the taking of office as a Minister. However, the Court of First Instance passed judgment whilst Mr. Newin Chidchorb was in office as Deputy Minister of Agriculture and Cooperatives. It was therefore questioned as to whether or not section 216 (4) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) was applicable to such a case.

On the second issue, Mr. Newin Chidchorb appealed against the judgment of the Court of First Instance and the case was pending judgment in the Court of Appeal. As the case was not yet final, it had to be considered whether or not the case was within the meaning of section 216 (4) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

On the third issue, Buri Ram Provincial Court passed a judgment sentencing Mr. Newin Chidchorb to six months imprisonment but the imprisonment sentence was suspended for a period of 1 year. It had to be considered therefore whether or not Mr. Newin Chidchorb was liable to an imprisonment sentence such that his ministership terminated under section 216 (4) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held the following opinion:

On the first issue, section 216 (4) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) stated that the ministership of a Minister terminated upon being sentenced by a judgment to imprisonment. Such a provision referred to a Minister who was sentenced to imprisonment by a judgment while in office as a Minister. Hence, the Constitution had regard to the fact that the commission of the act which constituted the cause of action occurred prior to or whilst the offender was in office as a Minister. As judgment was passed whilst Mr. Newin Chidchorb was in office as a Minister, even if the offence was committed prior to taking office as a Minister, Mr. Newin Chidchorb was subject to the application of section 216 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

On the second issue, according to the Constitution, the termination of membership or vacation of office before the expiration of term for various persons due to an imprisonment

sentence by judgment has been divided into the following two categories by the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

In the first category, the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) employed the terms “having been imprisoned by a final judgment” such as for the termination of membership of members of the House of Representatives, senators and members of the Election Commission under section 118 (12), section 133 (10) and section 141 (4) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

In the second category, the Constitution employed the terms “being sentenced to imprisonment by a judgment” such as for the vacation of office prior to the expiration of terms of the President and Vice-President of the House of Representatives, President and Vice-President of the Senate, Ministers, President of the Constitutional Court and Constitutional Court judges and members of the National Counter Corruption Commission under section 152 (4), section 215, section 216 (4), section 260 (7) and section 298 paragraph three of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

As the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) had provided for the termination of membership or vacation of office before the expiration of term of the various persons in two categories, this showed that the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) intended differently for the termination of membership or vacation of office of such persons under the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). In other words, persons in the first category had their memberships terminated or vacated office before the expiration of term in the case where they were sentenced to a final judgment of the Court which could not be altered. As for the second category, the use of the terms “being sentenced to imprisonment by a judgment” without the words “final” showed that the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) provided that persons in this second category were high in status and possessed important duties. As a result, the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) provided for the termination of their membership or vacation of office before the expiration of term for such persons differently from persons in the first category. This was especially true in the case of being subject to a sentence of imprisonment by judgment where a final judgment was not required as in the case of persons in the first category.

Therefore, when it appeared that any person is a Minister, i.e. a person in the second category, such a person’s ministership terminated immediately upon the sentence of imprisonment by judgment without having to wait for a final judgment.

On the third issue, section 18 of the Criminal Code provided for the sentencing of offenders that “an offender shall be sentenced to the following penalties: (1) life sentence; (2) imprisonment; (3) detention; (4) fine; (5) seizure of property.”

Section 56 of the Criminal Code stated that “in a case where any person has committed an offence subject to a sentence of imprisonment and in such a case the Court would sentence

such person to a term of imprisonment of not exceeding two years, if it does not appear that such a person has previously served a term of imprisonment or that he or she has served a term of imprisonment but for an offence committed through negligence or a minor offence, when the Court has taken into account the age, history, behaviour, intellect, education, health, mental state, traits, occupation and circumstances of such a person or the nature of the offence or other causes which deserved mercy, the Court may, if it deems appropriate, pass a judgment that such a person has committed an offence but the determination of his or her sentence shall be suspended or a sentence shall be determined but its implementation shall be suspended and release such person in order to give him or her an opportunity to revert himself or herself within the period prescribed by the Court, but which shall not exceed five years as from the date of the judgment...”.

It could be seen that in the case where the Court had passed a judgment imposing a term of imprisonment but had suspended the implementation of the sentence, section 56 of the Criminal Code had the effect of releasing the defendant. As a result, the defendant did not have to serve the term of imprisonment. In this connection, imprisonment under a judgment meant the detention of a defendant in a prison pursuant to section 74 of the Criminal Procedure Code which stated that “subject to the application of section 73 and section 185 paragraph two, when a person is subject to a sentence of imprisonment or life sentence or imprisonment in lieu of a fine, the Court shall issue an imprisonment warrant for such person.” In other words, any person subject to a sentence of imprisonment should be actually imprisoned. The Court had to issue an imprisonment warrant. Therefore, a defendant who had been sentenced to imprisonment by a judgment but the punishment was suspended and he or she was immediately released in such a case, the defendant’s suspension of sentence should not be deemed as his or her being imprisoned.

Moreover, section 55 of the Criminal Code stated that “if the imprisonment term to which the offender is liable has a period of three months or less, the Court may impose an even lower imprisonment term, or if the imprisonment term to which the offender is liable has a period of three months or less and the offender is also liable to a fine, the Court may impose a lower imprisonment term or totally exonerate the offender from the imprisonment term and maintain only the fine.” Section 58 paragraph one of the Criminal Code stated that “when it is appeared to the Court or facts appeared from the statement of the plaintiff or competent official that within the period prescribed by the Court in section 56, the person subject to the judgment has committed an offence which was committed through negligence or a minor offence and the Court has sentenced the offender to imprisonment for such an offence, the Court which passed the later judgment shall add the suspended determination of sentence in the preceding case to the sentence in the subsequent case or add the suspended sentence in the preceding case to the subsequent case as the case may be” and section 58 paragraph two stated that “but if within the period prescribed by the Court in section 56, such a person does not commit an offence in paragraph one, such a person shall be exonerated from the determination of a sentence or the penalties in such a case, as the case may be.”

Considered from the above provisions of the Criminal Code, it could be observed that a Court could suspend a sentence for an offender sentenced to imprisonment but who has a cause for mercy. According to the judgment of the Buri Ram Provincial Court, even though the sentence was stated as 6 months imprisonment, the judgment further stated that there were causes which deserved mercy, hence, the sentence was suspended. In such a judgment by the Buri Ram Provincial Court under the application, the Court had determined the sentence but had suspended its implementation. The case was therefore different from the provisions of section 216 (4) of the Constitution which employed terms to the effect that a person should be subject to an imprisonment sentence by judgment, or in other words, subject to an unconditional imprisonment sentence or without other causes of mercy. Particular emphasis was placed on the final part of the Buri Ram Provincial Court judgment which stated that “in relation to the plaintiff’s application to add the penalties in this case to the penalties in other cases, whereas in this case the Court has suspended the sentence of the defendant, such an application shall be dismissed”, which clearly showed that the Court did not sentence the defendant to imprisonment. Thus, the penalties could not be added.

Moreover, a comparison should be made with section 206 (5) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) which stated that “a Minister must possess the qualifications and must not be under any of the prohibitions as follows... (5) having been discharged for a period of less than five years before the appointment after being sentenced by a judgment to imprisonment for a term of two years or more, except for an offence committed through negligence.” Under section 206 (5) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), the provisions referred to an imprisonment sentence for a term of two years or more and the discharge from such a sentence for a period of not less than five years before such a person could be appointed as a Minister. Hence, this revealed that, in another case, there had to be an actual imprisonment under an imprisonment sentence in order that the number of days after discharge could be counted. Whereas, section 216 (4) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) contained similar terms that there should be an imprisonment sentence by judgment, it is thus seen that as regards the taking of office as a Minister, there should be an actual imprisonment. In effect, there was no reason to conclude that a Minister should vacate office just because the word “imprisonment” was used, which would only cause injustice to the person in office. Even though there was a need for stringent examinations, the degree required should be an actual imprisonment and not to imply as such from a judgment for a suspended sentence which was a condition of the imprisonment sentence.

Therefore, the suspension of the sentence was not a state of being subjected to a term of imprisonment by judgment. As Mr. Newin Chidchorb was sentenced to a term of six months imprisonment by Buri Ram Provincial Court but his sentence was suspended for a period of one year, the case could not be deemed as Mr. Newin Chidchorb being subject to an imprisonment sentence by judgment under section 216 (4) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

### **3. Ruling of the Constitutional Court**

By virtue of the reasons stated above, the Constitutional Court ruled that the ministership of Mr. Newin Chidchorb, Deputy Minister of Agriculture and Cooperatives, did not terminate under section 216 (4) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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