

Summary of Constitutional Court Ruling No. 5/2561 (2018)

Dated 31st October B.E. 2561 (2018)*

Re: The Election Commission requested for a Constitutional Court ruling under section 170 paragraph three on whether or not the individual ministerial office of Mr. Don Pramudwinai, Minister of Foreign Affairs, terminated under section 170 paragraph one (5) in conjunction with section 187 of the Constitution.

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1. Summary of background and facts

The Election Commission, applicant, submitted an application to the Constitutional Court for a ruling under section 170 paragraph three of the Constitution. The facts in the application and supporting document could be summarised as follows.

The applicant received a written complaint from Mr. Ruangkrai Leekijwattana requesting for an examination or inquiry into 9 ministers on allegations of actions constituting conflicts of interests pursuant to Chapter 9 of the Constitution, thus being a disqualification of ministerial offices under section 264 in conjunction with the relevant sections of the Constitution. It was requested further that the applicant refer the matter to the Constitutional Court for a ruling under section 170 paragraph three of the Constitution. The applicant ordered the appointment of a fact-finding committee to investigate the matter. The fact-finding committee reported the outcome of factual inquiry to the applicant, stating that after the commencement of the Constitution, the respondent's spouse held shares in Panawong Company Limited and Panawong Realty Company Limited in an amount exceeding the five percent legal limit. The respondent did not submit a letter to notify the Chairman of the National Anti-Corruption Commission of an intent to receive benefits from the shareholding of the respondent's spouse in such companies. The action was therefore a violation of section 187 of the Constitution in conjunction with section 5 of the Management of Partnerships and Shares of Ministers Act B.E. 2543 (2000), being a cause for termination of the respondent's individual ministerial office pursuant to section 170 paragraph one (5) of the Constitution.

The applicant adopted a resolution by majority vote to refer the matter to the Constitutional Court pursuant to section 170 paragraph three of the Constitution for a ruling to terminate the individual ministerial office of the Minister of Foreign Affairs pursuant to section 120 paragraph one (5) of the Constitution. The Constitutional Court was of the following opinion.

* Published in the Government Gazette Vol. 135, Part 100a, dated 28th November B.E. 2561 (2018).

The Constitution was promulgated on 6th April B.E. 2560 (2017). The transitory provision in section 264 paragraph one and paragraph two provided on the Council of Ministers administering state affairs on the day prior to the promulgation of the Constitution, which at the time the Council of Ministers consisted of the respondent serving as Minister of Foreign Affairs. Such Council of Ministers was immediately subject to the application of such constitutional provisions. In addition, the Secretariat of the Cabinet submitted a letter dated 5th April B.E. 2560 (2017) to the Deputy Prime Minister and all Ministers, providing a summary of actions for compliance with the Constitution. Upon a finding of facts, Mrs. Nareerat Pormudwinai, the respondent's spouse, held shares in Panawong Company Limited and Panawong Realty Company Limited, which exceeded five percent of the total distributed shares in both companies. If the respondent wished to receive benefits from the shareholding in both companies in the portion exceeding the legal limit, the respondent still failed to submit a notification in writing to the Chairman of the National Anti-Corruption Commission within thirty days of appointment to become a minister and transferred shares in such company to a juristic person within ninety days of receiving notice from the Chairman of the National Anti-Corruption Commission. The thirty-day period for giving notice to the Chairman of the National Anti-Corruption Commission commenced from the date of promulgation of the Constitution.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court had the competence to accept the application for a ruling under section 170 paragraph three of the Constitution.

After deliberations, the Constitutional Court found as follows. Section 170 paragraph three in conjunction with section 170 paragraph one (5) of the Constitution provided that the Election Commission had the competence to refer a matter to the Constitutional Court for a ruling on the termination of individual ministerial office upon the commission of a prohibited act by the minister pursuant to section 187 of the Constitution. It was found on the facts in the application that the applicant had adopted a resolution to refer the matter to the Constitutional Court for a ruling on whether or not the respondent's individual ministerial office terminated pursuant to section 170 paragraph one (5) of the Constitution and the applicant submitted an application to the Constitutional Court. This case was therefore in accordance with section 170 paragraph three of the Constitution and section 7(9) of the Organic Act on Procedures of the Constitutional Court B.E. 2561 (2018). Hence, the Constitutional Court could accept the application for a ruling and the respondent submitted a reply to the allegations.

3. Summary of reply

The respondent submitted a reply to the allegations together with documents to the Constitutional Court which could be summarised as follows.

The applicant's proceedings in the submission of the matter to the Constitutional Court

for ruling was inconsistent with section 170 paragraph three in conjunction with section 222 of the Constitution because the chairman of the meeting casted an additional vote as an adjudicating vote. Such a resolution could not be considered as a majority resolution. Furthermore, the respondent was appointed prior to the commencement of the Constitution for a period longer than thirty days. Hence, the respondent should be exempt from qualifications and disqualifications of ministerial office with regard to shareholding. The applicant's interpretation of the period as commencing thirty days as from the promulgation of the Constitution was therefore erred and inconsistent or contrary to section 187 of the Constitution. Also, the respondent did not wish to continue receiving benefits from shareholding in the company in excess of the legal limit under section 187 paragraph two of the Constitution and had transferred the shares within thirty days of the Constitution's promulgation to the respondent's child. The factual inquiry committee's report that the transfer occurred on 9th October B.E. 2560 (2017) was therefore incorrect.

4. Examination of witnesses

The Constitutional Court considered the application, reply statement and supporting documents and conducted examinations of 3 witnesses on 25th September B.E. 2561 (2018), namely Mr. Manas Suksawad, chairman of the factual inquiry committee, Mr. Pattakarn Bunnag, managing director of Panawong Realty Company Limited, and Mr. Triwat Tangsubut, managing director of Panawong Company Limited.

5. The issue considered by the Constitutional Court

The first issue was whether or not and to what extent section 264 in conjunction with section 187 of the Constitution applied to the respondent.

Section 264 paragraph two of the Constitution exempted the termination individual ministerial office under section 170 paragraph one (5) only with respect to the non-holding of an office or function in a government agency, state agency or state enterprise, or the office of a member of a local assembly or local administrator pursuant to section 184 paragraph one (1). The case under section 187 which provided that a Minister could not be a partner or shareholder in a partnership or company or retain partnership or shareholding in a partnership or company in the amount stipulated by law was not exempted. This was consistent with the letter of the Cabinet Secretariat, dated 5th April B.E. 2560 (2017), which notified the Prime Minister and all Ministers of the precautions relating to compliance with the Constitution with regard to conflicts of interests and partnership or shareholding in a partnership or company. Upon the respondent taking office as Minister of Foreign Affairs on 23rd August B.E. 2558 (2015), the respondent became a Minister in the Council of Ministers administering public affairs on the day prior to the promulgation of such Constitution, and should therefore not be a partner or shareholder in a partnership or company, or not retain partnership or shareholding in a partnership or company in the amount stipulated by law pursuant to

section 187 of the Constitution. In the case of shareholding in excess of the amount stipulated by law, if the Minister wished to continue receiving benefits from such shareholding, notice had to be given to the President of the National Anti-Corruption Commission within thirty days of appointment and the shares in such partnership or company to a juristic person which managed assets for the benefit of others as provided by law. The Minister should not by any means be involved in the management of shares or business of the partnership or company. In the case where the Minister did not wish to continue receiving benefits from such shares, such Minister could transfer the shares to retain an amount of shares which did not exceed the legal limit within thirty days of appointment. The date of appointment under such provision was the date of promulgation of the Constitution, being the date of taking office, in accordance with Constitutional Court Ruling No. 20/2544. As the Constitution was promulgated on 6th April B.E. 2560 (2017), the day deemed to be the date of the respondent's appointment as Minister pursuant to section 264 in conjunction with section 187 of the Constitution, i.e. 6th April B.E. 2560 (2017).

The second issue was whether or not the respondent's spouse had lawfully transferred shares to other persons.

It was found on the facts that the respondent's spouse had executed a contract to transfer shares in Panawong Company Limited, dated 27th April B.E. 2560, and executed a contract to transfer shares in Panawong Realty Company Limited, dated 30th April B.E. 2560 (2017). The ordinary meeting of shareholders of both companies approved such transfer of shares on 27th April B.E. 2560 (2017) and 30th April B.E. 2560 (2017) respectively. The transfer of shares of the respondent's spouse in each company was in accordance with section 1129 of the Civil and Commercial Code and the transfer had been executed within thirty days of 6th April B.E. 2560 (2017), being a lawful transfer of shares to other persons. As a consequence, the respondent retained shares in each company not exceeding five percent of the total number of distributable shares pursuant to section 4 of the Management of Partnerships and Shares of Ministers Act B.E. 2543 (2000). Hence, the respondent's spouse had duly complied with section 187 of the Constitution.

6. Ruling of the Constitutional Court

The Constitutional Court held that the individual ministerial office of Mr. Don Pormudwinai, Minister of Foreign Affairs, did not terminate under section 170 paragraph one (5) in conjunction with section 187 of the Constitution.
