

Summary of Constitutional Court Ruling No. 9/2557 (2014)

Dated 7th May B.E. 2557 (2014)*

Re: The President of the Senate referred an application of Senators to the Constitutional Court for a ruling on whether or not the individual ministerial office of Miss Yingluck Shinawatra, Prime Minister, terminated under section 182 paragraph one (7) in conjunction with section 268 and section 266(2) and (3) of the Constitution.

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1. Summary of background and facts

The President of the Senate referred the application of Mr. Paiboon Nititawan, Senator, and others, comprising a total of 28 applicants, to the Constitutional Court for a ruling under section 91 in conjunction with section 182 paragraph three of the Constitution on whether or not the individual ministerial office of Miss Yingluck Shinawatra, Prime Minister, respondent, terminated under section 182 paragraph one (7) in conjunction with section 268 and section 266 (2) and (3) of the Constitution. The facts could be summarised as follows.

After the Council of Ministers, by Miss Yingluck Shinawatra, Prime Minister (respondent), had declared policies to the National Assembly on 23rd August B.E. 2554 (2011), Prime Minister's Office Notification dated 30th September B.E. 2554 (2011) was issued to remove Mr. Thawil Pliensri from the office of Secretary-General of the National Security Council (Executive, Higher Level), Office of the National Security Council, and to appoint such person to the office of Advisor to the Prime Minister, Permanent Official Division (Executive, Higher Level), The Secretariat of the Prime Minister, Office of the Prime Minister, from 30th September B.E. 2554 (2011). Thereafter, Prime Minister's Office Notification dated 14th October B.E. 2554 (2011) was issued to remove Police General Vichien Photposri from the office of Commissioner-General of the Royal Thai Police and to appoint such person to the office of Secretary-General of the National Security Council as of 14th October B.E. 2554. Another Prime Minister's Office Notification was issued on 26th October B.E. 2554 (2011) to remove Police General Preawpan Damapong from the office of Deputy Commissioner-General of the Royal Thai Police and to appoint such person to the office of Commissioner-General of the Royal Thai Police as from 26th October B.E. 2554 (2011). Such actions of the respondent were not taken for the benefit of the nation and the people, but for the respondent and relatives of the respondent in order to pave the way

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for promoting Police General Preawpan Damapong, the respondent's relative, to the office of Commissioner-General of the Royal Thai Police. Such acts therefore constituted an exploitation of status or position of the Prime Minister to intervene for the benefit of oneself, others or a political party, being a clear violation of section 268 in conjunction with section 266(2) and (3) of the Constitution. As a consequence, the individual ministerial office of the respondent terminated under section 182 paragraph one (7) of the Constitution.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the competence to admit this application for a ruling under section 91 in conjunction with section 182 paragraph one (7) and paragraph three of the Constitution.

The Constitutional Court found as follows. The applicants consisted of 28 Senators, being a number not less than one-tenth of the total number of existing Senators, who filed petition to the President of the Senate that the individual ministerial office of the respondent terminated under section 182 paragraph one (7) in conjunction with section 268 and section 266 (2) and (3) of the Constitution, and the President of the Senate referred the application to the Constitutional Court for a ruling. The case was therefore in accordance with section 91 paragraph one in conjunction with section 182 paragraph three of the Constitution and article 17 (10) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court thus had the competence to admit this application for consideration.

3. The issues considered by the Constitutional Court

The Constitutional Court considered the determined issues as follows.

The first issue was whether or not after the respondent had vacated office due to the dissolution of the House of Representatives pursuant to section 180 paragraph one (2) of the Constitution, the ministerial office of the respondent also terminated.

The Constitutional Court found as follows. The Constitution provided for causes for the en masse vacation of ministerial office separately from the termination of the individual office of the Prime Minister and each Minister. In other words, the individual ministerial office terminated as per the causes under section 182 of the Constitution. Section 182 paragraph one (1) to (8) and paragraph two provided 9 causes. There was no provision for a person whose ministerial office had terminated to continue serving. This differed from the en masse vacation of office of the Council of Ministers under section 180 paragraph one of the Constitution, who continued to perform duties under section 181 until the new Council of Ministers assumed office, excluding the Prime Minister and Minister whose ministerial office had already terminated under section 182 paragraph one (7) in

conjunction with section 268 and section 266 of the Constitution. The Prime Minister and such Minister was not in a position to remain in office to continue to perform duties under section 181.

The en masse vacation of office of Ministers pursuant to section 180 paragraph one was a different situation from the termination of an individual ministerial office under section 182 paragraph one. In other words, merely an en masse vacation of office of Ministers under section 180 paragraph one did not cause the ministerial offices of the Prime Minister and Ministers to terminate under section 182 paragraph one since section 181 provided that such persons should remain in office to continue performing duties until the new Council of Ministers assumed office.

Upon a finding on the facts that the Royal Decree Dissolving the House of Representatives B.E. 2556 (2013) resulted in the dissolution of the House of Representatives on 9th December B.E. 2556 (2013) and the Ministers vacated office en masse pursuant to section 180 paragraph one (2) of the Constitution without any causes for termination of ministerial office under section 182 paragraph one, such vacation of office was therefore subject to section 181 of the Constitution which provided for the Ministers to remain in office to perform duties until the new Council of Ministers assumed office. The ministerial office of the Prime Minister and all Ministers had not yet terminated since they had to remain in office to perform duties until the new Council of Ministers assumed office. The ministerial office of the Prime Minister would terminate only upon the occurrence of a cause under section 182 paragraph one of the Constitution and the Constitutional Court had to give a ruling under section 182 paragraph one (2), (3), (5), (7) or paragraph two. Therefore, upon the applicant's submission of an application for the Constitutional Court ruling that the ministerial office of the respondent terminated under section 182 paragraph one (7) in conjunction with section 268 and section 266 of the Constitution, the Constitutional Court had the competence to admit this application for consideration.

The second issue was whether or not the respondent's actions were subject to the provisions of section 268 in conjunction with section 266 (2) or (3) of the Constitution which would cause the individual ministerial office of the respondent to terminate under section 182 paragraph one (7) of the Constitution.

The Constitutional Court found as follows. Section 268 in conjunction with section 266 (2) and (3) of the Constitution was provisions, which intended to provide security to a state official against political intervention, except where exercised within the scope of official functions. These principles under section 266 (2) and (3) of the Constitution also applied to the Prime Minister and Ministers as members of the executive pursuant to section 268. The intent was to ensure rightfulness in the performance of duties by the Prime Minister and Ministers and to prevent any acts which could give rise to any conflicts of interest. Section 268, also, provided an exception for acts done in the performance of public administration functions pursuant to policies declared to the National Assembly or as provided by law. The exception was necessary for the performance of legal duties of a

Prime Minister and Ministers in the determination of policies and direction of national administration in order to achieve utmost benefits for the nation and people. The exception was therefore needed to provide powers to command and recruit, appoint, reassign, transfer, promote, raise salaries and remove persons performing functions in the official service, without deeming such actions to be an intervention in the performance of functions of government officials, staff members or employee of any state agencies. Nonetheless, the actions of a person holding the office of Prime Minister or Minister had to conform to the principles of legality combined with honesty. In regard to the exercise of functions, the law granted powers of national administration for the public interests and benefits of people from all sectors. Appointments and reassignments of persons in various offices also had to be consistent with good governance. Furthermore, the Constitution provided a limitation on the exercise of powers by all levels of state officials which had to be in accordance with the rule of law pursuant to section 3 paragraph two. No action could be committed by an unfettered discretion due to a conflict of interest or hidden agenda constituting a dishonest act.

The Constitutional Court examined the facts in the judgment of the Supreme Administrative Court, oral testimonies, affidavits, including all evidence and circumstances of the case and reached the following findings. The respondent was involved in the removal of Mr. Thawil Pliensri from the office of Secretary-General of the National Security Council and appointment to the office of Advisor to the Prime Minister, Office of the Prime Minister. The reasons stated in the respondent's arguments were insufficient to support the claim that the issuance of order to reassign Mr. Thawil Pliensri to the Office of the Prime Minister was done for official benefit in accordance with the Council of Minister's policies declared to the National Assembly. Moreover, the transfer of Mr. Thawil Pliensri was rushed and not in accordance with normal official procedures. Hence, there was cause to believe that there were other factors behind the transfer of Mr. Thawil Pliensri from the office of Secretary-General of the National Security Council to the office of Advisor to the Prime Minister, Permanent Official Division, i.e. an intent to make the office of Secretary-General of the National Security Council vacant in order to transfer the Commissioner-General of the Royal Thai Police held by Police General Vichien Photposri at that time to such office, which would in turn make the office of Commissioner-General of the Royal Thai Police vacant and create an opportunity to appoint the respondent's relative to that post. All actions of the respondent were not in any way taken for the benefits of the nation and the people. There was a concealed intent or hidden agenda for the benefit of oneself or associates, thus constituting actions contrary to ethics, virtue and legitimacy in the exercise of functions pursuant to the intents of the Civil Service Act B.E. 2551 (2008), which provided rules for the exercise of powers and duties of personnel administrators in the state sector. The law expressed a clear intent that personnel administration had to be based on merit. The official service had to treat a government official under a personnel administration system which took into account the knowledge, competency, equality, fairness, non-discrimination, non-prejudicial and political impartiality. Any appointment, reassignment and removal of Mr. Thawil Pliensri from office was part of the same process and was connected to the appointment of Police General Preawpan Damapong to the office of Commissioner-General of the Royal Thai

Police. This showed a conflict of interest and hidden agenda. The respondent's involvement was deemed as an intervention in the appointment, reassignment and removal of a government official having a fixed position and salary who was not a political official, and the action was taken for the benefit of others, namely Police General Preawpan Damapong, who was the respondent's relative, being a violation of section 268 in conjunction with section 266 (2) and (3) of the Constitution.

For the foregoing reasons, the Constitutional Court ruled that the respondent had exploited her status or position as the Prime Minister to intervene or interfere in the recruitment, appointment, reassignment, transfer, promotion, salary raise or removal from office of a government official having a fixed position and salary and not being a political official for the benefit of oneself or others. The case was in accordance with section 266 (2) and (3) of the Constitution and considered to be an act under section 268 of the Constitution resulting in the termination of individual ministerial office of the respondent pursuant to section 182 paragraph one (7) of the Constitution.

The next question considered was whether or not after the termination of the respondent's individual ministerial office pursuant to section 182 paragraph one (7) of the Constitution, the respondent could remain in office to perform duties under section 181 of the Constitution.

Upon an examination of section 181 and section 182 of the Constitution, the Constitutional Court found that section 181 of the Constitution provided only for the case of the Council of Ministers vacating office under section 180 paragraph one to remain in office to perform duties under a new Council of Ministers assumed office. The provision did not apply to the case where an individual ministerial office terminated under section 182. In this case, once the respondent had committed a violation of section 268 in conjunction with section 266 paragraph one (2) and (3) of the Constitution which caused her individual ministerial office to terminate under section 182 paragraph one (7), the respondent was therefore unable to remain in office to perform duties under section 181 of the Constitution.

The third issue was whether or not the termination of the respondent's individual ministerial office under section 182 paragraph one (7) of the Constitution also constituted a cause for an en masse termination of ministerial offices.

The Constitutional Court found as follows. Section 180 paragraph one (1) and section 181 of the Constitution specifically provided that the Council of Ministers vacating office due to the termination of ministerial office of the Prime Minister under section 182 should remain in office to continue performing duties until a new Council of Ministers assumed office. Therefore, upon the termination of the respondent's ministerial office under section 182 paragraph one (7) of the Constitution being a cause for vacation of office of the Council of Ministers under section 180 paragraph one (1) of the Constitution, since the Prime Minister's ministerial office terminated individually, the remaining Ministers in the Council of Ministers who did not lack qualifications or were disqualified from being a

Minister should remain in office to continue performing duties until a new Council of Ministers assumed office under section 181 of the Constitution.

However, if a Minister committed an act which constituted a cause for termination of individual ministerial office as provided under section 182 paragraph one (1) to (8) of the Constitution, such Minister would also not be able to remain in office to continue performing duties until a new Council of Ministers assumed office under section 181 of the Constitution. In this regard, the appointment of a high level government official required the approval of the Council of Ministers. Therefore, in this case, if a Minister participated in the resolution which intervened or interfered with the permanent official by transferring Mr. Thawil Pliensri, being a violation of section 268 in conjunction with section 266 of the Constitution, regardless of whether the action was taken directly or indirectly, such action also constituted a cause for the individual ministerial office of such Minister to terminate under section 182 paragraph one (7) of the Constitution, and the vacancy of such Minister continued until the time of appointment of a new Council of Ministers under section 181 of the Constitution.

Upon a clear finding of fact that the matter on the transfer and removal of Mr. Thawil Pliensri from the office of Secretary - General of the Office of the National Security Council was submitted to the Council of Ministers for approval in a hasty, brief and irregular manner, by including the matter as a special agenda on 6th September B.E.2554 (2011), and the Council of Ministers unanimously adopted an unlawful resolution to sanction the transfer and removal of government official from office on the same day, all Minister who participated in the meeting and voted on that day therefore participated indirectly in the interference or intervention of matters pertaining to a permanent official. This act was a violation of section 268 in conjunction with section 266 (2) and (3) of the Constitution, thus also constituting a cause for termination of individual ministerial offices of such Ministers pursuant to section 182 paragraph one (7) of the Constitution.

As for the issue in the applicant's request for a Constitutional Court ruling to appoint a new Prime Minister under section 172 and section 173 of the Constitution *mutatis mutandis*, this request was beyond the scope of application for the Constitutional Court ruling in this case. The request was inadmissible and dismissed.

4. Ruling of the Constitutional Court

By virtue of the foregoing reasons, the Constitutional Court by unanimous votes held that the respondent exploited her status or position as a Prime Minister to intervene or interfere for her own benefit or the benefit of others in regard to the recruitment, appointment, reassignment, transfer or removal from office of an official who had a fixed position or salary and not being a political official, which was subject to section 266 (2) and (3) of the Constitution and deemed as an act under section 268 of the Constitution. As a consequence, the individual ministerial office of the respondent terminated under section 182 paragraph one (7) of the Constitution and the Ministers participating in the

Council of Ministers meeting on 6th September B.E. 2554 (2011) were involved in the interference or intervention of a permanent official, constituting a violation of section 268 in conjunction with section 266 (2) and (3) of the Constitution. Hence, the individual ministerial offices of such persons also terminated under section 182 paragraph one (7) of the Constitution.
