

# Summary of Constitutional Court Ruling No. 15/2551

**Dated 22<sup>nd</sup> October B.E. 2551 (2008)\***

**Re: The Supreme Court referred the objection of plaintiffs (Mr. Somkiat Bunsiri and others in a total of 10 persons) in a civil case of the Khon Kaen Provincial Court which requested a Constitutional Court ruling on whether or not clause 1 and clause 2 of the Announcement of the National Executive Council No. 337 dated 13<sup>th</sup> December B.E. 2515 (1972), section 7 bis of the Nationality Act B.E. 2508 (1965), as amended by the Nationality Act (No. 2) B.E. 2535 (1992), and section 11 of the Nationality Act (No. 2) B.E. 2535 (1992) were contrary to or inconsistent with section 30 and section 32 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).**

.....

## **1. Summary of background and facts**

The Office of the Judiciary sent a letter dated 26<sup>th</sup> August B.E. 2547 (2004) referring an opinion of the Supreme Court and objections of the first to tenth plaintiffs (Mr. Somkiat Bunsiri, first plaintiff; Mrs. Laddawal Bunsiri, second plaintiff; Mr. Wichai Bunsiri, third plaintiff; Mr. Somnuek Bunsiri, fourth plaintiff; Mr. Sombat Bunsiri, fifth plaintiff; Mr. Somsak Bunsiri, sixth plaintiff; Miss Pimkamol Bunsiri, seventh plaintiff; Miss Kanuengnuch Bunsiri, eighth plaintiff; Miss Pattarin Bunsiri, ninth plaintiff; and Mr. Damrong Bunsiri, tenth plaintiff) in a civil case of the Khon Kaen Provincial Court in request of a Constitutional Court ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) on whether or not clause 1 and clause 2 of the Announcement of the National Executive Council No. 337 dated 13<sup>th</sup> December B.E. 2515 (1972), section 7 bis of the Nationality Act B.E. 2508 (1965), as amended by the Nationality Act (No. 2) B.E. 2535 (1992), and section 11 of the Nationality Act (No. 2) B.E. 2535 (1992) were contrary to or inconsistent with section 30 and section 32 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). The facts could be summarized as follows.

Mr. Somkiat Bunsiri, the first plaintiff, and others in a total of 10 plaintiffs filed suit against the Khon Kaen Governor as a defendant in Khon Kaen Provincial Court on 28<sup>th</sup> November B.E. 2539 (1996) claiming that the Khon Kaen Governor signed an Order of

---

\* Published in the Government Gazette Vol. 126, Part 8a, 3<sup>rd</sup> February B.E. 2552 (2009).

Khon Kaen Province No. 2116/2525, dated 9<sup>th</sup> August B.E. 2525 (1982) to revoke the Thai nationalities of all ten plaintiffs pursuant to the Announcement of the National Executive Council No. 337 dated 13<sup>th</sup> December B.E. 2515 (1972) and directed the district chief to remove the names of all ten plaintiffs from the housing register, asserting that the first and second plaintiffs were Yuan immigrants. It was claimed that as a result thereof, all ten plaintiffs suffered losses. In the lawsuit, it was asserted that the first plaintiff was born in Nai Mueng Sub-District, Muang District, Khon Kaen Province in the year B.E. 2485 (1942), while the second plaintiff was born in Nawa Sub-District, Phu Wieng District, Khon Kaen Province in the year B.E. 2487 (1944). The first and second plaintiffs lived in matrimony throughout this time and had 8 children, namely the third to tenth plaintiffs. As all ten plaintiffs were born in Thailand, they should have Thai nationality. Thus, the order to revoke the nationalities of all ten plaintiffs was unlawful. It was therefore requested that the Court give judgment to reinstate the Thai nationalities of all ten plaintiffs and order the defendant to revoke Order of Khon Kaen Province No. 2116/2525, as well as to register the names and nationalities of all ten plaintiffs in the housing register; in the event of a failure to comply, the judgment would be deemed as the expressed intent. Khon Kaen Provincial Court gave judgment on 21<sup>st</sup> December B.E. 2544 (2001) after considering the facts adduced by the plaintiffs and the defendant and held that Order of Khon Kaen Province No. 2116/2525 to revoke the nationalities of all ten plaintiffs was lawful. The plaintiffs' claims were dismissed.

All ten plaintiffs filed appeals against the judgment of Khon Kaen Provincial Court and the Court of Appeals Region 4 gave judgment on 8<sup>th</sup> April B.E. 2546 (2003) affirming the court of first instance's judgment. The appeals filed by all ten plaintiffs were not upheld and dismissed.

All ten plaintiffs filed appeals to the Supreme Court and filed a motion dated 30<sup>th</sup> September B.E. 2546 (2003) requesting for a Constitutional Court ruling that the Announcement of the National Executive Council No. 337 was contrary to or inconsistent with section 29 and section 32 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), and also that section 7 bis of the Nationality Act B.E. 2508 (1965) as amended by the Nationality Act (No. 2) B.E. 2535 (1992) in conjunction with section 11 of the Nationality Act (No. 2) B.E. 2535 (1992) were inconsistent with section 30 of the Constitution.

After consideration, the Supreme Court made the following findings. In the appeal to the Supreme Court, all ten plaintiffs raised the argument that clause 1 of the Announcement of the National Executive Council No. 337 which were relied upon by the defendant as cause for revoking the Thai nationality of the third to seventh plaintiffs, and clause 2 of the Announcement of the National Executive Council No. 337 which was relied by the defendant in asserting that the eighth to tenth plaintiffs did not acquire Thai nationality, as well as section 7 bis of the Nationality Act B.E. 2508 (1965) (amended by the Nationality Act (No. 2) B.E. 2535 (1992)) and section 11 of the Nationality Act (No. 2) B.E. 2535 (1992), which provided for the application of section 7 bis of the Nationality Act B.E. 2508 (1965) to persons born before the coming into force of such Act, were contrary to or inconsistent with section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) due to

such provisions of law resulting in persons born in Thailand not having Thai nationality in accordance with the territorial principle, and were also contrary to or inconsistent with section 32 of the Constitution since they retroactively prejudiced the right to Thai nationality of all ten plaintiffs. Such issues were legal questions involving public order or good morals of the people. Thus even though all ten plaintiffs did not raise the arguments in the lower courts, they were entitled to raise the issues in the Supreme Court. As the Supreme Court was going to apply those provisions to the case, upon an objection that such provisions of law were contrary to or inconsistent with the Constitution, in the absence of a ruling of the Constitutional Court with respect to such provisions, the Supreme Court therefore issued an order on 16<sup>th</sup> June B.E. 2547 (2004) to refer all ten plaintiffs' objections only with respect to the clause stating that clause 1 and clause 2 of the Announcement of the National Executive Council No. 337 dated 13<sup>th</sup> December B.E. 2515 (1972), as well as section 7 bis of the Nationality Act B.E. 2508 (1965) as amended by the Nationality Act (No. 2) B.E. 2535 (1992) and section 11 of the Nationality Act (No. 2) B.E. 2535 (1992), were contrary to or inconsistent with section 30 and section 32 of the Constitution, to the Constitutional Court for a ruling under section 264 of the Constitution.

## **2. Preliminary issue**

The preliminary issue was whether or not the Constitutional Court had the power to admit the application for ruling.

The Constitutional Court examined the application and ordered the admittance of the application for proceedings under clause 12 of the Rules of the Constitutional Court on Constitutional Court Procedures B.E. 2546 (2003), and admittance for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

The case was pending proceedings in the Constitutional Court under the Constitution of the Kingdom of Thailand B.E. 2540 (1997) when subsequently the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) was promulgated on 1<sup>st</sup> October B.E. 2549 (2006) wherein section 35 paragraph one provided that all matters provided by law as powers of the Constitutional Court or when a problem arose as to whether or not a law was inconsistent with the Constitution would fall under the powers of the Constitutional Tribunal, and paragraph four provided that all cases or matters pending proceedings in the Constitutional Court prior to 19<sup>th</sup> September B.E. 2549 (2006) would be transferred to the powers and responsibilities of the Constitutional Tribunal. Thereafter, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was promulgated on 24<sup>th</sup> August B.E. 2550 (2007) to replace the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006). Section 300 paragraph one, paragraph three and paragraph four of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided that the Constitutional Tribunal under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) would be the Constitutional Court, and that the provisions of section 35 paragraph two, paragraph three and paragraph four of the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) would continue to

be in force until the enactment of an Organic Act on Constitutional Court. All cases or matters pending proceedings by the Constitutional Tribunal would be continued by the Constitutional Court. Upon the appointment of Constitutional Court judges under the new Constitution, all cases or matters pending would be transferred to the powers and duties of the newly appointed Constitutional Court. Hence, the Constitutional Court had the power to admit this application for consideration.

### **3. Issues considered by the Constitutional Court**

The Constitutional Court found that at the time of Constitutional Court ruling on this application, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) had already been promulgated, wherein section 30 and section 32 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), which the applicant had raised objections of provisions of laws being inconsistent with, embedded the same principles as section 30 and section 39 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Thus, the ruling on this application was made pursuant to section 30 and section 39 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The issues which had to be ruled upon by the Constitutional Court was whether or not clause 1 and clause 2 of the Announcement of the National Executive Council No. 337 dated 13<sup>th</sup> December B.E. 2515 (1972) and section 7 bis of the Nationality Act B.E. 2508 (1965) as amended by the Nationality Act (No. 2) B.E. 2535 (1992) and section 11 of the Nationality Act (No. 2) B.E. 2535 (1992) were contrary to or inconsistent with section 30 and section 39 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court held as follows.

1. On the issue of whether or not clause 1 and clause 2 of the Announcement of the National Executive Council No. 337 dated 13<sup>th</sup> December B.E. 2515 (1972) were contrary to or inconsistent with section 30 and section 39 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), it was found that the Announcement of the National Executive Council No. 337 dated 13<sup>th</sup> December B.E. 2515 (1972) was already repealed by section 3 of the Nationality Act (No. 2) B.E. 2535 (1992) as of 26<sup>th</sup> February B.E. 2535 (1992), prior to the promulgation of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) on 24<sup>th</sup> August B.E. 2550 (2007). Thus, there was no provision of law which could be contrary to or inconsistent with the Constitution of the Kingdom of Thailand B.E. 2550 (2007). A ruling on this issue was therefore not required.

2. On the issue of whether or not section 7 bis of the Nationality Act B.E. 2508 (1965), as amended by the Nationality Act (No. 2) B.E. 2535 (1992), was contrary to or inconsistent with section 30 and section 39 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), it was found that during the trial of this application, the Nationality Act (No. 4) B.E. 2551 (2008) was promulgated on 28<sup>th</sup> February B.E. 2551 (2008), resulting in the repeal of paragraph two and paragraph three of section 7 bis of the Nationality Act

B.E. 2508 (1965) as amended by the Nationality Act (No. 2) B.E. 2535 (1992), which were replaced by new provisions under section 7 of the Nationality Act (No. 4) B.E. 2551 (2008). The case was therefore an objection of provisions of law which were no longer in force. However, as the provisions of section 7 bis paragraph two remained unchanged except for the addition of the text “or generally”, which was deemed as being more beneficial than the previous provision, the Constitutional Court therefore admitted the issue for consideration. As for the provision in section 7 bis paragraph three, since there were significant amendments and change from the previous principle, the Constitutional Court did not admit such provision for consideration.

Hence, the issue which had to be ruled upon by the Constitutional Court was whether or not section 7 bis paragraph one and paragraph two of the Nationality Act B.E. 2508 (1965), as amended by the Nationality Act (No. 2) B.E. 2535 (1992), were contrary to or inconsistent with section 30 and section 39 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court made the following findings. The scope for determination of rules and conditions for granting nationality and revoking the nationality of a person was deemed as exclusive policies of each state. A state had the sovereign power to enact a law to the extent that was neither contrary to nor inconsistent with the Constitution and international agreements. The provision of section 7 bis paragraph one of the Nationality Act B.E. 2508 (1965), as amended by the Nationality Act (No. 2) B.E. 2535 (1992), which was currently in force, provided rules pertaining to the exclusion of Thai nationality acquired at birth under the territorial principle in section 7(2). The prescription of such rules was made in accordance with the necessities and statuses in relation to the country’s history, security, economy and society, and such provisions were applied to all persons equally without exemption for any specific person or case that would result in unequal treatment or protection of any person in the acquisition or relinquishing of nationality under the law. The provision also did not amount to unfair discrimination against persons by reason of differences in origin, race, language, sex, age, disability, physical or health conditions, personal status, economic or social standing, religious belief, education and training or political persuasion. The provision was therefore neither contrary to nor inconsistent with section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Furthermore, section 7 bis paragraph one of the Nationality Act B.E. 2508 (1965), as amended by the Nationality Act (No. 2) B.E. 2535 (1992), was not a provision of law which provided for the elements of an offence and the prescription of a criminal penalty. The case did not raise the issue of whether or not the provision imposed a criminal penalty upon a person who had not committed an offence, where a penalty had not been provided and where there was no law in that respect, or whether or not the law imposed a criminal sanction against a person retroactively. The provision was therefore neither contrary to nor inconsistent with section 39 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

With respect to section 7 bis paragraph two of the Nationality Act B.E. 2508 (1965), as amended by the Nationality Act (No. 2) B.E. 2535 (1992), such provision was an exception

to the principle where a person under section 7 bis paragraph one would not acquire Thai nationality. In this regard, the Minister of Interior had the discretionary power to issue orders specifically for individuals who had not acquired Thai nationality under section 7 bis paragraph one to acquire Thai nationality according to the rules prescribed by the Council of Ministers. Therefore, if the Minister of Interior considered granting Thai nationality to a person under section 7 bis paragraph one, the Minister would apply identical standards, i.e. those rules prescribed by the Council of Ministers. Such provisions of section 7 bis paragraph two were generally applicable, expanding the opportunity to persons who had not acquired Thai nationality under section 7 bis to have equal rights to submit applications for Thai nationality. Such provisions were not discriminatory against any person. This was a case where provisions conferred benefits. The provisions were therefore neither contrary to or inconsistent with section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Furthermore, section 7 bis paragraph two of the Nationality Act B.E. 2508 (1965), as amended by the Nationality Act (No. 2) B.E. 2535 (1992), was not a provision of law which provided for elements of an offence and criminal penalties. Thus, there was no case for consideration of whether the provision imposed criminal penalties against a person where there was no offence, no penalty and no law, or whether or not the law retroactively imposed criminal penalties against a person. The provision was therefore neither contrary to nor inconsistent with section 39 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

3. On the issue of whether or not section 11 of the Nationality Act (No. 2) B.E. 2535 (1992) was contrary to or inconsistent with section 30 and section 39 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the Constitutional Court held as follows.

Section 11 paragraph one of the Nationality Act (No. 2) B.E. 2535 (1992) provided for the application of section 7 bis of the Nationality Act B.E. 2508 (1965), as amended by the Nationality Act (No. 2) B.E. 2535 (1992), which was a provision on rules on exclusion from acquiring Thai nationality by birth and exceptions, to persons born in the Kingdom of Thailand prior to 26<sup>th</sup> February B.E. 2535 (1992), also being the date of coming into force of this Act, with the exception of persons who had already acquired Thai nationality by order of the Minister of Interior pursuant to the Announcement of the National Executive Council No. 337 dated 13<sup>th</sup> December B.E. 2515 (1972) prior to 26<sup>th</sup> February B.E. 2535 (1992). As regards the provision in section 11 paragraph one on the retroactive application of section 7 bis, although there were both positive and negative effects on a person, such provisions were still of general application and not directed at any particular case or person, or resulted in a person receiving unequal treatment under the law, or receiving unequal protection under the law in relation to the acquisition or exclusion from Thai nationality. This was therefore not a case of unfair discrimination against a person. The provision was thus neither contrary to nor inconsistent with section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Furthermore, even though section 11 paragraph one provided for the retroactive application of section 7 bis could be detrimental to certain persons born in the Kingdom of Thailand prior

to 26<sup>th</sup> February B.E. 2535 (1992), it was not a provision which prescribed the elements of an offence or criminal penalties that would result in a person receiving criminal penalties for an act committed prior to the effective date of the law. This was therefore not a case of a retroactive application of the law to determine an offence or impose criminal sanctions against a person. The provision was thus neither contrary to nor inconsistent with section 39 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

As for section 11 paragraph two of the Nationality Act (No. 2) B.E. 2535 (1992), such provision was an exception to section 11 paragraph one. In other words, a person born in the Kingdom of Thailand prior to the effective date of the Nationality Act (No. 2) B.E. 2535 (1992), i.e. prior to 26<sup>th</sup> February B.E. 2535 (1992), but who had not acquired Thai nationality under paragraph one, might acquire Thai nationality under section 7 bis paragraph two of the Nationality Act B.E. 2508 (1965), as amended by the Nationality Act (No. 2) B.E. 2535 (1992). In such a case, the Minister of Interior could order the grant of Thai nationality generally or to an individual person in accordance with rules prescribed by the Council of Ministers, being a beneficial provision for persons under section 11 paragraph one. This provision of law was generally applicable and not unfairly discriminatory on a person. The provision also did not retroactively imposed an offence or criminal penalty on a person. Thus, it was therefore neither contrary to nor inconsistent with section 30 and section 39 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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

By virtue of the foregoing reasons, the Constitutional Court held that section 7 bis paragraph one and paragraph two of the Nationality Act B.E. 2508 (1965), as amended by the Nationality Act (No. 2) B.E. 2535 (1992), and section 11 of the Nationality Act (No. 2) B.E. 2535 (1992), were neither contrary to nor inconsistent with section 30 and section 39 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

---