

# Summary of Constitutional Court Ruling No. 2/2552

**Dated 4<sup>th</sup> March B.E. 2552 (2009)\***

**Re: The Supreme Administrative Court referred the objection of a plaintiff (Mr. Suwachara or Rewat Porassami) in Case No. Or.505/2547 (2004) to the Constitutional Court in request of a ruling on whether or not section 35(6) of the Attorneys Act B.E. 2528 (1985) was contrary to or inconsistent with section 29 of the Constitution.**

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

Mr. Suwachara or Rewat Porassami, the plaintiff, filed a plaint against the Board of the Lawyers Council, the defendants, in Chiang Mai Administrative Court in the case of a resolution rejecting the application for registration and attorney licensing due to a disqualification under section 35(6) of the Attorneys Act B.E. 2528 (1985). The plaintiff appealed such order to the Special Honorary Chairman of the Lawyers Council who ruled in affirmation of such order. The plaintiff did not concur with the defendant's resolution and the ruling of the Special Honorary Chairman of the Lawyers Council, and therefore filed a plaint in the Administrative Court in request of a judgment or order to revoke the resolution of the defendant as well as to order the defendant to register and issue an attorney's license to the plaintiff.

Chiang Mai Administrative Court considered the plaint and found that the defendant's resolution to reject the plaintiff's application to register and obtain an attorney's license was due to the plaintiff's disqualification under section 35(6) of the Attorneys Act B.E. 2528 (1985). The resolution neither constituted a violation of rights without regard to human dignity, nor was it an unfair discrimination against a person due to differences of personal status as provided under the Constitution of the Kingdom of Thailand. Judgment was therefore given to dismiss the plaint.

The plaintiff appealed to the Supreme Administrative Court that he did not concur with the judgment of Chiang Mai Administrative Court. It was therefore requested that the Supreme Court conduct a trial and adjudication or refer the plaintiff's opinion to the Constitutional Court for trial and adjudication.

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The Supreme Administrative Court found that, in the proceedings for a judgment or order in this case, the Supreme Administrative Court had to apply the provisions of section 35(6) of the Attorneys Act B.E. 2528 (1985). However, as the plaintiff objected that such provision of law was contrary to or inconsistent with section 29 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) and there had not yet been a ruling of the Constitutional Court with respect to such provision, a temporary stay of proceedings was therefore imposed and the plaintiff's opinion was referred through official channels to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

## **2. Preliminary issue**

The Constitutional Court examined the application and ordered the admittance of the application for trial and adjudication under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). Pending proceedings of this application by the Constitutional Court, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was promulgated. Section 29 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), which was the constitutional provision asserted by Mr. Suwachara or Rewat Porassami, the applicant, that a provision of law was contrary to or inconsistent with, embodied an identical principle to section 29 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The case in this application therefore had to be considered in accordance with section 29 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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

The issue which was considered by the Constitutional Court was therefore whether or not section 35(6) of the Attorneys Act B.E. 2528 (1985) was contrary to or inconsistent with section 29 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

After consideration, the Constitutional Court found as follows. Section 29 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was a provision which laid down the safeguard principles for the security of rights and liberties of a person whereby the National Assembly's enactment of a law to restrict the rights and liberties of the people was only permitted under the rules prescribed by the Constitution. Such law should be generally applicable and not directed at any particular case or person. There should also be a specification of the constitutional provisions which authorized the enactment of such law.

The rationale behind the enactment of the Attorneys Act B.E. 2528 (1985) was to control and promote the attorney profession. It was intended to initiate the scrutiny of persons entering the attorney's profession in an orderly manner under identical standards. This would prevent a person from having unsuitable qualifications from feigning and exploiting the status of being an attorney, as well as control the conduct of persons engaging in the attorney profession to maintain good ethics. Furthermore, safeguards were provided

for the people in terms of the enjoyment of confidence in receiving legal services from the attorney profession, which was one of the key mechanisms in the facilitation of complete justice. Not only would this confer benefits for the people involved in cases and professional attorneys, but the impact also extended to peace and order in the judicial process, which would be beneficial to the people as a whole.

Section 35(6) of the Attorneys Act B.E. 2528 (1985) was a provision which stipulated the qualifications of an applicant for registration and obtaining an attorney's license, stating that a person who had previously served a prison term pursuant to a final judgment of imprisonment for a case which the Board of the Lawyers Council held as bringing disgrace to the honour of the profession, would be barred or disqualified from registration and obtaining an attorney's license. This provision meant that a person applying to register and obtain an attorney's license who once served a prison term pursuant to a final judgment of imprisonment would be barred or disqualified only upon the Board of the Lawyers Council finding that such person had served a prison term pursuant to a final judgment of imprisonment for a case that would bring disgrace to the honor of the profession. Section 35(6) was therefore not a provision which constituted an absolute restriction on the qualifications of an attorney. It was, however, a case where the law authorized the Board of the Lawyers Council to exercise judgment in determining the cases that would bring disgrace to the honour of the attorney profession, hence being those barred or disqualified from applying to register and obtain an attorney's license. This would enable controls and scrutiny of persons having qualifications suitable for the attorney profession. Furthermore, the exercise of discretion by the Board of the Lawyers Council to reject the registration and issuance of an attorney's license to an applicant had to be accompanied by the Board's explanation of clear reasons for the rejection of registration and issuance of a license. In such an event, the applicant would have the right to appeal against such rejection of registration and issuance of attorney license to the Special Honorary Chairman of the Lawyers Council pursuant to section 36. Moreover, the law did not deprive the right to file an action in the Administrative Court.

As for the issue of section 35(6) of the Attorneys Act B.E. 2528 (1985) not stipulating a period of time for the restriction of rights of a person who had served a prison term pursuant to a final judgment of imprisonment for a case determined by the Board of the Lawyers Council as bringing disgrace to the honour of the profession, resulting in the first-time applicant for registration and attorney licensing not being able to avoid the prohibition or disqualification for registration and attorney licensing, thus constituting a lifetime restriction of rights and liberties of a person with respect to engaging in the profession of an attorney, as compared to an attorney disbarred from the Attorneys Register due to the commission of an act disgraceful to the honour of the attorney profession and having an opportunity to re-apply for registration and licensing upon the lapse of not less than five years as from the date of disbarment pursuant to section 69 in conjunction with section 71 of such Act, the Constitutional Court found as follows. Section 35(6) of the Attorneys Act B.E. 2528 (1985), by not stipulating a period of time relating to the qualifications of a first-time applicant for

registration and attorney licensing in the case of a person who had served a prison term pursuant to a final judgment for a case determined by the Board of the Lawyers Council as bringing disgrace to the profession, was actually beneficial to the applicant for registration and licensing since the applicant for registration and attorney licensing had the right to submit an application at any time without time limit. As for the case of an attorney who was disbarred from the attorneys register due to the commission of an act of disgrace to the attorney profession, a reapplication to register and obtain an attorney's license had to proceed in the same manner as a first-time applicant for registration and attorney licensing. However, the registration and attorney licensing of both applicants were subject to the exercise of discretion by the Board of the Lawyers Council as provided by law.

The Constitutional Court therefore found that section 35(6) of the Attorneys Act B.E. 2528 (1985), despite the provisions empowering the Board of the Lawyers Council to exercise a discretion in determining the cases that would bring disgrace to the honour of the attorney profession, constituting a restriction of the rights and liberties of a person in engaging in the attorney profession, provided for safeguards of the people's interests and peace and order in the judicial process which was the public's interest. Such public interest had a higher priority than the protection of the interests of those engaged in the attorney profession, being the interests of a specific group. The provision was therefore a restriction of rights and liberties which was necessary and did not prejudice the essential substance of rights and liberties. Furthermore, the Board of the Lawyers Council was unable to exercise such powers absolutely, but was subject to reviews by the Special Honorary Chairman of the Lawyers Council and the Courts. Section 35(6) of the Attorneys Act B.E. 2528 (1985) was therefore neither contrary to nor inconsistent with section 29 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

As regards the issue of whether or not section 35(6) of the Attorneys Act B.E. 2528 (1985) was contrary to or inconsistent with section 29 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2528 (1985) since the Attorneys Act B.E. 2528 (1985) did not specify the provisions of the Constitution authorizing the enactment of law, such issue amounted to an objection that the law was not duly enacted pursuant to the provisions of the Constitution whereas section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) did not entitle the plaintiff's rights to argue without specifying the provisions of the Constitution. Section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) embodied the same principle as section 211 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Hence, it was not necessary to make a ruling on this issue.

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

The Constitutional Court held that section 35(6) of the Attorneys Act B.E. 2528 (1985) was neither contrary to nor inconsistent with section 29 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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