

Summary of Constitutional Court Ruling No. 10/2552

Dated 6th May B.E. 2552 (2009)*

Re: The Supreme Administrative Court referred the objections of the applicant (Mr. Winit Pisetsuntorn) to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) in the case of whether or not section 15 paragraph two, section 19 paragraph one subparagraph (4) and paragraph two, and section 20 bis paragraph one subparagraph (2) of the Municipality Act B.E. 2496 (1953), section 40 paragraph one of the Building and Land Tax Act B.E. 2475 (1932), section 5 and section 20 (3) of the Election of Municipal Assembly Members Act B.E. 2482 (1939), section 136 paragraph one subparagraph (3) and paragraph two of the Election of Local Assembly Members or Local Administrators Act B.E. 2545 (2002) and section 30 of the Administrative Procedures Act B.E. 2539 (1996) were contrary to or inconsistent with section 4, section 6, section 26, section 27, section 28, section 29, section 30 and section 69 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

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1. Summary of background and facts

The Supreme Administrative Court referred the objections of Mr. Winit Pisetsuntorn, the plaintiff (the applicant), in Case No. 34/2548 (2005), in an action against the Governor of Sakonnakhon Province, the first defendant, the Chief of Sawang Dan Din District, the second defendant, and the Mayor of Sawang Dan Din Tambon Municipality, the third defendant, to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). The facts in the application and supporting documents could be summarized as follows.

1.1 Mr. Winit Pisetsuntorn, the plaintiff, filed an action against all three defendants in Khon Khaen Administrative Court, as follows. The plaintiff was elected as a member of Sawang Dan Din Tambon Municipal Assembly on 7th April B.E. 2546 (2003). Thereafter in May B.E. 2546 (2003), a complaint was filed with the second defendant that the plaintiff's use of evidence of building and land tax payment as evidence in the application for candidacy

* Published in the Government Gazette Vol. 126, Part 76a, dated 9th October B.E. 2552 (2009)

in the election of Municipal Assembly Members was unlawful. The first defendant found that the plaintiff, whose name appeared in the Housing Register of house no. 14/147, Trok Kan Keha, Building No. 14, Klong Chan Sub-District, Bangkok District, Bangkok, had leased house no. 397, Moo 12, Sawang Dan Din Tambon Municipality, Sawang Dan Din District, Sakonnakhon Province, and had entered into an agreement for the purchase of such house with Mrs. Kanikar Sakpadungkamol without registration in the presence of a competent official, which was thus rendered void. Ownership in the house was therefore not transferred to the plaintiff. The evidence of building and land tax payment was thus deemed as payment of building and land tax on behalf of Mrs. Kanikar Sakpadungkamol, the owner. Since at the time of application for election candidacy, the plaintiff domiciled outside the Sawang Dan Din Tambon Municipality area, the plaintiff did not have the qualifications to apply as a candidacy in the election of members of Sawang Dan Din Tambon Municipality Assembly, Sawang Din Dan District, Sakonnakhon Province. The first defendant made the ruling by virtue of section 19 paragraph two of the Municipality Act B.E. 2496 (1953), as amended by section 12 of the Municipality Act (No. 12) B.E. 2546 (2003), in conjunction with section 20(3) of the Election of Municipal Assembly Members Act B.E. 2482 (1939), as amended by section 5 of the Election of Municipal Assembly Members Act (No. 9) B.E. 2538 (1995), and section 136 paragraph one subparagraph (3) and paragraph two of the Election of Local Assembly Members or Local Administrators Act B.E. 2545 (2002). The first defendant therefore ruled that the plaintiff lacked the qualifications for candidacy in the election of Municipal Assembly Members under section 20(3) of the Election of Municipal Assembly Members Act B.E. 2482 (1939), as amended by section 5 of the Election of Local Assembly Members Act (No. 9) B.E. 2538 (1995), resulting in the termination of the applicant's membership of Sawang Dan Din Tambon Municipal Assembly as provided under section 19(4) of the Municipality Act B.E. 2496 (1953), as amended by section 12 of the Municipality Act (No. 12) B.E. 2546 (2003), as of 18th January B.E. 2548 (2005), evidenced by Order of Sakonnakhon Province No. 28/2548 (2005), dated 18th January B.E. 2548 (2005).

The second defendant ordered Sawang Dan Din Tambon Municipality to hold a reelection of Sawang Dan Din Tambon Municipal Assembly to fill the vacant position. The plaintiff was of the opinion that the three defendants had acted in a wrongful and unjust manner and failed to comply with regulations, and that the administrative order and notification of applications for candidacy in the election of the Municipal Assembly Member was unlawful for failing to grant the plaintiff an opportunity to give an explanation of facts and submit evidence. The plaintiff lost the legitimate right to defend himself, which was a fundamental right of an alleged person. The acts thus constituted a restriction of rights and liberties. Such exercise of powers by a state organ had to take into account human dignity as well as rights and liberties under the provisions of the Constitution. The plaintiff therefore filed an action in the Khon Kaen Administrative Court in order to seek the revocation of Order No. 28/2548 (2005), dated 18th January B.E. 2548 (2005), and sought the revocation of the notification of the election of Sawang Din Dan Tambon Municipal Assembly Member.

1.2 Khon Kaen Administrative Court, after consideration, found that the following issues required ruling:

The first issue was whether or not the first defendant's decision to terminate the plaintiff's membership of the Municipal Assembly on the grounds of lack of qualifications was an administrative order under section 5 of the Administrative Procedures Act B.E. 2539 (1996).

The second issue was whether or not the essential steps and procedures in the consideration for a decision or an administrative order were lawfully carried out.

The third issue was whether or not the exercise of discretion in reaching the decision or administrative order was lawful.

Khon Kaen Administrative Court found that the first defendant had the lawful authority to make a decision and issue an order. The investigation and decision was not inconsistent with section 30 of the Administrative Procedures Act B.E. 2539 (1996). Therefore, Order of Sakonnakhon Province No. 28/2548 (2005), dated 18th January B.E. 2548 (2005) was a lawful order. Khon Kaen Administrative Court gave judgment to dismiss the action.

1.3 The plaintiff appealed to the Supreme Administrative Court. The plaintiff disagreed with the decision of Khon Kaen Administrative Court, holding the opinion that the review of lawfulness of a decision and administrative order had to comply with the rules of administrative procedures set out by the Administrative Procedures Act B.E. 2539 (1996), which guaranteed fairness and equal standards for administrative acts. However, considerations pursuant to the rules on administrative considerations under such Act, which were guarantees of fairness and minimum standards for administrative acts, were wrongful and improper for being contrary to or inconsistent with section 4, section 5, section 6, section 26 and section 30 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). It was further asserted that the first defendant did not have the power to make a decision or give an order to terminate the applicant's membership of the Municipal Assembly as provided under section 19 paragraph two of the Municipality Act B.E. 2496 (1953). Also, as no investigation had been undertaken, but the investigation documents of the second defendant were relied upon, the decision or order was therefore unlawful. No opportunity was given to the applicant to present evidence, thus there was a failure to comply with the essential steps and procedures as provided under section 30 of the Administrative Procedures Act B.E. 2539 (1996), which was inconsistent with section 4, section 26 and section 28 paragraph two of the Constitution of the Kingdom of Thailand. And finally, as regards the payment of building and land tax, the plaintiff held an honest intention as a citizen under a duty to pay taxes as provided under section 69 of the Constitution of the Kingdom of Thailand, and the payment of such tax it was not a requirement that only the property owner could make the tax payment. The assessed person, tenant or possessor of the property or a representative could also make the tax payment as provided under section 19

paragraph two, section 20, section 23 and section 37 of the Building and Land Tax B.E. 2475 (1932). The exercise of discretion and order of the first defendant were therefore unlawful.

1.4 The plaintiff filed a motion in the Supreme Administrative Court requesting the Supreme Administrative Court to refer the plaintiff's opinion to the Constitutional Court for a ruling.

The Supreme Administrative Court found that in order to consider or give an order in this case, the Supreme Administrative Court had to apply the provisions of section 15 paragraph two, section 19 paragraph one subparagraph (4) and paragraph two, and section 20 bis paragraph one subparagraph (2) of the Municipality Act B.E. 2496 (1953), section 40 paragraph one of the Building and Land Tax Act B.E. 2475 (1932), section 5 and section 20(3) of the Election of Municipal Assembly Members B.E. 2482 (1939), section 136 paragraph one subparagraph (3) and paragraph two of the Election of Local Assembly Members or Local Administrators B.E. 2545 (2002), and section 30 of the Administrative Procedures Act B.E. 2539 (1996), to this case. The applicant, however, objected that such provisions were contrary to or inconsistent with section 4, section 6, section 26, section 27, section 28, section 29, section 30 and section 69 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). This was thus a case of an objection that provisions of law applicable by a court to a case were contrary to or inconsistent with the Constitution and there had not yet been a ruling of the Constitutional Court with respect to such provisions. A temporary stay of proceedings was therefore imposed and the plaintiff's opinion transmitted 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 preliminary issue was whether or not the Constitutional Court had the power to admit this application for trial and adjudication.

After consideration, the Constitutional Court found that this application was pending proceedings in the Constitutional Court when the Constitution of the Kingdom of Thailand B.E. 2540 (1997) was repealed by the Announcement of the Council for Democratic Reform No. 3, dated 19th September B.E. 2549 (2006) and the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) was subsequently promulgated, wherein section 35 paragraph one provided that all matters provided by law as being the powers of the Constitutional Court or upon a problem arising on whether or not a law was inconsistent with the Constitution would become the powers of the Constitutional Tribunal, and paragraph four provided that all cases or matters pending proceedings in the Constitutional Court prior to 19th 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 to replace the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006), and came into force as of 24th August B.E. 2550 (2007).

Section 300 paragraph one 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) became the Constitutional Court, and paragraph three provided 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) continued to apply until the enactment of an Organic Act on Constitutional Court Procedures. Section 300 paragraph four of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) further provided that all cases or matters pending proceedings in the Constitutional Tribunal under paragraph one would be continued by the Constitutional Court under this section, and upon the appointment of Constitutional Court Judges under this Constitution, all cases or matters pending proceedings would be transferred to the powers and duties of the newly appointed Constitutional Court. Hence, the Constitutional Court had the power to try and adjudicate this application.

3. Issues considered by the Constitutional Court

After consideration, the Constitutional Court found that at the time of trial of this application in the Constitutional Court, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) had already been promulgated. The constitutional review of any provision of law thus had to take into consideration whether or not such provision of law was contrary to or inconsistent with the Constitution in force at the time of the Constitutional Court ruling. However, as the provisions of section 4, section 6, section 26, section 27, section 28, section 29, section 30 and section 69 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), which the applicant objected that provisions of law were inconsistent with the Constitution, embodied identical principles to section 4, section 6, section 26, section 27, section 28, section 29, section 30 and section 73 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the Constitutional Court therefore ruled this application in accordance with the provisions of section 4, section 6, section 26, section 27, section 28, section 29, section 30 and section 73 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court examined the application, supporting documents and issues in the application and found that as regards the applicant's objection that provisions of law were contrary to or inconsistent with the Constitution, the applicant was required to present clear objections on whether or not such provisions of law were contrary to or inconsistent with particular sections of the Constitution. Failure to specify the intended issues along with clear supporting reasons for a ruling of the Constitutional Court would not be in accordance with clause 18(4) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). Upon an examination of the application submitted by the applicant for a ruling of the Constitutional Court, it was found that the provisions of law objected by the applicant as being contrary to or inconsistent with the Constitution that were in accordance with the Rules of the Constitutional Court, thus requiring a ruling of the Constitutional Court, were as follows.

The first issue was whether or not section 30 of the Administrative Procedures Act B.E. 2539 (2006) was contrary to or inconsistent with section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Constitutional Court found as follows. The Administrative Procedures Act B.E. 2539 (2006) was intended to impose the rules on administrative procedures under this Act as standard rules applicable to the exercise of functions by state officials under all other laws as of the date of coming into force of this Act, regardless of other laws granting administrative authority to the state official. If the exercise of powers under such specific law was governed by a lesser standard than the rules provided under this Act, the state official's exercise of such powers had to adhere to the rules and procedures provided under this Act instead. Hence, whereas the Municipality Act B.E. 2496 (1953) did not explicitly provide steps for investigation, compilation of data and evidence to be used in the consideration for issuance of an administrative order affecting a party's rights, the rules under the Administrative Procedures Act B.E. 2539 (2006) therefore applied as a guarantee of a person's rights as a party in proceedings on an administrative order. In this regard, section 30 paragraph one of the Administrative Procedures Act B.E. 2539 (2006) provided a principle for the making of an administrative order which was in accordance with the principles of natural justice, i.e. giving the party a sufficient opportunity to acquire knowledge of the facts and an opportunity to object and present his/her own evidence. The provisions of such Act applied to proceedings for making an administrative order, and were applicable fairly and protected the rights of parties equally, without discrimination on any person. Section 30 of the Administrative Procedures Act B.E. 2539 (2006) was therefore neither contrary to nor inconsistent with section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The second issue was whether or not section 40 paragraph one of the Building and Land Tax Act B.E. 2475 (1932) was contrary to or inconsistent with section 73 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Constitutional Court found that section 73 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was a provision in Chapter IV Duties of the Thai People, being provisions under the Constitution on the duties which the Thai people had to perform, especially the duty to pay taxes, which was a fundamental duty provided by the Constitution to be performed by the people and in a responsible manner towards the collective society of the nation. In addition, the law on taxation was a law of general application that was not intended to apply to any particular person.

The Building and Land Tax Act B.E. 2475 (1932) was a law which provided details on the duties and responsibilities of a property owner to pay taxes. As the application of a law affecting rights and duties could cause detriment to the people, the application of such law therefore had to follow a restrictive interpretation. In this regard, section 40 paragraph one specified the persons under a duty to pay building and land taxes, namely a person deriving income directly from the lease of buildings and land, i.e. the property owner. Other persons who were not property owners were under no duty to pay any taxes. However, since no section of the Building and Land Tax Act B.E. 2475 (1932) expressly prohibited

a property owner from agreeing or shifting the tax burden to other persons to pay taxes on his/her behalf, therefore the property owner could shift the tax (annual charge) burden to the tenant of the building and land to pay such taxes on his/her behalf, as agreed. Moreover, the Building and Land Tax Act B.E. 2475 (1932) was a law applicable to the property or status of a person, and a law which had independent characteristics. The State therefore had the power to enact provisions differently from other branches of law pursuant to the particular rules or theories, so long as the enforcement of such law gave significant regard to the intents of each tax law. It was therefore found that the Building and Land Tax Act B.E. 2475 (1932) expressly provided in section 40 paragraph one that the property owner was the person under the duty to pay taxes. The person under a duty to pay taxes was under a direct burden to pay taxes, but the property owner could shift the tax burden to the building tenant if consented to by the tenant. Such provisions were consistent with the principles of taxation. Hence, the Building and Land Tax Act B.E. 2475 (1932) was neither contrary to nor inconsistent with section 73 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

4. Ruling of the Constitutional Court

The Constitutional Court therefore held that section 30 of the Administrative Procedures Act B.E. 2539 (2006) was neither contrary to nor inconsistent with section 30 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), and section 40 paragraph one of the Building and Land Tax Act B.E. 2475 (1932) was neither contrary to nor inconsistent with section 73 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).
