

# Summary of Constitutional Court Ruling No. 13/2552

**Dated 26<sup>th</sup> August B.E. 2552 (2009)\***

**Re: The Supreme Administrative Court referred the objection of a plaintiff (Mr. Prasit Kijamoejai) to the Constitutional Court for a ruling on whether or not section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979) were contrary to or inconsistent with section 6, section 29, section 33 and section 35 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).**

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

The Office of the Administrative Court sent a letter, dated 18<sup>th</sup> April B.E. 2549 (2006), referring an opinion of the Supreme Administrative Court and an objection of a plaintiff (Mr. Prasit Kijamoejai) to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) on whether or not section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979) were contrary to or inconsistent with section 6, section 29, section 33 and section 35 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). The facts could be summarized as follows.

1.1 Mr. Prasit Kijamoejai, as plaintiff, filed a plaint against the Director of Pranakorn District, as the first defendant, and the Appeals Committee for Bangkok, as the second defendant, in the Central Administrative Court claiming as follows. The plaintiff was the owner of building number 3, Soi Rambutri, Chakrapongse Road, Chanasongkram Sub-District, Pranakorn District, Bangkok. The first defendant, acting for the Governor of Bangkok, in the capacity of the local competent official, issued Order No. Gor Thor 4003/Jor 87, dated 21<sup>st</sup> July B.E. 2547 (2004), directing the plaintiff to remove the building, only where additions had been made, of Building Type Kor Sor Lor, steel structure covered with ceramic tiles in an area of approximately 4.50 x 12.60 metres, approximately 2.80 metres high, without permission, to be completed within thirty days as from the date of receipt of the order. The plaintiff appealed against the first defendant's order to the second defendant. The second defendant gave Appeal Decision No. 121/2547 (2004), dated 29<sup>th</sup> September B.E. 2547 (2004) that the plaintiff had contravened the Building Control Act B.E. 2522 (1979) by altering the building without permission and held that the first defendant's order was already lawful. The appeal was therefore dismissed. The plaintiff was

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\* Published in the Government Gazette Vol. 126, Part 91a, dated 2<sup>nd</sup> December B.E. 2552 (2009)

of the opinion that the order given by the first defendant and the appeal decision to dismiss the appeal made by the second defendant were unlawful exercises of discretion and the decisions were inconsistent with section 33 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). It was therefore requested that the Court give judgment or order the revocation of the first defendant's order and revocation of the second defendant's decision.

1.2 The Central Administrative Court found that the first defendant's issue of Order No. Gor Thor 4003/Jor 87, dated 21<sup>st</sup> July B.E. 2547 (2004), directing the plaintiff to demolish the part of the building that was altered without permission, was lawful, and that the second defendant's Appeal Decision No. 121/2547 (2004), dated 29<sup>th</sup> September B.E. 2547 (2004), dismissing the plaintiff's appeal was also lawful. The plaintiff's arguments that the first defendant's order and the appeal decision of the second defendant was inconsistent with the Constitution were not acceptable. Judgment was thus made to dismiss the action.

1.3 The plaintiff appealed the judgment of the Central Administrative Court to the Supreme Administrative Court which could be summarized as follows. The first defendant's order was deficient and unlawful, and the appeal decision of the second defendant, which failed to comply with section 46 of the Administrative Procedures Act B.E. 2539 (1996), was also unlawful. In addition, the plaintiff was of the opinion that the provisions of section 6, section 29, section 33 and section 35 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) recognized the protection of rights and liberties of a person in a criminal case, where there was a presumption of innocence on a suspect or defendant, and prior to a final judgment that such person had committed an offence, such person could not be treated as an offender. Moreover, a person having the liberty of dwelling enjoyed the protection to reside and occupy a place of dwelling peacefully. A law which restricted the rights of a person without an authorizing provision was contrary to or inconsistent with the Constitution of the Kingdom of Thailand B.E. 2540 (1997) and was unenforceable. In this regard, section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979), as amended by section 11 of the Building Control Act (No. 2) B.E. 2535 (1992), was contrary to or inconsistent with section 6, section 29, section 33 and section 35 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997). It was thus requested that the Supreme Administrative Court impose a temporary stay of proceedings and refer the plaintiff's objection to the Constitutional Court for a ruling under section 264 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

The Supreme Administrative Court held that in the trial and adjudication of this case, the Supreme Administrative Court had to apply the provisions of section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979), as amended by section 11 of the Building Control Act (No. 2) B.E. 2535 (1992), to the case. However, as the applicant (plaintiff) objected that such provisions of law were contrary to or inconsistent with 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 provisions, the applicant's objection was therefore referred to the Constitutional Court for a ruling and a temporary stay of proceedings imposed

on the case pursuant to 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 try and adjudicate this application under the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court found as follows. This application was pending proceedings in the Constitutional Court under the Constitution of the Kingdom of Thailand B.E. 2540 (1997) when 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 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 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 to replace the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006), wherein section 300 paragraph one, paragraph three and paragraph four provided for the Constitutional Tribunal under the Constitution of the Kingdom of Thailand (Interim) B.E. 2549 (2006) to become 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 apply until the enactment of the Organic Act on Constitutional Court Procedures. All cases or matters pending proceedings in the Constitutional Tribunal would be continued by the Constitutional Court, and upon the appointment of Constitutional Court Judges under this Constitution, such cases or matters pending proceedings would be transferred to the powers and duties of the newly appointed Constitutional Court. The Constitutional Court therefore had the power to try and adjudicate this application.

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

The Constitutional Court found that at the time of trial and adjudication of this application, the Constitution of the Kingdom of Thailand B.E. 2550 (2007) had already been promulgated. Section 6, section 29, section 33 and section 35 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), which were objected by the applicant that provisions of law were contrary to or inconsistent with embodied identical principles to the provisions of section 6, section 29, section 39 paragraph two and paragraph three, and section 33 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The issues considered by the Constitutional Court were whether or not section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979) were contrary to or inconsistent

with section 6, section 29, section 33 and section 39 paragraph two and paragraph three of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court found as follows. The Building Control Act B.E. 2522 (1979) was a public law which granted authority to a competent official to issue an order under section 40(2), including the authority to issue an order to remove a building under section 42, due to the failure to comply with the law by an owner or occupier of a building as provided under the Building Control Act. Such authority was granted to the competent official to the extent of necessity and did not affect the essential substance of the right or liberty of the owner or occupier of the building in constructing, altering, removing and relocating a building since the owner or occupier was still able to do so under the supervision of a competent official. Nevertheless, if a person affected by the exercise of powers by a competent official under the Building Control Act B.E. 2522 (1979) was dissatisfied with the competent official's order, he/she could appeal against the order to a higher authority within the administration. Thereafter, if such person still disagreed with the appeal decision of the administration, he/she had the right to commence proceedings in the Administrative Court.

Section 6 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) was provided in Chapter I General Provisions, being a provision which recognized and protected the legal supremacy of the Constitution, such that no law, rules or regulations in force or to be prescribed in the future could have any substance contrary to or inconsistent with the Constitution. This was therefore not a case where section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979), as amended by section 11 of the Building Control Act (No. 2) B.E. 2535 (1992), could be contrary to or inconsistent with the Constitution. Moreover, section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979), which was objected by the applicant as being inconsistent with section 6 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), did not have the characteristics of overturning the principle of legal supremacy of the Constitution as provided under section 6. Therefore, section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979) were neither contrary to nor inconsistent with section 6 of the Constitution.

Section 29 of the Constitution was provided in Chapter III Rights and Liberties of the Thai People, Part 1 General Provisions. The provisions prescribed guarantees and mechanisms for safeguarding the rights and liberties of persons. A principle was laid down that the restriction of rights and liberties of a person as recognized under the Constitution could be imposed by virtue of provisions of law only for the purposes provided by the Constitution, and only to the extent of necessity without affecting the essential substances of such rights and liberties. Moreover, the restriction should be generally applicable as well as specify the provisions of the Constitution authorizing the enactment of such law.

Upon an examination of section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979), it was found that such provisions granted the authority to a competent official to order the halt of construction, building alteration, prohibit the use or entry into an altered building, including an order to remove an altered building in violation of and failing

to comply with the law. Even though there was some restriction of rights and liberties, such restrictions were imposed for the mutual public interest, peace and order of the people and the society, to the extent that was necessary and without affecting the essential substance of the rights and liberties of a person to construct, alter, remove or relocate a building. Section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979) was therefore neither contrary to nor inconsistent with section 29 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997).

Section 33 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) was provided in Chapter III Rights and Liberties of the Thai People, Part 3 Rights and Liberties of an Individual. The provisions were intended to safeguard and recognize the rights of a person in a place of dwelling, whether as an owner or an occupier, to be able to reside and occupy a place of dwelling peacefully. If a person wished to enter a place of dwelling or conduct a search in a place of dwelling, the consent of the occupier had to be obtained, and not at will. There was, however, an exception in the case of an order or warrant of the court, or where authorized by law. Upon examining section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979), it was found that such provisions granted authority to a competent official to issue an order to suspend a construction, alteration, prohibit the use or entry into an altered building, including an order to remove a building that had been altered in violation of and failing to comply with the law. Even though the provisions had the certain characteristics of a restriction of rights and liberties in the peaceful residence and occupation of a place of dwelling, such restrictions were imposed in the interest of the public, peace and order of society, the protection of safety in life and properties of the plaintiff and the general public. Section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979) was therefore neither contrary to nor inconsistent with section 33 of the Constitution.

Section 39 paragraph two and paragraph three of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) was provided in Chapter III Rights and Liberties of the Thai People, Part 4 Rights in the Judicial Process, being provisions intended to protect the rights of a suspect or defendant in the criminal justice process. A suspect or defendant would enjoy the presumption of innocence, and prior to a final judgment that a person had committed an offence, such person could not be treated as an offender. Upon examining section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979), it was found that the provisions governed administrative matters and rights in the administrative justice process provided by specific provisions of law, and not on criminal penalties or rights in the criminal justice process which section 39 paragraph two and paragraph three of the Constitution intended to protect. Hence, section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979) was neither contrary to nor inconsistent with section 39 paragraph two and paragraph three of the Constitution.

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

The Constitutional Court therefore held that section 40(2) and section 42 of the Building Control Act B.E. 2522 (1979), as amended by section 11 of the Building Control Act (No. 2) B.E. 2535 (1992), were neither contrary to nor inconsistent with section 6, section 29, section 33 and section 39 paragraph two and paragraph three of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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