

Summary of Constitutional Court Ruling No. 7/2553 (2010)

Dated 12th May B.E. 2553 (2010)*

Re: The President of the Senate referred a petition of senators to the Constitutional Court for a ruling on whether or not the ministerial office of Mr. Kasit Piromya, the Minister of Foreign Affairs, terminated under section 182 paragraph one (7) in conjunction with section 268 and section 266(1) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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1. Summary of background and facts

Mr. Ruangkrai Leekitwattana, a senator, and others (the applicant), found a news article posted on the Matichon Online news webpage, which stated in summary that Mr. Kasit Piromya, the Minister of Foreign Affairs (the respondent) sent two secret and most urgent letters from the Ministry of Foreign Affairs to the Prime Minister on the subject of approaches for tackling problems on Thai-Cambodian relations. The letters contained texts stating, "... 2.4 ... expedite legal proceedings against Pol. Lt. Col. Thaksin that are still pending." The applicant was of the opinion that such texts constituted an exercise of executive powers to interfere with the functioning of judicial authorities, which was prohibited under section 266(1) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). It was contended that under section 197 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), the trial and judgment of cases were the competence of courts which had to be carried out justly under the Constitution, laws and in the name of His Majesty the King. The trial and judgment of cases were the functions of the courts and not powers and duties of the Government that could be used to exert influence. The actions of the Minister as evidenced by the letters of the Ministry of Foreign Affairs referred to were therefore prohibited under section 268 in conjunction with section 266(1) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), thus resulting in the termination of ministerial office under section 182 paragraph one (7) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

2. Preliminary issue

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the competence to admit this application for trial and adjudication

* Published in the Government Gazette Vol. 127, Part 68 a, date 8th November B.E. 2553 (2010).

under section 91 in conjunction with section 182 paragraph one (7) and paragraph three of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

After deliberations, the Constitutional Court found as follows. Section 182 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided that “an individual ministerial office terminates upon... (7) the commission of a prohibited act under section 267, section 268 or section 269.” Section 268 provided that “the Prime Minister and Ministers are prohibited from committing any act provided under section 266, except where the act was committed pursuant to the powers and duties of public administration in accordance with the policies declared to the National Assembly or as provided by law.” Section 266 provided that “members of the House of Representatives and senators shall not use their statuses or the offices of members of the House of Representatives or senators to interfere or intervene with certain matters for the benefit of oneself, others or a political party, either directly or indirectly, as follows: (1) the performance of official functions or routine tasks of government officials, employees or workers of government agencies, state agencies, state enterprises, enterprises where the majority of shares are held by the state, or local administration...” and section 182 paragraph three stated that “the provisions of section 91 and section 92 shall apply to the termination of ministerial offices under (2), (3), (5) or (7)...” In this connection, section 91 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) provided that “members of the House of Representatives or senators constituting not less than one-tenth of the existing members of each House shall have the right to enter a petition to the President of their respective House of membership for the termination of membership of a member of that House... and the President of the House receiving the petition shall refer the petition to the Constitutional Court for a ruling on whether or not the membership of such member terminated.”

Thus, upon the President of the Senate’s reference of a petition entered by 19 senators, which constituted not less than one-tenth of the existing senators, to the President of the Senate for a Constitutional Court ruling on whether or not the ministerial office of Mr. Kasit Piromya, Minister of Foreign Affairs, terminated, the case was in accordance with section 91 in conjunction with section 182 paragraph one (7) and paragraph three of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), in conjunction with article 17(10) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court therefore had the competence to try and adjudicate this application.

Thereafter, the President of the Senate submitted a letter to the Constitutional Court to give notice that Miss Sumol Sutawiriyawat, senator for Phetburi Province, a co-petitioner, had notified the President of the Senate of her withdrawal from the petition.

The Constitutional Court found that the withdrawal resulted in 18 senators remaining in the petition to the President of the Senate, which was still not less than one-tenth of the remaining senators. The case therefore remained in accordance with the rules prescribed under section 91 in conjunction with section 182 paragraph one (7) and paragraph three of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Constitutional Court could thus continue with the trial and adjudication of this application.

3. Summary of reply statement and inquisitorial proceedings.

The Constitutional Court instructed the respondent to submit a statement in reply to the allegations and the respondent submitted a statement in reply to the allegations which could be summarised as follows:

1. The documents referred to by the applicant that was disclosed and disseminated to the public and various media by core members of the National United Front for Democracy Against Dictatorship (UDD) and others were official documents classified as “secret” by the Ministry of Foreign Affairs due to the composition of contents and texts relating to policies and state security as well as domestic and international politics. The Ministry of Foreign Affairs had suggested approaches to the Prime Minister for consideration and determination of a directive on Thai-Cambodian relations in regard to each forecasted event, including the pros and cons of taking each measure.

The secret documents were prepared in the same manner as any other documents of the Ministry of Foreign Affairs. The documents were drafted after discussions, exchanges of opinions and analyses by officials of the Ministry of Foreign Affairs, being the normal procedures for giving advice on Thailand’s foreign policies. In this case, officials of the Department of East Asia had prepared the initial drafts, which were then presented to respective superiors along the chain of command, until the drafts were finally presented to the Deputy Permanent Secretary of the Ministry of Foreign Affairs (acting for the Permanent Secretary), who acted as the chief for permanent officials of the Ministry of Foreign Affairs. The letters were thereafter submitted to the Minister, acting as the political chief, who affixed his signature before submission to the Prime Minister for consideration. Till present, the Ministry of Foreign Affairs had not yet changed or withdrawn the documents’ confidentiality classification under the Rules on Official Secrets B.E. 2544 (2001).

2. As for such documents specifying suggestions in paragraph 2.4 that the Government should “expedite legal proceedings against Pol. Lt. Col Thaksin that are still pending,” such texts were truly intended to suggest the Government to expedite the executive agencies involved in the proceedings against Pol. Lt. Col. Thaksin Shinawatra, who at that time was a fugitive abroad, to cooperate in providing relevant information and evidence for court proceedings, as well as to take action to bring the defendant to court for further proceedings.

The texts in paragraph 2.4 of the classified document were therefore not intended to suggest the Government to expedite the court’s trial of pending cases on Pol. Lt. Col. Thaksin Shinawatra that would amount to an interference with or an order on the court as alleged. The respondent’s actions taken pursuant to such secret documents were consistent with the National Administration Act B.E. 2534 (1991), and taken in the capacity of the commanding officer of government officials responsible for determining policies, goals and outcomes of the ministry’s tasks in accordance with the National Administration Plan and the Government’s policies. There did not appear to be any facts to indicate that the respondent had interfered or intervened for the benefits of himself, of others or of a political party, whether

directly or indirectly.

3. The trial of cases was the competence of courts that had to be exercised justly in accordance with the Constitution, laws and in the name of His Majesty the King. Judges and justices enjoyed independence in the conduct of proper, expeditious and fair trials in accordance with the Constitution and laws. Such powers were recognized under section 197 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) pursuant to the principle of separation of powers and independence of the judiciary from the executive and legislature.

Therefore, when preparing the secret document, the respondent and the Ministry of Foreign Affairs, including the Government, were not able to interfere or apply any wrongful means to influence the court in its trial of cases on Pol. Lt. Col. Thaksin Shinawatra. Moreover, there were additional facts that the Secretariat to the Prime Minister had sent secret letters containing the Prime Minister's command endorsing the proposals of the Minister of Foreign Affairs in the secret document to relevant agencies for acknowledgement and implementation. No letter was, however, sent to any judicial agency.

4. Issues considered by the Constitutional Court

The Constitutional Court considered the application and supporting documents as well as the statement in reply to the allegations and supporting documents and made a finding of fact that the Ministry of Foreign Affairs had sent a secret and most urgent letters to the Prime Minister on approaches to tackling problems on Thai-Cambodian relations. The secret document stated in paragraph 2.4 that "expedite legal proceedings against Pol. Lt. Col. Thaksin that are pending."

After deliberations, the Constitutional Court found that section 266(1) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was intended to provide guarantees for political impartiality in the discharge of functions by permanent officials without fear of political interference or intervention. The principles under section 266(1) of the Constitution were also applicable to the Prime Minister and Ministers pursuant to section 268, with the exception for acts committed pursuant to the powers and duties of public administration in accordance with the policies declared to the National Assembly or as provided by law. The reason for providing an exception in section 268 for the Prime Minister and Ministers was that the holders of the offices of Prime Minister and Ministers were under a legal obligation to determine policies and directions for national administration which would confer the best results for the nation and the people. It was therefore necessary to provide an exception for the exercise of commanding and directing authority over actors in the government service, which should not be regarded as an interference or intervention with the performance of duties by government officials, employees and workers in an agency.

The respondent, in his capacity as Minister of Foreign Affairs, by preparing a letter containing the text stated in the application and sending the same to the Prime Minister, had committed an act pursuant to one of the functions of the Ministry of Foreign Affairs under

section 12 of the Reorganisation of Ministries, Sub-Ministries and Departments Act B.E. 2545 (2002), being tasks relating to foreign official services, namely analyses of events and giving advice to the Government on approaches to Thailand's relations with other countries with regard to economic, social and political aspects, particularly with countries having relations difficulties with Thailand. At the time of such letter from the Ministry of Foreign Affairs, Thailand had encountered relations difficulties with Cambodia. The advice given to the Prime Minister was therefore a performance of a legal duty and constituted an exclusive internal act within the executive. The exercise of executive powers could not interfere with the court's power to conduct a trial in regard to either the substantive or procedural aspects of a case in a way that would result in a departure from the process provided by law. In all events, the courts enjoyed independent exercise of discretion in the trial and judgment of cases as recognized under section 197 paragraph two of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). Moreover, the content and text in the respondent's letter did not amount to an interference or intervention with the performance of duties by officials, employees or workers of a government agency, state agency, state enterprise, enterprise where the majority of shares were held by the state, or local administration. Also, there was no substance to suggest that the act was committed for the respondent's personal benefit or for the benefit of others or a political party. The respondent's advice to the Prime Minister to expedite pending legal proceedings against Pol. Lt. Col. Thaksin was merely one of several approaches which the relevant agencies were under an obligation to suggest to the Prime Minister for assignment of tasks to executive agencies. The act did not constitute an intervention or interference with the performance of judicial functions.

5. Ruling of the Constitutional Court

By virtue of the aforesaid reasons, the Constitutional Court held that the ministerial office of Mr. Kasit Piromya, Minister of Foreign Affairs, the respondent, did not terminate under section 182 paragraph one (7) in conjunction with section 268 and section 266(1) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).
