

Summary of Constitutional Court Ruling No. 9/2553 (2010)

Dated 9th June B.E. 2553 (2010)*

Re: The Supreme Administrative Court referred an opinion to the Constitutional Court for a ruling under section 211 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) on whether or not section 16 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) was contrary to or inconsistent with section 223 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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1. Summary of background and facts

The plaintiff (Mr. Karom Poltaklang) filed a complaint against the Prime Minister (Mr. Abhisit Vejjajiva), the first defendant, the Deputy Prime Minister and Director of the Centre for Resolution of Emergency Situation (Mr. Suthep Thaugsuban), the second defendant, and the Council of Ministers, the third defendant, in the Supreme Administrative Court, stating that on 7th April B.E. 2553 (2010), the first defendant with the approval of the third defendant declared a serious emergency situation in the Bangkok Metropolis area and its vicinity in reliance of powers under the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005). The plaintiff was of the opinion that the first defendant's exercise of power to declare an emergency situation was inconsistent with section 184 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) since the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) was enacted under section 218 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997), which had already been repealed by an Announcement of the Council for Democratic Reform. Also, it was contended that the first defendant declared a serious emergency situation despite the absence of any serious emergency situation, thus there was no necessity for the first defendant to declare the application of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005). The Supreme Administrative Court was requested to give a judgment or an order that all three defendants had exercised powers inconsistently with section 184 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007), and to revoke the Declaration of Serious Emergency Situation, dated 7th April B.E. 2553 (2010) as well as orders and regulations issued by virtue of such declaration.

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The Supreme Administrative Court found that section 16 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) provided that regulations, announcements, orders or acts performed under the Emergency Decree were not subject to the application of the law on administrative procedures and the law on establishment of Administrative Courts and Administrative Court procedures. If the Administrative Court were to admit this case for trial, it would have to rely on the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005), the law on administrative procedures and the law on establishment of Administrative Courts and Administrative Court procedures. This raised the issue of whether or not the proceedings would be inconsistent with section 16 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005). As there was no prior ruling of the Constitutional Court in relation to these provisions, an opinion was therefore referred to the Constitutional Court for a ruling under section 211 paragraph one 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 under section 211 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Constitutional Court found as follows. This application presented a case where the Supreme Administrative Court referred an opinion to the Constitutional Court for a ruling under section 211 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) on whether or not section 16 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) was contrary to or inconsistent with section 223 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). As there was no prior ruling of the Constitutional Court on such a provision, the case was in accordance with section 211 paragraph one of the Constitution. The Constitutional Court therefore issued an order to admit the application for trial and adjudication.

3. Issues considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 16 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) was contrary to or inconsistent with section 223 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

After deliberations, the Constitutional Court found as follows. Section 223 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) was a provision on the jurisdiction of the Administrative Courts which was to be determined by law. The Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005), on the other hand, was a law intended to grant the executive with powers to administer situations where state security could be affected or the country or any part thereof could

fall into a perilous situation which could potentially have an impact on the independence or integrity of its territories, including the resolution of problems caused by natural disasters and the rehabilitation of living conditions of the affected people.

The provision of section 16 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005), which stated that regulations, announcements, orders or acts performed under the Emergency Decree were not subject to the law on administrative procedures and the law on establishment of Administrative Courts and Administrative Court procedures, limited the Administrative Court's review jurisdiction over regulations and executive acts. The provision was intended to grant the executive with certain special powers for the administration of emergency situations. In this regard, section 223 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) also provided for the limitation of the Administrative Court's jurisdiction by enacting the words "...as provided by law". This showed that not all cases between the state and a private party or a case arising from the exercise of administrative powers by a state agency or state official were within the jurisdiction of the Administrative Courts. The state could enact legislation to exclude the jurisdiction of the Administrative Courts from the trial and adjudication of certain cases. Indeed, laws had been enacted to empower the executive to carry out state undertakings without being subject to the jurisdiction of the Administrative Courts, such as section 11 of the Emergency Decree on Thai Asset Management Corporation B.E. 2544 (2001), or even section 9 paragraph two of the Act on Establishment of Administrative Courts and Administrative Court Procedures B.E. 2542 (1999).

Section 16 provided for the exclusion of regulations, announcements, orders or acts under this Emergency Decree from the jurisdiction of the Administrative Court so as to enable the state to effectively resolve the country's problems in accordance with the necessity called upon by the country's situation over a temporary period. The measure was merely provisional and did not imply that the rights and liberties of the people affected by acts under such Emergency Decree were not protected. An injured person could still instigate legal proceedings in the Courts of Justice as provided under section 218 of the Constitution as well as retained the right to claim damages from the official service pursuant to the law on tortuous liabilities of officials as provided under section 17 of the same Emergency Decree. The provisions therefore did not have any characteristic of limiting a person's right to instigate the judicial review process.

4. Ruling of the Constitutional Court

By virtue of the aforesaid reasons, the Constitutional Court held that section 16 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) was neither contrary to nor inconsistent with section 223 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).
