

# Summary of the Constitutional Court Ruling\* No. 3/2554 (2011)

**Dated 11<sup>th</sup> February B.E. 2554 (2011)**

**Re: The President of the Senate referred an application of senators to the Constitutional Court for a ruling on whether or not the membership of Mr. Paiboon Nititawan, senator, terminated under section 119(5) in conjunction with section 266 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).**

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

Mr. Ruangkrai Leekijwattana, senator, and others constituting a total of 16 persons, as applicants, petitioned to the President of the Senate for a referral of an application to the Constitutional Court for a ruling under section 91 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The facts under the application and amending application can be summarized as follows.

Khun Ying Jaruvan Maintaka, the Auditor-General, sent a letter of the Office of the Auditor-General of Thailand, dated 2<sup>nd</sup> July B.E. 2553 (2010), to the President of the Senate requesting for proceedings of the Senate to be taken in accordance with its powers and duties as regards the selection of an Audit Commission and Auditor-General due to a lack of progress. A legal problem had also arisen on the performance of functions by the Auditor-General under the Organic Act on State Audit B.E. 2542 (1999) on whether or not Khun Ying Jaruvan was required to vacate the office of Auditor-General upon the attainment of 65 years of age on 5<sup>th</sup> July B.E. 2553 (2010) or could continue to perform duties while the office of the Auditor-General was vacant pursuant to article 2 and article 3 of the Announcement of the Council for Democratic Reform No. 29. On this issue, Khun Ying Jaruvan sent a letter of the Office of the Auditor-General of Thailand dated 21<sup>st</sup> July B.E. 2553 (2010) to the Chairman of the Legal Advisory Committee of the Senate President (Mr. Paiboon Nititawan, the respondent) to inquire the legal opinion of the Senate President's Legal Advisory Committee on the legal question concerning the performance of functions by the Auditor-General as guidance for the discharge of official functions by the Office of the Auditor-General of Thailand, which opinion the Senate President's Legal Advisory Committee had already considered and reached a conclusion as tasked earlier by the President of the Senate. The respondent, in his capacity as Chairman of the Senate President's Legal Advisory Committee, sent a letter to inform the Auditor-General of the opinion as requested on the same day.

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Thereafter, Khun Ying Jaruvan sent a memorandum dated 30<sup>th</sup> July B.E. 2553 (2010) to the executive officers of the Office of the Auditor-General of Thailand stating that the Senate President's Legal Advisory Committee had formed a legal opinion on the performance of functions by the Auditor-General in regard to which clarification was given that Khun Ying Jaruvan, the incumbent Auditor-General on 18<sup>th</sup> September B.E. 2549 (2006) remained in office until 30<sup>th</sup> September B.E. 2550 (2007) pursuant to article 2 of the Announcement of the Council for Democratic Reform No. 29. And while the office of the Auditor-General was still vacant, the outgoing Auditor-General should temporarily continue to perform functions pursuant to article 3 paragraph two of the Announcement of the Council for Democratic Reform No. 29. The purpose of these provisions was to prevent disruptions to state audit functions which would result in detriment to the nation. It was thus said that Khun Ying Jaruvan would perform functions as of 30<sup>th</sup> July B.E. 2553 (2010) onwards.

The applicant was of the opinion that the respondent was a senator selected from a nomination by the Office of the Auditor-General of Thailand and a former advisor to the Auditor-General during Khun Ying Jaruvan's term as Auditor-General. It was therefore deemed that the respondent had used his status or position as a senator and Chairman of the Senate President's Legal Advisory Committee to, directly or indirectly, interfere or intervene for benefit of the respondent or for the benefit of Khun Ying Jaruvan in the performance of official functions or routine official operations of a government official, officer or employee of the Office of the Auditor-General of Thailand. It was contended that such acts were prohibited under section 266 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) thereby constituting a cause for termination of the respondent's membership under section 119(5) of the Constitution.

## **2. Preliminary issue**

The preliminary issue was whether or not the Constitutional Court had the competence to admit this application for a ruling under section 91 paragraph one of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Constitutional Court found that 16 senators, which was not less than one-tenth of the total number of existing senators, had petitioned to the President of the Senate that the respondent's membership had terminated under section 119(5) of the Constitution. Hence, upon the President of the Senate's submission of the application to the Constitutional Court, the case was in accordance with section 91 paragraph one of the Constitution in conjunction with article 17(3) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court therefore had the competence to admit this application for a ruling.

## **3. Reply statement**

The respondent gave a statement in reply to the allegations that he was a senator installed by selection and appointed by the President of the Senate to assume the role of Chairman of the Senate President's Legal Advisory Committee pursuant to Order of the

Senate No. 23/2551 (2008) Re: Appointment of the Senate President's Legal Advisory Committee, dated 8<sup>th</sup> May B.E. 2551 (2008). As regards the submission of a legal opinion of the Senate President's Legal Advisory Committee on the performance of functions of the Auditor-General, the respondent was of the opinion that the matter had already been concluded and that it was not a personal opinion or advice or order. Also, the legal opinion was not binding on any agency or person. The opinion was rendered pursuant to the functions of the Chairman of the Senate President's Legal Advisory Committee. The respondent had not acted for the direct or indirect benefit of himself, of others or any political party. Regard was only given to the nation's benefits. The act therefore did not constitute a use of the status or position of a senator and Chairman of the Senate President's Legal Advisory Committee to interfere or intervene with the performance of official functions or routine operations of Khun Ying Jaruvan or officials, officers or employees of the Office of the Auditor-General of Thailand. The amending application dated 4<sup>th</sup> October B.E. 2553 (2010), on the other hand, did not satisfy the rules and conditions under section 91 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) since the number of senators signing the petition was less than one-tenth of the total number of existing senators. In other words, this application was signed by only Mr. Ruangkrai Leekijwattana and it did not appear that any senator authorized Mr. Ruangkrai Leekijwattana to act on his or her behalf. The respondent therefore motioned for the Constitutional Court's dismissal of this application or expungement of this case.

#### **4. The issues considered by the Constitutional Court**

This case contained sufficient facts for determination. The issue which had to be decided was whether or not the membership of Mr. Paiboon Nititawan, senator and respondent, terminated under section 119(5) in conjunction with section 266 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

A preliminary issue which had to be decided was the respondent's objection on whether or not the amending application dated 4<sup>th</sup> October B.E. 2553 (2010) signed solely by Mr. Ruangkrai Leekijwattana was in satisfaction of the rules and conditions under section 91 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Constitutional Court found as follows. The application submitted by Mr. Ruangkrai Leekijwattana and others to the President of the Senate was already in satisfaction of the rules and conditions under section 91 of the Constitution. The amending application submitted by Mr. Ruangkrai Leekijwattana, on the other hand, was merely an act to comply with an order of the Constitutional Court pertaining to relevant facts or circumstances and supporting reasons pursuant to article 18 paragraph one (3) and (4) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The application amounted to compliance with the Constitutional Court order without amending or adding any cause of action. The amending application was therefore in accordance with the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

The Constitutional Court found further that section 266(1) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007) prohibited members of the House of Representatives and senators from using their statuses or offices to interfere or intervene with the performance of official functions or routine operations of an official, officer or employee of a government agency, state agency, state enterprise, state-owned enterprise or local administration for the direct or indirect benefit of oneself or of others, or for the benefit of a political party. A guarantee was provided for permanent officials to be able to perform duties in a politically impartial manner without fear of political interference or intervention.

Khun Ying Jaruvan had sent a letter to the respondent in the latter's capacity of Chairman of the Senate President's Legal Advisory Committee to inquire of the said committee's opinion on a legal question concerning the functions of the Auditor-General, which was to be used as a guide for the discharge of official functions by the Office of the Auditor-General of Thailand. The respondent, in his capacity of Chairman of the Senate President's Legal Advisory Committee, sent the memorandum of legal opinion of the Senate President's Legal Advisory Committee to the Auditor-General as requested. Thereafter, Khun Ying Jaruvan cited the memorandum of legal opinion of the Senate President's Legal Advisory Committee to the executive officers of the Office of the Auditor-General of Thailand. On this issue, the Constitutional Court was of the opinion that the Constitution provided that a senator's principal functions were the scrutiny and screening of laws, review of the exercise of state powers and the confirmation of appointments and removal of persons from offices as provided by the Constitution. The powers and duties of the Senate President's Legal Advisory Committee under the Senate President's order, on the other hand, were to give advice and legal opinions to the Senate President as tasked by the Senate President and to report the outcome of tasked operations to the Senate President for information in conjunction with deliberations. Upon an examination of the aforesaid powers and duties, the Constitutional Court found that the acts of the respondent, in his capacity of Chairman of the Senate President's Legal Advisory Committee, in giving notice of the legal opinion reached by the Senate President's Legal Advisory Committee, merely amounting to giving information as requested by the Office of the Auditor-General of Thailand, which was a state agency, for official purposes. Although Khun Ying Jaruvan cited the opinion, there was no connection with the respondent. Moreover, the legal opinion was reached by the Senate President's Legal Advisory Committee, as assigned, for the information of the Senate President in making deliberations, not being the personal opinion of the respondent. In any event, the routine functions of officials, officers or employees of the Office of the Auditor-General of Thailand were required to comply with the framework provided under the Organic Act on State Audit B.E. 2542 (1999). Hence, it could not be said that the respondent used his senatorial status or office to interfere or intervene for the direct or indirect benefit of himself or of others in the discharge of official functions or routine operations of officials, officers or employees of the Office of the Auditor-General of Thailand as provided under section 266(1) of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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

By virtue of the foregoing reasons, the Constitutional Court held that Mr. Paiboon Nititawan's membership of the Senate had not terminated under section 119(5) in conjunction with section 266 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007).

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