

Order to restrain
implementation
of an administrative
order

UNOFFICIAL TRANSLATION



**Case number 24/
2553 [2010]**

**In the Name of the King
Chiang Mai Administrative Court**

Date: 5 February B.E. 2553 (2010)

Mr. Natee Teerarojjanapongs I **Plaintiffs**

Mr. Suchathinat Champathong II

Against

The Governor of Chiang Mai Province **Defendant**

Issue: Dispute regarding an unlawful order made by a state official.

In this case the Plaintiffs object to the defendant having issued the Chiang Mai Provincial Announcement entitled "***Regulations for arranging Flower Festival floats joining the Flower Festival competition in the Chiang Mai Flower Festival, Chiang Mai Province, 34th time, year 2553***", (the

Regulations). The **Regulations** were issued 20 November 2552 [2009] by the defendant. Article 4 of the **Regulations** specifies that, for a float to be part of the Flower Festival parade, at least one lady must be sitting on each float, and men and women on floats are to dress appropriately. Attire that expresses sexual deviance is forbidden. The Plaintiffs say that the **Regulations** will prevent persons who are neither men nor women from joining the Flower Festival floats. The Plaintiffs thus ask for a judgment or order invalidating the 4th article of the **Regulations**, which specifies that people joining the parade by sitting on Flower Festival floats must not dress in a way that expresses sexual deviance.

In addition, the Plaintiffs request the court to order temporary measures, before final judgment, to restrain the implementation of Article 4 of the **Regulations**, specifically as regards the ban on wearing clothing that expresses sexual deviance for persons sitting on the Flower Festival floats.

The court has considered the request and the documentation accompanying it and interrogated Plaintiff No. I and the representative of the Defendant on 4 February 2553. The facts presented were as follows: The Province of Chiang Mai ordered that the 34th Chiang Mai Flower Festival be held between the 5th and 7th of February 2553 [2010], with the Defendant as head of the administrative committee. The order specified that the Flower Festival floats parade competition be arranged as a part of the festival. The Flower Festival parade competition committee was given the responsibility to set out the scoring criteria for floats in the Flower Festival competition, and to give advice to entrants on the decoration of Flower Festival floats. The committee suggested criteria for Flower Festival floats entering the competition to the Defendant. On the 20th of November 2553, the Defendant used his powers as the Provincial Governor according to the **Civil Service Regulations Act**, B.E. 2539, to issue the **Regulations**. As noted above, Article 4 of the **Regulations** specifies that at least one lady must be sitting on each Flower Festival Float and that men or women on the floats are to dress appropriately. Attire that expresses sexual deviance is forbidden. This ban had been in force each year since the 2550 Chiang Mai Flower Festival. But, in practice, the Defendant and the officers of the Defendant had not forbidden persons that have sexual diversity to participate by sitting on the Flower Festival floats or joining the Flower Festival parade. There had never been any problems related to inappropriate attire or attire by such persons that would be in contradiction with good culture, traditions, or morality in any way. The Defendant claimed that the ban on persons dressing in a sexually deviant way was intended to be implemented solely in cases of the Flower Festival beauty competition contestants, who would be featured on Flower Festival floats. The beauty competition is a women's beauty competition like the Miss Thailand, Miss Chiang Mai, and similar competitions.

The first Plaintiff, who is the Secretary General of Chiang Mai Araya Group, Head of Gay Political Group, and Coordinator of the Gender Identity Organizations' Network, said that the ban was in conflict with Article 30, Clause 3, of the **Constitution of the Kingdom of Thailand**. He said it constituted unfair discrimination based on sexual differences and did not respect human dignity. He therefore asked the Chiang Mai Administrative Court to issue a judgment or order invalidating the specific section of Article 4 of the **Regulations** which forbids persons sitting on Flower Festival floats to dress in attire that expresses sexual deviance.

The Court has considered the request for the Court to restrain the implementation of the specific part of Article 4 of the **Regulations** that forbids attire

that expresses sexual deviance, as a temporary measure before the Court has reached a final judgment. Together with the related documentation, the Court has also considered Article 66 of **Act on the Establishment of Administrative Courts and Administrative Court Procedure**, B.E. 2549. Article 66 provides that the Administrative Courts have the powers to issue temporary measures or means and to issue orders for related state bodies or officials to follow, according to the regulations and methods specified by the regulations issued by the Judicial Commission of the Administrative Courts. In issuing such regulations and methods, the responsibilities of administrative bodies or state officials, and any problems that might result in state administration, are to be taken into consideration. Article 72, Clause 3 of the regulations issued in 2543 by the Judicial Commission of the Administrative Courts, on the procedure of considering administrative cases, states that in cases where a court sees that a regulation or an administrative order that has resulted in a lawsuit is likely to be unlawful, and if such a regulation or order is further implemented it will cause severe injury that is difficult to amend afterwards, and restraint on the implementation of the said regulation or administrative order is not an obstacle in the administration of state bodies or in the provision of public services, the court will have the power to restrain the implementation of such a regulation or administrative order, as it sees necessary. Thus, there are altogether three conditions for an Administrative Court issuing an order for restraining the implementation of a regulation or administrative order that has resulted in a lawsuit. Firstly, the regulation or order is likely to be unlawful. Secondly, allowing the regulation or administrative order to be implemented while the case is being considered will cause severe injury to the plaintiff that is difficult to amend afterwards – namely, even if the court would afterwards adjudicate or issue an order to revoke the regulation or administrative order, the ruling or the court order could not redress an injury caused to the plaintiff by the implementation of the of the regulation or administrative order before the case had fully closed. Thirdly, restraining the implementation of the said regulation or administrative order is not a problem for the administration of state bodies or in the provision of public services.

The Defendant issued the **Regulations** in question. This dispute falls within the jurisdiction of the Administrative Court, according to Article 9, Clause one (1) of the **Act on the Establishment of Administrative Courts and Administrative Court Procedure**, B.E. 2549, and is a complete lawsuit according to the conditions for lawsuits specified in Article 43 and Article 49 of the same **Act**. Provisionally, this is a case that falls within the jurisdiction of the Administrative Court.

The Court must consider if there is a reason to issue an order to restrain the implementation of the administrative order which is the basis of this case or not. Firstly, is the administrative order that is the basis of the case likely to be unlawful or not? The plaintiffs claim that Article 4 of the **Regulations**, which can be interpreted as meaning that men who are clothed like women or women who are clothed like men are forbidden to sit on Flower Festival floats, is an order that limits the personal rights and liberties of people guaranteed in the **Constitution**. The plaintiffs say that it is unjust discrimination against persons on the grounds of sexual differences and conflicts with Article 29 and Article 30, Clause 3 of the **Constitution of the Kingdom of Thailand**.

Article 26 of the **Constitution** specifies that in using their powers, all state organizations must take human dignity, rights and liberties into consideration. Article 27 of the **Constitution** specifies that the rights and liberties that the constitution guarantees expressly, implicitly, or by a decision of the Constitution Court shall be protected and binding for the Parliament, Cabinet, Courts,

constitutional bodies, and state bodies, directly in legislation, in implementation and in interpretation of laws. Article 28 states that persons are entitled to claim their right to human dignity and use their rights and liberties to the extent that the action does not violate the rights and liberties of others, is not against the **Constitution**, and does not violate good public morals. Article 29 states that the rights and liberties of people guaranteed in the **Constitution** can only be limited by legislation, enacted in the way stated in the **Constitution**, only to the extent necessary, and only in a way that does not violate the essence of the rights and liberties involved. By clause 1, laws must be universally applicable, and not intended to be specifically enforced in any specific case or regarding a specific person. They must also state the provisions of the **Constitution** that give the powers to enact each law. The provisions of Clause 1 and Clause 2 are also to be used in enforcing rules issued under the provisions of law, *mutadis mutandis*. Article 30 states that persons are equal before the law and shall enjoy equal legal protection; men and women shall have equal rights. Unjust discrimination against persons on grounds of place of birth, ethnicity, language, sex, age, disability, physical status or health, status of the person, economic or social standing, religious belief, education, or political views that are not in contradiction with the constitution, is forbidden. And Article 32, Clause 1, specifies that persons shall have rights and liberties in life and person. It is thus seen that the disputed **Regulation** is an order that directly limits the rights of persons in certain kinds of attire to participate in the activity, which is a competition and a show arranged in a public place by a state body. It has a broad impact, and denies the equal rights of persons who have sexual diversity, differing from the born sex of those persons. If state officials have grounds to issue an order or rule that limits the rights and liberties guaranteed in the **Constitution**, it has to be on legal grounds, done only to the extent necessary, and must not violate the essence of the rights and liberties. In this case, it is not evident that the Defendant issued Article 4 of the **Regulations** based on any powers bestowed by any law. As regards the Defendant's claim to have acted on the powers bestowed by virtue of **Civil Service Regulations Act**, B.E. 2539, it is seen that the powers and responsibilities of a provincial governor as specified in Article 57 (1) of the said **Act** are specified so that a provincial governor has the powers and responsibilities of public administration based on the laws and customs of public administration, only limited to general matters. Issuing rules or orders that limit the rights and liberties of persons guaranteed in the **Constitution of the Kingdom of Thailand** is forbidden, unless it is by virtue of a law only as specified in the **Constitution**, only to the extent necessary, and does not violate the essence of rights and liberties. Now, since the said order does not specify the law that bestows the powers to the Defendant to issue an order, or the provisions of the **Constitution** that bestow the powers to issue such a law, and does not have good grounds based on relevant facts, relevant legislation, or considerations and justifications for exercising judgment as provided in Article 37, Clause 1 of the **Administrative Procedure Act**, B.E. 2539, this court considers that the said order is likely to be unlawful because it was given without the powers to do so.

Considering further whether the **Regulations** disputed in this case should be in force while the case is being considered, will cause grave injury to the plaintiffs and be difficult to amend afterwards or not, it is seen that the Chiang Mai Flower Festival, Year 2553, will be arranged on 5-7 February 2010, with a Flower Festival float parade competition on 6 February 2010 only. If Article 4 of the **Regulations** remains in force on the said day, it could prevent persons who dress contrary to their gender from sitting on the Flower Festival floats, which would constitute an injury that could not be amended after the event had finished. The final problem to be

considered is whether restraining Article 4 of the **Regulations**, specifically as regards the ban on wearing clothing that expresses sexual deviance for persons sitting on the Flower Festival floats, would constitute an obstacle in state administration or in the provision of public services. The Defendant admitted that in arranging the Flower Festival parade competition since B.E. 2550, there had always been participants sitting on the floats dressed in a way not corresponding to their natural gender, with no cases of attire inappropriate in terms of culture and traditions in any way whatsoever. In practice, participants dressed not corresponding to their natural gender have not been forbidden to sit on the floats. It had simply been ordered that persons sitting on the floats that had also entered the Miss Flower Festival beauty competition had to be women only. Ordering a restraint on the implementation of the disputed order does thus not constitute an obstacle for public administration or for the provision of public services in any way.

Having found that Article 4 of the **Regulations**, specifically as regards the ban on wearing clothing that expresses sexual deviance for persons sitting on the Flower Festival floats is an administrative order that is likely to be unlawful, and that implementing the Article that is disputed in this case while the case is being considered would cause injury that would be difficult to amend afterwards, and that ordering the restraint in the implementation of the disputed order does not constitute an obstacle for public administration or the provision of public services, it follows that this is a case in which the court has powers to restrain the implementation of a rule or an administrative order, as it sees appropriate, on the basis of Article 66 of the **Act on the Establishment of Administrative Courts and Administrative Court Procedure**, B.E. 2549, together with Section 72 of the regulations issued by the Judicial Commission of the Administrative Courts on Procedure in Administrative Cases, B.E. 2543.

For these reasons, the Court therefore orders that the implementation of Article 4 of the Chiang Mai Announcement "**Regulations for arranging Flower Festival floats joining the Flower Festival competition in the Chiang Mai Flower Festival, Chiang Mai Province, 34th time, year 2553,**" issued 20 November 2552, specifically as regards the ban on wearing clothing that expresses sexual deviance for persons sitting on the Flower Festival floats, be restrained as a temporary measure until the court issues a ruling or order stating otherwise.

Miss Saithip Sukhathiphan
Judge at Chiang Mai Administrative Court

Judge responsible for the wording

Mr. Surat Phumphuang
Head of Judges at Chiang Mai Administrative Court

Mr. Methi Chaisit
Judge at Chiang Mai Administrative Court

Translation and English usage by Timo Ojanen and Douglas Sanders.

Some paragraph breaks have been added for clarity and repetition of the full title of the regulations eliminated from the translation.