

**Ruling of
the Central Administrative Court
in the Black-Number Case
No. 671/2554**

**‘Sukhaphisit and Wongkitrungreang
v National Film and Video Board
and Second Committee for
Film and Video Censorship’**

**RE: Dispute as to issuance of unlawful order
by administrative agency or state authority**

Dated April 20, 2554 (2011)



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Ruling on Dismissal of
Application for Suspension of
Statute or Administrative Act



Black-Number Case No. 671/2554
Red-Number Case No. /25

**IN HIS MAJESTY'S NAME
THE CENTRAL ADMINISTRATIVE COURT**

The 20th Day of April, Buddhist Era 2554 (2011)

Between	{	Mr Thanwarin SUKHAPHISIT,	the 1 st	Plaintiffs
		Mr Thatchai WONGKITRUNGRUEANG,	the 2 nd	
	{	The National Film and Video Board,	the 1 st	Defendants
		The Second Committee for Film and Video Censorship,	the 2 nd	

RE: Dispute as to issuance of unlawful order by administrative agency or state authority

BOTH PLAINTIFFS SUBMITTED a plaint (“the Plaint”) containing the following statement. The 1st Plaintiff is a producer, director and owner of the copyright of a film entitled “*Insects in the Backyard*” (“the Film”). The 2nd Plaintiff represents the Film Viewers’ Network, a *collegium* consisting of the persons interesting in film viewing. Pursuant to section 25 of the *Film and Video Act, BE 2551 (2008)* (“FVA”), the 1st Plaintiff, on November 23, 2553 (2010), filed an application for broadcasting, letting, exchanging or disposing of the Film inside the Kingdom, together with a proposal to rate the film as “not suitable for viewers under twenty years” according to the *Ministerial Regulation on Determination of Film Rating, BE 2552 (2009)* (“Ministerial Regulation”). Later on November 24, 2553 (2010), the 2nd Defendant issued an order not allowing the Film to be broadcasted, let, exchanged or disposed of inside the Kingdom, citing that the Film is contrary to the public policy. The 2nd Defendant did not permit the 1st Plaintiff to enjoy any opportunity to participate in the consideration process or to give explanation. The 1st Plaintiff then appealed such order to the 1st Defendant in compliance with section 66 of the FVA. The 1st Defendant, in her session No. 11/2553 on December 22, 2553 (2010), resolved to deny the appeal of the 1st Plaintiff as documented in the *letter of the Ministry of Culture No. MC 020431/3680 dated December 28, 2553 (2010)* (“the Letter”), citing the reason that the Film contains certain contents contrary to the public policy. Deeming that the orders of both Defendants were inconsistent with the process and procedure required by law, that no statement of grounds, considerable issues, premisses and cited legal points has been provided according to section 39 the *Administrative Procedure Act, BE 2539 (1996)* (“APA”), and that the said orders amounted to an unlawful exercise of discretion, the 1st Plaintiff entertained an opinion that both orders infringed his right and liberty of expression as recognised by section 45 of the Constitution of the Kingdom of Thailand and constitute the unlawful administrative acts. Both Plaintiffs therefore brought this case to an administrative court.

BOTH PLAINTIFFS APPLIED to the Court for a judgment or ruling:

- (1) Revoking the resolution and the order of the 2nd Defendant not allowing the Film to be broadcasted, let, exchanged or disposed of inside the Kingdom and revoking the resolution in the session No. 11/2553 of the 2nd Defendant⁽¹⁾ and the Letter;
- (2) Directing the 1st and the 2nd Defendants to, jointly or severally, compensate the injury arising from performance of the unlawful administrative acts which infringed the 1st Plaintiff's right and liberty of expression by making a payment of 400,000 baht to him.

HAVING CONSIDERED, the Court found that the case is subject to the administrative court jurisdiction according to section 9, paragraph 1, (1) and (3), of the *Act Establishing the Administrative Courts and the Administrative Court Procedure, BE 2542 (1999)* ("AAC"), and that only the 1st Plaintiff is capable of suing before an administrative court pursuant to sections 42, paragraph 1, 49 and 72 of the same. By this reason, the Judge Rapporteur accepted the Complaint of the 1st Plaintiff and the Court denied that of the 2nd Plaintiff.

ANNEXED TO THE PLAINT was both Plaintiffs' application for interlocutory relief ("the Application"), that is, for an injunction permitting the 1st Plaintiff to broadcast the Film in academic forums and/or for academic purposes pending adjudicative judgment or ruling. In making the Application, the 1st Plaintiff alleged that the administrative acts grounding the institution of this case are possibly unlawful and ascribe an unlawful exercise of discretion, for the 1st Plaintiff has enjoyed no opportunity to be informed of the facts and to raise any objection or produce any evidence, and both the Defendants have performed the administrative acts without being aware of the substantive facts, i.e. both of them have not viewed the entire film, but merely a summary or synopsis thereof. Included in the allegation were the points that, if the 1st Plaintiff does not broadcast the Film in any place whatsoever pending adjudicative judgment, the social attention as to the issues presented therein would have changed and ceased to exist when the adjudicative judgment is rendered, and that, as the administrative authority to debar a film from domestic broadcasting has been exercised for the first time since promulgation of the FVA, it is expedient to draw the comments from the academic, legal and mass media sectors by allowing the Film to be broadcasted in academic forums or for academic purposes, citing that the attendants or viewers thereof would be those *sui juris* and capable of reasoning with respect to film viewing. The allegation also contained the point that interlocutory relief bestowed by the Court upon both Plaintiffs would not impair the performance of duty of the two Defendants under the FVA.

HAVING LOOKED INTO the Application, the Court was certain that the true intent of the 1st Plaintiff is to apply for a ruling suspending the administrative acts by which both Defendants allowed not the Film to be broadcasted, let, exchanged or disposed of inside the Kingdom. Such ruling, if rendered, would result in provisionally relieving or abating the enforcement of the administrative acts by operation of article 69, paragraph 2, of the *Rule of the Plenary Session of the Supreme Administrative Court on Administrative Case Procedure, BE 2543 (2000)* ("the Rule").

THE COURT HEARD the parties on April 4, 2554 (2011), in order to rule the Application.

THE COURT VIEWED the Complaint, the Application, the facts acquired in the course of the hearing and the documents concerned. Also viewed was section 66 of the AAC which empowers the Court to, subject to the criteria and procedure prescribed in the rule of the Plenary Session of the Supreme

⁽¹⁾ Correctly, it should be "the 1st Defendant". [Note by Wikisource]

Administrative Court, grant interlocutory relief and, by a ruling, instruct the agencies or state authorities to abide by the same, and which requires that, in prescribing such criteria and procedure, regards shall be paid to the responsibility of the administrative agencies or state authorities as well as the problems and impediments which may halt the administration of state affairs. In this respect, article 72, paragraph 3, of the Rule vests the court with the power to, by a ruling, suspend the statute or administrative act grounding the institution of the case had the court deemed that the statute or administrative act is likely to be unlawful, that the continued application of the same would cause such a serious injury to the extent subsequent remedy would be impossible and that suspension thereof would not impair the administration of state affairs or the providing of public service. Thus, the conditions under which an administrative court is permitted to render a ruling on suspension are of three points: firstly, the statute or administrative act in question is possibly unlawful; secondly, the continued application of the same pending trial would cause the plaintiff to sustain such a serious injury to the extent that subsequent remedy would be impossible, that is to say, even a judgment or ruling would subsequently be rendered to revoke the statute or administrative act, it might absolutely not remedy the injury the plaintiff has incurred from the enforcement of such statute or administrative act in the course of the trial; and thirdly, suspension of the said statute or administrative act would not impair the administration of state affairs or the providing of public service.

THE FACTS IN THIS CASE could preliminarily be heard as follows. The Pop Picture Company Limited, as a joint owner of the copyright with the 1st Plaintiff, has, on November 4, 2553 (2010), made an application for broadcasting, letting, exchanging or disposing of the Film inside the Kingdom (FV form 1) under section 25 of the FVA, with a proposal to rate the Film as “not suitable for viewers under eighteen years” according to section 26 (5) of the same. The 2nd Defendant considered the application and, by an order, denied it without requiring the applicant to edit or modify the Film. At that time, the applicant did not appeal such order to the 1st Defendant and the 1st Plaintiff, however, broadcasted the Film and applied it to a contention in the Vancouver International Film Festival, Vancouver, Canada. Also in November, 2553 (2010), the Film was broadcasted in the World Film Festival of Bangkok, Bangkok, in which approximately 400 viewers attended and the broadcasting was limited to the viewers having attained twenty first year only. The 1st Plaintiff, as a producer, director and owner of the copyright, once again applied to the 2nd Defendant for broadcasting, letting, exchanging or disposing of the Film inside the Kingdom. The contents of the Film were the same but the notice “This Film is based on an imaginary vision of the maker. Behaviours of the characters are therefore fictitious. No reference is made to any person in the society. Reasoning is required whilst viewing this Film.” has been inserted. A proposal to rate the Film as “not suitable for viewers under twenty years” according to section 26 (6) of the FVA was also made. The 2nd Defendant, consisting of seven members, pleaded that all of them have viewed the Film on November 23, 2553 (2010), and held a session for discussing as to the contents of the same on that very day. Passed was a unanimous resolution not allowing the Film to be broadcasted, let, exchanged or disposed of inside the Kingdom in pursuance of section 29 of the FVA, citing the reason that the Film presents certain issues contrary to the public policy. The 2nd Defendant did not require the Film to be edited or modified as she considered that an order not allowing the broadcasting of the Film has once been issued and, at this time, nothing in the Film has been edited or modified, but the mere notice has been inserted. The 1st Plaintiff later appealed such order to the 1st Defendant who forwarded the matter to the *Subcommittee for Advisory and Legal Consideration and Opinion and Appeal Adjudication under the FVA* for consideration. The Subcommittee considered the appeal of the 1st Plaintiff in her sessions No. 46/2553, 47/2553 and 49/2553. The 1st Plaintiff was permitted to explain before the Subcommittee in her session No. 47/2553 on December 9, 2553 (2010). In such session, the Subcommittee once asked the 1st Plaintiff whether he would cut certain parts of the Film off for, according to section 29 of the FVA, the Committee (the 2nd Defendant) is invested with the power to have the Film edited or modified prior to considering the application if she finds that the Film includes certain inappropriate contents, and the

1st Plaintiff replied that he had no intention to cut any part of the Film off, insisting that the notice has been inserted at the beginning of the Film. The Subcommittee then discussed and held that the Film as a whole presents the scenes of homosexual and heterosexual intercourses, of children in student uniforms smoking, consuming alcoholic beverages and offering sexual service and of immoral expressions, including female and male children earning their livings by prostituting themselves instead of going other ways out, children in student uniforms offering themselves for sexual purposes, children being taught about courtship, children dreaming of killing their own fathers etc. The Subcommittee was of an opinion that the subject matter of the Film conveys the acts of intercourse in a manner unsuitable with the Thai society and likely to cause amongst the social circles and the viewers, even having reached the twentieth year, misunderstanding and imitation of homosexual behaviours and other misconducts presented in the Film, and that the Film is therefore contrary to the public policy. The Subcommittee found expedient to deny the appeal of the 1st Plaintiff and submitted her opinion to the 1st Defendant for further consideration. In her session No. 10/2553 on December 16, 2553 (2010), the 1st Defendant considered the opinion of the Subcommittee and viewed the Film on that day, 19:00 hours, at the Theatre of the Kantana Group Company Limited (Public). The 1st Defendant did not demand the 1st Plaintiff to make a personal appearance and give explanation before her, for she deemed that he has explained to the Subcommittee. Later in her session No. 11/2553 on December 22, 2553 (2010), the 1st Defendant, by a majority of votes, resolved to deny the appeal of the 1st Plaintiff, citing the reason that the Film as a whole presents the scenes of homosexual and heterosexual intercourses, of children in student uniforms smoking, consuming alcoholic beverages and offering sexual service and of immoral expressions, including female and male children earning their livings by prostituting themselves instead of going other ways out, children in student uniforms offering themselves for sexual purposes, children being taught about courtship, children dreaming of killing their own fathers etc. The 1st Defendant also pleaded that she was of an opinion that the subject matter of the Film conveys the acts of intercourse in a manner unsuitable with the Thai society and likely to cause amongst the social circles and the viewers, even having reached the twentieth year, misunderstanding and imitation of homosexual behaviours and other misconducts presented in the Film, and that the Film is therefore contrary to the public policy. Whilst instituting this case, the Film has been selected to join a contention in the Torino International Gay and Lesbian Film Festival, Turin, Italy.

THE CONSIDERABLE QUESTIONS in this case were: Whether the continued application of the orders not allowing the Film to be broadcasted, let, exchanged or disposed of inside the Kingdom pending trial would cause the 1st Plaintiff to sustain such a serious injury to the extent that a subsequent judgment or order revoking the said administrative acts would absolutely not remedy the injury the 1st Plaintiff might have incurred from the enforcement of those administrative acts pending the trial; and whether suspension of the administrative acts in dispute would impair the administration of the state affairs or the providing of public service.

HAVING VIEWED the facts concluded from the documents in the file and from the statements given by the parties in the course of the hearing, especially, from the Application, the Court entertained an opinion that the injury the 1st Plaintiff alleged in the Application and in his statement in the course of the hearing is that against his reputation, for the general public and the film circle personnel would understand that he has produced and directed a film having the contents contrary to the public policy to the extent that the domestic broadcasting thereof cannot be allowed. The 1st Plaintiff stated, however, that both Defendants' orders not allowing the domestic broadcasting of the Film do not affect the international contention or broadcasting of the same. Having learnt this, the Court found that even it would render a judgment to the effect that the administrative acts of the two Defendants are unlawful, such judgment will be capable of absolutely remedying the reputational injury the 1st Plaintiff might have incurred pending trial. The continued application of the said administrative acts in the course of the trial therefore entails no serious injury against the 1st Plaintiff. Furthermore, it

appeared from the statement given by the 1st Plaintiff in the course of the hearing that the broadcasting of the Film in academic forums and/or for academic purposes as indicated in the Application is intended to be made without commercial costs so that the general public taking interest therein would view the Film and provide comments, the broadcasting is not to be limited to the specific group of viewers who are from academic or artistic sectors or whose comments are required. Should the Court rule that the Film shall be permitted to be broadcasted in academic forums and/or for academic purposes in the manner stated by the 1st Plaintiff before the Court, it could be conjectured that the great number of people would attend the said open broadcasting to view the Film. This kind of ruling would produce the same effect as that directing the two Defendants to allow the Film to be broadcasted inside the Kingdom, by which the legal enforcement of both Defendants would be jeopardised in consequence. The case, for these reasons, does not fall under the conditions under which any administrative court may render a ruling suspending the administrative act grounding the institution of the case according to article 73, paragraph 2, of the Rule.

THE QUESTION as to whether the administrative act in dispute is lawful is an issue of the case with respect to which the Court is required to ascertain the facts for further decision.

THE COURT HEREBY RENDERED a ruling dismissing the Application which, if granted, would result in suspension of the administrative acts, by virtue of section 77, paragraph 2, of the APA in conjunction with article 72, paragraph 3, of the Rule.

Ms Saithip SUKHATIPHAN
Judge of the Central Administrative Court

Judge Rapporteur

Mr Pranai WANITCHANON
Chief Judge of the Chamber of the Central Administrative Court

Mr Wachira CHOPTAENG
Judge of the Central Administrative Court

Mr Prakai WIBUNWIPHA
Judge of the Central Administrative Court

