CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] MLJU 886

Malayan Law Journal Unreported

FEDERAL COURT (PUTRAJAYA)

TENGKU MAIMUN TUAN MAT CHIEF JUSTICE, ROHANA YUSUF PCA, NALLINI PATHMANATHAN, VERNON ONG LAM KIAT, ZABARIAH MOHD YUSOF, HASNAH MOHAMMED HASHIM AND MARY LIM THIAM SUAN FCJJ

CIVIL APPEAL NO 01(i)-34-10 OF 2019(W)

28 May 2021

Cyrus Das (Sharmini Thiruchelvam and Francis Pereira with him) (Francis Pereira & Shan) for the appellants.
Shamsul Bolhassan (Mazlifah bt Ayob with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.
Jasmine Wong (Low Wei Loke and Larissa Louis Ann with her) (Mah Weng Kwai & Assoc) watching brief for the Bar Council.
Ranee Sreedharan (Ranee Sree & Assoc) for the Development of Human Resources for Rural Area.

Rohana Yusuf PCA:

JUDGMENT OF THE COURT (MAJORITY)

[1]The issue before us is fairly straightforward. It is whether an illegitimate child born outside Malaysia, to a Malaysian biological father and a Filipino mother is entitled to become a citizen by operation of law pursuant to Article 14 of the Federal Constitution (FC).

[2]At the time of his birth on 27.9.2010, the Child's parents were not married and five (5) months after his birth and on 22.2.2011, they legally registered their marriage in Malaysia pursuant to the Law Reform (Marriage and Divorce) Act 1976.

[3]The Child was correctly presumed to be a citizen of the Philippines by the Court of Appeal on the basis that he travelled on a passport issued by the Government of the Philippines.

At the High Court

[4]By an Originating Summons, the Appellants sought for a declaration before the High Court for the

Child to be a citizen by operation of law under Article 14(1)(b) and/or by registration pursuant to Article 15(2) of the FC.

[5]The High Court dismissed the declaration sought under Article 14(1)(b) because the learned trial Judge found that:

(i) the Child did not meet the criteria stipulated pursuant to Article 14(1)(b) of the FC read together with Section 1(b) of Part II of the Second Schedule and Section 17 of Part III of the Second Schedule. Since Section 17 of Part III of the Second Schedule defines the word "father" as referring to "mother" in a case of an illegitimate child, the Child's citizenship cannot follow that of his father;

(ii) the determining point of time for the acquisition of citizenship by operation of law would be at the point of birth of the Child. In effect, subsequent legitimisation of the Child by reason of the marriage of his parents would not entitle the Child to acquire citizenship by operation of law pursuant to Article 14(1)(b) and Section 1(b) of Part II of the Second Schedule of the FC;

(iii) and matters relating to citizenship are to be culled from within the four corners of the FC, which are to be construed and interpreted on its own without regard to any other statutes such as the Legitimacy Act. Therefore, the subsequent legitimate status of the Child resulted from the marriage of the parents after his birth is only relevant for purposes of the Legitimacy Act but not for acquiring citizenship by operation of law under Article *14(1)(b)* of the FC.

[6]The High Court also dismissed the declaration sought under Article 15(2) because it was found that:

(i) the declaration sought was premature because no application has yet to be made to the Federal Government pursuant to Article 15(2). What the Child did earlier was to apply for citizenship under Article 15A of the FC which was declined by the Government. The Appellants however did not challenge that decision by way of Judicial Review; and

(ii) the non-citizenship of his biological mother was an impediment to the application under Article 15(2) of the FC.

[7]The Appeal to the Court of Appeal was pursued only in respect of the application for a declaration of citizenship by operation of law under Article 14(1)(b) of the FC.

At the Court of Appeal

[8]Before it, the Court of Appeal had to consider two main questions:

(i) Can a child born out of wedlock be regarded as a legitimate child for the purpose of Article 14(1)*(b)* of the FC once his parents marry each other after he was born to render Section 17 of Part III of the Second Schedule inapplicable; and

(ii) Whether a child who has obtained a foreign citizenship is deprived of Malaysian citizenship.

[9]The Court of Appeal upheld the decision of the High Court as it agreed on the interpretation of the relevant provisions employed and propounded by the learned trial Judge. It was found that the wording of Section 1(b) of Part II of the Second Schedule clearly emphasised "at the time of the Child's birth". The Legitimacy Act was found to be an incompetent legal instrument to confer citizenship status under Article *14(1)(b),* because the Act provides only for personal rights and obligations of a legitimated person, which cannot include the right to citizenship.

[10]In addition, the Court of Appeal held that pursuant to Article 24(2) and (3A) of the FC, voluntary acquisition of a foreign citizenship by way of using a passport issued by a foreign country would deprive the Child of Malaysian citizenship.

[11]This Court had granted leave on four (4) questions of law.

[12]Before getting into the issues raised in relation to the four questions posed, it would be apposite to state a brief background on the law of Malaysian citizenship, to enable the matter be discussed in perspective.

Citizenship laws generally

[13]The concept of citizenship law predated the formation of the Federation of Malaysia. It was there even before independence. Laws pertaining to citizenship in Malaysia then form part of the supreme law and no longer remain as ordinary law. These provisions too are entrenched in the FC in that, they are not easily amended as it requires the consent of the Conference of Rulers pursuant to Article 159(5) of the FC. Even with the Proclamation of Emergency under Article 150 as we are currently under, no emergency law may be passed which is inconsistent with provisions relating to citizenship (see Article 150(6A)).

[14]Taking into account the various political and social factors prevailing then, the framers of the FC had introduced four categories of citizenship together with the requisite qualifications stipulated in Part III of the FC ranging from Articles 14 to 22.

[15]There are four ways of acquiring Malaysian citizenship and they are by:

(i) **operation of law (Article 14);**

(ii) registration (Articles 15, 15A, 16, 16A and 18);

(iii) naturalisation (Article 19); or

(iv) incorporation of territory (Article 22).

[16]Of the 4 categories, the operation of law citizenship is almost automatic. One either fits the given criteria under the FC or one does not. The criteria are clearly stipulated in the FC and it does not require any exercise of discretion by the authority.

[17]By operation of law, therefore entails a situation where at birth the person's status of citizenship will be so determined. It is a matter of birthright. This legal position is also as stated by Emeritus Professor Datuk Dr. Shad Saleem Faruqi, in his book 'Our Constitution' (Sweet & Maxwell, Thomson Reuters 2019) at pages 178 and 179. In practical terms, a birth certificate will be issued right away upon registration of such birth. While the other 3 categories of citizenship by registration and naturalization require an application to the authorities upon meeting the necessary conditions imposed under the FC (see Suffian 'An introduction to the Constitution of Malaysia' (3rd edn, Pacifica Publications 2007) at pages 330-337).

[18]The segregation between these two broad classes *viz* by operation of law and other forms of citizenship (registration and naturalisation) is mainly this: The other categories of citizenship may be acquired through an application to the Federal Government upon the required conditions being fulfilled. Thus, unlike the operation of law citizenship, their qualifications are not automatic at birth. They become qualified upon fulfilling the stipulated conditions.

[19]To illustrate this point we can take a citizen by registration as an example. One of the persons qualified to apply is a married woman who is a wife of a Malaysian citizen. Why I refer her as a person who qualifies is because she is eligible to apply for citizenship to the Federal Government, who then will exercise its discretion. She must first satisfy the prerequisites of Article 15(1)(a) in that she must reside in the Federation for a continuous period of 2 years, before applying, and *(b)* she must be of good character. These 2 conditions are subjected to further qualifications in Articles 15(4) and (5). It says if she had resided in the States of Sabah or Sarawak before Malaysia Day she is treated as residing in the Federation. Then her marriage to the Malaysian citizen must be registered in accordance with any written law (see Article 15(5)).

[20]Citizenship by operation of law is not peculiar only to Malaysia. Many countries in the world recognize this principle of citizenship, based on its own set of criteria as well as the *jus soli* and *jus sanguinis* rule. Hence, it is safe to conclude that whether one is qualified as a citizen by operation of law naturally must be discerned from the criteria as embedded in the FC itself, upon the true construction of the relevant provisions.

[21]It is over these legal constructions of the relevant FC provisions that parties before us differ in their views and approaches.

The Appellants' case Principle of Interpretation

[22]Learned Counsel for the Appellants, Dr. Cyrus Das impressed upon us to bear in mind two main principles in construing the relevant constitutional provisions. First, to adopt an interpretation enabling the availing rights. He submitted that in the process of interpreting constitutional provisions to the citizen, it should be done in ways so as to enable availing right be given and not to deny or denude them, citing in support the Supreme Court of India in *Post-Graduate Institute of Medical Education and Research v K.L. Narasimhan* [1997] AIR 3687 (SC) .

[23]The second principle is where it involves the welfare of a child, any likely breakup of the family unit will be relevant. He then cited Lord Wilberforce in *Minister of Home Affairs v Fisher* *[1980] AC 319* which emphasised on family unity and non-separation of a child from the family.

[24]Before even getting into the discourse on this subject further, let us first examine the above two principles in context. The case of **Minister of Home Affairs** (supra) is about a Jamaican mother of four illegitimate children all born in Jamaica. She later married a Bermudian in 1972 which took the mother and children to reside in Bermuda in 1975. The Minister of Labour and Immigration ordered the children to leave Bermuda in 1976. The Privy Council affirmed the Court of Appeal's decision where it held that the illegitimate children belong to Bermuda pursuant to Section 11(5)(d) of its Constitution and they would enjoy immunity from deportation until they reach 18 years old.

[25]The point to be noted is, this is not a case where conferment of the rights of citizenship was made to the children merely to ensure no family break up. No country in the world will grant citizenship to anyone without meeting the required criteria and family breakup may be a consideration but not the reason or criteria accepted. Thus, what the Court did in that case was only to allow them to stay in Bermuda till they reach 18 years old.

[26]Nobody can disagree that family should not be separated. However, the issue before us is whether avoiding family separation necessarily entitled the Child in this case to a **citizenship by operation of law.**

I am not saying that he cannot be a citizen pursuant to Article 15. The non-separation principle may be relevant for the authorities to consider in the exercise of its discretion pursuant to Article 15. That is where the requirement of discretionary power sets in. Hence, I do not find the case of much help to advance the principle of law on family separation in the context of this appeal.

[27]Further, in the case before us, there was no evidence that the authority ordered the removal of the Child away just because he is not a citizen of Malaysia. The fact remains that the Child is peacefully living together with his Filipino mother and Malaysian father in Malaysia.

[28]The next case on the principle of interpretation cited is the Indian case of **Post-Graduate Institute of Medical Education and Research (supra). It is a case where a challenge was made on the discrimination between certain tribes or castes in India, which were given better opportunities in relation to pursuing an advanced degree and to be appointed as Assistant Professor in a university. The Supreme Court acknowledged that the less privileged tribes or castes should be given better chances and opportunities as the Indian Constitution allows protective discrimination. This case too is of no assistance to the case of the Appellants. The principle of enabling right to a citizen does not arise in this appeal because the Child is not a citizen in the first place. Furthermore, he does not qualify a citizen by operation of law to even suggest that he has such enabling right.**

Construction of Article 14

[29]Let us next examine the construction of the relevant provisions as proposed by Dato' Dr. Cyrus Das. The provisions on citizenship by operation of law are encapsulated in Part III of the FC. The relevant provisions and the scheme of the constitutional provisions dealing with citizenship by operation of law begins with Article *14(1)(b)* of the FC which is situated in Part III that reads:

> PART III **CITIZENSHIP**
>
> **Citizenship by operation of law**
>
> 14.(1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> (a) ...
>
> (b) every person **born on or after Malaysia Day,** and having **any of the qualifications specified in Part II of the Second Schedule.**
>
> [Emphasis added]

[30]Part II of the Second Schedule applicable for the present purpose is Section 1 *(b)* which reads as follows:

> SECOND SCHEDULE
>
> **PART II**
>
> [Article 14(1)(b)]
>
> **CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY**

1. **Subject to the provisions of Part III** of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

(a) ...

(b) **every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State;** and

[Emphasis added]

[31]Section 1(b) above is subjected to the provisions of Part III of the Second Schedule that contains interpretation provision where Section 17 of Part III reads as follows:

SECOND SCHEDULE

PART III

(Article 31)

SUPPLEMENTARY PROVISIONS RELATING TO CITIZENSHIP

Interpretation

17. For the purposes of Part III of this Constitution references to a **person's father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be**

construed as references to his mother, and accordingly section 19 of this Schedule shall not apply to such a person.

[Emphasis added]

[32]The application of Part III of the Second Schedule as supplementary provisions relating to citizenship is provided for under Article 31 of the FC which reads:

Application of Second Schedule

31. Until Parliament otherwise provides, the supplementary provisions contained in Part III of the Second Schedule **shall** have effect for the purposes of this Part.

[Emphasis added]

[33]It was the submission of the learned counsel that the plain and ordinary reading of Section 1(b) of Part II above does not stipulate that legitimacy at birth as a pre-condition for citizenship by operation of law. Under that Section he said, the status of citizenship is opened to every "person" born outside the Federation whose father is a Malaysian citizen at the time of his birth. The only qualifying condition imposed by Section 1 *(b)* is on the citizenship status of the father at the time of the birth of that "person", and not his legitimacy. It was contended that nothing is to be added or omitted from the express words in that Section. So it would be wrong to interpose the legitimacy of the "person" as a condition to acquire citizenship by operation of law by applying Section 17. Section 17 is therefore of no application.

[34]In any event, Section 17 only becomes applicable according to him, at the point in time when the Child's citizenship by operation of law presents itself for consideration. He suggested a grammatical construction of the word "is legitimate" in Section 17, being a reference to that point in time.

[35]He further contended that, in reading Section 1 *(b)*, it should not be read in a discriminatory manner, where the effect would be causing differentiation between "legitimate" and "illegitimate" children for qualification for citizenship, as it would offend Article 8(1) of the FC, which guarantees equality of treatment to all persons. Also, it should not be read discriminating between a father and a mother.

[36]In substance, the line of submission raised the issue on the interpretation of Article 14(1)(b) read together with Section 1(b) of Part II of the Second Schedule of the FC. It questioned whether it can result in an illegitimate child, being legitimised through the subsequent marriage of his parents, would confer the Child the right to citizenship by operation of law.

The Respondents' case

[37]In opposing the appeal, the position taken by the Respondent is very much in line with the decisions of both the courts below, as well as the decided cases reported on this point.

My analysis

[38]Construing Article 14 is not a difficult process. It only requires reading it in its proper context. My understanding of Article 14 is this. First, there are two possible ways to a citizenship by operation of law as plainly stated in Article 14(1)(a) and *(b).* A person may either be born in or outside the Federation. The Child in the present appeal was born outside the Federation hence Article 14 (1)(b) applies to him.

[39]The opening words of Article 14 are that it must be read "subject to the provisions of this Part.". This Part refers to Part III of the FC (Citizenship). Then Article 14(1)(b) refers to the requisite qualifications specified in Part II of the Second Schedule. Under Part II of the Second Schedule, Section 1 lists 5 situations to qualify a citizenship pursuant to Article 14. They are in Section 1 *(a)* to *(e).*

[40]Section *1(b)* applies to the Child in the present appeal. It says "every person born outside the Federation whose father is at the time of birth a citizen...". Learned counsel argued that this provision merely emphasised on **every person** born outside the Federation and that **his father** is at the time of birth a citizen. There is no particular emphasis in that provision making a distinction between legitimate or otherwise. Thus, learned counsel contended, any distinction will lead to a discriminatory reading. I will deal with the discriminatory effect later, in this judgment.

[41]I have serious difficulty construing Article 14 as advanced by Dato' Dr. Cyrus Das for the Appellants. Learned counsel's construction cannot be correct since he has ignored the clearly articulated terms of Section 1 which is to be read "Subject to the provisions of Part III of this Constitution". With such clearly worded provisions how then one ignores the application of Section 17 to Section 1(b) of Part II of the Second Schedule?

[42]Furthermore, this is substantiated by the fact that Section 17 applies by virtue of Article 31. Article 31 mandates the application of the supplementary provisions contained in Part III of the Second Schedule to the construction of the citizenship provisions. It is in that Part III that Section 17 resides.

[43]Section (1)(b) Part II of the Second Schedule, *ipso facto* calls into operation of the provisions pertaining to citizenship under Part III. Section 17 opens with the words "For the purposes of Part III". Therefore in whichever way one looks at it, Section 17 cannot be detached from Section 1(b). Ignoring the application of Section 17 will also render Article 31 of the FC as otiose.

[44]Section 17 provides for reference to the "father" of an illegitimate child to refer to his "mother". The only clear meaning to be concluded therefore is that the Child's citizenship follows that of his mother. There is nothing ambiguous about Section 17 to permit other rules of interpretation.

[45]From the express distinction for parents or father of an illegitimate child in Section 17, it is obvious that the word "parents" in the context of Part III of the FC must be construed to refer to lawful parents in a recognised marriage in the Federation. This country never legally recognised unwedded parents. I say so because proper distinctions have always been made in our legislation in order to differentiate between the status of "parents" in a recognised marriage or otherwise. Even under *Section 13* of the *Births and Deaths Registration Act 1957*, the legislation makes a clear distinction between a father or mother of an illegitimate child. This connotes that "parents" refers always to legally wedded parents, not biological father and mother.

[46]It needs no emphasis that the relevant provisions relating to the citizenship by operation of law in the FC must be read as a whole and to be given a straightforward plain meaning. It is improper to interpret one provision of the FC in isolation from the others. Especially so, when the clauses indeed are written to be subjected to the other.

[47]To half read the provision by ignoring that Section 1 must be read "Subject to the provisions of Part III" is to deny the clearly express terms of the FC. The FC must always be considered as a whole so as to give effect to all its provisions (see *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener* *[2004] 2 MLJ 257*).

[48]The fundamental rule in interpreting the FC or any written law is to give effect to the intention of the framers. The court cannot insert or interpret new words into the FC. The court may only call in aid of other canons of construction where the provisions are imprecise, protean, evocative or can reasonably bear more than one meaning. I find Section 17 is plain and clear in its meaning. The court should not endeavour to achieve any fanciful meaning against the clear letters of the law.

Qualification at Birth

[49]First, the approach advanced by learned counsel defies the concept of citizenship by operation of law as being determined upon birth. At the risk of repeating, citizenship by operation of law is acquired automatically at birth either within or outside Malaysia, subject to certain qualifications without any application to be made (see R.H. Hickling, 'An Introduction to the Federal Constitution' (Federation of Malaya Information Services 1960) at page 24).

[50]Malaysian citizens who acquire this category of citizenship are those who by virtue of the FC, are citizens without volition on their part, without a choice in the matter by the Government and without oath or (in most cases) formality (see L.A. Sheridan, Harry E. Groves, 'The Constitution of Malaysia', (4th edn, Singapore: Malayan Law Journal 1987) and Emeritus Professor Datuk Dr. Shad Saleem Faruqi, 'Our Constitution' (Sweet & Maxwell, Thomson Reuters 2019)).

[51]There is a whole line of High Court decisions which take this approach of construction. Amongst others, *Foo Toon Aik v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 4 CLJ 613; *Chin Kooi Nah (suing by herself and as next of kin to Chin Jia Nee, an infant) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 1 CLJ 736; *Yu Sheng Meng (suing through next of kin, Yu Meng Queng) v Ketua Pengarah Pendaftaran Negara & Ors* [2016] 1 CLJ 336; *Nalan a/l Kunji Kanan & Anor v Secretary General of Ministry of Home Affairs, Malaysia & Ors* *[2017] MLJU 1808*; and *Samuel Duraisingh & Anor v Pendaftar Besar Kelahiran dan Kematian, Malaysia and another* *[2019] MLJU 1688*.

[52]I wish to add that in **Foo Toon Aik** (supra), I had the occasion to address this subject in the High Court. I held that the Child's status at birth should be the determining point to qualify for the acquisition of citizenship by operation of law. In the present appeal, similar issues are brought before this Court for determination. Notwithstanding my earlier decision, I have given my utmost considerations to the arguments put forth by the parties. Having heard those arguments, I am now even more convinced and fortified in my view that acquisition of citizenship by operation of law requires the fulfillment of the requisite conditions at the time of birth.

[53]A not dissimilar approach has been taken by the Court of Appeal. The Court of Appeal cases of *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor* *[2017] 3 MLJ 308*, *Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* *[2018] 6 MLJ 548* and *Chan Tai Ern Bermillo & Anor v Ketua Pengarah Pendaftaran Negara Malaysia & Ors* *[2020] 3 MLJ 634* are in chorus that qualification of citizenship by operation of law must be met at birth and must be conferred as a matter of birthright.

[54]I am mindful that all these cases being decisions of the High Court and the Court of Appeal are not binding on this Court by the doctrine of *stare decisis*. However, having considered the reasoning and the construction of Article 14(1)(b) of the FC as propounded, I fully agree and endorse the principles as established in all those cases.

[55]In **Pang Wee See** (supra), the Court of Appeal held that the phrase "is at the time of birth" in Section 1(a) of Part II of the Second Schedule refers to the factual event of birth, not a deemed event of birth. The factual event, in that case, was that the subject was born out of wedlock to a non-citizen mother. This is a case of an adopted child born in Malaysia to unknown parents, but was legally adopted by the applicants. The main question for determination was whether the adoption order pursuant to the Adoption Act 1952, qualifies a child to be a citizen by operation of law. The Court of Appeal held that the adoption order lawfully acquired under the Adoption Act 1952 cannot confer citizenship status to an adopted child by operation of law under Article 14(1)(b) read with Section 1(a) of Part II of the Second Schedule of the FC.

[56]The other decision by the Court of Appeal in **Lim Jen Hsian** (supra) relates to a child born in Malaysia to a Malaysian citizen father and a Thai-citizen mother. Both were not married at the time of the child's birth, or at any subsequent time. In fact, the Thai-citizen mother returned to Thailand for good and the child had since been in the care of the applicant's mother in Malaysia. On the question of whether the child acquired citizenship by operation of law under Article 14(1)(b) read together with Section 1(e) of Part II of the Second Schedule, the Court of Appeal held that, though the child was born in Malaysia to a Malaysian biological father, because he was born illegitimate, he cannot acquire Malaysian citizen by operation of law. His citizenship follows his Thai mother.

[57]Reference was made in the above cases to the interpretation section in Section 17. The Court found

that while the Child's biological father was a Malaysian citizen, and because of his illegitimate status since birth, the child could not have acquired the citizenship of his biological father. Instead, he acquired the citizenship of his biological mother, a Thai national. Consequently, the Court found that he was not stateless as envisaged under Section 1 *(e)* of Part II, Second Schedule of the FC, to qualify him as a citizen of Malaysia by operation of law.

[58]In the present appeal before us, the Court of Appeal in **Chan Tai Ern Bermillo** (supra) followed the approaches taken in all of the above decisions in holding that the Child's status at birth was the determination point in qualifying for the acquisition of citizenship by operation of law. And that the marriage of the parents was held to be irrelevant for the purpose of acquiring citizenship by operation of law because the emphasis is "at the time of the child's birth". The proper and correct interpretation of Section 17 was applied. I agree with the approach taken by the Court of Appeal in the application and construction of Article 14 and the related provisions.

[59]Even in our neighbouring land Singapore, the provision on this subject is much the same. The High Court in **Ukm v Attorney General** [2019] 3 SLR 874 adopted the same approach in construing the legal provision of citizenship by operation of law. An illegitimate child does not qualify for citizenship by operation of law and the qualification for such citizenship must be determined at birth.

[60]The Malaysian cases discussed above are also clear and unequivocal that because citizenship by operation of law is determined at birth, other laws which retrospectively qualify a person such as Legitimacy Act or Adoption Act cannot be used to construe the qualification of that person.

[61]I agree with the Court of Appeal's view in this appeal because the subsequent marriage of parents would not change the birth status of the Child as an illegitimate child. Section 4 of the Legitimacy Act only deems a person legitimate from the prescribed date or from the date of the parents' marriage, whichever is the later. Section 9 of the same Act merely provides for the legal rights of a legitimised person to be equivalent to those of a legitimate child. The legal rights referred to are the rights to maintenance and support, claim for damages, compensation, allowance and benefit. The effect of Section 9 of the Legitimacy Act must be confined to the ambit of its operability and its interpretation should not be stretched to supplement the provisions of the FC in matters relating to citizenship. There is no mention made for the rights of citizenship in the Legitimacy Act. And no corresponding provision in the FC that deems legitimisation confers the right to citizenship.

[62]Raja Azlan Shah FJ (as his Highness then was) in *Loh Kooi Choon v Government of Malaysia* *[1977] 2 MLJ 187* quoted Frankfurter J in reminding us that **"The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it".** Thus, the constitutional regime and mechanism for acquisition of citizenship under Part III of the FC are not to be supplemented by other Parliamentary legislation, any international instrument or any other extraneous material or authority. In view of the unequivocal words of the FC as the supreme law of the land, the Legitimacy Act cannot be a competent legal instrument to confer citizenship status.

[63]The Appellants' argument that the Child's birth status has been altered by virtue of his legitimation *via* Section 4 of the Legitimacy Act and that his legitimacy status for the purpose of Section 17 of Part III of the Second Schedule is to be taken at the time of the application for citizenship, amounts to introducing words into the provision of the FC against the express wordings of Article 14(1)*(b)* read together with the Second Schedule.

[64]This has been the interpretation of these clauses on the laws on citizenship by operation of law,

adopted in all the reported cases thus far except in the Court of Appeal case of *Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors* [2018] 1 MLJ 307 **("Madhuvita").**

[65]Madhuvita parted ways from all the reported cases on the subject both in the High Court as well as the Court of Appeal. The child in **Madhuvita** was born in Malaysia while here, the Child was born in the Philippines. In **Madhuvita,** the father is a Malaysian and the mother is a citizen of Papua New Guinea. At the time of the child's birth, both were not married. It was about two months after the birth of the child that the parents were married according to the Malaysian law. The Court of Appeal had granted citizenship by operation of law to an illegitimate child pursuant to Article 14(1)(b) read together with Section 1(a) and/or *(e)* of Part II of the Second Schedule of the FC.

[66]In arriving at its decision in **Madhuvita,** the Court of Appeal concluded that the word "parents" under Article 14(1)(b) read with Section 1 *(a)* of Part II of the Second Schedule is not qualified by the word "lawful", "natural", "biological", "adopted", "surrogate' or any other description or adjective. As such, it includes biological parents. The fact that her parents were not married at the time of her birth does not alter or diminish their capacities as her parents. Hence, it did not need to rely on the interpretation provision in Section 17 of Part III of the Second Schedule of the FC.

[67]Madhuvita distinctly differed from all other decisions in respect of two mains issues:

(i) that the legitimacy or otherwise of a child is to be considered at the time of the application; and

(ii) the word "parents" in Section 1(a) of Part II of the Second Schedule refers to the capacity of "parents" unqualified in any manner or form by the word "lawful", "natural", "biological", "adopted" or even "surrogate", or any other description or adjective.

[68]With respect, I am not in agreement with **Madhuvita** in relation to the finding that the legitimacy or otherwise of a child is to be considered at the time of the application. The interpretation of the word "parents" given by **Madhuvita** had also gone against all the other authorities. The word "parents" in Section 1 *(a)* is not defined in the FC. As such we will have to rely on the plain and ordinary meaning of the word. Black's Law Dictionary Abridged (6th Ed)(Centennial Edition 1891-1991) defines the word "parent" to mean "the lawful father or mother of a person".Therefore, in defining the word "parents" in Section 1(a) giving a plain and ordinary meaning must refer to lawful parents. In the same light, the word "father" in Section 1 *(b)* must also refer to a father in a valid marriage.

Grammatical Construction

[69]Learned Counsel relied further on **Madhuvita** to submit his grammatical construction to Section 17 to suggest that the legitimacy of the Child is only to be questioned at the time when the Child applies for his citizenship.

[70]Madhuvita considered the time of the application as the determining point of time for the qualification of the acquisition of citizenship by operation of law that the interpretation Section 17 becomes inapplicable in interpreting the legitimacy status of a child who at the time of the application is legally legitimised. It was held that:

"[61] The next consideration is whether the above conclusions are now qualified by the interpretation provisions in Part III of the Second Schedule. It is our respectful **view that it is not.** To recapitulate, s 17 provides that in relation to a person who is illegitimate, a reference to that person's father or parent is to be construed as a reference to the person's mother. The reason why we say that s 17 does not alter the above interpretation is because s 17 only applies to a person who is illegitimate. Section 17 is drafted in the present tense and it is the prevailing status of legitimacy or illegitimacy which is the relevant consideration.

[62] In that regard, the appellant is clearly, **not illegitimate.** She is born of parents who were not married to each other at the time of her birth. She is known as a child born out of wedlock. However, she is no longer illegitimate by reason of legitimation by the subsequent marriage of her parents.

[65] With the clear terms of s 4, the appellant is rendered legitimate by the subsequent marriage of her parents and that legitimation is from the date of the marriage, that is, from 23 January 2006. **From the language and terms of s 17, the appellant's legitimacy or illegitimacy is questioned at the time of the consideration of the application, and not some other point in time."**

[Emphasis added]

[71]I am not able to reconcile paragraph 62 of the grounds of judgment above as to how a child born to unmarried parents is not illegitimate but yet he is a child born out of wedlock. If so, why do you then need to legitimise a child who is not illegitimate but born out of wedlock.

[72]The grammatical construction employed in the case defies the basic premise that citizenship by operation of law requires no application nor consideration to be exercised by the Government as I have earlier alluded to. As rightly pointed by learned author Emeritus Professor Datuk Dr. Shad Saleem Faruqi in his book 'Our Constitution' (Sweet & Maxwell, Thomson Reuters 2019) at pages 178 and 179 said in respect of citizenship by operation of law.

"Birth and descent: This type of citizenship is also referred to as citizenship by operation of law. Its complex details are found in Article 14(1)(a) and the Second Schedule, Part 1. It confers an automatic right of citizenship without oath and without any official discretion on the following categories of persons."

[Emphasis added]

[73]The relevant point of time to determine the legitimacy or otherwise of a child as enunciated in **Madhuvita** contravenes the concept of *jus soli* and *jus sanguinis.* This issue was articulated in the decision of the Court of Appeal in **Pang Wee See,** where Abang Iskandar JCA (as he then was) observed as follows:

"[29] In determining citizenship of a person, two concepts are commonly applied, namely the concept of *jus soli* and the concept of *jus sanguinis. Jus soli* which means 'right of the soil', and commonly referred to as birth right citizenship, is the right of anyone born in the territory of a state to nationality or citizenship. The determining factor being the place or territory where a person was born. In the case of *jus sanguinis,* which in Latin means 'right of blood', is a principle of nationality law by which citizenship is not determined by place of birth but by having one or both parents who are citizens of the state. Viewed from the context of these two concepts, we are of the considered opinion that art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution is a provision which is anchored on the elements of **both the concepts of *jus sanguinis* and of *jus soli,* whereby citizenship of a person is traceable to the place of birth namely, Malaysia, as well as Malaysian citizenship of one of the person's parents (the right of blood) *at the time of the person's birth,*** in order to be a Malaysian citizen by operation of law, under art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution."

[Emphasis added]

[74]Learned counsel emphasised when a statutory provision is drafted in the present tense, it is intended that a person's legal status is to be determined as at the present time when a right is asserted (see *Minister of Public Works of the Government of the State of Kuwait v Sir Frederick Snow and Partners* [1984] AC 426; *Maradana Mosque Board of Trustees v Mahmud* [1966] 1 All ER 545; *Hamed v R* [2012] 2 NZLR 305; *S. A. Venkataraman v The State* [1958] AIR 107). Thus, by virtue of Section 4 of the Legitimacy Act, the Child is not illegitimate at the time of his application for citizenship.

[75]The grammatical construction suggested by learned counsel relying on all the cases cited above are out of context. These cases do not deal with matters relating to *jus soli* and *jus sanguinis.* No doubt they are appropriate for the grammatical construction in their own context.

[76]Besides defying the basic premise that citizenship by operation of law requires no application, the grammatical construction suggested is wholly irrelevant for yet another reason. Between the grammatical interpretation approach and the legislative history of the constitutional provisions, the latter outweighs the former. Legislative history plays an important role in interpreting and understanding the context of a constitutional provision (see *JRI Resources Sdn. Bhd. v Kuwait Finance House (M) Bhd. (President of Association of Islamic Banking Institutions Malaysia & Anor, Interveners)* [2019] 3 MLJ 561).

Legislative History

[77]The relevant historical documents show the process of how the current Article 14(1)(b), Section 1(b) of Part II, and Section 17 of Part III of the Second Schedule of the FC come into existence. There is a need to deduce from those processes, the meaning of the acquisition of citizenship by operation of law under the said provisions.

[78]The historical fact as articulated in The Reid Commission Report 1957 shows that it has always been the position taken by our framers of the FC that, an illegitimate child's citizenship is to follow that of the mother and not the father. Since its inception the provision of law on citizenship in the FC by operation of law had not undergone any change *vis-a-vis* the illegitimate child status (see Reid Commission Report 1957). The draft of the provision of current Section 17 was fully endorsed by the Working Party of the Constitution of the Federation 1957. It fully endorsed the proposal that the status of an illegitimate child is to follow the citizenship of the mother.

[79]The proposal for an illegitimate child to follow the citizenship of the mother received the support of the Working Party of the Constitution as reflected in the Minutes of the Working Party of the Constitution of the Federation 1957 (CO 941/86) on the then Section 7(3) which is now Section 17, with drafting modifications. The point worthy of noting from these historical documents is that the issue relating to an illegitimate child to follow the citizenship of the mother remained as the law to date. It would therefore be a total misapprehension, to severe Section 17 from the interpretation of Article 14.

[80]The other historical document to be noted is the Hansard of the Legitimacy Bill tabled on 6 February 1961. During that debate it was stated the intention of the Bill was:

> "As Honourable Members are aware, **under the common law an illegitimate child, or bastard, suffers from a number of disabilities, principally in matters of right over succession to property.** It was, I think medieval concept that the sins of the father should be visited on the child, but today nobody believes that this should be the case. **A child born out of wedlock can scarcely be expected to give previous assent to his status, or to determine on what side of the blanket he should enter this very unsatisfactory world.**

[Emphasis added]

[81]From the explanation given above, it is clear that the sole objective behind the enactment of the Legitimacy Act is to enable an illegitimate child to attain the inheritance rights upon him been legitimised thereunder. Nothing in the Act confers the birthright of citizenship under Article 14 and its incidental provisions. Hence, it would therefore be incorrect to apply and superimpose the Legitimacy Act to the provision of citizenship in the FC.

[82]Concluding my view and discussions, I am clear in my mind and reinforced in my view, that the qualification of acquiring citizenship by operation of law, must be met at birth. And if the qualifications are not met, this Court is not at liberty to add and subtract any other or qualifications which the FC states otherwise.

Discriminatory issue

[83]Learned counsel in his submission also addressed us on potential discriminatory implications of Article 14 reading it as it is. To recap this point, in his submissions learned counsel argued that it would be a discriminatory reading of the FC if the construction of the provisions leads to discrimination between a legitimate and an illegitimate child. It is also discriminatory between a father and a mother when Section 17 is applied. The protection against discrimination is part of the constitutional guarantee embedded in Article 8 of the FC.

[84]Let us begin by examining the guarantee against discrimination as housed in Article 8 which states:

"Equality

8. (1) All persons are equal before the law and entitled to the equal protection of the law.

(2) **Except as expressly authorized by this Constitution,**

there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment."

[Emphasis added]

[85]A student of Constitutional law will appreciate that not all forms of discrimination are protected by Article 8. Article 8 opens with "Except as expressly authorized by this Constitution.". In short, discrimination authorized by the FC is not a form of discrimination that Article 8 seeks to protect. There are in fact a number of discriminatory provisions expressed in the FC which include Article 14. Since the discriminatory effect of Article 14 is one authorized by the FC, it would be absurd and clearly lack of understanding of Article 8 for any attempt to apply the doctrine of reasonable classification, to Article 14.

[86]Many views have also been expressed on the gender biasness of the provisions in relation to laws on citizenship. Learned author Emeritus Professor Datuk Dr. Shad Saleem Faruqi at page 180 in his book **'Our Constitution'** in relation to the issue on citizenship observes that, "The Malaysian law on citizenship is riddled with sex bias". He concluded on this issue by posing a question on how far these aspects of law will be modified to accommodate gender equality remains to be seen. The same gender bias

issue has also been expressed by another academician Dr. Low Choo Chin under Chapter 3 in the book **'International Marriages and Marital Citizenship Southwest Asian Woman on the Move'** (1st edn, Routledge 2017) at page 66.

[87]I am in full agreement with the views expressed that the provisions on citizenship are gender bias in that it emphasizes on the citizenship of the father and not the mother. I hasten to add, lest it be misunderstood that I am all for the abolition of gender discrimination. There have been calls by various NGOs and Women groups to address these discriminatory issues to propose for the FC to be amended to eliminate gender bias. Hannah Yeoh, the then Deputy Minister of Women, Family and Community Development, had issued many statements calling for amendments to the laws to achieve gender equality in this area (see Arfa Yunus, **'Yeoh: 'It's 2019, treat men, women equally'** New Straits Times Online, 19 September 2019). That was a rightful call because only by way of the amendment of the FC that this discrimination may be altered.

[88]This whole issue begs the question of whether the Judiciary in the exercise of its judicial duty is constitutionally empowered to ignore or neglect the clear dictates of the FC and overcome that authorised gender bias in the name of progressive construction of the FC. Since the FC discriminates between a legitimate and an illegitimate child, a father and a mother of an illegitimate child, can the Court alter that discrimination so as to keep the FC living dynamically in order to avoid it from being locked and fossilized in 1963.

[89]What happens to the much-lauded doctrine of separation of powers and the judicial oath of upholding the Constitution. Is it not the doctrine of separation of powers which forms the basis of our democratic nation that deserves our attention and respect. We all know that there is no judicial supremacy articulated in our FC, and the power to amend the Constitution rests solely with the Parliament by virtue of Article 159. The Court cannot at its own fancy attempt to rewrite the clear written text of the FC because it would only lead to absurdity.

[90]There is also another dimension to the issue of discrimination which learned counsel had overlooked and failed to address. And it is this. We know that the Legitimacy Act, as well as the Adoption Act, do not apply to Muslims. Applying these laws to construe Article 14 would necessarily lead to discriminating against a Muslim child who cannot be legitimized or legally adopted. An illegitimate or adopted Muslim child cannot acquire citizenship by operation of law if these laws are to be resorted to. If the framers of the FC intend such religious discrimination it would have worded clearly in the FC in a similar tone as discriminating an illegitimate child. Whilst it authorises discrimination on legitimacy and gender, it does not authorise discrimination on religion on the issue of citizenship. Is the Court in holding the supremacy of the Constitution to indulge in amending clear words to uphold and prohibit discrimination which the FC authorises.

[91]Hence, accepting counsel's argument and following **Madhuvita** will lead to unauthorized discrimination of the application of the laws between Muslims and non-Muslims. This form of discrimination offends the very protection envisaged by Article 8 and the Court must not construe Article 14 to create discrimination that the FC prohibits.

Dual Citizenship Issue

[92]I agree with learned Appellants' view that the Court of Appeal erred in ruling that the Child is deprived of a Malaysian citizenship by virtue of Article 24. Article 24 is a citizenship-deprivation

provision which could only apply to a person who is already a citizen of Malaysia. There could not be a deprivation of citizenship until citizenship has first been conferred on the Child.

[93]With reference to the High Court cases in **Samuel Duraisingh** (supra) and *Haja Mohideen Bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Ors* *[2007] 8 MLJ 1*, the acquisition of a foreign citizenship and the discretion of the Federal Government to deprive any citizen of its citizenship under Article 24 are not relevant factors in determining whether a child is entitled to citizenship by operation of law under Article 14(1)(b). In the present case, the Child's acquisition of a Philippines passport which led to him being presumed a citizen of the Philippines is not a legally disqualifying factor to him acquiring Malaysian citizenship.

Conclusion

[94]To conclude, I will answer the four questions framed based on the foregoing discussions in the following ways:

1st Question

Whether it is proper to import into Part II Section *1(b)* of the Second Schedule to the FC any other requirements for the citizenship of a child born to a Malaysian father other than those expressly stated in the provision?

Answer

Once the entire of Article 14(1)(b) and Section 1(b) of Part II of the Second Schedule be read together with the interpretation provision in the FC, in particular Section 17 of Part III of the Second Schedule in order to determine the qualifications necessary for the acquisition of citizenship by operation of law, there is no necessity to adopt any other requirement to construe the provisions. Hence, Legitimacy Act or any other law is therefore not to be read into the provisions.

In view of my answer in Question 1, I decline to answer Question 2, Question 3 and Question 4.

[95]On all the reasons stated, the appeal by the Appellants is dismissed. The orders by the High Court as affirmed by the Court of Appeal are hereby maintained.

[96]This judgment has been read in draft by my learned brother Justice Vernon Ong Lam Kiat FCJ, my learned sisters Zabariah Mohd Yusof FCJ and Hasnah Dato' Mohammed Hashim FCJ. They have expressed their agreement and agreed to adopt the same as the majority judgment of this Court.

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