DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN SIVIL) SAMAN PEMULA

NO: SI-21-176-2006

Dalam Perkara 14(l)(b), 15(2), 18(1)(3), 30,38 Jadual Pertama, Bahagian 11, Jadual Kedua, dan Bahagian III Jadual Kedua Perlembagaan Persekutuan, Malaysia

Dan

Dalam perkara Peraturan 5(3)(a) Akta Pendaftaran Negara 1959 (Rev. 1972) dan Peraturan-Peraturan Pendaftaran Negara 1990

Dan

Dalam perkara Kaedah-Kaedah Mahkamah Tinggi, 1980

Dan

Dalam perkara Akta Spesifik Relief 1950

ANTARA

1. HAJA MOHIDEEN BIN MK ABDUL RAHMAN
2. BAHARUDEEN ALI AHMAD BIN HAJA MOHIDEEN
3. MAHATHIR MOHAMED BIN HAJA MOHIDEEN ... PLAINTIF-PLAINTIF

DAN

1. MENTERI DALAM NEGERI
2. KETUA PENGARAH PENDAFTARAN NEGARA, MALAYSIA
3. KERAJAAN MALAYSIA … DEFENDAN-DEFENDAN

ALASAN PENGHAKIMAN

OLEH YANG ARIF HAKIM DATO' KANG HWEE GEE

The 1st plaintiff, Haja Mohideen Bin Mk Abdul Rahman, is at all material times a male Malaysian citizen by registration pursuant to Article 15(2) of the Federal Constitution.

He married an Indian citizen in India on 26.3.1978. As a result of their union, the 2nd plaintiff was born on 29.8.1980 and the 3rd plaintiff on 6.7.1982, both in the State of Tamil Nadu, India.

The 1st plaintiff failed to register the birth of the 2nd and 3rd plaintiffs with the Malaysian High Commission in India within a year of their respective birth as required under Part II of the Second Schedule in order to enable the two children to be granted Malaysian citizenship by operation of law under Article 14(l)(b) of the Federal Constitution.

Some 6 years after the birth of the 3rd plaintiff, the 1st plaintiff decided to make a late application to the Malaysian High Commissioner in Madras to register their births. He received a reply from the office of the

Assistant High Commissioner for Malaysia in Madras advising him of the status of his application. The letter dated 5.9.1988 states as follows:

"PEJABAT PENOLONG PESURUHJAYA TINGGI MALAYSIA DI MADRAS
OFFICE OF THE ASST. HIGH COMMISSIONER
FOR MALAYSIA IN MADRAS
287 T.T.K. ROAD.
MADRAS-600018

Your Ref:

Our Ref: (032A)442/33/(44/81)

Date: 5th September, 1988.

Mr. Haja Mohideen
A/l. M.K. Abdul Rahman
13 Mitchell Road
Butterworth
Penang.

Tuan,

Per: Pendaftaran Kelahiran
a) Baharudeen Ali Ahmed
b) Mahathir Mohamed

Surat tuan bertarikh 4.6.1988 adalah diterima dan dengan ini dirujuk.

2. Harap maklum, kedua dua permohonan tuan ini sedang dalam perhatian kami. Ada beberapa perkara yang masih belum selesai dan apabila semuanya dapat diselesaikan, tuan atau isteri tuan akan diberitahu secepat mungkin untuk datang bersama-sama anak-anak tuan untuk dicam kenal.

Sekian saya maklumkan.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

t.t.

(ABDUL LATIF BIN AWANG)
PENOLONG PESURUHJAYA TINGGI."

The 1st plaintiff did not get any further response from the High Commission at Madras. On 23.9.1988 he sent a reminder, but did not receive any further reply from the High Commission. By this time the 1st plaintiff had returned to Malaysia with his wife but up to this stage the Malaysian citizenship status of the 2nd and 3rd plaintiffs had remained unresolved.

On 5.2.1997 the 2nd and 3rd plaintiffs having reached the age of majority came to Malaysia on a social visit visa which required periodical renewal.

On 28.2.1997 in their own right they made separate applications to the Government of Malaysia through the Ketua Pengarah Pendaftaran Negara for citizenship by registration under Article 15(2) of the Federal Constitution by a proforma application form supplied by the government.

Their applications were subsequently rejected by the Government of Malaysia vide a letter dated 15.9.1999 signed by the Ketua Setiausaha Kementerian Dalam Negeri for and on behalf of the Minister of Home Affairs.

By this application, the plaintiffs seek a declaration that the 2nd and 3rd plaintiffs are citizens of Malaysia under Article 14(l)(b) of the Federal Constitution and that the defendants did not have any ground to reject the 1st plaintiff's application to register the 2nd and 3rd plaintiffs as Malaysian citizens under Article 14(l)(b) of the Federal Constitution. They also seek an ancilliary order that the 2nd and 3rd defendants be issued their respective Malaysian citizenship certificate and identity card.

The plaintiffs' application is grounded on the submission that at the time the 1st plaintiff submitted the application at the High Commission at Madras in 1988, he had satisfied the requirement as set out in Article 14(l)(b) of the Federal Constitution. He contends that his failure to register the births of the 1st and 2nd plaintiffs within a year was purely a formal requirement and that this should not be an impediment to the

Federal Government to deny the 2nd and 3rd plaintiffs their rightful citizenship, without adverting to any reason for the delay.

With respect to the 2nd and 3rd plaintiffs' application, they contend that they should also be granted the opportunity to be heard before the Government rejected their applications under both the Articles.

The application is opposed on the grounds:

i) that the plaintiffs did not satisfy one of the two requirements under Article 14(l)(b) in that the 1st plaintiff had failed to register their births within a year or within such extended period as allowed by the Federal Government with the High Commission. The opposing affidavit of Md. Zin bin Abd. Hamid, secretary of Bahagian 'A', Bahagian Hal Ehwal Pendaftaran Negara dan Pertubuhan, Kementerian Hal Ehwal Dalam Negeri, which deals with citizenship issues states clearly that no extension of time was granted by the Federal Government to enable the 2nd and 3rd plaintiffs to be registered out of time pursuant to Article 14(l)(b) Part II of Second Schedule of the Federal Constitution;

ii) that both the 2nd and 3rd plaintiffs were Indian citizens at the time when the 1st plaintiff made the application for registration at the Malaysian High Commission in Madras in 1988. They were also Indian citizens when they applied to the Malaysian Government to be registered as citizens in 1999 under Article 15. See birth certificates of the 2nd and 3rd plaintiffs (Exhibits "HM-5" and "HM-6" in Enclosure 1). The Federal Government does not recognise dual citizenship and under Article 24 may deprive a person who has acquired the citizenship of another country outside the Federation or exercise the rights available to citizens under the law of that country;

iii) that there has been inordinate delay of more than 20 years since the 1 year period to register to qualify as a citizen under Article 14 ended;

iv) that there is no right to be heard before the Government (through the Minister of Home Affairs) made its decision to reject their application both under Article 14 and Article 16 relying on *Mak*

Sik Kwong v Minister of Home Affairs, Malaysia (No. 2) [1975] 2 MLJ 175.

The scope of this application:

At the outset, counsel for the plaintiffs made it clear that he was not challenging the rejection of the 2nd and 3rd plaintiffs' application for citizenship under Article 15 but was merely seeking the declaratory order under Article 14(l)(b) Part II Second Schedule (c) of the Federal Constitution.

I shall therefore treat this Originating Summons as strictly an application under Article 14(l)(b) of the Federal Constitution.

DECISION:

Under Article 14(l)(b) provides that "every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule" are citizens by operation of law.

And Part II of the Second Schedule (c) then provides that:

> *"(c) every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is. within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government;"*

A cursory reading of the provisions tends to suggest that the father must have two distinct "qualifications" of equal importance. First, the father must be at the time of his birth a citizen; second, he must register the birth within one year or such longer period as the Federal Government may in any particular case allow.

But a closer examination of the provision yields to the construction that there is in fact only one primary qualification in the true sense that an applicant must satisfy to qualify as a citizen of this country, that is to say, that his father must be a citizen when he was born. The other "qualification" is purely a secondary requirement that complements the primary qualification requiring the registration of the birth within a year, or such longer period as the Federal Government may allow. The

process is purely a procedural requirement which requires the exercise of discretion on the part of the Government.

The distinction and its implication can be better appreciated by referring to Hart's Concept of Law (1961). His treatise on primary and secondary rules is very ably summarized by Yudistra Darma in her short review of "A life of H L A Hart" by Nicola Lacey appearing in the August 2006 issue of Relevan as follows:

> *"His central tenet of law is this: law is akin to a game. Football, for example. Football will then have primary rules and secondary rules. An example of a primary rule is that to score one has to get the ball across the line. A secondary rule is one that helps to interpret primary rule. For a goal is valid only when the referee blows the whistle to indicate that he is satisfied of the legality of the goal. The fact that the players recognize and play according to these rules proves the authority of the rules.*"

It is at once discernible that the first "qualification" in Article 14 is in fact the "primary rule" conferring the right of citizenship by operation of law by the jus soli of the father. It is a rule conceived of a social contract by which the State recognized the natural law right of a citizen to have his offspring becoming a citizen after him. The "qualification" requiring that the birth must be registered within a year or such longer

period as the Federal Government may allow is but a "secondary rule" to help interpret the primary rule.

Whereas due compliance with the primary rule of being born of a father who is a citizen is imperative, a failure to comply with the secondary rule of registration is purely a procedural non compliance which need not necessarily disqualify a person from being a citizen by operation of law under Article 14 of the Federal Constitution - the infraction being merely of a secondary rule whose main purpose is to serve the primary rule.

Whether or not a person is a citizen by operation of law is therefore not to be determined by simply asking the question of whether he has or has not the two "qualifications" in Article 14 Part 11 Second Schedule (c) as the Senior Federal Counsel submitted. Where the "qualification" of being born of a father who is a citizen has been satisfied but not the "qualification" of registering the birth within one year, the Federal Government is obliged to examine the circumstances of the non compliance and to determine on the merit whether a longer period ought to be granted.

The secondary rule in Article 14 Part II Second Schedule (c) itself is an "open texture" (described by Hart to mean "the intentional generality of laws that allows them to be interpreted for unanticipated and unforeseeable circumstances") in that provision is made for the Federal Government to decide whether to allow a longer period of registration.

In making a decision, the Federal Government (acting by the Minister of Home Affairs) would not be making an administrative decision as in those "if the Minister is satisfied" instances in public law where the decision of the Minister is subjective and is susceptible to be challenged only on grounds of procedural impropriety. The minister would in fact be making a decision under a social contract between a citizen and the Federal Government. He must not unreasonably refused to allow a longer period of registration bearing in mind that the infraction is only of a secondary rule of procedure. A refusal to allow a longer period may therefore provide a course of action by which the reasonableness of the minister's decision may be examined by the court.

An application under Article 14 is quite unlike an application under Article 15 where a person has to apply to be citizen in which case the

Federal Government has the right to consider his application on a substantive basis which may include matters of policy in arriving at its decision whether or not to grant him citizenship.

I would venture to say that the procedure prescribed is purely regulatory or directory and certainly not mandatory, probably framed to discourage late registration and to facilitate easier verification of reported births overseas. It follows therefore, that in so far as the Federal Government is required to consider whether to allow the 1st plaintiff to submit the late application, it is bound to consider only the reason or reasons why he failed to register on time and a refusal may only be justified where the reason proffered was so unreasonable and unacceptable that it outweighs the 2nd and 3rd plaintiffs' right to citizenship - the infraction being only of a secondary rule of procedure, the handmaiden of the law and not the mistress.

It follows therefore, the grounds advanced by the Senior Federal Counsel that the 2nd and 3rd defendants had been Indian citizens, that the Federal Government does not recognize dual citizenship and that persons holding dual citizenship may be deprived of their Malaysian citizenship

under Article 24 is quite irrelevant under Article 14(l)(b) Part II Second Schedule (c) although they may be relevant under Article 15.

A birth certificate in any case is a certification of birth and not of citizenship and the fact that the 2nd and 3rd plaintiffs had obtained their respective birth certificates indicating that they were born in the State of Tamil Nadu did not necessarily indicate that they were citizens of India at the time the 1st plaintiff submitted his application at the High Commission at Madras in 1998.

The letter of the High Commission at Madras: The implication.

The plaintiffs has omitted to state in their supporting affidavit what reason the 1st plaintiff gave to the Malaysian High Commission at Madras to support his application for late registration.

On the other hand, Md. Zin bin Abd. Hamid, the secretary of Bahagian 'A', Bahagian Hal Ehwal Pendaftaran Negara dan Pertubuhan, Kementerian Hal Ehwal Dalam Negeri, by his affidavit merely says that no extension of time was granted by the Federal Government to enable

the 2nd and 3rd plaintiffs' birth to be registered pursuant to Article 14(l)(b) Part II of Second Schedule. Without condescending to particulars of any record that may be in the possession of the Federal Government, and whether the Federal Government had indeed considered that application.

Nevertheless, the fact remains that the 1st plaintiff did submit an application under Article 14 for late registration and he did receive a reply from the same High Commission. The fact that the secretary of Bahagian 'A', Bahagian Hal Ehwal Pendaftaran Negara dan Pertubuhan, Kementerian Hal Ehwal Dalam Negeri, Md. Zin bin Abd. Hamid may not have found any record that the Federal Government had allowed the late registration should not affect the status of the application. The High Commission at Madras was the agent of the Federal Government for the purpose. It is sufficient that the 1st plaintiff submitted his application at the High Commission as required under Part II of the Second Schedule (c). Similarly, the reply that he received from the same High Commission should carry sufficient authority to speak for the Federal Government.

Having read the letter with some degree of circumspection, I would interpret it as indicating that the Federal Government (speaking through the Penolong Pesuruhjaya Tinggi) had not disallowed the 1st plaintiffs application to register late.

It is true that the 1st plaintiff only applied to register the births of the 2nd and 3rd plaintiffs many years after the event but at the point of time when the High Commission replied by the letter of 5th September 1998, the Federal Government had not deemed it necessary to make an issue of the lateness nor of any specific issue relevant to the application. Lateness on the part of the father may not necessarily provide the only reason to disallow late registration. The 2nd and 3rd plaintiffs were respectively only aged eight and six at the time. A rational decision based on a balance of justice should not allow a mere procedural non compliance to undermine their substantive right to citizenship by operation of law.

The letter created in the mind of the 1st plaintiff a legitimate expectation that sooner or later those outstanding matters would be sorted out when (as stated in the letter) he, his wife and their children would be called to the High Commission for the purpose of identification. Given that

thereafter the Federal Government did not enter into any further correspondence with the 1st plaintiff with respect to those unsettled matters mentioned in that letter, it would be perfectly legitimate to assume that everything was in order and all that was required to complete the registration was to inform the 1st plaintiff that the Federal Government had allowed the late registration, and to request him to call at the High Commission Madras with his wife and children for the purpose of identification as promised in the letter of 5th September 1988.

Equity regards that as done which ought to be done.

The omission by the Federal Government for unexplained reason to follow up from where it left off despite the 1st defendant's reminder had caused injustice to the plaintiffs. The omission justifies the intervention of equity by the maxim, equity regards that as done which ought to be done.

The principle is of universal application and is applied by the court to do what is just, right or best under the circumstances, which in fairness and good conscience ought to be or should be done. In our jurisdiction it had

been applied among others to perfect and complete the creation of a trust where a valuable consideration had already been paid for the purchase of the trust property and all that was required was to vest it on the trustees for the benefit of the beneficiaries. The court of equity will in that instance lend its hands to perfect an otherwise imperfect trust and declare the beneficiaries entitlement to the property (see judgment of Gill J (as he then was) in *Lee Eng Teh & Ors v. Teh Thiang Seong & Anor* [1967] 1 MLJ 42). The maxim had also been applied outside our jurisdiction (as reported in Wikipedia free encyclopedia) to declare a life insurance policy operative despite the fact that the deceased had omitted to renew it before his death having failed to receive (through no fault of his) the renewal notice that the insurance company had sent to him. It was found as a fact that had the insured (who was terminally ill at the time) received the notice, there could be no doubt that he would have renewed the policy and kept the policy alive. To apply the maxim the court would have to ask the question: what would the position be if what should have been done had been done? The answer with respect to the plaintiffs in the instant case is that it is almost certain that their birth would have been registered at the Malaysian High Commission Madras.

There shall accordingly be a declaration that the 2nd and 3rd plaintiffs are citizens of Malaysia under Article 14(l)(b) of the Federal Constitution subject to the verification that they are issues of the father the 1st plaintiff. Upon verification both the 2nd and the 3rd plaintiffs shall respectively be issued with a citizenship certificate and national registration identification card befitting their status. The plaintiffs shall be entitled to costs of this application.

Sgd.

DATO' KANG HWEE GEE
Hakim Mahkamah Tinggi
Bahagian Sivil 1
Kuala Lumpur.

Tarikh: 6.7.2007

Didengar pada 19.10.2006, 6.7.2007.

Kaunsel:

Encik M. Manoharan
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