Madhuvita Janjara Augustin (suing through next friend Margaret Louisa Tan) v Augustin a/l Lourdsamy & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-427–11 OF 2016
TENGKU MAIMUN, KAMARDIN HASHIM AND MARY LIM JJCA
2 NOVEMBER 2017

Constitutional Law — Citizenship — Application for — Child born out of wedlock — Parents married after child was born — Father Malaysian citizen while mother citizen of Papua New Guinea — Concepts of jus soli and of jus sanguinis — Whether met by child — Whether child legitimate — Whether citizen of Malaysia by operation of law — Federal Constitution

The appellant was born on 28 November 2005 in Malaysia. Her mother was the citizen of Papua New Guinea while her father ('the first respondent') was a Malaysian citizen. The appellant's parents were not married to each other at the time of her birth. They got married on 23 January 2006 after the appellant was born. The appellant's parents were not aware that the appellant's birth was not registered until they wanted to enrol the appellant at a local school. A birth certificate was required for that purpose. The appellant's birth was then registered on 18 April 2011. According to the details entered in the birth certificate issued by the third respondent, the appellant was not a Malaysian citizen. The first respondent applied for citizenship under art 15A of the Federal Constitution ('the FC') but the application was unsuccessful. Before the High Court, the appellant sought: (a) a declaration that the appellant was a legitimate daughter of the first respondent and her mother; (b) an order that the appellant and the first respondent undergo DNA test; (c) the Registrar of Births and Deaths Malaysia re-register the appellant's birth as a legitimate person, her status as a Malaysian citizen and her religion as Christian. The issue before the High Court was whether the appellant may be granted citizenship by operation of law pursuant to art 14(1)(b) of the FC. The High Court judge refused the appellant's application on the basis that the appellant did not fulfil both conditions prescribed in art 14(1)(b) read with s 1(a) of Part II of the Second Schedule of the FC. Although the appellant fulfilled the first condition in that she is born in the Federation, she did not meet the second condition which required at least one of her parents to be, at the time of her birth, a Malaysian citizen or was ordinarily resident in the Federation. This second condition was not met because her parents were not lawfully married to each other at the time of her birth. The High Court judge further held that: (i) matters concerning citizenship were non-justiciable and outside the purview of the court; and (ii) the appellant was actually entitled to citizenship under the

laws of Papua New Guinea as her mother was a citizen. Hence, the present appeal. A

Held, allowing appeal:

(1) In the present appeal, the subject matter is entirely justiciable and within the purview of the court. The presence of an ouster clause of some degree or extent in its application found in s 2 of Part III of the Second Schedule was not the same as saying that the matter was non-justiciable. None of the cases cited equated the existence of ouster clauses, or matters concerning citizenship or immigration as 'non-justiciable'. The courts merely alluded to the fact that the court should be slow to enter into these areas for the subject matters of immigration and citizenship are often fraught with policy, political and administrative considerations (see paras 32 & 34). B C

(2) The appellant's application was moved under art 14 which fell under Part III. Specifically, she claimed citizenship by operation of law as set out in art 14(1)(b) read with s 1 (a) and/or (e) of Part II of the Second Schedule. In the case of art 14(1)(b) read with s 1(a) Part II, Second Schedule of the FC, citizenship by operation of law is anchored on elements of both concepts of *jus soli* and of *jus sanguinis*. Citizenship is claimed by virtue of these two rights, right of being born in the territory of Malaysia and by right of one or both parents who are themselves, citizens of Malaysia (see paras 42 & 46). D E

(3) The undisputed fact is that the appellant was born within the Federation. To the extent of *jus soli*, she fulfilled the terms of qualification set out at s 1(a) of Part II of the Second Schedule. Since it was an uncontroverted and an admitted fact that the first respondent was the biological father of the appellant, the first respondent was the father and parent of the appellant, and as a citizen of Malaysia at the time of the appellant's birth, the terms of art 14(1)(b) read with s 1(a) of Part II, Second Schedule were met. The fact that the appellant's biological parents were not married to each other at the time of the appellant's birth did not alter or diminish their capacities as parents of the appellant (see paras 48 & 59–60). F G

(4) The appellant was not illegitimate. She was born of parents who were not married to each other at the time of her birth. However, she was no longer illegitimate by reason of legitimation by the subsequent marriage of her parents on 23 January 2006. Their marriage was properly solemnised and recognised under s 3 of the Legitimacy Act 1961 ('the Act'). Where that happened, s 4 of the Act applied. With the clear terms of s 4, the appellant was rendered legitimate by the subsequent marriage of her parents and that legitimation was from the date of the marriage. As a legitimate person, the appellant was entitled to rely on her father's citizenship (see paras 62 & 66). H I

(5) The appellant had shown that she was not a citizen of Papua New Guinea. The appellant's birth was not registered in Papua New Guinea. It was registered here instead. If the declaration sought was not given and if the appellant was not a citizen of the Federation, then she would be stateless. That state would not and could not be said to be in the best interest and for the welfare of the appellant (see para 77).

[Bahasa Malaysia summary

Perayu dilahirkan pada 28 November 2005 di Malaysia. Ibunya ialah warganegara Papua New Guinea manakala bapanya ('responden pertama') ialah warganegara Malaysia. Ibu bapa perayu belum berkahwin dengan satu sama lain pada masa kelahirannya. Mereka berkahwin pada 23 Januari 2006 iaitu selepas perayu dilahirkan. Ibu bapa perayu tidak menyedari bahawa kelahiran perayu tidak didaftarkan hinggalah mereka ingin memasukkan perayu dalam sekolah tempatan. Satu sijil kelahiran diperlukan bagi tujuan itu. Sijil kelahiran perayu kemudian didaftarkan pada 18 April 2011. Menurut butir-butir yang dimasukkan dalam sijil kelahiran yang dikeluarkan oleh responden ketiga, perayu bukan warganegara Malaysia. Responden pertama memohon kewarganegaraan di bawah perkara 15A Perlembagaan Persekutuan ('PP') tetapi permohonan ini tidak berjaya. Di Mahkamah Tinggi, perayu memohon: (a) deklarasi bahawa perayu adalah anak perempuan sah taraf responden pertama dan ibunya; (b) satu perintah agar perayu dan responden pertama menjalani ujian DNA; (c) Pendaftar Kelahiran dan Kematian Malaysia mendaftar semula kelahiran perayu sebagai orang yang sah taraf, statusnya sebagai warganegara Malaysia dan agamanya sebagai Kristian. Isu yang timbul di Mahkamah Tinggi adalah sama ada perayu boleh diberi kewarganegaraan melalui operasi undang-undang di bawah perkara 14(1)(b) PP. Hakim Mahkamah Tinggi menolak permohonan perayu atas alasan perayu tidak memenuhi kedua-dua syarat yang diperuntukkan dalam perkara 14(1)(b) dibaca bersama s 1(a) Bahagian II Jadual Kedua PP. Walaupun perayu memenuhi syarat pertama iaitu dia dilahirkan dalam Persekutuan, dia tidak memenuhi syarat kedua yang mengkehendaki agar salah seorang ibu bapanya, semasa dia dilahirkan, warganegara Malaysia atau penduduk tetap Persekutuan. Syarat kedua tidak dipenuhi kerana ibu bapanya belum berkahwin dengan satu sama lain semasa kelahirannya. Hakim Mahkamah Tinggi seterusnya memutuskan: (i) hal-hal perkara berkenaan kewarganegaraan tidak boleh dibicarakan dan luar skop mahkamah; dan (ii) perayu sebenarnya berhak mendapat kewarganegaraan bawah undang-undang Papua New Guinea kerana ibunya warganegara di situ. Oleh itu, rayuan ini difailkan.

Diputuskan, membenarkan rayuan:

(1) Dalam rayuan ini, hal perkara yang timbul boleh dibicarakan dan berada dalam skop mahkamah. Kewujudan klausa penyingkiran pada satu tahap

atau tahap pemakaiannya yang didapati dalam s 2 Bahagian II Jadual Kedua tidak sama dengan mengatakan hal perkara tersebut tidak boleh dibicarakan. Tiada mana-mana kes yang dipetik yang menyamakan kewujudan klausa penyingkiran, atau hal perkara berkenaan kewarganegaraan atau imigresen sebagai 'tidak boleh dibicarakan'. Mahkamah-mahkamah hanya menyentuh fakta bahawa mahkamah wajar berat untuk menelurusi kawasan-kawasan ini kerana hal-hal perkara imigresen dan kewarganegaraan kebiasaannya tegang dengan pertimbangan polisi, politik dan pentadbiran (lihat perenggan 32 & 34).

(2) Permohonan perayu tergerak di bawah perkara 14 di bawah Bahagian Ketiga. Khususnya, dia menuntut kewarganegaraan melalui operasi undang-undang seperti yang diperuntukkan di bawah perkara 14(1)(b) dibaca bersekali dengan s 1(a) dan/atau (e) Bahagian II Jadual Kedua. Dalam kes perkara 14(1)(b) dibaca bersekali dengan s 1(a) Bahagian II, Jadual Kedua PP, kewarganegaraan melalui operasi undang-undang berpaksikan konsep *jus soli* dan *jus sanguinis*. Kewarganegaraan dituntut melalui dua hak ini iaitu hak dilahirkan dalam wilayah di Malaysia dan melalui hak salah seorang atau kedua-dua ibu bapa, dengan sendirinya, warganegara Malaysia (lihat perenggan 42 & 46).

(3) Fakta yang tidak dipertikaikan adalah perayu dilahirkan dalam Persekutuan ini. Bagi *jus soli*, dia memenuhi terma-terma kelayakan yang diperuntukkan bahawa s 1(a) Bahagian II Jadual Kedua. Oleh kerana menjadi fakta yang diakui dan tidak disangkal bahawa responden pertama adalah bapa kandung perayu, responden pertama adalah bapa perayu dan sebagai warganegara Malaysia semasa kelahiran perayu, terma perkara 14(1)(b) dibaca bersekali dengan s 1(a) Bahagian II Jadual Kedua dipenuhi. Fakta bahawa ibu bapa kandung perayu belum berkahwin antara satu sama lain semasa kelahiran perayu tidak mengubah atau mengurangkan kapasiti mereka sebagai ibu bapa perayu (lihat perenggan 48 & 59–60).

(4) Perayu bukan tidak sah taraf. Dia dilahirkan oleh ibu bapa yang belum berkahwin dengan satu sama lain pada masa kelahirannya. Walau bagaimanapun, dia tidak lagi menjadi tidak sah taraf dengan kesahtarafan melalui perkahwinan terkemudian ibu bapanya pada 23 Januari 2003. Perkahwinan mereka dilangsungkan dan diiktiraf s 3 Akta Kesahtarafan 1961 ('Akta'). Apabila ini berlaku, s 4 Akta terpakai. Dengan terma jelas s 4, perayu menjadi sah taraf melalui perkahwinan terkemudian ibu bapanya dan kesahtarafan ini bermula dari tarikh perkahwinan tersebut. Sebagai seorang yang sah taraf, perayu berhak bergantung pada kewarganegaraan bapanya (lihat perenggan 62 & 66).

(5) Perayu telah menunjukkan bahawa dia bukan warganegara Papua New Guinea. Kelahiran perayu tidak didaftarkan di Papua New Guinea. Sebaliknya, kelahirannya didaftarkan di sini. Jika deklarasi yang dipohon

tidak diberi dan jika perayu bukan warganegara Persekutuan ini, dia tidak bernegara. Keadaan ini tidak akan dan tidak boleh dikatakan dalam kepentingan dan kebajikan perayu (lihat perenggan 77).]

Notes

For a case on application for citizenship, see 3(2) *Mallal's Digest* (5th Ed, 2015) para 2397.

Cases referred to

Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur [1976] 2 MLJ 156, FC (refd)

Attorney General of the Commonwealth (At The Relation of McKinlay) v The Commonwealth of Australia & Anor (1975) 135 CLR 1, HC (refd)

Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia [2016] 7 MLJ 717, HC (refd)

D, an infant, In re [1959] 1 QB 229, CA (not folld)

Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (folld)

Dewan Undangan Negeri Kelantan v Nordin bin Salleh & Anor [1992] 1 MLJ 697, SC (folld)

Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia [2012] 9 MLJ 573, HC (not folld)

Haja Mohideen bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Others [2007] 8 MLJ 1; [2007] 6 CLJ 662, HC (refd)

Kuluwante (an infant) v Government of Malaysia & Anor [1978] 1 MLJ 92 (refd)

Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] MLJU 425, CA (not folld)

M, an infant, In re [1955] 2 QB 479, CA (not folld)

Meenal w/o Muniyandi, In Re [1980] 2 MLJ 299 (refd)

Minister of Home Affairs and another v Fisher and another [1979] 3 All ER 21, PC (refd)

Neduncheliyan V Uthiradam v Nurshafiqah Mah Singai Annal & Ors [2005] 2 CLJ 306, HC (refd)

OK Ghosh and another v EX Joseph 1963 AIR 812, SC (refd)

Ong Ah Chuan v Public Prosecutor [1981] 1 MLJ 64, PC (refd)

Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child) [2017] 3 MLJ 308; [2017] 7 CLJ 33, CA (refd)

Pham v Secretary of State for the Home Department [2015] 3 All ER 1015, SC (refd)

Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor [2004] 2 MLJ 648; [2004] 2 CLJ 416, HC (refd)

Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] MLJU 426, CA (not folld)
Yu Sheng Meng (a child represent by his litigator, Yu Meng Queng) v Ketua Pengarah Pendaftaran Negara & Ors [2016] 7 MLJ 628; [2016] 1 CLJ 336, HC (not folld)

Legislation referred to

Adoption Act 1952
Births and Deaths Registration Act 1957 ss 13, 17
Citizenship Act 1975 [PN] s 5
Constitution of the Independent State of Papua New Guinea Part IV, Division 2, s 66(2)
Federal Constitution arts 14, 14(1)(b), 15, 15(2), 15A, 19, 31, 160, First Schedule, Second Schedule, Part II, ss 1(a), 1(e), Part III, ss 2, 17, 19 Chapters 1, 2, 3
Legitimacy Act 1961 ss 3, 4, 5, 6, 9, 17

Appeal from: Originating Summons No BA-34–8–03 of 2016 (High Court, Shah Alam)

Ranee Sreedharan (Nurainie Haziqah bt Shafi with her) (Ranee Sree & Assoc) for the appellant.
Maisarah Juhari (Senior Federal Counsel, Attorney General's Chambers) for the second and third respondents.

Mary Lim JCA (delivering judgment of the court):

[1] The appellant, Madhuvita Janjara Augustin is a minor, aged 11. Her application before the High Court for amongst others, an order that she be re-registered by the third respondent, the Registrar of Births and Deaths, with the status of a 'Malaysian citizen' was brought on her behalf by her mother, her next friend. There were no objections to her other orders, that she is the lawful child of the first respondent, her father; that appropriate DNA tests be conducted to verify her blood ties with the first respondent and her mother. Those orders were consequently granted without event. However, her application that she was entitled to be declared a Malaysian citizen was objected to by the respondents and consequently, dismissed by the High Court.

[2] Upon full consideration, we unanimously allowed her appeal and granted the order sought. These are our reasons in full.

BRIEF FACTS

[3] The appellant was born on 28 November 2005 at the Tengku Ampuan Rahimah Hospital at Klang. Her birth was duly reported to the authorities on

A 1 December 2005. The appellant's mother, Margaret Louisa Tan, holds a passport issued by the Government of Papua New Guinea. Her father, the first respondent, is a Malaysian citizen, born in Selangor.

B **[4]** At the time of her birth, her parents were not married to each other. Her parents only married on 23 January 2006, after the appellant was born. They could not marry any earlier as her mother's divorce from her former husband had yet to be finalised. The appellant has since birth, lived with her parents at Taman Mujur in Klang, Selangor. At the time of her application, she was schooling at Sekolah Rendah SK Kampung Jawa in Selangor.

C

[5] In her mother's affidavit filed in support of the appellant's application, her mother averred that both she and her husband were not aware that the appellant's birth was not registered until they wanted to enrol the appellant for primary education at a local school. A birth certificate was required for that purpose. The appellant's birth was then registered on 18 April 2011. According to the details entered in the birth certificate issued to her by the third respondent, the appellant is not a citizen of Malaysia.

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E **[6]** The first respondent, the appellant's father subsequently applied for citizenship for the appellant under art 15A of the Federal Constitution. By letter dated 16 January 2013, the Home Ministry advised the first respondent that the application was unsuccessful.

F **[7]** Before the High Court, the appellant sought the following orders:

(i) a declaration that the appellant is a legitimate daughter of the first respondent and Margaret Louisa Tan;

(ii) an order that the appellant and the first respondent undergo DNA test
G to establish blood ties between them and that such results be taken as conclusive evidence of blood relations between them;

(iii) the Registrar of Births and Deaths Malaysia re-register the appellant's birth as a legitimate person under the name of Madhuvita Janjara Augustin and the names of the first respondent and Margaret Louisa Tan
H be registered as the respective biological father and mother; and

(iv) the Registrar of Births and Deaths Malaysia re-register the status of citizenship of the appellant as 'Malaysian citizen' and her religion as 'Christian'.

I

[8] The second and third respondents had no issue with and had no objections to the first three prayers. These prayers were then, allowed. The respondents had further agreed that a new birth certificate pursuant to s 17 of the Births and Deaths Registration Act 1957 ('Act 299') will be issued in the

event the appellant is declared as the legitimate child of the first respondent and Margaret Louisa Tan. With these concessions, a DNA test to establish paternity under prayer (ii) no longer arose.

[9] Consequently, the only issue before the High Court was whether the appellant may be granted citizenship by operation of law pursuant to art 14(1)(b) of the Federal Constitution.

CONTENTIONS OF THE PARTIES

[10] These were the principal arguments of the parties raised before the High Court.

[11] Learned counsel for the appellant contended that the appellant qualifies to be recognised as a citizen of Malaysia as she meets the conditions in art 14(1)(b). Article 14(1)(b) only requires the appellant to satisfy any of the qualifications specified in Part II of the Second Schedule. Since the appellant meets art 14(1)(b) read with the supplementary provisions in s 1(a) of Part II of the Second Schedule, and/or, art 14(1)(b) read with s 1(e) of Part II of the Second Schedule, she is a citizen of Malaysia.

[12] Specifically, and in relation to art 14(1)(b) read with s 1(a) of Part II of the Second Schedule, the submission is that the appellant is a legitimate child of her parents given that her parents are lawfully married. Section 17 of Part II of the Second Schedule which would have excluded her from the operation of art 14(1)(b) therefore, does not apply.

[13] The appellant further relied on ss 3 and 9 of the Legitimacy Act 1961 and the decision in *Yu Sheng Meng (a child represent by his litigator, Yu Meng Queng) v Ketua Pengarah Pendaftaran Negara & Ors* [2016] 7 MLJ 628; [2016] 1 CLJ 336 in support. In that decision, the learned High Court judge is said to have been prepared to consider the issue of citizenship by way of operation of law under art 14(1)(b) of the Federal Constitution had the parents of the applicant in that case been legally married thus rendering the child a legitimate child of his parents. In that case too, there was no averment on the status of the parents' marriage or even evidence on whether the biological parents of the child were legally married. Consequently, the child was deemed an illegitimate person under the law. As an illegitimate person, s 17 of Part III of the Second Schedule operates to disqualify the person from claiming status as a citizen of Malaysia. Contrasting with the facts in the present case, the appellant is a legitimate person within the meaning of s 3 of the Legitimacy Act 1961 (Act 60) as her parents are married to each other in which case, s 17 of Part III of the Second Schedule does not apply.

[14] The alternative ground for her claim of citizenship is art 14(1)(b) read with s 1(e) of Part II of the Second Schedule. The appellant makes the case that this provision guards against statelessness. Since the appellant is born in the Federation and is not born a citizen of any other country, including her mother's, she is entitled, as of right, to be a citizen of Malaysia.

[15] These are the rival arguments of the respondent, some of which pertain to the issue of the appellant's birth certificate, whether the existing should be amended or, a new birth certificate will be issued under s 17 of the Births and Deaths Registration Act 1957.

[16] As for the arguments on the citizenship of the appellant, the affidavit in reply of the respondent principally contended that the appellant is an illegitimate person. As an illegitimate person, the appellant adopts the citizenship of her mother under s 17 of Part III of the Second Schedule. Consequently, the appellant is not entitled to follow the citizenship of her father.

[17] Learned senior federal counsel further argued that s 1(a) of Part II of the Second Schedule requires the 'parents' of the appellant to be 'lawful parents' and not, 'biological parents'. Only 'lawful parents' beget the 'lawful child' or 'lawful person'. Although the appellant's parents married each other, the solemnisation was subsequent to the birth of the appellant thus rendering the appellant as a person 'born out of wedlock'. Several cases were cited in support; namely *Neduncheliyan V Uthiradam v Nurshafiqah Mah Singai Annal & Ors* [2005] 2 CLJ 306; *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 MLJ 648; [2004] 2 CLJ 416; and *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573. Section 13 of the Births and Deaths Registration Act 1957 is cited in further support.

[18] The learned senior federal counsel also submitted before the High Court that the appellant cannot be granted citizenship under art 15(2), again because of her illegitimacy and the operation of s 17 of Part III of the Second Schedule. Further, any order legitimising the appellant under ss 3, 4, 5 of the Legitimacy Act 1961 (Act 60) cannot serve to confer or qualify the appellant the status as citizen. This is because the Act clearly provides that the status of legitimacy is only enjoyed from the prescribed date or from the date of marriage of the appellant's parents, and that date is a date after the appellant was born.

[19] Lastly, learned SFC submitted that citizenship is entirely within the executive discretion of the federal government, that it is not a justiciable matter open to the court to review, and that the court has no jurisdiction to hear or make any order concerning citizenship. Article 31 and the decisions in

Kuluwante (an infant) v Government of Malaysia & Anor [1978] 1 MLJ 92, *In Re Meenal w/o Muniyandi* [1980] 2 MLJ 299, *Yu Sheng Meng v Ketua Pendaftaran Negara & Ors*) were cited in support.

[20] These same submissions were, to a large extent, canvassed before us by both parties.

DECISION OF THE HIGH COURT

[21] The High Court agreed with the submissions of the learned SFC. The High Court further agreed that matters concerning citizenship are non-justiciable and outside the purview of the court. According to Her Ladyship, the appellant ought to have appealed to the government when her application for citizenship under art 15A of the Federal Constitution was refused.

[22] On the question of whether the appellant may be granted citizenship by operation of law pursuant to art 14(1)(b) of the Federal Constitution, the learned judge answered the question posed in the negative. Her Ladyship refused the application on the basis that the appellant did not fulfil both conditions prescribed in art 14(1)(b) read with s 1(a) of Part II of the Second Schedule. Although the appellant fulfilled the first condition in that she is born in the Federation, she did not meet the second condition. The second condition required at least one of her parents to be, at the time of her birth, a Malaysian citizen or was ordinarily resident in the Federation. This second condition was not met because her parents were not lawfully married to each other at the time of her birth. The appellant was born out of wedlock.

[23] Relying on the decision in *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573 and *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717, Her Ladyship held that the appellant was only entitled to citizenship where her parents were lawfully married to each other at the time of her birth. In other words, the word 'parent' was read as necessarily inferring 'lawful parents'. Since the appellant's parents were not married to each other at the material time of her birth, the appellant did not qualify under the terms of the Federal Constitution. For the same reasons, the appellant would not qualify under art 15(2).

[24] The learned judge further found that the appellant was not without citizenship. According to Her Ladyship, the appellant was actually entitled to citizenship under the laws of Papua New Guinea as her mother is her citizen;

and that the appellant ought to apply for her citizenship in Papua New Guinea — see p 6 of the additional record of appeal.

OUR DECISION

[25] As stated earlier, after considering the submissions of both learned counsel, we found merits in the appellant's submissions and unanimously allowed the appeal. These are the reasons in full.

Justiciability of the issue

[26] We start with a few preliminary issues; first of which is the issue of justiciability of the matter, the argument being that a decision under Part III of the Federal Constitution is non-justiciable. Section 2 of Part III of the Second Schedule reads:

> A decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any Court.

[27] Section 2 above stands as an ouster clause. Parliament, in all its wisdom has seen it fit that decisions of the federal government under Part III of the Federal Constitution are not to be subject to appeal or review in any court. Now, as an ouster clause, and that will include such a clause sited in the Federal Constitution, which serves to limit and oust the jurisdiction of the court, s 2 must be read strictly. This is because the courts guard its jurisdiction and powers responsibly and for many more good reasons which do not require examination or expansion for the present purposes.

[28] It is quite clear from the carefully worded terms of s 2 that the scrutiny of the court is only excluded where it concerns a decision of the federal government made under Part III of the Federal Constitution. It is apparent from the records of appeal that the court was not moved to hear an appeal or review of any decision made by the federal government under Part III, and that includes the federal government's rejection of the appellant's application for citizenship under art 15A. That decision of the federal government is not under challenge. In fact, no decision of the federal government is in the facts of the present appeal. It is further clear from the cause papers and submissions before us that the decision of the federal government under art 15A in respect of the appellant remains with the executive government.

[29] But, that is not to say that the court may not refer to that decision in the course of its deliberations on the appellant's application. Neither can it be right nor may it be suggested to be the intention of Parliament as set out in s 2 above, that the court cannot make any pronouncements on citizenship under Part III of the Federal Constitution. Matters concerning citizenship, as are a whole host

of other subject matters found in the Federal Constitution are within the purview of the courts. It is only the decisions of the federal government under Part III that are not open to appeal or review in any court.

[30] In the originating summons filed by the appellant, the appellant sets out her prevailing facts and conditions before she invites the court to make certain declaratory orders on her status in respect of her claim for citizenship. When considering such an application, the court is far from sitting on appeal or review, let alone appeal or review of a decision already made by the federal government under Part III of the Federal Constitution. We, therefore, do not agree with the learned judge in this regard.

[31] We observed that the learned judge agreed with the submissions of the learned SFC that the matter before her is non-justiciable. Before leaving this first issue, we must correct the use of the term, 'non-justiciable'.

[32] The presence of an ouster clause of some degree or extent in its application found in s 2 of Part III of the Second Schedule is to our minds, not the same as saying that the matter is non-justiciable. Although the decisions in *Kuluwante (an infant) v Government of Malaysia & Anor* [1978] 1 MLJ 92; *Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156; and *In Re Meenal w/o Muniyandi* [1980] 2 MLJ 299 have been cited in support of this proposition, a careful reading of the same does not hold true. What those cases, in fact, say is that 'the laws on citizenship and immigration rest solely on questions of public policy'; that 'Under the Immigration Ordinance, only the Executive has power to release the appellant. Whether or not the Executive should do so is a matter of policy for them, they have information and sources of information not available to the court and are moved by political, economic, social and cultural considerations which the court is not well equipped to apply, and judges should be slow to embarrass them into any course of action'. None of the cases cited equated the existence of ouster clauses, or matters concerning citizenship or immigration as 'non-justiciable'. The courts merely alluded to the fact that the court should be slow to enter into these areas for the subject matters of immigration and citizenship are often fraught with policy, political and administrative considerations. An example of a non-justiciable matter would be clemency or pardon where such matters are within the prerogative of the Ruler of the realm and where mercy begins. A quick thumb through the law journals will readily yield results showing many challenges taken on immigration and citizenship matters. The success or otherwise of these challenges have not been for reasons of non-justiciability.

[33] In *Kuluwante (an infant)*, Yusoff J said at p 95:

A For these reasons, I am of the view that in a proper case, the court is not precluded by reason of the 'ouster provision' only, to entertain a claim for declaration that an individual is a citizen. But whether the court would entertain a claim for declaration that the plaintiff 'is eligible for registration as a citizen' under a relevant provision of the Federal Constitution, as it is sought in this case, involves different B considerations and the court should also construe other provisions of the law relating to citizenship to determine the effect of such declaration.

[34] In the present appeal, the subject matter is entirely justiciable and within the purview of the court.

C

Principles to be adopted when interpreting the Federal Constitution

[35] Moving quickly then to another preliminary matter and this really pertains to the interpretive principles that are to be applied when construing D the Federal Constitution. We note that in determining whether Margaret Louisa Tan and Augustin a/l Lourdsamy are the parents of Madhuvita Janjara Augustin within the meaning of art 14(1)(b) read with s 1(a) of Part II of the Second Schedule or s 1(e) of Part II of the Second Schedule, the High Court had turned to provisions of various statutes such as the Births And Deaths E Registration Act, the Legitimacy Act and the Adoption Act 1952. Principally, this was because the case authorities that were referred to the court concerned these statutes. This indirect reliance on statutes to construe and interpret the most basic and fundamental of all law in this country, that is, the Federal Constitution, must be treated with utmost care and circumspection, regardless F the end result. This is especially inadvisable given that the Federal Constitution has its own interpretation provisions in art 160, and in the particular instance of this appeal, Part III of the Federal Constitution has its own interpretation provision in s 17 of Part III of the Second Schedule.

G

[36] The apex court has laid down the principles to be applied when interpreting and construing the Federal Constitution, the supreme law of the land. Two of those principles that come immediately to mind were expressed in *Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 and *Dewan Undangan Negeri Kelantan v Nordin bin* H *Salleh & Anor* [1992] 1 MLJ 697. In *Dato' Menteri Othman bin Baginda*, Raja Azlan Shah Ag LP (as His Royal Highness then was) said at p 32:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its I provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher*). A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of

> Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms'. The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney General of St Christopher, Nevis and Anguilla v Reynolds*.

[37] This approach was adopted and applied by the Supreme Court in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* with Abdul Hamid Omar LP citing again the Privy Council's decision in *Minister of Home Affairs and another v Fisher and another* [1979] 3 All ER 21, that a constitution based on the Westminster model must not be treated as if it were an Act of Parliament and that 'a constitution should be construed with less rigidity and more generosity than other statutes and as sui juris, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used'. The Lord President cited Barwick CJ who, in the decision of the High Court of Australia in *Attorney General of the Commonwealth (At The Relation of McKinlay) v The Commonwealth of Australia & Anor* (1975) 135 CLR 1 said at p 17:

> ... the only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

[38] In *Dewan Undangan Negeri Kelantan v Nordin bin Salleh*, the Supreme Court further shared the view of the Privy Council expressed in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64. Although that was a decision on the Constitution of the Republic of Singapore, it is nevertheless noteworthy in relation to the approach when interpreting a constitution of a nation, that a 'generous interpretation is suitable, avoiding what has been called 'the austerity of tabulated legalism'. The Supreme Court also adopted the view of the Supreme Court of India in *OK Ghosh and another v EX Joseph* 1963 AIR 812 that an interpretation rendering the Constitution ineffective and illusory ought to be avoided.

[39] While these cases may have concerned different provisions of the Federal Constitution and certainly different subject matters, fundamental liberties as opposed to citizenship, we do not see how these basic principles which have been consistently applied in our land, should cease to be relevant or have no bearing in matters concerning citizenship. We note that none of these

principles weighed in the learned judge's mind when interpreting art 14 of the Federal Constitution; and they should. Instead, the meaning and application of art 14 was determined and construed by reference to statutes which are obviously subsidiary to the Federal Constitution.

[40] Having set out the proper approach when interpreting and applying the Federal Constitution, we shall now move to the particular provisions at play. An entire part of the Federal Constitution, that is, Part III, comprising three Chapters dedicated to the subject of citizenship. Chapter 1 deals with acquisition of citizenship, Chapter 2 deals with termination of citizenship while Chapter 3 contains supplemental provisions.

[41] The articles in Part III must be read together with two schedules, the First and the Second Schedules. The First Schedule contains the oath to be taken for citizenship by registration or naturalisation. The Second Schedule has three Parts; Part I does not concern this appeal as it deals with citizenship by operation of law of persons born before Malaysia Day. Parts II and III of the Second Schedule do because these Parts contain the detailed provisions on citizenship by operation of law of persons born *on or after* Malaysia Day and, the supplementary provisions.

[42] The appellant's application is moved under art 14 which falls under Part III. Specifically, she claims citizenship by operation of law as set out in art 14(1)(b) read with s 1(a) and/or (e) of Part II of the Second Schedule. These provisions read as follows:

> 14 Citizenship by operation of law
>
> (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and
>
> (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.
>
> (c) (*Repealed*).
>
> (2) (*Repealed*).
>
> (3) (*Repealed*).

[43] The qualifications in Part II of the Second Schedule are as follows:

> (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) *every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation*; and

(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 his birth in the service of the Federation or of a State; and

(c) every person 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; and

(d) every person born in Singapore of whose parents one at least is at the time of the birth a citizen and who is not born a citizen otherwise than by virtue of this paragraph; and

(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph. (Emphasis added.)

[44] By virtue of art 31, until Parliament otherwise provides, the supplementary provisions relating to citizenship which are contained in Part III of the Second Schedule shall have effect for the purposes of Part III of the Federal Constitution. Amongst the Supplementary Provisions are provisions on interpretation. Sections 17 and 19 of the interpretation provisions are crucial and they read as follows:

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.*

18. ...

19. Any reference in Part III of this Constitution to the status or description of the father of a person at the time of that person's birth shall, in relation to a person born after the death of his father, be construed as a reference to the status or description of the father at the time of his father's death; and where that death occurred before and the birth occurs on or after Merdeka Day, the status or description which would have been applicable to the father had he died after Merdeka Day shall be deemed to be the status or description applicable to him at the time of his death. This section shall have effect in relation to Malaysia Day as it has effect in relation to Merdeka Day. (Emphasis added.)

[45] As succinctly explained by Abang Iskandar JCA in *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)* [2017] 3

MLJ 308; [2017] 7 CLJ 33, generally, two concepts are commonly applied in determining citizenship: the concept of *jus soli* and the concept of *jus sanguinis*. The earlier refers literally to a 'right of the soil' or birth right citizenship or 'the right of anyone born in the territory of a state to nationality or citizenship'. The latter refers to 'right of blood', 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'.

Article 14(1)(b) read with s 1(a) Part II, Second Schedule

[46] In the case of art 14(1)(b) read with sections 1(a) Part II, Second Schedule of the Federal Constitution, citizenship by operation of law is anchored on elements of both concepts of *jus soli* and of *jus sanguinis*. Citizenship is claimed by virtue of these two rights, right of being born in the territory of Malaysia and by right of one or both parents who are themselves, citizens of Malaysia.

[47] Whether any person including the appellant fulfils the requirements and qualifications prescribed in art 14(1)(b) read with s 1(a) Part II, Second Schedule of the Federal Constitution, is a question of mixed fact and law.

[48] First, the facts. The undisputed fact is that the appellant is born within the Federation. To the extent of *jus soli*, she has fulfilled the terms of qualification set out at s 1(a) of Part II of the Second Schedule. What is disputed is that she has the necessary bloodline as prescribed in that her parents one at least is at the time of her birth either a citizen or permanently resident in the Federation of Malaysia.

[49] The appellant says one of her parents, that is, her father is a citizen at the time of her birth whereas the second and third respondents contend otherwise. The second and third respondents contend that s 17 of Part III of the Second Schedule operates to prevent her from referring to or relying on her father as making up her parents because she is illegitimate. Until she is legitimised, she is obliged to refer to her mother as her lawful parent. Since her mother is not a citizen of Malaysia, the appellant cannot claim citizenship by operation of law under art 14(1)(b).

[50] With respect, we disagree.

[51] In the first place, art 14(1)(b) read with s 1(a) of Part II of the Second Schedule does not make reference to the nature or state of the capacity of 'parents'; the term 'parents' is not qualified in any manner or form in art 14. Certainly, it is not qualified by the word 'lawful', 'natural', 'biological', 'adopted' or even 'surrogate', or any other description or adjective. It simply

refers to the capacity of 'parents'. Harkening back to the principles to be adopted when construing and interpreting the Federal Constitution as expressed in *Dato' Menteri Othman bin Baginda*, one is reminded that judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. As a 'living piece of legislation', the provisions in the Federal Constitution must be construed broadly and not in a pedantic way. The court must recognise that the construction of the provisions of the Federal Constitution must be 'with less rigidity and more generosity than other statutes' because the Federal Constitution is *sui generis*, 'calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation'. Since art 14(1)(b) has not qualified the term 'parents', it is inappropriate to do so.

[52] Hence, on a prima facie level, the term 'parents' must bear its ordinary common sense meaning. The *Merriam-Webster Dictionary* defines the term 'parent' as one that begets or brings forth offspring; or a person who brings up and cares for another and that includes a foster parents. The *Collins Dictionary* defines 'parent' as a father or mother or a person acting as a father or mother. Even *Black's Law Dictionary* (10th Ed), Thomson Reuters defines 'parent' not just as the 'lawful father or mother of someone' but goes on to state that:

> ... the term commonly includes (1) either the natural father or the natural mother of a child, (2) either the adoptive father or the adoptive mother of a child, (3) a child's putative blood parent who has expressly acknowledged paternity, and (4) an individual or agency whose status as guardian has been established by judicial decree ...

[53] It is where these meanings do not lend sense and will render violence to the main text that some other meaning may have to be considered.

[54] The respondent relied on the High Court decision of *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573. In *Foo Toon Aik*, the High Court had accepted the submissions of learned SFC that the word 'parent' cannot refer to a father of an illegitimate child and that the word 'parent' in art 14 refers to a lawful parent in a recognised marriage in the Federation. The learned SFC had cited *Stroud's Judicial Dictionary of Words and Phrases* (7th Ed), that the word 'parent' cannot include a father of an illegitimate child; and the cases of *In re M, an infant* [1955] 2 QB 479 and *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 MLJ 648; [2004] 2 CLJ 416 where the court also relied on *Black's Law Dictionary Abridged* (6th Ed) to the same effect.

[55] Bearing in mind that it is the Federal Constitution that is being examined and interpreted and reminding oneself of the applicable approach and principles to be adopted, the decision of *Foo Toon Aik (Suing on his own behalf and as Representative of Foo Shi Wen, child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* , and *Chin Kooi Nah v Pendaftar Besar Kelahiran dan Kematian, Malaysia,* offered by the respondent as authority for the proposition that the term 'parents' in art 14(1)(b) refers to 'lawful parents', is misplaced. Even *In re M, an infant*, a case which must be read with care as it concerned adoption and not citizenship, and which was relied on in *Foo Toon Aik*, Denning LJ qualified his view:

> In my opinion the word 'parent' in an Act of Parliament does not include the father of an illegitimate child *unless the context otherwise requires*. (Emphasis added.)

[56] The same may be said of the High Court decision in *Yu Sheng Meng (a child represent by his litigator, Yu Meng Queng) v Ketua Pengarah Pendaftaran Negara & Ors* [2016] 7 MLJ 628; [2016] 1 CLJ 336 where an old decision of *In re D, an infant* [1959] 1 QB 229 was cited. Again, the observations of illegitimacy *In re D, an infant*) were made in the context of an adopted child and in relation to property or succession rights, not citizenship. We also made similar observations in respect of the recent decisions of the Court of Appeal in *Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] MLJU 425 and *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] MLJU 426.

[57] For further reasons which will become more apparent, these decisions are also not applicable in the present appeal as the court in those cases was not considering the position of biological parents or even biological parents who subsequently married each other. Those decisions concerned persons who were adopted and whose parents never married each other or where the biological parents of the child or person was unknown. This is an important and significant distinction from the underlying facts in the present appeal which, unfortunately were overlooked by the learned judge.

[58] In any case, even if the term 'parents' is qualified by the status of 'lawful', we find it difficult to see how the natural or biological parents of the person can ever be said to be not lawful. In *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor,* the Court of Appeal opined that the phrase 'parents' 'has categorically made a reference to the biological parent of the person, who must either be a Malaysian citizen or a person who is permanently resident in Malaysia. He must be a person, whose either parent was a Malaysian citizen or a Malaysian permanent resident, when he was born in Malaysia.' The Court of Appeal rejected the submission that the term 'parent' in art 14(1)(b) read with s 1(a) of Part II of the Second Schedule refers to an 'adoptive parent', albeit Malaysian adoptive parent, but quite clearly concluded that the term

refers to the 'biological parents' of the person.

[59] We agree with that reading of the Court of Appeal in that it accords with and comprises the two basic elements for citizenship, *jus soli* and *jus sanguinis*. Since it is an uncontroverted and an admitted fact by the respondent that Augustine a/l Lourdsamay is the biological father of the appellant, Augustine a/l Lourdsamay is the father and thereby parent of the appellant, and Augustine a/l Lourdsamay is a citizen of Malaysia at the time of the appellant's birth, the terms of art 14(1)(b) read with s 1(a) of Part II, Second Schedule are met.

[60] We further find that the fact that Augustine a/l Lourdsamay and Margaret Luisa Tan, the biological parents of the appellant were not married to each other at the time of the appellant's birth does not alter or diminish their capacities as parents of the appellant.

[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.

[63] The Legitimacy Act 1961 ('Act 60') is an Act passed by Parliament to provide for the legitimation of children born out of wedlock. Although we are cautious to ensure that we cannot and do not use a subsidiary piece of legislation such as Act 60 to interpret the Federal Constitution, we find the reference to Act 60 appropriate in order to determine whether the appellant is illegitimate. The Federal Constitution has not defined the meaning of 'illegitimate'. The ordinary meaning of illegitimate person would be one who is born out of wedlock or is the issue of parents who were not married to one another at the time of the person's birth.

[64] In the present appeal, the parents of the appellant have married each other since 23 January 2006. Their marriage has been properly solemnised and recognised under s 3 of Act 60. Where that happens, s 4 of Act 60 applies. Section 4 reads as follows:

A Subject to section 3, where the parents of an illegitimate person marry or have married one another, whether before or after the prescribed date, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Malaysia, render that person, if living, legitimate from the prescribed date or from the date of the marriage, whichever is the later.

B

[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 C consideration of the application, and not some other point in time.

[66] As a legitimate person from 23 January 2006, s 17 does not apply. Section 17 only applies where the person is illegitimate. Since there is legitimation of the appellant, s 17 does not apply. As a legitimate person, the D appellant is entitled to rely on her father's citizenship in which case, the appellant has quite clearly fulfilled the requirements of art 14(1)(b) read with s 1(a) of Part II of the Second Schedule.

E **[67]** We must add that the appellant's case does not fall under s 5 of Act 60 as the appellant was not claiming to be a legitimate child or be legitimated by certain conditions under s 6. In the case of the appellant, s 4 applies.

[68] In conclusion on this ground, we found that the learned judge was F plainly erroneous in her apprehension of the law and the facts. Contrary to the findings and reasoning of the learned judge, the appellant has properly made her claim for citizenship and that this is an appropriate and suitable case for the grant of the declaratory order sought.

G *Article 14(1)(b) read with s 1(e) Part II, Second Schedule*

[69] Moving on to the alternative ground of art 14(1)(b) read with s 1(e) of Part II of the Second Schedule. Unfortunately, the learned judge did not deal with this equally important issue. Having considered the submissions, we also H find that we agree with the submissions of learned counsel for the appellant. This alternative ground reads in the appellant's favour in that the appellant is a person born in the Federation and is also not a citizen of any country otherwise than by virtue of para 1(e).

I **[70]** Learned counsel for the appellant submitted that the appellant has lived all her life in the Federation, and that she has no intention of applying for citizenship of the Independent State of Papua New Guinea. In any case, the Citizenship Act 1975 of Papua New Guinea requires the registration of birth overseas to be made within one year after the birth or with the consent of the

Minister, at any time after the end of that period, and this has not been done. A

[71] In response, the respondent's submission is that the appellant is not a stateless child, that contrary to the appellant's contentions, the appellant is actually a citizen of Papua New Guinea. That state can be easily determined by examining s 66(2) Division 2, Part IV of the Constitution of the Independent State of Papua New Guinea which deals with citizenship by descent. Alternatively, the appellant could apply to the federal government under arts 15 or 15A of the Federal Constitution. B

C

[72] We observed that the respondent's expositions on citizenship under the Constitution and laws of the Independent State of Papua New Guinea are substantially drawn from learned SFC's opinion and own interpretation. None of the submissions in this regard is supported by either case law from Papua New Guinea or even from esteemed authors in this area of law. There is also no confirmation of any sort or to any degree from the relevant authorities of the Independent State of Papua New Guinea that the appellant is its citizen. D

[73] Section 66(2) Division 2, Part IV of the Constitution of the Independent State of Papua New Guinea reads as follows: E

66 CITIZENSHIP BY DESCENT.

(1) A person who —

(a) is born in the country on or after Independence Day; and

(b) had one parent who was a citizen or who, if he had survived to Independence Day, would have been or would have been entitled to become, such a citizen, F

is a citizen.

(2) A person — G

(a) who is born outside the country on or after Independence Day; and

(b) who had one parent who was a citizen or who, if he had survived to Independence Day, would have been, or would have been entitled to become, such a citizen; and H

(c) whose birth is registered as prescribed by or under an Act of Parliament made for the purposes of this subsection,

is a citizen.

[74] The Citizenship Act 1975 ('Chapter 12') is the relevant Act of Parliament, it is an Act passed to implement Part IV (citizenship) of the Constitution of the Independent State of Papua New Guinea. Section 5 of this Act states: I

5 REGISTRATION OF BIRTHS OVERSEAS.

(1) For the purposes of Section 66(2)(c) of the Constitution, the registration of a birth overseas may be made by giving to a person appointed by the Minister the prescribed particulars.

(2) The registration shall be made within one year after the birth or, with the consent of the Minister, at any time after the end of that period.

(3) The regulations may provide for the keeping of a register or registers of births overseas for the purposes of Part IV of the Constitution.

(4) A certificate under, or apparently under, the hand of a person appointed under Subsection (1) and purporting to set out details of registration of a birth is *prima facie* evidence of the facts set out in it.

[75] On the strength of these two documents alone, we find difficulty in accepting the respondent's contentions that the appellant is a citizen of the Independent State of Papua New Guinea. That status is a question of mixed fact and law and there is insufficient evidence to come to that conclusion, particularly when the appellant's birth was undisputedly, never registered under the Citizenship Act 1975 (Chapter 12) of Papua New Guinea. Had there been a certificate to that effect issued under s 5(4), the respondent's contentions would have strong plausible basis. As it is, there is none and the suggestion that the appellant is thereby a citizen of Papua New Guinea is not one that the courts here should accept readily; more so on the particular facts in this appeal.

[76] This is quite different from the position in *Pham v Secretary of State for the Home Department* [2015] 3 All ER 1015, a case concerning the deprivation of citizenship; a status described by Lord Reed as one of 'fundamental importance'. At p 1046, Lord Sumption dealt with the issue of statelessness by considering whether the appellant there had Vietnamese citizenship at the time of his birth. Because the answer was in the affirmative, the Supreme Court concluded that the withdrawal of British nationality by the respondent did not render the appellant stateless, a condition that would have contravened art 1(1) of the Convention Relating to the Status of Stateless Persons 1954 (Cmd 9505).

[77] Coming back to the present appeal, in support of her application, the appellant has shown that she is not a citizen of Papua New Guinea. The appellant's birth was not registered in Papua New Guinea. It was registered here instead. We agree with the submissions of learned counsel for the appellant that if the declaration sought is not given, if the appellant is not a citizen of the Federation, then she is stateless. That state would not and cannot be said to be in the best interest and for the welfare of the appellant. Consequently, the appellant satisfies the terms of art 14(1)(b) read with s 1(e) of Part II of the Second Schedule to the Federal Constitution.

CONCLUSION

[78] For all the reasons discussed above, we are compelled to exercise our appellate powers and intervene in this appeal so as to set right the decision of the High Court. As explained by Kang Hwee Gee J (as he then was) in *Haja Mohideen bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Others* [2007] 8 MLJ 1; [2007] 6 CLJ 662, the two qualifications in art 14(1)(b) are akin to primary rules and these rules are 'conceived of a social contract by which the State recognised the natural right of a citizen to have his offspring becoming a citizen after him'.

[79] Given that the appellant and her underlying facts and circumstances have amply satisfied the primary rules of *jus soli* and *jus sanguinis* in the terms deployed in Part III of the Federal Constitution, in particular art 14(1)(b) read with ss 1(a) and/or (e) of Part II of the Second Schedule to the Federal Constitution, the appeal must be and is hereby, allowed in terms of prayer (iv).

[80] Finally, we make no order as to costs and order that the deposit be refunded to the appellant.

Appeal allowed.

Reported by Afiq Mohamad Noor