Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–185–06 OF 2015
DAVID WONG, BADARIAH SAHAMID AND HARMINDAR SINGH JJCA
16 MARCH 2017

Civil Procedure — Judicial review — Appeal against — Appellants applied for citizenship of second appellant — First respondent rejected appellants' application for citizenship — Appellants filed judicial review against first respondent's decision — Whether second appellant satisfied requirements stipulated in para 1(e) of Part II, Second Schedule of the Federal Constitution, to be read with art 14(1)(b) of the Constitution, to obtain citizenship by operation of law

Constitutional Law — Citizenship — Application for — Appellants applied for citizenship of second appellant — First respondent rejected appellants' application for citizenship — Appellants filed judicial review against first respondent's decision — Whether second appellant satisfied requirements stipulated in para 1(e) of Part II, Second Schedule of the Federal Constitution, to be read with art 14(1)(b) of the Constitution, to obtain citizenship by operation of law — Federal Constitution arts 14 & 15A

The second appellant was born on 28 September 1998 in a Poliklinik in Ampang. The first appellant and his wife had obtained an adoption order for the adoption of the second appellant. It ought to be noted that the second appellant's birth certificate contained no information pertaining to the biological parents. On 21 June 2012, the appellants applied for citizenship of the second appellant by registration under art 15A of the Federal Constitution ('the Constitution') but the same was rejected by the first respondent. Dissatisfied with the first respondent's decision, the appellants filed a judicial review application seeking an order of declaration that the second appellant was recognised as a Malaysian citizen under art 14 of the Constitution read with para 1(e), Part II, Second Schedule of the Constitution; and an order of mandamus to compel the first respondent to issue a MyKad identification card or a citizenship certificate to the second appellant as a Malaysian citizen. The learned High Court judge had dismissed the appellants' application for judicial review, hence the present appeal. The issue arose was whether the second appellant had satisfied the requirements stipulated in para 1(e) of Part II, Second Schedule of the Constitution, to be read with art 14(1)(b) of the Constitution, to obtain citizenship by operation of law.

Held, dismissing the appeal and affirming the decision of the learned High Court judge with no order as to costs:

(1) There was no dispute that documentary evidence confirmed that the second appellant was born after Merdeka Day in the Federation ie in 1998 in a Poliklinik in Ampang, thus fulfilling the requirement of *jus soli* in art 14(1)(b) of the Constitution (see para 26).

(2) In respect of the requirement of *jus sanguinis* in para 1(e) of Part II of the Second Schedule of the Constitution, the burden of proof was on the appellants to establish a prima facie case on the balance of probabilities that the second appellant, 'was not born a citizen of any country'. The only available documentary evidence ie the second appellant's birth certificate contained no information pertaining to the biological parents and the relevant particulars were endorsed with 'Maklumat Tidak Diperolehi'. Since the identity of the child's lawful and biological parents were unknown, it was not possible to determine the lineage of the second appellant that would enable the second appellant to be conferred citizenship by lineage ie jus sanguinis. Thus, the second appellant had not fulfilled the requirement to be a citizen by operation of law within the meaning of para 1(e) of Part II of the Second Schedule of the Constitution (see paras 27–30 & 35–37).

[Bahasa Malaysia summary

Perayu kedua dilahirkan pada 28 September di Poliklinik di Ampang. Perayu pertama dan isterinya telah memperolehi perintah pengambilan anak angkat untuk mengambil anak angkat perayu kedua. Ia patut diambil perhatian bahawa sijil kelahiran perayu kedua tidak mengandungi maklumat mengenai ibubapa biologi. Pada 21 Jun 2012, perayu-perayu memohon untuk kerakyatan perayu kedua dengan pendaftaran di bawah perkara 15A Perlembagaan Persekutuan ('Perlembagaan') tetapi ianya ditolak oleh responden pertama. Tidak berpuas hati dengan keputusan responden pertama, perayu-perayu memfailkan permohonan semakan kehakiman memohon perintah deklarasi bahawa perayu kedua diiktiraf sebagai rakyat Malaysia di bawah perkara 14 Perlembagaan dibaca dengan perenggan 1(e), Bahagian II, Jadual Kedua Perlembagaan; dan perintah mandamus untuk mendesak responden pertama mengeluarkan kad pengenalan MyKad atau sijil kerakyatan kepada perayu kedua sebagai rakyat Malaysia. Hakim Mahkamah Tinggi yang bijaksana telah menolak permohonan perayu-perayu untuk semakan kehakiman, maka rayuan ini. Isu yang berbangkit adalah sama ada perayu kedua telah memenuhi kehendak-kehendak yang ditetapkan di dalam perenggan 1(e), Bahagian II, Jadual Kedua Perlembagaan, untuk dibaca bersama dengan perkara 14(1)(b) Perlembagaan, untuk mendapatkan kerakyatan melalui operasi undang-undang.

Diputuskan, menolak rayuan dan mengesahkan keputusan hakim

Mahkamah Tinggi tanpa perintah kepada:

(1) Tidak terdapat pertikaian bahawa keterangan dokumentar mengesahkan bahawa perayu kedua dilahirkan selepas Hari Merdeka di Wilayah Persekutuan iaitu pada tahun 1998 di Poliklinik di Ampang, oleh itu memenuhi kehendak jus soli dalam perkara 14(1)(b) Perlembagaan (lihat perenggan 26).

(2) Berkaitan kehendak jus sanguinis di dalam perenggan 1(e), Bahagian II, Jadual Kedua Perlembagaan, beban pembuktian adalah ke atas perayu-perayu untuk membuktikan kes prima facie atas imbangan kebarangkalian bahawa perayu kedua, 'was not born a citizen of any country'. Satu-satunya keterangan dokumentar yang ada iaitu sijil lahir perayu kedua tidak mengandungi maklumat mengenai ibubapa biologi dan butir-butir relevan disahkan dengan 'maklumat tidak diperolehi'. Memandangkan identiti sah bayi dan ibubapa biologi tidak diketahui, ia adalah tidak mungkin dapat menentukan keturunan perayu kedua yang membolehkan perayu kedua diberikan kerakyatan melalui keturunan iaitu jus sanguinis. Oleh itu, perayu kedua tidak memenuhi kehendak untuk menjadi rakyat atas operasi undang-undang dalam maksud perenggan 1(e) Bahagian II, Jadual Kedua Perlembagaan (lihat perenggan 27–30 & 35–37).]

Notes

For a case on application for citizenship, see 3(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2397.

For cases on appeal against judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5935.

Cases referred to

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)

Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia [2008] 3 MLJ 625; [2008] 5 CLJ 42, CA (refd)

Singh v Commonwealth of Australia [2004] HCA 43, HC (refd)

Legislation referred to

Adoption Act 1952
Evidence Act 1950 s 103
Federal Constitution arts 14(1)(b), 15A, Second Schedule, Part II, para 1(e)

Appeal from: Application For Judicial Review No 25–91–05 of 2014 (High Court, Kuala Lumpur)

N Surendran (Latheefa Koya with him) (Daim & Gamany) for the appellants.

Mohd Rizal Fadzil (Habibah Haran with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Badariah Sahamid JCA:

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge who on 14 July 2014 dismissed the appellants' application for judicial review for the following reliefs:

(a) an order of declaration that the second applicant is recognised as a Malaysian citizen under art 14(1)(b) of the Federal Constitution read with para 1(e) Part II, Second Schedule of the Federal Constitution; and

(b) an order of mandamus to compel the first respondent to issue a MyKad identification card or a citizenship certificate to the second applicant as a Malaysian citizen.

[2] After careful consideration of oral and written submissions of parties, appeal records as well as relevant authorities, we find no merits in this appeal. We therefore dismiss this appeal and affirm the decision of the learned High Court judge. The grounds of our decision are set out below.

BACKGROUND FACTS

[3] The background facts are adopted from the learned High Court judge's grounds of judgment.

[4] The first appellant, a Malaysian citizen and one, Lim Lee Chiew are the adopted parents of the second appellant.

[5] The second appellant is a minor who was born on 28 September 1998 at Poliklinik and Surgeri Wanita Taman Dato' Ahmad Razali Ampang.

[6] At the time of the birth of the second appellant, a birth certificate was issued with the particulars of the adopted parents, one Mr Than Siew Beng ('the first appellant') and Madam Lim Lee Chiew, stated as the biological parents of the second appellant. At the time of the second appellant's birth the adopted parents had also identified themselves as being legally married ('exh TSB2 of encl 3 at pp 59–61 *RR*').

[7] Both the adopted parents had never disclosed the fact that they were not the biological parents of the second appellant or that they had taken the second

appellant allegedly from a woman who had given birth to the second appellant at Poliklinik and Surgeri Wanita Taman Dato' Ahmad Razali Ampang ('the Poliklinik'). A

[8] When the second appellant attained the age of 12, the first appellant applied for an identification card for the second appellant using exh TSB2 of encl 3. The application was rejected as the first respondent suspected that the second appellant was not the biological child of the first appellant and his wife. B

[9] Upon investigation it was revealed that the second appellant was not the biological child of the first appellant and his wife. The second appellant was taken away from his biological mother soon after his birth at the Poliklinik and since then was raised by the first appellant and his wife. C

[10] On discovery that the adopted parents of the second appellant had breached the relevant law in obtaining the second appellant's birth certificate ('exh TSB2 of encl 3'), the first respondent revoked the said birth certificate and issued another birth certificate in the form of exh TSB6 of encl 3 to reflect the facts surrounding the birth of the second appellant. As there was no information obtained with regards to the biological parents of the second appellant, exh TSB6 contained no information pertaining to the biological parents and the relevant particulars were endorsed with 'Maklumat Tidak Di perolehi'. D E

[11] Both the first appellant and his wife were asked to apply for an adoption order under the Adoption Act 1952, which order was granted on 4 June 2012 ('exh TSB10 of encl 3 at pp 80–81 *RR*'). F

[12] On 21 June 2012, the appellants applied for citizenship by registration under art 15A of the Federal Constitution but the same was rejected by the first respondent. Hence encl 1 was filed in this High Court seeking for various reliefs as stated therein. G

[13] When encl 1 came up for hearing before Her Ladyship Justice Zaleha Yusof on 1 August 2014, the appellants were only granted leave to pursue prayers (ii) and (iii) of encl 1 reproduced below: H

> (ii) Suatu deklarasi yang mengiktirafkan Pemohon Kedua diatas sebagai warganegara secara kuatkuasa undang-undang ('operation of law') dibawah Jadual Kedua, Bahagian II, Seksyen 1(e) Perkara 14(1)(b) Perlembagaan Persekutuan. I
>
> (iii) Suatu perintah Mandamus mengarahkan Responden Pertama untuk mengeluarkan Kad Pengenalan Kad atau Sijil Pengesahan Tarat Kewarganegaraan yang mengiktirafkan Pemohon Kedua sebagai warganegara Malaysia secara

kuatkuasa undang-undang ('operation of law') dibawah Perkara 14(1)(b) Perlembagaan Persekutuan.

ISSUES BEFORE THE HIGH COURT

[14] The learned High Court judge determined that the issues before the court were as follows:

(a) whether the applicants ('appellants') have fulfilled the requirement of art 14(1)(b) of the Federal Constitution to obtain citizenship by operation of law? and

(b) whether citizenship can be acquired pursuant to an adoption order?

FINDINGS AND DECISION OF THE HIGH COURT

[15] The learned High Court judge made a finding that the appellants had not fulfilled the requirement of para 1(e) of Part II, Second Schedule of the Federal Constitution which was to be read with art 14(1)(b) of the Federal Constitution to obtain citizenship by operation of law.

[16] International conventions, such as the Convention on the Rights of the Child ('CRC') have no force of law as it has not been incorporated into municipal legislation.

[17] An adoption order does not confer a right of citizenship by operation of law consequent upon the making of an adoption order.

GROUNDS OF APPEAL

[18] The grounds of appeal before us may be summarised as follows:

(a) the learned High Court judge had erred in law and fact in her failure to appreciate that the second appellant had satisfied the requirements of para 1(e) of Part II, Second Schedule of the Federal Constitution, to be read with art 14(1)(b) of the Federal Constitution to obtain citizenship by operation of law in that:

(i) the second appellant was born in Malaysia after Malaysia day;

(ii) the second appellant had resided in Malaysia his whole life; and

(iii) the second appellant is not a citizen of any country;

(b) the learned High Court judge had erred in placing an excessive and unrealistic burden on the second appellant to locate the biological

parents of the second appellant in order to determine their citizenship status when it was clear they were unknown and could not realistically be located;

(c) the learned High Court judge had failed to consider that the first appellant had made reasonable effort to locate the biological parents of the second appellant by placing an advertisement in the newspaper, as stated in the first appellant's affidavit in support;

(d) the learned High Court judge erred in stating that the fact of adoption is not a relevant consideration in conferment of a right of citizenship by operation of law; and

(e) the learned High Court judge had erred in her failure to appreciate that there are provisions in domestic and international laws that compels avoidance of statelessness of the second appellant.

OUR JUDGMENT

[19] We note that when encl 1 came up for hearing before Her Ladyship Justice Zaleha Yusof on 1 August 2014, the appellants were only granted leave to pursue prayers (ii) and (iii) of encl 1, reproduced below:

(ii) Suatu deklarasi yang mengiktirafkan Pemohon Kedua diatas sebagai warganegara secara kuatkuasa undang-undang ('operation of law') dibawah Jadual Kedua, Bahagian II, Seksyen 1(e) Perkara 14(1)(b) Perlembagaan Persekutuan.

(iii) Suatu perintah Mandamus mengarahkan Responden Pertama untuk mengeluarkan Kad Pengenalan Kad atau Sijil Pengesahan Tarat Kewarganegaraan yang mengiktirafkan Pemohon Kedua sebagai warganegara Malaysia secara kuatkuasa undang-undang ('operation of law') dibawah Perkara 14(1)(b) Perlembagaan Persekutuan.

[20] Thus, we will only confine the issues in this appeal to the question of whether the second appellant has satisfied the requirements stipulated in para 1(e) of Part II, Second Schedule of the Federal Constitution, to be read with art 14(1)(b) of the Federal Constitution, to obtain citizenship by operation of law.

[21] The relevant provisions abovementioned are reproduced below:

Article 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) ...

(b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

[22] The above provision is to be read with para 1(e) Part II of the Second Schedule which is reproduced below:

> 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 Merdeka Day are citizens by operation of law, that is to say:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (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.)

REQUIREMENT OF JUS SOLI AND JUS SANGUINIS

[23] Article 14(1)(b) of the Federal Constitution encapsulates the requirement of citizenship by *jus soli* ie place of birth; while para 1(e) of Part II of the Second Schedule of the Federal Constitution ('not born a citizen of any country') encapsulates the requirement of citizenship by *jus sanguinis* ie by blood or lineage.

[24] Thus, it would appear that the second appellant would need to satisfy both the requirements of *jus soli* and *jus sanguinis* in order to fulfil the requirements of art 14(1)(b) and para 1(e) of Part II, Second Schedule of the Federal Constitution (refer to *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).

[25] The doctrines of *jus soli* and *jus sanguinis* were explained in the case of *Singh v Commonwealth of Australia* [2004] HCA 43, which was referred to in the case of *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 at p 747 as follows:

> By the late nineteenth century, international law recognised two well established rules for acquiring nationality by birth: *jus soli* and *jus sanguinis* (*The Australian Legal Dictionary* (1997)) defines *jus soli* to mean: a right acquired by virtue of the soil or place of birth. Under this right, the nationality of a person is determined by the place of birth rather than parentage. Nationality is conferred by the state in which the birth takes place; and defines *jus sanguinis* to mean: a right of blood. A right acquired by virtue of lineage. Under this right, the nationality of a person is determined by the nationality of their parents, irrespective of the place of birth.

[26] There is no dispute that documentary evidence confirms that the second appellant was born after Merdeka Day in the Federation ie in 1998 in a Poliklinik in Ampang ('exh TSB6'), thus fulfilling the requirement of *jus soli* in art 14(1)(b) of the Federal Constitution.

MEANING OF 'WHO IS NOT BORN A CITIZEN OF ANY COUNTRY'

[27] The contentious issue is in respect of the requirement of *jus sanguinis* in para 1(e) of Part II of the Second Schedule of the Federal Constitution, as expressed by the phrase, 'who is not born a citizen of any country'. For the purposes of this requirement the material time to determine the status of the second appellant's lineage is at the time of his birth.

[28] The appellant's contention is that the requirements of para 1(e) are fulfilled because:

(a) the second appellant was born in the Federation;

(b) the second appellant had resided in Malaysia all his life; and

(c) the second appellant is not a citizen of any country.

[29] It is a well-established principle of law that 'he who asserts must prove'. The burden of proof is on the appellants to establish a prima facie case on the balance of probabilities that the second appellant, 'was not born a citizen of any country'.

[30] Such rule of evidence is enunciated in s 103 of the Evidence Act 1950 which provides:

> The burden of proof as to any parlicular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that proof of that fact shall lie on any parlicular person.

[31] In the case of *Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia* [2008] 3 MLJ 625; [2008] 5 CLJ 42, it was held that in order to ascertain the citizenship status of the applicant, the burden is on the applicant to furnish the necessary documents, and the absence of such documents would be fatal to the applicant's claim.

[32] The learned High Court judge had referred to the burden borne by the applicant in the following terms:

> This court would have to examine the factual matrix of this case and determine whether the second applicant was 'not born a citizen of any country'. As stated in the affidavits filed herein, the second applicant and his wife had sponsored the surgery of the biological mother of the second applicant and the second applicant was taken

A from his biological mother at the time of his birth at the Poliklinik. Therefore the burden is on the applicants to show to this court that the second applicant 'was not born a citizen of any country'.

B **[33]** The learned High Court judge had also found that the appellants had failed to prove that reasonable efforts had been made to determine the identity and citizenship status of the second appellant's biological parents. The learned High Court judge ruled that the mere publication of an advertisement in the papers to solicit information on the identity and citizenship status of the second appellant's biological parents is insufficient.

C In her grounds of judgment, she had stated thus:

> From the averment it would appear that the couple knew about the woman whom they have negotiated and finally paid for the medical bills relating to the birth. I believe there was no full and frank disclosure of facts pertaining to the identity of this woman. It would appear the Applicants had not made reasonable attempts to trace the whereabouts of the mother either from the Poliklinik and or even from the informant who could be identified and traceable in order to provide the full and frank facts about the mother.

D

E **[34]** The learned High Court judge had made findings of fact, in particular that the first appellant had not been forthcoming in disclosing the particulars of the second appellants' biological parents as such information on his lineage would determine whether or not the second appellant fulfils the requirement

F that he 'was not born a citizen of any country'.

[35] A plain reading of para 1(e) 'was not born a citizen of any country' refers to the relationship of the second appellant to his biological and lawful parents at the time of his birth. The only available documentary evidence, the second

G appellant's birth certificate ('exh TSB6') contained no information pertaining to the biological parents and the relevant particulars were endorsed with 'Maklumat Tidak Di perolehi'.

H **[36]** Since the identity of the child's lawful and biological parents are unknown, it is not possible to determine the lineage of the second appellant that would enable the second appellant to be conferred citizenship by lineage ie *jus sanguinis.*

I **[37]** Thus in our view, the second appellant has not fulfilled the requirement to be a citizen by operation of law within the meaning of para 1(e) of Part II of the Second Schedule of the Federal Constitution (refer to *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).

[38] We cannot accept the contention of the appellants that the evidence that the second appellant was born in the Federation and had resided in the Federation all his life, as well as the absence of particulars on the second appellant's birth certificate in respect of his lineage can be construed as sufficient proof that the second appellant 'was not born a citizen of any country'. As was stated earlier, what is required is evidence of the second appellant's lineage, which evidence is absent.

[39] Thus, we agree with the finding of the learned High Court judge that the second appellant has failed to prove on the balance of probabilities that the requirement of para 1(e) of Part II of the Second Schedule of the Federal Constitution abovementioned has been satisfied.

[40] For the reasons aforementioned, we therefore dismiss this appeal and affirm the decision of the learned High Court judge. We make no order as to costs.

Appeal dismissed; decision of learned High Court judge affirmed with no order as to costs.

Reported by Dzulqarnain Ab Fatar