# Haja Mohideen bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Others

HIGH COURT (KUALA LUMPUR) — SAMAN PEMULA NO SI–21–176 TAHUN 2006
KANG HWEE GEE J
6 JULY 2007

*Constitutional Law — Operation of law, by — Citizenship — Whether primary qualification or secondary procedural requirement — Whether conduct of government created legitimate expectation*

*Constitutional Law — Deprivation — Citizenship — Application for — Jurisdiction of authorities — Whether procedural non compliance can undermine substantive right to citizenship by operation of law*

The first plaintiff is a Malaysian citizen. The second and third plaintiffs are children of the first plaintiff as a result of his marriage to an Indian citizen. The children were born in the state of Tamil Nadu on 29 August 1980 and 6 July 1982 respectively. The first plaintiff did not register the birth of his children within a year of their birth as required under art 14(1)(b) and Part II of the Second Schedule of the Federal Constitution ('the FC'). The first plaintiff made an application to register their births some six years later. The office of the Assistant High Commission for Malaysia in Madras responded by letter dated 5 September 1988 stating that once certain matters were resolved the first plaintiff would be notified immediately to come to the office with his children for identification. The first plaintiff did not get any further response after this. On 28 February 1997, the second and third plaintiffs made applications for citizenship in their own right to the government of Malaysia. The said applications were rejected by letter dated 15 September 1999 from the Ketua Setiausaha Kementerian Dalam Negeri. In this originating summons, the plaintiffs seek a declaration that the second and third plaintiffs are citizens of Malaysia under art 14(1)(b) of the FC and that the defendants did not have any grounds to reject the first plaintiff's application to register the second and third plaintiffs as Malaysian citizens. The plaintiffs also seek an ancillary order that the second and third plaintiffs be issued a Malaysian citizenship certificate and identity card. The plaintiffs' application is grounded on the submission that at the time the first plaintiff submitted the application at the High Commission of Madras in 1988, he had satisfied the requirement as set out in art 14(1)(b) of the FC. He contends that his failure to register the births of the first and second plaintiffs within a year was purely a formal requirement and that this should not be an impediment to the Federal Government to deny the second and third plaintiffs their rightful citizenship.

**Held,** granting order in terms of the plaintiffs' application:

(1) A cursory reading of art 14(1)(b) and Part II of the Second Schedule of the FC tends to suggest that the father must have two distinct 'qualifications' of equal importance. First, the father must be a citizen at the time of the child's birth and second, he must register the birth within one year or such longer period as the Federal Government may in any particular case allow (see para 17).

(2) 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 (see para 18).

(3) The first 'qualification' 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 recognised the natural law right of a citizen to have his offspring become 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 art 14 of the FC, the infraction being merely of a secondary rule whose main purpose is to serve the primary rule (see paras 20, 21).

(4) In making a decision, the Federal Government would in fact be making a decision under a social contract between a citizen and the Federal Government. It must not unreasonably refuse 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. The Federal Government 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 second and third plaintiffs' right to citizenship. 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 (see paras 24, 26, 33).

(5) The letter dated 5 September 1988 created in the mind of the first 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 first 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

A was to inform the first 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 (see para 34).

B **[Bahasa Malaysia summary**

Plaintif pertama adalah seorang warganegara Malaysia. Plaintif kedua dan ketiga adalah anak-anak plaintif pertama hasil daripada perkahwinannya dengan seorang warganegara India. Anak-anaknya dilahirkan di Negeri Tamil Naidu masing-masing pada 29 Ogos 1980 dan 6 Julai 1982. Plaintif pertama tidak mendaftarkan kelahiran anak-anaknya dalam tempoh setahun kelahiran mereka sebagaimana diperuntukkan di bawah Artikel 14(1)(b) dan Bahagian II Jadual Kedua Perlembagaan Persekutuan. Plaintif pertama membuat permohonan untuk mendaftarkan kelahiran mereka lebih kurang 6 tahun kemudian. Pejabat Penolong Suruhanjaya Tinggi Malaysia di Madras membalas melalui sepucuk surat bertarikh 5 September 1988 menyatakan bahawa apabila perkara-perkara tertentu berjaya diselesaikan, plaintif pertama akan dimaklumkan secepat mungkin untuk pergi ke pejabat bersama-sama anak-anaknya untuk pengenalpastian. Plaintif pertama tidak mendapat sebarang maklum balas selepas itu. Pada 28 Februari 1997, plaintif kedua dan ketiga membuat permohonan-permohonan untuk warganegara berdasarkan hak-hak mereka kepada kerajaan Malaysia. Permohonan-permohonan tersebut telah ditolak melalui surat bertarikh 15 September 1999 daripada Ketua Setiausaha Kementerian Dalam Negeri. Dalam saman pemulanya, plaintif memohon perisytiharan bahawa plaintif kedua dan ketiga adalah warganegara Malaysia di bawah Artikel 14(1) (b) Perlembagaan Persekutuan dan bahawa defendan-defendan tidak mempunyai alasan-alasan untuk menolak permohonan plaintif pertama bagi mendaftarkan plaintif kedua dan ketiga sebagai warganegara Malaysia. Plaintif-plaintif juga memohon perintah sampingan bahawa plaintif kedua dan ketiga dikeluarkan sijil warganegara Malaysia dan kad pengenalan. Permohonan plaintif-plaintif adalah berdasarkan kepada hujahan bahawa pada masa plaintif pertama menghantar permohonan kepada Suruhanjaya Tinggi di Madras pada tahun 1988, dia telah memenuhi keperluan sebagaimana ditetapkan dalam Artikel 14(1)(b) Perlembagaan Persekutuan. Dia menegaskan bahawa kegagalannya untuk mendaftarkan kelahiran plaintif pertama dan kedua dalam masa setahun adalah semata-mata keperluan formal dan ini tidak seharusnya menjadi halangan kepada Kerajaan Persekutuan untuk menafikan plaintif kedua dan ketiga hak mereka sebagai warganegara.

H

**Diputuskan,** membenarkan perintah seperti dipohon dalam permohonan plaintif-plaintif:

(1) Sepintas lalu pembacaan Artikel 14 (1)(b) dan Bahagian II Jadual Kedua Perlembagaan Persekutuan cenderung mencadangkan bapa mestilah mempunyai dua 'kelayakkan' berbeza yang mempunyai kepentingan sama rata. Pertama, semasa kelahiran, bapa mestilah seorang warganegara; kedua, dia hendaklah mendaftarkan kelahiran dalam tempoh setahun atau untuk tempoh lebih lama sebagaimana Perlembagaan Persekutuan akan dalam sesetengah kes membenarkannya (lihat perenggan 17).

(2) Tetapi pemeriksaan secara menyeluruh peruntukkan memberikan tempat kepada pentafsiran bahawa pada hakikatnya hanya satu kelayakkan dalam erti kata sebenar bahawa pemohon hendaklah memenuhi untuk melayakkannya sebagai warganegara Negara ini, iaitu, bapanya mestilah seorang warganegara semasa dia dilahirkan. 'Kelayakkan' lain hanyalah kelayakkan sekunder yang melengkapkan kelayakkan utama yang memerlukan pendaftaran kelahiran dalam masa setahun, atau tempoh lebih lama sebagaimana Perlembagaan Persekutuan akan dalam sesetengah kes membenarkannya. Proses ini adalah keperluan prosedur yang memerlukan pengamalan budi bicara di pihak Kerajaan (lihat perenggan 18).

(3) 'Kelayakkan' pertama adalah sebenarnya 'peraturan utama' penganugerahan hak kewarganegaraan melalui operasi perundangan melalui jus soli bapanya. Ia adalah peraturan yang mengandungi kontrak sosial yang mana Negeri akan mengakui perundangan asasi hak warganegara untuk menjadikan keturunannya sebagai warganegara sepertinya. 'Kelayakkan' yang memerlukan bahawa kelahiran hendaklah didaftarkan dalam tempoh setahun atau untuk tempoh lebih lama sebagaimana Kerajaan Persekutuan akan dalam sesetengah kes membenarkannya. Tetapi 'peraturan sekunder' yang menolong mentafsirkan peraturan utama. Sedangkan, pematuhan menyeluruh terhadap peraturan utama dilahirkan semasa bapa adalah warganegara adalah sangat penting, kegagalan mematuhi peraturan sekunder pendaftaran hanyalah prosedur tiada pematuhan yang tidak akan sesekali tidak melayakkan seseorang untuk menjadi warganegara melalui operasi perundangan di bawah Artikel 14 Perlembagaan Persekutuan-perlanggaran peraturan kedua yang mana tujuan utamanya adalah untuk membantu peraturan pertama (lihat perenggan-perenggan 20, 21).

(4) Dalam membuat keputusan, Kerajaan Persekutuan pada hakikatnya membuat keputusan di bawah kontrak sosial antara warganegara dan Kerajaan Persekutuan. Ia adalah tidak munasabah untuk menolak tempoh masa yang sedikit panjang untuk pendaftaran berdasarkan kepada perlanggaran hanyalah untuk prosedur peraturan sekunder. Penolakkan untuk memberikan sedikit tempoh yang agak lama oleh itu akan menyebabkan perjalanan tindakan berkaitan pertimbangan keputusan menteri akan disemak oleh mahkamah. Kerajaan Persekutuan terikat untuk mempertimbangkan hanya sebab atau sebab-sebab mengapa dia gagal untuk mendaftar pada masanya dan keengganan akan hanya dapat dijustifikasikan bila sebab-sebab yang diberikan adalah tidak munasabah dan tidak boleh diterima bahawa ia jauh lebih penting daripada hak-hak kewarganegaraan plaintif kedua dan ketiga Keputusan yang munasabah berdasarkan kepada imbangan keadilan tidak akan membiarkan tiada pematuhan prosedur semata-mata untuk melemahkan hak substantif mereka kepada kewarganegaraan melalui operasi perundangan (lihat perenggan-perenggan 24, 26, 33).

(5) Surat bertarikh 5 September 1988 membuatkan plaintif pertama mentafsirkan sangkaan yang munasabah bahawa cepat atau lambat perkara-perkara tertunggak akan dapat diselesaikan apabila (sebagaimana dinyatakan dalam suratnya) dia, isterinya dan anak-anaknya akan dipanggil ke Suruhanjaya Tinggi untuk tujuan pengenalpastian. Berdasarkan kepada keadaan selepasnya

Kerajaan Persekutuan tidak menghantar sebarang surat menyurat dengan plaintif pertama berkenaan dengan perkara-perkara yang belum diselesaikan sebagaimana dinyatakan dalam surat tersebut, ia adalah sangat munasabah untuk mengandaikan bahawa semuanya berada dalam keadaan teratur dan apa yang diperlukan untuk melengkapkan pendaftaran adalah dengan memaklumkan plaintif pertama bahawa Kerajaan Persekutuan telah membenarkan pendaftaran lewat, dan memintanya menghubungi Pesuruhjaya Tinggi bersama-sama isterinya dan juga anak-anaknya untuk tujuan pengenalpastian seperti dijanjikan dalam surat tersebut (lihat perenggan 34). ]

**Notes**

For cases on citizenship, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 3591–3597.

**Cases referred to**

*Lee Eng Teh & Ors v Teh Thiang Seong & Anor* [1967] 1 MLJ 42 (refd)

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

**Legislation referred to**

Federal Consitution arts 14(1)(b), 15, 15(2), 24, Sch 2 Part II

*M Manoharan (M Manoharan & Co) for the plaintiff.*

*Azizah Nawawi (Senior Federal Counsel, Attorney General's Chambers) for the defendant.*

**Kang Hwee Gee J:**

BACKGROUND

**[1]** The first plaintiff, Haja Mohideen bin Mk Abdul Rahman, is at all material times a male Malaysian citizen by registration pursuant to art 15(2) of the Federal Constitution('the FC').

**[2]** He married an Indian citizen in India on 26 March 1978. As a result of their union, the second plaintiff was born on 29 August 1980 and the third plaintiff on 6 July 1982, both in the state of Tamil Nadu, India.

**[3]** The first plaintiff failed to register the birth of the second and third 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 art 14(1)(b) of the Federal Constitution.

**[4]** Some six years after the birth of the third plaintiff, the first 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 September 1988 stated 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-600 018

Your Ref: Our Ref: (03 2A)442/3 3/(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 Jun 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.

**[5]** The first plaintiff did not get any further response from the High Commission at Madras. On 23 September 1988 he sent a reminder, but did not receive any further reply from the High Commission. By this time the first plaintiff had returned to Malaysia with his wife but up to this stage the Malaysian citizenship status of the second and third plaintiffs had remained unresolved.

**[6]** On 5 February 1997, the second and third plaintiffs, having reached the age of majority, came to Malaysia on a social visit visa which required a periodical renewal.

**[7]** On 28 February 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 art 15(2) of the FC by a pro forma application form supplied by the government.

**[8]** Their applications were subsequently rejected by the Government of Malaysia vide a letter dated 15 September 1999 signed by the Ketua Setiausaha Kementerian Dalam Negeri for and on behalf of the Minister of Home Affairs.

**[9]** By this application, the plaintiffs seek a declaration that the second and third plaintiffs are citizens of Malaysia under art 14(1)(b) of the FC and that the defendants did not have any ground to reject the first plaintiff's application to register the second and third plaintiffs as Malaysian citizens under art 14(1)(b) of the Federal Constitution. They also seek an ancilliary order that the second and third defendants be issued their respective Malaysian citizenship certificate and identity card.

**[10]** The plaintiffs' application is grounded on the submission that at the time the first plaintiff submitted the application at the High Commission at Madras in 1988, he had satisfied the requirement as set out in art 14(1)(b) of the FC. He contends that his failure to register the births of the second and third plaintiffs within a year was purely a formal requirement and that this should not be an impediment to the Federal Government to deny the second and third plaintiffs their rightful citizenship, without adverting to any reason for the delay.

**[11]** With respect to the second and third 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 of the Federal Constitution.

**[12]** The application is opposed on the grounds:

(i) that the plaintiffs did not satisfy one of the two requirements under art 14(1)(b) in that the first 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 second and third plaintiffs to be registered out of time pursuant to art 14(1)(b) Part II of Second Schedule of the Federal Constitution;

(ii) that both the second and third plaintiffs were Indian citizens at the time when the first 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 art 15 (see birth certificates of the second and third plaintiffs (exhs 'HM-5' and 'HM-6' in encl 1). The Federal Government does not recognise dual citizenship and under art 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 one year period to register to qualify as a citizen under art 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 art 14 and art 16 relying on *Mak Sik Kwong v Minister of Home Affairs, Malaysia (No 2)* [1975] 2 MLJ 175.

THE SCOPE OF THIS APPLICATION

**[13]** At the outset, counsel for the plaintiffs made it clear that he was not challenging the rejection of the second and third plaintiffs' application for citizenship under art 15 but was merely seeking the declaratory order under art 14(1)(b) Part II Second Schedule (c) of the Federal Constitution.

**[14]** I shall therefore treat this originating summons as strictly an application under art 14(1)(b) of the Federal Constitution. A

DECISION

**[15]** Article 14(1)(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. B

**[16]** Part II of the Second Schedule (c) then provides that: C

> (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; D

**[17]** 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 the child's birth a citizen and second, he must register the birth within one year or such longer period as the Federal Government may in any particular case allow. E

**[18]** 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. F

**[19]** 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 summarised 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: G

> 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. H

I

**[20]** It is at once discernible that the first 'qualification' in art 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 recognised the natural law right of a citizen to have his offspring become a citizen after him.

A 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.

**[21]** Whereas due compliance with the primary rule of being born of a father who B 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 art 14 of the FC, the infraction being merely of a secondary rule whose main purpose is to serve the primary rule.

C **[22]** 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 art 14 Part II Second Schedule (c) as 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 D Federal Government is obliged to examine the circumstances of the non compliance and to determine on the merits whether a longer period ought to be granted.

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

**[24]** In making a decision, the Federal Government (acting by the Minister of F 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 refuse to allow a longer period of registration bearing in mind that the infraction is only of a G 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.

**[25]** An application under art 14 is quite unlike an application under art 15 where H a person has to apply to be a 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.

**[26]** I would venture to say that the procedure prescribed is purely regulatory or I 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 first 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 second and third plaintiffs' right to citizenship, the infraction being only of a secondary rule of procedure, the handmaiden of the law and not the mistress.

**[27]** It follows therefore, the grounds advanced by Senior Federal Counsel that the second and third defendants had been Indian citizens, that the Federal Government does not recognise dual citizenship and that persons holding dual citizenship may be deprived of their Malaysian citizenship under art 24 is quite irrelevant under art 14(1)(b) Part II Second Schedule (c) although they may be relevant under art 15.

**[28]** A birth certificate in any case is a certification of birth and not of citizenship and the fact that the second and third 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 first plaintiff submitted his application at the High Commission of Madras in 1998.

THE LETTER OF THE HIGH COMMISSION AT MADRAS: THE IMPLICATION

**[29]** The plaintiffs have omitted to state in their supporting affidavit what reason the first plaintiff gave to the Malaysian High Commission at Madras to support his application for late registration.

**[30]** 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 second and third plaintiffs' birth to be registered pursuant to art 14(1)(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.

**[31]** Nevertheless, the fact remains that the first plaintiff did submit an application under art 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 first 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.

**[32]** 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 first plaintiff's application to register late.

**[33]** It is true that the first plaintiff only applied to register the births of the second and third plaintiffs many years after the event but at the point of time when the High Commission replied by the letter of 5 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 second and third 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.

**[34]** The letter created in the mind of the first 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 first 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 first 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 5 September 1988.

EQUITY REGARDS THAT AS DONE WHICH OUGHT TO BE DONE

**[35]** The omission by the Federal Government for unexplained reasons to follow up from where it left off despite the first 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.

**[36]** 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 has been applied, among other situations, 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 has also been applied outside our jurisdiction (eg 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 of Madras.

**[37]** There shall accordingly be a declaration that the second and third plaintiffs are citizens of Malaysia under art 14(1)(b) of the FC subject to the verification that they are issue of the father, the first plaintiff. Upon verification, both the second and the third plaintiffs shall respectively be issued with a citizenship certificate and national registration identification card befitting their status. The plaintiffs shall be entitled to the costs of this application.

*Declaration granted.*

Reported by Brendan Navin Siva