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Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia

B

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–25–201 OF 2011
ROHANA YUSOF J
21 FEBRUARY 2010

C

Children and Young Persons — Adoption — Adoption order — Effect of — Child born out of wed-lock in Malaysia to Malaysian father and Thai mother — Whether adoption order suffices to qualify adoptive child as citizen by operation of law under art 14(1)(b) of the Federal Constitution

D

Children and Young Persons — Adoption — Citizenship — Child born out of wed-lock in Malaysia to Malaysian father and Thai mother — Whether adoption order suffices to qualify adoptive child as citizen by operation of law under art 14(1)(b) of the Federal Constitution

E

Children and Young Persons — Legitimacy — Definition of parent of illegitimate child — Whether refers to mother or biological father — Federal Constitution Second Schedule, s 17

F

Constitutional Law — Citizenship — Operation of law, by — Child born out of wed-lock in Malaysia to Malaysian father and Thai mother — Birth certificate issued as 'bukan warganegara' — Father subsequently obtaining adoption order for the child under Adoption Act 1952 — Whether child had become a citizen after adoption order was made — Whether an adoption order suffices to qualify an adoptive child as citizen by operation of law under art 14(1)(b) of the Federal Constitution — Whether child born to lawful parent

G

Words and Phrases — Definition of 'parent' of illegitimate child — Whether refers to mother or biological father — Federal Constitution Second Schedule, s 17

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The applicant, a Malaysian citizen, had a relationship with a Thai lady ('Ngamta') which cumulated in an unregistered marriage between them in Thailand. The marriage was neither registered in Thailand nor in Malaysia. A child named Foo Shi Wen was born in Malaysia out of that relationship. His birth certificate stated him as 'bukan warganegara'. He was however at all times

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under the care of his biological father, the applicant and his grandmother in Kuala Lumpur. The relationship between the applicant and Ngamta broke down and she returned to Thailand, voluntarily relinquished her parental rights over Foo Shi Wen boy to the applicant. The applicant then applied and obtained an adoption order of the child pursuant to the Adoption Act 1952 ('the Act'). Thereafter, the applicant applied to the National Registration Department for a new birth certificate to be issued to Foo Shi Wen. A new certificate was issued to the child with his citizenship status as 'bukan warganegara'. The applicant therefore commenced the present judicial review application seeking for an order of certiorari to quash the decision of the respondent. The application also sought for a declaration that, Foo Shi Wen was a citizen by operation of law following the adoption order made the Adoption Act. The main issues which arose to be decided were: (i) whether the child qualified to be a citizen by operation of law; (ii) whether an adoption order suffices to qualify an adoptive child as citizen by operation of law under art 14(1)(b) of the Federal Constitution ('Constitution'); and (iii) whether a writ of mandamus can be issued against the respondent to register the child as citizen resulting for the adoption order.

Held, dismissing the application with no order as to costs:

(1) Before a person can qualify as a citizen by operation of law, he must be born to a lawful parent under art 14 of the Constitution. The word 'parent' in art 14 must refer to lawful parent. The child here could not qualify as a citizen by operation of law because he was not born to a lawful parent (see paras 10–11).

(2) The emphasis of the requirement under art 14 has to be placed on his birth status because art 14 clearly refers to the fulfilment of the requisite conditions at the time of his birth. It could not be disputed that his birth status did not qualify him to be a citizen by operation of law (see para 11).

(3) Pursuant to s 17 of Part III of the Second Schedule of the Federal Constitution, in a case of an illegitimate child, as in this case, the word parent refers to his mother and not the biological father, the applicant (see para 18).

(4) There is no specific mention on the implication of the adoption order on issue of citizenship of a person, under the Adoption Act. The law is silent on matters of citizenship of an adopted child. Without any expressed provision in the law to say that an adoption order has implication on the citizen of the adoptive child, such implication cannot be simply read into the law (see para 23).

Obiter:

Eventhough the child was faced with constitutional impediment to qualify him as a citizen by operation of law, there were other provisions in the Federal Constitution that may qualify him to become citizen of Malaysia. Article 15A of the Constitution may be a possible solution. This provision does not stipulate any condition and would be an appropriate provision for the respondent to exercise discretionary power (see para 27).

[Bahasa Malaysia summary

Pemohon, seorang rakyat Malaysia, menjalinkan hubungan dengan wanita Siam ('Ngamta') yang mana melibatkan perkahwinan yang tidak didaftar di antara mereka di Thailand. Perkahwinan tersebut tidak didaftarkan sama ada di Thailand atau di Malaysia. Seorang kanak-kanak bernama Foo Shi Wen dilahirkan di Malaysia daripada hubungan tersebut. Sijil kelahirannya menyatakan dia sebagai bukan warganegara. Dia walau bagaimanapun pada kesemua masa di bawah jagaan bapa kandungnya, pemohon dan neneknya di Kuala Lumpur. Hubungan di antara pemohon dan Ngamta putus dan Ngamta pulang ke Thailand, secara sukarela melepaskan hak ibu bapa ke atas budak lelaki Foo Shi Wen kepada pemohon. Pemohon kemudiannya memohon dan memperolehi perintah pengambilan anak angkat kanak-kanak tersebut berikutan Akta Pengangkatan 1952 ('Akta'). Kemudiannya pemohon memohon kepada Jabatan Pendaftaran Negara untuk sijil kelahiran baru untuk dikeluarkan kepada Foo Shi Wen. Sijil baru dikeluarkan kepada kanak-kanak tersebut dengan status kerakyatannya sebagai bukan warganegara. Pemohon oleh itu memulakan permohonan semakan kehakiman ini memohon untuk perintah certiorari untuk membatalkan keputusan responden. Permohonan tersebut juga memohon untuk perisytiharan bahawa, Foo Shi Wen adalah rakyat oleh kuat kuasa undang-undang berikutan perintah pengambilan anak angkat di bawah Akta tersebut. Isu-isu utama yang berbangkit untuk diputuskan adalah: (i) sama ada kanak-kanak tersebut layak untuk menjadi rakyat oleh kuat kuasa undang-undang; (ii) sama ada perintah pengambilan anak angkat mencukupi untuk melayakkan anak angkat sebagai rakyat oleh kuat kuasa undang-undang di bawah perkara 14(1)(b) Perlembagaan Persekutuan ('Perlembagaan'); dan (iii) sama ada writ mandamus boleh dikeluarkan terhadap responden untuk mendaftarkan kanak-kanak sebagai rakyat akibat daripada perintah pengambilan anak angkat tersebut.

Diputuskan, menolak permohonan tanpa perintah kepada kos:

(1) Sebelum seseorang boleh layak sebagai rakyat oleh kuat kuasa undang-undang, dia mesti dilahirkan kepada ibu bapa sah di bawah perkara 14 Perlembagaan. Perkataan 'parent' di dalam perkara 14 mesti merujuk kepada ibu bapa sah. Kanak-kanak di sini tidak layak sebagai rakyat oleh kuat kuasa undang-ungang kerana dia dilahirkan bukan kepada ibu bapa sah (lihat perenggan 10–11).

(2) Penekanan terhadap keperluan di bawah perkara 14 mestilah diletakkan ke atas status kelahirannya kerana perkara 14 jelas merujuk kepada memenuhi syarat-syarat yang diperlukan pada masa kelahirannya. Ia tidak dapat dipertikaikan bahawa status kelahirannya tidak melayakkan dia menjadi rakyat oleh kuat kuasa undang-undang (lihat perenggan 11).

(3) Berikutan s 17 Bahagian III Jadual Kedua, Perlembagaan, dalam kes anak luar nikah, seperti dalam kes ini, perkataan ibu bapa merujuk kepada ibunya dan bukan bapa kandungnya, pemohon (lihat perenggan 18).

(4) Tidak terdapat penyataan spesifik atas implikasi perintah pengambilan anak angkat atas isu kerakyatan seseorang di bawah Akta tersebut. Undang-undang adalah senyap mengenai perkara-perkara kerakyatan anak angkat. Tanpa apa-apa peruntukan nyata dalam undang-undang untuk menyatakan bahawa perintah pengambilan anak angkat mempunyai implikasi ke atas kerakyatan anak angkat, implikasi sedemikian tidak dapat dibaca ke dalam undang-undang (lihat perenggan 23).

Obiter:

Walaupun kanak-kanak berhadapan dengan halangan perlembagaan untuk melayakkan dia sebagai rakyat oleh kuat kuasa undang-undang, terdapat peruntukan-peruntukan lain di dalam Perlembagaan yang mungkin melayakkan dia untuk menjadi rakyat Malaysia. Perkara 15A Perlembagaan mungkin adalah penyelesaian yang mungkin. Peruntukan ini tidak menyatakan apa-apa syarat dan akan menjadi peruntukan yang wajar untuk responden melaksanakan kuasa budi bicara (lihat perenggan 27).]

Notes

For cases on citizenship by operation of law, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2145–2146.

Cases referred to

AL Annamalai & Anor v Chandrasekaran Thangavelu [1999] MLJU 210; [1999] 8 CLJ 1, HC (refd)

M (An infant) Re [1995] 2 QB 479 (refd)

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

Shirley (Starrs) McKenna v Attorney General of Canada & Canadian Human Rights Commission & Adoption Council of Canada [1999] 1 FC 401, CA (refd)

Legislation referred to

Adoption Act 1952 ss 9, 9(2), (8), 25A

Births and Deaths Registration Act 1957

Federal Constitution arts 14, 14(1)(b), s 15A, Second Schedule, Part II, s 1(a), Part II, ss 17, 18

A Law Reform (Marriage and Divorce) Act 1976
Rules of the High Court 1980 O 53

Goh Siu Lin (Violet Mi Teng with him) (Shook Lin & Bok) for the applicant.
Najwa Bistamam (Federal Counsel, Attorney General's Chambers) for the respondent.

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Rohana Yusof J:

C **[1]** This is an application for judicial review made under O 53 of the Rules of the High Court 1980 (RHC), seeking for an order of certiorari to quash the decision of the respondent. The application also sought for a declaration that, Foo Shi Wen is a citizen by operation of law following an adoption order made by the High Court under the Adoption Act 1952.

D BRIEF FACTS

[2] The facts leading to this application are these. The applicant is a Malaysian Citizen. In September 2004, he started a relationship with a Thai lady (Ms Ngamta Thongsom) which cumulated in an unregistered marriage between them in Thailand on 21 July 2005. The marriage was neither registered under the governing laws of Thailand (Civil and Commercial Code of 1935, 1976 and 1990) nor in Malaysia under the Law Reform (Marriage and Divorce) Act 1976. Thus, the marriage was not legally recognised under either the laws of both Thailand and Malaysia.

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[3] A male child named Foo Shi Wen was born out of that relationship. He was born in Malaysia on 10 March 2006 as seen from his original birth certificate BR 15099 in exh FTA2. The certificate states him as 'bukan warganegara'. He took the citizenship of his mother. He however was at all times under the care of his biological father, the applicant and his grandmother in Kuala Lumpur.

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[4] The relationship between the applicant and Ms Ngamta broke down. She returned to Thailand and voluntarily relinquished her parental rights over Foo Shi Wen boy to the applicant. The applicant then applied and obtained an adoption order of the child pursuant to the Adoption Act 1952, vide Kuala Lumpur High Court Originating Summons No S8–21–1 of 2009 (as shown in exh FTA3).

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[5] Thereafter, the applicant applied to the National Registration Department for a new birth certificate to be issued to Foo Shi Wen pursuant to s 25 of the Adoption Act 1952 (see exh FTA4). A new certificate was issued to the child with his citizenship status as 'bukan warganegara'.

[6] The applicant now seeks to quash that decision of the respondent on the ground of error of law on the basis that the respondent failed to issue a birth certificate with his status as citizen by operation of law. The applicant contended that the impugned decision contradicts a pronouncement of the Kuala Lumpur High Court in another judicial review application R1–25–343 of 2008. Accordingly the High Court in that application had directed that the adopted child in that case be issued with birth certificate with his citizenship following that of his adoptive parent. Therefore relying on that authority it is the applicant's case that the citizenship of Foo Shi Wen should follow his adoptive father, the applicant.

[7] Further to that, learned counsel for the applicant Cik Goh Siu Lin submitted that the citizenship of Foo Shi Wen should follow the adoptive father because by virtue of the adoption order he should be treated as if he was born to the applicant like his natural child. That being so, learned counsel argued that Foo Shi Wen would qualify and can be deemed to be a child born to a parent either one of whom is a citizen on Malaysia, as envisaged by art 14 of the Federal Constitution.

[8] From the facts and the arguments put forth by learned counsel for the applicant the main issues to be deliberated are these:

(a) whether the child in this application qualifies to be a citizen by operation of law;

(b) whether an adoption order granted would suffice to qualify an adoptive child as citizen by operation of law under art 14(1)(b) of the Federal Constitution; and

(c) whether a writ of mandamus can be issued against the respondent to register the child as citizen resulting for the adoption order.

[9] Matters relating to issues on citizenship are stipulated under Part III of the Federal Constitution. Of relevance to this application is art 14. Article 14 stipulates the necessary requirements for a person to become a citizen of the Federation by operation of law.

[10] Learned federal counsel Puan Najwa bt Bistaman submitted that art 14(1)(b) read together with the Second Schedule Part II s 1(a) entails two main requirements to be fulfilled before a person can qualify as a citizen by operation of law. They are as follows:

(a) a person must be born in the Federation; and

(b) that *either parent at the time of birth* of the child is a citizen or a permanent resident of the Federation.

[11] It is clearly under the above provisions as submitted by learned federal counsel that before a person can become a citizen by operation of law, at least one parent must be a citizen or a permanent resident, at the time of his birth. It is not disputed that at the time this child was born, the parent was not lawfully married under any written law. Learned federal counsel contended that the word 'parent' cannot refer to a father of an illegitimate child. She relied on the definition of 'parent' in the *Stroud's Judicial Dictionary of Words and Phrases* (7th Ed), which says that the word 'parent' cannot include a father of an illegitimate child. This definition was also based on the decision by Lord Denning MR in *Re M (An infant)* [1995] 2 QB 479. In the case of *Shamda Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] CLJ 416 the court relied on *Black's Law Dictionary Abridged* (6th Ed), which defines parent as 'the lawful father and mother of the person'. Thus from all these definitions it is clear that the word 'parent' in art 14 refer to a lawful parent in a recognised marriage in the Federation.

[12] It is quite clear from the provisions cited that, before a person can be qualified as a citizen by operation of law, he must be born to a lawful parent under the said art 14. Since there is no specific definition of the word 'parent' in the Federal Constitution, the dictionary meaning cited would have to be resorted to. The dictionary meaning of the word 'parent' must therefore refer to lawful parent. Hence I agree with the contention of learned federal counsel that the word 'parent' in art 14 must refer to lawful parent. I have no hesitation to agree with learned federal counsel that the child here cannot qualify as a citizen by operation of law because he was not born to a lawful parent.

WHETHER AN ADOPTION ORDER CAN SUPPLANT THE REQUISITE QUALIFICATION

[13] Cik Goh Siu Lin for the applicant further submitted that as a consequence to the adoption order, it is an automatic operation of the law that the child takes on the citizenship of his adoptive father, the applicant. It was contended by learned counsel that this child, vide the adoption order should be treated as if he was born of the applicant's marriage as provided by the Adoption Act. Hence he would qualify the requirement of art 14.

[14] Her argument is premised on s 9 of the Adoption Act. She submitted that an adoption order has the effect of imposing all rights, liabilities, duties etc upon the applicant as though the child had been born to the adopter in a lawful wedlock. Thus in her contention she argued that since the effect of the adoption order deems this adopted child to have been born to the applicant, he should therefore be deemed to be born to a lawful parent. Furthermore, learned counsel contended that s 25A of the Adoption Act also lays down particulars to be inserted into a birth certificate of an adoptive child which will not reflect his

adoptive status. In fact after an adoption order he should be issued with a new certificate of birth which replaces the certificate of births issued under the Births and Deaths Registration Act 1957. Hence to all intents and purposes the Adoption Act deems an adopted child to be a natural child of his adopted parent and this would deem him to be a child born to a natural parent and hence qualifies the requirement under art 14 of the Federal Constitution.

[15] In addition learned counsel contended that, the main consideration and principles to be employed in the respondent's decision in this case was to balance between immigration policy of the country and the welfare of the child. In any conflict between the two she contended, the first consideration should be given to the welfare of the child, and this the respondent had failed to do.

[16] Premised on her above argument, learned counsel contended that the respondent's decision in not allowing Foo Shi Wen, to follow the adoptive father's citizenship in this case is therefore an error of law and liable to be quashed.

[17] First to recapitulate the legal position, it is clear that this child was not born to a lawful parent and hence cannot be a citizen by operation of law under art 14 as discussed earlier. Article 14(1) must be read together with Second Schedule Part II s 1(a) which states:

> (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 bom within the Federation of whose parents one at least is at the time of his birth either a citizen or permanently resident in the Federation;
>
> (b) …

[18] The above provisions are clear that, to be a citizen by operation of law under art 14, a person must be born within Federation and at the time of his birth, his either parent is a citizen or a permanent resident. If we examine art 14 read together with Second Schedule Part II s 1(a) carefully, it is clear that to qualify as a citizen by operation of law a person must be born within the Federation to parents, one at least is at the time of his birth either a citizen or permanently resident in the Federation. There is no doubt that at the time of his birth Foo Shi Wen was not born to a lawful parent. Since at birth he was not born to a lawful parent he did not qualify to be a citizen by operation of law. The emphasis of the requirement under art 14 has to be placed on his birth status because art 14 clearly refer to the fulfilment of the requisite conditions at the time of his birth. It cannot be disputed that his birth status does not qualify

him to be a citizen by operation of law. Furthermore s 17 of the Part III of the Second Schedule provides that '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 …' Thus, it is clear that in a case of an illegitimate child, as in this case, the word parent refers to his mother and not the biological father, the applicant.

[19] The next question to be asked is whether the adoption order made under the Adoption Act which in effect deems him to be a natural child of his adopted father in this case, would then change his birth status for the purpose of art 14.

[20] Let us now examine the effect of the adoption order in relation to the deeming provision as submitted by learned counsel of the applicant. Section 9 of the Adoption Act 1952 explains the wide implications of an adoption order. This section clearly covers all rights and obligations of an adoptive parent over an adoptive child. The rights include all the parental rights, future custody, maintenance, education including rights to appoint guardian, consent in relation to marriage and other such rights exercisable as though the child is born to the adopter in lawful wedlock. Section 9(2) provides for the effect of the adoptive order on inheritance, disposition of moveable and immoveable properties. Whilst under s 9(8) it is provided that the rights of an adoptive child under any written law in relation to compensation occasioned by death of a person caused by actionable wrong, is the same as that of a natural child.

[21] It is pertinent to note that there is no specific mention on the implication of the adoption order on issue of citizenship of a person, under the Adoption Act. The implication of an adoption order on the child and his adoptive parents (as laid out in s 9), covers a whole range of rights of an adopted child in relation to parental rights, future custody, maintenance, education including rights to appoint guardian, consent in relation to marriage. The law is silent on matters of citizenship of an adopted child. In my view without any expressed provision in the law to say that an adoption order has implication on the citizen of the adoptive child, such implication cannot be simply read into the law.

[22] The objective of the deeming provision made to the adoptive child to be treated as a natural child is clear. It is only for the purposes stipulated under s 9 and no more. For that reason in my view it cannot be extended to art 14. Furthermore, the deeming provision cannot change the birth status of an adopted child. His birth status as envisaged by art 14 remain the same, despite the adoption order, because the deeming provision is only for the purposes enumerated under s 9 of the Adoption Act.

[23] In the same light art 14 also does not make specific reference as to whether an adopted child can be treated as being born to a lawful parent for the purpose of art 14. Thus it would be inappropriate to infer or imply that an adoption order also deems an adopted child to be a natural child for purpose of citizenship when both the Adoption Act and the constitutional provisions are silent on the same. it is my considered view that, the adoption order in this case therefore cannot be read to affect the citizenship of the adopted child, in absence of clear written provision in the law.

[24] Another argument put forth by learned counsel is on the issue of the child's welfare. Learned counsel argued that, welfare of a child should prevail over immigration policy of a country. She submitted that in *AL Annamalai & Anor v Chandrasekaran Thangavelu* [1999] MLJU 210; [1999] 8 CLJ 1 the High Court had indeed taken into consideration the welfare of a child in issuing the adoption order in that case, against the will of his natural parent. I have also considered the cases referred to by learned counsel in relation to the issue of balancing these two conflicting interests. The Canadian case of *Shirley (Starrs) McKenna v Attorney General of Canada & Canadian Human Rights Commission & Adoption Council of Canada* [1999] 1 FC 401 is another case cited to support this point. In this case the law of Canada no does not allow discriminatory treatment in relation to a child adopted by Canadian family locally or abroad. The child adopted by Canadian family abroad are now given automatic citizenship once proven that the adoption is made in accordance with local laws and that the adoption creates a child-parent relationship between them. It must be noted that, there is no law or any provision in the Adoption Act that provides for the same in Malaysia.

[25] I agree with learned counsel that preference is to be given to the welfare of a child in all adoption case. However, I do not see any conflict of consideration that ensues from the facts of this case, for the respondent to weigh such conflict. It must be noted that art 14 read together with Second Schedule Part II s 1(a) lays down the requisites of a citizen by operation of law in very clear term. A person who meets all the criteria therein would qualify to become a citizen under that provision. There is no room for an exercise of discretion under art 14. Hence the argument of learned counsel that the respondent should weigh conflict of consideration between immigration policy and the welfare of a child simply cannot arise here, since there is no room for any discretion to be employed under art 14. The test to be applied is whether a person qualifies all the necessary requirements of art 14. Once the requisite conditions under these provisions are met it is automatic that a person is a citizen by operation of law.

[26] It is a fact that at the time of his birth he did not have a lawful parent. It is clear that there is no expressed provision under the Adoption Act to deem him to be born in a lawful parent for purposes of his citizenship. That being so in my considered view the adoption order cannot therefore qualify him to become a person who was born to a lawful parent at the time of his birth as envisaged by art 14(1)(b) read together with Second Schedule Part II s 1(a). Had the legislation intended for such a proposition either the Federal Constitution or the Adoption Act would have addressed this clearly in the respective laws. Since there is no provision in the Federal Constitution that provides for the implication of adoption order on art 14, in my view it is would be wrong for us to try and supplement it by mere deduction. Premised on all the above reasons the application by the applicant would have to be dismissed.

[27] It is also observed that, as contended by learned federal counsel, eventhough this child is faced with constitutional impediment to qualify him as a citizen by operation of law, there are other provisions in the Federal Constitution that may qualify him to become citizen of Malaysia. Article 15A may be a possible solution. Under art 15A it is provided that 'Subject to Art 18, the Federal Government may in such special circumstances as it thinks fit cause any person under the age of twenty-one years to be registered as a citizen'. This provision does not stipulate any condition and would be an appropriate provision for the respondent to exercise discretionary power.

[28] I note that as stated in the affidavit of the applicant, before the adoption order was issued, an application was already made under art 15A. This is shown in exh FTA6 and the application it was declined. However, I must point out that the application before me is strictly confined to issue of whether an adoption order can qualify person who had otherwise not qualified under art 14. I am not deliberating on whether this child can qualify as a citizen of Malaysia under any other provision such as suggested by learned federal counsel under art 15A. I however agree with learned federal counsel that eventhough art 14 cannot be invoked in this case it does not preclude the applicant to apply under the other provisions of the Constitution.

Premised on all the above reasons, the application of the applicant is hereby dismissed and I make no order as to costs.

Application dismissed with no order as to costs.

Reported by Kanesh Sundrum