CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & 2 Others

Summary of the Chief Justice's Grounds of Judgment

[1] The main issue in this appeal concerns the constitutional entitlement of the 1st appellant to Malaysian citizenship.

[2] The appellants had filed an originating summons ('OS') in the High Court, seeking for the following orders:

> "1. A declaration that the 1st appellant is a citizen of Malaysia by operation of law pursuant to Article 14(1)(b), Part II Section (1) paragraph (b) of the Federal Constitution;
>
> 2. An Order directing the respondents to issue a Certificate of Birth to the 1st appellant recording that the 1st appellant is a citizen of Malaysia within the period of twenty-one (21) days from the date of the Order;
>
> 3. An Order directing the respondents to issue the 1st appellant with a MyKid National Identity Card recording that the 1st appellant is a citizen of Malaysia within the period of twenty-one (21) days from the date of the Order;
>
> 4. An order that the 1st respondent do register and update the name of the 1st appellant in the register pursuant to section 4 of the National Registration Act 1959 and Regulation 11 of the National Registration Regulations 1990;
>
> 5. An award of damages including exemplary damages due to the respondents' unlawful and unconstitutional acts of refusing to issue the 1st appellant with a Certificate of Birth as a Malaysian citizen;
>
> 6. Costs;

7. Such further orders and/or orders that the Court thinks just.".

[3] Before us, learned counsel for the appellants only prayed for an order in terms of Prayer 1 – the declaration.

Constitutional Provisions

[4] The relevant constitutional provisions in this appeal are Article 14(1)(b) of the FC and the Second Schedule particularly section 1(b) of Part II and section 17 of Part III. The provisions read as follows:

"**Article 14**

(1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

…

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

Section 1, Part II Second Schedule

(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:

…

(b) every person born outside the Federation whose father is at the time of birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State;

…

Section 17 of Part III, Third Schedule

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.".

[5] Part II is directly governed by Article 14(1)(b) of the FC. Part III however is constitutionally sourced from Article 31 which provides as follows:

"**Article 31**

Until Parliament otherwise provides, the supplementary provisions contained in Part III of the Second Schedule shall have effect for the purposes of this Part.".

Decision of the High Court

[6] The High Court, in interpreting Article 14(1)(b) of the FC together with the provisions of Parts II and III, held that the 1st appellant, being an illegitimate child, was not allowed to take after the citizenship of his father, the 2nd appellant. This limits his lineage to his mother and since she is not a Malaysian citizen, the 1st appellant is not entitled to citizenship by operation of law under section 1(b) of Part II. The fact that the 1st appellant was legitimated upon his parents' marriage subsequent to his birth was immaterial to the construction of the provisions of the FC.

[7] The thrust of the reasoning was that section 17 of Part III qualifies the application of Part II, specifically section 1(b) thereof. The important point to note on the material finding of the High Court was that legitimacy must be assessed from the time of birth. Only if the 1st appellant was legitimate at the time of birth would he automatically qualify for citizenship by operation of law under Article 14(1)(b) of the FC. Premised on the above reasoning, the appellants' prayer for the declaration in Prayer 1 of the OS was accordingly refused.

[8] In arriving at its decision, the High Court had regard to previously decided High Court decisions and binding precedents of the Court of Appeal.

Decision of the Court of Appeal

[9] The arguments advanced by the respondents before the Court of Appeal were principally the same as the reasoning of the High Court. The Court of Appeal agreed with the reasoning of the High Court and affirmed it based on the same judicial decisions relied on by the High Court and the respondents.

[10] An additional point was raised in the Court of Appeal. The respondents argued that the 1st appellant is a holder of a Filipino passport and accordingly he committed an act which would deprive him of a Malaysian citizenship under Article 24 of the FC. The Court of Appeal agreed with the respondents.

[11] Aggrieved by the concurrent decisions of the courts below, the appellants filed a motion for leave to appeal to this Court. That motion was allowed on the following four (4) questions of law ('Questions'):

"**Question 1**

Whether it is proper to import into Part II Section 1(b) of the Second Schedule to the Federal Constitution any other requirements for the citizenship of a child born to a Malaysian father other than those expressly stated in the provision?

Question 2

Whether the words "born outside the Federation" in Part II Section 1(b) of the Second Schedule to the Federal Constitution can be properly read as requiring that the child not hold any other citizenship and/or passport or be stateless to qualify for Malaysian citizenship by operation of law?

Question 3

Whether the fact that the biological parents of the child who were not married to each other at the time of the child's birth but subsequently marry, disqualifies the child from acquiring a Malaysian citizenship by operation of law pursuant to Article 14(1)(b) and Part II Section 1(b) of the Second Schedule of the Federal Constitution?

Question 4

Whether having met the qualifications for citizenship by operation of law under Article 14(1)(b) read together with Part II Section 1(b) of the Second Schedule of the Federal Constitution, can the courts arbitrarily impose further qualifications which are not within the said Article?".

General Principles on Constitutional Interpretation

[12] This Court in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, at paragraph 13 advised that provisions of the FC which protect and promote fundamental liberties must be construed broadly, generously and prismatically whereas provisions which derogate from such liberties must be construed narrowly.

[13] The other important factor in constitutional interpretation is that judicial precedent plays a lesser part (see *Dato Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, at page 32).

[14] This does not mean that judicial precedent is irrelevant. *Stare decisis* ought to be observed with a view to keeping the law consistent (see *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 at paragraph 35; *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293; and *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276). However, the Courts cannot unduly hamper or restrict themselves to tabulated legalism especially in the construction of fundamental liberties which are always and naturally evolving. To harmonise the two conflicting notions, I reckon that general and guiding principles ought to be followed so long as they remain legally tenable or non-perverse. In that context, the Judiciary as the final arbiter of the law and the guardian of the FC may continue to build on constitutional jurisprudence without rigidly and pedantically confining itself to judicial precedent.

[15] Another aspect of constitutional interpretation is that a constitution must be interpreted in light of its historical and philosophical context to fully appreciate the meaning of and reasons for which certain provisions were drafted (see *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, at paragraph 29).

[16] Yet another general cannon of constitutional interpretation that should not be overlooked is that the provisions of the FC must be construed as against one another and not by contrasting it to or by applying statutes for that purpose (*see Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Chen Chuen, a child* [2017] 3 MLJ 308).

[17] In this case, the primary authorities relied upon by the parties and the Courts below are all subordinate to this Court – the High Court and the Court of Appeal. They do not therefore legally bind this Court under the principles of *stare decisis*. The cases cited were, among others, as follows:

(i) *Chin Kooi Nah v Pendaftar Besar Kelahiran & Kematian Malaysia* [2016] 1 CLJ 736 (‘*Chin Kooi Nah’*);

(ii) *Foo Toon Aik v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 4 CLJ 613 (‘*Foo Toon Aik’*);

(iii) *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 (‘*Pang Wee See’*);

(iv) *Lim Jen Hsian & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2018] 6 MLJ 548 (‘*Lim Jen Hsian’*); and

(v) *Madhuvita Augustin v Augustin Lourdesamy & Ors* [2018] 4 CLJ 758 (‘*Madhuvita*’).

[18] The rest of the cases cited either by the Courts below or the respondents appear to apply or distinguish the above cases, in principle. Insofar as *Madhuvita* is concerned, which is relied substantially by the appellants and thence responded substantially by the respondents, the respondents withdrew their appeal at the Federal Court (see Federal Court Civil Appeal No. 01-4-02/2014 between *Augustin Lourdesamy & Ors v Madhuvita Augustin*) and proceeded to resolve the issue. I understand that citizenship has since been granted to the respondent there.

[19] As for the instant appeal, now that the matter is before the apex Court for determination, the issue may be approached from a fresh angle as argued.

[20] The ultimate issue in this case appeal relates to the interpretation of Article 14(1)(b) of the FC and Parts II and III as regards the 1st appellant’s right to citizenship by operation of law. It is my view that as the right of any person to citizenship comprises the right to liberty, the provisions of Article 5(1) of the FC are relevant. And, since the issue concerns the right of a person based on the distinction of the citizenship status of their parents or

in any case, the distinction between the right of illegitimate and legitimate children to citizenship, the right of equality before the law and equal protection of the law under Article 8(1) is also materially relevant.

[21] As such, in construing the provisions of the FC strictly on the basis of the text of the FC alone, this Court ought to have regard to the purposive cannon of construction given that the fundamental rights of a person under Articles 5(1) and 8(1) are intertwined. In that regard, the relevant provisions of the FC relating to citizenship must be construed contextually.

The Respondents' Case

[22] As the courts below agreed with the arguments canvassed by the respondents, it would be more appropriate to begin with their case.

[23] The respondents argued, in essence that the words 'subject to' in the opening words of section 1 of Part II mean that the interpretation provision in section 17 of Part III of that Schedule require that references to that person's 'father' in section 1(b) of Part II must be construed as references to his 'mother'. This, it was submitted, factors in the legitimacy status of the person claiming citizenship in any given case from the time of his birth and not at any other moment in time.

[24] Learned Senior Federal Counsel ('SFC') submitted that the person's subsequent legitimisation by law subordinate to the FC is not sufficient to entitle him to citizenship by operation of law under the FC.

[25] Applying the facts to the law as submitted, learned SFC argued that since the 1st appellant was illegitimate at the time of birth, section 1(b) of Part II only factors in the citizenship of his mother. Since his mother is not a citizen of Malaysia, this means that the 1st appellant is not entitled to citizenship by operation of law under that provision. According to the respondents, the fact that the 2nd appellant is the 1st appellant's biological father is irrelevant.

[26] The respondents asserted alternatively that the 1st appellant, being a citizen of the Republic of Philippines and holding a valid passport of that country deprives him of Malaysian citizenship under Article 24 of the FC as was also decided by the Court of Appeal.

The Appellants' Case

[27] The appellants have no quarrel with the position of the law that the FC is to be construed within its four corners and without regard to other laws subordinate to it.

[28] The thrust of the appellants' case as canvassed by learned counsel is essentially that the word 'person' in section 1(b) of Part II must be given its literal interpretation and that it ought not to demarcate between legitimate and illegitimate children. Section 1(b) qualifies its application to the father and it is the status of the father that the Court should be concerned with. No external clauses such as that of section 17 of Part III should be imported to ascertain the clear meaning of the word 'father' in section 1(b) of Part II.

[29] Even if section 17 of Part III were to be imported, learned counsel argued that the words used in section 17 are ‘is illegitimate’ suggesting that it must be a pre-existing status which is capable of being overridden by subsequent factual developments. Thus, a person who is subsequently legitimated is not caught by the provision of section 17. The respondents’ argument as to the time of birth is therefore not applicable. In this sense, the appellants argued that if the provisions of the Legitimacy Act were applicable, the 1st appellant is not someone who ‘is illegitimate’.

[30] In the course of the hearing, the Bench posed a question to counsel for both the appellants and the respondents. The question was whether the word ‘father’ should be interpreted to mean biological father such that section 17 of Part III only applies in situations where the child does not know his father or that the status of the father is generally unknown.

[31] The respondents did not directly address the question and chose instead to rest on their written submission. The written submission merely elaborates the points they ventilated in oral argument.

[32] The appellants agreed with the method of interpretation suggested in the question from the Bench. Accordingly, they submitted that the word ‘father’ in section 1(b) of Part II continues to apply in relation to an illegitimate child whose father is known. Section 17 of Part III, it was submitted, only applies in situations where the child, being illegitimate, does not know his father such that he may be conferred citizenship through his mother provided that she is a citizen and meets all the other requirements of section 1(b) or any other provision.

[33] As regards Article 24, learned counsel for the appellants argued that the Court of Appeal interpreted and applied that provision erroneously.

Findings/Analysis

[34] For the reasons that follow, I am unable, with the greatest of respect, to agree with my learned sister Rohana Yusuf, PCA.

Interpretation of Article 14(1)(b), section 1(b) of Part II and section 17 of Part III

[35] The essential and primary issue falling for consideration in this appeal is how section 1(b) of Part II ought to be interpreted in light of section 17 of Part III. In this regard, the following questions arise:

(i) does section 17 of Part III, an interpretive provision, envelop and qualify the interpretation of section 1(b) of Part II as contended by the respondents; or

(ii) does section 1(b) of Part II function independently, such that section 17 of Part III is only invoked in cases where the person seeking citizenship by operation of law is illegitimate and has no information as to who his father is; and

(iii) is section 17 of Part III even germane to the construction of section 1(b) of Part II in the instant appeal, given that it is made pursuant to Article 31 of the FC, as a supplementary provision?

[36] To draw out what I consider is the correct interpretation, it is my view that we must first understand and appreciate the concepts of *jus soli* and *jus sanguinis* which concepts all parties during the hearing accepted as being applicable to this appeal.

[37] *Jus soli* encapsulates the notion that a person is entitled to citizenship purely on the basis of the place where he is born irrespective of the citizenship status of his parents. *Jus sanguinis* on the other hand looks only to the citizenship status of the parent irrespective of where the child was born. Our FC amalgamates both *jus soli* and *jus sanguinis* into its provisions.

[38] Looking at the citizenship scheme and structure of the FC as a whole, it is my interpretation that the framers of the FC intended that the conferral of citizenship be crafted as widely as possible to enable all relevant persons at the time of the formation of Malaya and later Malaysia the right to be conferred citizenship by operation of law. There are several indicators of this.

[39] Firstly, I refer to the comments to the working drafts of the initial draft Constitution of the Federation of Malaya and compare it to the existing provisions in Part III to ascertain the purpose of the inclusion of section 17 of Part III.

[40] The minutes of the Working Party of the Constitution of the Federation of Malaya 1957 in CO 941/86 elaborated in its comments on section 7(3) which later became section 17 of Part III as follows:

> "Under section 7(3) of the Second Schedule to the draft Constitution it is provided that the word "child" should include an illegitimate and a "legally adopted" child and that in respect of any such child the expression "father" should be construed as meaning "mother", "adoptive father" or "adoptive mother", as the case may be. **The effect of including "illegitimate children" and of correspondingly construing in the case of such children the words "father" and "mother" is that if an illegitimate child were born outside the Federation to a mother who at the date of the birth was a citizen, the child would become a citizen by operation of law under Article 14(1)(c) if that mother herself was born in the Federation** or if the birth was registered at a Malayan consulate or the mother was in service under the Government of the Federation. **Another effect is that an illegitimate child whose mother on or after Merdeka Day becomes a citizen would, under this Clause, become entitled to be registered**. There seems to be no grounds for objection to an illegitimate child born to a Federal citizen becoming itself a Federal citizen in the way proposed by the Reid Commission, and the Working Party recommends accordingly.".

[41] In my view, the above comment suggests that the Working Committee had to consider all possible scenarios and factual circumstances that may arise if a person claiming to be entitled to citizenship was not within the usual factual situation or rule contemplated by Part II. It suggests that section 17 of Part III was inserted for the purpose of ensuring, on the basis of *jus sanguinis* that even if a child was born outside the Federation, and the identity of the father was unknown on account of him being illegitimate, the mother being a citizen or later becoming a citizen is sufficient enough a reason to confer citizenship on that person so claiming.

[42] Reading section 17 of Part III in this way, it is clear that it was intended to function as an enabling provision to encompass children who do not know the identity of their fathers and ultimately avoid the children from being stateless. This intent of preventing statelessness is clearly evident in say, Article 26B. This is in contrast to the respondents' interpretation which seeks to restrict citizenship to a narrow compass which I find is contrary to the language and purposive intent of section 1(b) of Part II.

[43] Reading the other provisions in Part III also leads me to the inevitable conclusion that section 17 was intended to be an enabling provision.

[44] For example, section 19 of Part III provides as follows:

> "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 the 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.".

[45] Section 17 has singled out "accordingly section 19 … shall not apply to such a person.". The purpose of section 19, read in context, is to confer citizenship to a child who was born posthumously. In this regard, the meaning to be accorded to section 19 is that even if the biological father of the child is dead or died before the birth of the child, the father is still

considered to exist for the purposes of citizenship. It therefore makes sense why section 17 of Part III excludes the application of section 19. This is because, section 19 presumes that the identity of the father was known which in turn leads to the conclusion that section 17 must have contemplated a situation where the father's identity is not known. Such a situation may only occur in a case where the child was born illegitimately.

[46] The other provisions when read in the context of section 17 which shed further light on the interpretation to be afforded to it are sections 19A and 19B of Part III. They stipulate thus:

> "19A. For the purposes of Part I or II of this Schedule a person born on board a registered ship or aircraft shall be deemed to have been born in the place in which the ship or aircraft was registered, and a person born on board an unregistered ship or aircraft of the Government of any country shall be deemed to have been born in that country.
>
> 19B. For the purposes of Part I and II of this Schedule any new born child found exposed in any place shall be presumed, until the contrary is shown, to have been born there of a mother permanently resident there; and if he is treated by virtue of this section as so born, the date of the finding shall be taken to be the date of the birth.".

[47] Both sections 19A and 19B of Part III are constitutional presumptions as to births. Section 19A codifies in part the international principle of flag state jurisdiction and applies in relation to persons who are born on a vessel such that their birth there is attributed to the place of registration of the vessel. Section 19B applies in relation to children who are found abandoned in any given place such that the place of

abandonment is treated as their place of birth and where their mother is also permanently resident there.

[48] All the above sections, namely sections 17, 19, 19A and 19B exist as supplementary or filler sections – so to speak – to supplement or to close any gaps or to resolve technicalities that may arise when the person's parents' identity is in issue or even if their own place of birth is in issue so long as that is a relevant question for the purposes of Part I or Part II respectively.

[49] There is a further point to note when interpreting the provisions of Part III as a whole and in their context. Article 31 of the FC labels Part III as 'supplementary provisions'. The general header to Part III also describes the entire Part as 'Supplementary Provisions Relating to Citizenship'.

[50] The word 'supplementary' in ordinary parlance generally means to supplement, 'completing or enhancing something'. Synonyms for 'supplementary' include words such as 'additional', 'extra', 'further', 'more', 'complementary', 'subsidiary', 'accessory', 'auxiliary', 'ancillary' and 'supportive'. The general tenor of the words and the purpose of Article 31 of the FC suggest that Part III was meant to serve as an aid to assist in the interpretation of Parts I and II and not to qualify or conditionalize the application of those Parts to Part III. Certainly it cannot and ought not to be interpreted to the extent of diluting the intent and purpose of the principal provisions.

[51] How then should the word 'father' appearing in section 1(b) of Part II be construed without qualifying it to section 17 of Part III? On this point, the approach taken by the Court of Appeal in *CAS v MPPL & Anor* [2019] 2 CLJ 454 ('*CAS*') which judgment was affirmed by this Court on appeal in *MPPL v Anor v CAS* (02(f)-14-03/2018(W), is instructive.

[52] The issue in *CAS* concerned the distinction between paternity and legitimacy albeit in a different context.

[53] *CAS* establishes the principle that paternity and legitimacy are two distinct concepts. Paternity is an issue of fact while legitimacy is a construct of the law.

[54] Significantly, on the facts of this appeal, the 2nd appellant claims to be the father of the 1st appellant and to this end has even adduced a DNA test to establish incontrovertibly that he is the father biologically and in law. The 'blood relation' element of *jus sanguinis* which section 1(b) of Part II codifies in part has therefore been met.

[55] Additionally, Article 5(1) of the FC guarantees the right to life and personal liberty. Reading Article 5(1) broadly and prismatically, the right to life must include the right to nationality (see generally Article 15 of the Universal Declaration of Human Rights 1948 which provides that everyone has a right to nationality which right is not inconsistent with the FC). This method of interpretation supports the purposive approach I have taken to read section 17 of Part III in its appropriate context having regard to the drafting history of the FC.

[56] The logical conclusion therefore is that having regard to the historical and purposive cannons on construction as borne out from the foregoing interpretive exercise, the word 'father' in section 1(b) of Part II and anywhere else relevant to the context of this appeal ought to be construed as meaning 'biological father'. Thus, the legitimacy status of any person claiming citizenship under Article 14(1)(b) read together with Part II is an irrelevant factor in cases where paternity is known and the said biological father is a citizen of Malaysia and has met the rest of the requirements of section 1(b) of Part II.

[57] At this juncture, I find it pertinent to address the appellants' arguments as to unlawful discrimination.

Unlawful Discrimination

[58] The most recent and authoritative pronouncement on Article 8(1) is in the judgment of the 9-justices bench in *Alma Nudo Atenza v Public Prosecutor & other appeals* [2019] 4 MLJ 1 ('*Alma Nudo'*). This Court, at paragraph 117, upon affirming a long line of pronouncements on the subject advised that when interpreting other provisions in the FC the courts must do so in light of the 'humanising' and 'all-pervading' provision of Article 8(1).

[59] Article 8(1) of the FC reads as follows:

> "(1) All persons are equal before the law and entitled to the equal protection of the law.".

[60] Article 8(2) provides that:

> "(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground of only religion, race, descent, place of birth or gender in any law…".

[61] Discrimination is not always unlawful. There are two ways in which the FC allows it. The first, as made plain by Article 8(2), is where discrimination is expressly authorised by the FC itself. Article 8(5) is the constitutional exception to Clauses (1) and (2) of Article 8. Clause 5 of Article 8 reads:

> "(5) This Article does not invalidate or prohibit –
>
> (a) any provision regulating personal law;
>
> (b) any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion;
>
> (c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;
>
> (d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;
>
> (e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;
>
> (f) any provision restricting enlistment in the Malay Regiment to Malays.".

[62] Taking heed from *Lee Kwan Woh* (supra), as Article 8(5) is a derogation from liberty, it must be construed narrowly. Applying a narrow interpretation, the provision is clear as to the types of discrimination allowed under the FC and is, to that extent, exhaustive. A perusal of it does not suggest that it allows discrimination in respect of the conferment of citizenship under any of the provisions of Part III, i.e. the provisions on citizenship. In fact, as earlier observed, the FC guards against statelessness as seen in Article 26B.

[63] The second type of discrimination which Article 8(1) allows, based on decided and settled cases is the concept of reasonable classification (see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, at page 117 and generally *Mohamed Sidin v Public Prosecutor* [1967] 1 MLJ 106). Discrimination is unlawful and in violation of Article 8(1) if it is not founded on an intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question.

[64] There is a further point that must be made in respect of Clauses (1) and (2) of Article 8 that has not perhaps been explained in other judgments. 'Law' is defined in Article 160 of the FC to include 'written law'. The term 'written law' is further defined in that Article to include 'this Constitution'. Upon reading these definitions into the word 'law' in both Article 8(1) and Article 8(2) it is abundantly clear that the intention of the drafters of the FC was that the tests on unlawful discrimination applicable to ordinary laws passed by the Legislature or any executive act applies with equal force to the provisions of the FC itself.

[65] Based on the submissions of the appellants, I conclude that at least three instances of discrimination will arise if one were to read section 17 of Part III as qualifying the application of section 1(b) of Part II of the said Schedule.

[66] The first form of discrimination is against the parents. In a case where the parental status of child is known but the child is born out of wedlock, interpreting section 17 of Part III in the manner advanced by the respondents has the effect of discriminating the father of the person claiming to be entitled to citizenship by operation of law. The fathers are essentially deemed non-existent and the fact of paternity is ignored.

[67] The second instance relates to the *jus sanguinis* principle which section 1(b) of Part II seems to partly encapsulate. By this biological criterion, the only element that needs to be proved, apart from the other requirements of that section, is that the father is a Malaysian citizen. It matters not that the child is legitimate or illegitimate. However, if one were to accede to the interpretation accorded by the respondents, the *jus sanguinis* principle is effectively rendered otiose for illegitimate children.

[68] The third instance of discrimination though not expressly submitted but which must no less be inferred for coherence of the law is the discriminatory effect the respondents' reading of section 17 of Part III has on Muslims. The FC does not define 'legitimacy' and its cognate expressions. Bearing in mind the principle that in construing the constitutional provisions in issue no reference should be made to other statutes but the FC itself, section 17 of Part III as read by the respondents will create two different instances of applications on Muslims.

[69] This is because under almost all of the State Enactments, a Muslim child is considered legitimate only if he is born more than six *Qamariah* months after the marriage of his parents. Reading 'illegitimate' the same way to Muslims in spite of the Islamic law interpretation will result in different applications to Muslims in terms of personal law and citizenship.

[70] Additionally, it would cause discrimination between Muslims and non-Muslims. A non-Muslim child who was born illegitimate but who was subsequently legitimated would not be considered as legitimate for purposes of citizenship, but a Muslim child who is otherwise born illegitimate would for purposes of citizenship be considered legitimate. Surely that could not be the construct intended by the framers of the FC nor could they have intended for Article 8(5)(a) of the FC to apply as the question here turns on the qualifications for citizenship by operation of law and not personal law.

[71] Further, the discrimination between the father and mother as presented in the first example of discrimination is expressly in violation of Article 8(2) of the FC which provides that there shall be no prohibition against any citizen on grounds of gender in any law. And as I have alluded to earlier, 'law' includes the FC. The word 'citizen' in this case refers to the father of the person through whom he seeks to base his claim to citizenship.

[72] In my judgment, none of the three instances of discrimination which arise out of the interpretation advanced by the respondents pass muster under the reasonable classification test implied in Article 8(1) of the FC. While there may be an apparent differentia between legitimate children and illegitimate children or between their biological fathers on the one side

or mothers on the other, in my opinion, it is not an intelligible differentia in that the differentiation has no nexus or connection to any policy or object sought to be achieved by the statute, in this appeal, the FC itself.

[73] Whatever one may say or consider about the concept of legitimacy, there is at the end of the day no fault on the part of the person who was born illegitimate. They have absolutely no control over their status. I am unable to discern any nexus to any sound objective or policy to deny a person citizenship by operation of law in spite of them being able to prove, through reliable scientific methods, the biological nexus between themselves and their father (or even the mother) simply because their parents are not married. This defies the very notion of *jus sanguinis* (which requires a 'blood relation') which is not otherwise determined by law.

[74] It follows that the three instances of discrimination, not being countenanced by any of the all-pervading provisions of Article 8, would therefore amount to unlawful discrimination.

[75] In the circumstances and with respect, it is my opinion that the effect of accepting the respondents' interpretation would result in this Court construing Article 14(1)(b) of the FC and section 1(b) of Part II and section 17 of Part III in a manner which unwittingly promotes unlawful discrimination by the FC itself. Tying this together with my earlier analysis upon adopting the purposive and historical cannons of construction, such a reading of the law, as proposed by the respondents, is untenable. On the other hand, a wholesome and harmonious reading of the provisions of the FC relating to citizenship would not give rise to the instances of unlawful discrimination alluded to above.

[76] Based on the foregoing analysis, it is my view that Part III which was intended to contain supplementary provisions including section 17 cannot therefore be read as qualifying or conditionalizing the application of Part II. In my view, the phrase 'subject to the provisions of Part III of this Constitution' as appearing in section 1 of Part II are themselves insufficient to lead us to the conclusion that section 17 of Part III was intended to operate as an overriding provision.

[77] Section 17 is an interpretation provision just as sections 19, 19A and 19B of Part III are. In this sense, I opine that section 17 was intended only to apply to instances where a person is illegitimate and who has no knowledge of who his biological father is. For such a person, he is entitled to be conferred citizenship by operation of law by virtue of his mother, again to avoid the child from being stateless. It is only in such cases that any reference to such a person's biological father is to be taken to mean references to that person's mother. This again, is to facilitate citizenship to overcome any technical hurdle such a person would face simply by the fact that the identity of their father is unknown.

[78] Taking this approach, as 'father' in section 1(b) means biological father, whether a person is illegitimate or not is an irrelevant fact in the determination of their entitlement to citizenship provided that the identity of their biological father is known.

[79] At the risk of repetition, the 1st appellant has successfully proved that the 2nd appellant is irrefutably his biological father. The only question is whether, on the facts as presented, the 1st appellant is entitled to citizenship by operation of law. The rest of the constituent elements of section 1(b) are undisputed in this appeal. The only dispute is as to the

meaning of the word 'father'. In my judgment, as there is no dispute that the 2nd appellant is the 1st appellant's father, it follows that given the construction accorded to section 1(b) of Part II, the 1st appellant has met all the requirements for citizenship by operation of law.

Whether the 1st Appellant Ought to be Deprived of Citizenship

[80] The other remaining issue is whether the 1st appellant should be deprived of citizenship under Article 24 of the FC as decided by the Court of Appeal for the reason that he possesses a Filipino passport. With respect, I agree with the submission of the appellants that the Court of Appeal misdirected itself on the facts and the law in deciding that the 1st appellant ought to be deprived of citizenship.

[81] Article 24(1) of the FC provides thus:

> "24. (1) If the Federal Government is satisfied that any **citizen** has acquired by registration, naturalization or other voluntary and formal act (other than marriage) the citizenship of any country outside the Federation, the Federal Government may by order deprive that person of his citizenship.".
>
> [Emphasis added]

[82] It is abundantly clear from Article 24(1) of the FC that it only applies to citizens who have voluntarily acquired foreign citizenship or exercise a right exclusively available to the citizen of that foreign country under that country's laws. In *Haja Mohideen MK Abdul Rahman & Ors v Menteri Dalam Negeri & Ors* [2007] 6 CLJ 662 and *Kalwant Kaur a/p Rattan Singh v Kementerian Dalam Negeri Malaysia & Anor* [1993] 2 CLJ 648, our Courts have held that Article 24 has absolutely no application to cases

where a person claims to be entitled to Malaysian citizenship under Article 14 of the FC.

[83] As the 1st appellant's status as a Federal citizen is still unascertained, the question of deprivation of his citizenship does not arise. Further, the power to deprive anyone of their citizenship is to be exercised by the Federal Government upon having complied with all the procedural safeguards of natural justice contained for example in Article 27 of the FC. The Courts do not otherwise have the substantive power to make any order of deprivation.

[84] In the circumstances, it is my view that the Court of Appeal's finding in respect of Article 24 of the FC and its application to the 1st appellant is perverse and unsustainable in law. It is hereby set aside.

Conclusion

[85] Based on the above discussion, I consider it unnecessary to answer Questions 1 and 4. As for Question 1, it is my view that this appeal concerns the harmonious interpretation of Parts II and III. There is no issue of 'importation of any other requirements for citizenship' into section 1(b) of Part II in that sense. The same reasoning applies in relation to my view that Question 4 need not be answered.

[86] I answer Questions 2 and 3 in the negative.

[87] The appeal is consequently allowed and the orders of the High Court and the Court of Appeal are hereby side aside. An order in terms of Prayer 1 of the OS is granted.

[88] This is a public interest case and, in any event, involves the interpretation of provisions of the FC relating to citizenship for the first time by the apex Court. In the circumstances, there shall be no order as to costs.

[89] My learned sisters Justice Nallini Pathmanathan, FCJ and Justice Mary Lim Thiam Suan, FCJ have read this judgment in draft and have expressed their agreement to it.

Dated: 28th May 2021

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia

Note: This is merely a summary. The final grounds of judgment is the authoritative text.