

## THE VIABILITY OF ADOPTION AS AN ATTRIBUTABLE FACTOR FOR CITIZENSHIP CONFERMENT IN MALAYSIA

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### ABSTRACT

*Citizenship is a complex issue in Malaysia. The complexity lies in the manner the citizenship law is interpreted, the government's policy in the matter relating to the citizenship issuance and the bureaucracy of agencies involved in deciding the eligibility for the conferment of citizenship. The law relating to citizenship is enumerated in the supreme legal code that is the Federal Constitution. The Constitution dictates that conferment of citizenship can be done by the Federal Government through three methods, namely by operation of law, by registration and by naturalisation. Nevertheless, the government's policy is that the issuance of citizenship is not as of right or privilege, but it is instead a reward or award from the government to the applicant. The parties involved in deciding the entitlement and registration as a citizen, in practice, would either the National Registry Department, The Ministry of Home Affairs or the Minister. This paper, which employs content analysis and library research, seeks to analyse the extent of which adoption of a child is a matter for consideration for citizenship. The research is driven by the situation of the stateless non-citizen's children who are being adopted by Malaysian parents. As stateless children, they are denied many rights that being enjoyed by other children. The significance of this research is to look into the possibility of adoption as a criterion for the grant of citizenship. The discussion mainly circles around the Malaysian Court's interpretation of Art 14 (1) (b) of the Federal Constitution (FC) as well as Section 9 and Section 25A of the Adoption Act 1952. The key finding of the research indicates that the adoption order issued under the Adoption Act 1952 is not a matter for consideration in the issuance of citizenship. While the Malaysian adoptive parent is recognised as a lawful parent, the adopted child cannot be registered as Malaysian Citizen under Art 14 (1)(b) of the FC as he/she is not the child's biological parent at birth. The courts' attitude suggests that the best mode of application would be under Art 15A of the FC, which would fall still within the discretion of the Ministry of Home Affairs and the Minister.*

Key words: Adoption, Child, Citizenship, Federal Constitution, Stateless

### INTRODUCTION

Establishing legal connexion with a country in which a person resides, is crucial in deriving rights consequential to such relationship. Such connexion, universally known as citizenship, is essential apparatus signifies self-inclusion into civil society, without which a person is denied many rights that naturally belong to a citizen viz. the civil, political and the social rights. The civil rights include individual freedom's right, such as "freedom of liberty, speech, thought, faith, right to own property and to justice". The political rights include "the right to vote and to exercise political power". The social rights denote all such rights that are essential to living according to the accepted norm preponderant in the society such as the economic welfare, security and education (Robert Blackburn, 1993, p. 2).

While the concept of citizenship denotes different meaning throughout the different period of times in history, nonetheless, the connotation of citizenship in contemporary legal and political structure refers to "legitimate personal claim to certain rights, liberties and immunities" (Marback & Kruman, 2015, p. 1). In Malaysia, the rights mentioned above, which are expressly conferred upon citizens, are stipulated in the Federal Constitution. Such rights include the protection against discrimination based on "religion, race, descent, place of birth or gender" (Federal Constitution, Art 8 (2)), freedom of movement within the country (Art 9), freedom of speech and expression (Art 10 (1) (a)), the right to peaceful assembly (Art 10 (1) (b)), the right to form an association (Art 10 (1) (c)) and the right to education (Art 12 (1)). Thus, having citizenship and being a citizen of a country is fundamental to an individual as it serves as a "vehicle" to subsist like others within the communal society.

Conversely, being a non-citizen of any country renders a person being a stateless person. A stateless person is defined in the "Convention Relating to the Status of Stateless Person" 1954 as "a person who was not considered as national by any state under the operation of its law" (Art 1). Accordingly, such a person could not establish any legal relationship with any country, and he usually will be deprived of the rights naturally belongs to the citizen. In modern days, breathing as a stateless person placed a person in a situation of human's security threat. Human Development Report characterised human security as having two elements: the first is the "safety from such chronic threats as hunger, disease and repression"; and the second is the "protection from the sudden and hurtful disruption in the pattern of daily life". It has two dimensions to wit "freedom from fear and freedom from want" in the sphere of "economic, food, health, environment, personal, community and political" (Barbara Von Tigerstrom, 2007, p. 27). Such threat disturbs the living of a person's everyday life and complicates the relationship of such person with the societal structure of the society in which he is living.

Most children are fortunate of being born in a perfect family structure by having legitimate parents with recognised and registered citizenship. Nonetheless, a small fraction of children in the society are unfortunate of being abandoned upon birth, and, with the blessing of God, being found by others and survived. They are called foundling or abandoned child and, with God's blessings, are loved, taken cared and raised by adoptive parents. In another situation, some children are given to others to be adopted, upon birth, due to a variety of reason, and the real biological parent thereafter disappeared. Having a compassionate and kind-hearted adoptive parent does not make the life of such child completes. He will grow up, socialise in the society, make a friend, and at the later stage, he will need to work for his living. In order to prepare him for the society, the question of his status within the society is fundamental. The essential concern that needs to be resolved is that the child's identity. He needs to be recognised and his status within the society to be established as soonest and earliest possible. However, in most cases, the hurdles come in the form of identifying the biological parents (the information is vital for the conferment of citizenship under the *jus sanguinis* principle), time and date of birth (which shall determine the age of the child) and the place of birth (which is in an essential element in determining the citizenship of the child under the *jus soli* principle). That information is essential for birth registration and most importantly, the determination and conferment of citizenship. Without such information, it is most likely, the status of the child is 'in limbo', having no nationality identified, which will deprive him of many things that are enjoyed by other children of his age.

In normal circumstances, owing to countless love and responsibility towards the adopted child, the adoptive parents will take necessary action to legalise the bearing of such child by adoption. Adoption is defined as "a legal process through which a permanent family is created for a child whose birth parents are unable, unwilling or legally prohibited from caring for a child" (Triseliotis et al., 1997, p. 1). Through adoption, the unqualified legal parental lineage of a child is transferred from his biological parents to the adoptive parents (Azizah Mohd, 2011). The adoption itself, in some case, is a challenging process, but for a myriad of love, those parents are willing to sacrifice time and money for the child. The legal status of the child is perfect if the birth registration certificate identifies the child as 'citizen'. However, if it is not determined, the more tiring and costly processes need to borne by the adoptive parents to ensure the legal status of the child is conferred to the child. This article seeks to address the issues of citizenship conferment to the adoptive children in Malaysia. The adoption law, processes and procedure will be briefly explained. Then, the attitude of Malaysian court in determining whether adoption by Malaysian parents would entitle such child of becoming Malaysian citizen will be examined especially in the light of Section 9, Section 25 as well as Section 25A of the Adoption Act 1952 and Art 14 (1) (b) of the Federal Constitution. The article also seeks to venture into the available approaches to avoid the child being stateless.

#### A BRIEF NOTE ON ADOPTION LAW AND PROCEDURE IN MALAYSIA

In Malaysia, legal adoption is done through two methods, namely by registration at the National Registration Department (NRD) or through a court order. The NRD's registration of adoption is regulated by Registration of Adoption Act 1952, while the Adoption Act 1952 regulates the application of adoption through a court order. The cause of having two distinct laws governing adoption is to accommodate both "Muslims" and "non-Muslims" in Malaysia. The Registration of Adoption Act 1952 provides provisions which are not contrary to Islamic law. Both statutes are only applicable to persons residing in Peninsular Malaysia. The adoption in Sabah is governed by the State of Sabah Adoption Ordinance 1960 and The Adoption (Central Registry) Regulation 1960. The adoption in Sarawak is governed by the Adoption Ordinance (Sarawak Cap 91) (Amendment 2002) and Adoption Ordinance (Central Registration) Regulation 1960. For the purposes of this study, references are made only to the provisions of Registration of Adoption Act 1952 Act and the Adoption Act 1952.

It is a well-settled law that the Registration of Adoption Act 1952 confers the NRD, jurisdiction to register the *de facto* adoption. James Foong J in *Tang Kong Meng v. Zainon bte Md Zain* [1995] 3 MLJ 408 at p. 414, observed that the main purpose of the Act is legalising the *de facto* adoptions. The *de facto* adoption denotes "the practice of caring for a child temporarily or permanently without a legally recognised contract" and includes the customary adoption (Bowie, 2004). It embroils informal arrangement and may involve a child who is not abandoned but being given out for care by the birth parents voluntarily. In such a case, normally, the ties between the child and birth parents are maintained (United Nations, 2009, p. 28). This type of adoption is known as "registrar adoption" or "departmental adoption", involves less complicated processes as compared to the registration via court order. In most cases, for this type of adoption registration, the identity of the child genuinely can be established by the birth certificate. The application for adoption registration can be made by both "Muslim" or "non-Muslim" with pre-condition that the child needs to be "brought up and maintained" by the prospective adoptive parents for the minimum duration of 2 years before the application for registration is made. Most importantly, the prospective adoptive parents need to produce the child's identification documents. As for the prospective adoptive parents, one of the adoptive parent "must be a citizen or permanent resident, above the age of 25 and no less than 18 years older than the child". In the case of a married couple, proof of legal marriage document is essential. The registration shall confer the adoptive parents the custodial rights with duty to "care, maintain and educate" the adoptive child. The registration, however, does not grant the child the right of inheritance in the event the adoptive parents die intestate.

The Adoption Act 1952 governs the second type of adoption, namely the adoption made through the court process, typically known as the court adoption and is not applicable to Muslims. The prospective adoptive parents shall file the adoption application at the Sessions or the High Court. The child or person that is allowed to be adopted shall be below the age of 21 years and unmarried. However, a "divorced female who is below the age of 21 years" is allowed to be adopted. The applicant has to fulfil the pre-requisite requirement such as the applicant must "attained the age of twenty-five" and is at least "twenty-one years older than the prospective adopted child" except in the case of exceptional circumstances for the granting of an order (Section 4). If the applicant is a "relative of the child", the law lowered the minimum age to 21 years old (Section 4 (1) (b)). However, if the applicant is the "mother or father of the child", no minimum age is required. In addition, the prospective parents must ordinarily be a resident of

West Malaysia. The child must have "continuously been in the custody of the applicant" for a minimum duration of three consecutive months immediately preceding the date of the adoption order. Further, the applicant also needs to notify the Social Welfare Department, in writing, the intention to adopt the child "three months before the adoption order is made", and if consent is required, necessary steps need to be taken to acquire consent (Section 5). The court shall then make an adoption order, authorising the applicant to adopt that child (Section 6 and Section 3 (1)). The order shall specify relevant particulars of the child and the adopter, including the child's birthplace and the date and his/her surname. If the child's exact date of birth is unknown or is not ascertained to the court's satisfaction, the court shall "determine the probable date of his birth and the date so determined shall be specified in the order as the date of his birth" (Section 25(3)(a)). The child also shall bear the surname as specified in the court order that is the surname of the adopted parents instead of his original surname (if any) (Section 25 (3) (b)). The order also shall specify the country of the child's birth. Nonetheless, if the country of the child's birth is unknown and cannot be ascertained to the court's satisfaction, such particular may be omitted from the order (Section 25 (3) (c)).

In a nutshell, the registrar's adoption and the court's order adoption, both have the effect of legalising an adoption. Both types of adoption confer legal right for custody, care and maintenance of an adoptive child. To a certain extent, the registration will benefit the adopted children in terms of education, application for an identity card, passport and citizenship of the child. The registration also benefitted the adoptive parents in terms of income tax deduction. Nonetheless, while, the registrar's adoption does not affect the parental status or the parental birth lineage of the child, it is not the case of the court's adoption order. The court's adoption order has the statutory effects which will be discussed in the following section of this article.

### THE CONSEQUENCE OF THE COURT'S ADOPTION ORDER

The adoption order issued under the "Adoption Act 1952" has impacted the parental record of the adopted child in a birth certificate. At the outset, once an adoption order is made, the court is duty-bound to send a copy of the order to the NRD for the order to be recorded in the "Adopted Children Register" which is maintained by the NRD (Section 24 (1)). The entry to be made in the register shall specify essential information regarding the child's birthplace and date, his/her surname, gender, the adopter's particulars, the date of the order as well as the name of issuance court (Section 25 (2)). If the country of the child's birth is not determined by the court order, such detail may be omitted. Upon entry been made, the NRD shall issue a new birth certificate. The certificate issued will bear the name of the adoptive parents as the child's parents in accordance with the second schedule of the Act (Section 25A). The word "adoptive" or "adopted" or "adopt" are nowhere to be found on the certificate, portraying on the surface of the certificate, as if the parents are the real birth parents of the child. From this time, an adopted child "is deemed to be a child born to the adoptive parent, or parents in lawful wedlock" (Section 9 (1)).

Section 9 (1) the 1952 Act specifies the effect of the adoption order in respect of the "rights, duties obligation and liabilities of the adopted parent". Section 9 (1) of the 1952 Act reads as follows:

*"Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to a marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock."*

From the plain language of Section 9 (1) of the Adoption Act, it clearly appears that such provision intended to transfer the "rights, duties, obligations and liabilities" of the current guardian or parent of the child to the adopted parent, by virtue of the order. It confers certain "rights to and imposes certain duties on the adoptive parents" in the prospective nature. In the words of Abang Iskandar JCA in delivering the Court of Appeal Judgement in the case of *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor* [2017] 3 MLJ 308, he observed that:

*"the rights conferred on the adoptive parents operate only upon the granting of the Adoption Order. It does not operate retrospectively so as to obliterate what had been done in relation to the child before his adoption. The adoptive parents only come into the shoes of the biological parents upon the issuance of the Adoption Order, at which time, the rights of that the biological parent's rights, in futuro, over the child are, in law, extinguished" (at p 323).*

Accordingly, Section 9 (1), seeks to relinquish the obligations of the former parent/guardian of the child to the new parent (adopter) by virtue of the adoption order issued by the court. In addition, it also imposes the rights and liabilities upon the adopter "as though the adopted child was a child born to the adopter in lawful wedlock". Such imposition is intended to confer the legitimacy status, and it does affect the biological lineage of the child at birth. The court of appeal in the above case observed that while the adopted child "stands in the same position of his other adoptive siblings, as though the adopted child was a child born out of lawful wedlock of the adoptive parents", nonetheless "it would be erroneous to assume that the adoptive parents are the child's biological parents". The court observed that by deeming provision does not confer on the adoptive parents the status of being the biological parents of the adopted child. Hence, the rights conferred are the statutory rights and are specifically enumerated in Section 9 (1) namely with regard to "future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage" and none others. In this manner, the section only bestows upon the (adopted) parent impending rights with regard to control and possession of the child as well as his upbringing, financial and education needs including fulfilling the requirement of all statutory duties of a parent.

In addition, section 9 (2) further pointed that the adoptive child is statutorily entitled to inheritance rights "in the sense that the adopted child stands in the same position of his other adoptive siblings, as though the adopted child was a child born out of lawful wedlock of the adoptive parents". Accordingly, the (adoptive) child will have equal rights of inheritance comparable with his other siblings (if any). The similar provision is nowhere to be found in the Registration of Adoption Act 1952. Thus, the children who have registered under the Registration of Adoption Act 1952 will not enjoy the statutory rights of inheritance of the parents' estate.

#### **DOES THE ADOPTION ORDER IS AN ATTRIBUTABLE FACTOR FOR THE ACQUISITION OF CITIZENSHIP?**

The application for conferment of citizenship upon the granting of an "adoption order" has been subjected to litigation in the Malaysian Courts. The courts have concluded the issue based on the arguments put forward by the litigants, assessment of the court on the facts presented and interpretation of the prescribed law. The parties' arguments usually revolve around two issues, the first is regarding the interpretation of the word "parents" as prescribed in Section 1(a) Part II Second Schedule of the Federal Constitution (FC); and secondly, on the issue of whether the court's "adoption order" automatically confers the adopted child the right of citizenship by operation of law. The discussion on the two issues will ascertain whether or not the (adopted) child in consequence to the "adoption order" is entitled to derive citizenship of the (adoptive) parents.

It is worthy to note that the law relating to the acquisition of citizenship is to be found in Arts 14-22 of the FC. The articles specify that citizenship could be acquired by three means, namely by operation of law, registration and naturalisation. In normal circumstances, if a child is born to Malaysian parents, he is entitled to be registered as a Malaysian citizen by operation of law. The acquisition of citizenship, through registration and naturalisation, is based on application and will be subjected to the terms provided and stringent evaluation by the Ministry of Home Affairs. The non-approval of the citizenship application usually being challenged in the court of law by way of judicial review.

In most cases of the application for judicial review involving the citizenship of an adopted child, the applicants argue that following the adoption order, and the child is entitled to acquire citizenship pursuant to Art 14(1)(b) read together with Section 1 (a) and (e) Part II Second Schedule of the FC. Such an article is reproduced and reads as follows:

*"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."*

Part II of the Second Schedule provides that:

*"Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say: (a) every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanent resident in the Federation; and ... (e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph".*

Hence, Art 14(1)(b) encapsulates the requirement of citizenship by *jus soli* that is the place of birth while Part II of the Second Schedule delineates the condition of citizenship by *jus sanguinis*, i.e. by blood or lineage. Both requirements need to be satisfied to acquire Malaysian citizenship.

The High Court in the case of *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Weh, Child) v Ketua Pendaftar Kelahiran dan Kematian Malaysia* [2012] 9 MLJ 573, had the opportunity to elaborate the effect of an "adoption order" with regards to the acquisition of citizenship by operation of law under Art 14 (1) (b). In this case, a child was born out of wedlock to a Malaysian father (the applicant) and a Thai mother. The parents had neither registered their marriage under the Malaysian Law nor the Thailand Law. The child was illegitimate at birth. The father then applied for "adoption order" under the Adoption Act 1952 and was duly granted. A new birth certificate was issued by the NRD in accordance with Section 25 of the Adoption Act 1952, and his citizenship status is written as "bukan warganegara" (non-citizen). Consequently, the father (the applicant) (which hold the status as the biological father and adoptive father) filed for a judicial review seeking for "an order of certiorari to quash the decision of the respondent" (the NRD). The applicant also sought a declaration that "the child was a citizen by operation of law" following the "adoption order". The main issue considered by the court was: a) whether the child is qualified to be a citizen by operation of law; and b) whether an "adoption order" suffices to qualify an adoptive child as a citizen by operation of law. On question a), the court concluded that the word parent in Section 1 (a) Part II Second Schedule is attributed only to a lawful parent following a valid marriage in the Federation. Hence the child born out of wedlock would not entitle to citizenship by operation of law following the father's citizenship. Valid marriage in accordance with the law of the country is a must. On question b), the court held that the effect of "adoption order" cannot be extended to the acquisition of citizenship. The court observed that Section 9 of Adoption Act distinctly explains all rights and obligations of an adoptive parent over an adoptive child which comprise of "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". On the issue, the court concluded the findings in the following words:

*"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".*

In *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 71 the High Court once again had the opportunity to deliberate the effect of an adoption order on the application of citizenship. In this case, the applicant was granted an adoption order under the provisions of the Adoption Act 1952. Following the order, the respondent issued a new certificate of birth to the child, in which it was stated that the child as "Bukan Warganegara" (non-citizen), while the name of the applicant had been registered as the mother of the child. The applicant then filed to the high court for judicial review on the decision of the respondent refusing to "register the child as a citizen of Malaysia". The question before the court was whether an adopted child, by virtue of adoption order, is entitled to citizenship, as of right, by operation of law. The High Court held that from the wordings of Art 14(1)(b) read together with Section 1 (a) Part II Second Schedule, it is evident that, in determining the entitlement to the citizenship by operation of law, the relationship of the child to the parents is to be determined at the time of the child's birth. Accordingly, it is to be construed to be a reference to the biological and lawfully married parents of the child. Accordingly, in the present case, as the child is illegitimate, the word parent refers to the mother of the child and the relationship of the child to the parent is, in respect of Art 14 (1) (b) read together with Section 1 (a) Part II Second schedule, is to be determined at the time of the child's birth. As regards to the effect of adoption order on the application of the adopted child's citizenship, the High Court ruled that the Adoption Act 1952 has no express or implied reference to citizenship, in consequence, an adoption order. Thus an adoption order only affects the matters such as "parental rights, future custody maintenance, education including rights to appoint guardians, consent in relation to marriage and other rights" as expressly stipulated in Section 9 of the Adoption Act 1952.

The case of *Lee Chin Pon & Anor v Registrar-General of Birth and Deaths, Malaysia* (Unreported, 2010) which was decided very much earlier than the above two cases, has been concluded differently. In this case, the High Court, in a judicial review application held that the child acquired Malaysian citizenship "by operation of law" following the adoption order by virtue of Sections 9 and 25A of the Adoption Act 1952 and Art 14(1)(b). The court ruled that the action of the respondent by considering the child's natural parents were undetermined, was completely inappropriate consideration. Accordingly, the respondent had acted unreasonably by ignoring the applicants' "legitimate expectation that the respondent would issue a new birth certificate registering the child as a citizen of Malaysia". According to the court, such judgement to deny the child of his Malaysian citizenship action was unreasonable action. The decision in *Lee Chin Pon* was commended for giving the highest regards to the principle of the "best interest of the adopted child" (Raymond Mah, 2013).

The above three cases were decided by the High Court. The Court of Appeal has recently in *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 5 MLJ 662 deliberate the issue. The court ruled that "the adoption order per se is insufficient for the acquisition of Malaysian citizenship by operation of law". The evidence of biological parental lineage is essential, and the onus is on the applicant to furnish necessary documents to prove the applicant's claim. The court observed that the term "was not born a citizen of any country" refers to the relationship of the second appellant to his biological and lawful parents at the time of his birth. Since the evidence with regard to the "identity of the child's lawful and biological parents" was not available, the determination of the lineage of the second appellant is not possible. Accordingly, the second appellant had not fulfilled the requirement to be a citizen by operation of law within the meaning of Section 1(e) of Part II of the Second Schedule. Given that, it can be concluded that an adoption order is not an attributable factor for citizenship conferment.

The issue of the relevancy of the court's adoption order in the acquisition of Malaysian citizenship was the main issue arose in the case of *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor* [2017] 3 MLJ 308. In this case, the Court of Appeal observed:

*"The Adoption Act 1952 is not competent as a legal instrument to confer citizenship status to an adopted child under art 14(1)(b) read with s 1(a) Part II, Second Schedule of Federal Constitution. The fact that it is silent on that subject must be telling. Indeed, it would be futile to insert such a provision in the Adoption Act 1952. If it was the intention of the Federal Constitution to include an adoptive parent as a biological parent (parent whose at least one is at the time of the birth) for the purpose of art 14(1)(b) read with s 1(a) Part II, Second Schedule of Federal Constitution such intention would have found clear expression in the Federal Constitution itself, because to interpret an adoptive parent in the definition of a biological parent would have huge implications".*

Accordingly, the Court of Appeal ruled that:

*"an adoption order issued under the Adoption Act 1952 does not confer Malaysian citizenship to an adopted child although one of his adoptive parents is a Malaysian citizen or a person permanently resident in Malaysia by operation of law, within the contemplation and ambit of art 14(1)(b) read with s 1(a) Part II, Second Schedule of the Federal Constitution. To be a Malaysian citizen by operation of law under the provisions of art 14(1)(b) read with s 1(a) Part II, Second Schedule of the Federal Constitution, the person must be born in Malaysia, and one of his biological parents is at the time of his birth, either a Malaysian citizen or a person who is permanently resident in Malaysia. The third respondent (the child) in this case did not fulfil the crucial biological, or the jus sanguinis, criterion as envisaged under the said article".*

Currently, the decision by the Court of Appeal in the case of *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors*. and *Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor*, fixed a set of rule that is bound to the lower court. Unless and until other Court of Appeal or the Federal Court, decide otherwise, the ruling that the biological parental lineage at birth is an essential element in determining the citizenship by operation of law and that an "adoption order" does not an attribute for the conferment of citizenship, remain standing. On the same note, it is safe to conclude that an adoption is not a viable consideration for Malaysian citizenship.

## CONCLUSION

Conclusively, the determination of citizenship remains under the exclusive purview of the executive. In most cases, the courts recommended the invocation of Art 15A of the FC, the outcome of which, is still subjected to the discretionary power of the Ministry of Home Affairs or the Minister. In the case of *Foo Toon Aik v Ketua Pendaftar Kelahiran dan Kematian*, Rohana Yusof J, suggested that while the child encounters constitutional challenge to qualify him as a citizen, Art 15A may be a possible solution. Thus, the option is available to the respondent (the authority) to exercise their jurisdiction since such article does not stipulate any pre-condition to be fulfilled. In the same manner, Collin Sequerah JC in *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia*, found that the application of the applicants is premature since they did not opt to apply for citizenship under Art 15A. The court observed that the remedy under Art 15A "is open and available and remains open and available to her at all material times". Thus the applicant has not exhausted all possible measures in getting citizenship, and the court 'will not grant a declaratory judgement where an adequate alternative remedy is available'. Even if the applicant has resorted to Art 15A, and being turned down by the NRD as in the case *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)*, the court ruled that the applicant had not exhausted the available avenue for redress as his application has not reached the honourable Minister's consideration. Accordingly, a potential remedy is still available for him to be attempted.

In addition to the above, the child's welfare would not be a factor supporting the application for citizenship following the "adoption order". Rohana Yusof J in *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Weh Child) v Ketua Pendaftar Kelahiran dan Kematian*, opined that while the welfare of the child is the utmost consideration in all adoption cases, nonetheless, "there is no room for an exercise of discretion under Art 14". Consequently, the test to be adopted in determining the citizenship application is "whether such a person satisfied all the essential requirements" of Art 14. Once the requirement is fulfilled, such a person is "a citizen by operation of law".

Malaysia is a party to the Convention on the Rights of the Child (CRC). By ratifying the CRC, Malaysia asserts the commitment to upholding the rights of the children, including "the right to a nationality". Nonetheless, the Convention shall have no force of law unless and until it has been incorporated into municipal legislation. Hence, while the law is stagnant in providing the opportunity for these adopted children to live like others, the executives should make an appearance, within the ambit of their discretionary authority under S 15A, to expedite the decision on the matter, so that the children would not be left behind especially in terms of education as well as other benefaction that they would have acquired as normal citizens.

In addition, the NRD should recognise the children who are lawfully being adopted as citizens provided that it is proved that "they were born in Malaysia" and there is no evidence that they, in fact, "obtained foreign citizenship within a year after their birth in Malaysia". In this regard, sworn statements and further proof should also be obtained from the children and their families in order to assert that the child is born in Malaysia. Though there is no law specifically designed to "provide for the inclusion" of adoptive children as citizens, such lacuna is expected to be addressed by the government by objectively applying Art 15A of FC This is a way forward in conferring citizenship to the adopted children in Malaysia.

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