
STATELESS AND ABANDONED: THE FOUNDLING IN MALAYSIA

Citizenship denotes allegiance as well as a sense of belonging to a country. In return for such allegiance, certain benefits are conferred exclusively on citizens of the country. A person who is not a citizen of any country is a stateless person. Having no citizenship in a country, she is a perpetual alien, even in her country of origin and domicile. A stateless person has been likened to a vessel on the open sea not sailing under the flag of a state, or a bird that flies alone.

A foundling, namely an abandoned child of unknown parentage, suffers a plight similar to that of a stateless person. Helpless and unable to fend for herself, she is cast out into the unknown, without the protection of a family. The child's problem is compounded when she is also stateless. A child experiences tremendous rejection when abandoned by her family. Having been rejected by those who should have nurtured and protected her, the stateless foundling then faces a second hurdle – the rejection by her country as an alien. The denial of equality with others around her who enjoy the status of citizenship is akin to rubbing salt in the wound of a foundling. To a child, such rejection may be difficult to comprehend. Such rejection of a foundling also runs contrary to the conscience of a caring society.

The stateless foundling in Malaysia is no exception. She encounters substantial hardship in various aspects of ordinary life. The problem of statelessness is, however, one which may be alleviated. Citizenship is granted to foundlings in a variety of situations and jurisdictions to prevent the hardship caused by statelessness. In Malaysia, the issue of a foundling's statelessness has been addressed to some extent. An examination of the law relating to citizenship in Malaysia enables the position of the foundling to be better understood.

Citizenship in Malaysia

Citizenship may be acquired in a number of ways. One significant way in which citizenship is acquired in modern states is by operation of law. There are two general bases for the acquisition of citizenship by operation of law. These are known as the *jus soli* and *jus sanguinis* principles. The *jus soli* principle relates to the acquisition of citizenship according to the territory of a person's birth. Where the *jus sanguinis* principle applies, citizenship is determined according to a person's descent.¹ Apart from citizenship by operation of law, provisions are also commonly made for the acquisition of citizenship by registration and naturalisation.

In Malaysia, the substantive law relating to citizenship is embodied in the Federal Constitution. The Citizenship Rules 1964 contain the administrative rules in respect of citizenship. According to the Federal Constitution, Malaysian citizenship may be acquired by a person by:

- (a) operation of law;
- (b) registration; or
- (c) naturalization.

Citizenship by Operation of Law

Citizenship by operation of law is acquired automatically, without the need for an application for citizenship.² The Federal Constitution provides for the acquisition of citizenship by birth within Malaysia. In general, a person born within Malaysia acquires Malaysian citizenship if at least one of his parents is a citizen or permanent resident of Malaysia. As such, the principles of *jus soli* as well as *jus sanguinis* are intermingled. Nevertheless, there are variations to the rule which dispense with the requirement of parental citizenship or permanent residence.

Provisions are also made in the Federal Constitution for the acquisition of citizenship by descent, where the birth occurs outside Malay-

¹ RH Hickling, *An Introduction to the Federal Constitution*, 1960, 24.

² *Ibid.*

sia. In this situation, the person's father must be a Malaysian citizen. In addition, the person's father must either be born in the Federation or at the time of the birth must be in the service of the Federation or of a State. Alternatively, the birth must be registered.

Article 14(1) of the Federal Constitution provides for the acquisition of citizenship by operation of law. Specific details of the qualifications for citizenship by operation of law are set out in the Second Schedule. Two categories of persons are considered, namely, persons born before Malaysia Day,³ and persons born on or after Malaysia Day.

A person born before Malaysia Day is entitled to citizenship by operation of law if he was:⁴

³ 16th September 1963.

⁴ Part I of the Second Schedule of the Federal Constitution provides:

1(1) Subject to the provisions of Part III of this Constitution and anything done thereunder before Malaysia Day, the following persons born before Malaysia Day are citizens by operation of law, that is to say:

- (a) every person who immediately before Merdeka Day, was a citizen of the Federation by virtue of any of the provisions of the Federation of Malaya Agreement, 1948 by operation of law or otherwise;
- (b) every person born within the Federation on or after Merdeka Day and before October 1962;
- (c) every person born within the Federation after September, 1962, of whose parents one at least was at the time of the birth either a citizen or permanently resident in the Federation, or who was not born a citizen of any other country;
- (d) every person born outside the Federation on or after Merdeka Day whose father was a citizen at the time of his birth and either was born in the Federation or was at the time of the birth in service under the Government of the Federation or of a State;
- (e) every person born outside the Federation on or after Merdeka Day whose father was a citizen at the time of the birth if the birth was, or is within one year of its occurrence or within such longer period as in any particular case was or is allowed by the Federal Government, registered at a consulate of the Federation or, if it occurred in Singapore, Sarawak, Brunei or North Borneo, registered with the Federal Government.

(2) A person is not a citizen by virtue of paragraph (b) or (c) of

- (a) a citizen by virtue of the Federation of Malaya Agreement, 1948;
- (b) born within the Federation on or after Merdeka Day and before October 1962;
- (c) born within the Federation after September 1962, and at the time of his birth at least one of his parents was a citizen or permanently resident in the Federation, or was not born a citizen of any other country;
- (d) born outside the Federation on or after Merdeka Day whose father was a citizen at the time of his birth and either was born in the Federation or was at the time of the birth in service under the Government of the Federation or of a State; or
- (e) born outside the Federation on or after Merdeka Day whose father was a citizen at the time of the birth if the birth was within the required period⁵ registered at a consulate of the Federation or with the Federal Government.⁶

Part II of the Second Schedule sets out the necessary qualifications for citizenship by operation of law for persons born on or after

subsection (1) if, at the time of his birth, his father, not being a citizen, possessed such immunity from suit and legal process as is accorded to an envoy of a sovereign power accredited to the Yang di-Pertuan Agong.

2. Subject to the provisions of Part III of this Constitution, a person ordinarily resident in the State of Sabah or Sarawak or in Brunei on Malaysia day is a citizen by operation of law if he was immediately before that day a citizen of the United Kingdom and Colonies and either -

- (a) was born in the territories comprised in the Sabah or Sarawak; or
- (b) became such a citizen by registration in those territories or by or in consequence of naturalisation there.

⁵ Registration of the birth is required within one year of its occurrence, or within such longer period as in any particular case was or is allowed by the Federal Government; Clause 1(1)(e) of the Part I of the Second Schedule of the Federal Constitution.

⁶ The birth is to be registered with the Federal Government if it occurred in Singapore, Sarawak, Brunei or North Borneo; Clause 1(1)(e) of Part I of the Second Schedule.

Malaysia Day.⁷A person born on or after Malaysia Day is a citizen by operation of law if he is:

- (a) born within the Federation and at least one of his parents is at the time of the birth either a citizen or permanently resident in the Federation;
- (b) born outside the Federation and his father is at the time of the 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;
- (c) born outside the Federation and his father is at the time of the birth a citizen and whose birth is registered within the required period⁸ at a consulate of the Federation or with the Federal Government;⁹

⁷ Clause I of Part II of the Second Schedule provides as follows:

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 time of the birth either a citizen or permanently resident in the Federation; and
- (b) every person born outside the Federation whose father is at the time of the 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; and
- (c) every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di- Pertuan Agong, registered with the Federal Government; and
- (d) every person born in Singapore of whose parents one at least is at the time of the birth a citizen and who is not born a citizen otherwise than by virtue of this paragraph; and
- (e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.

⁸ The birth must be registered within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow; Clause 1(c) of Part II of the Second Schedule of the Federal Constitution.

⁹ Registration with the Federal Government is permitted if the birth occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di- Pertuan Agong; Clause 1(c) of Part II of the Second Schedule of the Federal Constitution.

- (d) born in Singapore and at least one of his parents is at the time of the birth a citizen and who is not born a citizen otherwise than by virtue of this paragraph;
- (e) born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.¹⁰

In each of the categories above, the minimum requirement for the acquisition of citizenship by operation of law is a person's birth within Malaysia or descent from a parent who is a citizen of Malaysia. What then of the child who is found abandoned in Malaysia without any record or evidence as to her place of birth or parentage?

The Federal Constitution provides that 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.¹¹ Consequently, an abandoned new born child found in Malaysia would have Malaysian citizenship. Nevertheless, the phrase 'new born child' is not defined, and it is not entirely clear when a child ceases to be regarded as a new born.

An abandoned child who is not a new born child would, however, be in a less privileged position. Whilst the majority of parents register

¹⁰ A person is not a citizen by virtue of paragraph (a), (d) or (e) of section 1 if, at the time of his birth, his father, not being a citizen, possesses such immunity from suit and legal process as is accorded to an envoy of a sovereign power accredited to the Yang di-Pertuan Agong, or if his father is then an enemy alien and the birth occurs in a place under the occupation of the enemy; Clause 2(1) of Part II of the Second Schedule of the Federal Constitution. Clause 2(3) also specifies that for the purposes of paragraph (e) of Clause 1 a person is to be treated as having at birth any citizenship which he acquires within one year afterwards by virtue of any provisions corresponding to paragraph (c) of that section or otherwise.

¹¹ Article 31 of the Federal Constitution and Clause 19B of Part III of the Second Schedule of the Federal Constitution. Clause 19B provides that:

For the purposes of Part I or 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 birth.

See also Tun Mohd Suffian bin Hashim, *An Introduction to the Constitution of Malaysia*, 2nd edition, 1976, 281.

the births of their children in accordance with the requirements of the Births and Deaths Registration Act 1957, there are some who fail to do so. Where a foundling's place of birth and parentage have not been registered, it may be impossible to trace her parentage or place of birth subsequently. Having no record of whether she was born in Malaysia or her parents were Malaysian citizens, she would be unable to adduce evidence of the matters required for the conferment of citizenship by operation of law. Hence, such a foundling who may have lived in Malaysia for as long as she can remember is left without citizenship in the country of her apparent origin and domicile.

Citizenship by Registration

Citizenship by registration is a means by which specified categories of persons may acquire Malaysian citizenship. In general, these persons are the wives and children of citizens¹² and persons born in the Federation before Merdeka Day.¹³ Article 15A provides for a special power to register children. This Article is of significance in relation to foundlings as it provides for citizenship by registration without reference to the requirement of birth within Malaysia or the citizenship of parents. Article 15A provides as follows:

Subject to Article 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.

Article 15A grants to the Federal Government the discretion to grant citizenship by registration to persons under the age of twenty-one years. Nevertheless unlike the other provisions relating to citizenship in the Federal Constitution, there are few details specified as to the qualifications a person must possess in order to acquire citizenship by registration under this Article. Apart from the requirement that a person must be under the age of twenty-one years, it is stated that special circumstances should exist. It is not clear from the Article what amounts

¹² Article 15 of the Federal Constitution.

¹³ Article 16 of the Federal Constitution. Article 16A provides that persons over the age of eighteen years who were ordinarily resident in Sabah or Sarawak on Malaysia Day may apply to be registered as a citizen subject to the requirements set out in the article. Nevertheless, applications were to have been made before September 1971.

to special circumstances. Nevertheless, the Article contains promises for the foundling and will be considered in greater depth below.

Citizenship by Naturalisation

Article 19 of the Federal Constitution provides that a certificate of naturalization may be granted upon application made by a person of or over the age of twenty-one years. The applicant would be required to satisfy requirements of residence in Malaysia for a specified length of time, intention to reside in Malaysia permanently, good character and adequate knowledge of the Malay language.¹⁴ Due to the age limit specified in Article 19, the option of citizenship by naturalization would not be available to a foundling, at least not until she attains the age of twenty-one years.

Disadvantages Faced by Non-citizens

Citizenship, or the lack of it, has an effect on many spheres of activities encountered in the course of daily life. These affect a child significantly in the present, and have the potential to limit a child's prospects for the future. A foundling's statelessness is an impediment to the child with an impact on activities ranging from education and choice of profession to travel abroad.

Education

Education is a basic building block in a child's life, without which a child's prospects for the future are significantly impaired. The right to receive an education in government and government-aided schools is specifically accorded to citizens.¹⁵ Non-citizens are admitted to these

¹⁴ Article 19(1) and (2) of the Federal Constitution. It has been argued that Article 19(2) is superfluous and of no effect, Article 19(2) being a repetition of Article 19(1); Sinnadurai, V., *Nationality and International Law in the Perspective of the Federation of Malaysia*, SS Ko (ed), *Nationality and International Law in Asian Perspective*, 309, 325.

¹⁵ Section 4(1) of the Education (Admission of pupils to schools, keeping of registers and conditions under which pupils may be retained in schools) Regulations 1998.

schools only in limited situations. More specifically, it is provided that a non-citizen may only be admitted if he or she is:

- (a) a child of a staff of a foreign embassy;
- (b) a child whose parent is also a non-citizen, working in government service or agency, statutory body or any other place with a valid working permit; or
- (c) a child whose parent is a permanent resident of Malaysia.

Needless to say, a foundling would not be able to adduce evidence to fulfill any of the criteria listed above. In practice, however, schools have at times admitted foundlings who are non-citizens, possibly on compassionate grounds.

Extra-curricular Activities

A youth's statelessness also affects her eligibility to participate in certain extra-curricular activities. Citizenship plays a part even in activities established for the purpose of inculcating in youths a sense of discipline, responsibility, adventure and leadership, such as the Malaysian Combined Cadets Force. Enrollment as a cadet in the Malaysian Combined Cadets Force is limited only to Malaysian citizens.¹⁶

Employment

The lack of citizenship status is an impediment in relation to a foundling's employment prospects. The employment of non-citizens is subject to restrictions imposed by the law. Non-citizens are required to have valid employment permits in order to be employed in Malaysia.¹⁷ There is no such requirement with regard to the employment of citizens. As regards employment in the public service, preference appears

¹⁶ Section 6 of the Malaysian Combined Cadet Force Act 1967.

¹⁷ Section 5 of the Employment (Restriction) Act 1968.

to be given to citizens, at least where contractual appointments are concerned.¹⁸

Future Profession

A foundling's statelessness also imposes limitations on her aspirations in relation to her future profession. Citizenship is a prerequisite to the appointment of judges of the Federal Court, the Court of Appeal and any of the High Courts.¹⁹ Various professions require a person to be a citizen of Malaysia in order to be registered with the relevant professional body. For instance, a person has to be either a citizen or a permanent resident of Malaysia in order to be admitted as an advocate and solicitor in Malaysia.²⁰ Only citizens and permanent residents qualify for registration as registered or professional architects,²¹ engineers,²² quantity surveyors²³ and valuers.²⁴ Persons who are neither citizens nor permanent residents of Malaysia may in some limited situations be accorded temporary registration as 'foreigners'.²⁵ A stateless foundling who aspires to be a judge, lawyer, architect or engineer, would have

¹⁸ Paragraph 4 of the 'Guide to appointment of contract officers' (Service Circular number 2 of 2003) states:

Preference must be given to candidates who are citizens. Candidates who are not citizens may only be considered if candidates who are citizens and who are eligible and suitable are not available or are insufficient in number. (translated from Bahasa Malaysia)

¹⁹ Article 123 of the Federal Constitution.

²⁰ Section 11(1)(c) of the Legal Profession Act 1976.

²¹ Section 10(3) of the Architects Act 1967.

²² Section 10(4) of the Registration of Engineers Act 1967.

²³ Section 10(3) of the Quantity Surveyors Act 1967.

²⁴ Section 18(6) of the Valuers, Appraisers and Estate Agents Act 1981.

²⁵ See Section 10A of the Quantity Surveyors Act 1967. It is worth noting, however, that in the case of architects and engineers, foreign architects and engineers are required to possess the necessary qualifications which are recognised for the practice of their profession in the country where they normally practise; Section 10A(2)(a) of the Architects Act 1967; Section 10A(2)(a) of the Registration of Engineers Act 1967. Accordingly, it is doubtful that a stateless person residing in Malaysia would be able to satisfy this requirement.

little chance of her dream being realized without the requisite citizenship.

The Right to Vote

Should a foundling remain stateless into adulthood, she will not have the right to vote in a general election. Article 119 of the Federal Constitution provides that only citizens have the right to vote in any election to the House of Representatives or the Legislative Assembly.

Travel Abroad and Entry into Malaysia

Citizens are granted privileges in relation to entry into Malaysia upon return from travel abroad. Section 7 of the Immigration Act 1959 stipulates that citizens are entitled to enter Malaysia without having obtained a pass or permit. Persons other than citizens of Malaysia require entry permits to enter the country.²⁶ Malaysian citizens traveling abroad would also carry Malaysian passports which entitle them to recognition as Malaysian citizens as well as consular assistance abroad, should the need arise.

A stateless child is regularly confronted with the stigma attached to her statelessness by the limitations encountered in the course of ordinary activities as well as by her identification documents. A person who is neither a citizen nor a permanent resident would have an identity card that is green.²⁷ Such an identity card is a constant reminder to her, and notice to the world at large, of her status as an alien.

The Stateless Foundling in Other Jurisdictions

The hardship faced by stateless foundlings has been recognized and acknowledged internationally. The Convention on the Rights of the Child²⁸ specifies in Article 7 that the child has the right to acquire a nationality. The avoidance of statelessness is of particular significance

²⁶ Section 6 of the Immigration Act 1959.

²⁷ Section 5(2) of the National Registration Regulations 1966.

²⁸ All of the countries mentioned above have ratified the Convention on the Rights of the Child. Indonesia and the United Kingdom expressed reservations on Article 7.

to the provisions of this article. The Convention on the Reduction of Statelessness²⁹ states in Article 2 that a foundling found in the territory of a contracting state shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that state. Various countries have enacted statutory provisions granting citizenship to foundlings who would otherwise be stateless.

Australia has enacted special provisions to prevent persons from being stateless. A person born in Australia who is not, and has never been, a citizen of any country or entitled to acquire the citizenship of a foreign country, may be granted Australian citizenship.³⁰ A child found abandoned in Australia is deemed to have been born in Australia, unless and until the contrary is proven.³¹ Accordingly, the foundling in Australia may be granted Australian citizenship.

In the United Kingdom, a new-born infant who is found abandoned in the United Kingdom is deemed to be a British citizen.³² The new-born infant is deemed to have been born in the United Kingdom to a parent who at the time of birth was a British citizen or settled in the United Kingdom.³³ As for the interpretation of the phrase 'new-born infant', although not defined in the Act, it was indicated when the Bill was in committee that an infant appearing to be up to twelve months old may be considered as 'new born' for the purposes of this provision.³⁴

Specific provisions have also been enacted in relation to the registration of births of abandoned children in England and Wales. Section 3A of the Births and Deaths Registration Act 1953 (UK) states that where the place and date of birth of an abandoned child are unknown and cannot be ascertained, the registration district or sub-district where

²⁹ Among the countries mentioned above, Australia, Canada and the United Kingdom have ratified the Convention on the Reduction of Statelessness.

³⁰ Section 23D of the Australian Citizenship Act 1948.

³¹ Section 5(3)(b)(i) of the Australian Citizenship Act 1948.

³² Section 1(1) and (2) of the British Nationality Act 1981. Section 1(1) provides that a person born in the United Kingdom is a British citizen if at the time of his birth his father or mother is a British citizen or settled in the United Kingdom.

³³ Section 1(2) of the British Nationality Act 1981.

³⁴ L. Fransman, *British Nationality Law*, 1998, 297.

the child was found shall be entered as the child's place of birth.³⁵ As a consequence, abandoned children may be eligible for citizenship by registration subject to the conditions of the British Nationality Act 1981.

In Canada, a person who was found as a deserted child before apparently attaining the age of seven years is deemed to have been born in Canada.³⁶ This presumption may be rebutted by proof of the contrary within seven years from the date the person was found. As persons born in Canada after 14 February 1977 are Canadian citizens,³⁷ a foundling in Canada may acquire Canadian citizenship accordingly.

The issue of statelessness among foundlings has also been addressed in various Asian countries. In China, a child born in China of parents unknown or with an indeterminate nationality has Chinese nationality.³⁸ In general, Chinese citizenship law reflects the principle of *jus sanguinis*, providing for citizenship based on the person's Chinese descent.³⁹ Nevertheless a foundling born in China is deemed to be a citizen and is an exception to the *jus sanguinis* rule. A child born in the Republic of Korea acquires Korean nationality if his parents are unknown or stateless.⁴⁰ Foundlings in the Republic of Korea are deemed to have been born in the Republic of Korea.⁴¹

³⁵ Section 3A(1) and (2)(a) of the Births and Deaths Registration Act 1953 (UK). Nevertheless, such registration of the child's place of birth is subject to the proviso that if the Registrar General is satisfied that the child was not born in England or Wales, he shall not register the birth under this section; Section 3A(3)(a) of the Births and Deaths Registration Act 1953 (UK).

³⁶ Section 4(1) of the Citizenship Act (Canada).

³⁷ Section 3(1)(a) of the Citizenship Act (Canada).

³⁸ Article 1(4) of the Nationality Law of the Republic of China (1929).

³⁹ Leo Suryadinata, China's Citizenship Law and the Chinese in Southeast Asia, MB Hooker (ed), *Law and the Chinese in Southeast Asia*, 169, 172-3.

⁴⁰ Article 2, para 1, item 4 of the Nationality Law (ROK).

⁴¹ Article 2, para 2 of the Nationality Law (ROK). See also HS Chang, Nationality in Divided Countries: a Korean Perspective; Ko Swan Sik (ed), *Nationality and International Law in Asian Perspective*, 255, 296.

As with China, Indonesian nationality law indicates a preference for *jus sanguinis* in attributing nationality at birth.⁴² Citizenship is, however, attributed *pseudo-jure soli* to foundlings born in Indonesian territory and foundlings are deemed to be Indonesian at birth.⁴³ Similarly, in the Philippines, a foundling whose parents were unknown but who appeared to be of alien parentage has nevertheless been considered a national of the Philippines.⁴⁴

The Federal Constitution and the Foundling

As mentioned above, an abandoned new born child found in Malaysia would have Malaysian citizenship by operation of law.⁴⁵ The phrase 'new born child' is not defined. The Federal Constitution does not contain specific provisions dealing with the citizenship of foundlings other than the new born child. Nonetheless, Article 15A, which provides for citizenship by registration to persons under the age of twenty-one years, is arguably applicable to foundlings.

Article 15A was inserted into the Federal Constitution by clause 4 of the Constitution (Amendment) Act 1962. Article 15A gives to the Federal Government the discretion to register persons under the age of twenty-one years as citizens, if the Government considers that there are special circumstances for registering such persons as citizens. Although, the qualifications of persons other than age are not stated in the Article, an examination of the discussions on the Article during the Second Reading of the Constitution (Amendment) Bill sheds some light on the intended purpose of the Article.

⁴² SS Ko, Teuku Moh Rhadie, *Nationality and International Law in Indonesian Perspective*; Ko Swan Sik (ed), *Nationality and International Law in Asian Perspective*, 125, 143.

⁴³ Id. 175; Article 1 items (f), (g) and (h) of the Nationality Act of 1958 (Indonesia).

⁴⁴ Op. of the Sec. of Justice No. 277, s 1940; See IR Cortes, RPM Lotilla, *Nationality and International Law from the Philippine Perspective*; SS Ko (ed), *Nationality and International Law in Asian Perspective*, 335, 420.

⁴⁵ Article 19B of Part III of the Second Schedule of the Federal Constitution. See also Tun Mohd Suffian bin Hashim, *An Introduction to the Constitution of Malaysia*, 2nd edition, 1976, 281.

During the Second Reading of the Constitution (Amendment) Bill when Article 15A was discussed, a question was put to former Prime Minister Tun Haji Abdul Razak as to what the words 'in such special circumstances' meant.⁴⁶ Tun Haji Abdul Razak replied:

I cannot, of course, state here the circumstances. If the Government thinks that a child probably has no parents here, or who obviously has attachment to this country, in such case possibly the Government will register him as a citizen. This is merely to give discretion to the Government in cases of hardship and in cases where Government thinks that it is in the interest of the child and the country that the child be registered as a citizen.

The explanation given by the framers of Article 15A lends credence to the proposal that the foundling falls squarely within the intended purpose of the power to grant citizenship by registration under Article 15A. A foundling's parents are unknown, and she is a *de facto* orphan, regardless of whether she in fact has parents in the country. In situations where the foundling's parentage cannot be ascertained and she is stateless as a consequence, the foundling suffers the stigma and impediment of statelessness through no fault of her own. Such an abandoned child found in Malaysia who has lived in Malaysia for as long as she can remember would clearly have an attachment to Malaysia as her country of origin and domicile. As discussed above, statelessness imposes substantial hardship on the foundling. It is submitted that a foundling such as this has a good and arguable case that her situation warrants serious consideration under Article 15A. It is circumstances such as these which would seem to come within the 'special circumstances' of Article 15A, as well as the intended purposes of the discretionary power.

Clause 1(e) of Part II of the Second Schedule provides that a person born within Malaysia who is not born a citizen of any country is a citizen by operation of law.⁴⁷ Hence, it appears that a child born

⁴⁶ Parliamentary Debates (Dewan Ra'ayat), 31 January 1962, Vol III, No. 42, Third Session, Col. 4528.

⁴⁷ See also V Sinnadurai, *The Citizenship Laws of Malaysia*, Tun Mohd Suffian, HP Lee, FA Trindade, (eds) *The Constitution of Malaysia, It's Development: 1957-1977*, 1978, 69, 82.

in Malaysia who would otherwise be stateless would be a citizen by operation of law.⁴⁸ A foundling who is unable to provide evidence of her place of birth would not be eligible for citizenship under Clause 1(e). Nevertheless, if citizenship is granted to a child born in Malaysia who would otherwise be stateless, it may be argued by analogy that a stateless foundling in Malaysia should be accorded similar treatment. The basis for granting citizenship to the stateless foundling is stronger where Malaysia is the foundling's country of apparent origin. The suggestion that Article 15A may be invoked to register a child as a citizen where a child would be stateless has received scholarly support.⁴⁹

Malaysia acceded to the Convention on the Rights of the Child in 1995 with certain reservations. Article 7 of the Convention specifies *inter alia* that the child has the right to acquire a nationality. In Malaysia's accession to the Convention, reservations were expressed with regard to Article 7 of the Convention. Article 7 was said to be applicable so far as it is in conformity with the constitution, national laws and national policies of the Malaysian government. In this regard, it was said that the right to acquire nationality in Malaysia is not automatic – different legal provisions exist, depending on where a child is born.⁵⁰

Article 15A is an existing provision of the Federal Constitution. An exercise of the discretionary power under the Article as discussed above would well be in conformity with the constitution and national laws. The reservation expressed in relation to Article 7, that a child's place of birth has a bearing on whether she has a right to acquire Malaysian nationality, merits consideration at this juncture.

As mentioned above, a foundling who has lived in Malaysia for as long as she can remember would have an obvious attachment to Malaysia. This may be contrasted with a situation in which it is known that the child was born outside Malaysia and was subsequently aban-

⁴⁸ Clause 2(3) of Part II of the Second Schedule provides that a person is to be treated as having at birth any citizenship which he acquires within one year afterwards.

⁴⁹ Sinnadurai, above nn 47 & 77.

⁵⁰ Kulasegaran, A., The Convention on the Rights of the Child– Malaysian's 12 Reservations, *Proceedings of the seminar 'Understanding the Convention on the Rights of the Child'*, 14-15 September 1996, Kuala Lumpur.

done in Malaysia. In such a situation, the child may have a right to acquire the citizenship of another country by virtue of her birth in that country. Consequently, the problem of statelessness is less likely to arise. A child who was born and has lived outside Malaysia is also likely to have less of an attachment to Malaysia.

A foundling whose country of apparent origin and domicile is Malaysia, would have little hope of acquiring citizenship in another country. Such an abandoned child whose parentage is unknown and cannot be ascertained would suffer a lifetime of statelessness, unless steps are taken to grant citizenship to her. A foundling such as this would seem to lie at the heart of the discretionary power contained in Article 15A and the compassionate purpose for which it was enacted.

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**KES PEMECATAN TERTUNGGAK DI
MAHKAMAH PERUSAHAAN: ADAKAH
PENYELESAIANNYA DENGAN MEMINDA AKTA
PERHUBUNGAN PERUSAHAAN 1967?**

Pengenalan

Seksyen 20 Akta Perhubungan Perusahaan 1967¹ merupakan satu seksyen yang memberikan laluan kepada pekerja yang telah dipecat tanpa alasan atau sebab yang munasabah untuk mendapat pembelaan. Remedi yang disediakan pula adalah untuk diambil bekerja semula, suatu remedi yang tiada dalam Common Law jika tuntutan dikemukakan di Mahkamah Sivil. Keadaan ini menyebabkan seksyen ini begitu “hidup” berbanding dengan seksyen lain dalam Akta Perhubungan Perusahaan 1967. Sehingga April 2004, sebanyak 7,000 kes tertunggak telah dapat diselesaikan sementara 700 kes lagi masih dalam proses perbicaraan.² Untuk mengatasi masalah kes tertunggak ini, Yang Berbahagia Menteri Sumber Manusia, Datuk Dr Fong Chan Ong, telah mencadangkan supaya pindaan kepada Akta Perhubungan Perusahaan 1967 dibuat. Pindaan yang dicadangkan ini akan meletakkan pekerja yang berpendapatan di bawah RM5,000 sahaja sebagai berhak untuk mengemukakan kes pemecatannya kepada Mahkamah Perusahaan. Mereka yang berpendapatan lebih daripada itu hendaklah mengemukakan kes mereka ke Mahkamah Sivil. Adakah cadangan ini sesuai? Adakah jumlah pendapatan yang dicadangkan itu sesuai? Makalah ini akan cuba memberikan jawapan kepada persoalan ini.

¹ (Akta 177). Versi sah sah adalah versi Bahasa Inggeris yang dikenali sebagai Industrial Relations Act 1967.

² Statistik yang diberikan oleh Menteri Sumber Manusia, Datuk Dr Fong Chan Ong, dipetik dalam laporan ‘Salary limit’ for industrial court, *The Star*, 25 August 2004, ms 16.