Citizenship for Adopted Children – A Malaysian Perspective

by Raymond Mah & Chloe Lim Yen Hwa

Introduction

[1] The Malaysian Adoption Act 1952 does not address the citizenship of adopted children. As a result, the nationality of adopted children in Malaysia has been determined arbitrarily by the National Registration Department (NRD) in the exercise of its administrative function of registering orders granted by the Malaysian courts. By refusing citizenship to many adopted children, the NRD has forced aggrieved parents to subsequently apply to the Minister of Home Affairs for citizenship for their adopted children, which decision is discretionary and beyond judicial review.

[2] Refusing to submit themselves to the arbitrary decision of the Minister, the parents of an adopted child in the case of Lee Chin Pon & Anor v Registrar-General of Births and Deaths, Malaysia [2010] (unreported), challenged the NRD’s refusal to register their adopted child as a citizen of Malaysia. In a novel and progressive decision, the High Court of Malaya allowed the parents’ application for judicial review and declared that their adopted child is a citizen by operation of law by virtue of the fact that he was adopted by Malaysian parents.

[3] This paper reports the facts and issues of law arising in Lee Chin Pon’s case and commends the decision of the High Court for being in the best interest of adopted children. This paper concludes with a quick look at the positions in South Korea, United Kingdom, Australia and Singapore to see how other nations have approached the issue of citizenship for their adopted children.

A child of parents unknown

[4] In July 1999, Mr and Mrs Lee welcomed into their home a baby boy, an infant no more than two months from birth. The baby was given by his family from a fishing village in Malacca who were too poor to care for the child. In gratefulness, Mr and Mrs Lee gave a small donation to the family.

[5] As Mr and Mrs Lee had received the child without any identification papers, they proceeded to register the birth of the baby with the NRD. A birth certificate was issued with
Mr and Mrs Lee as his natural parents and the child as a citizen. They loved and raised him as their own.

[6] In September 2006 when the child was 7 years of age, the Mr and Mrs Lee applied to the Immigration Department for a renewal of the child’s passport. To their surprise, the application for renewal was declined and referred to the NRD for investigations. In the course of investigations, Mr and Mrs Lee explained to the NRD officers how the child came to be theirs.

[7] At the close of investigations, a warning was issued and the child’s birth certificate issued in July 1999 was surrendered to the NRD. In its place, the NRD issued in February 2007 a birth certificate stating the particulars of the child’s parents as “not available”. The child’s citizenship was also recorded as “non-citizen” (“bukan warganegara”) on the basis that his natural parents could not be identified.

A child is adopted

[8] This time upon legal advice, Mr and Mrs Lee applied by Originating Summons dated 4.7.2007 to the High Court of Malaya at Shah Alam vide Adoption No. MT2-24-1203-2007 to lawfully adopt the child under the Adoption Act 1952. On 5.2.2008, the adoption application came up for hearing before Alizatul Khair Bte Osman Khairuddin J (now JCA) who in the presence of counsel, the applicants and the welfare officer granted an interim Order, inter alia:

(a) That the Court was satisfied that it was in the best interest of the child that he remain in the applicants’ custody;

(b) That the Court was satisfied that all the requirements of the Adoption Act 1952 had been complied with;

(c) That the Welfare Office (Pejabat Kebajikan Masyarakat) be appointed as the Guardian Ad-Litem for the child; and

(d) That the hearing of the adoption application be postponed and that lawful custody of the child be given to the applicants subject to the Welfare Officer who shall be at liberty at all reasonable times to visit and interview the child alone and to make all necessary inquiries as to the comfort and the well-being of the child.
At the subsequent hearing on 5.6.2008, the judge briefly interviewed the child and accepted the Guardian Ad-Litem report by the Welfare Officer in support of the adoption. The Court also dispensed with the consent of the child’s natural parents pursuant to Section 5(c) of the Adoption Act 1952 and sanctioned the applicants’ payment to the child’s family pursuant to Section 6(c) of the Adoption Act 1952.

The Court allowed the applicants to adopt the child and gave the necessary directions to the Registrar-General of Births and Deaths to record the adoption and to issue a birth certificate under the Adoption Act 1952 with the particulars set out by the Court in the Schedule to the Adoption Order. Significantly, the Schedule stated that the child was born in Kuala Lumpur on 22.7.1999.

Refusal of citizenship

Upon extraction of the Order for adoption, the applicants applied in October 2008 to the NRD for a new birth certificate pursuant to Sections 25 and 25A of the Adoption Act 1952. Section 25 concerns the Adopted Children Register while section 25A provides for the issuing of an adopted child’s new birth certificate.

The NRD issued a new birth certificate for the child in November 2008. However, the new birth certificate registered the said child as “permanent resident” (“pemastautin tetap”) and not a citizen of Malaysia. The new birth certificate was signed by the Registrar-General of Births and Deaths.

The applicants’ solicitors wrote to the NRD giving reasons why the child should be registered as a citizen of Malaysia and applied for a correction to the birth certificate. However, there was no written response from the NRD. Instead, the NRD orally informed the applicants’ solicitors that the NRD would not register the child as a citizen based on the Order for adoption because the NRD had no data on the natural parents. The NRD advised the applicants to apply to the Minister of Home Affairs under Article 15A of the Federal Constitution for the child’s citizenship.

The applicants were not satisfied with the Registrar-General’s decision to register the child as a “permanent resident” and not a “citizen”, which effectively deprived the child of his Malaysian citizenship and rendered the child stateless. Thus, the applicants sought to challenge the Registrar-General’s decision by way of judicial review. The child was by then 9 years old.
Application for judicial review

[15] On 12.12.2008, the applicants filed an application for leave to apply for judicial review under Order 53 of the Rules of the High Court 1980 against the decision of the Registrar-General of Births and Deaths seeking, *inter alia*, the following orders:

(a) A declaration that the child is a citizen of Malaysia *by operation of law* by virtue of his *lawful adoption* by the applicants pursuant to the Order for adoption dated 5.6.2008 read with Sections 9 and 25A of the Adoption Act 1952 and the Article 14(1)(b) Part II Second Schedule (a) of the Federal Constitution;

(b) A declaration that the child is a citizen of Malaysia *by operation of law* by virtue of his *birth within the Federation of Malaysia* pursuant to Article 14(1)(b) Part II Second Schedule (e) of the Federal Constitution;

(c) An order of certiorari to quash the decision of the Registrar-General to issue the birth certificate of the child which registers the child as a permanent resident and not a citizen of Malaysia; and

(d) An order of mandamus directing the Registrar-General to reissue the birth certificate of the child to register the child as a citizen of Malaysia.

[16] Lau Bee Lan J heard and allowed the application for leave to apply for judicial review on 5.2.2009. Thereafter, the judicial review was heard by the same judge on 22.10.2009 and 4.11.2009. On 16.12.2009, Lau Bee Lan J delivered an eagerly awaited decision in favour of the applicants allowing the judicial review with costs.

Citizenship “by operation of law”

[17] The phrase “by operation of law” requires the simple verification of facts in order to satisfy the requirements of any of the paragraphs in Article 14(1)(b) Part II Second Schedule of the Federal Constitution. There is no room under Article 14 of the Federal Constitution for the respondent to exercise any discretion or to consider any public policy when applying the words of Article 14(1)(b) Part II Second Schedule, which states:

“CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER
MALAYSIA DAY

1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

(a) every person 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.”

[18] In Haja Mohideen MK Abdul Rahman & Ors v Menteri Dalam Negeri & Ors [2007] 6CLJ 662 at 673, Kang Hwee Gee J (later JCA) considered the difference between citizenship by operation of law pursuant to Article 14 and an application for citizenship pursuant to Article 15 of the Federal Constitution. His Lordship held:

“An application under art. 14 is quite unlike an application under art. 15 where a person has to apply to be citizen in which case the Federal Government has the right to consider his application on a substantive basis which may include matters of policy in arriving at its decision whether or not to grant him citizenship.”
[19] His Lordship held that the applicant in that case was a citizen by operation of law pursuant to Article 14(1)(b) Part II Second Schedule (c) by literally applying the requirement of the paragraph:

“...there is in fact only one primary qualification in the true sense that an applicant must satisfy to qualify as a citizen of this country, that is to say, that his father must be a citizen when he was born.”

[20] Similarly in Kalwant Kaur a/p Rattan Singh v Kementerian Dalam Negeri Malaysia & Anor [1993] 2CLJ 648 at 651, Haidar bin Mohd Noor J (as he then was) held that the applicant was a citizen by operation of law pursuant to Article 14(1)(a) of the Federal Constitution based on a straightforward application of the facts:

“In a nutshell, the facts show that as at the date of her birth the plaintiff was a British subject as her father was a British subject and she was born in one of the territories comprised in the Federation, that is Perak and further her father was a permanent resident of Perak. It would seem clear that the plaintiff has satisfied the requirements set out in Article 14(1)(a) of the Constitution read with Article 124(1)(c)(ii) of the FMA for her to seek a declaration that she is a citizen or entitled to Federal citizenship by operation of law.”

[21] The facts in Lee Chin Pon’s case were not in dispute. The respondent did not challenge any part of the Order for adoption or the Schedule. Significantly, the respondent did not dispute that the child was born in Kuala Lumpur on 22.7.1999, as stated in the Schedule.

Citizenship by virtue of adoption

[22] At the hearing of the judicial review, the applicants submitted that the child is a Malaysian citizen by operation of law by virtue of his lawful adoption by the applicants pursuant to the Order for adoption read with Sections 9 and 25A of the Adoption Act 1952 and Article 14(1)(b) Part II Second Schedule (a) of the Federal Constitution, on the following grounds:

Section 9 of the Adoption Act 1952

[22.1] Pursuant to Section 9 of the Adoption Act 1952, all rights, duties, obligations and
liabilities shall vest in and be exercisable by and enforceable against the applicants as though the child was a child born to them in lawful wedlock. Such vesting of rights is especially clear from the following subsections of Section 9:

“(1) 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 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;**”

“(2) Where, at any time after the making of an adoption order, the adopter or the adopted child or any other person dies intestate in respect of any movable or immovable property, that property shall devolve in all respects **as if the adopted child were the child of the adopter born in lawful wedlock** and were not the child of any other person.”

“(8) For the purposes of any written law for the time being in force in Malaysia or any part thereof relating to the provisions of compensation to families for loss occasioned by the death of a person caused by actionable wrong, a person shall be deemed to be the parent or child of the person deceased notwithstanding that he was only related to him in consequence of adoption; and accordingly in deducing any relationship which under the provisions of such legislation is included within the meaning of the expressions “parent” and “child” and adopted child shall be treated **as being the child of the adopter born in lawful wedlock** and not the child of any other person.”

**Section 25A of the Adoption Act 1952**

[22.2] According to Section 25A (read with Section 9) of the Adoption Act 1952, the child’s new birth certificate shall be issued by the respondent as though the child is a child born to the applicants in lawful wedlock. This is supported by the following subsections of Section 25A:
“(1) In respect of the Certificate of Birth referred to in paragraph 25(2) (b), every adoption order shall contain a direction (a) to the Registrar-General that the word “adopted”, “adopter” or “adoptive” or any word to like effect shall not appear in the Certificate ...”

“(5) The Certificate of Birth issued under this Act pursuant to an adoption order shall replace the Certificate of Birth of the child issued under the Births and Deaths Registration Act 1957, and shall for all purposes be known as the Certificate of Birth of the child.”

“(6) Notwithstanding anything to the contrary in any written law, the Certificate of Birth under this Act, if given under the hand of the Registrar-General or any person authorized by him, shall be received without further or other proof as evidence of the facts and particulars relating to the birth of the child in respect of whom the Certificate of Birth was issued.”

**Article 14(1)(b) Part II Second Schedule (a) of the Federal Constitution**

[22.3] The child is a citizen of Malaysia by operation of law under the Federal Constitution as the child was born in Malaysia, the applicants are both citizens of Malaysia and the child is deemed to have been born to the applicants in lawful wedlock. Article 14(1)(b) Part II Second Schedule (a) states:

“Subject to the provisions of PartIII 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.”

**Purpose of the Adoption (Amendment) Act 2000**

[22.4] Due to its novelty, this argument was presented to the Court without the support of any precedent on point. Instead, reliance was placed on the purposive approach to the interpretation of statute and the application of the Adoption Act 1952. Particularly, the submission that the child is a citizen by operation of law is consistent with the purpose of the amendments to the Adoption Act 1952. The Explanatory Statement to the
Bill explains the purpose of the new Section 25A:

“Under paragraph- 25A(l)(a), the Court shall, in an adoption order, direct the
Registrar-General to ensure that the word “adopted”, “adopter” or “adoptive” or
similar words shall not appear in the Certificate of Birth. The omission of such
words in the Certificate of Birth is considered necessary to prevent the
possibility that knowledge of the fact of being adopted would have
adverse psychological effect on an adopted child who is unprepared to learn
of his actual background or status.”

[22.5] The respondent’s decision to record the child as a “permanent resident” while the
applicants are “citizens” contradicts the purpose of the amendments and is not in the
best interests of the child. On the contrary, depriving the child of his citizenship makes
it apparent that he is an adopted child.

Citizen by virtue of birth within the Federation

[23] In addition, the applicants submitted at the hearing of the judicial review that the child
is a Malaysian citizen by operation of law by virtue of his birth within the Federation of
Malaysia pursuant to Article 14(1)(b) Part II Second Schedule (e) of the Federal
Constitution, on the following grounds:

[23.1] The Shah Alam High Court in the Order for adoption confirmed and held that the
child was born in Kuala Lumpur on 22.7.1999. In fact, the NRD accepted this fact by
registering the child as having been born in Kuala Lumpur on 22.7.1999 on the birth
certificate under challenge.

[23.2] Accordingly, the child is a citizen of Malaysia by operation of law under the
Federal Constitution as he was born in Malaysia and was not born a citizen of any other
country. Article 14(1)(b) Part II Second Schedule (e) states:

“Subject to the provisions of PartIIIof this Constitution, the following persons
born on or after Malaysia Day are citizens by operation of law, that is to say:
(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.”

[24] For these reasons, the applicants submitted that the respondent’s decision to issue the birth certificate which states that the child is a “permanent resident” as opposed to a “citizen” is an error of law and in excess of jurisdiction.

**Applicable legal principles on error of law**

[25] In moving the Court to review the error of law by the respondent, the applicants relied on the following principles for judicial review:

[25.1] The Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3CLJ 65 at 101 per Edgar Joseph Jr FCJ (as he then was) held that a decision by an administrative body which is in error of law is always subject to review:

“In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the “not to be challenged, etc.” kind, **judicial review will lie to impeach all errors of law** made by an administrative body or tribunal and, we would add, of inferior courts. In the words of Lord Denning in *Pearlman v. Harrow School* (ibid) at p. 70, “No Court or tribunal has any jurisdiction to make an error of law on which the decision in a case depends. If it makes such an error it goes outside its jurisdiction and certiorari will lie to correct it”. [Emphasis added]

[25.2] The Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 CLJ 748 at 765 per Gopal Sri Ram JCA (later FJ) considered what amounts to an “error of law” and held:

“In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law.
Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.” [Emphasis added]

[25.3] Similarly, the House of Lords in *Council of Civil Servants Unions and Others v Minister for the Civil Service* [1985] AC 374 at 410 per Lord Diplock held that decisions tainted by illegality or irrationality are subject to judicial review:

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.” ...

By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no
sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court’s exercise of this role, resort I think is today no longer needed to Viscount Radcliffe’s ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court’s reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.”


“The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.” [Emphasis added]

[25.5] Finally, the Court of Appeal in *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil Pereira & Ors* [1996] 4CLJ 474 at 763 per Gopal Sri Ram JCA (later FJ) held that the Court has the jurisdiction to go into the merits of the impugned decision itself:

“...when a decision is attacked on grounds of “Wednesbury unreasonableness”,

...
the Court, in judicial review proceedings, is not merely confined to an examination of the decision-making process but may go into the merits of the decision itself."

Errors of law by the respondent

[26] Applying the above principles to the circumstances of the case, the applicants submitted that the respondent had acted in excess of jurisdiction and in error of law as follows:

[26.1] The respondent did not have the jurisdiction to register the child as a permanent resident or any other status of citizenship (other than as a citizen of Malaysia) in his new birth certificate despite the child’s citizenship by operation of law; and

[26.2] The respondent had acted in error of law and in excess of his jurisdiction by rendering the child stateless (that is, not recognised as a citizen of any country) despite the child’s citizenship by operation of law.

[26.3] The respondent committed an error of law by taking into account totally irrelevant considerations; in particular, the respondent had erroneously taken into consideration the fact that the child’s natural parents are unknown when deciding to register the child as a permanent resident and not a citizen of Malaysia.

[26.4] The respondent had acted in disregard of the applicants’ legitimate expectation that the respondent would issue the new birth certificate registering the child as a citizen of Malaysia given the applicants’ application for adoption of the child, the High Court’s decision that the child was born in Malaysia and the grant of the Order for adoption, as well as the provisions of the Federal Constitution on citizenship by operation of law.

[26.5] The respondent’s decision is an error of law because the respondent had acted unreasonably (in the Wednesbury sense), that is, so unreasonably that no reasonable authority would have made such a decision:

(a) to render the child stateless;
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(b) to have created a situation where the parents and future siblings (if any) of the child are citizens but the child is merely a permanent resident of Malaysia;

(c) to harm the best interests of the child by depriving him of his liberties, rights and privileges as a citizen of Malaysia;

(d) to impact negatively on the psychology of the child and his sense of belonging to his family and his community.

(e) to deprive the child of the right to a Malaysian passport and the liberty to travel in and out of Malaysia with the applicants together as a family;

(f) to make it so apparent from the birth certificate that the child is not a child born to the applicants in lawful wedlock by registering the child as a permanent resident while the applicants are recorded as citizens on the birth certificate.

(g) to require the applicants and the child to apply to the Minister of Home Affairs under Article 15A of the Federal Constitution for citizenship despite the child’s citizenship by operation of law;

(h) to subject the applicants and the child to the unfettered discretion of the Minister of Home Affairs when applying for citizenship under Article 15A of the Federal Constitution which discretion is not subject to appeal or review in any Court;

(i) to require the applicants to disclose the fact that the child has been adopted to the child’s school in order to obtain a letter of confirmation from the school to support an application for citizenship under Article 15A of the Federal Constitution; and

(j) to require the applicants to write a letter to the Director of the Citizenship Department of the NRD, explaining and giving reasons why they wish to apply for the child’s citizenship under Article 15A of the Federal Constitution.

Respondent’s arguments

[27] The respondent opposed the child’s citizenship. Although the respondent did not
dispute any of the facts stated by the applicants, the respondent contested the judicial review on technical and legal grounds. The respondent’s arguments are summarized as follows:

**Alternative remedy available**

[27.1] The respondent argued that the applicants were not entitled to an order of certiorari because the applicants had not exhausted their alternative remedies – namely to apply for citizenship for the child under Article 15A of the Federal Constitution. In support, the respondent relied on *Hongkong & Shanghai Banking Corporation, Ipoh v Rent Tribunal For Ulu Kinta & Ors* (1972) 1 MLJ 70; *Government Of Malaysia & Anor v Jagdis Singh* (1987) 2 MLJ 185; *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* (1987) 2 MLJ 346; *Lim Kui Siam & Anor (Representing All the Members of Persatuan Penduduk-Penduduk Kawasan Hj Manan, Kluang v Pentadbir Tanah, Daerah Kluang* (1995) 1 CLJ 846; *T Mohan A/L Ellen & Ors v Pentadbir Tanah Daerah Petaling* (2000) 2 MLJ 431; and *Ta Wu Realty v Ketua Pengarah Hasil Dalam Negeri & Anor* (2009)1 MLJ 555.

[27.2] In reply, the applicants submitted the option to apply for citizenship under Article 15A is not an “alternative remedy” which disentitled the applicants to an order of certiorari. In all the 6 cases referred to by the respondent, the “alternative remedy” considered by the courts was instead a statutory right of appeal, which did not exist in this case.

**Section 44 of the Specific Relief Act 1950**

[27.3] The respondent also argued that the applicants had failed to comply with the requirements of section 44 of the Specific Relief Act 1950. In support of this argument, the respondent referred to *Koon Hoi Chow v Pretam Singh* (1972) 1 MLJ 180; *Ng Bee v Chairman, Town Council, Kuala Pilah* (1975) 1 MLJ 273; *Thein Tham Sang v United States Amy Medical Research Unit* (1983) 1 MLJ 97; *Workon Sdn Bhd v Director of Lands & Surveys, Sabah* (1999) 4 MLJ 177; and *Ho Kooi Sang v Universiti Malaya* (2004) 2 MLJ 516

[27.4] In response, the applicants explained that they were not applying under section 44 of the Specific Relief Act 1950 for specific relief against a public officer, but were instead applying for judicial review under section 25 of the Courts of Judicature Act 1964 and Order 53 of the Rules of the High Court 1980. None of the cases referred to by the respondent were cases of judicial review.
Respondent was incorrectly named

[27.5] The respondent submitted that it was “wrongly named in this matter” because the respondent (Registrar-General of Births and Deaths) has no power to “decide” the status of the child’s citizenship. The respondent relied on Ku Luwante (In Infant) v Government of Malaysia & Anor [1977] 1 LNS 49; Article 15(3) of the Federal Constitution; Lim Lian Geok v The Minister of Interior, Federation of Malaya (1962) 1 MLJ 159; and Rule 3(1) of the Citizenship Rules 1960.

[27.6] However, the judicial review was brought against the respondent because it was the respondent who issued and signed the child’s birth certificate under challenge. At no time did the applicants “apply” to the respondent for the child’s citizenship under Part III of the Second Schedule to the Federal Constitution. Instead, the applicants had merely applied to the respondent for a new birth certificate pursuant to section 25A of the Adoption Act 1952.

Judicial review was premature

[27.7] Here the respondent submitted that the judicial review was premature because the applicants had “failed to show that the applicants had exhausted the avenue to apply to the Minister of Home Affairs for the status of citizenship for the child.” The respondent went on to refer Article 15(3) of the Federal Constitution and Part III Section 18 of the Second Schedule of the Federal Constitution.

[27.8] In response, the applicants pointed out that these provisions applied only to children born before October 1962. Further, Article 15A of the Federal Constitution was not relevant as the said Child was “citizen by operation of law” and was not obliged to “apply for citizenship” under Article 15A.

Court did not have jurisdiction


[27.10] In reply, the applicants submitted that the Court is not limited in any way by the ouster clause in Part III Section 2 Second Schedule to the Federal Constitution simply because the decision under review did not concern an application to the Minister of
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Home Affairs for citizenship under Part III Second Schedule.

Whether the said Child can be “given the status of citizenship by operation of law”?

[27.11] This issue raised by the respondent demonstrated the respondent’s misunderstanding of the applicants’ judicial review.

[27.12] The applicants in response submitted that a person is not “given” citizenship by operation of law. Instead, a person “is” a citizen by operation of law. A person is recognised as a citizen by operation of law by a straightforward application of the provisions in Part II Second Schedule of the Federal Constitution to the factual circumstances of that person.

[27.13] In the present case, the child was not seeking to “acquire” citizenship. Instead, the applicants were simply seeking to have the said child’s citizenship (by operation of law) correctly recorded on his birth certificate.

The High Court’s decision

[28] Lau Bee Lan J allowed the judicial review with costs on 16.12.2009. Her Ladyship orally delivered her brief grounds rejecting the respondent’s arguments and accepting, inter alia, the applicants’ submissions:

(a) that the child is a citizen of Malaysia by operation of law by virtue of his lawful adoption by the applicants pursuant to the Order for adoption read with Sections 9 and 25A of the Adoption Act 1952 and Article 14(1)(b) Part II Second Schedule (a) of the Federal Constitution;

(b) that the child is a citizen of Malaysia by operation of law by virtue of his birth within the Federation of Malaysia pursuant to Article 14(1)(b) Part II Second Schedule (e) of the Federal Constitution;

(c) that the respondent did not have the jurisdiction to refuse to register the child as a citizen of Malaysia in his new birth certificate;

(d) that the respondent had acted in error of law and in excess of his jurisdiction by
rendering the child stateless;

(e) that the respondent committed an error of law by taking into account that the child natural parents are not known, which is a totally irrelevant consideration;

(f) that the respondent has acted in disregard of the applicants’ legitimate expectation that the respondent would issue a new birth certificate registering the child as a citizen of Malaysia; and

(g) that the respondent’s decision is an error of law because the respondent had acted unreasonably (in the Wednesbury sense), that is, so unreasonably that no reasonable authority would have made such a decision to deprive the child of his Malaysian citizenship.

[29] The decision by the High Court is novel to Malaysian law and is a step towards better protecting the best interests of adopted children. This case is new authority for the principle that a lawfully adopted child born in Malaysia on or after Malaysia Day (16.9.1963) has the constitutional right to be recognised as a citizen, provided either of the adoptive parents is a citizen or permanent resident of Malaysia.

[30] The decision is also authority for the more general and widely applicable principle that any child who is born in Malaysia on or after Malaysia Day has the constitutional right to be recognised as a citizen of Malaysia, provided he or she is not born a citizen of any other country.

[31] The respondent did not appeal against the decision of Lau Bee Lan J allowing the judicial review. Upon service of the sealed order, the NRD complied with the orders of the Court to reissue the child’s birth certificate properly recognising him as a Malaysian citizen.

**Taxation of costs**

[32] The applicants’ Bill of Costs dated 11.5.2010 was heard by the learned Senior Assistant Registrar, Puan Jessica Ombou Kakayun, and was decided on 14.12.2010. The learned Registrar allowed the applicants’ the sum of only RM8,000.00 as getting up costs.

[33] The applicants not being satisfied with the costs awarded applied to the learned Registrar to review the award for getting up costs. On 16.6.2011, the learned Registrar
reviewed and increased the getting up costs by a mere RM2,000.00 to RM10,000.00.

[34] The applicants still unsatisfied with the costs awarded filed a further review to the Judge in Chambers. On 11.11.2011, Abang Iskandar Bin Abang Hashim J allowed the review and awarded getting up costs in the sum of RM30,000.00 to the applicants. The learned Judge orally delivered his brief grounds for increasing the costs awarded on the basis that:

(a) the issues before Lau Bee Lan J were difficult and complex, involving public and private rights;

(b) the legal principles involved in the matter were ground-breaking and novel, and of public importance particularly to adopted children;

(c) the matter required the involvement of skilled and experienced lawyers; and

(d) the getting up costs granted by the learned Registrar was not fair and reasonable.

[35] The decision of the Court to increase the getting up costs for the Judicial Review to RM30,000.00 properly reflects the significance of Lau Bee Lan J’s decision. It is adequate recognition and confirmation that her Ladyship’s decision is an important development in Malaysian adoption law.

International comparisons

[36] Different countries approach the issue of citizenship for adopted children in varying manners. As examples, South Korea, the United Kingdom and Australia have legislations which give citizenship to adopted children in specified circumstances. The decision in Lee Chin Pon’s case is consistent with the approach taken in these countries. As a result, however, the position of adopted children in Malaysia is now in contrast with that in Singapore.

South Korea

[37] South Korean citizenship is governed by the Nationality Act 1997. Adopted children in Korea may acquire nationality by birth or by special naturalization, depending on their circumstances.
Article 2 (Acquisition of Nationality by Birth) of the Nationality Act 1997 states:

“(1) A person falling under one of the following subparagraphs shall be a national of the Republic of Korea at the time of his or her birth:

1. A person whose father or mother is a national of the Republic of Korea at the time of his or her birth;

2. A person whose father was a national of the Republic of Korea at the time of his death, where his father died before his or her birth; and

3. A person who is born in the Republic of Korea, where both of parents are unknown or have no nationality.

(2) An abandoned child found in the Republic of Korea shall be recognized as born in the Republic of Korea.”

In addition, pursuant to Article 7-1 of the Nationality Act 1997, any child adopted by a father or mother who is a national of the Republic of Korea is entitled to special naturalization immediately upon entry into Korea and without having to meet the minimum length of stay in Korea.[1]

A child in South Korea who find him or herself in the position of the child in Lee Chin Pon’s case would acquire Korean nationality by virtue of Article 1-1-1 or may apply for citizenship under Article 7-1 of the Nationality Act 1997.

United Kingdom

Pursuant to Section 1(5) and (5A) of the British Nationality Act 1981, a child who is not a British citizen shall be a citizen upon adoption by parents who are English citizens or who are habitually resident in the United Kingdom provided the order for adoption was made by a UK court or is a Convention adoption under the 1993 Hague Convention. Section 1 states:

“(5) Where–

(a) any court in the United Kingdom makes an order authorising the adoption of a minor who is not a British citizen; or
(b) a minor who is not a British citizen is adopted under a Convention adoption, that minor shall, if the requirements of subsection (5A) are met, be a British citizen as from the date on which the order is made or the Convention adoption is effected, as the case may be.

(5A) Those requirements are that on the date on which the order is made or the Convention adoption is effected (as the case may be)—

(a) the adopter or, in the case of a joint adoption, one of the adopters is a British citizen; and

(b) in a case within subsection (5)(b), the adopter or, in the case of a joint adoption, both of the adopters are habitually resident in the United Kingdom.”

[40] In all other cases, an application to register an adopted child as a British citizen must be made to the Home Office Nationality Directorate under Section 3(1) of the British Nationality Act 1981, the approval of which is at the discretion of the Home Secretary. The criteria set out by the UK Border Agency on its website are:[2]

- “the application must be made before the child is of age 18;
- the adoption took place in a territory named in the Adoption (Designation of Overseas Adoptions) Order 1973;
- at least one of the adoptive parents is a British citizen otherwise than by descent;
- both adoptive parents have given their formal consent to the registration. There may be cases when it is not necessary for both parents to give consent. These cases are detailed on the completing the application form page;
- if the child is aged 10 or over they are of good character;
- the Home Secretary is satisfied that the relevant adoption laws have been followed in both the country where the adoption took place and the country where the child and parents will be living; and
- the Home Secretary is satisfied that the adoption was not arranged simply to allow the child’s entry into the United Kingdom.”

Australia

[41] Australian citizenship is acquired automatically upon adoption provided the criteria under Section 13 of the Australian Citizenship Act 2007 are satisfied.
“13. Citizenship by adoption

A person is an Australian citizen if the person is:

(a) adopted under a law in force in a State or Territory; and

(b) adopted by a person who is an Australian citizen at the time of the adoption or by 2 persons jointly at least one of whom is an Australian citizen at that time; and

(c) present in Australia as a permanent resident at that time.”

[42] In other cases of adoption, an application for grant of Australian citizenship must be made for the adopted child.[3] Sections 19C to 19F of the Australian Citizenship Act 2007 allow for the simplified registration of a person as an Australian citizen where that person was adopted outside Australia in accordance with the Hague Convention.

Singapore

[43] The adoption of children in Singapore is governed by the Adoption of Children Act 1939. However, Section 7(9) expressly states that “An adoption order shall not by itself affect the citizenship of the adopted child.” The Act does not make any further provision for the citizenship of adopted children in Singapore.

[44] Section 7(9) of the Singaporean Adoption of Children Act 1939 differentiates the position in Singapore from that of Malaysia – the Malaysian Adoption Act 1952 neither provides for the citizenship of adopted children nor prevents an adoption order from conferring the right to citizenship. In fact, it is the absence of such provision that both required and enabled the High Court in Lee Chin Pon’s case to find that an adoption order under the Adoption Act 1952 can give an adopted child citizenship by operation of law under the Federal Constitution.

[45] Article 121 of the Constitution of Singapore provides for citizenship by birth in Singapore. Although there is no automatic conferring of citizenship on children born of non-citizens in Singapore, the Government has the discretion to grant citizenship to any child born in Singapore upon application. This would also apply to adopted children who were born in Singapore.
"121. Citizenship by birth

(1) Subject to this Article, every person born in Singapore after 16th September 1963 shall be a citizen of Singapore by birth.

(2) A person shall not be a citizen of Singapore by virtue of clause (1) if at the time of his birth

(c) neither of his parents was a citizen of Singapore.

(3) Notwithstanding clause (2) (c), the Government may, where it considers it just and fair and having regard to all the circumstances prevailing at the time of the application, confer citizenship upon a person born in Singapore.”

[46] The parents of an adopted child who is not a citizen can apply to register the child for citizenship under Article 124 of the Constitution subject to conditions and the discretion of the Government. In practice, applications for citizenship are made to the Immigrations and Checkpoint Authority of Singapore.[4]

“124. Registration of minors

(1) The Government may if satisfied that a child under the age of 21 years —

(a) is the child of a citizen of Singapore; and

(b) is residing in Singapore,

cause such child to be registered as a citizen of Singapore on application being made therefore in the prescribed manner by the parent or guardian of such child.

(2) The Government may, in such special circumstances as it thinks fit, cause any child under the age of 21 years to be registered as a citizen of Singapore.”
Conclusion

[47] The decision of the High Court in *Lee Chin Pon’s* case is to be commended for the principles of law developed by Lau Bee Lan J in arriving at her judgment are in the best interest of adopted children. In summary, the case is authority for the principle that:

[47.1] a lawfully adopted child born in Malaysia on or after Malaysia Day (16.9.1963) has the constitutional right to be recognised as a citizen, provided either of the adoptive parents is a citizen or permanent resident of Malaysia; and

[47.2] a child who is born in Malaysia on or after Malaysia Day has the constitutional right to be recognised as a citizen of Malaysia, provided he or she is not born a citizen of any other country.

[48] The case also emphasizes the supremacy of the Federal Constitution and reminds of the necessity for the Court to protect the constitutional rights of all and sundry, including the most defenceless – adopted children.

[49] Finally, the recognition of adopted children as citizens appears to be in general accordance with that of other countries with legislation on nationality. Until such time that the legislature enacts specific legislation to provide for the inclusion of adopted children as citizens, it is hoped that the Malaysian Courts will continue to defend the rights of our children.

* This article was originally presented by Raymond Mah as a conference paper at the 24th LAWASIA Conference held in Seoul, South Korea from 9-12 October 2011 in the Family Law section. Raymond Mah acted as counsel for the applicants in the Originating Summons and Judicial Review proceedings detailed in this article. This article has been prepared and published with the consent of the applicants.

[1] 
Citizenship for Adopted Children - A Malaysian Perspective

