CTEB & ANOR

v.

KETUA PENGARAH PENDAFTARAN NEGARA MALAYSIA & ORS

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Rohana Yusuf PCA, Nallini Pathmanathan, Vernon Ong Lam Kiat, Zabariah Mohd Yusof, Hasnah Mohammed Hashim, Mary Lim Thiam Suan FCJJ
[Civil Appeal No: 01(i)-34-10-2019(W)]
28 May 2021

Constitutional Law: *Citizenship — Citizenship by operation of law — Construction of provision relating to art 14(1)(b) of Federal Constitution — Whether it was proper to import into s 1(b) of the Second Schedule to FC any other requirements for citizenship of a child born to a Malaysian father other than those expressly stated — Whether unlawful discrimination would arise if s 17 of Part III of Second Schedule to FC was used to qualify application of s 1(b) of Part II of said Schedule — Whether child should be deprived of citizenship under art 24 of FC because he possessed a foreign passport*

Statutory Interpretation: *Constitution — Principles of interpretation — Article 14(1)(b) Federal Constitution — Citizenship by operation of law — Construction of said provision – Whether it was proper to import into s 1(b) of the Second Schedule to FC any other requirements for citizenship of a child born to a Malaysian father other than those expressly stated — Whether unlawful discrimination would arise if s 17 of Part III of Second Schedule to FC was used to qualify application of s 1(b) of Part II of said Schedule*

The present appeal concerned the constitutional entitlement of a child ('the Child') born outside Malaysia, to a Malaysian father and a Filipino mother, to become a citizen by operation of law pursuant to art 14 of the Federal Constitution ('FC'). At the time of his birth, the Child's parents were not married. They only legally registered their marriage in Malaysia, five months after the birth of the Child. In this appeal, the main issues to be determined were, whether it was proper to import into s 1(b) of the Second Schedule to the FC any other requirements for the citizenship of a child born to a Malaysian father other than those expressly stated in the provision; whether unlawful discrimination would arise if s 17 of Part III of the Second Schedule to the FC was used to qualify the application of s 1(b) of Part II of the said Schedule; and whether the Child should be deprived of citizenship under art 24 of the FC because he possessed a foreign passport.

Held (dismissing the appellant's appeal by majority)

Per Rohana Yusof PCA (Vernon Ong Lam Kiat FCJ, Zabariah Mohd Yusof FCJ and Hasnah Mohammed Hashim FCJ, concurring):

(1) Section (1)(b) of Part II of the Second Schedule to the FC, *ipso facto* called into operation of the provisions pertaining to citizenship under Part III. Section 17 of Part III of the FC opened with the words "For the purposes of Part III". Therefore, in whichever way one looked at it, s 17 could not be detached from s 1(b) of the Second Schedule to the FC. Ignoring the application of s 17 would also render art 31 of the FC as otiose. (para 43)

(2) Section 17 of the Second Schedule to the FC provided for reference to the "father" of an illegitimate child to refer to his "mother". The only clear meaning to be concluded therefore was that the Child's citizenship in this case followed that of his mother. There was nothing ambiguous about the said provision to permit other rules of interpretation. Further, from the express distinction for parents or father of an illegitimate child in s 17, it was obvious that the word "parents" in the context of Part III of the FC must be construed to refer to lawful parents in a recognised marriage in the Federation. Even under s 13 of the Births and Deaths Registration Act 1957, the legislation made a clear distinction between a father or mother of an illegitimate child. This connoted that "parents" referred always to legally wedded parents, not biological father and mother. (paras 44-45)

(3) The fundamental rule in interpreting the FC or any written law was to give effect to the intention of the framers. The court could not insert or interpret new words into the FC. The court may only call in aid of other canons of construction where the provisions were imprecise, protean, evocative or could reasonably bear more than one meaning. In this instance, s 17 of the Second Schedule to the FC was plain and clear in its meaning. (para 48)

(4) The Child's status at birth was the determination point in qualifying for the acquisition of citizenship by operation of law. Because citizenship by operation of law was determined at birth, other laws which retrospectively qualified a person such as Legitimacy Act 1961 or Adoption Act 1952 could not be used to construe the qualification of that person. In addition, the subsequent marriage of the parents would not change the birth status of the Child as an illegitimate child. (paras 58, 60 & 61)

(5) The appellants' argument that the Child's birth status had been altered by virtue of his legitimation vide s 4 of the Legitimacy Act 1961 and that his legitimacy status for the purpose of s 17 of Part III of the Second Schedule to the FC was to be taken at the time of the application for citizenship, amounted to introducing words into the provision of the FC against the express wordings of art 14(1)(b) read together with the Second Schedule of the FC. Here, the qualification of acquiring citizenship by operation of law, must be met at birth. If the qualifications were not met, the court was not at liberty to add and

subtract any other or qualifications which the FC stated otherwise. (*Madhuvita Janjara Augustin v. Augustin Lourdsamy & Ors* (overruled)). (paras 63-82)

(6) Article 8 of the FC opened with "Except as expressly authorised by this Constitution…". Hence, discrimination authorised by the FC was not a form of discrimination that art 8 sought to protect. There were in fact a number of discriminatory provisions expressed in the FC which included art 14. Since the discriminatory effect of art 14 was one authorised by the FC, it would be absurd and clearly lack of understanding of art 8 for any attempt to apply the doctrine of reasonable classification, to art 14 of the FC. (para 85)

(7) On the issue of dual citizenship, the acquisition of a foreign citizenship and the discretion of the Federal Government to deprive any citizen of its citizenship under art 24 of the FC were not relevant factors in determining whether a child was entitled to citizenship by operation of law under art 14(1)(b) of the FC. In the present case, the Child's acquisition of a Philippines passport which led to him being presumed a citizen of the Philippines was not a legally disqualifying factor to him acquiring Malaysian citizenship. (para 93)

Per Tengku Maimun Tuan Mat, CJ (minority):

(8) The principle of *jus soli* encapsulates the notion that a person was entitled to citizenship purely on the basis of the place where he was born irrespective of the citizenship status of his parents. Thus, if immigrant non-citizen parents from one country gave birth to their child in a country which adopted the principle of only *jus soli*, the child was automatically a citizen of that country by the fact of his birth there. *Jus sanguinis* on the other hand looked only to the citizenship status of the parent irrespective of where the child was born. So long as the parent (sometimes the father only and other times either parent) was a citizen, the child was automatically entitled to 'inherit' the citizenship status of that parent. As observed in *Pendaftar Besar Kelahiran Dan Kematian Malaysia v. Pang Wee See & Anor* , the FC amalgamated both *jus soli* and *jus sanguinis* into its provisions. Looking at the citizenship scheme and structure of the FC as a whole, the framers of the FC intended that the conferral of citizenship be crafted as widely as possible to enable all relevant persons at the time of the formation of Malaya and later Malaysia the right to be conferred citizenship by operation of law. (paras 151-152)

(9) The general tenor of the words and the purpose of art 31 of the FC suggested that Part III of the Second Schedule to the FC was meant to serve as an aid to assist in the interpretation of Parts I and II of the Second Schedule and not to qualify or conditionalise the application of those Parts to Part III. Certainly, it could not and ought not to be interpreted to the extent of diluting the intent and purpose of the principal provisions. (para 164)

(10) On the facts of this appeal, the 2nd appellant claimed to be the father of the Child and to this end had even adduced a DNA test to establish incontrovertibly that he was the father biologically and in law. The 'blood relation' element of

jus sanguinis which s 1(b) of Part II of the Second Schedule to the FC codified was therefore met. Additionally, art 5(1) of the FC guaranteed the right to life and personal liberty. Reading art 5(1) of the FC broadly and prismatically, the right to life must include the right to nationality. This method of interpretation supported the purposive approach taken to read s 17 of Part III of the Second Schedule in its appropriate context having regard to the drafting history of the FC. The logical conclusion therefore was that having regard to the historical and purposive canons on construction, the word 'father' in s 1(b) of Part II and anywhere else relevant to the context of this appeal ought to be construed as meaning 'biological father'. Thus, the legitimacy status of any person claiming citizenship under art 14(1)(b) read together with Part II of the Second Schedule to the FC was an irrelevant factor in cases where paternity was known and the said biological father was a citizen of Malaysia and had met the rest of the requirements of s 1(b) of Part II of the Second Schedule to the FC.
(paras 170-172)

(11) On the issue of unlawful discrimination, art 8(5) of the FC was a derogation from liberty and must therefore be construed narrowly. Applying a narrow interpretation, the provision was clear as to the types of discrimination allowed under the FC and was, to that extent, exhaustive. A perusal of it did not suggest that it allowed discrimination in respect of the conferment of citizenship under any of the provisions of Part III of the Second Schedule of the FC, ie the provisions on citizenship. (*Lee Kwan Woh* (refd)). (para 178)

(12) Law' was defined in art 160 of the FC to include 'written law'. The term 'written law' was further defined to include 'this Constitution'. Upon reading those definitions into the word 'law' in both arts 8(1) and (2) it was abundantly clear that the intention of the drafters of the FC was that the tests on unlawful discrimination applicable to ordinary laws passed by Legislature or any executive act applied with equal force to the provisions of the FC itself. There was therefore a strong constitutional basis for the Federal Court's observations in *Alma Nudo Atenza v. PP & Other Appeals* that the whole of art 8 was 'all pervading' such that the other provisions of the FC must be construed having regard to it. (para 180)

(13) In the instant case, three instances of discrimination arose if one were to read s 17 of Part III of the Second Schedule to the FC as qualifying the application of s 1(b) of Part II of the said Schedule. Firstly, in a case where the parental status of a child was known but the child was born out of wedlock, interpreting s 17 of Part III of the Second Schedule to the FC in the manner advanced by the respondents had the effect of discriminating the father of the person claiming to be entitled to citizenship by operation of law. The fathers were essentially deemed non-existent and the fact of paternity was ignored. Secondly, relating to the principle of *jus sanguinis* which was encapsulated by s 1(b) of Part II, by this biological criterion, the only element that needed to be proved, apart from the other requirements of that section, was that the father was a Malaysian citizen. It did not matter that the child was legitimate or illegitimate. However,

if one were to accede to the interpretation accorded by the respondents, the *jus sanguinis* principle was effectively rendered otiose for illegitimate child. Thirdly, the FC did not define 'legitimacy' and its cognate expressions. Bearing in mind the principle that in construing the constitutional provisions in issue no reference should be made to other statutes but the FC itself, s 17 of the said Schedule as read by the respondents would create two different instances of applications on Muslims and cause discrimination between Muslims and non-Muslims. A non-Muslim child who was born illegitimate but who was subsequently legitimated would not be considered as legitimate for purposes of citizenship, but a Muslim child who was otherwise born illegitimate would for purposes of the citizenship be considered legitimate. As Federal or State-promulgated laws were irrelevant to the question of legitimacy and as such, in the context of citizenship by operation of law, 'legitimacy' must mean the same thing whether the applicant was a Muslim or a non-Muslim. (paras 181-186)

(14) The discrimination between the father and mother was expressly in violation of art 8(2) of the FC which provided that there should be no prohibition against any citizen on grounds of gender in any law. The 'law' included the FC. The word 'citizen' in this case referred to the father of the person through whom he sought to base his claim to citizenship. Therefore, the respondents' reading of s 17 of Part III of the Second Schedule to the FC as qualifying s 1(b) of Part II was unsustainable in light of the clear prohibition against discrimination on grounds of gender in any law as inserted into art 8(2) of the FC. (paras 187-188)

(15) In the circumstances of this case, as there was no dispute that the 2nd appellant was the Child's father, it followed that given the construction accorded to s 1(b) of Part II of the Second Schedule to the FC, the 1st appellant had met all the requirements for citizenship by operation of law. (para 196)

(16) Article 24(1) of the FC only applied to citizens who had voluntarily acquired foreign citizenship or exercised a right exclusively available to the citizen of that foreign country under that country's laws. The said article had absolutely no application to cases where a person claimed to be entitled to Malaysian citizenship under art 14 of the FC. In this instance, as the Child's status as a Federal citizen was still unascertained, the question of deprivation of his citizenship did not arise. Further, the power to deprive anyone of their citizenship was to be exercised by the Federal Government upon having complied with all the procedural safeguards of natural justice. In the circumstances, the Court of Appeal's finding in respect of art 24 of the FC and its application to the Child was perverse and unsustainable in law. (*Haja Mohideen MK Abdul Rahman & Ors v. Menteri Dalam Negeri & Ors* (refd); and *Kalwant Kaur Rattan Singh v. Kementerian Dalam Negeri Malaysia & Anor* (refd)). (paras 199-202)

Per Nallini Pathmanathan, FCJ (minority):

(17) The proper construction of s 17 Part II of the Second Schedule to the FC was that the section made provision for a child that was illegitimate, in that the child was born out of wedlock, and there was no legally acknowledged father either on the birth certificate or who came forward to acknowledge paternity. Hence, the absence of a father was the relevant situation in which the mother's status conferred citizenship by descent on the child. Put another way, in the absence of a father, the Malaysian mother may confer the right of citizenship by descent on the child. This ensured the child was not stateless. The section did not provide for a situation where there was a legally acknowledged father who was a Malaysian citizen. Further, it was evident from a perusal of s 17 Part III of the Second Schedule to the FC that it provided for the mother's status to substitute that of the father in s 1(b) of Part II of the Second Schedule to the FC. That should only arise where there was no Malaysian father at all. It did not follow that the citizenship of a legitimate biological father of the child should be ignored in its entirety, simply because the father and mother were not married. (para 244-246)

(18) Section 17 of Part III fell under art 31 of the FC which provided that until Parliament provided otherwise the provisions in Part II of the Second Schedule would have effect for the purposes of Part III of the FC. It was supplementary in nature and not a governing section. It was also clear that Part III of the Second Schedule was interpretive in nature. Therefore, such interpretive provisions which detail the legal construction to be adopted in specific instances could not be utilised to override, derogate from or abrogate from the general rule which was set out in s 1(b) Part II of the Second Schedule. Far less to nullify the express provisions of the FC which provided for the conferment of citizenship by operation of law as a consequence of descent or a blood tie from father to child. (paras 248-249)

(19) In the context of this appeal, the words "subject to" served the purpose of conjoining or bridging s 1(b) of Part II and s 17 Part III of the Second Schedule. The primary reason for this was that it was inconceivable at best and improbable at worst, that the primary mode of conferment of citizenship by descent should be eroded by illegitimacy. This ran awry of the fundamental basis of citizenship. If that had been the intention of the framers of the FC, then there would be express wording to that effect. It could not be argued that s 17 of Part III provided such express wording derogating from s 1(b) because the former was primarily interpretive in its function. It was a saving provision for those children who have no known father. (paras 251-253)

(20) It would be incorrect to construe s 17 Part III as imposing a condition of legitimacy on s 1(b) Part II, in order for a child to enjoy citizenship by descent. That was the net effect of construing s 17 Part III as a condition to the right of citizenship by operation of law premised on *jus sanguinis.* It would deplete and further restrict the right to citizenship by operation of law. The imposition

of a legitimacy requirement as a pre-condition to citizenship under s 1(b) Part II would need express provision as it effectively removed entrenched rights conferred under the FC. In the result, the conferment of citizenship in the instant appeal was effective by operation of law as the father was a Malaysian citizen. (paras 254-255)

(21) There could not be any conflict in the construction of the FC and to that extent the construction that promoted a harmonious result was always to be preferred. Here, the construction afforded in the majority judgment allowed for illegitimate children of Malaysian mothers to be afforded citizenship by operation of law, while illegitimate children of Malaysian fathers married to foreign mothers were not entitled to such citizenship. This was clearly gender discrimination which was contrary to art 8(1) of the FC. Neither was such discrimination justified as it did not comprise a reasonable classification having a rational nexus to the object of the citizenship provisions. (paras 273-274)

Per Mary Lim Thiam Suan, FCJ (minority):

(22) In the instant case, the Child had irrefutably satisfied the terms prescribed in art 14(1)(b) read with s 1(b) of Part II of the Second Schedule of the FC. The 2nd appellant was the biological father of the Child and was himself a citizen of this country as he was born in Malaysia. Furthermore, the fact that the Child's father was not married to his mother at the time of his birth in the Philippines did not diminish his right to acquire citizenship by operation of law under art 14(1)(b) of the FC. The 2nd appellant remained the father of the Child, and the legal relationship between the father and mother of the Child did not alter the status of the Child. It should be added that children similarly circumstanced as the Child in this appeal should never be required to apply for their citizenship under art 15 or 15A of the FC. (paras 283-284)

(23) The discrimination that arose from the respondents' reliance on s 17 of Part III of the Second Schedule to the FC, whether it be on grounds of legitimacy or illegitimacy or between father and mother were not at all 'expressly authorised by this constitution' as allowed under art 8(2) and as clearly illustrated in art 8(5) of the FC. Such discrimination was caused by the effect in reading s 17 of Part III of the Second Schedule to the FC in a manner which was countenanced in law. Any discrimination even if authorised under the FC and unless expressly and clearly authorised must be strictly and narrowly construed and must never be unwittingly condoned or encouraged. (para 284)

Cases referred to:

Abdullah Atan v. PP & Other Appeals [2020] 6 MLRA 28 (refd)

Ah Thian v. Government of Malaysia [1976] 1 MLRA 410 (refd)

Alma Nudo Atenza v. PP & Another Appeal [2019] 3 MLRA 1 (refd)

Augustin Lourdesamy & Others v. Madhuvita Augustin (Civil Appeal No 01-4-02-2014) (refd)

CAS v. MPPL & Anor [2019] 1 MLRA 439 (refd)

Chan Tai Ern Bermillo & Anor v. Ketua Pengarah Pendaftaran Negara Malaysia & Ors [2020] MLRAU 51 (refd)

Chin Kooi Nah (Suing By Herself And As Next Of Kin To Chin Jia Nee, An Infant) v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia [2015] MLRHU 1040 (refd)

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 MLRA 20 (refd)

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1980] 1 MLRA 18 (refd)

Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 MLRA 8 (refd)

Dick v. United States 208 US 340 (refd)

Foo Toon Aik v. Ketua Pendaftar Kelahiran & Kematian Malaysia [2012] 2 MLRH 548 (refd)

Haja Mohideen MK Abdul Rahman & Ors v. Menteri Dalam Negeri & Ors [2007] 2 MLRH 87 (refd)

Hamed v. R [2012] 2 NZLR 305 (refd)

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 2 MLRA 1 (refd)

JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Berhad; President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners) [2019] 3 MLRA 87 (refd)

Kalwant Kaur Rattan Singh v. Kementerian Dalam Negeri Malaysia & Anor [1993] 1 MLRH 595 (refd)

Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 1 MELR 501; [2012] 1 MLRA 661 (refd)

Lee Kwan Woh v. PP [2009] 2 MLRA 286 (refd)

Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2017] 6 MLRA 426 (refd)

Loh Kooi Choon v. Government of Malaysia [1975] 1 MLRA 646 (refd)

Madhuvita Janjara Augustin v. Augustin Lourdsamy & Ors [2017] MLRAU 455 (overd)

Maradana Mosque Board of Trustees v. Mahmud [1966] 1 All ER 545 (refd)

Merdeka University Bhd v. Government of Malaysia [1981] 1 MLRH 75 (refd)

Minister of Home Affairs v. Fisher [1980] AC 319 (distd)

Minister of Public Works of The Government of the State of Kuwait v. Sir Frederick Snow and Partners [1984] AC 426 (refd)

Mohamed Sidin v. Public Prosecutor [1966] 1 MLRA 419 (refd)

MPPL & Anor v. CAS (02(f)-14-03/2018(W) (refd)

Nalan Kunji Kanan & Anor v. Secretary General of Ministry of Home Affairs, Malaysia & Ors [2018] 2 MLRH 59 (refd)

Pendaftar Besar Kelahiran Dan Kematian Malaysia v. Pang Wee See & Anor [2018] 2 MLRA 406 (refd)

Post-Graduate Institute of Medical Education and Research v. KL Narasimhan [1997] AIR 3687 (distd)

Prigg v. Pennsylvania 10 L Ed 1060 [1842] US (refd)

PP v. Datuk Harun bin Haji Idris & Ors [1976] 1 MLRH 611 (refd)

Public Prosecutor v. Datuk Tan Cheng Swee & Anor [1980] 1 MLRA 572 (refd)

S A Venkataraman v. The State [1958] AIR 107 (refd)

Samuel Duraisingh & Anor v. Pendaftar Besar Kelahiran Dan Kematian Malaysia & Another Case [2019] MLRHU 1825 (refd)

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2012] 6 MLRA 375 (refd)

UKM v. Attorney General [2019] 3 SLR 874 (refd)

Weems v. US 54 L Ed 793 [1910] US (refd)

Yu Sheng Meng v. Ketua Pengarah Pendaftaran Negara & Ors [2016] 1 MLRH 627 (refd)

Legislations referred to:

Bermuda Constitution (Bermuda), s 11(5)(d)

Births and Deaths Registration Act 1957, s 13

Constitutional (Amendment) (No 2) Act 2001, art 8(2)

Evidence Act 1950, s 112

Federal Constitution, arts 5(1), 8(1),(2),(5), 9, 10, 14(1)(b), 15(1)(a)(b), (2), (4),(5), 15A, 16, 16A, 18, 19, 19A, 19B, 22, 24(1)(2)(3A), 26B, 27, 31, 150 (6A), 159(5), 160, Second Schedule, ss 1(b), 7(3) 17, 19A, 19B

Legitimacy Act 1961, ss 4, 9

Rules of Court 2012, O 14A

Universal Declaration of Human Rights 1948, art 15

Others referred to:

Arfa Yunus, *Yeoh: It's 2019, treat men, women equally* New Straits Times Online,19 Sept, 2019

Dr. Low Choo Chin *International Marriages and Marital Citizenship Southwest Asian Woman on the Move* ,Routledge, 2017, 1st edn, chapter 3, p 66

Emeritus Professor Datuk Dr. Shad Saleem Faruqi, *Our Constitution*, Sweet & Maxwell, Thomson Reuters, 2019, pp 178-180

RH Hickling, *An Introduction to the Federal Constitution*, Federation of Malaya Information Services 1960, p 24

Suffian *An introduction to the Constitution of Malaysia*, Pacifica Publications, 2007, 3rd edn, pp 330-337

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JUDGMENT

Rohana Yusuf PCA (Majority):

[1] The issue before us is fairly straightforward. It is whether an illegitimate child born outside Malaysia, to a Malaysian biological father and a Filipino mother is entitled to become a citizen by operation of law pursuant to art 14 of the Federal Constitution (FC).

[2] At the time of his birth on 27 September 2010, the Child's parents were not married and five months after his birth and on 22 February 2011, they legally registered their marriage in Malaysia pursuant to the Law Reform (Marriage and Divorce) Act 1976.

[3] The Child was correctly presumed to be a citizen of the Philippines by the Court of Appeal on the basis that he travelled on a passport issued by the Government of the Philippines.

At The High Court

[4] By an Originating Summons, the appellants sought for a declaration before the High Court for the Child to be a citizen by operation of law under art 14(1)(b) and/or by registration pursuant to art 15(2) of the FC.

[5] The High Court dismissed the declaration sought under art 14(1)(b) because the learned trial Judge found that:

> (i) the Child did not meet the criteria stipulated pursuant to art 14(1)(b) of the FC read together with s 1(b) of Part II of the Second Schedule and s 17 of Part III of the Second Schedule. Since s 17 of Part III of the Second Schedule defines the word "father" as referring to "mother" in a case of an illegitimate child, the Child's citizenship cannot follow that of his father;
>
> (ii) the determining point of time for the acquisition of citizenship by operation of law would be at the point of birth of the Child. In effect, subsequent legitimisation of the Child by reason of the marriage of his parents would not entitle the Child to acquire citizenship by

operation of law pursuant to art 14(1)(b) and s 1(b) of Part II of the Second Schedule of the FC; and

(iii) matters relating to citizenship are to be culled from within the four corners of the FC, which are to be construed and interpreted on its own without regard to any other statutes such as the Legitimacy Act. Therefore, the subsequent legitimate status of the Child resulted from the marriage of the parents after his birth is only relevant for purposes of the Legitimacy Act but not for acquiring citizenship by operation of law under art 14(1)(b) of the FC.

[6] The High Court also dismissed the declaration sought under art 15(2) because it was found that:

(i) the declaration sought was premature because no application has yet to be made to the Federal Government pursuant to art 15(2). What the Child did earlier was to apply for citizenship under art 15A of the FC which was declined by the Government. The appellants however did not challenge that decision by way of Judicial Review; and

(ii) the non-citizenship of his biological mother was an impediment to the application under art 15(2) of the FC.

[7] The appeal to the Court of Appeal was pursued only in respect of the application for a declaration of citizenship by operation of law under art 14(1)(b) of the FC.

At The Court Of Appeal

[8] Before it, the Court of Appeal had to consider two main questions:

(i) Can a child born out of wedlock be regarded as a legitimate child for the purpose of art 14(1)(b) of the FC once his parents marry each other after he was born to render s 17 of Part III of the Second Schedule inapplicable; and

(ii) Whether a child who has obtained a foreign citizenship is deprived of Malaysian citizenship.

[9] The Court of Appeal upheld the decision of the High Court as it agreed on the interpretation of the relevant provisions employed and propounded by the learned trial judge. It was found that the wording of s 1(b) of Part II of the Second Schedule clearly emphasised "at the time of the Child's birth". The Legitimacy Act was found to be an incompetent legal instrument to confer citizenship status under art 14(1)(b), because the Act provides only for personal rights and obligations of a legitimated person, which cannot include the right to citizenship.

[10] In addition, the Court of Appeal held that pursuant to art 24(2) and (3A) of the FC, voluntary acquisition of a foreign citizenship by way of using a passport issued by a foreign country would deprive the Child of Malaysian citizenship.

[11] This court had granted leave on four questions of law.

[12] Before getting into the issues raised in relation to the four questions posed, it would be apposite to state a brief background on the law of Malaysian citizenship, to enable the matter be discussed in perspective.

Citizenship Laws Generally

[13] The concept of citizenship law predated the formation of the Federation of Malaysia. It was there even before independence. Laws pertaining to citizenship in Malaysia then form part of the supreme law and no longer remain as ordinary law. These provisions too are entrenched in the FC in that, they are not easily amended as it requires the consent of the Conference of Rulers pursuant to art 159(5) of the FC. Even with the Proclamation of Emergency under art 150 as we are currently under, no emergency law may be passed which is inconsistent with provisions relating to citizenship (see art 150(6A)).

[14] Taking into account the various political and social factors prevailing then, the framers of the FC had introduced four categories of citizenship together with the requisite qualifications stipulated in Part III of the FC ranging from arts 14 to 22.

[15] There are four ways of acquiring Malaysian citizenship and they are by:

(i) operation of law (Article 14);

(ii) registration (Articles 15, 15A, 16, 16A and 18);

(iii) naturalisation (Article 19); or

(iv) incorporation of territory (Article 22).

[16] Of the four categories, the operation of law citizenship is almost automatic. One either fits the given criteria under the FC or one does not. The criteria are clearly stipulated in the FC and it does not require any exercise of discretion by the authority.

[17] By operation of law, therefore entails a situation where at birth the person's status of citizenship will be so determined. It is a matter of birthright. This legal position is also as stated by Emeritus Professor Datuk Dr. Shad Saleem Faruqi, in his book '*Our Constitution*' (Sweet & Maxwell, Thomson Reuters 2019) at pp 178 and 179. In practical terms, a birth certificate will be issued right away upon registration of such birth. While the other three categories of citizenship by registration and naturalisation require an application to the authorities upon meeting the

necessary conditions imposed under the FC (see Suffian '*An introduction to the Constitution of Malaysia*' (3rd edn, Pacifica Publications 2007) at pp 330-337).

[18] The segregation between these two broad classes *viz* by operation of law and other forms of citizenship (registration and naturalisation) is mainly this: The other categories of citizenship may be acquired through an application to the Federal Government upon the required conditions being fulfilled. Thus, unlike the operation of law citizenship, their qualifications are not automatic at birth. They become qualified upon fulfilling the stipulated conditions.

[19] To illustrate this point we can take a citizen by registration as an example. One of the persons qualified to apply is a married woman who is a wife of a Malaysian citizen. Why I refer her as a person who qualifies is because she is eligible to apply for citizenship to the Federal Government, who then will exercise its discretion. She must first satisfy the prerequisites of art 15(1)(a) in that she must reside in the Federation for a continuous period of two years, before applying, and (b) she must be of good character. These two conditions are subjected to further qualifications in arts 15(4) and (5). It says if she had resided in the States of Sabah or Sarawak before Malaysia Day she is treated as residing in the Federation. Then her marriage to the Malaysian citizen must be registered in accordance with any written law (see article 15(5)).

[20] Citizenship by operation of law is not peculiar only to Malaysia. Many countries in the world recognise this principle of citizenship, based on its own set of criteria as well as the *jus soli* and *jus sanguinis* rule. Hence, it is safe to conclude that whether one is qualified as a citizen by operation of law naturally must be discerned from the criteria as embedded in the FC itself, upon the true construction of the relevant provisions.

[21] It is over these legal constructions of the relevant FC provisions that parties before us differ in their views and approaches.

The Appellants' Case

Principle Of Interpretation

[22] Learned Counsel for the appellants, Dr Cyrus Das impressed upon us to bear in mind two main principles in construing the relevant constitutional provisions. First, to adopt an interpretation enabling the availing rights. He submitted that in the process of interpreting constitutional provisions to the citizen, it should be done in ways so as to enable availing right be given and not to deny or denude them, citing in support the Supreme Court of India in *Post-Graduate Institute of Medical Education and Research v. KL Narasimhan* [1997] AIR 3687 (SC).

[23] The second principle is where it involves the welfare of a child, any likely breakup of the family unit will be relevant. He then cited Lord Wilberforce in

Minister of Home Affairs v. Fisher [1980] AC 319 which emphasised on family unity and non-separation of a child from the family.

[24] Before even getting into the discourse on this subject further, let us first examine the above two principles in context. The case of *Minister of Home Affairs (supra)* is about a Jamaican mother of four illegitimate children all born in Jamaica. She later married a Bermudian in 1972 which took the mother and children to reside in Bermuda in 1975. The Minister of Labour and Immigration ordered the children to leave Bermuda in 1976. The Privy Council affirmed the Court of Appeal's decision where it held that the illegitimate children belong to Bermuda pursuant to s 11(5)(d) of its Constitution and they would enjoy immunity from deportation until they reach 18 years old.

[25] The point to be noted is, this is not a case where conferment of the rights of citizenship was made to the children merely to ensure no family break up. No country in the world will grant citizenship to anyone without meeting the required criteria and family breakup may be a consideration but not the reason or criteria accepted. Thus, what the court did in that case was only to allow them to stay in Bermuda till they reach 18 years old.

[26] Nobody can disagree that family should not be separated. However, the issue before us is whether avoiding family separation necessarily entitled the Child in this case to a citizenship by operation of law. I am not saying that he cannot be a citizen pursuant to art 15. The non-separation principle may be relevant for the authorities to consider in the exercise of its discretion pursuant to art 15. That is where the requirement of discretionary power sets in. Hence, I do not find the case of much help to advance the principle of law on family separation in the context of this appeal.

[27] Further, in the case before us, there was no evidence that the authority ordered the removal of the Child away just because he is not a citizen of Malaysia. The fact remains that the Child is peacefully living together with his Filipino mother and Malaysian father in Malaysia.

[28] The next case on the principle of interpretation cited is the Indian case of *Post-Graduate Institute of Medical Education and Research (supra)*. It is a case where a challenge was made on the discrimination between certain tribes or castes in India, which were given better opportunities in relation to pursuing an advanced degree and to be appointed as Assistant Professor in a university. The Supreme Court acknowledged that the less privileged tribes or castes should be given better chances and opportunities as the Indian Constitution allows protective discrimination. This case too is of no assistance to the case of the appellants. The principle of enabling right to a citizen does not arise in this appeal because the Child is not a citizen in the first place. Furthermore, he does not qualify a citizen by operation of law to even suggest that he has such enabling right.

Construction Of Article 14

[29] Let us next examine the construction of the relevant provisions as proposed by Dato' Dr Cyrus Das. The provisions on citizenship by operation of law are encapsulated in Part III of the FC. The relevant provisions and the scheme of the constitutional provisions dealing with citizenship by operation of law begins with art 14(1)(b) of the FC which is situated in Part III that reads:

> PART III
>
> **CITIZENSHIP**
>
> **Citizenship by operation of law**
>
> 14. (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> (a) ...
>
> (b) every person **born on or after Malaysia Day**, and having **any of the qualifications specified in Part II of the Second Schedule.**
>
> [Emphasis added]

[30] Part II of the Second Schedule applicable for the present purpose is s 1(b) which reads as follows:

> SECOND SCHEDULE
>
> ....
>
> **PART II**
>
> [Article 14(1)(b)]
>
> **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) ...
>
> (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**
>
> ...
>
> [Emphasis added]

[31] Section 1(b) above is subjected to the provisions of Part III of the Second Schedule that contains interpretation provision where s 17 of Part III reads as follows:

SECOND SCHEDULE

....

PART III

(Article 31)

SUPPLEMENTARY PROVISIONS RELATING TO CITIZENSHIP

...

Interpretation

17. For the purposes of Part III of this Constitution references to a **person's father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother,** and accordingly s 19 of this Schedule shall not apply to such a person.

[Emphasis added]

[32] The application of Part III of the Second Schedule as supplementary provisions relating to citizenship is provided for under art 31 of the FC which reads:

Application of Second Schedule

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

[Emphasis added]

[33] It was the submission of the learned counsel that the plain and ordinary reading of s 1(b) of Part II above does not stipulate that legitimacy at birth as a pre-condition for citizenship by operation of law. Under that section he said, the status of citizenship is opened to every "person" born outside the Federation whose father is a Malaysian citizen at the time of his birth. The only qualifying condition imposed by s 1(b) is on the citizenship status of the father at the time of the birth of that "person", and not his legitimacy. It was contended that nothing is to be added or omitted from the express words in that Section. So it would be wrong to interpose the legitimacy of the "person" as a condition to acquire citizenship by operation of law by applying s 17. Section 17 is therefore of no application.

[34] In any event, s 17 only becomes applicable according to him, at the point in time when the Child's citizenship by operation of law presents itself for consideration. He suggested a grammatical construction of the word "is legitimate" in s 17, being a reference to that point in time.

[35] He further contended that, in reading s 1(b), it should not be read in a discriminatory manner, where the effect would be causing differentiation between "legitimate" and "illegitimate" children for qualification for

citizenship, as it would offend art 8(1) of the FC, which guarantees equality of treatment to all persons. Also, it should not be read discriminating between a father and a mother.

[36] In substance, the line of submission raised the issue on the interpretation of art 14(1)(b) read together with s 1(b) of Part II of the Second Schedule of the FC. It questioned whether it can result in an illegitimate child, being legitimised through the subsequent marriage of his parents, would confer the Child the right to citizenship by operation of law.

The Respondents' Case

[37] In opposing the appeal, the position taken by the respondent is very much in line with the decisions of both the courts below, as well as the decided cases reported on this point.

My Analysis

[38] Construing art 14 is not a difficult process. It only requires reading it in its proper context. My understanding of art 14 is this. First, there are two possible ways to a citizenship by operation of law as plainly stated in art 14(1)(a) and (b). A person may either be born in or outside the Federation. The Child in the present appeal was born outside the Federation hence art 14(1)(b) applies to him.

[39] The opening words of art 14 are that it must be read "subject to the provisions of this Part...". This Part refers to Part III of the FC (Citizenship). Then art 14(1)(b) refers to the requisite qualifications specified in Part II of the Second Schedule. Under Part II of the Second Schedule, s 1 lists 5 situations to qualify a citizenship pursuant to art 14. They are in s 1(a) to (e).

[40] Section 1(b) applies to the Child in the present appeal. It says "every person born outside the Federation whose father is at the time of birth a citizen...". Learned counsel argued that this provision merely emphasised on every person born outside the Federation and that his father is at the time of birth a citizen. There is no particular emphasis in that provision making a distinction between legitimate or otherwise. Thus, learned counsel contended, any distinction will lead to a discriminatory reading. I will deal with the discriminatory effect later, in this judgment.

[41] I have serious difficulty construing art 14 as advanced by Dato' Dr Cyrus Das for the appellants. Learned counsel's construction cannot be correct since he has ignored the clearly articulated terms of s 1 which is to be read "Subject to the provisions of Part III of this Constitution". With such clearly worded provisions how then one ignores the application of s 17 to s 1(b) of Part II of the Second Schedule?

[42] Furthermore, this is substantiated by the fact that s 17 applies by virtue of art 31. Article 31 mandates the application of the supplementary provisions

contained in Part III of the Second Schedule to the construction of the citizenship provisions. It is in that Part III that s 17 resides.

[43] Section (1)(b) Part II of the Second Schedule, *ipso facto* calls into operation of the provisions pertaining to citizenship under Part III. Section 17 opens with the words "For the purposes of Part III". Therefore in whichever way one looks at it, s 17 cannot be detached from s 1(b). Ignoring the application of s 17 will also render art 31 of the FC as otiose.

[44] Section 17 provides for reference to the "father" of an illegitimate child to refer to his "mother". The only clear meaning to be concluded therefore is that the Child's citizenship follows that of his mother. There is nothing ambiguous about s 17 to permit other rules of interpretation.

[45] From the express distinction for parents or father of an illegitimate child in s 17, it is obvious that the word "parents" in the context of Part III of the FC must be construed to refer to lawful parents in a recognised marriage in the Federation. This country never legally recognised unwedded parents. I say so because proper distinctions have always been made in our legislation in order to differentiate between the status of "parents" in a recognised marriage or otherwise. Even under s 13 of the Births and Deaths Registration Act 1957, the legislation makes a clear distinction between a father or mother of an illegitimate child. This connotes that "parents" refers always to legally wedded parents, not biological father and mother.

[46] It needs no emphasis that the relevant provisions relating to the citizenship by operation of law in the FC must be read as a whole and to be given a straightforward plain meaning. It is improper to interpret one provision of the FC in isolation from the others. Especially so, when the clauses indeed are written to be subjected to the other.

[47] To half read the provision by ignoring that s 1 must be read "Subject to the provisions of Part III" is to deny the clearly express terms of the FC. The FC must always be considered as a whole so as to give effect to all its provisions (see *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 MLRA 20).

[48] The fundamental rule in interpreting the FC or any written law is to give effect to the intention of the framers. The court cannot insert or interpret new words into the FC. The court may only call in aid of other canons of construction where the provisions are imprecise, protean, evocative or can reasonably bear more than one meaning. I find s 17 is plain and clear in its meaning. The court should not endeavour to achieve any fanciful meaning against the clear letters of the law.

Qualification At Birth

[49] First, the approach advanced by learned counsel defies the concept of citizenship by operation of law as being determined upon birth. At the risk of

repeating, citizenship by operation of law is acquired automatically at birth either within or outside Malaysia, subject to certain qualifications without any application to be made (see RH Hickling, '*An Introduction to the Federal Constitution*' (Federation of Malaya Information Services 1960) at p 24).

[50] Malaysian citizens who acquire this category of citizenship are those who by virtue of the FC, citizens without volition on their part, without a choice in the matter by the Government and without oath or (in most cases) formality (see LA Sheridan, Harry E Groves, '*The Constitution of Malaysia*', (4th edn, Singapore: Malayan Law Journal 1987) and Emeritus Professor Datuk Dr Shad Saleem Faruqi, '*Our Constitution*' (Sweet & Maxwell, Thomson Reuters 2019)).

[51] There is a whole line of High Court decisions which take this approach of construction. Amongst others, *Foo Toon Aik v. Ketua Pendaftar Kelahiran & Kematian Malaysia* [2012] 2 MLRH 548; *Chin Kooi Nah (Suing By Herself And As Next Of Kin To Chin Jia Nee, An Infant) v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia* [2015] MLRHU 1040; *Yu Sheng Meng v. Ketua Pengarah Pendaftaran Negara & Ors* [2016] 1 MLRH 627; *Nalan Kunji Kanan & Anor v. Secretary General of Ministry of Home Affairs, Malaysia & Ors* [2018] 2 MLRH 59; and *Samuel Duraisingh & Anor v. Pendaftar Besar Kelahiran Dan Kematian Malaysia & Another Case* [2019] MLRHU 1825.

[52] I wish to add that in *Foo Toon Aik (supra)*, I had the occasion to address this subject in the High Court. I held that the Child's status at birth should be the determining point to qualify for the acquisition of citizenship by operation of law. In the present appeal, similar issues are brought before this court for determination. Notwithstanding my earlier decision, I have given my utmost considerations to the arguments put forth by the parties. Having heard those arguments, I am now even more convinced and fortified in my view that acquisition of citizenship by operation of law requires the fulfillment of the requisite conditions at the time of birth.

[53] A not dissimilar approach has been taken by the Court of Appeal. The Court of Appeal cases of *Pendaftar Besar Kelahiran Dan Kematian Malaysia v. Pang Wee See & Anor* [2018] 2 MLRA 406, *Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 6 MLRA 426 and *Chan Tai Ern Bermillo & Anor v. Ketua Pengarah Pendaftaran Negara Malaysia & Ors* [2020] MLRAU 51 are in chorus that qualification of citizenship by operation of law must be met at birth and must be conferred as a matter of birthright.

[54] I am mindful that all these cases being decisions of the High Court and the Court of Appeal are not binding on this court by the doctrine of *stare decisis*. However, having considered the reasoning and the construction of art 14(1)(b) of the FC as propounded, I fully agree and endorse the principles as established in all those cases.

[55] In *Pang Wee See (supra)*, the Court of Appeal held that the phrase "is at the time of birth" in s 1(a) of Part II of the Second Schedule refers to the factual event of birth, not a deemed event of birth. The factual event, in that case, was that the subject was born out of wedlock to a non-citizen mother. This is a case of an adopted child born in Malaysia to unknown parents, but was legally adopted by the applicants. The main question for determination was whether the adoption order pursuant to the Adoption Act 1952, qualifies a child to be a citizen by operation of law. The Court of Appeal held that the adoption order lawfully acquired under the Adoption Act 1952 cannot confer citizenship status to an adopted child by operation of law under art 14(1)(b) read with s 1(a) of Part II of the Second Schedule of the FC.

[56] The other decision by the Court of Appeal in *Lim Jen Hsian (supra)* relates to a child born in Malaysia to a Malaysian citizen father and a Thai-citizen mother. Both were not married at the time of the child's birth, or at any subsequent time. In fact, the Thai-citizen mother returned to Thailand for good and the child had since been in the care of the applicant's mother in Malaysia. On the question of whether the child acquired citizenship by operation of law under art 14(1)(b) read together with s 1(e) of Part II of the Second Schedule, the Court of Appeal held that, though the child was born in Malaysia to a Malaysian biological father, because he was born illegitimate, he cannot acquire Malaysian citizen by operation of law. His citizenship follows his Thai mother.

[57] Reference was made in the above cases to the interpretation section in s 17. The court found that while the Child's biological father was a Malaysian citizen, and because of his illegitimate status since birth, the child could not have acquired the citizenship of his biological father. Instead, he acquired the citizenship of his biological mother, a Thai national. Consequently, the court found that he was not stateless as envisaged under s 1(e) of Part II, Second Schedule of the FC, to qualify him as a citizen of Malaysia by operation of law.

[58] In the present appeal before us, the Court of Appeal in *Chan Tai Ern Bermillo (supra)* followed the approaches taken in all of the above decisions in holding that the Child's status at birth was the determination point in qualifying for the acquisition of citizenship by operation of law. And that the marriage of the parents was held to be irrelevant for the purpose of acquiring citizenship by operation of law because the emphasis is "at the time of the child's birth". The proper and correct interpretation of s 17 was applied. I agree with the approach taken by the Court of Appeal in the application and construction of art 14 and the related provisions.

[59] Even in our neighbouring land Singapore, the provision on this subject is much the same. The High Court in *UKM v. Attorney General* [2019] 3 SLR 874 adopted the same approach in construing the legal provision of citizenship by operation of law. An illegitimate child does not qualify for citizenship by operation of law and the qualification for such citizenship must be determined at birth.

[60] The Malaysian cases discussed above are also clear and unequivocal that because citizenship by operation of law is determined at birth, other laws which retrospectively qualify a person such as Legitimacy Act or Adoption Act cannot be used to construe the qualification of that person.

[61] I agree with the Court of Appeal's view in this appeal because the subsequent marriage of parents would not change the birth status of the Child as an illegitimate child. Section 4 of the Legitimacy Act only deems a person legitimate from the prescribed date or from the date of the parents' marriage, whichever is the latter. Section 9 of the same Act merely provides for the legal rights of a legitimised person to be equivalent to those of a legitimate child. The legal rights referred to are the rights to maintenance and support, claim for damages, compensation, allowance and benefit. The effect of s 9 of the Legitimacy Act must be confined to the ambit of its operability and its interpretation should not be stretched to supplement the provisions of the FC in matters relating to citizenship. There is no mention made for the rights of citizenship in the Legitimacy Act. And no corresponding provision in the FC that deems legitimisation confers the right to citizenship.

[62] Raja Azlan Shah FJ (as his Highness then was) in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 MLRA 646 quoted Frankfurter J in reminding us that "The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it". Thus, the constitutional regime and mechanism for acquisition of citizenship under Part III of the FC are not to be supplemented by other Parliamentary legislation, any international instrument or any other extraneous material or authority. In view of the unequivocal words of the FC as the supreme law of the land, the Legitimacy Act cannot be a competent legal instrument to confer citizenship status.

[63] The appellants' argument that the Child's birth status has been altered by virtue of his legitimation via s 4 of the Legitimacy Act and that his legitimacy status for the purpose of s 17 of Part III of the Second Schedule is to be taken at the time of the application for citizenship, amounts to introducing words into the provision of the FC against the express wordings of art 14(1)(b) read together with the Second Schedule.

[64] This has been the interpretation of these clauses on the laws on citizenship by operation of law, adopted in all the reported cases thus far except in the Court of Appeal case of *Madhuvita Janjara Augustin v. Augustin Lourdsamy & Ors* [2017] MLRAU 455 ("*Madhuvita*").

[65] *Madhuvita* parted ways from all the reported cases on the subject both in the High Court as well as the Court of Appeal. The child in *Madhuvita* was born in Malaysia while here, the Child was born in the Philippines. In *Madhuvita*, the father is a Malaysian and the mother is a citizen of Papua New Guinea. At the time of the child's birth, both were not married. It was about two months after the birth of the child that the parents were married according to the Malaysian law. The Court of Appeal had granted citizenship by operation of law to an

illegitimate child pursuant to art 14(1)(b) read together with s 1(a) and/or (e) of Part II of the Second Schedule of the FC.

[66] In arriving at its decision in *Madhuvita*, the Court of Appeal concluded that the word "parents" under art 14(1)(b) read with s 1(a) of Part II of the Second Schedule is not qualified by the word "lawful", "natural", "biological", "adopted", "surrogate" or any other description or adjective. As such, it includes biological parents. The fact that her parents were not married at the time of her birth does not alter or diminish their capacities as her parents. Hence, it did not need to rely on the interpretation provision in s 17 of Part III of the Second Schedule of the FC.

[67] *Madhuvita* distinctly differed from all other decisions in respect of two mains issues:

> (i) that the legitimacy or otherwise of a child is to be considered at the time of the application; and
>
> (ii) the word "parents" in s 1(a) of Part II of the Second Schedule refers to the capacity of "parents" unqualified in any manner or form by the word "lawful", "natural", "biological", "adopted" or even "surrogate", or any other description or adjective.

[68] With respect, I am not in agreement with *Madhuvita* in relation to the finding that the legitimacy or otherwise of a child is to be considered at the time of the application. The interpretation of the word "parents" given by *Madhuvita* had also gone against all the other authorities. The word "parents" in s 1(a) is not defined in the FC. As such we will have to rely on the plain and ordinary meaning of the word. Black's *Law Dictionary Abridged* (6th Ed) (Centennial Edition 1891-1991) defines the word "parent" to mean "the lawful father or mother of a person".Therefore, in defining the word "parents" in s 1(a) giving a plain and ordinary meaning must refer to lawful parents. In the same light, the word "father" in s 1(b) must also refer to a father in a valid marriage.

Grammatical Construction

[69] Learned Counsel relied further on *Madhuvita* to submit his grammatical construction to s 17 to suggest that the legitimacy of the Child is only to be questioned at the time when the Child applies for his citizenship.

[70] *Madhuvita* considered the time of the application as the determining point of time for the qualification of the acquisition of citizenship by operation of law that the interpretation s 17 becomes inapplicable in interpreting the legitimacy status of a child who at the time of the application is legally legitimised. It was held that:

> "[61] The next consideration is whether the above conclusions are now qualified by the interpretation provisions in Part III of the Second Schedule. It is our respectful **view that it is not**. To recapitulate, s 17 provides that in

relation to a person who is illegitimate, a reference to that person's father or parent is to be construed as a reference to the person's mother. The reason why we say that s 17 does not alter the above interpretation is because s 17 only applies to a person who is illegitimate. Section 17 is drafted in the present tense and it is the prevailing status of legitimacy or illegitimacy which is the relevant consideration.

[62] In that regard, the appellant is clearly, **not illegitimate**. She is born of parents who were not married to each other at the time of her birth. She is known as a child born out of wedlock. However, she is no longer illegitimate by reason of legitimation by the subsequent marriage of her parents.

...

[65] With the clear terms of s 4, the appellant is rendered legitimate by the subsequent marriage of her parents and that legitimation is from the date of the marriage, that is, from 23 January 2006. **From the language and terms of s 17, the appellant's legitimacy or illegitimacy is questioned at the time of the consideration of the application, and not some other point in time**."

[Emphasis added]

[71] I am not able to reconcile para 62 of the grounds of judgment above as to how a child born to unmarried parents is not illegitimate but yet he is a child born out of wedlock. If so, why do you then need to legitimise a child who is not illegitimate but born out of wedlock.

[72] The grammatical construction employed in the case defies the basic premise that citizenship by operation of law requires no application nor consideration to be exercised by the Government as I have earlier alluded to. As rightly pointed by learned author Emeritus Professor Datuk Dr. Shad Saleem Faruqi in his book '*Our Constitution*' (Sweet & Maxwell, Thomson Reuters 2019) at pp 178 and 179 said in respect of citizenship by operation of law.

"**Birth and descent**: This type of citizenship is also referred to as citizenship by operation of law. Its complex details are found in art 14(1)(a) and the Second Schedule, Part 1. It confers an automatic right of citizenship without oath and without any official discretion on the following categories of persons."

[Emphasis added]

[73] The relevant point of time to determine the legitimacy or otherwise of a child as enunciated in *Madhuvita* contravenes the concept of *jus soli* and *jus sanguinis*. This issue was articulated in the decision of the Court of Appeal in *Pang Wee See*, where Abang Iskandar JCA (as he then was) observed as follows:

"[29] In determining citizenship of a person, two concepts are commonly applied, namely the concept of *jus soli* and the concept of *jus sanguinis*. *Jus soli* which means 'right of the soil', and commonly referred to as birth right citizenship, is the right of anyone born in the territory of a state to nationality or citizenship. The determining factor being the place or territory where a

person was born. In the case of *jus sanguinis*, which in Latin means 'right of blood', is a principle of nationality law by which citizenship is not determined by place of birth but by having one or both parents who are citizens of the state. Viewed from the context of these two concepts, we are of the considered opinion that art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution is a provision which is anchored on the elements of **both the concepts of** *jus sanguinis* **and of** *jus soli***, whereby citizenship of a person is traceable to the place of birth namely, Malaysia, as well as Malaysian citizenship of one of the person's parents (the right of blood) at the time of the person's birth**, in order to be a Malaysian citizen by operation of law, under art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution."

[Emphasis added]

[74] Learned counsel emphasised when a statutory provision is drafted in the present tense, it is intended that a person's legal status is to be determined as at the present time when a right is asserted (see *Minister of Public Works of The Government of The State of Kuwait v. Sir Frederick Snow and Partners* [1984] AC 426; *Maradana Mosque Board of Trustees v. Mahmud* [1966] 1 All ER 545; *Hamed v. R* [2012] 2 NZLR 305; *S A Venkataraman v. The State* [1958] AIR 107). Thus, by virtue of s 4 of the Legitimacy Act, the Child is not illegitimate at the time of his application for citizenship.

[75] The grammatical construction suggested by learned counsel relying on all the cases cited above are out of context. These cases do not deal with matters relating to *jus soli* and *jus sanguinis*. No doubt they are appropriate for the grammatical construction in their own context.

[76] Besides defying the basic premise that citizenship by operation of law requires no application, the grammatical construction suggested is wholly irrelevant for yet another reason. Between the grammatical interpretation approach and the legislative history of the constitutional provisions, the latter outweighs the former. Legislative history plays an important role in interpreting and understanding the context of a constitutional provision (see *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Berhad; President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners)* [2019] 3 MLRA 87).

Legislative History

[77] The relevant historical documents show the process of how the current art 14(1)(b), s 1(b) of Part II, and s 17 of Part III of the Second Schedule of the FC come into existence. There is a need to deduce from those processes, the meaning of the acquisition of citizenship by operation of law under the said provisions.

[78] The historical fact as articulated in The Reid Commission Report 1957 shows that it has always been the position taken by our framers of the FC that, an illegitimate child's citizenship is to follow that of the mother and not

the father. Since its inception the provision of law on citizenship in the FC by operation of law had not undergone any change *vis-a-vis* the illegitimate child status (see Reid Commission Report 1957). The draft of the provision of current s 17 was fully endorsed by the Working Party of the Constitution of the Federation 1957. It fully endorsed the proposal that the status of an illegitimate child is to follow the citizenship of the mother.

[79] The proposal for an illegitimate child to follow the citizenship of the mother received the support of the Working Party of the Constitution as reflected in the Minutes of the Working Party of the Constitution of the Federation 1957 (CO 941/86) on the then s 7(3) which is now s 17, with drafting modifications. The point worthy of noting from these historical documents is that the issue relating to an illegitimate child to follow the citizenship of the mother remained as the law to date. It would therefore be a total misapprehension, to severe s 17 from the interpretation of art 14.

[80] The other historical document to be noted is the Hansard of the Legitimacy Bill tabled on 6 February 1961. During that debate it was stated the intention of the Bill was:

> "As Honourable Members are aware, **under the common law an illegitimate child, or bastard, suffers from a number of disabilities, principally in matters of right over succession to property.** It was, I think medieval concept that the sins of the father should be visited on the child, but today nobody believes that this should be the case. **A child born out of wedlock can scarcely be expected to give previous assent to his status, or to determine on what side of the blanket he should enter this very unsatisfactory world.**
>
> [Emphasis Added]

[81] From the explanation given above, it is clear that the sole objective behind the enactment of the Legitimacy Act is to enable an illegitimate child to attain the inheritance rights upon him been legitimised thereunder. Nothing in the Act confers the birthright of citizenship under art 14 and its incidental provisions. Hence, it would therefore be incorrect to apply and superimpose the Legitimacy Act to the provision of citizenship in the FC.

[82] Concluding my view and discussions, I am clear in my mind and reinforced in my view, that the qualification of acquiring citizenship by operation of law, must be met at birth. And if the qualifications are not met, this court is not at liberty to add and subtract any other or qualifications which the FC states otherwise.

Discriminatory Issue

[83] Learned counsel in his submission also addressed us on potential discriminatory implications of art 14 reading it as it is. To recap this point, in his submissions learned counsel argued that it would be a discriminatory reading of the FC if the construction of the provisions leads to discrimination between

a legitimate and an illegitimate child. It is also discriminatory between a father and a mother when s 17 is applied. The protection against discrimination is part of the constitutional guarantee embedded in art 8 of the FC.

[84] Let us begin by examining the guarantee against discrimination as housed in art 8 which states:

> **"Equality**
>
> 8. (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> (2) **Except as expressly authorised by this Constitution,** there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment."
>
> [Emphasis added]

[85] A student of Constitutional law will appreciate that not all forms of discrimination are protected by art 8. Article 8 opens with "Except as expressly authorised by this Constitution...". In short, discrimination authorised by the FC is not a form of discrimination that art 8 seeks to protect. There are in fact a number of discriminatory provisions expressed in the FC which include art 14. Since the discriminatory effect of art 14 is one authorised by the FC, it would be absurd and clearly lack of understanding of art 8 for any attempt to apply the doctrine of reasonable classification, to art 14.

[86] Many views have also been expressed on the gender biasness of the provisions in relation to laws on citizenship. Learned author Emeritus Professor Datuk Dr. Shad Saleem Faruqi at p 180 in his book *'Our Constitution'* in relation to the issue on citizenship observes that, "The Malaysian law on citizenship is riddled with sex bias". He concluded on this issue by posing a question on how far these aspects of law will be modified to accommodate gender equality remains to be seen. The same gender bias issue has also been expressed by another academician Dr. Low Choo Chin under Chapter 3 in the book '*International Marriages and Marital Citizenship Southwest Asian Woman on the Move*' (1st edn, Routledge 2017) at p 66.

[87] I am in full agreement with the views expressed that the provisions on citizenship are gender bias in that it emphasises on the citizenship of the father and not the mother. I hasten to add, lest it be misunderstood that I am all for the abolition of gender discrimination. There have been calls by various NGOs and Women groups to address these discriminatory issues to propose for the FC to be amended to eliminate gender bias. Hannah Yeoh, the then Deputy Minister of Women, Family and Community Development, had issued many statements calling for amendments to the laws to achieve gender equality in

this area (see Arfa Yunus, '*Yeoh: 'It's 2019, treat men, women equally*' New Straits Times Online, 19 September 2019). That was a rightful call because only by way of the amendment of the FC that this discrimination may be altered.

[88] This whole issue begs the question of whether the Judiciary in the exercise of its judicial duty is constitutionally empowered to ignore or neglect the clear dictates of the FC and overcome that authorised gender bias in the name of progressive construction of the FC. Since the FC discriminates between a legitimate and an illegitimate child, a father and a mother of an illegitimate child, can the court alter that discrimination so as to keep the FC living dynamically in order to avoid it from being locked and fossilised in 1963.

[89] What happens to the much-lauded doctrine of separation of powers and the judicial oath of upholding the Constitution. Is it not the doctrine of separation of powers which forms the basis of our democratic nation that deserves our attention and respect. We all know that there is no judicial supremacy articulated in our FC, and the power to amend the Constitution rests solely with the Parliament by virtue of art 159. The court cannot at its own fancy attempt to rewrite the clear written text of the FC because it would only lead to absurdity.

[90] There is also another dimension to the issue of discrimination which learned counsel had overlooked and failed to address. And it is this. We know that the Legitimacy Act, as well as the Adoption Act, do not apply to Muslims. Applying these laws to construe art 14 would necessarily lead to discriminating against a Muslim child who cannot be legitimised or legally adopted. An illegitimate or adopted Muslim child cannot acquire citizenship by operation of law if these laws are to be resorted to. If the framers of the FC intend such religious discrimination it would have worded clearly in the FC in a similar tone as discriminating an illegitimate child. Whilst it authorises discrimination on legitimacy and gender, it does not authorise discrimination on religion on the issue of citizenship. Is the court in holding the supremacy of the Constitution to indulge in amending clear words to uphold and prohibit discrimination which the FC authorises.

[91] Hence, accepting counsel's argument and following *Madhuvita* will lead to unauthorised discrimination of the application of the laws between Muslims and non-Muslims. This form of discrimination offends the very protection envisaged by art 8 and the court must not construe art 14 to create discrimination that the FC prohibits.

Dual Citizenship Issue

[92] I agree with learned appellants' view that the Court of Appeal erred in ruling that the Child is deprived of a Malaysian citizenship by virtue of art 24. Article 24 is a citizenship-deprivation provision which could only apply to a person who is already a citizen of Malaysia. There could not be a deprivation of citizenship until citizenship has first been conferred on the Child.

[93] With reference to the High Court cases in *Samuel Duraisingh (supra)* and *Haja Mohideen MK Abdul Rahman & Ors v. Menteri Dalam Negeri & Ors* [2007] 2 MLRH 87, the acquisition of a foreign citizenship and the discretion of the Federal Government to deprive any citizen of its citizenship under art 24 are not relevant factors in determining whether a child is entitled to citizenship by operation of law under art 14(1)(b). In the present case, the Child's acquisition of a Philippines passport which led to him being presumed a citizen of the Philippines is not a legally disqualifying factor to him acquiring Malaysian citizenship.

Conclusion

[94] To conclude, I will answer the four questions framed based on the foregoing discussions in the following ways:

1st Question

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

Answer

Once the entire of art 14(1)(b) and s 1(b) of Part II of the Second Schedule be read together with the interpretation provision in the FC, in particular s 17 of Part III of the Second Schedule in order to determine the qualifications necessary for the acquisition of citizenship by operation of law, there is no necessity to adopt any other requirement to construe the provisions. Hence, Legitimacy Act or any other law is therefore not to be read into the provisions.

In view of my answer in Question 1, I decline to answer Question 2, Question 3 and Question 4.

[95] On all the reasons stated, the appeal by the appellants is dismissed. The orders by the High Court as affirmed by the Court of Appeal are hereby maintained.

[96] This judgment has been read in draft by my learned brother Justice Vernon Ong Lam Kiat FCJ, my learned sisters Zabariah Mohd Yusof FCJ and Hasnah Mohammed Hashim FCJ. They have expressed their agreement and agreed to adopt the same as the majority judgment of this court.

Tengku Maimun Tuan Mat FCJ (Minority):

[97] Citizenship comprises a fundamental aspect of nationhood. There are numerous rights attached to the notion of citizenship, foremost of which include the right to vote, rights available to citizens only under the Federal

Constitution ('FC') such as those guaranteed under arts 9 and 10, and an identity and diplomatic protection by the home-State in foreign territory.

[98] The issues arising in this appeal relate directly to the right of a person, in this case a child who knows who his parents are and who has been legitimated by the subsequent marriage of his parents, to qualify for citizenship under the terms of the FC. The corollary question pertains to the methodology of constitutional interpretation on citizenship.

[99] For clarity and avoidance of doubt, references in this judgment to the 'second Schedule' mean references to the Second Schedule of the FC and references to Part II and/or Part III shall be taken to mean references to Part II and/or Part III of the said Second Schedule.

[100] The background facts of this appeal are uncontested and undisputed. For completeness, I set them out below as culled from the parties' respective submissions subject to necessary modifications.

Background Facts

[101] The 1st appellant is a minor male who was born on 27 October 2010 in the Republic of Philippines. His mother, who is not a party to this suit, is a citizen of the Republic of Philippines. The 2nd appellant is the 1st appellant's father and litigation representative. The 2nd appellant is at all material times a Malaysian citizen who was born in Alor Setar, Kedah on 13 March 1965.

[102] The 1st appellant's parents were married on 22 February 2011. This means that the 1st appellant was born out of wedlock (approximately four months before the marriage took place). But, as his learned counsel Dato' Dr Cyrus Das maintained and the respondents did not deny, the 1st appellant was subsequently legitimated under s 4 of the Legitimacy Act 1961 ('Legitimacy Act').

[103] It is a material fact that the 1st appellant, his father the 2nd appellant, and his mother are all non-Muslims and that his parent's marriage was registered in accordance with the provisions of the Law Reform (Marriage and Divorce) Act 1976.

[104] It is also pertinent to note that the appellants undertook a deoxyribonucleic acid test ('DNA test') to conclusively establish that the 2nd appellant is the 1st appellant's biological father.

[105] The 1st appellant, his mother and the 2nd appellant are domiciled in Malaysia. The 1st appellant is currently studying in a national-type primary school in Petaling Jaya.

[106] The 1st respondent is the Director-General of the National Registration Department ('NRD'). The 2nd respondent is the Chief Secretary to the Ministry of Home Affairs and the 3rd respondent is the Government of Malaysia.

[107] The main issue in this appeal concerns the constitutional entitlement of the 1st appellant to Malaysian citizenship. He had on 24 April 2011, applied to the 1st and 3rd respondents for citizenship under art 15A of the FC. This application was rejected without reasons approximately a year and five months later on 6 June 2012. The appellants did not challenge this decision.

[108] Instead, on 11 November 2016, the 1st and 2nd appellants filed an Originating Summons ('OS') principally for declarations to the effect that the 1st appellant is a citizen by operation of law under art 14(1)(b) of the FC or alternatively a citizen under art 15(2).

[109] The appellants however, eventually abandoned their claim under art 15(2) and they maintained before us only so much of the claim as it relates to the 1st appellant's right to citizenship by operation of law under art 14(1)(b) of the FC.

[110] In the OS, the appellants prayed for the following orders:

> "1. A declaration that the 1st appellant is a citizen of Malaysia by operation of law pursuant to art 14(1)(b), Part II s (1) para (b) of the Federal Constitution;
>
> 2. An Order directing the respondents to issue a Certificate of Birth to the 1st appellant recording that the 1st appellant is a citizen of Malaysia within the period of twenty-one days from the date of the Order;
>
> 3. An Order directing the respondents to issue the 1st appellant with a MyKid National Identity Card recording that the 1st appellant is a citizen of Malaysia within the period of twenty-one (21) days from the date of the Order;
>
> 4. An order that the 1st respondent do register and update the name of the 1st appellant in the register pursuant to s 4 of the National Registration Act 1959 and Regulation 11 of the National Registration Regulations 1990;
>
> 5. An award of damages including exemplary damages due to the respondents' unlawful and unconstitutional acts of refusing to issue the 1st appellant with a Certificate of Birth as a Malaysian citizen;
>
> 6. Costs;
>
> 7. Such further orders and/or orders that the Court thinks just.".

[111] Before us, counsel for the appellants only prayed for an order in terms of Prayer 1 - the declaration. Accordingly, my focus is only on the declaratory relief sought and whether the appellants are entitled to it.

[112] For convenience, I shall reproduce the relevant constitutional provisions and summarise the decisions of the High Court and the Court of Appeal insomuch as they are pertinent to the issue in this appeal.

Constitutional Provisions

[113] The relevant constitutional provisions in this appeal art 14(1)(b) of the FC and the Second Schedule particularly s 1(b) of Part II and s 17 of Part III.

The provisions read as follows:

> "Article 14
>
> (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> ...
>
> (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.
>
> Section 1, Part II Second Schedule
>
> (1) Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:
>
> ...
>
> (b) every person born outside the Federation whose father is at the time of birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State;
>
> ...
>
> Section 17 of Part III, Second Schedule
>
> 17. For the purposes of Part III of this Constitution references to a person's father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother, and accordingly s 19 of this Schedule shall not apply to such a person.".

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

> "Article 31
>
> Until Parliament otherwise provides, the supplementary provisions contained in Part III of the Second Schedule shall have effect for the purposes of this Part.".

Decision Of The High Court

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

[116] The thrust of the reasoning was that s 17 of Part III qualifies the application of Part II, specifically s 1(b) thereof. The important point to note on the material finding of the High Court was that legitimacy must be assessed from the time of birth. Only if the 1st appellant was legitimate at the time of birth would he automatically qualify for citizenship by operation of law under art 14(1)(b) of the FC. The learned High Court Judge appeared to have acceded to and accepted the arguments of the respondents in the High Court.

[117] Premised on the above reasoning, the appellants' prayer for the declaration in Prayer 1 of the OS was accordingly refused.

[118] In arriving at its decision, the High Court had regard to previously decided High Court decisions and binding precedents of the Court of Appeal. I shall elaborate on the said decisions where necessary.

Decision Of The Court of Appeal

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

[120] An additional point was raised in the Court of Appeal. The respondents argued that the 1st appellant is a holder of a Filipino passport and accordingly he committed an act which would deprive him of a Malaysian citizenship under art 24 of the FC. The Court of Appeal agreed with this point where it made the following observation:

> "[25] The 1st appellant is undeniably a citizen of the Philippines. Our FC does not recognise dual citizenship. Although our FC was first introduced on 31 August 1957, cl (3A) of art 24 only came into effect on 1 October 1962... The amendment conveyed greater intolerance towards dual citizenship. The government has a discretion to confer citizenship on a stateless child, as the FC provides safeguards against statelessness such as in art 15A of the FC. However, the 1st appellant is not stateless. He is, at the risk of repeating, a citizenship (sic) of the Philippines.".

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

> "Question 1
>
> Whether it is proper to import into Part II s 1(b) of the Second Schedule to the Federal Constitution any other requirements for the citizenship of a child born to a Malaysian father other than those expressly stated in the provision?
>
> Question 2
>
> Whether the words "born outside the Federation" in Part II s 1(b) of the Second Schedule to the Federal Constitution can be properly read as requiring

that the child not hold any other citizenship and/or passport or be stateless to qualify for Malaysian citizenship by operation of law?

Question 3

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

Question 4

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

General Principles On Constitutional Interpretation

[122] This court in *Lee Kwan Woh v. PP* [2009] 2 MLRA 286, at para 13 advised that provisions of the FC which protect and promote fundamental liberties must be construed broadly, generously and prismatically whereas provisions which derogate from such liberties must be construed narrowly. The High Court, to its credit, was cognisant of this principle of interpretation.

[123] In *Merdeka University Bhd v. Government of Malaysia* [1981] 1 MLRH 75, Abdoolcader J (as he then was) equally advised that courts must be careful in applying such a purposive construction to the extent that they cannot seek to rewrite the terms of the FC. His Lordship, cautioned as follows:

"I said in *Public Prosecutor v. Datuk Harun Haji Idris & Ors* [1976] 1 MLRH 611 ... that the Constitution is not to be construed in any narrow or pedantic sense *(James v. Commonwealth of Australia)* [1936] AC 578 ... but this does not mean that a court is at liberty to stretch or pervert the language of the Constitution in the interests of any legal or constitutional theory, or even, I would add, for the purpose of supplying omissions or of correcting supposed errors.".

[124] The other important factor in constitutional interpretation is that judicial precedent plays a lesser part (see *Dato Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1980] 1 MLRA 18).

[125] This does not mean that judicial precedent is irrelevant. *Stare decisis* ought to be observed with a view to keeping the law consistent (see *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 1 MELR 501; [2012] 1 MLRA 661 at para 35; *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 MLRA 89; and *Public Prosecutor v. Datuk Tan Cheng Swee & Anor* [1980] 1 MLRA 572). However, the courts cannot unduly hamper or restrict themselves to tabulated legalism especially in the construction of fundamental liberties which are always and naturally evolving. To harmonise the two conflicting notions, I reckon that general and guiding principles ought to be followed so long as they

remain legally tenable or non-perverse. In that context, the Judiciary as the final arbiter of the law and the guardian of the FC may continue to build on constitutional jurisprudence without rigidly and pedantically confining itself to judicial precedent.

[126] Another aspect of constitutional interpretation is that a constitution must be interpreted in light of its historical and philosophical context to fully appreciate the meaning of and reasons for which certain provisions were drafted (see *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 2 MLRA 1, at para 29).

[127] Yet another general canon of constitutional interpretation that should not be overlooked is that the provisions of the FC must be construed as against one another and not by contrasting it to or by applying statutes for that purpose. In this regard, Abang Iskandar JCA (as he then was) observed generally as follows in *Pendaftar Besar Kelahiran Dan Kematian Malaysia v. Pang Wee See & Anor* [2018] 2 MLRA 406 ('*Pang Wee See*'):

> "[21] We must state here that the law on citizenship is contained, both procedurally and substantively in the Federal Constitution itself. There is no statute that was specially legislated to house the specific provision pertaining to citizenship. Rather, these provisions reside in the Federal Constitution. We noted too, that these provisions make no reference to other specific statutes, especially in aid of its interpretation. In fact, the Federal Constitution itself provides for the interpretation required in order to make clear what the words in the citizenship provisions are supposed to mean. In other words, the citizenship provisions in the Federal Constitution are exclusively housed in the Federal Constitution itself. The Federal Constitution, like most other written Constitutions, is interpreted not in the like manner in which other statutes are normally interpreted. In relation to the Federal Constitution, all other statutes are subsidiary legislations. Thus the constitutionality of the Federal Constitution is considered from the perspective of the Constitution itself. It is not to be interpreted by reference to other statutes, albeit they were passed by Parliament.".

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

(i) *Chin Kooi Nah (Suing By Herself And As Next Of Kin To Chin Jia Nee, An Infant) v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia* [2015] MLRHU 1040 ('*Chin Kooi Nah*');

(ii) *Foo Toon Aik v. Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 2 MLRH 548 ('*Foo Toon Aik*');

(iii) *Pang Wee See (supra)*;

(iv) *Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 6 MLRA 426 ('*Lim Jen Hsian*'); and

(v) *Madhuvita Janjara Augustin v. Augustin Lourdsamy & Ors* [2017] MLRAU 455 ('*Madhuvita*').

[129] The rest of the cases cited either by the courts below or the respondents appear to apply or distinguish the cases in para [32], in principle. Insofar as *Madhuvita* is concerned, which is relied substantially by the appellants and thence responded substantially by the respondents, the respondents withdrew their appeal at the Federal Court (see Federal Court Civil Appeal No 01-4-02/2014 between *Augustin Lourdesamy & others v. Madhuvita Augustin*) and proceeded to resolve the issue. I understand that citizenship has since been granted to the respondent there.

[130] Coming back to the instant appeal, now that the matter is before the apex court for determination, the issue may be approached from a fresh angle as argued and thus I do not find it necessary to discuss those cases in detail save and except where discussion is necessary on principle.

[131] The ultimate issue in this appeal relates to the interpretation of art 14(1)(b) of the FC and Parts II and III as regards the 1st appellant's right to citizenship by operation of law. It is my view that as the right of any person to citizenship comprises the right to liberty, the provisions of art 5(1) of the FC are relevant. And, since the issue concerns the right of a person based on the distinction of the citizenship status of their parents or in any case, the distinction between the right of illegitimate and legitimate children to citizenship, the right of equality before the law and equal protection of the law under art 8(1) is also materially relevant.

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

[133] With the above authorities and principles in mind, I now find it apposite to set out the parties' respective submissions in respect of them.

The Respondents' Case

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

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

[136] Learned Senior Federal Counsel ('SFC') Shamsul Bolhassan submitted that whether or not the person was subsequently legitimated is of no significance to the provisions of the FC. And, even if it was significant, s 4 of the Legitimacy Act only legitimates that person from the date of the marriage of his parents and not before. Thus, the person's subsequent legitimisation by law subordinate to the FC is not sufficient to entitle him to citizenship by operation of law under the FC.

[137] Viewed this way, there can be no question of any person 'making an application' for citizenship under art 14(1)(b) of the FC because it and its related provisions take effect automatically.

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

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

The Appellants' Case

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

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

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

[143] In the course of the hearing, the Bench posed a question to counsel for both the appellants and the respondents. The question was whether the word

'father' should be interpreted to mean biological father such that s 17 of Part III only applies in situations where the child does not know his father or that the status of the father is generally unknown. In other words, would the FC be authorising otherwise irrational and unreasonable discrimination inconsistent with art 8(1) of the FC?

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

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

[146] As regards art 24, learned counsel argued that the Court of Appeal interpreted and applied that provision erroneously. The provision only applies to deprive a 'citizen' of Malaysian citizenship if the Federal Government is satisfied that they possess dual citizenship or if they have voluntarily exercised a right exclusively available to the citizen of that foreign country under that country's laws. Here, the 1st appellant seeks to acquire Malaysian citizenship. He is not yet a citizen and is not therefore caught by art 24.

Findings/Analysis

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

Interpretation Of Article 14(1)(b), Section 1(b) Of Part II And Section 17 Of Part III

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

> (i) does s 17 of Part III, an interpretive provision, envelop and qualify the interpretation of s 1(b) of Part II as contended by the respondents; or
>
> (ii) does s 1(b) of Part II function independently, such that s 17 of Part III is only invoked in cases where the person seeking citizenship by operation of law is illegitimate and has no information as to who his father is; and
>
> (iii) is s 17 of Part III even germane to the construction of s 1(b) of Part II in the instant appeal, given that it is made pursuant to art 31 of the FC, as a supplementary provision?

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

[150] The following exposition on what *jus soli* and *jus sanguinis* entail and how they apply are aptly put in the dictum of Abang Iskandar JCA (as he then was) in *Pang Wee See (supra)*:

> "[29] In determining citizenship of a person, two concepts are commonly applied, namely the concept of *jus soli* and the concept of *jus sanguinis*. *Jus soli* which means 'right of the soil', and commonly referred to as birth right citizenship, is the right of anyone born in the territory of a state to nationality or citizenship. The determining factor being the place or territory where a person was born. In the case of *jus sanguinis*, which in Latin means 'right of blood', is a principle of nationality law by which citizenship is not determined by place of birth but by having one or both parents who are citizens of the state. Viewed from the context of these two concepts, we are of the considered opinion that art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution is a provision which is anchored on the elements of both the concepts of *jus sanguinis* and of *jus soli*, whereby citizenship of a person is traceable to the place of birth namely, Malaysia, as well as Malaysian citizenship of one of the person's parents (the right of blood) at the time of the person's birth, in order to be a Malaysian citizen by operation of law, under art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution.".

[151] To reiterate the above passage, *jus soli* encapsulates the notion that a person is entitled to citizenship purely on the basis of the place where he is born irrespective of the citizenship status of his parents. Thus, if immigrant non-citizen parents from one country give birth to their child in a country which adopts the principle of only *jus soli*, the child is automatically a citizen of that country by the fact of his birth there. *Jus sanguinis* on the other hand looks only to the citizenship status of the parent irrespective of where the child was born. So long as the parent (sometimes the father only and other times either parent) is a citizen, the child is automatically entitled to 'inherit' the citizenship status of that parent. As observed by Abang Iskandar JCA in the above quoted judgment, our FC amalgamates both *jus soli* and *jus sanguinis* into its provisions.

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

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

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

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

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

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

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

[158] For example, s 19 of Part III provides as follows:

> "19. Any reference in Part III of this Constitution to the status or description of the father of a person at the time of that person's birth shall, in relation to a person born after the death of his father, be construed as a reference to the status or description of the father at the time of the father's death; and where that death occurred before and the birth occurs on or after Merdeka Day, the status or description which would have been applicable to the father had

> he died after Merdeka Day shall be deemed to be the status or description applicable to him at the time of his death. This shall have effect in relation to Malaysia Day as it has effect in relation to Merdeka Day.".

[159] Section 17 has singled out "accordingly s 19 ... shall not apply to such a person.". The purpose of s 19, read in context, is to confer citizenship to a child who was born posthumously. In this regard, the meaning to be accorded to s 19 is that even if the biological father of the child is dead or died before the birth of the child, the father is still considered to exist for the purposes of citizenship. It therefore makes sense why s 17 of Part III excludes the application of s 19. This is because, s 19 presumes that the identity of the father was known which in turn leads to the conclusion that s 17 must have contemplated a situation where the father's identity is not known. Such a situation may only occur in a case where the child was born illegitimately.

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

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

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

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

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

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

[165] How then should the word 'father' appearing in s 1(b) of Part II be construed without qualifying it to s 17 of Part III? On this point, the approach taken by the Court of Appeal in *CAS v. MPPL & Anor* [2019] 1 MLRA 439 ('*CAS*') which judgment was affirmed by this court on appeal in *MPPL & Anor v. CAS* (02(f)-14-03/2018(W), is instructive.

[166] The issue in *CAS* concerned the distinction between paternity and legitimacy albeit in a different context. The plaintiff had filed an action by way of an originating summons seeking on order from the court for a DNA test to determine the paternity of one Child C. The plaintiff argued that the mother of the child who was married to a man other than the plaintiff had been involved in an affair with the plaintiff which led to the birth of Child C. The counter contention by the defendant-mother and her defendant- husband was that the suit was resoluble on a point of law under O 14A of the Rules of Court 2012.

[167] The point of law being - s 112 of the Evidence Act 1950 conclusively presumed Child C to be the legitimate child of the defendants. The defendants asserted that the paternity test, if granted in favour of the plaintiff, would serve to render child C, an illegitimate child if it is proved that the plaintiff was in fact her biological father. The High Court allowed the application. On appeal, the Court of Appeal reversed and remitted the matter to the High Court and ordered that the originating summons be converted into a writ action.

[168] Crucially, the Court of Appeal held that because Child C was born in the course of marriage between the defendant-mother and her husband, under s 112 of the Evidence Act 1950, the defendant-husband was conclusively presumed to be the legal father of Child C. That said, the court held that paternity itself is a question of fact and should be distinguished from the legal concept of legitimacy. The plaintiff was therefore entitled to determine as a point of fact whether Child C was indeed his biological child. In this regard, the court held that s 112 of the Evidence Act 1950 was not a bar to the suit and ordered the summons to be converted to a writ so that the plaintiff could prove at trial whether the court ought to exercise its discretion to order a DNA test. The question remains open whether the courts are empowered to order a DNA test in their inherent jurisdiction.

[169] Legal differences aside, *CAS* establishes the principle that with the advent of virtually perfectly accurate DNA tests in this modern age, paternity

and legitimacy are two distinct concepts. Paternity is an issue of fact while legitimacy is a construct of the law. It is of note that the judicial decisions relied on by the respondents (as set out in para 32 of this judgment) did not refer to the distinction between paternity and legitimacy as decided in *CAS (supra)*.

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

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

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

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

Unlawful Discrimination

[174] The jurisprudence on art 8(1) of the FC has been very much settled by a series of cases decided by our courts. The most recent and authoritative pronouncement on art 8(1) is in the judgment of the nine justices bench in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 3 MLRA 1 ('*Alma Nudo*'). This court, at para 117, upon affirming a long line of pronouncements on the subject advised that when interpreting other provisions in the FC the courts must do so in light of the 'humanising' and 'all-pervading' provision of art 8(1).

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

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

[176] Article 8(2) provides that:

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

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

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

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

[179] The second type of discrimination which art 8(1) allows, based on decided and settled cases is the concept of reasonable classification (see *PP v. Datuk Harun bin Haji Idris & Ors* [1976] 1 MLRH 611 and generally *Mohamed Sidin v. Public Prosecutor* [1966] 1 MLRA 419). Discrimination is unlawful and in violation of art 8(1) if it is not founded on an intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question.

[180] There is a further point that must be made in respect of cls (1) and (2) of art 8 that has not perhaps been explained in other judgments. 'Law' is defined in art 160 of the FC to include 'written law'. The term 'written law' is further defined in that art to include 'this Constitution'. Upon reading these definitions into the word 'law' in both art 8(1) and art 8(2) it is abundantly clear that the intention of the drafters of the FC was that the tests on unlawful discrimination

applicable to ordinary laws passed by Legislature or any executive act apply with equal force to the provisions of the FC itself. There is therefore a strong constitutional basis for this court's observations in *Alma Nudo* that art 8(1) and perhaps the whole of art 8 is 'all pervading' such that the other provisions of the FC must be construed having regard to it.

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

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

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

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

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

[186] Additionally, it would cause discrimination between Muslims and non-Muslims. A non-Muslim child who was born illegitimate but who was subsequently legitimated would not be considered as legitimate for purposes of citizenship, but a Muslim child who is otherwise born illegitimate would for purposes of the citizenship be considered legitimate. Surely that could not be the construct intended by the framers of the FC nor could they have intended for art 8(5)(a) of the FC to apply as the question here turns on the qualifications by operation of law and not personal law. As also accepted by the majority judgment, federal or State-promulgated laws are irrelevant to the question

of legitimacy and as such, in the context of citizenship by operation of law, 'legitimacy' must mean the same thing whether the applicant is a Muslim or a non-Muslim.

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

[188] I am mindful of the fact that the word 'gender' was only inserted into art 8(2) in the year 2001 vide Constitutional (Amendment) (No 2) Act 2001 [Act A1130] and that the constitutional provisions in Parts II and III predate the said amendment to art 8. Regardless, it is a trite principle that Parliament is taken to know the law before it made such amendments (see generally *Abdullah Atan v. PP & Other Appeals* [2020] 6 MLRA 28). Parliament however made no attempt to amend the provisions on citizenship. In any event, the FC is a living document and I believe my reading of art 14, s 1 of Part II to the Second Schedule and s 17 of Part III is correct. I am therefore of the view that the respondents' reading of s 17 of Part III as qualifying s 1(b) of Part II is unsustainable in light of this clear prohibition against discrimination on grounds of gender in any law as inserted into art 8(2) by Parliament in 2001.

[189] In my judgment, none of the three instances of discrimination which arise out of the interpretation advanced by the respondents pass muster under the reasonable classification test implied in art 8(1) of the FC. While there may be an apparent differentiation between legitimate children and illegitimate children or between their biological fathers on the one side or mothers on the other, in my opinion, it is not an intelligible differentia in that the differentiation has no nexus or connection to any policy or object sought to be achieved by the statute, in this appeal, the FC itself.

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

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

[192] In the circumstances and with respect, it is my opinion that the effect of accepting the respondents' interpretation would result in this Court construing

art 14(1)(b) of the FC and s 1(b) of Part II and s 17 of Part III in a manner which unwittingly promotes unlawful discrimination by the FC itself. Tying this together with my earlier analysis upon adopting the purposive and historical canons of construction, such a reading of the law, as proposed by the respondents, is untenable. On the other hand, a wholesome and harmonious reading of the provisions of the FC relating to citizenship would not give rise to the instances of unlawful discrimination alluded to above.

[193] Based on the foregoing analysis of the various constitutional provisions as well as having regard to settled canons of construction, it is my view that Part III which was intended to contain supplementary provisions including s 17 cannot therefore be read as qualifying or conditionalising the application of Part II. In my view, the phrase 'subject to the provisions of Part III of this Constitution' as appearing in s 1 of Part II is itself insufficient to lead us to the conclusion that s 17 of Part III was intended to operate as an overriding provision.

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

[195] Taking this approach, as 'father' in s 1(b) means biological father, whether a person is illegitimate or not is an irrelevant fact in the determination of their entitlement to citizenship provided that the identity of their biological father is known. In *Madhuvita*, the child was born in the Federation and there was no issue that the child was the biological child of the father. Hence, both principles of *jus soli* and *jus sanguinis* were met. By the same reasoning in this judgment, Madhuvita would have met the requirements of art 14(1)(b) and acquired citizenship.

[196] At the risk of repetition, the 1st appellant has successfully proved that the 2nd appellant is irrefutably his biological father. The only question is whether, on the facts as presented, the 1st appellant is entitled to citizenship by operation of law. The rest of the constituent elements of s 1(b) are undisputed in this appeal. The only dispute is as to the meaning of the word 'father'. In my judgment, as there is no dispute that the 2nd appellant is the 1st appellant's father, it follows that given the construction accorded to s 1(b) of Part II, the 1st appellant has met all the requirements for citizenship by operation of law.

Whether The 1st Appellant Ought To Be Deprived Of Citizenship?

[197] The other remaining issue is whether the 1st appellant should be deprived of citizenship under art 24 of the FC as decided by the Court of Appeal for

the reason that he possesses a Filipino passport. With respect, I agree with the submission of the appellants that the Court of Appeal misdirected itself on the facts and the law in deciding that the 1st appellant ought to be deprived of citizenship.

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

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

[199] It is abundantly clear from art 24(1) of the FC that it only applies to citizens who have voluntarily acquired foreign citizenship or exercise a right exclusively available to the citizen of that foreign country under that country's laws. In *Haja Mohideen MK Abdul Rahman & Ors v. Menteri Dalam Negeri & Ors* [2007] 2 MLRH 87 and *Kalwant Kaur Rattan Singh v. Kementerian Dalam Negeri Malaysia & Anor* [1993] 1 MLRH 595 ('*Kalwant Kaur*'), our courts have held that art 24 has absolutely no application to cases where a person claims to be entitled to Malaysian citizenship under art 14 of the FC.

[200] With respect, I agree with the following observations of Haidar J (as he then was) in *Kalwant Kaur* on the interpretation of art 24 of the FC. His Lordship said:

> "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 art 14(1)(a) of the Constitution read with art 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. The defendants opposed this originating summons by going on the wrong premises, that is, relying on art 124(1)(f) of FMA, saying that her father is not a Federal citizen as at the date of her birth, that is, 1942. Further, the learned Federal Counsel for the defendants relied on the cases of *Mohan Singh v. Attorney General* [1987] 2 MLRH 594 and *J Annathurai v. Attorney General* [1987] 2 MLRH 646, both Singapore cases, to say that by the plaintiff using an Indian passport, she had deprived herself of her right to be a Federal citizen. However, in the Singapore cases, orders for termination of citizenship were made **whereas in the present case the plaintiff's status as a Federal citizen is still unascertained and therefore the question of deprivation of her citizenship does not arise as yet.** In any event if she succeeds in getting the declaration of her status as a Federal citizen, it is still within the discretion of the defendants to invoke the powers vested in them by subsequently making an order to deprive her of the citizenship if satisfied that by her conduct of using the Indian passport she had voluntarily claimed and exercised rights available to her under the laws of India, being rights accorded exclusively to citizens of India..
>
> [Emphasis added]

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

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

Conclusion

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

[204] Questions 2 and 3 are reproduced and answered as follows:

> "Question 2
>
> Whether the words "born outside the Federation" in Part II s 1(b) of the Second Schedule to the Federal Constitution can be properly read as requiring that the child not hold any other citizenship and/or passport or be stateless to qualify for Malaysian citizenship by operation of law?
>
> Answer:
>
> Negative. So long as the elements of para (b) of s 1 of Part II are satisfied, the child is qualified for Malaysian citizenship by operation of law.
>
> Question 3
>
> Whether the fact that the biological parents of the child who were not married to each other at the time of the child's birth but subsequently marry, disqualifies the child from acquiring a Malaysian citizenship by operation of law pursuant to art 14(1)(b) and Part II s 1(b) of the Second Schedule of the Federal Constitution?
>
> Answer:
>
> Negative. It is my judgment that the legitimacy status of any person claiming to be entitled to citizenship by operation of law is irrelevant in cases where the identity of the biological father is known or has

been established. This is the embodiment of the principle of *jus sanguinis* embedded in s 1(b) of Part II."

[205] For the avoidance of doubt, and for certainty in the law, all previous decisions of the courts below that have sought to interpret or reconcile art 14(1)(b) of the FC, s 1(b) of Part II and s 17 of Part III are hereby overruled. Instead, the manner of interpretation suggested in this judgment shall apply prospectively and shall take effect from this judgment onwards.

[206] The appeal is consequently allowed and the orders of the High Court and the Court of Appeal are hereby set aside. An order in terms of Prayer 1 of the OS is granted, as follows:

"A declaration that the 1st appellant is a citizen of Malaysia by operation of law pursuant to art 14(1)(b), Part II s (1) paragraph (b) of the Federal Constitution.".

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

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

Nallini Pathmanathan FCJ (Minority):

[209] I write this short judgment in support of the judgment of the Chief Justice of Malaysia, Tun Tengku Maimun bin Tuan Mat. I am, with respect, in complete agreement with the clear and legally coherent analysis of the relevant provisions in the Federal Constitution ('FC') relating to the eligibility for citizenship under art 14 (1)(b) FC, in the judgment.

[210] The central issue in this case is whether the provisions under the Federal Constitution conferring citizenship by operation of law under art 14(1)(b) FC, allow for the denial of Malaysian citizenship to the child of a Malaysian father and a non-Malaysian mother, on the basis that they were not married to one another at the time of the child's birth, but five months later.

[211] If the parents had been married to one another at the time of the child's birth, the child would have been Malaysian. If the mother had been Malaysian and the father non- Malaysian, the child would have been a Malaysian citizen. In other words, where motherhood definitively allows for the child to be Malaysian, fatherhood does not necessarily do so.

[212] Such a construction of the citizenship provisions of the FC allows for:

(a) illegitimacy or non-marital discrimination; and

(b) gender discrimination.

[213] As the basis for citizenship in Malaysia is premised on the doctrines of both *jus soli* as well as *jus sanguinis*, or citizenship by descent, does a construction of art 14(1)(b) FC, which deprives a child born to a Malaysian father of citizenship, by reason of his temporary 'illegitimacy' reflect the purpose and intent of the Federal Constitution in the context of citizenship?

[214] Citizenship is a fundamental right under the Constitution to children of fathers or a single female parent who is a Malaysian citizen. The fundamental rights and liberties accruing to a citizen of the country are significant, conferring, amongst others, the right to live, the right to vote and to work in the country without having to obtain permission to do so. The Universal Declaration of Human Rights stipulates that "Everyone has the right to a nationality". A person's right to an identity is an essential component of his life, as recognised by the Chief Justice in bringing the right to nationality within the spectrum of fundamental rights recognised under the right to life in art 5(1) FC.

[215] However, the children of Malaysian fathers and foreign mothers who were not married at the time of the child's birth are deprived of Malaysian nationality, solely on the basis of the non-marital status of the parents. To deprive a child who by accident of the timing of his birth, and the marital status of his parents, of citizenship, both of which he had no control over, is to make him suffer the consequences of his parents' actions. Is that the purpose and intention of the citizenship provisions under the FC?

[216] In short, is a construction of the citizenship provisions of the Federal Constitution that condones both illegitimacy discrimination and gender discrimination tenable? Is that the intent and purpose of art 14(1)(b) read together with s 1 Part II of the Second Schedule and s 17 Part III of the Third Schedule of the FC?

The History Of This Action

[217] I do not propose to set out the facts as they are adequately set out in both the majority and minority judgments. It is however pertinent to note that the child was born in the Philippines. His mother is Filipino and his father Malaysian. His paternity is not in doubt as there is a DNA test to prove this. The child holds a Philippines passport and appears to have been granted citizenship in the Philippines. His father brought him to Malaysia together with his wife. They married and the child has lived here ever since. He is now aged 10.

[218] Both the courts below held that on a reading of the relevant citizenship provisions, the child was not entitled to Malaysian citizenship under art 14(1)(b) FC. Their reasoning was predicated upon a construction of the relevant articles of the FC.

The Law

[219] The citizenship status of a child born to a Malaysian father outside of Malaysia is governed by art 14(1)(b) FC. In a fact situation such as the present appeal, the current legal lexicon in Malaysia encumbers, hinders or refuses to recognise the transmission of citizenship between the Malaysian father and the child, while readily recognising the child of a Malaysian mother as a citizen.

[220] To my mind this brings to the fore the following issues:

(a) The legally correct construction of the provisions relating to citizenship by operation of law in the FC (more particularly, art 14(1)(b), s 1, Part II of the Second Schedule and s 17 of Part III of the Third Schedule). Do they operate to confer citizenship in such a fact scenario, or to deprive the child of citizenship, and thus nationality?

(b) Whether by adopting a construction which precludes the child from enjoying citizenship by operation of law under art 14(1)(b) FC, art 8 FC is contravened on the basis of gender discrimination. What are the consequences of such a contravention?

Rules For The Construction Of A Constitution

[221] Before embarking on an applied construction of the provisions above, it is useful to consider some of the fundamental principles of constitutional construction. This is of relevance because the two issues highlighted earlier, namely illegitimacy discrimination and gender discrimination, appear to have played a major role in construing the citizenship provisions by operation of law in the FC. These two issues have been incorporated into the construction of the relevant provisions to deny citizenship resulting, amongst others in conflict within the FC itself.

Broad, Generous And Prismatic Construction

[222] As stated in *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1980] 1 MLRA 18, the FC cannot be interpreted in a narrow and pedantic fashion, but rather in a broad, liberal and expansive sense. This is because the FC is constantly being expounded. It is a living and organic document which is constantly being examined, explained and developed.

[223] The FC lays down the basic tenets of our system of parliamentary democracy which translate, on judicial interpretation, to reflect the basic way of life enjoyed and practiced by the people of the nation, as well as collective human lives and community living. Any construction which detracts from, or undermines these basic tenets is not an acceptable or true construction to be adopted. Interpretation of the FC must be such that it fosters, develops and enriches the system of parliamentary democracy that is contained in that supreme law.

[224] In the context of the present case, the citizenship provisions in the FC ought to be construed so as to accord to the people seeking relief, the full benefit of the provisions, rather than reading them down to deny persons or a section of them their basic entitlement to a right to life. As the FC is the supreme law it is incorrect to apply pedantic and technical rules and interpretations, which may be necessary in statutory interpretation, when construing the paramount law. This is because the FC sets out the framework for government and its objects and the principles of government ought not to be abrogated by the use of meagre and inadequate technical rules or grammar. As I have stated elsewhere the function of a judge is not to adopt a grammarian approach in the construction of statutes, far less the FC.

[225] As highlighted in the early United States Supreme Court decision in *Weems v. US* (1909) 54 L Ed 793,801 :

> "...Legislation both statutory and constitutional is enacted, it is true, from an experience of evils but its general language should not, therefore be necessarily confined to the form that evil had therefore taken. **Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are, to use the words of Chief Justice Marshall 'Designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provisions for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be of what has been but of what may be…**
>
> **…The meaning and vitality of the Constitution have developed, against narrow and restrictive construction.**"
>
> [Emphasis Added]

[226] I make reference to case-law in the United States of America in this context, because like Malaysia, it is a nation governed by constitutional supremacy, rather than parliamentary supremacy (see *Ah Thian v. Government of Malaysia* [1976] 1 MLRA 410 per Suffian LP). In like manner, Indian and Irish case-law is of relevance as those nations too practice constitutional supremacy within a government of parliamentary democracy.

[227] Lest these paragraphs be viewed as suggesting a completely free hand in the construction of the FC, I hasten to add that it is not the function of the court to place an unnatural or forced meaning to the provisions of the FC or to seek to fill a gap or introduce a meaning which simply does not exist.

The Principle That Conflict Within The FC Should Be Avoided

[228] Of importance and particular relevance in this case is also the rule that each of the fundamental constitutional principles is of equivalent importance and no one provision should be enforced so as to nullify or substantially prejudice or harm the other. As such a construction should be adopted which

has the effect of achieving a harmonious interpretation throughout, so as to protect and enforce the overall Constitution. This is a well-established rule and the construction which achieves harmony should be preferred to an alternative interpretation which would give rise to uncertainty and conflict.

The FC Is An Organic And Evolving Instrument

[229] A further adjunct to these general principles is that constitutional issues are not resolved by a mere reading of the meaning of the words without remembrance and acceptance that these matters are "living" or organic matters that are constantly evolving. Some degree of consideration ought to be accorded to the line of growth of concepts in relation to the constitutional provisions, otherwise we would remain locked and fossilised in 1963, without regard to the evolution of concepts and progress from then to date. The necessities of the present day and societal needs remain fundamental issues that cannot be simply ignored, while attention is accorded to the literal meaning of the words in question. In short, the provisions of the Constitution should be construed bearing in mind the founding principles and doctrines on which they were placed there, with due consideration given to progress, the nation's needs and the all-important component of pragmatism.

This Concurring Judgment

[230] As the learned Chief Justice has expounded on the application of the relevant law to the present factual matrix comprehensively, I do not propose to reiterate similar arguments. I turn instead to look at the foundational principles upon which our citizenship provisions rest. In this context, I adopt, gratefully, the careful and systematic study of the doctrines of *jus soli* and jus sanguinis as set out by Abang Iskandar JCA (now CJSS) in *Pendaftar Besar Kelahiran Dan Kematian Malaysia v. Pang Wee See & Anor* [2018] 2 MLRA 406 ('*Pang Wee See*').

The Relevant Provisions In The Instant Appeal

[231] The relevant constitutional provisions are:

> " Article 14
>
> (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> ...
>
> (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.

[232] Article 14 FC falls within Part III on Citizenship in Chapter 1 which deals with the acquisition of citizenship. Relevant to the instant appeal is art 14(1)(b) FC provides for the acquisition of citizenship by descent premised on the doctrine of *jus sanguinis* and se ts out the requirements in Part II of the Second Schedule.

Section 1, Part II Second Schedule

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

...

(b)Every person born outside the Federation whose father is at the time of 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;...

Section 17 of Part III, Second Schedule

17. For the purposes of Part III of this Constitution references to a person's father or to his parent, or to one of his parents, are in relation to a person who is illegitimate to be construed as references to his mother, and accordingly s 19 of this Schedule shall not apply to such a person."

[233] Section 17 of Part III is made pursuant to art 31 FC which provides that the provisions of Part III of the Second Schedule shall have effect to the chapter on citizenship until Parliament provides otherwise. This means that the provisions in Part III become applicable where relevant. It is also interpretive in its function as borne out by the heading to ss 17 to 22 of Part III, which states "Interpretation".

[234] From the foregoing provisions the relevant highlighted portions disclose that:

(a) art 14(1)(b) provides when citizenship by operation of law occurs;

(b) The key requirements for such conferment of citizenship by operation of law which encompass the principle of *jus sanguinis* are contained in s 1(b) of Part II of the Second Schedule. This provision allows for transmission of citizenship to the child because the father is a citizen of the nation. The requirement of descent or a blood tie is satisfied. That is the crux of the doctrine of *jus sanguinis*.

[235] These provisions are therefore the primary conditions that need fulfilment in order for citizenship to be transmitted from father to child by operation of law.

The Core Of The Respondents' Submissions

[236] However, it is argued by the respondents here that such transmission is not possible in a case where the mother is a foreigner and there is no recognised legal marriage between the father and the mother as at the time of birth. This submission is premised on the incorporation and their construction of s 17 Part III of the Second Schedule.

[237] It is contended that the words "Subject to the provisions of Part III of the Constitution" have the effect of substantively qualifying s 1(b) Part II Second Schedule. This qualification, it is further contended, extends to preventing a

child whose father is not a 'marital' father, or one who is legally married to the mother at the time of the birth, from transmitting citizenship to the child.

[238] The reasoning behind this is that the words "Subject to the provisions of Part III of the Constitution" in s 1(b), mandatorily require reference to s 17 of Part III of the Third Schedule, in the instant case because it makes provision for illegitimate children to take on their nationality from their mothers.

[239] It is then reasoned that as that section makes provision for "illegitimate""children, it applies to modify or replace s 1(b) of s II of the Second Schedule, with the result that:

(a) The child is illegitimate because the parents were not married at the time of the child's birth. Therefore s 17 is the relevant section to apply;

(b) The reference to "father" in the section must mean a 'marital' father, ie a father who is legally married to the mother of the child.

The Appellant's Submissions

[240] The appellants contend otherwise. They maintain that the word father means the biological father. They also state that it is incorrect to incorporate s 17 of Part III to alter and modify the meaning of s 1(b) Part II so as to ignore the Malaysian citizenship of the father. The submissions of the appellants are set out in full in the judgment of the Chief Justice and the majority judgment and I do not propose to set them out here.

Issue (A): What Is The Legally Correct Construction Of The Provisions Relating To Citizenship By Operation Of Law In The FC (More Particularly, Article 14(1)(B), Section 1, Part II Of The Second Schedule And Section 17 Of Part III Of The Third Schedule)?

[241] The crux of issue (a) is whether s 17 Part III, a supplementary provision, which is interpretive in nature, and applicable only where relevant, has the effect of revising or drastically modifying the fundamental condition of transmission of citizenship by descent such that art 14(1)(b) is effectively nullified with the result that the father's citizenship becomes valueless by reason of the lack of a legally recognised marriage under the law.

[242] The position is exacerbated in the present case where the mother is a foreigner. This is because s 17 Part III is ineffective where the mother is a foreigner, as the Malaysian Parliament cannot dictate to a foreign sovereign state that the child is to take on the nationality of that jurisdiction because the child is illegitimate. This can result in the child becoming stateless.

[243] I have set out the respondents' position above which is that s 17 Part III has the effect of prohibiting citizenship to a child of a Malaysian father married to a foreign mother, on the grounds that the parents are not married. I am of the view that such a construction is, with respect, flawed.

[244] The proper construction of s 17 Part III is that the section makes provision for a child that is illegitimate, in that the child is born out of wedlock, and there is no legally acknowledged father either on the birth certificate or who comes forward to acknowledge paternity. In short, the absence of a father is the relevant situation in which the mother's status confers citizenship by descent on the child. Put another way, in the absence of a father, the Malaysian mother may confer the right of citizenship by descent on the child. This ensures the child is not stateless. The section does not provide for a situation where there is a legally acknowledged father who is a Malaysian citizen. Even more so in the instant appeal where a marriage was contracted five months after the birth.

[245] However, the nub of this construction is the fact of the existence of the father, a Malaysian citizen, who is thus entitled to confer citizenship by descent on the child. Section 17 Part III does not, and cannot, obliterate the fundamental basis of transmission of citizenship by reason of the blood tie. It does not envisage depriving the child of a Malaysian father of citizenship on the grounds of the lack of a legally recognised marriage.

[246] Further, it is evident from a perusal of s 17 Part III that it provides for the mother's status to substitute that of the father in s 1(b) Part II . That should only arise where there is no Malaysian father at all. It does not follow that the citizenship of a legitimate biological father of the child can be ignored in its entirety, simply because the father and mother are not married.

[247] The doctrine of *jus sanguinis* or transmission by descent underlies the basis of art 14(1)(b) FC *vide* s 1(b) Part II . Citizenship by operation of law requires a blood relationship between the father and the child. In a case where such a blood relationship does subsist, it cannot be denied simply because the parents were not at the time of the birth, married.

[248] Section 17 Part III falls under art 31 which provides that until Parliament provides otherwise the provisions in Part II of the Second Schedule will have effect for the purposes of Part III of the Constitution . It is supplementary in nature and not a governing section. It is also clear that Part III of the Second Schedule is interpretive in nature as evidenced by the opening words. By its very nature it explains how specific variations from the general rule are to be dealt with.

[249] Therefore, such interpretive provisions which detail the legal construction to be adopted in specific instances cannot be utilised to override, derogate from or abrogate from the general rule which is set out in s 1 (b) Part II . Far less to nullify the express provisions of the FC which provide for the conferment of citizenship by operation of law as a consequence of descent or a blood tie from father to child.

The Meaning Of "Subject To" In Section 1(b) Part II Of The Second Schedule

[250] The essence of the construction turns on the manner in which the words "subject to" are understood. The phrase "subject to" has two possible meanings:

> (i) It is used as a referencing phrase, to cross-refer one provision to another. In its referencing context, the words "subject to" in s 1 Part II which states "Subject to the provisions of Part III of this Constitution" means that s 1 Part II cross-refers to Part III of the FC. It has the effect of linking a main provision to an exception or variants to the main rule. The purpose of the words "Subject to" are to emphasise the main rule contained in s 1 Part II and the variants and exceptions in Part III which includes s 17 ;
>
> (ii) Secondly, it can be used as a phrase introducing a conditional provision. In such a context the words "Subject to" mean that the provisions set out in s 1 (b) Part II are qualified or modified by the provisions of s 17 Part III. This means that the substance of the content of s 1 (b) Part II relating to the conferment of citizenship by descent, is conditional or dependent upon or may be qualified by the content of s 17 Part III, which relates to illegitimacy.

[251] It is my considered view that in the context of this appeal, the words 'subject to' serve the purpose of conjoining or bridging s 1(b) Part II and s 17 Part III. The primary reason, as I have stated several times in this judgment, is that it is inconceivable at best and improbable at worst, that the primary mode of conferment of citizenship by descent should be eroded by illegitimacy. This runs awry of the fundamental basis of citizenship. If that had been the intention of the framers of the FC, then there would be express wording to that effect.

[252] It cannot be argued that s 17 Part III provides such express wording derogating from s 1(b) because the former is primarily interpretive in its function. An interpretive section rarely if ever, imposes a condition to, or a condition modifying or altering the primary basis for citizenship.

[253] More importantly it refers to a different fact situation, namely one where there is no known or legally acknowledged father. The child has only one parent, namely the mother, and therefore is not to be left stateless because s 1(b) refers to the father. It is a saving provision for those children who have no known father. It is not a provision seeking to detract from or reduce the entitlement of those children who have a Malaysian father capable of conferring citizenship by virtue of the blood-tie.

[254] It would be incorrect to construe s 17 Part III as imposing a condition of legitimacy on s 1(b) Part II, in order for a child to enjoy citizenship by descent. That is the net effect of construing s 17 Part III as a condition to the right of

citizenship by operation of law premised on *jus sanguinis*. It would deplete and further restrict the right to citizenship by operation of law. The imposition of a legitimacy requirement as a pre-condition to citizenship under s 1(b) Part II would need express provision as it effectively removes entrenched rights conferred under the FC.

[255] Taking into consideration the principles of constitutional interpretation I have referred to at the outset, it follows that the correct interpretation to be accorded to s 14(1)(b) and s 1(b) Part II together with s 17 Part III is that:

(1) The conferment of citizenship in the instant appeal is effective by operation of law as the father is a Malaysian citizen. The words "Subject to" in s 1 Part II, comprise a cross-reference to Part III, if and where relevant. A perusal of the provisions on the conferment of citizenship in their entirety discloses that the drafters of the FC did not envisage setting out a single long and confusing art relating to the principle of *jus sanguinis* and its exceptions, within the body of the citizenship provisions, but chose to utilise Schedules to cater for exceptions and deviations from the general rule.

(2) The words "Subject to" in s 1 Part II do not have the effect of imposing a condition whereby the child's right to citizenship is affected by his illegitimacy at the point of birth. This is because a subsidiary section or a section providing for exceptions to the general rule cannot override the central thrust of a right to citizenship under s 1 (b) Part II. An interpretive section providing for variants and exceptions to the primary rule cannot have that effect.

(3) As the words "Subject to" in s 1(b) Part II are to be understood as a cross- referencing provision and not a condition imposing provision, a literal construction which gives effect to the words of the citizenship provisions in their entirety, does not give rise to a conclusion that the child is prohibited from obtaining citizenship by operation of law under art 14(1)(b). This is because such a construction is in accord with and supports the fundamental doctrine of the transmission of citizenship by descent or blood which is the nub of the constitutional provision.

(4) The construction preferred by the respondents and the majority, prohibits or takes away this entitlement. There are however no clear express provisions allowing for such an abrogation. Therefore, even a literal reading of the words "Subject to" in s 1 Part II do not have the effect of making s 1 conditional upon satisfaction of s 17 Part III. The literal reading, (which is not completely separate from, nor can be excised from the purposive meaning) allows for the general rule of a right to citizenship, through the citizenship of the father. And s 17 Part III provides for the exception or variation, namely where the child is illegitimate with only a mother to inherit citizenship from.

(5) It also cannot mean that s 17 Part III prescribes that where there is a Malaysian father, the child is to take on the foreign mother's citizenship by reason of illegitimacy because, as pointed out earlier, Parliament cannot seek to enact or impose on another sovereign nation the conferment of its citizenship to the child.

(6) The imposition of legitimacy as a condition to the conferment of citizenship amounts to a narrow and restrictive construction of these constitutional provisions. The subject matter of construction in this appeal is not a contract but the FC. Such a narrow reading is contrary to the fundamental principles of constitutional construction as set out in, *inter alia*, *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2012] 6 MLRA 375 and *Alma Nudo Atenza v. PP & Another Appeal* [2019] 3 MLRA 1. It also gives rise to a conflict within the FC resulting in a seeming contravention of art 8 FC, if effect is given to such a narrow construction.

(7) I have set out the principles of constitutional interpretation at the outset. It is trite that any construction which has the effect of rendering nugatory or taking away from the fundamental constitutional principles ought to be rejected outright. The full benefit of the provisions of the FC ought to be available to citizens, such as the child's father, and not whittled away so as to deprive citizens of their full entitlement to citizenship by operation of law.

Extraneous Sources

[256] The respondents vide letter of 24 February 2021 urged this court to consider the legislative history of s 17 Part III FC. Their contention is that the words of s 17 Part III are clear and applicable to all illegitimate children in determining citizenship under the FC. It would appear from the respondents' submissions that their reading of s 17 Part III is that illegitimacy overrides the fundamental requirements of citizenship by birth and citizenship by descent.

[257] It was further submitted that the Schedules comprise a part of art 14 for the purposes of ascertaining citizenship. I have no quarrel with that. As explained above, it is the construction to be placed on art 14 together with the Schedules that is the issue.

[258] The respondents also made reference to the Constitution of the Federation of Malaya 1957 and the relevant Hansard on 31 January 1962 to support their contention.

[259] It appears to me that it is not possible to conclude that a literal construction results in the construction put forward by the respondents or otherwise, without having regard to the full history of these provisions and the manner in which Parliament dealt with the same. As the respondents have sought to put this in issue, I am constrained to consider the Reid Commission

Report and the Draft Constitution of the Federation of Malaya which is Appendix II to the Reid Commission Report to comprehend the basis on which citizenship was originally granted and the changes brought about by Parliament to date. This will shed light on whether the Schedules, particularly s 17 is to be read so as to restrict the substantive citizenship provisions in art 14(1)(b) and s 1 (b) Part II or not.

[260] It is not tenable to adopt a construction, literal or purposive without having regard to the history of these provisions and the manner in which Parliament dealt with the same.

Appendix II Of The Draft Constitution Of The Federation of Malaya

[261] Part III, Chapter 1, art 14 dealt with the acquisition of citizenship, much as do the present provisions. Article 14 under the Draft Constitution made *jus soli* the primary mode of acquisition of citizenship in art 14(1)(a) and (b) while 1(c) allowed for acquisition of citizenship by descent or *jus sanguinis*.

[262] Article 14(1)(c) provided:

> "A person shall be a citizen by operation of law if he ...
>
> (a)...
>
> (b) ...
>
> (c) is born outside the Federation on or after Merdeka Day of a father who was on the date of the birth a citizen.
>
> Provided that a person shall not be a citizen by virtue of his birth outside the Federation unless –
>
> (i) His father was born in the Federation; or....

[263] Chapter 3 of the Draft Constitution dealt with supplemental matters. Article 26 of the Draft Constitution which appears to be equivalent to s 31 FC provides that until Parliament otherwise provides a Second Schedule "shall apply to the determination of questions relating to citizenship, the offences that may be connected therewith..."

[264] The present s 31 provides for the application of Part III of the Second Schedule to have effect.

[265] What is apparent from the tracing exercise is that the Second Schedule in Part III functions primarily to determine questions relating to citizenship. The utilisation of essentially the same drafting pattern in the FC warrants the inference that Part III of the Second Schedule in the FC serves a similar function. That function is not to modify or place conditions upon the acquisition of citizenship by operation of law.

[266] Section 7(3) of the Second Schedule in the Draft Constitution provides that any reference in Part III to a "child" shall be construed as including a reference to an illegitimate or legally adopted child. "Father" is to be construed to mean "mother", "adoptive father" or "adoptive mother" as necessary.

[267] It is evident from the foregoing that s 7(3) is purely an interpretive section to cover for situations of illegitimacy and adoption. Similarly, s 17 Part III Second Schedule which is headed "Interpretation" also covers the exception to the general rules, namely that where a child is illegitimate then the mother's status is to be read in place of that of the father. These are all expansive provisions seeking to ensure that children are not left stateless simply by reason of illegitimacy, in the instant appeal.

[268] To therefore construe this interpretive provision as imposing a condition of legitimacy before the doctrine of citizenship by descent can apply, is to do severely impair the present provisions of the FC. It is regressive in that it is evident that even in 1957 that was not the intent under the Draft Constitution. Such intent and purpose have been preserved through the amendments to the current provisions on citizenship in the FC.

Hansard Reading On 31 January 1962 In Relation To The Constitution (Amendment Bill)

[269] Amendments were made to the provisions on citizenship some four and a half years after Merdeka. The Hansard reading on The Constitution (Amendment) Bill at its Second Reading, submitted by the respondents bears out my conclusions above unreservedly. The Minister of Finance, Enche Tan Siew Sin in a long and erudite speech said, amongst other things:

> "... The Honourable Member for Dato Kramat went so far as to say that the rights acquired since Merdeka will be lost as a result of the Bill now before us and that cl 2 of the Bill in particular means the abandonment of the principle of *jus soli*. The relevant part of this Clause is, of course, Sub-cl (4)(c). If this amendment were to be passed, it would mean that in future every child born in this country would acquire citizenship by operation of law so long as either of his parents was either a citizen or a permanent resident of the Federation. Or to put it another way, this amendment will only exclude the children of parents both of whom are aliens, or temporary visitors ... In other words, this amendment is only designed to exclude the children of pure birds of passage. No fair-minded person can possibly clam that this amendment would affect anyone who can be considered to be a Malayan, and giving the term "Malayan" the most liberal interpretation. It must be emphasised that so long as only one parent is normally resident here, even though such parent may not be a citizen, and even though the other parent may be an alien, the child would still be a citizen by operation of law. How this can be construed as an infringement of the principle of *jus soli* is a puzzle to me..."

[270] These amendments substantively reflect the current position in the FC. These statements support the literal and purposive approach that has been adopted in arriving at the construction in the minority judgment of the

Honourable Chief Justice and this concurring judgment. If a parent who is only ordinarily resident here and the other parent is an alien and the child is entitled to citizenship by operation of law, what more a Malaysian father with an alien wife? The fundamental requirement of a blood tie has been made out entitling the child to citizenship under art 14 (1)(b) read with s 1(b) Part II.

[271] The interpretive provisions of s 17 simply do not come into play because the illegitimacy provisions are inapplicable here as:

(a) The Malaysian father was at all times legally acknowledged and paternity is not in doubt;

(b) The child was legitimised when the parents married five months later;

(c) Section 17 applies to a situation where the father is unknown and/or unacknowledged;

(d) Section 17 cannot be read as imposing a legitimacy requirement failing which the child of a Malaysian father married to a foreigner is not entitled to citizenship by operation of law. This is clear from the Draft Constitution and the Hansard excerpt above;

(e) Parliament never sought to suggest that the foreign mother's citizenship should be substituted for the Malaysian father when the child was illegitimate at the point of birth. This is because Parliament would not presume to legislate for the Philippines.

Issue (B): Whether By Adopting A Construction Which Precludes The Child From Enjoying Citizenship By Operation Of Law Under Article 14(1)(B) FC, Article 8 FC Is Contravened On The Basis Of Gender Discrimination. What Are The Consequences Of Such A Contravention?

[272] The Honourable Chief Justice has meticulously examined and set out the conflict that arises with art 8 of the FC and I agree entirely with the reasoning set out in Her Ladyship's judgment.

[273] I would merely reiterate that as stated at the outset there cannot be any conflict in the construction of the FC and to that extent the construction that promotes a harmonious result is always to be preferred.

[274] The construction afforded in the majority judgment allows for illegitimate children of Malaysian mothers to be afforded citizenship by operation of law, while illegitimate children of Malaysian fathers married to foreign mothers are not entitled to such citizenship. This is clearly gender discrimination which is contrary to art 8(1) FC. Neither is such discrimination justified as it does not comprise a reasonable classification having a rational nexus to the object of the citizenship provisions.

[275] Such a state of conflict between art 8 and art 14(1)(b) FC arises solely by reason of erroneously invoking and according s 17 Part II unnecessary and incorrect significance, in an effort to impose a requirement of legitimacy for the acquisition of citizenship which was never the intent nor purpose of the citizenship provisions in the FC from its onset in 1957 to date.

[276] Articles 8 (2) and 8 (5) FC provide no rescue, as there is no express authorisation allowing for discrimination in relation to the acquisition of citizenship by operation of law for children of fathers who are Malaysian citizens married to foreigners, as compared to illegitimate children of Malaysian mothers who are entitled to citizenship by operation of law at birth.

[277] For these reasons I have no hesitation in concluding that the child is entitled to Malaysian citizenship by operation of law under art 14(1)(b) read with s 1(b) Part II of the Second Schedule, as of the date of his birth. Section 17 Part III of the Second Schedule has no application here.

[278] I concur with the answers to the questions of law set out in the Honourable Chief Justice's judgment.

Conclusion

[279] In conclusion, it must be said that it is an unsustainable construction to utilise illegitimacy to abrogate from the acquisition of a right of citizenship by operation of law, as expressly provided under art 14(1)(b) read together with s 1 (b) Part II of the Second Schedule by imposing an interpretive provision, namely s 17 Part II, which does not come into play in the present factual matrix. The effect of doing so is to remove entrenched rights guaranteed by the Federal Constitution, without any basis or express authorisation to do so. I should also add that it is unlawful discrimination.

[280] The Judiciary cannot legislate to take away rights that are vested and come into being by operation of law. Any such attempt would be to exceed the authority and jurisdiction of the court and more importantly its role in the tripartite separation of powers. It amounts to a usurpation of Parliament's role and brings to the fore the real spectre of judicial supremacy.

Mary Lim Thiam Suan FCJ (Minority):

[281] I associate myself with the views and reasoning expressed by the learned Chief Justice and the further reasoning of my learned sister Justice Nallini Pathmanathan FCJ and would allow the appeal in the terms pronounced in the learned Chief Justice's grounds.

[282] Traditionally, citizens and the size of that citizenry is reflective of the sovereignty enjoyed by any independent nation. Consistent with the foundational principles of citizenship universally accepted, nations grant citizenship on the existence of *jus soli* and *jus sanguinis*. Malaysia practices those principles and this is ensconced in Part III of the Federal Constitution, noting

that the Federal Constitution recognises that statelessness is to be avoided - see for instance art 26B which, though a provision on deprivation or loss of citizenship categorically states that the Federal Government will not deprive citizenship if "satisfied that as a result of the deprivation he would not be a citizen of any country".

[283] The issue in this appeal pertains to the acquisition of citizenship of this country by the 1st appellant. In my view, the 1st appellant has irrefutably satisfied the terms prescribed in art 14(1)(b) read with s 1(b) of Part II of the Second Schedule. The 2nd appellant is the biological father of the 1st appellant. He is himself a citizen of this country as he was born in Malaysia.

[284] In my view too, the fact that the 1st appellant's father was not married to his mother at the time of his birth in the Philippines does not diminish his right to acquire citizenship by operation of law under art 14(1)(b). The 2nd appellant remains the father of the 1st appellant, and the legal relationship between the father and mother of the 1st appellant does not alter the status of the 1st appellant. Children similarly circumstanced as the 1st appellant should never be required to applying for their citizenship under say art 15 or 15A, the latter was in fact unsuccessfully explored by the appellants. The 1st appellant's relationship with this country is amply proven and he must be accorded citizenship by the operation of art 14(1)(b). The discrimination that arises from the respondents' reliance on s 17 of Part III, whether it be on grounds of legitimacy or illegitimacy or between father and mother are not at all 'expressly authorised by this constitution' as allowed under art 8(2) and as clearly illustrated in art 8(5). Such discrimination is caused by the effect in reading s 17 of Part III in a manner which is countenanced in law. The reading, interpretation and application of the Federal Constitution in the manner as conducted by the learned Chief Justice renders art 14 harmonious with the other provisions of the Federal Constitution, in particular arts 5 and 8; that a child of a citizen enjoys no less rights and liberties; and more fundamentally, is equally protected by the law, just as his father or mother is. This effectively gives meaning to the oft-quoted reference to our Federal Constitution as a "living piece of legislation" - see *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1980] 1 MLRA 18 and serve to provide an inclusive yet expansive approach in the construction of our beloved Federal Constitution. Any discrimination even if authorised under the Federal Constitution and unless expressly and clearly authorised must be strictly and narrowly construed, and must never be unwittingly condoned or encouraged.

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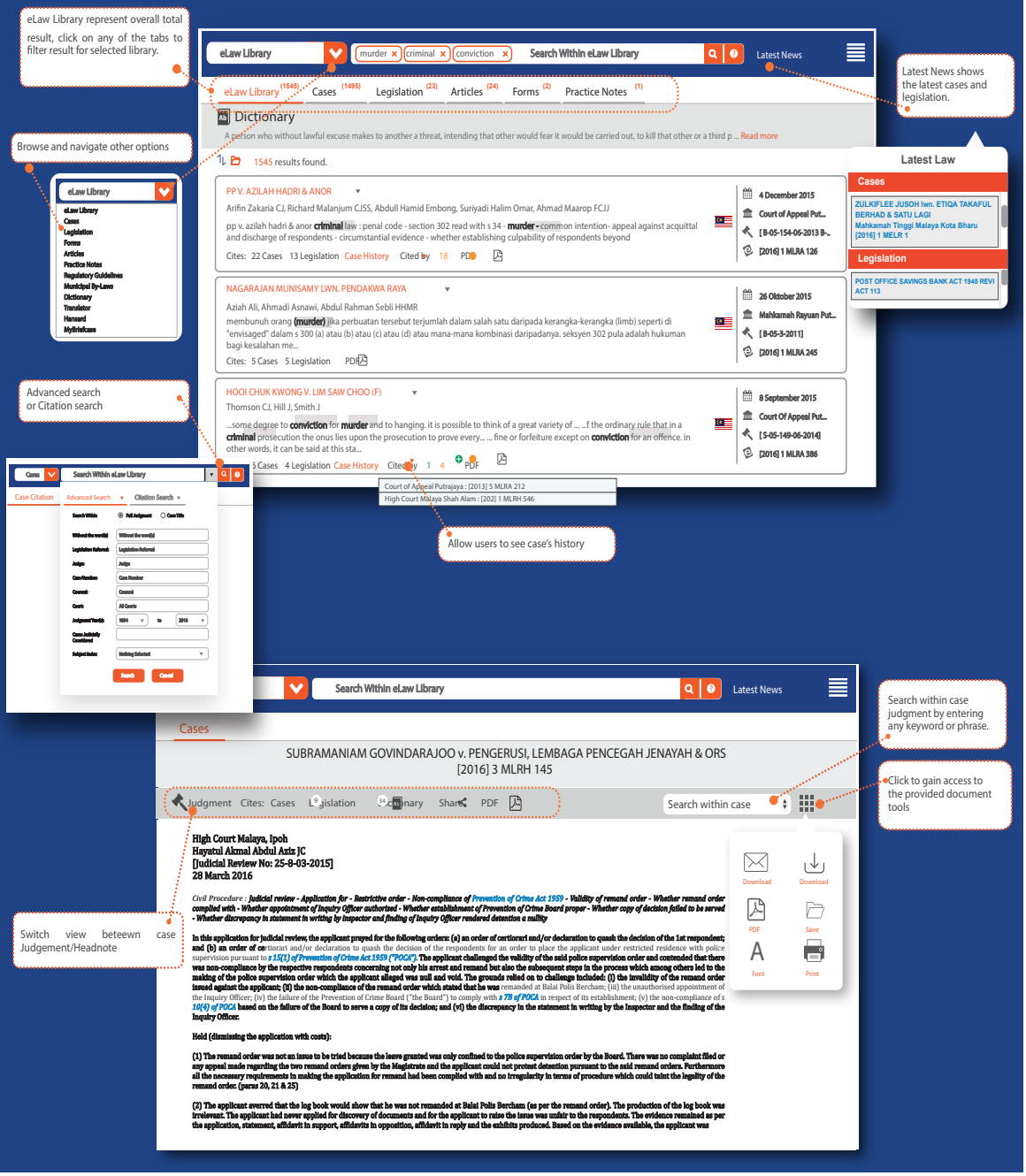

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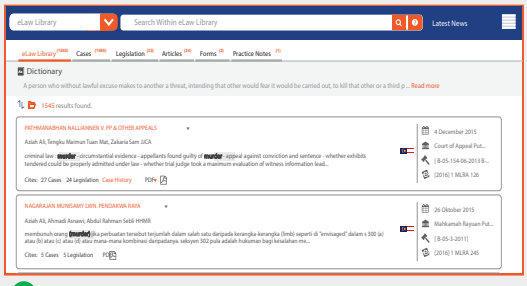

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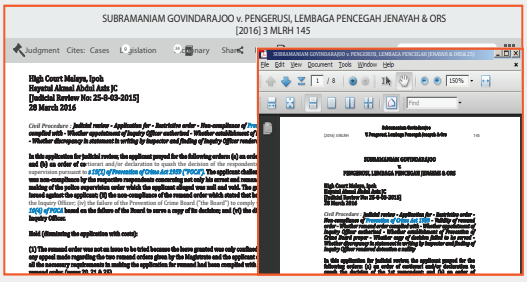

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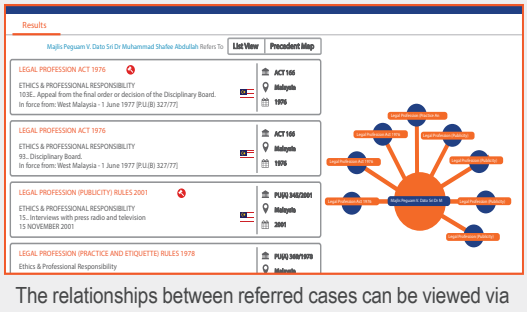

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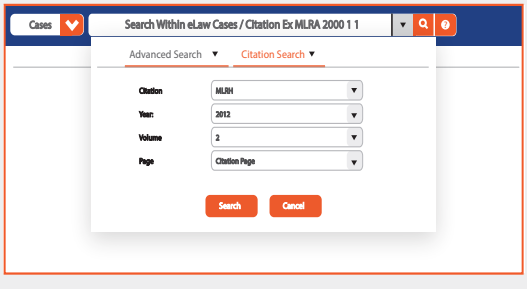

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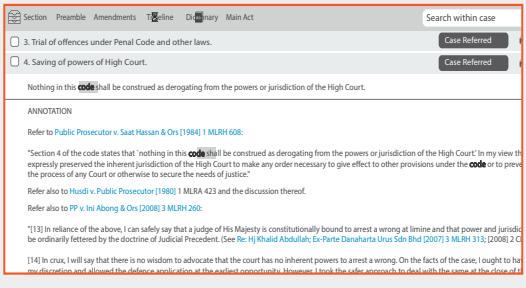

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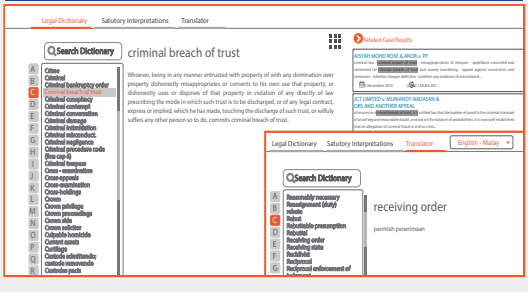

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