

CASE NOTE

CYM V MALAYSIA: LANDMARK DECISION FOR ADOPTED STATELESS CHILDREN HAS LITTLE TRACTION BEYOND APEX COURT

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I A SIGNIFICANT SHIFT IN MALAYSIA’S FEDERAL COURT

Malaysia has a known population of stateless persons and a vibrant network of advocates which have been seeking a more inclusive legal interpretation of its citizenship laws for the past few years.

On 19 November 2021, Malaysia’s apex court published an important decision granting citizenship to a stateless adopted child. *CYM v Malaysia* (*‘CYM’*)¹ may feel victorious for the family involved, but beyond the conferral of citizenship, this case signifies not only an important shift in how the Federal Court of Malaysia views who are citizens, but also demonstrates, two years later, the ongoing challenges to having such a perspective permeate through an administrative bureaucracy and lower court system.

II WHAT THE CASE IS ABOUT: JUDICIAL REVIEW OF DECISION TO LIST ADOPTED CHILD AS NON-CITIZEN ON BIRTH CERTIFICATE

CYM is an anonymised acronym for the child at the centre of this case. Abandoned at birth, *CYM* was adopted by two parents who believed they had formally adopted *CYM*, the proof of which was a birth certificate that listed the two adopted parents as *CYM*’s parents and *CYM* as a citizen of Malaysia.² In Malaysia, it is a rite of

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¹ *CCH & ADY v Pendaftaran Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71 (*‘CYM’*).

² *ibid* [10].

passage for citizens to acquire one's identification card at the age of 12.³ In the process of applying for CYM's identification card, an officer at the registrar found irregularities in the first birth certificate and confiscated it. A second birth certificate was issued with the parents listed as 'not available' and citizenship as 'yet to be determined'.⁴ CYM's parents, after seeking legal advice, formally adopted the child.⁵ With an adoption order, they returned to the registrar to apply for a new birth certificate. A third birth certificate was issued listing the adoptive parents but indicated CYM was a 'non-citizen' under citizenship.⁶

The central issue in this case was whether CYM could be rendered stateless via the third birth certificate given the adoption order that was proffered by CYM's adoptive parents to the registry. CYM's parents applied for judicial review of the issuance of the third birth certificate and asked that CYM be declared a citizen by operation of law.⁷

III HISTORICALLY UNEVEN TREATMENT OF STATELESS CHILDREN UNDER MALAYSIAN LAW

Malaysia's citizenship laws are housed in the *Federal Constitution of Malaysia* ('Constitution') and include both concepts of *jus soli* (citizenship based on birthplace) and *jus sanguinis* (citizenship based on blood relation).⁸ In the past, Malaysian courts have interpreted the Constitution unevenly between children depending on the circumstances of their birth. Children born to unmarried parents with non-citizen mothers, as well as adopted children, have historically been disadvantaged by the courts' interpretation of the Constitution. A parent's actions (having a child with a non-Malaysian mother) and non-actions (no marriage or registration) at the time of a child's birth impact their chances of obtaining citizenship.

'Illegitimate' children, or children born of unmarried parents where the mother is not a citizen of Malaysia, are often excluded in Malaysia's discriminatory legal regime, as it does not allow children to acquire citizenship from their Malaysian father if their mother is not married to that father and is not a Malaysian citizen.⁹ Adopted children, similarly, have faced challenges in the legal interpretation of citizenship. While acquiring all benefits and rights of biological children through Malaysia's *Adoption Act 1952* ('*Adoption Act*')¹⁰ once adopted, courts have interpreted both the *Adoption Act* and the Constitution as excluding citizenship as a legal benefit or right that flows automatically from adopted Malaysian parents.¹¹ 'Illegitimate' children have fared better than adopted children in the courts, with some judges examining the social facts that demonstrate a genuine link to Malaysia, such as a Malaysian father, the absence of a non-Malaysian mother, the

³ *ibid* [12].

⁴ *ibid* [20].

⁵ *ibid* [21]–[22].

⁶ *ibid* [25].

⁷ *ibid* [27].

⁸ *Federal Constitution* (Malaysia).

⁹ See, eg, *Haja Mohideen* [2007] 6 CLJ 662; *Mohamed Sadik Mohamed Ali* [2017] 8 CLJ 442 ('*Mohamed Sadik Mohamed Ali*').

¹⁰ *Adoption Act 1952* (Malaysia).

¹¹ See, for example, the seminal cases of *Foo Toon Aik v Ketua Pendaftar Kelahiran* [2012] 4 CJL 613 and *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [2017] 8 CLJ 16, which have been followed extensively by subsequent court decisions.

permanent residence of the non-Malaysian mother and the efforts taken by parents to regularise status.¹² This legal approach, however, is not practised widely and has been notably absent from cases involving adopted children. Perhaps the central reason behind this is that previous judicial decisions have focused on who the parents are *at the time of the child's birth*. In the parlance of many lawyers I have spoken to in Malaysia, courts are piercing the veil of a child's adoption order in order to go behind it and examine the biological parents.¹³ In the case of abandoned and adopted children, many do not know who their biological parents are and therefore cannot offer proof that the latter are Malaysian citizens or permanent residents. Courts have historically refused to look past this to examine the circumstances of the legal adoptive parents and have refused to accept the *Adoption Act's* premise that these children should enjoy all benefits and rights flowing from those parents, including citizenship. Indeed, the Federal Court in *CYM* acknowledged this by stating in the decision that lower courts require that 'the applicant must show that his or her birth parents are not citizens of any other country'.¹⁴ I have written elsewhere that the foreign mother is seen as a stain on the child; the invader that permits a child to be cast as foreign themselves.¹⁵ In cases of abandoned children where the mothers are unidentifiable, courts have presumed that the mother is not Malaysian in the past.¹⁶

IV TWO REASONS WHY *CYM* IS AN IMPORTANT DECISION

In light of the preceding discussion, the Federal Court's decision in *CYM* is significant because it does two things.

A *Use of a Purposive Approach to Interpret the Constitution*

First, in interpreting a fundamental right of the Constitution, 'the court should give their widest possible meaning' while 'having regard to the purpose and intent of those provisions and harmonise their collective meaning'.¹⁷ In doing this, the Court acknowledged that the citizenship laws were crafted to guard against statelessness.¹⁸

B *Presumption that the Biological Mother is a Permanent Resident*

Second, the Federal Court provides a practical approach to evidentiary requirements in citizenship cases unique to adopted children. As previously discussed, previous judicial decisions have required adopted children to show whether their biological parents were Malaysian, to give them entitlement to citizenship. In *CYM*, the Federal Court held that it was 'quite illogical in this appeal to expect the appellants to show that they do not have knowledge of the biological parents or the mother at least'.¹⁹ The Federal Court, however, goes

¹² See, eg, *Mohamed Sadik Mohamed Ali* (n 9).

¹³ Jamie Chai Yun Liew, *Ghost Citizens: The Legal Construction of the Foreign and Stateless Figure in Post-Colonial States* (Fernwood Publishing 2024) ('Ghost Citizens').

¹⁴ *CYM* (n 1) [33].

¹⁵ *Ghost Citizens* (n 13).

¹⁶ See, eg, *Than Siew Beng* (n 11).

¹⁷ *CYM* (n 1) [50].

¹⁸ *ibid* [44].

¹⁹ *ibid* [57].

further than this in finding a presumption that where a child has been abandoned, that child is presumed to be ‘born to a mother permanently resident’.²⁰ The evidentiary burden is then on the State to show that the presumption has been rebutted. In this case, the Court stated that ‘[t]here is nothing in the evidence, as far as we have examined it, to suggest that the appellants were lying about the fact of abandonment’.²¹

This shift towards a wide and flexible interpretive approach of the Constitution, coupled with the presumption of a biological mother as being permanently resident for an adopted child abandoned in infancy, demonstrates a willingness of the Federal Court to acknowledge that adopted children are kin and therefore automatic citizens of Malaysia by operation of the law.

V CHALLENGES OF IMPLEMENTING *CYM* BEYOND THE FEDERAL COURT

A *Irrelevant Glance at the ‘Shadow’ of a Biological Mother*

Despite this landmark decision, there are still reasons why stateless persons and advocates should persevere. First, the *CYM* decision still allows courts and decision-makers to pierce the veil of the adoption order. In crafting a presumption that the biological mother is a permanent resident, the decision gives the biological mother prominence when examining whether an adopted child is a citizen. This turn to the biological mother in cases involving adopted children gives license to the idea that foreign mothers should be guarded against in matters concerning citizenship. The preferred approach in my own view is to examine the identities of the legal adopted parents and consider citizenship on par with the other rights and benefits that ordinarily flow from an adoption order. A factual finding on the biological mother’s identity should be irrelevant when it comes to abandoned and adopted children.

B *Registrars and Lower Courts Ignoring *CYM**

Second, there are public reports that registrars and lower courts have not followed the approach in the *CYM* case.²² The Federal Court, in its wisdom, acknowledged the importance of a reported decision in stating: ‘this case is now precedent on how the Ministry of Home Affairs (generally) and the NRD and Registrar-General of Births and Deaths (specifically) ought to deal with all such future cases within the context of abandoned new born children.’²³ Nevertheless, one advocate speaking to the media in 2023 expressed frustration at the lack of implementation of the Federal Court’s reasoning by registrars:

²⁰ *ibid* [62].

²¹ *ibid* [58].

²² Ahmad Mustakim Zulkifli, ‘Rights Group Blasts Home Ministry over “Indifference” to Citizenship Bids after Court Ruling’, *Malaysia Now* (online, 16 March 2023) <<https://www.malaysianow.com/news/2023/03/16/rights-group-blasts-home-ministry-over-indifference-to-citizenship-bids-after-court-ruling>>, archived at <<https://perma.cc/EUR7-NEQN>> (‘Rights Group’); ‘Adoption Order does not Confer Citizenship, High Court Rules’, *Free Malaysia Today* (online, 16 March 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/03/16/adoption-order-does-not-confer-citizenship-high-court-rules>>, archived at <<https://perma.cc/EUR7-NEQN>> (‘Adoption Order’).

²³ *CYM* (n 1) [67].

The reality here is, despite the clear wording in the federal case in 2021, family members and individuals considered abandoned still face problems obtaining citizenship because of the obstinate behaviour of JPN [registrar] officers ... They refuse to accept the Federal Court's decision on the matter.²⁴

Lower courts also appear to be ignoring the Federal Court's decision, with one court justifying a denial of citizenship on the grounds of preventing abuse of the conferral of citizenship and preventing human trafficking.²⁵ One media story reported that a High Court in Malaysia held to a historical position that rights relating to citizenship need to be explicitly spelled out in the *Adoption Act*. Since they are not, the Court decided that this prevented the automatic conferral of citizenship to adopted children, particularly as there was no evidence in the reported case that the biological parents were Malaysian.²⁶ This decision ignores the Federal Court's presumption that biological parents of abandoned children are permanent residents.

VI THE CONTINUING NEED TO CHANGE PERSPECTIVES ON WHO ARE CITIZENS

While the *CYM* decision should be lauded, this case's reach outside the Federal Court has been restrained. The limited ability of stateless persons to harness this decision to obtain citizenship shows the shortcomings of only relying on legal reform or favourable legal interpretation for lasting change. As the response to the *CYM* decision shows, there is much more advocacy work to be done to change the perspectives of the public, registrars, courts and those with political power to determine who counts as Malaysian citizens and how stateless cases should be resolved. In the case of *in situ* statelessness, part of the advocacy effort should include education and discussion on how *in situ* stateless persons have been improperly cast as foreign and not deserving of citizenship. This single decision is but one step forward in the larger landscape of preventing and eradicating statelessness.

²⁴ Right's Group (n 22).

²⁵ Adoption Order (n 22).

²⁶ *ibid.*