State Practice of Asian Countries in International Law

Malaysia

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HUMAN RIGHTS

HUMAN RIGHTS – ARTICLE 7, 1989 CONVENTION ON THE RIGHTS OF THE CHILD – RESERVATIONS TO TREATIES – DNA PATERNITY TESTING

*Lee Lai Cheng (suing as the next friend of Lim Chee Zheng and Herself) v.
Lim Hooi Teik* [2016] 1 LNS 1212, High Court, 31 October 2016

This case relates to an application by the mother of a child to compel the defendant – the alleged father of the child – to undergo DNA testing to prove paternity. Counsel for the plaintiff cited among others, Article 7 of the 1989 Convention on the Rights of the Child (CRC), of which Malaysia is a State party to. Counsel for the plaintiff averred that Article 7 provides for the right of the child to know the identity of his parents. The High Court recognised that it was possible for the court to apply provisions of the CRC in domestic cases. An example is seen in the case of *Lai Meng v Toh Chiew Lian* [2012] 10 CLJ 479, where the court applied the best interest test as found in the CRC, to determine the issue of access to an illegitimate child.

However, in the present case, the High Court took note of Malaysia's reservation to several provisions of the CRC, including Article 7. The reservation states that "...the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia". On that basis, the High Court referred to the relevant national law, Section 13 of the Births and Deaths Registration Act 1957, which relates to the exemption of giving information pertaining to the facts of conception until the birth of the child. The High Court held that Section 13 does not exempt a father from undergoing a DNA test for purposes of determining paternity. However,

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the High Court found that despite the absence of exemption, there is also no obligation imposed by the CRC and national laws for the father to undergo a DNA test. Accordingly, the High Court could not order the alleged father to undergo DNA testing.

**HUMAN RIGHTS – FUNDAMENTAL LIBERTIES – 1966
INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL
RIGHTS – CRIMINAL LAW – CAPITAL PUNISHMENT – MENTAL
DISORDER**

Michael Philip Spears v. Ketua Pengarah Penjara Kajang & Anor [2017] 3 CLJ 161, *Court of Appeal*, 18 November 2016

This case relates to an appeal by an individual on death row, against a High Court decision to strike out an earlier application, where the appellant had asked the court to set aside or quash the death sentence as he has been diagnosed with schizophrenia.

The appellant was sentenced to death by hanging in the year 2000. He had been in detention for more than 17 years and on death row for 14 years. The appellant argues that the prolonged detention was inhumane, cruel and/or degrading punishment and had subsequently led to him being diagnosed with schizophrenia.

The Court of Appeal found that the appellant's arguments were of arguable basis or foundation. In arriving at this conclusion, the Court of Appeal found support from a case decided by the Indian Supreme Court – *Shatrughan Chauhan v Union of India* [2014] 3 SCC 1. The case interprets Article 21 of the Constitution of India (equivalent to Article 5(1) Malaysia Constitution), regarding the right to life and personal liberty. In particular, the case law relies on the United Nations Commission of Human Rights' documents such as Resolution 2000/65 "The Question on Death Penalty" and Clause 89 of the Report of the Special Rapporteur or Extra-Judicial Summary or Arbitrary Executions "Restrictions on the use of Death Penalty". These documents elaborate on the prohibition of the use of death penalty on persons suffering from any form of mental disorder.

The Court of Appeal acknowledged the possibility that the UN documents may not hold relevance to Malaysia, unlike to India, as India is a party to the International Convention on Civil and Political Rights. However, the case law and UN documents were sufficient at this point, to establish that the appellant had a sufficiently plausible and arguable case which merits a hearing. Accordingly, the decision to strike out the application by the High Court was reversed.

INTELLECTUAL PROPERTY

APPLICATION OF THE TRIPS AGREEMENT – DIRECT APPLICATION OF TREATIES IN MALAYSIA – REGISTRATION OF TRADEMARKS

Kraft Foods Schweiz Holding GmbH v. Pendaftar Cap Dagangan [2016] 9 CLJ 558, *High Court*, 15 August 2016

This case relates to a rejection of trademark registration by the trademark registrar. The registrar rejected the plaintiff's proposed mark on the basis that it did not qualify as a mark under the Trade Marks Act 1976. The plaintiff contended otherwise, arguing among others that, Article 15(1) of the TRIPS Agreement provides for a wide definition of trademark. In addressing the application of the TRIPS Agreement to the present case, the High Court acknowledged that Malaysia has been a State party to the Agreement since 1 January 1995. However, referring to previous case law, the High Court held that it cannot refer to the TRIPS Agreement as suggested by the plaintiff, as Parliament has not legislated for the inclusion and application of Article 15(1) of the Agreement into the Trade Marks Act 1976.

INTERNATIONAL TRADE

TRADE AGREEMENT – TREATY ADOPTION AND RATIFICATION – PARLIAMENTARY CONSENT– TPP – CPTPP

Trans-Pacific Partnership/Comprehensive and Progressive Agreement for Trans-Pacific Partnership

On 27 January 2016, the Malaysian Government held a special parliamentary voting session to obtain support for the ratification of the Trans-Pacific Partnership (TPP). The special voting session is notable as ordinarily, the Government does not require parliamentary consent to ratify treaties. However, this session was held with the purpose of addressing public concerns on the potential effects of the TPP, and to gain public support for ratification. The motion to ratify was subsequently passed by 127 votes for, and 84 votes against, leading to Malaysia's participation in the adoption of the Agreement on 4 February 2016. Subsequently, following the withdrawal of the United States, Malaysia continued its participation in the negotiation for the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

SHIPPING

SHIPPING – ILO – 2006 MARITIME LABOR CONVENTION – IMPLEMENTATION

Implementation of the 2006 Maritime Labor Convention

On 18 May 2016, Malaysia passed the Merchant Shipping Ordinance (Amendment) Bill 2016 which introduces new provisions to the Merchant Shipping Ordinance 1952. This follows Malaysia's ratification of the Maritime Labor Convention 2006 on 20 August 2013. Of note, the amendments apply to ships of five hundred gross tonnes or more.

The key provisions introduced include Section 90 which provides the minimum hours of rest for the seafarers on board a Malaysian ship. Also, Section 103, imposes an obligation on the owner of Malaysian ships and any foreign ship within Malaysian waters to provide adequate health protection and medical care for seafarers and to ensure that medical supplies are properly maintained and inspected.

AVIATION

AVIATION – ICAO – INDEPENDENT CIVIL AVIATION AUTHORITY – CIVIL AVIATION AUTHORITY OF MALAYSIA

Establishment of the Civil Aviation Authority of Malaysia

On 23 November 2016, the Malaysian Parliament passed the Civil Aviation Authority Bill 2016. The bill (subsequently, Civil Aviation Authority Act 2017), primarily establishes the Civil Aviation Authority of Malaysia, replacing the Department of Civil Aviation Malaysia (DCA). The main difference between the DCA and CAAM is that the latter operates as a statutory body, granting it independence in its management, including budget and human resources aspects. Autonomy over the human resources aspects are important as the 2016 International Civil Aviation Organization (ICAO) Universal Safety Oversight Audit Programme, highlighted the lack of qualified technical personnel at the DCA. The government believes that an independent civil aviation authority would be best positioned to address this concern. Further, the government noted that Malaysia is bound by the standards set by the ICAO as a State party to the Chicago Convention. Hence, the bill enables Malaysia to meet its treaty obligations, given that ICAO had requested States parties to the Convention to establish an autonomous civil aviation authority.