Critique on Judgment of the Court of Appeal Chin Peng v Government of Malaysia

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by M.R. Pearce

1. I have been an observer, on behalf of the International Association of Democratic Lawyers, at proceedings in the above matter in Jaya Putra, Malaysia. I have been asked by the lawyers for the plaintiff, Chin Peng, to prepare a critique of the most recent judgment in the case, that of the Court of Appeal dated 20 June 2008. (Click here to read the Judgment of the Court of Appeal)

2. In summary I consider that the Court of Appeal erred in the following respects:

- It failed to appreciate that, since the proceeding was commenced by originating summons, rather than writ, and since no order for discovery had been made, there was no obligation on Chin Peng to give discovery.
- It confused the Government's application for discovery with a notice to produce documents referred to in Chin Peng's affidavit sworn on 18 March 2005 and failed to acknowledge that such a notice would have been irregular as the affidavit did not refer to his birth certificate or citizenship certificate.
- It erred in holding that Chin Peng did not comply with an obligation to make discovery of documents relevant to his birth in Sitiawan, Malaya and his Malaysian citizenship. Chin Peng's affidavits sworn on 4 December 2006 and 14 March 2007 complied with any such discovery obligation.
- It failed to recognise that, even if Chin Peng did not comply with a discovery obligation, the consequences of that non-compliance were a matter of discretion and did not automatically result in summary dismissal.
- It failed to consider the discretionary considerations against summary dismissal for failure to give discovery.
- It wrongly adjudicated the ultimate issue in the proceeding on the basis of evidence that had been adduced for the interlocutory application for discovery.
- In wrongly making a final adjudication of the principal proceeding, it elevated the existence of a birth certificate and citizenship certificate to the decisive factual issues, whereas they are merely subsidiary issues that would be relevant at trial.
- In so doing, the Court of Appeal has attempted to rewrite the Haadyai peace treaty. The treaty provides that the right of return is available to former CPM members of Malaysian origin. However, the Court of Appeal has sought to confine it only to those who can

produce a Malaysian birth certificate and citizenship certificate.

3. My detailed reasons for these views follow. They and the forgoing summary must be read subject to the qualification that I am not

admitted to practise in Malaysia and have limited knowledge of Malaysian procedural and substantive law. My comments on the judgment of the Court of Appeal are made by reference to general principles of law and assume similarities between Malaysian law and other systems of law with which I am familiar, in particular Australian law.

Background

4. Chin Peng was the leader for many years of the Communist Party of Malaya (CPM). The CPM conducted an insurgency against the Government of Malaysia in the years following independence. In 1989 a peace treaty was made between the Governments of Malaysia and Thailand and the CPM at Haadyai in Thailand.

5. Pursuant to the peace treaty the CPM agreed to disband and destroy its weapons. The Government of Malaysia agreed, by cl 3.1 of the treaty, that members of the CPM who were "of Malaysian origin" would be permitted to return to and settle down in Malaysia. By cl 3.2 it was provided that members of the CPM who were not of Malaysian origin might be allowed to settle down in Malaysia.

6. The parties to the treaty also signed an “Administrative Arrangement” which made detailed administrative arrangements to give effect to the treaty. Clause 6.3.1 of the Administrative Arrangement provided as follows:

Those [CPM members] who were in possession of Blue and Red NRICs and citizenship certificates before they joined the CPM or its armed units shall continue to use them as valid documents. Any such documents which have been lost or damaged shall be replaced expeditiously after verification. [Emphasis added.]

Clause 6.3.4 provided:

Those who are of Malaysian origin and who joined the CPM and its armed units before the implementation of National Registration shall be issued with red NRICs should they be allowed to settle down in Malaysia. They shall be allowed to apply for citizenship in accordance with the laws of Malaysia.

7. Numerous members of the CPM applied pursuant to the treaty to enter and settle down in Malaysia and were permitted to do so. Chin Peng also applied but his application was blocked administratively by the Malaysian Government. After exhausting all administrative avenues to secure his return to Malaysia, Chin Peng instituted a legal proceeding in 2005 for orders against the Malaysian Government to permit him to enter Malaysia in accordance with the provisions of the peace treaty.

8. Chin Peng has encountered more obstruction from the courts. His application for a speedy hearing has been denied though he is now 84. In July 2007 the proceeding was summarily dismissed without trial by order of Justice Mohd Zabidin bin Mohd Diah of the High Court.

9. The summary dismissal was pursuant to an application by the Government that Chin Peng discover his birth certificate and citizenship papers, failing which the proceeding be dismissed. The application followed an affidavit sworn by Chin Peng on 18 March 2005 in which he deposed that he had been born in Sitiawan, Malaya in October 1924 and that he was and remained a Malaysian citizen.

The application for discovery was supported by an affidavit sworn by a Government lawyer, Madam Azizah binti Haji Nawawi, on 9 May 2005 in which she deposed that she believed Chin Peng should have the documents with him. However, no basis for that belief has ever been given.

10. In response to the Government’s application Chin Peng swore further affidavits on 4 December 2006 and 14 March 2007 in which he deposed that he had not registered as a citizen of Malaysia for obvious reasons, that he once possessed a birth certificate and a British passport but that he last had them among belongings which he abandoned on the evening of 16 June 1948 when he narrowly escaped capture in a British police raid.

11. In these circumstances the High Court summarily dismissed Chin Peng’s proceeding. The reasoning of the High Court judge appeared to be as follows: though Chin Peng had the right to claim entry to Malaysia under the peace treaty on the basis of his Malaysian origin, nevertheless he had in fact claimed that right on the basis of his Malaysian citizenship; this made his birth certificate and citizenship certificate “very relevant” and indeed were the foundation of his application; since he had not discovered them, the proceeding should be dismissed.

12. From this decision Chin Peng appealed to the Court of Appeal. The appeal was heard on 21 April 2008 by Low Hop Bing JCA, Abdul Malik bin Ishak JCA and Sulaiman bin Daud JCA. Judgment dismissing the appeal was given on 20 June 2008.

The decision of the Court of Appeal

13. The judgment of the Court of Appeal was written by Abdul Malik bin Ishak JCA. The judgment largely upheld the reasoning and decision

of the judge below. The reasoning was as follows:• at [23] the learned judge said that a party was entitled to inspect documents referred to in the affidavit of another party;
• at [25] his Lordship said the birth certificate and citizenship certificate were referred to in Chin Peng's affidavit;
• at [27] he agreed with the primary judge that the onus was on Chin Peng to produce these documents and at [29] referred to the Government lawyer's affidavit that she believed Chin Peng had these documents;
• at [54] his Lordship agreed with the primary judge that Chin Peng had in his affidavit of 18 March 2005 made his Malaysian citizenship the basis of his application;
• however, he went to hold at [56] and [57] that, even if the basis of the application was Chin Peng's Malaysian origin, it was necessary for him to prove this with his birth certificate and citizenship certificate, and it could not be proved in any other way;
• thus, his Lordship was able conclude at [59] that the failure to discover these documents was "fatal" to Chin Peng's case and the High Court had therefore been correct to dismiss it summarily.
14. It is respectfully submitted that there are a number of flaws in this reasoning. The first is the failure of the Court to recognise the consequences of the difference between a proceeding commenced by writ – where discovery is automatic – and one commenced by

originating summons – where discovery depends on a court order. This difference is referred to in [23] of the judgment but its consequence does not appear to have been appreciated. There was in fact no order for discovery and so no obligation on Chin Peng to give discovery. Therefore, since the summary dismissal was based on a failure to give discovery, it must be considered to be irregular.
15. The Government's application for discovery appears to have been confused for a notice to produce: see at [23] and [25] where it is asserted that the Government was entitled to compel Chin Peng to produce documents referred to in his affidavit. But Chin Peng's affidavit of 18 March 2005 did not refer to his birth certificate or his citizenship certificate. It merely asserted that he had been

born in Malaya and was a Malaysian citizen. This could have founded an order for discovery of documents relevant to those issues. However, it could not found a summary dismissal of the proceeding for failure to produce specific documents not even mentioned in the affidavit.

16. Assuming, contrary to the forgoing, that Chin Peng was under an obligation to give discovery of documents relevant to his birth in

Sitiawan, Malaya and his Malaysian citizenship, his affidavits of 4 December 2006 and 14 March 2007 satisfied that obligation. In those affidavits he deposed that he had been in possession of his birth certificate and a British passport but had lost that possession in

the circumstances deposed to. He also deposed that he had never had a citizenship certificate. This was sufficient compliance with any discovery obligation.
17. It is wrong to think that a party can only satisfy an obligation to give discovery of (or answer a notice to produce) specific documents by producing for inspection those documents. The obligation can be equally satisfied by an affidavit deposing that the party does not have possession, custody or control of the documents. If the party once had possession but no longer does, he

must give an account of how that possession was lost. Chin Peng satisfied these obligations by his affidavits of 4 December 2006 and 14 March 2007.

18. There was, therefore, no justification for summarily dismissing the proceeding because Chin Peng did not produce the documents. Even if Chin Peng was obliged to produce the documents, his failure to do so would not have justified the summary dismissal of the proceeding. At [47] Abdul Malik bin Ishak JCA seemed to assume that, since the Government applied for summary dismissal if Chin Peng did not produce the documents, this result must automatically follow in that event. However, this was only one of a number of alternative consequences of a failure to give discovery.

19. This is made clear by O 24 r 16(1) which states that "the Court may make such order as it thinks just". Thus, the consequence of a failure to give discovery is a matter of judicial discretion, as many of the authorities cited by his Lordship at [33]-[42] show, including Odgers Principles of Pleading and Practice (22nd ed) at pp 238 and 239 (referred to at [41]). Despite referring to the terms of O 24 r 16(1) and the passage from Odgers, his Lordship did not appear to appreciate that a failure to give discovery required the court to exercise a discretion in determining the consequences of that failure. Perhaps this was because the discretionary factors are overwhelmingly against a summary dismissal.

20. First, there had been no persistent refusal to give discovery but rather a genuine attempt to give an account of what had happened to the documents. Chin Peng's account of what had happened to his birth certificate and why he did not have a citizenship certificate were not challenged except by the Government lawyer's unsubstantiated assertion that she believed he had them. Given the consequences which have flowed from his failure to produce these documents it can fairly by inferred that Chin Peng would have

produced them by now if he had them.

21. There had not been a self-executing (or "unless" order) which Chin Peng did not comply with. As Odgers says at p 238-9 it is highly unusual for a proceeding to be summarily dismissed because of failure to give discovery except by a self-executing order. Such an order will usually only be made after persistent refusals to comply with a discovery obligation.

22. Secondly, and most importantly, Chin Peng's failure to produce the documents causes no prejudice to the Government. On the contrary, since Chin Peng must prove his Malaysian origin, he is the party disadvantaged by his failure to produce the documents. The Government does not need the documents for any forensic purpose at trial. At trial, it can rely on Chin Peng's failure to produce the documents in support of a submission that he is not of Malaysian origin. Thus, the Government's forensic purposes at trial are served, and not prejudiced in any way, by Chin Peng's failure to produce the documents. The Court of Appeal seemed to understand this: see at [39]. However, it failed to consider it as a discretionary factor against summary dismissal.

23. Thirdly, in considering the summary dismissal of the proceeding, the Court of Appeal erred by imposing an onus on Chin Peng to prove on the balance of probabilities that he is a Malaysian citizen or of Malaysian origin. On an application for summary dismissal of a proceeding, the court should assume the truth of the facts alleged by the plaintiff.

24. Furthermore, there was no occasion on an interlocutory application for the court to race forward to an adjudication of the merits of the principal application and conclude that it must fail because Chin Peng's proofs might end up being deficient at trial. That is a matter for trial and it was wrong for the High Court and then the

Court of Appeal to decide the ultimate issue on the basis of evidence adduced for the interlocutory application.

25. In support of its conclusion that Chin Peng's failure to produce his birth certificate and citizenship certificate was fatal to his case, the Court of Appeal was forced to disagree with the conclusion of the primary judge that Malaysian origin could be proved without a birth certificate and a citizenship certificate: see [56]. It is self-evident that the primary judge was correct, and the Court of Appeal in error, about this. The error is exposed by the Administrative Arrangement, in particular cls 6.3.1 and 6.3.4, which expressly envisage that CPM members of Malaysian origin may not possess citizenship papers and make arrangements for them accordingly.

26. The approach of the Court of Appeal is an attempt to rewrite the terms of the peace treaty. The treaty provides that CPM members of Malaysian origin shall have the right to return to Malaysian. However, the Court of Appeal seeks to confine that right to those who can produce a Malaysian birth certificate and citizenship certificate. The Court of Appeal thus seeks to turn Chin Peng's application to uphold and enforce his right of return under the treaty into a trial of whether he can produce certain documents of citizenship. This is contrary to the express terms of the treaty and the Administrative Arrangement.

27. The birth certificate and citizenship certificate, whether they exist and where they might now be, are no more than relevant (and subsidiary) facts in Chin Peng's application to return pursuant to the peace treaty. To elevate these facts to the decisive issue in the proceeding, and summarily dismiss it by a premature decision that the facts cannot be proved, betrays at best a failure of legal reasoning and at worst a determination to find some pretext for disposing of an inconvenient legal action.

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