Ong Boon Hua @ Chin Peng & Anor v. Menteri Hal Ehwal Dalam Negri, Malaysia & Ors 2008 [CA]

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ONG BOON HUA @ CHIN PENG & ANOR V. MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS

COURT OF APPEAL, PUTRAJAYA

[CIVIL APPEAL NO: W-01-87-2007]

LOW HOP BING JCA; ABDUL MALIK ISHAK JCA; SULAIMAN DAUD JCA

15 MAY 2008
JUDGMENT
Abdul Malik Ishak JCA:
The Background Facts
1. Cessation of armed activities between the Government of Malaysia and the Communist Party of Malaya was a welcome news for all Malaysians. It became a reality on 2 December 1989. On that date, an agreement was entered between the Government of Malaysia (the fourth respondent/defendant) and the Communist Party of Malaya (the second appellant/applicant) to terminate armed hostilities between the parties (hereinafter referred to as the "agreement"). With the signing of the agreement, armed hostilities between the parties ended and peace prevailed. The terms of the agreement can be seen at p. 235 of the appeal record at Jilid 1 (hereinafter referred to as "ARJ1"). There were four articles to that agreement and the relevant ones read as follows:

Article 3 - Residence In Malaysia

3.1 Members of the Communist Party of Malaya and members of its disbanded armed units, who are of Malaysian origin and who wish to settle down in Malaysia, shall be allowed to do so in accordance with the laws of Malaysia.
3.2 Members of the Communist Party of Malaya and members of its disbanded armed units, who are not of Malaysian origin, may be allowed to settle down in MALAYSIA in accordance with the laws of MALAYSIA, if they so desire.

2. The agreement was executed on behalf of the Malaysian Government by its representatives, namely, the first respondent/defendant (Menteri Hal Ehwal Dalam Negeri, Malaysia), the second respondent/defendant (Ketua Polis Negara Malaysia), and the third respondent/defendant (Ketua Angkatan Tentera Malaysia). The first appellant/applicant by the name of Ong Boon Hua @ Chin Peng (popularly known as "Chin Peng" and will be referred to as such hereinafter), was the secretary-general of the Communist Party of Malaya (the second appellant/applicant), and together with two others, namely, Abdullah C.D. and Rashid Maidin signed the agreement on behalf of the Communist Party of Malaya (the second appellant/applicant).
3. Again, on 2 December 1989, the parties to the agreement also agreed to sign an administrative arrangement which set out in detail the substance of what had been agreed between the parties in the agreement. And the same representatives who signed the agreement also signed the administrative arrangement. There were several provisions in the administrative arrangement (see pp. 236 to 245 of "ARJ1") and the relevant provisions read as follows:

Item 5 - Residence In Malaysia

5.2 Members of the CPM and members of its disbanded armed units, who are not of Malaysian origin, may be allowed to take up residence in MALAYSIA, if they so desire, after having stayed in

the pre-designated places in THAILAND for a minimum period of six months.
5.5 Those who wish to settle down in MALAYSIA shall be categorised as follows:

5.5.1 Malaysian citizens,
5.5.2 Non-citizen spouses and children of Malaysian citizens, and
5.5.3 Aliens.

5.7 Non-citizen spouses and children of those who are of Malaysian origin may be allowed to settle down in MALAYSIA in accordance with the laws of MALAYSIA if they so desire.
6.3 Citizenship And NRICs

6.3.1 Those 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.
6.3.2 Non-citizen spouses and children of those of Malaysian origin who have settled down in MALAYSIA shall be issued with RED NRICs. They can apply for citizenship after two years of continuous stay in MALAYSIA in accordance with the laws of MALAYSIA.
6.3.3 Those who are aliens and those whose citizenship have been revoked shall be issued with RED NRICs should they be allowed to settle down in MALAYSIA. They can subsequently apply for citizenship in accordance with the laws of MALAYSIA.
6.3.4 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 can subsequently apply for citizenship in accordance with the laws of MALAYSIA.

6.4 Privileges And Obligations

6.4.1 Those who are Malaysian citizens and have settled down in MALAYSIA shall enjoy the same privileges as any other citizens under the Federal Constitution and the laws of MALAYSIA.
6.4.2 Those not of Malaysian origin and non-citizens who have settled down in MALAYSIA shall be governed by the Federal Constitution and the laws of MALAYSIA.

Item 7 - Participation In Political Activities

7.1 Members of the CPM and members of its disbanded armed units, who are Malaysian citizens are free to participate in political activities including the formation of a political party or parties within the confines of the Federal Constitution and the laws of MALAYSIA.

Observations
4. Apart from the procedural aspects of the respondents/defendants' application for discovery and inspection, counsel on both sides also submitted on the merits of the said application and, consequently, the High Court judge considered them in his judgment. That approach should not be criticised nor faulted. Merits of the respondents/defendants' application should be considered in an application of this nature. Indeed before us, counsel on both sides submitted at length on them. We are constrained to say that although the merits of the case can only be

considered at the trial proper, yet the peculiar nature of the respondents/defendants' application justify the parties to submit on them and for this court to consider them. The luxury of detachment from considering the respondents/defendants' application from the merits of the case can never be achieved. They must, invariably, be considered together in order to do justice to the parties.

The Appellants/Applicants' Applications

5. Based on both the agreement and the administrative arrangement, the appellants/applicants filed three applications.

6. Firstly, on 4 March 2005, the appellants/applicants filed an originating summons as seen at pp. 10 to 13 of "ARJ1" for the following reliefs:

(a) a declaration that Chin Peng and all those persons represented by him have the right to enter, domicile, reside and stay in Malaysia;
(b) an order that the respondents/defendants grant permission and allow the appellants/applicants to enter Malaysia;
(c) an order that the respondents/defendants issue documents allowing the appellants/applicants to enter Malaysia;
(d) an order that the respondents/defendants comply with the terms of the agreement and the administrative arrangement dated 2 December 1989;
(e) costs; and
(f) any other ancillary order.

7. An affidavit in support of the originating summons affirmed by Darshan Singh Khaira on 4 March 2005 as seen at pp. 15 to 28 of "ARJ1", deposed to, inter alia, the following averments:

2. Plaintif Pertama dilahirkan pada 20.10.1923 di Sitiawan, Dinding, Perak, Malaysia. Ibubapa, anak-anak dan keluarganya juga adalah warganegara Malaysia.
3. Pada bila-bila masa pun Plaintif Pertama tidak pernah dilucut kewarganegaraan Malaysia dan tidak dibuang negeri dari Malaysia.

8. The English language translations of Darshan Singh Khaira's affidavit in support are as follows:

2. The first plantiff (referring to Chin Peng) was born on 20.10.1923 in Sitiawan, Dinding, Perak, Malaysia. Both his parents, children and family members are Malaysian citizens.
3. The first plaintiff (referring to Chin Peng) has not, at any time, been deprived of his Malaysian citizenship and has not been banished from Malaysia.

9. Secondly, on 7 March 2005, the appellants/applicants filed a summons in chambers as reflected at pp. 33 to 35 of "ARJ1" for the following orders:

(a) that Chin Peng be temporarily allowed to enter Malaysia and attend the hearing of this application;
(b) that a passport or an interim travelling document be issued to Chin Peng;
(c) that the respondents/defendants to obey the order and give effect to it accordingly;
(d) costs in the cause; and
(e) any other consequential order.

10. Again, Darshan Singh Khaira affirmed an affidavit in support on 7 March 2005 in support of the summons in chambers and his affidavit in support can be seen at pp. 37 to 40 of "ARJ1". In his affidavit in support, Darshan Singh Khaira alluded to art. 5 of the Federal Constitution and he pointed out that Chin Peng has the inherent right to appoint counsel of his own choice to act for him. The inherent right also extended, according to the

deponent of the affidavit in support, to the right of Chin Peng to attend court for his case and for that purpose he has to enter Malaysia and give the necessary directions to counsel of his own choice as well as to affirm affidavits and to give evidence, if the need arises.

11. Thirdly, on 12 March 2005, the appellants/applicants also filed another summons in chambers where they sought three orders, firstly, directing the respondents/defendants to furnish the list of the names of the members of the Communist Party of Malaya (the second appellant/applicant) who were desirous of entering and living in Malaysia and which list was handed to the respondents/defendants earlier by the appellants/applicants; and, secondly, directing the respondents/defendants to furnish the list of the names of the members of the Communist Party of Malaya (the second appellant/applicant) who were allowed to enter and live in Malaysia; and, thirdly, directing the respondents/defendants to furnish the list of the names of the appellants/applicants who were allowed to visit Malaysia. The usual costs and the ancillary order were also prayed for.

12. This summons in chambers was supported by the affidavit in support of Darshan Singh Khaira that was affirmed on 12 March 2005 as reflected at pp. 45 to 48 of "ARJ1". In was a short affidavit and there he deposed briefly to the following facts. That immediately after the signing of the agreement, the appellants/applicants had given a list of the names of those who were qualified and entitled to enter and stay in Malaysia to the respondents/defendants and the said list was kept by the latter. That the respondents/defendants had allowed a large majority of the members of the Communist Party of Malaya (the second appellant/applicant) to enter and reside in Malaysia. That there were even members of the Communist Party of Malaya (the second appellant/applicant) who entered and visited Malaysia. That the respondents/defendants had issued the certificates of identity, travel documents and passports to members of the Communist Party of Malaya (the second appellant/applicant) to enter Malaysia. Again, it was averred that the said list showing the movements of the members of the Communist Party of Malaya, to and fro, from Thailand to Malaysia was kept by the respondents/defendants.

13. Chin Peng himself affirmed an affidavit on 18 March 2005 proclaiming himself as a Malaysian citizen and an author with an address at c/o Visarn Pichienphati 1209/159 Parkland Road, Bagna, Bangkok 10260 Thailand. In that affidavit too, Chin Peng described himself as the former secretary general of the Communist Party of Malaya (the second appellant/applicant). Chin Peng's affidavit was filed on 28 March 2005 by the law firm of Darshan & Co and it was drafted in two languages - at pp. 50 to 58 of "ARJ1" in the Malay language and at pp. 59 to 68 of "ARJ1" in the English language.

14. At para. 7 of his affidavit, Chin Peng deposed in the Malay language as follows (see p. 52 of "ARJ1"):

> 7. Selanjutnya, saya telahpun dilahirkan pada hujung Oktober 1924 di Sitiawan, Dinding, Perak, Malaya. Selama ini saya adalah seorang warganegara Malaysia dan kini masih adalah warganegara Malaysia. Saya tidak pernah melepaskan kewarganegaraan saya dan kewarganegaraan saya tidak pernah dibatalkan. Saya juga tidak pernah dibuang negeri.

15. In the English language, this was what Chin Peng deposed to at para. 7 of his affidavit as seen at p. 61 of "ARJ1":

> 7. Further, I was born in the later half of October, 1924 in Sitiawan, Dinding, Perak, Malaya. I have always been and remain a Malaysian citizen. I have never relinquished my citizenship nor has it been revoked. Neither have I been banished.

16. Supporting the return of Chin Peng back to Malaysia is 76 years old Salim bin Hashim, a retired police personnel residing at no: 283, Jalan Dato Kramat, Pulau Pinang. He affirmed an affidavit as reflected at pp. 68 to 72 of "ARJ1" on April fool's day - and that would be on 1 April 2005. In the original Malay language text, this was what he deposed to at para. 9 of his affidavit (see p. 70 of "ARJ1"):

Saya juga diberitahu bahawa Plaintiff Pertama (merujuk kepada Chin Peng) adalah merupakan warganegara Malaysia. Beliau telah berusia 80 tahun.

17. The English language translation of Salim bin Hashim's affidavit of para. 9 would read like this:

I am told that the first plaintiff (referring to Chin Peng) is a Malaysian citizen. He is 80 years of age.

The Respondents/Defendants' Summons In Chambers Application Under O. 24 Of The Rules Of The High Court 1980 ("RHC") For Discovery And Inspection Of The Documents Of Chin Peng

18. The originating summons dated 4 March 2005 together with the summons in chambers dated 7 March 2005 and another summons in chambers dated 12 March 2005 (cumulatively referred to hereinafter as "the appellants/applicants' three applications") that were filed by the appellants/applicants as alluded to above must have prompted the respondents/defendants to file their O. 24 summons in chambers application under the RHC for discovery and inspection of the documents of Chin Peng. It did not help Chin Peng when he deposed in his affidavit that he was born in the later half of October 1924 in Sitiawan, Dinding, Perak, Malaya and that he has always been and remains a Malaysian citizen and that he has not relinquish his Malaysian citizenship nor has he been banished from Malaysia. The respondents/defendants wanted to see all the supporting documents to support Chin Peng's assertions.

19. The respondents/defendants applied on 13 May 2005 by way of a summons in chambers as seen at pp. 82 to 87 of "ARJ1" grounded on O. 24 of the RHC for an order requiring Chin Peng to file in court, within 14 days of the order, the documents in question (the birth certificate and the citizenship certificate of Chin Peng and hereinafter it will be referred to as "Chin Peng's documents"), in order to prove that Chin Peng was born in Malaysia or was a Malaysian citizen and, if he failed to do so, the appellants/applicants' three applications to be dismissed with costs. It was supported by an affidavit in support of Madam Azizah binti Haji Nawawi, the senior federal counsel, affirmed on 9 May 2005 as seen at pp. 1 to 21 of the additional appeal record ("AAR").

20. On 31 July 2007, the High Court allowed the respondents/defendants' application for discovery in accordance to the terms applied for (see the sealed order at pp. 1 to 5 of the additional appeal record (2) ("AAR (2)"). This meant that the High Court also dismissed with costs the appellants/applicants' three applications. According to the High Court, the documents sought to be discovered must be relevant and related to the issue at hand. The High Court was also of the view that Chin Peng's assertions that he was entitled to return to Malaysia was not based on the agreement but rather on the strength of him being a Malaysian citizen. Being aggrieved, the appellants/applicants filed their appeal to this court against the whole decision of the High Court and also craved that the decision of the High Court be set aside with costs (see pp. 205 to 209 of "ARJ1").

21. The respondents/defendants were not on a fishing expedition to discover Chin Peng's documents because they have been very specific as to what they were requesting for disclosure. This was certainly unlike the case of Datuk Amar James Wong Kim Min & Anor v. Pendaftar Pertubuhan [2006] 8 CLJ 106; [2004] 6 MLJ 235 where the court refused discovery because the documents were already before the court and the applicants there were said to be on a fishing expedition.

22. In a writ action, each party must, within 14 days after the pleadings in the action are deemed to be closed as between him and any other party, make and serve on that other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action (O.24 r. 2 of the RHC). In a writ action, discovery is automatic. There is no necessity, at all, for a prior order of the court.

23. Here, before us, the proceedings were begun by originating summons and the discovery of Chin Peng's documents are not

automatic. If discovery is required it must be done by way of an order of the court. That must have been the reason that prompted the respondents/defendants to apply to the High Court seeking discovery of Chin Peng's documents which they asked for. A defendant is entitled to inspect documents referred to in the affidavit of the plaintiff (Ram Dyal Saligram v. Nurhurry Balkrishna [1894] ILR 18 Bom. 368; and Khetsidas and Lachminarayan v. Narotumdas Gordhandas and Another [1908] ILR Bombay Series Vol. XXXII p. 152). Documents referred to in the affidavit but not produced by the plaintiff, can be called for by the defendant by way of discovery and the defendant will have the right of inspection thereof (Phoolchand Garg v. Gopaldas Agarwal and Others [1990] AIR Madras 135, 140). The word "discovery" is often used to mean disclosure and inspection (Teoh Peng Phe v. Wan & Company [2001] 5 CLJ 222). Thus, discovery would involve: (i) disclosure of the existence of the documents asked for; (ii) inspection of the documents once the documents are shown; and (iii) interrogatories under O. 26 of the RHC which does not concern us here. Discovery is distinct from the process of obtaining further and better particulars of a pleading under O. 18 r. 12 of the RHC and it is also not concerned about the process of obtaining unsworn admissions of fact under O. 27 r. 2 of the RHC.

24.Order 24 r. 10(1) of the RHC states that any party to a cause or matter shall be entitled at any time to serve a notice in Form 43 on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof. And O. 24 r. 10(2) of the RHC states that the party on whom a notice is served under para. (1) must, within four days after service of the notice, serve on the party giving the notice a notice in Form 44 stating a time within seven days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

25. The scope of O. 24 r. 10(1) of the RHC is quite wide. The area of inspection is certainly wider. Documents referred to in the pleadings or affidavits (here the documents were referred to in the affidavits) are now available for inspection and copies are permitted to be made under O. 24 r. 10(1) of the RHC. According to the case of Gobinda Mohan Das and Ors. v. Kunja Behary Dass and Ors. [1909-1910] Calcutta Weekly Notes, vol. XIV p. 147, the right to inspection includes the right to take notes and obtain copies. And according to the case of Lewis v. The Earl Of Londesborough [1893] 2 QB 191, if necessary, the court can even order that photograph to be taken of the documents. Of significance would be this. That permission to take photocopy of documents cannot be refused merely on account that these documents have not become part of the record of the suit (Jagatbhai Punjabhai Palkhiwala and Others v. Vikrambhai Punjabhai Palkhiwala and Others [1985] AIR vol. 72, Gujarat 112).

26. The party to whom the notice is given must produce the documents unless he can show good cause as to why inspection ought not to be allowed. The onus is thus on him to justify his refusal. Here, notice was given to Chin Peng through Messrs Darshan Singh & Co as seen at pp. 74 to 76 of "ARJ1". This was followed, as alluded to earlier, by a summons in chambers filed by the respondents/defendants on 13 May 2005 based on O. 24 r. 16 of the RHC (see pp. 83 to 87 of "ARJ1") that within 14 days if Chin Peng failed to produce the required documents to prove that he was born in Malaysia or was a Malaysian citizen, the appellants/applicants three applications would be dismissed with costs.

Order 24 r. 16 of the RHC are worded in this way:

16 Failure to comply with requirement for discovery, etc (O. 24 r. 16)

(1) If any party who is required by any of the

foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed, or as the case may be, an order that the defence be struck out and judgment be entered accordingly.
(2) If any party against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.
(3) Service on a party's solicitor of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the party disobeying the order, but the party may show in answer to the application that he had no notice or knowledge of the order.
(4) A solicitor on whom such an order made against his client is served and who fails without reasonable excuse to give notice thereof to his client shall be liable to committal.

27.Rule 16(1) of O. 24 of the RHC should apply to the appellants/applicants. The effect of non-compliance is quite severe. It provides that "the court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly". It is the court that will make the order dismissing the appellants/applicants three applications with costs even though such a prayer appears in the summons in chambers of the respondents/defendants dated 13 May 2005. And such an order was made by the High Court on 31 July 2007 as seen at pp. 1 to 5 of "AAR(2)". We do not see anything wrong with the order of the High Court. The onus was on Chin Peng to produce his birth certificate and his citizenship certificate. It was Chin Peng who deposed in his own affidavit, as alluded to earlier, that he was born in the later half of October 1924 in Sitiawan, Dinding, Perak, Malaya and that he remains a Malaysian citizen. Chin Peng also averred that he did not relinquish his citizenship and neither was he banished from Malaysia.

28. Chin Peng emphasised his Malaysian citizenship in his affidavit. Even Darshan Singh Khaira in his affidavit that was affirmed on 4 March 2005 alluded to Chin Peng's Malaysian citizenship and the averment that Chin Peng was born on 20 October 1923 in Sitiawan, Dinding, Perak, Malaysia.

29. It must be recalled that the senior federal counsel in the person of Madam Azizah binti Haji Nawawi has affirmed an affidavit in support on 9 May 2005 as seen at pp. 1 to 21 of "AAR". There she averred that the respondents/defendants were not in possession of Chin Peng's documents and she believed that Chin Peng should have those documents with him and he should, therefore, forward it to the respondents/defendants. She also averred that the Registration Department has no record of the birth certificate of Chin Peng and neither was there a certificate of citizenship of Chin Peng registered with or in the possession of the respondents/defendants. According to her, Chin Peng's documents were important and relevant to the issue pertaining to the citizenship of Chin Peng since the latter had affirmed an affidavit to say that he is a Malaysian citizen.

30. Haji Ab. Rahim bin Ismail from the Immigration Department affirmed an affidavit in reply on 14 May 2005 as seen at pp. 77 to 81 of "ARJ1" and there he asserted that Chin Peng was not entitled to be issued with a Malaysian passport unless he is a Malaysian citizen.

31. I must now refer to two more affidavits. One was affirmed by Darshan Singh Khaira on 22 July 2005 as seen at pp. 121 to 125 of "ARJ1". The other was affirmed by Chin Peng on 4 December 2006 as reflected at pp. 160 to 167 of "ARJ1". The contents of both these affidavits are similar and they may be summarised as follows:

(a) that all the documents and certificates were issued

by the respondents/defendants and they should be in the possession of the respondents/defendants;
(b) that Chin Peng was born in Sitiawan, Dinding, Perak and the same was also true for his brothers and sisters;
(c) that Chin Peng's children were also born in Sitiawan, Dinding, Perak and the whole family also resided in Perak;
(d) that in 1947, the Jabatan Pendaftaran, Sitiawan, Perak issued a birth certificate to Chin Peng and the latter was also issued with a British nationality passport to enable him to travel to Hong Kong and Bangkok but, unfortunately, both the documents were seized by the police;
(e) that Chin Peng was issued with a travel document entitled "Travel Document For Alien" by both Thailand and China and there Chin Peng's nationality was stated to be "Malaysia";
(f) that Chin Peng has ten siblings and his parents are said to be Malaysian citizens; and
(g) that Chin Peng's wife and two children are said to be Malaysian citizens.

32. The director of the Registration Department by the name of Hj Zainuddin bin Ramli affirmed an affidavit in reply on 20 September 2006 as seen at pp. 135 to 143 of "ARJ1" and there he deposed to the following set of facts:

(a) That the National Registration Department ("NRD") is tasked with the duty of registering the birth of an individual in Malaysia by the issuance of a birth certificate and it is also under a duty to record, register and keep copies of applications for citizenships and National Registration of Identity Cards ("NRICs").
(b) That the NRD would only keep the records of those documents that were registered with them. Thus, if the fact of a birth of a child is not registered with the NRD or there is no application for citizenship or for an NRIC, then the NRD would not know of that fact nor would it keep the records of the relevant documents.
(c) That the NRD has no record of the birth of Chin Peng at Sitiawan, Dinding, Perak. There is no registration of the birth of Chin Peng with the NRD and, consequently, the NRD has not issued a birth certificate to Chin Peng.
(d) That both the parents of Chin Peng, namely, Ong Sing Pio and Kuan Kheng Dee became Malaysian citizens after their applications for Malaysian citizenships were approved by the Government.

33. The principles governing discovery were set out by the English Court of Appeal way back in 1882 in the case of The Compagnie Financiere Et Commerciale Du Pacifique v. The Peruvian Guano Company [1882] 11 QBD 55. That case concerned the filing by the plaintiffs there of a further affidavit of documents pursuant to the English Rules of the Supreme Court 1875, Order XXXI, r. 12 thereof. Brett LJ writing a separate judgment for the Court of Appeal aptly laid down the principles of law in these fine language (see pp. 62 to 63 of the report):

The doctrine seems to me to go farther than that and to go as far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly,' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences: ...

34. I must categorically say that the documents that relate to the matters in question are Chin Peng's documents that are likely to

throw light on the case at hand (Merchants' & Manufacturers' Insurance Co Ltd v. Davies [1938] 1 KB 196, at p. 210).

35. Edgar Joseph Jr. SCJ sitting at the High Court of Penang in the case of Yekambaran s/o Marimuthu v. Malayawata Steel Berhad [1994] 2 CLJ 581 quoted verbatim the above mentioned passage of Brett LJ and, in his usual candour, continued to say at p. 585 of the report:

> The essential elements for an order for discovery are threefold; namely, first there must be a 'document', secondly, the document must be 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought.

36. Further down the same page, his Lordship Edgar Joseph Jr. SCJ had this to say:

> As to 'relevance', our Rules of the High Court limit discovery to documents which are 'relevant to' or 'relate' to the factual issues in dispute. More particularly, the discovery obligation applies to documents 'relating to matters in question in the action' [Rules of the High Court, O. 24 r. 1(1)] or 'relating to any matter in question in the cause or matter' [O. 24 r. 3(1)]. In practice, relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said to be in issue. (See Phillips v. Phillips [1879] 40 LT 815, 821). In this context, relevance is defined broadly. It does not extend to documents relevant merely to a party's credibility unless that itself is a fact in issue. (See George Ballantine & Sons Ltd. v. Dixon & Son Ltd. [1974] 1 WLR 1125). If, however, the document's relevance is to a fact in issue, not simply to credibility, it has long been settled that relevance of an indirect kind suffices.

37. Continuing further on the same page, this was what his Lordship Edgar Joseph Jr. SCJ said:

> The observation of Edward Bray in his highly regarded work on discovery at p. 18 as to the test of 'materiality' merits quotation; there he says this:
>
> > ... for the purpose of testing the materiality of the discovery to a particular issue ... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.
>
> I note that proposition received judicial approval in Format Communications Mfg. Ltd. v. ITT (UK) Ltd. [1983] FSR 473 CA.

38. Under O. 24 r. 10 of the RHC, the court has the jurisdiction to order discovery of a document referred to in an affidavit, whether or not the document is in the possession, custody or power of the party in whose affidavit the reference to that document is made (Rafidain Bank v. Agom Universal Sugar Trading Co. Ltd. And Another [1987] 1 WLR 1606, [1987] 3 All ER 859, CA). The discretion is vested in the court whether or not to make an order for discovery. An order will not be made if good cause to the contrary is shown. The absence of possession custody or power may amount to a good cause, but it is not always so. At the end of the day, the decision to order discovery is dependent on the facts of each particular case (Quilter v. Heatly [1883] 23 Ch. D 42, at pp. 48 to 51, CA). Privilege may be a good cause not to allow discovery. Thus, the party against whom the order is sought will be excused if, and only if, he is privileged from producing the document asked for (Roberts v. Oppenheim [1884] 26 Ch D 724; and Milbank v. Milbank [1900] 1 Ch 376). And "privilege" has not been raised by Chin Peng. At any rate, Chin Peng's documents

can never be classified as privileged so as to prevent him from producing them.
39. Here, there was an averment that Chin Peng's
birth certificate that was issued by the Registration Department of Sitiawan, Perak in 1947 was seized by the police and so Chin Peng says that he could not produce his birth certificate. There is a rebuttal evidence from the director of the Registration Department who categorically stated that there was no record of the birth of Chin Peng at Sitiawan, Dinding, Perak. Now, since Chin Peng says that he was born in Sitiawan, Dinding, Perak, Malaya, the onus was on him to show that that was so. He must produce his birth certificate. Chin Peng too must produce his citizenship certificate because the NRD has no record of it. The production of Chin Peng's documents would certainly throw light to the case at hand. It would support Chin Peng's claim that he is a Malaysian. It would prove his citizenship.
40. Even if Chin Peng were to raise "privilege" as
the reason in not producing those documents (which he did not), in the face of the evidence from the director of the Registration Department "privilege" cannot amount to a good cause. As I said the decision to order discovery would be dependent on the facts of each case.
41. There is a passage of critical importance
appearing in Odgers' Principles Of Pleading And Practice, 22nd edn by D.B. Casson and I.H. Dennis which merits reproduction. There at pp. 238 to 239, the learned authors wrote:

> Default in Making Discovery
> If any party fails to discover or produce or allow inspection of documents as provided by any of the foregoing rules, or as ordered, the court has power under rule 16(1) to make any order it thinks just. This includes, in particular, the power to order that an action be dismissed, or that a defence be struck out with judgment to be entered accordingly (Salomon v. Hole [1905] 53 WR 588; and Husband's of Marchwood Ltd. v. Drummond Walker Developments Ltd. [1975] 1 WLR 603). Normally, however, the court is reluctant to exercise such power and will only do so when a party has at least once disobeyed a peremptory order insisting, for example, that he make discovery within a time specified in the order. A party who fails to comply with an order for discovery or production is also liable to committal [rule 16(2)]. These are highly penal provisions and will only be enforced in the last resort, where it seems clear that the party in default really intends not to comply with an order of the court.

42. In
Mahfar Alwee v. Jejaka Megah Sdn Bhd & Anor [2007] 7 CLJ 116, Low Hop Bing J (now JCA) refused to accede to the plaintiff's application to produce certain documents because his Lordship was unable to find any relevance of those documents especially when the plaintiff's cause of action was not founded on contract but rather on fiduciary duties and implied trust. In the course of writing the judgment, his Lordship sets out the law in regard to discovery and inspection of documents and his Lordship vigorously applied the principles of law enunciated by Edgar Joseph Jr. SCJ in Yekambaran s/o Marimuthu v. Malayawata Steel Berhad (supra) as reproduced earlier.
43. Before us, Raja Aziz Addruse, the learned counsel
for the appellants/applicants, submitted along the following lines. That Chin Peng is of Malaysian origin and he is entitled to come back to Malaysia. That Chin Peng's documents are irrelevant to the issue of Malaysian origin. It would not be prejudicial to anyone if Chin Peng cannot produce those documents. That Chin Peng's birth certificate was lost when he tried to escape from capture.
44. After referring to the affidavit in reply of the
director of the Registration Department, Raja Aziz Addruse submitted that at the trial, the court would be in a position to decide whether Chin Peng is of Malaysian origin notwithstanding the fact that he may not be born in Malaysia. There were affidavits, according to the learned counsel, that showed that Chin Peng grew up in Malaysia and that he will be caught under the category of being a person of Malaysian origin. The learned counsel further submitted that Chin Peng's right to return and live in Malaysia is based on the agreement. He stressed that Chin Peng had satisfied the terms of the agreement to enable him

to live in Malaysia. He argued that the agreement has to be read contemporaneously with the administrative arrangement and I agree with him (Mars Equity Sdn Bhd v. Tis 'Ata'ashar Sdn Bhd [2005] 1 CLJ 513). He then referred to Item 6 of the administrative arrangement, in particular, para. 6.3.4 as seen at p. 243 of "ARJ1" which has been reproduced earlier.

45. And notwithstanding that the discretion was for the Government of Malaysia - the fourth respondent/defendant, to decide "whether they should be allowed to settle down in Malaysia" by virtue of para. 6.3.4 of the administrative arrangement, Raja Aziz Addruse submitted further and he addressed this court in this fashion, and I quote:

When he (referring to Chin Peng) went to the jungle he is allowed to come back if he can show that he has a Malaysian origin. If he is allowed to come back and he does not have NRIC or citizenship then under paragraph 6.3.4 of page 243 of "ARJ-1" (referring to the administrative arrangement) he would be entitled to get his citizenship.

46. According to Raja Aziz Addruse, under the agreement the people of Malaysian origins are allowed to settle in Malaysia and there was no necessity to prove it with a birth certificate or citizenship papers.

47. In regard to the respondents/defendants summons in chambers application for discovery and inspection of Chin Peng's documents, it was submitted that there was no requirement that if those documents were not produced for inspection then the appellants/applicants' three applications would be dismissed. With respect, that cannot be right. In actual fact, there was prayer 3 to the summons in chambers of the respondents/defendants (see p. 85 of "ARJ1") which categorically stated that if Chin Peng's documents were not produced for inspection then the appellants/applicants' three applications would be dismissed with costs. And the High Court had made the order accordingly. That order by the High Court was certainly good in law.

48. Madam Azizah binti Haji Nawawi argued that the Government of Malaysia was not in possession of Chin Peng's documents and she believed that Chin Peng - the former communist leader, possessed them. She rightly submitted that Chin Peng's documents were relevant as it would prove his citizenship. She was also right when she argued that the onus was on Chin Peng to produce those documents because he had attested that he had never given up his citizenship and neither was it revoked.

49. The expression "burden of proof" is self-explanatory. It simply means the obligation to prove. In this judgment, I am only concerned with one principal kind of burden. It is the legal burden. A legal burden is defined as the obligation imposed on a party by a rule of law to prove a fact in issue. And the standard of proof required to discharge the legal burden depends upon whether the proceedings are civil or criminal. In the former, the standard required is proof "on the balance of probabilities". In the latter, the standard required of the prosecution is proof "beyond reasonable doubt". In a negligence action, for example, where the defendant alleges contributory negligence: the plaintiff bears the legal burden on the issue of negligence while the defendant has to prove contributory negligence. By way of an analogy, reference should be made to the case of Scott and Another v. Martin and Others [1987] 2 All ER 813, CA at p. 817, where Nourse LJ, in construing a conveyance, said that the party who relies on surrounding circumstances as an aid to construction has the onus to prove them. Likewise here, the onus falls on Chin Peng to prove that he is a Malaysian citizen as claimed by him. If you say that you are a Malaysian citizen, where's the proof to support your claim?

50. The legal burden is often determined by the rules of substantive law set out in the predecents and statutes. As far as the statute is concerned, I must call in aid s. 106 of the Evidence Act 1950 (Act 56). That section enacts as follows:

Burden of proving fact especially within knowledge

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

ILLUSTRATIONS

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

51. Concisely put, it amounts to this. If a person asserts affirmatively that a certain state of facts is present or absent, that would be an averment that he is bound to prove. Section 106 of the Evidence Act 1950 (Act 56) is an exception to s. 101 of the same Act. Buttrose J in Ho Tong Cheong & Ors. v. Oversea-Chinese Banking Corpn. Ltd. [1967] 1 LNS 55; [1967] 2 MLJ 70, FC, aptly said at p. 71 of the report, in the context of when any fact is "especially" within the knowledge of any person, to this effect:

The fact as to whether the defendants knowingly committed the breaches complained of was surely something especially within their own knowledge.

52. The determination of where the legal burden falls is a matter of plain common sense. The latin phrase that says Ei incumbit probatio qui dicit, non qui negat is quite apt. Loosely translated it means this. That he who asserts must prove. The law books are replete with authorities on this latin maxim and its meaning. The Indian court in Pachkodi Gulab Badhai v. Krishnaji and Others [1947] AIR Vol. 34 Nagpur 145 held that where a document containing material alterations was produced from the custody of the person who had possession of it, that person has to explain where and how the alterations were made. The Court of Appeal in Public Prosecutor v. Yap Chai Kee [1922-1924] Volumes 3-4 F.M.S. Law Reports 75 held that since the accused was in possession of two forged rubber coupons it raised a presumption that he knew that they were forged. Likewise here, it was especially within the knowledge of Chin Peng who knew of the existence of his birth certificate and citizenship certificate and, consequently, the burden of proving that he had them is on him.
53. The relevancy of being a Malaysian citizen as opposed to being a person of Malaysian origin was highlighted in the appellants/applicants summons in chambers dated 7 March 2005 as alluded to in the early part of this judgment. In that summons in chambers, Chin Peng sought to have access to a Malaysian passport and he was asking the Malaysian Government to grant him a passport to enable him to attend court. Chin Peng's affidavit affirmed on 18 March 2005 alluded to, at para. 7 of p. 61 of "ARJ1", the issue of Malaysian citizenship. Nothing was mentioned about Malaysian origin in that paragraph. In drafting an affidavit, certain drafting principles must be adhered to. The most basic principle is succinctness. An affidavit must be as short as possible without sacrificing the content and effect of the evidence. There must be precision in language and the draftsman has admirably done that in para. 7 of p. 61 of "ARJ1". So, effect must be given to such an averment.
54. When Chin Peng asked the Malaysian Government to give him a passport to enable him to attend court, it brought into sharp focus the question of citizenship. Item 5.5 of the administrative arrangement at p. 241 of "ARJ1", item 5.7 of the administrative arrangement also at p. 241 of "ARJ1", items 6.3.1 and 6.3.2 of the administrative arrangement at pp. 242 to 243 of "ARJ1", and items 6.3.3, 6.4.1 and 6.4.2 of the administrative arrangement at p. 243 of "ARJ1" are relevant. They all made references to "citizens" and "non-citizens" and they have been reproduced earlier. That being the case, the citizenship issue becomes a very important issue. It is propelled to the forefront. In sharp contrast, the phrase "Malaysian origin" was only emphasised after the respondents/defendants filed their originating summons on 13 May 2005 as seen at pp. 83 to 87 of "ARJ1" that was hinged on O. 24 of the RHC. In fact, Chin Peng affirmed an affidavit on 14 March 2007 as seen at pp. 189 to 194A of "ARJ1" and there he raised the issue of Malaysian origin for the very first time. As I said, an affidavit must be drafted with precision and clarity. The appropriate words must be employed. Thus, when Chin Peng affirmed an affidavit on 18 March 2005 in both the Malay and the English

languages as alluded to in the early part of this judgment, he must have employed the appropriate words. Consequently it must be noted that in that affidavit that was affirmed on 18 March 2005, Chin Peng made reference to being a Malaysian citizen and not as a person of Malaysian origin.

55. Chin Peng also reiterated in his affidavit that was affirmed on 14 March 2007 that he was born in Sitiawan, Perak at his parents shophouse in October 1924. He too averred that his birth was duly registered and that he once possessed a formal copy of his birth certificate. And according to him, he had placed a copy of his birth certificate in the pocket of the suit which he abandoned at the Tong Ching bungalow, outside Kampar, on the evening of 16 June 1948, when he narrowly escaped capture by a Britishled police raid on that residence. According to him, the police had seized his abandoned belongings including his birth certificate. He averred that the full details of the raid can be found in Chapter 14 of his published memoirs entitled "Alias Chin Peng - My Side of History". With respect, what is written in Chin Peng's memoirs cannot be accepted as the gospel truth. Anything can be written in the memoirs. The bottom line is this: where are your documents? The onus is on Chin Peng to produce them.

56. Be that as it may, in my judgment, Chin Peng's documents are still required in order to ascertain the issues of "Malaysian citizen" or "Malaysian origin". It is imperative, in view of the affidavits of the officers from the Immigration and Registration Departments, that Chin Peng should produce his documents for inspection. In this context, the High Court judge was wrong when he acknowledged that one can prove one's Malaysian origin by other means.

57. You may be a Malaysian by origin by virtue of being born in Malaysia but you have since acquired, say, Australian citizenship. To prove your Malaysian origin, you need to produce your birth certificate and citizenship certificate. This is also true for Chin Peng. On both counts - be it as a Malaysian citizen or as a person of Malaysian origin, Chin Peng has to produce his birth certificate and citizenship certificate for inspection. There are no two ways about it. These two documents are certainly important to ascertain the status of Chin Peng.

58. The High Court decided on the basis of the respondents/defendants' application under O. 24 of the RHC. The appeal before us, pure and simple, revolved on O. 24 of the RHC and nothing else. We cannot go further than that.

59. The failure on the part of Chin Peng to produce those documents sought for by the respondents/defendants for inspection was fatal. Discovery was not given by the stated time and at the end of that time since the discovery has not been given, the High Court was right in allowing the respondents/defendants' application under O. 24 of the RHC with costs in the cause and, finally, dismissing the appellants/applicants' three applications forthwith with costs (see p. 4 of "AAR(2)").

60. It is always prudent to remember that O. 24 r. 16(1) of the RHC gives power to the court to order, for instance, that the defence be struck out and that judgment be entered accordingly unless the party complies with the rule or order for discovery by the stated hour of the stated day (see the Supreme Court Practice (1985 edn) at p. 417, at 24/16/1). Here, the High Court was right in dismissing the appellants/applicants' three applications for their failure to produce for inspection Chin Peng's documents.

61. For all these reasons, we unanimously affirmed the decision of the High Court. All the orders of the High Court as seen in the sealed order at pp. 1 to 5 of "AAR(2)" are hereby affirmed. The appellants/applicants' appeal are accordingly dismissed with costs.

62. My learned brothers, Low Hop Bing, JCA and Sulaiman bin Daud, JCA have read this judgment in draft and have expressed their agreement with it.

For the appellants/applicants - YM Raja Aziz Addruse (Darshan Singh Khaira, Chan Kok Keong & Kong Check Keng with him); M/s Darshan Singh & Co

For the respondents/defendants - Azizah Hj Nawawi SFC