

## 2g3: Undocumented Persons

### Preamble

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Citizenship is a fundamental human right guaranteed by Article 15 of the Universal Declaration of Human Rights. A life without citizenship is a futureless life. Children and adults who are stateless do not have equal access to basic human rights and opportunities accorded to citizens, including the right to education, healthcare and employment. In Malaysia, the stateless community is also excluded from social protection and access to public services and facilities. These exclusions increase their vulnerability to a number of social problems and health-related issues, particularly in the current COVID-19 era.

To make matters worse, Malaysian laws do not recognise stateless people as a specific category of residents. Malaysia also has not acceded to international accords pertaining to stateless persons—i.e. the 1961 Convention on the Reduction of Statelessness and the 1954 Convention Relating to Status of Stateless Person. We are also not a signatory to the 1951 Convention Relating to the Status of Refugees, which safeguards other vulnerable populations such as refugees and asylum seekers from statelessness.

While commendable, the commitment made by Prime Minister Dato' Sri Ismail Sabri Yaakob to protect all children regardless of their race, religion, citizenship or other status, in his World Children's Day speech on 18 November 2021 is not reflected in the existing law, policies, procedures and practices which continue to deter individuals born in Malaysia, as well as those with valid linkages to the country, from accessing Malaysian citizenship.

### I: Gender-discriminatory Nationality Law & Policies

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Whilst the Federal Constitution promotes equality and prohibits gender discrimination through Articles 8(1) and 8(2), these provisions are undermined by the prevalence of gender discrimination in other areas of the Constitution, specifically those dealing with citizenship.

For example, the Federal Constitution does not allow men to transfer nationality to their children if the child is born out of a legally recognised marriage (Section

17, Second Schedule, Part II); instead, the law only provides that stateless children born to unmarried couples would take on the mother's nationality. In other words, children born to parents who are not bound by common law marriage in Malaysia can only acquire Malaysian citizenship if the mother is a Malaysian citizen.

Historically, the Federal Constitution had been interpreted as not allowing legally married mothers to transfer nationality to their overseas-born children on the same basis as legally married fathers. Although in April 2010, the Home Minister announced a new regulation enabling Malaysian women married to foreigners to register their children born outside the country as a citizen under Article 15 (2), the purported change in policy neither guaranteed citizenship to overseas-born children of Malaysian mothers nor streamlined their citizenship application process. Hence, children in such situations continued to be stateless or placed at risk of statelessness if they were unable to acquire their father's nationality.

And although the High Court, in a landmark judgement on 9 September 2021 reinterpreted the Federal Constitution to grant Malaysian women equal rights to confer automatic citizenship on their overseas-born children in the case filed by Family Frontiers and six Malaysian mothers, the Government is appealing against this decision, indicating its dead-set position on this.

Of equal concern is the denial of citizenship to spouses of Malaysian citizens who have lived in Malaysia for many years. This particularly affects spouses of Malaysian women who do not have the option of "citizenship by registration"—an option stated in the Federal Constitution for spouses of Malaysian men. This is despite the fact that Article 9 of CEDAW, to which Malaysia is a party, explicitly obliges state parties to guarantee equal nationality rights, including the right for both men and women to confer their nationality on their spouses. Malaysia, though, places reservation on Article 9(2) relating to this.

### **1. Accept and implement the High Court judgement in *Suriani Kempe & Ors v Malaysian Govt & Ors*.**

Withdraw the appeal against the 9 September 2021 decision in the case of *Suriani Kempe & Ors v Malaysian Govt & Ors* that interpreted the word "father" in Article 14(1)(b) read with Section 1(b), Part II of the Second Schedule of the Federal Constitution to include "mothers" and as such granted Malaysian women equal rights to confer automatic citizenship on their overseas-born children.

## **2. Amend the gender-discriminatory nationality law to ensure all children born in Malaysia or to Malaysian parents are able to obtain Malaysian citizenship.**

(Firdaus Husni, MCCHR, Proposal 2G3-1)

- i. Article 14 of the Federal Constitution must be amended to include citizenship for: children born overseas to Malaysian mothers; and children who are born in Malaysia but cannot prove the fact or that they are born to Malaysian parents.
- ii. Section 17, Part II of the Second Schedule must be amended to allow Malaysian mothers to confer citizenship to children born outside of Malaysia.
- iii. Laws must be amended to remove the discrimination against illegitimate children or adopted children.

## **3. Amend the relevant provisions in the Federal Constitution to enable Malaysian citizens to confer nationality on foreign spouses on an equal basis, irrespective of the citizen spouse's gender.**

(Maalini Ramalo, Right2Citizenship Cluster, CSO Platform for Reform, Proposal 2G3-2)

## **II. Childhood Statelessness**

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When a child does not have any form of legal identification, she or he is often subjected to exclusion from cradle to grave—from being denied access to education, healthcare, employment and freedom of movement, to other basic rights and opportunities allowing for growth and progress as an individual. Whilst the extent of childhood statelessness in Malaysia remains unmapped and is therefore unclear, the affected children include the following:

- i. children of migrant workers, asylum seekers and refugees, whose births are often not registered because their parents are undocumented;
- ii. children born to parents with mixed nationality who are not married, and where the mother is not a Malaysian citizen;
- iii. adopted stateless children;
- iv. children born in welfare homes, foundlings and street children who often lack documentation due to discriminatory policies and poverty;

- v. indigenous children who, despite being born in Malaysia, face barriers in acquiring legal documentation due to factors such as family migratory lifestyle, poverty, lack of awareness of the importance of obtaining documentation and isolation from government authorities; and
- vi. foundlings who are no longer considered “newborn”.

#### **4. Ensure bureaucratic compliance with constitutional safeguards against childhood statelessness.**

- i. Ensure the comprehensive application of existing safeguards provided by the Federal Constitution to grant nationality to every child born in Malaysia who will otherwise be stateless, regardless of the gender, ethnicity, documentation or immigration status of the child’s parents.
- ii. Grant nationality to all children who are stateless or at risk of statelessness, including foundlings and adopted children.

(Maalini Ramalo, Right2Citizenship Cluster, CSO Platform for Reform, Proposal 2G3-2)

#### **5. Remove the reservation on Article 7 of the UNCRC.**

Article 7 of the UNCRC affirms every child’s right to a nationality. Malaysia’s reservation on this article, despite being a party to the convention, further denies stateless children born in Malaysia an avenue to uphold their right to a nationality.

(Maalini Ramalo, Right2Citizenship Cluster, CSO for Platform Reform, Proposal 2G3-2)

#### **6. Facilitate the integration and admission of stateless, undocumented and displaced children into the national education system.**

- i. Have clear directives and implementation measures to support the integration and admission of stateless, refugee, undocumented and displaced children into the national education system.
- ii. Recognise alternative schools and learning centres operated by NGOs and community-based organisations that cater for stateless and displaced children.
- iii. Allow stateless and displaced children to sit for public examinations and obtain certification.
- iv. Allow stateless and displaced children to compete for enrolment in public universities with the same fees as locals.

### III. Right to Nationality for Every Person

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The right to citizenship remains inaccessible for some communities in Malaysia, resulting in grave human rights challenges to these communities. Of particular concern is the Bajau Laut (Sama Dilaut) who reside predominantly around the coast of Sabah, many of whom do not have identity documents and whose births are often not registered. Though there are no estimates available as to the overall number of Bajau Laut affected by statelessness, the number of children affected is thought to be high due to their high birth rates, migratory lifestyle and lack of documentation. A similar predicament is faced by the Orang Asli community.

The absence of legal identification documents, which prevents these communities from accessing basic public services and other services to sustain their life, increases their vulnerability, which is further worsened by prohibitive citizenship application procedure and current practices being upheld by the Home Ministry and National Registration Department. The lag in implementation of the newly enforced standard operating procedure results in a backlog of applications, and it is typically the case that no valid reasons are provided for rejections of applications.

#### **7. Create a statelessness identification system.**

Issue every stateless person a personal identification card that carries a photo, renewable every three years and approved as a legal form of identity by banking institutions and other public domains that require a picture identification.

(Rosita MH Khan, Kelab Amal Prihatin Wanita Tapah, Proposal 2G3-4)

#### **8. Streamline citizenship application.**

Ensure applicants have easy access to the correct citizenship application forms and timely decision making on citizenship matters for them. In accordance with natural justice, unsuccessful applicants should also be provided a full explanation for the negative outcomes of their application.

(Maalini Ramalo, Right2Citizenship Cluster, CSO for Platform Reform, Proposal 2G3-2)

## Concluding Remarks

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The COVID-19 pandemic has left the stateless community in Malaysia in a most vulnerable state. Now, more than ever, collective and committed efforts are required from all stakeholders, especially the government, in addressing the denial of nationality to stateless individuals born in Malaysia who have a valid link to the country. It is not enough for the government to voice commitment in words; more importantly, this commitment needs to be translated into concrete actions to ensure the issue is effectively addressed, and to avoid its escalation into more severe societal and national concern.