

Family Reunification and Immigration Law in Malaysia

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I. Introduction

Transnational migration has raised questions on family separation. For example, to what extent and under what conditions should legally residing migrants be granted rights to family life? How do state immigration policies regarding various categories of migrants facilitate family reunification for desirable migrants and result in family separation for undesirable migrants? How are binational families in Malaysia campaigning for changes in immigration policies and gender-based citizenship laws through the Family Frontier advocacy group? What policy changes and judicial reforms has the Malaysian government made since the 2000s? This chapter explores how Malaysia's legal system has governed family reunification for the country's legal foreign population. Part II discusses how the Association of Southeast Asian Nations (ASEAN) addresses mobility for migrant parents and children in the context of migration. Part III looks specifically at how Malaysian immigration policies selectively grant legally residing migrants rights to family unification. It examines how various categories of desired and undesired migrants are granted rights to stay, to bring their family members and to work according to their level of desirability in support of the state's economic interests. Policy debates on family separation and newly introduced legal reforms are also examined. Finally, Part IV summarises changes in policies on the right to family reunification. The chapter draws upon constitutional texts, judicial opinions, legislative acts, media statements of relevant ministries, reports of nongovernmental organisations (NGOs) and secondary literature.

The findings suggest that the hierarchical right to family reunification is the result of the politics of desirability. The right is granted to different categories of legal residents based

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on their level of desirability. Desired migrants—highly skilled migrants, expatriates and international students—are allowed to bring in family members, but undesirable migrants—low-skilled labour migrants—are not allowed to be accompanied by family members. The in-between groups—marriage migrants—face legal challenges in having a sustainable family life prior to securing permanent residence. Refugees and asylum seekers are at the bottom of the hierarchy of desirability, though their presence with their family members is tolerated. They are confronted with many uncertainties during their temporary stay in the country, without any recognition of their legal status and without the right to employment (except the holders of an IMM13 Immigration Pass). In the Malaysian context, the right to family reunification does not connote a pathway to permanent residence or citizenship.

II. Mobility and Family Reunification in the ASEAN

For low-skilled labour migration in Southeast Asia, there is no provision for migrant parents to bring their family members. The absence of family reunification in destination countries, coupled with limitations in home visits allowed under temporary employment contracts, has implications on family relations and the mental health of those who stay behind. Contract renewal or entering into a new employment contract prolongs the length of family separation (Graham, Jordan and Yeoh 2015, 226). While family separation is a concern for low-skilled workers, highly skilled migrants are allowed to bring their spouses and dependent children. The temporary labour migration regime has impacted the well-being of left-behind children and, in some cases, has resulted in children migrating through illegal channels to join their migrant parents in the countries of destination. There is a need for a child-centred policy in the migration framework, as migration policies in East, South and Southeast Asia have focused on migrant parents and lack consideration of the interests of children as migration actors (Asis and Feranil 2020, 69 and 79). Running a strictly temporary migration regime has

curtailed the rights of migrants, such as the right to have a family life. When it comes to rights, temporary migrant workers do not enjoy the full protection of labour laws and welfare support. The temporary migration system is not sustainable in the long run as it is characterised by the non-integration of labour migrants in host societies and the absence of family reunification, and puts labour migrants in precarious situations (Asis 2000, 267; Yeoh 2020, 2).

Family reunification rights in the ASEAN are undermined by three factors. First, ASEAN member states focus only on facilitating the mobility of highly skilled workers in the region. Labour mobility in Southeast Asia has been addressed solely from the economic, trade and security perspectives. When the ASEAN was founded in 1967, its charter made no mention of labour mobility. Since the establishment of the ASEAN Free Trade Area in 1992, labour migration has been considered in isolation from economic integration. Countries of destination want to retain control over their national migration policies in accordance with their national interests, whereas countries of origin want to protect their nationals working abroad (Battistella 2002, 365–366). ASEAN regional migration governance lacks a framework for low-skilled labour migration; the ASEAN Agreement on the Movement of Natural Persons (MNP) and the ASEAN Economic Community (AEC) only facilitate the mobility of skilled labour and business visitors and does not mention low-skilled labour. The AEC, launched in 2015, allows the free flow of skilled labour, goods, services, investments and capital (Lavenex et al. 2016, 465; Ramji-Nogales 2017, 31). The MNP aims to establish an effective mechanism for further liberalising and facilitating the movement of natural persons in the ASEAN region towards the free flow of skilled labour, and to eliminate virtually all restrictions on the temporary cross-border movement of natural persons involved in trade and investment (Article 1, ASEAN 2012). However, the MNP would have no effect on natural persons seeking citizenship, residence or permanent employment in the destination countries (Article 2, ASEAN 2012). The governance of unskilled labour migration in Southeast Asia (including Malaysia) is critical

because the region's migratory flow consists primarily of unskilled and semiskilled workers, with irregular migrants at risk of trafficking and labour exploitation (Kneebone 2010, 383; World Bank 2020, 1).

Second, the absence of family reunification rights is also the result of the absence of provisions for family reunification or settlement for migrants in ASEAN member states. The migrant rights theme appeared in ASEAN instruments only in 2007 with the ratification of the 'Declaration on the Protection and Promotion of the Rights of Migrant Workers' (the Cebu Declaration). The declaration does not stipulate obligations or provisions for family reunification (Seol and Skrentny 2009, 595). It clearly says that the member states recognise the sovereignty of individual states in defining their migration policy in relation to the right of entry and the right to stay. The general principles agreed on by both the receiving states and the sending states included promoting the dignity of migrant workers, resolving the issues of undocumented migrant workers who become undocumented through no fault of their own and upholding the fundamental rights and dignity of migrant workers and their family members residing in the receiving country without undermining the national laws (ASEAN 2007). In 2018, the 'ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers' further dedicated a chapter to addressing the fundamental rights of migrant workers and their family members. Chapter 3 of the ASEAN Consensus outlined the following rights: the right to be visited by their family members for the purposes and length of time allow under the national legislations, to hold their own passport, to have similar rights as nationals of the receiving states in prison or detention centres, to file their grievances and seek assistance from their respective embassies and to enjoy freedom of movement subject to the receiving state's regulations (ASEAN 2018).

Third, the regional instrument that governs migrant children addresses the rights of children without any clauses on family unification. The rights of migrant children are stipulated

under the ‘ASEAN Declaration on the Rights of Children in the Context of Migration’, adopted in 2019 (hereinafter, ‘ASEAN 2019’). The document, however, does not overwrite the sovereignty and the principle of non-interference with member states in ‘determining their own policies relating to children in the context of migration, including determining entry into and departure from their territory and under which conditions they may remain’ (ASEAN 2019). The member states acknowledged the need to enhance the access of children affected by migration, including those who are unaccompanied by or separated from their families, to national systems such as child protection, education, health and justice (Article 2). The member states also committed to enhancing the identification, referral, protection and assistance of migrant children, especially victims of trafficking, refugees, asylum-seekers and internally displaced children (Article 3). They agreed to facilitate all birth registrations and the issuance of birth certificates in coordination with embassies (Article 8). In the best interests of children, the member states further committed to developing effective procedures for and alternatives to child immigration detention. States should work towards ensuring that children are kept together with their families in a non-custodial place (Article 9, ASEAN 2019).

III. Family Reunification Provisions: The Malaysian Legal Framework

In the Malaysian and ASEAN contexts, the right to family reunification is closely related to the states’ immigration control. ASEAN states rigidly separate different categories of legal residents. They strategically assign the rights of their foreign population based on such population’s potential economic contribution’. In the hierarchy of rights, foreigners with greater potential are granted greater rights, and foreigners with lesser potential are granted lesser rights. This strategy is akin to the modernist approach to immigration control (Nah 2012, 488–489). The inflow of the international population has two categories: the welcome inflows [the expatriates, Malaysia My Second Home (MM2H) participants and foreign students] and

the problematic inflows (low-skilled foreign workers, irregular migrants and asylum seekers and refugees). The rules and regulations governing their entry and stay are governed by different divisions of the Department of Immigration. Highly skilled professionals are administered by the Expatriate Services Division (ESD); MM2H participants, by the Ministry of Tourism; foreign students, by the Ministry of Education; foreign workers, by the Foreign Workers Division; irregular migrants, by the Enforcement Division; and asylum seekers and refugees, by the National Security Council (Kassim 2014, 11).

International migrants constituted 3.9% of the total population of Malaysia in 1990, 4.6% in 1995, 6.3% in 2000, 7.5% in 2005, 8.6% in 2010, 10.8% in 2015 and 10.7% in 2019 (refer Table 1) (United Nations Department of Economic and Social Affairs 2019). Under Malaysia's immigration system, legal resident foreigners include the foreign worker population [Visit Pass (Temporary Employment) VP(TE) holders], the expatriate population [Employment Pass (EP) holders], children and spouses of expatriates [Dependent Pass (DP) holders], foreign talents [Professional Visit Pass (PVP) holders], international students [Student Pass (SP) holders], foreign spouses [Social Visit Pass (SVP) holders] and Filipino refugees in Sabah (IMM13 Immigration Pass holders) (World Bank 2020, 34–35). The right to family unification in Malaysia is associated with the type of pass held by the legal resident foreigners. Highly skilled foreigners are given the EP, which allows them to be accompanied by their family members, to work for five years in Malaysia, to become permanent residents and to employ domestic helpers from foreign countries. Low-skilled workers enter the country with a VP(TE). VP(TE) holders are not allowed to bring in dependents, cannot become permanent residents and must return to their countries at the end of their employment contract (World Bank 2020, 6–7).

Table 1: International Migrant Stock 2019: Country Profile (Malaysia)

	1990	1995	2000	2005	2020	2015	2019
International migrants (thousands)	695.9	937.4	1463.6	1918.5	2417.4	3280.7	3430.4
International migrants as a share of total population (percentage)	3.9	4.6	6.3	7.5	8.6	10.8	10.7
Refugees (thousands)	14.9	23.3	50.5	44.5	92.9	154.6	151.3
Refugees as a share of international migrants (percentage)	2.1	2.5	3.4	2.3	3.8	4.7	4.4
Females among international migrants (percentage)	41.7	42.9	43.8	40.9	39.2	39.2	38.9
Median age of international migrants (years)	23.5	23.2	26.9	26.6	28.7	28.4	28.3
International migrants by age group (percentage)							
0-19	38.0	32.1	27.6	29.3	15.1	16.6	17.3
20-64	59.6	65.7	70.4	68.9	83.1	81.8	81.1
65+	2.4	2.2	1.9	1.8	1.8	1.6	1.7
Migrants originating from the same SDG region (percentage)	88.5	85.8	84.4	73.5	64.2	61.0	61.0

Source: United Nations Department of Economic and Social Affairs (UN DESA). 2019. https://www.un.org/en/development/desa/population/migration/data/estimates2/country_profiles.asp

Regulation 16A of Immigration Regulations 1963 grants a migrant the right to enter and stay in the country through a Residence Pass (RP). An RP is issued to the following categories of foreigners: (a) the husband or wife of a citizen, (b) any person who has a specialist qualification that would enable him to perform his occupation without prejudice against the interests of citizens and permanent residents (expatriates), (c) the husband or wife of an expatriate and (d) any other categories of persons as may be determined by the minister in accordance with the policy of the government. Children under 18 years of age in all the categories are eligible to enter the country through an RP (Subregulation 7, Regulation 16A). An RP issued under Regulation 16A is valid for a period not exceeding five years (Subregulation 4, Regulation 16A). The holder of an RP shall not give any form of political speech, engage in any political activity or be a member of any organisation not officially

recognised by the law (Subregulation 5, Regulation 16A). Spouses and children can join the holder of a valid EP and remain in the country with a DP. They shall not engage in any form of paid employment without the written consent of the Immigration Controller (Regulation 10, Immigration Regulations of 1963).

a) Family Reunification for Transnational Families in Malaysia

For transnational families, the government's policies on permanent residency (PR) and citizenship have hindered the creation of a supportive environment for family life. The Immigration Department issues a one-year Social Visit Pass (SVP), which has to be renewed for the next five years or until the PR is granted. In many cases, foreign spouses married to Malaysians have waited for decades for the approval of their PR. The PR status is a privilege that is fast-tracked for other categories of foreigners such as highly skilled foreigners, international students and expatriates. The contributions of foreign spouses to the nation as caregivers and homemakers are not measured accordingly or are undervalued. According to the Foreign Spouses' Support Group (FSSG), which was established in 2007 as an advocacy organisation for the rights of foreign spouses and children, foreign spouses should be prioritised in the granting of PR as the bureaucratic delays impact the family life of Malaysians (Nut Graph 2010; Ramanand 2018).

Foreign spouses are issued the Long-Term Social Visit Pass (LTSVP) for a temporary stay of six months and above. They are granted the pass for a period of five years if they comply with all the requirements. They are allowed to work without having to convert the pass to an EP (Immigration Department 2021b). Since 2008, foreign spouses on LTSVPs have had the right to work with an endorsement from the Immigration Department upon fulfilling certain conditions (Nah 2012, 496; Nut Graph 2010). For SVP holders, however, the right to work is not automatic. Under the Immigration Regulations 1963, an SVP is issued to any person who

enters the country on a social business or a professional visit for temporary employment and as a tourist. The holders of an SVP issued for the purpose of a social visit (or tourism) are not allowed to (a) engage in any form of paid employment or in any business or professional occupation and (b) engage in any political activity, including giving political lectures, speeches or talks (Regulation 11, Immigration Regulations 1963). Foreign spouses have remained foreigners in the country after having stayed there for more than 10 years, and their passports are stamped with SVPs. Renewal of SVPs in the Immigration Department requires filling out an application for extension of visit, which has raised the question of belonging of foreign spouses with Malaysian children. Foreign spouses, represented by the FSSG, have asserted their right to the country as their home and that they are not merely visiting their spouses (Low 2017, 65–66). The FSSG sought recognition of foreign spouses as part of the Malaysian family framework. In the best interest of Malaysian families, the FSSG urged the Malaysian government to consider these foreign spouses' uncertain legal status by outlining a clearer policy of granting PR. Simplifying the visas with the right to work, PR and citizenship processes would allow these people to have a sustainable livelihood. Bina Ramanand, the coordinator of the FSSG, urged the government to clearly demarcate marriage migrants from other categories of foreigners and 'exclude foreign spouses from the overarching policy governing foreigners....' (Ramanand 2018).

In terms of the acquisition of citizenship, foreign husbands have more barriers to obtaining citizenship than foreign wives. Female spouses have to fulfil two years of continuous residence in Malaysia to entitle them to apply for citizenship by registration [Article 15(1), Federal Constitution 2010]. Male spouses are treated as other foreigners in their application for citizenship through naturalisation, as they have to satisfy the requirements for no less than 10 years of the 12 years immediately preceding the date of their application [Article 19(2), Federal Constitution 2010].

Thus, we see that family separation among transnational families is caused by restrictive immigration policies. Foreign spouses, whose LTSVP applications had been rejected, have to leave the country. During the coronavirus disease 2019 (COVID-19) pandemic, many Malaysian transnational families were affected by emotional impact and financial strain when a family member visa extension was rejected. The immigration online appointment system, which has a three-month-long waiting list, caused delays in the extension of an SVP. Delays in securing the proper documentation from their embassies were due to movement control order restrictions (Nambiar 2021). Indeed, transnational families are affected by the state's citizenship laws and immigration policies, especially when it comes to family separation and employment restrictions. Foreign spouses residing in the country are confronted with various challenges in raising their Malaysian children. Meanwhile, Malaysian mothers overseas could not automatically transfer their citizenship to their children born abroad, which has resulted in restrictions in returning to the country with their non-Malaysian children on a long-term basis. The pandemic and subsequent visa restrictions exacerbated these challenges and uncertainty for transnational families. As FSSG stated, 'The most important thing ... is that we assert our constitutional right, as it's very clear that it is a rights issue—it is about the rights of the child, the family and the rights of Malaysian women' (FSSG 2020b).

b) Gender-based Citizenship Laws and Family Separation in Transnational Families Abroad

For transnational families residing abroad, the provision of gender-based citizenship is the main contributing factor to family separation. The Malaysian Constitution only allows automatic transfer of citizenship to children born abroad through the paternal line. Under Article 14 (1)(b), every person born abroad to a Malaysian father and whose birth is registered at a consulate of the Federation within one year of its occurrence is a citizen by operation of law. Children born abroad to Malaysian mothers, however, can obtain citizenship through

registration under Article 15(2) of the Federal Constitution, which states that ‘Subject to Article 18, the Federal Government may cause any person under the age of twenty-one years of whose parents one at least is (or was at death) a citizen to be registered as a citizen upon application made to the Federal Government by his parent or guardian’ (Malaysia 2010). National security and sovereignty concerns are the main reasons given by the government for denying inheritance of Malaysian citizenship to children born abroad to Malaysian women with foreign husbands. According to Ismail Mohamed Said, Deputy Home Minister, the government wants to prevent dual citizenship, as children born overseas would inherit the citizenship of their father. In the case of children not acquiring foreign citizenship, their mothers are allowed to apply for Malaysian citizenship under Article 15(2) of the Federal Constitution. As of 2020, 40,000 citizenship applications filed by Malaysian mothers for their children were pending. Thus, the country has reservations on Article 9(2) of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which recommends equal rights for women and men to confer their nationality to their children (Malaysia Today 2020).

Given the political landscape of Malaysia, constitutional amendment of the gender-bias citizenship provision may not be a feasible solution. The main barrier is the decision-makers in the Ministry of Home Affairs (MOHA), which has a ‘very conservative’ approach to citizenship. The MOHA only agreed to provide clearer standard operating procedures and expedite citizenship applications. Without a citizenship document, it is difficult for Malaysian mothers to bring their non-citizen children to Malaysia especially in cases of divorce (FSSG 2020a, 6). In addition, some foreign spouses without citizenship were denied renewal or application of visas, which compelled them to return to their home country and endure family separation. Family separation affects non-citizen children in various ways, including through anxiety, depression and restricted access to national healthcare and education in national schools (FSSG 2020a, 3–4). The COVID-19 pandemic worsened the uncertainty of the legal

status of children born abroad to Malaysian women. Many mixed families face family separation problems, unfair burden of care and difficulty in birth registrations. The FSSG, with its advocacy campaign, has led to the reunification of many families and the renewal of visas (FSSG 2020a, 4–5).

The FSSG, the initial campaigns of which were for the welfare of foreign spouses and children of mixed families, was gradually expanded to include Malaysian transnational families overseas. In 2020, it established the NGO ‘Family Frontiers’ with the general aim of advancing, promoting and strengthening the family unit. It has advocated policies that are ‘family-friendly’ for Malaysian citizens with foreign spouses and local-born children to keep the family unit together. The NGO strives to ensure families’ access to economic and social development, provide support for Malaysians and their spouses during the establishment of the family unit and encourage wellbeing, integration and respect for families in Malaysia (Family Frontiers 2021a). The Family Frontiers advocacy group has also mobilised all stakeholders to launch the ‘Malaysian Campaign for Equal Citizenship,’ which successfully challenged the gender-based citizenship provision, Article 15(2) in the Federal Constitution. The main legal issues addressed by the campaign included the inability of children born overseas to a Malaysian mother to become Malaysian citizens by operation of law, the inability of children born out of wedlock to a Malaysian father and a foreign mother to obtain Malaysian citizenship by operation of law and the inability of male spouses to obtain citizenship through the same citizenship provision as female spouses. Family Frontiers supports binational families in the application process for Malaysian legal status, birth registration and marriage registration (Family Frontiers 2021b).

In December 2020, Family Frontiers Malaysia and a group of six Malaysian mothers challenged the government’s gender discrimination practice and filed a lawsuit against it at the Kuala Lumpur High Court. Their main issue of contention was that under Article 15(2) in the Malaysian Federal Constitution, citizenship of children born overseas through registration by

Malaysian mothers is not automatic but is subject to the discretionary decision of the MOHA. However, the processing period is long and the success rate is low. They claimed that between 2013 and 2018, the MOHA has approved only 142 applications related to children born overseas, whereas it has rejected 3,715 applications, and 4,959 applications were still pending. They averred that gender inequality in the transmission of citizenship has resulted in family separation and hardships, which were intensified by the global pandemic. In cases of divorce, the mothers could not return to Malaysia with their children due to the high cost of health care and education for their non-citizen children. Staying overseas was the option to avoid separation from their non-citizen children (Ding 2021). The six Malaysian mothers filed the court case after the government rejected their applications to register their children as citizens under Article 15(2) without any reason. In response, the government appealed to the High Court to strike out the court case, but the High Court rejected the government's application on 6 May 2021. The Federal government's second attempt to strike out the case was dismissed by the Court of Appeals on 20 August 2021. The government challenged that the Malaysian mothers cannot claim citizenship for their children as citizenship is a "privilege rather than a right" and citizenship matters are beyond the courts' jurisdiction (Lim 2021a).

On 9 September 2021, the High Court ruled in favour of the Malaysian mothers. According to the Court ruling, Article 4(1)(b) of the Federal Constitution, together with the Second Schedule, Part II, Section 1(b), must be read in harmony with Article 8(2) on gender equality. The High Court ruled that the word 'father' in the Constitutional provisions in Article 14 (1)(b) must be interpreted to include the 'mother', and thus, children born abroad of all Malaysian women are entitled to citizenship by operation of law. The Court ordered the government to extend the time for the mothers to comply with the necessary procedures and ordered the relevant authorities to issue the relevant identity documentation, such as identity cards and passports, to such children. It acknowledged the consequences of the gender-based

citizenship provision to Malaysian mothers and their children—that the family could have non-Malaysian and Malaysian children, and non-Malaysian children face difficulties in education, healthcare and travel. The gender discrimination in citizenship transmission was apparent, and its effects on family cohesion were real. The ruling sought to use the existing law as a remedy for the grievance of the plaintiffs. Following the High Court’s order, the government filed an appeal at the Court of Appeals in the same month to temporarily suspend the High Court’s decision on the issuance of citizenship documents to the children until a decision has been made on its appeal (Bedi 2021; Lim 2021a). On 22 December 2021, the Court of Appeals rejected the government’s appeal, so the government had to issue citizenship-related documents to children born overseas to Malaysian mothers. The Court’s decision has a significant impact on family unification—the ability of such children to live with their family without the fear of separation. Family Frontiers president Suri Kempe commented, ‘It demonstrates the Court’s recognition of the urgency and importance of children being granted their national identity documents immediately, so that Malaysian families have a chance to be reunited’ (Lim 2021b).

c) Economic Desirability of Highly Skilled Professionals and Students

Highly skilled foreign talents in Malaysia are granted the privileges of family reunification. The government established Talent Corporation Berhad (TalentCorp) in 2011 to attract talents under the Residence Pass Talent (RP-T) Programme and the Returning Expert Programme (for Malaysian professionals overseas) (Economic Planning Unit 2015, ch. 5). The Talent Roadmap 2020 outlined the country’s aspiration to become the top 20 global talent destination by 2020. The Roadmap had three strategic thrusts to address the state’s talent need so that it would become a high-income nation: optimise Malaysian talent, attract global talent and build networks of top talent (TalentCorp 2012, 16). The RP-T, introduced on 1 April 2011,

targets top foreign talent in critical sectors. It is not the same as the PR but is a 10-year multiple-entry visa that allows expatriates to work and live in Malaysia. RP-T holders are offered the following benefits: the right to live and work in Malaysia for up to 10 years and the flexibility to change employers without converting the pass to an EP. In addition, it facilitates family reunification by granting spouses and children under 18 years of age the privileges of a DP and eligibility to study; spouses, the right to work without the need to apply for an EP; and parents and parents-in-law, a five-year SVP (2012, 151).

To be eligible for an RP-T, foreigners must have a basic monthly salary of MYR15,000 (raised on 1 February 2017 from MYR12,000); hold a PhD, Master's or Bachelor's Degree or Diploma; have at least five years of work experience; have worked in Malaysia for a minimum of three years; and have paid income tax in Malaysia for at least two years. Between 2011 and 31 December 2020, a total of 8,751 applications were approved under this initiative. More than 90% of the successful applicants had more than 10 years of global work experience. The key sectors that attract foreign talent include information and communications technology, finance, education, business, and oil, gas and energy (TalentCorp 2022). To enhance the immigration services offered, all RP-T applications are centralised at the Malaysia Expatriate Talent Service Centre (MYXpats Centre) under the Expatriate Services Division (ESD) of the Immigration Department of Malaysia (TalentCorp 2017).

The MYXpats Centre was established on 1 July 2015 in Klang Valley to support the processing of all documents for RP-T applications by companies wishing to employ expatriates. The Centre was managed by TalentCorp with the Immigration Department of Malaysia (ESD 2015a). The ESD was launched in 2014 as a one-stop centre to improve immigration services delivery to both expatriates and companies and to speed up the document approval process to within five working days. Foreign talents in the 12 industries under the National Key Economic Areas are prioritised for the issuance of passes. The ESD is in charge of processing the

Employment Pass, Residence Pass-Talent, Professional Visit Pass, Dependant Pass, Long-Term Social Visit Pass, and Social Visit (Temporary Employment) - Foreign Maid Pass (ESD 2015b).

The EP is another category of passes that allow family reunification. It offers the right to work with an organisation in Malaysia for a shorter duration of up to 60 months. Family members of EP holders have the following privileges: (a) a DP for spouses, natural children (under 18 years of age), legally adopted children (under 18 years of age), parents or parents-in-law; (b) an LTSVP for natural children (over 18 years of age), legally adopted children (over 18 years of age), parents and parents-in-law; and (c) a Social Visit (Temporary Employment) - Foreign Maid Pass for foreign maids (ESD 2015c).

The right to family reunification is also available to retirees from overseas who are participating in the Malaysia My Second Home (MM2H) Programme. While the EP and the RP-T are for business, investments and job opportunities, the MM2H is tailor-made for high-quality retirees. Between 2002 and 2019, the MM2H Programme generated revenues of MYR38.17 billion in the form of property and vehicle purchases, visa fees, annual medical insurance and household expenses (Aziz 2021). An MM2H visa comes with benefits and privileges that include a five-year renewable visa, tax exemption on overseas income, property purchase and passes for dependents. Holders of an MM2H visa do not automatically qualify for PR or citizenship, though, as ‘obtaining PR in Malaysia is a difficult and lengthy process and citizenship is close to impossible’ (MM2H 2022a). Between 2002 and 2019, a total of 48,471 MM2H applications were approved, broken down by year as follows: 818 in 2002; 1,645 in 2003; 1,917 in 2004; 2,615 in 2005; 1,729 in 2006; 1,503 in 2007; 1,512 in 2008; 1,578 in 2009; 1,499 in 2010; 2,387 in 2011; 3,227 in 2012; 3,675 in 2013; 3,074 in 2014; 2,211 in 2015; 3,347 in 2016; 6,195 in 2017; 5,610 in 2018; and 3,929 in 2019. However, many applications were rejected in 2019 and the programme was suspended in 2020 because the

MM2H visa facility became subject to various abuses such as applicants not residing in Malaysia and applicants misusing the visa facility for extended overseas holidays (MM2H 2022b). The suspension was implemented through the government's Movement Control Order on 18 March 2020 which closed the country's borders to curb the spread of the pandemic. Through the decision, applications to participate in MM2H were frozen to provide space for the MOHA and the Ministry of Tourism, Arts and Culture (MOTAC) to comprehensively review and re-evaluate the programme. On October 2021, the programme was reactivated, and new applications were processed and handled by the Immigration Department. However, a new policy was introduced that set a ceiling on the number of MM2H participants (principals and dependents) of 1% of the total number of Malaysian citizens at any one time, in response to concerns that uncontrolled entry of foreigners through MM2H would increase the influx of foreigners in Malaysia (MOHA 2021).

To further balance the security and economic aspects, the conditions for participation in the MM2H Programme in the new policy were improved after considering the views of several ministries and government agencies. The MOHA, in its media statement on 11 August 2021, announced 10 new criteria: (1) residence in Malaysia for at least 90 days (cumulative) in a year; (2) an offshore income of at least MYR40,000 per month, compared to MYR10,000 previously; (3) ownership of a fixed savings account of at least MYR1 million compared to at least MYR150,000 for applicants 50 years old and above and MYR300,000 for applicants below 50 years of age previously; (4) an additional MYR50,000 for each dependent in the amount saved in the fixed savings account; (5) five years duration of the MM2H's LTSVP, extendable to five more years and beyond, compared to 10 years previously; (6) declaration of liquid assets of at least MYR1.5 million; (7) a processing fee of MYR5,000 for the principal and MYR2,500 for each dependent compared to zero processing fees previously; (8) security screening for pass renewal; (9) a Certificate of Good Conduct for all participants and their

dependents; and (10) collaboration between MOHA and MOTAC in implementing the programme. The new conditions were clearly introduced to strengthen security control while ensuring that MM2H participants are financially capable and can contribute to the national economy (MOHA 2021).

National security concerns prevailed in the new policy, indicated by the transfer of the programme processing from the MOTAC to the Immigration Department of the MOHA. The stricter criteria were necessary for security purposes, as the Immigration Department found that more than 12% of MM2H participants were not residing in Malaysia. Some of the participants misused the MM2H visa to conduct unwanted activities, jeopardising the national security (Aziz 2021). The stricter financial requirements received negative responses from industrial stakeholders. Since the reintroduction of the programme in October 2021, most highly skilled foreigners who fulfilled the conditions have shown lukewarm interest. Only 20% of the applicants could fulfil the monthly income of MYR40,000, and only 2% of the qualified foreigners were able and willing to put MYR1 million in a fixed deposit. The Minister of Home Affairs, Hamzah Zainudin, stated that new participants have to adhere to the new requirements because the government wants to attract participants ‘who are genuine, of high quality and can provide positive contribution[s] to the country’s economic growth’ (Nur Hanani Azman 2021).

Next, the holders of an Student’s Pass (SP) are given the privileges of bringing in their dependents, who are defined as the spouse, children, mother and father. Dependents of international postgraduate students are issued a DP, which is valid for 12 months. Both the SP holders and their dependents are provided a Multiple-Entry Visa (Immigration Department 2021a). An SP may be issued to any person who (a) has been accepted as a student by a recognised university or another educational institution or (b) possesses a certificate issued by the Higher Education Minister to ‘the effect that it is desirable that he should be accepted as a student at a specified educational institution’ (Reg. 13, Immigration Regulations 1963).

International students are considered desirable in the context of the government's internationalisation of higher-education institutions (HEIs) in Malaysia. The commodification of education to generate revenue and the state's efforts towards internationalisation started in the 1990s, when the government facilitated the establishment of private HEIs under the Private Education Act of 1996 (Kassim 2014, 11 and 13).

Internationalisation of education was initiated to achieve the following aims: to attract and retain the best talent for developmental gains, to transform the country from a middle-income country to a high-income country based on knowledge and to contribute to nation building. From the perspective of the HEIs, internationalisation provides a lucrative source of revenue (Ministry of Higher Education 2011, 22–24). In 2009, the country attracted more than 85,000 international students. Realising that the transformation of Malaysia's higher-education industry could generate substantive revenue, as each international student spends MYR30,000 per year, the government aspired to make Malaysia the international 'hub of excellence for higher education' by 2020 (2011, 25).

d) The Right to Stay and Work for Refugees and Foreign Workers

Asylum seekers and refugees (ASRs) have been accommodated in Malaysia since the early 1970s. The government allows them to stay in the country temporarily for humanitarian reasons until a permanent solution is found. The UN High Commissioner for Refugees (UNHCR) works on three possible solutions: repatriation to the ASRs' country of origin, resettlement to a third country or integration into the host country. As Malaysia is not a signatory of the Geneva Convention on the Status of Refugees 1952, it does not formally recognise ASRs. Without a legal status, they are stuck in a legal limbo. If they are arrested by enforcement agencies during crackdown operations on irregular migrants, they would be released with the intervention efforts of the UNHCR. Among ASRs, Filipino refugees in Sabah

(Eastern Malaysia) are in a more favourable position than others in Peninsular Malaysia (Western Malaysia) because they are granted a special pass called the IMM13 visa, which allows them to stay and to work in Malaysia on a temporary basis. Failure to renew the IMM13 pass would make the holder an irregular migrant (Kassim 2014, 19–20).

The UNHCR has been facilitating ASR registration, including refugee status determination for Rohingya, family unity interviews (which grant refugee status to dependent family members), verification of biometrics and documentation of refugee cards. At the end of August 2017, 149,147 ASRs were registered with UNHCR Malaysia. The breakdown of the registrations is as follows: 89% from Myanmar and 11% from 60 other countries (mostly from Pakistan, Sri Lanka, Yemen, Syria, Somalia and Iraq); 67% male and 33% female; and 26% children below the age of 18. ASRs registering with the UNHCR are provided a UNHCR Card, which is an identity document but not a legal document or passport (UNHCR 2021a) that separates them from undocumented migrants in detention centres and gives them international protection from forced deportation to their country of origin, where they may face persecution, in line with the internationally recognised principle of non-refoulement (regardless of whether or not Malaysia signed the 1951 Refugee Convention and its associated 1967 Protocol). The card also gives its holders limited access to health, education and other essential services. Between 2008 and June 2020, UNHCR has resettled over 88,500 refugees from Malaysia to third countries; and at the end of January 2021, 178,710 ASRs were registered with UNHCR Malaysia (UNHCR 2021b).

To reiterate, the UNHCR's registration and documentation of refugees are important in ensuring their access to protection from refoulement, arbitrary arrest and detention. Most importantly, registration assists the UNHCR in facilitating family reunification and reuniting separated children with their families. Identity documentation serves as a proof of legal identity for better inclusion of ASRs within their host community. Registration and identity

management is conducted through UNHCR's digital Population Registration and Identity Management Ecosystem (PRIMES). The functions of PRIMES include registration and biometric enrolment, case management, resettlement, repatriation, legal protection, child protection, cash and in-kind assistance and data management (UNHCR 2021c). As Malaysia is not a signatory at the 1951 Refugee Convention, there is no legal framework for administering ASRs in the country. UNHCR promotes protection of refugees in cooperation with various partners that include government agencies, donor countries, NGOs and volunteers. In Malaysia, UNHCR's Protection Unit collaborates with and engages the government's Immigration Department, Police Department, Maritime Enforcement Agency and other agencies in managing legal and protection issues of refugees. UNHCR's Protection Unit specifically carries out: (1) detention interventions for registration of ASRs and verification of their refugee status, (2) cooperation with the Immigration Director for the Detention & Depot Management Division on the detention and release of ASRs, (3) verification of the refugee status of ASRs to support relevant enforcement authorities in monitoring persons of concern and (4) dialogues with the National Registration Department on the birth registration of persons of concern (UNHCR 2021d).

A study conducted by Wake and Cheung among Rohingya refugees found that their priorities are to be economically independent, to acquire UNHCR registration, to realise a better future for their children and to enjoy the rights and freedoms associated with a permanent solution to their state of legal limbo (2016, 31). In terms of employment rights, there are legal barriers and practical barriers, and refugees without a UNHCR identity document could not be employed. The UNHCR card helps ASRs to secure employment but is not sufficient for legal employment. The card holders are also subject to raids and arrests at workplaces during crackdown operations against irregular migrants. Many refugees continue to find employment through networks (family, relatives, friends, villagers, community leaders and strangers),

though it is illegal to employ refugees in Malaysia. Malaysian employers hire refugees for humanitarian reasons and to be able to hire people for jobs that local citizens are uninterested in as well as to be able to pay lower wages (Wake and Cheung 2016, 25–27). A policy report by the Institute for Democracy and Economic Affairs stated that granting refugees the right to work could increase Malaysia’s annual GDP by over MYR3 billion by 2024 through increased consumer spending and could increase taxes by over MYR50 million annually by 2024 through indirect taxation on goods and services (Todd, Amirullah and Wan 2019, 3). The policy paper concluded that giving refugees the right to work in Malaysia would have a positive contribution to the national economy. The government is urged to ensure that refugees are given full job mobility and to minimise the costs of businesses for hiring them (2019, 30).

A report by the Institute of Strategic and International Studies also recommended granting registered refugees the right to work in Malaysia, arguing that the advantages would outweigh the disadvantages. This is because low-skilled workers are needed in the country, and residing refugees could fill such economic demand. Moreover, it is unlikely that their employment would undermine the job opportunities for citizens. Without the legal right to work, many refugees have been working in the informal sector, with risks of labour exploitation, to sustain their families (Yasmin, Daniel and Fauzi 2019, 4 and 7). The report also pointed out that the country has been a transit point for refugees awaiting resettlement in a third country, and a solution is very much needed to address the gap between refugee status determination and resettlement to a third country. Granting refugees the legal right to work in Malaysia would be beneficial to the country’s national interests economically, socially and politically. The proposed policy is expected to increase the national productivity, enhance protection of the rights of vulnerable groups, mitigate the perception of refugees as illegal migrants and prevent the politicisation of refugees. The report cautions, though, that regularisation of status and granting of the right to work are not tantamount to naturalisation of citizenship status (29). In

March 2022, the Ministry of Human Resources planned to introduce a guideline on refugees' permission to work. The guideline, to be led by a committee, will consider a few factors, such as the applicable sectors, competition with citizens for jobs and cooperation with the UNHCR and other stakeholders for effective implementation (Free Malaysia Today 2022).

As stated, the rights of foreign workers are restricted in Malaysia, with no provision for a permanent residence status or for citizenship, as the state wants to keep the foreign workforce temporary and flexible. The entry of foreign workers is governed by the short-term VE(TP). Malaysia's position on foreign workers has remained the same since the 1970s, in line with the policy of temporary labour migration. Foreign workers have been regarded as a disposable and temporary workforce, which can be brought in to fulfil labour market needs in sectors not popular among the locals. The legal status of migrant workers and the renewal and cancellation of their immigration passes are, to a larger extent, determined by their employers under the sponsorship-based immigration system (Nah 2012, 498). The temporary labour migration system has benefitted employers who rely on low-cost labourers to reduce their production cost, and the state, who can thereby avoid the welfare costs of labourers. Under the contract recruitment system, the state prohibits family migration, repatriates pregnant workers, prevents them from giving birth to children in Malaysia, bans marriage between foreign workers and Malaysian citizens, prevents foreign workers from applying for citizenship through marriage and prevents permanent settlement of foreign workers because family migration involving foreign workers would be costly for the government in terms of welfare costs (Crisis 2013).

Keeping foreign workers transients in the country could reduce social security costs and prevent their incorporation into the local society. Their presence and stay are governed by labour demand; their recruitment is encouraged during economic growth, new intake is frozen during economic downturns, and existing foreign workers have to leave the country if the state so decides to reduce unemployment among locals. To protect the national labour market, access

to citizenship in Malaysia is restricted for foreign workers. Thus, foreign labourers are needed to meet the labour demand but are unwanted (Garcés-Mascreñas 2012, 63 and 81). The absence of family reunification rights for foreign workers in the country is not surprising, as rights have ‘played quite a marginal role in the formulation and implementation of migration policies’ (2012, 103). In the long run, the government aims to reduce reliance on low-skilled foreign workers in the shift from labour-intensive to knowledge- and innovation-based economic activities. The 11th Malaysia Plan sought to formulate immigration policies to address the heavy reliance on foreign workforce. Among others, it outlined the capping of the foreign worker workforce at 15% of the total workforce in 2020 and the use of automation in labour-intensive sectors (Economic Planning Unit 2015, ch. 5).

IV. Conclusions

As this chapter demonstrated, the Malaysian legal framework for family reunification legal foreign population has similarities with that of other Southeast Asian states, which is hinged on the desirability of highly skilled professionals. This is reflected in the ASEAN instruments, which facilitate freedom of cross-border movement for highly skilled people. The ASEAN acknowledged the need to protect migrant workers’ rights and children in the context of migration through the Cebu Declaration (2007) and the ASEAN Declaration on the Rights of Children in the Context of Migration (2019), respectively. However, both declarations do not mention family reunification. Family separation in various workforce categories is the result of a skills-based immigration regime that distinguishes foreign population based on their level of desirability. Foreign workers denied the right to family reunification due to the state’s avoidance of the burden of social and welfare costs. Foreign spouses are subjected to restrictive immigration policies as the state wants to avoid marriages of convenience. Children born abroad to Malaysian mothers are denied citizenship based on operation of law due to the

gender-based nationality law and the perceived threat of dual nationality. This level of desirability of family reunification is determined by the state's economic interests, immigration control and national security. Desirability matters as selective categories of migrants, such as expatriates, business migrants and students are welcomed based on economic desirability and the internationalisation of the higher education industry. To achieve both purposes, the state seeks to attract workers with a higher social economic status. The new ruling on MM2H introduced in 2021 raised the financial qualifications for expatriates to ensure high-quality participants and to prevent abuses of the visa facilities, which come with the privilege of family reunification.

There are positive changes taking place in the state's family reunification policies, though. After years of advocacy efforts by the NGO Family Frontiers, the High Court's ruling in 2021 provided a remedy for gender citizenship provision and enabled children born abroad to Malaysian mothers to inherit Malaysian citizenship. With such ruling, Malaysian mothers abroad can already bring their children to Malaysia without the fear of family separation. The landmark decision challenged the deeply rooted government position that children born abroad might acquire dual nationality and raise national security threats to Malaysia. It reflected that citizenship provisions should prevent family separation in the best interests of the children. Meanwhile, the granting of conditional rights to work to foreign spouses in Malaysia since 2008 has ensured the sustainability of family life for transnational families. Policy debates are still ongoing on the granting of rights to work to refugees, which would ensure better livelihood for refugees and their families staying temporarily in the country.

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