



16 December 2011

Parliamentary Select Committee on Electoral Reform

VOTING RIGHTS FOR MALAYSIANS OVERSEAS

Introduction

1. This submission is made to the Parliamentary Select Committee on Electoral Reform (the “Committee”) by **MyOverseasVote UK**, an unincorporated association which was established in London under the laws of England and Wales in October 2010 to press for voting rights for over 1 million Malaysian citizens overseas.

2. MyOverseasVote UK has been involved in supporting an action by six Malaysian citizens resident in the UK who have brought judicial review proceedings against the Election Commission (“EC”) for refusing them the right to register as absent/postal voters in order to vote in the upcoming general election. This judicial review will be heard by the High Court in Kuala Lumpur on 3 January 2012.

Summary

3. MyOverseasVote UK believes that all Malaysian citizens resident outside Malaysia should have the right to vote by post. We accept the Committee's recommendation in its interim report that Malaysians resident overseas should be added as a new category of postal voter, and recommend that the EC should adopt the draft regulations in the Appendix to these submissions. In any case, we call upon the Committee to set a deadline for implementation of no later than the end of January 2012.

Background

4. Article 119 of the Federal Constitution gives the right to vote in elections to every Malaysian citizen who has attained the age of 21 years on the qualifying date and: (i) is resident in a constituency in Malaysia on the qualifying date, or (ii) is an absent voter; and is registered as an

elector for that constituency.

5. The Elections Act 1958 (the “**Act**”) does not define absent voters, but section 15 of the Act gives the EC the power, with the approval of the Yang di-Pertuan Agong, to make regulations for the registration of electors and for all matters incidental thereto.

6. Regulation 2 of the Elections (Registration of Electors) Regulations 2002 (the “**2002 Regulations**”), made under section 15 of the Act, defines “absent voter” as a citizen who has attained the age of 21 years and is (i) a member of any regular armed force of Malaysia or a Commonwealth or foreign country, (ii) a Malaysian public servant stationed overseas, (iii) a full-time student in higher education, (iv) (subject to certain conditions) a spouse of any of the above.

7. Section 16 of the Act also gives the EC the power, with the approval of the Yang di-Pertuan Agong, to make regulations for the conduct of elections and for all matters incidental thereto. Section 16(2)(n) specifically gives it the power to prescribe the facilities to be provided for voting by post and the persons entitled to vote by post.

8. Regulation 3(1) of the Elections (Postal Voting) Regulations 2003 (the “**2003 Regulations**”), made under section 16 of the Act, gives the right to be a postal voter to absent voters (as defined in the 2002 Regulations) and certain other categories of voters. Overseas Malaysians do not currently qualify unless they qualify as absent voters.

9. The exclusion of the vast majority of overseas Malaysians from the definition of “absent voter” and thus from being postal voters is unconstitutional because it amounts to unreasonable discrimination between citizens on the grounds of their occupation and the identity of their employer in a matter as fundamental as the right of each citizen to vote. This discrimination is arbitrary and not based on any rational or reasonable grounds, contrary to Article 8 of the Federal Constitution.

The EC's position

10. Although the EC Chairman, Tan Sri Abdul Aziz Yusof, announced on 25 August 2011 that all Malaysians overseas would be allowed to vote by post, the EC has clarified to MyOverseasVote that the EC Chairman never promised that the EC would do so before the next general election. Nearly four months after the announcement was made, the EC has still taken no action to enable Malaysians overseas even to begin the process of registering as absent/postal voters.

11. Overseas Malaysians are increasingly worried that the 13th General Election will come and go while they continue to be deprived of their constitutional right to vote.

The Committee's Interim Recommendation

12. On 1 December 2011, the Committee made the following recommendation, which was accepted by the Dewan Rakyat:

Jawatankuasa memutuskan supaya kategori pengundi pos di luar Negara dibuka pada semua pemastautin yang layak mengundi di luar Negara. Ini bermakna Peraturan-Peraturan Pilihan Raya (Pengundian Pos) 2003 dipinda dengan memasukkan suatu peruntukan 3(1)(g) dalam yang menyatakan bahawa pemastautin warganegara Malaysia yang layak mengundi adalah dibenarkan untuk mengundi secara pos di luar Negara. Bagi tujuan tersebut, Jawatankuasa juga berpendapat bahawa terdapat keperluan untuk mengadakan peruntukan berkenaan Akuan Berkanun (Statutory Declaration) bahawa pengundi tersebut berniat mengundi di luar Negara di konsulat Malaysia. Jawatankuasa juga berpendapat bahawa SPR perlu mengadakan suatu peraturan berkenaan pengundian pos bagi warganegara Malaysia di luar Negara.

13. Although MyOverseasVote UK has previously pressed for Malaysians overseas to be given postal votes by expanding the definition of “absent voter” in the 2002 Regulations, we are willing to accept the Committee's and the Dewan Rakyat's decision to give Malaysians overseas postal votes by expanding the definition of “postal voter” in the 2003 Regulations, which will allow Malaysians overseas to register as postal voters without having to repeat the lengthy process of voter registration in order to become absent voters.

14. However, because Regulation 3(3) of the 2003 Regulations currently requires applications for postal votes to be made only after it is known that an election will be contested, the current mode of application cannot be used for overseas Malaysians, as it will be impossible for 1 million Malaysians to apply for postal votes after nomination day and to receive their postal votes in time to exercise and return their votes by 5pm on polling day.

15. It is therefore necessary to draft new regulations to deal with overseas postal voting, as was envisaged by the Committee. We have drafted the regulations that we believe should be adopted by the EC in order to allow for overseas postal voting, and these appear in the Appendix.

Registration

16. We propose that any registered voter who resides overseas and wishes to vote by post should make an application to the Malaysian consulate in the country in which he resides, giving his postal address overseas. We believe that in order to prevent fraud, all applications for overseas postal votes must be made overseas to the relevant consulate and accept the Committee's

recommendation that each application should be supported by a statutory declaration. In countries or territories where there is no Malaysian consulate, the EC should designate another consulate to act for that country or territory.

17. Provided that the applicant's identity and voter registration status is confirmed online, the application should be approved by the Malaysian consulate concerned and the applicant's details passed to the EC for registration. The EC should then maintain a register of overseas postal voters for each constituency. This register should be available for inspection online, except that the postal addresses of voters should not be shown online.

18. Voters should be able to apply for a postal vote at any time up to nomination day. Once a voter is added to the register of overseas postal voters, he will remain an overseas postal voter until the conclusion of the first subsequent general election, when the register will be wiped clean. If there is a by-election in a constituency before the first subsequent general election, voters on the overseas postal voters' register for that constituency will also be able to vote by post in that by-election.

19. This means that overseas voters will have to re-register as a postal voter after each general election or at any time if they change their postal address. However, if they return to Malaysia after the first subsequent general election, as many do after their studies or a work attachment, they will be able to vote in Malaysia without having to re-register as an ordinary voter.

Issuance of postal ballots

20. At present, postal votes are issued by the returning officer in front of the candidates' election agents, who sign the seal of the postal voters ballot box, and the list of postal voters and the ballot counterfoils are also sealed. We believe that this is satisfactory.

Despatch of postal ballots

21. Regulation 9 of the 2003 Regulations currently allow the EC to prescribe the method of despatch of postal ballots. However, we believe that special procedures are required to allow for overseas postal ballots to be sent and received in time to be counted and without undue opportunity for fraud. We recommend that all overseas postal ballots must be sent through the Malaysian consulate designated by the EC for that country or territory.

22. We recommend that each returning officer should seal the postal voting envelopes intended for each consulate in a sealed packet signed by the candidates' election agents. The EC should then send all the sealed packets intended for each consulate via diplomatic pouch. When they are

received by the consulate, they should be opened, counted and despatched into the local postal system in the presence of the parties' overseas agents.

Exercise of postal votes

23. At present, the declaration of identity by the postal voter must be witnessed by another person on Form 2, after which the voter marks his ballot paper in secret. We believe that this is satisfactory; however, if additional security is required, the Committee should consider requiring a witness to a declaration of identity to be a Malaysian consular officer or a police officer, magistrate, lawyer or commissioner for oaths in that country.

Return of overseas postal votes

24. At present, postal votes must be returned to the returning officer so that they are received no later than 5pm on polling day. We believe that in order to reduce the time that is required to transport postal ballots, and to reduce the opportunity for fraud, all overseas postal votes must be returned to the same consulate through which they were despatched.

25. Overseas postal votes should be held in clear ballot boxes sealed with the signatures of the parties' overseas agents at the time of the despatch of the overseas postal votes. There should be at each consulate at least one ballot box for each State and one box for the Federal Territories in a parliamentary election, and one ballot box for each State election that is being held at the same time.

26. The EC should be able to designate an overseas polling day that is one or two days ahead of polling day in Malaysia, so that overseas postal votes can be counted in time for the addition of votes in the constituencies. Overseas postal votes can be returned either by post or in person to the consulate, as long as they are received by 5pm on overseas polling day.

Counting of overseas postal votes

27. In order to reduce the logistical complexity and the opportunity for fraud, we recommend that all overseas postal votes should be counted at the consulate to which they are returned. Ballot boxes should be opened after 5pm on overseas polling day, and overseas postal ballot papers should then be sorted by constituency. The verification and counting of postal votes can then take place as usual in front of the parties' overseas counting agents.

28. The number of votes for each candidate in each constituency should be recorded on a single form for each ballot box, e.g.:

“MALAYSIAN HIGH COMMISSION, LONDON

NEGRI SEMBILAN (STATE ELECTION)

N1: BN–45, PKR–47, Ind.–2;

N2: BN–22, PAS–18, Ind.–1, spoilt–1;

N3: ... etc.”

29. The statements of results from each consulate can then be faxed to the parties and to the EC, who will forward them to the relevant returning officers in time for the addition of votes.

Conclusion

30. Over 115 countries and territories in the world allow external voting, and two thirds of these allow external voting by all citizens. Postal voting for overseas Malaysians need not be excessively expensive: Australia manages to conduct overseas voting for A\$1.2 million out of a total election expenditure of A\$75 million. In the case of Malaysia, the EC already has to send overseas postal ballots to government servants and students overseas, so the additional cost of including postal ballots for other Malaysians overseas will be marginal.

31. MyOverseasVote UK welcomes the interim recommendation of the Committee that Malaysian citizens overseas should be entitled to vote as postal voters, but fears that the lack of any timeline for implementation by the EC will mean that Malaysians overseas will continue to be deprived of their right to vote at the upcoming elections. We commend the draft regulations contained in the Appendix for consideration and adoption by the Committee, and call upon the Committee to set a firm deadline for the adoption by the EC of the necessary regulations in any case of no later than the end of January 2012.

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APPENDIX

Elections (Postal Voting) Regulations 2003

New/amended definitions:

“agent” means the election agent, the overseas agent or any person appointed to attend in the election agent's or the overseas agent's place.

“consular officer” includes a consul-general, consul, vice-consul, pro-consul and consular agent and any diplomatic officer entrusted with consular duties.

“envelope B” means a covering envelope bearing the words “returning officer/consular officer” for the return of envelope A and Form 2.

“overseas agent” means an overseas agent appointed under subregulation 8A(3).

“overseas postal voter” means any postal voter who is ordinarily resident in a place outside Malaysia.

“overseas postal ballot paper” means any postal ballot paper issued to an overseas postal voter.

“overseas presiding officer” means the consular officer designated under regulation 8A or any other person appointed by the Election Commission to conduct proceedings in respect of overseas postal votes under these Regulations.

“place outside Malaysia” includes any country or territory or division thereof outside Malaysia, and includes any combination of two or more countries or territories or divisions thereof outside Malaysia as may be specified in a notice published under subregulation 8A(1).

Amendment to regulation 3:

3. Persons entitled to vote as postal voters

(1) Any person who has registered as a Parliamentary or State elector under the Elections (Registration of Electors) Regulations 2002, and is—

(a) an absent voter;

(b) a person certified by the Election Commission to be an election officer and liable for duties on polling day;

(c) a member of any police force established by any written law in force in Malaysia, other than a member of the Police Volunteer Reserve Force;

(d) *(Deleted)*;

(e) a member of the Election Commission appointed under Article 114 of the Federal Constitution; or

(f) a member of any category of persons designated as postal voters by the Election Commission from time to time by notification in the *Gazette*; or

(g) a person who is ordinarily resident in a place outside Malaysia,

shall, on receipt of a postal ballot paper, be entitled to vote as a postal voter at an election in accordance with these Regulations.

(2) A person referred to in paragraphs (1)(b), (e) and (f) desiring to vote by post shall apply to do so by using Form 1 in the Schedule.

(3) The application referred to in subregulation (2) shall be made direct to the returning officer of the constituency in which he is registered as soon as it is known that an election is contested in that constituency.

(4) If an application made under subregulation (2) is approved, the returning officer shall issue a postal ballot paper to the applicant and if it is not approved, the returning officer shall so inform the applicant and shall state his grounds for not approving the application in the letter prescribed in Form 1.

(5) A person referred to in paragraph (1)(g) desiring to vote by post shall apply to do so by using Form 1A in the Schedule.

(6) The application referred to in subregulation (5) shall be made at any time prior to nomination day direct to a Malaysian consular officer in the place outside Malaysia in which the applicant resides or to any other consular officer who has been designated by the Election Commission for the purpose of receiving such applications from such place.

(7) If an application made under subregulation (5) is approved, the consular officer shall forward the Form 1A to the Election Commission, and if it is not approved, the consular officer shall so inform the applicant and shall state his grounds for not approving the application in the letter prescribed in Form 1A.

(8) The Election Commission shall maintain a register of overseas postal voters, which shall be made available for public inspection online subject to the redaction of the overseas postal voters' postal addresses, and the returning officer shall issue a postal ballot paper to each person who is listed in that register as being registered with respect to that constituency.

(9) A person who has been registered as a postal voter pursuant to an application under subregulation (5) shall remain on the register of overseas postal voters until the conclusion of the first parliamentary general election after such application, and may before such time apply to amend the postal address listed on the register or apply to be removed from such register using Form 1A.

Amendment to regulation 5:

5. Persons entitled to be present at issue of postal ballot papers and opening of postal voters' ballot boxes.

(1) No person other than—

(a) the returning officer, the overseas presiding officer and his~~their~~ clerks;

(b) the candidates;

(c) an election agent or person appointed by a~~the~~ candidate or party by whom the agent was appointed to attend in the ~~election agent's~~ place; and

(d) member or officers of the Election Commission,

may be present at the proceedings on the issue of postal ballot papers or the opening of postal voters' ballot boxes.

(2) If a candidate or party appoints a person under paragraph (1)(c), he or it shall give notice of the appointment to the returning officer or consular officer, stating the name and address of the person so appointed at any time during the issue of the postal ballot papers or the opening of the postal voters' ballot boxes, as the case may be.

(3) If the person referred to in subregulation (2) dies or becomes incapable of acting, the candidate or party may appoint another person in his place and shall forthwith give to the returning officer, consular officer or overseas presiding officer notice in writing of the name and address of the person so appointed.

...

New regulations:

8A. Overseas postal ballot papers.

(1) The Election Commission may by notice published in the Gazette direct that all envelopes addressed to overseas postal voters in a place outside Malaysia shall be despatched and collected via a specified consular officer in or in the vicinity of such place and such notice shall specify the deadline for the receipt of overseas postal ballots by such consular officer (referred to in these Regulations as the "overseas polling day"), being not more than two days before and no later than polling day.

(2) All overseas postal ballot papers thus despatched shall only be eligible to be counted if returned to the same consular officer before five o'clock in the afternoon of overseas polling day in accordance with these Regulations.

(3) Each political party and each candidate not belonging to a political party shall be entitled to nominate an overseas agent in the location of such consular officer, and the names and contact details of such agents shall be notified to the Election Commission within seven days of the publication of the notice under subregulation (1).

(4) Where the Election Commission has issued a notice under subregulation (1), regulations 9A, 10A, 13A and 14A shall apply in place of regulations 9, 10, 13 and 14 in respect of overseas postal ballot papers sent to such place outside Malaysia, and regulations 15, 16, 17 and 18 shall apply with the substitution of "overseas presiding officer" for "returning officer".

9A. Despatch of overseas postal ballot papers

(1) The returning officer shall, at the proceedings on the original issue of postal ballot papers, place all envelopes addressed to overseas postal voters which are to be sent via a specified consular officer in a packet sealed and affixed with security tape, which shall be sent to that consular officer via the Election Commission.

(2) Upon receipt of the sealed packets from the Election Commission, the consular officer shall give the agents in his location no less than 24 hours' notice of the time and place of the opening of the sealed packets.

(3) The consular officer shall, in the presence of the agents, open each sealed packet and note the number of envelopes addressed to overseas postal voters in respect of each constituency and despatch such envelopes to the overseas postal voters via the local postal system or any independent courier approved by the Election Commission for that purpose.

10A. Provision of overseas postal voters' ballot box

(1) The consular officer shall, at the proceedings on the despatch of the envelopes addressed to overseas postal voters, provide a ballot box or ballot boxes for the receipt of envelope B when returned by the overseas postal voters.

(2) There shall be no fewer than one ballot box for each state for which overseas postal ballot papers for elections to the state Legislative Assembly are to be received, and no fewer than one ballot box for the Federal Territories and each state for which overseas postal ballot papers for elections to the House of Representatives are to be received.

(3) Every such ballot box shall be shown open and empty to the agents present and shall then be locked by the consular officer and affixed with security tape and signed by the consular officer and the agents present who desire to sign on the security tape.

(4) Every such ballot box shall be numbered and marked "overseas postal voters' ballot box" and with the name of the state or territories and the legislative body for which the election is held.

(5) The consular officer shall make arrangements for the safe custody of every such ballot box.

13A. Receipt of overseas covering envelopes.

The consular officer shall, immediately on receipt of envelope B before five o'clock in the afternoon of overseas polling day, place it unopened in the appropriate postal voters' box which has been locked and affixed with security tape in accordance with regulation 10A.

14A. Opening of overseas postal voters' ballot box.

(1) Each overseas postal voters' ballot box shall be opened by the overseas presiding officer in the presence of the agents as soon as practicable after five o'clock in the afternoon of overseas polling day, and the overseas presiding officer shall inform the agents of the time and place at which he will open such ballot boxes and the envelopes contained therein.

(2) When each overseas postal voters' ballot box is opened, the overseas presiding officer shall count and note the numbers of envelope B received for each constituency, and place the envelopes B received for each constituency into separate receptacles, prior to the commencement, in respect of that ballot box, of proceedings under regulation 15.

New Form 1A:

(See attachment)

Amendment to Form 2:

...

5. Immediately after voting, you must place the marked ballot paper in the enclosed small envelope marked "A" and close it up. You must then place the envelope marked "A", together with the Form 2, in the larger envelope marked "B" addressed to the returning officer or consular officer without delay. For postal voters within Malaysia, the ballot paper, in order to be counted, must be received by the returning officer not later than five o'clock in the afternoon of polling day. If you are voting from overseas, the ballot paper, in order to be counted, must be received by the consular officer not later than five o'clock in the afternoon of overseas polling day.

...

FORM 1A
STATUTORY DECLARATION IN RESPECT OF
APPLICATION FOR OVERSEAS POSTAL BALLOT PAPER
[Subregulation 3(5)]

To:
The Consular Officer at

I,
(Full name in block letters)

N.R.I.C. No.: of
.....
(Full permanent address as recorded in N.R.I.C.)

do solemnly and sincerely declare that I am a Malaysian citizen ordinarily resident at.....
.....
(Full postal address)

and am at present registered as an elector in
in the *State/Federal Territory of

*I hereby apply to be registered as an overseas postal voter at the above address and undertake that if I am issued a postal ballot paper, I will not vote in person in Malaysia on polling day.

*I hereby apply to be removed from the register of overseas postal voters.

I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act 1960.

Subscribed and solemnly declared by the)
abovenamed Applicant at)
.....)
in)
this.....day of.....20.....)

.....
Signature of Applicant

Before me,

.....
*Signature and seal of Malaysian diplomatic
and consular officer outside Malaysia, State
Elections Officer within Malaysia, or notary
public, commissioner for oaths or other
person authorised to administer oaths in that
country.*

*Delete whichever is inapplicable

FOR OFFICE USE ONLY

Code No.:
N.R.I.C. No.:
Serial No. in Electoral Roll

*Application approved.

*Application rejected and applicant informed.

Ground:

Dated

.....
Consular Officer/Registrar of Electors

**Delete whichever is inapplicable*

To:

.....
(Full Name)

.....
(Full Postal Address)

.....
(Fold along dotted line)

Sir/Madam,

I regret to inform you that your application for a postal ballot paper datedis not approved on the ground that.....

Your obedient servant,

.....
Consular Officer

Dated.....

Elections (Conduct of Elections) Regulations 1981

New definitions:

“consular officer”, “overseas presiding officer”, “overseas agent”, “overseas polling day”, “overseas postal ballot paper” and “overseas postal voter” have the same meanings as in the Elections (Postal Voting) Regulations.

“assistant overseas agent” means a person appointed as such by an overseas agent whose name and address has been notified in writing to the overseas presiding officer.

New regulation:

25cc. Counting of votes of overseas postal voters.

(1) Where the Election Commission has issued a notice under subregulation 8A(1) of the Elections (Postal Voting) Regulations, overseas postal votes shall be counted in accordance with this regulation, and regulation 25c shall not apply to such postal votes.

(2) Subject to the general or special directions of the Election Commission, each overseas presiding officer shall appoint, and may revoke the appointment of, such officers or staff to assist him in the counting of votes of overseas postal voters.

(3) The overseas presiding officer shall, as soon as practicable after the conclusion of the proceedings under regulation 17 of the Elections (Postal Voting) Regulations, make arrangements for the counting of the votes of overseas postal voters in the presence of the overseas agents or assistant overseas agents who are present, and shall inform each such overseas agent or assistant overseas agent of the time and place at which he will begin to count such votes.

(4) The provisions of regulation 25, other than paragraphs 1, 1A, 3(b), 4 and 5, shall apply in relation to the counting of votes of overseas postal voters as if—

(a) references to a presiding officer were references to an overseas presiding officer;

(b) references to the returning officer were references to the State Elections Officer;

(c) references to election agents and counting agents of candidates were references to overseas agents and assistant overseas agents;

(d) references to officers and staff appointed under regulation 12A were references to officers and staff appointed under this regulation;

(e) references to ballot papers were references to overseas postal ballot papers; and

(f) references to Form 14 were references to Form 15A.

(5) On the completion of the counting of the votes of overseas postal voters in respect of each constituency, the overseas presiding officer shall put the counted ballot papers and the rejected ballot papers into separate packets, affixed with security tapes which shall be signed by the overseas presiding officer and by each overseas agent who is present and who desires to sign on the security tapes.

(6) The packets containing the counted ballot papers, the rejected ballot papers and the packets referred to in regulations 16 and 17 of the Elections (Postal Voting) Regulations for

such constituency shall be placed into a packet affixed with security tape which shall be signed by the overseas presiding officer and by each overseas agent who is present and who desires to sign on the security tape.

(7) On completion of counting of the votes of overseas postal voters from each ballot box, the packets referred to in paragraph (6) shall be placed in the ballot box, affixed with security tape which shall be signed by the overseas presiding officer and by each overseas agent who is present and who desires to sign on the security tape.

(8) On the completion of the counting of the overseas postal votes, the overseas presiding officer shall despatch—

(a) each ballot box; and

(b) the special envelope containing the statement in Form 15A referred in regulation 25(12)(b).

in safe custody to the relevant State Elections Officer.

Amendment to regulation 25b:

25b. Proceedings of returning officer after return of ballot boxes, and official addition of votes.

...

(2) After the returning officer has completed the counting of the votes of postal voters in his constituency and has received all statements of the overseas postal voting for his constituency, the returning officer shall make arrangements for the official addition of the votes, and shall inform the candidates or their election agents of the time and place at which he will commence to add up the number of votes given to each candidate.

...

(4) At the place appointed for the official addition of the votes, the returning officer, in the presence of such of the candidates, and their election agents as attend, shall—

(a) open the special envelope containing the official statement of the postal voting; and

(aa) examine the statements of the overseas postal votes received by him from each overseas presiding officer; and

(b) upon receipt of the special envelope containing the official statement of the poll despatched or delivered to him by each presiding officer, open the said envelope and examine the statement of the poll contained therein,

and announce subject to paragraph (4A), the number of votes recorded for each candidate in the statement of the poll contained in such envelope.

New Form 15A:

(See attachment)

