**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA**
**(BIDANG KUASA RAYUAN)**
**RAYUAN SIVIL NO.: 01(f)-43-09/2017(W)**

ANTARA

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|---|---|---|---|
| **1.** | **JABATAN PENDAFTARAN NEGARA** | | |
| **2.** | **KETUA PENGARAH PENDAFTARAN NEGARA** | | |
| **3.** | **KERAJAAN MALAYSIA** | **…** | **PERAYU-PERAYU** |

DAN

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|---|---|---|---|
| **1.** | **SEORANG KANAK-KANAK** | | |
| **2.** | **M.E.M.K** | | |
| **3.** | **N.A.W** | **…** | **RESPONDEN-RESPONDEN** |

DAN

**MAJLIS AGAMA ISLAM NEGERI JOHOR** **… PENCELAH**

[Dalam Mahkamah Rayuan Malaysia
(Bidang Kuasa Rayuan)
No. Rayuan Sivil: W-01(A)-365-09/2016

Antara

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| 1. | Seorang Kanak-Kanak | | |
| 2. | M.E.M.K | | |
| 3. | N.A.W | **…** | Perayu-Perayu |

Dan

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|---|---|---|---|
| 1. | Jabatan Pendaftaran Negara | | |
| 2. | Ketua Pengarah Pendaftaran Negara | | |
| 3. | Kerajaan Malaysia | … | Responden-Responden |

Yang diputuskan oleh Mahkamah Rayuan di Putrajaya pada 15 haribulan Mei 2017]

[Dalam Mahkamah Tinggi Malaya di Kuala Lumpur
(Bahagian Rayuan dan Kuasa-Kuasa Khas)
Permohonan bagi Semakan Kehakiman No.: 25-250-09/2015

Antara

1. Seorang Kanak-Kanak
2. M.E.M.K
3. N.A.W **…** Perayu-Perayu

Dan

1. Jabatan Pendaftaran Negara
2. Ketua Pengarah Pendaftaran Negara
3. Kerajaan Malaysia … Responden-Responden

Yang diputuskan oleh Mahkamah Tinggi Kuala Lumpur pada 04 haribulan Ogos 2016]

**CORAM:**

**ROHANA YUSUF, PCA**

**AZAHAR MOHAMED, CJM**

**DAVID WONG DAK WAH, CJSS**

**MOHD ZAWAWI SALLEH, FCJ**

**ABANG ISKANDAR ABANG HASHIM, FCJ**

**IDRUS BIN HARUN, FCJ**

**NALLINI PATHMANATHAN, FCJ**

## JUDGMENT OF THE COURT

### Introduction

**[1]** This appeal raises the issue of whether the Director General of National Registration ("DGNR") possess the authority, under the Births and Deaths Registration Act 1957 ("the BDRA") to ascribe "bin Abdullah" instead of the biological father to the name of an illegitimate Muslim child in registering the birth of that child. Related to this issue is whether the DGNR in doing so was correct in giving consideration to the personal law of a Muslim person.

**[2]** The High Court had on 04.08.2016, ruled the legal issue by holding that the DGNR had such power, but it was reversed by the Court of Appeal on 25.05.2017. On the decision of the Court of Appeal, this Court granted the DGNR and two others (the Appellants) leave to appeal on three questions of law.

### Background Facts

**[3]** The First Respondent ("the Child") is the son of MEMK (the Second Respondent) and NAW (the Third Respondent). MEMK and NAW are both Muslims.

**[4]** The Child was born in Johor on 17.04.2010 which was 5 months and 24 days (5 months and 27 days according to the Islamic Qamariah calendar) from the date of the marriage of MEMK with NAW, which took place on 24.10.2009. According to Muslim law, a child is illegitimate if he is born less than 6 *qamariah* months from the date of his parents' marriage. It is therefore undisputed that the Child is an illegitimate child under Muslim law.

**[5]** The Child's birth was registered late being two years after his birth. It was a late application made pursuant to section 12(1) and also section 13 of the BDRA. Section 13 relates to illegitimate child. At the time of making the application the parents jointly applied for MEMK's name to be entered in the Birth Register as the father of the Child.

**[6]** The DGNR issued the Respondent Child's Birth Certificate on 06.03.2012. In that Birth Certificate the DGNR, in compliance with section 13 entered the name of MEMK in the column on particulars of the father. However, the Child's full name was given as "bin Abdullah", instead of "bin MEMK". The Child's Birth Certificate also contained a notation *"Permohonan Seksyen 13"* which was an explicit acknowledgement that the application for the registration of birth, is for an illegitimate child.

**[7]** About three years later, on 02.02.2015 MEMK applied under section 27(3) of the BDRA, to correct the Child's name from "bin Abdullah" to that of his name, MEMK. The application was rejected by the DGNR *vide* a letter dated 08.05.2015 on the basis that the Child being an illegitimate Muslim child cannot be ascribed to the name of his biological father, MEMK. And the Child was to be named "bin Abdullah" in line of the *fatwa* issued on the subject.

**In The High Court**

**[8]** The decision of the DGNR was challenged by way of judicial review, at the High Court seeking for various declarations and reliefs as stated below:

(a) a declaration that a discriminatory decision by the Appellants against the illegitimate status of the Child is against the law;

(b) a declaration that the insertion of the entry "*Permohonan Seksyen 13*" in the Child's Birth Certificate is null and void and in violation of the Child's right;

(c) a declaration that the DGNR's decision dated 08.05.2015 is against the law;

(d) a certiorari to quash the decision; and

(e) a mandamus to compel the DGNR -

i. to remove the entry "*Permohonan Seksyen 13*" from the Child's Birth Certificate;

ii. to alter the Child's Birth Certificate "bin Abdullah" with MEMK's name;

iii. to alter the father's and mother's record accordingly; and

iv. to refer the Child's father as MEMK and not Abdullah.

**[9]** The central issues canvassed before the High Court were these:

(a) whether the DGNR's refusal to correct or alter the particulars "bin Abdullah" to be substituted with MEMK in the Birth Register was made in accordance with law; and

(b) whether the entry of "bin Abdullah" and the notation *"Permohonan Seksyen 13*" in the Child's Birth Certificate infringed the Child's fundamental liberties under Articles 5, 8, 10 and 12 of the Federal Constitution.

**[10]** The learned High Court Judge dismissed the Respondents' application on the reason that the DGNR's refusal to alter the Child's name from "bin Abdullah" to "MEMK" was in accordance with law and that the entry *"Permohonan Seksyen 13*" in the Child's Birth Certificate did not

violate any of the Child's fundamental constitutional liberties. The learned High Court Judge also opined that the DGNR was not wrong to rely on Islamic law on legitimacy in rejecting the application to amend the Child's full name as "bin MEMK".

**In The Court Of Appeal**

**[11]** In reversing the decision of the High Court, the Court of Appeal found that the learned High Court Judge had failed to address the existence of section 13A(2) of the BDRA in arriving at its decision. Upon examining that provision, the Court of Appeal found and held that the language of section 13A(2) read together with section 27(3) enabled an illegitimate child to bear either the mother's name or the father's name. And it was held that the DGNR was wrong in dismissing the application of the Respondents.

**[12]** In arriving at that conclusion, the Court of Appeal opined that the BDRA in its true purport made no distinction between a Muslim child and a non-Muslim child hence section 13A(2) never prescribes a different treatment for illegitimate Muslim children. It further found that section 13A(2) did not require an illegitimate Muslim child to bear the father's name as "bin Abdullah". Furthermore, since the father's name has already been entered in the Birth Certificate, there would be no further necessity

to register the Child's name as "bin Abdullah". The statutory duty of the DGNR was held to merely register births and deaths in the states of Peninsular Malaysia, without more.

**[13]** In support, the Court of Appeal referred to the decision of the Gujarat High Court in **Nitaben Nareshbai Patel v State of Gujarat & Ors (2008) 1 GLR 884** which was found to be dealing with a similar provision in India. The ruling in that case by the Gujarat High Court was that "the Registrar was not justified in referring to some guidelines and reading them into the law so as to curtail his own power under section 15 of the Act." Applying the principle in **Nitaben**, the Court of Appeal similarly held that, the DGNR had acted irrationally and outside the scope of his powers in registering "bin Abdullah" as part of the Child's name in the Child's Birth Certificate.

**[14]** The explanation proffered by the DGNR in his affidavit affirmed on 09.03.2016 that the notation *"Permohonan Seksyen 13*" on the Child's Birth Certificate was to assist the relevant agencies in dealing with the issues of inheritance, maintenance, *perwalian*, marriage, death, citizenship, lineage, *et cetera* did not find favour with the Court of Appeal. It viewed that it was not the DGNR's duty and function under the BDRA to do so. Furthermore, it opined that the foregoing issues could be settled without the need to make the *"Permohonan Seksyen 13*" entry on the

Child's Birth Certificate. In its grounds of judgment it was further justified that, since the procedure for the registration of an illegitimate child was spelt out clearly and formally in section 13A(2), it would be that section and not a *fatwa* that should guide the DGNR in considering an application under it.

**[15]** The bases relied upon by the DGNR on the 1981 and 2003 *fatwa* issued by the National *Fatwa* Committee were found to be erroneous. It was found by the Court of Appeal that the *fatwa* relied upon bore no relevance to the DGNR's statutory duty under the BDRA. A *fatwa*, the Court of Appeal said, did not have the force of law. And even if a *fatwa* has any force of law (being made pursuant to state law), the Court of Appeal ruled that, it could not supersede the BDRA, a Federal law.

**[16]** In the end, the Court of Appeal held that there was nothing in the BDRA that allowed for the importation of substantive principles of Islamic law in the registration process. The impugned decision was a purely administrative function that had nothing to do with Islamic jurisprudence on legitimacy. The duty of the DGNR according to the Court of Appeal, was to follow the procedure laid down in section 13A(2) and to allow applications, which comply with the necessary requirements under that provision.

**In The Federal Court**

**Preliminary Objection**

**[17]** At the commencement of the hearing of this appeal, Majlis Agama Islam Negeri Johor as Intervener, raised by way of a preliminary objection the *de novo* hearing of this appeal. The background to this objection was mainly due to the fact that this Court had, on 07.02.2018 heard this appeal before a panel of five, where its judgment was reserved. Two out of the five members had later retired leaving three members to deliver the panel's decision.

**[18]** A case management was set for this case on 27.07.2018 where a direction for a *de novo* hearing was told to the parties. It was objected to by the Appellants and a new hearing date was then fixed on 18.10.2018. Before that date, on 30.07.2018 counsel for the Intervener sought clarification on the same, which led to a second case management before the Deputy Registrar on 21.09.2018. Parties were informed that the *de novo* hearing was directed by the then Chief Justice YAA Tan Sri Datuk Seri Panglima Richard Malanjum. The Intervener objected as there were still three Judges remained from that earlier panel to deliver its decision pursuant to section 78 of the Courts of Judicature Act 1964. A hearing date was fixed on 18.10.2018 where the objection was heard by a seven

coram of Judges. The panel had unanimously held that the direction for *de novo* be set aside.

**[19]** A decision date of 22.11.2018 was then set before the three remaining Judges, whereby Ahmad bin Haji Maarop PCA, declared in open Court that the decision of the earlier panel was ready to be pronounced. However, the Attorney General's Chambers sought for a postponement, on the basis that the matter would be resolved amicably. Despite objections by the Respondents, the Court adjourned the decision. Another case management was set on 24.01.2019 where parties were again informed that the decision was ready. Thereafter, there were only two Judges left from the hearing panel and eventually one, making it untenable for any decision to be delivered.

**[20]** To this preliminary objection, the Respondents responded to say that by the hearing date before us, there was not any judge from the earlier panel remained, necessitating a *de novo* hearing.

**[21]** As such, when this objection was brought before us, we had no other option but to proceed with a *de novo* hearing of this appeal.

**THE APPEAL**

**Section 13A and Surname**

**[22]** We now proceed to deal with the questions posed before this Court, in turn. For convenience, we will begin with Question 3, which is:

**<u>Question 3</u>: Whether section 13A of the Births and Deaths Registration Act 1957 applies to the registration of births of Muslim children enabling the children to be named with the personal name of a person acknowledging to be a father of the Children?**

**[23]** To recapitulate, the Court of Appeal found and held that the High Court in dismissing the judicial review application had failed to consider section 13A of BDRA. It was held that section 13A would have justified the Child's full name as "bin MEMK" and not "bin Abdullah". Section 13A as we understand it, is a relatively newly enacted provision. It deals strictly with "surname", as the short title to it, suggests. It provides for a situation where additional information may be inserted in the Register.

**[24]** Following section 13A(1), in respect of a legitimate child, ordinarily the surname of the father may be entered. In case of an illegitimate child, section 13A(2) provides that a mother's surname be inserted where the mother is the informant and that she volunteers the information. However, if a person who acknowledges to be a father in accordance with section

13 so requests, his surname may be inserted. To better appreciate this position section 13A is hereby reproduced in extenso:

> "***Section 13A. Surname of child***
>
> *(1) The **surname, if any**, to be entered in respect of a legitimate child shall ordinarily be the surname, if any, of the father.*
>
> *(2) The **surname, if any**, to be entered in respect of an illegitimate child may where the mother is the informant and volunteers the information, be the surname of the mother; provided that where the person acknowledging himself to be the father of the child in accordance with section 13 requests so, the surname may be the surname of that person." (emphasis added)*

The Explanatory Statement to the Bill explained the background to section 13A in the following way:

> *"Clause 6 seeks to allow **the use of surname** of the mother where the child is illegitimate and the surname of the putative father only if he requests."*

**[25]** It is apparent that section 13A(2) is an extension of section 13, which allows additional information to be entered in the Birth Register of an illegitimate child. That additional information is the surname, if any, of the mother or the father of the child. It is plainly clear that it allows a surname (if any) of a legitimate child to that of the father, to be stated in the Birth Certificate and following that, section 13A(2) provides that where –

(a) the mother is the informant and volunteers the information, be the surname of the mother;

(b) if the person who acknowledges himself as the father in accordance with section 13 and on his request then his surname will be inserted.

**[26]** Given its plain meaning, section 13A is not a mandatory provision to be applied to all cases. Its application is only relevant to a person who carries a surname, hence the word “if any” in the law. The section too contemplates cases where a person to be registered does not carry a surname. It does not discriminate between Muslim or non-Muslim. It only discriminates between people with surname with one who has none.

**[27]** The term “surname” is not defined under the BRDA. Hence by the rule on statutory interpretation, ordinary word must be given a plain meaning. The following dictionary meanings of this word are instructive:

(i) **Oxford Dictionary of Law (Sixth Edition) –**

*“Surname: A family name. Upon marriage a wife is entitled to take her husband's surname (and title or rank) and to continue using it after his death or divorce (unless she uses it for fraudulent purposes) although she is not obliged to do so. A legitimate child, by custom, takes the name of his father and illegitimate child that of his mother (although the father's name may be entered on the birth certificate if both parents agree and*

*an affiliation order names the man as the putative father). Upon adoption a child automatically takes the name of his adoptive parents."*

(ii) **Black's Law Dictionary, Tenth Edition –**

*"Surname: The family name automatically bestowed at birth, acquired by marriage, or adopted by choice. Although in many cultures a person's surname is traditionally the father's surname, a person may take the mother's surname or a combination of the parents' surname."*

(iii) **Concise Oxford English Dictionary, Eleventh Edition, Revised –**

*"Surname: 1. Hereditary name common to all members of a family, as distinct from a forename. 2. Archaic a descriptive or allusive name, title, or epithet added to a person's name."*

(iv) **Oxford Dictionary and Thesaurus, Second Edition 2007 –**

*"Surname: An inherited name shared by all members of a family, as distinct from a personal name."*

**[28]** We can safely conclude from the above plain dictionary meaning that there is a difference between a personal name and a surname. In the present case MEMK cannot therefore be a personal name and a family name at the same time. It is not a family name or hereditary name or inherited name commonly shared by for example, the wife and all members of the family as defined by the dictionary meaning.

**[29]** As generally understood the word “bin” or “binti” in the Malay naming culture means the son or daughter of someone. In other words, the word “bin” or “binti” is attributed to a person's personal name and not a family name. Obviously there is a difference between the meanings of the words “name” and “surname”. The legislature does not legislate “surname” in vain. Section 13A is intended to allow a surname as an additional information to be added in the Birth Register and Birth Certificate. Naturally if someone has no surname, section 13A cannot be applied to him.

**[30]** Taking the above definitions, to my mind a surname refers to a family, hereditary and inherited name, distinct from a personal name. In the present case, MEMK is obviously not a family name or hereditary name or inherited name commonly shared by, for example, the wife and all members of the family. Instead, it is merely his personal name. This is clear when MEMK and the Third Respondent at the time of making the section 13 application, applied for MEMK to be entered in the Birth Register as the father of the Child, which the DGNR did. In construing section 13A, we are of the view that the Court of Appeal failed to appreciate that there is a difference between a personal name and a

surname. With respect, I am not able to agree with the Court of Appeal's application of section 13A to the Respondents.

**[31]** In the first place the surname of the Child was never an issue before the DGNR. The Court of Appeal had erred in holding that "the purpose of a surname is to identify who the child's father is". There was never an issue on the identity of the father in this case. MEMK's name was already entered in the Birth Register as the father of the Child. We are now only dealing with the issue on additional information as envisaged by section 13A, which allows a surname to be entered.

**[32]** It is difficult to appreciate how the personal name of the father may also be a surname at the same time.

**[33]** In this regard, we agree with the argument in support of the Appellants, put forth by Majlis Agama Islam Selangor as "Amicus curiae", that if a Malay child's surname is that of the father's personal name, section 13A(2) would not allow MEMK to insert his own personal name after the child's name. Since section 13A(2) says "the surname of that person" which by this argument would refer to MEMK's father or his family name. So what then is MEMK's surname.

**[34]** Since this issue was heavily disputed in the oral submissions before us, we welcomed parties to submit further by way of additional written submissions on this particular issue, including to obtain any expert view on the subject.

**[35]** Following that, Majlis Agama Islam Johor as Intervener had submitted by way of an additional written submission dated 21.11.2019 on the issue of whether Malays have surname. In that submission two experts are cited as authorities. The first is Professor Madya Dr. Kassim Thukiman. He is from the Faculty of Social Sciences and Humanities, Universiti Teknologi Malaysia with experiences of researching on issues relating to "Sejarah Melayu dan Sejarah Johor". He had written extensively in the area of history, tracing background of ethnic groups. He has written his opinion titled as "Pandangan Pakar" on this issue as attached in the written submission by the Intervener. The other is Professor Madya Dr. Mohd Rosli Saludin. He is a Senior Research Fellow from the Institute of the Malay World and Civilization (ATMA), Universiti Kebangsaan Malaysia. He too had undertaken research on topics such as "Adat Melayu Serumpun" and had written quite extensively in the area of "Adat Pepatih". He wrote a separate opinion on the subject.

**[36]** The Attorney General's Chambers on behalf of the DGNR had enlightened further in the additional written submission filed on 10.01.2020 on this issue. In its submission an expert opinion of Professor Dr. Teo Kok Seong dated 15.12.2019 was enclosed. Professor Dr. Teo is from the Institute of Ethnic Studies (KITA), Universiti Kebangsaan Malaysia (UKM). He is now the Principal Research Fellow from that Institute as well as the Institute of the Malay World and Civilization (ATMA), both in UKM. He specializes in the area of *"Sosiolinguistik dan Sosiologi Bahasa"*. He had done research in many areas as described in his *curriculum vitae* which basically relate to ethnic issues.

**[37]** All the three experts echoed the same views on this subject which I will summaries them as follows:

(a) Malay names are similar to Icelandic naming conventions. For men, the patronym consists of the title bin (from the Arabic, meaning 'son of') followed by his father's personal name. The example given is if Osman has a son called Musa, Musa will be known as Musa bin Osman. For women, the patronym consists of the title binti (from the Arabic, meaning 'daughter of') followed by her father's name. Thus, if Musa has a

daughter called Aisyah, Aisyah will be known as Aisyah binti Musa;

(b) Upon marriage, a Malay woman does not change her name, as is done in many cultures, especially in Western cultures.

(c) In the context of Malaysia, the Malaysian Chinese are the only major ethnic group in Malaysia to use family names as surname. The other ethnic group like the Malays or the Indian do not carry any surname. Again the following example has been cited; the name "Leung Chun-ying", with the family name "Leung" placed in front of the given name, "Chun-ying". The surname "Leung" will be passed down from a father to all his children and their children.

(d) The view also opined that the Malay naming convention is poles apart from the Western or Chinese. A Malay only answer to his personal name and do not have surname, hence calling a Malay by his father's name is inappropriate in a Malay culture and in the Malaysian context. Any attempt to rely on the naming in the western culture in giving surname to the local practice will be a total misplace.

**[38]** The above observations according to them must be compared to names bearing hereditary titles, as Malays also have hereditary titles. Most of those with these titles are descended from royalty or nobility. Such examples by Patrilineal Royal descent (Malay) are Tunku, Tengku, Raja and Wan. Nonetheless, despite using the hereditary titles, the person's name will be followed by the father's name. For example: "Raja Ahmad Bin Raja Ali".

**[39]** Having examined the experiences and the research undertaken by Professor Dr. Teo which was also supported by the other two Professor Madya Dr. Kassim and Professor Madya Dr. Mohd Rosli, I accept their views as the correct observation.

**[40]** It is pertinent to note that there was no expert opinion in response, tendered by the Respondents to rebut the opinions expressed by the above experts.

**[41]** The Intervener, Majlis Agama Islam Johor had also referred us to the brief guide issued by the Australian Catholic University ***"ACU National Naming Convention for Asian Names" (Australian Catholic University 2007),*** which states that –

> *"Malay names are common in Malaysia and Singapore and reflect a Muslim culture. Family names as such have not existed in Malaysia, and names change from generation to generation, rather than record alineage."*

**[42]** This is further emphasized in an Article published in the Legal Network Series **"Preimplantation Genetic Diagnosis For Social Sex Selection: The Possible Implications on Malaysia's Sex Ratio" [2012] 1 LNS(A) lix**. It is observed that –

> *"The Malays, on the contrary, place equal importance on the mother's and father's kin, where their descent is generally traced through both parents. As a result, there is no requirement for the continuation of the family name to the next generation for the Malays (Dancz, 1987)."*

**[43]** All these observations reinforced and fortified my view that giving a plain meaning to the word surname, it is as clear as daylight that Malays do not have any surname. To name the Child as “bin MEMK” on the basis that it is a surname of the father pursuant to section 13A is therefore without basis legally or factually.

**[44]** Section 13A is clear in its language and does not call for any other rule of statutory interpretation, purposive or golden rule. In view of the above, I am clear in my mind that section 13A of the BDRA is not applicable to the Malays in Malaysia, and hence is of no application to the

Respondents. With respect the Court of Appeal was plainly wrong to apply section 13A(2) to the Respondents.

**[45]** In its grounds of judgment the Court of Appeal had also mentioned that it was guided by the Gujarat High Court case of **Nitaben** *(supra)* in its decision on the application pursuant to section 27(3). It would be necessary for this Court to deal with it. In its grounds of judgment the Court of Appeal had referred to the case in the following words:

> ***"[33] We were not referred to any authority directly on section*** *27(3) of the BDRA, or have we been able to find any in our research, but the judgment of the Gujarat High Court dealing with* a *similar provision in* ***Nitaben Nareshbai Patel v State of Gujarat & Ors [2008] 1 GLR 884*** *which cited with approval the following passage in Registrar, Birth and Death, Rajkot Municipal Corporation v Vimal M. Patel Advocate, in Letters Patent (Appeal No. 231 of 2001 dated 30.3.2001) may throw some light on the issue:*
>
> > *"Since the powers of the Registrar are wide enough to ensure that the entry made in the Registrar does not mislead or give an incorrect impression, it is his duty to ensure that suitable correction is made in the entry to ensure the authenticity of the Register by reflecting the correct state of affairs in the marginal entry that he is required to make. No direction can be issued by any authority to take away the powers of the Registrar of making correction in* ***entries which are erroneous in form or substance in the Register.*** *The registrar, therefore, was not justified in referring to some guidelines and reading them so* as *to curtail his own*

> *powers under Section 15 of the Act. No guidelines can be issued against the statutory provisions empowering the Registrar to make corrections except by way of rules made by the Government with respect to the conditions on which and the circumstances in which such entries* may *be corrected or cancelled* as *provided in Section 15 itself. In our opinion, therefore, the learned single Judge was justified in setting aside the impugned order and directing the appellant Registrar to entertain the application of the respondent and effect the necessary correction in the register in accordance with the provisions of Section 15 of the Act." (emphasis added)*

**[46]** The facts in **Nitaben** were not exactly the same as in the present case. In **Nitaben,** the Gujarat High Court was dealing with section 15 of the Indian Registration of Births and Deaths Act 1969, which is similar to section 27(3) of our BDRA. The Gujarat High Court was not interpreting a provision similar to section 13A(2) of our BDRA. What the Gujarat High Court held was that "the Registrar was not justified in referring to some guidelines and reading them so as to curtail his own powers under section 15 of the Act." In our case, the DGNR was not dealing with guidelines, but with the personal law applicable to the Respondents as envisaged by the Federal Constitution. On the application made pursuant to section 27(3), the Court of Appeal relied on the Gujarat High Court case of **Nitaben** *(supra)* as relied upon by the Court of Appeal. I am also of the view that the Court of Appeal was in error when it referred to that case to support its decision.

**[47] Question 3 therefore is answered in the following way:** Section 13A of the Births and Deaths Registration Act 1957 does not apply to registration of births of Malay Muslim children. It does not enable the children to be named with the personal name of a person acknowledging to be a father because the personal name of the father is not a surname.

**[48]** Without even deliberating on further issues we find the DGNR was correct in law not to allow the application to name the First Respondent as "bin MEMK". That part of the DGNR's decision does not call for judicial interference.

**Personal Law of the Respondents**

**[49]** I next move to Question 1 which is, **whether in performing registration of births of Muslim children, the Registrar of Births and Death may refer to and rely on sources of Islamic Law on legitimacy?** As alluded to earlier the DGNR had reasoned the rejection on the fact that a Muslim illegitimate Child cannot be ascribed to his biological father. In a letter dated 08.05.2015 he stated the rejection thus:

> *"Dukacita dimaklumkan bahawa permohonan pembetulan maklumat dalam Daftar Kelahiran anak tuan/puan telah ditolak kerana TEMPOH TARIKH KELAHIRAN DAN TARIKH*

*PERKAHWINAN TIDAK MENCUKUPI BAGI SABJEK DINASABKAN KEPADA BAPA."*

**[50]** Before I venture any further in deliberating this particular issue, this is a suitable juncture to first of all understand and appreciate the position of a Muslim in our legal constitutional history and the Malaysian legal system. As early as 1927, pre-Merdeka, Thorne J in the case of **Ramah v. Laton [1927] 6 FMSLR 128** had pronounced that –

> *"Muslim law is not foreign law but local law; it is the law of the land, and the local law is a matter of which court must take judicial notice. The court must propound the law."*

**[51]** The Federal Constitution and the background to our legal history has always accepted that Muslims in this country are subjected to the general law enacted by Parliament as well as Islamic state laws enacted by the Legislature of each State. These constitutional arrangements are clearly stipulated in the various provisions of the Federal Constitution. Article 74(2) gives the Legislature of a State in Malaysia the authority to make laws on the matters stated in List II (State List) in the Ninth Schedule of the Federal Constitution. It is therefore by constitutional prescription that the Muslims in this country are subjected to the general law enacted by Parliament as well as Islamic laws enacted by the State Legislature. This is how to Article 74(2) of the Federal Constitution which states:

> *"Article 74: Subject matter of Federal and State Laws*
>
> *(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislative of a State may make laws enumerated in the State List (that* is *to* say, *the Second List set out in the Ninth Schedule) or the Concurrent* List."

**[52]** The legitimacy of a Muslim person is one of the areas in which the State Legislature is authorized by the Federal Constitution to enact state law. In fact, the Federal Constitution has explicitly and expressly ousted the legislative competence of Parliament to legislate in respect of legitimacy for Muslims. Based on Item 4(ii) of List I (Federal List) in the Ninth Schedule of the Federal Constitution, the matters excluded from federal legislative competence include Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gift or succession, testate and intestate.

**[53]** The intention of the framers of the Federal Constitution that Muslims in this country shall be governed by Islamic personal and family law is therefore clearly embedded in the Federal Constitution This was expressed by the then Supreme Court in **Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib [1992] 2 MLJ 793** where Harun Hashim SCJ (as he then was) said –

> *"Taking an objective view of the Constitution, it is obvious from the very beginning that the makers of the Constitution clearly*

*intended that Muslims of this country shall be governed by Islamic Family Law as evident from the Ninth Schedule to the Constitution."*

**[54]** We know that the personal law and family law are the heart of the *Shariah* and that part of Islamic Law has remained in force to govern the lives of Muslim in Malaysia. The position of Islam in the Federal Constitution was further elaborated by various case laws. Abdul Hamid Mohamad HMR (as he then was) in the case of **Kamariah bte Ali Dan Lain-Lain v Kerajaan Negeri Kelantan Dan Satu Lagi [2002] 3 MLJ 657** made his observation at page 665 of this decision:

"…*Ini kerana kedudukan Islam dalam Perlembagaan Persekutuan adalah berlainan daripada kedudukan agama-agama lain. Pertama, hanya Islam sebagai satu agama, yang disebut namanya dalam Perlembagan Persekutuan, iaitu sebagai 'agama bagi Persekutuan' (the religion of the Federation) - Perkara 3(1).*

*Kedua, Perlembagaan itu sendiri memberi kuasa kepada Badan Perundangan Negeri (bagi Negeri-Negeri) untuk mengkanunkan Hukum Syarak dalam perkara-perkara yang disebut dalam Senarai II, Senarai Negeri, Jadual Kesembilan Perlembagaan Persekutuan (Senarai II). Selaras dengan kehendak Senarai II itu, Akta Mahkamah Syariah (Bidang Kuasa Jenayah} 1965 (Syariah Courts (Criminal Jurisdiction) Act 1965) (Akta 355/1965) dan berbagai-bagai enakmen (untuk Negeri-Negeri) termasuk yang disebut dalam penghakiman ini, telah dikanunkan."*

**[55]** More recently, this Court in **ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener) [2016] 1 MLJ 153** had similarly stated that –

> *"In conclusion, we wish to highlight that a Muslim in Malaysia is not only subjected to the general laws enacted by Parliament but also to the state laws of religious nature enacted by Legislature of a state. … Taking the Federal Constitution as a whole, it is clear that it was the intention of the framers of our Constitution to allow Muslims in this country to be also governed by Islamic personal law. Thus, a Muslim in this country is therefore subjected to both the general laws enacted by Parliament and also the state laws enacted by the Legislature of a state."*

**[56]** It is also for that reason that the Legitimacy Act 1951, which governs the legitimisation of children born out of wedlock excludes its application to Muslims. Section 3(3) of the Law Reform (Marriage and Divorce) Act 1976 stipulates this exclusion.

**[57]** In the present case, both MEMK and NAW are Muslims and were married under Islamic law, and the birth of the Child occurred in Johor. Thus, they are subjected to Islamic law as found in the State of Johore.

**[58]** It is known and beyond doubt or dispute that an illegitimate Muslim child cannot be ascribed to the name of his father in Islam. This is made manifest when almost every legislation on the subject in the enactment of

each states of Malaysia contains this clear injunction. The Respondents here are subjected to section 111 of the Family Law (State of Johore) Enactment, 2003 (The Johore Family Law Enactment) is clear on that prohibition when it provides for the following:

> *"**Ascription of paternity***
> *111. Where a child is born to a woman who is married to a man more than six qamariah months from the date of the marriage or within four qamariah years after dissolution of the marriage either by the death of the man or by divorce, and the woman not having remarried, the nasab or paternity of the child is established in the man, but the man may, by way of li'an or imprecation, disavow or disclaim the child before the Court."*

**[59]** Similar provision prevails in all other legislations of the States of Malaysia on Islamic family laws, such as Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Terengganu as well as the Federal Territories.

**[60]** Before going any further, we cannot lose sight of the fact that the Respondents' application in the judicial review application was to quash the decision of the DGNR dated 08.05.2015, for refusing to correct the information in the Birth Register of the Child. The information that MEMK wanted to be corrected was the word "Abdullah", which he sought to be replaced with "MEMK". In this regard I agree that the DGNR had correctly rejected the Respondents' application for the Child to be ascribed to him

as “bin MEMK” not only due to the non application of section 13A but he also took into account the above written law applicable to the Respondents in the State legislation.

**[61]** We must not overlook what a judicial review entails. It has often been stressed that unfettered discretion is a contradiction in terms; it is another name for arbitrariness and has no place in public law (see **Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9** at 12; **Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337** at 359). In the celebrated words of Azlan Shah LP in **Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135** at 148:

> *“Every legal power must have legal limits, otherwise there is dictatorship. In particular, it* is *a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it* is *wrongly exercised, it becomes the duty of the courts to intervene.”*

**[62]** The general principles on the review of executive discretion by the court are found in the judgment of Lord Greene MR in **Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223.**

As summarised by Hashim Yeop Sani CJM in **Minister of Labour, Malaysia v Lie Seng Fatt** (*supra*) at 12:

> "... so *long* as *he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had mis-directed himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute."*

**[63]** The authority exercising the discretion "must act bona fide, fairly, honestly and honourably" (see **Government of Malaysia & Ors v Loh Wai Kong [1979] 2 MLJ** 33 at 36). If the discretion conferred by a statute is exercised in a way so as to defeat the policy and object of that statute the Courts would interfere with the discretion; where the authority has given insufficient weight to proper considerations, or was influenced by improper considerations would be another area meriting the Courts intervention (see **National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower [1980] 2 MLJ 189** at 191).

**[64]** This being a case of a judicial review application, the simple question confronting the Court is, can the DGNR be said to be unreasonable in recognising the applicable written law to the Respondents and should his decision be impugned by the Court?

**[65]** In dealing with this particular question and on the application of personal law , there are two aspects that I need to address:

(a) First, whether the DGNR was correct in rejecting the application to ascribe the name of the First Respondent of his natural father.

(b) Secondly, whether the decision of the DGNR to ascribe "bin Abdullah" is supported by legal or factual basis.

**[66]** Applying the above acceptable general principle in a judicial review exercise, it cannot be said that the DGNR in rejecting the application of the Respondents was unreasonable. His decision not to allow the Respondent Child's full name as "… bin MEMK" was clearly substantiated by the law applicable to the Respondents. Furthermore such written law is not inconsistent with any of the provisions in the BDRA. The DGNR's decision cannot therefore be impugned on reasons of unreasonableness.

**[67]** The act of the National Registration Department (NRD) in employing Islamic law in the exercise of its duty and power is not new in our legal system. In **Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors [2007] 4 MLJ 585** the NRD had done the same. The same issue

was before this Court. In that case, the main issue was whether the NRD had acted in accordance with law when it rejected Lina Joy's request to remove the word “Islam” from her National Registration Identity Card (“NRIC”). Lina Joy in applying to remove the word “Islam” from her NRIC, tendered a statutory declaration to support her application that she was no longer a Muslim. The NRD refused to accept her application on the ground that it was incomplete without an order of Syariah Court to the effect that she had renounced Islam.

**[68]** It was found and held in **Lina Joy** that the refusal of the NRD to act without the approval of religious Islamic authority was reasonable, because a renunciation of Islamic faith is a matter relating to Islamic law. Thus, it was held to be reasonable for the NRD in that case to impose the condition that a certificate or declaration or order from the Syariah Court that Lina Joy had renounced Islam must be produced. As such, this Court found that the imposition of such a condition was not an unreasonable decision. That remains the legal position of this Court and we see no reason to depart from the same.

**[69]** Quite similar to the present case, the DGNR in my view had acted reasonably in referring to Islamic law in performing registration of birth of an illegitimate Muslim child. It follows that the DGNR’s decision in

refusing to ascribe the father's name MEMK to the Child was in compliance with the law and is not tainted with illegality, irrationality or procedural impropriety such as to warrant interference by the Courts.

**"bin Abdullah issue"**

**[70]** The second aspect of Question 1 is on the application of the National Fatwa which requires a Muslim child to ascribe to "bin Abdullah". In deciding that the Child should carry his name as "bin Abdullah", the DGNR relied on two decisions of Mufti/Scholars of Islamic Jurisprudence through *Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan* (National Fatwa Committee) dated 28 January 1981.

**[71]** The Islamic jurisprudence is clear. Whilst the *Shariah* prohibits ascription to paternity the *Fiqh* is not consensus on the ruling that all illegitimate children must be "bin or binti Abdullah". The next issue confronting us is therefore whether the DGNR, in deciding as he did, had taken into account irrelevant matters, when he ascribed the Child's name to "bin Abdullah". In other words, can the DGNR be said to have acted unreasonably in this instance.

**[72]** There are various views on how an illegitimate child be named. The variation of the *Fiqh* or juristic opinions on this particular issue is

demonstrated in the *fatwa* made by various state *fatwa* committee as well as the National Fatwa Committee.

**[73]** Typically under the state legislation on the administration of Islamic laws, there is always a provision that allows a *fatwa* to be made or deliberated on an unsettled or controversial issue. Such a ruling or opinion, generally speaking, becomes law and binding, upon it been gazetted (see as an example section 34 of the Administration of Islamic Law (Federal Territories) Act 1993). This kind of provision is made on the recognition that there are often differences in views on *Fiqh* but not in *Shariah*. In this particular case, the *Shariah* on ascribing an illegitimate child to the natural father is clearly prohibited. The *Fiqh* on what such an illegitimate child be ascribed to is, however quite unsettled. In Islamic jurisprudence the Government of the day, is responsible to decide which amongst the view should be applicable to the *Ummah,* in line with the circumstances and local communities. This is known as the doctrine of *Siasah* as *Shariah* in the Islamic jurisprudence.

**[74]** The *Fiqh* on naming an illegitimate child is based on juristic opinion which differs from one to another. This explains why there are bound to be a divergence in view on the *Fiqh* which we are now dealing with i.e. whether an illegitimate child must be named as “bin Abdullah”. Due to the

divergence, the State law may adopt the appropriate fatwa in each State in cognizance of its local circumstances.

**[75]** The opinion of the National Fatwa Committee or a *fatwa* becomes law in the State of Johore and would be legally binding only if it is gazetted in the State *Gazette* under section 49 of the Administration of the Religion of Islam (State of Johor) Enactment 2003 (Enactment No 16 of 2003). That Enactment requires that a *fatwa* becomes law and only has the force of law upon gazetting and a provision on the procedure of making a *fatwa* is articulated in section 48. Under section 49, it further provides on how a *fatwa* becomes law and binding on the Muslim when it says:

> *"49.(1)Upon its publication or being informed, a fatwa shall be binding on every Muslim in the State of Johor as a dictate of his religion and it shall be his religious duty to abide by and uphold the fatwa, unless he is first permitted by the Fatwa Committee to depart from the fatwa in accordance with Hukum Syarak.*
>
> *(2) A fatwa shall be recognised by all courts in the State of Johor of all matters laid down therein."*

**[76]** Section 52 deals with "Adoption of advice and recommendation of the National Fatwa Committee". The section provides that:

> *"52.(1) The Fatwa Committee may adopt any advice and recommendation of the National Fatwa Committee which affects any act or observance which has been agreed upon*

*by the Conference of Rulers as an act or observance which extends to the Federation as a whole pursuant to Article 38(2)(b) of the Federal Constitution.*

*(2) The advice or recommendation adopted by virtue of subsection (1) shall be deemed to be a fatwa and section 48, except subsection 48(7), shall apply thereto.*

*(3) A fatwa published in the Gazette shall be accompanied by a statement that the fatwa is made under this section."*

**[77]** There are various fatwas issued on the naming of an illegitimate child, or how an illegitimate child should be named. In a *fatwa* gazetted and made in accordance with section 34 of the Administration of Islamic Law (Federal Territories) Act 1993, it states in the Federal Gazette No. PU(B) 446 of 2017 in paragraph 2 that:

*"Anak tidak sah taraf dalam perenggan 1 –*

(a) *Boleh dinasabkan, iaitu dibinkan atau dibintikan kepada –*

(i) *nama ibunya;*

(ii) *nama datuk wa in'alaw (dan ke atas) sebelah ibunya;*

(iii) *nama "Abdullah"; atau*

(iv) *mana-mana nama asma'ul-husna yang hendaklah dimulai dengan nama "Abdul" sebelum nama asma'ul-husna itu."*

From the above, and in the case of the Federal Territory an illegitimate child may be named as "bin" any of the persons enumerated in (a) (i) to (iv) above.

**[78]** In Perlis, the *fatwa* was gazetted by the *Warta Kerajaan Jil. 56* on 17.1.2013, that an illegitimate child can be named or "bin" of his biological father. That *fatwa* states that:

> *"Anak yang lahir kurang 6 bulan selepas ibunya berkahwin, boleh dibinkan kepada suami ibunya, kecuali jika dinafikan oleh si suami."*

**[79]** The *fatwa* in Pulau Pinang as gazetted in 2003 is:

> *"Anak tak sah taraf samada diikuti dengan perkahwinan pasangan itu atau tidak hendaklah dibinkan/dibintikan kepada "Abdullah".*

**[80]** In Kedah the gazetted *fatwa* is:

> *"Anak Tidak Sahtaraf tidak boleh dinasabkan kepada lelaki sama ada lelaki yang menyebabkan kelahirannya atau yang mengaku menjadi bapa kepada anak tersebut. Oleh itu, mereka tidak boleh mewarisi antara satu sama lain, tidak boleh menjadi mahram dan bapa tersebut tidak boleh menjadi wali kepada anak tersebut."*

**[81]** In Negeri Sembilan, the gazetted *fatwa* pursuant to Islamic Law (Negeri Sembilan) Enactment 1991 provides:

> *"Jika seorang bayi itu dilahirkan kurang 6 bulan daripada tarikh akad nikah maka anak tersebut haram dinasabkan kepada suami ibunya atau lelaki yang menyebabkan kehamilan anak tersebut."*

**[82]** The national-level *fatwa* body's stand is that illegitimate children have to be named "bin" or "binti" Abdullah regardless of whether his birth was followed by their parents' marriage.

**[83]** In citing and stating the various opinions or *fatwa* above, I am not making any decision as to the correctness or otherwise of any of them. It is to demonstrate a point that, there are differences of views on the *Fiqh* of how an illegitimate child can be named. These differences in view in *Fiqh* is acceptable in the Islamic jurisprudence. It may be due to the differences of views in the *Fiqh* such as this, that in the State Legislature a particular *fatwa* is only binding as the law only if it is adopted and gazetted as one. This then would give the relevant authorities in the State to choose which of the views is best suited to the people in that State.

**[84]** As no *fatwa* on how to name an illegitimate child is gazetted in Johor, I am of the view that the DGNR cannot unnecessarily impose the *fatwa* of the National Fatwa Committee on the Respondents. The National Fatwa can only apply to the State of Johor by virtue of section 52(1) which I had earlier referred to.

**[85]** Thus, in imposing the *fatwa* of the National Fatwa Committee without adhering to section 52, the DGNR had, therefore, usurped the power or the authority given to the Fatwa Committee of Johor in the imposition of “bin Abdullah” on the First Respondent. Not only that, his act was inconsistent with section 47 because only the Royal Highness the Sultan of Johor must assent to the publication of a *fatwa*. Since the Fatwa Committee of Johor had not adopted this *fatwa* of the National Fatwa Committee, it is not for the DGNR decide that the fatwa of the National Fatwa Committee is the one applicable to the Respondents.

**[86]** I, therefore, agree with the Respondents that the DGNR has no basis in law to impose the naming of “bin Abdullah” in this case and such a decision of the DGNR is subject to be impugned. I, therefore, answer Question 1 in the following way: In performing registration of births of Muslim children, the DGNR may rely on Islamic law applicable to the person.

**[87]** Now on **Question 2, Whether the civil court may determine** questions or matters on the legitimacy of Muslim children in respect of naming and ascription of paternity?

There is no necessity to deal with Question 2 since I have highlighted numerous times in my judgment that the legitimacy of the

child under Islamic law was never an issue in dispute.

**Notation on Section 13**

**[88]** The Respondents in their judicial review application sought to remove the notation "*Permohonan Seksyen 13"* on the ground that it is discriminatory against illegitimate children. However it has been the bone of contention of the Respondents' case that the DGNR's statutory duty under the BDRA, is purely to register births and deaths in the states of Peninsular Malaysia. To argue now that noting the true fact of birth is contradictory and discriminatory then it countered the argument that the DGNR cannot take into account any other matters in registering the birth of a child. And if the Birth Certificate is purely a record of birth, and not an evidence or determination of legitimacy nor a determination of the status of a child - in that same token when it registers the true fact of birth it cannot be argued to be discriminatory. I am not able to appreciate the argument on discrimination as that notation is purely a true reflection of the record of the birth of the Child.

**[89]** Hence, I agree with the argument by the Appellants that the notation stating it as an application pursuant to section 13 is a true reflection of the fact surrounding the registration of birth of the First Respondent. That

notation cannot be held to be discriminating when it only gives a true reflection of the surrounding fact.

**[90]** In the result, I allow the appeal of the Appellant in part and set aside the orders made by the Court of Appeal. I hereby make a consequential order for the DGNR to remove “bin Abdullah” from the Birth Certificate of the First Respondent. The name of the First Respondent without “bin Abdullah” shall so remain. This is also in line with the application made by the Respondents in his application dated 10.11.2015 as found in the Appeal Records Jilid 1 at page 171.

**[91]** My learned brothers Azahar Mohamed CJM, Mohd Zawawi Salleh FCJ and Idrus Harun FCJ had read this judgment in draft and had expressed their agreements on the reasons and the conclusion arrived in this judgment.

*signed*
**ROHANA YUSUF**
President of the Court of Appeal

Dated: **13 February 2020**

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