PRESS SUMMARY

CIVIL APPEAL NO.: 01-43-09/2017(W)

The National Registration Department & 2 Ors v A Child & 2 Ors

1. This appeal relates to the ambit of the powers exercisable by the Registrar-General of Births and Deaths under the provisions of the **Births and Deaths Registration Act 1957 (Act 299) ("the BDRA 1957")**, in relation to recording or registering the full name of a child who is illegitimate under the Muslim faith. More particularly, it turns on the record of paternity of such a child in the Register of Births and Deaths under the said Act.

2. In ascertaining the scope of the Registrar-General's powers it is necessary to construe specific provisions of the **Births and Deaths Registration Act 1957 ("BDRA 1957")** within the context of the entire Act. It is of primary importance to bear in mind that the **BDRA 1957** was enacted pursuant to Federal powers as contained in the **Ninth Schedule, List 1 – Federal List, Item 12 of the Federal Constitution**.

3. It is important to clarify at the outset that this is not a case seeking to confer legitimacy on a Muslim child deemed to be born out of wedlock under Muslim personal law. The legitimacy of the child in the instant appeal is not in issue.

Salient Facts

4. This appeal stems from a judicial review application filed by the father, MEMK, and mother NAW, of a child ('the Child'), who seek to quash the

decision of the 2nd Appellant, the Registrar-General of Births and Deaths ('the Registrar-General') dated 6 March 2012. On that date the Registrar-General, on behalf of the 1st Appellant, the Jabatan Pendaftaran Negara ('the Registry of Births and Deaths') issued a birth certificate in respect of the Child which bears the surname "Abdullah" rather than the father's name, "MEMK".

5. The birth certificate was so issued despite the fact that the father's name, i.e. MEMK had been registered as the Child's father pursuant to **section 13 BDRA 1957**. Put simply, the father's name was not ascribed to the child as his surname or patronymic name on the birth certificate.

6. To echo the judgment of the Court of Appeal, the child's name as it presently appears on his birth certificate is "A Child bin Abdullah" and not "A Child bin MEMK".

7. The issue before the Courts is simply whether the Registrar-General, whose powers are expressly set out in the BDRA 1957, acted within or outside the scope of his powers in registering the Child's birth by recording his name as " A Child bin Abdullah" and not "A Child bin MEMK", given that the name of the father was recorded at birth as MEMK.

8. The majority judgment has been delivered by my learned sister Rohana Yusuf, the President of the Court of Appeal. However, and with the greatest of respect, I am unable to agree with the reasoning and conclusions of my learned sister. I am therefore constrained to deliver this separate judgment. My learned brother, Justice Abang Iskandar Abang Hashim, having read these grounds of judgment concurs with the same.

The Questions of Law

9. This appeal raises four fundamental questions necessitating constitutional and statutory interpretation:

(1) Is **section 13A of the BRDA 1957** inapplicable to Malays and/or Muslims;

(2) Is legislation enacted in respect of matters falling within the Federal List, such as the **BDRA 1957**, to be construed by reference to, or by incorporation of, enactments or ordinances enacted under the State List, such as the personal law relating to Muslims in relation to legitimacy?

(3) Were the Appellants correct in law, on the facts of this case, to ascribe the surname 'bin Abdullah' to the Child;

And

(4) If the Appellants acted outside the scope of their jurisdiction under the **BDRA 1957**, should this Court order that the child be ascribed his father's name, MEMK on the birth certificate? Or should the birth certificate bear only the Child's name?

Whether section 13A of the Births and Deaths Registration Act 1957 is inapplicable to Malays and/or Muslims

10. It is an undisputed fact in this case that the Child is, under the Islamic law of Johore, an illegitimate child. Before proceeding to ascertain the application of **section 13A of the BDRA 1957**, it would be pertinent to first examine the general rule in relation to the registration of births of children.

11. The **BDRA 1957** draws no distinction between Muslim and non-Muslim children. The only two blanket exceptions applicable in respect of the registration of child births are contained in **sections 13 and 13A** which stipulate the birth registration details in respect of illegitimate children.

12. **Section 13** is accordingly the first exception to **section 7(2) of the BDRA 1957** in that the purported father of a child need not provide information of the birth of such child unless such person acknowledging himself to be the father jointly requests with the mother to do so.

13. On the facts of this case, both parents of the Child, MEMK and NAW, entered a joint request to register MEMK as the father and this request was essentially approved. As matters stand, the Child's birth certification identifies MEMK as his father. Paternity is therefore neither unknown or disputed.

14. The second exception is contained in **section 13A(2) of the BDRA 1957**. Despite having registered MEMK as the Child's father, the Appellants ascribed the latter the surname "Bin Abdullah". The bulk of the parties' contentions rest on the word "surname".

Surname

15. "Surname" as utilised in the **BDRA 1957** is not defined. Neither is it defined in the in the **Interpretation Acts 1948 and 1967**.

16. The Appellants submitted expert evidence to explain that certain races in Malaysia do not have surnames. With respect, it is a well-accepted principle of law that the opinion of experts is confined to the facts of a case, and they cannot purport to draw legal inferences or provide their subjective view of a particular matter. More so when such opinion purports to provide a specific definition of a term utilised in specific legislation for a specific purpose.

17. In the present case, the meaning of "surname" is a question of law because it requires statutory interpretation. Thus, the view of experts on the subject is, with respect, entirely irrelevant. None of the experts was, in any event, presenting an opinion in relation to the statutory interpretation of "surname" in the context of the **BDRA 1957**.

18. This is important because it must be borne in mind that the **BDRA 1957** is essentially a repository of facts and statistics in relation to the births and deaths of persons in Malaysia. It is enacted pursuant to **Item 12, of the Federal List in the Ninth Schedule,** which item relates to census and statistics in the nation. It is applicable to all persons in the country, regardless of race and religion. No differentiation is made in the applicability of the provisions of the **BDRA 1957** to the various races who comprise the citizens of this plural population comprising Malaysia.

19. Neither does **the Act** relate to, provide for, or prescribe stipulations in relation to legitimacy, naming conventions, cultural practices or religious law. In other words it is an entirely secular Act.

20. It is also pertinent that the experts did not address the issue of whether 'surname' would include patronymic surnames, particularly in the context of the **BDRA 1957**. The purpose of the **BDRA 1957** is to provide a full repository or register of births within the country. An essential feature of that register is that the identity of the mother and father, meaning the biological mother and father, is recorded. This affords a child an identity.

21. In the context of the Child, the paternity of the father is certainly not in issue. It follows that for the purposes of registering his birth and identification of his biological parents, the Child ought to be ascribed the name of his biological father as that is a fact that is not in dispute. It accords him a full name and identity. A child born in this country relies on that identity to enjoy basic human rights such as an education and other benefits that accrue to citizens of Malaysia.

22. Ultimately the issue of how the term surname is to be interpreted must be one of statutory interpretation. The primary rule is the literal rule which envisages that the term 'surname' in **section 13A** is to be given its ordinary and natural meaning, but within the context of the **BDRA 1957**. This means that the word 'surname' cannot be construed *in vacuo* or without regard to the surrounding words, context and most significantly, the purpose or objective of **the Act**.

23. Courts must interpret legislation according to the clear wording of the statute, and in keeping with its context. Even if it is suggested that 'surname' in **section 13A** is ambiguous, the exercise of statutory construction does not end there. It remains incumbent upon the Courts to undertake the task of

construing the section, adopting a purposive approach. It is beyond dispute that the Courts are tasked to give meaning to legislation in accordance with its object, purpose and prevailing legislative intent.

24. Applying the purposive approach, it follows that the object of **section 13A** is to enable or facilitate the entry of a father's name where a child is illegitimate. It allows paternity to be established for an illegitimate child where the father acknowledges paternity, and seeks and consents to have his name specified as the child's surname. In short, the section allows for a formal acknowledgement of paternity, for purposes of record in the register of births.

25. Paternity provides information in relation to the identity of the biological father of a child. The **BDRA 1957** is enacted to provide for a census of all citizens through a system of registration of births and deaths nationwide. As such is its object, the application of a purposive approach to statutory construction would yield the result that the term 'surname' in **section 13A** ought to be construed as referring to both a patronymic name as well as the **English Oxford Dictionary** meaning of the word.

26. The expert opinions relied upon in the majority judgment might well provide in essence that Malays have no surnames as understood in the traditional English language and culture sense. However it does not thereby follow that **section 13A of the BDRA 1957** therefore becomes inapplicable to an entire segment of society or citizens in the nation. The more logical and reasonable conclusion which accords with a purposive approach to statutory interpretation would be to construe 'surname' in the context of the object of the Act, so as to mean the name of the father. After all, the purpose of

section 13A is to enable an illegitimate child to have the name of his father added to his name so that the identity of the biological father is expressly stated.

27. The attendant question that arises for consideration is whether the **BDRA 1957**, which is a federal civil law applicable to all persons/citizens of the nation, can be construed such that one section only in the entire Act, namely **section 13A**, is inapplicable to a particular section of citizens, by reason of the use of the word 'surname'. And can it be so, particularly where Parliament has made no such provision, expressly or impliedly? In the absence of any such stipulation by Parliament in the statute or the section, is it open to the Courts to arrive at such a divergent conclusion? I am unable to conclude, with respect, that such was the intention of Parliament. Such a construction gives rise to a result that is not tenable. It strains the language and purpose of **section 13A** and the statute as a whole.

28. In other words it cannot simply be concluded that in view of the word used in the section, namely 'surname', the entire **section** i.e. **13A** becomes inapplicable to a particular segment of the population. This is particularly so, given that such a conclusion leads to the inapplicability of the entire section to the majority of the population of Malaysia, in respect of an Act that has application, as promulgated by Parliament, to all citizens of the country. It is pertinent in this context that many other races within the country also do not have "surnames" in the traditional sense used in the Western culture. This would include, for example Indians and Kadazans to name a few.

29. The consequence of attributing a literal dictionary meaning to the term "surname" in the **BDRA 1957** would be to render the section ineffectual. When construed literally the section would have no effect in respect of all persons who do not have a family name or surname.

30. In direct contrast, attributing a construction to surname which includes a patronymic surname, immediately affords the section relevance, as it is then applicable to all segments of the populace, regardless of race, culture and social convention. As such the application of a purposive approach, whereby the term 'surname' is construed as including a 'patronymic surname' affords greater rationality and lucidity to the section and Act as a whole. The Courts are bound to construe legislation in such a way as to avoid an absurd result.

31. In other words, to conclude that **section 13A** is inapplicable to Malays and/or Muslims on the grounds that they do not possess surnames, would amount, in my view, to going against the express purpose set out in **section 13A**, namely to afford a child born out of wedlock the right to have his father's name specified on his birth certificate. This would run awry of the textual meaning to be accorded to 'surname' in that section. Significantly, it would preclude such persons, albeit non-Muslims, from utilising **section 13A** too.

32. It might be argued that the use of the words "if any" in **section 13A(2)** suggests that Parliament envisioned not all persons having surnames, even if that includes patronymic surnames. With respect, I disagree. Form JPM.LM01 prescribed either under the **BDRR 1958** or the **BDRR 2019** makes no specific allocation for surnames in spite of the **section 13A**. The

Form only provides for “Nama” or “Nama Penuh” under the “Maklumat Kanak-Kanak” header. Reading the Form with **section 13A t**herefore suggests that a surname proper or a patronymic surname, constitutes a part of the child’s name or full name.

33. For the foregoing reasons, as the **BDRA 1957** makes no distinction in its application between Muslims or non-Muslims, and until and unless Parliament amends the law to this effect, it is my view that **sections 13 and 13A** apply to apply to all persons. Thus, it is my considered view that the Appellants were under the legal obligation to ascribe to the Child the name ‘Child bin MEMK’ representing the MEMK’s personal name as a patronymic surname.

Whether the Personal law of Muslims as enacted under the State List Applies to the BDRA 1957

34. The starting point for this discussion is **Articles 74(1), (2) and (3) of the Federal Constitution**. The above provisions clearly stipulate that the legislative powers respectively of the Federal and State Legislatures are mutually exclusive save for the **Concurrent List**. One cannot make laws within the purview of the other unless expressly authorised by the conditions stipulated in the **Federal Constitution**. The power of the States to enact laws relating to the Islamic religion is expressly circumscribed by **Item 1, State List, Ninth Schedule of the Federal Constitution**. This quite plainly means that any law promulgated by the States in relation to Islamic personal law applies only in that State. Such has been the structure and demarcation

of the powers of the Federation and the individual States since Independence Day.

35. Matters which fall within the exclusive purview of the State List have no impact and bearing on matters which fall strictly within the exclusive purview of Parliament – the Federal Legislature.

36. The strict federality of the **BDRA 1957** as referenced earlier, is borne out by **Item 12(a) of the Federal Constitution, Ninth Schedule, List 1 ('Federal list')**.

37. In this context, **Item 3(e) of the Federal List** is also germane and again reaffirms that the registration of births and deaths is strictly a federal matter.

38. Further a perusal of the long title of the **BDRA 1957** reveals that it was made under the auspices of **Item 12(a)**. The **BDRA 1957** is therefore, for all intents and purposes, a federal law dealing with subject matter that falls within the Federal List namely, registration of births and deaths. The power of Parliament to enact the **BDRA 1957** is strictly a federal legislative power over which the State-legislated law can have no bearing.

39. No cognisance has been taken of **Article 3(1)** and particularly **Article 3(4) of the Federal Constitution**. **Clause (4) is** significant because it clearly means that the overarching provisions of **Article 74**, which demarcates the powers of the Federal and State Legislatures, continue to apply. Thus, Islamic law has no application insofar as the registration of deaths and births is concerned.

40. The structure of the **Federal Constitution** in the present context is such that a clear divide is maintained between civil law, which is intrinsically secular in nature and applicable to all citizens on the one hand, and Muslim personal law on the other, which is confined to State legislation promulgated in accordance with the State List and applicable only to Muslims. This clear demarcation between the Federal and State legislatures is an essential or intrinsic feature of the **Federal Constitution**, and ought not to be violated or transgressed. To assimilate or import state law or **List 2** matters in the construction, implementation or application of federal law would be to violate the internal architecture of the carefully constructed and circumscribed structure of the Federal Constitution. I therefore conclude that the contents of the **Johore State Enactment** cannot be imported and applied in the construction of federal law, namely the **BDRA 1957**. To do so would be to conflate federal law and State law. It would also conflate the concepts of paternity and legitimacy, which are differently treated under these separate "regimes".

41. Most importantly there can be no intrusion or violence done to Islam or the ascription of paternity under Muslim personal law because that is preserved and practiced as expressly set out in the **Johore State Enactment**.

42. This separate treatment of the civil law and Muslim personal law which arises from the clear demarcation of Federal and State law, is in keeping with the Rule of Law as applicable in Malaysia, a plural society, which enjoys a dual system of law. The genius of the structure of the **Federal Constitution**

lies in its bifurcated system which embraces and encapsulates both secular and religious laws in its unique structure.

43. By virtue of the **Federal Constitution**, the **Johor Enactment 2003** does not apply to the registration of births and deaths, which is governed solely by federally promulgated law – the **BDRA 1957**.

44. The Appellants, the Intervener and the amicus argued that the non-ascription of paternity in the birth certificate is a crucial factor to determine the status of the legitimacy of a person before the Syariah Court. With respect, this argument is somewhat misplaced. In the first place, the function of the births and deaths register is to record facts relevant to the birth. The register does not however, purport to conclusively establish the truth of the contents of a birth certificate. (See: **section 33 of the BDRA 1957)**.

45. As such, if the legitimacy of a person is in issue before the Syariah Courts, it is for the person alleging that the other is illegitimate to prove that fact. Such a fact is capable of proof by simple arithmetic, namely by calculating the difference in months or days between the birth of the person and the date of marriage of his parents.

46. The National Fatwa Council ("NFC") is a federal body and its fatwas therefore do not have the force of law. If the NFC's fatwas are gazetted by the relevant State, then it applies as part of that State's law. However, the NFC's fatwas in this case have not been gazetted in Johor and even if they were, thereby becoming State law, that would, in any case, have no effect insofar as the interpretation and application of the **BDRA 1957** is concerned.

This is because, as explained, the intrinsic structure of the **Federal Constitution** renders all federal law promulgated for general federal purposes secular. Islamic law can only be enacted by the State and have effect in that State over matters in respect of which it has jurisdiction.

47. Based on the foregoing, it is my considered view that the Appellants acted *ultra vires* the **BDRA 1957** by referring to external sources of law when exercising their powers of registration under that law, which the Federal Constitution and the **BDRA 1957** do not otherwise permit them to do.

Were the Appellants correct in law, on the facts of this case, to ascribe the surname 'bin Abdullah' to the Child

And

If the Appellants acted outside the scope of their jurisdiction under the BDRA 1957, should this Court order that the child be ascribed his father's name, MEMK on the birth certificate? Or should the birth certificate bear only the Child's name

48. Premised on the above reasoning, the Appellants were not entitled to ascribe the name 'Bin Abdullah' to the 1st Respondent. Illegality, irrationality and procedural impropriety generally constitute well-accepted grounds for judicial review. Without referencing any of the three principles directly, it is beyond doubt, settled law that administrative bodies, being creatures of statute, only have such powers conferred on them by law.

49. Decided case law has held that the word 'may' generally confers discretionary power. Such power is not absolute and cannot be exercised arbitrarily according to the subjective opinion of the decision maker or by reference to materials outside of the four corners of the relevant statute governing the exercise of such power. This principle is applicable to the Registrar-General of Births and Deaths, who was undertaking, at all times, an administrative function within the purview of the **BDRA 1957**. He was not acting as an adjudicator. To that extent his discretion was circumscribed to matters within **the Act**.

50. The question is whether it was open to the Appellants to make the Impugned Decision to reject the Respondents' **section 27(3)** application to have the 1st Respondent's surname corrected from "Bin Abdullah" to the 2nd Respondent's name in patronymic form.

51. The Court of Appeal noted that **section 13A(2) of the BDRA 1957** permits MEMK to have his surname used in respect of his illegitimate son, the Child. It further held that it was not within the power of the Appellants to arbitrarily elect the surname "bin Abdullah" over "bin MEMK". Based on the foregoing, and the well-settled principles of administrative law, the judgment of the Court of Appeal is, with respect, correct.

52. Administrative law's emphasis on the objective exercise of discretion is supported by another principle of law, namely that the decision maker must not take into account irrelevant considerations and only consider relevant considerations. The ascription of 'bin Abdullah' is not countenanced by the **BDRA 1957**. The Appellants were therefore duty bound by virtue of **section**

27(3) of the Act, upon the application of the parents, to rectify the mistake they made in ascribing the name 'bin Abdullah' to the Child.

53. To do otherwise would amount to the Registrar-General taking on a function that has not been conferred upon him under the Act. Neither has he been conferred with powers as an adjudicator with the ability to adjudge on the best option to be adopted in relation to the naming convention of a child, be it in relation to religion, culture or otherwise.

54. With respect, and notwithstanding counsel for the Respondents' concession, I do not think that making an order to include only the 1st Respondent's name without including the 2nd Respondent's name is legally tenable. For one, practice and even Form JPM.LM01 suggests that the child is to enjoy the benefit of his full name. There is no legal authority to suggest that the patronymic surname 'bin Abdullah' is correct just as there is no authority to suggest that only the 1st Respondent's name alone should be reflected. To ascribe to him only his name without his father's name as his full name amount to an implicit recognition that State-promulgated Islamic law declaring him illegitimate applies.

55. If the present appeal was any other case involving a legitimate child, the Appellants would have followed the typical naming convention applied to all Muslim children in this country. That convention should not change on the facts of this case. This is so given that the requirements of **section 13A of the BDRA 1957** have been met, and as Muslim personal law relating to paternity and legitimacy is not applicable to the **BDRA 1957**, which is federal law.

Conclusion

56. For completeness and based on the foregoing, I accordingly answer the three leave questions as posed, as follows:

(i) Whether in performing the registration of births of Muslim children, the Register of Births and Deaths may refer to and rely on sources of Islamic Law on legitimacy?

Answer: **Negative**.

(ii) Whether the civil court may determine questions or matters on the legitimacy of Muslim children in respect of naming and ascription of paternity?

Answer: **Negative**. Based on the above reasoning, this is a matter exclusively for the Syariah Courts to decide. That said, the birth certificate is not conclusive proof of the paternity or legitimacy of a person and the incorrect application of the **BDRA 1957** is amenable to judicial review by the civil Courts.

(iii) Whether **section 13A of Act 299 (the BDRA 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 the father of the children?

Answer: **Affirmative**.

57. I would dismiss the appeal and affirm the decision of the Court of Appeal.

Note: This summary is merely to assist in understanding the judgment of the court. The full judgment is the only authoritative document.