IN THE COURT OF APPEAL MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. W-01(A)-365-09/2016

BETWEEN

1. A CHILD

2. M.E.M.K.

3. N.A.W. … APPELLANTS

AND

1. JABATAN PENDAFTARAN NEGARA

2. KETUA PENGARAH PENDAFTARAN NEGARA

3. KERAJAAN MALAYSIA … RESPONDENTS

[In the matter of Kuala Lumpur High Court Judicial Review Application No: 25-250-09/2015

Between

1. A Child

2. M.E.M.K.

3. N.A.W. … Applicants

And

1. Jabatan Pendaftaran Negara

2. Ketua Pengarah Pendaftaran Negara

3. Kerajaan Malaysia … Respondents]

CORAM

TENGKU MAIMUN TUAN MAT, JCA

ABDUL RAHMAN SEBLI, JCA

ZALEHA YUSOF, JCA

JUDGMENT

Introduction

[1] At the request of learned counsel for the appellants we are withholding the real names of the appellants to protect the identity of the 1st appellant, who was born illegitimate to the 3rd appellant. In the High Court, the 1st appellant filed the judicial review application through his next friends the 2nd and 3rd appellants.

[2] The premise of judicial review is that the entity seized with a legal power has breached the limits upon the grant of that power. Every power must have legal limits, otherwise there is dictatorship: *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 per Raja Azlan Shah Ag. CJ (Malaya) (as His late Royal Highness then was).

[3] This appeal concerns the question whether the Director General of National Registration (2nd respondent) has power under the Births and Deaths Registration Act 1957 ("the BDRA") to ascribe the patronymic surname of "bin Abdullah" to an illegitimate Muslim child in place of his father's name and against his wish. Legal technicalities aside, the issue involves the question whether an innocent child should be subjected to humiliation, embarrassment and public scorn for the rest of his life.

[4] We heard arguments by both sides on 25 May 2017 and unanimously allowed the appellants' appeal in terms of paragraphs 1.4 and 1.5 of Enclosure 1 with no order as to costs. The High Court decision was set aside. These are our grounds for allowing the appeal.

The background facts

[5] The 2nd and 3rd appellants, both Muslims, were legally married on 24 October 2009. The 1st appellant was born to the 3rd appellant in Johor on 17 April 2010, which was 5 months and 24 days (5 months and 27 days according to the Islamic Qamariah Calendar) from the date of her marriage to the 2nd appellant. By simple arithmetical calculation, this period was less than 6 months from the date of their marriage. The 1st appellant's birth was only registered two years later as late registration pursuant to section 12(1) of the BDRA.

[6] At the time of making the application for late registration, the 2nd and 3rd appellants jointly applied for the 2nd appellant's name to be entered in the register as the father of the 1st appellant pursuant to section 13. This provision reads:

> "**Provisions as to father of illegitimate child**
>
> 13. Notwithstanding anything in the foregoing provisions of this Act, **in the case of an illegitimate child**, no person shall as a father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as the father of the child except **at the joint request of the mother and the person acknowledging himself to be the father of the child**, and that person shall in that case sign the register together with the mother."
>
> (emphasis added)

[7] The provision clearly allows for the name of the person acknowledging himself to be the father of the illegitimate child to be entered in the register as the name of the child's father, provided the mother of the child agrees to it. The 2nd and 3rd appellants' application was approved, meaning to say the 2nd respondent acknowledged the 2nd appellant as the lawful father of the 1st appellant. However, on the 1st

appellant's birth certificate that was issued on 6 March 2012, his surname was given as "Abdullah" instead of "M.E.M.K.", the 2nd appellant.

[8] Thus, although the 2nd appellant's name had been duly registered as the 1st appellant's father pursuant to section 13, his name was not ascribed to the 1st appellant as his surname in the birth certificate. On the face of the birth certificate the 1st appellant's father is "Abdullah" and not the 2nd appellant. His full name as it presently appears on his birth certificate is "A Child bin Abdullah" and not "A Child bin M.E.M.K".

[9] The surname "Abdullah" may not cause much of an embarrassment, on the surface at least, if the 2nd appellant's name happens to be Abdullah or if the 1st appellant is a convert to Islam. But the 1st appellant was born a Muslim, not a convert and his father's name is not Abdullah. His father's name is M.E.M.K.

[10] Herein lies the injustice because the sad truth is, there is a stigma attached to the surname "bin Abdullah" among the Muslim community. It is generally understood that if a Muslim child is given "Abdullah" as his surname when his father's name is not in fact Abdullah, he will be exposed as a child that is born out of wedlock (*Anak luar nikah*).

[11] It will just be a matter of time before he discovers the hard truth about his status as an illegitimate child by looking at his birth certificate, which no doubt he will have access to as he grows older. His identity card (IC) that will be issued later will also retain "Abdullah" as his surname and all official documents involving him will likewise bear the same surname.

[12] One can imagine the 1st appellant's grief, not to mention the feeling of shame that he has to bear throughout his existence. A birth certificate serves as a poignant reminder of one's birth into this transitory world. It should not be turned into an instrument of shame.

[13] Unfair as it may appear to be, the 1st appellant will have to carry the stigma of being an illegitimate child for the rest of his life, a classic case of being punished for the sins of his parents, who had in fact been legally married before he was born. They remain his parents to this day. His grief will be compounded if he compares his birth certificate with the birth certificates of his brothers and sisters (if any), which will carry their own father's name as their surnames, unlike his birth certificate.

[14] As if the surname "Abdullah" is not bad enough to expose him as an illegitimate child, the 1st appellant's birth certificate also contains the entry "Permohonan Seksyen 13". This is yet another entry that is certain to give away his status as an illegitimate child as the entry is an explicit acknowledgment by the 2nd appellant that the 1st appellant is an illegitimate child.

[15] An application was made by the 2nd appellant on 2 February 2015 to correct the 1st appellant's surname from "Abdullah" to his name in the register on the ground of error of fact or substance. The application was made pursuant to section 27(3) of the BDRA, which provides as follows:

> "(3) Any **error of fact or substance** in any register may be corrected by entry (without any alteration of the original entry) by the Registrar-General upon payment of the prescribed fee and upon production by the person requiring such error to be corrected of a statutory declaration setting forth the nature of the error and the true facts of the case, and made by two persons required by this Act to give information concerning the birth, still-birth or death

with reference to which the error has been made, or in default of such persons then by two credible persons having knowledge to the satisfaction of the Registrar-General of the truth of the case; and the Registrar-General may if he is satisfied of the facts stated in the statutory declaration cause such entry to be certified and the day and the month and the year when such correction is made to be added thereto."
(emphasis added)

[16] To the 2nd appellant's disappointment, the 2nd respondent by letter dated 8 May 2015 rejected his application. The second paragraph of the rejection letter reads:

"2. Dukacita dimaklumkan bahawa permohonan pembetulan maklumat dalam Daftar Kelahiran anak tuan/puan telah **DITOLAK** kerana
TEMPOH TARIKH KELAHIRAN DAN TARIKH PERKAHWINAN TIDAK MENCUKUPI BAGI SUBJEK DINASABKAN KEPADA BAPA."

The application for review

[17] It is plain and obvious that the decision by the 2nd respondent was based on the religious ground that the surname of an illegitimate Muslim child cannot be ascribed to the name of his father but must be ascribed to the surname "Abdullah", and this is so even where his parents had already been legally married at the time of his birth.

[18] Aggrieved by the decision, on 3 September 2015 the appellants filed an application in the High Court for judicial review to quash the decision of the 2nd respondent. Other than for declaratory reliefs, the appellants also applied for mandamus to compel the 2nd respondent to do, amongst others, the following acts:

(i) To remove the entry "Permohonan Seksyen 13" from the 1st appellant's birth certificate;

(ii) To replace the surname "Abdullah" with the 2nd appellant's name on the 1st appellant's birth certificate.

[19] The issues for the High Court's determination were:

(a) Whether the respondents' refusal to correct or alter the particulars "Abdullah" with the 2nd appellant's name was in accordance with law;

(b) Whether the 2nd respondent's entry of "Permohonan Seksyen 13" in the 1st appellant's birth certificate was in accordance with law;

(c) Whether the entry of "bin Abdullah" and "Permohonan Seksyen 13" in the 1st appellant's birth certificate infringed the 1st appellant's fundamental liberties under Articles 5, 8, 10 and 12 of the Federal Constitution.

[20] The appellants' application was dismissed by the High Court on 4 August 2016. The learned judge held that the 2nd respondent's refusal to alter the 1st appellant's surname from "Abdullah" to the 2nd appellant's name was in accordance with law and that the entry "Permohonan Seksyen 13" in the 1st appellant's birth certificate did not transgress any of the 1st appellant's fundamental liberties under the Federal Constitution.

[21] The learned judge reasoned that the 2nd respondent was not wrong to rely on the Islamic law on legitimacy in deciding to register the 1st appellant's surname as "Abdullah" in his birth certificate instead of the 2nd appellant's name.

The respondents' position

[22] In urging this Court to affirm the High Court's decision, the learned Senior Federal Counsel submitted that the 2nd respondent's decision was not tainted with illegality, irrationality or procedural impropriety to warrant interference by this Court, citing the judgment of Lord Diplock in the Privy Council case of *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] 1 AC 374.

[23] As for the entry of "Permohonan Seksyen 13" in the 1st appellant's birth certificate, it was contended that the decision by the 2nd respondent to make the entry was not tainted with unreasonableness which is so outrageous beyond logic, nor did it transgress the 1st appellant's fundamental liberties under Articles 5, 8 and 10 of the Federal Constitution.

Information of birth and entry of surname

[24] Section 7(2) of the BDRA lists out the persons who are qualified to give information concerning the birth of a child. It reads:

> "**Particulars of births to be registered**
>
> 7. (2) The following persons shall be qualified to give information concerning a birth, that is to say –
>
> (a) the father of the child;
> (b) the mother of the child;
> (c) the occupier of the house in which the child was to the knowledge of that occupier born;
> (d) any person present at the birth; and
> (e) any person having charge of the child."

[25] With regard to the surname of a child, section 13A provides as follows:

> "**Surname of child**
> 13A. (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)

Sub-section 13A(2)

[26] Sub-section 13A(2) above is crux to the issue. This is the provision that governs the entry of an illegitimate child's surname in the register. Despite the obvious importance of the provision, the learned judge did not consider it at all in her grounds of judgment. Her focus was on section 13 which, although relevant, is not determinative of the issue of whether the 2nd respondent had acted in accordance with the law in rejecting the 2nd appellant's application to use his name instead of "Abdullah" as the 1st appellant's surname.

[27] We have to say, with the greatest of respect to the learned judge, that her failure to direct her mind to section 13A(2) rendered her judgment fatally flawed and liable to be set aside *ex debito justitiae*, i.e. a remedy that the court has no discretion to refuse. The language of sub-section 13A(2) is clear and free from ambiguity. It means the following:

(1) Where the mother of the illegitimate child is the informant and volunteers the information, the surname of the child may be in her name.

(2) If so requested by the person registered as the father of the illegitimate child pursuant to section 13, the surname of the child may be in his name.

[28] In simple language what it means is that the surname of an illegitimate child can be either of the following:

(i) the mother's name; or

(ii) the father's name.

[29] The name of the 1st appellant's mother is N.A.W. and his father's name is M.E.M.K. Therefore his surname should either be N.A.W. or M.E.M.K. and certainly not Abdullah, but since the 2nd appellant had applied to use his name as the 1st appellant's surname, the 1st appellant's patronymic surname should be in his name. The 2nd appellant was only asking what he was entitled to under the law, nothing more and nothing less.

[30] The surname "Abdullah" that the 2nd respondent unilaterally and on his own volition ascribed to the 1st appellant is unquestionably not the name of the 1st appellant's mother nor his father's name and is therefore neither of the two surnames that the 2nd respondent was authorized by section 13A(2) to enter in the register.

[31] In fact section 13 in clear terms provides that *"and the Registrar shall not enter in the register the name of any person as the father of the child*

except at the joint request of the mother and the person acknowledging himself to be the father of the child". No such request was ever made by the 2nd and 3rd appellants to register "Abdullah" as the 1st appellant's father and therefore his surname.

[32] The name "Abdullah" is not even mentioned anywhere in the BDRA. Thus the entry of the surname "Abdullah" in the birth certificate of the 1st appellant was a clear error of fact or substance within the meaning of section 27(3) which obligated correction by the 2nd respondent.

[33] We were not referred to any authority directly on section 27(3) of the BDRA, nor 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 Nareshbhai 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 Register 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)

[34] Having regard to section 13A(2) read with section 27(3) of the BDRA, we were of the view that the 2nd respondent had acted irrationally and outside the scope of his power in registering the surname "Abdullah" as the 1st appellant's surname in the birth certificate and overriding the 2nd appellant's wish to have his name used as the 1st appellant's surname.

[35] It is important to note that the BDRA makes no distinction between a Muslim child and a non-Muslim child and section 13A(2) does not say that an illegitimate Muslim child must be treated differently from a non-Muslim child when it comes to the registration of a surname. Specifically, section 13A(2) does not say that in the case of a Muslim child, his surname must be "Abdullah".

[36] A surname is nothing more than the name borne in common by members of the family, as distinct from a first name. In relation to a child, the *Oxford Dictionary of Law* (Seventh Edition) defines the word "surname" as follows:

"A legitimate child, by custom, takes the name of his father and an illegitimate child that of his mother (although the father's name may be entered on the birth registration if both parents agree or an affiliation order names the man as the putative father)."

[37] That of course is the common law position, which is consistent with section 13A(1) and (2) of the BDRA. Under the law therefore (and we are here talking about civil law and not syariah law), a child derives his

surname either from his mother's name or his father's name. If he is a legitimate child, section 13A(1) applies. If he is an illegitimate child, section 13A(2) applies. It cannot be more straightforward than that.

[38] Where the father's name has already been entered in the birth certificate, we see no reason why there is a further need to enter in the birth certificate the surname of the child, legitimate or illegitimate. If at all the entry is necessary, it is in the identity card that will be issued later when the child comes of age.

[39] We say this for a simple reason. The purpose of a surname is to identify who the child's father is. Where the birth certificate itself already contains the name of the child's father in the relevant column, it should be obvious who the child's father is. It is self-evident. As the Malay saying goes *"sudah terang lagi bersuluh"*.

[40] It is therefore superfluous and completely unnecessary to ascribe any surname to the child in the birth certificate unless, in the case of a Muslim child, the purpose is to announce to the whole world that the child is an illegitimate child by tagging the surname "bin Abdullah" to his name in the birth certificate. We believe Islam does not condone such open and public humiliation of an innocent child.

The basis for the 2nd respondent's decision

[41] There can be no argument that the whole basis for the 2nd respondent's decision to register the 1st appellant with the patronymic surname of "bin Abdullah" was the following two *fatwas* (edicts) issued by the Jawatankuasa Fatwa Majlis Kebangsaan ("the National Fatwa

Committee") in 1981 and 2003 respectively, which were in the following terms:

The 1981 Fatwa

(i) Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan bagi Hal Ehwal Ugama Islam Malaysia Kali ke 1 yang bersidang pada **26-29.1.1981** telah membincangkan Penamaan **Anak Tak Sah Taraf (Anak Luar Nikah)**. Muzakarah telah memutuskan bahawa:

"Anak zina atau luar nikah (anak tak sah taraf) sama ada diikuti dengan perkahwinan kedua pasangan ibu bapanya atau tidak **hendaklah dibinkan atau dibintikan kepada Abdullah**."
(emphasis added)

The 2003 Fatwa

(ii) Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan bagi Hal Ehwal Ugama Islam Malaysia Kali ke 57 yang bersidang pada **10.6.2003** telah membincangkan mengenai Anak Tak Sah Taraf. Muzakarah telah memutuskan seperti berikut:

"a. **Anak Tak Sah Taraf** ialah:

1. Anak yang dilahirkan di luar nikah sama ada akibat zina atau rogol dan dia bukan daripada persetubuhan syubhah atau bukan daripada anak perhambaan.

2. Anak dilahirkan kurang dari 6 bulan 2 lahzah (saat) mengikut Takwim Qamariah daripada tarikh tamkin (setubuh).

b. Anak tak sah taraf **tidak boleh dinasabkan kepada lelaki yang menyebabkan kelahirannya atau kepada sesiapa yang mengaku menjadi bapa** kepada anak tersebut. Oleh itu, mereka tidak boleh pusaka mempusakai, tidak menjadi mahram dan tidak boleh menjadi wali."
(emphasis added)

[42] It was at the second Muzakarah, held 22 years after the first in 1981 that a decision was made that an illegitimate child (*"Anak Tak Sah Taraf"*) cannot be surnamed (*"tidak boleh dinasabkan"*) to the father of the child or to the person who claims to be the father of the child. This directly conflicts with section 13A(2) of the BDRA, which allows for the name of the person acknowledging himself to be the father of the illegitimate child to be registered as the surname of the child, if he so requests.

[43] But as it turned out, it was this *fatwa* that the 2nd respondent used as the basis for rejecting the 2nd appellant's application in his letter of rejection dated 8 May 2015 giving the reason: "**TEMPOH TARIKH KELAHIRAN DAN TARIKH PERKAHWINAN TIDAK MENCUKUPI BAGI SUBJEK DINASABKAN KEPADA BAPA**".

[44] The underlying object behind paragraph (ii) of the 2003 *fatwa* is obviously to reaffirm the Islamic law position that an illegitimate child has no right of inheritance, is not a *mahram* (a relative of the opposite sex whom one is prohibited from marrying), and has no capacity to act as *wali* (to give away a bride in marriage).

[45] Issued as it was by a religious body, the *fatwa*, if at all it has any force of law in syariah jurisprudence, relates purely to the administration of the Islamic law or *Hukum Syarak* and has nothing to do with the 2nd respondent's statutory duty under the BDRA, which is to register births and deaths in the states of Peninsular Malaysia. The 2nd respondent must act within the confines of his powers. If he acts beyond the limits of his powers, he acts in excess of his jurisdiction.

The section 13 information

[46] In an oblique but obvious reference to the *fatwa*, the 2nd respondent in his affidavit in reply that was produced at the hearing in the court below explained that the entry "Permohonan Seksyen 13" in the 1st appellant's birth certificate was to assist the relevant agencies in dealing with the issues of inheritance, maintenance, *perwalian*, marriage, death, citizenship, lineage, land, *et cetera*. The purpose clearly was to alert the agencies to the fact that the 1st appellant is an illegitimate child (*Anak tak sah taraf*).

[47] With due respect, that is not the 2nd respondent's job under the BDRA. It is a wholly irrelevant consideration which must also have weighed heavily in the 2nd respondent's mind when rejecting the 2nd appellant's application to register his name as the 1st appellant's surname in the birth certificate.

[48] If at all, the purpose intended by the 2nd respondent can in fact be achieved without the need to make the section 13 entry in the 1st appellant's birth certificate, and that is by asking for the production of the 2nd and 3rd appellants' marriage certificate as well as the 1st appellant's birth certificate if and when there is a need to determine the 1st appellant's legitimacy, for example in a dispute over inheritance in the Syariah Court.

[49] We note that section 13 of the BDRA merely sets out the procedure for the father to be registered as the father of the illegitimate child. It does not mandate the insertion of the section 13 information on the birth certificate. Rule 7 of the Births and Deaths Registration Rules, 1957 which was made pursuant to section 39 of the BDRA only obligates the 2nd respondent to issue the birth certificate in the prescribed Form JPN.LM05, without making it mandatory to insert any information on the legitimacy of

the child in the certificate. There is nothing in Form JPN.LM05 that requires the entry of the remark that the registration is a section 13 registration.

[50] It is therefore not a requirement of the law that the birth certificate of an illegitimate child must be endorsed with the section 13 information. What the 2nd respondent did in the present case was something that the law did not require him to do. The irony is that he does not see the need (rightly so in our view) to make such entry in respect of a legitimate child.

[51] No rational explanation has been given for the difference in treatment between a legitimate child and an illegitimate child. It is clear that the practice of making the section 13 entry in the birth certificate of an illegitimate Muslim child is for an extraneous purpose, without any regard for the best interest of the child.

The prerequisites under section 13A(2)

[52] There are only two requirements under section 13A(2) that the father of the illegitimate child needs to fulfill before he can register the child's surname in his name, namely:

(i) He has been registered as the father of the child pursuant to section 13;
(ii) He has made a request to register the child's surname in his name.

[53] Since the prerequisites and the procedure for the registration of an illegitimate child's surname are spelt out in black and white in section 13A(2), it is this procedure that should guide the 2nd respondent in

considering an application under the section and not any *fatwa* that does not have any legislative force and which does not have any binding effect on him. Such *fatwa* cannot be used as a source of legal authority for the purpose of determining a child's surname under section 13A(2).

[54] Even if the *fatwa* has legislative force, being made pursuant to a State law (if at all), it cannot prevail over the BDRA, which is a Federal law. There is no reference whatsoever in the BDRA to any *fatwa* or Islamic law that can be construed as having the effect of diluting or qualifying the legislative force of section 13A(2) in its application to an illegitimate Muslim child.

[55] Further and more importantly, there is nothing in the BDRA that envisages the application of any substantive principle of Islamic law in the registration process. The fact that section 13A through sub-sections (1) and (2) makes a distinction between a legitimate child and an illegitimate child does not mean that in the case of a Muslim child, he must be subjected to the Islamic law on legitimacy before he can use his father's name as his surname in the birth certificate.

[56] What is perfectly clear is that section 13A(2) allows for the surname of the illegitimate child to be in the name of the person acknowledging himself to be the father of the child, and that is all that the 2nd respondent should concern himself with.

[57] The learned Senior Federal Counsel submitted that should there be any challenge to the legitimacy of the 1st appellant, the appellants should have gone to the Syariah Court to obtain a ruling on the matter, citing the Federal Court decisions in *Hj Raimi bin Abdullah v Siti Hasnah*

Vangarama bt Abdullah [2014] 3 MLJ 757 and *Lina Joy v Majlis Agama Islam Wilayah Persekutuan dan lain lain* [2007] 4 MLJ 585 (by majority).

[58] The first case was cited for the proposition that in the absence of any determination by the Syariah Court that the 1st appellant is a legitimate child, the 2nd respondent was right in relying on the documentation presented to him to determine the legitimacy of the 1st appellant.

[59] The second case was cited for the proposition that since the 2nd respondent was relying on the Islamic law on legitimacy to reject the 2nd appellant's application, he had not acted unreasonably beyond logic or moral standard which no reasonable person who had directed his mind to the question to be decided could come to such decision.

[60] With due respect, counsel's reliance on the two cases is misconceived. In the first place, the question of the appellants having to go to the Syariah Court for a ruling or for a declaration that the 1st appellant is a legitimate child does not arise at all for the simple reason that they never disputed that the 1st appellant is an illegitimate child, unlike *Lina Joy* who denied that she was still a Muslim when applying to delete the word "Islam" from her identity card. The appellants' challenge was on the correctness in law of the 2nd respondent's refusal to replace the surname "Abdullah" with the 2nd appellant's name in the birth certificate of the 1st appellant.

[61] It needs to be emphasized that the appellants' application involved the administration of the civil law by the civil authority and not the administration of the *Hukum Syarak* by the religious authority. The matter before the 2nd respondent was a simple and straightforward question of

whether the 2nd appellant, being a person duly and lawfully registered as the father of the 1st appellant under section 13, was entitled, by virtue of section 13A(2), to register the 1st appellant's surname in his name. This is a purely administrative function that has nothing to do with Islamic jurisprudence on legitimacy.

[62] In any event, even if the legitimacy of the 1st appellant had to be determined by reference to Islamic law, the 2nd respondent had no jurisdiction nor the competence to decide on the matter, as decided by the Federal Court in *Lina Joy* (supra).

[63] The 2nd respondent's jurisdiction is a civil one and is confined to the determination of whether the 2nd appellant had fulfilled the requirements of section 13A(2) of the BDRA, which obviously covers all illegitimate children, Muslim and non-Muslim alike. For that purpose, he is not obligated to apply, let alone to be bound by a *fatwa* issued by a religious body such as the National Fatwa Committee.

[64] For him to do so would amount to an abrogation of his power under the BDRA and surrendering it to the religious body. That would in effect be to take away the statutory right accorded to the 2nd appellant by section 13A(2) to have his name ascribed as the 1st appellant's surname in the birth certificate.

[65] Such abrogation of power will render section 13A(2) of the BDRA completely otiose and gives the impression that Parliament had enacted the provision in vain, a proposition that has no place in legislative interpretation. A *fatwa* or a religious edict issued by a religious body has no force of law unless the *fatwa* or edict has been made or adopted as

federal law by an Act of Parliament. Otherwise a *fatwa* issued by a religious body will form part of federal law without going through the legislative process.

[66] At the risk of repetition, it needs to be borne in mind that in considering an application under section 13A(2), the 2nd respondent is only to be guided by the procedure prescribed by that section and his duty is to allow the application if all requirements under that section are met.

[67] His failure or refusal to do so will defeat the clear object of the provision (and therefore the intention of Parliament), which is to allow the surname of the illegitimate child, irrespective of religion, to be in the name of the person who has been registered as the child's father pursuant to section 13, if he so requests.

[68] The 2nd respondent had clearly acted irrationally in refusing to alter the 1st appellant's surname from "Abdullah" to the 2nd appellant's name in the birth certificate on the purported ground that according to the *fatwa* issued by the National Fatwa Committee, the 1st appellant cannot be ascribed with the surname of the 2nd appellant as he is an illegitimate child. There is no provision in the BDRA that allowed him to do so.

[69] Read with sub-section 13A(2), sub-section 27(3) obligated the 2nd respondent to register the correct surname of the 1st appellant on the birth certificate, which is the name of the 2nd appellant, if at all he deemed it necessary to enter any surname in the birth certificate. His alternative was not to register any surname at all.

[70] In the circumstances, and having regard to the 2nd appellant's lawful request to register his name as the 1st appellant's surname in the birth certificate, in addition to the fact that the 2nd respondent had no authority to make the section 13 entry, the 2nd respondent's decision to make the two impugned entries in the birth certificate of the 1st appellant was clearly unauthorized by law and cannot be allowed to stand.

Applicability of Islamic law on legitimacy

[71] The learned Senior Federal Counsel submitted that a Muslim is subject to Islamic law, citing *Kamariah Bte Ali Dan Lain-Lain Lwn Kerajaan Negeri Kelantan, Malaysia Dan Satu Lagi* [2002] 3 MLJ 657 FC, implying of course that since the 1st appellant is a Muslim, he is subject to the Islamic law on legitimacy.

[72] With due respect, the issue is not whether the 1st appellant is subject to Islamic law on legitimacy. Of course he is, but only in matters involving the administration of the Islamic law by the religious authority, and not the administration of the civil law such as the BDRA by the civil authority.

[73] The issue, we emphasise, is whether the 2nd respondent, in exercising his powers under the BDRA, can override the 2nd appellant's wish to have his name registered as the 1st appellant's surname in the birth certificate as permitted by section 13A(2). In the absence of any express provision in the BDRA to import the application of Islamic law on legitimacy in the registration of a surname under section 13A(2), there is no basis to invoke any religious element in the decision making process.

[74] The learned Senior Federal Counsel went on to submit that a Muslim citizen is subject to both Federal and State laws, including State

laws that are religious in nature. Again, the suggestion here is that the 1st appellant being a Muslim must subject himself to the Islamic law on legitimacy, specifically, in the case of the 1st appellant who resides in Johor, section 111 of the Islamic Family Law (State of Johore) Enactment 2003 ("the Johor Family Law Enactment").

[75] For this proposition learned counsel referred to the recent decision of the Federal Court in *ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, Intervener)* [2016] 1 MLJ 153 where Raus Sharif PCA (now CJ) delivering the judgment of the court said at page 164:

> "[31] 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 a religious nature enacted by the Legislature of a state. This is because the Federal Constitution allows the Legislature of a state to legislate and enact offences against the precepts of Islam. 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."

[76] With due respect, the learned Senior Federal Counsel had misconstrued and again misapplied the principle to the facts and circumstances of the case. The issue is not whether the 1st appellant is subject to both Federal and State laws that are religious in nature. Of course he is, as indeed all Muslims are in this country.

[77] The issue, in the context of the present appeal, is whether the 2nd respondent was obligated by section 13A(2) to enter in the register the

name of the 2nd appellant as the 1st appellant's surname where a request had been made by the 2nd appellant for him to do so.

[78] It is purely a question of whether the 2nd respondent had acted within the confines of his powers when he rejected the 2nd appellant's application, not whether Federal and State laws that are religious in nature apply to the 1st appellant.

The Johor Family Law Enactment

[79] As we mentioned, it was the learned Senior Federal Counsel's submission that section 111 of the Johor Family Law Enactment applied against the 1st appellant as he resides in the State of Johor. Section 111 is in the following terms:

> "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."

[80] We fail to see how this provision, which in any event is State law, is relevant to the issue of registration of an illegitimate child's surname under section 13A(2) of the BDRA. Anyway, the first thing to note with regard to this provision is that it makes no reference to a child who is born less than 6 Qamariah months from the date of marriage.

[81] In fact it provides the exact opposite as it speaks of a period of more than 6 Qamariah months from the date of marriage. Further, the provision does not say that a child that is born less than 6 Qamariah months from

the date of marriage must be given the patronymic surname of "bin Abdullah".

[82] What is clear is that the provision is worded differently from the *fatwa* issued by the National Fatwa Committee which computes time to be a period of less than 6 Qamariah months from the date of sexual intercourse. The significance of the difference is that the 2nd respondent's case was premised on the fact that the 1st appellant was born less than 6 Qamariah months from the date of the 2nd and 3rd appellants' marriage, and not from the date of their sexual intercourse, which is what paragraph (ii) (a) (2) of the *fatwa* issued by the National Fatwa Committee in 2003 speaks about.

[83] In any event, there is no evidence that the Johor Fatwa Committee established under section 46(1) of the Administration of the Religion of Islam (State of Johor) Enactment 2003 ("the Johor Religion of Islam Enactment") has prepared and issued any *fatwa* on the issue of legitimacy of a child pursuant to section 47, which provides:

> "47. Subject to section 51, the *Fatwa* Committee shall, on the direction of His Majesty the Sultan, and may on its own initiative or on the request of any person by letter addressed to the Mufti, prepare *fatwa* on any unsettled or controversial question of or relating to *Hukum Syarak*."

[84] Such *fatwa*, if prepared, will only be binding if it fulfils the requirements of section 49 which stipulates as follows:

> "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 recognized by all courts in the State of Johor of all matters laid down therein."

[85] There is also no evidence that the Johor Fatwa Committee has adopted the advise and recommendation of the National Fatwa Committee as provided by section 52 of the Johor Religion of Islam Enactment which states:

"52(1) The *Fatwa* Committee may adopt any advise 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 advise or recommendation adopted by virtue of subsection (1) shall be deemed to be a fatwa and section 48, except section 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."

[86] We are mindful of the fact that the operative word in section 27(3) of the BDRA is "may", which may be interpreted to mean that it was not obligatory for the 2nd respondent to approve the 2nd appellant's application. In this regard the following passage in the judgment of Berret-Lennard J in the old case of *The Eastern Shipping Co. Ltd. of Penang v His Majesty's Attorney General for the Straits Settlements* [1932] S.S.L.R. [Vol. III] 99 is on point, where the learned judge said at page 108:

"Secondly, it was contended that the Governor in Council has an entire discretion as to whether he will fiat a Petition and that this Court cannot directly or indirectly review his decision. Section 19 of the Crown Suits Ordinance enacts that the Petition shall be

considered by the Governor in Council, who, if it appears to him that the claim is a *bona fide* claim which cannot be amicably settled, may order that right shall be done. **The question whether the word "may" imposes an imperative obligation or creates a mere power has been debated in our Courts on very many occasions**. The rule to be extracted is stated by Lord Cairns in *Julius v. The Bishop of Oxford* (5 A.C. 214 at 225). He said "My Lords, the cases to which I have referred appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise **that power ought to be exercised, and the Court will require it to be exercised**." The foregoing statement is the one which, until instructed by superior authority, I shall accept as representing the true doctrine."
(emphasis added)

[87] Applying the *ratio* to the facts of the present case, the 2nd respondent ought to have allowed the 2nd appellant's application to use his name as the 1st appellant's patronymic surname, given the fact that he had made the request and had fulfilled the requirements of section 13A(2).

[88] The section is clearly meant for the benefit of the father of an illegitimate child like the 2nd appellant by giving him the option of using his name as the surname of the child, provided he has been registered as the father of the child pursuant to section 13.

[89] Section 13A(2) is not a section that gives power to the 2nd respondent to override the 2nd appellant's wish to have his name ascribed as the 1st appellant's surname. Nor is it a provision that empowers him to decide upon himself that the 1st appellant's surname should be "Abdullah". A *fatwa*, we reiterate, is not law and has no force of law and cannot form the legal basis for the 2nd respondent to decide on the surname of an illegitimate child under section 13A(2) of the BDRA.

[90] It was the 2nd appellant's wish to have his name ascribed as the 1st appellant's surname. That was a right accorded to him by statute and the 2nd respondent had no right to deny him of that right without good cause. To feel bound by the *fatwa* of a religious body or to be guided by any irrelevant consideration is not a good cause.

Conclusion

[91] Constitutional issues relating to Articles 5, 8 and 10 of the Federal Constitution were also raised by the parties but we do not propose to delve into those issues as we are of the view that there is no constitutional issue of grave significance involved in this appeal.

[92] In our view the appeal essentially turned on the proper construction to be given to the relevant provisions of the BDRA and did not involve any issue that relates to any act on the part of any of the respondents that was *ultra vires* the Federal Constitution. It was for all the reasons aforesaid that we allowed the appellants' appeal.

ABDUL RAHMAN SEBLI
Judge
Court of Appeal Malaysia
Dated: 25 July 2017.

For the Appellants: Shanmuga Kanesalingam, Nizam Bashir bin Abdul Kariem Bashir and Kiattilin Sommat of Messrs Khan, Mazlan & Bashir.

For the Respondents: Mazlifah binti Ayob, Senior Federal Counsel of the Attorney General's Chambers.