

Robinder Singh Jaj a/l Bijir Singh v Jasminder Kaur a/p Bhajan Singh A

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-48-08 OF 2023(N) B
 ZABARIAH YUSOF, MARY LIM AND HARMINDAR SINGH
 DHALIWAL FCJJ
 9 FEBRUARY 2024

Civil Procedure — Application to refer question of law to Federal Court — Academic question of law — Leave of appeal to Federal Court granted in relation to several questions of law — Questions of law became academic — Whether Federal Court should answer academic questions of law which were of public interest — Courts of Judicature Act 1964 s 96 C
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Civil Procedure — Language — National Language — Failure to file cause papers in National Language — Appellant's application to set aside ex parte order for interim sole custody, care and control of child was dismissed by High Court on ground that appellant failed to file translation of application — Whether cause papers filed under Law Reform (Marriage and Divorce) Act 1976 read with Divorce and Matrimonial Proceedings Rules 1980 may be filed in English language without an accompanying translation in National Language in view of Registrar's Circular No 5 of 1990 — Whether dismissal of application to set aside ex parte order by High Court had the effect of depriving appellant's access to justice and equal protection of law — Divorce and Matrimonial Proceedings Rules 1980 rr 3 & 105 — Federal Constitution arts 5 & 8 — Law Reform (Marriage and Divorce) Act 1976 — National Language Acts 1963/67 (Revised 1971) s 8 — Rules of Court 2012 O 1 r 2(2), O 5 r 1, O 92 r 1(1), O 94 r 2(1) & (2) — Rules of the High Court 1980 E
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Both parties in the present appeal were husband and wife before they agreed that their marriage had irretrievably broken down. Following this event, the respondent obtained an ex parte order for interim sole custody, care and control of their son. The appellant then filed encl 20 to set aside the said ex parte order, but the High Court dismissed encl 20 on the ground that the appellant had failed to file the translation of this application within the time ordered. This was despite the appellant's protestations and claims that the requirement did not arise in the proceedings. Insofar as the Registrar's Circular No 5 of 1990 ('the Registrar's Circular') was concerned, the High Court held that encl 20 was dismissed not because it was filed in the English language but because no translation was filed within the time directed and under the mandatory requirements of O 92 r 1 of the Rules of Court 2012 ('the ROC'). The H
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- A appellant's appeal to the Court of Appeal was dismissed. The Court of Appeal found, inter alia, that the Registrar's Circular was administrative in nature and could not prevail over the requirement in O 92 r 1(1) of the ROC. Leave to appeal to the Federal Court under s 96 of the Courts of Judicature Act 1964 ('Act 91') was granted in relation to the following questions of law: (a) whether
- B petitions for judicial separation or divorce (matrimonial proceedings) filed pursuant to the provisions of the Law Reform (Marriage and Divorce) Act 1976 ('Act 164') and the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR') may be filed in the English language only ('the first question');
- C (b) if so, whether all other cause papers filed in the matrimonial proceedings may be filed in the English language only ('the second question'); and (c) if the answers to either one or both of the questions above were in the negative, whether the filing of the documents in English only was an irregularity that could be cured with the necessary directions by the court that the said cause papers be filed in Bahasa Malaysia ('the third question'). Before the hearing of
- D the substantive appeal, the respondent had filed an application ('encl 6') to strike out the appeal on the basis that the appeal was academic considering that the parties had withdrawn the petition for judicial separation, proceeded to file a joint petition for divorce and had obtained a decree nisi with the necessary orders for custody and guardianship of the child from the marriage. In other
- E words, there was no longer any lis pending in the courts below.

Held, dismissing encl 6, allowing the appeal and setting aside the decisions of the courts below:

- F (1) Although the general principle was that the court did not answer academic questions, but there were exceptions to this general principle. In *R v Secretary of State for the Home Department, ex p Salem* [1999] AC 450, the House of Lords explained that it would exercise its discretion to
- G hear the appeal on a question of public law, even though by the time of the appeal, there was no longer an issue which would directly affect the rights and obligations of the parties concerned in the appeal. In the present appeal, leave was granted on the basis that the questions of law posed had fulfilled the high threshold under s 96 of Act 91. There was and there remained a strong and overwhelming element of public interest and
- H public importance in the issues raised. The decision in the High Court which was affirmed on appeal and for which grounds had been provided by the Court of Appeal, served as binding precedent for other cases to follow. It was therefore imperative that for the proper administration of family justice, the Federal Court, as the apex court, must proceed to
- I deliberate and deliver the court's views on this most pressing issue. With those considerations, the court overruled the objections of the respondent and dismissed encl 6 (see paras 4 & 9).
- (2) In the matter of proceedings in court, s 8 of the National Language Acts 1963/67 (Revised 1971) ('Act 32') (as amended vide Act A765/1990

with effect from 30 March 1990) permitted the continued use of English language in the interests of justice. To facilitate the amendment to s 8 of Act 32, Practice Direction No 2 of 1990 ('PD No 2/1990') was issued by the Chief Judge of Malaya on 10 May 1990. The substance of PD No 2/1990 was substantially reflected in the amended s 8 of Act 32. Shortly after the issuance of PD No 2/1990, the Registrar's Circular was issued. This circular essentially 'allows' the cause papers relating to divorce and matrimonial proceedings, insolvency and winding up proceedings to be filed in English until such time as the relevant rules are translated into the national language and the translations are *gazetted*. The court had used the word 'allows' because the Registrar's Circular is still in effect today as the DMPR, relevant to this appeal, has yet to be translated and *gazetted* (see paras 30–33).

- (3) The High Court dismissed encl 20 because there was no translation of the cause papers into the national language and the learned judge was of the view that O 92 r 1 of the ROC was applicable. It was quite clear that O 92 r 1 was applicable where the document(s) filed in court were for use in pursuance to 'these Rules'; these Rules being the ROC. However, the ROC did not apply to matrimonial proceedings under Act 164 and the DMPR. Order 1 r 2(2) of the ROC specifically recognised that the ROC would not have any effect in or to those proceedings where separate rules had already been made or may be made under written law specifically for the purpose of such proceedings. This was an express provision for the operation of the maxim *generalia specialibus non derogant* (see paras 34–36).
- (4) There was also O 94 r 2 of the ROC. Under O 94 r 2(1), O 5 r 1 which dealt with the mode of commencement of proceedings was expressly excluded from application to those proceedings initiated under the written laws listed in Appendix C, except as provided under the rules themselves. In the list of exempted written laws set out in Appendix C was item 5 dealing with matrimonial proceedings under Act 164. Order 94 r 2(2) stated that in the event there was any inconsistency between any of the rules made under the specific written law and the ROC, the former shall prevail. This reemphasised the significance and application of the specific rules enacted under written law. In the present appeal, it would be the DMPR themselves which contained comprehensive provisions on the commencement and conduct of matrimonial proceedings, including applications for judicial separation under Act 164. All this therefore meant that the ROC and in particular O 92 did not apply to the matrimonial proceedings at hand and as such, the matter of conflict between the Registrar's Circular and the ROC as was found by the Court of Appeal did not arise. Although r 3 of DMPR provided for the application of the then Rules of the High Court 1980 and now the ROC, it categorically stated that the application was 'Subject to these Rules' and

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- A that the application was ‘with necessary modifications’. However, as we have seen, the ROC themselves had excluded its application to matrimonial proceedings (see paras 37–39, 50 & 56).
- B (5) In any case, there was also r 105 of the DMPR which provided for the issuance of directions for the purpose of ensuring uniformity of practice and observance of the statutory requirements in matrimonial proceedings. There was nothing in the Registrar’s Circular to suggest that it was issued pursuant to r 105 of the DMPR. However, it would be reasonable to say that the contents of this circular accorded with the purpose why any directions would be issued under r 105, that it was issued in order to ensure uniformity of practice and due observance of the statutory requirements in Act 164 and the DMPR (see paras 40 & 42).
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- D (6) It was the recipients of PD No 2/1990 and the Registrar’s Circular that the court must have regard to and not so much who was copied in on the direction or the fact that the public would come eventually to be aware of the directions. The direction was given to these recipients so that they know what to do when confronted with the particular circumstance. What the administrators who maned the registries had to do was to comply with the Registrar’s Circular and accept any cause papers which was filed only in the English language. A litigant such as the appellant here could expect their cause papers to be accepted not just by the registry but by the learned judge without any issue since there was clear permission for a filing of related documents in English. This expectation would be quite legitimate and fair since the litigant or appellant in this appeal, could not use the ROC simpliciter as the Rules themselves had excluded its application to matrimonial proceedings under Act 164. To complicate matters, the existing DMPR had yet to be translated (see paras 46–48).
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- G (7) While practice directions and circulars were issued for the proper and better administration of justice, and they were generally effective in that regard, the courts who were responsible for the issuance of these directions and circulars must guard against adherence that resulted in injustice. The circumstances and conditions that present in this appeal illustrated this unfortunate outcome, with the appellant complying with the Registrar’s Circular but indirectly faulted by the High Court for having done so. The relevant direction or circular must be carefully examined and appreciated in context. Having held out to the public that their cause papers may be filed only in the English language, it did not hold any sense to then castigate a party for not having complied with the ROC and reasoning that the direction and circular was in fact worth naught. The court opined that the dismissal of encl 20 had the effect of depriving the appellant access to justice and equal protection of the law as embodied in arts 5 and 8 of the Federal Constitution. The court therefore
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answered the first question and the second question in the affirmative. The court declined to answer the third question as it was no longer necessary with the development of the case (see paras 51, 53 & 57).

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[Bahasa Malaysia summary]

Kedua-dua pihak dalam rayuan ini adalah suami dan isteri sebelum mereka bersetuju bahawa perkahwinan mereka tidak dapat dipulihkan. Berikutan peristiwa ini, responden memperoleh perintah ex parte untuk jagaan, penjagaan dan kawalan tunggal sementara anak mereka. Perayu kemudiannya memfailkan lampiran 20 untuk mengenyepikan perintah ex parte tersebut, tetapi Mahkamah Tinggi menolak lampiran 20 atas alasan bahawa perayu gagal memfailkan terjemahan permohonan ini dalam tempoh yang diperintahkan. Ini walaupun terdapat bantahan dan dakwaan perayu bahawa keperluan tersebut tidak timbul dalam prosiding. Berkaitan dengan Pekeliling Pendaftar Bilangan 5 Tahun 1990 ('Pekeliling Pendaftar tersebut'), Mahkamah Tinggi memutuskan bahawa lampiran 20 ditolak bukan kerana ia difailkan dalam Bahasa Inggeris tetapi kerana tiada terjemahan difailkan dalam masa yang diarahkan dan di bawah keperluan mandatori A 92 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Rayuan perayu kepada Mahkamah Rayuan telah ditolak. Mahkamah Rayuan mendapati, antara lain, bahawa Pekeliling Pendaftar tersebut adalah bersifat pentadbiran dan tidak boleh mengatasi keperluan dalam A 92 k 1(1) KKM 2012. Kebenaran untuk merayu kepada Mahkamah Persekutuan di bawah s 96 Akta Mahkamah Kehakiman 1964 ('Akta 91') telah diberikan berhubung dengan persoalan-persoalan undang-undang berikut: (a) sama ada petisyen untuk pemisahan kehakiman atau perceraian (prosiding hal ehwal suami isteri) difailkan menurut peruntukan Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 164') dan Kaedah-Kaedah Prosiding Perceraian dan Hal Ehwal Suami Isteri 1980 ('DMPR') boleh difailkan dalam Bahasa Inggeris sahaja ('soalan pertama'); (b) jika ya, sama ada semua kertas kausa lain yang difailkan dalam prosiding hal ehwal suami isteri boleh difailkan dalam Bahasa Inggeris sahaja ('soalan kedua'); dan (c) jika jawapan kepada salah satu atau kedua-dua soalan di atas adalah negatif, sama ada pemfailan dokumen dalam Bahasa Inggeris sahaja adalah suatu penyelewengan yang boleh dibetulkan dengan arahan yang berkaitan oleh mahkamah bahawa kertas kausa tersebut hendaklah difailkan dalam Bahasa Malaysia ('soalan ketiga'). Sebelum pendengaran rayuan substantif, responden telah memfailkan permohonan ('lampiran 6') untuk membatalkan rayuan tersebut atas dasar bahawa rayuan tersebut adalah akademik memandangkan pihak-pihak telah menarik balik petisyen untuk pemisahan kehakiman, telah meneruskan dengan pemfailan petisyen bersama untuk perceraian dan telah mendapat dekri nisi dengan perintah yang diperlukan untuk jagaan dan penjagaan anak daripada perkahwinan tersebut. Dalam erti kata lain, tiada lagi lis yang belum selesai di mahkamah-mahkamah di bawah.

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A **Diputuskan**, menolak lampiran 6, membenarkan rayuan, dan mengenepikan keputusan mahkamah-mahkamah di bawah:

- (1) Walaupun prinsip amnya ialah mahkamah tidak menjawab soalan-soalan akademik, tetapi terdapat pengecualian kepada prinsip am ini. *R v Secretary of State for the Home Department, ex p Salem* [1999] AC 450, the House of Lords menjelaskan bahawa ia akan menggunakan budi bicaranya untuk mendengar rayuan mengenai persoalan undang-undang awam, walaupun pada masa rayuan, tiada lagi isu yang akan menjejaskan secara langsung hak dan kewajiban pihak yang berkaitan dalam rayuan. Dalam rayuan semasa, kebenaran telah diberikan atas dasar bahawa persoalan-persoalan undang-undang yang dikemukakan telah memenuhi ambang yang tinggi di bawah s 96 Akta 91. Terdapat dan kekal ada unsur kepentingan awam dan keperluan awam yang kuat dan besar dalam isu-isu yang dibangkitkan. Keputusan di Mahkamah Tinggi yang disahkan melalui rayuan dan alasan yang telah disediakan oleh Mahkamah Rayuan, menjadi duluan yang mengikat untuk kes-kes lain yang akan menyusul. Oleh itu, adalah penting bahawa, untuk pentadbiran keadilan keluarga yang betul, Mahkamah Persekutuan, sebagai mahkamah tertinggi, mesti meneruskan untuk membincangkan dan menyampaikan pandangan mahkamah mengenai isu yang paling mendesak ini. Dengan pertimbangan tersebut, mahkamah menolak bantahan responden dan menolak lampiran 6 (lihat perenggan 4 & 9).
- (2) Dalam hal prosiding di mahkamah, s 8 Akta Bahasa Kebangsaan 1963/67 (Disemak 1971) ('Akta 32') (seperti yang dipinda oleh Akta A765/1990 berkuat kuasa 30 Mac 1990) membenarkan penggunaan berterusan Bahasa Inggeris demi kepentingan keadilan. Untuk memudahkan pindaan kepada s 8 Akta 32, Arahan Amalan No 2 Tahun 1990 ('PD No 2/1990') telah dikeluarkan oleh Hakim Besar Malaya pada 10 Mei 1990. Kandungan PD No 2/1990 telah dicerminkan dengan ketara dalam s 8 Akta 32 yang dipinda. Sejurus selepas pengeluaran PD No 2/1990, Pekeliling Pendaftar tersebut telah dikeluarkan. Pekeliling ini pada dasarnya 'membenarkan' kertas kausa berkaitan perceraian dan prosiding hal ehwal suami isteri, insolvensi dan prosiding penggulungan difailkan dalam Bahasa Inggeris sehingga peraturan-peraturan yang berkaitan diterjemahkan ke dalam bahasa kebangsaan dan terjemahannya diwartakan. Mahkamah telah menggunakan perkataan 'membenarkan' kerana Pekeliling Pendaftar tersebut masih berkuat kuasa hari ini kerana DMPPR, yang berkaitan dengan rayuan ini, masih belum diterjemahkan dan diwartakan (lihat perenggan 30–33).
- (3) Mahkamah Tinggi menolak lampiran 20 kerana tiada terjemahan kertas kausa ke dalam bahasa kebangsaan dan hakim yang arif berpendapat bahawa A 92 k 1 KKM 2012 adalah terpakai. Agak jelas bahawa A 92 k 1
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terpakai apabila dokumen yang difailkan di mahkamah adalah untuk digunakan menurut 'Kaedah-Kaedah ini'; Kaedah-Kaedah ini merujuk kepada KKM 2012. Bagaimanapun, KKM 2012 tidak terpakai untuk prosiding hal ehwal suami isteri di bawah Akta 164 dan DMPR. Aturan 1 k 2(2) KKM 2012 secara khusus mengiktiraf bahawa KKM 2012 tidak akan mempunyai apa-apa kesan dalam atau kepada prosiding-prosiding yang mana peraturan berasingan telah dibuat atau mungkin dibuat di bawah undang-undang bertulis khusus untuk tujuan prosiding-prosiding tersebut. Ini adalah peruntukan nyata untuk pemakaian maksim *generalia specialibus non derogant* (lihat perenggan 34–36).

- (4) Terdapat juga A 94 k 2 KKM 2012. Di bawah A 94 k 2(1), pemakaian A 5 k 1 yang memperkatakan cara permulaan prosiding secara jelas dikecualikan daripada prosiding-prosiding yang dimulakan di bawah undang-undang bertulis yang disenaraikan dalam Lampiran C, kecuali sebagaimana yang diperuntukkan di bawah kaedah-kaedah itu sendiri. Dalam senarai undang-undang bertulis yang dikecualikan yang dinyatakan dalam Lampiran C adalah butiran 5 yang berkaitan dengan prosiding hal ehwal suami isteri di bawah Akta 164. Aturan 94 k 2(2) menyatakan bahawa sekiranya terdapat apa-apa percanggahan antara mana-mana kaedah-kaedah yang dibuat di bawah undang-undang bertulis khusus dan KKM 2012, yang pertama akan diguna pakai. Ini menekankan semula kepentingan dan penggunaan kaedah-kaedah khusus yang digubal di bawah undang-undang bertulis. Dalam rayuan ini, ianya merujuk kepada DMPR sendiri yang mengandungi peruntukan komprehensif mengenai permulaan dan pengendalian prosiding hal ehwal suami isteri, termasuk permohonan untuk pemisahan kehakiman di bawah Akta 164. Semua ini bermakna KKM 2012 dan khususnya A 92 tidak terpakai kepada prosiding hal ehwal suami isteri di sini dan oleh itu, perkara berkenaan percanggahan antara Pekeliling Pendaftar tersebut dan KKM 2012 seperti yang didapati oleh Mahkamah Rayuan tidak timbul. Walaupun k 3 DMPR memperuntukkan tentang pemakaian Kaedah-Kaedah Mahkamah Tinggi 1980 dan kini KKM 2012, ia dengan tegas menyatakan bahawa pemakaian tersebut adalah 'Subject to these Rules' dan bahawa pemakaian tersebut adalah 'with necessary modifications'. Walau bagaimanapun, seperti yang telah kita lihat, KKM 2012 sendiri telah mengecualikan pemakaiannya untuk prosiding hal ehwal suami isteri (lihat perenggan 37–39, 50 & 56).
- (5) Dalam apa jua keadaan, terdapat juga k 105 DMPR yang memperuntukkan pengeluaran arahan bagi tujuan memastikan keseragaman amalan dan pematuhan keperluan statutori dalam prosiding hal ehwal suami isteri. Tiada apa-apa dalam Pekeliling Pendaftar tersebut yang mencadangkan bahawa ia dikeluarkan menurut

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- A k 105 DMPR. Walau bagaimanapun, adalah munasabah untuk mengatakan bahawa kandungan pekeliling ini sesuai dengan tujuan mengapa apa-apa arahan akan dikeluarkan di bawah k 105, bahawa ia dikeluarkan untuk memastikan keseragaman amalan dan pematuhan yang sewajarnya terhadap keperluan berkanun dalam Akta 164 dan DMPR (lihat perenggan 40 & 42).
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- C (6) Penerima-penerima PD No 2/1990 dan Pekeliling Pendaftarlah yang mahkamah perlu mengambil kira dan bukannya siapa yang disalin dalam arahan tersebut atau fakta bahawa orang ramai akhirnya akan mengetahui tentang arahan tersebut. Arahan tersebut diberikan kepada penerima-penerima ini supaya mereka tahu apa yang perlu dilakukan apabila berhadapan dengan keadaan tersebut. Apa yang perlu dilakukan oleh pentadbir yang menguruskan pendaftaran ialah mematuhi Pekeliling Pendaftar tersebut dan menerima apa-apa kertas kausa yang difailkan dalam Bahasa Inggeris sahaja. Pihak litigasi seperti perayu di sini boleh mengharap kertas kausa mereka diterima bukan sahaja oleh pihak pendaftar tetapi oleh hakim yang arif tanpa apa-apa isu memandangkan terdapat kebenaran yang jelas untuk memfailkan dokumen berkaitan dalam Bahasa Inggeris. Ini adalah jangkaan yang agak sah dan adil memandangkan pihak litigasi atau perayu dalam rayuan ini, tidak boleh sewenang-wenangnya menggunakan KKM 2012 kerana kaedah-kaedah itu sendiri telah mengecualikan pemakaiannya untuk prosiding hal ehwal suami isteri di bawah Akta 164. Untuk merumitkan lagi keadaan, DMPR sedia ada masih belum diterjemahkan (lihat perenggan 46–48).
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- F (7) Walaupun arahan amalan dan pekeliling telah dikeluarkan untuk pentadbiran keadilan yang betul dan lebih baik, dan ia secara amnya berkesan untuk tujuan tersebut, mahkamah yang bertanggungjawab untuk mengeluarkan arahan dan pekeliling ini mesti berwaspada terhadap pematuan yang mengakibatkan ketidakadilan. Keadaan dan kondisi yang terdapat dalam rayuan ini menggambarkan pengakhiran yang malang ini, di mana perayu telah mematuhi Pekeliling Pendaftar tersebut tetapi secara tidak langsung disalahkan oleh Mahkamah Tinggi kerana telah berbuat demikian. Arahan atau pekeliling yang berkaitan mesti diteliti dan dihayati dengan teliti dalam konteksnya. Setelah menyatakan kepada orang awam bahawa kertas kausa mereka boleh difailkan dalam Bahasa Inggeris sahaja, ia tidak masuk akal untuk kemudian mengkritik sesuatu pihak kerana tidak mematuhi KKM 2012 dan memberi alasan bahawa arahan dan pekeliling tersebut sebenarnya tidak bernilai. Mahkamah berpendapat bahawa penolakan lampiran 20 mempunyai kesan melucutkan akses perayu kepada keadilan dan perlindungan undang-undang yang saksama seperti yang terkandung dalam perkara 5 dan 8 Perlembagaan Persekutuan. Oleh itu mahkamah menjawab soalan pertama dan soalan kedua secara afirmatif. Mahkamah
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enggan menjawab soalan ketiga kerana ia tidak lagi perlu dengan perkembangan kes semasa (lihat perenggan 51, 53 & 57).]

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Cases referred to

Ainsbury v Millington [1987] 1 All ER 929, HL (refd)

Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal [2020] 4 MLJ 773; [2018] 10 CLJ 129, FC (refd)

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Citibank Bhd v Malwira Manufacturing Sdn Bhd [2012] 3 CLJ 81, HC (refd)

Costellow v Somerset County Council [1993] 1 WLR 256, CA (refd)

Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad [2010] 2 MLJ 41, CA (refd)

C

Emrail Sdn Bhd & Ors v Kuwait Finance House (Malaysia) Berhad [2020] MLJU 439, HC (refd)

Export-Import Bank of Malaysia Bhd & Anor v TFT Display (M) Sdn Bhd [2021] MLJU 1329; [2021] 1 LNS 1185, HC (refd)

D

Kerajaan Malaysia v Mudek Sdn Bhd [2017] 5 MLJ 133; [2017] 10 CLJ 158, FC (refd)

Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor [2012] 2 MLJ 8, FC (refd)

E

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)

Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal [1995] 3 MLJ 465, SC (refd)

Protasco Bhd v Tey Por Yee & Anor and other appeals [2021] 6 MLJ 1; [2021] 6 MLRA 370, FC (refd)

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R v Secretary of State for the Home Department, ex p Salem [1999] AC 450, HL (refd)

Spind Malaysia Sdn Bhd v Justrade Marketing Sdn Bhd & Anor [2018] 4 MLJ 34; [2018] 4 CLJ 705, FC (refd)

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Scientequip (M) Sdn Bhd v Properties Review Sdn Bhd [2006] 3 CLJ 592, HC (refd)

Sun Life Assurance Co of Canada v Jervis [1944] AC 111, HL (refd)

Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420, SC (refd)

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Walley Metal Works Sdn Bhd v Safety Development Corporation Sdn Bhd; Pegawai Penerima (applicant) & Ler Cheng Chye (liquidator) [2015] 1 CLJ 1019, HC (refd)

Witech Sdn Bhd & Ors v BHR Group Ltd [2011] 1 MLJ 781; [2010] 9 CLJ 288, CA (refd)

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Zainun bte Hj Dahan lwn Rakyat Merchant Bankers Bhd & satu lagi [1998] 1 MLJ 532, HC (refd)

A Legislation referred to

Bankers' Book (Evidence) Act 1949
 Companies (Winding-Up) Rules of 1972
 Courts of Judicature Act 1964 ss 17, 17A, 96
 Divorce and Matrimonial Proceedings Rules 1980 rr 3, 61(1), 91, 105
B Federal Constitution arts 5, 8, 152(1)
 Law Reform (Marriage and Divorce) Act 1976 s 108(1)
 Legal Profession Act 1976
 National Language Acts 1963/67 ss 2, 8
C Rules of Court 2012 O 1 r 2(2), O 5 r 1, O 29 r 1, O 92, O 92 rr 1, 1(1),
 (4), 3B, O 94 r 2
 Rules of the High Court 1980 (repealed by Rules of Court 2012)
 Subordinate Courts Rules Act 1955 s 4

D Appeal from: *Robinder Singh Jaj a/l Bijir Singh v Jasminder Kaur a/p Bhajan Singh* [2024] 2 MLJ 303 (Court of Appeal, Putrajaya)

Honey Tan Lay Ean (with Tay Kit Hoo) (Seira & Shahrizad) for the appellant.
Harpal Singh Grewal (with Dhanesh a/l Subramaniam Nair and Sharanpreet
E *Kaur a/p Parmjit Singh) (AJ Ariffin, Yeo & Harpal) for the respondent.*
Malik Imtiaz Sarwar (with Wong Ming Yen) (Malik Imtiaz Sarwar) as the amicus curiae.

Mary Lim FCJ (delivering judgment of the court):

- F** [1] The three questions of law for which leave to appeal was granted under s 96 of the Courts of Judicature Act 1964 (Act 91) revolve around the issue of whether cause papers, from petition to interlocutory applications and associated affidavits, filed under the Law Reform (Marriage and Divorce) Act
- G** 1976 (Act 164) read with the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR') may be filed in the English Language without an accompanying translation in the National Language in view of Registrar's Circular No 5 of 1990 ('Registrar's Circular'). The three questions of law are:
- H** (a) whether petitions for judicial separation or divorce (matrimonial proceedings) filed pursuant to the provisions of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) and the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR') may be filed in the English Language only;
- I** (b) if so, whether all other cause papers filed in the matrimonial proceedings may be filed in the English Language only; and
- (c) if the answers to either one or both of the questions above are in the negative, whether the filing of the documents in English only is an

irregularity that can be cured with the necessary directions by the Court that the said cause papers be filed in Bahasa Malaysia.

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[2] We answered the first two questions in the affirmative leaving the third question unnecessary for determination. Aside from counsel representing the respective parties, the Malaysian Bar appeared as *amicus curiae*. We place on record our appreciation for all submissions made.

B

[3] We must point out the fact that even before we started with the hearing of the substantive appeal, we were urged by the respondent to strike out the appeal on the basis that it was academic. The respondent had filed an application to this effect — encl 6. According to the respondent, the parties had withdrawn the petition for judicial separation, proceeded to file a joint petition for divorce and had obtained a decree nisi with the necessary orders for custody and guardianship of the child from the marriage. Given these circumstances, the Federal Court was said to be without jurisdiction to hear the appeal as the matter was now academic; essentially because there was no longer any *lis* pending in the courts below.

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[4] We disagreed. Although the general principle is that the court does not answer academic questions (see *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener)* and *another appeal* [2020] 4 MLJ 773; [2018] 10 CLJ 129, applying *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 and *Ainsbury v Millington* [1987] 1 All ER 929), there are exceptions. In *R v Secretary of State for the Home Department, ex p Salem* [1999] AC 450, the House of Lords explained that it will exercise its discretion to hear the appeal on a question of public law, even though by the time of the appeal, there was no longer an issue which will directly affect the rights and obligations of the parties concerned in the appeal.

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[5] Two instances of such exception are illustrated in *Kerajaan Malaysia v Mudek Sdn Bhd* [2017] 5 MLJ 133; [2017] 10 CLJ 158 and *Spind Malaysia Sdn Bhd v Justrade Marketing Sdn Bhd & Anor* [2018] 4 MLJ 34; [2018] 4 CLJ 705. In *Mudek*, the parties had reached an amicable settlement with each other before the appeal was heard. Yet, the Federal Court proceeded to hear the appeal, troubled with the majority decision of the Court of Appeal which 'would remain on record, and unless dealt with, would cause confusion to parties and legal advisers alike as it does not reflect the correct position of the law'.

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[6] Care and caution must, of course, be exercised when considering whether a given set of circumstances warrant the exercise of this sparingly used discretion. In this regard, we found that in order to deal with the questions of

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law for which leave had already been granted, a detailed consideration of facts will not be required. More importantly and even more critically, we take judicial notice of the fact that there is a substantial number of matrimonial proceedings not only pending but are anticipated to be filed in the courts below. For those cases, the decision of the Court of Appeal on the application of the Registrar’s Circular will apply by virtue of the doctrine of stare decisis.
- B

[7] There is also a lack of uniformity of practice in matrimonial proceedings. The High Court sitting respectively in Kuala Lumpur and Penang are said to accept cause papers in matrimonial proceedings which are filed only in the English Language while the High Court sitting in Malacca has rejected papers which do not have the National Language translation.
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[8] Aside from matrimonial proceedings, the decision of the Court of Appeal has implications to a wider field of cases, to winding up petitions since the Circular in question applies equally to proceedings for the winding up of companies under the Companies (Winding-Up) Rules of 1972. We understand that a body of case law has consistently applied the Registrar’s Circular and allowed the winding up petitions to be filed only in the English Language as the Company (Winding-Up) Rules 1972 are yet to be translated and gazetted — see *Export-Import Bank of Malaysia Bhd & Anor v TFT Display (M) Sdn Bhd* [2021] MLJU 1329; [2021] 1 LNS 1185; *Walley Metal Works Sdn Bhd v Safety Development Corporation Sdn Bhd*; *Pegawai Penerima (applicant) & Ler Cheng Chye (liquidator)* [2015] 1 CLJ 1019, *Citibank Bhd v Malwira Manufacturing Sdn Bhd* [2012] 3 CLJ 81 and *Scientequip (M) Sdn Bhd v Properties Review Sdn Bhd* [2006] 3 CLJ 592.
- D

[9] It is thus quite clear that a proper resolution by this court is absolutely necessary. Leave was granted on the basis that the questions of law posed fulfilled the high threshold under s 96 of the Courts of Judicature Act 1964 (Act 91). In this appeal, there was and there remained a strong and overwhelming element of public interest and public importance in the issue(s) raised. The decision in the High Court which was affirmed on appeal and for which grounds have been provided by the Court of Appeal, serve as binding precedent for other cases to follow. It was therefore imperative that for the proper administration of family justice, we, as the apex court must proceed to deliberate and deliver our views on this most pressing issue.
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[10] With those considerations, the objections of the respondent were overruled and the application in encl 6 was dismissed.
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FACTUAL BACKGROUND

A

[11] Some factual background for context. Both parties to the marriage agreed that their marriage had unfortunately irretrievably broken down. On 7 January 2022, the respondent filed an ex parte application at the High Court for, inter alia, interim sole custody, care and control of a son from the marriage (encl 6). On 24 January 2022, the High Court granted certain orders in encl 6. The order was however not served on the appellant. Consequently, it lapsed after 21 days from the date of the order. The interlocutory application was also not fixed for inter partes hearing within 14 days from grant of the order.

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[12] On 27 January 2022, the respondent filed yet another application bearing similar terms to encl 6. On 24 March 2022, the appellant filed an application to set aside the ex parte order granted on 24 January 2022 — encl 20. In this application, the appellant contended that there were no urgent circumstances warranting the application in encl 6 to be filed on an ex parte basis, that the respondent had failed to disclose material facts, that there was a failure to comply with O 29 r 1 of the Rules of Court 2012, rr 61(1) and 91 of the DMPR, and an assertion that the appellant had suffered damage and costs by reason of the ex parte order.

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[13] On 18 April 2022, the appellant filed an application for, inter alia, interim guardianship, custody, care, control and access — encl 26. The parties recorded a consent order to encl 26. Thereafter, the appellant asked for encl 20 to be heard. The respondent had actually agreed to this application, the only matter then outstanding was the matter of whether damages ought to be granted.

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[14] At this point, the High Court dismissed encl 20 on the ground that the appellant had failed to file the translation of this application within the time ordered. This was despite the appellant's protestations and claims that the requirement did not arise in the proceedings. The appellant's appeal to the Court of Appeal was dismissed.

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DECISION OF THE HIGH COURT

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[15] In the written grounds of decision, several reasons were articulated for the dismissal of encl 20.

[16] First, the insistence of the appellant that encl 20 need only be filed in the English Language despite being directed to provide a translation into the National Language within two weeks. The learned judge disagreed. Relying on O 92 r 1(1) and (4) of the Rules of Court 2012, His Lordship held that encl 20 had to be translated.

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A [17] According to the learned judge, even in urgent cases, O 92 r 1(4) required a translation of the documents to be filed within two weeks or within such extended time as allowed by the court. Insofar as the Registrar's Circular No 5 of 1990 was concerned, the High Court held that encl 20 was dismissed not because it was filed in the English language but because no translation was
B filed within the time directed and under the mandatory requirements of O 92 r 1 of the Rules of Court 2012. In fact, the learned judge found that the appellant had failed to do so despite the lapse of three months. The decision of *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 on the compliance with O 92 was cited in support.
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[18] The failure to file a translation in the National Language was an irregularity which, according to the High Court, ought to have been remedied by the appellant — see *Emrail Sdn Bhd & Ors v Kuwait Finance House (Malaysia) Berhad* [2020] MLJU 439.
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[19] His Lordship was also of the view that the unavailability of a translation of the DMPR into the National Language should not have been used as a reason for not filing a translation of encl 20 and its related cause papers as the amendments to s 8 of the National Language Acts 1963/67 had been in force for over 30 years since 1 June 1990. The decisions in *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2010] 2 MLJ 41 and *Zainun bte Hj Dahan lwn Rakyat Merchant Bankers Bhd & satu lagi* [1998] 1 MLJ 532 were cited in support.
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DECISION OF THE COURT OF APPEAL

[20] The principal ground for the decision of the Court of Appeal was on the applicability of the Registrar's Circular. At para [15], the Court of Appeal 'found no merit in the appeal premised on O 92 r 1(1) and (4) of the RC 2012 coupled with the Registrar's Circular being administrative in nature' and at para [27], that it, the Registrar's Circular 'cannot possibly prevail over' the language requirement in O 92 r 1(1) of the Rules of Court 2012.
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H [21] The court relied on *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385, that where the directions conflict with statutory rules of court, the directions 'are of no legal effect'. The Court of Appeal further relied on *Ooi Bee Tat v Tan Ah Chim & Sons Sdn Bhd & Anor and another appeal* [1995] 3 MLJ 465 where the Supreme Court explained:
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Practice directions are intended to be no more than a direction for administrative purpose ...

OUR ANALYSIS AND DETERMINATION

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[22] The appellant had filed his cause papers in the matrimonial proceedings at the High Court in English. There was no translation of the same. For this, the appellant relied on the Registrar's Circular which states:

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Pekeliling Pendaftar No. 5 Tahun 1990

Sebagaimana yang telah dimaklumkan bahawa Pelaksanaan Penggunaan Bahasa Malaysia di Mahkamah telah berkuatkuasa mulai dari 1hb Jun 1990. Sehubungan dengan itu satu Arahan Hakim Besar Malaya No. 2 Tahun 1990 telah dikeluarkan.

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2. Sebagai garis panduan lanjut, YAA Hakim Besar Malaya telah mengarahkan bahawa mana-mana petisyen berkaitan dengan Penceraian dan Prosiding Hal-Ehwal Suami Isteri, Kebankrapan dan Penggulangan Syarikat, *dibenar difailkan dalam Bahasa Inggeris sehingga kaedah-kaedah berkenaan dengannya selesai diterjemah dan ditawarkan.*

D

3. Arahan ini berkuatkuasa dengan serta merta sehingga diberitahu kelak.

(Mohd Ghazali Bin Mohd Yusoff) Ketua Pendaftar

Mahkamah Agung (Emphasis added.)

E

[23] In 2019, the Bar Council Family Law Committee met with the managing judge of the High Court in Kuala Lumpur over the application of this Circular. Circular No 153/2019 captioned 'Filing of Documents in English for Family Law Matters' and dated 6 August 2019 was issued following that meeting. In that circular, the Managing Judge confirmed that the Registrar's Circular 'remains valid, as far as matrimonial proceedings are concerned. As the Bahasa Malaysia translation of the Divorce and Matrimonial Proceedings Rules 1980 has yet to be *gazetted*, all cause papers may be filed in English'. This practice of filing documents in English for family or matrimonial matters has thus carried on till today. The current appeal is no exception.

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[24] In dealing with the questions of law posed, it is useful to go back a little in time to why and how this Registrar's Circular came to pass. This requires us to appreciate and understand the juxta-positioning of several events, legislations and various rules and directions issued over the relevant passage of time.

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[25] First, divorce and matrimonial proceedings. Such proceedings including judicial separations and matters related to matrimonial proceedings are governed by the Law Reform (Marriage and Divorce) Act 1976 (Act 164) and the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR'); the DMPR being Rules made pursuant to s 108(1) of Act 164. The DMPR contains extensive provisions regulating how proceedings for the dissolution of marriage or obtaining of divorce decrees and the related ancillary reliefs concerning children are to be initiated and conducted.

- A** [26] Although there is a National Language translation of Act 164, the authoritative text is the English Language version of the Act — see PU(B) 127/1976. The DMPR, enacted in English, however, remains untranslated till today for reasons which are irrelevant for this appeal.
- B** [27] Then, there are the Rules of the High Court 1980 and later Rules of Court 2012. These Rules, enacted under s 17 of the Courts of Judicature Act 1964 (Act 91) and s 4 of the Subordinate Courts Rules Act 1955 (Act 55), regulate procedure and proceedings before the High Court and subordinate courts. Effective from 1 August 2012, the Rules of Court 2012 apply to both
- C** the High Court and subordinate courts.
- D** [28] Next, The National Language Acts 1963/67 (Revised 1971) (Act 32) was revised in 1971. In that revision exercise, the two Acts, the National Language Act of 1963 and the National Language Act of 1967 were consolidated into a single Act with effect from 1 July 1971. The Acts came into force in the States of Sabah and Sarawak on different dates.
- E** [29] Section 2 of Act 32 provides that the National Language shall be used for official purposes ‘Save as provided in this Act and subject to the safeguards contained in Article 152(1) of the Constitution relating to any other language and the language of any other community in Malaysia’. Even for official purposes, s 4 provides that the Yang di-Pertuan Agong may permit the continued use of the English language as may be deemed fit.
- F** [30] In the matter of proceedings in court, s 8 (as amended vide Act A765/1990 with effect from 30 March 1990) permits the continued use of the English Language in the interests of justice:
- G** 8. All proceedings (other than the giving of evidence by a witness) in the Federal Court, Court of Appeal, the High Court or any Subordinate Court shall be in the national language:
- H** Provided that the Court may either of its own motion or on the application of any party to any proceedings and after considering the interests of justice in those proceedings, order that the proceedings (other than the giving of evidence by a witness) shall be partly in the national language and partly in the English language.
- I** [31] To facilitate the amendment to s 8 of Act 32, Practice Direction No 2 of 1990 (PD No 2/1990) was issued under the authority of the Chief Judge of Malaya on 10 May 1990. PD No 2/1990 deals specifically with all urgent and pending proceedings:
- Adalah memang dijangkakan bahawa beberapa kesulitan praktikal akan dihadapi dalam tempoh sementara pelaksanaan pindaan kepada seksyen 8 Akta Bahasa Kebangsaan melalui Akta Pindaan A765. Bagi mengatasi kesulitan-kesulitan tersebut, arahan berikut hendaklah terpakai dalam tempoh sementara ini.

1. Dalam kes-kes kedesakan, prosiding boleh dimulakan atau dijalankan sebahagiannya dalam Bahasa Kebangsaan dan sebahagiannya dalam Bahasa Inggeris atau kesemuanya dalam Bahasa Inggeris dengan syarat bahawa —
 - (i) suatu sijil kedesakan yang menjelaskan kedesakan perkara itu dalam Bahasa Inggeris difailkan oleh peguamcara berkenaan; dan
 - (ii) salinan semua dokumen tersebut dalam Bahasa Kebangsaan hendaklah difailkan dalam tempoh dua minggu atau dalam tempoh yang dilanjutkan sebagaimana yang dibenarkan oleh mahkamah.
2. Prosiding-prosiding yang telah dimulakan sebelum 1hb Jun 1990 boleh, atas budi bicara mahkamah, diteruskan sebahagiannya dalam Bahasa Kebangsaan dan sebahagiannya dalam Bahasa Inggeris atau kesemuanya dalam Bahasa Inggeris.
3. Mengikut Aturan 92(1) Kaedah-Kaedah Mahkamah Tinggi 1980 dan Aturan 53(5) Kaedah-Kaedah Mahkamah Rendah 1980, mana-mana dokumen yang pada asalnya dalam Bahasa Inggeris bolehlah digunakan sebagai ekshibit, dengan atau tanpa terjemahannya dalam Bahasa Kebangsaan.
4. Sekiranya terdapat apa-apa pertikaian atau kesulitan dalam pelaksanaan Akta Pindaan A765 seperti yang disebut terdahulu, yang tidak diliputi oleh Arahan ini, Mahkamah boleh, atas permohonan lisan oleh Peguam bagi mana-mana pihak atau atas permohonan dengan cara Saman dalam Kamar secara ex-parte atau Saman Pemula atau atas kehendaknya sendiri, memberi apa-apa arahan sebagaimana yang dikehendaki demi kepentingan keadilan.

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[32] As can be seen, the substance of PD No 2/1990 is substantially reflected in the amended s 8, except that the discretion on the use of cause papers in the English language was no longer restricted to urgent circumstances.

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[33] Shortly after PD No 2/1990 was issued, Registrar's Circular No 5 of 1990 the contents of which have already been set out, was issued on 28 July 1990. This Circular deals specifically with divorce petitions and proceedings related to matrimonial affairs, bankruptcy and winding up proceedings. This Circular essentially allows the cause papers relating to divorce and matrimonial proceedings, insolvency and winding up proceedings to be filed in English until such time as the relevant Rules are translated into the National Language and the translations are *gazetted*. We have used the word 'allows' because the Registrar's Circular is still in effect today as the DMPR, relevant to this appeal, have yet to be translated and *gazetted*.

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[34] Enclosure 20 at the High Court was dismissed because there was no translation of these cause papers into the National Language. Order 92 r 1 operated on the mind of the learned judge and it reads as follows:

- A** (1) Subject to paragraph (2), *any document required for use in pursuance of these Rules shall be in the national language* and may be accompanied by a translation thereof in the English language, except that the translation for the purpose of Order 11, rule 6(4) and rule 7(1) shall be prepared in accordance with rule 6(5) of that Order:
- B** Provided that any document in the English language may be used as an exhibit, with or without a translation thereof in the national language.
- (2) For Sabah and Sarawak, any document required for use in pursuance of these Rules shall be in the English language and may be accompanied by a translation thereof in the national language except that the translation for the purpose of Order 11, rule 6(4) and rule 7(1) shall be prepared in accordance with rule 6(5) of that Order.
- C** (3) ...
- D** (4) In cases of urgency, proceedings may be commenced or conducted partly in the English language or wholly in the English language provided that—
- (a) a certificate of urgency explaining the urgency of the matter is filed by the solicitor; and
- (b) copies of all such documents in the national language shall be filed within two weeks or within such extended period as the Court may allow:
- E** Provided that:
- (a) any document in the national language may be used as an exhibit, with or without a translation thereof in the English language; and
- F** (b) any document in the English language may be used as an exhibit, with or without a translation thereof in the national language. (Emphasis added.)
- G** [35] It is quite clear that O 92 r 1 is applicable where the document(s) filed in Court are for use in pursuance to ‘these Rules’; these Rules being the Rules of Court 2012. But, Rules of Court 2012 do not apply to matrimonial proceedings under Act 164 and the DMPR. This is clearly provided in O 1 r 2(2) which seems to have escaped the attention of the courts below:
- H** 2 Application (O 1, r 2)
- (1) Subject to paragraph (2), these Rules apply to all proceedings in —
- (a) the Magistrates’ Court;
- I** (b) the Sessions Court; and
- (c) the High Court.
- (2) *These Rules do not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the specific purpose of such proceedings or in relation to any criminal proceedings.* (Emphasis added.)

[36] Order 1 r 2(2) specifically recognises that the Rules of Court 2012 will not have any effect in or to those proceedings where separate rules have already been made or may be made under written law specifically for the purpose of such proceedings. This is an express provision for the operation of the maxim *generalia specialibus non derogant*. In *Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor* [2012] 2 MLJ 8, this court held that this maxim applied to exclude the operation of the general law on appeals under the Legal Profession Act 1976 (Act 166) as that Act had specific provisions on appeal. Similarly, in the recent decision of *Protasco Bhd v Tey Por Yee & Anor and other appeals* [2021] 6 MLJ 1; [2021] 6 MLRA 370, the Federal Court held that it is the specific law in the form of the Bankers' Book (Evidence) Act 1949 which applied to banking documents and not the general provisions of the Rules of Court 2012.

[37] There is also O 94 r 2 of the Rules of Court 2012. Under r 2(1), O 5 r 1 which deals with the mode of commencement of proceedings is expressly excluded from application to those proceedings initiated under the written laws listed in Appendix C, except as provided under the Rules themselves. Appendix C was amended vide Rules of Court 2012 (Amendment) 2018 (PU (A) 24/2018). Order 94 r 2(2) provides that in the event there is any inconsistency between any of the Rules made under the specific written law and the Rules of Court 2012, the former shall prevail:

2 Exception (O 94, r 2)

- (1) Order 5, rule 1 shall not apply to the proceedings under the written laws listed in Appendix C, except as provided under these Rules.
- (2) In the event of any inconsistency, *the rules under the written laws in Appendix C shall prevail over these Rules.*
- (3) Any application under any written law, other than those listed in Appendix C, which is by way of a mode other than originating summons or writ, shall be construed to be by way of originating summons in accordance with these Rules. (Emphasis added.)

[38] In the list of exempted written laws set out in Appendix C is item 5 dealing with matrimonial proceedings under Act 164:

APPENDIX C

LIST OF EXEMPTED LAWS

(1) Item	(2) Proceedings	(3) Written law
1.	Bankruptcy proceedings	Bankruptcy Act 1967
2.	Proceedings relating to the winding up of companies and capital reduction	Companies Act 2016 [Act 777]
3.	Criminal proceedings	Criminal Procedure Code [Act 593]

A	(1) Item	(2) Proceedings	(3) Written law
	4.	Proceedings under the Elections Offences Act 1954	Elections Offences Act 1954 [Act 5]
B	5.	Matrimonial proceedings	Law Reform (Marriage and Divorce) Act 1976 [Act 164]
	6.	Land reference	Land Acquisition Act 1960 [Act 486]
C	7.	Admission to the Bar	Legal Profession Act 1976 [Act 166] Advocates Ordinance of Sabah [Sabah Cap. 2] Advocates Ordinance of Sarawak [Sarawak Cap. 110]
	8.	Proceedings under the Income Tax Act 1967	Income Tax Act 1967 [Act 53]
D	9.	Proceedings under the Sabah Trustees (Incorporation) Ordinance 1951	Sabah Trustees (Incorporation) Ordinance 1951 [Cap. 148]
	10.	Proceedings under the Sabah Probate and Administration Ordinance 1947	Sabah Probate and Administration Ordinance 1947 [Cap. 109]
E	11.	Proceedings under the Real Property Gains Tax Act 1976	Real Property Gains Tax Act 1976 [Act 169]
	12.	Proceedings under the Petroleum (Income Tax) Act 1967	Petroleum (Income Tax) Act 1967 [Act 543]
F	13.	Proceedings under the Development Financial Institutions Act 2002	Development Financial Institutions Act 2002 [Act 618]
	14.	Proceedings under the Trust Companies Act 1949	Trust Companies Act 1949 [Act 100]
G	15.	Proceedings under the Kootu Funds (Prohibition) Act 1971	Kootu Funds (Prohibition) Act 1971 [Act 28]

[39] It cannot be any clearer that the Rules enacted under written laws are to apply to those subject matters mentioned in Appendix C. If the Rules of Court 2012 are ever to apply, it is only where it is expressly provided in the Rules of Court 2012. This reemphasises the significance and application of the specific rules enacted under written law. In the present appeal, it would be the DMPR themselves which contain comprehensive provisions on the commencement and conduct of matrimonial proceedings, including applications for judicial separation under Act 164. All this therefore means that the Rules of Court 2012 and in particular O 92 do not apply to the matrimonial proceedings at hand.

[40] In any case, there is also r 105 of the DMPR which provides for the

issuance of directions for the purpose of ensuring uniformity of practice and observance of the statutory requirements in matrimonial proceedings: A

105 Practice to be observed in registries and divorce courts

The Chief Justice may issue directions for the purpose of securing in the registries and the divorce courts due observance of statutory requirements and uniformity of practice in matrimonial proceedings. B

[41] There is a similar power in s 17A of the Courts of Judicature Act 1964 (Act 91) for the issuance of Practice Directions and in O 92 r 3B the directions seen as 'necessary for the better carrying out or giving effect' to the provisions of the Rules of Court 2012. C

[42] There is nothing in the Registrar's Circular to suggest that it was issued pursuant to r 105. However, it would be reasonable to say that the contents of this circular accords with the purpose why any directions would be issued under r 105, that it was issued in order to ensure uniformity of practice and due observance of the statutory requirements in Act 164 and the DMPR. D

[43] PD No 2/1990 was issued following the application of the National Language to proceedings in court. Even then, there was cognizance of the importance of interests of justice, that such interests must never be compromised in the course of implementing procedures for the better administration of justice. PD No 2/1990, as is with other Practice Directions is directed at the judges who will hear the applications under the relevant laws. E F

[44] PD No 2/1990 was directed at all the judges and judicial commissioners of the High Court of Malaya, sessions court judges, Deputy and senior assistant registrars and magistrates in West Malaysia. This PD was copied extensively to everyone who mattered or was concerned with the administration of justice, namely, the Chief Justice, Chief Judge of Sabah and Sarawak (for information), judges of the Federal Court, Attorney General, Chief Registrar of the Federal Court, Registrar of the High Court, President of the Bar Council of Malaysia, Editor General of the Malayan Law Journal, Malayan Law Journal and the Senior Editor at Dewan Bahasa & Pustaka. Ultimately, the public, the users of the system of justice will get wind of the details in the direction. G H

[45] The same may be said of the Registrar's Circular. It was directed at all the Senior Assistant Registrars and Registrars in West Malaysia. I

[46] But, it is the recipients of PD No 2/1990 and the Registrar's Circular that we must have regard to and not so much who was copied in on the direction or the fact that the public will come eventually to be aware of the directions. The direction is given to these recipients so that they know what to

A do when confronted with the particular circumstance. What the administrators who man the registries have to do is to comply with the Registrar's Circular and accept any cause papers which is filed only in the English Language (*dibenar difailkan dalam Bahasa Inggeris sehingga kaedah-kaedah berkenaan dengannya selesai diterjemah dan ditawarkan*).

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[47] As for the users who may have reason to be in court, they would have the confidence to know what the particular practice will be. In other words, any litigant taking proceedings under Act 164 including filing an application such as encl 20, can expect that it will be 'business as usual' and may proceed to file the application only in the English language; particularly since the DMPR have yet to be translated and the translation, *gazetted*. A litigant such as the appellant here can expect their cause papers to be accepted not just by the registry but by the learned judge without any issue since there is clear permission for a filing of related documents in English.

D
[48] This expectation would be quite legitimate and fair since the litigant or appellant in this appeal, cannot use the Rules of Court 2012 *simpliciter* as the Rules themselves have excluded its application to matrimonial proceedings under Act 164 (O 94 r 2 and Appendix C item 5). To complicate matters, the existing DMPR have yet to be translated.

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[49] Here, we must address r 3 of the DMPR which reads as follows:

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G (1) Subject to these Rules and to any other written law, the Subordinate Courts Rules 1980 and the Rules of the High Court 1980 shall apply with necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending in the Sessions Court in West Malaysia or the First Class Magistrate's Court in East Malaysia and in the High Court respectively.

(2) For the purpose of paragraph (1), any provision of these Rules authorising or requiring anything to be done in matrimonial proceedings shall be treated as if it were, in the case of proceedings pending in the High Court, a provision of the Rules of the High Court 1980.

H
[50] Although r 3 provides for the application of the then Rules of the High Court 1980 and now the Rules of Court 2012, it categorically states that the application is 'Subject to these Rules' and that the application is 'with necessary modifications'. However, as we have seen, the Rules of Court 2012 themselves have excluded its application to matrimonial proceedings.

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[51] While practice directions and circulars are issued for the proper and better administration of justice, and they are generally effective in that regard, the courts who are responsible for the issuance of these directions and circulars

must guard against adherence that result in injustice. The circumstances and conditions that present in this appeal illustrates this unfortunate outcome, with the appellant complying with the Registrar's Circular but indirectly faulted by the High Court for having done so.

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[52] In *Witech Sdn Bhd & Ors v BHR Group Ltd* [2011] 1 MLJ 781; [2010] 9 CLJ 288, the Court of Appeal acknowledged the 'importance of the Registrar's Circular as a practice direction', as highlighted by Sir Thomas Bingham MR in *Costellow v Somerset County Council* [1993] 1 WLR 256. However, the Court of Appeal opined that:

B

Defendants must be protected from the injustice that they might incur if a judgment is entered against them in contravention of the relevant procedural rules or in some other way that might prevent them from exercising their right to defend the action.

C

[53] We agree. The relevant direction or circular must be carefully examined and appreciated in context. Having held out to the public that their cause papers may be filed only in the English Language, it does not hold any sense to then castigate a party for not having complied with the Rules of Court 2012 and reasoning that the direction and circular is in fact worth naught. The dismissal of encl 20 have in our opinion the effect of depriving the appellant access to justice and equal protection of the law as embodied in arts 5 and 8 of the Federal Constitution.

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[54] In the course of this judgment, we have deliberately referred to the cause papers filed under Act 164 as opposed to the petition alone. It makes sense that our deliberations extend and include all cause papers filed in relation to the petition.

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[55] Earlier, we had also pointed out the existence of a consistent line of authorities from the High Court on the application of the same Registrar's Circular in the context of winding up proceedings. From the above deliberations, the interpretation in those decisions is correct.

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[56] The Court of Appeal had found the circular to be in conflict with the Rules of Court 2012, particularly O 92 r 1(1). There was however, no analysis as to how the conflict arose, if at all there is one since the intent of the Registrar's Circular is really at the end of the day to defer the operation of the Rules of Court 2012 to such time as when, for the purposes of this appeal, the DMPR have been translated and *gazetted*. From the above analysis, it is evident that the Rules of Court 2012 do not apply to matrimonial proceedings filed under Act 164 and DMPR in which case, the matter of conflict does not even arise.

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[57] For all the reasons adumbrated above, we allowed the appeal and set

A aside the decisions of the courts below. We answered the first two questions of law posed in the affirmative and decline to answer the third as it is no longer necessary with the development of the case, as confirmed by learned counsel for the appellant.

B *Enclosure 6 dismissed; appeal allowed; decisions of courts below set aside.*

Reported by Dzulqarnain Ab Fatar

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