

## EDITORIAL HIGHLIGHT

INTERVIEW SESSION WITH YB PUAN HAJAH NANCY SHUKRI,  
THE MINISTER IN THE PRIME MINISTER'S DEPARTMENT

YB Puan Hajah Nancy Shukri, Minister in the Prime Minister's Department in charge of law during an interview session with INSIGHTs' team members on the 28th October 2014, shared her thoughts and hopes for ILKAP.



YB PUAN HAJAH NANCY SHUKRI  
THE MINISTER IN THE PRIME MINISTER'S  
DEPARTMENT

**INSIGHT :** It has been one and a half years since YB has been appointed as a Minister in the Prime Minister's Department. What are some of YB's aspirations that YB would like to share with us?

**YB:** If you noticed the minute I assumed office, I was promoting outreach programmes because our nation's hunger for knowledge was obvious. That's the reason why I require agencies under me such as ILKAP to have outreach programmes. I think ILKAP should have outreach programmes as their Key Performance Indicator (KPI). I am aware the reason for ILKAP's establishment was to train the lawyers, but making the public understand about law helps them to be aware of their rights. I think it is important for the people to learn about law and the importance of it. It is timely for ILKAP to venture out and have more of these programmes. That is my aspiration.

**INSIGHT:** We understand that there are many KPIs YB has to meet and that ILKAP's outreach programme is the latest one to be included this year. We are honoured that YB has chosen our outreach programme, perhaps YB would like to elaborate on this choice?

**YB:** I am glad that ILKAP can organize the outreach programmes even though it is not in ILKAP's KPI. I am also glad ILKAP is able to meet this request. Even though it is quite new for ILKAP, I think ILKAP had done a good job. That is why I intend to include

ILKAP's KPI as one of my KPI under the Minister's KPI. I think from the outreach programmes that we had organised, we have received overwhelming response. People want more actually, this is as what was told by the people.

**INSIGHT:** What are YB's hopes on the positive impact of these outreach programmes?

**YB:** I hope we can increase the participation. Right now the participation is 300 people. I hope to see more people being given legal knowledge on whatever issues so that they will be aware of their rights. I think it is important for people to have knowledge. ILKAP has the capacity to train so why not educate the public.

**INSIGHT:** Is there any limit that YB has in mind?

**YB:** There is no limit actually. There should not be any limit in sharing knowledge. Of course I understand ILKAP would have constraints on budget allocation. Nevertheless, we should try to increase the number of the participants with proper budgeting. Perhaps in the future you can have more programmes in each state. Use the network you already have in those states. You all have good relationship with one another hence, capitalise on the networking.

### DISCLAIMER

**INSIGHT :** We started the outreach programme with the topic on issues of women and children. Why is this issue pertinent at this moment?

**YB:** Women are easily the target of being victimised out there in many ways. That is why I started with women and children so that they can empower themselves. With the knowledge they acquire, they can lead a better life and also can carry out their duties in their daily lives. It is also to build their confidence in facing with problems and challenges. Give them the chance to listen to lawyers. Provide them with necessary information through this kind of outreach programmes.

**INSIGHT :** What are the issues that YB think are of importance to the public to create awareness and to educate them of their rights?

**YB :** I think we should focus again on educating women. We look into their rights and role as a mother, as a woman and as a wife. There are a lot of issues. Such as, any women are married to foreigners. How do these women go about when they are divorced? What is the status of their children? The issue of maintenance, how can they go about it? Next will be the issue of human trafficking. Some of them do not know what is human trafficking. Some of the women were promised jobs but ended being sold to slavery. Then, the issue on violence against women. Women who were abused and they do not know they were being abused.

Other issues include rights as citizen. Their rights under the Constitution. People should be taught on the importance to uphold the Constitution. I think issues on Constitution are the in thing now. We should go to basic. I think those are the issues that are of importance now.

**INSIGHT :** ILKAP is a training centre for officers in judicial and legal services, as such what are YB's hopes for ILKAP?

**YB :** I hope ILKAP will do more courses for Judicial and Legal Officers. I think ILKAP should concentrate on communication programmes. Like it or not, in West Malaysia we use Bahasa Malaysia in the court. But in Sabah and Sarawak we use English as the main language to communicate in court. Therefore, officers should be well versed in English. I think ILKAP should concentrate more on that area.

**INSIGHT :** What would YB wish to convey to ILKAP's officers?

**YB :** You all have done a very good job. My wish is all the best to all of you. With this coming New Year, have a new resolution. Try to increase your capacity in terms of what all of you want to achieve. Share your knowledge. Be strong, be strategic in whatever you are doing, so that you will be more focus.

## THANK YOU





## \* FORUM NON CONVENIENS IN CHILD CUSTODY CASES IN MALAYSIA

### INTRODUCTION

International parental child abduction has been an issue long outstanding. Parental child abduction happened when a child is wrongfully removed or retained by a parent without the consent of the left-behind parent. The issue complicates further if the child is abducted across national boundaries.

The only international mechanism thus far with the objective to ensure prompt return of abducted children is the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Child Abduction Convention). The Child Abduction Convention does not deal with custody dispute or merits of a case. It concerns the prompt return of abducted children to their place of habitual residence. Issues on custody will be dealt with by the courts of the child's habitual residence. This is the underlying principle of *forum non conveniens*. The doctrine was meant to prevent forum shopping by allowing the defendant to argue that there is a more natural forum elsewhere.

The application of the doctrine of *forum non conveniens* in Malaysia in custody cases marked a remarkable approach by the courts to deter forum shopping and hopefully curb international parental child abduction even when Malaysia is not yet a member to the Child Abduction Convention. The court when applying *forum non conveniens* will use its discretion to ascertain which forum has the most real and substantial connections to the child whom custody is in dispute. In short, the application of *forum non conveniens* signifies the approach of the Malaysian court to be in line with the spirit of the Child Abduction Convention for prompt return of an abducted child to a place of her habitual residence.

### FORUM NON CONVENIENS IN CUSTODY CASES

*Forum Non Conveniens* is a discretionary power of courts to refuse jurisdiction over matters where there is a more appropriate forum available to the parties. The doctrine of *forum non conveniens* was first developed in the Scottish courts in the cases of *Sim v Robinow* (1892) 19 R. 665 (Lord Kinnear) and *The Abidin Daver* [1984] AC 398. *Forum Non Conveniens* was derived from commercial dispute (*Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, [1986] 3 WLR 972) and is equally applicable in family cases in England as held by the House of Lords in *De Dampierre v. De Dampierre* ([1988] AC 92, [1987] 2 WLR 1006) including custody cases.

The basic principle is that *forum non conveniens* is applicable if 'the court is satisfied that there is some other forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. It is to identify the court in which the case can be most suitably tried for the interests of the parties and the ends of justice. *Forum non conveniens* allows the court the discretion to decline or stay jurisdiction when the forum selected by the plaintiff is clearly inappropriate.

Essentially, the doctrine involves a two-stage test. The burden of proof is on the defendant to show that there is another forum which is clearly or distinctly more appropriate. Regard must be had to the connecting factors which point to one forum that has the most real and substantial connections. If this is established, jurisdiction will be stayed or declined unless (and this is the second stage) the plaintiff can demonstrate that justice could not be obtained in that other jurisdiction. In the Malaysian context, the doctrine of *forum non conveniens* is accepted in custody disputes as can be seen in the case of *Herbert Thomas Small v. Elizabeth Mary Small And Kerajaan Malaysia & Anor*, interveners (Herbert Thomas Small) ([2006] 6 MLJ 372, [2004] MLJU 732. The doctrine is applicable especially when it involves foreign nationals not substantially connected to Malaysia. It is suggested that the factors to be considered in future custody applications involving foreign elements would be the factors considered in the commercial disputes following the *Spiliada* case as long as the 'best interests of the child' is not jeopardized. The most prominent factor is whether any particular forum has 'the most real and substantial connection' as held

*American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 at page 168. In *Spiliada*, the court seems comfortable to use the word 'appropriate forum' rather than '*conveniens*' which does not mean a forum for the convenience of the pursuer or the defender or the court. It is not a 'mere practical convenience'.

The modified *Spiliada* principles when applied to issues relating to children, answered the question as to which jurisdiction would be the most appropriate one to effectively determine the best interests of a child. In parental child abduction cases, a child wrongfully removed from his or her habitual residence would remain most connected to the country of the child's habitual residence. This rule does not deviate from the welfare principle. It points out at how the principle of the best interests of the child must be applied where a child has connections with two countries. This also enables the welfare principle to be applied within the international perspective.

The determining factors in *forum non conveniens* are described as 'legion' and include the child's welfare; habitual residence of the child; efficiency, expedition and economy of the proceedings; availability and cost of legal representation and legal aid; availability of witnesses and cost of travel; ability of the court to ascertain the wishes and feelings of the child and availability of independent reporting facilities. The court needs to balance these factors to reach a decision that *forum non conveniens* is applicable.

### FORUM NON CONVENIENS AND BEST INTERESTS OF THE CHILD IN PARENTAL CHILD ABDUCTION CASES

In any matters concerning children especially custody disputes, the principle of the best interests of the child is the paramount consideration even if there was a foreign court order as ruled in *McKee* followed in *Mahabir Prasad v Mahabir Prasad (Mahabir Prasad)* [1981] 2 MLJ 326. In *forum non conveniens*, the best interests of the child will be given weight of importance but not paramount as decided in the case of *Herbert Thomas Small*. The most prominent factor is which forum has the 'most real and substantial connection'.

*Forum non conveniens* in custody disputes does not depart from the principle of the best interests of the child. The court in *Herbert Thomas Small* considered two factors in determining which forum was more appropriate for the best interests of the child: whether the child would be harmed if returned to Australia and whether Australia would apply the paramountcy of the child's welfare principle. Based on these considerations, the court's main concern was to ensure prompt return of the abducted child to the country with which the child was substantially connected, unless there was a compelling reason to the contrary. This includes harmful effects to abducted children if returned. Another factor is whether the court of the country where the child to return applies best interests of the child as a paramount consideration (See the case of *G v G (Minors) (Abduction)* [1991] Fam Law Vol 21). This includes harmful effects to abducted children if returned. Another factor is whether the court of the country where the child to return applies best interests of the child as a paramount consideration (See the case of *G v G (Minors) (Abduction)* [1991] Fam Law Vol 21).

The court further decided that in abduction cases, it was in the child's welfare to be returned to the child's home country. The court observed that 'an important consideration must be the child's cultural connections and affinity which a child's best interest is best determined by the forum which is best equipped to determine what is best for the child in all material aspects ranging from its health care, education, moral and spiritual and other relevant needs.

It is not in the best interests of the child if the issue of custody of an abducted child be heard and determined in a jurisdiction that has little or no connection at all with the child. In *G v G (Minors) (Abduction)* [1991] Fam Law Vol 21. Balcombe LJ said that 'any decision relating to the custody of children is best decided in the jurisdiction in which they have hitherto normally been resident. Furthermore as Buckley LJ said in *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 All.E.R 913, the consequence of abductions 'are likely to be psychologically disturbing to the child. It is in the best interests of the child

these disturbing factors should be eliminated from his life as speedily as possible. He further said that the order for the child to return to the country from which he was removed is 'in the expectation that any dispute about his custody will be satisfactorily resolved in the courts of the country' and this 'may well be regarded as being in the best interests of the child'. These English cases were referred with approval and followed in the cases of *Herbert Thomas Small* and *Neduncheliyan*.

*Herbert Thomas Small* and *Neduncheliyan* followed the comment of Nigel Lowe on the English decision in *G v G (Minors) (Abduction)*. In both cases, the court thinks that the decision in *G v G (Minors) (Abduction)* correctly stated the position for abduction cases in non-convention countries.

*G v G (Minors) (Abduction)* decided on 26th May 1989, was a case of parental child abduction involving children abducted away from Kenya, a non-convention country. The decision in *G v G (Minors) (Abduction)* is a case which decision was made after the United Kingdom joined the 1980 Child Abduction Convention. The UK Child Abduction and Custody Act 1985 gives effect to the 1980 Child Abduction Convention and the European Convention.

The Malaysian cases which referred and followed this English case demonstrates the trend by the Malaysian courts to follow the decision in the United Kingdom even when Malaysia is not a member to the 1980 Child Abduction Convention.

If *forum non conveniens* is applicable, the abducted child will be sent back to the country where he or she was first removed and the custody proceedings will be heard and determined in that country. The question is, whether *forum non conveniens* conflicts with the best interest of the child especially on abduction cases?

In Malaysia, *Mahabir Prasad* is still good law and binds all the courts below. The facts of the case were that the mother went back to India and filed a divorce petition and custody for the infants. Interim custody order was given to the mother. The father was represented at the hearing and gave an undertaking to produce the infants on the date fixed for hearing i.e. December 16, 1980. On the date of hearing, the father failed to appear and produce the infants. The court in India proceeded and gave the final custody order to the mother. The father on the other hand, instituted a custody application on December 15, 1980 in the High Court of Malaysia but was unsuccessful as the court was of the opinion that the court's decision in India was conclusive as against the father and it was not open to the father to ask for another court on the same matter. The father appealed and the Federal court held that the High Court judge erred in his exercise of his discretion and that the conclusion reached by the court did not serve in the best interests of the child as the High Court concluded that on merits the father could not succeed as the father had not shown any change of circumstances to re-open the custody order granted in India.

*Mahabir Prasad* was not mentioned at all in *Herbert Thomas Small*. Based from the facts of the case, the reason is probably because the main issue in *Herbert Thomas Small* was not about recognition of foreign custody order. The main issue in *Herbert Thomas Small* was which forum is the more appropriate forum, to decide the custody dispute. *Mahabir Prasad* was not an abduction case unlike *Herbert Thomas Small*. In *Mahabir Prasad*, Malaysia was the ordinary residence of the children. The children were with their father in Malaysia even during the time when the custody order was obtained in India.

It is hoped that for future cases that involve foreign elements, the courts would adopt the approach in *Herbert Thomas Small*. *Forum non conveniens* serves to be in the best interests of the child in abduction cases if the child is returned to his/her country of habitual residence. This is to enable the more appropriate forum to decide on the merits, being the court with the most real and substantial connections to the child. This would also discourage forum shopping and parental child abduction and in line with the spirit of the 1980

1980 Child Abduction Convention even though Malaysia is not yet a member.

## CONCLUSION

The cases of *Herbert Thomas Small* and *Neduncheliyan* illustrate the efforts of the courts in Malaysia to decide abduction cases in accordance with the spirit of the 1980 Child Abduction Convention that summary return of children is in the best interests of the child. The reason for summary return is due to the impact of abduction, which is severe, and conflicts with the best interests of the child.

In cases relating to children and particularly child abduction, it is for the best interests of the child to restore the child to his or her familiar surroundings in a country where the child has connections. The changing of environment, socially and culturally and even the language barrier have some effects to the child psychologically. Children may suffer emotional trauma especially when their parents break up. This is aggravated when one parent decided to take away the child from having any contact with the other parent when the child is abducted thus denying access to the left-behind parent.

An effort to ensure the swift return of a child is in the best interests of the child as it restores the child to his or her familiar surroundings. If however the custody issue is re-assessed despite a previous foreign custody orders and return is delayed, the child may have adapted to the new environment and further change after this would be detrimental to the child's growth. In short, "time is of the essence" in all decisions relating to children and a prompt return is imperative. According to Goldstein J, Freud A and Solnit A J in *Beyond the Best Interests of the Child*, (1980) at page 43 stated that children have a very different sense of time from adults. 3 months may not be a long time for an adult, for a young child it may be forever.

*Forum non conveniens* promotes prompt return of children to their familiar surroundings prior to the abduction. The approach of the Malaysian courts in applying the doctrine of *forum non conveniens* in child custody cases involves the immediate return of an abducted child to a country with which the child is substantially connected as long as it would not harm the child and the other jurisdiction applies the best interests of the child test as the paramount consideration. This issue is best determined by the forum court based on the cultural and societal environments which are familiar to the child. This is the underlying reason for *forum non conveniens* in cases involving children.

The doctrine of *forum non conveniens* involves the court exercising its discretion. The determining factors vary depending on the facts of each case. *Forum non conveniens* needs to be pleaded and litigated in court. As compared to the approach adopted under the traditional common law rules, which had the consequence of condoning parental child abduction, *forum non conveniens* discourages forum shopping and parental child abduction. The approach of the Malaysian courts in applying the doctrine of *forum non conveniens* follows the spirit of the 1980 Child Abduction Convention even though Malaysia is not a convention country.

The cases discussed above show that *forum non conveniens* does regard the best interests of the child with the swift return of children to their place of habitual residence.

The case of *Herbert Thomas Small* raised a remarkable point in the approach of the Malaysian courts relating to foreign custody orders. The court when deciding under *forum non conveniens*, does not re-assess a foreign custody order but instead, acknowledges a foreign court's jurisdiction as the more appropriate forum to determine any issue of dispute. This decision of the Malaysian court to order the return of the abducted child illustrates the approach of the Malaysian court to be in line with the spirit of the 1980 Child Abduction Convention for prompt return of a child to a place of her ordinary residence even when Malaysia is not a member and still considering accession to the 1980 Child Abduction Convention.



## ILKAP NATIONAL LAW CONFERENCE

The ILKAP National Law Conference 2014 (ILKAP NLC 2014) had set to take a critical look from the legal perspective at the challenges faced by society through the emergence of issues brought about by the nation's progress and more generally from the effects of globalization. Thus the conference theme "LAW AND SOCIAL ORDER : CURRENT CHALLENGES IN MALAYSIA" was apt and timely, and served as platform for intense and mature discourse.

The ILKAP NLC 2014 brought together a pool of distinguished speakers who are experts in their respective fields. The Honourable Puan Hajah Nancy Shukri, Minister in the Prime Minister's Department acted as Patron and officiated the Conference while the Honourable Tan Sri Abd Ghani Patail, the Attorney General of Malaysia delivered the Keynote Address on "Current Challenges In Preserving Social Order and National Harmony- A Critical Note" in this Conference.

The objectives of ILKAP NLC 2014 were-

- To enhance the understanding of participants on the scope and impact of law on social order;
- To provide a platform for intellectual discourse amongst participants; and
- To explore possible solutions that addresses the challenges in maintaining social order.

ILKAP acknowledged the kind support of all the collaborating partners who have made the event possible. They are the Ministry of Women, Family and Community Development, Ministry of Education, Ministry of Communications and Multimedia, Institut Terjemahan & Buku Malaysia (ITBM), the Law Faculty of Universiti Kebangsaan Malaysia, University Malaya and Universiti Teknologi MARA (UiTM).

## OUTREACH PROGRAMME SABAH

After Sarawak, ILKAP Outreach Programme was continued in Sabah on "Rights and Issues Of Women and Children". The main objective is to raise public awareness of the rights and issues related to women and children. The programme was well received and will be continued in 2015.



## ILKAP SPEAKER SERIES (ISS)

The inaugural lecture of ISS was held successfully at ILKAP on the 27th October 2014 and officiated by The Honourable Tan Sri Abdul Gani Patail, The Attorney General Of Malaysia with the Topic "Critical Lawyering : Bridging Theory and Practice for Social Change".

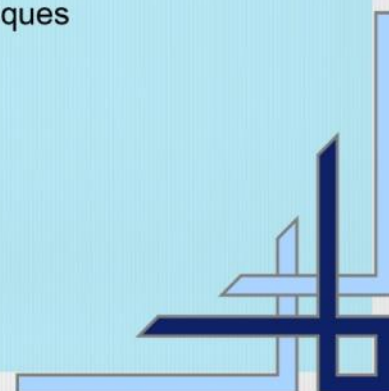
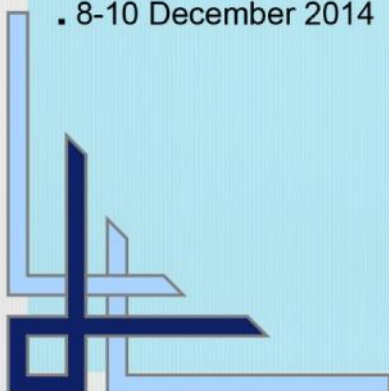
ISS was initiated to create platform for intellectual discourse and knowledge sharing by having prominent and eminent speakers from the legal fraternity to share their thoughts and ideas on current legal issues.





## ILKAP ACTIVITIES

- . 10 May 2014 - *Ekspedisi Mendaki & Eksplorasi Hutan FRIM, Kepong*
- . 28 May 2014 - *Armchair Discussion "Anti-Money Laundering And Anti-Terrorism Finance"*
- . 29 May 2014 - *Program Bicara Inovasi ILKAP Bil.1/2015*
- . 4 June 2014 - *Kursus Kesedaran dan Kepentingan Sihat Cergas Ceria*
- . 12 June 2014 - *School Break Activity; English is Fun*
- . 24 June 2014 - *Majlis Makan Malam (Oscar Night) Program Transformasi Minda*
- . 27 June 2014 - *Ceramah Sambutan Ramadhan 'Kerana Terpaksa Aku Relakan'*
- . 18 July 2014 - *Majlis Iftar ILKAP*
- . 19-21 August 2014 - *Bengkel Pelan Strategik ILKAP 2015-2020*
- . 22 August 2014 - *Visit By The Honourable Chief Justice Of Bangladesh*
- . 29 August 2014 - *Majlis Ramah Mesra ILKAP*
- . 7 September 2014 - *Bowling Puspanita*
- . 27 October 2014 - *ILKAP Speaker Series (ISS)*
- . 11-12 November 2014 - *ILKAP National Law Conference 2014*
- . 22 November 2014 - *Bowling ILKAP*
- . 26-28 November 2014 - *Kursus Kesedaran dan Kepentingan Sihat Cergas Ceria*
- . 8-10 December 2014 - *Kursus Lateral Thinking : Edward De Bono's Techniques*

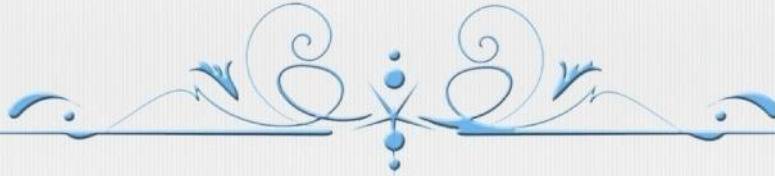




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JABATAN PERDANA MENTERI

# INSIGHT

ILKAP E-NEWS LETTER



## ARMCHAIR DISCUSSION

### BICARA INOVASI



### BOWLING ILKAP



### EKSPEDISI MENDAKI



### IFTAR ILKAP



## MANAGING CONFLICT AND RESOLVING DISPUTES EFFECTIVELY THROUGH MEDIATION





INSTITUT LATIHAN KEHAKIMAN DAN PERUNDANGAN  
JABATAN PERDANA MENTERI

# INSIGHT

ILKAP E-NEWS LETTER



FORUM PARENTAL RESPONSIBILITIES



FORUM ASEAN READINESS



MAULIDUR RASUL



PERHIMPUNAN BULANAN



SCHOOL ACTIVITY



WORKSHOP OPINION WRITING

