

IN THE FEDERAL COURT OF MALAYSIA

PUTRAJAYA (APPELLATE JURISDICTION)

CIVIL APPEAL NO. 01-2-2006 (W)

BETWEEN

LINA JOY (NO.I/C: 640108-10-5038)

APPELLANT

AND

1. FEDERAL TERRITORY ISLAMIC

RESPONDENTS

COUNCIL

2. THE GOVERNMENT OF MALAYSIA

3. DIRECTOR-GENERAL OF THE

NATIONAL REGISTRATION DEPARTMENT

CORUM: AHMAD FAIRUZ BIN DATO' SHEIKH ABDUL HALIM, KHN

RICHARD MALANJUM, HBSS

ALAUDDIN BIN DATO' MOHD SHERIFF, HMP

## JUDGMENT

- (1) The Appellant was given leave to appeal to this court on the following questions:-
- (a) Whether the National Registration Department (NRD) is entitled, in law, to impose as a requirement for deleting the entry of Islam in the Applicant's Identity Card (IC), that she produce a certificate or a declaration or an order from the Syariah Court that she has apostatized?
  - (b) Whether the NRD has correctly construed its power under the National Registration Regulations 1990, in particular Regulation 4 and Regulation 14, to impose the requirement as stated above when it is not expressly provided for in the Regulations?
  - (c) Whether **Soon Singh S/O Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor (1999) (1) MJL 489** was rightly decided when it adopted the implied jurisdiction theory propounded in **Md Hakim Lee v. Majlis Agama (1998) 1 MLJ 681** in preference to **Ng Wan Chan v. Majlis Agama (No.2) (1991) 3 MLJ 487** and **Lim Chang Seng v. Pengarah Jabatan Agama Islam (1996) 3 CLJ 231** which declared that unless an express jurisdiction is conferred on the Syariah Court, the civil courts will retain their jurisdiction?
- (2) The Appellant was born a Muslim. Since she wished to marry a Christian man, the appellant made an application to the NRD on the 21.2.1997 to change her name from Azlina binti Jailani to Lina Lelani on the reason that she has embraced

Christianity. This application was not approved by the 3<sup>rd</sup> Respondent (Director General of the NRD). On 15<sup>th</sup> March 1999 the Appellant applied once again to change her name but this time from Azlina binti Jailani to Lina Joy. In her statutory declaration, the Appellant once again stated that she wanted her name to be changed because she had embraced Christianity. On 2.8.1999, the Appellant, acting on the advice of an NRD officer, made another statutory declaration in which she gave reasons that she wanted to change her name as a matter of choice, and not because she had converted her religion. In November 1999, the Appellant was given her new IC but the NRD had inserted the word “Islam” at the front of her IC and her previous name at the back of the IC. On 3.1.2000, the Appellant applied to the NRD to have the word “Islam” deleted. The application was rejected and the appellant was informed that her application was incomplete without an order from the Syariah Court stating that she had converted out of Islam. The Appellant then made an application to the High Court for several declarations against the Federal Territory Islamic Council and the Malaysian Government. The declarations that were applied for were based on breaches of her fundamental rights to her freedom of religion as assured by **Article 11 (1) of the Federal Constitution**. However, the High Court rejected her application. The Appellant then appealed to the Court of Appeal. The Court of Appeal dismissed her appeal by a majority decision. The Appellant subsequently made an application for leave to appeal to this court and her application was allowed based on the questions set out at the beginning of this judgment.

- (3) In the Court of Appeal, the parties agreed (and this is clear from the majority’s grounds of judgment and dissenting judgment) that only one issue needed to be

considered by the court – that is, whether the NRD was right, in law, when it rejected the appellant’s application to have the word “Islam” erased from her IC and by imposing the requirement that a certificate or an apostasy order from the Syariah Court first be produced. The majority judgment of that court decided that the NRD was not wrong from the point of administrative law when it rejected the appellant’s application (2005 (6) MLJ at pg 213). The Appellant in her application to the NRD stated that there was a mistake in her IC and that mistake was that her religion was stated as “Islam”. Hence the majority’s view was that the Appellant’s statement indirectly carried the meaning that the Appellant had stated that she had converted out of Islam. Therefore, the NRD can require the Appellant, under Regulation 4 (c) (x) **National Registrations Regulation 1990**, to produce documentary evidences to support the accuracy of her argument that she no longer is a Muslim. The majority also decided that matters pertaining to conversion of persons to or from Islam was a question relating to Islamic law, and this issue is not within the jurisdiction of the NRD which is not equipped with the authority or qualified to decide on the said matter. Therefore, the NRD adopted a policy requiring a decision by the religious authorities before the NRD acted to delete the word “Islam” from a Muslim person’s IC. This policy, according to the majority decision, was completely reasonable (2005 (6) MLJ at pg. 209).

- (4) In this court, the learned counsel for the Appellant had argued that the 1990 Regulations was the only written source regarding powers under which the NRD could require an apostasy order. According to the learned counsel, the 1990 Regulations did not contain provisions that allowed the NRD to require the said documents from the Appellant. The learned counsel then stressed that the

documents that were recognised under Regulation 14 was only a statutory declaration. Therefore in asking for such a document when the requirement was not provided for or allowed by Regulation 14, the NRD had acted ultra vires its powers under the 1990 Regulations. This, argued the learned counsel, was not valid under administrative law. Counsel then argued that the majority should have decided as such and its failure to do so naturally are reasons upon which this court, as an appellate court, should set aside the said judgment.

- (5) Learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents stressed that the Appellant's application was to erase the word "Islam" from her IC. Therefore her application fell within Regulation 14(1) (c) that is to correct details regarding her religion. Regulation 14(1) reads:

- “(1) A person registered under these Regulations who-
- (a) changes his name
  - (b) acquires the citizenship of Malaysia or is deprived of his citizenship of Malaysia; or
  - (c) has in his possession an identity card containing any particular, other than his address, which is to his knowledge incorrect, shall forthwith report the fact to the nearest registration office and apply for a replacement identity card with the correct particulars.”

Learned counsel then referred to regulation 4 which reads:

“4 – Any person who is required to register under regulation 3 (1) or 3 (2) or to re-register under regulation 18 or 28 or who applies for a replacement identity card under regulation 13 or 14, shall ---

(a) .....

(b) .....

(c) give the following particulars to the registration officer as aforesaid, namely:

(i) his name as appearing in his Certificate of Birth or such other document or, if he is known by different name, each of such names, in full:

(ii) his previous identity card number, if any;

(iii) the full address of his place of residence within Malaysia;

(iv) his race;

(iva) his religion (only for Muslims);

(v) his place of birth;

(vi) his date of birth and sex;

(vii) his physical abnormalities, if any;

(viii) his status of a citizen of Malaysia or other citizenship status;

(ix) such other particulars as the registration officer may generally or in any particular case consider necessary; and

(x) produce such documentary evidences the registration officer may consider necessary to support the accuracy of any particulars submitted”

Learned counsel then stressed that regulation 4(c) (ix) and (x) were the powers that justified the NRD imposing the condition for an apostasy certificate.

(6) With regards to these arguments, with the majority judgment that regulation 14(1) was regarding:

(a) change of name under paragraph (a); and

(b) correcting incorrect details under paragraph (c)

The Appellant's case falls under correcting the incorrect details under paragraph (c). However, Regulation 14 does not state what should be given in cases where the details are incorrect but Regulation 14(1) actually requires the Appellant to report facts concerning the details that are incorrect, to the closest Registration Office and to request for a replacement IC which contains the details that are correct. With regards to this, Regulation 4 becomes relevant because the regulation clearly states that whoever requests for a replacement IC under Regulation 13 or 14 has to abide by Regulation 4. Therefore I agree with the learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that the NRD was justified under Regulation 4(c) (x) to require a decision from the Islamic religious authority concerning the Appellant's apostasy or her conversion out of Islam. Therefore I agree with the majority's decision which states that the mistake in the Appellant's IC was concerned with her religion being stated as "Islam" and the Appellant wanted that mistake to be corrected by removing the word "Islam" from her IC. This is would be the same thing as the Appellant stating that she had

converted out of Islam. Therefore, the NRD, pursuant to Regulation 4(c) (x), can require the Appellant to produce documentary evidence to support the accuracy of her assertion that she no longer is a Muslim. I also agree that if the NRD receives an admission from someone that he or she has converted out of Islam solely based on the declaration made by him or her, the NRD will be taking a risk when affirming, by mistake, a person as not being a Muslim anymore whereas following Islamic Laws that person has not yet converted out of Islam. If this is done, those born and educated as Muslims may, also choose to remain ignorant, or, in wanting to prevent persecution from Islamic Laws, may conveniently declare themselves to have renounced their religion. This would bring ignominy to the Muslim society. For this reason, following the majority decision, I believe that the NRD had used a policy that a statutory declaration was insufficient to enable the word “Islam” to be removed from the IC of a Muslim person. This is because the issue of converting out of Islam is an issue which concerns Islamic Laws and therefore the NRD used it as a basis to require a decision from the Islamic religious authorities before the NRD can delete the word “Islam” from a Muslim person’s IC. Based on the considerations as explained above I agree with the majority decision that the NRD’s policy was completely reasonable.

- (7) With regards to the said NRD policy, the Appellant also argued that by requiring the apostasy certificate, the NRD has delegated its power and duty under Regulation 14 to a third party in order for the third party to decide whether or not to approve the application to delete the word “Islam”. This, according to the Appellant, cannot be done unless allowed by the relevant laws. Hence the said policy by the NRD, without the authority under Regulation 14, was conflicting

with law. Furthermore, learned counsel for the Appellant argued that the court's duty is not to verify a policy as something that is reasonable; in fact what the court has failed to appreciate is that such issues are for the legislators and not for the courts to decide whether or not it is right or whether or not it is proper to refer these issues to a religious body.

- (8) On the basis of this argument by the Appellant, I am of the view as argued by the learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, that Regulation 4(c) (x) clearly gives the power to the NRD officer to seek documentary evidences as reference which he felt necessary to support any application. Reference here need not mean that the Syariah Court had the jurisdiction to delete the word "Islam" in the identity card. The Syariah Court is only required to determine whether the Appellant was still a Muslim based on Islamic law. Based on this decision, it is within the NRD's discretion to decide whether or not permission can be granted to delete the word "Islam".
- (9) Learned counsel for the Appellant also directed the court's attention to the case of **Ismail bin Suppiah v Ketua Pengarah Pendaftaran Negara (R-1-24-31 Year 1995)**. According to the learned counsel, both the cases of Ismail and the present appeal are about :-
- a) Change of name due to change of religion;
  - b) Powers of the NRD under regulation 14;
  - c) A certificate from the Religious Council as a precondition before the NRD can consider an application under Regulation 14;

- d) Freedom to choose one's religion under Article 11 of the Federal Constitution;
- e) A third party cannot decide which religion a person should choose; and
- f) Regulation 14 does not impose a condition that a certificate be obtained from the Religious Council

The learned counsel subsequently pointed out to me that I was the Judge in Ismail's case and I had nullified the NRD's decision that required a certificate from the religious council as being ultra vires regulation 14.

9.1 The Plaintiff in Ismail's case was a Muslim since birth. The Plaintiff applied to have his Muslim name as in his IC to be changed to a Hindu name on the grounds, as was stated in his statutory declaration, that he had converted out of Islam and embraced Hinduism. The NRD were adamant to obtain the approval of the Johor Islamic Council the Johor Chief Kadi on the Plaintiff's action to convert out of Islam. The NRD still refused to allow the Plaintiff's application even though the Plaintiff's counsel had reported the Plaintiff's said conversion out of Islam to the Johor Chief Kadi. In fact the NRD had referred this matter to and for action by the Johor Islamic Council. Because of that the Plaintiff applied for and obtained from the High Court of Kuala Lumpur a declaration that the approval of the Johor Islamic Council is not needed and any reference by the NRD to the council was ultra vires **Regulation 14 of the National Regulation 1990, Section 141(2) of the Administration of Islamic Law 1978 Negeri Johor, and Article 11(1) of the Federal Constitution.** The Plaintiff also applied and successfully obtained an order that the NRD issue a temporary IC on the Plaintiff's new name.

9.2 With regards to the Appellant's argument that the NRD did not appeal against the High Court's decision in Ismail's case and therefore the NRD cannot do so in the present appeal takes a stance that is in conflict with the decision with the said High Court.

9.3 The majority's decision emphasized that Ismail's case is a case that involves an application to change a name in an IC whereas the present appeal is to delete the word "Islam". Based on the fact that there were no grounds of judgment in Ismail's case, the High Court's reasons in reaching that decision cannot be determined. Hence, the Court of Appeal is only capable of speculating as to why I had decided as such in Ismail's case. Those speculations are based on me being said to have seen the Ismail's case from an angle that the case needed to be decided in the context of Johor law. I was said to have been of the view that the NRD was wrong when it required the Johor Islamic Council agreement before the Plaintiff could convert out of Islam where else following the Johor enactment, the correct authority is the Kadi under **section 141(2). Section 141** of the **Johor Enactment** reads:-

(1) Whoever converts any person into the Islamic religion shall forthwith report the matter to the Kadi by giving all necessary particulars for registration.

(2) Whoever is aware of a Muslim person has converted out of the Islamic Religion shall forthwith report the matter to the Kadi by giving all necessary

particulars and the Kadi shall announce that such person has been converted out of the Islamic Religion and shall register accordingly.

9.4 It was also the majority's speculation that I may have been of the view that the NRD misunderstood section 141 because in paragraph 10 of the NRD's affidavit 28.7.1995, the NRD officer seems to have stated that subsection 2 only applies to someone who previously embraced Islam under subsection 1, where else in actual fact the said subsection 2 is independent from subsection 1. The majority decision also stressed that I may have been of the view, from the clarity of the words in subsection 2, that in Johor, the Kadi himself does not have the right to give or refuse consent to a Muslim to convert to or out of Islam. That matter is solely left up to the person concerned. The duty of the Kadi is only to announce the fact that a person has converted out of Islam and subsequently register it. This duty is mechanical in nature. From this, it was speculated that I was of the view that;

- a) in Johor, a Muslim was free to convert out of Islam and does so by merely declaring as such;
- b) no approval or determination by any religious authority is needed;
- c) NRD should accept the Plaintiff's statutory declaration that states that the plaintiff has converted out of Islam as evidence that the Plaintiff is no longer a Muslim; and

d) NRD should approve the plaintiff's application for change of name.

9.5 From the speculations as set out above, it was apparent that Ismail's case should be examined in the context of Johor law. **Section 141(2)** of the **Administration of Islamic Law Enactment 1978 Negeri Johor**, clearly shows that even a Kadi does not have the right to give or refuse consent to convert out of Islam. Hence, the speculation in the majority decision was correct when it was pronounced because of the clarity of the words in section 141(2). The NRD should have accepted the Plaintiff's statutory declaration that states the Plaintiff had converted out of Islam as proof that the Plaintiff was no longer a Muslim and the NRD should have approved the Plaintiff's application to change his name. It is appropriate to stress at this stage that the above arguments show that **Article 121(1A) and item 1 list 2 of Schedule 9 of the Federal Constitution** did not arise in Ismail's case.

(10) The next issue that was argued by the Appellant was whether the Federal Territory Syariah Court has the jurisdiction to determine apostasy. The Appellant argued that all this while the NRD had taken the same position with regards to many applications by the Appellant that is the Appellant must firstly obtain an apostasy order from the Syariah Court or, as later stated by the Director General in his affidavit, from any other Islamic Religious authority. The Appellant also argued that under the **Administration of Islamic (Federal Territories Act 1993) (Act 505)** does not contain provisions regarding apostasy. The Syariah Court or any other Islamic body is not given the jurisdiction for apostasy matters and no power was given to any authority under the said act to issue apostasy orders. This is the

position at all material times taken by the Appellant between the months of February 1997 to January 2000 until today. According to the Appellant, **section 46(2)(b) Act 505**, as it is now, lists, the matters in which the Syariah Court can exercise its civil jurisdiction and under this section, apostasy is not contained in the said list. The majority acknowledged that **Act 505** does not contain any provisions on apostasy. The said judgment went on to consider the Appellant's argument that the Federal Court's decision in the case of *Soon Singh* (supra) had shaped the procedure, which is followed by the NRD, in requiring acknowledgment from the Syariah Court before the department accepts the fact that a Muslim had converted out of Islam. The decision in **Soon Singh**, following the majority decision, was and is still authoritative and in administrative law, from the angle of that decision, the NRD acted correctly when it named the Syariah Court as the relevant authority that can issue the apostasy order and that the NRD will accept the order as proof that the Appellant was no longer a Muslim. The majority decision, however, was of the view that the correctness or otherwise of the decision in *Soon Singh* is no longer important because it was agreed by the parties that the appeal was about the validity of the NRD's decision according to administrative law and not constitutional law. Therefore, the Appellant argues in the Court of Appeal that the NRD's actions to impose conditions to obtain an order from the Syariah Court is an action that is not reasonable following the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corp (1948) 1 KB 223**. According to the Appellant, this is because there is no provision relating to apostasy in **Act 505**. At this stage, it is apropos for me to express my agreement with the majority decision that states that what the NRD wants is a declaration from an individual who has been conferred the power to exercise it and the NRD

will act on that declaration, ergo, the NRD is free from any mistake or from being blamed by the public on a matter that is extremely important and sensitive. Hence, the majority's decision on deciding on the fact of the unwillingness of the NRD's to act without a declaration from an authorized Islamic body is reasonable. The said judgment also decided upon the issue as to whether a Muslim is an apostate or not is a question that relates to Islamic laws; and if the court decides that the unwillingness of the NRD is not reasonable, that would bring the understanding that the court would want the NRD to accept the fact that following Islamic law, a Muslim can be assumed by the world at large to have been converted out of Islam and is no longer a Muslim when that particular individual merely states that he has converted out of Islam.

- 10.1 Regarding the majority's decision that the action of the NRD was reasonable when the NRD required a certificate/ declaration/ order from the Syariah Court which expressly states that the Appellant is an apostate, I wish to add that stressing on **Item 1 List 2 of Schedule 9 of the Federal Constitutions** provisions, that Syariah Courts should have jurisdiction only over persons who are of the Islamic religion and only on matters which are contained in the said paragraph (item 1) and one of the matters in the said paragraph is, Islamic law. In relation to this, the matter in **Article 74 (4) of the Federal Constitution** stresses on the vast ambit of the general expressions in the Ninth Schedule cannot be seen curbing the specific expressions in the said schedule. **Article 74 (4)** is as follows:

**74 (4)**

*“Where general as well as specific expressions are used in describing any of the matter enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter”.*

Therefore, it is reasonable for the NRD to impose those conditions for apostasy matters, following the majority’s judgment (to which I am agreement with) is a question that relates to Islamic laws and as it has been stated by the Supreme court in the case of **Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor (1992) 1 MLJ 1** that the answer to the same question as to whether a person is a Muslim or has converted out of Islam before his demise, is included in the realm of Syariah laws which needs serious consideration and appropriate interpretation. Hence, in this situation, I agree with the arguments of the learned counsel of the 2<sup>nd</sup> and 3<sup>rd</sup> counsel that the conditions for a certificate or declaration or order to be produced from a Syariah Court that the Appellant has become an apostate is not a decision that is unreasonable to the extent of being so ignorant of logic or acceptable moral standards such that an ordinary reasonable man will not be able to fathom such a decision.

- (11) With regards to the 2nd and 3rd Respondent's arguments that the NRD is entitled to enter the word "Islam" in the front portion of the Appellant's IC in November 1999 as the amendments to **Rule 4 (c) (iva)** and **Rule 5 (2)** which came into force retrospectively on 1.10.1999 and this coming into force retrospectively was allowed

as the amendments were in relation to procedures, the Appellant argues that so long as the amendment is not gazetted, the executive authority (i.e. the NRD) cannot incorporate the said amendment and act based on it. The Applicant draws the attention to the fact that her application for an IC was made on 25th October 1999 whereas as at 1st October 1999 the said amendment was still not gazetted. The Appellant stresses that the actual position of the law at the material time is that the Appellant is entitled a new IC under the name Lina Joy without any religion being stated in the IC. The said amendment according to the Appellant cannot be enforced retrospectively as it jeopardizes the Appellant inherent rights.

11.1 On this issue of retrospectively coming into force, I wish refer to the case of **Sim Seoh Beng @ Sin Sai Beng v. Koperasi Tunas Muda Sungai Ara Bhd (1995) 1 CLJ 491** which states the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity. The Federal Court in the case of **Lim Phin Khian v Kho Su Ming (1996) 1 MLJ 1** has stated that the question in the said case was as to whether the prima facie presumption of no retrospective effect has been replaced by contrary Parliament intention, and if so, to what extent. The case of **Attorney General v Bernazar 1960 3 AIIER 97** instead states that the situation is different when the statute is retrospective either because it contains clear words to that effect or because it deals with matters of procedures only; for then Parliament has shown an intention that the Act

should operate on pending proceedings, and the Court of Appeal are entitled to give effect to this retrospective intent as well as a court of first instance. In the case of **Yew Bon Teow v Kenderaan Bas Mara (1983)1 MLJ** the Privy Council has stated that whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute. I wish to refer to **section 19 of the Interpretation Act 1948 and 1967** which states:

"19

- (1) The commencement of an Act or subsidiary legislation shall be the date provided in or under the Act or subsidiary legislation or, where no date is provided, the date immediately following the date of its publication in pursuance of section 18.
  
- (2) Acts and subsidiary legislation shall come into operation immediately on the expiration of the day preceding their commencement.
  
- (3) Notwithstanding section 2(1) and (2) and section 65(2), subsections (1) and (2) shall apply -
  - (a) to all Acts enacted after the 31st December 1968 including Acts which amend laws enacted before the commencement of Part I of this Act; and
  - (b) to all subsidiary legislation made after the 31st December 1968, whether

made under a law enacted before or after the commencement of Part I of this Act whether or not that law has been revised under the Revision of Law Act 1968."

In the appeal in the court herein, there is clearly a direction (as mentioned in the case of **Sim Seoh Beng**) that the amendments of the **1990 Regulations**, save for **regulation 19**, shall be deemed to have come into operation on 1.10.1990. Therefore, amendments to **regulations 4 and 5** and to the first schedule is retrospectively enforced. As such, the NRD's actions in issuing an IC with the additional word "Islam" is valid in law.

(12) The Bar Council, HAKAM and the Malaysian Consultative Council of Buddhism, Christianity & Sikhism, as watching brief had also given their respective view which is briefly as follows:-

(a) if a person no longer professes Islam, he can no longer be subject to the jurisdiction of the Syariah Court. If he is said to be still under the jurisdiction of the Syariah Court therefore such an act is a violation of human rights under **Article 11 (1)** and **Article 8 of the Federal Constitution**.

(b) Apostasy is not included into item **1 list 2 of Schedule 9 of the Federal Constitution**;

(c) An apostasy certificate is clearly contrary to the provisions of fundamental freedom under **article 11**;

- (d) A declaration by the Appellant that she is a Christian means that she professes Christianity and this would mean that she is no longer deemed a Muslim or a person professing Islam.
- (e) Chua H in **Re Mohamed Said Nabi, deceased (1965 (3) MLJ 121)** has referred to the Shorter Oxford English Dictionary for the meaning "profess" means 'to affirm one's faith in or allegiance to (a religion, principles, God or Saint etc)' This means that the NRD is not entitled to impose the condition that the appellant produce a certificate as the Syariah Court has no jurisdiction over the appellant as she no longer professes Islam. The appellant is still alive and has made a statutory declaration and affidavits showing that she professes Christianity. Therefore, it is not necessary for any Islamic authority to decide as to whether she is an apostate or not;
- (f) The Malaysian government has represented internationally and to its citizen that it subscribe to the norms of compressive freedom of faith, thought, conscience as declared in **Article 18** of the **Universal Declaration of Human Rights**, therefore the appellant has a legitimate expectation that the Malaysian government and the agencies would not act in contradictory to its said representation.
- (g) The appellant has, because of her application to delete the word Islam being disallowed, has been denied her right to marry a person professing Christianity or to marry a person of her choice. This is a denial of her rights under **Article 5 (1)** of the **Federal Constitution**.

(13) ABIM, Muslim Lawyers Association and the Syariah Lawyers Association of Malaysia as watching brief, had given their respective views which are briefly as follows:-

(a) **Article 11 of the Federal Constitution** uses the words "profess and practice".

Therefore conversion out of Islam must be in accordance of the relevant legislation. A person may renounce Islam but must follow its procedure. If a person is allowed to do so according to his whims and fancies it would create chaos among Muslims. Therefore the determination by the Syariah Court is pursuant to the Syariah legislation and as such does not contradict **Article 11**;

(b) with regards to the issue of equal rights under **Article 8 of the Federal**

**Constitution, Article 8** is subject to provisions that regulate personal law.

(14) With regards to the view in paragraphs (12) and (13) above I agree with the opinions in paragraph (13). In the appeal before the present court, there is no conclusive certainty that the appellant no longer professes Islam. Therefore the statement that she can no longer be under the authority of the Syariah Court as the Syariah Court has only jurisdiction over a person who professes Islam cannot and should not be stressed. The way a person renounces a religion must essentially be carried out pursuant to the rules or laws or practice followed or set by the religion itself. The Appellant is not prevented from marrying. The Freedom of religion under **Article 11 of the Federal Constitution** requires the Appellant to comply with the practices or law of the Islamic religion in particular with regards to converting out of the religion. Upon complying

with the requirements of the religion and the religious authorities confirming her as an apostate only then can the Appellant profess Christianity. In other words one cannot at ones whims and fancies renounce or embrace a religion. When professing a religion, common sense itself requires him to comply with the laws and practices of the religion.

- (15) The Appellant further submits that, NRD cannot act in a manner that breaches the right of freedom of religion of each citizen enshrined under **Article 11 of the Federal Constitution** or in a discriminatory manner breach the assurances and freedom guaranteed under **Article 8(2) of the Federal Constitution** which prohibits any form of discrimination on grounds of religion. The Appellant contends that **Article 11** guarantees her absolute freedom to renounce Islam and become a Christian. According to her such freedom cannot lawfully be restricted or controlled by any law such as the **Administration of Islamic Law (Federal Territory) Act 1993** by the Syariah Court, or any other authority. As such the Applicant applies to the High Court for a declaration that her action of converting out of Islam was proper and valid under **Article 11 of the Federal Constitution**. This, as asserted by the Muslim Lawyers Association of Malaysia, assumes that the civil courts have jurisdiction to make a declaration as applied for by the Appellant. (As such the third question arises).

15.1. The learned counsel for the Appellant drew the attention of this Court to the conflicting decisions of the High Court. In cases such as **Ng Wang Chan v. Majlis Agama Wilayah Persekutuan (No. 2)** (supra) and **Lim Chan Seng v Pengarah Jabatan Agama Islam** (supra) decided that without jurisdiction being clearly granted to the Syariah Court on a certain matter, the civil court

must maintain its jurisdiction over the said matter. On the other hand, **Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan** (supra) holds out the theory of implied jurisdiction. Under the said theory, it is sufficient if the said matter is confined to the Syariah Court in **item 1, list 2 of Schedule 9 of the Federal Constitution**. According the learned counsel, the case of **Soon Singh** (supra) has settled this conflict by adopting the theory of implied jurisdiction as proposed in the case of **Md. Hakim Lee**. The Appellant's learned counsel further refer to the decision of the Federal Court in the cases of **Majlis Agama Islam Pulau Pinang v. Shaik Zolkaffily (2003 (3) MLJ 705)** and **Azizah binti Shaik Ismail v. Fatimah binti Shaik Ismail (2003 I(2) MLJ 529)** which follows the case of Soon Singh. Despite the same, the learned counsel still argues that Soon Singh's case was wrong in law as:

- (a) the said decision had failed to consider that all state Islamic law enactment gave rise to two separate entities, i.e. the Religious Council and the Syariah Court. Under the said enactment, the Religious Council holds the role of administration whereas the Syariah Court is the judiciary body. The learned counsel then referred to **Act 505** which via **Section 24, 7 and 10** which provides for matters pertaining to the establishment, membership, function, duties and activities of the Religious Council whereas **section 46** provides for the jurisdiction of the Syariah court. **Soon Singh's** case (supra) according to the learned counsel, has committed an error as it did not differentiate between the Religious Council and the Syariah Court. As a result of the said mistake the Soon Singh's case itself committed an error when it assumed that the Syariah Court, wherever it may be, is the authority that manages and conducts

matters pertaining to embracing the Islamic religion. **Sections 139-141** of the **Enactments in Kedah** refer to the Religious Council as the relevant authority that manages and conducts matters pertaining to embracing the Islamic religion. Similarly, sections **77-89** of the **Enactments in Penang** refer to the Registrar of Conversion to Islam and **section 82** identifies the Religious Council as the keeper of records of converts. The same applies to **Act 505** which through **Sections 85-95** explains that it is the Religious Council manages and has conduct over matter pertaining to embracing Islam. As such, the learned counsel contention that the statement of the case of *Soon Singh* that all state enactment confers the jurisdiction to the Syariah Courts in matters pertaining to embracing Islam is clearly wrong.

- (b) The authorities referred to/relied on in *Soon Singh* to establish its theory of implied jurisdiction does not support its decision. If the said authorities were to be carefully studied in depth, "**Craies on Statute Law (7th Edition)** page **1112** actually states that express and unambiguous language is required to alter the jurisdiction of the courts of law. *Albon v Pyke (1842 (4) M&G 421)* shows **Tindl CJ** at **para 424** stating the general rule undoubtedly is that the jurisdiction of the superior courts is not taken away, except by express words or necessary implications.
- (c) The errors in *Soon Sing* as explained in paragraphs 15(a) - (b) above has caused *Soon Singh's* case to conclude that the Syariah Court's jurisdiction need not be conferred by law but is sufficient by merely referring to the state list in **Schedule 9** as that the case of *Md. Hakim Lee*. This, according to the learned

counsel, contradicts with the principle of the legislation of laws by the legislator and cannot be enforced until the said law is notified by gazette. The learned counsel goes on to say that, the implication of Soon Singh's case is that a law is assumed to be in existence although the said matter is only contained in **item 1 list 2 of Schedule 9 of the Federal Constitution** and the legislator has not yet passed any law on the said matter. **Soon Singh's** case has failed to identify the difference between power to legislate on a certain matter and the legislation itself. The learned counsel went further to refer to what the Supreme Court of India had stated in **Calcutta Gas Company v. State West Bengal (AIR 192 SC 1044 at 1049)** i.e. the power to legislate is given to the appropriate Legislatures by **Article 246 of the Indian Constitution**. The provisions in the three Lists are only the heads or guidelines to making law: they demarcate the area over which the appropriate Legislatures can operate. Hence, as contended by the learned counsel, the decision in Soon Singh that the right to legislate on a certain matter is similar to the legislation itself ought to be dismissed as a bad precedent.

- (d) **Section 67 of the Interpretation and General Clauses Act 1967** declares that each Parliament Act or State Enactment is an Act or Enactment for public and it can be given judicial notice. **Soon Singh's** case has exempted the requirement to publish the legislation or the legislative process that goes through bill and ends with the consent of the King. Therefore, **Soon Singh's** case must be rectified immediately; such is the learned counsel's contention. In furtherance to his argument of **Soon Singh's case**, the learned counsel points out the observance by **Hashim Yeop Sani in Dalip Kaur a/p Gurbox Singh**

**v Pegawai Polis Daerah OCPD) Bukit Mertajam & Anor** (supra) which, inter alia, states that this new **Article 121(1A)**, which was enforced effective from 10.6.1988, has taken away the jurisdiction of the civil court to interpret any written laws which are under the jurisdiction of the Syariah courts. However, this clause does not take away the power of the civil court to interpret any written state law which is passed for the administration of Islamic law. For the said learned counsel, this observation clearly shows that the civil court must decide whether a certain matter falls under its jurisdiction or the jurisdiction of the Syariah Court.

15.2 The learned counsel for the 2nd and the 3rd Respondents are of the view that the case of **Md. Hakim Lee** was rightly decided. Therefore he is of the opinion that the cases of **Soon Singh** and **Shaik Zolkaffily** contained the correct principles with regards to the jurisdiction of the Syariah Court.

15.3 The 1st Respondent learned counsel refers to the word implication as contained in "**Bernion's Statutory Interpretation 2nd Edition**" at page 362 i.e. Implications may arise from the language used, from the context, or from the application of some external rule. Further the learned counsel contends that as **Act 505** contends provisions with regards to the matters in relation to embracing Islamic religion under the jurisdiction of the Syariah Court (**s. 87 and s. 91 read with s 46(2) (b) Act 505**) therefore by way of implication, matters with regards to apostasy and leaving the Islamic religion is also within the jurisdiction of the Syariah Court.

15.4. In the case of **Soon Singh**, the appellant applied to the High Court for a declaration that he was not a Muslim, the learned counsel of the **Kedah Islamic Department (JAIK)** made a preliminary objection applying for the applicant's application to be dismissed as the High Court has no jurisdiction on a matter that a person is not Muslim. The said matter is under the jurisdiction of the Syariah Court. The High Court agreed with **JAIK's** learned counsel's argument and dismissed the Appellant's application who thereafter appealed to the Federal Court. In its judgment, the Federal Court stated that the question before it is with regards to the jurisdiction of the Syariah Court under **Article 121 (1A) of the Federal Constitution**. The Federal Court also admitted that there were no express provisions in the Kedah enactment granting jurisdiction to the Syariah Court to deal with the question of apostasy. Thereafter, the Federal Court referred to **Craies on Statue Law, Albon v Pyke, Bennion's Statutory Interpretation** and the case of **Dalip Kaur**.

15.5 With regards to the criticism by the learned counsel for the appellant on references made by the Federal Court to **Craies on Statue Law** and the case of **Albon v Pyke**, I only need to stress that **Tindal CJ** also use words of necessary implication. Therefore, the Federal Court was of the opinion that it is logical for the Syariah Court, which had expressly been granted jurisdiction to adjudge matters pertaining to embracing Islam, is also impliedly required to have jurisdiction to adjudge on matters pertaining to a Muslim converting out of Islam or being an apostate. I do not see any defect in the judgment of the Federal Court. Therefore I have no other choice but to answer the 3rd question by stating that **Soon Singh's** case had been correctly decided.

- (16) As explained in the above paragraphs, **Soon Singh's** case clearly shows that apostasy lies within the jurisdiction of the Syariah Court. In paragraph (10) I have also referred to item **1, list 2, Schedule 9 of the Federal Constitution** to show that the important words used therein are "matters" and as "Islamic Law" is one of the "matters" contained in item 1 and when read together from the background of the case of **Dalip Kaur**, it is therefore much evident that the matter on apostasy is a matter that relates to Islamic Law and as such it lies within the jurisdiction of the Syariah Court as by reason of Article 121 (1A) of the Federal Constitution, the civil courts cannot interfere in this matter.
- (17) Several arguments have been raised with regard to the Appellant's rights under the Federal Constitution. It is also argued that the requirement to produce a certificate/declaration from the Syariah Court/Authority to certify that the Appellant had apostatized contravene the freedom enshrined under **Article 11 of the Federal Constitution**. According to the said argument, **Article 11** grants freedom to the appellant to profess any religion and to leave any religion. Nobody or nothing can prevent her from doing so. Any action to prevent the Appellant from doing as she likes in choosing her religion or leaving any religion contravenes **Article 11**.

**17.1 Article 11 of the Federal Constitution** is as follows:

"(1) Every person has the right to profess and practice his religion and, subject to

Clause (4), to propagate it.

- (2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.
- (3) Every religious group has the right----
- (a) to manage its own religious affairs;
  - (b) to establish and maintain institutions for religious or charitable purposes;  
and
  - (c) to acquire and own property and hold and administer it in accordance with  
law.
- (4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.
- (5) This Article does not authorise any act contrary to any general law relating to public order, public health or morality."

17.2 What is clear in Article 11 is that the words "..... right to profess and practice his religion....." As stated by Abdul Hamid Mohamad HMR (as he was then) in the case of **Kamariah bte Ali v Kerajaan Negeri Kelantan Malaysia (2002 (3) MLJ page 657 in page 665)**: the word 'has the right' is applicable to 'profess' and also 'practise'. According to the case of **Che Omar bin Che Soh v Public Prosecutor (1988 (2) MLJ 55)**. Islam is not only a gathering of

dogmas and rituals but it is also a complete way of life which covers all human activities, private or public, legislation, politic, economic; social, customs, moral or judicial. A perusal on **Articles 11(1), 74(2) and item 1 in list 2 of Schedule 9 of the Federal Constitution**, it is evident that Islam covers inter alia the Islamic law. Therefore, as submitted by the learned counsel from the Malaysian Muslim Lawyers Association who are watching brief, if a Muslim wishes to leave the religion of Islam, he actually uses his right under the context of the Syariah law which has its own jurisprudence on the issue of apostasy. If a person professes and practices Islam, it would definitely mean that he must comply with the Islamic law which has prescribed the way to embrace Islam and converting out of Islam. That is the meaning of professing and practicing Islam. And what was done by the NRD officer was merely to ascertain that the appellant was no longer a Muslim as prescribed by Islam. Therefore, I do not see how such action could be said to be contrary with **Article 11(1)** which in itself provides for the requirement to comply with the requirements of the religion before he renounces Islam. To profess and practice Islam should definitely mean practicing not only the theological aspect of the religion but also the laws of the said religion.

- 17.3 The appellant in the case of **Kamariah** (supra) argues that **Article 11** not only gives her freedom to profess any religion, but also to renounce any religion. The appellant states that the laws cannot prevent her from doing so. The laws according to the Appellant, cannot require her to follow a certain rule whether to embrace or renounce a religion. Such laws, says the appellant, contravenes **Article 11** and therefore is null and void. **Section 102** of the **Kelantan**

**Enactment 1994** states that the Appellant prevents a Muslim from declaring that he is not Muslim unless he obtains a Court's certificate. This, says the appellant, contravenes **Article 11** and therefore is null and void.

17.4 Based on this submission by the Appellant, Abdul Hamid Mohamad, HMR in the case of **Kamariah** says:

*" If that was the meaning of the provision then not only laws that fix a way for a person to embrace Islam and renounce Islam is void but also the laws that makes it an offence if a Muslim commits adultery, close proximity, not pay zakat etc are also all together void. As, according to the said argument, Article 11 grants a right to a person to practice his religion, therefore, it is left to him as to whether he wishes to practice any instructions that he wishes to practice and which he doesn't, comply with any restriction which he want to comply and which he doesn't. Therefore, according to the said submission, any law that requires a person to perform something or renounce something that contravenes with the freedom granted by Article 11 is therefore void in its entirety."*

I am of the opinion with regards to Islam (I do not decide with regards to other religion), **Article 11** cannot be construed or defined in with such a wide meaning to the extent it annuls all laws that require a Muslim to perform an Islamic obligation or that restrict them from performing a matter that is prohibited by Islam or which prescribe the method of conducting a matter in relation to Islam.

This is because the position of Islam in the **Federal Constitution** differs from the position of other religions. Firstly, only Islam as a religion is mentioned by its name in the **Federal Constitution** i.e. "*as the religion of the Federation*"---- article **3(1)**.

Secondly, the Constitution itself grants power to the State Legislative Body (for states) to canonize the Hukum Syarak in matters mentioned under **List II, State List, Schedule 9, Federal Constitution ('List II')**. Pursuant to the requirements under **List II, the Syariah Court ( Criminal Jurisdiction) Act 1965'** [\*666] ('Act 355/1965') and various enactments (for States) including those mentioned in this judgment, has been canonized.

Therefore, if the laws including **s.102 of Enactment 4/1994** does not contravene with the provision of **List II**, and does not further contravene with the provisions **Act 355/1965**, it is a valid law.

This provision can be compared with the provisions with regards to marriage and divorce. The Hukum Syarak requires a male and a female who wish to cohabit to marry in accordance with certain conditions and rules. The present requirements requires laws to be made pertaining thereto, including, inter alia, the requirement to register a marriage and application for divorce be made in the Syariah Court and the order made, if granted, be registered (for me the law lastly stated which is often referred to as "administrative law" is part of the development of the Hukum Syarak). Is such law also null and void by reason that it contravenes **Article 11**, as, pursuant to the said argument, it prevents freedom of religion guaranteed under Section 11? I am of the view that , it is not".

17.5 Based on the above authorities, it is evident that:-

- (a) The issue of religious conversion is directly connected with the rights and obligations of the Appellant as a Muslim before the conversion;
- (b) **Article 11(1)** should not be argued as a provision that provides unrestricted right of freedom;
- (c) The right to profess and practise a religion should always be subject to the principles and practices prescribed by the said religion.

18. Based on the above reasoning, my answer to the questions mentioned in paragraph (1) is as follows:-

- (a) NRD has the authority;
- (b) NRD is correct;
- (c) Soon Singh was rightly decided.

In the premises, this appeal is dismissed without order as to costs.

Dated : 30th May 2007